Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Arthur Larios v. *Antonio Bonany y Gurety, from Gibraltar ; delivered the 3rd May,* 1873.

Present :

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THIS is an appeal from the Supreme Court of Gibraltar. The Appellant is the surviving partner of a firm which carried on business at Gibraltar under the style of Larios Brothers. The Respondent is a Spaniard living at Algeciras who, in 1867, was engaged in some kind of trade or business there as an exporter of bark, cork, and other produce.

By the latest of the Decrees under appeal, which bore date the 29th of June, 1870, and was the final Decree in the cause, the Appellant and his late partner were ordered to pay to the Respondent the sum of 6,095 hard dollars money of Gibraltar for special and general damages, in addition to the sum of 1,218 dol. 1 r. 50 c., awarded to the Respondent by an earlier and interlocutory Decree, dated the 3rd day of December, 1869, making in all the full sum of 7,293 dol. 1 r. 50 c., and also the taxed costs of the suit.

The appeal against this final Decree was preferred in the ordinary way ; and the Appellant afterwards obtained from Her Majesty in Council leave to include in his appeal the interlocutory Decree of the 3rd of December, 1869.

By this last-mentioned Decree the Chief Justice of the Supreme Court declared that, under the several contracts and agreements mutually entered into between the Plaintiff and Defendants, the Plaintiff was entitled to receive from the Defendants the two several sums or advances of 2,500 and 6,900 dollars, making together a total amount of 9,400 dollars. He then stated an account by which it was made to appear that there remained due from the Defendants to the Plaintiff, on the balance of the said account, the sum of 1,218 dol. 1 r. 50 c., which he ordered the Defendants to pay to the Plaintiff within one month from the date of the service upon them of the order. And then, after reciting that the Plaintiff had sustained loss and damage by reason of the non-performance of the contract, and that the equities of the case were not sufficiently met by the above Decree for specific performance, he ordered that it should be referred to the Assessors of the Supreme Court before the Court itself to inquire into and assess the damages so sustained by the Plaintiff.

A protracted inquiry subsequently took place before the Chief Justice and three assessors, which resulted in the assessment of the damages at the sum of 6,075 dollars, and the final Decree above mentioned.

The suit, therefore, was framed as an equity suit for the specific performance of an alleged contract, and for damages for the breach of it; the latter relief being obtained by proceedings similar to those which are had in the Court of Chancery under Lord Cairns' Act.

Before they consider the objections which have been taken to these Decrees, and to the proceedings which lead to them, their Lordships will shortly review the transactions out of which the suit arose, in order to ascertain what was the true nature of the contract between the parties, and what were the rights that flowed from it.

In June 1867, the Respondent applied to Larios Brothers for a loan of money. There had been former transactions between them, and the amount of the balance due from him in respect of those transactions which had previously been the subject of dispute was in the course of the negotiation for the loan settled at 3,337 dols. 4. r. 50 c. On the 30th

of June, 1867, the Respondent and Don Pablo Larios Herreros, the then senior partner of Larios Brothers, appeared before a notary at Algeciras and executed three notarial instruments. By the first of these Larios Brothers bound themselves to advance by way of loan to the Respondent the sum of 2,500 dollars, opening for him a credit in account current on their firm at Gibraltar, with interest at the rate of 6 per cent. per annum ; he pledging to them by way of security his stock-in-trade, actual and future, and giving them power to inspect his books, so as to assure themselves of the right investment of the funds advanced. By this investment the Respondent also bound himself to settle the balance due on this account every three months and to pay the outstanding balance on demand.

The second instrument purported to be a sale to Messrs. Larios Brothers of certain landed property belonging to the Respondent in consideration of 2,100 dollars (of which the receipt was admitted); with a condition for the rescission of the sale, if within five years the Respondent should repay the consideration money, and a stipulation that, during the five years, the seller was to continue to receive the rents and other proceeds naturally arising from the property.

