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NOTES AND COMMENTS

IMPOTENCY, STERILITY AND BLOOD-GROUPING TESTS— AND THEIR EFFECTS ON THE PRESUMPTION OF LEGITIMACY

I. *The Presumption of Legitimacy.*

Of the thousands of babies born in the Philippines every year,[1] a great majority will undoubtedly enjoy the perpetual undisputed status of a legitimate child. But there will be those who, though born within the span of a marriage or immediately after its dissolution, will be denounced as illegitimate by the mother's husband or

[1] According to Bureau of Health statistics, the number of births in the Philippines during the years 1946-1951 are as follows:

1946	533,283	1949	609,138
1947	572,226	1950	642,472
1948	602,415	1951	637,264

his heirs. It is for the protection of the latter class of children that the law establishes the presumption of legitimacy.

Under Article 255 [2] of the Civil Code of the Philippines, children born after 180 days following the celebration of the marriage, and before 300 days following its dissolution or the separation of the spouses, shall be presumed to be legitimate. Physical impossibility of the husband having access to his wife within the first 120 days of the 300 preceding the birth of the child is the only evidence admissible to rebut this presumption. This physical impossibility may be caused: (1) by the impotence of the husband; (2) by the fact that the husband and wife were living separately, in such a way that access was not possible; (3) by the serious illness of the husband. However, even when there is no such physical impossibility of access, a child will be *prima facie* presumed *illegitimate,* when the wife commits adultery at or about the time of conception, and it appears highly improbable for *ethnic reasons* that the husband is the father of the child.[3]

A child born *within* 180 days after the celebration of the marriage is *disputably* presumed to be legitimate, but such a presumption becomes *conclusive* when certain conditions are present.[4] There is *no* presumption of legitimacy or illegitimacy when the child is born *after* the 300 days following the dissolution of the marriage or the separation of the spouses.[5] Presumptions as to the paternity of a

[2] Article 255 of the Civil Code of the Philippines provides:

"Children born after one hundred and eighty days following the celebration of the marriage, and before three hundred days following its dissolution or the separation of the spouses shall be presumed to be legitimate.

"Against this presumption no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife within the first one hundred and twenty days of the three hundred which preceded the birth of the child.

"This physical impossibility may be caused:

"(1) By the impotence of the husband;

"(2) By the fact that the husband and wife are living separately, in such a way that access was not possible;

"(3) By the serious illness of the husband. (108a)"

[3] Art. 257, *op. cit.,* provides: "Should the wife commit adultery at or about the time of the conception of the child, but there was no physical impossibility of access between her and her husband as set forth in article 255, the child is *prima facie* presumed to be illegitimate if it appears highly improbable, for ethnic reasons, that the child is that of the husband. For the purposes of this article, the wife's adultery need not be proved in a criminal case. (n)"

[4] Art. 258, *op. cit.,* provides: A child born within one hundred eighty days following the celebration of the marriage is *prima facie* presumed to be legitimate. Such a child is conclusively presumed to be legitimate in any of these cases:

"(1) If the husband, before the marriage, knew of the pregnancy of the wife;

"(2) If he consented, being present, to the putting of his surname on the record of birth of the child;

"(3) If he expressly or tacitly recognized the child as his own. (110a)"

[5] Art. 261, *op. cit.,* provides: "There is no presumption of legitimacy or illegitimacy of a child born after three hundred days following the dissolution of the mar-

child, whose mother remarries, within 300 days following the death of her first husband, will be found in Article 259.[6]

The above-cited Article 255 [7] of the Civil Code of the Philippines amended Article 108 [8] of the Spanish Civil Code, which according to Manresa, was in consonance with traditional legislation dating back to the time of Justinian,[9] and was (Article 108) a restatement, with certain minor differences, of the portions of the Law of Civil Marriages and the Partidas on this point.[10] This presumption is based on the Roman principle: *Pater est quem nuptiae demostrant.*[11]

The presumption of legitimacy had its origin in remote time.[12] Denis Le Marchant [13] says that the earliest authority on this subject which can be safely cited is the Digest, from where it has descended into most of the codes of modern Europe. He believes, however, that the definitions given by the great Roman jurists to the presumption,[14] most probably did not originate from them, but must have been of great antiquity. This presumption, under the Roman law, could be rebutted by showing the impotency of the husband or by proving that there was no sexual intercourse between the husband and wife when the period of the wife's gestation commenced.[15]

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riage or the separation of the spouses. Whoever alleges the legitimacy or the illegitimacy of such child must prove his allegation. (n)"

[6] Art. 259, *op. cit.*, provides: "If the marriage is dissolved by the death of the husband, and the mother contracted another marriage within three hundred days following such death, these rules shall govern:

"(1) A child born before one hundred eighty days after the solemnization of the subsequent marriage is disputably presumed to have been conceived during the former marriage, provided it be born within three hundred days after the death of the former husband;

"(2) A child born after one hundred eighty days following the celebration of the subsequent marriage is *prima facie* presumed to have been conceived during such marriage, even though it be born within the three hundred days after the death of the former husband. (n)"

[7] See note 2, *supra.*

[8] Art. 108 of the Spanish Civil Code provides: "Children born after the one hundred and eighty days next following that of the celebration of marriage or within the three hundred days next following its dissolution or the separation of the spouses shall be presumed to be legitimate.

"This presumption may be rebutted only by proof that it was physically impossible for the husband to have had access to his wife during the first one hundred and twenty days of the three hundred next preceding the birth of the child."

[9] 1 Manresa (4th ed.), p. 479.

[10] *Op. cit.*, p. 480.

[11] *Op. cit.*, p. 479.

[12] *Kennedy v. State,* 173 S. W. 842.

[13] Denis Le Marchant's preface to his report published in 1828 of *the Gardner Peerage Case,* p. xiii, cited in *In re Walker's Estate,* 181 P. 792.

[14] Idem: "* * * Paulus declares 'marriage to be proof of paternity,' whilst according to Ulpian 'the issue of a man and his wife are legitimate.' * * *"

[15] Idem.

The early common law in England on this point was very rigid. If the husband was "within the four seas—that is, within the jurisdiction of the King of England," no proof was to be admitted to prove the child a bastard, if the husband was not impotent.[16]

This rule was gradually relaxed and the rule both in England and in the United States became as follows:

> "A child born of a married woman is in the first instance presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent (impotent); (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." [17]

Unfortunately, however, the expressions used to designate the *degree of proof* necessary to rebut the presumption are at wide variance. Justice Cardozo, on this point, observed that the courts were by and large, generally agreed that "countervailing evidence may shatter the presumption though the possibility of access is not susceptible of exclusion to the point of utter demonstration." [18] But as has been said, the expressions vary. Some courts require that to rebut the presumption of legitimacy, the evidence of nonaccess must be "clear and convincing"; others, that it must be "strong and irresistible"; and still others, that it must be proof "beyond all reasonable doubt." [19] Justice Cardozo sums up all these expressions as meaning nothing more than that "* * * the presumption will not fail unless common sense and reason are outraged by holding that it abides." [20] Under this rule, it was held that where the wife left the husband and lived in adultery with another man, and the child is acknowledged by her and the adulterer as the fruit of their illicit union, such child will *not* be presumed legitimate on the theory that she was visited by her abandoned husband while she was living away from him in adultery.[21]

It also seems to be generally conceded in American courts that it is competent for the complainant to show by proof that it is *con-*

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[16] *Kennedy v. State,* see note 12, *supra; Ewell v. Ewell,* 79 S. E. 509; *West v. Redmond,* 88 S. E. 341; *Powell v. State,* 95 N. E. 600; *Dazey v. Dazey,* 122 p. 308.

[17] *Matter of Mills,* 70 p. 91; citing Lord Langsdale in *Hargrave v. Hargrave,* 9 Beav. 552; *Riley v. State,* 203 N. W. 767; *Dazey v. Dazey,* see note 16, *supra; Craven v. Selway,* 246 N. W. 821.

