[HIGH COURT OF AUSTRALIA.]

FINK . . . . . APPELLANT;
PLAINTIFF,

AND

FINK . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 8, 10; *Dec.* 23.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Damages—Breach of contract—Loss not assessable in money—Loss dependent on contingency—Husband and wife—Agreement in composition of differences—Period of agreement limited—Wife to be permitted to remain in matrimonial home for one year—Husband not to take divorce proceedings within a year—Loss by wife of opportunity to effect reconciliation.

Assignment of Chattels—Bill of sale—Power to seize property—Instruments Act 1928 (*Vict.*) (*No.* 3706), *s.* 30.

By an agreement in writing between husband and wife, after reciting that the husband had made allegations against his wife and that the husband was not at present prepared to agree to a reconciliation but had agreed to permit the wife to remain in the matrimonial home and not to proceed for a divorce for a period of a year or until the wife should commit a matrimonial offence or be guilty of other conduct such as would revive a condoned offence, the husband agreed, subject to a proviso as to the wife's behaviour, for a period of a year to permit the wife to remain in the matrimonial home and to maintain her and not to take any proceedings for divorce. The wife brought an action against the husband claiming substantial damages for breach of the agreement in that he did not permit her to remain in the matrimonial home for a year and, in breach of what was claimed to be an implied condition of the agreement, he interrupted and adversely affected the peaceable and quiet occupation and enjoyment of the matrimonial home by her. She alleged by way of damage that she had been deprived of the opportunity (*a*) of being reconciled to the husband; (*b*) of a normal married life with the husband; (*c*) of living with and being supported and maintained by the husband in a comfortable environment during the rest of her life.

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Held, by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. and *Williams* J. dissenting), that the claim must fail as to the damage alleged, because (by *Starke* J.) no such damage flowed from any breach alleged, the purpose of the agreement being to enable the husband to consider whether he would or would not forgive the wife, not to give her the opportunities of which she complained of having been deprived, (by *Dixon* and *McTiernan* JJ.) apart from nominal damages recoverable on proof of a breach of the agreement, the loss alleged was not one for which pecuniary compensation could be assessed.

Chaplin v. *Hicks*, (1911) 2 K.B. 786, discussed.

Damages recoverable by a wife for breach by the husband of an agreement not to take divorce proceedings for a limited period considered.

What constitutes a "bill of sale . . . whereby the grantee or holder has power . . . to seize or take possession of any property," within the meaning of s. 30 of the *Instruments Act* 1928 (Vict.), discussed.

Decision of the Supreme Court of Victoria (Full Court) varied.

APPEAL from the Supreme Court of Victoria.

In an action in the Supreme Court of Victoria by Sima Fink against Sydney Fink, her husband, the statement of claim was substantially as follows :—

2. On or about 13th April 1945 the plaintiff and defendant by an agreement in writing covenanted with one another as follows :— (*a*) The defendant agreed to permit the plaintiff to remain in the matrimonial home of the parties and there to have joint custody of the children of the marriage and there to maintain the plaintiff and the children for a period of one year from the date of execution of the agreement; (*b*) The defendant agreed that for a period of one year as aforesaid he would not take any proceedings for a divorce; (*c*) The plaintiff agreed forthwith to transfer all the real and personal property in her name or to which or to any interest in which she might be entitled to the defendant in trust for the children. 3. It was also an implied condition in the agreement that, during the period of one year, the plaintiff should peaceably and quietly occupy and and enjoy the matrimonial home with the defendant free from any interruption or adverse action by the defendant. 4. Immediately prior to the agreement, there had been serious domestic differences between the plaintiff and the defendant, and the defendant had for a period separated himself from the plaintiff and taken the children out of her custody. 5. The plaintiff only executed the agreement, as the defendant well knew, for the purpose of becoming reconciled with the defendant, to get back the children and live a normal married life jointly with the defendant and the children thereafter. 6. In breach of the agreement, the defendant did not permit the

plaintiff to remain in the matrimonial home for twelve months. 7. In breach of the agreement, the defendant before the expiration of twelve months took proceedings for divorce. 8. In breach of the agreement, during the period of twelve months the defendant gravely and violently interrupted, and adversely affected the peacable and quiet occupation and enjoyment of the matrimonial home by the plaintiff. 9. Pursuant to the provisions of the agreement, the plaintiff, on or about 25th April 1945, transferred all her real property in her name or to which or to any interest in which she was entitled (all of which was valued approximately at £9,500) to the defendant. 10. In consequence of the premises the plaintiff had suffered great loss and damage in that (*a*) she had been deprived of the opportunity of being reconciled to the defendant; (*b*) she had been deprived of the opportunity of a normal married life with the defendant and the children together; (*c*) divorce proceedings had been taken against her; (*d*) she, having given up her assets, had been deprived of the opportunity of living with and being supported and maintained by the defendant in a comfortable environment during the rest of her life. 11. The defendant had wrongfully detained and converted to his own use chattels owned by the plaintiff (which were itemised). The plaintiff claimed (1) under pars. 1-10 of the statement of claim, damages, £10,000, and (2) under par. 11, damages, £6,500.

The terms of the agreement referred to in the statement of claim appear in the judgments hereunder. It is sufficient here to set out clause 3: "The wife hereby assigns and conveys to her husband absolutely all her furs and jewels (other than her engagement and wedding rings) but including watches and all moneys and other personal property other than her clothing and will forthwith deliver them over to her husband." The agreement was an indenture under seal.

