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Current Decision, Weight and Admissibility of Chemical Tests as Evidence of Intoxication

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broad and vague standard vests the censor with unlimited control over movies and makes it virtually impossible for him to avoid favoring one religion over another or banning the expression of unpopular sentiments sacred to a religious minority.[18]

It does not follow from the overruling of the *Mutual Film* case that there will be absolute freedom to exhibit every motion picture of every kind.[19] Freedom of speech and press is not absolute,[20] and the state's police power remains intact where there is a question of health, morals, and safety,[21] and where the well-being and tranquility of the community are concerned.[22] Moreover, the Court has recognized that certain limited classes of speech and publication can be constitutionally restrained. These include lewd, obsence, profane, libelous and insulting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[23]

The instant case, in effect, places the movies into the "preferred position of freedom of speech."[24] The Court, in overruling the *Mutual Film* case, has finally faced up to the reality that the film industry has advanced from its 1915 nickelodeon stage to become an important force in the communication of ideas that affect public attitudes and behavior. More specifically, it has re-emphasized the view that "it is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures."[25]

MORIO OMORI

WEIGHT AND ADMISSIBILITY OF CHEMICAL TESTS AS EVIDENCE OF INTOXICATION

At 3:50 a.m. the car which *D* was driving ran off the road. The accident resulted in the death of *D's* companion. After being taken to a hospital, *D* voluntarily gave a urine sample at 4:30 a.m. The sample revealed a .21% blood-alcohol content. *D* was arrested about

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[18]Joseph Burstyn, Inc. v. Wilson, *id.* at 505.

[19]See Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L. Q. 273 (1951), which points out that obscenity statutes, self-regulation in the movie industry with its Production Code Administration, unofficial groups like the Legion of Decency and the National Board of Review, and the copyright law would fill in the void left by the elimination of censorship.

[20]Breard v. Alexandria, 341 U.S. 622 (1951); Schenck v. United States, 249 U.S. 47 (1919).

[21]Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

[22]Kovacs v. Cooper, 336 U.S. 77 (1949). *But cf.* Saia v. New York, 334 U.S. 558 (1948).

[23]Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); *see* Winters v. New York, 333 U.S. 507, 510 (1948); Near v. Minnesota, 283 U.S. 697, 716 (1931).

[24]Kovacs v. Cooper, 336 U.S. 77 (1949).

[25]Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).

fourteen hours later for negligent homicide.[1] During the trial the test results were admitted in evidence under a state statute providing that the court may admit the results of testing such a sample if taken within two hours of *the time of arrest.* A showing that there was at that time a blood-alcohol content of .15% or more is prima facie evidence of intoxication, which, if corroborated by other physical evidence, is sufficient to support a jury finding that the defendant was intoxicated.[2] On appeal from a conviction of *D,* the Wisconsin Supreme Court *held:* Reversed.[3] The court accepted *D's* contention that the trial court erred in admitting the evidence since the time limitation prescribed by the statute was not followed. The court ruled that the statute was clear and unambiguous and that the phrase "within 2 hours of the time of arrest" meant within two hours before or within two hours after the arrest.[4]

While it would seem probable that the legislature intended that the statute should mean within two hours of the time of the alleged offense, it failed to state its intention clearly.[5] This legislative oversight, which led to the thwarting of justice in the principal case, affords the opportunity to inquire into the changes which this type of statute may make upon the common law rules governing the weight and admissibility of chemical tests as evidence of intoxication.[6]

Under the statute as well as under the common law rule the

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[1]Negligent homicide is a statutory crime in Wisconsin defined as follows: "any person who by operation of any vehicle while under the influence of alcoholic beverages . . . shall cause the death of another shall be guilty of negligent homicide." WIS. STAT. § 340.271 (1949).

Colorado has a comparable statute. COLO. STAT. ANN. c. 48, § 39 (1935).

[2]WIS. STAT. § 85.13(2) (1949). The statute also provides that evidence of a blood-alcohol content of less than .05% is prima facie evidence of nonintoxication, while evidence of .05% to .15% is merely relevant evidence not entitled to prima facie effect in determining the defendant's nonintoxication or intoxication.

Several states have similar statutes, *e.g.,* ARIZ. CODE ANN. § 66-156 (Cum. Supp. 1951); IND. STAT. ANN. § 47-2003(2) (Burns 1933); ME. REV. STAT. c. 19, § 121 (1944); NEB. REV. STAT. § 39-727.01 (Cum. Supp. 1951); N.Y. VEHICLE AND TRAFFIC LAW § 70(5); N.D. Laws 1949, c. 250, § 1; S.C. Acts 1949, No. 281, § 57; UTAH CODE ANN. § 57-7-111 (Supp. 1951); WASH. REV. CODE § 46.56.010 (1952). For the history of this type of legislation, see Starnes, *Intoxication Tests,* 15 TEX. B.J. 187, 188 (1952).

[3]State v. Resler, 55 N.W.2d 35 (Wis. 1952).

[4]The court added that it did not feel that its construction led to an absurd result since the legislature may have worded the statute in this way in order to insure quick action on the part of the law enforcement officers if they intended to rely on the evidence. *Id.* at 38.

