ousted of jurisdiction; that if the judge made no special provision as to costs, he left them to be disposed of by the usual course of the law which would give them to the defendant. If the plaintiff was dissatisfied with the course taken in removing the cause into the Superior Court, he could have applied to the judge who granted the order to vary its terms or to the full Court to quash the writ of certiorari on shewing proper grounds. He referred to *Porter* v. *Radway* reported in 6 Ex. 184.

He further urged that the judge's omitting to order as to the costs, could only affect the costs of obtaining the certiorari which the master had refused to tax to the plaintiff.

RICHARDS, J.—By section 78 of the U. C. Division Court Act 13 & 14 Vic., cap. 53, it is provided that in any action brought in any County or Superior Court for any cause which might have been entered in a Division Court, and the plaintiff shall obtain judgment for a sum to which the jurisdiction of a Division Court is limited, no more costs shall be taxed against a defendant than would have been incurred in the Division Court, unless the judge who tried the cause shall certify it a fit one to be withdrawn from the Division Court, and commenced in the County or Superior Court. Section 85, that any suit brought in a Division Court may be removed into the Court of Queen's Bench or Common Pleas by certiorari, when the debt or damage claimed shall amount to ten pounds and upwards, provided leave be obtained from one of the judges of the said Courts in cases which shall appear to him fit to be tried in either of the Superior Courts and not otherwise, and upon such terms as to payment of costs and upon such other term, as he shall think fit.

There is no doubt, if it were not for the enactments limiting the amount of costs to be recovered in actions brought in the Superior Courts, plaintiffs under the statute of Gloucester would in all actions in which damages are recoverable, be entitled to tax costs against defendants.

The statute 23 Hen. VIII cap. 15, and 4 Jac. I cap. 3, gave costs to defendants on a verdict for them in those cases where costs would be recoverable against them; if the verdict had been for the plaintiffs. There can be no doubt if the plaintiff had originally brought this action in the Superior Court, and the defendant had obtained a verdict that the latter would have been allowed full costs of defence without a certificate of the judge who tried the same.

I see nothing in the facts of the present case to limit the right defendant would have had, merely because he has obtained a judge's order to bring up the case to the Superior Court. Most of the statutes on the subject are to deprive a plaintiff of costs, they do not seem to extend to the case of the defendant. It is probable the Legislature thought the power given to the judges to impose terms on ordering a certiorari to take the case up to the Superior Court would sufficiently protect all parties.

It is urged that as the judge did not impose any terms as to the payment of costs, therefore the defendant is not entitled to his costs though he has succeeded in his case, or at all events is only entitled to Division Court costs, he having taken the case into the Superior Court.

The plaintiff who instituted the action in the Superior Court, is still the plaintiff and has control of his own suit, when the case is in the Superior Court, it is disposed of there like any other action; and if the terms of the order on which the certiorari issued, were not satisfactory to the plaintiff, he should have applied to the judge who made the order, to amend it by imposing terms as to costs, if the judge has power to do this after having made the order, or to the full Court to quash the certiorari on the ground that the facts were not properly brought before the judge who made the order, so as to enable him to exercise his discretion as to imposing proper terms, *Parker* v. *Bristol and Exeter Railway*, 6 Ex. 184, is an authority on this point.

The plaintiff having failed to do this and having taken his case down to trial without any specific terms being imposed, cannot now, I think, claim that it is necessary the judge who granted the order should have directed that full costs should be allowed defendant if he succeeded. The costs are not allowed by virtue of the power to impose terms, but under the general law relative to costs. The judge who granted the order decided that the case appeared to him to be a fit one to be tried in the Superior Court, otherwise he would not have directed the certiorari to issue. If the judge who tries a case in a Superior Court where a verdict is rendered for a plaintiff, for an amount within the jurisdiction of an Inferior Court gives a similar certificate; *that* entitles a plaintiff to tax full costs.

It must be assumed, I think, that it was proper for the defendant to take his case into the Superior Court; and, having succeeded, I can see no reason why he is not entitled to his full costs.

The only question on which I have any doubt is as to the costs in discharging this summons. The Clerk of the defendant's attorney, in the affidavit he has made in reply to that filed on behalf of the plaintiff, has thought proper to introduce some statements charging improper conduct on the part of the plaintiff's attorney, without stating what the acts are which he considers improper.

These statements appear to me unnecessary and unwarranted, from everything that appears on the papers filed, and would, I apprehend, be struck out of a bill of Chancery, or perhaps in affidavits filed there, as impertinent. Ther, should the judge before whom the matter is brought, allow the defendant the costs of preparing such an affidavit, and ought be not to mark his disapproval of such a course by depriving the defendant of his costs in relation to this matter altogether. Perhaps, if the costs of that affidavit be disallowed, that will be sufficient.

It may as well be observed here, that there seems to be a disposition on the part of some practitioners to introduce extraneous matters into their affidavits on application in Chambers. It is probable such affidavits will not be allowed in the costs if the attention of the presiding judge is drawn to the subject; and I mention it now in connection with the matter referred to in this case, that such a practice may not be resorted to in the future.

On the whole, I think this summons must be discharged with costs; but no costs to be allowed to the defendant for the affidavit filed on his behalf.

Summons discharged with costs.

BRASH v. LATTA.

Practice—Render by Bail—Charging defendant in execution—Computation of time.

Our Rule of Court, Trinity Term, 20 Vic., No. 99, applies to a defendant who though not a prisoner at the time of the trial, is rendered by his bail during the same vacation.

A defendant who has surrendered himself in discharge of his bail, during vacation, though not a prisoner at the time of the trial, will become supersedable, unless the plaintiff charge him in execution, during the Term next succeeding such trial.

July 11th, 1859.

This was a summons dated 24th June, 1859, calling on the plaintiff to shew cause why the defendant should not be superseded as to this action, the plaintiff not having charged the defendant in execution, in due time after the trial of this cause.

It appeared from the affidavits filed. that defendant was arrested on a writ of *Capias* in this cause, on the 16th November, 1858, and gave bail to the action. That the declaration was filed and served 16th February, 1859, and the cause taken down to trial in April, 1859, and a verdict rendered for plaintiff for £50 damages, the cause being a country cause. That defendant was rendered by his bail on the 11th of May, to the Sheriff of the County of Hastings. That judgment was entered on the first, and a writ of *capias ad satisfaciendum* issued, but had not been placed in the Sheriff's hands on 23rd of June, the day defendant made his affidavit, where he stated he was a prisoner in close custody.

By an affidavit made by defendant on the 29th of June, defendant stated that on the 23rd of June, he was in close custody on the writ of *capias ad respondendum* issued in this cause. That the door of the gaol was forcibly broken (whilst he was in an adjoining room) for the purpose of assisting one Alexander M. Ross, to escape. That he left the gaol on that day, and shortly afterwards ascertained that his escape would compel the officers to pay the amount for which he was imprisoned, whereupon he at once returned and surrendered himself to the gaoler, and was a prisoner in close custody as a debtor, having returned voluntary rather then subject the officers of the Court, to lose on his account.

On the same day, a notice of defendant's recapture and being in custody and detained as a prisoner, on the *capias* issued in this cause, was served.