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## *Intoxication and Opinion Evidence*

*John E. Martindale\**

**I**T MUST BE SAID at the outset that there are many problems in connection with the rules of evidence which an article as short as this one cannot hope to touch upon. Among these is the relevance of intoxication to particular issues. It must be assumed that the evidence sought to be introduced is material and relevant. With this assumption we will consider three areas of intoxication evidence: lay opinion, expert opinion and hospital records. These are the three main areas involving the introduction of an opinion as to intoxicated condition.

### **Lay Opinion**

It is a generally accepted rule that a layman may testify as to the intoxicated condition of another person.<sup>1</sup> Whether this is because his testimony is considered to be fact or because it is an exception to the rule against opinion evidence is open to some argument. The difference between fact and opinion is often a tenuous one at best.<sup>2</sup> Where the physical state of a person is at issue, one authority distinguishes between the two by the test of whether the "instantaneous conclusion of the mind" was derived from facts presented "at one and the same time" (fact), or "successively perceived" (opinion).<sup>3</sup> In the case of intoxication, the distinction seems hardly worth propagating, and it is little wonder there is disagreement among the courts.

Under the so called "composite facts" exception to the opinion evidence rule a layman is allowed to testify as to his opinion when it is not practicable to place before the jury all the primary facts upon which his opinion is founded. It is a corollary of this rule, that the witness must, to the extent that it is possible, testify as to the primary facts on which his opinion is based. The question of a person's intoxication has long been considered to be within the composite facts exception to the general rule against the admission of lay opinion evidence.

Where a person's intoxication is itself considered to be a matter of fact, the witness would not be required to state the

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<sup>1</sup> 20 Am. Jur., Evidence § 876.

<sup>2</sup> 7 Wigmore, Evidence 736.

<sup>3</sup> McKelvey, Handbook of the Law of Evidence, 325 (5th ed. 1944).

primary facts he observed in order to make his conclusion admissible into evidence.<sup>4</sup> He would, of course, be open to cross-examination on these facts. But, where such testimony is considered opinion, it ordinarily must be accompanied by a narration of the primary facts on which it is based,<sup>5</sup> and it is error to exclude testimony as to these facts.<sup>6</sup> There appears to be no general agreement as to whether this must be done before or after the opinion is introduced, but the cases cited<sup>7</sup> generally accept the idea that the better practice is to state facts first and then opinion.

Whether the witness is considered to be testifying to fact or opinion, there is no disagreement over the rule that he must have had actual knowledge from his own observations.<sup>8</sup> He must have been in a position to observe the intoxicated party or he cannot testify as to his condition.<sup>9</sup> It is not required, however, that the witness have observed the person at the particular time in question. Intoxication at a particular time may be proven circumstantially by testimony as to prior or subsequent intoxication within such a time that the condition may be supposed to be continuous.<sup>10</sup>

<sup>4</sup> *Vandever v. Preston*, 13 Ill. App. 2d 29, 140 N. E. 2d 521 (1957); *Edwards v. City of Worcester*, 172 Mass. 104, 51 N. E. 447 (1898); *State v. Blackwood*, 162 La. 266, 110 S. 417 (1926).

<sup>5</sup> *Felska v. New York Central & H. R. R. Co.*, 152 N. Y. 339, 46 N. E. 613 (1897); *Limbach v. Forum Lunch Co.*, 258 S. W. 451 (Mo. App. 1924); *Laubach v. Colley*, 283 Pa. 366, 129 A. 88 (1925); *Lloyds Casualty Co. v. Bruckner*, 56 S. W. 2d 658 (Tex. Civ. App. 1933); *American Bauxite Co. v. Dunn*, 120 Ark. 1, 178 S. W. 934 (1915); *Com. v. Eycler*, 217 Pa. 512, 66 A. 746, 11 L. R. A. (N. S.) 639 (1907); *City of Springfield v. Moxley*, 24 Ohio L. Abs. 601 (1937); *Turner v. Pa. Liquor Control Bd.*, 161 Pa. Super. 16, 53 A. 2d 849 (1947).

Wigmore criticizes this rule. 7 Wigmore, *Evidence*, § 1922, p. 19.

Contra: *State v. Cather*, 121 Iowa 106, 96 N. W. 722 (1903); *Daniels v. State*, 155 Tenn. 549, 296 S. W. 20 (1927). But these cases, and those they cite, while using the term "opinion," treat intoxication as a fact.

See also: *Bohnsack v. Driftmier*, 243 Iowa 383, 52 N. W. 2d 79 (1952); and *Reinheimer v. City of Greenville*, 90 Ohio L. Abs. 573 (1930). Both cases say no fact testimony is required, but seem to treat the situation as one of expert testimony, where facts are not required to support opinion testimony. In both cases, the witness was a police officer.

<sup>6</sup> *Martin v. Philadelphia*, 348 Pa. 232, 35 A. 2d 317 (1944).

<sup>7</sup> *Supra* note 5.

