Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Burstall and others v. *Baptist, from the Court of Queen's Bench for the Province of Quebec, Canada, [appeal side]; delivered 17th January* 1873.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

IN this case the question is extremely short and simple, depending on the construction of a clause in the agreement made upon the dissolution of a partnership between Mr. Thomas Gordon and Mr. Baptist the Respondent.

It appears that Mr. Gordon and Mr. Baptist had been for some time engaged as partners in the timber trade on the river St. Maurice, and for the purpose of that business, they had taken what are called timber limits from the Government of Canada, originally at rents which are stated to have been at that time the ordinary rents, and which were extremely low, about 6*l.* up to 6*l.* 5*s.* for each limit. It seems that after these gentlemen had erected considerable machinery at great cost, and prepared for a large trade, owing to some change in the policy of the Government, the limits were ordered to be put up for public competition at auctions.

Messrs. Gordon and Baptist complained at the time of this action of the Government, after they had invested their money in machinery upon this ground, on the faith, as they declare, of having the limits continued in their possession at the ordinary rents. However,

their remonstrances did not produce any effect at the time. Auctions were held for these limits, and in order to secure the benefit of the machinery they had erected, Messrs. Gordon and Baptist found it was necessary that they should purchase them at the auction at whatever price the bidders might run them up to. Accordingly they became the highest bidders at the auction, and took the limits from the Government at very greatly enhanced rents, varying from 36*l.* to 70*l.* or 80*l.*

After they had so obtained the limits they proceeded with their business, and cut large quantities of timber, and became liable to pay dues for the timber so cut,—the dues which are called timber dues. No question arose between them and the Government as to the amount of those dues. The timber was cut, dues were paid, and no question or difficulty arose about them. It appears that on the 25th of August 1855 the timber dues then in arrear were ascertained, and a bond given for the amount to the Governmen. The amount of the obligation was settled at 3,251*l.* 6*s.* 5*d.*

Previously to the time that this bond was given Messrs. Gordon and Baptist had petitioned the Government for a remission of the rents which they had paid according to the auction rates. They put their case before the Government in a petition of the 28th of October 1852, and they again wrote a long and explanatory letter on the 2nd February 1855. They go very fully into the history of their settlement upon this river; they mention the fact of their being the first persons who had enterprise enough to clear the ground; they refer also to the large expenditure of money, and they say they incurred this expense on the faith that the ground rent was to remain at the rate of 6*l.* 5*s.* for each limit. They then apply to the consideration of the Crown, not as a matter of right, but as an exercise of grace and favour, to make them an allowance in respect of the ground rents.

This was the state of affairs between the partnership and the Government at the time of the dissolution of the partnership in the year 1857.

Upon that dissolution a deed was entered into which was to settle the rights of the parties at the termination of the partnership. It is said that the partnership had been dissolved in the previous October, but the deed, which is dated the 6th January 1857, makes no reference to that time. After having made provision for various matters connected with the partnership, this clause is found in the deed, upon which the whole question in the present suit turns:—

"It is hereby agreed that an application shall "be made by the said George Baptist to the "Government for a remission of the amount due "to them under the aforesaid obligation, [*i.e.* the "bond before described,] and that should he suc- "ceed in obtaining the same, in whole or in "part, he will be bound to account for and pay "unto the said Thomas Gordon the one half of "the amount which may be so remitted, after "deducting all charges, which shall be at the "discretion of the said George Baptist."

Some time after this agreement was made, an application was made by Mr. Baptist to the Government for a remission in respect of the ground rents which had been paid in the way that has been already stated, and he put his application very much upon the same grounds upon which it had been placed in the earlier petitions.

Negotiations went on between him and the Government, which resulted in the Government complying with the prayer of the petition, and making an allowance to Mr. Baptist as prayed by him.

Now, the mode in which the allowance ultimately came to be made was this—the matter was referred to a committeee of the Executive Council of the Government. That committee made a report which was afterwards approved by the Governor in Council. The report upon

which the Order in Council was founded [and the Order in Council did little more than adopt the report] is this :—" On the annexed report of the " Hon. the Commissioner of Crown Lands, on " several petitions from Mr. George Baptist, " claiming that certain alleged overcharges made " against and paid by him to the Crown Land " Department for ground rent, on his timber " berth in the St. Maurice territory, be, in " consideration of the special circumstances " mentioned in his petitions, allowed to go in " deduction of the amounts due by him for " timber dues for which he is under bond." It thus appears that the Respondent applied in terms for a deduction upon the obligation or bond referred to, in consideration of the moral claim which he had upon the Government, in respect of the overcharges for the ground rents. The report goes on:—" The " Commissioner of Crown Lands enters at some " length into the particulars of this case, and " concludes by expressing his opinion, and " recommending that, under its peculiar circum- " stances, the previous action of the Government " should be so far modified that nothing more " should be exacted from Mr. Baptist in respect " of limits for which, at the time of sale referred " to, he held license, or which he worked with- " out actual license, (but paying the Govern- " ment charges thereon as if a license had issued " for them,) than the ordinary rents and charges " payable thereon at the time of such sale."

