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Domestic Relations--Divorce--Adultery--Presumption of Legitimacy (Lockwood v. Lockwood, 62 N.Y.S.2d 910 (Sup. Ct. 1946))

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serve complainant better than valor in resistance. The court found no reason to disturb this verdict.

Surprisingly, the facts and crimes being of such a common nature, this appears to be a case of first impression in New York. The logic of the court in dealing with this problem emits of no other opinion but that the decision is based upon a sound legal foundation.

J. R. S.

DOMESTIC RELATIONS—DIVORCE—ADULTERY—PRESUMPTION OF LEGITIMACY.—Plaintiff, husband, sues for an absolute divorce and the only evidence of adultery is an inference sought to be drawn from the length of the period of pregnancy. The husband, an officer in the Merchant Marine, left Norfolk for the Pacific on April 24, 1944 and did not return to the United States until after January 4, 1945. The defendant gave birth to a child on April 14, 1945 which, denying misconduct, she claims is the child of the plaintiff. The plaintiff adduced no evidence reflecting upon the conduct of the defendant. He offered no evidence to associate his wife with any paramour or with any act of indiscretion. He seeks a decree solely upon the hypothesis that it is impossible that so long a period as 355 days could intervene between coition and parturition. A gynecologist called as an expert witness by the plaintiff testified that the accepted period of gestation was 270 days, the longest authenticated case being 320 days, he admitted that there was a non-authenticated case of 369 days. A physician called by the defendant as an expert testified that there have been cases of 344 days. The physician who attended the defendant during her pregnancy testified that the head of the foetus was engaged for 68 days before birth, whereas birth normally occurs within one month after such engagement. *Held,* complaint dismissed. The plaintiff has failed to sustain the burden of proof and the court can not say, on inference alone, that the defendant has been guilty of adultery unsupported by any evidence reflecting on defendant's conduct. *Lockwood v. Lockwood,* — Misc. —, 62 N. Y. S. (2d) 910 (Sup. Ct. 1946).

A case decided in England appears to be very similar in many respects where the protracted pregnancy was 331 days. Viscount Birkenhead in dismissing the petition said:

> In this case the only evidence of adultery is the admittedly abnormal length of pregnancy. No other fact or circumstance has been adduced which in the slightest degree casts any reflection upon the chastity or modesty of the respondent, who has on oath denied the alleged adultery. I can only find her guilty if I come to the conclusion that it is impossible, having regard to the present state of medical knowledge and belief, that the petitioner can be the father of the child. The expert evidence renders it manifest that there is no such impossibility. In these circumstances I accept the evidence of the

respondent, and find that she had not committed adultery, and accordingly I dismiss the petition.[1]

Adultery may be shown by circumstantial evidence.[2] However, if the circumstances are as consistent with the theory of innocence as of guilt, the inference of innocence must prevail.[3] Courts "must not be duped, and they must take such evidence as the nature of the case permits, circumstantial, direct or positive, and bring to bear upon it the experiences and observations of life, and thus weighing it with prudence and care, give effect to its just preponderance." [4]

The birth of a child to a wife after the lapse of such a period from the access of the husband as to make it impossible for him to be the child's father, if shown by sufficient evidence, is clearly proof of the wife's adultery.[5]

In the United States the courts will take judicial notice of the scientific fact that the gestation period antedating the birth of a child is approximately 280 days.[6] However, there is strong medical authority recording exceptions to this general rule. In 782 cases of protracted pregnancy, some lasted 319, 324, 332 and 335 days.[7] A California court ruled that 304 days was presumed to be excessive.[8] In a case in Tennessee, the court held that ten months and 19 days was also presumed excessive.[9] A Washington court, however, held that 336 days was not necessarily excessive.[10]

No principle of law is more firmly established than the principle that every child born in wedlock is presumed to be legitimate.[11] In 7 Corpus Juris 940, the principle is stated:

> The presumption of the fact of legitimacy is one of the strongest known to the law, and it cannot be overthrown except by evidence which is stronger.

