of interest" as used in the *Goldfinger* decision. Thus in the *Feldman* case, the neutral plaintiff was picketed by members of the teamsters' union although he hired union butchers and did not hire non-union teamsters or any non-union workmen remotely connected with teamsters, his "vice" being merely to sell scrap to one who did. Hence, by analogy to the *Auburn* case, his workmen would not have sufficient interest in the teamsters' welfare to support them by striking. Similarly in the cases involving the sale of neon signs, it is doubtful that there would be a sufficient "common interest" between union electrical workers employed for a short time only to install the individual unit and the retail salespersons employed permanently by the stores picketed to justify a strike by the latter to help the former. The instant case, like the window-washing cases, might be differentiated from the cases just discussed upon the ground that a continuing relation involving the non-union service men results from the contract of maintenance.

One problem under the *Goldfinger* case which has not been treated by the New York cases is the implications of the recent United States Supreme Court decisions[28] which have protected peaceful picketing in a labor dispute under a constitutional guaranty. Although Mr. Justice Murphy used general language in *Thornhill v. Alabama*,[29] which might suggest that picketing in a situation like the instant case is an exercise of freedom of speech, other language of his opinion and approving citations[30] to opinions of Mr. Justice Brandeis indicate that the "limits of permissible contest upon the industrial combatants" are set by the state.[31] In New York the test of "unity of interest" between the non-union employer and the picketed neutral as stated in the *Goldfinger* case and as subsequently developed seems to be the limiting factor set by state law.

Procedure—Federal Rules of Civil Procedure—Blood Test to Prove Paternity—Substance or Procedure—[Federal].—The plaintiff brought an action for separate maintenance against her husband, alleging him to be the father of her unborn child. The husband counterclaimed for divorce denying paternity and charging the plaintiff with adultery. Pending this suit, the child was born. The district court, on the defendant's motion, ordered that the plaintiff and the child be subjected to a blood-grouping test, applying Rule 35(a) of the Federal Rules of Civil Procedure, which provides that "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination. . . ." The plaintiff contended that a blood-grouping test would invade her substantive rights,[1] and hence could not be authorized under the Federal

[28] Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940), petition for rehearing denied, 310 U.S. 657 (1940); Hague v. C.I.O., 307 U.S. 496 (1939), petition for rehearing denied 307 U.S. 661 (1939); Schneider v. California, 308 U.S. 147 (1939); Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).

[29] 310 U.S. 88 (1940).

[30] See quotation with approval, ibid., at 103, from the majority opinion in Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937), and citation, ibid., at 104, to the dissent in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1920).

[31] Thornhill v. Alabama, 310 U.S. 88, 103, 104 (1940); see Barnard and Graham, Labor and the Secondary Boycott, 15 Wash. L. Rev. 138, 163 (1940).

[1] The substantive right argued was apparently the right to be "let alone."

Rules of Civil Procedure. On appeal, *held*, a federal court, under Rule 35(a), may order a blood-grouping test in a disputed paternity case. Order affirmed. *Beach v. Beach.*[2]

The federal courts were formerly committed to the minority view that a court could not compel a litigant to submit to a physical examination in the absence of express statutory authorization.[3] But it has been held that the power to order a physical examination in a tort action under Rule 35(a) does not exceed the limitation of the enabling act that substantive rights may not be affected by the Federal Rules of Civil Procedure.[4] The question whether blood-grouping tests may be ordered under this rule, however, has not arisen previous to the instant case.

The court assumed that the characteristics of an individual's blood are a condition of his physical being, and hence that a blood-grouping test is a physical examination within the meaning of Rule 35(a). That the rule was intended to be restricted to personal injury actions and insanity proceedings might be argued since the courts have tended to associate physical and mental examination with these types of litigation. Yet under a New York statute authorizing physical examinations in personal injury actions—a more restricted provision than Federal Rule 35(a)—a court was held to have the power to order a blood test.[5]

The meaning of the term "controversy" within Federal Rule 35(a) was litigated recently in *Wadlow v. Humberd.*[6] This case was a libel action in which the district court interpreted[7] the rule as restricted to situations in which the mental or physical condition of a litigant is *directly* or *immediately* in controversy.[8] Under such a limited construction it could be argued that the rule does not apply to the principal case, since the blood-grouping of the plaintiff was an evidential rather than an ultimate fact in the defendant's counterclaim for divorce. But there is nothing in the rules to warrant such

[2] 114 F.(2d) 479 (App. D.C. 1940).

