himself in full terms to do everything as if he were the full fiar.

Infeftment was taken upon the deed, so that there is a valid disposition. Nothing remains but the question whether the disponer had the power to make this alteration. I think he had the power necessary to do so. This is an alteration not requiring feudal forms, merely a common provision, and one competent. This is practically the same case as if the parties were trustees.

LORD BENHOLME—I am substantially of the same opinion. The last consideration stated by your Lordship is quite satisfactory to me. These persons were trustees in the interest of the children.

LORD NEAVES—I am of the same opinion. There is no conveyancing difficulty here, the granter had distributed the full fee and liferent, he only altered the proportions of the conveyance. I am by no means convinced that he might not have altered the conveyance of the whole liferent.

LORD ORMIDALE—I am of the same opinion, on the grounds stated by your Lordships.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Reclaimers—H. J. Moncreiff. Agent—Charles S. Taylor, S.S.C.

Counsel for the Claimants Alex. Rennie and Others—Guthrie Smith and R. V. Campbell. Agents—Douglas & Smith, W.S.

Friday, March 13.

SECOND DIVISION.

IRWIN AND MACGREGOR, PETITIONERS.—(RENFREWSHIRE ELECTION.)

Election Petitions Act (31 *and* 32 *Vict. c.* 125)—*Ballot Act* (35 *and* 36 *Vict. c.* 33)—*Enumeration of Votes—Specific Averment—Relevancy.*

Certain electors having presented to the Court a petition praying for a recounting of the ballot papers in a parliamentary election on the general averment that a mistake or mistakes had been made by the Returning Officer in his enumeration,—*held* that such a petition was relevant, that questions as to counting of the ballot papers might competently be tried by the Election Judges, and that the averments were sufficiently specific; and prayer of a note for the respondent *refused.*

This was a petition presented to the Court by Charles Edward Irwin, 62 Maxwell Street, Glasgow, and James Macgregor of Pollockshiels, timber merchant, electors in the county of Renfrew, against the election of Colonel Mure of Caldwell as Member of Parliament for that shire. The election took place on February 5, 1874, and Colonel Mure was returned as duly elected by a majority over his opponent, Colonel Campbell of Blythswood. The grounds of the petition were set forth in articles 3 and 4, as follows:—"3. And your petitioners say that they believe and aver that the majority of the votes was in favour of Colonel Campbell, and they believe and aver that a mistake or mistakes were made in the counting of the voting papers at the said election. 4. And your petitioners further say, that the mode of procedure at the counting of the voting papers at said election was unsatisfactory, inasmuch as the counting of the different enumerators, of whom there were twelve or thereby, was in no way checked, and in this respect the said counting was differently conducted from the counting at the previous election for the said county in September 1873, when Colonel Campbell was returned by a majority of one hundred and seventy-six votes or thereby against the said Colonel William Mure." The petition further stated that the agent present at the counting on Colonel Campbell's behalf requested the Returning Officer to check the votes by recounting them, and that he refused this request. The prayer of the petition was thus expressed:—"Wherefore your petitioners pray that it may be ordered that the voting papers used at the said election be recounted, so that the correct numbers voting for each candidate be ascertained; and that it may be determined that the said Colonel William Mure was not duly elected or returned, and that the said Colonel Archibald Campbell Campbell was duly elected, and ought to have been returned." On behalf of Colonel Mure, a note was presented to the Lord President of the Second Division of the Court, as follows:—"My Lord Justice-Clerk,—The said petition, which was presented of this date [March 2, 1874], does not contain any statements relevant or sufficient to support the prayer of it; and, *separatim*, the prayer for an order to have the voting papers recounted is not warranted either by the said Parliamentary Elections Act, 1868, the Ballot Act of 1872, or any other statute law or practice. May it therefore please your Lordship to move the Court to dismiss the said petition as irrelevant, and as containing a prayer not warranted by any law or practice."

Argued for Colonel Mure—We must notice the allegations contained in the petition and the prayer with which it concludes. The third article is the most important one, as being the only one in which any averment warranting this complaint is made. In the fourth article, relating to the procedure, there is no alleged violation either of any statutory direction or of any rule of procedure made by the judges, nor is it said that anything in the procedure led to injustice or to error. The only remaining portion of this article sets forth that the procedure on this occasion was different from that adopted at a previous election, when Colonel Campbell was returned. That certainly is no ground of complaint, as both modes may be right; and further, the former mode may have been, for ought that is stated, wrong. [LORD ORMIDALE—It was not checked on this occasion; that is the difference.] We are not told what sort of checking was used or to be used, or that checking was essential to a true result. Article five is yet more irrelevant, as all that is there said is, that there was a request for recounting which was refused. Every one, under this view, might say, "Count over again;" and it is impossible to tell when this would stop. The whole question, then, turns on article three. As regards mistakes, it does not say what these were; whether against, or, for ought we know, in favour of Colonel Campbell. [LORD ORMIDALE—It does not say that Colonel Mure was returned in consequence of these mistakes?] No. It is not said that the mistakes were such as to influence the result. That is a very important consideration. In criticising the