[18] *In re Findlay,* 170 N. E. 471.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

trary to the laws of nature for both the parents of a mulatto to be persons of the white race.[22]

Despite the fact, however, that the "rule of the four seas" has been exploded and no longer prevails,[23] the presumption of legitimacy is still said to be "one of the strongest and most persuasive known to law." [24] It cannot, therefore, be overthrown "* * * at the call of rumor or suspicion, or through inferences nicely poised." [25]

What is the purpose or underlying reason behind the presumption of legitimacy, and why is it so rigid that in certain cases it would almost seem unjust?

The presumption of legitimacy is founded on decency, morality, and public policy,[26] and the immediate exigencies or even the apparent justice of any particular case will not justify a departure from the rule so necessary and salutary to the best interests of society.[27] The child is safeguarded against future humiliation and shame. Likewise under the rule, the family relationship is kept sacred and the peace and harmony thereof preserved.[28] Montesquieu alluding to this presumption, gloomily observed: "The wickedness of mankind makes it necessary for the law to suppose them better than they really are. Thus we judge that every child conceived in wedlock is legitimate, the law having a confidence in the mother as if she were chastity itself." [29]

II. *Impotency and Sterility.*

It will be noted that even when the rule was most rigid, impotency was recognized as a means of overthrowing the presumption of legitimacy.

The Partidas referred to natural and occasional impotency.[30] The Spanish Civil Code did not specifically mention impotence as a means

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[22] *Bullock v. Knox,* 11 So. 339. Also see *In re Findlay,* see note 18, *supra; In re Walker's Estate,* see note 13, *supra; Hilton v. Hilton,* 201 p. 337.

Our new Civil Code has recognized this principle in Art. 257 (see note 3, *supra*), a new provision.

[23] *In re Findlay,* see note 18, *supra; Bullock v. Knox,* see note 22, *supra; Wright v. Hicks,* 60 Am. Dec. 687; *Ewell v. Ewell,* see note 16, *supra; In re Walkers Estate,* see note 13, *supra.*

[24] *In re Findlay,* see note 18, *supra* (citing *Haynes v. McDermott,* 91 N. Y. 415, 459, 43 Am. Rep. 677; *Matter of Matthews Estate,* 155 N. Y. 443, 47 N. E. 901); *Riley v. State,* see note 17, *supra; People v. Case,* 137 N. W. 55; *Schulze v. Schulze,* 35 N. Y. S. (2d) 218; *Saks v. Saks,* 71 N. Y. S. (2d) 797; *Mayer v. Davis,* 103 N. Y. S. 943.

[25] *In re Findlay,* see note 18, *supra.*

[26] *Craven v. Selway,* see note 17, *supra.* Also see, *Bruner v. Engels,* 213 p. 307, citing *Locust v. Coruthers,* 100 p. 520.

[27] *Powell v. State,* see note 16, *supra; In re McNamara's Estate,* 183 p. 552.

[28] *Craven v. Selway,* see note 17, *supra.* See also, *In re McNamara's Estate,* see note 27, *supra.*

[29] Cited in *Kennedy v. State,* see note 12, *supra.*

[30] 1 MANRESA (4th ed.), pp. 488-489.

of rebutting the presumption of legitimacy. Physical inability for the husband to have access to his wife was declared by Article 108 [31] of said code to be the only means by which the presumption could be rebutted. Manresa, however, commenting on this article, said that "impotencia" was "otra causa que de un modo absoluto impide el acceso." [32]

Section 68(c),[33] Rule 123, made the fact that the husband was "not impotent," a requisite to the conclusive presumption of legitimacy. Article 255 [34] of the new Civil Code which amended [35] said section 68(c), specifically mentions "impotence" of the husband as one of the means of overcoming the presumption when the child is born after 180 days following the celebration of the marriage, and before 300 days following its dissolution or the separation of the spouses.

What then is impotency? In defining the term, one should be careful to distinguish it from "sterility." These two terms are frequently confused as meaning the same thing. In the case of *Menciano vs. Neri*,[36] it was bitterly argued by the counsel for the appellants that the true technical meaning of the word "impotent" is, or at least includes, "sterile." [37] The Supreme Court, however, ruled that: *"Impotency is not synonymous with sterility."* (Underscoring ours.)

Impotency refers to the want of power for copulation, or the inability to have sexual intercourse, while sterility, applies only to the lack of fertility in the reproductive elements of either sex.[38] This distinction has long been recognized by courts in the United States.[39]

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[31] See note 8, *supra*.

[32] 1 Manresa (4th ed.), p. 489.

[33] Section 68, Rule 123 of the Rules of Court in the Philippines provides: "The following are instances of conclusive presumptions:

"* * * *

"(c) The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate, if not born within the one hundred and eighty days immediately succeeding the marriage, or after the expiration of three hundred days following its dissolution; * * *"

[34] See note 2, *supra*.

[35] 3 MORAN, COMMENTS ON THE RULES OF COURT (3rd ed.), 492. Subsec. (cc), sec. 69, Rule 123 on the disputable presumption of legitimacy was amended by Arts. 258, 259 and 261 of the New Civil Code, *Ibid.*, pp. 502-503.

[36] G. R. No. L-1967, prom. May 28, 1951.

[37] See *Memorandum in Support of Oral Argument* for the Defendants-Appellants, pp. 67-101.

[38] Glaister, *Medical Jurisprudence and Toxicology* (8th ed.), p. 319; DE LOS ANGELES, LEGAL MEDICINE, p. 470; SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (2d ed.), p. 365; 3 WHARTON & STILLE'S MEDICAL JURISPRUDENCE (5th ed.), p. 120; also see notes 39 and 40, *infra*.

[39] *Payne v. Payne*, 49 N. W. 230: "* * * 'impotency' * * * means want of *potentia copulandi*, and not merely incapacity for procreation."

Turney v. Avery, 113 A. 710: "In *Kirschbaum v. Kirschbaum*, 111 Atl. 697, I decided that want of power for copulation is impotence, but that mere sterility is not."

Anonymous, 7 So. 100: " 'Barreness,' however, is in no sense the synonym of impotency."

Although some of the definitions cited by Justice Jugo [40] in the *Menciano* [41] case would seem to limit the term "impotency" to the male sex alone, medico-legalists have stated that the affliction can also occur in women.[42] This seems to be recognized in Article 85 (6)[43] of the Civil Code of the Philippines. In dealing with the presumption of legitimacy of a child, however, the law has, for obvious reasons, spoken only of impotence of the male or to be more specific, the impotency of the husband.

Conditions producing impotency may be divided into physical, psychic, physiological and pathological causes.[44] All kinds of im-

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Also see, *Smith v. Smith*, 229 S. W. 398.

In *Sarao v. Guevara* (CA), 40 O. G. 263, it was observed that: "* * * In the United States it is generally held that the test of impotency is not the ability to procreate, but the ability to copulate. As stated by a well known authority, 'the defect must, be one of copulation, not reproduction. Barreness will not invalidate the marriage,' * * * (Keezer on Marriage and Divorce, sec. 168)."

[40] Justice Jugo cites the following authorities to support his statement that: "Impotency is the physical inability to have sexual intercourse; it is different from steriliyt":

"(1) *Impotence, in Medical Jurisprudence.*—Inability on the part of the male organ of copulation to perform its proper function. Impotence applies only to disorders affecting the function of the organ of copulation, while sterility applies only to lack of fertility in the reproductive elements of either sex. (DENNIS, SYSTEM OF SURGERY; BOUVIER'S LAW DICTIONARY, Rawle's Third Revision, Vol. II, p. 1514).

"(2) *Impotentia* (L.) *Impotence.*

"Impotentia Coeundi, inability of the male to perform the sexual act.

"Impotentia Erigendi, inability to have an erection of the penis. (THE AMERICAN ILLUSTRATED MEDICAL DICTIONARY, by DORLAND, 20th Edition, p. 721).

(3) *Impotentia. Impotence.*

"i. Coeundi. Inability of the male to perform the sexual act. (i) Erigendi, impotence due to the absence of the power of erection. (STEDMAN'S PRACTICAL MEDICAL DICTIONARY, p. 551).

