

C. L. Cham.]

SUMMERVILLE V. JOY ET AL.

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not a necessary element. Given a beneficent and useful idea, and the pervasive intercourse of the age works wonders. Certainly in an age which entertains the idea of conventions which shall bring the whole world under a uniform system of public law, the idea of giving simplicity and uniformity to the administration of law throughout the United States, is not quixotic. We have a firm belief that, whatever the difficulty and whatever traditions are disturbed, the change must be and will be effected. The possible spectacle of five thousand *Fora* in the United States administering perhaps a hundred different and clashing systems of law, fifty years hence, is an idea a hundred times more objectionable than such an exertion of the degree of constraint necessary, in exceptional instances, to prevent the absurdity.

We are led to indulge this vein of thought by the assembly of Jurists at Heidelberg, the other day. A leading object of the Convention is to introduce uniformity into the German system of Jurisprudence. May all honor attend Bluntschili and his illustrious compeers in their good work, and may we Americans catch their spirit before our judicial experience is like those unhappy victims of old who floundered about in the

“—— Great Serbonian bog
Betwixt Damietta and Mt. Cassius old,
Where armies whole have sunk.”

—*Pittsburg Legal Journal.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, ESQ., Barrister-at-Law.)

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Notice of trial by proviso.

The defendants having given notice of trial by proviso, claiming that the plaintiff had made default in not proceeding to trial within due time after a new trial had been ordered; the question, whether there had been, under the circumstances, a default such as to enable the defendants to give this notice considered, but not decided.

Quere: whether notice of trial by proviso has been abolished in this country.

[Chambers, Oct. 1, 1869.]

W. Sydney Smith for the plaintiff obtained a summons to set aside notices of trial by proviso, under the following circumstances:—The venue in this cause was laid in the County of Brant. The action was commenced on the 19th of March, 1868, and was tried on the 21st April, 1868, when a verdict was rendered for the plaintiff, for one thousand dollars damages.

The defendants moved for and obtained a rule absolute for a new trial on payment of costs in Hilary Term last, about the 6th day of March last. The costs were taxed and paid by the defendants on or about the 10th day of April last, in time to let the plaintiff go to trial at the next assizes if he so desired. Only one assize was held for the County of Brant since that date, namely on the 26th day of April.

On the 20th day of September last, notice of trial by proviso and issue book were served, but no other proceedings were had in the cause since the payment of the said costs, nor did the defendants give any twenty days notice to the plaintiff to proceed, nor did they obtain any rule of court enabling them to proceed with the trial of this cause.

The plaintiff alleged that it was his intention to proceed to trial at the next Brant Assizes, if he could procure the attendance or evidence of a witness that he said was material and necessary.

The grounds of irregularity mentioned in the summons were:—1st. That no twenty days notice was given by defendants or either of them to plaintiff to proceed to trial.

2nd. That a trial having been once had, no such notice can or could at present be given to plaintiff.

3rd. That the costs, upon payment of which defendants obtained a new trial, were only paid in vacation preceding Easter Term last, and plaintiff has same time to proceed as if issue then joined, and no assize has passed since Easter Term, this cause being a country cause.

4th. That no notice of trial could be so given until plaintiff was in default under section 217 of the C. L. P. Act, and he was not so at the time of such services. And plaintiff, not having up to present time neglected either to give notice of trial, or to bring the cause on to be tried at the assizes following said Easter Term, is not subject to such notice to proceed, or of trial, or notice of trial by proviso.

The summons also called on the defendant to shew cause why the time for proceeding to trial herein should not be extended over the present ensuing assizes for the County of Brant, to the next Spring Assizes for said county, on grounds of absence of a necessary and material witness for said plaintiff, and the impossibility of procuring his evidence by commission or otherwise at the next assizes, or why such order should not be made for relief of plaintiff, as to said presiding judge might seem meet, on grounds disclosed in affidavits and papers filed.

J. A. Boyd shewed cause. The defendants were entitled to give notice of trial by proviso, owing to the lapse of time since issue had been joined, and for the default of the plaintiff in not having gone to trial at the Spring Assizes as he might have done.

Smith *contra*. There was no default as the case had been once tried, and the defendants could not proceed either by proviso or twenty days notice. In any case they were not bound to go to trial before the Fall Assizes.

The cases cited are referred to in the judgment of,

GWYNNE, J.—By the Imperial Common Law Procedure Act, 1852, sec. 116, it is enacted that “nothing herein contained shall affect the right of a defendant to take down a cause for trial after default by the plaintiff to proceed to trial, according to the course and practice of the court.

The 42nd rule of H. T. 1853, establishes the practice of the court thereafter to be that “no trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.”