DUGALD McPHERSON (PLAINTIFF) . . APPELLANT; 1912

AND *Nov. 13.

1913

DAMEAU H. MEHRING (DEFENDANT) . . . . . RESPONDENT. *Feb. 18.

IN THE MATTER OF THE WEST LORNE SCRUTINY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Election law—Vote on Municipal by-law—Scrutiny—Powers of judge—Inquiry into qualification of voter—Disposition of rejected ballots—"Ontario Municipal Act," 1903, ss. 369 et seq.—"Voters' Lists Act," 1907, s. 24.

A County Court judge holding a scrutiny of the ballot papers deposited in a vote on a municipal by-law may go behind the voters' list and inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote. Davies and Brodeur JJ. dissenting.

The judge has no power to inquire whether rejected ballots were cast for or against the by-law.

Held, per Fitzpatrick C.J. and Duff J.—Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the by-law. Davies and Brodeur JJ. contra.

The Supreme Court affirmed the decision of the Court of Appeal (26 Ont. L.R. 339) reversing the judgment of a Divisional Court (25 Ont. L.R. 267) which reversed the decision at the hearing (23 Ont. L.R. 598).

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment of a Divisional Court(2) which reversed the order at the hearing(3) for a writ of mandamus ordering the judge holding the

(1) 26 Ont. L.R. 339. (2) 25 Ont. L.R. 267.
(3) 23 Ont. L.R. 598.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Brodeur JJ.

1913

IN RE WEST LORNE SCRUTINY.

scrutiny to inquire how rejected ballots had been marked, but refusing a prohibition against an inquiry as to qualification of voters.

The municipal corporation of West Lorne passed a by-law to prohibit the sale of liquor by retail in the village. A vote having been taken on such by-law an application was made to the County Court judge for a scrutiny, in holding which he proposed to inquire into the right of certain persons on the voters' list to cast their ballots. Application was then made to Mr. Justice Middleton for a writ of prohibition against this proceeding. He granted the writ to prohibit the judge from certifying the result of his scrutiny to the municipal council until he had ascertained how the ballots he had rejected were marked. On appeal to a Divisional Court the above order was set aside and a writ issued prohibiting the judge from certifying to the council that the by-law had not been approved by three-fifths of the electors. On further appeal the Court of Appeal reversed the last-mentioned judgment and as a result the County Court judge was left at liberty to certify that the by-law had not been appealed. An appeal was then taken to the Supreme Court of Canada.

Raney K.C. for the appellant. The weight of authority in Ontario is against the jurisdiction claimed by the County Court judge. See *In re Saltfleet Local Option By-law*(1), *per* Boyd C. and Mabee and Teetzel JJ.; *In re Mitchell and Municipal Council of Campbellford*(2), *per* Clute J.; *In re McGrath and Township of Durham*(3), *per* Anglin J.; *In re Orangeville Local Option By-law*(4), *per* Meredith C.J.; *In re*

(1) 16 Ont. L.R. 293.
(2) 16 Ont. L.R. 578.
(3) 17 Ont. L.R. 514.
(4) 20 Ont. L.R. 476.

Ellis and Town of Renfrew(1), *per* Riddell J. and Meredith J.A.; *In re Weston Local Option By-law*(2), and the opinions of Meredith and Maclaren JJ.A. of the Court of Appeal in this case.

C. St. Clair Leitch for the respondent. As to the power of the County Court judge to inquire into the qualification of electors, see the *Saltfleet Case*(3), *per* Boyd C. and Mabee and Magee JJ.

As to the disposition of rejected ballots the learned counsel cited *In re Armour and Township of Onondaga*(4), *per* Riddell J.; *In re Duncan and Town of Midland*(5), followed in *In re Prangley and Town of Strathroy*(6), *per* Sutherland J.; *The Renfrew Case* (1), at page 87, and the opinions of the majority of the judges of the Court of Appeal in the present case.

THE CHIEF JUSTICE.—The broad question to be decided on this appeal is: What is the nature and extent of the county judge's powers under the ballot scrutiny sections (367-372) of the "Ontario Municipal Act" (statutes of 1903, ch. 19)? In my view it will in addition be necessary to consider: How far in the case of a tenant the voters' list is conclusive not only as to his qualification when it is certified, but also as to his right to vote at the time of the election; and the powers of the judge to inquire into the way any of the votes were cast. The decisions in the provincial courts are numerous and have not been consistent.

Those sections (367-372) in substance provide

(1) 21 Ont. L.R. 74; 23 Ont. L.R. 427.
(2) 9 Ont. W.R. 250.
(3) 16 Ont. L.R. 293.
(4) 14 Ont. L.R. 606.
(5) 16 Ont. L.R. 132.
(6) 21 Ont. L.R. 55.

1913

IN RE WEST LORNE SCRUTINY.

The Chief Justice.

that, upon reasonable grounds, the county judge may direct a "scrutiny of the ballot papers" (369) and, upon their inspection, and the hearing of such evidence as he may deem necessary, he shall in a summary manner determine "whether the majority of the votes given is for or against the by-law and forthwith certify the result to the council" (371). With respect of all matters arising upon the scrutiny, the judge possesses the like powers and authority as are possessed by him upon a trial of the validity of the election of a member of a municipal council (372).

