[PRIVY COUNCIL.]

McNAGHTEN . . . . . APPELLANT;

AND

PATERSON . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY* COUNCIL. 1907.

July 22.

Husband and wife—Separation deed—Annuity payable to trustee for wife—Restraint on anticipation — Provision for revocation — Notice — Condition precedent — Waiver—Equitable plea.

If there be a personal covenant for the payment of an annuity to a married woman for her separate use, a restraint on anticipation may be effectually attached to such separate use.

By a separation deed between a husband, his wife and a trustee, the husband agreed to pay an annuity of £400, payable quarterly, to the trustee upon trust for the wife for her separate use without power of anticipation. By the deed it was provided that, in the event of the husband, at any time after the expiration of one year, considering the amount of the annuity should be reduced, he should give notice to the trustee, and that, in the event of no agreement being arrived at between the parties as to the amount within one month after the notice, the arrangement should be at an end and the covenants and agreements should become void.

Held, (1) that the restraint on anticipation had nothing to do with the provision as to reduction of the amount of the annuity, and (2) that the provision for notice being given to the trustee was directory and not imperative, and, therefore, that the wife might waive the notice.

Held, further, that even if the provision as to notice being given to the trustee were imperative, the wife having purported to waive the notice and having thereby misled the husband, and induced him to alter his position and to refrain from taking the steps pointed out by the deed, could not claim payment under the deed.

Judgment of the High Court: *Paterson* v. *McNaghten*, 2 C.L.R., 615, affirmed.

*Present—Lord Loreburn L.C., Lord Ashbourne, Lord Macnaghten, Sir Arthur Wilson and Sir Alfred Wills.

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APPEAL to His Majesty in Council from the decision of the High Court: *Paterson* v. *McNaghten* (1).

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This case is peculiar in its circumstances. At first sight it seems to present questions not by any means easy of solution, and to touch very nearly points of nicety and difficulty on which little or no authority is to be found in the books. But after the very full and able argument on both sides, their Lordships have come to the conclusion that there is no ground for disturbing the judgment of the High Court.

The question depends on the meaning and effect of a deed of separation dated 2nd April 1894, made between Hugh Paterson, of Sydney, dentist, of the first part, Mary Stewart Paterson, his wife, of the second part, and John Stewart Gill, of Thursday Island, in the Colony of Queensland, of the third part. The deed is in the form in which such deeds used to be framed. Gill, who was a brother of Mrs. Paterson, was named as trustee for the purpose of the arrangement. The most important clauses are clause 3 and clause 4, which are in the following terms:—

"3. The said Hugh Paterson shall, during the joint lives of himself and the said Mary Stewart Paterson, subject to clause 4 (provided the said Mary Stewart Paterson shall remain chaste), pay to the said John Stewart Gill, his executors, administrators, and assigns, the sum of four hundred pounds (£400) per annum, payable quarterly on the first days of the months of January, April, July, and October in each and every year, the first payment to be made on the first day of April instant upon trust for the said Mary Stewart Paterson for her separate use, and she shall not have power to anticipate the same.

"4. In the event of the said Hugh Paterson at any time after the expiration of twelve months from the date hereof considering that the amount in the said third clause mentioned should by reason of the diminution of his income or otherwise be reduced, he shall give notice thereof to the said John Stewart 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 Hugh

(1) 2 C.L.R., 615.

Paterson to the said John Stewart Gill within one month after notice of his intention to pay such reduced amount has been received by the said John Stewart Gill from the said Hugh Paterson, then the arrangement herein contained shall be considered as at end and the covenants and agreements herein contained shall become void and not thereafter binding on any of the parties."

It is not necessary to refer to the other clauses. They are for the most part in common form. There is the usual covenant on the part of the trustee to indemnify the husband against the debts of the wife, and the usual covenant for further assurance. In one aspect of the case it is perhaps not immaterial that Mrs. Paterson bound herself to do all such things as might be reasonably required for the purpose of giving full effect to the provisions contained in the deed.

The meaning of the deed seems plain enough. The arrangement was to hold good for a year. At the end of that period the husband, if he pleased, was to be at liberty to re-open the question of the wife's allowance with a view to its reduction. If the parties could not agree within a month's time the arrangement was to be at an end, and both husband and wife were to be remitted to their original position. It was therefore within the contemplation of the husband and the wife, and indeed it was part of the arrangement, that the capacity of the wife to bargain with her husband and the attitude of antagonism which preceded the deed of separation might be revived and resumed at any time after the interval of a year at the instance of the husband.

As soon as the deed was executed the trustee, who seems to have taken no part whatever in the preliminary negotiations, and who was then residing, and has since continued to reside, outside the State, authorized a Mr. Hamilton, who had acted as solicitor for the wife, to receive the stipulated allowance on her behalf.

On 26th March 1895, as the year was drawing to a close, the husband's solicitors wrote to Mr. Hamilton's firm to ascertain if they were prepared to accept service of a notice in terms of clause 4 of the deed. They stated that their client was not in a position to carry on the terms of the agreement, and asked Mr.

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Hamilton's firm to give the matter their early attention, adding that they would be "compelled otherwise to take the course indicated by the deed and give the notice in due form so as to bring the present state of affairs to an end." Mrs. Paterson saw her solicitor and instructed him to waive notice to the trustee. It was obviously the right thing to do, if it was competent for her to do it. The husband was master of the situation. It was better to come to the point at once, and so give effect to the provisions of the deed and the intention of the parties. Nothing could be gained by making trouble over a mere technicality. Negotiations followed with regard to the amount of the allowance. These negotiations came to nothing, and the month expired without any settlement being reached. Both parties after that seem to have treated the agreement as at an end. Then followed a period of several years in the course of which various applications were made to the Court on the one side and on the other, and various orders were pronounced. Mr. Paterson continued to make payments to or for the benefit of his wife, sometimes voluntarily and sometimes under an order of the Court. But these payments fell considerably short of the allowance provided by the deed of separation.

