[HIGH COURT OF AUSTRALIA.]

COCKS . . . . . APPELLANT;
COMPLAINANT,

AND

JUNCKEN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Feb.* 27, 28; *June* 9.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

Legitimacy—Evidence—Presumption—Rebuttal—Child conceived before, and born after, marriage—Paternity—Pregnancy known to husband at time of marriage—Child acknowledged by him—Evidence that another man was father of child—Admissibility.

High Court—Appeal from Supreme Court of State—Competency—Judgment involving civil right—Value of £300—Affiliation proceedings in court of summary jurisdiction—Order against defendant for maintenance of child—Order quashed on appeal to Supreme Court—Complainant's right of appeal to High Court—Judiciary Act 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *s.* 35 (1) (*a*) (2)—*Maintenance Act* 1926-1941 (*S.A.*) (*No.* 1780 *of* 1926—*No.* 44 *of* 1941).

There is a presumption that a child born in wedlock is legitimate. It applies to a child conceived before the marriage, but it is a presumption of fact only and may be rebutted in any case by clear and satisfactory evidence that the child was not procreated by the husband. In the case of a child conceived before marriage the presumption does not become irrebuttable by reason of the fact that the husband knew the wife was pregnant when he married her or that he acknowledged the child as his own.

Poulett Peerage Case, (1903) A.C. 395, applied.

R. v. *Luffe*, (1807) 8 East 193 [103 E.R. 316], explained and distinguished: Dictum of Lord *Ellenborough* C.J., therein, not followed.

Decision of the Supreme Court of South Australia (Full Court), (1946) S.A.S.R. 84, reversed.

In affiliation proceedings under the *Maintenance Act* 1926-1941 (S.A.) a court of summary jurisdiction adjudged the defendant to be the father of the

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child in question and ordered him to pay 12s. 6d. a week for maintenance until the child attained eighteen years or until further order. The present value of the weekly payments, calculated actuarially (on the assumption that the order remained unaltered), exceeded £300. On appeal by the defendant to the Supreme Court of the State, the order was quashed.

Held that, under s. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1940, an appeal lay by the complainant from the decision of the Supreme Court to the High Court, because a civil right of the value of £300 was involved.

APPEAL from the Supreme Court of South Australia.

The complaint, under the *Maintenance Act* 1926-1941 (S.A.), of Arthur Wellesley Cocks, an officer of the Children's Welfare and Public Relief Board of South Australia, stated that Raelene Patricia Simper, a female child of the age of eight months, was an illegitimate child born of the body of Brunhilde Irene Simper and that the defendant, Douglas Juncken, "is the father thereof, and is able to pay for the . . . maintenance of the said child."

The complaint came on for hearing before a special magistrate, sitting as a court of summary jurisdiction, at Adelaide on 30th August 1945. The evidence of the mother, Mrs. Simper, was tendered to prove the allegation of paternity and was admitted by the magistrate, who overruled the defendant's objection to its admissibility. She gave evidence that she was the wife of Keith Eugene Simper, whom she had married on 1st May 1944. She was now living apart from him and was taking proceedings against him for divorce. He was not maintaining her or the child. Prior to the marriage she was a widow, her first husband, one Tiver, having died in March 1940. In February 1944 she had intercourse with the defendant, as a result of which she became pregnant, but the defendant denied responsibility. In April 1944 she went to a matrimonial agency in Adelaide and explained her circumstances to the proprietor. Subsequently she was introduced there to Simper, who was informed of her pregnancy and agreed to marry her. The marriage took place a few days later. The child was born on 29th October 1944. She registered the child as Raelene Patricia, giving the father's name as Keith Eugene Simper. She had done this because "Simper had asked me to register him as the father of the child, he said he would be a father to the child. Simper told me he would be as a father to the child before we were married and would look after the child. He said he would do all he could to be a father to the child. That was his intention up to the time the child was born. That is what he told me." Mrs. Simper's evidence of what took place at the matrimonial agency was corroborated by Mrs. Smith, the proprietor. The doctor who attended at the birth of the child gave evidence that

"it was developed to the stage of at least thirty-seven weeks. . . . If it is taken that Mrs. Simper was married on 1st May 1944, this child could not have been conceived after 1st May 1944—definitely not. . . . At delivery this child would be thirty-seven to thirty-eight weeks at the most. That would take conception back to about 1st February. Thirty-seven to thirty-eight weeks is an estimate within a week. It couldn't be anything beyond a week out. . . . The earliest date at which a child can be viable is twenty-eight weeks. . . . It would be possible for me to say that this child could not have been conceived twenty-eight weeks before it was born." The defendant admitted that he had had intercourse with the mother at the relevant time but said he had used contraceptives.

The magistrate adjudged that the child was illegitimate and that the defendant was the father, and ordered him to pay 12s. 6d. a week for the maintenance of the child until she attained the age of eighteen years or until further order.

From this decision the defendant appealed to the Supreme Court of South Australia. The appeal was referred to the Full Court, which quashed the order of the magistrate, being of the opinion that in the particular circumstances of this case the presumption that the child, having been born in wedlock, was legitimate, was irrebuttable.

The complainant purported to appeal as of right from this decision to the High Court. He filed an affidavit in which he deposed that he was advised, and was of opinion, that the judgment appealed from was "one from which an appeal lies to the High Court without leave or special leave to appeal, on the following grounds: (*a*) It involves directly or indirectly a question respecting a civil right amounting to or to the value of £300." "(*b*) It affects the status of a person, namely, the said Raelene Patricia Simper, under a law relating to marriage." He also filed affidavits of an actuary, who deposed that the present value of an annuity of 12s. 6d. per week, ceasing on the first death of two persons—(*a*) a female at birth; (*b*) a male of the age of the defendant—or at the expiration of a period of eighteen years, whichever first happened, exceeded £300.

It was, however, objected on behalf of the respondent that the appeal did not lie of right.

R. M. Napier, for the respondent, in support of the objection. The appeal does not lie under s. 35 (1) (*a*) (2) of the *Judiciary Act*. The order of the magistrate did not confer or involve a civil right; the right given by the *Maintenance Act* (S.A.) is one which is enforceable criminally. Further, the order may be varied from time to

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time under s. 63 of the Act. In substance it is not an order for the payment of 12s. 6d. a week for a given number of years; it merely orders that the payments be made until further order. Accordingly, actuarial calculations of the present value of an annuity are irrelevant; it is not possible to attribute a present capital value to the order, and it cannot be said that the judgment of the Supreme Court involves any civil right of the value of £300. The case is not within s. 35 (1) (*a*) (3) of the *Judiciary Act*. The status of the child under a law relating to marriage is not affected. There is no question of a law relating to marriage at all; the validity of the mother's marriage is not questioned. Status is not involved. The judgment of the Supreme Court merely declares that the child is not illegitimate.

Hannan K.C. (with him *K. J. Healy*), for the appellant. The affidavits stating that £300 is involved, being uncontradicted, are conclusive as to value (*Ashton & Parsons Ltd.* v. *Gould* (1)).

[LATHAM C.J. What if the order shows on its face that £300 is not involved?]

That is not the case here. It is the present value of the right in question that must be regarded. The power to vary the order of the magistrate is irrelevant.

[DIXON J. The order of the Supreme Court relieving the respondent of the maintenance order is the subject of the appeal.]

Nevertheless, regard must be had to the magistrate's order to ascertain the value of the matter in dispute. A civil right is involved; the maintenance order could be enforced by execution (*Maintenance Act* (S.A.), s. 83). Moreover, the matter is within s. 35 (1) (*a*) (3) of the *Judiciary Act*; the status of the child is in question.

[LATHAM C.J. But is it under any law relating to marriage?]

The common law relating to the consequences of marriage is within the description of a law relating to marriage.

R. M. Napier, in reply.

PER CURIAM. The Court will reserve its decision on the preliminary objection and, without prejudice to the objection, will hear the appeal on the merits.

Hannan K.C. The effect of the decision of the Supreme Court is that there are two different presumptions of legitimacy, one of which is reserved for "special" cases such as the present case. This view is not supported by the authorities, nor is there any obvious reason

(1) (1909) 7 C.L.R. 598.

for such a distinction. It would produce curious results, and should not be adopted unless for some compelling reason. The true rule is (as stated in *Halsbury's Laws of England*, 2nd ed., vol. 2, pp. 559, 560) that the presumption of legitimacy can always be rebutted if sufficient evidence is available. That rule is stated without qualification in the *Poulett Peerage Case* (1), which is in point here. The rule may work out differently according to the different circumstances of various cases; the rebuttal of the presumption may be easy or difficult according to the nature and quality of the evidence available. The view of the Supreme Court was based on a misconception of dicta in *Gardner* v. *Gardner* (2) (which was a decision on Scottish law, so that what was said as to English law was clearly *obiter*) and *R.* v. *Luffe* (3). The latter case was not a case of pre-marital conception, and what was said by Lord *Ellenborough* in relation to such cases was merely *obiter*; it was said only in the course of a general explanation of the law; no such view was expressed by the other three members of the court. The case has not been treated as authority for Lord *Ellenborough's* proposition: Cf. *Re Parsons' Trust* (4). The rule in *Russell* v. *Russell* (5) does not affect the admissibility of the mother's evidence in this case; it applies only to evidence of non-access after marriage (*In the Estate of L.* (6)). As to the evidence (assuming that the presumption was rebuttable), the magistrate felt no difficulty in accepting the testimony upon which his finding was based and there was ample evidence to support the finding.

