

GUIDE
TO COUNTING
MARKED BALLOTS
AT ELECTIONS

THOMAS HODGINS, Q.C.

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GUIDE
TO COUNTING
MARKED BALLOTS AT ELECTIONS
FOR THE
HOUSE OF COMMONS,
CONTAINING THE CLAUSES OF THE
DOMINION ELECTIONS ACTS OF 1874 & 8,
RELATING TO
VOTING BY BALLOT;
WITH NOTES OF DECISIONS AND FAC SIMILES OF BALLOTS,
ADJUDICATED UPON BY THE ELECTION COURTS.

BY THOMAS HODGINS, Q.C.

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1878.

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GUIDE
TO
COUNTING THE MARKED BALLOT PAPERS
AT
DOMINION ELECTIONS.

The following sections prescribe the mode of voting by Ballot at Elections for the House of Commons, and are taken from the Dominion Elections Act of 1874, (37 Vic. ch. 9,) as amended by the Act of 1878, (41 Vic. ch. 6.)

Form and Contents of Ballot Papers.

27. (a). The ballot of each voter shall be a printed paper (b) in this Act called a ballot paper (with a counterfoil) showing the names and description of each candidate alphabetically arranged in the order of their surnames, or if there be two or more candidates with the same surname, in the order of their other names; (c) the names and description of each candidate shall be set forth in the ballot paper as they have been set forth in the nomination paper, (d) and the ballot paper and counterfoil shall be in the form Schedule I to this Act. (e)

Ballot papers, form of,
[New Section 27
under 41 V. c. 6, s.
2.]

(a). This section is similar to rule 22 in the First Schedule to the English Ballot Act of 1872. (35 & 36 Vic. ch. 33.)

(b). Where voting by ballot prevails, it is generally provided that the ballots shall be in such form as not to be outwardly distinguishable from each other. But where a Statute provided that no ballot should be counted unless the same were written or printed on white paper without any marks or figures thereon intended to distinguish one ballot from another, ballots upon paper tinged with blue, which had ruled lines thereon (not however as distinguishing marks) were held to be legal ballots. *People v. Kilduff*, 15 Ill. 492. But ballots having an eagle printed thereon

were held to be in violation of the act, and were rejected. *Commonwealth v. Woelper*, 3 S. & R. Penn. 29.

(c) The ballot paper must contain the names of those candidates, only who have been duly nominated by nomination papers in the form Schedule F. Any votes given at the election for any other candidates than those so nominated, are null and void. The nomination paper must be delivered to the Returning Officer, with, (1) The consent in writing of the candidate, unless he be absent from the Province in which the election is to be held; (2) The affidavit of the witness or witnesses to the signatures and qualification of the nominating electors, and to the signature of the consenting candidate; and, (3) A deposit of \$50 towards the expenses. But the deposit is not a condition precedent by the English Act. *Davies v. Lord Kensington*, L. R. 9 C. P. 720, (ss. 19 and 21.) Any candidate may withdraw after his nomination and before the closing of the poll, by filing with the Returning Officer a declaration in writing to that effect, signed by himself; and any votes cast for such candidate so withdrawing, shall be null and void. (sec. 25.) See also *South Renfrew Election*, 11 C. L. J. 47.

(d) A candidate at an election was nominated by two nomination papers, each giving different localities for the residence of such candidate; one of the nomination papers was good, the other being defective, was admitted to be bad. The name of the candidate appeared twice as No. 5 and No. 6 on the ballot paper, according to the separate description in each nomination paper; seventy-one ballots were marked for him under the description given in the defective nomination; 301 under the valid nomination, and eight had crosses opposite each place where his name appeared: Held, that the mistake of entering the candidate's name twice, neither deceived nor misled any voter in voting for the wrong person, and did not therefore affect the result of the election, and that all the ballots marked for him should be counted. Held, further, that inasmuch as the ballot paper is to contain a list of the candidates and not a list of their nominations, that the Returning Officer should have entered his name once. *Northcote v. Pulsford*, L. R. 10 C. P. 476; *S. C.* 44 L. J. C. P. 217. A ballot which contains the name of the candidate voted for two or more times is to be counted as one vote; it is not to be looked upon as two or more ballot tickets folded together. *People v. Holden*, 28 Cal. 123; *Brightley on Elections*, 480: When there is a doubt as to the person intended to be voted for, by reason of a misspelling of the

surname, or of the addition of a different or erroneous surname, facts and circumstances of public notoriety, *dehors* the ballot, connected with the election and the different candidates, are competent evidence to ascertain for whom the ballots were intended to be cast. *Carpenter v. Ely*, 4 Wis. 420. The weight of authority in the United States, though there are some conflicting decisions, is in favor of the rule that, where a candidate is voted for by the initials only of his Christian name, parol evidence is admissible to apply the ballot to the candidate for whom it was intended. *Brightley on Elections*, 267. But in England it was held a fatal misnomer to represent the candidate's Christian name by its initial. *Mather v. Brown*, 34 L. T. N. S. 869. Voting papers inscribed Wm. Bradley and Willm. Bradley, were held to be admissible as votes for William Bradley. *Regina v. Bradley*, 3 E. & E. 634.

