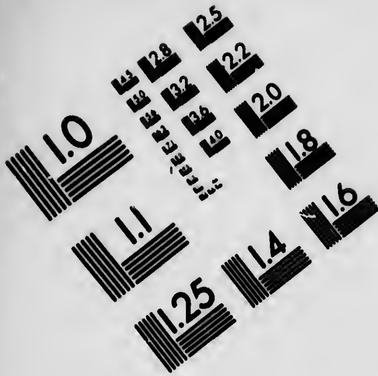


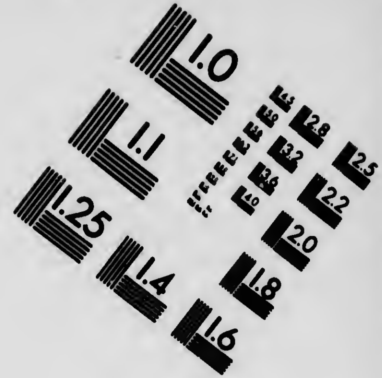
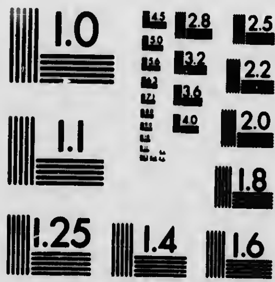
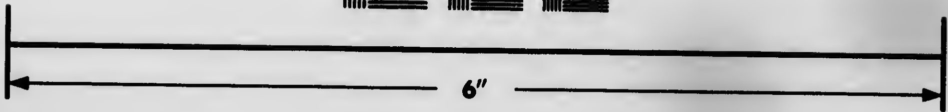
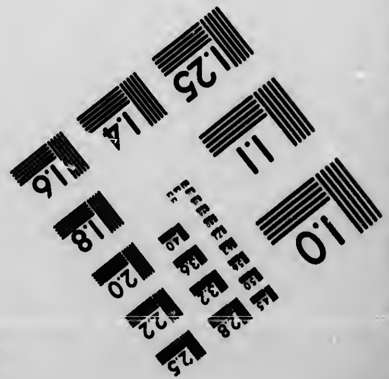


IMAGE EVALUATION
TEST TARGET (MT-3)





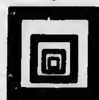


Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)



Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

© 1993

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [x] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [ ] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [ ] Quality of print varies/ Qualité inégale de l'impression
- [ ] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [x] Additional comments:/ Commentaires supplémentaires: Pagination is as follows: p. 179-546.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X		12X		14X		16X		18X		20X		22X		24X		26X		28X		30X		32X
														✓								

The copy filmed here has been reproduced thanks to the generosity of:

National Library of Canada

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol ⟶ (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

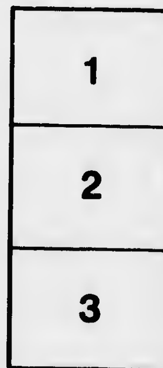
Bibliothèque nationale du Canada

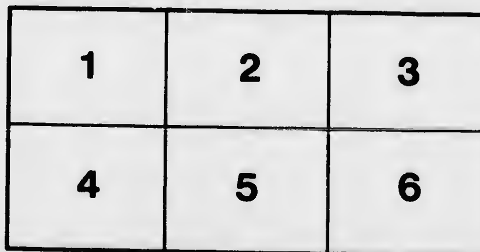
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole ⟶ signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.





J S McMu

REPORTS

OF

ELECTION CASES

By THOMAS HODGINS, Q. C.

PART II.

PROVINCIAL ELECTIONS, 1875,

Under "The Election Law of 1878" (32 Vic., c. 21), "The Controverted Elections Act, 1871" (24 Vic., c. 3), "The Election Act of 1873" (36 Vic., c. 2), "The Ballot Act of 1874" (37 Vic., c. 5); and "An Act further to amend the Laws affecting Elections of Members of the Legislative Assembly, and the Trial of such Elections" (38 Vic., c. 3, of 1874).

PART III.

PROVINCIAL ELECTIONS, 1879,

Under Revised Statutes of Ontario, chapters 10 and 11, "The Voters' Lists Finality Act, 1878" (41 Vic., c. 21), and "An Act to make further provisions respecting Elections of Members of the Legislative Assembly" (42 Vic., c. 4, of 1879).

TORONTO:
CARSWELL & COMPANY.
1882.

JL 279
A4
H64
1881-
Pt. 2-3
***

NATIONAL LIBRARY
CANADA
BIBLIOTHÈQUE NATIONALE

PROVINCIAL ELECTIONS, 1875.

WEST TORONTO (2).

BEFORE CHIEF JUSTICE DRAPER.

TORONTO, *6th, 7th, and 10th May, 1875.*

WILLIAM ADAMSON, *Petitioner*, v. ROBERT BELL, *Respondent.*

Agent accepting and drinking spirituous liquor during polling hours—Corrupt practices by a particular class—32 Vic., c. 21, s. 66; 36 Vic., c. 2, secs. 1, 3.

The 66th section of 32 Vic., c. 21 (Election Law of 1868), provides that "no spirituous or fermented liquors or drinks shall be sold or given to any person" during the day appointed for polling in the wards or municipalities in which the polls are held; and by s. 1 of 36 Vic., c. 2, "corrupt practice" means "any violation of the 66th section of the Election Law of 1868 during the hours appointed for polling;" and by s. 3 of the latter Act any corrupt practice "committed by any candidate at an election, or by his agent, whether with or without the actual knowledge or consent of such candidate," avoids the election.

On the day of the election in question, and during the hours appointed for polling, one M., an agent of the respondent for the purposes of the election, was offered by a person unknown to him spirituous liquor (whiskey) in a bottle, which such agent, after remonstrating with such person, accepted and drank at the polling place where such agent then was. The unknown person also gave spirituous liquor from the same bottle to other persons then present.

Held, that as the Legislature had, by the provisions as to the selling or giving of liquor during the hours of polling, provided for the punishment of one particular class, which was defined to be the seller or giver, it did not intend to include the other class, the purchaser or receiver, to which no reference was made, except inferentially; and that therefore such agent, as the receiver of spirituous liquor during such polling hours, was not guilty of a corrupt prac[tice].

The petition contained the usual charge[s as] to corrupt practices. The election took place on the 1[1th] and 18th January, 1875.

Mr. Bethune and Mr. N. W. Hoyles for petitioner.

Mr. Alfred Boultbee and Mr. Evatt for respondent.

The evidence on the charge of corrupt practices by an agent of the respondent was as follows:

John A. Macdonell: Q.—You acted as an agent for Mr. Bell? A.—Yes? Q.—Are you aware of any liquor

having been given on polling day, or sold during the hours of polling? A.—No; I have heard vague reports. Q.—Never mind what you have heard, except you have heard it from Mr. Bell; were you present when any liquor was given? A.—Yes; there was a man at the polling place where I stood; I did not know his name; I never saw him before or since; he gave me some; it was at the polling place in Simcoe Street; it was at some hour in the morning after the poll opened; I do not know who it was; he had only one bottle; I think he gave it to others. Q.—Do you know any one who got any? A.—No; when the man came up I saw he was somewhat intoxicated; I never heard him called by name. I do not know who he was. Q.—Did you remonstrate with him? A.—Yes; it was a very cold day; I had been out from 9 o'clock in the morning to this hour, about 11, and it was very cold and stormy; and he was very pressing that I should take some, and at last I did take some and others took some; I have not the slightest idea who he was. Q.—Do you happen to know where he got the liquor? A.—No. Q.—What kind of liquor was it? A.—It was, I think, whiskey. Q.—That was the only liquor you know of having been given on polling day? A.—It was, except after the election was over.

Cross-examined: Q.—This about the bottle occurred in the street? A.—Yes. Q.—Was he particular in his attentions, or did he give the liquor to both parties? A.—To both parties, I think. Q.—Did he come there again? A.—I don't think he came back, and no one else tried this.

Evidence was also given of treating during polling hours on the day of the election, at taverns within the electoral division, by John Ball and Richard Duplex, referred to in the judgment.

Mr. Bethune said three cases of treating had been proved—one by Mr. Ball, another, the treating of an

unknown person by Duplex, and the third, the treating of Mr. Macdonell by an unknown person. It was not necessary to consider the first and second cases, as there was not sufficient proof of agency. The third case, however, was one which came up for the first time under the statute. The 66th section of the Act of 1868 prohibited the keeping open of taverns and the sale or giving of spirituous liquor during the hours of polling to any person within the limits of the municipality. By the earlier Act of 1871, relating to the trial of controverted elections, corrupt practices were defined to be bribery, undue influence, and illegal and prohibited acts in reference to elections or any of such offences. Under that Act the *Brockville* election trial (*ante* p. 139) took place, and the Court of Queen's Bench construed the law so that the word "corruptly" was held to govern the whole section. In the original Ontario Act, treating at meetings was a corrupt practice when done "with intent to promote the election" of a candidate. That phrase governed the whole section; but the Legislature had omitted that phrase from the new Act (36 Vic., c. 2, s. 2) with the design of getting rid of the question of "intent" altogether. The manifest policy of the law was to stop the giving or selling of liquors on the polling day, whether the intent were innocent or not. He referred to the Interpretation Act, 31 Vic., cap. 1, sec. 8, sub-sec. 39, to show that all statutes were to be construed in a fair, large and liberal manner, so as to ensure the attainment of the object of the Act. The object of the provision in the Election Act was to prevent the giving or selling of liquor. Two persons must be concerned in any such transaction or violation of the law, and so the person who received the liquor was as much a violator of the law as he who gave it. *Rex* v. *Pitt*, 3 Burr. 1335; and *Rex* v. *Vaughan*, 4 Burr. 2501. It had been argued that while it was an offence to receive a bribe it was none to give one; but Lord Mansfield said that what it was a crime to take, it was a crime to give; the two things are reciprocal. It

was clear that if Mr. Macdonell had given the liquor he would have violated the section, and it would be an anomaly to say that in receiving it he was not also guilty of a violation of the law. In the *Cornwall case* (Dom.) (*a*) the Chancellor had held that the old canon of a distinction of construction between penal and civil statutes did not now exist. Mr. Macdonell, as agent of the respondent, had been guilty of an act in direct opposition to the spirit and intent of the law, and if it were not so held it would open the door to an easy evasion of the provision of the statute against corrupt practices. It might be said that an election should not be lightly set aside, but a Judge had declared that if only two shillings and sixpence had been spent in bribery, he would have no choice but to avoid the election (*Blackburn case*, 1 O'M. and H. 202); and in the 36 Vic., cap. 2., sec. 3, no distinction was made between giving liquor and giving money.

Mr. Boultbee contended that the intention of the amended election law was to close taverns and stores, and prevent the proprietors carrying liquor to barns or other places and selling it there, and thus avoid being fined. The object of the present law was to secure purity of election. Judging from the evidence, it appeared that the intention of the Legislature had been carried out in this instance, and it would be a most unfortunate thing if, after an election had been conducted as this had been, it should be set aside because of a trifling act, such as was made the ground of avoiding it. He contended there must be an "intent" in the giving of liquor, and that the simple giving or selling of a glass of liquor on polling day would not avoid the election. He thought the clause was put in the Act without considering the full effect it would have, and that the Court would construe it differently from what the petitioner contended.

DRAPER, C. J., A.—The only charge in the petition which was entered into at the trial was that the respondent was

(*a*) Reported Dominion Elections, 1874, *post*.

personally and by his agents, before, during and after the election, guilty of corrupt practices, as defined by the Controverted Elections Act of 1871 and the Elections Act of 1873, whereby the said election had become void. Mr. Bethune opened the case very briefly, stating that it was impossible for him to explain what particular facts he expected to prove by the different witnesses he should call. They all, or nearly all, belonged to the opposite party, and it would have been useless to apply to them for information. He could only say that he hoped to prove that there were corrupt practices, as defined by the statute, and that they were committed by or under the authority of the respondent or by his agents, for whose acts, in these respects, he was answerable; that he fully expected that he should prove that the respondent was put forward as a candidate by the Liberal-Conservative Association in the City of Toronto, on the understanding that he was to be put to no expense, and that he placed himself in their hands, thereby constituting all its members who took part in the election as his agents, and in support of this assertion he read a part of the respondent's deposition. The trial lasted part of two days, during which fifty-five witnesses were examined. I adjourned rather earlier than I had intended, as there was one witness, whose probable importance to the petitioner had only become apparent by the testimony given during the first day; and I thought it better, understanding that no witnesses would be called for the defence, that the testimony in support of the petition should be completed before Mr. Bethune summed up.

At the close of this witness's examination, Mr. Bethune admitted that the charge of bribery was altogether unsustained, and that he must rest the case upon the allegation of treating. Three cases of treating during the election had been proved. Two of them he would not press, as the fact that the parties who gave the liquor were agents of the respondent was not established; but he contended that the case of Mr. John A. Macdonell was different. There was no

possibility of doubting that he was agent of the respondent. He himself admitted that he received and drank some liquor during the polling hours; and Mr. Bethune contended that the original Ontario Act, 32 Vic., cap. 21, sec. 61, which made treating with intent to promote the election of a candidate illegal, having been altered by omitting the words "with intent to promote the election of a candidate," it showed that the offence no longer consisted in the intent but in the act. He then argued that the person who drank liquor given him was as much an offender against the 66th sec. of 32 Vic., cap. 21, as he who gave it; and, therefore, as Mr. Macdonell had accepted and drank within the limits of the municipality some spirituous or fermented liquor during the time when the poll was open, and was an agent of the respondent, that act was sufficient to avoid the election. The point on which the petitioner's case was finally rested was not raised or brought under my notice until the last witness called to support the petition had been examined. Not one instance of bribery had been—I will not say established; but there was no evidence given upon which there was even a *primâ facie* case of bribery. The evidence also did not connect the sitting member personally with any act which could sustain the charge of corrupt practices, so far as bribery is concerned. But several witnesses were examined to prove either treating or a breach of the 66th section of the 32 Vic., cap. 21, which requires that every hotel, tavern or shop in which spirituous or fermented liquors or drinks are ordinarily sold, shall be closed during the day appointed for polling in the wards of municipalities in which the polls are held, and prohibits selling or giving to any person within the limits of such municipality, during the said period, any spirituous or fermented liquors, under a penalty of $100 in every such case. There was evidence which was in my judgment sufficient to prove at least two cases in which this clause of the Act was violated. But in no such case was there any evidence connecting the offenders with the successful candidate or any of his

agents; and for this reason the petitioner's counsel gave them up.

There remained one case, however, in which there was no such defect. Mr. Macdonell was examined, and unequivocally admitted himself to be an agent of the respondent for the purposes of his election. He gave in evidence that he was at No. 1 division, St. Patrick's Ward, during the polling. There was a man at the polling booth on Simcoe Street, upon the street, who had a bottle of liquor, and who seemed to be a little intoxicated. Mr. Macdonell did not know his name, and has not seen him since, nor has he any idea who he was. The day was cold, the man was very pressing, and Mr. Macdonell took some whiskey from him. It was during the hours of polling. It was contended that this avoided the election; that there was a clear violation of the statute; that liquor could not be given or sold unless there was a purchaser or a receiver; and as by the act of receiving the giver was enabled to commit the offence, the receiver became a *particeps criminis.* Reference was made to the definition of corrupt practices, in the 34 Vic., cap. 3, sec. 3, and to the repeal of that definition by 36 Vic., cap. 2, sec. 1, and the substitution of another definition in lieu thereof, which latter definition makes any violation of the 66th section during the hours of polling a corrupt practice. This change in the law does not, however, affect the question I am called upon to decide. It leaves the point untouched whether the words "No spirituous liquors or fermented liquors or drinks shall be sold or given" make the purchaser or recipient in effect a seller or giver, and as such subject to a penalty of $100 in every such case, for "sell" or "give" are the only words in the Act which can be made applicable. It might have been argued on the part of the respondent with as much show of reason, that the earlier part of the section shows that the Legislature had in view a stringent preventative to the dangers of having taverns and other places where liquors are usually sold kept open during

the polling day, by requiring such places to be kept shut, and by forbidding the sale of such liquors. In the 68th section the contracting to vote for money and the receiving of money on account of having voted or refrained from voting, are treated and subjected to a penalty as distinct offences, though in the preceding section the giving or lending money, or agreeing to do so, to influence a voter, is subjected to the same penalty. The Legislature in that instance evidently did not consider that by punishing the lender or giver of money, they had also provided for the punishment of him who borrowed or received. Upon the construction contended for by the petitioner's counsel, in making the 66th section consist of two separate parts, the first relating to the closing of hotels, &c., and the latter of a general character, it appears to me that if any person in his private way give a glass of wine or beer to a friend who happened to call upon him during polling hours, he would himself be subject to the penalty of $100, and his friend would be similarly liable. I have not now to deal with the former of these propositions, but the latter is involved on the present occasion. I cannot adopt a conclusion which appears to me unwarranted by the plain meaning of the words of the Act, nor hold that where the Legislature provides for the punishment of one particular class, which they distinctly define, they intended to include another to which they make no reference unless inferentially, and when, by the 67th and 68th clauses of the Act, they show that they considered that by providing for the punishment of the giver of a bribe they had not provided for the punishment of the receiver of it. For these reasons I feel compelled to hold that the petition is not proved; that the respondent. Robert Bell, was duly elected and returned; and shall certify accordingly to the Speaker. I shall also report to the Speaker that no corrupt practice has been proved to have been committed at the said election; and that there is no reason to believe that corrupt practices have extensively prevailed at the said election. Costs to follow the event. (9 *Journal Legis. Assem.*, 1875-6, p. 20.)

WELLAND (2).

BEFORE MR. JUSTICE GWYNNE.

WELLAND, *17th, 18th and 28th May, 1875.*

WILLIAM BUCHNER, *Petitioner*, v. JAMES G. CURRIE, *Respondent.*

Principles guiding a Judge in deciding Election Cases—Intimidation of Government Servants—Corrupt Treating—Evidence as to offer of Bribes—Delegates to a Convention, not Agents—Agency and Sub-Agency—Corrupt Practice by a tavern-keeper as a Sub-Agent—32 Vic., c. 21, ss. 61 and 66; 36 Vic., c. 2, s. 2.

Before subjecting a candidate to the penalty of disqualification, the Judge should feel well assured beyond all possibility of mistake, that the offence charged is established. If there is an honest conflict of testimony as to the offence charged, or if acts or language are reasonably susceptible of two interpretations, one innocent and the other culpable, the Judge is to take care that he does not adopt the culpable interpretation unless, after the most careful consideration, he is convinced that in view of all the circumstances it is the only one which the evidence warrants his adopting as the true one.

The respondent was charged with intimidating Government servants, during his speech at the nomination of candidates, by threatening to procure the removal of all Government servants who should not vote for him, or who should vote against him. The evidence showed that, though in the heat of debate, and when irritated by one U., he used strong language, there was no foundation for the corrupt charge; and as it should not have been made, the costs in respect of the same were given to the respondent against the petitioner.

About an hour after a meeting of a few friends of the respondent at a tavern, one of their number was sent some distance to buy oysters for their own refreshment, of which the parties and others partook. The following day a friend of the respondent treated at a tavern, and not having change, the respondent gave him 25 cents to pay for the treat.

Held not to be corrupt treating, nor a violation of 36 Vic., c. 2, s. 2.

Where the evidence as to the offer of bribes was contradictory, and the parties making charges of bribery appeared to have borne indifferent characters:

Held, that the offer of bribes was not satisfactorily established.

The delegates to a political convention assembled for the purpose of selecting a candidate, who never had intercourse with the candidate selected, and who never canvassed in his behalf, cannot be considered as agents for such candidate.

The respondent gave to one H. some canvassing books, with directions to put them into good hands to be selected by him for canvassing. H. gave one of the books to B., a tavern-keeper, and B. canvassed for the respondent. B. was found guilty of a corrupt practice in keeping that part of his tavern wherein liquors were kept in store, so open that persons could and did enter the store-room and drink spirituous liquors there during polling hours on the day of election.

Held, that H. was specially authorized by the respondent to appoint sub-agents, and had under such authority appointed B. as a sub agent, and that the corrupt practices committed by B. as such sub-agent of the respondent avoided the election.

The respondent was ordered to pay the costs of the petition and trial, except the costs of certain issues found in favor of respondent, part of which costs were to be paid by petitioner to the respondent; and as to part, each party was ordered to bear his own.

The petition contained the usual charges of corrupt practices.

Mr. James A. Miller and Mr. Peter McCarthy for petitioner.

Mr. Arthur S. Hardy, and the Respondent in person, for the respondent.

The evidence in support of the charges against the respondent and his agents is set forth in the judgment.

GWYNNE, J.—At the close of the evidence taken in this matter, the counsel for the petitioner rested his case upon five points upon which the respondent should be unseated. (1) Upon the ground of intimidation by himself personally in his speech at the nomination, as to Government servants on the Welland Canal; (2) upon the ground of treating, commencing at the oyster supper at Whiteman's; (3) upon the ground of bribes offered, as is alleged, to Harper, William Brown, and one Archer, by one Hellems, who, as is contended, was an agent of the respondent; (4) upon the ground of undue influence alleged to have been exercised by one Hagar, who, as is contended, was an agent of the respondent, and as such threatened one Samuel Fraser that he would lose his employment as bridge-tender at the canal unless he should vote for the respondent; and (5) for corrupt practices committed in violation of secs. 61 and 66 of 32 Vic., cap. 21, by one Luther Boardman, who, as is asserted, was an agent of the respondent, and for whose act the respondent is to be held responsible.

Before subjecting a candidate to the penalty imposed by sub-sec. 2 of sec. 3 of 36 Vic., cap. 2, I should feel well assured, beyond all possibility of a mistake, that the offence charged, which is attended with such consequences, is established. If there be what appears to be an honest conflict of testimony as to the existence of these matters which constitute the offence charged, or if these matters

consist of acts or language which are reasonably susceptible of two interpretations, one innocent and the other culpable, a very grave responsibility is imposed upon the Judge to take care that he shall not adopt the culpable interpretation unless, after the most careful consideration he is able to give to the matter in hand, his mind is convinced that, in view of all the circumstances, it is the only one which the evidence warrants his adopting as the true one.

Now, as to the first of the above charges, namely, intimidation in the respondent's speech at the nomination, it is to be observed that it is difficult to believe that it could have entered into the mind of any man of ordinary intelligence—not to say of a gentleman of the legal profession and of considerable experience in public life—at the nomination, in the presence as well of his opponent and of *his* friends, as in the presence of *his own* friends, to threaten that he would procure the removal of all the Government servants at the canal who should not vote for him or who should vote against him; and it seems quite incredible that if such a threat had been made in such a presence, that the utterer should not have been instantly called to account *flagrante delicto.* But there is abundance of evidence by reason of which I have no difficulty in arriving at the conclusion that, although in the heat of debate, and under the irritation caused perhaps by the manner in which the respondent was interrupted by the witness Upper, he may have made use of some language which had better have been left unused, there is no foundation for the corrupt charge, namely, of intimidation, which has been made against him; and I am of opinion that this charge should not have been made, and I shall therefore direct that so much of the costs of the petition and trial as relates to this charge shall be paid by the petitioner to the respondent.

As to the second charge, involved in what is contended to be corrupt treating, by reason of the oyster supper at Whiteman's tavern, and of the treating which took place

at the same tavern on the following day, I am of opinion upon the evidence, and so find as a matter of fact, that the meeting which had been held at Whiteman's about an hour before the oyster supper was a meeting of a few friends of the respondent, and that after having transacted what business they may have had in hand, and about three-quarters of an hour to an hour after the close of the meeting, they for their own refreshment procured one of their number to go to Port Colborne, some little distance off, to buy some oysters, which having been procured, were at their own expense, or at the expense of some of them, served up at Whiteman's tavern; and although one or perhaps two persons who had formerly been and were still believed to be friends of the respondent, and to be then present as such, but who in this election afterwards proved not to be his friends, partook of those oysters at the expense of the others who supplied them, I can see nothing which can in this supper be properly construed to be corrupt treating, and it was not contended to be a violation of the 2nd sec. of 36 Vic., cap. 2. The complaint as to what took place on the following day consists in this: that Dr. Haney, who was going about with the respondent, visiting a few of the latter's friends, did, as he swore is his constant practice when meeting his friends, treat some of them at the tavern, and that one Gagner, a friend of the respondent, did in the respondent's presence treat a friend of his own, and not having any small change about him, did receive from the respondent 25 cents to pay for the treat. Now, whether or not these acts or any of them were done with the corrupt intent of influencing the election, is a question of fact to be determined according to the circumstances disclosed in the evidence. The language of Mr. Justice Blackburn in the *Bewdley case* (1 O'M. and H. 20) is the most appropriate upon this point, and I hesitate not to adopt it in leading me to my decision upon this point of the case. He says: "In considering what is corrupt treating and what is not, we must look broadly at the common sense of the thing. There is an old legal maxim

Inter apices juris summa injuria. To go by the strict letter of the law often would produce very grave wrong. If I was to say that an election was void upon a single case of that sort, we should be going to the *apices juris*, and the result would be *summa injuria;* therefore, the inquiry must be as to the extent and amount of such cases." To hold such an amount of treating as is relied upon in this case, and given under the circumstances appearing in the evidence, to be corruptly given with the intent of influencing the election, would be well calculated, as it appears to me, to bring a most wholesome law into contempt. I must therefore hold that this charge is not established.

As to the charge involved in the third of the above heads of complaint: Harper, whose story has in it some particulars which appear to be improbable, and who by his own account is not a person of the most incorrupt integrity, is flatly contradicted by Hellems, the person whom he accuses of offering to him the bribe which he says was offered to him; Brown is contradicted not only by Hellems but also by another witness; and Archer is contradicted by Hellems and also by three or four other witnesses. In view of these contradictions, and of the indifferent characters which appear to be borne by the persons making these charges, I cannot arrive at any other conclusion than that it is not established to my satisfaction that the bribes which these witnesses allege to have been offered to them respectively by Hellems were in fact ever offered to them; so that it becomes unnecessary to inquire how far the fact of Hellems having been upon one or two occasions, or perhaps oftener, specially requested by the respondent to attend at public meetings of the electors for him and in his stead, and to address the meetings on his behalf, would constitute him an agent for all those acts done to promote the respondent's election, and would render the respondent responsible.

As to the fourth charge, Samuel Fraser and his wife, who make the charge, are contradicted by Hagar, the person against whom it is made. There is no evidence

whatever that Hagar ever canvassed a single vote, unless it be that he canvassed Fraser, who makes the charge against him, and he himself denies that he canvassed him or any one else. He appears to have been one of the Reform delegates sent to the convention which put forward the respondent as the candidate of the Reform party. He does not appear to have been spoken to by the respondent, or to have been directly or indirectly requested to act in any particular for him. A canvassing book containing the names of the voters in the town of Welland appears to have got into his possession, but how it did get into his possession does not appear, and he distinctly swore that he never made any use of it. Now, although the respondent was put forward by the Reform Association as the candidate of the party, and although he accepted the nomination, and although a candidate put forward by a political association may so deal with the members of the Association, and may so place himself in their hands with the view of availing himself of the benefits of their organization, and of the influence of the individual members of the Association, as to make them his agents, for whose acts he should be responsible, still it appears to me that it would be going altogether too far to hold that every delegate to a convention assembled for the purpose merely of selecting a candidate, although he never had any intercourse directly or indirectly with the candidate, and although he does not appear to have acted in any instance or canvassed on his behalf, unless in the sole particular case which is charged and relied upon in avoiding the election, is an agent of the candidate, so as to make him responsible for the act complained of. If it could be so held, it would make a delegate opposed to the nomination of the candidate selected by the majority, able to defeat his election by a single case of bribery committed for the express purpose of invalidating the election. In short, in such case the acceptance of the nomination by the candidate selected by the majority would have the effect of constituting every member of the convention,

whether a supporter or opposed to the nomination, of the candidate selected, his agent, for whose acts the candidate would be responsible. Such a result would be repugnant to the plainest principles of justice. I cannot, therefore, upon the evidence in this case, arrive at the conclusion that Hagar was an agent of the respondent, for whose acts he should be held responsible to the avoidance of the election, even though it should be true that Hagar did commit the offence of which Fraser and his wife accuse him, as to which I do not, for this reason, think it necessary to express an opinion.

There remains to be considered the fifth ground of complaint, for the consideration of which I reserved my judgment. That Luther Boardman has been guilty of corrupt practices, and has thereby exposed himself not only to the penalty imposed by sec. 66 of 32 Vic., cap. 2, but also to the disqualifications enacted by sec. 49 of 34 Vic., cap. 3, there can be no doubt. Upon the facts disclosed in evidence, and notwithstanding his own statement to the effect that he cautioned people against going into the open store-room in rear of his shop and tavern, where the liquors to supply the tavern were kept, I can come to no other conclusion than that he, being a tavern-keeper, did, at the very spot where the poll in the township of Crowland was being taken, and during the polling hours, keep that part of his tavern wherein his liquors were kept in store so open that all persons attending the poll for the purpose of voting could and did, at their free will and pleasure, enter the room and drink spirituous liquors there kept, and I have no difficulty in determining that this store-room was kept accessible in the manner in which it was, in order that the persons attending the poll might so enter it and supply themselves with drink at their pleasure. If such conduct as is here brought home to Boardman were not pronounced to be a plain violation of sec. 66 of 32 Vic., cap. 21, that section would be a dead letter. But it is not only as in violation of sec. 66 that the conduct of Boardman is

culpable. It was in every way calculated to influence and corrupt that class of loose and undecided electors who hang around polling places, withholding their votes, undecided until the last moment how they shall vote or whether or not they will vote at all, and who, knowing that this place was open, where their appetites for intoxicating drinks could be gratified during the entire day, could readily be induced, when their senses might be steeped in inebriety, to vote for the candidate known to be the friend of their liberal entertainer.

The only question which remains is whether or not the respondent is to be affected by, or whether he can claim exemption from responsibility for Boardman's corrupt conduct—whether, in fact, Boardman is or is not to be regarded as an agent of the respondent so as to make the latter responsible for the acts of the former.

The law of agency as applied to election petitions has been expressed by different learned judges to be quite different from that applied to the common relation of principal and agent. "A candidate," as is said by Grove, J., in the *Taunton case*, 30 L. T. N. S., 127, "may be, and I would add that, unless the wholesome Act passed for the purpose of preventing corrupt practices at elections be wholly frustrated, he must be responsible for the acts of one acting on his behalf, though the acts are beyond the scope of the authority given, or indeed in violation of the most express injunctions."

So far as regards the present question, to establish agency in Boardman for which the respondent would be responsible, he must be proved to have, by himself or by an authorized agent, employed Boardman to act on his behalf, or he must have to some extent, either through himself or by the act of an authorized agent, put himself in Boardman's hands, or have made common cause with him, or have put faith in him, or have availed himself of his services in doing what is currently done by a committee-man or canvasser for promoting the election, or have been aware that he was so acting for him without

repudiation. In the *Bewdley case* (1 O'M. & H. 18), Blackburn, J., has held that an agent made the candidate responsible for the acts of a sub-agent as well as the agent, even though the candidate did not know and was not brought into personal contact with the sub-agent.

I proceed now to consider the evidence upon which the question in this case turns.

It appears that a convention of an association called the Reform Association, was called for the purpose of nominating a candidate in the Reform interest. To the convention each municipality in the electoral division elected eight delegates, which eight delegates were in the habit of acting (with one of their number as chairman) as local branches or committees of the Reform Association in their respective municipalities. The convention of delegates so constituted nominated the respondent as the candidate to stand in the Reform interest. The respondent had been put forward in like manner upon former occasions.

Mr. Price, Reeve of Welland, himself a member of the convention, says that the committees of the Reform Association always acted for the Reform candidate; that it had always been understood that they were to act for the Reform candidate; that Mr. Currie, the present respondent, had stood for the county in former elections, and that witness never knew him to repudiate those committees, which have always acted for the candidate, although he says that Mr. Currie never attended the committee meetings. In former elections a central committee of the Reform Association used to meet, but none met at this election; but he was not aware of any reason why there was no meeting of a central committee on this election. The custom had been on former occasions for the members of the committees of the Reform Association to act as committees for Mr. Currie to promote his election, and reports were made from the local committees to the Central Reform Committee.

John Henderson, Reeve of Crowland, a most respectable witness, who gave his testimony in a most candid manner, and who impressed me with the belief that he did not wish any corrupt practices to be adopted by any one in promotion of the respondent's election, says that he was chairman of the committee of the Reform Association for the township of Crowland. The committee, consisting of eight, including himself, were elected as delegates to the convention which nominated Mr. Currie, and he was a warm supporter of Mr. Currie on former elections. Upon this election he was an active canvasser, and worked for Mr. Currie, and that was well known. Mr. Currie wrote to him appointing a meeting of electors to be held for the township of Crowland, and requesting him to get his friends to turn out and attend the meeting. Mr. Currie himself came to the meeting, which was held in the Town Hall; but before the meeting at Boardman's tavern, where he was staying, he gave to witness 10 or 12 canvassing books, with the names of all voters printed in each, made up by Mr. Currie himself from printed voters' lists, which he cut into slips and pasted in books. These books, Henderson says, were given to him by Mr. Currie to put "into good hands to be selected by him for canvassing." He does not know that Mr. Currie knew that he was chairman, but he knew that he (Henderson) had canvassed before for him. These books Henderson distributed among the other members of the Reform Committee of the township, and one he gave to Boardman, not, however, a member of the committee. The intention was that all were to report the progress of their work to the central committee of the Reform Association on nomination day; but the business at the nomination was so protracted that the central committee did not meet. When Mr. Currie gave the books to Henderson, he said they contained the voters' lists, and "we were to see how the parties would go." Boardman was the only canvasser in the school section where he lived. On the Saturday before the polling day there was a meeting of the com-

mittee of eight and a few others at Boardman's. Boardman himself was there, and he, as well as others, made a return of the result of his canvass, and stated that there would be a large majority for Mr. Currie in his section. He made a return showing a good majority. At this meeting arrangements were made as to bringing up voters to the poll early on the Monday, and on the Sunday, Henderson gave Mr. Currie a general return of the result of the canvass of the township. Boardman, as Mr. Henderson says, was expected to work like any other Reformer. Boardman did not say he would attend to bringing up voters, but he saw Henderson on the Saturday before polling day, and told him that all was right. Mr. Currie himself says that although he appointed no committee specially to act for him, he did ask some of his friends to work for him. He says that he sent the canvassing books in parcels to his friends in the different municipalities. He knew that Henderson was working for him, and in that capacity he gave him the books, not as chairman of any committee. He thought the books would be of service to his friends, and he gave them to Henderson at Boardman's to enable them to advance the canvass for him, and to let them see who the voters were. He left the election, he says, to his friends, and Henderson had been a friend of his for three years. He appointed no scrutineer but at four polling places; the rest were appointed by the local committees in the respective municipalities. The committee of which John Henderson was chairman appointed James Henderson, John's brother, scrutineer for the poll in the township of Crowland, held where Boardman resided, and on the Sunday before the polling day John informed the respondent of his appointment, and he approved of it. The respondent says that he himself despatched the posters for meetings by mail or parcel post, and Boardman says that the posters for the meeting at Crowland came to his address. Boardman, in the course of his canvass, ascertained that a Mr. Brough, although a friend of Mr. Currie's, was cross about some slight, and he

advised Mr. Currie that it would be advisable for him to go and see him. He says that the book which he had was handed to him for the purpose of his canvassing the school section in which he lived in Mr. Currie's behalf, and although he did not, as he says, go through the section, he canvassed all persons who came to the tavern and shop, and made, as we have seen, a return to Mr. Henderson of the result.

Under this evidence it seems clear beyond a doubt that John Henderson was the agent of the respondent, and one specially authorized to appoint other agents under him to canvass and act in the respondent's interest. It appears that he did appoint Boardman as such sub-agent, and, upon the whole, I am compelled to say that upon this evidence I can arrive at no other conclusion than that such a degree of assistance was rendered by Boardman in virtue of the selection made of him as a trustworthy person, to whom the interests of the respondent were confided by John Henderson in virtue of the power in that behalf vested in him by the respondent, that the respondent must abide the consequences and be responsible for the malpractices of Boardman, although such malpractices were committed without his actual knowledge or consent. The 3rd section of 36 Vic., cap. 2, in that respect is very explicit and very peremptory. My painful duty, in accordance with the view I feel compelled to take of the evidence, is therefore to declare the election of the respondent to have been and to be null and void, by reason of corrupt practices committed by Luther Boardman, an agent of the respondent, in the promotion of his election, but which corrupt practices were committed by the said Luther Boardman without the actual knowledge or consent of the respondent.

I do further order that the respondent do pay to the petitioner the costs of the said petition and trial, except so much of said costs as may relate to the second, third, and fourth heads of complaint above in this my judgment enumerated, as to which several heads of complaint

I do order that each party do bear and pay his own costs, and except also so much of the said costs as relate to the first head of complaint herein above enumerated, the costs of which I do order that the petitioner do pay to the respondent.

With his certificate to the Speaker of the result of the trial, the learned Judge reported that Luther Boardman was proved to have been guilty of corrupt practices, in this, that being a tavern-keeper and as such authorized to sell spirituous and fermented liquors, he the said Luther Boardman did, in violation of the provision of the statute in that behalf, keep open his said tavern during the hours of polling on the day of the election; and that he, being an agent of the said James George Currie, did give, furnish and supply, at a meeting of electors assembled for the purpose of voting at one of the polling places at which votes were polled in the township of Crowland, at the said election, spirituous and fermented liquors during the hours in which the poll was being taken at the said polling place, to all such persons, electors and others, as were desirous of partaking of such spirituous and fermented liquors, and many of whom did partake thereof.

(9 *Journal Legis. Assem.*, 1875-6, p. 5.)

RUSSELL.

BEFORE CHANCELLOR SPRAGGE.

L'ORIGNAL, *3rd and 4th June, 1875.*

ROBERT OGILVIE *et al*, *Petitioners*, v. ADAM JACOB BAKER, *Respondent.*

Corrupt practices by Agent—Admission of Counsel—Keeping tavern open and treating on Polling Day.

One F., a tavern-keeper, was given $5 by the respondent, and requested to appoint a scrutineer to act for the respondent at the poll on polling day. F. kept his tavern open on polling day, and various persons treated there during polling hours. Counsel for the respondent, after the evidence of the above facts had been given, admitted that F. was an agent of the respondent, and that his acts were sufficient to avoid the election.

Held, that although the Court did not adjudicate that the respondent, by giving the $5 and requesting F. to appoint a scrutineer, had constituted him an agent for all purposes, it was the practice of the Court to take the admission of counsel in place of proof of agency, and therefore the admission of counsel as to F.'s agency was sufficient.

Held further, that F., as such agent, had been guilty of a corrupt practice in keeping his tavern open on polling day, and that such corrupt practice avoided the election.

The petition contained the usual charges of corrupt practices.

Mr. J. K. Kerr for petitioner.

Mr. John O'Connor, Q.C., for respondent.

The evidence of the corrupt practices on which the election was avoided was as follows:

Michael Foubert: I keep a tavern. Mr. Baker was at my place on the Sunday before the election. He gave me authority to appoint an agent for him, and gave me $5 on the Sunday and told me it was to pay him. I sent for Antoine Lamotte and asked him if he would act as agent at the poll for Mr. Baker, and that I would see that it was all right. The polling place was about three or four acres from my tavern. I don't recollect Baker being at my place during the polling day. I was back and forward during the day. I think Kelly treated, Robillard treated, and I think Toilferd treated during the day. I don't remember anybody else. I don't remember whether I treated or not, but I may have done so.

Michael McArdle: Was at St. Joseph's Village on polling day. Was at Foubert's in the morning; was treated there; this was between 9 and 10 o'clock. There were several treats. Foubert was there; do not know that he treated; seven or eight persons there.

Mr. O'Connor stated that the facts brought out in the evidence of Michael Foubert, who he admitted was an agent of the respondent, were sufficient to avoid the election, and he offered to do so; the respondent to be called to explain the personal charges.

Mr. Kerr accepted this proposition.

The respondent was then called, and after denying the charges of personal bribery adduced in evidence against him, stated as to treating: " My general habit as to treating is 'rather free.' I seldom have entered a tavern and left without treating. The custom of the country is to treat freely at taverns, and I followed out my usual custom."

SPRAGGE, C., said that the evidence had established corrupt practices by an agent, but that no personal charges against the respondent were proven. He had no reason to believe that bribery or corrupt practices had extensively prevailed throughout the constituency. With regard to the agency of the man Foubert, he held that he had acted in gross violation of the law. He did not adjudicate that the respondent, having left $5 with Foubert to engage a scrutineer for the polling day, had constituted him an agent for all purposes, but simply as an agent for that particular purpose; but as it was the practice of the Court to take the admissions of counsel in proof of agency, he felt warranted in taking the admission now made by the respondent's counsel. Foubert being guilty of the corrupt practice of keeping his house open on polling day was sufficient to void the election.

The practice on former occasions was to manage the elections through the agency of third persons, and many instances were on record of very corrupt practices by agents. It was to meet this end that the law was made as stringent as it is, because it was manifest that unless the candidates themselves were held responsible for the acts of their agents, there would be very corrupt practices in the elections. He thought the law was a very necessary one to meet that evil.

As to the treating in this case, he did not think that it had been brought home to the respondent within the meaning of the law. He might say that a practice more demoralizing than the system of treating in vogue could scarcely exist. It was a pity, he thought, that public

sentiment runs the way it does. A man goes into a tavern, and it seems to be expected of him as a matter of course that he should give ardent spirits to whatever persons were there present, and unless he does so he is considered of a mean and niggardly disposition. The consequence was the very widespread evil of intemperance. There was not a case which came before him in which this evil had not forced itself upon his attention, and it was one which prevailed in all parts of the country alike.

He thought the personal charges had been explained, and to his mind satisfactorily explained, in an ingenuous and honest manner. Mr. Kerr had said very properly that they could not be pressed upon him after the evidence of the respondent. He could not have found in the face of the denial that these personal charges were established. He did not say that the denial of the respondent alone would have relieved the Court from the necessity of adjudicating on the personal charges, but at least as much weight was due to the respondent's evidence of the denial of the charges as to the evidence against him, and it was to himself satisfactory that Mr. Baker had purged himself so thoroughly from the personal charges that had been made against him. These personal charges the Court did not give effect to except on clear and satisfactory evidence, and certainly in this case such evidence had not been adduced. Therefore, it only remained to certify to the Speaker that the election was void. With regard to costs, they would follow the event.

With his certificate to the Speaker of the result of the trial, the learned Judge reported that Michael Foubert was proved to have been guilty of corrupt practice at the said election.

(9 *Journal Legis. Assem.*, 1875-6, p. 6.)

CORNWALL.

BEFORE CHANCELLOR SPRAGGE.

CORNWALL, *8th June, 1875.*

JOHN GOODALL SNETZINGER, *Petitioner*, v. ALEXANDER FRASER McINTYRE, *Respondent.*

Bribery by an Agent—Admission of Counsel.

A voter who had been frequently fined for drunkenness was canvassed by C. to vote for the respondent, and was asked by him "how much of that money" (paid in fines) "he would take back and leave town until the election was over."

Counsel for the respondent admitted that C. was an agent of the respondent, and that the evidence was sufficient to avoid the election.

Held, that the election was void on account of corrupt practices by an agent of the respondent.

The petition contained the usual charges of corrupt practices.

Mr. R. A. Harrison, Q.C., *Mr. D. B. Maclennan, and Mr. Chisholm*, for petitioner.

Mr. J. K. Kerr, and the Respondent in person, for respondent.

The evidence given at the trial was as follows:

Michael Loo: I am an elector of the district, and voted at the late election. I was asked to vote for McIntyre by Robert Conroy the evening before the polling day. That was the first time he saw me about my vote. There was another man present at the time. He saw me in my own house. I believe Dr. Allen occupies the position of Police Magistrate, and I know him. I had been fined several times by him. I paid my fines before the election. I did not like it at all. I paid upwards of $100 in fines, and I suppose it was well known. Conroy and I talked of it that night. I was in bed when he came, and not feeling well. I told my son to get up and see who was there. I was called to come down-stairs, and saw Conroy and another man talking to my son. Conroy produced a bottle of whiskey. I refused to drink that night, though they told me to take hold and drink some. They urged

me to drink, but I persisted in my refusal. My son drank. He asked me if I was going to vote with the McIntyre party. I told him I could not give an answer, as my mind was not made up. He said I must know how I was going to vote. I told him I would not know until the morning. He asked me what they had done to put me against them, and I spoke of the money taken from me by the fines. I said that that company had taken too much money out of me for me now to support them. He replied, asking me how much of that money I would take back and leave town until the election was over. I told him I never left my country yet dishonestly, and I would not do so now. He replied, Don't vote to-morrow without coming to see me, and then bid me good night and went off. I am sometimes too fond of whiskey. Conroy is a hotel-keeper in this town. I was fined for drinking whiskey. He did not say whether he had money to pay my fines. I did not leave town, nor did I see him before I voted. That was the only time he was with me.

Cross-examined: No money was paid to me by Conroy or by any one else. I took it that Conroy promised to return me some of the fines on condition of my leaving town. I do not belong to any particular place. I lived about twenty years in the States. I have lived here since March a year ago, and have since that time been fined to the extent of upwards of $100. I have been drunk without being fined. I take it whenever I can get it handily.

Mr. Kerr admitted that Conroy was an agent of the respondent, and stated that he considered this evidence sufficient to void the election, and that the respondent would agree to have the election declared void.

Mr. Harrison agreed to this.

SPRAGGE, C.—The election will be declared void on account of corrupt practices by an agent, but not by the candidate, nor by any one with his knowledge and con-

sent. I shall report that corrupt practices were not proved before me to have extensively prevailed in the election.

With his certificate to the Speaker of the result of the trial, the learned Judge reported that Robert Conroy was proved to have been guilty of corrupt practices at the said election.

(9 *Journal Legis. Assem.*, 1875-6, p. 6.)

DUNDAS.

BEFORE CHANCELLOR SPRAGGE.

MORRISBURG, *14th, 15th and 16th June, 1875.*

SIMON S. COOK, *Petitioner*, v. ANDREW BRODER, *Respondent.*

Meeting of Electors—Treating at—Bribery—Evidence of corrupt offer—Treating on Nomination Day a corrupt practice—Treating Act, 7 Wm. III., c. 4; 32 Vic., c. 21, s. 61; 36 Vic., c. 2, s. 2.

The respondent, who was a member of a temperance organization, held an election meeting in a locality within the electoral division, and about an hour after the meeting had dispersed, went to a tavern where he met about 10 or 15 persons in the bar-room, to whom he made the remark, "Boys, will you have something?" Nothing was then taken; but one E., a supporter of the respondent, said he would treat, and he did treat the persons present, and the respondent gave him the money to pay for the treat.

Held, 1. That as the meeting for promoting the election had dispersed an hour before the respondent went to the tavern, this was not a meeting of electors.

2. That the treating not having been done with a corrupt intent, was not an offence under 32 Vic., c. 21, s. 61, as amended by 36 Vic., c. 2, s. 2, nor at common law.

Quære, Whether the Treating Act, 7 William III., c. 4, is in force in this Province.

The respondent had in 1873 compromised with his creditors for 50 cents in the $1, and then promised to pay all his creditors in full. About the time of the election he paid one S., who had at the two previous elections supported the opposing candidate, a portion of the promised amount.

Held, under the circumstances, the payment was not bribery.

Where one party affirmed and the other party denied a corrupt offer between them as to voting for the respondent,

Held, that the offer was not sufficiently proved.

One F., an agent of the respondent, on the day of the nomination of candidates to contest the election, and while the speaking was going on, treated a large number of persons at a tavern across the street from the place of the nomination, for which he paid $7 or $8.

Held a corrupt practice by an agent of the respondent, which avoided the election.

The petition set forth the usual charges of corrupt practices.

Mr. Bethune for petitioner.

Mr. Alfred Boultbee and Mr. J. B. Read for respondent.

The evidence affecting the election, referred to in the judgment, was as follows:

Andrew Broder, Respondent: I have been a member of temperance associations off and on for many years. I am a total abstainer. In January last I was a member of the Independent Order of Good Templars, whose pledge is not to touch, taste, or handle intoxicating liquors, beer, wine, or cider. It may be part of the obligation not to buy or sell, but I don't know. I did not treat during the canvass. We had a meeting in the Agricultural Hall called by hand bill; I made a speech. After the meeting I went to Dixon's, and remained there an hour. I don't recollect seeing Genesee Empey at Dixon's hotel. I did not treat then. I went from Dixon's to Powell's. The bar-room was filled; perhaps 10 or 15 were there. I spoke to Powell, who was a friend of mine, and then I made the remark: "Boys, will you have something?" or, "Hadn't you better take something?" This was in the bar-room. I was nearly as far from the bar as I could get. The room was small. After I said this there was nothing set up. Genesee Empey spoke to me, and asked me if the law allowed me to treat—something to that effect. I said, I think, that I did not believe the law hindered it. He said, "I'll do it," and I handed Genesee Empey there and then the money to pay for it. I handed him the money in the bar, opposite the door of the sitting-room. I did not attempt to conceal my giving him the money. I gave him a $4 bill; he gave me back the change afterwards; $1 was spent. I think Genesee Empey was a supporter of mine. He did not accompany me there; I came with Mr. Armstrong. This is the only time I treated during the election.

John Suffel: I live in Mountain, and am a farmer. I was at one time a creditor of Andrew Broder; it was for six tubs of butter. It was between $75 and $100. I signed the composition deed for 50 cents in the $1. This was in 1873. I got part in cash and part by note; the note was paid in 1873. I signed the composition deed in May, 1873. I received $10 from A. Broder some time in December, a short time before Christmas. He paid it to me voluntarily in his own store; he said he was going to pay every man in full, dollar for dollar. He took a memorandum of it. He took me behind the counter, and said he wanted to give me a little on the old score. He was talking about holding meetings in Williamsburg at this time. He did not ask me to support him. I had not always voted on that side. I had supported Cook in the election of July, 1867, and that of 1871 as well. I did not tell Broder that I was going to support him; I never mentioned it to him. We had not been talking of the payment in full. I am John Suffel the younger. He owed my father something and paid him; so my father says, but I do not know this of my own knowledge. The half of my debt was $35 or $50; there would be $20 due me still after the $10. This was before Christmas. He spoke to me yesterday, and said he was not going to deny it. I voted for Broder.

The respondent was also examined on this charge, and gave explanations of the payment to Suffel and others as set out in the judgment, and added: "These payments were made on the understanding that I was to pay my liabilities and settle in full. These were all amounts beyond the composition."

Abraham Bockus: I live in Morrisburg, and am a joiner by trade. I am a voter. Previous to the election I had a conversation with Dr. Hickey; my brother-in-law, Milan Daley, was in the house at the time. Hickey asked me if I had promised my vote to any one; I said, No. He then spoke favorably of Mr. Andrew Broder, and asked me if I would support him, saying that if I did they would give

me a good summer's work. He did not say where the work would be. The conversation was out of doors.

Charles E. Hickey, M.D.: I am a medical practitioner here. (His agency was admitted by Mr. Boultbee for the respondent). I know Bockus; I canvassed him for Broder a few days before the election; I asked him how he was going to vote, and said that I would take it as a favor if he would vote for Broder. He took exception to Cook's course in Parliament, and I took advantage of this, and urged him as strongly as I could. He said he did not know A. Broder, and I told him he was to be here shortly and he could hear him. He gave me to understand that if he was engaged at work on that day he would not vote. He had been working for me on a job at one of the houses belonging to the Rose estate; but neither he nor I referred to this. I swear that not one word of any kind was said about the future work; he or some one for him must have invented the story.

Alexander Farlinger: I am a member of the Conservative Association of Dundas, and President of the Morrisburg Branch. I treated on nomination day after standing a couple of hours, feeling very cold and tired. George Casselman asked me to go. Some one was then speaking. We went to the bar-room, which was full; it was as far as across the street from the nomination place; about 40 or 50 feet separated. I was asked by Casselman to go and get something to drink. Some one said: "This is Farlinger, who ought to be Reeve, and this ought to be his treat." I did not drink, because all the good whiskey was drunk before I got a chance. I think I paid between seven or eight dollars for the treat. I don't know the landlord by name. He probably counted the drinks. I paid him just what he asked. Speaking was still going on when I got out. The Returning Officer had gone before I went to the hotel, and I don't think he returned.

The evidence as to agency showed that the witness attended meetings at William Broder's (who was respond-

ent's election agent) to promote the election, and is sufficiently set out in the judgment.

Upon the opening of the Court on the next morning, the following judgment was given:

SPRAGGE, C.—The first point in Mr. Bethune's argument was the treating at Dixon's Corners. This treat, although not direct by respondent, but through the instrumentality of Empey, was in substance a treat by the respondent. This treating was impeached as a corrupt act on three grounds: 1st, As against the statutes of 1868 and 1873; 2nd, As against the Treating Act, 7 William III., c. 4; and 3rd, As an offence at common law.

In the first place, was this a meeting of the electors assembled for the purpose of promoting the election? [The learned Judge reviewed the facts of the case, showing that the meeting had dispersed one hour before the respondent went to the hotel.] There was no adjournment of the meeting; no preconcerted arrangement of meeting at the hotel, but an accidental meeting of a few persons. He held it was not therefore a meeting of the electors. In the second place, assuming the Treating Act of William III. to be in force here, was this treating a corrupt act *per se?* He referred to the authorities to show that "treating in order to be elected, or for being elected," did not apply to this case. He doubted whether the Act of William III. was in force here (*a*), and cited the decision of Chief Justice Hagarty in the *Glengarry case* (*ante* p. 8) in support of his opinion. 3rd, Was it corrupt treating at common law? At first treating was considered a species of bribery—bribery by refreshment—and that a corrupt motive was in the heart of the giver and the receiver. It is laid down by Rogers (11th Ed., p. 366) that it may be doubted whether treating was ever

(*a*) In the *Lennox and Addington case* (1841), the committee (of which Messrs. W. H. Draper, T. C. Aylwin, J. E. Small, and others were members) held "that treating on the part of the sitting member was proved, but that it is not, in the opinion of the committee, a legal ground for avoiding the election under the laws in force in that part of this Province, heretofore Upper Canada."—*Patrick's Election Precedents, p. 44.*

an offence at common law. The true consideration is, was the thing done corruptly, *i.e.*, with the object of doing what the Legislature intended to forbid? The Judge must look broadly at the common sense of the thing as to whether it was corrupt or not. He felt no difficulty in negativing the idea of corrupt intent; and taking all the circumstances into consideration, he did not consider this act of treating came within the meaning of the statute.

The payment to Suffel must be looked upon as a debt of honor, it having been promised when the deed of composition was made. Suffel's character, appearance, and the manner in which he gave his evidence, placed him above suspicion. Then the large number of other cases in which the respondent had carried out his promises—notably to women—robbed the act of any appearance of bribery which it might otherwise have worn. He ruled that in this also there was no corrupt intent

As to the Bockus case, he inclined to the belief that something was said about building, but that Bockus, in his anxiety to get work, fancied more than was said. He could not think Dr. Hickey made any such promise as was implied.

The treating by Farlinger at the nomination he held came within the mischief of the law, as it was a treating of the electors at a meeting of the electors to promote the election. The large, extensive powers given by the respondent to his brother, constituted him an agent in the largest sense, giving him power to appoint sub-agents; and he attached more weight to William Broder's connection with Farlinger as constituting him an agent, than to the latter's position in the Conservative Association. The common-sense view of the evidence was that Farlinger was an agent.

In conclusion, he acquitted the respondent of all corrupt acts by himself, or his agents with his knowledge. He congratulated the respondent upon the manner in which the election had been conducted. There was an entire absence of evidence of corruption; and few persons

had been subjected to so searching an examination as the respondent had been. He acquitted him and his active supporters of all corrupt acts. Although he believed Mr. Farlinger was not actuated by any corrupt motives in giving the treat at the nomination, still the act was one which came within the meaning of the statute as a corrupt practice, and he could not overlook it. In consequence of that act, and that alone, he was compelled to void the election.

The learned Judge certified to the Speaker that the election was void, and reported that no person was proved to have been guilty of corrupt practices.

(9 *Journal Legis. Assem.*, 1875-6, p. 7.)

WEST HASTINGS.

BEFORE CHANCELLOR SPRAGGE.

BELLEVILLE, *17th and 18th May, 1875.*

ELISHA WESLEY, *Petitioner*, v. THOMAS WILLS, *Respondent.*

Payment of Election Expenses by the Candidate—Corrupt Practices—Member's Oath—36 Vic., c. 2, ss. 7-12 ; 38 Vic., c. 3, s. 6.

The Act 36 Vic., c. 2, ss. 7-12, requires all election expenses of candidates shall be paid through an election agent ; and the Act 38 Vic., c. 3, s. 6. requires the member-elect to swear that he had not paid and will not pay election expenses except through an agent, and that he "has not been guilty of any other corrupt practice in respect of the said election." Certain payments were made by the respondent personally, and not through an election agent.

Held, that such payments were not corrupt practices.

Held, that the words "other corrupt practices" in the member's oath meant "any corrupt practice."

The petition contained the usual allegations as to corrupt practices.

Mr. Bethune and Mr. Clute for petitioner.

Mr. Wallbridge, Q.C., *and Mr. S. J. Bull*, for respondent.

The facts of the case are set out in the judgment.

Mr. Bethune contended that sec. 7 of the Act of 1873, 36 Vic., c. 2, absolutely forbade any payment of election expenses except through an agent, and made it a corrupt act. He referred to the *Cashel case* (1 O'M. & H. 288) and the *Penryn case* (*Ibid.* 131).

Mr. Wallbridge, for the respondent, contended that no man could be found guilty of a corrupt act unless the statute expressly declared that the doing of a certain act should be corrupt, and the statute had not so declared. As to the payment to the son, the money had not been paid, and the money therefore remained the property of the father in the hands of the son, and was unappropriated. The other payment was before the nomination of the respondent as a candidate.

SPRAGGE, C., said that the technical points raised by the petitioner narrowed themselves into two cases: first, that a hall had been hired by the respondent previous to the nomination, which had been used by him, and that he had paid for it without making the payment through an expense agent; and secondly, that the respondent had given some $4 to his son, a lad under age, in order to take him to an adjoining village on business connected with the election subsequent to the nomination. The son, it appeared from the evidence, had not appropriated the money to that object, and the agent of the respondent had subsequently paid for the horse hire in the manner required by the Act. There was an entire absence of merit in these objections; they were technical in the strictest sense of the term, and should, considering the circumstances, be met by the most technical criticism of the Act itself. The question to be considered was · Do these acts constitute a corrupt practice? A definition of corrupt practices had been given in the Controverted Elections Act of 1871, sec. 3. This had been repealed by the 36 Vic., c. 2, and under the last mentioned Act, corrupt practices were defined as meaning "bribery," "treating," etc.; under s. 46, "personation;" under s. 61, "providing

entertainment;" under s. 64, "hiring of teams;" and under s. 66, "keeping open of public houses and giving of liquor during polling hours." The argument that the member's oath prescribed by 38 Vic., c. 3, s. 6, requiring the successful candidate, before taking his seat, to swear that he had not made and would not make any payment in respect of the election, because it required that he should also swear that he had not been guilty of "any other corrupt practice in respect of the said election," made the payments mentioned corrupt practices under the statute, could not be sustained. He thought that the oath should read "any," and that the word "other" had crept into the Act through inadvertence. As to the last item not being in the statement of expenses, he did not consider that the *Cashel case* (1 O'M. & H. 288) was an authority on this point. There the agent had not been notified of his appointment, nor was he aware of it until after the election. The candidate had himself paid by cheque all the expenses of the election, and some of the sums given by him having been appropriated to corrupt purposes, the respondent was, under the decision of Baron Fitzgerald, made to suffer the consequences. He did not consider the objections were sustained, and he would overrule them. As to the election itself, there had been an entire failure of proof to sustain the charges of corrupt practices; and this election, and another which he had tried, would teach politicians that notwithstanding the stringency of the law, it is possible to have elections so pure and honest that they will stand the test of the strictest inquiry. The petitioner having so entirely failed, must bear the consequence in the matter of costs.

(9 *Journal Legis. Assem.*, 1875-6, p. 21.)

LONDON.

BEFORE CHANCELLOR SPRAGGE.

LONDON, *21st to 23rd June, 1875.*

WILLIAM JARMAN, *Petitioner*, v. WILLIAM R. MEREDITH, *Respondent.*

Candidate treating during canvass without corrupt intent—Treating in a private house during polling hours—Charity not Bribery—Limited agency.

The treating of persons by a candidate at a tavern during his canvass is not a treating of electors with corrupt motives.

Where a member of the respondent's committee, on the day of election, invited some of his friends to his house, which was opposite the polling booth, and gave them beer, &c., during or soon after polling hours:

Held not a contravention of 32 Vic , c. 21, s. 66.

Where half a cord of wood was given to a voter in poor circumstances during the election, and the giver swore that it was given out of charity; and

Where a voter was bailed out of jail on the day of polling by a friend, but according to the evidence without reference to the election :

Held not acts of bribery.

Where a political organization, after nominating their candidate, divided into committees "to look after voters in the particular wards in which they resided ;" and the respondent had not given authority to any member of such committees, nor to any canvasser, to canvass generally :

Held, that one K., who was a member of the Committee for Ward No. 2, and who was alleged to have committed an act of bribery in Ward No. 6, having no authority to canvass in the latter ward, was an agent with limited authority to canvass in Ward No. 2 only, and therefore the respondent could not be made liable for his alleged acts.

K., the agent referred to, while canvassing a voter in Ward No. 6, gave him money to get beer, for which the voter paid a lesser sum, and as the voter was poor, told him to keep the change.

Held, under the circumstances, not an act of bribery.

The petition contained the usual charges of corrupt practices.

Mr. J. K. Kerr for petitioner.

Mr. Robinson, Q.C., *and Mr. H. Becher*, for respondent.

The judgment sufficiently states the facts affecting the cases disposed of, except the following case, which was mainly relied upon by the petitioner.

Sarah Woolston : I remember the Meredith-Durand election. My husband is Walter Woolston; he is a carpen-

ter by trade. He was canvassed on the Saturday evening before the polling. I don't know the gentleman's name who asked my husband's vote. I was standing at the door when he was passing, and he asked me if my husband was going to vote; he said he would make it all right with me if I would get my husband to support Mr. Meredith. I said I would do all in my power. He returned a couple of times that evening, pretty late; when he came the second time I had not then seen my husband. He went in and talked to my husband; I also went in and told my husband to give Mr. Meredith his vote, as he had always been on that side. He said he had not determined how he would vote. The canvasser told me to send my husband to his house on Monday morning, and my husband went there; I saw the two together. There was an offer of money to me by this gentleman. He took some money out of his trousers' pocket, and said he would make it all right if I would get my husband to vote right. I got no money except some to pay for some beer; he gave me a 50c. piece. I got a quart of beer; it cost ten cents. He asked my husband if he would not like a glass of beer. My husband took the money and returned with the beer. He told my husband to put the change in his pocket, and he did so. He afterwards gave my husband 25 cents to get another quart; this was a couple of hours afterwards. He told him to put the change over in his pocket. The gentleman never "made it all right with me" after. I told my husband that this gentleman would make it all right with me.

Cross-examined: No sum was named; nothing was promised definitely. I never got anything; nothing was ever asked for.

Re-examined: The person said he "would make it all right," and he held the money out in his hand.

Walter Woolston: I am the husband of the last witness. I was not canvassed for Mr. Meredith, except that I was asked by one gentleman to vote for him, either on the Friday or Saturday, in the evening. The person who

asked me is a cab-driver; Robert Keightley is his name; he lived near where I then resided; he came to my house and asked me; we were then in the room off the shop. When he first asked me I told him I had not determined how I would go. He offered no inducement to me. He came several times in the night. The first time he came was after supper. I had been at a meeting; he remained there quite a while. We had some beer; I got it, but he, Keightley, furnished the money, a 50c. piece. He told me to get the beer, and I got a quart, for which I paid ten or fifteen cents; we drank it between us. We were talking about the election while drinking. He told me to keep the change, and I kept it accordingly. He afterwards gave me some more money to get a further supply of beer. I only had to go to the next house for it; we drank that too. He was there for some time; I paid ten cents for it the second time. I remember there was some change; he told me to keep that too, and that it would do to get me a drink in the morning. He urged me to vote for Meredith. He went away about twelve. My wife asked me to vote for Mr. Meredith; she said this gentleman was going to give her a present if I voted that way. He was there before I saw him the first time. He remained quite a time the last time. I accompanied him to the door as he was leaving. He said nothing to my wife except good-night; I heard nothing more. I did not see him offer my wife money. She told me if she were me she would vote for Mr. Meredith. On Monday I went to Keightley's house, in the morning—the polling day. He said he supposed I would vote all right; nothing further. We went to the polling-place. We drove there in a cab; there were three others in the hack, but they were strangers to me; I imagine they were electors. I went into the polling booth and voted. I remained about the polling place for some time and then went home. I have since received no consideration for my vote. I have seen Keightley, and think I reminded him of the promise made. We talked of the election, and I told him he had said to my wife he

would make it all right. He said there was a protest entered now.

Cross-examined: This gentleman never held out any inducement to me, and I never saw him talking to my wife, and did not see him putting his hand in his pocket. I remember his leaving the house the last time. I have no recollection of seeing him put his hand in his pocket; all the money I got was what he gave me for the beer.

Robert Keightley: I remember the Meredith-Durand election; I took part in it. I was on the committee for Ward No. 2. I attended some of the meetings. I asked some voters to vote for Mr Meredith. I may have reported some of them to the committee. I took some voters to the poll on election day; I also took Mr. Woolston. I had asked him to vote for Mr. Meredith some few nights before. I canvassed him in his own place. I saw his wife and told her what I wanted; I asked her to try and get her husband to vote for Mr. Meredith; she said she would. I did not say I would make it all right; I deny emphatically that I held out any inducement directly or indirectly. We had something to drink; I think it was beer. I proposed we should have it, and gave the money, 50 cents, to get it; the husband and I drank it, I taking but little; his wife may have taken some. I do not recollect beer being got a second time that night; my impression is there was none. We were talking considerable about the election. My object in going there was to get his vote. When I sent for the beer my object was to talk matters over pleasantly about the election. I voted in division four in No. 2 Ward, and canvassed there principally. He voted in No. 6 Ward. A canvasser told me he did not know where Woolston lived, and that led me to go there. I may have canvassed in No. 3, but I cannot recollect. I canvassed wherever I saw people.

Cross-examined: Woolston's vote was in No. 6 Ward, but he lived in No. 2 Ward, having moved there before. His name was not on my book for canvassing. I got no change for the 50 cents; they were pleading such poverty,

I thought it would be hard to take back the change. I don't think the change was offered to me.

At the close of the argument of counsel the Court adjourned, and on the next day the following judgment was delivered:

SPRAGGE, C., said: The petitioner's case was yesterday rested by Mr. Kerr on the Mill's case, Pritchard's case, the treating at the Revere House, and the Woolston case.

The charge of treating at the Revere House against the respondent himself had, in his opinion, no foundation; it was not treating of the electors, nor was it treating with corrupt motives.

As to Mr. McCormick's case: McCormick was a supporter of the respondent, and on his committee. His dwelling house was opposite one of the polling places, and at a late hour of polling (after the polling had been finished, the witness said), he asked two or three or four of his friends to go over to his house. On the table was some beer, and also elderberry wine and cakes, which the parties partook of. It was contended that this was a controvention of section 66 of the Act. He did not think that it was so; and believed that the fact that the witness stated, that a number of Mr. Durand's friends were amongst those whom he invited, was a proof that no corrupt influences were intended. He decided that no corrupt practices had been proven in this case.

The next case was what was known as the Pinkham case. In it there had been considerable conflict of evidence; but he thought he could take Brown's account of what took place as the one most likely to be correct. Brown, who was an alderman, was charged with bribery. There was the evidence of Pinkham and Trainham for the respondent in addition to that of Brown. Now the note he had made of this was, that Trainham was an active man, and was acting on behalf of Durand. The witness Brown was an active supporter of Meredith, and appeared to be a truthful man. It appeared that

Pinkham had always supported respondent, and this was proved without any doubt. He had gone to vote, but hesitated, as he said, because Alderman Brown had promised to give him half a cord of wood if he voted for the other side. This appeared to be the only obstacle, and if what Trainham had deposed to were true, then it would be a clear case of bribery. But a different version is given to the story by Brown, who says, that when Pinkham stated his difficulty, he said, "Go in and vote like a man; and if you are really in want, the city will relieve you. If you are really in want, I will give you sufficient to keep you from starving." Now, it had been proved that Pinkham was in bad circumstances; he had got wood from the city before; and it had also been proved that Brown had relieved him before, and was in the habit of relieving others. Trainham's mode of getting information was not to be commended; and he obtained what information he did get at a disadvantage. Mr. Justice O'Brien in the *Youghal case* (1 O'M. & H. 294), held that where it had been proven that money was given in charity, it could not be regarded as bribery, and this appeared to be one of a similar nature. Brown having stated on his oath, and he had no reason to disbelieve him, that he gave this wood to Pinkham out of charity, he therefore decided that no bribery had taken place.

With reference to the case of Mills, who was bailed out of jail by Woods, it appeared that the witness, Mills, was a particular friend of Woods; and the latter, on his oath, had stated that he did not belong to Meredith's committee, and did not even know that Mills had a vote. He preferred to regard the case in that light, and that Woods bailed Mills out as a friend, and not with the view of getting him to vote for the respondent.

But the case on which Mr. Kerr mainly relied was that known by the name of the Woolston case. As to that, there were two questions of fact: The first is the question of agency. When that question was brought before

him by Mr. Kerr, he had expressed his opinion on it, and he had not any reason to alter that opinion. As to the contention of Mr. Kerr, that all the members of the Liberal-Conservative Association were agents of Mr. Meredith, he was not prepared to accede to this; it rested mainly on that association bringing out Mr. Meredith. He was the gentleman of their nomination, or, as it had been said in evidence, "the standard-bearer of the party." That party decided to bring him out at a general meeting—a mass meeting—which was called, and Mr. Meredith accepted the nomination. At that meeting those present broke up into knots, the different sections choosing the representatives for the wards in which they were voters. As soon as that was done the functions of the Conservative Association were at an end, and a new arrangement entered upon. He thought they might as well say that if a requisition to a man to become a candidate was signed by 100 or 200 electors, the act of signing it constituted them his agents, as that the Conservative Association were so because they brought out Mr. Meredith. It was clearly explained to the committees then formed to promote the respondent's election, that they were to look after voters in the particular wards in which they resided; they had no right to canvass in any other ward. The principle of agency might have been established if authority from Mr. Meredith had been given to any canvasser to canvass generally; then he would have been canvassing under Mr. Meredith's sanction, and the respondent would have to be responsible for the acts of such canvasser. This authority does not appear to have been granted in this particular case. The person charged with having bribed Woolston is a man named Keightley, who lived in No. 2 Ward, whilst the person Woolston lived in No. 6 Ward. The committee for the ward in which Woolston lived dealt with that man, and the respondent could not be made responsible for Keightley's act, seeing he had no authority from the respondent to canvass out of the ward in which he was appointed. It had been maintained

that a book had been supplied to Keightley containing all the names of the electors in the city, but it does not appear to have been such; it was only a book with the names in his own ward. Neither did Keightley appear to have got any general authority from the respondent to act for him; the respondent appeared to regard him as a man of zeal with little discretion, and not a man to be altogether trusted with his confidence.

Having thus stated his views with regard to agency, he thought it was unnecessary for him to go into the acts of bribery said to have been used on the occasion of inducing Woolston to give his vote. There was a conflict of evidence, and each party had given their own account. He preferred to accept the evidence of the witness Keightley himself, and to hold, as in the case of Pinkham, that the change received for the beer was given as charity, and, therefore, that Woolston was not bribed. The promise of money to Mrs. Woolston would have been an act of bribery had it been sufficiently proved. The act on Keightley's part (as stated by himself) he held to be a suspicious act—a most dangerous act—and showed a good deal of impropriety on his part; but it had not, in his opinion, been sufficiently proved to constitute an act of bribery for which a candidate could be made responsible.