R. M. Napier. The *Poulett Peerage Case* (7), properly understood, is not an authority on the point here. It has been given a wider operation than is justified on its facts; it is the antithesis of the present case. That being so, there is no authority to the contrary of the proposition adopted by the Supreme Court; what authority there is supports it. Lord *Ellenborough's* statement of the law in *R.* v. *Luffe* (8) has been accepted in the United States (*State* v. *Shoemaker* (9); *Miller* v. *Anderson* (10)): See also *Nicolas* on *Adulterine Bastardy*, p. 24. The proposition is not dependent on, or in any way affected by, the "four-seas" rule; accordingly, it is not to the point that that rule has been "exploded." [He referred to *Quinn* v. *Leathem* (11); *Blackstone's Commentaries*, vol. 1, p. 454; *Swinburne* on *Wills*, 7th ed. (1803), vol. II., p. 539; *Pollock and Maitland, History of English*

(1) (1903) A.C. 395.
(2) (1877) 2 App. Cas. 723.
(3) (1807) East 193: See pp. 202, 206, 210, 212 [103 E.R. 316, at pp. 319, 321, 322, 323].
(4) (1868) 18 L.T. 704.
(5) (1924) A.C. 687.
(6) (1919) V.L.R. 17.
(7) (1903) A.C. 395: See particularly p. 398.
(8) (1807) 8 East 193 [103 E.R. 316].
(9) (1883) 49 Am. Rep. 146.
(10) (1885) 54 Am. Rep. 823.
(11) (1901) A.C. 495, at p. 506.

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Law, vol. 2, pp. 395, 396; *Smyth* v. *Chamberlayne*, reported in *Nicolas* on *Adulterine Bastardy*, p. 154.] If the presumption was rebuttable, the evidence in this case was inadequate. There was no positive evidence of where the husband, Simper, was or what he was doing at any relevant time. This was a serious deficiency in the evidence. Either Simper should have been called or some other evidence should have been adduced on this point. In the absence of such evidence, the magistrate should not have found as he did.

Cur. adv. vult.

June 9.

The following written judgments were delivered :—

LATHAM C.J. A preliminary objection has been raised to the competency of this appeal. It is an appeal from a judgment of the Full Court of the Supreme Court of South Australia setting aside an order of a special magistrate directing that Douglas Robert Juncken pay 12s. 6d. a week for the maintenance of a child adjudged by the magistrate to be his illegitimate daughter (*Maintenance Act* 1926-1941, (S.A.), s. 46). The appellant is an officer of the Children's Welfare and Public Relief Board of South Australia and he asks that the order of the magistrate be restored. It is contended for the appellant that the order appealed from is a judgment which involves directly a civil right of the value of £300 so that an appeal lies under the *Judiciary Act* 1903-1940, s. 35 (1) (*a*) (2). It is also contended for the appellant that, as the order of the magistrate is based upon a decision that the child in question is illegitimate, the order of the Supreme Court is a judgment affecting the status of the child under the laws relating to marriage, and that an appeal therefore lies also under the *Judiciary Act*, s. 35 (1) (*a*) (3).

The appellant has sworn that in his opinion the order involves directly or indirectly a question respecting a civil right amounting to or of the value of £300. The appellant has also filed affidavits of an actuary in which calculations are made of the present value of an annuity of 12s. 6d. a week ceasing on the first death of (*a*) a female at birth (the child in question is under one year old) or (*b*) a male aged thirty-two or thirty-three years (the age of the respondent). The values calculated vary, according to the rates of interest assumed for the purpose of the calculation, from £385 to £418. This actuarial evidence has not been challenged.

It is, however, contended for the respondent that no civil right is involved. In my opinion this argument fails. The order of the magistrate imposed a liability upon the respondent and that liability can be enforced against him by execution levied against his land or

goods (*Maintenance Act* 1926-1941, s. 83). It would be the duty and the right of the Child Welfare Department, which is responsible for instituting the present proceedings, or of any guardian of the child, to enforce the order on behalf of the child. The order created a civil right in the child which can be enforced against the respondent.

It is, however, further contended that the actuarial calculation of the value of the right created by the order of the magistrate should not be accepted because s. 63 of the *Maintenance Act* provides that the court may, from time to time, vary the order by increasing, reducing or entirely remitting the periodical sum ordered to be paid. If, owing to some change in the circumstances of the parties, the order were entirely remitted or the amount payable under the order were reduced, then the value of the civil right might fall below £300. In my opinion this argument is not relevant to the application of the provisions of the *Judiciary Act* which are under consideration. If the question were whether a house and land were worth £300 or more and it was shown that the house was worth £500, that would conclude the matter, although everybody would be aware that the house might be burnt down at any time or damaged or destroyed in some other manner. The value of the right established by the order of the magistrate, which has been set aside by the order appealed from, should be estimated in accordance with the actual terms of the magistrate's order and not by reference to the terms of an order for a reduced amount of maintenance which might possibly be substituted for it. This view is in accordance with the opinion of *Isaacs* and *Rich* JJ. in *Coal Cliff Collieries Ltd.* v. *Austin* (1).

In my opinion the appeal is competent under the *Judiciary Act*, s. 35 (1) (*a*) (2), and it is therefore not necessary to consider the further question whether the order of the Supreme Court setting aside the order of the magistrate is an order which affects the status of the child under the laws relating to marriage. I proceed, therefore, to consider the appeal itself.

On the evidence accepted by the magistrate one K. E. Simper married a widow, Mrs. B. I. Tiver, knowing her to be pregnant by another man and for the purpose of having the child born in wedlock. The marriage took place on 1st May 1944 and the child was born on 29th October 1944. With the knowledge and consent of Simper the child was registered as his child. After a few months Simper left his wife and she sued him for divorce. She alleged that the respondent Juncken was the actual father of the child. A. W. Cocks, an officer of the Children's Welfare and Public Relief Board, took proceedings for maintenance of the child against Juncken. The

(1) (1919) 27 C.L.R. 355.

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Maintenance Act 1926-1941, ss. 46-48, provided that an order for maintenance may be made against the father of an illegitimate child. The magistrate held that Juncken was the father of the child, that the child was illegitimate and an order was made against him. An appeal was referred to the Full Court of the Supreme Court of South Australia, and it was held that the child was legitimate.

The court was of opinion that when a man marries a woman whom he knows to be pregnant, the child when born is considered to be legitimate by an irrebuttable presumption of law, so that evidence to prove procreation by another person is inadmissible. The marriage of the husband and wife in such circumstances was held to amount to a conclusive acknowledgment that the child was the child of the husband. If the question of legitimacy were to be decided upon evidence as a question of fact, marriage in such circumstances would be very strong prima-facie evidence that the husband admitted that he was the father of the child, and further evidence that he allowed the mother to declare, upon the registration of the birth of the child, that he was the father, would be a further admission which it would, in most cases, be almost impossible to displace by evidence. In the present case, however, the magistrate, who was by no means unaware of the important questions of credibility which arose, has been satisfied by evidence that Juncken was, and Simper was not, the actual father of the child. The Supreme Court has held that the rule of law is that the fact that the husband married the wife with knowledge of her pregnancy conclusively shows that the child is legitimate, no evidence as to the actual procreation of the child being admissible. A subsequent acknowledgment of the child by the husband as his child (in this case by allowing himself to be recorded officially as the father of the child) is, according to the reasoning of the Supreme Court, an irrelevant circumstance, because the fact of marriage, with knowledge of pregnancy of the woman, in itself and at once and finally, irrespective of what had in fact happened or of what might thereafter happen, produced the result that the child must be considered to be legitimate.

The rule was held to apply vis-à-vis "the parents" of a child (that is, I understand, the husband and mother) and all who claimed through or under them, though in proceedings in which the rights of other parties were concerned it would (it was considered) be permissible to examine the facts and to hold that such a child was illegitimate. It may be observed that neither the husband nor the mother was a party to the proceedings in the present case and that the result of the view of the Supreme Court is that a child may be legitimate for some purposes but illegitimate for other purposes—a result which

elicited some strong expressions of opinion from Lord *Findlay* in *Russell* v. *Russell* (1).

In the present case no question of the admissibility of evidence under the rule in *Russell* v. *Russell* (2) arises. The decision in that case was that neither husband nor wife could give evidence of non-access after marriage for the purpose of showing that a child of the wife born during the marriage was illegitimate. The rule relates only to evidence of non-access after marriage (*In the Estate of L.* (3)). In this case the wife gave evidence of non-access before marriage, and the husband did not give evidence.

There is a presumption that a child born in wedlock is legitimate. The decision of the Full Court that the presumption was irrebuttable in the present case was based in part upon statements of the law contained in 1 *Rolle's Abridgment* (1688) 358 : *Viner's Abridgment* (*sub tit.* Bastard (B) 3) ; *Comyn's Digest* (*sub tit.* Bastard (B)) and *Bacon's Abridgment* (*sub tit.* Bastardy (A)). All these authorities contain statements to the effect that a child born in wedlock is not a bastard, even though the wife was pregnant by a person other than the husband. These statements are very brief and do not provide any clear material to assist in the consideration of the question whether and in what circumstances (if at all) evidence is admissible to rebut the presumption. There is no doubt that it may be shown by evidence that a child born in wedlock was the result of adultery by the wife. But the Supreme Court has held that cases of pre-nuptial generation have a special character and do not fall within the general rule, applied in cases of adulterine bastardy, that the presumption of the legitimacy of children born in wedlock may be displaced by evidence. The judgment of the Full Court is mainly founded upon a dictum of Lord *Ellenborough*, in *R.* v. *Luffe* (4), in the following words :—

" 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 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 " (5).

This was a dictum, because in the case before the court the husband and wife had been married for some years before the child was born.

(1) (1924) A.C. 687, at p. 719.
(2) (1924) A.C. 687.
(3) (1919) V.L.R. 17.
(4) (1807) 8 East 193 [103 E.R. 316].
(5) (1807) 8 East, at pp. 207, 208 [103 E.R., at p. 321].

