Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Oxford and Co. v. *Provand and Daly, from the Supreme Court of China and Japan; delivered 21st May,* 1868.

Present:

SIR WILLIAM ERLE.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
JUDGE OF THE HIGH COURT OF ADMIRALTY.

THIS was an appeal from a decree of the Supreme Court of China and Japan in a suit for the specific performance of a Memorandum of Agreement dated at Shanghae, 27th April, 1863, in the following terms:—

"SKETCH of Agreement between Messrs. A. Provand and Daly, and Messrs. Oxford and Co.

"The latter take from the former the unexpired term of the lease they hold for the whole ground and four houses thereon erected, and to be erected, part of which was occupied by the late Miller's Hotel. They pay for the same an annual rent of 4,000*l.* (four thousand pounds); but, as it will take some time to build all the houses, they take possession of the house now building in the centre and the one now used as billiard room, as soon as the former is finished, paying an annual rent of 1,600*l.* from that day. This rent is increased to 2,800*l.* as soon as the large house now building is finished, and to the above stated 4,000*l.* when the fourth house, which has been destroyed by fire, has been rebuilt, and is delivered. The building of all houses to be proceeded with at once.

"Messrs. Provand and Daly will consult Messrs. Oxford and Co.'s wishes in finishing the houses now building, and in building the house not then commenced (burnt down).

"This house is to be rebuilt on the vacant piece of ground now in front of the same, so as to be contiguous to the street.

"If Messrs. Oxford and Co. should wish to have a larger house or one differently built, Mr. A. Provand promises to do his best to make the original owners of the land agree to such alterations,

for the extra cost of which Messrs. Oxford and Co. would have to pay.

"A proper contract to be made by Mr. Cooper, Solicitor, of Shanghae, and the contracting parties to bear each one-half the expense thereof.

"Shanghae, 27th April, 1863.

(Signed) "OXFORD and Co.
"PROVAND and DALY."

The plaintiffs in the suit prayed that the defendants might be ordered to carry out the terms of the said Memorandum, and to execute the underlease set out in the record, which it was alleged had been approved of by the defendants. The defendants, by their answer, denied, among other things, that the plaintiffs had performed their part of the contract in respect of the buildings mentioned therein, and they contended in argument that the agreement was so vague that a suit for the specific performance of the part of it relating to "a proper contract" could not be maintained. These defences were overruled by the Decree of the Court below, for the reasons stated in the Judgment of Chief Justice Hornby, upon which that Decree was founded, against which Judgment this Appeal was brought. The Appellant here, in addition to the defence in the Court below, has contended that the Decree founded on that Judgment is bad, because in the part referring it to the Registrar to settle a lease in conformity with the said Agreement, the Decree orders that such lease shall contain clauses and covenants in conformity with the terms of a letter dated 3rd of August, 1863, and with the terms of the inclosed Memorandum, which it may be convenient to call the Additional Memorandum, the effect of which two documents is to impose on the lessor, 1st, the duty of doing the substantial repairs to the premises during the term; and, 2ndly, the duty of allowing to the lessee (the Defendant) 300*l*., being the seventh quarter's rent, in consideration of the insufficient manner in which the house (No. 3) has been finished.

Five grounds of objection.

The case was complicated, and the Appellant raised many points which resolve themselves into five, two of form, two of substance, besides the objection to the Decree, as abovementioned. Of these in their order. The two points of form, viz., that the lease to Messrs. Provand was void, because there was no seal, and that the suit ought to fail by

reason of the delay in commencing it, were shown in the course of the argument to be untenable, and when that was clearly proved it was admitted by the Defendants. The two points of substance related, the first to the supposed vagueness of the Memorandum of Agreement of the 27th April, 1863; and the second, to the non-performance by the Plaintiffs of their duty under that agreement. The remaining objection was to the part of the Decree.

As to vagueness of contract.