With reference to the law as applicable to treating and bribery, he said it had been much needed in the land, and past experience showed it had been much needed in the city of London. There were in all communities some electors who were apt to be corrupted. Some were apt to be corrupted by drink, and there were others—and perhaps they were more in number—who would sell their votes for gain; for this reason, a strict and stringent election law was required, and he disagreed with those judges who held otherwise. The determination of Mr. Meredith was that he would rather stay at home than be returned corruptly, and the result of this inquiry had shown that he had not been returned corruptly. He was thus enabled to form a very different opinion of the city

of London from that stated by his brother Hagarty at the last trial. The present inquiry had shown him that there could be an election conducted on honest and pure principles.

The particulars contained charges of bribery and corruption against the respondent and a large number of his supporters which there was not a tittle of evidence to prove. There may be an excuse for this partly from the fact that such charges had been made at a former election, and partly because there are charges in the particulars which those that got them up only expected to prove. This course was not justifiable, because the particulars could be amended at any time before the trial; and those who got up the bill of particulars ought to have been much more careful in doing so; these charges were not only not proven, but entirely disproven. He concluded by congratulating Mr. Meredith upon having come out of the election with his hands clean. The result was that the petition be dismissed and the respondent found duly elected; the petitioner to pay costs.

(9 *Journal Legis. Assem.*, 1875-6, p. 22.)

WEST ELGIN.

BEFORE CHIEF JUSTICE DRAPER.

TORONTO, *10th and 17th April, 1875.*

JOHN CASCADEN, *Petitioner*, v. MALCOLM G. MUNROE, *Respondent.*

Practice—Particulars for scrutiny—Tendered votes—Corrupt practices—Ballots and counterfoils—7th General Rule in Election Cases.

When the petition claimed the seat for the unsuccessful candidate on the grounds that (1) illegal votes and (2) improperly marked ballots were received in favor of the successful candidate; that (3) good votes and (4) properly marked ballots for the unsuccessful candidate were improperly refused; and that (5) the successful candidate and his agents were guilty of corrupt practices, and particulars of all such votes and ballots and corrupt practices were asked from the petitioner.

Held, 1. As to the illegal votes, that the 7th General Rule prescribed the particulars of objected votes to be given, and the time of filing and delivering the same, and a special order was not therefore necessary.

2. As to the improperly marked ballots and improperly rejected ballots, the petitioner not having information respecting them, could not be ordered to deliver particulars of the same.

3. Particulars were ordered of the names, address, abode and addition of persons having good votes, whose votes were improperly rejected at the polls; and particulars of the corrupt practices charged by the petitioner against the respondent and his agents.

Beal v. *Smith*, L. R. 4 C.P. 145 (*Westminster case*), followed.

The petition in this case contained the usual charges of corrupt practices; and alleged that illegal votes and improperly marked ballots had been received and counted in favor of the respondent; and that good votes and properly marked ballots in favor of his opponent had been rejected; and claimed the seat for the unsuccessful candidate.

After the petition was at issue, a summons was taken out by the respondent, calling for the particulars of the allegations in the petition. The summons asked for particulars (1) of the persons not qualified to vote who had voted for the respondent, and the grounds of their disqualification; (2) of the votes tendered for his opponent and rejected; (3) of the counterfoils and ballots for his opponent which had been improperly rejected; (4) of the counterfoils and ballots improperly received and counted

for the respondent; and (5) of the corrupt practices charged against the respondent and his agents in the petition.

Mr. Hodgins, Q. C., for the petitioner, showed cause, and had no objection to the usual order as to corrupt practices, but he contended that as the 7th General Rule in Election Cases (31 Q.B. 227) provided for the delivery of particulars of objected votes, no special order was necessary. As to particulars respecting the ballots and counterfoils, the petitioner could not give the information asked, as all the ballots and counterfoils were in the custody of the officers of the House, sealed up; and the cases of *Stowe* v. *Joliffe*, L. R. 9 C. P. 446, and *Macartney* v. *Corry*, 21 W. R. 627, showed that the ballots in these election cases could only be inspected under a special order.

Mr. J. B. Read, contra, contended that it was the petitioner's duty to obtain an inspection of the ballots, and to furnish the information asked for; and if he did not do so, that he should be precluded from relief on that branch of the case.

Draper, C. J. 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 therefore clearly within the 7th 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 Crown, 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 the 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 Officer, 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 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. *Joliffe*, L. R. 9 C.P. 446, which was mentioned by Mr. Hodgins, would have probably prevented this part of this summons, which part I also discharge.

5. It is further asked that an order should issue for full 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 tenth clause of the petition; and of the names, abode and addition of parties who before, at, and during the election offered to corrupt and bribe, or give or procure advantage to electors to induce them to vote for 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, bribery and advantage, 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 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 time fourteen days instead of three, and will in the same manner dispose of the application as to the matters charged in the paragraphs of the petition referred to.

WEST ELGIN.

BEFORE CHANCELLOR SPRAGGE.

ST. THOMAS, *24th June, 1875.*

JOHN CASCADEN, *Petitioner*, v. MALCOLM G. MUNROE, *Respondent.*

Petition claiming the seat—Scrutiny of votes—Change of day of trial—Withdrawal of respondent—Seat awarded to the unsuccessful candidate at election—Certificate thereon to Speaker.

Where a petition claims the seat for the unsuccessful candidate, a scrutiny of votes may be ordered to be taken in each municipality by the Registrar acting for the Judge on the *rota.*

The day appointed for the trial of an election petition may be altered to an earlier day by consent of the parties, and by an order of the Judge.

During the scrutiny of votes the respondent abandoned the seat to his opponent, after his opponent had secured a majority of 8 votes, and agreed that such should stand as his opponent's majority, and that the Court should declare such opponent duly elected; and the same was ordered by the Court.

The petition was as stated on p. 223.

The vote at the election was: for the respondent, 1,101; for Thomas Hodgins, 1,091; majority for respondent, 10.

A scrutiny of votes having been applied for on behalf of the petitioner, the Chancellor, being the Judge on the *rota* for the trial of this election petition, made an order on the 21st May, 1875, pursuant to the 36 Vic., c. 2, ss. 28-37, directing a scrutiny of votes in each of the municipalities of the electoral division. The scrutiny thereupon took place before the Registrar, and was conducted by the following counsel:

Mr. Davidson Black and Mr. J. H. Coyne for petitioner.
Mr. John McLean for respondent.

During the scrutiny, 18 votes for the respondent were held bad, and were struck off the respondent's poll, and the vote of one of the respondent's agents was held bad for corrupt practices. The respondent thereupon abandoned the defence of the seat to his opponent, the latter having secured on the scrutiny a majority of 8 votes. The trial had been appointed to take place at St. Thomas on the 28th June, 1875, but on a consent signed by both

parties the day was changed to the 24th June, on which day the Court was held in the Court House, St. Thomas.

Mr. Colin Macdougall and Mr. J. H. Coyne for petitioner.
Mr. John McLean for respondent.

The CHANCELLOR said that the trial of the election petition had been fixed for the 28th June, but as both parties had agreed to his taking it at an earlier day if it were found convenient, he had changed the day of trial to to-day. He had not been able to get the report of the scrutiny of votes from the Registrar, but he presumed counsel knew the nature of it and could state the result.

Mr. Macdougall, for the petitioner, said that the result of the scrutiny was to give Mr. Hodgins a majority of eight votes. The respondent had agreed to let that stand as Mr. Hodgins' majority, and that the Court should report that Mr. Hodgins was duly elected.

The petition was then read by the Registrar.

The CHANCELLOR asked if it was intended to prosecute the charges of corrupt practices against the respondent, or if there was a counter petition against Mr. Hodgins?

Mr. Macdougall said it was not intended to prosecute the charges against the respondent, and there was no counter petition.

Mr. McLean, for the respondent, then read the consent signed by the counsel for both parties, and stated that on hearing the evidence of one of the witnesses examined on the scrutiny of votes, he was convinced that the election of the respondent would be avoided; and not wishing to incur a very large expense, he, on behalf of the respondent, had proposed the settlement which was agreed to, and was embodied in the consent just read.

The CHANCELLOR then asked if any one else desired to continue the defence against the petition, in place of the respondent.

Mr. McLean said he did not know that any one else desired to continue the case, and he had no reason to suppose that any other person would continue it.

The CHANCELLOR then gave judgment, declaring that the respondent was not duly elected, and ought not to have been returned as member for West Elgin, and that Mr. Hodgins was duly elected, and ought to have been returned.

The following certificate of the result of the trial was transmitted by the learned Judge to the Speaker:

In pursuance of the Controverted Elections Act of 1871, I beg to certify to you, in relation to the election for the Electoral Division of the West Riding of the County of Elgin, holden on the eleventh and eighteenth days of January last past, that a petition was duly presented under the statutes against the return of Malcolm G. Munroe, Esquire, as member to represent the said Electoral Division in the Legislative Assembly for the Province of Ontario, and claiming the seat for Thomas Hodgins, Esquire, one of Her Majesty's Counsel learned in the law, the unsuccessful candidate at the said election.

That in consequence of the said petition being presented, it became necessary to enter into a scrutiny of the votes polled and tendered at the said election, and I thereupon, by order bearing date the twenty-first day of May last past (whereof a copy is hereto annexed), made provision for holding in every local municipality in the said Electoral Division a scrutiny of the votes polled and tendered in such municipality, and by such order appointed a day and place within each of the said municipalities respectively for entering into the scrutiny. And I did further, by said order, appoint my registrar, Charles Allan Brough, barrister-at-law, to act in my stead in the taking of said scrutiny.

That, as appears by the report of the said Charles Allan Brough, hereto annexed, the scrutiny of votes polled at

the said election was entered into before him, as directed by the said order, and on the conclusion of the scrutiny he determined that the said Thomas Hodgins had a majority of eight of the good and legal votes at the said election.

That the trial of the said petition came before me at the town of St. Thomas, in the county of Elgin, on Thursday, the twenty-fourth day of June last past.

That at the conclusion of the said trial, I determined that the election of the said Malcolm G. Munroe was void, and that the said Thomas Hodgins was duly elected at the said election. And I certify such determination to you, pursuant to the statute in that behalf.

That no evidence was given before me at the trial.

I append hereto a copy of the notes of evidence taken before the said Charles Allan Brough on the said scrutiny.

The learned Judge further reported that the following persons were proved to have been guilty of corrupt practices, viz.: (1) Duncan McKillop, (2) James Timewell, (3) John Livingstone.

(9 *Journal Legis. Assem.*, 1875-6, p. 18.)

WEST WELLINGTON.

BEFORE MR. JUSTICE GWYNNE.

Guelph, 25th and 26th June, 1876.

GEORGE MOORE, *Petitioner*, v. JOHN McGOWAN, *Respondent.*

Agent furnishing drink at meeting of electors—32 Vic., c. 21, s. 61; 36 Vic., c. 2, s. 1—Costs occasioned by conduct of Election Agent—Corrupt practices by tavern keepers.

One F., an agent of the respondent, brought a jar of whiskey to a meeting of electors assembled for the purpose of promoting the election, and gave drinks from the same to the electors present, which was held a corrupt practice, and a violation of the Election Law of 1868, as amended by the Election Act of 1873, so that the election was avoided thereby.

The costs of investigating charges of bribery against the respondent's election agent, though not established, were awarded against the respondent, owing to the equivocal conduct of his agent in the matters which led to the charges; also the costs of other charges of bribery which were not established, and the costs of proving that several tavern keepers, for their own profit, had violated s. 66 of the Election Law of 1868, as the witnesses who gave evidence of these matters also gave evidence of other matters, as to which it was reasonable they should have been subpœnaed.

The petition contained the usual charges of corrupt practices.

The candidates at the election were the Respondent and Robert McKim.

Mr. Hodgins, Q.C., *and Mr. Guthrie* for petitioner.

Mr. Robinson, Q.C., *and Mr. Drew*, Q.C., for respondent.

The evidence on which the election was avoided was as follows:

Thomas McAllister: I live in the Kerry settlement. I was at a meeting held in the school-house during the election, called by Mr. Fahey. It was a meeting of the electors. The school-house was pretty full. It was about a week before the polling day, or the week before. The polling day was on Monday. Mr. Fahey addressed the meeting on behalf of Mr. McGowan. There was some whiskey going at the meeting; Mr. Fahey brought it there. He told us it was his whiskey. It was served out to the people attending the meeting. I got some.

The whiskey was served out before he commenced to address the meeting. The people who drank stayed for the meeting. The whiskey was in a jar. It held, I should say, by appearance, a gallon or more. There were thirty or forty at the meeting.

Edmund Jeremiah O'Callaghan: I live in the West Riding of Wellington, and am an elector. I took Mr. McKim's part actively. I attended meetings and spoke for him. Mr. Fahey attended meetings and spoke for Mr. McGowan; also Dr. Orton; also, I think, Mr. Barrett attended one meeting. I was at the meeting in Kerry settlement, held at Rocky Mountain. The bills advertised that the meetings were to be addressed by Mr. Fahey and Dr. Orton. There were two meetings at the Kerry settlement. I think Fahey was late for the first, and did not attend, and a second was called specially to hear him. The last was the one at which the whiskey was. I cannot say who brought it. Several asked Fahey if he had whiskey. He went to the door to look after it. The cutter in which it was had gone. He asked then for some persons to go after it. Some boys were sent for it. It was brought back, and Fahey poured it out and gave it to the parties there. There were from thirty to forty people there. Fahey kept pouring out until all was drank. It was immediately before the meeting commenced that the whiskey was handed round. It was a public meeting of the electors in relation to the election. I went there for the purpose of replying to Mr. Fahey, and did so. The neighborhood was chiefly against Mr. McGowan.

Cross-examined: I did not drink any whiskey myself. I have not drunk whiskey for thirty years. I have drunk beer probably at meetings held during the election. Was asked by several if I had had any whiskey. I said no, but I thought Mr. Fahey might have some, and I asked him. It never entered my mind at the time whether he was an agent of Mr. McGowan or not. I did not think the law was so stringent as it appears to be.

James Fahey: I addressed some meetings for Mr. McGowan. I addressed a meeting in the township of Arthur. I heard it stated here that whiskey was brought by me to the meeting. I had nothing to do with it, but that it came in the same sleigh with me. Mr. Charles Biggar drove me. He had charge of the sleigh. I got out of the cutter at the school-house. The horse and cutter were sent up to Mr. Cornelius O'Dowd's stables. The whiskey was in the cutter when it was sent there, about a quarter of a mile from the school-house. I had no intention that whiskey should come to the school-house. When we were leaving Mount Forest where we were, Biggar put the whiskey in the sleigh. I never thought more of it until we got to the school-house; there was quite a crowd there. Mr. O'Callaghan and Mr. Milloy asked me if I had any whiskey, or if we would not treat. I said, of course, you never knew an Irishman that would not treat. I said that there was some in the cutter, but it had gone away, and that if they had a mind to send for it they could. Somebody went for it; I did not send. Biggar was present when this was said. The whiskey was brought down; some boys brought it in. I said to O'Callaghan and Milloy, now if you want a drink, here it is; Milloy took a drink; I took one myself; O'Callaghan put it to his lips but did not drink. I thought then that it was a trap, and I said, I hope this is not against the law. O'Callaghan laughed, and said he thought not, and even if it was, nothing would be said about it. If I had thought it was against the law, I would not have had anything to do with it. The whiskey then went round, and it went but a short way.

Mr. Robinson, at this stage of the case, said that he was satisfied that upon the evidence of Mr. Fahey the election must be avoided; for that no doubt Mr. Fahey was an agent, and his acts as to treating at meetings could not be justified. He therefore asked whether the petitioners insisted still upon the personal charges?

Mr. Hodgins said that so far as the petitioner was concerned he had no desire to press the personal charges, and would leave the case as to them to the Court without argument.

GWYNNE, J.—I determine the election of the respondent to be null and void by reason of corrupt practices, in this, that James Fahey, an agent of the said respondent for promoting the said election, in violation of the 61st section of the Election Law of 1868, as amended by the Election Act of 1873, did provide and furnish drinks to a meeting of electors assembled for the purpose of promoting the said election.

I should not have allowed to the petitioner the costs attending the charges of bribery (which were not established), and also the costs incidental to the proving certain tavern keepers guilty of having for their own profit sold liquor within polling hours on the polling day, but for the following reasons. Two of the charges of bribery were attempted to be established by the evidence of the respondent's financial agent; who, while his evidence showed that in the matter complained of there was no just imputation of any charge of bribery, certainly showed very equivocal conduct of his own in the matter, attributable either to gross ignorance on his part, or to a graver charge of want of fidelity to his employer and to the trust he had assumed. I regret very much that the law as it at present stands does not enable the Court, as it does in the case of election to the House of Commons, to make the agent pay himself all the costs of this vain inquiry which his own very equivocal conduct gave occasion for. As between the petitioner and the respondent, the latter must bear the costs incidental to an inquiry which the ignorance and misconduct of his own agent, although not criminal, has occasioned. As to the other charges of bribery, which also were failed to be established, and as to the costs attending proving the tavern keepers to have violated the 66th section of the

Act of 1868, which it was proved they did for their own profit, with which the respondent had nothing to do, I cannot separate these from the general costs, because, upon a careful reperusal of the evidence, I find that the several witnesses who spoke to these points also spoke to other points as to which it was reasonable they should have been subpœnaed.

In certifying the result of the trial to the Speaker, the learned Judge also reported that the following persons, being tavern keepers, were proved to have been guilty respectively of corrupt practices, namely, in keeping their taverns open, and selling therein spirituous and fermented liquors in violation of the 66th section of the Election Law of 1868, namely, Robert Ramsay, Daniel Sheehy, Carleton Calvin Green, Theodore Zass, William Kirby; and further, that James Fahey was proved to have been guilty of corrupt practices, in violation of the 61st section of the same Act, as amended by the Election Act of 1873.

(9 *Journal Legis. Assem.*, 1875-6, p. 9.)

SOUTH ESSEX.

Before Chancellor Spragge.

Sandwich, *6th to 10th and 13th July, 1875.*

Samuel McGee, *Petitioner*, v. Lewis Wigle, *Respondent.*

Agent accepting a treat in a tavern during polling hours—Corrupt Practice—Costs.

On the day of the election, and during the hours of polling, one W., an agent of the respondent, was offered a treat in a tavern within one of the polling divisions, of which such agent and others then partook.

Held, that giving a treat in a tavern during polling hours was a corrupt practice, and being an act participated in by an agent of the respondent, the election was avoided.

The petitioner was declared entitled to the general costs of the inquiry, and the costs of the evidence incurred in proof of the facts upon which the election was avoided; but the costs incurred in respect of charges which the petitioner failed to prove were disallowed.

The petition contained the usual charges of corrupt practices.

Mr. Alexander Cameron for petitioner.

Mr. Horne and Mr. S. White for respondent.

The material facts of the case on which the election was held void are set out in the following evidence:

James McQueen: I know Alfred Wigle; I saw him in both taverns at Ruthven on polling day. He treated five or six persons on polling day. It was at Taylor's; Alfred Wigle and I had a drink or two afterwards; it was while the polling was going on; it was in Lovelace's sitting-room. There were five or six of us together. I treated once; I am not sure whether Alfred Wigle treated at Lovelace's; he drank. There are only the two taverns at Ruthven. I saw Alfred Wigle several times in the taverns during polling hours. Went to Taylor's about 9, about the time of the opening of the poll; went to Lovelace's about noon.

Alfred Wigle: I heard James McQueen's evidence. I saw him on polling day. I treated him on polling day; it was pretty early; I don't know whether it was before or after the opening of the poll. It was pretty early, and before the opening of the poll, I think.

Cross-examined: When McQueen proposed to drink we went to Taylor's and sat in the sitting-room. The reason, I think, the polls were not open is that it was early in the morning, and I had just come up town. I went to Lovelace's hotel in the middle of the day, and had a drink. I and McQueen tossed up for the treat; he lost, and we went in and had a drink. There were five or six of us. I was bringing up voters to the poll during the day. I used my own horse and cutter in bringing voters to the poll. I took a pretty active part in the election ever since my brother came out. We formed a little committee at Ruthven to work up the locality. I got a voters' list and marked off names. I did not canvass, unless people came to the store. I saw respondent twice during the election, and told him I thought we could give him pretty good support. I told Dr. Allworth (respondent's

election agent) we could give pretty good support where we were. I appointed Henry Smith as scrutineer for respondent, and got him to act as such on the polling day. [The other evidence as to agency is omitted.]

SPRAGGE, C.—At the close of the argument on Saturday last I gave my views upon the several points of law and of fact presented in the case.

One point only I did not decide finally, viz., whether the partaking by Alfred Wigle, whom I find to be an agent of the respondent, of a treat given by James McQueen, during polling hours, in Lovelace's tavern, was a corrupt act within the statute, which would avoid the election. I could see no escape from the conclusion that this act, prohibited by the 66th sec. of the Act 32 Vic., cap. 21, and declared to be, being within polling hours, a corrupt act by 36 Vic., cap. 2, s. 1, and being an act participated in by one for whose acts the respondent was responsible, must avoid the election.

I have since had an opportunity of conferring with three of the other Judges, and they all concur in the view which I expressed at the conclusion of the argument. The result is, that I must declare the election void by reason of the corrupt practice by an agent.

As to costs, I think the petitioner is entitled to the general costs of the inquiry; but the costs have been greatly increased by the calling of witnesses on charges which the petitioners have failed to prove; and the costs, so far as they have been so increased, are to be disallowed. No costs are to be taxed in respect to the evidence, except such as have been incurred by proof of the fact upon which my judgment proceeds.

In the searching and protracted inquiry which has been had before me, I find no personal wrong proved against the respondent. The expenses of the election have been very moderate, and the evidence leads me to believe that the respondent desired and endeavored that the election should be a pure one.

With his certificate to the Speaker of the result of the trial, the learned Judge reported that Alfred Wigle and James McQueen were proved to have been guilty of corrupt practices at the election.

(9 *Journal Legis. Assem.*, 1875-6, p. 11.)

SOUTH OXFORD.

BEFORE CHIEF JUSTICE DRAPER.

TORONTO, *10th April, 1875.*

BENJAMIN HOPKINS, *Petitioner*, v. ADAM OLIVER, *Respondent.*

Agent of respondent cannot be made a party to petition—34 Vic., cap. 3, sec. 49—"Person other than the candidate."—Form of Petition.

The petition, besides charging the respondent with various corrupt acts, charged one of his agents with 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 respondent in a petition on a charge of personal misconduct on his part.

2. There is no authority given to the Election Court or the Judge on the *rota* to subject a person "other than a candidate" to such disqualifications.

3. The Judge's 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 Vic., cap. 3, sec. 49, and so render them liable to penal consequences.

The 6th General Rule in Election Cases does not preclude the statement of evidence in the petition; it renders it unnecessary, and is intended to discourage such pleading.

The petition contained the usual charges of corrupt practices, and in paragraph 3 charged that the respondent 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 the respondent, 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 respondent was therefore null and void, and he 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 Lieutenant-Governor, or any municipal office.

The second paragraph of the prayer of the petition 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 be 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.

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

Mr. F. Osler showed cause.

Mr. Hoyles supported the summons.

DRAPER, C. J. 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 show 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, 34 Vic., c. 3, 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 has 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 Vic., 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 Vic., 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. *Gillett*, L. R. 6 C. P. 147, which was not referred to on the argument, points out very clearly the distinction between a "determination" and a "report," and our own statute so closely resembles the English Act 31-32 Vic., 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 it 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 section 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 Vic., 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 disqualifications enumerated, is not conferred either upon the Election Court or the Judge on the *rota;* and that the Judge's 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.

SOUTH OXFORD.

Before Chief Justice Draper.

Woodstock, *13th to 15th July, 1875.*

Benjamin Hopkins, *Petitioner*, v. Adam Oliver, *Respondent.*

Production of telegrams—Evidence respecting charges not in particulars—Excluding Respondent's Attorney from court.

The Court ordered the agent of a telegraph company to produce all telegrams sent by the respondent and his alleged agent during the election, reserving to the respondent the right to move the Court of Appeal on the point; the responsibility as to consequences, if it were wrong so to order, to rest on the petitioner.

A witness called on a charge in the particulars of giving spirituous liquors in a certain tavern on polling day, during polling hours, cannot be asked if he got liquor during polling hours in other taverns.

The attorney for the respondent may be ordered out of court when a witness is being examined on a charge of a corrupt bargain for his withdrawal from the election contest, when the evidence of such witness may refer to the sayings and doings of such attorney in respect of such withdrawal.

The statements in the petition appear on p. 238.

Mr. R. A. Harrison, Q.C., *and Mr. H. B. Beard* for petitioner.

Mr. Bethune and Mr. F. R. Ball for respondent.

During the trial the following points were decided:

An agent of a telegraph company was subpœnaed to produce certain telegrams in the custody of the telegraph company.

David Flook: I am in the Montreal Telegraph Company's employment at Ingersoll. The respondent and Peter J. Brown sent messages through the office during the election. The messages are in existence now. I object to produce them. I am instructed not to produce them.

After the argument of counsel,

Draper, C. J. A., said: I admit the right to call for the telegrams, reserving, as a question of law, whether the petitioner has a legal right to demand them, the responsibility as to any and all consequences, if it be wrong, to rest on the petitioner. The respondent having leave reserved to move the Court of Appeal on the point, I direct their production.

A witness was called to prove that spirituous liquors were given during the polling hours at Brady's tavern, in Ingersoll. During his examination,

Mr. Harrison asked the witness: In what taverns in Ingersoll, other than Brady's, did you get liquor on polling day, during polling hours?

Mr. Bethune objected. Brady's tavern is the only tavern in Ingersoll mentioned in the particulars, and therefore the question should not be allowed.

Draper, C. J. A.—I sustain the objection.

A paragraph in the petition charged that one James A. Devlin, who had been a candidate at the election, was induced by a corrupt bargain to retire from the contest. During his examination, Devlin stated that he had been asked to see Mr. P. J. Brown and another as to his withdrawal.

Mr. Harrison then applied that Mr. P. J. Brown should be ordered to withdraw while the witness was giving his evidence.

Mr. Bethune objected, as Mr. Brown was the attorney for the respondent, and his presence was necessary to assist counsel in the proceedings.

Draper, C. J. A.—I direct Mr. Brown's withdrawal while this witness is examined as to Mr. Brown's sayings and doings in relation to paragraph 8 of the petition

After a number of witnesses had been examined, it was agreed by the counsel for both parties that the election should be declared void on account of corrupt practices by one William McMurray, an agent of the respondent, in giving spirituous and fermented liquors at his tavern, in the town of Ingersoll, on the polling day, during the hours appointed for polling, in violation of section 66 of the Election Law of 1868.

The CHIEF JUSTICE certified accordingly, and reported that William McMurray was proven to have been guilty of corrupt practices at the said election.

(9 *Journal Legis. Assem.*, 1875-6, p. 10.)

EAST PETERBORO.

BEFORE CHIEF JUSTICE DRAPER.

PETERBORO, *26th to 28th July, and 2nd August, 1875.*

JAMES STRATTON, *Petitioner*, v. JOHN O'SULLIVAN, *Respondent.*

Acts of agency—Respondent's Agent partaking of liquor during polling hours not a corrupt practice—Meeting of electors—Treating by Respondent's Agent—36 Vic., c. 2, s. 2—Law of agency.

A witness stated that he had asked the people in his neighborhood to vote for the respondent, had attended a meeting of the respondent's friends, and made arrangements for bringing up voters on polling day, and had a team out on polling day.

Held, that the evidence of his being an agent of the respondent was not sufficient.

One B. was appointed, in writing, by the respondent to act as his agent for polling day. During the day he went to a tavern and asked for and was given a glass of beer.

Held, that B. treated himself, and neither gave nor sold, and was not therefore guilty of a corrupt practice.

One C. accompanied the respondent when going to a public meeting, and canvassed at some houses. On the journey, the respondent cautioned C. not to treat, nor do anything to compromise him or avoid the election. The respondent's election agent paid for C.'s meals at the place where the meeting was held.

Held, that the evidence showed that the respondent had availed himself of C.'s services, and was therefore responsible for his acts.

Agency in election matters is a result of law to be drawn from the facts of the case, and the acts of the individuals.

A meeting of the electors was held in a town hall, and C. (the agent above named) and a number of electors went from the meeting to a tavern, where they were treated by C.

Held, 1. That this was a meeting of electors assembled for the purpose of promoting the election; and,

2. That the treating by C. was a corrupt practice, and a breach of the 61st s. of 32 Vic., c. 21, as amended by 2nd s. of 36 Vic., c. 2.

The petition contained the usual charges of corrupt practices.

Mr. Bethune and Mr. D. W. Dumble for petitioner.

Mr. Hector Cameron, Q.C., *and Mr. Burnham* for respondent.

In addition to what is set out in the judgment, the following evidence was given:

Francis Birdsall: I live in Asphodel. I asked people in my neighborhood to vote for Dr. O'Sullivan. There was a meeting at Westwood—not a public meeting—of the friends of Dr. O'Sullivan. We talked over the election; made arrangements for bringing up voters on polling day. John Breakenridge and Charles O'Reilly were the agents for O'Sullivan at this election. I had a team out on polling day. Treated myself and four or five others at Westwood on polling day; I paid. I had brandy and sugar; the landlord, Galbraith, brought in the liquor. I was cold, and had driven 35 miles. I told the landlord that if he would not bring the liquor, I would get it myself, and he then gave it. One of the others said he had voted, and it would do no harm to treat him.

Garry Galbraith: I keep a tavern at Westwood. My tavern was closed on polling day. Francis Birdsall came and insisted on having something, and he gave something to four or five who came with him, who said they had voted. John Breakenridge may have drank, but I am not sure I gave him any. I think Breakenridge was at my place about noon. He was there again during the evening.

John Breakenridge: I took part in favor of respondent. I was at Norwood when Dr. O'Sullivan was there at a public meeting. I was also at a private meeting at Bishop's

hotel; a meeting of respondent's central committee; 20 or 30 persons were present; respondent was not there. I was secretary; I had no regular appointment. At that meeting I was appointed as agent for the respondent for polling day, but respondent himself appointed me. [Appointment put in.] I got this from the respondent's brother. Mr. O'Reilly was also named at my request. I did no treating on polling day. I was in Galbraith's tavern. I treated myself; I got a glass of beer; I asked for it in the kitchen, and got it in another room, not the bar. Francis Birdsall came with me. I paid for no drinks for any person that day.

After the argument of counsel as to the agency of Francis Birdsall, and the purchase of liquor by John Breakenridge at Galbraith's tavern, Westwood, during polling hours on polling day,

Draper, C. J. A., said: I think the evidence of Birdsall's agency insufficient. As to the purchase by Breakenridge of liquor in Galbraith's tavern, it was a glass of beer to which he treated himself; he neither gave nor sold. I find for the respondent on these charges.

The facts on which the election was avoided are sufficiently set out in the judgment.

Draper, C. J. A.—It is very satisfactory to me to be able to find that there is no evidence whatever in this case which impugns the personal conduct or character of the respondent. I find not only that he is free from the imputation of any forbidden practice in the course of this election, but that he has endeavored, by earnest advice and caution, to restrain his friends and supporters from doing anything which would enable his opponents to neutralize the success to which he aspired, and render the election in which he confidently anticipated success being open to question through the indiscretion or recklessness of any of them. Unfortunately, his advice was disregarded; the

law forbidding the practice of treating and keeping the taverns open during the hours of polling, has been wantonly violated, and the principal matter of inquiry is whether any of the leading culprits in those offences are so far identified with the respondent as in point of law to constitute them his agents, and to render him responsible for their illegal acts.

There was a meeting of the electors at Apsley about a week before the polling day. It had been publicly advertised. The respondent, the petitioner and Major Boulton all spoke at it. The respondent had engaged a sleigh, and one Timothy Cavanagh and Major Boulton accompanied him to this meeting. They drove first to Holmes's tavern. After the meeting the respondent and Cavanagh returned to Holmes's. The respondent retired almost directly for the night. A number of those electors who attended the meeting went also to Holmes's. Cavanagh treated the people; Holmes says he told him to give the people liquor, and Cavanagh says he treated many times, and that one Boyd—a supporter of Stratton's, the opposing candidate—did so likewise. This continued, as Cavanagh states, from 10 p.m. to 2 a.m. the next morning. The facts are relied upon to show a violation of the 61st section of the Election Law of 1868, by Cavanagh, at the expense of the respondent, or at his own expense, in providing and furnishing drink to a meeting of electors assembled for the purpose of promoting such election. If this be proved, then the question arises, was Cavanagh the agent for respondent? For if he was, then the latter is answerable for his acts and corrupt practices, though, as in this case, he not only did not authorize them, but actually, and in sincerity, endeavored to prevent them.

Agency does not necessarily require to be proven by an actual appointment, verbal or written, by the candidate. "It is a result of law to be drawn from the facts of the case, and from the acts of the individuals." Every instance in which, with the knowledge of the candidate or his employed agent, say his expense agent, a person acts at

all in furthering the election for him, or in trying to get votes for him, tends to prove that the person so acting was authorized to act as his agent. A repetition of such acts strengthens the conclusion. I found these conclusions upon authorities in the mother country, using to a great extent their very words, but not simply quoting them.

To apply them to this case. Cavanagh, at his own request, which I do not doubt, and for certain personal motives which he asserts,—but to which (excepting his gratitude to the doctor for his professional services) I give but slight credit,—accompanies the candidate on a journey, which had for one object to attend a public meeting in reference to the election at Apsley, and for another to canvass voters in a particular section of the county. It was intended that Mr. Carnegie, one of the respondent's authorized agents, should have gone with him. He did not go, and Cavanagh's request that he should be taken was complied with, though Mr. Carnegie says he had no desire to take him. Cavanagh says he was acquainted with people on the Burleigh Road, and that he did not canvass *the whole* of the Burleigh Road; that on this journey he canvassed at some houses, and perhaps canvassed some voters whom they met on the road, and *may* have introduced some voters to respondent. The very first witness called in this case was one of them. On their journey, Cavanagh states, the respondent, knowing his habits (if I remember rightly, he used some such expression as "*He was an awful fellow for treating*"), cautioned him to do nothing which would spoil his election—a caution which strengthens the assumption that the respondent counted on Cavanagh's assistance and exertions. Major Boulton, who also went with the respondent and Cavanagh, heard the former tell Cavanagh not to treat nor do anything to compromise him or avoid the election—a charge which points to the employment of Cavanagh for some work or duty in which his acts would be deemed acts done under the implied authority of the respondent. Again, on the day after this meeting,

Mr. John McDonald, who appeared to me to be a very respectable witness, saw Cavanagh and the respondent together, and took Cavanagh on one side and asked him whether he had done anything towards enabling parties to get liquor on the election day, and received his assurance that he had not. He also said he knew Cavanagh many years, and had heard of his character as to being free handed in treating, and busy in elections. Then Cavanagh goes to a meeting in Otonabee in a cutter which he hired, but does not know whether he paid for it, or whether it was charged to respondent. The respondent's authorized agent paid for the meals which Cavanagh got, and which Holmes had charged against him in an account dated in February, 1875, but relating to Cavanagh's being at Holmes's on the 13th January preceding. All these circumstances, taken separately, may, or at least some may, be deemed trifling and unimportant, but combined they acquire weight and substance; and substantiated by parties none of whom are hostile to the respondent, they appear to me to furnish strong evidence of agency. I am alive to the danger, as well as to the apparent hardship, of fixing the respondent with liability for acts done by another as his agent, which other, if the question had been directly put to him, he would not have employed in that character. There was obvious misgiving on the respondent's part, and apparently still greater on Carnegie's, but I think they resolved to incur the risk, and, without any formal appointment, the respondent availed himself of his services, and *quoad* the election, became responsible for his acts.

Assuming the agency to be established, I go back to inquire into the acts of Cavanagh in treating at Holmes's after this meeting of the electors. His own statement may suffice as to this: "I was at the Apsley meeting, and afterwards went to Holmes's tavern. Boyd and I treated alternately, turn about; I treated from about ten at night till two in the morning; can't tell how many times; I paid for each drink as it was taken."

I think this is a breach of the 2nd sec. of 36 Vic., c. 2, which repeals sec. 61 of the Election Law of 1868. The only question that can arise is whether this drink was furnished to a "meeting of electors assembled for the purpose of promoting such election previous to or during such election." The meeting was certainly not convened at Holmes's tavern, but at a town hall not far from it; and Cavanagh, Boyd, and a number of electors went from that meeting to Holmes's. It is not open to question that the meeting was assembled for the purpose of promoting such election, unless the statute is to receive the narrower construction that a meeting of the supporters of only one candidate is meant, and the promotion of the election means only the promotion of election of that candidate. I do not doubt that such a case would be within the Act, and the evidence on the present trial is by no means conclusive against this being precisely that case. Still I am of opinion the wider construction is no more than what the Legislature intended. If the meeting consists of electors of different parties, and it is held with the view of promoting an election, it must necessarily be an election of a representative for the whole constituency, to whatever party he may belong. Unless the larger construction prevail, a general meeting of electors, held only for the purpose of selecting a candidate, would not be within its provisions, and the providing and furnishing drink or other entertainment to the electors present would not be prohibited. I do not agree in such an interpretation. Another difficulty has been suggested, namely, that the treating did not take place in the building within the meeting assembled, and that the meeting was in fact over. A similar question arose in the *North Wentworth case* (*post*). I there held that where a meeting had been held for the promotion of an election, and after the transaction of their business they had gone generally together to a neighboring tavern on the invitation of the candidate on whose behalf the meeting was held, who there furnished or provided drink or other entertainment for them, it was

within the statute. I have been given to understand that a similar construction was adopted in another case. I have seen no reason hitherto to change my opinion, and adhering to it, I am under the necessity of finding that this was a corrupt practice committed by an agent of the respondent, though without his actual knowledge and consent, and that the election and return are void.

The result is, I find for the petitioner on the first charge relied upon by Mr. Bethune. I give no judgment on the charge of treating by Cavanagh at Smith's tavern at Indian River, as it was not included in the particulars, and I find for the respondent on the other charges.

(9 *Journal Legis. Assem.*, 1875-6, p. 10.)

NORTH VICTORIA.

BEFORE CHIEF JUSTICE DRAPER.

LINDSAY, *4th to 7th, 18th and 19th August, 1875.*

DUNCAN MCRAE, *Petitioner*, v. JOHN DAVID SMITH, *Respondent.*

Practice—Particulars—Evidence of bribery and of agency—Entertainment at a meeting of electors—Hiring teams on polling day—Agent treating during polling hours—Case not in Particulars—Recriminatory case.

Where particulars were delivered after the time limited by the order for particulars, and not returned, an application made at the trial to set them aside was refused; such application should have been made in Chambers before the trial.

Particulars of recriminatory charges delivered after the time limited by the order for such particulars were allowed, but the petitioner was allowed to apply for time to answer the charges therein contained, and was given such costs as had been occasioned by the granting of the application.

Where evidence of an act of keeping open his tavern on polling day, and selling liquor therein as usual, by P., an agent of the petitioner, came out on cross-examination, and during the argument the evidence was objected to because the charge was not in the particulars, the case was not considered.

The evidence respecting a charge of bribery, by payment of a disputed debt, was held insufficient to sustain the charge.

After a meeting of electors in a town hall, some friends of the respondent remained together consulting about the election, and afterwards went to a tavern, where some of them boarded, and had an oyster supper.

Held, that the evidence was not sufficient to sustain the charge that this was entertainment furnished to a meeting of electors under s. 61 of 32 Vic., c. 21, as amended by 36 Vic., c. 2, s. 2.

On polling day, one W. asked two voters to go with him and vote for the respondent, and he would bring them back, and they could feed their horses and have dinner. W. sent one of his horses on some of his own business, and hired from one of the voters a horse, for which W. paid him 50c., and then drove with the two voters to the poll.

Held, not a hiring of a horse, etc., to carry voters to the poll within s. 71, nor a furnishing of entertainment to induce voters to vote for the respondent, within s. 61 of the Election Law of 1868.

An offer by an agent of the respondent when canvassing a voter, that he "would see him another time and things would be made right," is not an offer of bribery.

An agent of the respondent, while canvassing a voter, gave $8 to the widowed sister of the voter, an old friend of his, who was then in reduced circumstances. The agent stated that this was not the first money so given, and that it was in no way connected with the election.

Held, under the circumstances, not an act of bribery.

One M., an agent of the respondent, treated at a tavern during polling hours on polling day. The evidence was, that decanters were put down, and people helped themselves, but there was no evidence that spirituous liquors were used. The evidence was objected to at the time, as the charge was not mentioned in the particulars, but admitted subject to the objection.

Held, 1. That the nature of the treat in the bar-room of a country tavern raised the presumption that the treat was of spirituous liquors, and was a corrupt practice, which avoided the election.

2. That had an application been made to add a particular embracing the charge, it would have been granted.

A charge of treating a meeting of electors by an alleged agent of the petitioner was not sustained, owing to the alleged agency not having been satisfactorily proved.

One M., the financial agent of the petitioner, agreed with a voter who had a difference with the petitioner about a right to cut timber on the voter's land, to settle the matter—the voter when canvassed to vote for the petitioner referring to this difference. M. signed an agreement in the petitioner's name, whereby he surrendered any claim to cut timber except as therein mentioned.

Held, 1. That a surrender of the right to cut timber on the lands of another was a "valuable consideration," within the meaning of the bribery clauses of 32 Vic., c. 21.

2. That the agent M. was guilty of an act of bribery.

Where the right of the petitioner to claim the seat is decided adversely in one case, it is no prejudice to the respondent's case that other charges against the petitioner are not pronounced upon.

Recriminatory charges are permitted in the interest of electors, in order to prevent a successful petitioner obtaining the vacated seat if he has violated any provision of the Election Law.

The petition contained the usual charges of corrupt practices, and claimed the seat for the petitioner.

The vote at the election was: For respondent, 724; for petitioner, 720; majority for respondent, 4.

The respondent filed recriminatory charges against the petitioner.

Mr. Hector Cameron, Q.C., *and Mr. A. Boultbee* for petitioner.

Mr. Maclennan, Q.C., *and Mr. D. J. McIntyre* for respondent.

During the trial, the following points were decided respecting the particulars:

Mr. Maclennan, at the opening of Court, objected to the particulars delivered by the petitioner, on the ground that they were too late, not having been delivered within the time limited by the order.

Mr. Cameron, contra: The order under which the particulars were delivered is not here, so the application is defective. Moreover, the particulars were delivered, and also further particulars.

Draper, C. J. A.—The particulars appear to have been accepted, and never returned to the petitioner. I think the application to set them aside should have been made in Chambers before the trial, and that the respondent should not have allowed the petitioner to proceed and incur costs. Particulars allowed.

Mr. Maclennan, on 5th August, moved to have the service of the particulars on the recriminatory charges, under the order of 31st July, allowed, and read an affidavit showing why an earlier compliance with the order was not made.

[The Chief Justice.—An affidavit should be filed stating that the deponent has reasonable grounds for believing that he can prove the allegations.]

Mr. Cameron: The order being for better particulars, shows that those previously delivered were insufficient. The respondent made no application until the 31st July, and the order then made was not acted on until the 3rd August, and not, therefore, 24 hours before the day ap-

pointed for the trial. Numerous witnesses must be called if the particulars are now received, and the petitioner must get up evidence to reply. Besides, the order is not complied with, as the residences of the parties named are not given, and there is no facility for inquiring.

Mr. Maclennan: The order requiring petitioner to deliver particulars to the respondent within a limited time was not complied with; but particulars delivered to the respondent up to the night before the trial have been allowed.

DRAPER, C. J. A.—I am embarrassed by the consideration that if these new particulars, or some of them, are sustained, they would be of vital import. And, on the other hand, the order being made on, I must assume, sufficient grounds, unless some sufficient reason—beyond the delay in delivering the new particulars—be shown for neutralizing the order, I am bound to give effect to it. The residences of the persons named in the new particulars are given in the scrutiny particulars, and, in fact, no prejudice is shown. The petitioner is allowed to apply for time to answer, and the indulgence now asked is granted on the terms of payment of such costs as may be occasioned to the petitioner by the granting of this application.

During the cross-examination of a witness called by the petitioner, on the case against the respondent, the following evidence was given:

William Peters: I live at Victoria Road. . . . . .

Cross-examined: I kept my tavern open on polling day, and sold liquor as usual. There was no polling place within 3 miles of my house, and I was told that I need not shut it. [The evidence on which Peters was held to be an agent of the petitioner is omitted].

Mr. Maclennan, on the recriminatory case, contended that the selling of liquor on polling day by William Peters, an agent of the petitioner, destroyed the petitioner's right to claim the seat.

Mr. Boultbee objected, as there was no such charge in the particulars.

Mr. Maclennan: The evidence on this charge was elicited from Peters, who was called as a witness for the petitioner, and he made the statement on cross-examination, to which no objection was taken.

Mr. Boultbee: Peters was called as a witness on the petitioner's case, and this evidence bears on the recriminatory case. The charge is not in the particulars, and the witness made the statement *suâ sponte.*

DRAPER, C. J. A.—It is not on the record that I can find, in any shape; nor was any application made to put it there.

The evidence affecting the result of the election was as follows:

Malcolm McDougall: I was at Simpson's hotel at Coboconk about 2 or 3 P.M. on the polling day, and about 5 or 6 miles from any polling place, while I was travelling from Kirkville to Somerville. I treated about six persons in the bar-room; some of them were strangers to me. Decanters were put down for people to help themselves.

[The CHIEF JUSTICE on the day on which he delivered judgment, made the following note opposite the above evidence: "Mr. Maclennan objected to this evidence, as the charge was not mentioned in the particulars. I received it subject to the objection. I did not think of noting this at the time; but now (18th August), being reminded of it by Mr. Maclennan, I have a recollection that it was so, but not the same as if I had noted it at the moment. I did not then think it of any great importance."]

Counsel for the petitioner contended that as it was shown decanters were put down for people to help themselves, the presumption was, that spirituous liquors had been drunk on the occasion referred to by the witness.

The Court was then adjourned until the 18th August, at Osgoode Hall, when the following judgment was delivered:

DRAPER, C. J. A.—The unsuccessful candidate, Duncan McRae, is the petitioner, and the respondent, John David Smith, has filed recriminatory charges against the petitioner.

The first case relied on by the petitioner is stated in the particulars thus: That James Ellis and one Mooney, agent of respondent, bribed Thomas Coulter and Thomas Hodgson by the payment of a disputed debt between Coulter and Hodgson. The facts proved were that Mooney asked him to vote for the respondent. Coulter would not promise nor did he refuse, but he said that there was a debt due to him for seven or more years by a firm of John C. Smith & Co., John C. Smith being the respondent's uncle. Mooney promised to write and get the debt paid if he could. Afterwards Coulter saw respondent and Ellis together, and again referred to this claim. Ellis said that respondent was not a member of the firm when this claim arose (which was proved to be the case). Respondent said he would write to his uncle, and if it was right his uncle would no doubt pay it. Coulter and Hobden (not Hodgson, as stated in the particulars) voted for the respondent. Hobden was not present at any of these conversations, nor interested in them, and it does not appear that anything was done in the matter. I think the evidence entirely insufficient to sustain the charge.

The next charge relates to an oyster supper at Buck's hotel, in Minden. There had been an election meeting in the Town Hall—about five minutes' walk from the hotel. After this meeting was over some of the respondent's friends remained together consulting about the election, and afterwards went to Buck's, where some of them boarded. There it was proposed to have an oyster supper, which Frederick J. Shove, one of the party, ordered. He

said he had been working hard for the respondent during the day, and needed refreshment. Respondent had previously gone to his own room, and Shove invited him to come down and join them. Respondent was half undressed and declined, but at the same time he urged Shove to do nothing to prejudice the election, and Shove went down, and seven or eight persons sat down to supper.

The respondent gave evidence respecting this to the following effect: I began to undress, when Shove came in and said, "Don't you want to buy a load of oats?" I asked him, "What do you mean?" He said, "There are a few of us down stairs who are going to have some oysters." It must then have been 11.30 p.m. He invited me to join them. I excused myself, and he said, "Can't Jim Ellis pay for this?" I said I thought he could. He said, "Very well," and turned down stairs. Shove swore he thought the supper should be given. It was an understanding it should be for the benefit of respondent, but respondent did not like the idea of giving refreshment. Shove thought there was an arrangement that it should be charged by Buck to respondent as a sale of oats. Shove said that he suggested this. Buck's charge was $13.20, which was for the supper only. Shove made up the account a day or two after the supper. Oats were thirty-two cents a bushel, and Shove swore that he thought that was the way the amount was got at. Shove made it up with one Lott, Buck's book-keeper or bar-tender. He applied for payment, and Shove said forty-one bushels of oats would cover it. He also stated on re-examination that this supper was ordered without any thought of influencing Buck, and that respondent said to him (Shove) to be very careful to do nothing to interfere with the election. He said that they were careful, that the oysters were to be charged as oats, and that it was arranged with the bar-keeper it should be charged as oats; and he concluded his evidence by saying, "As we were working all day for respondent, I thought naturally that he ought to pay for our refreshment. I intended all along to have it charged

to him. I thought it necessary to forward the election." Some of those at the supper were boarders at the hotel.

James Ellis spoke of this supper, and said he was one of the party. He thought $3.20 would have been ample payment for the supper. He heard a talk about oats after the supper was mentioned. Gaynor, one of the party who had been at the meeting, produced a paper on which was written, "Twenty bushels of oats at forty cents," and they laughed, and the paper was thrown under the table. As far as he knew, the supper had nothing to do with the election. The oysters were got from Gaynor's, who keeps a grocery near the tavern. When Shove came down from seeing respondent, he stated that respondent had said, "Whatever Jim says." The witness understood that he was meant by "Jim."

The particular to support which the foregoing evidence was given, is that one Frederick Shove, of the village of Minden, an agent of the respondent, and with his knowledge and consent, provided and furnished drink and other entertainment to a meeting of electors assembled for the purpose of promoting the election, at the hotel of D. Buck, in the Village of Minden.

I think this particular is not proved by the evidence given. I assume it to be amended so as to obviate any minor objections, but it fails in my opinion, on the essential ground that Shove is not shown to be generally the respondent's agent, nor particularly to furnish this entertainment. Mr. Shove (whose manner appeared to me to indicate that he entertained no mean opinion of himself) desired to have an oyster supper at the respondent's expense, and to evade the law against treating, which he feared might apply, proposed the absurd scheme of an imaginary purchase of oats for a sum much in excess of what the supper would have cost, and then goes to the respondent, who was just going to bed, to invite him to join them, concluding that if he accepted the invitation he would pay the bill. The respondent very prudently declined, coupling the refusal with a caution against any

improper practice. Shove made the arrangement with the bar-keeper, and afterwards made up the account for him. I suspect the bar-keeper at first looked to Shove for payment, though scarcely for the sum of $13.20, for I cannot find that Shove ever pretended to be respondent's agent, or, even on Shove's own statement, that the respondent gave him actual or implied authority to act as his agent on this special occasion. Looking at Shove's conduct and his account of the matter, I think his evidence does not prove this charge, and the only plausible ground for sustaining it is the respondent's statement that Shove said to him, "Can't Jim Ellis pay for them?" and the respondent answered, "He thought he could." Mr. Ellis's evidence of what Shove said when he came down, of the result of his inviting respondent to join them, does not sustain Shove's account of it, nor does Ellis appear to have said or done anything in regard to ordering or authorizing the supper to be ordered. In fact, Shove represents he ordered it *before* he went up to respondent's room. I think it would be an extreme construction to hold this supper to be a violation of section 61 of the Election Law of 1868. Mr. Shove's language might be held sufficient as against himself to subject him to the penalty mentioned in the 65th section of the Act, but not to avoid the election. I find for the respondent in this part of the case.

In Hicks's case the charge is that Andrew Washington (agent for respondent), on the polling day hired the teams, horses and vehicles of George Hicks and David Mitchell to convey voters to the poll, and also paid them for horse hire, furnished the keeping of two teams, and gave dinner to them to induce them to vote for respondent.

The facts, as well as I can gather from the evidence, are that Hicks had a team of his own and was employed by Washington to draw lumber for him, Washington owning a saw mill. Hicks and Mitchell were voters, and Hicks had been canvassed by a Mr. McLaughlin for respondent. Washington had been written to by respondent

for his vote and influence, and did not answer the letter though he supported respondent. On the polling day, Washington, who was going to the poll, asked Hicks and Mitchell to go with him and vote for respondent, saying that he would take them and bring them back, and they could feed their horses and have dinner. Hicks said to Mitchell, "We should vote for Smith," and Washington said "Yes, vote for Smith," and they agreed to go.

Washington then sent off his foreman on some business to another place in a cutter, with one of the horses of Washington's own team, with instructions, after his errand was done, to meet him at the polling-place, and hired from Hicks one of his horses to make up his team, and paid Hicks half a dollar for his hire. Washington then drove with Hicks and Mitchell to the poll. The foreman arrived, and Washington and he drove off in the cutter, and Hicks and Mitchell, with the horses and sleigh, returned to Washington's house and got dinner.

On this evidence I cannot find that Washington was acting as an agent for respondent, nor that Washington was guilty of a breach of either the 61st or the 71st sections of the Election Law of 1868.

The next case on which the petitioner's counsel relied was Ralph Simpson's case.

The charge is that Malcolm McDougall, an agent of respondent, bribed, or attempted to bribe, or offered to bribe certain electors—to wit, Ralph Simpson, of Eldon, and Mrs. McDonald, of Kirkfield, and furnished and offered a sum of money to the said Mrs. McDonald to use in corrupt practices.

I find that Malcolm McDougall was an agent of the respondent. I arrive at this conclusion upon the statements contained in his examination before the County Judge, and McDougall's evidence confirms me in it. In regard to Simpson's statement, McDougall swore that he met him on the road on the polling day. He had no doubt he asked him to vote for respondent. He (Simpson) said he was going to vote for McRae, and that he (McDougall)

said nothing to him to induce him to change, by way of promise or otherwise.

Simpson swears that McDougall asked him to vote for respondent, but offered him nothing—did not mention money to him at all, but said he would like me to vote for respondent; if I would, he would see me another day, and things would be made right—that he told McDougall he would vote for McRae, and it was after this that McDougall said he would see him again.

I think the evidence falls short of what is required to bring the case within the statute. There was no gift or loan of money, or offer or promise of money or valuable consideration. It would, I think, be a forced and unwarrantable construction of the words "he would see me another time, and things would be made right," to hold them to import an undertaking fraught with penal consequences; and McDougall's assertion on oath "that he said nothing to him" (Simpson) "to induce him to change, by way of promise or otherwise," is entitled to some consideration.

I find for respondent on this charge, as far as respects Ralph Simpson.

There is another item included in the same charge—that of having bribed or attempted to bribe certain electors—namely, Mrs. McDonald, of Kirkfield, and furnished and offered a sum of money to the said Mrs. McDonald to use in corrupt practices.

It is shown that McDougall was canvassing one John McDonald in favor of respondent—not very successfully, for he said he left him quite undecided as to whether he would vote or no. They two were outside the house, and McDougall went in to take leave. Mrs. McRae, a widowed sister of John McDonald's, was there. McDougall spoke of her as an old friend of his, and it might be inferred that his acquaintance with her preceded her marriage. He said she was in reduced circumstances. He put some money—he thought $8—in her hand, but she was unwilling to take it. She said nothing, but did not take it.

McDougall swore "This was not the first money I had given her. I swear I acted in this from personal feelings, and in no way connected with the election."

This offer to Mrs. McRae was the only offer of money he made to any one while he was out there. He did also live in that part of the country. He was the only witness who spoke to this part of the charge, and he strenuously denied its truth, and I believe him. It escaped notice at the trial that the charge had reference to a Mrs. McDonald, and the evidence to Mrs. McRae.

I find in favor of the respondent on this part of the charge.

There is a further charge that McDougall, as agent for the respondent, which I have already found him to be, bribed Duncan Monro by payment of money.

To sustain this charge McDougall and Monro were both examined. McDougall swore that he hired Monro to take him with his team to the Victoria Road, to drive him round. He went to arrange for teams to carry in voters. McKay arranged to take his teams out. He made no bargain with him. Nothing was said to him that he was to be paid. "I made no bargain with any one to hire their teams. I gave them to understand I would not promise or pay for them." Monro swears, "I was out with a horse and cutter at Mr. McDougall's request on Saturday, and at his request on the following Monday, the polling day. I was paid upon Saturday night. Nothing was then said about the Monday. I took a man (one Sickles) to the polls on Monday. Mr. McDougall asked me to drive a man to the polling place, and said nothing about paying or not paying. If I was offered pay I would take it. When I returned McDougall was gone." Now the only money paid by McDougall to Monro is stated to be $2.50, and that is shown to be for the hiring on Saturday by the testimony of both witnesses, and to have been paid on Saturday night. This appears to me to disprove the charge of bribery; there is no particular charging the hiring or paying for the conveying of Sickles

to the polls on Monday, though there is an unsupported charge of bribing one Sickles by the payment of money. It is enough to say that this other charge (if advanced) would not have been proved by the foregoing evidence.

The remaining charge relied upon by the petitioner's counsel was a charge of treating by McDougall, as agent for respondent, upon the polling day. The only witness to prove it is McDougall himself.

He stated that he was at Simpson's hotel, at Coboconk, about two or three o'clock p.m. on the polling day It was about five or six miles from any polling place. He was travelling from Kirkville to Somerville. He treated about six persons in the bar-room. Some of them were strangers to him. His teamster was named Edwards. He (McDougall) did not know he was a voter. The bar-room was open. They only stopped at Coboconk to water the horses. McDougall said he did not know what the parties whom he treated drank; that he was not in the habit of drinking anything stronger than beer or wine.

The respondent's counsel objected to the admissibility of this evidence. I have already expressed my very clear opinion, which I will repeat, that McDougall's agency was sufficiently established by his own evidence, which proves also that he treated five or six persons at Simpson's hotel on the polling day and during polling hours. The question as to what the parties drank was raised, and was answered by the assertion (not denied) that the witness had stated that decanters were put down and people helped themselves. I had not noted this particular expression. In fact, it never occurred to me to doubt what was the nature of this treat in the bar-room of a country tavern.

It is my unpleasant duty upon this evidence to find that respondent was guilty of a "corrupt practice" through his agent, Malcolm McDougall, but without the respondent's actual knowledge and consent.

I come now to the recriminatory charges, of which four are relied upon by the counsel for the respondent.

1. That petitioner, on the 6th January, at Victoria Road Station, provided drink and other entertainment at his own expense for a meeting of electors assembled for the purpose of promoting his election, contrary to the 61st section of the Election Law of 1868. Hector Campbell proved that he kept an inn at Victoria Road; that shortly before the polling there was an election meeting of some fifty or sixty persons at a stone building; after the meeting a number of them came to Campbell's inn, and drink was given to them by order of Dalglish, who said petitioner would pay for it. During the same afternoon Dalglish himself returned to the inn, and paid the charge, which amounted to $2. The petitioner did not speak to Campbell on this matter at all. Richard Killingsworth swore that he was present when the petitioner asked Campbell if there was anything in the charge relating to treating at his tavern on his (petitioner's) behalf, and Campbell said there was no treating, and that he did not see petitioner there. The petitioner, the last witness called by respondent, swore that the meeting at which he was nominated was held at a store-room a short distance from the hotel. He expressed a doubt as to whether Dalglish was there, and said positively that he did not make or authorize any payment to Peters (who also kept a tavern close by) or to Campbell for anything furnished that day. He said he read the charge respecting the treat at Campbell's to him (C.), who said there was no such thing—that petitioner was not at his house at all.

It was stated, and not denied, that Dalglish was the petitioner's brother-in-law. The petitioner proves that Dalglish accompanied him (driving in the sleigh) on some of his electioneering tours; but of any acts of his—excepting what Campbell swore to—I find scarcely a trace. Unfortunately, the efforts to serve him with a subpœna on (as I understand) the day this trial began, were not successful. I am not satisfied that his character as agent is proved, and must therefore decide in the petitioner's favor on this charge.

2. Next comes McIlroy's case. The particulars are in these words: "John Merry and Archibald McFayden (McFadyen), the financial agent of the petitioner, on the evening of the 15th January, 1875, before the day of polling, bribed Francis McIlroy, an elector, to induce him to vote for the petitioner, by the giving up of an agreement for the cutting of timber upon Lot No. 2, in the 5th concession of the township of Carden to the said Francis McIlroy."

It was proved that McIlroy had by some agreement in writing, which was not produced, sold the timber growing upon the lot named, and that under it all the pine timber and basswood had been cut down by the petitioner's workmen. McIlroy insisted that he had sold the pine timber only, and that the word "pine" should have been inserted before "timber." This agreement was made upwards of two years before the election, and the pine and bass had all been cut, and under it, as McIlroy stated, the petitioner claimed to have bought all the timber. Two days before a meeting of the petitioner's friends at Kirkville, Merry and Gibson, two of his supporters, asked McIlroy who he intended to vote for, and he said he did not know that he should vote at all, and told them of the difference between him and the petitioner, and Merry said he thought petitioner and witness could settle it. After the Kirkville meeting was over, McFadyen, who was one of petitioner's clerks, told McIlroy to wait and settle this matter. McIlroy said if petitioner would give up his claim to the rest of the timber, "we would call it square, and have no hard feelings about the matter." McIlroy had previously told Merry and Gibson that if petitioner would give up all claim to the timber, except what he had then cut, he (McIlroy) would not go against him; and either then or soon after McIlroy got from McFadyen a paper in the following terms: "Balsover, January 13th, 1875. This is to certify that I do not claim any timber of Mr. McEllroy, excepting the pine timber and the basswood that is already cut on west half Lot 5, on the 5th

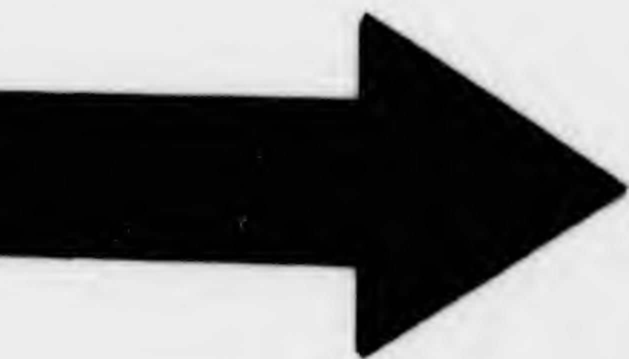
con. in the township of Carden, county of Victoria." (Sd.) "Duncan McRae, per A. McFadyen, witness."

John Merry testified that he desired to help petitioner, and went to see McIlroy about his vote. He knew nothing then of the difficulty about the timber. McIlroy told him he generally supported petitioner. Merry saw petitioner, and told him or McFadyen what McIlroy had said to him. He afterwards heard that there had been a settlement. The petitioner in his evidence said as to this matter: "I had a transaction with McIlroy about timber. I told him I had no claim except for the pine and basswood. Merry asked me on the night of the meeting if I was going to claim any more of McIlroy's timber, and I said I did not intend to cut any more of it. I do not remember that McFadyen or Gibson said anything about it. I know nothing about the paper mentioned by McIlroy. I never heard of it until last Monday, when I got the particulars. McFadyen is not an elector."

I think that the surrender of a right to cut timber on the lands of another who desires to obtain such surrender is clearly within the meaning of the term "valuable consideration." It was obviously so regarded by McIlroy, and was so asked for and accepted by him. The evidence is conclusive as to McFadyen having delivered the assurance that McIlroy would not in that event oppose the petitioner, and as to his having been an agent of the petitioner.

I find, therefore, that the petitioner, through his agent, Archibald McFadyen, was guilty of a "corrupt practice," but without the petitioner's actual knowledge and consent.

After the foregoing judgment was given, counsel for the respondent called the learned Judge's attention to a difference of ruling between the treating by Malcolm McDougall, an agent of the respondent, at Coboconk on polling day, and the selling of liquor on polling day by Wm. Peters, an agent of the petitioner, at Victoria Road. The evidence as to the latter is given on p. 255.



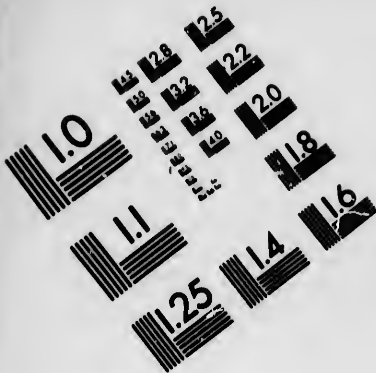
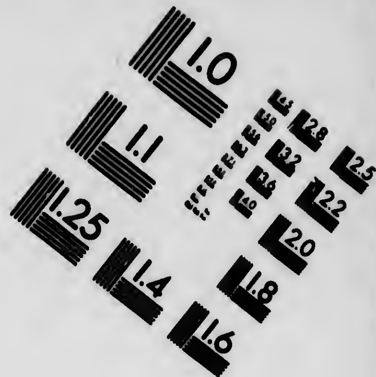
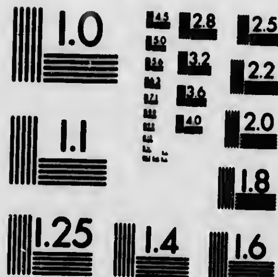
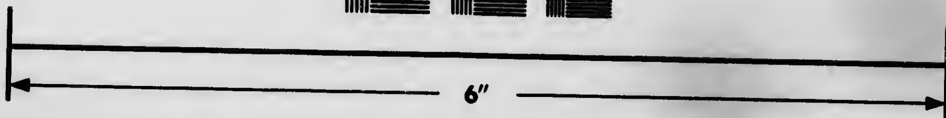



IMAGE EVALUATION TEST TARGET (MT-3)

Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

On the following day (19th August) the learned Judge added the following to his judgment:

DRAPER, C. J. A.—This conclusion appeared to me to render it unnecessary to form an opinion upon the two remaining matters advanced by way of recrimination. It is mainly in the interest of electors that this *tu quoque* accusation is permitted, in order to prevent a successful petitioner from obtaining the vacated seat if he also has violated any provision of the Election Law.

However, in consequence of a reference made by one of the learned counsel to an apparent inconsistency between my ruling in the Coboconk treating case and the keeping open on polling day of his tavern by William Peters, I enlarged the time for pronouncing my final conclusion until to-day. I must say it struck me that it would be an extreme case if I should find myself compelled to hold that Peters (though an election agent of petitioner), being himself the tavern-keeper and selling liquor as usual in the course of his business, could thereby make the petitioner's return, if he had been elected, void, though no connection between the election or the petitioner and the keeping the tavern open on the polling day was shown to exist. Moreover, I noticed that Peters swore (as if justifying his acts) that there was no polling place within three miles of his house. I have been told that there is an erroneous idea abroad that the law does not render necessary the closing a tavern at that distance from the polling place; and McDougall's evidence seems to point to a similar mistake.

Having arrived at a result adverse to the petitioner upon McIlroy's case, I can see no object in going into Peters' case, and my refusal to receive evidence to support it could be no detriment or hindrance to the respondent. On a broad view of the case, I am of opinion that the evidence in the Coboconk case was properly received, though it may be doubtful. Had an application been made to me in regular form to add a particular embracing

it, I think that (always on reasonable conditions) I could not have refused; and if so—the evidence being conclusive to prove it, and given by an apparently very trustworthy witness—the error resolves itself into one of form. I adhere to my conclusion on the charge avoiding the election, and also to that upon McIlroy's case as against the petitioner. It is no prejudice to his case that the other charges are not pronounced upon.

(9 *Journal Legis. Assem.*, 1875-6, p. 13.)

CARDWELL.

BEFORE CHIEF JUSTICE DRAPER.

BRAMPTON, *7th and 13th September 1875.*

FRANCIS O'CALLAGHAN, *Petitioner*, v. JOHN FLESHER, *Respondent.*

Acts of agency—Hostility to opposing candidate—Corrupt practices.

One S., who desired nomination as a candidate by a Reform Convention, was not nominated, and thereupon, from hostility to the convention and its nominee, opposed the candidate of the convention, which thereby had the effect of supporting the respondent. At the close of the poll, the respondent publicly thanked S. for being instrumental in bringing about his election. S. owned a shop and tavern, but the license for the latter was in his clerk's name; and during the polling hours on polling day spirituous liquors were sold and given in the shop and tavern.

Held, that what was done by S. at the election was in pursuance of a hostile feeling against the convention and its candidate, and did not constitute him an agent of the respondent.

The petition contained the usual charges of corrupt practices.

Mr. Bethune for petitioner.

Mr. J. Hillyard Cameron, Q.C., for respondent.

The evidence affecting the election is set out in the judgment.

DRAPER, C. J. A.—The only point of importance in this case is, whether the facts in evidence establish that Peter Small, a merchant and hotel keeper within this electoral riding, was an agent of the respondent. That his hotel

was open on the polling day, and during polling hours, and that spirituous liquors and beer were freely given and sold therein, were not at all denied.

The circumstances are peculiar.

A convention of the electors of the riding, who belonged to the Reform party, was called together to nominate their candidate for this election. Certain delegates had been chosen or otherwise appointed to attend this convention. Peter Small had fully anticipated that he would be the nominee. He was a well-known member of the Reform party, and was a Roman Catholic. He kept a merchant's store and a hotel in the village of Ballyeroy, in the township of Adjala, and had large dealings and connections throughout the riding. The convention, however, disappointed his expectations and nominated Mr. Bowles, who became the opponent of the Conservative candidate, the now respondent.

In his evidence Mr. Small stated, in regard to Bowles and his nomination by the convention, that "people voted for him (in the convention) who had no right to vote. I showed up the convention · I asked people to vote against Bowles. I made it un[illegible]ood I wanted to defeat the nomination of the convent[illegible]n. I considered that Bowles had personally broken faith with me. Though I had a conversation with the respondent after Bowles' nomination, I never spoke to him at all about the election. By opposing Bowles I was in effect supporting respondent. A large number of my friends are Roman Catholics. I suppose there are seven or eight hundred Roman Catholics in the riding. I remember telling the respondent to see young Walsh and he would give him some information." On his cross-examination he said, "It made no difference to me who was the nominee of the convention. People were allowed to vote in the convention who had no votes in the riding," and he mentioned the names of several such persons. "That was the ground of my acting publicly. I was never answered except by one Jones. I had nothing

to do with the respondent in trying to procure his election either for his party's sake or his own."

Walsh was a clerk and employee of Small in the store and business, and occasionally in the bar of the hotel. He was also the telegraph operator, the telegraph office being in the store, which, with the hotel (all forming one building), was burnt down in April last. The hotel license was taken out in Walsh's name. Spirituous liquors were sold in the shop as well as in the hotel. Walsh said he was a Conservative, and was from the first favorable to the respondent, and spoke to others in his favor and to get votes for him, and wrote one or two letters with the same object. He spoke to the respondent about the election, and was his scrutineering agent at the poll at Ballycroy under an appointment signed by respondent, who left three appointments in blank, signed by him, with Walsh, to be used if necessary, so that the respondent might always have an agent at the poll; but they were not used, as he (Walsh) was not absent from the poll more than five minutes. The poll was taken in a separate building very near the shop and hotel. He was at the meeting at Tottenham, in the township of Tecumseth. Small took him there, and Small made a speech to which a Mr. Jones replied. Small was showing up the convention, and accused Jones of treachery. Small was, as Walsh understood, desirous of defeating Bowles. Walsh told respondent of the dissatisfaction of the Roman Catholics at the unfair exclusion of Small, and that he thought this dissatisfaction improved respondent's prospects. After the result of the polling was known, and late in the evening of polling day, the respondent returned thanks for his election, and said he was thankful to Small for being instrumental in bringing about his election, which remark may have been made in irony, as Small had supported Bowles at a previous election. On cross-examination he (Walsh) added, "I think Small expected the nomination, and I understood he was thrown out because he was a Roman Catholic. There was a breach of faith among the mem-

bers of the Reform convention; there was a change between the open and the secret voting, and Mr. Small's feeling arose from this."

