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The Resistance to Flouridation

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mitted that the reading of the majority opinion in the instant case demands the conclusion that the law is changed. And it is changed without benefit of overruling previous conflicting cases. The interest of the forum here, as pointed out in the dissenting opinion, is solely dependent on the occurrence of the injury within its borders. And this apparently is the rule of the case—injury within the borders of the state of the forum is enough to entitle it to reject any defense based upon full faith and credit. The court said that Arkansas was free to accept the defense or reject it. This is a choice which the court could make, apparently without any necessity of offering reasons for the choice. This seems to place an unfair burden upon litigants who will have no inkling of how a court will choose.

The moral, if a moral is to be derived from the case, is simple enough. To our black-robed dispensers of justice, the statute is not so fair-haired as its cousin, the judgment—despite the fact that Congress has made it clear by legislation²³ that statutes are entitled to the same full faith and credit within the meaning of the Constitution.²⁴

WILLIAM J. STOKES

THE RESISTANCE TO FLUORIDATION

In a country such as ours that is so acutely conscious of its health, fervent controversies frequently arise over proposed or newly adopted public health measures. One of the most popular current controversies in this area is the battle over the fluoridation of municipal water supplies. Both state and federal governments are charged with the responsibility of public health. The modern extension of public health measures through government regulation poses the double question of how far people want their lives regulated in the interests of good health, and how far the Constitution of the United States will allow government to go in adopting such measures.

Should municipalities artificially fluoridate their water systems? It is claimed by the advocates of fluoridation, who have much scientific support, that fluoridation reduces the occurrence of tooth decay, known in dentistry as dental caries, in children from six to eighteen years old. The fluoridation process is accomplished by adding fluorides directly to municipal water mains by means of special equipment. The Ohio trial court has given detailed consideration to the scientific material in support of fluoridation.¹ The results tend to prove that in those areas of naturally low fluoride content, where fluorides have been artificially ingested, the occurrence of dental caries has been significantly reduced. The U. S.

23. 62 Stat. 947 (1948), 28 U.S.C. § 1738 (1948).

24. U.S. Const., Art. IV, § 1.

1. See especially *Kraus v. City of Cleveland*, 116 N.E.2d 779 (Ohio 1953), for a detailed consideration of the scientific aspects.

Public Health Service recommends that from one part of fluorides per million to one and one-half parts per million (1.5ppm) is optimum fluoride content; that over 1.5 ppm concentration causes moulting and discoloration of children's teeth. The evidence in opposition to fluoridation is less scientific and usually not offered by a chemical or medical expert, but it is not the purpose here to pass upon the validity of the scientific evidence.

Among the communities throughout the United States which are deficient in natural fluoride, there have been many where the proposal to fluoridate has been tied in with local politics in such ways as to obscure the merits of the issue. In very recent years there has been increasing legal opposition. The problem has received attention in Wyoming where the State Board of Health has announced that "Tests have shown that the water supplies of numerous Wyoming towns and cities are far below (the desired) ratio (of flouride content)."² Wyoming has experienced some political opposition. The response to a letter inquiry made of the mayors of all the county seats of the State and other principal towns reveals that there has been no court litigation thus far in Wyoming. However, some litigation in the future is foreseeable.

There are only seven decisions from the state appellate courts on the legality of fluoridation. Six courts have upheld fluoridation and dismissed the suits to enjoin it.³ The other court merely overruled a demurrer without deciding the case on its merits.⁴ In each case the plaintiff, as an individual taxpayer or citizen, filed his action to enjoin a city official or the city council from carrying out a fluoridation program pursuant to an ordinance adopted by the council. An outline of the grounds relied upon to support such an injunction will give a clear picture of what one might expect if engaged in such a suit.

