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DIVISIONAL COURT.

RE DUNCAN AND TOWN OF MIDLAND.

Municipal Corporations—Local Option By-law—Order Quashing because Third Reading and Final Passing Premature—Appeal from—Waiver by Council Purporting to Read By-law a Third Time after Notice of Appeal—Time for Finally Passing By-law—Necessity for Expiry of Two Weeks from Declaration of Result of Vote—No Necessity for Declaration—Municipal Act—Liquor License Act—Repeal of By-law—Irregularities in Voting—Voters Depositing Ballots in a Box — Publication of Notice — Time for—Constitution of Council—Knowledge of Council of Approval of Voters — Voters' Lists — Names of Voters—Deputy Returning Officers — Appointment of — Poll Clerks—Illiterate Voters—Marking of Ballots—Irregularity—Effect on Result—Curative Provision of Statute—Form of Oath for Voters—By-law not Prohibiting Sale of Liquor in Places of Public Entertainment—Immaterial Omission.

Appeal by the corporation from order of MULOCK, C.J., 9 O. W. R. 826, quashing a local option by-law passed by the town council.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

F. E. Hodgins, K.C., for township corporation.

J. B. Mackenzie, for the applicant.

RIDDELL, J.:—An objection was taken at the opening of the argument that the town corporation had waived the right of appeal. It appears that the judgment appealed from having been given 25th April, 1907, the council on 29th April, as it is said in deference to the opinion of the learned Chief Justice, passed a resolution that the by-law should now be read the third time, and thereupon purported to read the by-law the third time and pass it. The by-law was not then before the council, the original being in Toronto, and nothing was done but the bare form of affecting to read it and then declaring it passed. No by-law was signed or sealed upon that day or thereafter.

I do not think this is a waiver of the appeal, notice of which had been theretofore given, even if the council has the power to waive a right of this character. The cases as to waiver are collected in Holmested and Langton, p. 1003, and I think that the act done here, not being done in any action and not such as to signify conclusive acceptance of the judgment appealed from, does not destroy the right to appeal: Phillips v. City of Belleville, 10 O. L. R. 178, 6 O. W. R. 129. Cases such as International Wrecking Co. v. Lobb, 12 P. R. 207, in which the appellant has acted upon a judgment in such a way as to derive some benefit from it, have no application. As at present advised, I think the council would have been wise had they passed the by-law with all formality ex abundanti cautela; but that we cannot now decide, as the matter has not come before us for decision.

Upon the merits, I am unable to agree with the learned Chief Justice. It must, I think, not be lost sight of that the voters of each municipality are vested with the right of self-government to a very large extent, and that their wishes should be given full effect to if at all possible. The Court should strive to do this; and not be astute to find reasons for interfering with the result which should follow from a voting.

The Act 6 Edw. VII. ch. 47, sec. 24, amending the Liquor License Act, R. S. O. 1897 ch. 245, sec. 142, sub-sec. 4, provides that "in case three-fifths of the electors voting upon" a local option "by-law approve of the same, the council shall, within 6 weeks thereafter, finally pass such by-law, and this section shall be construed as compulsory, and the duty so imposed upon the council may be enforced at the instance of any municipal electors by mandamus or

