[193] THE KING *against* LUFFE. Saturday, Jan. 31st, 1807. 1. An order of bastardy stated to be made upon the oath of the wife, as otherwise, is good; for it will be presumed that the non-access of the husband was proved by competent witnesses on oath other than the wife; or if proved by her also, that the judgment of the justices was founded on the other proof. 2. Such an order filiating the child of a married woman is good, though it only states that such child was likely to become chargeable; which are the words of the stat. 6 Geo. 2, c. 31, s. 1, as applied to the bastards of single women: for upon that statute, as well as the st. 18 Eliz., c. 3, which has the words born out of lawful matrimony, the only question is whether the child be by law a bastard. 3. Non-access of the husband need not be proved during the whole period of the wife's pregnancy: if is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father; as where he had access only a fortnight before the birth.

[See *Morris* v. *Davies*, 1837, 5 Cl. & Fin. 234; *R.* v. *Collingwood*, 1848, 12 Q. B. 686; *R.* v. *Pilkington*, 1853, 2 El. & Bl. 552; *Turnock* v. *Turnock*, 1867, 36 L. J. P. & M. 86.]

An order of bastardy returned into this Court by certiorari was as follows. Suffolk to wit.—The order of S. K. and J. H. two of H. M. Justices of the Peace, &c. made the 20th of August 1806, concerning a male bastard child lately born in the parish of Benhall, (in the said county) on the body of Mary Taylor, wife of Jonathan Taylor, late of B. aforesaid, mariner. Whereas it appeareth unto us, the said justices, upon the oath of the said Mary Taylor, as otherwise, that her husband hath been beyond the seas, and that she did not see her said husband or had access to him from the 9th of April 1804, until the 29th of June last past: and whereas it hath also appeared unto us, the said justices, as well upon the complaint of the churchwardens, &c. of Benhall, as upon the oath of the said Mary Taylor, that she, the said Mary Taylor, on or about the 13th of July now last past, was delivered of a male bastard child in the said parish of Benhall, and that the said male bastard child is likely to become chargeable to the said parish of Benhall: and further, that H. Luffe, of Benhall, &c. did beget the said bastard child on the body of her, the said Mary Taylor: and whereas the said H. Luffe hath this day appeared before us, but hath not shewn any cause why he should not be adjudged the reputed father of the said bastard child: we therefore, upon examination of the cause and circumstances of the premises, as well upon **[194]** the oath of the said Mary Taylor, as otherwise, do hereby adjudge him, the said H. Luffe, to be the reputed father of the said bastard child; and do also adjudge that the said bastard child was born in the said parish of Benhall. And thereupon we do order, as well for the better relief of the said parish of B. as for the sustentation and relief of the said bastard child, that the said H. Luffe shall forthwith, upon notice of this our order, pay to the said churchwardens, &c. of the said parish of B. 2l. 3s. 6d. for and towards the lying in of the said Mary Taylor, and the maintenance of the said bastard child, to the time of making this our order. And we do also hereby further order that the said H. Luffe shall likewise pay to the churchwardens, &c. of the parish of B. for the time being, 3s. weekly, &c. for the maintenance, &c. of the said bastard child, so long time as the said bastard child shall be chargeable to the said parish of B. And we do further order that the said Mary Taylor shall also pay, or cause to be paid to the said churchwardens, &c. of the said parish of B. for the time being, 1s. 6d. weekly, so long as the said bastard child shall be chargeable to the said parish of B. in case she should not nurse and take care of the said child herself." (Signed and sealed by the justices.) The defendant appealed against the order to the Quarter Sessions, by which Court it was confirmed.

Three objections were taken to this order (*a*); 1st, that the wife was admitted to prove the non-access of her husband. 2dly, that this being the child of a married woman, the justices had no jurisdiction to make an order of filiation, unless the child appeared to have been actually **[195]** chargeable, and not merely likely to become so. 3dly, that the non-access of the husband was not proved during the whole time of the wife's pregnancy; which was necessary to bastardize the issue.

(*a*) The presence of the defendant in Court was waved by consent. Vide *Rex* v *Mathews*, Salk. 475.