<sup>8</sup> *Guedon v. Rooney*, 160 Or. 621, 87 P. 2d 209 (1939); *Gaynor v. Atlantic Greyhound Corp.*, 183 F. 2d 482 (1950). Many cases are cited in 20 Am. Jur. *Evidence* 737, n. 8.

<sup>9</sup> *Morris v. City Transfer & Yellow Taxi Co.*, 220 Ky. 219, 294 S. W. 1030 (1927); *Atkinson v. Mitchell*, 62 Montg. 303 (Pa. Com. Pl.); see also *Law v. Gallegher*, 39 Del. 189, 197 A. 479 (1938).

<sup>10</sup> *Ackerman v. Kogut*, 117 Vt. 40, 84 A. 2d 131 (1951).

## Expert Testimony

### *Constitutionality*

Expert testimony almost necessarily involves the various scientific tests for blood alcohol and all their attendant problems. The constitutionality of these tests has received a great deal of attention in the last twenty years. Usually the tests are questioned on the basis of self-incrimination, unreasonable search and seizure, or violation of due process of law.

Historically, the privilege against self-incrimination arose as a solely *testimonial* privilege.<sup>11</sup> That is to say it applied only to verbal or written testimony elicited through compulsion.<sup>12</sup> The reasoning behind the rule was the fact that such testimony was considered to be unreliable, and the United States Supreme Court has held that this privilege does not apply in such a manner as to exclude a person's body as evidence.<sup>13</sup> It is on this basis that photographs, fingerprints, handwriting samples, and physical features have been admitted into evidence against a defendant even when the evidence was secured through the use of compulsion.<sup>14</sup>

Obviously, where the defendant consents to a test for intoxication, there is no problem since the privilege against self-incrimination may be waived. It is where force is used that the problem arises. The problem has been avoided to some extent by the courts, either by their refusal to find any compulsion under the circumstances of the case,<sup>15</sup> or by taking the negative ap-

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<sup>11</sup> 8 Wigmore, Evidence § 2263 (1961 Ed.).

<sup>12</sup> Holt v. U. S., 218 U. S. 245 (1910).

<sup>13</sup> *Ibid.*

<sup>14</sup> 8 Wigmore, Evidence § 2265 (1961 Ed.).

<sup>15</sup> People v. Kovacik, 205 Misc. 275, 128 N. Y. S. 2d 492 (1954); Novak v. Dist. of Columbia, 82 U. S. App. D. C. 95, 49 A. 2d 88, rev. 160 F. 2d 588 (1946).

One astounding example of this refusal to find compulsion is the case of People v. Kiss, 125 Cal. App. 2d 138, 269 P. 2d 924 (1954), where the defendant testified he had been struck by an officer in the face and stomach before the intoximeter test and that he submitted to the test because he was afraid he would be again beaten by the officers. Admitting the truth of the testimony for the sake of argument, the court held that, "The taking of evidence from one suspected of crime is not in itself unlawful. It will be excluded only where the accused is by threats and punishment so terrorized into submission that to admit it would be a mockery and a pretense of a trial." The evidence was held admissible. It should be said for the court that it was probably leaning toward the idea that the privilege is solely testimonial, but what of the due process clause? Is this any better than the stomach pumping in the Rochin case cited below? Apparently this court thought so.

proach that the defendant must actively object to the test or be held to have waived his privilege.<sup>16</sup>

Logically, the question of compulsion should be no more material when scientific tests for alcohol are involved than it is where involuntary fingerprinting or display of the physical features is involved. But, with only a few notable exceptions,<sup>17</sup> courts have refused to state positively that the privilege against self-incrimination is solely testimonial, and will not bar the introduction of blood alcohol evidence elicited by compulsion. It is interesting to note that the Kansas statute states that anyone who operates a motor vehicle on the public highways of that state shall be deemed to have given his consent to submit to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood.<sup>18</sup> Presumably the basis for this is the argument that driving a motor vehicle is a privilege which the State of Kansas has a right to withhold.

The issue of compulsion is clearly important to the question of whether or not the defendant's right to due process of law has been violated. But the quantitative question of how much force is required before a violation occurs is an open one. In the case of *Rochin vs. California*,<sup>19</sup> the Supreme Court held that police officers could not force a prisoner to have his stomach pumped to recover evidence.<sup>20</sup> That case appears to stand for the rule that evidence which is secured by conduct which "shocks the conscience" and "offends the decencies of civilized conduct" is inadmissible. It is a rule which obviously places a premium

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<sup>16</sup> A number of cases involving tests on unconscious persons or persons otherwise not competent to consent are collected at 8 Wigmore, Evidence 391, n. 5. See particularly *Schutt v. MadDuff*, 205 Misc. 43, 127 N. Y. S. 2d 116 (1954); and *Breithaupt v. Abraham*, 352 U. S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).

<sup>17</sup> *State v. Berg*, 76 Ariz. 96, 259 P. 2d 261 (1953), where the defendant was strapped in a chair while a blood sample was taken. *People v. Conterno*, 170 Cal. App. 2d 817, 339 P. 2d 968 (1959); *Com. v. Statti*, 73 A. 2d 688, 166 Pa. Super. 577 (1950).

