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NOTES

COMPETENCY OF HUSBAND OR WIFE TO TESTIFY TO NON-ACCESS TO ESTABLISH ADULTERY

Under the statute providing for divorce, the innocent and injured spouse may obtain a divorce from the bond of matrimony whenever it shall be judged that the other spouse has committed adultery.[1] Because adultery is usually committed under clandestine circumstances, it is difficult to prove. Consequently, as a general rule, it is sufficient to prove adulterous inclination and opportunity to carry out that inclination.[2] However, where the respondent who is being charged with

[1]Act of May 2, 1929, P. L. 1237; 23 P. S. section 10.

[2]Amman v. Amman, 90 Pa. Super. 25 (1926); Pierpoint v. Pierpoint, 108 Pa. Super. 108, 164 Atl. 808 (1933); Yocum v. Yocum, 3 Pa. Dist. 615 (1894); Graham v. Graham, 153 Pa. 450, 25 Atl. 766 (1893); Yost v. Yost, 14 Schuyl. 336; Stewart v. Stewart, 85 Pa. Super. 41 (1925); Reighter v. Reighter, 58 Pa. Super. 636 (1915); McCune v. McCune, 31 Pa. Super. 248 (1906); Gruninger v. Gruninger, 190 Pa. 633, 43 Atl. 128 (1899); Cook v. Cook, 85 Pa. Super. 403 (1925); Davis v. Davis, 91 Pa. Super. 354 (1933); Price v. Price, 69 Pitts. 479; see Sturgeon on Divorce, section 323; Freedman on Divorce, section 194. All these cases recognize that direct evidence is not necessary to prove adultery.

adultery is the wife, the strongest proof of her adultery is the birth of a child which must have been conceived in the absence of her husband. It should be noted here that the mere birth of a child to a married woman does not of course raise a presumption of adultery. Rather, the presumption is that a child born during marriage, whether begotten prior or subsequent to marriage, is legitimate and can be bastardized only on proof that there was no sexual intercourse between the parents at the time when the child must have been conceived.[3] The rule is expressed best in the words of Cardozo, Ch. J.,[4]

> "Countervailing evidence may shatter the presumption, though the possibility of access is not susceptible of exclusion to the point of utter demonstration. . . . Issue will not be held legitimate by a sacrifice of probabilities in a futile quest for certainty."

It is in connection with this rule that the incapacity of a husband or wife to testify to non-access tending to bastardize the issue arose. Lord Mansfield first laid down the rule in *Goodright v. Moss*;[5]

> "The testimony 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 have had no connection, and therefore that the offspring is the offending party."

This rule has been accepted in the United States and is supported by the great weight of authority.[6] Pennsylvania[7] is in line with the weight of authority. The rule had been touched upon in many early Pennsylvania cases,[8] and was stated definitely in *Janes' Estate*.[9] In that case it was said that:

> "A presumption of legitimacy attaches to birth in wedlock, and it cannot be rebutted by the testimony of the mother or of her husband. It may be overcome by proof of non-access of the husband, but they are not competent to establish it. The proof must come from another source. But the mother is competent to prove the time of her marriage, and when her child was born."

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[3]Com. v. Shepherd, 6 Binney 283 (1814); Dennison v. Page, 29 Pa. 420, 423 (1857).

[4]In re Findlay, 253 N. Y. 1, 170 N. E. 471 (1930); Dulsky v. Susquehanna Collieries Co., 116 Pa. Super. 520, 177 Atl. 60 (1935); Com. v. Dimatteo, 124 Pa. Super. 277, 188 Atl. 425 (1936); see Freedman on Divorce, section 199, p. 495.

[5]2 Cowp. 591, 98 Eng. Rep. 1257 (1777); 11 Eng. Rul. Cas. 518; Com. ex rel Moska v. Moska, 107 Pa. Super. 75, 162 Atl. 343 (1932).