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The statement of Lord *Ellenborough* was treated by Sir *J. P. Wilde* in *Turnock* v. *Turnock* (1) as stating a presumption which was not open to rebuttal. In that case, however, there was no appearance for the defendants and the learned judge, after quoting the dictum mentioned, referred to it simply as a legal principle which he must take as he found it. There was no examination of the question. On the other hand, in *Re Parsons' Trust* (2) *Stuart V.C.* said : " Lord *Ellenborough*, in *R.* v. *Luffe* (3), has laid down the rule that, notwithstanding the birth of a child shortly after marriage, the presumption of legitimacy clearly exists until rebutted by satisfactory evidence to the contrary." Thus very diverse views have been taken of the effect of the decision in *R.* v. *Luffe* (3).

Reference to the report of *R.* v. *Luffe* (3) shows that in the course of argument Lord *Ellenborough* expressed opinions in terms which do not treat the case of ante-nuptial generation as an exception to the general rule. His Lordship said : " 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. . . . 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 " (4). His Lordship also said : " 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 " (5). In his judgment, however, the Chief Justice did state a limitation upon the " plain and broad rule " which limitation has been adopted as the ground of the decision in the Supreme Court.

As I have already said, the statement made was an *obiter dictum* of the Chief Justice. The other three members of the Court did not, in my opinion, support the view that the presumption of legitimacy which undoubtedly arises from the birth of a child in wedlock was irrebuttable where the child was the result of pre-nuptial intercourse. *Grose* J. said :—" 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

(1) (1867) 16 L.T. 611.
(2) (1868) 18 L.T. 704.
(3) (1807) 8 East 193 [103 E.R. 316].
(4) (1807) 8 East, at pp. 200, 201 [103 E.R., at pp. 318, 319].
(5) (1807) 8 East, at p. 202 [103 E.R., at p. 319].

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 " (1). *Laurence* J., after referring to authorities which show that imbecility from age and natural infirmity might be proved in order to bastardize the issue, asked : " Why not give effect to any other matter which proves the same natural impossibility ? " (2). He added that if a man marry a woman who is with child it raises a presumption that it is his own. This is obviously the case. It is a most natural presumption to make and could be rebutted only by very strong and convincing evidence. *Le Blanc* J. said :—" 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 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 " (3). Thus three members of the court state in general terms that evidence is admissible upon the question of the legitimacy of a child born in wedlock. *Luffe's case* (4) cannot be regarded as a decision of a court in accordance with the dictum of *Ellenborough* C.J.

In the *Poulett Peerage Case* (5) a man married a woman who was in fact pregnant by another man. The question was whether a child which was born within six months after the marriage was legitimate. *Halsbury* L.C. said :—" There was at one time authority for saying that if the husband and wife were within the four seas you must presume that there was intercourse, and that you could not possibly contradict it. I think that idea is completely exploded. The question is to be treated as a question of fact, and, like every other question of fact, when you are answering a presumption it may be answered by any evidence that is appropriate to the issue " (6). In that case the husband did not know that the wife was pregnant when he married her, but the rule as above stated by the House of Lords is not said to be limited by reference to that circumstance.

(1) (1807) 8 East, at p. 208 [103 E.R., at p. 322].
(2) (1807) 8 East, at p. 210 [103 E.R., at p. 322].
(3) (1807) 8 East, at p. 212 [103 E.R., at p. 323].
(4) (1807) 8 East 193 [103 E.R. 316].
(5) (1903) A.C. 395.
(6) (1903) A.C., at p. 398.

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In my opinion the dictum of Lord *Ellenborough* is not a sure foundation for introducing a limitation upon the principle which has been gradually established that the fact of non-access by a husband may always be proved by evidence. This proposition was supported in argument by reference to many text-writers, e.g., *Halsbury's Laws of England*, 2nd ed., vol. 2, pp. 560-561 : *Taylor, the Law of Evidence*, 12th ed., p. 102.

The Supreme Court has held that evidence of non-access of the husband before marriage cannot be given to rebut a presumption of legitimacy in the case of pre-nuptial generation where the question arises in relation to the husband or the wife or to other persons claiming through the husband or wife but that such evidence may be admitted where the rights of other persons are concerned. It is on this basis that the conflict between *Turnock* v. *Turnock* (1) and *Re Parsons' Trust* (2) is explained. But no reference to such a distinction was made in either of these cases. They simply exhibit contrary views of the meaning of what was said in *Luffe's Case* (3). The distinction suggested has been taken in American cases to which reference is made in the judgment of the Supreme Court but it has, as far as I have been able to ascertain, never been introduced into English law. The adoption of such a rule would, I think, create grave difficulties in some cases. I mention as an illustration the case of a posthumous child born to a widow who marries again before the child is born. Can it be the case that, for purposes of succession to the deceased father the child is to be regarded as his legitimate child, but that it is also the legitimate child of the second husband ? The rule approved by the Supreme Court does not deal satisfactorily with such a case.

Thus I am of opinion that the presumption that a child born in wedlock is legitimate is a presumption of fact which is rebuttable, though the circumstances of a particular case may make it almost impossible actually to rebut the presumption—as in the very strong case of *Gardner* v. *Gardner* (4).

In the judgment of the Full Court it was further said that the evidence that the husband was not the father of the child was neither clear nor convincing. The magistrate, however, heard the evidence of the mother of the child and it is plain also that he accepted the evidence of Mrs. Emma Smith, who gave evidence that she controlled a friendship club to which the mother came for the purpose of finding a husband. Mrs. Smith gave evidence that the mother explained the difficulty that she was in—that she was pregnant and that she

(1) (1867) 16 L.T. 611.
(2) (1868) 18 L.T. 704.
(3) (1807) 8 East 193 [103 E.R. 316].
(4) (1877) 2 App. Cas. 723.

wanted her child to have a father. Mrs. Smith then made inquiries, got into touch with Simper and introduced the parties to each other, and they were married within a few days. Further, Juncken gave evidence of actually having intercourse with Mrs. Simper before her marriage, though he said that he took precautions which, if they had been successful, would have prevented conception. It was for the magistrate to determine whether the evidence of Mrs. Simper that she had had intercourse with Juncken at the relevant time and with nobody else should be believed or not, and also whether her evidence, supported by that of Mrs. Smith, that she had had nothing to do with Simper for some years before the marriage, though she had known him when he was a boy, should be accepted. In my opinion there was no satisfactory ground for setting aside the decision of the magistrate on the facts.

The appeal, in my opinion, should be allowed, the order of the Full Court set aside and the order of the magistrate restored.

RICH J. This matter originated in affiliation proceedings before a special magistrate under the *Maintenance Act* 1926-1941 (S.A.). He heard the evidence of a number of witnesses, found that the allegations in the complaint concerning the illegitimacy were proved, adjudged the respondent to be the father of the child and ordered him to pay 12s. 6d. per week for the future maintenance of the child. On appeal to the Supreme Court of South Australia this adjudication and order were reversed. Hence this appeal to us. The evidence which the magistrate found was duly proved was that the respondent Juncken had between November 1933 and March 1944 had intercourse with the child's mother who was then Mrs. Tiver, a widow. Indeed the man admitted intercourse on three occasions about the relevant time. The result was that the child was conceived. And *Ligertwood J.* said that "there was ample evidence to support the magistrate's finding." Towards the end of April 1944 Mrs. Tiver being pregnant and Juncken having repudiated his responsibility went to an agency with a view to matrimony so that the child might be born in wedlock. The agent introduced her to one Simper who was informed of her condition and agreed to marry her and to father the child. The introduction of the parties occurred on the 29th April and they were married on 1st May 1944. The child was born on 29th October 1944. The doctor who attended Mrs. Simper on her confinement deposed that if Mrs. Simper was married on 1st May 1944 the child could definitely not have been conceived after 1st May but was conceived in February.

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On behalf of the respondent it was contended by way of preliminary objection that the appeal was not competent under s. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1940. In my opinion the order of the magistrate involves a civil right enforceable against the respondent in favour of the child and imposes a present liability which according to undisputed actuarial calculations exceeds the sum of £300. I pass now to consider the appeal.

The evidence to which I have referred very strongly supports the findings of the magistrate who expressed his opinion in no uncertain terms. The decision appealed against is based on a rule or principle that where a man marries a woman knowing that she is pregnant by another man and a child is born the husband is conclusively presumed to be the father and the child is considered to be legitimate by an irrebuttable presumption of law. This principle or rule is founded on an alleged dictum of Lord *Ellenborough* in *R.* v. *Luffe* (1). The facts in that case are different from those in the present case and the other judges who formed the court did not adopt that dictum. *Grose* J. said that where " the husband could not be the father of the child, there is no reason why it should not be so declared." He went " upon the sure ground of natural impossibility and good sense; rejecting a rule founded in nonsense " (2). *Lawrence* J. and *Le Blanc* J. were also of opinion that where it is proved to be impossible that the husband should have been the father " there is nothing to prevent us from coming to that conclusion " (3). There is no question of the admissibility of evidence and *Russell* v. *Russell* (4) has no application to this case. " The question is to be treated as a question of fact, and, like every other question of fact, when you are answering a presumption it may be answered by any evidence that is appropriate to the issue " (*Poulett Peerage Case* (5)). The facts in this case prove the impossibility of the husband being the father of the child and the presumption of the legitimacy has been conclusively rebutted.

In my opinion the appeal should be allowed.

STARKE J. This is an appeal from a judgment of the Supreme Court of South Australia which quashed an affiliation and maintenance order made by a special magistrate pursuant to the *Maintenance Act* 1926-1941 of South Australia.

In July 1945, the appellant, an officer of the Children's Welfare and Public Relief Board, complained pursuant to the provisions of

(1) (1807) 8 East 193 [103 E.R. 316].
(2) (1807) 8 East, at p. 208 [103 E.R., at p. 322].
(3) (1807) 8 East, at p. 213 [103 E.R., at p. 323].
(4) (1924) A.C. 687.
(5) (1903) A.C. 395, at p. 398.

the Act mentioned that Raelene Patricia Simper, a female child of the age of 8 months, was an illegitimate child born of the body of Brunhilde Irene Simper and that the respondent was the father thereof and able to pay for the past and future maintenance of the child.