The ultimate object of the proceedings authorized by those sections is, in the concluding words of section 371, to enable the judge "to determine in a summary manner whether the *majority of the votes given* is for or against the by-law and to forthwith certify the result to council," and to that end he is required not only to "inspect the ballot papers" for the purpose of counting the votes recorded on those ballot papers as in the case of a recount, but he is in addition "to hear such evidence as he may deem necessary" to enable him to give his certificate to the council. It would not be necessary to hear evidence if his duty was merely to recount the good ballots in the box, but he is directed to ascertain and report whether the will of the majority of those qualified to speak, — *i.e.*, the electors (sec. 338) — as signified by their ballots, is for or against the by-law, and for that purpose it may be necessary to hear evidence on matters connected with the *right* to vote, although external to the ballot which is merely the paper record of the *fact* that a person voted. Section 372 vests the judge with the like powers and authority as to all matters arising upon the *scrutiny* as are possessed by him upon a trial

of the validity of the election of a member of a municipal council. These are powers which one would not expect to find given to a judge to enable him to recount the ballot papers. This further observation is suggested by the use of the word scrutiny in this section. A scrutiny is an entirely distinct proceeding from a recount; it is an inquiry into the validity of the votes.

The object of a scrutiny is to ascertain who has had the majority of the legal votes,

Halsbury, vol. 12, page 454, No. 883, and that being the accepted meaning of the word in England, from which country our whole system of elections by ballot is very largely borrowed, it is binding upon us.

The difficulty, however, arises out of the use of the expression "scrutiny of the ballot papers" in section 369, and of the words "inspection of the ballot papers" in section 371. It is argued that the legislature must have intended when it used the word "scrutiny" and "inspection" in collocation with "ballot papers" to give those words a restricted meaning and to limit the duty and power of the judge to a mere inspection of the ballot papers with respect to their physical aspect. This construction, I respectfully submit, defeats the object of the "scrutiny" or the "inspection." How, as I said before, could the judge comply with the terms of the statute and certify to the council whether the majority of the legal votes given and not of the ballots cast is for or against the by-law, if he cannot go beyond the ballot papers ? It is the assent of the electors of the municipality that gives effect to the by-law (338—sec. 141 "Liquor License Act"), and the elector is the person entitled for the time being to vote in respect of the by-law. Sec. 2, sub-sec. 5.

1913

IN RE WEST LORNE SCRUTINY.

The Chief Justice.

Throughout the several Acts we have to consider "votes" and "ballot papers" are frequently used as convertible terms, as, for instance, in section 189, which provides for the recount. There the judge is directed to count "all the votes or ballots returned," and in some places the electors are said to have marked their "votes" and in others their "ballot papers." The judge it is also said recounts "the votes" on proof that the returning officer improperly counted the "ballot papers." Referring to the sections of the Act grouped under the caption of "The Poll," it will be found, one may fairly say, that the ballot papers are generally described as votes when they are deposited in the box. All those who have a voice at the polls are called voters; they express their choice by the means of the ballot papers which when used and deposited in the box are called votes. (Secs. 350, 353, 354, 355, 356, 357, 358, 361.) The deputy returning officer at the close of the poll is not required, for instance, by section 361 to count and state in writing the number of ballots given, but the number of votes, and what the council desires to know is the will of the majority of the voters. This further observation occurs to me assuming that the words used in section 369 were "scrutiny of the votes" instead of "scrutiny of the ballot papers," what difference would there be in the nature of the duty imposed on the judge? He could only ascertain the majority of the legal votes by the aid of the ballots which are the only record; there are no votes to scrutinize or inspect except those recorded on the ballot papers, so that ultimately the use of these words would lead to the same result. I am fortified in the conclusion at which I have arrived by an examination of the history of the legislation which is exhaustively

and lucidly set forth by Magee J., in the *Saltfleet Case* (1), and in Idington J.'s notes in this case. I have not, of course, overlooked the judgment of this court in *Chapman* v. *Rand*(2), but I distinguish for the reasons given by Magee J., in the *Saltfleet Case*(1).

The next question has reference to the qualification of leaseholders entitled to vote. In other words: How is their right to vote determined ? I have much difficulty in reaching a conclusion on this point. As a general rule the voters' list is conclusive as to the right to vote, but par. 2 of sec. 24, of the "Voters' List Act," read with sec. 86 of the "Consolidated Municipal Act," makes an exception in that continuous residence in the municipality up to the time the poll is held is made a condition of the exercise of that right by a tenant. This fair construction of the language of that section is confirmed by reference to section 357 of the Act, which provides for the form of oath the leaseholder must take if required. That form may, I think, be fairly taken as the construction put by the legislature upon section 24. Those only are qualified to vote who can take that oath, and one of the qualifications required is residence within the municipality for one month next before the vote.

Finally, I am of opinion that the judge has not got the right to inquire into the way any of the votes were cast. If the number of votes improperly cast is found to be greater than the majority in favour of the by-law and it is not possible to ascertain, without violating the secrecy of the ballot as admitted by all the judges, except Middleton J., whether or not those illegal votes constitute that majority, how can the judge report that the by-law was adopted or defeated

(1) 16 Ont. L.R. 293. (2) 11 Can. S.C.R. 312.

1913

IN RE WEST LORNE SCRUTINY.

The Chief Justice.

by the required three-fifths of the legal votes cast? The result is, I admit, most unsatisfactory, in as much as it enables one who has no right to vote to cast his ballot against the by-law as pointed out by Mr. Justice Middleton. But if that incongruous result follows on the application of settled legal principles to the construction of the statute, the remedy is with the legislature that has attempted to apply a procedure devised for the contestation of municipal elections to a case in which the question at issue is whether or not the requisite majority of the legal votes is for or against a by-law. As the learned Chief Justice in appeal very properly observes, this case vividly illustrates the dangers attendant upon legislation by reference.

I would dismiss the appeal and confirm the judgment with costs.

DAVIES J. (dissenting).—The questions arising on this appeal relate to the ambit or extent of the jurisdiction of the County Court judge under the provisions of the "Consolidated Municipal Act of 1903," of Ontario, sections 369 to 372, when holding a scrutiny on the result of the voting of the electors of a municipality on a by-law submitted for their approval.

