[591] GOODRIGHT EX DIM. STEVENS *versus* MOSS ET AL. Thursday, May 1st, 1777. General declarations, or the answer of a parent in Chancery, are good evidence, after the death of such parent, to prove that a child was born before marriage; but not, to prove that a child born in wedlock is a bastard.

[Applied, *Inglis* v. *Inglis*, 1867, 16 L. T. 775. Followed, *Nottingham Guardians* v. *Tomkinson*, 1879, 4 C. P. D. 348; *Murray* v. *Milner*, 1879, 12 Ch. D. 845. Referred to, *Haines* v. *Guthrie*, 1884, 13. Q. B. D. 819.]

Upon shewing cause why a new trial should not be granted in this case, Mr. Justice Willes reported from Mr. Baron Eyre as follows:

This was an ejectment for two messuages, &c. demised by Samuel Stevens on the 1st of March 1776, for seven years. Plea, not guilty. Verdict for the plaintiff.

The lessor of the plaintiff claimed to be entitled to the premisses for which the ejectment was brought, as cousin and heir at law of Ann Stevens, who died seised. And the only question in the cause was, whether the lessor of the plaintiff was the legitimate son of Francis and Mary Stevens; or was born of Mary before their marriage.—For the plaintiff, the register of the marriage of Francis Stevens and Mary Packer, dated November 2d, 1703, and the register of the birth of the lessor of the plaintiff, in the following words, "Christenings 1704, Samuel son of Francis and Mary Stevens baptized July 3d," were produced. It was insisted, on the part of the defendant, "that the lessor of the plaintiff was born and privately baptized before the marriage, and that there was a public baptism after the marriage," which accounted for the register.—They first offered witnesses to general declarations by the father and mother, that Samuel the lessor of the plaintiff was born before marriage, which evidence Mr. Baron Eyre was of opinion to reject.—They also offered evidence, that there was a general reputation in the place, where the father and mother and Samuel resided, "that he was born before marriage;" which Mr. Baron Eyre was likewise of opinion to reject.—They further offered to produce one Joseph Dowsell as a witness, to prove that he had heard one Crips say many times "that the lessor of the plaintiff was a baseborn child," which evidence was rejected: and lastly, they offered an answer of the mother of the lessor of the plaintiff to a bill in the Court of Chancery by the committee of Ann a lunatic, the person last seised, against the lessor of the plaintiff and his mother; in which answer, the mother declared him to be illegitimate; that he was born before marriage and privately baptized; and again publicly baptized after the marriage: which evidence Mr. Baron Eyre was also of opinion to reject. Where upon a verdict passed for the plaintiff, subject to the opinion of the Court upon these points of evidence.

[592] Mr. Howarth and Mr. Jones now shewed cause, and insisted, that though the testimony of parents in their life-time, or their declarations after their decease, might be admissible in cases where proof of the marriage was presumptive only, as by cohabitation, or general reputation; yet neither their declarations, nor their personal testimony could be admitted to bastardize their issue; where, as in this case, the fact of the marriage was actually proved. If so, the evidence offered was rightly rejected. In support of this position they cited the following authorities. *Rex* v. *Inhabitants of Reading*, Mich. 8 Geo. 2, B. R. Cases temp. Lord Hardwicke, 79. *Rex* versus *Rook*, Mich. 26 Geo. 2, B. R. 1 Wils. 340. *Rex* v. *Inhabitants of St. Peter's Worcester*, Bur. Set. Cas. 25. *Rex* v. *Inhabitants of Stockland*, Bur. Set. Cas. 506. 8 Mod. 180. Code, lib. 2, tit. 4, lex, 26. Lib. 8, tit. 47, lex, 6, 9, 10. Dig. lib. 5, tit. 2, 27. Lib. 22, tit. 3, 29.

Lord Mansfield.—All the cases cited, are cases relative to children born in wedlock: and the law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage. But here the evidence offered is only to prove the time when the issue was born; and to shew, whether it was before the marriage or after. The objection that is made to it goes a great way indeed; for it goes to this; that even if the father and mother were alive, their own testimony could not have been received.

