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Bastards - Evidence - Admissibility of Blood Tests to Prove Non-Paternity

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NOTES

BASTARDS — EVIDENCE — ADMISSIBILITY OF BLOOD TESTS TO PROVE NON-PATERNITY. —It is written in the Book of Acts that the Lord "hath made of one blood all nations of men." [1] This statement is presently known to possess no scientific application. Yet before the turn of the present century attempts at blood transfusion proved fatal, the "one blood" belief the lord high executioner.[2] In contrast, the present day recognition that defined blood-groupings exist is not confined to men of science, for military service and blood donor programs have made the existence of blood "types" common knowledge. Unfortunately blood "types" and transfusions have become synonymous, although in reality successful blood transfusion is merely a specific application of the blood-grouping discovery. Scientists possess irrefutable proof that blood-grouping tests can prove non-paternity;[3] accordingly the discovery is of paramount importance in paternity proceedings, divorce actions and other types of cases in which the legitamacy of a child is in issue.

The medico-legal significance of the blood test to prove non-paternity, while unquestioned by men of science, is of little value unless the tests are recognized, used and admitted by the court in a particular jurisdiction. Despite numerous articles by medical [4] and legal [5] writers, the courts have been exceedingly slow in recognizing that blood tests can conclusively prove non-paternity. This judicial non-acceptance seems paradoxical in view of the fact that courts have previously admitted numerous contributions of science, such as ballistics,[6] fingerprinting,[7] and X-rays.[8] Furthermore courts take judicial notice of scientific facts which are common

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1. Acts 17:26.
2. *Dr. Landsteiner's Discovery of Blood Groups*, 72 Science (NS) Supp. 10 (Nov. 7, 1930); *Studies of Isohemagglutination*, 19 Journal of Immunology 259 (1930).
3. Wiener, Blood Groups and Blood Transfusions (3rd ed. 1943); Lattes, Individuality of the Blood (1932); Snyder, Blood Grouping in Relation to Legal and Clinical Medicine (1929); Schatkin, Disputed Paternity Proceedings (2nd ed. 1947); Schiff and Boyd, Blood-Grouping Technique (1942).
4. *Ibid.*
5. *E.g.* Flacks, *Evidential Value of Blood Tests to Prove Non-Paternity*, 21 A.B.A.J. 680 (1935); Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 Minn. L. Rev. 671 (1936); Maguire, *A Survey of Blood Group Decisions and Legislation in the American Law of Evidence*, 16 So. Cal. L. Rev. 161 (1943); Galton, *Blood-Grouping Tests and their Relationship to the Law*, 17 Ore. L. Rev. 177 (1938).
6. Evans v. Commonwealth, 230 Ky. 441, 19 S.W.2d 1091 (1929); State v. Casey 108 Ore. 386, 213 Pac. 771 (1923).
7. People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911); Willoughby v. State, 154 Miss. 653, 122 So. 757 (1929); Kidd, *The Right to Take Fingerprints, Measurements and Photographs*, 8 Calif. L. Rev. 25 (1919).
8. Ligon v. Allen, 157 Ky. 101, 162 S.W. 536 (1914); DeForge v. New York, N.H. & H.R. Co., 178 Mass. 59, 59 N.E. 669 (1901); 3 Wigmore, Evidence §795 (3d. ed. 1940).

knowledge,[9] facts which are laws of nature,[10] and facts generally known to the medical world,[11] although scientific facts of uncertain or questionable repute are denied judicial notice.[12]

Law and the courts are traditionally conservative, a trait attributable in a large degree to *stare decisis* and case precedent. The emphasis placed upon certainty in the law oftentimes renders courts oblivious of scientific advancement. The conflict between the adherence to conservative ideals and the adoption of scientific findings is readily recognized by Dean Pound as he states:

> "Law must be stable and yet cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change." [13]

The passage of time between the scientific or intellectual finding of a material fact and the ultimate acceptance by the legal tribunals has been aptly defined by Professor Britt as a "cultural lag." [14] Needless to say the non-recognition of blood-grouping tests to conclusively prove non-paternity is a glaring example of judicial hesitancy.

Medical Development of Blood-Grouping Tests.

Blood is mainly composed of serum, white corpuscles and red corpuscles. In 1900, Dr. Karl Landsteiner discovered that the serum from one person's blood would agglutinate (clump) with the red cells of certain other individuals.[15] With the aid of de Castello and Sturli, blood was properly classified into four groupings.[16] According to the accepted International nomenclature the four groups were termed A, B, AB, and O. Landsteiner found that red cells contain two substances known as "agglutinogens" [17] which

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9. *E.g.* N.D. Rev. Code §31-1002 (62) (1943) "Of the explosive character of nitro-glycerine, dynamite, gunpowder, and gun-cotton."; Valley Spring Hog Ranch v. Phagmann, 282 Mo. 1, 220 S.W.1 (1920); 9 Wigmore, Evidence §2580 (3d. ed. 1940).

