FOR ASSOCIATE JUDGE OF THE COURT OF APPEALS,

ISAAC H. MAYNARD.

For Associate Judge of the Court of Appeals,
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JUDGE MAYNARD

THE FACTS
RELATIVE TO THE CONTESTED
ELECTION CASES.

Report Adopted by the Legislature.

A MANLY LETTER.

JUDGE MAYNARD'S LETTER

IN REGARD TO THE

Contested Senatorial Election Cases.

To Hon. Robert Earl,
Chief Judge of the Court of Appeals,
and
Hon. David L. Follett,
Chief Judge of the Second Division.

So much has been said in regard to my conduct as an attorney for the State board of canvassers in the late contested election cases, by persons who are evidently unfamiliar with the facts, and it has attracted public attention to such an extent that I deem it appropriate to lay before you all the facts bearing upon my relations to those cases. I do this because you represent the only body which could, with any propriety, expect a statement from me upon this subject.

The facts are briefly these: I was retained by the State board of canvassers and by the individual members thereof, on December 1, 1891, to act as attorney and counsel for them in all matters and legal proceedings brought against them or calling for their action in the senatorial contests in the Fifteenth, Sixteenth, Twenty-fifth and Twenty-seventh senatorial districts. Delos McCurdy, Esq., of New York city, was associated with me in the cases, and my appearance was not in any official capacity, but solely in my private capacity as an attorney, as the papers in the case will show. The attorney-general was himself a party defendant in those proceedings, and I had no connection with them as deputy attorney-general. The appearances therein are all signed "I. H. Maynard and Delos McCurdy, attorneys for," etc. Four other attorneys, of great eminence in the profession, were retained as counsel, and gave advice upon all important questions arising in the cases. Before the State board of canvassers met or had an opportunity to meet, or to take any action whatever, the members of the board were served with a large number of stays, ex parte orders and orders to show cause at Special Term of the Supreme Court, with the accompanying papers, all of which were, as soon as served, delivered to me, with the request to attend to them and take such action as in my judgment would be lawful and proper. These orders accumulated, until on December fifth there were five orders to show cause, which came on for hearing at the Hudson Special Term, before Mr. Justice Edwards—two relating to the Twenty-seventh district, and one for each of the other districts. The proceeding in the Fifteenth district was entitled "The People, etc., ex rel. William C. Daley and John I. Platt, against the State board of canvassers and the individual members thereof." The argument of the cases lasted nearly the entire day and was not concluded when the counsel for the relators, through Hon. W. A. Sutherland, proposed that the parties should enter into a stipulation by means of which all questions in controversy in the various senatorial districts should be taken to and submitted to the Court of Appeals for final decision. Especial emphasis was laid upon the fact that if this proposition was accepted, it would put an end to the whole controversy relating to these elections. I said, in response, I was in favor of the proposition, but as it was entirely new, unexpected and important, I did not feel justified in accepting it without consulting with my clients. That I should advise acceptance of it and had no doubt it would be accepted; but did not wish to take the responsibility of signing such a stipulation at that time. If, however, the matter could be held until Monday morning following, I could then give a final answer, which I did not doubt would be favorable.

Judge Edwards then adjourned the court until Monday morning at Albany, when the proposition was accepted, and the following stipulation drawn and signed:

SUPREME COURT—Albany County.

In the Matter of the Application of the People of the State of New York on the Relation of Franklin D. Sherwood, for a Mandamus against Frank Rice, as Secretary of State.

In the Matter of the Application of the People of the State of New York, on the Relation of Franklin D. Sherwood, for a Mandamus against Frank Rice, as Secretary of State; Edward Wemple, as Comptroller of the State; Elliot F. Danforth, as Treasurer; Charles F. Tabor, as Attorney-General, and John Bogart, as State Engineer and Surveyor, Composing the State Board of Canvassers.

The People of the State of New York, on the Relation of William C. Daley and John I. Platt against the Board of State Canvassers of the State of New York, and Frank Rice, Secretary of State; Edward Wemple, Comptroller; Charles F. Tabor, Attorney-General; Elliot F. Danforth, Treasurer, and John Bogart, State Engineer and Surveyor, as Members thereof and Each of Them.

In the Matter of the Application of Rufus T. Peck for a Writ of Mandamus against the Board of State Canvassers.

In the Matter of the Application of John H. Derby for a Writ of Mandamus against the Board of State Canvassers.

It is hereby stipulated, in each of the above entitled proceedings, that an appeal shall be immediately taken from each of

the orders granted therein, at the Columbia Special Term commencing December 5, 1891, and entered in Albany county clerk's office December 7, 1891, that the relators therein will print the papers upon such appeals and furnish them so that the appeals shall be submitted to the General Term, now being held in the Third Department, on Tuesday, December 8; that the respondents, upon such appeal, will accept notice of argument thereof for that day and unite with the appellants in a request to the General Term to put such appeals upon its calendar for that day, and immediately hear and decide appeals; that the defeated party at General Term shall immediately appeal to the Court of Appeals, and the prevailing party shall accept short notice of argument of the appeals in that court, and unite with the appellants in a request to the court to place the appeals upon the present calendar and hear them upon some day to be fixed by the court therefor as early as practicable, and that the proceedings of the State board of canvassers, relating to the canvass of votes for senator in the Fifteenth, Sixteenth, Twenty-fifth and Twenty-seventh senatorial districts be suspended until the decision of the Court of Appeals upon such appeal, providing such decision be made prior to December 30, 1891, and that such canvass shall be completed and the certificates of the result and of election made and issued by the State board of canvassers in accordance with the decision of the Court of Appeals in these cases, if so made, and also in the Twenty-fifth district in accordance with the decision of the Court of Appeals in this and other appeals.

Dated Albany, September 7, 1891.

I. H. MAYNARD and
DELOS MCCURDY,
Attorneys for State Board of Canvassers and Frank Rice, Secretary of State.

J. F. PARKHURST,
Attorney for F. D. Sherwood, Relator.

WILLIAM NOTTINGHAM,
Attorney for Rufus T. Peck.

MATTHEW HALE,
Of Counsel for Relators Daley and Platt and Derby, and all other Relators.

Thereupon pro forma orders were entered the same day, both in Special and General Term, and an appeal taken in each case to the Court of Appeals.

So far as the State board of canvassers was concerned, the only question involved in the Fifteenth senatorial district was the validity of the statement of the canvass of the votes in Dutchess county, then before that board. If this statement was properly authenticated, the State board could not go behind it, no matter what legal controversy there might be relating to the action of the board of county canvassers. With such controversies the State board did not and could not concern itself. This statement of the county canvass was attacked on the ground that it was not attested by the county clerk as required by law, but purported to be attested by one John J. Mylod, as secretary pro tem. of the board; and upon the further ground that the county board could not send the original returns directly to the State board, but must file them in the county clerk's office, and certified copies thereof be forwarded to the State board by the clerk.

Referring again to the stipulation, it is proper to say it was made and entered into by all the counsel in the cases, in absolute good faith and with the perfect understanding, on our part, that, by its express terms, it embraced all matters in controversy in the contested election cases, and submitted them for final decision to the Court of Appeals. It was read to the Court of Appeals on the argument by Mr. Choate, the leading counsel for the relators, and the court informed by him that its decision would finally settle and determine the whole controversy in these four senatorial districts, as well as the question which political party would have control of the State sen ate for the next two years.

At the time the stipulation was made, and at the time of the argument before the Court of Appeals, it was not intimated by any one then before the court that any attempt would be made to send up from Dutchess county a new return, and thereby create a new controversy over the result there, which could not be passed upon or determined by the Court of Appeals. In short, it was believed by us, and we had a right to believe from the scope of the stipulation and the statements made by counsel for the relators, that they assumed that the decision of the Court of Appeals, in the cases then before it, would finally determine all possible controversy as to the result of the election in those four senatorial districts. In those cases my advice was sought and given upon five separate propositions:

First—Whether the Supreme Court at Special Term possessed the power to control the action of the State board of canvassers, or its members, by means of stays, injunction orders or writs of injunctive mandamus.

