HOUSE OF LORDS.

Monday, April 6, 1914.

(Before Earl Loreburn, Lords Atkinson, Shaw, and Moulton.)

LLOYD *v.* POWELL DUFFRYN STEAM COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58)—*Accidental Death of Workman—Dependant—Posthumous Illegitimate Child—Evidence—Statements by Deceased—Amendment of Claim by County Court Judge.*

Where a claim was made on behalf of the posthumous illegitimate child of a workman who was killed by an accident in the course of his employment, *held* that (*a*) statements made by the workman to the effect that the child was his and that he would marry the mother before the child was born are evidence of paternity and dependence; (*b*) the County Court Judge cannot on a claim based on partial dependence award compensation based on total dependence.

Opinion per Lord Shaw that the fact of dependency, whether in the case of legitimate or illegitimate children, does not necessarily rest on proving a promise of support by the father.

Appeal from a decision of the Court of Appeal (Cozens-Hardy, M.R., Buckley and Hamilton, L.JJ.) setting aside an award in an arbitration wherein Alice Lloyd claimed for Thomas Lloyd, an infant, compensation from the respondents for the death of Frank Whittall. The amount claimed was £127, 8s.

Frank Whittall was a miner and was killed by an accident arising out of and in the course of his employment by the respondents. Thomas Lloyd was the illegitimate son of Alice Lloyd by Frank Whittall, born seven months after the latter's death. At the arbitration Alice Lloyd gave evidence, objected to by the respondents but admitted and accepted by the arbitrator, that Whittall shortly before his death promised to marry her before the child was born. William Jones and Matilda Evans, whose evidence was similarly objected to and accepted, also testified to Whittall's intention to marry Alice Lloyd.

Being satisfied by this evidence that Whittall had intended to marry Alice Lloyd before the birth of the child, and that at the time of Whittall's death Thomas Lloyd was wholly dependent on his earnings, the arbitrator made an award for £213 and costs.

The Court of Appeal held that the arbitrator was wrong in deciding that Thomas Lloyd was a dependant of Whittall within the meaning of the Workmen's Compensation Act 1906, and in admitting the evidence of Alice Lloyd, William Jones, and Matilda Evans.

Their Lordships' considered judgment was delivered by

Earl Loreburn—This is an appeal under the Workmen's Compensation Act. The material facts are that the infant applicant is the posthumous illegitimate child of the deceased workman, who was killed by accident arising out of and in the course of his employment. An award was made for the applicant, but the Court of Appeal reversed this decision upon the ground that the learned Judge had received evidence which was inadmissible.

The evidence thus rejected consisted of statements made by the deceased in which he acknowledged the paternity of the child and promised to marry the mother before the child should be born. In the Court of Appeal the admission of this evidence was justified upon one ground alone, namely, that it was evidence given by a deceased person against his interest. It is very unfortunate and, indeed, unfair to any Court that the true point should not be taken before it. But I do not think that we ought to exclude the true point when it comes before us, though we have been deprived of the invaluable assistance which we should have gained from learning the opinions upon it of the Court of Appeal. In my view the evidence was admissible upon grounds not urged upon that Court. The argument which failed there was not renewed here, and I do not desire to express any dissent from the opinion expressed by the Court of Appeal.

In considering whether the evidence was admissible or not the first question is, What were the issues? Paternity was one issue. Whether the child was posthumous or illegitimate or both is immaterial. I think the evidence was properly allowed on the issue of paternity. If paternity has been established, the next issue is dependency. It is now clear that the existence of a legal duty upon the deceased workman to maintain wife or child out of his earnings, where such duty exists, is not conclusive proof of dependency, but it is a strong element, and in my opinion may be of itself sufficient.

The evidence in question went to show that if the father had not prematurely died this child would have been born legitimate and his father would have been legally bound to maintain it, which is a strong fact to prove dependency. Accordingly the evidence was in my opinion admissible upon that ground also. There was enough to show that the child would need and would have received its father's support.

Another and quite distinct point might arise. Is not the moral duty of a father to maintain his illegitimate child an element in proof of dependency which may be of itself sufficient to prove it with or without the liability to an affiliation order, just as the legal duty is an element in the case of a legitimate child? I do not express an opinion because this case was argued throughout upon the admissibility of evidence, and the point ought not to be decided without full argument. But the observations of my noble friend Lord Shaw require the most serious consideration, if I may be allowed to say so.

