Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Osborne and others v. *Eales, from New South Wales; delivered 16th March*, 1864.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

THIS is an Appeal from an Order of the Supreme Court of the Colony of New South Wales, refusing an injunction to stay execution upon a Judgment obtained by the Respondent against the Appellants. The Appellants are the executors of Henry Osborne, and the Respondents obtained this Judgment against them upon a bond, to be presently stated, given by the said Testator to the Respondent, under the circumstances we are about to detail.

On the 30th December, 1851, a large tract of land in the Colony was granted by the Governor to Henry Osborne, the Appellant's testator, as the purchaser of the land from one John Stirling, who derived his title by purchase from the trustees of the insolvent estate of John Terry Hughes. This grant was made to Osborne after a contest before the Commissioners of Claims in the Colony between him and Rosetta Terry, who claimed to have the land granted to her in right of a mortgage to her by John Terry Hughes, and under an arrangement made by her with the trustees of his estate, by which she was to take the land in discharge of her mortgage debt. The land having been thus granted to Henry Osborne he agreed to sell it to the Respondent for the sum of 2,000*l.*; a written agreement of sale and purchase was entered into between these parties, which was follows :—

"Agreement, made on the tenth day of July, one thousand eight hundred and fifty-two, between Henry Osborne, of Marshal Mount, Illawarra, Esquire, of the one part, and John Eales, of Hunter River, Esquire, of the other part. The said Henry Osborne agrees to sell, and the said John Eales to purchase, one thousand and twenty-seven acres and one rood of land, situate in the parish of Alnwick, county of Northumberland, granted by the Crown to the said Henry Osborne, by deed dated the thirtieth of December last, at the price of two thousand pounds, to be paid on the execution of the conveyance. The vendor is either to give the purchaser immediate possession, or to pay any necessary expenses of his obtaining such possession, but any arrears of rent or mesne profits recoverable to this date are to belong to the vendor. Mrs. Osborne is to release her dower in the usual manner."

After the making of this agreement some discussion appears to have taken place between the parties in reference to the position of the Respondent in the event of the agreement being carried into effect and Rosetta Terry proceeding to enforce her claim. We defer for the present stating the evidence as to what passed in the course of this discussion. The result of it was, that on the 21st July, 1852, a bond was given by Henry Osborne to the Respondent, and the Respondent signed a memorandum at the foot of the bond. The bond and memorandum were as follows:—

"Know all men by these presents, that I, Henry Osborne, of Illawarra, in the Colony of New South Wales, Esquire, am held and firmly bound unto John Eales, of Berry Park, in the Colony aforesaid, Esquire, or his certain attorney, executors, administrators, and assigns, in the sum of four thousand pounds of lawful British money, to be paid to the said John Eales, or his certain attorney, executors, administrators or assigns, for which payment, to be well and truly made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated this twenty-first day of July, in the year of our Lord one thousand eight hundred and fifty-two: Whereas the said John Eales has lately purchased from the said Henry Osborne certain lands in the Parish of Alnwick, in the said Colony consisting of one thousand and twenty-seven acres and one rood, granted to the said Henry Osborne by deed poll, bearing date the thirtieth day of December, one thousand eight hundred and fifty-one. Now the condition of this obligation is this, that if the said Henry Osborne shall deliver possession of the said land, or the said John Eales shall otherwise obtain possession of the said land within twelve calendar months from this date, and there shall not be, at the end of such time, any suit or other proceeding at law or in equity pending against the said Henry Osborne, or any person or persons claiming under him, or against the said John Eales, or any person or persons claiming under him, whereby the title to the said land of the said John Eales, and those claiming under him, as derived from the said Henry Osborne, may be

prejudicially affected, or if the said Henry Osborne, his executors or administrators, shall, on the twenty-first day of July, one thousand eight hundred and fifty-three, pay to the said John Eales, his heirs, executors, administrators, or assigns, the sum of two thousand pounds, with interest for the same from the date of these presents, at six pounds per centum per annum, then, and in either such case, this obligation shall be void, otherwise shall remain in full force and virtue."