10. *E.g.* N.D. Rev. Code §31-1002 (92) (1943) "Of the laws of nature, the measure of time, and the geographical divisions and political history of the world."; Bullock v. Knox, 96 Ala. 195, 11 So. 339 (1892); McKelvey, Evidence §25 (3d. ed. 1924).

11. Rosted v. R. Co., 76 Minn. 123, 78 N.W. 971 (1899) (that exposure to cold is likely to cause inflammatory rheumatism); Viemeister v. White, 179 N.Y. 235, 72 N.E. 97 (1904) (vaccination is a preventive of smallpox).

12. State v. Fox, 79 Md. 514, 29 Atl. 601 (1894) (no notice that glanders is a contagious illness for humans); Wiggins v. Industrial Accident Board, 54 Mont. 335, 170 Pac. 9 (1918) (no notice that metals such as iron and steel possess properties which perceptibly attract lightning and enhance the danger from lightning).

13. Pound, Interpretations of Legal History 1 (1923).

14. Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag"*, 21 Minn. L. Rev. 671 (1936).

15. Flacks, *Evidential Value of Blood Tests to Prove Non-Paternity*, 21 A.B.A.J. 680 (1935) citing Landsteiner, Zentralb. f. Bakteriol., Parasitenk. u. Infektionshrank. (1900). In 1930 Landsteiner received the Noble Prize for medicine for his contributions in the field of serology.

16. Seeger and Schaefer, *Blood Grouping*, 45 Am. J. Dis. Child. 999 (1933).

17. Agglutinogen: "The agglutinable substance present in bacteria which, when introduced into the animal body, stimulates the latter to form agglutinin." Dorland, Illustrated American Medical Dictionary.

he called "A" and "B"; a given blood might contain both A and B, either separately, or neither. Corresponding to the "agglutinogens" in the cells he postulated the presence of "agglutinins" [18] "a" and "b" in the serum. When an agglutinogen (A) is present in an individual's blood, the agglutinin of the corresponding letter (a) is absent in the serum. Agglutination (clumping) occurs through interaction of agglutinogen with agglutinin of the same letter. To illustrate, if the blood of an A person (containing b agglutinin) is mixed with blood from a B individual (containing a agglutinin) clumping occurs. The chart below will reveal the properties of each individual group.[19]

CHART I [20]

International nomenclature	Cells (agglutinogen)	Serum (agglutinin)
O	-----	a & b
A	A	b
B	B	a
AB	A&B	-----

Subsequent investigation by von Dungern and Herschfeld proved fruitful, for in 1910 they discovered that blood-groupings followed Mendel's law of inheritance, with agglutinogens A and B being inherited as Mendelian dominants.[21] Later in 1925, Bernstein established that agglutinogen O was the Mendelian recessive.[22] By applying the law of inheritance it was established that: (1) a group O parent cannot have a group AB child, (2) a parent whose blood group is AB cannot have a group O child, (3) a child cannot have either agglutinogen A or agglutinogen B in his blood unless one or both of the parents have that agglutinogen in his or her blood. Chart II reveals the application of these principles to the ten possible mating combinations.

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18. Agglutinin: "An antibody found in an immune serum which when added to a homogeneous suspension of its specific micro-organism causes such a change that the organisms adhere to one another and thus form clumps." Dorland, Illustrated American Medical Dictionary.

19. Boyd, *Protecting tthe Evidentiary Value of Blood Group Determinations*, 16 So. Cal. L. Rev. 193 (1943), chart modified from one appearing on p. 195.

20. The interrelation of the blood groups in performing blood transfusions is as follows: (1) type O can receive blood from type O, and can give blood to all types; (2) type A can receive blood from types A and O, and give to types A and AB; (3) type B can receive blood from types B and O, and can give to types B and AB: (4) type AB can receive blood from all types, and can give to type AB only.

21. Flacks, *Evidential Value of Blood Tests to Prove Non-Paternity*, 21 A.B.A.J. 680 (1935); Wiener, *Genetics and the Law*, 8 St. John's L. Rev. 70 (1933).

22. Note, 21 Journal of Immunology 261 (1931).

CHART II [23]

Parents' groups	Possible children	Impossible children
O x O	O	A, B, AB
O x A	O, A	B, AB
O x B	O, B	A, AB
A x A	O, A	B, AB
A x B	O, A, B, AB	none
B x B	O, B	A, AB
AB x O	A, B	O, AB
AB x A	A, B, AB	O
AB x A	A, B, AB	O
AB x AB	A, B, AB	O

Chart II above reveals the possible and impossible children from two known parental blood groups. Through the process of deduction it is a simple matter to determine from the known blood groups of the mother and child the possible and impossible fathers. Chart III presents the male exclusionary possibilities.

