

Co. C. Cases.]

DECOW V. MCCALLUM ET AL.

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HUGHES, Co. J.—I shall dispose of the 2nd ground of objection first, because it is the most important, and a disputed point in the profession, and it would seem not as yet settled by any definite authoritative decision of the Courts. I find, however, that the present learned Chief Justice of Upper Canada in the Practice Court, in *Carscallen v. Moodie*, 2 Prac. Rep. 254, said, "I see nothing in the statute to deprive a party of his right to bring a cause down by proviso, &c." and further on,—"I see nothing in the statute to prevent defendants from taking the cause down in the way they have done." This decision I must take at present to be binding upon me in this matter. The judgment of Mr. Justice Gwynne, in Chambers, in *Summerville v. Joy et al.*, 5 C. L. J. N. S. 208, goes undevotedly to confirm the same view, for he says, "It would seem that our courts do not consider that the trial by proviso is abolished, for we have also a rule which is in the words of the statute, that no Rule for trial by proviso shall be necessary," and again, "I am not prepared to say that this mode of proceeding is abolished;" and, further on, "it is a proper point for the court to determine, and I shall not make an order which might probably deprive the defendants of what might prove to be their right, &c." These opinions negatively affirm the right, but were it not for their existence I should not have hesitated to set aside the nonsuit in this case as irregularly obtained, from the fact that I should have regarded the defendant's proceeding as a nullity, because the old mode of trial by proviso is legally abolished; it would, however, be presumptuous in me to set up an opinion against those of the two learned judges who have expressed opinions to the contrary (although neither of them was very decided) upon this subject. I feel it my duty however, in vindication of my own opinion, to say, that in examining the various statutes passed from time to time containing provisions for regulating the practice of our Superior Courts of Common Law; I find none which ever expressly or impliedly introduced the system of trial by proviso, and none which expressly embodied the practice of the Superior Courts of Common Law in England with that of our Courts. Of course the provision of 2 Geo. IV. c. 1 sec. 24, whereby the statutes of jeofails and of limitations, and the several statutes for amendment of the law (excepting those of mere local expediency in England) in so far as they provided for the practice of our courts were embodied; the provision of that statute, I apprehend, brought into force in this Province the provision of the statute 14 Geo. II. c. 17, which provided for the moving for judgment as in the case of a nonsuit, where the plaintiff did not proceed to trial according to the practice of the court. By the rule of M. T., 4 Geo. IV., the practice was no doubt provided for, because it sets forth that "in future the practice of the court is to be governed (where not otherwise provided for), by the established practice of the court of King's Bench in England; and we find the practice of trial by proviso expressly recognised before the passing of the C. L. P. Act, in *Doe Davidson v. Gleason*, 9 U. C. Q. B. 606. Chief Justice Robinson said with regard to it, "although the trial by proviso is now in a great measure disused, the

remedy by obtaining judgment as in case of a nonsuit being commonly resorted to." And further on, "The trial by proviso is given for his (defendant's) protection in proper cases, that the case may not be kept hanging over his head vexatiously." The practice however, since that decision, appears to be otherwise provided for, and the rule of M. T., 4 Geo. IV., abrogated, and all the statutory provisions settling the practice appear to be also swept away, for our C. L. P. Act in section 1 provides, that in the Superior Courts of Common Law and County Courts the process and procedure shall be as therein set forth. The 227th section provides for a case like the present. If the plaintiff neglects to go to trial within the time therein specified after issue joined, a certain procedure is prescribed, and the old procedure being done away by the 223rd section, so far as related to judgment as in case of non-suit, I think, with all submission to the opinions I have already referred to, we have no practice but that which is to be found in the C. L. P. Act, or in the rules of practice framed and passed by the Judges since it was passed, and the rule of M. T., 4 Geo. IV.; and, all previous rules being abolished by the Rule of Trinity Term, 20 Vic. (Har. C. L. P. Act 1st ed., 591), and the new practice rules, providing nothing on this subject beyond what the statute prescribes—this mode of proceeding to trial by proviso is abolished. It is true the Imperial C. L. P. Act preserves this right of trial by proviso in the Superior Courts of Common Law in England, but, whilst I candidly admit that no inference ought to be drawn from that circumstance, or because of its omission from our statute, (for our courts cannot take judicial notice of the fact that our Legislature adopted very largely the provisions of an Imperial Statute, and omitted or changed others), and that the mind of our Legislature is not to be interpreted by what has been copied from the Acts of other Legislatures, whether British or Foreign: that it is only proper to gather and interpret what is intended by what is expressed in our local or Provincial Acts, and by what has been the course of legislation and what authority the courts have exercised in establishing the practice on a given subject, I think the mere negative reference to the mode of trial by proviso in the 227th section of the C. L. P. Act, and the new rules by enacting that "no rule for trial by proviso shall hereafter be necessary," with all the old practice abolished and a new mode of proceeding provided, suggests very little from which it may be inferred that the right to that mode of trial is preserved to a defendant.

As to the other grounds urged, I think they do not form reasons for setting aside the nonsuit; the first would be a valid objection to the entry of a judgment for defendant's costs if the notice referred to had not been given. The rule for trial by proviso is abolished and made unnecessary, and the notice of trial by proviso is all that is necessary of that proceeding were correct: 1 Pat. Mac. and Mar. 816. The third objection, if it were a ground for setting aside the notice of trial, is a matter of practice (if necessary) which should have been moved against promptly and not kept in reserve for an application like the present; in my view however, it was unnecessary.