See also: *People v. One 1941 Mercury Sedan*, 74 Cal. App. 2d 199, 168 P. 2d 443 (1946); *Green Lake County v. Domes*, 247 Wis. 90, 18 N. W. 2d 348 (1945).

The case of *Alexander v. State*, 305 P. 2d 572 (Okla. Crim. App. 1956), contains an excellent discussion of the entire problem.

<sup>18</sup> Kan. Gen. Stat. 1949, Supp. 1955, § 8-1001 *et seq.*

<sup>19</sup> 342 U. S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1951).

<sup>20</sup> In actual fact, the struggle in the *Rochin* case occurred in the defendant's home after the officers broke in. He was arrested and taken to a hospital, and there was no evidence that he struggled there to prevent his stomach being pumped.

on the prisoner's violence in resisting the invasion of his person. Six years after the *Rochin* case, in *Breithaupt v. Abraham*,<sup>21</sup> the Supreme Court held that the taking of a blood sample from an unconscious person to be used in evidence against him did not violate due process for the reason that there was nothing "brutal" or "offensive" involved. The lack of conscious consent was of no effect.

The "shocks the conscience" method of delineating due process of law is indeed an indefinite standard. Perhaps the only thing that can be said of it with any degree of certainty is the fact that the members of the Supreme Court are themselves dissatisfied with it. The recent decision in *Mapp v. Ohio*<sup>22</sup> may, in fact, foreshadow the disappearance of that nebulous standard.<sup>23</sup>

The actual issue of the *Mapp* case was unlawful search and seizure, and on that point it has directly reversed the earlier position of the Court. There are very few cases involving objections to the introduction of blood alcohol tests into evidence on the basis of unlawful search and seizure. This is partly for the reason that a person under arrest may have his person and surroundings searched. And even when the search was unlawful, in the past this has been no objection to the evidence produced by the search since state courts were not bound by the federal rule that such evidence was admissible. In *Mapp v. Ohio*,<sup>24</sup> the Supreme Court made evidence obtained by unlawful search inadmissible in state courts. It would seem that this should become one of the future grounds for objection to the use of evidence gained by unlawful violation of the person of a defendant to obtain blood alcohol samples.

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<sup>21</sup> 352 U. S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).

<sup>22</sup> 81 S. Ct. 1684 (1961).

<sup>23</sup> *Id.* at 1697. "Only one thing emerged with complete clarity from the *Irvine* case—that is that seven Justices rejected the "shocks the conscience" constitutional standard enunciated in the *Wolf* and *Rochin* cases. . . . As I understand the court's opinion in this case, we again reject the confusing "shock the conscience standard." This case is also enlightening as to the court's attitude on the question of self incrimination. Justice Clark, speaking for himself only, says, "I concurred in the reversal [of the opinion of the lower court] of the *Rochin* case, but on the ground that the Fourteenth Amendment made the Fifth Amendment's provision against self-incrimination applicable to the states, and that, given a broad rather than a narrow construction that provision barred the introduction of [evidence by means of stomach pump] just as much as it would have forbidden the use of words *Rochin* might have been coerced to speak."

<sup>24</sup> *Supra* note 22.

### *Admissibility of Test Results*

Research has failed to uncover a single state which now refuses to admit scientific blood alcohol tests on the basis that they are scientifically unreliable, although at least one state still requires testimony as to the generally recognized reliability and accuracy of such tests before their results can be introduced into evidence.<sup>25</sup> At least thirty states have authorized the tests by statute.<sup>26</sup> Any question of scientific unreliability now runs to the weight of the evidence, and not to its admissibility.<sup>27</sup>

The qualifying foundation which must be laid for the particular test before its results are admitted seems to vary from court to court. However, the requirement is generally as set forth in *Hill v. State*,<sup>28</sup> requiring proof that the chemicals used were compounded properly; that the operator of the machine was qualified in his job and that he and his machine were under the periodic supervision of one who had an understanding of the scientific theory; and testimony by a witness who was qualified to calculate and translate the reading of the instrument scale into percentage of alcohol in the blood.<sup>29</sup> In addition, where a sample is taken from the defendant and transported from one person or place to another, there is a requirement of proof of the identity and unchanged condition of the sample.<sup>30</sup>

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<sup>25</sup> *Rivers v. Black*, 259 Ala. 528, 68 S. 2d 2 (1953).