CHART III

Mother's group	Child's group	Exclude as a father, group
O, A, B	O	AB
AB	AB	O
A	AB	A, O
B	AB	B, O
B	A	O
O	A	B, O
A	B	O
O	B	A, O
A	A	No group impossible
B	B	No group impossible

It should be borne in mind that in a paternity suit if the alleged father possesses the same type of blood as the true father, the blood-grouping tests cannot prove non-paternity. To illustrate, assume that the true father and the alleged father are both type B, the known mother O and the child B, it is evident (see Chart II) that the alleged father *could* be the parent. But this is *not* proof that the alleged father is the true parent, for the result would be the same with every man with type B blood. If, however, in the instant illustration, the alleged father was type A, the combination would be impossible. Thus the test operates to prove non-paternity. Since the percentage of each blood group in the population has been determined,[24] the chances of the test pro-

23. Wiener, *Determination of Non-Paternity by Means of Blood Groups*, 186 Am. Jour. Med. Sci. 257 (1933).

24. Muehlberger & Inbau, *The Scientific and Legal Application of Blood Grouping Tests*, 27 Jour. of Crim. L. & Criminology 578, 582 (1937) "In the United States, about 45% of the population falls into Group O, 42% into Group A, 10% into Group B, and 3% into Group AB."

ducing a negative result can be reasonably calculated. Through the sole application of the A-B-O classification the chances of exclusion are about 1 in 7.[25]

The likelihood of ascertaining non-paternity was doubled with the discovery in 1927 by Landsteiner and Levine of two additional agglutinogens called M and N.[26] The M-N classification is wholly independent of the A-B-O classification, with which it differs in certain respects. Human blood contains either agglutinogen M, agglutinogen N, or both , but unlike the A-B-O grouping, there is never an absence of both M and N in the human blood. It was discovered that: (1) a child cannot have either agglutinogen M or agglutinogen N in his blood unless one or both the parents has that agglutinogen in his or her blood, (2) it is impossible for an M parent to have an N child, or an N parent to have an M child.[27] Chart IV summarizes these rules in application to the six possible matings.

CHART IV [28]

Parents' groups	Possible children	Impossible children
M x M	M	N, MN
M x N	MN	M, N
N x N	N	M, MN
MN x M	M, MN	N
MN x N	N, MN	M
MN x MN	M, N, MN	None

The M-N test, like the A-B-O classification, cannot prove non-paternity in all cases due to the possibility that the alleged father and true father may possess the same blood types. But by using both the A-B-O and M-N tests, the chance of excluding paternity in the case of a wrongly accused man is raised from 1 in 7 to 1 in 3.[29]

The rhesus blood factor was discovered in 1940 by Landsteiner and Wiener.[30] This discovery was gained through the immunization

25. Hooker & Boyd, *Blood-Grouping as a Test of Non-Paternity*, 25 Jour. of Crim. L. & Criminology 187, 202 (1934).

26. Landsteiner & Levine, *Heredity of Agglutinogens M and N*, 21 Journal of Immunology 157 (1931), citing the original articles by Landsteiner and Levine.

27. *Ibid.*

28. Muehlberger & Inbau, *The Scientific and Legal Application of Blood Grouping Tests*, 27 Jour. of Crim. L. & Criminology 578, chart modified from one appearing on p.584.

29. Landsteiner & Levine, *Heredity of Agglutinogens M and N*, 21 Journal of Immunology 157 (1931); Hooker & Boyd, *Blood-Grouping as a Test of Non-Paternity*. 25 Jour. of Crim. L. & Criminology 187 1934) (article reveals method of determining mathematical possibilities).

30. Wiener, Recent Developments in the Knowledge of the Rh-Hr Blood Types; Tests for Rh Sensitization (1946); Wiener, *Application of the Rh Blood Types and Hr factor in Disputed Parentage*, 31 Jour. Lab. & Clin. Medicine 575 (1946).

of rabbits and guinea-pigs with blood from the rhesus monkey and mixing the anti-serums obtained with the blood to be tested. Through the use of this anti-serum, every person can be classified as Rh positive and Rh negative.[31] Anti-serums, prepared by immunizing human volunteers, made it possible to detect three Rh factors in human blood, Rh_0, rh', and rh". The anti-Rh_0 serum detects the presence of factor Rh_0 and separates all blood into Rh_0-negative and Rh_0-positive. Anti-rh' and anti-rh" serums detect their respective groups, thereby separating blood into four types. When tests were made with all three of the Rh anti-serums, the human blood could be subdivided into eight types. The subsequent discovery of the Hr blood factor, with its attending anti-serum, facilitated the discovery of the twelve Rh-Hr blood groupings. Detailed charts have been devised which contain all possible Rh-Hr mating combinations and list the blood types of children which are excluded.[32]

Since the Rh-Hr classification is independent of the A-B-O and the M-N classifications, when used with the latter two tests it increases the chances that the alleged father may be excluded from 1 out of 3 to over 1 out of 2.[33] It is important to understand that if any one of the three tests indicate an impossible combination, non-parentage is proved, even though the other tests record a possible combination. Although the test will never become 100% operative, it has become less and less likely that the alleged father and the true father will have the same types. The discovery of new agglutinogens will, of course, greatly increase exclusionary probabilities, but all is for nought unless our courts accept and correctly apply these tests.

