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Evidence -- Blood Grouping Tests in Paternity Suits

All crimes involving the element of fraud[33] have been held to involve moral turpitude within the meaning of the deportation statute.[34] Fraud has been used as the test in determining whether lesser crimes involve moral turpitude.[35] State court decisions also show a unanimity of opinion that crimes tinged with fraud involve moral turpitude.[36] Since fraud against persons denotes moral turpitude,[37] *a fortiori* fraud against the government involves moral turpitude, "for such is malum in se, contrary to justice, honesty, principle and good morals."[38] Inasmuch as defrauding the government is found to be immoral, it is self-evident that conspiring to violate the revenue laws of the country involves moral turpitude.[39]

In a carefully written, analytical opinion, the Court judged the instant case upon the firmly imbedded touchstone of fraud. Accordingly, the alien was deported. The dissent presented many forceful and logical arguments against this result based chiefly upon the proposition that the phrase "crime involving moral turpitude" has no sufficiently definite meaning to be a constitutional[40] standard for deportation. Because of the penal nature[41] of deportation and the uncertainty of the phrase it is submitted that in the interest of uniformity and equal treatment before the law[42] Congress should set a more definite standard.

EVIDENCE—BLOOD GROUPING TESTS IN PATERNITY SUITS

Plaintiff, in a suit for support of herself and child, objected to defendant's motion for an order compelling a blood grouping test. By

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33. Maita v. Haff, *supra* note 18 (engaging in business of distiller of alcohol with intent to defraud the United States of tax); Guarneri v. Kessler, 98 F.2d 580 (5th Cir. 1938), *cert. denied*, 305 U.S. 648 (1939) (conspiring to smuggle alcohol into the United States with intent to defraud the government in violation of the Tariff Act of 1930); Mercer v. Lence, 96 F.2d 122 (10th Cir. 1938) (conspiring to defraud a person by deceit and falsehood); United States *ex rel.* Popoff v. Reimer, 79 F.2d 513 (12th Cir. 1935) (fraudulently aiding an alien not entitled to naturalization to obtain citizenship); United States *ex rel.* Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931) (forgery, since it involves an intent to defraud); United States *ex rel.* Medich v. Burmaster, 24 F.2d 57 (8th Cir. 1928) (concealing assets from trustee in bankruptcy); Ponzi v. Ward, 7 F. Supp. 736 (D. Mass. 1934) (using mails to defraud); United States *ex rel* Millard v. Tuttle, 46 F.2d 342 (E.D. La. 1930) (incumbering mortgaged property with intent to defraud); United States *ex rel.* Portada v. Day, 16 F.2d 328 (S.D. N.Y. 1926) (willful intent to defraud by issuance of check without funds under California law).

34. See note 1 *supra*.

35. *See* United States *ex rel.* Berlandi v. Reimer, 113 F.2d 429, 431 (2d Cir. 1940).

36. *See* Jordan v. De George, 71 Sup. Ct. 703, 706 n. 13 (1951).

37. United States *ex rel.* Medich v. Burmaster, *supra* note 33; United States *ex rel.* Millard v. Tuttle, *supra* note 33.

38. *See* United States *ex rel.* Berlandi v. Reimer, *supra* note 19 at 769.

39. United States *ex rel.* Berlandi v. Reimer, *supra* note 19.

40. The argument is that the statute is penal, and since it does not provide a definitely ascertainable standard, it is "void for vagueness" under the "due process clause," U. S. CONST. AMEND. V.

41. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948), *reversing* 162 F.2d 633 (9th Cir. 1947) (deportation is equivalent to banishment or exile).

42. As against citizens the alien suffers the additional penalty of deportation.

statute[1], a court may, in a civil suit where paternity is in issue, order any party and the child involved to submit to such a test, and receive the results thereof into evidence when they definitely exclude the alleged father as a possible father. The trial court's refusal to order a blood grouping test was reversed. *Held*, it is, in the absence of special circumstances, a substantial abuse of the trial court's judicial discretion to refuse to utilize this accepted tool of evidence whenever the issue of paternity is material. *Cortese v. Cortese*, 10 N.J.S. 152, 76 A.2d 717 (1950).