(e) The English Ballot Act provides (sec. 28) that, "The Schedules to this Act and the notes thereto, and directions therein, shall be construed and have effect as part of this Act," and in the Schedule it is noted, "The forms contained in this Schedule, or forms as nearly resembling the same as circumstances will admit, shall be used in all cases to which they refer, and are applicable, and when so used, shall be sufficient in law." In construing the provisions of that Act, it was held that the sections in the body of the Act are absolute enactments which must be obeyed or fulfilled exactly, whilst the rules and forms in the Schedules are only directory enactments; and that it is sufficient if the directory enactments are obeyed or fulfilled substantially. *Woodward v. Sarsons*, L. R. 10 C. P. 733; S. C. 44 L. J. C. P. 293.

Elector when Introduced into the Polling Booth, to state his Name, and receive a Ballot Paper.

43. Each elector, being introduced, one at a time for each compartment, into the room where the poll is held, shall declare his name, surname and addition, which shall be entered or recorded in the voters' list to be kept for that purpose by the Poll Clerk; and if the same be found on the list of electors for the polling district of such polling station, he shall receive from the Deputy Returning Officer a ballot paper, on the back of which such Deputy Returning Officer shall have previously put his initials, (f) so

Regulations for voting, and conduct of elector and Deputy Returning Officer.

[New section 43 under 41 V. c. 6, s. 5.]

placed that when the ballot is folded they can be seen without opening it, and on the counterfoil to which, he shall have placed a number corresponding to that opposite the voter's name on the voters' list.

The Deputy Returning Officer shall instruct him how and where to affix his mark, and how to fold his ballot paper, but without inquiring or seeing for whom the elector intends to vote except only in the case provided for in section forty-eight.

Deputy Returning Officer to instruct elector.

(f) The initials of the Deputy Returning Officer on the back, and the number on the counterfoil are for the purpose of identification, and the absence of the initials of the Deputy Returning Officer will not render the ballot invalid. If therefore any ballot papers, without the initials, have been counted by the Deputy Returning Officer, the Judge on a re-count of the votes, would hold such ballots to be *prima facie* valid. So far as the public interests and the electors are concerned, this clause may be looked upon as directory, and its non-observance will not invalidate the votes. See *Rex v. Norwich*, 1 B. & Ad. 310; *Nickle v. Douglas*, 35 Q. B. 127. But so far as it affects the Officer, whose duty it is made to do the act, the clause may be construed as imperative. *Hunt v. Hibbs*, 5 H. & N. 126.

Elector to mark his Ballot with a Cross on any part of the Division containing the Candidate's Name.

45. (g) The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments of the polling station and there mark his ballot paper, (h) making a cross with a pencil (i) on any part of the ballot paper within the (j) division (or if there be more than one to be elected, within the divisions) containing the name (or names) of the candidate (or candidates) for whom he intends to vote; and shall then fold up such ballot paper so that the initials on the back can be seen without opening it, and hand it to the Deputy Returning Officer, who shall without unfolding it, ascertain by examining his initials and the number upon the counterfoil, that it is the same that he furnished to the elector, and shall first detach and destroy the counterfoil and shall then immediately, and in the presence of the elector, place the ballot paper in the ballot box. (k)

Mode of voting and marking ballots by electors.

[New Section 45 under 41 V. c. 6, s. 6.]

(g) The section of the Act of 1874, for which this is substituted, provided that the elector should mark his ballot paper by *making a cross on the right hand side opposite the name of the candidate* for whom he intended to vote. This provision was held to be imperative as to (1) the mark being a cross ×, and (2) that it should be on the right hand side of the name. *Monck Election*, 12 C. L. J. 114. The effect of the alteration in the Act is to make valid hereafter all ballots marked with a cross, thus ×, “*on any part of the ballot paper within the division containing the name of the candidate.*” See also *North Victoria Election*, 11 C. L. J. 163.

(h) The marking of ballots, so as to indicate whether the voter has legally voted, and for which candidate, has given rise to much discussion and litigation. The English Act in the enacting clause (sec. 2) provides that the voter shall secretly *mark* his vote on the paper; in the schedule of rules (No. 25) that the elector shall *mark* his ballot paper, and in the schedule of forms it prescribes that the voter shall place a cross on the right hand side opposite the name of the candidate for whom he votes, thus: × Under that Act it was held by the Irish Court of Common Pleas in the *Athlone Case*, 1874, without deciding as to a cross on the left hand side of the ballot paper, that a ballot paper with a cross on the right hand side, and within the compartment containing the candidate’s name, was valid and should be counted. *Athlone Election*, 2 O’M. & H. 197. In the *Wigtown Case* (1874) the Scotch Court of Session (Lord Benholme *dissentiente*) held that a ballot paper with a cross above or below the name towards the right hand side of the name was valid and should be counted. *Wigtown Election*, 2 O’M. & H. But in 1875 the English Court of Common Pleas, reviewing the previous cases and drawing a distinction between the enacting words of the statute “secretly mark his ballot,” and the directions in the schedule of forms “place a cross on the right hand side opposite the name of the candidate,” held that a ballot paper with a cross, a star, a single line, or any other mark which would show that the voter really intended to vote, was valid and should be counted. The Court held that the following ballots were valid, and should be counted: (1) Ballots marked with two crosses; (2) Ballots with a cross of a peculiar form; (3) Ballots with an extra mark and a cross; (4) Ballots with a cross to the left hand side of the name; and that such ballots were valid unless there was evidence of an arrangement that such peculiar marks were to be indications of identity; (5) Ballots with a single or double line. The