The first and main objection raised in nearly every case is that the ordinances providing for fluoridation exceed the city's police power. In considering this objection, the courts seem to agree that the action of a municipal legislative body will not be disturbed in the exercise of its police powers "unless it is plain and palpable that such action has no real or substantive relation to public health or safety or general welfare."⁵ Added to this is the presumption that an ordinance is valid and that the party objecting must bear the burden of showing the contrary.⁶ Courts will not limit the use of the police power, even though harsh, unless it is "unreasonable and arbitrarily invoked."⁷ Thus, an ordinance must bear a

2. Minutes of the Meeting of the State Board of Health, Cheyenne, December 9, 1949.

3. *DeAryan v. Butler*, 119 Cal.App.2d 674, 260 P.2d 98 (1953); *Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1954); *Kraus v. City of Cleveland*, 127 N.E.2d 609 (Ohio 1955); *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954); *Kaul v. City of Chehalis*, 45 Wash.2d 616, 277 P.2d 352 (1954); *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.2d 242 (1955).

4. *McGurren v. City of Fargo*, 66 N.W.2d 207 (N.D. 1954).

5. *Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1954).

6. *Chapman v. City of Shreveport*, supra note 5.

7. *DeAryan v. Butler*, 119 Cal.App.2d 674, 260 P.2d 98 (1953).

reasonable relation to the matter dealt with and fair doubt should be resolved in favor of the ordinance.⁸ So great is the legislative discretion that courts will consider only an extreme use of the police power as violative of fundamental rights. But when the exercise “. . . is, beyond all question, a plain, palpable invasion of rights . . . it is the duty of courts to so adjudge, and thereby give effect to the Constitution.”⁹ Such is the tenor of the decisions; and, by these tests, the exercise of the police power in effecting fluoridation has been upheld.

As to express authority from the state to legislate, courts have grasped the most tenuous of constitutional and statutory provisions relating to public health and spelled out of these some express authority for fluoridation. For example, a constitutional provision such as Article 7, Section 20 of the Constitution of the State of Wyoming¹⁰ would probably be sufficient to satisfy courts that the state has power to fluoride, because it has the duty to protect the health of the people. Such a provision justifies the creation of a State Board of Health, and it is then a simple matter for the State Board, by resolution or rule, to authorize a municipality to fluoridate. Thus does a city council acquire the power to pass a fluoridation ordinance. This was the line of reasoning in the recent Washington case.¹¹

The contention that fluoridation ordinances deny freedom of religion to those who believe in no medication at all is quickly disposed of by all the courts which have considered it. As the Supreme Court of Ohio explained it,¹² freedom of religion has two components: the right to believe, which is recognized as an absolute right, and the right to act on those beliefs, which is not absolute but limited for the protection of all society. Thus, a personal, religious conviction against taking medicine in any form is not sufficient to invalidate an exercise of the police power so far as fluoridation is concerned.

The other constitutional objections raised by the opponents of fluoridation are not very clear-cut but are claimed to stem from the Tenth and Fourteenth Amendments. The constitutional rights claimed are the right to care for one's own health as an individual deems best, and the right of a parent to care for his children's health in the way he deems best. Here again the answer given in the cases is that such rights exist but are subordinate to the public welfare.¹³

In addition to constitutional objections, it has been contended on a contractual theory that fluoridated water is different than that contracted

8. *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.2d 242 (1955).

9. *Kraus v. City of Cleveland*, 121 N.E.2d 311, 314 (Ohio 1954).

10. Wyo. Const. Art. VII, Sec. 20: "As the health and morality of the people are essential to their well being . . . it shall be the duty of the legislature to protect and promote these vital interests. . . ."

11. *Kaul v. City of Chehalis*, 45 Wash.2d 616, 277 P.2d 352 (1954).

12. *Kraus v. City of Cleveland*, 127 N.E.2d 609 (Ohio 1955); see also *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954).

13. *Chapman v. City of Shreveport*, 225 La. 859, 47 So.2d 142 (1954); see also *Kraus v. City of Cleveland*, *supra* note 12.

for,¹⁴ and that, therefore, it violates a right to have the same type and quality of water pass through the plumbing system as when it was constructed. Most of the opinions hold that no such contractual right exists.¹⁵ However, one lone case has held that a complaint which alleges an implied contract to furnish pure water, and a breach of that contract by the addition of fluorides, is sufficient to constitute a cause of action.¹⁶ This decision merely sustained the demurrer to a complaint which had been overruled in the trial court.