[6]Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527 (1908); Taylor v. Whittier et al (Mass.), 138 N. E. 6 (1922); Timman v. Timman, 142 N. Y. Sup. 298, 31 N. E. 113 (1913); Jane's Estate, 147 Pa. 527 (1892); Tioga County v. South Creek Twp., 75 Pa. 433 (1874); Dennison v. Page, 29 Pa. 420 (1851).

[7]Dennison v. Page, 29 Pa. 420 (1851), cited supra note 6.

[8]Tioga County v. South Creek Twp., 75 Pa. 433 (1874).

[9]Jane's Estate, 147 Pa. 527 (1892), cited supra note 6.

Thus the rule seems to be well settled in Pennsylvania, but only in those cases in which the legitimacy of children is directly in issue. However, whether this rule will be adopted in divorce cases in Pennsylvania where adultery is the main issue, is in doubt, for there is no appellate decision as yet, and the lower court cases are in conflict. In *Peters v. Peters*,[10] the court, after repeating the rule as applied in cases where legitimacy of children is directly in issue, went on to hold that:

> "We think, however, that the same consideration of public policy requires its application in divorce cases. To permit the proof of adultery by such evidence in a divorce proceeding would not merely be subject to the objections stated in the cases cited, but would open wide the door to collusion and fraud."

Again in *Coyles v. Coyles*,[11] although a divorce was granted, the court rejected the testimony of the husband and wife as to non-access, applying the rule as in the case where legitimacy of children is directly in issue.

On the other hand, in *Thompson v. Thompson*,[12] the question arose as to whether the testimony of witnesses who testified as to respondent's admission, viz: that her husband, the libellant, was not the father of her child, and the court held:

> "This is an action which does not relate to the legitimacy of the children but to the adulterous practices of the respondent and what she has admitted relating thereto is admissible. If the child were a party to this issue and its paternity were involved, the rule that the testimony would be inadmissible due to the incompetency of the parents to testify as to non-access might prevail. But that is not the issue; it is that of the adulterous practices of the respondent."

This same reasoning is found in *Allison v. Allison*,[13] another lower court case, where the husband testified to non-access to his wife for six months before they separated. There, the court said,

> "The testimony admitted was not for the purpose of affecting in any way the rights or legitimacy of the child that was born to the respondent but simply as bearing upon the right of the libellant to his divorce on the ground of his wife's unfaithfulness."

Still other lower court cases have adopted this reasoning and rejected the rule forbidding the husband or wife to testify to non-access.[14]

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[10] 4 D. & C. 287 (1923); Kleinert v. Ehlers, 38 Pa. 439 (1861).
[11] 26 Pa. Dist. 816 (1916).
[12] 28 Dauph. Co. Rep. 73, 31 Dauph. Co. Rep. 330.
[13] 61 Pitts. Legal Journal 101.
[14] Pasquarelle v. Pasquarelle, 18 Pa. Dist. 526 (1907); 36 Pa. C. C. 513; 21 A. L. R. 1457; Corcoran, 73 Pitts. Legal Journal 511.

Whether this rule as established should be extended is a question which can correctly be answered only by looking at the reasons for its origin and the purposes it has served. Before its enunciation by Lord Mansfield in *Goodright v. Moss*,[15] no such rule prohibiting the husband and wife from testifying to non-access existed. Indeed, the only rule of this nature serving to incapacitate the husband and wife was the well-settled one which forbade either spouse from testifying for or against the other. What, then, gave rise to the rule, which has received such wide support?