The special magistrate before whom the complaint was heard adjudged that the respondent was the father of the child and ordered that he pay the sum of 12s. 6d. per week for the future maintenance of the child until she attained the age of eighteen years or until further order.

It was this order that the Supreme Court quashed.

The mother of the child was formerly Mrs. Tiver, a widow. She appears to have been a woman of somewhat easy virtue. She admitted sexual intercourse with a man other than the respondent and also alleged sexual intercourse with the respondent on various occasions at or about the time when the child was conceived. The respondent did not deny intercourse with the mother of the child at relevant times but he asserted that he had used a contraceptive sheath. The mother approached the respondent and informed him that she was pregnant but he denied responsibility.

The next step was that she went to a matrimonial agency in Adelaide to arrange a marriage so that the child might be born during wedlock. The matrimonial agency found a man, Simper, who was informed of the pregnancy and agreed to marry her. The mother and Simper each paid the matrimonial agency £5 for introducing them. They were married on 1st May 1944 and the child was born on 29th October 1944.

The medical evidence was that the child was " developed to a stage of not less than thirty-seven weeks " and could not have been conceived after the marriage on 1st May 1944. Simper said he would be a father to the child and he was, with his consent, registered as the father of the child. But he was not called as a witness and gave no evidence in the case.

The mother and her child have left Simper and he no longer supports them.

Notwithstanding the presumption that a child born during lawful wedlock is legitimate (*Morris* v. *Davies* (1); *Bosvile* v. *Attorney-General* (2)), the special magistrate was satisfied that the presumption had been repelled in the present case and that the respondent, Juncken, was the father of the child Raelene Patricia Simper.

The learned judges of the Supreme Court accepted this finding though I am not surprised that they were by no means satisfied that

(1) (1837) 5 Cl. & F. 163 [7 E.R. 365]. (2) (1887) 12 P.D. 177.

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the evidence was "either clear or convincing" : Cf. *Bosvile* v. *Attorney-General* (1). But they held " that a man, who marries a woman whom he knows to be pregnant, must, in point of law, become the 'legal father' of her child i.e., be ascertained and fixed upon as 'the person to whom the care, the protection, the maintenance, and the education of the child shall belong.' The corollary would be that the child has the status of legitimacy, and vis-à-vis its parents, and all who claim through or under them, 'such a son will be the heir.' In a suit between these parties, the law will not admit of an averment that the child was not begotten by the husband of its mother."

The question is whether the conclusion of the learned judges is now the law. They have cited considerable authority in support of their view which I shall not traverse.

But it must be remembered that rules touching presumptions relating to legitimacy have been gradually relaxed: See *Bosvile* v. *Attorney-General* (2) ; *In the Estate of L.* (3). And it must also be remembered that though neither a husband nor a wife is permitted to prove their access or non-access during marriage with the object or result of bastardizing a child born during wedlock (*Russell* v. *Russell* (4) ; *Ettenfield* v. *Ettenfield* (5)), still the access or non-access of husband and wife before marriage is provable by their own testimony or, if dead, by their declarations (*Poulett Peerage Case* (6) ; *Jackson* v. *Jackson* (7)).

And it is now, I think, settled law that the presumption of the legitimacy of a child born during marriage is a presumption of fact which may be repelled by evidence which shows that it is impossible or unlikely (*Banbury Peerage Case* (8) ; *Morris* v. *Davies* (9) ; *Aylesford Peerage Case* (10) ; *Poulett Peerage Case* (6) ; *Bosvile* v. *Attorney-General* (11) ; *Jackson* v. *Jackson* (12) ; *In the Estate of L.* (3)).

Gardner v. *Gardner* (13), a case governed by Scots law, is to the same effect and despite the careful reservation in that case (14) of the Lord Chancellor the case has been cited as of authority in cases governed by English law. Thus, in *Jones* v. *Davies* (15), where it was said in argument that " a man who marries a woman with child

(1) (1887) 12 P.D., at p. 183.
(2) (1887) 12 P.D., at p. 179.
(3) (1919) V.L.R. 17.
(4) (1924) A.C. 687.
(5) (1940) P. 96.
(6) (1903) A.C. 395.
(7) (1939) P. 172.
(8) (1811) 1 Sim. & St. 153 [57 E.R. 62].
(9) (1837) 5 Cl. & F. 163 [7 E.R. 365].
(10) (1885) 11 App. Cas. 1.
(11) (1887) 12 P.D. 177.
(12) (1939) P. 172.
(13) (1877) 2 App. Cas. 723.
(14) (1877) 2 App. Cas., at p. 728.
(15) (1900) 70 L.J. Q.B. 38, at pp. 39, 40.

must be presumed to be the father of the child, and is liable to maintain it," *Kennedy* J. observed: "Although the presumption is very strong, yet it is rebuttable" *Gardner* v. *Gardner* (1)); and see Lord *Atkinson* in *Lloyd* v. *Powell Duffryn Steam Coal Co. Ltd.* (2).

The learned judges of the Supreme Court treat the present case as an exception to the general rule of law based upon the fact that Simper knew that his wife was pregnant at the time of his marriage and recognized the child as his own. But I do not think that the law of England now recognizes any such exception despite the authorities cited by the learned judges. The legitimacy of a child born during marriage is not in any case a *presumptio juris et de jure* but a presumption of fact. Evidence to repel the presumption must vary with the circumstances of the case but it should be such as to produce judicial conviction that the child was not procreated by the husband: it must be clear, distinct and satisfactory (*Bosvile* v. *Attorney-General* (3); *In the Estate of L.* (4)).

Objection was taken to the competence of this appeal. It was contended that it did not involve directly or indirectly any claim to any civil right amounting to or of the value of £300 (*Judiciary Act*, s. 35; *Coal Cliff Collieries Ltd.* v. *Austin* (5)).

The *Maintenance Act* 1926-1941, ss. 46-47, impose a duty or liability upon the near relatives of a legitimate or illegitimate child to pay for or contribute towards its past or future maintenance and enables that duty or liability to be enforced by officers of the Children's Welfare and Public Relief Board (See ss. 61, 65, 83, 88 and 89) for the maintenance of the child. In my opinion, those sections create and vest in the complainant in these proceedings a civil right and I do not think it has been shown that the present value of an obligation to pay 12s. 6d. per week for the maintenance of the child until she attains the age of eighteen years or until further order is not of the value of £300.

This appeal should therefore be allowed, the judgment of the Supreme Court set aside and order of the special magistrate restored.

DIXON J. To dispose of this appeal we must, I think, decide upon the soundness of the rule laid down by the Supreme Court of South Australia concerning the presumption of legitimacy when a child is conceived by an unmarried woman who marries before the birth of the child. In a judgment read by *Napier* C.J. on behalf of himself, *Reed* J. and *Ligertwood* J., their Honours pronounced the rule to be,

(1) (1877) 2 App. Cas. 723.
(2) (1914) A.C. 733, at p. 740.
(3) (1887) 12 P.D. 177.
(4) (1919) V.L.R. 17.
(5) (1919) 27 C.L.R. 355.

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as I understand them, that a child so born in wedlock but conceived before the marriage is presumed to be legitimate and that, if the husband knew of her pregnancy when he married his wife and afterwards acknowledges the child, then the presumption cannot be rebutted, subject, however, to an exception in favour of strangers and claimants under strangers to proprietary rights. Perhaps the learned judges would prefer that the rule which they accepted should be expressed so as to give conclusiveness to the presumption if the husband either knew of the woman's pregnancy at the time he married her or acknowledged the child after its birth and should not be expressed so as to make both these conditions necessary to its operation. But, upon the facts, this point did not arise, though some of the authorities which their Honours cite from the Abridgments appear to make the husband's knowledge enough. But this difference is not material to the question whether the presumption is in such a case irrebuttable. My examination of the matter has led me to the conclusion that the rule proposed should not be adopted and that it does not represent the modern law.

The law of to-day appears to me to provide a simple presumption of legitimacy which applies to children born during a marriage, whether conceived before or after the marriage took place, and to children conceived during the marriage, whether born before or after the marriage is dissolved by the husband's death or otherwise.

The presumption is rebuttable in all these cases by proof that sexual intercourse between the husband and the mother could not have taken place or did not take place at a time which would account for the pregnancy, having regard to the date of the child's birth. Although I think that for all these cases the presumption should be regarded as a single one, that is of the same character, proceeding from the same principle and to be repelled only by proofs attaining the same high standard of persuasion, yet it is evident that, in the practical operation or application of the presumption, its effect may vary because of the different considerations to which the cases give rise. In this way the knowledge of the husband when he married his wife that she was with child and his acknowledgement of her child are facts each of which must have importance. But they are important as evidentiary facts supporting the presumption. Though they tend against proof to the contrary, they do not exclude it.

The law relating to the determination of a question of bastardy has gone through a long course of change and, although from the reign of Henry VI. to perhaps the end of Anne's reign the rule laid down by the Supreme Court obtained and in judicial dicta in quite late cases there is to be found language in which its influence may

be traced, I think that it has not survived the general abandonment of the doctrine of which it was but a part.

The development has not been consistent and continuous. In Glanville's time there seems to have been no room for adulterine bastardy. The common saying that fornication does not take away an inheritance must, he says, be understood of the mother's fault, "*quia filius heres legitimus est quem nuptiae demonstrant*" (Lib. VII. c. 12): the language of Paulus, "*Pater vero est quem nuptiae demonstrant*" (Dig. II. 4. 5).