The third instrument, which was executed by the Respondent's wife, as well as by the before-mentioned parties, purported to be a sale by her to Messrs. Larios of certain property belonging to her in consideration of 4,900 dollars (the receipt whereof was also admitted) upon a like condition for rescission, and with a similar stipulation for the intermediate possession.

The first instrument, so far as it went, stated the true nature of the contract between the parties. Not so the other two. These were on the face of them conditional sales, for which the full consideration was admitted to have been paid. But, in truth, no money passed on either of them, and the real contract was that stated in paragraphs 4 and 5 of the Respondent's petition in the nature of a Bill of complaint, and admitted by the fourth and fifth paragraphs of the plea and answer of the Appellant and his late partner ; being in fact an agreement that Messrs. Larios Brothers should make further advances to the Respondent to the amount of

6,900 dollars over and above the 2,500 dollars upon the security of the property comprised in the two instruments of conditional sale, debiting him with the old balance of 3,373 dols. 4 r. 50 c. as part of such advances. A question was raised by the Respondent *whether interest* was chargeable on the 6,900 dollars when advanced, but their Lordships considering the stipulations that the rents of the property comprised in the two deeds of conditional sale were to be received as before by the so-called vendors, have no doubt that the whole account was, as found by the Court below, to carry interest at 6 per cent.

Nor, after full consideration of the pleadings, and evidence, and of the arguments addressed to them, do they find any reason to dissent from the conclusion of the Court below that the general effect of the arrangement was to impose upon the Defendants the obligation of opening a credit in favour of the Respondent to the extent of 9,400 dollars, and of honouring his drafts to that amount less the old balance of 3,374 dols. 4 r. 50 c. with which he was to be debited in account.

Between the 30th of July and the 4th of August, 1867, they had advanced to him the whole of the 2,500 dollars, and sundry other sums; but there seems to be no reason to doubt that at the latter date, after debiting him in account with those advances, with the old balance, and with the interest on both, they had in their hands, undrawn, a balance of the 9,400 dollars, which considerably exceeded the sum of 1,000 dollars.

On that day they refused to accept a bill for 1,000 dollars, drawn upon them by him in favour of one Manuel Gomez, and the bill was accordingly protested. This, and their subsequent refusal to make any further advances to him are the alleged breaches of the agreement in respect of which the Respondent brought the suit out of which this Appeal has arisen.

In the course of the argument a question was raised whether the Court at Gibraltar had jurisdiction to entertain any suit to enforce the contract between the parties. This objection, however, was hardly pressed; and it seems to their Lordships perfectly clear that, if the contract were such as is above stated, the breach of it was a cause of action arising in Gibraltar, where Messrs. Larios Brothers carried on business, for which there

was some remedy against them in the Supreme Court of that place.

More formidable objections have, however, been taken to the nature of the proceedings in the cause, and to the form and substance of the relief given by the two decrees.

1st. It was argued that the suit was, on the face of the pleadings, a suit in equity for specific performance; that the Court of Gibraltar, in administering equity, was bound to follow the rules and course of practice of the Court of Chancery; that no suit for the specific performance of a mere agreement to advance or lend money would lie in the Court of Chancery; and that if the Court, considered as a Court of Equity, had not the power to decree a specific performance of the agreement, it had no jurisdiction to award damages for the breach of it. Mr. Solicitor-General cited Lewers *v.* the Earl of Shaftesbury, 2 L.R., Equity Cases 270, in support of the last proposition; and the cases of Rogers *v.* Challis, 27 Beav., 175, and Sichel *v.* Mosenthal, 30 Beav., 371, in support of the last but one.

2nd. It was pointed out that the interlocutory decree, though termed in the body of it a decree for specific performance, had really very little resemblance to an ordinary decree of that kind; but was, in effect, a declaration of what the Court found to be the obligation which lay upon the Defendants, in consequence of the agreement between the parties; a computation of what was due from them at the date of the decree on the footing of that agreement; and an order for the payment of the balance so found to be due. And it was argued that, inasmuch as the Defendants had thus become entitled, under the stipulations expressed in the first of the notarial instruments, and by reason of their demand at the expiration of the period of three months then mentioned, to the repayment of the 2,500 dollars, with interest, this decree was erroneous, in that it omitted to set off this item, which would have turned the balance in favour of the Defendants, against the undrawn portion of the 9,400 dollars.

