consent for the plaintiff for $160 with leave reserved to the defendants to move in term to enter a nonsuit on three objections taken at the trial.

Articles of submission, dated 24th March, 1860, were put in at the trial, the material parts of which submission and award appear in the judgment of the court.

G. L. Mowat, in April term, obtained a rule first calling upon the plaintiff to show cause why the verdict should *not be set aside*, and a nonsuit entered pursuant to leave reserved at the trial upon the grounds,

First, That assumpsit will not lie, as the submission and award are under seal.

Second, That the submission does not support the award in reference to the present cause of action as set out in the declaration, in this, that the submission gives the arbitrators power to direct that a lease should be made between the parties to define the conditions and stipulations of the lease, and to set forth in the lease what each party would be bound to do in the use and occupation of the premises, therefore that no cause of action like the present can arise out of the award itself, without the interposition of a lease.

Third, That no action, if any, should be upon a lease made in pursuance of the award, the submission itself not authorizing the making of an award to order work like that on which the present action is brought, though it may authorize an award directing such a stipulation to be inserted in a lease.

Britton shewed cause. He contended among other things that the defendants could not avail themselves of the points taken in the rule under the plea of Nunquam Indebitati, and even if they could, he contended that the award was well warranted by the submission.

G. L. Mowat, supported the rule.

The following authorities were cited, Russell on Awards, 502, 523, 535. *Hodgson* v. *Township of Whitby*, 17 U. C. Q. B. 230, Chitty's precedents, 254.

The counsel for the defendant abandoned the first point mentioned in the rule at the argument.

MACKENZIE, Co. J.—The general issue of Nunquam Indebitatus pleaded by the defendants, in my opinion, puts in issue the submission to arbitration the enlargement of the time, and the making of an award according to the submission, in other words an award within the terms of the submission mentioned in the declaration is requisite to sustain the present action under that plea. I refer to the case of *Hodgson* v. *The Municipality of Whitby* 17 U. C. Q B. R., 230, and to Bullen & Leake's Precedents, 288, note (*a*) in support of this view of the law.

As the learned counsel for the defendant has abandoned the first point taken in the rule, there is in reality but one question for the Court to decide. Have the arbitrators exceeded their authority in ordering the defendants to pay one-fifth of the expenses incurred by the plaintiff in the putting in of the new wheel, flume and bulk-head, as mentioned in the declaration, directly, without the interposition of a lease? To arrive at a correct understanding of the matter, each portions of the submision as relate to the subject matter of the present action must be examined.

It is recited in the submission. "Whereas disputes have arisen between the parties, as to the amount of rent the defendants shall pay to the plaintiff for the time they have occupied (a part of certain premises in the village of Gananoque) and to their right to receive from the plaintiff a lease of the premises they the defendants so occupied, and as to the terms of the said lease, it is desirable to refer the same to arbitration as after mentioned. And whereas it is desirable and has been mutually agreed between the parties to submit to the decision and arbitratement of the said arbitrators all other matters in dispute between them, it is hereby agreed that they, the said arbitrators, shall decide by whom the costs which have been incurred in the Court of Chancery and Division Court shall be paid. They shall also further determine the claim of the plaintiff with a contra account of defendant now pending in the Division Court; and shall also award what amount, if any, shall be paid by the plaintiff to the defendants in pursuance of their bill of items hereunto attached; the foregoing, together with the first named matter of dispute, as to a lease, being all matters in dispute between them" After a clause in the submission, agreeing to refer the matters in dispute to David Ford Jones, Isaac Briggs and Robert Brough, or any two of them, follows the agreement bearing principally on the present action; that is to say:—"And it is hereby further agreed that the said arbitrators or any two of them, may, if they think proper, by their said award, direct that the occupation, by the defendants, *of the premises shall*, at some short period thereafter, cease and determine, and that the same shall be delivered up by the defendants to the plaintiff in good order and condition, or that the plaintiff shall execute and deliver to the defendants or the survivor of them, etc., a lease of a part of the said premises, and they, or any two of them, shall, by their said award, direct who is to prepare the said lease, and within what time it is to be executed and delivered; what rent shall be reserved thereby, and the time of payment of the same, and the duration of the said lease (not to exceed, however, thirteen years), also what part of the said premises, including the use of the water wheel by the said contemplated lessees, and manner the same may be used; and such other regulations and stipulations as they, or any two of them, may think proper so as to prevent disputes afterwards arising as to the parts of the premises the lessees are to occupy, and the manner of using the water wheel and the machinery of the parties respectively, and what other covenants or stipulations they, or any two of them, may think proper, and also what shall otherwise be done by either of the parties respecting the matters in difference."

Mr. Britton has argued the case for the plaintiff with much point and intelligence in favor of the integrity of the award. He has contended that the words, "what shall otherwise be done by either party respecting the matters in difference,' are sufficiently comprehensive to embrace the groundwork of the present action as set out in the award, and its immediate subject-matter as disclosed in the declaration. The matters which were referred to the arbitrators were the matters in dispute between the parties at the time of the submission, which are specified with clearness and precision in the submission itself. It is declared in the submission that the matters in dispute are about the payment of certain costs incurred in the Court of Chancery, and not in the Division Court, a claim pending in the Division Court, and about a certain bill of items attached to the submission 'together with the first named matter of dispute as to a lease, being all matters in dispute between the said parties." The first named matters of dispute, as to a lease, are particularized in the submission as follows: "Whereas the defendants entered into possession of part of said premises under the plaintiff, and have put up certain machinery thereon, which has been worked by the water wheel on said premises, under the promise, as they allege, of obtaining from the said plaintiff a lease of part of the said premises and privileges for thirteen years, from the first day of October, 1857. And, whereas disputes have arisen between the parties as to the amount of rent the defendants should pay to the plaintiff for the time they have so occupied a part of the said premises, and to their right to receive from the plaintiff a lease of the premises they have so occupied, for the period of thirteen years, and as to the terms of the said lease." It certainly does not appear by the submission that there was any dispute between the parties in reference to the repairing or renewing of the water-wheel, flume and bulk-head, or as to the proportion of the expenses to be paid by each party for putting in a new wheel, flume and bulk-head, independent of the dispute about the lease and the terms of it. The dispute between the parties, over and above the costs in Chancery and Division Court and the account and bill of items, is restricted to the amount of rent to be paid by the defendants to the plaintiff for the time they had occupied the premises, their right to receive from the plaintiff a lease of the premises for 13 years, and the terms of the lease. The submission then gives the arbitrators power to direct who is to prepare the lease—within what time it shall be executed, what rent shall be reserved—its duration—what part of the premises should be demised to the defendants, including the use of the water-wheel, and the extent of that use, and the manner in which it might be used, and such other regulations and stipulations as the arbitrators should think proper, so as to prevent disputes afterwards arising.