EVIDENCE — BLOOD GROUPING IN BASTARDY — JURY'S SOLE FUNCTION MAY BE IN DETERMINING USE OF PROPER LABORATORY METHODS.—Complainant brought bastardy action and had a verdict designating respondent father of her twins. This was the finding of the jury despite the admission into evidence of statutorily authorized blood grouping tests which conclusively demonstrated respondent's non-paternity. On appeal it was held that where, as here, there is no challenge of the skill and accuracy utilized in performing such tests, a showing of incompatible blood groups must exclude respondent's filiation as a matter of law. Motion for a new trial was granted, the appellate court specifying that the jury was to limit its inquiry to the ascertainment of the presence of purely technical conditions needed to make the biological law operative.[1]

It is no novelty for Maine juries to be forbidden a determination of the evidentiary weight to be assigned the gentic laws of blood inheritance.[2] This does not indicate any special daring or scientific consciousness on the part of the local courts until compared with the considerable "cultural lag" found in other jurisdictions.[3] Although the cry emanating from the medical profession and medico-legal writers has been loud and sustained,[4] it is only in recent years that any great judicial significance has been placed on the evidence from blood groupings.[5] This evidence could have had and will have greater influence on varied actions both criminal and civil. *Jordan v. Mace*[6] has been anticipated in the New York lower courts where at least twice, in actions by husband against wife, the unchallenged testimony of leading serologists was given conclusive effect.[7] These cases are exceptions. Elsewhere the most recognition afforded such evidence

1. Jordan v. Mace, 69 A.2d. 670 (Me. 1949).
2. *See* Jordan v. Davis, 57 A.2d 209, 210 (Me. 1948).
3. Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 MINN. L. REV. 671, 679-691 (1937).
4. Britt, *supra* note 3; 25 IOWA L. REV. 823 (1940); Schatkin, *Paternity Blood-Grouping Tests: Recent Setbacks*, 32 J. CRIM. L. & CRIMINOLOGY 458 (1941); Note, 16 TENN. L. REV. 734 (1941); Note, 34 CORNELL L. Q. 72 (1948). There has been a superabundance of material published in this field.
5. Maguire, *A Survey of Blood Group Decisions and Legislation in the American Law of Evidence*, 16 SO. CALIF. L. REV. 161 (1943); Schoch, *Determination of Paternity by Blood-Grouping Tests: The European Experience, id.* at 177. For a collection of cases, see Note, 163 A.L.R. 939 (1946).
6. 69 A.2d 670 (Me. 1949).
7. Saks v. Saks, 189 Misc. 667, 71 N.Y.S.2d. 797 (N.Y. Dom. Rel. Ct. 1947); Schulze v. Schulze, 35 N.Y.S.2d 218, 220 (Sup. Ct. 1942), "To deny

in bastardy proceedings has been to admit it for whatever worth the jury decide.[8] Probably owing to attendant sordid and degrading fact situations comparatively few filiation suits are appealed, the litigants having a natural desire to end the matter as quickly as possible.[9] This hardly encourages the acceptance of evidentiary innovation. Nor is bastardy a favored action, as witness the old Mansfield approach.[10] The peculiar problems of *stare decisis*, a sensible judicial distrust for medical theory that is definitively unconstant, and, perhaps, a fear of the social implications of easy bastardization hardly cushion this collision of science and law. Further, many courts were and are without legislative pronouncement by way of enabling statutes for mandatory blood test procedure.[11] The state of Maine then, despite a dearth of precedent, has consistently used an unsophisticated approach to the problem of serology in law.

There is no scientific doubt that the presence of certain serologic conditions will conclusively demonstrate one individual filially unrelated to another. It does not follow that certain other conditions will prove relationship because the identical blood structure of the actual progenitor may be found in a great number of persons. However, the innocent man has better than a fifty percent chance of exoneration through one of the three accepted classification tests.[12] The "A and B" test was developed

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plaintiff a decree in this action would be tantamount to a holding by this court that . . . Dr. Caspar [testifying serologist] was not worthy of belief [and] the procedure for a blood test, authorized by . . . the Civil Practice Act, is futile insofar as having any probative value."

