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Evidence--Competency to Husband and Wife to Testify to Nonaccess During Time of Conception

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the court in the instant case may indicate that in the future the federal courts will question more strenuously the qualifications of a juror who has served on a previous case of a similar nature in which the same prosecuting witnesses were used.

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P, a married woman, accused *D* who was not her husband of being the father of her child. During the trial *P* testified over objection by *D*, that she had been separated from her husband for more than one year prior to the birth of the child, that she had seen him only four times during that period, and that on all of these occasions there were other witnesses present. The husband, also over objection by *D*, corroborated *P's* testimony. *D* was convicted of bastardy. A motion to set aside the verdict and award a new trial was overruled. *D* appealed. *Held*, reversed and remanded. In a bastardy proceeding instituted by a married woman, in the absence of a statute authorizing the spouses to testify as to nonaccess, they were incompetent to testify to that fact. The admission of such testimony constituted prejudicial error. *State ex rel. Worley v. Lavender*, 131 S.E.2d 752 (W. Va. 1963).

The presumption of legitimacy of a child born in wedlock is one of the strongest known to law. *Bariuan v. Bariuan*, 186 Kan. 605, 352 P.2d 29 (1960). In the early days of the law there was a conclusive presumption of legitimacy of a child born in marriage. Therefore, testimony by the husband and wife as to nonaccess would have been immaterial. *Regina v. Murry*, 1 Salk. 122, 91 Eng. Rep. 115 (K.B. 1706). As time passed this ancient doctrine was repudiated, and it became possible to question the legitimacy of a child born in wedlock. *Pendrell v. Pendrell*, 2 Stra. 925, 93 Eng. Rep. 495 (K.B. 1732); 7 WIGMORE, EVIDENCE § 2063 (3d ed. 1940).

After the presumption became rebuttable a rule arose that a married woman was a competent witness to testify to the nonaccess of her husband during the time of conception. Because of interest, however, a wife's testimony uncorroborated by other

witnesses could not bastardize the child. *Rex v. Reading,* 95 Eng. Rep. 49 (K.B. 1734). At first, this rule was limited strictly to nonsupport proceedings, but later it was applied to other situations and was expanded to include the testimony of the husband. 7 WIGMORE, *op. cit. supra* at 359.

The rule set out in *Rex v. Reading, supra,* was ignored by Lord Mansfield when he stated that a husband and wife were incompetent to testify as to nonaccess during the time of conception. *Goodright v. Moss,* 2 Cowp. 591, 98 Eng. Rep. 1257 (K.B. 1777). However, a spouse may testify to any other fact relevant to the issues such as adultery of the wife and nonaccess itself may be proven by other witnesses. *Pope v. Kincaid,* 99 W. Va. 677, 129 S.E. 752 (1925). The Lord Mansfield rule was adopted in the United States without challenge, and the majority of jurisdictions continue to follow it. *Shatford v. Shatford,* 214 Ark. 612, 217 S.W.2d 917 (1949); *Zutavern v. Zutavern,* 155 Neb. 395, 52 N.W.2d 254 (1952); *Holmes v. Clegg,* 113 W. Va. 449, 48 S.E.2d 438 (1948); see 60 A.L.R. 380, 381 (1929).

Lord Mansfield's rule was not based on disqualification because of the wife's interest. Rather, it was based on morality, decency, and public policy. *Goodright v. Moss, supra.* There seems to be little logic to the fact that the doctrine disallows the spouses' testimony as to nonaccess and yet permits the husband to testify to the wife's infidelity or the wife to avow to her adultery. In *Kennedy v. State,* 117 Ark. 113, 173 S.W. 842 (1915), the court heartily approved Lord Mansfield's rule and added that such testimony was delicate and personal. The court stated that such testimony would scandalize the marital relationship. The opinion failed to explain why the mention of nonaccess is so indecent and yet testimony concerning the wife's adultery is not. The Mississippi court has pointed out that to follow the Lord Mansfield rule would be to protect the unfaithful wife and her lover, both of whom have grossly violated the sanctity of marriage. Further, it would refuse the husband the right to be heard, and force him to remain tied to an adulterous wife and to acknowledge and support a child which was in fact not his. *Moore v. Smith,* 178 Miss. 383, 172 So. 317 (1937). Though a majority of states still follow the Lord Mansfield rule, some states have abrogated it by statute, *Cinders v. Lewis,* 93 Cal. 2d 90, 208 P.2d 687 (1949); *Loudon v. Loudon,* 114 N.J.Eq. 242, 168 Atl. 840 (1933); or by judicial de-

cision, *Commonwealth v. Rosenblatt,* 219 Mass. 197, 106 N.E. 852 (1914); *Moore v. Smith, supra.*

In West Virginia, by statute, a wife who has been living separate and apart from her husband for one year or more prior to the birth of the child, may accuse any person other than her husband of being the father of her child, in like manner and under the same proceedings as if she were unmarried. W. VA. CODE ch. 48, art. 7, § 1 (Michie 1962). This statute and the nonsupport statute, W. VA. CODE ch. 48, art. 8 § 1 (Michie 1962), are to be read *pari materia* in the judicial determination of the paternity of the child. *Holmes v. Clegg, supra; State v. Mills,* 121 W. Va. 205, 2 S.E.2d 278 (1939). Both statutes have as their purpose the prevention of the child becoming a burden on the state. *State v. Hoult,* 113 W. Va. 587, 169 S.E. 241 (1933). In *State ex rel. Crouser v. Mercer,* 141 W. Va. 691, 92 S.E.2d 745 (1956), the court stated that these statutes were remedial and should be construed liberally to effectuate their purpose.

In the principal case the court based its decision on *State v. Reed,* 107 W. Va. 563, 149 S.E. 669 (1929). In that case the conviction in a bastardy proceeding was reversed because the mother admitted that she and her husband had not been separated for at least one year prior to the birth of the child. The case seems to imply that she and her husband would have been competent to testify concerning the nonaccess issue if they had been separated for a period of one year or more during the time that the child was conceived. The court stated that the bastardy statute was a modification of the Lord Mansfield rule, yet cited cases with approval which strictly upheld the rule.

The dissenting opinion in the principal case stated that the bastardy statute in West Virginia gave a new remedy to a married woman; that once she had met the separation requirement of the statute she could proceed as if she were unmarried. To meet this requirement, she must prove the absence of cohabitation with her husband during the year preceding the child's birth. As a practical matter if the Lord Mansfield rule is followed the right given to a married woman by the legislature is of little benefit because of the difficulty of proving nonaccess under the rule.

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