"(4) *Impotence.*

"'3. Law & Med. Incapacity for sexual intercourse.' (WEBSTER'S NEW INTERNATIONAL DICTIONARY, Second Edition, Unabridged, p. 1251).

"(5) *Impotency or Impotence.* Want of power for copulation, not mere sterility. The absence of complete power of copulation is an essential element to constitute impotency. (31 C. J., p. 259).

"(6) *Impotence.* Inability to perform the sexual act may be due to defective organs from abnormal or incomplete development, or to deficient internal secretions, or to disorders of the nervous system diminishing the libido. Impotence may or may not be accompanied by sterility. (THE COLUMBIA ENCYCLOPEDIA, 877)."

[41] See note 36, *supra.*

[42] See Angeles, *op. cit.*, 414-416; Glaister, *op. cit.*, pp. 321-322.

[43] Article 85 of the Civil Code of the Philippines provides: "A marriage may be annulled for any of the following causes, existing at the time of the marriage:

"* * * *

"(6) That *either* party was, at the time of marriage, physically incapable of entering into the married state, and such incapacity continues, and appears to be incurable. (30a)" (Italics ours).

[44] Angeles, *op. cit.*, p. 412.

"Among the physical causes are the malformation or defect in the generative

potency may be further classified into two main groups: absolute and relative, and both into permanent, temporary or partial.[45]

In the *Menciano* [46] case, the Supreme Court held that impotency being an abnormal condition should not be presumed. *"The presumption is in favor of potency."* (Underscoring ours.) This ruling is in harmony with decisions on this point in the United States.[47]

This presumption of potency applies even when the husband is an old man, or is sick and confined in bed. The child in the *Menciano* case was conclusively presumed legitimate although the alleged father was "an old man" and "somewhat weak" when he married the mother of the child.[48]

In the case of *Taylor vs. Whittier,*[49] the husband was seventy-five years old when he married the mother of the child in question,

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external organs, either congenital or acquired, to such a degree as to render penetration impossible. Among the psychical causes there are those mental factors that prevent sexual feeling during coitus and consequently the necessary erection or opening as the case may be, thus interfering in fact with its due accomplishment, i.e., lack or excess of passion, timidity, fear, etc. The physiological causes are those produced by extreme youth or advanced age. The pathological relates to diseases and intoxications which prevent likewise efficient cohabitation or diminish greatly sexual desire, such as some renal and prostate disease, those affecting the genito-urinary organs, certain general diseases, poisons, drugs, or injuries to the nervous paths and centers which control the sexual act or functions." *Op. cit.,* p. 412.

[45] *Op. cit.,* pp. 412-413: "Absolute impotency means incapacity to cohabit with anybody of the opposite sex; relative, when sexual intercourse can be consummated with individuals of different sexes other than husband or wife. Permanent impotency exists if the person is impotent all the time to all persons of different sexes, while temporary is that form of impotence which occurs only occasionally. Partial impotency relates to those cases in which the individual is potent in fact but of such an insufficient degree or duration that erection exists momentarily or just at the beginning of the act.

"Examples of relative and partial impotency are numerous in medico-legal literatures, being attributed generally to neurasthenic conditions of individuals. Herzog cites the interesting case related to 'a man, who having married a woman whose right leg had been amputated when a child, was impotent after her death in relation to all other women, until he again found one who also was without a right leg, when his potency was re-established':

For striking example of relative impotency, see *Tompkins v. Tompkins,* 111 A. 599.

[46] See note 36, *supra.*

[47] *Gardner v. State,* 7 S. E. 144; see also *Taylor v. Whittier,* 138 N. E. 6. But in the case of *Tompkin v. Tompkins,* see note 45, *supra,* it was declared that "if the wife be a virgin and apt after three years' cohabitation, the husband will be presumed to be impotent, and the burden will be upon him to overcome the presumption by proof that he is not at fault," in an action by the wife to annul the marriage. This is the essence of the so-called "doctrine of triennial cohabitation."

[48] In this case, the deceased was alleged to have been suffering from *senile dementia* caused by anemia and that he was "sterile, unable to procreate, and was impotent and congenitally sterile, the same as his brothers and his sister * * *, who had no children."

[49] See note 47, *supra.* Also, Wharton & Stille, *op. cit.,* pp. 125-126.

who gave birth, five years after said marriage. The court declared the child legitimate, even when it was shown that the testator had been married three times prior to the last, and that no children were born of those marriages. The court held that such a fact was "too remote in its tendency to prove impotency," and that the burden was on the appellants to prove the impotency of the testator "beyond all reasonable doubt," to overcome the presumption of legitimacy.

A child was declared legitimate in the case of *State vs. Reed*,[50] despite the testimony of a physician that for a long time before the husband went to the sanitarium, he was absolutely stiff in the hips, and that the witness doubted that if during the last six or eight months before the husband went away he was capable of indulging in sexual intercourse. The court decided that this evidence was in no sense conclusive. The requirement of the law was that under such circumstances the impotence of the husband must be clearly and fully established.

In the case of *Andal vs. Macaraig*,[51] the Supreme Court of the Philippines pronounced a child legitimate although the wife was shown to have been having illicit sexual relations with another man, and the husband was at the time of conception suffering from tuberculosis, and his condition was "so serious that he could hardly move and get up from his bed and his feet were swollen and his voice hoarse." No evidence, according to the court was presented that the husband was suffering from impotency, patent, continuing and incurable, nor that he was absent during the initial period of conception, or was in prison.[52]

The above-mentioned case of *Andal vs. Macaraig* was decided under Article 108 [53] of the *old* Civil Code. Said Article 108 has been amended by Article 255 [54] of the new Civil Code.

It might be argued that had this case been decided under the new Civil Code, the judgment would have been different; that the condition of the alleged father would fall under "serious illness of the husband," which is one of the three causes of physical impossibility enumerated by Article 255. It may be wise, however, to note that Justice Jugo, who penned the decision in this case, wrote as follows:

> "* * * But experience shows that this (condition of the husband) does not prevent carnal intercourse. There are cases where persons suffering from this sickness can do the carnal act even in the most crucial stage

[50] 149 S. E. 669.

[51] G. R. No. L-2474, prom. May 30, 1951.

[52] In the *Andal* case, the Supreme Court, citing 1 Manresa, 492-500, said that under Art. 108 of the Spanish Civil Code: "Impossibility of access by husband to wife would include (1) absence during the initial period of conception; (2) impotence which is patent, continuing and incurable; and (3) imprisonment, unless it can be shown that cohabitation took place through corrupt violation of prison regulations."

[53] See note 8, *supra*.

[54] See note 2, *supra*.

> because they are more inclined to sexual intercourse. As an author said, 'the reputation of the tuberculous towards eroticism (sexual propensity) is probably dependent more upon confinement to bed than the consequences of the disease.' (An Integrated Practice of Medicine, by Hyman, Vol. 3, p. 2202)" [55]

In this jurisdiction, the presumption of legitimacy is so jealously preserved that a child will be presumed legitimate even when the mother has declared against its legitimacy or may have been sentenced as an adulteress.[56] The question then arises: Under this rule, can a wife testify to the fact that at the time of conception, the husband was impotent? We believe the answer should be in the negative. If the wife is permitted to testify that her husband was impotent, she would in effect be indirectly, though just as effectively, declaring the child illegitimate. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.*

Let us now consider the physical condition, which we have already distinguished from impotency, to wit, sterility.

Sterility is the inability to procreate or to impregnate—it is the lack of fertility in the reproductive elements of either sex.[57]

Sterility in men, may be caused by some anomaly or disease of the testicle or the seminal passages,[58] by drugs,[59] by excessive sexual intercourse or masturbation,[60] or by operations such as castration and vasectomy.[61] Sterility is natural before the age of puberty,[62] but there does not seem to be any age limit in cases of old men. Spermatozoa has reportedly been found in a man of ninety-six.[63]

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[55] This observation is supported by 3 Wharton & Stille's, *op. cit.*, p. 125 which says that the increase of the sexual desire in consumption is well known, even in the last stages. Hofmann is said to have cited the case of a man who had coitus the night before his death from tuberculosis. The same authority cites another instance of coitus the night before death in a case of a man with syphilis of the liver and marked ascites; and still another, on the fifth day of an acute lobar pneumonia.

