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THE CONCLUSIVE PRESUMPTION OF LEGITIMACY OF CHILD

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I have just read with interest Dean Jorge Bocobo's article with the above title, in the October issue of the PHILIPPINE LAW JOURNAL, in which he gives his four reasons, why Senate Bill No. 172, abolishing the conclusive presumption established in Section 333, par. 3, of the Code of Civil Procedure, and Article 108 of the Civil Code, regarding the legitimacy of a child, and further providing for a disputable presumption of a legitimacy of a child born under certain conditions, should not become a law.

Although whatever I might say in opposition to Dean Jorge Bocobo's argument may be too late to influence the result as to Senate Bill No. 172, yet it would not be right for me to leave unsaid what I have to say.

While I am principally interested in Dean Bocobo's fourth point, referring to Medical Jurisprudence, may I be permitted to briefly answer the other three points:

"The law has from ancient times established such conclusive presumption." This, while true, is no reason against the passage of the bill. Even though the legal fiction: "Pater est quem nuptiae demonstrant" has come down to us from the old Roman Law, still, as Dean Bocobo rightly says: "Law is not a sudden product, but the result of gradual and orderly development." Laws being rules of action laid down by lawmakers of every nation, of every group of society for the government of such nation or group, must be changeable so as to accommodate themselves to different conditions of society, to changing morals, to changing civilization and above all, perhaps, to increase knowledge, increase scientific attainments.

Even though in ancient times it may have been impossible to prove in any case that a certain man or a certain woman could not be a parent of a certain child, and so, as a matter of public

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policy the maxim: "Pater est quem nuptiae demonstrant" may have been a good law, it must be conceded that in some cases it was nothing but a legal fiction.

We have had the same in English Law, where the rule of the four seas was for a long time held absolute. This rule was: "If the husband be within the four seas, that is within the jurisdiction of the King of England, if the wife has issue, no proof is to be admitted to prove the child a bastard, unless the husband has an apparent impossibility of procreation; as if the husband be but eight years old, or under the age of procreation, such issue is bastard. But if the issue be born within a month and a day after marriage, between parties of full lawful age, such child is legitimate." [1]

The presumption of legitimacy was carried to such extremes in England, that in Wright *v.* Hicks,[2] the court said: "It was solemnly declared by a court of highest jurisdiction, that a child born in England was legitimate, although it appeared on the fullest evidence that the husband resided in Ireland during the whole term of the wife's pregnancy, and for a long while previously, because Ireland was within the King's domain."

In my book on Medical Jurisprudence published by the Bobbs Merrill Company, Indianapolis, Indiana, I have dealt with Legitimacy and Paternity in Chapter 50, and I have shown in Sec. 1072 that "The presumption of legitimacy is one of the most difficult in law to overcome." This is no more than right, but sufficient. Even the rule of the four seas, which in England was an ancient rule, and which, therefore, notwithstanding its absurd results, should according to Dean Jorge Bocobo, have remained unchanged, was modified in 1807 by Lord Ellenborough.[3] I have shown in my book that (Sec. 1075), the presumption of legitimacy may be overcome not only in the United States, but also in all England and all other European countries, so that Dean Jorge Bocobo's second point can not be upheld, as now what may have been before a conclusive presumption has been changed to a rebuttable presumption.

Even the citation in Dean Jorge Bocobo's article from Prof. Valverde y Valverde does not show that the presumption of legitimacy is conclusive, but only rebuttable; for were it not so, the cited maxim "Pater est quem nuptiae demonstrant" would

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[1] Coke on Littleton, 244 a.

[2] 12 Ga. 155, 56 Am. Dec. 451.

[3] Herzog's Medical Jurisprudence, sec. 1074.

be conclusive, whether the child was born before 180 or after 300 days after the marriage ceremony. The fact in itself is that it may be shown that although a child was born during wedlock, it was born before 180 after the ceremony, is a rebuttal of the presumption of legitimacy.

In answer to Dean Jorge Bocobo's third point, that such a conclusive presumption is necessary for the existence and stability of the family, I contend, that where an unchaste female, being pregnant, can trick an unsuspecting male into marriage, knowing that the child born to her will be legally acknowledged and declared as the child of her husband, although he is not the child's real father; likewise, where an adulterous wife knows that no matter who the child's real father, her husband will by law be held to be its legal father, such a state of affairs does not tend towards the stability of the family, but to its demoralization. If Laurent, whom Dean Jorge Bocobo cites, states that "la paternidad se establece en una presunción tan vieja como el matrimonio, tan fuerte como la moralidad" I can only state, answering the first part of the proposition, that the age of a presumption does not make it any better, but when it comes to the second part, I must reply wtih a question, namely: How strong is the morality? And, if it be admitted that "Tempora mutantur et nos mutamus in illis," and that, perhaps through the emancipation of women during the last century, greater freedom in sex matters, and other factors, morality is not as strong as it used to be, then it also ought to be admitted that the presumption, which by Laurent is claimed to be as strong as morality, should not be as strong at present as heretofore; therefore, a conclusive presumption of legitimacy should be changed to a rebuttable presumption.

