Neutral Citation Number: [1842] EWHC QB J74
(1842) 114 ER 496; QB

KING'S BENCH DIVISION

30 May 1842

Before:

Lord Denman C.J.

Between:

ROSCORLA
-v-
THOMAS

Assumpsit. The declaration stated that, whereas heretofore, to wit, etc, in consideration that plaintiff, at the request of defendant, had bought of defendant a certain horse, at and for a certain price, etc., to wit, etc., defendant promised plaintiff that the said horse did not exceed five years old, and was sound etc., and free from vice; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse, at the time of the making of the said promise, was not free from vice, but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious; whereby etc.

Pleas: 1. Non assumpsit. Issue thereon.

2. That the horse, ungovernable or ferocious, in manner, etc.: conclusion to the country. Issue thereon[1].

On the trial, before Wightman J., at the Cornwall Spring Assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter term, 1841, Bompas Serjt. obtained a rule nisi for arresting the judgment on the first count[2]. In last term[3],

Erle and Butt shewed cause. The objection is, that the first count states only a nudum pactum. But there is an executed consideration, which, with a request, will support a promise. Now the request need not be express: wherever the law will raise a promise, a request by the party promising will be implied; note to *Osborne v. Rogers* (1 Wms. Saund. 264 a.). *Payne v. Wilson* (7 B. & C. 423), was the converse of the present case: there a consideration, which in its form was executed, was declared on as executory; and this was held to be no variance, because in reality the consideration was continuing. Here the declaration states an executed consideration in form; but it is, practically, executory, because the sale and warranty would be coincident. Here the declaration states an executed consideration in form; but it is, practically, executory, because the sale and warranty would be coincident. In *Thornton v. Jenyns* (1 Man. & G. 166), the declaration charged that, in consideration that plaintiff had

[1] There were other counts, on which issues were joined and found for the defendant.
[2] The rule was also for entering a verdict, on the evidence, for the defendant; but on this the Court did not decide.
[3] April 28th, 1842. Before Lord Denman C.J. Patteson, Williams, and Wightman Js.

promised to defendant, defendant then promised plaintiff. It was objected that this was executed consideration without a request, which was insufficient where the law would not raise a promise; and *Brown v. Crump* (1 Marsh. 567), was cited: but the Court held that the two promises might be considered as simultaneous, and that the objection therefore could not be sustained[4].

Bompas Serjt. and Slade, contra: The warranty ought to be given at the time of the sale: if made after, it is without consideration; 3 Blackst. Com. 166, Com. Dig. Action upon the Case for a Deceipt (A, 11), *Roswell v. Vaughan* (Cro. Jac. 196), *Pope v. Lewyns* (Cro. Jac. 630). *Thornton v. Jenyns* (1 Man. & G. 166), was a case of mutual promises, which can never literally be made at the same moment: here the declaration definitely lays the perfect sale as antecedent to and distinct from the warranty. And the warranty is a matter not implied by law upon a sale; *Parkinson v. Lee* (2 East, 314). Even an express promise without a legal consideration is invalid; *Collins v. Godefroy* (1 B. & Ad. 950). In *Hopkins v. Logan* (5 M. & W. 241), there was an executed consideration from which a promise to pay on request would have arisen: and it was holden that this did not support a promise to pay on a future day named.

Cur. adv. vult.

Lord Denman C.J., in this term (May 30th), delivered the judgment of the Court.

This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of 30l., the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be take as a general rule, subject to exceptions not applicable to this case, that the promise must be coextensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be coextensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express: and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to *Wennall v. Adney* (3 Bos. & Pul. 249), and in the case of *Eastwood v. Kenyon* (11 A. & E. 438). They are cases of voidable contracts subsequently ratified, of debts barred by operation of law; subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

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[4] It was also argued that the warranty might here, after verdict, be taken to be coincident with the sale: to which it was answered that, if it were so, the evidence negatived the declaration.

The rule for arresting the judgment upon the first count must therefore be made absolute.

Rule absolute.