Marquette Law Review

Volume 29
Issue 2 *February 1946*

Article 6

Evidence - Admissibility of Testimony of Married Woman as to Illegitimacy of Child

Kathleen Landman

Evidence — Admissibility of Testimony of Married Woman as to Illegitimacy of Child — Defendant was arrested on a complaint charging him with being the father of an illegitimate child born to complainant, a married woman. During the preliminary hearing the complainant, over objection, was allowed to testify as to her illicit relations with defendant. Counsel for defendant contended that since such testimony was inadmissible there was no probable cause for defendant's being bound over for trial. The court found probable cause and defendant thereupon petitioned for a writ of habeas corpus. It appeared from other testimony in the case that complainant was married; at the time of gestation her husband was in service over seas; and during the period in question she had been associating with defendant. The court observed that since the hearing in this case, the legislature enacted chapter 38, laws of 1945, which provides in substance that the husband and the wife are competent to testify as witnesses to the facts in a proceeding involving illegitimacy. Held: that the complainant was incompetent to testify as to her sexual relations with defendant during the period that her child was conceived. However, the other facts and testimony in the case had furnished probable cause, and an order issued quashing the writ of habeas corpus. *State ex. rel. Briggs v. Kellner, Sheriff,* (Wis. 1945) 20 N. W. 2nd 106.

The presumption of legitimacy was one of the strongest presumptions at common law. Originally, if it appeared that the husband was within the four seas at any time during the pregnancy of the wife, the presumption was conclusive.[1] Subsequently the rule was gradually relaxed to make the presumption rebuttable if one could prove non-access or impotency.[2] Generally speaking, the rule is the same in this country. In *Estate of Lewis*[3] our own Supreme court declared that the rule prevailing in Wisconsin was that stated by Lord Langdale.[4]

> "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established is not to be rebutted by circumstances which only created doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the mother must, in the cause of nature, have been begotten; or (4) only present under

[1] American Jurisprudence, Vol. 7, sec. 14, p. 636 (1937); Wigmore on Evidence, Vol. 3, sec. 2063, p. 2761 (1905); Jones on Evidence, Vol. 1, sec. 93, p. 162 (1938).
[2] Jones on Evidence, Vol. 1, sec. 93, p. 163 (1938).
[3] Estate of Lewis, 207 Wis. 155 at p. 159, 240 N. W. 818 (1932).
[4] Lord Langdale, M. R., in Hargrave v. Hargrave, 9 Beav. 552.

> such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."

This rule has been approved in *Riley v. State*,[5] and *Shuman v. Shuman*.[6]

The instant case concerned the competency of the wife's testimony rebutting the presumption. Husband and wife were disqualified because of interest at common law to testify as to non-access and illegitimate cohabitation. The courts felt that the mother might thus attempt to relieve her husband of his duty to support the child. In 1734 Lord Hardwicke, in a filiation proceeding,[7] declared that a wife was a competent witness to prove adultery between herself and the defendant, because the secrecy of the act would admit of no other proof; but that it was improper, on account of the interest of the wife in relieving her husband of the burden, to charge the maintenance of the child against the defendant upon the mother's sole and uncorroborated testimony of the non-access of her husband. So in the beginning there existed no reason except interest for excluding the testimony of the wife. Not until the time of Lord Mansfield[8] was the doctrine injected that "the law of England" as well as "decency, morality and policy" forbade parents from testifying to the fact of non-access. This added reason for the rule was on ground of policy to protect the innocent child, and had no precedent to support it. However the majority of our courts have accepted the policy explanation and in Wisconsin it has been stated time and time again. In an early case[9] the court said:

> "The law is well settled that a wife, on the question of legitimacy of her children, is incompetent to give evidence of the non-access of her husband during the time in which they must have been begotten. This rule is founded on the very highest ground of public policy, decency, and morality."

