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NOTES

PROOF OF ILLEGITIMACY IN PATERNITY PROCEEDINGS

The problem of proving that a child of a married woman, whose husband is alive, but from whom she is separated, is illegitimate becomes a matter of great importance to the prosecuting attorney in any paternity proceeding. However, some states have simplified the solution of this problem by legislation, while other states, of which Wisconsin is one, have, by a strict adherence to common law principles¹ and to certain statutory enactments,² made the solution of this problem very difficult.

The obstacles which confront the prosecuting attorney in the latter group of states is well illustrated in a Wisconsin decision.³ In this illegitimacy proceeding the husband and wife, having lived together up to the year of 1879, separated. The wife did not see or have any relations with her husband after that date. However, there was no one other than the husband or wife to prove this fact. In 1881, two years after the separation, the wife gave birth to a child, the result of illicit relations with a third person. The Wisconsin Supreme Court on an appeal upheld the trial court's refusal to permit the husband or wife to testify to the actual fact of their absolute separation and non-access. Therefore, the prosecuting attorney could not possibly overcome the prevailing common law presumption of legitimacy. As a result, this illegitimate child was held to be legitimate.

The reasoning of the Wisconsin Supreme Court in this case was based upon two well-known common law principles: first, that "A child born of a married woman is presumed to be legitimate . . . but this presumption 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 of any kind with the mother, (3) entirely absent at the period during which the child must, in the course of nature, have been begotten, or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse;"⁴ and second, that "Upon an issue as to the legitimacy of a child born in lawful wedlock neither the husband nor the

¹ *Mink v. State*, 60 Wis. 583, 19 N.W. 445 (1884); *Shuman v. Shuman*, 83 Wis. 250, 53 N.W. 455 (1892); *State ex rel. Reynolds v. Flynn*, 180 Wis. 556, 193 N.W. 651 (1923).

² WIS. STAT. (1939) § 325.18.

³ *Mink v. State*, 60 Wis. 583, 19 N.W. 445 (1884).

⁴ *Hargrave v. Hargrave*, 9 Beav. 552, 50 Eng. Rep. 457 (1846); *Shuman v. Shuman*, 83 Wis. 250, 53 N.W. 455 (1892); *Scanlon v. Walshe*, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488 (1895).

wife is a competent witness to testify as to the non-access of the husband,"⁵ "or to any fact even tending to prove or infer non-access. Such non-access and illegitimacy must be proved by other testimony."⁶ This second principle of law is commonly called the Lord Mansfield Rule. It is the basic cause of the prevalent difficulties which face the prosecutor in every illegitimacy action.

The historical background of the Lord Mansfield Rule deserves mention in that it shows the peculiar way in which the rule has come to be accepted as an established common law principle. In the early part of the 18th century it was the settled rule of England, as found in the case of *Clerk v. Wright*,⁷ that "a wife can testify as to the non-access of the husband in illegitimacy cases." But in the middle of that century a rule limited to filiation cases was stated in *Rex v. Reading*,⁸ namely, that "a wife is incompetent to testify as to the non-access of her husband unless such testimony is corroborated." Toward the end of the century a chance judicial expression was made by Lord Mansfield in the case of *Goodright v. Moss*⁹ in which he stated, not as the law of the case, but as *dictum*, that "the law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage . . . It is a rule founded in decency, morality and policy that they shall not be permitted to say after marriage that they had no connection, and therefore the offspring is spurious, more especially the mother who is the offending party." These words, commonly known as the Lord Mansfield Rule, have become as effective as other men's positive decisions. Lord Mansfield depended upon the rule of *Rex v. Reading*¹⁰ as authority for his statement, but there is a wide contrast between his rule and the rule of that case. The principle of *Rex v. Reading* applied only to filiation proceedings, had application only to the wife, was flexible according to the rule of disqualification by interest, and admitted the husband and wife's testimony as to non-access. It merely required corroboration in regard to the wife's testimony. However, the Lord Mansfield Rule applies to all issues of litigation, has application to both the husband and wife equally, is based on a broad and fixed ground of policy, and excludes

⁵ *State ex rel. Reynolds v. Flynn*, 180 Wis. 556, 193 N.W. 651 (1923).

