Online library: digital copies

Copyright Notice

Course of Study: LLB - Contract law - LA1040

Extract title: Contracting in the Haven: Balfour v Balfour revisited

Title author: Freeman, M.

Name of Publisher: Dartmouth

Publication year, Volume, Issue: 1996

Page extent: 68 - 82

Source title: Exploring the Boundaries of Contract

ISBN/ISSN: 9781855217126

UNIVERSITY OF LONDON

4 Contracting in the Haven: Balfour v. Balfour Revisited

MICHAEL FREEMAN

> *Balfour* v *Balfour* is one of those wise decisions in which the courts allow the realities of life to determine the legal norm which they formulate (Otto Kahn-Freund[1]).

Balfour v *Balfour*,[2] three quarters of a century after it was decided, remains a leading case. It features prominently in all contract textbooks and, as Treitel observes,[3] it has not been judicially questioned. It has had one in-depth critical article devoted to it but this, by Stephen Healey,[4] concentrates mainly on the place of the case in the law of contract.

My starting point is somewhat different. As a family lawyer I am struck by a paradox. The ruling orthodoxy remains *Balfour* v *Balfour* but increasingly English law extends to those in family relationships the power to regulate their own lives. Nor is English law alone in exemplifying this trend.[5] Oddly, as commercial law has come to learn the perils of an uncritical embrace of freedom of contract as its governing principle,[6] so family law, for so long its paradigmatic antithesis, has welcomed the ideological framework of contract. As contract law has shifted its direction towards status,[7] as it has come to reflect ongoing relationships[8] with reliance[9] rather than choice its key, so modern family law has steadily embraced contract as its governing principle and in the process has cast off many of its status associations.[10] Once no clearer antimony was drawn than that which separated the family and the market.[11] The family was quintessentially "private": commerce, by contrast, belonged to the "public" world.[12] But the family, that "haven from the heartless world"[13] of the market has now adopted many of the same concepts and principles that (once) commerce embraced.

And yet *Balfour* v *Balfour* remains ruling orthodoxy. The standard examples

still given in contract textbooks of agreements or arrangements where there is no intention to create a legal relationship, and therefore no contract, are those in family relationships, in particular between husbands and wives.[14]

Not only has family law changed since *Balfour* v *Balfour*, but there have also been enormous changes in the way people regulate their domestic arrangements. When *Balfour* v *Balfour* was decided in 1921 what we would understand today as cohabitation was unheard of. Men had mistresses - this is evident from another leading contract case of the period *Upfill* v *Wright*[15] - but the phenomenon of cohabitation outside marriage[16] was discretely veiled. It was the 1970s, fifty years after *Balfour* v *Balfour*, before the courts began to confront the problems caused by dysfunctional cohabitation arrangements.[17]

Does *Balfour* v *Balfour* accordingly have much relevance today? Does it remain a "wise" decision in tune with the realities of life? Was such an astute observer as Otto Kahn-Freund, a founding father of academic family law in this country,[18] wrong or have our perceptions of wisdom changed in the forty-three years since his remarks appeared in the *Modern Law Review*? It is my view that there is now a mismatch between the so-called governing principle and the realities of family life. Indeed, that family law itself, as it has come to embrace contract, has ignored, and wisely so, the ruling orthodoxy of contract lawyers. Before this argument can proceed, *Balfour* v *Balfour* itself needs to be critically examined.

Balfour v *Balfour*

The facts of *Balfour* v *Balfour* could not be more straightforward. The parties were married in 1900. The husband, a civil engineer, had a post with the government of Ceylon as Director of Irrigation. At the end of a period of leave spent in England in 1916, the wife, who suffered from rheumatic arthritis, stayed on in England on medical advice. The husband promised to pay his wife £30 a month during the period of their separation whilst he was in Ceylon. Some eighteen months later he wrote suggesting that they had better remain apart. She sought and was granted a decree of restitution of conjugal rights, and an order for alimony. The law report does not disclose the amount of this award but we may assume it was probably quite small.[19] The wife also sued on the promise of maintenance, presumably, though it is not clear from the report, to supplement her alimony award. If there were any conflict of laws issues in the case, they were not raised.[20] We may, however, assume that Mr Balfour's domicile remained English.

Sargant J. decided in Mrs Balfour's favour:[21] he found consideration for the contract in her forbearance from seeking to pledge his credit for necessaries.[22] The Court of Appeal allowed Mr Balfour's appeal.[23] The three judgments do not pursue identical lines of argument and Atkin L.J.'s is, perhaps not surprisingly, the most interesting.