following ballots were rejected: (1) Ballots with the voter's signature; (2) Ballots with the name of the candidate or initials in writing, as giving facilities by a comparison of handwriting to identify the voter. *Woodward & Sarsons* L. R. 10 C. P. 733. In the *Monck Case* in 1876 the following marks on ballots were held good: (1) An irregular mark in the nature of a cross, so long as it did not lose the form of a cross; (2) A cross not in the proper compartment of the ballot paper, and either over on or under the candidate's name, but to the right hand side of the centre of the ballot paper; (3) A cross with a line before it apparently inadvertently made; (4) A cross rightly placed opposite one of the candidate's names, but with two additional crosses one across the other candidate's name, and the other to the left; (5) A double cross, or two crosses, in the right place; (6) A cross in the right place, but on the back of the ballot paper; (7) Ballot papers inadvertently torn; (8) A cross in the right place, but with other marks on the ballot paper apparently made inadvertently; (9) Ballots with the cross in the proper place, but marked by a pen and ink instead of a pencil. *Monck Election*, 12 C. L. J. 114. This decision is now varied by the above amendment, so that a cross to the left of the candidate's name is valid. See the Appendix.

(i) "Making a cross." In these words consist the substantial difference between the English and the Canadian systems of marking ballots. Under this Act the mark must be a cross, or "an irregular mark in the nature of a cross, so long as it did not lose the form of a cross." The cross may be to the right or left, above or below, or on, the name or the numerals, and if on any place within the division, or clearly intended to be within the division, "so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote, the ballot will be good and should be counted. The ballot must not be marked so as to show that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all, or which candidate he intended to vote for; nor so as to make it possible, by seeing the paper itself, or by reference to any other available facts to identify the way in which he has voted. If these requirements are substantially fulfilled, there is no enactment or rule of law by which a ballot paper can be treated as void; and if the requirements are not substantially fulfilled, the ballot paper is void and should not be counted." *Per* Lord Coleridge, C. J., *Woodward v. Sarsons*. L. R.

10 C. P. 733; S. C. 44 L. J. C. P. 293; S. C. 32 L. T. N. S. 867. "There are ballot papers in which a cross is made or attempted to be made, but is not very well made; whether from unsteadiness of hand or accidental disturbance, the cross lines are not clear or steady, but somewhat shaky and irregular. I am of opinion that such imperfections and defects are not fatal, and that it would be hard and unjust to disfranchise a voter for such appearances. Neither am I inclined to punish with disfranchisement one voter here who has made a very respectable cross, but who has thought that it might not be the worse for small feet and claws to support it and make it like a printed capital, X. That seems to me to be an innocent idea, and, at any rate, not a sufficiently serious or suspicious addition to make his vote bad. I don't know whether this voter may not have been reading Johnson's Dictionary, and referring to a word which he is very fond of using—the word 'decussate,'—which he explains as meaning 'to intersect at an acute angle,' and he quotes some passages which show that decussating is used by lines, having the form of the letter X, decussating one another longways. Now this voter has decussated these lines, and in doing so has made very small feet or resting places for them. I would not advise that system to be carried too far; but where it is done as appears here, I would not hold that it operates a disfranchisement of the voter." *Per* Lord Neaves, *Wigtown Election*, 2 O'M. & H. 221.

(j) "Making a cross with a pencil." These words are copied from the Quebec Election Act (38 Vic. ch. 7, s. 170, Q.) Had they been omitted, the principle of the English decisions would have applied to ballots under the Canadian Act. The provision requiring the ballot to be marked with a pencil is not new. The "directions to voters" in the English Act (35 & 36 Vic. ch. 33), the Dominion Act of 1874 (37 Vic. ch. 9), and 1878 (41 Vic. ch. 6), the Ontario Act (R. S. O. ch. 10), so prescribed; but it now appears in the body of the enactment. Prior to this alteration in the wording of the enactment, the question had been the subject of judicial investigation in Scotland and Canada; and it was held that the use of a pencil in marking a ballot was not essential to the validity of the vote, "because the use of a pencil was not positively and directly enjoined by the statute, and because the only positive and direct enactment on the subject is to the effect merely that the returning officer shall provide each polling station with materials for the voters to mark the voting papers; but what materials,

whether pencils or pens and ink, are not specified.” *Per* Lord Ormidale, in *Wigtown Election*, 2 O’M. & H. 226. “A good cross with any pencil, or with any ink not peculiar, seems unobjectionable.” *Per* Lord Neaves, *Ibid.* 223 The 28th sec. of the Dominion Elections Act of 1874, as amended in 1878, directs the returning officer (fourthly) to furnish the deputy returning officer * * with the necessary materials for voters to mark their ballot papers. See also *Monck Election*, 12 C. L. J. 114.

(k) When the ballot is placed in the ballot box, the act of voting is complete, and the vote cannot thereafter be questioned.

Elector not to take away his Ballot Paper nor to disclose how it is marked.

