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Current Notes

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Blood Tests Overcome "Presumption of Legitimacy—*Schulze v. Schulze,* Supreme Court, Monroe County, June 3, 1942. 35 N. Y. Supp. 2d, 218-221.)

1. Bastards, Key 3.

The presumption of legitimacy is one of the strongest known to the law.

2. Bastards, Key 6.

In husband's action for divorce and for determination of legitimacy of a child, where parties had been living apart for one year prior to child's birth and, although there was dispute on question of access, husband's evidence supported by unqualified testimony of a qualified physician that blood grouping tests excluded husband as father, *held* sufficient to overcome "presumption of legitimacy." Civil Practice Act, Secs. 306-a, 1157.

3. Bastards, key 6.

In a divorce action in which husband challenged legitimacy of wife's second child, testimony of a qualified physician that blood grouping tests revealed that husband could not be the father of the child was admissible. Civil Practice Act, ss. 306-a, 1157.

Action by Herman E. Schulze, Jr. against Ruth Schulze, for an absolute divorce, for the custody of one child, and for a determination of legitimacy of another child of the defendant wife.

Decree for plaintiff as prayed.

Bechtold & Bernstein, of Rochester, for plaintiff.

Ray F. Fowler, of Rochester, for defendant.

GILBERT, Justice.

This action was brought on for trial before me at the April Equity Term of Supreme Court held at the Court House in Rochester, New York. The action was brought by the plaintiff husband for an absolute divorce from the defendant wife; for the custody of one child; and for a determination of the legitimacy of another child of the defendant wife, born after the act of adultery complained of, pursuant to the provisions of Section 1157 of the Civil Practice Act.

The parties were married on April 4, 1931, and lived together as husband and wife in the City of Rochester until on or about the 8th day of September, 1940, when they separated. Under date of October 3, 1940, the parties entered into a separation agreement, a copy of which was made an exhibit on the trial of this action.

One child, Elsie Hoyce Schulze, was born to the parties during the period prior to their separation. After the parties had separated and on or about September 5, 1941, the defendant gave birth to another child, named as Herman Lloyd Schulze, and it was following the birth of this child that the present action was instituted by the plaintiff charging the defendant with adultery and alleging that the child born on or about September 5, 1941, was not the child of plaintiff but is an illegitimate child of the defendant.

(1) On the trial of the action it was not disputed that the parties had been living separate and apart during the period of one year prior to the birth to the defendant of the child last mentioned; there was sharp dispute, however, on the question of access. The defendant testified that she and the plaintiff had met and indulged in intercourse on several occasions during the period that they were living separate and apart from each other. There was also testimony by others of the defendant's family or friends

tending to corroborate defendant so far as the meeting of plaintiff and defendant was concerned. On the other hand, plaintiff denied any acts of intercourse and also denied that he had any knowledge of the pregnancy of his wife prior to the birth of the child and introduced testimony of a disinterested witness who overheard a conversation between plaintiff and defendant within a few weeks prior to the date of the birth of the second child and whom testified that the defendant said nothing at that time about being pregnant. This testimony given by the parties themselves and by witnesses produced by the parties would raise some question of fact on the issue of adultery but would scarcely be sufficient, alone, to overcome the presumption of legitimacy of the child, which is one of the strongest presumptions known to the law; and, as plaintiff's case is based entirely on his charge that the child born on September 5, 1941, was not his child, the proofs offered by plaintiff would not be sufficient to overcome the presumption if there were no other evidence in the case to support plaintiff's charges against the defendant.

(2) During the pendency of the action the plaintiff applied at Special Term and was granted an order, pursuant to the provisions of Section 306-a of the Civil Practice Act, requiring the defendant to produce the child, known as Herman Lloyd Schulze, before a physician appointed by the Court for the purpose of having a blood grouping test of the blood of the said child and of the plaintiff. Such an examination was had by Dr. Istvan Gaspar at the Rochester General Hospital pursuant to the order of the Court. Dr. Gaspar was produced and sworn by the plaintiff on the trial of this action and testified to the making of the tests directed by the Court and as to the result thereof. Dr. Gaspar testified unqualifiedly that the blood grouping tests excluded the plaintiff as the father of the child.

