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The "Lord Mansfield Rule" as to "Bastardizing the Issue" - Harward v. Harward - Hale v. State

Comments and Casenotes

THE "LORD MANSFIELD RULE" AS TO "BASTARDIZING THE ISSUE"

***Harward v. Harward*[1]**
***Hale v. State*[2]**

In the first principal case plaintiff-appellee-husband filed a bill of complaint against defendant-appellant-wife in which he charged that her cruel and vicious temper and threats of violence compelled him to leave their joint abode. He further alleged that his wife had committed the crime of adultery, and as a result of said adultery a female child, the father unknown, was born of her on July 22, 1935. He alleged that he had not had sexual intercourse with his wife since his departure from their joint abode in July, 1934. The wife denied these charges and at the trial the husband offered no testimony, other than his own, to support his allegations. There was evidence that on several occasions after the appellee's departure in July, 1934, the couple were together in the Fall of that year, at which times there might have been opportunity for intercourse. The evidence of the wife as to when the last instance of intercourse occurred was very hazy, and the testimony of the husband was obscure and misleading as to dates, and, on his own admission, inaccurate. The appellee in the court below made a motion to strike out the husband's testimony as to non-access to his wife after July, 1934. This motion was refused. The trial court granted the appellee a divorce *a vinculo matrimonii* and the wife appealed. *Held:* Decree reversed and bill dismissed. The motion to strike out the testimony of the husband as to non-access to his wife, within the period in which conception might have occurred, should have been granted. The court reaffirmed the existence of "Lord Mansfield's Rule" in Maryland and used the language of Dean Wigmore[3] to the effect that the doctrine was, in many jurisdictions, "too deeply planted to be uprooted".

In the second principal case, Hale, the appellant, was presented in the Criminal Court for Baltimore City for bastardy. The defendant pleaded not guilty. The court sit-

[1] 196 Atl. 318 (Md. 1938).
[2] 2 Atl. (2d) 17 (Md. 1938).
[3] Wigmore, Evidence, Sec. 2063.

ting as a jury found a verdict of guilty, and upon motion a new trial was granted. Upon the second trial the court again found him guilty. During the course of this trial it was shown that the mother of the child was a married woman, and was married to another man at the time of the conception of the child whose parentage was in question. To meet the requirement of proof as to non-intercourse between her and her husband, her mother, who lived four doors down the street from her, testified that the daughter and her husband had been separated for three years, and that she had never seen or heard of him associating with his wife during that time. The daughter's sister-in-law, with whom she had lived from the middle of 1936 until June, 1937, when she went to live with defendant, also testified that during that time she had been with her day and night and had never seen her with her husband. Several other witnesses who were intimate friends offered similar testimony. Subsequent to the admission of the above testimony, the mother of the child was allowed to testify to the non-access of her husband and as to the relations between her and Hale, who was named by her as father of the child. This testimony was objected to, and its admissibility was in question on appeal, *held:* Affirmed. The Court said:

> "We think the rule if not already established by the decisions in this State, should be, that when non-intercourse is shown to the trial court, by clear satisfying and convincing evidence, then the mother should be held competent to testify as to her relations with the accused and to disclose the identity of the father of her child."

The greater part of the discussion which follows will deal with the *Harward* case, as we feel that the treatment of that case raises many of the problems which are kindred to the *Hale* case, and the discussion of one will throw light upon the other.

The *Harward* case leads us to a consideration of Lord Mansfield's Rule", and the relative merits concerning its retention in the law today. The rule as stated by Lord Mansfield in *Goodright Ex. d. Stevens v. Moss,*[4] is: "As to the time of 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 had no connection, and therefore that the offspring is spurious,". Today most courts tersely

[4] 2 Cowp. 291, 98 Eng. Rep. 1257 (1777).

phrase it to the effect that after marriage, neither spouse may testify to the non-access of the other during that period when conception might have occurred, so as to rebut the presumption of legitimacy.

A brief sketch of the historical background of "Lord Mansfield's Rule" will aid us in accurately appraising the true value of the rule in the law of evidence today.

It has always been a well settled rule of the common law that a child born in wedlock is presumed to be legitimate.[5] At early common law this presumption could only be overcome by evidence of non-access, and the law was most strict as to the nature of this evidence of non-access, the limitations of this rule being quaintly phrased by Lord Blackstone,[6] "As if the husband be out of the kingdom 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." Quite obviously it was only on rare occasions when the extrinsic circumstances were such as required by this rule, i. e., the husband being beyond the seas.

