

that it is thereafter unusable. Rather, the practice is to return the tube to the manufacturer in order to obtain a refund on the cost.

Prior to the trial, appellant moved for production for his inspection of the ascarite tube. The State was unable to produce the tube because of the policy of returning the used tubes to the manufacturer.

Appellant thereupon moved to suppress the analysis of the intoximeter test on the ground that his rights have been violated by the inability to examine the ascarite tube, and on the further ground that the tube, itself, was the best evidence and since it was destroyed by the State the State may not offer secondary evidence of the test.

The results of the intoximeter tests are admissible in evidence in this State by reason of 11 *Del. C.*, § 3507 authorizing the admission into evidence of a chemical analysis of the breath of any person in cases where the issue is whether such person was or was not under the influence of intoxicating liquor.

Appellant does not argue, as of course he could not, that this analysis is inadmissible in evidence. The statute precludes that argument. He does argue that the State's failure to produce for his inspection one of the components has deprived him of an important right—that of an opportunity to demonstrate, possibly, the inaccuracy of the analysis. He cites several authorities in support of his argument that the failure to produce for inspection and analysis material, the character of which is in issue, is reversible error. Cf. *State v. Bramhall*, 63 S. 603, and an unreported case in the Federal District Court for Delaware, *U.S. v. City Dressed Beef Co., Inc.*, Civil Action No. 1426.

The authorities cited, however, are not in point, for in them it was possible to produce at least some of the material to be analyzed. In the case of intoximeter tests the material necessary to the making of the analysis is necessarily used up in the process. The only remaining element, the ascarite tube, furthermore sheds no meaningful light on the results since, by itself, it does not determine the final analysis.

In the case before us it appears that the ascarite tube went out of the possession of the State in accordance with the practice followed in several thousand such analyses before the appellant moved to produce for inspection. In our opinion the State has committed no error in disposing of an apparently useless tube in the absence of a request by the appellant to preserve it. Particularly is this so when chemical analysis of substances made by qualified chemists are as a matter of course received in evidence without the production in evidence of the substance itself. 2 *Wharton's Criminal Evidence* (11th Ed.), §§ 788, 1002. We express no opinion, however, on what would result if timely application for inspection of the component parts had been made.

Next, appellant argues that the ascarite tube was the best evidence of the result of the test, and that, therefore, the chemist's analysis should have been rejected. The answer to this contention is that, alone, the ascarite tube proves nothing with respect to blood alcohol content. The so-called Best Evidence Rule comes into play only when the secondary evidence offered, of itself, shows that better evidence exists of the fact sought to be proved. 1 *Wharton's Criminal Evidence* (11th Ed.), §§ 366, 387. Secondary evidence is excluded not because it is necessarily inferior in probative quality, but because it, itself, presupposes that direct, primary evidence is held back. To state the rule is to show its inapplicability in this case.

Finally, appellant argues that it was error to permit the State Chemist to testify in answer to a question as to whether or not in his experience he had seen any individual with a 0.243 blood alcohol by weight reading who would not be under the influence of alcohol. Over the defense objection he answered that he had never found anyone with a reading of 0.243 who was capable of operating a motor vehicle.

Appellant objects on the ground that the witness had not been qualified as an expert, and that the statute permits only the admission into evidence of the results of the analysis without comment from the witness.

We think the objection is without merit. Similar testimony has been given by qualified chemists in other jurisdictions and upheld on appeal, even in trials before a jury which is not this case. *Commonwealth v. Capalbo*, 308 Mass. 376, 37 N.E. 2d 225; *People v. Markham*, 153 Cal. App. 2d 260, 314 P. 2d 217; *State v. Libby*, 153 Me. 1, 133 A. 2d 877; *State v. Cline*, 339 P. 2d 657. And see 2 *Wharton's Criminal Evidence* (11th Ed.), § 1001.

For the foregoing reasons, the conviction below is affirmed.