

The second question is stated in these terms :

2nd. Whether upon a hearing before two of the Arbitrators only, these two could legally give a decision in the absence of the third.

In the first question the case is put, of a decision by the two upon a hearing before all : in this, two only were present at the hearing, as well as at the decision. Whatever application the authorities cited may have been supposed to have to the former question, it is impossible to maintain that anything can be found in them to justify an affirmance of the present one. The reasons are substantial why the two cases should not be confounded.

When a case is heard before all, each has an opportunity of expressing his opinion, and of endeavoring to influence that of his co-Arbitrators. In that endeavour he may or may not succeed, but there is always safety in discussion, and from a conflict of opinion the truth is more likely to be struck out. But when the hearing as well as the judgment is by two only in the absence of the third, this advantage is lost, and whatever aid the suggestions and even the dissent of the third Arbitrator might afford in arriving at a just conclusion is wanting. Such is the obvious and weighty reasoning to be found in cases in which the fact of the absence of one of the Arbitrators from the hearing and deliberation, is dealt with in the English and American Courts, and its applicability and conclusiveness in the present case are too manifest to be denied.

It seems self-evident that if the Tribunal consists of three, each party has an interest and a right to be heard before the three, even if after the hearing and deliberation judgment can, in any case, be based upon the opinion of two of them against that of the third or in his absence. The three Arbitrators composed a Court ; and it is to be observed that in all Statutes constituting Courts, the number is specially fixed, before whom proceedings can be had in the absence of the others. For example, by Statute, our Court of Appeals is made to consist of Five Judges of whom by special provision four may sit, in the absence of the fifth, and three may decide. Similar provisions are made in the Statutes constituting Courts in Upper Canada, and in the several United States ; and if it were necessary to extend the examination, would be found, I have no doubt, in the Legislation of other countries. Now it will not, I apprehend, be pretended that if a Court be created to consist specifically of three judges, with no provision that a less number shall be a *quorum*, one or two of them alone can exercise the jurisdiction committed to the Court ; the authorities of the Civil Law are conclusive upon this point. The rule is concisely and pointedly stated from the Roman Law, in a book of familiar reference, in these terms : " Dans les Arbitrages de même que dans les tribunaux, les décisions passent à la pluralité des voix ; ainsi, supposé qu'il y ait trois Arbitres, ce sera l'avis uniforme de deux, en supposant que le troisième soit d'un avis différent, qui formera la sentence. Mais il ne faut pas conclure de là que quand il y a trois Arbitres, deux puissent procéder seuls au jugement en l'absence du troisième. Il faut que tous assistent au jugement." And this was conformable to the rule and practice of the French Courts. Tous les Arbitres," says Pigeau, " doivent être assemblés pour juger. Un seul manquant, on ne le peut ; et la sentence serait nulle quand même tous ceux qui l'ont rendue auraient été de même avis. Si un Arbitre refuse d'assister au jugement, on ne peut y faire procéder par les autres."

Con: S, L. C. p
64.

Nouv. Den. V
Arbitro §III.
No. 2, p. 242
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§17 et 19 de
receptis Dom.
Loix Civ. lib. 1
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c. 5, p. 161, fol
64.

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