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Virginia is generally in accord with the rules followed in the majority of states in regard to the procedural aspects of proving the defense of insanity.⁴¹ Bringing up the issue of insanity under a plea of not guilty is the prevailing rule followed by thirty-eight states.⁴² However, the Model Penal Code calls for a "special plea,"⁴³ the rationale being that there should be a full disclosure of all pertinent issues at an early stage of the proceedings. This would be a considerable aid for a more scientific determination of mental irresponsibility since the Commonwealth would have longer to investigate the matter. While this comment does not purport to resolve the substantive inconsistencies of insanity, its repetitious use as a defense in the field of criminal law manifestly demands some clarification of the substantive tests. It would be advisable to have a more authoritative declaration as to the different tests to be applied at the time of the crime⁴⁴ and at the time of the trial.⁴⁵ Attorneys are well aware of the distinction, but with the use of commissions and assignments to mental hospitals for observation, a more explicit pronouncement would be a further aid to the medical profession. Except for these suggestions, the Virginia procedure appears to be highly equitable to all concerned.

WILLIAM W. MOORE

USE OF BLOOD TESTS AS EVIDENCE OF INTOXICATION IN VIRGINIA

The chemical analysis of blood samples to determine intoxication has reached a stage of scientific development and reliability whereby it now serves a most useful purpose in assisting courts and juries whenever intoxication is in issue.¹ In the absence of specific legis-

reveals no cases on insanity. For a brief history of the writ see 37 *Harv. L. Rev.* 744 (1924). The writ has been used in cases of insanity in other jurisdictions. See *Schroers v. People*, 399 *Ill.* 428, 78 *N.E.2d* 219 (1948); *Swain v. State*, 215 *Ind.* 259, 18 *N.E.2d* 921 (1939), cert. denied, 306 *U.S.* 660 (1939).

⁴¹See generally *Weihofen, Mental Disorder as a Criminal Defense* 353-474 (1954). 8 *Ala. L. Rev.* 49, 52-55 (1955) has an excellent short summary of the procedural rules throughout the United States.

⁴²*Weihofen, Mental Disorder as a Criminal Defense* 357 (1954).

⁴³Model Penal Code § 4.03(2) (Tent. Draft No. 4, 1955). See *Weihofen, Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code*, 29 *Temp. L.Q.* 235 (1956).

⁴⁴See notes 28 and 29 *supra* and accompanying text.

⁴⁵See notes 24 and 25 *supra* and accompanying text.

¹*Ladd & Gibson, Legal-Medical Aspects of Blood Tests to Determine Intoxication*, 29 *Va. L. Rev.* 749, 750 (1943); *Comment*, 35 *Texas L. Rev.* 813, 815-16 (1957).

lation the courts treat the admissibility of blood tests according to established rules relating to scientific evidence.² Virginia has given its stamp of legislative approval to the admissibility in evidence of blood tests,³ but the Supreme Court of Appeals has, by judicial interpretation of the relevant Code sections, limited the use of the tests to prosecutions for driving while under the influence of intoxicants.⁴ It is desirable that the scope of this legislation be enlarged to permit the introduction of blood test analyses into evidence in other types of criminal prosecutions and in civil suits where intoxication is in issue.

Chemical tests to determine intoxication are used in nearly all states.⁵ Thirty-four states and the District of Columbia have legislation dealing specifically with the subject,⁶ and the remaining states use such tests without legislative authority.⁷ States having legislation in this area have adopted in varying degrees the provisions of section 11-902 of the Uniform Vehicle Code which sets forth standard presumptions to be drawn from given blood alcohol percentages.⁸ The use of these tests in state courts was upheld over constitutional objections by the United States Supreme Court in *Breithaupt v. Abram*.⁹

Virginia enacted chemical test legislation in 1954.¹⁰ Prior to that time the results of blood and breath tests were admissible in evidence¹¹ in prosecutions under Code section 18-75¹² for driving while intoxicated. The 1954 legislation allowed the use of blood tests at the re-

²Donigan, *Chemical Tests and the Law* 13 (1957).