With respect to the supposed vagueness of the Memorandum of Agreement, their Lordships propose to consider what is the true construction of that Memorandum, having regard to the terms of the instrument and to the surrounding circumstances, and also in reference to this suit for specific performance, to the conduct of the parties in the interval between the making of the Agreement and the commencement of the suit.

This contract operates by way of mutual agreement. The Plaintiffs below agree to transfer the residue of a term in certain premises, and to build or finish houses thereon, and to proceed with the building at once, and to consult the Defendants' wishes in finishing the houses then being built and in building the house then not commenced. The Defendants below agree to take the term so to be transferred, and to pay a rent of 4,000*l.* per annum, divided into three portions, the liability for each portion to begin from the time when the house to which that portion relates is finished by the Plaintiffs, and delivered by them into the possession of the Defendants. Both parties further agree that a proper contract shall be drawn for them to execute by a solicitor named by them.

In their Lordships' opinion the terms of this Memorandum of Agreement, taken by themselves, clearly express the intentions of the parties. The contract bound, from the moment it was made, the respective parties to do the acts which each was to perform, in the order which is to be collected therefrom. The stipulation that a proper contract should be made by a legal adviser is isolated from the other stipulations in point of sequence, and might have been performed either directly after the memorandum had been signed, or when possession was given of the first house (as expressly provided in the proposal of the 21st of

April, which led to the agreement of the 27th), or at any subsequent time either before or after the completion of all or any of the houses. By the Memorandum all the essentials to the relation between lessor and lessee are ascertained, viz , the interest in the term is bound by the signature of the parties to the Memorandum, and the duration of the term, the amount of rent, the time for taking possession of the respective portions, and the time from whence the rent should begin to accrue due, are clearly stated. The stipulation for a proper contract is usual where the parties make the agreement in their own language for a transfer of an interest in land in the performance of which technical skill is wanted. The legal adviser chosen by the parties (or in case of suit, the Registrar) has to express in detail what are the legal and usual provisions in such a case in respect of repairs and rates and taxes, and to settle whether the mode of transfer shall be by assignment or underlease.

The duties arising by law from the relation either between lessor and lessee, or between assignor and assignee of a lease, may be modified according to usage, and the named referee, or his substitute, or the Registrar, has to express the detail of that which is involved, according to legal implication, in the more general terms of the Memorandum.

So far their Lordships' have considered the terms of the contract itself. They now refer to the surrounding circumstances. The leases to the Messrs. Provand, the Plaintiffs, with a plan of the premises, were shown to the Messrs. Oxford, the Defendants, before they made the agreement of the 27th of April. If the interest of the Plaintiffs thereunder was assigned to the Defendants as assignees, the Defendants would be subject to all the terms in those leases which according to law would run with the land; but if the mode of transfer should be by underlease instead of assignment, the terms of the underlease would in usual course be analogous to those in the lease transferred, subject to modifications according to legal usage in respect of any alteration of the buildings after the grant of the lease to be transferred. In the present case, the parties added the stipulation that the Plaintiffs should consult the wishes of the Defendants in completing the buildings which were to be built.

It has been objected that this part of the agreement relating to consulting the wishes of the Defendants in making the buildings is so vague, that specific performance of the other part of the agreement relating to making a proper contract cannot be enforced. But to this objection there are two answers, by which the vagueness complained of, if it had existed, would have been removed, first, by reference to the surrounding circumstances; and secondly, by reason of the part execution by the Plaintiffs of the duties to be performed on their part. The circumstances show that the part of the contract relating to building had as much certainty as an ordinary building contract admits of. As to the house No. 1 on the plan, it was an agreement for the delivery of a specific thing agreed on between the parties. That house had not been injured by the fire, and the Plaintiffs did not contract to alter it; but the Defendants chose to alter it for their own purposes by their own builder, to the detriment both of the building and of the interest of the lessor, and they are not entitled to take any advantage therefrom. As to the two houses in course of building, Nos. 2 and 4, the Defendants, before they made the agreement of the 27th April, 1863, saw the plans and specifications, and building contracts for the houses, and made their agreement by reference thereto, with the additional stipulation that their wishes should be consulted in the course of the building. The plans and specifications for these two houses, defined with as much precision as the subject is capable of, the dimensions, materials, and workmanship which the builder was bound to supply. As to one of them, the defendants substituted another plan. Both houses were completed, as the Plaintiffs allege, according to these plans, with opportunities for the defendants constantly to inspect the work, by themselves and by their architect, as it went on. Their wishes the Plaintiffs were bound to consult. Those wishes were expressed in many of the letters which have been produced; but the greater part of these letters ought to be *distinguished* from complaints of breach of contract, as they are querulous letters, not unusual in building operations, expressive of the wishes of the party in the performance of the work. The rent of the