⁶ *Rex v. Sourton*, 5 Adol. and El. 180, 111 Eng. Rep. 1134 (1836); *Dennison v. Page*, 29 Pa. St. 420 (1857); *People ex rel. Crandall v. Overseers of the Poor of the Town of Ontario*, 15 Barb. 286 (N.Y. 1853); *Commonwealth v. Shepherd*, 6 Binn. 283, 6 Am. Dec. 449 (Pa. 1814); *State v. Pettaway*, 3 Hawks 625, 10 N.C. 340 (1825); *Cope v. Cope*, 1 Moody and R. 269, 174 Eng. Rep. 92 (1833); *Rex v. Luffe*, 8 East 193, 103 Eng. Rep. 316 (1807); *Mink v. State*, 60 Wis. 583, 19 N.W. 445 (1884).

⁷ 1 BOTT, POOR LAW (6th ed. 1717) 496.

⁸ Cas. temp. Hardwicke 79, 95 Eng. Rep. 49 (1734).

⁹ 2 Cowper 591, 98 Eng. Rep. 1257, 11 E.R.C. 518 (1777).

¹⁰ Cas. temp. Hardwicke 79, 95 Eng. Rep. 49 (1734).

absolutely the husband or wife's testimony as to non-access. A series of decisions ignoring the settled rule as to the competency of a wife to testify as to the non-access of her husband followed this *Goodright* case. For example, in 1809 the case of *Rex v. Kea*¹¹ stated as law that "the wife cannot testify as to the non-access of her husband." The court cited as authority the case of *Rex v. Reading*¹² which was really no authority at all. Such rulings opened the door for the establishment and spread of the Lord Mansfield Rule.

The early American decisions¹³ followed the principle of *Rex v. Reading*, but about 1800 the American courts¹⁴ rejected this rule and accepted with unquestioned faith the Lord Mansfield Rule.

Some of the states which adhere to the Lord Mansfield Rule are as follows: Wisconsin,¹⁵ Michigan,¹⁶ Iowa,¹⁷ Illinois,¹⁸ Arkansas,¹⁹ and New Hampshire.²⁰ Most of these states have even enacted statutes which substantially set forth the rule. The Wisconsin statute is typical of such legislation.²¹

The reasons which these states give for following the Lord Mansfield Rule are most clearly expressed in the opinions of the courts of Wisconsin, Arkansas, and New Hampshire: The Lord Mansfield Rule prohibiting a husband or wife from testifying as to the non-access of the husband in illegitimacy cases "is founded on the very highest

¹¹ 11 East 132, 103 Eng. Rep. 954 (1809).

¹² Cas. temp. Hardwicke 79, 95 Eng. Rep. 49 (1734).

¹³ Commonwealth v. Shepherd, 6 Binn. 283, 6 Am. Dec. 449 (Pa. 1814).

¹⁴ Barnett v. State, 16 Ark. 530 (1855); Kennedy v. State, 117 Ark. 113, 173 S.W. 842, L.R.A. 1916B, 1052, Ann. Cas. 1917A, 1029 (1915); State v. Reed, 107 W.Va. 563, 149 S.E. 669 (1929).

¹⁵ Mink v. State, 60 Wis. 583, 19 N.W. 445 (1884); Shuman v. Shuman, 83 Wis. 250, 53 N.W. 455 (1892); State *ex rel.* Reynolds v. Flynn, 180 Wis. 556, 193 N.W. 651 (1923); WIS. STAT. (1939) § 325.18.

¹⁶ MICH. COMP. LAWS (1929) c. 266, § 14221; Egbert v. Greenwalt, 44 Mich. 245, 6 N.W. 654 (1880); People v. Case, 171 Mich. 282, 137 N.W. 55 (1912); *In re Wright's Estate*, 237 Mich. 375, 211 N.W. 746 (1927).

¹⁷ IOWA CODE (1927) c. 494, §§ 11260, 11262; Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527, 14 L.R.A. (N.S.) 544, 15 Am. Cas. 761, 126 Am. St. Rep. 253 (1908).

¹⁸ ILL. REV. STAT. (1931) c. 51, § 5; People *ex rel.* Cullison v. Dile, 347 Ill. 23, 179 N.E. 93 (1931).

¹⁹ Kennedy v. State, 117 Ark. 113, 173 S.W. 842, L.R.A. 1916B, 1052, Ann. Cas. 1917A, 1029 (1915); Liles v. State *ex rel.* Johnson, 117 Ark. 408, 174 S.W. 1196 (1915); Scott v. State, 173 Ark. 625, 292 S.W. 979 (1927).

