St. John's Law Review

Volume 8
Number 2 *Volume 8, May 1934, Number 2*

Article 4

The Iso-Agglutination Test as Evidence in Judicial Proceedings in German Courts to Determine Parenthood

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THE ISO-AGGLUTINATION TEST AS EVIDENCE IN JUDICIAL PROCEEDINGS IN GERMAN COURTS TO DETERMINE PARENTHOOD*

OUTSIDE of criminal proceedings the application of the iso-agglutination test plays a part mainly in proceedings involving the judicial determination of parenthood.

For example, a certain man is sought as putative father of an illegitimate child, to be held chargeable with its support. His defense usually is that the child obviously could not have been conceived by him. To prove the impossibility he will ask for an iso-agglutination test. Similarly, a claim by the putative father that a specified third person who had sexual commerce with the mother during the period of conception was the father of the illegitimate child, will be met on the part of the child whose paternity is assailed by an iso-agglutination test to prove that the defense is impossible.

Whether the iso-agglutination test will fulfill properly its function as effective evidence in proceedings of that character will, of course, depend upon the degree of recognition the test will receive in the courts.

A great conflict of opinion has prevailed in Germany in recent times concerning this question, nor have the legal implications of it been definitely decided.

Although the most eminent scientific authorities in the domain of the biology of heredity have been unanimous that the test will yield in proper cases conclusive proof that a certain specific individual could not be progenitor of another specific individual, the courts in Germany, in contrast to the Austrian courts, have shown much reserve on the question.[1]

The Eighth Civilsenat of the Kammergericht of Berlin in its well-known decision of the 2nd October 1927 (8 W. 4228-27 in J. W. 27, S. 2862) and 12th October 1928 (8 W. 8648-28 in J. W. 29, S. 467) especially has held the iso-

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* Translated by S. R. Wachtell of the New York Bar.

[1] Feststellung Sperls in Dt. Jur. Ztg. S. 1523, Jgg. 27; ferner O. G. H. Wien v. 16. III. 1927; O. G. H. Brunn, in J. W. 1930, S. 1631; vergl. aber neuerdings die zuruckhaltende Entscheidung des O. G. H. Wien vom 31. LO. 28 in J. W. 1929. S. 467.

agglutination test not sufficiently reliable to base thereon a conclusive finding of the impossibility of descent of a given individual from another by generation, within the purview of section 1717 of the German Civil Code.

The court in these decisions, pointing to certain "exceptions" established by those learned in the subject, concluded that to prove "obvious impossibility" it will not suffice to establish that "according to medical practice and theory the descent is excluded," [2] for that would contravene the legally prescribed requirement of "absence of all doubt" which would result only from an extended and infallible observation of a sufficiently large and varied material, giving certainty to the empirical rule.

According to this requirement, every possibility of any other procreation of the child must be excluded not only under the theoretical principles of the science but under its practical applications, before a finding of "obvious impossibility" will be justified. The court's reasoning is as follows:

That natural science knows empirical laws of such thoroughly established certainty can hardly be doubted. Should further research prove that these propositions cannot be maintained as subject to no exception, it would result that the exceptional provisions of the law which would follow from these propositions could no longer be applied. Even the greatest probability will not satisfy section 1717, which demands certainty. One therefore cannot speak of "obvious impossibility" so long as even the remotest chance exists of the procreation of the issue of an act of sexual commerce. But the fundamental principle of the immutability of blood groups is subject to many exceptions, as shown by modern research workers. So long as the causes of these exceptions remain unexplained, every case under investigation may be claimed to be a case falling within the exceptions. Theoretically it would be entirely permissible to speak of an unknown departure from the rule of heredity even in the case of blood groups. The required "obvious impossibility" of section 1717 in the sense of a procreation which is unthinkable, is therefore not sufficiently established. Moreover, the prac-

[2] Hinweis auf Strassman in J. W. 1927 S. 2862.

tical handling of blood test investigations offers an unmanageable infirmity.

Vigorous protest has come from medical [3] as well as judicial [4] quarters against this evaluation of the iso-agglutination test by the Kammergericht. Moreover, in spite of the attitude of the Prussian Kammergericht, many courts of first instance and intermediate appellate courts have admitted the test as competent legal evidence.[5]

The Kammergericht has committed many errors. In the first place, its construction of the concept of "obvious impossibility" in the sense of theoretical, or rather mathematical, impossibility, is erroneous. Principles in medicine or natural science can never yield mathematical certitude since these empirical propositions are based upon an experimental examination of a certain number of cases, but never upon all the cases. To establish whether in any given case the claim of an indicated paternity is "obviously impossible" the judge must proceed upon the basis of the circumstances of the particular case. The statute, therefore, could not have intended a mathematical but only an empirical determination which might establish an overwhelming probability but never an absolute certainty. "Obviously impossible" can therefore mean only—as in the Austrian law [6]—that under the given circumstances it is so unlikely that the child in question is descended from the putative father that to hold the opposite would be against reason. The Reichsgericht shared this opinion for many years.[7] An overwhelming majority of the text writers likewise adopt this view.[7a]

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[3] vergl. die Aufsatze von Werkgartner-Strassman in J. W. 1928, S. 867; von Dr. Schiff in Dt. Ztschr. fur die ges. ger. Medizin Bd. 9. S. 385 ff.

