

Domestic Relations - Massachusetts Joins States Holding Blood Grouping Tests Conclusive in Paternity Suits - *Commonwealth v. D'Avella*, 162 N.E.2d 19 (Mass.,1959)

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regulating the order of challenges to a juror.³⁰ Where such a statute is in effect, it is mandatory; the court exercises its discretion only in the absence of statutory regulation.³¹

The *Nail* case has expressly reversed a long line of Arkansas decisions regarding the right to peremptorily challenge an accepted juror, and appears to be in definite conflict with the view in most states that it is error to allow such a challenge when the defendant has exhausted his peremptory challenges.

The order in which peremptory challenges are exercised is more important than it seems. Assume a particular juror is so offensive that both sides would not hesitate to peremptorily challenge him. If the state must challenge first, the defendant has saved himself a challenge. Repeat this for a number of jurors, and we see that the order in which the challenges must be exercised has its advantages and disadvantages. Further, where the peremptory challenges are exhausted on one side, to allow such a challenge by the opposite side after he has accepted the juror could conceivably work a hardship, if not injustice, on that party.

It will be interesting to note if the *Nail* majority opinion will have any effect on the discretionary powers of the trial courts in states where the order of challenges is not mandatory by statute. The possible effect will be even more important in cases where the defendant *has exhausted* his peremptory challenges and the court will be faced with precisely the same problem.

³⁰ Ark. Stat. (1947) c.19, § 43-1914 provides: "When challenges taken.—It must be taken before he is sworn in chief, but the court, for a good cause, may permit it to be made at any time *before the jury is completed.*" (emphasis supplied). Ark. Stat. (1947) c.19, § 43-1924 provides: "Order of challenges.—The challenge to the juror shall first be made by the State and then by the defendant, and the State must exhaust her challenges to each particular juror before such juror is passed to the defendant for challenge or acceptance."

³¹ *State v. Ferguson*, 187 La. 869, 175 So. 603 (1937); *People v. Grieco*, 266 N.Y. 48, 193 N.E. 634 (1934) cites similar statute in N.Y. Code, Crim. Proc. § 385 which provides: "Challenges to an individual juror must be taken first by the people, then by the defendant." Accord: *People v. Hamlin*, 192 N.Y.S.2d 870 (1959).

DOMESTIC RELATIONS—MASSACHUSETTS JOINS STATES HOLDING BLOOD GROUPING TESTS CONCLUSIVE IN PATERNITY SUITS

In a criminal proceeding on complaint charging the defendant with begetting complainant with child, evidence was introduced showing that the defendant had intercourse with complainant during the probable period of conception and that the defendant had suggested a name for the child. A blood grouping test was made. The test excluded the de-

defendant as the father of the child. The commonwealth conceded that the tests were properly made by a qualified expert. The Supreme Judicial Court of Massachusetts reversed the district court's finding of guilty on the basis that where a properly administered blood test excludes the defendant as the father, the defendant is entitled to a finding in his favor *as a matter of law*. *Commonwealth v. D'Avella*, 162 N.E.2d 19 (Mass., 1959).¹

The blood groups are simply inherited and known with certainty at birth or soon thereafter. They retain their character throughout life, unchanged by climate, disease, age or by any other environmental or genetical agency. Regardless of the time between blood grouping tests or which expert performs the tests the results are the same. They are objective.²

Because of the scientific certainty of blood tests most of the states either by judicial decision³ or by statute⁴ allow the results of the tests to be admitted into evidence in actions concerning illegitimate children when they exclude the possibility of paternity. But in admitting the test

¹ The scope of this discussion is limited to the conclusiveness of the results of the blood tests when they exclude the possibility of paternity in actions concerning illegitimate children. It is not concerned with the tests when they support a finding of paternity.

² Race and Sangers, *Blood Groups in Man*, p. 310 (2d ed., 1954).

