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The "Lord Mansfield Rule" and the Presumption of Legitimacy - Clark v. State

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Clark v. State[1]

In a bastardy proceeding instituted by Patricia Skosnick, Ronald Clark was accused of the paternity of her child conceived prior but born subsequent to her marriage to Joseph

[1] 118 A. 2d 366 (Md. 1955).

Skosnick. Upon conviction, Clark appealed, alleging error in that the trial court admitted testimony of the mother as to facts that would bastardize her child and as to non-access of her husband, claiming that such testimony should have been excluded under the Lord Mansfield Rule. The Court of Appeals indicated that the Lord Mansfield Rule applies to ante-nuptial as well as post-nuptial conception;[2] and *held,* that in any event there was, as the trial court found, sufficient proof *aliunde* to set aside the general rule and to allow the mother, Patricia, to testify to any fact other than non-access.[3] As to the testimony of the mother directly concerning non-access, the court found that, irrespective of this testimony, there was sufficient evidence to permit the lower court to find that the appellant was the father of the child.[4]

This case is interesting in that, first, although not necessary for the decision, it extended by *dictum* the application of the Lord Mansfield Rule to ante-nuptial conception (being in this respect, the first case of its kind in the Maryland courts) and second, it held a very small quantum of proof sufficient to rebut the presumption of legitimacy upon which the Lord Mansfield Rule is dependent for its application.

THE "LORD MANSFIELD" RULE

In 1777, Mansfield, L.C.J., in the often cited case of *Goodright v. Moss,*[5] set forth the rule which bears his name. He declared:

> "... the law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage.... 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."[6]

Although almost uniformly adopted in the United States at one time,[7] the rule has, in later years, been the object of vigorous criticism by text writers,[8] and has been abrogated

[2] *Ibid,* 369.
[3] *Ibid,* 370.
[4] *Ibid,* 372.
[5] 2 Cowp. 591, 98 Eng. Rep. 1257 (1777).
[6] *Ibid,* 1257-1258.
[7] 7 WIGMORE, EVIDENCE (3rd ed. 1940) 363, Sec. 2063; 7 Am. Jur. 640, Bastards, Sec. 21; 70 C. J. 144, Witnesses, Sec. 176.
[8] WIGMORE, *op. cit., ibid,* 358-71; MCCORMICK, EVIDENCE (1954) 146, Sec. 67.

by the courts of some states[9] (in the interpretation of general competency statutes) and by direct legislation in others.[10]

The Maryland courts have consistently followed the Lord Mansfield Rule.[11] The recent case of *Dayhoff v. State*,[12] involved the prosecution of a husband for non-support of a child. The husband attempted to offer evidence of declarations on the part of his wife that he was not the father of the child. The court after quoting the Rule, noted that it has been followed in this state in every case involving legitimacy, and quoted the statement made in *Hall v. State*[13] that:

> "In this state the accepted rule is that where a child is born of a married woman, neither the husband nor the wife is a competent witness to prove non-access at a time when, according to the laws of nature, the husband could have been the father of the child, and that neither the husband, the wife, nor the paramour will be permitted to give testimony which will bastardize the child until such non-access be first shown (. . .) but if non-access is shown, either the husband or the wife is

[9] Evans v. State, 165 Ind. 369, 75 N. E. 651 (1905); In re McNamara's Estate, 181 Cal. 82, 183 P. 552, 7 A. L. R. 313 (1919), where there was no cohabitation of husband and wife within gestation period, but *cf.* Hill v. Johnson, 102 Cal. App. 2d 94, 226 P. 2d 655 (1951), where there was cohabitation and the rule was applied; State v. Soyka, 181 Minn. 533, 233 N. W. 300 (1930); In re Wray's Estate, 93 Mont. 525, 19 P. 2d 1051 (1933); Loudon v. Loudon, 114 N. J. Eq. 242, 168 A. 840, 89 A. L. R. 904 (1933); Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937); Yerian v. Brinker, 35 N. E. 2d 878 (Ohio, 1941); Peters v. District of Columbia, 84 A. 2d 115 (Municipal Ct. of App., D. C. 1951).

[10] The Uniform Illegitimacy Act provided in 9 U. L. A. Sec. 16, "Both the mother and the alleged father shall be competent but not compellable to give evidence, and if either gives evidence he or she shall be subject to cross-examination." Although this act has been declared obsolete and was withdrawn in 1943 by the Commissioners on Uniform State Laws (9 U. L. A. XVII, Table 3), it is still the law of at least Wyoming: Wyo. Comp. Stats. (1945, Off. ed.), Sec. 58.416. This result has been reached in other states by independent legislation; see, among others: New York, Dom. Rel. Law (1950), Sec. 126, subdiv. 1; Massachusetts, 9 Ann. Laws (1933 and 1955 Cum. Supp.), Ch. 273, Secs. 1-7 (in non-support cases) and Secs. 11-19 (in illegitimacy proceedings), both being interpreted in Sayles v. Sayles, 323 Mass. 66, 80 N. E. 2d 21, 4 A. L. R. 2d 564 (1948); Vermont, Vt. Stats. (1947), Sec. 1738 (in divorce proceedings) as applied in Adams v. Adams, 102 Vt. 318, 148 A. 287 (1930).

