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Trend in Presumption of Legitimacy in Pennsylvania

Arthur L. Goldberg

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TREND IN PRESUMPTION OF LEGITIMACY
IN PENNSYLVANIA

It has been conceded by students of the law that the principle of *stare decisis* has a well defined place in our legal system; it is one method of capitalizing on the wisdom, research, and opinions of the great minds of the past. But too strict an adherence to this principle can cause a costly hesitation or at least a reluctance on the part of our judges to alter what has been the law for so many years, even though it is felt by them to require a change.

One such consequence of this dogmatic adherence is the presumption of legitimacy, and its rebuttal, which seems to have recently proceeded a step further in its process of evolution to a point which more nearly reaches the ends of reality and justice.

*History of the Presumption of Legitimacy*

If one would trace the presumption of legitimacy from its origin until the present time, it might appear that a definite pattern has been followed, originally giving little significance to the presumption, later more significance to it, and finally, our modern view, which appears to be allowing a slight retreat to the original status.

Originally, a legitimate child was one born in lawful wedlock; that is, one whose *mother* was a *married woman* at the time of its birth. The paternity aspect of the problem was given little significance. Later, certain exceptions were admitted, which gave limited consideration to the husband. First, he would not be considered the father if he were physically incompetent; later, he would not be considered the father if he were beyond the "four seas" of the kingdom; later if he lived at a distance which made intercourse *improbable*. Finally, the father's right was admitted as an element of legitimacy; the definition had now become, "one whose parents were inter-married before he was born."\(^1\)

Then the presumption arose that a child born in wedlock was presumed to be the child of the *mother and father*, that is, that the husband was presumed to be the father. This presumption, the one about which this note is concerned, was not looked on by all the judges as a proper or even a logical one; for as is noted in the dissent of *Page v. Dennison*:\(^2\)

"The presumption of the paternity from the nuptials alone is a falling back upon the very principles of the old, absurd, and abandoned decisions; and we might as well say that gestation might be complete in three months or three weeks; for when we abandon natural presumptions and go to fictions, we are simply disregarding the truth; and then the more plainly false they are, the less liable are they to mislead, by being supposed to be intended for truth."

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2. Ibid., at page 383.
Treatment In England

In the very early common law in England, the presumption of legitimacy was so complete and strong that no evidence could be introduced to show that a child which was born in wedlock was illegitimate. There then became known in England a doctrine called "the Four Seas Rule," which continued to be quoted even in our Pennsylvania decisions until the evolution in Pennsylvania began to take a more concrete form. In Commonwealth v. Shepherd it was said:

"In old times it seems to have been holden that a child born of a married woman whose husband was within the four seas which bound the kingdom could not be considered as illegitimate."

But in commenting on that rule, Pennsylvania decisions noted its unfairness to the husband, and began to get away from the definiteness of such a dogmatic standard:

"This was unreasonable. When a husband had access to his wife it is right that no evidence short of absolute impotence of the husband should bastardize the issue. But where they live at a distance from each other so that access is very improbable, the legitimacy of the child should be decided upon a consideration of all the circumstances."

In England, during the period between 1811 and 1846, there appeared a trend away from the idea of such a strong desire to uphold the presumption to the extent alluded in "the Four Seas Rule." In what was called the Banbury Peerage case, sexual intercourse was presumed to have taken place between the husband and wife if the child was born in lawful wedlock, unless it could be proved to the satisfaction of the decider of the question, that sexual intercourse did not take place within any such time as the husband could by laws of nature be the father of such child. While in 1846, in the English case of Hargrave v. Hargrave, the decision was reached whereby the presumption could be wholly removed by proper and sufficient evidence of any one of four things: that the husband was impotent; that he was so absent as to have no communication or intercourse with the mother; or was entirely absent during the period within which the child must have been begotten; or proof, clear and satisfactory, that there was no sexual intercourse.

It is interesting to view a case noted in Thayer's Treatise on Evidence in which he discusses an English case, which was decided in the House of Lords and in which Lord Campbell commented:

"So strong is the presumption of legitimacy that if a white woman have a mulatto child, although the husband is white and the supposed paramour black, the child is presumed legitimate, if there were any opportunities for intercourse."

