

1943

## Current Notes

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## Current Notes

**Blood Grouping and Typing Tests in Affiliation Cases**—Mr. Sidney B. Schatkin, Assistant Corporation Council in Charge of Paternity Proceedings (Municipal Building, New York City), has sent us an interesting comment on the above subject. It is based upon two papers that were read at the 19th Annual Conference of Judges of Children's Courts of New York State, held in Auburn, N. Y., on Oct. 3, 1941.

One of these papers deals with the scientific aspect of the subject. It was written by Dr. Ernest Witebsky, Professor of Bacteriology and Immunology in the University of Buffalo School of Medicine, and Bacteriologist and Serologist in the Buffalo General Hospital. The other deals with the legal aspect of the subject. Its author is the Hon. Victor B. Wylegala, Judge of the Children's Court in Buffalo. (Erie County, New York).

(The papers are privately printed in a single pamphlet—Ed.)

Judge Victor B. Wylegala's paper on the Legal Aspect of Blood Grouping Tests in Filiation Cases is a refreshing example of a correct judicial attitude on this subject. He has taken the pains to acquaint himself with the fundamental principle and technique of the test, and, what is more, he realizes that unless the test is carefully and honestly performed by a competent serologist, the science of serology may be discredited.

Beginning about May 1, 1938, Judge Wylegala has insisted that each test include both the group and type and be done in each instance by Dr. Ernest Witebsky, a highly qualified serologist. With each exclusion, Dr. Witebsky performed a repeat test or had the result checked by another competent pathologist. One hundred and one blood tests done resulted in 18 exclusions of paternity. Due to the safeguards thrown around each test, the findings are beyond dispute. In fact, the accuracy of each exclusion except one was confirmed by the mother's subsequent confession of intercourse with another man about the time she became pregnant.

Judge Wylegala cites several decisions which hold that an exclusion does not constitute conclusive proof of non-paternity, but should be considered along with the rest of the evidence. He does not quarrel with that viewpoint, but deplors that in none of those cases did the court inquire into the scientific basis and proper application of the test.

For example, in *Harding v. Harding*, 1940, 22 N. Y. Supp. (2d) 810, the court ordered support for a child in complete disregard of an exclusion of paternity.

In *State v. Holod*, 63 Ohio App. 16, 24 N. E. (2d) 962, the appellate court affirmed a judgment of filiation, despite an exclusion. Judge Wylegala's particular quarrel with the *Holod* opinion is that, to justify its disregard of the exclusion, the court raised some particularly abstruse and involved scientific speculation on other subjects, with which it surely could not be familiar.

In *Arias v. Kalensnikoff*, 1937, 115 A.L.R. 163, 74 Pac. (2d) 1043, the California court of last resort reinstated the order of filiation, rendered against a 70-year old defendant, excluded by the blood test.

Although New Jersey is one of the six states to have a specific blood test statute, the Court of Chancery of that State denied a motion for a blood test in *Bednarik v. Bednarik*, 1940, 16 Atl. (2d) 80.

The judicial policy of not accepting as conclusive the evidence of any expert, should not preclude courts from making thorough inquiry into the scientific accuracy with which the test can be done. This leads to the problem of the selection of a qualified expert. Judge Wylegala suggests the method provided for by section 684a of the New York Criminal Code:

"Such experts to be selected from a list certified by the state medical society of individuals who have proved their ability to do such tests, and they shall be subject to cross-examination by both parties after the court has caused them to disclose their findings to the court or jury."

Inasmuch as the blood groups are a matter of scientific fact, the careful selection by the expert will assure the integrity and ability of the pathologist. Judge Wylegala is not prepared to recommend, even under these circumstances, that the exclusion be accepted as conclusive. He does concede, however, that the expert's report of non-paternity is entitled to greater weight than testimonial evidence of interested parties.

Other judges charged with the duty of determining paternity disputes would do well to emulate Judge Wylegala's efforts to solve these perplexing questions by means of scientific blood tests.

**Congress of Correction**—The new name for the 72nd Annual Meeting of the American Prison Association is *Congress of Correction*. It was held on October 18 to 23 at Asheville, North Carolina.