³Va. Code Ann. § 18.1-55-57 (Repl. Vol. 1960).

⁴Wade v. Commonwealth, 202 Va. 117, 116 S.E.2d 99 (1960); Russell v. Hammond, 200 Va. 600, 106 S.E.2d 626 (1959).

⁵According to *Breithaupt v. Abram*, 352 U.S. 432, 436 n.3 (1957), forty-seven states used chemical tests to determine intoxication at that time.

⁶Committee on Alcohol and Drugs of the National Safety Council, *Uses of Chemical Tests for Intoxication* 1 (1959). A summary of such statutes is set forth in the appendix to this comment.

⁷See *Breithaupt v. Abram*; 352 U.S. 432, 436 (1957) which lists states where there is statutory or judicial authority for the use of chemical tests to determine intoxication.

⁸Those states which have adopted statutes have patterned their legislation after § 11-902 of the Uniform Vehicle Code (1956), cited in Goff, *Constitutionality of Compulsory Chemical Tests to Determine Intoxication*, 49 J. Crim. L., C & P.S. 58 n.4 (1958).

⁹352 U.S. 432 (1957). See especially footnote 3 at page 436.

¹⁰Acts of the Assembly 1954, ch. 406. This was codified as Va. Code Ann. § 18-75.1 (Supp. 1954) which has subsequently been extensively altered. See note 16 *infra*.

¹¹*Omohundro v. Arlington County*, 194 Va. 773, 75 S.E.2d 496 (1953).

¹²Code § 18-75 is now § 18.1-54 (Repl. Vol. 1960).

quest of the accused and provided that a failure to request such a test was not a proper subject for comment at the trial. This nullified a 1954 decision of the Supreme Court of Appeals that the testimony of a police officer that the accused refused to submit to a blood test did not violate the defendant's privilege against self-incrimination.¹³ In the 1955 decision of *Rogers v. Commonwealth*,¹⁴ the result of a blood test was offered by the Commonwealth without adequate evidence regarding the details of the handling of the blood sample. The Supreme Court of Appeals ruled that the evidence was insufficient to establish beyond a reasonable doubt that the blood was that of the defendant and reversed the drunk driving conviction. It was held that the Commonwealth must prove with competent evidence the taking of the blood sample, every step in its transmission, and the testing of the same sample by a qualified analyst.

Apparently prompted by a desire to modify the rule of the *Rogers* case¹⁵ the Virginia Legislature determined that further statutory provisions for chemical tests were in order. In 1956 an addition to the Code was enacted setting forth the procedures to be followed in making blood tests and the presumptions to be drawn from the results.¹⁶ The statute provides for placing the blood sample in a sealed container provided by the Chief Medical Examiner, delivering it to the arresting officer and mailing the sample to the Chief Medical Examiner for analysis. The report of the analysis can then be introduced in evidence without the elaborate proof required under the rule of *Rogers v. Commonwealth*. The statute also states the various presumptions arising from given percentages of alcohol in the blood.¹⁷

¹³*Gardner v. Commonwealth*, 195 Va. 945, 81 S.E.2d 614 (1954).

¹⁴197 Va. 527, 90 S.E.2d 257 (1955).

¹⁵*Ibid.*

¹⁶Acts of the Assembly 1956, ch. 557; Acts of the Assembly, Extra Session 1956, ch. 45; both codified as Va. Code Ann. § 18-75.1-75.3 (Supp. 1956) (now codified as Va. Code Ann. § 18.1-55-57 (Repl. Vol. 1960)).