³ The following jurisdictions by judicial decision admit the results of the blood tests to exclude paternity: District of Columbia, *Beach v. Beach*, 114 F.2d 479 (C.A. D.C., 1940); Iowa, *Livermore v. Livermore*, 233 Iowa 1155, 11 N.W.2d 389 (1943); New York, *U.S. v. Shaughnessy*, 115 F.Supp. 302 (S.D.N.Y., 1953); Oklahoma, *Roberts v. Van Cleave*, 205 Okla. 319, 237 P.2d 892 (1951); South Dakota, *State v. Damm*, 64 S.D. 309, 266 N.W. 667 (1936); Vermont, *Pomainville v. Bicknell*, 118 Vt. 328, 109 A.2d 342 (1954). But Louisiana, in *Williams v. Williams*, 230 La. 1, 87 So.2d 707 (1956), held that the tests were not admissible. The court held they would not be admissible until the legislature passed a statute making them admissible.

⁴ The following states have statutes making the exclusionary test results admissible and conclusive: California, *West's Ann. Cal. Codes, Code Civil Proc. §§ 1980.1 to 1980.7* (Supp., 1959); Illinois, *Ill. Rev. Stat. (1959) c. 106½, §§ 1 to 7*; Michigan, *Mich. Stat. Ann. § 25.474* (Supp., 1954); New Hampshire, *N.H. Rev. Stat. Ann., c. 522, §§ 1 to 10* (Supp., 1957); Oregon, *Ore. Rev. Stat. (1959) § 109.258*; Utah, *Utah Code Ann. (1959) c. 78, §§ 25-18 to 25-23*; Wisconsin, *West's Wis. Stat. Ann. § 325.23* (1959 Supp.). The following states have statutes making the exclusionary test results admissible. They are silent as to the weight to be given the test results: Arkansas, *Ark. Stat. Ann., c. 34 §§ 705.1 to 705.3* (1960 Supp.); Colorado, *Colo. Rev. Stat., c. 52, §§ 1 to 7* (1957 Supp.); Indiana, *Burns Indiana Statutes, c. 33, § 658* (1959 Supp.); Maine, *Me. Rev. Stat., c. 166, § 34* (1959 Supp.); Maryland, *Md. Ann. Code, Art. 12, § 20* (1959 Supp.); Massachusetts, *Mass. Ann. Laws, c. 273, § 12A* (1959 Supp.); Nevada, *Nev. Rev. Stat., § 56.010* (1959); New Jersey, *N.J. Stat. Ann., c. 2A, §§ 83-2 to 83-3* (1959 Supp.); New York, *McKinney Consol. Laws of N.Y. Ann., Dom. Rel. § 126-A* (1959 Supp.); Pennsylvania, *Purdon's Pa. Stat. Ann., c. 28, § 306* (1958 Supp.); West Virginia, *W.Va. Code, c. 58, § 4776(1) (8)* (1959 Supp.).

results, the majority of the states have left the question of how much weight will be given this evidence unanswered.

Historically, the question of paternity has been a question for the trier of facts. This was left undisturbed in the initial rulings of the American courts of last resort. The Supreme Court of California, in *Arais v. Kalensnikoff*,⁵ was the first high court to consider whether the results of the blood test were conclusive if they established non-paternity.⁶ This court held that the blood tests were *not* conclusive on the issue of non-paternity. In reaching this decision it was reasoned that where there is a conflict between scientific testimony and the testimony as to facts, the trial court or jury has the duty to determine the relative weight of the evidence. As a result of this line of reasoning juries frequently seemed to apply their subjective rules of thumb in determining the paternity of the child: If the alleged father can adequately support the child he is the father;⁷ if the alleged father and the mother are married it is better to compel the husband to support the child of another man's adulterous relations with the husband's wife than to bastardize that child;⁸ and the witticism of the negotiable instruments law, that when the maker cannot be found the last known subsequent endorser is held liable, is applied.