Judicial Status of Blood-Grouping Tests

In innumerable instances the full import of a scientific discovery is only appraised by the distant observer. Through early judicial recognition of blood tests, the European countries assumed the role of the astute "distant observer." Within five years after the first reported case in 1924, over 5,500 cases were collected in which European courts accepted blood-grouping tests as unanswer-

31. Wiener, Recent Developments in the Knowledge of Rh-Hr. Blood Types; Tests for Rh Sensitization, p. 9 (1946) (The Rh positive and the Rh negative classification has received much publicity recently. In some cases, where the father is Rh positive and the mother is Rh negative, the blood of the mother may be incompatible with the blood of the child. The child could develop progressive anemia, resulting in stillbirth. In milder cases the baby is born alive and can be saved by transfusion with Rh negative blood.).

32. *Id.* at 2.

33. See note 30 *supra.*

able proof of non-paternity,[34] and such tests were compulsory in every affiliation case.[35] In contrast, the first reported American decision, *Commonwealth v. Zammarelli*,[36] did not appear until 1931. Zammarelli was granted a new trial after conviction on an indictment charging bastardy; the ground for new trial was that the verdict was against the weight of the evidence, where evidence of blood tests excluding paternity was admitted and uncontradicted. The court was not disposed to determine whether the blood tests should be accorded "ordinary" or "conclusive" evidential weight. From the advent of the *Zammarelli* case to the present day courts in numerous jurisdictions have been beset by the following questions:

(1) In absence of statute does a court have power to compel submission to blood tests?

(2) Are the results of tests admissable in evidence?

(3) If so, what weight is to be given this evidence?

Apparently at common law the courts did not have the power to order a party in a civil action to submit to a physical examination.[37] Today the common law rule has been generally abrogated; the majority of states have given the courts this power to be exercised through judicial discretion.[38] The taking of blood-grouping tests has been held to come within the physical examination rule.[39] Eight states have removed the question by enacting statutes which specifically empower the courts to compel these tests.[40] Other courts have reached the same result by taking judicial notice of the principles underlying the blood tests.[41]

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34. Note, 186 Am. J. Med. Sc. 257 (1933).

35. See Schoch, *Determination of Paternity by Blood-Grouping Tests: The European Experience*, 16 So. Cal. L. Rev. 177 (1943); Hyman & Snyder, *The Use of the Blood Tests for Disputed Paternity in the Courts of Ohio*, 2 Ohio St. L. Jour. 203 (1936).

36. 17 Pa. D. & C. 229 (1931).

37. Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891) (court stated p. 252: "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow.").

38. Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940) (based on Fed. R. Civ. P. 35a which provides for a medical examination when physical condition is an issue): State v. Damm, 64 S.D. 309, 266 N.W. 667 (1936); Johnston v. Southern Pac. R.R., 150 Cal. 535, 89 Pac. 348 (1907).

39. State v. Damm, 64 S.D. 309, 266 N.W. 667 (1936); Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937); Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931).

40. Me. Rev. Stat. c. 153 §34 (1944); Md. Ann. Code Gen. Laws art. 12 §17 (Flack, Supp. 1947); N.J. Stat. Ann. §2:99-3,4 (Supp. 1946); N.Y. Civ. Prac. Act §306 (a) (1939), N.Y. Dom. Rel. Law §126 (a) (1935), N.Y. Crim. Code §684 (a) (1938), Dom. Rel. Act of the City of N.Y. §34 (1942); N.C. Gen. Stat. §49-7 (Michie. Supp. 1945); Ohio Gen. Code Ann. §12122-1,2 (Page, Supp. 1950); S.D. Code §36.0602 (1939); Wis. Stat. §166.105, 323.23 (Brossard, 1943).

41. Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937); Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931). *But cf.* Commonwealth v. Morris, 22 Pa. D. & C. 111 (1934); Commonwealth v. English, 123 Pa. Super. 318, 186 Atl. 298 (1936) (in both cases courts refused to take judicial notice, stressed lack of statutory authority).