But, at the same time, the refusal of the common law to follow the canon law concerning legitimation by subsequent marriage extended to children engendered before but born after espousals. "*Si quis antequam pater matrem suam desponsaverit fuerit genitus vel natus . . . secundum ius regni et consuetudinem nullo modo tanquam heres in hereditate sustinetur vel hereditatem de iure regni petere potest,*" (Lib. VII. c. 15), (*Woodbine's Glanvill* (1932), p. 111). But in Bracton's account of the great contention at Merton we read only of those *qui nati* and not those *qui geniti, fuerunt ante sponsalia vel matrimomiun*, (fol. 416 : 417) and we learn elsewhere from him (fol. 63) that it mattered not for legitimacy whether the child was begotten and born after the marriage or begotten before but born into the marriage or begotten in the marriage and born after the marriage had been dissolved and whether dissolved by death or by divorce and that it did not matter whether the union was by *matrimonium* or (subject to certain exceptions) by *sponsalia*. But we find that he recognizes adulterine bastardy. The child is to be presumed a bastard, it appears, if feebleness, frigidity or impotence of the husband is proved *per multum tempus* or absence for two years from the kingdom or from the county or shire is shown. If he returns and finds his wife pregnant or that she has a child of a year or less, whether he avows it and nurtures it or not, the child may rightly be excluded from succession because it could not be heir. But, if it was possible to presume that he could have engendered the child, it seems that decisive importance was given to avowal and nurture by the husband (fol. 63) : Cp. fol. 70 and 70*b* and fol. 278 and 278 b, *Woodbine's Bracton*, vol. 2, pp. 185, 186 and 204 ; vol. 3, p. 311, and vol. 4, p. 295.

In the ensuing century there was a hardening of the rules as to what matter might be set up to show bastardy notwithstanding birth within the espousals. For Bracton it was enough that the husband was *extra regnum vel provinciam per biennium* (fol. 63 b) or that *propter temporis intervallum et distantiam locorum* the child could not be his. But these less definite tests of separation hardened into

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the requirement that at the time of conception and up to the birth of the child the husband should have been and remained beyond the four seas; Scotland, as a separate kingdom, being reckoned for this purpose as *extra quattuor maria*, but Ireland as *intra quattuor maria*. *Le Marchant* in his preface to his Report of the Proceedings in the House of Lords on the claim to the *Barony of Gardner* (p. li.) speaks of the change thus—"The doctrine on this subject to be collected from the Year Books is entirely at variance with the earlier writers. Rules of pleading were laid down which reduced the discussion of the question of legitimacy within very narrow limits. The presumption in favour of legitimacy was treated as conclusive, unless it could be opposed by proof of what was termed special matter, viz. the husband's impotency, or his being out of the four seas during the period of the wife's gestation. There is no case in the Year Books illustrative of the position laid down by Bracton respecting the effects of the non-recognition of a child by the husband, and this omission may be an argument that the presumption, when unaccompanied by such recognition, was inadmissible. On the other hand, the rules of pleading seem to be directed against all encroachments upon the special matter."

Before the end of the fifteenth century it had become the settled rule that a married woman's child born during the marriage could not be bastardized except upon proof of special matter, namely the husband's impotency, separation by divorce *a mensa et thoro* or absence from the realm at the time of the conception and thereafter (*Nicolas, Adulterine Bastardy*, p. 56). So much was settled with respect to a child begotten as well as born during the period of the marriage. The same rule applied to a child begotten during the marriage but born after the husband's death, subject, however, to a particular difficulty felt about the affiliation of a child if the widow remarried before its birth. For a time there was a question about the position of a child born during, but begotten before, the marriage. According to Y.B. 44 Edw. III. c. 12, pl. 21, which is discussed by *Nicolas*, p. 46, and by *Le Marchant*, p. liv., *Finchden* J. considered that, if the child was not that of the husband, it was bastard and that the fact was to be ascertained by a jury. Perhaps some support for *Finchden's* view can be found in Y.B. 5 Edw. II. 14 (*Lydford* v. *Gifford*, printed and translated by the *Selden Society*, *Publications*, vol. 33; *Year Book Series*, vol. 12; See particularly p. 187). But in Y.B. 1 Hy. VI. (*Mich.*) 3 and 18 ed. IV. 30, the contrary rule was laid down, namely the child was to be presumed legitimate. Sir *Harris Nicolas* (*op. cit.*, p. 51) quotes the utterance of *Serjeant Rolfe* for the demandant in the former case, "But the defendants offered an issue which

could never be tried, viz. that the mother, was large with child by one C.P., for God alone knew by whom she was pregnant; for which reason, if a woman before marriage be with child, and it be born within espousals, the law adjudges it to be the child of the husband, because it is known to no one." See, too, *Le Marchant, op. cit.*, p. lv.

The case in 1 Hy. VI. 3 is printed and translated by the *Selden Society*, vol. 50, pp. 24-27. It appears probable that *Rolfe* conceded that " special matter " might be set up.

The substance of the law of the Year Books as to the bastardy of a married woman's child does not seem to have undergone any change before the beginning of the eighteenth century. The effect of the Year Books and of one or two cases in the Star Chamber was summed up in 1705 by *D'Anvers* in his *Abridgment* (*s.v.* Bastardy B. 1-6). " By the law of the land a man cannot be a bastard who is born after espousals unless it be by special matter. If a woman be grossly enseint by A and after A marries her and the issue is born during the marriage this is a mulier " (scil., legitimate) " and not a bastard. So if a woman be grossly enseint by one man and after another marries her and after the issue is born, this is a mulier because it is born during the marriage and no issue can be taken " (as to) " by whom she was enseint because that cannot be known: so, although the issue be born within 3 days after the marriage. If a feme covert hath issue in adultery yet if her husband be able to beget children and is within the 4 seas this is no bastard. If a wife elopes and lives in adultery with another, and during this, issue is born in adultery, yet this is a mulier by our law but the baron ought to be within the 4 seas, so that by intendment he may come to his wife, otherwise the issue is a bastard."

The word " mulier " has now dropped out of use. *Coke* explains it thus: " ' Mulier ' seu filius muliertatus . . . filius natus vel filia nata ex iusta uxore appellatur in legibus Angliae filius mulieratus seu filia mulierata, a sonne mulier or a daughter mulier." (*Co. Lit.* 243 a).

In the foregoing I find nothing to suggest that a husband whose wife gave birth to a child necessarily conceived before marriage could not set up the same special matter to bastardize it, viz. his own impotence or absence from the kingdom. On the contrary, reliance is placed upon *Rolle's Abridgment*, p. 358, by *Jacob* (*Law Dictionary*, *s.v.* bastardy) for stating the law governing such a case in a form containing two qualifications. One relates to the incapcaity of the husband by reason of infancy, the other to its being impossible that he is the father.

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Jacob says: "Where a child is born within a day after marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is no bastard but supposed to be the child of the husband." This statement, which has passed into *Tomlin's Law Dictionary* (*s. v.* bastard) is not a translation of *Rolle* but a deduction from or interpretation of a number of entries.

Up to this point the law with respect to the legitimacy of a child born or conceived during coverture had not only refused to allow the question of paternity to be determined as a matter of probability, and made it depend upon possibility or impossibility, but it had restricted the grounds upon which impossibility might be shown.

But early in the eighteenth century the restriction upon the grounds for showing impossibility broke down and was abandoned. "As the age became more enlightened, the rule of law requiring proof of the husband's" (absence) "beyond the four seas, where the legitimacy of the child was impeached on the ground of non-access, gradually fell into disuse, whilst the attention of the judge was more exclusively directed to the circumstatial evidence" (*Le Marchant, op. cit.*, p. lviii.). The question passed from the province of physical impossibility to that of moral impossibility. Cp. Lord *Ellenborough's* language in the *Banbury Peerage Case* (1); *Le Marchant*, pp. 457, 458. There is a doubt whether Lord *Hale* had not in his day allowed the mere separation of the spouses to repel the presumption of the legitimacy of a birth in wedlock: see the reference to *Dickens* (or *Hospell*) v. *Collins* in *St. George* v. *St. Margaret, Westminster* (*Parishes of*) (2) and the discussion thereon by Sir *Harris Nicolas, op. cit.*, pp. 121-126, to whom it seemed incredible that the great Chief Justice should thus innovate. But, however that may be, Lord *Raymond* in 1732 told a jury at the Guildhall "that the old notion of the presumption intra quattuor maria was exploded and that the evidence to overturn this presumption need not be so strong as was insisted on by the counsel: that the evidence was the same in this as in all other cases, a probable evidence was sufficient and it was not necessary to prove access impossible between them" (*Buller's Nisi Prius*, 4th ed. (1755), p. 113). The case was *Pendrell* v. *Pendrell* (3), and, according to that report, "it was agreed by court and counsel . . . that the old doctrine of being within the four seas was not to take place; but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff."

(1) (1811) 1 Sim. & St. 153 [57 E.R. 62].
(2) (1706) 1 Salk. 123 [91 E.R. 115].
(3) (1732) 2 Stra. 925 [93 E.R. 945].

It was an issue directed by Lord *Talbot* L.C., who said in *Sidney* v. *Sidney* (1): "What has been asserted of a child begotten and born during the time of the voluntary separation of the husband and wife, *viz.* that no evidence shall be admitted to prove the illegitimacy of such child, is now held to be otherwise. For if a jury find the husband had no access, such child will be a bastard, according to the determination in the case of *Pendrell* v. *Pendrell* (2)."

"This case proved fatal to the old law of adulterine bastardy" (*Nicolas*, *op. cit.*, p. 129).

In the first part of the nineteenth century three celebrated cases in the House of Lords carried on the development of the law and not without some controversy the general rule came to be that the presumption of the legitimacy of a child born during marriage may be rebutted by any admissible evidence of circumstances establishing to the exclusion of doubt that sexual intercourse did not take place between the spouses at the period of conception (*Banbury Peerage Case* (3), fully reported, *Nicolas*, *op. cit.*, pp. 291 et seq.; also *Le Marchant*, *op. cit.*, pp. 389 et seq.; *Gardner Peerage Case* (4); *Morris* v. *Davies* (5)). See further the discussion by *Cussen* J. in *In the Estate of L.* (6); *Hooper*, *Illegitimacy*, Part III., ch. 2, r. 4, pp. 162 et seq., and *Piggott* v. *Piggott* (7).