In the case before us, the pith of the dispute lies in the answer to be given to the question whether or not the County Court judge, when holding such scrutiny, has any, and if any, what power to go behind the voters' list, and examine into, and determine the legality of any vote cast except upon grounds apparent *ex facie* of the ballot papers. There has been much judicial difference of opinion on the question and the judgment of the appeal court now before us, Meredith J.A. dissenting, upholds the contention that

on such a scrutiny as the County Court judge is authorized to hold he is empowered to enter into a general scrutiny of the votes polled, and is not limited to a scrutiny of the ballot papers only.

After a careful examination and comparison of the different statutes which create, control and determine the County Court judge's jurisdiction, I have reached the conclusion that the sections in question of the "Consolidated Municipal Act," 1903, 369 to 372, confer only a limited jurisdiction upon the County Court judge, expressly confined to a "scrutiny of the ballot papers," and which does not entitle him to inquire into the validity of any vote cast except upon grounds apparent *ex facie* of the ballot papers.

This is the opinion of Meredith J.A., and one of his grounds for dissenting in the appeal, and has the support of a great many of the learned judges in Ontario before whom the question has from time to time arisen.

The legislature has used language in section 369 which to my mind indicates a clear intention of limiting the powers of the County Court judge to a "scrutiny of the ballot papers" only, and precludes an inquiry into the right of a voter upon the voters' list to vote. The judge was not to hold a general scrutiny, or a scrutiny of the "votes polled," and thus enter upon a vast field of inquiry. He was simply to enter into a "scrutiny of the ballot papers" and determine the result in a summary way. Without reading other words into the section than those used by the legislature, I cannot see how I can put any wider construction upon the County Court judge's powers than the limited one I have mentioned. I do not think I have any such right to read any other words into the section enlarging the meaning of the words used, or in a

1913

IN RE WEST LORNE SCRUTINY.

Davies J.

case where plain and simple language has been used, speculate as to whether some larger or hidden meaning had not been intended to be expressed. My view is that the legislature knew just what kind of an inquiry it was authorizing and used appropriate language to express its will.

It is argued that this view of the jurisdiction of the County Court judge creates simply a "recount" and that if a recount only was intended to be granted, the well known word "recount" would have been used.

I agree with Chief Justice Meredith's view of the meaning of the sections in question on this point as expressed by him in *In re Orangeville Local Option By-law* (1) :—

> The inquiry is, in my opinion, limited to a scrutiny of the ballot papers, and differs only from a recount in that the judge is not limited to dealing with the ballot papers *ex facie*, but may take evidence in the same way as may be done upon a trial of the validity of the election of a member of a municipal council (sec. 372), for the purpose of determining whether any ballot paper ought or ought not to be counted, this power being in terms limited to taking evidence as to all matters arising upon the scrutiny.

It was suggested that section 372 in enacting that "the judge should, on the scrutiny possess the like powers and authority as to all matters arising upon the scrutiny as are possessed by him upon the trial of the validity of the election of a member of a municipal council," shewed that a wider power than a "scrutiny of the ballot papers" alone must have been intended to be conferred.

It is obvious, however, that this section is not intended to enlarge the jurisdiction conferred on the judge by section 369, but simply to invest him with all necessary powers effectively to exercise a jurisdiction already conferred and defined.

(1) 20 Ont. L.R. 476.

It would appear to me reasonably clear that if a voter duly entered upon the voters' lists tenders himself at the polls as a voter and claims the right to vote he may be required to take the oath prescribed by law with regard to the qualification he claims to vote under, whether as a tenant, a freeholder, or otherwise. This oath embraces the statement that he is a British subject, and if he claims as a tenant, the further statement of residence in the municipality for one month before the election. If he takes the oath, he does so at his peril, and his vote is entered. If he declines to take it, his vote is, of course, refused to be taken. The question whether or not he is or was such resident is frequently one of much doubt and difficulty. But it seems to me clear that none of the questions of nationality, age, tenancy, or residence, which go to make up his qualifications to be put on the voters' list, are open for discussion or inquiry on "the scrutiny of the ballot papers" which the County Court judge is authorized to hold.

Such questions of fact are under the "Ontario Voters' List Act," Ontario Stats. 1907, ch. 7, to be tried and determined before the voters' list is finally settled, and the only exceptions are those mentioned in section 24 of the Act. *In re Port Arthur and Rainy River Provincial Election* (1).

These exceptions, however, excluding the first, namely, "persons found guilty of corrupt practices at or in respect of the election in question on such scrutiny or since the list was certified by the judge," are expressly confined to persons who by reason of want of residence are "under the provisions of the 'Ontario Election Act,' dis-entitled to vote," or who

(1) 14 Ont. L.R. 345.

1913

IN RE WEST LORNE SCRUTINY.

Davies J.

under sections 4 to 7 of that Act are disqualified and incompetent to vote, and are not applicable to municipal elections. It is not contended that in this case any one of the four persons whose votes were disallowed by the County Court judge became disentitled to vote under the "Ontario Election Act," or were disqualified persons under that Act. I adopt the construction placed upon the language of this section by Chief Justice Meredith in *In re Orangeville Local Option By-law*(1), and am of opinion that it is applicable only to voting under the Ontario election law.

Then with regard to the first exception, persons "guilty of corrupt practices in respect of the election in question," it is perhaps sufficient to say that none of the votes attacked in this case were attacked on that ground.

