

To my mind the two situations provided for in what I have called (1) and (2) in which two valuers may make a valid award, do not account for nor exhaust the provision dealing with the finality of the decision. Indeed, No. 2 in words reproduces almost exactly the position which gave rise to the agreement itself, for here the two valuers chosen by the parties did fail to agree and in consequence a third was appointed; not, it is true, by the two chosen valuers, but by the parties who appointed them a distinction without a difference in this case.

It seems incredible to me that the parties, in view of the agreement of reference having arisen out of such a disagreement, should have proceeded in it to solve an *impasse* which might occur again, but which, if it did, would be practically that in which they then found themselves and yet left entirely out of sight the very thing they had to deal with, thus settling a contingency only, and not the very problem in hand.

The rule which says that if the parties agree to leave a matter to the determination of more than one person they cannot be bound by the decision of a less number than the whole of the agreed tribunal, is merely another way of saying that the parties are held to the contract which they have made. There is nothing that requires more than the ascertainment of what the bargain really is, this being a determination in a private reference, not the performance of a public duty. This appears clearly, if authority is needed, in *Grindley v. Barker* (1798), 1 B. & P. 229; *Re O'Connor & Fielding* (1894), 25 O. R. 568.

The result seems to be that this agreement in express words contemplates an award by two valuers in two events, and, in the paragraph which is framed so as to give final effect to the decision of the valuers, recognises it, though not perhaps in exceptionally clear language.

One other consideration, drawn from the document itself, points in the same direction. Two valuers may decide what evidence may be taken and whether under oath or not. Yet the other valuer, who may possibly dissent from their view as to procedure, would, if the respondents' contention be correct, be required to agree in a result obtained in a way which he did not favour and upon evidence which he did not desire or ask for. Otherwise no award could be had, and the proceedings taken under the discretion vested in the majority would be useless and a waste of time.