Dean Francisco Capistrano, a member of the Code Commission, commenting on Art. 255, wrote: "In No. 3, the serious illness of the husband must produce inability or impossibility to copulate." 1 CAPISTRANO, CIVIL CODE OF THE PHILIPPINES, p. 223.

[56] Article 256 of the Civil Code of the Philippines provides: "The child shall be presumed legitimate, although the mother may have declared against its legitimacy or may have been sentenced as an adulteress. (109)"

[57] See notes 38, 39, and 40, *supra.*

[58] See de los Angeles, *op. cit.*, pp. 416-419; Glaister, *op. cit.*, p. 321; 3 Wharton & Stille's, *op. cit.*, pp. 123-125.

[59] Opium and alcohol when long indulged in may cause sterility. Angeles, *op. cit.*, p. 419.

[60] *Op. cit.*, p. 419.

[61] *Op. cit., p.* 529.

[62] Among Filipinos puberty usually occurs at the age of 14 years. See Angeles, *op. cit.*, p. 417.

[63] Glaister, *op. cit.*, p. 319.

Sterility may be due to the complete absence of spermatozoa, the absence of motile spermatozoa, or a low spermatozoa count in the semen.[64] It is said that below 60 million spermatozoa per cc. of human ejaculate, a man would be relatively infertile.[65]

As has been explained, the rule in the Philippines, at the time of this writing, is that impotency and not sterility is the means of rebutting the presumption of legitimacy, when the facts fall under the provision of Article 255 of the Civil Code. Dr. Sixto de los Angeles,[66] however, suggests that "the condition of sterility must be regarded as stronger ground for counter-proving legitimacy than that of impotency, should the latter be interpreted in its literal narrow sense." He points out that impotency does not necessarily coexist with sterility. A man may be impotent, but not sterile.[67] Such a man, could still become the father of a child. Impotency does not prevent the possibility of ejaculation, and should this ejaculation occur at the entrance of the female vulva, when there is even the slightest or superficial penetration (without erection), the healthy and live spermatozoa may still impregnate the woman.[68] In the case of *Clark vs. Clark*,[69] the court took cognizance of this fact, and declared the husband the father of the child, although it was shown that there was never any consummation of the marriage, i.e., no penetration of the vagina.

Another aspect of impotency which should be noted is that weakened male organs can be artificially erected with special devices, which are well known in medical practice. Such devices enable an otherwise impotent male to accomplish sexual penetration into the vaginal canal.[70]

Conversely, a man may be potent, but sterile. In such a case, the man would be able to consummate the sexual act and even ejaculate semen, *but he would be incapable of procreation because of the absence of live and healthy spermatozoa.*[71]

We now ask the reader this question: How can one justly presume a man who is *absolutely* sterile, although not impotent, to be the father of a child, when it was impossible for him to have impregnated his wife—when he did not have the power to procreate the child?

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[64] See Schatkin, *op. cit.*, p. 366.

[65] *Idem.*

[66] Angeles, *op. cit.*, p. 470-471.

Dean Capistrano shares this view: "The word 'impotence' in connection with cases involving the conclusive presumption of legitimacy, as distinguished from cases for annulment of marriage on the ground of physical incapacity, is not restricted to inability to copulate but also extends, and with more reason, to sterility or incapacity to procreate." 1 Capistrano, *op. cit.*, p. 222.

[67] See Angeles, *op. cit.*, p. 470; Wharton & Stille, *op. cit.*, p. 125.

[68] Angeles, *op. cit.*, p. 470.

[69] Lancet, Vol. I, p..89, 1943, cited by Glaister, *op. cit.*, 325.

[70] Angeles, *op. cit.*, 409-410.

[71] *Ibid.*, p. 470.

In the light of the *Menciano vs. Neri* [72] case, however, the word "impotence" must be construed as meaning the physical inability to have sexual intercourse. Evidence presented to establish sterility i.e., the lack of fertility in the reproductive elements of either sex, is immaterial evidence, and therefore can be objected to successfully.[73]

It is submitted that the above stated rule should apply only in cases falling under Article 255 [74] of the new Civil Code. When there is only a *prima facie* presumption of legitimacy [75] or illegitimacy,[76] or when there is no presumption of legitimacy or illegitimacy,[77] it is believed that evidence regarding the sterility of the man, can and should be admitted, to prove non-paternity. It is only Article 255, which specifically mentions, and thus limits, the means of rebutting the presumption to impotency. Of course, when the presumption is *conclusive,*[78] evidence regarding sterility or any other such evidence for that matter, will be rejected.

If, and when, sterility is received in evidence, the following observations are some of the things which should be kept in mind:

1. According to medical jurisprudence, a man may not have spermatozoa at a certain time, but may have had it previously or may have it subsequently to the examination.[79]

2. It has been stated that when the spermatozoon count is below 60 million per cc., such a man will be relatively infertile. But it should be remembered that *only one* spermatozoon is needed to impregnate the ovum. The only *absolute* proof of sterility, therefore, would be the absence of testicles or complete absence of spermatozoa from the semen due to atrophy or disease of the testicles or blockage of the vas diferens, the tube through which the spermatozoa are excluded.[80]

3. Vasectomy operations, which may be performed purposely to produce sterility, have been known to fail in this objective.[81]

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[72] See note 36, *supra.*

[73] See *Menciano* case, *supra.*

[74] See note 2, *supra.* Such a rule would also apply to proper cases falling under sec. 68 (c), Rule 123, see note 33, *supra* (Menciano case) and under Art. 108 of the Spanish Civil Code, see note 8, *supra.*

[75] Art. 258, see note 4, *supra.*

[76] Art. 257, see note 3, *supra.*

[77] Art. 261, see note 5, *supra.*

[78] Art. 258 (second part), see note 4, *supra.*

[79] *Obiter dictum* in *Menciano v. Neri,* see note 36, *supra.*

[80] Schatkin, *op. cit.,* p. 366.

[81] See *Christensen v. Thornby,* 255 N. W. 620 which is an action for damages based upon the alleged failure of a sterilization operation (vasectomy).

"* * * The operation of sterilization upon a man (vasectomy) is a simple one, accompanied by very slight hazard, whereas that upon a woman is more serious and requires a greater degree of skill on the part of the physician. It entails hospitalization. It is frequently performed upon women who habitually miscarry or abort. So far as progeny is concerned, the results to this married couple would be the same were effective sterilization performed upon either. Therefore, in our opinion, it was entirely

4. Castration after the age of puberty does not necessarily produce sterility immediately. Complete sterility occurs only after the seminal passages have been emptied of all contained spermatozoa.[82]

III. *Blood-Grouping Tests.*[83]

All human blood in the world falls within four groups and three types: [84]

Blood Groups	*Blood Types*
A	M
B	N
AB	MN
O	

The forensic application of these blood-grouping and typings to establish non-paternity in courts of law is based on the following firmly established properties of the blood groups and types:

> "1. The blood group and type of any individual can be determined at birth or shortly thereafter.
>
> 2. The blood group and type of every individual remains constant throughout life and does not change regardless of age, disease, medication, etc.
>
> 3. The blood groups and types are inherited in accordance with Mendel's laws." [85]

After having determined the blood groups and types of the mother, the child, and the alleged father,[86] the following established rules may then be applied:

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justifiable for them to take the simpler and less dangerous alternative and have the husband sterilized. Such an operation does not impair, but frequently improves, the health and vigor of the patient. Except for his inability to have children, he is in every respect as capable physically and mentally as before. *It does not render the patient impotent* or unable 'to fight for the king,' as was the case in mayhem or maiming." (Italics ours). *Ibid.*

[82] Angeles, *op. cit.*, p. 417. The procreative power is progressively lost—Glaister, *op. cit.*, p. 321.

[83] The blood group has been characterized as "the fingerprint of the blood * * *" *State v. Wright,* 17 N. E. 2d 428.