But even if it were otherwise and votes had been attacked on the ground that the voters had been guilty of corrupt practices, I am utterly unable to see how, in the face of the statutory provisions guaranteeing the secrecy of the ballot, and the limited character of the scrutiny provided for, any vote could be inquired into and struck off. The "General Elections Act" contains provisions enabling such votes to be dealt with on a general scrutiny, but it has not been suggested that any similar legislation exists with respect to municipal elections, and until that is done the provisions with regard to the secrecy of the ballot preclude any striking off of the votes of persons, even if they may be found guilty of corrupt practices, for the obvious reason that how the corrupt voter voted is unknown and cannot be inquired into. To give effect to exception one of section 24, therefore, on such a

(1) 20 Ont. L.R. 476.

scrutiny as that now before us, further legislation would probably be necessary. As I have said, however, that question does not arise here, except indirectly.

The judge is, by section 369 of the "Municipal Act," authorized to enter upon a "scrutiny of the ballot papers." By section 371 he is directed, upon inspecting the ballot papers and hearing such evidence as he may deem necessary, to "determine in a summary manner whether the majority of the votes given is for or against the by-law." His determination must be reached by the validity or invalidity of these papers and not by going behind them and entering upon an inquiry whether any of the persons on the voters' list who voted by depositing these ballot papers were entitled to vote or not. It is the "votes" polled as evidenced by the ballot papers that he is to determine upon.

If he had the right to inquire beyond the ballot papers, then to do so effectively he must have the right to inquire how the parties voted. But section 200 prohibits any such inquiry. The secrecy of the ballot is made a matter of public policy by the statute, and cannot be waived. No inquiry, therefore, being permissible as to whether any voter voted for or against the by-law, how is it possible for the county judge to determine, except from the legal and allowed ballot papers themselves, whether the majority of votes given was so given for or against the by-law ? I do not think it is possible, and the plan adopted by the County Court judge in this case of deducting the disallowed votes from the total of those cast in favour of the by-law is to my mind an arbitrary, unjust and totally indefensible plan. It was suggested, but not decided, by Garrow J.A., that

1913

IN RE WEST LORNE SCRUTINY.

Davies J.

in some cases perhaps evidence more or less reliable might be got as to the habits and associations of the voter which might raise a presumption as to which way he had probably voted.

I cannot assent to any such process of mere speculation or presumption.

No other judge has, I think, adopted the suggestion, and the very necessity which the extreme construction of the County Court judge's powers on the scrutiny compelled the learned judge to resort to, shews how unreasonable such a construction is.

And still, if this extreme construction of the Act is held to be correct, while the public policy of maintaining the secrecy of the ballot is maintained in order to make such a construction workable or effective, resort must either be had to the suggestion put forward by Garrow J., and which I think absolutely indefensible, or to the conclusion reached by Middleton J., that it was competent for the judge to examine into the voters' qualifications to vote, and when he had determined adversely to that right then the secrecy which, as a matter of public policy had been placed upon the ballot, was withdrawn and the voter could be compelled to state how he had voted. I cannot find that this construction of the clauses of the Act relating to secrecy of the ballot reached by Middleton J. has received any other judicial support. I cannot concur with it, though I admit it is the logical result of accepting the enlarged construction of the County Court judge's powers on the scrutiny. The 89th section, which provides that

> no person shall be entitled to vote at any election unless he is one of the persons named or intended to be named in the proper list of voters, and *no question of qualification* shall be raised at any election except to ascertain whether the person tendering his vote is the person intended to be designated in the list of voters,

and the sections 198 to 200 providing for the secrecy

of the ballot, all convince me that no such conclusion is permissible. Section 200 reads:—

> *No person* who has voted in any election shall in any legal proceeding to question the election or return, be required to state for whom he voted.

This language is, to my mind, conclusive. It is not confined to those who may on a subsequent scrutiny inquiry be held to have been "legally qualified voters" only, but expressly applies to *any person* who votes, and that includes all persons named or intended to be named in the lists of voters.

I have dwelt at some length upon these two rival suggestions of the learned Justices Garrow and Middleton, because I think on their enlarged construction of the scrutiny clause one or other is essential to the practical working out of the scrutiny, but as I have shewn, I do not agree with either suggestion.

That of Justice Garrow is avowedly only a partial solution of the difficulty the larger construction of the judge's powers on the scrutiny involves, and is one which I venture to say will not be adopted. That of Justice Middleton is, as I have attempted to shew, at direct variance with the language and policy of the statute.

If neither of these suggestions can be adopted, then I venture to think that the construction of the Act which alone is workable under existing legislation should be adopted. In my humble judgment that construction is clear and is confined to a scrutiny of the ballot papers only, and does not extend to an inquiry into the right of a duly registered voter to vote. Such a construction involves no insuperable difficulties; it assumes that the legislature well knew what it was doing when it used the language it did, and it gives

1913

IN RE WEST LORNE SCRUTINY.

Davies J.

effect to clear and unambiguous language without reading into the section words which are not there.

As the ballot paper itself is the only legal means which the County Court judge possesses to determine how the voter who deposited it intended to vote, so it is this paper alone, which if found bad or invalid, must determine from which vote, for or against the by-law, it should be deducted. The "votes" he is to determine upon in a summary manner are those and those only evidenced by ballot papers found to be good *ex facie*.

Summing up shortly my reasons for holding that the special jurisdiction conferred on the County Court judge by the 369th section of the "Consolidated Municipal Act, 1903," is confined to a scrutiny of the ballot papers only; they are, first, that such a construction follows the literal words of the section relating to such scrutiny, carries out their intent and expressed object, is workable, does not contravene any of the other provisions of the statute, and is supported by a very large, if not a preponderating, judicial opinion in Ontario.

That the larger construction contended for is not justified by the language of the section and is unworkable, unless either by violating the public policy of the statute with regard to the secrecy of the ballot, or by resorting to the expedient of taking evidence as to the habits and associations of the voter so as to raise a presumption as to which way he probably voted, neither of which alternatives is permissible.