[4] vergl. Hellwig in J. W. 1928, S. 867 ff; in Jr. Rdsch. 1929. S. 168; und 177; ders. in J. W. 1930. S. 1556. Caro in J. W. 1929, S. Sperl a. a. O.

[5] Urteil des O. L. G. in Konigsberg v. 14. 6. 29;—2. U. 182/28 in J. W. 1930 S. 82; Beschluss des O. L. G. Oldenburg, 1. Z. Sen. v. 17. 4. 29-W. 37/29. Rdbrf. der Dt. Amtsvormum der V. 43. Beschuless des O. L. G. Koln 6. Z. Sen. v. 28. 5. 29 in 6. w. 121/29, des O. L. G. Dusseldorf, v. 6. 3. 29.-7. S. 47/29, des O. L. G. Stuttgart v. 10. III. 28-3. W. 117/28; des O. L. G. Naumburg, v. 9. 12. 27-5. W.-421/27 und a. mehr.

[6] Das Oester. Gesetz kennt aber nur den Begriff "unmoglich" ohne das Wort "offenbar." Jedoch ist die Bedeutung dieselbe wie im dt. Recht, so: Sperl: a. a. O. ferner O. G. H. Wien v. 16. III. 27/usw. dagegen Leonhard in J. W. 1929, S. 30.

[7] Entscheidg. in Bd. 15. S. 330 Urt. v.-14.I. 1884; R. G. St. Bd. 61. S. 202.

[7a] Stein-Jonas Komm. zur Z. P. O. zu Sec. 286 I; Caro in J. W. 1929, S. 2230; Heusler, Arc Civ. Praxis, 62, S. S. 217 ff.

The Reichsgericht considers it of no importance that expert opinion would decline to say that the appearance of an abnormal case running counter to present experience is unthinkable, since the concept of "obvious impossibility" is satisfied by the highest probability, which does not exclude the remote probability of an exception. The judge must be satisfied with a degree of probability which in practical daily life will be considered conclusive.

It must be considered in this connection that until now, according to the statements of the most outstanding scientists in that field (Professor Thomsen, Dr. Schiff, Professor Abderhalden, etc.) on whose results the Kammergericht based its judgments, no real exceptions have been demonstrated, and that the exceptions announced until now are only apparent ones, since the identity of the children examined was not established.[8] The number of such apparent exceptions, based upon insufficient identification, established in mass examinations, will vary, naturally, with the moral status of any given community. But it is not always possible to establish that the exception is only an apparent one. The requirement of the Kammergericht, therefore, that evidence be produced of the basis of all exceptions, is not feasible. The blood test method would have to be abandoned if these exceptions could not be explained. It would be more just, in view of the regularity, generally, of the result of the tests until now, to require him who questions the conclusiveness of any test, to prove his contentions.[8a]

After the examining committee of the Federal Health Council handed down on opinion (May 6th, 1929) that the iso-agglutination test is entirely reliable and constitutes a conclusive test of descent, the Kammergericht abandoned its view of the incompetency of the test and in an order issued on April 4th, 1930,[9] permitted evidence of the test in court. Thereby uniformity of decision in the German courts has again been established, especially since the Reichsgericht

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[8] Thomsen, Hospitalstidende 1928, S. 331, Nr. 13; Dr. Schiff: Die Technik der Blutgruppenuntersuchung fur Kliniker und Gerichtsarzte, 2 Auflage, Berlin, 1929, S. 7ff Dt. Ztschr. f. die ges. ger. Medizin, Bd. 7, S. 360 ff Lattes, L, individualite du sang Paris, 1929. 192 ff ua.

[8a] vergl. auch Hellwig, Jur. Rdsch. 1929, S. 180 ff.

