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Evidence - Documentary Evidence - The Right of Confrontation. Robertson v. Commonwealth, 211 Va. 62, 175 S.E.2d 260 (1970)

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meaningful beliefs which prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion, the test has become unworkable.[21] The present effect is clearly not what the framers of the Universal Military Training and Service Act envisioned.

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Evidence—DOCUMENTARY EVIDENCE—THE RIGHT OF CONFRONTATION. *Robertson v. Commonwealth*, 211 Va. 62, 175 S.E.2d 260 (1970).

The defendant was found guilty of the rape of two girls, ages nine and eleven. His conviction was based on the testimony of the girls and the results of laboratory tests performed on vaginal specimens taken from the victims. A copy of the laboratory report was admitted into evidence under the authority of section 19.1-45 of the Virginia Code.[1]

The defendant on appeal contended that the admission of the laboratory report into evidence violated his constitutional right to cross-examination of witnesses,[2] but the Supreme Court of Appeals of Virginia affirmed the conviction.[3] The court construed the Code section as permitting investigation reports by the Chief Medical Examiner, which were not related to post-mortem examinations, to be prima facie evidence of the facts stated therein, and held that the Chief Medical

21. So unmanageable has this determination become that the *Welsh* court stated that if petitioner classifies his beliefs as "religious" this is to be given "great weight," while if he characterizes his views as not religious "this is a highly unreliable guide for those charged with administering the exemption." 90 S. Ct. at 1797.

1. VA. CODE ANN. § 19.1-45 (Repl. Vol. 1960):

> Reports and Records Received As Evidence.—Reports of investigations made by the Chief Medical Examiner or his assistants or by medical examiners, and the records and reports of autopsies made under the authority of this chapter, shall be received as evidence in any court or other proceeding, and copies of records, photographs, laboratory findings, and records in the office of the Chief Medical Examiner or any medical examiner . . . shall be received as evidence in any court or other proceeding for any purpose for which the original could be received without any proof of the official character or the person whose name is signed thereto.

2. U.S. CONST. amend VI; VA. CONST. art. I, § 8. The Sixth Amendment right of confrontation derives from the English common-law right which developed as a reaction against the use of affidavits in the trial of Sir Walter Raleigh. Note, *Confrontation, Cross-Examination, and the Right To Prepare A Defense*, 56 GEO. L.J. REV. 939, 957 n.136 (1968).

3. Robertson v. Commonwealth, 211 Va. 62, 175 S.E.2d 260 (1970).

Examiner was not required to appear as a witness in support of the laboratory reports.[4]

The Board of Health in Virginia is required to establish and maintain suitable laboratories for the examination of clinical material submitted by members of the medical profession in the state.[5] The Board is authorized to furnish the police and other law enforcement officers or agencies with all assistance, cooperation, and facilities which can be afforded by its laboratory and technical staff.[6] These statutes provide the necessary basis for the participation of the state laboratory in a criminal case.

The Virginia Code contains several sections concerning the admissibility of evidence developed by laboratory or scientific tests. For example, the certificate of any chemist employed by the Board of Health, attesting to the results of analyses made on mixtures believed to be alcoholic in composition, when signed and sworn to by the chemist, is evidence in all prosecutions and all controversies in any judicial proceeding.[7] The statute does not violate the constitutional right of confrontation.[8] When a statute authorizes the admission into evidence of a certificate made by a public officer concerning acts that are within the scope of his duty, such certificate is admissible under the documentary evidence exception to the hearsay rule.[9] It is well settled that the Sixth Amendment is not intended to exclude proper documentary evidence.[10]

In prosecutions for exceeding automobile speed limits, the court may receive as evidence the results of a speedometer calibration test.[11] The constitutionality of this evidentiary rule in respect to the defendant's

4. *Id.* The court overrules Brooks v. Hufman, 200 Va. 488, 106 S.E.2d 631 (1959) to the extent that it is inconsistent. *Brooks* had followed the authority of Russell v. Hammond, 200 Va. 600, 106 S.E.2d 626 (1959) in holding the certificate of a blood analysis in a case involving driving under the influence of intoxicants inadmissible in a civil action under VA. CODE ANN. § 18-75.2 (1950), now § 18.1-55.1 (Supp. 1970), and in a one sentence statement unsupported by reasons, the court held the certificate inadmissible under VA. CODE ANN. § 19-26 (1950), now § 19.1-45 (Repl. Vol. 1960).