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6 Hargrave v. Hargrave, 9 Beaver 553, 555.
7 THAYER, PRELIMINARY TREATISE ON EVIDENCE 346 (1898).
8 Piers v. Piers, 13 Jurist 569, 572 (1849).
Mr. Thayer, in his treatise, seems to say that Lord Campbell must have injected into the situation other elements, for what the noted Lord said did not appear to be the law. As Mr. Thayer continues:

"It never was a rule that the mere opportunity for intercourse between an English husband and his wife gave rise to a presumption that he was the father of her child under the specific circumstances named. On the contrary, it was a just contention in North Carolina in 1872, when a colored child of a white married woman was exhibited to the jury as 'proof that it was impossible' that the white husband of the woman could be its father." 10

Later Mr. Thayer quotes a portion of a case which may have an effect on Pennsylvania decisions, since it has been found of such importance as to be quoted in the latest expression of the law of evidence in Pennsylvania, 11 although it is not a case decided in this Commonwealth. The case is Nolting v. Holt, 12 in which a white woman was married to Charles Nolting, 'a blue eyed flaxen-haired German' to whom she had born nine children, and later gave birth to several mulatto children. The children were claiming as the illegitimate children of Holt, the defendant, a negro.

"The mother was permitted to testify that the negro was the father of the children, and a finding of illegitimacy was sustained notwithstanding the fact that there was no proof of non-access by the husband during the period of likely conception."

This presents another interesting problem, which will be more fully discussed later in the note, that of allowing the parent to testify in an action which might tend to bastardize the child.

A Word About Presumptions

"It is one of the commonest errors to misapprehend the scope and limitations of the ordinary rules and maxims of presumptions; and to attribute to them a mistaken quality and force . . ." 13

In Pennsylvania, in the case of Watkins v. Prudential Insurance Co. 14 the court attempts to show how and in what manner presumptions arise. The court enumerates presumptions, and in the course of the opinion places the presumption of legitimacy in a grouping of those firmly based upon the generally known results of wide human experience. Professor Wigmore notes as to presumptions as a caution: 15

"A presumption must be distinguished from 'prima facie evidence.' The latter signifies properly an amount of evidence which is sufficient in the particular case to pass the judge. But the term has been used

9 See note 7, supra.
10 Warlish v. White, 76 N. Car. 175.
11 BROWN, PENNSYLVANIA EVIDENCE 33 (1949).
13 See note 7, supra.
by some judges to signify the equivalent of a presumption, i.e., to authorize the judge to direct a verdict for the proponent. This ambiguity of the term makes trouble in reading the judicial opinions; but a scrutiny of the proceedings in each case will usually disclose the sense in which the term is being used."

When the courts begin to speak of conclusive presumptions, it appears to this writer that they are attempting to twist the true meaning of presumptions into something which presumptions could not logically adduce. The courts are then creating fictions, for if something is merely a presumption, surely there is room for error; otherwise, it would be no mere presumption, but a fact. Professor Wigmore says this use of "conclusive presumptions" is usually a mere fiction to disguise a rule of substantive law, and when they are not fictions, they are usually repudiated by modern courts.

**Pennsylvania's View of the Presumption and its Rebuttal**

There appears to be little doubt in this Commonwealth that the presumption of legitimacy does exist.\(^1\)

But the courts of Pennsylvania have shifted from the original view that necessitated showing that the husband had no opportunity at all to have intercourse with his wife at the time of conception,\(^1\)\(^7\) to a more realistic view as expressed in the more recent cases in which the courts are looking for what probably happened, rather than what might remotely have occurred.\(^1\)\(^8\)

As the court said in *Commonwealth v. Di Matteo:*\(^1\)\(^9\)

"To rebut the presumption of legitimacy it is not necessary that non-access of the husband to the wife be absolutely proven."

Compare this quotation from a statement from the opinion in *Dennison v. Page:*\(^2\)\(^0\)

"Where it is shown that the husband might have begotten the child, the presumption of legitimacy is conclusive."

The modern trend in Pennsylvania, which is supported by many cases both among the sister states and the federal government, was given a comment of approval by Justice Cardozo in the celebrated case of *In Re Findley:*\(^2\)\(^1\)

"Countervailing evidence may shatter the presumption though the possibility of access is not susceptible of exclusion to the point of utter demonstration."\(^2\)\(^2\)

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\(^{17}\) *Dennison v. Page,* supra.


\(^{19}\) *Comm. v. Di Matteo,* see note 18, supra.

\(^{20}\) *Dennison v. Page,* supra.; Italics Supplied.

\(^{21}\) *In Re Findley,* 170 N. E. 471, 473.

