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Paternity - Presumption of Legitimacy - Proof Necessary to Rebut Presumption

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> indicate that some portion, at least, of the refreshing material was prepared by the witness in his own words and was available to defendant under our prior decisions.[21]

In summary, it clearly appears that under the Illinois adoption of the Federal rule, as clarified in *Scott*, the defendant in a criminal prosecution may have access to a testifying witness's prior statements which are in the hands of the prosecution. That is true regardless of whether the statements are used in refreshing memory while on the stand or not.[22]

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PATERNITY[1]—PRESUMPTION OF LEGITIMACY—PROOF NECESSARY TO REBUT PRESUMPTION—In *People v. Monroe*, 43 Ill. App. 2d 1, 192 N.E.2d 691 (2d Dist. 1963), the Appellate Court of Illinois was confronted with the question of whether the presumption of legitimacy of a child conceived during wedlock was overcome by the wife's testimony that she had no intercourse with her husband during the possible period of conception. In the trial court, the jury found that the evidence presented by the wife was sufficient to rebut the presumption and that the defendant paramour was the father of her child. On appeal, the defendant contended that the pre-

21 People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814, 821 (1963).

22 Interestingly, it is equally apparent that the United States Court of Appeals, Seventh Circuit, feels the traditional view should prevail in civil litigation; that no absolute right exists in the examining party to demand inspection of a writing not used by the testifying witness in refreshing his memory on the stand. In Goldman v. Checker Cab Co., 325 F.2d 853 (7th Cir. 1963), decided since the Scott decision, the plaintiff brought an action for alleged injuries sustained while a passenger in the defendant's taxi which was allegedly struck from the rear by another of the defendant's vehicles. The Court held that the trial court erroneously quashed the deposition of the plaintiff's physician who had treated the plaintiff from the date of the accident to the trial. The osteopath, testifying in his office from memory alone, refused the defendant's demand that he produce his records of the treatment of the plaintiff. For that reason, the trial court quashed he deposition. In reviewing the transpirings below, the Court of Appeals cited Echert, but made no mention of Jencks. Justice Kiley, speaking for the Court said: "Since the doctor testified from memory alone, defendant was not entiled to have the records produced at the taking of the deposition. Echert v. United States. . . . The opportunity given by the district court to bring the doctor from Missouri with his records did not cure the error. . . . If defendant wishes to obtain Dr. Gould's records, it has the opportunity to do so by appropriate procedures on remand."

An interesting question which arises inferentially in Goldman v. Checker Cab Co. is whether the decision limits the discretion of the trial court, previously considered part and parcel of the traditional view. The question may be answered when it is remembered that since the witness's testimony was under deposition, the trial court acutally had no discretion to compel inspection. Therefore, since there is no absolute right under the traditional view to inspect, no reason then existed to quash the deposition, especially in view of Fed. R. Civ. P., Rule 45(b), which provides: "For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. . . ."

1 Ill. Rev. Stat. ch. 106 3/4 (1963).

sumption of legitimacy had not been rebutted since the principal factor in the plaintiff's evidence was her own self-serving testimony that she had not copulated with her husband at or around the period of conception. The Appellate Court agreed with the putative father and reversed the trial court's judgment.

The plaintiff was a married woman at the time the child in question was conceived in June, 1959, but was divorced from her husband on January 19, 1960; the child was born out of wedlock on March 10, 1960. The evidence produced at the trial indicated that the plaintiff and defendant had been carrying on an illicit clandestine affair at the time the child was conceived. Both plaintiff and defendant had engaged in discussions with a doctor about the expectant child. The other five children of the plaintiff and her husband were dark complected, with dark eyes and dark hair like their father, who was Spanish. However, the child in question had a very fair complexion, blue eyes and light blond hair. The wife testified that although she lived in the same house with her husband, she had not slept in the same bed or bedroom with him since 1955, and they did not speak to each other. This was verified by a son. On direct examination, she testified that she had had intercourse with her husband once since meeting the defendant and to the best of her knowledge that was in 1957. On cross examination, however, she testified that she had intercourse with her husband one time while living with him in the same house from 1957 to 1960. There was evidence that the plaintiff and defendant were on a one week vacation together about the 1st of June, 1959, the period during which the child was likely conceived. The defendant denied he had ever had sexual relations with the plaintiff and testified that he was on a fishing trip by himself about the 1st of June, 1959, but could not recall the names of any motels where he had sojourned.