47. No elector shall be allowed to take his ballot paper out of the polling station, or, except only in the case provided for by section forty-eight, to show it when marked to any person, so as to allow the name of the candidate for whom he votes to be known, under a penalty of two hundred dollars; and no person shall directly or indirectly induce or endeavour to induce any voter to show his ballot paper after he has so marked it, under a penalty of two hundred dollars for so doing, and for each case of such offence.(L)

Ballot not to be carried away or shewn
[New Section 47 under 41 V. c. 6, s. 7.]

(L) A voter who shews his ballot paper when marked to any person, does not render his ballot paper invalid. The Deputy Returning Officer has no authority to reject it; but such voter renders himself liable to a penalty. Where, owing to the defective arrangements at the polling booth, it happened that each voter taking his ballot paper into a back room in order to mark the same, and returning, had to pass a landing, close to which were standing at the head of the staircase a policeman, and parties engaged in bringing up voters, all of whom could occasionally see the ballot paper as marked when the voter carried the same in his hand unfolded, but there was no evidence that any voter’s marked ballot paper had been seen, the Court held that such irregularities did not affect the election. *Drogheda Election*, 2 O’M. & H. 201.

Elector unable to read, or blind, may have the ballot paper marked by the Deputy Returning Officer.

48. The Deputy Returning Officer on application of any voter who is unable to read, or is incapacitated by blindness or other physical cause from voting in the manner prescribed by this Act, shall assist such voter by marking his ballot paper in the manner directed by such voter, in the presence of the sworn agents of the candidates, or of the sworn electors representing them in the polling station, and of no other person, and by placing such ballot paper in the ballot box; (m) and the Deputy Returning Officer shall require the voter making such application, before voting to make oath of his incapacity to vote without such assistance in the form following:—

Case of voter unable to mark his voting paper. [New Section 48 under 41 V. c. 6, s. 8.]

“I solemnly swear (*or if he be one of the persons entitled by law to affirm in civil cases, solemnly affirm*) that I am unable to read and to understand the ballot papers so as to mark the same, (*or*) that I am incapacitated by physical cause (*as the case may be*) from voting without the assistance of the Deputy Returning Officer.”

Oath of voter in such case.

And whenever the Deputy Returning Officer shall not understand the language spoken by any elector claiming to vote, he shall swear an interpreter, who shall be the means of communication between him and such elector with reference to all matters required to enable such elector to vote.

The Deputy Returning Officer shall enter opposite the name of the voters whose ballots have been so marked, in addition to what is required in the forty-ninth section of the said Act, the reason why each ballot paper was marked by him.

Duty of D. R. O. in such case.

(m) Where the Returning Officer placed each of the ballot papers which he had marked for voters unable to read, in the ballot box, wrapped up in the declaration of inability to read made by the voter, and each such vote could have been, but was not in fact, identified at the counting: *Held*, that though there was a breach of the directions by the Returning Officer, such ballots should be counted. *Woodward v. Sarsons*, L. R. 10 C. P. 738.

Elector who has been personated may Vote, and the two Ballots may be counted.

53. If a person, representing himself to be a particular elector named on the Register or list of voters (*n*), applies for a ballot paper, after another person has voted as such elector (*o*), the applicant upon taking the oath in the form of Schedule P. to this Act (*p*), and otherwise establishing his identity to the satisfaction of the Deputy Returning Officer, shall be entitled to receive a ballot paper (*g*), on which the Deputy Returning Officer shall put his initials, together with a number corresponding to a number entered on the list of voters opposite the name of such voter, and he shall thereupon be entitled to vote as any other elector. (*r*)

Case of an elector in whose name another person has voted.— Entry of his name on the list of voters.— After taking the oath (P) he may also vote as any other elector.

The name of such voter shall be entered on the list of voters, and a note shall be made of his having voted on a second ballot issued under the same name, and of the oath or affirmation of qualification having been required and made, as well as of any objections made on behalf of any and which of the candidates.

(*n*) A person whose name has been omitted, by inadvertence or otherwise, from the copy of the Voters' List furnished to the Deputy Returning Officer, cannot vote. There is no provision in the Dominion Elections Act authorising the preparation or use of "Tendered Ballot papers," such as are provided by the English Ballot Act, and the Ontario Elections Act.

(*o*) That is, after some person has personated him, and voted. Personation is a corrupt practice in the person personating or in the person inducing another to commit personation. Under the English Act the Returning Officer, on the declaration of any agent of a candidate that a person has committed personation, and after such person has voted, is bound to order by word of mouth the arrest of such person. No such power is given to a Deputy Returning Officer by this Act.

(*p*) The oath is as follows: "I solemnly swear (*or if he be one of the persons permitted by law to affirm in civil cases—solemnly affirm,*) that I am *A. B.* of (*as on the Voters' List*), whose name is entered on the Voters' List now shown to me. So help me God."

(*g*) The ballot paper will be one of the ordinary ballot papers, and is to be numbered and initialed in the same manner.

(*r*) The effect of this section is, that the two ballot papers are to be counted. There is no means by which the first or illegal vote, when deposited in the ballot box, can be identified or got rid of, and

therefore the person lawfully entitled to vote is not deprived of his franchise.

Elector Spoiling his Ballot may have Another.