Whilst Warrington L.J. and Duke L.J. might have been prepared to dispose of Mrs Balfour's action because of the absence, as they saw it, of consideration, it is Atkin L.J. who, with a flourish of language and an eye on theory, articulates what has become the orthodox legal argument. He lays down, what Unger called,[24] the "charmed circle" of family arrangements. "In respect of these promises", Atkin L.J. says, "each house is a domain into which the King's wait does not seek to run, and to which his officers do not seek to be admitted".[25] There could not be a clearer statement of the privacy argument, to which I will return.

Atkin L.J. continued that, even if there were consideration, arrangements such as that entered into by the Balfours "are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences".[26] In Atkin L.J.'s opinion, "agreements such as these are outside the realm of contracts altogether".[27] It should be noted that the privacy argument has thus been supplemented by an altogether different one, namely that parties in domestic situations do not intend to be contractually bound. Subtle distinctions between subjective intention and objective intention do not appear to have concerned Atkin L.J., though it would seem that he is imputing intention on the basis of what might be expected from persons in the situation of the Balfours. But note he does not put this into any reasonable spouses' context. People in the position of the Balfours do not intend to be contractually bound because judges do not want them to come under the umbrella of contract protection.

Atkin L.J. uses, it should be noted, two common reasoning techniques: *reductio ad absurdum* and the slippery slope argument. Thus, he starts his judgment by invoking the social arrangement ("Two parties agree to take a walk together or ... there is an offer and acceptance of hospitality").[28] This leads him straight into the conclusion that agreements between husbands and wives, many of which are of course of this kind but some of which are, as in *Balfour* v *Balfour* itself, on matters of real importance, should be treated similarly.

He also reasons, using the well-known floodgates argument, that if the court were to conclude there were a contract between the Balfours "the small Courts of this country would have to be multiplied one hundredfold".[29] Duke L.J. agreed. He foresaw "unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind".[30] Such fears are entirely exaggerated, even more so in 1921 when there was no legal aid. Warrington L.J.'s judgment employs the *reductio ad absurdum* argument too - indeed, he admits as much. "If", he argues, "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".[31] At most, in Warrington L.J.'s view, the husband was "bound in honour"[32] to pay the sum he had promised: the wife, however, in his view, "made no bargain at all".[33] The *reductio ad absurdum* reasoning, particularly as it features in Warrington L.J.'s

judgment, is weak: it is easily arguable that with trivial matters there is no intention to create legal relations. An agreement about support - in issue in *Balfour* v *Balfour* - comes into a very different category. But this assumes that Warrington L.J. saw the case as about intention to create legal relations, and that may be doubted.

The textbook writers, Leake,[34] Pollock,[35] Anson,[36] wrote of the need for there to be an intention to create legal relations long before *Balfour* v *Balfour*. It is true others did not (Chitty only recognises the requirement in 1930, 102 years after his first edition and nine after *Balfour* v *Balfour),*[37] but it seems to be the case that academic doctrine antedates precedent in this area. It is inconceivable that Atkin L.J. will not have read Pollock or Anson, though he does not refer to them. If he were aware that he was propounding a novel proposition, with support only in academic textbooks, we might have expected him to cite them in support. They were long dead, so that the absurd obstacle of not citing living authors would not have obtruded.[38]

After *Balfour* v *Balfour* the textbook writers were able to seize upon the case, and in particular Atkin L.J.'s judgment, to clothe with authority what they had previously based on principle or civilian writings like Pothier and Savigny.[39] Atkin L.J.'s judgment came to be seen as judicial support for the intention to create legal relations requirement. Pre-*Balfour* it was easy to conceptualise this in terms of the absence of consideration, and this is thinking still firmly rooted in the judgments of Duke L.J. and Warrington L.J. It was some years after before Atkin L.J.'s judgment attracted attention. Indeed, only in the 1940s did the requirement of an "intention to create legal relations" achieve prominence in the case law.[40] It is difficult to explain why, but it seems - we can, of course, rely on reported cases only - that not until this time did plaintiffs seek to apply contract outside its normal commercial context. Or, perhaps, only then did defendants resist attempts to do so.