Although the presumption of legitimacy arising from birth in wedlock was once considered practically conclusive in England, the majority of the courts in the United States now hold that the presumption is rebuttable,[2] but differ as to the nature of the evidence necessary to overcome the presumption. The Illinois courts have stated that the presumption is overcome by proof that the husband was impotent or that he had no possibility of access to the wife at the time of conception.[3] The degree of proof necessary to rebut the presumption of legitimacy in Illinois has been variously stated

2 *Re* Findlay, 253 N.Y. 1, 170 N.E. 471 (1930); Wilson v. Wilson, 174 Ky. 771, 193 S.W. 7 (1917); Arthur v. Arthur, 262 Ala. 126, 77 So. 2d 477 (1955).

3 In People v. Gleason, 211 Ill. App. 380 (1st Dist. 1918), the presumption of legitimacy was overcome where it was shown that the wife did not meet her husband until August, 1917; married him on December 3, 1917; and the child was born on December 8, 1917; whereas she had been having sexual relations with the defendant from June, 1916 to June, 1917. Also, in Robinson v. Ruprecht, 191 Ill. 424, 61 N.E. 631 (1901), the presumption failed even though the legal husband was living in the same state as the wife, but had no access to her and both the wife and the paramour were not aware of the husband's residence.

as "clear and conclusive,"[4] "clear and convincing,"[5] and "clear and irrefragable."[6] The burden of proof is upon the person alleging illegitimacy[7] and the presumption cannot be "shaken by a mere balance of probabilities."[8] The husband is presumed to be the father of a child conceived during coverture even if the marriage is terminated prior to birth, unless it can be shown that the husband did not cohabit with the wife at the time she became pregnant.[9]

At common law both the husband and wife were considered incompetent to testify to the husband's nonaccess to the wife, where such testimony would tend to bastardize or prove a child conceived after marriage illegitimate.[10] The reason often given for holding the wife incompetent to testify to the access or nonaccess of the husband is one of "public decency and morality."[11] However, a wife may give evidence of illicit relations with other men on the grounds that this information could not otherwise be obtained because of the secrecy which necessarily surrounds such relations.[12] Therefore, if the wife may testify to the lurid details of an extra-marital affair in open court, there would seem to be no reason to shelter the public from her testimony regarding intimacies (or lack thereof) with her husband. Nevertheless, the wife's incompetency to testify to her husband's nonaccess still persists in many states unless abrogated by statute. The reason for this inconsistency is that the courts are not so much interested in protecting the "public decency and morality" as they are in sheltering the child from the stigma of illegitimacy.

An early Illinois Appellate case[13] followed the common law rule in stating that the mother could not deny the presumption of legitimacy, where the child is born in wedlock, for reasons of public decency and morality. However, this same court said:

> . . . . This prohibition does not apply to her competency as a witness, but is a rule of law governing any right of action which she may set up, involving such bastardism of her own offspring, born in wedlock.[14]

The Illinois Supreme Court has held, in reviewing a bastardy proceeding, that the husband is incompetent to testify as to the nonaccess to the wife,

4 Sugrue v. Crilley, 329 Ill. 458, 160 N.E. 847 (1928).
5 Dill v. Patterson, 326 Ill. App. 511, 62 N.E.2d 249 (4th Dist. 1945).
6 Orthwein v. Thomas, 127 Ill. 554, 21 N.E. 430 (1889).
7 Zachmann v. Zachmann, 201 Ill. 380, 66 N.E. 256 (1903).
8 Orthwein v. Thomas, *supra* note 6.
9 Drennan v. Douglas, 102 Ill. 341, 40 A.R. 595 (1882). Also, see Zachmann v. Zachmann, *supra* note 7, wherein a child born 20 days after the mother divorced husband #1 and 15 days after her marriage to husband #2 was considered to be the child of husband #2.
10 Goodright v. Moss, 2 Cowp. 594, 98 Eng. Rep. 1258 (1777).
11 Rex v. Rook, 1 Wils. 340, 95 Eng. Rep. 651 (1752).
12 Rex. v. Reading, 95 Eng. Rep. 49 (1734).
13 Vetten v. Wallace, 39 Ill. App. 390 (4th Dist. 1890).
14 *Id.* at 397.

but she is given the "unqualified right to testify." After discussing the law of England, Justice Heard said:

> . . . . In this country in earlier times there was much diversity of opinion as to the competency of the wife. There does not seem to have been any as to the incompetency of the husband. This led to the enactment of statutes on the subject in many States, while in some the old English law still prevails. In this state under the early statutes the question could never arise as only unmarried women were given the benefit of those statutes. In 1919, the word 'unmarried' was elided from the Bastardy act and married women were given the benefit of the act. By this act the prosecutrix is specifically given the unqualified right to testify.[15]

