Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Wasteneys v. *Wasteneys, from the Court of Appeal of New Zealand; delivered* 15*th May* 1900.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal from an order of the Court of Appeal of New Zealand affirming a judgment of Prendergast C.J. which declared that a Deed of Separation dated the 27th of April 1891 and made between the Respondent the Appellant and a Mr. Jellicoe as trustee for the Appellant was obtained fraudulently and ought to be set aside and delivered up to be cancelled.

The Respondent married the Appellant in England in January 1875. There has been issue of the marriage six children in all, two of whom died before 1885.

In January 1885 the Respondent and the Appellant agreed to live separately for the period of at least two years. A Deed of Separation was accordingly executed under which the Respondent bound himself to provide for the maintenance of the children and to pay the Appellant 240*l.* a year. The Respondent then

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went to New Zealand and set up in practice as a barrister and solicitor in Auckland leaving his wife in England. In 1887 at the request of the Respondent she joined him in New Zealand. In January 1888 with the Respondent's consent she went to Australia on the invitation of the manager of a travelling company of actors. She remained in Australia till August 1890. While in that country she seems to have spent much of her time in the society of a man called Hutchens. A letter of hers addressed to this man accidentally fell into the hands of the Respondent. The letter was of a most compromising character and the Respondent treated it as it was afterwards treated by both Courts of New Zealand under the circumstances as proof positive of adultery. From the correspondence which passed between the parties while the wife was in Australia it appears that each accused the other of adultery and apparently with good reason. The Appellant urged the Respondent to obtain a divorce or to come to some arrangement which would leave her free to get her own living as a *femme sole*. The Respondent does not seem to have been averse to such a course. The only difficulty was one of money. In August 1890 the Appellant returned to New Zealand with the object it is said of bringing about some final settlement. In the following November while negotiations for this purpose were still going on the Respondent published in a newspaper called the *Reefton Guardian* a letter charging his wife with improper conduct at Brisbane. She thereupon broke off the negotiations. She consulted Mr. Jellicoe who was a barrister and solicitor practising at Wellington and on the 21st of January 1891 she filed her petition claiming a judicial separation on the ground of cruelty and adultery. A Mr. Bell who was also a barrister

and solicitor in Wellington acted for the Respondent. The Respondent prepared and swore to an answer in which he made charges against his wife of so gross a character that Mr. Bell declined to file it without more satisfactory proof of the truth of his client's allegations. A copy of the answer was however handed to Mr. Jellicoe. The legal advisers on both sides seem to have thought it most undesirable that the suit should proceed. They both put pressure upon their clients in order to prevent the scandal of a public trial. Ultimately terms of compromise were agreed upon. The Deed of Separation which is impeached in this suit was executed and the Appellant shortly afterwards went back to Australia.

It was one of the terms of the compromise that the Respondent should withdraw all the charges he had made against his wife and admit that they were without foundation. Reluctantly under pressure by his solicitor he signed a letter to that effect. He handed the document to Mr. Jellicoe. As he did so he characterised it as a lie. According to Mr. Jellicoe's statement "He said it was the "first lie he had ever signed his name to." That this remark was not a hasty expression uttered in a moment of irritation is shown by a letter written by the Respondent to Mr. Jellicoe six months afterwards in which he says "You yourself dis- "believe me solely because I put my name to that "retractation a document we both knew was "false from beginning to end." It is only fair to Mr. Jellicoe to say that he seems honestly to have believed in his client's innocence while the Respondent throughout the negotiations maintained that she was guilty and averred that he was prepared to prove it.

The Deed of Separation of the 27th of April 1891 provided for the payment by the Respondent to Mr. Jellicoe of the annual sum of 240*l.*

by equal monthly payments on the 20th of each month.

Beyond meeting the sums payable in April 1891 the Respondent made no payment whatever in pursuance of his covenants contained in the Deed of Separation. After some correspondence in which the Respondent pleaded extreme poverty and proposed an alteration in the terms of the Deed Mr. Jellicoe brought an action against the Respondent claiming judgment for 521*l.* 12*s.* The Respondent put in a defence modelled on the propositions enunciated by Campbell, L.C., in *Evans* v. *Carrington* (2 De G. F. & J. 241) which was a very different case from the present. Thereupon as the Appellant could not furnish means to carry on the proceedings Mr. Jellicoe was as he says "very glad to drop "the action."

The Respondent having been so far successful followed up his advantage by bringing this action to set aside the Deed of Separation.

The grounds on which he relied and on which the Deed has been set aside by the Courts of New Zealand are in substance these (1) That the Respondent was induced to execute the Deed by fraudulent representations that the Appellant was a virtuous woman whereas in fact as both Courts have found she had committed adultery and (2) That the Appellant procured the execution of the Deed with the object of enabling her to continue with impunity her adulterous intercourse with Hutchens. The learned Chief Justice rested his judgment mainly on the first ground. The Court of Appeal seem to have placed most reliance on the second.

It will be convenient in the first place to deal with the second ground of the judgments under appeal. The Deed of Separation does not contain a provision limiting the annuity during chastity. It is well settled that in the absence

of such a clause the mere fact of subsequent adultery does not put an end to the provision for the wife. It may be that in the present case after a time—probably after a comparatively short time—the wife resumed immoral relations with her paramour. But so far as their Lordships can discover there is not the slightest proof that the resumption or the continuance of those relations was the object of the Deed. The object of the Appellant and indeed her sole object seems to have been to free herself from the control of a husband for whom she had neither affection nor respect and to secure a certain provision for her own support.

Their Lordships have had more difficulty in regard to the first ground upon which the Deed is impeached. Undoubtedly the Respondent pledges his oath that when he executed the deed he believed that his wife was a virtuous woman. He says what is perfectly true that his wife always protested her innocence. He says too that he and his solicitor Mr. Bell were influenced by the representations made by Mr. Jellicoe who was convinced that his client had not been guilty of adultery with Hutchens. It is possible that when the Respondent gave his evidence in this case he may have persuaded himself that his state of mind at the time when the Separation Deed was executed was such as he describes it. But that view is out of the question if any reliance is to be placed upon his word. Reviewing the whole of the evidence and considering the letters which he wrote to his wife to her mother and to Mr. Jellicoe and the statements which he made on oath in his answer to his wife's petition for Judicial Separation their Lordships find it impossible to believe that the Respondent was induced to execute the deed by representations as to his wife's chastity or indeed that he believed in her innocence for

a moment. The situation seems to be aptly described by Mr. Bell who was called as a witness by the Respondent. "I do not think" said Mr. Bell in cross-examination "that he credited "her denials any more than she credited his."

Their Lordships will therefore humbly advise Her Majesty that the Appeal should be allowed the order of the Court of Appeal reversed with such costs as are payable in New Zealand in pauper appeals and the action dismissed with costs.

Their Lordships think that in pauper cases the rule prevailing in the House of Lords ought to be adopted by this Board. The Appellant therefore will have such costs of this Appeal as she would be entitled to under that Rule.