unable to adduce any sufficient reason for interfering with his exercise of the discretion reposed in him.

Rich J. desires to add for himself that, whilst concurring in this judgment, he does not wish to conceal his misgivings upon the correctness of the interpretation of the words "bona fide" in the definition of "gift *inter vivos*" in sec. 3, which the parties both adopted, and upon the reality of the covenants in the deed, performance of which might well have involved a greater expenditure in income tax than would be saved in death duties.

Appeal dismissed with costs.

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *Simmons, Wolfhagen, Simmons & Walch*, Hobart.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

COHEN . . . . . PLAINTIFF;

AND

COHEN . . . . . DEFENDANT.

Contract—Husband and wife—Arrangement as to dress allowance—No resulting contract—Limitation of actions—Defendant receiving money for plaintiff—Whether to be accounted for specifically or merely as a debt—Express trust—Debt—Effect of Statute of Limitations—Acknowledgment in writing—Right of action accruing—Time within which—Onus of proof—Statute of Limitations 1623 (21 *Jac. I. c.* 16)—*Supreme Court Act* (*Vict.*) 1915 (*No.* 2733), *secs.* 57 (2), 79, 85.

Practice—High Court—Original jurisdiction—Statutes of Limitations—Whether in force in action tried in High Court—Supreme Court Act 1915 (*Vict.*) (*No.* 2733), *sec.* 79—*Judiciary Act* 1903-1927 (*No.* 6 *of* 1903—*No.* 9 *of* 1927), *secs.* 79, 80.

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(1) An arrangement between intending husband and wife for a dress allowance to the wife *held* not to be a contract because not intended to affect or give rise to legal relations or to be attended with legal consequences.

Balfour v. *Balfour*, (1919) 2 K.B. 571, and *Rose & Frank Co.* v. *J. R. Crompton & Bros. Ltd.*, (1923) 2 K.B. 261, (1925) A.C. 445, applied.

(2) Though the *Statute of Limitations* 1623 (21 Jac. I. c. 16) by its terms does not operate directly upon equitable remedies, such remedies are barred in Courts of equity by analogy to the statute. The analogy is found in the case of constructive trusts, where the equity is fastened upon the trustee not because he intended to become the fiduciary of property but because of the character of his dealings and in spite of his intention to take the property for himself. But Courts of equity have refused to see any analogy when a person, intending to act in a capacity which is fiduciary, has received as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit. Such a person is either an express trustee or, if that name does not in strictness belong to him, he stands in the same position as a direct or express trustee.

Principles in *Soar* v. *Ashwell*, (1893) 2 Q.B. 390, *Burdick* v. *Garrick*, (1870) L.R. 5 Ch. 233, *Lyell* v. *Kennedy*, (1889) 14 App. Cas. 437, and *Henry* v. *Hammond*, (1913) 2 K.B. 515, applied.

Held, therefore, that where the plaintiff entrusted the sale of her furniture to the defendant and authorized him to receive the proceeds on her behalf, and where the defendant received money from an insurance company on account of a loss sustained by the plaintiff, the defendant was under an obligation to account specifically for the money, the receipt of which was not intended to create a mere debt; and that, therefore, the *Statute of Limitations* did not apply to an action to recover such sums: but that where the plaintiff was entitled to payment of a sum of money from a person in Germany and authorized the defendant to obtain such money and pay it to her, the transaction which the parties performed to enable the defendant to acquire such money showed that he was not expected to account specifically for the money he received or the goods into which it was transformed or the proceeds of these goods, and that this cause of action was subject to the *Statute of Limitations*.

(3) The defendant against whom the plaintiff claimed a total sum of £1,000 upon various causes of action, some well founded and some not, gave the plaintiff a document in these words: "In case of my becoming bankrupt and death I owe you £1,000 for money lent"; in law none of the causes of action were money lent, although a layman might have so described them.

Held, that there was an absolute acknowledgment sufficient to take the causes of action out of the *Statute of Limitations*.

