[HIGH COURT OF AUSTRALIA.]

PATERSON . . . . . APPELLANT;
DEFENDANT,

AND

McNAGHTEN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *June* 14, 15, 16, 19, 20, 30.

Griffith C.J., Barton and O'Connor JJ.

Husband and wife—Separation deed—Restraint on anticipation—Effect of clause on revocability of contract—Waiver of condition precedent—Equitable plea—Accord and satisfaction.

The respondent, as trustee of a chose in action vested in him by an order of the Supreme Court, brought an action to recover from the appellant arrears alleged to be due under a covenant in a deed of separation by which the appellant covenanted to pay to a trustee a certain sum per annum by quarterly instalments, upon trust for his wife for her separate use without power of anticipation. The appellant pleaded *inter alia*, an equitable plea alleging that by a clause of the deed it was provided that under certain circumstances, upon the performance by the appellant of certain conditions as to giving notice, the deed should be considered as at an end and its covenants void. The plea alleged further that the circumstances contemplated in the said clause had arisen, that the wife had waived the performance of the condition as to notice, and that the deed was therefore at an end, and its covenants void; and that the appellant, before any of the moneys claimed became due, ceased to pay the sum covenanted to be paid, and paid other sums to the wife and entered into other arrangements with her from time to time, and that these moneys were so paid and arrangements entered into by the appellant on the faith and understanding that the arrangement in the deed was at an end and the covenants void, and his wife accepted these moneys and entered into these arrangements on the same faith and understanding, and by her conduct both she and the respondent were estopped from setting up and suing upon the deed. Issue was joined upon the pleas.

It appeared at the trial that at the date of the alleged notice, one quarterly instalment was due and unpaid. The jury found specially that the wife had

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waived the performance of the condition as to notice, and also that she accepted the moneys paid and the other arrangements made after the date of the waiver, as alleged in the plea.

Held, that the plea must be construed not as merely setting up a waiver by the wife of the condition as to notice, but as further alleging that on each occasion when a payment was made under the substituted arrangement, the wife accepted the payment and the fresh arrangement as a satisfaction of all instalments then due, and agreed not to insist upon the stipulation as to notice or to set up the deed as creating a subsisting obligation; and

That, inasmuch as a restraint on anticipation imposes no restriction upon a wife with respect to income actually accrued due, the plea disclosed a good defence in Equity as to all the instalments sued for except the first; and

That, upon the findings of the jury, the defence had been substantially proved.

Hood Barrs v. *Heriot*, (1896) A.C., 174, followed.

Semble, that but for the equitable nature of the interests involved, this would also have been a good defence at common law, by way of accord and satisfaction.

An executory contract to which a married woman is a party, and which does not amount to a complete gift of property, is not made irrevocable by the mere fact that it contains a clause in restraint of anticipation with regard to her rights under the contract.

Semble, therefore, that in a separation deed by which no property is assigned such a clause would not prevent the wife from rescinding or releasing the deed, or waiving her rights under it.

Decision of the Supreme Court, *McNaghten* v. *Paterson*, (1905) 5 S.R. (N.S.W.), 90, reversed, and judgment of *Darley* C.J. restored.

APPEAL from a decision of the Supreme Court of New South Wales.

The following statement of the facts is taken from the judgment of *Griffith* C.J.:—

This action was brought by the respondent as trustee of a chose in action which had been vested in him by an order of the Supreme Court under the *Trustee Act* (N.S.W.) 1898, to recover arrears of money covenanted to be paid by the appellant under a deed of separation, dated 2nd April, 1894, and made between the appellant of the first part, M. S. Paterson, his wife, of the second part, and J. S. Gill, who resided out of New South Wales, of the third part. The respondent, as assignee of the chose in action, took it, of course, with all its equities. The deed, after stipulations that it

should be lawful for the wife to live apart from her husband and to choose her residence wherever she might think fit, provided that such residence did not prevent her compliance with clause 6 of the deed, and that neither should molest the other or take any steps to compel a return to cohabitation, contained in clause 3 a covenant by the appellant to pay to Gill during the joint lives of himself and his wife, subject to clause 4, the sum of £400, payable quarterly on the first days of January, April, July, and October, in each year, "upon trust for the said M. S. Paterson for her separate use and she shall not have power to anticipate the same."

Clause 4 of the deed is as follows:—"In the event of the said H. Paterson," (the appellant) "at any time after the expiration of twelve months from the date hereof considering that the said amount in the third clause mentioned should by reason of the diminution of his income or otherwise be reduced, he shall give notice thereof to the said J. S. Gill and in the event of no agreement being arrived at between all the parties as to the amount to be thereafter paid by the said H. Paterson to the said J. S. Gill within one month after notice of his intention to pay such reduced amount has been received by the said J. S. Gill from the said H. Paterson then the arrangement herein contained shall be considered as at an end and the covenants and agreement herein contained shall become void and not hereafter binding upon the parties."

Clauses 6 and 7 stipulated that the wife should have sole custody and control of the child of the marriage, and of his education and bringing up till he attained 21, without any interference on the part of the husband, with a proviso that the child should spend every alternate Sunday with his father in Sydney except on two occasions in the year, when his mother was to be at liberty to take the child away from Sydney for periods not exceeding six weeks. By clause 8 Gill covenanted to indemnify the appellant against any claims for his wife's debts.