It seems that the rule arose as a result of an utterance by Lord Mansfield,[16] an utterance not necessary to the decision of the case, but merely dictum, for which, it appears, no authority whatever was given.[17] It was repeated with approval, very likely because it was the opinion of Lord Mansfield, and has come to be accepted both in England and the United States, having even been extended to divorce cases in England by the *Russell v. Russell* case.[18] Such is the origin of this doctrine—a rather inauspicious one. Even less has been said for the reasons which have been given in support of the rule. It has been strongly criticized by judges in dissenting opinions of cases which have upheld the doctrine. But it has been most strongly and effectively criticized by Professor Wigmore.[19]

The rule, as stated, seems to be based wholly on the ground of decency, morality, and policy. In the words of Professor Wigmore,

> "Why is such a fact indecent, immoral, or impolitic? There is nothing indecent in asking a wife whether her husband was in Texas from 1920 to 1925 during the time she was in Maine, nor is it indecent to ask whether during that time she lived with the alleged adulterer. 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."

The opinion of Gordon, J., in *Tioga County v. South Creek Township*,[20] has generally been cited for reasons best supporting the rule. It was there said:

> "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

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15 2 Cowp. 591 (1777), cited supra note 5.
16 2 Cowp. 591 (1777), cited supra note 5.
17 In making this statement no cases were cited by Lord Mansfield.
18 A. C. 687 (1924); Freedman on Divorce, section 199, p. 498.
19 Wigmore on Evidence, vol. 3, sect. 2063, p. 2767.
20 Tioga County v. South Creek Twp., 75 Pa. 433 (1874); cited supra note 6.

> bastardize the child is a proposition which shocks our sense of right and decency."

Again Professor Wigmore[21] severely and effectively criticizes these reasons. Of the opinion of Gordon, J., in the *Tioga County* case, he says:

> "There is an immorality and a scandal we are told in allowing married parents to bastardize 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 person or their hearsay declaration (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."

Professor Wigmore's criticism of the rule clearly and simply indicates the unsoundness of the reasoning behind the rule. He has, it seems, removed the last vestige of any possible reason which could support the doctrine. In this he is joined by many able jurists who cannot reconcile themselves to any justification of the rule. A good example is to be found in the dissenting opinion written by Rush, J., in *Dennison v. Page*,[22] which upheld the doctrine. Judge Rush said:

> "To admit a married woman upon inquiry into the legitimacy of a child born in the absence of her husband, to swear that she lived in adultery, which she must do when she swears that there was no marriage between her and the putative father, and at the same time to say that she shall not give evidence that her husband had no access to her, because the evidence would be indecent seems rather mysterious and incomprehensible."

The rule seems to be seriously wanting of logic. On the face of it, it appears that the application of the rule depends wholly upon whether or not a child is born from the illicit connection. Yet no adequate explanation has been given for the distinction. Lord Carson, writing a dissenting opinion in the *Russell v. Russell*[23] case, suggests still another problem which the rule raises. He asks: "Would the evidence be inadmissible if the child had been stillborn, or if no child had been born but the mother had a miscarriage which would equally prove the adultery?" Or, suppose a child had been born but had died before the case had come to trial? Such problems serve only to indicate more clearly that the rule is without logic.

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[21] Wigmore on Evidence, vol. 3, sect. 2063, p. 2767, cited supra note 19.

[22] Dennison v. Page, 29 Pa. 420 (1851); cited supra note 6.

[23] A. C. 687 (1924), cited supra note 18. He was joined by Lord Sumner, who also wrote a strong dissenting opinion.

Finally, Professor Freedman, in his treatise on Divorce,[24] very ably summarizes the problem in a few words. He says:

> "The legitimacy of the child is not involved and the issue simply is whether the respondent was guilty of adultery. The rule should be no different in the case where a husband is an eyewitness to an act of adultery by his wife, which results in the birth of a child. The shame upon the child is no greater, and indeed cannot stand in the way of the administration of justice. The illegitimacy of the child, however it may come to be doubted by the world, is not in law established or even affected. The weight of reason, therefore, supports the decisions which declare that the incompetency of the spouse to testify to non-access does not apply in divorce proceedings."