(4) *Semble*, upon an issue whether a cause of action arose within six years the onus of proof is upon the plaintiff.

Hurst v. *Parker*, (1817) 1 Barn. & Ald. 92, *Wilby* v. *Henman*, (1834) 2 Cr. & M. 658, and *Beale* v. *Nind*, (1821) 4 Barn. & Ald. 568, at p. 571, referred to.

(5) Application of Statutes of Limitations to proceedings in the High Court discussed.

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TRIAL of action.

This was an action brought in the High Court by Dolly Cohen against her husband, Lionel Cohen. In her statement of claim the plaintiff claimed: under pars. 1 and 2, £462, alleging that in December 1919 she deposited certain money being her sole and separate property with one Max Halle of Germany which the defendant collected for her at her request and which he had neglected to reimburse to her; under par. 3, £80, alleging that in 1921 the defendant collected this sum from the Law Accident Insurance Co., being an amount paid by the company in settlement of the plaintiff's claim in respect of a policy of insurance over certain articles of the plaintiff's jewellery; under par. 4, £123, alleged to have been money received by the defendant in 1918 to the use of the plaintiff on the sale of her furniture; under par. 5, £60, as money paid by the plaintiff at the request of the defendant; under par. 6, £275, claimed as money agreed to be paid by the defendant to the plaintiff and being eleven quarters' dress allowance at £25 per quarter from January 1920 to September 1922; under par. 7, £200, alleged to be due on eight promissory notes.

The facts are sufficiently stated in the judgment hereunder.

J. H. Moore, for the plaintiff.

K. A. Morrison, for the defendant.

Cur. adv. vult.

June 4.

DIXON J. read the following judgment:—

This action was commenced on 25th May 1928, and is brought by a wife who is a resident of New South Wales against her husband who is a resident of Victoria. She sues upon six different causes of action for six several sums of money which amount in all to £1,200. The plaintiff and the defendant were married in England

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in July 1918. She was a widow and he a widower. After the death of her previous husband, who was a German subject, she continued to live in Germany until 1917, when she was permitted to return to England. At the time of her departure from Germany she had some 3,000 marks in money and some movables. The money and the movables she confided to the care of a citizen of Berlin named Max Halle. With her authority he sold the movables for 6,000 marks, and in 1919 he held for her 9,000 marks in all. By the end of that year Halle had also become indebted to her in sterling in the small sum of £12. The business which the defendant carried on in London included the importation and sale of jewellery and trinkets. In order to overcome the legal and other difficulties which then attended the transfer of funds from Germany to Great Britain, the plaintiff arranged with the defendant that he should go to Germany, collect the 9,000 marks from Halle, employ them in the purchase of goods for his business and import the goods into England. I think the agreement between the husband and wife was that he should repay her out of his own funds the equivalent in English money of 9,000 marks. It was intended that the goods acquired by the use of this sum should belong to him and not to her, and she was not intended to have a charge upon them or their proceeds.

I do not think that at the time the parties adverted to the rate of exchange at which the amount to be paid to the wife should be ascertained, and I am of opinion that the husband must be taken to be liable to repay his wife a sum calculated by converting 9,000 marks into sterling at the mercantile rate of exchange prevailing at or about the time when he obtained the money from Max Halle. I did not understand this view to be contested by counsel. The defendant went to Germany about January 1920, and I find that at the end of January 1920, at Cologne, he obtained from Max Halle 9,000 marks together with an additional sum in marks then equivalent to £12 sterling. He did not, however, pay his wife any sum in respect of the marks he so received. No doubt immediate repayment was not insisted upon, and it does not appear that while the transaction was fresh the precise amount of his indebtedness was fixed between them. As time wore on, the wife seems to have

made the assumption, most favourable to herself, that the exchange appropriate was mint par rate, and accordingly to have treated herself as entitled to £450 in respect of the 9,000 marks, which, together with the £12, amounted to £462; and this is the first of the sums which the plaintiff seeks to recover.