I advised that the Special Term did not possess such power, and that the power could be exercised only by the General Term in the Third department. This advice was sustained by the decision of the Court of Appeals (The People ex rel. John H. Derby vs. Frank Rice et al. composing the Board of State Canvassers, 41 State Reporter, 933), in which it was held that the members of the State board could not be restrained or controlled in the performance of their duties by an order granted at Special Term, but only by an order granted at the General Term under section 605 of the Code of Civil Procedure. The court saying: "The inhibition of this statute is jurisdictional and an order not granted as prescribed is a nullity."

Second—Whether Franklin D. Sherwood was eligible to the office of senator in the Twenty-seventh district, and whether the State board of canvassers could be compelled to issue to him a certificate of election, notwithstanding his ineligibility. I advised the board that Sherwood was not eligible, and that they could not be compelled to issue to him a certificate of election, and the correctness of that advice was sustained by the Court of Appeals (Matter of Sherwood vs. State Board of Canvassers, 41, State Reporter, 912), the court saying at page 916: "He (Sherwood) could not be elected to or hold the office of senator. He violated the constitutional provision in seeking the votes of the electors and they

violated it in voting for him. As matter of constitutional law, any certificate the appellants could issue to him would be an absolute nullity, and the only use he could make of it would be to violate the constitution and do a wrong by intrusion into an office which he has no right for one moment to hold." Again, on page 920: "He and his competitor may both present their cases to the senate, without either of them having a certificate of election, and that body will have jurisdiction to determine all the questions of fact and law involved in the matter."

Third—Whether ballots in the Twenty-fifth district not indorsed with the number of the election district where they were used by the electors, but indorsed with the number of another district, could be lawfully counted for the candidate for whom they were cast. I advised that they could not be counted, but should be excluded from the computation by the canvassers, and my advice was sustained by the Court of Appeals in People ex rel. Nichols vs. The Board of County Canvassers of Onondaga County (41 New York State Reporter, 713), the court, per Ruger, Ch. J., holding that these ballots contained "obviously illegal indorsements." And, again, that "there is the strongest evidence in the case to show that they were designedly transposed." And, again, "the ballots cast in all of the towns and districts named were taken under circumstances which obviously exposed the political character of every Republican vote, as notoriously as though it had been openly proclaimed by a herald at the polls."

Fourth—Whether the returns of the board of county canvassers of Dutchess county authenticated by John J. Mylod, as secretary pro tem., were validly certified so as to entitle them to be filed and considered by the board of State canvassers, as a duly authenticated result of the canvass of the board of county canvassers of Dutchess county, upon which the State board of canvassers could lawfully act.

My advice was that the so-called Mylod return was, under the circumstances, properly certified and could be lawfully used by the State board of canvassers in determining the result of the election in Dutchess county; and my advice was sustained in this respect by the Court of Appeals (The People ex rel. Daley vs. State Board of Canvassers, 41 State Reporter, 943), the court using this emphatic language: "In this case we think that, under all the facts, the steps taken to certify and authenticate the statements were valid and the proceedings by which they were sent to and received by the secretary of state and the other State officers were sufficient to entitle them to be filed and considered by the board of State canvassers as the properly certified result of the canvass of the board of county canvassers."

Fifth—Whether, after the stipulation referred to, the relators could properly procure a new return from Dutchess county, and transmit it to the board of State canvassers and thereby create a new controversy, before the Court of Appeals had rendered its decision as provided for by the terms of the stipulation.

I advised that, pending the decision of the Court of Appeals, no new return could properly be sent up, and none should be received by the board of State canvassers; that the relators and the board of State canvassers were bound by that stipulation, and neither could violate it; that by its terms the board of State canvassers was prohibited from acting upon the returns then in their possession until the decision of the Court of Appeals, and were then bound to complete the canvass and issue certificates of the result, and of election in accordance with the decision of that court.

After the stipulation was made it was discovered that the relators, through attorneys other than the ones who had signed the stipulation, were endeavoring to secure the transmission of another return from the board of county canvassers of Dutchess county, and this endeavor continued through a period of several days. It seemed to receive its stimulus when it was demonstrated upon the oral argument of the cases on December 11th, that the relator's position in respect to the Mylod return was utterly untenable. The question then arose for the consideration of the governor, secretary of state and comptroller, as to what course should be pursued by them in case another return was transmitted to them by the county clerk of Dutchess county. This question received the most careful consideration and elaborate examination, especially with respect to the rights of the parties under the stipulation referred to. I reached the conclusion, and advised the State officers that they ought not to receive or file any such statement pending the determination of the case in the Court of Appeals; and that if the attempt was made to transmit any such statement, it should be returned by the State officers to the county clerk of Dutchess county, with a statement of their reasons for so doing, unless they were restrained by the order of the General Term of the Third department, which was the only branch of the Supreme Court having jurisdiction to control their action in this respect, as was subsequently decided by the Court of Appeals in both the Fifteenth and Sixteenth senatorial district cases.

I did not rely upon my own judgment in giving this advice, nor upon the advice of my associate attorney, Mr. McCurdy, who was also strongly of the same opinion, but we consulted upon this point the eminent counsel who had been employed to assist us in the conduct of the cases, namely, Hon. F. R. Gilbert, formerly a justice of the Supreme Court; Hon. Augustus Schoonmaker, a former attorney-general of the State, and Hon. J. Newton Fiero, president of the State Bar association, each of whom, after a most careful examination of the question, advised that the State officers ought not, and could not, properly receive any further returns from that county, pending the decision of the case in the Court of Appeals. All of this occurred before December 21, 1891. But the question is no longer a matter resting upon the opinion of attorneys; it is res adjudicata.

On the 23d day of December, 1891, an application was made at the Special Term of the Supreme Court, sitting in Albany, for an order requiring the county clerk of Dutchess county to show cause, at the same Special Term, on December 29, why a peremptory mandamus should not issue commanding the county clerk to retain in his possession any other

return made by the county canvassers of Dutchess county, excepting the one attested by John J. Mylod, secretary pro tem., and to refrain from filing or attempting to file any such return with the State board of canvassers, the order meanwhile restraining the county clerk from filing or attempting to file any such return with the State board. This order to show cause was granted upon the sole ground that under the stipulation, and on account of the pendency of the case in the Court of Appeals, the county clerk could not lawfully transmit any such returns.

The learned judge who granted the order to show cause made a most careful examination of the question before granting it; and again, when the order was returnable before him on December 29 and 30, and made a final order that a peremptory writ of mandamus issue to the county clerk, commanding and requiring him to retain in his possession any such returns, and to refrain from filing or attempting to file any returns in his possession with the State board or any member thereof, which order has not been appealed from. All the papers relating thereto are on file in the Albany county clerk's office.

It had, therefore, been determined before December 21st, that if the county clerk of Dutchess county, in disregard of the stipulation and of the stays of proceedings which were in force, should transmit any return to the comptroller, he would not receive or retain it, but would immediately return it to the county clerk with a statement of his reasons for so doing.

On the evening of December 21st, shortly after six o'clock, I was informed by telephone from Mr. Hinckley, at Poughkeepsie, that the counsel for the relators there were threatening the county clerk that if he did not at once mail the new return he would render himself liable to punishment, and that the county clerk was about to comply with their demands. I replied that the county clerk had no right to forward the return, in view of the stipulation and the proceedings under it, and that he was enjoined from forwarding it by the order of Judge Fursman, which was still in force, and that another order had been granted that afternoon by Judge Ingraham (Mr. McCurdy having just before telephoned from New York that such order had been signed), and told Mr. Hinckley to communicate these facts to the county clerk, which, I am informed, he did.

Shortly afterward we were informed that the county clerk had mailed the new returns, and it was at once determined, pursuant to our previous conclusion, not to receive them, but to send them back by a special messenger or otherwise, and I prepared a memorandum of the grounds upon which they were to be returned and which was to accompany their return. These were:

First—That the county clerk had no right to transmit them, because of the stipulation and the pending proceedings under it.