I am therefore of opinion that the award ought to be restored, but with one modification. The County Court Judge awarded as for total dependency, whereas the claim was for a smaller sum, £127, 8s., as for dependency in part. The award must be reduced to the sum claimed.

LORD ATKINSON — In this case it is not disputed that Frank Whittall, a workman, was on the 17th October 1911, while in the employment of the respondent company, killed by an accident arising out of and in the course of that employment. The claimant Thomas Lloyd, the illegitimate son of Alice Lloyd, was born on the 15th May 1912, within four days of seven months after Whittall's death.

A claim is made on this child's behalf for compensation under the Workmen's Compensation Act of 1906, on the ground that Frank Whittall was his father, and that at the time of the latter's death he (the applicant) was within the meaning of this statute dependent upon his father. It has already been decided by this House on this statute in *Orrell Colliery Company* v. *Schofield*, [1909] A.C. 432, that an illegitimate child *en ventre sa mère* at the time of his father's death may, when it subsequently comes into existence, be held to have been dependent upon its father at the time of the latter's death. The fact therefore that this child was a posthumous child is not *per se* a bar to its claim for compensation if it should be otherwise entitled to it.

Your Lordships' House has also decided in *New Monckton Collieries, Limited* v. *Keeling*, [1911] A.C. 648, 49 S.L.R. 664, that dependency is a question of fact, and that on this issue of fact the existence of a legal obligation upon a workman to support and maintain a wife or child, though not *per se* conclusive as a matter of law, is in all cases an element to be taken into consideration by the tribunal that has to decide that issue, and might in many cases be an almost conclusive piece of evidence. From these authorities it necessarily follows, in my view, that if a man, with full knowledge of the pregnancy of a woman with whom he has had sexual intercourse, becomes during her pregnancy engaged to be married to her, the fact of that contract having been entered into, though not in fact carried out, is a most powerful piece of evidence on both the issues of fact, namely, the dependency and the paternity of the child, because by the marriage a relation would be created from which the presumption of the legitimacy of the child would arise, and by reason of that legitimacy the legal liability of the father to support and maintain the child would result. If the contract should be terminated, the fact that it was made would be evidence on the second issue. I further think that the mere proposal of marriage made by a man under such circumstances, whether accepted or not, would be admissible evidence, certainly on the issue of paternity, though possibly not on that of dependency.

The question of paternity — an issue of fact — and the question of dependency — another issue of fact—are the only issues of fact raised in this case. By the marriage of the parents of a child even one day before its birth the presumption of legitimacy is created—*Gardner* v. *Gardner*, 1877, 2 A.C. 723. The headnote to that case runs thus—"Where after open courtship and constant intercourse a man and woman (she being ultimately in an advanced state of pregnancy) hurry on their marriage to prevent or mitigate scandal, and where in less than seven weeks after the marriage she gives birth to a child, the presumption of the husband's paternity of that child is next to insuperable." The Lord Chancellor (Lord Cairns) added—"The presumption is not a presumption *juris et de jure*, but a presumption of fact."

This presumption is, I think, founded on the great improbability that any man with the ordinary feelings of a man would marry a woman he believed or knew to be pregnant if he did not believe he was the father of her child.

The proposal to marry and the acceptance of it may of course be made by word of mouth, but the making and the acceptance of it are acts, matters of conduct, and strong pieces of evidence on the issue of paternity, inasmuch as they show the character in which the parties regarded the child *en ventre sa mère* and desired to treat it. The considerations which apply to a suit in which the issue of fact is the legitimacy of a child must obviously apply to a litigation like the present, in which one of the issues of fact is its paternity. In *Morris* v. *Davies*, 5 Cl. & F. 163, the matter in issue was the legitimacy of a child born in wedlock. The statement of the deceased paramour of the mother to the effect that he objected to the child being brought up to a particular trade, and that he would clothe and provide for it, was admitted in evidence as proof of a matter of conduct showing the character in which he regarded the child.

Again, in the case of the *Aylesford Peerage*, 1885, 11 A.C. 1, where the question in issue was also the legitimacy of a child born in wedlock, the letters of both the mother of the child, Lady Aylesford, and of her paramour, both alive at the date of the hearing, were given in evidence as proofs of matters of conduct, showing that they both regarded and treated this child as the offspring of their adulterous intercourse, and were therefore evidence to rebut the presumption of legitimacy.

