

HIS MAJESTY THE KING ON THE }
RELATION OF CARL POWIS TOLFREE. } APPLICANT;

1943
*Oct. 12.

AND

JAMES H. CLARK AND OTHERS..... RESPONDENTS.

ON PROPOSED APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Appeal—Refusal of special leave to appeal—State of facts to which proceedings in lower courts related and upon which they were founded no longer existing.

An application was made to this Court under s. 41 of the *Supreme Court Act* for special leave (this having been refused below) to appeal from the judgment of the Court of Appeal for Ontario ([1943] O.R. 501) affirming the striking out by Hope J. ([1943] O.R. 319) of notice of motion in the nature of *quo warranto* for an order that respondents show cause why they, as was alleged, did each unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the *B.N.A. Act* (s. 85), whether or not the same were lawfully amended by *The Legislative Assembly Act* (R.S.O. 1937, c. 12, s. 3), notwithstanding *The Legislative Assembly Extension Act, 1942* (Ont., 6 Geo. VI, c. 24), which, it was alleged, was *ultra vires*. Since the date of the judgment of the Court of Appeal, the "then present" Legislative Assembly was dissolved.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin, Hudson, Taschereau and Rand JJ.

1943
 THE KING
 EX REL.
 TOLFREE
 v.
 CLARK
 ET AL.

Held: Leave to appeal should be refused. Though the application by way of *quo warranto* was for the purpose of obtaining a judicial pronouncement upon the validity of said Ontario enactments, yet the direct and immediate object of the proceeding was to obtain a judgment excluding respondents from sitting and exercising the functions of members of the "then present" Legislative Assembly; and, that Assembly having been dissolved since the judgment of the Court of Appeal, the judgment sought could not now be executed and could have no direct and immediate practical effect as between the parties (except as to costs). It is a case where, the state of facts to which the proceedings in the lower courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation had disappeared; therefore, in accordance with well-settled principle, the appeal could not properly be entertained. The fact that some important question of law of public interest was or might be pertinent to the consideration of the issue directly and immediately raised by the proceedings does not affect the application of the principle.

MOTION by the relator under s. 41 of the *Supreme Court Act* (R.S.C. 1927, c. 35) for special leave to appeal from the judgment of the Court of Appeal for Ontario (1) dismissing his appeal from the order of Hope J. (2) striking out the notice of motion by the relator in the nature of *quo warranto* for an order that respondents show cause why they, as was alleged, did each unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the *B.N.A. Act* (s. 85), whether or not the same were lawfully amended by the provisions of *The Legislative Assembly Act* (R.S.O. 1937, c. 12, s. 3), notwithstanding the provisions of *The Legislative Assembly Extension Act, 1942* (Ont., 6 Geo. VI, c. 24), which, it was alleged, was *ultra vires*.

A notice of the proceedings and of the intention to bring in question the constitutional validity of the said Ontario enactments had been served upon the Attorney-General of Ontario and upon the Attorney-General for Canada.

The Court of Appeal for Ontario refused to grant special leave to appeal to this Court (3).

V. E. Gray K.C. for the motion.

C. R. Magone K.C. contra.

(1) [1943] O.R. 501; [1943]
 3 D.L.R. 684.

(2) [1943] O.R. 319; [1943]
 2 D.L.R. 554.

(3) [1943] O.R. at 524; [1943] 3 D.L.R. at 699.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—We are satisfied it would not be proper to grant leave to appeal in this case.

The Legislature of the Province of Ontario, by a statute passed in 1942 as chapter 24 and known as *The Legislative Assembly Extension Act, 1942*, enacted as follows:—

1. Notwithstanding anything in *The Legislative Assembly Act* or in any other Act contained, the present Assembly shall continue until the 19th day of October, 1943, and it shall not be necessary to hold any general election to choose members of the Assembly until such date.

2. Nothing in this Act shall affect or amend the provisions of section 4 of *The Legislative Assembly Act*, nor be taken or deemed to affect or abridge any prerogative of the Crown or the power of the Lieutenant-Governor to dissolve the Assembly at an earlier date than that mentioned in section 1.

3. This Act may be cited as *The Legislative Assembly Extension Act, 1942*.

But for this statute, the twentieth Legislative Assembly of Ontario would have expired, we are informed, by operation of law on or before the 19th of October, 1942; but pursuant to its enactments a session of the Legislative Assembly was convoked for and continued to sit from the 9th of February, 1943. On the 30th of June, 1943, the “then present” Legislative Assembly was dissolved by the Lieutenant-Governor of the Province.

On the 15th of March, 1943, notice of motion in the nature of *quo warranto* was given on behalf of the relator, Carl Powis Tolfree, for an order that the respondents should show cause why they did unlawfully exercise or usurp the office, functions and liberties of a Member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the *British North America Act*,

whether or not the same are lawfully amended by the provisions of *The Legislative Assembly Act* (R.S.O. 1937, cap. 12, s. 3), notwithstanding the provisions of an “*Act to Extend the Duration of the Present Legislative Assembly Act*” (6 Geo. VI, cap. 24).

The respondent then moved to strike out this notice of motion as frivolous and vexatious and as disclosing no reasonable cause of action. On the 17th of April, 1943, an order was made by Mr. Justice Hope striking out the notice of motion. An appeal to the Court of Appeal was dismissed on the 11th of June, 1943, and on the 23rd of June, 1943, an application to the Court of Appeal for leave to appeal to this Court was refused.

1943
THE KING
EX REL.
TOLFREE
v.
CLARK
ET AL.

1943
 THE KING
 EX REL.
 TOLFREE
 v.
 CLARK
 ET AL.
 Duff C.J.

Admittedly the application by way of *quo warranto* was for the purpose of obtaining a judicial pronouncement upon the validity of the statute of 1942 extending the life of the Legislative Assembly, as well as section 3 of *The Legislative Assembly Act*. Nevertheless, the direct and immediate object of the proceeding was to obtain a judgment forejudging and excluding the respondents from sitting and exercising the functions of members of the "then present" Legislative Assembly; and obviously, the Legislative Assembly having been dissolved since the delivery of the judgment of the Court of Appeal, such a judgment could not now be executed and could have no direct and immediate practical effect as between the parties, except as to costs. It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. The fact that some important question of law of public interest was or might be pertinent to the consideration of the issue directly and immediately raised by the proceedings does not affect the application of the principle. *Archibald v. Delisle* (1); *Delta v. Vancouver Rly. Co.* (2).

The application must be dismissed with costs.

Application dismissed with costs.

Solicitor for the applicant: *W. A. Toogood.*

Solicitor for the respondents Clark and Conant and for the Attorney-General of Ontario: *C. R. Magone.*

(1) (1895) 25 Can. S.C.R. 1, at 14, 15.

(2) (1909) Cameron's Supreme Court Practice, 3rd edit. (1924), p. 93.