The unfortunate consequences of the *Arais* case were demonstrated nine years later in the highly publicized case of *Berry v. Chaplin*.⁹ A California appellate court, conceding that the testimony of the complainant was in part "unique" and "extraordinary,"¹⁰ that the blood tests excluded

⁵ 10 Cal.2d 428, 74 P.2d 1043 (1937).

⁶ In *Commonwealth v. Zammailli*, 17 Pa. Dist. & Co. 229 (1931), the court granted a new trial because the jury's verdict contrary to the results of an unchallenged blood test was against the weight of the evidence. In *Spencer v. Spencer*, 53 Dolph Co. Ct. (Pa.) 241 (1942) the court held that the blood test was conclusive. These were lower court cases.

⁷ E.g., *Berry v. Chaplin*, 74 Cal.App.2d 652, 169 P.2d 442 (1946). Although Miss Berry's testimony was unique and extraordinary as to her relations with other men, and the blood tests showed Chaplin could not be the father, the jury found that Chaplin, a wealthy man, was the father.

⁸ E.g., *Hill v. Johnson*, 102 Cal.App.2d 94, 226 P.2d 655 (1951). Plaintiff testified that the defendant and not her husband was the father of her child. The blood tests excluded the husband but not the defendant. The jury found against the defendant but, on appeal, the court reversed on the grounds that the blood tests were not conclusive and that the presumption of legitimacy, when the husband has access to his wife, was conclusive. See *Prochnow v. Prochnow*, 274 Wis. 491, 80 N.W.2d 278 (1957).

⁹ 74 Cal.App.2d 652, 169 P.2d 442 (1946).

¹⁰ *Ibid.*, at 450. The defendant argued that the particular sexual relation in which the child was to have been conceived as described by the plaintiff was unbelievable. The court said: "Quaint though the episode may appear, the jury presumably composed of experienced persons, must have believed her statements, and merely because the incident as described may have been unique and extraordinary an appellate court will not say that her testimony is incredible."

the putative father, and that the scientific law of blood groupings is unquestioned, nevertheless ruled it could not upset the jury's finding for complainant because of the California Supreme Court's decision in the *Arais* case.

*Jordan v. Davis*¹¹ presented the question of the conclusiveness of the blood tests to the Supreme Court of Maine. The court stated that the tests were not conclusive on the issue of non-paternity as a matter of law. This was based on the reasoning that the jury may find that there has been some error in the handling of the blood or serum or some mistake in the conclusions reached.

Vermont in *Pomainville v. Bicknell*¹² followed the reasoning in the *Davis* case but the court emphasized the fact that the person who made the tests was not called as a witness to testify as to the manner in which the tests were conducted.

The New York,¹³ New Jersey,¹⁴ New Hampshire,¹⁵ Ohio,¹⁶ Pennsylvania¹⁷ and Wisconsin¹⁸ courts followed the *Arais* decision and held that the results of the blood grouping tests were not conclusive. The statutes of these states made the results of the blood tests admissible in evidence, but they were silent as to the weight to be given this evidence. The courts viewed this to mean the tests were not intended to be conclusive. Secondly, the courts felt the tests might not be properly made. Hence the conflict between scientific testimony and testimony of the facts was left to be decided by the trier of the facts.

In *Williams v. Williams*¹⁹ the Louisiana court ruled that the tests were not even admissible. It felt that the admissibility and the weight of the blood tests was for the legislature to decide.

Because the juries were in many cases apparently ignoring the results of the blood tests, the courts adopting the view that the exclusionary results of the blood tests are conclusive are growing in number. This trend started with *Jordan v. Mace*²⁰ in 1949. One year after its decision

¹¹ 143 Me. 185, 57 A.2d 209 (1948).

¹² 118 Vt. 330, 109 A.2d 342 (1954).

¹³ *Harding v. Harding*, 22 N.Y.S.2d 810 (1940) affirmed without opinion in 261 App. Div. 924, 25 N.Y.S.2d 525 (1941).