5. VA. CODE ANN. § 32-17 (Repl. Vol. 1969).

6. VA. CODE ANN. § 52-11.1 (Repl. Vol. 1967).

7. VA. CODE ANN. § 4-90 (Repl. Vol. 1966).

8. Hosier v. Commonwealth, 135 Va. 516, 115 S.E. 511 (1923); Bracey v. Commonwealth, 119 Va. 867, 89 S.E. 144 (1916).

9. Bracey v. Commonwealth, 119 Va. 867, 89 S.E. 144 (1916); 7 MICHIE'S JUR. OF VIRGINIA AND WEST VIRGINIA, EVIDENCE § 86 (1949).

10. Cochran v. Commonwealth, 122 Va. 801, 94 S.E. 329 (1917); Bracey v. Commonwealth, 119 Va. 867, 89 S.E. 144 (1916); Runde v. Commonwealth, 108 Va. 873, 61 S.E. 792 (1908).

11. VA. CODE ANN. § 46.1-193.1 (Repl. Vol. 1967).

right of confrontation has been expressly upheld by the Supreme Court of Appeals of Virginia.[12] A similar rule has evolved as to the use of chemical analyses as evidence to determine the amount of alcoholic content in a person's blood in cases of intoxication.[13] Under a statute which became effective January 1, 1971, a breath analysis may also be used to determine intoxication; but it is not admissible into evidence since it is merely a preliminary analysis of alcoholic content.[14] The Bogen's test, utilized in Virginia to determine alcoholic content in blood, has been held to come under the category of observed physical condition, and not of opinion, and is therefore admissible as documentary evidence.[15]

Likewise, under Virginia's Drug Control Act,[16] the certificate of a chemist stating his analysis of substances believed to be narcotic is admissible as evidence in prosecution for misdemeanors and preliminary hearings for felonies. The same section further provides that if either party to the action desires the chemist to appear for cross-examination, a motion to this effect must be made within a reasonable time prior to the

12. Royals v. Commonwealth, 198 Va. 876, 96 S.E.2d 812 (1958); Dooley v. Commonwealth, 198 Va. 32, 92 S.E.2d 348 (1956).

13. VA. CODE ANN. § 18.1-55.1 (Supp. 1970). This section is a consolidation of sections 18.1-55 through 18.1-57 (Repl. Vol. 1960), which resulted from the court holding that the sections must be read together. Russell v. Hammond, 200 Va. 600, 106 S.E.2d 626 (1959). Because there is little substantive change in the sections, case law on the repealed sections is still valid.

In Wade v. Commonwealth, 202 Va. 117, 116 S.E.2d 99 (1960), the Supreme Court of Appeals refused to admit into evidence the results of a blood analysis made under VA. CODE ANN. § 18-75.2 (1950), now § 18.1-55.1 (Supp. 1970), where the defendant was charged with involuntary manslaughter and not drunk driving.

14. VA. CODE ANN. § 18.1-54.1 (Supp. 1970).

15. Kay v. United States, 255 F.2d 476 (4th Cir. 1958); Kissinger v. Funkhouser, 194 F. Supp. 276, 279 (E.D. Va. 1961); *see* Comment, *Use of Blood Tests As Evidence of Intoxication in Virginia*, 18 WASH. & LEE L. REV. 370 (1961); *Federal Assimilative Crime Act: How Much State Law?*, 16 WASH. & LEE L. REV. 62 (1959).

Blood tests have been held admissible in the federal courts under the business records exception to the hearsay rule. Kay v. United States, 255 F.2d 476 (4th Cir. 1958), interpreting the Federal Shop Book Rule, 28 U.S.C.A. § 1732 (1966). The operations of government constitute "business" within the meaning of this statute. LaPorte v. United States, 300 F.2d 878, 880 (9th Cir. 1962).

16. VA. CODE ANN. § 54-524.77 (Supp. 1970):

> In any prosecution for a misdemeanor or in any preliminary hearing for a felony under this chapter, the certificate of analysis of the chemist performing such analysis for the Commonwealth, when duly attested by the chemist, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis referred to therein.

day of trial.[17] The Supreme Court of Appeals of Virginia in *Ritter v. Commonwealth*,[18] however, has held that a copy of the report of the Chief Medical Examiner as to the analysis of the contents of a package is admissible as evidence under section 19.1-45 of the Code, the same section employed in *Robertson*. The court stated that if the defendant had desired an opportunity to question the Medical Examiner as to his findings, he could have summoned him as a witness; otherwise, an analysis made by an official in the regular course of his duties is presumed to have been properly made.[19]

Among the common tests utilized in identification of a seminal fluid is the Walker or Kaye test for acid phosphatese which was used in the *Robertson* case. It is the most accepted and conclusive test,[20] but is relatively complex for one who has not developed considerable familiarity with forensic chemistry.[21] Blood tests, also highly technical procedures requiring a high degree of skill on the part of the analyst,[22] are presently admissible into evidence as reliable proof.[23] Such tests, while complex, are admitted into evidence without accompanying expert testimony upon the realization that certain laboratory procedures are so standardized that the possibility of error is nearly non-existent.