The instalment of £100 payable on 1st April, 1895, was not paid by the appellant. On 26th March his solicitors had written to a Mr. Hamilton, a solicitor who had acted as Gill's agent to receive the money payable under the deed of separation, to ask if he was prepared to accept service of a notice in terms of clause

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4 of the deed and to waive the necessity of a notice being sent to Gill. On 3rd April an interview took place between Hamilton and the appellant's solicitor, at which Hamilton, acting, as he deposed, on the authority of Mrs. Paterson, agreed to waive the question of notice to the trustee. Negotiations then took place between them as to the reduced amount to be paid to her, but they failed to come to an agreement. These negotiations had, of course, no effect upon the claim for the £100 which had already accrued due. Mrs. Paterson then instituted a suit for judicial separation and obtained an order for alimony *pendente lite*. The suit was dismissed on the merits in November, 1895.

In January, 1896, she applied for an order for maintenance under the *Deserted Wives and Children's Act*, but her complaint was dismissed. Further negotiations then took place between the husband and wife through their respective solicitors, with the result that fresh arrangements were made from time to time as to the allowance to be paid to her by the appellant, and as to the custody of the child, and the moneys payable under the fresh arrangements were from time to time paid to and accepted by the wife.

On 5th March, 1897, an order was made by the Supreme Court, by consent, upon an application by the appellant for a writ of *habeas corpus* against the wife in respect of the child, by which the conditions of the deed as to the access of the appellant to the child were materially varied, and it was ordered that the appellant should pay the wife £15 a month by way of maintenance for the wife and child (subject to diminution in certain events), and should also pay the child's school fees at a rate to be agreed upon between the parties' solicitors. This order was to be in force for two years from its date.

On 3rd May, 1899, another order was made by *Cohen* J., also upon an application for a writ of *habeas corpus* by the appellant, whereby the custody of the child was given to the appellant with full directions as to his future education at the appellant's expense. The child was to spend the first half of his vacations with his father, and the second half with his mother. No limit was assigned to the duration of this order, and it is still in force.

The plaintiff's declaration in the action alleged that the appel-

lant by deed of 2nd April, 1894, covenanted to pay Gill the sum of £400 per annum by quarterly instalments, but did not do so, that the balance of £1879 9s. 4d. remained due, and that the right to sue for and recover that sum had been vested in the plaintiff. Credit was given for the sums actually paid by the appellant.

The appellant pleaded denying the existence of the alleged debt, and also pleaded an equitable plea, alleging that the deed sued upon was a deed of separation, Gill being a trustee as therein mentioned. The plea then set out the fourth clause of the deed and proceeded :—

"And the appellant says that, after the expiration of the said twelve months from the date of the said deed, and before any portion of the said sum of £1879 9s. 4d., herein sued for became due under the said covenant of the said deed, the defendant considered that the said amount in the said third clause of the said deed mentioned, should, by reason of the diminution of his income and otherwise, be reduced, and the defendant says that the said J. S. Gill was a trustee under the said deed for the said M. S. Paterson, and was by the said deed to receive the said moneys for her the said M. S. Paterson, and the said M. S. Paterson was and is solely entitled to the said moneys to be paid under the covenant in the said deed in the declaration mentioned and sued upon, and this action is now brought by the plaintiff as trustee for and for the sole benefit of the said M. S. Paterson; and the defendant says that he gave notice of the fact that he considered that the said amount in the said third clause of the said deed mentioned should for the reason aforesaid be reduced to the solicitor acting for the said M. S. Paterson and for the said J. S. Gill; and the said M. S. Paterson accepted the said notice in lieu of and as a good and valid notice under the said clause of the said deed, and exonerated and discharged the defendant from giving such notice to the said J. S. Gill; and the defendant says that no agreement was arrived at between the said parties the defendant and the said J. S. Gill and the said M. S. Paterson as to the amount to be thereafter paid by the defendant to the said J. S. Gill within one month after such notice had been given to the said solicitor or at all, and thereupon the said arrangement in the said deed contained was considered as at an end, and the

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covenants and agreements therein contained, including the said covenant in the declaration mentioned, became void and not thereafter binding on the defendant, and the said J. S. Gill and the said M. S. Paterson; and the defendant thereupon and before any of the said moneys in the declaration claimed became due ceased to pay the said moneys by the said deed covenanted to be paid, which is the alleged breach; and the defendant paid other moneys to the said M. S. Paterson, and entered into other arrangements with her from time to time, and the said moneys were so paid, and the said arrangements entered into by the defendant on the faith and understanding that the arrangement in the said deed was at an end, and the said covenant void; and the said M. S. Paterson accepted the said moneys and entered into the said other arrangements upon the same faith and understanding, and is now estopped by her said conduct, and the plaintiff is estopped by her conduct from now setting up and suing upon the said deed."

On these pleas issue was joined. It did not appear on the pleadings that the money was to be paid to Gill for the separate use of the wife without power of anticipation.

At the trial the jury, in answer to questions left to them by the learned Chief Justice, found that Mrs. Paterson had accepted notice to Hamilton as a good notice under clause 4, and had exonerated the appellant from giving notice to Gill. They also found that she "accepted the moneys paid and other arrangements made since April, 1895, on the faith and understanding that the arrangement in the deed was at an end and the covenant therein contained void."

On these findings the learned Chief Justice directed a verdict for the plaintiff for £100, reserving leave to the plaintiff to move to increase the verdict to £1879 9s. 4d. A rule to increase the verdict accordingly was afterwards made absolute by the Full Court: *McNaghten* v. *Paterson* (1). The appeal was from this rule.

Gordon K.C. and *Rolin*, for the appellant. The orders of the Supreme Court under which the respondent was appointed to

(1) (1905) 5 S.R. (N.S.W.), 90.

receive the moneys and to sue for them are invalid, and he is not the proper party to sue. Sec. 38, sub-secs. (*c*) and (*f*) of the *Trustee Act* 1898 applies only to the case of a bare trustee. Gill was not a bare trustee, but was bound to indemnify. McNaghten could not be sued upon the covenant by Gill to indemnify.