The dominant themes were: "The War's Challenge to America," "The War's Challenge to America's Correctional System," "The Challenge of Present Social Conditions to the Correctional System," "The Prisoner and His Community," "The Released Prisoner in a World at War," etc. On this last subject, there was general agreement with the tenor of the opening address by former warden, Lewis E. Lawes, who said: "If this is a total war, and God knows it is or should be if we expect to win it, then why should the man who has served a prison sentence be forbidden to serve in it if he is physically, mentally and morally healthy?"

As to the challenge of the delinquent to society, Mr. Harvey L. Long of the Illinois Department of Public Welfare declared:

"The war has shown us again the high quality of courage, honor and loyalty possessed by many delinquent youth. These assets have in the past been channeled into unsocial conduct. It is the task of all who work with youth on whatever level to capitalize upon these assets and to find, among other things, a moral equivalent of war to challenge youth in peace time."

The President of the Congress, Hon. G. Howland Shaw, Assistant Secretary of State, called attention to the certain increase of juvenile delinquency, due to loss of good probation, parole and prison personnel to war service, and to the absence of many fathers from the home. The situation now and after the war, he said, calls for "an increasing number of volunteers, which means a new type of community organization. The very program of our Congress this year indicates an awareness of this fact." He urged the delegates to grasp and carry away with them the importance and the implications of these factors in the correctional field.

Hon. Margery Fry, M.P.M.A., L.L.D., was the distinguished guest speaker from London. Miss Fry is a descendant of Elizabeth Fry, the pioneer prison worker of the 1870's. Her subject was: "Juvenile Delinquency and the Light It Throws on Society." "The increase of juvenile delinquency during war," the speaker said, "is additional proof that environment has its share in the production of law breaking." She urged less stress upon property and more upon supervised recreation, facilities for creative work, initiative, and other character building influences.

Discussions indicated that during the war some modifications of child labor laws are to be expected, as well as provision in many states and most Federal prisons for the manufacture of supplies needed by the Government in the national defense. A proposed new system for accepting paroled and dis-

charged prisoners into the army was described by James V. Bennett, Director of the Bureau of Prisons. He said, "The army has already indicated a willingness to be liberal in regard to men with prison records, but they are depending on prison wardens, parole and probation officers to warn them of undesirable individuals." Many states reported scores of former inmates already in the service.

Two new and interesting survey projects were proposed. One was the suggestion that a test of the Federal Probation Law be made by tracing the probationers in the Federal Courts over a period of five years to find their present status. The other survey suggested, would compare two prisons—one with a well developed educational and classification system with another institution that has had no such organization.

The subject of alcoholics was discussed by Austin H. MacCormick of the Osborne Association. He quoted a Judge of the Boston Municipal Court who said that 50% of the prison population of Massachusetts from year to year are alcoholics. He cited statistics showing that in 1940 there were forty million users of alcohol in this country over fifteen years of age. Of the 2,400,000 users, 600,000 are chronic alcoholics. "The most serious problem the army faces from the standpoint of discipline is the problem of the young soldier who cannot carry his liquor."

Conviction by the Court and sentence determined by a Board of experts after thorough study of the defendant's background and character was eloquently argued by Federal Judge B. J. Laws of Washington, D. C.

Assistant Attorney General Wendell Berge, head of the Justice Department's criminal division expressed his conviction that the press is less to blame for sensational accounts of crime than the public's morbid appetite for sordid details. He censured the prosecutors and defending attorneys who play politics instead of practicing law. In their ambition "they make the practice of law a sounding board to enhance their career."

Barnette Faroll, Chicago business man and President of the Central Howard Association, made this contribution to the Prison Congress: "It has been our experience in working with prisoners that, if given the opportunity to express themselves, they are as conscious of what is at stake in this war as the average citizen. The reason is obvious—they know the meaning of the loss of liberty." In discussing "The Released Prisoner in a World at War," Hon. Edwin Gill of North Carolina pointed out that the released prisoner must of necessity find adjustment and a part to play commensurate with his abilities, for his own sake and that of the community.

