

absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment, the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

“The Commissioners so named shall meet in the City of Halifax, in the Province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment and according to justice and equity; and such declaration shall be entered on the record of their proceedings.

“Each of the High Contracting Parties shall also name one person to attend the Commission as its Agent, to represent it generally in all matters connected with the Commission.”

This is the ordinary form of Arbitration in which each side chooses an Arbitrator, and an umpire is chosen by an indifferent party to decide between the two. The appointment of the umpire is of no utility, the precautions for securing his impartiality are unmeaning, if the adverse vote of one of the Arbitrators may deprive his decision of all force and effect.

In ordinary phraseology the decision of a body of members means a decision come to by a majority of voices. In the common use and understanding of language, this is the interpretation which suggests itself to every reader, when it is stated that a number of men have expressed an opinion or have arrived at a determination. The requirement of unanimity is the exception, and therefore can only be conveyed by an explicit statement. There are, of course, well-known exceptions, as in the case of trial by jury. But in such cases the constitution of the deciding body is diametrically opposed to that adopted in the case of the Fishery Commission. Instead of a provision that two-thirds shall be named by the parties to the suit, the most elaborate precautions are taken that the whole body shall be unbiassed. It is obvious that when unanimity is to be required, when any one member of the deciding body is to have the power of nullifying all the proceedings and preventing a decision, such an arrangement will only be endurable on the condition that each member shall be so chosen as to be as far as possible free from any inclination to exercise that power on one side rather than on the other. If a jury were constituted on the principle that the Plaintiff should choose one-third of it and the Defendant another third, very few persons would be found to expose themselves to the cost of an action at law. Had it been known five years ago that an Award would be prevented by the dissent of one of the members of an arbitration constituted on the same principle, though I do not venture to conjecture what the course of the United States' Government would have been, I feel confident that England would have declined to enter upon so unfruitful a litigation.

Her Majesty's Government may appeal to a cogent proof that in accepting this Arbitration they did not contemplate that the Award was liable to be prevented by the requirement of unanimity. Believing, in agreement with the majority of the Commission, that they were heavy losers by the exchange of concessions contained in Articles XVIII, XIX, and XXI of the Treaty, they nevertheless have for five years allowed those concessions to come into force, trusting to the compensation which the Commission would give to them. That they have done so is a sufficient proof that they did not anticipate a construction of the Treaty which would make the delivery of an Award almost impossible. A valuable property has actually passed into the enjoyment of others, and cannot be recalled. The price to be paid for it was to be determined later by a Tribunal agreed upon between the parties. Is it conceivable that they should have deliberately constituted a Tribunal for this purpose, in which a decision could be wholly prevented by the dissent of a member nominated by the party to whom the property had passed?

Reciprocating cordially the courteous and friendly sentiments by which Mr. Evarts' language is inspired, Her Majesty's Government feel confident that the United States' Government will not, upon reflection, see in the considerations which have been advanced any sufficient reason for treating as a nullity the decision to which the majority of the Commission have arrived.

I have, &c.
(Signed) SALISBURY.