The most recent statement of the law in Pennsylvania on this subject is found in the case of *Commonwealth v. Barone*, in which the court reiterates in strong terms the position of our courts on this subject:

"Legitimacy is not to be sustained by a 'sacrifice of probabilities in a futile quest for certainty.' Common sense and reason are not to be shattered in order to uphold the presumption of legitimacy."

**Competency of the Spouses**

In regard to the competency of spouses to testify as to non-access, there appears to be a problem of unique character in that the law has been rigid so long that a change would necessarily have to be wrought in the legislature. However, it must be noted that certain courts have deviated slightly from the original path of the rule, and such a trend could slowly bring about a gradual evolution which might eventually alter the rule in the courts themselves.

A recent statement of the law as to competency was made in *Commonwealth v. Di Matteo*:

"Husband and wife are incompetent to testify as to non-access of the husband, where the effect of that testimony will be to bastardize the issue of the wife."

This statement has appeared in Pennsylvania cases from our earliest reports until the present time, although the reasons for its existence do not seem to justify the faith placed upon it by the courts.

It appears difficult to this writer to comprehend a clear and logical basis for excluding the testimony of the spouses, when they and they alone in many cases, are the persons who could definitely give the true situation as to access of the husband at the time of conception.

Professor Wigmore notes in his Student’s Edition:

"A child’s legitimacy is presumed from his birth during wedlock; and this presumption holds unless husband’s non-access during the period of gestation is specifically proved. But here, by a peculiar and irrational rule, neither parent is allowed to testify to the non-access."

The courts in Pennsylvania have given reasons from time to time for the existence of the rule. One such statement may be found in *Tioga County v. South Creek Twp.*:

"Many reasons have been given for the rule. Prominent among them is the idea that the admission of such testimony would be unseemly..."
and scandalous, and this is not so much from the fact that it reveals immoral conduct on the part of the parents, as because of the effect it may have on the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency, and hence the rule of law which forbids it."

Another more simple reason was noted in the case of *The King v. Kea*:28

"Public policy excludes the mother in bastardy and pauper cases from being a witness to bastardize her children, by proving the non-access of her husband."

Lowrie, J., in the *Dennison Case, supra*,29 calls this rule a "dead and arbitrary law;" and after a consideration of the practical results of such a rule, this writer is inclined to share the learned justice's sentiments.

It is a noted fact that in Pennsylvania the husband or the wife is permitted to show an adulterous and criminal connection; when this is done we must face the reality that the line of demarcation upon which we stand is indeed a narrow one. As is noted in several cases on this point:80

"A married woman whose husband is living and undivorced is competent to testify in support of a charge of bastardy to the criminal connection with defendant although she is not competent to prove non-access of her husband."

Also, in the case of *Commonwealth v. Wibner* it was stated:31

"In a prosecution for the failure to contribute to the support of a child born out of wedlock—it is not error for the court to allow the introduction of evidence of the relations between the accused and the mother of the child in order to prove his parenthood."

And in the case of *Commonwealth v. Atherton* the court said:82

"However, either may testify as to the fact of intercourse with another, and if non-access may be proved by other witnesses, there may be sufficient evidence to justify a finding that someone other than the husband is the father of the child."

It is the opinion of this writer that the conclusions arrived at by legal reasoning processes do not always fall satisfactorily on the conscience of the lay public; decisions often seem harsh and incorrect to the layman for strict legal principles are clouded from his mind by his emotions.

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29 See note (1), supra.
80 Comm. v. Gantz, supra; see also Comm. v. Atherton, supra.
82 Comm. v. Gantz, supra; see also Comm. v. Atherton, supra.
The recent war, and the separation of married persons because of it, has presented complications beyond description because of such rules as the disallowance of testimony of the spouses in such cases above.

When the law would have a married man support a child which he knows to be not his own, or would have a married woman demand support from one other than her spouse, the parties should be heard on the question of who the father really is. For by not permitting them to speak, we often close the door on the only persons who can truly know of access. The law says that non-access is to be proved by other witnesses. In most cases of marital intercourse there are only two witnesses possible and these two witnesses are also the only ones in most cases who can know as a fact whether sexual intercourse took place between them within the period of gestation. They should be heard.\footnote{Note: An interesting account of this problem giving the position of other states in regard to this presumption can be found in Wigmore on Evidence, Vol. IX p. 448, §2527.}

\textbf{ARTHUR L. GOLDBERG}