It would appear to me therefore that on this question of paternity it is impossible to distinguish on principle the statements made by the deceased to Alice Lloyd, Mrs Matilda Evans, and William Jones from the statements contained in the letters received in evidence in the *Aylesford* case. No doubt Alice Lloyd proved the paternity of the child, and her evidence was not impeached; the County Court Judge believed it; but of course that circumstance cannot make additional evidence on the same point inadmissible. To treat the statements made by the deceased as statements made by a deceased person against his pecuniary interest, and therefore, though hearsay, proof of the facts stated, is wholly to mis-

take their true character and significance. This significance consists in the improbability that any man would make these statements, true or false, unless he believed himself to be the father of the child of whom Alice Lloyd was pregnant.

As I have already stated, I think the entering by these two people into an engagement to marry after the woman's condition had become known would, for the reasons I have mentioned, be admissible evidence on both issues, but if so, evidence of corroboration of the promise to marry such as would make the marriage contract enforceable in law would also be admissible.

How does the evidence stand on these two questions? First, of the fact of an engagement to marry having been made, and second, of the corroboration of it. Alice Lloyd might have been asked in the course of her examination-in-chief whether she was engaged to be married to the deceased? and if so, when and under what circumstance did the engagement take place? And if she had replied, "Yes, we were engaged before I became pregnant," or "immediately on my informing him I was pregnant, and would be confined in May 1912," no objection whatever could have been taken on the ground of admissibility to these questions or the answers to them. This was apparently the course followed in *Orrell Colliery Company* v. *Schofield*. It was there proved that when the girl discovered she was with child she and Schofield, the deceased workman, became engaged to be married; that Schofield acknowledged the paternity of the child in the presence of the girl's mother, and told her that he did not intend the child to be a chance child, but that he would marry the girl and keep her. It did not apparently occur to any person engaged in that case to suggest that Schofield's proposal to marry, or his admission of paternity, or his statement of his intentions in reference to the child, were not matters of conduct showing his attitude towards and mode of regarding and treating the fact of this girl's pregnancy, but were mere statements of a deceased person not made against his pecuniary interest, and therefore inadmissible. The course apparently followed in that case was not pursued in the present case. On the contrary, the gentleman who appeared for the applicant resolutely abstained from putting specifically to Alice Lloyd the most important question, which, as the fact stood, he could have put to her, which question, moreover, it is highly probable from her evidence she would have answered in the affirmative, namely, whether she was engaged to the deceased man or not. Fortunately, however, in the interest of justice, the woman has given evidence, the fair inference to be deduced from which is I think this, that she and Whittall were engaged to be married. The evidence runs as follows:—"He came to see me Sunday week before he was killed. I went for a walk with him and I was crying because I knew of my condition. He told me not to worry because we would be married in plenty of time. He had wanted to marry me before I got into that condition. I told him the child would be born in May. It was born on the 15th May."

There was no suggestion that Alice Lloyd was not ready and willing to marry the deceased, and her evidence would appear to me to be more consistent with the assumption that he and she were before this interview engaged to be married, but that the time when the marriage was to take place had not been fixed, rather than with any other assumption, and that when he saw her in distress by reason of her condition he sought to console her by assuring her that the engagement theretofore existing would be carried out before the child was born. I think it was quite competent for the County Court Judge to have from this evidence drawn the inference that these two people had become engaged before this interview.

Now as to the evidence of corroboration.

It consists of the statements made, acts done, and feelings displayed by the deceased, as deposed to by Mrs Matilda Evans and William Jones. The first witness says that the night before Whittall's death he looked vexed. I presume that means troubled in mind. That he said that Alice Lloyd had told him something which troubled him very much, but that it did not matter because he would marry her soon enough. This statement would appear to me to suggest that he and Alice Lloyd had arranged to get married and would get married in time rather than he merely intended to make thereafter a proposal of marriage to her.

To Jones he said he was afraid Alice Lloyd was in trouble—that it was a case of "getting married." That he asked the witness where he could get a house, and the witness further stated the deceased wanted to work as much as he could to provide a house for himself and Alice Lloyd. The same remark applies to this evidence as to that of Mrs Evans. It suggests, I think, an intention to carry out an arrangement already made rather than an intention to make thereafter a proposal to marry.