That with respect to the three exceptions to the conclusive character of the certified voters' list stated in section 24 of the "Voters' Lists Act," 1907, exception one referring to persons guilty of corrupt prac-

tices has nothing to do with any of the votes challenged on this scrutiny, and if it had, requires further legislation to make it effective in municipal scrutinies, while exceptions 2 and 3 relate *exclusively* to voting under the "Ontario Election Act," and to votes disqualified under that Act.

For these reasons I would allow the appeal with costs and restore the judgment of the Divisional Court, Exchequer Division.

IDINGTON J.—If any one desires truly to interpret a statute which is, or was when enacted, a marked innovation in existent law, he should observe the rules in *Heydon's Case*(1), which are quite as good to-day as three hundred years ago.

The first and chief question raised herein is in truth the meaning of section 369 of the "Municipal Act, 1903."

To comprehend properly the purpose and meaning of this section we must look at the group of sections in which we find it under the caption of scrutiny, and inquire whence they came and why they were brought into existence. They are substantially, and indeed almost literally, the same as those appearing in 39 Vict. ch. 35, entitled:—

An Act to provide for voting by ballot on municipal by-laws requiring the assent of the ratepayers,

and numbered therein sections 21, 22, 23 and 25, and have remained ever since as part of the "Municipal Acts."

Other sections of the same Act appear in other parts of the "Municipal Act, 1903," relevant to the said elections.

This "Ballot Act" was passed two years after vot-

1913

IN RE WEST LORNE SCRUTINY.

Idington J.

ing by ballot had been enacted as the method of election to the municipal councils. This latter Act had specially excepted from its operation the taking of votes of electors with respect to by-laws requiring the assent of electors.

Why was it necessary in passing the enabling Act to provide this group of sections now in question ?

To understand this we may profitably advert briefly to the history of legislation relative to the quashing of municipal by-laws.

The Court of Queen's Bench in 1854, in *In re Cæsar and Township of Cartwright*(1), having apparently in earlier cases suggested the court might have a common law power over such by-laws, concluded it had none but such as given by statute.

The first statutory power in this regard was contained in 12 Vict. c. 81, s. 155. The language of that statutory provision pointed at illegality in the by-law as the ground upon which the courts might quash, and that was for some time held to mean an illegality on the face of the by-law.

It was interpreted later in such a way as to enable ratepayers to shew illegality in a variety of ways not appearing on the face of the alleged by-law; such, for example, as if a by-law required the assent of the ratepayers and yet no such vote had been taken. This was later expanded to cover the case of illegal voting or any improper taking of the vote.

In other words "illegality" seemed to be taken as synonymous with *ultra vires* in the widest sense of the term.

It is to be noted that the exercise of the power to quash had always been held, and especially so in

(1) 12 U.C.Q.B. 341.

these cases of irregularity, as in the discretion of the courts.

And in *Coe and Township of Pickering*(1), Chief Justice Draper had questioned whether a scrutiny of the vote had ever been intended as part of the duty of the courts on a motion to quash. He pointed out that they could not sit beyond term, and within these limited periods such a proceeding seemed impracticable. That state of things continued till terms were in the old sense abolished by the "Judicature Act" of 1881.

The Court of Common Pleas, in the case of *Erwin* v. *Township of Townsend*(2) seemed to imply that illegal votes might become a proper subject of inquiry on a motion to quash.

Indeed, the jurisdiction to quash had been the subject of so much doubt and difficulty that as late as 1885 Chief Justice Wilson, in the case of *Fenton* v. *County of Simcoe*(3) found it necessary to review the authorities in order to shew his duty to entertain what was analogous to a scrutiny.

Preceding, yet almost concurrently with, the ballot, there had come other reforms reaching many indirect modes of bribery or corrupting the electorate in ways that had not been always considered bribery, and also acts of intimidation.

In accord with legislation in this regard relative to elections to the legislature, the Act of 1872, for the prevention of corrupt practices at municipal elections, 35 Vict. ch. 36, was passed, and in that was given for the first time the express statutory power to make such causes the basis of a motion to quash a by-law.

(1) 24 U.C.Q.B. 439. (2) 21 U.C.C.P. 330.
(3) 10 O.R. 27.

1913

IN RE WEST LORNE SCRUTINY.

Idington J.

The grounds open on a motion to quash were still limited, if this statute was to be taken as the guide measuring the powers the courts were given. Such a motion might not reach the cases of personation, for example. Besides, motions to quash had never been at that time very summary; and as I have said had been looked upon as dependent upon discretion.

And after all this was an unsatisfactory way of reaching and remedying the evils likely to arise from any such or other misconduct, as an election for obtaining the assent of the electors to a by-law was apt to give rise to.

Indeed, there was even with this amendment no adequate machinery then in the power of the courts for effectively reaching such cases, and all others as might be involved in and be reached by a proper scrutiny of the vote, and hence for all these reasons a better remedy for growing evils was urgently needed.

So when the legislature, which had paused for two years after introducing the ballot at municipal elections, decided to apply the same method of taking votes for by-law elections, it enacted above named 39 Vict. ch. 35, containing a code, as it were, consisting of twenty-eight sections relevant to the subject.

The County Court judges had always been, concurrently with the Superior Court judges, the duly constituted tribunals for trying and deciding cases of controverted municipal elections and so continue. There can hardly be a doubt, therefore, respecting their supposed fitness for the duties of trying any question arising on the trial of a contested election relevant to the submission of a by-law to the electors.

They had become accustomed to applying the laws bearing on such elections and been fully intrusted in

that regard with enforcing the stringent provisions relevant thereto, and to which I have adverted; so far as bearing upon the council elections.