It must not be forgotten that *Balfour* v *Balfour* was decided only a generation after married women acquired the capacity to make contracts with their husbands:[41] another fourteen years were to elapse before they acquired complete contractual capacity.[42] The social changes since 1919 have been enormous. The doctrine enunciated in *Balfour* v *Balfour* lives on. The cases provide several instances of its application. One of the more significant is *Gould* v *Gould.*[43] The majority in this case (Edmund Davies and Megaw L.J.J.) did not think that the form of words used by a working class husband in saying that he would pay his wife £15 a week "so long as he had it" imported sufficient certainty as to indicate that the parties intended to enter into legal relations. The agreement in issue had been entered into after the husband and wife separated. An equally valid conclusion is that the parties had intended a contractually-binding arrangement but lacked the ability to formulate this agreement in language acceptable to the Court of Appeal.

Lord Denning M.R.'s dissenting judgment is the more interesting of the judgments in *Gould* v *Gould.* He conceded that "the question of an "intent to

create legal relations" [was] not to be resolved by looking into the minds of the parties". By contrast, "it is not the actual intention of the parties, but the intention that the court imputes to them. It is to be found by looking at what the parties said and did in the situation in which they found themselves: and then asking: what would reasonable people think about the provision? Would they regard it as intended to be binding? If it was a firm promise, made for good consideration, a reasonable person will, as a rule, have regarded it as intended to be binding: and the courts will enforce it unless it was a mere domestic or social arrangement".[44] It is a fair suspicion that reasonable people, certainly people who understood the lives of couples like the Goulds, would have concluded that they had made a binding agreement. They may also have found sufficient certainty in the agreement. Should we expect agreements such as those entered into by the Balfours and the Goulds, and entered into orally, to look like formal contracts found in the business world?

The facts of *Gould* v *Gould* were different from those in *Balfour* v *Balfour*. In the earlier case, the agreement was entered into in a state of amity (or so we must assume): in the latter case, the parties had already separated.[45] Mrs Balfour lost her case because she could not prove that there was a contract - she was arguably the first litigant to have to prove this. Mrs Gould lost her case because the agreement was not sufficiently commercial enough - it was not formulised in sufficiently precise language.

How to deny contractual remedies

From the cases considered and from others we can find at least three processes of reasoning used by the judges to conclude that arrangements between husbands and wives - and we will see between cohabitants - should be denied contractual remedies. The three arguments adduced are not necessarily consistent, nor is there any necessary coherence between them. This is the world of "mix and match", rather than of scientific exposition.

The first argument is that the presumption against finding a contract accords with the parties' intentions. This argument emphasises private autonomy: the parties do not want their agreement to have legal consequences and it would accordingly be wrong for a court to gainsay their decision.

But public-regarding arguments are also found. The first of these suggests that intimate relationships are too private for court intervention through contract enforcement to be appropriate. The intuitive appeal of this is obvious, until it is realised that all contractual relationships are private. The law of contract, whatever its juridical basis, is there to facilitate and enforce private arrangements. A ready, if unconvincing, response to this is that business arrangements, whilst private, are not as private as intimate arrangements. But there are different sorts of intimate arrangements too. The differentiation suggested here becomes all the more unsatisfactory when we look at the relationship of cohabitation outside

marriage, an area where the courts have had to grapple with domestic arrangements constantly in the last 20 years.

Balfour v *Balfour* long ante-dates the renewed trend towards living together as husband and wife outside marriage. However, if we look at a case decided eight years before *Balfour*, we are confronted, albeit inchoately, with a further public argument.

The case of *Upfill* v *Wright*[46] concerned not a cohabitation agreement as such but a tenancy agreement where the landlord knew that the tenant's rent would be paid by her lover. The court could not distinguish the tenant's situation from that of a prostitute and, following *Pearce* v *Brooks,*[47] held that, since the flat was let for an immoral purpose - the court had no doubt that "fornication", as it called it, was immoral - the landlord could not recover rent which was owed. The court was not interested in intention. Nor was it concerned that the stigmatized relationship was an intimate one. What led the court to conclude that the tenancy agreement could not be enforced were the very public considerations of public policy. The court saw itself as the guardian of public morality. Its role was conceived as being to reinforce public standards and to condemn deviant relationships. In *Walker* v *Perkins*[47a] and *Benyon* v *Nettlefold*[48] much earlier cases, this public policy role is forcefully maintained. In 1938 Lord Wright in *Fender* v *St. John Mildmay* expressed the same view in the clearest of terms. It was his view that "the law will not enforce an immoral purpose, such as a promise between a man and a woman to live together without being married or to pay a sum of money or to give some other consideration in return for an immoral consideration".[49] This, as Cretney[50] writing in 1974 noted, was still thought to represent English law - and probably remains orthodox doctrine even today. This tends to be forgotten largely, I suspect, because the very many cases that have been litigated in the last twenty years the contract has either been at arm's length after separation,[51] or the very absence of a contract has forced the courts to fall back on the law of trusts[52] where, curiously, these considerations of public policy do not seem to obtrude. Yet, in these cases it is the absence of an agreement[53] which compels the courts to seek justice in the law of trusts and allows them conveniently to pass over whatever is left of the public policy considerations.

