ONTARIO REPORTS.

PRACTICE REPORTS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

In re Potter and Knapp.

Arbitration — Notice of meetings — Proceeding ex parte — Duty of Arbitrator and dominus litis.—Costs.

Held, 1.—That before an arbitrator undertakes to proceed *ex parte*, he should satisfy himself by proper evidence that necessary notice of the appointment has been served, so as to enable the party notified to appear, and in case of non-appearance, it should clearly be shewn that such absence is wilful.

2. That the party acting in the prosecution of the arbitration ought to take care that all proper notices are served on the opposite party and should be able to shew, if he desires to proceed *ex parte*, that the other party has been properly notified, and that he wilfully absents himself; nor should the arbitrator proceed *ex parte* unless the notice conveys the information, that the arbitrator will proceed *ex parte* if the party served does not attend, nor should he so proceed, if a reasonable excuse for his inability to attend is given.

A party, therefore, who had not fulfilled his duty in this respect was ordered to pay costs, and the case was referred back.

[Practice Court, Hil. Term, 1870, *Gwynne, J.*]

O'Brien for Knapp, hereafter called the defendant, obtained a rule *nisi*, calling upon Potter, hereafter called the plaintiff to shew cause why the award made in this cause should not be set aside, and vacated upon the following, among other grounds, viz:—On the ground of misconduct of the arbitrator: 1st. In having proceeded with the said reference and heard evidence on behalf of the plaintiff in the absence of the defendant, and without notice to him, and without giving notice to the defendant of the time, if any, fixed for proceeding with the said reference, and without giving said defendant an opportunity of examining the remainder of his witnesses, or being heard 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 *McNulty* 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 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