It may be doubted whether the transaction upon which this claim is founded was not conducted in defiance of the British *Treaty of Peace Order* 1919, which gave force and effect to arts. 296, 297 and 298 of the *Treaty of Peace* as from 10th January 1920, the date when ratifications were deposited and exchanged. Although Halle's obligation to the plaintiff could not be a debt within art. 296 because it arose during the War, yet it was probably a cash asset within the definition contained in sec. 11 of the Annex to arts 297-8, and therefore fell under par. (*h*) of art. 297. However this may be, no question of illegality or of public policy was raised by the parties, and as this is not a case in which it can be said that the facts proved make it certain that the transaction upon which the plaintiff's claim is founded was unlawful, it is not a matter which the Court should independently inquire into or decide (*North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1)). Upon the facts as I have found them, it is clear that the defendant was liable to his wife for the sterling equivalent of 9,000 marks at the rate of exchange prevailing at the end of January 1920, and the only questions remaining are whether the claim is barred by lapse of time and what that sterling equivalent was. It is convenient to defer consideration of these questions until the facts upon which the other causes of action depend have been stated and their effect has been discussed.

The claim next to be dealt with is that for £123 received by the defendant as the proceeds of the sale of the plaintiff's furniture. When the plaintiff and the defendant married they had between them more furniture than they required. With his wife's consent the defendant caused some of her furniture and some of his to be sold, and he received the net purchase-money of her furniture as well as of his own. The amount which he received in respect of her furniture was £123, but he has not paid any part of this sum to the plaintiff. He says in answer to the claim that she authorized

(1) (1914) A.C. 461.

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him to expend the money in buying for the matrimonial establishment more furniture and ornaments, and that in fact he so spent the money. I find that she did not authorize him to spend the money in this way and that he did not do so. He is therefore liable upon this cause of action, which accrued in 1918, unless it is barred by lapse of time.

The plaintiff's next claim is for £275 arrears of dress allowance. She says that before their marriage she suggested to her husband that he should give her the same amount for pin-money as her sister received from her husband, namely, £100 a year, and that it should be paid quarterly in sums of £25. She says that he promised her that he would make her this allowance, and that in fact he did pay her £25 a quarter until January 1920. The statement of claim alleges no consideration for this supposed contract, and none appears from the facts given in evidence unless it be the intended marriage. Probably a contract to marry had already been made between the parties before the husband promised to make a dress allowance, and, if so, it is difficult to see how the intended marriage could be a consideration which would support the defendant's new promise to pay £100 per annum. (See *Anson on Contracts*, 16th ed., pp. 110 *et seqq.*) In any case such a consideration would bring the contract within the fourth section of the *Statute of Frauds*, and although that defence is not pleaded it may be said that the defendant's pleader should be permitted to wait until the plaintiff's statement of claim is amended so as to state the consideration for the agreement sued upon. But these matters only arise if the arrangement which the plaintiff made with the defendant was intended to affect or give rise to legal relations or to be attended with legal consequences (*Balfour* v. *Balfour* (1); *Rose & Frank Co.* v. *J. R. Crompton & Bros. Ltd.* (2)). I think it was not so intended. The parties did no more, in my view, than discuss and concur in a proposal for the regular allowance to the wife of a sum which they considered appropriate to their circumstances at the time of marriage. For these reasons I think this cause of action fails.

In October 1921 the defendant insured in his own name a number of articles, consisting of jewellery and furs, against loss or damage by

(1) (1919) 2 K.B. 571. (2) (1923) 2 K.B. 261, at p. 288; (1925) A.C. 445.