The performance of a blood grouping test[2] is governed by theory based on established laws of heredity,[3] and test results are universally accepted by scientific and medical authorities as conclusive proof of non-paternity.[4] Variations between the blood characteristics of the alleged father and those which would necessarily be in the blood of the actual father are the basis for a determination of non-paternity[5]. Therefore, as new characteristics are discovered, an increasing proportion of men can be excluded as the father of a given child.[6] The results of tests for the groupings now known will exonerate approximately one out of two men wrongly accused of paternity.[7] Since our courts admit evidence of the test results only when they prove non-paternity,[8] it is obviously advisable for any man being sued for the support of his alleged child to request that the tests be made.[9] It follows that such tests can only damage the position

1. N. J. STAT. ANN. § 2:99-4 (Cum. Supp. 1950).

2. "Blood grouping test" usually designates the determination of one or all of known blood characteristics, including: groups A, B, AB, O; types M, N, MN; and the Rh and Hr factors. See 46 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES Art. 9 pp. 887-98, 927-38, 969-92 (1946).

3. *Report of the Committee on Medicolegal Blood Grouping Tests*, 108 A.M.A.J. 2138, 2139 (1939): "Summary . . . laws of heredity:
1. The agglutinogens A and B cannot appear in the blood of a child unless present in the blood of one or both parents. 2. Individuals in groups AB cannot have children of group O, and group O individuals cannot have group AB children. * * * ". . . 1. The agglutinogens M and N cannot appear in the blood of a child unless present in the blood of one or both parents. 2. A type M parent cannot have a type N child and a type N parent cannot have a type M child, regardless of the type of the second parent." Keeffe and Bailey, *A Trial of Bastardy is a Trial of the Blood*, 34 CORNELL L. Q. 72, 75 (1948). "(1) Factors RH_0, rh', rh", and Hr cannot appear in the blood of a child unless present in the blood of one or both parents. (2) Parents of types Rh_1Rh_1 and rh'rh' cannot have children of types rh, Rh_0, Rh_2 or rh" and parents of types rh, Rh_0, Rh_2 or rh" cannot have children of Rh_1Rh_1 or rh'rh'."; SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 134-49 (2d ed. 1947); WIENER, BLOOD-GROUPS AND TRANSFUSIONS 161-97, 245-54 (3d ed. 1945).

4. Jordan v. Mace, 69 A.2d 670 (Me. 1949); Walker v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944); WIENER, *op. cit. supra* note 3; Wiener, *The Judicial Weight of Blood Grouping Tests Results*, 31 J. CRIM. L. & CRIMINOLOGY 523 (1941); 108 A.M.A.J. 2138 (1939); *cf.* Shanks v. State, 185 Md. 437, 45 A.2d 85 (1945) (quoting SCHATKIN, *op. cit. supra* note 3, at 225 [c. 8 The Unerring Accuracy of Blood Tests]).

5. See note 3 *supra*.

6. SCHATKIN, *op. cit. supra* note 3, at 158; Keeffe and Bailey, *supra* note 3, at 75.

7. See WIENER, *op. cit. supra* note 3, at 385 (disputed maternity, as interchange in hospitals, solution in over 40% of the cases).

8. *E.g.*, Jordan v. Mace, *supra* note 4; Statutes, *infra* note 28. *But see* 63 HARV. L. REV. 1271, 1272 (1950) (suggesting they be admitted to show probability in some cases).

9. *But cf.* Wollock v. Brigham, 72 S. D. 278, 33 N.W.2d 285 (1948) (wife mistakenly thought tests *proved* paternity).

of the woman,[10] who may otherwise have a good case based on circumstantial evidence;[11] for that reason, she is always the party who resists them. Knowledge of the physical facts concerning the blood characteristics of those involved may, therefore, prove useful to an attorney preparing a disputed paternity case. These characteristics can be determined quickly and inexpensively by any reputable hospital or blood bank laboratory,[12] as is done for blood transfusions.

When the tests are voluntarily submitted to,[13] there seems no doubt that evidence of the blood groups of the parties will be accepted in the form of expert testimony.[14] However, when the mother refuses to submit herself and her child to the tests, a problem arises as to the power of the courts to secure this evidence by ordering that blood groupings be made.[15] A federal and some state courts[16] have found authority to order the tests by construing existing statutes[17] authorizing such physical examinations as are necessary, as for example those in personal injury cases. Other courts find inherent authority to ferret out the truth by drawing an analogy to fingerprinting and similar compulsions.[18] Objections to ordering the tests have ordinarily been based on some theory of constitutional privilege[19] such as that against self-incrimination.[20] Although this particular ground might otherwise have some validity,[21] there is authority indicating that the privilege against self-incrimination will be limited to

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10. *See* State v. Wright, 59 Ohio App. 191, 197, 17 N.E.2d 428, 431 (1938). See Waybright, *Florida's New Juvenile Court Act*, 6 MIAMI L. Q. 1 (1951).