Most courts hold that the results of blood tests are admissible in evidence where they show non-paternity.[42] If the tests indicate possible parentage the results are inadmissible.[43] Here again the result was accomplished through statutory enactment[44] or judicial notice.[45]

The most frequent objection voiced against compulsory blood tests and their admission into evidence has been the violation of the privilege against self-incrimination.[46] A few courts have held that the privilege extends to acts as well as words, but the majority of the courts recognize a distinction between testimonial evidence and real evidence (herein the submission of the person and his blood) and accordingly hold that the privilege is applicable to testimonial evidence only.[47] Mr. Justice Hughes, in noting the distinction, stated:

> "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 extort communications from him, not an exclusion of his body as evidence when it may be material." [48]

The principal problem is what weight should be accorded these tests when they are held to be admissible. Nearly all jurisdictions place no more weight on blood tests than on other evidence,[49] *e.g.*, evidence that defendant had sexual intercourse with complainant. The fact that certain states have enacted statutes compelling submission to blood tests has had no effect on this issue, for none of the statutes go beyond allowing the tests to be made and admitted in evidence. No statute expressly states what evidentiary weight should be accorded blood-grouping tests.[50]

Perhaps the best-known American case on the weight of blood test evidence is *Arais v. Kalensnikoff*.[51] The facts of this case are

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42. Williams v. State, 143 Fla. 826, 197 So. 562 (1940); *In re* Swahn's Will, 158 Misc. 17, 285 N.Y. Supp. 234 (1936); Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937); State v. Wright, 59 Ohio App. 191, 17 N.E.2d 428 (1938).

43. Dunbar v. Dunbar, 77 N.Y.S.2d 586 (N.Y. Dom. Rel. ct. 1948).

44. See note 40 *supra*.

45. See note 41 *supra*.

46. *E.g.*, U.S. Const. Amend. V, "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."; N.D. Const. Art I, Sec. 13.

47. Holt v. United States, 218 U.S. 245 (1910); McFarland v. United States, 150 F.2d 593 (D.C. Cir. 1945); Davis v. State, 189 Md. 640, 57 A.2d 289 (1947); 8 Wigmore. Evidence §§2263, 2265 (3rd ed. 1940). *Contra:* Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (1940) (ordering party to submit to blood test would violate constitutional right to personal privacy and security). Subsequently overruled by Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950).

48. Holt v. United States, 218 U.S. 245, 252 (1910).

49. State v. Holod, 63 Ohio App. 16, 24 N.E.2d 962 (1939); State v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944); Harding v. Harding, 22 N.Y.S.2d 810 (N.Y. Dom. Rel. Ct. 1940); Berry v. Chaplin, 74 Cal.App.2d 652, 169 P.2d 442 (1946).

50. See note 40 *supra*.

51. 10 Cal.2d 428, 74 P.2d 1043 (1937).

unique. The plaintiff was a young Spanish woman who could speak no English, while the defendant was a seventy year old Russian who likewise spoke no English. In the action to determine the paternity of an illegitimate child, plaintiff testified that since separation from her husband she had had sexual intercourse only with the Defendant. Defendant denied that he had ever had intercourse with the plaintiff, and further testified that he had in fact been impotent for a number of years. The defendant's wife also testified as to her husband's impotency. The court, with the consent of the plaintiff, appointed a physician who made blood tests. The physician testified that on the basis of his findings the defendant could not be the child's father.[52] Irrespective of this evidence, the trial court found the defendant to be the father. The verdict was based upon testimony showing that Defendant had frequently taken the child to a playground and had purchased groceries for the plaintiff. The California district court of appeals, taking judicial notice of blood-groupings and their results, reversed the verdict, stating that a "finding of fact, based solely upon testimony of a witness contrary to a scientific fact will be set aside by this court on appeal as not supported by substantial evidence."[53] Unfortunately, upon further appeal, the California Supreme Court reinstated the trial court's verdict against the defendant.[54] The court reasoned that testimony based on blood tests is expert testimony and that the law makes no distinction between expert and other testimony. Furthermore, no evidence is deemed conclusive unless it is specifically made so by the Code of Civil Procedure, and if there should exist a conflict between the scientific testimony and other evidence, the jury or trial judge must determine the relative weight of the evidence. The *Arais* case has been severely criticised.[55] The critics have vociferously maintained that the statute providing that no evidence shall be conclusive unless so declared by the code did not prevent the court from taking judicial notice of a fact within the laws of nature.[56] The opinion failed to discuss the application of the judicial notice statute to the facts before the court.

52. The results of the blood tests disclosed: (1) Plaintiff type O, (2) Defendant type O, (3) Child type B. (see Chart III, *ante.*, which lists exclusions).

53. Arais v. Kalensnikoff, 89 Cal. Dec. 537, 67 P.2d 1059, 1060 (1937).

54. See note 51 *supra.*

55. Britt, *Blood-Grouping Tests and more "Cultural Lag,"* 22 Minn. L. Rev. 836, 839 (1938) "This is probably the best instance to date of an absurd result in a paternity case."; Note, 26 Calif. L. Rev. 456 (1938).