I have set out this evidence with some particularity, because upon it is founded an argument that it maintains the assertion that Small ought to be regarded as an agent for the respondent as to this election; that the respondent must consequently be bound by his acts, and that if he is proved to have been guilty of corrupt practices, they will attach upon the respondent as the acts of his agent, and will avoid the election. I will take the question upon the assumption that Small was guilty of corrupt practices against the election laws—a fact in reality not disputed.

Small by his own evidence, as well as by circumstances appearing which indirectly but strongly lead to the same result, was a well-known member of the Reform party; nothing transpired during the whole trial to put this in doubt, and not an expression was drawn from him in his examination to raise a doubt that his political opinions were unchanged. He admitted that he had a conversation with the respondent, but not about the election; that he had told him to see young Walsh, who would give him some information. The respondent did see Walsh, who informed him of the dissatisfaction of some of the Roman Catholics at the treatment of Small by the convention, and that, in Walsh's opinion, this was favorable to the respondent's success; but however well founded that young man's opinion, I cannot discover in it any proof that Small had become the respondent's agent for the election, or that respondent had so considered him. Mr. Small was disappointed in an object which he desired and expected to have obtained; he was irritated because (whether rightly or not) he thought there had been treachery in the conduct of some on whom he had relied as friends, and that unfair means had been resorted to, by which one of those friends accepted and occupied the very position which he coveted; and he resented it not merely in words, but in the acts which he stated in evidence; and it is to be

remarked that not another witness but himself proves any act on which reliance has been placed to prove his agency. It is perfectly true that everything he did under the influence of these feelings which was prejudicial to the nominee of the convention was favorable to the respondent; that every obstruction placed in the path of the one was *pro tanto* a clearing of the way for the other; but, for the purposes of this question, I must regard the motive which brought about the acts relied upon. I think I have the key to this whole conduct, and that I have shown what dominating influence governed him. All that he is proved to have done is accounted for by his hostility towards the convention and their nominee, while there is really no direct evidence of his having done anything which furnishes the ordinary proof from which agency is inferred. He did not canvass for the respondent either with the respondent or alone. He attended no meetings called by the respondent—for the meeting at Tottenham, if not a Reform meeting, was a mixed meeting, and his speech at it was hostile to the convention and its nominee on account of their conduct towards him. He does not appear to have solicited one vote in favor of the respondent or to have taken one vote for him to the poll; and, while fighting on purely personal grounds against the Reform candidate, he does not change his opinions as a Reformer. I freely grant that his conduct from a party stand-point was absurd; but he was an angry man, listening to the promptings of disappointed and exciting feelings of wounded self-esteem; but I can find no proof in it of his agency in favor of the respondent; nor can I fasten upon him a character which I feel convinced he never meant to assume. I can quite understand Small's resolve to oppose Bowles, and to do all that he could to defeat him, although in so doing he was helping the opposite party, without desiring the success of Bowles' opponent on any other ground than hostility to Bowles, and disregarding all other consequences of his gratifying that hostility; but I cannot convert such a course into an agency which is to affect a party who

is not in any way connected with the difference between Small and Bowles, or hold the respondent to be affected by anything done by Small in pursuance of a vindictive feeling against another, to which the respondent was no party.

I must therefore dismiss the petition; and can find no reason which will justify me in refusing to give the respondent his costs.

(9 *Journal Legis. Assem.*, 1875-6, p. 25.)

WEST PETERBORO.

BEFORE CHIEF JUSTICE DRAPER.

PETERBORO, *30th and 31st July; 2nd and 18th August, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *17th September, 1875.*

WILLIAM HEPBURN SCOTT, *Petitioner*, v. GEORGE ALBERTUS COX, *Respondent.*

Bribery by offer of employment—Contradictory evidence—Treating during polling hours—Fraudulent device, enabling an unqualified person to vote—Corrupt practice—Special case—Costs.

Evidence of admissions made by an agent after his agency has expired is inadmissible.

Where, in evidence of offers of bribery, an assertion on one side is met by a contradiction on the other, the uncorroborated assertion is not sufficient to sustain the charge.

A candidate's appeal to his business, or to his employment of capital in promoting the prosperity of a constituency, if honestly made, is not prohibited by law.

Quære, Whether the word "employment" used in the bribery clauses of the Act refers to an indefinite hiring, or would include a mere casual hiring.

One T., who was on the roll as an elector, and had sold his property in June, 1874, before the final revision of the Assessment Roll by the County Judge, was, with the knowledge of the respondent—who was aware a doubt existed as to T.'s right to vote—given an appointment to act as scrutineer at a distant polling place, and also a certificate from the Returning Officer under 38 Vic., c. 3, s. 28, to enable T. to vote at the place where he was to act as such scrutineer, at which place T. voted without taking the voter's oath, and returned without entering upon the duties of scrutineer. On a question of law reserved on the above facts for the Court of Appeal,

Held, that the act complained of was not a corrupt practice under the statute; but under the circumstances, the Court gave the respondent no costs in appeal.

The petition contained the usual charges of corrupt practices.

Mr. Hector Cameron, Q.C., *and Mr. H. H. Smith* for petitioner.

Mr. Bethune and Mr. D. W. Dumble for respondent.

During the examination of a witness respecting his account for liquors supplied to voters on polling day, which he presented to one Peter Hamilton, an agent of the respondent, on the day after the election,

Mr. Cameron asked what Hamilton said to the witness when he presented the account to him the day after the election.

DRAPER, C. J. A.—I refuse to allow the question. Hamilton's agency expired with the election. Even if he asserted some fact of importance bearing on the issue, his statement of that fact would not be evidence to charge the respondent. As to mere admissions, there can be no doubt; as to matters of fact, Hamilton may be called.

The evidence on the charges of corrupt practices showed that two persons, Cardinelle and La Plante, who had canvassed among the French voters, had treated several persons in taverns during polling hours on polling day. The evidence on the other charges is set out in the judgment.

DRAPER, C. J. A.—At the close of the petitioner's case, Mr. Bethune admitted that the agency of Cardinelle and La Plante was proved, and that he could not deny that the evidence established that they, being such agents, had violated the 66th section of 32 Vic., c. 21, and consequently that the respondent could not retain the seat. He contended, however, that whatever was done by these agents contrary to law was done contrary to his wishes, and without his knowledge and consent. If the petitioner, however, persisted in the personal charges, he called upon the counsel on the other side to state on which of them he relied.

Mr. Cameron stated that he relied on the second particular, charging that respondent offered to one John Drake a voter, permanent employment during the summer, if he would vote for him.

Also on the third particular, charging that respondent offered to one Cole Barrett employment if he would vote for him.

Also on the fourth particular, charging that respondent offered to one John C. Wood employment during the coming summer if he would use his influence for respondent.

Also on the twelfth particular, charging that respondent offered and agreed to pay the travelling expenses of one Jeremiah Daley, of the Town of Peterboro, from that town to the place where the said Daley was then intending to work, if the said Daley would vote for respondent, and did pay such his expenses.

Also on the thirteenth particular, charging a fraudulent device in procuring from the Returning Officer a certificate that one Frederick Taylor was entitled to vote in the second ward of the Town of Peterboro, his name appearing on the voters' list, though he had parted with the property in respect of which his name so appeared; and in further pursuance of the said device, in giving to the said Taylor a colorable appointment to act as agent for the respondent, on the polling day, at one of the polling places for the township of North Monaghan, for the purpose of enabling the said Taylor to vote, without having the voter's oath tendered to him, whereas it was not intended that the said Taylor should, nor did he, act as agent for respondent at the said polling place in North Monaghan.

I need not take up time in discussing the evidence of Drake. His statement is that when the respondent asked him for his support, he replied he had not made up his mind, and added: "I suppose if I am idle, you will give me work," and that respondent said he would give him work for the summer. The conversation was talked of,

and four or five weeks afterwards he was applied to to state what he could prove, and he put his mark to a statement drawn up from his answer to this inquiry. He stated on the trial that he hoped, as times were dull, to secure work for the ensuing summer, and that he told his then employer (Mr. Clark), a few minutes after respondent left, that the respondent had asked him for his vote, and had *offered* him work for next summer, which is stronger than his present statement. The respondent swore that when he asked Drake for his vote, that he promised so readily that he doubted if Drake knew him—that Drake did not even ask him "If I'm idle," etc., and that not a word passed between them on the subject of respondent's giving him work. Several witnesses were examined with reference to Drake's character for truthfulness. In answer to their unfavorable statements, a number of persons were called who amply sustained him. But I am quite clear that in the face of the respondent's positive denial, I cannot take Drake's uncorroborated assertion as sufficient to sustain this personal charge.

Barrett's evidence is also relied on to sustain another personal charge. He swore that respondent asked him for his vote, and he replied that he had promised Scott. Respondent said that Scott did not give any work. He heard respondent, at a public meeting at the Town Hall, say he had lots of work on hand, and plenty of money to spend on it, and he would employ workmen as soon as the election was over. His statement of a promise of the respondent to give him work in return for the exercise of his influence at the election is positively denied by the respondent. I cannot on such a state of evidence find that this personal charge is proved. I may remark also that I am not disposed to treat what a candidate may say in public, to the assembled electors, before or during an election contest, as furnishing evidence of offers or promises to corrupt individuals. An appeal to his business as being a benefit generally to the community, or to certain classes of it, or to the employment of his capital

in a manner promoting the prosperity of the constituency, if honestly and truly made, is no more prohibited by the law than an appeal to distinguished public services would be, when a man is fortunate enough to have them to appeal to. It is against the personal corruption of individuals that the law has been provided, and that law will be the more respected if it be administered in a spirit of wise moderation.

Then comes the charge which rests upon the evidence of John C. Wood, and which may be stated in nearly his own words. Respondent "asked for my vote: I told him I had none. He told me, if you will give me your influence, I will give you the painting of what work I am carrying on; you can do a good deal among the English people. I told him I did not think much of his promises." The respondent meets this thus: "I did not say to him that if he would use his influence for me, I would give him work." In commenting on this case the respondent's counsel suggested that what Wood swore to amounted to no more than an endeavor by respondent to get his (Wood's) services to canvass for him, for which he was willing to give him a consideration. It may be that the words are open to such an interpretation. I do not, however, rest upon it; I am not free from doubt whether the word "employment," as used in the statute, refers to the mere indefinite hiring of a mechanic or a laborer. It is connected with the words "office" and "place," and if the maxim *noscitur a sociis* be applied to its construction, it could scarcely include a casual hiring. The present case, however, does not render it necessary to decide that point. There is here an assertion on one side met by a contradiction upon the other. The accuser admitted an unfriendly feeling to the respondent, and his own reputation for veracity was somewhat impeached. I treat this charge as not proven.

Daley's case was given up by the counsel for the petitioner, and Taylor's case is the last to be disposed of.

Frederick Taylor was put upon the roll as an elector, being owner of Lot No. 8, east of Water Street, town of Peterboro, and in the West Riding. He had sold this property in June, 1874, having removed to Lindsay in Oct., 1873. He had also a vote in the East Riding. He was asked to vote in that riding, and went to Peterboro on Saturday, 16th January. He was at respondent's house about four hours, but, he says, had no conversation with him at any time respecting his voting. But he talked with Fairbairn, a clerk of respondent, who insisted his vote was good; and the subject was discussed in respondent's committee room between Fairbairn, Taylor and Lacy, another of respondent's clerks. Taylor saw the voter's oath in the committee-room. That same night Lacy got from the Returning Officer a certificate under the 28th section of 38th Victoria, under which Taylor could vote at the election, at the polling place where he was stationed during the polling day, and Fairbairn handed to Taylor this certificate, together with an appointment in writing, signed by the respondent, authorizing Taylor to act as his agent or scrutineer at the polling place in North Monaghan. Taylor said that he thought these documents were given to him to enable him to vote without taking the voter's oath—it was said it was not likely he would be sworn there. He went to North Monaghan with one Robinson, who was also an agent for respondent at that polling place. They arrived at the poll before nine a.m. Taylor tendered his vote as early as he could, and the voter's oath was not tendered to him. He returned to Peterboro without even entering upon the duties of respondent's agent at North Monaghan, and voted in the East Riding.

On the examination of the respondent upon a Judge's order, he said, "I signed my appointments of agents in blank, and they were filled in by the committee." And further, "I understood on the polling day that Taylor went out to North Monaghan and voted there. I may have heard, the Saturday before the polling day, that

Taylor was to be sent out there. I think it is likely that I did hear it then. I understood that he was going out there to act as agent, and that he would vote there. I think he came down from Lindsay on the Friday or Saturday. Very likely I understood from himself that he was going out to North Monaghan. He went with Robinson, who was my agent at North Monaghan. I understood that there was a question whether his vote was good or not. I knew that he had sold his property in Peterboro. It is possible that he may have been sent to North Monaghan as my agent, for the purpose of getting his vote in. I was under the impression that he was sent there for that purpose. I didn't suppose he was going to stay there all day to act as my agent." Robert Fairbairn, however, says that he asked Taylor to go out as agent for respondent to North Monaghan; that he really thought Taylor had a vote; and that he asked Taylor in good faith to go as scrutineer, and not from any thought of getting a vote—that he did not know he had sold his property—and that he knew Taylor had no knowledge of the voters in North Monaghan.

It was admitted that there were appeals to the County Judge against the voters' lists in each of the wards in the town of Peterboro for the year 1874, and that the lists which were used at the polls were the lists of 1874.

Upon the evidence given before me, I find that prior to June, 1874, Taylor owned property which entitled him to vote in the West Riding of Peterboro, and that he parted with it in June, 1874, but that his name was inserted on the roll for that year, and it is not proved that it was taken off on any revision of appeal.

I find that Taylor was doubtful of his right to vote, and whether he could properly take the voter's oath if called upon to do so.

I find that it was agreed that Taylor should be nominated as respondent's agent at the polling place at North Monaghan, in the West Riding of the county of Peterboro, for the day of polling, and that a certificate should

be obtained from the Returning Officer under the 38th Vic., chap. 3, sec. 28, to enable Taylor to vote at the polling station at North Monaghan.

I find that such certificate was obtained from the Returning Officer by one Lacy, a clerk of the respondent.

I find that the respondent had signed appointments in blank, and placed them at the disposal of his committee for the election, in order that the blanks should be filled with the names of such persons as should be selected to act as agents at the several polling places.

I find that Robert Fairbairn, who was a clerk of the respondent, got one of such appointments so signed by the respondent, in which the name of Taylor was inserted, though it was not proved by whom.

I find that Fairbairn delivered the said certificate and the said appointment to Taylor, and that Taylor proceeded to the polling place at North Monaghan and voted soon after the poll was opened, without taking or having tendered to him the voter's oath.

I find that immediately after having voted, Taylor left North Monaghan and returned to Peterboro, without having entered upon the duties of agent for respondent at the polling place at North Monaghan.

I find that respondent knew that Taylor was going to North Monaghan to act as agent and to vote there.

I find that respondent was aware that a doubt existed as to whether Taylor had a right to vote, and knew that Taylor had sold the property in Peterboro which was his only qualification to vote at that election.

I find that Taylor was sent to North Monaghan in the expectation that his vote would be received without dispute, and that he would not be required to take the voter's oath.

I find that Taylor's appointment as agent for respondent was merely colorable, and that the respondent did not expect that Taylor would perform the duties of agent at the polling place at North Monaghan.

And I reserve for the decision of the Court of Error and Appeal the question of law whether, under these findings, I should hold and report that a corrupt practice has been committed by and with the actual knowledge and consent of the respondent, or by his agent or agents without his actual knowledge and consent; and I reserve the final determination of this petition, and the certifying thereof to the Clerk of the Legislative Assembly of Ontario, until the said Court of Error and Appeal have expressed and given their opinion and determination upon the question reserved, or have made some other decision or order in the premises.

The question of law reserved by the learned Chief Justice was argued before the Court of Appeal on the 17th September.

The COURT (Draper, C. J. A., Strong, Burton, and Patterson, JJ. A.) held that the act complained of was not a corrupt practice within the statute; but under the circumstances, gave the respondent no costs.

The CHIEF JUSTICE thereupon certified that the election was void, and reported that Cardinelle and La Plante were proven at the trial to have been guilty of corrupt practices.

(9 *Journal Legis. Assem.*, 1875-6, p. 17.)

HALTON.

BEFORE CHIEF JUSTICE DRAPER.

MILTON, *12th to 14th May, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *22nd June and 20th September, 1875.*

JAMES M. BUSSELL *et al, Petitioners,* v. WILLIAM BARBER, *Respondent.*

Refreshment at a meeting of electors—Irregularities in voting by ballot—Undue influence—Bribery—Promise of a "nice present"—Appeal on questions of fact.

Refreshments provided at a meeting of electors, all of one political party, or at a meeting of a committee to aid in returning a candidate, by and at the expense of one or more of their number, unless in some extreme case, cannot be deemed a breach of the provisions of the statute against treating.

One B., a voter who could neither read nor write, came into a polling booth, and in the presence of the Deputy Returning Officer asked for one not present to give him instructions how to mark his ballot. The Deputy Returning Officer gave the voter a ballot paper, who then stated he wished to vote for the respondent. One W., an agent of the respondent, in the polling booth, took the pencil and marked the ballot as the voter wished, and the voter then handed it to the Deputy Returning Officer. No declaration of inability to read or write was made by the voter.

Held, that no one but the Deputy Returning Officer was authorized to mark a voter's ballot, or to interfere with or question a voter as to his vote; and the Deputy Returning Officer permitting the agent of a candidate to become acquainted with the name of the candidate for whom the voter desired to vote, violated the duty imposed on him to conceal from all persons the mode of voting, and to maintain the secrecy of the proceedings.

One B. claimed the right to vote in respect of his wife's property, and was told by W., an agent of the respondent, that he could not vote unless he could swear the property was his own. The voter's oath was read to him, and the agent repeated his statement, and said he would look after the voter if he took the oath. The voter appeared to be doubtful of his right to vote, and withdrew.

Held, that the agent was not guilty of undue influence.

Quære, Whether the act of the agent as above set out was undue influence under 32 Vic., c. 21, s. 72.

On a charge that the respondent offered to bribe the wife of a voter by a "nice present," if she would do what she could to prevent her husband from voting, three witnesses testified to the offer; the respondent denied, and another witness who was present heard nothing of the offer. On this evidence, and there being no proof that the witnesses in support of the charge were acting from malicious motives or corrupt expectation, nor any evidence impeaching their veracity, the charge was held proved.

The respondent appealed to the Court of Appeal on the finding of the learned Chief Justice on the above charge of personal bribery.

Held, 1. That an appellate court will not, except under special circumstances, interfere with the finding of the court of first instance on questions of fact depending on the veracity of witnesses and conflicting evidence.

2. That as the Judge trying the petition had found that the respondent had made the offer to the wife of the voter in the manner above stated, such an offer was a promise of a "valuable consideration" within the meaning of the bribery clauses of 32 Vic., c. 21.

Per Richards, C. J.—The intention of the Legislature was, that votes should be given from the conviction in the mind of the voter that the candidate voted for was the best person for the situation, and that the public interests would be best served by electing him; and that the evil to be corrected was supporting a candidate for *causâ lucri*, or personal gain in money or money's worth to the voter.

The petition contained the usual charges of corrupt practices.

Mr. James Beaty, Q.C., *and Mr. R. S. Appelbe* for petitioners.

Mr. Bethune for respondent.

In addition to the facts set out in the judgment, it appeared in evidenee that the respondent and one McCraney called at the house of Nathan Robins to solicit his vote. There were present at the time Mr. and Mrs. Robins and their son.

The effect of Mrs. Robins' evidence was that respondent said to her if she would keep her husband at home from going to vote for Beaty, he would do something for her and give her a nice present. Mrs. Robins said she would do what she could. Respondent put his hand on her shoulder and said, "Do what you can and keep your husband from the election, and I will make you a nice present."

Nathan Robins said, "Mr. Barber asked my missus whether she would try to get me not to go to the election, or to get me to vote for him, and he would do something for her."

The son, Nathan Henry Robins, said: "I heard Mr. Barber say if she would keep father at home or get him to vote for him (Barber), that he would do something nice for her, or make her a nice present, or get her something nice, I am not sure which; there was something nice about it, any way."

The respondent, in his examination, denied that he had offered Mrs. Robins anything. McCraney said he was present at the time of this conversation, but that he had heard nothing of any promise being made to Mrs. Robins.

DRAPER, C. J. A.—I am under the necessity of giving an oral judgment from the notes which I have made, after a close examination and careful consideration of the testimony of the various witnesses. I may say that being somewhat new to the practice of deciding questions of fact, I have felt this duty especially burdensome, where there was contradictory evidence upon important points.

I can, however, without difficulty dispose of several of the charges of treating, as I am satisfied, by looking carefully at the dates assigned to them, they took place at too early a period to justify a conclusion that they were acts of corruption designed to affect this election. There were cases which, having regard to the time when they happened, were much more questionable. They were however, taken separately, not only in some degree doubtful, but also very trivial, and were too few in number to treat them as in the aggregate sufficient to establish general designed or systematic corruption. Again, a meeting of electors all of one way of thinking, to support a partieular candidate, or of a committee to aid in his return, at which refreshments were provided at the expense of one or more of them, could not, unless in some extreme case, be deemed a breach of the provisions against treating.

Mr John White was examined, and said he was a supporter of the respondent, but not a committee-man, and attended no committee meetings, though he attended several public meetings. He acted as the respondent's agent at the poll at Drumquin—"worked with a will for him. I saw no treating; I had a bottle of brandy; I drank some myself; I gave none to any one. This bottle I left on a work-bench in a blacksmith's shop which had been converted into the polling booth; it was left on my great-coat there; I think I covered the bottle with my coat;

I invited no one to drink; I left the bottle afterwards at Brown's private dwelling house; it was nearly empty. After some further statement, relative to two meetings at Palermo, which appeared to have no connection with this election, Mr. White proceeded to say that he thought there were three or four persons, illiterate or otherwise incapable, without explanation, of marking their ballot papers. That one Barry, who could neither read nor write, asked for instructions from one Charles Connor, who was not present. Mr. White suggested that he should act for Connor, being a supporter of respondent. The Returning Officer was present, and heard and saw all that passed. The ballot paper was placed in Barry's hand by the Returning Officer; he got the pencil and stated he wanted to vote for Barber; then Mr. White took the pencil and marked the ballot paper as Barry had expressed he wished it should be marked, and then Mr. White says he believes the ballot paper was handed by Barry to the Returning Officer. Now, the 12th section of the Ballot Act provides for this case: 1st, there must be a declaration of incapacity to mark the ballot paper, and the Deputy Returning Officer shall, in the presence of the agents of the candidates, cause the vote of such person to be marked on a ballot paper in the manner directed by such person, and shall cause the ballot paper to be placed in the ballot box. A form of declaration is given in Schedule C to the Act, and an attestation clause is given in Schedule D, to be signed by the Deputy Returning Officer. Then by section 8, sub-section 10, power is given to the Deputy Returning Officer, either personally or through his clerk, to explain to the voter the mode of voting and the colors in which the numbers and names of candidates are printed on the ballot paper. Provision is made for receiving and entering objections by a candidate or his agent to a vote, as well as a refusal of a voter to take the oath or affirmation, when he has been required and refuses to take the same.

It seems clear to me that no one but the Deputy Returning Officer is authorized to perform these official acts,

or to interfere with the voter, or question him as to his vote or his right to vote. His name must be on the voters' list; this gives him a *primâ facie* right to vote. The candidate or his agent may object, and the duty of the Deputy Returning Officer is in that case plainly prescribed. If the voter is required to take the oath or affirmation and refuses, his vote is not to be received. The Deputy Returning Officer is to conceal as far as possible, from all persons present, including the poll clerk and the agents of the candidates, as well as all other persons, the number printed on the ballot paper and upon the counterfoil, and not to permit the counterfoil to be inspected.

Mr. White spoke of himself as scrutineer (and not general agent for the respondent), appointed by writing. The appointment was not put in evidence. I do not find the term "scrutineer" in the Ballot Act; but I think the candidate may limit the authority he gives to acting for him during the polling. It would so far limit the powers and authority of the agent, and consequently the responsibility of the principal. It is, however, the Returning Officer's duty not to permit interference by either candidate or agent with the discharge of his own prescribed functions, to execute what the law prescribes, and not to delegate to another that which is required of himself in this respect. I do not see how the Returning Officer can permit the agent of any candidate to become acquainted with the name of the candidate for whom the voter desires to vote, or to mark the ballot accordingly for the voter, without violating the duty imposed on him to conceal from all persons, including the poll clerks and the agents of the candidates, the matters mentioned in the 9th sub-section of section 8 of the Ballot Act, or maintain the secrecy of the proceedings so rigidly directed by the 30th section of that Act. I feel compelled to say that I think the Deputy Returning Officer was at least guilty of great indiscretion in his conduct in regard to the voter Barry.

There is also another case at the same polling place which was a subject of complaint and investigation as to

which William Black swore that he went to Drumquin on the polling day with the intention of voting. Mr. White objected: "My wife owned the property." White said, "I could not vote unless I would swear the property was my own." The Returning Officer said, "I had a vote. The Returning Officer read the oath; I was a little afraid to take the oath after what Mr. White said. He said I could not take it; he said he would look after me if I did take it. I had never heard the oath read before. Mr. White insisted I could not vote unless I was owner, and I would not swear that, and withdrew." Mr. White swore that he thought he told the voter that he thought he could not take the oath, and Black refused on hearing the oath read. He (Mr. White) said he thought the man had no right to vote; that he did not intend to mislead him; that he had no influence over Barry, and did not know him before.

Looking at the 72nd sec. of 32 Vic., cap. 21, I find it very difficult to determine that this is intimidation within the meaning of that section. If it were, the only or the most obvious meaning of the words used, so that they would convey to the voter the idea of force, violence or restraint, or the infliction of injury, damage, harm or loss, or in any manner import intimidation, as by threatening the use of force, etc., the case would be within the 72nd section, and the offence, undue influence. All that was said, was said in the presence of the Deputy Returning Officer, whose bounden duty it was to have protected the voter; and that he (White) was present within the polling booth only as agent of the respondent, and where he had any reason for doubt, his duty was to require the oath or affirmation to be administered, but not to deter the voter from taking it by the suggestion of a point of law as to the extent of a husband's right and interest in the wife's real estate. The only act of the Returning Officer was proper, the reading the oath to the voter. He ought to have gone further, and have forbidden Mr. White from interfering with the free exercise of the voter's judgment,

and, if necessary, to have removed him from the polling booth. I am not surprised, considering the several topics embraced in this oath, that an uneducated man, as Black seems to be, should on a single reading refuse to swear in its full terms. But if the Deputy Returning Officer had referred to the 41st section of the Act, he must have known that every person whose name was on the voters' list had a right to vote, provided that, upon being properly required, he took the necessary oath or affirmation. The statute does not sanction any questioning of the voter by a candidate or his agent in order to show that his name ought not to have been placed on the list.

But as I have come to the conclusion that Black did not vote because he really felt doubtful of his right to vote, and therefore was, as he says, "a little afraid," and as I have no reason to doubt that Mr. White (as he has sworn) really thought "the man had no right to vote, and had no intention to mislead him," I cannot find the respondent through his agent (I have no doubt as to the agency) guilty of undue influence by intimidation in this particular case. I have already said I think an improper course was pursued by Mr. White and the Deputy Returning Officer.

[The learned Chief Justice then reviewed the evidence as to the Robins' case (*ante* p. 284), and proceeded:]

I assume that the particulars gave the respondent notice that this charge would be advanced in order to unseat him. If this be so, and the conduct of the Robins' family afforded even indirect proof that they had made such an assertion from malicious motives or with a corrupt expectation, why was it not brought forward? or if the Robins' reputation for veracity would not bear investigation, why was that not made to appear? These and similar considerations, and the uncertain sound of an unsupported negative, or of an assertion of utter oblivion on some points and rather vague generalities upon others, are ill calculated to reject a charge sworn to pointedly and directly—a charge of a novel character, and attended

with consequences to which public attention has been but recently strongly drawn—in which ignorance might be more reasonably presumed in persons of the apparent station and knowledge of the Robins' family, but which I should not venture to attribute to a member of the House of Commons or of the Legislative Assembly.

I have felt that I could not avoid declaring the election of the respondent to be void on the ground that a corrupt practice, namely, that of bribery, has been proved to have been committed by the respondent himself in making an offer of money or valuable consideration to Christina Robins, in order to induce her to procure or endeavor to procure the vote of one Nathan Robins in favor of the respondent at the late election of a member of the House of Assembly for the county of Halton.

From this decision the respondent appealed to the Court of Appeal.

Mr. Blake, Q. C. (Attorney-General of Canada), *and Mr. Bethune* for respondent.

Mr. James Beaty, Q. C., for petitioner.

RICHARDS, C. J.—We do not think we can properly interfere with the decision of the learned Chief Justice as to the facts found by him, the general rule being that the finding of the Judge, who hears the witnesses when there is conflicting evidence, and the decision turns on the credibility of the witnesses, should prevail. He sees the witnesses, hears their testimony, observes the way in which they answer questions, and is in a much better position to decide on conflicting evidence than those who merely read the statements of the witnesses as they have been taken down. We are all of opinion that we ought not to interfere with the finding of the learned Chief Justice as to the matters of fact.

It was not urged before the learned Chief Justice that if he came to the conclusion that the respondent had offered to make Mrs. Robins a nice present if she would

keep her husband from voting against him, that this was not bribery within the meaning of the statute of this Province, 32 Vic., cap. 21, sec. 67.

The question is raised before this court for the first time; and it is contended that there must be something named as the present to be given, or it will not be a promise or offer of a *valuable consideration* (within the meaning of the Act) to Mrs. Robins to induce her husband to vote or refrain from voting at the election.

It is not in terms an offer of money. Does it imply that something *of value* is to be given if the promise or offer is carried out? and if so, is that not what is meant by a promise of money or a valuable consideration? Not a promise of something which has no appreciable value, such, for instance, as to make a lady one of the patronesses of some exhibition, where no one was to receive any pecuniary benefit but all were to pay money; or buying a ticket to admit a person to grounds on which a pic-nic was being held, where each person attending paid for or furnished his own lunch; or to make an elector a member of an election committee, where he would receive no emolument, and would probably be compelled to labor, and might be subject to loss.

When this offer was made was it a mere pretence? Are we to presume the respondent wished Mrs. Robins to understand, as she appears to have understood, that she was to receive a present of some value, when he intended to give her something of no value or no appreciable value? This would be presuming a certain kind of fraud on his part, and in his favor to relieve him from what would be the consequence of his act, which I do not think that judges or courts usually do.

One of the earlier statutes on the subject of bribery, 7 Wm. III., c. 4 provided that no person to be elected to serve in Parliament "shall directly or indirectly make any promise to give any money, meat, drink, provision, *present*, *reward*, or entertainment to and for any person having a voice in the election, or for the use, advantage, benefit,

employment, profit or preferment of any such person in order to be elected to serve in Parliament."

Our own Con. Stat. Canada, 22 Vic., cap. 6, sec. 82, provided that no candidate should directly or indirectly employ any means of corruption by giving any sum of money, office, place, *gratuity, reward*, or any bond, bill or note, or conveyance of land, *or any promise* of the same, nor shall he threaten any elector with losing any office, &c., with intent to corrupt or bribe any elector to vote for such candidate, *or to keep back* any elector from voting; nor shall he support or open any house of public entertainment for the accommodation of the electors. And if any representative returned to Parliament is proven guilty of using any of the above means to procure his election, his election shall be declared void, and he shall be incapable of being a candidate or being elected during that Parliament.

The above provisions were repealed, and the Legislature of Canada passed the statute 23 Vic., cap. 17. The first three sub-sections of section 1 of that Act define bribery in the same way as it is defined by the Imp. Stat. 17 and 18 Vic., cap. 102, and by sub-sections 1, 2 and 3 of sec. 67 of the Stat. of Ontario, 32 Vic., cap. 21. These provisions were in force when *Cooper* v. *Slade* (27 L. T. Rep. 137) was decided in England, and I suppose are still in force there.

The words of Baron Alderson, after giving the judgment in *Cooper* v. *Slade*, as reported in 27 L. T. Rep., 139, are: "I entertain this opinion also, whether the rest of the Court agree in it or not, that the words 'money or other valuable consideration' ought to be expounded, money or other valuable consideration estimable."

In construing this statute, we must consider what was the intention of the Legislature; and there is no doubt the primary object was that votes should be given from the conviction in the mind of the voters and those who supported a candidate that he was the best person for the situation, and that the public interests would be best

served by electing him. The evil to be corrected was the supporting a candidate, not because he was the proper person, but for "*causâ lucri.*" The supporting of the candidate because of personal benefit to himself; the exercise of the franchise not for the public good, but for personal gain in money or money's worth to the voter or the person inducing the elector to vote or not to vote, was what the Legislature wished to guard against.

Then what was the motive presented to the mind of Mrs. Robins, in the case under consideration, to induce her husband not to vote against respondent? It was that she was to receive some substantial advantage from it, either in money or property—something of value. She was to have a *nice present*. The evidence showed she considered it would be something of value—not of mere fanciful or imaginary value, but of real value that would be *appreciable*. What occurred would well justify her in supposing that the respondent intended to give her something of value, and that he intended to give her, in the language of the statute, a valuable (not a fanciful) consideration for inducing her husband not to vote; and she, entertaining that belief, tried to induce her husband to abstain from voting.

So that, in fact, the evil which the Legislature intended to prevent actually existed in this case. This woman was *corrupted* by the offer, and she endeavored to exercise an influence over her husband from the desire to get the *present* which had been promised her.

I understand when a corrupt promise has not been carried out, that the election Judges in England—to use the language of Mr. Justice Willes in the *Lichfield case* (1 O'M. & H. 27)—"require as good *evidence* of that promise illegally made, as would be required if the promise were a legal one, to sustain an action by Barlow (the person to whom the promise was made) against the respondent, upon Barlow voting for him, for not procuring or trying to procure him a place in the hospital."

But I do not understand that the promise must be one for which, were it not prohibited by the Corrupt Practices Act, an action would lie for the breach of it. The *evidence* of the promise requires to be satisfactory, and, as far as we are concerned, that question has already been disposed of.

My brother Patterson has given me a note of some cases not referred to in the argument; the older ones show that as a matter of pleading it was necessary to show *what* was offered, and in that view would seem to go a long way in sustaining the view pressed upon us by the respondent, but the modern cases, under this very statute, are, I think, the other way.

I quote at some length the language of the learned Judge who tried the *Launceston Election Petition*, in which Col. Deakin was respondent. In that case (30 L. T. N. S. 823), Mellor, J., said in relation to the privilege granted by Col. Deakin to his tenants to shoot rabbits on the farms leased by them, "I cannot help thinking that it was to those tenants a valuable consideration, and *that the effect on the minds of these tenants* was that they had acquired by that concession a *valuable consideration*, capable of being represented by some money value. Of course I cannot estimate what money value, nor is it necessary that I should do so; it is only necessary that I should arrive at the conclusion that it was money or *money's worth*, and that the respondent considered that he was parting with something which was or might be in his hands a source of great enjoyment or pleasure, or otherwise, which he gives up to a tenant, and thereby destroys the effect of the reservation under which the tenant was formerly holding. I cannot help thinking, therefore, that it was a concession which had an appreciable value. . . . . . I must see that in construing the Act of Parliament intended to put down all corrupt practices and influences at an election, I am not narrowing by any construction of mine the effect of it, but am giving all proper effect to it. . . . . . The conclusion at which I have arrived is, that the giving of this concession

to the tenants, under the circumstances, was either a promise or a grant; *it was not a legal grant*, because that would require something more than a parol expression; *but when we are dealing with an election question, we must deal with the motives which are apparent*, and which appear from the Act itself. I cannot go into any intention of Col. Deakin. I must be governed by what he said, and by the inferences I ought to draw from *what he did and what he said*; and *by the inferences drawn* by those persons who were present, and who heard *what he did and what he said*."

Here it will be observed, that even had it not been for the Corrupt Practices Act, Col. Deakin could not have been by law compelled to make a legal grant of the right of killing the rabbits, and could not have been sued for any more than the promise made in this case; but nevertheless the promise was considered as equally corrupt. Other expressions, I think, warrant the conclusion that the apparent motives of the party, and the inference from the Act itself, should influence our decision.

My brother Patterson has also drawn my attention to the case of *Simpson* v. *Yeend* (L. R. 4 Q. B. 628). That was an action to recover a penalty for bribery, and it was virtually decided under the Imp. Stat. 17 and 18 Vic., cap. 102, sec. 2, sub-sec. 1, as I have already mentioned, similar to the section of the Provincial statute under which we are called on to decide the case before us. The promise to the voter was, "I said he would be *remunerated* for his loss of time." The learned Judge who gave the judgment, Mr. Justice Mellor, said: "We delayed giving our judgment at the close of the argument, not because of any doubt existing in our minds as to the answer which we ought to return to the question put by the Judge of the County Court, but because we were assured by the counsel for the defendant that the election judges had in their decisions upon the section taken a view differing from that which we were disposed to take. Had the fact been as suggested, we should not have felt ourselves

bound by the opinion of the election judges, unless upon consideration we had agreed with it, but we thought it desirable to ascertain what opinion had in fact been expressed by them with reference to a subject with which their duties had necessarily made them familiar. Upon inquiry, we find, as we anticipated, that those learned judges have expressed no opinion adverse to the conclusion at which we have arrived. Their observations upon this section, so far as it refers to an *offer* or *promise not accepted,* merely expressed a rule of prudence and caution as to the quantity and character of the evidence by which such an 'offer' or 'promise' should be considered as proved."

"We cannot doubt the words used, 'that the voter would be remunerated for what loss of time might occur,' did, under the circumstances, amount to an offer or promise to procure, or to endeavor to 'procure, money or valuable consideration to a voter,' in order to induce him to vote at the election in question. The expression 'remuneration for loss of time' would necessarily convey to the apprehension of the voter that if he would vote for a particular candidate he should receive, either directly from the person offering, or by his procurement, *money* or valuable consideration which he would not otherwise obtain; and any assurance of that kind, which can *only* be so understood, is calculated to operate upon the mind of the elector as a direct inducement to vote for such candidate."

After referring to *Cooper* v. *Slade* (6 H. L. C. 746), the learned Judge proceeds: "It is so important to the public interest that electors should be left free to vote without any disturbing influence of any kind, that we feel ourselves bound, in construing the statute in question, to give full effect to the plain meaning of the words used, and to apply them to the substantial facts of the case, *without raising subtle distinctions or refinements as to the precise words or expression in which the promise or offer may be conveyed.*"

Here we have no doubt that the words used did substantially convey to the mind of Mrs. Robins that if she used her influence, as the respondent wished her to, she would, in the language just quoted, receive money or valuable consideration which she would not otherwise obtain, and this was calculated to operate on her mind as a direct inducement to do what the respondent wished.

Our duty, then, is to give effect to this statute, though the consequences of our judgment to the respondent will be so very serious. We are not at liberty to fritter away by subtle distinctions an Act of Parliament. The same learned Judge whose language I have quoted above, Mr. Justice Mellor, in one of the recent cases decided last year, the *Bolton case* (2 O'M. & H. 144), uses the following language on this subject: "I take it to be the duty of a Judge to take care that he does not fritter away the meaning of Acts of Parliament by any subtle construction, but to give a bold (but at the same time cautious) decision, which shall further rather than defeat the object of any Act of Parliament of this character which he has to construe."

We are all of opinion that the judgment of the learned Chief Justice should be affirmed; that the Clerk of this Court should certify to the Clerk of the Legislative Assembly that the said respondent was not duly elected; that the said respondent was proved to have been guilty of a corrupt practice at such election, and that such corrupt practice was by promising to Christina Robins, the wife of Nathan Robins, if she would keep her husband from voting for Mr. Beaty at the said election, he would give her a nice present.

There is no reason to believe that corrupt practices prevailed extensively at said election.

We direct the respondent to pay the costs of the trial, of the petition, and of this appeal.

Strong, J.—The question of fact argued on this appeal must, I am of opinion, be held to be concluded by the de-

termination of the learned Judge who tried the petition. It depended altogether on the credit to be given to witnesses who were examined before the Judge in open court; and there was, therefore, afforded to him opportunities of observing the demeanor of the witnesses, and of forming a judgment as to their truthfulness, which this Court does not possess. It is a principle well established in the procedure of appellate tribunals, including the highest court of the empire—the House of Lords—that questions of fact depending on the veracity of witnesses, and the credit to be given to them, are concluded by the finding of the Judge of the court of first instance, in whose presence the testimony is given.

This rule was acted on in this court in the case of *Sanderson* v. *Burdett* (18 Gr. 417), and in addition to that case and the authorities there referred to, I may mention the cases of *Penn* v. *Bibby* (L. R. 2 Ch. App. 127), and *Bull* v. *Ray* (28 L. T. N. S. 356) (*per* Lord Selborne, C.), and I would also refer to the judgment of Coleridge, J., in the case of *Reg.* v. *Bertrand* (L. R. 1 P. C. 535), who speaks of written as compared with oral evidence as "the dead body of evidence without its spirit; which is supplied when given openly and orally by the ear and eye of those who receive it."

Taking the promise to be proved, as found by the Chief Justice, the case of *Simpson* v. *Yeend* (L. R. 4 Q. B. 626), discovered by the research of my brother Patterson, clearly shows that we must hold it to have been a promise or offer of "valuable consideration" within section 67, sub-section 1, of 32 Vict., cap. 21, a conclusion to which, for reasons which I do not think it necessary to give at length, as they have been already stated in the judgment of the Chief Justice, I should have come, even if we had not had the satisfaction of knowing that our view was supported by the high authority of the English Court of Queen's Bench.

In my judgment the appeal must be dismissed with costs, and the certificate should be as already indicated by the Chief Justice.

BURTON, J.—I fully concur in the judgments which have just been pronounced. The only difficulty I have felt is as to whether the words alleged to have been used come within the 67th section; but when one regards the mischief which the Legislature intended to deal with, and the words of our own Interpretation Act, which declares that every Act shall receive such fair, large and liberal interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit, it is impossible, I think, to come to any other conclusion than that this promise comes within it. To hold otherwise would open the door to every kind of ingenious evasion of the Act.

The Legislature has endeavored to put down an evil which prevailed to an alarming extent throughout the Province, and to meet every possible case of bribery or other corrupt practices; and we are bound, I think, to give full effect to the meaning of the language they have employed, without, as expressed in one of the cases, raising subtle distinctions or refinements as to the precise words or expression in which the offer or promise may be conveyed. A "nice present" must have been understood by both parties as something of value, and would convey to the mind of the party to whom it was made, that if the elector would vote for the candidate he would receive something, and could only be so understood.

PATTERSON, J.—The finding of his lordship the Chief Justice of this Court, that the respondent promised Christina Robins a nice present if she would procure her husband to vote for the respondent or to refrain from voting, is clearly supported by the evidence. After hearing the witnesses and seeing their demeanor, and testing the value of their evidence by a consideration of the circumstances which tended to give probability to the statement on the one side, as against the opposing evidence of the respondent, his lordship arrives at the conclusion that the charge is proved.

We are, it is true, to sit in appeal from decisions upon questions of fact as well as upon questions of law; but this does not necessarily mean that we are to criticise the opinion formed of the witnesses by the Judge who sees and hears them. In many cases the finding of a fact depends not so much upon the credit to be attached to one statement as against another, or to the credit to be accorded to individual witnesses, as upon the proper deduction from facts which are not seriously disputed. On questions depending on such considerations, appellate courts frequently reverse the finding of courts below. Even where there is conflicting evidence, and where much may depend on the credit given to particular witnesses, the appellate court may, by the report of the Judge who hears the witnesses, be enabled to review his finding; as noticed by Lord O'Hagan in the case of *Symington* v. *Symington* (L. R. 2 Sc. App. 424), where he says: "On the first question we have been fairly pressed by the argument, that the Lord Ordinary, who had the advantage of seeing the witnesses and judging of their veracity from their demeanor before himself, should not have his decision lightly set aside; and undoubtedly the value of *viva voce* testimony can be much better ascertained by those who hear it than by those who know it only by report. But there is this peculiarity in the present case, that the Lord Ordinary has put us somewhat in his own position, and enabled us, so to speak, to see with his own eyes, when he states the impression produced upon him by the principal witness, and describes her as 'a girl of modest appearance, who gave her testimony generally with an air of truthfulness,' and he speaks favorably of her aunt, another witness, whose part in the transaction is of great importance. Besides, we are concerned directly, not with the judgment of the Lord Ordinary, but with that which overruled it, and the latter we ought to affirm, unless we are satisfied of its error." In the present case I can see no ground for arriving at a conclusion different from that of his lordship the Chief Justice, who gaves credit to the Robins family

after carefully balancing the reasons for preferring their account of the transaction.

I have, however, had strong doubts whether the promise to make a "*nice present*" was an offer of "money or valuable consideration" within the meaning of section 67 of the statute. This point was taken by Mr. Blake in his argument before us, though not taken before the Chief Justice at the trial, and we were referred to a dictum of Alderson, B., in *Cooper* v. *Slade*, which is noted in the report of that case in 27 L. T. Rep. 139, and 2 Jur. N. S. 1020, though not in the report in 6 E. & B. 447. The report in the Jurist is: "Alderson, B., added: I entertain this opinion also, that the words 'money or other valuable consideration' ought to be construed to mean 'money or other valuable consideration to be estimated by money.'"

I have not seen any case in which any Judge or court has actually decided that any offer or promise which came in question, was not an offer of money or valuable consideration, except the decision in the Exchequer Chamber, in *Cooper* v. *Slade*, where it was held that giving money to a voter to pay his railway fare in going to vote was not giving money to induce him to vote. That decision was, however, reversed in the House of Lords (6 H. L. C. 746.) In the *Launceston case* (2 O'M. & H. 129, 30 L. T. N. S. 823), Mr. Justice Mellor held, that an offer by a landlord to his tenants of the privilege of shooting rabbits on their farms was bribery, because it was a valuable consideration, capable of being represented by some money value. If the question had been merely whether an offer of a nice present was an offer of something having some money value, I should not have hesitated much as to the correct decision; because I think there can be no doubt that such an offer would convey to the mind of the person to whom it was addressed, that something which was either money or money's worth was to be given. My doubt has been not as to *some value* being implied, but as to whether the words "valuable consideration," which are

technical words, should not, in construing the statute, receive the same construction as they would receive with reference to contracts.

The present statute takes the place of one in which the words were apparently of a more general character, viz., Con. Stat. Can., c. 6, s. 82, where the words used were "sum of money, offices, place, employment, *gratuity, reward*, or any bond, bill or note, or conveyance of land." Having regard to this change in phraseology, as well as to the fact that the words "valuable consideration" have a recognized meaning in law, it seemed to me that we ought to construe the clause as requiring such a consideration as would ordinarily support a promise; and that the offer now in question was too indefinite in its character to fulfil that condition.

The adequacy of the consideration for which a promise is made, is usually not a material inquiry, because parties may agree for what consideration they please; but where there is no agreement—where there is merely an unaccepted offer, and the adequacy is not, therefore, settled by consent—it would seem that a consideration which is entirely indefinite is not one which can be called a "valuable consideration," as we are accustomed to use the term. Thus a promise to forbear "*for a little time*," or for "*some time*," is too indefinite to constitute a good consideration for a guaranty (Chitty's Cont. 29, citing 1 Roll. Abr. 23, pl. 25), which doctrine is approved by Bramwell, B., in giving the judgment of himself and Watson, B., in *Oldershaw* v. *King* (2 H. & N. 399), and in the same case in the Exchequer Chamber by Cockburn, C. J., at p. 519 of the same volume, and it does not seem to be disputed by any of the Judges who gave judgment in that case; and in *Davy* v. *Baker* (4 Burr. 2471), a declaration in debt on 2 Geo. II. c. 24, which alleged in the words of the statute that the defendant did receive "a gift or reward," was held bad in arrest of judgment, for not specifying what particular species of reward was given. This case is cited by Patteson, J., in *Baker* v. *Rusk* (15 Q. B. 870), as estab-

lishing the position that the declaration must state the means by which the voter was corrupted.

The rule of construction stated in *Lord Huntingtower* v. *Gardiner* (1 B & C., 297), viz., that "it is not for us to say what might be politically desirable, but what is the provision of the Legislature, and that in order to answer that question we must resort to established rules for construing acts of this nature," seemed to me to make it proper to treat the section as I have indicated; and I do not say that that view is incorrect. But the judgment of the English Court of Queen's Bench in *Simpson* v. *Yeend* (L. R. 4 Q. B. 626), is so very much in point upon the construction of the English statute, with which ours corresponds, as in my opinion to govern the present case. The promise in that case was that the voter would be remunerated for any loss of time in going to vote, and there was no acceptance of the offer on the part of the voter. It was argued that the promise must be of something tangible, and that there was no promise which, if accepted, would, putting aside the illegality, have supported an action. The judgment of the Court was given by Mellor, J., who said: "We cannot doubt that the words admitted to have been used by the defendant, viz., 'that the voter would be remunerated for what loss of time might occur,' did, under the circumstances, amount to an 'offer or promise' to procure, or endeavor to procure, money or valuable consideration to a voter in order to induce him to vote (at the election in question). The expression 'remuneration for loss of time' would necessarily convey to the apprehension of the voter, that if he would vote for a particular candidate he should receive, either directly from the person offering, or by his procurement, money or valuable consideration which he would not otherwise obtain; and any assurance of that kind, which can *only* be so understood, is calculated to operate on the mind of the elector as a direct inducement to vote for such candidate." If any authority were required to induce us to adopt this view of the transaction in the present case, it

is supplied by that of *Cooper* v. *Slade* (6 H. L. C. 746), which upon this point is not distinguishable in principle from the present case. It is so important to the public interest that electors should be left free to vote without any disturbing influence of any kind, that we feel ourselves bound, in construing the statute in question, to give full effect to the plain meaning of the words used, and to apply them to the substantial facts of the case, without raising subtle distinctions or refinements as to the precise words or expression in which the promise or offer may be conveyed.

I agree that the judgment should be affirmed.

(9 *Journal Legis. Assem.*, 1875-6, p. 8.)

NORTH ONTARIO.

BEFORE MR. JUSTICE WILSON.

WHITBY, *13th to 15th May, and 20th June, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *16th, 17th and 25th September, 1875.*

WILLIAM MCCASKILL, *Petitioner*, v. THOMAS PAXTON, *Respondent.*

Treating at a meeting of electors—Disorderly crowd—Agency, and Law of agency—Township committees—Undue influence—Settlement of an old debt—Bribery—Penal statutes—Appeal.

A meeting of the electors was held at a tavern, at which both candidates were present. A dispute arose, and the meeting broke up and the parties left the room as a disorderly crowd, and began pulling off their coats and talked of fighting. A treat was proposed to quiet the people, and one F. (held by *Wilson*, J., to be an agent of the respondent), treated, and the crowd quieted down and dwindled away.

Held (*per Wilson*, J.), that the treating, under the circumstances, was not furnishing drink to a meeting of electors assembled for the purpose of promoting the election.

On appeal the Court, without expressing any opinion as to the treating, held, on the evidence, that F. was not an agent of the respondent at the time of the alleged treating.

One W., a voter, who was in arrears to the Crown for the purchase money of a lot of land, was canvassed by B., an alleged agent of the respondent, who told him that the Government would look sharply after those in arrears for their land who did not vote for the supporters of the Government.

Held (reversing *Wilson*, J.), that what occurred was a *brutum fulmen*, or an expression of opinion upon a subject on which every one was competent to form an opinion.

Acts of agency and the decisions bearing thereon, discussed.

A charge of bribery against the respondent, where the evidence was unsatisfactory and repugnant in itself, and rested more on suspicion than on clear positive proof, was held not proven.

One M. was a member of a township committee, organized by direction of the convention which nominated the respondent, and the work of the election was put into the hands of these township committees. M. canvassed his school section, and had a voters' list, which was taken from him by the committee on the allegation that he was not doing much. The respondent never asked M. to work for him, but M. asked the respondent what success he had. The respondent had no one acting for him except these committees and some volunteers, and he never objected to the aid they were giving him, nor did he repudiate their services.

Held, on the evidence, that the respondent was responsible for these committees, and that M., as a member of one of such committees, was an agent of the respondent.

One H., a voter, held a claim against the respondent. and M. above named, and another, for five years, which he had been endeavoring to procure payment of. When canvassed at the time of the election, he stated that if he did not get it settled he would not vote for the respondent. M. induced the respondent to give his promissory note to H. for the debt, but did not give the respondent to understand directly or indirectly that the note had anything to do with the election.

Held, 1. That it is always open to inquire, under statutes similar to the Election Acts, whether the debt was paid in accordance with the legal obligation to pay it, or in order to induce the voter to vote or refrain from voting.

2. (affirming *Wilson*, J.,) That on the evidence, the motive which induced M. was that of procuring the voter H. to vote at the election, and that thereby an act of bribery was committed by M. as such agent, which avoided the election.

In penal statutes questions of doubt are to be construed favorably to the accused, and where the court of first instance in a quasi criminal trial has acquitted the respondent, the appellate court will not reverse his finding.

The petition contained the usual charges of corrupt practices.

Mr. Hector Cameron, Q.C., *and Mr. N. F. Paterson* for petitioner.

Mr. Hodgins, Q.C., for respondent.

The evidence is fully set out in the judgment.

WILSON, J.—The petition charged the commission of corrupt practices by the respondent himself, and by him through his agents.

I shall dispose first of the charges of treating, beginning with that which is contained under head of number four.

Number four relates to the act of James P. Foley. I may say at the outset I find him to have been a general agent of the respondent, and if the act he did is against the 61st section of the Election Law of 1868, there will have to be treating found to have been practised of a nature sufficient to avoid the election. Did he then provide drink or other entertainment at his expense "to any meeting of electors assembled for the purpose of promoting such election," at the time in question?

The facts were that the respondent had called a public meeting at Birney's tavern, on New Year's Eve; there was a large attendance; both candidates were there, and many of their supporters. After a few persons had spoken, Foley took the platform to explain the facts relating to some local matter, which he conceived had been spread about to his prejudice. He was called upon to name the person to whom he alluded; he did so. The lie was exchanged between them, and the whole meeting got up. Mr. Paterson (a supporter of the opposing candidate, McCrae, and the solicitor for the petitioner) applied to David M. Card, the principal agent of the respondent, if it would not be better to close the meeting. Card said he thought not, and the people soon quieted after that. As Paterson was speaking, Donald Bruce, a supporter of the respondent, called out "that's a lie," and a general call was made to turn Bruce out, and he was thrust out, and shoved down upon the ground. Those at the meeting then jumped up and talked of fighting, and there was a great disturbance, and a general rush to the door, and parties began pulling off their coats. The meeting was broken up. Christopher Moore said it was about ten at night when he got to the meeting. When he was within 75 yards of it he heard an awful noise. He tried to get in, and was told not to go in, he would get killed. There was no meeting there; it was fighting. He then proceeded: "I got on a bench and called to the people to come to me; that it was a shame to fight for Paxton and McCrae, who would not fight for them; that it was far better to

shake hands, have a drink, and go home. Liquor was brought on; I did not pay for it. Mr. Paterson, Dr. Fair (who was the person named by Mr. Foley), and others, said it was a good thing I was there, for if I had not been there some of them would have been out of the window. Some of them were awfully frightened. I thought it was a regular *melee*, and a Donnybrook. When I began speaking the row ceased. I was there an hour or so, and when I came away half of the people had gone off. What I did quieted the disturbance; if I had not done what I did, there would have been a breach of peace. I am sure McRae drank there; he went up to the bar to drink; I never was asked to pay for the drink"—the meeting having been broken up, and the people being about there in the excited condition spoken of. The part which Foley took in it he stated as follows:

"There was a disturbance that night at the meeting. One of Mr. McRae's friends proposed that he and I should join in a treat of all hands. I refused; I said if I treated I would treat all hands. I did so. There may have been about 30 or 40 persons. I treated all alike—Paxton's and McRae's friends all alike. [He paid for an oyster supper then which he had with a few friends.] I paid $4 that night for supper and for treating; that was the principal sum I paid; but I spent some smaller sums."

The meeting at Birney's was broken up, and parties had left the room. The row continued after the meeting was over, and it was then proposed to treat all hands, to quiet the people, as is usual on such occasions. It was not done to promote the election; both parties drank. Moore said to the people if they would hold their tongues and vote for him he would treat them all; and he did. That was to make peace. The crowd quieted down, and dwindled away.

I think it would be quite unreasonable to say that the treating at that time, and under the circumstances, by Foley, the agent of the respondent, was a treating of a "meeting of electors assembled for the purpose of

promoting such election." It was done for a different purpose, and participated in by both parties, to restore harmony and to induce the people to go home quietly; and it fully answered the purpose, and prevented bloodshed, and it may be—for no one can tell to what extent the violence of excited men may be carried—it may have saved life also.

It was no more a violation of the statute than the impromptu suggestion of the successful candidate to give a glass of champagne to his supporters in place of having a public procession, which he feared might lead to a disturbance, and giving it to about 200 of his friends, was a violation of the statute in the *Huddersfield case* (14 L. T. N. S. 345). And I need scarcely say that the committee did not hesitate to pronounce that the treating upon that occasion was not an act which was contrary to the statute. I have no doubt of that; I only regret that I am obliged to explain so fully the reasons which led me to form the opinions I came to in these election cases.

The third charge is the alleged act of intimidation by Donald Bruce, who is alleged to have been the authorized agent of the respondent, towards George Wharen. Wharen said Bruce called on him three times about voting; the first time about a week before the polling day, the second time about three days before it, and the third time upon that day. He said on the first visit that McRae was no good; Paxton would do the most for poor people. On the last visit he asked Wharen if he had made up his mind who he was going to vote for. "I said, not for Paxton. He said if I did not go down and vote for Paxton I had better stay at home. I said I did not know that. He said if there were favors I wanted from the Government Mr. Paxton was the one to get them for me, as he had a great deal of influence in the Crown Land office. I said I would not vote for Paxton; if I voted I would vote for McRae. He said to me I would have to look out, for those who don't vote for the supporters of the Government, and are in arrears for their

land, the Government will look sharp after them, and they will very likely lose their land. I said I would go down and vote for McRae just for that speech."

In cross-examination he said, "I could not say whether the Government would injure me for my vote; at that time I had doubts about it, based upon the newspapers. I know no one in my position injured by the Government for his vote. I should not think Paxton nor any man would injure me about the vote. I have no doubt one way or the other about what was said, but I was vexed at it. . . . I suppose what Mr. Bruce said was what he called giving good advice to people; he speaks rather hasty sometimes. The words hardly sounded like advice in my mind. I don't know what they sounded like to him." In the examination he said he then lived on a Crown lot, and there were arrears due upon it. His wife confirmed her husband's statement of the conversation.

Donald Bruce said as to Wharen: "I canvassed his vote eight or ten days before polling, and also on the morning of polling; the first time he had not made up his mind. On the morning of the polling he said he was going to vote for McRae. I said he might vote as he liked, but I thought he should vote for a man who supported the Government when he was in arrears for his land. I did not say the Government would watch him, nor that the Government would come down on him. I did not threaten him. I advised him only it was better to support a man who supported the Government."

I am disposed to think, and the conclusion I may say I have come to is, that Mr. Bruce, who said "I always work in elections," said what is said by Wharen and his wife. The evidence of the wife was very convincing; for although she said no more than her husband said, her manner assured me she was narrating an actual occurrence, and just precisely as it had taken place. The husband's evidence was given also very satisfactorily in every way; but I refer to the wife's manner as a witness, because it was especially calculated to induce a belief in the

correctness and simplicity of her story. The facts must have been impressed upon her attention, because she said "I was alarmed at first about the words." I do not say I disbelieve Mr. Bruce. But as a partizan he may, as he seems to have taken great pains to secure this vote, have said more than he intended to have said, or than he thought he had said, and that which may not have impressed him as anything very unusual or very serious—as he was not a debtor to the Crown for the land he lived upon, and was a strong political supporter of the candidate he favored—may have operated, and undoubtedly did operate, very differently upon this voter and his wife, who were not greatly taken up with polities, and whose land had not been paid for when, according to Bruce's own account, the husband was reminded of the fact, and was told how he might be affected in such a case if he gave his vote in a different way from the way in which Bruce wanted him to vote.

I think that Bruce supposed his reference to the situation of this voter would have some effect upon him, and that he intended it to have the effect of getting him to vote for Paxton.

The reference to the government power, and position as a creditor, was a most improper act on the part of Mr. Bruce, who is an intelligent, wealthy man of good social standing, and of good reputation in his neighborhood, and was one calculated to alarm a plain man like Wharen, especially as Wharen intimated rather than fully expressed he had seen a great deal in the newspapers of persons having influence with the Government giving the Crown Land debtors great trouble by procuring valuations and re-valuations to be made of their lands, and showing favor to them who supported the Government candidate, and dealing harshly with those who opposed the Government. It may be that all these are scandals, and we would much rather believe them so; for anything impeaching the good faith and justice of the Crown to all alike, without regard to creed or politics, or color or caste,

is repugnant to every notion we have ever believed to be the principle and only rule of action of our Government.

Finding the fact of intimidation to have been practised by Mr. Bruce upon or against George Wharen in order to induce or compel him to vote for Mr. Paxton, or to refrain from voting for McRae, the law declares that such act shall be deemed undue influence and a corrupt practice, subjecting the person guilty of it to a penalty, and avoiding the election if the act can be charged personally against the successful candidate, or upon his duly authorized agent. The question then is, was Mr. Bruce the duly constituted authorized agent of Mr. Paxton, so as to make him liable for this act of Mr. Bruce.

The facts, as applicable to this part of the case, are: Mr. Bruce lived in Beaverton; he worked for Mr. Paxton. During the election he was at the Reform convention as a spectator. When he was there he was appointed a delegate for Rama, as none of the Rama delegates were present.

Mr. Paxton was at the meeting, and he was then nominated a candidate. He continued, "It is likely I spoke to Paxton; I did not offer to support him; it is likely he expected I would support him. I always work in elections; I was not on any committee; I attended committee meetings. . . . I saw Paxton during the canvass. He knew I was working for the cause, and I was a strong supporter of his, and that I was working for him too. Paxton did not attend the committee meetings in Thorah; I don't know that he knew of such a committee. At the committees men are appointed to canvass; I was not so appointed; I did what I could. I made no report of what I was doing to the committee. Paxton did not ask me, to my knowledge, how people were going to vote. I may have spoken to Paxton twice during the election. I was at the meeting of Paxton's at Birney's hotel."

In cross-examination: "I was not appointed by any committee, or by any party to work at the election." What-

ever I did I volunteered, and did of my own good will. I never canvassed with Paxton."

Re-examined: "At Brechin, Paxton told me not to do anything to avoid the election. Some persons were wanting money from him to treat; he would not give it. He said he did not want anything done by anybody to avoid the election. What Paxton said about not wanting anything done to avoid the election was said to seven or eight of us."

That is his evidence, excepting as to what has been given already relating to Wharen's vote.

Charles Robinson said he was the president of the Reform Association at which Mr. Paxton was nominated. He thought it was probable a resolution was passed to support Mr. Paxton. It was understood all parties would support him, but he was not sure there was any resolution. There was a branch of the Association in Thorah, and he thought a special committee was appointed in the township for election purposes. He attended some of the meetings. Thinks he saw Bruce at two of its meetings. Could not say if Paxton knew there was a committee in Thorah. That committee looked over voters' lists, and got the views of parties as to how they would vote. It is likely Bruce talked of such matters, but could not say he did. He would be likely to have something to say of such matters. Bruce is active; some say more active than discreet. The Thorah committee was a voluntary committee of Reformers. It was made up by the Reformers for their own purposes. Paxton had nothing to do with appointing it. I attended the meetings as a friend of the cause. Paxton had nothing to do with the committees. He held public meetings, and canvassed the electors at these meetings by his speeches. I know of no connection Bruce had with the election, excepting that he was a volunteer, and worked for the cause.

Adam Gordon said, "Mr. Paxton took all opportunities, whenever it could properly be brought up, to caution people not to violate the law. I did so for him particularly

at the convention which chose him, that in governing their sub-committees they should be careful to see that the election was carried on properly, and that no rash friends should do anything to hazard the election. Mr. Paxton was present at the convention, and spoke shortly at it. I don't think Paxton took part in forming committees or in attending them, there was so little time. The formation of committees was spoken of at the convention. It was urged upon the delegates to see that their sub-committees were put into proper working order. The work of the election was put into the hands of the township committees. I only knew of the formation of the Port Perry committee; Mr. Bigelow, I suppose, organized it. We heard there were other committees." The evidence shows positively there were committees in the respondent's interest in Mara, Thorah, Reach, Port Perry, and, as David M. Card thinks, in Uxbridge also; there may have been committees formed in his interest in other places, but it was not shown by evidence there were.

Keeping in view that the inquiry is as to the agency of Donald Bruce, it is to be considered what facts are relied on by the petitioner to show that agency. Bruce was a delegate, named at the convention which nominated Mr. Paxton as a candidate in the Reform interest, on which side Bruce takes an active interest. He canvassed in this election to some extent, and particularly the elector George Wharen, on behalf of Paxton. He was a zealous assistant, and, as he said, he always works in elections. He was not, however, appointed by the committee to work, and he did not report to the committee what he did. He attended at two, at least, of the committee meetings in Thorah, but he was not a member of the committee. Mr. Robinson says Bruce would be likely to talk of the work at the committee-room. Paxton knew Bruce was working in the cause, and was a supporter of his, and that he was working for him too. Bruce did not canvass with Paxton, and he says he acted throughout as a mere volunteer. He attended one or more of

Paxton's public meetings. He was told with several others, by Paxton at Brechin, not to do anything to avoid the election.

Then as to the committees. Mr. Paxton was nominated by the Reform Convention at which he was present.

It was there mentioned that, in forming these sub-committees, they should be careful to see the election was carried on properly. The delegates were urged to put these sub-committees into proper working order. The work of the election was put into the hands of the township committees. There was a branch of the association in Thorah, and a special committee was appointed in Thorah for election purposes. That committee was said to be a voluntary association of the reformers there for their own purposes. And there were various other committees in the riding in the respondent's interest; the one at Port Perry being presided over by the respondent's partner, Mr. Bigelow, and at which Mr. Card, the respondent's general agent, was present on one occasion, and it is at Port Perry where the respondent resides. The question of agency depends upon the three inquiries:

1. Was Donald Bruce an agent of the respondent, by authority direct or implied, for the respondent himself? If he were not, then

2. Was the Thorah committee a body for whose acts the respondent is responsible? If it were, then

3. Was Bruce appointed by, or acting under the authority of the committee?

All the cases show, and common sense requires, that authority from the alleged principal, the candidate, must be shown creating or sanctioning a person to be his agent before the candidate can be made responsible for the acts of such person.

The authority need not be expressly conferred. It may be inferred to have been given by various acts of the alleged agents in the interest of the candidates under certain circumstances, and it is the circumstance which gives rise to all the difficulty of determining whether

they are or are not sufficient to raise a just presumption that the candidate has recognized and adopted the acts of the person assuming to represent him.

A large allowance is and must be made for the services of friends and volunteers who are acting for the sake of the cause which the candidate represents, and without any pretence of authority from, or any recognition by him, for, or of the performance of these services.

The candidate may know his friends and others are working for him, and yet it is not clear he is answerable for what they do, although he does not in every case repudiate their acts and services.

I shall refer to some of the decisions upon the subject. They are the opinions of able, disinterested men, and I think it will appear on a perusal of them, that while administering the law in so difficult and delicate a branch of it with the most perfect impartiality, there is a general desire exhibited not to press the law more severely than they are compelled to do, to require strong proofs of the alleged illegal acts, to give the benefit of all reasonable inferences in doubtful cases to the persons charged, to make allowances for the acts and sayings of people during such exciting times, by not putting the harshest construction upon them, to require full and fair proof of agency before accepting it as established, to allow much latitude for the zeal of supporters of the candidate, without holding him to be answerable for their conduct, although he is getting the benefit of their services, and generally to uphold the election if it can properly be done.

One who visited voters, and made appointments for them to see the candidate, and who afterwards introduced them to the candidate, was held to be an agent. *Bewdley case* (19 L. T. N. S. 676). In the same case (1 O'M. & H. 17), Blackburn, J., said: "Every instance in which it is shown that, either with the knowledge of the member or candidate himself, or to the knowledge of his agents who had employment from him, a person acting at all in fur-

thering the election for him in trying to get votes for him is evidence tending to show that the person so acting was authorized to act as his agent."

One who is on a committee, who attended its meetings, who canvassed, and whose canvassing was recognized, is deemed an agent. *Westbury case* (20 L. T. N. S. 16). Asking an employer of workmen for his vote and interest may mean, "Go round and canvass your workmen for me," and may create an agency (s. c., 1 O'M. & H. 47).

A supporter of the candidate gave a feast to his friends on the polling day. He twice canvassed with the candidate; he had a list of the voters on Lanivet, given by an agent of the candidate, although given to him only on great pressure; he brought people to the polls; he had no canvass book. Held, these facts were evidence of agency. *Bodmin case* (20 L. T. N. S. 989).

A supporter gave a public breakfast on polling day. He provided vehicles to carry voters to the poll. The candidate, on election day, wrote and thanked him for what he had done. Held, that went a long way to establish agency; but it was not conclusive. *Hereford case* (21 L. T. N. S. 117). It was also shown that the same supporter was seen canvassing with A., a recognized agent of the candidate. Held, that that additional fact, with the other acts above mentioned, was not conclusive proof of agency. But it was further proved that the committee-men had brought voters to the breakfast, and that A., the recognized agent, had spoken of the supporter, after the election, as having done much good service. Held, that all these acts together so connected the supporter with the candidate as to make the one liable for the acts of the other (s. c., 1 O'M. & H. 194).

Employing a person to act for the candidate on the candidate putting himself to some extent in the hands of that person, or the candidate allowing that person to make common cause with him to promote the election, is evidence of agency. *Taunton case* (2 O'M. & H. 66).

A person upon a committee, but not shown how he got there or what he was to do, who wrote a letter offering to pay the voters' travelling expenses, was held not to be an agent. The Judge, Bramwell, B., said: "If we were to hold this man to be an agent it would make the law of agency, as applicable to candidates, positively hateful and ludicrous." *Windsor case* (2 O'M. & H. 88, 31 L. T. N. S. 133). In the following case the same Judge said: "Mr. Dawson attended the respondent's committee, he said as many as twenty times. He was also present at the committee, and on the day on which he bribed the voter he was busy in getting up voters who required particular attention. I should have thought that itself was enough, if he was to use anything, either solicitation or persuasion, to them." But not if he were only to bring them up and to use no influence with them. *Durham case* (2 O'M. & H. 134).

A candidate will not always be answerable if he accept the services of a volunteer. *Staleybridge case* (20 L. T. N. S. 75). A candidate is not obliged to repudiate volunteer services (s. c., 1 O'M. & H. 70); *Taunton case* (2 O'M. & H. 66); *Hereford case* (21 L. T. N. S. 117).

A mere volunteer cannot hurt the candidate. Mellor, J., said: "You must show me various things. You must show me he was in company with one of the principal agents, who saw him canvassing, or was present when he was canvassing, or that in the committee room he was in the presence of somebody or other acting as a man would do who was authorized to act. In putting all these things together, you satisfied me that the man was a canvasser with the authority of the candidate's agent; then I do not look with nicety at the precise steps, but that must be something of that character." *Bolton case* (2 O'M. & H. 138).

In the *Londonderry case* (21 L. T. N. S. 709), P. was appointed by the Liberal Registration Society to conduct the business of the revision, which shortly preceded the election. The candidate subscribed liberally to the funds

of the society, and approved of P.'s appointment. The staff of the society, with P. at its head, was afterwards used in promoting the election. The committee of the society directed in a great measure the meeting of the electors, and the candidate on one occasion communicated directly with P. by letter with reference to the election. Held, P. was an agent of the candidate.

In the same case (1 O'M. & H. 274), O'Brien, J., said: "I cannot concur in the opinion that any supporter of a candidate, who chooses to ask others for their votes and to make speeches in his favor, can force himself upon the candidate as an agent, or that a candidate should be held responsible for the acts of one from whom he actually endeavors to dissociate himself."