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accident or misfortune. Of these articles two belonged to him and the remainder to his wife. He said in evidence : " I was just acting on her behalf in making the insurance." The plaintiff in her statement of claim alleges that in or about the year 1921 the defendant collected certain moneys totalling the sum of £80 from the insurer, being the amount paid by it in settlement of a claim made by the plaintiff in respect of the insurance, and that the defendant has failed to account to her for this amount, although repeatedly requested to do so. She claimed this sum of £80. In the particulars which were delivered a month later she alleges the facts as follows :— " During the year 1921 one pearl ear-ring and one pearl belonging to a brooch which contained two pearls and one diamond were lost. A claim was made and paid by the " insurer " to the defendant on behalf of the plaintiff, and the defendant received £120 in respect thereof. The defendant thereupon replaced one small pearl in the brooch at a cost of £40 and put in an imitation pearl of no value in the ear-ring. . . . Upon receiving the ear-ring in which the imitation pearl was replaced, the plaintiff taxed the defendant that the same was spurious and the defendant replied that the imitation pearl was put in temporarily as he had not been able to match the remaining real pearl in the ear-ring. At no time was the real pearl replaced." These facts have been established to my satisfaction. In making this finding I have not overlooked the apparent support given to the defendant's story, that he received only £80, by the manner in which the statement of claim is expressed. The time when this cause of action accrued is important ; but, although it must have arisen between October 1921 and September 1922, I have not been able to satisfy myself whether it did or did not accrue more than six years before action brought—i.e., before 25th May 1922. Upon issue taken on a plea of *actio non accrevit infra sex annos* it was held that the onus of proof lay upon the plaintiff (*Hurst* v. *Parker* (1) ; *Wilby* v. *Henman* (2)). So, too, on a plea of *non assumpsit infra sex annos* (per *Bayley* J. in *Beale* v. *Nind* (3)). It follows from what I have said that the plaintiff is entitled to recover upon this cause of action unless she is precluded by lapse of time.

(1) (1817) 1 Barn. & Ald. 92.
(2) (1834) 2 Cr. & M. 658.
(3) (1821) 4 Barn. & Ald. 568, at p. 571.

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On 22nd July 1922 the defendant became liable under an order of the Chancery Division to pay a sum of £92 2s. 7d. for costs to a client of the plaintiff's brother, who was a solicitor. In August 1922, at the defendant's request, the plaintiff paid her brother £60 in full discharge of this liability. She now claims this sum. Her husband's defence is payment. He says that early in September 1922 the plaintiff paid herself by appropriating for that purpose £60 or more out of a large sum which he had entrusted to her to pay to his credit at a bank. I find that this did not take place, and that his liability is still unsatisfied. The plaintiff is therefore entitled to recover upon this cause of action.

In September 1922 the defendant left England for Australasia. His wife remained in England for some eight or nine months more, and arrived in Melbourne in June or July 1923. Husband and wife lived here together until November of that year, when they separated. She petitioned for divorce in the Supreme Court of Victoria, but at the hearing on 31st July 1925 she failed to establish some essential part of her case, perhaps the acquisition by her husband of a Victorian domicil, perhaps the commission of a matrimonial wrong. The petition was withdrawn, and she commenced proceedings for maintenance in Petty Sessions. On 10th August 1925 an order for her maintenance was made, probably an agreed order, for £5 per week.

On 1st September 1925 she visited her husband and complained that she needed money, and asked him to repay her the expenses which she had incurred after he left England. She gave him a number of items of expenditure made, as she said, on his account before she left England, which amounted in all to £245 1s. 2d., and she said that she had also spent £131 in travelling. He took these items down on a sheet of paper, omitting, she says, certain others she mentioned for which he would not recognize any responsibility. As a result of the interview he made and delivered to her twelve promissory notes of £25 each, having such currencies that one would fall due every three months. She now sues upon eight of these. Of the remaining four, one fell due after writ issued, one was recovered upon in Petty Sessions, one was negotiated to a third party, and one was paid (the defendant says through mistake). The defence to this claim is that the promissory notes were given in consideration,

and upon condition, that the plaintiff would not (in effect) pledge the defendant's credit and would not " make any claim or take any legal proceedings or action against the defendant in respect of any moneys or debts due by the defendant to the plaintiff as and at the the day upon which " the promissory notes were given. No failure of such a consideration or breach of such a condition was established. But in any case I think that the true transaction was that the defendant gave the notes in satisfaction of the claim which the plaintiff was then making against him for moneys expended on his account and in travelling after he left England, and for no other consideration. The plaintiff is entitled to recover upon seven of the eight promissory notes. Upon the eighth she cannot succeed because it was drawn to order in favour of another payee and has not been endorsed.