[9] Aktenz.: 8, W. 8557/29, J. W. 1930, S. 1605.

has in principle accepted the iso-agglutination test as competent.[10]

Still, all the impediments to the application of the iso-agglutination test in litigation involving questions of paternity as well as in other legal proceedings have by no means been removed. The greatest difficulty is to be found in the fact that neither the parties (that is, the putative father and the child whose paternity is in question) nor the witnesses (that is, the mother as well as the third person charged with the act of sexual commerce resulting in the birth of the child) can be compelled to undergo the test. All these persons have the right to refuse to subject themselves to the test, just as all persons generally have the right to refuse invasions of their bodies.[11] Nor can one be bound to the test by agreement, for the execution of the test in the face of a last-minute revocation of a previously granted consent would constitute a crime as well as an actionable assault. In addition, the fundamental principle that one is not obliged to furnish evidence against himself by an examination of his body, here still finds application. The provisions of law for compelling a party to give evidence against himself are narrowly limited to specific cases, such as, principally, the examination of documents. An extension of these provisions to include blood tests is not legally permissible. Such an extension would require an amendment of the statutes.[12]

Nor is it part of the duty of witnesses to permit the test. That duty, according to German law, includes only the giving of testimony under oath of facts within their knowledge. It does not even include the production of instruments, not to mention the production of their bodies for experimental purposes or even inspection. According to German law, therefore, the abstraction of a drop of blood without the consent of the person concerned would amount to a constitutional violation of the provisions of Article 114 of the Constitution guaranteeing liberty of the person, and

[10] vergl. besonders R. G. Z. v. 5. 6. 1930,—IV. 188/30.

[11] so das Kammergericht in Dt. J.-Ztg. 1929, Sp. 1348; K. G. v. 4. 4. 1930 a. a. O. R.-G. Urt. v. 5. 6. 1930—IV. 188/30; R. G. v. 16.5-30, zur Veroffentlichung in der amtl. Sammlung bestimmt.

[12] so auch die Vorschlage in der neuesten einschlagigen Rechtsliteratur.

subject the one doing so to an action for damages under the authority of Section 823 B. G. B. (Civil Law Code); and the act could be regarded as a criminal bodily assault under Section 223 St. G. B. (Penal Law Code).[13] Every physician engaged in the preparation or execution of the blood tests would therefore have to be on his guard. That is the view of the Oberste Gerichtshof, the Reichsgericht, and the Prussian Kammergericht.[14] Both courts rejected the recommendations of the text writers for a compulsory blood test as impossible under German law.[15] The developments of the foreign law on the subject, however, are interesting, particularly in Austria and in the United States of America. The Austrian case law [16] (the Obersten Gerichtshofes in Vienna) regards the view expressed by the text writers [17] in support of a compulsory blood test as a corollary to the duty of a witness to give evidence, and consequently as subject to the court's order. The refusal of the witness will there be regarded as a refusal to co-operate in the interests of justice and, hence, not entitled to the protection of the courts. Witnesses must therefore consent to the abstraction of the drop of blood if they would avoid the penalties provided for a contumacious witness.

The case law in the United States goes even further. The Supreme Court of the United States, it is true, at one time considered that to compel a person to undergo a physical examination was a violation of the Federal Constitution. But today parties as well as witnesses are subject to a compulsory physical examination.

It happens often in the German courts that parties and witnesses, especially official guardians,[18] refuse the blood test with the statement that they are under no obligation to facilitate the production of evidence for their adversaries. The result of this refusal—practiced also by official guardians—is that the one charged with the burden of proof—

[13] vergl. die Kommentare, zu Sections 383 ff Z. P. O., insbes. Gaupp-Stein.
[14] vergl. oben Anm. 11.
[15] so Caro, J. W. 1030, S. 1605.
[16] O. G. H. Wien. Urt. v. 267. 4.27; —II. 216/27, Sperl, Oesterr. Richterztg., Juli, August 1926, S. 177; 180; und Sperl, Dt. J. Ztg. 1927. S. 1523 ff.
[17] Sperl, a. a. O.
[18] bezuglich ihres Mundels. Vergl. die gleichen Verhaltnisse in Oesterr.

usually the putative father—is deprived of the evidence of "obvious impossibility." This condition, undesirable in the interests of justice, could be remedied if the refusal to consent to the blood test would be punished with an adverse presumption against the party or witness refusing or the parties benefitted by the refusal: if it would be presumed, for instance, that the putative father's denial of paternity would be regarded as true where he is deprived in this manner from producing his evidence. In this case it would be considered that the evidence of the "obvious impossibility" of the paternity charge, required by section 1717 B. G. B. has been established. The idea of such a presumption, coupled with a judicial acceptance of the refusal as proof in lieu of evidence (section 286 Z. P. O.—Code of Civil Procedure) has much in its favor, especially as there already exists a presumption of curability in the case of a person refusing to undergo an operation necessary for his cure, with the consequent rejection of his claim for further damages.[19] In view of the inexpensiveness and simplicity of the test and the absence of all danger and pain in connection with it, it is certainly just to suspect the veracity of the claim of the party refusing. From this point of view the refusal for which the parties must be responsible if it takes place with their consent, or, at their instance, resulting, as it must, in the deprivation of the adversary of the means to prove the truth of his assertions must be regarded as immoral and in bad faith. Text writers [20] and decisions [21] have in this sense been unanimous in interpreting the refusal of the mother as equivalent to proof of "obvious impossibility" by applying the judicial presumption mentioned.