In the *Norfolk case* (1 O'M. & H. 236) a landlord was asked by the candidate's agent to be one of the committee. He declined, but said he would answer for his tenants; he spoke to them and reported the result. Held, he was an agent as to them. Blackburn, J., said: "The real governing point was that he was put forward and consented to be the person upon whom they relied to get those votes." The landlord had not in that case used any undue influence.

The following cases relate more particularly to committees or similar organizations.

In the *Westminster case* (1 O'M. & H. 92) Martin, B., defined a committee to be a limited number of persons in whom faith and confidence were placed by a candidate, and between whom there was some privacy. The same idea is a little differently expressed in the same case, in 20 L. T. N. S. 238.

In the *Staleybridge case* (1 O'M. & H. 70), Blackburn, J., said: "As a general proposition, that (*i.e.*, a person employed by the candidate to canvass and get a vote was an agent) would go a great way towards saying who is an agent; but I don't think we can take it as an absolute hard and fast rule on which we can say that whenever a case of corruption has been brought home to a person who was

within this limit, the seat should be vacated. The effect of that would be to say that whenever there were volunteers who were acting at all, and whose voluntary acting was not repudiated by the candidate or his agents—whenever, in fact, a person came forward and said, 'I will act for you and endeavor to assist you,' and the candidate or his agent said, 'I am very much obliged to you, sir'—any corrupt or improper act done by that volunteer, although unconnected with the member, would render the election void. To lay down such hard and fast rules as that would at times work great injustice. At present I cannot go farther than to say that each case must be considered upon the whole facts taken together, and it must be determined in that way whether the relation between the person guilty of the corrupt practice and the member was such as to make the latter fairly responsible for it." "But in such a case, where I am convinced that they were *bonâ fide* volunteers acting for themselves, not selected by the member nor chosen by him at all, but really *bonâ fide* and in a business-like manner, the voters of the district choosing sober and respectable men in whom they had confidence, to be the head of their own department, and acting together, a messenger who was sent by one of them is not so directly connected with the candidate, or any of his recognized agents, as to make him responsible for the misconduct in offering a bribe."

In the *Westminster case* (20 L. T. N. S. 238), an association was formed with the view of supporting certain political principles. A candidate subscribed to the association, and had been its president, but resigned before his candidature commenced. He was selected as the candidate to be supported by the association, and thereupon many members of the association canvassed for him. These canvassers acted independently of the candidate's canvassers, and uncontrolled by his committee. The candidate's canvass agent, by request of the secretary of the association, furnished him with copies of the canvassing books. And it was held by Martin, B., that the members

of the association, canvassing voluntarily as above described, under the association though on behalf of the candidate, were not agents of the latter.

In the *Blackburn case* (20 L. T. N. S. 823, 1 O'M. & H. 198), a circular was issued by a Tory meeting; the circular was signed by persons, some of them connected with the Registration Society for the Tory candidate, or by persons upon the election committee, and also by the respondent's son. The election generally on that side was conducted in accordance with the circular, and Mr. Justice Willes held the circular had been adopted by the sitting member, and that the association which issued it was adopted also in view of a committee for the management of the election, and made every person mentioned in the circular agent for the candidate. *Dublin case*, (1 O'M. & H. 270).

In the *Wakefield case* (2 O'M. & H. 102), Mr. Justice Grove said: "It was proved that the respondent was vice-president of a certain society, that he spoke at meetings of it; that many members of it were active partizans of his, and were actively canvassing for him. That there were certain rooms belonging to the society, which might, in one sense, be called committee-rooms, but which were not so in the old sense of being occupied by a certain fixed committee. These rooms were placarded with the respondent's name, and at them business connected with the election was transacted. These facts would *primâ facie* bring the case within the law of agency, and would be sufficient to satisfy a tribunal that the respondent had put himself, or allowed himself to be in the hands of certain persons, or had made common cause with them, so as to make him liable if they, for the purpose of promoting his election, committed acts of bribery."

In the *Shrewsbury case* (2 O'M. & H. 36), Channell, B., said: "There may be a central committee; placards may be issued from it in the course of the election, signed, not by the candidate, but by some person representing him. These are acts which go beyond the mere act of canvassing."

In the *Limerick case* (1 O'M. & H. 262), Mr. Baron Fitzgerald said: "If the clergy make the cause of the candidate their own, and give him the benefit of having what may be equivalent, in its effect upon the election, to a committee-room conducted by themselves in every parish, they being the canvassers; and if it then turns out at the time of the election that the candidate represents his cause as identical with that of the clergy, and publicly gives out that the question between him and his adversaries is whether the clergy shall be put down or raised up, and is accompanied by them through the streets canvassing; if that be so—although the particular clergyman of the parish be not the party who accompanied the candidate in canvassing—I, for my part, will doubt long before I say the candidate is not, as far as his seating in Parliament is concerned, responsible for the acts of those parties in their several districts or parishes."

In the *Taunton case* (21 L. T. N. S. 169) there existed in the town a Conservative and a Liberal Association, each of which generally promoted the return of its own candidate, and assisted the registration of its own supporters. The managers of the Conservative Association having circulated addresses and papers issued by the candidate, will be presumed to have done so with his knowledge, or with that of his agents, so as to constitute the association agents of such candidate, and to make him responsible for any illegal acts of its managers. Blackburn, J., said: "We have it that the body are acting as canvassers for Mr. Cox—actively acting in promoting the election; and that fact, I think, we must fairly take it was known to him and his people. Now, does that, without any more, raise a *primâ facie* case which would call for an answer? I think it does. I think when it appears that things are done openly in that way, which in the ordinary course of things would not be done except with the cognizance of a candidate who sanctioned them, the fair and natural inference, in the absence of proof to the contrary, would be that they were done by a person acting

as agent for the candidate. I am very far from thinking that that evidence would be conclusive. I think it was quite open to Mr. Cox himself, and his agent, to have been called to show that they had no communication with that body; that they repudiated it; and if that repudiation were *bonâ fide*, they would not certainly be responsible for their acts. The candidate may show that the body was acting officiously for him, as I may call it; that it was not with his consent, and was against his will; but the presumption does arise, I think, that it was done in his favor—done for him, unless there was something to show the contrary. I think in this case such a degree of benefit would be derived from their assistance—that their assistance was so important to the candidate—that it fairly established this, that if he took their assistance, and did not hold them off or repudiate them, he must take the consequences, and be responsible for their malpractices."

In the *Taunton case* (1 O'M. & H. 185), Mr Justice Blackburn said: "I think all one can do is this, to say that whenever a person is in any way allowed by the candidate, or has the candidate's sanction to try to carry on his election and to act for him, that is some evidence to show that he is his agent."

In the *Galway case* (2 O'M. & H. 199), Mr. Justice Lawson said: "I think Mr. Justice Grove has given an admirable definition of it in a late case, in which he says the candidate is responsible, generally, for all those who, to his knowledge, carried on the purpose of promoting his election."

In looking over the different cases to which I have referred, it appears to me that the *Staleybridge case* (1 O'M. & H. 66) and the *Taunton case* (1 O'M. & H. 181) are very seriously opposed the one to the other.

The former exempts the candidate from all responsibility for the acts of persons or committees whom he does not appoint, and who act voluntarily for him, even although he knows they are acting for him, and he receives their services, and it holds that he is in no case

bound to repudiate them. The latter case is quite opposed to it, because it is based upon this, that if the candidate knows that material services are being rendered for him, he must disclaim them and the persons giving them, if he wishes to be free from the consequences of their proceedings.

And both cases were decided by the same able Judge, Mr. Justice Blackburn.

The *Limerick case* (excepting in an important particular, certainly, the fact of the candidate canvassing with the clergy) agrees in one respect with the *Taunton case*, last referred to, that the candidate identifying his cause with the clergy, and taking the benefit of their services, is bound by their acts.

It appears to me also that the *Westminster case*, decided by Mr. Baron Martin, is not in accordance with the *Blackburn case*, decided by Mr. Justice Willes, and the *Wakefield case*, decided by Mr. Justice Grove.

I cannot do better, after reading most of the law on the subject, than accept as my principal guide as to what will constitute agency, the rules of Mr. Justice Grove in the *Taunton case*, and inquire whether the candidate or his agent did employ the person whose conduct is impugned to act on his behalf, or did to some extent put himself in such person's hands, or did make common cause with him for the purpose of promoting the election; and in the *Wakefield case* (2 O'M. & H. 200), when the same learned Judge uses the like language of the candidate placing himself or allowing himself to be in the hands of certain persons, or making common cause with them.

And I think I ought to adopt the ruling of Mr. Justice Blackburn in the *Taunton case*, in determining whether the acts of Donald Bruce, under the facts detailed, made him the agent of the respondent, or made the Thorah committee the agents of the respondent, and Donald Bruce the agent of the committee. The *Bewdley case* (1 O'M. & H. 17) may also be relied upon, and some of the others before given.

Looking at the facts before mentioned, relating to the conduct of Donald Bruce, can he be held to have been the agent of the respondent within the effect and operation of the law, so as to subject the respondent to the consequences of Bruce's act, in his dealing with George Wharen as to his vote? I am disposed to think that Bruce must be considered to have been such agent, judged by his conduct before stated, and the knowledge the respondent had of his services in promoting the election.

The respondent, according to the evidence, had no persons or bodies of persons acting for him in canvassing, securing, and bringing up voters, excepting these committees, and those private friends who are called volunteers. The whole management of the election was in their hands. The respondent was receiving, and knew he was receiving the active aid of Mr. Bruce and others like him. He never objected to the aid they were giving him. He did not repudiate it, nor tell them they were acting officiously, and busying themselves when they were not wanted. He knew there was a risk in what they were doing, because he cautioned them as to their conduct; and I do not know how else to deal with Mr. Bruce than to hold him as an authorized and competent agent of the respondent, to bind him by what he did in and about the respondent's business.

If Mr. Bruce had been acting zealously in the private affairs of the respondent, as for instance in calling upon the debtors of the respondent and receiving payment from them of their accounts, and the respondent became aware of it, and told him to be careful he did not do anything to his, the respondent's, prejudice while he was so acting, could it be said, although in one sense Mr. Bruce might be called a volunteer, that Mr. Paxton was not bound to give credit to his debtors for the money which they had paid on his account for Mr. Bruce.

The act of Mr. Bruce with respect to Wharen was committed after all the above acts he had done for the respondent, and after his conversation with him, for the

interview with Wharen was on the morning of the polling day. I am also of opinion that Thorah township committee must be considered to have been the agents of the respondent for the purposes of the election. The reasons I came to that conclusion are before fully set out.

I must assume the respondent, as well as his agent, Mr. Card, knew of the Port Perry committee, and of the others also of which Mr. Card had knowledge. And I must assume from the above facts, relating to what was said at the convention as to the formation of these committees, and that they were to have the general management of the election, that he knew also of the organization of the Thorah township committee, which is the one with which Mr. Bruce is said to have been connected.

The like rules and principles upon which I have been obliged to hold Mr. Bruce to have been the agent of the respondent, equally oblige me to hold that the Thorah committee were the duly authorized agents of the respondent. Holding that as proved, was Mr. Bruce also the agent of the committee?

I am not fully satisfied he was. He was not a member. He was not deputed by them to do anything. It is not shown that they knew what he was doing. He never reported to them. His attendance there twice may have been merely to talk over matters, and to give them such information as he was possessed of. These circumstances will not warrant any act of delegation of powers by them to him, nor of any acceptance of his acts by them.

In the *South Ontario case* (*post*), I came to a different conclusion with respect to this question of agency of the Oshawa committee. I gave too much effect to the services of committees, and of the members of them, and of others acting for the candidate, and to his knowledge, and apparently with his consent and approval, by holding them to be volunteers, and by exempting the candidate from accountability for the acts of such bodies and of such persons. I have since reconsidered the opinion I gave in that case, and I think the first impression I had on it, that

the respondent was answerable for some of the acts for which I held him not responsible, was the correct one, and the one I should have adopted as my judgment. I expressed the opinion which I delivered, as I then mentioned, with much doubt, and I stated also that I should be glad to have the decision reviewed by the full Court, and I am glad it has been put in a course for reconsideration.

The doubt on the subject which I then felt, required that I should give it in favor of the existing state of things in support of the election and return, rather than against them. But I may say if I had judged of the matter then as I do now, I would have been obliged to avoid the election for the giving of liquor by Mr. Thomas at Hallett's tavern to voters during polling hours, contrary to the 66th section of the Election Law of 1868. Although it was not in any manner corruptly given, such is the stringency of the statute. I do not say the candidate is responsible for all volunteers; but I think he is if he knows of their acts in his interest, and he permits them to go on without disclaimer.

He cannot take the benefit of their acts, knowing of them and accepting of them without repudiation, and escape the consequences resulting from, or connected with them.

If it was otherwise there might be a dozen committees, and a legion of private friends all canvassing and, it may be, treating and bribing, and by such means securing the election of their candidate, and, it may be, their nominee, and he would hold it, however clearly these practices were proved, merely because they were all volunteers, and the candidate had never appointed any of them, or expressly or openly identified himself with them, and because it was said they were fighting for the cause, and not for the candidate who represented it.

In this case it is quite manifest the respondent had no organization of any kind but his public meetings, and it was notorious the whole business of the election was permitted to be in the hands of the branch Reform Associ-

ations and the township committees, and in those of private persons, of whom Mr. Bruce was, in my opinion, and to the knowledge of the respondent, certainly one. I find the third charge to be sustained against the respondent.

The remaining charges on personal grounds are pressed against the respondent. The first one is the alleged bribing by the respondent of Nichol Leppard. [The learned Judge here reviewed the evidence, which showed that up to the polling day Leppard was hostile to the respondent on account of some difficulty he had about a lot of land, and then proceeded :]

In every way I look upon Leppard's evidence as unsatisfactory and unreliable. It is repugnant in itself, and it is directly contradicted in some respects. I see, however, the great fact that Leppard, having pledged his vote to McRae, changed round immediately upon the conversation with Paxton, and that conversation was admittedly about this land, and Leppard's grievance against Paxton. How was that change brought about? In my opinion there is strong reason to believe it was brought about by Paxton's promise to Leppard to get another lot for him as good as the one he had lost, or to fetch it out all right for him, and that the change of side from McRae to Paxton—from the person he was pledged to support to the person he was pledged to oppose—was effected by the promise then made by Paxton. I am not prepared, however, to find this charge proved against the respondent; it rests more on suspicion than on clear positive proof, and the petitioner might have given more testimony on the subject by the examination of Mrs. Leppard; and as that has not been done, I do not feel disposed to convict the respondent and to subject him to such highly penal consequences, so long as I do not feel assured the offence has been proved. Although I may believe the transaction is surrounded with the greatest suspicions, I am glad to be able to say that the charge has not been proved against the respondent.

The last of the nine charges, which is the second of the personal charges, is that the respondent was guilty of bribing Thomas Hope. Hope's evidence was as follows:

"I live on Scugog Island. I was a tenant of Paxton's for twelve or fourteen years; live on the same lot yet. Paxtor is not now my landlord. I had an unsettled account with Paxton before the last election. It was for wheat I had sold to Marsh and Trounce while they ran Paxton's mill. They are bringing up a claim for rent since the election. I tried lots of times before the election to get a settlement for the wheat. I claim there is money due to me. I applied to Paxton and to Marsh and Trounce. Paxton always said he would settle. Trounce said they had paid it to Paxton. Marsh said he would see and get it settled.

"I told Marsh I would not vote fo Paxton unless that account was settled, and he said he would try and get it settled. I never talked to Paxton of it about the time of the election. Marsh said he would go down and see Paxton, and he did, and he brought me a note signed by Paxton for $110. I gave the note to Mr. Billings of Port Perry to collect, for it was not paid when it was due. Marsh, on the Saturday before the polling day, showed me the note he had got for me, and I told him to give it to Mr. Billings at Port Perry. Then he said that Tom (Paxton) had been a good friend to me, and it was too bad he and I should quarrel. I told Marsh we would do the best we could for Paxton at the election. It was about five years ago I sold the wheat to Marsh and Trounce, and I had been trying ever since then to get a settlement. I had two sons who had votes, and that is what I meant by *we* would do all we could for him. I had not the team out. We all voted. It is now said there are $200 arrears of rent against me; but there are no such arrears. The note is not paid. I should not have voted for Paxton if I had not got the note, nor would I have voted for McRae either."

Cross-examination: "I did not tell Marsh that if I did not get the thing settled by the Monday morning, I would sue him on the Monday morning. I said if I did not get it settled I would not vote for Paxton. I spoke to Marsh about not voting for Paxton about a week before the polling day. That conversation was in Tom Walker's tavern at Port Perry. I don't know that I ever said I would sue Marsh for the claim. I did not know where to collect my claim. I threatened of course to sue the claim at different times. I threatened Trounce to sue it. To the best of my knowledge I never threatened to sue Marsh. I did not threaten Marsh at Walker's hotel to sue him that night if I did not get the money or a note, nor to sue him on Monday after if I did not get it settled, or a note for it by Monday. There were quite a few in the tavern at the time Marsh and I were conversing. Mr. Shaw was there, so was Reuben King, I think also James Grove. Marsh did not say, that I recollect, when I said I would not vote for Paxton, that I must not speak of the election in connection with that matter, nor did he say, that I recollect, that the election would have nothing to do with that claim. Marsh said I need not be afraid but I would get my pay. I don't know that Marsh said anything to me about the election. I did to him."

He was shortly after recalled. He said, "I look at the note; can't read it; believe it to be the one."

Cross-examination: "I know John Phillips; did not say to him if I got $20 I would say nothing of the matter. I did not know I had to come here till last night. I did not threaten to come down. I had a conversation with Phillips about giving evidence of the transaction. That was two or three weeks ago. I did not say to him if I got $20 I would not come down and give evidence. I never talked to Bigelow of this transaction; did so on Saturday last; he said if I came down it would be worse for me. I did not say it would be worse for Paxton if he did not settle with me, for I would come down and break the election, or anything to that effect. I did not say to

Bigelow that if Paxton did not settle it to my satisfaction I would come down and give evidence. It was a few minutes after that Mr. Bigelow sent a man to me with the off-set of the rent. The conversation with Phillips of the $20 was about a wholly different matter."

For the respondent, Charles Marsh was examined. He said at the conversation at Walker's tavern, spoken of by Hope, the latter said to him "if I did not pay the claim or give my note he would sue me for it by nine on Monday morning. I refused to give it; I said he knew it was not my place to pay it; if he consented to wait, and did not put costs on for three or four days, till I could see Paxton, who should pay it, I would endeavor to get it settled for him. He said he would not wait; his friends advised him not to wait; he would have it or he would put me to costs. He intimated that Paxton had better settle that claim, for he might want his help at the election. I said to Hope if the election had anything to do with it, I would have nothing to do with the settling of it. . . . I said if they would wait till Paxton came home, and I could see him, as he was the party to settle it, I would try and settle it, and if Paxton did not settle, he, Hope, could sue as soon as he liked. That was the way it was left that night. I said most distinctly it had nothing to do with the election. In the forepart of the following week I saw Paxton and told him what Hope had said about putting me to costs in that matter, and I said I wished he would settle i to save me from being sued. I did not tell Paxton of Hope's remark as to voting. Paxton said he calculated to settle it, and he would if he knew the amount. I said it was somewhere about $110. Paxton then wrote out the note and gave it to me for Hope. . . . . I did not give Paxton to understand directly or indirectly the note had anything to do with the election."

Cross-examination: "Hope did not say to me he would not vote for Paxton unless he settled that claim; he did not say more than that Paxton might want his help about the election. I did not take the election into consider-

ation at all when the note was given. I went on purpose to see Paxton after the conversation in Walker's; went to his house. . . . I am sure nothing then took place between me and Paxton of the election in connection with the note. I supported Paxton at election. I was not on the committee at Port Perry. I went in there one night. I did some canvassing. I attended two public meetings in Reach. I think I was on a Reach committee. I canvassed in my own school section. I had a voter's list; one of the committee came for it and took it, and I never saw it after. He said he thought I was not doing much, and he would give the book to some one else. Paxton and I married sisters. He never asked me to do anything for him. I have asked him what success he had.

Mr. Shaw was examined. He mentioned a conversation between Hope and himself about Hope's claim on the same day when Hope and Marsh, in Shaw's presence, had the conversation. He supports Mr. Marsh's view generally, of what was said between Hope and Marsh. So far as it is modified, it is in the following passages of his cross-examination:

"I take an interest in all the Reform elections. I did not want to see Marsh put to costs; my whole anxiety was not to save Marsh the costs; it was partly to save Hope's vote. My interest was equally to save the costs and to save the vote. . . . I think Hope said he would not vote for Paxton if he did not get the claim settled. King said now was the time to have it settled, before the election; he said so to Marsh. King mentioned more strongly than Hope that he should get his pay before the election. . . . Marsh told me before the polling day he had got the note from Mr. Paxton, for Hope. There was a committtee at Port Perry for the election. I was there every night; took any part that was handy; I did all I could; Paxton knew my nature; I would do all I could: he had known how I worked; everybody in town knew it." He also said in one part of his examination in chief, Marsh said "if Hope would wait till after the

election, and Paxton were home, he would have it settled. King said now was the time to settle it, and not to wait."

John D. Phillips, the miller of respondent at Port Perry, contradicted Hope very explicitly as to the conversation about the $20.

Joseph Bigelow, a partner of the respondent, was also examined. He was said to have been the chairman of the committee in the respondent's interest at Port Perry. He bought the land about two years ago from Paxton, which Paxton had rented to Hope. The rent was $500 a year. Bigelow did not let Hope know when he bought the place, and when he did, and applied for the rent, Hope said he had paid $200 of it to Paxton. Bigelow said that would be all right, and he took Hope's note for the remainder, $300, of that year's rent. The Saturday before this trial he made a claim on Hope for the $200 of rent referred to, and of a note for $116 he held against Hope, and he said he had concluded to put them in suit. He continued: "I said I was satisfied he owed the rent, and I was determined to collect it. He said, I would if I could; he said it would be worse for Paxton if it was not settled as he wanted; that he would do all he could in the election suit. I said I did not care, that it was a matter of business with me."

On this evidence, from what I have already said about committees, I find the Reach committee was a body for whose acts the respondent is liable, and that Marsh, who is also a brother-in-law, was a member of it, having had a voters' list, and being entrusted by that body with the canvassing of or in his school district, and that he did canvass.

I find also that Mr. Shaw must be considered to have been, from his constant attendance at the Port Perry committee meetings, and of which he was very probably a member, to have been a member or in the same position as a member of that committee, and that the committee was one at which the respondent's recognized agent, Mr. Card, was present upon one occasion, and had

therefore knowledge of. It was presided over by Mr. Bigelow, the partner in business of the respondent. It was held in the same place where the respondent resided, and I have no doubt he had personal knowledge also of the existence of that body. I find also that Mr. Shaw aided actively in promoting the election, and to the personal knowledge of the respondent, and that he and Marsh were agents, or sub-agents at least, of the respondent, for whom and for whose acts he was and is responsible.

I am of opinion Hope's main story is quite true and correct; that is, "that he did tell Marsh he would not vote for Paxton if he did not get the claim settled." He swears to it positively, and Mr. Shaw expressly confirms him. Marsh denies that such language was used, but he admits that while Hope was pressing for an immediate settlement, Hope did say that Paxton might want his help at the election. I think he said more than that, and that Marsh heard it, for it was said to himself.

Mr. Shaw also says that Marsh wanted Hope's claim to lie over till after the election, but that both Hope and King said that "now was the time to have it settled, before the election."

The meaning of that all parties fully understood, which was that the coming on of the election was the pressure put on by Hope to have his claim settled, and that the other parties, to get the benefit of Hope's vote, were to remove his objection to voting for Paxton before the polling day.

Shaw says plainly "my interest was equally to save the costs and to save the vote," and he was also an agent of the respondent's, and taking a special part in the arrangement of that matter. I find that the facts show the settlement of that demand at that juncture, and in so great a hurry, with such special zeal for Hope's interest, after it had lain over for more than five years, neglected or resisted by all parties, Paxton, Marsh and Trounce, who had been repeatedly applied to by Hope for payment, was

brought about by Marsh and Shaw with the design and for the express purpose of securing the votes of Hope and his sons for the respondent, and which Marsh and Shaw knew could not be obtained upon any other terms. Shaw substantially admits that that was his purpose and interest. Marsh denies it; but I cannot take his mere statement as an answer against the evidence of Hope and Shaw, and against the facts of the case, and his own conduct. When his conduct is not consistent with his statement in some particulars, and cannot reasonably be made so by any explanation, I prefer to be governed by what he did, and by the time and incidents of his doing the act, to discover why it was he did do it.

And viewing the case in that way, and calling in aid the evidence of Hope and Shaw and the surrounding facts and circumstances, I have no doubt that the object and purpose of Marsh in getting that note from the respondent at the time it was got, was for the purpose of procuring and securing the votes of Hope and his sons for the respondent at the election; and I have no doubt he knew that Hope believed the note was being got for the same purpose, and that if it were so got before the polling day, that Hope and his sons would and were to vote for the respondent, but not otherwise.

I should say here that Hope has been contradicted by Phillips as to what was said in connection with the $20; which of them is telling the truth may be a question. Hope says he was referring to a different matter than the settlement of his demand and the claim against him for the rent, at the time he spoke to Phillips. It may be Phillips is in that respect more correct in his account of the conversation than Hope.

Hope also is contradicted by Marsh and by Shaw as to the threats they say he made at Walker's tavern to Marsh, to sue him if the claims were not settled by some given time, and which threats he denies. He is also contradicted by Mr. Bigelow, who says that Hope said if his claims were not settled it would be worse for Paxton, and

that he would do all he could in the election suit against Paxton; which statement Hope denies. He says it was Bigelow who said to him if he came down to give evidence it would be the worse for him.

I do not think the contradiction by Phillips of Hope, nor the contradiction by Marsh and Shaw of Hope, in the particular referred to, destroy Hope's credibility and veracity as a witness. There are other causes to which these contradictions can be assigned than to untruthfulness of character. Marsh is directly contradicted by Hope and Shaw in an important matter, and the surrounding facts confirm them, yet I do not for a moment impute wilful misstatements to Mr. Marsh.

Undoubtedly in cases of contradiction I must be more cautious in accepting as true the statements of a witness who has been so contradicted, but until I have lost all faith in him, I must not disbelieve him altogether.

I have so dealt with Hope, and in forming the conclusions I have come to in his case, I have sought and found confirmatory evidence in the testimony of Mr. Shaw, partly in that of Mr. Marsh himself, and very strongly in the accompanying facts and circumstances. There is still one matter of contradiction to be accounted for, that between Mr. Bigelow and Mr. Hope. Mr. Bigelow says that Hope said if his claim was not settled it would be worse for Mr. Paxton—that he, Hope, would do all he could against him at the election trial; while Hope says that it was Mr. Bigelow who said that if he, Hope, came down to the trial it would be worse for him.

The facts are that on the Saturday before the trial Hope and Bigelow had a conversation, and Bigelow made a demand on Hope for payment of a note for $116, which is no doubt a just claim, and also for an arrear of $200 upon a former year's rent, which latter sum Hope disputed, because he said he had before that, and before he had had any notice of Mr. Bigelow being his landlord, settled with Paxton, his former landlord. Mr. Bigelow had long before that time been told that very fact by Hope, and he had

accepted it when first told of it as true, and had allowed it to Hope as good payment by deducting it from that year's rent, and taking Hope's note for $300, the balance of that year's rent.

Hope never heard of this alleged arrear of rent being claimed until he began to press Paxton for payment of the note for $110, which Marsh got for him just before the election, and probably he thought the claim for rent was set up to overreach his claim upon the note.

It was upon that Saturday before the trial that Mr. Bigelow, the business partner of the respondent, declared to Hope he had concluded to put the rent (as well as the note for $116, which is not in dispute) in suit, and at that time Mr. Bigelow knew that Hope was required to attend this trial as a witness.

I think it is somewhat suspicious that Mr. Bigelow, the business partner of the respondent, at such a time should tell (I do not say threaten) Hope, a witness upon the trial against his partner, that he would sue him for a large claim of rent, which he, Bigelow, had himself settled for in full with Hope many months before that time, and I confess, if I am obliged to say whether it was Hope who threatened Bigelow it would be the worse for Paxton if his, Hope's, claim were not settled, or Bigelow who threatened Hope it would be worse for Hope if he, Hope, came down to give evidence against Paxton, that I shall hold there is quite as much, and perhaps more, reason for believing that Mr. Bigelow, who was advancing such a claim at such a time, and with a knowledge of Hope's position as a witness at that time, was the person who made the threat as or than that Hope was the one who made it.

I can see that Hope might have made it because of the claim, which he believed to be an unjust one, then made upon him, and as a mode of getting rid of it. There are views in favor of each of these two parties; but most assuredly it is not for what Mr. Bigelow has said that I should discredit or disbelieve Mr. Hope.

The result of my examination of the case is that upon all the charges above stated, excepting the second and third, the evidence has not been sufficient to maintain them.

I find also that the two charges with respect to the alleged bribery of Edward Cunningham and Joseph May, which I disposed of on the trial, also failed.

I may say I have no hesitation in finding the second charge fully proved against the respondent so far as the act of bribery was committed by Charles Marsh, his agent, but I acquit the respondent of all personal participation in it or knowledge of it. Whatever knowledge the respondent may have had of the nature of Marsh's act can rest on suspicion only, which can never, and especially in so serious a matter as this is, form the ground of an adverse judgment.

And I desire to say also, that while I determine the third charge against the respondent, I do so with less confidence than I dispose of the second charge, because there are not wanting *dicta* of Judges which are not unfavorable, to a considerable extent, to the view of the respondent, that Bruce was a mere volunteer for whom he, the respondent, is in no way liable; but that question in this case is of less consequence from the conclusion I have arrived on the second charge, that the election must be vacated; and I hereby determine that Thomas Paxton, the respondent, the member whose election and return are complained of, was not duly elected or returned for the reasons given upon and with respect to the second and third charges above set forth, and that the said election was and is void.

I shall give the petitioner the general costs of the cause. I shall direct the petitioner to pay the respondent his costs of the 4th, 6th, 7th, 8th, and 9th charges, and also of the charges made with respect to Edward Cunningham and Joseph May.

I shall allow no costs to either party of the 1st and 5th charges, and I shall direct the respondent to pay to the petitioner his costs of the 2nd and 3rd charges; and I

shall report to the Clerk of the Legislative Assembly (there being at present no Speaker thereof) that Donald Bruce, of the Village of Beaverton, was guilty of a corrupt practice, during the election, by the intimidation of George Wharen, an elector of the said Riding, as before mentioned, with respect to the third charge; and that Charles Marsh, of the township of Reach, was guilty of a corrupt practice during the said election, by the procuring for and delivery to Thomas Hope, an elector of the said Riding, the promissory note as before mentioned, with respect to the said second charge.

That no corrupt practice was committed at the said election by or with the knowledge and consent of either of the candidates thereat.

And that corrupt practices have not extensively prevailed at the said election, nor at all, so far as I have reason to believe, except as aforesaid.

I shall report also that many of the taverns in the Riding were open, and in many of the taverns of the Riding spirituous and fermented liquors were given and sold upon the polling day, and during the polling hours of that day, in violation of the 66th section of the Election Law of 1868.

From the above judgment both parties appealed to the Court of Appeal; the respondent against the decision of the learned Judge in (1) the Bruce-Wharen and (2) Marsh-Hope cases; and the petitioner against the decision in (1) the Leppard bribery, (2) the Hope bribery, and (3) Foley treating cases.

The appeal and cross appeal were argued before Draper C. J. A., Strong, Burton, and Patterson, JJ. A.

Mr. Hector Cameron, Q.C., for petitioner.

Mr. Hodgins, Q.C., for respondent.

The judgment of the Court was delivered by

BURTON, J.—This case comes up by way of appeal and cross appeal from the judgment of Mr. Justice Wilson.

On the appeal two questions are raised:

1st. Whether the respondent, through Donald Bruce, his agent, exercised undue influence on one George Wharen, a voter; and

2nd. Whether he was guilty of bribing one Thomas Hope through Charles Marsh, an agent.

The respondent contends that in neither case was agency established, and that, assuming the agency to be established, the act complained of in the first of the two charges was not within the 72nd section of the Election Law of 1868, and the act complained of under the second head was not bribery.

The learned Judge with some hesitation held the agency of Donald Bruce to be established; but I have not deemed it necessary to consider that question, inasmuch as I have been unable to convince myself that what is stated to have occurred is a corrupt practice within the 72nd section.

The evidence tends to show that Wharen was in arrears to the Crown for a lot of land, and it is contended that Bruce endeavored either to intimidate him or to influence his vote by persuading him that the Government would look sharply after those so circumstanced who did not vote for supporters of the Government.

No doubt it is the intention of the law that voters should exercise their franchise with the utmost freedom, that they should use their own judgments, and that no influence should be brought to bear upon them which would have the effect of interfering with this free exercise of judgment; and if, in a constituency composed largely of debtors to the Crown for Crown lands, an organized and general system had existed, leading the electors to believe that supporters and opponents of the Government would be differently dealt with, so as to create any ground of apprehension in their minds, I entertain no doubt that the common law would declare such an election to be a void election without any proof of agency, because it would be

carried on contrary to what the principle of the law is. But it is not shown in this case that any such general practice prevailed; and the question here is whether, assuming the agency to be established, the act was one of undue influence, in its proper statutory sense, of using any violence, or of threatening any damage, or of resorting to any fraudulent contrivance, to restrain the liberty of a voter, and so either to compel or frighten him into voting or abstaining from voting otherwise than in accordance with his own free will and judgment.

The Act applies not only to cases when the injury inflicted or threatened is wrongful or violent, but to cases where, although the party has a perfect legal right to do the act (if not done with a view to affecting the vote), the doing it does inflict harm upon the other side; still I apprehend it must be a threat of something which the party or the person he represents would presumably have the power to carry out. If, for instance, the Commissioner of Crown Lands had been the candidate, and his agents had made a representation of the kind ascribed to Bruce, or if such threat had been made by a local agent of the department, the voter might perhaps not unreasonably assume that such a threat might be acted on.

What occurred in this case was at most a mere *brutum fulmen*, if intended as a threat at all; it was one which neither the principal nor the agent had any means of enforcing. It appears that as a matter of fact Wharen was not intimidated, although that might not be material if what is alleged to have occurred amounted to a threat within the statute; but the words, as it seems to me, were at most but an expression of opinion upon a subject on which every one was competent to form his own judgment. Speaking for myself only, I am of opinion that it was not an act of intimidation or undue influence within the 72nd section. But it is unnecessary to decide the question, as we are all agreed that the other charge is fully sustained.

It was contended that as there was an actual legal debt, Marsh was merely carrying out what he was bound by law to do, and that his motive could not be inquired into.

I am not aware that there has been any express decision upon the point, but I should say that it is always open to inquire, under statutes of this nature, whether the debt was simply paid in accordance with the legal obligation to pay it, or whether it was in fact paid or secured in order to induce the elector to vote or refrain from voting.

In *Cooper* v. *Slade* (6 H. L. C. 746), on the argument in the House of Lords, Lord Brougham put this case: "Suppose a debtor to say to his creditor, 'If you will vote for A., I will pay you what I owe you,' would that be within the statute?" Lord Wensleydale adding: "It being a great advantage to have the debt paid without the trouble to bring an action to recover it."

If it be open to inquire into the motive, as I think it is, it is impossible to say that the learned Judge was not fully justified in holding that the motive which influenced Marsh was that of procuring Hope to vote at the election. Then, was there a gift of any money or valuable consideration in order to induce him so to vote?

The voter had for upwards of five years been endeavoring to procure payment of this debt without success. The learned Judge has come to the conclusion that he did receive valuable consideration, in the shape of Mr. Paxton's promissory note, in place of a claim which his original debtors insisted should be paid by Mr. Paxton, but which he disclaimed all liability for, and which had remained in that unsettled position for nearly six years. We cannot say that the learned Judge was wrong in coming to the conclusion that this note would not have been given unless with the view of inducing Hope to vote; and as we think the evidence of agency was ample to warrant the conclusion of the learned Judge, his decision should be affirmed and this appeal dismissed.

On the cross appeal it is urged that the decision of the learned Judge was erroneous in holding that the respondent was not proved to have been guilty of bribery in the Leppard case, in holding that the bribery of Thomas

Hope by the respondent himself was not proved, and that the treating by the respondent's agent, James P. Foley, at a meeting of electors assembled for the purpose of promoting the election of the respondent, had not been proved.

As to the first of these charges, the learned Judge reports the evidence of Leppard as unsatisfactory and unreliable, repugnant in itself and directly contradicted in some respects, and he declined to convict the respondent and subject him to such highly penal consequences as would follow an adverse decision upon such evidence. We see no ground whatever for differing from that view.

Upon the second point, the only evidence to show Paxton's connection with the transaction is that of Marsh, who, after referring to the conversation with Hope, says: "In the forepart of the following week I saw Mr. Paxton, and told him what Hope had said about putting me to costs, and I said I wished he would settle it, to save me being sued. I did not tell him of Hope's remark as to voting; Paxton said he calculated to settle it, and would if he knew the amount. I said it was about $110, and he then gave the note."

I am very far from saying that the case is not one of grave suspicion; but there is no reason, that I am aware of, why the general maxim should not apply, that in penal statutes questions of doubt are to be construed favorably to the accused; and although it may be said that the party charged here had an opportunity of purging himself by his own oath, if he chose to take the ground that the charge was not proved, and that he was not called upon to disprove it, it was competent for him to do so, subjecting himself to the risk of having his omission to do so commented upon by the opposing counsel. No doubt, the most was made of that omission, and the learned Judge, sitting also as a jury, has come to the conclusion that the evidence was not sufficient to satisfy him that the charge was brought home to the respondent, and he has acquitted him of all knowledge of or participation in it. It would be

too much in a quasi criminal case to ask us, under these circumstances, to reverse his finding.

It is not necessary to offer any opinion upon the Foley case, as the charge if established merely goes to avoid the election, but we may say that the evidence does not satisfy us that he was an agent *at the time* of the alleged treating.

(9 *Journal Legis. Assem.*, 1875-6, p. 14.)

NORTH WENTWORTH.

Before Chief Justice Draper.

Hamilton, *19th and 20th May, 1875.*

Before the Court of Appeal.

Toronto, *16th and 25th September, 1875.*

Robert Christie, *Petitioner*, v. Thomas Stock, *Respondent.*

Committees—Agency—Treating on polling day—Corrupt practice with Respondent's knowledge and consent—32 Vic., cap. 21, sec. 66 ; 36 Vic., cap. 2, secs. 1 and 3.

About a dozen of the electors met some time before the election and nominated the respondent as the candidate who should contest the election in the interest of the political party to which they belonged. The respondent accepted and acted upon the nomination. They met occasionally for the purpose of promoting the respondent's election, procured voters' lists, canvassed voters, and got reports on which they estimated their chances of success.

Held, that if they did not style themselves a committee, they had assumed the functions which usually devolve upon such bodies.

On the polling day, and during the hours of polling, the respondent drove up to a tavern at C., where he met one S., a member of the above-mentioned committee, and addressing him or the assembled people, said, " Boys, this is the first time I came to C. when I dare not treat, and some one will have to treat me." S. replied that he would treat, and, with the respondent and 30 or 50 people, went into the tavern, where S. treated some of the people, and the respondent drank with the rest.

Held, 1. That going into the tavern for the purposes of the treat, when the law directed that such tavern should be kept closed, and joining in and accepting such treat, was a literal as well as a substantial violation of the law, and a corrupt practice.

2. That the concurrence of the respondent in the commission of such corrupt practice made him liable to the disqualification imposed by the statute for "a corrupt practice committed with the actual knowledge and consent of a candidate."

The decision of *Gwynne*, J., in the *Lincoln case* (*post*), that tavern-keepers alone are liable for the violation of s. 66 of 32 Vic., c. 21, as amended by 36 Vic., c. 2, s. 1, not approved of.

Per Burton and Patterson, JJ. A.—The 2nd sub-sec. of s. 3 of 36 Vic., c. 2, applies equally to the elected and defeated candidates at an election; and, if found assenting parties to any practice declared by the statute to be corrupt, each of them is liable to the disqualifications mentioned in the statute.

The petition contained the usual charges of corrupt practices.

The facts of the case on which the election was avoided are set out in the judgment, and were substantially as follows: On the polling day, and between 2 and 3 o'clock in the afternoon, the respondent drove up to Davidson's tavern in the village of Carlisle, where he met one James Sullivan, who had been an active member of the organization which had nominated the respondent as their candidate. The respondent, addressing Sullivan or the assembled people, said, "Boys, this is the first time I came to Carlisle when I dare not treat, and some one will have to treat me." Sullivan said he would treat, and with the respondent and a number of people went into the tavern, and while there Sullivan treated some of the people; the respondent drank with the rest.

Mr. Bethune, for petitioner, contended that Sullivan was an agent of the respondent, and that his treating on polling day was a corrupt practice; and the respondent, being present and partaking of the liquor, was a consenting party to the infringement of the law. Under the present law, if a candidate is a consenting party to a breach of the law, agency need not be proved.

Mr. Thos. Robertson, Q.C., for respondent, contended that the respondent did nothing but partake of refreshment, and that act is not brought within the definition of a corrupt practice. There was no proof of Sullivan's being an agent of the respondent; in fact, he was not an agent, nor was he a member of the Conservative Association, by whom the respondent was brought out; nor was there any charge in the particulars of Sullivan's being guilty of a breach of sec. 66 of the Election Law of 1868.

DRAPER, C. J. A.—In the interval between the adjournment of the Court yesterday evening and the meeting

this morning, I carefully read and considered the whole evidence. The result at which I arrived in regard to the acts of the respondent and others on the polling day, and during the hours appointed for taking the polls at Davidson's hotel in the village of Carlisle, rendered it unnecessary, in my opinion, to determine any other of the charges advanced for the purpose of avoiding the election. My finding and my report to the Speaker will be limited to that one matter.

It will be convenient to begin by referring to the statutory provisions on which the charge of corrupt practices is founded. They are contained in the Ontario Statutes, 32 Vic., cap. 21, sec. 66; 36 Vic., cap. 2, secs. 1 and 3, sub-secs. 1 and 2.

1st. "Every hotel, tavern, and shop in which spirituous or fermented liquors or drinks are ordinarily sold, shall be closed during the day appointed for polling in the wards or municipalities in which the polls are held; and no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period, under a penalty of $100 in every such case."

2nd. "'Corrupt practices' or 'corrupt practice' shall mean bribery, treating and undue influence, or any of such offences as are defined by this or any Act of the Legislature, or recognized by the common law of the Parliament of England; also any violation of the 46th, 61st and 71st secs. of the Election Law of 1868, and any violation of the 66th section of such last mentioned Act during the hours appointed for polling."

3rd. "When it is found, upon the report of a Judge upon an election petition, that any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, the election of such candidate, if he has been elected, shall be void;" and further, when it has in like manner been found "that any corrupt practice has been committed by or with the actual knowledge or

consent of any candidate at an election, in addition to his election, if he has been elected, being void, he shall, during the eight years next after the date of his being so found guilty, be incapable of being elected," &c.

It will be seen, therefore, that the first provision above stated prohibits certain things, and subjects the persons who act contrary to the prohibition to a penalty of $100 in every such case. The second, among other things, makes things prohibited corrupt practices; and the third, in its first branch, avoids the election of a candidate found guilty of such corrupt practice, and, by the second branch, superadds a very severe personal disqualification.

The question I have to determine is, whether the respondent is guilty to the full extent, so as to be unseated and disqualified, or so far only as to be unseated, and this question is to be disposed of on the evidence taken on the trial.

Now, it is not disputed that the 66th section above quoted was entirely set at naught in both particulars. Davidson's hotel was not kept closed during the day appointed for polling, and whiskey and beer were both sold and given in that hotel within the limits of Carlislé. Davidson's evidence proves the house not altogether open, for there was no access proved to exist directly from the street into the bar-room, but entrance from the street into the dining-room was proved, and spirituous liquors and beer were passed from the bar into the dining-room. Then it was proved by Sullivan that, being outside the hotel, he saw respondent drive up, that respondent, addressing Sullivan or the people assembled, said something to this effect: "Boys, this is the first time I came to Carlisle when I dare not treat, and some one will have to treat me;" and Sullivan said he would treat, and, with respondent, went into the house, followed by a number of persons, variously estimated at from 30 to 50. Several of them drank, the respondent taking a glass of beer.

Surely no one can doubt that these facts constituted a breach of sec. 66, and under the subsequent Act of the

Legislature such breach was a corrupt practice. The respondent's attention had evidently been attracted previously to the law, which occasioned him to say he *dared not treat*, and this makes it the more remarkable that he should have so entirely overlooked or forgotten the prohibitory enactment as to having certain houses closed, and as to the sale and gift of liquors, etc. In reality, he acted like one who did not know that the law required that the house should be kept closed, and that liquors should not be sold by the tavern-keeper or given away by Sullivan or any other purchaser while the polling was in progress. I am compelled to attribute knowledge of the law to him; nor can I avoid the conclusion that he was a participant in its breach. He went into that house in order to accept a treat which his own remark shows he did not imagine would be limited to himself, and which was not so limited.

The whole evidence may be thus summarized. About a dozen of the electors of North Wentworth met together some time before the election for North Wentworth, to consult as to their course, they all being of similar political views. By them and others the respondent was nominated, and ultimately accepted the nomination. James Sullivan was one of their body. There was but slight evidence given of their proceedings until the polling day. It appeared that they were not personally summoned to meet—did not keep minutes of their proceedings, appointed no chairman—but as they met one another, they agreed to meet and adjourn their meetings from time to time; and it was argued, on these and similar grounds, that they did not constitute a committee—but there is no magic in that word. These parties united together for the common purpose of procuring respondent's election; they had some organization; they canvassed electors, procured voters' lists, and got reports on which they estimated their chances of success. They are the parties, so far as appears, whose nomination the respondent accepted and acted upon; and if they did not style

themselves a committee or committees, they seemed to have assumed the functions which usually devolve upon such bodies. Mr. Sullivan appears to have been an energetic member, under whatever name, in supporting the respondent. It is he who, in the respondent's presence, gives spirituous liquors and beer to some of the electors who were assembled on the polling day as respondent's friends, the respondent being present, with his silent consent and undeniable knowledge.

This was a corrupt practice by the express language of one of the statutes. It was committed, as I conclude, to help the respondent's election by one of his known supporters, and it was concurred in by the respondent, and, as I am willing to think, in forgetfulness at the moment of the law.

I do not found my conclusion on the question whether the respondent actually did drink any of the liquor or beer given by Sullivan, who bought from Davidson. But he was one of those who more or less actively concurred in a corrupt practice. He joined in going into the house which the law directed should be kept closed; he joined in accepting beer as a treat, or, in other words, as a gift—in a literal as well as substantial violation of the law, with a knowledge of the fact and assenting thereto. It is not as if the question turned on a violation of sec. 66, when he was prosecuted for the pecuniary penalty, and might say he was not within the law, having neither sold nor given. Until those acts were declared a corrupt practice the election was not avoided, but since that declaration, the effect of the 66th section is extended. The concurrence in the commission of the prohibited acts makes the candidate responsible for the newly imposed consequence.

I must report to the Speaker accordingly.

From this judgment the respondent appealed to the Court of Appeal.

Mr. J. Hillyard Cameron, Q.C., *Mr. R. A. Harrison*, Q.C., *and Mr. Thos. Robertson*, Q.C., for appellant.

Mr. Bethune for petitioner.

HAGARTY, C. J.—The facts, as detailed by testimony friendly to the appellant, are very clear. Davidson's tavern was open for the sale of liquor during polling hours, although the form of closing the bar was observed. This was in direct violation of the statute. Several persons are assembled there. The appellant drives up, declares that he cannot and will not treat, and that some one must treat him. His supporter, Sullivan, accordingly does so; appellant takes a glass of beer, and two or three others join in Sullivan's treat.

It is forcibly argued for the appellant that these facts do not show a corrupt practice committed "by or with the actual knowledge and consent of the candidate." First, it is urged that the violation of 32 Vic., cap. 21, sec. 66, can only mean an incurring of the penalty of $100 thereunder, and that the appellant cannot come within its provisions—(1) in the strictest construction of it, that it only applies to the innkeeper; and (2) on the wider construction, that he was not either the seller or the giver of the liquor. Again, that sec. 3 of the Ontario Act of 1873 is divided into two sub-sections which must be read together, and that the corrupt practice brought home to the candidate's knowledge and consent, in sub-sec. 2, must be read as only the corrupt practice mentioned in the preceding sub-sec. 1, "committed by any candidate at an election, or by his agent;" that the facts before us may show a corrupt practice in the innkeeper, but that the latter was not the appellant's agent, or that even if a corrupt practice in Sullivan in giving the liquor, the latter was not appellant's agent.

It is pointed out that section 46 of the Act of 1871 for which the existing enactment has been substituted, provides that when any corrupt practice has been committed by or with the knowledge and consent of any

candidate, his election, if elected, shall be void, and he shall be disqualified, &c. And an argument is founded on the effect of the two sub-sections substituted for this 46th section.

The legal construction of the existing clauses urged by the appellant seems to have commended itself to the well-considered judgment of my brother Gwynne in a very recent case (*Lincoln case, post;* s. c., 12 Can. L. J. 161). I feel very great difficulty in bringing my mind to the same conclusion.

We have not much authority to guide us. It seems to me that we must simply try to satisfy ourselves as to the meaning of the words used by the Legislature. We have to ask ourselves what was considered the wrong to be remedied; next, the remedy to be applied. The wrong was very plain—the keeping open of public houses, and selling and giving away of liquor on polling days.

For the decision of this case we are not necessarily to decide some of the extreme cases suggested in argument, such as the drinking of a glass of beer at the private table of any person (not an innkeeper) at which an ordinary guest might be present and partake of such drink as the common beverage used by the family—the meal and the presence of the guest being wholly unconnected with any election or canvassing object. I am quite prepared to express an opinion on this point whenever it may be necessary to do so.

To confine the section wholly to the innkeeper would prevent its reaching the case of a private person who might on the polling day broach casks of ale or spirits for the public use of all comers. It might perhaps not be easy to bring such conduct within the grasp of the law as bribery, or to connect the person with a candidate as an agent, or perhaps even as an avowed supporter of any candidate, and yet the mischief caused by such conduct might be enormous.

It is to be remarked that this clause appears in a statute that makes no provision against treating, except

in the one case as to meetings called to promote the election.

We must always, in my judgment, try to construe a statute in the light of common sense, and always give full credit to the Legislature to have used words (not being words of art or of technical significance) in their ordinary meaning, as they would be naturally understood by those whose conduct they are intended to regulate.

There is a celebrated passage as to the construction of statutes in Plowden, 204: "The judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the intent was particular. . . . The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

Sir George Turner, L. J., cites this passage in *Hawkins* v. *Gathercole* (6 De Gex, M. & G. 21), saying, "I have selected these passages as containing the best summary with which I am acquainted of the law upon this subject. . . . . We have to consider not merely the words of the Act, but the intent of the Legislature to be collected from the cause and necessity of the Act being

made, from a comparison of its several parts, and from foreign, that is, extraneous, circumstances, so far as they can justly be considered to throw light upon the subject."

Sir J. L. Knight Bruce, L. J. (p. 19), speaks of the propriety of reading the Act "with a due degree of attention to the nature of the subject certainly embraced by it, to the state of our institutions and jurisprudence when the Act was passed, to the judicial construction that other statutes have by approved decisions received, and to the universally recognized canons by which the interpretation of laws is regulated."

The case is approvingly noticed in *Cope* v. *Doherty* (2 De G. & Jo. 614), before the Lord Justices in 1858.

In the recent *South Essex case* (*ante* p. 235; s. c., 11 Can. L. J. 247), the learned Chancellor held that the partaking by Alfred Wigle, whom he found to be an agent of the respondent, of a treat given by J. McQueen during polling hours in Lovelace's tavern, was a corrupt act within the statute, which would avoid the election.

Here the candidate himself partakes of a treat under the same circumstances, instead of his agent. If the *South Essex case* were rightly decided (on which I express no opinion), it would seem to be impossible to uphold either this election or the non-disqualification of the candidate. If it is a corrupt act sufficient to avoid the election by the agent accepting the treat, it must be equally so in the principal, with the fatal addition of knowledge and consent. I think the present case raises a much more formidable question than that before the learned Chancellor.

It is pressed upon us that the evidence shows a direct participation by the candidate in what the Legislature has pointedly declared to be a corrupt practice—that if it be a corrupt practice in Davidson to keep his tavern open and to sell liquor during polling hours, and the candidate knowingly goes thereto and drinks thereat, it is impossible to say he is not a consenting party to a corrupt practice.

A case was suggested in the argument. We will suppose Davidson closing his tavern according to law, and refusing to give or sell drink to any one. The candidate appears and tells him not to act foolishly, but that it would be better to let people have drink who might desire it. Thereupon the tavern is opened and the candidate accepts a treat from a friend. It was suggested that in such a case the candidate would be responsible, because he would thereby make the tavern-keeper his agent. I do not see that any question of agency would arise. The tavern-keeper acts on the suggestion or the reasoning of the candidate, but he does not thereby become his agent in any sense intelligible to me. If the candidate had in like manner suggested to all the other innkeepers in the constituency to do the same thing, I still do not think he would thereby make them his agents, but it would be most difficult not to hold that therefore the corrupt practice, which is undoubtedly committed by them, would not be so committed with his knowledge and consent.

In short, the only escape that I can see for the appellant from the stringent provisions of the Act, must be our adoption of the argument that the corrupt practice committed with his knowledge and consent can only mean a corrupt practice actually committed by himself or by his agent.

I do not see what right we have thus to narrow the very clear words of sub-sec. 2. I do not consider that we in any way infringe on the rule as to the strict construction of statutes creating penalties and disqualifications. If we adopt the appellant's construction, I very much fear that we should be defeating the clear intent of the Legislature, as evidenced by the plain language used.

The sale of the liquors at the tavern during polling hours is declared to be a corrupt practice. The tavern keeper—the offender against the law—is not shown to be the candidate's agent. The latter is shown to have known of the law being broken, but nothing is proved

to indicate his approval or consent thereto. But the moment we find him drinking at the offending tavern—perfectly well aware that it ought to have been closed instead of being open—then it is beyond my comprehension how I can place such a construction on the words as to hold that the corrupt practice was not committed with his knowledge and full privity and consent.

It was urged on us that the Legislature could not have intended to inflict such a penalty as eight years' disqualification for Parliamentary honors or municipal offices, or offices in the gift of the Crown, for this slight breach of the law. We have considered the case in this aspect with most painful attention.

When a severe punishment is made equally applicable to a case like the present—the acceptance of a glass of beer from a friend at a house illegally kept open—as to a case of the most flagitious and unprincipled bribery, the argument can never be unexpected that the Legislature could not have so intended the law to be. It is a cardinal principle in every good law that it should commend itself to the approval of all well-disposed citizens. It is quite possible that at the passing of this enactment--honestly designed to remedy great evils—the applicability of its severest penalties to a case like the present may not have been directly anticipated.

I agree in the conclusion of the learned Chief Justice, that the appellant acted at least in forgetfulness of the law.

It is for the Legislature to deal with these cases. We can only strive to interpret their meaning by the ordinary rules of construction.

STRONG, J., concurred with the judgment delivered by the Chief Justice of the Common Pleas.

BURTON, J.—I see no way of avoiding the conclusion at which the learned Chief Justice and my brother Strong have arrived. One not unnaturally feels a repugnance to give a decision, the result of which is to inflict, for so slight an infraction of the law, so harsh a penalty upon

a candidate, who, upon the evidence, appears to have been anxious to conduct the election fairly and in accordance with law. The Legislature probably never contemplated the occurrence of such a case as the present, and it is not unreasonable to assume that, had their attention been drawn to it, they would not have visited such an infraction of the provisions of the statute with the same penalties as are aimed at the more grave and disreputable offences of bribery, intimidation, and corrupt practices of that nature. We have, however, to interpret, not to make the laws; and with every anxiety to relieve the appellant from the penal consequences which the decision of the learned Chief Justice of this Court has exposed him to, I can come to no other conclusion than that that decision is a correct one.

We may assume, for the purpose of the present decision, that the only person who is liable to the pecuniary penalty affixed to an infraction of the 66th section is the hotel, tavern or shop-keeper who, in violation of that section, sells or gives to any person spirituous or fermented liquors or drinks within the limits of the municipality during the day appointed for polling. Previously to the Act of 1873 that was the only penalty provided; but that Act in addition makes any violation of it during the hours appointed for polling a "corrupt practice."

Assuming still that the only person who can be said to be acting in violation of the 66th section is the hotel or shop-keeper, and that he alone is guilty of the corrupt practice, by selling or giving liquor during polling hours, I do not see how it is possible to avoid the conclusion that this act, which is, without reference to the intent or motive, declared to be a corrupt act, having been committed with the actual knowledge and consent of the appellant, not only avoids the election, but in addition subjects him to the penalty of disqualification for the period named in the statute.

It was very ingeniously argued that the 1st and 2nd sub-sections of section 3 must be read together; that the

1st sub-section declares that the election should be avoided *for any corrupt practice committed by the candidate himself or his agent;* and that the 2nd sub-section imposes, *in addition* to the avoidances so declared by the 1st sub-section, disqualification when the corrupt act which so avoids the election is done by or with the knowledge and consent of the candidate; but the argument is, to my mind, more ingenious than sound.

Under the 46th section of the Act of 1871, any corrupt practice committed by the candidate, or with his knowledge and consent, avoids the election, and disqualifies the candidate; but no provision is thereby made with reference to corrupt practices by agents without the candidate's knowledge; but the repealing Act of 1873, as I read it, in the 1st sub-section avoids the election for any corrupt practices either by the candidate *or his agent*, whether such act of the agent was committed with or without his knowledge.

And then the 2nd sub-section declares that if *any* corrupt practice—not *such* corrupt practice as under the 1st sub-section would avoid the election, but any corrupt practice—has been committed by (the candidate) or with the knowledge and consent of the candidate—then, in addition to the avoiding of the election (if he has been elected), he shall be subject to the disqualification mentioned in that sub-section.

To give effect to the contention of the appellant, we should have to read the sub-section as if the words "the candidate" were inserted after "by," and the words "his agent" after "or," so as to read, "any corrupt practice has been committed by the candidate or his agent with the knowledge and consent of the candidate." But why should we be called upon to take any such liberty with the plain language of the section, apart from the disqualification. There is much good sense in the Legislature declaring that a tavern-keeper shall keep his bar closed, and shall be subject to a penalty for not doing so, and

that a candidate who encourages him to break the law shall thereby avoid his election.

There are many other corrupt practices, besides the violation of the 66th section, which would not, unless committed by an agent, avoid the election; and yet it is manifest that if they were done with the knowledge and consent of the candidate, they would—and rightly so—have that effect, and would also have the effect of disqualifying him.

Besides, the 2nd sub-section is not confined to the candidate *who has been elected*, but applies equally to the defeated candidate, who, if found to have been an assenting party to this or any practice declared by the statute to be corrupt, is rendered ineligible to be elected, and to the other disqualifications mentioned in the statute.

The corrupt practice in this case was admittedly committed by Davidson, and was so committed with the actual knowledge and consent of Mr. Stock; and unless we are to import words into the 2nd sub-section which will entirely alter its plain and natural meaning, it is impossible, in my opinion, to hold that the decision of the learned Chief Justice is erroneous. For my part, I think no other rational conclusion could be arrived at, and that the appeal should be dismissed.

PATTERSON, J.—The facts which, in my judgment, are material to the decision of this case, are not disputed.

There is no doubt that Davidson, a tavern-keeper at Carlisle, violated sec. 66 of the Act of 1868, 32 Vic., cap. 21, by selling and giving spirituous and fermented liquors and drinks to persons in his tavern on the polling day. There is no doubt that this was a corrupt practice in Davidson, under the Act of 1873, 36 Vic., cap. 2, sec. 1. There is no doubt that this corrupt practice was committed by Davidson with the actual knowledge and consent of the appellant, who was one of those who received the liquor or drink, whether he invited the others in and treated them, as some witnesses say, or was treated him-

self along with the others by Sullivan, as it is put by Sullivan, and by the appellant himself.

The question is whether, under these facts, the appellant's election is avoided, and himself disqualified under sub-sec. 2 of sec. 3 of the Act last referred to.

The contention for the appellant is that sub-sec. 2 only applies when the candidate himself, or *his agent* with his knowledge and consent, commits a corrupt practice. It is argued that as sub-sec. 1 makes void the election by reason of any corrupt act committed by a candidate, or committed by his agent, either with or without the knowledge of the candidate, and as sub-sec. 2 does not say in direct words, as was said in sec. 46 of 34 Vic., cap. 3, that a corrupt practice committed by or with the knowledge and consent of the candidate *shall make his election void*, and also disqualify him, but merely says that, *in addition to the election being void*, he shall be disqualified—it must be read as saying, that in addition to the election being void—*if under sub-section* 1 *it would be void*—the candidate shall be disqualified; and that unless the election is avoided by sub-section 1, there is nothing in sub-section 2 either to avoid the election or disqualify the candidate. Besides hearing the argument addressed to us in this case, I have had the advantage of reading that part of the very ably argued judgment of Mr. Justice Gwynne, in the *Lincoln case* (*post*), in which he discusses the construction of sub-section 2, and takes the same view which has been urged upon us, although I believe he decided the case on grounds which did not depend on his reading of this sub-section. With the greatest respect for the ability and authority of that learned Judge, and fully appreciating the reasoning which he so forcibly employs, I am unable to agree with him in the construction of the statute.

In 1871, the particular offence now in question had not been declared to be a corrupt practice; but section 3 of the Act of 1871 defined corrupt practices as including bribery and undue influence, and illegal and prohibited acts in reference to elections, or any of such offences as defined

by Act of the Legislature. Under this definition many acts were included which were not necessarily committed by either the candidate or his agent.

Then section 46 of that Act, which declared that where it was found by the Judge that any corrupt practice had been committed by or with the knowledge and consent of any candidate at an election, his election should be void, and he should be disqualified, evidently applied to avoid an election and disqualify the candidate, by reason of the commission by any one, whether his agent or a volunteer, of any corrupt practice with the knowledge and consent of the candidate. What was not provided for by that Act was the avoidance of the election in case the agent, without the knowledge or consent of the candidate, committed a corrupt practice. This omission has been supplied by sub-section 1 of section 3 of the Act of 1873; and the object of passing this section 3 probably was to supply this omission.

Having regard to the course of legislation with respect to purity of elections, which has tended constantly towards greater strictness in the provisions for repressing every act and contrivance by which the perfect freedom and honesty in the exercise of the franchise may be interfered with; and this policy being distinctly apparent in several of the provisions of the Act of 1873, particularly in the extension of the definition of corrupt practices by sec. 1, there is no reason to suppose that the Legislature intended that any election which would have been avoided under the Act of 1871 should stand good under the Act of 1873; or that while a new ground for avoiding an election was added, viz., when an agent, without the candidate's knowledge or consent, committed a corrupt practice, it was intended to declare that a corrupt practice, committed with the knowledge and consent of the candidate, but by one who was not his agent, should no longer either affect the seat or work any personal disqualification.

It would require language very clearly enacting such a change to have the effect contended for. We must not

regard the question as relating only to the selling of liquor at taverns. It extends to bribery, undue influence, and all other prohibited acts which, according to the contention of the appellant, may now be committed or practised by volunteers, with the knowledge and consent of the candidate, without any further risk than the risk of destroying the vote that is influenced, and incurring the pecuniary penalty. If it is answered, that by the candidate's consent the volunteer becomes *ad hoc* an agent, so does the tavern-keeper.

The contention is founded on the assumption that the words in sub-sec. 2, "in addition to his election, if he has been elected, being void," do not carry with them a declaration that the election shall be void, and that there is nothing else in the sub-section which has the effect of avoiding the election.

Let us test this by reading section 3 as applying to a defeated candidate. He will not be touched by sub-sec. 1, as he has not been elected; and when we simply omit from sub-sec. 2 the words which do not concern him, viz., "in addition to his election, if he has been elected, being void," every word that remains is perfectly applicable to him. There is no doubt of his disqualification by reason of a corrupt practice being done with his knowledge and consent.

If it is still urged that the first sub-section, though not in terms affecting a defeated candidate, must nevertheless be read with the second, or that the second must be read in the light of the first, as if the words were, "by the candidate or *by his agent*, with his knowledge and consent," I answer that instead of importing into sub-section 2, words which cannot be so introduced without doing some violence to the structure of the clause, it will be much more in accordance with the spirit and object of the Act, if any change of reading is to take place, to read the first sub-section by a slight transposition, as if worded thus: "When it is found . . . . that any corrupt practice has been committed at an election by any can-

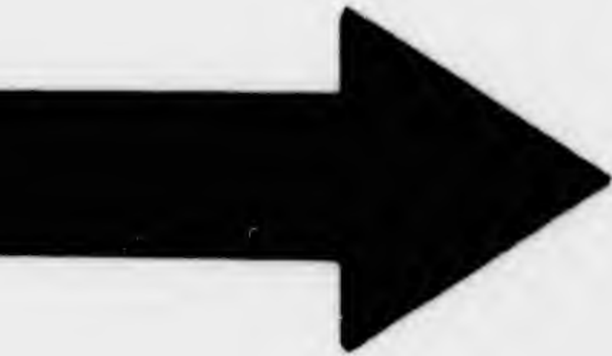
didate *who has been elected*, or by his agent, whether with or without the actual knowledge or consent of such candidate, the election of such candidate shall be void," which in no way changes the effect of the sub-section; while as it seems to me, it removes any pretence for modifying the reading of the second sub-section by any reference to the first, at all events as far as the defeated candidate is concerned.

Then, is a defeated candidate to be disqualified on grounds which do not affect a successful candidate? The sub-section cannot be so construed. And if we read the disqualifying clause, we find that the candidate is made incapable not only of "being elected to," but "*of sitting in*, the Legislative Assembly" "during the eight years next after the date of his being so found guilty"—a provision which of itself vacates the seat without the aid of the preceding part of the sub-section.

I do not, however, see any necessity for resorting to any subtlety of construction. The plain words of the section are, in my opinion, easily intelligible as they stand—the natural meaning being that a candidate, if elected, shall lose his seat in case a Judge reports that any corrupt practice has been committed by him or his agent: that if a candidate commits or consents to the commission of any corrupt practice, he shall be subject to the penal disqualifications, which, if he has been elected, include, but are not confined to, the vacation of his seat.

Appeal dismissed with costs.

(9 *Journal Legis. Assem.*, 1875-6, p. 12).



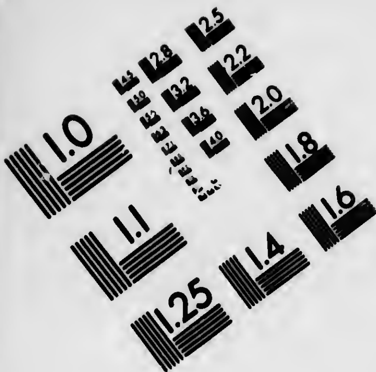
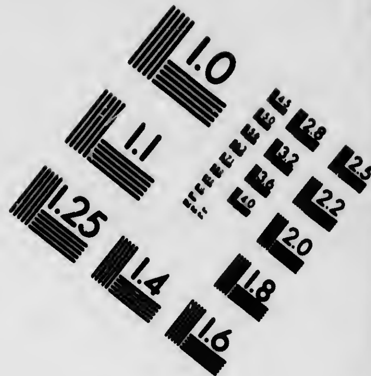
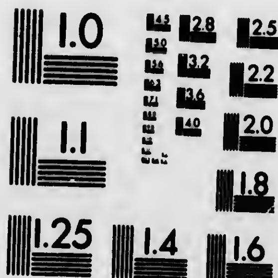
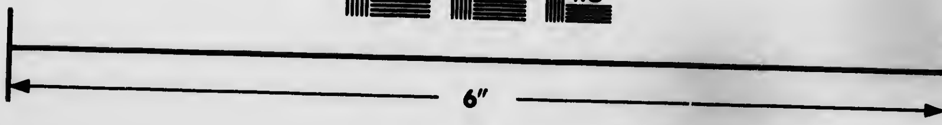



IMAGE EVALUATION TEST TARGET (MT-3)

Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

NORTH GREY.

BEFORE MR. JUSTICE GWYNNE.

OWEN SOUND, *29th June and 2nd July, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *18th and 25th September, 1875.*

THOMAS BOARDMAN, *Petitioner*, v. THOMAS SCOTT, *Respondent.*

Political association—Agency—32 Vic., cap. 21, secs. 61-66—Treating a meeting of electors—Treating during polling hours.

The fact of a political association putting forward and supporting a particular candidate does not make every member of the association his agent; but the candidate may so avail himself of their services in canvassing for him and promoting his election, as to make them his agents.

One W., a member of a political association, treated the members of the association present at a meeting in a tavern.

Held, That the members so present were electors assembled to promote the election of the respondent within s. 61 of the Election Law of 1868, and that such treating was a corrupt practice by W.

One M., the reeve of a township, exerted himself strongly in favor of the respondent, to whom he was politically opposed, and against the other candidate, and attended meetings where the respondent was, and spoke in his favor. The reason for his supporting the respondent and opposing the other (ministerial) candidate, with whom he was politically in accord, was, that the ministry of the day had separated the township of which he was reeve from the Riding. He was annoyed and indignant at this separation, and announced his intention of using all his influence against the ministerial candidate. The respondent asked M. to attend a public meeting, which he did; and at another meeting which he attended, M. stated (but not in the respondent's hearing) that he was acting there on the respondent's behalf. M. was once in the respondent's committee-room, and signed and circulated circulars issued by the respondent's friends.

Held, That the question of agency being one of intent, the respondent, under the circumstances, never conferred upon M. the authority, nor did M. accept the delegation, of an agent for the purposes of the election.

The respondent, during polling hours on the polling day, met one P., a supporter of the opposing candidate, and told him he would like a drink; and both of them, not thinking it illegal, went to a tavern, and the bar being closed, P. treated the respondent in the hall of the tavern.

Held by the Court of Appeal (reversing *Gwynne*, J.), That the receiving of a treat by the respondent during the hours of polling was a corrupt practice and avoided the election.

Semble, per Gwynne, J., that as to the seller or giver of the treat, the only person liable to the penalty of $100 would be the tavern-keeper, as the statute does not authorize two penalties for the same act.

The petition contained the usual charges of corrupt practices.

Mr. J. K. Kerr for petitioner.
Mr. M. C. Cameron, Q.C., for respondent.

The cases relied upon by the counsel for the petitioner at the close of the evidence, as sufficient to invalidate the election of the respondent, are stated in the judgment.

GWYNNE, J.—I propose to deal with these heads of complaint, upon which, after hearing all the evidence, the petitioner, through his counsel, rests his case, in a different order from that in which they were taken, and I shall deal lastly with the most serious, involving a grave charge, affecting not only the conduct and character of the respondent, but his civil status for a period of at least eight years, if the charge is established.

No duty can be more painful, and sometimes more difficult, for a Judge to discharge than that of estimating with discrimination and with due regard to the interest of the public on the one hand, and to that of the accused on the other, the proper weight to be given to evidence in support of, or in refutation of, charges of personal bribery. There are so many things to be considered. We must be careful not to be too hasty in rejecting the accusatory evidence as coming from a tainted source, for in cases of this kind it is frequently by the recipient of the bribe alone that the offence can be proved. Of the general character of the accuser we frequently know little. Although the recipient of a bribe, his truthfulness may be as reliable as that of the accused, who always has a strong interest to maintain his position, even at the expense of his veracity; but again, the accuser may be a person of such a character and habits as to make it difficult to place implicit confidence in his statements, although it may be impossible to adduce evidence such as the law requires to impeach the witness as unworthy of belief. We must, therefore, in all these cases scan with care all the surrounding circumstances, for the purpose of determining upon which side the truth lies, namely, whether upon that of him who, while accusing another,

accuses himself also, or upon that of him who asserts only his own innocence. Every case must depend upon its own circumstances; the manner of the witnesses as well as the matter of their evidence must be diligently noted; and after all, all that a judge can do is to express the honest conviction which the whole evidence and bearing of the witnesses have impressed upon his mind.