otherwise." The duty of the council then is purely ministerial, if three-fifths of the electors voting approve; and any defects in the manner of passing the by-law would, in my opinion, therefore, be of little consequence. The proviso in R. S. O. ch. 245, sec. 141 (1), is: "Provided that the by-law, before the final passing thereof, has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act." Let the by-law be approved of by the electors in the manner provided by secs. 338 et seq. of the Municipal Act, that is, by voting after such advertisement and other proceedings as are prescribed; let three-fifths of the electors, as a fact, approve in this way of the by-law; and the duty of the council is clear. I do not think that any proceedings after the polling are necessary, such as a summing up, or declaration by the clerk, as provided by sec. 364 or otherwise; if the voting, as a fact, has resulted in the statutory approval, the duty of the council is clear. Any proceedings taken after the polling may be of assistance to the council in determining the actual state of the poll; but I think that the council may assure themselves of this by any other means; and the validity of the final passing of the by-law will depend upon the fact of the result of the voting, and not upon the method of ascertaining such fact. There may be some doubt as to the application of secs. 367-374 to a by-law of this kind at all. I think there need be no declaration by the clerk of the council as to the result of the voting; and consequently the elector who might desire a scrutiny may be in a difficulty under sec. 369. But if these sections do apply, I am unable to accept the judgment of the learned Chief Justice holding that for 2 weeks after such a declaration, if it be made, the council cannot pass the by-law. There is no such prohibition in terms, and I do not think the prohibition should be applied. The whole purpose of a scrutiny would be be to shew that the necessary three-fifths had not approved of the by-law; that being shewn at any time, the basis upon which the by-law rests fails, the necessary pre-requisite is found to be wanting (6 Edw. VII. ch. 47, sec. 24 (5)); the council are proved not to have had the power to pass the by-law they have purported to pass. The result will follow that follows in any other case of a by-law passed without jurisdiction; any action or proceeding under it would fail, and it might be quashed by the Court. There would be no necessity of any repeal; that, it is argued, is for-

bidden by sub-sec. 6. As at present advised, however, I do not think that sub-sec. 6 applies to any by-law which has not in fact received the majority contemplated by the statute; and I think that there would be nothing to prevent a repeal of a by-law which had not received the proper majority, useless as that repeal would seem to be.

Even if the council are forbidden to repeal a by-law passed without jurisdiction, I cannot see that the by-law could therefore be considered of any avail.

An objection was also taken that a number of voters, instead of handing their ballots to the deputy returning officer for him to put them in the ballot box, themselves placed them in the ballot box, and sec. 170 is appealed to. This provides that "no person who has received a ballot paper from the deputy returning officer shall take the same out of the polling place; and any person having so received a ballot paper, who leaves the polling place without first delivering the same to the deputy returning officer in the manner prescribed, shall thereby forfeit his right to vote; and the deputy returning officer shall make an entry in the poll book in the column 'Remarks' to the effect that such person received a ballot paper, but took the same out of the polling place or returned the same declining to vote, as the case may be." Had the section stopped with the words "forfeit his right to vote," the argument would have had some weight; but the remainder of the section shews that what was being provided against was the voter going away without voting, or declining to vote. It never could have been intended that a voter who, upon the direction or with the approval of the deputy returning officer, himself in good faith placed the ballot in the box, instead of handing it to the deputy returning officer, thereby should disenfranchise himself. Section 204 covers this defect.

Taking now the other objections in the order of the notice of motion.

Objection 2. The statute, sec. 338 (2), provides for publishing notice of the by-law for 3 successive weeks, and 338 (1) that the day "fixed for taking the votes shall not be less than 3 . . . weeks after the first publication of the proposed by-law." The first publication was 12th December, 1906, and the day of polling 7th January, 1907. It will be seen that 3 weeks elapsed from the first publication before the day of polling, if the word "week" be used in the ordi-

nary signification. But it is argued that Sundays and holidays are to be excluded, and that 21 days must elapse excluding such days.

I dealt with this objection and overruled it in Re Armour and Township of Onondaga, 9 O. W. R. 833. Having read and considered again the cases cited by counsel for the respondent, I see no reason for changing my view there expressed. The cases cited are as follows, under the Temperance Act, 1864, 27 & 28 Vict. ch. 18: Coe v. Pickering, 24 U. C. R. 439; Miles v. Richmond, 28 U. C. R. 333; Brophy v. Gananoque, 28 C. P. 70; Mace v. Frontenac, 42 U. C. R. 70.

That Act provided, sec. 5, that "the clerk . . . shall . . . cause such by-law . . . to be published for 4 consecutive weeks . . . and also by posting up copies of the same in at least 4 public places . . . with a notice, signed by him, signifying that on some day within the week next after such 4 weeks, at the hour of 10 o'clock in the forenoon . . . a meeting of the municipal electors . . . will be held for the taking of a poll. . . ."

In Coe v. Pickering the dates were, first publication 12th January, 1865, polling 7th February. Held, time too short, but that the last week ended 8th February.

