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Blood Grouping Tests in Bastardy Proceeding

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BLOOD GROUPING TESTS IN BASTARDY PROCEEDINGS

There is no scientific dispute at the present time as to the accuracy of a properly conducted blood grouping test.[1] These tests have been widely used in bastardy suits where paternity is denied, both in this country and on the continent. A child must have the blood characteristics of one of its parents. If it does not have the mother's characteristics, it must have those of the father. Therefore, a blood grouping test can disprove paternity in cases where the child has neither the blood characteristics of its mother, nor those of the purported father.[2] However, a blood grouping test will never prove paternity, since many millions of men might have the same characteristics as that of the child.

The legislatures of eight jurisdictions have enacted provisions specifically giving the courts power to order blood grouping tests and providing for their admissibility into evidence.[3] Generally these statutes only allow the results to be admissible in evidence when the test established non-paternity.[4] Several of these states allow counsel of the defendant to comment to the jury on the failure of the mother to take the test.[5] These provisions would seem to indicate that the drafters of the statutes did not believe that a mother could constitutionally be forced to take the test on the grounds of immunity from self-incrimination. Justice Holmes states in *Holt* v *United States,* "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to exort communications from him, *not an exclusion of his body as evidence when it may be material.*" (Italics writers)[6] Thus it appears that the privilege against self-incrimination refers to testimonial evidence and not to real evidence, and a blood grouping test should fall into the latter category. It seems, moreover, that the claim of the privilege against self-incrimination at least has no basis when applied to the mother because the mother will in no way be incrim-

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[1] Note, 63 HARV. L. REV. 1271 (1950); Britt, *Blood Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 MINN. L. REV. 671 (1937); State v. Damm, 64 S.D. 309, — 266 N.W 667, 668 (1936).

For a complete discussion of the blood patterns and what they prove and disprove, 1 WIGMORE, EVIDENCE, secs. 165a, 165b (3d ed. 1940).

[3] ME. REV. STAT. c153, sec. 34 (1944); MD. ANN. CODE GEN. LAWS art. 12, sec. 17 (Flack Supp. 1947); II N.J. REV STAT. secs. 99-3, 4 (Supp. 1946); N.Y. CIV. PRAC. Act. sec. 306a (Thompson 1939); N.C. GEN. STAT. ANN. sec. 49-7 (Michie Supp. 1950); OHIO GEN. CODE ANN. secs. 12122-1, 2 (Page Supp. 1951); S.D. CODE sec. 36.0602 (1939); WIS. STAT. ANN. secs. 166,105 325.23 (1949).

[4] So provided in Maine, Md., N.Y., Ohio, and Wis.

[5] So provided in Md., Ohio, and Wis.

[6] 218 U.S. 245, 252 (1910). In Elmore v. Com., 282 Ky 443, 138 S.W 2d 956 (1940) the court held that the taking of defendant's shoes and comparison of same with prints at scene of crime did not constitute self incrimination.

mated as a result of the test. In civil suits it is clear that the court can order the parties to do many, things, such as the ordering of a physical examination[7] or the answering of questions as a witness.

Probably the first reported decision allowing a blood grouping test in the absence of a statute was *Commonwealth* v *Zammerelli*,[8] a Pennsylvania case decided in 1931. Courts of other states have held that a court may order a blood grouping test in an action to determine non-paternity even in the absence of statute.[9] The South Dakota Court has said, "We are entirely unable to agree that a trial court of record cannot order the taking of blood for purposes of test in an effort to establish non-paternity, unless there is some specific statute authorizing such procedure."[10] This is not so startling in view of a court's inherent authority to order a physical examination.[11] A New York appellate court reversed a lower court, which ordered a blood grouping test of the mother, for the reason that the test could not prove paternity and therefore "plainly determines nothing."[12] The test does, however, prove non-paternity which is the negative issue, so it seems that the New York court was in a sea of confusion. After this, New York enacted laws providing for a blood grouping test.[13] *In Beach* v *Beach*,[14] a federal district court ordered a blood grouping test under rule 35 (a) of the Federal Rules of Civil Procedure which merely provides for a mental or physical examination when these conditions are in controversy A special appeal from that order was taken and the sole question presented was whether the district court was authorized to order the test. The court affirmed the district court and ordered the blood grouping test, stating that the value of blood grouping tests as proof of non-paternity is well known and that such tests should be allowed.

In all those jurisdictions, except Iowa which permit blood grouping tests, the result of the tests are only admissible when paternity is to be disproved.[15] As to what weight will be given the results of these tests,

[7] Cook v. Miller, 103 Conn. 267, 130 Atl. 571 (1925); Brown v. Hutder Bros. Co., 152 Md. 39, 136 Atl. 30 (1927).

17 Pa. D. & C. 229 (1931).

[9] Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P 2d 1043 (1938); *see* State v. Damm, 64 S.D. 309, — 266 N.W 667, 669 (1933); Britt, *op. cit. supra* note 1, at 680 ff.