Hospitality was extended to the 1942 Conference, by the Governor of North Carolina, the Mayor of Asheville and the local committee who provided for the comfort and entertainment of the delegates. At the annual business meeting, the following officers were chosen for the ensuing year:

President, American Prison Association—Richard A. McGee, state of Washington;

Secretary, E. R. Cass, New York;

President, National Parole Association—Hon. Sanford Bates;

President, National Conference of Juvenile Agencies—Hon. G. Howland Shaw, Washington, D. C.;

President, Warden's Association—Joseph W. Sanford, Atlanta, Georgia;

President, National Prisoners' Aid Association—Walter Botsford, Milwaukee, Wisconsin;

President, Medical Health Center—Dr. J. I. Reichard, Lexington, Kentucky;

President, National Jail Association—Paul Brown, Eastview, New York.

—F. E. L.

**Blood Tests in Affiliation Proceedings**—The following has been communicated by Mr. George Wiener, Attorney at Law, Brooklyn, N. Y. It is from Sec. 12, Part XVI of Act No. 17, 1939 in New South Wales: assented to on October 23, 1939.

(1) This section shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.

(2) In this section "blood test" means a test made for the purpose of ascertaining the inheritable characteristics of blood.

(3) (a) A children's court consisting of special magistrate shall, at the request of any person against whom an order for the expenses of maintenance which has been made or is deemed to have been made under this Part is in force or of the parties to any proceedings or contemplated proceedings under this Part, direct that the child in respect of whose maintenance the order was made or the proceedings are taken or contemplated, the mother of the child and the man adjudged or alleged to be the father of the child submit to blood tests. No such direction shall be given unless the child has been born and the child, its mother and the man concerned are all living.

(b) When any such direction is given the magistrate shall in and by the direction nominate a medical practitioner to take such blood samples as may be necessary for the purpose of making the blood tests and a pathologist to make the blood tests and shall also fix a period within which the child, the mother and the man concerned shall attend such medical practitioner for the purpose of the taking of such samples.

Any period so fixed may be extended from time to time by the magistrate.

The pathologist so nominated shall be a medical practitioner whose name is on a panel of names of medical practitioners authorized to carry out blood tests under this Part, which panel shall be prepared by the Minister on the recommendation of the Director-General of Public Health.

(4) When a direction has been given by a magistrate under subsection three of this section the following provisions shall have effect:—

(a) When a hearing of a complaint under subsection one of section ninety-nine of this Act is pending. (I) proceedings in such hearing shall be stayed until the expiration of the period or extended period fixed under subsection three of this section; (II) if the mother and the child referred to in the direction, or either of them, does not within such period or extended period attend the medical practitioner nominated in the direction and permit him to take blood samples, the complaint shall be dismissed and a further complaint shall not be allowed under section one hundred and thirteen of this Act unless the mother gives an undertaking to submit herself and the child to blood tests; (III) if the defendant to such complaint does not within such period or extended period attend the medical practitioner nominated in the direction and permit him to take blood samples the complaint shall be set down for hearing.

(b) Where an order for expenses of maintenance made or deemed to have been made under this Part is in force—(I) if the mother and the child referred to in the direction or either of them do not, within such period or extended period attend the medical practitioner nominated in the direction and permit him to take blood samples, the order shall, as from the expiration of such period or extended period, be suspended until the direction is complied with by the mother and the child; and if the direction is not so complied with within a reasonable time, the order may be discharged; (II) if the person liable under the terms of the order to pay the expenses of maintenance does not, within such period or extended period, attend the medical practitioner nominated in the direction and permit him to take blood samples the direction under subsection three of this section shall lapse.

(c) The special magistrate may adjourn the proceedings from time to time as such special magistrate may think fit.

(d) The fee of the medical practitioner nominated in the direction and the costs and expenses payable in connection with the making of the blood tests shall be paid by the person at whose request the direction was given.

(5) The medical practitioner nominated in a direction given under subsection three of this section shall in the manner and within the time prescribed forward all blood samples taken by him pursuant to the direction to the pathologist.

The blood tests shall be made by the pathologist nominated in the direction, and the results of such test shall be embodied in a certificate in the prescribed form.

(6) The certificate given under subsection five of this section shall be forwarded—

(a) in any case where the direction was given by the Metropolitan Children's Court or by a magistrate exercising jurisdiction within the area named in the proclamation establishing the Metropolitan Children's Court—to the Clerk of the Metropolitan Children's Court; (b) in any other case—to the Clerk of Petty Sessions for the district within which the magistrate exercises jurisdiction.