Mr. Wallace and Mr. Bower contra, in support of the rule, admitted the fact of the marriage, but nevertheless contended the evidence offered ought to have been received. That the legitimacy of the lessor of the plaintiff did not depend, upon whether F. Stevens or a third person was his father, supposing him to be actually

born in wedlock; but upon the fact, whether he was born in wedlock or not. That the register, though evidence of his being the son of M. and F. was by no means conclusive as to the time of the birth. What then is the best evidence the nature of the thing will admit of? Most clearly the testimony of the parents themselves, if alive; especially, of the mother. If so, why are not her declarations to be received after her death. (Lord Mansfield. Suppose the father had entered the day or hour of the child's birth in a leaf of his Bible, would not that have been evidence? Most undoubtedly it would.) And though there are many distinctions in the books, as to how far an answer, or depositions in one suit, may, or may not, be read in another suit not between the same parties; the mother's answer in [593] Chancery is here offered only as a solemn declaration by her in her life-time. In questions of pedigree, declarations of persons of the family have been frequently admitted. Parents have been examined in Court: and in *Rex* v. *Inhabitants of Reading*,* the mother was admitted to prove every thing but the want of access, though the child was born in wedlock. (Lord Mansfield. It was formerly held, that if the husband was within the four seas at the time the child was born, no evidence could be admitted to prove it was illegitimate; but that doctrine was over-ruled in the case of *Pendrel* v. *Pendrel*;† and from that time the law has been settled the other way.‡)

Lord Mansfield.—The whole of this evidence has been rejected. If any part of it ought to have been received that is material, there ought to be a new trial; and there can be no doubt of its being material.

This case has been argued at the Bar with a greater latitude than I thought it could have been. Two questions have been made: 1st, whether the father and mother could have been examined, if alive. 2dly, if they could, whether their declarations, though ever so solemn, can be admitted as evidence after their death. In this case there is evidence of the fact of the marriage. But there is no evidence of the time of the birth. The register only proves the christening; but non constat from thence, when the child was born. As to the first question, I should as soon have expected to hear it disputed, whether the attesting witnesses to a bond could be admitted to prove the bond. I have known it done over and over again: and it is much too clear to admit of a doubt. In this Court, at Nisi Prius, a mother was allowed to prove a clandestine marriage at the Fleet, and no other evidence was given, to shew the legitimacy of the child. A great estate was recovered upon her single testimony, and no objection whatever started as to the admissibility of it. In *Lord Valentia's case*, in the House of Lords,§ where the question was, whether the Earl of Anglesea was married to the countess dowager of Anglesea on the 15th of September 1741, prior to the birth of Lord Valentia their son, who was born in the year 1744, the countess dowager, having no interest, was admitted as a witness to prove the fact of the marriage. In *Stapylton* v. *Stapylton*,‖ upon an issue to try whether the plaintiff was legitimate or not, the mother attended at Guildhall to prove he was illegitimate. But it happened that she had made an affidavit, in which she had sworn that she and her [594] husband had been married long before the plaintiff was born; and this affidavit was intended to be used against her. Upon this fact being known, it was thought prudent not to call her: but there was not an idea on either side, that she was not a proper witness to the fact of the marriage.—As to the time of the birth, the father and mother are the most proper witnesses to prove it. But 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 spurious; more especially the mother, who is the offending party. That point was solemnly determined at the Delegates. But the question of access or non-access is totally different from giving evidence of the time of the birth.—The next question is, whether the declarations of the father and mother in their life-time, can be admitted in evidence after their death? Tradition is sufficient in point of pedigree: circumstances may be proved: for instance: suppose from the hour of one child's birth to the death of its parent, it had always been treated as illegitimate, and another introduced and considered as the heir of the family; that would be good evidence. An entry in a father's family Bible, an inscription on a tombstone, a pedigree hung up in the family mansion (as the Duke of Buckingham's was), are all good evidence.