[84] Schatkin, *op. cit.*, p. 131. Also see *State v. Wright,* see note 83, *supra; Shanks v. State,* 45 A 2d 85.

According to Davidsohn, *Blood Grouping Tests in Disputed Paternity Cases,* SYMPOSIUM ON MEDICOLEGAL PROBLEMS, p. 210, the approximate distribution of the so-called blood groups in the population are as follows:

Group A	40%	Group AB	5%
Group B	13%	Group O	42%

In the Philippines, the Philippine National Red Cross reports that the Blood-group distribution among those who donated blood in 1951 are as follows:

Group O	45.15%	Group B	24.29%
Group A	25.62%	Group AB	4.94%

[85] Schatkin, *op. cit.*, p. 134. Also see Davidsohn, *op. cit.*, pp. 212 and 216.

[86] The determination of the blood group of an individual is based on that fact that when samples of two "incompatible" blood groups are mixed together, clumping

"1. The agglutinogens A and B cannot appear in the blood of a child unless present in the blood of one or both parents.

2. A parent belonging to group AB cannot give rise to a group O child, and a group O parent cannot give rise to a group AB child.[87]

3. The agglutinogens M and N cannot appear in the blood of a child unless present in the blood of one or both parents.

4. A type M parent cannot give rise to a type N child, and a type N parent cannot have a type M child." [88]

From the above rules, the following charts [89] can be drawn:

CHART 1

Groups of Parents	*Groups of Children Not Possible*	*Groups of Parents*	*Groups of Children Not Possible*
O x O	A, B, AB	B x B	A, AB
O x A	B, AB	O x AB	O, AB
O x B	A, AB	A x AB	O
A x A	B, AB	B x AB	O
A x B	—	AB x AB	O

CHART 2

Types of Parents	*Types of Children Not Possible*
M x M	MN, N
M x N	M, N
N x N	M, MN
MN x M	N
MN x N	M
MN x MN	—

(agglutination) in the mixture results. Substances in the plasma, known as agglutinins, are responsible for this clumping. Sera which contain agglutinins against M and N types of blood are obtained from animals which have been previously injected with human blood. For a more comprehensive discussion of this point, the reader is referred to Schatkin, *op. cit.*, pp. 131-134; Davidsohn, *op. cit.*, pp. 209-211.

For the chemical technique used in blood-grouping tests, see Glaister, *op. cit.*, p. 307.

[87] "Wiener aptly summed up the position of the medico-legal application of blood grouping, in relation to questions of heredity * * *, when he expressed the views that for reasons, namely, certain exceptions found, there may be slight objections to placing exclusions of paternity or of maternity based on the second law of heredity on the same level as those made in accordance with the first law. Thus, while non-conformity to the first law may be considered absolute proof of non-paternity, non-conformity to the second law should perhaps only be considered strong evidence that paternity is most unlikely * * *." However, Bernstein's theory, which includes this second law, is now generally accepted. Glaister, *op. cit.*, p. 310.

[88] Schatkin, *op. cit.*, pp. 134-135.

[89] Taken from Keeffe & Bailey, "*A Trial of Bastardy is a Trial of the Blood*," 34 *Cornell Law Quarterly*, 72. For other similar charts, see Schatkin, *op. cit.*, pp. 135-137 and Glaister, *op. cit.*, pp. 310-311.

It should be immediately observed that blood grouping tests *cannot prove* paternity, and cannot always disprove it, but the tests, in many cases, *can disprove* it conclusively.[90]

A competent expert on this matter *cannot*, therefore, testify that "X *is* the father of the child," but he may in certain cases affirm that "It is *impossible* for X to have been the father of the child."

For example: It is proven by tests that the mother has group A blood, the alleged father group A, and the child group B. The alleged father in this case could not have possibly sired the child in question. The child must have inherited his group B blood from another man.

But if the results of the tests are: Mother—group A; alleged father—group A; and the child—group A, then the exclusion of the alleged father is not possible. However, it cannot be said that these results establish the paternity of the child. Millions of men have group A blood, and any of these men could have been the potential father of the child.[91] Therefore, when blood grouping tests are ordered in paternity cases, the results should be admitted in evidence *only* when there is an exclusion.[92]

With the announcement of a discovery of the rhesus (Rh) blood factor in 1940, new doors were opened in the field of blood testing. By using three so-called Rh anti-sera, the human blood can be subdivided into eight types, and by the use of two anti-Hr sera, as many as twelve Rh-Hr blood types can be identified.[93]

The Rh-Hr, A-B-O and M-N classifications are independent of each other. By using the A-B-O classification alone, the chances of excluding an erroneously accused father is about 1 in 7. When the M-N test is availed of together with the A-B-O test, the chances of exclusion become 1 in 3. The RH-Hr test, when used with the other

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[90] Glaister, *op. cit.*, p. 310; Davidsohn, *op. cit.*, p. 215; Keeffe & Bailey, *op. cit.*, p. 72; *Beach v. Beach*, 114 F 2d 479; *Jordan v. Mace*, 69 A 2d 670, citing *Jordan v. Davis*, 57 A. 2d 209.

[91] See *Shanks v. State*, see note 84, *supra*.

[92] See 2 JONES, THE LAW OF EVIDENCE IN CIVIL CASES (4th ed.), pp. 774-775.

[93] In *Saks v. Saks*, see note 24, *supra*, the New York City Domestic Relations Court accepted the Rh-Hr blood-grouping test as proof of non-paternity. In this case, a baby was born about ten or eleven weeks after the marriage of the parties. The husband knew of the pregnancy of the woman at the time of their marriage and believed the child to be his. In this action for support, he denies paternity of the child. The court ordered a blood-grouping test. The husband could not be excluded by the A-B-O and M-N tests, but he was so excluded by the Rh-Hr test. The court ruled that the husband was not the father, on the basis of these tests.

Under Art. 258 (see note 4, *supra*) of the Civil Code of the Philippines, however, such a child would be *conclusively* presumed to be legitimate, because although the baby was born *within* 180 days following the celebration of the marriage, the husband, before the marriage, knew of the pregnancy of the wife.

For a more comprehensive discussion of the Rh-Hr classification and corresponding charts, see Schatkin, *op. cit.*, pp. 138-149; Keeffe & Bailey, *op. cit.*, pp. 73-76.

two above-mentioned tests, makes it possible for 1 out of every 2 wrongly accused father to be excluded.[94]

In order that a blood-grouping test can be considered accurate and dependable, Shatkin [95] states that the following requisites must be present:

> "1. It must be carried out by a highly competent and qualified pathologist.
>
> 2. Identification of the mother, child, and alleged father must be verified.
>
> 3. The test must be carried out completely, i.e., it must include the test for the A-B group, the M-N types, and the Rh-Hr types.
>
> 4. It must be carried out with care and accuracy by experts specially trained in this field.
>
> 5. The sera used must be of good quality and of proper potency.
>
> 6. All possible sources of error, whether of sera used, or technic employed, must be eliminated.
>
> 7. The pathologist must check and recheck the result, particularly in case of an exclusion of paternity."

There seems to be no doubt that the accuracy and reliability of blood tests, when properly carried out, has been accepted by medical authorities, and courts in the United States have taken cognizance of this fact.[96]

The Philippines does not have any law which expressly permits the use of blood tests in paternity cases, although as will be shown later, our courts may make use of Section 1, Rule 22,[97] of the Rules of Court, to order blood-grouping tests in proper cases. The Supreme Court of the Philippines, to this date, has not yet passed on the subject of blood-grouping tests.

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[94] Keeffee & Bailey, *op. cit.*, pp. 73 and 75; Schatkin, *op. cit.*, pp. 158-159; *Saks v. Saks*, see note 24, *supra*.

[95] Schatkin, *op. cit.*, pp. 155-156.

[96] As early as 1936, the Supreme Court of North Dakota in *State v. Damm*, 266 NW 667, said: "We therefore say, without further elaboration or discussion, that it is our considered opinion that the reliability of the blood test is definitely, and indeed unanimously, established as a matter of expert scientific opinion entertained by authorities in the field, and we think the time has undoubtedly arrived when the results of such tests, made by competent persons and properly offered in evidence, should be deemed admissible in a court of justice whenever paternity is in issue."