averment you are entitled to take the weakest alternative in considering the question of relevancy. There actually was a majority of 88, and a mistake of one or two, which for all we know may be the whole error here, could not affect the result. The petitioners say they believe and aver that Colonel Campbell had a majority. Now, can such an averment of a suspicion give a right to ask for recounting? Allegations of bribery or of error in law on the part of the Returning Officer are perfectly competent; but here all asked is that the votes be recounted, without saying how or by whom. The Act of 1868 does not refer to voting by ballot at all; and consequently such an objection as this falls under the Ballot Act of 1872 (35 and 36 Vict., cap. 33), sec. 2. The only part of the section having reference to this question is the the 3d sub-division. This shows that the Returning Officer is made the counting officer, and there is no provision for review of his counting, although a decision as to validity of a voting paper is subject to review. [LORD BENHOLME—The correctness of his counting may depend on the soundness of his decisions.] Doubtless; but that is a different case. The only fact relied on in support of the prayer here is that the majority was the other way. When bribery or corruption is averred, or personation, or where a ballot paper has been wrongly marked, then that is a proper question for decision by the Judges. [LORD NEAVES—Do you think an actual statement of miscounting would not in former times have been tried by the House of Commons?] That was a different thing, because the voting was then open, and a record of it could be presented to the House, by a mere inspection of which the result could be ascertained. Suppose there came to be a difference of opinion as to the counting again, would there be another complaint? It would seem sufficient merely to say again that it was wrong. [LORD NEAVES—Can no arithmetical fact be ever ascertained by a court of law?] No doubt many, arithmetical as well as others; but here we are dealing with a Court created and defined by the statutory provisions of the Acts of 1868 and 1872. The Court sits not as a Court of original jurisdiction, but to try particular things, and they are not invested with the ministerial duties of the Sheriff, in so far as, in counting, he is merely a sort of ministerial functionary, and is not performing any judicial act.

Argued for the petitioners—The case is raised upon the pure and simple question whether or not there has been any actual mistake in counting the votes, whereby the result has been the return of one candidate when in point of fact the election was the other way. The Court here sits under Act 31 and 32 Vict. c. 125, and neither this nor any other Act describes what constitutes an undue return or an undue election. A more clear case of undue return could scarcely be shown than that of a man who has not polled a majority. That being so, the next question is whether that is averred in this petition. Following on the formal and statutory statements in Arts. 1 and 2, we have the crucial statement of the petition. Art. 3 is not two averments, but only one, viz., that the majority of votes was in favour of Colonel Campbell, and that a mistake or mistakes were made in the counting. That taken as one statement means this, and this only, that Colonel Mure, who was declared to be duly elected, was declared to be duly elected in consequence of a mistake or mistakes made in the counting of the votes, and that in point of fact Colonel Campbell had the majority. If that averment had stood alone it would have been relevant. Can it be made irrelevant by any mere explanation which follows? The subsequent statements go to show that the unsatisfactory mode of procedure was pointed out at the time and that the very simple remedy of recounting was expressly refused. It is not reasonable to say that the risk of a re-counting showing that there is a mistake somewhere and causing a third counting is a reason for not checking the original counting. If the argument was sound it would come to this, that the duty of a Returning Officer was only to count the votes once for fear it should turn out upon re-counting that there was a mistake, and therefore to avoid the danger of having to count the number of ballot papers two or three times over you are to encounter the danger deliberately of returning the wrong man. As to the question of mistake, it may be suggested that a single mistake in an election where there are 3000 or 4000 ballot papers may be a mistake amounting to hundreds of votes. There may be an error of putting down a wrong figure in a summation; but that single figure may make a difference of 200 or 300 votes one way or other. There may be an error in counting one bundle of votes which ought to be for one candidate as being for the other, and this single mistake may turn the whole election. [LORD ORMIDALE—Might not a mistake of one vote make a difference for anything that appears in this petition?] Certainly.—If the contention of the other side were right, then it would come to this, that unless the petitioner was in the position of stating in his petition the exact mistake which was made in the figures by the Returning Officer you never could have a relevant petition. The state of things under the Ballot Act is quite changed from that when there was open voting. There are far more difficulties in the way of a candidate seeing himself that the election is duly conducted and that the proper return is made than formerly. You have the counting of an enormous number of votes; not taken from moment to moment as each voter comes in, but when the whole votes are accumulated together, and upon that occasion there may be only one agent present for the party, when perhaps there are as many as 12, 15, or 20 enumerators all counting votes at the same time. Obviously, if there is a risk of mistake at all, there is greater risk of that mistake not being discovered by the candidate at the time. The Court is now fulfilling the functions of a committee of the House, with this difference only, that these functions are exercised under a statute which deals with elections in a way totally different from that in which they used to be dealt with, and makes the checking of the counting a much more important matter than it was under the old law. If we cannot complain of an undue return in respect of a false mistaken counting, there is no remedy at all in the case of a mistake. Formerly the whole thing was open; there was nothing concealed, whereas under the law as it now stands the whole thing is shut up from inspection, and the only persons who can order an inspection to be made are the House of Commons or the Court. Under these petitions it has not been the practice

to make an elaborate statement of facts and circumstances in the petition, but simply to state generally the ground on which it has been presented, and under the order of the Court a more articulate statement might be put in in sufficient time before the trial to prevent any complaint on the ground of surprise by the respondents.