There remains the question whether the plaintiff is precluded by lapse of time from recovering in respect of (i.) the German marks collected by the defendant from Halle, (ii.) the proceeds of the sale of her furniture (£123) and (iii.) the £80 unaccounted for out of £120 paid to him by the insurer of her pearls.

I assume that in some way the law which in England results from 21 Jac. I. c. 16, *Lord Tenterden's Act* (9 Geo. IV. c. 14) and sec. 9 of the *Mercantile Law Amendment Act* (19 & 20 Vic. c. 97) is in force in relation to an action heard in this Court. If it had not been for the doubts expressed in *Lady Carrington Steamship Co.* v. *Commonwealth* (1), I should have supposed that secs. 79 and 80 of the *Judiciary Act* 1903-1927 operated in such a way that a suit in this Court heard in Victoria was affected by secs. 79 and 85 of the Victorian *Supreme Court Act* 1915, which enacts this law for Victoria, as well as by sec. 57 (2) of the same Act (see per *Isaacs* J. in *Federated Sawmill &c. Association* v. *Alexander* (2)). Upon the assumption made the first question which arises is whether these three causes of action are of such a nature that they may be barred directly by, or else by analogy to, these provisions. In at least two of these three instances the defendant was accountable in equity for what he had received on the plaintiff's behalf. The *Statute of Limitations*, by its terms, does not operate directly upon equitable remedies.

(1) (1921) 29 C.L.R. 596.

(2) (1912) 15 C.L.R. 308.

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(See also, for Victoria, sec. 79 (2) of the *Supreme Court Act* 1915.) But such remedies are barred in Courts of equity by analogy to the statute. The analogy is found in the case of constructive trusts, where the equity is fastened upon the trustee not because he intended to become the fiduciary of property but because of the character of his dealings and in spite of his intention to take the property for himself. But Courts of equity have refused to see any analogy when a person, intending to act in a capacity which is fiduciary, has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit. Such a person is either an express trustee, or, if that name does not in strictness belong to him, he stands in the same position as a direct or express trustee (see *Soar* v. *Ashwell* (1)). In *Burdick* v. *Garrick* (2) attorneys under power who were authorized to sell the principal's property and invest the proceeds set up the statute in vain. *Giffard* L.J. said (3) :—" There was a very special power of attorney, under which the agents were authorized to receive and invest, to buy real estate, and otherwise to deal with the property ; but under no circumstances could the money be called theirs ; under no circumstances had they the least right to apply the money to their own use, or to keep it otherwise than to a distinct and separate account ; throughout the whole of the time that this agency lasted the money was the money of " the principal " and not in any sense theirs. Under these circumstances, I have no hesitation in saying that there was, in the plainest possible terms, a direct trust created. . . . I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time." The last sentence is often quoted, and in *Lyell* v. *Kennedy* (4) Lord *Macnaghten* said he thought it was a sound proposition. " I do not think," he continued, " it can make any difference what the nature of the property may be, whether it is a lump sum, or collected in the shape of rents accruing from time to time. . . . Nor do

(1) (1893) 2 Q.B. 390, and particularly pp. 393-394 (per Lord *Esher* M.R.) and 397-398 (per *Bowen* L.J.).

(2) (1870) L.R. 5 Ch. 233.
(3) (1870) L.R. 5 Ch. at p. 243.
(4) (1889) 14 App. Cas. 437, at p. 463.