Second—That the attempted transmission was in violation of the stay granted by Judge Fursman.

Third—That it was in violation of the stay granted by Judge Ingraham.

This, then, was the situation at the close of December 21, and the papers would have been returned the next morning, probably by special messenger, if not, by mail, to the county clerk. It so happened that the clerk himself came to Albany for the purpose of taking them back, if he could be permitted to do so, and his presence therefore afforded a safe and convenient medium for their return. But they would have been returned if he had not then come to Albany.

At about 8:30 in the morning of December 22, Mr. Emans, the clerk, called upon me at the house, with a letter of introduction from Mr. Hinckley to the governor, saying that Mr. Emans was satisfied he had made a grave mistake in mailing the new returns, and that he wished to do whatever he could to rectify it, and desired to take back the returns if he might be permitted to do so. I walked down the street with him and he told me he had been intimidated and bulldozed by the counsel for the relators into mailing the papers; that they pointed to the clause in the order of Judge Cullen, to "forward the returns forthwith," and told him that that meant that very hour.

He also stated that, surrounded as he was, he felt constrained to yield to their compulsion and mailed the papers; but that he wished to be allowed to take them back again. I told him that I had no doubt he could do so; that it would have made no difference whether he came up or not, for the papers would have been sent back to him; but as he was here he could take them back himself.

We had, at that time, reached the entrance to the capitol, and he spoke of the return he had directed and mailed to the comptroller. I told him the comptroller was not in town, and there was no one here who could represent him in such a matter but myself, and that he might go to the executive chamber and secretary of state's office and see about the paper there. I went to the comptroller's office and found the clerk who had charge of the comptroller's mail engaged in opening it. I asked him if there was a letter in the mail that morning from Poughkeepsie. He looked the letters over and found one, and only one. I told him that it was probably from the county clerk, and that the clerk was then at the capitol, and said he had sent it by mistake and wanted to take it back, and that it was right he should do so and I would take it over to him, and if it was the one sent by the clerk I would deliver it to him; if not, I would have it returned to the comptroller's office. I took the letter to the capitol and found Mr. Emans in the secretary of state's office with Judge Rice. I handed him the envelope in Judge Rice's presence and asked him if that was the letter he wanted. He said it was, and I gave it to him.

He said he already had the letters which had been sent to the governor and secretary of State, and asked me what he should do with them after he got back to his office. I told him he had better put them in his office safe and carefully preserve them. I also told him not to hesitate to say that he had taken them back and had them in his possession, and to give the reasons why.

Soon after I saw in the public prints a statement purporting to come from Mr. Emans, to the effect that he had got the returns back, because he had been tricked and deceived into sending them in the first place.

What I did in this matter I did as the attorney and representative of the comptroller, and I had full authority to act for him in all such matters, and he so understood it, as will fully appear from his statement hereto appended.

Independently of the force and effect to be given to the stipulation and the pending proceedings under it, the county clerk was enjoined from forwarding copies of any new statement of the canvass, by an order granted by Mr. Justice Fursman, December 14, 1891, which directed the clerk not to transmit any such copies to the State officers until the further order of the court. This order also contained an order to show cause, returnable at the Brooklyn Special Term December 19, why all proceedings under an order granting a peremptory writ of mandamus against the board of county canvassers should not be stayed, pending an appeal from such order. It was under this order to show cause that the matter came on before Judge Cullen, and in which he made the order requiring the clerk to forward the statement forthwith. The venue of the proceeding was in Dutchess county, and all orders had to be entered there which required entry. Judge Fursman's injunction order was, therefore, in force until the filing and entry of Judge Cullen's order in the county clerk's office at Poughkeepsie. This did not occur until at least nine o'clock on Tuesday morning, December 22. The attempt to file the order at 5:45 o'clock on the afternoon of December 21 was not a filing and entry of the order upon that day. The clerk's office could not be open or be legally held open for the transaction of public business after five o'clock on that day. (4 R. S. [8th ed.], p. 46, § 54; France v. Hamilton, 26 How., 189; Hathaway v. Showell, 54 N. Y., 97; Devlin v. Mayor, 9 Daley, 331.)

All papers filed or entered after 5 P. M. of that day must be deemed to have been filed and entered at 9 A. M. the next day.

It is scarcely necessary to refer to authorities to sustain the proposition that where an order enjoins or stays a person until the further order of the court in the premises, that such stay continues in force until the order terminating it is entered. The order does not become operative until entered. (Petrie v. Fitzgerald, 2 Abb. Pr. [N. S.], 354; Whitney v. Belden, 4 Paige, 140; Stewart v. Berge, 4 Daley, 477; Brower v. Loonis, 17 Hun, 439; Vilas v. Paige, 106 N. Y., 439, 455; rule 3 of the Supreme Court.)

The clerk was also bound to obey the injunction order granted by Judge Ingraham, if he was informed that the order was granted and was about to be served upon him. (People v. Brower, 4 Paige, 405; Hull v. Thomas, 3 Edwards, 236; People v. Compton, 1 Duer, 512; Conover v. Wood, 5 Abb. Pr., 84.)

This was an ex parte chambers order and did not require entry.

The clerk having been inveigled into mailing the returns in defiance of the orders of the court, it was his duty, when he became aware of the situation, to regain possession of the papers, if he could do so with the consent of the parties to whom they were directed, and thus reinstate himself in the same position, with respect to the outstanding orders, that he occupied at the time of mailing them.

With respect to the contempt proceeding before Judge Cullen, I have only to say that it was instituted ostensibly for the purpose of punishing Mr. Emans for contempt, but it seems to have been used, and was doubtless intended for another and entirely different purpose. I was not a party to it, was not counsel for any party to it; was not examined as a witness in it, and was denied the opportunity of an examination. I was subpœnaed to be at Brooklyn on January 20th, when my engagements here rendered it impossible for me to be present. I sent word to the court and the counsel to that effect. A referee was appointed to take the testimony of witnesses in Albany. By inadvertence on my part, the day of the hearing was first fixed for Monday, February 1st, when I could not attend, because it was consultation day of the court. As soon as I discovered that fact I wrote to Mr. George Bliss, who was conducting the proceeding, requesting him to fix another day, and saying that I could attend on Tuesday, February 2d, or on any other day of that week except Thursday. He wrote me, under date of January 29, that he had subpœnaed other witnesses for the first of February, and would have to examine them then; but if I could not attend on that day, he would arrange for my examination on some other day, but was not prepared to say whether the next day or not. The examination of other witnesses was had on Monday, February 1st, and at the close of their examination Mr. Bliss announced that he had no other witnesses to examine; that the hearing was closed; and he took with him to New York the report of the referee. He did not arrange for any other day for my examination, and hence I was not permitted to testify upon the subject.

When the decision of the Court of Appeals in these cases was handed down, on December 29th, my relations with them as attorney ceased. My advice was not sought by the members of the board of State canvassers as to what they should do in view of the decisions which had been rendered. The legal controversy was at an end, and with it terminated my authority to act for them. It then became their duty, as a board of public officers, to make such a canvass as, in their judgment, acting upon their official oaths, the decisions of the court required. All of the opinions of the court, both prevailing and dissenting, were delivered to them. They went into executive session, and, as I am informed, every opinion was read throughout, in the presence of all the members, and a conclusion arrived at by them, without advice or suggestion from any outsider; certainly without any from me. I was present as a spectator in the room at the public meeting of the board when the result was announced; I heard counsel for the relators make some inquiries of the board, as to the additional returns from Dutchess county. The inquiry was addressed to members of the board and not to me, and I had no right to say anything but it was a part of the history of the case, that the return had been sent back eight

days before, and was not then in the possession of any member of the board. If the State officers were bound to receive the return, they had an ample remedy. The General Term of the Supreme Court of the Third judicial department was in session as late as December 28. Application could have been made to it to compel the State officers to receive the returns; and the whole question determined, as to whether, under the facts as they then existed, it was their duty to receive and retain them.

The Court of Appeals distinctly pointed out in the Fifteenth and Sixteenth senatorial district cases the proper course to be pursued by the relators.