"Memorandum:—If the sum of two thousand pounds, and interest, be received by me under the above bond, I undertake to convey all my interest in the land as Mr. Osborne shall direct, without any incumbrance occasioned by me."

Upon this bond being executed and the memorandum signed the purchase was completed. The estate was conveyed to the Respondent. The conveyance and the bond were delivered to him, and he paid the purchase-money and got into possession of the estate. Shortly before the purchase was thus completed, a bill was filed by Rosetta Terry against Osborne, praying either an absolute conveyance of the land or foreclosure upon her alleged mortgage title, and soon after the completion of the purchase, the Respondent was made a party defendant to this suit. He defended the suit, but ultimately by a Decree dated the 15th of November, 1856, it was declared that the Plaintiff Rosetta Terry had an equitable mortgage on the land to secure the payment of the sum of 2,000*l.*, with interest thereon, at the rate of 10*l.* per cent. per annum, and an account was directed of what was due to Rosetta Terry for principal and interest on her mortgage. In pursuance of this Decree the Master made his report on the 6th March, 1858, and thereby found that the sum of 3,116*l.* 13*s.* 4*d.* would on the 6th September, 1858, be due to Rosetta Terry in respect of her mortgage, and this sum was paid by the Respondent to Rosetta Terry, in redemption of her mortgage. From the foregoing circumstances it will be seen that the suit instituted by Rosetta Terry was pending at the end of twelve calendar months from the date of the bond, being the 21st July, 1853. Osborne did not, it appears, on that day pay to the Respondent the 2,000*l.* and interest, and demand a reconveyance of the estate as under the bond and memorandum he was entitled to do; but on the 16th August, 1853, he offered to pay to the Respondent the 2,000*l.* and interest, and to take a reconveyance of the estate. The Respondent,

however, then declined to accept the offer. Matters appear to have rested thus until the 27th April, 1858, when Osborne instituted a suit against the Respondent, which, upon his death, pending the suit, was revived by the Appellants, his executors. The Bill alleged that subsequently to the purchase agreement of the 10th July, 1852, there was a discussion between the Plaintiff and the Defendant in reference to the position of the Defendant in the event of the agreement being carried into effect, and of Rossetta Terry's succeeding in establishing her claim, and that the Defendant then insisted that he ought to have the option of rescinding his purchase, and to have security for the return of his purchase-money in the event of Rosetta Terry so succeeding; that the Plaintiff acquiesced in what was so insisted on by the Defendant, and that it was accordingly agreed between the Plaintiff and the Defendant that the Plaintiff should enter into a bond for enabling the Defendant, if he should elect so to do, to recover from the Plaintiff the purchase-money of 2,000*l.* with interest thereon, in case the Plaintiff should, in consequence of Rosetta Terry succeeding in establishing her claim, be unable to carry out the agreement for the sale to the Defendant free from the claim of Rosetta Terry, and that it was also agreed between the Plaintiff and the Defendant, that the Defendant should, on receiving back his purchase-money and interest, reconvey the land to the Plaintiff; that there was considerable discussion as to the precise terms of the bond, and especially as to what time should be allowed for the determination of the claim of Rosetta Terry, and that the result of the discussion was that the agreement was carried into effect by the bond and memorandum above set forth.

The Bill charged that the sole object of the bond was to provide that in the event of Rosetta Terry succeeding, as she had done, in establishing her claim, the Defendant might have the option of rescinding his purchase and of recovering the purchase money from the Plaintiff with interest, on reconveying the land to the Plaintiff, and that the time mentioned in the bond for payment of the 2,000*l.* and interest was inserted only in reference to the probable duration of the suit by Rosetta Terry, and was not intended to affect in any way the general object for which the

