be assumed that it would hardly have escaped the attention of so accomplished a jurist as Judge Day, the Arbitrator of Quebec, had he deemed it tenable, or that he would, under the circumstances of the decision, have undoubtedly brought it to the notice of his co-arbitrators. The learned Judge heard the argument, but left with us no expression of his opinion, save that the arbitration was one of a public nature. The views, therefore, now delivered are those of the remaining arbitrators, and consequently of a majority.

In matters of private reference the law is plain, that unless the terms of the submission provide that a majority may rule, all must agree in the award, or it would not be binding. The impracticability in private affairs of working out an arbitration, if unanimity was essential, led to the adoption, in almost all cases of submission, of the majority clause, or the alternative provision of an umpire. So essential to the successful conducting of an arbitration has this become that in the ordinary forms of arbitration bonds, or of rules of reference, one of these clauses is almost always found inserted. Without such clause, in private arbitration it is admitted unanimity is required.

The point now is—Does the same rule apply to public references or arbitrations?—to which class it is conceded, the present inquiry belongs—the 142nd section of the B. N. A. Act, 1867, under which the arbitration is held, containing no such clause.

Mr. Irvine, the Solicitor General for Quebec, has properly narrowed the question to this point.

Mr. Ritchie in his argument for Quebec, cited Caldwell on Arbitration, p. 102, to prove the undoubted position as to private arbitrations. In the note to that page by the able American editor, who republished the work in the United States, we find the following remarks:—

"There is a wide distinction to be observed between the case of a power conferred for a public purpose and an authority of a private nature.—In the latter case, if the authority is conferred on several persons, it must be jointly exercised, while in the former it may be exercised by a majority."

Further on, at p. 202, he says that referees appointed under a statute must all meet and hear the parties, but the decision of the majority will 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 & 585, 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