H. C. OF A. 1904.

NOLAN v. CLIFFORD.

whom he with reasonable cause suspects of having committed "any such crime," that is, a felony. That interpretation is in accordance with the previous law and in accordance with the common law, and it appears to me to be the interpretation which we are forced to adopt in reading this Statute. That being so, I agree with their Honors in the judgment already delivered, that the appeal cannot be sustained.

*Appeal dismissed with costs.*

Solicitors, for appellant, *Crown Solicitor for New South Wales.*
Solicitors, for respondent, *Wilkinson & Osborne.*

---

[HIGH COURT OF AUSTRALIA.]

CHANTER . . . . . PETITIONER;

AND

BLACKWOOD . . . . . RESPONDENT (No. 3).

H. C. OF A. 1904.

MELBOURNE, *August* 10, 11, 16.

GRIFFITH, C.J.

IN CHAMBERS.

*Costs—Taxation—Expenses of party attending trial—Party not a witness—Election petition—Costs of party up to particular day—Reduction of fees on counsel's brief.*

On taxation of costs, the expenses of a party who may reasonably be expected to be required as a witness, may be allowed although no subpœna to him was issued.

On an election petition a party claiming or defending the seat is *primâ facie* a probable witness.

Where the respondent had been ordered to pay a part of the petitioner's taxed costs, the fee paid to petitioner's counsel in respect of the whole petition may, on taxation, be allowed in full, if the amount is a fair and reasonable fee in respect of the matter on which the petitioner succeeds.

SUMMONS to review taxation.

By the Riverina Election Petition (reported *ante*, p. 121), the petitioner, Chanter, sought a declaration that the respondent, Blackwood, was not duly elected, and that he, the petitioner, was

duly elected. The hearing took place on 10th, 11th and 12th March, and 11th, 12th, and 13th April, 1904. The Court by its order declared that the respondent was not duly elected, and that the election was absolutely void, and ordered "that the respondent do pay to the petitioner his costs of and occasioned by the said petition so far as the same relate to the claim of the said petitioner that he received a majority of votes and ought to have been returned at the said election, up to and inclusive of Monday the eleventh day of April, such costs to be taxed by the Deputy Registrar of the High Court."

In the petitioner's bill of costs were the following items (*inter alia*):—

| | | | |
|---|---|---|---|
| (1) Fee paid to counsel on his brief ... | £31 | 0 | 0 |
| (2) Further fee paid to counsel ... ... | 10 | 10 | 0 |
| (3) Petitioner's expenses of attending the High Court on the trial of the petition, and at the re-count ordered by the Court ... ... ... ... ... | 33 | 12 | 0 |
| (4) Petitioner's fare and other expenses for similar purposes ... ... ... | 10 | 10 | 0 |

On taxation the Deputy Registrar allowed items (1) and (2) in full, and reduced item (3) to £20, and item (4) to £9 10s.

On objections by the respondent to the allowance of these amounts the Deputy Registrar stated his reasons as follows:—

As to items (1) and (2) that in the exercise of his discretion he considered that the amounts allowed were fair and reasonable, and that he took into consideration the fact that the petitioner was successful on the one issue only.

As to items (3) and (4) he stated "I did not hold that petitioner was a witness. I held that under the order he was entitled to be present and should therefore be allowed his expenses of so doing."

It appeared that no subpœna was delivered to the petitioner nor was he called as a witness.

The respondent on summons now sought to review the taxation as to these items amongst others.

*Moule*, for the respondent, in support of the summons.

*McCay*, for the petitioner, *contra*.

H. C. OF A. 1904.

CHANTER v. BLACKWOOD (No. 3).

*Moule.*—As to items (1) and (2) the amount claimed and allowed is in respect of a brief for the whole of the hearing, and if the petitioner had been allowed his costs of the whole of the petition he could have got no more than he has been allowed. As he was only allowed his costs for part of the hearing, some reduction should be made.

GRIFFITH, C.J.—I am against you as to this. I think it is a reasonable amount, and that the taxing officer was not bound by the order of the Court as to costs to reduce it.

*Moule.*—As to items (3) and (4) a party is not entitled to claim his expenses unless he is a witness; *Chadwick* v. *McMullen*, 19 A.L.T., 123. There is no case where a party as such has been allowed his expenses of attending the trial. See also *Howes* v. *Barber*, 21 L.J., Q.B., 254.

*McCay.*—The attendance of the petitioner at the trial was necessary, and it is only reasonable that he should be allowed his expenses of such attendance.

*Cur. adv. vult.*

16th August.

GRIFFITH, C.J. I reserved judgment on the objection that the travelling expenses of the petitioner to attend the trial of the petition ought not to be allowed. The case of *Howes* v. *Barber* (18 Q.B., 588; 21 L.J. Q.B., 254) was cited in support of the objection. In that case, Lord *Campbell*, C.J., said :—"The simple fact that parties are examined as witnesses must by no means be considered sufficient to establish a claim for their expenses as witnesses, and if it appear that their attendance was unnecessary, or that they attended to superintend the conduct of the cause, the claim ought to be rejected." On the other hand, the expenses of a person subpœnaed as a witness may be allowed although he is not actually called, if his attendance was reasonably necessary, having regard to the probable course of the case. In the case of a party the issue of a subpœna would be an idle form. In my opinion, therefore, the expenses of a party who may reasonably be expected to be required as a witness should be allowed without

a subpœna being issued. No authority was cited to me in which such expenses have been allowed to a suitor conducting his case in person. The case of *Anthony* v. *Walshe*, (1888) 22 L.R. Ir., 619, is against such an allowance. There are, in my opinion, some cases of such a character that the party ought *primâ facie* to be regarded as a probable witness. Such, I think, are cases in which the status or character of the party is involved, and in which it is likely that adverse evidence may be given at the trial as to which his evidence might be beneficial to him. As an instance I may mention the case of a wife made respondent in a divorce suit. I think that the same rule should *primâ facie* be applied in the case of an election petition in favour of a party claiming or defending the seat for himself, although the nature of the issues raised might be such as to exclude the application of the rule.

In the present case I think that the attendance of the petitioner as a witness was reasonably necessary. In fact, although he was not called as a witness, information was afforded by him during the progress of the trial, which, if the facts supplied by him through his counsel to the Court and accepted by the other side had not been so ascertained, would have had to be proved by witnesses, and an adjournment of the trial might have become necessary.

I think that the recount before the Deputy-Registrar should be regarded as part of the trial. The Deputy-Registrar informs me that the sums allowed are for actual travelling expenses only.

In my opinion, therefore, the objection fails, and, as all the other objections have been over-ruled, the summons to review must be dismissed.

*Summons dismissed with costs.*

Solicitors for petitioner, *B. P. B. Rymer*, Melbourne, for *Quick, Hyett & Rymer*, Bendigo.

Solicitors, for respondent, *Blake & Riggall*, Melbourne.