***Judgement** of the Lords of the Judicial Committee of the Privy Council on the appeal of Rolland* **v.** *Cassidy, from the Court of Queen's Bench for Lower Canada in the Province of Quebec, delivered* 19*th June,* 1888.

Present:

THE EARL OF SELBORNE.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by the Earl of Selborne.*]

THEIR Lordships do not think it necessary in this case to call upon the Counsel for the Respondents.

The question arises under a reference to arbitration of the accounts of a partnership constituted in the year 1874, for the purpose of certain speculations in lumber of which either the whole or a considerable part had been previously bought by the co-partners.

The only articles of the partnership material for their Lordships to consider are the second and the third. By the second article, (the partnership being originally of three, and afterwards by the insolvency and death of one reduced to two), one of the partners, the present appellant, Jean Baptiste Rolland, was made the sole gerant—that word is not used in the article—or administrator of the partnership, in these terms :—" All " the affairs and transactions of the partnership " shall be carried on and conducted by the said " partners together, and by common agreement,

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"under the form of Rolland and Company, by the "management of Rolland (one of them) who alone "shall have the agency and the active adminis- "tration of the entire affairs of the concern, "employing under his immediate control one or "more salaried persons, as guardians of the "place, sellers and receivers of the wood of the "said partnership. The expenses of the agency "or the commission of the said Rolland shall be "left to the decision of his co-partners." It was said that they might possibly have exercised that discretion, by not paying him; but it is clear he was meant to have a fair and reasonable commission; and in the course of the arbitration he has had the benefit of that stipulation. That article distinctly made him the agent of his co-partners for the purpose of sole control and sole administration; and as to payment, he was to receive a commission. And, further, the next article shews that the wood which at that time had been bought, and their Lordships assume what was afterwards bought also, was deposited upon three closes of land belonging to him. Nothing indeed is expressly said in that article about the payment of rent; but he claimed, and it was agreed on all hands that he was entitled to, rent for the occupation by the partnership of those closes of land belonging to him on which the wood of the partnership was placed. Upon that the only question of law which could arise, as it seems to their Lordships, was, not whether the account was to be taken upon the footing expressed in a passage of Mr. Justice Monk's opinion, of a simple agent instead of a partner, but whether it was to be taken on the footing of agency as between himself and his co-partners as well as with reference to his rights as a partner. Taking the question so, their Lordships imagine that it would be impossible in any country to construe such words, or to act upon

such a provision, except as holding him responsible to his co-partners upon the footing of agency and administration for their benefit; at the same time that beyond all doubt he was entitled to all the rights of partnership. That seems perfectly clear.

Well, the partnership is carried on for some years, and it ends in disputes as to the accounts, and a reference to arbitration, out of which the present question arises. It is not immaterial that by the deed of submission to arbitration, which is at page 47 of the Record, the arbitrators were expressly to act as *amiables compositeurs;* they are characterised by the same words more than once, as "arbitrators and *amiables compositeurs*." What is the force and meaning of that expression "*amiables compositeurs*" by Canadian Law? We find it in the 1346th Article of the Code of Civil Procedure: "Arbitrators must hear the parties, and "their respective proofs, or establish default "against them, and decide according the Rules "of Law, unless they are dispensed from so "doing by the terms of the submission, or "unless they have been appointed as '*amiables* "*compositeurs*.'" That is to say, if they are *amiables compositeurs*, they are to be exempt at all events from the strictness of the obligations expressed in the previous words: "The arbi-"trators must hear the parties, and their "respective proofs, or put them into default, "and judge according to the rules of law." Their Lordships would, no doubt, hesitate much before they held that to entitle Arbitrators named as *amiables compositeurs* to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is, that they dispense

with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity.