[10] State v. Damm, *supra* note 9.

[11] Id. at — 266 N.W at 670 " it is distinctly the majority view that courts have an inherent power to order physical examination even in the absence of statute."

[12] Beuschel v. Manowitz, 241 App. Div. 888, 272 N.Y. Supp. 165 (2d Dep't 1934).

[13] N.Y. CIV. PRAC. Act sec. 306a (Thompson 1939); N.Y. CRIM. CODE sec. 684a (Thompson 1939).

[14] 114 F 2d 479 (App. D.C. 1940).

[15] *Supra* note 4; cf. Livermore v. Livermore, 233 Iowa 1155, 11 N.W 2d 389 (1943) where no distinction seems to be drawn.

jurisdictions are in conflict, and even courts of the same jurisdiction have not been consistent. Maine is a good example of this. In the first Maine case, *Jordan* v *Davis*,[16] decided in 1948, the defense was based on a blood grouping test which determined non-paternity The jury determined otherwise and the purported father sought a new trial. This was denied and affirmed on appeal, the court holding that the statute authorizing the test did not intend the result to be conclusive as to non-paternity but only that it be admissible in evidence. The second Maine case, *Jordan* v *Mace*,[17] decided a year later, ordered a new trial in a case very similar to the first one. The court held that the jury could not disregard the biological laws operative in blood grouping tests, but can only decide whether the tests were properly administered. Since the judges were substantially the same in both cases, it is clear that they found it necessary to distinguish *Jordan* v *Davis*, which they did on the technicality that there the defendant did not prove the accuracy of the administering of the test. Though the basis used might be found in the first case, the writer believes that in the *Davis* case the court held the test not to be conclusive, and in the Mace case the court properly changed its position and made the results conclusive.

One of the more recent cases which gave a large amount of publicity to the blood grouping test was *Berry* v *Chaplin*.[18] Here, Chaplin, the famous movie star, was accused of being the father of the plaintiff's child. The parties stipulated to abide by the results of a blood grouping test. Although the test proved nonpaternity, the plaintiff obtained new attorneys and proceeded to trial. The jury found for the mother and this was affirmed on appeal, the court holding that the stipulation could not bind the child and that the results of the blood grouping test were not conclusive. In taking this view the court followed *Arais* v *Kalensnikoff*,[19] a landmark California case, which held that no evidence was conclusive unless so declared by the California code and went on to say that " when there is a conflict between scientific testimony and testimony as to the facts, the jury or trial court must determine the relative weight of the evidence. "[20] Perhaps this holding was necessary because of the above mentioned code provision, but other jurisdictions,[21] not having similar statutes, can not

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[16] 142 Me. — 57 A. 2d 209 (1948).
[17] — Me. — 69 A. 2d 670 (1949).
[18] 74 Cal. App. 2d 652, 169 P 2d 442 (1946).
[19] 10 Cal. 2d 428, 74 P 2d 1043 (1937).
[20] *Id.* at — 74 P. 2d at 1046.
[21] State *ex rel* Walker v. Clark, 144 Ohio St. 305, 58 N.E. 2d 773 (1944); Tyler v. Costome, 277 App. Div. 90, 97 N.Y. Supp. 2d 804 (1st Dep't 1950).

logically reach the same result. It seems that by making this positive evidence nonconclusive, the courts must be leaning upon the social principle that he who dances must pay the fiddler, even if someone else also had the pleasure of the dance. In so doing, the courts allow juries to follow their natural inclination to protect the infant to overcome scientific fact, and thereby force a man to support for about twenty-one years a child that is not his. If a man is not the father of the child he should not be required to support it. This basic truth has been recognized in some jurisdictions, and, in these jurisdictions, the findings are declared to be conclusive.[22] Obviously, the plaintiff even in these jurisdictions may impeach the validity of the test by showing that it was improperly conducted,[23] but if she cannot do so, then the result should be conclusive.

There is no reported case in Kentucky where a blood grouping test has been ordered. Nor is there a provision in the KENTUCKY REVISED STATUTES so providing. Applying the law previously set out, it seems that the Kentucky courts may order such a test even without statutory authority and if they so order, the results of the test should be admissible only when non-paternity is proved, and they should be conclusive evidence when admitted, the party claiming paternity being given the opportunity to disprove the accuracy of the test. Perhaps if the court finds it is necessary to have some authority before ordering the test, the inherent power of Kentucky courts to provide for physical examinations would suffice as it did in South Dakota in *State* v *Damm*.[24]

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[22] Jordan v. Mace, — Me. — 69 A. 2d 670 (1949); *see* Gilpin v. Gilpin, 197 Misc. 319, — 94 N.Y. Supp. 2d 706, 709 (Dom. Rel. Ct. N.Y. City 1950); State v. Damm, 64 S.D. 309, — 266 N.W 667, 668 (1936); Beach v. Beach, *supra* note 14, at 480, *semble*.

[23] — Me. — 69 A. 2d 670 (1940).

[24] *Supra* note 9.