The defendant applied by summons for an order dismissing or staying the action as frivolous and vexatious and an abuse of process or, alternatively, striking out the statement of claim as disclosing no reasonable cause of action, or striking out pars. 1 to 11 on the grounds that they were unnecessary, scandalous, immaterial, and irrelevant and might tend to embarrass, prejudice or delay a fair trial of the action.

On the hearing of the summons, it appeared that the plaintiff's claim for damages for conversion was based on the view that the assignment contained in clause 3 of the agreement was void for want of registration as a bill of sale; but the defendant exhibited to an affidavit filed on his behalf a subsequent agreement under seal between the parties and sought to rely on it, if necessary, as giving

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him an independent title to the chattels to which it related. This agreement, which was dated 23rd April 1945, recited the assignment expressed in clause 3 of the earlier agreement and that " the wife states that the items set out in the schedule hereto are the whole of the items referred to in the said clause," and, in its operative part, provided that it was " agreed and acknowledged that the said items have been and are now in the possession and control of the husband as and for his own use absolutely and that the wife has no further claim or interest therein and the husband acknowledges the receipt thereof in execution of " clause 3. The items in the schedule constituted the major portion of the chattels itemised in par. 11 of the statement of claim.

Herring C.J. ordered that pars. 3, 4, 5, 8 and 10 of the statement of claim be struck out.

The plaintiff appealed to the Full Court of the Supreme Court, and the defendant cross-appealed from so much of the order as refused or failed to order that par. 11 of the statement of claim be struck out.

The Full Court ordered that the appeal be dismissed save and except that the order of *Herring* C.J. be varied in that, in lieu of striking out the whole of par. 10, sub-pars. (*a*), (*b*), (*c*) and (*d*) thereof and the words " in that " be struck out, and it further ordered that pars. 2 (*c*) and 9 should also be struck out and that the cross-appeal " be allowed in relation to the chattels particulars of which are set out in the schedule to the agreement " of 23rd April 1945.

By leave of the Supreme Court granted pursuant to s. 35 (1) of the *Judiciary Act* 1903-1940, the plaintiff appealed to the High Court.

Reynolds K.C. (with him *Gillard*), for the appellant. Paragraph 3 of the statement of claim is not a mere repetition of the express provisions of the agreement as set out in par. 2 (*c*). It is an independent and wider allegation, and there is no reason for striking it out. Paragraphs 4 and 5 allege facts which are material to par. 3, and should therefore stand with it. However, even if par. 3 were struck out, pars. 4 and 5 should be allowed to stand, because they are material to the claims for damages. They plead facts known to the defendant, showing that the resultant damages were reasonably to be anticipated from the breaches of contract alleged. [He referred to *Bullen and Leake's Precedents of Pleadings*, 9th ed. (1935), p. 37 ; *Mulholland* v. *King* (1).] As to the breaches, par. 6 is the co-relative of par. 2 (*a*) and par. 8 of par. 3. The breaches alleged are distinct ; if par. 3 stands, par. 8 must stand with it. Paragraphs 2 (*c*) and 9,

(1) (1895) 6 Q.L.J. 268.

read with par. 10, disclose a cause of action and resultant damage; they are also relevant to par. 11; there is no reason for striking them out. The allegation of damage in par. 10 (*c*) is linked with the breach alleged in par. 7, which clearly must entitle the plaintiff to damages. As to par. 10 (*a*), (*b*) and (*d*), it is submitted that the matters covered all sound in damages and are properly pleaded. It may be that it will be difficult to assess damages for the loss of opportunity complained of, but that is merely a question of quantum. Once the plaintiff establishes the breach and the loss of opportunity flowing from it, she is clearly entitled to an assessment of damages (*Chaplin* v. *Hicks* (1)). However difficult the assessment may be, it is a matter to be determined on trial; it does not affect the validity or propriety of the pleading. The claim for conversion in par. 11 depends on the contention that the deed as a whole (or, alternatively, clause 3, if severable) is a bill of sale and is invalid because not registered in accordance with the *Instruments Act* 1928 (Vict.).

[DIXON J. referred to *Smith* v. *Baker* (2).]

It is submitted that clause 3 is severable from the other provisions of the deed; if it is, the plaintiff can enforce other provisions of the deed consistently with the claim that clause 3 is invalid (*Re Burdett*; *Ex parte Byrne* (3); *In re Isaacson*; *Ex parte Mason* (4)). However, the plaintiff is prepared to face the possibility that the agreement is wholly void and that the statement of claim goes by the board except as to the cause of action in par. 11 and the claim for damages founded on it. Quite apart from the question of the bill of sale, it is proposed to present another view of the agreement the consequence of which may be that it is wholly void. If so, the plaintiff will have no claim except that for conversion. So long, however, as par. 11 stands, pars. 2 (*c*) and 9 should be allowed to stand; they allege facts which are relevant to the claim for conversion. Clause 3 of the agreement is an assignment which would have passed the property in the chattels assigned immediately on its execution. Under the clause the wife undertakes to deliver the chattels to the husband forthwith, but it is known that possession was not given at the time of the assignment. The assignment, having passed the property to the husband, gave him the right to possession of, and the power to seize, the goods. Therefore, it is a bill of sale which is void for want of registration (*Instruments Act*, ss. 27, 30; *King* v. *Greig*; *Rechner, claimant* (5)). The subsequent agreement of 23rd April 1945 does not take the matter any further so far as the *Instruments Act* is concerned; in substance it did no more than had already

(1) (1911) 2 K.B. 786.
(2) (1873) L.R. 8 C.P. 350.
(3) (1880) 20 Q.B.D. 310.
(4) (1895) 1 Q.B. 333.
(5) (1931) V.L.R. 413, at pp. 454, 455.