Let us now turn to Dean Jorge Bocobo's fourth point, which is that Medical Jurisprudence has not advanced to such an extent that the question of paternity may be safely entrusted to the judgment of medical experts.

Here I may, first of all, suggest, that if the first 3 points in Dean Jorge Bocobo's proposition were valid, the fourth point could not be taken into consideration; while the fact itself that Dean Bocobo advances the fourth point, admits that, if Medical Jurisprudence has advanced sufficiently to determine paternity, it should be given due weight and the first three points should be relegated to extinct laws, where they belong.

Now let us see whether Dean Bocobo is right in his contention that Medical Jurisprudence has not advanced sufficiently to be taken into consideration for the purpose of rebutting the presumption of paternity.

Dean Jorge Bocobo quotes Manresa, as to racial differences, and says that if the author of the bill has only racial differences in mind, which might plainly prove that a certain child, born of a mother, who belongs to the same race as the husband, is the offspring of mixed races, as for example White and Negro or White and Indian, or White and Chinese, then he ought to have restricted himself in the bill by simply providing that such fact might be produced in evidence; but Dean Jorge Bocobo states, such exception would in many cases be dangerous on account of the difficulty of distinguishing the various races.

Let us admit that there may sometimes be difficulty in arriving at a just conclusion in such cases; let us also admit that there is in most cases an impossibility in arriving at an exact conclusion as to the time of conception. But Medical Jurisprudence has advanced considerably and while in most instances it is not as yet possible to definitely state that a certain man is the father of a certain child, it is very often possible to absolutely prove that a certain man can not possibly be the father of a certain child, or that a certain woman can not be its mother.

In my work on Medical Jurisprudence, sec. 1081, I mention among other means which may be used in evidence to disprove paternity, "The use of the isoagglutination test for the purpose of proving illegitimacy or paternity, by examining the blood of mother, husband or accused and child and by ascertaining to which blood-group each one belongs, to fix paternity on some one or to disprove it."

Chapter 51 of my book is devoted to Agglutination Tests and in sec. 1096 I say: "While so far it is impossible by means of isoagglutination tests to prove that a certain child is the offspring of a certain man, in many instances the negative of the question can be thus proved."

This fact is now absolutely proven. Quoting from my book, sec. 1100: "The question of the determination of paternity or maternity is based on the theory of v. Dungern and Hirschfeld, according to which the red blood corpuscles of the group 4/1 have both agglutinogenes A and B; the blood corpuscles of group 1/4 have neither of these two agglutinogenes. The blood corpuscles of group 2 have only the agglutinogene A, while the

blood corpuscles of group 3 have only the agglutinogene B. Thus in relation to the presence or absence of the agglutinogenes, the four blood groups differ as follows: Group 4/1: A-B; group 2; A; group 3: B; group 1/4: O (neither A nor B)."

As far as the determining of parentage is concerned, the child can only then have agglutinogene A or B in its blood, if either or both were in the blood of either parent. The child may, however, belong to blood group O, which is devoid of either agglutinogene and in this case the parents may belong to any one or the other of the four blood groups. If, therefore, the child belongs to a blood group containing the agglutinogene A, the A-B (4/1) group or the A (2) group, the A must be present in the blood of at least one of the two parents. If the child belongs to the A-B (4/1) group, either one of the parents must belong to the same group, or one must have A and the other one B.

A report in the *Lancet*, November 2, 1929, entitled MEDICO-LEGAL SIGNIFICANCE OF BLOOD GROUPS, describes its use in the German courts. The method has been resorted to in both civil as well as in criminal problems. A committee of experts, made up of the leading representatives in forensic medicine, serology, and the science of inheritance, unanimously arrived at the following conclusions: "It is a reliable method when performed by an expert, especially for the exclusion of paternity." In Berlin, Frankfurt, and Nurnberg special medico-legal experts are sworn to perform this test. In Bavaria, Saxony and Wurtemberg the examinations are made by the university institutes of forensic medicine. Norway, Sweden and Austria are also using this approach.[5]

Being that it has been fully established through Medical Jurisprudence that blood-grouping tests are absolutely certain, so that in many instances paternity can be absolutely excluded, there can be no valid reason why the law should fail to take cognizance of blood-grouping tests for the purpose of rebutting

[5] Symposium on the Forensic Value of Tests for Blood Grouping. Proceedings of the Society of Medical Jurisprudence at the New York Academy of Medicine. March 14, 1932. 1. Blood Grouping—Its Legal Applications by George I. Swetlow. 2. Principles and Technic of the Determination of Blood Groups, by Silik H. Polayes. 3. Theory of Blood Groups with Special Reference to Heredity, by Alexander S. Weiner. 4. Practical Application of the Determination of Blood Groups, by Max Lederer.

the presumption of paternity. Any one interested in this subject may secure sound information by consulting the works mentioned in the appendant bibliography.

I trust that if the bill to change The Conclusive Presumption of Legitimacy of Child to rebuttable presumption has been defeated, that it may in the near future be taken up again, and be victorious. "Fiat justicia pereant mundi."

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