54. A voter who has inadvertently dealt with the ballot paper given him, in such manner that it cannot be conveniently used, may, on delivering the same to the Deputy Returning Officer, obtain another ballot paper in the place of that so delivered up.(s)

Elector spoiling his ballot paper.
[New Section 54 under 41 V. c. 6, s. 9.]

(s) Ballot papers so inadvertently dealt with and delivered up to the Deputy Returning Officer are not to be counted, but to be returned as “spoiled ballot papers.”

Counting the Ballots at the Close of the Poll—What Ballots are to be Rejected.

55. Immediately after the close of the poll, the Deputy Returning Officer shall, in the presence of the poll clerk and the candidates or their agents, and if the candidates and their agents are absent, then in the presence of at least three electors, open the ballot box and proceed to count the number of votes given for each candidate: In doing so he shall reject all ballot papers which have not been supplied by the Deputy Returning Officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter could be identified,(t)

Counting votes by D. R. Officers.
[New Section 55 under 41 V. c. 6, s. 10.]

The other ballot papers being counted, and a list kept of the number of votes given for each candidate, and of the number of rejected ballot papers, all the ballot papers indicating the votes given for each candidate respectively shall be put into separate envelopes or parcels, and those rejected shall also be put into a different envelope or parcel, and all these parcels, being endorsed so as to indicate their contents, shall be put back into the ballot box.(u)

Rejecting ballots.

Duty of D. R. Officer after counting the votes.

(t) The three classes of ballot papers to be rejected are (1) ballots which have not been supplied by the Deputy Returning Officer; (2) ballots which are marked for more candidates than are to be elected; and (3) ballots upon which there is any writing or mark by which the voter can be identified. “Trivial and unimportant deviations, s{uch as} might not unfairly be held to be incidental to the performance of the p{iece} of work in question by different individuals of different ages, habits, and conditions, ought to be disregarded, provided that the true object and intention of the voter is free from serious doubt, and that there is not sufficient ground for holding in a fair and reasonable sense that there is any mark or writing on the ballot paper, whereby the voter can be identified.” *Per* Lord Ormidale, *Wigtown Election*, 2 O’M. & H. 225. “The Act does not say any mark, or any mark deliberately made, but a writing or mark by which the voter could be identified. I think the mark must contain in itself a means of identification of the voter in order to vitiate the ballot. There must be something in the mark itself such as the initials, or some mark known as being one the voter is in the habit of using. If there be not this restriction, then it will naturally follow that every peculiarity about every cross should be scanned in order to see whether some of the additions were not put there designedly so as mark distinctively that particular ballot paper.” *Per* Blake, V. C., *Monck Election*, 12 C. L. J. 114. Where out of 182 ballot papers used at the election, 130 had not, on the back, the initials of the Deputy Returning Officer, the Court refused to reject the ballots. *Ibid.* Where the Returning Officer marked upon the face of the ballot paper the number of the voter as it appeared on the voters’ list, and the number so marked was not in fact seen so as to be identified, but it could have been seen at the counting of the ballots: Held, that the ballots so marked with the numbers, had marks by which the voters could be identified by reference to the voters’ list, and were therefore void and should not be counted. *Woodward v. Sarsons*, L. R. 10 C. P. 733.

(u) The different packages should contain:—1. The used ballot papers which have been counted. 2. The rejected ballot papers. 3. The spoiled ballot papers; and 4. The unused ballot papers.

Deputy Returning Officer to note Objections to the Ballots, and to decide upon their Validity.

56. The Deputy Returning Officer shall take a note of any objection made by any candidate, his agent, or any elector present, to any ballot paper found in the ballot box; and shall decide any question arising out of the objection; (v) and the decision of such Deputy Returning Officer shall be final, subject only to reversal on petition questioning the election or return.(w)

Objections to ballot papers.— Decision of D. R. Officer final—Exception.— Objections to be numbered.— Identification.

Each objection to a ballot paper shall be numbered, and a corresponding number placed on the back of the ballot paper and initialed by the Deputy Returning Officer.

(v) If the Deputy Returning Officer neglects or refuses to “take a note of any objection to any ballot paper,” or to number the same as directed in this section, there will be no evidence before the appellate tribunal of the “decision of such Deputy Returning Officer.”

(w) This section of the Act of 1874, is in effect, although not in words, amended by the Act of 1878, (41 Vic. ch. 6, s. 14) which gives appellate jurisdiction to a Judge to review the decision of the Deputy Returning Officers and to re-count the ballot papers, according to the rules set forth in section 55. Having completed the work of counting, the Deputy Returning Officer is to transmit all the papers to the Returning Officer with his statement of the result.

Returning Officer to sum up Votes and return the Majority Candidate.

59. The Returning Officer at the place, day and hour appointed by his proclamation, and after having received all the ballot boxes, shall proceed to open them in the presence of the election clerk, the candidates, or their representatives, if present, and of, at least, two electors, if the candidates or their representatives are not present, and to add together the number of votes given for each candidate from the statement contained in the several ballot boxes returned by the Deputy Returning Officers,(x)

Returning Officer to sum up total votes from the statements of the D. R. Officers.— Majority candidate to be declared elected.

The candidate who shall on the summing up of the votes, be found to have a majority of votes shall be then declared elected.(y)

(x) Within four days after the day on which the Returning Officer makes the final addition of the votes under this section, for the purpose of declaring which candidate elected, an application may be made to a Judge for a recount of the votes.

