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Automobiles - License and Regulation of Chauffeurs or Operators - Invalidity of Arrest as Bar to Revocation under Implied Consent Statute

Leland Hagen

RECENT CASES

AUTOMOBILES—LICENSE AND REGULATION OF CHAUFFEURS OR OPERATORS—INVALIDITY OF ARREST AS BAR TO REVOCATION UNDER IMPLIED CONSENT STATUTE—Petitioner was arrested for driving while intoxicated and was later acquitted of the charge. He had refused to take the drunkometer test provided for by the "implied consent" statute.[1] Pursuant to statute,[2] his license was revoked for failure to submit to the test. The District Court restored the license, and the Supreme Court affirmed, one justice dissenting. The court *held*, that because the motorist was acquitted, the arrest without a warrant was unlawful, and the statute could not be invoked to suspend the license for refusing the test. *Colling v Hjelle*, 125 N.W.2d 453 (N.D 1964)

At common law, an officer could arrest for a misdemeanor without a warrant only if it involved a breach of the peace and was in fact committed or attempted in his presence.[3] Several courts now take the same view requiring actual guilt,[4] but usually the offense need not involve a breach of the peace.[5] Under this view, it has been held that the unlawfulness of the arrest is conclusively established by acquittal.[6]

The Federal courts and a majority of states do not require actual guilt and hold that the arrest is lawful if the officer

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1. N.D. CENT. CODE § 39-20-01 (1961). "Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of this chapter to a chemical test, or tests, of his blood, breath, saliva, or urine for the purpose of determining the alcoholic content of his blood. The test or tests shall be administered at the direction of a law enforcement officer only after placing such person under arrest and informing him that he is or will be charged with the offense of driving while under the influence of intoxicating liquor. "

2. N.D. CENT. CODE § 39-20-04 (1961). "If a person under arrest refuses to submit to chemical testing, none shall be given, but the state highway commissioner, shall revoke his license for a period of six months "

3. United States v. DiCorvo, 37 F.2d 124 (D.D. Conn. 1927) State v. Lutz, 101 S.E. 434 (W Va. 1919) See generally Note, 40 B.U.L.REV. 58 (1960)

4. See Edgin v. Talley, 169 Ark. 662, 276 S.W 591 (1925) People v. Dority, 282 App. Div. 995, 125 N.Y.S.2d 526 (1953) Jones v. State, 202 P.2d 228 (Okla. 1949).

5. Howard v. State, 137 Ark. 111, 208 S.W 293 (1919) State v. Smith, 37 N.J. 481, 181 A.2d 761 (1962). Where breach of the peace is required, driving while intoxicated has been held to be such a crime. City of Troy v. Cummins, 107 Ohio App. 318, 159 N.E.2d 239 (1958).

6. Parrott v. Commonwealth, 287 S.W.2d 440 (Ky. 1956). *Contra,* People v. Edge, 406 Ill. 490, 94 N.E.2d 359 (1950).

has reasonable grounds to believe that the offense has been committed.[7]

To deal with the problem of the intoxicated driver, New York adopted its so-called implied consent law in 1953.[8] Since then, a number of states besides North Dakota have enacted substantially the same statute.[9] The rationale of the act is that use of the highways is a privilege rather than a right and is thus subject to reasonable regulation.[10] These statutes have withstood various constitutional objections.[11]

By compelling the motorist to submit to the test, or lose his license, evidence of guilt is more easily obtained. Almost every state utilizes chemical testing for intoxication.[12] But without the implied consent statute, it has been held that a motorist cannot be compelled to submit to testing.[13] As a result of this, comment during the trial on the refusal has been disallowed.[14]

The issue decided in this case of whether the implied consent statute can be invoked to suspend the license after the motorist has been acquitted was also considered by the New York[15] and Nebraska[16] courts. Both rejected the argument that it cannot on the basis that the trial and revocation proceedings are separate and unrelated.[17]

It is submitted that although greater emphasis has in recent years been placed on the value of a driver's license,[18] this court gave that consideration too much weight. It could