bond was given. The Bill, therefore, prayed that the Defendant might be decreed to elect either to retain or give up the purchase of the land, the Plaintiff offering in the event of the Defendant electing to give up the purchase to pay to the Defendant the 2,000*l.* with interest upon the Defendant's conveying to him the land without any incumbrances occasioned by him, the Defendant. That the bond might be cancelled and for an injunction to restrain proceedings at law upon it. The Respondent put in his answer to this Bill, and by the answer he denied the allegations of the Bill as to the discussions which had taken place respecting the bond and the purposes for which it was given, and stated that the agreement was that the bond should be given to protect his title and to secure him against any claim upon the land which he had purchased. Evidence was gone into on both sides in this suit, and upon the hearing before the primary Judge in Equity the Bill was dismissed with costs. This decision was affirmed by the Supreme Court of the Colony upon appeal, and from the decision of the Supreme Court there was an Appeal to Her Majesty which was heard before this Committee. Their Lordships gave Judgment on this Appeal on the 16th July, 1862, and after observing that the Bill was founded upon the principle that the Respondent was not entitled to hold both the bond and the estate, and that the Plaintiffs had a right to put him to his election between the two, and that the question was not raised to what extent the Defendant, retaining the estate, was entitled to avail himself of the bond, and further observing that the evidence of the intention of the parties as it was to be collected from the pleadings and the evidence was so vague, and in some respects so contradictory, that it was impossible to arrive at any satisfactory conclusion as to their intention if such evidence could be attended to against the written instrument, they proceeded to consider the legal and equitable rights of the parties, and held that the Judgment of the Colonial Court ought to be affirmed; but after stating their reasons for this conclusion they expressed themselves as follows:—

"To what extent the obligor is liable upon the bond if the purchaser keeps the estate is a question not raised upon the record, and which we cannot decide. At law the bond would be

forfeited if the claim was pending on the 21st July, 1853, and were dismissed on the 22nd. But certainly it never could be the intention of the parties that in such case the purchaser should both keep the estate and receive back the purchase-money. In that case Equity would probably have granted relief on the terms of the obligor's paying the costs which the obligee had incurred in resisting the claim; so if the claim had been established to an amount less than the purchase-money, it could not be intended that, if the purchaser had to pay 100*l.* in respect of the claim, he should recover 2,000*l.* or more from the vendor. The reasonable interpretation of the contract appears to be that the bond should stand as an indemnity to the purchaser against this claim to the extent of the purchase-money and interest."

Pending this appeal, however, the Respondent had brought an action on the bond against the Appellants, and in this action he obtained a verdict for the sum of 4,000*l.*, the full amount of the bond. The Appellants then filed the Bill against the Respondent which has given rise to the present Appeal. The Bill, after reiterating in terms the allegations contained in the former Bill as to the discussions which had taken place after the purchase agreement had been entered into in reference to the position of the Respondent, in the event of the agreement being carried into effect, and of Rosetta Terry proceeding to enforce her claim, and as to what had passed in the course of such discussion, proceeded to charge,—

"That by the terms of the contract entered into between Henry Osborne and the Defendant, the bond given by Henry Osborne to the Defendant was to stand as an indemnity to the Defendant against the claim of Rosetta Terry, to the extent of the purchase-money, or sum of two thousand pounds and interest, but no further."

And the Bill accordingly prayed,—

"That, upon payment by the Plaintiffs to the Defendant of the sum of two thousand pounds, and interest thereon, at the rate of six pounds per centum per annum, from the thirtieth of July, one thousand eight hundred and fifty-two, to the time of the offer to pay the same, together with the costs of the said action, which payment the Plaintiffs were ready and willing and thereby offered to make, the Defendant might be restrained, by the order and injunction of the Court, from further proceeding in the said action, and from issuing execution for the amount recovered in the said action; and might also be directed to deliver up to the Plaintiffs the said bond given by Henry Osborne to the Defendant."

Immediately upon the filing of this Bill the Appellants gave notice of motion for an injunction to stay further proceedings in the action upon payment by them to the Defendant of 2,000*l.* and interest from the 13th of July, 1862, to the 16th

August, 1863, when Henry Osborne offered to repay the purchase money and interest, and of the taxed costs of the action at law, which the Appellants offered to pay. This motion was supported by an affidavit of the Appellants' solicitor verifying in terms the allegations of the Bill as to the discussions which had taken place after the date of the purchase agreement in reference to the position of the Respondent, in the event of the agreement being carried into effect, and of Rosetta Terry afterwards proceeding to enforce her claim, and as to what had passed in the course of such discussions. It was met by an unsworn statement of the Respondent which was received by consent, and in which he stated as follows:—