[5]This interpretation would be more logical since it is proof of intoxication at the time of the alleged offense upon which a conviction must rest and not proof of intoxication at the time of arrest. See note 1 *supra.*

[6]The problems of self-incrimination, illegal search and seizure, and procedural due process are beyond the scope of this article. On the problem of self-incrimination see Block v. People, 240 P.2d 512 (Colo. 1951), *cert. denied,* 343 U.S. 978 (1952); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945); Apodaca v. State, 140 Tex. Cr. 593, 146 S.W.2d 381 (1940); State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937). On illegal search and seizure see Comment, 22 ROCKY MT. L. REV. 91 (1949). On the problem of due process see Rochin v. California, 342 U.S. 165 (1952), noted in 24 ROCKY MT. L. REV. 386 (1952); Doyle, *Blood, Whiskey and the Constitution,* 24 ROCKY MT. L. REV. 459 (1952).

ultimate question of the intoxication of the defendant remains a jury question.[7] The fact that any individual with a blood-alcohol content of more than .15%, regardless of tolerance, is intoxicated according to medical science,[8] is not a matter of which the court may properly take judicial notice.[9] The results of a chemical test, therefore, cannot be taken as raising a conclusive presumption of the intoxication of the defendant.[10]

The rebuttable presumption which is raised by the statute affects only the weight of the evidence. The evidence is given prima facie weight although at common law it enjoyed no such status.[11] It should be noted that this presumption raised by the prima facie evidence is procedural in effect only. After the presumption becomes operative, the defendant has the burden of going forward with rebutting evidence, but the burden of proving beyond a reasonable doubt by the weight of the evidence still rests with the state. Thus, strictly speaking, the evidence has more significance procedurally than it does substantively.[12] It is also doubtful that if the defendant fails to rebut the evidence,[13] the court can withold the question of intoxication from the jury. This is apparent for two reasons: (1) under the Wisconsin statute, where other corroborating physical evidence is required, the jury would have to consider such evidence, and (2) the statute only provides that the evidence is prima facie evidence of intoxication at the time of arrest, not at the time of the alleged offense.[14]

The more affirmative effect of the statute would seem to be the changes which it makes upon the common law rules of admissibility. Under the common law the state is required to identify the sample, show proper handling of the sample from the time it was taken to the time it was analyzed, establish the accuracy of the analysis, properly qualify the opinion witness and satisfy the court that the interval of

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[7]State v. Beane, 81 A.2d 924 (Me. 1951) (under a statute); State v. Werling, 234 Iowa 1109, 13 N.W.2d 318 (1944) (common law); Kuroske v. Aetna Life Insurance Co., 234 Wis. 394, 291 N.W. 384 (1940) (civil action).

[8]Kozelka, *Scientific Tests for Alcohol Intoxication*, 24 WIS. BAR BULL. 19 (Nov. 1951); Committee Report, 124 A.M.A.J. 1290 (1944).

[9]State v. Beane, 81 A.2d 924 (Me. 951) (under a statute); Toms v. State, 239 P.2d 812 (Okla. Cr. 1952) (common law); McKay v. State, 235 S.W.2d 173 (Tex. Cr. 1950) (common law). In accordance with this policy one court has taken judicial notice of individual susceptibilities to the influence of intoxicating liquors. Fernandez v. State, 135 Tex. Cr. 12, 116 S.W.2d 1067 (1938). *But cf.* Schiller v. Rice, 246 S.W.2d 607 (Tex. Civ. 1952), and State v. Bolsinger, 221 Minn. 154, 21 N.W.2d 480 (1946) where the courts ruled that the effects of intoxication are matters of judicial notice.

[10]State v. Beane, *supra* note 9; Toms v. State, *supra* note 9; McKay v. State, *supra* note 9. *See* Halloway v. State, 146 Tex. Cr. 353, 175 S.W.2d 258, 259 (1943).

[11]People v. Tucker, 88 Cal. App.2d 333, 198 P.2d 941 (1948).

[12]9 WIGMORE, EVIDENCE §§ 2487, 2489 (3d ed. 1940). On the question of the constitutionality of statutory presumptions see 4 *Id.* § 1356.

[13]The defendant would only be required to raise a reasonable doubt. Alexander, *Presumptions in Criminal Cases*, 17 MISS. L. J. 45, 60 (1945).

[14]WIS. STAT. § 85.13 (2) (1949).

time between the alleged offense and the procuring of the sample was not unreasonable.[15] Of these requirements, it is clear that the Wisconsin statute is designed only to alter the last two.[16]

The statute seemingly relieves the state of the burden of bringing in an expert witness to testify to the fact that any individual is intoxicated if his blood-alcohol content is above .15%.[17] The statute, however, does not apparently relieve the state of showing that the test was run by a qualified expert.[18] This requirement for admissibility, both under the statute and under the common law, appears to be inconsistent with the common law rule that the reliability of the test method itself is a matter of weight and not a question of admissibility.[19]