²⁰ Melvin v. Melvin, 58 N.H. 569, 42 Am. Rep. 605 (1879).

²¹ WIS. STAT. (1939) § 325.18 Husband and wife. "A husband or wife shall be a competent witness for or against the other in all cases, except that neither one without the consent of the other, during marriage, nor afterwards, shall be permitted to disclose a private communication, made during the marriage, by one to the other, when such private communication is privileged. Such private communication shall be privileged in all except the following cases:

- (1) Where both husband and wife are parties to the action;
- (2) Where such private communication relates to a charge of personal violence by one upon the other;
- (3) Where one has acted as the agent of the other and such private communication relates to matters within the scope of such agency."

ground of public policy, decency, and morality."²² "The admission of such testimony would be unseemly and scandalous, 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 be the chief sufferer thereby."²³ "That the parents should be permitted to illegitimize the child is a proposition which shocks our sense of right and decency."²⁴

Some of the states which dissent from the Lord Mansfield Rule are as follows: New York, New Jersey, California, Indiana, Kansas, Mississippi, Montana, North Carolina and Minnesota. Most of these states, like the concurring states, have enacted statutes, but these statutes set forth rules which show dissent from the Lord Mansfield Rule. In New York the husband and wife are permitted to testify as to the non-access of the husband in illegitimacy cases by virtue of the following statutory section: "If the mother is married both she and her husband may testify as to non-access."²⁵ New Jersey has a similar statute.²⁶ Under this statute either spouse is competent to give testimony for or against the other to prove adultery and thus illegitimize the issue.²⁷ The California statute²⁸ makes competent as witnesses all persons, without exception, who can perceive and make known their perception to others. Under this statute a wife may testify to non-access by her husband after separation from him in any illegitimacy proceeding.²⁹ In the state of Indiana a wife may testify as to the non-access of her husband in illegitimacy proceedings as a result of statutory enactments providing, first, that "a married woman is a competent witness in any illegitimacy proceeding instituted by her,"³⁰ second, that "in illegitimacy proceedings the mother, if of sound mind, shall be a competent witness,"³¹ and third, that "the mother of an illegitimate child shall be a competent witness to prove all the elements necessary to sustain the charge, including the non-access of the husband."³² The Supreme Court

²² *Mink v. State*, 60 Wis. 583, 19 N.W. 445 (1884).

²³ *Kennedy v. State*, 117 Ark. 113, 173 S.W. 842, L.R.A. 1916B, 1052, Ann. Cas. 1917A, 1029 (1915); *Tioga County v. South Creek Township*, 75 Pa. 433 (1847).

²⁴ *Melvin v. Melvin*, 58 N.H. 569, 42 Am. Rep. 605 (1879).

²⁵ N. Y. INFERIOR CRIMINAL COURTS ACT (1932) § 35g, as added by the Laws 1930, c. 434, § 1; *Public Welfare Commissioner v. Zizzo*, 260 N.Y. Supp. 169, 236 App. Div. 813 (1932).

²⁶ N. J. 2 COMP. STAT. (1910) 2222, § 5.

²⁷ *Loudon v. Loudon*, 114 N.J.Eq. 242, 168 Atl. 840, 89 A.L.R. 904 (1933).

²⁸ CALIF. CODE OF CIVIL PROCEDURE (1919) §§ 1870, 1879.

²⁹ *In re McNamara's Estate*, 181 Cal. 82, 183 Pac. 552, 7 A.L.R. 313 (1919).

³⁰ IND. REV. STAT. (1881) §§ 978, 980; *Evans v. State ex rel. Freeman*, 165 Ind. 369, 74 N.E. 244 (1905).

³¹ BURNS ANN. IND. STAT. (1901) §§ 504, 990, 992; *Cuppy v. State*, 24 Ind. 389 (1865); *Dean v. State*, 29 Ind. 483 (1868).