* Cas. temp. Lord Hardwicke, 79. † 2 Str. 925. ‡ 3 P. Wms. 276.
§ Adjudged, April 22d, 1771. ‖ About the year 1739. Vide 1 Atk. 4.

So the declarations of parents in their life-time. I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard eigne and the subsequent marriage, to prevent controversy in the family touching the inheritance. If the credit of such declarations is impeached, it must be left to the jury to judge of. As to the declaration made by the mother of the present plaintiff, in her answer to the bill filed against her in the Court of Chancery, it is not like offering a deposition or an answer in evidence against a person not a party to the original suit. That cannot be done for this reason; because such person has it not in his power to cross-examine. But here the answer is offered only as evidence under her hand, of her having made such declaration. Therefore I am of opinion, that as part of the evidence, which was material in this case, and which ought to have been admitted, was rejected; there must be a new trial.

Aston Justice.—I am of the same opinion. I think rejecting the general declarations of the father and mother was wrong: and here the declarations are not inconsistent with the register, [595] but are rather strengthened by it. For if the child was born after the marriage, the mother did not go above eight months.

Willes, Justice.—I am of the same opinion.

Per Cur. Rule for a new trial absolute.

DENN EX DIM. TARZWELL *versus* BARNARD. Same day, 1777.

Upon shewing cause why a new trial should not be granted in this case, Mr. Justice Willes reported from Mr. Baron Hotham as follows:—This was an ejectment tried at the last assizes at Taunton, in the county of Somerset, for certain premises in the parish of Street, which Mary Tarzwell, before her marriage with Richard Skitter, demised to the plaintiff: she claiming under an assignment from William Tarzwell the Younger, who took under the will of his father William Tarzwell the Elder. Thomas Tottle said, he knew William Tarzwell the son. That he had an house, orchard, and garden, at Street, which belonged to his mother before, who has been dead ten or eleven years. That William was in possession about two years ago: but how much longer he could not say. But one Atwell, who lived there above ten years ago, paid rent, before that time, to William for one end of the tenement: and William kept possession of the orchard ever since his mother's death. The deed of assignment from William Tarzwell and Mary Tarzwell dated the 26th of February 1771, was then read; by which, William Tarzwell, in consideration of love and affection, and for divers services done and performed by the said Mary for the said William, and also of the sum of ten shillings, assigned the premises to Mary Tarzwell, her executors, administrators and assigns, for and during all the rest, residue, and remainder of a certain term of 2000 years, formerly raised and granted thereon, then subsisting, and undetermined, for the yearly rent of one shilling. There was a covenant "that he had full power to assign," and "for quiet enjoyment during all the rest and residue of the said term therein yet to come and unexpired." The subscribing witness to this deed said, that William Tarzwell lived at Bladrop in the parish of Street, at the time of the execution of the deed: that Mary was not present: but he was perfectly sober at the time. He brought the deed with him to her, and some shillings passed from her to him. It was not called a deed of gift; but a deed of assignment. He offered to give up the writings to her; but [596] she said he might keep the premises for his life; though she had a right to them immediately. It was by her consent he continued in possession. He gave directions about the estate ever since his mother's death; which was in 1765 or 1766. A year ago, William offered her ten pounds for the estate, which she refused; saying, at the same time, "that it was not her intention to turn him out."

William Southey, the officer of the Surrogate's Court, produced the will of William Tarzwell, the father, dated the 25th of August 1755, by which he gave the premises to his wife; and after her decease, to his son William during the term he had therein unexpired. On the will was indorsed the Act of Court, dated the 1st of June 1756, in these words: "This was proved, &c. on the oath of Elizabeth Tarzwell, sole executrix therein named, who was then sworn, &c."—The defendant refused to enter into any title, whereupon a verdict was taken for the plaintiff, with liberty to move for a new trial, without costs, on these two grounds. 1st, that the deed of assign-