

Eng. Rep.]

COUNTY OF DURHAM.

[Elec. Case.]

## ENGLISH REPORTS.

## ELECTION CASE.

## COUNTY OF DURHAM (NORTHERN DIVISION).

*Parliamentary Election—Withdrawing Petition—  
Functions of the Judge—Conditions of Withdrawal.*

By the Parliamentary Elections Act 1868 (31 and 32 Vict. c. 125) an election petition can only be withdrawn with leave of the court or a judge.

But, *semble*, where the petitioner withdraws during the hearing of the petition it would be practically impossible for the judge to proceed with the inquiry.

The only power which the judge has in such a case is to recommend the court not to allow the return of the deposit except upon the most satisfactory explanation of the grounds of the withdrawal of the petition.

The learned judge having come to the conclusion that no case had been made out to justify the unseating of the respondent the withdrawal was allowed, costs following the event.

[August 12, 1874—GROVE, J. 31 L.T., N.S., 321.]

This was a petition against the return of Sir George Elliot, and contained the usual allegations of corrupt practices.

Counsel for the plaintiffs were *Charles Russell, Q.C., Edwards, Q.C., and Anstie.*

Counsel for the respondent were *Hawkins, Q.C., H. Gifford, Q.C., and A. L. Smith.*

After some evidence had been given in support of the petition, counsel intimated the intention of the petitioner to withdraw the petition.

GROVE, J.—The withdrawing of an election petition must be by leave of the judge, and if the judge saw that the withdrawal was the result of any compromise, of any giving and taking, so as to prevent evidence being brought forward, which ought to be brought forward, not in the interest of either of the parties, but in the interest of the constituency, and of purity of elections, the judge ought not to allow a petition to be withdrawn; he ought, as far as he would have power to do so, to insist upon the petition being proceeded with. But although the Act of Parliament in my mind rather expects that on the part of a judge, no doubt it is an extremely difficult task, because if parties do not call witnesses forward a judge himself cannot become as it were counsel for the petitioners and judge at the same time. He cannot examine a witness and force him, if he is reluctant or antagonistic, to answer questions, and if I may say so exercise

his ingenuity to elicit the truth from a possibly adverse witness, while at the same time he has to keep the scales of Justice even and to hear what may be said on both sides; nor can he, on the other hand, know what answers might be given if he had those instructions which counsel have, and could find out what the real facts were as presented by the opposite side. Therefore, when, as appears to be supposed by some, the duty is thrown upon the judge to occupy that somewhat equivocal position of being counsel and judge, it is simply, at all events according to the practice of the law of England, an impossibility. All that the judge can do is to see the truth is, as far as he can possibly do it, fairly elicited; and to my mind it can never be so well elicited as when there are persons on either side representing opposite interests, the judge only exercising his power in furtherance of the truth, when he sees that there is an endeavour to keep it back. I mention that because the task is an unusual one, which the Act imposes upon the judge of his exercising a discretion as to the withdrawal of a petition.

I mention those circumstances for this reason, that I think there possibly might be cases in which a judge would not allow a petition to be withdrawn, but would, as far as he could, use his power to prevent it. He might for instance exercise the power which is given to him of recommending the court not to allow the deposit to be withdrawn without considerable explanation. The task no doubt would be an extremely difficult one. The mode in which a judge is to compel parties to go on with a petition which they have determined to withdraw remains to be proved. I am not aware of how it can be made compulsory, but at all events he has the power over the deposit in court, which may in some degree be indirectly used as a compulsion. I mention that, not as applying to the present case, because I am thoroughly and entirely convinced, not only from the character of the learned counsel who now withdraws the petition, but from the course that the case has taken, that this is a petition in which he would have had no reasonable hope of success. I have watched the evidence to the best of my ability, and I will not say that some suspicion has not been excited in my mind as regards the acts of some of those who might be proved to be agents, in the election-law sense of the word, but it seems to me that there has been something like an intimation of some small reward to some of the witnesses. I presume, as is usual in nearly all these cases, the strongest portion of the case is put forward in the first instance, so as to