¹⁷Va. Code Ann. § 18.1-57 (Repl. Vol. 1960). "In any prosecution for a violation of § 18.1-54, or any similar ordinance of any county, city or town, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of the accused's blood in accordance with the provisions of § 18.1-55, shall give rise to the following presumptions:

"(1) If there was at that time 0.05 per cent or less by weight of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants;

"(2) If there was at that time in excess of 0.05 per cent but less than 0.15 per cent by weight of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused;

"(3) If there was at that time 0.15 per cent or more by weight of alcohol in the

This legislation has provided law enforcement agencies in the state with a reliable tool of evidence in prosecuting for violations of section 18-54. According to a report of the National Safety Council for 1959, of 3,291 prosecutions in Virginia for driving while intoxicated in which chemical tests were made, there were 2,677 convictions.¹⁸

If these tests are acceptable as evidence in criminal prosecutions for driving while intoxicated, why should there be any objection to their admission in evidence in other criminal prosecutions or in civil proceedings where intoxication is an issue?

The Supreme Court of Appeals closed the door to the use of a blood test certificate of the Chief Medical Examiner in a civil action in the case of *Russell v. Hammond*¹⁹ in which the plaintiff brought an action as administratrix to recover damages for the death of her son who was struck by the defendant's automobile. At the time of the accident a police officer informed the defendant that he could request a blood test. The plaintiff attempted to submit the results of the test in evidence, and the trial court excluded the certificate. The Supreme Court of Appeals affirmed the ruling of the lower court and held that under the applicable statutes the certificate is not admissible in a civil case. This holding was reaffirmed in the case of *Brooks v. Huffman*.²⁰

Since the statutory presumptions of intoxication have proven useful in prosecutions for driving while intoxicated, it would seem that they might also be applied in other criminal prosecutions where intoxication is in issue. This point was raised in the recent case of *Wade v. Commonwealth*,²¹ a prosecution for manslaughter arising out of an automobile accident in which an occupant of the Wade vehicle was killed. There was evidence that Wade had been drinking, that he consented to the blood test, that the blood sample was taken according to the procedure outlined in the statute, and that such sample was analyzed by the Chief Medical Examiner. At the trial the prosecutor commented in his opening statement to the jury, over the objection of the defendant, on the certificate of the Chief Medical Examiner. Over the objection of the defendant the attorney for the Commonwealth was also permitted to introduce the certificate in evidence.

accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants."

¹⁸Committee on Alcohol and Drugs of the National Safety Council, *Uses of Chemical Tests for Intoxication* 14 (1959).

¹⁹200 Va. 600, 106 S.E.2d 626 (1959).

²⁰200 Va. 488, 106 S.E.2d 631 (1959).

²¹202 Va. 117, 116 S.E.2d 99 (1960).

On appeal the major issue of the case was whether the blood test result was admissible in a manslaughter prosecution.²² The defendant contended that the certificate of analysis referred to in section 18-75.1 could be introduced only in a prosecution under section 18-75 relating to driving while intoxicated.²³ The Commonwealth, on the other hand, took the position that the certificate was properly admitted because section 18-75.2 provided that the certificate "shall . . . be admissible in any court or proceeding as evidence of the facts therein stated and the result of the analysis of the blood of the accused."²⁴

The Supreme Court of Appeals reversed the conviction, holding that the result of the blood test is not admissible in a prosecution for manslaughter. The decision was apparently based upon a strict construction of the language of the statute which does not expressly provide for use of the tests and statutory presumptions in prosecutions other than for driving while intoxicated. The court referred to the decision in *Russell v. Hammond*²⁵ which held that the certificate was not admissible in a civil case. The court there pointed out that the three statutes (sections 18-75.1 through 18-75.3, now 18.1-55 through 18.1-57) "must be read together since they are related and the last two refer to the blood alcohol test made under section 18-75.1"²⁶ Thus, in *Wade* the court concluded that these statutes all relate to a prosecution under section 18-75:

"Sections 18-75.1, 18-75.2, and 18-75.3 refer to § 18-75 (driving automobile, etc., while intoxicated) or similar ordinance of any county, city or town. Wade was not prosecuted for operating an automobile under the influence of intoxicants, and we cannot extend the provisions of the statutes in question to include prosecutions for involuntary manslaughter or other criminal offenses."²⁷

