block, which buildings were generally occupied as taverns, and to some of which there was no access except across the sidewalks. The city authorities, for some unexplained reasons, had recently erected a close board fence on the extreme northerly boundary of the sidewalk from street to street, thus effectually obstructing the doors and windows of said buildings, and cutting off all access to one or more of them. The defendant, being one of those injuriously affected by the board fence, cut it away, contending that he had a right to enter upon the sidewalk from any part of his land adjoining to it, as long, at any rate, as it was permitted to be used as a public way either for carriages or foot passengers, and in trespass for cutting away the fence he pleaded several pleas, alleging the *locus in quo* in some to be a carriage way and in othersa footway, relying on the public user for over twenty years:

Held, that the city authorities, being in the position of trustees, were incapable of dedicating any part of land to the purposes of a highway, or of diverting it in any respect from its original purpose of a public market, and therefore no such dedication could be presumed from any length of user they might permit or had permitted; and that, acting on behalf of the public, from the nature of their trust, they necessarily retained such a power of control as would justify the erection of the fence in question.—*The City of Hamilton* v. *Morrison*, 18 Com. Pleas, 228.

ONTARIO REPORTS.

PRACTICE COURT.

(Reported by HENRY O'BRIEN, Esq., *Barrister-at-law, Reporter to the Court.)*

IN RE SOULES V. MORTON.

Arbitration—Right of parties to go into case afresh before an umpire.

Where a case is referred to the award of two persons, and, in case of disagreement, to the decision of a third person, either as an umpire or as a third arbitrator, the parties have the right to insist that such third arbitrator or umpire shall have before him the evidence and witnesses produced before the two arbitrators, as well as the right to appear and state their case to such third arbitrator or umpire, before a binding award can be made.

[P. C., Easter Term, 1868.]

D. McMichael obtained, on behalf of Soules, a rule *nisi*, to set aside the award herein, on several grounds, one of which was that one of the arbitrators was not appointed until after evidence taken, and gave his award without having heard the parties or the evidence; also, that the arbitrator heard evidence on behalf of Morton, in the absence of Soules or any one on his behalf.

The submission was by deed dated the 17th April, 1868, and after reciting that disputes, &c., were pending between the parties, in reference to the annual sum of money to be paid to Mrs. Morton in lieu of dower, &c., and in order to settle the amount, &c., the parties agreed to refer the same to the award of two named arbitrators, and in the event of these two not being able to agree within two days from the date of the deed, then they could appoint a fit and proper person as third arbitrator by a memorandum to be endorsed on the deed, and the award of any two of them should be final and conclusive. The award was to be made in writing, on or before the 23rd April, with power to the arbitrators to extend the time, &c. On the 17th April the two arbitrators appointed the third arbitrator, and on the 23rd April the three arbitrators made the award now moved against, awarding an annual payment of $82 50, &c.

It appeared from Soules' affidavit that the two arbitrators proceeded with the arbitration on the 17th April: that both parties attended before them with their evidence, and were heard by the arbitrators, and although they had appointed the third arbitrator he was not present, nor did he hear the parties. The two arbitrators being unable to agree, they called in the third arbitrator, and the three arbitrators considered the matter among themselves and made their award, and did so without notifying Soules, and without his being heard by the third arbitrator, and he swore that if he had been allowed to place his case before the third arbitrator he would have convinced him that the annual amount was unusually large. Smith, one of the arbitrators, also made an affidavit stating that they named the third arbitrator to meet the event of the two not agreeing: that having considered the subject with his co-arbitrator they were unable to agree, and they then called in the third: that Soules and his evidence was not heard, nor was he offered an opportunity to be heard by the third arbitrator: that the son of Soules asked if they did not require his father, but he was told they did not, and Smith also swore that he was not aware that it was necessary or proper for the third arbitrator to hear Soules.

On the part of Mrs. Morton several affidavits were filed, going principally to show that the award was a reasonable one.

Harrison, Q C., shewed cause.
McMichael supported his rule.

MORRISON, J.—There is no dispute about the fact that the two named arbitrators first heard the parties; that being unable to agree upon the amount to be annually paid to Mrs. Morton they called in the third arbitrator, to whom, we may assume, they related the case made by the respective parties, and without the third arbitrator hearing the case except as stated; they conferred among themselves, and they then came to the conclusion of awarding as they did. It is to be regretted that the parties were not heard by the three arbitrators, as from the affidavits filed it is, I think, clear that the award is a fair and proper one, and if it were possible to uphold it I would do so, for it is just one of those cases in which the arbitrators, neighbours residing in the immediate vicinity of the land in question, could determine upon the statement of the parties alone, what was fair and reasonable, but on principle the award cannot be upheld. The third arbitrator was either intended to be an umpire or a third arbitrator. In either case the