

[Prac. Rep.]

IN RE POTTER AND KNAPP—STACEY V. MCINTYRE.

[Prac. Rep.]

that he knew that after his evidence was closed further evidence would be received from the plaintiff, without the defendant having notice of that proceeding. The plaintiff indeed swears that the defendant knew that the plaintiff would require to call witnesses to rebut Henderson's evidence. How must the defendant have known that? the plaintiff does not pretend that he communicated to the defendant his intention of calling such evidence, and even though the defendant might be content to be absent at any future meeting, as all his evidence had been given, that reason for his absence will scarcely account for its being supposed that he should not attend if the plaintiff should be permitted to adduce fresh evidence, when we find him attending regularly while all the previous testimony was being taken.

In arbitrations, it is, in my opinion, the duty of the party acting in the prosecution of the arbitration, whether he be plaintiff or defendant, to take care that all proper and sufficient notices are served upon the opposite party, and it is the duty of the arbitrator, before he proceeds *ex parte*, to satisfy himself by sufficient evidence that such notices have been given. Before an arbitrator is justified in proceeding *ex parte*, he ought, in my opinion, to have before him the clearest evidence that the party not attending is wilfully absenting himself; and, when a question arises before the court as to whether an arbitrator has or has not been justified in proceeding *ex parte*, it is incumbent upon the party who did proceed before the arbitrator, to adduce evidence abundantly sufficient to satisfy the court that the party absenting himself had full notice of the meeting or meetings from which he was absent, so as to enable the court to see clearly whether the absence was wilful or excusable, and whether the arbitrator was or was not justified in proceeding in his absence. A very strong case indeed should be made to justify an arbitrator in so proceeding, and it might be well perhaps that it should be established as a rule, that no notice would justify such a proceeding unless it should convey the information that the arbitrator will peremptorily proceed *ex parte* in case the party served with the notice should not attend, and the party serving it should, and even in such a case, the arbitrator should not proceed *ex parte* if the party served should, before the day of meeting, communicate to the arbitrator a reasonable excuse for his inability to attend.

In this case, I must say that I am not satisfied that the absence of the defendant was wilful. There is reason, I think, to doubt that it was even negligent. I am not satisfied that the matters contained in the affidavits filed upon the motion have been displaced by the affidavits in reply, so as to place the defendant in the position of having committed a wilful default; and I do not think that a sufficient case is shewn to have justified the arbitrator in proceeding in the manner in which he did, *ex parte*. Whatever may be the merits of the case, I cannot say that those due precautions have been observed which alone could justify judicial proceedings being taken or continued against a party in his absence.

I have come to this conclusion upon a careful perusal of the several affidavits, and a consideration of the abstract principles of justice, with which all who are conversant with the conduct

of proceedings in courts of justice are familiar, without seeking for decisions in like cases, although I doubt not that if it were necessary, abundant authority can be found to support the conclusion at which I have arrived.

As I do not think that the arbitrator's conduct was wilfully improper, but that it proceeded rather from ignorance of the judicial duties of an arbitrator, the rule will be to refer the matter back to the arbitrator, with such enlargements as may be necessary.

I think the plaintiff must pay the costs of this application. It was his duty to see that the enlargements were properly made and notice served, before he called upon the arbitrator to proceed *ex parte*.

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New trial to plaintiff on payment of costs—When to be paid.

When a plaintiff obtains a new trial on payment of costs, he is not bound to pay them before the next assizes, because, even had the costs been paid, the plaintiff could not be compelled to go to trial at such assizes; but he must be *out tempus prist* to pay the costs taxed to defendant.

On 19th June the judgment for new trial was given, and on 19th August the rule was served, and on 30th September the costs were tendered. *Held*, that the tender was made within a reasonable time.

A rule to rescind a rule for new trial was therefore discharged, but, as the costs taxed, which had (too late for the assizes) been tendered and refused, were not paid into court, without costs.

[Practice Court, H. T., 1870, Gwynne, J.]

O'Brien, for defendant, obtained a rule *nisi* to rescind a rule granted in Easter Term, 1869, giving plaintiff a new trial on payment of costs, on the ground that the costs taxed under said rule were not paid in accordance with the terms of said rule and the practice of the court in such cases.

It appeared that the venue in this cause was laid in the county of Elgin, and that the case was tried at the assizes in and for the said county, on the 8th April, 1869, and that a verdict was then rendered for the defendant on the first count, and for the plaintiff on the second count of the declaration, with fifty dollars damages, and leave was reserved to the plaintiff to move in Term to enter judgment for himself on the first count.

In Easter Term last the plaintiff obtained a rule *nisi* upon the leave reserved, which rule was argued by counsel for both sides during the same Term, and judgment thereon was reserved; and on or about the 19th June last judgment on the rule *nisi* was given to the effect that the plaintiff should have a new trial upon payment of costs.

On 19th August last a copy of the plaintiff's rule for said new trial, upon payment of costs, was served upon the Toronto agent of the said defendant's attorney, and the said copy was forwarded by the agent to the attorney.

On the 24th September last a letter was received from the attorney for the plaintiff, asking for the bill of the costs so required to be paid by the plaintiff; which was on the same day forwarded by post to the Toronto agent of the defendant's attorney for taxation, and upon the same day a letter was written and posted to the plaintiff's attorney, informing defendant that the bill had been so forwarded to be taxed according to the usual course of practice, and on the