This language, coupled with that of the *Russell* case, prohibits

²²This issue has been dealt with in other jurisdictions. Arizona and Nebraska have enacted into law the statutory presumptions which arise on submission in evidence of blood test results in order to supplement their drunk driving statutes. Courts of these states have ruled that the statutory presumptions do not apply when the defendant is charged with an offense other than driving while intoxicated. *Hoffman v. State*, 160 Neb. 375, 70 N.W.2d 314 (1955). *Mattingly v. Eisenberg*, 79 Ariz. 135, 285 P.2d 174 (1955). South Dakota, however, has ruled that the presumptions may be used in criminal prosecutions. *Fossum v. Zurn*, 100 N.W.2d 805, 811 (S.D. 1960).

²³202 Va. 117, 121, 116 S.E.2d 99, 102 (1960).

²⁴Va. Code Ann. § 18-75.2 (Supp. 1956) (now Va. Code Ann. § 18.1-56 (Repl. Vol. 1960)).

²⁵200 Va. 600, 106 S.E.2d 626 (1959).

²⁶*Id.* at 603, 106 S.E.2d at 629.

²⁷*Wade v. Commonwealth*, 202 Va. 117, 122, 116 S.E.2d 99, 103 (1960).

the introduction in evidence of the certificate of the Chief Medical Examiner in any cases other than prosecutions for violation of section 18-75 (now 18.1-54). the effect of these rulings is to exclude a reliable and competent source of evidence from the courts.

It should be noted that besides section 18.1-54 there are eight separate and distinct offenses set forth in the Code involving acts done "while under the influence" of intoxicants, or "being intoxicated." Since the issue of intoxication is as material²⁸ to these offenses as it is to section 18.1-54, blood tests should be applicable in prosecutions for these offenses. Section 4-26 provides that it shall be a misdemeanor to sell any alcoholic beverages to "an intoxicated person."²⁹ Section 5-10.1 makes it a misdemeanor for any person to operate an aircraft "while under the influence of intoxicating liquor. . ."³⁰ Section 15-553 authorizes the governing bodies of cities, towns and counties to enact ordinances prohibiting drivers of motor vehicles, engines and trains in such towns "while under the influence of alcohol," and to prescribe fines and other punishment for violation of such ordinances.³¹ Section 18.1-237 provides that if any person who has "arrived at the age of discretion . . . get or be drunk in public he shall be deemed guilty of a misdemeanor. . ."³² Section 18.1-239 makes it unlawful for any person "being intoxicated" to disturb an assembly met for religious worship.³³ Section 18.1-240 makes it a misdemeanor for any person, being intoxicated, to "disturb the exercise of any free school or any other school or of any literary society . . ."³⁴ Section 45-72(c) states, "No person shall at any time . . . enter any mine while under the influence of intoxicants."³⁵ Section 54-560 provides for suspension of pilots who are "intoxicated . . . while in charge of a vessel. . ."³⁶ In the above listed offenses the issue of intoxication

²⁸"In the court room the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue . . . the evidence is properly said to be immaterial." McCormick, Evidence § 152 (1954). "When evidence is referred to as immaterial, it is usually meant that it is being offered to prove some proposition which makes no difference under the rules of substantive law, or has not been put in issue by the pleadings." Laughlin, Evidence, Annual Survey of Virginia Law, 44 Va. L. Rev. 1195, 1197 (1958).

²⁹Va. Code Ann. § 4-62 (1950).

³⁰Va. Code Ann. § 5-10.1 (1950).

³¹Va. Code Ann. § 15-553 (Repl. Vol. 1956).

³²Va. Code Ann. § 18.1-237 (Repl. Vol. 1960).

³³Va. Code Ann. § 18.1-239 (Repl. Vol. 1960).

³⁴Va. Code Ann. § 18.1-240 (Repl. Vol. 1960).

³⁵Va. Code Ann. § 45-72(c) (Repl. Vol. 1958).

