1924

Witnesses, Competency, Husband and Wife, Illegitimacy. [Russell v. Russell (1924) AC 687]

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EVIDENCE—WITNESSES—COMPETENCY—HUSBAND AND WIFE—ILLEGITIMACY.—In *Russell* v. *Russell*[1] [England] the husband brought an action for divorce, charging the wife with adultery, and that in consequence she had given birth to an illegitimate child. At the trial in the divorce court the husband was permitted to testify to non-access, and obtained a verdict finding the defendant guilty. The divisional court refused a new trial, and this ruling was affirmed by the Court of Appeal.

On appeal to the House of Lords, it was held, reversing the Court of Appeal, (1) That, as a matter of common law, the husband was incompetent to prove non-access after marriage to bastardize a child born in wedlock; (2) that this rule was not affected by the statute, 32 & 33 Vict. c. 68 s. 3, making the parties to such proceedings competent witnesses.

The history of this anomalous rule is interesting. At the early common law the legitimacy of a child born in wedlock was apparently not open to dispute. Thus in *Wartone v. Simon,*[2] Hengham, J., refers to an assize of mort d'ancestre, where the claimant was allowed to recover, though the assize expressly found the absence of the husband beyond the seas and that he was not the father of the plaintiff. In the course of time this ancient doctrine was repudiated and it became possible to attack the legitimacy of a child born in wedlock: *Pendrell* v. *Pendrell.*[3] The presumpticy of legitimacy, however, was held to require proof of illegitimacy beyond a reasonable doubt: *Bosvile* v. *Attorney General.*[4]

From the time it became possible to attack legitimacy until the latter part of the eighteenth century there were no special or peculiar rules of evidence affecting the question, except the unusual burden of proof. The competency of the witnesses was governed by the same rules applicable to any other issue. In bastardy proceedings to charge the alleged father with the support of a child born of a married woman, her husband was thought to be legally interested because he would be relieved of the burden of supporting a child presumptively legitimate, and accordingly the mother would be an incompetent witness under the general rule disqualifying one spouse from testifying for or against the other. In one of the early bastardy cases,[5] Lord Hardwicke recognized the general incompetency of the wife for this reason, but thought that the necessity of the case created an exception under which she might be admitted to prove her adultery with the defendant. But since non-access of the husband was a fact which ordinarily might be proved by other witnesses, there was no necessity to extend the exception any further. Accordingly the wife was held disqualified by the general

1. L. R. (1924) A. C. 687.
2. (1307) 32 Ed. I 60.
3. (1732) 2 Strange 925.
4. (1887) L. R. 12 P. D. 177.
5. (1735) *Rex* v. *Reading* Cas. temp. Hardwicke 79.

marital incompetency to prove non-access of the husband: *Rex* v. *Book*.[6]

Here there was an understandable rule. Because of the real or supposed interest of the husband, the wife was disqualified to testify to *any fact in a bastardy case,* except her own adultery, and as to that she was admitted by way of exception based on necessity, i. e., the general impossibility of proving that fact by other witnesses. The defendant, of course, could not be forced to testify for the prosecution because of his privilege. There is no suggestion in the cases of any other ground of incompetency until Lord Mansfield's famous dictum in *Goodright* dem. *Stevens* v. *Moss*.[7] That case was an ejectment in which the lessor's title depended on the fact that he was the legitimate son of Francis and Mary Stevens. At the trial Baron Eyre had excluded evidence of statements by the admitted parents that the child in question was born prior to their marriage and hence was illegitimate by the common law.

It does not appear whether this ruling was based on a misconception of the pedigree exception to the hearsay rule, or on a misunderstanding of the interest disqualification of husband and wife in the bastardy or filiation cases.

On the argument of the rule nisi for a new trial counsel for plaintiff, in support of the ruling, cited the filiation cases, *Rex* v. *Reading* and *Rex* v. *Book,* and also a pedigree case, *Hilliard* v. *Phaly,*[8] where on an issue of legitimacy the court rejected the mother's answer in a former chancery suit, in which the time of her marriage was stated.