"1. The late Henry Osborne first offered the land in the pleadings mentioned to me for sale many months before I agreed to purchase. He came to my house at Berry Park, which is an adjoining property, and asked me to show him Duckinfield (the property in question). I rode with him over it and showed it to him. He then said something to the effect that I had better buy it. I declined, saying I did not want it. He some time after again offered to sell it to me, and then I said I would give him 2,000*l.* for it, but he wanted more. In a short time after, the said Henry Osborne again came to Berry Park. I was sitting at dinner, and went outside to him. He again asked me to buy the property. I said I would give him what I had before offered (2,000*l.*) for it, and no more. He said, 'Then it is yours.' I then returned with him to the dinner-table, and said I had bought Duckinfield.

"2. Shortly after, I went to Sydney; and on the 10th day of July, 1852, a contract was signed by me and the said Henry Osborne, at the house of Mr. Holden (who was the Solicitor of Henry Osborne). Myself, the said Henry Osborne, Mr. Holden, and Mr. Daintrey (who was the Solicitor of the Respondent), were present. Before signing the contract, reference was made to Mrs. Terry's claim, which Mr. Holden seemed to think very lightly of. My solicitor, Mr. Daintrey, said something to the effect, 'If you think so little of the claim, you will have no objection to give us an absolute covenant.' Mr. Holden said to the effect that he would not mind doing that even, but it would cast suspicion on the title. It was at that meeting agreed that some security should be given to indemnify me against any claim by Mrs. Terry, but it was not until some days after that a bond was finally fixed on as the security.

"3. I looked upon the bond in no other light than as security to indemnify me against Mrs. Terry's claim, and, on my part, there was no understanding that the bond should mean or intend anything not expressed on the face of it, and of the memorandum indorsed.

"4. The memorandum was not indorsed to give the said Henry Osborne the power of repurchasing the land at any time, but to enable him to relieve himself from his liability under the bond,

if he should elect to tender back the purchase-money on the day mentioned in the bond—that is, on the 21st day of July, 1853.

"5. I deny that I ever took upon myself the expenses of defending against Mrs. Terry, or the expenses of obtaining possession of the land; on the contrary, by the agreement of the 10th day of July, 1852, in the Bill mentioned, the expenses of obtaining possession of the said land are expressly thrown on the said Henry Osborne.

"6. There was very little discussion between myself and the said Henry Osborne as to the precise terms of the bond, and there was no necessity for much discussion; because, from the day the agreement for sale was signed, it was well understood that security to protect my title against Mrs. Terry's claim should be given. I believe the said Henry Osborne cared very little about the terms of the bond, because he was confident that his title, and mine as claiming from him, could not be disturbed."

It was also met by an affidavit of the Respondent's solicitor, in which he deposed as follows:—

"1. After the purchase agreement was drawn up on the tenth of July, one thousand eight hundred and fifty-two, it was mentioned, that before the purchase-money was paid, security should be given to Defendant, to protect him, as I understood, against Mrs. Terry's claim.

"2. I heard nothing said at the meeting on the 10th of July, nor subsequently, as to Defendant having an option of rescinding the purchase at any time: and I did not understand the bond or the memorandum in any such sense. The meaning of the two together was this, as I understood it,—that if, on the twenty-first of July, one thousand eight hundred and fifty-three, the said Henry Osborne wished to get rid of his responsibility under the bond, he might do so by tendering back the purchase-money on that day, with interest, as in the bond mentioned.

"3. I verily believe that the Defendant left Sydney on the night of the twelfth day of July, one thousand eight hundred and fifty-two, and went to the Hunter, and did not return to Sydney, as I believe, until the nineteenth of July. I did not see him myself, as I believe, until the twentieth. On the day following, the twenty-first, I went with him and saw Mr. Holden. I think Mr. Osborne went with us, but I am not quite positive as to this. At this meeting it was agreed that a bond should be given. I returned to my office immediately and drew up the draft of a bond accordingly, and submitted it to Mr. Holden, who altered it slightly.