That an ordinance instituting fluoridation is not necessary to public health in that it is not designed to check a contagious or infectious disease which threatens immediate danger, is one of the stronger objections raised by the plaintiffs. Vaccination was justified on the theory of the "pressure of great danger"¹⁷ and it has been argued that this should be the standard applied to fluoridation. But the courts are emphatically unwilling to accept the "pressure of great danger" test. In holding that they are not subject to such a limitation, the Supreme Court of Washington in the *Kaul* case cited authority upholding statutes which provide for safeguards pertaining to bedding and germicidal treatment of second-hand materials, and statutes which require the injection of nitrate of silver or other proven antiseptics into the eyes of newborn infants, those which regulate milk production and marketing and those which specify the vitamin and mineral requirements for flour.¹⁸ There is however, a strong well stated dissent in this case that would adopt the "pressure of great danger" test and hold fluoridation invalid as failing to meet it.¹⁹

Fluoridation has been denounced as mass medication, compulsory medication, medical experimentation, the practice of medicine and pharmacy by the state, and socialized medicine. These arguments are probably best disposed of by one court's explanation that the addition of fluoride is not medication, but rather the replacing of a mineral which naturally occurs in water.²⁰

One ingenious contention is that the addition of fluoride to water is a violation of state pure food and drug acts. As a practical matter the argument carries no weight, because it is the stated policy of the Federal Security Agency that fluoridation, which is conducted with the limitations of the U. S. Public Health Service, is not actionable under the Federal Food Drug and Cosmetics Act.²¹

Wyoming municipalities have had some experience with fluoridation.

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14. *DeAryan v. Butler*, 119 Cal.App.2d 674, 260 P.2d 98 (1953); see also *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954).
 15. *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.2d 242 (1955).
 16. *McGurran v. City of Fargo*, 66 N.W.2d 207 (N.D. 1954).
 17. *Jacobson v. Commonwealth*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1904).
 18. *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352 (1954).
 19. *Kaul v. City of Chehalis*, supra note 18.
 20. *Chapman v. City of Shreveport*, 225 La. 859, 47 So.2d 142 (1954).
 21. *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.2d 242 (1955); see also *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954).

Several communities, among them Laramie and Sinclair, now fluoridate their municipal water supplies. Many other communities have considered fluoridation, but because of its controversial nature the city councils have hesitated to act. These hesitant cities and towns have been deterred also by the initial cost of equipment involved, which in many cases is high in relation to the city's budget.

Sheridan has had the unique experience of installing fluoridation equipment and then after two years discontinuing its use. A test survey²² made of four Wyoming communities illustrates the problem in Sheridan. To define a base line of dental conditions in representative Wyoming cities, Cheyenne, Gillette, Torrington and Sheridan were selected. At the time of the survey and for several years prior, Gillette was consuming public water naturally containing 8 ppm fluoride. This is well above the optimum of 1.5 ppm. Over the same period, Sheridan consumed water from sources containing either no fluorides or 0.3 ppm. Cheyenne and Torrington were closer to optimum. In these four places, all school children between ages six and eighteen were examined. The results showed conclusively that the condition of the teeth of children in Sheridan was far worse than the teeth of those living in the other three cities. More specifically, the number of extracted teeth among eighteen years old in Sheridan was almost two per child while in Torrington it was 0.2 per child. Among fifteen year olds in Sheridan there were over seven occurrences of decayed, missing or filled teeth per child, while in the other three cities there were less than three per child.

