

CITY OF TORONTO AND LEAK.

and material matter to be considered and discussed by the three arbitrators before finally settling the award. This application itself conclusively shews that such was the case. The fact of the two arbitrators being of opinion that they would not have been influenced in changing their determination, or that Manning would have varied his objection, is beside the question. It is unnecessary to consider or speculate what effect such a proposition might have had upon the mind of Manning, or how far it might have modified his views, further than as it appears by his affidavit, the chief matter upon which he disagreed with his co-arbitrators was in reference to the legal right Leak had to any allowance for the filling in or amount of work he had done upon the esplanade, (the principal point referred to in Mr. Dalton's letter.)

If a final or other meeting or consultation had been held by the three arbitrators to discuss the propriety of drawing up the award in accordance with Mr. Dalton's proposition, the main question, as I have said, depending upon the construction of the statute, he, Manning, might have agreed to an award setting out the objectionable item, with a view of having the point settled by the court, and by his so assenting might have influenced the other two arbitrators, or one of them, to agree to the not unreasonable request of Mr. Dalton, and to the award being drawn in accordance with it.

It is in this view of the case I think the rule quoted by the late Mr. Justice *Burns* in *Martin v. Kergan*, (2 P. R. 374,) is applicable, namely, "That the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings, brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving together at a just conclusion."

On the 16th the three arbitrators separated, unable to agree. On the 17th Mr. Dalton's letter was received by Mr. Dennis. On the 19th the other two arbitrators met, and without any notice or any further consultation with Manning settled and executed their award. In my opinion it was the duty of the two arbitrators, after the receipt of Dalton's com-