costs The learned judge who tried the case would have certified for such costs if he had had authority to do so, and he therefore refused to interfere.

[Chambers, July 12, 1866.]

The plaintiff recovered a verdict for $100 in an action for use and occupation. At the trial, a certificate to the effect that the cause was properly brought in the Superior Court was asked for, but refused by the learned Chief Justice of Upper Canada, for the reasons given in the following memorandum:—

"I do not see any sufficient grounds to justify me in giving a certificate for costs. The verdict is within the County Court jurisdiction, and these courts have jurisdiction to try such an action. After carefully reading my notes, I cannot say that the title to land was brought into question. It was not in truth disputed. The question was simply as to the premises actually used and occupied by the defendant, by the permission of the plaintiff upon defendant's request."

The master taxed the costs upon the County Court scale, notwithstanding the objection of the defendant that only Division Court costs were taxable, whereupon a summons was taken out, calling on the plaintiff to shew cause why the master should not revise the taxation of costs, by taxing the plaintiff's costs on the Division Court scale, on the ground that the cause was within the jurisdiction of the Division Court.

*Harman* shewed cause and filed his own affidavit to the effect:—

That the action was brought to recover the amount due from the defendant to the plaintiff, for the use and occupation by the defendant of certain lands of the plaintiff, Mary Anne Harold, wife of the said plaintiff, Thomas G. Harold.

That a considerable amount of previous litigation had taken place between the same parties, to establish the right of the plaintiffs to the lands, for the use and occupation of which, by the defendant, this action was brought.

That at the trial of this cause, one of the principal witnesses was the deputy sheriff of the County of Halton, who was rigidly cross-examined as to his having given the plaintiff possession, under the writ of possession issued after a previous action of ejectment of the said lands.

That an exemplification of the judgment in the said action of ejectment was put in at the trial on the part of the defendant.

That the amount sought to be recovered by the plaintiffs was variously sworn to by the witnesses, at a much larger sum than was awarded as their verdict by the jury.

That the said amount sought to be recovered by the said plaintiffs was in no way to be considered a liquidated amount, or an amount *or balance claimed*, in any way struck or settled, between or by the acts of the parties, so as to bring it within the scope and meaning of the Division Court Act.

That in the copy of the affidavit of disbursements, made by the defendant, (and served upon deponent, with notice of taxation of defendant's costs, to be made at the same place and time as was appointed for the taxation of the plaintiff's costs, in order that any difference of costs to be allowed on taxation might be then ascertained or allowed,) the defendant alluded and swore to the professional evidence to be given by one of her witnesses, as a land surveyor; and also to a plan and survey which was necessary on the trial of the said cause, and was used at the trial.

That the learned chief justice, while declining to grant a certificate for full costs, used the expression that the verdict rendered was "within the County Court jurisdiction."

That a bill of costs was served and notice of taxation given to tax the same on the County Court scale, on which scale the said costs were taxed, and that at the same time the difference of Superior Court costs were taxed and allowed to the defendant, amounting to upwards of ten pounds, according to the statute in such case made and provided.

Mr. Harman cited *Cleaver* v. *Hargrave*, 2 Dowl. 689; *Sellman* v. *Boom*, 8 M. & W. 552; *Woodham* v. *Newman*, 7 C. B. 666; Arch. Pr. 11 Ed. 518; Patterson's Pr. 500.

*C. S. Patterson* supported the summons.

Draper, C. J.—The Common Law Procedure Act (s. 328) provides, that in case a suit of the proper competency of a County Court be brought in the Q. B. or C.P., or in case a suit of the proper competency of a Division Court be brought in either of these Courts, or in a County Court, the defendant shall be liable to County Court costs or to Division Court costs only, as the case may be, unless the judge who presides at the trial certify in court immediately after the verdict has been recorded, that it is a fit cause to be withdrawn from the County Court or Division Court, as the case may be, and brought in the Superior Court or a County Court, making provision, if the judge does not so certify, for the indemnification of the defendant.

This action having been brought in the Queen's Bench, I refused to certify under the above section. It had been previously held by that court in *Cameron* v. *Campbell*, 11 U. C. Q. B. 159, that where a cause had been improperly brought in the Queen's Bench, and a verdict rendered, for an amount within the Division Court jurisdiction, the judge who tried it had no power to order County Court costs, the suit not having been commenced there. I had granted the certificate, in that case, holding a different view; but finding the opinions of the chief justice and my brother Burns against me, I acquiesced in their decision.

In that case the judgment proceeded on the foundation that the Court could not, on anything that appeared, say that the plaintiffs had any claim against the defendant beyond a money demand of an ordinary nature, not exceeding $100. If I had had authority in this case to have certified for County Court costs, I should have done so, first, because I felt no doubt, that on the evidence, as well as on the cause of action, the case was of the proper competence of the County Court; and next, because, if the case had been instituted in the Division Court, the evidence was such as to support a claim beyond $100, and therefore beyond the jurisdiction of the Division Court—in the words of the Act, not of the proper competence of the Division Court.

I presume that it was shown to the master, as it is now shown on affidavits before me, that the amount sought to be recovered in this suit was in no way to be considered a liquidated amount, or an amount or balance claimed, or in any way