As the case stood when the State board acted, it was their duty to make the canvass upon the return before it. The five cases in the Court of Appeals were argued as one case, as there were some questions common to all the cases; and when such a question was decided in one case, it was to be regarded as the decision in all. The court decided in the Derby case that a Special Term could not grant a writ of mandamus to compel the State board to refrain from using any papers before it; and in the Fifteenth district case the court decided that it was only the proper branch of the Supreme Court (meaning thereby the General Term) which could restrain the State board from using the return before it, which disposed of that part of the order granted at Special Term, which commanded the State board to abstain from using the so-called Mylod return, and left them at liberty to use it. The court expressly ordered that part of the order of the Special Term to be struck out which prohibited the State board from using anything but certified statements forwarded by the county clerk. It was, therefore, the plain duty of the State board to make the canvass upon the return before it, and declare the result accordingly.

But with respect to the new return from Dutchess county, it is proper that I should add that its correctness and validity were seriously questioned by the attorneys who had charge of the case. Whether these allegations were well supported or not I am unable to say. I only know that the attorneys were denied the privilege of having its correctness or validity passed upon by the General Term and the Court of Appeals. It was, therefore, an attempt to have a return placed before the State board for their action, unsupported by any decision, except that of the Special Term, while the return upon which we relied had to be submitted to the ordeal of the Court of Appeals.

Nor did the Court of Appeals decide that the Mylod return was not a correct statement of the canvass. They simply held that there were allegations to that effect in the moving papers, which were not denied, and, therefore, for the purposes of that proceeding they might be taken as true. But they were not denied, for the reason that the State board could not properly enter upon such an inquiry, and under the stipulation the case must eventually turn upon the validity of the certificate which was before the board. The State board had sufficient information of the falsity of these allegations to have put them in issue, and would have done so but for the stipulation, which was intended to make the decision of the case turn upon the point as to whether the board had the right to make the canvass upon the first return.

I desire to say in conclusion that if an attorney may be censured for fidelity to his client and blamed for the advice he gave that client, even after the correctness of the advice has been sanctioned by the highest court in the State, it may well be asked what an attorney can do in his client's behalf with safety and honor. It is uniformly assumed that faithfulness to his trust and accuracy in his advice are cardinal virtues in an attorney. Measured by the standard by which professional conduct is usually gauged, that attorney is to be the most highly commended whose fidelity to his trust is firmest, and whose advice turns out in the end to have been most accurate.

These cases were among the very last in which I acted as attorney. Looking back through the years in which I have practiced at the bar, there is no work of my professional life which I regard with more satisfaction and pride than my conduct of them. There was no act done, no advice given by me, which I would not, in all things repeat under like circumstances.

I entered upon the conduct of the cases without compensation or the hope of compensation, and from a sense of duty only, and my sole reward has been that which arises from a consciousness of duty performed. Very respectfully,

ISAAC H. MAYNARD.

Albany, March 16, 1892.

Comptroller Wemple's Letter.

FULTONVILLE, N. Y., March 14, 1892.

Hon. Isaac H. Maynard:

Dear Sir—In regard to the Dutchess county election controversy, and the proceedings in relation thereto, and your connection therewith, I would state that upon the organization of the State board of canvassers in December last to canvass the returns of the State election, you were duly retained and authorized by the State board to represent them and the several members thereof, as their attorney and counsel, and to appear and act for them in all matters and proceedings relating to the various senatorial contests resulting from the election of 1891, and you did, as such attorney and counsel, represent the State board of canvassers, and myself as comptroller and member of that board, in all of such matters, with full authority in the premises.

Your judgment and advice were repeatedly asked and accepted in regard to all legal questions involved in said matters as they arose, from time to time, during the proceedings

When the stipulation was entered into, by virtue of which all disputed questions involved were to be submitted to the Court of Appeals for final decision, I understood that the submission thereof embraced all matters and questions involved in the disputed cases, and especially I understood that, in the Dutchess county case, the final determination of the board of State canvassers should depend upon the question whether the statements of canvass made by the Dutchess county board of canvassers, and attested by John J. Mylod as secretary pro tem., and then before the State board, was legally certified so that it could be used in our determination of the result of the votes in Dutchess county, and which should be settled by the decision of the Court of Appeals.

I was not at the comptroller's office on the afternoon of December 20th or the morning of December 21st, 1891; but afterwards learned that an attempt had been made by the county clerk of Dutchess county to transmit to the State authorities another statement of canvass, improperly and in violation of the said stipulation, and that such statement had been recalled by the county clerk and returned before being filed, the return of which met my approval.

In my examination before Judge Cullen, in the contempt proceedings against the county clerk, I testified that I was not present at my office when the alleged further return from the county clerk was taken away, and gave no specific authority to my clerk to give the package to any one. But I did not then testify that you were not authorized to have it taken if, in your judgment, it was proper to do so. I always considered that you had full authority to do as you considered proper in that and all other matters involved, as attorney and counsel for the board of State canvassers, and myself as one of the members composing the same.

The copies of certificates of county canvasses forwarded to the comptroller pursuant to the election laws do not become a part of the records of his office, and are not filed therein. The secretary of state is required by the law to obtain them, and, as matter of practice, all such papers are sent by the comptroller to the secretary of state after their receipt, and not retained in the comptroller's office. Yours very truly,

EDWARD WEMPLE.

Statement of County Clerk Storm Emans.

I am the county clerk of Dutchess county, and was such clerk on and prior to December 21, 1891.

On that day I left the clerk's office at five o'clock in the afternoon, that being the hour fixed by statute as the close of the official day, and closed the office. One young man, temporarily employed by me as a copyist, wished to remain in the office to finish some work on which he was engaged. I told him he might stay, but that he must not receive any papers or do any business whatever.

At about six o'clock in the evening I was called upon by John A. Cossum, one of the attorneys for the relators in the senatorial election case, who told me that an order had come up from Judge Cullen, requiring me to forward the new election returns at once. He insisted that I must go to my office and see about it.

I went with him and found that he had previously, and at about 5:45 P. M., induced the copyist to receive Judge Cullen's order in the clerk's office, and thereupon said Cossum had also persuaded the copyist to put the file stamp on the order and to write in the blanks left by the stamp impression "5:45" P. M., as hour, and December 21st as the day on which the order was filed.

I was then told by Cossum, and others acting with him, that I must at once put the new returns in the mail.

They told me to look at the order, which said "forthwith," and that that meant that very hour.

I asked them to wait until I could see what I ought to do.

They said if I waited I would render myself liable to punishment. I did not know but what they said was true, and fearing the consequences they pictured if I delayed longer, I finally yielded, and at 7:38 P. M. put the new returns in the mail inclosed in envelopes addressed to the governor, secretary of state and comptroller. I had, however, prior to that time and before mailing been told by Mr. J. W. Hinckley that Judge Ingraham had granted an order requiring me to refrain from forwarding the returns, and that the order was then on its way to be served personally on me, and that there was a stay in force; and also that under some stipulation I ought not to send forward the new returns.

These statements were denied by the attorneys for the relators and I could not then prove their truth, and the counsel for the relators threatened me with the consequences if I did not at once comply with their demand and immediately forward the returns by mail. After I had mailed the new returns, and on the same evening, I was personally served with a copy of Judge Ingraham's order. I then knew that I had been deceived by the relator's counsel.

I also learned that Judge Cullen's order could not be entered until nine o'clock on the following morning, and, therefore, Judge Fursman's stay was still in force and operative upon me.

As soon as possible, that very night, I started for Albany for the express purpose of stopping the returns before they reached the officers to whom they were addressed or of getting them back into my possession if they had reached those officers if I could do so.

I have read Judge Maynard's statement as to what occurred in Albany between us, and it is entirely correct. As soon as I returned with the papers I informed every one that I had obtained possession of them, and that I had brought them back because I had been tricked and deceived into sending them when I did. This statement of mine was published in the daily newspapers. I put the papers in my safe and kept them awaiting some further order of the court in respect to them.

STORM EMANS.

