

It must be borne in mind that the respondents are given the right to retain possession and to proceed with the construction of their railway. If these proceedings are to be treated as nugatory, what are the appellants' rights? They have agreed that the compensation is to be determined by three valuers, who have now disagreed. Does this failure to ascertain the amount render the agreement void? If it does, then the arbitration clauses apply, or the Court itself has jurisdiction; and in either event a majority of the tribunal will be able to decide the question.

The question asked by Lord Kenyon, C.J., in *Withnell v. Garthem* (1795), 6 T. R. 388, may well be repeated in this case; "If they cannot all agree in such a case, how is it to be decided?"

The cases cited do not help very much. *Thirkell v. Strachan* (1848), 4 U. C. R. 136, decides that where a reference is made to three persons and there was a covenant to abide by their award or that of a majority of them the word "arbitrators" would, in dealing with their powers, be construed as including a majority. In *Re Kemp & Henderson* (1863), 10 Gr. 54, the decision was finally put upon the fact that the arbitrators had not decided all that was referred to them. The point of importance here was not necessary to be decided, and while the opinion of Esten, V.C., would seem to be adverse to the appellants' contention, it indicates at all events that the meaning of the whole document governs. The agreement here is *sui generis*, and I can find nothing expressly in point.

I think the appeal should be allowed and the judgment should be set aside. In view of the statement of the learned trial Judge that his judgment was, for the reasons he gives, in effect a non-suit and that the respondents were not called on for their evidence, the case should go back for trial with a declaration that the agreement between the parties provides for a valuation by the valuers named therein or a majority of them, and expresses the true agreement between the parties, and that no case for the reformation thereof was made out. The respondents should pay the costs of the appeal and of the former trial.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE :—We agree.