This report was acted upon, and a remission was made upon the bond of the calculated amount of the excess of rents paid by the firm, and by the Respondent since the dissolution, viz. $9,976. Upon that allowance being made, Mr. Gordon, or rather Mr. Burstall, his assignee, claimed to be entitled to a share of the remission, and no more was claimed than a share proportionate to the over-payments which had been made to the Government in respect of the ground rents during the partnership.

Their Lordships think that, on the true and proper construction of the clause in the agreement, Mr. Gordon was entitled to have the benefit of this share of the remission.

Construing the clause literally the remission made by the Government would appear to be within its terms. The clause is: "that an appli- "cation shall be made by Baptist to the Govern- "ment for a remission of the amount due under "the obligation, and that should he succeed "in obtaining the same, in whole or in part, "he will account for and pay unto Gordon one "half of the amount which may be so remitted."

Well, the Government, upon the application of Mr. Baptist, did remit part of the amount due upon the obligation. And it was properly said by Mr. Justice Badgley that it was the remission of the actual debt and not the mere consideration of the debt that the parties contemplated. It is quite obvious why this clause took the form it did; the only way in which the partners contemplated relief was, not by an actual re-payment in money by the Government, of what had been overcharged, but, there being a sum due to the Government, that the Government should be asked not to enforce the payment of the obligation. That is exactly what happened. However, if the literal construction had led to anything inequitable, it might perhaps have been corrected by looking at the surrounding circumstances, and ascertaining if the construction could be aided by them.

Mr. Matthews is quite right in saying that agreements must be construed with reference to the surrounding circumstances. But, upon looking at the surrounding circumstances, it is quite plain that the allowance or remission made by the Government was the very allowance, and the very remission, contemplated by the parties when they entered into this agreement. Therefore, whether you construe the clause upon the terms of it only, or whether you look out of the deed and regard the surrounding circumstances, the construction

appears to their Lordships to be equally clear. They entirely agree with the reasons given by Mr. Justice Badgley for his judgment, and they regret that the judges who formed the majority of the court did not regard more closely what was in the contemplation of the parties. Some of the reasons of their judgments are really inapplicable to the clause as it stands, and to the facts as they exist.

It was argued for the Respondent that, assuming Mr. Gordon would have had the right to maintain an action of this kind, his assignee, Mr. Burstall, could not sue, inasmuch as the deed of assignment to him was not adapted to assign the particular claim in question. On looking, however, at that deed, it appears that one half of the specific sum which had been at that time remitted by the Government was the subject of the assignment. The only question being what was really assigned, their Lordships cannot doubt that what Mr. Gordon was assigning to the present Appellant included the money in question in the present suit; they think, therefore, that his title as assignee is perfect, and he is as much entitled to succeed in this action as Mr. Gordon himself would have been.

The only remaining question which has been discussed is, whether or not the amount for which the judgment in the court of first instance was given should be reduced. It was pointed out by the learned counsel for the Respondent that the judgment had been given for a share of the remission in respect of dues paid up to the date of the deed of dissolution of the 6th January 1857, and it was said that the partnership had in fact been dissolved in October; so that the payments subsequent to October in respect of these ground rents must have been made by the Respondent out of his own money and not out of the partnership money.

If this point could be maintained, it must be by a reference to the accounts, and ascertaining what was really intended between the parties,

having regard to the existing state of account, by the deed of January 1857. But no investigation or inquiry appears to have been required in either of the courts below upon this point, and it does not appear to have been raised; probably because, upon the face of the deed of the 6th of January 1857, the parties were dealing with the accounts as they stood at that time, and that the deed speaks from its date, and relates to a remission upon any account arising prior to it.

Their Lordships, therefore, think there is no ground for disturbing upon appeal the original decree so far as the amount is concerned.

In the result their Lordships will humbly advise Her Majesty to reverse the decree of the Court of Queen's Bench, and in lieu thereof to order that the Appeal to that Court from the Superior Court for the Province of Quebec be dismissed, with costs, and the judgment of the Superior Court affirmed.

The Respondent must pay the costs of this Appeal.