In re Clarke, One, &c.

Prohibition—Disputed facts—Matters of practice—When writ granted.

Where, on an application for a writ of prohibition, the question of jurisdiction depended on a question of fact concerning which the affidavits were contradictory, and the parties had no desire to declare in a prohibition, a certificate of the learned judge as to the fact was held to govern, and it showing all facts necessary to sustain jurisdiction, the summons for prohibition was discharged with costs.

Semble, the writ of prohibition will not lie in regard to matters of practice in an inferior court.

Quære, the effect of an application to the inferior court for the relief afterwards sought to be obtained in an application to a judge or a superior court for a writ of prohibition.

[Chambers, 1866.]

This was a summons calling on Mr. Clarke and the judge of the County Court of the United Counties of Huron and Bruce to shew cause why a writ of prohibition should not issue to restrain the judge from granting his certificate for full costs to be allowed to Mr. Clarke in two actions pending in the County Court, or to restrain the judge or clerk from taxing any greater costs than would have been allowed had the actions been brought in the Division Court, or from issuing executions for any such costs, and with such directions and commands as necessary to put the parties in the same position as they would have been had no such certificates been given.

Mr. Clarke, an attorney, brought two actions in the County Court on separate bills of costs. He recovered in both, but the amount recovered was within the jurisdiction of the Division Court, because the amounts of the verdicts were reduced by a taxation of Mr. Clarke's bills, which were taxed in one of the superior courts. These verdicts were rendered at the sittings of the County Court on the 18th Dec., 1865, and the parties, plaintiff and defendant, differed materially as to what took place in the County Court in regard to the court being moved for a certificate for County Court costs.

The plaintiffs positively asserted that applications for certificates for costs were made in court after verdict and before the trial of any other cause, while the defendant's counsel swore he was in court at the trial of both suits and remained till its adjournment for that day, and no certificate for costs in either case was asked for or obtained during the time he remained there. The plaintiffs swore that in accordance with the application made in court he afterwards applied to the judge and got the certificate signed by him.

Summonses were taken out by defendant to set aside these certificates, and were discharged by the judge of the county court.

The judge of the county court furnished a certificate of the proceedings, which was sworn to as being in his handwriting, and was to the effect that "immediately after the verdicts were rendered, applications were made in the usual way for certificates for full costs if necessary, (the jury being out in one case when the matter was named); that afterwards, in pursuance of the applications, the certificates were granted, and that afterwards a summons was obtained in each case, to shew cause why the certificates should not be set aside, which summonses were discharged. Plaintiff afterwards entered judgment and issued execution."

Robert A. Harrison (*Clarke* with him) shewed cause and argued, that the decision of the judge as to full costs was a matter of practice; that no prohibition would lie to regulate the practice of an inferior court; that the affidavits were contradictory as to whether or not certificates were properly moved; that in such case the judge's certificate of the facts should govern; that his decision on an application to set aside the certificates was final; that no appeal can be directly or indirectly had from the decision of a county judge on a point of practice; that his decision had been acted upon, and the acts done before this application, which it was sought by this application to restrain, and the application therefore under any circumstances too late.

D. McMichael (*Chadwick* with him) supported the summons and argued, that the judge had no jurisdiction to grant the certificates, unless the application for them were made immediately after the verdicts; that it sufficiently appeared on the papers filed, the application was not made till afterwards; that the judge, under these circumstances, had no power or authority to grant the certificates, and the question raised was not one of practice but of jurisdiction, and where there is an excess of jurisdiction, there is power in the Superior Court to prohibit the exercise of jurisdiction, even after its exercise has been, as in these cases, attempted.

Draper, C. J.—I understand the parties desire that I should not direct the applicant to declare in prohibition, which, when the facts are in dispute, is the usual course.

I shall not therefore refer to the affidavits, which are contradictory, but act upon the judge's certificate, which assumes that the application for the certificates were made in proper time; if so, the judge is the authority to grant or withhold, and he has granted the certificates.

I do not, however, wish to be understood as intimating an opinion that the granting or withholding is anything but a matter of practice, with regard to which, *i. e.*, as a matter of practice, I am satisfied the writ would not lie, for if it were otherwise a party could, on a motion for a prohibition, virtually get an appeal from the decision of the Superior Court on matters which, by the statute, no appeal is given.

By moving the court below to set aside the certificate, the defendant may have prejudiced his right if otherwise good. See *Stainbank* v. *Bradshaw*, 10 Ea. 349; *Roberts* v. *Humby*, 3 M. & W. 120. See also. 2 Inst. 601, 602, 619; *Darby* v. *Cosens*, 1 T. R. 552; *Full* v. *Hutchins*, Cowp. 424; *Duteres* v. *Robson*, 1 H. Bl. 100; *Griffith v. Stevens*, 1 Chit. R. 196; *Carslake* v. *Mapledoram*, 2 T. R. 478; *Argyle* v. *Hunt*, Str. 187; In re Birch, 15 C. B. 743; *Mossop* v. *Great Northern R. Co.*, 16 C. B. 580; *Great Northern R. Co.* v. *Mossop*, 17 C. B. 130; *Carter* v. *Smith*, 4 El. & B. 696.

Summons discharged with costs.