But the number of decisions contra is much greater. Thus, the Prussian Kammergericht in its order of the 4th April 1930 [22] declined to make the adverse presumption upon the ground that the one refusing did not do so with the con-

[19] R. G. Z. Bd. 60. s. 152 r .g. Urt. v. 12. 7. 30—IX. 54/30; Bd. 83. S. 15; R. V. A. Urt. v. 5. II.-29—IIa. 2393/28 zu Section 1306 R. V. O. Schlager, Jur. Rdsch. 29, S. 93 ua.

[20] so Caro, J. W. 1930, a. a. O.; und Sperl. Dt. Zur. Ztg. a. a. O.

[21] L. G. Altona, Urt. v. 24 II. 1930-6. 8. 344/29 in J. W. 1930 S. 1616 und die in ihm onthaltenen Literatur nachweise; Onet, in J. W. 1929, 2290 Bespr. zum Urt. des O. L. G. Munchen, v. 11. 12. 28; Strassmann; J. W.-1930, 82.

[22] Aktenz.: 8 W. 8557/20 in Rdbrf. des A. Dr. Berfsvorm. VI. Igg. S. 6.

sciousness that thereby he has deprived the adversary of his means of proof, because no one undergoing the test is able to decide definitely whether there will be a failure of the blood groups to agree and thus constitute an absolute refutation of the claim of descent. The consciousness of the possibility that such a result might follow from the examination does not amount to the same thing. More is therefore necessary in the way of special circumstances to stamp the refusal as being in bad faith. But this ground would not seem to be tenable, for in law and precedent conduct predicated upon consciousness of a possibility of damage to another is regarded as immoral and sometimes even as criminal.

Also in its judgment of the 5th of June, 1930,[23] the Reichsgericht refused to make the adverse presumption upon the ground that the method of the iso-agglutination test, so far, has established, at most, in only about 8% of the examinations a finding against paternity by a specific person. It could, therefore, not be justifiable under any circumstances to treat the refusal to be examined in such a way as to put the adversary into the favored position accorded only to 8% of the examined cases. A further ground for the rejection is to be found also in the fact that persons have declined to undergo the iso-agglutination test for fear of its reliability as evidence. Only when confidence in the reliability of the experiment will have been sufficiently spread among the people will it be possible to draw the adverse presumptions mentioned.

These reasons of the Reichsgericht appear unconvincing. If the refusal persists even after detailed explanation by the court relative to the certainty of the test, without sufficient reasons being given, here appears room for doubt of the good faith of the person refusing. This attitude on the part of the higher court will also be decisive of the attitude of the lower courts, so that the effectiveness of the blood test to establish the truth will often be shattered by a refusal of the parties concerned to undergo it.

These decisions have gone to the far-reaching extent to deny the rights granted by the Poor Law if the applicant

[23] Aktenz. IV. 188/30.

does not submit with his pauper's petition a consent of the parties to subject themselves to the abstraction of blood for the test. This follows because according to the view of some courts,[24] the Kammergericht among them, the chances of a successful prosecution of the suit in the absence of such a consent would be too unfavorable since the applicant will not be in a position to produce the evidence for his claim. Fundamentally, therefore, the failure to produce this consent has the result of making the Poor Law in this respect a nullity. This result now has a sharp incidence on the population since many sections thereof are dependent upon the Poor Laws for the enforcement of their legal rights. This attitude of the courts is erroneous inasmuch as the test of a pauper's petition is not the nature of his prospects to produce the necessary evidence but the nature of his legal right in and for itself. Nevertheless, this position of the Kammergericht will for the time being, of course, be decisive of the attitude of the lower courts.

It follows from these decisions that the iso-agglutination test, while competent as evidence, may be entirely eliminated as such by the permissible refusal of the parties to furnish blood for the test. The test, therefore, does not by far play the role which it is entitled to by reason of the certitude attending its results over and above other evidence, and the means it furnishes to eliminate the uncertain and trouble-making testimony of witnesses as the sole basis of the court's decision. The right which is unjustly accorded to parties and witnesses to refuse the test, is to blame for this situation. Since the civil as well as criminal codes at present in existence contain no machinery for the compulsion of persons to the test by legal means, a change of these laws is necessary. Proposals for such legislation are to be found in legal literature in profusion.

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[24] K. G. Beschluss v. 4. 4. 1930—8 W. 8557/29; O. L. G. Stuttgart v. 10. 3. 28—2 W. 117 in J. W. 1928 S. 2160, die es allerdings genugend sein lasst. wenn der Antragstellerdie Einwilligung nur glaubhaft behauptet.