[GRIFFITH C.J.—As the pleadings stand, if the orders could be made at all, they must be taken to be good. The section seems to apply to this case.]

The principle of *Jorden* v. *Money* (1) upon which the Supreme Court relied, does not apply. Here a waiver is alleged. The wife had power to waive the notice. Even rights given by Act of Parliament may be waived. The deed here contains no provision as to any particular form of notice, and the notice necessary under clause 4 was waived. If the notice had been given as required by that clause, the deed would have been at an end. The acts of the wife amounted to a representation that the deed was at an end. She treated notice to herself as notice to Gill. The jury have found both waiver and estoppel against the wife. All the allegations in the equitable plea have been found in the appellant's favour. The evidence shows that arrangements were made and proceedings taken by both parties inconsistent with their rights under the deed. It is not open to the wife or the respondent to contend now that the rights of the wife under the deed remain unchanged. [He referred to *Chadwick* v. *Manning* (2); *Earl Beauchamp* v. *Wynn* (3); *Selwyn* v. *Garfit* (4); *In re Thompson and Holt* (5); *Watts* v. *Hyde* (6); *Caincross* v. *Lorimer* (7); *Agra and Masterman's Bank* v. *Leighton* (8); *Cochrane* v. *Green* (9); *Encyclopædia of the Laws of England*, sub. *Waiver and Acquiescence*.]

The doctrine of restraint on anticipation cannot be applied to such a deed as this. The authority of *Bateman* v. *Faber* (10), is not disputed, but it applies only to separate property settled on a married woman. The separation deed constitutes the wife a *feme sole* as regards the benefits under it: *Cahill* v. *Cahill* (11);

(1) 5 H.L.C., 185.
(2) (1896) A.C., 231.
(3) L.R. 6 H.L., 223.
(4) 38 Ch. D., 273.
(5) 44 Ch. D., 492.
(6) 17 L.J. Ch., 409.
(7) 3 Macq. H.L. Cas., 829.
(8) L.R., 2 Ex., 56.
(9) 9 C.B.N.S., 448.
(10) (1898) 1 Ch., 144.
(11) 8 App. Cas., 420.

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Macqueen on Husband and Wife, 3rd ed., p. 338. The respondent's argument must go so far as to contend that the presence of the words "restraint on anticipation" in the deed make it irrevocable, and incapable of modification in any particular by agreement on the wife's part. That is to say that, even though in the wife's suit for judicial separation the Court had made a consent decree, it would have had no power to order the payment of alimony, in any way inconsistent with the deed, or to give any directions as to custody of the child. *Nicholl* v. *Jones* (1), which was relied upon by *A. H. Simpson* J., does not apply, because there is here no settled fund of personalty. The words in the deed have no meaning to which effect can be given. [He referred to *Bolitho & Co. Ltd.* v. *Gidley* (2) and *Hood Barrs* v. *Heriot* (3).]

Delohery and *Mason*, for the respondent. The equitable plea does not disclose facts upon which a Court of Equity would grant an unconditional and perpetual injunction. Justice could not be done without bringing before the Court a third party. Mrs. Paterson, the person responsible for the alleged waiver, is not a party.

A restraint on anticipation prevents a married woman from affecting the property settled upon her, whether by fraud, estoppel, or release, whatever the nature of the property. A covenant to pay money is included in the meaning of property: *Jackson* v. *Hobhouse* (4); *Stanley* v. *Stanley* (5); *Thomas* v. *Price* (6). The rule applies to rents, which are analogous to the right to income under this deed. It applies to a covenant to pay certain monthly sums: *Birmingham Excelsior Money Society* v. *Lane* (7). The *Married Women's Property Act* 1901, includes a chose in action under the term "property," sec. 28. Nothing that the wife could do, even for her advantage, could put an end to the deed: *Robinson* v. *Wheelright* (8). An agreement under seal made by all the parties would be ineffective to remove the restraint: *Bateman* v. *Faber* (9); *Clive* v. *Carew* (10). The restraint cannot be evaded

(1) L.R. 3 Eq., 696.
(2) (1905) A.C., 98.
(3) (1896) A.C., 174.
(4) 2 Mer., 483.
(5) 7 Ch. D., 589.
(6) 46 L.J. Ch., 761.
(7) (1904) 1 K.B., 35.
(8) 25 L.J. Ch., 335; 21 Beav., 214; 6 De G. M. & G., 535.
(9) (1897) 2 Ch., 223; (1898) 1 Ch., 144, at pp. 149, 150.
(10) 1 John. & H., 199.

by any document however formal: *Shafto* v. *Butler* (1); *In re Glanvill*; *Ellis* v. *Johnson* (2); *Stogdon* v. *Lee* (3).

[GRIFFITH C.J.—Then do you contend that by means of the words "without restraint on anticipation" a married woman's contract may be made unalterable?]

Yes, so far as the contract is executory, and relates to future payments; relief can only be obtained through the Court of Equity: *Bateman* v. *Faber* (4).

[GRIFFITH C.J.—The law as you state it, is not disputed. The question is whether it applies to rights under an executory contract to which the married woman is herself a party.]

Some meaning must be given to the words. They are of a technical character, and have always been given a definite meaning. This is an instance of the very case which the doctrine was intended to meet, viz., to protect the wife against the influence of her husband: *In re Ridley*; *Buckton* v. *Hay* (5); *In re Vardon's Trusts* (6). *Heath* v. *Wickham* (7) is a direct authority as to the ability of a wife to vary a separation deed containing such a clause. The doctrine has been applied to a debt on a bond: *In re Brettle*; *Jollands* v. *Burdett* (8); to a mortgage debt in *Willett* v. *Finlay* (9). The facts of the present case may be new, but there is nothing in them to take the case out of the old rule. [He referred to *Bolitho & Co. Ltd.* v. *Gidley* (10).]