Thus the rule, supported by the two reasons stated, has survived; and unquestionably it often leads to hard decisions. For example in *Romanowski v. Romanowski*[10] the court ordered the divorced

---

[5] Riley v. State, 187 Wis. 156 at p. 159, 203 N.W. 767 (1925).
[6] Shuman v. Shuman, 83 Wis. 250 at p. 254, 53 N. W. 455 (1892).
[7] King v. Reading, Lee Temp. Hardwicke 79 (1734).
[8] Goodright v. Moss, 2 Cowp. 591 (1777).
[9] Mink v. State. 60 Wis. 583 at p. 584, 50 Am. Rep. 386, 19 N. W. 445 (1884); See Tioga v. South Creek, 75 Pa. 433 at 437 wherein Justice Gordon says:
> "Many reasons have been given for this (Mansfield's) rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous; and this, not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency."

husband to pay additional support money. At the time of the divorce proceeding the husband was ordered to pay for the support of the older of two children born during the marriage. The evidence offered at the trial showed that the younger child had been conceived during a period in which the parties were separated; that the appellant never recognized the child as his own; and the mother had started an illegitimacy proceeding some time prior. The trial court relieved the plaintiff from the payment of support money for the younger child, but the Supreme Court, in a five to four decision, granted the additional suport money which the mother requested.

Certainly the policy reason for the rule should prevent its waiver by the parties involved. However in *State ex. rel. Reynolds v. Flynn*[11] the defendant failed to object to the competency of complainant as a witness, and cross examined her in relation to facts from which non-access might have been inferred. It was held that defendant thus waived her incompetency. If the purpose of this rule is to protect the child, then it seems inconsistent and wrong to permit the mother or defendant to waive the protection at will.

The rule excluding the wife's testimony has been much criticized, and its rigidity has, resulted in too many hard cases. Conditions following the war would certainly result in many more such cases were the rule preserved. It is felt that the possible interest of the wife in shifting the burden of support, and even the policy against allowing parents to bastardize their children, can be more adequately met by tests of credibility and by cross examination, and it is no longer necessary to bar the testimony altogether as incompetent. Professor Wigmore has stated his opinion in strong language:[12]

> "The truth is that these high sounding 'decencies' and 'moralities' are mere pharisaical afterthoughts, invented to explain an otherwise incomprehensible rule, and having no support in the established facts and policies of our law. There never was any true precedent for the rule; and there is just as little reason of policy to maintain it."

---

[10] Romanowski v. Romanowski, 245 Wis. 199, 144 N. W. 2nd 23 (1944); See Koenig v. State, 215 Wis. 658, 255 N. W. 727 (1934). This was an illegitimacy action. A child was conceived when the husband was on parole working on a farm thirty-three miles from his wife's residence in Fond du Lac. The trial court allowed the wife to testify that during the period in question she had no sexual intercourse with anyone other than defendant. Likewise the husband was allowed to testify he remained on the farm; left only when accompanied; and had not been in Fond du Lac during the period in which the child was conceived. On appeal, all this testimony was declared incompetent and the child was held legitimate.

[11] State ex rel. Reynolds v. Flynn, 180 Wis. 556, 193 N. W. 651 (1923).

[12] Wigmore on Evidence, Vol. 3, sec. 2064, p. 2768 (1905).

Accordingly the Wisconsin Legislature in the summer of 1945 passed the following statute:[13]

> "Presumption of legitimacy. Whenever it is established in an action that a child was born to a woman while she was the lawful wife of a specified man, any party asserting the illegitimacy of the child in such action shall have the burden of proving beyond all reasonable doubt that the husband was not the father of the child. In all such actions the husband and the wife are competent to testify as witnesses to the facts.***"

It is to be expected that this statute will receive early interpretation, which was not necessary in the instant case although the court saw fit to cite and quote the statute. Interpretations in courts of other states of similar statutes indicate that the Wisconsin enactment should be given substantial effect by the Court, and we are informed that the courts in Milwaukee are at present giving effect to the statute by permitting the testimony formerly excluded. The Supreme Court of Arkansas, considering a similar statute, has stated:[14]

> "In the absence of a statute in express words making the mother competent to testify to non-access of her husband, we hold that she cannot do so. Under our Statute, as we have seen, the mother is a competent witness. She may testify to facts which tend to prove the access on the part of her husband within the period of gestation was impossible, and, if she testified to facts of that character there would be a question for the court or jury trying the issue to determine as to whether or not the presumption of legitimacy had been overcome."

The Indiana Court has given full effect to such a statute,[15] and has admitted the testimony of the mother as to the facts of non-access and illegitimate cohabitation. There certainly is no reason to believe the Wisconsin Court will not reach a similar result.

KATHLEEN LANDMAN

---

[13] Wisc. Stat. sec. 328.39; Laws of Wisc. (1945) Ch. 38.
[14] Kennedy v. State, 173 S. W. 842 at p. 843 (1915).
[15] Pleasant Evans, appt., v. State of Indiana ex rel. Irene Freeman. 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 2 L. R. A. N. S. 619, and note, 6 Ann. Cas. 813 (1905).