Bearing those facts in mind, their Lordships must consider what actually took place, and what it is that is complained of. The arbitrators came to a decision after many meetings, and made an award in which they have stated very fully the questions which they examined, and the view they took of them, the result being that a certain sum is found due upon the result of the account from the present Appellant to the firm. It is admitted, or at least it cannot be controverted, having regard to the terms of the Code, that it is not for their Lordships to perform the office of the arbitrators with regard to the merits, or to take the accounts, and exercise their judgement upon all the questions which were referred. Their Lordships must consider whether anything is shown to have been done which vitiates the award. And in point of fact, from the numerous grounds of objection to the award which are printed at page 236 in the judgement of Mr. Justice Cross, it is manifest that the Appellant's case as against the award proceeds not upon the merits, not upon any attempt to ask the Court to go into the accounts and review the decisions which the arbitrators came to, but upon the allegation that as to various matters they conducted themselves irregularly or improperly in the performance of their duty; that is the sole question which their Lordships have to consider.

What, then, is the ground of this appeal? That upon the questions of law, or question—for it really comes to a single question,—as to the footing on which, under this partnership deed, Mr. Rolland was to account, they received or took, and may be presumed to have been influenced by, certain legal opinions, taking or

receiving them in a certain manner, which appears by the evidence.

The facts, shortly stated, seem to be these. In this, as in many other cases of arbitration, there was some appearance of a greater degree of zeal on the part of the arbitrators nominated by the parties for those who nominated them than in the abstract might be desired. One of the arbitrators was named by Mr. Rolland; another was named by Mr. Cassidy, his opponent, and the third was named by the two. It appears by the judgements of the Court below that these gentlemen were well known, and were perhaps the best arbitrators, for a case of this kind, who could have been obtained; and being *amiables compositeurs*, and not bound to proceed with strict form and regularity in everything, though they were, as their Lordships assume, bound to proceed according to the substantial rules of justice, they desired to know, in the first instance, whether the position of *gerant* or administrator, under the Article which has been read, made it proper to treat this gentleman, Mr. Rolland, not as a simple partner, but as an accounting party to his partners upon the footing of the agency *primâ facie* constituted by the second Article. They wanted to know whether the law was one way or the other about that. One of them, M. Tourville, the arbitrator named by Mr. Cassidy, he, or Mr. Cassidy, or both of them together, went to a lawyer, Mr. Lacoste, whom Mr. Cassidy had been accustomed to consult as his legal adviser in this and other affairs, and to whose standing and character M. Archambault has this morning borne testimony honourable to both gentlemen. Mr. Lacoste's character was above reproach or suspicion. That he was a gentleman whom, both in this business and in other matters of business, Mr. Cassidy had consulted, was perfectly well known to everybody; and it appears quite

clearly, that not Mr. Ward and M. Tourville, as Mr. Justice Monk erroneously assumed in his opinion, but either Mr. Cassidy or M. Tourville for Mr. Cassidy, went to Mr. Lacoste to obtain his opinion upon the question or questions of law which were supposed to lie upon the threshold of the case, and which did in fact lie upon the threshold of the case. That opinion, signed, was obtained, with the accession to it of the opinion of another gentleman, an advocate, Mr. Béique. As to him also, Mr. Justice Monk appears to have thought that there was some evidence showing that Mr. Ward and M. Tourville had intervened. There is no evidence of the kind. Their Lordships will deal with the case upon the assumption that M. Tourville individually did intervene: but that is a different thing from the intervention in that matter of two of the three arbitrators, constituting a majority. That opinion was obtained by or for Mr. Cassidy without any concealment; it appears on the face of the opinion that it was given on his behalf; it was produced, according to the evidence, to all the arbitrators. According to the evidence it was clearly spoken of and discussed between them all.