The arguments appraised

The three lines of reasoning do not convince. Of the three the public policy rationale can be most readily disposed of. If public policy is to reflect public rather than judicial opinion it clearly has no place in the changed social environment of today.[54]

The privacy argument must be recognised for what it is. The law has long claimed to be absent in the "private" world of family and domestic life.[55] Thus, it was not until 1962 that husbands and wives could sue each other in tort[56]. Rape

in marriage only became criminal with *R* v *R* in 1991.[57] The marital rape immunity remarkably was justified by implying a term into the marriage contract (the terms of which were fixed by common law, not the parties)[58] that most women in the last fifty years at least would have rejected.[59] Wife beating was initially omitted from the definition of criminal assault on the ground that the husband had the right to chastise his wife.[60] Subsequently, police reluctance to intervene in wife battering was justified on privacy grounds.[61] The rhetoric of privacy has insulated the female world from the legal order and, in doing so, has sent an important ideological message to society. It devalues women by saying that they are not important enough to merit legal regulation. Taub and Schneider argue that

> This message is clearly communicated when particular relief is withheld. By declining to punish a man for inflicting injuries on his wife, for example, the law implies she is his property and he is free to control her as he sees fit. Women's work is discredited when the law refuses to enforce the man's obligation to support his wife, since it implies she makes no contribution worthy of support. Similarly, when courts decline to enforce contracts that seek to limit or specify the extent of the wife's services, the law implies that household work is not real work in the way that the type of work subject to contract in the public sphere is real work. These are important messages, for denying woman's humanity and the value of her traditional work are key ideological components in maintaining woman's subordinate status. The message of women's inferiority is compounded by the totality of the law's absence from the private realm. In our society law is for business and other important things.[62]

Nor should it be forgotten that what we protect as "private" is a political decision and this has important "public" consequences,[63] or that failures to respond, whether it be to domestic violence or to claims to enforce a contract, are public, not private, actions.[64]

What is constantly overlooked is the inconsistency between the privacy argument, which says that what goes on in intimate relationships is no business of the state, and the public policy argument which, for example, does not allow parties who wish to do so to deviate from the standard terms of a marriage contract. Why are the parties not free to vary the terms of their relationship without interference by the state? Thus, to take one example, the law says that a marriage contract is incomplete without sexual intercourse taking place.[65] Accordingly, an agreement before marriage not to have sexual intercourse after its celebration is said to strike fundamentally at the basis of the marriage itself,[66] in the same manner as is an agreement entered into before marriage for a future separation.[67]

The intention argument is also far from unproblematic. Contracts between husbands and wives will often be oral rather than written. The courts, despite the

emphasis on what the parties intended, are wary of subjective intention and seem to look both to context and to formal criteria. There is a tendency to emphasise factors external to the parties and their actual intentions (in so far as these can be gleaned). But in doing this the courts are applying the same techniques as they would in a trusts or restitution case. In effect whether they find an agreement ultimately rests on public-sounding considerations. Clare Dalton,[68] writing of cohabitation agreements in the United States, has observed that different judges can interpret virtually identical agreements differently: she explains this in terms of "their views of what policy should prevail or their own moral sense".[69]

Contract and family law: a mismatch

The Balfours was a Victorian marriage. The ideals of Victorian marriages and values concerning the family lasted until perhaps a generation ago.[70] But where the emphasis was on status, it is now on autonomy. For role identification we have now substituted role distance.[71] The "self" and individual choice have replaced role and obligation as central organising concepts. Whether this is a good or a bad thing is outside the remit of this article: certainly, communitarianism has become attractive to those who find the individualism embraced by the new model destructive of the good society.[72]

Modern family law, responding to this trend, has embraced contract as its governing principle. Despite the ruling orthodoxy of *Balfour* v *Balfour*, private ordering, rather than public regulation, has become the preferred means of organising and governing relationships within the family.[73] I speak of trends - in the coda of an article nominally addressing contract rather than family law issues I can do no more[74] - and there are clear and important exceptions to dominant trends. Thus, for example, the broad equitable redistributive powers of a court upon divorce[75] and the paramountcy principle that has come to govern the Solomonic decision[76] where a child's living arrangements are disputed[77] do not fit the trend depicted here.