11. See discussion, Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940) (married woman usually helped by restriction of testimony as to non-access and by presumption of legitimacy); Berry v. Chaplin, 74 Cal. App. 65, 169 P.2d 442 (1946) (exhibition of child to jury); SCHATKIN, *op. cit. supra* note 3, at 118-29 (evidence of resemblance).

12. Keeffe and Bailey, *supra* note 3, at 80 (transfusions). It should be remembered that an expert serologist's testimony would be required upon trial of the case. See SCHATKIN, *op. cit. supra* note 3, at 181-82.

13. See Berry v. Chaplin, *supra* note 11; State v. Wright, *supra* note 10.

14. *E.g.*, Walker v. Clark, *supra* note 4; WIGMORE, EVIDENCE §§ 26, 165a (3d ed. 1940).

15. See Comm. v. English, 123 Pa. Super. 161, 186 Atl. 298 (1936); Galton, *Blood-Grouping Tests and their Relationship to the Law*, 17 ORE. L. REV. 177 (1937); Lee, *Blood Tests for Paternity*, 12 A.B.A.J. 441 (1926); Maguire, *A Survey of Blood Group Decisions and Legislation in the American Law of Evidence*, 16 So. CALIF. L. REV. 161 (1943).

16. Beach v. Beach, *supra* note 11; *cf.* Camden & Suburban Ry. v. Stetson, 177 U.S. 172 (1900); Hayt v. Brewster & Co., 199 App. Div. 68, 189 N. Y. Supp. 907 (1921). See Lee, *supra* note 15.

17. *E.g.*, FED. R. CIV. P. 35(b).

18. Anthony v. Anthony, 9 N. J. Super. 411, 74 A.2d 919 (1950); State v. Damm, 64 S.D. 309, 266 N.W. 667 (1936); *cf.* State v. Wright, *supra* note 10; Galton, *supra* note 15, at 208.

19. See Maguire, *supra* note 15, at 168 *et seq.*

20. Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (1940).

21. Especially in criminal cases not involving paternity, *e.g.*, Shanks v. State, 185 Md. 437, 45 A.2d 85 (1945); or divorce cases whenever adultery is a crime, see 8 WIGMORE, EVIDENCE § 2257 (3d ed. 1940).

spoken evidence.[22] Other such theories as violation of the rights to privacy,[23] to freedom of the person,[24] and of due process[25] have definitely been rejected on grounds of public necessity.[26] A different objection, based on the presumption of legitimacy of a child born in wedlock, affords no valid basis for not ordering the tests, as the presumption is rebuttable.[27] A few states have statutes[28] which authorize the tests to be ordered by the trial court in either criminal[29] or civil[30] cases, or in both, upon motion of the defendant only,[31] or of any party.[32] Most of these statutes provide that refusal to submit to the tests may be disclosed to the jury.[33] Even under these statutes a trial court that refuses to order the tests is usually upheld on the constitutional theories discussed above,[34] or for failure to prove the evidentiary value of the requested tests.[35] However, such statutory authority has enabled the tests to be used quite freely in some jurisdictions.[36]

An even sharper conflict arises regarding the weight to be given the results of the tests, once admitted by whatever means.[37] These results are considered expert opinion testimony.[38] However, in some jurisdictions, without contradicting the doctrine that conclusions drawn from test results are only expert opinion, the courts have overruled verdicts contrary

22. Holt v. United States, 218 U.S. 245 (1910); State v. Galton, 60 Ohio App. 192, 20 N.E.2d 265 (1938); see WIGMORE, *op. cit. supra* note 21, at § 2265; 24 MICH. L. REV. 617 (1926).

23. See Maguire, *supra* note 15, at 168; 23 VA. L. REV. 450, 455 (1937).

24. *See* Comm. v. English, *supra* note 15, at 171, 300.

25. *Cf.* Buck v. Bell, 274 U.S. 200 (1927) (sterilization for insanity); Jacobson v. Mass., 197 U.S. 11 (1905) (vaccination).

26. Anthony v. Anthony, *supra* note 18; Van Camp v. Welling, 6 Ohio Ops. 371 (1936).

27. Anthony v. Anthony, *supra* note 18; Walker v. Clark, *supra* note 4. *Contra,* Harding v. Harding, 122 N.Y.S.2d 810 (N.Y. Dom. Rel. Ct. 1940).