In 1899 Gill, the trustee, brought an action against Mr. Paterson on his covenant for the balance of the moneys due or alleged to be due under clause 3 of the deed. As Gill was out of the jurisdiction, an order was made for security for costs and so that action was stopped. Then it seems that in 1903 the present appellant, who is said to be a clerk in a solicitor's office, and a person without means, was appointed trustee in Gill's place, and an order was made by the Supreme Court in March 1904 vesting in him the right to sue for and recover the sum of £1,879 9s. 4d. alleged to be due under the covenant in clause 3 of the separation deed.

On 2nd June 1904 this action was brought in the Supreme Court of New South Wales. It was tried before *Darley* C.J., and a jury of four persons, in December 1904. In answer to questions left to them by the Judge the jury found :—

1. That Mrs. Paterson accepted notice given to Hamilton in lieu of and as a good notice under clause 4 of the deed.

2. That Mrs. Paterson exonerated and discharged Mr. Paterson from giving notice to Gill.
3. That Mrs. Paterson 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.

By the direction of the Judge the jury returned a verdict for the plaintiff for £100, as to which no question is now raised, and his Honor reserved leave for the plaintiff to move to increase the verdict to £1,879 9s. 4d.

A rule *nisi* was accordingly obtained, which the Supreme Court made absolute, ordering the verdict to be entered for the full amount claimed: *McNaghten* v. *Paterson* (1). The High Court on appeal discharged the rule with costs: *Paterson* v. *McNaghten* (2).

The Supreme Court rested their judgment mainly on the ground that, in their view, Mrs. Paterson was not in a position to waive notice to the trustee. "I am clearly of opinion," said *Owen* J., who gave the leading judgment (3), "that she had no such power at all, because, although the money had to be paid to her trustee for her separate use, she had no power to anticipate the same. In my opinion," his Honor added, "this waiver of notice by Mrs. Paterson would be clearly an anticipation in contravention of the restraint clause in the deed." This view was pressed upon their Lordships by the learned counsel for the appellant, who argued that the Court had no power to dispense with a provision tending to the protection of a married woman restrained from anticipation. On the other hand, the learned counsel for the respondent maintained that the contract for payment of the annuity was "an executory contract," and they said that a married woman in such a case might disregard a restraint against anticipation, which could not in their view be effectually attached to an annual payment secured merely by a personal covenant. To neither of these views are their Lordships disposed to accede. On the one hand, if there be a personal covenant for the payment of an annuity to a married woman for her separate

(1) (1905) 5 S.R. (N.S.W.), 90.
(2) 2 C.L.R., 615.
(3) (1905) 5 S.R. (N.S.W.), 90, at p. 96.

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use, there seems to be no reason why a restraint on anticipation should not be attached to the separate use, and when so attached be as valid to all intents and purposes as it would be if the subject of the separate use were income of a settled fund. So far as their Lordships are aware, in all cases where a husband in a separation deed covenants to pay an annuity to his wife, the practice is to make the annuity payable to the wife for her separate use without power of anticipation. The forms, both in Mr. Davidson's and in Messrs. Key and Elphinstone's precedents, are to that effect, and it is difficult to see what objection there can be to the practice. On the other hand, their Lordships are unable to accept the view of the Supreme Court. It appears to them that the restraint on anticipation in clause 3 has nothing to do with clause 4. It protects the annuity so long as it is payable under the deed. But if the meaning of the deed is that it was to be competent for the husband to take steps which might have the effect of reducing or putting an end to the annuity altogether, it is difficult to see how the restraint against anticipation can prevent those steps being taken, or prevent the wife from waiving strict and literal compliance with formalities required by the terms of the deed. It seems to their Lordships that, as regards the construction and effect of clause 4, the restraint against anticipation may be put aside altogether.

The real questions seem to their Lordships to be these:—(1) Was the provision as to notice being given to the trustee imperative or directory only? (2) If it was imperative on the husband, was the wife in a position to waive it, or, at any rate, is it competent for her now to insist upon it after having induced her husband to forego his advantage and so alter his position to his prejudice? On each of these points their Lordships' view is adverse to the pretensions put forward by the appellant.

Notice to the trustee as provided by clause 4 seems to be the merest formality. Any negotiation would necessarily be between husband and wife and their respective advisers. The trustee could have no voice in the matter. He was not arbiter in case of difference. If husband and wife agreed on a reduction, it is absurd to suppose that the trustee could interpose and stop the arrangement by objecting or withdrawing his consent. The

object of naming the trustee as the person to whom notice was to be given could only have been to relieve the husband from the necessity of direct communication with the wife.

Apart from the effect of the restraint on anticipation, or, rather, apart from the effect of the influence attributed to it, it was hardly contended that the wife was not competent to waive notice to the trustee. Assuming, however, that the course pointed out by clause 4 was imperative and not directory, and that the wife was not in a position to waive the notice, it seems to their Lordships under the circumstances contrary to equity that the wife, having misled her husband and having induced him to alter his position and to refrain from taking the steps pointed out by the deed, can now turn round and claim payment of money under an obligation from which, if he had not been put off his guard, he could have relieved himself without trouble or expense, or, at the worst, at the expense of sending a registered letter to the trustee.

On this head of equity, which is in substance the case made by the defendant's equitable plea, their Lordships are disposed to hold that the action would not have been maintainable even if the provision as to notice were imperative and the wife had not been at liberty to dispense with it.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed with the consequences which follow in pauper cases.

Appeal dismissed.