Storks shewed cause against the rule for quashing the order. As to the first objection; the non-access of the husband does not rest upon the evidence of the wife alone; nor does it even necessarily appear that she gave any evidence of that fact. The words of the order are that it appeared to the justices, upon the oath of the said Mary Taylor, as otherwise, (by which must be understood other legal proof), that her husband had been beyond sea, and that she had not seen him, or had access to him, &c. And the words as otherwise occur again in the subsequent part of the order. It was long ago decided in *Pendrell* v. *Pendrell* (*a*)[1], and *Rex* v. *Bedall* (*b*)[1], that non-access may be proved to bastardize the issue, though the husband be in England; and the old doctrine of the quatuor maria (*c*)[1] was agreed to be exploded. And in the latter case, the order being stated to be made "on the examination of the wife and on other proof," it was holden to be good; though it was agreed that the evidence of the wife alone to prove non-access would not have been sufficient, according to the case of *The King* v. *Reading;* but that she was a witness from necessity to prove the criminal conversation. It appears by the report **[196]** of *Rex* v. *Reading* (*a*)[2], that the wife was the only witness to prove the non-access, as well as the criminal intercourse; and Lord Hardwicke said, "It would be of dangerous consequence to lay it down in general that a wife should be a sufficient sole evidence to bastardize her child, and to discharge her husband of the burthen of its maintenance." Upon the authority of that case, the order was quashed in *The King* v. *Rooke* (*b*)[2]; it having been made upon the sole evidence of the wife as to the non-access. Both those cases therefore are distinguishable from the present. The 2d objection is grounded on this, that the stat. 6 Geo. 2, c. 31, s. 1, which gives jurisdiction to magistrates to take examinations for making orders of filiation in case of bastards likely to become chargeable, is confined in terms to the bastards of single women. But this order would at any rate be good on the general statute of the 18 Eliz. c. 3, which gives the magistrates jurisdiction to filiate bastards "begotten and born out of lawful matrimony." And it was determined in *Rex* v. *Albertson* (*c*)[2], that a bastard begotten on the body of a feme covert, while her husband was beyond the four seas, was "begotten and born out of lawful matrimony." And in *Rex* v. *Taylor* (*d*)[1], the mother of a bastard was after her marriage holden to be still liable to be committed for **[197]** disobedience to an order of maintenance made under the Statute of Elizabeth. According to *Rex* v. *Mathews* (*a*)[3], and *An Anonymous case* in 10 Mod. 84, it is not even necessary to state in the order that the bastard child is likely to become chargeable; for that, say the Court, will be presumed. And in *Rex* v. *Nelson* (*b*)[3], though it were agreed, that it ought to appear by the order, that the child was likely to be chargeable; yet that, it was said, sufficiently appeared by the order to pay such charges as the parish had been at. As to the 3d objection, that the child was born after access of the husband; the birth of the child was on the 13th of July 1806, and the fact of non-access stands proved from the 9th of April 1804 until the 29th of June 1806: the access therefore of the husband was not till within about a fortnight before the birth; which renders it impossible, in the course of nature, that he could have been the father. In support of this objection were cited at the time *Regina* v. *Murray* (*c*)[3], and *Rex* v. *Albertson* (*d*)[2], to shew that non-access must be proved during the whole time of pregnancy, in order to bastardize the issue. But those cases were decided upon the ground of the old rule

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(*a*)[1] 2 Stra. 925.

(*b*)[1] Ib. 941, 1076. Rep. temp. Hardw. 379, and Andr. 9.

(*c*)[1] Vide Co. Lit. 244 a. and 123 b. to 125, 129, in which the whole doctrine is discussed in the notes.

(*a*)[2] Rep. temp. Hardw. 79. 2 Sess. Cas. 175, and Andr. 10. Ford's MS. states the facts thus, "John Alman was husband of Mary Alman, and leaving her upon the 25th of May 1731, had no access to her from that time till the 25th of May 1733, upon which day she was delivered of a bastard child begotten by the defendant Reading: all which was proved by the evidence of Mary Alman. There were other witnesses who proved that the husband was within 7 miles of his wife during that time."

(*b*)[2] 1 Wils. 340.

(*c*)[2] 2 Salk. 483. 1 Ld. Ray. 395, and Carth. 469.

(*d*)[1] 3 Burr. 1679.

(*a*)[3] 2 Salk. 475.

(*b*)[3] 1 Ventr. 37.

(*c*)[3] Salk. 122.