<sup>26</sup> *Ariz. Rev. Stat. Ann.*, § 28-692; *Ark. Stat.* 1947, § 15-1031.1; *Colo. Rev. Stat.* 1953, § 13-4-30; *Del. Code Ann.*, Tit. 11 § 3507; *Ga. Code Ann.* 1937, Cum. Supp. 1955, § 68-1625; *Hawaii Rev. L.* 1955, § 311-29; *Idaho Code* 1948, Cum. Supp. 1955, § 49-520-2; *Ill. Rev. Stat. ch.* 95½-144; *Ind. Stat. Ann.* 1952, Cum. Supp. 1955, § 47-2003; *Kan. Gen. Stat.* 1949, Supp. 1955, § 8-1001 *et seq.*; *Ky. Rev. Stat. Ann.* 1955, § 189.520; *Me. Rev. Stat.* 1954, c. 22 § 150; *Minn. Stat. Ann.* § 169.12; *Mont. Rev. Code.* 1947 § 32-2142(2); *Neb. Rev. Stat.* 1943, Reissue of 1952, § 39-727.01; *Nev. Rev. Stat.* § 484.055; *N. H. Rev. Stat. Ann.* 1955, § 262:20; *N. J. Stat. Ann.* § 39:4-50.1; *N. Y. Vehicle and Traffic Laws* c. 71, § 70(5); *N. D. Laws* 1953, c. 247; *Or. Rev. Stat.* 1955, § 483.630; *S. C. Code* 1952 § 46-344; *S. D. Code* 1939, Supp. 1952, § 44.0302-1; *Tenn. Code Ann.*, 1955, § 59-1032 *et seq.*; *Utah Code Ann.* 1953, § 41-6-44; *Va. Code* 1950, Supp. 1956, § 18-75-1 *et seq.*; *Wash. Rev. Code* 1951, § 46.56.010; *W. Va. Code*, § 1721 (331a) [2a]; *Wis. Laws* 1955, c. 510; *Wyo. Comp. Stat.* 1945, Cum. Supp. 1955, § 60-414.

<sup>27</sup> *People v. Bobczyk*, 343 Ill. App. 504, 99 NE 2d 562 (1951); *State v. Olivas*, 77 Ariz. 118, 267 P. 2d 893 (1954); *McKay v. State*, 155 Tex. Crim. 416, 235 S. W. 2d 173 (1951).

<sup>28</sup> 158 Tex. Crim. 313, 256 S. W. 2d 93 (1953).

<sup>29</sup> See also *Schacht v. State*, 154 Neb. 858, 50 S. W. 2d 78 (1932); and *Alexander v. State*, 305 P. 2d 572 (Okla. Crim. App. 1956).

<sup>30</sup> 21 A. L. R. 2d 1216.

The recent case of *Woolley v. Hafner's Wagon Wheel, Inc.*<sup>31</sup> points up the fact that there may be a different standard of foundation for civil cases than the standard set for criminal cases, since civil actions require proof only by a preponderance of the evidence.

### *Qualification of the Witness*

The experiential requirement a court may make before a witness is allowed to testify as an expert should logically depend on the subject of his testimony. And the reported cases indicate that the standard is different depending on whether the witness will testify as to the mechanical process of making the test, or will testify as to the result of the test in terms of quantity of alcohol in the blood, or will give his opinion as to intoxication based on the alcohol content shown.

The mere running of the test is essentially a mechanical act, and the person qualified to perform this act may not be qualified to evaluate the chemicals the test produces in terms of percentage of alcohol in the blood. For this reason, in many cases the introduction of the test involves two witnesses even before the test can be evaluated in terms of the subject's intoxication. In *Jackson v. State*,<sup>32</sup> a police officer who had had two days training in the operation of an intoximeter and who had given approximately two hundred such tests was held qualified to administer such a test. However, the testimony that the result was .17% alcohol was given by a toxicologist who also stated that the analysis of the properly identified test had been made under his supervision by a laboratory assistant. In *People v. Lewis*,<sup>33</sup> a Navy corpsman with six years of hospital experience including the running of blood tests was held qualified to testify as to the making of a Bogans blood test. Testimony as to the fact that the result was .222% alcohol, however, was offered by a criminologist of the San Diego Police Department. This difference in qualification required to testify to the test or its re-

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<sup>31</sup> 176 N. E. 2d 757 (Ill. 1961), holding that the foundation laid for introduction of evidence of blood analysis need not preclude every possibility of doubt as to identity of specimen or possibility of change of condition in blood. "The plaintiff proved by a preponderance of the evidence and by the highest degree of proof available to her that the blood sample analyzed was taken from decedent and was in an unchanged condition when analyzed."

<sup>32</sup> *Jackson v. State*, 262 S. W. 2d 499 (Tex. Crim. App. 1953).

