the applicant to his action—unless, indeed, the grounds were not such as could be taken advantage of in an action: Stalworth v. Jones, 13 M. & W. 466; In re Hall, 2 M. & Gr. 847. If an action were to be brought, there seems much doubt whether all the objections taken to the award upon this motion could be raised by way of defence: Smith v. Whitmore, 2 DeG. M. & G. 297; Bache v. Billingham, [1894] 1 Q.B. 107, at p. 112; Pedler v. Hardy, 18 Times T.R. 591.

It would seem that the proper course is to move to set the award aside; but there seems to be no good reason why it should not be made on a motion in an action brought to enforce the award: Halsbury, Laws of England, vol. 1, p. 475. This application is, under our statute (ch. 62, sec. 45), to be "made within 6 weeks after the publication of the award; but the Court or a Judge may, under special circumstances, allow the application to be made after the said time."

If, then, Hollinger were to bring his action to enforce the award, Zuber should be at liberty to move in the action to set it aside. Under the special circumstances, we (or, if there be technical difficulty in the way of the Divisional Court making such an order, one of us sitting as a Judge) could give leave to Zuber to make such a motion (limited as hereinafter mentioned) notwithstanding the lapse of time. Then the whole matter could be fought out on vivâ voce evidence . . . If Hollinger is willing that this course be pursued, he should have an opportunity of so doing; but, if he refuses, it would not, in my judgment, be proper to allow the award to stand.

If, then, the appellant undertakes either to abandon the award or to bring an action to enforce the same within 6 weeks, and further undertakes in the said action not to object to the regularity of a notice of motion by Zuber to set aside the award, made upon grounds set up in the present application (except those referring to the appointment of the third arbitrator and to the drafting of the award), the appeal will be allowed, costs here and below to be disposed of by the Judge trying the said action, and, if not so disposed of, to be costs in the said action to the successful party—if no action be brought ,the costs to be paid by Hollinger. If an action be brought, neither the judgment of the Court below setting aside the award, nor ours allowing the appeal, is to be an estoppel—as we express no opinion on the merits.

If Hollinger refuse this undertaking, the case is of such a suspicious character that the award should not be allowed to stand; and the appeal should be dismissed with costs.