In Miles v. Richmond, first publication 2nd October, 1868, polling 4th November. Held, that the first publication was bad, in that it stated the hour of polling as 10 p.m. instead of 10 a.m.; but further said that the first publication, which was good, having been made 9th October, the fourth week ended 6th November.

In Brophy v. Gananoque, first publication 6th March, 1875, polling 1st and 2nd April. Held, that this was not 4 weeks.

In Mace v. Frontenac, first publication 9th October, 1876, polling 6th November. Held, that for those townships in which the first publication was on 9th October, the time was sufficient; but where, as in Loughborough, the first publication was 10th October, or, as in Oso, the 12th or 13th October, the time was too short; and the by-law was accordingly quashed.

Then there is a case of a by-law for a loan, Re Armstrong and Township of Toronto, 17 O. R. 766. First publication 30th November, 1888, polling 7th January, 1889. Held, that this was 3 days after the expiry of the 5 weeks mentioned

in the statute. Ostrom v. Sydney, 15 O. R. 43, and Cross v. Gladstone, 15 Man. L. R. 328, are not in point. Re Rickey and Township of Marlborough, 9 O. W. R. 930, does not assist upon this question in any way favourable to the attack upon the by-law. It seems to have been considered that a first publication on the 14th December, followed by polling day 7th January, would answer if the publication in other respects were regular. I adhere to the opinion in the Armour case.

Objection 3, that the council were not a lawfully constituted body when finally passing the by-law is fully met by the case Re Vandyke and Village of Grimsby, 12 O. L. R. 211, 7 O. W. R. 739, 8 O. W. R. 81. See Re Armour and Township of Onondaga, 9 O. W. R. at p. 838.

Objection 4, that the council had no knowledge of the by-law having been carried by a majority of votes, when assuming to finally pass it, is answered in the early part of the judgment, where it is considered that the validity or otherwise of the final passing by the council depends upon the fact of the vote having been cast—even though the fact be as stated in the objection, which cannot be said to be proved in view of the affidavit of the clerk.

Objection 5. The same ballot boxes, poll books, and voters' lists were made use of on the concurrent votings for water and light commissioners and public school trustees, and said by-law. The statute does not forbid this; I cannot find that it is contra-indicated; and the case about to be mentioned indicates that the practice is unexceptionable.

Objection 6. No voters' lists, as required by the statute, were prepared or supplied to the deputy returning officer. This is met by Re Sinclair and Town of Owen Sound, 12 O. L. R. 488, 8 O. W. R. 239, 298, 460, 974, which shews the very wide application of sec. 204—even if there were a defect, which I am far from asserting.

Objection 7. The voters' list for polling sub-division No. 3 contained more than the lawful number of names.

The voters' list for this subdivision contains more than 300, but not more than 400, names of voters, and it is argued that 3 Edw. VII. ch. 19, secs. 535, 536, apply, so as to render this a fatal error. I do not think so. Sub-section (12) of sec. 536 gets over the difficulty; and, at the worst, sec. 204 is applicable: Re Sinclair and Town of Owen Sound, supra.

Objection 8. That no deputy returning officer was legally authorized to conduct the polling.

The resolution providing for submission to the votes of the electors, passed 27th November, 1906, appointed the clerk as returning officer, William Clegg as deputy returning officer for the west ward, James Baker as deputy returning officer for the east ward, and Alfred Courtemanche, as deputy returning officer for the south ward.

The by-law, as advertised, provided that William Clegg should be deputy returning officer for the west ward or polling subdivision No. 1, James Baker for the east ward or polling subdivision No. 2, and Alfred Courtemanche for the south ward or polling subdivision No. 3. Clegg acted as deputy returning officer for polling subdivision No. 1, and no objection is taken to him. James Baker was apparently unable, at all events he refused, to act, and the clerk of the town, after consultation with the mayor, appointed William Gerow to act in his stead. This is alleged to have been done under sec. 108, but it was done long before the time arrived for attending for instructions. Consequently, the provisions of this section have not been literally complied with; but this was the merest irregularity. It was known that Baker would not act as deputy returning officer, and, instead of going through the idle form of notifying him to attend for instructions, and waiting for his non-attendance, and then appointing a substitute, the clerk acted at once upon the refusal. Such an irregularity is healed by sec. 204.