¹⁴ *Ross v. Marx*, 24 N.J. Super, 25, 93 A.2d 597 (1952).

¹⁵ *Groulx v. Groulx*, 98 N.H. 481, 103 A.2d 188 (1954).

¹⁶ *State v. Clark*, 144 Ohio St. 305, 58 N.E.2d 773 (1944); *State v. Holad*, 63 Ohio App. 16, 24 N.E.2d 962 (1939).

¹⁷ *Commonwealth v. Wright*, 178 Pa. Super. 181, 113 A.2d 724 (1955).

¹⁸ *Prochnow v. Prochnow*, 274 Wis. 491, 80 N.W.2d 278 (1957).

¹⁹ 230 La. 1, 87 So.2d 707 (1956).

²⁰ 144 Me. 351, 69 A.2d 670, (1949). "If the jury found that the results of the blood grouping tests were inaccurate, such finding must have been based on mere conjecture or understandable sympathy for the complainant. . . . Such finding is not supported by any believable evidence in the record." *Ibid.*, at 673.

in the *Davis* case, the Maine court was again faced with the weight to be given the results of the blood tests. This time the Supreme Court held that the *Davis* case was not authority for the proposition that the jury can give as much weight as it may desire to biological laws, but that it supports the proposition that the jury has a duty to determine if the tests were properly made. If the evidence shows the tests were properly made, the exclusion of the defendant as the father is conclusive.

The New York appellate court in *Saks v. Saks*²¹ held the tests were not only admissible but conclusive. Several other lower courts also held that the tests were conclusive but in *Scalone v. Scalone*²² the Supreme Court of New York followed the *Arais* and *Davis* cases. The following year the Supreme Court in *C. v. C.*²³ reversed the ruling in the *Scalone* case and held the tests were conclusive when they established non-paternity. Since this case, it is felt that New York is in line with the Maine court in the *Mace* case.

In 1952 the Uniform Act on Blood Tests to Determine Paternity was approved by the National Conference of Commissioners on Uniform State Law and the American Bar Association. The preamble to the Act states:

If the negative fact is established it is evident that there is a great miscarriage of justice to permit juries to hold on the basis of oral testimony, passion or sympathy, that the person charged is the father and is responsible for the support of the child and other incidents of paternity.²⁴

The Uniform Act makes the results of the blood grouping tests conclusive when they exclude the putative father as the father if the tests are properly made.

In 1953 this Act was adopted in California,²⁵ thereby superseding the *Arais*, *Chaplin* and *Johnson* cases, in New Hampshire²⁶ and in Oregon.²⁷ Two years later Illinois adopted the Act in part.²⁸ The legislatures of Utah²⁹ and Michigan³⁰ also passed statutes making the results of the blood tests conclusive when they establish non-paternity. The same year the

²¹ 71 N.Y.S.2d 797 (1947).

²² 98 N.Y.S.2d 167 (1950).

²³ 109 N.Y.S.2d 276 (1951).

²⁴ Uniform Laws Annotated, Vol. 9, p. 102.

²⁵ West's Ann. Cal. Code, Code Civ. Proc. §§ 1980.1 to 1980.7 (1959 Supp.).

²⁶ N.H. Rev. Stat. Ann., c.522, §§ 1 to 10 (1959 Supp.).

²⁷ Ore. Rev. Stat. (1959) § 109.258.

²⁸ Ill. Rev. Stat. (1959) c. 106½, §§ 1 to 7.

²⁹ Utah Code Ann. (1959) c. 78, §§ 25-18 to 25-23.

³⁰ Mich. Stat. Ann., § 25.474 (1954 Supp.).

Wisconsin courts rendered their decision in *Prochnow v. Prochnow*³¹ the legislature made the blood tests conclusive if they establish non-paternity.³²

In the *D'Avella* case, the Massachusetts Supreme Court followed this trend. The court reasoned that the legislature passed their statute admitting the results of the blood tests in evidence because the tests were scientifically reliable. The court went on to say that to permit the jury to ignore these tests, would defeat the intention of the legislature. Since the results of the tests were not in dispute, it was decided, *as a matter of law*, that the defendant was excluded as the father.

