

HALTON CONTROVERTED ELECTION CASE. 1891

THOS. LUSH (*Petitioner*)..... APPELLANT; *Nov. 17.

AND

JOHN WALDIE (*Respondent*).....RESPONDENT.

(THE HONOURABLE MR. JUSTICE PATTERSON IN
CHAMBERS.)

Election petition—Appeal—Dissolution of Parliament—Return of deposit.

In the interval between taking of an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition and the February sittings (1891) of the Supreme Court of Canada, parliament was dissolved, and by the effect of the dissolution the petition dropped. The respondent subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the court below by the petitioner as security for costs, moved before a judge of the Supreme Court in chambers (the full court having referred the motion to a judge in chambers) to have the appeal dismissed for want of prosecution, or to have the record remitted to the court below. The petitioner asserted his right to have his deposit returned to him.

Held, per Patterson J., that the final determination of the right to costs being kept in suspense by the appeal the motion should be refused.

Held, also, inasmuch as the money deposited in the court below ought to be disposed of by an order of that court the registrar of this court should certify to the court below that the appeal was not heard, and that the petition dropped by reason of the dissolution of Parliament on the 2nd February, 1891.

MOTION to dismiss an appeal in an election case for want of prosecution.

The full court, Taschereau J. dissenting, held that the application should be made to a judge in chambers. The facts are stated in the judgment of Patterson J. hereinafter given.

1891
 HALTON
 ELECTION
 CASE.

Kerr Q.C. for the respondent accordingly applied to His Lordship Mr. Justice Patterson in chambers.

Aylesworth Q.C. for the petitioner opposed the motion.

PATTERSON J.—This petition was presented as long ago as October, 1888, and appears to have been brought to trial with reasonable speed, the trial having been begun on the 30th January, 1889. But, though begun at that time, it was not brought to a close until the last week of October, 1890, and the judgment dismissing the petition and awarding costs to the respondent was pronounced on the 8th of November, 1890. It is not material to attempt to apportion the responsibility for this waste of two years before reaching a decision, so unlike the promptness which is aimed at by the law respecting controverted elections, but it may not be out of the way, in view of the emergency which has led to the present application, to remark that, from the affidavits made for the purpose of former applications to this court, it is clear that a large share of the delay arose from the circumstance that, from one cause or another, it was not always convenient for the respondent's solicitors to give timely attention to the proceedings. This is true of the steps necessary to prepare the appeal for being heard as well as of the trial, although there are some sweeping statements to the contrary contained in the affidavits made on the part of the respondent by a gentleman who evidently was not so well informed respecting what had taken place as he supposed himself to be.

The petitioner appealed against the decision of the 8th of November, 1890. In the ordinary course the appeal would have been heard at the February sittings in the present year, 1891, but before those sittings began Parliament was dissolved. By the effect of the dissolution the petition dropped. The object of the

contest had ceased to exist. If authority were required for that understanding, it is furnished by the cases cited to me, *The Exeter Case, Carter v. Mills* (1), and *The Taunton Case, Marshall v. James* (2). The dissolution took place on the 2nd February. On the part of the petitioner an order had been obtained on that day from the registrar of this court settling what materials were to be printed for use in the appeal, but after the dissolution the petitioner, properly in my opinion, took no further proceedings in this court. The respondent is desirous of having the costs that were awarded to him at the trial taxed and paid out of the money deposited in the court below by the petitioner as security for costs, and with that view he has moved to have the appeal dismissed for want of prosecution, or to have the record remitted to the court below.

On the other hand the petitioner asserts his rights to have his deposit returned to him on the principle acted on in *The Exeter Case, Carter v. Mills* (1), on the ground that the petition has dropped before any final adjudication respecting either the merits or the costs.

The respondent would be entitled to be paid his costs out of the deposit if the proceedings under our Controverted Elections Act were the same as under the English Act of 1868, which our act follows in many of its provisions. *The Taunton Case* (2) would be, as I think, authority for holding that the adjudication as to costs could be sustained and enforced notwithstanding the dissolution of the House before the judge had made his report to the speaker, which dissolution put an end to the petition as far as the right to the seat was concerned. But we must notice the difference between the English law and ours. The English act gave no appeal from the judge's decision. It was final both as to the merits and the costs. Our statute gives

1891

HALTON
ELECTION
CASE.

—
Patterson J.
—

(1) L. R. 9 C. P. 117.

(2) L. R. 9 C. P. 702.

1891.

HALTON
ELECTION
CASE.

Patterson J.

an appeal to this court which is to "pronounce such judgment upon questions of law or of fact, or both, as in the opinion of such court ought to have been given by the court or judge appealed from (1), and may adjudge the whole or any part of the costs in the court below to be paid by either of the parties." (2)

The respondent, therefore, cannot insist that he has a final judgment in his favour for the costs. If the appeal had gone on the result might have been that he would have to pay in place of receiving costs. Hence the importance to the respondent to have the order he asks for to dismiss the appeal for want of prosecution if the case were one for giving him that relief. That is, however, out of the question. He had no tenable ground on which he could, on the second of February, or at any later date, charge the petitioner with default in the prosecution of the appeal. On the 2nd of February the petition dropped. It did not abate in the technical sense of that word but the effect was quite as fatal. In the Exeter case, in which an order was made to return the deposit to the petitioner, the petition had not gone to trial when the dissolution took place. I suppose it would have been dealt with in the same way if the trial had been begun and not concluded. That is essentially the present position, the final determination of the right to costs as well as of the right to the seat being kept in suspense by the appeal.

I do not see my way to make an order in either of the forms asked for by the respondent, and I think his motion must be refused with costs.

I should not consider it right, even with a view to the petitioner being repaid his deposit, to send the record back to the court below. That would be proper only in case the appeal had been disposed of in some

(1) 49 Vic. ch. 9, sec. 51.

(2) Sec. 54.

shape in this court, and if done now might lead to misapprehension. But inasmuch as the money deposited in the court below ought to be disposed of by an order of that court it would, in my opinion, be proper for the registrar to certify to that court that the appeal was not heard, and that the petition dropped by reason of the dissolution of parliament on the 2nd of February.

1891
 HALTON
 ELECTION
 CASE.
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 Patterson J.
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Motion refused with costs.

Solicitors for appellant: *Moss, Hoyles & Aylesworth.*

Solicitors for respondent: *Kerr, Mac Donald, Davidson
 & Paterson.*