

BALFOUR v. BALFOUR

Court of Appeal [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346

The defendant, who was a civil servant stationed in Ceylon, in November 1915, came to England with the plaintiff, his wife. They remained in England until August 1916, when the husband's leave was up and he had to return. The plaintiff, on the doctor's advice, remained in England, and the husband, before sailing, promised to give her £30 a month until she returned. He did so after assessing the sum the would that it would be better if they remained apart, and in 1918 the wife obtained a decree nisi. The plaintiff sued on the promise to pay her £30 per month. Sargant J. gave judgment for the plaintiff, holding that the husband was under an obligation to support his wife and the parties had contracted that the extent of that obligation should be defined in terms of so much a month. The consent of the wife to that arrangement was a sufficient consideration to constitute a contract which could be sued upon. The husband appealed.

WARRINGTON and Duke L.J. gave judgment allowing the appeal.

ATKIN L.J.: ... it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves – agreements such as are in dispute in this action – agreements for allowances, by which the husband agrees that he will pay to his wife a certain sum of money, per week, or per month, or per year, to cover either her own expenses or the necessary expenses of the household and of the children of the marriage, and in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given. To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. The consideration, as we know, may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. That is a well-known definition, and it constantly happens, I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there is consideration in form within

the definition that I have mentioned. Nevertheless, they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30s. or £2 a week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code.

ROSE AND FRANK CO. v. CROMPTON BROS.

Kings Bench Division [1923] 2 K.B. 261, 276; House of Lords [1925] A.C. 445; 94 L.J.K.B. 120; 132 L.T. 641; 30 Com. Cas. 163

The defendants were an English firm which manufactured paper tissues. In 1913 the defendants entered into an arrangement with the plaintiffs, an American firm, whereby the plaintiffs were constituted sole agents for the sale in the United States of the tissues supplied by the English firm, for three years with an option to extend that time. The document contained the following clause, described as the "Honourable Pledge Clause".

"[T]his arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation".

The agreement was subsequently extended to March 1920, but in 1919 the defendants terminated it without notice. The defendants had received and accepted a number of specific orders for tissues before the termination, and these they refused to execute. The plaintiffs sued for breach of contract and for non-delivery of the goods.

② Bailhache J. held that the 1913 arrangement and the orders and acceptances were legally binding contracts. The Court of Appeal (Bankes, Scrutton and Atkin L.J.J.) were unanimous in holding that the 1913 arrangement was not legally binding, and they also held by a majority (Atkin L.J. dissenting) that the orders and acceptances did not constitute legally binding contracts.

SCRUTTON L.J.: Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean. If they clearly express such an intention I can see no reason in public policy why effect should not be given to their intention.

Both legal decision and the opinions of standard text writers support this view... [His Lordship then considered *Balfour v. Balfour* (above p. 133)]. In the early years of the war, when a member of a club brought an action against the committee to enforce his supposed rights in a club golf competition, I non-suited him for the same reason, that from the nature of the domestic and social relations, I drew the inference that the parties did not intend legal consequences to follow from them: *Lewis v. Devoynshire Club* (unreported; see *The Times*, December 9, 1914). Mr. Leake says (7th ed., 1921, p. 3) that "an agreement as the source of a legal contract imports that the one party shall be bound to some performance, which the latter [*sic*] shall have a legal right to enforce". In Sir Frederick Pollock's language (9th ed., 1921, p. 3), an agreement to become enforceable at law must "be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention". Sir William Anson requires in contract "a common intention to affect" the legal relations of the parties.

Judged by this test, I come to the same conclusion as the learned judge,

that the particular clause in question shows a clear intention by the parties that the rest of their arrangement or agreement shall not affect their legal relations, or be enforceable in a court of law, but in the words of the clause, shall be "only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves", and shall not be subject to legal jurisdiction". If the clause stood first in the document, the intention of the parties would be exceedingly plain.

The cases cited to us to the contrary were cases in which the form of the other part of the document as a covenant in a deed, or a grant of a right in property in legal terms, clearly showed an intention to create a legal right, and where subsequent words, purporting not to define but to negative the creation of such a right, were rejected as repugnant. IN *Ellison v. Bignold* ((1821) 2 Jac. & W. 503, 510) where the parties under seal "resolved and agreed and did by way of declaration and not of covenant spontaneously and fully consent and agree". Lord Eldon laid aside "the nonsense about agreeing and declaring without covenanting". An agreement under seal is quite inconsistent with no legal relations arising therefrom. And in the present case I think the parties, in expressing their vague and loosely worded agreement or arrangement, have expressly stated their intention that it shall not give rise to legal relations, but shall depend only on mutual honourable trust.

