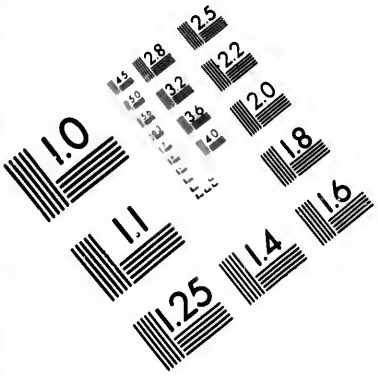

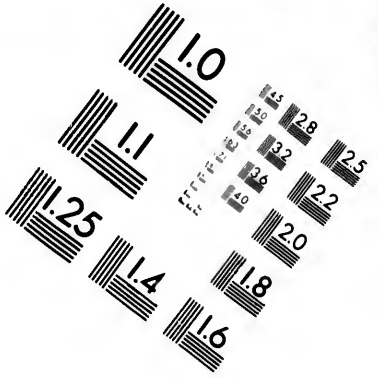

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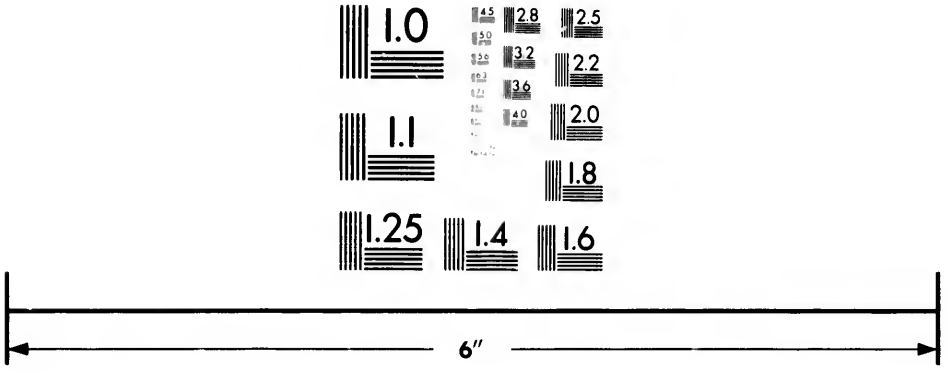

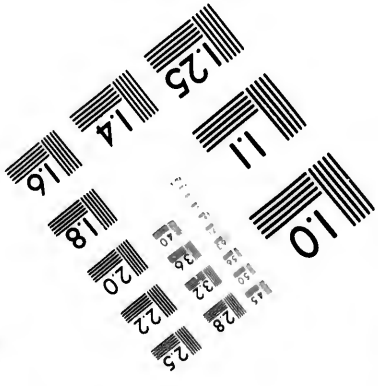

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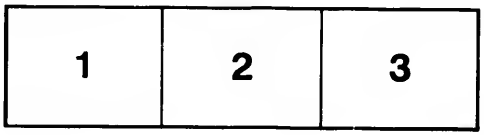

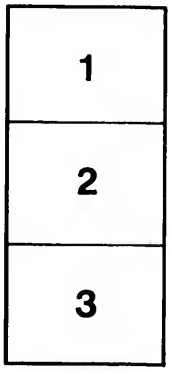

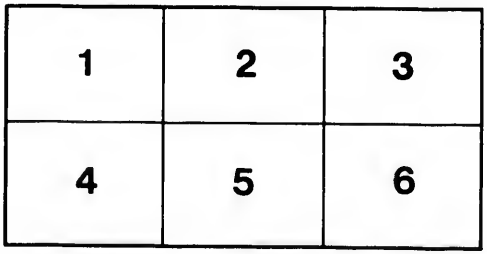

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FULL TEXT

—OF—

JUDGE ELLIOT'S JUDGMENT

—IN THE—

LONDON ELECTION CASE,

1892.