As to polling subdivision No. 3, by-law No. 632 had appointed Alphonse Courtemanche deputy returning officer for the polling subdivision for the municipal elections. This seems to have been a mere mistake for Alfred Courtemanche —and the resolution for submitting this by-law to the electors was correct; the name is printed "Alfred Courtemanche" in the by-law as published, and Alfred Courtemanche acted as deputy returning officer. I see nothing in this objection.

The case of Re McCartee and Township of Mulmur, 32 O. R. 69, is cited against these two deputy returning officers. Since that decision, the statute of 4 Edw. VII. ch. 22, sec. 8, has been passed, but the provisions of this statute have not been complied with. Supposing the McCartee case to have been well decided, I still think that the naming of the deputy returning officer is sufficient.

Objection 9. The poll clerks officiating at polling subdivisions Nos. 1 and 2 were not authorized to do so. By-law No. 633, passed 18th December, appointed for the municipal election poll clerks George Gregory for polling

subdivision No. 1, and William Gerow junior for polling subdivision No. 2. Gerow refused to act, and was appointed deputy returning officer in the place of James Baker, as has already been said. George Gregory was appointed in his place by the town clerk after consultation with the mayor. Gregory thus becoming unable to act as poll clerk in No. 1, C. H. McMahon was appointed in his place in the same way. The Consolidated Municipal Act, 1903, sec. 106 (1), as amended by 5 Edw.VII. ch. 22, sec. 3, and 6 Edw.VII. ch. 34, sec. 5, makes it the duty of the council of every local municipality in which an election for members of such council is to be held, by by-law to appoint the poll clerks who shall act as such at the respective polling places. The duties of the poll clerk are not defined; sec. 165 (2) provides that the deputy returning officer may cause him to record the names, etc., of persons claiming to vote; sec. 174 (6), that the poll clerk (if any) shall sign the statement at the close of the poll; sec. 177 (2), that the deputy returning officer may make his declaration before the poll clerk or the clerk of the municipality, or a justice of the peace; sec. 108 (3) provides that if in case of illness, etc., the returning officer or deputy returning officer becomes unable to perform his duties, the poll clerk chall act. It would seem of small importance that poll clerks should not be appointed at all in the ordinary case, and, in my view, even if poll clerks should have been appointed, sec. 351, directing such proceedings in a vote of this character, the facts that none was specially appointed for this particular by-law, and that a change was made afterwards in those appointed for the municipal election proper, form such an irregularity as is cured by sec. 204.

Objection 10, that no copies or lawful copies of the by-law were posted, etc., was before the Chief Justice not insisted upon, except to contend that they should have been put up outside. There is no substance in this objection; and the extended objection will be considered with 18.

Objection 11 is abandoned; as is objection 12. The first part of objection 13 is substantially the matter secondly considered in this judgment, i.e., as to the effect of sec. 170; and need not be further considered.

Then it is said that in polling subdivision No. 1 some half a dozen voters gave open votes; and in no such case was a declaration of inability to read, or physical incapacity for the marking of the ballot, made by the voter: affidavit J. F. Berry, paragraph 18. This is explained by the deputy

returning officer as having been done by consent of scrutineers for and against the by-law, and what happened was that several persons who were unable to read had their ballots marked for them behind the screen in the presence of both scrutineers. This was wrong: it is only those who make a declaration that they are unable to read, who are entitled to have their votes cast in the manner mentioned: sec. 171. Some half a dozen are said to have voted in the same way in No. 3.

If the number of persons thus voting had been large, it might be necessary to consider how far this defect was cured by sec. 204, but not more than about a dozen are claimed to have voted in this way. The vote was in all 711—for the by-law 477, against 234. To destroy the statutory majority, 126 votes must be struck out, thus: for the by-law 477, struck out 126: 351. Against 234; total value votes 585; three-fifths of 585, 351.

See Re Armour and Township of Onondaga as to the proper method of calculating the effect of striking off votes.

Thus it appears unnecessary to consider the effect of sec. 204.