This trend, as one American observer has put it, "has evolved far toward recognizing the need for private choice and the untenableness of uniform public policy as a strategy for governing the conduct and obligations of intimacy".[78]

Thus, entry into marriage is less regulated than it was and is more dependent upon individual choice.[79] The law relating to affinity was relaxed in 1986,[80] that relating to capacity to enter into a polygamous marriage has been liberalised by both case law[81] and also by recent legislation.[82] The places where marriages can be celebrated now takes greater account of what the parties want.[83] It is unlikely that you will ever be able to choose to marry a close blood relation, though there have been calls to allow brothers and sisters to marry,[84] but, it may be expected that some relaxation will take place in time (perhaps allowing uncles and nieces and aunts and nephews to marry).[85] It is inevitable that the law will come to allow people to choose their own sex, in that the bar on transsexuals marrying

is likely to revoked.[86] Similarly, it can only be a matter of time before we allow, as the three Scandinavian countries already do, the registration of gay partnerships.[87]

The law is also more willing to let those who are married define the terms of their relationship. Husbands and wives can sue each other, in contract[88] and in tort.[89] And, although a spouse cannot by his or her own covenant preclude him or herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction,[90] courts nevertheless start from the position that a solemn and freely-negotiated bargain by which a party with competent legal advice defines his or her own requirements ought to be adhered to unless some clear and compelling reason is shown to the contrary.[91] An agreement between spouses cannot fetter the jurisdiction of the court, but a court order which makes a once-and-for-all financial provision for a party to the marriage or dismisses that party's claim to financial relief operates as a bar to any fresh application for a court order.[92] This is the basis on which so called "clean break" orders[93] are routinely made by consent in matrimonial proceedings. One illustration may be given. In *Edgar* v *Edgar*,[94] the wife of a multi-millionaire entered into an agreement whereby she accepted property worth £100,000 from her husband and agreed not to seek any further capital or property provision from him whether by way of ancillary relief in divorce proceedings or otherwise. Three years later she petitioned for divorce, claimed a substantial sum and at first instance was indeed awarded a lump sum of £760,000. But the Court of Appeal held that she had shown insufficient grounds to justify going behind the original agreement. The court conceded that the husband had not exploited this in a way which was unfair to the wife. She had had the benefit of proper professional advice and had deliberately chosen to ignore it.[95]

It may be thought that this emphasis on private ordering is not inconsistent with the *Balfour* principle. But this can only be so on the basis that courts, so it is said, are prepared to impute to husbands and wives an intention to create legal relations where they decide to separate and make an agreement to govern their future financial relationship.[96] But, again, it needs to be stressed that actual intentions are often ignored by the courts so that husbands and wives, it seems, will often be deemed by a court to have entered into a contract only in circumstances where it finds contract the appropriate mechanism to describe the relationship. Private ordering is then permitted for public-regarding reasons.

In addition to greater control over entry into marriage and its terms, husbands and wives have been given greater powers to determine for themselves when to leave the marital relationship. The shift to no-fault divorce,[97] which will be completed when the latest proposals[98] are implemented very soon, reflects a conception of marriage as a private matter, controlled by the preferences of the parties. The U.S. Supreme Court has come close to articulating a right to divorce.[99] The White Paper, *Looking to the Future*, envisages, although it does not explicitly formulate as much, the termination of marriage (albeit after a period of "reflection") on the "say-so" of one party. We have got beyond talk of

divorce upon mutual agreement to an acceptance of repudiation. In a country where there is no society only individuals,[100] the social bond of marriage cannot count for much. It is at least arguable that Muslim women in Pakistan, for example, will get greater protection from the *talaq* than English women will get from the Lord Chancellor's divorce proposals.[101]

The conceptualization of marriage as a private matter is emphasised also by the trend to define marital fault very narrowly in property and money determinations[102] and in disputes about children.[103] This reflects, what Regan calls, "agnosticism about marital behavior".[104] And he notes a link between this and no-fault divorce: "if the state feels less able to assess the propriety of behavior in an existing marriage, then it is in a poor position to proclaim what behavior justifies ending the marriage".[105] Clean break policies, the preference for lump sums rather than periodical payments and time limits on alimony also reflect policy decisions to allow the individual to move on unencumbered by past choices.

