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proof against the owner would that court countenance any presumption against him.¹⁵

A statute providing a penalty against the owner whenever his car is illegally parked, if interpreted literally, might be held unconstitutional. On the other hand, if the prosecution must present evidence showing knowledge or acquiescence on the part of the owner, the statute becomes ineffective. To avoid either pitfall, it behooves the drafter of parking legislation to adopt the pattern of the statutes which provide that the facts of ownership and violation together raise a prima facie presumption that the owner committed or authorized the offense. The National Conference on Street and Highway Safety proposed an ordinance to the effect that "In any prosecution charging a violation of any law or regulation governing the standing or parking of a vehicle, proof that the particular vehicle described in the complaint was parked in violation of any such law or regulation, together with proof that the defendant named in the complaint was at the time of such parking the registered owner of such vehicle, shall constitute in evidence a prima facie presumption that the registered owner of such vehicle was the person who parked or placed such vehicle at the point where, and for the time during which, such violation occurred."¹⁶ The authors of this Model Traffic Ordinance also added the provision that in cases where the driver has failed to respond to the ticket on the automobile, this presumption shall apply only after a warning letter has been issued to the owner.¹⁷ Such procedure serves to give fair warning to an owner who was not in fact aware that his automobile had been ticketed for a parking offense. The authors of the Model Ordinance further suggest the preferability that the state legislature enact the presumption provision in order to avoid any question of the city's power to enact rules of evidence or to create presumptions.¹⁸ The decisions to date seem to assure a state or city which proceeds in the manner recommended herein a valid and effective parking ordinance.

THE RIGHT OF A DEFENDANT TO INSPECT THE RESULTS OF STATE CONDUCTED TESTS AND EXPERIMENTS

Keith Wesley Ragan

Often in the course of preparation for a criminal trial the prosecution will conduct various tests and experiments the results of which it may not offer in evidence, particularly if they fail to show the guilt of the defendant. For this very reason, of course, the results may constitute evidence which the defendant would desire to use. Also, the accused may want to know the results of these tests or experiments as a guide to the lines along which he will form his defense,

15. *People v. Bigman*, 38 Cal. App. 2d Supp. 773, 100 P. 2d 370 (1940). The court distinguished *People v. Forbath* on the ground that the ordinance in the Forbath case would have raised an un rebuttable presumption of guilt against the owner.

16. Model Traffic Ordinance approved by the National Conference on Street and Highway Safety, 1946, §162(a).

17. *Id.*, §162(b).

18. In determining the power of a city to raise this presumption against defendant, it must be found that the state has delegated that power to the particular city, by constitution, by statute, by charter, or otherwise. Cities generally have been delegated power to regulate their traffic. Where defendant makes no issue of the city's power to create this rule of evidence, the courts seem to assume that it is implicit in the police power over traffic. *City of St. Louis v. Cook*, 221 S.W. 2d 468 (Mo. 1949). In *Commonwealth v. Kroger*, 276 Ky. 20, 122 S.W. 2d 1006 (1938), where defendant specifically raised the question of municipal power, the court held that it existed by virtue of a charter provision authorizing the city to maintain the peace, good government, health and welfare. While no appellate court which recognizes the state's power to create such a rule of evidence in a parking case appears to have denied it to the city, the question may be avoided altogether if the suggestion of the authors of the Model Ordinance is followed.

even though he might not be able to use the results themselves in evidence. His attempt to avail himself of this information may occur during the trial or before it begins.

It is well settled that the defendant can demand experimental or test results from the prosecution at the trial. The latest statement of this principle was made by a New Jersey court in *State v. Cooper*,¹ which held that the accused could subpoena results of fingerprint tests on an alleged murder weapon. The court said that suppression of this type of information was not consistent with the concept of a fair trial. It found that the state constitutional provision for compulsory process to obtain witnesses in the accused's favor embraced the results of the fingerprint test. This is the basis generally used by the courts in granting such requests.

When a defendant asks for such information before the commencement of a trial, however, he generally has been unsuccessful.² Even jurisdictions which grant defendants a right to inspect documentary and chattel evidence before the trial draw a distinction between such evidence and experimental or test results.