FULL TEXT

—OF—

JUDGE ELLIOT'S JUDGMENT

—IN THE—

LONDON ELECTION CASE,

1892.

THE RECENT LONDON ELECTION.

The following is a verbatim report of the judgment delivered by His Honour Judge Elliot, the Senior Judge of the County of Middlesex. It has reference to the recent electoral contest for the City of London between the Honourable Mr. Carling and Mr. Hyman, which, the public are aware, terminated in the election of the former.

There have appeared in various newspapers so many garbled accounts of this judgment, and so much misrepresentation, that it is deemed desirable to give it verbatim as delivered, and thus leave the public to form their own opinion.

It is proper to observe that during the preparation of the Voters' List, in the fall of 1891, for London, the Revising Officer, Mr. J. H. Fraser, Q. C., had some eighteen hundred cases before him, in which he had to decide what names should stand on the list and what should be removed. On both sides, Conservative and Liberal, numerous applications were made to remove names from the list. Among the applications was one by a person named Lilley to remove the name of one Allin and some five hundred others, because, as he said in his notice, they were "not qualified", giving no other ground or reason for their disqualification. A number of these persons thus objected to, about 200, refused by their counsel, to appear and put in any defence. They said: "We are entitled to know upon what ground our rights are challenged, and we will not be harassed by being called upon to defend them at the caprice of a man who is only recklessly trying to annoy us." Such was the position they took, and it will be seen by the judgment that in this position they were sustained by the Judge. No sooner, however, had the Judge given his judgment, which he did at the urgent solicitation of Mr. Aylesworth, Q. C., the Liberal counsel, than he was assailed with incredible bitterness. He was termed a Tory partisan, incapable of doing

justice ; and all for what ? Because he had dared (mind, actually dared) to give an independent judgment ! Even his family matters were deemed fit subjects for criticism and attack. He was compared with the bloody-minded Judge Jefferys, and reminded that, two hundred years since, a celebrated personage, referring, it is supposed, to Strafford in the time of Charles I., had ended his life on the scaffold for a similar wrong-doing.

Had this scurrilous abuse been confined to the London Advertiser, which led the way, there need not have been much surprise. The same paper had, in a previous election case, pronounced Chief Justices Haggarty and Galt and Mr. Justice Gwynne, now of the Supreme Court, to be Tory partisans, from whom such a decision as they gave could only be expected. Had all this, we say, been confined to this inferior and scurrilous London print, there need not have been much surprise ; but, when a journal, calling itself respectable, like the Globe came out with three columns of matter full of misrepresentation and designating Mr. Carling as the "member for Judge Elliot," it is time that the real facts should be known.

To meet the cry of bogus votes having given Mr. Carling a majority, Mr. Hellmuth, the counsel for the appellants, offered to waive every objection to the disputed notices in the case of at least forty to fifty of his clients, and to stake the result of the election upon the votes of those persons who had refused to appear before the Revising Officer, and he offered forthwith to produce these forty to fifty voters (all of whom had voted at the last election) who were easily accessible. This number, Mr. Hellmuth said, would appear and go into their individual qualifications, if this consent were given, and they would show that their right to vote was beyond dispute. This would place Mr. Carling in a majority of unquestionable votes, but the offer was flatly refused by the counsel acting for Mr. Hyman and the Liberal party, thus showing the hollowness of the outcry that had been raised that Mr. Carling had gained his majority by the inclusion of bad votes.

The following is the judgment now rendered famous, and which, it is conceived, may be more properly attacked by argument than by personal abuse :—

IN THE MATTER OF THE APPEAL UNDER THE ELECTORAL FRANCHISE ACT.

LEWIS ALLIN,

(Appellant),

AND

FRANK WALDER LILLEY,

(Respondent).