(3) Section 306-a of the Civil Practice Act is the authority for the examination made by Dr. Gaspar. The Legislature has recognized the advances made in this type of medical science and has given its stamp of approval to the use as evidence, under certain circumstances, of the result of such examination. While this Court has found no precedent for the use of such evidence in a divorce action, nevertheless there are many precedents for its use in determining paternity. Probably the closest analogous case is that of *D'Agostino v. D'Agostino,* 173 Misc. 312, 17 N.Y.S. 2d, 905, which was an annulment action based on the alleged fraudulent concealment of pregnancy by the defendant wife at the time of the marriage. In Matter of Lentz, 247 App. Div. 31, 283 N.Y.S. 749, an action originating in Children's Court and based on a charge of neglect to provide for a child, in which the defense was that the child was not the defendant's child, the Court intimated that a blood grouping test was open to the defendant. Such a test was ordered in the Surrogate's Court in Matter of Swahn's Estate, 158 Misc. 17, 285 N.Y.S. 234.

The physician appointed by the Special Term to make the examination in the case at bar testified as to his qualifications and experience and also as to the advance of medical science in this field; he further testified that, from the examination of blood which he made, the plaintiff could not possibly be the father of the child born to the defendant on September 5, 1941. We therefore have to overcome the legal presumption, in addition to the testimony of the plaintiff himself that he had no intercourse with the defendant during the period of gestation, the unqualified testimony of the physician that plaintiff could not be the father of defendant's second child; in other words, that the defendant must have had intercourse with a male not her husband.

To deny to plaintiff a decree in this action would be tantamount to a holding by this Court either that the testimony of Dr. Gaspar was not

worthy of belief or that the procedure for a blood test, authorized by Section 306-a of the Civil Practice Act, is futile in so far as having any probative value is concerned. There was no testimony offered by the defendant to impeach the Doctor's credibility or his ability and standing as a physician. He was selected by this Court as a physician of experience and qualified to make the tests. There was nothing about his testimony which would lead the Court to suspect his integrity or to question the result of his findings and, under the facts and circumstances of this case and considering the other evidence in the case, this Court feels justified in giving the testimony of the Doctor full weight.

At the close of the evidence, motions were made by the defendant to strike out the testimony of the physician. These motions are now denied.

Findings may be prepared that plaintiff has sustained the allegations of the complaint and a decree may be entered by plaintiff for the relief demanded in the complaint.

The Medical Correctional Association—This Association is an affiliate of the American Prison Association, is interested in establishing contact with all professional personnel who are specially concerned with the medical aspect of crime and interested in it. The membership is confined to the following groups:

1) Physicians employed in Penal and Correctional Institutions or jails.
2) Physicians, Social Welfare workers, and special workers who engage in medical research work in Penal and Correctional Institutions, or jails.
3) Psychologists, Physicians, Social Welfare workers, and special workers engaged in medical research work in connection with.
   a) Institutions or Hospitals for the mentally ill,
   b) Mentally defective individuals,
   c) Juvenile delinquents,
   d) Defective delinquents,
   e) Out-patient or behavior clinics dealing with any aspect of crime or its prevention,
   f) Criminal, Juvenile, and domestic relations courts,
   g) Parole,
   h) Probation,
   i) Public and Private school, Colleges and Universities,
   j) Federal, State, County and Municipal Public Health Organizations.
4) Any other person who, while not automatically falling in any one of these three above-mentioned groups, presents satisfactory evidence that he or she is engaged in research or occupation in which the medical aspects of crime are acknowledged as important features.

The annual dues of the Association are one dollar. Payment should be made to Dr. Robert M. Lindner, W. S. Penitentiary Hospital, Lewisburg, Pa.

The present officers of the Medical Correctional Association are, President, Dr. J. D. Reichard, United States Public Health Service Hospital, Lexington, Kentucky; First Vice-President, Dr. John W. Cronin, Federal Reformatory, El Reno, Okla; Second Vice-President, Dr. Lawrence Kolb, Assistant Surgeon General, Washington, D. C.; Secretary-Treasurer, Dr. Robert M. Lindner, Federal Penitentiary, Lewisburg, Pennsylvania.

To Identify Criminals by Blood Grouping Tests—The following Act of Assembly in the State of New York became a law on April 17, 1943. It is known as Chapter 592, Laws of 1943.

Section 1. Section nine hundred forty of the code of criminal procedure, is hereby amended to read as follows:

§ 940. Identifying criminals; taking of fingerprints. In order that the courts and public officials dealing with criminals may have accurate information as to the identity of persons charged with crime, there is hereby conferred and imposed upon the chief of police or peace officer performing such functions, in each city, town or village, and upon sheriffs, members of the state constabulary, the railway police, the aqueduct police, the state park police and all other police officers making arrests, the power and duty of causing to be taken, upon arrest, [finger-] *fingerprints* and thumbprints, and if necessary the photograph, *and if necessary the blood grouping tests,* of every person arrested and charged with a felony or with any of the misdemeanors and offenses specified in section five hundred and fifty-two of this code. Members of the state police, upon arresting a person or persons for any felony or any of the misdemeanors and offenses specified in section five hundred and fifty-two of this code, may transport and bring said persons arrested to their troop headquarters for the purpose of fingerprinting and thumbprinting and photographing *and if necessary blood grouping.*

§ 2. This act shall take effect September first, nineteen hundred forty-three.

