any building as to form in law part of the realty. So far the evidence of meaning is plain, that land, with what is upon it, is something tangible. I have no doubt, if the company should fill in a portion of the water and make dry land of it, and erect buildings thereon with machinery, such would become liable to taxation. Then the legislature goes on, and declares that all trees and underwood growing upon the land shall be included within the term, thus carrying out the idea that the term, so far, means something visible and tangible. Then comes the expression, that it shall include all mines, minerals, quarries and fossils in and under the same, except mines belonging to her Majesty. This last shews the desire that lands made profitable in the use for such purposes should be taxed, but still it is all the time carrying out the same idea, that the land intended to be taxed is something that is visible and tangible. I have no doubt if it were discovered that a valuable mineral could be obtained at the bottom of the harbour, and means were devised either to exclude the water in working for it or otherwise it would be subject to taxation, but then that would not be upon the ground that it was land covered with water, but it would be because the mineral was extracted from it, and it would be the mineral which would be taxed, and not the land *qua* land, and it would be so because the legislature has declared that the expression land shall include minerals. I do not think it would make any difference in taking such things from under the surface, whether it came through a body of water or through land, in order to get it to the surface, for the purpose of taxation.

In the present case the land at the bottom of the harbour is not and cannot be used, so far as disclosed, unless it is for the anchorage of vessels. The right to impose tolls is not said to be for anchorage, nor do I suppose such a thing ever entered the mind of the legislature, but the right is given to impose tolls for the use of the harbour by vessels, and we must understand that to mean the use of the water and not the land, unless we go back to the days of the ancients, when they frequently, to avoid storms, or for other purposes, drew up their ships at pleasure upon the land on rollers; or adopt the story of the Argonauts who it is said by some transported their ships by land from the Black Sea across either to the Baltic or North Sea.

The legislature has defined what was meant by land, and there is no necessity for our extending that meaning in any way by the application of legal doctrines. The mentioning of mines, minerals, fossils, &c., convince me the legislature never intended to tax the use of water.

The defendants have acted upon a false principle in supposing they could tax land of no earthly value except to support the water upon it, because that water may be made useful in commerce. Nothing was easier than for the legislature to have said that harbours should be taxed, if it were intended to be so, and it nothing had been said in defining what should be considered as land, the argument might have been much stronger in the defendants' favour.

I think that judgment should be entered for the plaintiffs.

The CHIEF JUSTICE, having been absent during the argument, gave no judgment. Judgment for the plaintiffs.

COMMON PLEAS.

GEROUX v. YAGER *

Costs—Final judgment without a trial—Order for full costs—Jurisdiction.

Where final judgment is obtained without a trial a judge in Chambers has power to make an order for full costs.

Quære—Should the order be *ex parte*?

Where a cause is decided by the award of an arbitrator, the cause is one proper for an application of the kind.

The order may be made unless it appear that the cause was one which the plaintiff was bound to sue in an inferior court.

A plaintiff in order to bring his cause within the jurisdiction of an inferior tribunal is not bound to give credits. It is a privilege to do so, but there is no legal obligation upon him to do so.

Wallbridge, Q. C., obtained a rule *nisi* to set aside an order made in this cause by McLean, J., for the taxation of full county court costs to the plaintiff, and that the taxation should be revised and the defendant be allowed his costs against plaintiff, pursuant to the statute in that behalf—the debt sued for in this action being within the jurisdiction of the division court.

From the affidavits filed on both sides it appeared that this action was brought in the inferior jurisdiction for an amount claimed by the plaintiff, as amounting to upwards of £36, the principal item of which was thirty seven weeks' board and washing amounting to £22 6s. 3d. The residue was made up of small charges for hay and grain, day's work, use of team, pasturing &c.

The defendant advanced a set-off, in which he claimed £61 16s. 9d.; the largest items being a promissory note, £10 15s. 9d; nine head of cattle and six sheep, £10 6s. 3d.; a stack of hay, £7 10s. The residue of the charges were similar in character to those made by plaintiff.

The action was referred to arbitration by a judge's order, made 1st March, 1850: costs of the action to abide the event of the award; costs of reference and award in the discretion of the arbitrator.

The arbitrator awarded that the defendant should pay the plaintiff £1 11s. 7d. in full satisfaction of the plaintiff's claim, being the balance due him after deducting the defendant's set off, and that the defendant should pay the costs of the award and of the reference after taxation of the same, and £7 10s arbitration fees, and £1 for drawing award.

On the 11th July Burns, J., made an order to tax a counsel fee of £5 to the plaintiff on the proceedings before the arbitrator.

On the 23rd July, McLean, J., made the order complained against, as follows:—"Let the master tax to the plaintiff in this cause full county court costs."

The defendant in his affidavit swore that the plaintiff's account was what is usually called a trumped up account, such as charging day's work done by farmers, when the same had, in fact, been returned. That this being the nature of the plaintiff's account, when such items were proved they were struck out. It was further sworn that the order for county court costs was granted without notice to the defendant, and that the costs originally were taxed at £37 3s. 4d.

The plaintiff put in a sworn copy of the notes of evidence taken before the arbitrator, by which it appeared that each party gave, apparently, all the evidence in his power to prove the various items in his respective account; each seemed to have given in evidence that which had been settled or paid for by the other side.

But the plaintiff and his attorney swore, and the notes of the evidence gave support to their statement, that the defendant endeavoured to make it appear that the promissory note held by him was given for a balance due, after all the plaintiff's demand had been allowed for, against the rent of the premises of which plaintiff was tenant, and that plaintiff was obliged to prove this payment of the residue of the rent, £50 per annum, exclusive for which the note was given; and then to shew his account, otherwise proven, was independent of any claim for rent due to defendant, so that in effect the plaintiff was obliged to give evidence of the account, and of the payment of the greater part of the rent as his side of the account.

J. B. Read shewed cause.

DRAPER, C. J.—Upon the merits I do not see any ground to warrant our determining that the plaintiff should not have county court costs.

The amount stated to have been taxed certainly appears large. The arbitrator's fees, however, and the charge for award amount to £8 10s., and a judge's order for a counsel fee of £5 was made, which indicate that in his view at least it was not a division court case; and from the notes of evidence it appears the arbitration occupied two days, and that nine witnesses were examined for the plaintiff. From the expression in the affidavit "originally taxed" there has probably been a revision, at all events it is not the *amount* of costs that is in question, but the *scale* by which they are to be ascertained; and so far as the merits are concerned, I am not prepared to differ from my brother McLean in ordering county court costs.

Then the only question is as to authority.

The jurisdiction of the division court extends to all cases of debts, accounts, breach of contract, covenant, or money demand,

* We can find no report of this case among the cases reported in the sixth revised series of the Common Pleas Reports. Probably the reporter did not consider the case of sufficient importance to publish it. But knowing that it is often referred to, though long since decided, we have with the permission of the taxing master of the court, procured a copy, and now give it to our readers.