two houses, Nos. 2 and 4, as well as of the house No. 1, was to become due from the time when such houses respectively should have been delivered as finished according to contract by the Plaintiffs to the Defendants, and accepted by the Defendants accordingly. All the three houses were so accepted by the Defendants, and rent was paid for them for several quarters; and Nos. 2 and 4 were sublet to lessees who would have continued to occupy them if theDefendants had not interfered to induce them to leave. As to these three houses, the Plaintiffs' contract was sufficiently certain as it was made, and if there had been ground for doubt, it would have been removed by performance. If the Appellants supposed that the builder's contract, with a precise specification could be at all affected by implications from the fashion which prevailed among other merchants of Shanghai in respect of the houses they chose to inhabit, such supposition was a mistake. Each contract for a house is singular, and must be construed without reference to other contracts for other houses, unless it contains terms of reference thereto. Upon these facts their Lordships consider that as to these three houses the objections of the Defendants (the present Appellants) fail, both in respect of the supposed vagueness of the contract, and in respect of the supposed non-performance thereof by the Plaintiffs.

Then with respect to the remaining house, No. 3 on the plan, for the Defendant's own occupation, the same objection, viz., that a promise to consult the Defendants' wishes in the building and finishing thereof, was so vague as to be a bar to any suit for specific performance of another part of the agreement, although wholly distinct therefrom, was more strongly pressed on their Lordships' attention; but the force of the objection disappears when the surrounding circumstances relevant to that stipulation are reviewed. By the letter of the 21st of April, 1863, the Defendants make the proposal to take the transfer which led to the agreement of the 27th; and in this letter they state the dimensions of the house they wish for, and propose to hand a plan to the Plaintiffs, and offer an addition of 500*l.* per annum to the rent if the Plaintiffs will undertake the building thereof. It is clear that this proposal for the house No. 3, was agreed to and

became part of the contract of the 27th April, the rent being 4,000*l.* instead of 3,500*l.* as at first proposed. It further appears by the evidence of Mr. Provand that Messrs. Oxford handed to the Plaintiffs a plan for the house No. 3; and although the time when they so furnished it is not mentioned, it is almost self-evident that the builder must have seen the plan before he contracted to execute it at a certain price. The Defendants inspected the building thereof, and had the aid of an architect to advise, as the work went on; and in this way the meaning of the parties in stipulating that the wishes of Messrs. Oxford should be consulted in the building of the house is made apparent by their performance of that stipulation. It appears also from the same evidence that the house was built according to Messrs. Oxford's plan, although there are many letters complaining that joiners', plasterers', and locksmiths' work was not as good as Messrs. Oxford wished and had a right to expect; but of this more hereafter. Their Lordships are now considering whether Messrs. Oxford are well-founded in asserting that the contract was so vague in respect of building that a stipulation in it unconnected with building cannot be enforced, although the building has been either performed or nearly performed.

The contract and the circumstances relevant thereto, being as above explained, their Lordships do not stop to inquire whether a suit for specific performance of the stipulation for a "proper contract" could have been maintained at once; but having regard to that which had been done before this suit was commenced, they consider that there was not such uncertainty as to be a bar to this suit.

Objection to failure of consideration.