At first, the only objection to the testimony of the husband and wife as to non-access to the other, seemed to rest on the interest rule, disqualifying the husband and wife to testify against each other. However around the middle of the seventeenth century the courts began to permit the wife to testify to the non-access of the husband, if her testimony was corroborated.[7] But in 1777, Lord Mansfield in *Goodright v. Moss*,[8] made his remarkable statement, refusing to allow either spouse to testify as to non-access, for which as Wigmore calls attention,[9] "If there is any such law of England or was any for any period, it was invented by him and dates from his utterance".

In the early part of the nineteenth century "Lord Mansfield's Rule" found its way into the law of this country and courts seemed to rival one another in adopting it.[10] In the first principal case of *Harward v. Harward* the Maryland Court of Appeals seemed to feel that "Lord Mansfield's Rule" was deeply imbedded in the law of this State, citing

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[5] 1 Jones, Commentaries on Evidence, Sec. 64.

[6] 1 Blackstone's Commentaries, Lewis ed., 457.

[7] Rex. v. Reading, Cas. t. Hardwick 79, 94 Eng. Rep. 1113 (1734); Rex v. Bedel, Cas. t. Hardwick 379, 95 Eng. Rep. 245 (1737); Rex v. Luffe, 8 East 193, 101 Eng. Rep. 316 (1807).

[8] *Supra* note 4.

[9] Wigmore, Evidence, Sec. 2063.

[10] Canton v. Bently, 11 Mass. 441 (1841); Corson v. Corson, 44 N. H. 587 (1863); Cuss v. Cuss, 3 Paige (N. Y.) 139 (1832).

Crauford v. Blackburn[11] and *Scanlon v. Walshe,*[12] as authority. It is interesting to note that, in the former case, the court stated the rule merely by way of dictum, and in the latter case, although the rule was applied, yet there was an element of estoppel present, which of itself would seem to have justified the decision of the court. The plaintiff, Charlote Walshe had some twenty years before secured a divorce on the grounds of adultery against her former husband, alleging at that time that the children which she subsequently sought to illegitimate, were his. Consequently one wonders whether or not the Court in the *Harward* case was over zealous in reaffirming the rule in Maryland.

Lord Mansfield in stating the rule said that it was "founded in decency, morality, and policy".[13] There has been much conjecture and speculation as to just what he meant by that statement. In the most recent case in England reaffirming his rule, *Russel v. Russel,*[14] Lord Dunedin construed it in the following manner, "The decency that Lord Mansfield referred to was the decency before all the world of laying bare the most secret, and, at the same time, the most sacred of the legitimate relations of man and woman as husband and wife". This clearly places it within what, in the common parlance of men, would be regarded as "decency". Following this argument another prominent writer, Jones, has said,[15] "It is founded upon the policy of the law which forbids either husband or wife to testify to occurrences between them during marriage, also upon its supreme regard for those privileges of the married state that all men instinctively withhold from public knowledge."

From the above authorities the conclusion is forced that a close analogy must then exist between "Lord Mansfield's Rule" and the privilege extended to the "confidential communications" between husband and wife. They both can be catalogued under the same "public policy" argument, and the courts have used much fustian language, regarding the inadmissibility of the testimony of spouses as to non-access.

It is suggested however that there is a recent trend in judicial decisions which has the effect of cutting short this analogy between "Lord Mansfield's Rule" and "confidential communications" between husband and wife. To use the vernacular, many courts have done much toward "de-

[11] 17 Md. 49 (1860).
[12] 81 Md. 118 (1895).
[13] *Supra,* note 4.
[14] (1924) A. C. 726.
[15] 5 Jones, Commentaries on Evidence, Sec. 339.

bunking" the "public policy" argument urged in favor of the rule. "Confidential communications" cannot, as we know, be divulged on the witness stand, either during the existence of the marriage or after its termination by death or divorce.[16] This marks the demarcation where the analogy fails, as recent cases have shown a tendency toward allowing the testimony of a spouse as to non-access to the other, when such testimony will not bastardize the issue. A case which seems to strike directly at the "decency" angle, is that of *Melvin v. Melvin,*[17] a New Hampshire case, wherein the court admitted the testimony as to non-access of the husband to the wife, because there was no issue involved, and hence no chance to bastardize any issue, it being simply a divorce proceeding. Hence we see that this evidence as to non-access may be allowed either before or after dissolution of the marriage, when no question of bartardizing the issue is involved.