It is evident, then, that the Court of Appeals in *Robertson* has merely brought the admissibility of laboratory reports on the results of vaginal swabs in rape cases into line with the procedures recognized in similar areas of the law. The court accomplishes this by expanding the application of section 19.1-45 of the Code beyond post-mortem examinations. Justification for this development is found in other sections of the Code as well as in *Ritter v. Commonwealth*.[24] Although criticism may arise because of the complexity of the test involved, the United States Court of Appeals for the Fourth Circuit has stated that receipt of a certificate

17. *Id.*

18. 210 Va. 732, 173 S.E.2d 799 (1970).

19. *Id.; accord*, Brush v. Commonwealth, 205 Va. 312, 136 S.E.2d 864 (1964).

20. 12 AM. JUR. PROOF OF FACTS, *Identification of Seminal Fluids*, § 10, at 320 (1962).

21. *Id. See also* Smith, *Scientific Proof and Relations of Law and Medicine*, 29 VA. L. REV. 679, 710 (1943).

Under VA. CODE ANN. § 19.1-34 (Repl. Vol. 1960), the Chief Medical Examiner is required to be a skilled pathologist and eligible to be licensed as a doctor of medicine, while one need only be a licensed doctor of medicine to be a medical examiner under VA. CODE ANN. § 19.1-40 (Repl. Vol. 1960).

22. Annot., 159 A.L.R. 212 (1945).

23. Ladd & Gibson, *The Medico-Legal Aspects of the Blood Test To Determine Intoxication*, 24 IOWA L. REV. 191, 192 (1939).

24. 210 Va. 732, 173 S.E.2d 799 (1970).

into evidence does not foreclose inquiry into the procedure and accuracy of the chemical analysis.[25] The *Robertson* ruling appears to be based on the court's trust in the reliability of the state laboratory system, and its knowledge that the defendant, if he so desires, may require the chemist to appear as a witness.

FRANCIS H. FRYE

Landlord and Tenant—RETALIATORY EVICTIONS. *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

Elmer Dickhut, a landlord, brought an unlawful detainer action pursuant to a Wisconsin statute,[1] seeking a writ of restitution for the premises against Clifford Norton, a month-to-month tenant. The defendant admitted that a timely thirty day eviction notice had been served,[2] and that he had failed to quit the premises on or before the eviction day.[3] Prior to the eviction notice, the tenant had filed a complaint with the Milwaukee City Health Department reporting the unsanitary conditions of the premises.[4] He denied that he was holding over without right,

25. Kay v. United States, 255 F.2d 476, 481 (4th Cir. 1958).

1. Under the law of Wisconsin, applicable proceedings to remove a tenant holding over without right are governed by WIS. STAT. ANN. § 291.01(1) (1958). Commencement of the action, supplementary proceedings, and pleadings are codified in WIS. STAT. ANN. §§ 291.05, 291.07 (1958). The plaintiff-respondent fully complied with the requisite statutory proceedings.

2. WIS. STAT. ANN. § 234.03 (1958) embodies the notice requirement in terminating tenancies. It provides in pertinent part as follows:

> Whenever there is a tendancy at will or by sufferance, created in any manner, the same may be terminated by giving at least 30 days' notice in writing to the tenant requiring him to remove from the demised premises, or by the tenant's giving at least 30 days' notice in writing that he shall remove from said premises, and by surrendering to the landlord the possession thereof within the time limited in such notice. . . .

Under a month-to-month tenancy, the notice of thirty days by the landlord must terminate at the end of the rent month and not before. Hartnip v. Fields, 247 Wis. 473, 19 N.W.2d 878, 879 (1945). In *Dickhut*, the plaintiff-landlord gave the written statutory notice on May 27, 1968. The notice required the tenant to quit the premises on or before June 30, 1968. Consequently, the notice given was timely, pursuant to the applicable statute.

3. Dickhut v. Norton, 173 N.W.2d 297, 298 (1970).

4. *Id.* The tenant's allegation that the conditions of the premises were in fact unsanitary was corroborated at the trial by an inspector of the Milwaukee Health Department.