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Evidence - Statutory Rape - Right of Accused to Compulsory Blood Test of Prosecutrix and Child

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EVIDENCE—STATUTORY RAPE—RIGHT OF ACCUSED TO COMPULSORY BLOOD TEST OF PROSECUTRIX AND CHILD—Defendant was convicted of statutory rape on the strength of complaining witness' uncorroborated testimony. Testimony of the prosecutrix was to the effect that she had had sexual relations with defendant only once, that she had become pregnant and had given birth to a child prior to the trial, and that she had had sexual relations with no other men. Defendant moved for an order requiring that blood tests be taken of the child and the mother. The motion was denied. On appeal, *held,* affirmed. Assuming power, absent statute, to compel the taking of blood-grouping tests, the trial court did not err since defendant did not offer to submit himself to the test and without him the tests could prove nothing. Furthermore, the record did not reveal the date of birth, present existence of, or jurisdiction of the court over, the child. *State v. Eli,* (N.D. 1954) 62 N.W. (2d) 469.

"In one specific biological trait, viz. *blood-groups,* scientific opinion is now in accord in accepting the fact that there is a causative relation between the trait of the progenitor and the trait of the progeny."[1] However, "this trait can be used *only negatively, i.e.* to evidence that a particular man P is *not* the father of a particular child C."[2] The courts are not in accord as to the power to compel the taking of these tests. There seems to be sufficient authority recognizing judicial power, in civil cases, to compel the parties to submit to the ordinary type of physical examinations.[3] The South Dakota court recognized that a blood-grouping test may be ordered in an appropriate case although an order for such test was denied because of scientific uncertainty at that time.[4] A lower New York court also had no difficulty in recognizing such judicial power,[5] but this opinion was reversed by the appellate division.[6] An Ohio

[1] 1 WIGMORE, EVIDENCE, 3d ed., §165*a*, p. 610 (1940).

[2] Ibid.

[3] See 15 L.R.A. (n.s.) 663 (1908).

[4] State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933). See also 163 A.L.R. 939 at 943 (1946).

[5] Beuschel v. Monowitz, 151 Misc. 899, 271 N.Y.S. 277 (1934).

[6] 241 App. Div. 888 (1934). The court felt that such power was lacking since the child was not a party to the action (civil action for carnal abuse) and would not benefit from the test. This is a questionable conclusion since a witness is often not a party to the action. Appeal was denied on grounds of a non-final order. 265 N.Y. 509, 193 N.E. 295 (1934).

court, in ordering a blood test in a bastardy proceeding,[7] said, "The absence of statutory authority is not conclusive. On the other hand, the Legislature has not undertaken to limit the court in exercise of such power."[8] The Delaware Supreme Court affirmed the granting of a motion by a defendant accused of statutory rape to order a physical examination of the prosecuting witness,[9] and the same has been done by the Oklahoma court.[10] These decisions demonstrate an awareness of the necessity of obtaining and introducing evidence which bears on the truth.[11] If the state can subject witnesses to the inconvenience of attending trials in the first instance, it is strangely inconsistent to deny to it the right to elicit pertinent testimony by applying to them reasonable physical tests. Measures which are more drastic than blood extraction are often resorted to by courts, as when witnesses are jailed to avoid flight, or plaintiffs are physically examined in personal injury actions, or sensitivity tests are applied to plaintiffs claiming paralysis.[12] Despite these parallels, there is still a reluctance to utilize blood-grouping tests. Such indisposition on the part of the courts seems unwarranted. The test itself is harmless and virtually painless. A properly supervised blood test should easily surmount the constitutional barriers conjured up by its opponents.[13] One might expect that a court would welcome all useful evidence, especially in trials for rape, where the word of the complaining witness often constitutes the sole evidence for the state, and where a conviction may spell disaster for the defendant. The principal case epitomized the point. Had defendant's motion been granted, he might have succeeded in establishing non-paternity in direct contradiction to positive assertions by the prosecutrix. This, of itself, would not prove that defendant did not have sexual intercourse with prosecutrix, but it would serve to impeach her credibility very seriously. If the blood tests proved non-paternity, the jury

[7] State ex rel. Van Camp v. Welling, 22 Ohio L. Abs. 448, 3 Ohio Supp. 333 (1936).

[8] Id. at 450. Said the court, "It is our view that the granting of this order comes within the inherent power of the court." Ibid. The court felt the issue was procedural instead of substantive. See also State v. Damm, 64 S.D. 309 at 315, 266 N.W. 667 (1933): "It is our position that a statute can neither add to nor detract from the inherent powers of the court in such a matter."

[9] State v. Pucca, 20 Del. 71, 55 A. 831 (1902).

[10] Walker v. State, 12 Okla. Cr. 179, 153 P. 209 (1915). In State v. Driver, 88 W.Va. 479, 107 S.E. 189 (1921), the court expressed doubt as to the authority to compel an examination without the female's consent. Professor Wigmore has said that "the ruling is fundamentally unsound, and especially for cases of sexual offenses of any sort." 8 WIGMORE, EVIDENCE, 3d ed., 170n. (1940).

[11] See 8 WIGMORE, EVIDENCE, 3d ed., §2216 (1940).

[12] 23 N.Y. UNIV. L.Q. REV. 156 at 160 (1948). ". . . of the jurisdictions which have had the opportunity to pass upon the subject, (Calif., Conn., Fla., Me., Md., Mass., N.J., N.Y., Ohio, Pa., S.D., Wis., and the Dist. of Col.), only Penn. and N.Y. have refused to order the tests without a statute." Id. at 161. See Lee, "Blood Tests for Paternity," 12 A.B.A.J. 441 (1926).

[13] See generally, 8 WIGMORE, EVIDENCE, 3d ed., §§2194, 2216, 2220, 2265 (1940). See also Maguire, "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence," 16 So. CAL. L. REV. 161 (1943). But cf. Schock, "Determination of Paternity by Blood-Grouping Tests: The European Experience," 16 So. CAL. L. REV. 177 at 187 (1943).

would have good cause to question the reliability of prosecutrix' testimony, or, if the jury believed her testimony that she had engaged only once in sexual intercourse, and the blood tests proved non-paternity, then defendant would be acquitted. The court attempted to justify the denial of defendant's motion on very technical grounds, viz., that defendant did not offer himself to be tested, nor did he show the date of birth of the child or its present existence and jurisdictional status. Surely these determinations could have been made with ease had the appellate court been willing to face the real issue—whether the trial court had power to order the tests—and conclude it affirmatively. Such resort to technicalities on the part of an appellate court evidences a lack of desire to settle a very important issue.

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