In November last an appeal was heard before me as to the validity of a notice given by Lilley calling in question the right of Allin to have his name registered on the Voters' List for the City of London. I then expressed my opinion that this notice was invalid for the reason that it did not conform with the requirements of the Dominion Franchise Act. Had this expression of opinion been carried into practical effect, the name of Allin and others similarly situated would have been retained on the Voters' List unaffected. But a mandate forthwith issued from the Court of Queen's Bench adjudging that this description of notice was sufficient, and requiring the Revising Officer to proceed. Under this compulsion he did proceed, treating the alleged notice as sufficient, whereupon a considerable number of persons by their Counsel stood upon what they deemed to be their rights, and refused to make any defence, or did not attend at all.

This decision of the Court of Queen's Bench was appealed from. But the Court of Appeal declined to give a formal judgment on the points submitted, deeming it unnecessary to do so.

On the 31st December last an application was made to me, on behalf of the respondent, for my judgment in the matter of this appeal. I then declined to interfere, as the case at that time was pending in the Court of Appeal. But now that it has passed

through that ordeal, I am again solicited, on behalf of the respondent, to give a decision which, it appears, the Act demands. To this solicitation an objection is raised on behalf of the appellant, that the intention is to submit the case to the Supreme Court, and that anything in the shape of a judgment upon my part would be premature. Mr. Aylsworth, for the respondent, affirms that there is scarcely a reasonable expectation that the Supreme Court would entertain the appeal, giving reasons for his statement, which I need not further refer to. Mr. Hellmuth, for the appellant, is of a contrary opinion. But I think I may conclude from his observations that he does not very decidedly oppose a decision upon my part at this juncture, and for my part I would rather give it now.

Looking in the first place at the Law contained in the Dominion Franchise Act, we find that by Section 19, Sub-Section 2, it is enacted that any person desiring to object to or in any way to amend or correct the original voters' list or either of the supplementary lists, on the final revision shall have the right so to object, * * * "if he has at least two weeks before the day fixed for such final revision, deposited with, or mailed to the Revising Officer by registered letter at his office or place of address a notice in the form D in the schedule to this Act," and then follows the requirement that a notice in *the like form* is to be delivered or mailed by registered letter to the party to whom the objection is made. Turning to this Form D we find that the notice prescribed is "that I (that is, the objector) will apply to have the list of voters for Polling District No. of the said Electoral District for the year as preliminarily revised, amended, added to or corrected, as the case may be;" then says the Form, "state the name or names objected to, with the *grounds* therefor."

Now upon the interpretation of this word grounds rests the entire controversy.

The following diagram shows the form of list given in the Act to be prepared by the Revising Officer, and I have marked on it the manner in which the name of the appellant Allin

appears upon it, and the letter I indicates that his qualification is for income:

No.	Name in Full.	Post Office.	Occupation.	Qualification.	Description of Property.
	Allin, Lewis.	London.	Musical Instrumts.	I.	City Hotel.

Now, this schedule or form of list contains the assertion that Lewis Allin is qualified as an income voter, and Lilley disputes his claim in the following manner:—He says in his notice that he will apply to have the list of voters for Polling District No. 1, as preliminarily revised, amended by removing therefrom the following names for the *grounds* hereinafter stated. Then follow a number of names, that of Allin being among them, with a copy of the schedule above referred to, only there is added a column headed "grounds for amendment," namely "not qualified." Some of the names are of persons stated to be tenants, owners, income, etc.—Allin is on the list for income, and what is called the ground "for amendment" is that he is *not qualified*, meaning that he is not qualified for income. Now the question is, are there any grounds stated by Lilley?

To see how the matter will come out, let us put it in the form of a dialogue.

Allin—I claim to be a voter for income. Lilley—I dispute your claim. Allin—Why? Lilley—Because you are not qualified. Allin—Why do you say I am not qualified? Lilley—Because you are not qualified. Allin—But what ground have you for saying I am not qualified? Lilley—Because you are not qualified.

To proceed further would only be to follow endless circular tracks, the result of which could only be "you are not qualified, because you are not qualified".