The second point relied on for the Appellant (the Defendants in the original suit), was an allegation that the Plaintiffs had so far failed in the performance of the promises on their part to be performed before October 1865 (the date of the commencement of this suit), that the Court below ought to have refused to assist them by decreeing a specific performance of the stipulation for executing "a proper contract;" and they referred to the principle that a party seeking equity must do equity.

They contend that the conduct of the Plaintiffs

in respect of the contract has given them a right to treat the contract as annulled thereby, and to repudiate the transfer of the Plaintiffs' interest. The Defendants seek under this pretext to release themselves from the payment of a rent amounting altogether to nearly 50,000*l.*, and to compel the Plaintiffs to resume possession of the premises in their altered state. The Plaintiffs would thus become liable to their lessors upon the leases which they contracted to assign, to pay rent exceeding 20,000*l.*; and are to be liable also for damages for alterations made by the Defendant contrary to the contract between the Plaintiffs and his lessors, as well as for loss by deterioration of premises by reason of desertion, and for all rates and taxes. And besides these direct pecuniary losses, the Plaintiffs are to resume possession, when the market is low, of houses which they agreed to assign when the market was high. This formidable loss Messrs. Oxford claim to inflict on Messrs. Provand because, as it is alleged, they failed to do equity to the extent of laying out about 1,000*l.* in plasterers', joiners', and locksmiths' work. And this work, as far as it could be claimed under the building contract, Messrs. Provand offered to do if Messrs. Oxford would execute an underlease. But as Messrs. Oxford claimed to annul the agreement altogether, and to throw back the premises upon the lessor, without any right for so doing, they in a manner prevented Messrs. Provand from going on to fulfil their contract till the question thus wrongfully raised by Messrs. Oxford was determined; and under these circumstances Messrs. Oxford cannot take advantage of their own wrong; that is, of the non-completion of the house No. 3, caused by their own wrong. Their Lordships assume that the claim of Messrs. Oxford to annul the agreement of the 27th of April, 1865, is altogether untenable.

It is clear that the Conrt may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion, the circumstances of the case, and the conduct of the parties, and their respective interests under the contract, are to be remembered. In reviewing the evidence on this point, the Court must be careful to distinguish between evidence of opinion and evidence of facts. If a party has an interest in

depreciating a building, it is not difficult to obtain opinions that it is unfinished, uninhabitable, untenantable, and so forth. But the Court must endeavour to ascertain the real facts; and it seems a very cogent fact in this case that the balance of the evidence establishes that the whole premises could have been put into complete order, according to the construction of the contract most unfavourable to the plaintiffs, by an outlay of 1,000*l.*

Then, if the Court examines the conduct of the parties in respect of each of the four houses which the Defendants claim to throw back on the Plaintiff's hands, the equity of the Defendant's contention will be better appreciated. As to the proceedings in relation to the houses Nos. 1, 2, and 4. Their Lordships have already expressed their opinion. In the house No. 3, which was occupied by the Defendants before it was finished, for their own convenience, and in which the work went on for more than a year in their presence, and with the knowledge of their architect, the plasterers' and joiners' and locksmiths' work was not so good as in some other houses; but the building was required without delay; much building was going on, and good workmen and good materials were not to be had. The Agreement to allow 300*l.* for these, perhaps, inevitable defects, which was to be laid out by the Defendants themselves, was accepted by the Defendants, but was not so laid out according to the understanding of both parties; and the process of making good these defects was going on when the Defendants in January 1865 claimed to throw back the premises on the Plaintiff's hands, and to put an end to the Agreement of the 27th April, 1863. Messrs. Oxford had furnished the plan (which in ordinary course of business would mean specification); they saw the materials and the workmanship, and if completion was delayed it would have been an inconvenience to them. The justice of Messrs. Oxford's objections to the locks, bolts, &c., may be estimated by the fact to be inferred from the correspondence that Messrs. Provand got the best articles which Shanghae afforded; that on Messrs. Oxford's objections to these, they sent to England for better articles (the arrival of which was delayed because it was necessary to have them made expressly for this service); and that the substitution of these articles

was promised as soon as the mail should arrive. The house was delivered by Messrs. Provand as finished, and although Messrs. Oxford protested against admitting that it was finished, they kept the house and paid rent for it several times.