In *Bessela* v. *Stern*, 2 C.P.D. 265, the plaintiff had been seduced by the defendant, and was pregnant. The corroboration held on appeal to be sufficient was the evidence of the sister of the plaintiff. This witness stated that "In May 1875 she saw the plaintiff was in the family way, that she went to see the defendant, and that she said—'What have you done? You have got her into such disgrace. What do you mean'? That he said he would marry her and give her anything, but she must not expose him. That she said 'I hope you will do so.' That in July 1875 she went to the defendant's office; he gave her £1 to give her sister. That she said 'What are you intending to do'? That he said 'There is plenty of time to talk about that when that thing is born.' That she (the witness) was at Mrs Balder's house (where the plaintiff was confined) shortly after the birth of the child. That defendant came, and went into the parlour where her sister was. That she could hear

what they were saying. That her sister said 'You always promised to marry me and you don't keep your word.' He said he would give her some money to go away."

Grove and Denman, JJ., held that this evidence did not amount to sufficient corroboration. That decision was reversed on appeal by Cockburn, C.J., Bramwell and Brett, L.JJ., sitting in the Court of Appeal, who held that the conversation overheard was sufficient evidence of corroboration to require the case to be left to the jury, on the ground, apparently, that the defendant's omission to make any reply to the plaintiff's assertion might be held by a jury to amount to an admission of the truth of that assertion, Brett, L.J., (as he then was) stating that it was not necessary that the corroborative evidence should prove a promise to marry—that all that was wanted was a corroboration of the promise. It would appear to me that the statement of the deceased deposed to by Mrs Evans and Jones is quite as strong a corroboration of the promise to marry as the silence of the defendant in *Bessela* v. *Stern*.

In my view, therefore, all the evidence held by the Court of Appeal to be inadmissible was admissible on one or both of the two issues of fact raised in the case, namely, paternity and dependency. I further think that if what took place between Alice Lloyd and the deceased at their last interview only amounted to a proposal to marry, it was still evidence on the question of the paternity of the child. It is admitted, as I understand, that if this evidence was admissible, any reasonable man might have come to the conclusion at which the County Court Judge arrived on the whole of the evidence on this assumption legitimately before him, namely, that the claimant was entitled to recover the amount claimed.

I think the amendment he made was indefensible, and should not be allowed to stand on the ground that the respondent got no opportunity of showing that the child was not wholly dependent upon his deceased father, the claim having been framed on partial dependency only. The finding of the County Court Judge was in the Court of Appeal assailed mainly, if not entirely, on the ground that he had admitted in evidence the statements of the deceased deposed to by Alice Lloyd, Mrs Evans, and Jones as statements made by the deceased against his own pecuniary interest, and therefore evidence of the facts stated. The Court of Appeal held that these statements of the deceased were not of that character.

I thoroughly concur in that conclusion. I think, however, that these statements were admissible on the other grounds I have mentioned. I am therefore of opinion that the appeal should be allowed, and that the order and decree of the County Court should be varied by reducing the amount awarded to that originally claimed, and should be affirmed as amended. The appellant is, I think, entitled to his costs of the appeal in the Court of Appeal. The parties should, I think, respectively bear their own costs in the appeal to this House.

LORD MOULTON concurred with the judgment of Lord Atkinson.

LORD SHAW—I concur in the judgment proposed. But as I have reached this conclusion on grounds which are somewhat different from those of some of your Lordships, I desire to explain—and can do so briefly—what is my own point of view.

After the cases of *Orrell Colliery Company* v. *Schofield*, [1909] A.C. 433, *New Monckton Colliery Company* v. *Keeling*, [1911] A.C. 648, 49 S.L.R. 664, and *Potts* v. *Niddrie and Benhar Coal Company*, [1913] A.C. 531, 50 S.L.R. 744, there can be no doubt of the law —(1) That dependency is a matter of fact, and whether it is total or partial is also a matter of fact; and (2) that a posthumous child may be a dependent in the sense of the Workmen's Compensation Act.

As to the third point, namely, whether illegitimate children can be included within the category of dependants — that in my view is definitely settled by the statute itself. Under section 13 "dependants" "means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, and where the workman being the parent . . . of an illegitimate child, leaves such a child so dependent upon his earnings . . . shall include such an illegitimate child."