The Annual Conference of the National Probation Association—Disrupted families, young camp followers, and the mounting number of juvenile delinquents—all of them war casualties on the home front—were the chief topics of discussion at the thirty-seventh annual conference of the National Probation Association, at a five-day session which began April 8th at St. Louis, Missouri. The meeting was held in connection with the National Conference of Social Work. Hundreds of judges, probation and parole officers, and other social workers attended.

Charles L. Chute, executive director of the National Probation Association, spoke of the results of the comprehensive nationwide survey made by the Association of the prevalence of juvenile delinquency in wartime. The survey showed that in 1941 there was an increase of 8 per cent over the previous year and that in 1942 the increase in juvenile delinquency was 9 per cent over 1941. The reasons for this increase are: the home disruptions from labor migration to munition factories, mothers working in war industries, indulgence from higher wages for war plant workers unaccustomed to their new affluence, and soldiers and sailors out for a good time endangering young girls.

Harold H. Krowech, chairman of the Juvenile Crime Prevention Committee of the State Bar of California spoke on the means used by the State Bar of California to help reduce the number of crimes committed by young people. He said, "The Bar has discarded the old axiom, 'Ignorance of the law excuses no one,' in its application to children and has substituted the more enlightened phrase that 'to know the law is to respect it.' The legal profession has undertaken the responsibility of bringing the law to the child instead of the child to the law. This has been done effectively by making available to the principals of the public school system, attorney speakers qualified in legal guidance activity. Each county bar association has assumed the responsibility of furnishing speakers to its local school district." After the talks either to the entire student body or before small classes, open forum sessions are held to give the children an opportunity to ask questions.

Roy Casey, jail inspector of the United States Bureau of Prisons,

pointed out that of the 3000 or more city and county jails in the United States, the vast majority of them are unfit not only for the confinement of the tens of thousands of children now detained in them, but also are improper places even for the incarceration of adults. He gave specific instances in support of his statement, mentioning for example a jail in a northwestern capital city which was admitting juvenile offenders while it was under quarantine for smallpox. The quarantine had been in effect against the release of inmates but not against commitments.

Harvey L. Long, superintendent of the Division of Supervision of Delinquents, State Department of Public Welfare, Chicago, Illinois, contended that many problem children can be adjusted successfully in foster homes, concluding that "it goes without saying that an adequately trained staff employing common sense and good judgment in the application of the most advanced philosophy and technique of child care, is fundamental to such a program. We view all preadolescent delinquents as treatable in a foster home program unless clinical study indicates that group treatment in the available institution is advisable before placement."

American culture produces crime, was the startling declaration made by Donald R. Taft, professor of sociology, University of Illinois. He indicated that there are three directions in which one may look for an explanation of crime. The first, he said, is abnormal personality, the second is bad environment, and the third is that he is the product of the whole culture. "We see the criminal as normal rather than abnormal. We ask how he could have been anything else than a criminal in a society where there is race prejudice, tense struggle to get ahead of the other fellow, corrupt politics, conflicting moralities. The line between criminal and non-criminal behavior is often so narrow as to lose its significance. Whenever behavior that is essentially like crime is not defined or treated as crime and is prevalent, crime will also be prevalent."

Dr. Edmond F. Sassin, Psychiatric Consultant to the Social Planning Council of St. Louis, Missouri, spoke on the adult offender as an individual. He based his observations on a study conducted at the Missouri State Penitentiary in 1942 and 1943 of 30 prospective parolees. He said, "The study of the adult offenders does not differ from the study of any kind of human behavior. We must view them all in the same light and attempt to study and understand each individually, neither condemning nor rejecting. Our attitude must be one of tolerance and professional acceptance. We must also understand our own resistances and repugnances to 'people who differ.' "

Ernest W. Burgess, Professor of Sociology, University of Chicago, warned that there is a strong probability that there will be a marked increase in juvenile delinquency in 1943. He declared, "The responsibility of our welfare agencies and institutions is clear. It is like that of the Health Department which predicts an epidemic upon the basis of the first reports of an increase of a contagious disease. It then sets about to fight this disease and to make its own prediction false. The same action lies ahead of us regarding juvenile delinquency."

C. H. Z. MEYER.