

RULE NISI

January Term, 43 Victoria.

Monday, January 5th, 1880.

Let the Defendant, his Attorney or Agent upon notice of this Rule show cause:

- 31 Why the non-suit entered herein should not be set aside, and a verdict entered for the Plaintiff pursuant to leave reserved at the trial, on the ground that the non-suit entered by the learned judge was contrary to law, evidence and the weight of evidence. Or why the said non-suit should not be set aside and a new trial granted on the ground that the non-suit entered is contrary to law and evidence, and meantime let all proceedings be stayed.

On motion of Mr. Garrow,
of Counsel for Plaintiff.

By the Court,

D. McDONALD,
Clerk.

JUDGMENT ON RULE NISI.

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The Plaintiff brings his action in debt for the enforcement of his claims under the award produced in evidence and has thus assumed the burden of proving not only a valid award but a mutual submission of the matters thereby determined. Though according to the recitals contained in the award a written submission would appear to be in existence the Plaintiff instead of producing and proving the same in the ordinary way relied upon the acts and conduct of the Defendant as precluding him from objecting to the want of the necessary submission. In *Stuart vs Nicholson* 3 B. N. C. 113 the signature by the Defendant pursuant to the directions of an award of an undertaking not to pirate the Plaintiff's inventions was held sufficient proof of Defendants having submitted to the arbitration. The same principle is acted upon in *Tyremann vs Smith* 6 E. & B. 719 where the parties by acting upon the reference as still subsisting were held to be estopped from denying the existence of circumstances necessary to give Jurisdiction to the Arbitrators who had entered upon the reference after the expiring of the time limited by the order. It appears by Mr. Campion's evidence that the present Defendant has brought an action against the present Plaintiff upon this award and that the Defendant has demanded the security to which he considered himself entitled thereunder. These circumstances seem to me to be quite sufficient to estop the Defendant from denying the existence of a submission upon which to base the award.

The Defendant by the terms of the award was entitled on the 1st October 1879 to a valid