First as to the charge of corrupt practices committed by George Wright, in treating at meetings of committees in his own tavern. That a candidate may so avail himself of the services of members of a political association, in canvassing for him and promoting his election, as to make them his agents, for whose acts he shall be responsible, there cannot, I think, be any doubt; but nothing could be more repugnant to common sense and justice than to hold that because a political association puts forward or supports a particular candidate, therefore every member of that association becomes *ipso facto* his agent. The meetings which took place at Wright's tavern were of members of an association called the Liberal-Conservative Association. None of the mem[illegible] so meeting were members of the respondent's com[illegible]e. A convention, as it is called, of that association had put forward the respondent as the person recommended to the support of the members of the association. What was done at these meetings, or for what particular purpose they were assembled, did not very clearly appear; it may be admitted that the members of the association who assembled at Wright's were electors assembled to promote the election of the respondent within the 61st sec. of the Act of 1868 as amended by the Act of 1873, so as to make Wright himself guilty of corrupt practices in supplying drink to them at or immediately after their meetings; but they were not, that I can say, in any sense the agents of the respondent, or in any way authorized by him, nor does it appear from anything in the evidence that he had any knowledge of their meeting. The evidence shows that when the respondent had a meeting himself at Wright's,

there was no treating within the meaning of the 61st section, and I can therefore arrive at no other conclusion upon this head than that it is not proven, in so far as the respondent is concerned, or so as to affect him; although, as affects Wright himself, he has sufficiently admitted the charge to subject him to being reported as having been guilty of a violation of the section referred to.

As to the corrupt practices charged as having been committed by Dr. McGregor at Desborough, Chatsworth and Williamsford (although whether or not there was treating by him at Chatsworth does not appear to be clearly established), there is, I think, sufficient established to subject *him* to all the consequences annexed to the violation of the 61st section of the Act; but whether or not the respondent is to be affected by his conduct depends upon whether Dr. McGregor was or was not an agent of the respondent, for whose conduct the latter is to be held responsible.

It has been in different cases said that no one can lay down any precise rule as to what will constitute evidence of being an agent. Each case must depend upon its own circumstances. Definitions may be attempted, but none can be framed applicable to all cases. "It rests with the judge," as is said in the *Wakefield case* (2 O'M. & H. 103), "not misapplying or straining the law, but applying the principles of law to changed states of facts, to form his opinion as to whether there has or has not been what constitutes agency in these election matters." We have, however, the opinions and sayings of some very learned Judges to guide us in arriving at a just decision, and first I may place the observations approved by Keogh, J., in the *Sligo case* (1 O'M. & H. 301), as a rule of general application, namely, "that the evidence ought to be strong, very strong, clear and conclusive of agency before a judge allows himself to attach the penalties of the Corrupt Practices Prevention Act to any individual."

The language of Baron Channell in the *Shrewsbury case* (2 O'M. & H. 36), and of Mr. Justice Mellor in the *Bolton*

case (2 O'M. & H. 140), is also instructive. The former says, "Canvassing will only afford premises from which a judge discharging the functions of a jury may conclude that agency is established;" and again he says, "I wish it to be understood how far, in my opinion, from mere canvassing those acts must be from which you may infer that kind of agency which is to fix the candidate with responsibility for the act of a person acting in his behalf." And Mr. Justice Mellor says, "The fact of a man having a canvass-book is only a step in the evidence that he is a canvasser *authorized by the candidate's agents;* if you want to go further call the canvasser, because the mere fact of a man having a canvass-book and canvassing, cannot affect the principal *unless I know by whom the man was employed.* There is nothing more difficult or more delicate than the question of agency; but if there be evidence which might satisfy a judge, and if he be conscientiously satisfied that the man *was employed to canvass,* then it must be held that his acts bind the principal. I should not, as at present advised, hold that the acts of a man who was known to be a volunteer canvasser, *without any authority* from the candidate or any of his agents, bound the principal."

The question, as it seems to me, may be said to be one of intent. Did the candidate depute and authorize the person to be his agent, and did the person so authorized accept the deputation? If so, to what extent; namely, was it for the performance of a special isolated act, or for a few special acts, or was the appointment as agent generally, but with powers confined to a limited district, constituting part only of the electoral division, or was the appointment as agent general, extending over all parts of the electoral division? For upon the nature and extent of the authority conferred and accepted must depend the nature and extent of the liability of the principal. What the nature and extent of the agency is, may be established by direct positive evidence, or may be inferred from the acts and conduct of the parties; but all inference is ex-

cluded if the evidence ignores any intention upon the part of the parties either to confer or accept authority, and at the same time shows with reasonable certainty that acts, which in certain events might be sufficient to warrant the drawing an inference of an authorized agency having been created, are attributable to or explicable by other influences affecting the mind and conduct of the party alleged to be an agent in the performance of the acts relied upon as establishing the agency. In such case there is no agency, and the party assumed to be a principal cannot be affected by the acts of the other.

Now, in the case of Dr. McGregor, the facts may be briefly stated to be, that having heretofore been a member of the party to which the respondent had been always opposed, and being a public man of considerable importance and public influence in the township of Holland, recently by Act of Parliament separated from the North Riding of Grey, and being very much annoyed and indignant, upon public grounds or otherwise, with the separation of his township—of which he had been just recently elected reeve—from what he conceived to be its geographical connections, he resolved to use all his influence to oppose the ministerial candidate for this Riding. He publicly announced his intention of so doing, as I gather from the evidence, at the close of the meeting at which the nomination took place, or I should say previously, for some of his former friends seem upon that occasion to have called him a turncoat, which led to some warm altercation.

The respondent formed a committee to act as his agents to promote his election. Dr. McGregor was not one, nor does he appear to have been ever asked to be one. It is relied upon, that upon one occasion he was in the respondent's committee-room; but the evidence shows that this was for the purpose of consulting his local knowledge as to the most suitable places at which to call public meetings of electors in his neighborhood, having regard to the then condition of the roads—the great depth of snow rendering

most places inaccessible. He also was referred to in a printed circular as a person, with others, capable of refuting and proving to be untrue certain charges which had been made by the opposing candidate's friends, in a paper printed and circulated by them against the respondent, and he may perhaps have signed the paper for the purpose of testifying his willingness and his ability to refute the charges. He took also some of these circulars into the neighborhood where he resided. An honorable man may surely express his willingness to refute, if in his power to do so, false charges made by one candidate or his friends against the other, without being held to be the agent of the latter.

Upon one occasion the respondent, when passing through Chatsworth, where the Doctor resides, asked him to come to a public meeting convened at Desborough. True, the Doctor was not an elector in the Riding, but he was a public character in the adjoining township, and had, as the respondent no doubt knew, expressed his determination, as a public character, to take a very serious part in this election. The respondent does not appear to have asked the Doctor to come to the meeting to speak upon his behalf. He thought perhaps that it was very likely he would speak if he should come, and that if he should speak, the subject of his oration would be the condemnation of the ministerial candidate, and the running sore which, for the present at least, had alienated him from his party. The respondent, indeed, very probably thought that the Doctor could not and would not stay away, and it may be conceded that he was not unwilling to derive whatever benefit should result to him as the natural consequence of this alienation. The evidence has satisfied my mind that the respondent's asking the Doctor to go to the meeting had very little influence upon him, for the Doctor confesses, I think beyond all doubt—at least this is the impression he conveyed to my mind—that he had mounted a hobby of his own which was very high mettled, and from which he had no intention to dismount

until he should either fail or succeed in effecting the object for the time being nearest to his heart, namely, damaging as far as he could the ministry that had withdrawn his township from the Riding by the defeat of the candidate who had been put forward in their interest; and I have no doubt—at least such is the impression left upon my mind—that he never entertained the idea of merging his own independent quarrel on behalf of the township of which he was reeve, and which he regarded as a matter of grave public moment, in the mere agency of an individual, nor do I think the respondent had any idea that he had enlisted the Doctor in the capacity of an agent. Such an idea, I have no doubt, never entered the mind of either the one or the other.

It is said that at the Chatsworth meeting, which was held in the limits of the Doctor's own township of Holland, he, in the presence of the respondent, stated that he was acting there on the respondent's behalf. Now, with respect to what actually took place there, there is much discrepancy of opinion. The gentlemen opposed to the Doctor do not themselves agree as to what did take place, one thinking the Doctor's remarks were confined to the particular act of insisting to know how many of the opposing candidate's friends intended to speak, for they seemed to be numerous, before they should proceed further, and that he made this demand on behalf of the respondent; others attributing a wider signification to his words, namely, that he was there attending the meeting on the respondent's behalf. The Doctor himself says, that what he said was, that the meeting was being held in his own township of Holland, of which he was reeve, and that therefore he had a right to interfere. The respondent says that he was in and out of the room, and that he did not hear the Doctor make use of any such expression as that he was interfering upon his, the respondent's, behalf, or that he was there upon his behalf. All admit that there was great noise and confusion made upon the Doctor's interference, so that I can well conceive it very

possible that no one can very accurately tell us what was in fact said; but assuming that the Doctor did make use of the language attributed to him, in the sense strongest against the respondent, I can well conceive that in view of the position in which the respondent found himself outnumbered by the friends of his opponent, he may well desire to avail himself of the powerful aid of the Doctor in that particular emergency to secure an equality of the number of speakers on either side without making the Doctor his agent generally, so as to be affected by his acts out of doors in the indulgence of a habit which is so strong upon him, as he says, of treating his friends upon all occasions when he meets them away from home, that he could not resist doing it, though at the peril of the penalties attending a plain violation of the law. Upon the occasion of this meeting at Chatsworth, the witnesses say that the Doctor claimed to be of more importance than the respondent. This view seems precisely to accord with what the Doctor himself gives us to understand, in virtue of his dignity as reeve in his own township; and I confess that the evidence has impressed my mind very strongly, as I should think it probably would every one who came in contact with the Doctor during the contest, that whatever he did was done in the carrying on his own independent battle, waged with the ministerial candidate for his own reasons and with his own objects. I mean, of course, public reasons and objects in connection with the particular matter which gave him offence, and not in any sense as the agent of the respondent, a position which I am satisfied the respondent never conferred upon him, nor did the Doctor assume. The constitution of our municipal institutions is such, that it is not meet that public men should be fettered in the expression of their political sentiments, or in their right to address public meetings of electors during election contests, by any fear that, contrary to their intent, their public sentiments as expressed at those meetings should be attributed to mere advocacy as the agent of a

candidate who may perhaps hold a few, and only a few, opinions in common with them. Nor is it meet that candidates should be exposed, against their will, to the peril of having persons presumed to be their agents whom they have not made and never intended to make such, merely because from their own public standpoint they declare themselves opposed to the election of the other candidate, and advocate—it may be perhaps as the lesser of two evils—the election of his opponent. Under these circumstances I cannot hold the respondent accountable for the corrupt practices of the Doctor, who himself must bear the consequences attendant upon his own violation of the law.

There remains to be considered the last ground relied upon, namely, that Mr. Paterson had treated Mr. Scott, and that this was in violation of the 66th section of the Act of 1868.

The facts relating to this charge are, that the respondent, between 3 and 4 o'clock in the afternoon of the polling day, when going down the stairs from one of the polling places in Owen Sound, in company with Robert Paterson, a supporter of the opposing candidate and one of the petitioner's sureties, not having had, as respondent says, any refreshment since 8 o'clock in the morning, and not having his sleigh at hand to take him home, expressed himself to his friend Mr. Paterson in some such terms as follows: "Is not this a hard law; I have had nothing since 8 o'clock, and I should so like a drink;" whereupon Mr. Paterson very kindly, according to the respondent's version, said that he would give him a glass, not thinking this mode of giving refreshment to the respondent to be illegal, or, according to Mr. Paterson's version, the respondent asked Mr. Paterson to treat him, which Mr. Paterson agreed to do, both believing this to be legal. Accordingly they went over together to Spiers' hotel, where the bar being closed against the public, they procured Spiers to get them each a glass of ale, for which Mr. Paterson paid, and which they drank in the hall of the hotel.

The contention now is, that this conduct constitutes a violation of the 66th section, not only by Spiers, the tavern-keeper who sold the ale, but also Paterson, who purchased it and gave a glass to Scott, and by Scott, who drank the glass so given to him. Paterson, according to this contention, is liable in two capacities: 1st, as the giver of a glass to Scott; and 2nd, in drinking one himself; and lastly, Scott, as it is contended, is further liable, not merely as having drank the glass which Paterson gave him, but also for having asked Paterson to give him the glass, as he did if Paterson's version be accepted; and both of them, for having asked Spiers to sell the ale. And so it is contended that for this act the election is not only void, but that Scott is disqualified personally.

The argument is, that it is a violation of this clause of the Act for any person, whether tavern-keeper or shop-keeper, or not, during polling hours to sell or give any spirituous or fermented liquors whatever, whether by retail or wholesale, to any person, whether an elector or a perfect stranger, and whether it be sold for consumption in a private house or for transportation abroad even to a foreign country. For example, if any person within the municipality takes a friend who does not live within the municipality, and is not an elector, home to dinner with him, and gives him at his dinner a glass of ale or wine within the polling hours; or if any person, within the same hours and within the municipality, sells to any person, though not an elector nor living within the municipality, a hogshead of brandy to be transported abroad, and ships it in the ordinary course, the statute, it is contended, is violated both in the giver and the receiver in the one case, and in the vendor and the vendee in the other. Whether or not this is the true construction of the Act, I do not feel myself at present called upon to express an opinion, and therefore reserve my opinion until some such case shall arrive, if it ever shall. At present I am called upon to go further than either of the above cases, and to declare that to be a violation of the law which, beyond all ques-

tion, is not within its letter, but which, as is contended, is within its spirit and intent.

The Act of 1873, which makes all violations of the 66th section which are committed within the polling hours to be corrupt practices, does not make anything to be a violation of that section which was not so before. The question, therefore, must be considered wholly irrespective of the Act of 1873, the simple question being, has there been a violation of the 66th section of the Act of 1868; and if so, by whom? Assuming for the sake of argument that the second branch of this 66th section has no connection whatever with the first, and is to be read without any light from the previous part, then what the section says is, that no spirituous or fermented liquors or drinks *shall be sold* or *given* within the limits of such municipality during polling day under a penalty of $100.

The question then resolves itself into this: Is the receiver or drinker of the liquor liable to a penalty under this section, and also the seller to another, and also the giver, if there be a person who buys and treats another?

The contention here is, that for every glass sold by the tavern-keeper he is liable to a separate penalty, and for each glass so sold to a person who treats others the treater is liable to a separate penalty as giver, and for each same glass the drinker is liable to a distinct penalty. In this view, assuming twenty persons to be treated by a person intervening to purchase and give, the penalties recoverable under the Act would amount to $6,000.

The simple answer to this contention, it appears to me, in so far as the respondent is concerned, is that no judge has any jurisdiction to extend a penal statute so as to create a penalty which the statute itself has not in express terms created. The statute in its terms imposes no penalty upon one who receives and drinks; it is said that it should be construed as doing so, because that morally the receiver is as culpable as the seller and giver, and that if there were no one to receive and drink, there would be no one to sell or give. Grant this to the fullest extent

With the ethics of the case I am not at present concerned. The same may be and often is said of the receiver of stolen goods, yet a receiver was never for that reason liable to be indicted for the larceny, nor could he have been indicted without a special Act constituting the act of receiving a distinct offence. Then again, it is said that the person who procures an act to be done by another is himself a principal and so liable. That, no doubt, is a rule of law and a very good one in its place, but it is not of universal application. A man who procures another to sell his farm and to lend him the money, is not himself the vendor, nor is the rule of universal application in the case of crime. A man who procures another to commit bigamy is not himself guilty of bigamy.

These and like suggestions are all lost in the consideration that it is impossible for a judge to pronounce that to be criminal or penal which, without an Act of Parliament, is neither the one nor the other, unless he has the authority of the Legislature unqualifiedly conveyed in express terms for doing so. He cannot proceed upon a suggestion of constructive guilt. This seems to afford a complete answer to the point, in so far as the respondent is concerned.

In so far as Mr. Paterson as a giver is affected, I shall content myself at present with saying that I do not think the statute authorizes two penalties in the case, and therefore for this act of treating I shall not report him as guilty of a corrupt practice within the Act. Whether or not the Legislature contemplated, when passing the 66th section, to impose a penalty upon the tavern-keeper for such a single act as is proved here, may perhaps be open to doubt; but as he comes within the express terms of the section, even though we should read the second branch as dependent upon and connected with the first, I feel compelled to report him as guilty.

The result is, that I adjudge, declare and determine, that the said Thomas Scott, the above respondent, was duly elected as member of the North Riding of Grey, and

that the petition against his return be and is hereby dismissed with costs, to be paid by the petitioner to the respondent; and I shall have to report as guilty of a violation of the 61st section of the Act of 1868, the following persons, viz.: Dr. Duncan McGregor, George Wright, John Hill and Edmund Haynes. Some evidence was also given against one Hutton, but as he was not called himself, and his first name did not appear in the evidence, I am unable to report him. I shall have also to report Thomas Spiers as guilty of a violation of the 66th section of the same Act.

The petitioner appealed from the decision of Mr. Justice Gwynne to the Court of Appeal.

The COURT (Hagarty, C. J. C. P., Strong, Burton, and Patterson, JJ. A.), following the judgment in the *North Wentworth case* (*ante* p. 343), reversed the decision of Mr. Justice Gwynne, and held that the giving of the treat by Paterson, and its acceptance by the respondent during polling hours on polling day, was a corrupt practice committed by Paterson with the knowledge and consent of the respondent, and that the election was avoided.

The costs of and incidental to the petition and appeal were ordered to be paid by the respondent to the petitioner.

(9 *Journal Legis. Assem.*, 1875-6, p. 15).

NORTH MIDDLESEX.

BEFORE CHANCELLOR SPRAGGE.

LONDON, *14th, 15th, 20th and 28th September, 1875.*

JOHN CAMERON, *Petitioner*, v. JOHN McDOUGALL, *Respondent.*

Evidence—Proof of letter—Bribery—Offers made in jest—Meeting of electors —Treating—Usual custom of treating by candidate.

A witness stated that he had received a letter frcm a voter, asking for the fulfilment of an offer as to his vote, but the letter was not produced.

Held, that it was not proved that the letter in question was written by the voter referred to.

On a charge that one O. bribed a voter by promising to procure a deed of his land for him if he would procure votes for the respondent, the evidence showed that though the voter had so represented, the procuring of the deed had nothing to do with the election.

One S., an alleged agent of the respondent, made offers of sheepskins to two voters as to their votes at the election, but he swore the offers were made in jest; but as the evidence did not show that S. was an agent of the respondent at the time of the alleged offers, no effect was given to the charge.

A statement that an offer to bribe was made in jest should be received with great suspicion. A briber may make an offer which he intends should be taken seriously, and then, if not accepted, he may assert it was made in jest.

After the nomination of candidates on the nomination day, and on another occasion, after a "meeting assembled for the purpose of promoting the election," and after the business for which the electors had assembled was over, the electors left the building in which the meeting was held and dispersed to various taverns, at which their vehicles had been put up, and then before leaving for home treated each other; and at one of the taverns the respondent himself partook of a treat.

Held, 1. Not furnishing drink or other entertainment to meetings of electors within s. 61 of the Election Law of 1868.

2. That the meeting of electors for the nomination of candidates, is a "meeting assembled for the purpose of promoting the election."

Treating is not *per se* a corrupt act, except when so made by statute; but the intent of the party treating may make it so, and the intent must be judged by all the circumstances by which it is attended;

Semble, where it is done by a candidate in order to make for himself a reputation for good fellowship and hospitality, and thereby to influence electors to vote for him, it is a species of bribery, which would avoid his election at common law.

When the respondent who, in the course of his business as a drover, had been in the habit of treating at taverns, treated during his canvass, but to a less extent than was his habit, and not apparently for the purpose of ingratiating himself with the electors;

Held, under the circumstances, that such treating was not corrupt, and his election was not avoided.

The petition contained the usual charges of corrupt practices.

Mr. J. K. Kerr for petitioner.

Mr. R. A. Harrison, Q.C., *and Mr. Duncan MacMillan* for respondent.

A witness, William Stevenson, who had offered one William Robson a sheepskin if he would stay at home on election day—referred to in the judgment—during his examination said that Robson afterwards wrote to him asking for the sheepskin, but the letter was not produced. For the defence a witness was called to prove the handwriting of the letter sent to Stevenson.

Mr. Kerr objected. The letter must be produced. Evidence of the letter having been sent was given by the petitioner, but no evidence of handwriting.

SPRAGGE, C.—I hold that it is not proved by the petitioner that the letter in question was written by the person in whose name it is said to have been written.

The facts upon which the case was disposed of appear in the judgment.

SPRAGGE, C.—I will consider first the alleged bribery of Michael Sullivan by Robert O'Neil. Sullivan was in possession of a Canada Company lot, and there was a difficulty in regard to his getting a deed of it from the Company. The charge is that O'Neil held out to him that if he procured electors to vote for the respondent he would aid him in procuring for him the deed from the Canada Company, and it is represented that the getting out of the deed was intended to be kept hanging over the head of Sullivan as a spur to his exerting himself in procuring votes; and, though in fact obtained before the election, it was only very shortly before, and its procurement expedited in consequence of the commencement of an action of ejectment by the Canada Company.

The intention to postpone the procurement of the deed till after the election is not denied, but it is alleged that it was for a sufficient reason, viz., lest its being procured pending the contest might be laid hold of by the opposing

candidate, Mr. Smith, or his friends, as a handle, as O'Neil in his evidence expresses it, to impute a corrupt practice upon Sullivan by O'Neil. There was no need, it is said, to bring any undue influence to bear upon Sullivan, or to bribe him by any inducement to support the respondent, inasmuch as he was already, and had been previously, a warm supporter of the party to which the respondent belonged, and would in any event have supported him. It is agreed that the action of O'Neil in the procurement of the deeds was accelerated in consequence of the issuing of process in ejectment. Something was said in evidence of a petition being got up among Sullivan's neighbors, connecting in some way the application of Sullivan for a deed with the election, and that the neighbors were led to believe by Sullivan himself that his interests would be promoted in the matter of the procurement of the deed by his obtaining votes for the respondent. That is in substance the case made by the petitioner, but in my opinion the facts proved do not support it. Much sympathy was felt for Sullivan (by his neighbors), who had lived upon and improved the land, a deed of which he was seeking to obtain, and a petition was talked of among them, but it was a petition to the Canada Company. It was not suggested by O'Neil, who discouraged the idea, nor does it seem to have had anything to do with the election. I say this, discarding the evidence of what Sullivan is reported to have said about it, and about O'Neil's agency in obtaining the deed. Sullivan says in his evidence, that O'Neil spoke of the respondent as a good liberal man, or may have so spoken of him. This was said to Sullivan, who had not known him before. It is contended that I must infer that this was said (assuming it to have been said at all) in order to lead Sullivan to believe that the respondent would be liberal in aiding him in money or otherwise—I suppose in money—in the procurement of his deed. It is true that O'Neil *may* have spoken of the respondent as a good and liberal man, and in connection with the obtaining of the deed, and of

Sullivan exerting himself on his behalf in the election. But this is not proved. Sullivan does not seem to have supposed that his support of the respondent had anything to do with the getting of his deed from the Canada Company. He says he asked only one person to vote for him, and O'Neil says very distinctly that his getting out the deed from the Canada Company was purely a business transaction, of a kind to which he was in the habit of attending; that Sullivan and another—one Fahey—employed him for that purpose, and for himself, that he went to Toronto on behalf of both, and that Sullivan paid him $12 for his expenses and trouble. He denies very explicitly that Sullivan's support of the respondent had anything to do, so far as he was concerned, with the matter, and I think the proper conclusion from the evidence is that it had not.

I have thought it well to discuss this question, as it was a prominent matter in the investigation before me, but I at least doubt whether O'Neil was an agent for whose acts the respondent was responsible.

Two direct corrupt acts are charged to have been committed by William Stevenson, an agent, it is alleged, of the respondent, consisting in the offer to one George Shibley of a sheepskin if he would vote for the respondent, and in the offer to one William Robson also of a sheepskin if he would stay at home on election day. Shibley and Robson are not called upon this charge, but William Stevenson only. The defence is that these offers, which were both made on the same day, were never seriously made, and that it was well understood by both Shibley and Robson that they were made in mere jest. Stevenson, in his evidence, says that Shibley is a man of wealth and a magistrate, and as I understand his evidence, the offer came from him that he would vote for the respondent if Stevenson would give him a sheepskin. The witness describes Robson as a storekeeper living in Carlisle. He swears that he looked upon these offers as in jest, and felt sure that they were so regarded by Shibley and Robson.

A statement that an offer to bribe was made in jest should be received with great suspicion. A briber may make an offer which he intends should be taken seriously, and then, in the event of its not being accepted, shelter himself afterwards with the plea that it was only in jest; but looking at the position of Shibley and Robson, and the nature of the thing offered and its value—a dollar or less—it is probable that Stevenson speaks the truth when he says that it was but a jest. The case, however, is divested of all difficulty by the circumstance that Stevenson was not at the time an agent of the respondent. The matter occurred in the autumn before the snow fell—the witness thinks in October; and it was long afterwards, and, as the witness thinks, after the public nomination, which was on the 11th of January, that he received a communication from Gilchrist, financial agent of the respondent, asking him to canvass a school section. There was nothing shown to constitute him an agent before that.

Another point taken by the petitioner is this, that there were meetings of electors within the meaning of section 61, at which there was treating within the meaning of that section, and that the same being with the actual knowledge and consent of the respondent, he thereby loses his seat, and is disqualified. Mr. Kerr's contention upon this point is, that it is immaterial whether the treating was by the candidate himself or by an agent, or by a stranger, and that the motive and intent are, under the section as amended, immaterial; that all that is necessary to bring the case within the section is, that the treating is to a meeting of electors, such as is described in this section, and that it is with the actual knowledge or consent —which Mr. Kerr reads, knowledge *and* consent—of the candidate.

I incline to agree with this interpretation of the section, and in the *Dundas case* (*ante* p. 205) I acted upon a like construction then put upon it by myself, with this difference, that in that case the treating was by an agent of the candidate, not by a stranger. But I thought in the *South*

Essex case (*ante* p. 235), that a corrupt practice participated in by an agent, being by his participation a party thereto, would avoid the election. This was under the second provision of section 66; and this construction has now, I understand, been approved by the Court of Appeal. But my difficulty in this case is upon the question whether the treatings in question were to meetings of the electors within the meaning of the section. I take the meeting on nomination day and at Elson's as examples. I take the meeting held on that occasion (the nomination) to have been a meeting within the section. The meeting at Elson's, while of a different character, was still, in my opinion, a meeting of electors, assembled for the purpose of promoting the election; and if the treating had been, in any proper reasonable sense, a treating to electors so assembled, I should hold it to be a corrupt act. But there are these material circumstances to be taken into account: North Middlesex is a rural constituency; the electors attending these meetings were for the most part from a distance; their horses and conveyances would be put up in the stables and driving sheds of the taverns of the place; the meetings were in January, and the weather is described to have been very cold. Then there is the custom of the country—not to be commended, but still to be taken into account—to take drink in the bar-rooms of taverns, and to do so in the shape of treating some or all of those assembled with them in the room, "the crowd," as it is so often called. Now, what was done upon the occasion in question was in substance this: After the business for which the electors had assembled was over, they left the building in which the meeting had been held, and went, some to one tavern, some to another; generally, as I infer, to those at which their vehicles were put up, and before leaving for home took drink in the bar-rooms in the usual mode—that of treating one another. I cannot think that doing this is in any proper or reasonable sense giving drink or other entertainment to a meeting of electors assembled for the purpose of promoting an election. It

is indeed doubtful whether there was treating on any of those occasions by any agent of the respondent; and it now appears that there was not any treating by the respondent himself, but the respondent himself partook of the treat on one at least of these occasions in the bar of a tavern.

I am not in the least disposed to sanction any evasion of the law, or to insist upon too rigid a construction of the provisions of the section. It would indeed be a rare case, if a possible one, that treating should be given literally to a meeting of electors. It was not so in the *Dundas case* (*ante* p. 205), in which I applied the Act; but what was done in this case is not in my judgment within the spirit and meaning of the Act. To apply it to what was done in this case would be in my opinion straining the provisions of the sections beyond their legitimate meaning and intent.

Upon another branch of the case I have entertained considerable doubt. It has been in regard to treating by the respondent at various taverns in the course of his canvass, which occupied about three weeks before the polling day. The respondent is a farmer, and has for the last sixteen years followed the business of a drover. He says that it is the practice of drovers to go to taverns as the best places for meeting with farmers and hearing of cattle, and that he has always been in the habit of treating at taverns in the course of his business, and this is confirmed by the evidence of other witnesses. He states that when he became a candidate he canvassed personally through the Riding, and went to the taverns as good places to meet with the electors; that on these occasions he sometimes treated; sometimes friends who were with him treated; and the treating was sometimes by others who were not friends; and the treating was general to all who might happen to be present. As to its extent, he says it was much less than was his habit in the course of his business, not more he says than one-fifth as much; he denies emphatically that he treated with any view of influencing

voters; that he made no distinction as to whom he treated; that he had taken legal advice; that he meant to obey the law, and thought that in what he did he committed no infraction of the law. As to which last, I will merely observe that if what he did was really an infraction of the law, his being advised and his entertaining the belief that it was not so, would be no excuse in the eye of the law. The treating upon these occasions stands upon a different footing from meat, drink, &c., furnished to a meeting of electors, to which I have already adverted.

The law upon this branch of the case differs from the law prevailing in England in this, that we have not in this Province any enactment equivalent to section four of the Corrupt Practices Prevention Act. The Imperial Act of 1854 makes corrupt treating a statutable offence; treating therefore—not to a meeting of electors—can only be reached by the common law, and must be of such a character as to amount to bribery.

It is not contended by Mr. Kerr that the case comes within the old Treating Act, 7 William III., c. 4, which forbids treating within certain times specified, "in order to be elected or for being elected." I do not know whether it has been decided that the Act is in force in Canada, but it appears, as interpreted in *Hughes* v. *Marshall* (2 C. & J. 118), to be in affirmance of the common law, inasmuch as treating "in order to be elected" is only a species of bribery. The same may be said, I think, of the Act of 1854, for to bring a case within that Act, the treating must be with a corrupt intent, *i.e.*, to influence electors to give their votes to the person treating them.

My doubt has been whether the treating by the defendant in the course of his canvass, as described by himself, and to which I have referred, does not come within the definition of corrupt treating given by Mr. Justice Blackburn in the *Wallingford case* (1 O'M. & H. 59), that "whenever a candidate is, either by himself or by his agents, in any way accessory to providing meat, drink or entertainment for the purpose of being elected, with an intention

to produce an effect upon the election, that amounts to corrupt treating. Whenever also the intention is by such means to gain popularity and thereby to affect the election; or if it be that persons are afraid that, if they do not provide entertainment and drink to secure the strong interest of the publicans, and of the persons who like drink whenever they can get it for nothing, they will become unpopular, and they therefore provide it in order to affect the election; when there is an intention in the mind either of the candidate or his agent to produce that effect, then I think it is corrupt treating."

I think that the respondent, in doing what he did, was treading upon dangerous ground; but before holding that his seat is thereby avoided and himself disqualified, I must be satisfied that what he did was done with a corrupt intent, and in judging of this, the general habit of treating in the country, and the respondent's own practice, may properly be considered. In the *Kingston case* (*post;* S.C., 11 Can. L. J. 23), the Chief Justice of Ontario observed: "The general practice which prevails here amongst classes of persons, many of whom are voters, of drinking in a friendly way when they meet, would require strong evidence of a very profuse expenditure of money in drinking to induce a Judge to say that it was corruptly done, so as to make it bribery, or come within the meaning of 'treating' as a corrupt practice at the common law."

In the *Glengarry case* (*ante* p. 8), Hagarty, C. J., has referred to the language of English Judges upon the question as to what, in their judgment, would amount to corrupt treating. I find the case reported in Mr. Brough's very useful little work, "A Guide to the Law of Elections," at page 21. I quote from the passages given in the judgment of the Chief Justice: "In the *Bewdley case* (1 O'M. & H. 19), Blackburn, J., says 'corruptly' means 'with the object and intention of doing that which the Legislature plainly means to forbid.' In the *Hereford case* (*Ibid.* p. 195) the same Judge says that corrupt treating means 'with a motive or intention by means of it to pro-

duce an effect upon the election.' In the *Lichfield case* (p. 25) Willes, J., says treating is forbidden 'whenever it is resorted to for the purpose of pampering people's appetites, and thereby inducing voters either to vote or abstain from voting, otherwise than they would have done if their palates had not been tickled by eating and drinking supplied by candidates.' And again, that the treating must be done 'in order to influence voters' (p. 26). And so in the same reports in the *Tamworth case* (p. 83)."

The Chief Justice also cited the *Coventry case* (*Ibid.* p. 106), and the *Wallingford case* (*Ibid.* p. 57), in which it was said by Blackburn, J., that "the intention of the Legislature, in construing the word 'corruptly,' was to make it a question of intention;" also the *Bradford case* (*Ibid.* p. 37), where Martin, B., as to the meaning of "corruptly," says: "I am satisfied it means a thing done with an evil mind and intention, and unless there be an evil mind or an evil intention accompanying the act, it is not 'corruptly' done. 'Corruptly' means an act done by a man knowing that he is doing what is wrong, and doing it with an evil object. . . . There must be some evil motive in it, and it must be done in order to be elected."

Without subscribing to every word contained in the passages quoted, they contain, no doubt, upon the whole a sound exposition of the law.

The extent of the treating and the quantity of drink given should also be taken into account. It was said by Willes, J., in the *Lichfield case:* "It may be doubted whether treating in the sense of ingratiation by mere hospitality was struck at by the common law;" but he goes on to say in effect that it is now forbidden by the Act of 1854, whenever resorted to with the corrupt intent of influencing voters.

In the treating in question there was the reverse of profusion; there was not more but much less than the usual hospitality practised by the respondent, so that there is really no room for saying that the respondent was actuated by the intention of ingratiating himself with the

electors by profuse hospitality. I will upon this head quote the language of two learned Judges not quoted in the *Glengarry case*. In the *Wallingford case* (1 O'M. & H. 59), Mr. Justice Blackburn considers that the amount of treating is an element of consideration upon the question of intention, and observes, "When we are considering as a matter of fact the evidence to see whether a sign of that intention does exist, we must, as a matter of common sense, see on what scale and to what extent it was done." So Mr. Justice Willes in the *Tamworth case* (Ib. 83), says that it is "obvious that the Legislature did not intend that every bit of bread or sup of drink given to a voter in the course of an election should have the effect of defeating that election." And the same learned Judge in the *Westbury case* (Ib. 50), took occasion to explain what he had said in a previous case, desiring it not to be supposed "that treating by a single glass of beer would not be treating, if it were really given to induce a man to vote or not to vote. All that he had ever said was that there was not sufficient to bring his mind to the conclusion that the intention existed to influence a man's vote by so small a quantity of liquor."

It seems all to come to this, treating is not *per se* a corrupt act; the intent of the act must be judged of by all the circumstances by which it is attended. If in this case the evidence led me to the conclusion that the respondent did what he did in order to make for himself a reputation for good fellowship and hospitality, and thereby to influence electors to vote for him, I should incline to think it a species of bribery which would avoid the election at common law; but, upon a careful consideration of the evidence, it does not lead me to that conclusion. There was nothing wrong, in the eye of the law, in the respondent making his canvass by meeting the electors at taverns, and he does not seem to have abused the occasions of so meeting them by seeking to obtain their votes by pampering their appetites for drink or by other undue means. I apprehend that I must be able to see with reasonable

certainty that he has done this before I can set aside the election.

The case made of an attempt by a Dr. Saurs to bribe one Donald McDonald to vote for the respondent by the giving of a glass of liquor, fails upon the evidence; and the case for avoiding the election by reason of Dr. Saurs treating and partaking of liquor during the hours of polling, fails by the absence of proof that he was an agent of the respondent.

I have not found it necessary to discuss the question of agency in this case, as, in my view of it, nothing turns upon it except in the case of Dr. Saurs, for whose acts I do not find the respondent responsible.

There is not, in my opinion, anything in this case to take it out of the general rule that the costs follow the result of the suit.

(9 *Journal Legis. Assem.*, 1875-6, p. 23.)

EAST NORTHUMBERLAND.

BEFORE MR. JUSTICE GWYNNE.

COBOURG, *20th to 23rd September, and 1st October, 1875.*

HENRY S. CASEY, *Petitioner*, v. JAMES MARSHALL FERRIS, *Respondent*.

Agency—Delegates to political association to nominate candidates and promote their return—Bribery—Fraudulent device to influence voters.

By the constitution of the Reform Association for the East Riding of Northumberland, each delegate to the convention was actively to promote the election of the candidate appointed by the convention. The respondent had himself been for six years a member of the association, and was familiar with its objects and constitution. He had also as a delegate acted and canvassed for other candidates in the promotion of their elections, and expected the like assistance from the present members of the Association, and to the perfection of that system as an electioneering agency, the respondent owed his election.

Held, that the delegates to the association, acting as such in promoting the election of the respondent, were his agents, for whose acts he was responsible; and that an act of bribery committed by one R., a delegate to such association, and who canvassed and otherwise acted for the respondent, avoided the election.

Shortly before polling day the respondent's agents issued a circular, the substance of which was that they had ascertained upon undoubted authority that W., an independent candidate, despairing of election himself, was procuring his friends to vote for C., the opposition candidate. W. denied the truth of this report.

Held, that this was not a "fraudulent device," within the meaning of sec. 72 of 32 Vic., cap. 21, to interfere with the free exercise of the franchise of voters.

The petition contained the usual charges of corrupt practices.

Mr. D'Alton McCarthy, Q.C., for petitioner.
Mr. J. D. Armour, Q.C., for respondent.

There were three candidates—Ferris, Webb and Cochrane. Mr. Ferris was the nominee of the Reform Association, and was the successful candidate. A night or two before the polling some letters or circulars were sent to different leading men, stating that Mr. Webb, an independent candidate, had despaired of success, and wanted his friends to vote for Mr. Cochrane, the Conservative candidate. Mr. Webb denied the truth of this report.

The main points disposed of at the trial were (1) as to the agency of one Richmond, a delegate to the Reform Association, and an act of bribery said to have been committed by him whereby it was contended the respondent's election would be avoided; and (2) as to the effect of the circular as to Webb's alleged resignation, spoken of above, which it was said was a fraudulent device to influence voters.

Gwynne, J.—The evidence establishes, beyond all doubt in my mind, that it is part of the constitution and organization of the Reform Association in this Riding (whose candidate the respondent was) that the delegates to the convention, consisting of ten persons from each township and five from each village municipality, should, so long as they might remain in office—that is, until displaced by other delegates—act in promoting the election of the candidate adopted by the convention, in all respects and in the same manner as persons appointed agents by candidates are in the habit of doing for that purpose; that the candidate

looked for, expected and demanded such their assistance and agency to carry his election, and that in consequence thereof, and because of the perfection of the organization as a canvassing and general agency to conduct the election, the candidate chosen by the convention appointed no agent of his own, but used those provided by the organization. The evidence also establishes that the respondent was for six years himself a delegate—that he was well aware of the nature of the organization—that as a delegate he canvassed and acted for other candidates in the promotion of their election, and that he expected and demanded like services from all the delegates, to be rendered to him upon his candidature; and that to the perfection of that system as an electioneering agency the respondent owes his election.

The evidence in like manner establishes that Cyrus Richmond was a delegate—that he was a supporter of the respondent in the convention and voted for his candidature—that, although perhaps not very active at first, he worked for the respondent to promote his election in canvassing for him, arranging for the bringing up of voters, and otherwise as is customary with nominated agents, and that the respondent, as the nominee of the convention, expected and claimed to be entitled to such his support and assistance.

Under these circumstances, I must hold that Mr. Richmond was a person for whose acts the respondent is responsible. It is said that the organization is such, in express terms, that the candidate shall only receive the assistance of the delegates as committee-men on his behalf in all matters that are legal. That is precisely the authority given to all election agents. No man appoints another his agent to do an illegal act; he appoints him only to do legal acts; but if, instead of confining himself to such, he does illegal acts amounting to bribery and such like, the candidate is responsible.

The first question then to be decided is: whether or not Cyrus Richmond did make to Arthur Lyndon the offer of

a bribe, which it is charged that he did make. [The learned Judge, after discussing at length the evidence on this point, decided that an act of bribery had been committed by Richmond, and on that ground declared the election void.]

As to the other point raised, namely, the issuing of the circular on the Saturday night preceding the polling day, there is no doubt in my mind that all the parties to the issuing of that circular were persons who, equally with Richmond, who was himself one of them, must for the same reason be regarded as the respondent's agents, for whom he must be held responsible. I am, however, of opinion that, even assuming the matters stated in the circular to be false to the knowledge of the parties issuing it, it does not come within the 72nd sec. of the Act of 1868, which enacts that "everybody who shall directly or indirectly, by himself or by any other person on his behalf, by any fraudulent device or contrivance impede, prevent or otherwise interfere with the free exercise of the franchise of any voter, shall be deemed to have committed the offence of undue influence." It is, in my judgment, distinguishable from the *Gloucester case* (2 O'M. & H. 60), which is the only case reported having any resemblance to the present. There the act complained of was one which, if it had been designed with the intent imputed, would have been calculated to have the effect of misleading persons, without any exercise of judgment, to place their mark on the ballot paper opposite the respondent's name only, and so have been calculated to make persons, by a trick and deception, vote for a candidate for whom at the time of voting they did not intend to vote. In the case before me, the most that can be said is (assuming the statement in the circular to be false to the knowledge of the parties issuing it), that they were by a falsehood appealing to the electors to exercise their judgment in voting for the friend of the parties issuing the circular.

Now, I do not think that this clause of the statute was intended to cover cases where parties, although it be by

falsehood and slander, appeal to the electors to exercise their judgment how to vote. Election squibs, it is to be regretted, are accustomed to deal freely with the character of opposing candidates; this, although a practice which is immoral in the extreme, and to be condemned by all honest men, has not as yet, in my judgment, been touched by legislation.

(9 *Journal Legis. Assem.*, 1875-6, p. 17.)

LINCOLN.

BEFORE MR. JUSTICE GWYNNE.

ST. CATHARINES, *20th to 22nd May, 8th to 12th July, and 17th September, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *15th December, 1875, 22nd January, 1876.*

JOHN CHARLES RYKERT, *Petitioner*, v. SYLVESTER NEELON, *Respondent.*

Treating in a tavern during polling hours—Penalties on tavern-keeper and purchaser—Bribery by respondent in compensating for an injury to a voter's wife—Implied knowledge by candidate of agent's acts of bribery—Appeal.

One L., an alleged agent of the respondent, went into the tavern of one D. during polling hours on polling day, and purchased spirituous liquor, with which he treated himself and several persons there present.

Held, per Gwynne, J., that the penalties provided by s. 66 of the Election Law of 1868 apply only to the tavern-keeper, who as such is able to control what is done on his own premises in violation of the Act, and that the treating by L. was not a corrupt practice.

Per Draper, C. J. A.—1. That section 66 of the Election Law of 1868 must be construed distributively.

2. That under the first part of the section the tavern-keeper is the only person who can incur the penalty, for not keeping his tavern closed during the prescribed time.

3. That under the second part of the section, the persons who incur the penalty are (1) the tavern-keeper who sells liquor in violation of the statute, and (2) the purchaser who gives the liquor purchased by him to persons in the tavern.

The wife of one S., a voter, had been injured some years before the election by the horses of the respondent, and in 1872 the respondent gave S. compensation for the injury partly by cancelling a debt and partly in cash, for which S. signed a receipt "in full of all accounts and claims whatsoever." The respondent canvassed S. during the election, saying, "I would like to have you with me at the election," but S.

declined, expressing dissatisfaction with the compensation made for the injury to his wife, to which the respondent replied that he was able to do, and could do, what was right. Afterwards the respondent sent his salesman to the wife of S., who told her that the respondent was still able to do justice, to which she replied she would write a letter, which she did, and in which she referred to her husband's vote. After the election the respondent gave S. $30 partly by cancelling a debt and partly in cash. The respondent denied that he gave S. to understand that he would give him anything to induce him to vote for him at the election.

Held by the Court of Appeal (affirming *Gwynne*, J.), That the evidence showed that an indirect offer of money or other valuable consideration was made by the respondent to S., to induce him to vote for the respondent.

At a late hour on the day preceding the election some agents of the respondent determined to resort to bribery, and they carried out such determination at an early hour on the morning of the polling day. There was no evidence of the respondent's knowledge of, or consent to, this act of his agents.

Held (reversing *Gwynne*, J.), That the shortness of the interval between the resolve and the execution of the bribery, which was carried out at a place several miles away from where the respondent lived, rendered improbable the fact of the respondent's actual knowledge of such bribery.

Per Gwynne, J.—That if an act, made a corrupt practice by statute, is done by an agent of a candidate, but not in pursuit of the object of the agency or the interest of the candidate, or in any way in relation to the election, but solely for the purpose, interest, or gratification of the agent, such act, not being done by such agent *qua* agent, is not within the penalties of s. 3 of 36 Vic., c. 2.

The petition contained the usual charges of corrupt practices, and claimed the seat for the petitioner, the unsuccessful candidate.

Mr. J. A. Miller and the Petitioner in person for petitioner.

Mr. J. G. Currie and Mr. Bethune for respondent.

The facts on which the election was avoided are set out in the judgments in appeal. Evidence was also given that one Patrick Larkin, an alleged agent of the respondent, went into the tavern of one Doyle at Niagara during polling hours on the polling day, and treated several persons there present. Counsel for the petitioner contended that this treating during polling hours was a violation of s. 66 of the Election Law of 1868, and a corrupt practice. The learned Judge held it was not a corrupt practice, and his judgment on that point, not being appealed by the petitioner, is given as follows:

GWYNNE, J. [After stating the facts and quoting the 66th section of the Election Law of 1868, proceeded :]

I confess it does appear to me to be inconceivable that the Legislature could have contemplated the possibility of the section in question being open to the construction that whenever any person, whether a resident in the municipality wherein the election is going on or not, and whether an elector therein or not, sells or gives any quantity of spirituous liquors, whether by wholesale or otherwise, to any person, whether an elector in the municipality or not, and although the transaction, beyond all question, had no relation to, and has no effect upon, the election, the section is violated and the penalty incurred. If then it be, as it appears to me to be, impossible that the section should be construed literally, we must, in order to construe it in the sense intended by the Legislature, endeavor to ascertain with what object, and in order to guard against what evil this section was enacted. And I confess that the difficulties suggested against construing the section as containing two separate and independent offences, appear to me to be so great as to involve the necessity of excluding such a construction, and of reading the section as defining one offence to the committal of which the prescribed penalty is attached.

The prime object of the Act, there can be no doubt, was to secure freedom and purity in elections. The particular section in question is placed under the heading, "keeping the peace and good order at elections." The giving spirituous liquor directly, for the express purpose of obtaining a vote, or after a vote was given, in pursuance of a promise made in order to obtain the vote, is sufficiently guarded against, independently of this section, as an act of bribery. The indirect influence which might be exercised by the providing any species of entertainment or drink, whether previous to or during the election, to any meeting of electors assembled for the purpose of promoting the election at any place except the entertainer's own private residence, where such entertainment is permitted,

and the paying, or promising or engaging to pay, for any such drink or entertainment, was provided against by the prohibition contained in the 61st section.

Still it remained possible, if spirituous liquors could be obtained at the hotels, taverns, and shops where they are ordinarily sold, that much drinking might be indulged in, which the parties partaking of should themselves pay for, and which might injuriously affect the freedom and purity of the election, and from which bloodshedding riots and other breaches of the peace might ensue. Therefore, for greater caution, and with a view to securing that the election should be uninfluenced by any cause arising from the use of spirituous liquors at any of those places during polling day, this section was passed with the intent that "every hotel, tavern and shop, in which spirituous or fermented liquors are ordinarily sold, shall be so closed during the day appointed for polling in the wards or municipalities, that no spirituous or fermented liquors shall be sold or given to any person within the limits of such municipality under a penalty of $100 in every such case." That is to say, in every case in which any such hotel, tavern, or shop-keeper shall, in violation of this section, sell or give such spirituous liquors or drinks, or permit such to be sold or given upon his premises.

But assuming this to be the true construction, still the treating, which is assailed as in violation of the 66th section of the Act of 1868, occurred at a hotel. Doyle, the hotel-keeper, within the polling hours sold the drinks, of which McClelland, Lavelle, and Todd partook. Doyle is undoubtedly guilty of a violation of the section, and upon prosecution liable to its penalty. It may be also admitted that the act of selling by Doyle, as in violation of the section, is, under the provisions of the 1st section of 36 Vic., cap. 2. a statutory corrupt act committed by Doyle, although the act was never contemplated by any one to have, and although it had not in fact, any effect whatever upon the election, and that moreover by this act of sale, Doyle, upon his being proceeded against and found guilty

under the provisions of the 49th section of the Act of 1871, will be rendered incapable for a period of eight years 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 of the Lieutenant-Governor, in Ontario, or any municipal office. Still two questions remain: Firstly, is Larkin also guilty of a violation of the same 66th section within the meaning of that section? And secondly, assuming him to be, and that he was an agent of the respondent, is the latter's election thereby avoided? The answer to the first of these questions depends upon the construction to be put upon the 66th section referred to, and to the latter upon the construction to be put upon the 3rd section of the Act of 1873. The 66th section undoubtedly says that no spirituous or fermented liquors or drinks shall be sold or given.

Now in the case in question, certainly in one sense, Larkin, as the person treating McClelland, Lavelle, and Todd, may be said to be the giver to them of the drinks which Doyle sold and for which Larkin paid, but it is contended that the section is pointed against the hotel, tavern, or shop-keeper, and that it is upon him that the penalty is imposed, and that where a tavern-keeper sells a glass of liquor to A. for the purpose of treating B., who thereupon drinks it while A. pays for it, there is but one act done in violation of the statute, but one offence committed, which is committed by the tavern-keeper, and that two penalties cannot be recovered, the one against the seller and the other against the treater, for one and the same glass of liquor sold. The glass of spirits, for example, which Lavelle drank, was sold only for the purpose of being drunk by him, although Larkin paid for it. For the sale of that glass Doyle is guilty of a violation of the section, and for that glass, for the sale of which Doyle is responsible and liable to be disfranchised for eight years, it is contended that Larkin cannot also be made responsible and be subjected to the like penal consequences as

given within the meaning of the Act, merely because he pays the price instead of Lavelle. So if a shopkeeper licensed to sell liquors sells a dozen of wine to A., who buys it for the purpose of being sent, and orders the vendor to send it, to B., a poor friend of A.'s unable to pay for it himself, although this being done within polling hours may make the shopkeeper liable for selling in violation of the statute, it is contended that A., who bought it only that it might be sent to B., to whom the shopkeeper did send it, is not also liable to another penalty as giver. This is a point which would more satisfactorily be raised upon a prosecution for the penalty under the statute. I confess there seems to be great force in the argument. If the true view be, as it seems to me to be, that the act was intended alone to point against hotel, tavern, and shop-keepers, upon whose premises spirituous liquors and drinks are ordinarily sold, and who have it in their power to control what is done there, then the words "sold or given" must be limited to the hotel, tavern, or shop-keeper, and must mean sold or given by him; the word "given" being added to prevent the possibility of the party proceeded against for the penalty evading the statute by setting up as a defence that he did not sell, but himself gave the drinks.

That this is the true construction seems to me to be apparent, when we trace the source from which the 66th section is derived. It and the preceding sections, numbering from 57, are taken from sections 72 to 81 inclusive, which are grouped under precisely the same heading as clauses relating to the "keeping of the peace and good order at elections," in the Con. Stats. of Canada, 22 Vic., cap. 6; the 81st sec. of which Act, corresponding with the 66th section of the Act of 1868, enacted that "every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be on Sunday during divine service; and no spirituous or fermented liquors or drinks shall be sold or

given during the said period under a penalty of $100 against the keeper thereof if he neglects to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors or drinks as aforesaid."

What was meant by the words in this section, "in the same manner as it should be on Sunday during divine service," is not very clear, for there was no law that I can find then in force in Canada prescribing the duty of hotel and tavern-keepers to keep their houses closed in any particular manner during divine service on Sunday. [The learned Judge referred to various statutes on this subject, viz., Con. Stats. L. C., c. 6, s. 27; *Ibid.* c. 22, s. 5; Con. Stats. U. C., c. 54, s. 264; Imp. Stats. 3 George IV., c. 77; 9 George IV., c. 61; 11 and 12 Victoria, c. 49; and proceeded:] But none of those statutes which have reference to the period of "divine service on Sunday" had ever any force in Upper Canada, and it was drinking spirituous liquors at the places which constituted the offence, during the hours of divine service on Sunday. It is difficult, therefore, to understand what the Legislature of Canada meant by the 81st sec. of 22nd Vic., cap 6, which in plain terms enacted two penalties against the innkeeper—the one for neglecting to "close his hotel or tavern in the same manner as it should be on Sunday during the hours of divine service," and the other "if he should sell or give any spirituous or fermented liquors as aforesaid."

How the offence of neglecting to keep the hotel or tavern "closed in the same manner as it should be on Sunday during the hours of divine service," could be committed in the absence of the sale or gift of any spirituous or fermented liquors or drinks, and in the absence of all drinking suffered or permitted at the hotel or tavern, I fail to be able to see, and it seems to me that it was most probably this difficulty which induced the draughtsman of the Election Law of 1868 to strike out these ineffectual words, and so to amend the section as to do away with the double penalties, and to enact a single offence with a

single penalty, which in my opinion is what is done by the 66th section, which offence consists in the selling or giving spirituous or fermented liquors or drinks at any hotel, tavern, or shop in which spirituous or fermented liquors or drinks are ordinarily sold. The word drinks, used in the Act of 1868, and in 22 Vic., cap. 6, seems to me very plainly to indicate that what the Legislature desired to guard against was that general habit of "drinking spirituous liquors" so common at elections, and which was so well calculated to tend to breaches of the peace and violation of good order at elections, which it was the object of that section of the Act, from which this 66th section was taken, to maintain. But it is further to be observed that in all the above statutes in which I find any reference to the words "during the hours of divine service," and especially in the 22nd Vic., cap. 6, it was the proprietor of the hotel, tavern, or shop where the spirituous or fermented liquors or drinks are ordinarily sold, and who as such is able to control what is done on his own premises, that is made guilty of the offence, and upon whom the penalty for any violation of the statutes is imposed.

In my judgment, the 66th section of the Act of 1868 was not intended to have, and has not, any different effect in this respect, and such person is, in my opinion, the only person who can be pronounced to be guilty of a violation of the statute, and liable to the penalties which it imposes, and consequently he is the only person who, in the terms of section 1 of the Act of 1873, can be said to be guilty of the corrupt practice which that statute declares a violation of the 66th section of the Act of 1868, within polling hours, to be.

It was the retailing of drink, and drinking in such a manner as was calculated to affect the purity and freedom of election, which was the evil intended to be guarded against; and the Legislature, in my opinion, have deemed that object sufficiently attained by making the proprietor of the hotel, tavern, or shop where the spirituous liquors

are ordinarily sold, answerable for what he permits to be done in violation of the Act.

But assuming in the cases put of the treat at the hotel, and the purchase of the dozen of wine at a shop, that not only the seller is liable, but also the person who pays the price, and assuming the latter to be an agent for promoting the election of a candidate, will the candidate, if elected, forfeit his seat by reason of such act within the meaning of the 3rd section of the Act of 1873, the first sub-section of which enacts that "when it is found upon the report of a Judge upon an election petition, that any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, his election, if he has been elected, shall be void." If a person who is a candidate choose to appoint as his agent a hotel or tavern-keeper who has an independent interest of his own in violating the statute, and whose violation of it may, as it certainly might, lead to violence endangering the freedom of the election, it would be plainly proper that a candidate who appoints such a person as his agent should have his election avoided, if his agent should so conduct himself in plain contravention of the statute, and we should not stop to inquire whether the violation of the statute did or did not in fact affect the election. It is sufficient that it was well calculated to do so. And it was because it was well calculated to do so that the section prohibiting such practices, and that pronouncing them to be corrupt, were passed. But it seems to be quite another thing where an agent, not himself a tavern-keeper, and being in need of refreshment, goes to a tavern, and for that purpose buys there a glass of beer, wine, or other liquor for himself, and at the same time treats a friend or two to a glass as he would on any other occasion, such treat having no reference whatever to the election, and, it may be, being given to a person not an elector—in such case, although the tavern-keeper who sells the liquor would undoubtedly be guilty of a violation of the 66th

section of the Act of 1868, and so of the statutory corrupt practice declared by the Act of 1873, and even though the agent may also be in like manner guilty, shall the innocent principal in such case have his election avoided by such treat?

The Legislature, no doubt, may arbitrarily enact that any act, even one in which the candidate is in no way concerned, and which is not done in his actual or supposed interest or in pursuit of the object of the election, may notwithstanding avoid the election, but in the absence of the most express words conveying such an intent, we should avoid a construction having such effect.

What the Legislature has said upon the subject is contained now in the 3rd section of the Act of 1873, which contains two sub-sections that must be read together, and so as to be consistent with each other. The object and effect of that section was plainly, as it appears to me, to repeal wholly the 69th section of the Act of 1868, which had been in effect, though not in terms, repealed by the 46th section of the Act of 1871, and to substitute a clause in lieu of the 46th section. That 46th section of the Act of 1871 had enacted that, where it is found by the report of the Judge upon an election petition under the Act that any corrupt practice has been committed by or with the knowledge and consent of any candidate at any election, his election, if he has been elected, shall be void, and he shall during the eight years next, after the date of his being so found guilty, be "incapable of being elected to, and of sitting in the Legislative Assembly, and of being registered as a voter and voting at any election, and of holding any office at the nomination of the Crown, or of the Lieutenant-Governor, in Ontario, or any municipal office."

It might perhaps have been held under this section, prior to the passing of the Act of 1873, that a corrupt practice committed by any person should avoid a candidate's election and subject him to disqualification for eight, years, if committed with his knowledge and con-

sent, for the only practices which were corrupt within the provisions of the Act of 1868, or the common law of Parliament, were such as were directly or indirectly done by the candidate himself, or by some person in his behalf, with a view to the promotion of his election; but whether or not there could have been any corrupt practice committed by any one, other than the candidate himself or his agent, to which this 46th section of the Act of 1871 could be applied, it is unnecessary to inquire, for that section is repealed by the 3rd section of the Act of 1873, the 1st sub-section of which very distinctly, to my mind, expresses and declares all the cases in which an election shall be avoided, namely, in the cases only of corrupt practices committed by the candidate himself or by his agent at the election, while the 2nd sub-section declares that in addition to the avoidance so declared by the first sub-section, disqualification shall also ensue when the corrupt act which so avoids the election is done by or with the knowledge and consent of the candidate, that is, where it is done by himself personally or by his agent, with his knowledge and consent, for unless done by himself or his agents, the election is not avoided at all. The second sub-section carefully abstains from saying that any corrupt practice committed by or with the actual knowledge and consent of any candidate shall avoid the election, as the 46th section of the Act of 1871 had done; it simply annexes to the avoidance of the election, which the first sub-section regulates and declares, disqualification if the act avoiding the election (which can only be the act of the candidate or his agent) be done with his knowledge and consent; the whole section taken together enacting that any corrupt practice committed by a candidate at an election, or by his agent, shall avoid the election, whether done with or without his knowledge, which words can only refer to the acts of the agent, but if done by himself personally, "or with his knowledge or consent" (which words must also be held here to refer to the act of the agent, to be consistent throughout, for no other act

but that of the candidate or his agent avoids the election), disqualification also shall ensue in addition to the avoidance.

Now the avoidance of a candidate's election being confined to the acts of himself or his agents, what are the acts of an agent within the meaning of these words in the section, "committed by any candidate at an election, or by his agent?" The first section of the Act of 1873 adds to the category of corrupt practices the violation of the 66th section of the Act of 1868. This violation can, in my judgment, be committed only, as I have said, by the keeper of the hotel, tavern, or shop where spirituous liquors or drinks are ordinarily sold, but such violation of the section may be committed by a person who is an agent of the candidate, in such a manner as to have no reference whatever to the promotion of the purpose for which the agency was created—in such a manner as in no possible way to be capable of having any effect whatever on the election; as, for example, where a candidate and a friend find it absolutely necessary to take the refreshment of dinner at an hotel, and at the dinner partake of their usual reasonable quantity of beer or wine—it may be one or two glasses, supplied by the hotel-keeper as part of the dinner—can it be that the Legislature contemplated not only avoiding a candidate's election, but also of disqualifying him for eight years, because (admitting, for the sake of argument, the hotel-keeper, within the rigid terms of the 66th section, to have been guilty of its violation) the candidate partook of the refreshments so supplied, or paid for what was supplied to his friend, and was, so far as such act could make him, a consenting party to the violation of the Act by the hotel-keeper. The 66th section does not say that any person consenting to a hotel-keeper or other person violating the 66th section, shall himself be guilty of a violation of it. I must say that, to my mind, it would be contrary to the plainest principles of common sense and justice, to attribute such an intent to the Legislature, or to put such a construction upon the Act. Such a construction would have the effect,

in my judgment, of enacting laws of the most penal character by judicial decision—not by legislative declaration clearly expressed, without which latter sanction, plainly expressed, no penal consequences of any description—much less of the character of those penalties here referred to—can be imposed. Every Act of Parliament should be so construed as to be consistent with common sense and justice, and not so as to do violence to common sense and to work injustice.

The sensible construction then of the 3rd section of the Act of 1873, which declares the election to be avoided by the corrupt act of the candidate's agent, seems to me to be to confine its operation to such acts as are done by the agent—I do not say within the scope of, but in the course of or exercise of the agency, and in the pursuit of the object of the agency—acts done as specified in the 67th section of the Act of 1868, directly or indirectly by the candidate himself—some act done with a view to promoting in some way the objects of the principal, and not to extend to acts in which the principal is in no way concerned, and which are done not with any view to his interests, or to the object of the agency. Such acts are, it is true, the acts of the person who is agent, but they are not the acts of the agent *qua* agent. In some cases a question may sometimes arise whether or not the act of the agent, which is relied upon as avoiding the election, was done by him *qua* agent, that is to say, in the pursuit of the object of the agency, and with a view to the interests of the principal; in such cases justice will be done, and the purity of election secured by determining the point in doubt in favor of avoidance, but if, beyond all question, the act complained of is not done in pursuit of the object of the agency, in view of the interest, actual or supposed, of the candidate, or in any way in relation to the election, but solely for the purpose, interest, or gratification of the person who is agent, and is not corrupt otherwise than as it is prohibited and made so by the statute, such an act, not being done by the agent *qua*

agent, is not an act which can, in my opinion, be within the meaning of the 3rd section of the Act of 1873.

I am of opinion, therefore, for all of the above reasons, that the respondent's election cannot be avoided for the treat referred to as given by Larkin at Doyle's hotel, although Doyle undoubtedly was guilty of a violation of the 66th section of the Act of 1868, and thereby of a corrupt practice within the meaning of the 1st section of the Act of 1873, and is liable to be made amenable, under that section, to all consequences of having committed a corrupt practice.

The learned Judge having, on the other evidence in the case, found that the respondent personally, and by his agents, with his knowledge and consent, was guilty of corrupt practices, the respondent appealed to the Court of Appeal.

Mr. Robinson, Q.C., *and Mr. Bethune* for the appellant (the respondent to the petition).

Mr. J. A. Miller for the respondent (the petitioner).

DRAPER, C. J. A.—The only reason given for the appeal in this case is as follows: "That there was not sufficient evidence of corrupt practices having been committed by any agents of respondent, or by the respondent himself, or by and with his actual knowledge and consent, to warrant a judgment voiding the election herein." The judgment was that the respondent was not duly elected—that the election was void "by reason of corrupt practices committed by himself personally, and by reason of other corrupt practices committed by his agents with his knowledge and consent."

In the outset, I must say (speaking for myself only) that I entirely concur in the introductory observations to the judgment delivered, to the effect following: "The difficulty which I have experienced in evolving truth from the greater part of this mass of evidence has been great beyond what can well be conceived, arising from the fact

that the manner in which many of the witnesses gave their evidence—who from their intimate connection with the respondent in his business relations, and in the connection with the canvass on his behalf, should reasonably be expected to be able to place matters in a clear light—has left an impression on my mind that their whole object was to suppress the truth."

Apart from the weight to which the opinion of the learned Judge is entitled, he having heard the whole evidence, and having had the fullest opportunity to notice the demeanor of each witness, his manner of giving evidence, whether serious and considered or otherwise; and having myself repeatedly gone over it to compare the statements of the witnesses, I feel it my duty to say that I recognize the justice of the censure thus passed upon no inconsiderable portion of the testimony; and severe as the comment undoubtedly is which the learned Judge felt himself called upon to make in regard to the evidence of Mr. John W. King, I see much reason for thinking that it was not uncalled for. One illustration of the want of correspondence between their verbal resolves and their actions may be given. On the afternoon or evening of Saturday the 16th January (the poll was to take place on Monday following), as one witness stated, "We spoke about spending money, but it was resolved not to. It was the subject of general conversation. Spending money was talked of the same as any other election matter, but there was no way of spending it, the law was so strict." On the Sunday evening (Mr. James S. Norris is the witness) some parties met at Mr. John W. King's house, at St. Catharines, Mr. King being the book-keeper and confidential clerk of the respondent. Mr. Norris says: "There was a discussion that evening which would lead to the requirement of money. They spoke, I think, of money being used against them. The party said so. . . . . The impression among us was that money was being used against us, and we spoke of using money to counteract it. We decided not to use any money." That same evening,

at a late hour, Robert McMaugh and Hugh Hagan left St. Catharines. They drove to Clement's, the postmaster, and with him went to several houses. The evidence as to the acts of some one or other of them is quite sufficient as against them to sustain the charge of bribing voters. Whether the evidence, on a consideration of the whole case, will bring the respondent within the scope of sub-sec. 2, sec. 3, of 36 Vic., c. 2, on the ground of corrupt practice committed by and with his actual knowledge and consent, is a question which will be more conveniently disposed of after other cases have been stated and remarked upon.

The case of treating during polling hours in a tavern in the town of Niagara, by giving spirituous liquors which were drank in the tavern, calls for an interpretation of the 66th sec. of the Act of Ontario, 32 Vic., cap. 21.

The section is placed in a division of the statute headed "keeping the peace and good order at elections," and is thus worded: "Every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold, shall be closed during the day appointed for polling in the wards and municipalities in which the polls are held; and no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period, under a penalty of $100 in every such case."

The law previously in force in the Province of Canada on the same subject was: "Every hotel, tavern and shop in which spirituous liquors are ordinarily sold, shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be on Sunday during divine service, and no spirituous or fermented liquors or drinks shall be sold or given during the said period, under a penalty of $100 against the keeper thereof if he neglects to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors as aforesaid."

It is, as I understand, contended that the change of language in the latter Act, omitting the special limitation of the penalty to "the keeper thereof," makes no difference in the construction, and that the offence which subjects to the penalty can only be committed by the hotel, tavern, or shop keeper, under the present statute, which I shall not contend would not be the true construction of the statute of Canada.

It is also, as I learn, further contended that section 66 creates only *one* offence, consisting of two parts, viz.: (1) not keeping the tavern, &c., closed; (2) selling or giving spirituous or fermented liquors to any person. If the latter proposition be correct, it may be that no one but the keeper can incur the penalty; but, confining attention strictly to the language of the section, I think the proposition untenable.

I will first endeavor to meet a suggestion that, unless the section is read as indivisible, the non-observance of the first part will incur no penalty. This appears to me to make the question depend upon punctuation. Put a full stop after the word "closed," and it may be so; but read the whole together, without pause, or even with a comma after "closed," and give legitimate effect to the closing words, "under a penalty of $100 *in every such case*," and the objection disappears. In every case in which the preceding enactments are violated a penalty is inflicted, as well when the house is not kept closed as when a glass of wine, or of spirits, or of beer is sold or given.

There is a further reason for construing this section distributively, though the amount of the penalty is the same in all cases. The authority of *Crepps* v. *Durden*, Cowp. 640, has never been questioned; it has been frequently recognized, and was the unanimous judgment of the Court of King's Bench, delivered by Lord Mansfield. The point decided was that where a statute imposed a penalty upon a man for exercising his ordinary calling on the Lord's day, he could commit but one offence on the *same* day. As regards the form, it can make no dif-

ference that our statute is mandatory, ordering that the house, &c., be kept closed, while in the English Act it is prohibitory—"No tradesman or other person shall do or exercise any wordly labor, business or work of their ordinary calling on the Lord's day." In Lord Mansfield's language, "The offence is exercising his ordinary calling on the Lord's day, and that, without any fraction of a day, hours or minutes, it is one entire offence, whether longer or shorter in point of duration, and so whether it consist of one or a number of particular acts." In that case the act complained of was exercising his ordinary calling by selling hot rolls of bread. That was the mode in which the ordinary calling was exercised. The selling hot rolls was not prohibited, the exercise of the ordinary calling was. In our case the Legislature have not stopped short at commanding that the tavern should be kept closed, they have also prohibited two other distinct matters—selling and giving liquor, &c. The first is of a character which falls directly within the principle of *Crepps* v. *Durden*—only one such offence can be committed on the same day; the second, forbidding acts which may be repeated again and again with or to different individuals all day long—and they have imposed the penalty *in every such case.*

It appears to me to follow that the keeper of the hotel, tavern or shop is the only person who can incur a penalty for not keeping the same closed during the day appointed for polling.

The violation of this 66th section is made a corrupt practice by 36 Vic., cap. 2, s. 1, provided such violation occurs "during the hours appointed for polling." The reason for a difference between the 66th section and the 1st section of 36 Vic., cap. 2, is not very obvious; but for some cause penalties are imposed by the one for any violation of its provisions during the *day* appointed for polling; but to constitute the same violations corrupt practices, they must take place "during the *hours* appointed for polling." With that exception, the offences remain

as defined in the 66th section, and for the purpose of imposing the penalty there is no change. The Legislature, however, appear to have taken a more serious view of these offences than they did when the Act of 1868 was passed. There may have been a necessity for some greater punishment than a mere pecuniary penalty to check the undiminished practice of having taverns open on polling days, or of selling liquor or treating on those days, and hence the additional provision in the 36th Victoria.

But for the word "*give*" I might have thought the whole section 66 was confined to the keepers of hotels, taverns and shops. But looking at the object, viz., "keeping the peace and good order at elections," and the prohibition to *give* as well as to *sell*, I think that would be too narrow a construction; and I am of opinion that any person who during the day appointed for polling shall give any spirituous or fermented liquor or drink to any other person within a hotel, tavern or shop in which such liquors or drinks are ordinarily sold, in the wards or municipalities in which the polls are held, is as guilty of a violation of the section in question as the keeper of such establishment would be who himself should give the liquor. If it was intended to limit sec. 66 to the hotel-keepers, &c., by the provision that no spirituous or fermented liquors or drinks shall be sold or given, it would have been much simpler to have said within his hotel, etc., instead of within the limits of such municipality, and simpler still to have said, and no keeper, etc., of any such hotel shall sell or give, etc.

The peculiar form of expression tends to show that the Legislature intended to prescribe one thing, *i.e.*, keeping the hotel, etc., closed; and to forbid another, *i.e.*, selling or giving liquor, and to impose a penalty on every person who neglected to obey the one, or who acted in defiance of the other.

As the tavern-keeper, etc., who sells in violation of the statute commits an offence, so the purchaser is equally

guilty with the former if he gives the liquor purchased by him to persons in the tavern.