(*d*)[2] 1 Lord Ray. 395.

of the quatuor maria, now exploded by the subsequent cases of *St. Andrew's* v. *St. Bride's* (*e*), *Pendrell* v. *Pendrell* (*f*), *Rex* v. *Lubbenham* (*g*), and *Goodright* v. *Saul* (*h*). Besides, the Court will presume every thing in favour of an order: and where it is apparent from the facts stated that the defendant is the father of the child, they will not, by quashing the order, make the husband liable to maintain it.

[198] Wilson, Alderson, and King, contrà. As to the first objection, it has been clearly settled since *The King* v. *Reading*, that the wife is not a competent witness to prove the non-access of her husband, though from the necessity of the case she is admitted to prove the act of adultery. And it is no answer to say that she was not the sole witness; and that the fact of non-access may have been proved by other evidence, by reason that the order is stated to have been made upon her examination upon oath, as otherwise: for it expressly appears that the non-access was proved by her: and though it were also testified by other evidence, (which other evidence, however, does not necessarily appear to have been upon oath); yet the judgment of the magistrates, which must be taken to have been formed upon all the evidence taken together, cannot be sustained if part of that evidence were incompetent to be received; for the Court cannot tell what degree of weight was given to her testimony as to the fact of non-access in coming to the conclusion. The 2d objection was only argued by some of the defendant's counsel, on the words, "born out of lawful matrimony," in the Statute of Elizabeth, and on the words, "single woman," used in the St. 6 Geo. 2, neither of which, they said, applied to the illegitimate child of a married woman. But this objection, being discountenanced by the Court for the reasons after stated, was ultimately abandoned. 3dly, the law presumes access, and the proof of non-access must come from the party disputing the legitimacy. The mode of proof was formerly very plain and precise; for unless the husband were proved to be beyond the four seas, or labouring under some personal disability, the children were deemed legitimate. If, says Lord **[199]** Coke (*a*)[1], "the issue be born within a month, or a day after marriage, between parties of full lawful age, the child is legitimate." The law, therefore, never looked to the period of conception, or to the actual possibility of the husband having begotten the child, but only to the notorious fact of its birth during the marriage, and while the husband was within the four seas (*b*). The doctrine indeed, of the extra quatuor maria, is now obsolete: and is supplied by the positive proof of non-access, though the husband be in England: but so much of the old rule of law still holds, that if access be proved at any time between the possible conception and the birth, the child is legitimate. So Mr. Justice Blackstone (*c*), speaking of the old doctrine, says; "If the husband be out of England (or, as the law somewhat loosely phrases it, extra quatuor maria) for above nine months, so that no access to his wife can be presumed; her issue during that period shall be bastards. But generally (he adds, with reference to the later determinations engrafted on the old rule,) during the coverture, access of the husband shall be presumed, unless the contrary can be shewn; which is such a negative as can only be proved by shewing him to be elsewhere." [Lord Ellenborough C.J. Suppose a husband, who had been out of reach of access during the whole period of the wife's possible gestation, returned to his wife the very instant before her actual delivery, can it be contended that the child would in such case be legitimate? The ground insisted upon in the case of *The Queen* v. *Murray*, was a little slurred by Mr. Justice **[200]** Lee, in *The King* v. *Reading*. If the fact be once ascertained, that it is naturally impossible, (I do not say improbable merely) that the husband should be the father of the child, the conclusion follows, that the child is a bastard. There is a very early case of *Foxcroft* in the time of Ed. 1 (*a*)[2], where an infirm bedridden

(*e*) 1 Stra. 51.
(*f*) 2 Stra. 925.
(*g*) 4 Term Rep. 251.
(*h*) Ib. 356.
(*a*)[1] Co. Lit. 244 a.
(*b*) Many cases were referred to, which are collected in 4 Vin. Abr. 21, letter B, pl. 3, 4, 5, and 6.
(*c*) 1 Blac. Com. 457.
(*a*)[2] E. 10 Ed. 1, B. Rot. 23. 1 Rol. Abr. 359. It is to be observed, however, that as the case is stated in Rolle, R. the infirm bedridden man was married to A. by the Bishop of London privately, in no church or chapel, nor with the celebration of any mass; "le dit A. Esteant adonque pregnant del dit R." &c. Now if by the word