I, therefore, see no reason to doubt that when the legislature enacted this new law it intended to confer on these judges to the fullest extent any and every power any tribunal might need to decide such controversies as might arise in the conduct of such an election as voting upon a by-law; at least just as extensively as they had been given power to thoroughly try and decide other municipal elections involving the same sort of questions.

The history and peculiar frame of the legislation indicates that much.

Section 21 of the Act was substantially that which is now section 369 of the Act before us. It was as follows:—

21. If within two weeks after the clerk of the council which proposed the by-law has declared the result of the voting, any elector applies upon petition to the the County Judge, after giving such notice of the application and to such persons as the judge may direct, and shews by affidavit to the judge reasonable grounds for entering into a scrutiny of the ballot papers, and the petitioner enters into a recognizance before the judge in the sum of one hundred dollars, with two sureties (to be allowed as sufficient by the judge upon affidavit of justification) in the sum of fifty dollars each conditioned to prosecute the petition with effect, and to pay the party against whom the same is brought any costs which may be adjudged to him against the petitioner, the judge may appoint a day and place within the municipality for entering into the scrutiny.

Let us turn to section 128 of the Act respecting municipal institutions as in the Consolidated Statutes of Upper Canada, and section 132 (its successor) in the "Municipal Act" of 1873, and compare this section which I quote with those for initiating the trial of a controverted municipal election and we see where it was got. Let us then turn to the subsequent sections

1913

IN RE WEST LORNE SCRUTINY.

Idington J.

in the original Act and in the Act as it stands, and we find the judge is empowered not only to inspect the ballot papers, but also to take evidence and hear the parties

> and in a summary manner determine whether the majority of the votes given is for or against the by-law and shall certify the result to the council.

And it remains so in the Act before us.

Then section 372 of the Act now in question is as follows:—

> The judge shall, on the scrutiny, possess the like powers and authority, as to all matters arising upon the scrutiny, as are possessed by him upon a trial of the validity of the election of a member of a municipal council; and in all cases costs shall be in the discretion of the judge, as in the case of applications to quash a by-law, or he may apportion the costs as to him seems just.

This is substantially the same as section 25 in the original Act.

What can a scrutiny in such a connection mean if it does not mean the full trying out of all that can be legally tried on an election petition relative to the rights of parties to vote; and incidentally thereto in some cases, the loss or forfeiture of a vote by reason of some act which the law prohibits from being given, and surely by implication from being counted as a vote?

Every intelligent man of the time when this group of sections first became law had, by reason of the occurrence of a great many cases of scrutiny, come to have a pretty accurate idea of what it meant. It is necessary to understand that commonly received apprehension of the term when the Act was passed, if one would read these sections aright.

It had, prior to its use in this Act in 1876, a well defined meaning derived from its use in Parliamentary trials of election petitions. It had been used in the

"Controverted Elections Act" of Ontario, passed three years previously, and stands yet in that Act.

It seems amusing in light of legal history to hear an argument addressed to the court that this scrutiny must mean no more than a recount.

A change in habit of thought does in time change the meanings of words and shades thereof. And I am now convinced from this case that a use of words changes the mode of men's thoughts.

But for all that I must insist upon it that a scrutiny of ballots did not, according to the notion that prevailed in 1876, and in this connection, mean the same thing as a recount. In proof thereof we have the fact that the legislature which first enacted these sections now under consideration, had during the same session in which they were enacted made the first legislative provision in Ontario for a recount of ballots; and I may, by the way, add that in doing so it used the words "votes" and "ballots" as if interchangeable terms.

Nay, more, though for or in respect of elections to the legislature it had provided a recount by a judge, it did not provide any such thing for municipal elections till six years later than the Act we are considering, when it did so by the Act of 46 Vict. ch. 18, sec. 162.

Moreover, the Act of 1874, 38 Vict. ch. 28, sec. 19, sub-sec. 4, had provided for the clerk of the municipality as returning officer in case of dispute, breaking open the ballot packages and deciding any dispute that had arisen as to the count of ballots.

Framed as the whole scheme of this group of sections is in outline upon the plan and with the identical powers that had long been in use for trying controverted municipal elections, can there be any doubt of its purpose?

1913

IN RE WEST LORNE SCRUTINY.

Idington J.

How can it be said in face of such a course of legislation amid which these sections were first enacted, that this scrutiny before a county judge was intended for or meant merely a recount? Or how can it be said that when the law was changed and power was given to have a recount by the county judge in ordinary municipal elections and the provisions for a scrutiny left standing unrepealed and in force, that they were to be reduced, in effective operation, to something less than originally intended and to be treated as a mere recount? And if these considerations do not dispose of such a contention how can it be maintained in face of section 322, sub-sections 3 and 4 (in the same Act as introduced the recount in municipal elections) which provided specially as to bonus by-laws requiring a two-fifths of the total available vote, as follows:—

(3) In case of dispute as to result of the vote, the judge shall have the same powers for determining the question as he has in any case of a scrutiny of the votes. 45 V. c. 23, s. 17.

(4) The petition to the judge may be by any elector, or by the council; and the proceedings for obtaining the judge's decision shall be the same, as nearly as may be, as in the case of a scrutiny. 43 V. c. 27, s. 16(2)?

That section stands now section 366*a* of the present Act.

Such is the history of the law so far as I can find and verify it.

The decision we are asked to come to would gravely affect the rights of electors to have a true report made of the result not only of this sort of election relative to the liquor law, but also as to all the elections by which the Act provides for obtaining the assent of the electors to any by-law involving their money and property and especially as to the bonus

by-laws which respectively require a certain specified proportion of the total votes entitled to be cast in such regard.