Assuming that the wife could release the appellant, the equitable plea is bad. There is no sufficient allegation of authority, and no estoppel shown which will prevent the trustee from setting up the deed. There is a mere allegation of a voluntary promise, or statement of intention not to take advantage of the omission to give notice. The "faith and understanding" mentioned in the jury's finding must be referred only to that set out in the plea. There can be no estoppel by representation except by representation of an existing fact. A mere promise will not estop: *Jorden* v. *Money* (11). There was here a bare promise without consideration.

(1) 40 L.J. Ch., 308.
(2) 31 Ch. D., 532, at p. 537.
(3) (1891) 1 Q.B., 661.
(4) (1898) 1 Ch., 144.
(5) 11 Ch. D., 645.
(6) 31 Ch. D., 275, at p. 280.
(7) 3 L.R. Ir., Ch., 376; 5 L.R. Ir., Ch., 285.
(8) 2 De G., J. & S., 79.
(9) 29 L.R. Ir., Ch., 156.
(10) (1905) A.C., 98.
(11) 5 H.L.C., 185.

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[GRIFFITH C.J.—Was not the appellant induced by the representation to refrain from giving formal notice? *Nash* v. *Armstrong* (1).]

The wife had no authority to waive notice, or to make any representation binding the trustee: *George Whitechurch Limited* v. *Cavanagh* (2). The provision as to reducing the amount was for the husband's benefit and must be strictly performed: *Broom's Maxims*, 7th ed., p. 531; *Williams* v. *Stern* (3). The trustee is not a mere dry trustee without rights under the deed. He is entitled to insist that notice be given to him in accordance with the deed, and no substituted arrangement can be made by the other parties to the deed without making him a party to the arrangement. The deed could not be altered or rescinded except in the way pointed out by the terms of the deed; even re-cohabitation will not avoid a separation deed, if the deed itself provides that it is to be avoided only in some particular manner, *e.g.*, by agreement in writing: *Randle* v. *Gould* (4). The Court will look jealously upon any transaction between the *cestui que trust* and the person who is liable under the deed: *Doe d. Rowlandson* v. *Wainwright* (5). No case has been cited in which the rights of a *cestui que trust* have been deemed to be waived by statements made by him to the person liable without the sanction of the trustee. It is to prevent such abandonment of rights that the trustee is appointed.

Gordon K.C., in reply. The dictum of Lord *Campbell* C.J. in *Randle* v. *Gould* (4) was questioned in *Nicol* v. *Nicol* (6) by *Cotton* L.J. and *Bowen* L.J. In the latter case it was held that the former must be regarded as a decision merely upon the construction of the deed then in question, and not as laying down any general rule.

As to waiver, the contention of the respondent would do away with the law of waiver altogether. The authority of *Jorden* v. *Money* (7) is not disputed, but in this case the waiver was not a mere representation of intention but a definite contract for consideration.

(1) 10 C.B.N.S., 259.
(2) (1902) A.C., 117.
(3) 5 Q.B.D., 409.
(4) 8 E. & B., 457; 27 L.J.Q.B., 57.
(5) 8 A. & E., 691.
(6) 31 Ch. D., 524.
(7) 5 H.L.C., 185.

[He was stopped on this point.]

The restraint on anticipation does not prevent a married woman from rescinding a contract. It only applies to money payable to her under it. She cannot forestall it, but she may re-contract. There is no case in which the restraint has been applied to anything which was not in the nature of property. It is to protect the property of the separate estate. But it does not apply to a mere contract, like a separation deed, which the wife has clearly power to break in one way, *i.e.*, by re-cohabitation. *Birmingham Excelsior Money Society* v. *Lane* (1), only applies where the deed admittedly subsists, it is no authority for the contention that the deed is irrevocable. *Heath* v. *Wickham* (2) is fatal to the respondent's contention on this point. He is not enforcing the covenant, but is suing as trustee for past income already due to the wife. The restraint ceases immediately the moneys become payable: *Hood Barrs* v. *Heriot* (3). For these sums, as they became due, there has been an accord and satisfaction from time to time. The wife agreed on each occasion in return for further advantages to forego the amounts not paid, and the provisions of the deed, and accepted the smaller sum. Different arrangements were made on many matters, altogether inconsistent with the deed, and both parties accepted them as part of the consideration for the new arrangement.

[GRIFFITH C.J. referred to *Goddard* v. *O'Brien* (4)].

That is the gist of the plea, and the third finding of the jury is substantially a finding that the plea has been made out. The wife, having allowed the appellant all these years to pay moneys and to alter his position on the footing that the deed was at an end, is now debarred by her *laches* and acquiescence from setting it up. There were, therefore, facts alleged and proved which amount to an absolute discharge of the liability under the deed. Even if the plea is informal, any defects would be cured by amendment, which the Court would be bound to allow after such a finding of the jury. A new trial would be futile, as all the material facts have already been found in the appellant's

(1) (1904) 1 K.B., 35.
(2) 3 L.R. Ir. Ch., 376; 5 L.R. Ir. Ch., 285.
(3) (1896) A.C., 185.
(4) 9 Q.B.D., 37.

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favour. Under such circumstances a new trial will not be ordered: *Deane* v. *City Bank of Sydney* (1).