Jordan v. Davis, see note 90, *supra:*

"Scientific research over many years by the use of blood grouping tests has made important discoveries which have had a profound effect, not only in the practice of medicine, but in the proof of issues in courts of law. Medical men have accepted these as accurate in many cases in which has depended the question of life and death."

Also see *Beach v. Beach*, see note 90, *supra; Shanks v. State*, see note 84, *supra; State ex rel. Walker v. Clark*, 58 N. E. 2d 773; *Beuschel v. Manowitz*, 271 N. Y. S. 277; *Anthony v. Anthony*, 74 A. 2d 919; *Saks v. Saks*, see note 24, *supra* (on Rh-Hr tests).

[97] Section 1, Rule 22 of the Rules of Court provides:

The first tribunal in the Philippines before which blood test results are known to have been offered in evidence, was the Board of Commissioners of Immigration.

In the deportation proceedings [98] of one Chua Mah Tuan, male, single, and 14 years of age, the Board of Commissioners, refused to deport the respondent despite the Chemistry Report submitted by the Forensic Chemistry Division of the N.B.I. (National Bureau of Investigation) that according to blood-grouping tests, the said respondent could not have been the child of the naturalized Filipino, Antonio Roxas Chua. The respondent upon arriving in this country on May, 1950, had declared under oath before a Board of Special Inquiry that he was the son of said Antonio Roxas Chua. This allegation was taken by the Board of Special Inquiry as true, and the respondent was permitted to land in the Philippines. Antonio Roxas Chua, the alleged father, declared that the respondent was really his son, and that said respondent was born one year after his (Antonio's) marriage with his present wife in China.

The Board of Commissioners ruled, among other things, that under sec. 68(c),[99] Rule 123 of the Rules of Court, the respondent is indisputably presumed to be legitimate. As to the exclusionary blood-grouping test results, it said:

> "* * * This is the first time that the blood-test system of determining paternity has come before this Board for appreciation. It cannot be denied that even our courts do not as yet resort to this system. We ourselves cannot speak with authority on the question of the merits and demerits of this system. While it is admitted that blood-test has its obvious merits, as a scientific test, we are not prepared to say that it has been established as an infallible guide. Taking into consideration the acts of Antonio Roxas Chua which are entirely consistent with his claim of paternity, we cannot deny the claimed relationship on the sole basis and authority of Exhibit H (blood test results)." [100]

About half a year after this decision was promulgated, Judge Juan Sarenas of the Court of First Instance of Cotabato, rendered a decision which regarded blood-grouping test exclusions in an entirely different light. The above-mentioned decision was promulgated in

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"*When examination may be ordered.*—In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may in its discretion order him to submit to physical or mental examination by a physician."

[98] *In re deportation proceedings on W. A. No. 1962,* Chua Mah Tuan, respondent, I. C. No. 12447-e (August 28, 1950). We wish to thank Mr. Edgardo Hojilla, Technical Assistant to the Commissioner of Immigration, Bureau of Immigration, for making available to us a copy of this decision.

[99] See note 33, *supra.*

[100] Subsequent blood tests conducted by the N.B.I. for the Bureau of Immigration have not resulted in any more exclusionary results. Interview with Mr. E. Hojilla, see note 98, *supra.*

a habeas corpus proceeding [101] for the custody of the minor Pricela Dionaldo. Both the petitioner and the respondent and their respective wives, claimed the child in question as their own. A blood test was conducted and the results showed that the child could not have been the petitioner's and his wife. This finding, together with a comparison of the facial characteristics of the child Pricela, with those of the other children of both the petitioner and the respondent, led the court to dismiss the petition. This case was not appealed.[102]

Mr. Lorenzo Sunico, chief of the Forensic Chemistry Division of the N.B.I., says that after this decision of Judge Sarenas was reported in a local newspaper,[103] the N.B.I. was besieged with many inquiries regarding the probative value of blood-grouping tests, and requests were subsequently received from other Courts of First Instance, for the performance of these tests.[104]

In 1951, Judge Demetrio Encarnacion of the Court of First Instance of Rizal (Sala of Pasig), "en interés de la justicia y considerando el progreso de la ciencia," ordered the accused, the allegedly offended party, and the child in a qualified seduction case,[105] to submit to a blood-grouping test. The Forensic Chemistry Division of the N.B.I., which conducted the tests, reported that according to the results of the blood-grouping tests, the accused could not be the father of the child whose birth was alleged to have been the consequence of the crime charged. In acquitting the defendant, the court, among other things said:

> "* * * El Dr. Lorenzo Súnico, jefe del Forensic Chemistry Division del National Bureau of Investigation, en el banquillo testifical, bajo juramento, ratificó el resultado de su exámen de la sangre de los tres individuos mencionados, *en el sentido de que el acusado no podría ser padre de la niña Paraluman Limón* (italics not ours), y que a pesar de las hábiles repreguntas dirigidas por el abogado de la acusación privada, el testimonio pericial del Dr. Súnico produjo el convencimiento de que la niña no podría ser hija del acusado. El testimonio del Dr. Súnico no ha sido refu-

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[101] *Dionaldo v. Joloana,* Special Case No. 134 (March 8, 1951, C. F. I. of Cotabato. We wish to thank Mr. Lorenzo Sunico, chief of the Forensic Chemistry Division, N.B.I. for making available to us his copy of this decision.

[102] *The Manila Times,* March 30, 1951 reported:

"Sunico, who bared yesterday that the Dionaldos never bothered to appeal the case because of the conclusive findings, added that it was high time local courts upheld the probative value of these paternity tests, a procedure which has found acceptance not only in the United States, but also in Denmark, Danzig, Norway, Lithuania, Czechoslovakia, Holland, Sweden, Japan, Russia, Italy, Belgium, Ireland, England, Australia, and Brazil."

[103] *Ibid.*

[104] In Civil Case No. 10848, Judge Rudolfo Baltazar of the Court of First Instance of Pangasinan issued an order asking the Forensic Chemistry Division of the N.B.I. to conduct blood grouping tests. The tests, however, were not able to establish an exclusion. Interview with Mr. L. Sunico, see note 101, *supra.*

[105] *People v. Leon Ka Tongohan,* Criminal Case No. 2914 (February 4, 1952), C. F. I. of Rizal, Sala of Pasig.

tado bajo ninguna, forma, y el Juzgado no tiene otra alternativa que aceptarlo como verídico. *Esta prueba científica se acepta actualmente en Filipinas y se respeta como prueba en las otros países de más cultura y civilización.*" (Italics ours).

In Europe, courts of Germany, Denmark, Russia and England, among others, have availed themselves of blood-grouping tests in some paternity cases.[106]

In the United States, New York,[107] Maine,[108] Maryland,[109] New Jersey,[110] Ohio,[111] Wisconsin,[112] South Dakota,[113] and North Carolina [114] have blood-grouping test statutes.

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[106] See Schatkin, *op. cit.*, pp. 211-217. See also note 102, *supra*. Blood-grouping tests have been recognized by the courts of Europe since 1924. *Shanks v. State*, see note 84, *supra;* MAGUIRE, *A Survey of Blood Group Decisions and Legislation in the American Law of Evidence*, SELECTED ESSAYS ON FAMILY LAW, p. 716.

[107] Domestic Relations Court Act of the City of New York, section 34 (1942): "On motion of an actual or alleged parent, the family court may, in its discretion, order each actual or alleged parent and the child to submit to one or more blood-grouping tests by a duly qualified physician to determine whether or not any person disclaiming parenthood may be excluded as the parent of the child; and the results of such tests may be received in evidence but only in cases where definite exclusion is established. The cost of such test shall be defrayed by the person demanding it."

