Legal Department

J. M. GLENN, K.C., LL.B.,
OF OSGOODE HALL, BARRISTER-AT-LAW.

Rex el Rel Warr v. Walsh.

Judgment on motion by relator to set aside the election by acclamation of Edward J. Walsh, Joseph Allen, Thomas Mara, Manton Treadgold, John Fingland and Richard Ashley, as councillors for the Town of Brampton, upon the ground that the nomination of candidates for councillors was held at 10 o'clock in the forenoon of Monday, 29th December, 1903, for one hour, instead of at noon of the same day. Held, that the Legislature having by section 119 of the Municipal Act expressly fixed the hour of noon for such nominations, the council has no power by by-law or otherwise to alter the hour. The time of holding an election is a matter of substance; the nomination is the commencement of the election. The authority to hold an election at one time will not warrant an election at another time. Am. and Eng. Encyc. of Law, 2nd ed., vol. 10, p 697; re East Simcoe Election, 1 Ont. Elec. Cas., 291, 308, 322, 336-7. Held, also, that the direction of the statute is not merely directory, but imperative. Held, also, that holding the election at the wrong hours is not a mere irregularity coming within Sections 204 of the Act, the "saving clause." Order made setting aside the election and directing the holding of a new election, with costs.

The above is the judgment of Mr. Winchester, the then Master in Chambers. An appeal was taken from this judgment and heard by Mr. Chief Justice Meredith. The following is his decision reversing that of Mr. Winchester:

Re ex rel. Warr v. Walsh.—Judgment on appeal by defendants from order of Master in Chambers (4th Febuary, 1903), setting aside the election of the appellants as councillors for the Town of Brampton, and directing a new election, upon the ground that the nomination of candidates, which resulted in the election of the appellants by acclamation, took place at 10 o'clock in the forenoon, and not at noon. In each of the years from 1898 te 1902 (inclusive) the municipal Council of the Town of Brampton provided by by-law that the nomination for Councillors should be held at the same time and place as the nomination for mayor, that hour being 10 o'clock in the forenoon, and this they assumed to be under sub-section 2 of section 118 of the Municipal Act, R. S. O., ch. 223. The difficulty arises in grafting the provisions of the Municipal Amendment Act, 1898, as to the election of councillors of towns having a population of not more than 5,000 upon the provisions of the Municipal Act. Held, that sub-section (1) of the section added by the act of 1898 (71a) had not the effect of abolishing in the case of towns to which it applied their division into wards; the only change made was that instead of there being a prescribed number of councillors for each ward, the number of councillors was fixed at six, and, instead of being elected by wards, they were all to be elected by a general vote. The language of sub-section 2 of the added section should be treated as an inaccurate expression of the idea that on the conditions and in the event mentioned in it, the former mode of constituting the council and of election of councillors might be restored. Sub-section 2 of section 118 should be read, in order to give effect to the amendment, as empowering the council, where the election is to be by general vote, to provide by by-law that the nomination of councillors shall be held at the same time and place as that for Mayor, and to make the same provision in the case of all towns of over 5,000, where the nomination of councillors must still be made for the several wards of the town. And section 119 should be read as providing that the meeting for the nomination of councillors in either case shall, unless the contrary is provided by by-law, be held at noon. Therefore, the council had power to pass the by-law under the authority of which the nomination for councillors was held at the same time and place as the nomination for Mayor, and the appellants were properly nominated and duly elected. Appeal allowed, with costs here and below.

Rex Ex-rel McFarlane v. Coulter.

Judgment on appeal by relator from order of local judge at Sandwich, setting aside the fiat, the relation, and all proceedings taken thereon. On 21st January, 1902, upon the application of the relator, the local judge granted a fiat giving the relator leave, upon entering into the proper recognizance, to serve a notice of motion upon James A. Coulter, under section 20 of the Municipal Act, to set aside his election as reeve of the township of Colchester North. The proceedings were taken and styled in the county court of Essex, and the recognizance was duly entered into and filed, and notice of motion served on the respondent on 21st January. On 10th March, 1902, respondent, by leave of the same judge, gave a notice of motion, returnable before him on 11th March, 1902, to set aside the fiat, notice of motion, under it, and all the proceedings in the relation. On 21st March respondent's motion to set aside all the relator's proceedings was heard, and judgment reserved. On 1st August this was granted, and an order made setting all proceedings aside, with costs. The present appeal was from that order. Held, that the appeal must be dismissed upon the ground that no appeal lies from the order appealed against to a judge in chambers. The proceedings were intituled and carried out in the county court of Essex, and appeals from county courts lie in ordinary cases to a divisional court. Under the Municipal Act of 1892, 55 Vic., chap. 42, section 187, sub-section 3, for the first time an appeal was given from the decision of the judge trying the matter, to a judge of the high court. Such appeal is not from any interlocutory proceeding, but from the decision of the judge in the matter upon the merits. No opinion expressed as to whether the county court judge had any power to make the order appealed against. No such power is expressly given him, and unless he have it by implication, which the court of appeal in Regina ex-rel. Grant v. Coleman, 7 A. R., 619, thought he had not under the law as it then stood, his duty was to go on and try the matter on the merits. The change in the law effected by the statute of 1892 is such as to render the decisions referred to in that case no longer binding. The further change by 2 Edw. V. I. I., chapter 1, section 15, does not seem to affect the present application, which was launched before that statute was passed.

Greer vs. Village of Colborne.

This was an appeal by plaintiff from judgment of Street, J., dismissing with costs an action for damages for injuries alleged to have been received owing to defendant's negligence in not having a sufficient railing along the walk on which plaintiff was walking so as to prevent pedestrians from falling into the dangerous hole mentioned in the evidence. The trial judge found that the sidewalk in question was defective and in a dangerous condition, and that appellant would have recovered had he not been intoxicated. The appellant contends that the trial judge erred in finding that such intoxication was the proximate cause of the accident and not defendant's negligence. Appeal dismissed with costs.

Township of Lochiel v. Township of East Hawkesbury.

Judgment on appeal by plaintiffs from judgment of Ferguson, J., in so far as it was against the plaintiffs, in an action brought for a declaration that a government allowance for public road exists between the plaintiff township, in the county of Glengarry, and the defendant township, in the county of Prescott, and between the respective gores of the township, and that such allowance is upon the boundary line between the townships. Appeal allowed (Osler, J. A., dissenting) and judgment to be entered for plaintiffs in the court below. No costs of action or appeal.