3rd. It was argued that the damages for the breach of the agreement, if assessable at all, were assessed on a wrong principle; and in particular that the two sums awarded by way of special

damage were improperly awarded, and that the amount at which the general damages were assessed was excessive.

The chief part of Mr. Rigby's argument in answer to the first objection was directed to show that the contract, so far as it related to the advance of the 6,900 dollars, was one of sale, though of conditional sale, and was, therefore, properly made the subject of a suit for specific performance.

Their Lordships, however, are of opinion, that to this argument there are two answers which admit of no reply. In the first place, no suit could have been brought for the specific performance of the supposed agreements for conditional sales, since each of these transactions was, on the face of the written instrument, completed by an actual conveyance for a consideration admitted to have been paid and received; and, in the second place, the suit actually brought is not framed with the object of enforcing any such contract, or even with that of obtaining equitable relief, on the ground that the consideration, which in the notarial instruments is expressed to be paid, had not been really paid.

The parties throughout the negotiation which led up to the contract were stipulating for advances of money on one side, and for security for those advances on the other; the pleadings state and admit an agreement of that nature; and it seems impossible to treat the cause of action in this case as anything more than the breach of a contract to honour the drafts of the Respondent to the extent of the amount agreed to be advanced and placed to his credit. And, upon a full consideration of the arguments and the authorities, their Lordships are constrained to admit that the Court of Chancery would not have entertained a suit for the specific performance of such an agreement, but would have left the party aggrieved by the breach of it to seek his remedy, where he would find an adequate remedy, in a Court of law.

But does it follow that, in the Court of Gibraltar, the Plaintiff, because he had misconceived his suit, by making it one for specific performance, was necessarily to be subjected to the consequences of having that suit altogether dismissed? That Court is not a mere Court of Equity, exercising jurisdiction over matters only of equitable cognizance. Nor is it

even, like some of the Courts created by Royal Charter in India and other dependencies of the Crown, a Court having, under the terms of the Charter erecting it, different sides, and directed on its equity side to govern itself by the course and practice of the High Court of Chancery; and on its Common Law side to exercise the jurisdiction and functions as near as may be of the Court of Queen's Bench. The Charter of Justice by which the Supreme Court of Gibraltar was created, directs generally that the Court shall have cognizance of all pleas, and jurisdiction in all causes, whether civil, criminal, or mixed, arising within the garrison and territory, with jurisdiction over all subjects of the Crown, and all other persons whatsoever residing and being within the said garrison and territory, save as thereinafter is excepted. It further provides that all questions there arising are to be judged and determined according to the laws then or thereafter to be in force within the garrison and territory, that the trial of criminal cases is to be by the Judge and a jury of twelve, and that all issues of fact arising in civil suits or actions are to be tried by the Judge and three assessors, the verdict of the Judge and assessors to be according to the majority of votes; or, if they are equally divided, according to the opinion of the Judge.

It also contains a provision which gave to the Judge large powers of framing rules touching the forms and manner of proceeding to be observed in the Court, and the practice and pleading upon all actions, suits, and other matters both civil and criminal.

Under this latter power Mr. Baron Field, the first Judge of the Court, made certain rules, which were duly allowed by the Crown on the 1st October, 1832.

By the 10th of these it was provided that the civil practice of the Court, whether in its legal or equitable jurisdiction, should be simply by petition, answer, or demurrer, and (if necessary) replication or joinder in demurrer, and rejoinder, addressed to the Judge of the Court.