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been done by the assignment. Moreover, it is void for mistake, because it is founded on the assumption that the prior assignment was valid. The other view in which the earlier agreement may be wholly void is that it is contrary to public policy because it is an agreement for the future separation of husband and wife (*Lurie* v. *Lurie* (1)). The agreement permits the plaintiff to remain in the home for twelve months only; it contemplates a separation after the twelve months at the husband's option. It is implicit in the agreement that the parties will not be together after the twelve months unless the husband so chooses. [He referred to *Fender* v. *St. John-Mildmay* (2); *Davies* v. *Elmslie* (3).]

Hudson K.C. (with him *Nimmo*), for the respondent. The paragraphs of the statement of claim which the order appealed from strikes out are embarrassing because they are designed to give a false appearance of substance to claims which are in reality unsubstantial. Dealing first with the allegations of damage in par. 10, sub-par. (*c*) alleges no more than the breach of agreement already pleaded in par. 7. It does not allege any particular damage as flowing from the breach. On the face of the pleading there is nothing to show that the plaintiff is entitled to more than nominal damages for the breach, and it is difficult to conceive that the plaintiff can recover anything more on this allegation. It is to be noticed that the agreement merely postpones for twelve months any divorce proceedings which the husband might take. If it is assumed that the outcome of the divorce proceedings will be unfavourable to the wife, the prejudice to her must be a consequence rather of the pre-existing facts than of the breach of agreement. The so-called opportunities of which the plaintiff complains that she has been deprived are not the subject of any promise to be found in the agreement. In that regard this case differs from such cases as *Chaplin* v. *Hicks* (4), in which the chance of winning a prize was the subject of a concrete promise; the effect of the agreement was that one or other of a number of persons *must* receive the prize, and the chance of each of them was something to which a money value could be attributed as a loss suffered by being deprived of the chance. Here the chance of reconciliation still exists; in any event, on the terms of the agreement, reconciliation is dependent on the volition of the husband. Moreover, the agreement did not oblige the husband to reside in the home during the twelve months. [He referred to *Withers* v. *General Theatre Corporation* (5); *Wright* v. *Cedzich* (6).] Paragraph 3 either is a

(1) (1938) 3 All E.R. 156, at pp. 163, 164.
(2) (1938) A.C. 1, at p. 24.
(3) (1938) 1 K.B. 337, at p. 350.
(4) (1911) 2 K.B. 786.
(5) (1933) 2 K.B. 536, at pp. 548, 556.
(6) (1930) 43 C.L.R. 493.

repetition of par. 2 (*a*) or else sets up an implication which is inconsistent with the express terms of the agreement. Paragraph 3, and, with it, par. 8, were properly struck out; pars. 4 and 5 then ceased to be material to any claim to damages. The allegations in pars. 2 (*c*) and 9 are not related to the claim for conversion in par. 11, which is the only claim to which they could be material. Moreover, any objection based on the *Instruments Act* is overcome by the agreement of 23rd April 1945. The appellant has merely put a legal argument that this agreement is based on the assumption of the validity of the prior agreement, and has not shown any facts to support the argument. This agreement is an assurance in itself and would not be invalidated even if the parties wrongly assumed that the property had already vested in the husband. Where possession as well as property passes simultaneously with or before the execution of the document, it need not be registered as a bill of sale (*Butler* v. *Lewis*; *Lewis, claimant* (1)). The *Instruments Act*, therefore, did not affect this agreement. In any event the prior agreement did not require registration as a bill of sale; it did not give any power to seize goods, and, therefore, it was not within s. 30 of the *Instruments Act*. A document which purports to pass the property in goods and provides for the delivery of possession does not give a power to seize, either expressly or by implication; it merely confers a right which is enforceable in a court. The mere passing of the property does not give the right to seize.

Gillard, in reply. The agreement of 23rd April 1945 is not an assurance of chattels; it is so bound up with the prior agreement that it depends on the validity of that agreement. The facts before the court at least leave open the possibility that the later agreement was based on a mistake. It has not been shown that possession was given before the later agreement. As to the drawing of implications from a contract, see *Kelantan Government* v. *Duff Development Co. Ltd.* (2), and, as to loss of consortium, *Place* v. *Searle* (3). [He also referred to *Newton* v. *Hardy* (4); *Elliott* v. *Albert* (5); *Salmond's Law of Torts*, 10th ed. (1945), p. 369; *Herbert Clayton & Jack Waller Ltd.* v. *Oliver* (6); *Tolnay* v. *Criterion Film Productions Ltd.* (7); *Price* v. *Parsons* (8); *Ex parte Parsons*; *In re Townsend* (9).]

Cur. adv. vult.

(1) (1932) V.L.R. 62.
(2) (1923) A.C. 395, at p. 411.
(3) (1932) 2 K.B. 497.
(4) (1933) 149 L.T. 165.
(5) (1934) 1 K.B. 650.
(6) (1930) A.C. 209.
(7) (1936) 2 All E.R. 1625.
(8) (1936) 54 C.L.R. 332, at pp. 353, 359.
(9) (1886) 16 Q.B.D. 532, at p. 547.

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The following written judgments were delivered :—

LATHAM C.J. AND WILLIAMS J. In the reasons for judgment of our brothers *Dixon* and *McTiernan* the statement of claim in this case and the questions which arise are set out. We agree with those reasons, except with respect to the claim for damages for breach of an implied term of the contract between the parties.