Replied for the respondents — The question really is, whether or not any candidate defeated at an election is entitled to insist upon the votes being counted, either by the Court, or by some persons receiving authority from the Court, on the simple allegation that there has been an error in the enumeration, and such an error in the enumeration that it has led to the turning of the election against the candidate so defeated. Accepting statement 3 as equivalent to an allegation that the minority of votes was given for Colonel Mure, and that if the votes had been accurately counted it would have been found that the majority was given for Colonel Campbell,—the question comes to be, whether that is an allegation which, under such a petition as this, the Court will send to trial before the Election Judge under the statute of 1868. This question requires to be considered, *first*, with reference to the powers of the Court under the Act of 1868; and, *secondly*, with reference to the duties of the Returning Officer and the powers of this Court under the Act of 1872. The Act of 1868 transferred the jurisdiction which had formerly existed from the House of Commons to the Courts of the country; and undoubtedly it provides that from and after the dissolution of the Parliament of 1868 it should be competent to present a petition complaining of an undue return or undue election to the Supreme Court. There is no definition of what is meant by an undue return or an undue election. Of course if the Returning Officer mistakes the numbers, that is in a certain sense an undue return, but the question is not whether the allegation is relevant, but whether it is relevant to go to proof under the authority of this statute of 1872. Now, when a petition is presented to this Court against an undue election or undue return, it is provided by the 11th section that a Judge selected by the Court shall proceed to try it. It seems from the provisions of the section that the decision of the Judge who tries the petition is final in all matters of fact, although there is an appeal with respect to any questions of law which may arise. The idea of the petition being presented before the Judge is that the party shall come before him and produce evidence, of which evidence he shall judge, and his judgment upon the matter of fact shall be final. That being so, there is undoubtedly a very great change made in the manner of voting under the Ballot Act of 1872, and there are under that Act obviously certain questions which may arise under an election petition, and certain questions which it was not contemplated should be raised. The second section of that Act provides that the ballot boxes shall be taken charge of by the Returning Officer, and so on. But then it proceeds with respect to what is to follow upon certain questions which arise in the course of the enumeration. There are very many of such questions. For instance, there is the question whether a ballot paper is properly marked,—whether the specified mark is placed on the paper, and on the proper place in the paper—again, there are questions which arise with respect to uncertainty of marks, and in not a few of the last elections questions of that kind did arise. Another objection consists in this, that no mark must be used by which the voter can be distinguished. All these are questions which the Sheriff must determine finally in the first instance. So far as enumeration is concerned,—the enumeration which takes places before him,—his judgment upon all these questions is absolutely final. But then there may be an inquiry for the purpose of seeing whether or not his judgment is well founded in respect of these decisions, because it is provided that it shall be subject to reversal on petition extending to election or return. That being so, we may observe the statutory rules for taking the poll, and the various rules for the regulation of the presiding officer with respect to the reception of votes, with respect to the disposal of spoiled voting papers and tendered voting papers, and with respect to the marking of the papers of illiterate voters—*(Reads rules.)* Then follow the rules of the statute applicable to the counting of the votes, with which we are more immediately concerned. The first thing provided is that the candidates may respectively appoint agents to attend the counting. This enumeration therefore takes place in the presence of the candidates and agents, who are to superintend the counting of the votes, in order that by their presence they may secure accuracy in the results. The 34th section provides for the mixing of the ballot papers, and then the mode of counting is described—*(Reads.)* Now, there is a very anxious provision for two things, *First*, for the mere enumeration of the votes, and that is to be done by the Returning Officer and his clerks and assistants in presence of the agents appointed by the candidates for that purpose. That is so far a merely ministerial duty. In the course, however, of the counting, various questions more or less complicated may arise, and a record of these questions is to be kept by the Returning Officer in the event of either party desiring it. That is to say, if he rejects a vote as being bad upon any of the grounds indicated in section 36, then he is to endorse upon the ballot paper the words "rejection objected to," if any such objection shall be stated by the agent to whom that vote professes to go, and a separate list of these rejected votes is to be made up so that they may be accessible when required. All the papers thereafter are to be transmitted to the Sheriff-Clerk; and the question now is whether the Court will bring the whole of those papers again into their own custody for the purpose of counting them again. The emuneration must be by the Judge. He may take more or less help in doing it, but he must satisfy himself that the thing is done. He is not to be entitled to try an election petition by deputy. [Lord Ormidale—It must be done under his eye.] There is no allegation against any decision pronounced by the Sheriff with respect to the validity of the votes. No question of law of that kind is raised. It is a question of simple enumeration, and that enumeration is to be performed by the Court. [Lord Neaves—Before the ballot, if an election petition was brought before the Court, do you say it was incompetent to extend correction to enumeration? Does not your argument depend upon that?] We argue now upon the Ballot Act. Such a question could hardly arise under the prior Act, for then the taking down of the votes was under the inspection of the candidates and their