Conclusion

Marriage has become "a personal rather than a social institution",[106] fit for private ordering rather than state regulation. And yet the official version of the truth is that husbands and wives do not subject their arrangements to the law of contract. If *Balfour* v *Balfour* was a "wise" decision based on the "realities" of life, then wisdom dictates that we rethink the doctrine it embodies. It no longer reflects realities nor is it in line with developments taking place in family law. Once the fiction is rejected we will be in a position to assess the role of contract in intimate relationships and to examine the relevance of the modern law of contract on the family.

Notes

1. "Inconsistencies and Injustices in the Law of Husband and Wife", [1952] 15 *Modern Law Review* 133, 138.
2. [1919] 2 K.B. 571.
3. *The Law of Contract* (London: Sweet and Maxwell, 9th ed., 1995), p. 152. Though its facts are said to stretch the doctrine to its limits: *Pettit* v *Pettit* [1970] A.C. 806, 816.
4. "Keeping Contract in its Place - *Balfour v Balfour* and the Enforceability of Informal Agreements", [1985] 5 *Oxford Journal of Legal Studies* 391.
5. "Keeping contract in its Place - *Balfour v Balfour* and the Enforceability of Informal Agreements", [1985] 5 *Oxford Journal of Legal Studies* 391.

6. See Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).
7. See Slawson, "The New Meaning of Contract: the Transformation of Contract Law by Standard Terms" [1984] 46 *University of Pittsburgh Law Review* 21.
8. See the work of Stewart Macaulay (*Law and the Balance of Powers* [1966]) and "Elegant Models, Empirical Pictures and the Complexities of Contract" [1977] 11 *Law and Society Review* 507, as well as the early study "Non-Contractual Relations in Business: A Preliminary Study" [1963] 28 *American Sociological Review* 55.
9. See Atiyah, op. cit., note 6 and his *Promises, Morals and the Law* (Oxford: Clarendon Press, 1974). See also G. Gilmore, *The Death of Contract* (Columbus: Ohio State University, 1974). But cf. C. Fried, *Contract As Promise* (Cambridge, Mass.: Harvard University Press, 1981) (where contract is justified as an enforcement of promises).
10. See K. O'Donovan, *Family Law Matters* (London: Pluto Press, 1993).
11. See M.D.A. Freeman, "Towards a Critical Theory of Family Law" [1985] 38 *Current Legal Problems* 153.
12. See James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991).
13. In Christopher Lasch's well-known expression: see his book *Haven in a Heartless World* (New York: Basic Books, 1977).
14. Though not exclusively: see, for example, *Jones* v *Padavatton* [1969] 1 W.L.R. 328.
15. [1911] 1 K.B. 506.
16. On which see Michael Freeman and Christina Lyon, *Cohabitation without Marriage* (Aldershot: Gower, 1983).
17. *Diwell* v *Farnes* [1959] 1 W.L.R. 624, 631 *per* Ormerod L.J.
18. His course at L.S.E. in the 1940s was probably the first academic course in the country. In a lecture reminiscing on this he tells of walking through the Temple and astonishing a divorce barrister by telling him that family law included the law of marriage as well as divorce.
19. Such awards were very small until quite recently.
20. It must be presumed that the putative proper law of this contract was English law.
21. [1919] 35 T.L.R. 476.
22. As she could have done then. This was not abolished until 1970.
23. [1919] 2 K.B. 571.
24. "Intent to Create Legal Relations, Mutuality and Consideration", [1985] 19 *Modern Law Review* 96, 98. But cf. Hugh Collins, *The Law of Contract* (London: Butterworths, 2nd ed. 1993), p. 90 where the absence of consideration is seen as at the root of *Balfour* v *Balfour*.
25. Op. cit., note 2, p. 579.
26. Idem.