[3] Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891); Camden & Suburban R. Co. v. Stetson, 177 U.S. 172 (1900); see Beuschel v. Manowitz, 241 App. Div. 888, 272 N.Y. Supp. 165 (1934); Thomson v. Elliot, 152 Misc. 188, 273 N.Y. Supp. 898 (Children's Ct. 1934). The Beuschel case, holding that the court could not compel physical examination, occasioned severe criticism; cf. 20 Corn. L. Q. 232 (1935). The legislature shortly thereafter passed a statute providing specifically for blood-grouping tests. N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1940) § 306a. A majority of the courts have always held that it lies within the "inherent powers" of a court to compel a litigant to submit to a physical examination. State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933), aff'd on rehearing, 64 S.D. 309, 266 N.W. 667 (1936); see 51 A.L.R. 183 (1927) for a collection of cases; cf. 8 Wigmore, Evidence § 2220 (3d ed. 1940).

[4] Sibbach v. Wilson & Co., 108 F.(2d) 415 (C.C.A. 7th 1939) (personal injury action), affirmed by the Supreme Court on Jan. 13, 1941. See note 12 infra.

[5] Hayt v. Brewster, Gordon & Co., 199 App. Div. 68, 191 N.Y. Supp. 176 (1921). This case did not involve a blood-grouping test to determine paternity, but a blood test for another purpose which is not indicated in the opinion.

[6] 27 F. Supp. 210 (Mo. 1939).

[7] After admitting that there was no precedent, the court said: ". . . . we are compelled to rely upon our own interpretation and construction of the Rule, which I think is always a very satisfactory situation." Ibid., at 212.

[8] Implicit in the language of the court is the distinction between ultimate facts and evidential facts.

a restricted construction;[9] it is not consistent with the historical development of the rule;[10] and the court in the present case expressly rejected this restricted construction in a footnote to the opinion.[11]

Assuming that Rule 35(a) was intended to permit courts to order blood-grouping tests, the test could be successfully resisted if substantive rights of the parties were affected thereby.[12] The enabling act of 1934 empowering the Supreme Court to pass rules of "practice and procedure" expressly forbade abridgement of substantive rights.[13] The advisory committee and the Supreme Court, in including a provision for physical examination in Rule 35(a), were probably cognizant of the express limitation of the rule-making power contained in the enabling act. Congress, by giving its tacit approval to the rules, apparently believed that the rules did not go beyond what had been authorized in the enabling act.[14]

Procedural rules are designed to facilitate the production in court of relevant operative facts; substantive rules determine the legal effect of the established facts.[15] The analytical distinction between substance and procedure, however, is frequently tenuous.[16] In the borderline cases, no clear demarcation can be drawn without qualification as to the purpose for which the distinction is made.[17] It may reasonably be assumed that the purpose of the enabling act for the new Federal Rules was to confer upon the Supreme Court broad powers to increase the effectiveness of the federal courts.[18] Consistent with this view, it can be said that Rule 35(a) gives the court the power to order a blood-grouping test to determine more effectively that a person is not the parent. Blood-grouping tests for this negative purpose have scientific validity;[19] state

[9] See Rules 1, 8(f), 61, of the Federal Rules of Civil Procedure; 17 Hughes, Federal Practice § 18529 (1940) (". . . . the courts have uniformly construed and applied the rules in the spirit of the greatest liberality . . . . ."); cf. Chemo-Mechanical Water Improvement Co. v. Milwaukee, 29 F. Supp. 45 (Wis. 1939).

[10] See Notes of the United States Supreme Court Advisory Committee on Rules for Civil Procedure, Rule 35 (1938).

[11] The court deemed the decision in Wadlow v. Humberd, 27 F. Supp. 210 (Mo. 1939), "erroneous."

[12] Section 1 of the enabling act expressly provided that: "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 48 Stat. 1064 (1934), 28 U.S.C.A. §§ 723b, 723c (1940).

[13] Note 12 supra. [14] 1 Moore and Friedman, Federal Practice § 1.02, n. 3 (1938).

[15] See Stumberg, Conflict of Laws 128 (1937).