Delohery, on the question of accord and satisfaction. The third finding of the jury must be looked at in connection with the question left to them, the plea and the directions of the Judge. A consideration of these will show that the attention of the jury was directed solely to the time when the notice was given. The question of accord and satisfaction as now raised was never presented to them. They found, not that the new arrangements were accepted from time to time in place of the rights under a *then existing* deed, but on the faith and understanding that the deed was at an end in 1895. That contradicts the defence of accord and satisfaction, which is in its essence a confession and avoidance, on the basis of the continued existence of the deed. On such a finding the Court cannot hold that there was a fresh accord and satisfaction as each payment fell due. In 1895 there could not be an accord with respect to future breaches: No evidence was given by the plaintiff to controvert the plea in this aspect. It was treated as applying only to what took place in 1895.

[GRIFFITH C.J. referred to *Hobson* v. *Cowley* (2).]

That was a case of substituted agreement, not of accord and satisfaction. A defence of accord before breach would be met by the restraint on anticipation.

If the Court decides in favour of the appellant on this point, no costs should be allowed, as the point was never raised before. [He referred also to *Barclay* v. *Bank of New South Wales* (3); *Day* v. *McLea* (4).]

Cur. adv. vult.

June 30.

GRIFFITH C.J. [His Honor, having stated the facts as already set out, continued]: *Owen* J. in his judgment referred to the well known rule laid down in *Jorden* v. *Money* (5); and *Chadwick* v. *Manning* (6), that in order to create an estoppel a representation

(1) 2 C.L.R., 198.
(2) 27 L.J., Ex., 205.
(3) 5 App. Ca., 374.
(4) 22 Q.B.D., 610.
(5) 5 H.L.C., 185.
(6) (1896) A.C., 231.

must be of an existing fact and not of a mere intention; and he thought that the waiver of notice set up by the appellant amounted to no more than an expression of intention by the wife not to avail herself of the failure to give notice and not to set up the deed as valid. If this were the true effect of a waiver this reasoning would be conclusive. But, as I will presently show, the doctrine of waiver rests on other grounds. The learned Judge then dealt with the power of the wife to waive the notice, and thought that she had no such power by reason of the restraint on anticipation, referring to the case of *Bateman* v. *Faber* (1) in which *Lindley* M.R. said: "A married woman cannot by hook or by crook—by any device, even by her own fraud (the cases go that length)—deprive herself of the protection which the restraint on anticipation throws around her." If the doctrine of restraint on anticipation applies to this case, this reasoning is also unanswerable. The learned Judge also thought that the wife's waiver could not in any case bind the trustee.

A. H. Simpson J. came to the same conclusion, but with reluctance. He rested his judgment entirely on the doctrine of restraint on anticipation.

Pring J. thought that the trustee himself could not have waived the notice.

I will deal first with the question of restraint on anticipation. In *In re Ridley, Buckton* v. *Hay* (2) the doctrine was considered and expounded by *Jessel* M.R. He said: "Now, it is necessary to consider what the meaning of a restraint on anticipation is, for with the exception of a single observation in one of the authorities, to which I will refer presently, the point does not seem to have been discussed at all.

"In the first place, the law of this country says that all property shall be alienable; but there has been one exception to that general law, for restraint on anticipation or alienation was allowed in the case of a married woman. That was purely an equity doctrine, the invention of the Chancellors, and is, as I have said, an exception to the general law which says that property shall not be inalienable. That exception was justified on the ground that it was the only way, or at least the best way, of giving

(1) (1898) 1 Ch., 144, at p. 149. (2) 11 Ch. D., 645, at p. 648.

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property to a married woman. It was considered that to give it her without such a restraint would be, practically, to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation of her property.

"That ground I must assume to be correct. The result, therefore, was that the exception to the general law was in favour of married women, to enable them to enjoy their property.

"Then there was another rule, also invented by the Chancellors, in analogy to the common law. That was an invention of a different kind from the other, and was this time in favour of alienation and not against it. The law does not recognize dispositions which would practically make property inalienable for ever. Contingent remainders were introduced, which had the effect of rendering property inalienable. The doctrine of contingent remainders was discussed by the Chancellors, who held that a remainder depending upon what was called a possibility on a possibility was contrary to the common law. That was a wholesome rule, only it was considered that it did not go far enough. The result was that the Chancellors established this rule in favour of alienation, that property could not be tied up longer than for a life in being and twenty-one years after. That is called the rule against perpetuities. This rule, therefore, was established directly in favour of alienation; it merely carried out the principle of law that property is alienable. Similarly in the case of executory interests, the law put a limit or fetter upon the testamentary power. The theory of both rules is, however, the same, namely, that property is alienable, though it may be made inalienable to a certain extent and in a peculiar way.

"The question is, whether the restraint on alienation should not be allowed within certain limits under the one rule as well as under the other. The first exception is a clear and manifest exception to the general law, which says that property shall be alienable; the question is, whether there should not be a similar exception to that branch of the general law which says that property shall not be inalienable beyond a life in being and twenty-one years after. But this question does not appear to me to have been well weighed or considered." The learned Master

of the Rolls then gave his reasons for holding that the rule against perpetuities must prevail against the rule of restraint on anticipation.