[11] Crawfurd v. Blackburn, 17 Md. 49 (1861); Scanlon v. Walshe, 81 Md. 118, 31 A. 498 (1895); Howell v. Howell, 166 Md. 531, 171 A. 869 (1934); Harward v. Harward, 173 Md. 339, 196 A. 318 (1937), noted, 3 Md. L. Rev. 79 (1938); Hale v. State, 175 Md. 319, 2 A. 2d 17 (1938), noted, 3 Md. L. Rev. 79 (1938); Hall v. State, 176 Md. 488, 5 A. 2d 916 (1939); Dayhoff v. State, 206 Md. 25, 109 A. 2d 760 (1954). See the note, *The "Lord Mansfield Rule" as to "Bastardizing the Issue"*, 3 Md. L. Rev. 79 (1938).

[12] *Ibid.*

[13] *Supra*, n. 11.

> competent to testify to any fact other than non-access, even though it tends to establish the illegitimacy of the child."[14]

Prior to the *Clark* case,[15] all of the Maryland cases involving application of the Lord Mansfield Rule were limited to situations in which conception and birth both occurred during marriage. In a majority of the states which continue to apply the Rule, the time of conception is immaterial; so long as birth occurs during wedlock, the presumption of legitimacy and the exclusion of testimony arise.[16] In the often cited and leading Pennsylvania case of *Dennison v. Page*,[17] the legitimacy of Mary Dennison was questioned in partition proceedings of the estate of one Page, Mary having been born four months after the marriage of her mother to Page. The court held that ante-nuptial conception did not prevent application of the Rule and further held: "That the mother was incompetent to prove this, (non-access) is perfectly well settled by abundant and uniform authority. Non-access cannot be proven by either the husband or the wife . . ."[18]

Although admittedly not necessary to the decision (since non-access was held to have been established by sufficient evidence *aliunde*), the Court of Appeals in the *Clark* case[19] indicated that the Lord Mansfield Rule applies to cases involving ante-nuptial conception. The court (1) quoted from a Delaware case[20] the statement that where the Mansfield Rule has been applied, it applies to cases of both ante and post-nuptial conception, (2) noted that in the *Dayhoff* case[21] the court relied on a Texas and a Nebraska case,[22] both of which involved ante-nuptial conception, and (3) concluded:

> "If there is justification for both the presumption and *the difficulty of rebutting it* where the child is

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[14] *Ibid*, 494.

[15] 118 A. 2d 366 (Md. 1955).

[16] I JONES, EVIDENCE (4th ed. 1938) Sec. 97; and see *infra*, n. 18.

[17] 29 Pa. St. 420 (1857).

[18] *Ibid*, 423. Parenthetical material added. See also: Hicks v. State, 97 Tex. Crim. 629, 263 S. W. 291 (1924); Schmidt v. State, 110 Neb. 504, 194 N. W. 679 (1923), (These two cases were cited with approval in Dayhoff v. State, *supra*, n. 11); Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527 (1908). For a collection of cases see: 70 C. J. 145, Witnesses, Sec. 176, ns. 90 and 91; 7 Am. Jur. 642, Bastards, Sec. 22; 8 A. L. R. 431; 60 A. L. R. 387; 68 A. L. R. 421; 128 A. L. R. 725; 31 A. L. R. 2d 1024.

[19] *Supra*, n. 15.

[20] Morris v. Morris, 1 Terry 480, 13 A. 2d 603 (Del. 1940).

[21] *Supra*, n. 11.

[22] Hicks v. State and Schmidt v. State, both *supra*, n. 18.

> begotten and born in marriage, because of the furthering of social policy, there is much the same justification where there is ante-nuptial conception, knowledge of the pregnancy and subsequent marriage of the mother."[23]

In Maryland the operation of the Lord Mansfield Rule is contingent upon the strength of the presumption of legitimacy of the child, since once this presumption has been overcome by outside proof of non-access, the child's legitimacy having been thus destroyed, the Rule is set aside, and either parent is then competent to testify as to any fact other than non-access.[24] It is crucial, therefore, to the Maryland application of the Rule to determine what evidence is sufficient to rebut the presumption.