³⁶Va. Code Ann. § 54-560 (Repl. Vol. 1958).

is as material as it is in a prosecution under 18.1-54, and therefore the use of blood tests in establishing the matter of intoxication should be allowed.

There are other criminal and civil cases such as manslaughter prosecutions and negligence actions arising out of automobile accidents in which evidence of intoxication is relevant. Liability in such cases is predicated upon negligence, not upon intoxication; however, intoxication is evidence of negligence.³⁷

It is submitted that if blood tests are acceptable as proof of intoxication in criminal prosecutions under section 18.1-54, they should also be relevant evidence in other criminal and civil cases where intoxication is in issue. Five states have legislation that provides for use of chemical tests in such cases;³⁸ five jurisdictions have legislation providing for use of the results of chemical tests in criminal prosecutions other than driving while intoxicated;³⁹ and a number of jurisdictions without specific statutory provisions permit the use of chemical test results in criminal cases other than driving while intoxicated prosecutions and in civil actions.⁴⁰ To facilitate the use of this evidence, which has substantial probative value whenever intoxication is in issue, it is urged that the Virginia statute be revised to make the test results admissible in evidence in other criminal prosecutions as well as in civil litigation.

JOHN PAUL

³⁷ In the case of *Bogstad v. Hope*, 199 Va. 453, 100 S.E.2d 745 (1957) the plaintiff sought to show that the defendant was intoxicated when his car struck and injured the plaintiff. The Supreme Court of Appeals commented: "Here the evidence supports an instruction submitting the issue of whether or not the defendant was operating his automobile while under the influence of intoxicants. . . . [The instruction] should have been so phrased as to tell the jury that operating the vehicle while under the influence of intoxicants was negligence, and if Bogstad's negligence in that respect was a proximate cause of the accident and that the plaintiff was free from contributory negligence, then they should find for the plaintiff. In short, if the defendant was driving his car while under the influence of intoxicants, he violated § 18-75, Code 1950, and that was negligence. Yet it was not his intoxication but his negligence that had to be the proximate cause of the mishap before there could be a finding against him because of his conduct in that respect." *Id.* at 458-59, 100 S.E.2d at 748-49.

³⁸ Delaware, Illinois, New York, North Dakota and Wisconsin. See appendix.

³⁹ District of Columbia, Indiana, Kansas, Minnesota and Nevada. See appendix.

⁴⁰ *Lawrence v. City of Los Angeles*, 53 Cal. App. 2d 206, 127 P.2d 931 (Dist. Ct. App. 1942) (civil suit); *People v. Henry*, 23 Cal. App. 2d 155, 72 P.2d 915 (Dist. Ct. of App. 1937) (motor vehicle homicide); *Touchton v. State*, 154 Fla. 547, 18 So. 2d 752 (1944) (motor vehicle homicide); *Nicholson v. City of Des Moines*, 246 Iowa 318, 67 N.W.2d 533 (1954) (civil suit); *Commonwealth v. Capalbo*, 308 Mass. 376, 32 N.E.2d 225 (1941) (murder); *Breithaupt v. Abram*, 58 N.M. 385, 271 P.2d 827 (1954), *aff'd*, 352 U.S. 432 (1957) (involuntary manslaughter); *State v. Cash*, 219 N.C. 818, 15 S.E.2d 277 (1941) (murder); *Bowden v. State*, 95 Okla. Crim. 382, 246 P.2d 427 (1952) (motor vehicle homicide).

APPENDIX

Table of Statutory Provisions for the Use of Chemical Tests
To Determine Intoxication

<i>State</i>	<i>Driving while Intoxicated</i>	<i>Other Criminal Prosecutions</i>	<i>All Actions (Civil & Criminal)</i>
Arizona ¹	x		
Arkansas ²	x		
Colorado ³	x		
Delaware ⁴			x
District of Columbia ⁵		x	
Georgia ⁶	x		
Hawaii ⁷	x		
Idaho ⁸	x		
Illinois ⁹			x
Indiana ¹⁰		x	
Kansas ¹¹	x*	x	
Kentucky ¹²	x		
Maine ¹³	x		
Maryland ¹⁴	x		
Michigan ¹⁵	x		
Minnesota ¹⁶		x	
Montana ¹⁷	x		
Nebraska ¹⁸	x		

*Applicable also to local ordinance violations of driving while intoxicated.

