attendance of witnesses, the production of documents, enforcing or setting aside the award, or otherwise, as upon a reference made by consent under a rule of one of the superior courts of common law or the order of a Judge thereof. The preceding sections, beginning with section 158, shew that a compulsory reference is included in the words "any such arbitration." It is true that the order of *Nisi Prius* which is endorsed on the record before us contains no power to make the reference a rule of court; but *Millington* v. *Claridge*, 3 C B 609, decides that, this being a proceeding in a cause, there can be no doubt as to the power of the court to make the order a rule of court. In Russell on Awards, 559, 2nd ed., numerous authorities are cited in support of the position, that before proceeding to enforce the award by summary process the submission must be made a rule of court. It appears to us to make no difference whether the object be to enforce or to impeach the award, and the common practice undoubtedly is to make the submission or order of *Nisi Prius* a rule of court before moving to enforce or set aside the award.

The terms of this rule appear also designed to raise a question as to the power to make the compulsory reference. We are clearly of opinion that that question is not open for discussion on this rule. And here we may observe, that this rule granted in the Practice Court is not on the face of it made returnable here, though it was argued without objection on that ground. We notice this because, although it is in the discretion of the Judge presiding in the Practice Court so to direct, it would, we think, be a most inconvenient practice to allow parties to argue here rules obtained in that court upon some understanding between themselves; and further, because, although in substance the rule is directed against the award, yet in terms it asks to set aside the verdict and for a new trial.

The rule, limited by the grounds on which it was asked for and granted, seeks to overturn the award because the finding of the arbitrator is contrary to the evidence as shewn in the certificate annexed to the award. Such, reduced to its lowest terms, is the true character of the objection, and assuming the authority to refer, at which the rule does not strike, the objection is untenable unless misconduct is to be inferred. We do not think the defendants could be heard to question the reference after appearing before the arbitration and taking part in the entire proceedings. Two cases—*Ringland* v. *Downdes*, 10 Jur. N S. 850, and *Davies* v. *Price*, 34 L. J. Q. B. 8, and 11 L. T. N. S. 203—show that a party may appear under protest before an arbitrator, and afterwards raise the objection of the want of legal authority; but we hear nothing of any protest in this case; the defendants seem to have been content, though the reference was made against their will, to take their chance of a decision in their favor.

In this latter view, at all events, we think the rule should be discharged, for the application is in truth an attempted appeal against the arbitrator's decision of a matter of fact.

The case of *Angell* v. *Folgate*, 8 N. & N. 396, and the authorities therein cited, may be referred to with advantage on the question of this being a case in which a Judge could order a compulsory reference. My impression is strong against the objection hinted at, but not really raised for decision by the rule.

I am also strongly impressed in favor of the plaintiff's case by the consideration that the award appears to have been made on the 30th of April, 1866, while the statement or certificate annexed thereto bears date the 11th of May following. *Holgate* v. *Killick* is a clear authority, among several others to the same effect, that the court will not look at a letter or document written after the completion of the award. Apart from objections of a character more affecting the form than the substance, though such as if found to exist in fact must have prevailed in law, we think the plaintiff has established a meritorious case to recover. We think the rule must be discharged.

Rule discharged.

Connell v. Boulton.

Covenant against encumbrances—Measure of Damages.

In an action on a covenant that the defendant had done no act to encumber, contained in a conveyance of land by the defendant to the plaintiff, for a consideration of £150.

Held, that the plaintiff was entitled to recover the whole amount due upon an outstanding mortgage, although it exceeded the purchase money and interest, and the mortgage included other lands sufficient in value to satisfy it.

[Q. B., E. T., 1866.]

Declaration on a covenant contained in an indenture dated the 24th of September, 1860, whereby the defendant conveyed to the plaintiff, in consideration of £150, certain lands in the town of Cobourg, and covenanted with the plaintiff that he had not done any act or thing whereby the said lands were or might be impeached, charged, affected, or encumbered in title, estate, or otherwise. Breach, that before making the indenture, *i.e.*, on the 30th of December, 1843, defendant had conveyed the said lands, with other lands, to one Corrigal in fee, by way of mortgage, to secure £600, which mortgage was at the time of the commencement of this suit in force and unsatisfied.

Plea.—Payment of one shilling into court in satisfaction. Replication.—Sum insufficient.

The trial took place in October, 1865, at Cobourg, before *Draper*, C. J.

It was admitted that the plaintiff entered into possession of the land mentioned in the declaration under the indenture of bargain and sale therein also mentioned, and had continued in possession ever since, and had made improvements thereon to the extent of £400: that the consideration money in the deed was £150, and the interest from the date of the deed was £46 10s., making principal and interest $786: that the defendant executed the outstanding mortgage in the declaration mentioned at the time alleged therein, and that the same was outstanding, in full force and unsatisfied: that the amount due and unpaid upon the mortgage was £450: that the mortgage covered other land besides that of the plaintiff, which other land was of the full value of the mortgage money and interest.

It was agreed that a verdict be entered for the plaintiff for $786; and leave to the plaintiff to move to increase the verdict to such sum as the court should think proper, and to the defendant to move to reduce the verdict to such sum as the