I think it can make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken and that property has been received by a person assuming to act in a fiduciary character, the same consequences must, I think, in every case follow." In *Henry* v. *Hammond* (1) *Channell* J., after referring to these authorities, says :—" We must apply that principle to a case where the property is a sum of money. It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee . . . but a mere debtor. All the authorities seem to me to be consistent with that statement of the law." The application of these principles to the three causes of action now in question appears to depend upon making the correct inferences of fact.

The plaintiff entrusted the sale of her furniture to the defendant and authorized him to receive the proceeds as and for her property on her behalf. I think he was intended to account specifically for the proceeds. He was not merely to take the money, mix it with other funds as his own and treat his wife simply as his creditor whose debt, like other debts, was to be met out of his general resources. If the auctioneer or dealer paid him one cheque for the proceeds of his own and his wife's furniture she would be entitled to be paid out of the proceeds of that cheque, whatever her share was. I think a similar position arose in the case of the claim against the insurer. He was avowedly receiving on her behalf moneys which represented her property, and again I think he was not intended to deal otherwise than specifically with what he received. In neither case do I think he could reasonably conceive himself as

(1) (1913) 2 K B. 515, at p. 521.

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receiving money as his, incurring a mere debt to his wife. In the case of these spouses, the nature of their matrimonial and financial relations affords no ground for supposing that the wife would be likely to exchange willingly any specific thing she could get for a debt due by her husband to her. I think neither of these two causes of action is barred by the direct operation of the statute or by analogy to it.

On the other hand, I consider it clear in the case of the German marks that the defendant was not accountable specifically for the money he received nor the goods into which it was transformed or the proceeds of these goods. This cause of action is, therefore, subject to the time bar. But in answer to the *Statute of Limitations* (by an amendment to an unfiled reply) the plaintiff pleaded an acknowledgment in writing dated 6th September 1922. She says that just before her husband's departure for Australasia she told him that she would like some acknowledgment of the money she had lent him; that he asked her what she wanted; that she answered that he ought to know as a business man what to give her—"Give me an IOU." He sat down and wrote out the following document: "In case of my becoming bankrupt and death I owe you £1,000 for money lent." He put a twopenny stamp upon it, and wrote across the stamp his signature and the date; and then handed the document to her. The defendant gave two accounts of this incident, but they vary very little from hers, save that in one he says that she suggested what he should write and in the other he says that he did. Six days later she took the document to Somerset House and had an agreement stamp impressed upon it. The plaintiff says that there was no talk of bankruptcy when her husband left England, and he says that he left sufficient assets behind him to meet all his liabilities. But a receiving order was made against him in his absence—according to him eighteen months after his departure. The plaintiff says that on 6th September 1922 the defendant was under no liability to her other than those sued for. Excluding the promissory notes these claims amount to £1,000 exactly.

I have felt some difficulty in determining exactly what significance this transaction had for the parties themselves. But on the whole I have come to the conclusion that the defendant knew the amount

and nature of his wife's claims against him, and wished to acknowledge them in such a way that his wife would be able to prove her claims against his assets. I think I am warranted, by the evidence that no other indebtedness subsisted, in interpreting the document as referring to the sum of the claims now asserted (excluding the promissory notes). The reference to money lent does not appear to me to prevent the document from being so understood. It is, in all probability, nothing but a layman's misdescription. Nor do I consider that to attribute to the defendant an intention to acknowledge claims which included arrears of dress allowance and a conversion of the German marks at par, involves an inconsistency with the views I have already expressed about what the parties intended and did at the times these dealings actually took place. At the time when he gave the IOU he may well have preferred to accept, rather than contest, the suppositions which his wife made in her own favour. Doubtless he had had many previous opportunities of questioning them, and he may have grown accustomed to treat them as valid.

