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# Evidence--Admissibility of the Results of Blood Tests in Bastardy Proceedings

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## CASE COMMENTS

EVIDENCE—ADMISSIBILITY OF THE RESULTS OF BLOOD TESTS IN BASTARDY PROCEEDINGS.—*P*'s attorney, in his opening statement, said that he would offer in evidence the results of a blood test which would show that *D*'s blood was in such a blood group as to make it possible for *D* to be the father of the child in question. An objection to this remark was overruled and an exception was taken. Later, the trial court ruled that such evidence was inadmissible. At the close of the trial, the court offered to instruct the jury to disregard the above remarks by *P*'s attorney, which instruction the counsel for *D* advised against. *Held,* that the action of counsel for *D* in advising the court not to give such instruction constituted a waiver of his objection. *State* ex rel. *Harrah v. Walker,* 74 S.E.2d 679 (W. Va. 1953).

The sole issue which confronted the court in the instant case was the question of waiver, and it expressly refused to rule on whether the results of blood-grouping tests are admissible in bastardy cases. The court, however, did quote from 20 AM. JUR., Evidence, § 352 to the effect that the result of such a test is admissible "upon an issue of paternity." This blanket phrase was left unqualified and was quoted with apparent approval.

The purpose of this comment, then, is to outline briefly the nature of the test and to review the recent cases on the question of its admissibility and on the related question of the weight to be accorded to it.

The blood-grouping test is conducted to establish paternity or nonpaternity. It is founded on two scientific truisms: first, all human blood may be classified into one of four groups: A, B, AB, or O; and second, no gene will appear in the blood of the progeny that was not present in the blood of one of its parents. To illustrate, consider a hypothetical case wherein the mother is type O and the child is type B. If the putative father is type O or A, his innocence is immediately established by operation of the second truism above. If the putative father is type B or AB, it is established, not that he is the father, but only that *someone* in one of those blood groups is the father. Thus, the test can definitely establish nonpaternity in a given case, but if it is used affirmatively, to show paternity, the field of inquiry as to the identity of the father is narrowed only to those millions of people with the same blood type. See, for an exhaustive treatment of the subject, 1 WIGMORE, EVIDENCE § 165b (3d ed. 1940).

In deference to this affirmative indecisiveness, the vast preponderance of the courts have admitted the results of such tests in evidence only to show nonpaternity, *Roberts v. Van Cleave,* 205 Okla. 319, 237 P.2d 892 (1951), although some courts admit the test as either affirmative or negative evidence of paternity. *Livermore v. Livermore,* 233 Iowa 1155, 11 N.W.2d 389 (1943). It would seem that the former view is preferable in that any consideration given by the jury to an affirmative finding would be without sufficient scientific foundation.

After the results of such test are admitted, the question arises as to whether a negative finding should be conclusive evidence of nonpaternity. Again, cases are found which impute conclusiveness to such a showing, *Jordan v. Mace,* 144 Me. 351, 69 A.2d 670 (1949), and others which hold that a negative result is only some evidence of nonpaternity. *State v. Morris,* 156 Ohio St. 333, 102 N.E.2d 450 (1951). The courts which adhere to the latter view generally maintain that such evidence is to be treated as expert opinion, in that the conclusions reached are based upon processes with which the layman is unfamiliar, and that paternity is not exclusively a subject for expert evidence. *Arais v. Kalensnikoff,* 10 Cal. 2d 457, 74 P.2d 1043 (1937).

Notwithstanding these latter arguments, it is suggested that the better view would treat a negative result as conclusive evidence of nonpaternity because of the scientific finality of such a determination. This, however, should be dependent upon a finding by the jury that the test was properly and efficiently conducted by an impartial expert. Too many people, in this age of scientific miracles, are prone to ascribe unquestioned infallibility to science and scientists, while, in fact, there was never such thing as an unerring man.

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TAXATION—CASH BASIS TO ACCRUAL BASIS—INVENTORY INCLUDED. —Action to recover federal income tax alleged to have been erroneously assessed. The taxpayer kept his books and reported his income, in which inventory was an income-producing factor, on a cash basis. Subsequent to 1946 the commissioner decided that the method used by the taxpayer in reporting his income did not properly reflect it; thereupon the commissioner calculated the income for that year upon an accrual basis, and assessed the taxpayer on that basis. *Held,* that the beginning inventory should also