³² BURNS ANN. IND. STAT. (1901) §§ 504, 990, 992; *Evans v. State ex rel. Freeman*, 165 Ind. 369, 74 N.E. 244 (1905).

of Kansas voiced the law of that state as follows: "The Lord Mansfield Rule is artificial and unsound, causing the suppression of truth and the prevention of justice. Therefore we reject it and hold that a wife is competent to testify as to the non-access of her husband in illegitimacy cases."³³ Mississippi, dissenting from the Lord Mansfield Rule, has enacted the following law: "The mother of the child is competent to testify as to the non-access of the husband."³⁴ Montana has departed from the Lord Mansfield Rule by the enactment of statutes providing first, that "the presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such a case, may be proved like any other fact,"³⁵ and second, that "all persons, without exception, who can make known their perceptions to others, may be witnesses."³⁶ North Carolina has passed a similar law.³⁷ The operation of this decree is shown in an illegitimacy proceeding in which the wife was held to be a competent witness to show the non-access of her husband.³⁸ Minnesota has also enacted statutes showing departure from and abrogation of the Lord Mansfield Rule. These statutes state in substance first, that "any woman who is delivered of an illegitimate child may institute the statutory filiation proceeding,"³⁹ and second, that "every person of sufficient understanding, including the parties to the action, whether married or not, are competent to testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence."⁴⁰

The reasons which these states give for their dissent from the Lord Mansfield Rule are most clearly summarized in the opinions of the courts of Kansas and Mississippi: "The Lord Mansfield Rule is artificial and unsound and causes the suppression of truth and the prevention of justice."⁴¹ Neither domestic nor social policy requires that the husband or wife cannot testify as to non-access, and justice is not best promoted by adhering to such a rule."⁴²

The Mississippi court in the case of *Moore v. Smith*⁴³ sets forth the reasons for its divergence from the Lord Mansfield Rule more completely, analyzing the specific arguments of the conflicting jurisdictions.

³³ *Lynch v. Rosenberger*, 121 Kan. 601, 249 Pac. 682, 60 A.L.R. 376 (1926).

³⁴ MISS. CODE (1930) §§ 170, 179; *Moore v. Smith*, 178 Miss. 383, 173 So. 317 (1937).

³⁵ MONT. REV. CODE (1921) § 5832; *Parker v. Lew*, 93 Mont. 525, 19 P. (2d) 1051 (1933).

³⁶ MONT. REV. CODE (1921) § 10534.

³⁷ N. C. CODE (1888) § 588.

³⁸ *State v. McDonnell*, 101 N.C. 734, 7 S.E. 785 (1888).

³⁹ MASON'S MINN. STAT. (1927) § 3261; *State v. Soyka*, 181 Minn. 502, 233 N.W. 300 (1930).

⁴⁰ MASON'S MINN. STAT. (1927) § 9814.

⁴¹ *Lynch v. Rosenberger*, 121 Kan. 601 249 Pac. 682, 60 A.L.R. 376 (1926).

⁴² *Moore v. Smith*, 178 Miss. 383, 172 So. 317 (1937).

⁴³ *Ibid.*

It says that those states which concur with the Lord Mansfield Rule claim that the rule "most wisely and properly protects the sanctity of married relations and permits it not to be inquired into in any court of law,"⁴⁴ while those states which dissent from the rule claim first, that it "protects an unfaithful wife, and also her paramour, both of whom have grossly violated the matrimonial relation,"⁴⁵ and second, that it "closes the mouth of the injured husband and forces him to remain tied to an unfaithful wife, and to acknowledge and support a child which is not, in fact, his own."⁴⁶ Other common arguments enunciated by the court in favor of the Lord Mansfield Rule include these: first, "it prevents disastrous consequences that would follow the unsettling of titles to property,"⁴⁷ second, "it lessens the number of public charges,"⁴⁸ and third, "it works for the peace and quiet of the family and the community and society in general."⁴⁹ The court then answers these arguments in the following manner: first, "human rights—rights that inhere in human beings as such—are of more value and should be given preference over mere property rights,"⁵⁰ second, "The fact that the public may be called on to support an illegitimate child does not justify the exclusion of evidence bearing on the legitimacy *vel non* of the child, that is otherwise admissible and comes from the best source,"⁵¹ and third, "Exactly how the peace of the community and society generally would be protected by excluding this evidence is not apparent. On the contrary, it would seem to be best protected by admitting any otherwise competent evidence that would relieve an innocent husband from remaining tied to an unfaithful wife, and being charged with the care and support of a child of which he is not the father."⁵²

In the New Jersey case of *Loudon v. Loudon*⁵³ the court reasoned as follows in its rejection of the Lord Mansfield Rule: "The question is now squarely before us. What should determine the view we should adopt? The answer is obvious. We shall adopt that view in the case at bar which we adopt in all our deliberations, namely, the one that shall lead to a righteous judgment. Such a judgment must be founded on truth, reason and justice. A rule of law which has existed in our

⁴⁴ *Ibid.*

⁴⁵ *Poulette Peerage Case*, A.C. 395 (1903); *Moore v. Smith*, 178 Miss. 383, 172 So. 317 (1937).

