a review of all the circumstances I discharge this summons. If the sheriff improperly withholds the goods now, though an interpleader issue is directed, he will give a new cause of action against himself, after demand on him.

Summons discharged.

SMITH ET AL. v. FORBES.

Verdict subject to a reference—Power to certify for costs—When to be exercised.

At Nisi Prius in an action for unliquidated damages a verdict was taken for $500, subject to a reference, with power to the referee to certify for costs in the same manner as a Judge at Nisi Prius. The referee reduced the damages to $33 50 and made his award without certifying for costs. It was held, that after award made and published the referee had no power to certify for costs.

Quære. Whether a referee under such a submission had power to certify for the costs of the county or intermediate court.

(7th January, 1862.)

The first count of the declaration was for selling grain seized on a distress warrant for rent before the same was cut; the second on a covenant for the price of certain fences put by by plaintiffs, and for cordwood. The third, the common counts for work, labor, money, and on account stated.

The plea to first count was, not guilty; to second, payment; and to third, never indebted, payment, and set off.

The case was entered for trial at the last Kingston Assizes, and a verdict rendered for plaintiff by consent for $500, subject to the award of the judge of the County Court, to be reduced, or vacated, or a verdict to be entered for defendant for any balance due defendant; award to be made by 1st January, submission to be made a rule of court, arbitrator to have the same power to certify for costs as the judge at Nisi Prius, costs of the cause, reference, and award, to abide the event.

On the 9th Dec., 1861, the arbitrator awarded that the verdict should stand for the plaintiff on all the issues and he assessed and awarded the damages which the plaintiffs were entitled to recover at $33.65, and that the verdict be reduced to that sum.

Afterwards on the 18th Dec. he signed a paper as follows: "In the Common Pleas, Thomas Smith and William George Smith, Plaintiffs, *v.* David Forbes, defendant, I, Kenneth McKenzie, referee in the cause, do certify, that application hath been duly made under the 325th section of the Common Law Procedure Act for a certificate that this cause is a fit cause to be brought in the Superior Court or County Court. I decline to certify, as I am not of opinion that it is a fit cause to be brought in the Superior Court, but in my opinion it is a fit cause to be withdrawn from the Division Court and tried in the County Court, and that the Division Court had not jurisdiction to try the cause, and would certify for County Court costs if I thought I had power under the Act to certify that the cause could be brought in an intermediate jurisdiction. I therefore leave the point for the decision of an superior court judge. Dated thie 18th December, 1861."

Upon these facts, and an affidavit stating that the counsel for both parties appeared before the referee, and it was arranged that referee should make the above certificate, so that the directions for taxation might be decided by a judge of one of the Superior Courts, a summons was issued calling upon the defendants to shew cause why the master should not "tax to the plaintiff Superior Court costs, or such other costs as the presiding judge should order."

It was opposed on an affidavit stating that the award was delivered on the 9th Dec., and that on delivering the award the arbitrator refused to certify for any costs, that the defendants counsel, at the request of plaintiffs counsel, went before the arbitrator on 18th Dec., and the arbitrator again refused to certify, but at the request of plaintiffs counsel signed the foregoing certificate; that it was not arranged the referee should make the certificate, that the Defendant's counsel was not an assenting party thereto; that on the 9th Dec. the referee did not reserve the matter for further consideration, but stated decidedly he would not certify; that on appearing before the arbitrators on the 18th Dec. the defendant's counsel waived no right, as he considered the arbitrator's authority at an end.

R. A. Harrison for the application. *M. B. Jackson* contra.

DRAPER, C. J.—Whether the arbitrator had power or not to certify for County Court costs under the circumstances, he made his award without certifying, and as to Superior Court costs refusing to certify.

If the verdict had been rendered at Nisi Prius then according to the Act, "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 certifies in open court immediately after the verdict has been recorded," &c.

In an analagous case in England (*Spain* v. *Cadell*, 8 M. & W., 129,) Alderson, B. said, "No doubt the arbitrator who is invested with power by the consent of the parties must in all substantial matters follow the rules laid down in the statutes for the guidance of the judge, that is, he must give his opinion upon the matter immediately, he cannot make his award at one time and certify as to costs at a subsequent time. That is in substance the power possessed by the judge at Nisi Prius, which the arbitrator, although he cannot follow it literally, is bound to follow *cy pres*, the mode of doing which is by immediately inserting his certificate in the award." The case of *Greves* v. *Gorton*, 10 Jur. 272 is strong to the same effect.

I think the case stands precisely on the same footing as if the Judge at Nisi Prius had not certified.

No application could afterwards be made to another judge to supply the defect, in consequence of the express language of the Act, and therefore I think the summons must be discharged.

Summons discharged without costs.

HINGSTON ET AL. v. WHELAN.

Entry of Nisi Prius record—Con. Stat. U. C., cap. 22, s. 203, 204, 205, 23 Vic. cap. 42.

Where in a country cause the record was entered for trial before the commission day of the assizes, and afterwards before the commission day settled, the Master, upon consulting the Chief Justice of the Common Pleas, refused to allow the costs of entering the record or counsel fee.

The venue in this cause was laid in the County of Wellington, though all the proceedings were had in the principal office at Toronto.

On 8th November last the attorney for plaintiffs having made up the record sent it to his agent at Guelph, the County Town of Wellington, to be entered for trial and returned after verdict.

On 9th November the agent for defendant's attorney called upon the attorney for plaintiffs between three and four o'clock in the afternoon for the purpose of settling the suit. He was then informed that the record had on the day previous been sent to Guelph for trial. It was then agreed that the debt and costs, not including counsel fee or entry of record, should be received without prejudice, and that if plaintiffs were entitled to counsel fee and costs of entry of record on facts afterwards appearing such costs were to be paid. Immediately upon receipt of the money on this understanding a telegram was sent by the attorney for plaintiffs to his agent in Guelph that the suit was settled and not to enter the record. On same day an answer was received that the record had been previously entered.

It appeared that in the forenoon of 9th November, before any settlement had been effected, the record had been in good faith entered for trial at Guelph, though the assizes did not open till 11th November.

The question was whether the record, being in a county cause, had been properly entered before the commission day of the assize, and if so whether plaintiffs were entitled to the costs of entering the same and counsel fee.

The taxing officer refused to allow counsel fee or costs of entry of record.

R. A. Harrison appealed against his decision, contending that in country causes records may be properly entered before the commission day of the assize, and that if entered in good faith plaintiff is entitled to the costs of entering same together with counsel fee. He referred to Con. Stat. U. C., cap. 22, s. 203, 204 and 205, and 23 Vic., cap. 42.

M. B. Jackson contra.

BURNS, J.—It is for the Master to decide whether the costs in dispute are or are not to be allowed. I cannot interfere.

The parties afterwards went before the clerk of the court. He thought the record was properly entered and was inclined to allow