One William Shaw is said to have been brought into the room and up to the table for the purpose of receiving a ballot, by two persons said to be supporters of the by-law. He is not sworn to have voted, but I find a name William Shaw in the poll book for No. 3, which I shall assume shews that he did vote. If these persons acted as they are said to have acted, it was wrong; but the matter is a trifling one. William Gerow senior was helped into the room by two persons, but it is sworn that that was because he had met with a severe accident and lost one leg, and the assistance was necessary: and it is further sworn that he went alone behind the screen to mark it.

Thomas Sharpe and his mother are said to have gone behind the screen together, the son having received both the ballots: but this is modified by the affidavit of the deputy returning officer, who says that each received a ballot separately, and went behind the screen separately, although they were there at the same time. This irregularity is a trifling one.

Some 18 voters weere sworn and voted; I cannot understand how the objection now taken to these votes can be given effect to. See objection 17 below.

William Clegg, deputy returning officer of No. 1, received a certificate from the clerk of the town that he was entitled to vote, and voted accordingly. I held in Re Armour and Township of Onondaga that a deputy returning officer has no right to vote upon such a by-law, and I adhere to that opinion. But this does not affect the result of the voting.

Objection 14 is not pressed.

Objection 15, a second ballot illegally used to continue voting—not now urged.

Objection 16, no declarations of secrecy. This is shewn to be unfounded unless it be considered that there must be a separate voting, etc., for the by-law, and this has already been dealt with.

Objection 17, a worthless form of oath furnished the deputy returning officer; but this was the statutory form before 5 Edw. VII. ch. 34, sec. 11; and no one can be deprived of his vote because the proper oath has not been administered to him. It might be different if it were shewn that the voters were citizens or subjects of a foreign power.

Passing over objection 18 for the moment, objection 19 the Court below was not asked to deal with, it having been introduced that the applicant might, if so advised, take advantage of it upon appeal. The only matter now urged is that the by-law wrongly embraces the public harbour, legislative authority over which pertains to the federal Parliament.

A somewhat similar objection was raised in the Onondaga case and overruled—I still think rightly. The objection fails, even if, as I am far from asserting, the town cannot pass a by-law binding upon a public harbour.

Objection 18 reads: "That the by-law is bad on its face for not prohibiting the sale of liquor in places of public entertainment." In the written argument before Mulock, C.J., counsel says: "Objection 18 was shewn on the argument to have been raised under a misapprehension." This arose in the following manner. The applicant, Duncan, a day or two before he applied for a certified copy of the by-law, is said to have been informed by the son of the town clerk that a few of the sheets of the "Midland Argus," in which the by-law had been published, were left over, and that the certified copy which he would receive from the town would

be certified on or from one of these copies—and, upon applying for a certified copy, he received from the clerk one of these copies. It was upon the faith of the copy so furnished and certified that the motion was launched. The copy reads:—

"1. That the sale by retail of spirituous, fermented, or other manufactured liquors, is or shall be prohibited in every tavern, inn, or other house of public entertainment, in the said municipality, and the sale thereof, except by wholesale, is and shall be prohibited in every shop or place other than a house of public entertainment in the said municipality." The original by-law, when produced upon the argument before the Chief Justice, read, "in every tavern, inn, or other house or place of public entertainment," and the punctuation was corrected to "sale thereof, except by wholesale, is and shall be prohibited." The original by-law being read by the Chief Justice, counsel for the applicant seems to have thought that the copies, as published in the "Argus," and as posted throughout the municipality, were the same as the original, and, therefore, thought no objection could lie against the form. Upon discovering his error, he asks that we should give effect now to the objection that the by-law was not really published or posted at all, as an exact copy was not put out.

It seems reasonable not to allow a mere inadvertence or mistake of counsel to deprive the applicant of any rights he may have.