27. Idem.
28. Ibid., p. 578.
29. Ibid., p. 579.
30. Ibid., p. 577.
31. Ibid., p. 575.
32. Idem.
33. Idem.
34. *The Elements of the Law of Contracts* (1st ed., 1867), p. 9.
35. *Principles of the English Law Contract* (1st ed., 1876), p. 2.
36. *Principles of Contract: Being a Treatise on the General Principles Concerning the Validity of Agreements to the Law of England* (1st ed., 1879), p. 14.
37. Only in his 1st edition, edited by MacFarlane and Wrangham in 1930 is the doctrine first mentioned.
38. According to Atiyah, op. cit., note 6, p. 690 "in 1919 Lord Atkin borrowed Pollock's ideas and gave them judicial support in *Balfour* v *Balfour*".
39. Leake used Pothier (but also Austin, Maine and the French *Code Civil*): Pollock relies on Savigny. On these influences see Gordley, op. cit., note 12.
40. *Peters* v *IRC* [1941] 2 All E.R. 620 (though *Balfour* v *Balfour* was not cited or referred to in the judgments).
41. In 1882 with the Married Women's Property Act. *Hall* v *Michelmore* [1901] 18 T.L.R. 33 seems to be the first case in which such a contract is alleged.
42. In 1935 with the Law Reform (Married Women and Tortfeasors) Act.
43. [1969] 3 All E.R. 728.
44. Ibid., p. 730.
45. And see *Merritt* v *Merritt* [1970] 1 W.L.R. 1121.
46. Op. cit., note 15. The case was viewed with some scepticism in *Heglibiston Establishment* v *Heyman* [1977] 36 P. and C.R. 351.
47. [1866] L.R. 1 Ex. 213.
47.a. [1764] 1 W.B. 517.
48. [1850] 3 Mac. and G. 94.
49. [1938] A.C. 1, 42.
50. *Principles of Family Law* (London: Sweet and Maxwell, 1974), p. 31.
51. For example, see *Ward* v *Byham* [1956] 2 All E.R. 318 and *Tanner* v *Tanner* [1975] 2 All E.R. 716.
52. *Pettitt* v *Pettitt* [1970] A.C. 777; *Gissing* v *Gissing* [1971] A.C. 886, cf. *Lloyds Bank* v *Rosset* [1991] 1 A.C. 107 and *Burns* v *Burns* [1984] Ch. 317.
53. See, for example, *Springette* v *Defoe* [1992] 2 F.L.R. 388.
54. In a quarter of a century cohabitation has been transformed from the practice of 6 per cent of couples before their wedding day to close on 60

per cent. See K. Kilruan and V. Estaugh, *Cohabitation: Extra-Marital Child Bearing and Social Policy* (London: Family Policies Centre, 1993).

55. See F. Olsen, "The Family and the Market: A study of Ideology and Legal Reform", [1983] 96 *Harvard Law Review* 1497.
56. Law Reform (Husband and Wife) Act 1962.
57. [1992] 1 A.C. 599.
58. See Lenore Weitzman, *The Marriage Contract* (New York: Free Press, 1981).
59. The reasoning is usually traced to Sir Matthew Hale's *Pleas of the Crown.* See Michael Freeman, "Doing His Best to Sustain the Sanctity of Marriage" in N. Johnson (ed.), *Marital Violence* (London: Routledge, 1985).
60. And See Mavis Doggett, *Marriage, Wife-beating and the Law in Victorian England* (London: Weidenfeld and Nicolson, 1992).
61. See M.D.A. Freeman, *Violence in the Home - a Socio-Legal Study* (Aldershot: Gower, 1979).
62. "Perspectives on Women's Subordination and the Role of Law" in David Kairys (ed.), *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982), pp. 122-3.
63. See Frank Michelman, "Private, Personal but not Split: *Radin* v *Rorty*", [1990] 63 *Southern California Law Review* 1783, 1794.
64. See Martha Minow, "Words and the Door to the Land of Change: Law, Language and Family Violence", [1990] 45 *Vanderbilt Law Review* 1665, 1672.
65. See Richard Collier, *Masculinity, Law and the Family* (London: Routledge, 1995).
66. *Scott* v *Scott* (*orse Fone*) [1959] P. 103, 106 *per* Sachs J.
67. *Brodie* v *Brodie* [1917] P. 271; *Hudston* v *Hudston* [1922] 39 T.L.R. 108, 111 *per* Horridge J.
68. "An Essay in the Deconstruction of Contract", [1985] 94 *Yale Law Journal* 997.
69. Ibid., p. 1102.
70. On which see S. Mintz, *A Prison of Expectations: The Family in Victorian Culture* (1983). See also Michael Grossberg, *Governing the Hearth* (Chapel Hill: University of North Carolina Press, 1985).
71. See Milton Regan, *Family Law and the Pursuit of Intimacy* (New York: New York University Press, 1993) pp. 46-56. See also Robert Bellah et al., *Habits of the Heart* (Berkeley: University of California Press, 1985) and Charles Taylor, *Sources of the Self* (Cambridge, Mass.: Harvard University Press, 1989).
72. See Robert Bellah et al., *The Good Society* (New York: Knopf, 1991).
73. See Jana B. Singer, "The Privatization of Family Law" (1992) *Wisconsin Law Review* 1443.

