

Aug. 12, }
1875. }

McINTIRE v. EASTERN RAILROAD.

Reference Law—Practice.

A case having been referred by order of the court, and no proceedings having been had under the order until after the act of July 3, 1875, changing the law in regard to references, had been passed—*Held*, that the order should be rescinded, and the question of reference be determined by the court under the law as amended.

In this case, the claim of the plaintiffs was for unliquidated damages. The defendants moved for a reference. The court held, that the defendants had a legal right to a reference under the reference law of 1874, unless it was made to appear that it would be inexpedient to make such reference. There was nothing in the nature of the case to distinguish it from ordinary cases, except the fact that the claim was for unliquidated damages; and the court, in the exercise of its discretion, held that that was not sufficient to render it inexpedient to refer the case. And the intention of the court now is, to transfer to the superior court the question whether or not that was a proper exercise of discretionary power, and also the point above stated as to the proper interpretation of the reference law. The case was entered at the October term, 1874. At the January term, 1875, the defendants moved for reference, and the motion and the cause were continued, the case not having been reached in its order. At the April term, 1875, the case was marked by the plaintiffs for the jury at the call of the docket; and the plaintiffs claimed the right to try the case by the jury, and the defendants insisted upon their motion to refer.

Transferred.

Marston, for the plaintiffs.

Hatch and *W. H. Y. Hackett*, for the defendants.

CUSHING, C. J. I am not aware of any reason why this action should not have been referred; but, inasmuch as no proceedings have been had, and, by the law as amended, the case now would not be referred except on its being made to appear that it ought to be, I think the order already made should be rescinded, and the question of reference determined by the court under the existing law.

LADD, J. The case does not show whether the action could or could not have been conveniently tried by a jury or in court; and this, as I read the act of 1874, was an important element in determining the exercise of the large discretion conferred upon the court by that act in the matter of sending causes to referees for trial. But, as any doubt

on this point has been removed by the legislature,—act of 1875, ch. 35,—the question need not be considered now. I agree that the order should be rescinded.

SMITH, J. I am of the same opinion. The act of 1874 having been materially changed, the question at the next term of the circuit court will be, whether this case shall be recommitted to the referee; and that must be determined by the provisions of the act of 1875.

Case discharged.

BROOKS v. NEW DURHAM.

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Attorney's authority to refer pending cause.

An attorney of record, in an action which had been sent to a referee by order of court, signed an agreement in writing that the report of the referee should be final, and the agreement was entitled as of the term of the circuit court to which the report was to be made. *Held*, that his client was bound by such agreement.

CASE, to recover for injuries occasioned, as alleged, by obstructions in a highway in said town. At the September term, 1874, of said court, this action was by order of court referred to a referee, under the statute of 1874. He gave notice to the parties of a hearing, and they appeared before him,—the plaintiff by himself and counsel, and the defendants by their selectmen and counsel. While the hearing was in progress, and before the referee had made his report, the parties entered into an agreement as follows:

STRAFFORD, SS.

CIRCUIT COURT, FEBRUARY TERM, 1875.

Charles Brooks v. The Town of New Durham.

It is hereby agreed, that the report of Judge Worcester, referee in said case, shall be final, and that judgment shall be rendered thereon at said term by said court.

CHARLES BROOKS, plaintiff.

FRANK HOBBS, att'y for defendants.

The referee made his report, finding for the plaintiff, which was duly returned to court, and the plaintiff thereupon moved for judgment on the report, and the defendants elected a trial by jury. The court ordered judgment on the report, and the defendants excepted. If competent and material to show the circumstances under which said agreement was signed, the court find the following facts in relation thereto: When the parties came together to try the case before the referee, the