The Clerk of the Metropolitan Children's Court or the Clerk of Petty Sessions, as the case may be, shall, within seven days of the receipt by him of the certificate, send a copy of the certificate to the parties concerned.

(7) A certificate given under subsection five of this section shall be admissible as evidence in any proceedings under this Part, and shall be evidence of the facts and conclusions stated therein.

(8) The regulations may prescribe all matters necessary or convenient to be prescribed for carrying out or giving effect to this section.

Without prejudice to the generality of the foregoing provision the regulations may prescribe—(a) the duties of medical practitioners nominated to take blood samples, in relation to such samples; (b) the scale of fees to be paid to medical practitioners so nominated; (c) the scale of costs and expenses payable in connection with the making of the blood tests.

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**Seminar on Legal Medicine at Harvard University**—During six days, beginning on September 30 and closing on October 10, a Medico-Legal conference and seminar was held at Harvard University.

The conference was open, without fee, to physicians, lawyers and police under the auspices of the Massachusetts Medico-Legal Society and the Department of Legal-Medicine in Harvard Medical School. Papers and discussions were on the following subjects:

Demonstration of Medico-Legal Autopsy—DR. LEARY

The Medical Examiner and the Health Department—DR. GALLAGHER.

Establishment of Time of Death—DR. BRICKLEY.

Examination of Burned, Mutilated, and Putrefied Bodies—DR. MORITZ

Interpretation of Laboratory Reports of the Carbon Monoxide and Alcohol Content of Postmortem Materials—DR. BREYFOGLE.

Examination of Bodies Recovered from Water—DR. JETTER.

Hit and Run Accidents—MR. STRATTON.

Collection and Preservation of Toxicological Materials—DR. WALKER.

Legal Considerations re the Performance of Autopsies—DR. SMITH.

The seminar, for intensive work, was open also to physicians, lawyers and police but a fee was charged. The subjects under discussion, as the reader will understand, were of very great practical value to men and women of the three classes mentioned who are seriously intent upon enlarging the applications of science:

Introductory Discussion and Demonstration of Methods and Procedure of Medical Examiner—DR. WATTERS.

Carbon Monoxide Poisoning—DR. BREYFOGLE.

Postmortem Biochemical Changes in the Body—DR. JETTER.

Gunshot and Explosive Injuries—DR. MORITZ.

- Fauna of Putrefaction—DR. BEQUAERT.  
 Medico-Legal Autopsy in Investigating Deaths Suspected to be due to  
 (a) Natural Causes, (b) Poison—DR. LEARY.  
 Demonstration of Methods for Identification of Barbiturates—MR.  
 STRATTON.  
 Autopsy Demonstration. (Sudden Death in Infants.)—DR. FARBER.  
 Determination of Alcohol in Body Fluids—DR. JETTER.  
 Use of Ultra-Violet and Infra-Red in Medico-Legal Postmortem Ex-  
 aminations—MR. GLASS.  
 Examination of Bullets and Shell Cases—CAPT. VAN AMBURG.  
 Examination and Preservation of Non-Medical Scientific Items Incident to  
 a Medico-Legal Postmortem Investigation (Hair, Dust, Fibers, Stains,  
 etc.)—DR. WALKER.  
 Fingerprints—CORP. LACAIRE.  
 Medico-Legal Autopsy. (Injury by Mechanical Violence.)—DR. MORITZ.  
 Head Injuries—DR. LEARY.  
 Dried Blood Stains—DR. BOYD.  
 Medico-Legal Autopsy. (Identification of Bodies and Estimation of the  
 Time of Death—DR. BRICKLEY.  
 Sudden Death and Heart Disease—DR. MALLORY.  
 Selection and Preservation of Material for Toxicological Analysis. Dem-  
 onstration of qualitative methods for identifying the presence or  
 absence of some of the more common poisons—DR. WALKER.

