

C. L. Cham.]

SUMMERVILLE V. JOY ET AL.

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Our statute has no section similar to the 116th section of the Imperial Act, and the 227th section which makes a provision in substitution for the abolished practice, of moving for judgment as in case of a nonsuit, makes statutory what was provided for by rule 42 of H. T. 1853, in England, for it enacts that no rule for trial by proviso shall be necessary. Why there should be this difference between the two acts is not apparent. If our statute contemplated abolishing trial by proviso altogether, and making the 227th section a substitute for that also, one would suppose that instead of abolishing the rule for a trial by proviso, they would have abolished the trial by proviso itself.

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."

In Chitty's Archbold, 11th ed., p. 1488, it is said, "it would seem that after the plaintiff has once tried the cause, he cannot be compelled to proceed to trial under the new Act." that is, under the clause in C. L. P. Act of 1852, similar to our 227th clause. No case is cited there in support of that dictum, but *Oakeley v. Ooddeen* 11 C. B. N. S. 805, has been cited to me as supporting it. The case does not so decide in terms. The point did not precisely arise, and in fact, in one stage of the cause, notice had been given as if the section did apply, but upon its being given, the plaintiff also gave notice of trial, and the case was taken down, but went off for want of a jury, and the plaintiff took the case down for trial again, when the jury, being unable to agree, were discharged. What the case does decide is that where the plaintiff is not in default, there can be no trial by proviso, and that the plaintiff was not in default there, for he had taken the case down to trial, and it was no fault of his that a verdict had not been rendered. Mr. Smith dwelt strongly upon the language of Byles, J., in that case, viz.—"where a new trial is ordered, the plaintiff is in the same position as to proceeding to a second trial, as he was when issue was first joined." Mr. Smith, upon this contended that after a new trial was ordered, the plaintiff had the same time to go down to trial from the granting of the order, as he had from the joining issue, and the marginal note of the case supports this view. I think all that Byles, J. meant is explained by the next sentence in his judgment, that the plaintiff must, after the new trial is granted, "be guilty of a default before the defendant can interpose, &c." I think, however, that there is good ground for contending, from the terms of the 227th section of our act, that it does not apply to a case where there has been a trial—that is the conclusion which I think would be arrived at in England, upon the similar clause in the Imperial Act; but the Imperial Act specially preserves the practice of trial by proviso, which our act does not; and it may be contended that the omission in our act is intentional and that the trial by proviso as well as judgment in case of a nonsuit, is abolished, in which case our 227th clause must apply to a case where a new trial has been ordered, or the defendant will be without remedy. If I should decide now that trial by proviso is done away with, and that

the plaintiff must proceed by a notice under the 227th clause, he could only obtain redress by appealing, and in the meantime he would be deprived of the right which is his, of proceeding to trial by proviso, if that mode of trial is not done away with, whereas, if it is done away with, the plaintiff can as effectually move after the nonsuit, if the plaintiff should suffer himself to be nonsuited, as now. If the 227th section does not apply where there has been a trial, then the time which by that section must elapse before the defendants can give the notice, is not the time which must elapse before he can give notice of trial by proviso, if that mode of trial still exists, unless that be also the time which must elapse according to the practice of the court, independently of this section, before the plaintiff is in default. Here an assize has elapsed since the new trial was ordered, and since the costs by the rule granting the new trial ordered to be paid have been paid. *Oakeley v. Ooddeen*, does not decide, and no case has been cited to me which does decide that the suffering that assize to elapse is not a default which entitles the defendants to proceed to trial by proviso, if that mode of trial is not abolished. The case of *The Staffordshire &c. Canal Company, v. The Trent and Mersey Canal Company*, 5 Taunt. 577, seems to imply that such a default does entitle the defendants to give notice of trial by proviso. I am not prepared to say that this mode of proceeding is abolished. I am not prepared to say that the defendants can and must proceed by a notice under the 227th section. I shall not therefore pronounce the service of the notice of trial to be an irregularity. I shall leave the plaintiff to elect whether he will proceed or not with the trial, and move against a nonsuit, if that should be the result. It is a point proper 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. The defendants may proceed at their own risk of having their proceeding set aside by the court, if it should be of opinion that the trial by proviso is irregular, for if irregular, the irregularity, as it appears to me, is one constituting a nullity.

As to that part of the summons which asks as an alternative to put off the trial—upon the present material I cannot grant that because the plaintiff swears that he intends to proceed to trial himself at the next assize, if he can get the witness spoken of—it may be that he will get him—and if he cannot get him, and if the plaintiff cannot proceed to trial without him, the plaintiff can renew his motion to put off the trial before the judge at Nisi Prius; but while there is acknowledged to be a doubt whether he can be got or not, I should not, I think, put off the trial absolutely.

The proper order I think to make, under the circumstances, will be to discharge the summons without costs, leaving the parties to determine what course they will respectively pursue, and leaving to the court the question which this motion raises, and which is new in practice. If the plaintiff should resolve to let the defendants proceed, and should suffer a nonsuit, he can when moving against the nonsuit, appeal against my order, if he thinks his omitting to do so can in any way prejudice his right to move to set aside