The contract gives a right to the wife (subject to a limitation as to occupying and sleeping in separate rooms) of consortium with her husband and maintenance by him for twelve months. The recitals, particularly the fourth recital, show that the intention of the parties was to give to the wife an opportunity for reconciliation and for re-establishment of herself as the wife of the defendant with all the attendant advantages accruing. To obtain this opportunity she transferred all her property to her husband. It cannot reasonably be said that such an opportunity was valueless.

If the wife proves that the husband has broken the contract by behaving towards her in such a manner that it was impracticable, or inconsistent with her self-respect, for her to remain in the house, then she is entitled to damages for what she has lost, viz :—(1) six months of consortium and maintenance as contracted for ; and (2) the opportunity of bringing about a reconciliation.

The contract is not merely an agreement for board and lodging for twelve months. There are special circumstances which were not only communicated to the husband at the time of making the contract but which were, by the recitals, made the basis on which the contract was made. Therefore, under the third rule in *Hadley* v. *Baxendale* (1), the damages are such as would reasonably follow from a breach of contract in those special circumstances.

For many years damages have been given to husbands for loss of matrimonial consortium—though not to wives : *Wright* v. *Cedzich* (2). The loss is difficult to quantify, but this fact has not been allowed to exclude a remedy. Here we have a case in which a wife has a contractual right to consortium and maintenance for twelve months, and the damages for the loss of such consortium and maintenance can be estimated if a breach of the contract is proved. This much is conceded.

The loss of the opportunity for effecting a reconciliation with her husband is a loss to the plaintiff of a possibility of future consortium and maintenance. The damage arising from loss of opportunity to obtain a benefit may be so dependent upon a number of contingencies as to be negligible (*Sapwell* v. *Bass* (3)) or the chance which has

(1) (1854) 9 Ex. 341 [156 E.R. 145].
(2) (1930) 43 C.L.R. 493.
(3) (1910) 2 K.B. 486.

been lost, though no more than a chance, may be sufficiently real to afford a basis for an estimate of loss, difficult though that estimate may be (*Chaplin* v. *Hicks* (1)). The decision in a particular case must depend upon the circumstances of the case. In the present case we have to decide whether the contingencies affecting a possible reconciliation are so many and so obvious at this stage of her action that the plaintiff should not be allowed to endeavour to make out a case. She transferred all her property to her husband—for himself or their children—in order to obtain the opportunity of recovering her position as a wife with its pecuniary advantages of maintenance and consortium. The contention for the defendant is that she can recover nothing for the loss of this opportunity.

Whether there would be a reconciliation and how long it would continue are matters which are evidently subject to many contingencies—the most obvious contingency being that of the will of the husband. Whether he would agree to a reconciliation or not depended not only upon what might be called the objective circumstances of the case, but essentially upon his simple volition. In view of this fact, and of the further fact that the experiment had failed after a six months' trial, it might be impossible to set any high value upon the opportunity for reconciliation of the loss of which the plaintiff complains. But, though the damages awarded might not be large, the loss of this opportunity, which the defendant contracted to provide, is, in our opinion, a matter for which damages can be given if a breach of the contract is proved. Since the case of *Chaplin* v. *Hicks* (1) it cannot be said that the fact that a benefit under a contract depends upon a contingency, and the fact that an element in the contingency is the exercise of the will of a particular person or persons, are sufficient to make damages for the deprivation of such a benefit irrecoverable because too remote: Cf. *Howe* v. *Teefy* (2).

For these reasons the plaintiff should, in our opinion, be allowed to amend par. 3 of the statement of claim so as to state the implied term in a supportable form: pars. 4 and 5 should be allowed to remain as a statement of the special circumstances known to both parties when the contract was made and as therefore relevant to the question of damages: par. 8 should be struck out, but the plaintiff should be allowed to amend by alleging a breach of the implied term as restated in an amended par. 3: and pars. (*a*), (*b*) and (*d*) of par. 10 should be allowed to remain.

As to the other matters involved in this appeal we agree with the order proposed by our brothers *Dixon* and *McTiernan*.

(1) (1911) 2 K.B. 786.

(2) (1927) 27 S.R. (N.S.W.) 301; 44 W.N. 102.

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STARKE J. Appeal from orders of the Supreme Court of Victoria striking out various paragraphs of a statement of claim.

An agreement under seal was entered into between the parties to the appeal on 13th April 1945. The agreement recited that the respondent had made certain allegations against his wife, the appellant, and that she had expressed her desire to atone for any wrong she may have done him and had requested an opportunity to prove her sincerity and that the respondent was not then prepared to agree to a reconciliation but had agreed to permit her to remain in the matrimonial home and not to proceed for divorce for a period of twelve months or until the wife should commit a matrimonial offence or be guilty of other conduct that would revive a condoned offence, whichever should be the earlier, upon the basis that, if the appellant should convince the respondent of her sincerity and ability to remain true and faithful to him for the remainder of their joint lives, he would favourably consider a complete reconciliation in due course but in the meantime there should be no reconciliation or condonation by him, and also that unless and until the respondent agreed to a reconciliation the parties should not cohabit as man and wife and would occupy and sleep in separate rooms but in the interests of their children might be associated socially. And it was agreed that the respondent permit the appellant to remain in the matrimonial home and there to have the joint custody of the children of the marriage and that the respondent would there maintain her and the children for a period of one year provided that if during that period the wife should commit a matrimonial offence or be guilty of other conduct that would revive a matrimonial offence the appellant would forthwith upon request leave the home and the children but without prejudice to her right, if any, to obtain custody of the children by application to the court. And subject to the proviso already mentioned and for the period therein stated the respondent agreed not to take any proceedings in divorce.