agents. [LORD NEAVES—Questions have arisen.] Not with respect to the number of persons who actually voted. Our argument is not based upon the question whether the mere enumeration could come before the House of Commons under the Prior Act, but whether it was intended by the two statutes, taken together, that this process of enumeration should be done by this Court only, on the presentation of a petition for that purpose; and that depends mainly upon the construction of the Act of Parliament of 1872, whether that Act was not intended to make the Sheriff final in the mere matter of enumeration, and whether there is provision made in the Act by which the Court may proceed to check that enumeration. They must be before the Court in precisely the same sense as they were before the Sheriff under the regulations regarding the counting of the votes, and it is intended to preserve as much secrecy in the counting before the Judge as there was in the counting before the Sheriff. (*Reads* § 40)—That does not apply to anything except rejected ballot papers. The first part of the section plainly refers to the rejected ballot papers only. There is a direction that no person shall be allowed to inspect any rejected ballot papers, and that even the order for inspection may be made subject to such conditions with respect to time, place, and mode of inspection, as the House or the Court may think proper. (*Reads* § 41)—That is not an order applicable to the whole of the ballot papers being inspected *per reversionem*, but a power with the Court to order inspection of such ballot papers as may legitimately be asked for in connection with an election petition. First, it provides that no person shall open the sealed packets after the same shall be once sealed up, or be allowed to inspect any counted ballot paper except under the order of the tribunal having cognizance. That is, if parties apply for inspection of a ballot paper this Court may grant an order for the inspection of that ballot paper. (*Reads* secs. 42 and 43)—These sections are the whole which are applicable to this matter of counting votes and of reviewing the counting. The inspection of a paper may be very necessary in order to settle some objection with reference to the validity of a vote, and if that is alleged the Court may grant an order for inspection. If, again, inspection may be necessary for determining questions which may be raised with respect to the personation of voters the Court may grant an order, but that is not what is desired in this case at all. There is no allegation of improper practices at the election. There is nothing that went wrong in the election until, it is said, the Returning Officer began and ended his counting, and it is on that period, and that period alone, that the error is alleged; the question is, whether it has been committed to this Court to correct the error or rather to inquire whether or not it has been committed. There is no machinery provided by the statute to enable the Court to do this. In the first place, the plain meaning of the statute was, that on the Sheriff there was placed that special duty of enumeration, with respect to which duty very special directions are given, and given to him and him only,—that that duty was to be performed in the presence of the agents of the candidates appointed for that purpose,—and that when he performs that ministerial duty by the reasonable implications of the statutory enactments it is intended that his enumeration shall be final and not subject to review. A review is out of the question. It is absurd to speak about reviewing an enumerator's proceedings. [LORD NEAVES — What do you mean by an undue return?] Bribery and treating. [LORD NEAVES—But there is a difference between the polling and the return.] An undue return is when votes are improperly rejected. [LORD ORMIDALE — Or improperly received.] [LORD BENHOLME — A return may be quite correct although mistakes in point of law may have been made in respect of votes, but it is not an undue return unless its result is to turn the election.] But supposing a person said "such and such votes were rejected by the Sheriff, and if these had been accepted I should have had a majority." That is plainly a case of undue return, because the Sheriff has rejected a certain number of votes which should have been received, and he says, "Give me these votes and I shall be returned." The only question then is, were these votes duly rejected or not? If they were not duly rejected add them to the return and it will be seen whether the return has been a proper return. But there are many cases of undue election or undue return, but the question is, whether under such falls the mere matter of enumeration? [LORD ORMIDALE — What would you say to a case in which an enumerator employed by the Returning Officer had told him, "We have according to our calculation a majority in favour of Colonel Campbell," and then the Returning Officer made by some mistake the return to be in favour of Colonel Mure?] That might be an allegation of gross carelessness or corruption. Of course there is neither the one nor the other here. There is merely the allegation that there was a mistake, the only thing which your Lordships can do in this question is simply to count. Now how is it to be done? In the first place, is this petition to be tried in open Court? [LORD NEAVES—Why should it not go on with as much secrecy as before the Sheriff?] Then it comes to be worse, because it is a counting by the Court itself. Are the votes to be counted by the Court without the usual assistance? [LORD NEAVES—If the Judge were to do it himself is that impossible?] There is much greater risk of going wrong in that way than in holding that the Sheriff has gone wrong. I think the Sheriff has much greater facilities for counting, and is much more likely to be right. [LORD ORMIDALE—Are you aware of any instance in the three kingdoms in which the votes have had to be re-counted?] We have not been able to learn that there has been any instance where an error in counting has led to the votes being re-counted by the Judges. It is a counting in open Court, while the counting by the Sheriff and his assistants is merely in presence of the agents for the candidates, who are there to superintend. [LORD ORMIDALE—But it is said on the other side that it is implied, though not expressed, that the Judge may have the assistance of enumerators, and may also require or allow the parties' agents to be present; and it was not said whether all that is to be done, if it is to be done at all, in open Court.] The Judge must satisfy himself that the thing is right, and he cannot count in any other way so as to be able to come to a judgment. [LORD NEAVES—Do you think it is impossible for the Court to review and correct such a thing as an *error calculi?*] No doubt the Court could correct

an arithmetical error; but it was not the intention of the Legislature to put that duty on a Judge of the Supreme Court,—the clauses of the statute with respect to the inspection of the ballot papers are entirely against it. Careful provision has been made for everything else,—but with respect to enumeration or re-counting the statute is absolutely silent, and the reason why there is no authority in the Act of 1872 for any such proceeding is simply this, that while the Sheriff's judgment might be reviewed with respect to any question of law which might arise, it was intended that he should be final in the enumeration itself, and that your Lordships should not be required to count over the votes as if they had not been counted at all by the Sheriff. [LORD BENHOLME—Suppose that the petition embraced an allegation of error in judgment in refusing to allow votes as contrary to law,—I suppose if the Judges here reversed his decision, especially if the thing had gone wrong in a variety of cases, you say that the remedy is not an absolute recounting of the whole, but you are only to add in the one case or deduct in the other that which you think is wrong?] Certainly. [LORD BENHOLME—If that is your argument it is consistent, but there must be some statute to say that with those exceptions his decision is to be final,—one would expect that.] We notice in the 2d section that he is the statutory officer for enumeration. [LORD BENHOLME—He is the statutory officer for deciding in the first place.] No; he is the statutory officer for enumeration, and also the statutory officer for deciding in questions of law which arise in the course of enumeration; and with respect to these last review is given by the 2d section. That is done expressly. Now, the fair meaning of the thing is, that with respect to the statutory duty he is called on to discharge of enumeration he is final, because there is a review only given with respect to questions of law which arise in the course of the enumeration. [LORD BENHOLME—Your argument does not depend upon the allegation that it is impossible to do it, but only that the law does not allow it?] We do not say that it would be impossible for your Lordships to do it, but that the provisions of the Statute do not give the power. [LORD ORMIDALE—And more especially by providing machinery for everything else.] The Sheriff is made the statutory officer, there being a review provided in certain questions—implying that there is not to be review in all things that he does. There is careful provision for his proper discharge of a certain ministerial duty. Then, in the course of discharging this ministerial duty questions will arise, and provision is made how these questions are to be determined; and then, in order to enable parties to raise any question of law for the decision of the Judge, very careful provisions are also made to enable inspection of particular ballot papers to be given from time; but there is no provision that the Judge shall order the ballot papers to be brought to him, and it is quite certain that the Judge could never allow inspection to either of the parties of the ballot papers in this case, because no case has arisen in this question under which either party is entitled to the inspection of a single ballot paper. Take the case of an election decided by 10 votes, and with a majority of 10 for it. B says, "But there were 12 rejected papers, and these rejected papers were all in my favour, and I ask it shall be decided by this Court whether these rejected papers were good or bad votes?" An order is given for the inspection of these papers, and the result is, that the Judge who examines them says, "Very well, there are 6 bad and 6 good; that makes no difference in the election;" but if, upon the other hand, he says there are 11 good out of those which were rejected the result is affected. [LORD NEAVES—Then the other party rejoins that there was a wrong calculation?] We maintain that that is excluded. It is just the question we are now at. [LORD NEAVES—Suppose it were to be held that the House of Commons before 1868 had the power to alter a return, or set aside a return upon the ground of numerical disconformity,—suppose that that power was transferred to this Court by the Act of 1868,—suppose it were held as fixed,—do you still maintain that the Ballot Act destroys it?] Certainly; for the Ballot Act says that the Sheriff is to be final in enumeration, and, further, it is not, we submit, possible to proceed under these rules and count these votes. [LORD ORMIDALE—On the other side, it is assumed that the Judge could not or would not do it personally, but that all the necessary machinery is to be employed.] If the Judge is not to do it personally, he is made to delegate to another person the particular duty which the statute imposes upon a particular officer, and the person to whom he delegates it supersedes the enumeration of the statutory officer. It necessarily comes to that, and that is one of the reasons why it is obvious that the statutory officer should not be superseded, and, in the next place, if it had been the intention of the Legislature that this duty should be cast upon the Judge, or that the Judge should have power with the assistance of others to make the enumeration over again, there would have been some other provision for getting up the ballot papers, for it seems that sections 40 to 43 are really for the purpose of giving inspection of ballot papers in order to determine legal questions which have been determined, or questions of fact which require to be determined in the case of personation or otherwise.