Chart I shows that over the past ten years the weight of the American courts has shifted from the view that the results of the blood grouping tests are not conclusive to the view that they are conclusive.³³

Of the fifteen states which have decided the issue of conclusiveness of the blood tests which establish non-paternity, all but five have held the tests are conclusive. It should be noted that while Pennsylvania still holds that the tests are not conclusive, in two 1959 decisions³⁴ the Pennsylvania Supreme Court has granted new trials because the findings of paternity were against the weight of the evidence. In one of these cases all of the evidence except the blood tests showed paternity.

Vermont is at the same stage that Maine was in 1948. Since in the *Bicknell* case the court did give considerable weight to the fact that the method of making the tests was in doubt, as did the Maine court in the

³¹ 274 Wis. 491, 80 N.W.2d 278 (1957). In this case the husband was in service and his wife at home having an affair with another man. She later cohabited with her husband for one night. In the morning she told him she wanted a divorce. Eight months later she had a fully developed child. The blood tests excluded the husband as possible father. The jury found that the husband was the father. This decision was affirmed.

³² West's Wis. Stat. Ann., § 325.23 (1959 Supp.).

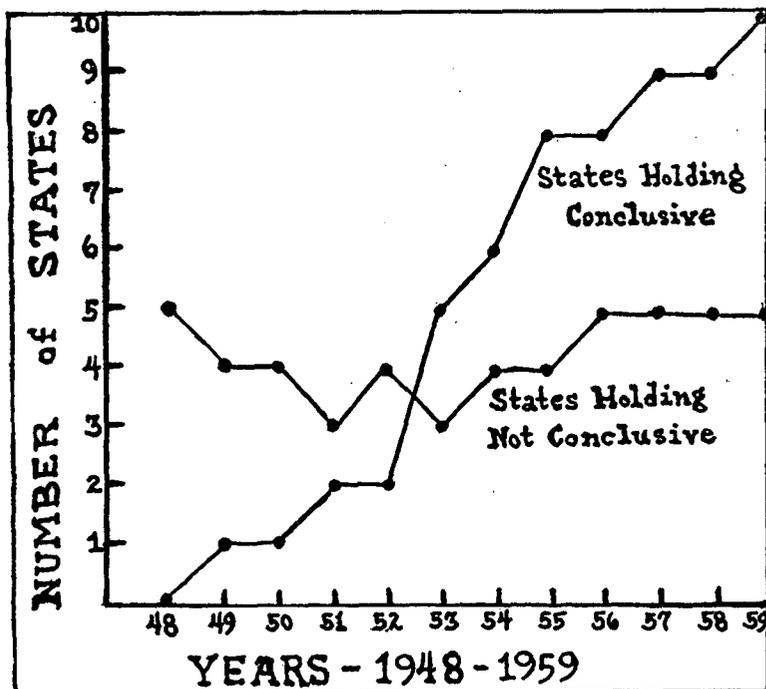
³³ The following is a chronological list of the developments shown on the graph: (1948) California, Maine, New York, Ohio and Pennsylvania held not conclusive; (1949) Maine conclusive by judicial decision; (1950) No change; (1951) New York finally settled as conclusive by judicial decision; (1952) New Jersey held not conclusive; (1953) California, New Hampshire and Oregon, conclusive by statute; (1954) Vermont held not conclusive, Michigan conclusive by statute; (1955) Utah, Illinois conclusive by statute; (1956) Louisiana held not conclusive; (1957) Wisconsin made conclusive by statute; (1958) No change; (1959) Massachusetts held conclusive by judicial decision.