In my opinion this rule extends to the case of a child born during a marriage but conceived while the mother was unmarried, which I regard as only a particular case within the operation of the general presumption. In principle I can see no sound reason for excluding the case of pre-marital conception from the operation of the general rule and making it the subject of a separate and irrebuttable presumption. To make the critical fact knowledge of her condition on the part of the pregnant woman's bridegroom or his subsequent acknowledgement or acceptance of the child is to select a disputable and uncertain matter as the basis of a presumption and one which, according to prevailing ideas, would be reckoned an evidentiary fact the probative force of which would depend on circumstances. Such considerations as the necessity for certainty, the unfairness to the child of bastardizing it after recognizing it and so on, are equally true of a child conceived during a marriage. Indeed such arguments of policy as have been suggested will be found to form part of the grounds for Sir *Harris Nicolas*' objection to the alteration in the law of adulterine bastardy *stricto sensu* which he ineffectually resisted.

(1) (1734) 3 P. Wms. 269, at p. 275 [24 E.R. 1060, at p. 1063].
(2) (1732) 2 Stra. 925 [93 E.R. 945].
(3) (1811) 1 Sim. & St. 153 [57 E.R. 62].
(4) (1824) Le Marchant's Report 169.
(5) (1837) 5 Cl & F. 163 [7 E.R. 365].
(6) (1919) V.L.R. 17.
(7) (1938) 61 C.L.R. 378, at pp. 389, 401, 402, 412-415, 422, 428, 429.

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I think the rule is now all one. Here, I believe, is the point of departure between the view which I prefer and that adopted by the learned judges in the Supreme Court. Their Honours do not appear to me to have considered that the great change, which, in the eighteenth and early part of the nineteenth century, judicial decision effected in the law governing this subject extended to the particular case of a child begotten by one man but born after the subsequent marriage of the mother to another. This meant a carrying over of the old law and the old authorities dealing with that special situation.

In doing this the learned judges were guided in some measure by the meaning and effect they ascribed to some judicial dicta of the nineteenth century. The first is a statement by Lord *Ellenborough* in *R.* v. *Luffe* (1), decided some five years before his Lordship took part in hearing the claim to the Banbury peerage (2). A bastardy order had been made and confirmed in Sessions. The bastard was the child of a sailor's wife conceived whilst he was at sea, but born a fortnight after his return. One objection to the order was that the child was not " begotten and born out of lawful matrimony " within the meaning of the statutes giving authority to make the order. Another objection was that the absence of the husband had not extended over the whole period of the pregnancy, an objection based on the old law. In supporting the objections, counsel relied on decisions that " it must appear that the husband was not here all the space ; for if he were here at the begetting or at the birth of the child it is sufficient " (3). Counsel added :—" And this falls in with the old established rule of law which has never been questioned, that, if a man marry a pregnant woman at any time 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 " (3).

I do not believe that the rule stated in the absolute terms counsel employed ever was the law. I think that in such a case there was a condition, that expressed by *Jacob*, " if there be no apparent impossibility that the husband should be the father of it " ; in other words that " special matter " might be set up in answer to the presumption of legitimacy.

It was literally the fact, as counsel said, that " the rule had never been questioned." But the situation it contemplates is not perhaps of frequent occurrence. It has come little before the courts and it does not appear to have arisen directly for decision since the change

(1) (1807) 8 East 193, at pp. 207, 208 [103 E.R. 316, at p. 321].
(2) (1811) 1 Sim. & St. 153 [57 E.R. 62].
(3) (1807) 8 East 193, at p. 202 [103 E.R. 316, at p. 319].

in the general rule. The main part of the argument employed to establish that the absence of the husband must be continuous and cover the period of conception and of birth led Lord *Ellenborough* to deal in his judgment with the change in the law. In doing so, he referred to the case in the Year Book 10 Edw. I., Paschae B. Rot. 23, 1 *Rolle* 359, commonly called *Foxcroft's Case*. This case has since been explained as depending upon the insufficiency of the ceremony of marriage. It was so explained by Sir *Harris Nicolas*, *op. cit.*, pp. 31 and 357, and by Sir *Frederick Pollock* and *F. W. Maitland*, *History of English Law*, vol. 2, p. 384, and note 9 R.R., p. vii. Owing to a not unnatural misunderstanding, Lord *Ellenborough* (1). treated the case as one in which a child was bastardized because it was born twelve weeks after the mother's marriage to an infirm bedridden man. " This therefore," Lord *Ellenborough* said, " is another instance of an exception to the general rule, admitted at so early a period as the 10 Edw. I. and founded on natural impossibility arising from bodily infirmity." This means, to my mind, that his Lordship considered that a man who married a single woman big with child could always bastardize it by " special matter." He proceeds to show that in a case like that before him, where a child begotten and born during a marriage could not possibly be the husband's, the presumption of legitimacy is overcome He concludes :—" 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 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 " (2).

In the judgment of the Supreme Court this dictum was taken to mean that Lord *Ellenborough* considered the presumption irrebuttable where the husband married a woman evidently pregnant. His Lordship's meaning is not clear, but what he had said about *Foxcroft's Case* is hardly consistent with such an interpretation. After all, he is only answering a not very logical analogy or comparison instituted by counsel and saying that the distinction between the case where an absent husband returns to find a wife pregnant and

(1) (1807) 8 East, at p. 205 [103 E.R., at p. 321].

(2) (1807) 8 East, at pp. 207, 208 [103 E.R. 321].

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a bridegroom who takes a pregnant wife, lies in the force given in the latter case to the taking in marriage which puts out of consideration the period of conception, so important in the former case. I do not think that, in making this statement, Lord *Ellenborough* had in mind the question whether the presumption could or could not be rebutted and upon what grounds. It may be remarked, moreover, that at many points the influence of the old law may be traced in his judgment and that much of it hardly accords with the modern view. The modern view is well expressed in a brief general proposition by *Luxmoore* J. in a recent case *In re Bromage*; *Public Trustee* v. *Cuthbert* (1) :—" It is well settled that every child born of a married woman during the subsistence of the marriage is prima facie legitimate. This presumption, however, is not one *juris et de jure*, and therefore can be rebutted by evidence of circumstances proving the contrary."

It is to be noticed that *Grose* J., who followed the Chief Justice, regards the case as one in which they have been asked to adhere to the old law of the *quattuor maria*, and that he states as a general proposition the newer law and in a form approximating to the modern rule : " 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 " (2). *Lawrence* J. appears to me to deal with the special situation of a man marrying a pregnant woman as raising a rebuttable presumption. He says : " 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 " (3).

Le Blanc J. expressly says that the presumption in the case of a child born a short time after the marriage of the parents 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 showed that the husband could not have been the father of the child " (4). This means that the presumption was rebuttable as in other cases, though *Le Blanc* goes back to older grounds of rebuttal.

A decade before Lord *Ellenborough's* dubious dictum in *R.* v. *Luffe* (5), Sir *William Wynne*, the Dean of Arches, a distinguished civilian, had made an observation which accepted the passages in *Rolle* 358 as representing the still existing law. He was dealing with the rule

(1) (1935) Ch. 605, at p. 609.
(2) (1807) 8 East, at p. 208 [103 E.R., at p. 322].
(3) (1807) 8 East, at p. 210 [103 E.R., at p. 322].
(4) (1807) 8 East, at p. 211 [103 E.R., at p. 323].
(5) (1807) 8 East 193 [103 E.R. 316].

of evidence which has now come to be known as that of *Russell* v. *Russell* (1), and, in seeking a parallel to the operation of the rule, he remarked :—" This is not the only case of a similar nature in which the law rejects evidence opposed to a presumption, though such evidence shall amount altogether to full proof. If a woman, big with child by a., be married to B., it is clear that the latter becomes the legal father : *Rolle* I. 358 " (*Smyth* v. *Chamberlayne* (1792), reported in *Le Marchant*, *op. cit.*, at pp. 370, 371, and again in *Nicolas*, *op. cit.*, at p. 154).

I am not prepared to place reliance upon this dictum as evidence of the condition of the law to-day and for two reasons. In the first place, his Honour had used among other passages in the reference *Rolle* (*Le Marchant*, at pp. 356-357, and less fully in *Nicolas*, at pp. 149-150) in a discussion of the common law rule before and after *Pendrell's Case* (2) and, after doing so, said :—" Now, it appears from those passages that the two exceptions to the rule, namely, that of the husband being beyond the seas, and an apparent inability of procreation,—are laid down by Lord *Coke* and *Rolle*, not by way of instances liable to be extended, but as confining the exceptions strictly to these two." If *Jacob* be sound in his interpretation of the entries contained in *Rolle* 358, it would not be right to regard the legal fatherhood of the husband in the case Sir *William Wynne* gives as completely irrebuttable. In the second place, his Honour spoke long before the full development of the modern law and his dictum is but an example of the persistence of the influence of the former law during the period of change.

More support for the view of the Supreme Court is obtainable from two judicial dicta of much later date and of greater persuasive force. The first of these is a statement of Lord *Penzance* in the Court of Probate in *Turnock* v. *Turnock* (3). It was an undefended suit in which the plaintiff sought letters of administration to his intestate father's estate. It appeared that the plaintiff's legitimacy had been challenged because he was born six months after the marriage of his parents who had been fellow servants in the same household and who, after the birth of the child, did not cohabit. The intestate had acknowledged the child and had maintained it. It was, therefore, a very clear case. But Lord *Penzance*, to whom the dictum of Lord *Ellenborough* in *R.* v. *Luffe* (4) was cited, quoted it in his judgment and proceeded : " There are many other passages which may be cited to the same effect, but that is simply the principle, and the court would be doing wrong, in my opinion, if it abandoned

(1) (1924) A.C. 687.
(2) (1732) 2 Stra. 925 [93 E.R. 945].
(3) (1867) 16 L.T. 611.
(4) (1807) 8 East 193 [103 E.R. 316].