(y) This declaration may, however, be reversed by the recount of votes before the Judge under 41 Vic. ch. 6, sec. 14; for after such recount the Judge is to certify the result to the Returning Officer who shall then declare to be elected the candidate having the highest number of votes. It cannot be made if there is an equality of votes; such a contingency must be dealt with under the next section.

Returning Officer to have a Casting Vote.

60. When on the final addition of the votes by the Returning Officer an equality of votes is found to exist between any of the candidates, and the addition of a vote would entitle any of such candidates to be declared elected, the Returning Officer shall give such additional or casting vote, but shall in no other case have the right to vote. (z)

Returning Officer to have a casting vote where an equality of votes.

(z) The casting vote of the Returning Officer, like all other votes cast at the election, should be by ballot. A difficulty may occur if the Returning Officer gives his casting vote before the expiration of the time for making application to the Judge for a recount of the votes. The final addition of the votes must take place before the Judge could entertain the application; and by the section giving the right to a recount, that final addition is referred to as “for the purpose of declaring the candidate elected.” Although the statute is not quite clear, the sections as to the final addition of the votes, and declaration of the candidate, and the casting vote of the Returning Officer, must be read in the light of the proceedings authorized to be taken subsequently to such final addition of votes; and as by the 60th section of the Act it is provided that the Returning Officer “shall in no other case (but an equality of votes) have a right to vote,” that is, shall have only have one casting vote for the election in question, the provision as to his casting vote (until a judicial decision to the contrary) should not be acted upon until either after a recount before the Judge, shews an equality of

votes, or after the expiration of the time for applying to the Judge for such recount.

Mistakes of Form not to affect Election.

80. No election shall be declared invalid by reason of a non-compliance with the rules contained in this Act, as to the taking of the poll, or the counting of the votes, or by reason of any want of qualification in the person signing a nomination paper received by the Returning Officer under the provisions of this Act, or of any mistake in the use of the forms contained in the schedules to this Act if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the Act, and that such non-compliance did not affect the result of the election.

Mistakes of form not fatal.

If election conducted according to the principle of the Act, and non-compliance with forms did not affect the result.

Recount of the Ballot Papers by a Judge.

14. (a) In case it is made to appear within four days after that on which the Returning Officer has made the final addition of the votes for the purpose of declaring the candidate (or candidates) elected, (b) on the affidavit of any credible witness, (c) to the County Judge of any County, or in Quebec, to a Judge of the Superior Court, ordinarily discharging his duties in any Judicial District in which the electoral district or any part thereof is situated, (d) that such witness believes that any Deputy Returning Officer at any election in such electoral district in counting the votes has improperly counted or rejected any ballot papers at such election, or that the Returning Officer has improperly summed up the votes, (e) and in case the applicant deposits within the said time with the clerk of the Court the sum of one hundred dollars as a security for the costs of the candidate, in respect of the re-count appearing by the addition, to be elected, the said Judge shall appoint a time within four days after the receipt of the said affidavit by him, to re-count the votes, or to make the final addition, as the case may be, and shall give notice in writing to the candidates or their agents of the time, and place at which he will proceed to re-count the same, or to make such final addition, as the case may be; and shall summon and

[41 Vic. c. 6, s. 14.]

Provision for re-count of votes by a judge.

Improper counting or rejecting ballot papers.

Order of Judge to Returning Officer.

command the Returning Officer and his election clerk to attend then and there with the parcels containing the ballots used at the election, which command the Returning Officer and his election clerk shall obey:

(1.) The said Judge, the Returning Officer and his election clerk, and each candidate, or his agent appointed to attend such re-count of votes, or in case any candidate cannot attend, then not more than one agent of such candidate, and if the candidates and their agents are absent, then at least three electors shall be present at such re-count of the votes;

Who may be present at the re-count.

(2.) At the time and place appointed, (f) the said Judge shall proceed to re-count all the votes or ballot papers returned by the several Deputy Returning Officers, and shall, in the presence of the parties aforesaid, if they attend, open the sealed packets containing—(1) the used ballot papers which have been counted; (2) the rejected ballot papers; (3) the spoiled ballot papers,—and no other ballot papers;

Opening packets of ballots and re-counting the votes.

(3.) The Judge shall, as soon as practicable, proceed continuously, except on Sunday, with such re-count of the votes, allowing only time for refreshment, and excluding (except so far as he and the parties aforesaid agree) the hours between six o'clock in the evening and nine on the succeeding morning; During the excluded time (and recess for refreshments) the said Judge shall place the ballot papers and other documents relating to the election close under his own seal and the seals of such other of the parties as desire to affix their seals, and shall otherwise take precautions for the security of such papers and documents.

Re-count to be continuous.—
Exception.—
During excepted time documents to be under seal.

(4.) The Judge shall proceed to re-count the vote according to the rules set forth in section fifty-five of “*The Dominion Elections Act, 1874*,” as hereby amended, (g) and shall verify or correct the ballot paper account and statement of the number of votes given for each candidate: and upon the completion of such re-count, or as soon as he has thus ascertained the result of the poll, he shall seal up all the said ballot papers in separate packets, and shall forthwith certify the result to the Returning Officer, who shall then declare to be elected the candidate having the highest number of votes; and in case of an equality of votes the Returning Officer shall give the casting vote, in like manner as provided in section sixty of “*The Dominion Elections Act, 1874*.” (h)

Mode of proceeding with the re-count.—
Certificate of remit.
— Casting vote.

