

[IN THE COURT OF APPEAL.]

BESSELA v. STERN.

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Feb. 7;

May 7.

*Breach of Promise of Marriage—Material Evidence in support of Promise—*  
32 & 33 Vict. c. 68, s. 2.

In an action for breach of promise of marriage, the plaintiff having sworn that the defendant had seduced her and had repeatedly promised to marry her, her sister gave evidence that, at an interview she had with the defendant when she discovered her sister's condition, she upbraided him for the ruin and disgrace he had brought upon the plaintiff, when he said "he would marry her and give her anything, but I must not expose him." The sister further stated that, after the plaintiff's confinement, she overheard a conversation between the plaintiff and the defendant in the course of which the plaintiff said to the defendant, "You always promised to marry me, and you don't keep your word," when the defendant said he would give her some money to go away.

*Held*, reversing the judgment of the Common Pleas Division, that this was "material evidence in support of the promise," to satisfy the requirement of 32 & 33 Vict. c. 68, s. 2.

ACTION for breach of a promise to marry.

The cause was tried before Herschell, Q.C., at the last Liverpool summer assizes. The plaintiff gave evidence that she was a native of Berlin; in 1874 she went into the service of the defendant's father who kept an hotel in Liverpool, and whilst there was seduced by the defendant, who made her repeated promises of marriage. In June, 1875, finding herself with child, she, at the defendant's instigation, left the house of his father, and went into lodgings in Liverpool, where she was ultimately confined, and where she was visited by the defendant both before and after that event. The defendant paid for her lodgings, provided an accoucheur for her, and gave her small sums of money from time to time, and at length persuaded her to go to Germany, for which purpose he supplied her with money to the extent of 50*l.* or 60*l.* After remaining about four months in Germany, the plaintiff returned to Liverpool, and, the defendant repudiating the alleged engagement to marry her, she obtained an affiliation order of 4*s.* per week against him. In January, 1876, she brought this action.

In order to satisfy the requirement of 32 & 33 Vict. c. 68,

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s. 2 (1), Marie Bessela, the plaintiff's sister, was called. Her evidence was to this effect,—In May, 1875, I saw that the plaintiff was in the family way. I went to see the defendant. I said: "What have you done? You've got her into such disgrace. What do you mean?" He said he would marry her, and give her anything; but I must not expose him. I said: "I hope you'll do so." In July, 1875, I went to the defendant's office. He gave me 1*l.* to give my sister. I said: "What are you intending to do?" He said: "There's plenty of time to talk of that when that thing is born." I was at Mrs. Balmer's (where the plaintiff was confined) shortly after the birth of the child. Defendant came, and went into the parlour where my sister was. I could hear what they were saying. She 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. He said: "Why did not you make away with the little devil?" He parted in very bad temper.

The defendant, who was called as a witness, admitted the alleged connection and the paternity of the child, but positively denied that he had ever promised to marry the plaintiff.

Upon this and other evidence which is irrelevant to the present purpose, the case was left by the learned commissioner to the jury, who found a verdict for the plaintiff with 100*l.* damages. The commissioner declined to enter judgment for either party.

Feb. 7. *Torr, Q.C.*, and *Crompton*, moved for judgment for the plaintiff. The question is whether a promise made to a third person can be "material evidence in support of the promise" within 32 & 33 Vict. c. 68, s. 2. (1) The conversation deposed to by the sister to have passed between the plaintiff and the defendant on the second occasion surely was some evidence. The evidence of an accomplice is not received without corroboration; but the corroborative evidence need not be such evidence as would prove the commission of the crime. So, in cases under

(1) 32 & 33 Vict. c. 68, s. 2: "The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: provided always that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

the bastardy law, although the words of 7 & 8 Vict. c. 101, s. 3, are nearly the same as those of the Act in question (1), it is not necessary, and indeed it would obviously be impossible, to obtain proof such as is suggested was requisite here. The materiality of the corroborative evidence must be judged by all the surrounding circumstances.

*Day, Q.C.*, and *Gully*, for the defendant. The evidence given by the plaintiff's sister clearly was not "material evidence in support of the promise;" at the most, it amounted only to a wild assertion by a man anxious to avoid exposure,—“He said he would marry her, and give her anything; but I must not expose him.” How can that be material evidence in support of a previous promise to marry the plaintiff? It is a new promise made to a third person not in the plaintiff's presence. And as to the conversation between the plaintiff and the defendant overheard by the sister, it amounts only to an assertion by the plaintiff that the defendant had promised her marriage. The defendant's abstaining from contradicting the plaintiff's assertion was no corroborative evidence within the Act. It could hardly be expected that he would deny the statement at such a time. The words imputed to him on that occasion are certainly not the words of a man under an engagement to marry the woman he had seduced. This kind of evidence ought to be carefully watched: see *Taylor on Evidence*, 6th ed. § 1175, 1176.