In *Fosdike v. Fosdike,*[18] a case decided a year after *Russel v. Russel,*[19] the court held that the testimony of the husband as to the non-access to his wife, was admissible to dissolve the marriage bonds because the issue resulted in a miscarriage, and consequently there was no question of bastardizing it.

In a Michigan case, *In re Wright,*[20] the facts presented were similar to the facts of the Maryland case of *Scanlon v. Walshe.*[21] In the *Wright* case, Lloyd Wright filed a suit for the partition of the property of J. Edwin Wright whom he alleged to be his father. Lloyd's mother, Mrs. Wright, testified to the fact that Lloyd was her son by J. Edwin Wright and that he had been born to her while she was married to one Raby, and that the latter had had no access to her prior to birth of issue, and that she had married Wright after Raby divorced her. The Michigan court admitted the testimony and claimed that the test should be whether or not the issue would be bastardized by such testimony, and that since at common law a man legitimated his issue by marrying the mother, that Lloyd Wright was legitimated by the marriage of his mother to Wright, even though born while his mother was in coverture with Raby. It is advanced that the Maryland Court might well have used such reasoning in *Scanlon v. Walshe,* because in that case,

[16] Ibid, Sec. 2143.
[17] 58 N. H. 569, 42 Am. Rep. 605 (1879).
[18] 159 L. T. J. (Eng.) 95, 60 A. L. R. 384 (1925).
[19] *Supra* note 14.
[20] 237 Mich. 375, 221 N. W. 746 (1927).
[21] *Supra* note 12.

even though the children born to Charlotte Walshe were born while she was married to Florian Simonds, yet the testimony as to the non-access of Simonds would not have resulted in the bastardizing of the issue, because she later married Walshe, the alleged father, and as a result of this second marriage the children would have been legitimated.

This test of whether the evidence of non-access by the spouse tends to bastardize the issue would certainly limit the application of "Lord Mansfield's Rule", and evidence would be admitted only where there was no chance to illegitimate the issue.

Some courts have gone even further in restricting the application of the rule, and allow the testimony of the spouse as to the non-access of the other, where such testimony, although having a bearing on the legitimacy of the issue, yet does not directly bastardize the issue. A few illustrations by way of cases explain its application. In *Koffman v. Koffman,*[22] the Massachusetts court held, that in a divorce proceeding by the husband, against his wife on the grounds of the wife's adultery, that the husband could testify as to non-access to his wife to dispell the defense of condonation which she set up, even though such testimony might indirectly prove the illegitimacy of the offspring. The court did, however, say that the evidence so given in the divorce proceeding, although insufficient for proving adultery, would not be competent in a proceeding to bastardize the child. The court contended that they were separable issues. *Mulligan v. Thompson,*[23] an Ontario case, used similar reasoning in a seduction proceeding, and likewise did *Bancroft v. Bancroft,*[24] a Delaware case, where letters of the wife were admitted showing non-access of the husband. The Court said: "We are clearly of the opinion that they cannot be excluded on the ground that they also tend to prove the issue of the child's illegitimacy." Again in this instance the court stated that in issuing their decree of illegitimacy it did not take the evidence established by the letters into consideration, but limited the admissibility of the letters to the divorce proceedings.

Clearly these cases have made progress in limiting the application of "Lord Mansfield's Rule", and it is a limitation which should be encouraged, for such limitation restricts the rule to bastardy cases, and decrees from the Orphans' Court establishing illegitimacy, that is to say, it

[22] 193 Mass. 593, 79 N. E. 780 (1907).
[23] 22 Ont. Rep. 54, 60 A. L. R. 384 (1892).
[24] 4 Boyce 9, 85 Atl. 561 (1911); (1913) 26 Harv. L. Rev. 560.

curtails its use to those cases in which the bastardization of the issue is the direct questions before the court. Conversely, we may say, it allows the evidence of the spouse as to non-access to the other, in all proceedings where the bastardizing of the issue is only indirectly involved, or not involved at all. This would render such evidence competent in divorce proceedings where the husband seeks to establish the adultery of his wife with an unknown paramour, it would likewise admit such evidence in a situation such as presented by *Scanlon v. Walshe.*[25] It would seem then that the rule would have been whittled down to its proper limits.

The rule as to testimony of non-access, as it originally applied to those situations where the husband had been beyond the seas for a period of nine months, has been greatly relaxed. The bastardization of the issue, even by those jurisdictions which follow "Lord Mansfield's Rule", may be accomplished by other evidence such as outlined by Lord Langdale in *Hargrave v. Hargrave,*[26] that is where the husband proves that he 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 beginning of the period during which the child must, in the course of nature have been begotten, (4) only present, under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." *Hale v. State,* the second principal case, would seem to offer proof within the bounds of Lord Langdale's third and fourth rules. Hence today the only evidence which is still inadmissible is that of either spouse as to non-access, and it would seem a step in the right direction to relax the rule as to this, in keeping with the suggestions made elsewhere in this note.