THE PRESUMPTION OF LEGITIMACY

It was at the time the Rule was formulated,[25] and is now,[26] a well settled principle of the common law that a child born in wedlock is presumptively legitimate. In the early days of its application, this presumption was conclusive, being overcome only by evidence of impossibility of access or impotency of the husband.[27] With the passage of time, this strictness has been relaxed. In 1846 in the case of *Hargrave v. Hargrave*,[28] Lord Langsdale said:

> "The presumption . . . is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence, showing that the husband was: (1) Incompetent. (2) Entirely absent, so as to have no intercourse or communication of any kind with the mother. (3) Entirely absent, at the period during which the child must, in the course of nature, have been begotten; or

[23] *Supra*, n. 15, 370. Italics added.
[24] Hall v. State, 176 Md. 488, 494, 5 A. 2d 916 (1939).
[25] 9 WIGMORE, EVIDENCE (3rd ed. 1940) 448, Sec. 2527.
[26] *Ibid*, 449. There seems to have arisen an exception to the application of this presumption in situations where, at the time of the marriage ceremony the wife was pregnant and the husband married with neither knowledge of the pregnancy nor premarital intercourse. Poulett Peerage Case, A. C. 395 (1903). Compare Morris v. Morris, *supra*, n. 20; Baker v. Baker, 13 Cal. 87 (1859); Miller v. Anderson, 43 Ohio St. 473, 3 N. E. 605 (1885). The husband in such a case was allowed to testify as to these facts. The exception is not applicable in the noted case, for it was shown at the trial that at the time of the wedding ceremony the husband had knowledge of his wife's pregnancy.
[27] 1 BLACKSTONE'S COMMENTARIES (Lewis' Ed. 1902) 457.
[28] 9 Beav. 552, 50 Eng. Rep. 457 (1846).

(4) Only present, under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman."[29]

Some of the States have taken the view that the presumption is weakened by proof that the child was conceived before marriage,[30] while others have held that antenuptial conception does not weaken the presumption.[31] Perhaps the better rule, if not the weight of authority, is that so long as the birth occurs during wedlock the same presumption arises and to overcome it the same degree, of proof is required, if there has been either pre-marital intercourse or marriage with knowledge of pregnancy, since the former creates the possibility if not strong probability of paternity, while the latter may be taken as an acknowledgment thereof.[32]

Although there have been many and varied criteria or formulae used to determine the sufficiency of presumption-rebutting evidence,[33] the great majority of the 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, by the criminal standard, proof beyond a reasonable doubt.[34]

The proof of illegitimacy required in Maryland was first established in 1895 in the case of *Scanlon v. Walshe*,[35] where "strong, distinct, satisfactory, and conclusive" testimony was required to overcome the presumption. However, in the later case of *Hale v. State*,[36] in 1938, the court stated:

"In the trial of this case it was first established that Edna Doney was a married woman at the time of the

[29] *Ibid*, 458.

[30] Wright v. Hicks, 15 Ga. 160 (1854); Jackson v. Thornton, 133 Tenn. 36, 179 S. W. 384 (1915); and see 8 A. L. R. 432 and 128 A. L. R. 725 for collections of cases.

[31] Dennison v. Page, 29 Pa. St. 420 (1857); Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527 (1908); and see 8 A. L. R. 428 and 128 A. L. R. 725 for collections of cases.

[32] See note 26, *supra*.

[33] 128 A. L. R. 714.

[34] McCormick, Evidence (1954) 646-7, Sec. 309. See also In re Findlay, 253 N. Y. 1, 170 N. E. 471 (1930), where Judge Cardozo after reviewing the various formulas concluded at page 473: "What is meant by these pronouncements, however differently phrased, is this, and nothing more, that the presumption will not fail unless common sense and reason are outraged by a holding that it abides."

[35] 81 Md. 118, 130, 31 A. 498 (1895).

[36] 175 Md. 319, 2 A. 2d 17 (1938), noted, 3 Md. L. Rev. 79 (1938).

> conception and birth of the child. This being so, the presumption of its legitimacy arises with all the force and favor the law accords to it, in support of the legitimacy of the child, and thus placed upon the State the exacting burden to show to the contrary by clear, satisfactory, and convincing evidence. . . ."[37]

Under this rule, the court determined that non-access had been sufficiently proven by the following testimony: The prosecutrix's mother, who lived on the same side of the street about four doors away from her daughter's house, testified that her daughter and the daughter's husband had been separated for about three years, that the daughter lived with her for a while and then went to live with a sister-in-law, and that during this time she had neither seen nor heard of her daughter's husband; the sister-in-law testified that the prosecutrix had lived with her for about one year, that during this period of time she had never seen the husband although she had seen the prosecutrix every day and every night, and that during the critical period (the period when conception must have occurred) the prosecutrix had gone to live with the defendant. Intimate friends of the prosecutrix testified as to the same general facts. It was further shown that the prosecutrix and the defendant had treated the child as their own and that the married woman and her mother sought to learn the whereabouts of the husband. Speaking of this testimony the court said: "It is rather difficult to perceive how more clear and convincing proof could be offered of the continued separation of this man and wife than here presented."[38] It should be noted that this finding was made although, at the critical period, the wife was out of the observation of each of the witnesses.