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7. See *e.g.*, Garske v. United States, 1 F.2d 620 (8th Cir. 1924) People v. Wrest, 345 Ill. App. 186, 103 N.E.2d 171 (1952) Smith v. Hubbard, 253 Minn. 215, 91 N.W.2d 756 (1958) Bursack v. Davis, 199 Wis. 115, 225 N.W 738 (1929)

8. See N.Y. VEHICLE & TRAFFIC LAW § 1194 for present law.

9. See *e.g.*, KAN. GEN. STAT. ANN. § 8-1001 (Supp. 1961) NEB. REV. STAT. § 39-727.03 (Supp 1961).

10. See Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961) N.D. CENT. CODE § 39-06-01 (1961) " Any person licensed as an operator hereunder may exercise the *privilege* thereby granted. "

11. See Lee v. State, *supra* note 11 (equal protection) Schutt v MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954) (self-incrimination and illegal search and seizure) For a thorough discussion of constitutional questions regarding chemical testing, see Note, 37 N.D.L.REV. 212 (1961).

12. Comment, 51 MICH.L.REV. 1195, 1196 (1953).

13. Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1940)

14. Bumpass v. State. 160 Tex. Crim. 423, 271 S.W.2d 953 (1954).

15. See Combes v. Kelly, 2 Misc. 2d 491, 152 N.Y.S.2d 934 (County Ct. 1956).

16. See Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961).

17. See also Pieri v. Director of Motor Vehicles, 192 A.2d 807 (D.C. Ct. of App. 1963). Although no implied consent statute was involved, this same rationale was used to uphold the revocation despite acquittal of the drunk driving charge.

18. See State v. Moseng, 254 Minn. 263, 95 N.W.2d 6 (1959).

logically have accepted the reasonable grounds test for arrest, thereby validating the revocation.[19] In refusing to do so, the implied consent statute has been rendered useless as an instrument for the promotion of highway safety, and the legislature is left to cure what this court could have prevented.

LELAND HAGEN

MENTAL HEALTH—CARE AND SUPPORT OF DISORDERED PERSONS—LIABILITY OF RELATIVES—EQUAL PROTECTION—The California Department of Mental Hygiene, pursuant to statute,[1] presented a claim to intestate's estate for the support of intestate's mother who was an inmate in a mental institution. Defendant administratrix disallowed the claim and appealed from an adverse judgement in Superior court. The Supreme Court *held* that a statute which imposes upon one adult, because of a family relationship, a duty to support another adult, who is confined in a mental institution, is arbitrary and unreasonable and thus violates the equal protection clause of the Fourteenth Amendment. *Department of Mental Hygiene v Kirchner*, 36 Cal. Rpts. 488, 388 P.2d 720.

At common law the state undertook the care and custody of idiots and lunatics and of their estates.[2] There was no duty upon parents to support their adult children[3] or upon children to support their parents.[4] Nor was there a duty upon a wife to support her husband.[5] The first statute appearing in this area was 43 Eliz. C.2 § 7 (1601)

A large majority of the states have statutes which are comparable to the California statute involved in the principal

19. *Compare* N.D. CENT. CODE § 29-06-15. "Arrest without a warrant.—A peace officer, without a warrant, may arrest a person. 1. For a public offense, committed or attempted in his presence " *with* Smith v. Hubbard, 253 Minn. 215, 91 N.W.2d 756 (1958), wherein the court adopted the reasonable grounds test even though the arrest statute is the same as North Dakota's.

1. CAL. WELFARE AND INST'NS. CODE ANN. § 6650 (West 1956) "The husband, wife, father, mother or children of a mentally ill person or inebriate shall be liable for his care, support and maintenance in a state institution of which he is an inmate. "

2. 2 ODGERS, COMMON LAW OF ENGLAND, 1381 (2d Ed. 1920).

3. Murrah v. Bailes, 255 Ala. 178, 50 So. 2d 735 (1951).

4. Duffy v. Yordi, 149 Cal. 140, 84 Pac. 838 (1906).

5. Hagert v. Hagert, 22 N.D. 290, 133 N.W 1035 (1911).