MAJORITY REPORT

OF THE

Joint Committees of the Senate and Assembly in the Subject-Matter Contained in Certain Documents and Letter of Judge Maynard in Regard to the Senatorial Election Cases in the Fifteenth Senatorial District.

To the Legislature:

The joint committees on the judiciary of the senate and assembly, to whom, by concurrent resolutions, adopted March 24, 1892, it was referred to make investigation of the statement and allegations contained in the documents accompanying said resolutions and report their conclusions thereon, have the honor to report:

We have examined the evidence taken before the Association of the Bar and the report based thereon. It charges Judge Maynard with wrong, first, in his having taken from the office of the comptroller, on the morning of December twenty-second, a sealed envelope containing one of the certified corrected statements which had been transmitted to that officer through the mail by the county clerk of Dutchess county; second, by his acquiescence in the canvass of the Mylod returns by the board of State canvassers, on the pretext that the corrected return removed by him was not before them.

To determine the truth or untruth of these charges, it is necessary to examine the exact situation of affairs at the time Judge Maynard is alleged to have committed such acts.

Judge Maynard gave to the board of State canvassers advice as to their duties in every one of the districts in which there was a contest. His advice was affirmed in every instance by the Court of Appeals.

The charges against Judge Maynard are confined entirely to the advice he gave in reference to the contest in the Fifteenth senatorial district.

As early as the 30th day of November, 1891, a certificate from that district had been duly filed, in accordance with the laws of this State, in the office of the secretary of state.

The board of State canvassers were in session. Judge Maynard advised them that it was their duty to count such certificate. This certificate is spoken of as the Mylod certificate.

An application for a mandamus was made by the Republican contestants in that district, returnable on the 5th day of December, 1891, before Judge Edwards, at his chambers, in the city of Hudson. By this mandamus the Republicans sought to restrain the board of State canvassers from counting the Mylod certificate.

The board of State canvassers were advised by Judge Maynard that no judge sitting at Special Term could restrain their action, that the only court having jurisdiction in the premises was the General Term of the Third department. This advice was subsequently affirmed by the Court of Appeals. Therefore, on the 7th day of December, had the board of State canvassers followed his advice and performed their duty, the Mylod certificate would have been counted and Edward B. Osborne would have taken his seat as senator for the Fifteenth senatorial district without further question.

After the 7th day of December the only power of the board was that conferred upon it by the stipulation and the proceedings under it, their first meeting having taken place on the 2d day of December and they having no power under the law to remain in session for more than five days.

On that day Judge Maynard, acting for the board of State canvassers, entered into a stipulation with the relators acting for the Republican party in the county of Dutchess. That stipulation was made not alone in the Dutchess county case, but also in the Onondaga, Steuben and Rensselaer senatorial district cases.

The title of the Dutchess county suit was: "The People of the State of New York, on the relation of William C. Daley and John I. Platt, against the Board of State Canvassers of the State of New York and its individual members."

The entire object of that stipulation was to benefit the Republican party and to prevent a possible wrong being done by the board of State canvassers in at that date awarding to Osborne his certificate of election.

By the terms of that stipulation it was expressly provided that the proceedings of the board of State canvassers, relating to the canvass of votes for senator in that and the other districts in controversy, should be suspended until the decision of the Court of Appeals upon an appeal to be forthwith taken from the orders made in such various contested election cases.

The committee of the bar association express "astonishment that a proposition should be seriously maintained by a public officer holding a place in the highest judicial tribunal in the State that it is competent for the Board of State Canvassers, by agreement with private individuals who have instituted suits against it, to directly suspend the operation of the laws of the State," and they assert that "the proposition amounts to the assertion that the members of the board of State canvassers have authority whenever, in their judgment, it is expedient, to refuse to receive and act upon those solemn legal evidences of the popular will, as expressed at elections, which the law imperatively requires them to receive and act upon."

This language, while forcible, is meaningless, unless it be the judgment of that committee that it was the duty of the board of State canvassers to have counted the Mylod certificates there and then. And it is a strange reflection upon the assumed integrity of those gentlemen that they should complain that Judge Maynard, though advising as a lawyer that it was the duty of the board to canvass forthwith, should for the purpose of being certain that there was no error in his advice by which the defeated Republican candidate could be injured, have urged the board to stretch their powers to the extent, not of refusing to receive and act upon "the solemn legal evidence of the popular will," but to await the decision of the highest tribunal of the State on the allegations made by the Republican contestants, that they were violating their duty if they counted such return at that time.

It may be that Judge Maynard erred in giving this advice. In the light of subsequent events, we believe the Mylod certificate should have been counted then and there. But it is an evil mind, indeed, that asks and approves a concession and then criticises those who grant it.

But what is more, the very relators who signed and obtained such concession proceeded forthwith to change the situation.

Judge Maynard was counsel to the board of State canvassers. He had taken no part in, and there is nothing to show that he knew anything as to the situation of, any other litigations than those to which his clients were parties.

It is asserted that at the very time this stipulation was made, the same relators were engaged in another proceeding by which they sought to obtain a mandamus compelling the board of county canvassers of the county of Dutchess to reconvene and recanvass the vote of that county.

It is claimed by Judge Maynard that the fair intent of the stipulation and his understanding of it was that it meant that no other proceedings of any kind were to be taken to alter the situation in which the board of State canvassers then stood. The argument in favor of this position is so strong as to amount to conviction.

Judge Maynard having advised the board to count at that time could scarcely have committed so great an error as to advise them by their own act to postpone the counting for a period of three weeks, if he had any reason to suppose that the Republican contestants would meantime change the state of affairs by causing to be forwarded to the board of State canvassers a new and different certificate.

It is claimed by the committee of the bar association that Mr. Joseph H. Choate and Mr. Matthew Hale and all the counsel who were opposed to Judge Maynard, did not hold the same understanding; but we have not been favored by this committee with any evidence to sustain such statement in their report, though they did, under oath, state that we were given all evidence before them.

We do not, however, regard it important to determine how counsel may have understood or construed the stipulation, the attorneys for the respective parties may have honestly entertained different views upon the subject; the stipulation must be construed according to its terms and in the light of the proceedings had under it, and in so construing it we have no hesitation in affirming that during the pendency of the case in the Court of Appeals, the comptroller as a member of the State board of canvassers could not properly receive and transmit to the secretary of state another return from Dutchess county, without violating its terms.

But it is averred that Mr. Osborne himself, having commenced certain proceedings on the 19th of December, it necessarily follows that Judge Maynard must be mistaken in his views.

Strangely enough, there is shown in the record given us by the Bar association an adjudication of the Supreme Court of this State in favor of Judge Maynard's contention in this regard, and the fact that it is never alluded to in the memorial addressed to this legislature indicates strong ground for the belief that only such facts were stated and such deduction drawn as could cause an unfavorable reflection upon Judge Maynard.

On the twenty-third day of December, Mr. Edward B. Osborne verified an affidavit containing this phrase: "That under and by the terms of said stipulation" (referring to the stipulation in question), "this relator is entitled to have the canvass, when finally made, proceed upon the return filed November 23, 1891, as aforesaid, and to have the board of canvassers of the State of New York decide and determine the canvass upon the said return so filed."

Upon that affidavit an order to show cause why a writ of mandamus should not issue was granted by Judge Mayham, which order to show cause contains this statement: "That a stipulation was made and entered into by and on behalf of the relators representing the interests of the persons opposed to the election of Edward B. Osborne as senator, in and by which it was agreed that the proceedings of the State board of canvassers relating to the canvass of votes for senator in the said Fifteenth district should be suspended until the decision of the Court of Appeals upon such appeal, provided such decision should be made prior to December 30, 1891." And that the county clerk of Dutchess county be restrained from forwarding any other return and from filing or attempting to file the same with the State board of canvassers.

And on the 30th day of December, in answer to said order to show cause, a peremptory writ of mandamus was issued by Judge Mayham, requiring the county clerk of Dutchess county to retain in his possession the second return, of which so much has been said, and to refrain from filing or attempting to file such return with the board of State canvassers or any member thereof.