man was privately [201] married to a woman, who, within twelve weeks after, was delivered of a son; and the issue was adjudged a bastard. The principle to be deduced from the cases is, that if the husband could not by possibility be the father, that is sufficient to repel the legal presumption of the child's legitimacy. But if the mere fact of access of the husband at any time between the moments of conception and delivery would make the child legitimate, it would have been an answer to many of the cases where legitimacy has been in question.] No other certain time can be drawn than that laid down in *Regina* v. *Murray* (*a*)[1], and *Rex* v. *Albertson* (*b*). In the latter case it is said, "He is a bastard who is born of a man's wife while the husband, at and from the time of the begetting to the birth, is extra quatuor maria;" or, as it is now understood, is proved to have had no access during that period. And in the report of the same case in Carthew, the 3d exception to the order, on which it was quashed, was that it was not alleged that the husband was beyond sea for 40 weeks before the birth of the child; and that it would not be sufficient to say that he was beyond sea at the time of the conception; because that in nature could not certainly be known. [Lord Ellenborough C.J. Here, however, in nature the fact may certainly be known, [202] that the husband, who had no access till within a fortnight of his wife's delivery, could not be the actual father of the child. Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to, and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon: but where the question arises as it does here, and where it may certainly be known from the invariable course of nature, as in this case it may, that no birth could be occasioned and produced within those limits of time, we may venture to lay down the rule plainly and broadly, without any danger arising from the precedent.] The same case of *Rex* v. *Albertson* is reported in 5 Modern, 419 (*a*)[2], and there Holt C.J. is made to say that it must appear that the husband was not here all the space; for if he were here either at the begetting or at the birth of the child, it is sufficient. And this falls in with the established rule of law, which has never been questioned, that if a man marry a pregnant woman any time

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del it be meant that A. was pregnant by the man whom she afterwards married (and the words are so construed in other abridgments); assuming that there was a marriage, the case is scarcely intelligible; for it is contrary to the whole current of decisions to say that a child born after the marriage of its actual parents, if begotten before, is a bastard: and if R. were in truth the father of the child begotten some time before, it was a matter of no consequence how infirm of body he was at the time of his marriage, only 12 weeks before the birth; and yet stress is evidently laid upon this circumstance in the statement of the case. But if, by the mention of the privacy of the marriage, and that it was in no church, &c., it were meant to question its validity for want of a proper ceremonial, the infirmity of the man's body at the time was equally immaterial, and the case itself not worth noticing; as amounting only to this, that the issue of persons not married according to the requisite ceremonies of the law, or in other words, not married at all, are bastards. And if Lord Rolle had considered that to be the point in judgment, it is singular that he should not have drawn exclusive attention to it by some more appropriate turn of expression, than by saying that R. was married privately, &c. in conjunction with the other circumstances of the case. Quære then, whether there may not be some error of the pen, or of the press? For though the relative word dit supports the allusion to the husband R.; there being but one R. before mentioned; yet in abstracting the record, as it is likely enough that the son was of the same name with the supposed father, this error may have crept in without attracting attention. The word del properly signifies of, and pregnant del, &c. is pregnant of, &c. and not by, &c. And Lord Rolle, in other places under the same head, speaking of pregnancy, in relation to the husband or father, uses the phrases, "enseint per A." "ad issue per luy;" "ad issue per B.;" while the word del is plainly used in its common sense for of, in several sentences immediately preceding. And in this sense only, speaking of the woman as pregnant of R. the issue, is the case intelligible, or likely to have been noted in that place or manner: in which sense Lord Ellenborough seems to have read the case. There is no regular Year Book of this period to refer to, but only a few scattered notes, not including this case.

(*a*)[1] Salk. 122. (*b*) 1 Lord Ray. 395. Salk. 484. Carth. 469.

(*a*)[2] Under the name of *Alenson* v. *Spence*.

before the birth of the child, such child is legitimate. Then by analogy to that, if the husband have access any time before the birth of the child, the same construction must prevail.