(5.) The Returning Officer, after the receipt of a notice from the Judge of such re-count of ballots, shall delay making his return to the Clerk of the

Crown in Chancery until he receives a certificate from the Judge of the result of such re-count, and upon receipt of such certificate, the Returning Officer shall proceed to make his return in the form of Schedule S of the said Act.

Return not to be made until after Judge's certificate.

(i)

(6.) In case the re-count or addition does not so alter the result of the poll as to affect the return, the Judge shall order the costs of the candidate, appearing to be elected, to be paid by the applicant, and the said deposit shall be paid out to the said candidate on account thereof, so far as necessary, and the Judge shall tax the costs on giving his decision; and if the deposit is insufficient, the party in whose favor costs are allowed shall have his action for the balance.

Costs of re-count, how to be paid.

(a) This provision for a recount of the ballot papers was introduced by the author into the Ontario Election Law in 1876 (89 Vic. ch. 10, s. 25, O., now R. S. O. ch. 10, ss. 117-122). The clauses are in some particulars similar to the rules 31 to 37 in the first schedule of the English Ballot Act. Under that Act the Returning Officer, and not the Deputy Returning Officers, counts the ballots, and thus a uniformity of decision is obtained.

(b) Within four days after the day, &c. The general rule for the computation of time fixed by statute is to hold the first day excluded, and the last day included. When the last day is a Sunday or holiday, the application may be made on the day next following which is not a Sunday or holiday (s. 129) See *West Toronto Election*, 5 Pr. R. 894, in appeal 31 Q. B. 409, and *Hodgins on Voters' Lists*, pp. 26, 33.

(c) This section of the Act of 1878 does not state before whom the affidavit should be made. By sec. 127 of the Act of 1874, jurisdiction is given to certain officers to administer oaths under that Act, and it further provides that "the Returning Officer at any election shall have power to administer any oath or affirmation required, with respect to such election, by *this Act*; and the Deputy Returning Officer may administer such oath or affirmation, except only such as may be required to be administered to the Returning Officer." See also the Interpretation Act (31 Vic. ch. 1, s. 6, sub-sec. 16), and the "Act for the Suppression of Voluntary and Extrajudicial Oaths." (37 Vic. ch. 37.)

(d) In some cases in Ontario, the electoral district is formed from two or more portions of judicial counties, and each of the County Judges within such counties would have jurisdiction to order a recount.

(e) The affidavit must follow the provisions of this section, and as a matter of precaution, should show such grounds for the belief of the witness, as will satisfy the Judge that the re-count should be ordered.

(f) Before proceeding with the re-count, proof of the service of the Judge's "notice in writing to the candidates, or their agents, of the time and place at which he will proceed to re-count," should be given.

(g) The Judge in re-counting the ballot papers, acts as an appellate tribunal from each Deputy Returning Officer, and "re-counts all the votes or ballot papers returned by the several Deputy Returning Officers," and decides whether such officers have "improperly counted or rejected" any ballot papers at such election.

(h) See note (z), page 18.

(i) The Act of 1874, required the Returning Officer to transmit his return to the Clerk of the Crown in Chancery, "within four days after" the verification or final addition of the votes.

SCHEDULE I.

Ballot Paper and Directions for Voting.

Election for the Electoral District of

18 .

DOE.

I. John Doe, Township of
Nepean, Courty of Car-
leton, Yeoman.

ROE.

II. Richard Roe, of Town of
Prescott, County of Gren-
ville, Merchant. ×

STILES.

III. Geoffrey Stiles, of 10
Sparks Street, Ottawa,
Physician.

STILES.

IV. John Stiles, of 3 Elgin
Street, Ottawa, Barrister-
at-Law.



The names of the candidates will be as in the nomination paper. There is to be no margin on the left side of the ballot paper; and the horizontal division lines will be carried to the edge of the paper on the right side. The elector is supposed to have marked his ballot paper in favour of Richard Roe. The dotted line will be a line of perforations for easily detaching the counterfoil.

DIRECTIONS FOR THE GUIDANCE OF ELECTORS IN VOTING.

The voter is to vote only for one candidate, unless two members are to be returned for the Electoral District, in which case he may vote for one or

for two candidates as he thinks fit.

The voter will go into one of the compartments, and with a pencil there provided, place a cross in the division containing the name or names of the candidate or candidates for whom he votes, thus ×.

The voter will then fold the ballot, so as to show a portion of the back only, with the *number and the* initials of the Deputy Returning Officer; he will close it in the usual way and deliver it to the Deputy Returning Officer, who will place it in the ballot box. The voter will then forthwith quit the polling station.

If a voter inadvertently spoils a ballot paper he can return it to the proper officer, who, on being satisfied of the fact, will give him another.

If the voter votes for more candidates than he is entitled to vote for, or places any mark on the ballot paper by which he can afterwards be identified, his vote will be void, and will not be counted.

If the voter takes a ballot paper out of the polling station, or fraudulently puts any other paper into the ballot box than the ballot paper given him by the Deputy Returning Officer, he will be subject to be punished by fine *of five hundred dollars*, or by imprisonment for a term not exceeding six months, with or without hard labour.

