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*571 Balfour v Balfour.

Positive/Neutral Judicial Consideration

Court
Court of Appeal

Judgment Date
25 June 1919

Report Citation
[1919] 2 K.B. 571

ICLR

In the Court of Appeal.

Warrington , Duke and Atkin L. JJ.

1919 June 24, 25.

Husband and Wife—Contract—Temporary Separation—Allowance for Maintenance of Wife—Domestic Arrangement—No resulting Contract.

The plaintiff sued the defendant (her husband) for money due under an alleged verbal agreement, whereby he undertook to allow her 30*l*. a month in consideration of her agreeing to support herself without calling upon him for any further maintenance. The parties were married in 1900. The husband was resident in Ceylon, where he held a Government appointment. The plaintiff accompanied him to Ceylon, but in 1915 they returned to England, he being on leave. In 1916 he went back to Ceylon, leaving her in England, where she had to remain temporarily under medical advice. The plaintiff alleged that the defendant before returning to Ceylon entered into the above agreement. The parties remaining apart, the plaintiff subsequently obtained a decree nisi for restitution of conjugal rights, and an order for alimony:—

Held, that the alleged agreement did not constitute a legal contract, but was only an ordinary domestic arrangement which could not be sued upon. Mutual promises made in the ordinary domestic relationship of husband and wife do not of necessity give cause for action on a contract.

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Decision of Sargant J. reversed.

APPEAL from a decision of Sargant J., sitting as an additional judge of the King's Bench Division.

The plaintiff sued the defendant (her husband) for money which she claimed to be due in respect of an agreed allowance of 30*l*. a month. The alleged agreement was entered into under the following circumstances. The parties were married in August, 1900. The husband, a civil engineer, had a post under the Government of Ceylon as Director of Irrigation, and after the marriage he and his wife went to Ceylon, and lived there together until the year 1915, except that in 1906 they paid a short visit to this country, and in 1908 the wife came to England in order to undergo an operation, after which she returned to Ceylon. In November, 1915, she came to this country with her husband, who was on leave. They remained in England until August, 1916, when the husband's leave was up and he had to return. The wife however on the doctor's advice remained in England. On ***572** August 8, 1916, the husband being about to sail, the alleged parol agreement sued upon was made. The plaintiff, as appeared from the judge's note, gave the following evidence of what took place: "In August, 1916, defendant's leave was up. I was suffering from rheumatic arthritis. The doctor advised my staying in England for some months, not to go out till November 4. On August 8 my husband sailed. He gave me a cheque from 8th to 31st for 24l., and promised to give me 30l. per month till I returned." Later on she said: "My husband and I wrote the figures together on August 8; 34l. shown. Afterwards he said 30l." In cross-examination she said that they had not agreed to live apart until subsequent differences arose between them, and that the agreement of August, 1916, was one which might be made by a couple in amity. Her husband in consultation with her assessed her needs, and said he would send 30l. per month for her maintenance. She further said that she then understood that the defendant would be returning to England in a few months, but that he afterwards wrote to her suggesting that they had better remain apart. In March, 1918, she commenced proceedings for restitution of conjugal rights, and on July 30 she obtained a decree nisi. On December 16, 1918, she obtained an order for alimony.

Sargant J. held 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.

He accordingly gave judgment for the plaintiff.

The husband appealed.

Barrington-Ward K.C. and *Du Parcq* for the appellant.

Where husband and wife are only temporarily living apart an agreement like that in the present case confers no contractual rights. There was no agreement for a separation. The agreement here

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was a purely domestic arrangement intended to take effect until the wife should rejoin her husband. It *573 cannot be regarded as a binding contract. The wife gave no consideration for the promise.

On the evidence it is submitted that this was a temporary domestic arrangement caused by the absence of the husband abroad, and was not intended to have a contractual operation.

Hawke K.C. and *Tebbs* for the respondent.

Where a husband and wife are living together the wife is as capable of contracting with her husband that he shall give her a particular sum as she is of contracting with any other person.

Where husband and wife separate by mutual consent, the wife making her own terms as to her income and that income proves insufficient for her support, the wife has no authority to pledge her husband's credit: *Eastland v. Burchell* . [1]

[DUKE L.J. That may be because they must be taken to have agreed not to live as husband and wife.]