Replied for the petitioners—It is not said here that votes were wrongly given or wrongly recorded; but it is said that there has been an error in the summation, and the result is that in declaring that the one candidate had the majority the Returning Officer has erred, because the return should have been the other way. An examination of the provisions of the Ballot All will show that all those fears about counting, about the necessity of the Judge doing it himself, about the necessity of everything even under the Ballot Act being done in open Court, are purely visionary. The Ballot Act throughout assumes that those papers which are forwarded by the Returning Officer after the declaration of the poll to the clerk appointed by the Judges on the rota by the regulations of Court, are to remain under the custody and control of the Court for the purpose of enabling the Court to carry out that jurisdiction with which they have been entrusted by statute—at one time in the history of this country the Legislature themselves disposed of all questions touching the validity of elections of Members of Parliament. The first innovation made on that was by

the Act of 1770, and certain portions of their jurisdiction were parted with from time to time by subsequent statutes, and it was entirely surrendered by them in 1868. They transferred deliberately by that statute the whole of their jurisdiction regarding inquiry into the facts connected with the elections. It has been settled by two consecutive resolutions of the House that they have still retained the power to enquire into certain matters touching the qualification of their own members. They held in the case of *Sir Sydney Waterlow*, in 1869, that a committee of the House of Commons was entitled to enquire into the effect of his disqualification for sitting as a member by reason of his being a Government contractor; and in the subsequent case of *O'Donovan Rossa*, where one of the members had been convicted of felony, the House held they had jurisdiction. But that was keenly controverted, and it was assumed in that resolution and by the Judges of the English Courts that the whole jurisdiction touching matters occurring at an election itself, or at the declaration of the poll, is matter entirely with the Courts. Regarding what transpired in 1770, we may refer to Sir Erskine May.—(*Reads.*) These considerations no doubt eventually weighed with the Legislature in framing the Act of 1868. Prior to the statute of 1770 it was a not unfrequent occurrence that there should be complaints made to Parliament and petitions against elections in respect of undue return. Upon that matter we have Clerk's Practice of Election Committees, 1852 edition, p. 57. In point of fact, or rather in point of law, the Returning Officer, the moment the declaration is made, has only one duty left; and if he has used a wrong name by mistake he cannot put the mistake right. But if this Court under the provisions of the Ballot Act cannot look to the summation of the poll, it comes to this, that there is no machinery by which a wilful error on the part of the Returning Officer can be corrected, so as to substitute the proper candidate for the one who had been improperly declared, any more than there is if error has been purely accidental. Now the provisions of that Act of 1868 are very plainly such as to transfer to this Court at a period before the passing of the Ballot Act the whole jurisdiction of parliamentary committees and of Parliament in these matters. In regard to this see the expressions of the late Chief Justice Bovill in *Lees* v. *Norwood*, 1869, 4 L.R. C.P., 246. But if your Lordships will turn to the 50th section of the statute, its enactments exclude the Legislature from and after the next dissolution of Parliament from dealing with the matters. There is a further enactment, which shows how it was intended to exclude these matters from the consideration of the House of Commons, because by the 56th section there is provision made for certain proceedings which shall notwithstanding be competent before the House. Now, in these circumstances, it cannot admit of the slightest doubt that if a petition had been presented to this Court complaining that the Sheriff had, by error or wilfully, erroneously summed the poll, and that the return he made was accordingly not correct,—an undue return,—it would have been perfectly competent for this Court to have ordered production of the books. Now, has that been altered by the Ballot Act? The whole fallacy of the argument maintained on the other side consists in this,—in regarding these special provisions with regard to inspections of documents in the hands of the clerk as provisions intended to limit the Judges of this Court or the Judges of the *rota* in doing justice as between the parties who are before them complaining of undue return, or maintaining the validity of the return. There are other sections, and some of those sections are limited. The purposes of these sections are obvious. Take for example that which relates to rejected ballot papers. The purpose of that is to enable the Court to allow the parties when they are in Court to see these papers with a view to the preparation of their case; and the word "inspection," referred to in the 41st section of the Statute, is inserted there with the same view. It is not intended that they shall not be seen by the parties. On the contrary, they are to have all such inspection as is necessary, without defeating the purposes of the Act. The most important matter, requiring the utmost secrecy, is the book of counterfoils, because until that is given, you have not the means of getting at the name of the voter and the way in which he votes. That might betray itself to a person who had some degree of knowledge, but not necessarily so; but the inspection of the mere ballot papers that were received and counted—and it is only in regard to these that there is any question here—would be tray no secret whatever to any one. And therefore it is out of the question to say that any proceedings necessary for the purpose of arriving at the truth of the election that are proposed in this petition would conflict with the secrecy required by the Ballot Act, and which that statute had in view, in the slightest degree. There would be no such revelations. [Lord Neaves—The principal part which is given in contains the vote and no name.] It bears a number, which according to the mode of counting is not exhibited. [Lord Neaves—And it only shows the candidate and the vote.] That is all. For certain purposes, as to detect personation, the book of counterfoils must be unsealed and the counterfoil obtained. Section 39 shows how entirely they are under control of the Court; for the Sheriff-clerk retains these for a year, and then, unless otherwise directed by one of Her Majesty's Supreme Courts, he shall cause them to be destroyed. The sections that follow do not relate to the examination of these for the purpose of doing justice at the instance of parties, but to the facilities of access which the Court is to give them,—these facilities being restricted by any conditions the Court may think fit to impose for the purpose of securing the ends of the statute. That is what is referred to in the 41st section. The 43d also is of importance. —(*Reads.*) Any paper whatever in the hands of the Sheriff-clerk may be produced under the order. The section proceeds upon that assumption; and, proceeding upon that assumption, goes on to indicate that these productions, when made by the proper custodiers of the documents, shall be not only *prima facie* conclusive evidence that they are the documents; but that section does not relate to inspection, or anything treated of in the preceding sections, but shows that the Legislature in this section are proceeding upon the assumption that the Court to whom they have committed the trust of inquiring into all these matters, to whom they have given jurisdiction to do so, shall have full power and control over these documents, shall determine whether they are to be destroyed at the