The question remains whether the document amounts to an acknowledgment of the indebtedness to which I consider it refers. To do so, it must express or imply a promise to pay. If it imports a promise which is not unconditional but depends upon some contingency, the contingency must have occurred. But an admission of liability implies a promise to pay unless something to the contrary appears (see the judgment of *Isaacs* J. in *Hepburn* v. *McDonnell* (1), and *Spencer* v. *Hemmerde* (2)). Here there is a clear admission of liability in the words " I owe you £1,000 for money lent." Do the words " In case of my becoming bankrupt and death " negative or condition the promise which otherwise should be imported ? The document may mean : To provide you with evidence in case of my bankruptcy or death I now acknowledge my debt ; or it may mean : In order to render my estate but not myself liable on bankruptcy or death I acknowledge my debt. I think the former is the better interpretation of the document. So interpreted, there is nothing to negative the imputation of a promise to pay or to subject the implied promise to a condition. If, however, bankruptcy was a

(1) (1918) 25 C.L.R. 199.

(2) (1922) 2 A.C. 507.

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condition upon which the promise depended, it occurred in fact. But it would be a curious result if the defendant's bankruptcy which would stop the plaintiff from suing in England was the very fact which enabled her to maintain an action in Australia. It appeared, from questions which I asked the defendant (subject to the parties' objection), that he had obtained no discharge either under sec. 16 or under sec. 28 of the English *Bankruptcy Act* 1914 and defendant's counsel felt unable to contend that sec. 7 (1) had an Imperial operation. In the result, the plaintiff succeeds upon her causes of action save that upon which she sues for arrears of dress allowance.

There is left for consideration the question at what rate of exchange the German marks should be converted in order to ascertain the defendant's liability. Upon this question the plaintiff was unable to adduce any evidence save the admission implied in the IOU of 6th September 1922. The defendant's counsel offered no evidence upon it either; but the defendant, while giving evidence, volunteered an interjectional observation, upon which no reliance can be placed, that marks in January 1920 were 800 to 900 to the £. Perhaps in these circumstances the logical course is to infer from the IOU that German marks were at par at the end of January 1920. But this is so contrary to my view of what is probable that I propose to direct an inquiry to ascertain the rate of exchange prevailing on or, if that is not ascertainable, shortly before 31st January 1920. This inquiry need not be made if the parties will take the sensible course of looking at the commercial journals of the time and agreeing to accept the rate they quote.

Adjudge, order and declare as follows: (1) That in respect of the cause of action alleged in pars. 1 and 2 of the statement of claim the plaintiff is entitled to recover from the defendant a sum ascertained to be the equivalent of 9,000 German marks converted at the rate of exchange prevailing between London and Germany on or shortly before 31st January 1920 together with the sum of £12 sterling; (2) that an inquiry be made to ascertain what rate of exchange prevailed between London and Germany on 31st January 1920 or at the nearest earlier date for which a rate can be found; (3) that in respect of the cause of action alleged in par. 3 of the statement of claim the defendant do pay the plaintiff the sum of £80 and in

respect of the cause of action alleged in par. 4 thereof the sum of £123; (4) that in respect of the cause of action alleged in par. 5 of the statement of claim the plaintiff do recover from the defendant the sum of £60 and in respect of the causes of action alleged in par. 7 thereof the sum of £175; (5) that judgment be entered for the defendant upon the cause of action alleged in par. 6 of the statement of claim; (6) that the plaintiff's costs of and incidental to this suit other than the costs of and occasioned by the amendment of her reply allowed at the trial be taxed and when taxed be paid by the defendant to the plaintiff or her solicitor; (7) that further consideration of this suit be adjourned and the parties be at liberty to apply as they may be advised. The judgment will be drawn up so as to contain the order made at the trial allowing amendments in the defence and reply and directing the parties to pay the costs of and occasioned by their respective amendments. It will direct a set-off of costs. The plaintiff must file the reply.

Judgment for the plaintiff accordingly.

Solicitor for the plaintiff, *P. J. Ridgway*, for *E. R. Abigail*, Sydney.

Solicitors for the defendant, *Woolcott & Madden*.

H. D. W.