Similar considerations arise when the rule that a person *sui juris* may rescind or release an executory contract comes in conflict with the rule of restraint on anticipation. It is clear that the doctrine by which the separate estate of a married woman could be made inalienable was, when first invented by Lord *Thurlow* [See note to *Pybus* v. *Smith* (1)], a rule attaching an incident to property, *i.e.*, to property of a specific kind, namely, separate estate already existing. It could not, at that time, have extended to make an executory contract by a married woman not relating to existing separate estate irrevocable, because at that time she could not make any such contract at all. The proposal, therefore, to apply the doctrine to the case of an executory contract of a married woman not relating to existing property, and not relating to property at all, except so far as the chose in action created by the contract itself is property, is an extension of the original doctrine to a case which it was not originally intended to cover. Now, it is, in general, as much an incident of a contract between persons *sui juris* that it may be rescinded or released as it is an incident of property that it may be alienated, and under the *Married Women's Property Act* married women are persons *sui juris* for all purposes except as to separate estate subject to restraint on anticipation. Two cases were cited to us in which, as against judgment creditors, moneys payable under a deed of separation to a trustee for the benefit of the wife with restraint on anticipation were assumed to be within the doctrine. The point was not raised in either case. But it does not follow that, because the doctrine should be held to apply to such a case, the power of a married woman to rescind an existing contract may be destroyed by a stipulation in the contract that it shall be for her benefit without power of anticipation. The distinction between a completed gift of property and a gift which is only complete by way of contract was adverted to by *Cotton* L.J. in *Nicol* v. *Nicol* (2). No authority was cited to us to show that

(1) 3 Bro. C.C., 340 ; and see 1 Ves., 189.
(2) 31 Ch. D., 524, at p. 527.

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an executory contract to which a married woman is a party, and which does not amount to a complete gift of existing property, can be made irrevocable by the use of the magic formula "without power of anticipation" with regard to her rights under the contract. Very singular consequences would follow from so holding. The suggested doctrine is clearly not part of the original doctrine as laid down by Lord *Thurlow* and as expounded in *Tullett* v. *Armstrong* (1) and *Hood Barrs* v. *Heriot* (2). No trace of it is to be found in any book with which I am acquainted, and I should hesitate a long time before laying down such a rule.

But, even supposing the existence of such a rule in general, regard must be had in every case to the terms of the instrument under which the claim is set up. The words "with restraint on anticipation" or analogous words have, it is true, a definite meaning as applied to property assigned or created as separate estate; but, if the words are used with reference to a different subject-matter, or if the context is inconsistent with that meaning, I do not think that we are necessarily bound to give them the usual meaning. The deed now in question is a deed of separation. Now, it is, in general, an incident of such a deed that it may be put an end to by resumption of cohabitation. *Bowen* L.J., in *Nicol* v. *Nicol* (3), stated the rule thus:—"I think that the true principle is that a renewal of cohabitation will put an end to all or any of the provisions of a separation deed, so far as the language of the deed, properly construed by the light of surrounding circumstances, shows that its provisions were only intended to take effect whilst the separation lasted," adding that Lord *Eldon* in *Bateman* v. *Countess of Ross* (4) had suggested that there is a presumption that the separation deed is intended to end on a reconciliation.

In the present case it is expressly provided that the deed shall end in that event. But, I cannot think that in the absence of this express stipulation the deed would not have come to an end on reconciliation. The separate use is a necessary incident of such a deed. If this is the correct view, a stipulation in such a deed as to restraint on anticipation would not prevent the

(1) 1 Beav., 1; 4 My. & C. 390.
(2) (1896) A.C., 174.
(3) 31 Ch. D., 524, at p. 529
(4) 1 Dow., 235.

married woman from rescinding the deed in one manner, namely by returning to cohabitation. It is further provided by the deed now under consideration that the husband may at any time put an end to it of his own motion, unless his wife and the trustee and he mutually agree to modify it. I have great difficulty in thinking that the words "she shall not have power to anticipate the same" in such a context were intended to make the deed irrevocable by any action on the part of the wife short of reconciliation.

It appears to me, as at present advised, that the question of the revocability of a contract is an entirely different question from that of the incidents attaching to the rights arising from it while it subsists in full force, and that the latter question does not govern the former. I know of no reason why under a power authorizing a married woman to make an appointment with power of revocation she should not make a revocable appointment in her own favour for her separate use without power of anticipation. The case of an executory contract seems the same in principle.

If, therefore, it were necessary to decide the case on this ground, I should be strongly disposed to hold that the wife had power to rescind or release this deed at any time, before as well as after the times appointed for payment. It was suggested that the covenant by the trustee to indemnify the husband would prevent the wife from releasing or otherwise putting an end to the deed without his consent. But what I have already said is a sufficient answer to this argument. It is obvious that the incidental liability of the trustee under his covenant would come to an end with the rest of the deed. Moreover a *cestui que trust* if *sui juris*, can ordinarily bind the trustee by his contract as to the trust.

It is not, however, in the view which I take of the pleadings and findings of the jury, necessary to rest my decision on this ground. If, indeed, the equitable plea is regarded merely as a plea of waiver of a condition precedent, the difficulty, if it be one, arising from the inability of the wife to rescind the contract would be fatal. For, as *Sir W. Grant* M.R. said in *Stackhouse* v. *Barnston* (1):—"A waiver is nothing; unless it amount to a

(1) 10 Ves., 453, at p. 466.

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release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea." But, if there is a consideration, the waiver is good in equity as well as at law. In every case of waiver of a condition precedent there is consideration. When the party entitled to a right upon the performance of a condition refrains from performing it at the request of the other party, he would alter his position for the worse unless the request were held to imply a promise not to take advantage of his inaction. The consideration is that at the request of the other party he refrained from doing the act which would have been a performance of the condition, and would have perfected his right. In *Selwyn* v. *Garfit* (1), *Bowen* L.J. said :—"What is a waiver ? . . . . . Waiver is consent to dispense with the notice. If it could be shewn that the mortgagor had power to waive the notice, and that he knew that the notice had not been served, but said nothing before the sale and nothing after it, although this would not be conclusive, there would be a case which required to be answered." In *In re Thompson and Holt* (2), *Kekewich* J. gave effect to this doctrine, and held that a mortgagor had waived the notice required by the *Conveyancing Act* to be given before the sale by the mortgagee and could not take advantage of its absence. A good illustration is afforded by the case of *Wing* v. *Harvey* (3) in which it was held that the receipt by an insurance company of premiums upon a policy of insurance with knowledge of the failure of the insured to comply with a condition, non-performance of which rendered the policy void, prevented the company from setting up the condition.