However, it is important to bear in mind that the presumption does not consecrate as truth the extravagantly improbable.[12]

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[1] Gaskill v. Gaskill, [1921] P. 425, 21 A. L. R. 1451.

[2] Krauss v. Krauss, 73 App. Div. 509, 77 N. Y. Supp. 203 (1st Dep't 1902); Pollock v. Pollock, 71 N. Y. 137 (1877); Allen v. Allen, 101 N. Y. 658, 5 N. E. 341 (1886).

[3] Axtell v. Axtell, 119 N. Y. Supp. 644 (Sup. Ct. 1909).

[4] Moller v. Moller, 115 N. Y. 466, 468, 22 N. E. 169, 170 (1889).

[5] Bancroft v. Bancroft, 4 Boyce 9, 85 Atl. 561 (Del. 1911); Kohlenberg v. Kohlenberg, 74 Atl. 432 (N. J. Eq. 1909); Van Aernam v. Van Aernam, 1 Barb. Ch. 375 (N. Y. 1846).

[6] Milone v. Milone, 160 Misc. 830, 290 N. Y. Supp. 863 (Dom. Rel. Ct. 1936); Commissioner of Public Charities v. Leary, 144 App. Div. 283, 129 N. Y. Supp. 148 (2d Dep't 1911); People v. Farina, 134 App. Div. 110, 118 N. Y. Supp. 817 (2d Dep't 1909); HERZOG, MEDICAL JURISPRUDENCE (1931) §§ 955, 975.

[7] SIMPSON, CLINEQUE OBS. & GYNECOLOGIQUE.

[8] *In re* McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919).

[9] Gower v. State, 155 Tenn. 138, 290 S. W. 978 (1927).

[10] Pierson v. Pierson, 124 Wash. 319, 214 Pac. 159 (1923).

[11] 7 C. J. 940; 3 R. C. L. 726.

[12] Matter of Findlay, 253 N. Y. 1, 8, 170 N. E. 471, 473 (1930).

The principal case is entirely barren of evidence of misconduct on the part of the wife subsequent to the husband's leaving, and the court was unwilling to say, as a matter of law, that the period elapsing between that date and the date of the birth of the child was so far excessive as to conclusively show illegitimacy. The court refused by its judgment to brand an innocent child with the bar sinister unless the evidence was so conclusive as to leave room for no other course.

M. T.

EMINENT DOMAIN—REAL PROPERTY—TAKING OF PROPERTY BY CONTINUOUS FLIGHT OF AIRCRAFT.—On May 11, 1942, the United States Government entered into a lease with the Greensboro-High Point Municipal Airport Authority whereby the United States was to lease ten acres of land adjoining the airport property. The lease began on June 1, 1942, and was to terminate at the expiration of thirty days, but with a privilege of renewal given until June 30, 1967, or until six months after the end of the present national emergency whichever first occurred.

The northwest-southeast runway of the airport is located about 2,000 feet from respondents' property. To reach this particular runway, the petitioners' planes, of necessity, flew directly over the respondents' domain at a height of less than 100 feet. The height at which the planes flew over the property in question, was in accordance with the 30 to 1 safe glide angle [1] approved by the Civil Aeronautics Authority. The frequency with which the northwest-southeast runway was used was determined by the wind direction and velocity so that it was used approximately four percent of the time in taking off and seven percent of the time in landing. The proof shows, however, that large numbers of planes flew frequently over the respondents' property causing considerable loss in the operation of their chicken farm. Production of chickens was materially lessened because of the distraction at night occasioned by the noise and bright glare of the planes in passing. Fatality among the chickens ran high as, in terror, they dashed themselves to death against the side of the barn.

The respondents had previously brought an action in the Court of Claims,[2] and were awarded damages in the amount of $2,000. The award was based on the reasoning that the frequent and regular passage of Army and Navy aircraft over the property of the respondents at low altitudes, constituted a taking of said property within the meaning of the Fifth Amendment. The case came to the Supreme

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[1] A 30 to 1 glide angle means one foot of elevation or descent for every 30 feet of horizontal distance.

[2] Causby v. United States, — Ct. Cl. —, 60 F. Supp. 751 (1945).