1900.
October 4.

AMARASEKARA *v.* SILVA.

D. C., Galle, 5,316.

Arbitration — Arbitrator proceeding ex parte *— Hearing fresh witnesses without notice—Misconduct of arbitrator.*

BONSER, C.J.—It is misconduct on the part of an abritrator to proceed *ex parte* in the absence of an agreement to that effect.

Even if this rule does not apply to a case of compulsory reference, it is misconduct on his part to hear fresh witnesses after informing the plaintiff that certain witnesses who had been already examined would be re-examined.

THE plaintiff sued the defendant for the recovery of Rs. 336, being arrears of salary said to be due to him from the defendant, who denied the plaintiff's claim, and in reconvention averred that a sum of Rs. 2,447 was due to him from the plaintiff.

The District Judge, after inquiring into the plaintiff's claim, dismissed it, and referred the claim in reconvention to the arbitration of Mr. E. G. Ludovici (under section 5 of the Ordinance No. 15 of 1866)

The arbitrator filed his award on the 15th May, 1900. The plaintiff thereupon appeared and moved the Court to set aside the award on certain grounds set forth in his affidavit, viz.: —

" (*a*) The compulsory reference to arbitration is bad in law, inasmuch as the said reference is not signed by the District Judge.

" (*b*) The recalling of witnesses already examined, without giving the plaintiff an opportunity of being present, was irregular and tantamount to misconduct on the part of the arbitrator.

" (*c*) The calling for and receiving fresh evidence of two witnesses not previously called on behalf of the defendant company, without notice to and in the absence of the plaintiff, is misconduct sufficient to invalidate the award found on such evidence.

1900.
October 4.

" (*d*) The defendant company has been guilty of fraud, inasmuch as one of the directors of the defendant company plied the plaintiff's witness W. O. VanGeyzel with liquor, with the object and intent of incapacitating him from giving evidence for the plaintiff, and by reason of such fraud the arbitrator's mind was prejudiced against the evidence that would have been led by the plaintiff."

At the hearing of plaintiff's motion plaintiff deposed that when he last appeared before the arbitrator he told him that no further proceedings would be taken; that he was informed by letter that the arbitrator intended to re-examine the witnesses of the defendant on the 8th May at 12.30 P.M., and desired him to be present if he choose; that he replied by telegram that he wished to be present at the re-examination, but that as neither he nor his counsel could attend he desired another date; that the arbitrator replied that he had fixed 12.30 P.M. in view of the fact that there was a train to reach Galle at 11.20 A.M. that day; that the re-examination must proceed because there was very little time for the preparation of the award; and that if he (the plaintiff) wished to come to Galle on Friday next, he would read to him what had been recorded.

The District Judge disallowed the plaintiff's motion to set aside the award in these terms:—" It was plaintiff's fault that he was " not present at the further hearing, as he received notice to attend. " He was given an opportunity to attend on 14th May to meet the " evidence recorded on 8th and 9th May, and he again failed to " attend.

" I hold the arbitrator was guilty of no misconduct.

" I am not satisfied plaintiff's inability to call his witness " VanGeyzel owing to the drunken condition he was in was due to " the conduct of one of the directors of the defendant company, " who gave him a glass of beer. But even if that were so, that is " no ground for setting aside the award."

The District Judge entered up a decree in terms of the award.

Plaintiff appealed.

Walter Pereira, with him *Allan Drieberg*, for appellant.—An arbitrator has no power to hear evidence *ex parte*. By so doing he was guilty of misconduct as defined by the English Law, which should govern the present case. (Ordinance No. 17 of 1864, section 27). According to the Civil Procedure Code an award may be set aside for misconduct of arbitrator. The same rule prevails under the Indian Code, and its operation has been explained in *Ganga Sabai v. Lekraf Singh* (*I. L. R. 9 Alla 253*).

1900.

October 4.

The case of *Walker v. Frobisher* (*6 Ves. 69*) applies to the present case, as also *Aitken, Spence & Co. v. Fernando* (*4 N.L.R. 35*). Sufficient notice was not given by the arbitrator of his intention to record further evidence.

Samarawickrama, for respondent.—The proceedings were *inter partes* and cannot afterwards be said to be *ex parte*. The District Judge is right in finding that the arbitrator has not misconducted himself. Plaintiff ought to and might well have been present on the day named by the arbitrator. Notice was given of his intention to take further evidence.

BONSER, C.J.—

This is an appeal to set aside an award which was made under the following circumstances. The award was on a compulsory reference made by the District Judge on a claim in reconvention. The arbitrator sat on four several days, and the plaintiff attended on those four days with his counsel.

On the 30th April the cases on both sides were closed and the arbitrator stated that no further proceedings would be taken. On the 7th May, however, the plaintiff received a letter which had been written to his proctor in Galle, the plaintiff himself residing in Colombo, in which the arbitrator stated he intended to re-examine the defendant's witnesses on Tuesday, the 8th, at 12.30 o'clock in the afternoon, and suggested that the proctor should inform his client of this in case he wished to attend. The plaintiff at once telegraphed that he wished to be present, but could not attend at such short notice. On the morning of the 8th May the arbitrator wrote to the plaintiff's proctor that he intended to go on with the re-examination that day, but if the plaintiff desired to hear the evidence that he might record he would give him an opportunity of doing so. On the following Friday the arbitrator proceeded to re-examine the witness in the absence of plaintiff, who did not attend either in person or by a proctor or by counsel. The arbitrator did not content himself with the re-examination of the witnesses he had already examined, but he examined two fresh witnesses, and ultimately gave his award.

The plaintiff has appealed to have the award set aside on the ground that it was misconduct on the part of the arbitrator, firstly, to proceed *ex parte*, and secondly to hear fresh witnesses behind his back without any intimation to him that he intended to hear any further witnesses. It seems to me that the award must be set aside. It is obnoxious to the rule, which was laid down in a recent case, that it is misconduct on the part of an arbitrator to proceed *ex parte* in the absence of an agreement to that effect. But even

1900.
October 4.
BONSER, C.J.

if that rule did not apply to a case of compulsory reference, yet it seems to me it was misconduct on the part of the arbitrator to hear fresh witnesses when he had in effect informed the plaintiff that he did not intend to hear any further witnesses, but merely to re-examine witnesses who had already given evidence.

It was something like a breach of faith, after informing the plaintiff that the meeting was to be held for one purpose, to hold it for another.

The award must be set aside.

BROWNE, A.J.—I agree.