end of the year or not; that they shall have full power to order production, for that is certainly involved in the enactment; that when produced by the proper person in Court, the purposes of their production being nowhere limited or defined in any way, they shall come there with a certain *imprimatur* that prevents their genuineness being impugned. Various other questions have been raised here. It no doubt is the duty of the Returning Officer, not of the agents of the parties, to count. It is done in their hearing and presence it may be; but they have no duty in the matter. They have no right of interference except to make a suggestion, which might be attended to, but cannot be enforced. The duty of counting rests entirely with the Returning Officer. The provisions of the Ballot Act, section 49, forbid that any person shall be employed by the Returning Officer for the purposes of the election, no matter in what capacity, who has been employed by any other person about the election; and the 48th section gives power to the Returning Officer to employ competent persons to assist in counting the votes. But these are questions which do not affect the issue before this Court at present,—that is, as to your jurisdiction in regard to undue return arising from error. It is not alleged that it was wilfully done; very far from it; but there is a distinct allegation of error. There is a very easy mode of inquiry without violating a single provision of the Ballot Act, without violating even the spirit of the Ballot Act in any one single particular. Your Lordships are quite free to grant the parties an inspection of those papers which are counted papers. There is an opportunity for doing that under the 41st section. For what purpose is that given? It would be a very singular thing if in an election petition it is not within the competency of the Court to give the persons complaining—subject to such conditions as your Lordships impose—the right to go to the Sheriff-clerk's office and examine every one of those papers. It would be a very singular thing if, after having by virtue and force of the statute indulged the parties with that inspection, the Court should be bound to stop there, and should not be entitled, for the purposes of using their jurisdiction, to arrive at that conclusion for themselves by any mode which they may think proper, which the parties might arrive at upon inspection. Your Lordships are to count the votes yourselves. What assistance you are to take is a very different question. It is difficult to see how it cannot be done. It is impossible to see how that is against the letter or the spirit of the Ballot Act, because this special inquiry involves the disclosure of no one single particular in regard to which the Ballot Act enjoins to secrecy. There is no reason to disclose how any one voted,—not the slightest. The Court is dealing here simply with an arithmetical question,—an *error calculi*. [LORD NEAVES—You think it applies only to the voting papers and not the books?] Yes; and even though it did involve the necessity of disclosing to those who made the inquiry the way in which particular voters had given their vote (which it does not), that would not stand in the way of such an inquiry being made, because every such inquiry must be conducted as consistently as possible with the object which the Statute was intended to promote.

Counsel on behalf of the Returning Officer stated that he had no opposition whatever to offer to the inquiry now being asked for.

LORD BENHOLME asked if the bar had anything to say on the question whether this was a matter to be addressed to the Court or to the Election Judges.

The DEAN OF FACULTY replied that this had been decided in the Greenock Election petition case, *Christie* v. *Grieve*, in 1869. [LORD ORMIDALE—That case is in the sixth volume of the Scottish Law Reporter, very fully reported.]

Authority—*Christie* v. *Grieve*, 6 Scot. Law Rep. p. 223, and 7 Macph., 378.

At advising—

LORD NEAVES—My Lords, this is a case undoubtedly of importance. It is presented under section 40 of the Ballot Act of 1872, by certain electors of the county of Renfrew, setting forth a complaint which has been made of the return by the Returning Officer, and the allegation is contained in the 3d article of that statement. The erroneous return is explained to have arisen through a mistake, and the petitioners disclaim any imputation of improper conduct on the part of the Returning Officer. The petition has been answered by a note praying the Court to find the petition irrelevant and not warranted by the Act. I consider that the mode of moving in the case has been quite competent and regular. If it is well-founded, the objection here made in the petition is good. The petition is presented not to the Judge who ultimately tries the case, but to the Inner House; and if there be a competent or relevant petition I think this is the proper way of raising it.

