DRAPER, C. J.—I find no authority for staying proceedings until the costs of the day are paid, though an extreme case might arise, in which *such a course would be* proper (see *Henzell* v. *Hocking*, 9 Jur. 18). The defendant, if successful in this action, will, I apprehend, be able to recover these costs, and if he fails, will be allowed to set them off against the sum recovered by plaintiffs.

Besides, I do not see how I could properly make such an order, when the defendant has given the plaintiffs notice to proceed, and will be entitled to enter a suggestion and sign judgment for his costs, if the plaintiffs omit either to give notice of trial, or to proceed to trial pursuant thereto, or do not obtain an extention of the time for going to trial.

The giving the notice to proceed, appears to be proceeding in the cause, (see *Knight* v. *Gaunt*, 17 Jur. 139,) and I presume that in strictness the defendant could not have taken it, after the lapse of four terms, without giving a term's notice. But plaintiffs do not object to this, they comply with defendant's notice by giving notice of trial. There has, therefore, been a proceeding in the cause, within four terms next proceeding the giving notice of trial. It certainly would be a strange result if the defendant could call on the plaintiffs to proceed by giving notice of trial, and then move to set aside the notice for irregularity.

The summons must therefore be discharged, and with costs, because moved with costs. *Henzell* v. *Hocking*, is exactly in point in this respect.

Summons discharged with costs.

JONES v. HARRIS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law*)

Interpleader—County Court—Certiorari.

A certiorari does not lie to remove an interpleader issue from a County to a Superior Court.

If such a writ do improvidently issue the application should be to quash the certiorari and not for a procedendo.

(27 December 1859.)

This was an an application to set aside a writ of certiorari and proceedings under the following circumstances.

On the twenty ninth of June 1859, the Judge of the County Court of the County of Middlesex, at the instance of the Sheriff made an interpleader order in a suit of *Harris* v. *Andrews'*, to try whether certain goods seized by the sheriff under a *fi. fa.* were the goods of the claimant (Jones).

The order directed the parties to try the issue at the then next sittings of the County Court in London and the question of costs, repayment of possession money, and all further questions were reserved until after the trial of the issue.

The execution creditor Harris was made Defendant.

The issue was delivered afterwards on the second of September, the plaintiff sued out a writ of certiorari upon a præcipe and removed as the writ expresses it, the plaint and proceedings into the Court of Queen's Bench

Subsequently to this being done the defendant made an application to a judge in Chambers for security for costs, and on the thirteenth of October an order was made *ex parte*.

This application to set aside the certiorari was made by defendant.

BURNS, J.—There is no doubt the proceeding by certiorari is altogether irregular. Such a writ does not apply an to issue directed by the Court or Judge which has possession of the cause out of which the issue to be tried springs. The ordinary writ of certiorari removes the cause to a superior court, and when once removed the Superior court disposes of the cause thoroughly. There is no going back to the inferior court for judgment or anything connected with the suit.

It is obvious that the writ of certiorari does not remove the judge's order for the interpleader issue, for that has been made in the suit of *Harris* v. *Andrews*, which is in no way brought into the superior Court by the writ of the certiorari. Besides this difficulty a judge's order cannot be removed in that way to a higher tribunal.

The writ of certiorari then, if it could issue, would do nothing more than remove the feigned issue which the parties had entered into pursuant to the order of the judge of the County Court, and all that the Superior Court could do would be to let it be tried as a record of the Superior Court. If it were so tried the parties would have to get the *matter back again in some* way to the County Court to be disposed of finally, for the judge of that Court has reserved all questions until after the issues should be tried. The judge has ordered the issue to be tried at the County Court in London. What becomes of that provision, and where is the issue to be tried when the party has brought it into the superior Court? All these difficulties shew that the writ of certiorari does not apply to removing an issue directed by the Court. The parties must try it in the Court where ordered and under the terms provided for.

The plaintiff resists the application on the ground that the defendant has assented to the case being regularly before the Superior Court because he has obtained an order on the plaintiff to compel him to give security for costs. But the most direct and positive assent of the parties upon the facts as they appear could not possibly give the Superior Court jurisdiction.

The defendant asks for a writ of procedendo to send the matter back to the County Court there to be disposed of. I do not think such a writ can properly issue for that would be recognizing a right to bring the matter up. The only proper order to make is to quash the writ of certiorari as being improvidently issued in a case where it never ought to have issued. If the defendant had applied for that in the first instance he might have obtained the costs of the application but he has led the plaintiff into the belief by his applying for and obtaining an order for security for costs, that he thought all right and therefore there should be no costs.

The order of the Judge of the County Court has never been removed from that Court, and the parties must apply to the judge for time to comply with the terms of it in regard to trying the issue thereby directed.

THE BANK OF BRITISH NORTH AMERICA v. ELLIOTT.

Several actions on Promissory notes—One of Defendants out of Jurisdiction—Costs.

The Consolidated Act of Upper Canada, cap. 42, sec. 23, providing that in case several suits be brought on one bond or on one promissory note, to or against the maker, drawer, acceptor, or indorser of such note, &c., there shall be collected or received from the defendant the costs taxed in one suit only at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or received from the defendant does not apply to the case where one of the parties to the note not sued with the other is at the commencement of the suit out of the jurisdiction of the Court.

(Chambers, Dec. 15th, 1859.)

This was a summons calling on the plaintiff to shew cause why the judgment should not be entered, and the costs if any taxed at Toronto, and why also the plaintiff should not be deprived of all costs except the disbursements in the cause, and a suggestion to that effect be entered pursuant to the statute on the grounds that defendant should have been sued along with the other parties to the note sued on in this cause, when they were sued and not separately.

From the affidavits filed it appeared that this case was brought to recover the amount of a promissory made by Messrs Smith & McNaught and indorsed by Hugh Workman, John Turner and the defendant Elliott. An action had been brought against the other defendants, in which judgment was obtained by default, and full costs taxed against them.

Both summonses in the suits against the defendant and the other parties to the notes were issued on the 11th August last. The writ in this suit was issued against Elliott as an absent defendant.

Defendant for many years past resided in Brantford, and had been a member of the Town Council. It was also stated in the affidavits filed on his behalf, that he was again elected in January last and had acted as a Town Councillor part of this year. But the affidavits in reply stated, that on getting a contract to build a Post Office in Quebec he resigned his office as Town Councillor.

Previous to the month of June last he obtained the contract to build the Post Office and went to Quebec to look after the work leaving his family behind him. Up to the time of the application he visited Brantford three times. First in the month of June, next in September, (the affidavits filed on his behalf state the early part of September while those filed for the plaintiff say the middle of September), and again in October. He remained several days on each occasion. In the affidavits filed on behalf of defendant, it was stated that the writ might have been served in time at Brant-