Other rules provided one uniform process for compelling an appearance, and for executing the Decrees or Judgments of the Court; the only Rule which seems to contemplate any distinction between

a suit for equitable relief and an action to enforce a strictly legal right, or to point to any difference of procedure in the two cases, being the 17th, which is in the following terms:—" In the case of equitable suits, the Defendant's answer shall be put in upon oath, and the rest of the practice in such suits shall be conformable to that of the High Court of Chancery in England, except that the evidence of the witnesses shall be taken before the Court *vivâ voce*, at the hearing; that inquiries, which in England would be referred to a Master in Chancery, shall be made before the Court; and that issues of fact, when directed by the Court, shall be tried by the Judge with assessors, or a jury.

There is, therefore, nothing in the constitution of the Court, or in the rules which govern it, to compel it to relegate a party who had mistaken his remedy, and had sought equitable relief in a matter not properly within the cognizance of an English Court of Equity, to another tribunal, or to send him from one side of the Court to another. It seems rather to be a Court that already possesses the power, which modern legislation is seeking to attribute to our own Superior Courts, of administering to the fullest extent both law and equity in any cause of which it may be seised; though, in administering law, it may be bound to adopt and follow the principles which govern English Courts of Law; and in administering equity, to adopt and follow the principles which govern English Courts of Equity. From this it seems to follow that had the objections taken to the suit as a suit of specific performance, on the argument of this Appeal, been taken by demurrer or otherwise in the Court below, that Court would not have been bound to hold its hand for want of jurisdiction, but might, amending the pleadings if necessary, have caused the subsequent proceedings in the suit to be had as if the suit had been originally an ordinary action for damages sustained by reason of a breach of contract.

It is desirable, with reference both to the second and third of the objections above stated, and to the question what their Lordships ought to do upon this Appeal, to consider what would have been the proper result of the proceedings if the course suggested had been taken in the Court below. The damages awarded would necessarily have consti-

tuted the whole of the relief obtainable by the Respondent, and the first question, therefore, is what is the proper measure of damages to be applied to such a case.

It was argued for the Appellant that the cause of action being merely the breach of an agreement to pay a sum of money, nothing could be recovered by way of damage, except the principal money contracted to be paid, and interest. On the other side it was contended that this case fell within the principle established by or recognized in such cases as Marzetti *v.* Williams, 1 Barn. and Ad., 415; Rolin *v.* Stewart, 14 C. B., 595; Prehn *v.* the Royal Bank of Liverpool, 5 L. R., Exch., 92; and others; and that the contract, being a special one, whereby the Defendants became bound to honour, out of monies agreed to be placed by them to his credit, the drafts of the Plaintiff up to a certain amount, the Plaintiff was entitled to general and substantial damages for the breach of it. Their Lordships are of opinion that this latter contention is correct. No question arises with reference to the first of the notarial instruments, since it appears that the whole of the 2,500 dollars were advanced, and afterwards became repayable. But the agreement for the further advance of 6,900 dollars was one whereunder, in consideration of the promise to advance, the Plaintiff had executed one, and induced his wife to execute the other, of the two conditional sales, each admitting in a binding manner, as is shown on the face of the instruments, that the whole of the consideration money had been actually paid. The result of that transaction was, therefore, to confer irrevocably upon the Defendants all the rights over the property comprised in the two instruments which the law of Spain might give them; and it is reasonable to presume that the parties intended to treat the consideration money, of which the payment was so acknowledged, as remaining in the hands of the Defendants, just as if it had been a sum paid into their house, standing in their books to the credit of the Plaintiff, and to be drawn upon by him in the same manner as the 2,500 dollars to be advanced under the first of the notarial instruments.

