

IN RE ARBITRATION BETWEEN ONTARIO AND QUEBEC.

be binding. The correctness of these views is sustained by the citation of many authorities.

In the case of *Green v. Miller*, 6 Johnson, 38, as far back as 1810, it is clearly laid down:—"When an authority is confided to several persons for a private purpose, all must join in the act; *aliter* in matters of public concern." Thompson, J., says: "A controversy between these parties was submitted to five arbitrators. The submission did not provide that a less number than the whole might make an award. All the arbitrators met and heard the proofs and allegations of the parties, but four only agreed on the award; and whether the award be a binding award is the question now before the court. No case has been cited by counsel where this question has been directly decided. I am, however, satisfied that when a submission to arbitrators is a delegation of power for a mere private purpose, it is necessary that all the arbitrators should concur in the award unless it is otherwise provided by the parties. In matters of public concern a different rule seems to prevail; there the voice of the majority shall be given."

In the case of *Grindley v. Barker*, 1 Bos. & Pul. 236, Erle, C. J., says:—"It is now pretty well established that when a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole." The same principle was recognized by the Court of King's Bench in the case of *The King v. Beaton*, 3 T. R. 592; see also Paley on Agency, 3rd Am. ed. pp. 177-8, note c, and *Broker v. Crane*, 21 Wendell, 211-18.

In *Ex parte Rogers*, 7 Cowen, U. S. Rep. 526, and note a, pp. 530 & 535, the whole position is ably and thoroughly reviewed; and in a long note citing the English as well as the American authorities bearing upon the same point, the distinction between public and private references and the duties and powers resulting therefrom are clearly shown, and the power of the majority to decide clearly established. The English cases upon the point are not so direct, but in the reasoning of those which have been cited, or can be found, the same principle clearly manifests itself. In the Courts of the United States, decisions are constantly found bearing upon circumstances similar to those in our own Dominion. The varied nature of the business of that country, the different aspects under which questions arise from their position as a congregation of States, the daily development of new conflicts of rights arising from the expanding nature of their society, raise questions which do not come up in England, but the solution of which after all, in the absence of any particular local statutory provisions, is governed by the law of England. Under these circumstances our courts are in the habit of taking those decisions as guides. These cases then determine that in matters of public arbitrations or reference, though provisions to that effect be not specifically made, the decision of a majority shall be incident to the reference. The 142nd section of the British North America Act, 1867, must come within this rule. Were it not so intended, the section would be superfluous, because any

one party in a great question of public importance could prevent a decision.

To work out the reasoning of the counsel of Quebec to its legitimate conclusion would place absolute power in the hands of the third or Dominion arbitrator. I have supposed that on points in which Ontario and Quebec were agreed it was my duty at once to assent, and that under such circumstances, whether I differed or not, was of no consequence; but, as the powers of all the arbitrators must be co-equal, if unanimity is essential, I might, by simply disagreeing, prevent an award, even when both Ontario and Quebec had agreed upon it. Such a position is untenable.

Mr. Macpherson and myself are therefore of opinion that the decision of a majority must govern.

The arbitrators then proceeded to hear the arguments of counsel for Ontario on several of the heads stated in the printed case for that Province, and some progress having been made the arbitration was adjourned until the next day. Soon after the adjournment writs of prohibition against further proceeding in the arbitration, issued from the Superior Court of the Province of Quebec by Judge Beaudry, were served on both the arbitrators, who however met pursuant to their adjournment, and then further adjourned to meet in Toronto, in the Province of Ontario, on the 4th August, 1870. Soon after this last adjournment a writ of *quo warranto* was served on Mr. Gray, calling on him to shew cause why he should not cease to exercise jurisdiction as arbitrator for the Dominion, on the ground that he had become a resident of Ontario.

On the 4th August the arbitrators met for the purpose of considering the questions arising on the service of the writ of prohibition, and as to what further action they should take in the premises.

On the 5th August they again met, and delivered the following judgments as the result of their deliberations:

Hon. D. L. MACPHERSON.—The two arbitrators now present meet under circumstances calling for the most careful circumspection and thoughtfulness.

The Province of Quebec is not represented before them. The counsel for Ontario calls upon them to proceed with the evidence and to make their award.

The retirement of the arbitrator for Quebec, sanctioned by the Government of that province, was formally communicated to the arbitrators when they met at Montreal on the 21st July last, by an official letter from the Premier and Secretary, the Honourable Mr. Chauveau, in which he further preferred the extraordinary request that the remaining arbitrators "will be pleased to stay further proceedings until such time as they receive notice as to their intentions from the government of this province,"—the Province of Quebec.

A request to stay proceedings until the government of Quebec should determine whether they would appoint another arbitrator was shortly afterwards made by the counsel for that Province, and was upon consideration refused by the arbi-