<sup>33</sup> *People v. Lewis*, 152 Cal. App. 2d 824, 313 P. 2d 972 (1957).



sults is partly a by-product of the hearsay rule. Thus, it has been held that where the police technician was unable to translate the results of the test into alcohol content in the blood from his own knowledge, and was forced to rely on a chart which he did not himself understand, the evidence was inadmissible as hearsay.<sup>34</sup> However, if the witness has sufficient understanding of the formula and calculation required to make the translation himself, then the use of appropriate charts would not constitute hearsay under the doctrine that reference by an expert to a known authority to support his opinion does not constitute an introduction of the medical textbook or authority as original evidence, but as corroboration of the expert's opinion.<sup>35</sup>

Not all courts, however, are this strict in the degree of expertness required to qualify a witness to testify to the results of an intoxication test. In *Alexander v. State*,<sup>36</sup> Oklahoma relaxed its earlier and stricter ruling,<sup>37</sup> at least as far as the Harger drunkometer test. The court held that when there is ample evidence to show that the witness was competent to conduct the test so as to obtain the required readings, he could also testify as to the readings, whether or not he could himself work the formula by which the machine produced the readings, or a parallel chart translated the readings into blood alcohol. In the words of the court,<sup>38</sup>

One is allowed to testify as to the time of day by having looked at a watch or clock; the temperature by the reading of a thermometer; the speed of an automobile by reference to the speedometer; the operation and results from adding a column of figures on an adding machine, and the distance between points within Oklahoma by having referred to an official map of the State. We conclude that Sgt. Haddock was competent to give the readings he found on the gasometer cylinder or accompanying chart of the drunkometer.<sup>39</sup>

One may well question the parallels drawn by the Oklahoma court since one does not look at a chart after looking at

<sup>34</sup> *Fortune v. State*, 197 Tenn. 691, 277 S. W. 2d 381 (1955); *Hill v. State*, 158 Tex. Crim. 313, 256 S. W. 2d 93 (1953).

<sup>35</sup> *Hill v. State*, 158 Tex. Crim. 313, 256 S. W. 2d 93 (1953).

<sup>36</sup> 305 P. 2d 572 (Okla. Crim. App. 1956).

<sup>37</sup> Set forth in *Riddle v. State*, 288 P. 2d 761 (Okla. Crim. App. 1955).

<sup>38</sup> *Alexander v. State*, *supra* note 36, at 588.

<sup>39</sup> The court also comments, however, that it would require an expert to interpret the meaning of the reading.

the clock in order to tell time. But, rightly or wrongly this approach seems to be the more common. Thus, a doctor's assistant who made a test under the doctor's supervision and who had helped the doctor make tests on numerous occasions was held qualified to state the result of the test.<sup>40</sup> A medical technician at a hospital who had gone to college two years taking courses in chemistry, biology, and bacteriology, followed by one year internship in a hospital as a technician and some five to six years work as a laboratory technician was held qualified to state the results of a blood alcohol test even though she had only made four such tests.<sup>41</sup> In *Commonwealth v. Mummert*,<sup>42</sup> there is dicta to the effect that the witness "showed his qualifications in the operation of the drunkometer by having trained under (a certain superior officer of the city) Police Force." And, in *Omohundro v. Arlington County*,<sup>43</sup> a police officer was allowed to testify to the results of a drunkometer test when testimony showed that he was "a high school graduate, had not attended college, nor taken a course in chemistry; that he had not made a control test of the Drunk-o-Meter machine immediately before or after the test was given to the defendant; and that he did not know whether or not the machine was accurate; that his entire training in the use of the machine consisted of approximately two days' instruction, and he had never had any laboratory training or instruction in the analysis and evaluation of such tests."

Under the above cases the requirement that a witness be an expert to testify to the result of a scientific intoxication test seems to be dwindling to non-existence. But, there are obvious limits to such a thing. The following colloquy took place in *State v. Mannix*<sup>44</sup> after a police captain was called to testify as to the results of an alcometer test:

"Q. What was the result of the test?

A. Twenty-five.

\* \* \*

Q. Are you familiar with the National Safety Council standards, Captain Bouillion?

A. Yes, sir.

<sup>40</sup> *State v. Haner*, 231 Iowa 348, 1 N. W. 2d 91 (1941).

<sup>41</sup> *State v. Deming*, 66 N. M. 175, 344 P. 2d 481 (1959).

<sup>42</sup> 55 Lanc. L. Rev. 245, aff'd 183 Pa. Super. 638, 133 A. 2d 301, cert. den. 356 U. S. 939 (1957).

<sup>43</sup> 194 Va. 773, 75 S. E. 2d 496 (1953).

<sup>44</sup> 101 Ohio App. 33, 137 N. E. 2d 572 (1956).

Q. Using the result of the defendant's test in relation to the National Safety Council standards, what would that indicate as to the defendant's condition?

A. He was intoxicated."

On cross examination, the witness was asked the following:

"Q. Do you know anything at all about this machine?

A. No, I don't know a thing about it."

In reversing the defendant's conviction, the Supreme Court of Ohio said,

The testimony of persons skilled in the mechanics and use of modern machines and equipment to test or determine bodily conditions is generally accepted in courts as proper evidence. However, this rule does not extend to permitting an unskilled person who admits he knows nothing about such an instrument to give expert testimony upon the result of a test made with it.

