*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Osborne* v. *Eales, from the Supreme Court of New South Wales; delivered 16th July,* 1862.

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Present:

LORD KINGSDOWN.
JUDGE OF THE ADMIRALTY COURT.
SIR EDWARD RYAN.

IN this case, a bond was executed by the Appellant's testator to the Respondent, and the question is what is to be the effect of it in certain events for which the parties to it have not expressly provided. Mr. Osborne, whom the Appellant represents, obtained on the 30th December, 1851, a grant of a large parcel of land in New South Wales from the Crown, and agreed, on the 10th July, 1852, to sell the land to the Respondent for the sum of 2,000*l.* A written agreement to this effect was signed by the vendor and the Respondent.

At this time a lady named Terry insisted that she was entitled to have the grant which had been made to Osborne made to her, and she had threatened to institute proceedings against Osborne for the purpose of establishing her right.

Osborne and the Respondent were both aware of this claim of ~~Miss~~ Terry, and a negotiation took place between them on the subject of it. It resulted in an arrangement which can be collected only from the terms of the bond which was executed, and the agreement added to it.

The bond was dated the 21st July, 1852, and was in these terms :—

"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 to John Eales, of Berry Park, in the Colony

or what cause or matter soever they concern, shall be made and had by the parties aggrieved, or having cause of appeal, after such manner, form, and condition as is limited for Appeals to be had and prosecuted within this realm, in causes of matrimony, tithes, oblations, and obventions by the preceding statute. It seems clear that, although the words of this section are very general, they must be confined by the context to Appeals which, in the words of the statute, "had been provoked or made, out of the realm, to the Bishop of Rome."

It is the more necessary that this matter should be understood, because a general impression seems to have prevailed that Appeals from the Admiralty Courts are governed by these statutes of Hen. VIII. This appears to have been the opinion of Lord Stowell, for in the case of the "Sally" (2 Rob. 229), that eminent Judge says:—

"With respect to time, it has never been the practice of this Court to construe the limitation of time for Appeals" (from the Vice-Admiralty Courts of the Colonies) "with the same strictness as would be applied to Appeals from the Courts of this country. It has been held that the statute of Hen. VIII does not apply to cases in the Plantations, but that it is left to the discretion of the Court to entertain an Appeal."

This language obviously implies that Lord Stowell thought that the statutes applied to Appeals from the Admiralty Court of this country. A careful examination of them has led their Lordships' minds to a different conclusion, and they are satisfied that the limitation of the time for appealing in these cases does not depend upon legislative enactment, but upon long-established practice, most probably derived, as to the prescribed limit of fifteen days, from the statutes themselves. That it is a mere rule of practice not incapable of bending to circumstances, appears, amongst other instances, from the case of the Illeanoon Firates (6 Moore, 471), where leave was given to appeal against an Interlocutory Decree of the Court of Admiralty, the Appeal not having been interposed in due time. Other cases might be adduced where, if a similar indulgence was not granted, no doubt appears to have been entertained that it was in the power of their Lordships to grant it if a proper case had

been made out. The case of the "Ulster" mentioned in the course of the argument is no authority either way. In that case the Appeal had been lodged within fifteen, but more than ten days from the date of the sentence. It was insisted that the rule of the civil law limiting the time of appealing to ten days was the one which applied to Admiralty cases, and all that was decided was that the Appeal having been interposed within fifteen, but more than ten days from the date of the Decree, it was not thereby invalid.

Their Lordships, therefore, entertain no doubt that they are not precluded either by the statutes referred to, or by any inflexible rule of practice from granting the indulgence prayed; and the only question to be determined is, whether a proper case has been made out for the exercise of their discretion. The grounds of the application are shortly these:—Cross-actions were brought by the owners of the "Mæander" and of the "Florence Nightingale" respectively, in respect of a collision between the two vessels. The Judge of the Admiralty pronounced a Decree that the "Mæander" was alone to blame, but that the act which caused the collision was that of the pilot who had charge of her; and he dismissed the owners in the cause brought against them, leaving each party to pay his own costs, but condemning the owners of the "Mæander" in the costs of the cross-action.

The owners of the "Mæander" were satisfied to abide by the Decree in all respects, and they supposed that the owners of the "Florence Nightingale" would also have acquiesced; but, contrary to their expectation, the owners of the "Florence Nightingale" lodged an Appeal, of which the owners of the "Mæander" were not informed until after the fifteen days from the time of the Decree had expired. If they had known of the Appeal of the opposite party, they would undoubtedly have presented their cross-Appeal. And it appears to their Lordships that acting, as the owners of the "Mæander" did, under a not unreasonable belief that the matter would rest with the Judgment of the Court of Admiralty, no laches can be justly imputed to them, and that the leave to appeal for which they petition ought to be granted.