74. See Mary-Ann Glendon, *The Transformation of Family Law* (Chicago: University of Chicago Press, 1989).
75. See Matrimonial Causes Act 1973 s. 25.
76. See Jon Elster, "Solomonic Judgments: Against the Best Interests of the Child", (1987) 54 *University of Chicago Law Review* 1.
77. See Children Act 1987 s. 1 (1) (and see the welfare checklist in s. 1 (3)).
78. See Marjorie M. Schultz, "Contractual Ordering of Marriage: A New Model for State Policy" (1982) 70 *California Law Review* 204, 291.
79. In the U.S. where formerly there were miscegenation statutes this is even more marked. See *Loving* v *Virginia* 388 U.S. 1 [1967]. Also of interest is *Turner* v *Safley* 482 U.S. 78 [1987] (ruling unconstitutional the requirement that prison inmates required the governor's permission to marry).
80. By the Marriage (Prohibited Degrees of Relationship) Act 1986.
81. *Radwan* v *Radwan (No. 2)* [1973] Fam. 37 and *Hussein* v *Hussein* [1983] Fam 26.
82. See the Private International Law (Miscellaneous Provisions) Act 1995, part II.
83. As a result of the Marriage Act 1994, though local authorities retain ultimate control and are unlikely to relax the law governing place of celebration unduly. My own local authority is ambivalent about weddings being celebrated in Wembley Stadium.
84. There have been well-publicised examples of cohabitation: in all these cases the brother and sister had not been brought up together. This weakens the social objections but not necessarily the eugenic considerations.
85. Cf. *Cheni* v *Cheni* [1965] P. 85 (marriage in Egypt between Jews domiciled in Egypt upheld in England and ruled not offensive to our standards of decency and Christian morality).
86. This ban was upheld in *Corbett* v *Corbett* (*orse Ashley*) [1971] P. 83 and subsequently by the European Court on Human Rights in *Cossey* v *U.K.* [1991] 2 F.L.R. 492 and *Rees* v *U.K. (No. 2)* [1987] 2 F.L.R. 111.
87. See Symposium, "The Family in the 1990s: And Exploration of Gay and Lesbian Rights", (1991) 1 *Law and Sexuality* 1.
88. See op. cit, note 41.
89. Since 1962: the court may stay the action where (in its view) no substantial benefit would accrue to either party.
90. *Hyman* v *Hyman* [1929] A.C. 601.
91. *Edgar* v *Edgar* [1980] 1 W.L.R. 1410.
92. *De Lasala* v *De Lasala* [1980] A.C. 546.
93. *Minton* v *Minton* [1979] A.C. 593.
94. [1980] 1 W.L.R. 1410.
95. See *Camm* v *Camm* [1982] 4 F.L.R. 577.

96. Cf. *Merritt* v *Merritt* [1970] 1 W.L.R. 1211. It is worth comparing the approaches of Lord Denning M.R. (at p. 1213) and Widgery L.J. (at p. 1214).
97. With the Divorce Reform Act 1969 (the sole ground for divorce being irretrievable breakdown, but adultery, behaviour and desertion retained as "facts").
98. *Looking to the Future: Mediation and the Ground of Divorce*, Cm. 2799 (London: H.M.S.O., 1995).
99. In *Boddie* v *Connecticut* 401 U.S. 371 (1971).
100. According to that well-known sociologist, Margaret Thatcher.
101. Although the Pakistan Muslim Family Law Ordinance of 1961 provides for a 90 day period (for conciliation) and the English law will provide a 12 month breathing space.
102. Conduct is taken into account only where it would be inequitable to disregard it (see Matrimonial Causes Act 1973 s. 25 (2) (g)).
103. See *S (BD)* v *S (DJ)* [1977] Fam. 109; *Re K* [1977] Fam. 179.
104. *Family Law and the Pursuit of Intimacy* (New York: New York University Press, 1993), p. 39.
105. Idem.
106. *Per* Temple, op. cit., note 5, p. 151.