That Larkin was an active agent of respondent is sufficiently proved, and in my view of the law he was guilty of a corrupt practice in treating at Doyle's. The learned Judge, after a very elaborate consideration of the statute and of other authorities which he has referred to in relation to the question, held that the election could not be avoided for this treat, and the petitioner has not appealed against that decision.

The case of W. H. Stewart (the colored man) remains to be considered. Upwards of two years before the election a pair of respondent's horses ran over Stewart's wife, and one of her legs was broken. She was laid up for eight months in consequence. At that time Stewart was indebted to the respondent, and the debt was written off in the respondent's mill book. Mr. J. W. King gave this account of the matter: "Mr. Stewart had no legal claim. It was an act of charity to pay him what we did. It is two years since we paid him, whatever it was. It was given as a little present on account of the affliction." And on the 23rd November, 1872, Stewart signed a receipt in presence of J. W. King as follows: "Received from S. Neelon the sum of fifty-four dollars and sixty-six cents, in full of all accounts or claims whatsoever." About a week before the election now under consideration, the respondent, having apparently heard that Stewart or his wife were dissatisfied, sent his salesman, Sisterson, to see her. She told him she was not satisfied—she did not think respondent had done her justice. After the election she came and saw the respondent, and he told her he would give her $30, and asked if that would satisfy her. Credit was then given for $19.12 on an account against Stewart, and $18.88 was paid to her in cash, by respondent's direction. But before this payment, and also about a week before this election, Stewart and the respondent met at the municipal election at the Grantham school-house, and according to Stewart's account, respondent said to him,

"I would like to have you with me at the election." Stewart replied he could not very well be with him because he, respondent, did not give what Stewart thought were the damages due to his wife. That he told respondent he had not done him justice, and that respondent said if he had not done what was right, he was able to make it right. Respondent did not say anything about his (Stewart's) vote, but he told more than one time that he would like to have Stewart with him. Daniel Stanley was sitting with Stewart at the time, and says respondent asked Stewart if he was going to do anything for him; that Stewart said, "No, sir, I cannot." Respondent asked, "Why?" Stewart said, "You did not do the fair thing when my wife's leg was broken." This is Stanley's account, and he goes on: Mr. Neelon said, "If you will see me in this cause or case, if I have not done the fair thing, I will do the fair thing." Stanley says he heard the conversation distinctly—he could not help hearing it particularly, and did not think there was anything wrong in what was said at the time, and did not think from the language that Mr. Neelon was trying to buy the man's vote. And Robertson, who was standing near, heard respondent say, "Mr. Stewart, I am willing to do it, and will do it." Stewart says respondent began the conversation by saying, "I would like to have you with me at the election." Then Stewart expressed his dissatisfaction as to the compensation made for the injury to his wife, and respondent said if he had not made it right, he was able to make it right. And he wound up his evidence by saying, "Mr. Neelon said to me, 'Mr. Stewart, I want to do what is right. I am able to do what is right. I can do what is right.' It was not said by way of a bargain. Mr. Neelon only told me he wanted me to support him; he did not make the payment depending on my voting for him." Stewart told his wife what had passed, and she wrote a letter to respondent, beginning, "You sent me word by my husband *about voting, and what I had to say, and if you* do what is right, he can use his own pleasure

about it. . . . . And now you can use your own pleasure about it, but I think you will do what is right. If you do, give me $100, and I don't think that will be anything out of the way." This letter is dated January, 1875, no day stated. Stewart says he went to the mill about dusk with the letter, and gave it to a man who attends at the mill. He saw King and Sisterson afterwards, and not hearing anything about the letter, he asked Mr. King if he had seen the letter, and he said he had read it, hung it up, and put it on file. He afterwards asked Mr. King, and he said respondent had read the letter and placed it on file. Then afterwards he saw respondent, who gave him $30—not all in cash He deducted a bill Stewart owed at the mill, and gave the balance in money. Sisterson says that about a week before the election, respondent sent him to see Mrs. Stewart. He told her respondent was still able to do justice—he did not say respondent *would* do justice; he was not authorized to say anything of the kind. Mrs. Stewart told him she would write a letter. It was at her own dictation that she wrote the letter stating what her claim was, and Sisterson said, "That will be just as well."

In reference to this the respondent swears: "I gave him (Stewart) to understand I would not give him a cent to go with me in the election. I used no such language as 'If I had not done the fair thing, I will do it if you will be with me,' or anything in substance the same; nor did I say, 'If I had not made it right, I would make it right.' After the election was over, Stewart came to the mill and asked if I had received a letter he had left there. I said no. He went out and made inquiry of King or Sisterson, and they came in with the letter, which was found in a pigeon hole in my desk. I opened the letter and read it."

Looking at the whole of this evidence, I cannot resist the conclusion that the respondent errs in his representation—he does not say so in express words—that he knew nothing of this letter until after the election. He had

heard of Mrs. Stewart's dissatisfaction, and before the election he sent Sisterson to her; she told him she would write, and his statement clearly indicates he was present when she dictated the letter; his remark, "that will be just as well," clearly indicates that he knew of its contents, makes it at least highly probable that she had expressed her views to him, which, but for the letter, he would have communicated to respondent. Sent for the express purpose of asking Mrs. Stewart "what was the matter with her," Sisterson must, on his return, have given some account to respondent, and if he said what, if his present account be true, he must have said, that she was going to send a letter, it makes it unlikely that the letter, when it arrived, should have been put away in a pigeon hole unopened. King says, in reference to letters for respondent arriving when he was not at the mill, "If he was not at home I opened them. . . . He was not absent, only for meetings, and his letters always remained *on his desk.*" Stewart swears that King told him that he had read this letter and put it on file, and afterwards told him that respondent had read it and put it on file. If King read it, and it seems to have come to his hands upon or soon after its arrival at the mill, I cannot assume that he put it in respondent's desk without mentioning it. On the whole, I deduce as a fact that respondent became aware of it before the election, and thought it as well to leave Stewart to vote without further interference, being satisfied Mrs. Stewart would not influence him adversely.

But in any event the letter shows what impression the conversation with respondent produced at the time on Stewart, and I attach more value to that than to his subsequent assertion, which literally was no doubt true, that respondent did not make the payment depend on his voting for him. Stewart went to his wife, apparently immediately after parting with respondent, and tells her about it, and she writes, or rather dictates, a letter to respondent, beginning, "You sent me word by my husband *about voting*, and what I had to say, and if you do

what is right, he can use his own pleasure about it." I cannot doubt that, whatever were the precise words used by respondent, the conversation between him and Stewart related to the election and to Stewart's vote, and that Stewart's statement that respondent said to him, "I would like to have you with me at the election," is the key-note to all that followed. Stewart understood it, though his vote was not directly mentioned, and the respondent expected it would be so interpreted though so guardedly veiled; and the subsequent settlement and payment confirm me in this conclusion.

I feel therefore constrained to hold this to have been an indirect offer, originating with the respondent, of money or valuable consideration, made to Stewart to induce him to vote for respondent at the coming election, and I therefore agree in the judgment that the election is void by reason of this corrupt practice committed by the respondent himself, as well as by reason of other corrupt practices committed by James S. Clement, Robert McMaugh, Hugh Hagan, and others his agents.

Before concluding, I desire to make an observation as to the proceedings and bribery which are proved to have occurred on the Sunday night before, or in the early morning of the day of the polling.

The professions of a candidate that he is entirely ignorant of the conduct and acts of his most zealous supporters, especially in reference to such acts as are rarely adopted except as a last resort, must unavoidably be regarded with suspicion, and cannot be accepted without scrutiny. And this the more if among these supporters are found some who for years have been and still are in his service, employed and trusted by him in business relations, some of them confidential, and of frequent, perhaps daily occurrence—the candidate, to insure immunity, to all appearance keeping aloof from the consultations of his friends, avoiding any apparent participation in their acts, and thus remaining ignorant of everything which might not become known to the most ordinary observer—ignorant, in

fact, because he will not use the means of information which surround him.

Such ignorance brings to mind the old maxim, *Ignorantia juris quod quisque tenetur scire neminem excusat*, and makes Mr. Best's comment on the maxim more pertinent: "If those only should be amenable to the laws who could be proved acquainted with them . . . persons would naturally avoid acquiring a knowledge which carried such dangerous consequences with it."

And so the wilful avoidance of a knowledge also fraught with danger might, without much strain, be deemed evidence of approval or even of consent.

But in this case I do not find any proof of a determination to resort to bribery until a late hour on Sunday evening, and it was immediately acted upon and carried out by an early hour on Monday morning. As a fact, I cannot find proof of the respondent's knowledge or consent. The evidence of agency I think ample, so also of bribery by those agents and this avoids the election. The shortness of the interval between the resolve and the execution renders improbable the fact of the respondent's actual knowledge, and a finding against him ought to be free from reasonable doubt.

Burton, J. A.—I concur in thinking that this appeal must be dismissed, but I desire to base my decision entirely upon the Stewart case.

I agree with the learned Chief Justice, that there is no evidence to connect the respondent with what is spoken of as the Sunday raid. That transaction was conceived and carried out only a few hours before the polling day, and there is not a scintilla of evidence to show that the respondent had knowledge of it, nor, in my opinion, that there was any arrangement to which he was a party, that he should be kept in ignorance of the particular acts of corruption, whilst having a general knowledge that such means were being employed; and—adopting the language of the late Mr. Justice Willes—no amount of evidence

ought to induce a judicial tribunal to act upon mere suspicion, or to imagine the existence of evidence which might have been given, but which the petitioner has not thought proper to bring forward, and to act upon that evidence, and not upon that which really has been brought forward; and that when circumstantial evidence is relied on, the circumstances to establish the affirmative of a proposition must be all consistent with the affirmative, and that there must be one or more circumstances believed by the tribunal, if you are dealing with a criminal case, inconsistent with any reasonable theory of innocence. There is nothing in the whole of the evidence which is not consistent with the respondent's innocence.

As regards the Stewart case, there was evidence which might impress different minds differently.

In dealing with the finding of the learned Judge upon that evidence, we are much in the position of Judges when a rule is moved for to set aside the verdict of a jury on the ground that the verdict is against evidence. The Judges do not consider what conclusion they would have arrived at had they been placed in the position of the jury, but whether there is sufficient evidence to warrant the verdict, and whether the presiding Judge is satisfied with it. Here the learned Judge has found upon the evidence adversely to the respondent, and I should not presume on a question of fact to set up my opinion against his, when he had the advantage of hearing the witnesses, apart from the deference which I feel to be due to a Judge of his learning and experience.

PATTERSON, J. A.—This is an appeal from the decision of Mr. Justice Gwynne, which sets aside the election and disqualifies the candidate for corrupt practices committed by him.

The evidence on one of the charges, viz., that of bribing a colored man named Stewart, is quite sufficient to sustain the finding, and I see no reason for taking a different view of it from that taken by the learned Judge.

The facts stated in evidence were, that Stewart's wife had her leg broken about two years before the election by Mr. Neelon's team, which had run away, and Mr. Neelon had paid her or her husband $55 as compensation, partly by cancelling an account and partly by cash. It does not appear that after that settlement the Stewarts had had any open account with Mr. Neelon, or had been obtaining goods on credit, until January, 1875. The Stewarts were dissatisfied with the settlement, but nothing was done to remove their dissatisfaction until the approach of the election now in question. This election was on the 18th January, 1875. When the municipal election for the township of Grantham was being held, in the beginning of the same month, Mr. Neelon spoke to Stewart in a school-house where a number of people were, and asked for his support, which Stewart declined to promise, saying that Mr. Neelon had not done the fair thing when his wife's leg was broken, and Mr. Neelon gave him to understand that he was willing to "do the fair thing." Mr. Neelon himself denies that he made any promise to Stewart, although he says that Stewart had put forward his grievance as a reason for not supporting him, both on the occasion in the school-house and on another occasion shortly before that, when Mr. Neelon had been canvassing him for his vote. After going home from the school-house, Stewart appears to have told his wife of the conversation with Mr. Neelon, and some little time afterwards she wrote, or dictated to her daughter, a letter to Mr. Neelon, commencing thus: "Mr. Neelon, you sent me word by my husband about voting, and what I had to say, and if you do what is right, he can use his pleasure about it," and ending by asking $100 more. Mr. Neelon had asked a Mr. Sisterson, who was his salesman at the mill, and apparently a confidential agent in the election contest, to go to Mrs. Stewart to see "what was the matter with her," and Mr. Sisterson was at her house when this letter was being written, and was told of it by Mrs. Stewart. The letter was promptly sent by Stewart,

and delivered to some one at Mr. Neelon's mill or office. Mr. Neelon says the contents of it did not come to his knowledge till after the election. There is quite room on the evidence for a different inference, but the matter is not very important. The letter shows, at all events, the terms on which the Stewarts understood the negotiation to be proceeding. Following Sisterson's visit and the sending of the letter, the facts next in order of time are shown by entries in Mr. Neelon's books, where Stewart is charged, under date 13th Jan., $4.44 for flour, &c., and on the 16th Jan., $11.17. The election was on the 18th January. On 10th February Stewart is charged with flour, &c., to the amount of $3.51, making in all $19.12. Afterwards, Mr. Neelon himself settled with Stewart, allowing him $30 additional compensation in respect of the accident, which he paid by giving him in cash the difference between the $19.12 and the $30.

The learned Judge having been satisfied, upon evidence of this character, that Mr. Neelon had directly or indirectly, by himself or by some other person, given, offered, or promised money or valuable consideration to Stewart in order to induce him to vote, it is impossible for us to say that he ought to have come to any other conclusion.

This disposes of the appeal without the necessity of discussing the other matters covered by the very careful and elaborate judgment of the learned Judge. One of these subjects, viz., the construction of section 66 of the Act of 1866, and the effect of the Act of 1873, when that section has been violated with the knowledge and consent of the candidate, we have already had occasion to notice in the judgment of this Court in the *North Wentworth case* (*ante* p. 343). And we have further to construe section 66 in the *South Ontario case* (*post* p. 420), in which judgment is now to be delivered.

With respect to the charge founded on what is spoken of as the "Sunday raid," I shall merely say that I am not prepared to assent to the application to that case of

the principle on which the *London case* (a) was decided, or to hold that on that principle alone the candidate is to be fixed with knowledge of the bribery committed by his agents, however gross and deliberate that bribery may have been, and however strong may be the suspicion created in our minds that the candidate can hardly have been quite ignorant of what was being done on his behalf. I entirely assent to the distinction which was clearly pointed out by Mr. Robinson in the very able argument which he addressed to us, between the case of a city where, within a comparatively small area and for the space of two or three weeks, bribery had been going on so extensive and so flagrant as to be appropriately described as pervading the atmosphere; where not to ascribe knowledge of it to the candidate in whose interest it was committed, and who was on the spot, would be to forego experience and give no weight to probabilities so strong as to be almost irresistible; and where, in the graphic language of the same learned Judge whose judgment is now on review, one could "as readily believe it possible for the respondent to have been immersed in the lake and to be taken out dry, as that the acts of bribery which the evidence discloses to have been committed on his behalf, almost under his eyes, in his daily path, with means of corruption proceeding from his own headquarters and from the hands of his confidential agents there, could have been committed otherwise than with his knowledge and consent," and the present case, where what was done was done only a few hours before the election, and though initiated in the town where the candidate lived and by agents who were in his confidence, was carried out at a place several miles away, and amongst the voters in one locality only of a county constituency.

I agree that the appeal should be dismissed with costs.

Moss, J. A., concurred.

Appeal dismissed with costs.

(9 *Journal Legis. Assem.*, 1875-6, p. 199).

(a) Reported Dominion Elections, 1874, *post*.

SOUTH ONTARIO.

BEFORE MR. JUSTICE WILSON.

WHITBY, *11th to 13th May, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *22nd December, 1875, 22nd January, 1876.*

ABRAM FARWELL, *Petitioner*, v. NICHOLAS W. BROWN, *Respondent.*

Agency—Political association—Committees—Corrupt practices—Treating during polling hours—"Municipality in which polls are held"—Respondent treating himself during polling hours—New charge in Appeal—Particulars.

The respondent was nominated by a Conservative association, and he accepted the nomination. The delegates to the association were to do all they could to secure his election. A committee was appointed in O. to canvass the town, and a committee-room was engaged and paid for by the association, voters' lists were procured and used as canvassing books, and members were appointed to canvass parts of the town, and reports were made to the committee of the result of the canvassing. The respondent, who resided at W., did not attend the meetings, but knew they were canvassing for him, and gave them blank appointments of scrutineers to fill up, which they did, but the respondent did not know who composed the committee.

Held, per Wilson, J., that the respondent, by authorizing such committee at O. to appoint scrutineers, made them his special agents for that particular matter and for that occasion only, and did not adopt them as his general agents for all the purposes of the election.

One T., a member of such committee, canvassed actively for the respondent and to his knowledge, and on the nomination day attended a meeting of the respondent's friends in W., at which the respondent was present, and at which arrangements were made about canvassing and getting out votes, and generally about the election.

Held, by the Court of Appeal (*Wilson*, J., *dubitante*), that T. was an agent of the respondent for the purposes of the election.

One G., a member of the same committee, had a voters' list, and canvassed for the respondent, and stated he had no doubt the respondent expected him to vote and work for him.

Held, per Wilson, J., that G. was not an agent of the respondent.

The committee at the town of W., having been recognized and attended by the respondent, were held to be his agents.

One B. was a member of the committee at W. for the respondent's election, canvassed for him, and met him at the committee-rooms once or twice. B. was also appointed in writing by the respondent to act as scrutineer for him on the polling day, and during polling hours gave whiskey to the Deputy Returning Officer in the polling booth.

Held, per Wilson, J., that B., while acting as such scrutineer, was not acting in his former capacity as committee-man or agent of the respondent, and that his appointment as scrutineer did not empower him to do an act of treating so as to make the respondent answerable for it.

One C., a member of such committee at W., partook of whiskey in the kitchen of a tavern at W. during polling hours, and also, when bringing a voter from the town of O. to the town of W. (within the same electoral division) to vote at W., treated himself and the voter in O.

Held (*Draper*, C. J. A., *dissentiente*), that C. was not guilty of corrupt practices within s. 66 of the Election Law of 1868.

Held, by the Court of Appeal (*Draper*, C. J. A., *dissentiente*), that s. 66 of the Election Law of 1868 (32 Vic., c. 21), as amended by 36 Vic., c. 2, applies only to shop, hotel and tavern keepers, who alone are liable to the penalties for keeping open the tavern, etc., and for selling or giving spirituous liquors during the prohibited hours.

Held, by the Court of Appeal (reversing *Wilson*, J.), that the prohibition in such section (66) as to opening taverns and giving or selling liquor "in the municipalities in which the polls are held," applies to all the municipalities within the constituency, irrespective of the place where the vote is given or to be given.

The respondent, on polling day and during polling hours, went to a tavern at W. and partook therein of spirituous or fermented liquor, for which he did not then pay.

Held, per Wilson, J., that he did not "sell or give" spirituous liquors within the meaning of s. 66 of the Election Law of 1868.

The petitioner was not allowed to urge before the Court of Appeal a charge of corrupt practices against the respondent personally, which had not been specified in the particulars, or adjudicated upon at the trial of the petition.

The petition contained the usual charges of corrupt practices.

Mr. Bethune and Mr. A. G. McMillan for petitioner.

Mr. Hector Cameron, Q.C., *and Mr. Billings* for respondent.

The evidence affecting the election is set out in the judgment.

Wilson, J.—The petitioner contends he has proved corrupt practices to have been committed by W. H. Thomas and F. E. Gibbs, who, he says, were the general authorized agents of the respondent, and that he has proved corrupt practices to have been committed by W. H. Billings and Francis Clark, who, he says, were the general agents of the respondent, but if not, he says they were his agents for the purpose of charging him with treating, and that will be sufficient for the petitioner's case. He charges also that the respondent having had liquor sold or given to himself during the polling hours at Ray's tavern, in the town of Whitby, was personally guilty of

a corrupt practice within the 66th section of the Election Law of 1868.

It must be considered—

Firstly: Whether Mr. Thomas and Mr. Gibbs were, or either of them, and which of them was the general agents or agent of the respondent? Secondly: Whether Mr. Billings and Mr. Clark were, or either of them, and which of them was the general agents or agent of the respondent, and if not the general agents or agent, whether they were, or either of them was, the agents or agent of the respondent so far as the alleged corrupt practices charged are concerned? Thirdly: If Thomas were the agent of the respondent, has he been guilty of corrupt practices? Fourthly: If Gibbs were also an agent, has he been guilty of corrupt practices? Fifthly: If Billings were an agent, has he been guilty of corrupt practices? Sixthly: If Clark were an agent, has he been guilty of corrupt practices? Seventhly: If Thomas were an agent, has he been guilty of corrupt practices by having had given to him a glass of brandy by G. Hodson at the village of Columbus in polling hours? Eighthly: Whether the respondent was guilty of corrupt practices by having had sold or given to him at Ray's tavern, by the person attending the bar there, liquor during polling hours?

The first question I have to deal with is whether Thomas was the agent of the respondent for the purpose of the election? That of course depends upon the evidence, and it is to this effect. Thomas said: "I was at the convention for choosing delegates, and was chosen one of them. I think it was called by the Conservative Association for the South Riding. I am a member of the association. The meeting was at Brooklin. The delegates retired to an adjoining room and chose Mr. Brown by ballot. Brown accepted the nomination two or three days after. It was understood these delegates were to do all that they could to secure Mr. Brown's election. There was a meeting at the committee-room in Oshawa a few days after Brown's acceptance; don't know who engaged or paid

for the room. The committee met there nearly every evening until the election was over. It was arranged that certain members of the committee were to canvass certain parts of the town. I was to canvass generally. There were voters' lists got and put into the form of books for canvassing; think the Conservative Association paid for the use of the room. The scrutineers were appointed by the committee. I suppose blank appointments, signed by Mr. Brown, were got and filled up by the committee. I did what I could in the riding for Mr. Brown. I had not much else to do at the time, and I went into this election to win. I met Brown at Oshawa during the canvass. He was not at our meetings. No arrangement that he was not to attend. From anything that passed between us, I do not know he knew I was canvassing for him; I suppose he knew I was doing all I could for him. There were reports made to committees of the result of the canvassing. On nomination day, after the nomination was over, a meeting of Brown's friends was held in the room over the *Chronicle* office in the town of Whitby. Brown came to it; it was to arrange about canvassing and about getting out voters and generally about the election. I was there only a few minutes. There were volunteer teams from a number of people for the election, and among them from myself. I drove one Hoey as far as Cedarville to vote, drove him in the team I had hired to go to Port Perry in the North Riding to vote; did not hire the team to take him, but to go to Port Perry. I had $50 bet on the result of the election."

That is the whole of the evidence as to acts on which the agency for Brown is founded and from which it is to be inferred, excepting the acts of treating, which are the corrupt practices to be connected with the alleged agency. Do these acts establish the agency? The Brooklin meeting was called by the Conservative Association before there was any candidate. The meeting of the delegates was also before there was a candidate. Brown's first act was two or three days after his nomination by the delegates.

So far, Thomas was not his agent; he was only a member of the party which supported Brown afterwards, and it may be an active member, too. The delegates were to do all they could for Brown. Brown resided in Whitby; Thomas resided in Oshawa. The committee meetings Thomas speaks of were held in Oshawa. The committee-room was paid for by the Conservative Association. It may be presumed that all that was done up to the time of the hiring of the committee-room in Oshawa was done by the Conservative Association, or by the voluntary contributions of the electors in order to secure a representative on the side of that body or party. It is what took place after that which must be chiefly relied upon to connect or identify Brown with the acts of Thomas, although the previous conduct and position of Thomas must not be wholly lost sight of. What happened after the committee-room in Oshawa was opened was this: The committee met almost every night upon election business. They provided for canvassing the town. Thomas was to canvass generally; he was not restricted to any particular division of it. Voters' lists were got by the committee for canvassing. Thomas met Brown at Oshawa during the canvassing. Thomas supposes Brown knew he (Thomas) was doing all he could for him. Brown signed blank appointments of scrutineers, and delivered them in some way to the committee in Oshawa to fill up, and they did so. At the meeting held after the nomination on nomination day, at which Brown was present, it was arranged that there should be canvassing, voters brought up, and other usual means taken to forward the election. Thomas says he went in to win at this election, and he did what he could do for Brown all over the riding, and he had $50 bet on the result of the election.

There can be no doubt, then, that under these circumstances, and from his conduct on the polling day, that Thomas was a very active committee-man and partizan for Brown, and that he was clearly an agent of the committee. I was disposed to think very strongly that Thomas

was shown to be an agent of the respondent during and for the purpose of the election, on the following grounds. Brown knew there was a committee sitting in Oshawa in connection with his election, because he entrusted that committee with blank appointments of scrutineers signed by him, to fill up with the names of such persons as the committee selected for that duty; in fact, that he left such blank appointments with the committee was a delegation of power to that body, to that extent at all events, to act for him. Brown knew Thomas was doing all he could for him, although not from anything which was said between them, and although it does not appear Brown knew Thomas was a member of the committee, and Brown knew generally that canvassing and the other ordinary proceedings as to elections were being carried on in Oshawa for him, and I thought it must be said that Brown did know that Thomas was doing all he could for him during that period of canvassing, and so that there was sufficient authority conferred on Thomas to continue so to act, and of a ratification by Brown of what Thomas had already done.

If it were not that Brown gave authority to the committee to appoint the scrutineers, I think it could not be said that the evidence showed that Brown was identified with the committee, but that it was a committee merely in his interest, got up either by the Conservative Association or by voluntary contributions of the people of the village favorable to that party and to the candidate. *Staleybridge case* (1 O'M. & H. 66); *Westminster case* (1 O'M. & H. 91).

Having given that authority, he did to that extent constitute the committee his agents; but I think he thereby did not adopt them as his general agents for all purposes, and so constitute each member of it his representative to canvass or to make him responsible for the bribery or treating of the members. Empowering a person to act as objector-general at the revision of voters' lists does not give him authority to bind the candidate

by an act of bribery: *Wigan case* (1 O'M. & H. 188). I thought that strictly agency on the part of Thomas was established by the evidence referred to, although there was no express or direct authority given by Brown to Thomas to canvass generally or to do all he could for him. I did not think it was conclusive evidence of agency; but that it was evidence nevertheless, and it certainly is so.

But I am disposed to doubt whether agency has been established either in fact or by implication, for the following reasons: The original meeting to choose delegates was called by the Conservative Association, Thomas being at the time a member of it. The delegates so chosen, of which Thomas was one, nominated Brown as their candidate. The committee-room in Oshawa was hired by the same association. How the committee was appointed does not appear. Thomas was a member of it. Brown was never at any of its meetings. There is no evidence he knew who were the members comprising it. That committee unquestionably did canvassing, and authorized it to be done, for Brown, and managed the election matters generally for their candidate. And if Brown can be identified with it, then agency by the committee and by Thomas also will be well established against Brown. But can Brown be identified with the committee? He did not appoint it; was never at it; did not know who composed it; excepting the fact that he gave it authority to appoint his scrutineers, there is no evidence which shows that he knew there was such a body at all. In the *Staleybridge case* (1 O'M. & H. 66), Blackburn, J., speaks of a "committee not selected by the respondent, but consisting of *bonâ fide* volunteers chosen by the voters of the district as persons in whom they had confidence, to be the head of their own department, and to act together;" and again, at p. 72, he says: "But in such a case as this, when I am convinced that they were really *bonâ fide* volunteers, voters acting for themselves, not selected by the member or chosen by him at all, but really *bonâ fide* in a business-like manner, the voters of the district choosing sober and

respectable men in whom they had confidence to be the head of their own department, and acting together, a messenger who is sent by one of them is not so directly connected with the candidate or any of his recognized agents as to make him responsible for his misconduct in offering a bribe." So also in the *Westminster case* (1 O'M. & H. 91), Martin, B., said: "It was proved that one Davis was a person who canvassed for a society called 'The Working-man's Conservative Association.' This society was assumed to be formed of working-men, but next to nothing was subscribed to it by working-men; all the rest of the funds of the society came from a subscription of £60 from the respondent himself (he withdrew from the society, however, on becoming a candidate), two subscriptions from his partner, and various other sums from persons who subscribed, expecting this money to be expended in promoting their political views. The funds of the society were spent in canvassing persons to vote for the respondent, but the evidence was that it was an independent agency, and that this body was acting on its own behalf." And on this statement of facts, the Judge said, "he should not hold Davis to be an agent."

I am not prepared, upon the evidence and upon the statement of the law to which I have referred, to say that it was Brown's committee appointed by him, or adopted by him (excepting as to the scrutineers), or authorized by him to canvass for or to manage the election contest generally for him. I have already said that the authority by Brown to this committee to name scrutineers for him was, in my opinion, a special authority to act in that particular matter and for that occasion only, and that it cannot be extended to the adoption by him of the committee as his general agents for all purposes.

If the committee were not of Brown's nomination or adoption—were not, in fact, his general agents deriving their authority from him as all agents must do, then it will be very difficult to make out that Thomas was an agent of Brown. He had nothing personally to do with

Brown excepting that during the canvassing he saw Brown in Oshawa. He did not speak to Brown of canvassing, but he says he supposed that Brown knew that he (Thomas) was doing all he could for him in the election. If these circumstances be of such a nature that it can be inferred that Brown accepted Thomas from thenceforth as his agent, it is of no consequence whether the committee was appointed by or adopted by Brown or not. The statement of Thomas shows rather that he was a volunteer and had no authority from Brown, or if he were acting under any authority, that he was acting for and under the committee. Now a candidate is not obliged, as a rule, to repudiate all voluntary acts of service. He may accept them at times without binding himself to all that such persons may do for him. As in the *Staleybridge case* (1 O'M. & H. 70), where Blackburn, J., said: "The effect of that would be to say that whenever there were volunteers who were acting at all, and whose voluntary acting was not repudiated by the candidate or his agents—whenever, in fact, a person came forward and said, 'I will act for you and endeavor to assist you,' and the candidate or his agent said, 'I am very much obliged to you, sir,'—any corrupt or improper act done by that volunteer, although unconnected with the member, would render the election void. To lay down such hard and fast rules as that would at times work great injustice." But Brown did not say to Thomas that he (Brown) was very much obliged to Thomas for anything he supposed Thomas was doing. The most that can be said is that if Brown did know Thomas was doing all he could for him, he did not object to it or repudiate his acts. But a candidate by mere non-interference does not necessarily bind himself by or to what another may be doing for him; that alone will not make the other his authorized agent. It must be remembered too that Thomas did not tell Brown he was doing all he could for him. He said that nothing of the kind was mentioned; that all he said was that he supposed Brown did know that he (Thomas) was doing all he could

for him. After much hesitation, and I must say to a considerable extent against my own primary impression, I think the agency of Thomas has not been established as against the respondent. Thomas was not the direct representative of Brown. He was the agent of and for the committee, and if the agency of the committee had been proved, the agency of Thomas would have been proved too. But I am not satisfied the committee are shown to have been the general authorized agents of the respondent.

As to Mr. Gibbs, the evidence as to him is: "I was working in Brown's interest in Oshawa. The committee there was divided into wards. I was interested in the Son's Hall ward particularly, but (in answer to the words of Mr Bethune's question) I had a roving commission over the rest of the town. We met at the committee-rooms. Oshawa was divided into sections; each section had a committee of its own. I canvassed where I thought it would be of use. I had a voters' list. We raised no fund to pay expenses. I did not contribute one dollar. No arrangement that I am aware of to pay expenses. I was in Oshawa on polling day. There were some public meetings held in Oshawa. Brown was there. I am not aware of Brown's convassing a single man in Oshawa. No conversation with him about our canvassing. I said to Brown I had no doubt Oshawa would do its duty again. I have not the least doubt that Brown expected me to vote and to work for him too. I spent no money at the election but my own personal expenses, and they were very trifling, a glass of beer and a cigar once in a while; I hired no teams." Upon that evidence I cannot say there is agency established. There is the fact that Gibbs was one of the committee and was canvassing generally, but not by authority from Brown unless through the committee; but there is still the same lack of evidence to prove that the committee was appointed by Brown, although it was unquestionably acting for him and in his interest. There is also the same lack of evidence that Brown personally

adopted or authorized Gibbs' individual acts. I therefore find the first question against the petitioner—that Thomas and Gibbs were not, according to the evidence, the authorized agents, nor was either of them the authorized agent of the respondent at the time of or during the election.

As to the second question, relating to the alleged agency of Billings and Clark or of either of them. The evidence as to Mr. Billings is: "I took part in the election; was on Brown's committee in the town, held over the *Chronicle* office. I was not an active member. I canvassed those I met. Saw Brown every day at that time; saw him at the committee-room once or twice; no other committee but that one in the place. I was a scrutineer at one of the polls here for Brown. There was whiskey at the poll that day. I took it for lunch. I gave the Deputy Returning Officer some of it that day at lunch time; gave it to no one else."

I think on this evidence that Mr. Billings, while acting in a special character as scrutineer, and under a special written authority from the respondent, cannot be said to have been in any way acting in his former capacity of a committee-man, or agent of or for the respondent; and when he gave the whiskey to the Deputy Returning Officer at lunch time, and took some as part of his own lunch, was doing an act in no way as a representative of Mr. Brown. If the authority to act as an objector-general in settling the voters' lists will not make such person the agent of the candidate, to fix him with bribery committed by such person—*Wigan case* (1 O'M. & H. 188)—the appointment of Mr. Billings to act as scrutineer will not empower him to do an act of treating and to make the respondent answerable for it. Upon that occasion Mr. Billings' authority was limited to that especial duty, and he had no power whatever to assume to act beyond it: *Bodwin case* (1 O'M. & H. 117); *Hereford case* (1 O'M & H. 194). The fact that he gave whiskey to the Deputy Returning Officer and not to any voter, shows that he did not assume to be acting as a committee-man

or as a general agent of the respondent, if he can be said even to have been one. I am of opinion Mr. Billings was not an agent of Brown's who could bind him for the act of treating, if it be one.

As to Clark's alleged agency. He said: "I attended Brown's committee meetings at the last election. They were held over the *Chronicle* office. I attended not over three times; went there to help on Brown's election. I would like to see Brown elected. I don't remember asking any one to vote for Brown in the Orange lodge, or out of it. I went on the polling day for Jordan, a voter, to vote for Brown. I got him and brought him to vote. I was at Bandell's tavern that day in the kitchen. I took a drink there between 9 a.m. and 5 p.m. in Whitby. I had a glass at Oshawa too. I treated myself there and Jordan also. I paid for it; think it was whiskey we had. Jordan worked in Oshawa but lived in Whitby, and had a vote here. Fothergill volunteered to drive me there for Jordan, and we brought him up. There was no particular part of the town given to me to canvass. I think I saw Brown once at the committee meeting. I know of no other body organized for Brown's election but this committee. Jordan went into the polling place, and I suppose he voted. He does not belong to my lodge; he is a Roman Catholic." I think the Whitby committee is shown to have been Brown's committee, at which he attended several times. The members were to canvass generally for him, and Mr. Billings did do some of it. Clark was one of the committee, and he was authorized to canvass, and was not limited as to any particular part of the town to work in. With such authority he went to Oshawa for Jordan, a voter, and brought him up to Whitby to vote for Brown, and it is believed Jordan did vote, as he went into the poll for that purpose. While Clark had Jordan in his company at Oshawa, and before they left it for Whitby, where Jordan was to vote, he treated himself and Jordan to a glass of whiskey each, and he paid for it.

The third, fourth, and fifth questions it is unnecessary to say anything of, because if Thomas, Gibbs, and Billings were not the agents of the respondent, there were no corrupt practices to make him answerable for the acts proved against them.

The sixth question, which relates to the treating by Clark, an authorized agent of the respondent, I must now dispose of. After much consideration, and of doubt too, I come, with some hesitation, to the conclusion that the treating by Clark, an authorized agent of the respondent, of the voter Jordan, was not an act within the terms of the 66th section of the Election Law of 1868, because the liquor was not so given by Clark to Jordan within the limits of the municipality, where the poll of the town of Whitby was held. I think that is the reading of that part of the section which it was said was applicable to the case. The whole section is as follows: "Every hotel, &c., shall be closed during the day appointed for polling in the wards or municipalities in which the polls are held, and no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period, under a penalty of $100 in every such case." If a poll is held in a city in one of two wards into which the city is divided for electoral purposes, the hotels, &c., in such ward in which the poll is held must be closed on the day of polling. They need not be closed in the other, but no liquor is to be sold or given throughout the whole of the city, that is, in the whole municipality, during that day. If an election is going on in a town and in another municipality forming one electoral division, the hotels, &c., in all the municipalities in which the polls are held must be closed, and no liquor is to be sold or given within the limits of such municipality during the said period. It is not within the limits of such *municipalities* nor within the electoral division, nor within *any* such municipality, but within *such* municipality; and the question arises when there are more municipalities than one in the electoral division in which the polls are held,

what municipality is it that is referred to by *such municipality?* Will it apply to the giving of liquor in the municipality of Oshawa, although a poll for that election is held there, while the poll to be voted at is in the municipality of the town of Whitby, both municipalities being in the one electoral division of South Ontario?

If it will apply to such a case as that, it will equally apply to liquor given in North Ontario or in the city of Toronto, in which places elections are going on when the vote is to be given in South Ontario, for which division an election is also going on upon the same day. I understand *such municipality* to be the municipality "in which the polls are held." Which poll is it that is referred to?

If a person were prosecuted for the penalty of $100 for violating this enactment, I think it would have to be held that *such municipality* applied to the municipality "in which the polls are held," and that these words being governed by the singular term of *municipality*, must mean the one in which the poll to be voted at is held. I am only speaking of the 66th section, which, it is said, applies to the *fact* only of selling or giving liquor, and *not* to the intent with which it is given, as in the ordinary cases of treating, and I feel no disposition to extend the operation of a provision for which so comprehensive a grasp is claimed to have been given, so long as I do not see that any such meaning must necessarily be attributed to it. I do not say positively that my construction of the 66th section, as it respects Clark's treating Jordan at Oshawa while the poll at which the vote was given was in Whitby, is certainly right. I give it with some degree of diffidence. But I think it is correct, and I think it is the only sensible one which can be given to it. At the present, I determine that Clark, although an agent of the respondent, did not do an act in treating Jordan in Oshawa, while he voted in Whitby, which was contrary to the 66th section of the Election Law of 1868; and my answer to the second question, therefore, is against the petitioner, both as regards Mr. Billings and Mr. Clark, but upon different grounds, as before stated.

The seventh question, which depends on whether Thomas was guilty of drinking at Hodson's, it is not necessary to answer, as I have not found the agency to be proved. If it had been proved I should have been obliged to have held, as in Clark's case, that the glass of brandy which Mr. Hodson gave to Mr. Thomas at Columbus, was not liquor given in the municipality in which the poll was held, so far as Thomas was concerned, who voted in Oshawa. If Thomas had not voted at all, I understand it would still be contended by the petitioner that if he had been an agent of the respondent, and the innkeeper gave to Thomas a glass of brandy at any place within the electoral division, or even beyond it, if a poll happened to be held there at the time, it would invalidate the election for this South Riding.

I can see a way in which definiteness can be given to the words *such municipality*, before mentioned, where a person is to vote, because it may mean the municipality where the vote is given or to be given. But when the agent of a candidate, who has no vote, is given liquor in *such municipality*, I do not know to what municipality the reference is made. Nor do I know what municipality is referred to if the agent sell or give liquor to a person who is not a voter in the electoral district. I should say also that this act of drinking by Thomas was not an act of *selling* or *giving* liquor within the 66th section, but of receiving only. As to the act of giving liquor to voters and others by Thomas at Hallett's hotel, I am of opinion it has been proved, and if the agency by Thomas had also been proved, the giving of such liquor must, I fear, by the rigid construction of the 66th section, although there was no corrupt intent, have made void the election. But the agency was not proved, in my opinion as before stated.

The eighth question is, What is the effect of the respondent having had liquor sold or given to him at Ray's tavern in the town during the polling hours? I think the evidence shows, as a fact, that he did get spirituous or fermented liquor during these hours at Ray's tavern.

Samuel Ray says so. He says Brown called for a treat. He drank twice that day. No one drank with him. He has not paid for it yet. It is very clear, I think, that his *buying* or *receiving* drink is not selling or giving it within the 66th section. It is said that as there can be no sale or gift without a purchase or receipt, there can be no complete sale or gift until the other contemporary acts take place; but that where the sale or gift is complete, the purchaser or receiver is as much an offender against that section of the Act as the seller or giver, because the Act does not say *no person* shall sell or give, but *no liquor shall be sold or given*, and it is sold or given when there is a purchaser or receiver, and in that case the purchaser or receiver is violating the Act by joining in the transaction of sale or gift as much as the actual seller or donor.

A person cannot be both seller and buyer, and if the seller is subjected to a penalty, that, by no force of language or reasoning, can be made to extend to the buyer. Both may be specially made liable as both are equally culpable. The statute does not here speak of a seller or giver, but it says no liquor shall be sold or given to *any person* under a penalty. I do not think that includes the person who buys or receives in the penalty even without the words to any person; I think I may say I have no doubt that it is the seller or giver only who is liable, for he is the person who makes the sale or gift; the other cannot make it, although he is a receiving party to perfect it. I fully adopt the opinion of Draper, C. J. A., as given in the *West Toronto case* (*ante* p. 179), decided a few days ago.

If a statute declared that no promissory note should be made without a stamp being attached to it under a penalty, would the payee be liable for the penalty if the stamp were not attached? I think he would not be.

This question I also decide against the petitioner.

If this enactment as applied to Brown, the candidate himself, in taking a glass of liquor as he did at Ray's tavern, is enforced, as it is said it must be, then, as the

candidate himself at his own expense drank a glass of whiskey or beer, he must be personally guilty of a corrupt practice, and besides the loss of his seat and a pecuniary penalty, he becomes incapacitated for eight years from being elected again. Such results must make me careful how a statute is expounded which leads to such highly penal consequences.

The more comprehensive the provision against drinking and treating at such a time can be made, the better it must be for electoral purposes and for all persons concerned; but it cannot be made so absolute or unqualified as it now reads, and as it is said it must be construed.

So far as this case has now gone, I must decide the whole of it in favor of the respondent. I have had grave doubts, from which I cannot say I am yet relieved, with respect to the agency of Thomas and Mr. Gibbs, although with respect to Mr. Gibbs it may not be of any moment whether he was an agent or not, for I do not think his treating himself was against the Act, as I have before stated, and I have very great doubt whether his treating the two commercial travellers, strangers in the division and not voters, can be an act prohibited by the 66th section just construed; and besides, there was no evidence given of the kind of liquor which was taken by these two strangers; there was nothing to show it was spirituous or fermented liquor; and I do not feel disposed to supply such a defect of evidence, even if it could be done by a fuller examination under the circumstances.

With respect to Thomas, he I think did, as I have before stated, violate the law, and according to the effect of the 66th section if he were an agent of the respondent; but I think he was not, although he was an agent of the committee, but the committee were not the agents of Brown. Upon that point, and also as to the effect of Clark (who I find was an agent of the respondent) treating Jordan outside the municipality in which Jordan voted, I entertain, as I have already said, a very considerable degree of doubt, and I shall of course be very glad if

the petitioner will carry the matter, by way of review, to the Court appointed to reconsider such questions for their more deliberate judgment.

The costs of this part of the case must abide the event of the trial. I need not say that I shall be obliged to report to the Speaker, if I have to report at all, that the evidence shows there has been a common and notorious violation of the Act by the keeping open of inns, and taverns, and other places where spirituous liquors are usually sold, and selling to all persons during the prohibited hours of the election day, and during nearly the whole of that day, and that some measures should be taken against all those who have so shamefully defied the law. I feel obliged to say that I regret to find that the respondent should have been in any tavern during these hours, and that he should have drank there, or that he should have been there at a time when others were improperly drinking, and that other persons of influence and good position should have been in these places at such a time, or for a purpose which they knew was against the law, and when their example was likely to be an encouragement to others of a different station from themselves.

[MR. JUSTICE WILSON, after the delivery of judgment, added the following memorandum]:

I should perhaps have stated more clearly the grounds on which committees, discharging the usual functions of election committees, should be considered to be or not to be the agents of the candidate in whose interest they are acting, because I am not sure that my first impression on the subject was not the more correct one, that a committee known by the candidate to be acting for him, although neither appointed nor accepted by him, should, as a rule, be held to be the committee of the candidate, for whose acts he is responsible, because they are openly acting for him, and he is receiving the benefit of their services and exertions. The two cases to which I have specially referred in the judgment delivered, adopt the view very strongly of voluntary committees and agents

being so entirely independent of the candidate that he is not in any way responsible for their conduct, and no doubt some freedom must be afforded in such cases for voluntary independent operations, and for the acts of the persons so aiding in the election, which should not be binding on the candidate.

While the *Taunton case* (21 L. T. N. S. 169) is a decision very much the other way: that committees and persons so forwarding the general purpose of the contest have the power of binding the candidate they are assisting, unless he, with a knowledge of their proceedings, repudiates their work.

There is much force in this view, and I confess it more nearly represents my own original impression, before referred to. It may not, however, be entitled to prevail so absolutely, as stated in the last mentioned case. The candidate cannot be required, in every case, to suppress all help from every voluntary association, and to repudiate every effort of individual enterprize. The fact of the candidate having left blank appointments of scrutineers to be filled up by them for him, is a strong ground for holding a candidate to have adopted the committee as his representatives and, I might say, as his agents. Probably I might have so decided with more leisure for consideration, and then the question as to Thomas' agency would have depended upon what he did at Hallett's tavern and the effect of it, as to which I expressed an opinion at the time which I think to be correct.

The petitioner appealed from the decision of Mr. Justice Wilson to the Court of Appeal—setting out among others the following ground of appeal:

"That the keeper of the hotel called 'Ray's hotel,' in the town of Whitby, was guilty of a corrupt practice in giving spirituous and fermented liquors at his tavern on the day of polling, and during the hours appointed for polling, to divers persons, and that the respondent was present when liquor was so given as aforesaid, and consented thereto."

The order for particulars of corrupt practices provided that the petitioner should deliver within a limited time "full particulars in writing, so far as known to the petitioner, of the alleged corrupt practices in the said petition referred to, with names and additions, dates and places" (and other specified particulars in detail); and the order concluded as follows: "And in default the petitioner shall be precluded from giving evidence of such particulars on the trial thereof."

In the particulars delivered pursuant to the order, the charge was thus stated: "The respondent on the said day of polling, and during the hours appointed for polling, gave spirituous and fermented liquor, and drank with divers electors, to the petitioner unknown, at Ray's hotel in Whitby."

Mr. Bethune for petitioner.

Mr. Hector Cameron, Q.C., for respondent.

Counsel for the respondent objected that the charge involved in the first ground of appeal was not in the particulars; that it was urged now for the first time; and that, by the order for particulars, the petitioner was precluded from raising it.

The COURT declined to entertain the first ground of appeal, as the allegation therein contained differed in a material point from the charge specified against the respondent in the particulars; that the particulars could not now be amended; and because the charge had not been inquired into nor adjudicated upon by the learned Judge at the trial of the petition.

Judgment in appeal was delivered on the 22nd January, 1876, as follows:

DRAPER, C. J. A.—I have doubted the correctness of the decision in Clark's case, and am not sorry to find that the learned Judge had also a considerable degree of doubt, as I should not, unless upon the clearest conviction, depart from his deliberate opinion.

The facts seem to be as follows: One Jordan was a voter, whose residence was in Whitby, and who was a voter in that municipality. During the time of the election he was working in Oshawa—both places, though separate municipalities, being within the electoral division of South Ontario. Clark, whose agency appears to be sufficiently proved, went to Oshawa on the polling day to bring Jordan up to vote at Whitby, and treated him in a hotel at Oshawa to a glass of whiskey. This was held not to be a violation of the 66th section, because the liquor was not given by Clark to Jordan within the municipality in which the poll for the town of Whitby was held. No question was asked as to the hour when the treating took place—no doubt suggested as to its being within the hours appointed for polling, *i.e.*, from nine a.m. to five p.m. Considering that to make this treating a corrupt practice, which, if committed by an agent without the actual knowledge and consent of the candidate, would avoid the election, it cannot have been overlooked at the trial; and as the evidence shows that Clark drove from Whitby to Oshawa to get Jordan; that Clark had told him when they got to his (Jordan's) own place that he could stop there and go down after dinner and vote; and that no point has been suggested on either side that the treat was or was not within the hours appointed for polling, I shall assume it to have been so.

I have already expressed my opinion upon this section in the *Lincoln case* (*ante* p. 391), but I avail myself of this opportunity to add a few observations.

So far as keeping peace and good order at elections is concerned, it can make little difference, as between two coterminous wards or municipalities, in which of them persons who commit a breach of the peace drank the liquor which overcame their discretion and influenced their disorderly proceedings. The distance between municipalities in which polls are being held at the same time may be such as to render quite unnecessary any provision against dangers to arise from the prohibited

cause, and ought to repel the idea that the Legislature had the prevention of any such danger in their contemplation. But it would be little if at all less absurd to hold that treating voters in municipality A—who, being excited to lawlessness and influenced by liquor, went into the adjoining municipality B, where they created a disturbance—would not be within the mischief intended to be prevented by the Act, as if the tavern in which the liquor was given to them was in municipality B.

Further; I see nothing in sec. 66 which makes the fact that the person to whom liquor is given is or is not a voter an element in the matter prohibited, that is, selling or giving *to any person* within the limits of such municipality. There is no necessity that a man should be a voter to make selling or giving liquor to him on the polling day an offence subject to penalty. In Jordan's case, if he had not been a voter, giving liquor to him in a tavern in Oshawa would have been a violation of the law, assuming as I do that the day in question was appointed for holding the polls in the municipality in which the tavern stood.

I think we surmount most of the difficulties suggested by holding that section 66 is confined to the regulation of hotels, taverns and shops in which liquors are ordinarily sold. On the day appointed for polling they must be kept closed under a penalty. No liquor must be sold or given to any person in any such hotel, &c., on the polling day. The words, "within the limits of such municipality" may perhaps be redundant, but the word *such* confines the construction to the municipalities mentioned in the former part of the section, which may, I think, be properly treated as part of the description of the hotels, &c., which are to be kept closed, namely, hotels, &c., situate in "the municipalities in which the polls are held."

Adopting this conclusion, I am of opinion that Clark was an agent of the respondent, and did, in violation of section 66, give spirituous liquors to one Jordan in a tavern in Oshawa, which was a municipality in which a

poll was held on that day appointed for the polling and within the polling hours, and that the election was therefore void and should be set aside.

My brothers consider section 66 of the Act of 1868 does not affect any person except the keeper of the hotel, tavern or shop, who is subjected to a penalty in three cases:

1. Not keeping the hotel, &c., closed.

2. Selling liquor in his tavern, &c., during the polling day.

3. Giving liquor in his tavern, &c., during the polling day.

The whole three are made corrupt practices if committed during the hours appointed for polling. I hope the Legislature will remove the doubts by a clear statement.

BURTON, J. A.—The three charges, assuming that in all or some of them the agency is established, are charges of giving liquor in a tavern by an agent within the hours appointed for polling, and involve the necessity of our placing a construction upon the language of the much-debated 66th section of the Election Law of 1868.

We had occasion to consider this section before in the *North Wentworth* (*ante* p. 343) and *North Grey cases* (*ante* p. 362), and then held that there having been a clear violation of the section by the hotel-keeper, which was made a corrupt practice by the Act of 1873, and that corrupt practice having been committed with the knowledge and consent of the candidate in each case, there was no alternative but to declare the election void and the candidates disqualified. But it is contended on the part of the petitioner that the latter part of this section is general in its terms, and is not to be restricted to the parties aimed at or intended to be referred to in the first part, viz., the keeper of any hotel, tavern or shop in which spirituous or fermented liquors or drinks are ordinarily sold, but extends to any person within the municipality,

and that the penalty imposed is confined to the offence of selling or giving referred to in that portion of the section.

The clause in question, with several others having for their object the preservation of peace and good order at elections, is to be found in the 22nd Vic., cap. 82. That to which this section corresponds was consolidated in the Consolidated Statutes of Canada, cap. 6, as section 81, and read thus: "Every hotel, tavern or shop in which spirituous or fermented liquors or drinks are sold, shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be on Sunday during divine service, and no spirituous or fermented liquors or drinks shall be sold or given during the said period, under a penalty of $100 against the keeper thereof if he neglects to close it, and under a like penalty if he sells or gives any spirituous liquors or drinks, as aforesaid."

So far there would have been no room for doubt, but in re-enacting this section in the Election Law of 1868, the words relating to the period of divine service are omitted; the words "to any person within the municipality" are added after "given," and instead of affixing a distinct penalty upon the keeper for neglecting to close, and another penalty upon him for selling or giving, the clause concludes, "under a penalty of $100 in every such case." If these words have the effect of extending the penalty to each case of omitting to close a tavern, hotel or shop, as well as to each case of selling or giving, there would be no good reason that a wider signification should be given to them when read in connection with the latter part of the section than the former. The *party liable* to the penalty for *omitting to close* must be the keeper. Why should they be construed as extending to *every person* when read in connection with the remainder of the section? My own view is that the new enactment is in substance the same as the former one. It is impossible to believe that if the Legislature had intended to effect so sweeping a change, they would have left it to be inferred, or as a

question for argument, instead of making it clear by the insertion of a few words. It would be such a mistake that, in the language of Mr. Baron Bramwell, it would be an imputation upon that body to suppose it.

It is true, that for omitting to close the hotels there could be only the one penalty—the offence being complete whether kept open for one hour or for the whole day—whilst each separate sale or gift would, I presume, constitute a separate offence. *Brooke qui tam* v. *Milliken* (3 T. R. 509).

I can see no good reason for holding that the Legislature intended to confine the penalty to a portion only of the offences enumerated in the 66th section, or for holding, as suggested by Mr. Justice Gwynne, that the whole, viz., the *keeping open and the sale*, should be regarded as but *one* offence, complete only in the event of spirituous liquors being sold or given. In *Newman* v. *Bendyshe* (10 A. & E. 11), a conviction for keeping open the house, for selling beer, and for suffering the same to be drank and consumed in the house, was held bad, as including three several offences in one conviction, for which the defendant might have been distinctly convicted.

It is said that if it had been intended to limit section 66 to hotel and shop keepers it would have been easy to have so expressed it. To my mind it is so expressed—the first part of the section overriding and being the key to the whole. But if there is any doubt or ambiguity, I have already intimated my opinion that in the construction of statutes it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely requires. The law rather infers that our Act does not intend to make any alteration other than what is specified, and beside what has been plainly pronounced; for if the Parliament had had that design, it is naturally said they would have expressed it. It is further argued, however, that the word "give" indicates an intention to extend the Act to other parties beyond the keepers of hotels, but it must be borne

in mind that that word is to be found in the original Act, where the penalty was unquestionably restricted to the keeper of the hotel, &c., and, as Mr. Justice Gwynne suggests in the *Lincoln case* (*ante* p. 391), was probably added to prevent the possibility of the party proceeded against for the penalty evading the statute by setting up as a defence that he did not sell, but gave, the drinks.

But there is an additional reason for concluding that the Legislature did not intend to effect so sweeping a change under a section which purports in its introductory clauses to deal only with hotels and shops where spirituous or fermented liquors are sold. In such a case we may fairly refer to and examine other parts of the Act for the purpose of ascertaining the intent of the legislature. On referring, then, to the 61st section, we find that the candidate, or any other person, is authorized to furnish drink or any other entertainment to any meeting of electors, even on the polling day, at his or their usual place of residence. Here, then, we have a clause in the same statute expressly permitting what another section, in as express terms, prohibits, if the construction contended for by the petitioner be the correct one.

Now that the elections are all held in one day, a literal compliance with the first portion of the 66th section would be impracticable, there being no such exception as is to be found in the English Acts in favor of the reception of travellers, and in the amendment to the Act that has just been introduced, I see that it has been omitted; but whatever may be meant by closing a hotel on the day of polling, it is directed, and the failure to do so is made a distinct offence.

I will refer only to one other matter which confirms me in the opinion that in the construction of this clause we should give no further effect to the words than they clearly and unmistakably bear, which is this: The Legislature, in what is popularly known as the Dunkin Act, has declared that no prohibitory law shall be passed by any municipal council without the consent of the ratepayers,

and, whilst declining to pass such a law themselves, have left it in the power of the ratepayers to make such an enactment. Are we to suppose that they intended inferentially to pass such a law, even for a limited period, when they re-enacted a clause which, when first passed, applied only to hotel and shop keepers selling spirituous and fermented liquors?

For these reasons I am of opinion that the person, and the only person, liable to the penalties imposed by the Election Law of 1868 is the hotel or shop keeper, or person acting in that capacity; that he, and he alone, is the person who is guilty of a violation of the Act, by selling or giving liquors, and so liable under the Act of 1873 to the additional penalties imposed by it if within polling hours; and whilst the investigation of this case has more fully confirmed me in the conviction of the correctness of the decision of the Court, which declared that a violation by the hotel-keeper of this section, with the knowledge and consent of the candidate, avoided the election and entailed the penal consequences affixed by the statute, I am not prepared to hold that the agent of the candidate is guilty of a corrupt practice in treating at a hotel within the prohibited hours. To do so would be in effect to hold that there could be two penalties for the same offence, when the statute has imposed only one.

My conclusion, therefore, is that there has been no violation of the 66th section within the meaning of the Act of 1873.

Patterson, J. A.—The grounds of appeal charge as violations of section 66 the giving of liquor to various persons by agents of the candidate during the hours of polling, the persons in each case being treated by the agents at a tavern; the agents not being the tavern-keepers, but merely casual guests.

In this respect the three charges are precisely alike. The questions peculiar to each case are those touching the facts of the agency and the places where the drinking took place.

It is contended by the appellant that under section 66 the giving of spirituous or fermented liquors *by any person* to any other person during the day appointed for polling is made penal, and, by the Act of 1873, is a corrupt practice. On the other side, it is insisted that the section applies only to those who sell or give in the character of keepers of a hotel, tavern or shop in which spirituous or other fermented liquors or drinks are ordinarily sold. It seems to me that we must either construe the clause literally, and give their full effect to the words "no spirituous or fermented liquors or drinks shall be sold to any person;" or we must read the words with which the clause commences as indicating the class to which the whole clause applies, and read the clause as if worded to the effect that "no keeper of a hotel, tavern or shop in which spirituous or fermented liquors or drinks are ordinarily sold, shall open his hotel, &c., during the day appointed for polling; nor sell or give to any person, &c." This was evidently the effect of the clause as it stood in C. S. Can., cap. 6, sec. 81, where it forms, as it does in the Act of 1868, one of the provisions for "keeping the peace and good order at elections."

It is not difficult to suggest reasons why, as a matter of policy, it may be desirable to extend the prohibition against distributing liquor on polling days beyond the ordinary dealer in liquors. We have, however, to inquire whether that has been done, and if so, whether this extension is in any way limited, or whether it reaches all persons in the municipality without regard to the place where liquor may be given, or the purpose for which it may be required.

The consequences which would follow from holding the restriction to be entirely unlimited have been well pointed out by the learned Judge below, and they are of a character so startling that it is impossible to suppose they could have been in the contemplation of the Legislature. And, besides this, the clause, so construed, would apparently be in conflict with section 61, which allows a candidate to

entertain a meeting of electors at his own house on the polling day.

I believe we are all agreed that this unlimited effect cannot be given to the section; but the learned Chief Justice, while he construes the prohibition as extending to all persons, considers that the law is only violated when the liquor is sold or given in a hotel, tavern or shop in which liquors are ordinarily sold. I have not been able to see in the clause itself or in the context anything which imposes this limitation. I cannot find room for any middle course. I think these two alternatives only are presented: either the keeper of the house alone is aimed at, or the prohibition applies against all persons and to all places within the municipality.

The true view of the enactment, in my judgment, is that it is simply a re-enactment of the former law, either without modification or with no modification that points to any more extensive operation; and I think this appears whether we closely examine the clause itself or look elsewhere, as we may do in vain, for indications of an intention to change the law.

All the other clauses in this division of the statute are verbatim re-enactments of the former statute, except that the penalties, while the old amounts are retained, are imposed in terms adopted to avoid any appearance of legislating as to criminal law.

Three changes are made in the section. The first change is the omission of the words which directed that the house should be closed on polling days "in the same manner as it should be on Sunday during divine service"—an omission apparently made because the omitted words were not applicable to any law in Ontario, but which has no bearing on the argument now in hand.

The second is the insertion of the words which I quote in italics in the passage, "and no spirituous or fermented liquors or drinks shall be sold or given *to any person within the limits of such municipality* during the said period."

The clause as it stood was, in its terms, general enough to forbid the selling or giving of liquor anywhere in the municipality; but I have no idea that either the most literal or the most fanciful expounder would have so construed it. Where was the necessity for the words now inserted? To my mind the reason is plain. The whole section as it stood admittedly applied only to keepers of hotels, &c. The danger was that this part of the section might be read as forbidding only selling or giving *in their houses*, but not the dispensing of liquor outside of their four walls. That doubt is set at rest, and the present section is either simply declaratory of the law as it stood, or modifies it only so far as to make evasion of its intention more difficult, without, by force of the insertion of the particular words I am now discussing, otherwise extending its effect.

The third change is in the penal part. It formerly read, "under a penalty of $100 against the keeper thereof if he neglects to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors or drinks aforesaid." It now reads, "under a penalty of $100 in every such case." The words themselves appear to be only a statement in a general and comprehensive form of what was before expressed in more detail. The argument, however, is that because "the keeper thereof" is not now mentioned, an intention is shown not to confine the prohibition as it was before. Let us see where this argument leads to. We have to take the section either by itself, or we have to look at it in connection with and as re-enacting the other. Reading it by itself, and taking two provisions separately, we have *first* this enactment: "Every hotel, &c., shall be closed during the day appointed for polling, in the wards or municipalities in which the polls are held . . under a penalty of $100." Whose duty does this make it to close the house? I apprehend there would be a serious difficulty in enforcing the penalty for neglecting a statutory duty, unless the statute made it the duty of some particular person. As far as the clause expresses

it, the duty may be intended to be cast upon the owner of the house, or the holder of the license, or the actual manager of the business, or the reeve or constable of the township. The answer, of course, will be that there must be a reasonable construction adopted, and that when it is said that an establishment is to be closed, that is equivalent to saying it shall not be opened, and that the person who could otherwise open it is the person intended. It is not my present object to analyse this contention minutely. It might appear on close reasoning that an enactment that a house shall "be closed" is not equivalent to one that it shall "not be opened" or shall be "kept closed;" and it might not be found so clear that if a servant opened the house in the absence of his master, the master would be liable to the penalty. My object is, in combating the contention that by the omission of the words "against the keeper thereof," the Legislature have relied on a strict construction of the language instead of using an express declaration, to extend to other words an effect which they had not before, to point out that by strictly construing the section, the first part of it would be inoperative, and that if it could be made operative at all, it would be by applying to it a rule of construction depending partly on presumption, and liable to lead to a wrong conclusion.

We get rid of all the difficulty by looking first at the law as it was, where we find there was no room for doubt. We then inquire, has the law been changed? and we find that the Province of Ontario having become separated from Quebec, its Legislature having found it necessary or desirable to re-enact the law relating to elections, did re-enact it, making such changes as the changed constitution required; but indicating no intention to change the law except where that is done in express terms, as, *e. g.*, in adopting the law then in force in England. The passage of the Act in itself does not, under the circumstances, imply an intention to change the law, or to do more than to adapt it to the changed political circumstances of the country. No obstacle exists to prevent the section in

question being regarded as meant to be and as being a re-enactment, with only such modifications as I have noticed. When we refer for explanation to the law as it was, we find no difficulty in reading the words, "under a penalty in every such case," as the same in effect as "under a penalty against the keeper thereof, if he neglects to close it, and under a like penalty if he sells or gives."

We have either to take the new section by itself, when we find that one half of it is inoperative, or if operative at all, is only so by some nicety of construction which can never be other than doubtful, or we have to take it as a re-enactment of the old law, when the whole is operative.

I do not think the word "given" as it occurs in the phrase "sold or given" adds much weight to the contention for the more extended construction, as to have prohibited selling only would have been to invite evasion by almost suggesting that the tavern-keeper should distribute the liquor on the pretence of giving it.

I have already said that while satisfied that the section cannot be read as forbidding the giving of the liquor *by any one*, without restriction as to place or purpose, I am not able to perceive any ground, satisfactory to myself, for holding that the restriction may extend to persons, other than the keeper of the house or person acting in that capacity, who give liquor in the house itself, when it would not touch them if they gave it elsewhere in the municipality, as in the charges now before us, which are ordinary cases of treating, the person charged as giving did so merely by buying from the bar-keeper, and then by his own hand or the hand of the bar-keeper giving it to others.

We should have to impute to the Legislature the intention to convey by the one expression two separate mandates, one of which pre-supposes disobedience to the other. As far as it affects the tavern-keeper, the enactment is that he is neither to open his house nor to sell or give liquor on the polling day. If he obeys this command, no other person can possibly give, on that day, any of

the tavern-keeper's liquors. He is to retain his whole stock safely in his own possession. It would seem a faulty rule of construction on which we should hold that the Legislature, in contemplation of the tavern-keeper disobeying the law by parting with liquor, meant to provide against such disobedience by the further command that if he did so disobey, the recipient of the liquor must not give it away again under a penalty, and particularly as no penalty is attached to the act of receiving it. If such an intention existed it should and doubtless would have been somewhat more clearly expressed.

The only other case in which it can be suggested that *giving* at a tavern, etc., is the act intended, is the case of persons bringing liquor from elsewhere to the tavern and giving it away. This is too remote a possibility to require more than a bare mention, and no good reason can be suggested why a giving of that nature should not be an offence wherever committed, as well as when committed in a tavern or place where liquor is ordinarily sold.

In my view, therefore, the agents, Thomas, Clark and Gibbs, did not violate sec. 66 by treating at taverns on the polling day,

The same remark applies to a personal charge against the candidate for treating at Ray's tavern, which seems to have been urged below, but which was not renewed before us as one of the grounds of appeal.

It is not necessary for the disposal of the case to dispose of the other questions discussed in the judgment before us, but on two of those questions it is proper that we should express our opinion.

[The learned Judge then referred to the agency of Thomas, and agreed with the later opinion of Mr. Justice Wilson, that he was an agent. He then proceeded:]

The other question relates to sec. 66 of the Act of 1868. One Clark, an agent of the candidate, had treated one Jordan, a voter whose polling place was in Whitby, at a tavern in Oshawa, during the hours of polling. The learned Judge held that this was not an illegal act within

sec. 66, "because the liquor was not given by Clark to Jordan within the limits of the municipality where the poll of the town of Whitby was held."

I think this is a mistaken view of the section, and that the mistake has arisen from regarding the prohibition as aimed at the treating *of voters;* and with that idea, reading the words "municipalities in which the polls are held" as meaning the municipalities in which are held the polls at which *the voters who are treated* are entitled to vote. I think it is quite plain, not only that the object of the enactment, viz., to preserve peace and good order at elections, would be very inefficiently attained if open house might be kept for all who were not voters of the particular ward or municipality, but that nothing in the section points to that construction. An election is proceeding for the riding: Whitby and Oshawa are two separate municipalities in the riding, and in each a poll is held during the same hours. A *tavern-keeper* who sells or gives liquor in either municipality is plainly violating sec., 66, whether he gives it to voters of that municipality or to voters of the other municipality, or to persons who are not voters. The prohibition is against selling or giving within the limits of a municipality in which a poll is being held, without any regard to the persons to whom the liquor is sold or given. The decision in Clark's case is therefore upheld—not upon the ground on which the learned Judge rested it, but upon the other ground which I have discussed, viz., that the corrupt act was committed, not by Clark, but by the person who sold him the liquor.

The appeal should be dismissed with costs.

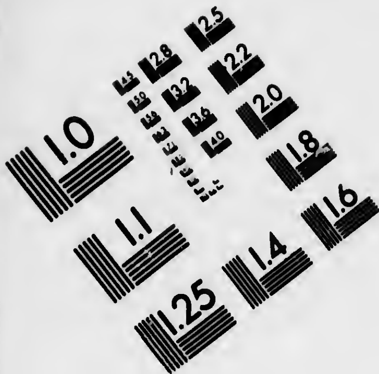
Moss, J. A.—The learned Judge below, upon a review of the evidence and an examination of the authorities, held, although with much hesitation, that neither Thomas nor Gibbs was an agent by whose treating in taverns the respondent could be affected; but he was manifestly of opinion that if the agency had been established, their conduct in giving treats, although not shown to be for

the purpose of influencing votes, would have avoided the election. On further consideration he seems to have inclined to the view that agency had been established in the case of Thomas; and I must say that that appears to me to be the proper conclusion from the evidence. In the case of Clark he decided that agency had been proved, but he thought that his treating was not a corrupt practice within the meaning of section 66, for reasons to which I shall refer presently. But it is broadly argued by the learned counsel for the respondent that, even assuming these persons to have been agents, there was no corrupt practice, because section 66 of the Act of 1868 is only intended to deal with the keepers of hotels, taverns and shops in which spirituous or fermented liquors are ordinarily sold, and to prohibit the selling or giving of liquor by persons answering that description. If that be the true interpretation of the section, it becomes immaterial to discuss the evidence of agency. On the other hand, it is contended by the counsel for the appellant that the section is divisible; that while the first part relates to keepers of taverns, &c., alone, the second extends to and renders penal the giving of liquor by any person to any person in the electoral division during polling day; and that consequently, if given by an agent of the candidate during the polling hours, the election is avoided by force of sections 1 and 3 of the Act of 1873 (36 Vic., cap. 2).

The words used are certainly of extreme generality. Read literally they are sufficient to support the appellant's contention. But there are numerous cases in which language quite as wide and terms quite as general have been restricted by a consideration of the previous state of the law, the express object of the statute, and other circumstances which the Courts have held fitting to be regarded in arriving at the intent of the Legislature. [The learned Judge here cited and reviewed the following authorities: *Hawkins* v. *Gathercole* (6 D. McN. & G. 1); *Lord Auckland* v. *Westminster Local Board of Works* (L. R. 7 Chy. 597); Sedgwick on Statutory and Constitutional Law, 234].

These references are authority sufficient, not only for the proposition that we should regard the terms of the enactment for which section 66 was substituted, but that we should presume that the Legislature only intended to change the law to the extent that it has clearly and positively expressed. The 66th section of the statute of 1868 was substituted for the 81st section of the Consolidated Statutes of Canada, cap. 6. In each statute the section forms one of a group collected under the heading of "keeping the peace and good order at elections." Some doubt has been expressed whether it is allowable to refer to this heading upon a question of the proper construction of one of the sections coming under it. It seems to me that it can be taken into account for the purpose of determining the immediate and special object which the Legislature had in view while passing these sections, and there is no doubt that the nature of this object may have an important bearing upon the interpretation to be given to language of a general character. In *Bryan* v. *Child* (5 Ex. 368), Pollock, C. B., refers to the mode then "recently introduced in statutes, namely, by having certain clauses connected by a sort of preamble to each separate class of clauses, which preamble may really operate as part of the statute:" and he decides that such preamble must be read in order to ascertain the meaning of the Legislature. The so-called preamble was this: "And with respect to transactions with the bankrupt, &c., be it enacted." Our statute may fairly be read as if expressed thus: "For the purpose of keeping the peace and good order at elections, be it enacted," &c. In *Robinson* v. *Collingwood* (17 C. B. N. S. 777), the word "trusts," used without any limitation in a statute, was construed in the light of the preamble to mean "trusts in favor of the grantor."

It appears, then, that the object which the Legislature had in view when it passed the sections in the Consolidated Statute was the maintenance of peace and good order; and that the object was still the same when the corresponding sections of the statute of 1868 were enacted.