APPENDIX A.

1. The following *fac similes* of Ballot Papers were held to be valid, and were counted by the English Court of Common Pleas in the case of *Woodward v. Sarsons*. The forms are taken from the report of the case in 44 L. J. C. P. 293.

a

1	SARSONS.	+ +
2	WOODWARD.	

b

1	SARSONS.	× ×
2	WOODWARD.	

c

1	SARSONS.	×
2	WOODWARD.	

d

1	SARSONS.	× ¶
2	WOODWARD.	

e

1	SARSONS.	×
2	WOODWARD.	

f

1	SARSONS.	
2	WOODWARD.	×

The blotch or lower mark in these two ballots *e* and *f* was evidently a cross rubbed out with a damp finger.

g

1	SARSONS.	×
2	WOODWARD.	

h

1	SARSONS. ×	×
2	WOODWARD.	

Those two ballots *g* and *h* had evidently been marked with a cross in ink and folded up, thereby making a corresponding

mark on the other part of the paper.

i

1	SARSONS.	*
2	WOODWARD.	

j

1	SARSONS.	×
2	WOODWARD.	

In the ballot *j* the name 'Woodward' had a pencil mark through it diagonally across the paper.

k

1	SARSONS.	
2	× WOODWARD.	

l

1×	SARSONS.	
2	WOODWARD.	

m

1	SARSONS.	
×2	WOODWARD.	

n

×	1	SARSONS.	
2		WOODWARD.	

o

1	SARSONS.	
×		
2	WOODWARD.	

p

1	SARSONS.	
.....
1	WOODWARD.	×

This ballot *p* was torn through the middle in the place indicated by the dotted line.

2. The following forms of ballots were held to be invalid, and were rejected by the Court in the same case:—

a

1	SARSONS.	<u> </u> Sanen
2	WOODWARD.	

b

1	SARSONS.	Sarsons
2	WOODWARD.	

c

1	SARSONS.	×
2	WOODWARD.	

E. PREWS.

d

1	SARSONS.	
2	WOODWARD.	C. W. ×

This ballot bore the name of a voter, "E. Prews," which was a name on the Voters' List.

B.

1. The following *fac similes* of Ballot Papers were held to be valid, and were counted by the Court in the Monck Election Case under the Dominion Elections Act of 1874. See 12 Can. Law Jour. 114.

I	EDGAR. ×	
II	McCALLUM.	

I	EDGAR. ×	
II	McCALLUM.	

I	EDGAR.	
II	McCALLUM.	×

I	EDGAR.	
II	McCALLUM.	X

I	EDGAR.	×
II	McCALLUM.	

I	EDGAR.	×
II	McCALLUM.	

This ballot was torn through in the place indicated by the marked line.

I	EDGAR.	✖
II	McCALLUM.	×

I	EDGAR.	
II	McCALLUM.	×

The cross had apparently been placed for 'Edgar,' but rubbed out and a cross then made for "McCallum."

The voter had apparently made a cross on the right of the outside line, and then rubbed it out and made a cross in the proper field.

I	EDGAR.	-/ -
II	McCALLUM.	

I	EDGAR.	
II	McCALLUM.	✖

I	EDGAR.	
II	McCALLUM.	⊗

I	EDGAR.	
II	McCALLUM.	×

There was no cross on the face on the ballot, but one on the back in the square for McCallum.

I	EDGAR.	× ●
II	McCALLUM.	

I	EDGAR.	×
II	McCALLUM.	

I	EDGAR.	
II	McCALLUM.	× ×

2. The following forms of ballots were held to be invalid, and were rejected by the Court:—

I	EDGAR.	×
II	McCALLUM.	

I	EDGAR.	
II	McCALLUM.	Jacob Kline.

This ballot had the letters 'A. D.' on the back in addition to the initials of the Deputy Returning Officer.

I	EDGAR.	George Otter.
II	McCALLUM.	

I	EDGAR.	
II	McCALLUM.	//

I	EDGAR.	/
II	McCALLUM.	

I	EDGAR.	
II	McCALLUM.	I vote for Mc- Callum

C.

1. The following forms of Ballot are valid under the Ontario Elections Act:—

1 x	HODGINS.	x
2	MUNROE.	

1	HODGINS.	x
2	MUNROE.	x

These Ballots were marked in ink for 'Hodgins,' but the cross blotted in folding, as marked.

1	HODGINS.	X
2	MUNROE.	

1	HODGINS.	
2	MONROE.	X

2. The following form of Ballots are invalid:—

1	HODGINS.	
2	MUNROE.	□

1	HODGINS.	x
2	MUNROE.	

A square instead of a cross.

“JAMES W. BLAIN.”

The voter wrote his name on the Ballot Paper.

1	HODGINS.	
2	MUNROE.	x Munro

1	HODGINS.	
2	MUNROE.	

Transcriber's Notes

In two locations short fragments of text were obliterated in the original. The missing text was inferred and is enclosed by { }.

Page numbers in the Table of Contents were changed to match the pagination of the document.

A very small number of other typographic errors were corrected.

[End of *Guide to Counting Marked Ballots at elections for the House of Commons* by Thomas Hodgins]