"4. On the same day, the twenty-first, the conveyance of the land and bond were handed over to me at Mr. Holden's office. Mr. Holden, the late Mr. Osborne, and Defendant and myself were present, and I was directed to take immediate proceedings to obtain possession, and I commenced an action of ejectment against the tenants in possession at once. Mrs. Terry shortly after made Defendant party to a suit already commenced against the late Henry Osborne.

"5. From my recollection of what passed at the time the bond was entered into, and from all that has passed between myself and the Defendant since, I verily believe that the Defendant, from first to last, always considered the bond in the light of a security to his title."

The Respondent's Solicitor also verified the Judge's notes upon the trial of the action which were as follows :—

" Daintry examined by Sir William Manning :—I am solicitor of the Defendant Eales. The bill filed against Osborne first, and after the bond given against Eales. Under the order, I paid 3,116*l.* 13*s.* 4*d.*, being the principal and interest on the mortgage. The sheriff was ordered to be paid by Osborne or Eales the costs of Mrs. Terry's suit, which I paid for Eales, amounting to 354*l.* 17*s.* 3*d.* Eales paid me the costs between attorney and client, 538*l.* 9*s.* 7*d.*, and the interest paid on the principal and interest was 63*l.* 6*s.* 8*d.* The amount altogether is 4,073*l.* 6*s.* 10*d.* The circumstances under which the bond was given were, that Osborne had agreed to sell the land to Eales, and, between the contract and the conveyance, I learned that a suit had been commenced against Osborne; and it was agreed that security should be given. The bond was drawn, and submitted to Mr. Holden, and executed at the same time as the conveyance was executed, I believe. *Cross-examined by Mr. Martin:*—Eales was to pay two thousand pounds. It was not stated that if he lost the land he was to get his two thousand pounds and interest. We discussed the claim; Mr. Holden made light of it. I said, 'Will you give an absolute covenant for title?' Mr. Holden objected, and this was then given. Two thousand pounds was put into the bond. Osborne and Eales told me to prepare the bond, after the conversation as to the bill. Eales has the land. *Re-examined by Sir William Manning:*—Some security was talked of against the suit, and the bond was proposed. I can find no correspondence as to it."

Upon the hearing of this motion before the primary Judge in Equity, it was refused without costs, and upon appeal this decision was affirmed by the Supreme Court. It is from this order of the Supreme Court, affirming the decision of the primary Judge, the present Appeal has been brought.

In disposing of this Appeal we must of course have regard to what has been already decided in the course of the litigation with reference to the bond, the subject of the appeal, and we consider it to have been finally settled by the decision upon the former Appeal to which we have referred, that the Respondent was entitled to hold both the purchased estate and the bond. Being then thus entitled to hold the bond, the Respondent must of course be entitled to enforce it, and the sole question therefore which we have now to consider is, for what purpose and to what extent he is in equity so entitled. That this bond is not to be considered as a bond for the absolute payment of the sum of 4,000*l.* without reference to any other consideration, we entertain no doubt. The reasons

assigned in the Judgment upon the former Appeal are in our opinion conclusive upon that point. For the reasons there assigned it seems to us to be clear that the bond must be considered to be a bond of indemnity merely, and the real question, therefore, which we have now to decide is, what is the extent of the indemnity which the bond was intended to secure; whether, as the Appellants contend, it was intended for the security of the Respondent to the extent of the purchase-money and interest only; or, as the Respondent contends, it was meant for his security to the full extent of the 4,000*l.* made payable by it. From the Judgment delivered upon the former Appeal, which, however, was extra-judicial, the point not having been before the Court, it is evident that the opinion of the Court was favourable to the view taken by the Appellants, and on the other hand it is not less evident from the Judgments delivered by the Judges of the Colonial Court that their opinion is favourable to the Respondent's view. The case, therefore, cannot be considered otherwise than as one of considerable difficulty. We are bound, however, to act upon our own opinion, much as we must of necessity respect the opinion expressed by this Court upon the former Appeal, although that opinion was extra-judicial; and we think it right to express our full concurrence in the opinion of the Colonial Judges that they also were bound to act upon the opinions which they entertained. The bond is forfeited at law, and at law the full sum of 4,000*l.* is payable upon it. There is no case alleged upon the bill for the interference of a Court of Equity, except upon the footing of agreement. There is no fraud, no mistake, no accident alleged. The case rests wholly upon the alleged agreement, and the question therefore seems to be whether the Appellants have proved this alleged agreement. We are satisfied that upon the evidence before us they have failed to do so. No doubt there are circumstances which would render it probable that the agreement alleged was the agreement which was likely to have been come to between the parties. The fact of the bond having been taken in the sum of 4,000*l.*, which is exactly double the amount of the purchase money, and of the heavy liability imposed upon the vendor, the testator of the Appellants, by the bond having been taken in so large a sum, would tend to that