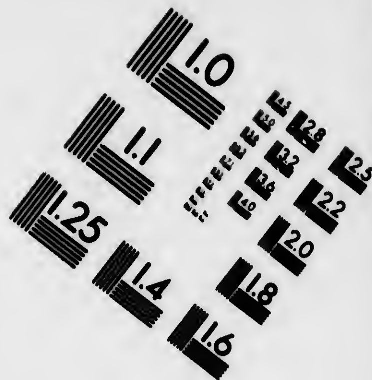
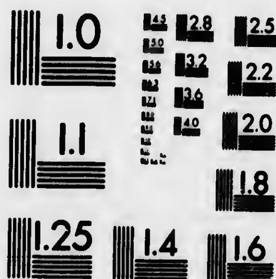
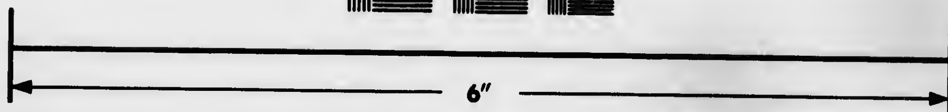


IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

According to the principles of construction to which I have referred, we ought not to assume that the Legislature, which in the associate clauses was re-enacting the former statute, contemplated such a wide extension of the law as is contended for by the appellant, unless it has used language clearly expressing that purpose. How wide that extension would be is manifest from an examination of the 81st section. There is no room for doubt as to the description of persons who were affected by its provisions. It enacts that every hotel shall be closed, and no spirituous or fermented liquors shall be sold or given during the said period, under a penalty of $100 against the keeper thereof, if he neglects to close it, and under a like penalty if *he* sells or gives liquor. This language is free from all ambiguity. The persons subjected to a penalty for giving or selling liquor are the keepers of the houses directed to be kept closed. In the statute of 1868 the phraseology is —except in some particulars immaterial to the present argument—precisely the same until the part relating to the penalty is reached. The injunction to keep closed and the prohibition against such a gift are expressed in the same terms in both statutes. If, then, the later statute, passed with the same object as the earlier, and coinciding with it in the corresponding sections directed to this object, is to be extended from the comparatively narrow circle of keepers of such houses to the general body of the public, it is simply because in the part of the section relating to the penalty there is no definition of the persons who are rendered liable. I entertain little doubt that the draftsman who penned the 66th section thought that in substituting the words, "under a penalty of $100 in every such case," for the definite language of the 81st section, he was expressing the same thing in a more concise form. It may be that in aiming at a little originality by this consideration, he has fallen into obscurity; but such things have been known to occur in Acts prepared by skilful and experienced hands.

Regarding the 66th section as it stands, it is necessary to supply by construction the designation of persons whose duty it is to close the houses. The reasonable construction is that these persons are the keepers of the houses. If the words "by the keeper of such house" must be introduced into the first clause of the section, it appears to me that they should equally be introduced into the second clause. For my own part, I prefer that construction to one that virtually seeks to introduce into the same clause the words "by any person." The inconveniences of such a construction, some of which have been graphically described by the learned Judge below, are in themselves sufficient to induce the Court to pause before adopting it.

I do not repeat the other constructions which have been presented by my brothers Burton and Patterson, in confirmation of this view, but content myself with saying that if this be the correct view to take of the section, it follows that it is only violated by the giving of liquor, when the giver is a keeper of one of the houses directed to be closed; and that no agent of the candidate will, by giving liquor to any person within the prohibited hours, be guilty of a corrupt practice avoiding the election, unless he is the keeper of such a house.

I only desire to add that I entirely concur in the remarks of my brother Patterson upon Clark's case. If his treating Jordan at Whitby, where Jordan was entitled to vote and did vote, would have avoided the election, that would have been the result of the treat he actually gave him at Oshawa. The offence does not depend upon the character of the person treated. It does not matter whether he is or is not entitled to vote at any particular place, or whether he is entitled to vote at all.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs. (*a*)

(*a*) No report of this case was sent to the Speaker.

MUSKOKA.

BEFORE MR. JUSTICE WILSON.

BRACEBRIDGE, *20th to 23rd July, and 17th September, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *16th December, 1875, and 22nd January, 1876.*

ANDREW STARRATT, *Petitioner*, v. JOHN C. MILLER, *Respondent.*

Corrupt practice—Each charge a separate indictment—Cumulative evidence—General promise by ministerial candidate—Bribery or undue influence—32 Vic., c. 21, s. 72.

The respondent was charged with several acts of corrupt practice. Each separate charge was supported by the evidence of one witness, and was denied or explained by the respondent. The learned Judge trying the petition held, that if each case stood by itself, oath against oath, and each witness equally credible, and their being no collateral circumstances either way, he would have found that each case was not proved; but as each charge was proved by a credible witness, the united weight of their testimony overcame the effect of the respondent's denial; and on the combined testimony of all the witnesses, he held the separate charges proved against the respondent.

Held by the Court of Appeal (reversing *Wilson*, J.), that in election cases, each charge constitutes in effect a separate indictment, and i[illegible]ge on the evidence in one case dismisses the charge, the respond[illegible]ot be placed in a worse position because a number of charges are [illegible]ed, in each of which the Judge arrives at a similar conclusion, and therefore the separate charges above referred to were held not sustained.

The respondent stated at a public meeting of the electors with reference to an alleged local grievance, that he understood it to be the constitutional practice, here and in England, for the Ministry to dispense as far as practicable the patronage of the constituency on the recommendation of the person who contested the constituency on the Government side; and that he, being a supporter of the Government, would have the patronage in respect to appropriations and appointments whether elected or not.

Held, 1. That the respondent by such words did not offer or promise directly or indirectly any place or employment, or a promise to procure place or employment, to or for any voter, or any other person to induce such voter to vote, or refrain from voting.

2. (reversing *Wilson*, J.) That the respondent was not guilty of undue influence as defined by s. 72 of the Election Law of 1868, nor as recognized by the common law of the Parliament of England.

3. That to sustain such general charge of undue influence, it would be necessary to prove that the intimidation was so general and extensive in its operations that the freedom of election had ceased in consequence.

The petition contained the usual charges of corrupt practices.

Mr. M. C. Cameron, Q.C., *and Mr. Eratt* for petitioner.

Mr. D'Alton McCarthy, Q.C., *and Mr. Bethune* for respondent.

The cases disposed of by the learned Judge are set out in his judgment.

WILSON, J.—The case was very fully argued by the counsel for the respective parties. It will not be necessary to refer to any other of the charges than those now standing for judgment.

The first of the cases relied upon by the petitioner is that which is called the Hill case. The charge as to this case is that the respondent promised and guaranteed the said Hill that, through the respondent's influence, he should never be called upon to pay certain timber dues, if the said Hill would support and vote for the respondent. [The learned Judge then reviewed the evidence of Hill and of the respondent, and proceeded:] There is a very plain and direct contradiction between the two accounts of these two witnesses. The fact whether Hill or the respondent first spoke of the dues so claimed by the Government may not be material. It does not appear to be of much consequence who first introduced that subject, or at what part of the conversation it was introduced. The main question is, was it, whoever introduced by, or at whatever stage of the conversation it was introduced, held out in any form by Miller to Hill as a promise or endeavor to procure any money or valuable consideration in order to induce Hill to vote or refrain from voting? According to Hill's evidence it manifestly was; according to the respondent's evidence it certainly was not. There is no other person who can speak as to the conversation. The counsel for the petitioner argued that the fact of the claim having been made by the Government on the firm of which Hill was a member was somewhat extraordinary, if it were one which was never intended to have been enforced; and that Hill's evidence was very direct and reliable as to the fact of such claim.

For the respondent it was argued that Hill in the former sworn statement had said Miller first asked him how he was going to vote, while, in the present examination, he said that Miller first spoke to him of the dues, and that the fact of the petitioner or his friends having taken a written statement was to bind Hill to adhere to it, which showed they could not fully depend upon him. I formed no unfavorable opinion of the witness, or the manner of his giving his evidence; I must act upon his testimony if I believe it to be true, and if I think it has not been answered or rebutted by the evidence of the respondent. The respondent is unquestionably, on the face of the inquiry, an interested witness, but there was nothing in the evidence he gave, nor in his manner of giving it, which could or did excite any suspicion whatever against his perfect truthfulness. Hill, the witness, did show he had some feeling or bias against the respondent, for he said he thought the statement in writing which he made against the respondent would operate adversely to him.

If this were the only charge, and it rested only upon the evidence of Hill in support of it and that of Miller against it, I should, without disbelieving either witness, hold that as there was as much evidence against the charge as there was for it, it must be considered to have failed. It is the fact that because both witnesses are believed the case must be held to have fallen through. If one were believed and the other were not, or if more credit were given to the one than to the other, the decision would be given on a different ground. The respondent, in a case of even and fully counterbalanced testimony, is entitled to the presumption of innocency in his favor. The question is, whether the evidence can, on this record, be said to be equally balanced, so as to give him the right and benefit of all just presumptions of law and of fact? That will depend upon the other charges which are still to be considered; for if in the other cases I find that they are respectively balanced by the evidence of the respondent, the same witness in all of them as against

several witnesses—one, however, only in each case—I should then feel obliged to rely more upon the impartiality and truth of the greater number who testified against the respondent, and whose evidence and characters were respectively, for reliability and veracity, as much to be depended upon as were those of the respondent. I have already stated my opinion on this point in the matter of the *North Renfrew case* (*a*), in which also I acted upon it.

I shall state the conclusion I have come to on this charge when I have gone over the other charges before mentioned. I shall pass by for the present the charge respecting the speech of the respondent at Matthias' Hall, and take up the charge relating to Sufferin's case, in which the respondent is charged with offering, that if Sufferin would support him, he, the respondent, would get him the laying out of $3,000 on the Parry Sound Road.

The respondent's counsel contended that it was absurd to suppose the respondent would, in the short space of two or three minutes, in a hurried interview, make a corrupt promise to a man who had already pledged his support to the respondent. There is no doubt it was not a long conversation which took place between them, but they both agree that there was mention made of Sufferin being about to run for reeve, and about the expenditure of the $3,000 being made. The parties differ in these respects: Sufferin says the respondent applied to him to give his support, and that the respondent said he heard Sufferin was going to run for reeve, and that he wished Sufferin to go in for it and to support him, and that he (the respondent) would get Sufferin the laying out of the $3,000, and that Sufferin said it was all right, he would support him.

The respondent says he asked Sufferin how the matter was, who said that the respondent would have the majority in the township; that he, Sufferin, said he was

(*a*) Reported Dominion Elections, 1874, *post*.

going to run for reeve, and he hoped as reeve that respondent would see that the Council had the laying out of the $3,000, and that the respondent said Sufferin's claim would have to be considered at the proper time.

The chief differences are that Sufferin says the respondent said he wanted Sufferin to support him, and he would get Sufferin the laying out of the money, and Sufferin said it was all right, he would support him; while the respondent says it was Sufferin who said he hoped as reeve the respondent would see the Council had the laying out of the money.

The statement of Sufferin is distinctly coupled with the exercise of his right of voting; the statement of the respondent is in no way connected with it. The statement of Sufferin shows a promise by the respondent: the statement of the respondent shows a hope only expressed by Sufferin. The statement by Sufferin shows a personal inducement held out by the respondent to Sufferin for his support; the statement of the respondent shows a mere hope expressed by Sufferin that the Council would get whatever advantage there was in laying out the appropriation, but at the same time they would have that as distinct from the election. The one statement is a corrupt offer or promise by the candidate of personal gain to the elector, in consideration of support at the election being given; the other statement is a mere hope dissevered from the election, expressed by the voter to the candidate, that the respondent would see the Council were allowed to appropriate the money.

And the question is, "Which account of the conversation should I accept?"

If this stood by itself, as before stated, oath against oath, and each side equally credible, and no collateral or accompanying circumstances to aid me either way, I should hold the charge not to be proved. But the other charges, if severally sworn to by a credible witness, and the united weight of their testimony is to overcome the effect of the respondent's unsupported word, I may be

obliged to attach such a degree of importance to the combined testimony of these witnesses, as to hold the charges to which they severally speak as sufficiently proved in law, against the opposing testimony of the respondent. I shall, before forming any opinion on this part of the case, consider the other remaining charge of the like general character, resting on the evidence, also of one witness on each side, which is contained in the next charge relating to Barker's case; the witness for the respondent being the respondent himself as in the two preceding cases.

[The learned Judge reviewed the evidence in the charge referred to, and decided it was not proved.]

The remaining charge is the one relating to the respondent's speech at Matthias' Hall, in the township of Draper, and as it is a peculiar and a very important one, I shall have to get the language used as accurately as I can.

I must make out, in the first place, what Miller really said, as well as I can extract it from the accounts of what he said.

His own statement, especially when it is adverse to him, may be accepted as a genuine account of his language. The respondent says he used the words following: "I was the recognized ministerial candidate, having been nominated by the Reform party. That I understood it to be the constitutional practice here, and in England, for the Ministry to dispense, as far as reasonable and practicable, the patronage of the constituency on the recommendation of the individual who had contested the constituency in favor of the Government." He said, "I did not state I would have the patronage whether elected or not. I said I understood the constant practice was, or, as above stated, I said the patronage would be in me, and I would redress the grievance complained of, if elected." The respondent, although not now in words, in effect shows he did say or gave those at the meeting to understand that he would have, as the Government or ministerial candidate, the influence or patronage of the Government in the district whether he was elected or not, because, he says, he told

them he understood the practice was "that the Ministry should dispense the patronage of the constituency on the recommendation of the individual who had contested it in favor of the Government"—not on the recommendation of the person who had contested the constituency in favor of the Government, if that person were successful at the election, or were elected, or, in other words, on recommendation of the member if he were a Government supporter, but on the recommendation of the person who *contested* the constituency on the Government side, or, in other words, whether he was successful or not.

Dill, one of the respondent's witnesses, says: "To a certain extent Miller said, as I understood him, that, being the supporter of the Government, he would have the patronage, whether he was elected or not." Meyers, also one of the witnesses, says: "His speech was that, as he was the Government candidate, it was the interest of the people to support him whether he was elected or not: that he would have the patronage and Mr. Long would not—he was not the Government candidate."

Assuming, then, that the respondent did use such language and on the occasion spoken of, is it an offence within the Election Law, or is it an act or the exercise of undue influence, "recognized by the common law of the Parliament of England," according to the 36 Vic., c. 2, s. 1? Is such language an offer or promise, directly or indirectly, of any place or employment, or a promise to procure, or endeavor to procure, any place or employment to or for any voter, or any other person, in order to induce such voter to vote or refrain from voting? The language was, in effect, "I am the Government candidate, and, because I am so, I shall have the patronage and influence of the Government as to appointments and in the laying out of money appropriations in the district roads, and in the appointment of overseers for such works, and I shall have such patronage and influence whether I am elected or not, and I shall take care that no outside persons, but residents only of the district, receive such appointments." I think

it is not an offer or promise of any place or employment, or a promise to procure, or to endeavor to procure, any place or employment to or for any voter or other person. I think it is not so, because the number of overseers in the district would be comparatively small for the expenditure to be made there, and the promise, if one were made, was not exclusively addressed to those present at Matthias' Hall, but to the whole constituency. If the respondent had said the district was about to be formed into a county, and a sheriff would have to be appointed at once, and he would have the disposal of that office, and he would see that a resident of the district would get it, I think it could not properly be said that the respondent had offered or promised a place or employment, or had promised to procure, or had endeavored to procure, a place or employment to or for any one within the meaning of that section of the Act.

The expectation that each one of the constituency would form or might form on such language, would be of the vaguest and most indefinite kind. But if the respondent had said that 100 or 500 men would be required for a particular work at good wages and for a good while, and he would have the selection of them, and he would take care they were taken from the district, and that no outsiders should be employed, and that he would have that patronage whether he was elected or not, I am disposed to think that such a case might be brought within the operation of that section of the statute. For although there was nothing addressed to any particular 100 or 500, and the persons to be selected could not then be known, yet the great number who were to be employed would afford some ground for each person supposing he might be one of so numerous a body; and in that way, although the offer or promise were not made to any defined body or number of persons, it being made to such a body that it might naturally operate practically in advantaging a very great number of people, and raise an expectation that the promise so made would be or might

be fulfilled to each one in his own case. A promise to two to employ one, not naming which one, would, in my opinion, be within the Act: a promise to one thousand to employ one of them would, in my opinion, not be within the Act. In this district there were at least 1,400 voters polled. Those capable of being overseers, or who might probably look for or take the office, I only conjecture. Perhaps there were several hundred, and as the expenditure was not very large (I am not sure whether it was named or not), the number of overseers would not be very numerous. The *data* are not given to me to enable me to state them accurately; but I have no reason to believe that, acting upon the rule which I have stated, the exact facts, if I knew them, would establish a case within the provision of the Act of an offer or promise of any kind, respecting place or employment, which could possibly be called an offer or promise, having been made contrary to that enactment by the respondent. If it is a violation of the Act, or of the common law of the Parliament of England, it must be by reason of its amounting to undue influence by the respondent.

The 72nd section of the Act defines what is undue influence under that Act: "Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of, or threaten to make use of, any force, violence or restraint, or inflict, or threaten the infliction by himself or by or through any other person, of any injury, damage, harm or loss, or in any manner practise intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting, &c., shall be deemed to have committed the offence of undue influence, and shall incur the penalty of £200."

Can the case be brought within the terms just quoted of that section? If it can it must be by the following words: "Every person who shall directly or indirectly . . make use of . . any restraint . . or in any manner practise intimidation upon or against any person in order to induce or compel such person to vote or refrain

from voting . . shall be deemed to have committed the offence of undue influence." The word *restrained* is used, it will be seen, in connection with *force or violence*, and so may be said to mean some physical restraint. But *menace* has been held not to be confined to indicating only bodily injury. The apprehension of being excluded from the sacraments of the church, and the menace of eternal punishment, might be far more powerful than any threat of corporal punishment. *County of Dublin case*, 1827 (Espinasse 57, *note*). So *restraint* does not mean only corporal confinement or the fear of bodily harm. Taking away the will of the person by threats or by improper means of any kind not willingly assented to by the person, but brought about by the exercise of authority or by fear, or apprehension of loss of any kind, must be a restraint. It is said to be, to keep from action by any means; to hold back; to hold on; to curb, check, repress, coerce, constrain, debar, prevent, abridge, hinder. "I have promised to *restrain* him hurting any man's reputation." —Addison. Constraint (Worcester's Dictionary) respects the movements of the body only; restraint, those of the mind and the outward actions. The conduct is restrained by particular motives. Restraint is an act of power; restrict is an act of authority. "The will or the actions of the child are restrained by the parents."—Crabbe's Synonyms. I refer to the leading case of *Huguenin* v. *Baseley* (2 White & Tudor's L. C. 462) for a very full and admirable exposition of what is undue influence, and the variety of ways in which it may be exercised. I think language may be addressed to a body of electors which, by a particular person, may constitute a restraint upon the free action of the electors.

Now, what I have to determine is, whether the language in question can be held to have been a *restraint* upon or against any person in order to induce or compel such person to vote or refrain from voting; or whether it can be said the respondent, by his language, in any manner practised intimidation upon or against any person for the

like purpose; or whether it can be said to be an act or the exercise of undue influence recognized by the common law of the Parliament of England, within the meaning of the statute. Too much strictness must not be imposed upon election speeches. It is said "a husting's speech has become almost a proverb for insincerity."—Freeman's Federal Government, p. 83. But that will not sanction anything being said without any check or restraint.

When the respondent made the declaration he did, which is the subject of this charge, what was its nature, purpose and import? It was to show the electors that, under any circumstances, he, the respondent, would have the influence and patronage of the Government in the electoral district, and that he would distribute them among the residents: and that under no circumstances would his opponent have any such favor or influence. The effect of that was to draw votes to himself and to withdraw them or keep them from his opponent; and it is a fair conclusion that the respondent intended to bring about such a result, for it is the natural tendency of the language which he used.

I think that is not a fair or warrantable course of argument to take; it does interfere with the free deliberation and choice of the electors of their candidates. It is made hopeless to struggle against the influence and patronage of the Crown so to be exercised, and useless to vote for a candidate who is in no case to have any voice or influence in such matters in the constituency. Whether such language will operate upon a large body of the electors, or upon what precise number it will operate, is not so much the question. It will undoubtedly operate upon some of them, especially in this district, a newly settled, sparsely peopled, and what may be called a poor settlement; poor because newly settled, and because the labors of the people are turned to the clearing of their land and the establishment of a home for their families. They have not received and are not receiving the return as yet of their labor. Their effort is until they can make their land remunerative; and it was designed to operate upon them prejudically

and unduly as affecting their choice of a candidate; for, of course, the candidate in dispensing his favors will prefer those who supported him to those who opposed him. I don't place any stress upon the respondent calling himself the Government candidate or the ministerial candidate; it is the common mode of speaking; all that is meant by it is, that he is the person that the party which supports the Ministry has selected as its candidate. No one thinks that the Government or Ministry has actually selected a candidate and put him forward as its nominee in the contest. I do not think either that the respondent saying that it was the custom, and by parliamentary practice he would have the influence and patronage whether he was elected or not, alters the character or the force or effect of the language.

It is the fact that the Minister in his department has the patronage of it, and that the contractor has the choice of his workmen. And it would not lessen the objection of their holding out what they could do, and what they meant to do in the district, and how they meant to spend their money and distribute their patronage among the electors, by telling them at the same time that they had the right and power, and it was the practice to act on these matters as they pleased—the Minister by custom of parliamentary practice, and the contractor because he may do as he pleases with his own.

I put out of consideration all those arguments addressed to the electors by the candidates, the one saying he is in favor of a new road, or a canal, or a railway, or some other object, and his opponent is not, and that he, the speaker, will press the performance of that work, and it will be a great advantage for the people of the constituency; because it is one of the duties of a representative to attend to matters of that kind, and he may as freely speak in that manner on such subjects as he may speak on changes in the school law, or on the tariff, or on any other matter not so peculiarly affecting the constituency. There is a difference between such a line of argument and the

candidate saying he will have the patronage and influence of the Government in all the work and expenditure to be done or to be made in the constituency, and that he will have them whether he is elected or not, and that he will see that no outsiders participate in these benefits, even although he should add that he would have that power and patronage according to the custom of the parliamentary practice in such cases. I consider that, fairly interpreted, to be the exercise of undue influence, not of Government influence, but of influence in the name of the Government by the respondent, and if it be not that, or do not mean that, it means nothing. But I have no doubt it was meant for a purpose, and that purpose could only have been, and in his case it was, I think, unduly to influence the electors in their free choice and deliberate judgment of a candidate.

The conclusion I come to in reference to this charge is that I think the respondent did make use of restraint or practise intimidation upon the occasion in question upon or against the electors present at the meeting at Matthias' Hall, and perhaps upon or against those who were not present, in order to induce or compel such persons to vote, or refrain from voting, at that election. Or if the case do not come within that section of the statute, I am of opinion it must be undue influence according to the common law of the Parliament of England. New modes of undue influence must or may be practised from time to time which may not be covered by the written law, but the principle of the law itself, written or unwritten, is that every election must be *free* (2 Co. Inst. 169; W. & M., sess. 2, c. 2, secs. 1, 2; 2 W. & M., sess. 1, c. 7); that the electors must be allowed freely and indifferently to exercise their franchise; and it is for that cause an election is vacated by riot or other serious disturbance, or by general drunkenness, or by general bribery, although neither the sitting member nor any one for him had anything to do with such acts: *Lichfield case* (1 O'M. & H. 22); *Bradford case* (1 O'M. & H. 30); *Beverley case* (1 O'M. & H. 143); *Staf-*

ford case (1 O'M. & H. 228); *Tamworth case* (1 O'M. & H. 75). However varied or novel the acts or conduct of these may be who proceed in such a manner as to violate the freedom of the election, can make no difference in the law. If the law itself be broken, if the whole election be rendered in any manner or by any persons not free, the result must be that it will be vacated as a void election. If the whole election be not so affected, but the sitting member or any of his agents is or are chargeable with certain acts of the violation of such freedom, the return of the election of that candidate will be avoided.

But if the candidate is no way chargeable with any individual case of violating the principle of a free election, his seat will not be affected; the vote or votes which may be affected by it will be deemed to be illegal. There is a resolution of the Commons of December, 1779 (37 Commons' Journal, 507), against the interference in elections by Ministers of the Crown: "That it is highly criminal in any Minister or Ministers or other servants under the Crown of Great Britain, directly or indirectly, to use the powers of office in the election of representatives to serve in Parliament, and an attempt at such influence will at all times be resented by this House as aimed at its own honor, dignity, and independence, as an infringement of the dearest rights of every subject throughout the empire, and tending to sap the basis of this free and happy constitution."—Rogers on Elections, 9th ed., p. 370. In Chambers' Election Law, p. 374, it is said the interference of Ministers was made a principal ground of avoiding the election in the *Dublin case*, 1831. That case I have not seen. The only one I have seen where a charge was made against the interference of Ministers of the Crown, is the *Dover case* (Wolf. & Br. 121).

If it is highly criminal in a Minister of the Crown to use the powers of office in electoral contests, it must be objectionable for a candidate to assert that he has and will have those powers, although he is not in office, because he is the Government or ministerial candidate, whatever may

be the result of the election. The powers of office are not to be used in the contest, and whether they are used by a Minister, or a friend, ally or supporter of the Minister, must be alike vicious and objectionable. Of course, in all of these cases I am assuming that such a course of proceeding is adopted with the intent mainly to influence the election: for, as I have already said, the intent is everything in such a case. These powers of office are the patronage and influence which that office confers. The exercise of that patronage and influence by delegation to a ministerial supporter is quite as effectual to operate perniciously on the freedom of elections as if the powers were exercised by the principal himself. I see no difference between the Minister saying to the electors in an electoral district in which there are Crown lands to be valued for the settlers, "I have the power and patronage of the valuation of all your lands," or, "I will have the valuation of them," if said with the intent unduly to influence the election in which he is a candidate or the supporter of a candidate, and another person (not a Minister, but the friend and supporter) saying the same thing by reason of his being such supporter and of his contesting the constituency in favor of the Government, if such person say it with the like intent; and the same thing applies to language of the like kind addressed to lumbermen with respect to lumber dues in their imposition, remission or otherwise, and to the expenditure of Government appropriations in the opening of roads, or in the performance of other public works.

I am obliged to find this charge has been sustained.

I must now dispose of the other charges, relating to the alleged remission of timber dues to W. J. Hill, and to the appropriation by Sufferin of the road money in his township. These charges depend not so much on the credibility as upon the weight of testimony, and I am now disposed to adopt the case of the petitioner with respect to them, partly because of the weight of testimony by their united force, and partly because they are to some

extent of a like nature with the last charge, resting upon the influence, or upon the alleged interest and influence, of the respondent with the Government or Ministry of the day, which it is not improbable the respondent used as an argument on these occasions, a it is said he did, and as he unquestionably did on the occasion which is the subject of the last charge. I should have been glad to have been spared from pronouncing any opinion on the other two charges. And I am not sure I should have found as I have upon them but for the conclusion to which I have come with respect to the last charge. The evidence would have warranted me in one view in finding adversely to the respondent upon them, but not necessarily so.

Upon the whole, with much concern and with an earnest desire to decide fairly between the parties, I must find these charges above enumerated to have been proved by the petitioner against the respondent. And I direct that the cost shall abide the result of my finding upon the said petition.

I have retained this judgment for a considerable time in order to advise with some of the Judges upon a point which has not before arisen here. I am bound to say that some of the learned Judges I have consulted do not agree with me. I have not been able to adopt their opinions. It has also been a question with me, and that too has been discussed, whether, as I desired advice, which indicated to some extent a doubt in my own mind, I should not give effect to that doubt by deciding for the respondent, and particularly in a case which is attended with such highly penal consequences. I have not been able to adopt that view, because I do not entertain such a degree of doubt as would warrant me in adopting that course. I should gladly have done so if I could have done it from conviction. But I have not that conviction, and I cannot force myself to it from the opinions of others, however highly I may prize their advice and judgment. I must, after all, act on my own responsibility and judgment. The consequences resulting from an adverse judgment to the re-

spondent I cannot help thinking of; but they are not my work; I am not answerable for them. That is the declaration of the written law, which is above my power. I have now only to say I desire most sincerely that this case will be appealed to another tribunal, and I for one shall in no way regret if the conclusion I have felt obliged to come to should not be the opinion of the higher Court.

The respondent thereupon appealed to the Court of Appeal.

Mr. D'Alton McCarthy, Q.C., *and Mr. Bethune* for appellant (respondent in the petition).

Mr. M. C. Cameron, Q.C., *and Mr. Boultbee* for respondent (petitioner).

DRAPER, C. J. A.—I agree in the conclusion arrived at by my brother Burton, that the appeal should be allowed and the petition dismissed.

But a principle as to the law of evidence was laid down in the *North Renfrew case*, which was referred to and acted upon in the present case, with regard to which I entertain some doubts: and I do not wish, by passing it over in silence, to be supposed to concur in it, or to have been influenced by it in being a party to the judgment now given. I am not deciding one way or the other.

It has been distinctly enough held that on a petition charging any corrupt practice, the respondent is, in a case of even and fully counterbalanced testimony, entitled to the presumption of innocency to turn the scale in his favor. Now the question presented in the present case is, whether the evidence can be said to be so equally balanced as to render it necessary for this respondent to invoke the aid of that presumption, or, on the other hand, to entitle him to it. It is put in the judgment in the following shape: "The question is, whether the evidence can, on this record, be said to be equally balanced, so as to give him the right and benefit of all just presumptions of law and fact. That will depend upon the other charges which are still

to be considered; for if in the other cases I find that they are respectively balanced by the evidence of the respondent, the same witness in all of them as against several witnesses—one, however, only in each case—I should then feel obliged to rely more on the impartiality and truth of the greater number who testified against the respondent, and whose evidence and characters were respectively, for reliability and veracity, as much to be depended on as those of the respondent. I have already stated my opinion on this point in the *North Renfrew case*."

In another part of the same judgment it is said: "If this stood by itself, as before stated, oath against oath, and each side equally credible, and no collateral or accompanying circumstances to aid me either way, I should hold the charge not to be proved. But the other charges, if severally sworn to by a credible witness, and the united weight of their testimony is to overcome the effect of the respondent's word (second oath), I may be obliged to attach such a degree of importance to the combined testimony of these witnesses as to hold the charges to which they severally speak as sufficiently proved in law against the opposing testimony of the respondent."

In the *North Renfrew case* there were nine independent charges of corrupt practices committed by Thomas Murray, the brother and agent of the respondent. Each charge was proved by one witness only, and was based upon offers or promises, not upon any act of the agent. Admitting the general circumstances and much of the conversation, and in the very words of each witness, Thomas Murray gave a different color to the language and a different turn to the expression used, which altered the meaning of the conversations detailed by the witnesses, and so constituted in effect a complete substantial denial of the character of the charge attempted to be proved, and in many respects he directly contradicted the witnesses. The learned Judge discussed at some length the question as to whose testimony he should act upon, and observed: "It is impossible to avoid seeing and feeling that the

more frequently a witness is contradicted by others—although such opposing witnesses contradict him on a separate point—the more is our confidence in that single witness affected, until at length, by the number of contradictory witnesses, we may be induced in effect to disbelieve him altogether. It is difficult to believe that so many are wrong; it is easier to believe that one is wrong so many times; and the more there are who speak against him, the more we are led to believe that he is the one who is in the wrong. . . . The question of veracity does not depend only upon the strength of numbers, nor in some cases does it do so at all. Its true basis is character. It is upon the quality of the evidence, and the point is to determine that quality." In the application of these observations in several cases, the determination was against the respondent, although it was expressly stated that if each case stood alone it would have been decided the other way. In one case the learned Judge said: "I would, as I have already said of other charges, decide this against the petitioner if this were the only charge; but as it is one of a series of charges, each one of which is supported by a different witness, I do not know what I can do, even in so small, I may say so trivial, a matter, unless I give effect to the accumulated weight of testimony, when I have no reason whatever to doubt the truth of the respective witnesses who maintain these charges."

I have found no reported case which deals with this question. On an indictment for perjury, the oath of the defendant, which is charged to be false, is nevertheless, for certain purposes, assumed by the law to be true; that is, to warrant a conviction it is held necessary to have the evidence of two witnesses, or if only one, that "there be some documentary evidence, or some admission, or some circumstances to supply the place of a second witness" (*per* Tindal, C. J., *Reg.* v. *Parker*, Car. & M. 639). In *Reg.* v. *Yates* (Car. & M. 132), Coleridge, J., held that one witness was not sufficient to sustain an indictment for perjury; that this is not a mere technical rule, but a rule

founded on substantial justice. The facts in *Reg.* v. *Parker* are worth noting: A debtor had made affidavit that he had paid all the debts proved under his bankruptcy except two, and in support of an indictment for perjury on that affidavit several creditors were called, each of whom proved the non-payment of a debt due by the debtor to himself, and this evidence was held insufficient. The distinction between a criminal prosecution and the present case is not to be overlooked, but considering the respondent's position as a defendant in this proceeding, there is not only the presumption of innocence of an offence charged against him in his favor, but also the maxim, applicable in civil as in criminal cases, "*semper presumitur pro negante.*" (See 10 Cl. &. Fin. 534.)

The respondent is charged with corrupt practices. There were four cases on which the learned Judge took time to consider, and three were held to be sustained, and the election was declared void. He was in the position of a defendant accused of an offence before a competent tribunal. The presumption of innocence, until his guilt was proved, was in his favor—having denied the charge; the maxim above quoted was in his favor also. The case as put is one of even and fully balanced testimony; each separate charge is supported by only one witness, and is contradicted by the respondent on oath; and, as I understand from the judgment delivered, would have been found against the petitioner if it had been the sole charge, for though the proof adduced by the petitioner sustained it, it was answered and displaced by the respondent's evidence. It is not asserted that this evidence in rebuttal was untrue, or that the respondent was a man not worthy of belief. I cannot follow the reasoning which makes the fact that several independent charges were, *prima facie*, proved—each by one witness only, and were rebutted, though by the respondent alone—a ground for convicting him of all, for no distinction can be drawn between them. And yet I cannot to my own satisfaction answer the arguments on which the judgments in this and the *North*

Renfrew case were founded, and I am relieved from the necessity of so doing, as on the other grounds taken I fully concur in the judgment of my brother Burton.

BURTON, J. A.—We are fortunately, in this case, not embarrassed with any difficulty arising from a conflict of testimony. The learned Judge finds expressly that there was nothing in the evidence of the respondent, nor in the manner of giving it, which could or did excite any suspicion whatever against its perfect truthfulness, whilst in commenting upon the evidence both of Hill and Sufferin, it is clear that he had not formed an equally favorable opinion of their manner of giving their testimony or of their conduct as disclosed by themselves, remarking that the behaviour of the latter, even on his own version of what occurred in conversation with another witness when going to vote, and his voting against the respondent after voluntarily engaging to support him, had not been altogether creditable; whilst Hill had shown some feeling against the respondent in giving his evidence.

We have before us, therefore, the learned Judge's views of the way in which the witnesses impressed him, and we have to draw such inference from the whole evidence set out on the record as we think he should have drawn, and find accordingly.

It must, in the first place, be borne in mind that no *acts* of bribery were established; what is alleged in the two cases of Hill and Sufferin (assuming them for the present to constitute corrupt practices within the meaning of the statute) consisted merely of *offers* or *proposals* to bribe. In such cases it ought to be made out beyond all doubt that the words imputed to the respondent were actually used, because, as has been remarked in one of the decided cases, when two people are talking of a thing which is not carried out, it may be that they honestly give their evidence, but one person understands what is said by another differently from what he intends it. Still more should that be the case when the adverse finding is

attended with such highly penal consequences as the Legislature has declared shall follow the infraction of several clauses of the Election Act.

The learned Judge reports that he should have found both these charges disproved if there were no collateral or accompanying circumstances to aid him either way. He finds all the other charges, with the exception of the last (to which I shall presently refer), disproved, which should, I venture to think, have some weight.

The collateral circumstance which turned the scale, and induced the learned Judge to arrive at a different conclusion, was what occurred at Matthias' Hall. The speech there delivered induced him to adopt the case of the petitioner with respect to these two charges also; partly, as he says, "because of the weight of testimony by their united force, and partly because they are to some extent of a like nature with the Matthias' Hall charges, resting upon the influence or upon the alleged interest and influence of the respondent with the Government or Ministry of the day, which it is," he adds, "not improbable the respondent used as an argument on these occasions, as he unquestionably did on the occasion of the speech."

I can quite understand that a judge or a jury may find their confidence considerably shaken in a witness whom they were at first inclined to credit, by his being contradicted by a number of witnesses, although each witness speaks of a different subject. Still, after all, it comes back to the question of what credit is to be given to the witnesses on each side.

The judge or jury, under such circumstances, would scrutinize the evidence of the witness with greater care. The maxim of law is, "*ponderantur testes non numerantur*," and, as laid down by Mr. Starkie, no definite degree of probability can in practice be ssigned to the testimony of witnesses; their credibility usually depends upon the special circumstances attending each particular case; upon their connection with the parties and the subject matter of litigation, and many other circumstances, by a careful

consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

I do not understand that there is any conflict of evidence as to what occurred at Matthias' Hall; the speech, as proved on both sides, is substantially the same.

The weight of the evidence, then, so far as it is increased by what the learned Judge calls its united force, is confined to the two charges in respect of Hill and Sufferin.

There is a peculiarity about these election cases, that each charge constitutes in effect a separate indictment. It seems to me, therefore, that if, in the opinion of the Judge, there is not sufficient evidence to support the charge, or, in other words, if evidence is given on both sides, and the Judge gives credit to the respondent, and so dismisses the charge, the respondent cannot be placed in a worse position because a number of charges are submitted, in each of which the Judge arrives at a similar conclusion, or that a limit could eventually be reached where, although his conclusion upon the particular charge in addition to the others would in itself be favorable to the respondent, the Judge should feel called upon, by reason of the multiplicity of the charges in which the respondent's evidence and that of the witnesses opposed to him have been in conflict, to come to an adverse decision by reason of the cumulative testimony which he has previously discredited. To my mind, an accumulation of such acquittals should if any weight is to be given to it at all, be thrown into the scale in favor of the respondent.

The only two charges in which there is a conflict of evidence are those of Hill and Sufferin. The learned Judge, in the first of these cases—a case dependent altogether upon the witness' precise recollection of the words used and the way in which they were understood—avows his conviction of the perfect truthfulness of the respondent, and that Hill's evidence was given with a manifest bias; and he comes to the conclusion at first to

believe the respondent—a conclusion which, from a perusal of the evidence, I should also have arrived at, but in the correctness of which I am further confirmed by two circumstances not referred to by the learned Judge, viz.: (1.) That Hill himself states that he did not regard it as a bribe at the time, but only awoke to the consciousness of there being anything corrupt in it some six weeks afterwards, when it was deemed necessary to bind him down by a statement under oath. (2.) That it was deemed necessary so to fetter him. These two circumstances, apart altogether from the explicit denial by the respondent, carry conviction to my mind that the learned Judge's first impression was the correct one.

In the Sufferin case it is clear that when the alleged conversation occurred Sufferin had avowed his intention to support the respondent, who was aware of the fact, and any promise thus made could not have been made in order to induce him to vote or refrain from voting; and this renders Sufferin's version of it highly improbable. He is, moreover, contradicted by two witnesses besides the respondent. Sufferin himself admits, "I was not induced to support him by this offer of $3,000 (that is, as to the laying out of $3,000 on the roads in his township); it made no definite impression on my mind at the time;" and the conduct of this witness was such as not unnaturally to call forth the remark from the Judge, that it was not straightforward dealing, and was calculated, and perhaps purposely so, to deceive. This also, subject to the investigation of the two other charges, he held to be not proved. "But," adds the learned Judge, "the other charges, if severally sworn to by a credible witness, and the united effect of their testimony is to overcome the effect of the respondent's unsupported word, I may be obliged to attach such a degree of importance to the combined testimony of these witnesses as to hold the charges to which they severally speak as sufficiently proved in law against the opposing testimony of the respondent."

The learned Judge then proceeded to investigate the remaining charges, holding one of them not proved, and the other, viz., the Matthias' Hall speech, is one about which there is no conflict of evidence.

We may assume, therefore, that but for the learned Judge's view of that speech, he would have disregarded the united force of the adverse testimony; and had he taken the same view of that speech which we are inclined to do, he would not have varied his first decision upon the other charges.

It would seem that both the respondent and his opponent claimed to be supporters of the Ministry of the day; but that the respondent claimed to be the recognized ministerial candidate, having been nominated by the Reform party. He claimed further, that his opponent, having originally pledged himself to support him and then coming out in opposition, could not expect to retain the confidence of the Government, and that according to his ideas of constitutional practice, the patronage in the constituency would be in his hands, as the ministerial candidate, whether elected or not.

It seems to be admitted on all sides that it was felt to be a grievance of some standing, that strangers were sent up to superintend the work on the roads, and the respondent is said to have stated that, whether elected or not, he would endeavor to get it remedied. Taken in the most unfavorable view for the respondent, what he did say, according to Mr. Teviotdale's evidence, was, "He would have the patronage, as he was the choice of the Government, he would have it whether elected or not elected;" adding by way of explanation, as I understand it, "It was the laying out of money on the roads and appointment of overseers."

There is a slight difference between the respondent's version of this speech and that of some of the witnesses; but, taking them in the strongest way against him, I have been unable to convince myself that they constitute a corrupt practice, or that they differ substantially from

what is constantly done by candidates, in impressing upon electors the importance to themselves of being represented by a ministerial candidate.

The learned Judge holds that such language cannot amount to an offer or promise of any place or employment, or a promise to procure, or to endeavor to procure, any place or employment to or for any voter or other person, within the 1st section of 36 Vic., cap. 2, and therein we agree with him; but he holds that it amounts to undue influence within the 72nd section of 32 Vic., cap. 21, or according to the common law.

To prove an offence within that section, it must be shown either that physical force was used or threatened, or that loss or damage was caused or threatened upon or against some person in order to induce or compel such person to vote or refrain from voting. This was not a threat, nor does it come within the definition of physical force or violence, or doing any loss or harm to any one. Can it then be brought within the remaining words, "in any manner practice intimidation?" To bring the case within this branch of the section, it would, I presume, be necessary to show that some one had been intimidated. But it appears to me to be quite impossible to hold that it comes within this section at all. There was no attempt to work upon the fears of any one; it was rather upon their hopes or expectations; and would come more properly, if an offence at all, within the bribery clauses, but the learned Judge has himself given the answer to that.

Baron Bramwell, in reference to the evidence necessary to bring a case within this clause, is reported to have said: "When the language of the Act is examined it will be found that intimidation, to be within the statute, must be intimidation practised upon an individual. I do not mean to say upon one person only, so that it would not do if practised upon two or a dozen, but there must be an identification of some or more specific individuals affected by the intimidation, I will not say influenced by it, but to whom the intimidation was addressed, before

it could be intimidation within the statute, otherwise it comes under the head of general intimidation."

The suggestion that the offence was one at common law was perhaps sufficiently answered by the statement that no such charge was made in the petition, and that the respondent should not be called upon to meet it. But apart from that, I apprehend it would be necessary to go much further to sustain such a charge, and to prove that the intimidation is of such a character, so general and extensive in its operation, that people were actually intimidated to such an extent as to satisfy the Court that freedom of election had ceased to exist in consequence; just such evidence, in fact, as would be required to avoid an election on account of an organized system of treating or bribery.

Great latitude is necessarily allowed in speeches of this kind; and to hold an election illegal because of the use of such language as is attributed to the respondent in this case would be to render a law, harsh enough admittedly in many of its provisions, intolerable. What the respondent is alleged to have said was an argument or reason for the electors supporting him rather than his opponent, if they believed his statement that he would be more influential with the Government in securing local benefits, and in redressing the particular grievances of which they complained; but it would be going, in my opinion, far beyond what the Legislature ever contemplated, to hold that self-recommendation of that kind on the part of a candidate was to subject the electors to have the election avoided, and to expose him to the disgrace of disqualification for any office in the gift of the Crown, or any municipal office, for eight years.

I think the evidence fails to establish either of the two first charges, and that the remaining charge is not a corrupt practice within the Act; and adopting the language of Mr. Justice Willes in the *Lichfield case*—"considering the extreme solemnity and weight which ought to be attributed to an election that has, so far as one can judge, in all its substantials been regularly and properly conducted

—looking to the amount and weight of evidence which ought justly to be required to disturb a proceeding of that description;" and looking, I may add, to the highly penal consequences resulting to the respondent, and finding no evidence which, in my opinion, ought to outweigh the denial of the respondent, and justify me in finding him guilty of the offences charged, I think we ought not to arrive at a conclusion adverse to him, and that the appeal should be allowed and the petition dismissed.

PATTERSON and MOSS, JJ. A., concurred.

Appeal allowed and petition dismissed.

(9 *Journal Legis. Assem.*, 1875-6, p. 198).

PEEL.

BEFORE CHIEF JUSTICE DRAPER.

BRAMPTON, *2nd to 5th, and 14th June, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *17th December, 1875, 24th January, 1876.*

WILLIAM HURST, *Petitioner*, v. KENNETH CHISHOLM, *Respondent.*

Corrupt practices—Partial denial—Appeal—Further evidence—New trial—Withdrawal of petition—Refusal to allow substitution of petitioner.

Charges of corrupt practices, consisting of promises of money and of employment, were made against the respondent and one M., his agent. Both the respondent and his agent denied making any promises of money, but left the promises of employment unanswered; and the Judge trying the petition (*Draper*, C. J. A.) so found, and avoided the election. Thereupon the respondent appealed to the Court of Appeal, and under 38 Vic., c. 3, s. 4, offered further evidence by affidavit, specifically denying any offer or promise, directly or indirectly, of employment. *Draper*, C. J. A., who tried the petition, having intimated to the Court that had the respondent and his agent made the explicit denial as to offers of money or employment which it appeared they had intended making, he would have found for the respondent,

Held, under these circumstances, that the finding of the Election Court should be set aside, and that a new trial should be held before another Judge on the *rota*.

Observations on the difference between an election trial and a trial at Nisi Prius.

The Court recommended the petitioner to withdraw his petition in this case; and on an application for that purpose, another elector having applied to be substituted as petitioner,

Held, per Burton, J. A., that as the Court of Appeal had been placed in possession of all the charges against the respondent, and of the evidence in support of them, and had recommended the withdrawal of the petition, and no sufficient additional grounds having been shown for such substitution of petitioner, the order for the withdrawal of the petition should be granted.

The petition contained the usual charges of corrupt practices.

Mr. Boultbee and Mr. Evatt for petitioner.

Mr. Bethune and Mr. James Fleming for respondent.

The evidence showed that the respondent, in company with one Martin Maddigan, when canvassing a voter, Daniel Mullen, was given to understand that Mullen wanted money for his vote. Mullen's wife also swore—"Mr. Chisholm said, if my husband was put out of work for him, he would find him employment; if he voted for him, and he was put out of his winter's work through his means, he would find employment if he voted for him." The respondent swore that he did not make Mullen any promise, or offer him anything; that he told Mrs. Mullen that it was against the law, and that it was impossible to pay for a vote; that he had to take a solemn oath if elected that he had neither paid nor promised to pay anything; and that he would not pay one cent for a vote in any shape whatever.

Another voter, Michael Hugo, and his wife swore that when canvassed by the respondent and Maddigan, money was talked of, and that the respondent said, "If he (Hugo) got out of employment, he (respondent) would give him employment if he would vote for him." The respondent swore that he did not offer any money in any form of words or in any shape, or any inducement.

The respondent's evidence in each case was confirmed by Martin Maddigan.

DRAPER, C. J. A. [in giving judgment on this part of the case, said:] "Although the respondent and Martin Maddigan meet the statements as to money, or promises

of money, by a full denial, neither they nor any other witness touch the question of employment, which, as far as I see, is unanswered. This conclusion makes it my duty to determine the election and return of the respondent void."

The respondent appealed to the Court of Appeal from this decision of the learned Chief Justice, and set out amongst others the following as one of the grounds of appeal: "That the judgment of the said Chief Justice was erroneous in finding that the evidence of Daniel Mullen, Mrs. Mullen, Michael Hugo and Mrs. Hugo, was uncontradicted by the evidence of the said respondent; and that on the hearing of the said appeal the respondent will ask that this Honorable Court hear the affidavits of the said respondent, Martin Maddigan and John Maddigan, specifically denying the said alleged offers or promises."

The affidavits above referred to specifically denied any offer or promise, directly or indirectly, of employment to the voters referred to.

Mr. Blake, Q.C. (Attorney-General of Canada), *and Mr. Bethune* for respondent.

Mr. Hector Cameron, Q.C., *and Mr. Beaty*, Q.C., for petitioner.

RICHARDS, C. J., in delivering the judgment of the Court, pointed out the difference that existed between an election trial and one at a Nisi Prius Court, showing that in the latter there was every facility for the analysis and comparison of evidence, and the discovery and correction of error; while at election trials, by reason of the usually large mass of evidence taken, and the fact that such trials were comparatively new, the liability to mistake by omission or mistake was much greater. Under these circumstances, he thought it would be rather severe if rules applicable to Nisi Prius trials were strictly enforced at the Election Courts, especially when, perhaps by

an oversight on the part of counsel, parties might be visited by very severe penalties.

He had communicated with the learned Chief Justice by whom the present case had been tried, and he (Chief Justice Draper) had said that if the respondent and the witness Maddigan had made the explicit denial as to the alleged offers of money or employment which it appeared they had intended making, he would have found for the respondent. The Chief Justice had further stated that he was satisfied that the respondent and Maddigan had intended making such denial, but it not having been made, he was obliged to decide against the respondent on the evidence. Under these circumstances, this Court could not allow the finding of the Election Court to stand. They would therefore grant a new trial, to be held before another Judge on the *rota*. On account of the irksomeness attending the second trial of the same case by a Judge, and having in view the advantage of the evidence being brought before a mind new to the case, they deemed it preferable to have the trial conducted by another Judge on the *rota*. The petitioner should seriously consider whether it would not be better to withdraw the petition altogether without costs to either party. The costs of the former trial and of the appeal to abide the event of the new trial.

Subsequently, on an application by the petitioner to withdraw the petition,

Mr. Justice Burton made the order for the withdrawal of the petition, and on the 24th January, 1876, transmitted the following report thereon to the Speaker:

"I have the honor to report to you, in accordance with the requirements of the 39th section of the Controverted Elections Act of 1871, that an application made by the petitioner against the return of Kenneth Chisholm as member for the County of Peel, for leave to withdraw such petition, was heard before me on the 19th instant; and being of opinion that the withdrawal was not the

result of any corrupt agreement, or in consideration of the withdrawal of any other petition, I granted the application.

"I beg further to report that on the hearing of such application, one George Sharpe, an elector, applied to be substituted for the petitioner; but as the Court of Appeal had been placed in possession of all the charges, and of the evidence which had been adduced in support of them; and had, with such information before them, considered it a fit case for withdrawal, and had recommended that course to the petitioner, although he had not availed himself of the permission within the prescribed period; and as no sufficient additional grounds were in my opinion shown for such substitution, in the exercise of the discretion vested in me by the Act, I declined to allow such substitution."

(9 *Journal Legis. Assem.*, 1875-6, p. 167).

LINCOLN (2).

BEFORE MR. JUSTICE PATTERSON AND MR. VICE-CHANCELLOR BLAKE.

ST. CATHARINES, *11th to 13th September; 4th and 5th December, 1876.*

TORONTO, *30th September; 6th, 23rd and 30th December, 1876; 21st February, 1879.*

NATHAN HENRY PAWLING *et al, Petitioners,* v. JOHN CHARLES RYKERT, *Respondent.*

Waiver of particulars—Amendment—Cumulative acts of bribery—39 Vic., c. 10, s. 37—Affecting result of election—Bets to change votes—Interim certificate to Speaker—Stolen ballots—Costs.

The respondent was elected by a majority of 23, and on the trial of an election petition, filed to set aside his election for corrupt practices and illegal votes, evidence was given by both sides on a charge not properly set out in the petitioners' particulars of corrupt practices. At the close of the evidence the respondent objected that the charge was not in the particulars, and that it was not verified by the affidavit of the petitioners:

Held, 1. That the petitioners might amend their particulars, and that the charges in the petition were wide enough to cover the charge.

2. That as to this charge, the parties had in fact gone into evidence without particulars, and that the petitioners' affidavit verifying the particulars was not necessary.

Where corrupt practices by agents, and others in the interest of the respondent, affected less votes than the majority obtained by the respondent at the election :

Held, under 39 Vic., c. 10, s. 37, that such corrupt practices did not extend beyond the votes affected thereby, and did not avoid the election.

Where, in addition to the above corrupt acts, bets were made by agents of the respondent and others, with a number of voters who were supporters of N., the opposing candidate, the effect of the bets being that in order to win the bets, the voters must vote for the respondent :

Held, that these bets were for the purpose of getting votes for the respondent, and were corrupt practices; and that in connection with the other corrupt acts proved as set out above, they affected the result of the election ; and that the election was therefore avoided.

The Court cannot grant an interim certificate declaring an election void, as the statute contemplates only one certificate to the Speaker, certifying the result of the election trial.

During the progress of a scrutiny of votes, certain ballot papers, counterfoils and a voters' list were stolen from the Court, which had the effect of rendering the proceedings in the scrutiny useless.

And in disposing of the costs, the Court ordered the respondent to pay the costs up to the date the election was avoided, but that, under the circumstances, each party must bear his own costs of the scrutiny.

The election of January, 1875, having been declared void (*ante*, p. 391), a new election was held on the 18th and 25th February, 1876, at which the respondent was declared elected by a majority of 23.

The petition was thereupon filed, containing the usual charges of corrupt practices, and claiming the seat for the unsuccessful candidate.

Mr. Maclennan, Q.C., *Mr. Hodgins*, Q.C., *and Mr. Calvin Brown*, for the petitioners.

Mr. M. C. Cameron, Q.C., *and Mr. Peter McCarthy*, for the respondent.

Evidence was given on behalf of the petitioners on a charge that John Junkin, the financial agent of the respondent, had been guilty of corrupt practices in bribing one Arthur Belcher. The evidence showed that the corrupt practice was an offer to the wife of Belcher to procure the husband's vote for the respondent in the manner set out in the judgment. At the close of the evidence,

Counsel for the petitioners contended that the evidence sustained the charge, and asked for leave to amend the particulars.

Counsel for the respondent contended that the charge relied upon was not in the particulars, and therefore, as laid, it failed; and that the evidence did not sustain any charge of a corrupt act. No new particulars could now be allowed, for by the Act of 1876 the particulars must be verified by the oath of the petitioners. The amendment would be in effect new particulars, and the evidence would have to be given over again. Besides, the evidence of Mrs. Belcher showed that the petitioners had long been in possession of the facts relied upon.

PATTERSON, J. A.—The amendment is opposed on the grounds, amongst others, that the charges now asked to be added are founded on facts which were stated in the affidavit made by Mrs. Belcher before the petition was filed, and which has been ever since in the hands of the solicitors for the petitioners; and that the charges ought to have been embodied in the particulars delivered under the order in the cause, instead of the illusory statements then made, and which are neither supported by the evidence now given nor by the information which it is sworn was in the solicitors' hands. This is a serious objection, and upon it we should refuse the amendment, as we did yesterday refuse one on the same grounds; but in this case no objection was made at the close of the petitioners' evidence, but the respondent called evidence, not to rebut the charge in the particulars which the petitioners' evidence had not approached, but to rebut the charge of offering inducements to the wife to procure her to persuade her husband to vote or refrain from voting. The charge has thus been brought before us by both parties; and we think that however strongly we disapprove of the practice of paying so slight regard to the order for particulars as to furnish as particulars a statement based on no grounds warranting the oath now required to accompany the particulars, and to withhold the facts embodied in the affidavit, which, by another most reprehensible practice, had been taken as a fetter upon the

conscience of the witness, yet we have to regard this application as one to state on the record what has already been investigated as if it had been there.

It is further objected that under section 28 of the Act of 1876 (39 Vic., c. 10), we cannot allow these amended particulars without an affidavit of verification, and that if they are received the charge must be investigated afresh. We do not think this objection well founded. The petition is wide enough to cover the charges in their amended shape. The parties may go on without particulars if they please, and this is in fact what they have done as to these charges.

The amendment is made under the power given us by section 33 of the Act of 1870-71 (34 Vic., c. 3), and by General Rule No. 6, and has the same effect as any amendment at Nisi Prius. We do not read section 28 of the new Act as restricting this power.

[The learned Judge here reviewed the evidence.]

On the evidence we find that John Junkin did offer Anne Belcher a valuable consideration, by offering either to procure two months' rent to be thrown off, or that time should be given for the payment of that rent; and that this was, within the words of section 67, subsec. 1, 31 Vic., c. 21, an offer or promise of valuable consideration to a person on behalf of a voter, or to a person in order to induce a voter to vote or refrain from voting.

We hold that Junkin was an agent of the respondent. The acts done by him during the election contest are unquestionably sufficient evidence of agency, if they had the requisite recognition by the candidate or his agents. We think this recognition is shown both by the evidence of the respondent himself as to his calling on his friends at his nomination to work for him—not merely to vote for him; by the fact, which is apparent from the evidence, that the whole of what was done in the city was left to Junkin and others to do; and by the circumstance that Junkin was named by the respondent as his financial agent; and Junkin's evidence that he constantly resorted

to the respondent's office to meet with the other persons who were canvassers like himself, and compare progress, and otherwise promote the election of the respondent.

The respondent may not have been at any of these meetings, or have any personal knowledge of the persons who were there; but his clerks were there, and he had the means of knowledge, and must be held, as the proper inference of fact, to have known of what was taking place.

BLAKE, V.-C., concurred.

An order was then made appointing the times and places for a scrutiny of votes to be taken before the Registrar (Mr. C. A. Brough) in each municipality of the electoral division.

Evidence was given that one Dexter Potter was an agent of the respondent, and that on the night preceding the election he made bets with two voters, John Jackson and Abram Hollingsworth, in consequence of which bets they voted for the respondent.

After argument, the following judgment was given:

PATTERSON, J. A.—We hold that the agency of Dexter Potter is established, and that, therefore, the charges of bribery by an agent are made out in the cases of Jackson and Hollingsworth; but the effect of these acts of bribery, either by themselves or in connection with the Belcher case, do not extend beyond the votes affected.

Evidence was then given of the payment of $150, in sums of $50 each, to Patrick Hennegan, John Y. Cushman and Thomas Nihan, by one Arthur Aiken, on the 22nd or 23rd February. The money was placed in three separate parcels on a table in the tavern kept by Aiken at St. Catharines, and each of the parties above named took a $50 parcel of the money. One of the witnesses (Hennegan) swore he used the money for election purposes.

Evidence was also given of the payment by the said Arthur Aiken of the taxes of nine income voters between the 10th and 17th February.

The petitioners then applied for leave to amend charging the above as corrupt practices by an agent of the respondent, and the Court, by consent of parties, then adjourned to meet in Osgoode Hall, Toronto, on the 30th September, on which day the following judgment was delivered:

PATTERSON, J. A.—After conference, we hold that the agency of Aiken is not proved, but that the evidence is sufficient (if not rebutted) to show an illegal act by Aiken under s. 67, subs. 5 of the Election Law of 1868; and we allow an amendment to charge an offence by Aiken under that subsection, and also to charge an offence in respect of the payment of the income tax of the nine voters.

The Court then adjourned to meet at the Court House in St. Catharines, on the 4th December.

On the reassembling of the Court,

Mr. Maclennan, Q.C., proposed to read to the Court evidence taken before the Registrar on the scrutiny of votes.

Mr. M. C. Cameron, Q.C., objected.

The COURT ruled that the evidence taken on the scrutiny was not admissible on the trial of the petition.

The petitioners then called the following witnesses:

Arthur Aiken: I went out on the night previous to the election with James Brownlee; cannot say where I first met him; cannot say if it was before I went to Rykert's office; had no particular business in meeting him; if I swore I met Brownlee for election purposes I must have been crazy at the time; we talked about the election and about making bets; I heard some one say at Rykert's office, "We must all do our best;" don't know who it was; I think Rykert was in one of the rooms, but am not positive; we were all to do our best at the elec-

tion; think there were fifty people present; have no recollection of scrutineers being appointed; was at a committee meeting at Cain's, for St. James' Ward, a week or two before that; we were looking over the voters' list. When I met Brownlee on the night before election I had about $1,000 in my pocket; I went out to get men to bet; I did not know whether the men were Neelon or Rykert men; wanted to bet they would vote for Neelon, or for them to bet they would not vote for Rykert; believe Brownlee got some men to bet that way; do not recollect how much money I gave Brownlee to bet with; I think Brownlee gave me back all the money except $35; the bets were $5 and $10; do not recollect how much I bet myself; expended about $50 or $60 in bets; have no recollection of saying it was $60 or $70; I sent Brownlee to make bets; he told me he had made two bets; I asked Dexter Potter if he knew anyone who would bet that they would vote for Rykert; Potter said, "Come along," and Brownlee and I went with him; I suppose I had six or seven other bets; think one of the bets occurred next morning; they were not all Neelon men I bet with; nearly all of them I thought would vote for Neelon; I thought a little money at election time would do almost anything, and I think so still; have great faith in money at election times; thought the election would be close, and did what I could to change it; spent $55 altogether in bets; made other bets with supporters of each party; bet that Neelon would be elected; bet on majorities all over the county; the bet on the morning of the polling day was with David Grant, a colored voter; went to Jacob Moore's place on polling day with Dexter Potter, and offered to bet with him; do not know if Moore had any money; Moore said he did not want to bet; had nearly $1,000 in my pocket, the balance of what I had the night before; first talked of these bets with Brownlee on the night previous to the election; no one suggested the idea of making these bets; think I met Brownlee at Rykert's office; did not consult anyone beside Brownlee

and Potter; thought I was getting round the law, but it seems I was not; lost all of the bets but one; kept no account of them in any book; only put them down on a piece of paper in an envelope; have had large financial dealings with Mr. Rykert; did not bring a farthing of this betting account into the dealings with him; may have discussed these bets with him; he never mentioned bets to me; he told me I was very foolish; have made no claim through him for any money expended in bets; did not know Moore was a supporter of Neelon's; thought he would accept the bet when I made it; think he said he would see Potter again.

Cross-examined: I am not an agent of Mr. Rykert's; was in his office on the night before the election; did not receive any instructions from Rykert; most of the bets were sporting bets.

Dexter Potter: I supported Mr. Rykert at last election; do not recollect that there were any committee rooms for St. James' Ward; looked over the voters' list when at Cain's house to see who were voters; there may have been a dozen people present; the names of two scrutineers were agreed on; Brownlee and Aiken asked me about several voters; mentioned the names of Wise, Parker, John Jackson, Hollingsworth, and the two Tyrrells; cannot remember how many I spoke of; Collins' name was mentioned later in the evening; do not think Moore's name was mentioned; might have spoken about David Grant; think I was out with Brownlee and Aiken about two hours; I bet that the voter would vote for Neelon; think Aikens suggested the bets; my father stopped at my house, and asked me to go up to Cain's place; I went there expecting to meet others and hear what was going on; went there for purposes of the election.

Counsel for the petitioners contended that, in any event, Aiken was an agent of the respondent, either from his attending the respondent's committee meetings, or from

Potter, who had been held to be respondent's agent, requesting him to canvass with him the night before the election; that the respondent's majority was 23; that the bets proved were with voters who had intended voting for Neelon, and the effect of their voting for the respondent was to "count two on a division." Under s. 37 of the Act of 1876, these acts, in connection with the illegal practices already adjudicated upon, have affected the election: *Hackney case* (31 L. T. N. S., 69; s. c., 2 O'M. & H. 81.)

Counsel for the respondent contended that the agency of Aiken had not been established, and that the petitioners had failed to bring the case within the operation of s. 37; that to do so they must show that the corrupt practices and illegal acts have had a material effect on the election.

Blake, V.-C., referring to the majority of 23, by which the respondent was declared the member for the county, said the question was—would the result have been that had not these corrupt practices been adopted? He referred to the advance of $150 by Aiken to Cushman and others, and to its having been admitted that that money effected the very object the person advancing the money had in view, and it was but reasonable to suppose it more or less affected the result of the election. Then again, this same gentleman advances money to persons to pay their income taxes, which payment gave them a vote, and it is a reasonable conclusion that the election was more or less affected by these nine voters whose income tax was paid. Then there are these three men going out and pursuing a system of betting for the purpose of getting votes, and it is out of all question to say that this did not affect the election. Aiken says he thought by doing so he would get outside of the law, for he knew he could not openly bribe any voter: that is the system of betting which was pursued on the night previous to the election, and again on the morning of the election. He goes to bet with a person more for the purpose of inducing him not to vote the way

the other intended. Had these corrupt practices not prevailed there is no doubt the result of the election, instead of being in favor of the respondent, would have been the other way; and under the 37th section of the Act, it is impossible to say that the seat can be held by respondent. He did not express any opinion on the point as to Aiken being an agent of the respondent, although he strongly believed he was such agent.

PATTERSON, J. A., agreed with the conclusion arrived at by his learned brother. It was shown that there had been a considerable expenditure of money, and that Aiken actively, and for considerable time before the polling day, was endeavoring by the expenditure of money to influence the election, and that two corrupt practices already adjudicated upon were committed by agents of the respondent, with his money and in concert with Aiken. It is impossible to say that the corrupt acts were of such trifling nature or extent, that the result cannot be reasonably supposed to have been affected by those acts and illegal practices. We therefore declare the election void. It is not necessary to hold that Aiken was an agent, but I am strongly of opinion that his agency is established.

The Court then adjourned to 23rd December, to allow the scrutiny of votes to proceed. On the reassembling of the Court on that day,

Mr. Maclennan moved to have the statutory certificate sent to the Speaker, showing that the election of the respondent had been declared void. He also asked that the Court declare that sec. 31 of the Election Act of 1876, which prohibits the trial of an election petition during the session of the Legislative Assembly, did not apply to prevent the scrutiny of votes proceeding in this case.

Mr. Cameron, for the respondent, declined to consent to the trial proceeding during the session.

The COURT declined to grant the interim certificate asked for, as the statute contemplated only one certificate; and held that the prohibition in the Act applied to prevent the scrutiny proceeding during the session of the legislature.

After the close of the then session of the Legislature, the scrutiny of votes proceeded before the Registrar. A case affecting the revision of the voters' lists by the County Judge of Lincoln was stated by the Registrar and reserved for the decision of the Judges under 36 Vic., c. 3, s. 34. (See *re Lincoln Election, Borrowman's case*, 2 App. R. 316.) The judgments in appeal from the Registrar are reported *post*, p. 500.

During the proceedings before the Registrar, certain ballot papers, etc., required to identify a number of votes which had been declared bad, were stolen from the Court.*

Both parties thereupon made admissions before the Registrar as to how the voters whose ballots had been stolen had voted, which admissions the respondent afterwards sought to withdraw.

A special case was then settled by the election Judges for the opinion of the Court of Appeal: *re Lincoln Election Petition*, 4 App. R. 206. The Court held the admissions were not binding, and that no evidence could be given to show how the voters had voted. The proceedings were then terminated by an application to the election Judges to certify the result of the trial to the Speaker, and to dispose of the costs. After argument, the judgment as to costs was given by

PATTERSON, J. A.—I think that there are abundantly sufficient reasons for not giving either party the costs of the scrutiny; but the respondent should pay the costs up to the time when his seat was declared void.

The certificate to the Speaker, after setting out the proceedings and the result of the election trial, set forth the following special report:

"And the said Judges further specially report that while the scrutiny was proceeding before the Registrar at the Court-house in the city of St. Catharines, some of the papers which had been procured from the custody of the Clerk of the Crown in Chancery for the purpose of the

* The Report of the Commissioner appointed to investigate the theft of the ballots will be found in Ontario Sess. Paper, No. 32, 1878.

trial—namely, some ballot papers, some counterfoils, and a voters' list—were stolen from the said Court-house, and were not recovered; and that by reason of the loss of those papers, it was impossible for the Judges to determine for whom the majority of good and lawful votes were polled at the said election."

(12 *Journal Legis. Assem.*, 1879, p. 209.)

LINCOLN (2).

SCRUTINY OF VOTES.

BEFORE MR. JUSTICE PATTERSON.

TORONTO, *26th November, 1877, to 31st July, 1878.*

NATHAN HENRY PAWLING, *Petitioner*, v. JOHN CHARLES RYKERT, *Respondent.*

Selling and giving liquor during polling hours—Tavern-keepers—Aliens—Onus probandi—Supporting vote by other qualifications—Income Voters—Tendered Ballots—Parol declaration.

By the 3rd sec. of 39 Vic., cap. 10, which is substituted for the 66th sec. of the Election Law of 1868, tavern-keepers, or persons acting in that capacity for the time, who sell or give liquor at taverns on polling day and within the hours of polling, are guilty of corrupt practices; but persons who treat or are treated at such taverns are not affected by the statute. (*James Ford's vote*).

Where evidence was given of parol admissions made by certain voters, some years before the election, that they had been born in a foreign country, and also evidence that since the parol admission the voters had voted at Parliamentary elections, and had sworn to the voter's oath as to being British subjects by birth or naturalization:

Held, 1. That the oath at the polls could not be treated as testimony, not having been given in any judicial proceeding.

2. That by swearing at the polls he was a British subject by birth or naturalization, the voter only stated the legal result of certain facts.

3. That there was therefore no presumption of naturalization sufficiently strong to rebut the presumption of the continuance of the original *status* of alienage. (*Jacob Shenck's vote.*)

Where a voter, in support of his own vote, swore that he was born in the United States but that his parents were British subjects,

Held, that the whole statement of the voter must be taken, and that it amounted to this: "I was born in the United States of British parents." (*James Mulrennan's vote.*)

Certain aliens had taken the oaths of allegiance, &c., before a Justice of the Peace of a town, which oaths were administered to them in a township, but within the same county:

Held, that under the Alien Act, 34 Vic., cap. 22, sec. 2, Can., the Justice of the Peace, in administering the oaths, was acting ministerially and not judicially; and that the oaths were properly administered. (*John Johnson's vote.*)

A voter whose qualification is successfully attacked may show a right to vote on income; but in such case he must prove that he has complied with all the requirements of the Act which are essential to qualify him to vote on income. (*James B. Gray's vote.*)

A voter was assessed in two wards of a town; he parted with his property qualification in one of the wards, but voted in such ward:

Held, that the vote might be supported on the qualification in the other ward, which, if the voter had voted on it, would have made it necessary for him to vote in another polling division. (*William T. Gibson's vote.*)

A person assessed for land he does not own, though receiving rent for it from a tenant, is not qualified to vote. (*John Clark's vote.*)

Where a voter offered to vote at a poll, but did not ask for or put in a tendered ballot paper:

Held, that the Ballot Act required the vote to be given secretly, and that the parol declaration of the voter as to his vote could not be received in order to add it to the poll. (*George Secord's vote.*)

The scrutiny of votes referred to on pp. 493, 499, having taken place before the Registrar, appeals from his decisions were heard by consent before Mr. Justice Patterson.

Mr. Hodgins, Q.C., for petitioner.

Mr. Bethune, Q. C., *and the Respondent in person*, for the respondent.

JAMES FORD'S VOTE. (*Liquor cases.*)

A number of voters who had given or partaken of liquor at taverns during polling hours on the polling day were held disqualified for corrupt practices. The following judgment was given on the appeals affecting this class of voters:

PATTERSON, J. A.—Some of the cases in these appeals raise the question of the construction of section 3 of the Act 39 Vic., c. 10, which reads thus:

"No spirituous or fermented liquor, or strong drink, shall be sold or given at any hotel, tavern, shop, or other place, within the limits of a polling district, during the polling day therein or any part thereof, under a penalty of $100 for every offence; and the offender shall be subject to imprisonment, not exceeding six months, at the discretion of the Judge or Court, in default of payment

of such fine; and this provision is substituted for the 66th section of the Election Law of 1868."

The votes which are claimed to be vitiated are of three classes:

1. Those of tavern-keepers who sold or gave the liquor.
2. Those of persons who treated at taverns.
3. Those of persons who were treated.

The first and general question, which applies to all the cases, is whether a violation of the section during the hours appointed for polling is a corrupt practice.

The Act of 1875, 36 Vic., cap. 2, s. 3, made any violation of the 66th section of the Election Law of 1868, during the hours of polling, a corrupt practice. The present section is substituted for section 66.