*Torr, Q.C.*, was heard in reply.

GROVE, J. I am far from saying that this case is free from difficulty. The statute casts upon the judge the duty of determining what is material corroborative evidence in support of the testimony of the plaintiff herself that the defendant has promised to marry her. If the words of this Act had been, like those of the Bastardy Act, 7 & 8 Vict. c. 101, s. 3, “corroborated in some material particular by other testimony,” then the case would have been brought within the words of the statute, because any evidence which must be left to the jury would fall within that description. But the words here are, “some other material evidence in support of such promise.” There must be something more than a mere scintilla

(1) 7 & 8 Vict. c. 101, s. 3: “If the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices,” &c.

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of evidence which would be admissible. Upon the best opinion I can form, I think the evidence in this case was not "material evidence in support of the promise,"—not the sort of evidence the statute requires. The evidence upon which the point really arises is that of the plaintiff's sister, which was to this effect:—"In May, 1875, I saw that the plaintiff was in the family way. I went to see the defendant: I said 'What have you done? you've got her into such disgrace. What do you mean?' He said he would marry her, and give her anything; but I must not expose him. I said 'I hope you'll do so.'" It does not appear that the witness was aware at that time that there had been any promise of marriage. That cannot be relied on as a new promise: it is given to a third person. Neither can it be said to be a corroboration of a previous promise to marry the plaintiff. She goes on,—“In July, 1875, I went to the defendant's office. He gave me 1*l*. to give my sister. I said, 'What are you intending to do?' He said, 'There's plenty of time to talk of that when that thing is born.'" Then comes the conversation between the plaintiff and the defendant deposed to by the sister, in which the plaintiff is represented to have said to the defendant, "You always promised to marry me, and you don't keep your word," to which the defendant replied that he would give her some money to go away,—adding, "Why did not you make away with the little devil?" That seems to me to be somewhat inconsistent with the first conversation. If he had promised before, one would have expected that he would have given a different answer when thus challenged. On the one hand, the defendant's abstaining from contradicting the plaintiff's assertion might be some evidence for the jury that he had made some promise; but, on the other hand, coupling it with the unfeeling remark about the child, it would seem to negative the idea of his ever having contemplated marriage. Taking it all together, I think it does not amount to "material evidence in support of the promise" such as the statute contemplates. It is capable of either interpretation. The Act must have meant something by the word "material." There is in these cases a strong interest in the woman to prove a promise; and therefore the legislature has thought fit to require that her evidence of the promise shall be corroborated "by some other material evidence in support of *such promise*." The

fact of the man saying nothing when taxed by the plaintiff with having given his word to marry her and failed to keep it, is clearly not sufficient. Each case must depend upon its own particular circumstances. It is impossible to lay down any precise rule. I think the defendant is entitled to judgment.

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DENMAN, J. I am of the same opinion, though, I must say, not without having entertained very considerable doubt. The 32 & 33 Vict. c. 68, s. 2, for the first time makes the parties to an action for breach of promise of marriage admissible witnesses, with this proviso, that "no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." It is a negative clause: the words are strong, and every one of them is intended to have force. The plaintiff is not to recover unless her testimony is corroborated "by some other material evidence in support of such promise," that is, the promise sworn to by the plaintiff herself. In order to put a proper construction upon this statute, it will be useful to compare its language with that of any other analogous statute. In the case of an application to affiliate a bastard child, 7 & 8 Vict. c. 101, s. 3, enacts that, "if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child," &c. Those words have received a construction in a case of *Hodges v. Bennett*. (1) There, the application was not made until more than twelve months after the birth of the child, and the only evidence to give the justices jurisdiction was the unsupported testimony of the complainant that the defendant had paid money for the maintenance of the child within the twelve months; and the Court of Exchequer held that corroborative evidence of that fact was unnecessary. It was not necessary that there should be evidence in corroboration of the statement of the fact which gave jurisdiction: it was enough that the evidence as to the paternity of the party charged should be confirmed in some

(1) 5 H. & N. 625; 29 L. J. (M.C.) 224.