In the only instance, therefore, in which a judicial interpretation of this stipulation has been had, Judge Maynard's understanding of it was sustained.

These affidavits and orders are found at page 203 of the transcript of record prepared by the Bar association.

We, therefore, find that it is not only conceivable that it was the design of the parties to the stipulation to arrest any other proceedings than those specified in the stipulation, but that such was the intent and object of the stipulation, and any endeavor to break its force or effect by the relators was a fraud upon the voters of the Fifteenth senatorial dis-

trict who had cast their ballots for Mr. Osborne, and a fraud which it was Judge Maynard's duty and that of his clients, the board of State canvassers, to frustrate.

It is true that there was this other proceeding then pending before Judge Barnard, by which a recanvass of the votes of Dutchess county was sought; and it is true that on the 9th day of December Senator Osborne instituted proceedings to compel a correction of the new canvass made by the board of supervisors of that county in pursuance of Judge Barnard's peremptory mandamus. The State board of canvassers were not parties to such proceeding, and Judge Maynard had nothing to do with it. But it must have been known to the members of the committee of the bar association that that step was taken by Mr. Osborne, because it was his only relief under the provisions of the ballot law of 1890. It was done because Judge Barnard had ordered the new canvass; and when the new canvass was filed with the county clerk, Mr. Osborne was compelled, for his own protection, to take this step.

It was no new proceeding instituted by him.

His proceeding was but a defense to the active proceeding which the Republican relators, Platt and Daley, took after signing their aforesaid stipulation.

The stipulation was a cessation of hostilities. Thereupon the relators moved their artillery to the rear, and when the Democrats assumed to defend themselves against such treacherous attack, they are charged with a violation of the stipulation themselves.

But it is said that the Mylod return was illegal and false, and that the new and so-called corrected return, against which Mr. Osborne initiated his proceedings on the 9th of December, is the correct return.

It is strange, indeed, that this same committee, with all their assumed honesty should have presented to the legislature a record containing the most overwhelming and uncontradicted evidence of unblushing bribery even presented in a court of justice, which bore, and bore alone, upon the so-called corrected return, and which marks the so-called corrected as in fact the fraudulent return.

It is a fact that the only difference between the Mylod certificate and the corrected certificate is as to the throwing out by the board of county canvassers of eighteen ballots in the district of East Fishkill, and thirty-one ballots in the Third election district in the town of Red Hook.

The evidence thus referred to shows that these eighteen ballots in the East Fishkill district were the ballots of bribed voters, in pursuance of a completed and perfected conspiracy in that regard, by which the terms of the ballot reform act of 1890 were turned to the benefit of bribe givers and bribe takers, and by which the Republican party seeks to credit their candidates with eighteen purchased votes.

As to the Third district of Red Hook, being the district in which resided the Republican county clerk of Dutchess county, and himself a candidate for re-election, there were thirty-one ballots voted, clearly marked for identification and clearly and designedly so used. Each of such marked ballots contained the name of the Republican candidate for senator. And evidence is found in the record of the Bar association at page 109, uncontradicted, to the effect that Republican leaders and workers in that district have boasted that they knew their men voted right by their use of such marked paster ballots. The Supreme Court General Term of the Second Department passed upon these questions the day the bar association adopted its resolutions. Its language is in these words:

"To my mind as to the eighteen ballots in East Fishkill, the evidence was sufficient to establish a conspiracy for the purpose of committing a fraud in casting of ballots, but what evidence shall be satisfactory proof that any one ballot was bought or cast in fraud of the law is a difficult subject to which to apply any cast-iron rule, as the circumstances must differ in each case, but where a conspiracy is established to defraud, and some ballots containing a specified mark are shown to have been cast in pursuance of such conspiracy, it seems to me that all ballots containing such specified mark ought to be thrown out of the count. It is utterly impracticable to prove an intent of each individual voter except by the voter himself and such evidence cannot be compelled, as that would require him to testify to his own dishonesty. The law is therefore nugatory."

And it is this return, the product of fraud and corruption, that the board of State canvassers and Judge Maynard are criticised for not assisting to count.

The Mylod certificate was the completed return of the voluntary act of the lawfully elected board of county canvassers in the county of Dutchess; the fraudulent return was the product of the fiat of a Special Term of the Supreme Court, which, until the twelfth day of December, had made no order directing it to be sent to the board of State canvassers.

Senator Osborne's application for a mandamus was to compel a correction of this return, which would have made it agree with the Mylod certificate.

The court, in the first instance, gave him a peremptory mandamus so directing, requiring the board of county canvassers to reject and not to count the aforesaid ballots from the town of East Fishkill, and the aforesaid thirty-one ballots from the town of Red Hook.

But on the twelfth day of December, Judge Barnard vacated such order, quashed his writ of mandamus, and at the end of such order he directed County Clerk Emans to transmit, certified copies of the fraudulently corrected canvass to the governor, secretary of state and comptroller.

The Republicans, by such order, sought to obtain, during the armistice which they had secured, the filing of a fraudulently corrected return without a hearing upon the merits.

During the period that intervened between the twelfth of December and the final canvass of the vote the General Term of that department was open to them at any time to an application upon the merits to compel the board of State canvassers to accept such return. And it was the exercise of precisely that power that the Court of Appeals referred to in their opinion in the Dutchess county case, where they used the language quoted in the report of the committee of the Bar association. It was that if the facts were true as to such second fraudulently corrected return not being fraudulent, the court below, in its proper

department, to wit, the General Term, would have had the power to command the board of State canvassers to canvass without regard to the first return.

But before the court below in its proper department would have made such order, the question of fact, as to the bribery and corruption which caused it to differ from the Mylod certificate, must have been met and determined.

Such hearing the Republicans never dared to have, and such they sought to avoid by obtaining, in the first place, the stipulation, and then striving to violate its terms.

The fraudulently corrected returns remain untouched in the hands of the county clerk of Dutchess county until the fourteenth of December, when Judge Fursman granted an order requiring the board of county canvassers of Dutchess county to show cause before a Special Term, in the city of Brooklyn, on the 19th of December, why certain stays of proceedings should not be had, and such order meantime restrained the county clerk of Dutchess county from transmitting the certified copies of the said fraudulently corrected canvass.

This stay was vacated by Judge Cullen when the motion came on for a hearing, but the order vacating it was not entered in Dutchess county until the morning of December 22. It is true that it was delivered at 5:45 o'clock on the afternoon of December 21, to a copyist in the county clerk's office.

On the afternoon of December twenty-first, Judge Ingraham also granted a further stay against the clerk mailing such certified copies of said return, so that at the hour between seven and eight o'clock in the evening of December twenty-first, the county clerk of Dutchess county was under a double stay against his mailing such returns. He had been informed of the granting of Judge Ingraham's order. That such was the fact cannot be doubted, for Mr. Emans attended, before this committee, as a witness and so testified, and explained the use of some language in the affidavit that he made in the contempt proceedings, which had been claimed to be in contradiction of such fact.

With knowledge of both these orders on the evening of December twenty-first, the county clerk of Dutchess county mailed three copies of such returns, one to the governor, one to the secretary of state and one to the comptroller. On realizing that he had violated the order of the court, he went to Albany to get back his returns.

It is claimed by the exceptionally learned committee of the Bar association that these orders were without force and effect, and that the county clerk was under no stay, and not only violated no orders, but simply performed his duty in mailing these returns.

Various explanations of such position have been made by different members of that committee.

It is said in the report that the order of Judge Fursman being made in a proceeding to which the county clerk was not a party, was wholly inoperative upon him. This statement signifies a want of acquaintance with the authorities of this State on the part of the committee which we think at variance with their legal learning, though possibly consistent with their desire to bring Judge Maynard into contempt.