Lord Ellenborough C.J. Three exceptions have been taken to this order; 1st, that the wife was examined generally and alone to the fact of non-access, and that the order is founded on her evidence only; whereas it is laid down in the cases that an order of this sort cannot be made on the evidence of the wife alone, but that there must be other proof of the non-access. This ob-[203]-jection 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 cases of necessity, where, from the nature of the thing, no other witnesses can probably have been present: but exceptions of that sort have been established; and that it is necessary, and on that account allowable, to examine her as to the fact of her criminal intercourse with another, has been held by various Judges at different periods; for this is a fact which must probably be within her own knowledge and that of the adulterer only. And by a parity of reasoning it should seem that if she be admitted as a witness of necessity to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove that the adulterer alone had that sort of intercourse with her, by which a child might be produced within the limits of time which nature allows for parturition. Certainly, however, it is competent for her to prove the fact of her connexion with that person whom she charges as being the real father of her child. And here the order is stated to have been made, not on her evidence only, but "upon the oath of the said Mary Taylor, as otherwise." It is true that it is not said, "as otherwise upon oath;" but as no evidence can properly be given otherwise than upon oath, it is not going further in making an intendment to support this order than has been done in other cases, to say that such other evidence must also be taken to have been given upon oath. Now it does not appear to what particular facts the wife deposed, or what were proved by the other evidence: and then the rule laid down in *The King* v. *Bedall* applies, that if there were other witnesses besides the wife, and she were competent to prove any [204] part of the case, the Court will intend, in support of an order framed like the present, that she was examined only as to those facts which she was competent to prove, and that the rest of the case was proved by the other evidence. And this is not more than has been intended in many other cases. We may therefore read the adjudicatory part of the order as made "upon examination, &c. of the premises upon oath, as well of the said Mary Taylor, as otherwise." The 2d exception, which arose on the wording of the Statutes of Elizabeth and George 2d, in effect resolves itself into the third. For when the question is whether this were a child born out of lawful matrimony, that is, out of the limits and rights belonging to that state, it is the same in substance as the question, whether it be a bastard. It is so for the general purposes of the Act. The matrimony does not cover the child if it be in other respects (according to the rule of law applicable to this subject) a bastard. And so it seems that a child born by adulterous intercourse is as much within the provision of the Act of Geo. 2, as one which is born of a single woman. The cases of *The King* v. *Reading*, and *The King* v. *Bedall*, were both after the Statute of Geo. 2, and yet no such objection was taken. It is a consequence which follows of course from establishing the bastardy of the child, that it was born out of lawful matrimony, in the proper sense of those words as applied to the subject matter. This brings it to the 3d and principal exception; that as it appears that the husband returned within access of the wife about a fortnight before the child was born, he must be presumed to be the father of it; which will throw upon him the burthen of its maintenance. As something has been said concerning the novelty of the [205] doctrine of admitting the proof of non-access of the husband living within the kingdom, in order to rebut the presumption of legitimacy, let us see how the law was understood to be in early periods. In 1 Rol. Abr. 358, tit. Bastard, letter B, it is said, "By the law of the land no man can be a bastard who is born after marriage, unless for special matter." Therefore in the very text of the rule an exception is introduced. The first special matter of exception mentioned by Rolle to bastardize the issue, where the husband is within reach of access, is one of a natural impossibility; where the husband is within the age of puberty; though that was no obstacle to the marriage. There is a case in the Year Book 1 H. 6, 3 b. which goes the length of deciding the issue to be a bastard, where the husband was within

the age of 14. There are several other cases mentioned from the Year Books, of course less questionable, as the age in those cases was much less. All these establish this principle, that where the husband in the course of nature could not have been the father of his wife's child, the child was by law a bastard. But *Foxcroft's case* (*a*)[1], p. 359, of the same book, which I before mentioned was the case of an infirm bed-ridden man, who having married in that state 12 weeks before the delivery of his wife, that was holden to bastardize the issue, though the parties were together. And no doubt is thrown on the principle of that case in any subsequent authority, nor even in the learned editor's notes on Co. Lit. 244 a. 123 b. &c. This therefore is another instance of an exception to the general rule, admitted at so early a period as the 10 Ed. 1, and founded on natural impossibility arising from bodily infirmity. There is another case in the **[206]** 18 Ed. 1, also mentioned in Rol. Abr. (p. 356,) still stronger to the present purpose; where the child was found to be born 11 days post ultimum tempus legitimum mulieribus pariendi constitutum; and because of that fact, et quia per verdictum juratorum invenitur quod prædictus Robertus (the husband) non habuit accessum ad prædictam Beatricem per unam mensem ante mortem suam, per quod majis presumitur contra prædictum Henricum (the issue,) &c. therefore the brother and heir of Robert had judgment to recover in assize. Even at that time, therefore, it was considered that the fact of access or non-access was a material question to be gone into; and that the period of time which had elapsed between the non-access and the birth, which only goes to establish the natural impossibility of the husband being the father of the child, was proper to be inquired of. And Lord C. J. Rolle adds a note to that case, that the jury found that the husband languished of a fever long before his death: which shews that the natural impediment to any access, arising from his languishing of a fever some time before his death was also considered as an ingredient in the question which was submitted to the jury. The rule of law which has prevailed in these cases is (*a*)[2], "Stabitur huic præsumptioni donec probetur in contrarium. Ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel aliâ causâ impeditus, velerat in ea invalitudine ut generare non possit." From all these authorities I think this conclusion may be drawn, that circumstances which shew a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability **[207]** occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded. And therefore, if we may resort at all to such impediments arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to shew the absolute physical impossibility of the husband's being the father: I will not say the improbability of his being such; for upon the ground of improbability, however strong, I should not venture to proceed. No person, however, can raise a question, whether a fortnight's access of the husband, before the birth of a full grown child, can constitute in the course of nature the actual relation of father and child. But it is said, that if we break through the rule insisted upon, that the non-access of the husband must continue the whole period between the possible conception and delivery, we shall be driven to nice questions. That, however, is not so; for the general presumption will prevail, except a case of plain natural impossibility is shewn: and to establish as an exception a case of such extreme impossibility as the present cannot do any harm, or produce any uncertainty in the law on this subject. As to the case of *Regina* v. *Murray*, relied on for the position contended for; on which case alone *The King* v. *Albertson* proceeded; the ground of it was discountenanced by Mr. Justice Lee in *The King* v. *Reading*. Without weakening, therefore, any established cases, or any legal presumption, applicable to the subject, we may without hesitation say, that a child born under these circumstances is a bastard. With respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage **[208]** of the parties is the criterion adopted by the law, in cases of ante-nuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage.