The question of expert *opinion* actually is not involved either in the running of the test or the translation of the result into percentage of alcohol in the blood. Opinion testimony is first involved only when a conclusion as to the subject's intoxication is drawn from the percentage figure. Courts seem to be in agreement that a higher standard of academic background and experience is required to give this opinion testimony than is required for the testimony as to the test and its result. But, again, the courts are not in agreement as to what that standard is. In *Tarroch v. Kingston*,<sup>45</sup> testimony of a hematologist as to a "recognized standard" by which intoxication is presumed to occur from the percentage of alcohol found in the blood was excluded on the basis that he was not a physician or otherwise shown to be qualified from personal experience to be able to give an opinion. Yet, in *Kallnbach v. People*<sup>46</sup> a medical technologist was permitted to testify that "anything over one point five is considered under the influence of alcohol," and "would cause an impairment of his ability to drive." The report indicates that the technologist's work involved blood analyses, but it is silent as to any previous experience in interpreting or evaluating blood alcohol tests.

No doubt this lack of uniformity results from the fact that whether or not an expert is properly qualified is considered to

<sup>45</sup> 279 App. Div. 693, 108 N. Y. S. 2d 16 (1951).

<sup>46</sup> 125 Colo. 144, 242 P. 2d 222 (1952).

be almost entirely within the discretion of the trial court. Appellate courts are slow to interfere with the ruling of a trial court on this matter unless it involves an abuse of discretion.<sup>47</sup> The result is that the witness' qualifications unavoidably run to the weight rather than the admissibility of the evidence.

Generally speaking, a witness seems to be qualified to evaluate blood alcohol tests if he has a background in medicine, chemistry, or toxicology and has had substantial past experience with the type of alcohol test sought to be introduced and evaluated. All of the following have been held to be properly qualified to testify as to their expert opinion on the matter: an expert hematologist who had conducted over 1,500 tests for blood alcohol,<sup>48</sup> a graduate chemist who had taken special courses in chemical tests for intoxication and had given more than 500 such tests in two years;<sup>49</sup> a chemist at an army camp who testified as to his long experience in laboratory work and that the test was made according to U. S. Army standards;<sup>50</sup> a graduate chemist and toxicologist who had performed over 3,500 tests for blood alcohol;<sup>51</sup> a Ph.D. in chemistry who had "quite a bit" of experience in making tests and observing the reaction of subjects having different percentages of alcohol in their blood;<sup>52</sup> a professor of biochemistry and toxicology who had conducted "thousands" of tests;<sup>53</sup> a professor of toxicology who had made "innumerable" tests;<sup>54</sup> a research biochemist who had been working with a Harger breath tester for ten to eleven months;<sup>55</sup> and, a police officer with two and one half years of chemistry in college and attendance at special courses in breath tests for alcohol

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<sup>47</sup> 2 Wigmore Evidence, § 561. Wigmore suggests that the future rule should be, "The experiential qualifications of a particular witness are invariably determined by the trial judge and will not be reviewed on appeal." What then, of situations like the Mannix case, *supra* note 44?

<sup>48</sup> State v. Moore, 245 N. C. 158, 95 S. E. 2d 548 (1956).

<sup>49</sup> People v. Bobczyk, 343 Ill. App. 504, 99 N. E. 2d 567 (1951).

<sup>50</sup> Macon Busses, Inc. v. Dashiell, 73 Ga. App. 108, 35 S. E. 2d 666 (1945). The report is silent as to the witness's formal schooling in chemistry or his own past experience with blood alcohol tests.

<sup>51</sup> Cloud v. Market St. R. Co., 74 Cal. App. 2d 92, 168 P. 2d 191 (1946). His tests, however, had been on deceased persons and the testimony showed he had had access to the official reports showing the conduct of such persons prior to death.

<sup>52</sup> Bryant v. State, 159 Tex. Crim. 98, 261 S. W. 2d 728 (1953).

<sup>53</sup> People v. Bobczyk, *supra* note 49.

<sup>54</sup> People v. Bobczyk, *supra* note 49.

<sup>55</sup> McKay v. State, 155 Tex. Crim. 416, 235 S. W. 2d 173 (1950).

and who "had been in charge of training and supervising operators" of the breath tester.<sup>56</sup>

To a certain extent, statutes are beginning to make the expert's opinion testimony unnecessary. Legislatures, recognizing the scientific accuracy of the blood alcohol tests have begun passing statutes making a given percentage of blood alcohol *prima facie* evidence of intoxication.<sup>57</sup>

### Hospital Records

Underlying the problem of introducing hospital records to prove intoxication are two basic considerations—the doctor—patient privilege, and the rule against hearsay evidence. In jurisdictions where the privilege is recognized, all or the greatest part of a hospital record may be inadmissible even though it is brought under some exception to the hearsay rule.<sup>58</sup> Thus, the portion of the record which is admissible may be no more than the fact that a certain person was a patient at the hospital, the names of his doctors, and the extent of his stay.<sup>59</sup> The statutory physician-patient privilege, however, is in derogation of the common law. And a strict construction of the privilege has been held to allow introduction of the record where the communication by the patient was made to a nurse rather than a physician.<sup>60</sup>

But, if the jurisdiction involved does not recognize the privilege,<sup>61</sup> or the privilege has been waived,<sup>62</sup> or if for some other reason the privilege is held not to attach under the par-

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<sup>56</sup> *Fluitt v. State*, 333 S. W. 2d 144 (Tex. Crim. 1960).