N. Y. Civil Practice Act, section 306a: "Whenever it shall be relevant to the prosecution or defense of an action, or whenever it shall be relevant in any proceeding pending in a court of record, the court, by order, shall direct any party to the action or proceeding, and the child of any such party and the person involved in the controversy to submit to one or more blood-grouping tests, the specimens for the purpose to be collected and the tests to be made by duly qualified physicians and under such restrictions and directions, as to the court or judge shall seem proper. Whenever such test is ordered made, the results thereof shall be receivable in evidence only where definite exclusion is established. The order for such blood grouping test may also direct that testimony of such experts and of the persons so examined may be taken by deposition pursuant to this article." Cited in Keeffe & Bailey, *op. cit.*, p. 76.

[108] Rev. Stat. 1944, Ch. 153, Sec. 34, cited in *Jordan v. Davis*, see note 90, *supra*. See also note 114, *infra*, second paragraph.

[109] Md. Ann. Code Gen. Laws (Flack, Supp. 1943) Art. 12, section 17. See *Shanks v. State*, note 84, *supra*. Also see note 114, *infra*, second paragraph.

[110] R. S. 2: 99—4, N. J. S. A., cited in *Anthony v. Anthony*, see note 96, *supra*. Also see note 114, *infra*, second paragraph.

[111] Ohio General Code, Sections 12122-1, 2, cited in *State ex rel. Walker v. Clark*, see note 96, *supra*. Also see note 114, *infra*.

[112] Wis. Stat., sec. 166.105, cited in *Euclide v. State*, 286 N. W. 3. See also note 114, *infra*.

[113] S. D. Code (1939) 36.0602, Sup. Ct. Rule 540 (1939), Keeffee & Bailey, *op. cit.*, p. 77 (footnote 15). Also see note 114, *infra*.

[114] N. C. Gen. Stat. (Michie, *et al.*, Supp. 1945), sec. 49-7, *Ibid.*

The above cited statutes (notes 107-114, *supra*) are similar in that * * * if the putative father cannot pay for the test, the expense must be borne by the county; an-conclusive result is inadmissible as evidence. In New Jersey and Ohio, the court determines how and by whom the cost of the test shall be paid while in Wisconsin, Maine and Maryland, the county always pays this cost. In Wisconsin "any duly

California, Connecticut, Minnesota,, Mississippi, North Dakota, and Pennsylvania courts have ordered blood-grouping tests in the absence of statutes.[115]

The Federal District Court of the District of Columbia, in the case of *Beach v. Beach*,[116] construed a Federal Rule, which provided for a physical or mental examination by a physician in actions where the mental or physical condition of a party is in controversy, as permitting a blood test. The rule construed in that case was Rule 35(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723-c, which provides:

> "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician."

The Federal Court held: "We think that the characteristics which are expressed in terms of blood grouping are likewise part of physical conditions."

It will be interesting to note that said rule is similar, almost verbatim, to section 1, Rule 22 [117] of our Rules of Court. As a matter of fact said section was taken from the above-cited Federal Rule 35(a).[118] This may suggest a means whereby our courts may authorize blood-grouping tests in paternity cases, at least where the child is not conclusively presumed to be legitimate.

What is the probative value of blood-grouping test exclusions in the courts of the United States? What is its effect on the presumption of legitimacy?

It is reported [119] that:

> "New York and New Jersey courts, with the aid of statutes indicating legislative approval, have usually given decisive and final weight to the blood-grouping test. The New Jersey record shows only one recent denial of the blood-grouping exclusion while the Court of Special Sessions of the City of New York has accepted the blood-grouping results as conclusive in every case."

On November 19, 1949, the Supreme Court of Maine, declared [120] that in bastardy actions where blood tests had been ordered, the jury could not determine the weight it desired to give to the biological law. The jury could *only* determine *whether the tests were properly conducted.* "If so made, the exclusion of the respondent as father of one child follows irresistibly." It was further ob-

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qualified person, or persons' as distinguished from a 'physician' may make the test." Keeffee & Bailey, *op. cit.*, p. 77 (footnote 16). Also see Schatkin, *op. cit.*, p. 184.

[115] *Ibid.*, pp. 77-78. Also see *Beach v. Beach*, note 90, *supra.*

[116] See note 90, *supra.*

[117] See note 97, *supra.*

[118] 1 Moran, *op. cit.*, p. 459.

[119] Keeffee & Bailey, *op. cit.*, p. 78. Also see Schatkin, *op. cit.*, pp. 157-158.

[120] *Jordan v. Mace*, see note 90, *supra.*

served that the blood-grouping test statutes were applicable where the respondent, on a matter of ordinary proof without the tests, could do no more than "create a doubt about the paternity of a child." Blood test exclusion was held to be scientific proof that a respondent is not the father.

In the case of *Schulze v. Schulze*,[121] it was held that exclusion under the blood-grouping tests, together with the testimony of the plaintiff himself that he had no intercourse with the defendant during the period of gestation, was sufficient to overcome the presumption of legitimacy which is "one of the strongest presumptions known to the law." The blood test in this case was ordered pursuant to the provisions of section 306-a of the Civil Practice Act.[122] Commenting on this section, the court stated:

> "The Legislature has recognized the advances made in this type of medical science and has given its stamp of approval to the use as evidence, under certain circumstances, of the result of such examination."

Judicial acceptance of giving great or decisive weight to blood-grouping tests, however, is not unanimous.

During the period from 1940 to 1948, around eight New York courts have found contrary to blood test exclusions.[123]

The Supreme Court of California, in the case of *Arais v. Kalensnikoff*,[124] declared that evidence concerning blood tests could not be considered conclusive, unless so made by statute. Blood tests were considered as expert evidence, and as such was to be given the weight to which it appears in each case to be justly entitled, the law making no distinction between expert testimony and evidence of other character.

In *Berry v. Chaplin*,[125] a California jury found the defendant to be the father of a child, despite the unanimous conclusion of the three physicians, who conducted the blood tests (pursuant to a stipulation between the parties) that according to the well accepted laws of heredity, the defendant, Charles Chaplin, could not be the father of the child, Carol Ann Berry.[126] The District Court of Appeals of

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[121] See note 24, *supra*.

[122] See note 107, *supra*. In this case the parties had entered into a separation agreement. About one year after the parties had separated, the defendant gave birth to a child, and it was following the birth of this child that the present action was instituted by the plaintiff charging the defendant with adultery and alleging that the child in question was not his (plaintiff's) but was illegitimate. There was a sharp dispute in this case on the question of access. (Cf. Art. 261 of the Civil Code of the Philippines, note 5, *supra*).

[123] Keeffe & Bailey, *op. cit.*, p. 78.

[124] 74 P. 2d 1043.

[125] 169 P. 2d 442.

[126] The result of the blood-grouping tests were as follows:

	Group	*Type*
Charles Chaplin	O	MN
Joan Berry	A	N
Carol Ann Berry (the child)	B	N

California, feeling itself bound by the ruling in the *Arais* [127] case, held that the lower court did not err in instructing the jury that blood tests to determine parentage was not conclusive and that they (the jury) were therefore not bound by such medical opinion.

The court in the *Berry* case took cognizance of the fact that the decision in the *Arais* case had been the subject of discussion and criticism in law reviews and other legal periodicals, but declared that until the Supreme Court of California modified or reversed its decision, it remained the law of the state.

The *Berry v. Chaplin* case itself was not without criticism. The *Boston Herald,*[128] commented: "Unless the verdict is upset, California has in effect decided that black is white, two and two are five and up is down." As has been seen, the verdict was not upset.

Let us now attempt to summarize the scientific and judicial acceptance of blood-grouping tests. There seems to be no doubt that the accuracy and reliability of blood-grouping test *exclusions* have long been universally recognized in the scientific world. By and large judicial tribunals in the United States seem to be generally agreed that blood-grouping test exclusions are *admissible* in evidence, but there is a divergence of opinion as to the *amount of evidential weight* which is to be given to such exclusions. It appears, however, that the tendency of these courts has been to give more and more weight to this kind of evidence.

It is submitted (as was suggested with regard to sterility), that where the presumption is only *prima facie* [129] and not conclusive,[130] or when there is *no* presumption of legitimacy or illegitimacy,[131] the courts of the Philippines, can and should admit blood test exclusions in evidence. Section 1, Rule 22 [132] may be availed of by our courts for the purpose of ordering blood tests to be performed in such cases. But, should the case fall under the provisions of Article 255 [133] of the new Civil Code, it is believed that blood-grouping test exclusions, like evidence concerning sterility, will be held to be immaterial evidence, because of the narrow wording of this Article.

