

Prac. Rep.] STACEY v. MCINTYRE—REG. EX REL MCGOUVERIN v. LAWLOR. [Elec. Case.

next day the agent of the defendant's attorney told the agent of the plaintiff's attorney that the bill was ready for taxation.

The costs were not taxed until the 28th of September last, and on the 30th September were tendered to the defendant's attorney but refused.

The commission day for the fall assizes for the county of Elgin was the 5th October, the last day for notice of trial for the said assizes being therefore the 27th September.

Boyd shewed cause:

There is a material difference between an application of this kind by defendant and by plaintiff. The plaintiff was not bound to go down to trial at the next assize; the defendant could not have forced him to do so, and consequently the plaintiff was not required to pay the costs previous to the time for giving notice of trial for the first assizes. The plaintiff is not in default, and this rule should be discharged with costs. There is no case directly in point, but *Summerville v. Joy*, 5 Prac. Rep. 144, is an authority in plaintiff's favor, and see C. L. P. Act, sec. 227.

O'Brien, contra. It was the plaintiff that obtained the new trial, and it was his duty to have had the costs taxed promptly and paid forthwith. If this rule is granted it must be with costs; if not the plaintiff cannot have costs: *Lush's Prac.* 494; *Rubidon v. Harkin*, 2 Prac. R. 129; *Van Every v. Drake*, 3 Ib. 84; *Johnson v. Sparrow*, 1 U. C. Q. B. 397; *Stock v. Shewan*, 18 U. C. C. P. 185.

GWYNNE, J.—Upon the principle on which I proceeded in *Summerville v. Joy*, I must hold that the defendant is not entitled to rescind the rule for a new trial, because the plaintiff did not proceed to trial at the last assizes in the county of Elgin. The rule granted to the plaintiff, upon his own application, a new trial upon payment of costs. Had these costs been taxed and paid before the last day for giving notice of trial for the last assizes, there was no process by which the defendant could have compelled the plaintiff to give notice of trial for, and to proceed to trial at these assizes; his default in doing so would have given defendant no right to rescind the rule, the costs of which had been paid. He must have proceeded according to the practice of the court to bring the case down to trial by proviso, or by notice under the 227th section of the C. L. P. Act, whichever is or shall be determined to be the correct practice.

Now, here the plaintiff tendered the costs two days after the last day for serving notice of trial. The defendant refused to accept the costs thinking he could rescind the rule for the default of the plaintiff in not having given notice of trial, but I think the defendant should have received the costs as tendered. I think they were tendered within a sufficiently reasonable time to comply with the rule, and as the defendant could not have moved to rescind the rule, if the costs had been paid, so he can not succeed in rescinding it since he himself prevented the payment by his refusal to accept. But the plaintiff should have been *tout temps* *prist* since to pay the costs, and if he had, upon this rule being served upon him, brought the taxed costs into court I should have felt bound to give him the costs of opposing this application; not having done so, I think the proper

rule to make, if it should be necessary to issue any rule, will be to make the defendants rule absolute without costs, unless the plaintiff shall within three weeks pay the taxed costs of the former rule, and in such case the defendants rule will be discharged without costs.

ELECTION CASE.

REG. EX. REL. MCGOUVERIN v. LAWLOR.

Quo warranto summons—Forfeiture of seat.

A summons in the nature of a *quo warranto*, under the Municipal Act, is not an appropriate proceeding to unseat a defendant who has forfeited his seat by an act subsequent to the election, the election having been legal.

[Chambers, March 8, 1870, Mr. Dalton.]

This was a summons in the nature of a *quo warranto* under the Municipal Act, complaining of the election of the defendant, as Reeve of the Municipality of the Township of Alfred, in the County of Prescott.

The facts appeared to be, that the defendant filed the office of Reeve for the year 1869: that at the election which took place on the 3rd January last, the defendant was again elected, and accepted office, and afterwards, on the 24th January last, was convicted before two justices "for that he the said George Lawlor, did on the 21st day of December, 1869, at the Township of Alfred aforesaid, sell and barter spirituous liquors without the license required by law," and he was fined \$20 with \$5 costs.

Mr. Clarke (Cameron & Smart) for the relator, claimed that the defendant should be unseated, the defendant having forfeited his seat under 32 Vic. (Ont.) cap. 32, secs. 17, 22, 25.

W. S. Smith shewed cause, contending that the act did not cover a case where the election or qualification of the defendant was not called in question, but only matters subsequent thereto; and he alleged matters against the conviction not necessary to be noticed here.

MR. DALTON.—The only cause alleged by the relator for unseating the defendant is the above conviction.

This proceeding, in the nature of a *quo warranto* summons, is entirely statutory. Section 130 of the Municipal Act contemplates the case of the validity of the election being contested, and sec. 131, which prescribes the proceeding for the trial, enacts, that if the relator shows by affidavit to the judge reasonable grounds for supposing that the election was not legal, or, was not conducted according to law, or, that the person declared elected thereat was not duly elected, the judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested; and, throughout the subsections of sec. 131, the language is consistent. It is said in subsec. 9: *The judge shall in a summary manner upon statement and answer, without formal pleadings, hear and determine the validity of the election.*

Now from the time of his election and acceptance of office to the 24th January, the defendant properly filled the office, because, 1st, the election was legal; 2nd, it was conducted according to law, and 3rd, the defendant declared elected