ATKIN L.J.: In this case the defendants by the honourable understanding entered into the vague engagement contained in the document which had as a basis the average turnover for the last three years before the agreement. But whatever the terms of the agreement or understanding, it contemplated, as nearly all such agreements do, that the actual business done under it should be done by particular contracts of purchase and sale upon the terms of the general agreement so far as applicable. The actual business was done in this case, as in countless others, by orders for specific goods given by the "agent" and accepted by the manufacturer or merchant... [His Lordship then examined the correspondence between the parties]. Pausing there, this is the common formula of acceptance in the business world which has been treated as acceptance in countless cases since merchants first wrote to one another. It would be understood as an acceptance passing between two merchants where there was no obligation at all on the part of the vendor to accept. Why it should bear a different meaning in a case where there is an honourable understanding by the merchant to accept up to some vague limit, I am unable to understand.

MAY AND BUTCHER v. R.

House of Lords (1929) [1934] 2 K.B. 17n.; 103 L.J.K.B. 556n.; 151 L.T. 246n.

Petition of Right. The suppliants, May and Butcher, alleged that it was

mutually agreed between them and the Controller of the Disposals Board for the purchase by the suppliants of the whole of the tentage which might become available for disposal in the United Kingdom up to March 31, 1923.

The relevant terms of the alleged agreement were as follows:

"(3) The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission.

"(10) It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889".

By demurrer, answer and plea the Attorney-General said that the petition of right disclosed no sufficient and binding contract of sale.

Rowlatt J. held that the arrangement constituted no contract, but merely a series of clauses for adoption if and when contracts were made, because the price, date of payment and period of delivery had still to be agreed; and that the arbitration clause did not apply to differences of opinion on these questions. The Court of Appeal (Scrutton L.J. dissenting) affirmed Rowlatt J.'s decision. The suppliants appealed.

LORD BUCKMASTER: In my opinion there never was a concluded contract between the parties. It has long been a well-recognised principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. It is, of course, perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined. It has been argued that as the fixing of the price has broken down, a reasonable price must be assumed. That depends in part upon the terms of the Sale of Goods Act, which no doubt reproduces, and is known to have reproduced, the old law upon the matter. That provides in section 8 that "the price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price", while, if the agreement is to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, section 9 says that the agreement is avoided. I find myself quite unable to understand the distinction between an agreement to permit the price to be fixed by a third party and an agreement to permit the price to be fixed in the future by the two parties to the contract themselves. In principle it appears to me that they are one and the same thing...

The next question is about the arbitration clause, and there I entirely agree with the majority of the Court of Appeal and also with Rowlatt J. The clause refers "disputes with reference to or arising out of this agreement" to arbitration, but until the price has been fixed, the agreement is not there. The arbitration clause relates to the settlement of whatever may happen when the agreement has been completed and the parties are regularly bound. There is nothing in the arbitration clause to enable a contract to be made which in fact the original bargain has left quite open.

VISCOUNT DUNEDIN: I am of the same opinion. This case arises upon a question of sale, but in my view the principles which we are applying are not confined to sale, but are the general principles of the law of contract. To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. In the system of law in which I was brought up, that was expressed by one of those brocards of which perhaps we have been too fond, but which often express very early what is wanted: "*Certum est quod certum reddi potest*". Therefore, you may very well agree that a certain part of the contract of sale, such as price may be settled by someone else. As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract. It may be left to the determination of a certain person, and if it was so left and that person either would not or could not act, there would be no contract because the price was to be settled in a certain way and it has become impossible to settle it in that way, and therefore there is no settlement. No doubt as to goods, the Sale of Goods Act 1893, says that if the price is not mentioned and settled in the contract it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point and here there is no silence, because there is a provision that the two parties are to agree. As long as you have something certain it does not matter. For instance, with regard to price it is a perfectly good contract to say that the price is to be settled by the buyer. I have not had time, or perhaps I have not been industrious enough, to look through all the books in England to see if there is such a case; but there was such a case in Scotland in 1760, where it was decided that a sale of a landed estate was perfectly good, the price being left to be settled by the buyer himself. I have only expressed in other words what has already been said by my noble friend on the Woolsack. Here there was clearly no contract. There would have been a perfectly good settlement of price if the contract had said that it was to be settled by arbitration by a certain man, or it might have been