The decisions are clear that the clerk is an officer of the board of canvassers and bound by an order made for or against it, chapter 13, Laws 1842, title 5. (People v. Sturtevant, 9 N. Y., 263; Commissioners v. Buffalo, 1 Barb. Chan. Practice, 636; Rourke v. Russell, 2 Lansing, 242; Abell v. R. R. Co., 12 Abb., 171.) Disobedience to an injunction order will be punished as a contempt, and it is not necessary that service of the order should have been made if the person violating it has knowledge it has been granted. (Hull v. Thomas, 3 Edw. ch. 250; Mayor v. N. Y. & S. I. Co., 40 N. Y. Super., 300; affirmed, 64 N. Y., 623; People v. Brower, 4 Paige, 405; Neale v. Osborne, 15 How., 81; Wheeler v. Gilsey, 35 id., 139; Atlantic Tel. Co. v. Baltimore, etc., R. R. Co., 46 N. Y. Super., 377; Ewing v. Johnson, 34 How., 202; Waffle v. Vanderheyden, 8 Paige, 45.)

The decisions are equally clear that the knowledge of an injunction order is sufficient; and if County Clerk Emans was informed that Judge Ingraham's order had been issued, he was bound to obey it at his peril.

That such an order existed before the mailing of the fraudulently corrected returns is conceded by every witness who testified before this committee.

(For this order, see p. 129 of the Bar association record.)

The order of Judge Ingraham as soon as made fixed the legal status of the return subject alone to any action taken in good faith before information was given to the county clerk. The order fixed not only the duty of the clerk, but the legal rights of the actual parties. Hence it was the right of every person interested to have the return remain in fact where, by Judge Ingraham's order, it was in contemplation of law, and it was the duty of every citizen to aid in enforcing the order of the court staying the forwarding of the return. The Republicans had a remedy by application to the courts to compel the State board to receive the return, if their claim is correct, but of this they neglected to avail themselves, thus virtually conceding that the action of the State officers in refusing to receive this return was correct.

The proposed ignorance of the committee is nowhere better shown than in the statement in their report last above quoted. They knew, if they read any of the papers that lay before them, that the only order ever made directing Clerk Emans to forward these returns in question to the Board of State Canvassers was made by Judge Barnard in proceeding entitled as follows: "The People of the State of New York on the relation of Edward B. Osborne against The Board of Supervisors of the County of Dutchess, sitting as a Board of County Canvassers."

The stay granted by Judge Fursman was in that same proceeding.

If Judge Barnard could order the clerk to send the returns, it necessarily follows that Judge Fursman could, by an order made in the same proceeding, stay that clerk. More than this, the restraining order granted by Judge Ingraham was made in that same proceeding. If Judge Barnard could order the clerk to transmit the returns, Judge Ingraham, by an order in the same proceeding could stay him.

But more than this. Proceedings to

punish Clerk Emans for contempt were instituted before Judge Cullen. The proceedings in which it was sought to commit him to the common jail for violation of court orders was in that same matter, and it was for an alleged violation of an order made in that proceeding that he was brought into court to meet such punishment.

If County Clerk Emans could be punished for contempt because he failed to obey an order of the court made in that proceeding, what is to be thought of a committee daring to report that other orders unfavorable to the end they seek to reach, made in the same proceeding, are null and void?

County Clerk Emans, learning that in violating the stays of Judge Fursman and Judge Ingraham, he was in fact guilty of contempt of court, proceeded to Albany to get back the returns he had mailed in ignorance of his duty under such orders and in obedience to the orders he thus violated.

It was the duty of County Clerk Emans to correct the wrong he had done. It was his right to stop in *transitu* the delivery of such paper. It was his right to obtain this return, if he could, from the person to whom it was directed.

The statute of the State provides that all three sets of returns should be delivered to the secretary of state, one directly addressed to him, one to the governor and one to the comptroller, who are to deliver the same to him.

County Clerk Emans obtained, by the consent of the secretary of state, the next morning, the copy of the returns he had thus erroneously mailed to him. He stopped the other two returns in *transitu* as they were received in the mail in the office of the governor and comptroller.

The right of stoppage in *transitu* as to letters and papers of a private individual is sustained to the fullest length in Muller vs. Pondir, 55 N. Y., page 325.

Can it be consistently urged that the right attaches any the less for the purpose of rectifying an erroneous or wrongful act of a public officer?

It appears that Judge Maynard, when consulted by the board of State canvassers as to whether the Republicans could procure a new return from Dutchess county and transmit it to the board of State canvassers and thereby create a new controversy, advised that pending the decision of the Court of Appeals no new return could be properly sent, and none could be received by the board of State canvassers. In this advice he was sustained by Judge Gilbert, Hon. Augustus Schoonmaker and Hon. J. Newton Fiero.

This advice had been communicated to the board of State canvassers before County Clerk Emans arrived at Albany on the morning of the twenty-second of December.

Mr. Emans obtained himself the certificates from the secretary of state and the governor.

The comptroller not being in the city, Judge Maynard went to the comptroller's office, found the clerk who had charge of the mail, and told him that the county clerk was then at the capitol saying that he had sent the return, which was then in the mail of the comptroller, by mistake, and wanted to get it back. Judge Maynard advised the comptroller's clerk that the county clerk had the right to deliver it to him, or that it could be returned from the comptroller's office. The clerk gave Judge Maynard the letter, and he took it to the secretary of state's office, where he handed it to Mr. Emans. This was done openly.

He informed the county clerk to carefully preserve the returns and not to hesitate to say that he had take them back; that he had them in his possession, and give his reason for taking them back.

Judge Maynard had full authority from the comptroller to act in the matter. The comptroller had accepted the advice of counsel that it was his duty not to receive any such return, and has since expressly unqualifiedly approved Judge Maynard's action.

This act of Judge Maynard is treated by the committee of the Bar association as a violation of a section of the Penal Code. That section makes the taking of a record deposited in a public office, or with any public officer, an offense when it is willfully and unlawfully done, and only when so done.

The very fact of Judge Maynard going to the office and openly receiving the return certifies more to the innocence of the act than any language we can employ. Had he doubted in the slightest degree the propriety of the act, or felt that it was other than a lawful and proper proceeding, he would have employed other means to accomplish the end. It was not an unlawful act; it was not a willful act; it was an act which was the duty of the comptroller to perform. Judge Maynard's action was inconsistent with guilt—it was consistent with innocence.

And for the purpose of casting discredit upon Judge Maynard, his accusers have gone the length of purposely misapplying the words of the statute to an innocent and proper act.

The remaining accusation of the Bar association is that Judge Maynard was present at the meeting of the board of State canvassers on the 29th of December, when the Mylod return was counted.

It is said by the Bar association committee that this counting was made in the face of the opinion of the Court of Appeals upon the pretext that the corrected return was not before the board, and that Judge Maynard was present and remained silent, although he was well aware of the fact that the decision of the Court of Appeals required the counting of the return, in the removal of which he was the chief party concerned.

There was at that time in the hands of the board three certified copies of this return. The board of State canvassers had full knowledge of all the facts of the case. The Republican counsel who were present had the same knowledge, and had purposely waited three weeks without seeking any adjudication upon the merits of this return. What duty did Judge Maynard owe?

His statement that his functions as counsel to the board were then ended is not contradicted, it cannot be contradicted; but whether he yet remained counsel to the board or not, is of no importance. He would have been strangely lacking in his duty to the electors of the Fifteenth senatorial district if he had urged the board to count the fraudulently corrected certificate, or to do anything else than

count the lawful return then on file, the validity of which all parties to the stipulation of December 7th agreed should be passed upon by the court of last resort.

We read the language of the order from which the appeal was taken as to the counting of any future return to refer to a future return to be made in the event that the court of Appeals should decide that the Mylod certificate was not properly authenticated, and only that.

The whole force of the criticism against Judge Maynard as to this act is that he stood by as a matter of fact and saw an illegal return counted, while, at the same time, as matter of fact, a fraudulently corrected return was suppressed. We find that, as a matter of fact, the legal return was counted, and that the only suppression of the fraudulently corrected return was by the judgment of the Supreme Court of the Third department, which judgment today stands unreversed.