The question, however, remains whether, even upon this view of the Plaintiff's rights, the damages

have been correctly assessed. Their Lordships are of opinion that the sums of 670 dollars and 400 dollars which the assessors awarded to the Plaintiff under the 7th and 12th items of his amended claim for special damages were improperly awarded. As to the first they entirely concur with the learned Chief Justice, who in his charge to the assessors ruled that the full market value of the cork at Algeciras on the day of the sale must on the evidence be taken to have been realized, and that any extra price which the Plaintiff might possibly have obtained for it in a foreign market, had he had the funds to export it, was uncertain, speculative, and remote. In fact, he failed to prove on this item that he had actually sustained a loss, so that the question whether the Defendants could be reasonably taken to have contemplated such damages when they made the contract never arose. And the 12th item appears to their Lordships to consist of sums which may or may not be allowable in the taxation of costs; but which, if recoverable at all, are recoverable as costs, and not as damages.

If these items are struck out, the only item of special damage left would be the small sum of 5 dollars allowed for cost of protest, &c., and the case stands pretty clear of the questions raised and considered in Hadley *v.* Baxendale, 9 Exch. 341, and very recently by the Exchequer Chamber in the case of Horne *v.* the Midland Railway Company, 8 L. R., Exch. Chamber, 131. The only remaining question is whether the general damages amounting to 5,000 dollars were so excessive as to call for any interference on the part of their Lordships. That question ought, they apprehend, to be determined by the principles which would guide a Court of Law, sitting in Banco, in controlling the discretion of a jury. It is to be observed that this sum does not represent the whole amount of the damage to be recovered by the Plaintiff in respect of the breach of contract, less the items of special damage, because it does not include the amount remaining at the Plaintiff's credit in the hands of the Defendants. As general damages sustained by the Plaintiff by loss of credit, the sum in question appears to their Lordship on the evidence in this case to be excessive; and in truth the effect of the circuitous proceedings in the Court below is substantially to assess the damages payable

by the Defendants for their breaches of contract at the gross sum decreed against them by the final decree, viz., 7,293 dols. 1 r. 50 c.

Their Lordships have next to consider how far the proceedings in the Court below are affected by the question raised by the second objection touching the liability of the Plaintiff to repay the advance of the 2,500 dollars with interest. The Defendants appear to have been allowed the interest on these advances up to the date of the interlocutory decree in the computation of the balance remaining in their hands. But it seems clear that they have not received credit for the principal moneys or the subsequent interest thereon, and that in respect thereof they would, if the final decree were to stand, still have a counter claim against the Plaintiff. The liability of the Plaintiff to repay these advances had not accrued when the Defendants broke their contract by refusing to accept the bill; nor when the suit was commenced; nor until the 5th of December when they first made their demand pursuant to the first notarial instrument. It had, however, accrued when they had filed their answer, and is thus asserted in the third paragraph of that answer: "And these Defendants say that they have made up their accounts with the Plaintiff in respect of the said credit of 2,500 dollars, which sum had been paid by the Defendants to the Pla ntiff in different instalments, which, with interest amounted inall to the amount of 2,534 dols. 1 r. 18 c.; that they demanded payment thereof as entitled to by the terms of the said agreement, and they say that, by making default in payment of the said sum of 2,330 dols. 1 r. 18 c. the Plaintiff has committed a breach in the terms of the said instrument in writing, recited in the third paragraph of his petition."

It may be conceded that, in an equity suit to take the account between the parties and ascertain the balance due to either on the footing of the agreements between them at the date of the final Decree, this item ought to have been brought into the account; although, if the Plaintiff had asserted his claim, as the principal argument for the Appellant assumes he ought to have asserted it, by an action at law, this counter-claim, which, when the action was commenced, had not even ripened into a debt, could not have been pleaded by way of set-off to

damages which were in their nature partially, at least, unliquidated.

Their Lordships, having regard to the objections both of substance and form which have been taken to the proceedings in the Courts below, have felt considerable difficulty as to the advice which it will be their duty to give to Her Majesty on this Appeal.

It was pressed upon them them that they ought to dismiss the suit altogether ; and even at the close of his reply the Solicitor-General seemed still to contend for the dismissal of the Plaintiff's claim for relief, though he was willing that, under the power reserved by Her Majesty's order on the petition for special leave to appeal, an order should be made allowing the Plaintiff to redeem the properties comprised in the two deeds of conditional sale on payment to the Defendants of what may be due to them in respect of their advances.

