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Family Law -- Paternity Proceedings -- Validity of Blood Tests

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and it is important to an enlightened and impartial judiciary that the principle be perpetuated. This conclusion is in line with the recent Supreme Court ruling of *Tenney v. Brandhove*.[19] The court there excluded members of a state legislature from claims arising out of the Civil Rights Act, based on the rationale that any other result would destroy legislative freedom of judgment. The holding of the *Picking* case does not seem to be based on sound reasoning, principle, or authority. Rather, it was an attempt to import into an act of Congress an interpretation which would tend to destroy the very nature of the judiciary. With the noted case, the well established principle of judicial independence has been reaffirmed.[20]

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FAMILY LAW — PATERNITY PROCEEDINGS — VALIDITY OF BLOOD TESTS

A married woman brought paternity proceedings against a party not her husband. Husband and wife, though cohabiting, testified to non-access and the results of blood grouping tests excluded the husband as the possible father. *Held*, action dismissed because the presumption of legitimacy had not been overcome. *Complaint of Dunn*, 115 N.Y.S.2d 438 (Children's Ct. 1952).

No principle of law is more firmly established than that which presumes every child born in wedlock to be legitimate.[1] However, a child born to a married woman begotten by one not her husband may be considered a child born out of wedlock.[2]. To overcome the presumption of legitimacy evidence of non-access, where admissible, may be introduced to prove adulterous intercourse resulting in the disputed issue.[3] There is a

19. Tenny v. Brandhove, 341 U.S. 367 (1951).

20. "No man would accept the office of judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend." Phelps v. Sill, 1 Day's Conn. Rep. 315, 329 (1804).

1. CAL. CIV. CODE § VTC (1941); CAL. CODE CIV. PROC. ANNOTATIONS §§ 1962, 1963 (1941); Dill v. Patterson, 326 Ill. App. 511, 62 N.E.2d 249 (1945); Heath v. Heath, 222 Iowa 660, 269 N.W. 761 (1936); Bassil v. Ford Motor Co., 278 Mich. 173, 270 N.W. 258 (1937); Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940); Harding v. Harding, 22 N.Y.S.2d 810, *aff'd* 261 App. Div. 924, 25 N.Y.S.2d 525 (2d Dep't 1940); Jacobs v. Jacobs, 163 Misc. 98, 297 N.Y. Supp. 642 (Dom. Rel. Ct. 1937); Gonzalez v. Gonzalez, 177 S.W.2d 328 (Tex. Civ. App. 1944).

2. Jones v. State, 11 Ga. App. 760, 76 S.E. 72 (1912); N.Y. DOM. REL. LAW § 119, Complaint of Vincent, 284 N.Y. 260, 30 N.E.2d 587, *aff'd* 259 App. Div. 835, 20 N.Y.S.2d 172 (2d Dep't 1940) ("out of lawful matrimony" refers to status of natural parents); N.D. REV. CODE §§ 14-0901, 14-0902, 14-0903 (1943), North Dakota v. Coliton, 17 N.W.2d 546 (N.D. 1945).

3. CAL. CIV. CODE §§ 193, 194, 195 (1941); CAL. CODE CIV. PROC. ANNOTATIONS §§ 1962, 1963 (1941) (parents cannot testify to non-access); MASS. GEN. LAWS c. 273, §§ 7, 16; MONT. REV. CODES ANN. § 5830, § 10605 subdivision 5, § 10606 (1935); N.Y. DOM. REL. LAW § 126; Hubert v. Cloutier, 135 Mo. 230, 194 Atl. 303 (1937);

conflict as to the amount of weight to be given them, but blood grouping tests are admissible in some states to establish non-parentage.[4]

In New York both husband and wife may testify to non-access.[5] There is also provision for the introduction into evidence of results of blood grouping tests for vindicatory purposes.[6] Some New York courts have held that the results of blood grouping tests scientifically conducted and objectively made by doctors expert in the field must be accepted as conclusive of non-paternity.[7]

The court in the instant case based its decision upon a strict interpretation of the statute defining a child born out of wedlock.[8] According to the provisions of the statute, the action could not be maintained. The results of the blood grouping tests were ignored and the action was dismissed.

It is submitted that the court erred on two points: (1) in its interpretation of the statute; and (2) in its utter disregard for the blood grouping tests. There are three subdivisions to the statute.[9] It is clear that two of them are not applicable. However, can the section defining an illegitimate child as one born out of lawful matrimony be discarded with the statement, the plaintiff was a married woman? Matrimony is "marriage in the sense of the relation or status, not of the ceremony"[10] of a man and woman as husband and wife. It would appear that the term "born out of lawful matrimony" relates to the status of the parents of the child. When a child is born to a mother and father *not married to each other,* is the child not "born out of lawful matrimony"? There is no matrimonial relationship exist-

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Hale v. State, 175 Md. 319, 2 A.2d 17 (1938); Commissioner v. Kitchen, 299 Mass. 7, 11 N.E.2d 482; Salas v. Olmos, 47 N.M. 409, 143 P.2d 871 (1944); State v. Green, 210 N.C. 162, 185 S.E. 670 (1936); State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1945); Jackson v. Jackson, 182 Okla. 74, 76 P.2d 1062 (1938); *In re* Rowe's Estate, 172 Ore. 293, 141 P.2d 832 (1943); State *ex rel.* Briggs v. Kellner, 247 Wis. 425, 20 N.W.2d 106 (1945).