The statement of claim alleges this agreement in par. 2 and in pars. 6 and 7 breaches of the agreement in not permitting the appellant to remain in the matrimonial home for twelve months and taking proceedings in divorce before the expiration of twelve months.

The pleading also alleges in par. 3 that it was an implied condition of the agreement that during the period of one year mentioned in the agreement the appellant should peaceably and quietly occupy and enjoy the said matrimonial home with the respondent free from any interruption or adverse action by the respondent. And in breach of the agreement it is alleged in par. 8 that the respondent gravely and violently interrupted and adversely affected the

peaceable and quiet occupation and enjoyment of the matrimonial home.

This allegation of an implied condition and the breach of it was struck out because it merely affirmed that the appellant was entitled to the benefit of the performance of the agreement by the respondent, as the Chief Justice of the Supreme Court held; and covered no more than was contained in the express agreement pleaded as was said by the Supreme Court in Full Court. The appellant insists that the implied condition as pleaded involves a wider obligation than is expressed in the agreement between the parties. The allegation is vague and embarrassing. But it is to be implied according to the particulars from the terms of the agreement and the following circumstances, that domestic differences had occurred between the parties, that the appellant desired reconciliation and to live a normal married life with the respondent and the children of the marriage. It is therefore suggested that the allegation involves an obligation on the part of the respondent to give the appellant an opportunity of being reconciled and of living a normal married life with him and their children. And apparently pars. 4 and 5 are introduced into the statement of claim for the purpose of buttressing this contention and founding a claim for damages on this basis.

The suggested interpretation is, I think, untenable on the face of the pleading itself: the allegation is not that the implied term or condition of the agreement was that an opportunity should be given of reconciliation &c., but simply, peaceable and quiet occupation and enjoyment of the matrimonial home.

Assuming however that the allegation is sufficient to raise the obligation suggested, still it must be remembered that "implied terms . . . can only be justified under the compulsion of some necessity." "The first thing," said *Scrutton* L.J. in *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd.* (1), "is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract." Unless the court so concludes it ought not to imply a term which the parties have not expressed (see *Luxor (Eastbourne) Ltd.* v. *Cooper* (2)).

The express provision of the agreement is that the appellant is permitted to occupy the matrimonial home for the period therein stated. And the term or condition suggested by the appellant if within her pleading is not necessary for perfecting or carrying out

(1) (1918) 1 K.B. 592, at p. 605. (2) (1941) A.C. 108, at pp. 125, 144.

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the agreement between the parties. The presence of the appellant in the home might convince the respondent of the appellant's sincerity and future good conduct and lead to a reconciliation but nothing more is promised than is expressed in the agreement and nothing more is necessary or is required to give the agreement efficacy.

In my opinion, the Supreme Court was right in striking out this allegation in par. 3 of an implied condition and the connected allegations in pars. 4 and 5 and also the allegation in par. 8 of a breach of the implied condition and for the reasons given by the learned judges.

The appellant also alleges in par. 10 that in consequence of the premises she suffered great loss and damage in that:

(*a*) she has been deprived of the opportunity of being reconciled to the respondent;

(*b*) she has been deprived of the opportunity of a normal married life with the respondent and the said children together;

(*c*) divorce proceedings have been taken against her;

(*d*) she having given up certain assets had been deprived of living with and being supported and maintained by respondent in a comfortable environment during the rest of her life.

Sub-paragraph (*c*) was rightly struck out as unnecessary because the pleading had already alleged divorce proceedings in breach of the agreement. Sub-paragraphs (*a*), (*b*) and (*d*) were also struck out. It was said that these paragraphs could not be allowed to stand in their present form because they were so closely wrapped up with the implied condition that had been pleaded. But the appellant contends that the damages claimed under sub-pars. (*a*), (*b*) and (*d*) are the natural consequence of a breach of the express agreement between the parties, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. *Hadley* v. *Baxendale* (1); *Chaplin* v. *Hicks* (2); *Herbert Clayton & Jack Waller Ltd.* v. *Oliver* (3); *White* v. *Australian and New Zealand Theatres Ltd.* (4); *Withers* v. *General Theatre Corporation* (5) were referred to. But the agreement does not provide for nor contemplate any benefit to the appellant other than remaining in the matrimonial home with the children. The purpose of the agreement is not to give the appellant an opportunity of reconciliation or of living a normal married life with the respondent and her children but to enable the respondent to consider whether he would or would not forgive her.

(1) (1854) 9 Ex. 341 [156 E.R. 145].
(2) (1911) 2 K.B. 786.
(3) (1930) A.C. 209.
(4) (1943) 67 C.L.R. 266.
(5) (1933) 2 K.B. 536.

In my opinion, the damages claimed by the appellant do not flow from any breach of the agreement alleged and the sub-pars. (*a*), (*b*) and (*d*) in their present form were rightly struck out.

Another allegation in the statement of claim (par. 11) is that the respondent wrongfully detained and converted to his own use certain chattels of the appellant. The particulars under this allegation, so far as it related to chattels described in an agreement dated 23rd April 1945, were struck out. This agreement acknowledges that the chattels were and are in the possession and control of the respondent and that the appellant had no claim or interest therein. But the respondent acquired possession of the chattels under the agreement of 13th April 1945 whereby the appellant assigned and conveyed to the respondent all her personal property which included the chattels mentioned with certain exceptions and agreed forthwith to deliver them to the respondent. Now it is said that this latter agreement is a bill of sale which is void for want of registration. Even if it were a bill of sale, which is arguable on the terms of the agreement (*Palette Shoes Pty. Ltd.* v. *Krohn* (1); *King* v. *Greig*; *Rechner, claimant* (2); *Purcell* v. *Deputy Commissioner of Taxation* (3)), still the right of the respondent to possession of the chattels is acknowledged by the agreement under seal of 23rd April 1945 which, according to the cases cited, is not a bill of sale.