In order to throw light on this subject let us see upon what grounds Allin's claim to be a voter for income must stand. 1. He must be of age. 2. He must be a British subject. 3. He must reside in the Polling District in which he seeks to be registered. 4. He must have an income of at least $300 a year. 5. He must have earned that income during the last year. 6. He must have resided in Canada for the last preceding year.

Now, these are the grounds I submit on which Allin's claim must rest, and his failure to sustain any one of them would exclude his name from the list. I take it that grounds and reasons are synonymus terms, and I am unable to see any ground or reason for exclusion in the bare assertion "you are not qualified for income". The assertion "you are not qualified for income" is a conclusion to be drawn from the want of one or other of the requisites I have mentioned; it is not *a ground* or a reason. It is a deduction to be drawn from certain premises.

If this word *grounds* is to be regarded as meaningless it is an unfortunate expression. It was very easy to have said that a simple complaint in writing was all that was necessary. But when this form requires the grounds to be stated surely something more is requisite than a mere naked complaint like this of Lilley's.

There is also another income qualification. By Sub-Sec. 1 of Section 3 a person is entitled to be registered as a voter who has a life annuity of $100 a year secured on land, and to maintain his claim he has to fulfil the conditions 1 and 2 above mentioned. 3. He must have been a resident in the electoral district for one year previous. 4. He must be in the receipt of this annuity for the year previous. 5. It must be secured on land. 6. He must be registered in the particular polling district in which he resides. These variations of the income qualification render it more necessary that an objecting party should particularize the grounds upon which he intends to make the attack.

The Revising Officer in the preparation of the list in June has to collect the names of those who appear qualified from the

assessment rolls and the provincial and municipal lists and from solemn declarations, and to register their names subject to subsequent corrections. In this I think he is entitled to the benefit of the maxim "omnia presumuntur rite esse acta" until his unworthiness is shown. Accordingly, those persons whose names he has placed upon the list have a *prima facie* right to be there as voters, and from this right I conceive they can only be displaced for good and sufficient reason, which they are entitled to know with at least reasonable certainty.

It is a very easy thing to scatter hundreds of notices of objections founded on mere conjecture, and by way of experiment with the result that the parties thus objected to if within ten miles of the polling place, on being served with a summons, are to obey it without any payment whatever for expenses; or if they do not attend their names may be struck off the list, and they are likewise liable to a fine of $5. All this tends to strengthen the position that a party having a *prima facie* right to be on the list is entitled to have some solid ground or reason why that right is to be invaded, before he is subjected to these punitive conditions.

To return to what transpired upon the issue of the mandamus from the Court of Queen's Bench requiring the Revising Officer to proceed. It appears he did so, considering that it was no part of his duty to incur expense and loss of time by entering into an adverse contention with the Court of Queen's Bench. He then went on and dealt with various cases on the notices which I deemed to be invalid. Of these cases there were many in which the parties, by their counsel, refused to make any defence, relying upon the invalidity of the notices they had received; and there were others who made no appearance at all. The names of these persons are retained on the list, and are distinguished by the letter A attached to each. These persons, or some of them, it appears, voted at the recent election, and the question is whether these persons were entitled to vote. To this point the controversy is reduced. Let me here refer to some other portions of the Act to

see if there is any authority for treating such a notice as this as sufficient by way of amendment or correction.

By Sec. 20 Sub-Sec. 3 "no application to add to or to remove a name shall be dismissed on account of error in the name, surname or designation mentioned therein, provided such error is corrected on or before the final revision, and provided that the Revising Officer is satisfied that the application was reasonably certain, and that no person concerned is misled by such error." This shows what descriptions of innocent error shall not exclude a voters name. But it does not favor the inference that errors of a more serious character like that we are considering are to be deemed equally venial. By the same Sec. 20 the Revising Officer is authorized to amend or correct the list, but his power is subject to this condition, that "notice has been given as aforesaid," by which is meant the notice D. Sec. 16 authorizes the Revising Officer to *retain* the name of any person entered on the original list although his qualification is incorrectly entered thereon "if it appears that such person is entitled to be registered on the "list of voters as possessed of any of the qualifications set forth "in this Act; but the Revising Officer shall enter the name of "such person on the first supplementary list with the necessary "alterations."