⁴⁶ *Moore v. Smith*, 178 Miss. 383, 172 So. 317 (1937).

⁴⁷ *In re Wright's Estate*, 237 Mich. 375, 211 N.W. 746 (1927); *Moore v. Smith*, 178 Miss. 383, 172 So. 317 (1937).

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Moore v. Smith*, 178 Miss. 383, 172 So. 317 (1937).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Loudon v. Loudon*, 114 N.J.Eq. 242, 168 Atl. 840, 89 A.L.R. 904 (1933).

mother country for over 150 years and has been adopted and followed in so many sister states would ordinarily strongly recommend itself for our favorable consideration. But the fact that the rule is based on a foundation that is unsound and leads to the suppression of the truth and the defeat of justice takes from it the customary traditional and precedential justification urging its adoption."

In the state of Wisconsin the Lord Mansfield Rule was criticized by dissenting Justice Owen of the Wisconsin Supreme Court in these words: "The reason underlying the rule prohibiting a married woman from testifying to the non-access of her husband at or about the time of conception for the purpose of illegitimizing her child is somewhat hazy. There seems to be an incongruity in permitting her to testify to relations with a strange man, but prohibiting her from testifying to the non-access of her husband."⁵⁴

However, the most famous attack on the Lord Mansfield Rule was made by Wigmore. He criticizes the rule in the following manner: "We learn, then, that the indecency or unseemliness lies in allowing a person to testify to an illicit connection, and that the immorality consists in allowing a parent to give testimony which will ruin his own child's legal status. The utterly artificial and false nature of the rule could not more forcibly appear than in the inconsistency of these '*ex post facto*' reasons. (1) There is an indecency, we are told. And yet, in nine cases out of ten, the sole question that the wife is asked is (for example) whether her husband was in St. Louis from 1849 to 1853 during the time that she was in New York. Is this indecent? Moreover, the very next question may be whether during that time she lived with the alleged adulterer; and this, (by general concession) is indubitably allowable. In every sort of action whatever, a wife may testify to adultery or a single woman to illicit intercourse; yet the one fact singled out as 'indecent' is the fact of non-access on the part of a husband. Such an inconsistency is obviously untenable. (2) There is an immorality and a scandal, we are told, in allowing married parents to illegitimize their children. And yet they may lawfully commit this same immorality by any sort of testimony whatever, except to the fact of non-access. They may testify that there was no marriage ceremony, or that the child was born before marriage, or that the one party was already married to a third party, or their hearsay declarations (after death) to illegitimacy in general may be used. In all these other ways they may lawfully do the mean act of helping to bastardize their own children born after marriage. Where is the consistency here? Of what value is this conjuring phrase about 'bastardizing the issue,' if it will not do the trick more than once in a dozen times? What shall be said of a system

⁵⁴ State *ex rel.* Reynolds v. Flynn, 180 Wis. 556, 193 N.W. 651 (1923).

of law which, while thus rebuking parents who come to prove their children bastards, at the same time by its own inhuman prohibition (unique among civilized peoples) has refused absolutely to allow those parents, by any means whatever, to remove afterwards (by legitimation) the consequences of their original error and to give to their innocent children the sanction of lawful birth,—a refusal which is still maintained in most of our jurisdictions? That the same law which harshly fixed the stain of illegitimacy as perpetually indelible should censure parents for the abomination of testifying to that illegitimacy is preposterous.

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 fact and policies of our law. There never was any precedent for the rule; and there is just as little reason of policy to maintain it."⁵⁵

LLOYD J. PLANERT.*

* Charles Nicoud, third year student, compiled part of the authority used in this note. Acknowledgment is also due Nathan Heller, Assistant District Attorney of Milwaukee County, for helpful advice on the problem.

⁵⁵ 4 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2063, 2064; *In re Wright's Estate*, 237 Mich. 375, 211 N.W. 746 (1927); *State v. Soyka*, 181 Minn. 502, 233 N.W. 300 (1930).