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that general ground to enter upon the question at all who was really the father of the child" (1). Notwithstanding the weight to be attached to any dictum of Lord *Penzance*, I think that this statement should be considered as amounting to his Lordship's immediate impression of the meaning and effect of Lord *Ellenborough's* dictum without having had that opportunity of examining the case and the subsequent developments of the law which Lord *Penzance* would, doubtless, have desired before pronouncing upon so difficult a question as the rebuttable character of the presumption. The facts of the case before him contained nothing even tending to displace the presumption.

The second of the two dicta to which I refer is that of Lord *Cairns* in the Scotch appeal of *Gardner* v. *Gardner* (2). The case was one of a child born seven weeks after marriage and the House held that it was legitimate. Counsel arguing for legitimacy had contended (3) that, according to the law of England, a man by marrying a woman he knows to be with child acknowledges that the child is his own and that the law of Scotland does not differ in this respect. He cited *R.* v. *Luffe* (4). Lord *Cairns*, after stating some of the facts of the case, proceeded:—"Still the facts which I have described would raise (I agree, with regard to Scotch law, not a presumption *juris et de jure*, but) a presumption of fact so strong that the man was the father of the child, that it would be extremely difficult to rebut or controvert it. Speaking of Scotch law only, and putting aside the much stricter presumption which in the case of English law would be drawn from those circumstances, I take the expression of Scotch law by Lord *Gifford* to be one which is accurate in itself, and which, indeed, was not challenged in the argument of this case" (5). The passage from Lord *Gifford* deals with successive possible states of fact in relation to the marriage of a woman who has borne or is pregnant with a child, treating the presumption as one weakening or strengthening according to circumstances. There is, thus, some ground for thinking that Lord *Cairns* believed that the presumption under English law was of a special character. But he does not state what, in his opinion, is the English rule and it must be remembered that, on any view, the strength of the general presumption of the legitimacy of a child born in wedlock is so great in English law as to need for its rebuttal evidence meeting a standard of persuasion more fit for criminal than civil proceedings: See *Piggott* v. *Piggott* (6). It is to be noticed that neither Lord *Hatherley* nor Lord *Blackburn*

(1) (1867) 16 L.T., at p. 612.
(2) (1877) 2 App. Cas. 723.
(3) (1877) 2 App. Cas., at p. 724.
(4) (1807) 8 East 193 [103 E.R. 316].
(5) (1877) 2 App. Cas., at p. 728.
(6) (1938) 61 C.L.R., at p. 415.

distinguish between the law of Scotland and the law of England and Lord *Blackburn*, referring, I think, to the general reason of the matter, said : " I do not think that the presumption of parentage is nearly so strong in such a case as it would be or ought to be if the time when the child was begotten was after the parties were married and were husband and wife " (1).

In opposition to the view that in the special case of the marriage of a woman not recently widowed but known to be pregnant the presumption of legitimacy is not rebuttable, there stand three judicial authorities of importance and much text-book authority. In an anonymous case, *Anon. v. Anon.* (2), Lord *Romilly* M.R. ruled that what is now called the rule in *Russell* v. *Russell* (3) applied to a case of " a child who becomes legitimate by the fact of a marriage subsequent to his conception, but previous to his birth." In this he was wrong. But the Master of the Rolls went on to say : " Though I do not entirely adopt, to its full extent, the proposition that a husband admits, by his marriage, that the child subsequently born is his, yet I think that the presumption is, that he does so admit it, if he takes no step to repudiate it, but adopts towards it exactly the same course as if it were his own child, making no complaint of the premature birth of the child, or of his having married a woman not fit to be his wife. Of course, all these cases of presumption may be rebutted, and it may be shown that the marriage is not valid, in which case the presumption does not arise. But, assuming a valid marriage to have taken place, I think the child is legitimate, and that the burden of proving the contrary lies upon those persons who dispute the legitimacy."

In *Re Parsons' Trust* (4) *Stuart* V.C. decided a petition to establish the legitimacy of a child born three weeks after the marriage of his mother to the son of a testator under whose will the child claimed a fund in court. On the one side, it was alleged that only a week before the marriage the husband had first met the woman he made his wife and that the meeting was the result of an advertisement ; on the other, that a long course of intimacy had existed between them. The Vice Chancellor on voluminous and conflicting evidence decided in favour of legitimacy ; but he began his judgment by saying : " I consider that the law on this subject is clearly settled. Lord *Ellenborough* in *R.* v. *Luffe* (5) has laid down the rule that notwithstanding the birth of a child shortly after marriage, the presumption of legitimacy clearly exists until rebutted by satisfactory evidence to the contrary."

(1) (1877) 2 App. Cas., at p. 737.
(2) (1856) 23 Beav. 273 [53 E.R. 107].
(3) (1924) A.C. 687
(4) (1868) 18 L.T. 704.
(5) (1807) 8 East 193 [103 E.R. 316].

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In the Supreme Court this case was distinguished or explained on the ground that the petitioner claimed under the will of his alleged grandfather, a stranger to the marriage, and, therefore, outside the rule stated by their Honours or within the exception it admits. But there is no trace of such a distinction in the report and none of the Vice Chancellor's being conscious of its possible existence.

In the *Poulett Peerage Case* (1) the Committee of Privileges had to consider the legitimacy of a child born full grown six months after its mother's marriage to the peer through whom the child claimed. That peer had denied that he had sexual intercourse with his wife prior to marriage and that he knew of the pregnancy when he married her. On a question whether the rule of *Russell* v. *Russell* (2) applied (which was answered in the negative, Lord *Romilly* being overruled) Lord *Halsbury*, as Lord Chancellor, expressed himself thus :—" I shall submit to your Lordships that the evidence tendered is properly admissible. There was at one time authority for saying that if the husband and wife were within the four seas you must presume that there was intercourse, and that you could not possibly contradict it. I think that idea is completely exploded. The question is to be treated as a question of fact, and, like every other question of fact, when you are answering a presumption it may be answered by any evidence that is appropriate to the issue " (3). Though it is true that the important element of knowledge by the intended husband of the pregnancy of the intended wife was lacking, yet it is to be noticed that Lord *Halsbury* speaks in general terms and refers to the rule *intra quattuor maria* and its abandonment as if it is all part of the law affecting cases of prematrimonial conception.

A matter which I think ought not to be treated as of no significance on this question is the absolute and unqualified form of the judges' answer in the *Banbury Peerage Case* (4), which literally makes the presumption of the legitimacy of a child born in wedlock rebuttable in all cases, no exception being indicated.

Among the text books, *Hooper* on *The Law of Illegitimacy* is to be noticed because as part of a full study of the history of the subject and present law, the author formulated rules, the fifth of which (p. 186) deals precisely with the very question. After placing the presumption of legitimacy upon the fact that the husband knew or had reason to suspect her pregnancy when he married his wife, he proceeds to say by what proof it may be rebutted. The author then goes on to justify his rule in a long comment. It is true that he makes much

(1) (1903) A.C. 395 ; 72 L.J. K.B. 924 : Cf. 19 T.L.R. 644, which contains the fullest report.
(2) (1924) A.C. 687.
(3) (1903) A.C., at p. 398.
(4) (1811) 1 Sim. & St. 153, at p. 154 [57 E.R. 62, at p. 63] and *Le Marchant*, p. 433.

of *Gardner* v. *Gardner* (1) without referring to any possible distinction between Scots and English law. But he relies on the *Poulett Peerage Case* (2) and also upon *R.* v. *Luffe* (3), evidently interpreting the judgments as meaning that the presumption, though strong, is rebuttable (see p. 188, par. 2). Sir *Travers Humphreys*' article in *Halsbury's Laws of England*, 2nd ed., vol. 2, par. 769, p. 560, states the rule in the same way and relies on Lord *Blackburn's* observation in *Gardner* v. *Gardner* (4). See, too, vol. 2, p. 202, of 3rd ed. of the *Encyclopaedia of the Laws of England*. *Phipson* on *Evidence*, ch. 48, is to the same effect. The modern editions of *Best* on *Evidence*, s. 349, say almost in terms that the irrebuttability of the presumption in favour of a child born in wedlock has gone in the case of conception before marriage as well as conception after marriage. In *Jenks*' *Civil Digest*, par. 1918, considered with pars. 1922 and 1923, makes it clear that this also was the author's view. And I think it was the view of *Hubback*: *Treatise on the Evidence of Succession*, p. 412.

For the foregoing reasons I am of opinion that the presumption of legitimacy may be rebutted by a sufficiency of legal evidence in a case where a child born during a marriage was conceived before the marriage by a woman not previously married or if previously married discovert before the period of conception and that this is so notwithstanding that the husband knew of the pregnancy at the time of the marriage and subsequently acknowledged the child. The case of a child conceived during one marriage and born during a subsequent marriage of its mother is a special one and even more special is that referred to by *Blackstone's Commentaries*, vol. 1., p. 456, " If a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband ; in this case he is said to be more than ordinary legitimate." See, further, *Law Quarterly Review*, vol. 30, p. 153. But even in such cases there is no reason to suggest that by evidence of circumstances negativing marital access the child may not be wholly bastardized.

It was suggested that in the case before us the facts were strange and the proofs defective because the husband was not called, and, accordingly, bastardy should not be considered established. Doubtless the facts are strange, particularly to ears unaccustomed to stories disclosing the divers purposes for which matrimonial agencies exist. But, in the relationships such as those with which this case is concerned, it is a mistake to reason from fixed moral premises and to regard the unexpected or curious as incredible. I notice in Mr.

(1) (1877) 2 App. Cas. 723.
(2) (1903) A.C. 395.
(3) (1807) 8 East 193 [103 E.R. 316].
(4) (1877) 2 App. Cas., at p. 738.