Lord Mansfield held that error had been committed in rejecting the statements of the parents, and in that connection is reported to have said:

"Two questions have been made: 1st, whether the father and mother could have been examined, if alive; 2dly, if they could, whether their declarations, though ever so solemn, can be admitted as evidence after their death. . . . As to the *time* of the birth, the father and mother were the most proper witnesses to prove it. But it is a rule founded in *decency, morality, and policy,* that they shall not be permitted to say after marriage that they have had no connection, and therefore the offspring is spurious; *more especially the mother who is the offending party.*"

This dictum out of a clear sky is the first suggestion of any disqualification except from interest, and since no such problem was before the court, it is not surprising that the opinion fails to indicate why it should be thought indecent, immoral, or against public policy for a husband, for example, who had been absent in India or on the Continent for a year or more, to say so, though the effect might be to show that a child born to his wife shortly before his return was illegitimate.

6. (1752) 1 Wilson 340.
7. (1777) 2 Cowper 592.
8. (1723) 8 Mod. 180.

In the bastardy case of *Rex* v. *Luffe,*[9] an objection had been taken to the competency of the wife to prove non-access by her husband, upon which Lord Ellenborough made the following statement of the rule in such cases as then understood:

"This objection is grounded upon a principle of public policy which *prohibits the wife from being examined against her husband in any matter affecting his interest or character,* unless in case of necessity where from the nature of the thing no other witness can probably have been present."

Two years later the pauper settlement case of the *King* v. *Kea,*[10] involving the legitimacy of the child of a married woman, came before the King's Bench, and Lord Ellenborough ruled that she was incompetent to prove non-access, "the principle of public policy precluding her from being a witness to that fact," for which he cited *Rex* v. *Reading* and *Rex* v. *Luffe.*

If, as stated in both of those cases, the policy which excluded the wife from testifying to non-access was that found in the general rule prohibiting one spouse from testifying for or against the other except in a few cases of necessity, it would seem inapplicable to a pauper settlement case where the husband could ordinarily have no interest in the controversy between the two parishes, and certainly none in the actual case of the *King* v. *Kea,* for he was then dead.

Rex v. *Bathwick*[11] is very clear on the point that the husband had no interest in a settlement case and hence that his wife was a competent witness. In that case it was sought to remove a woman to another parish on the ground that it was the legal settlement of H, to whom she had been married. To meet this claim, the first and lawful wife of H was held competent to prove her own prior marriage to H, and thereby invalidate the second marriage, because he was neither a party nor legally interested in the litigation.

In the *King* v. *Sourton,*[12] the question of competency arose in a pauper settlement where the husband had been admitted to prove his own absence and non-access. Lord Denman held this error, observing:

"It is desirable to show that in a case of such importance as this we adhere to the *old* rule of law, without any doubt. The rule, cited in 2 Starkie on Evidence,[13] p. 139, note x (2d ed.) from *Goodright* dem. *Stevens* v. *Moss,* supported also by *Rex* v. *Kea,* cited in the same note, is that the parties shall not be permitted after marriage to say that they had no connection."

Thus the marital disqualification from interest, the only ground ever assigned for excluding husband or wife in the bastardy cases, now appears to have been lost sight of, and Lord Mansfield's ill-

9. (1807) 8 East 193.
10. (1809) 11 East 132.
11. (1831) 2 Barn. & Adol. 639.
12. (1836) 5 Adol. & Ell. 180.
13. The passage in Starkie is taken almost verbatim from Lord Ellenborough's opinion in *Rex* v. *Luffe,* which was a *bastardy* case.

considered dictum in *Goodright* v. *Moss* becomes an *old* and settled rule in 1836, for some undefined reason excluding the spouses regardless of interest from testifying directly or indirectly to non-access after marriage where any question of legitimacy was involved.

In this form it was applied without further question to pauper settlement cases, to ejectments and to claims to a peerage.

In the *Poulett* Peerage[14] counsel did not question the general rule; the only point was whether it excluded the husband's deposition, which had been taken in a proceeding to perpetuate testimony, to prove non-access *before* marriage, where a fully developed child had been born within six months after marriage. Lord Halsbury, while apparently recognizing the general rule, held it inapplicable to that situation, observing: "My Lords, I should lament for the reputation of English law that it should be supposed that our jurisprudence sanctioned such an outrage upon reason and common sense as to reject such evidence." But no plausible reason has ever been suggested for the application of the rule to any case after the interest disqualification disappeared. It can hardly be for the protection of the "sanctity of the marriage relation," for, as Lord Summer observed in his dissenting opinion, the divorce act relegates that to the "limbo of lost causes and impossible loyalties." It cannot be for the protection of the child, for he is no more harmed by proof of the fact by husband or wife than by other witnesses. It cannot be for the protection of the feelings of the parties, for in divorce cases they testify to much more harrowing matters than non-access, as in *G.* v. *G.* [1924] A. C. 349. It cannot be because the evidence is indecent, for much more indecent evidence is constantly received. In fact, the only reason advanced in the majority opinion in the principal case was that to admit such evidence from the husband might enable him to obtain a divorce by perjury, a strange argument at this day in view of the qualifying statutes.

