unless by his own consent. I do not see upon what principle the arbitrators could imagine that they had a right to oblige the defendants to restore the plaintiff's right to the use of the flood water for a period of only five years, and make the plaintiff pay the defendants 5s. a-year for it, if the 5s. a-year was awarded for that purpose.

Taking the award, however, upon the face of it it is clearly bad. It is manifest that it is not final, for after the expiration of the five years the parties would be in a worse situation than they now are. The award admits [illegible] the plaintiff had some use of the stream, for the defendants are ordered to *turn it as he formerly used it*, and to do so for the space of five years.

If the plaintiff accepts this award, and pays the 5s. a-year for the five years, he would do a great deal to destroy any right he might after that period set up to the use of the water. Why the arbitrators should have disposed of the matters between the parties for five years, leaving them at the end of that time in a worse situation than now, is difficult to understand.

The award must be set aside.

DEAN v. THE PETERBOROUGH AND COBOURG RAILWAY COMPANY.

Arbitration—Discovery of fresh evidence after award made out, of itself sufficient to set it aside, defendants being previously aware of such evidence having existed and diligent search therefor having been made—Query. If award could not have been enlarged, or if application to do so had been refused, to enable defendants to make further search?

Practice Court.

BURNS, J.—The facts are, that in March, 1855, the plaintiff commenced two actions against the defendants, one in trespass to his land for building the railway across it, and the second for so constructing the railway as to make a breach in his mill dam, and thereby cause him an injury. In the action of trespass the parties pleaded to issue; and in the other the writ was merely sued out and served. On the 16th of June, 1855, both of these causes of action were referred to arbitration, and also all other matters between the parties, except a certain action of ejectment brought by the plaintiff against the defendants. On the 14th July, 1855, the arbitrators made an award, and thereby awarded that the defendants should pay the plaintiff £16 13s. 4d. for damages in respect of the action of trespass; and in respect of the other matters in difference, they found that the defendants did agree with the plaintiff to make and maintain an embankment from the waste way of the plaintiff's dam, and along the line of the railway, so as to enable the plaintiff to raise the water in his mill pond two feet higher than he could before the railway was constructed across his land, and they awarded that the defendants should pay the plaintiff the sum of £88 6s. 8d. for the damage occasioned to the plaintiff in consequence of the breaking away of the embankment.

The defendants have now moved to set aside the award, on the ground of discovering important evidence since the award was made.

The evidence since discovered is as follows.—In 1853 a person was employed by the defendants to purchase the right of way for the railway from the proprietors of the lands through which the railway would pass; and on the 16th May, 1853, the plaintiff signed a paper as follows: "I hereby agree to sell the said Company the right of way across my lot, being part of lot number 9 in the 3rd concession of Hamilton, for the price of £15, including all damage; provided I am not prevented from raising the water on my land two feet above the present working level, and also that a switch is built on said road on lot No. 9 in the 4th concession of Hamilton."

Indorsed on this paper, dated 23rd September, 1853, is a receipt for £7 10s., part of the £15. It is shown that this document was not produced to the arbitrators, and has only been found since the award was made. It is further sworn to that the paper was mislaid before the arbitration, and could not, after a diligent search, be found, and has been found since among papers not connected with this matter.

One of the arbitrators swears that if he had seen the document before he consented to the award, it would have made a very material difference in his mind as to the conclusion he would have arrived at.

In opposition to the application, the other two arbitrators swear that had they seen the document, it would not, in their estimation, have made any difference in their minds as to what should have been awarded to the plaintiff.

This is a novel application.—The cases I have been referred to on the subject of the discovery of fresh evidence, where the Court has interposed, are cases chiefly after verdict. What Lord Hardwicke said with respect to awards, is this: "I will not say that in no case whatever, new matter discovered after the award will not affect it—but I do not know any case where it has been allowed. An award differs from a decree in this respect—a decree is compulsory. The parties cannot bring on their cause, or delay it before the Court; but an award is the judgment of Judges of the parties own choosing; and they need not submit, until fully approved of, the merits of their case; and if they do, it is their own fault."*

In the present case the arbitrators were not obliged to make their award by the day named, for authority is given to extend the time; and, in fact, they did extend it. It is strange that the arbitrators were not asked to delay the final award until the document should be found, for I infer from the affidavits that those in charge of the Company's interests before the arbitrators knew of its existence before the award. The arbitrators would surely have granted time for the purpose of searching for it. Suppose, however, that I am not correct in supposing that the document was so known to exist before the award made, then it is purely a case of the discovery of a document after the award made. Eardly v. Otley, 2 Chit. Rep. 42 does not support the present application, because more was required than merely stating the discovery of fresh evidence. It should be shown that there was some surprise, and that the evidence was such as reasonable diligence could not have obtained. In this case it is shown that a person was employed to purchase up the rights of way, and that was one of the very points in issue in the action of trespass. Surely a very moderate amount of diligence might have enabled the defendants to have procured evidence of the plaintiff's assent to the land being taken for the railway, even though the paper showing his assent had been forgotten and could not be found. The price he agreed to sell at was £15, and the amount awarded is £16 13s. 4d. Whether the arbitration took into consideration the £7 10s. paid on the 23rd September, 1853, does not appear; and I have no means of ascertaining. I suppose, however, they did not do so. If they did not, it was a moral fraud in the plaintiff to conceal that fact from them; but I could not, on that account, set aside the award, for the fact of the plaintiff having received the money was equally well known on the other side, and the parties have left all matters to judges of their own choosing, with power to extend the time for making an award, from time to time, to enable every matter to be submitted for the consideration of the arbitrators. How can I tell but that the knowledge or information discovered after an award made, may not purposely have been withheld, if the mere discovery were a sufficient ground to set aside an award?

In Smith v. Samsbery, 9 Bing. 31, it was discovered after an award made, that one of the parties examined had been a convicted felon. The Court did not allow that to be a sufficient ground for setting aside the award. Pelmore v. Hood, 8 Scott, 182; and 8 Dowl. 21. The Court would not interfere against an award where it was shown that the arbitrators had been imposed upon by a false statement of the witness.

The Rule must be discharged.

---

* Vide note to Henning v. Swinnerston, 1 Coop. C. C. 418.