When electors suppose that the law provides a protection in requiring that a certain percentage of the total available vote must be had, they do not turn out with the same zeal as in other cases and hence often the doors are thrown open to personation and the analogous fraud of voting when a man, though on the list, has in truth no vote.

This view presented by appellant, if adopted, would render all this and much more of an undesirable kind of consequence not only possible, but without the summary and reasonable remedy the scrutiny gives, drive the ratepayer to a locking of the stable after the horse has been stolen, as moving to quash the by-law would often mean.

I do not think an Act which has stood as a shield for an honest vote and protection against fraud in by-law elections for so very long, ought to be frittered away merely because the supporters of this by-law neglected (if their pretensions be founded on fact) the obvious duty of tendering the oath to those voting where they had no right to vote.

Coming to the last question involved in the appellant's contention, it seems a remarkable one. The voters' list is the foundation of the vote taken, and but for the "Voters' List Act" containing section 24, no trouble could arise in the way of carrying out this scrutiny.

The following is the section in question:—

24. The certified list shall, upon a scrutiny, under the "Ontario Election Act," or the "Municipal Act," be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used, except

1913

IN RE WEST LORNE SCRUTINY.

Idington J.

(1) Persons guilty of corrupt practices at or in respect of the election in question on such scrutiny, or since the list was certified by the judge;

(2) Persons who, subsequently to the list being certified are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the "Ontario Election Act," disentitled to vote;

(3) Persons who, under sections 4 to 7 of the "Ontario Election Act," are disqualified and incompetent to vote.

Appellant argues that the exception in sub-section 2 forms no part of the law governing this election and has nothing to do with the matter.

The first part of the section is set up against scrutiny, but its limitations expressed in the exceptions are to be excluded. Needless to answer that, I imagine.

But we are asked, despite recent amendment in 1907, to read sub-section 2 so as to make the last member of the sentence govern the whole and say it can only refer to Ontario elections and thus render nugatory and nonsensical the first part referring to a municipality. I do not think that mode of interpretation commends itself or falls within either the latter part of the rule in *Heydon's Case*(1) above referred to or the "Interpretation Act" in force here.

I am also unable to read the language of this sub-section 2 as it is said it has been read elsewhere.

I am unable to so read that as to treat the non-resident at the time of voting as entitled to vote. If tendered the proper oath he could not take it. But his vote cannot be effectively counted, and if in the result the learned trial judge is thus disabled from reporting the by-law has been carried, he must say so.

It is, therefore, unnecessary to determine here anything relative to the first class of exceptions. But to support the argument of appellant excluding its opera-

(1) 3 Co. 18.

tion I suppose we must assume that the voting when and where a man knows he has no right to vote should not be held a corrupt, but a pious practice: Willes J. in the case of *Cooper* v. *Slade*(1), at page 773, and Baron Martin in the *Bradford Election Case*(2), at page 31, to the contrary notwithstanding.

The judge cannot do the impossible thing in such a case as this. However ingenious the method adopted of counting the votes cast so as to produce a total vote and then deduct the total bad votes from the numbers reported as supporting the by-law and thus present a less than three-fifths majority, I do not agree therein, save as illustrative of possible results if voters could be sworn as to how they had voted.

If the law prohibits his swearing the alleged voters and forcing them to tell how they voted, as I think it does by section 200 of the Act, then there is no alternative left him but to consider, as in any other election trial, whether or not he can say there has been a valid election shewing the by-law carried.

If, as here, the result is that he cannot thus determine, he must say so and thus end the matter.

There might in many such cases be such a preponderance of votes cast in favour of the by-law as to overcome any such result being necessary.

Each case must in its result depend on these considerations according to the facts developed.

In this case the result is the by-law cannot be reported as carried.

The appeal must be dismissed with costs.

DUFF J.—I concur in dismissing this appeal. The grounds upon which this conclusion is based are suffi-

(1) 6 H.L. Cas. 746. (2) 1 O'M & H. 30.

1913

IN RE WEST LORNE SCRUTINY.

ciently stated in the judgment of Garrow J. with which I entirely agree.

Brodeur J.

BRODEUR J. (dissenting).—In 1876 the ballot paper was introduced in elections on municipal by-laws in the Province of Ontario (39 Vict. ch. 35). The law provided that the ballot should have a number printed on the back and should have attached a counterfoil with the number printed on the face. That numbering of the ballot made it similar to the one then used in England. At the same time it was provided that a scrutiny of the ballot papers could take place. That provision as to the scrutiny is now reproduced in section 369, chapter 19 of the "Consolidated Municipal Act" of 1903, under the heading "Scrutiny," and reads as follows:—

> If within two weeks after the clerk of the council which proposed the by-law has declared the result of the voting, any elector applies upon petition to the county judge * * * and shews by affidavit to the judge reasonable grounds for entering into a scrutiny of the ballot papers * * * the judge may appoint a day and place within the municipality for entering into the scrutiny.

The legislative and municipal elections are held on lists prepared according to the provisions of an Act known as the "Voters' List Act," though the qualification of the elector in those elections are different. Thus we find in the "Election Act for the Legislative Assembly," that the judges are not competent to vote (sec. 4, the "Ontario Election Act"). However, in any municipal election those judges could vote. Their names are put on the list.

The "Voters' List Act" which is now contained in chapter 4 of the statutes of 1907, declares in its section 24 what is the effect of those lists upon a scrutiny as follows:—

24. The certified list shall upon a scrutiny, under the "Ontario Election Act," or the "Municipal Act," be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used, except

(1) Persons guilty of corrupt practices at or in respect of the election in question on such scrutiny, or since the list was certified by the judge;

(2) Persons who, subsequently to the list being certified are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the "Ontario Election Act," disentitled to vote;

(3) Persons who, under sections 4 to 7 of the "Ontario Election Act," are disqualified and incompetent to vote. R.S.O. 1897, c. 7, s. 24.