He was not and could not have been aware of the fact that the decision of the Court of Appeals required the counting of the corrected return, for the reason that the Court of Appeals decided nothing of the sort. All that was decided by that court was that the court below, in its proper department, could have compelled the canvassing of a corrected return if it was not fraudulent. Upon the merits of that return the Court of Appeals did not and could not pass any judgment.

Where the legislature receives a communication requesting that it consider whether the conduct of any officer does not demand the exercise of the power of removal, it is fitting, in the first place, that the merits of the charge should be inquired into and determined.

We have determined that in all that Judge Maynard did he acted as an honorable, upright and conscientious lawyer.

Having adjudicated upon the merits of the charge, it is right that the legislature should consider the motive.

A judge thus assailed is entitled to a vindication upon the merits; that is all he requires. But the legislature owes itself the duty of considering the motives of the charge.

It is known that two at least of the committee of the Bar association served as counsel upon the impeachment proceedings of Judge Barnard in 1871. It is known that at that time exhaustive argument was had upon the authority of the legislature to consider acts done in office but during a term prior to that in which the charges were presented.

In the argument made upon this question of law upon that trial, there was quoted as a precedent upon the right of the legislature to remove by concurrent resolution for acts committed before office taken, but one case; that case was the trial of Henry W. Merritt in the Common Pleas in the county of New York, in the year 1840. And in determining such questions the court used the following language: "If causes of removal were to be deemed sufficient for acts done before appointment, where is the line to be drawn as to the boundary to limit the examination. If the court can go back two years in one case, they may go back five in another and ten in another. And if the examination is only to be limited by the peculiar circumstances of the case under investigation, the court might be required to review the conduct of an individual at any previous time which the complainant thought fit to select."

While it was determined in the Barnard trial that so far as impeachment lay, acts committed in office prior to the term in which the impeachment was sought could be considered, no authority whatever was quoted for the removal of an officer by concurrent resolution for acts committed before office taken.

It has never been contended, and never will be successfully urged, that an offense for which impeachment does not lie can be punished by removal from office by concurrent vote of the two houses of the legislature; but since the trial to which allusion has been made, the legislature of this State, in the adoption of the Penal Code, expressly enacted that even impeachment should only thereafter lie for offenses committed in office.

It is therefore apparent that a body of lawyers asking the legislature to remove an individual from office for acts committed before office was taken, do so only as a excuse for the presentation to the public of willful aspersions against the character of the man so sought to be injured.

No one of the lawyers signing the report of the Bar association committee could have been ignorant of these principles of the law. It is, therefore, apparent that they did not and could not have expected, even had they believed the assertions they made, that the legislature could have imposed the penalty they suggested.

A charge being thus willfully made with knowledge that the suggested punishment could not be inflicted, it is not improper to examine the records of the association presenting it as to the action of such association in cases where wrong has been committed by persons in office.

We have looked in vain for an attack by the Bar association upon any officer taking his appointment from Republican sources.

While the committee of the Bar association was engaged in the investigation which led to the memorial addressed to the legislature, there was confirmed, by the senate of the United States as circuit judge of the United States for the district of Indiana, a man whose acts had been so notorious in office in connection with suppression of indictments against persons engaged in the purchase and sale of votes in the State of Indiana at the last presidential election as to lead men to wonder at the hardihood of the president of the United States in naming him for such high judicial office. For weeks his confirmation hung in abeyance before the senate of the United States. The facts were notorious and were discussed in all the public prints. The bar association of the city of New York had just as much right to protest against his appointment as they had to ask this legislature to consider charges against Judge Maynard. But no such protest was filed.

It is a notorious fact that at the last election in the county of New York more than 400 men were arrested and held to bail for alleged fraudulent registration, only one of whom has since been tried.

It is a notorious fact that at the election of 1890 more than 400 men were arrested in the same manner, and in their case bail refused, no one of whom was ever brought to trial.

These illegal and unwarrantable arrests were not made in good faith, but were made for the purpose of intimidating voters. The same thing has been done at each presidential and congressional election since the year 1876.

This was the work of John I. Davenport, an official holding judicial powers in the city where the bar association exists. No protest has ever been made against these acts.

This record would extend itself as we narrate each infamy of the Republican party since the electoral fraud of 1876.

But it is urged that this is not a Republican attack, but that the committee which signed the resolutions in the bar association consisted to some extent at least of men claiming to be Democrats.

It is frequently difficult to ascertain the political status of an individual; but if any of them be Democrats we think it will be sufficient to refer to the declaration made by a member of such committee in in an address made to United States Senator Hill, at the Manhattan club, as late as the 26th of January, 1892, when this language was used:

After Senator Hill had concluded, Mr. Coudert says: "He tells us that we have a Democratic senate; if we have, it is not only because the people of this State and the people represented in the legislature are, upon the whole, in a large degree Democratic, but because we were fortunate in having a man that knew no fear. He encountered great misrepresentation, encountered and risked greater obloquy than almost any man in the history of our State but he did his duty, and it is largely to that fact that the Democratic party in the State is to-night in the enjoyment of its fullest rights."

The change of heart that came may have been the result of the investigations of the secret conclave of members of the association of the bar who constituted themselves a committee of inquiry during the early days of March last, but it is passing strange that it also came about within so short a period after the holding of the Democratic State convention, on the twenty-second of February last, and contemporaneously with the initiation of the movement against the present organization of the Democratic party in this State.

The memorial addressed to the legislature reflecting upon Judge Maynard is the act of the Republican party and its allies. Therefore, in conclusion, your committee recommend the adoption of the following resolutions:

Resolved, That the action of the county clerk of Dutchess county, in forwarding an alleged statement of the canvass of the votes in that county to the governor, secretary of state and comptroller, on the 21st day of December, 1891, was unauthorized and illegal, and in violation of two injunction orders of the Supreme Court, then in force, restraining him from doing so. Itsprocurement by Republican counsel was a breach of faith and a violation of the stipulation and proceedings under it, by virtue of which alone the State board of canvassers then had jurisdiction of the matter and it was the duty of the county clerk to immediately take the necssary steps to regain possession of the papers, and it was the duty of the State officers to whom they were addressed and their attorneys to cause them to be returned to him upon his request. That such statement of the canvass was in truth false and fraudulent, and did not correctly set forth the canvass of the votes cast for senator in that county, in the last election, and it has been in fact so determined recently by the General Term of the Supreme Court in the Second department.

2. That when such statement reached the office of the comptroller on the morning of December 22, 1891, it was his duty and that of his attorneys and all other persons representing him no' to receive it, but to cause it to be immediately returned to the custody of the officer who had illegally transmitted it.

3. That in causing such statement to be returned unopened to the county clerk, Judge Maynard had full authority from the comptroller as his attorney, to act for him in the matter. Thatin so doing he did not violate any provisions of law, but on the contrary acted in accordance with the order of the Supreme Court, with reference thereto, and simply discharged his professional duty as the attorney for the comptroller, and in a perfectly proper and lawful manner.

4. That all the acts and conduct of Judge Maynard in the contested senatorial election cases, as attorney for the State board of canvassers, and the individual members thereof, including the return of this statement to the county clerk, were in conformity with the strictest code of professional ethics, and were designed to obtain a canvass of the votes cast in conformity to the law, and to prevent the commission of great public wrongs, and have our unqualified approval.

5. That we commend the appointment of Judge Maynard by Governor Flower, as a judge of the Court of Appeals, as eminently fitting and proper as a well-deserved recognition of his long and faithful public service, his integrity of character and ability as a lawyer.

6. That the final action of the State board of canvassers in the Fifteenth senatorial district, and in all the other senatorial election cases, was strictly in accordance with law, and with the decision of the Court of Appeals in each case, and embodied the result of the canvass of votes legally cast in each district, and by means of it the conspiracy on the part of the Republican leaders to nullify the ballot reform law and to issue certificates of election to candidates not lawfully elected was defeated, and that for this action such board of canvassers is entitled to the commendation of the people of the State.

All of which is respectfully submitted.

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GALEN R. HITT.
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DANIEL F. MARTIN.
MYER J. STEIN.
P. J. RYAN.
LOUIS H. HAHLO.

Dated Albany, April 18, 1892.