IV. *Conclusion*

The presumption of legitimacy is still one of the strongest and most persuasive known to law [134] and it should certainly be so. It is based on public policy, morality and decency.[135] The innocent child and the sacredness of family relationship is protected by this pre-

[127] See note 124, *supra.*
[128] April 19, 1945, cited by Keeffe & Bailey, *op. cit.*, p. 79.
[129] See notes 75 and 76, *supra.*
[130] See note 78, *supra.*
[131] See note 77, *supra.*
[132] See note 97, *supra.*
[133] See note 2, *supra.*
[134] See note 24, *supra.*
[135] See note 26, *supra.*

sumption.[136] Mere doubts and suspicions, therefore should not be permitted to overthrow the presumption of legitimacy.

But no matter how salutary its aims may be, there must be limits to its application. In the words of Justice Cardozo: [137] "* * * There are breaths of human nature at which presumptions shrink and wither." and "* * * The presumption does not consecrate as truth the extravagantly improbable, which may be one, for ends juridical, with the indubitably false." And then again, while protecting the interests of the child and society, the law should not ignore those of the alleged father. To place upon him the burden of supporting and recognizing a child not his own,[138] and to force him submit to the fact that upon his death, his property will "descend through channels where his blood did not flow—channels, too, tainted and corrupted by the grossest impunity," [139] would indeed be harsh.

It is believed that Article 255 [140] of the new Civil Code of the Philippines, is too archaistically rigid, in view of new scientific discoveries. There may be times when it will cause manifest injustice. For example, let us examine this hypothetical case:

A woman, after ten years of fruitless marriage, gives birth to a child. The husband brings an action impugning the legitimacy of said child. This case will fall under the provisions of Article 255 of the Civil Code, as the birth occurred during the marriage.

At the trial it was proven, over the objection of the counsel for the defendant, that: (1) the wife had been having illicit sexual relations with another man at or about the time of the conception of the child; (2) the wife had on several occasions, declared that the child was the result of her adulterous relations; (3) the husband, who had been under the continuous care and observation of several doctors for a span of six years before the birth of the child, had no motile spermatozoa in his semen during that period, and therefore was and still is sterile; (4) according to blood-grouping tests conducted separately by the N.B.I., the Red Cross laboratory, and an eminent private pathologist, the husband could not have possibly sired the child in question.

On the other hand, it was proven by the opposing party that at the time of the conception of the child, the husband and his adulterous wife were living together in their conjugal home, that the husband was not impotent, and that he was not seriously ill.

It seems to us that in the light of existing laws and precedents, the final judgment in this case will inevitably be that the child is presumed to be legitimate, and therefore the husband's.

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[136] See note 28, *supra.*

[137] *In re Findlay,* see note 18, *supra.*

[138] Anonymous, *Presumption of Legitimacy of a Child Born in Wedlock,* SELECTED ESSAYS ON FAMILY LAW, p. 369.

[139] *Wright v. Hicks,* 56 Am. Dec. 451.

[140] See note 2, *supra.*

Article 256 provides: "The child shall be presumed legitimate, although the mother may have declared against its legitimacy or may have been sentenced as an adulteress." [141] This disposes of facts (1) and (2). Evidence of the sterility of the husband will be held as immaterial. The law speaks of impotency only, and impotency is not synonymous with sterility, according to the *Menciano* case.[142] The blood test exclusions will also be declared as immaterial, because Article 255[143] provides that "Against this presumption *no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife* * * *" (Italics ours), and the husband in this case, does not deny the fact that during the "first one hundred and twenty days of the three hundred which preceded the birth of the child," he actually had access to his wife. This being so, the court does not have any alternative but to declare the child legitimate. *Hoc quidem perquam durum est, sed ita lex scripta est.*

Brooding over such a situation, we cannot help but recall Justice Cardozo's forceful exclamation: "This is the presumption of legitimacy gone mad!" [144]

Science has opened new doors in its continuous search for truth. Legislators and judges should not be afraid and should not refuse to see what lies beyond those open portals, for after all, is it not the ascertainment of the factual truth that is the aim of justice? Justice McComb, in a separate opinion, in the case of *Berry v. Chaplin,*[145] argued this matter as follows:

> "Ascertainment of the factual truth in the adjudication of any controversy is a consummation devoutly to be wished. Time was when the courts could rely only upon human testimony. But modern science brought new aids. The microscope, electricity, X-Ray, psychology, psychiatry, chemistry and many other scientific means and instrumentalities have revised the judicial guessing game of the past into an institution approaching accuracy in portraying the truth as to the actual fact where, in the pursuit of which, scientific devices may be applied. The chemical tests for learning the presence of poisons in the blood stream, application of the Roentgen ray in defining the fracture of a bone, the use of the microscope in acquiring exact knowledge of the authorship of documents, of the presence of bacteria or of the prevalence of white corpuscles—all argue eloquently for a reliance upon scientific devices for ascertaining the truth. If the courts do not utilize these unimpeachable methods for acquiring accurate knowledge of pertinent facts they will neglect the employment of available, potent agencies which serve to avoid miscarriages of justice.
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> "In the case at bar a widely accepted scientific method of determining parentage (blood-grouping tests) was applied. Its results were definite. To reject the new and certain for the old and uncertain does not tend to promote improvement in the administration of justice."

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[141] See *Andal v. Macaraig,* see note 51, *supra; Recipulo v. Ardes,* 38 O. G., No. 144, 3452.

[142] See *Menciano v. Neri,* note 36, *supra.*

[143] See note 2, *supra.*

[144] *In re Findlay,* see note 18, *supra.*

[145] See note 125, *supra.*

But our courts are already strait-jacketed by precedents and/or the narrowness of the phraseology of the law, when it comes to admitting evidence concerning sterility and blood-grouping tests. It is left for the Legislature to cut those bonds, which have been so tightly wound by the uncertainty of the past. The law must be amended—blood-grouping test statutes must be enacted. We do not claim to be a legal oracle, but we firmly believe that such legislation will inevitably be passed in the future. It is only hoped that it will be done soon.

VICTOR H. RODRIGUEZ

ARE UNACKNOWLEDGED NATURAL CHILDREN ENTITLED TO ANY SUCCESSIONAL RIGHTS?

When a person dies he leaves his earthly possessions either by virtue of a will or by operation of law to those who stand in a special relation to him.[1] Thus a person is given the privilege to regulate to a certain degree the disposition of his property even after his death by means of a will without however prejudicing the rights of certain individuals who, with or without such will, are entitled as a matter of right to share in his estate after his demise.[2] And in case the deceased dies intestate, the law steps in to regulate the proper disposition of his property.[3]

But in spite of the existence of a seemingly ordered system which regulates the disposition of the properties of a deceased person after his death, controversies still arise because of the varied relationship of the persons who are called upon to succeed the decedent. Among the many problems connected with hereditary succession which consume much of the time of the Bench and the Bar is, whether a natural child not recognized by either or both of his parents is entitled to

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[1] Article 774 new Civil Code (Republic Act No. 386). "Succession is a mode of acquisition by virtue of which the property, rights and obligations to the extent of the value of the inheritance, of a person are transmitted through his death to another or others either by his will or by operation of law."

[2] Article 783, id. "A will is an act whereby a person is permitted, with the formalities prescribed by law, to control to a certain degree the disposition of his estate, to take effect after his death."

[3] Article 960, id. "Legal or intestate succession takes place:

(1) If a person dies without a will, or with a void will, or one which has subsequently lost its validity;

(2) When the will does not institute an heir to, or dispose of all the property belonging to the testator. In such case, legal succession shall take place only with respect to the property of which the testator has not disposed;

(3) If the suspensive condition attached to the institution of heir does not happen or is not fulfilled, or if the heir dies before the testator, or repudiates the inheritance, there being no substitution, and no right of accretion takes place.

(4) When the heir instituted is incapable of succeeding, except in case, provided in this Code."