In the present case, however, it is not necessary to have recourse to this principle. For there is no doubt that a restraint on anticipation imposes no restriction upon a married woman with respect to income already accrued due : *Hood Barrs* v. *Heriot* (4). The concluding averments of the equitable plea set out that the

(1) 38 Ch. D., 273, at p. 284.
(2) 44 Ch. D., 492.
(3) 5 De G. M. & G., 265.
(4) (1896) A.C., 174.

appellant paid other moneys to his wife and entered into other arrangements with her "from time to time," that the said moneys were so paid and the said arrangements entered into by him "on the faith and understanding that the arrangement in the deed was at an end and the covenant void," and that she "accepted the said moneys and entered into the said other arrangements on the same faith and understanding." I read this as an allegation that each payment, including the last, was made and accepted on these terms. This amounts, in effect, to a statement that Mrs. Paterson (on whose behalf the plaintiff is suing), on every occasion on which a payment was made to her under the substituted arrangements, agreed to accept the payment on the terms of those substituted arrangements, including those set out in the orders of the Court, in satisfaction of all instalments then due, and further agreed not to set up the failure to give notice under clause 4 of the deed, and not to set up the deed as creating a subsisting obligation. This is clearly a good discharge in equity of all instalments then accrued due, and in my opinion would also be a good discharge at common law by way of accord and satisfaction, but for the equitable considerations involved by reason of the nature of the plaintiff's claim, and the fact that Mrs. Paterson's right to the chose in action vested in the plaintiff is equitable only.

"If accord is a question of agreement, there must be either two minds agreeing, or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon this view": *per Bowen* L.J., in *Day* v. *McLea* (1). The defence in the present case is not open to the objection founded on the doctrine that mere payment of a smaller sum cannot be a satisfaction of a larger sum already due, for the altered arrangements as to the custody of the child and the appellant's altered responsibility as to him were an additional consideration sufficient to exclude the application of that rule.

I read the finding of the jury as a finding that this part of the plea was substantially proved, and, having regard to the declaration, I think that this defence extends to all the instalments sued

(1) 22 Q.B.D., 610, at p. 613.

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for except the first. The date of the last credit is apparently 9th September, 1903, while the last instalment under the deed must have fallen due on 1st July. I am, therefore, of opinion that, quite irrespective of the doctrine of restraint on anticipation, the appellant has established his defence, except as to the £100 due on 1st April, 1895. The decision of the learned Chief Justice at the trial was therefore right, and the rule to increase the verdict should have been discharged.

BARTON J. I have had the opportunity of reading the judgment which the learned Chief Justice has just delivered, and I entirely concur in it.

O'CONNOR J. It having been admitted by Mr. Gordon that the verdict was properly entered for the plaintiff for £100, the question for our consideration is whether the plaintiff is entitled to have that verdict increased to the amount claimed. The whole controversy turns upon the equitable plea, and the facts found specially by the jury in reference to it. The plaintiff has urged upon several grounds that neither the plea in itself nor the facts found with regard to it afford any defence to the action. As to the ground that the clause in restraint of anticipation makes it impossible even for Mrs. Paterson herself to consent to the deed coming to an end, either by express act on her part or by waiver of any of its conditions, I entirely concur in the view of my learned colleague the Chief Justice. His reasoning, which I altogether adopt, would justify the conclusion that the doctrine of restraint against anticipation cannot be so applied as to prevent a wife from exercising her right of agreeing to modify or rescind a deed of separation such as this, merely because it contains a provision restraining anticipation of the moneys payable to her during separation. But, in the view that I take of the case, it is not necessary to decide that question. I do not wish, without necessity, to express a final conclusion upon a new point of so much importance in the law of married women's property. I prefer to base my decision upon a ground which is entirely free from that difficulty.

Equitable pleas are allowed by sec. 95 of the New South Wales

Common Law Procedure Act 1899, which repeats the words of the earlier Statute first authorizing equitable pleas. The section provides that "the defendant in any action in which if judgment were obtained he would be entitled to relief against such judgment on equitable grounds may plead the facts which entitle him to such relief by way of defence." It has been held that the facts alleged in the plea must be such as would entitle the defendant to a perpetual and unconditional injunction against the defendant in a Court of Equity. The test to be applied to the plea is therefore this—does it set out facts which would justify a Court of Equity in granting a perpetual and unconditional injunction against the plaintiff proceeding upon a judgment for her claim? It is plain from the form of the plea that it was intended to put forward as the ground of defence an equitable rescission of the deed. For the purposes of this judgment, I assume that such a rescission would be contrary to the law of restraint against anticipation, and that, if the plea rested upon that ground only, it would be no answer to the action. But at the end of the plea, no doubt, as showing a consideration for the waiver alleged, and a change of the defendant's position on the faith thereof, there occurs the following statement of facts:—"And the defendant paid other moneys" (meaning moneys other than those covenanted to be paid) "to the said Mary Stewart Paterson, and entered into other arrangements with her from time to time, and the said moneys were so paid, and the said arrangements entered into by the defendant on the faith and undertaking that the arrangement in the said deed was at an end, and the said covenant void, and the said Mary Stewart Paterson accepted the said moneys and entered into the said other arrrangements on the same faith and undertaking, and is now estopped by her conduct, and the plaintiff is estopped by her conduct from now setting up and suing upon the said deed." The allegation as to estoppel is merely a statement of an inference in law. The jury specially found in substance that these facts had been proved by the plaintiff. It is immaterial that some of the other facts alleged in the plea, and found by the jury, are no answer to the action. The defendant is entitled to hold the decision of the Chief Justice in the Court below in his favour if he can show