With the greatest respect I think that those statutory words have not had sufficient importance attached to them, and that accordingly a good deal of the discussion was misplaced. So far as I am concerned I cannot see my way, in face of this positive provision of this statute, to exclude from the category of dependents every illegitimate child with regard to whom it is not established that the father was meaning to provide for it, or had come under obligations or made promises in that particular. I humbly think that what the statute meant was to include all children of the workman, whether legitimate or illegitimate, within the category of possible dependants. It would not appear to me to have any bearing upon the case of a legitimate child to make the fact of its dependency in any case rest upon whether the father had made promises that his children born or about to be born would be supported by him; and I do not see why, when illegitimate children are included within the category of possible dependants as well as legitimate children, such an inquiry as to promises or undertakings by the father comes into place. The statute, in my view, has said that the workman's family and his illegitimate children shall be within the category of possible dependants, and that being so, in my view what remains to ask are two questions of fact and two alone—namely, was the workman the father? and secondly, was the child, legitimate or illegitimate, in fact dependent? But his promises or undertakings or acknowledgments do not appear to be a necessary part of any inquiry in

regard to the true and only relevant subjects which are the two which I have mentioned.

It was said in argument that some kind of limitation ought to be put on the class of illegitimate children, otherwise bogus claims might be numerous. The County Court Judges will no doubt take care of that, and I for myself do not doubt that they will demand clear proof of paternity. But if the paternity be proved, then the statute for reasons of State has included along with legitimate, illegitimate children.

As to the second fact — namely, dependency itself — one can figure cases with regard to both classes of children—cases, for instance, where dependency is not established because the son or daughter is earning his or her own living, has lived a separate life from the father, has a competence acquired from the mother, or has a fortune left to it by the father. In the case of illegitimate children suitable and full provision is sometimes made even before their birth. All these illustrations show that whether a child be legitimate or illegitimate, the question of dependency is just the old question of fact.

And with regard to both classes of children I do not think the matter of fact is concluded by inquiring whether there was a direct right of action for support or not. For the reason I am about to give I should be sorry to think that in the construction of a statute which applies to the whole of the United Kingdom the form of procedure for the enforcement of the parental obligation had any such bearing on the question to be determined.

In England the case of the legitimate children may be more direct than the case of the illegitimate, but whether directly or circuitously made effectual the obligation of the father to contribute towards the maintenance of the illegitimate child is there, and it is there in all those cases in which the child is without independent means. As it humbly appears to me, the express extension and application of the statute to the case of dependent illegitimate children in no way depend upon anything said or promised by the father, or upon whether his obligation in relief of the child's dependency was accompanied by undertakings of maintenance by him.

And in Scotland the same difficulty or circuity of procedure does not occur, and the action of an illegitimate son or daughter is a direct action for aliment, which as to the obligation there is no doubt whatsoever. In *Clarke* v. *Carfin Coal Company*, [1891] A.C. 412, 18 R. (H.L.) 63, 28 S.L.R. 950, a full examination was made by Lord Watson of the institutional writings and of recorded cases on the subject. "They settle," said he, "in conformity with the text of Bankton and Erskine, that there is a joint obligation upon both parents to maintain their natural child until it becomes capable of earning its own livelihood, and that the inability of either parent casts the whole liability on the other." The inclusion or exclusion, the extension or limitation, of the obligation to support illegitimate children is never complicated by any consideration of the question whether the father had made promises or arrangements to support his offspring. It would be very regrettable if this imperial statute should have its words applied in different senses north and south of the Tweed. But for the reasons which I have given I do not see any reason so to construe it. And for the same reasons I think those elements of the evidence to which I have referred are irrelevant.

As to the paternity itself, it does not seem to me that there are any grounds for disturbing the decision of the learned Judge. All the statements by the father importing his knowledge of the condition of the mother, his intentions to set up a household and the like, appear to me to be legitimate matter of proof on the point of paternity. In a question of status I am of opinion that such statements proved to have been made at the time and in the circumstances such as occurred in the present case are part of the *res gestæ* equally with actual contracts entered into by the deceased or conduct apart from words, both of which contracts and conduct could undoubtedly have been proved. I agree with the view that statements made at the time are, in this question of status, similarly admissible evidence. I cannot, speaking for myself, hold that they can be excluded because of the English rule as to statements not made against interest. I observe the tendency to confine the word "interest" in that connection to pecuniary interest. Statements of the kind made in this case do not appear to me to be ruled out by any such principle, and I do not think that those parts of the judgments of the Court below which imply this can be supported. The statements of a deceased man with regard to paternity of a child must, no doubt, be carefully weighed, but I do not know of any principle which would deny their admissibility *quantum valeant*. I should add that in the present case, even apart from these statements, it would not appear to me doubtful that the learned County Court Judge had material for arriving at the conclusion which he reached.

Their Lordships allowed the appeal, but varied the amount awarded by the County Court Judge by reducing it to the amount originally claimed, and subject to such variation restored his award.

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