1938

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BLOOD-GROUPING TESTS AND MORE
"CULTURAL LAG"

By Steuart Henderson Britt

Why are American courts and legislatures slow to accept valid scientific principles? Why have certain facts been accepted by scientists, but not by judges and legislators?

These questions were raised last year in a discussion of the usefulness of blood-grouping tests to prove non-parentage. It was pointed out specifically that, although blood-grouping tests can never affirmatively fix parentage on a person, they may exonerate that person. In fact, it is now possible to detect 33 per cent of all false accusations of paternity. The tests will either answer "No" or else will give no answer at all. However, in spite of the tens of thousands of bloods which have been examined, which fully corroborate the laws of heredity of both the A-B and the M-N tests, there has been a genuine "cultural lag" in the acceptance of these tests by the courts.

Seemingly only a few scattered courts have understood the principles of blood-grouping at all. Many judges have balked at the notion of compelling a person to furnish a drop or two of his blood. Certain Pennsylvania courts were afraid to act without definite authority from the legislature. The supreme court of South Dakota, even after becoming convinced in 1936 of the validity of blood-grouping principles, still would not allow the defendant to avail himself of the tests. The disastrous effects are shown even more clearly in three 1934 New York cases; only

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BLOOD-GROUPING TESTS through two years of remedial legislation was the situation corrected in New York.

Two situations of the past year again focus attention on the problem of "time lag" as related to the blood-grouping tests for non-parentage: (1) the history of the recent California case of Arais v. Kalensnikoff; (2) the failure of enactment of blood-grouping laws which were proposed in several state legislatures.

(1) Arais v. Kalensnikoff is probably the most flagrant example thus far of what may happen when a court is blinded to scientific truths because of emotional factors. The case arose in the superior court of Los Angeles, and was tried by the judge without a jury. Mr. Louis Kalensnikoff, a Russian 70 years old, was charged by Mrs. Daniela Arais, a Spanish woman, with being the father of her illegitimate daughter, Elsie Arais, who was four years old at the time of the trial. Mrs. Arais testified through an interpreter that she had been married twice, that she was separated from her second husband, and that since the time of this separation she had not had sexual intercourse with any other man than the defendant. The defendant, who also testified through an interpreter, denied that he had ever had sexual intercourse with the plaintiff; and both he and his wife testified that he had been impotent for a number of years.

At the defendant's request and with the plaintiff's consent, blood-grouping tests were made of the plaintiff, of her daughter Elsie, and of the defendant. The tests showed that both the plaintiff and defendant belonged to Group O, and the child to Group B. According to such a grouping, it was impossible for the defendant to be the father of this child. In spite of this evidence from an eminent Los Angeles physician, the trial court "found" that Mr. Kalensnikoff was the father of the plaintiff's child.

On May 5, 1937, the district court of appeal, second appellate district, reversed the trial court. Judge McComb's statement may be pointed to with pride: "In passing, our research discloses that the blood-grouping test requires only a few drops of


Several writers noted the favorable outcome, but their enthusiasm was short-lived.

The supreme court of California granted a hearing, and on December 27 handed down an opinion holding that "there is ample evidence to support the finding of parentage." Here is a case where sympathy for the poor mother and her child apparently outweighs all other considerations. Mr. Justice Edmonds, who wrote the opinion, practically dismisses the blood-grouping evidence with a wave of the hand. The emotional factors were probably too much for the court to bear:

"The mother of the child testified that she met the defendant in November, 1930, and at his request moved to a different house for which he paid rent and bought the furniture and equipment; 'furnished everything I needed to keep myself and children.' The defendant, she said, came to her home at least twice a week during the next three years, and had frequent relations with her. The child was born in November, 1932. She testified that after the birth of the child, 'I quit my job at the restaurant at defendant's request and upon his promise to support me.' Thereafter, she moved to another location. The defendant, she said, 'continued to pay my rent and support me. He usually brought groceries with him when he came. He arranged at the store . . . to let me have groceries or anything I needed on his credit. . . . This arrangement . . . continued until in February, 1936, when defendant refused to support me any more or support Elsie. . . . When defendant came to see me after the baby was born he would hold it and later when she was older he would take her to the playground. He always brought something for the baby. Later he took the baby and had her picture taken. . . . Before the baby was born defendant asked me not to say that he was the father of the child but to use another name. He said he would support the child and make a nice home for her.'"

The court also was impressed by the testimony of witnesses that they had often seen the defendant at Mrs. Arais's home, fre-
quently bringing a basket or bundle with him, that they had often seen him carrying the baby from the house, and that he had said that he was the baby's father. The nurse who cared for the mother at the birth of the child also testified that the defendant had paid her for her work, and had bought groceries and clothing for the baby; and a grocer testified that he had supplied the mother with food for about two years, commencing early in 1934, at the request of the defendant, who always paid the bills.