And by Sub-Sec. 4 Section 20, "if on the hearing of any objection to any name on the original or supplementary list of a polling district it appears that the name or qualification of the person whose name is objected to is incorrectly entered on the list, but that he possesses such qualification as entitles him to be registered thereon, the Revising Officer shall retain such person's name thereon making the necessary corrections; or if it appears that the person whose name is objected to is not entitled to be retained on such list, but that he possesses such qualification as would entitle him, if he had given the necessary notice, to be placed on the list for any other polling district, the Revising Officer can make the change."

Thus there are extensive powers of correction and amend-

ment in the Act, but they are in my opinion dependent on the condition that a proper notice has been given in the first instance so as fairly to require the party objected to enter upon his defence. I do not say that this notice of objection must contain all the grounds I have above enumerated. Probably the mention of one of them would suffice to require the party objected to to appear, and having done so the Revising Officer may proceed or not under the amending clauses of the Act in his discretion.

Under the English system of registration for voting purposes the duty of first collecting the names and preparing the lists devolves on certain officials called overseers. There are points of similarity and divergence between our Act and the Imperial one. But no authority has been cited, and I believe none can be cited, to show that such a notice as this in question has ever been held sufficient.

I shall refer to some of these cases:

In Hartley v. Halse, 22, Q. B. Div., 200, the Voters' List comprised three divisions, almost precisely similar to our Provincial Voters' Lists, comprehending first parliamentry and county voters; 2, parliamentary voters only, and 3rd, county voters only. The objection to the name was that it did not specify the particular division to which the objections referred. It was held that this was a mere mistake, and that the notice referred in an unmistakable manner to the list intended. Coleridge, C. J., said: "Where a statute directs that a particular form shall be used, and a form is used which omits some essential element in the statutory form, the use of the defective form invalidates the proceeding."

Borough of Battersea v. Clethem, 4 L. T., Rep. 115.—The question was whether the description of the objector given in the notice was in compliance with the form given in the Act. The Revising Barrister decided that it was, and expunged several names in consequence. This decision was reversed. Lord Coleridge, C. J., said that the notice was not according to the form.

He said further that though it was true that the Act provides "that *the disregard of any form shall not invalidate,* these "words do not mean that a total disregard of all forms is pro- "tected. The notice does not give the person objected to the "information as to the person objecting which the Act intended "to be given and the absence of which might put him to incon- "venience. I therefore hold," he said, "that in not following the "form in this respect the objector has not only not followed the "form but has not in substance complied with the enactment," in which the other judges concurred.

In Bridges v. Miller, 20, Q. B. Div., 287, a notice of objection that you do not reside at 12 Clifton St., Norwich, was held bad because a valid notice of objection should have stated that he had not resided there for a year past. Lord Coleridge held it was no notice at all and the other judges concurred.

In Humphrey v. Earle, 20, Q. B. Div. 294, the form under the Act of 1885 requires a notice of objection to contain a description of the objector's place of residence (as our notice D. does). The description here was wrong, or at all events it was imperfect. Pollock, B., said the point is technical, but on the other hand it is important that these notices should strictly follow the statutory form.

In Smith v. Chandler, 5, L. T. Rep., 110, a case was reserved as to the sufficiency of an attestation clause in which the date was omitted. This affected 260 names. Lord Coleridge said, "It was suggested that the barrister might have amended, but he rightly held he could not amend. It was not a case of mistake, but the form had deliberately been departed from." Mr. Justice Manisty said the omission of the date was not a mistake. It was done knowingly and intentionally, and the barrister was right in holding it to be fatal to the claim. In this case the application was to add names, and the attestation was important as it must have been before a certain date. In this case the proviso in the Act was cited that a disregard of the form shall

not make a notice bad. But to that Mr. Justice Hawkins replied that it was so in the case of a mistake, which the Court held this was not.