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material particular. That seems to me to be the common sense of the statute. Again, in the somewhat analogous case of the accomplice, it was for some time doubted whether there need be corroborative evidence on the question as to who committed the offence. It is now settled by competent authority that it must be corroborative evidence as to the commission by the prisoner of the crime charged. In such a case as the present, it cannot be doubted that it is for the judge to tell the jury whether or not the corroboration relied on constitutes evidence in support of the promise. Unless it is, it cannot be held to be corroborative testimony within the statute. In order to see whether or not the evidence is corroborative in that sense, the judge must look at all the surrounding circumstances. If there had been no other relation between the parties here than that suggested by the plaintiff, I am not prepared to say that I should not have considered that there was corroborative or material evidence fit to be left to the jury. But I think the evidence that was relied on was more consistent with another relation existing between them than that of marriage. Looking at all the circumstances, I agree with my Brother Grove that we cannot hold what was said to Marie Bessela to amount to a corroboration of the promise alleged to have been made to her sister. I therefore think the learned commissioner did right in leaving the plaintiff to move for judgment, and I have come to the conclusion, though not without doubt, that she is not entitled to it.

*Judgment for the defendant.*

The plaintiff appealed.

May 7. *Torr, Q.C.*, and *Crompton*, for the plaintiff.

The Court called upon

*Day, Q.C.*, and *Sutton*, for the defendant. There must be some substantial corroborative evidence in support of the promise. The whole conversation which is stated to have been overheard must be taken together. Then it amounts to no more than that the defendant said he would give the plaintiff money to go away.

[COCKBURN, C.J. I think this is a plain case, and the verdict

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should have been for the defendant; but the question is whether there is confirmatory evidence of the promise. I think there is and that the Court below are wrong. It is not necessary to give such evidence as will prove the contract, but only confirmatory evidence of some part of it. If the jury do not believe the plaintiff's evidence that there was a contract, the confirmatory part of the evidence falls to the ground.]

The defendant did not deny what the plaintiff said to him, and it must be therefore admitted that it cannot be argued that there was no corroborative evidence; but the corroborative evidence must be of a substantial character, which this was not.

COCKBURN, C.J. I think the decision of the Court of Common Pleas must be overruled, as I am of opinion that there was sufficient corroborative evidence to support the promise. The evidence given in corroboration need not go the length of establishing the contract: if the evidence support the promise it is enough. Here the sister says that she overheard a conversation between the plaintiff and the defendant. She says she heard the plaintiff say, "You always promised to marry me, and you don't keep your word." To that the defendant makes no answer. It is true that he offered her money to go away, and it might be that a man might say, "What shall I give you to go away?" without having made any promise to marry; but, on the other hand, there is his silence, and from that silence the jury might come to the conclusion that he admitted the promise. I think the verdict is against the evidence, but I cannot say that there was no evidence to go to a jury corroborating the plaintiff's testimony.

BRAMWELL, L.J. I am entirely of the same opinion. The judgment of the Court of Common Pleas must be reversed, and I regret it, for I see the danger of holding there was evidence in corroboration of the promise. It is not too much to suppose that a woman under similar circumstances does sometimes fancy that a promise has been made to her, nor is it too much to suppose that she will sometimes find a sister or some one who will confirm her statement as to a promise having been made. The

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evidence was that the plaintiff said, "You always promised to marry me, and you don't keep your word." The defendant made no answer. If we were to hold that that was no evidence of a promise, we should get rid of a great deal of evidence which is given every day at nisi prius. A claim is made on a man in respect of goods sold and delivered, and he does not deny it. If a statement is such that a denial of it is not to be expected, then silence is no admission of its truth; but if two persons have a conversation, in which one of them makes a statement to the disadvantage of the other, and the latter does not deny it, there is evidence of an admission that the statement is correct.

BRETT, L.J. The evidence is that the plaintiff made this statement to the defendant and he did not deny it. The whole question was left to the jury, and they believed the plaintiff. Similar evidence is received every day. The defendant by his silence admits what the plaintiff said, that the defendant always promised to marry her. It was not necessary that the evidence should shew a mutual promise to marry. The evidence need not prove a promise; all that is wanted is corroborative evidence of it.

*Judgment reversed, and entered for the plaintiff.*

Solicitor for plaintiff: *H. Sowton, Liverpool.*

Solicitor for defendant: *J. H. Lydall, for Stephens & Danger, Liverpool.*