Living apart is a question of fact. If the parties live apart by mutual consent the right of the wife to pledge her husband's credit arises. If, however, instead of doing so she agrees to give up that right and to accept an allowance instead, she is entitled to sue for it.

The agency of the wife arises either where the husband leaves her wrongfully, or where the parties are by mutual consent living apart.

In Lush on Husband and Wife, 3rd ed., p. 404, it is stated that:

> "If the wife is living apart from her husband either (a) on account of the husband's misconduct, the wife being left without adequate means; (b) or by mutual consent; and the husband has agreed to make her an allowance, and neglects to pay it, the law gives her an absolute authority to pledge his credit for suitable necessaries."

[DUKE L.J. Are not those cases where the parties are matrimonially separated?]

[WARRINGTON L.J. referred to Lush on Husband and Wife, 3rd ed., p. 386.]

The agency arises where there is a separation in fact. The *574 consideration for the promise by the husband to pay the allowance was that she gave up her right to pledge his credit.

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[DUKE L.J. The husband has a right to withdraw the authority to pledge his credit. The wife's consent, therefore, cannot be treated as consideration to support such a contract as this.]

Where a husband leaves his wife in England and goes abroad it is no longer at his will that she shall have authority to pledge his credit. If there be a separation in fact (except for the wife's guilt) the agency of necessity arises. The parties here intended to enter into a binding contract.

WARRINGTON L.J.

(after stating the facts). Those being the facts we have to say whether there is a legal contract between the parties, in other words, whether what took place between them was in the domain of a contract or whether it was merely a domestic arrangement such as may be made every day between a husband and wife who are living together in friendly intercourse. It may be, and I do not for a moment say that it is not, possible for such a contract as is alleged in the present case to be made between husband and wife. The question is whether such a contract was made. That can only be determined either by proving that it was made in express terms, or that there is a necessary implication from the circumstances of the parties, and the transaction generally, that such a contract was made. It is quite plain that no such contract was made in express terms, and there was no bargain on the part of the wife at all. All that took place was this: The husband and wife met in a friendly way and discussed what would be necessary for her support while she was detained in England, the husband being in Ceylon, and they came to the conclusion that 30*l*. a month would be about right, but there is no evidence of any express bargain by the wife that she would in all the circumstances treat that as in satisfaction of the obligation of the husband to maintain her. Can we find a contract from the position of the parties? It seems to me it is quite impossible. If we were to imply such a contract in this case we should be ***575** implying on the part of the wife that whatever happened and whatever might be the change of circumstances while the husband was away she should be content with this 30l. a month, and bind herself by an obligation in law not to require him to pay anything more; and on the other hand we should be implying on the part of the husband a bargain to pay 30l. a month for some indefinite period whatever might be his circumstances. Then again it seems to me that it would be impassible to make any such implication. The matter really reduces itself to an absurdity when one considers it, because if we were to hold that there was a contract in this case we should have to hold that with regard to all the more or less trivial concerns of life where a wife, at the request of her husband, makes a promise to him, that is a promise which can be enforced in law. All I can say is that there is no such contract here. These two people never intended to make a bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make it, and was bound in honour to continue it so long as he was in a position to do so. The wife on the other hand, so far as I can see, made no bargain at all. That is in my opinion sufficient to dispose of the case.

It is unnecessary to consider whether if the husband failed to make the payments the wife could pledge his credit or whether if he failed to make the payments she could have made some other arrangements. The only question we have to consider is whether the wife has made out a contract which she has set out to do. In my opinion she has not.

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I think the judgment of Sargant J. cannot stand, the appeal ought to be allowed and judgment ought to be entered for the defendant.

DUKE L.J.