This survey was conducted, and its results published, in 1949. In the regular Sheridan election of 1951 the city council, urged by the local dental association, presented the issue of fluoridation to the voters, and a majority of the townspeople were in favor of the program. Equipment was purchased and treatment of municipal water undertaken for two years. The issue was again presented to the voters in the election of 1953, and this time a majority opposed fluoridation. The council then discontinued the program. It is not know whether the Sheridan council felt bound by the election results as a matter of law; that is, whether the election complied with Wyoming Compiled Statutes 1945, Sec. 29-526 and 29-427. These statutes provide for referendum of ordinances to the people, as a result of which the ordinance is either continued or repealed. If Wyoming Compiled Statutes 1945, Sec. 29-526 and Sec. 29-527 were not complied with and the vote did not bind the council nor affect an ordinance, then a valid question would be raised as to the propriety of submitting the question to a vote. If this procedure were carried to its logical extreme, a city council would never be compelled to exercise its own judgment but would fall back on the expensive process of printing ballots and holding an election for every issue as it arose.

22. Walter J. Pelton, D.D.S., M.S.P.H., Dental Caries Data Obtained by Simplified Method and Correlated with Fluorine Data in Four Wyoming Cities, 38 Journal of the American Dental Association 723 (June 1949).

It is noteworthy, however, that the State Department of Public Health in its Regulations Governing Fluoridation of Water, has recommended that a municipality test the popular demand for fluoridation by popular vote or straw vote.²³ Following this suggestion the City of Rock Springs in November of 1954 went to the polls to vote on fluoridation as a "recommendation and guide" for the council. The council had adopted a resolution several months earlier asking the Public Service Commission to allow an increase in water rates to inaugurate fluoridation. A majority of the popular vote was against fluoridation. In December of 1954, the council passed a bill killing the earlier resolution in favor of fluoridation.²⁴

In view of the consistent line of decisions favorable to fluoridation and the fact that the U. S. Supreme Court has three times refused to hear the question,²⁵ it is fair to predict that the Supreme Court of Wyoming could uphold the legality of municipal fluoridation. A glance at the tabulation of fluoride content in the water supplies of sixty-two Wyoming cities and towns²⁶ will show that the potential trouble areas are almost everywhere; hence a ruling on fluoridation might come from any of the District Courts. Less than 15% of Wyoming communities have fluoride contents of 0.9 ppm or higher, which means that about 85% of the communities are potential fluoridation areas. Twenty-nine per cent have only 0.1 or 0.2 ppm. These include such towns and cities as Evanston, Jackson, Rawlins, Buffalo, Kemmerer, Lander, Moorcroft and Newcastle. Twenty-five per cent have from 0.3 to 0.4 ppm. On this group are Casper, Cody, Douglas, Green River, Duck and Worland. In the 0.5 and 0.6 ppm group, which is still far below optimum is another 25% including Lovell, Riverton, Rock Springs, Torrington and Wheatland.

CARL M. WILLIAMS

BELIEF IN DEATH OF ABSENT CONSORT AS A DEFENSE TO A CHARGE OF BIGAMY

The problem suggested by the title of this law note is as old as the legendary tales of "men who go down to the sea in ships." It is called the "Enoch Arden situation" because the perplexing question was posed in Tennyson's poem bearing that title:

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23. Regulations Governing Fluoridation of Water, State Department of Public Health, Cheyenne, Wyoming (February 8, 1952).
 24. A Report of Fluoridation Activities As They Occurred in Eight States in 1954 and Part of 1955, Regional Dental Consultant, Public Health Service, Denver, Colorado, Region VIII.
 25. *DeAryan v. Butler*, 119 Cal.App.2d 674, 260 P.2d 98 (1953); cert.den. 347 U.S. 1012 (1954); *Chapman v. Sheveport*, 225 La. 859, 47 So.2d 142 (1954); app. dism. 348 U.S. 892 (1954); *Dowell v. Tulsa*, 273 P.2d 859 (Okla. 1954); cert. den. 348 U.S. 912 (1955).
 26. Table 27, Chemical Analysis of Municipal Water Supplies, State Department of Public Health, Cheyenne, Wyoming (undated).