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that, taking the pleadings and all the facts found, there is sufficient ground for a perpetual unconditional injunction against the plaintiff. It is clear that the Court of Equity would treat the suit as if Mrs. Paterson were plaintiff, and would enforce against McNaghten all the equities available against her. It is also plain that the moneys claimed by her were at the time the action was brought, all free from the restraint against anticipation. *Hood Barrs* v. *Heriot* (1) is a distinct authority that restraint on anticipation does not apply to income accrued due. As each monthly payment became due it was free to be dealt with by Mrs. Paterson in any manner she thought fit. In adjudicating, therefore, upon Mrs. Paterson's rights to these moneys a Court of Equity would not be in any way hampered by the clause in the deed restraining anticipation. It was urged that clause 8 of the deed of separation imposing an obligation upon Gill, the trustee, would make it impossible to relax any provisions of the deed unless he were a party to the suit. I cannot assent to that argument. I am assuming that Mrs. Paterson could not in Equity be held to have consented to the rescission of the deed, and that the Court of Equity would, on the application for an injunction, treat it as subsisting. It is also said that her waiver cannot bind Gill. It is not necessary that Gill should be bound for the purpose of an injunction on the facts then under consideration. The jurisdiction of an Equity Court is over the person, and it will sometimes restrain a party from inequitably taking advantage of a provision in a deed which for all other purposes, and in respect of other parties, is treated as being in full force. If Mrs. Paterson or her trustee were inequitably seeking to enforce the deed, the Court would restrain her or her trustee from proceeding.

The principle upon which the Court of Equity will restrain the inequitable use of a provision in a deed is well illustrated by *Wing* v. *Harvey* (2). That was a suit against an insurance society for payment of money on a life policy taken out by the assured at the instance of his creditor and assigned to the latter. One condition of the policy was that, if the assured should go beyond the limits of Europe without the licence of the directors,

(1) (1896) A.C., 174. (2) 23 L.J., Ch., 511.

the policy should be void, and all moneys paid thereunder should become forfeited. The assured, without the licence of the directors, did go beyond the limits of Europe, to Canada, lived there for some years, and died there. The society set up this breach of condition as a defence. It was proved by the plaintiff that the representative of the society, who had been in the habit of receiving the premiums while the assured was in England, was informed of the breach of condition by the agent of the assured, and, in answer to the question whether it would be safe to continue paying premiums under the circumstances, stated that the policy would be perfectly good, if the premiums were regularly paid. On this assurance, made at the time of each payment, the premiums were regularly paid until the death of the assured. The Court, *Knight Bruce* L.J. and *Turner* L.J., holding that the society was bound by the acts of their representative, decided that the defence was ineffectual, as there had been a waiver of the forfeiture. *Knight Bruce* L.J., in the course of the argument, states the principle of the decision (1): "The party pays and the agent receives the premiums upon the faith and condition that the policies are to be considered as valid and subsisting; and the argument is, that although the money was paid on those express conditions, the person paying it is to be in the same position as if he had paid it unconditionally. How can he be now reinstated in his position? If he had been informed in 1835," (the date of the breach of condition) "that the forfeiture would be insisted on, he might have insured the life at another office: not so now, the life having dropped." The principle of that decision may well be applied in this case. The jury have found that Mrs. Paterson accepted the notice to her solicitor, instead of to Gill, as a good notice to determine the deed; that she exonerated the defendant from giving notice to Gill; that she accepted the moneys paid as the plea alleges from time to time, and the other arrangements made since April, 1895, on the faith and understanding that the arrangement in the deed was at an end, and the covenant for payment therein void. A waiver, a statement, a promise may be inferred from conduct as well as from words. The series of arrangements and proceedings that took place after the notice

(1) 23 L.J., Ch., 511, at p. 514.

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to Mrs. Paterson's solicitor were absolutely inconsistent with the respective rights of Mrs. Paterson and her husband under the deed, and it must be taken that the payments from time to time made by the defendant to his wife from that time on for over eight years were made upon the express condition understood between them, that, as far as they were both concerned, the deed was at an end. Upon the faith of that condition he altered his position, omitted to give the notice to Gill, which he otherwise would have given, entered into arrangements, and made payments, solely on the faith of the deed being at an end. That altered position and those benefits are the consideration for the waiver of her rights by Mrs. Paterson. She has received the benefit of the consideration, the defendant cannot be reinstated in the position of advantage as to the notice which he gave up, and, in so far as a Court of Equity could interfere, it would not permit the party who has received these benefits as a consideration for waiving rights, to still insist upon their enforcement. Assuming that a Court of Equity would not, upon the facts, allow the deed by reason of the restraint against anticipation to be treated as at an end for all purposes, I have no doubt that it would grant a perpetual and unconditional injunction against Mrs. Paterson's assertion of any rights under the deed in respect of the moneys accrued due at the commencement of the action on the ground that she had, for valuable consideration, waived those rights. Holding these views, I am of opinion that the facts stated in the equitable plea, and found by the jury in the defendant's favour, are a complete answer to the plaintiff's claim, except in respect of the £100 for which the verdict has been entered. I agree with my learned brother the Chief Justice that the plaintiff is not entitled to have the verdict increased, as ordered by the Supreme Court, and that the appeal must be upheld.

Appeal allowed with costs. Order of the Supreme Court appealed from discharged and rule nisi for increase of verdict discharged with costs. Both parties undertaking that the costs and other moneys due from either party