The defendant's testimony was contradictory. He testified that he was never at the home of the mother, never had had any relations with her, that he gave her no groceries or furniture, and "did not know her." Yet he also said that "at one time" he felt sorry for the plaintiff and told the grocer to give her some food. Even if his testimony had been fairly convincing, its effectiveness was most certainly offset by the damaging statements of Mrs. Arais (visible symbol of motherhood), and by the neighbors, the nurse, and the grocer (symbols of good substantial citizens).

With scientific evidence available, however, the court's decision should never have rested on matters of verbal testimony. The blood-grouping evidence showed an exclusion of the defendant from possible parentage of the child in question. Even though the relations of the plaintiff and the defendant may have been suspect, the one fact stands out—Louis Kalensnikoff could not possibly be the father of Elsie Arais. In spite of this evidence, the supreme court of California forced the defendant to recognize some other man's child as his own, and to support it. In fact, on January 25, 1938, the court even denied a petition for rehearing.

This is probably the best instance to date of an absurd result in a paternity case. The word "best" is used in the same sense that a physician might say that he had just seen the best compound fracture of an arm that he had ever witnessed. There is, however, one difference. The physician, having seen the "best" fracture yet, does something about the fracture. In the case of


14A A lawyer who read this manuscript writes: "My only doubt about the California case is whether the court might not have had its doubts as to the doctor's being a reputable physician of standing. One difficulty about expert testimony is the fact, of which the courts are well aware, that the medical profession has its own housecleaning problems, as well as ours." The answer is, of course, that the court might have ordered additional blood-grouping tests by physicians whom it considered more reputable. 15Arais v. Kalensnikoff, (1938) 95 Calif. Decisions 45.
Mr. Kalensnikoff, nothing can be done about the fracture. The law has taken its course—the "law" here probably consisting of sympathy for Mrs. Arais, plus enough legal lore written into the opinion of the court to make its decision look respectable.

Although this may at present appear to be just a simple fracture, it may turn out to be a compound fracture and, therefore, even more serious. If the doctrine of stare decisis is followed in the next case of this type which arises in California, the unjust result can already be predicted. The doctrine of stare decisis was followed just this blindly in the New York case of Thomson v. Elliott, sixth a filiation case; the court refused an order for blood-grouping tests, simply relying on the earlier New York case of Beuschel v. Manowitz.

With scientific blood-grouping evidence available which may be conclusive to prove non-parentage, shall we continue to see other judges behave in the same way as the judges of the California supreme court? A recent Massachusetts opinion illustrates the unenlightened state of knowledge of another court. The presumption still obtains in Massachusetts that a child born in wedlock is legitimate. In discussing this presumption in Commonwealth v. Kitchen, the court said,

"It is, however, established in this Commonwealth that this presumption can be overcome only by proof that the husband of the mother was impotent... or by proof that he had no access to her during the time when, according to the course of nature, he could be the father of the child."

The idea apparently never occurred to the court that blood-grouping tests might be introduced as evidence bearing on the presumption of legitimacy.

(2) The situation is not limited to the courts. The legislatures are also at fault. Although blood-grouping tests have been used by scientists for a great many years, only two states, New York and Wisconsin, have laws which specifically grant power to the courts to order blood-grouping tests in parentage disputes. Blood-
grouping bills have been presented during the past year to the California, Illinois, Montana, New Jersey, and Texas Legislatures, and efforts have been made in the same direction in Maryland, Massachusetts, and Michigan. Yet not one of the proposed bills was enacted into law. The “cultural lag” is indeed great.

In the meantime, what do lawyers and scientists do about the situation? Some write elaborately documented articles for law reviews and other scholarly publications. When an article on this same subject was prepared by the present writer last year, dozens of such articles were cited, all that could be found. Numerous others have appeared since. More will undoubtedly follow—here is one such. All this bombardment of articles may give emotional satisfaction to their authors, but, considering the fact that the articles will simply be bound and then stood on end in dusty li-


21It may be noted that Judge Eugene V. Holland did order blood-tests in a bastardy case in the Domestic Relations Court of Chicago (People of Illinois ex rel. Downey v. Davis). The results of the tests were negative, that is, showed no exclusion; on subsequent argument the results were excluded from the evidence, and the defendant was convicted on the trial apart from the tests.

braries, they scarcely can be expected to have much effect either on judges or legislators.

What, then, should lawyers do about the situation? The only intelligent solution is to bring pressure for the passage of adequate blood-grouping legislation in every jurisdiction. Either the New York or the Wisconsin statutes on the subject serve as excellent models; in fact, they have been specifically recommended for copying by a special committee of the House of Delegates of the American Medical Association.\(^2\)

Here is something worthy of the consideration of state bar associations, of the American Bar Association, and of the National Lawyers Guild. Here is a matter for serious thought and action.