28. ME. REV. STAT. c. 153, § 34 (1944); MD. ANN. CODE GEN. LAWS art. 12, § 17 (Cum. Supp. 1947) N.C. GEN. STAT. ANN. § 8-50.1 (Cum. Supp. 1951); N.J. REV. STAT. § 2:99-3,4 (Cum. Supp. 1950); N.Y. CRIM. CODE § 684-2; N.Y. DOM. REL. LAW § 126-a; OHIO GEN. CODE ANN. § 12122-1, 2 (Supp. 1950); S.D. CODE § 36.0602 (1939); WIS. STAT. §§ 166.105, 325.23 (1949).

29. Maine, Maryland, New Jersey, New York, North Carolina, Ohio, South Dakota and Wisconsin.

30. New Jersey, New York, North Carolina, South Dakota and Wisconsin.

31. Maine, Maryland, New York and Ohio.

32. New Jersey, North Carolina, South Dakota and Wisconsin.

33. Except in New Jersey, New York, North Carolina, South Dakota and Wisconsin civil actions, where no alternative to submission is provided.

34. Bednarik v. Bednarik, *supra* note 20.

35. Harding v. Harding, *supra* note 27; Slovak v. Holod, 63 Ohio App. 16, 24 N.E.2d 962 (1939); *cf.* Comm. v. English, *supra* note 15; Dale v. Beckingham, 40 N.W.2d 45 (Iowa 1949).

36. Notably New York, see SCHATKIN, *op. cit. supra* note 3, at 225.

37. See discussion, Berry v. Chaplin, *supra* note 11; State v. Wright, *supra* note 10; State v. Damm, *supra* note 18; SCHATKIN, *op. cit. supra* note 3, at 184, "the weight of enlightened legal authority is in favor of according decisive evidentiary effect to reliably reported blood test exclusions . . . " (giving over two full pages of references to law reviews, *e.g.,* Wiener, *supra* note 4).

38. Jordan v. Davis, 57 A.2d 209 (Me. 1948); Berry v. Chaplin, *supra* note 11; Walker v. Clark, *supra* note 4; Slovak v. Holod, *supra* note 35; 1 WIGMORE, EVIDENCE § 165a (3d ed. 1940).

to them, on the ground that the findings were against the weight of the evidence.[39] Thus some courts have, in effect, granted the test results more weight than ordinary expert opinion. As yet, no trial court has made the tests so conclusive as to either order a directed verdict based on their results[40] or expressly limit investigation to the accuracy and skillfulness employed in determining them.[41]

The jurisdiction in which the instant case was decided presents a good example of the wavering path toward complete legal acceptance of blood grouping tests. Even with a precedent for accepting established scientific evidence,[42] and a model statute empowering the trial judge to order the tests,[43] its first reported case, *Bednarik v. Bednarik*,[44] refused to order them. That decision was mainly based on a case decided on self-incrimination which had been virtually overruled[45] and on a constitutional clause,[46] such as is found in most states, prohibiting violations of privacy. Yet when New Jersey's courts were again confronted with the problem ten years later, the tests were ordered under almost identical facts.[47] In the instant case the same constitutional privileges were advanced in plaintiff's brief, and, although they were waived on oral argument, the court made a point of rejecting them completely, and of disapproving the *Bednarik* case.[48] The court did not sustain plaintiff's refusal to submit, because these tests may afford the assistance which a citizen has the duty to furnish the courts in ascertaining truth.[49] The statute was construed as empowering a court to enforce obedience.[50] Although this statute uses permissive terms, this case limits the discretion thus permitted to special circumstances, as when it is proved that the tests would endanger plaintiff's health or that competent technicians are not available.[51]

Thus, blood grouping tests are made virtually mandatory in New Jersey, since such special circumstances almost never occur. Although the court refused to rule on whether the tests would be deemed con-

39. Jordan v. Mace, *supra* note 4; Saks v. Saks, 71 N.Y.S.2d 797 (N.Y. Dom. Rel. Ct. 1947); State v. Wright, *supra* note 10; Comm. v. Visocki, 23 Pa. D. & C. 103 (1935); *accord*, Euclide v. State, 231 Wis. 616, 286 N.W. 3 (1939).