(*a*)[1] Vide ante, 200, note (*a*).

(*a*)[2] Bracton, p. 6 a.

Grose J. As to the 1st and 2d objections which have been made, I shall content myself with referring to the answers given to them by my Lord. But in respect to the 3d objection, as we have been warned not to break in upon the common law, without some rule to go by, I shall make a few observations upon it. It is said that if we break in upon the old rule of the quatuor maria, we must adopt some other line, which will be difficult to be drawn. But that rule has been long exploded on account of its absolute nonsense; and we will adopt another line, which has been marked out on account of its good sense. In every case we will take care, before we bastardize the issue of a married woman, that it shall be proved that there was no such access as could enable the husband to be the father of the child. If by reason of imbecility or on any personal account, or from absence from the place where the wife was, the husband could not be the father of the child, there is no reason why it should not be so declared. Here it is apparent that the husband, who had no access to the wife till two weeks before her delivery, could not be the father. And in saying so we go upon the sure ground of natural impossibility and good sense; rejecting a rule founded in nonsense.

[209] Lawrence J. The objections are reduced to two. The first is, that this order is made upon the evidence of a married woman, that her husband had no access to her: and *The King* v. *Reading*, and *The King* v. *Rooke*, have been relied on. But those cases are not broken in upon by sustaining the present order; because it was made on other evidence besides that of the wife. It is stated to have been made on examination of the wife on oath, as otherwise; by which I understand on other legal proof besides her evidence. But it is said that we can make no intendment in support of this, which is more in the nature of a conviction for an offence than of an order. That however is not so, and is contrary to the determination in *The King* v. *Bedall;* between which and the present case there is no distinction, except that there the order was stated to be made "upon examination of the wife and other proof upon oath;" the only question therefore is, whether the words "as otherwise," here used, must not be taken to mean other proof upon oath; for, if they can, the cases are parallel. Though if orders can be made in any cases without oath, which I do not know that they can, still this would be good as an order. But suppose it had been stated in express terms, that the wife had given evidence of the non-access, and that the same fact had been proved by ten other witnesses, we should presume in the case of an order that the magistrates had proceeded upon the evidence of the other witnesses as to that fact. This case comes to us after an appeal to the sessions; and we may presume that if there had been no other evidence of non-access than that of the wife, the sessions would not have confirmed the order. Then the 3d question is, whether, as the husband had no access until about a fortnight before the birth, a child so born can be said by our law to be legitimate. Now without going **[210]** over the whole ground of the argument again, the doctrine of the quatuor maria has been long exploded; and it has been shewn by the authorities mentioned by my Lord, that imbecility from age, and natural infirmity from other causes, have always been deemed sufficient to bastardize the issue; all which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility? It is said, however, that in so doing we shall shake a settled rule of law, that if a child be born in wedlock, though but a week after the marriage of its parents, such child is to be deemed legitimate. But I do not see that the consequence supposed would follow. By the civil law, if the parents married any time before the birth of the child, it was legitimate: and our law so far adopts the same rule, that if a man marry a woman who is with child, it raises a presumption that it is his own. Lord Rolle gives some such reason for the rule; and it seems to be founded in good sense: for where a man marries a woman whom he knows to be in this situation, he may be considered as acknowledging by a most solemn act that the child is his.