In the last few years the "Ballot Act" was amended and the numbering of the ballot on its back has disappeared as a result of the amendment.

A scrutiny has taken place in this case in a municipal by-law election. The County Court judge has proceeded to inquire as to the residential qualifications of a certain number of voters. Four of them were found to have the same residential qualification as that which they had when the lists were made. And the judge, although not able to ascertain now for whom those people had voted, because their ballots were not numbered as formerly, proceeded, nevertheless, to deduct their votes from the number given in favour of the by-law. As a result of that subtraction he found that the by-law had not the necessary majority and declared it had not carried.

The majority of the Court of Appeal confirmed that decision of the County Court judge.

I may say that I am not able to concur in that view. I am of the opinion that the County Court judge had no authority first to inquire upon a scrutiny in a municipal election as to the residential quali-

1913

IN RE WEST LORNE SCRUTINY.

Brodeur J.

fication of electors and secondly that even admitting that he could make such inquiry, the law does not give him the power to deduct those votes from the votes given in favour of the by-law.

The scrutiny is well known in Great Britain. It is a procedure on the trial of an election petition by which the petitioner claiming the seat must put himself in a majority by adding sufficient votes to his own poll or by striking off a sufficient number from the respondent; then the respondent begins and adopts the same course until he is in a majority and so the scrutiny is continued until the particulars are exhausted. And in order to ascertain for whom a person whose name should be struck off has voted, the court refers to the register used in the election, finds the name of the voter, then refers to the counterfoils and finds the ballot paper used by that disqualified voter and having in that way discovered for whom he has voted, deducts his vote from the number given in favour of his candidate.

Fraser in his work on Parliamentary Elections, 2nd ed., p. 26, says:—

> The object of the numbering of the ballot paper is to make it possible to ascertain in the event of a scrutiny how votes have been given.

In Ontario the law, as I have already said, provided at first for a numbered ballot in municipal elections. When a scrutiny would take place and a corrupt vote would be found they could then refer to the poll book, the counterfoils and the ballot papers and strike off that vote.

There is no doubt that under section 24 of the "Ontario Voters' List Act" they could also in a provincial election strike off the votes of persons who

were declared unqualified by sections 4 to 7 of the "Election Act," or who had ceased to be residential voters since the making of the lists, but when they abolished the marked ballot they unfortunately forgot to amend the provisions of their Act as to the scrutiny, and did not provide any machinery by which it could be detected for whom the unqualified voter had given his vote. It would have been easy in order to render the scrutiny effective to authorize such an inquiry. On the contrary it is declared in the law that nobody may disclose, and the elector cannot be forced to state, for whom he voted.

Now, as to whether the judge could inquire as to the residential qualification of voters who were in the same position as when the list was made, I find that the section 24, though referring in its first part to a scrutiny in municipal and provincial elections, applies in its two last sub-sections to legislative elections only. Corrupt practices might, under sub-section 1, be inquired into in municipal elections, but no power seems to me to have been given to make the same inquiry as to voters disqualified on account of change of residence or for some other reason. That is the view which has been enunciated by several judges of the Ontario courts and in which I concur. See *Saltfleet Case*(1); *Campbellford Case*(2); *Durham Case*(3); *Orangeville Case*(4); *Renfrew Case* (5).

Now, suppose that the inquiry could be made as to the change of residence of a voter, could the inquiry cover or relate to a case where the voter is to-day in

(1) 16 Ont. L.R. 293.
(2) 16 Ont. L.R. 578.
(3) 17 Ont. L.R. 514.
(4) 20 Ont. L.R. 476.
(5) 21 Ont. L.R. 74; 23 Ont. L.R. 427.

1913

IN RE WEST LORNE SCRUTINY.

Brodeur J.

the same position as he was when the list was made ? One cardinal principle is that the lists are final and conclusive. They are made with a great deal of care under the control of the municipal authorities and of the courts. Very frequently in the making of the lists the municipal authorities and the courts have to decide whether a man is residing in one municipality or in another. The residence is a question of fact which it is sometimes difficult to determine. In the case of a man whose residence has not changed since the making of the lists is it legal that the qualification of that man could be determined on the scrutiny ? I think not. I think that the list is final and conclusive in such a case.

Now, coming to the second question as to what the judge is going to do with the votes which he finds have been illegally given.

Formerly when the ballot was marked it would have been easy to find out for whom this person had voted, and his vote could have been struck off. But by the law passed a few years ago, the ballot was changed and is not numbered any more. It is the same as in our federal law. Could it be claimed for one moment under the federal law when a scrutiny takes place, that a member could not be declared elected because some person had voted who had no right to vote ? Suppose that a member should be elected by a majority of one, a scrutiny takes place and it is found that two electors were not qualified to vote, should it be declared by the judge who holds this scrutiny that the member should not be returned because he is not sure whether he has the majority or not, there being no means of ascertaining for whom those unqualified men have voted ? Certainly not.

That is, however, what has been done in this case. Where was the authority of the judge to declare that the four or five alleged illegal votes should be deducted from the number of those who have voted for the by-law? That is a conclusion not authorized by the law, and it is also a very unjust and unfair one, because those unqualified electors may have voted against the by-law so their votes would be counted twice against the by-law. For my part, I am strongly of the view that the judge acted without authority and that those votes should not be deducted from those given for the by-law. To justify his acting in that way the judge would have required express statutory authority, and I fail to find in the statutes any such powers vested in the judge who holds a scrutiny.

For those reasons the appeal should be maintained and the judge should declare that there was a sufficient majority of votes in favour of the by-law.

Appeal dismissed with costs.

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