In New Hampshire, the Groulx case was decided in 1954, one year after adopting the Uniform Act on Blood Tests. The court pointed out that the trial was before passage of the Act and hence it did not apply. In Wisconsin, the statute was passed the same year as the Prochnow decision. Therefore, neither of these states appear on Chart I as states holding tests not conclusive.

³⁴ *Commonwealth v. Coyle*, 154 A.2d 412 (Pa., 1959); *Commonwealth v. Gromo*, 154 A.2d 417 (Pa., 1959). In both of these cases Justice Ervin dissented in part. He felt that instead of granting a new trial the defendant should have been dismissed.

CHART I

THE TREND TOWARD ACCEPTANCE OF BLOOD GROUPING TESTS AS CONCLUSIVE



Davis case, it is probable that it will reverse itself when the question is again presented if the test is shown to have been properly given.

At the time the New Jersey court ruled that the tests were not conclusive, only two states were of the opinion that the tests were conclusive. In view of the acceptance of the tests in ten states as conclusive, it might follow its earlier dicta in *Cortese v. Cortese*³⁵ and hold the tests conclusive.

In Ohio the view that the blood tests are not conclusive is well settled, as it was in California before 1953. It will probably take a statute to change this court's stand.³⁶

The Louisiana court, in the *Williams* case, took a definite stand that it will not admit the tests into evidence until a statute admitting them is passed. The court also took this view as to the conclusiveness of the test results.

In the majority of American jurisdictions, the weight to be given the

³⁵ 10 N.J. Super. 152, 76 A.2d 717 (1950).

³⁶ But in *State v. Gray*, 145 N.E.2d 162 (Juv. Ct. Ohio, 1957), the court held that the tests were conclusive when they establish non-paternity.

test is still undecided. However, Maryland has indicated that it will follow the *Mace* case and give conclusive weight to blood tests in paternity cases. The court of appeals commented in *Shanks v. State*,³⁷ that in bastardy prosecutions: "[T]he non-scientific evidence is often quite unreliable and scientific evidence may be conclusive as to non-paternity."³⁸ Similarly, there was dicta in *Beach v. Beach*³⁹ that the District of Columbia will make the tests conclusive. The rule also was recognized in *United States v. Shaughnessy*.⁴⁰

In view of the stature of the states adopting the rule that the blood tests are conclusive to establish non-paternity if properly made, it seems to follow that the rest of the states likewise will follow this rule. But the question remains, will these states wait for decisions like the *Chaplin*, *Johnson* and *Prochnow* decisions before, either through their courts or their legislature, they adopt this rule.

³⁷ 185 Md. 437, 45 A.2d 85 (1945).

³⁸ *Ibid.*, at 449, 90.

³⁹ 114 F.2d 479 (C.A.D.C., 1940).

⁴⁰ 115 F.Supp. 302 (S.D.N.Y., 1953).

EQUITY—RESTRICTIVE COVENANT ON CHATTEL BINDING ON THIRD PARTY WITH NOTICE

Plaintiff, a dealer in damaged goods, agreed with a carrier not to permit fruit salad which had become frozen in transit to enter retail outlets under the original brand name label. The carrier notified the plaintiff that a violation of their agreement would result in a severance of further business relations with the carrier, one of its principal customers. The plaintiff then resold the goods to a third party. Subsequently, the defendant, a former employee of the plaintiff, who had participated in the transactions, purchased the goods from the third party and began their sale under the original brand name label without regard to the sales restriction imposed by the plaintiff. In affirming the decree granting an injunction, the court held that, having acquired the goods with the knowledge of the restriction on their resale in the containers with the original label, defendant was bound thereby. *Nadell & Co. v. Grasso*, 346 P.2d 505 (Cal. App., 1959).

Originally at common law, restraints on the alienation of property were considered void.¹ Equitable servitudes on realty binding subsequent purchasers with notice of the restrictions were first upheld in *Tulk v. Mox-*

¹ Coke's Institutes, Vol. 2, p. 21 (1836).