I agree. This is in some respects an important case, and as we differ from the judgment of the Court below I propose to state concisely my views and the grounds which have led me to the conclusion at which I have arrived. Substantially the question is whether the promise of the husband to the wife that while she is living absent from **576* him he will make her a periodical allowance involves in law a consideration on the part of the wife sufficient to convert that promise into a binding agreement. In my opinion it does not. I do not dissent, as at present advised, from the proposition that the spouses in this case might have made an agreement which would have given the plaintiff a cause of action, and I am inclined to think that the promise of the wife in respect of her separate estate could have founded an action in contract within the principles of the Married Women's Property Act, 1882 . But we have to see whether there is evidence of any such exchange of promises as would make the promise of the husband the basis of an agreement. It was strongly urged by Mr. Hawke that the promise being absolute in form ought to be construed as one of the mutual promises which make an agreement. It was said that a promise and an implied undertaking between strangers, such as the promise and implied undertaking alleged in this case would have founded an action on contract. That may be so, but it is impossible to disregard in this case what was the basis of the whole communications between the parties under which the alleged contract is said to have been formed. The basis of their communications was their relationship of husband and wife, a relationship which creates certain obligations, but not that which is here put in suit. There was a discussion between the parties while they were absent from one another, whether they should agree upon a separation. In the Court below the plaintiff conceded that down to the time of her suing in the Divorce Division there was no separation, and that the period of absence was a period of absence as between husband and wife living in amity. An agreement for separation when it is established does involve mutual considerations.

That was why in *Eastland v. Burchell* [2] the agreement for separation was found by the learned judge to have been of decisive consequence. But in this case there was no separation agreement at all. The parties were husband and wife, and subject to all the conditions, in point of law, involved in that **577* relationship. It is impossible to say that where the relationship of husband and wife exists, and promises are exchanged, they must be deemed to be promises of a contractual nature. In order to establish a contract there ought to be something more than mere mutual promises having regard to the domestic relations of the parties. It is required that the obligations arising out of that relationship shall be displaced before either of the parties can found a contract upon such promises. The formula which was stated in this case to support the claim of the lady was this: In consideration that you will agree to give me 30*l*. a month I will agree to forego my right to pledge your credit. In the judgment of the majority of the Court of Common Pleas in *Jolly v. Rees* [3] , which was affirmed in the decision of *Debenham v. Mellon* . [4] Erle C.J. states this proposition [5] : “But taking the law to be, that the power of the wife to charge her husband is in

the capacity of his agent, it is a solecism in reasoning to say that she derives her authority from his will, and at the same time to say that the relation of wife creates the authority against his will, by a presumptio juris et de jure from marriage." What is said on the part of the wife in this case is that her arrangement with her husband that she should assent to that which was in his discretion to do or not to do was the consideration moving from her to her husband. The giving up of that which was not a right was not a consideration. The proposition that the mutual promises made in the ordinary domestic relationship of husband and wife of necessity give cause for action on a contract seems to me to go to the very root of the relationship, and to be a possible fruitful source of dissension and quarrelling. I cannot see that any benefit would result from it to either of the parties, but on the other hand it would lead to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind. I think, therefore, that in point of principle there is no foundation for the claim which is made here, and I am satisfied that there was no consideration **578* moving from the wife to the husband or promise by the husband to the wife which was sufficient to sustain this action founded on contract. I think, therefore, that the appeal must be allowed.

ATKIN L.J.

The defence to this action on the alleged contract is that the defendant, the husband, entered into no contract with his wife, and for the determination of that 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 **579* 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

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30s. or 2*l*. 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. The parties themselves are advocates, judges, Courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted. The only question in this case is whether or not this promise was of such a class or not. For the reasons given by my brethren it appears to me to be plainly established that the promise here was ***580** not intended by either party to be attended by legal consequences. I think the onus was upon the plaintiff, and the plaintiff has not established any contract. The parties were living together, the wife intending to return. The suggestion is that the husband bound himself to pay 30l. a month under all circumstances, and she bound herself to be satisfied with that sum under all circumstances, and, although she was in ill-health and alone in this country, that out of that sum she undertook to defray the whole of the medical expenses that might fall upon her, whatever might be the development of her illness, and in whatever expenses it might involve her. To my mind neither party contemplated such a result. I think that the parol evidence upon which the case turns does not establish a contract. I think that the letters do not evidence such a contract, or amplify the oral evidence which was given by the wife, which is not in dispute. For these reasons I think the judgment of the Court below was wrong and that this appeal should be allowed.

Representation

Solicitors for appellant: Lewis & Lewis . Solicitors for respondent: Sawyer & Withall , for John C. Buckwell, Brighton.

Appeal allowed. (G. A. S.)

Footnotes

1 *(1878) 3 Q. B. D. 432 .*

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2 *3 Q. B. D. 432 .*
3 *(1864) 15 C. B. (N. S.) 628 .*
4 *(1880) 6 App. Cas. 24 .*
5 *15 C. B. (N. S.) 641 .*

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