did not think he would attend; or even what is sworn by the plaintiff and Chase, "that he would not *attend, that he did not think it of any use*" I do not think than an arbitrator in the conduct of a judicial proceeding is justified from such language to proceed *ex parte*, behind the back of one of the parties, without seeing that he had had notice of the further proceedings, so as to give him an opportunity of changing his mind, and of calling more witnesses if he should think fit, or, of being present at least when other witnesses, if any, should be called by his opponent, and of pressing his views equally with his opponent before the arbitrator, if that should have been the purpose for which the meeting was to be held.

Then, the next point is, had the defendant any, and if any, what notice of the intended proceeding upon the 11th, and had the arbitrator any, and if any, what evidence of his having had such notice before he proceeded to take further evidence upon the part of the plaintiff.

The arbitrator swears that he directed McCrea to notify both parties of the intended meeting, that he *knows* that McCrea did so by sending notice to plaintiff and defendant; he says he *knows* that McCrea did so, but he gives me no means of testing the correctness of his knowledge. If he *knows* that McCrea sent the requisite notice he must know what information the notice contained, and how it was sent; but he says nothing in his affidavit upon either of these points. Then McCrea swears that he sent notices as directed by the arbitrator, but he does not say *how* he sent them; and this is in answer to an affidavit of the defendant, that he lives only two miles off, and that he never received any such, or any notice. McCrea without saying how he sent the notice, contents himself with saying that he sent one to defendant, and that he believes he received it, but he gives me no means of judging of the foundation for his belief, or, whether it should out-weigh the affidavit of the defendant, who swears that he never received it. The arbitrator, indeed, swears that the defendant acknowledged to him that he had received the notice.

Now the defendant in his affidavit swears that after he had heard of the award being made, he remonstrated with the arbitrator for having proceeded in his absence, and without having given him notice of his intended sitting of the 11th June; and that the arbitrator replied, that he regretted he had not had notice, but that he could not open the matter, and that he had taken advice upon the subject. Now did this occur or did it not? it is sworn that it did, and the arbitrator does not deny it. If the allegation of the arbitrator is intended as a denial of the statement in the defendant's affidavit, it is a bald way of denying a very precise and material averment; and if being uncontradicted I am to take the defendant's statement in this particular to be true, how am I to understand the arbitrator's reply to the effect that he had acted under advice, upon a point relating to his having proceeded *ex parte* without giving sufficient notice; if he had, *then* the defendant's acknowledgment that he had *received* the notice, or if the arbitrator, as he swears, *knew* that it had been sent *in time*; assuming it even to be true that the defendant did, as the arbitrator swears, *at some time* acknowledge that he had received a notice for the meeting of the 11th, the statement of the arbitrator upon that point is loose enough to be consistent with the fact that the acknowledgment was made after the conversation alluded to by defendant, and that the notice had been so carelessly sent, or sent so late that he did not receive it until long after the award was made, and when it was too late to be of any use But, looking at the preciseness of the affidavit of the defendant upon this point, and the vagueness of the affidavits in reply, I am compelled to adopt the affidavit of the defendant that he never received one; and I am left in doubt whether any was ever sent, or if sent, whether it was sent in such a manner as to present a reasonable expectation that the defendant would receive it in time.

But further, an arbitrator who acts in the character of a judge, before he undertakes to proceed *ex parte*, should satisfy himself by some proper evidence, that the necessary notice not only had been sent, but delivered so as to enable the party notified to appear, and there is no suggestion that the arbitrator required or called for any such evidence before he entered upon the *ex parte* examination of the plaintiff's witnesses on the 11th June.

Granting that the defendant may have had no further evidence to call, though he swears to the contrary, what right had the arbitrator to suppose that he knew that after his evidence was closed further evidence would be received from the plaintiff, without the defendant having notice of that proceeding The plaintiff indeed swears that the defendant knew that the plaintiff would require to call witnesses to rebut Henderson's evidence. How must the defendant have *known* that? the plaintiff does not pretend that he communicated to the defendant his intention of calling such evidence, and even though the defendant might be content to be absent at any future meeting, as all his evidence had been given, that reason for his absence will scarcely account for its being supposed that he should not attend if the plaintiff should be permitted to adduce fresh evidence, when we find him attending regularly while all the previous testimony was being taken.

In arbitrations, it is, in my opinion, the duty of the *party* acting in the prosecution of the arbitration, whether he be plaintiff or defendant, to take care that all proper and sufficient notices are *served* upon the opposite party, and it is the duty of the arbitrator, before he proceeds *ex parte*, to satisfy himself by sufficient evidence that such notices have been given. Before an arbitrator is justified in proceeding *ex parte*, he ought, in my opinion, to have before him the clearest evidence that the party not attending is wilfully absenting himself; and, when a question arises before the court as to whether an arbitrator has or has not been justified in proceeding *ex parte*, it is incumbent upon the party who did proceed before the arbitrator, to adduce evidence abundantly sufficient to satisfy the court that the party absenting himself had full notice of the meeting or meetings from which he was absent, so as to enable the court to see clearly whether the absence was wilful or excusable, and whether the arbitrator was or was not justified in proceeding in his absence. A very strong case indeed should be made to justify an arbitrator in so proceeding, and it might be well perhaps that it should be established as a rule, that no notice would justify such a proceeding unless it should convey