It may be right to refer to one or two passages in the evidence which make those facts with regard to that opinion perfectly clear. The evidence of M. Tourville, which was referred to by M. Archambault for the Appellant, is at page 138, and at the bottom of page 139 he is asked the question :—" *Q.* That opinion of " M. Lacoste was given at the commencement of " the enquiry?—*A.* Yes. *Q.* Was it to you " that it was sent?—*A.* I am not sure. I cannot " precisely say. *Q.* Was it not Mr. Cassidy who " sent it you?—*A.* I cannot say. I know it was " sent." Then he repeats that it was communicated at the beginning of the enquiry. " We

received the communication"—"we" evidently referring to all the arbitrators. "We read it. We "often spoke of it before Messrs. Ward and "Grier. I cannot say whether all the arbitra-"tors read it through. I know that they had "knowledge that it was on the table." Then he is asked whether M. Rolland knew it. He says, "Rolland saw it himself. It was before us all; "and he was present at the meetings." Not only is it clear from this evidence of M. Tourville that Rolland did see it, but there is another place at page 151. When Mr. Grier, M. Rolland's own arbitrator, was examined by his own Counsel, he was asked this question:—"Did not Mr. Rolland "tell you in the presence of Mr. Cassidy that he "wished to bring Mr. Taillon as a witness before "you, on account of the opinion given by Mr. "Lacoste and fyled by Cassidy?" The answer of Mr. Grier, his own arbitrator, is:—"I cannot "remember all the conversation in detail that "went on there, but I remember that that was the "purpose for which Mr. Rolland brought Mr. "Taillon." It was therefore the act of Mr. Cassidy, the known act of Mr. Cassidy, known by everybody, to bring this opinion before the arbitrators as an opinion given on his behalf, by the two gentlemen who subscribed it upon that question of law; and this at all events was perfectly well understood by Mr. Rolland, who in consequence of it produced two other opinions on his own behalf, which are upon the Record, opinions of the lawyers whom he consulted. So far as that first opinion is concerned, the only thing which can be called irregularity was the intervention of M. Tourville, one of the arbitrators. Everything was perfectly above-board; it was done for a reasonable and proper purpose, and everybody, M. Rolland included, knew and understood it.

Well, then, next comes the question whether that was an erroneous opinion in point of

law? It has not been seriously argued that it was, for it affirms nothing more than what their Lordships have already said, and what seems to them to be quite clear upon the terms of the deed of partnership, that this gentleman was answerable for the property which came into his custody on behalf of the firm; and being answerable for that, being paid rent for the place in which it was deposited, being paid a commission for his care and administration of it, he was *primâ facie* chargeable with the quantity of the goods which he admitted having received; and there being a large and important deficiency of no less than 10 per cent. on the whole quantity, he had to explain that in some manner consistent with his duty as agent. If it was not received, *primâ facie* he was accountable for not having taken care that it was received. If it was received he must explain how it was that this being in his custody, and under his administration, it has disappeared; and it ought not to be charged as a loss to the partnership except so far as after explanations upon proper evidence it may appear that he is not responsible for it upon the principle applicable to a fiduciary agent for his co-partners. The opinion went no further than that. It did not prejudge the question on the evidence. It proceeded upon a statement made by or for Mr. Cassidy upon the matters of fact, and upon those assumptions stated conclusions of law which in their Lordships' opinion were sound and correct.

Then what afterwards happened? It may be said, and their Lordships think it is true, that it would be prudent and discreet for arbitrators, when they desire to put themselves upon the best possible footing of information as to matters of law, to ask all the parties to be present when they communicate with any gentlemen whom they may see upon that subject. But if they cannot be shown to have acted

with improper partiality, or for any other purpose than that of being correctly informed about the law, and avoiding mistakes of law. and if they cannot be shown to have been misled as to the law, it seems an extraordinary thing —their Lordships would be inclined to think so even in the case of an ordinary arbitration, but certainly when they were acting under this particular law as *amiables compositeurs* — a most extraordinary thing, if they having judged rightly in law, having been rightly advised as to the law, and having taken all the steps which they did take for the sole purpose of getting correct information as to the law, that should be a ground for setting aside the award. What the evidence shows, in point of fact, is that Mr. Ward placed more confidence in another gentleman, Mr. Greenshields, who was supposed in the first instance to have expressed an opinion more or less at variance with that of Mr. Lacoste. What could be more reasonable, if those two gentlemen were willing to meet and confer together, than that they should do so; and unless there was something else wrong, the arbitrators were not upon any conceivable principle wrong in seeking to bring those gentlemen together and learn what the result was. This was done, and, according to the evidence, quite uncontradicted, when Mr. Greenshields met Mr. Lacoste, the apparent difference of opinion disappeared, and they agreed in the substance of Mr. Lacoste's opinion. Then afterwards, the Appellant being still dissatisfied, the arbitrators consulted two other gentlemen, M. Trenholme, as to whom not a word is said as to the manner in which his opinion was obtained, and M. Laflamme, and they also were found to agree. All those opinions agreed, they were all right, and their Lordships agree with them. What is it then which remains? Why that