56. Cal. Code Civ. Proc. §1978, "No evidence is by law made conclusive or unanswerable, unless so declared by this code."; §1875, "Courts take judicial notice of the following facts: . . . 8. The laws of nature, the measure of time, and the geographical divisions and political history of the world."

Berry v. Chaplin [57] dashed the hopes of legal critics that the wrath leveled against the *Arais* case would result in overruling the latter decision. Joan Berry, plaintiff, testified to acts of sexual intercourse with the defendant Charles Chaplin at or about the time the child, Carol Ann, had been conceived. The trial court admitted the blood-grouping results made by three physicians which proved that Chaplin could not be the father of the child.[58] The jury found that Chaplin was the father of the child and the District Court of Appeal affirmed the finding squarely on the precedent of the *Arais* case.

In 1951, *Hill v. Johnson* [59] reaffirmed the precedent established in the *Arais* case. Plaintiff, a minor, brought suit by his mother as guardian ad litem against Defendant for support. The defendant answered denying paternity. Testimony revealed that during the time when the plaintiff was allegedly conceived Mrs. Hill was living with her husband. Blood tests were taken of the plaintiff, Mr. and Mrs. Hill, and the defendant, the results showing that Mr. Hill could not have been the father of the plaintiff.[60] On appeal, the verdict for plaintiff was reversed, the court stating:

> "Evidence of the result of a blood test is to be considered with all other evidence in the case and is not conclusive. It was error to admit the evidence since it is contrary to the conclusive presumption of legitimacy." [61]

The end result was that the court declared Mr. Hill the father of the Plaintiff, and he was duly bound to support a child he could not have fathered.

The aforementioned cases are illustrative of absurdities in the law, not solely confined to California, for other jurisdictions have adopted the same reluctance in admitting exclusionary results as conclusive proof of non-paternity.[62] Fortunately, inroads have been established toward the eventual abolition of this judicial barrier. The most notable departure from the majority view, and at present the only contrary holding by a court of last resort, is the Maine case of *Jordan v. Mace*.[63] Mace, the respondent in a bastardy action, was found by the jury to be the father of twins.[64] In rever-

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57. 74 Cal. App. 2d 652, 169 P.2d 442 (1946).
58. The results of the blood tests disclosed: (1) Plaintiff type A, (2) Defendant type O, (3) Child type B. (See Chart III, *ante.*).
59. 102 Cal.App.2d 94, 226 P.2d 655 (1951).
60. The results of the blood test disclosed: (1) Plaintiff (minor) type B, (2) Mr. Hill type O, (3) Mrs. Hill type O, (4) Defendant type B, (see Chart III, *ante.*).
61. Hill v. Johnson, 102 Cal.App.2d 94, 226 P.2d 655, 656 (1951).
62. See note 49 *supra.*
63. 144 Me. 367, 69 A.2d 670 (1949).
64. The results of the blood tests disclosed: (1) Plaintiff type M, (2) Defendant type N, (3) Child No. 1 type M, (4) Child No. 2 type MN. (see Chart IV, *ante.*).

sing, the court recognized the conclusiveness of the evidence by stating:

> "The jury has the duty to determine if the conditions existed which made the biological law operative. That is to say, were the tests properly made? If so made, the exclusion of the respondent as father of one child follows irresistibly." [65]

Due to the total absence of reliable evidence to support a finding that the results were inaccurate, the non-paternity of Mace was established.

The decision of *Jordan v. Mace,* although without square precedent, is not without support from other jurisdictions, notably New York. In 1940, *Harding v. Harding* declared: "the law makes no distinction between expert testimony and evidence and medical testimony is no exception." [66] Yet, within a short span of two years a New York court, granting a divorce where blood tests excluded the plaintiff husband as the father of the defendant's child, stated:

> "To deny the plaintiff a decree in this action would be tantamount to a holding by this Court either that the testimony of Dr. - - - was not worthy of belief or that the procedure for a blood test . . . is futile in so far as having any probative value is concerned . . . this Court feels justified in giving the testimony of the Doctor full weight." [67]

In 1947, the Domestic Relations Court of New York City, sitting without a jury, admitted the testimony of Dr. Wiener as to the exclusion of respondent through application of the Rh-Hr blood test and ruled that non-paternity was established.[68] Subsequent decisions have recognized blood tests establishing non-paternity as conclusive evidence.[69] But in each instance the court was afforded medical witnesses who testified as to the methods adopted, precautions taken to insure accuracy, and the scientific basis for their findings. Failure to produce medical testimony to substantiate blood test results has been a ground for new trial.[70]