CONCLUSION

As already mentioned above, this rule is well entrenched in the law of England and this country. Pennsylvania supports it unquestionably in those cases where the legitimacy of a child is in issue. However, the criticisms of many eminent jurists have demonstrated the unsoundness of the rule, and have cast considerable doubt upon its efficacy. That this has been recognized is to be seen in the decisions of many recent cases. Outstanding among them is a recent New Jersey case.[25] The court in that case, recognizing the attempted justification of the rule to be wholly inadequate, rejected it and ruled that the testimony of either parent as to non-access would be admitted. The judge pointed out in his opinion, as many others have before him, that if it is not immoral, indecent, or impolitic for either spouse to testify against the other to prove adulterous inclination and opportunity to commit adultery, then it is not so to testify to non-access. Indeed, were the reasoning behind this rule to be logically carried out, practically every bit of testimony in a divorce suit brought on the grounds of adultery could be objected to as being immoral, indecent, and impolitic! Absurd as this may seem, it is, nevertheless, not a far cry from the present rule, and its reasoning.

Many other recent cases holding similarly to the New Jersey case are to be found in the reports of various states.[26] In those cases, statutes were held to have abrogated Lord Mansfield's rule and the testimony of the husband or wife was held admissible. So far there has been a rigid adherence to the rule by the courts,

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[24]Freedman on Divorce, section 199, p. 502, cited supra note 18.

[25]Loudon v. Loudon, 114 N. J. Eq. 242, 168 Atl. 840 (1933). The court in that case said: "We feel that the rule leads to the suppression of the truth and the defeat of justice. We therefore decline to adopt the Lord Mansfield rule."

[26]State v. Sayler, 181 Minn. 553, 233 N. W. 300 (1930); In re Wray, 93 Mont. 525, 19 Pac. (2d) 1051 (1933); People v. Dykeman, 225 App. Div. 751, 241 N. Y. Supp. 343 (1930); Public Welfare Comm. v. Zizzo, 236 App. Div. 813, 260 N. Y. Supp. 169 (1932); Adams v. Adams, 102 Vt. 318, 148 Atl. 287 (1930). See for additional cases, 89 A. L. R. 911.

but it is submitted that further recognition of the inefficacy of the rule, should and will likely be forthcoming in the future. Often has it been said that when the reason for a rule ceases to exist, the rule ceases. It might well be urged, then, that this is a rule for which no good reason exists, and which therefore should cease.

WILLIAM BATRUS

THE EFFECT OF INSURANCE ON FAULT WITHOUT LIABILITY

It is the purpose of this note to determine the effect of insurance on the various phases of tort law where, in consideration of public policy, no recovery is generally allowed. The validity of the various theories and arguments for imposing or not imposing liability so far as they do not consider the element of insurance is immaterial to the writer. It is the writer's purpose to accept the existing rules of the law in the various jurisdictions and apply to them the influence of insurance. In short then, should or should not the fact that the defendant charity, municipality, parent, child or spouse is protected adequately by insurance produce a different result?

Apropos to the discussion, we should keep in mind the extremely wide spread use of insurance in all forms. It is not amiss to state that the old phrase, "There is a remedy for every wrong," may safely be replaced by a more effectual one, "There is insurance for every wrong." If this fundamental concept of the purpose of insurance be given its full and entitled office, its effect will be tremendous. Completely intertwined with the increased use of insurance is the ever mounting number of automobiles using our highways daily. The majority of cases cited in this note arose from alleged negligence in the operation of such vehicles.

While many reasons are assigned by the courts for refusing recovery, the basic reason behind all of the holdings is public policy. The public policy reasoning generally breaks down into two classes, the trust fund theory and the family dispute theory. Under the trust fund theory there are two branches, the eleemosynary institutions and municipalities. These will be discussed together.

THE TRUST FUND THEORY

The basic principle behind these cases is that the fund should be used only for charitable or municipal purposes and to permit its divergence for any other use would be to vitiate the primary aim. Conceding, for a working premise, that this is sound, it would appear that when such institutions carry insurance to protect themselves from liability incurred by the torts of their servants, they are in effect recognizing the harshness of the rule, waiving their exemption and cre-