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Hooper's book (p. 17) an extract from the Stepney Baptismal Record of 1633 which may serve as a lesson in the persistence of patterns in human conduct that might not be anticipated. It is as follows: "Alexander son of Katherine, wife of Alexander Tucky of Poplar, begotten she affirmed in the field on this side the mud wall near the Gunne, about nine of the clock at night: the father she knew not, but the said Alexander by them that brought the child to be baptized, requested that it might be recorded in his name." There is some analogy in this to the present case and in the story told to, but not accepted by, *Stuart* V.C. (1).

The magistrate found the facts without any indication of misgiving and, on the evidence, I do not see why his finding should be doubted.

I agree that the appeal should be held competent. Enough appears to warrant the conclusion that more than £300 is involved.

I think the appeal should be allowed with costs. The order of the Full Court should be discharged and in lieu thereof it should be ordered that the appeal of the defendant (respondent in this court) to the Supreme Court be dismissed with costs and the order of the Court of Summary Jurisdiction restored.

WILLIAMS J. This is an appeal from an order of the Supreme Court of South Australia quashing an order made by a special magistrate in affiliation proceedings under the *Maintenance Act* 1926-1941 (S.A.). In these proceedings the magistrate adjudged the respondent to be the father of an illegitimate child within the meaning of s. 52 of the Act, and ordered him to pay the sum of twelve shillings and sixpence per week to the Children's Welfare and Public Relief Board until the child attained the age of eighteen years. The child was conceived whilst the mother was a widow, but was born after she had contracted a second marriage with a man who prior to the marriage knew that she was pregnant. The mother, with the knowledge and authority of her husband, registered the child in the register of births of South Australia as their legitimate child. The Supreme Court quashed the order on the ground that there is an irresistible presumption *de juris et de jure* that a child is legitimate where it is conceived before marriage to the knowledge of the husband, and the husband subsequently acknowledges it to be his offspring. The Supreme Court also expressed a doubt whether, assuming that the presumption is rebuttable, the evidence was sufficiently clear and convincing to justify the magistrate in adjudging that the respondent was the father of the child. The Supreme Court said

(1) (1868) 18 L.T. 704.

that in view of his express acknowledgement of the paternity of the child, the husband should have been called to tell the magistrate what none of the other witnesses could tell him, i.e., where he was and what he was doing at the relevant time.

I am unable to agree with the Supreme Court on either point. The common law does not require that a child should be conceived during the marriage in order to be legitimate. It is sufficient if its parents have married before its birth. At one time the presumption of legitimacy was so strong as to be irrebuttable unless it could be proved that it was impossible for the husband to be the father because he had dwelt beyond the four seas during the whole period of his wife's pregnancy; or was impotent. Thus in *Hooper*, *The Law of Illegitimacy* (1911), p. 12, it is stated that "the legitimacy of a child born shortly after marriage, whether first or subsequent, was in fact as impregnable as if it had been also conceived in wedlock, though it was admittedly not begotten by the husband; and ante-marital incontinence with another was not a ground for bastardizing. *Radwell's Case* 18 Edw. I., *Rolle* 356; 1 H. 63; *Fitzh. Bast.*, Pl. 1; *Abr. Bast.* (E); *Coke*, *Litt.* 244a." But the doctrine of *ex quattuor maria* had become obsolete by 1732 (*Pendrell* v. *Pendrell* (1)), and it is clear that the presumption is now rebuttable in the case of a child conceived and born during the marriage where the evidence establishes that no sexual intercourse took place between the spouses at any time when the child could have been conceived. It is only where sexual intercourse is proved to have taken place between the husband and wife at this time that the law will not permit an inquiry whether the husband or some other man was more likely to be the father of the child (*Morris* v. *Davies* (2)). It would be a strange anomaly if the presumption is irrebuttable, except in the circumstances already mentioned, in the case of a child conceived before the marriage of its parents when it is rebuttable in the case of a child conceived during the marriage.

The Supreme Court founded itself to a great extent on the dictum in the judgment of Lord *Ellenborough* C.J., in *R.* v. *Luffe* (3), that "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 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,

(1) (1732) 2 Str. 925 [93 E.R. 945].
(2) (1837) 5 Cl. & F. 163, at pp. 242-244 [7 E.R. 365, at pp. 396, 397].
(3) (1807) 8 East, at pp. 207, 208 [103 E.R., at p. 321].

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looking only to the recognition of it by the husband in the subsequent act of marriage." But his Lordship was there dealing with presumptions, and it is not likely that he would have used the word " criterion " to express a presumption so strong as to be a positive rule of law. His statement that the law will not examine when the gestation began appears to be simply a reference to the rule of the common law that a child born after the marriage of its parents need not be conceived in wedlock. This view of the meaning of his Lordship's dictum was taken by *Stuart* V.C. in *Re Parsons' Trusts* (1). In *Gardner* v. *Gardner* (2) the House of Lords was engaged on an appeal from Scotland. Lord *Cairns* speaks of the much stricter presumption which in the case of English law would be drawn from the circumstances of the marriage to a woman avowedly pregnant, and near the time of her delivery, by a man who had been courting her and keeping company with her and who subsequently provided for the child as his own (3). His Lordship did not however elaborate the extent of the much stricter presumption, and it would not in my opinion be right to infer that he meant that the circumstances mentioned would raise a presumption *juris et de jure* in English law. I can see no reason to suppose that Lord *Blackburn's* statement (4) is confined to Scotch law, or that Lord *Cairns* intended to disagree with Lord *Blackburn's* statement that, if it could be proved that the husband notwithstanding his opportunities did not in fact have intercourse at any time that the child could have been conceived, the child would be illegitimate. There follows the significant remark by Lord *Blackburn* that the presumption of parentage is not nearly so strong where the child is conceived before marriage as it would be, or ought to be, if the time when the child was begotten was after the parties were married and were husband and wife. Then there is the *Poulett Peerage Case* (5). In his speech the *Earl of Halsbury* L.C. first said that there was at one time authority for saying that if the husband and wife were within the four seas, you must presume that there was intercourse, and that you could not possibly contradict it, but that the doctrine of the four seas was completely exploded. He said that " the question is to be treated as a question of fact, and, like every other question of fact, when you are answering a presumption it may be answered by any evidence that is appropriate to the issue " (6). His Lordship was there, as we are here, dealing with a case where the child was conceived before marriage and could not have intended his remarks to be confined to the case of a child

(1) (1868) 18 L.T. 704.
(2) (1877) 2 App. Cas. 723.
(3) (1877) 2 App. Cas., at p. 728.
(4) (1877) 2 App. Cas., at p. 737.
(5) (1903) A.C. 395.
(6) (1903) A.C., at p. 398.

conceived during the marriage. His Lordship then said: "The question is whether it is possible for a husband to be asked whether he had intercourse before marriage with the woman who afterwards became his wife" (1). His Lordship answered this question in the affirmative, and I cannot agree with the Supreme Court that he intended by the remarks which followed to confine the admissibility of the evidence to the case where the husband was deceived into believing that he had married a virgin. To my mind his Lordship only intended by these remarks to point out that the facts before the House afforded a clear illustration in favour of the admissibility of the evidence. There was no deception in *Gardner* v. *Gardner* (2), but evidence of both spouses of non-intercourse before marriage was admitted. In my opinion, the presumption that the husband was the father of the child was not a presumption *juris et de jure*, but a presumption of fact, and evidence was admissible to prove that no intercourse took place between the spouses at any time when the child could have been conceived, and to fix the paternity upon the respondent.

The further question is whether the evidence was sufficient to justify the magistrate adjudging that the respondent was the father of the child. Lord *Blackburn* has pointed out in the remarks already cited that the presumption of the parentage of the husband is not nearly so strong where the child is conceived before marriage as it is where the child is conceived during marriage, but, in view of the husband's acknowledgement of the child, strong and convincing evidence was required to establish that no sexual intercourse took place between the spouses at any time that the child could have been conceived. It is clear, however, from the magistrate's reasons that he was fully aware of the degree of proof required. In my opinion there was sufficient evidence of this nature to support the finding of the magistrate that no sexual intercourse had taken place between the spouses. The evidence of Mrs. Smith, which he accepted, would be utterly inconsistent with any other finding. The registration of the child by the mother as the daughter of her husband, with his consent, is consistent with the evidence of Mrs. Smith and the mother that the arrangement was that he would marry the mother knowing she was pregnant by another man, but nevertheless adopt and acknowledge the child as his own.

I cannot agree with the Supreme Court that there was any obligation on the appellant to call the husband. The effect of the decision of the House of Lords in *Russell* v. *Russell* (3) is that evidence cannot

(1) (1903) A.C., at p. 398.
(2) (1877) 2 App. Cas. 723.
(3) (1924) A.C. 687.

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be given by the husband or the wife to bastardize a child conceived and born during the marriage (*Ettenfield* v. *Ettenfield* (1)). But evidence to prove non-intercourse can be given by other persons. The rule in *Russell* v. *Russell* (2) does not extend to a child conceived before but born after marriage and either spouse can give evidence of non-intercourse before marriage to prove that a child conceived before marriage is illegitimate. The husband's evidence was therefore admissible, but since he has left his wife for another woman, and she is divorcing him, he may easily have been a hostile witness. In view of his acknowledgement of the legitimacy of the child, his evidence of non-access would not have carried much weight. His absence from the witness-box was at most a circumstance for the magistrate to take into account. There was ample evidence on which the magistrate could hold that the respondent is the father of the child.

For these reasons I would allow the appeal.

Appeal allowed with costs. Order of Supreme Court set aside. In lieu thereof order that appeal of defendant to Supreme Court be dismissed with costs and order of Court of Summary Jurisdiction be restored.

Solicitor for the appellant: *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitor for the respondent: *R. M. Napier*, Adelaide.

E. F. H.

(1) (1940) P. 96, at p. 110.

(2) (1924) A.C. 687.