I am of opinion that the note should not be granted, and that there is no ground for its prayer. I shall shortly state the reasons which weigh with me in coming to that conclusion. The election law distinguishes two things—complaints against an election and complaints against a return. There is this plain distinction, that a man is elected when he has a majority of votes in his favour, and if he be elected or voted for by a majority of voters, and if the Returning Officer returns another man who has a minority, that is an undue return. There may be objections to a return as undue as not being in conformity with the state of the poll: and there may also be something wrong with the election in respect of objections to votes and circumstances which imply no mistake on the part of the Returning Officer, but some error in the original matter so far as regards the votes given. Now, it appears to me that there cannot be a clearer case of relevancy in regard to an undue return than to say that the Returning Officer, having before him the poll book with a majority in favour of one man, makes a return declaring the majority to be in favour of another. There cannot be a clearer case of relevancy if that be proved. I cannot doubt that the House of Commons under its old powers would have looked over and corrected the return had such a case been brought before them; indeed to suppose that the old House of Commons, with its full jurisdiction over its members, could not detect and correct the enumeration and summation of the poll seems to me to be utterly absurd—accordingly, when for the purposes of avoiding those feelings that must necessarily influence a body of the nature of the House of Commons, their jurisdiction was transferred to the Judges in 1868, I have no doubt that power went along with it. The House retained the question of disability in its hands, but as regards

everything of the nature of scrutiny, arithmetic, and so forth, the jurisdiction was really transferred to the judicial tribunals of the country, and I cannot doubt it was their duty under it to see that no man should sit in Parliament who was in a minority upon the poll, but who had been returned as the member who had the majority. Then the question comes, was this jurisdiction taken away by the Ballot Act? I do not think so. There is no need of any special machinery, and in this case the enquiry is quite practicable without invading the privacy of secrecy of voting intended by the ballot. All we have to do is to take the portions of paper which have no name, and see if the votes given on the one side and the other are right. No doubt it is possible for a person to go wrong; but a judge or any one else may be able to add up an account, and it is possible to arrive at the result with certainty. On the point whether this is relevant, I hold it is clearly competent. Is it inadmissable in consequence of the Ballot Act? I cannot find anything in the Ballot Act that prevents the Judges from doing what they did before, or which takes away the power they had in regard to an undue or bad return. With regard to any presumption whether it is given or taken away, I cannot doubt that the presumption must be in favour of doing justice, and there cannot be a greater injustice than the return of a man who is at the bottom of the poll. I think there has been a remedy for that, and I think there still continues to be a remedy. With regard to the mode in which it is to be carried out, I have no doubt that the practical difficulties will diminish when we come to face them; but difficult or not, the determination of the matter devolves upon us and we must dispose our attention to it. Upon the grounds, therefore, which I have stated, I think we should refuse the prayer of the note.

Lord Ormidale—There can be no doubt whatever that if one candidate has been returned by the Returning Officer as the candidate elected by the constituency, and if that result has been arrived at in consequence of an erroneous counting of the votes, a great wrong has been perpetrated, and it would be a little surprising if there was to be no redress against that wrong. Now, I think in the argument it was not suggested that, assuming a wrong of that kind to have occurred, the House of Commons could remedy or correct it. It was rather my impression from the whole argument that the power of the House of Commons as it previously existed has in this and almost all other respects been delegated now to the Superior Courts. Still there is a considerable difficulty which has occurred to me in arriving at the conclusion that the Election Judges can try a case founded purely and entirely upon an erroneous or mistaken enumeration, because undoubtedly neither the statute of 1868 nor the Ballot Act of 1872 expressly say that that is to be a ground for challenging the return; but then under the Election Petitions Act of 1868, which is really with reference to this matter the important one, we have general language which is very comprehensive in section 5. It is very difficult to see that it does not comprehend the case of an undue return by the Returning Officer. Suppose it is a complete and total mistake. Take the case of the Returning Officer himself—it is a supposable case—where, after he has made a return, he cannot touch or correct it. He is perfectly satisfied on further consideration and reflection that he has committed a grievous error—that he has counted 100 where it ought to have been 1000. Is there to be no remedy for such a blunder, committed it may be in perfect innocence—and it is not said here that there is anything wilful,—Is there to be no remedy for such a case as that? I think under this very comprehensive section such a matter of this kind might be enquired into and tried by the Election Judges under the general statement that the petitioner complains of an undue return or an undue election—that there had been some irregularity or mistake in the election proceedings themselves or in the return of the member. And in confirmation of the same view I may advert to subdivision 2 of rule 2 attached to the Act, and which we are entitled to read as part of the Act. This subdivision of rule 2 applicable to Scotland narrates that a petition should set forth certain things, and among those things we have the proceedings at and the result of the election. Now, under this expression "result of the election," are we not entitled and bound to take cognisance of the whole enumeration of votes? Is not that the very thing which approaches as closely as possible to a determination of the result of the election. How do people get at the result of the election except by enumerating the votes and seeing in favour of which candidate the numbers stand. Then under the 5th clause of the Election Petitions Act, and under the regulations passed in terms of the statute, there is power here to entertain this petition. The only other difficulty I have, and I felt it a great deal in the course of the discussion, was in reference to the manner in which this petition—suppose it is entertained and the question of erroneous enumeration gone into—is to be granted so as to ensure greater certainty than has been already obtained by the Returning Officer. It has been suggested that the Judge himself might enumerate the votes. In the first place, I hardly think that could have been contemplated by the Legislature at all. I don't think it is a matter that would have been fairly sent to any Judge himself to undertake; but that is another matter. It would probably be quite competent for the Judge at the trial, and preparatory to the trial, to give all the necessary directions that an agent or agents should be in attendance to go through the enumeration with the view of seeing whether the Returning Officer is or is not correct. It may be very likely under the eye and the immediate protection of the Judge; and in that view persons probably more skilled and more accustomed to such enumeration proceedings would go through the operations necessary to arrive at the true result, as it were being the hand of the judge, and in that way very probably the thing would be accomplished. Lord Neaves has said when we really go to the trial with the assistance which we shall probably have from the bar here, that and other difficulties which now appear to be somewhat formidable will probably disappear. I very often find that to be the case. Therefore, upon the whole, although I am not so free from difficulty as his Lordship who has just spoken, I cannot say that I differ from the judgment which he has proposed, and which I understand is to be entirely concurred in by your Lordship in the chair.