The statute R. S. O. 1897 ch. 254, sec. 141 (1), provides: "The council of every township, city, town, and incorporated village, may pass by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors, in any tavern, inn, or other house or place of public entertainment, and for prohibiting the sale thereof, except by wholesale, in shops and places other than houses of entertainment." The legislature has used the double form "prohibiting the sale by retail . . . in any tavern, inn, or other house or place of entertainment," and "prohibiting the sale . . . , except by wholesale, in shops, and places other than houses of public entertainment." These are not the same thing in terms, the former being aimed at the prohibition of retail sale in places of public entertainment; and the latter at the probibition of sale by retail everywhere, except in a

"house of public entertainment." It is plain, I think, that the phrases "tavern, inn, or other house or place of public entertainment," and "houses of public entertainment" are used as equivalent, and, therefore, the omission is immaterial. If "place of public entertainment" be included in the expression "house of public entertainment" (as I think), the words "or place" may be omitted without harm; if not, the latter part of the by-law, which prohibits the sale, except by wholesale, in every place other than a house of public entertainment, prohibits the sale by retail in such "place of public entertainment." After the passing of this by-law, any one who kept a "place of public entertainment" and who sold liquor by retail, would be placed in the dilemma—either this place is a "house of public entertainment," or it is not—if it is, the sale is forbidden by the former part of the by-law—if not, the sale is forbidden by the latter. The omission is trivial and should not affect the validity of the by-law.

Before us was raised the objection that there were two independent subject matters voted upon at the same time, as indicated above. But that is for the legislature; sec. 141, above quoted, appears to permit this, and I can find nothing to indicate that the whole subject matter of that section may not be incorporated in one by-law, and be passed upon at the same time by the voters.

On all grounds taken, I am of opinion that the attack upon the by-law fails, and that the appeal should be allowed, with costs in this Court and in the Court below. As we, at the hearing, quashing the proceedings of 29th April, 1907, the costs of that order will be set off against the costs awarded under this order.

I have not thought it necessary to refer to more than a few of the numerous cases cited by counsel. I have read them all, however, and a few others—only a few, there were very few left.

FALCONBRIDGE, C.J., agreed with the opinion of RIDDELL J.

BRITTON, J., agreed in the result, for reasons stated in writing.

RIDDELL, J. JULY 3RD, 1907.

WEEKLY COURT.

RE CAMERON AND UNITED TOWNSHIPS OF HAGARTY, SHERWOOD, JONES, RICHARDS, AND BURNS.

Costs — Motion to Quash By-law of Township Corporation Closing Road — Necessity for Confirmation by County Council—Statutes—Appeal to County Council—Exhausting Other Remedies before Moving to Quash.

Motion by the applicant upon an application to quash a by-law for an order for the costs of the application.

C. A. Moss, for the applicant.

W. E. Middleton, for the municipality.

RIDDELL, J:—By-law No. 188 was passed 15th December, 1906, by the municipality of Hagarty, Sherwood, &c., for the closing of a road allowance. The particular facts leading up to the passing of this by-law are not material, as on the 17th June, 1907, this by-law was repealed. In the meantime, however, an application had been made to quash, and the matter reduces to a question of costs—no unimportant matter.

There was "a saying of the late Mr. Jacob, that the importance of questions was in this ratio: first, costs; second, pleading; and third—very far behind—the merits of the case:" per James, L.J., at pp. 344, 345, of Hall v. Eve, 4 Ch. D. 341. But I cannot continue with the Lord Justice and say, "The time employed in the argument of the present case has been wholly disproportionate to its importance," as Mr. Middleton, upon my intimating an opinion that the by-law could not have stood an attack, contented himself with arguing that the application was premature, as the by-law had not been confirmed by a by-law of the county council, under sec. 660 (2) of the Consolidated Municipal Act, 1903—while Mr. Moss argued ab inconvenienti and upon the case of Harding v. Cardiff, 2 O. R. 329. This case decides that in the case of a by-law opening a street upon private property, the application to quash must be made within one year from the actual passing by the council, and

it is not sufficient that the motion be made within one year from the registration, even though the statute then in force, R. S. O. 1877 ch. 174, sec. 507, provides that, before the by-law "becomes effectual," it shall be registered in the registry office. This legislation has been continued through 46 Vict. ch. 18, sec. 547; R. S. O. 1887 ch. 184, sec. 547; 55 Vict. ch. 42, sec. 547; R. S. O. 1897 ch. 223, sec. 633; and is now 3 Edw. VII. ch. 19, sec. 633. The provisions will be found practically identical through this whole period.