Today, Illinois still has the same statutory provision, although it has been renamed the "Paternity Act," which declares the mother and the accused in a paternity action to be competent witnesses and their credibility to be left to the jury.[16]

In the instant case,[17] the Appellate Court, Second District, in reversing the lower court, held, as a matter of law, that the presumption of legitimacy had not been overcome by the wife's testimony that she had not had intercourse with her husband during the period in which conception likely occurred. The court, without definitely indicating whether it was objecting to the wife's competency or to her credibility, stated:

> . . . . Her [plaintiff's] case was based primarily upon her own testimony of no intercourse and our courts have held that a wife will not be allowed to make such a statement as long as she is living with her husband.[18]

It is difficult to rationalize the Appellate Court's opinion in the light of the Illinois Supreme Court's pronouncement that the mother has an "unqualified right to testify" and the legislative mandate that the credibility of her testimony is to be left to the jury. It would seem that an unwarranted restriction is being placed upon the wife's testimony.

In Illinois, a paternity action is a civil proceeding and it is only necessary to prove by a preponderance of the evidence that the defendant is the father of the child. However, to overcome the presumption of legitimacy of a child conceived in wedlock and born within a competent time thereafter, the proof must be "clear and irrefragable." The instant case creates the anomalous situation whereby the jury may find the defendant to be the father of the plaintiff's child, but nevertheless must find upon the same evidence that the plaintiff's child is legitimate. It is difficult to imagine a paternity action where a mother would be able to produce more convincing evidence than was presented in *People v. Monroe.*

15 People v. Dile, 347 Ill. 23, 27, 179 N.E. 93, 95 (1931).
16 Ill. Rev. Stat. ch. 106 3/4, sec. 56 (1963).
17 People v. Monroe, 43 Ill. 2d 1, 192 N.E.2d 691. (2d Dist. 1963).
18 *Id.* at 8, 192 N.E.2d at 694.

The best method to eliminate this seemingly unconquerable barrier of the presumption of legitimacy, where the mother is married, would seem to be by the use of blood tests, whenever possible, showing that her husband was not the father of her child.[19] If the mother could eliminate the presumption of legitimacy by excluding her husband from any possibility of being assumed to be the father, then she could obtain a favorable adjudication in her paternity action by proving the defendant to be the father of her child by a mere preponderance of the evidence. Of course, the court may always order the mother, child, and alleged father to submit to blood tests; but the results of such tests are admissible in court only to exclude the defendant as being the father of the child and never as affirmative proof of guilt.[20]

T. RYDELL

TORTS—RES IPSA LOQUITUR—LIABILITY OF ROPE MANUFACTURER—A recent decision of the Appellate Court of Illinois in *May v. Columbian Rope*[1] serves to underscore the longevity and progression of the doctrine of res ipsa loquitur.

The case arose out of an accident that occurred at a construction site when a one-half inch, three-strand Manila line, manufactured by Columbian, broke and caused the plaintiff to fall and sustain injuries. The evidence presented by the plaintiff was entirely circumstantial, consisting of the offending rope and the plaintiff's own testimony that on the morning of the accident the rope was "brand new," having been delivered to the job and placed in use only some 45 minutes before it broke. This testimony was seemingly corroborated by the deposition of a fellow workman, and by the direct testimony of the man who delivered the rope to the job site. A further point made by the delivery man was that the rope appeared to be dirty when he delivered it, as if it had been used.[2]

To rebut the inference of negligence arising from the circumstantial evidence put forward by the plaintiff, the defendant, Columbian, introduced extensive evidence pertaining to its manufacturing processes, arguing that its testing and safety procedures "showed it to be in the exercise of all due care in the manufacture of its rope.[3] This evidence was buttressed by the testimony of an expert witness that the "dirty" rope in question was not new, as the plaintiff had testified. In concluding its

19 Ill. Rev. Stat. ch. 106 3/4, § 5.
20 Ill. Rev. Stat. ch. 106 3/4, § 1.

1 40 Ill. App. 2d 264, 189 N.E.2d 394 (1st Dist. 1963).
2 *Id.* at 279, 189 N.E.2d at 400. The court took notice of the fact that the workman giving the deposition freely admitted that an illness had left him with an impaired memory and capacity for narration and that he was "hazy" about such events which had happened long ago.
3 *Id.* at 269, 189 N.E.2d at 396.