In a very recent case reported in 8, L. T., Rep. 299, the magistrates refused a tavern license because they said the case had already been disposed of. The Court ordered a mandamus to issue to require the Justices to state the grounds upon which their decision was arrived at. Sir Henry Hawkins said there were four grounds on which the renewal of the license might have been refused. The applicant was entitled to know upon what ground it was refused. Mr. Justice Wills said, there being four grounds on which the renewal of the license might be refused, the magistrates ought to have specified the ground on which it was refused. This last case has no immediate reference to parliamentary voting, but serves to show that where there are certain grounds why a privilege may be denied the specific grounds, or one or other of them must be stated.

There are other English cases which bear upon the subject of this appeal, but so far as I can discern they all lead to one result, namely, that a person whose name is on the original voters' list is not required to defend his position unless he has received a notice distinctly stating one or more sufficient grounds for his exclusion. If it be said that the law on this subject is much stricter in England than it is here, and stress is laid upon Sec. 26, where it is said the Revising Officer shall not be bound by forms in force in Courts of Record. I answer, that the Imperial Act contains the proviso already mentioned which our Act does not, namely, that the disregard of any forms not limited to forms used in Courts of Record shall not invalidate. Nevertheless, we see that a deviation from the forms in the English Act, much less important than in the case of this Appeal, has been held to be fatal I now come to what has transpired in our own Courts in relation to this subject. In Lilley v. Allin, 21 Ont., Rep. 424, an opinion was expressed by the learned Judges of the Court of Queen's Bench that the notice in question was sufficient, and by

mandamus the Revising Officer was required to proceed, which he did upon the notices, the invalidity of which was then, as now, the subject of appeal. Scarcely any decision could be more briefly stated, and the want of a reasoned judgment is unsatisfactory, especially as on the cardinal question as to the power of the Court to control the Revising Officer there is a wide divergence between that decision and the considered judgment of the Divisional Court of Chancery in Hessin v. Lloyd.

In the Court of Appeal to which the case was carried no judgment or costs were given, but three of the judges expressed an opinion that the notices given were sufficient. I entertain an unfeigned respect for opinions expressed by the learned judges of that Court, and I would gladly, if I could, shelter myself from inevitable odium by conforming to their expression of opinion. But it is evident from the language used by these learned judges, or at least by some of them, that they were rather reluctantly drawn into any expression of opinion on the subject, and one of them described any opinion expressed by the Court to be simply an *obiter dictum.*

In this situation it appears to be imperative that I should give judgment; and for the reasons I have given, I can arrive at no other conclusion than this, That the notice in question, and the other similar notices, were and are invalid. I repeat this, although this notice of Lilley has been specially dealt with by me, because it formed the particular object of the appeal by Allin. Still, it was understood all along that it was only representative of other instances where similar notices omitting the grounds of objection had been given, not for income only, but for other qualifications, and all these are involved in the result of Allin's appeal.

The effect of this invalidity is, that the recipients of such notices were not required, unless they chose, to appear before the Revising Officer to maintain their position, and their rights as voters have not been prejudiced by such non-attendance. Their names, as I learn from the Revising Officer, are noted on the list which was used at the recent election with the letter A, signify-

ing that their claims were under appeal, and so they are easily distinguished.

In conclusion, I hold that this appeal is sustained, and that these persons thus distinguished by the letter A were entitled to vote. Whether they did so or not is a matter in which I am not now concerned.

If they did vote, I hold their votes must be treated as good votes, and the declaration of the Returning Officer as to the result of the Poll does not require any change so far as I am concerned.

W. ELLIOT,
County Judge Middlesex.

9th March, 1892.