8. State *ex rel.* Walker v. Clark, 144 Ohio 305, 58 N.E.2nd 773 (1944); Berry v. Chaplin, 74 Cal. App.2d 652, 169, P. 2d 442 (1946); Ehrlich v. Ehrlich, 181 Misc. 1057, 49 N.Y.S.2d 863 (Sup. Ct. 1943).

9. Schotkin, *Law and Science in Collision: Use of Blood Tests in Paternity Suits*, 32 VA. L. REV. 886 (1946). Apparently contested legitimacy is encountered to a surprising extent in domestic relations courts. The presumption of legitimacy of the issue of a married woman must be understood as just that: a "presumption" and rebuttable.

10. See extensive discussion of ancient disapprobations in note, 25 MARQ. L. REV. 148 (1941).

11. Eight states have blood grouping statutes of one type or another—none with conclusive terms. ME. REV. STAT. c. 153, §34 (1944), MD. ANN. CODE GEN. LAWS art. 12, §17 (Flack, Supp. 143); N. J. STAT. ANN. §2: 99-3, 4 (Supp. 1946); N. Y. CIV. PRAC. ACT, §306a (1935), N. C. GEN. STAT. §49-7 (Michie, et al., Supp. 1945); OHIO GEN. CODE ANN. §12122-1, 2 (Page, Supp. 1946); S. D. CODE §36.0602 (1939); WIS. STAT. §§166.105, 325.23 (Brossard, 1943).

States without such statutes are naturally loath to give a specially designated weight to blood test evidence. Berry v. Chaplin, 74 Cal. App.2d 652, 169 P.2d 444 (1946).

12. Saks v. Saks, 189 Misc. 667, 668, 71 N.Y.S.2d 797, 798 (N.Y. Dom. Rel. Ct. 1947); 34 CORNELL L. Q. 72, 75 (1948).

in 1900 by Nobel Prize winning Karl Landsteiner and is based on the fact that there are two different substances found in red blood corpuscles—"A" and "B", called isoagglutinable because it is their clustering under artificial circumstances that enables them to be classified. The blood corpuscles of a given individual may contain "A", "B", both, or neither and thus be grouped A, B, AB, or 0 respectively. The simplest rule of inherited blood following from this is that a child may not have an isoagglutinable substance in his blood which is lacking in both his parents.[13] This rule also applies to another test based on isoagglutination which types blood rather than groups it. The two factors "M" and "N" exist singly or in combination in all blood regardless of its group and a given factor cannot exist in the child when absent from both parents' serological make-up nor can any type M parent have a type N child and vice-versa.[14] The most recent blood characteristic discovered is the rhesus factor giving rise to the RH-hr test. As a result of the blood divisions created from this theory of six allelic genes, definite exclusionary laws may be formulated as in the other tests.[15]

In *Jordan v. Mace* the complainant, both children, and respondent were all group "A", making exclusion impossible by the "A-B" test. However, a blood typing disclosed one twin possessed only factor "M", while respondent was limited to factor "N"—serologically impossible if the jury verdict was correct.

Complainant	A	M
Child X	A	M
Child Y	A	MN
Respondent	A	N

Except for twins, exclusion might have been impossible but of course non-filiation of one twin must necessarily include the other. The court does not settle this matter of multiple exclusion but it would be a novel theory that created "half-twins."[16] The

13. 1 WIGMORE, EVIDENCE §165b (3d ed. 1940); Boyd, *Protecting the Evidentiary Value of Blood Group Determinations*, 16 SO. CALIF. L. REV. 193 (1943); WIENER, BLOOD GROUPS AND TRANSFUSIONS (3d ed. 1946).

14. WIENER, *op. cit.* supra note 13; Hooker and Boyd, *Blood Grouping as A Test of Non-Paternity*, 25 J. CRIM. L. 187, 194 (1934).

Notice how the jury in Jordan v. Mace, 69 A.2d 670, 671 (Me. 1949) found a serologically indicated type "N" respondent father of a type "M" child. Similarly in Jordan v. Davis, 57 A.2d 209, 211 (Me. 1948). There is no apparent kinship between the complainants Jordan.