40. See Keeffe and Bailey, *supra* note 3, at 80; Comment, 1950 WASH. U. L. Q. 443. *But cf.* Saks v. Saks, *supra* note 39 (court sitting without a jury held unchallenged test results to be controlling).

41. *Cf.* State v. Hunter, 4 N.J. Super. 531, 68 A.2d 274 (1949).

42. As was done in State v. Hunter, *supra* note 41; State v. Carciello, 86 N.J.L. 309, 90 Atl. 1112 (1914).

43. N.J. STAT. ANN. § 2:99-4 (Cum. Supp. 1950).

44. 18 N.J. Misc. 633, 16 A.2d. 80 (1940. *But see* SCHATKIN, *op. cit. supra*, at 196 (that from 1939 to 1943 ninety tests were made in New Jersey under court order and the twelve exclusions shown were all accepted by the courts as conclusive, citing a personal communication from Dr. Levine).

45. State v. Height, 117 Iowa 650, 91 N.W. 955 (1902).

46. N.J. CONST. Art. 1, par. 1.

47. Anthony v. Anthony, *supra* note 18.

48. Cortese v. Cortese, 10 N.J.S. 152, 76 A.2d 717, 720 (1950).

49. *Id.* at 721.

50. *Ibid.*

51. *Id.* at 720.

clusive evidence of non-paternity, the wording of its decision should serve to discourage results contrary to the tests. It is submitted that enactment of model statutes such as the one involved here would assist other enlightened courts in rendering similiarly laudable decisions.

GAMING — FUNDS SEIZED BY THE STATE

Defendants, sheriff and his deputies, raided plaintiffs' games and took the monies from the gambling tables as evidence. Plaintiffs pleaded guilty to gambling, paid their fines and brought this suit to recover the monies taken. A prayer by the county for forfeiture was consolidated with this suit. The trial court denied recovery, and also found a forfeiture contrary to statute.[1] On appeal, denial of plaintiffs' right to recover was affirmed. *Held*, the courts will neither aid any party whose claim is grounded in an illegal contract or purpose, even though the suit is against one not a party thereto, nor direct the ultimate disposition of the seized monies in face of a statute not allowing forfeiture. *Lee On v. Long*, 234 P.2d 9 (Cal. 1951).

Since abolition of the early common law forfeiture of all property by conviction for a felony,[2] the courts never have considered that a plaintiff lost all his rights to the use of the courts for matters not connected with his past illegal activity.[3] Although a violator must suffer his penalties, he is otherwise under the protection of the law and can demand all its remedies.[4] However, the courts have steadfastly refused to aid any plaintiff to enforce an illegal contract or purpose either as against the other party to the wrong,[5] or against one not a party where the action is necessarily founded in such a contract or purpose.[6] The conflict in the decisions seems to arise over the question: when is the action founded in the illegality of the contract or purpose? An action is not founded in the illegality if the plaintiff's pleading establishes a prima facie case without mentioning the illegal con-

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1. CAL. PEN. CODE § 2604 (1949): "No conviction of any person for crime works any forfeiture of any property except in cases in which a forfeiture is expressly imposed by law . . . ."

2. Attainder, which includes corruption of blood, forfeiture and loss of civil rights, is not known in modern law. *See* Howard v. State, 28 Ariz. 433, 434, 237 Pac. 203, 204 (1925).

3. E.g., Connoly v. Union Sewer Pipe Co., 184 U.S. 540 (1901); Cook v. Ball, 144 F.2d 423 (7th Cir. 1944), *cert. denied*, 323 U.S. 761 (1945).

4. Welch v. Wesson, 71 Mass. (6 Gray) 505 (1856).

5. E.g., McMullen v. Hoffman, 174 U.S. 639 (1899); RESTATEMENT, CONTRACTS, § 598 (1932). This broad principle, based on the maxim *in pari delicto potior est conditis defendentis et possidentis*, is claimed to have originated from the decision of "The Highwayman's Case", Everet v. Williams (1725), noted in 9 L. Q. REV. 197 (1893) (an accounting between highwaymen). "The vice of a maxim is that sometimes lawyers and judges are apt to seize on it to govern cases to which if more critically examined it should not be applied." *In re* Brown's Estate, 147 Kan. 395, 399, 76 P.2d 857, 860 (1938).

6. E.g., Ingersoll v. Coal Creek Co., 117 Tenn. 263, 98 S.W. 178 (1906). *Contra:* Matta v. Katsoulas, 192 Wis. 212, 212 N.W. 261 (1927).