In the United States, Lord Mansfield's dictum has been accepted and followed in practically every state where the question has arisen. Several recent cases are worth noting.

In *Taylor* v. *Whittier*,[15] the rule was recognized as settled and applied to exclude the testimony of the mother and the declarations of the deceased husband on an issue of legitimacy.

In *Schmidt* v. *State*,[16] where a prosecution for desertion was defended on the ground that the husband was not the father of the child, the rule was invoked to exclude the wife's declarations.

In *Nolting* v. *Holt*,[17] the illegitimacy having been "sufficiently" proved by other evidence, the mother was held competent to prove the paternity of the child, in support of its claim under a statute making bastards capable of inheriting from the father.

14. (1903) A. C. 395.
15. (1922) 240 Mass. 514, 138 N. E. 6.
16. (1923) 194 N. W. (Neb.) 679.
17. (1923) 215 Pac. (Kan.) 281.

In *State* v. *Flynn*,[18] the defendant in a bastardy case brought habeas corpus to be discharged from the order of commitment founded on the testimony of the mother both as to her adultery with defendant and non-access of her husband. The court agreed that the mother was incompetent, under the "well settled rule," but held that defendant had waived it by his cross-examination.

The dissenting opinion argued that the doctrine of waiver should not be applied to this incompetency based on public policy. In the whole field of evidence, there are few, if any, rules so universally accepted on so unsatisfactory a foundation. But apparently legislation alone can rid the law of this absurdity.

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PARTNERSHIP — INSOLVENCY OF FIRM AND PARTNERS—MARSHALLING OF ASSETS—JOINT AND SEVERAL CLAIMS.—[North Carolina] It is the well known general rule, in equity, that, in the distribution of the estates of insolvent partnerships and partners, the firm creditors have a first claim upon the partnership assets, and the individual creditors have a first claim upon the individual assets.[1] This is also the rule in bankruptcy.[2]

What the foundation of this rule is has been much disputed. It is commonly said to be a rule of general equity, designed, to some extent, to even up the advantages of the individual creditors as compared with the partnership creditors.[3] The rule obviously produces different results from those reached by legal process. While the partnership obligation is so far joint that, if the creditor sues one partner only, the latter may usually plead the non-joinder of the others in abatement,[4] yet, as soon as judgment is obtained in a suit against all, the creditor may cause execution to be levied upon the property of one, leaving him to get contribution from his co-partners later.[5] In the case of the death of one partner before action is brought, still other rules apply which it is not necessary to notice here.[6]

These different consequences have sometimes been sought to be explained by saying that, while partnership contractual obligations are joint at law, they are joint and several in equity.

18. (1923) 193 N. W. (Wis.) 651.

1. See *Rodgers* v. *Meranda* (1857) 7 Ohio St. 180; *Hundley* v. *Farris* (1890) 103 Mo. 78, 15 S. W. 312, 23 Am. St. R. 863, 12 L. R. A. 254; *Hawkins* v. *Mahoney* (1898) 71 Minn. 155, 73 N. W. 720; and many others.

2. See section 5, sub. f, of the Bankruptcy Statute.

3. See *Rodgers* v. *Meranda* supra.

4. See *Rice* v. *Shute* (1770) 5 Burr. 2611, 2 Wm. Bl. 695.

5. See *Rice* v. *Shute* supra. It is true that it was said by Lord Mansfield, in that case, that contracts with partners are always joint and several, but it is clear, as has often been pointed out, that he was speaking only of the procedural aspect, i. e., that it was so far joint that a single partner, sued alone, could plead the non-joinder of the others in abatement, but that if he did not so plead it, he waived it, and could be held alone. He also said, as has often been stated, "If the action be brought against *all*, the plaintiff may take out execution against any *one*."