

[Prac. C.]

LESLIE V. FOLEY—FOWLER V. MORTON.

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that he verily believes that no cause was shewn against said rule, and that no copy of it to his knowledge was served on the defendant; and he states that he cannot obtain a copy of the rule absolute, as it is not filed.

All this no doubt is perfectly true, but notwithstanding, the defendant, or his attorney or counsel, may have appeared and shewn cause, or consented to the rule going. The rule *nisi* itself on its face is regular, for assuming that the general practice requires personal service (which I do not decide) the court may dispense with it, and order the rule *nisi* to go calling on the defendant upon notice to be given to his attorney or agent to shew cause.

The rule was served on the defendant's attorney, no affidavit is filed by that gentleman shewing whether or not he took any step in the matter; neither does the defendant himself make any affidavit denying that the rule came to his knowledge, or that he has or had any grounds or merits for opposing the rule, nor is it suggested that the proceedings injuriously affect his rights; and no excuse is given why the defendant or his attorney have not filed any affidavit, there being abundance of time between the 11th February and the 22nd May to do so; and as neither of them think it worth their while to make an affidavit stating the facts, and setting at rest any doubts as to what they did in the matter, or shew that they have any substantial ground of complaint, I do not think I am to conjecture circumstances to entitle the defendant to succeed. By doing so I should be sanctioning a loose and careless practice.

A party seeking relief, as sought in this case, ought to support his application with the best and fullest materials at his command, and not, as here, only file the affidavit of a gentleman, who merely states what appears on the files of the court, matters quite consistent with the regularity of the proceedings complained of.

Rule discharged.

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 parties had a right, personally or by counsel, to