<sup>57</sup> N. Y. Vehicle & Traffic Laws § 70(5); Wis. Stat. § 53.13(2); Ariz. Rev. Stat. § 28-692. For a discussion of the constitutionality of such statutes, see 46 A. L. R. 2d 1176.

<sup>58</sup> *Ost v. Ulring*, 207 Minn. 500, 292 N. W. 207 (1940); *Mass. Mut. L. Ins. Co. v. Mich. Asylum*, 178 Mich. 193, 144 N. W. 538 (1913); *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709 (1907); *Weis v. Weis*, 147 Ohio St. 416, 72 N. E. 2d 245 (1947); *Lamarand v. Nat. L. & Acc. Ins. Co.*, 58 Ohio App. 415, 16 N. E. 2d 701 (1937); *Casson v. Schoenfeld*, 166 Wis. 401, 166 N. W. 23 (1918); *Mehegan v. Faber*, 158 Wis. 645, 149 N. W. 397 (1914); *Newman v. Blom*, 249 Iowa 839, 89 N. W. 2d 349 (1958); 7 *Wigmore Evidence* § 2382; Anno. 75 A. L. R. 386, 120 A. L. R. 1140.

<sup>59</sup> *Newman v. Blom*, 249 Iowa 839, 89 N. W. 2d 349 (1958).

<sup>60</sup> *Weis v. Weis*, *supra* note 58; *Prudential Ins. Co. v. Kozlowski*, 266 Wis. 641, 276 N. W. 300 (1937).

<sup>61</sup> *Florida Power & L. Co. v. Bridgeman*, 133 Fla. 195, 182 S. 911 (1938).

<sup>62</sup> *Marx v. Parks*, 39 S. W. 2d 570 (Mo. App. 1931).

ticular facts,<sup>63</sup> then only the problem of the hearsay rule remains. Many states have adopted the Uniform Business Records Evidence Act,<sup>64</sup> or have a statute similar to the Federal Shopbook Rule.<sup>65</sup> Hospital records may escape the hearsay rule by qualifying under these acts.

A proper foundation for the introduction of hospital records under the business records acts is laid when the following have been shown: custody from which the record comes; identity of the record offered as that of the patient in question; mode of preparation; that the entries were made in the regular course of business; and that the regular course of the hospital business was to make records at or near the time of the act, transaction, occurrence, condition, or event recorded.<sup>66</sup> Once this is done, the record need not be introduced by one who actually created it, so long as it is produced by one who has the custody of the record as a regular part of his work.<sup>67</sup> There should be no difficulty in admitting a patient's intoxicated condition as a part of such a record.<sup>68</sup> And the mere fact that the record contains an opinion

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<sup>63</sup> *Soltanink v. Metro. L. Ins. Co.*, 133 Pa. Super. 139, 2 A. 2d 501 (1938); *Shepard v. Whitney Nat. Bank*, 177 S. 825 (La. App. 1938), where the court says, "We are referred to no authority which sustains the contention of counsel to the effect that such records are privileged communications between doctor and patient." *Motley v. State*, 174 Miss. 568, 165 S. 296 (1936); *Weis v. Weis*, *supra* note 58.

<sup>64</sup> *Ariz. Rev. Stat.*, 1956, § 12-2262; *Cal. C. C. P.* § 1953 *et seq.*; 10 *Del. Code* § 4310; *Fla. Stat.*, 1957, § 92.36; *Hawaii Rev. L.*, 1955, § 224-26; *Idaho Code*, 1947, § 9-413 *et seq.*; *Min. Stat.*, 1957, § 600.01 *et seq.*; *Mo. Rev. Stat.*, 1949, § 490.660 *et seq.*; *Mont. Rev. Code*, 1947, § 93-801-1 *et seq.*; *Neb. Rev. Stat.*, 1943, § 25-12, 108 *et seq.*; *N. H. Rev. Stat. Ann.*, 1955, 521:1 *et seq.*; *N. J. Rev. Stat.*, 1937, 2A:82-34 *et seq.*; *N. Dak. Rev. Code*, 1943, § 31-0801; *Ohio Rev. Code*, § 2317.40; *Ore. Rev. Stat.*, 1953, 41.680 *et seq.*; *Pa.*, 28 P. S. § 91a *et seq.*; *S. Dak. Code*, 1939, 36.1001; *Tenn. Code*, 1956, § 24-712 *et seq.*; *Vt. Rev. Stat.*, 1947, § 1753 *et seq.*; *Rev. Code Wash.*, 5.45.010 *et seq.*; *Wyo. Comp. Stat.* 1945 § 3-3122 *et seq.*

<sup>65</sup> 28 *U. S. C.* § 1732; *Ala. Code*, 1940, Tit. 7, § 415; *Conn. Gen. Stat.*, 1958, § 52-180; *Ga. Code*, 1933, § 38-711; *Md. Ann. Code*, Art. 35, § 59; *Mich. Comp. L.*, 1948, § 617.53; *Nev. Rev. Stat.*, 51.030; *N. Mex. Stat.*, 1953, § 20-2-12; *N. Y. C. P. A.* § 374a; *R. I. Gen. L.*, § 9-19-13; *Tex. Rev. Code*, Art. 3737e § 1-4.