The Full Court was justified, I think, on this material, under its inherent jurisdiction in striking out par. 11 so far as it related to the chattels described in the schedule to the agreement of 23rd April 1945.

Paragraphs 2 (*c*) and 9 were also struck out by the Full Court. The allegations contained in them are not essential to the causes of action pleaded by the appellant and serve no useful purpose. The Full Court struck them out and I would not interfere with the order which it thought proper to make.

The result is that the appeal should be dismissed.

DIXON J. AND MCTIERNAN J. This appeal comes by leave of the Supreme Court of Victoria. It is from an interlocutory order made by the Full Court on an appeal from an order of *Herring* C.J. by which he struck out certain paragraphs of the plaintiff's statement of claim. The Full Court affirmed the order of *Herring* C.J. but went further by striking out some additional paragraphs. The plaintiff appeals from the whole of the order of the Full Court.

(1) (1937) 58 C.L.R. 1, at p. 20.
(2) (1931) V.L.R. 413, at pp. 443, 448.
(3) (1920) 28 C.L.R. 77.

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The action is founded upon or arises out of an agreement of an unusual nature. It is an agreement between husband and wife affecting to establish for a limited term a *modus vivendi* between them upon conditions avoiding condonation on the part of the husband. It also contains an assignment by the wife to the husband of her furs and jewels and an engagement by her to transfer her real property upon trusts for the children of the marriage. The instrument is an indenture under seal; it was not registered as a bill of sale. The situation of which the agreement was the outcome is described by a number of carefully framed recitals contained in the instrument.

They recite the marriage between the parties and the existence of two children of the marriage. They then state that the husband had made certain allegations (not otherwise specified) against the wife; that she had expressed her desire to atone for any wrong she may have done her husband and had requested an opportunity to prove her sincerity; and that he had requested her to leave the matrimonial home, and, on her failing to do so, he had himself left the home and had taken the two children with him and was about to institute certain proceedings (presumably divorce proceedings) against the wife. Then follows a long recital which discloses the purpose of the agreement. It states that the husband was not at present prepared to agree to a reconciliation with his wife but had agreed to permit her to remain in the home and not to proceed for divorce for a period of twelve months or until she should commit a matrimonial offence or the like, whichever should be the earlier, upon the basis that if the wife should convince him of her sincerity and ability to be and remain a true and faithful wife to him for the remainder of their joint lives he would favourably consider a complete reconciliation in due course but, in the meantime, there should not be any reconciliation or condonation by him. Two short recitals bring the narrative to a close. They are to the effect that, until a reconciliation, they would occupy separate rooms but in the interests of the children might be associated socially and that the husband had made various gifts to her believing that she was a good wife and that the gifts constitute the whole of her real and personal property.

The first two clauses of the operative part of the instrument are as follows:—

"1. The husband agrees to permit the wife to remain in the matrimonial home and there to have joint custody of the children of the marriage and he will there maintain her and the said children for a period of one year provided that if during such period the wife shall commit a matrimonial offence or be guilty of other conduct which

would revive a condoned offence the wife will forthwith upon request leave the said home and the said children but without prejudice to her right (if any) to obtain the custody of the children by application to the Court.

2. Subject to the proviso set out in clause 1 and for the period therein stated the husband undertakes that he will not take any proceedings for divorce."

Then follow clauses 3, 4 and 5 dealing with the assignment to the husband of the furs and jewels and the creation of the trust of the land. Clause 6, which is the last in the deed, provides that the agreement should be and become void at the election of the husband if the wife should fail to carry out and execute all the terms of clauses 3, 4, 5 and 6. Upon the agreement there is a certificate by the managing clerk of the solicitors who apparently acted for her to the effect that he had fully explained it to her and that she fully understood it and had executed it freely and voluntarily.

It seems that, after the execution of the agreement, she handed over to her husband her furs and jewels and executed the assurances creating the trusts; the husband returned to the matrimonial home, where they both dwelt for nearly six months, when she left the house. On the same day she began proceedings for the custody of the children. A month later her husband filed a petition for dissolution of marriage on the ground of her adultery.

She then instituted the present action against her husband. Her statement of claim seeks damages for breach of the agreement and damages for conversion of the furs and jewels. The claim for conversion is based upon the view that the assignment contained in the agreement was void for want of registration as a bill of sale. The claim for breach of agreement is founded on allegations (1) that by his conduct her husband broke implied conditions of the agreement; (2) that he did not permit her to remain in the matrimonial home for twelve months; and (3) that within twelve months he took proceedings for divorce.

In an attempt to prevent the plaintiff proceeding to trial on all or some of these causes of action the defendant applied by summons for an order dismissing or staying the action as frivolous and vexatious and an abuse of process or alternatively striking out the statement of claim as disclosing no reasonable cause of action, or striking out pars. 1 to 11 on the usual grounds.

There are objections to be disposed of concerning the form and contents of certain paragraphs of the pleading, but the questions of substance which underlie the application seem to be (1) whether substantial or only nominal damages can be recovered for loss of

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the opportunity or chance of a reconciliation; (2) whether substantial or only nominal damages can be recovered for the alleged breach consisting in the institution of proceedings for divorce; (3) whether the husband (the defendant) obtained property in the furs and jewels or, on the contrary, the operation of s. 30 of the *Instruments Act* 1928 prevented his doing so.