Le Blanc J. As to the first objection, I think it must be taken that the wife was examined to prove the fact of the non-access of her husband within the time mentioned, as well as the other witnesses; for the particular facts proved by her and other witnesses, or by her alone, are given in detached sentences. And then the question is brought to this, whether an order of filiation, where the wife and other witnesses were examined to prove the non-access of the husband, can be supported? To that the case of *The King* v. *Bedall* is in point: for **[211]** there the wife, as well

as other witnesses, was examined to prove that fact, (which I think appears as plainly here from the statement of the case), and yet the order was holden to be good. I consider that case, therefore, as an authority to this point. And it is more peculiarly fit to make the intendment, that the fact was proved by the other witnesses as well as by the wife, in a case like the present, where an appeal lies to the sessions from the original order of the justices; where the appeal has been heard; and where the objection might have been taken on the evidence, that no other than the wife had proved the non-access; and where notwithstanding it is stated that that fact, amongst others, was proved by the wife as otherwise; understanding, as I do, these latter words to mean other competent proof. The second objection has been properly abandoned; because it comes in effect to this question, whether a child proved to be a bastard be not the same, for the purpose of these Acts of Parliament, as a child born out of matrimony, or born of a single woman? To be sure they must be considered as the same thing. As to the 3d objection, the question will be, whether the child of a woman, whose husband is proved to have had no access to her till a fortnight before her delivery, can in law be considered as illegitimate? And our attention has been called to cases where a child born within a short time after the marriage of the parents is, by the rule of law, considered to be legitimate. That is a rule of law not to be broken in upon, except as in other cases, one of which has been mentioned, by proof of natural imbecility, which shewed that the husband could not have been the father of the child. But in order to make the cases the same, it must be supposed that the adultery of the wife in the absence of her husband, who only returns to her just before her delivery, **[212]** is assimilated in law to the case of a man's marriage with a pregnant woman recently before the birth of the child, where the very act of marriage in such a situation is an acknowledgment by him that he is the father of the child with which the woman is pregnant. But there is no analogy between the two cases. It comes then to a case of non-access for a year and a half, excepting the last 14 days before delivery. The rule of law was formerly very strict in favour of the legitimacy of children born of a married woman whose husband was within the four seas; but that has been long broken in upon. Afterwards the rule was brought to this, that where there was an impossibility that the husband could have had access to his wife, and have been the father of the child, there it should be deemed illegitimate: and in *Goodright* v. *Saul* (*a*), the Court held that there was no necessity to prove the impossibility of access, if the other circumstances of the case went strongly to rebut the presumption of access. The cases of *The Queen* v. *Murray*, and *The King* v. *Albertson*, were rather cited for the sake of expressions thrown out by some of the Judges in giving their opinions, than for the determination of the Court: for the points in judgment did not require the support of the doctrine advanced, that there must be non-access during the whole period of the wife's pregnancy in order to bastardize the issue. But where it can be demonstrated to be absolutely impossible, in the course of nature, that the husband could be the father of the child, it does not break in upon the reason of the current of authorities, to say that the issue is illegitimate. If it do not appear but what he might have been the father, the presumption of law still holds in favour of **[213]** the legitimacy. But if, as in this case, it be proved to be impossible that he should have been the father, then, within the principle of the modern cases, there is nothing to prevent us from coming to that conclusion.

Order confirmed.

THE KING *against* THE ARCHBISHOP OF CANTERBURY. Saturday, January 31st, 1807. No mandamus lies to the Archbishop of Canterbury to issue his fiat to the proper officer, &c. for the admission of a Doctor of Civil Law, graduated at Cambridge, as an advocate of the Court of Arches.

Wilson, in the last term, applied for a writ of mandamus to the archbishop, to issue his fiat to the Vicar General of the province of Canterbury, for the purpose of making out a rescript under the seal of the vicar general, commanding the Dean of the Arches to admit Dr. Highmore as an advocate of the Court of Arches. This application was founded on affidavits stating in substance, that the Court of Arches,

(*a*) 4 Term Rep. 356.