<sup>66</sup> 6 Proof of Facts 135.

<sup>67</sup> *Green v. Cleveland*, 79 N. E. 2d 676 (Ohio App. 1948). (Uniform Business Records Act.) *Shaffer v. Seas Shipping Co. Inc.*, 127 F. Supp. 384 (1954). (Federal Shopbook Rule.)

<sup>68</sup> "Such a record may properly include case history, diagnosis by one qualified to make it, condition and treatment of the patient covering such items as temperature, pulse, respiration, symptoms, food and medicines, analysis of tissues or fluids of the body, and the behavior and complaints of the patient." *Lewis v. Woodland*, 101 Ohio App. 442, 1 Ohio Ops. 2d 349, 140 N. E. 2d 322 (1955).

as to intoxication should afford no grounds for objection provided the entry resulted from direct observation by the person making the entry.<sup>69</sup>

In some jurisdictions which have no statute similar to the Business Records Act, hospitals are required by law to keep records. Such records would be admissible under the exception to the hearsay rule involving official public documents.<sup>70</sup> The foundation required for their admission is similar to that required for admission under the Business Records Act, plus proof that the record is maintained pursuant to statutory requirements and that the record offered contains all the information required by the statute.<sup>71</sup> And just as business records are admissible only to show entries made in the regular course of business, records required by statute are admissible only to prove matters required by law to be in those records.<sup>72</sup> Again, this should be no barrier to the introduction of entries concerning the patient's intoxicated condition.<sup>73</sup>

It would appear that if neither of the foregoing two statutes were available, the attorney seeking to introduce hospital records showing intoxication would have to depend on the common law rules relating to "past recollections recorded"<sup>74</sup> or "regular entries"<sup>75</sup> as exceptions to the hearsay rule. The past recollections recorded rule is, of course, only available in situations involving testimonial recollection of a witness on the stand, and the com-

<sup>69</sup> *D'Amato v. Johnston*, 140 Conn. 54, 97 A. 2d 893, 38 A. L. R. 2d 772 (1953); *Reed v. United Commercial Travelers*, 123 F. 2d 252 (1941).

Where the opinion was not admissible because of the lack of direct observation or proof of direct observation, see: *Brown v. St. Paul City R. Co.*, 241 Minn. 15, 62 N. W. 2d 688 (1954); *Geroeami v. Fancy Fruit & Produce Corp.*, 249 App. Div. 221, 291 N. Y. S. 837 (1936); *Roberto v. Nielson*, 262 App. Div. 1035, 30 N. Y. S. 2d 334, *aff'd* 42 N. E. 2d 27 (1941).

*Lane v. Samuels*, 350 Pa. 446, 39 A. 2d 626 (1944), required for the admission of such an opinion that, (1) the entry must be made contemporaneously with the acts which it purports to relate, (2) it must be impossible at the time the entries are made to anticipate reasons which might subsequently arise for making a false entry, and (3) knowledge of the person responsible for the entry. However, see 5 Wigmore, Evidence § 1530 and Anno. 38 A. L. R. 2d 778.

<sup>70</sup> *Galli v. Wells*, 209 Mo. App. 460, 239 S. W. 894 (1922).

<sup>71</sup> 6 Proof of Facts 145.

<sup>72</sup> *Florida Power & Light Co. v. Bridgeman*, 133 Fla. 195, 182 S. 911 (1938).

<sup>73</sup> *Clark v. Beacon Oil Co.*, 271 Mass. 27, 170 N. E. 836 (1930); *Leonard v. Boston Elev. R. Co.*, 234 Mass. 480, 125 N. E. 593 (1920); *Cowan v. McDonnell*, 330 Mass. 148, 111 N. E. 2d 759 (1953).

<sup>74</sup> 3 Wigmore, Evidence §§ 734, 751.

<sup>75</sup> 5 Wigmore, Evidence § 1521.

mon law "regular entries" rule requires strict unavailability of the witness and a reasonable guarantee of the trustworthiness of the document.<sup>76</sup>

Professor Wigmore argues that hospital records should be admissible merely on the identification of the original by its keeper or on offer of a certified or sworn copy.<sup>77</sup> But he is forced to concede that "No court seems yet to have sanctioned such an exception on common law principles. Moreover, several courts have so illiberally applied the exception for official records and for regular entries in the course of business that many classes of reliable hospital records have been virtually excluded from use."<sup>78</sup>

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<sup>76</sup> 6 Proof of Facts 147.

<sup>77</sup> 5 Wigmore, Evidence § 1707.

<sup>78</sup> *Ibid.* The reader is also referred to the large number of cases collected in the 1959 supplement to 6 Wigmore, Evidence, listed in § 1707.