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**Mr. Walter P. Armstrong on the Trial of the Nazi Saboteurs**—In his Pres-  
 idential Address before the American Bar Association at its recent conven-  
 tion in Detroit Mr. Walter P. Armstrong spoke in part as follows:

"The recent trial and proceedings in connection with the trial of the Nazi saboteurs reflected great credit upon the nation. It was a practical demonstration that we actually believe in the things for which we are fighting. The accused were accorded the benefit of counsel who were not only sworn to defend them, but who, as I can testify from personal observation, performed that duty in a way that measured up to the finest traditions of the American bar and reflected great credit upon our profession. The Military Commission, while it proceeded with expedition, accorded a full opportunity for the production of all evidence. The Chief Justice of the United States called a special term of the Supreme Court.

"As an American citizen I thrilled with pride as I sat in the court room and listened to the arguments. Steel helmeted soldiers with fixed bayonets were on guard over some public buildings, but there were none at the Supreme Court Building. There were no army officers present except those directly concerned with the cause. The Attorney General of the United States never for a moment either lifted his voice or lost his quiet poise. He manifested no inclination to take advantage of technicalities and cooperated with counsel for the defense in eliminating procedural obstacles that there might be a full hearing on the merits. The attorneys of the petitioners forcibly and unhesitatingly presented every argument that could be urged in favor of their clients' cause. The justices put their questions in their usual conversational tones and manifested neither impatience nor haste. It was sometimes difficult to realize that this simple, restrained and dignified proceeding was held for the purpose of determining the alleged rights of ruthless enemies who landed on our shores to help carry on with fire and explosives a war which involves our very existence. I understand that the accused were incredulous when they were told that they would be fully advised of their rights and that every defense they desired to offer would be vigorously insisted upon by lawyers who wore the uniform of officers in the Army of the United

States. Their incredulity is said to have changed into amazement when they became convinced that this was exactly what was happening. This I can well believe for they came from a land where execution does not wait upon trial—a land where the Gestapo raid the courts and arrest and imprison the judges when they are dissatisfied with their decrees.

“Every lawyer appreciates the significance of what happened. Yet some unthinking persons have expressed impatience over the length of time consumed by the Military Commission and over the fact that the Supreme Court saw fit to accord a hearing. Our task is to convince such critics that what they really witnessed was the actual writing of a shining page in our national history.”

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**Bar Association Committee on Courts and Social Protection**—At the recent Detroit meeting of the American Bar Association in Detroit Charles P. Taft, Assistant Director of the Office of Defense, Health and Welfare Services, presented the case against commercialized prostitution. He stated the need for action and cooperation on the part of all groups engaged in law enforcement. The Criminal Law Section of the Association appointed a committee to promote these objectives. Mr. John M. Goldsmith of Radford, Virginia was made chairman. The committee will work with state and local bar associations to secure full cooperation with the army and navy, and all government agencies for the purpose of controlling liquor, gambling and vice.

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**War Work Committee for Mental Hygiene**—Dr. George S. Stevenson, Medical Director of the National Committee for Mental Hygiene, reported at the Annual meeting of the National Committee in New York on November 12. Point by point, he indicated the nature of the program that the War Work Committee has undertaken, as follows:

(1) The armed forces must be assured of mentally healthy men and the mentally unstable must be protected from dangers of duty with the armed forces and conserved for civilian manpower;

(2) Within the armed forces there should be early detection and treatment of incipient neuropsychiatric cases and prompt and adequate care and disposition of the mentally ill;

(3) The rehabilitation of disabled civilian and service men should be provided for both to augment manpower and to assist in adjustment;

(4) Civilian services for the mentally defective must be protected;

(5) Public morale—related to mental health—must be maintained;

(6) Persons moving or moved to strange locations and those forced to make unusual vocational adjustments need the help of competent social, recreational, health and educational agencies and personnel services;

(7) Post-war life in America promises many challenges to mental hygiene organizations that must be given critical attention even if the future cannot now be well defined. We know that the returning service men will be faced with the problem not only of leaving a life into which they have sunk many roots but of entering one that has changed greatly in their absence. Even civilians will find it difficult to accept the change from wartime to peacetime conditions and to give up the idea of returning to things as they were in 1940. With democracy in the ascendancy, individual dignity and individual differences are destined to be given greater value, perhaps at the cost of some traditional economic freedoms.