As has been previously stated, Lord Mansfield had no precedent for his statement in *Goodright v. Moss,* yet the rule was blindly followed by most jurisdictions in the belief that it served some vague and nebulous public policy, which they all felt existed but were at odds as to just what it was. Dean Wigmore wrote a vitriolic criticism of the rule in his work on Evidence, exposing the fallacy in the public policy argument based on "decency", which so many courts urged for the rule's justification. Wigmore states[27] "In every sort of action whatever, a wife may testify to adultery or a single woman to illicit intercourse, yet the one fact singled out as 'indecent' is the fact of non-access on the part of a

[25] *Supra* note 12.
[26] 9 Beav. 553, 50 Eng. Rep. 546 (1846).
[27] Wigmore, Evidence, Sec. 2064.

husband. Such an inconsistency is obviously untenable." Wigmore also convincingly points out that even if the salient purpose of the rule is considered by many courts not to be the preservation of "decency", but rather to prevent the bastardizing of the issue, that even this end is not served, because the issue may be bastardized by other evidence.[28]

The Kansas Court[29] was the first jurisdiction emphatically and without reserve to overthrow "Lord Mansfield's Rule", and the Court from its decision shows that it was obviously influenced by Wigmore's caustic condemnation of the rule. New York, Montana, and New Jersey[30] have quite recently abrogated the rule by statute, while many other courts, as previously stated, although not overthrowing the rule, have limited it, thereby restricting its effectiveness.[31]

In conclusion it would seem that the limitation of "Lord Mansfield's Rule" to bastardy charges and decrees of illegitimacy issuing from the Orphans' Court, would allow the admission of testimony in divorce proceedings which would be of real assistance in arriving at the justice of the case. To be sure no one would argue that such evidence of itself should be sufficient to prove the non-access, but corroboration should be required.

The situation can easily be imagined, wherein the wife being estranged from the husband, and finding herself pregnant by another man, might arrange a private meeting with her husband in a secluded spot (from which it could be argued that the opportunity for intercourse might have occurred) and thus seal the husband's lips upon this vital subject. The injustice caused by such a rule in refusing to allow the husband to testify as to what occurred is obvious.

During the course of this note, we have argued for a limitation or abolishment of Lord Mansfield's Rule, but it may be well to call attention to the fact that whether or not a court feels disposed to adopt such a limitation to Lord Mansfield's Rule, or retain it, it does not in any way affect the principle involved in *Hale v. State,* for as pointed out by the Maryland Court of Appeals, there is nothing inconsistent between that case and Lord Mansfield's Rule. In the *Harward* case, which follows the rule, the testimony of the

[28] *Supra* note 2; State v. Bosley, The Daily Record, Nov. 4, 1938 (Ct. Ct. for Baltimore Co.).

[29] Stille v. Stille, 115 Kan. 420, 223 Pac. 281 (1924); Lynch v. Rosenberg, 121 Kan. 601, 249 Pac. 682 (1926).

[30] Public Welfare Comm. v. Zizzo, 236 App. Div. 813, 260 N. Y. S. 169 (1932); In re Wray, 93 Mont. 525, 19 Pac. (2d) 1051 (1933); Louden v. Louden, 114 N. J. E. 242, 168 Atl. 840 (1933).

[31] *Supra* note 22.

wife as to non-access was held inadmissible because the fact of non-access had not been clearly proven by other clear and convincing extrinsic evidence, whereas in the *Hale* case, prior to the testimony of the wife, the fact of non-access had been clearly and convincingly proven by extrinsic evidence.

The *Hale* case was not one of first impression in this State, as the case of *Howell v. Howell*,[32] was considered by the court to have established the rule. In the *Howell* case the question did not arise by virtue of a bastardy charge, but on a suit brought by the wife for separate maintenance of herself and child.

Lord Langdale's rules regarding the necessary proof for non-access as established in the *Harwick* case,[33] and Bishop on Marriage,[34] indicate that all that is required is proof of non-access by testimony other than that of either spouse. Once this proof has been satisfied there is nothing to be gained from further silence on the part of the spouses.

[32] 166 Md. 531, 171 Atl. 869 (1934).
[33] Supra note 26.
[34] Bishop, Marriages, Secs. 1168-1174.