Originally the New Jersey statute granting the court power to order any party litigant in a paternity suit to submit to a blood test was declared an unconstitutional "invasion of the right of personal privacy." [71] Ten years later in *Anthony v. Anthony* [72] the court stated that to order blood-grouping tests would not infringe

65. Jordon v. Mace, 144 Me. 367, 69 A.2d 670, 672 (1949).
66. 22 N.Y.S.2d 810, 821 (N.Y. Dom. Rel. Ct. 1940).
67. Schulze v. Schulze, 35 N.Y.S.2d 218, 220 (Sup. Ct. Monroe Co. 1942).
68. Saks v. Saks, 71 N.Y.S.2d 797 (N.Y. Dom. Rel. Ct. 1947).
69. Cuneo v. Cuneo, 96 N.Y.S.2d 899 (Sup. Ct. N.Y. Co. 1950); "C," v. "C", 200 Misc. 631, 109 N.Y.S.2d 276 (1951); Clark v. Rysedorph, 118 N.Y.S.2d 103 (App. Div. 3d Dept. 1952).
70. Comm'r of Welfare v. Costonie, 277 App. Div. 90, 97 N.Y.S.2d 804 (1950).
71. Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80, 91 (1940).
72. Anthony v. Anthony, 9 N.J. Super. 411, 74 A.2d 919 (1950).

upon the right of privacy; in fact, to deny an application for compulsory tests, in the absence of any reason, was declared an abuse of judicial discretion.[73] The question of evidential weight was answered within the past year when a lower New Jersey court held that tests indicating definite exclusion were conclusive proof of non-paternity.[74]

Legislation Existing and Recommended

To date, seven states (Maine, Maryland, New Jersey, North Carolina, Ohio, South Dakota and Wisconsin) have adopted blood grouping statutes patterned after the original New York enactment of 1935.[75] The text of the New York statute, after two amendments reads as follows:[76]

> "Wherever it shall be relevant to the prosecution or defense of an action, the court, by order, shall direct any party to the action and the child of any such party and the person involved in the controversy to submit to one or more blood grouping tests, the specimens for the purpose to be collected and the tests to be made by duly qualified physicians and under such restrictions and directions, as to the court or judge shall seem proper. Whenever such test is ordered and made, the results thereof shall be receivable in evidence only where definite exclusion is established. The order for such blood grouping tests may also direct that the testimony of such experts and of the persons so examined may be taken by deposition pursuant to this article."

Each state statute is similar in that it is mandatory for the court to order blood tests upon the defendant's motion. In addition, only conclusive results are admissible in evidence. The dissimilarities that exist are insignificant. In Wisconsin "any duly qualified person, or persons" as distinguished from a "physician" may make the tests. Ohio, New Jersey, New York and North Carolina permit the courts to determine how and by whom the cost of the tests will be paid, while in Maryland and Wisconsin the county assumes the expense. The defendant must pay for the blood tests in Maine, but in South Dakota no mention of costs appears in the statute.

The National Conference of Commissioners on Uniform State Laws, during its annual conference in September, 1952, approved and recommended for nation-wide enactment the "Uniform Act

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73. Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950).
74. Ross v. Marx, 21 N.J. Super. 95, 90 A.2d 545 (1952).
75. See note 40 *supra*.
76. N.Y. Civ. Prac. Act §306 (a) (1939).

on Blood Tests to Determine Paternity".[77] The more pertinent provisions are as follows:

"Section 1. *Authority for Test.* In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

Section 2. *Selection of Experts.* The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the Court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court .

Section 3. *Compensation of Expert Witnesses.* The comsation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order . . . .

Section 4. *Effect of Test Results.* If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence. If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the frequency of the blood type.[78]

Section 5. *Effect on Presumption of Legitimacy.* The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child.

Section 6. *Applicability to Criminal Actions.* This act shall apply to criminal cases subject to the following limitations and

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77. Copies of this Act can be obtained by writing, National Conference of Commissioners on Uniform State Laws, 1419 First Nat'l. Bank Bldg., Omaha 2, Nebr.

78. Note the distinction between the last sentence of the Uniform Act and state statutes which provide that results of blood tests are receivable in evidence only where definite exclusion is established. Querie: Would admission of inconclusive evidence produce a prejudicial effect toward the defendant which would outweigh the evidence's probative value?

provisions; (a) An order for the tests shall be made only upon application of a party or on the court's initiative; . . .

This act met with the approval of the American Bar Association at its meeting on September 19, 1952.