conclusion; but these are circumstances which show merely what the agreement might probably have been, not what in fact it was, and on the other hand it is to be considered that it was plainly intended that the Respondent should become the owner of the estate in the event of the option to re-purchase provided for by the bond not being exercised, and that in the event of the Respondent thus becoming the owner of the estate, he could neither improve it nor in any way deal with it, except at his own peril, if in the event of his title being disturbed he was to recover only his purchase money and interest. It is to be considered too that if the agreement had been such as is alleged on the part of the Appellants it might easily have been so expressed in the bond, and that it is not so expressed. These are circumstances which render it difficult to suppose that the Respondent, in the event of his title being disturbed, was to recover back only his purchase money and interest. Weighing these considerations on the one side and on the other we find ourselves unable to arrive at any certain conclusion that the liability upon this bond was intended to be limited to the purchase money and interest, and in the absence of such a conclusion we think that a Court of Equity could not be justified in interfering with the legal liability upon the bond. A Court of Equity ought not, as we think, to interfere with a legal right upon the assertion of a merely doubtful equity. It ought, we think, before it interferes in such a case, to be satisfied that there is an equity calling for its interference as clear as the legal right which it is called upon to control.

It was argued for the Appellants that the Respondent was not bound to pay the mortgage, and that he was not entitled to alter the Appellants' liability by making the payment, but having regard to the purchase agreement it was the Appellants' duty to pay the mortgage; and if, as we think was the case, the Respondent was, as between him and the testator of the Appellants, to become the owner of the estate after the period limited for the repurchase he was, in our opinion, entitled to pay the mortgage, although he was not bound to do so. Again, it was argued for the Appellants that it could not be intended that the testator should not only lose the

estate and the purchase money, but be liable also to pay the mortgage, so far as it might exceed the purchase-money; but in addition to what has been already said as to the vendor's liability to pay the mortgage, it is to be observed that the vendor, the testator of the Appellants, entered into this bond with full knowlege of the nature, if not of the extent, of the claim against the estate, and that with that knowledge he thought it for his interest to give the bond rather than lose the opportunity of selling the estate. It appears indeed from the evidence that he thought but lightly of the claim. He cannot, we think, be entitled to visit upon the Respondent the erroneous opinion which he may have formed of the validity or amount of the claim. That the Respondent also knew of the claim does not seem to us to alter the case, as he took an indemnity against it. It was further argued for the Appellants that the Respondent was not entitled to recover the costs paid by him to Rosetta Terry, or the costs incurred by him in defending her suit, and authorities were referred to as to damages in cases of eviction, but on looking into these authorities they do not appear to us to support the Appellants' contention. On the contrary, in most if not all of the cases, the costs of defending the title seem to have been allowed. We do not think it necessary, however, to enter into a minute examination of the authorities on this subject, for we do not think that this case can be governed by the cases on eviction. The intention of the parties appears to us to have been that the Respondent should be fully indemnified to the extent of the liability upon the bond, and as he was to continue to be the owner of the estate we think that he was well entitled to defend the proceedings instituted by Rosetta Terry, more especially as those proceedings extended to the recovery of the estate itself, and not of the mortgage money only. We are of opinion therefore that the Respondent was entitled to be allowed the costs incurred in defending Rosetta Terry's suit, and as these costs, together with the principal and interest paid upon the mortgage, exceed the 4,000*l.* made payable by the bond, we think that the motion for the injunction in this case was properly refused. We shall, therefore,

humbly recommend Her Majesty to dismiss this Appeal; but having regard to what was said upon the hearing of the former Appeal and to the difficulty of the case, we shall recommend that the Appeal be dismissed without costs.