15. Editorial, 125 J. AM. M. ASS'N. 495 (1944); 23 N.Y.U.L.Q. 156 REV. (1948).

16. Jordan v. Mace, 69 A.2d 670, 671 (Me. 1949).

RH-hr test was not used in the case, possibly because of its relative complexity or recent appearance. In any event, it was not needed although it might have directly excluded respondent's paternity of Child Y.

The statute authorizing the taking and forensic use of blood tests in bastardy actions was passed in Maine in 1939. It provides for court ordered tests on motion of respondent, the findings to be "admissible into evidence" where exclusion is established.[17] The statute is silent as to any specific weight to be assigned such evidence. The intent of the 1939 state legislature in regard to blood tests was probably quite in keeping with the view of the court nine years later in *Jordan v. Davis*, "The determination of such an issue [bastardy] is not transferred from the courtroom to the laboratory, where lurk certain hazards in the application of scientific techniques."[18] While there is undoubtedly no question as to the conclusiveness of an accurate test, science can never guarantee lack of human error. At least this latter possibility has not been accorded legislative recognition by a statute giving, in certain terms, finality to the testimony of serologists. However, there have unquestionably been technical advances in the administration of blood examinations in the past decade. *Jordan v. Mace* has taken judicial notice of these advances and as a result placed the burden on complainant to show medical error.

The court's previous attitude toward blood as evidence is indicated in *Jordan v. Davis*—almost identical in its facts with the principal case, but resulting in a judgment against the respondent-"father." The court refused to say that there was no justification for a jury finding of technical inaccuracy although the state of Maine "accepts this verdict of science"[19] in regard to the *theory* involved. The opinion goes on the tacit assumption that the jury has repudiated not Landsteiner, but the testifying serologist, Dr. Hooker (the same Dr. Hooker of *Jordan v. Mace* fame). There may be some feeling that *Jordan v. Davis* has been overruled by the instant case, and that the

17. ME. REV. STAT. c. 153, §34 (1944).
18. 57 A.2d 209, 210 (Me. 1948). A few lines later: "We do not believe that the statute intended to make the result of a blood grouping test *as reported in court* conclusive in the issue of non-paternity." [Italics supplied.]
19. Jordan v. Davis, 54 A.2d 209, 210 (Me. 1948).

Maine court has become the first of final impression to make blood test evidence conclusive. This is not true. Actually we have the logical next step from the earlier decision, requesting "believable evidence"[20] that the tests were inaccurate and refusing to subsume the reasons why the jury has not accepted the "M-N" test results.

Of what probative force is blood evidence in Maine today? There is no reason to think it has become conclusive to the extent that a putative father is innocent as a matter of law upon testimony of a serologist to that effect. This may be concluded to be the present state of the law in Maine: where respondent has been excluded serologically, the component parts of the evidence of exclusion become the entire controversy. If, by credible evidence, doubt is thrown on the skill of the examiners or the validity of their conclusions, the serological indications of non-paternity are rejoined by the other evidence and given only such weight as the jury choose. The further significance of the case awaits a determination as to what quantum of discrediting evidence the Maine court will require to affirm a verdict of paternity in the face of an apparently conflicting medical fact.

It is doubted whether this is the landmark decision for which the medico-legal writers have called, *i.e.*, upon testimony of non-paternity by a blood expert with some sort of official certification, a directed verdict to that end.[21] It is further doubted whether such a decision soon will be forthcoming in Maine. A procedure which would so greatly restrict the force of cross-examination is properly viewed with caution.

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PERSONAL PROPERTY—DEPOSIT OF FUNDS IN A BANK TO THE JOINT CREDIT OF DECEASED DEPOSITOR AND SURVIVING DONEE—PAROL EVIDENCE RULE AS APPLIED TO DEPOSIT OF FUNDS IN NAME OF DEPOSITOR AND ANOTHER.—Crandall and defendant Watts went to the plaintiff bank, signed, executed, and filed with it an instrument wherein they agreed with each other and with the bank that all deposits made therein by either of them should

20. Jordan v. Mace, 69 A.2d 670, 673 (Me. 1949). Three justices, it might be noted, were now sitting who were not present 15 months earlier for Jordan v. Davis, note 19 *supra*.

21. Note, 1 MERCER L. REV 266, 278 (1950) Also see note 4 *supra*.