Upon this state of facts the Court below did not find that the Plaintiffs had forfeited by their own default the usual right of a party to a contract to a Decree in equity for specific performance; and their Lordships see no reason for dissenting from the conclusion of the Court below on this point.

Objection to the Decree.

In support of their Appeal the Defendants objected to the Decree of the Court below, because it directed that the under lease should contain a clause in conformity with the Defendant's letter to Mr. Lawrence, of the 3rd of August, 1863, which says:—"Lessor agrees to repair any damage arising from the act of God, or faulty construction of walls, roofs, and beams, and lessee to repair damages arising from any other cause than the above;" and also in conformity with the terms of a Memorandum sent by the Defendants to Mr. Lawrence, which was as follows:—

"Regarding the house occupied by Messrs. Oxford and Co., it has been in addition agreed that the floors are to be kept in good order by the lessors during the term of contract, and that in consideration of the insufficient manner in which this house has been finished, Messrs. Oxford and Co. are to retain the rent for this house for the first quarter in the third year of this lease, towards renewing and repairing the fittings.

"300*l.*, from 1st January to 1st April, 1867."

The memorandum or agreement of the 27th of April, 1863, contains in the words "a proper contract to be made," a stipulation entirely separate from the other stipulations, which are made to be inter-dependent on each other, as above fully explained.

For the specific performance of this stipulation the Court ought to ascertain what was the "proper contract" which the parties intended. If Mr. Cooper settled it according to legal usage, there would be no doubt. If Mr. Cooper declined to act, and the parties agreed to another solicitor, he might settle the same question. But whether Mr. Cooper or Mr. Lawrence acted, if the two parties concurred in settling what they considered to be a proper contract according to legal usage, it would be reasonable

for the solicitor who acted as arbiter between them both, to adopt their consent if he saw nothing improper therein. Now the letter of the 3rd of August, 1863, purports only to embody the construction which the parties finally and by consent put upon their respective obligations to repair—obligations which were implied in the original contract whereof a specific performance was sought, but of which the extent and meaning had been the subject of the dispute before Mr. Cooper. Their Lordships are therefore of opinion that there is no error in that part of the Decree which directs that the lease shall contain clauses and covenants in conformity with the terms of this letter.

The objection taken to the incorporation in the lease of the terms of the second Memorandum is more formidable. In considering it their Lordships will assume, for the sake of argument, that the paper was sufficiently proved to have been written about January 1864 by Mr. Arnhold, one of the Defendants (who appears, however, to have had no opportunity of explaining it); and that it was intended not to be a mere proposal, as suggested by Sir Roundell Palmer, but to express, so far as it went, a concluded agreement between the parties. If the Plaintiffs relied on that agreement as a variation or modification of the original contract, it is clear that, according to the uniform course of Courts of Equity, and every sound principle, they ought to have pleaded it as such, and thus to have put on the record the whole of the subsisting contract which they meant to prove, and of which they sought the performance. On the other hand, if it is to be treated as an independent agreement by which the parties have fixed the compensation to be made by the Plaintiffs to the Defendants for the defective finishing of one of the houses (and this their Lordships think is the reasonable construction of the document), it is no part of the contract upon which the lease is founded, and ought not to be incorporated in that document.