4. N.J. STAT. ANN. §§ 2:99-3, 2:99-4 (1951); N.Y. CIV. PRAC. ACT § 306(a); N.Y. DOM. REL. LAW § 126(a); OHIO GEN. CODE ANN. § 12122-2 (1952); Beach v. Beach, 72 App. D.C. 318, 114 F.2d 479 (1940) (can disprove conclusively in great many cases provided administered by qualified experts); Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (N.J. Ch. 1940) (possibly evidential of non-parentage); Wilferth v. Wilferth, 174 Misc. 1007, 22 N.Y.S.2d 264 (Sup. Ct. 1940); State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1945) (previously married woman introduced blood grouping test to prove prior husband not the father); State *ex rel.* Slovak v Holod, 63 Ohio App. 16, 24 N.E.2d 962 (1940); State v. Wright, 59 Ohio App. 191, 17 N.E.2d 428, *rev'd* 135 Ohio St. 187, 20 N.E.2d 229 (1939) (evidential weight).

5. N.Y. DOM. REL. LAW, § 126, Complaint of Heidinger, 236 App. Div. 813, 260 N.Y. Supp. 169 (2d Dep't 1932).

6. N.Y. CIV. PRAC. ACT § 306(a).

7. V., 200 Misc. 631, 109 N.Y.S.2d 276, (Sup. Ct. 1951); Saks v. Saks, 189 Misc. 667, 71 N.Y.S.2d 797 (Dom. Rel. 1947).

8. N.Y. DOM. REL. LAW § 119: "1. A child born out of wedlock is a child begotten and born: (a) Out of lawful matrimony; (b) while the husband of its mother was separate from her a whole year previous to its birth; or (c) during the separation of its mother from her husband pursuant to a judgment of a competent court."

9. *Ibid.*

10. BLACK'S LAW DICTIONARY (4th ed.), Matrimony.

ing between its natural parents.[11] Furthermore, can the testimony of non-access and the results of the blood test be disregarded? Some courts have taken cognizance of the advances of science in the field of blood grouping tests, and have accepted the results as conclusive of non-paternity.[12] The iron clad presumption of legitimacy, is applied in the instant case in an effort to fend off the attacks by modern science.[13]

Estelle L. Ague

LABOR LAW—RIGHT OF NON-STRIKING EMPLOYES TO ENJOIN PICKETING

Non-union employees brought an action to enjoin union from committing acts of violence against them and their families, and from picketing their employer's place of business. *Held*, the violence and the picketing were so enmeshed that the two cannot be separated. Permanent injunction granted. *Ormerod v. Miami Typographical Union*, 61 So.2d 753 (Fla. 1952).

The general rule is that a state can enjoin all picketing, presently peaceful or otherwise, when it would be justified in assuming that past fears—caused by continued and persistent threats, coercion, and violence would survive.[1] The courts have also reasoned that a union forfeits the rights or privileges accorded to labor to engage in labor activity when the picketing has been accompanied by violence.[2] Another reason advanced is that unions which engage in violent picketing cannot be expected to modify their practices.[3]

The leading cases dealing with Florida labor law have been discussed in recent issues of this publication.[4] This case supplements these articles in that it is the first case in Florida brought by a group of *employees*, as distinguished from an employer, to enjoin picketing. It is also the first em-

11. Complaint of Vincent, 284 N.Y. 260, 30 N.E.2d 587, *aff'd* 259 App. Div. 835, 20 N.Y.S.2d 172 (2d Dep't. 1940); North Dakota v. Coliton, 17 N.W.2d 546 (N.D. 1945).

12. Beach v. Beach, 72 App. D.C. 318, 114 F.2d 479 (1940); Jordan v. Mace, 69 A.2d 670 (Me. 1949); C v C, 200 Misc. 631, 109 N.Y.S.2d 276 (Sup. Ct. 1951); Saks v. Saks, 189 Misc. 667, 71 N.Y.S.2d 797 (Dom. Rel. 1947). See note, 6 MIAMI L.Q. 128 (1951).

13. Shatkin, *Paternity Blood Grouping Tests: Recent Setbacks*, 32 J. CRIM. L. 458 (1941); Note, 40 GEO. L.J. 340 (1952).

1. Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941); Moore v. City Dry Cleaners & Laundry, 41 So.2d 865 (Fla. 1949).

2. Busch Jewelry Co. v. United Retail Employees Union, 281 N.Y. 150, 22 N.E.2d 320 (1939).

3. Riggs v. Tucker Duck and Rubber Co., 196 Ark. 571, 119 S.W.2d 507 (1938); Balis v. Fuchs, 283 N.Y. 133, 27 N.E.2d 812 (1940).

4. Gramling, *The Development of Florida Labor Law*, 7 MIAMI L.Q. 188 (1953); Kanner and Corcoran, *Florida Employment Peace Statute*, 4 MIAMI L.Q. 161 (1950). See 34 CORNELL L.Q. 81 (1948-49) on picketing and free speech generally.