As to the common law requirement of relevancy in time, the decision in the principal case casts into sharp relief one impractical change which the Wisconsin statute makes in the common law. As noted, the statute measures the duration of time between the arrest and the taking of the sample, limiting such time to two hours; while the common law measures the duration of time between the alleged offense and the taking of the sample, limiting it in terms of reasonableness.[20] The majority of states having similar statutes have seen fit to allow the common law rule to prevail omitting any time restrictions from their statutes altogether.[21]

It is evident from the instant case that the value[22] of the Wisconsin statute in aiding the state in its efforts to combat drunken driving has been greatly diminished by the unfortunate oversight of

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[15]Toms v. State, 239 P.2d 812 (Okla. Cr. 1952). As to the requirement of showing the accuracy of the analysis see Kallnbach v. People, 242 P.2d 222 (Colo. 1952) wherein the Colorado Supreme Court seems to imply that the technique of taking the sample is not a part of the process of analysis. Mr. Justice Holland raises this question at pages 229-230 in his dissenting opinion. The conflicting opinions in the case and the present status of the Colorado common law rules of admissibility are ably discussed in 24 ROCKY MT. L. REV. 391 (1952).

[16]WIS. STAT. § 85.13 (2) (1949).

[17]Schacht v. State, 154 Neb. 858, 50 N.W.2d 78 (1951) (by implication).

[18]Schacht v. State, 154 Neb. 858, 50 N.W.2d 78, 80 (1951).

[19]Kallnbach v. People, 242 P.2d 222 (Colo. 1952); Toms v. State, 239 P.2d 812 (Okla. Cr. 1952); People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567 (1951); McKay v. State, 235 S.W.2d 173 (Tex. Cr. 1950). *Contra*: People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949). For further material on the reliability of the various types of tests see Rabinowitch, *Medicolegal Aspects of Chemcial Tests of Alcoholic Intoxication*, 39 J. CRIM. L. & CRIMINOLOGY 225 (1948); Note, 24 ROCKY MT. L. REV. 391 (1952); Note, 24 *Id.* at 253.

[20]The court in Toms v. State, 239 P.2d 812 (Okla. Cr. 1952) pointed out that the longer the taking of the test sample is delayed the more favorable situation is for the defendant since the body gradually consumes the alcohol. However, it should be noted that this may not always be true, *e.g.*, in the case where the defendant has his strong drink at 3:00; the accident occurs at 3:05; and the blood test is taken at 3:40.

[21]Of those states having comparable statutes only the New York statute imposes a like time restriction. See note 2 *supra*.

[22]The helpfulness of such a statute has been recognized by at least two courts by their suggestions in recent cases that such legislation might be appropriate. See Toms v. State, 239 P.2d 812 (Okla. Cr. 1952); McKay v. State, 235 S.W.2d 173 (Tex. Cr. 1950).

the legislature in its attempt to define the common law term of reasonableness. Had the legislature made it clear that the test sample was to be related in point of time to the alleged offense and not to the arrest, the injustice of the present case to the citizenry of Wisconsin could have been avoided.

HOWARD KLEMME

ADMINISTRATIVE DISCRETION IN ISSUING LIQUOR LICENSE

The V.F.W. 101 Club applied to the Colorado Springs City Council for a transfer of its state liquor license to a new residential location to which the club had moved. The council unanimously denied the request. The council then revised, without public notice, a zoning resolution so as to permit the sale of liquor by membership clubs in residential areas. The club again made application, and the license was granted despite the fact that neighbors submitted numerous petitions and letters of protest. There were no petitions in favor of the license, but letters from various service clubs, from the chief of police, and a spectators' vote at the council meeting favored the license. The irate neighbors, through an action in the nature of certiorari, sought to reverse the ruling of the council. The district court affirmed the ruling without opinion. On writ of error to the Colorado Supreme Court, *held*: Reversed. The statute required the council to consider two things: (1) the requirements of the neighborhood; and (2) the desires of the inhabitants. It acted without any evidence on the requirements, and contrary to the desires of the neighborhood. "Therefore, as a matter of law, such action was capricious and arbitrary."[1]

This case is unique in this country in that never before have the irate neighbors compelled the reversal by a supreme court of the issuance of a liquor license. To secure a reversal of an administrative decision, the court must be shown more than a "better rule." As a general principle, a purely administrative function is reversed only upon an abuse of discretion or when performed in an arbitrary or capricious way.[2] For instance, action is arbitrary or capricious if done without consideration and in disregard of material facts,[3] or if by mere exercise of personal will,[4] or if without any reason for so

[1]Page v. Blunt, 248 P.2d 1074, 1077 (Colo. 1952).

[2]Green, *The Scope of Judicial Review of Administrative Action*, 12 ROCKY MT. L. REV. 173 (1940).

[3]Hudson Bergen County v. Board of Commissioners, 135 N.J.L. 502, 52 A.2d 668 (1947); *see* Van DeVegt v. Board of Commissioners, 98 Colo. 161, 166, 55 P.2d 703, 705 (1936); Ostler v. Industrial Comm., 84 Utah 428, 36 P.2d 95 (1934).

[4]19 R.C.L. 968 § 265 as quoted in Van DeVegt v. Board of Commissioners, 98 Colo. 161, 167, 55 P.2d 703, 705 (1936).