In dealing with it as he has done, the learned Chief Justice probably considered that it was equitable to give to the Defendants the benefit of the stipulations concerning the repairs of the floors, and the allowance of the 300*l.* by which the Plaintiffs had admitted themselves to be bound. It is to be

observed, however, that the Defendants do not ask to have the benefit of this agreement. On the contrary, they, as their Lordships understand, object to have it forced upon them as a settlement of what is at most only a portion of their counterclaim against the Plaintiffs in respect of the defective construction or fittings of the houses. The Decree does not purport to determine all the questions thus pending between the parties. The Chief Justice himself, in his Judgment, seems to assume that the Defendants may bring some other proceeding for the recovery of whatever compensation may be due to them for the defective completion of the houses, in so far as their claim was not covered by this agreement touching house No. 3. And this being so, their Lordships are of opinion that the proper course is to leave the Plaintiffs to get the benefit of this Memorandum, which was never properly put in issue in this suit, in any such proceeding as may hereafter be taken, by pleading it by way of accord and satisfaction to the whole or part of the Defendants' demand; and that the Decree under appeal should be amended by striking out the passage which relates to it. Their Lordships have reluctantly come to this conclusion since the objection, which is independent of the merits of the case, seems hardly to have been in the contemplation of of the Appellants when they began their Appeal.

It remains to consider the case of Tidersly *v.* Chapman, 30 Beavan, which was pressed on our attention as a strong authority in support of the Appellants' case in which a suit for specific performance of an agreement to take a lease was decided adversely to the Plaintiff. But the relevancy of that case to the present depends on the similarity of the two agreements and the two alleged defaults in the two cases.

There the agreement related to the accepting of a lease of one nearly-finished house, upon the terms as to covenants usual upon the estate where the house was situate, and the promise to accept such lease was, in effect, upon condition that the house should be finished, and a day was fixed for the delivery of the finished house into possession, and for the beginning of the term.

Here the agreement relates to the transfer of an existing term for fourteen years, in land, on which

there were various buildings, some built, some to be built, with three different times for going into possession (that is to say, of becoming liable for the rent of three different portions), and no day was specified for the delivery of either house or the finishing of the work.

There the possession by the Defendant as between him and the Plaintiff was in law, none, because the entry of the Defendant had been produced by a false representation of the finished state of the premises made by the Plaintiff. Here the voluntary possession by the Defendant had been long, and his acts of ownership numerous as above described.

There the lessor would be restored to his former situation. Here that was rendered impossible by the acts of the lessee.

The surface of Tidersly's case wears a semblance of support for the Appellant; but the principle of that case, if we understand it aright, is decisive for the Respondent.

The meaning of the maxim in Chancery that he who seeks equity must do equity, is not clear because equity has not been clearly defined. The maxim, as their Lordships understand it, includes the rule at law which in all suits upon contracts either for specific performance or for damages, guides to discriminate whether an alleged breach of the duty of the Plaintiff under the contract is a bar to the suit.

The rule has been expressed in various forms, the substance of it as regards the present purpose is, that such breach is a bar when it goes to the whole of the consideration for the promise sued on; but when it amounts only to a partial failure of such consideration, it is no bar to the suit: the Defendant being entitled to recover in a cross action compensation for such failure, if it should be proved to exist.

This rule has been of frequent application at law, as appears by the numerous decisions cited in the note to Cutter *v.* Powel, in 2 Smith's Leading Cases, pages 13 and 14; see also 1st Saunders, 320, *c, d, e,* note to Pordage *v.* Cole.

The Judgment of the Master of the Rolls in Tidersly's case, showing with minute and elaborate search into the facts that the alleged breach of duty on the part of the Plaintiff there went to the whole consideration for the Defendant's promise and the

judgment of Hornby, C. J., in the present case, showing that the alleged breach of duty under the contract on the part of the Plaintiff, if it could be proved to exist, amounted at most to a partial failure of consideration for which compensation in damages might be claimed, are each of them founded on this rule well known in Courts of Law, though neither of the Judges referred to it in the language used in the Courts of Law.

Their Lordships will, therefore, humbly recommend to Her Majesty that the Decree of the Court below be amended by striking out the clause beginning with the words, "and with the terms of a memorandum," and ending with the word "fittings," and that, with that variation, it be affirmed. Each party must bear his costs of this Appeal.