I see no reasonable grounds for reading the word "substituted," in any narrow sense. The new section is *in pari materia* with the former one. It merely varies the terms in which the offence of selling or giving liquor on polling day is prohibited. It retains the same penalty, though it adds more stringent means of enforcing it. It does not, in terms, repeal sec. 66, and though it does not, in terms, enact that the new section is to be read as sec. 66 of the former Act, I think the expression used is at least as effective as that form of amendment would have been to attach to the infringement of the substituted law all the consequences attendant upon the infringement of the original law. In other words, I think the new law must be substituted in the reading of the Act of 1875, as well as in reading the provisions for keeping peace and good order at elections, contained in the Act of 1868.

It was argued by Mr. Bethune that as secs. 1 and 2 of the Act of 1875 dealt with acts expressly required to have been done with corrupt intent, we ought not to import into sec. 3, which says nothing of intent, the implication of corrupt practice derived from the Act of 1873. This argument, I think, is untenable for two reasons. The Act is not providing a general scheme, or dealing generally with any classes of offences. It is an amending Act only,

and makes amendments more or less isolated in their character. There is, therefore, no sound rule which makes it necessary to construe any particular amendment by the light of an association which we may discover here, but which may be absent when the new clause is read with the rest of the law which it amends. But it happens that these three sections are classed in the amending Act under the head of corrupt practices—a circumstance which, as shown by the present Chief Justice of Appeal in his judgment in the *South Ontario case* (12 Can. L. J. 223; s. c., *ante*, p. 455), may be taken into account in determining the immediate and special object the Legislature had in view; and which, in the present case, certainly does not dissociate the clause in question from the subject of corrupt practices, showing rather that in re-enacting the law in its altered shape, it was in the contemplation of the Legislature that, in the application of it, an offence against its provisions would be a corrupt practice, as it had been before.

It is, therefore, in my opinion, clear that every tavern-keeper, or person acting in that capacity for the time, who sold or gave liquors at the tavern within the hours of polling, committed a corrupt practice.

Then, as to persons who were not tavern-keepers. I have no hesitation in holding that it is the selling or giving only, and not the receiving, which is prohibited under the penalties attaching to the violation of this law. The words are plain and unambiguous, and cannot be extended to include accessories. The penalty is upon *the offender;* and the offender is the person who sells or gives. In this respect, the statute differs from the English Act, 17 & 18 Vic., cap. 102, sec. 4, which makes accepting or taking an offence as well as giving.

In considering whether the man who treats another is one who gives within the meaning of the section, it will be useful to refer to the old sec. 66. It provided that every hotel, tavern and shop, in which spirituous or fermented liquors or drinks are ordinarily sold, shall be closed

during the day appointed for polling in the wards or municipalities in which the polls are held; and no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period, under a penalty of $100 in every such case. This section had been the subject of several judgments in contested election cases.

In the *South Essex case* (11 Can. L. J., 247; *ante*, p. 235), the Chancellor avoided the election for a corrupt practice participated in by an agent of the candidate, by receiving a treat at a tavern during the polling hours. That decision has not, that I am aware of, ever been followed; and it was in effect overruled by the judgment of the Court of Appeal in the *South Ontario case* (*ante*, p. 420). In the last named case, the Court held that the person prohibited was the tavern-keeper, or the person acting in that capacity. It has been suggested by Hagarty, C. J., in his judgment given in the Court of Appeal in the *North Wentworth case* (11 Can. L. J., 296; s. c., *ante*, p. 350), that to confine the section wholly to the innkeeper would prevent its reaching the case of a private person who might, on the polling day, broach casks of ale or spirits for the public use of all comers; and in the *South Ontario case*, Draper, C. J. A. (*ante*, p. 439), did not take exactly the same view of the section as the other members of the Court, his opinion being that it extended to all persons who sold or gave liquor in a tavern.

In this state of the law, the amending Act was passed. It prohibited the selling, &c., at any *hotel, tavern, shop, or other place* within the limits of a polling district. Now, *hotel, tavern* and *shop* are evidently places *ejusdem generis*, and the general words, "or other place," must therefore be confined to places *ejusdem generis*. In this particular, the Legislature has affirmed the existing law, as it had been construed by the Court in the *South Ontario case*, so far as the place of selling or giving was concerned.

There is no prohibition in the clause against selling or giving at any other place. It probably was considered

sufficient for the purposes of this enactment, and with the object of keeping peace and good order, so to limit its operation. A person giving under any other circumstances would apparently be in one of two positions. He would either do the act in perfect innocence, as in the case of giving a glass of beer or of wine to a friend dining at his table; or he would do it, as in the suggested case of broaching a cask for all comers, or even in the case of carrying a bottle in order to treat an occasional tippler, in a way that would probably amount to bribery.

The object of the enactment seems to be the same as in the former case, while it is so framed as to avoid the difficulties that attended the attempt to construe the earlier clause. The leading idea is that liquors kept for sale at hotels, taverns, shops, or other places where liquor is usually sold, shall not be dispensed on polling days, either by selling or under the pretence of giving. The mandate points to that object; and it cannot be disobeyed, except by the act or permission of the person in whose control the liquors are. That person is the offender, if the law is disobeyed. If he obeys the law and sees that none of his liquor is sold or given, he has done what the statute was passed to insure. It is only after a violation of it on his part that a second giving, such as occurs when one man treats another, can take place. I do not think such a second giving is aimed at by this statute, which attaches no penalty to the purchasing, or accepting, or drinking. I do not think it was ever intended by the words before me to make two offences—not one joint offence, but two separate offences—out of what is in reality but the one act. Giving is, in my opinion, prohibited to prevent an evasion of the prohibition to sell, and, like its companion word, points to the vendor only.

If intended to have a more general application, we should not find it limited in its operation to the walls of the tavern, or counter of the drinking booth, or other place for the sale of liquor, as it is in this clause; and we should find, what is here wanting, a penalty attached to accepting or drinking.

Some observations which I made in the *South Ontario case* (12 Can. L. J., 222; *ante*, p. 452), seem as apposite to the present law as to the old sec. 66: "It would seem a faulty rule of construction, on which we should hold that the Legislature, in contemplation of a tavern-keeper disobeying the law by parting with liquor, meant to provide against such disobedience by the further command, that if he did so disobey, the recipient of the liquor must not give it away again under a penalty, and particularly as no penalty is attached to the act of receiving it. If such an intention existed, it should, and doubtless would, have been somewhat more clearly expressed. The only other case in which it can be suggested that *giving* at a tavern, &c., is the act intended, is the case of persons bringing liquor from elsewhere to the tavern and giving it away. This is too remote a possibility to require more than a bare mention, and no good reason can be suggested why a giving of that nature should not be an offence wherever committed, as well as when committed in a tavern or place where liquor is ordinarily sold."

I think, therefore, that when a man treats another at a tavern, he does not *give* within the meaning of this penal law; but that the offender is the inn-keeper or his substitute.

JACOB SHENCK'S VOTE. (*Alien cases.*)

The appeal in this and nine other cases were heard together, as involving the same question of law. The respondent had given evidence before the Registrar of a parol admission made by each voter, in some cases many years before the election, of his having been born in a foreign country. Against this admission evidence was given on behalf of the petitioner, that since the date of admission, the voter had voted at this or a former parliamentary election and had taken the voter's oath, which contained a declaration that he was a subject of Her Majesty by birth or naturalization. The Registrar considered that the oath displaced the parol admission, and held the vote good.

Mr. Bethune contended that the admission was *primâ facie* evidence against the voter, and that it was incorrect to allow the oath, as that was showing, in answer to an admission, that the party had at another time asserted the contrary: *Tipperary case* (3 O'M. & H. 34); *Taylor on Evidence*, s. 686; *Brightly on Elections*, 395; *People* v. *Pease* (27 N. Y. 45; 30 Barb. 588); *Rex* v. *Twyning* (2 B. & Ald. 386); *Lapsley* v. *Grierson* (1 H. L. Cases, 504); *Reg.* v. *Inhabitants of Harborne* (2 A. & E. 540); *Chambers' Dictionary of Elections*, 23; *Montgomery* v. *Graham* (31 U. C. R. 57); *Doe Hay* v. *Hunt* (11 U. C. R. 367.)

Mr. Hodgins contended that as the admissions as to foreign birth were made long before the *status* of voter was acquired, it could not affect the after acquired *status*. Admissions to affect a person in an office or holding a title or *status* cannot bind until the office, title or *status* has vested. Voting at an election without qualification involves a criminal neglect of duty, and renders the voters liable to a penalty, and the presumption is in favor of innocence; therefore the former parol admission cannot now be taken as against the oath and the voting: *People* v. *Pease* (*supra*); *Brightly on Elections*, 411, 413; *Regina ex rel. Carroll* v. *Beckwith* (1 Pr. R. 284); *Rex* v. *Edith* (8 East, 542); *Fitch* v. *Weber* (6 Hare, 57; s. c. 12 Jur. 76); *The Acorn* (2 Abbott, U. S. 434).

PATTERSON, J. A.—In the case of nine voters objected to as being aliens, it was established that each one had been born out of the Queen's allegiance; and it was then contended that the burden of proving naturalization was cast upon the supporters of the votes.

This contention was resisted on the grounds that each voter had taken the oath prescribed by the statute when his vote was challenged at the poll, in which oath he had sworn (amongst other things) that he was a subject by birth or naturalization.

In each case it has been proved that the voter was not a subject by birth; therefore, it was argued, his oath must be understood as affirming that he was naturalized;

and having thus professed to have voted as a naturalized subject, it is of no avail that he was not born a subject, but some evidence must be given to show that he was not naturalized. To accede to this suggestion would be unwarranted by any rule of evidence.

The oath at the polls cannot be treated as testimony in this matter, either primary or secondary in its character. As a statement made by the voter in his own interest, it proves nothing for him.

It derives no greater force from being made under oath; for the reasons, amongst others, that it could not be received as secondary evidence unless it were out of the power of the person adducing it to produce primary evidence; that it was not given in any judicial proceeding, the functions of the Returning Officer being ministerial only, and his duty compelling him to receive the vote when the oath was taken; and that the adverse litigant had no opportunity to cross-examine the deponent. (*Taylor on Evidence*, s. 434, &c.)

The other branch of the argument is to the effect that because the voter said he was naturalized, it must be assumed that he was naturalized until proof that he was not naturalized has been given. The foundation for this argument fails, because the man did not say he was naturalized. He said he was a subject by birth, just as much as he said he was a naturalized subject. He simply swore to his *status*, "a subject by birth or naturalization"—a legal result of certain facts—and we do not know what facts influenced his opinion, any more than we know whether he thought he was a subject by birth or a subject by naturalization.

But granting, for argument's sake, that he had unequivocally announced that he voted as a naturalized subject, he would still, in my opinion, be bound to rebut by evidence the inference of alienage arising from his foreign birth.

No authority has been produced for the proposition that the fact of the voter assuming to vote as a natural-

ized subject raises a presumption of naturalization sufficiently strong to rebut the presumption of the continuance of his original *status*, except an American case, *People* v. *Pease* (27 N. Y. 45); but that case, even if satisfactory in its reasoning, was distinguished from those before us by the circumstances that the presumption was there acted on in favor of innocence in a proceeding against the individual whose conduct was in question.

The well-known rule which, as applied to pleading, requires a party to plead the facts which are within his knowledge, and which throws on him the onus of proving such facts, unites in this case with the presumption that things continue in the same state till the contrary appears: *Price* v. *Price* (16 M. & W. 241-2).

There is no presumption in this Province that, because a man who was once an alien owns and is assessed for land, he has become a subject, because aliens may hold land and must pay taxes on it.

The assertion of the attacking party is, "You are an alien, which I show by proving that you were born abroad." The reply is, "I admit I was born abroad; but I say I have been naturalized, and you must disprove that." The rejoinder may be in words from *Best on Evidence*, p. 370: "You assert that a certain event took place, not saying when or where, or under what circumstance; how am I to disprove that, and to convince others that at no time, at no place, and under no circumstances has such a thing occurred." In another place the same learned author says (p. 374): "There is a third certain circumstance which may affect the burden of proof; namely, the capacity of parties to give evidence. 'The law,' says one of our old books, 'will not force a man to show a thing which by intendment of law lies not within his knowledge.' *Lex neminem cogit ostendere quod nescire præsumitur.* From the very nature of the question in dispute, all or nearly all the evidence that could be adduced respecting it must be in the possession of or easily attainable by one of the contending parties, who accordingly could at once put an end

to litigation by producing that evidence; while the requiring his adversary to establish his case because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant."

Our statutes for the naturalization of aliens have, I believe, invariably provided means of preserving and furnishing to the alien the proof of his naturalization, and for the reception of that proof whenever the fact had to be established by evidence. If any of these voters claim to have been naturalized under any one of our statutes, they cannot complain of being asked to produce the evidence provided by law. If they claim to have been naturalized by any other process, such, for instance, as a private Act of the Imperial Parliament, the wisdom of the rule I have quoted becomes very manifest.

The statute of 1871, 34 Vic., c. 22, Can., supplies an illustration of what the effect of yielding to the contention in support of these votes would be. For the relief of persons who had taken the oaths required for the naturalization of aliens by former Acts, but had not procured the certificates which those Acts authorized, it was enacted that such persons should be entitled to the privileges of natural born British subjects, giving them power to procure a certificate from the functionary who had administered the oaths, or to make an affidavit of the fact of having taken the oaths; and then, after providing for oaths being taken by aliens who had not theretofore done so, it was enacted that every affidavit taken under that Act should be filed with the Clerk of the Peace of the county, who should file it of record in his court; and, *upon its being so filed*, the person making it should be entitled to the benefit of the Act and the privileges of British birth. And the Act

further provides for a certificate from the Clerk of the Peace, which should be *primâ facie* evidence of naturalization.

We held in one case under the present scrutiny, that to obtain the benefit of this Act it was not sufficient to give oral evidence that the oaths had been taken under some former Act; but that either the certificate of the functionary who administered the oaths must be produced, or the oath allowed by that statute must have been taken and filed of record.

We may infer from the passing of the Act of 1871, even if we did not know it otherwise, that many persons took the oaths but did not complete the steps necessary to their admission to the privileges of subjects—and yet supposed they had done all that was required. This shows how little the fact of the claim to vote as a naturalized subject could be relied on as raising a presumption of any force; and how appropriate the rule is which I hold to apply here, and which requires the production of the evidence provided by law for the very purpose of being produced on such an occasion as this.

I am of opinion that the objection to the nine votes on the ground of alienage must be sustained.

JAMES MULRENNAN'S VOTE. (*Alien case.*)

In this case the voter was called, and proved that he was born in New York, in the United States, but that his parents were British subjects, and that he derived the knowledge of both facts from his parents. The Registrar held that the statement of the parents was good evidence of the voter's alienage, but not of their nationality, and disallowed the vote.

PATTERSON, J. A.—I think the whole statement of the voter in his evidence must be read together, not as hearsay, but as his own admission: and it amounts to this: I was born in the United States, of British parents. Vote held good.

JOHN JOHNSON'S VOTE. (*Alien cases.*)

The objections to this vote, and two others, are set out in the judgment.

PATTERSON, J. A.—The votes of John Johnson, and of Lewis Tyrell and Nelson Tyrell, were objected to on the ground that they, having been aliens, had not been properly naturalized, because the oaths required by the Act of 1871 (34 Vic., c. 22, s. 2, Can.) had been administered to them by a Justice of the Peace for the town of St. Catharines, appointed under commission for the town only, and not for the county, and had been administered to them in one of the townships and not within the limits of the town.

I think the Justice had authority to administer the oaths. The statute requires the oaths to be taken before some Justice of the Peace or other person authorized to administer oaths under the Alien Act of 1868 (31 Vic., c. 66, Can.) The persons designated by that Act are a Judge of any Court of Record in that Province of Canada in which the alien resides; or any person authorized to administer oaths in any of the Courts thereinafter mentioned; or any Commissioner to be appointed by the Government for that purpose; or any Justice of the Peace of the county or district within which the alien resides. The courts named include, in Ontario, the Court of General Sessions of the Peace, or the Recorder's Court of the county or city within the jurisdiction of which the alien resides.

This Act was passed on the 22nd of May, 1868. On the 4th of March of the same year, the Legislature of Ontario had passed an Act (31 Vic., c. 18) authorizing the Lieutenant-Governor to appoint Justices of the Peace for every city, town and county in Ontario. The question is whether a Justice of the Peace appointed *for* the town of St. Catharines, under the Ontario Act, was a Justice of the county of Lincoln within the meaning of the Dominion Act I think he was. He was not charged by the Act of 1871 or 1868, with any judicial duty, or any duty which had any

necessary reference to the authority exercised, under the commission, within the territorial limits to which it extended. He was simply a person designated to discharge a certain ministerial duty. The Dominion statute added a function or power to those he already possessed, as it did in the case of Judges of Courts of Record and the officers of Quarter Sessions and Recorders' Courts. There is no reason which I can perceive for reading a Justice *of* the county as if it were a Justice *for* the county, which is the expression ordinarily used when territorial jurisdiction is spoken of—as *e. g.* in ss. 306, 307 of the Municipal Act of 1873. The description "Justice of the Peace of the county," is sufficiently descriptive of a Justice who is not a Justice *for* the whole county, but only for a part of it.

It would be an anomalous state of things if a person living in St. Catharines could not have effectually taken the oath before a Justice for the town. And yet that would be the effect of our holding the present oaths to have been administered without authority. No such consequence was contended for in the argument of this matter. The objection urged was that the Justice could only act within the town; but the statute gives him no right to act within the town unless he is a Justice of the county. I have no doubt that in furtherance of the object of the Act of 1871, which was to enable aliens to put on record, in the solemn form of an oath, their purpose of transferring their allegiance to the British Crown—but which gave no effect to the oath until a further act was done, by filing it of record in the designated office—it is our duty to give as liberal a construction to the statute as its language will fairly bear: and not to hold, without necessity, that the steps taken in good faith, and in literal compliance with the law, are nugatory merely because the expression "*of* the county" is capable of being read as meaning "*for* the county;" and where the function in question is not one of those belonging to the officer as a Justice, but one belonging to the individual designated as *personæ designatæ* for a particular purpose.

I therefore hold that these persons are entitled to vote as naturalized subjects.

JAMES B. GRAY'S VOTE.

The voter was assessed for property sufficient to qualify him to vote, and also for an income of $400. His name appeared on the voters' list as a voter in respect of property, and he so voted. Evidence was given to show that he had parted with the assessed property prior to the revision of the assessment roll; and the vote was then sought to be sustained as a vote in respect of income. The voter, at the time of voting, did not produce to the Deputy Returning Officer a receipt for taxes, as required by sub-sec. 2 of s. 6 of 39 Vic., c. 10, although he stated he had it with him at the time of voting.

PATTERSON, J. A.—I hold that the voter appearing on the voters' list and on the poll-book for property only, and that qualification having been successfully attacked, the petitioner has a right to show that the voter had a good right to vote on income; and that the fact of the voter being assessed for $400 income, does not throw the onus on the other side to show that he had no right to vote on income, because the income qualification includes the payment of taxes before 31st December of the previous year, under 39 Vic., c. 10, s. 5, and in this particular case, the production of the receipt, under s. 6, sub-sec. 2. The evidence shows that he produced no receipt to the Deputy Returning Officer, and I hold that there is no presumption that he had an income qualification, so as to require a specific objection to that kind of qualification. Vote held bad.

WILLIAM T. GIBSON'S VOTE.

The voter was assessed in St. Paul's ward and St. George's ward, in the town of St. Catharines, for property sufficient to qualify him to vote in either ward; but prior to the revision of the assessment roll, he parted with his property in St. Paul's ward. At the election he voted in St. Paul's ward and not in St. George's ward, in which he was then owner of the assessed property.

PATTERSON, J. A.—It has already been held that the ostensible qualification being successfully attacked, a voter may show that he had another qualification. I think that the vote having been *primâ facie* regularly received, and therefore the Deputy Returning Officer having had jurisdiction, there is nothing either in the letter or the spirit of the law to prevent the vote being supported on the ground of a qualification which, if the voter had voted on it originally, would have made it necessary for him to vote in another polling division. Vote held good.

JOHN CLARK'S VOTE.

The voter had originally been a squatter on Crown land adjoining the Welland Canal, but some years prior to the election had rented it to a tenant, who then occupied it and paid him rent for the same, the voter not personally occupying the property. He was assessed as owner, and his tenant as occupant.

PATTERSON, J. A.—The vote of John Clark is objected to on the ground that he is neither owner, tenant nor occupant of the land on which he qualifies. It is a small piece of land which belongs to the Crown. John Clark and his brother James acquired the right to the possession of it from a former possessor, who conveyed it by deed to them. The evidence is that John bought James' right, but no release from James appears to have been executed. The value would not entitle two to vote; but it is shown that John occupied the land exclusively of James, and for some years past had let it to a tenant, who pays him rent, and that he has not been personally occupying. By 32 Vic., c. 21, s. 5, the voter must be actually and *bonâ fide* the owner, tenant or occupant of real property, and must be entered on the assessment roll as the owner, tenant or occupier. "Occupant" is defined as signifying a person *bonâ fide* occupying property otherwise than as owner or tenant, either in his own right or the right of his wife, but being in possession of such property, and enjoying the revenues and profits arising therefrom to his own use.

By the assessment law, 32 Vic., c. 36, which received the royal assent on the same day as the Election Act, the assessor was (s. 21) to state whether the party assessed was a householder, freeholder or tenant, by affixing the letter F., H. or T.; and (s. 26) when the land was assessed against both the owner and occupant, or owner and tenant, the assessor was to place both names within brackets on the roll, and write opposite the name of the owner the letter F., and opposite the name of the occupant or tenant the letter H. or T. The Legislature thus defines owner as meaning freeholder; and occupant and householder are made convertible terms; and the distinction between a tenant and an occupant, whatever that distinction may be, is preserved. The force of these two definitions of occupant clearly excludes this voter. He is not the householder; he does not actually occupy the land, and he does not enjoy the revenues and profits of it, but only that portion of them which his tenant pays him as rent, the tenant enjoying the residue. Being neither freeholder, tenant nor occupant, he cannot vote.

GEORGE SECORD'S VOTE.

The facts of this case are set out in the judgment.

PATTERSON, J. A.—In George Secord's case there is a conflict of evidence between the voter and the Deputy Returning Officer, as to what took place at the poll, when the voter was required to take the statutory oath. The voter's account of the matter is, in substance, that he was questioned as to whether he still lived in Grantham, and that he said he did not, but that he lived in the electoral division, and he was required to take the oath; whereupon the Deputy Returning Officer read the oath to him, making it read that he was still a resident of the *township of Grantham* instead of *this electoral division*; that the voter refused to take this oath, but offered to swear he was a resident of the electoral division, which the Deputy Returning Officer would not permit; and the voter therefore left the polling booth without having re-

ceived a ballot paper. The petitioners contend that the vote ought to be counted for Neelon, because the voter ought to have been allowed to take the oath and to vote; and because he now swears he intended to vote for Neelon. The Deputy Returning Officer contradicts the voter, and says he read the oath just as given in the statute, and, in fact, entered the voter's name as of Niagara; but that he did not read to the voter the latter part of the oath, as to his being a subject, and the parts following that. The Registrar took the view of the facts presented by the voter's evidence. On this question of fact, I do not see sufficient grounds for disturbing that decision, although on merely reading the evidence, without seeing the witnesses, it may not be that which would at first suggest itself.

I have been referred to a decision of Wilson, J., in the *North Victoria case* (11 Can. L. J., 162), in which he expressed an opinion that some voters, whose names had been omitted from the voters' list, but who were duly assessed and entitled to vote, and who had presented themselves for the purpose of voting, and declared their intention of voting for a particular candidate, but had been refused the right by the Deputy Returning Officer, ought to be counted as having voted for that candidate. The Court of Queen's Bench held, on appeal from this judgment, that the learned Judge was right in refusing to set aside the election to enable the men to vote, when their candidate had a majority without them; but I do not gather from the judgment of the Chief Justice (37 U. C. R., 234), that the view of Wilson, J., as to counting votes, met with approval. It would seem difficult to reconcile that opinion with the principle of voting by ballot; but to act upon it in the present case, in which the intention to vote for the petitioner was not declared at the time, would be to extend it so far as to leave the principle out of sight. I have already had occasion, during this scrutiny, to refer to the rule stated by Lord Coleridge, in *Mather* v. *Brown* (1 C. P. D., 596), and which commends itself to

my judgment as a sound one, that in these election matters we are bound to keep ourselves within the letter of the Acts and to abstain from any attempt to strain the law. I find provision made (ss. 13 and 14 of 37 Vic., cap. 5) for tendering ballot papers in certain cases, so that the votes may be given secretly and kept secret until the right to vote has been determined; but I do not find that open voting is in any case contemplated, to say nothing of receiving a vote when to the absence of secrecy is added the absence of some of the incidentals intended to secure honesty in voting at the poll. The question of the power of an unscrupulous Returning Officer to dishonestly affect the result of the poll, is one to be dealt with by parliamentary rather than judicial legislation. I have no doubt, however, that I ought not to add the vote.

(12 *Journal Legis. Assem.*, 1879, p. 209.)

PROVINCIAL ELECTIONS, 1879.

RUSSELL (2).

BEFORE CHIEF JUSTICE MOSS AND MR. VICE-CHANCELLOR BLAKE.

OTTAWA, *4th December, 1879.*

ADAM J. BAKER, *Petitioner*, v. IRA MORGAN, *Respondent.*

R. S. O., c. 10, s. 105, sub-sec. 2; 42 Vic., c. 4, s. 18.—Irregular marking of Ballots by Deputy Returning Officers—Recount by County Judge—Costs.

The petitioner had received a majority of the ballots cast at the election; but on a recount before the County Judge, certain ballots, with other marks on the back than the initials of the Deputy Returning Officers, were rejected by the County Judge, thereby giving a majority to the respondent. Evidence was given on the hearing of the petition that the Deputy Returning Officers had, from a mistaken idea of their duty, placed the numbers of the voters, as marked in the voters' list, on the backs of the ballots.

Held, 1. That under 42 Vic., c. 4, s. 18, the marks so made did not avoid the ballots, and that such ballots should now be counted.

2. That as the petition had been rendered necessary by the mistakes of the Deputy Returning Officers, for which neither the petitioner nor respondent was responsible, each party should bear his own costs.

Semble, that the County Judge, acting ministerially on the recount o ballots, could not have investigated by whom or for what motive such marks had been made on the ballots.

The petition set forth that the petitioner had received a majority of 28 of the ballots cast at the election held on the 29th May and 5th June, 1879; but that, on a recount of the ballots before the Junior Judge of the county of Carleton, certain ballots, with other marks than the initials of the Deputy Returning Officers, had been rejected, thereby giving the respondent a majority of 27: that such marks had been placed on the ballots corruptly or intentionally, or by mistake, by the Deputy Returning Officers; and the petitioner prayed that they might be counted for him, and that he be entitled to the seat. The petition also contained the usual charges of corrupt practices.

Mr. O'Gara and Mr. Christie for petitioner.
Mr. A. F. McIntyre for respondent.

The evidence of the Deputy Returning Officers of the polling sub-divisions No. 6 Gloucester and Nos. 2 and 3 Cumberland, was to the effect that they had put numbers on the backs of the ballot papers corresponding with the numbers on the voters' list, believing it was their duty so to number the ballots.

The arguments of counsel are referred to in the judgment of the Court, which was delivered by

MOSS, C. J. O.—My learned brother and myself think it quite unnecessary to trouble Mr. O'Gara with answering the objections to the *primâ facie* case advanced by the petitioner.

The general objection is couched in the form that the ballots have been so marked as to constitute a violation of the principle of the Ballot Act (R. S. O., c. 10), which, it has been correctly said, is the securing of secrecy and the non-identification of the voter; but, in working out this principle, we are obliged to look at the precise machinery which the Act has devised and employed. We can only gather the nature of that machinery from the words which the Legislature has chosen to use. Turning, then, to the 80th section, on which reliance is placed on behalf of the petitioner, we find it contended that there has been a violation of the principle of secrecy, which that section was designed to serve. That section, in effect, requires the Deputy Returning Officer to prefix to the names on the voters' list numbers. Those numbers, it appears in the present case, I think in the three polling sub-divisions now in question, were consecutive. I see nothing in the section to actually prohibit such a mode of numbering the names by the Deputy Returning Officer, but it might not be out of place here to remark that it is highly inexpedient for such a course to be adopted. Although the law has not prohibited it, and although the law does not intend that the election should be avoided simply because the Deputy Returning Officer has chosen to mark the names upon the voters' lists with consecutive numbers, it is quite obvious that the great

object of securing non-identification will be promoted by the adoption of arbitrary numbers. The section itself says that "The Deputy Returning Officer shall, upon receiving the copy of the voters' list from the polling sub-division for which he is to act, prefix a number to every name in such copy, and such numbers so prefixed need not be consecutive numbers, but may be chosen arbitrarily by the Deputy Returning Officer." I take it it requires no comment to establish that the sole object of that clause is to prompt the Deputy Returning Officer to use other than consecutive numbers.

It is further urged, though that would be immaterial here, in consequence of the small number involved, that in one case the Deputy Returning Officer did not affix a number to two names on the list. It appears from his evidence that the figures are not his. He has not sworn positively by whom they were made, but he has sworn that they must have been made by his poll clerk, and I think the fair effect of the whole of his evidence, taken together, is that in his opinion they were made by his poll clerk. He would not have been at liberty, in accordance with the law, to permit any one else to see the numbers, and we must act on the principle *omnia præsumuntur rite esse acta.*

I pass to the objection under sub-sections 7, 8 and 9 of the 90th section. That is the section which prescribes the mode of conduct which should be adopted by the Deputy Returning Officer upon a vote being tendered. After having ascertained that the name of the voter is upon the list, and after having heard and disposed of any objection which may be made, in the manner provided by the Act, the 7th sub-section prescribes the method of proceeding to actually give the vote by ballot. The Deputy Returning Officer is to "sign his name or initials upon the back of the ballot paper and upon the counterfoil attached thereto," to detach the ballot paper and deliver it to the voter, and to "write, or otherwise mark, upon such counterfoil, the number prefixed to the name of such person upon

the voters' list;" and the only mark he is to make opposite the name of the voter on the list is one which shall "denote that he has received a ballot paper." Any tick or mark of any kind, to denote that, complies with the statute, and is all, indeed, that it designed. Now, in these cases, it appears that the Deputy Returning Officers endorsed upon the back of the ballot paper not merely their initials, but the numbers which appeared upon the voters' lists, and which, from the voters' list, had been properly transferred to the counterfoil. Under the Act of 1874 (R. S. O., c. 10), that would, I apprehend, have been a fatal objection to the validity of the vote, but the Act of 1879 (42 Vic., c. 4) was passed for the very purpose of remedying that difficulty. That statute, while still rendering the ballot paper invalid if marks are placed upon it other than the proper marks, namely, the official number corresponding to that upon the counterfoil, and the initials of the Returning Officer, contains this saving clause: "But words or marks corruptly or intentionally, or by mistake, written or made, or omitted to be written or made, by the Deputy Returning Officer on a ballot paper, shall not avoid the same."

I am of opinion that this case, upon the evidence, comes clearly within the proviso that, where the mark is made by mistake of the Deputy Returning Officer, the ballot paper is not avoided, but the vote is entitled to be counted. Upon the evidence here it is beyond controversy in my judgment that the Deputy Returning Officers honestly, although mistakenly, placed the numbers upon the ballot papers. They had no intention of violating the law, I am quite sure. Their mistake was one which arose from misinterpretation of the Act, and was precisely that kind of mark upon the ballot paper which the Legislature did not intend to have the effect of destroying the vote. Mr. McIntyre has pointed out difficulties that might arise, and objections that might be taken to that mode of procedure by a Deputy Returning Officer—that a Deputy Returning Officer who is a partisan might be enabled in this way to

gain an unfair advantage. That difficulty is one we are obliged to encounter in each particular case as best the Court can. The effect, if that were established in a particular case, might be to show that the mark had not been made mistakenly, but it would be hard to show that it had not been made corruptly. But the language of the Legislature is plain, that, under such circumstances, it did not intend that the act of the Deputy Returning Officer, by whatever motive animated, should have the effect of destroying the franchise.

Then, in furtherance of that argument, it was contended on behalf of the petitioner that section 197 shows that such an objection as this should be fatal to the vote. The argument is that there has been a disregard of the principles laid down by the Act. Now, we are to endeavor to arrive at the principles laid down by the Legislature which govern the election now in question by putting together the Act in the Revised Statutes, and the Act passed in 1879. The principles are, I think, what I have indicated. Followed out, they show that the petitioner in this case had a majority of the votes, that he was entitled to be returned, and that the onus is now cast upon the respondent to attack the return.

The charges of corrupt practices were then withdrawn on both sides; and after evidence had been given on behalf of the petitioner affecting the question of costs, the following judgments were delivered:

Moss, C. J. O.—The question of costs is one which could not have arisen in this precise form previous to the Act of 1879. Until that amending Act, which I have had occasion already to refer to, was passed, the effect of what has been shown to-day would not have been to entitle Mr. Baker to the seat. It is only by virtue of the saving clause contained in that statute that he is enabled, notwithstanding the mistake of the Returning Officers, to receive that seat to which the votes of the people entitled him.

Now, the first question in endeavoring to dispose of the matter of costs, is to ascertain, if we can, with whom the wrong originated. The Deputy Returning Officers had undoubtedly made a mistake; but for that it cannot be contended that the respondent was in any way liable. In the next place, a recount was asked for; and without entering into details as to the part which the respondent may have taken in setting the Judge in motion, it is quite sufficient to observe that, whatever was that part, the respondent was acting within his legal rights, and that if he failed in prosecuting the recount with success, the law had already made the provision for the penalty. He did not procure the return which the learned Judge in the discharge of his duty made. He procured that return, at least, no further than by asking the Judge to make the recount, and thus exercising his strictly legal right. Thus far, therefore, the respondent appears to have committed no act of which the petitioner is entitled to complain.

In the next place, we have to consider what was open to the Junior Judge upon the recount. It is, to say the least of it, by no means clear that the learned Judge could have received any of the evidence which we have heard to-day explanatory of the manner in which the Deputy Returning Officers fell into this unfortunate mistake. It is quite true that the Judge of the County Court or the Junior Judge, in proceeding with the recount, is to proceed in the manner pointed out by the 105th and 106th sections, and that the 105th section has been amended by the Act of 1879; but no provision has been made for the learned Judge entering into an investigation of the motives which led to the Deputy Returning Officer making any mark upon the ballot beyond those strictly authorized by law. If we turn for a moment to the wording of sec. 18 of the Act of 1879, I see the words are simply: "Words or marks corruptly or intentionally, or by mistake, written or made, or omitted to be written or made, by the Deputy Returning Officer on a ballot paper, shall not avoid the same."

What is the tribunal which is invested with the jurisdiction to determine whether "words or marks" which, in point of fact, are not authorized by the law, have been "corruptly or intentionally, or by mistake, written or made?" It is at least a grave question, and the inclination of my own opinion is to answer it in the negative as to whether the learned Judge could entertain, could listen to, such evidence upon an application which pointed merely to a recount, and while discharging the duties of a ministerial officer, acting under the clauses relating to recounting. At any rate, the learned Judge was not asked to enter upon any such investigation.

Some question is made as to the sufficiency of the notice served upon Mr. Baker. The notice was quite sufficient, at any rate, to enable him to appear with his counsel and object to its insufficiency. It would have been the easiest thing in the world to ask the learned Judge to adjourn the proceedings, and enable Mr. Baker to adduce before the Judge such evidence as this Court has heard to-day from the Deputy Returning Officers. That course was not taken. Mr. Baker chose to rely upon his objection to the notice. The law has not provided for the form of the notice in such a matter, that I am aware of. Mr. Baker, at any rate, knew this investigation was going on, I have no doubt. Then, if it was desirable to adduce evidence before the learned Judge, what course was open? I apprehend it to be quite clear, and indeed Mr. O'Gara conceded that it was quite clear, that a petition was absolutely necessary. There stood the return, declaring in due form of law that Mr. Morgan had been elected, by the majority of the duly qualified electors in this constituency who had voted, to represent them in the Legislative Assembly. How was this to be got rid of, unless by taking proceedings under a petition? No answer to that can be suggested. Then what should the respondent have done upon the petition being filed? He was charged with personal corruption, and therefore not in a position to have resigned; but supposing him to have been in a position

to have resigned either before the petition was filed or after, what would have been the result, suppose he had resigned before the petition was filed and the petitioner had not chosen to prosecute any petition. I asked the learned counsel to define the exact attitude which his client would have occupied if Mr. Morgan had chosen to recede from that position. It is extremely difficult to say what would have occurred. Mr. Baker would not have been declared returned by any duly recognized authority, and the Legislature would have had to recognize the return of the Judge, or given some special directions on the subject. It is unnecessary to say that the Legislature has contemplated the withdrawal from itself of the giving of special directions in such matters, and desires them all to be dealt with according to the general law.

Then a similar observation applies to the case of a withdrawal after the petition. Supposing him to be in a position to do so, he could only have done so a certain time after it had been filed, and by taking certain steps. He does, before serious proceedings are taken, file a disclaimer as far as this point is concerned, though it contains a proviso that if Mr. Baker still claims the seat his right will be resisted.

That does not enter into the question of the general costs, which at present the Court is considering. In these cases, as I understand the doctrine, the Courts have always taken a wide and liberal view of the right of a person, in the interests of the public, to contest a return which was at all questioned. If there was real substantial reason for questioning the return of Mr. Baker, neither Mr. Morgan nor any other person, supposing Mr. Baker to be returned, would have been culpable—would have been doing anything but discharging a duty to the public—in contesting the return. If he had done so and failed, he would have had to pay the costs; but if a petition was necessary, and he simply stood on the defensive, and said: You, the petitioner, have not been declared to be duly returned; you can only show that you were entitled to the seat by show-

ing that those marks were put "corruptly or intentionally, or by mistake," by the Deputy Returning Officers; it is in the interest of the public that, before you are entitled to enjoy the seat, such proof should be given—that does not strike one as an unreasonable course to take. I do not indeed see what other course was open. It is clear that if the Junior Judge was not in a position to receive evidence upon the conduct of the Deputy Returning Officers, upon the motives that led them to place these erroneous marks upon the ballots, it was absolutely essential for the petitioner to come before an Election Court and establish his right.

In my opinion, the result of these considerations, to which I have no doubt others might readily be added, is that each of the parties should bear his own share of the costs.

BLAKE, V.-C.—I agree in the conclusion that is arrived at. I think one must bear in mind that in this case no fraud or impropriety has been brought home to the petitioner or the respondent; that the result which is being impeached by the petitioner in this case is one flowing from the act of the officers that have been appointed under the statutes. The Deputy Returning Officers are independent officers, selected under the statute for the purpose of this duty. Unfortunately, ignorantly but honestly, they so dealt with the ballots as that, except for the Act of 1879, these votes must necessarily have been rejected, while neither the petitioner nor the respondent is responsible for that. That was an act entirely outside of anything they had to do in the conduct of the election. So that by them, and by them alone, has this difficulty arisen. Then the matter was brought before the Junior Judge of the County; and I quite agree with what the Chief Justice has said, that his duty began and ended with a recount of the votes; that he could not have investigated the matter; and certain ballots were produced before him, and on counting those ballots, looking at some of them,

he saw there was a mark there which might have identified the voter in such a way as to avoid the election under the Act. He could not obtain the explanatory evidence ; he could not set the matter right. Up, therefore, to the period of the presenting of the petition, all has been a matter which cannot be traced to the respondent or the petitioner. It has been a miscarriage, owing to the conduct, honestly though ignorantly, of the officers appointed under the statute.

I do not think there has been any case where, under circumstances such as presented to us to-day, the Court has charged a person entirely innocent of any impropriety or wrong conduct, with the costs which have been necessary in order to set right that which these officers have done incorrectly. It was necessary for the petitioner that these proceedings should be taken, that he should set aside, not a wrong the respondent had done him, but what these officers had done, in mistaken pursuance of what they thought to be their duty.

Looking at the fact that Courts have been very desirous of investigating and examining everything which could tend to throw discredit upon an election, we would be closing the door to a fair investigation in many cases, if in this one the respondent were to be charged with the costs of a proceeding to set aside, not any wrong done by him, but by the officers, with whose appointment he had nothing to do. I think, therefore, that each party must, unfortunately, bear his own costs of the litigation up to the present.

(13 *Journal Legis. Assem.*, 1880, p. 9).

DUFFERIN.

BEFORE CHIEF JUSTICE MOSS.

TORONTO, *29th October, 1879.*

JAMES SLEIGHTHOLM, *Petitioner*, v. JOHN BARR, *Respondent.*

Preliminary objection—Status of Petitioner, how impeached.

As the Ontario Act (R. S. O., c. 11) makes no provision similar to that in the Dominion Controverted Elections Act, 1874 (37 Vic., c. 10, Can.), limiting the time within which preliminary objections to an election petition should be taken, the special circumstances of each case must determine whether the preliminary objections have been taken with sufficient promptitude.

An objection to the *status* of a petitioner cannot be taken by preliminary objection.

A petitioner in an election petition who has been guilty of corrupt practices at the election complained of, does not thereby lose his *status* as a petitioner.

Except where there are recriminatory charges against the unsuccessful candidate, or for the purpose of declaring the petitioner's vote void on a scrutiny, the conduct of a petitioner at an election cannot be inquired into. And in this case there is no distinction between a candidate-petitioner and a voter-petitioner.

Semble, That if the petitioner in this case was proved at the trial of the election petition to have been guilty of corrupt practices at the election complained of, the petition could not be dismissed.

The petition contained the usual charges of corrupt practices.

After the petition was at issue, but before the day for the trial was appointed, the respondent became aware of a charge of corrupt practices against the petitioner, who claimed to be a voter at the election in question. Thereupon he obtained a summons calling upon the petitioner to show cause why the petition should not be taken off the files, on the ground that the petitioner had been guilty of corrupt practices during the election. After the argument of counsel the learned Chief Justice gave judgment as set out in the head note.

The case is reported in 4 App. R. 420.

DUFFERIN.

BEFORE CHIEF JUSTICE MOSS AND MR. JUSTICE ARMOUR.

ORANGEVILLE, *9th December, 1879.*

JAMES SLEIGHTHOLM, *Petitioner,* v. JOHN BARR, *Respondent.*

Admission of Counsel.—Corrupt practices and other illegal acts.—R. S. O., c. 10, s. 159.

The respondent was elected by a majority of 261, and at the trial counsel for the respondent admitted that there was evidence capable of being produced which would have the effect of avoiding the election under R. S. O., c. 10, s. 159; and the Court on such admission declared the election void.

The petition contained the usual charges of corrupt practices. The respondent had been declared elected by a majority of 261.

Mr. McCarthy, Q.C., *and Mr. P. M. Barker,* for petitioner.
Mr. Hodgins, Q.C., *and Mr. D. L. Scott,* for respondent.

After the reading of the petition, counsel for the petitioner stated that he did not propose to offer evidence of corrupt practices by the respondent. But he was in possession of evidence which would show that acts had been committed by those for whom the respondent was responsible, as his agents, in the legal signification of the term, both in character and number sufficient to avoid the election under the Ontario Act (R. S. O., c. 10, s. 159).

Counsel for the respondent then stated that from the instructions given to him, he had to say that there was evidence capable of being produced which would have the effect of avoiding the election.

The section of the Election Act (R. S. O., c. 10, s. 159) is as follows: "To prevent the expense and trouble of new elections when unnecessary and useless, in case of a corrupt act or acts being committed by an agent without the knowledge and consent of the candidate, if the corrupt act or acts was or were of such trifling naturé, or was or were of such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been

affected, by such act or acts, either alone or in connection with other illegal practices at the election, such corrupt act or acts shall not avoid the election."

MOSS, C. J. O.—We declare the election void. We will report to the Speaker that the election ought to be set aside, but that corrupt practices have not been proved to have been committed by the respondent. The petitioner is entitled to the general costs of the cause.

(13 *Journal Legis. Assem.*, 1880, p. 7.)

SOUTH WENTWORTH.

BEFORE CHIEF JUSTICE MOSS AND MR. JUSTICE GALT.

HAMILTON, *7th to 10th November, 1879.*

TORONTO, *29th December, 1879.*

SAMUEL NASH OLMSTEAD *et al.*, *Petitioners*, v. FRANKLIN METCALF CARPENTER, *Respondent.*

Voters' Lists Finality Act — Particulars — Right to vote — Torn ballot — Marking ballots.

Particulars for a scrutiny of votes were delivered by the respondent objecting to certain voters, as (1) aliens ; (2) minors ; (3) not owners, tenants or occupants of the property assessed to them ; and (4) farmers' sons not residing with their fathers upon the farm, as required by law. On a motion to strike out such particulars :

Held, that under the "Voters' Lists Finality Act" (41 Vic., c. 21, s. 3), the legality of the votes so objected to could not be inquired into, and that the particulars should be struck out.

Held, further, that the effect of the said Act was to render the Voters' Lists final and conclusive of the right of all persons named therein to vote, except where there had been a subsequent change of position or status, by the voter having parted with the interest which he had (or by the Assessment Roll appeared to have) in the property, and becoming also a non-resident of the electoral division.

A voter who had inadvertently torn his ballot, and whose ballot was rejected on the counting of votes, was allowed his vote, the evidence proving that no trick was intended for the purpose of showing how he intended to vote.

The Election Act in its enacting part requires ballots to be marked with a cross on any place within the division which contains the name of the candidate. Ballots marked with a straight line within the division, or with a cross on the back, were rejected.

Observations on the difference between the English and Ontario statutes in this respect.

The petition contained the usual charges of corrupt practices, and claimed the seat for the defeated candidate, Nicholas Awrey. The vote at the election, after a re-count by the County Judge, was for respondent, 1,231; for Mr. Awrey, 1,230; majority for respondent, 1.

Mr. B. B. Osler, Q.C., *and Mr. Teetzel*, for petitioners.

Mr. McCarthy, Q.C., *and Mr. Robertson*, Q.C., for respondent.

During the proceedings application was made to strike out the following classes of objected votes in the particulars filed by the respondent: Persons objected to as (1) aliens; (2) minors; (3) having no interest as owners, tenants or occupants in the land assessed to them; and (4) farmers' sons not residing upon the farm, as required by law.

The COURT held, that by the Voters' List Finality Act of 1878 (41 Vic., c. 21), they were precluded from inquiring into the legality of the votes included in those lists; and that the only votes that could be inquired into were those specially excepted by section 3 of the Finality Act. The particulars moved against were then struck out.

A scrutiny of votes took place before the learned Judges, the result of which is set out in the judgment, which was delivered by

MOSS, C. J. O.—Of most of the very numerous questions raised upon the petition we disposed during the progress of the trial, and to them it will be unnecessary now to refer.

We reserved for consideration the case of Philip Gage, whose vote was rejected upon the counting of the ballots. This voter, who was a man of intelligence, accustomed to exercise his franchise, and familiar with the mode of using the ballot, through some curious mistake or inadvertence tore the paper in two after putting a cross opposite the name of Mr. Carpenter, and handed the marked half to the Deputy Returning Officer, by whom it was deposited

in the ballot box. It immediately occurred to Mr. Gage that he had made a mistake, and he so stated to the officer, at the same time giving him the other half, and demanded a ballot paper on the ground that he had inadvertently spoiled that which he had received. To this request—correctly, we think—the Deputy Returning Officer refused to accede, for the voter had disabled himself from complying with the conditions prescribed by the statute of returning the original paper. But without laying down any rule of general application, we are of opinion that under the special circumstances proved the vote should be allowed. This was the only torn ballot paper deposited, so that its identity admits of no doubt. There is no question as to the good faith of the voter. His political sympathies were not doubtful; and it would be simply absurd to suspect him of having resorted to a trick for the purpose of showing for which candidate he had cast his vote. We think, therefore, without violating any sound principle, or without opening the door to any dangerous evasion of the principle of securing secrecy, that we can allow this vote.

The next objection made by the petitioner is to the votes of Alva G. Jones and Geo. A. Davis, on the ground of their having treated William Joyce. We decline to disturb their votes, because it has not been proved to our satisfaction that the spirituous liquor was given during polling hours.

The other questions are divisible into three classes:

The first and most important depends upon the construction of the 2nd sub-section of the 3rd section of the Voters' Lists Finality Act, by which it is declared that the certified list shall, upon any scrutiny, be final and conclusive evidence of the right to vote, except as to "persons who at any time subsequently to the list being certified are, or have been, non-resident, either within the municipality to which the said list relates, or within the electoral district for which the election is being held, and who by reason thereof are, under the provisions of 'The

Election Act of Ontario,' incompetent and disentitled to vote." The particular portion of that Act to which reference is made is contained in the 1st subdivision of the 7th section. This does not enumerate any grounds upon which a person shall be incompetent or disentitled, but merely states the necessary qualification, which for our present purpose is that he shall be, at the time of the election, either an actual *bona fide* owner, tenant or occupant of real property of certain value, for which he has been entered upon the roll, or in case he has ceased to be such owner, tenant or occupant, a resident of the electoral district. The judicial construction placed upon this enactment permitted great latitude of inquiry upon the right to vote upon a scrutiny being held. There can be no question it was to prevent this extravagant range of investigation, which reached a culminating point in one memorable instance, the Act of 1878 was passed.

Looking at the whole enactment, the intention of the Legislature seems to be reasonably clear. But we must confess that the particular sub-section now in question does not seem to be happily framed. Indeed, it is scarcely too much to say that it invites the discussion which it has received. It does not appear to us to be possible to apply to it any rule of minute verbal criticism; such a test it obviously will not stand; but keeping in view the discernible object of the Legislature, we think its effect is to render the Voters' List final, except where there has been a subsequent change of position, by the voter having parted with the interest which he had—or by the Assessment Roll appeared to have—in the property, and becoming also a non-resident of the electoral division. Where there has been no change of his *status* there is no room for opening an inquiry. The result of this decision is to leave the position of the contestants for the seat unaffected.

The second class of cases reserved is that of voters who chose to mark their ballot papers with a straight line, instead of anything approaching to the form of a cross, opposite the name of a candidate.

The decisions in our Courts upon the provisions of the Dominion Act, which do not appear to be distinguishable, are against the validity of such votes. But it is urged that these decisions are irreconcilable with and should be treated as overruled by the judgment of the Court of Common Pleas in England, in *Woodward* v. *Sarsons* (L. R., 10 C. P. 746).

We are much impressed with the force of Mr. McCarthy's argument upon this point; but, upon consideration, we do not think it can be sustained. The judgment of the English Court proceeded upon the ground that the making of a cross was merely directory and not mandatory. There is no reference to a cross in the enacting part of the Imperial Statute, but it makes its appearance, for the first time, in the instructions for the guidance of voters.

It is in fact simply given as the appropriate mode for the voter indicating his choice. In our statute it is very different. It is expressly enacted that the voter shall mark his ballot in the manner mentioned in the direction by placing a cross on the right hand side, opposite the name of the candidate for whom he desires to vote. The natural and obvious meaning of this language is, that he must make a cross to signify his choice. The whole policy of securing secrecy precludes the suggestion that the voter is at liberty to make any mark he pleases; and the Legislature has therefore prescribed a kind of mark which is the easiest and most familiar—that indeed which is used by the illiterate.

In view of the difference between the English statute and ours, we do not feel at liberty to refuse to follow the decisions of our own Courts.

We may observe that this conclusion seems to be justified by the amending Act of 1879, which enacts that a voter may mark his ballot paper with a cross, either (as heretofore) on the right hand side opposite the name of the candidate for whom he desires to vote, or any other place within the division which contains the name of the candidate.

While removing the objection as to the precise position of the mark in the compartment, this seems to insist upon its form being retained. As this was the view taken by the learned Judge of the County Court, our decision upon this point does not affect the result of the scrutiny.

The third class is that of voters who have from some strange perversity put a cross upon the back of the ballot paper only.

We are of opinion that this mode of marking is not sanctioned by the statute, and we disallow these votes, the effect of which is to strike off one vote from Mr. Carpenter and two from Mr. Awrey.

The result of our judgment is as follows: The respondent had upon the recount a majority of one; to this we have added the vote of Philip Gage, and from it have struck off one vote, on the ground that the mark was endorsed on the ballot instead of being made on its face; and we disallowed on various grounds, during the progress of the trial, twelve votes.

This would have placed respondent in a minority of eleven. But we struck off from Mr. Awrey's total three votes during the trial, and two are now disallowed by reason of the marks being endorsed.

During the trial, however, we added three votes to his number. On the whole, therefore, we give him upon the scrutiny a majority of nine.

We find that Nicholas Awrey was duly elected; and that no corrupt practice was proved to have been committed by or with the knowledge and consent of either of the candidates, and there is no reason to believe that corrupt practices extensively prevailed at the election.

While unseating Mr. Carpenter, we are satisfied that he conducted the contest with the utmost propriety and fairness, and that there is no pretext with charging him with the slightest violation of the law.

(13 *Journal Legis. Assem.*, 1880, p. 9.)

STORMONT (2).

BEFORE CHIEF JUSTICE MOSS, AND MR. VICE-CHANCELLOR BLAKE.

CORNWALL, *2nd December, 1879.*

EDWARD EMPEY *et al., Petitioners,* v. JOSEPH KERR, *Respondent.*

Disqualification of an agent for corrupt practices, R.S.O., c. 10, ss. 164, 174, 175.

The election having been declared void on account of the corrupt practices of an agent of the respondent, the Judges acting as a Court for the trial of illegal acts committed at the election, after notice to such agent, granted an order for the punishment of such agent by fine and disqualification.

The petition in this case contained the usual charges of corrupt practices.

The majority for the respondent at the election was 11.

It appeared from the evidence of one John M. Campbell and others, that a number of voters had been bribed to vote for the respondent.

At the close of the evidence, and after the argument of

Mr. Bethune, Q.C., *and Mr. A. F. McIntyre,* for petitioner,

Mr. Hector Cameron, Q.C., *Mr. Bergin and Mr. Whitney,* for respondent,

The COURT held that corrupt practices had not been established against the respondent personally; that the agency of Campbell had been established; that he (Campbell) had been guilty of corrupt practices, and that the result of the election had been affected thereby. The election was thereupon declared void.

Mr. Bethune then moved for a summons, under R.S.O., c. 10, ss. 174, 175, calling upon John M. Campbell to show cause why he should not be punished pursuant to s. 164, by fine and disqualification.

Mr. Cameron thereupon appeared for Campbell, and admitted that he could not deny that he had been guilty of wilful and corrupt bribery and corrupt practices, and that he must therefore be disqualified.

The COURT thereupon granted the order.*

---

*The form of conviction settled by the Judges in the *Lincoln case* (*ante* p. 489) is as follows:

Be it remembered, that from evidence given before us, the Honorable Christopher Salmon Patterson, and the Honorable Samuel Hume Blake, two of the Judges appointed for the trial of election petitions at the city of St. Catharines, in the county of Lincoln, on the twelfth day of September, in the year of our Lord one thousand eight hundred and seventy-six, at the trial of an election petition, wherein Alexander Hutchinson and Nathan Henry Pawling were petitioners, and John Charles Rykert was respondent, and whereby the said petitioners alleged that the said respondent was not duly elected as a member of the Legislative Assembly of the Province of Ontario at the election for the electoral division of the county of Lincoln, holden on the eighteenth and twenty-fifth days of February, in the said year of our Lord one thousand eight hundred and seventy-six, John Junkin, a person not a party to the said petition, appeared to have committed a corrupt practice against the form of the statutes in such case made and provided, by giving or agreeing to give, and offering or promising, a sum or sums of money or other valuable consideration, and promising or endeavoring to procure money or other valuable consideration, or discharge or release of rent then due by one Arthur Belcher or one Anne Belcher, to the said Anne Belcher (wife of the said Arthur Belcher), or on behalf of the said Arthur Belcher, in order to induce the said Anne Belcher to procure the vote of the said Arthur Belcher at the said election, or to procure or induce the said Arthur Belcher to vote for the said respondent at the said election, or to refrain from voting.

And the said John Junkin was charged with the said corrupt practice upon the said evidence before us the said Judges, whereupon we ordered the said John Junkin to be summoned to appear at Osgoode Hall in the city of Toronto, on Thursday the fourteenth day of December in the said year one thousand eight hundred and seventy-six, at noon, before the Court for the trial of all illegal acts committed during the said election, to show cause why he should not be adjudged guilty of bribery pursuant to the statutes in that behalf, in that he the said John Junkin had committed the said corrupt practices; and the said John Junkin was duly summoned so to appear and to show cause, as has been made to appear to us now sitting as such last mentioned Court in pursuance of the Election Act of 1876, at the time and place aforesaid, by the affidavit in writing of William Davis Swayze, and has neglected or refused to attend in pursuance of such summons; and thereupon proof having been duly made before us by the said affidavit, that the said John Junkin was duly summoned by the personal service upon him by the said Swayze of the summons issued by us in that behalf, we pronounce judgment in the absence of the said John Junkin. And it appearing to us, the said Judges sitting as such last mentioned Court, from the said evidence, that the said John Junkin is guilty of a corrupt practice, namely, bribery by offering and promising to procure valuable consideration to or for the said Anne Belcher, that is to say, the discharge or release of rent due by her husband the said Arthur Belcher, who was a voter at the said election, in order to induce the said

WEST HASTINGS (2).

BEFORE CHIEF JUSTICE MOSS AND MR. JUSTICE GALT.

BELLEVILLE, *4th and 5th November; 16th and 18th December, 1879.*

TORONTO, *29th December, 1879.*

THOMAS HOLDEN, *Petitioner*, v. ALEXANDER ROBERTSON, *Respondent.*

Corrupt acts affecting the result of the election—R. S. O., c. 10, s. 159—Onus of proof.

The majority of the respondent was 337; but it appeared in evidence that two agents of the respondent had bribed between forty and fifty voters; that in close proximity to the polls spirituous liquor was sold and given at two taverns during polling hours, and that one of such agents took part in furnishing such liquor; and that such agent had previous to the election furnished drink or other entertainment to a meeting of electors held for the purpose of promoting the election.

Held, that the result of the election had been affected thereby, and that the election was void.

Per Moss, C. J.—*Primâ facie* corrupt practices avoid an election; and the onus of proof that they are not sufficient to affect the majority of votes rests upon the respondent.

Anne Belcher to procure the vote of the said Arthur Belcher at the said election.

Therefore, it is adjudged by us that the said John Junkin be convicted, and he is hereby accordingly convicted by us of the said last mentioned corrupt practice.

And we do further adjudge that, under and by virtue of the statutes in that case made and provided, the said John Junkin hath for his said offence incurred the penalty of two hundred dollars, and that during the eight years next after the date hereof he shall be incapable of being elected to and of sitting in the Legislative Assembly of the Province of Ontario, 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 of the Lieutenant-Governor in Ontario, or any municipal office.

And we do further adjudge that the said John Junkin do pay the said penalty of two hundred dollars to the Sheriff of the county of Lincoln, on or before the fifteenth day of January next, to be by the said Sheriff paid and applied according to law. And if the said sum be not paid to the said Sheriff on or before the said fifteenth day of January next, we adjudge the said John Junkin to be imprisoned in the common gaol of the county of Lincoln until he shall have paid the same.

Dated at Toronto, this fourteenth day of December, in the year of our Lord one thousand eight hundred and seventy-six.

(Signed), C. S. PATTERSON, *J. A.*
S. H. BLAKE, *V. C.*

The petition contained the usual charges of corrupt practices, and claimed that the election was void on the ground that the corrupt acts and other illegal practices had affected the result of the election. The candidates at the election were the petitioner and respondent; and the majority for the respondent was 337.

Mr. J. K. Kerr, Q.C., *and the Petitioner in person*, for petitioner.

Mr. Hector Cameron, Q.C., for respondent.

During the argument,

The CHIEF JUSTICE remarked, that his reading of the statute was that, *primâ facie*, corrupt practices avoided the election; and the onus of proof that they were not sufficient to affect the majority rested upon the respondent.

The Judge's notes of the evidence of the principal agents of the respondent, whose acts were held to affect the result of the election, are as follows:

William Sarsfield: I worked for Robertson on the day of the election. Was outside man at the Coleman ward poll. I told Robertson that I must get so and so, and I suppose he understood I was working for him. I was at the poll until the close. I went and got voters, and also took them as they came. I used all my influence for Robertson. I tried to get a man named Maloney to vote. I used every inducement to get him to vote. I gave him $1 and got it back. I suppose it was not enough money for his vote; he said nothing about a $4 or $5 bill. I told him it was a $5 bill; I showed him a $5, and I then put a $1 into his pocket; he went as far as the door, and having examined the bill, handed it back. I was three or four times in Walsh's and McNulty's; people were in with me each time. We went in to get something to drink. There was drinking there all day back and forwards. I understood it was Mr. Holden's whiskey at Walsh's. Menzies was a supporter of Robertson. I don't know that I saw

any whiskey at McNulty's except Mulhern's flask. I gave T. Harris 50c. to try to get him to vote for Robertson; I promised him $2 more. He got $1.85 and three drinks. I had $40 or $45 in my pocket that morning. I received $3 from one party that day. I spent part of the money that day; I can't say how much. I paid people money to go and vote for Robertson. I may have bought five votes more; I will swear I did not buy ten more. I can't say how many I paid after the election; I paid Michael Cahill $2; I don't remember the name of any other person I paid that day. Burke handed me $3 on election day; he didn't say what for; I had a small bar account against him. He said nothing as to how the money was to be applied. I drove Robertson's conveyance that afternoon.

Owing to the non-attendance of one of the agents of the respondent when called on his subpœna, the Court adjourned to the 16th December, 1879, when the following additional evidence was given:

John Johnson: I canvassed for Mr. Robertson on the day of the election. I was most of the time in the Murray ward, where there are two or three divisions. I went with some voters I had solicited; Peter Morgan and John Daly. I drove Morgan to the poll in Ontario Street. I spent some money that day—about $200; I can't say how much on the election. More than $100; I couldn't say more than $150; I can't say how much. I also treated. I couldn't say whether there were fifty; I suppose there would be pretty near fifty. I only treated one man whom I knew to be a voter—P. McNulty; the others were young men whom I met on the street. I didn't give more than $7 to any one voter. I gave from that down to $1; $6, $5, $4, $3, $2, $1.50. I think they would average about $2.50. I kept no track. I can't say to how many they were to give $1. It was my own money. I had received money from Mr. Ashley and Mr. Robertson. I got $50 from Robertson on the morning of the election; I sent my brother for it to Robertson. I got a cheque the Saturday

before for $350. The election was on Thursday. I got another $50, I think, on the Monday before, but I am not sure. I was putting up a building for Mr. Ashley. There was only one of my workmen named McHugh who was paid for his day. He said he would otherwise have gone off to another job. The night before the election I gave some money to electors—two or three; I can't say how many. They gave me to understand that they wanted to spend some money the next day one way or the other. I lent Dick Burke $7; I let Jemmy Hughes have $1; I gave James Sheelin $7.

Cross-examined: I had no conversation with Robertson about the election at any time. I didn't talk with Robertson about any votes, or how they were to be canvassed. The moneys I received were on the building contract. We had no talk that any of this should be spent on the election. I can't tell to how many persons I gave money for the purpose of influencing their votes; I can give no idea. I gave money to twenty, twenty-five or thirty persons. I was present at only one committee meeting; I think Robertson was there. I took no part at that meeting.

MOSS, C. J. O.—The petition in this case contains the usual charges of corrupt practices by the respondent himself and by his agents. The majority was 337. There was no proof of corrupt acts on the part of respondent himself, but there was convincing and admitted proof of bribery by at least two persons, namely, Sarsfield and Johnson, who were his agents. Mr. Cameron, counsel for respondent, candidly admitted he could not deny the agency of the former, and the respondent in his evidence stated, "I asked Mr. Johnson to do what he could for me."

I shall have occasion to refer more at length to the evidence hereafter, but for the present it is sufficient to say the result of this petition depends upon the construction to be placed upon the 159th sec. of chap. 10, R. S. O. That section is: "To prevent the expense and trouble of new

elections when unnecessary and useless, in case of a corrupt act or acts being committed by an agent, without the knowledge and consent of the candidate, if the corrupt act or acts was or were of such trifling nature, or was or were of such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been affected, by such act or acts, either alone or in connection with other illegal practices at the election, such corrupt act or acts shall not avoid the election."

By Sarsfield's own admission he bribed at least seven voters; he mentioned two, and stated he might have bought five more. Johnson admitted he had spent $150 in the purchase of votes—for some he paid $7 and for others $1, but he thought the average was $2.50. This would represent sixty votes; but I gather from his evidence the number was not so large, but would extend to between thirty and forty, so that we have direct proof that at least between forty and fifty voters were bribed by these two agents alone.

It appeared also from the evidence, that in close proximity to one of the polls situate in Coleman Ward, there were two places at which spirituous liquor was given to voters; one of these was kept by a man named Walsh, and the other by a woman named McNulty. It was not satisfactorily shown that the respondent was aware that this was being carried on during polling hours, although shortly after the poll closed he visited McNulty's in company with a person named Mulhearn, who gave him some whiskey out of a flask he had in his pocket. The evidence was not clear that Mulhearn was an agent of respondent's, but it was proved that Sarsfield, an admitted agent, was in both these places. He says himself, "Was in both McNulty's and Walsh's on the day of election perhaps three or four times; parties went in with me each time." Morton, another active supporter of respondent, although not an agent, said, "Was at the poll in Coleman Ward during the day; Mr. Robertson was there and spoke to many people; did not hear him solicit any

person's vote; Sarsfield, Mulhearn, and Morris worked actively for Mr. Robertson; saw people going into and out of Walsh's and McNulty's; was once at McNulty's with Sarsfield; saw probably twenty or thirty people go to the houses; do not know whether Mr. Robertson knew there was drinking going on; should think that anyone there could see that drinking was going on." There were several other witnesses who admitted being in those two places during polling hours, and while the poll was open in their close proximity.

By the 151st section, "No candidate for the representation of any electoral district shall, nor shall any other person, either provide or furnish drink or other entertainment at the expense of such candidate or other person to any meeting of electors, aforesaid, for the purpose of promoting such election, previous to or during such election, or pay, or promise or engage to pay, for any such drink or other entertainment, except only that nothing herein contained shall extend to any entertainment furnished to any such meeting of electors by or at the expense of any person or persons at his, her or their usual place of residence." By the 11th sub-sec. of sec. 2 of the Election Act of Ontario, any violation of this 151st sec. is declared to be a corrupt practice.

It is plain from the evidence that the liquor dispensed at these two places was not provided at the expense of either Walsh or McNulty, but by some other persons, consequently was a corrupt practice under the 11th sub-sec. of sec. 2, above referred to; and as it has been shown that Sarsfield took part in furnishing this liquor to voters, the respondent must be held responsible, so far as the result of this petition is concerned, for such acts of his agent.

It was also strongly urged by Mr. Kerr that there was a contravention of this provision on two other occasions, or perhaps three, namely: one, or perhaps two, at the hotel kept by Sarsfield, and another at the residence of Mr. R. S. Young. I think, as respects the meeting at Mr. Young's, there was nothing objectionable; it was clearly within the

exception, being furnished at his own expense and at his usual place of residence. I confess I did not attach much importance during the trial to the meeting or meetings held at Sarsfield's, for the reason that, until Mr. Kerr referred to the interpretation clause, I considered a contravention of the 151st section in the light rather of a forbidden than a corrupt practice, but a consideration of his argument has satisfied me I was mistaken. Moreover, I looked upon what took place on those occasions as of such a trifling nature as not to have affected the result of the election; but I was much impressed with his contention that when we are called upon to decide on the effect which a number of illegal acts may have had on that result, we can exclude none from our consideration. It is plain the meeting in question was held "for the purpose of promoting the election previous to such election," and also that persons who were agents of the respondent were present and furnished drink and entertainment to the persons then taking part in the proceedings; it is therefore clear there was an infringement of the law. There were also two cases of personation proved, but it was not shown that this violation of the law was done by persons for whose actions the respondent is responsible; still they cannot be overlooked when we are called upon to decide whether "the corrupt act or acts was or were of such trifling nature, or of such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been affected, by such act or acts, either alone or in connection with other illegal practices at the election."

We find, then, that there were between forty and fifty cases of bribery, a large amount of indiscriminate treating close to one of the polling places—one at a large meeting the evening before the polling day—which treating was a corrupt practice under the 11th sub-section of section 2 of the Election Act, and two cases of personation.

Thus there are instances of almost every corrupt practice forbidden by the Election Law.

We feel it impossible to say that such numerous illegal

practices cannot be said not to have affected the result of the election, nor be reasonably supposed not to have done so. If the present return can be supported, owing to the large majority of 337, that would be to determine that in any case in which the successful candidate has a large majority it is useless to complain of any infringement of the law unless corrupt practices can be brought home to the candidate personally.

We find that the election of Alexander Robertson was void for corrupt practices by his agents; and we declare the election void, and order the costs of this petition to be paid by him.

(13 *Journal Legis. Assem.*, 1880, p. 7.)

CONTENTS.

PART II.—PROVINCIAL ELECTIONS, 1875.

PAGE

CARDWELL—CHIEF JUSTICE DRAPER, ... 269
CORNWALL—CHANCELLOR SPRAGGE, ... 203
DUNDAS— " " 205
EAST NORTHUMBERLAND—MR. JUSTICE GWYNNE, . . 387
EAST PETERBORO'—CHIEF JUSTICE DRAPER, ... 245
HALTON— " " " AND COURT OF APPEAL, 283
LINCOLN—MR. JUSTICE GWYNNE AND COURT OF APPEAL, . . 391
" (2)—MR. JUSTICE PATTERSON & MR. VICE-CHANCELLOR BLAKE, 489
" "—MR. JUSTICE PATTERSON, ... 500
LONDON—CHANCELLOR SPRAGGE, ... 214
MUSKOKA—MR. JUSTICE WILSON AND COURT OF APPEAL, . . 458
NORTH GREY—MR. JUSTICE GWYNNE AND COURT OF APPEAL, . 362
NORTH MIDDLESEX—CHANCELLOR SPRAGGE, ... 376
NORTH ONTARIO—MR. JUSTICE WILSON AND COURT OF APPEAL, 304
NORTH VICTORIA—CHIEF JUSTICE DRAPER, ... 252
NORTH WENTWORTH— " " AND COURT OF APPEAL, 343
PEEL— " " " " 485
RUSSELL—CHANCELLOR SPRAGGE, ... 199
SOUTH ESSEX— " " 235
SOUTH ONTARIO—MR. JUSTICE WILSON AND COURT OF APPEAL, 420
SOUTH OXFORD—CHIEF JUSTICE DRAPER, *(Practice)*, . . 238
" " " " " . . . 243
WELLAND (2)—MR. JUSTICE GWYNNE, ... 187
WEST ELGIN—CHIEF JUSTICE DRAPER, *(Practice)*, . . . 223
" " —CHANCELLOR SPRAGGE, ... 227
WEST HASTINGS— " " 211
WEST PETERBORO'—CHIEF JUSTICE DRAPER AND COURT OF APPEAL 274
WEST TORONTO (2)— " " " 179
WEST WELLINGTON—MR. JUSTICE GWYNNE, ... 231

PART III.—PROVINCIAL ELECTIONS, 1879.

DUFFERIN—CHIEF JUSTICE MOSS, *(Practice)*, ... 529
" —CHIEF JUSTICE MOSS AND MR. JUSTICE ARMOUR, . 530
RUSSELL (2)—CHIEF JUSTICE MOSS AND MR. VICE-CHANCELLOR BLAKE, ... 519
SOUTH WENTWORTH—CHIEF JUSTICE MOSS AND MR. JUSTICE GALT, ... 531
STORMONT (2)—CHIEF JUSTICE MOSS AND MR. VICE-CHANCELLOR BLAKE, ... 537
WEST HASTINGS (2)—CHIEF JUSTICE MOSS AND MR. JUSTICE GALT, ... 539