

etc. No evidence was given that the third fence viewer refused to act, nor as to the cause of his absence.

The appellant, in person. *W. L. Wickett*, for respondent.

ERMATINGER, Co.J.:—I look upon the duties of fence viewers under the Act as analogous to those of arbitrators (see s. 4, where the expression "to arbitrate" is used). As to these I find this statement of the law in *Russell on Awards*, 6 ed., 226: "When there is no positive refusal to act, two cannot make a good award, without first taking the opinion of the third. If after discussion he refuse to concur with them in the award, they may then execute it, and it will be binding." In *Re McCluny v. Motley*, 6 U.C.L.J. 93, McLean, J., says: "If any one of the three refuses to act, the other two, on being satisfied of that fact, may proceed without him—and if two take upon themselves by consent of all parties to decide upon all matters referred in absence of the third arbitrator, it does not afterwards rest with either of the litigants to object to that which has taken place, and would not have taken place, but for his concurrence." To the same effect is the judgment of Robinson, C.J., in *Sloan v. Holden*, 14 U.C.R. 496. See also *Rioux v. The Queen*, 2 Exch. Rep. 91.

I think Mr. Miller was entitled to the joint conference of three fence viewers, or at least to positive evidence of the refusal of the third to act, when possibly, if there were no other available, duly appointed fence viewer, the other two might make an award. That it is, however, open to a fence viewer, who is a public officer, to refuse to act, as a private arbitrator may, may be questioned—and I do not wish to be understood as so deciding.

I do not consider that there is evidence of Mr. Miller's consent to the two fence viewers proceeding in the absence of the third.

The award is set aside, but without costs.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] *COTTER v. OSBORNE.* [Sept. 16.
Equitable execution—Receiver—Trade union—Dues and assessments payable by members.

If there is nothing in the constitution or rules of a trade union importing a contract express or implied on the part of the mem-