Mr. Cassidy upon two of those occasions, when Mr. Greenshields and Mr. Lacoste met, and when M. Laflamme was consulted, was present, and the meetings took place at his office; but Mr. Cassidy and the other witnesses say that not only did he not by word or otherwise interfere, but he desired to withdraw, and he was told it was not necessary; and he said nothing, and did nothing which could practically influence anybody; although it would have been more discreet that they should hold no communication with anybody in his presence when the other party was not also present. Yet if it is clear that it was only a legitimate communication, perfectly in good faith, bearing only upon the point of law, and resulting in nothing except correct information about the law—the law not seriously disputed even now before their Lordships Board—it would appear to their Lordships to be wrong and unreasonable to set aside an award by arbitrators of this character on those grounds —a mere mistake or error of judgement in a matter not affecting the law of the case, not affecting the facts of the case, not affecting the justice of the case, and under a reference to *amiables compositeurs.*

Their Lordships therefore do not think it necessary to go into the question whether with regard to those subsequent communications there was sufficient knowledge of them on the part of Mr. Rolland to bind him upon the footing of acquiescence because he afterwards went on with the arbitration, or to justify the inference that these were among the irregularities referred to at the end of one of his memoranda, and which he there appeared willing to waive. Their Lordships, until they had heard the other side, would rather assume the contrary; because the burden of proving a case of waiver and acquiescence is upon the person who suggests

it; and their Lordships wish it to be distinctly understood that they base no part of their judgement upon that ground. They are satisfied indeed that Mr. Rolland was well aware of the original opinion given by Mr. Lacoste, and the other gentleman, M. Béique, that he knew it had been laid before the arbitrators, and had the fullest opportunity of producing the opinions on his own side which he did produce. To that extent they are satisfied, not that there was a case of acquiescence, but that there was knowledge, and that nobody was misled. It was not a consultation by the arbitrators which was at all irregular; it was an opinion which Cassidy, as a party, brought before the arbitrators to the Appellant's knowledge. The subsequent communications of the arbitrators with the legal gentlemen may not have been known to him; their Lordships do not proceed upon the supposition that they were, or that any objection founded upon them was waived; but their Lordships are of opinion that there was nothing substantially wrong in those communications, though there may have been an error in judgement in holding them to any extent whatever in Mr. Cassidy's presence when the Appellant was not present.

With regard to the opinions which have been given by the learned judges, their Lordships think that perhaps it may be expedient to make one or two observations. The opinion given at the time by Mr. Justice Cross, in which, as their Lordships understand, all the members of the Court, except Mr. Justice Monk, then concurred, appears to their Lordships to be altogether right, and to put the case substantially upon its proper grounds. It is not quite a satisfactory thing that at a later stage other judgements should be written by those who at the time concurred without delivering separate opinions, which may appear

to suggest different grounds, especially when those opinions were not sent over with those upon the Record. The judgement of Mr. Justice Monk appears to their Lordships to proceed upon erroneous views of the effect of the evidence, both as to the conduct and *bona fides* of the arbitrators, and also as to the manner in which the first opinion of Mr. Lacoste was obtained; and it appears to them that those errors deprive that judgement of the weight which otherwise might have been due to it.

On the whole case their Lordships will have no difficulty in advising Her Majesty that the appeal ought to be dismissed, and the judgement appealed from affirmed with costs.