But it is obvious that, if the Plaintiff had, as their Lordships think he had, a good cause of action, a dismissal of the suit on the ground that he had mistaken his remedy, would be most unjust and improper, unless it left him at liberty to seek the proper remedy in a new suit, and thus to reopen the whole litigation between the parties.

And their Lordships, having regard to the general jurisdiction of the Court below, and to the fact that the objection to the form of the suit, as one for specific performance, seems never to have been taken in the Court below, are of opinion that it is their duty, in the interest of both parties, to do justice between them in this suit.

Considering all the circumstances of the case, and the liberty reserved by the order giving special leave to appeal against the Interlocutory Decree of the 3rd of December, 1869, they are of opinion that full justice between the parties might be done in the following manner. They would reduce the amount awarded to the Plaintiff for general damages to 2,500 dollars. That sum added to the sum of 1,218 dol. 1 r. 50 c., which has been found to be the balance undrawn on the 3rd of December, 1869, and to the 5 dollars, the costs of protest, would make the gross amount of damages recoverable by the Plaintiff 3,723 dol. 1 r. 50 c. But against that amount the Defendants ought, in their Lordships'

opinion, to be allowed on equitable grounds to set off the 2,500 dollars repayable to them, thereby reducing the amount for which the Plaintiff is entitled to judgment to 1,223 dol. 1 r. 50 c., with the costs of the suit. The order to be made on this Appeal should accordingly declare that the Plaintiff is entitled to retain his judgment for that sum and the costs of the suit, and should direct that, in the event of the Plaintiff or his wife being willing to redeem, an account be taken between the parties of what is due from the Plaintiff to the Defendants for principal and interest in respect of their advances, giving credit therein to the Plaintiff for the amount due to him in respect of his said judgment debt, with interest thereon since the 3rd day of December, 1869, the date up to which interest has been calculated and allowed (the interest on both sides of the account being calculated at the rate of 6 per cent. per annum) and also giving credit to him for the rents (if any) of the properties comprised in the two instruments of conditional sale, or either of them, which have been received by the Defendants, and should further order that, upon payment to them of the balance to be found due within six months after the date of the ascertainment of such balance, together with the costs of taking the said account, and of the other proceedings to be had in the Court below for the purpose of such redemptions, the Defendants do reconvey to the Plaintiff and his wife their respective properties; and declare that, in default of such payment, the Defendants will be entitled absolutely to retain all the rights which the law of Spain may have given to them in such properties under the instruments of conditional sale, the Plaintiff being, on his side, at liberty to take out execution for the amount due to him in respect of his judgment debt.

They feel, however, that such an order as that suggested could only be made by consent of the Plaintiff. If he does not consent to it, their Lordships are of opinion that they must humbly advise Her Majesty to reverse the two decrees under appeal; to declare that, by virtue of the agreements subsisting between the parties, the firm of Larios Brothers was bound to open a credit in favour of the Respondent, and to honour his drafts, to the extent of 9,400 dollars; and that, on the 4th

of August, 1867, they had in their hands undrawn on account of the said credit a balance exceeding the amount of the bill then dishonoured; and to direct that a new trial be had before the Chief Justice and three assessors, in order to ascertain what damages have been sustained by the Plaintiff by reason of the Defendants' breaches of their said agreement, such damages to cover the whole of the amount recoverable by the Plaintiff. If this course be pursued, their Lordships, having regard to the pleadings and to the general jurisdiction of the Court, think that the Defendants ought to have the benefit, by way of set-off, of their counter-claim in respect of the 2,500 dollars and interest; and that they should be left to assert, in such manner as may be open to them, their rights under the two instruments of conditional sale.

Their Lordships think that there should be no costs of this Appeal. The costs below must be dealt with by the Supreme Court of Gibraltar.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—7/5/73.