The defendant's application depended in part upon the inherent jurisdiction of the Court and in part upon Order XIX., r. 27, and Order XXV., r. 4. Upon such an application we ought not to decide such questions as the foregoing against the plaintiff unless we think that they are not open to real doubt and that in the interests of all concerned they should be disposed of *brevi manu*.

(1) The first question is wholly a matter of law. It arises from the fact that in the paragraph of the statement of claim containing the allegation of damages there are sub-paragraphs stating as items of damage that the plaintiff has been deprived of the opportunity of being reconciled to the defendant and that she had been deprived of the opportunity of a normal married life with the defendant and their children together. No-one doubts that, if she establishes a breach of the contract, the plaintiff may recover damages representing the temporal loss sustained in losing for the balance of the period of twelve months the advantages of residing in the matrimonial home and of the enjoyment of the form of maintenance for which clause 1 stipulates. What is denied is that she may obtain an award of substantial damages because if she had been permitted to remain and had remained in the matrimonial home for the full period of twelve months there might have been a chance of a reconciliation occurring between herself and her husband and a consequent possibility of her enjoying her husband's society and protection for the rest of their joint lives.

To eke out the claim for substantial damages on this head allegations are introduced into the statement of claim stating what sufficiently appears from the recital in the instrument, namely that her purpose in entering into the agreement was to obtain the opportunity of such a reconciliation. But the fact that she was prepared to accept so slender a chance as the chief benefit which the agreement secured to her, apart from the postponement of divorce proceedings, hardly affects the question whether, as a matter of law, it is possible to treat the premature determination of the chance or opportunity as a loss for which a pecuniary compensation may be assessed. "In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated . . . it may be laid down as a rule, that generally in actions upon contracts no damages

can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of the contract" (per *Pollock* C.B., *Hamlin* v. *Great Northern Railway Co.* (1)).

The chance of a reconciliation if clause 1 of the agreement had been punctually performed is one depending on all the fortuitous elements upon which the healing or the exacerbation of domestic differences depends. They are not like contingencies or conditions which are recognized for some commercial purpose, such as the chances which are made the subject of insurance; they are not aleatory, such as are habitually made the subject of the calculation of odds, or, at all events, of the giving and taking of odds; they bear no resemblance to the claim of one of a very limited number of competitors to receive the consideration to which he is contractually entitled in the distributive award of definite and material benefits, as in *Chaplin* v. *Hicks* (2). There is no actual relation in human affairs between the tolerance or intolerance of one spouse for another and the material considerations which we are accustomed to estimate in money, and there is no common understanding or convention under which any such relation is presumed to exist. We have here a question concerning the continuance for an additional six months of an experiment which had failed during the preceding six months. The intangible chance of success in the remainder of the stipulated period cannot be compared with any of the contingencies which in the decided cases have been regarded as capable of monetary expression or as a proper subject for pecuniary assessment however speculative. Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages. But such an actual loss cannot be found in the ending of a situation from which a chance supposedly arose that the plaintiff's husband might be reconciled to her. In the language of *Vaughan Williams* L.J. in *Chaplin* v. *Hicks* (3) "There are cases, no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from the breach." This is one of them. The damages to which the plaintiff is entitled for breach of clause 1 are limited to the temporal loss flowing from the premature termination of the permission promised by that clause and from the premature deprival of the other benefits thereby secured.

(1) (1856) 1 H. & N. 408, at p. 411 [156 E.R. 1261, at p. 1262].
(2) (1911) 2 K.B. 786.
(3) (1911) 2 K.B., at pp. 792, 793.

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(2) The question, whether a breach of the agreement contained in clause 2 not to take proceedings for divorce within the twelve months entitles the plaintiff to general damages which are substantial, is akin to the first question but is not exactly the same. On the footing that the institution of divorce proceedings about five months before the end of the stipulated year amounted to a breach of agreement, what the plaintiff lost was five months' immunity from divorce proceedings, with presumably such chance as an additional five months might give her of her husband changing his mind and refraining from petitioning. What has been already said is enough to show that this chance cannot be made the subject of an award of substantial damages. But, is there any loss, that it is possible to appreciate, estimate, specify or state, implied by the deprivation of five months' immunity from divorce proceedings ? The petition has not yet been heard and as yet it is not known whether it will result in a decree nisi for dissolution or will be dismissed. If the former result be assumed, the plaintiff would have ceased to be a wife about five months earlier than if the time contracted for had been observed. The status of a wife does or may carry with it material advantages. In the event assumed she would, no doubt, be entitled as damages to such compensatory sum as can be fairly estimated to represent the temporal loss which the deprival of her status as a wife for five months may be supposed to constitute. If, however, the petition is dismissed, it is difficult to see what elements of loss are recoverable in an action *ex contractu*. Resentment, disappointment and the loss of esteem of friends are not proper elements. The contract is not that he will never bring divorce proceedings, but that he will not do so for twelve months. If for this breach of contract substantial damages are to be recovered it must be, not as compensation for the bare premature filing of the petition, but for such consequential loss as can be pointed to.

The pleading, however, in par. 10 (*c*) alleges the fact that divorce proceedings have been taken against the plaintiff as in itself the actual loss or damage suffered. That is to say, the breach of contract itself is treated as being of a nature importing the damages. For the reasons given this view is wrong. Damages cannot be assessed for the mere fact of the institution of divorce proceedings before the contract time ; temporal loss flowing from that must be alleged and shown. Of course in the assessment of damages speculative elements may be taken into account and the proof need by no means be exact, but that is a matter with which we need not deal as the pleadings are framed.