[16] Clark, Code Pleading 31 (1928); see Sunderland, Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise, 21 A.B.A.J. 404, 405 (1935) ("The chief difficulty in drawing this distinction is that the terms involved have acquired no settled meaning . . . . [because] they have been used in different senses in solving different types of problems").

[17] Sunderland, op. cit. supra note 16, at 405; Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 355–56 (1933).

[18] Sunderland, op. cit. supra note 16, at 406.

[19] See The Evidential Value of Blood Tests, 1 Univ. Chi. L. Rev. 798 (1934). For a compilation of literature on blood-grouping tests see 1 Wigmore, Evidence § 165a n. 1 (3d ed. 1940). For a discussion by a court, see In re Swahn's Will, 158 Misc. 17, 285 N.Y. Supp. 234) (Surr. Ct. 1936). Discussions of the Landsteiner test are to be found in 1 Wigmore, Evidence § 165b (3d ed. 1940), and 20 Corn. L. Q. 232 (1935).

courts already have used such tests in paternity cases.[20] As a fact-finding device, they may be said to be superior to circumstantial evidence and the subjective opinion of a jury which is called upon to detect the absence or presence of any physical resemblance between an adult and a child. Paternity is difficult to disprove; it may be lightly charged. The mechanisms for sifting such charges hitherto available have been not only cumbersome, but inadequate in that they were inaccurate. Blood-grouping tests are relatively painless and safe.[21] Insofar as their forensic utility has been demonstrated, they make possible the introduction of scientific accuracy and certainty in resolving disputed paternity cases.

Procedure—Corporations—Statute of Limitations in Stockholder's Derivative Suit —[New York].—A minority stockholder of Radio Corporation of America brought suit against its directors, the General Electric Company and its directors, and the Westinghouse Electric and Manufacturing Company and its directors, alleging that the latter corporations had been majority stockholders of RCA, and, through their control of its directorate, had managed RCA for their benefit contrary to the best interests of RCA. The wrongs alleged included the purchase of goods by RCA from the defendant corporations at excessive prices, the payment of a large sum by RCA to the defendant corporations for exclusive manufacturing rights at a time when the defendants knew the government was preparing to void these licenses under the Sherman Act, and the improper declaration of dividends by RCA. It was also alleged that these acts had been fraudulently concealed from the minority stockholders of RCA, and that suits by those stockholders who had discovered the wrongs had been collusively compromised and settled.[1] All the alleged wrongs admittedly had occurred more than six years before this action was brought, and the defendants pleaded the statute of limitations as a bar. The plaintiff contended in the alternative (1) that the complaint was essentially a claim for relief on the ground of fraud, and that the statute of limitations accordingly

[20] See, for example, Arais v. Kalensnikoff, 67 P. (2d) 1059, 1061 (Cal. App. 1937), aff'd 10 Cal. (2d) 428, 74 P. (2d) 1043 (1937). But see Bednarik v. Bednarik, 16 A. (2d) 80, 84 (N.J. Ch. 1940). In a suit for divorce on the ground of adultery the court refused a husband's petition for an order to compel his wife to submit to a blood-grouping test to determine the paternity of a child. The opinion rested upon the "constitutional" right to personal security and upon a statute (N.J. Comp. Stat. (1937) sub. tit. 11, c. 97, § 2:97–9) expressly exempting a husband and wife in a divorce action from being compelled to give "evidence" for the other, except to prove the fact of marriage. A recent New Jersey statute (N.J. Comp. Stat. (Supp. 1939), sub. tit. 11, c. 101, § 2:101–2) expressly empowers courts to order blood-grouping tests in disputed paternity cases, but the court denied that the more recent statute impliedly repealed the older one. This decision is open to question.

[21] Cf. Hayt v. Brewster, Gordon & Co., 199 App. Div. 68, 191 N.Y. Supp. 176 (1921). As to the privilege against self-incrimination, ". . . . it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion." 8 Wigmore, Evidence § 2263 (1940). Wigmore thus draws a distinction between real evidence, which is not within the scope of the privilege, and into which category blood-grouping tests fall, and testimonial evidence. See Britt, Blood-Grouping Tests and the Law: The Problem of the "Cultural Lag," 21 Minn. L. Rev. 671 (1937).

[1] Bill of Complaint, paragraph 95, p. 40. The defendants denied that the settlements were not made in the best interests of RCA. Reply Memorandum of Individual Defendants, pp. 22–25.