Lord Benholme—What your Lordship has concluded is quite right. I have not found the

question altogether free from difficulty; but upon the fullest consideration, I have come to be of opinion that we cannot do other than refuse this note. The note alleges that the petition does not contain any statements relevant or sufficient to support the complaint, and that the prayer to have the voting papers recounted is not warranted by the Ballot Act or any other. The first of these grounds must be solved by looking to article 3 of the petition. It seems to me that the sole ground here stated is a mistake in arithmetic. That was about the foundation of the argument on both sides; and had there been grave errors in point of law that might have justified or required a further statement than a mistake or mistakes were made in the counting. Well, we have to consider whether the bare statement that a mistake has been made by the Returning Officer in the counting of the votes is or is not a relevant petition. I do not contemplate the causes that might have led to such a failure; but I think we must suppose the statement to be true; and, in the first place, if it be true, can we possibly say it is irrelevant? Is there anything in the statutes or form of practice that can induce us to say that we have no power to ascertain whether the one party has a majority of votes, while the other who had not a majority was returned? Is there no remedy in the country for such a bad return? It appears to me that this must be a relevant statement. But, in the second place, if it is relevant is there no machinery for ascertaining the truth? Now, an argument has been raised upon that point in which I cannot agree. I think there are materials which the Court can get possession of by which the truth can be completely ascertained, and ascertained without violating the secrecy by which voters are entitled to be protected. I think there is machinery to enable us to ascertain whether, in point of fact, the statement here made is true, that a mistake or mistakes were made in the counting of the votes. I concur with your Lordships in refusing the prayer of the note.

LORD JUSTICE-CLERK absent.

The Court refused the note, with expenses.

Counsel for the Petitioners—Watson and Macdonald. Agent—John Walker, W.S.

Counsel for Colonel Mure — Dean of Faculty (Clark) and Balfour Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Returning Officer—Burnet.

Tuesday, March 10.

FIRST DIVISION.

SHANKS *v.* UNITED OPERATIVE MASONS ASSOCIATION OF SCOTLAND.

[Lord Ormidale, Ordinary.

Trade - Union — Agreement — Implement — Action, competency of—Trades Unions Act 1871, (34 and 35 Vict. c. 31) §§ 3 and 4.

In the rules and regulations of a Trade Union it was provided that a member disabled for life by a real accident while following his employment, should (certain conditions being complied with) receive £80 from the Union. A member who averred that he had been injured for life in the pursuit of his employment, and had fulfilled all the other conditions, brought an action against the Trade Union for payment of the £80. *Held* that the object of the action being to enforce implement of an agreement for the application of the funds of a Trade Union to provide benefit to a member, could not, in terms of section 4 of the Trades Unions Act of 1871, be entertained by the Court.

This was an action at the instance of George Shanks, mason, Greenock, against "The United Operative Masons Association of Scotland," and also against the individual members of the Central Committee as representing the Association. The summons concluded for a sum of £80, which the pursuer alleged to be due to him in the following circumstances—On the 9th August 1871 the pursuer, who at that time had been twelve months a member of the said Association, and of the Helensburgh Lodge or Branch thereof, and was not to any extent in arrears, received a real accident while following his employment as a mason, at or near Clinder, Roseneath, by the falling of a heavy block of stone on his person, whereby his right leg was crushed, and his body was otherwise so severely injured as to disable him for life from following his trade or occupation as a mason.

By Law I, Class IV, of the Rules and Regulations by which the Association was governed, it was provided that "Members disabled for life by any real accident while following their employment as a mason may lay an application before the Society, according to Law 7 of this Class, and if the majority of those voting on the application consider him entitled, he shall receive the sum of £80 sterling."

The pursuer averred that he had complied with all the conditions upon which, according to the further rules of the Association, a member was eligible for the provisions of this class, and that the sum of £80 had been wrongfully withheld from him by the Association.

The defenders denied that the pursuer had been disabled for life by the accident, and averred that the provision of £80 had been refused to him in terms of and in conformity with the said Rules and Regulations.

The pursuer pleaded *inter alia*:—"(1) The pursuer having, while a member of the said Association, been disabled for life by a real accident received while following his employment as a mason, became, in terms of the said Rules and Regulations, entitled to the foresaid sum of £80 sterling."

The defenders pleaded *inter alia*:—"(1) In so far as directed against 'The United Operative Masons Association of Scotland,' the action ought to be dismissed, in respect that the Association is not incorporated, and has no *persona standi in judicio*. (2) The Association and its laws being directed to support strikes of workmen and in restraint of trade, the said laws cannot be enforced or sustain action in a Civil Court. (3) The pursuer's statements are not relevant or sufficient in law to support the conclusions of the Summons. (4) The pursuer is not entitled to recover, in respect that neither the Central Committee, nor the Association, nor the majority of the Lodges, or of the individual members voting, were or are satisfied that he was disabled for life from following his