One year later, in the case of *Hall v. State*,[39] the Court of Appeals, in holding for the defendant in a bastardy proceeding under the above rule, declared that the mere fact of separation is insufficient where husband and wife lived in the same city and met on friendly terms on at least one occasion, and the wife had many evenings out for which she did not account.

CONCLUSIONS AS TO THE INSTANT CASE

The court in *Clark v. State*[40] recognized that the presumption of legitimacy arises irrespective of the time of

[37] *Ibid*, 321.
[38] *Ibid*, 324.
[39] 176 Md. 488, 5 A. 2d 916 (1939).
[40] 118 A. 2d 366 (Md. 1955).

conception where there is birth during marriage but said that it was unnecessary to decide what standard of proof would be sufficient to rebut the presumption since the State had successfully proven non-access by the "clear, satisfactory, and convincing" standard of the *Hale* case,[41] stating, "We think that the facts and the testimony in the *Hale* case make it authority in this case."[42] The proof of non-access in the *Clark* case which the court found sufficient to satisfy the strict standard of the *Hale* case was, first, the testimony of Mrs. Dingle, a friend of the family, who said that she introduced prosecutrix to her future husband, they apparently being strangers to one another, at a time when prosecutrix was four months pregnant and, second, that "There is no indication in the testimony that Patricia even knew or had heard of Skosnick before said introduction."[43]

It is submitted that this evidence of non-access is even less "clear, satisfactory, and convincing" than that presented in the *Hale* case. But it is not suggested that the verdict in this case was in any way erroneous since first, as noted in the lower court opinion,[44] testimony to prove non-access must necessarily be "very sparse and sketchy", and second, that "Once non-access had been established, the supporting evidence which then became admissible made it clear that the court well could have been convinced beyond a reasonable doubt that the appellant was the father of the child."[45] This result was reached, however, by a further lessening of the quantum of proof sufficient to: rebut the presumption under the *Hale* test, establish non-access, and make a decision on the Lord Mansfield Rule unnecessary. Nor is this effect mitigated by the court's subsequent observation that testimony that Patricia married only to keep her baby, and Skosnick only to avoid military service, and that he gave no sign that the child was his, greatly weakened the presumption.[46]

It is suggested that the admittedly proper result in this case could have been reached either by holding that the Lord Mansfield Rule does not apply to ante-nuptial conception, thus limiting it, or by holding that the presumption of legitimacy is weaker in ante-nuptial conception

[41] *Supra*, n. 36.
[42] *Supra*, n. 40, 372.
[43] *Ibid*, 371.
[44] State v. Clark, Criminal Court of Balto., Part III, 1955, *Baltimore Daily Record*, Feb. 25, 1955 (Md., 1955).
[45] *Supra*, n. 40, 371.
[46] *Ibid.*

cases, thus preserving the vigor of the test for post-nuptial cases. Either would have been preferable to the decision in this case which weakens a desirable presumption to avoid a holding upon a widely discredited rule. Eighteen years have passed since the Lord Mansfield Rule was first attacked in this REVIEW,[47] and though the court has referred to the Rule in derogatory terms,[48] its pernicious effect has been avoided, as in this case, by decreasing the quantum of proof necessary to set it aside, a result which is not desirable. Perhaps this case indicates that the Rule is too deeply embedded in the law of this state to be readily overruled[49] and that remedial legislation[50] is necessary.

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[47] Note, 3 Md. L. Rev. 79 (1938). The author, after discussing the Lord Mansfield Rule, made a strong bid to the courts of this state to limit or abolish it.

[48] The Court of Appeals in the Clark case, *supra*, n. 39, referring to the rule, at page 368 said: "In 1777, Lord Mansfield was inspired — apparently by some brooding omnipresence in the sky — to declare that 'decency, morality and policy' required the law to be (such). . . ." Parenthetical material supplied. Again, at page 369: "The Poulett Peerage case cited no authority for its conclusion — it merely announced in certainties as Jovian as those of Lord Mansfield that the law was so."

[49] 7 WIGMORE, EVIDENCE (3rd ed. 1940) 367, Sec. 2063: "It may have become, in some jurisdictions, too deeply planted to be uprooted." Cited in Harward v. Harward, 173 Md. 339, 354, 196 A. 318 (1938).

[50] Legislation is recommended on the order of 9 U. L. A. Sec. 16, as set forth, *supra*, n. 10. For a caustic criticism of the Lord Mansfield Rule see WIGMORE, *op. cit.*, *ibid*, Secs. 2063, 2064.