on the examination of the witnesses of the plaintiff before said arbitrator, subsequent thereto; and, because the said arbitrator exceeded his authority under the submission in having assessed the costs of and incidental to the award, and ordered payment of the same.

The rule was founded mainly upon an affidavit of the defendant, and one Henderson.

J. B. Read shewed cause, and filed four affidavits, namely, of Mr. Geo. Whates, McCrea, the plaintiff himself, and one Chase. He contended that the award should stand, the fault, if any, having been that of the defendant

O'Brien contra cited *McNully* v. *Jobson*. 2 Prac Rep. 119; *Waters* v *Daly*, Ib 202; *Williams* v. *Roblin*, Ib. 234; *In re Manley et al.*, Ib. 354; Russell on Awards, 179, 191, 199, 207, 655; *Gladwin* v. *Chilcote*, 9 Dowl. 550 The main facts of the case appear in the judgment of

GWYNNE, J.—It appears from the affidavits that neither plaintiff nor defendant had any person attending the arbitration for them as counsel or attorney, but that they acted each as his own counsel.

Now from these affidavits I am to say whether I am satisfied that the defendant wilfully abstained from attending the arbitration, although he had ample notice of its several sittings, and, whether the circumstances established by his affidavits shew that the arbitrator was justified in proceeding *ex parte*, or whether the arbitration was conducted in any part in the absence of the defendant, without his having had that reasonable notice of the proceedings which he was entitled to, and without which the arbitration would be divested of its judicial character, and the solemn duty of administering justice between parties be degraded into a farce.

I take it to be sufficiently established that the arbitration opened on the 28th May, which day the arbitrator says he formally appointed, by an appointment endorsed on the bond of submission. By reference to this bond, which was filed on the motion to make it a rule of court, I find that this is so, the appointment being dated the 22nd May for Friday the 28th May, and signed by the arbitrator Upon the 28th May, it appears that the plaintiff's witnesses were examined, but whether his case was closed upon that day, or upon the 4th June, does not appear; however, there is no complaint made of any of the proceedings of the 28th May Referring again to the submission, I find an endorsement thereon, also signed by the arbitrator in these words: "adjourned till Friday, June 4th, by consent of parties, J Higgins, Arbitrator." So far the proceedings appear regular, and to have been as represented by the defendant

Upon the 4th June, then, I take it that the plaintiff's case was closed, if it was not closed on the 28th, and then the defendant's case was opened by the examination of Henderson. Now the substance of defendant's affidavit and Henderson's is, that the arbitration upon that day broke off without Henderson's evidence having been closed and while the defendant had another witness named Buck, present to be examined: that there was no adjournment to any other day: and, that defendant left, informing both the plaintiff and McCrae that he would expect a notice of the next meeting, whenever it should be appointed. All the affidavits in reply state, on the contrary, that not only was Henderson's examination completed, but also his cross-examination; and the clerk swears that it was taken down in writing, and when so completed was signed by Henderson. Now upon this point, which certainly was a very material point, it would have been very easy, if this were true, for the examination so taken and signed to have been produced; it would no doubt have settled *one* point upon which there is a very grave contradiction in the affidavits filed by the respective parties.

Then again, the affidavits in reply, concur in saying that there was an adjournment made on the 4th June, after the close of Henderson's testimony, to a future day. The arbitrator, McCrea, and Chase, stating that day to be the 11th June, and the plaintiff stating it to have been until the 18th of June. This *may* be a clerical mistake, and yet in view of what I am about to advert to it *may not*. The arbitrator swears that he made a *formal* adjournment to the 11th; McCrea says that the adjournment was made unto the 11th June, and that he acted as clerk and noted all the adjournments Now referring to the submission upon which the first appointment and adjournment are endorsed, I find no adjournment upon the 4th June endorsed at all, but under the adjournment *to* the 4th June, I do find an entry of an adjournment, *which is erased*, and which is in the words following: "adjourned June 11th *to* Friday next, J. Higgins." and the Friday following the 11th June was the 18th June, which is the day mentioned by the plaintiff as the date of the adjournment from the 4th June, so that there may be some colour for something having taken place at some time relating to the 18th June, the day named by the plaintiff; but why is this erased, and why, if the arbitrator did make the *formal* adjournment which he says he he did on the 4th to the 11th, does not that appear on the submission where the other entries of appointment and adjournment, of which there is no dispute, do appear.

Again, if, as McCrea says, he noted down the several adjournments, the production of the minute kept by him would have been very material upon a point as to which also there is such grave contradiction in the affidavits. Then again, the arbitrator swears that what the defendant said upon the alleged adjournment to the 11th being made upon the 4th June was, "that he did not think he would attend, that I might go on whether he was present or not, that he had no further evidence to put in." McCrea states it in somewhat similar terms, namely, "that *he did not think* he would attend as he had no more evidence to offer, and it was of no use coming, and that the arbitrator might proceed in his absence." The plaintiff swears that the defendant stated "that *he would not* attend again, that there was no use as he had no more evidence to put in, and the arbitrator might go on with the hearing" Chase states it as the plaintiff does, that defendant said "that *he would not* attend as he had no further evidence to offer, and that he did *not think* it any use" Now, was Buck there or not in attendance to be examined as a witness by defendant. He swears he was, and no allusion is made to this fact in any of the affidavits filed by the plaintiff, but, assuming that the defendant said what is sworn to by the arbitrator and McCrea, *that he*