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Therefore, the *Stewart* case follows the modern trend in recognizing that probation and physical custody are not to be equated. It also recognizes that a court may have jurisdiction over a probationer without the consent of the court which placed him on probation. On the other hand, in its disregard for the rule of comity, it seems to have limited support.

DOMESTICS–PRESUMPTION OF LEGITIMACY NOT OVERCOME BY NON-ACCESS UNTIL 232 DAYS PRIOR TO BIRTH IN WEDLOCK

Richard Holder, plaintiff, commenced this suit for annulment of his marriage to the defendant Ruth Holder on the grounds that his wife had fraudulently induced him to enter into it by representing that she was pregnant with his child. The parties had intercourse on December 24, 1956, were married on February 2, 1957 and the child was born on August 13, 1957. The plaintiff contended this was not his child since the normal period of gestation is 270 days, and that he had no access to his wife until December 24, 1956, which was only 232 days prior to the birth of the child. Before that time he was in Alaska. The Supreme Court of Utah in reversing a decree for the plaintiff held that evidence which showed only 232 days had elapsed between the first possible date of coition and the date of birth was insufficient to overcome the presumption of the legitimacy of a child. *Holder v. Holder,* 340 P.2d 761 (Utah, 1959).

The legal presumption is always that a child born in lawful wedlock is legitimate.[1] This presumption is founded on morality, decency, and public policy and is one of the strongest presumptions in the law.[2] Although there have been many and varied criteria or formulae used to determine the sufficiency of rebutting evidence,[3] the majority of American courts have, in cases involving the presumption of legitimacy, demanded more than a mere preponderance of the evidence; most of them requiring clear, convincing, and satisfactory proof and some even requiring proof beyond a reasonable doubt.[4] This proof must be sufficient to show that the husband was: (1) impotent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent for the period during which the child must, in the course of nature, have been begotten by the alleged father; or (4) only present under such circumstances

[1] Phillips v. Allen, 84 Allen (Mass.) 453 (1861).

[2] Estate of Mills, 137 Cal. 298, 70 Pac. 91 (1902).

[3] 9 Wigmore on Evidence, § 2527 (3rd ed., 1940).

[4] Admire v. Admire, 42 N.Y.S.2d 755, 180 Misc. 68 (1943); In re Jones' Estate, 110 Vt. 438, 8 A.2d 631 (1939).

as afford clear and satisfactory proof or proof beyond a reasonable doubt that there was no sexual intercourse.[5]

The average period of conception is 270 days.[6] When non-access is pleaded as a defense, the question then arises of whether proving there was no access with the mother until a time shorter than the average period of conception will be sufficient to overcome the presumption in favor of the legitimacy of a child born in wedlock. If so, how much time shorter than the average period of conception must be proven to establish that the child, in the course of nature, could not have been begotten by the alleged father?

A review of recent cases indicates that the presumption of legitimacy may be rebutted; however, no United States jurisdiction has yet decided at what point in time, as a matter of law, without any further proof, that a certain number of days is too short for the husband without access during the period to have been the father.

A fully developed child born 225 days after marriage was held, in a California case, to be legitimate in view of the policy to declare a child legitimate when it can fairly so be done. The court went on to say that this period of gestation was not so short as to be abnormal, or contrary to the usual operation of the laws of nature.[7]

In a recent Massachusetts case, the court held that a period of non-access until 216 days before the birth of the child was insufficient to overcome the presumption of legitimacy. This seems to be the shortest period of gestation held insufficient to overcome the presumption of legitimacy.[8]

On the other hand in *Pilgrim v. Pilgrim*,[9] an Indiana case, the court held that where there is evidence that the husband could not have had access to his wife until 190 days before birth of the child that this is sufficient to overcome the presumption of the legitimacy of a child born during wedlock.

Consequently, the case law indicates that the period of gestation is sufficient to establish the defense of non-access if it is somewhere between the 216 days which was held insufficient in *Silke v. Silke*[10] and the 190 days found to be sufficient as a matter of law in Michigan.

In conclusion, in cases where non-access is pleaded as a defense, it may be sufficient to rebut the presumption of the legitimacy of a child born in lawful wedlock. This can be done by showing the alleged father had

[5] In re Schuman's Estate, 83 Wis. 250, 53 N.W. 455 (1892).

[6] Holder v. Holder, 340 P.2d 761 (Utah, 1959).

[7] Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308 (1942).

[8] Silke v. Silke, 325 Mass. 487, 91 N.E.2d 200 (1950).

[9] 118 Ind. App. 6, 75 N.E.2d 159 (1947).

[10] 325 Mass. 487, 91 N.E.2d 200 (1950).

no access until a period prior to the birth of the child which is too short for the person to have been the father according to the laws of nature. The *Holder* case follows the modern trend which fixes this period somewhere between 190 and 216 days prior to the birth of the child. This seems to be stretching the laws of nature beyond a natural point since the average period of conception is 270 days; however, the motivating forces of public policy and the long historic strength of the presumption favoring the legitimacy of children seem sufficient justification.

EVIDENCE–JUROR OBTAINING INFORMATION ON "ARCING" BY READING BOOK ON ELECTRICITY DURING TRIAL HELD REVERSIBLE ERROR

The decedent suffered death by electrocution while installing an outdoor television antenna. The plaintiff (the decedent's wife) brought the action against the defendant corporation, alleging its highwire, which passed through the decedent's yard, was the cause of death. Although the plaintiff introduced evidence which tended to prove that the defendant had not maintained the highwire the required distance above the ground as specified by the Kansas statute, she did not introduce evidence showing exactly how this highwire resulted in her husband's death. While the jury was recessed, Noll, one of its members, read a book on electricity and, when the jury reconvened, reported his findings concerning the arcing and jumping characteristics of electricity.[1] The majority of the jury admitted hearing Noll's statements, but only a few admitted to giving them any consideration. Upon discovering Noll's statements, the defendant filed a motion for a new trial which was denied. The Supreme Court of Kansas reversed and remanded the cause because of jury misconduct. *Thomas v. Kansas Power & Light Co.*, 340 P.2d 379 (Kan., 1959).

The court, in reversing, accepted the plaintiff's admission that the juror was guilty of misconduct as conclusive, but stated that it would have found the same result even if no such admission had been made. As a result of this finding, the court gave a very cursory explanation as to why the juror's statement would constitute jury misconduct. Although not specifically stated, the issue of the case was whether arcing is a matter of common knowledge.

At early common law, it was permissible for a member of the jury to have personal knowledge of the case and, in fact, a juror was chosen because he was possessed of this personal knowledge.[2] This rule had such a wide scope that the jury could return a verdict notwithstanding

[1] Although arcing has a strict technical meaning, it is referred to in some cases as the jumping characteristic of electricity. The latter meaning will be used in this note.

[2] Blackstone's Commentaries, Vol. 3, pp. 373, 4 (1768).