¹Ariz. Rev. Stat. Ann. § 28-692 (Supp. 1960).

²Ark. Stat. § 75-1031.1 (Supp. 1957).

³Colo. Rev. Stat. Ann. § 13-4-30 (Supp. 1957).

⁴Del. Code Ann. tit. 11, § 3507 (Supp. 1960).

⁵D.C. Code Ann. § 40-609a (Supp. 1960).

⁶Ga. Code Ann. § 68-1625 (1957).

⁷Hawaii Rev. Laws § 311-29 (1955).

⁸Idaho Code Ann. § 49-352 (1957).

⁹Ill. Ann. Stat. ch. 95 1/2 § 144 (Smith-Hurd 1958).

¹⁰Ind. Ann. Stat. § 47-2003 (Supp. 1960).

¹¹Kan. Gen. Stat. Ann. § 8-1001-07 (Supp. 1959).

¹²Ky. Rev. Stat. Ann. § 189-520 (1955).

¹³Me. Rev. Stat. Ann. ch. 22, § 150 (Supp. 1959).

¹⁴Md. Ann. Code art. 35, § 100 (Supp. 1960).

¹⁵Mich. Acts 1960, No. 148.

¹⁶Minn. Stat. Ann. § 169.121 (1960).

¹⁷Mont. Rev. Codes Ann. § 32-2142(2) (Supp. 1959).

¹⁸Neb. Rev. Stat. § 39-727.01 (1960).

<i>State</i>	<i>Driving while Intoxicated</i>	<i>Other Criminal Prosecutions</i>	<i>All Actions (Civil & Criminal)</i>
Nevada ¹⁹		x	
New Hampshire ²⁰	x		
New Jersey ²¹	x		
New York ²²			x**
North Dakota ²³			x
Oregon ²⁴	x		
Rhode Island ²⁵	x		
South Carolina ²⁶	x		
South Dakota ²⁷	x		
Tennessee ²⁸	x		
Utah ²⁹	x		
Vermont ³⁰	x		
Virginia ³¹	x*		
Washington ³²	x		
West Virginia ³³	x		
Wisconsin ³⁴			x
Wyoming ³⁵	x		

**Applicable to all actions if the person was arrested at the time the blood sample was taken.

¹⁹Nev. Rev. Stat § 484.055 (1960).

²⁰N.H. Rev. Stat. Ann. § 262:20 (1955).

²¹N.J. Rev. Stat. § 39:4-50.1 (Supp. 1961).

²²N.Y. Vehicle & Traffic § 1194.

²³N.D. Rev. Code § 39-20-07 (1960).

²⁴Ore. Rev. Stat. § 483.630 (1959).

²⁵R.I. Gen. Laws Ann. § 31-27-2 (Supp. 1960).

²⁶S.C. Code § 46-344 (1952).

²⁷S.D. Code § 44.0302-1 (Supp. 1960).

²⁸Tenn. Code Ann. § 59-1032-33 (1955).

²⁹Utah Code Ann. § 41-6-44 (1960).

³⁰Vt. Stat. Ann. tit. 23, § 1189 (Supp. 1959).

³¹Va. Code Ann. § 18.1-54-57 (Repl. Vol. 1960).

³²Wash. Rev. Code § 46.56.010 (Supp. 1959).

³³W. Va. Code Ann. § 1721(331a) (Supp. 1960).

³⁴Wis. Stat. Ann. § 325.235 (1958).

³⁵Wyo. Comp. Stat. Ann. § 31-129 (1957).