The Court in the Harding case seem to have considered that an application to quash might be made before the registration—and were the present case governed by the same legislation, I should follow the Harding case without further remarks.

But the legislation governing such cases as the present is different. This is found in 3 Edw. VII. ch. 19, sec. 660 (2), which comes from R. S. O. 1897 ch. 223, sec. 660 (2), and further back 55 Vict. ch. 42, sec. 567 (2); R. S. O. 1887 ch. 184, sec. 567 (2); 48 Vict. ch. 18, sec. 566 (2); R. S. O. 1877 ch. 174, sec. 525 (2)—and it provides that "no such by-law shall have any force, unless confirmed by a by-law of the council of the county in which the township is situated, at an ordinary session of the county council, held not sooner than three months nor later than one year next after the passing thereof."

However it may be in the case of a by-law which, to have full validity, needs only the act of registration—and such act may be performed at any time—I cannot think that the Court should interfere so long as there is another tribunal to whom appeal may be made. It is apparent, I think, that the intention of the legislature is that a second legislative body shall pass upon the propriety of such a by-law as this before it becomes law—and that body is expected to act in the public interest. I do not intend to decide how the case would be if there were delay in presenting the matter to the county council, or anything in the nature of fraud or collusion preventing an honest consideration of the by-law on its merits. I hope the arm of the Court would be found sufficiently long to reach any case of that kind. In the ordinary case, however, I think that before approaching the Court and asking the Court to exercise its discretion to quash a by-law, all the other remedies should be exhausted.

It is, perhaps, not unlike the case of members of benevolent societies whose position when asking the Court to interfere I considered in Zilliax v. Independent Order of Foresters, 8 O. W. R. 631, 13 O. L. R. 155, and Re Errington v. Court Douglas, 9 O. W. R. 675.

The applicant should have no costs of the motion, but, as the municipality should not have passed the by-law in question, I give no costs against him.

The by-law having been repealed, there will be no order on this application.

TEETZEL, J. JULY 3RD, 1907.

TRIAL.

PRUE v. TOWN OF BROCKVILLE.

Negligence—Electrical Appliances—Injury to Person Using Highway—Municipal Corporation Operating Electric Light Plant under Statutory Authority—Spike on Post Charged with Electricity—Failure of Person Injured to Prove Negligence.

Action to recover damages for a shock and severe burns sustained by plaintiff by accidentally touching an iron spike driven into an electric light pole belonging to defendants, about 6 feet from the ground, which spike was used to attach a chain for lowering and raising a lamp.

J. Deacon, Brockville, for plaintiff.

J. A. Hutcheson, K. C., for defendants.

TEETZEL, J.:—At the close of the trial I expressed the view that I could not, upon the evidence, find defendants guilty of any negligence, and after further consideration of the evidence, I am unable to change my opinion. It is true that there was no satisfactory evidence to account for the escape of the electric current down the pole and into the spike, but I am unable to find that there was any defect in the insulation, or other apparatus, or that the plant and appliances were not of the most modern and approved type.

Defendants constructed and are operating the municipal lighting system under authority of legislative enactment, and, in the absence of negligence, are not insurers against accidents. . . . .

[Reference to Roy v. Canadian Pacific R. W. Co., [1902] A. C. 220; National Telephone Co. v. Baker, [1893] 2 Ch. 186.]

It is equally well settled by many authorities that persons who operate or deal in dangerous material are obliged to take the utmost care to prevent injuries to the public as well as to their employees, by adopting all known devices to that end. But in this case not only did plaintiff fail to prove default, but I think the evidence offered by defendants shewed that they complied with the law.

Plaintiff sought to bring the case within the decision of Gloster v. Toronto Electric Light Co., 38 S. C. R. 27, but the judgment in that case turned upon the finding that the wires in the condition in which they were at the time and place where the boy was injured constituted a danger to those using the highway, and were, in fact, a nuisance—that the wires had become worn and defective and had ceased to be insulated. In other words, the defendants were, in that case, found guilty of negligence.

The action must be dismissed with costs, if costs are insisted upon by defendants.