(3) The question whether the assignment of the furs and jewels contained in the agreement required registration as a bill of sale depends in the first instance upon the meaning and application of a few words in s. 30 of the *Instruments Act* 1928. The words are :— " bill of sale . . . whereby the grantee or holder has power . . . to seize or take possession of any property and effects comprised in . . . such . . . bill of sale." In *Purcell* v. *Deputy Federal Commissioner of Taxation* (1), *Knox* C.J. and *Gavan Duffy* J. expressed the following opinion concerning these words :— " We do not think that this section requires that the bill of sale in order to come within the Act should contain express words giving power to the grantee to seize or take possession : in our opinion it is sufficient if the legal effect of the transaction evidenced by the bill of sale is to confer on the grantee a right enforceable at law or in equity to take possession of the chattels comprised therein."

In the present case the facts are, or at all events appear to be, that the wife (or the plaintiff) was in possession of the furs and jewels at the time when the document was executed and afterwards handed them over to her husband. The document contains an agreement on her part forthwith to deliver the chattels over to her husband but, having regard to the situation of the chattels, this may not be incompatible with his seizing the chattels in the exercise of his right of property, had she failed to hand them over. If so, on the view expressed in the passage quoted, the contention that the document needed registration would seem sufficiently plausible to merit examination in the ordinary course of procedure. Under s. 30 an unregistered bill shall not be operative or have any validity at law or in equity. If the facts stopped there, it would seem that there is sufficient in the considerations mentioned to warrant the plaintiff in alleging a cause of action in conversion and to make it impossible at this stage to strike out that part of her pleading.

But, on the hearing of the appeal before us, it was pointed out that, after the delivery of the chattels to the husband, another agreement was made between the parties. It is unnecessary to say more concerning this agreement than that upon its text it suggests reasons why, failing the earlier agreement, it might be treated as giving the husband an independent title to the possession and property in the jewels and furs. The document has not, however, been pleaded, the circumstances in which it was made have not been examined nor considered. It is true that in the argument before this Court no very impressive answer was given by counsel for the plaintiff to the reliance which the defendant proceeded to place upon

(1) (1920) 28 C.L.R. 77, at p. 84.

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this document, but it does not appear possible on this application to treat the document as a solid ground for interfering summarily and eliminating the cause of action in conversion.

The foregoing are the main matters of substance raised by the defendant's complaints against the plaintiff's pleading. It is necessary now to deal in detail with the objections to the form in which the statement of claim is cast.

In par. 2 (*c*) there is an allegation setting forth part of the consideration which the plaintiff agreed to give, namely the transfer of her real and personal property, and in par. 9 there is an allegation that she in fact made a transfer in performance of that agreement. It does not seem proper to strike these allegations out. They are not irrelevant and, although the plaintiff might have relied on the rule dispensing with the averment of the performance of the conditions precedent, she was not obliged to do so. Without laying down any general rule upon the matter, it is enough to say that in this case these allegations should not be struck out as unnecessary and embarrassing.

In par. 3 the statement of claim alleges a condition implied in the agreement. The implication alleged is that during the period of one year the plaintiff should peaceably and quietly occupy and enjoy the matrimonial home with her husband free from any interruption or adverse action by him. This overstates any implication which could be made in the agreement read in the circumstances. The general rule by which an obligation is implied in contracts against one contracting party doing any intentional act preventing or making less probable the enjoyment by the opposite party of the benefits secured by the contract might, of course, be invoked and there is no objection to the implication being expressly pleaded. But par. 3 cannot stand having regard to the extreme form in which it states the condition.

Paragraphs 4 and 5 allege facts which it is said are introductory to the claims for damages and intended to lay a foundation for the consequential damage. They cover facts stated or implied in the recitals of the agreement, although possibly it may be intended to prove a different version under the allegations. They are not linked up with any allegation of damage which is in fact consequential and it appears likely that their real purpose is to lay a foundation for introducing into the case a prejudicial but irrelevant inquiry into facts antecedent to the agreement and made the subject of recital therein. They were rightly struck out.

Paragraph 8 sets up breaches of the implied condition alleged by par. 3. It should go out with par. 3.

Paragraph 10 states the two heads of damages dealt with above and, in so far as it relates to them, it should be struck out. Sub-paragraphs (*a*) and (*c*) clearly relate to them. Sub-paragraph (*d*) forms part of the allegation of damage due to the loss of the chance of reconciliation and should go out accordingly and so does sub-par. (*b*). The whole of par. 10 should, therefore, be struck out. It seems better to strike out the whole of par. 10 and allow the plaintiff to reform it rather than to leave the initial words, although they are not open to objection.

The result to which the foregoing reasons lead is that the order of the Full Court of the Supreme Court should be varied so as in substance to restore the order of *Herring* C.J. To give effect to this conclusion the formal order should be as follows. Vary the order of the Supreme Court by dismissing the appeal to that Court from the order of the Chief Justice of Victoria with costs, and by dismissing the cross-appeal. Subject to such variations appeal dismissed.

Order of Supreme Court set aside. In lieu thereof restore the order of Herring C.J. that pars. 3, 4, 5, 8 *and* 10 *of the statement of claim be struck out and the certificate for counsel: order that the plaintiff have leave to amend the statement of claim at any time before 7th February* 1947 *and that the defendant have ten days from the expiration of the time limited for the amendment of the statement of claim within which to deliver a defence. Appellant to pay the costs of the application to Herring C.J., of the appeals of the Supreme Court and to this Court: respondent to pay costs of cross-appeal to Supreme Court: costs to be set off.*

Solicitor for the appellant: *A. L. Abrahams.*
Solicitor for the respondent: *Sylvia Rothstadt.*

E. F. H.