CONCLUSION

In each bastardy action there exist two seemingly irreconcilable socio-legal goals. On the one hand is the interest of the state in the welfare of the innocent child. Conversely there is the basic right of each individual to a just and fair determination of guilt or innocence. It is unfortunate that emotional factors are prevalent which thwart any attempt to insure the proper perspective. Invariably the sympathies of the jury are with the woman whose child lacks a father to support it, and against the alleged father who has usually had sexual intercourse with the complainant. To admit sexual relations establishes a presumption of paternity in minds of many jurymen. Yet the same individuals will fail to recognize that in charging the defendant with paternity the mother can hide instances of other intimate indiscretions. As Professor Britt so aptly stated:

> "A decision can easily rest on sympathy for a particular woman, or it can rest on addiction to the vague symbols of "Womanhood" and "Mother". The judge and jury may hear how a poor, innocent girl was taken advantage of by a hard, cruel man. He is a rascal, they may say, even to be accused in this affair—make him pay!" [79]

In view of the inherent difficulty which an innocent man has in disproving parentage, a rule that in face of established scientific proof the court or jury may reach a contrary result seems wholly unjustified.

By this writer's count, the Supreme Court of North Dakota has decided twenty-five bastardy cases on appeal from decisions on the merits. In no instance has the blood test problem arisen; nevertheless the results of the twenty-five decisions afford an interesting ratio. Seventeen Supreme Court cases affirmed judgment for the plaintiff,[80] six ordered a trial *de novo*,[81] while only one deci-

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79. Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag"*, 21 Minn. L. Rev. 671, 699 (1936).

80. State v. Peoples, 9 N.D. 146, 82 N.W. 749 (1900); State v. Carroll, 13 N.D. 383, 101 N.W. 317 (1904); State v. Brander, 21 N.D. 310, 130 N.W. 941 (1911); State v. Banik, 21 N.D. 417, 131 N.W. 262 (1911); State v. Goetz, 21 N.D. 569, 131 N.W. 514 (1911); State v. Hiertz, 41 N.D. 55, 170 N.W. 118 (1918); State v. Fucks, 48 N.D. 730, 186 N.W. 752 (1922); State v. Southall, 50 N.D. 723, 197 N.W. 866 (1924); State v. Fury, 53 N.D. 333, 205 N.W. 877 (1925); State v. McKay, 54 N.D. 801, 211 N.W. 435 (1926); State v. Sukut, 55 N.D. 417, 213 N.W. 961 (1927); State v. Jongula, 55 N.D. 580, 214 N.W. 855 (1927); State v. Probst, 56

sion affirmed judgment for defendant."[82] Whether this one-sided ratio is indicative of district court cases not appealed is mere speculation, but the futility in appealing a decision is readily apparent. Without the aid of blood tests any attempt to refute a bastardy charge in court is so difficult that an out-of-court settlement is often more advantageous, both to the defendant's finances and his reputation. Certainly the infrequency of bastardy proceedings in North Dakota does not justify judicial and legislative inertia. The defendant in a bastardy action should not be denied the right to submit competent scientific evidence in his defense. To effect a remedy the Legislature should pass the Uniform Act *in toto*.

WILLIAM E. PORTER

CONSTITUTIONAL LAW — SEPARATION OF POWERS — CURRENT PROPOSALS TO LIMIT INTERNATIONAL COMPACTS BY THE UNITED STATES GOVERNMENT.—The American Bar Association recently recommended to the Congress the adoption of a constitutional amendment to the effect that treaties could become effective as internal law "only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty." [1] Designed, according to its sponsors, to ward off the danger that basic constitutional principles might be subverted by the use of the federal government's treaty-making powers, the proposal has provoked wide-spread controversy. Its opponents charge that it amounts to a drastic curtailment of the federal government's freedom of action on the international scene, and that it is unnecessary in view of well-settled principles of constitutional law.

Following the meeting at which this resolution was passed, the ABA's Standing Committee on Peace and Law Through United Nations took up the study of executive agreements. The Committee has since proposed that the American Bar Association recommend to Congress the following amendment to the Constitution:

N.D. 316, 216 N.W. 576 (1927); State v. Luithle, 57 N.D. 316, 221 N.W. 885 (1928); State v. Anderson, 58 N.D. 721, 227 N.W. 220 (1929); State v. Rudy, 62 N.D. 403, 244 N.W. 28 (1932); State v. Hollinger, 69 N.D. 363, 287 N.W. 225 (1939).

81. State v. Burnette, 28 N.D. 539, 150 N.W. 271 (1914), State v. Sibla, 46 N.D. 337, 179 N.W. 656 (1920); State v. Weber, 49 N.D. 325, 191 N.W. 610 (1922); State v. Kvenmoen, 60 N.D. 60, 232 N.W. 475 (1930); Weisser v. Preszler, 62 N.D. 75, 241 N.W. 505 (1932); State v. Muldoon, 64 N.D. 564, 254 N.W. 475 (1934).

82. State v. McKnight, 7 N.D. 444, 75 N.W. 790 (1898).

1. The full text of the proposed amendment is as follows: "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty." 76 A.B.A. Rep. 7 (1952) (Report of Standing Committee on Peace and Law Through United Nations).