The inspection of any kind of evidence before trial is a modern development of the law. At common law there was no such right in either civil or criminal cases.³ Equity first recognized the need for inspection with a suit for discovery and inspection, limiting the subject sought to one admissible at the trial as evidence for the seeking party and prohibiting use for exploratory purposes.⁴ An outgrowth of this, the opportunity for inspection before trial, has been generally recognized in the civil practice codes in operation today.⁵ Parties are protected against possible fishing expeditions by placing the power to permit inspection within the discretion of the court.⁶ Many codes have broadened the scope of inspection to matter material to the merits of the cause even though such matter may not be admissible as evidence.⁷ Several state codes of civil procedure have supplementary sections which make these rules of practice applicable to criminal cases where no contrary provision has been made.⁸ The one opportunity for inspection secured to the accused by specific statute is the right to a list of prosecution witnesses. Based largely upon considerations of fairness, this is a universal right.⁹

There has been a general unwillingness on the part of the courts to extend broad inspection into the criminal field. Some courts recognize no basis for inspection before a criminal trial, reasoning that there is no precedent at common law to force the state to disclose evidence constituting its case.¹⁰ They see no relief from the

1. 2 N.J. 540, 67 A. 2d 298 (1949). See 8 WIGMORE, EVIDENCE §2224 (3d ed. 1940).

2. Except in Florida, where inspection of experimental results before trial is provided by statute (see note 16 *infra*) no court has permitted such inspection. Some courts have, however, allowed the accused to conduct his own experiment upon evidence secured from the state before trial. *State v. Bunk*, 63 A. 2d 842 (1949) (request of defendants to examine and have an expert examine revolvers and fatal bullets in the custody of the state allowed); *Application of Hughes*, 41 N.Y.S. 2d 843 (1943) (gun and bullet allowed to be examined by defense before trial). *But cf. People v. Gatti*, 4 N.Y.S. 2d 130 (1938) (to obtain inspection of gun the accused must prove the state has it by more than evidence based on surmise from newspaper reports).

3. 6 WIGMORE, EVIDENCE §§1858, 1862 (civil) and §§1859g, 1863 (criminal).

4. 6 *id.* §1857.

5. 6 *id.* §2219 n. 7.

6. A fishing expedition may be defined as a rummage through the opponent's papers, etc. with the hope of finding something to aid in preparation of one's case. *U. S. v. Rosenfeld*, 57 F. 2d 74 (2d Cir. 1932).

7. 6 WIGMORE, EVIDENCE §1859c.

8. BURNS' IND. CODE §9-2407 (1933), *Weer v. State*, 219 Ind. 217, 36 N.E. 2d 787 (1941); Kan. R.S. §62-1413 (1935), *State v. Jeffries*, 117 Kan. 742, 232 Pac. 873 (1925); CAL. CIV. PROC. CODE §1000, *People v. Nields*, 70 Cal. App. 191, 232 Pac. 985 (1924).

9. 6 WIGMORE, EVIDENCE §1851.

10. *State ex rel. Robertson v. Steele*, 117 Minn. 384, 135 N.W. 1128 (1912) (statement given by accused to state authorities not allowed to be inspected); *State v. Jeffries*, 117

prohibition at common law in an analogy to the civil codes nor do they recognize any inherent power in themselves to change this. However, a majority of the courts do purport to recognize a discretionary power to allow inspection. But many of these make such statements about the trial judge's discretion only as an excuse not to reverse his failure to order inspection.¹¹ They have never given any positive indication, as by remanding with instructions to the trial court to exercise its discretion, that they would affirm an opposite decision. As a result, the lower courts in these states pursue their natural desire to follow a course on which they know they will not be reversed. Because of this recognition by word only, the accused actually has the right of inspection in a minority of courts. Courts which do allow inspection use one or both of two methods to overcome the common law policy. The first theory looks to the civil codes,¹² founded upon the view that the same rules of evidence are applicable to civil and criminal cases.¹³ A second theory is that there is an inherent power in the court to grant inspection without a remedial statute where it is necessary to further justice and ensure a fair trial.¹⁴ But even where these two theories are used the courts will limit their orders to certain subjects,¹⁵ apparently because they feel constrained by arguments against divulging state's evidence not to permit all of the inspection that is requested. In addition to these two methods, one state has changed the common law by a statute which permits the accused pre-trial inspection of document and chattel evidence pertinent to the case.¹⁶ This statute has been narrowly read by the courts,¹⁷ as has Rule 16

Kan. 742, 232 Pac. 373 (1925) (defendant charged with murder of her husband and seeks letters she wrote to him which are in possession of the state; held no analogy to the civil code and hence no power in the court to order inspection).

11. *Hameyer v. State*, 148 Neb. 798, 29 N.W. 2d 458 (1947) (although court repudiates analogy to civil codes and announces there is independent power in the court to permit inspection in a criminal case, in suit for obtaining money under false pretenses, the accused is denied inspection of the lease in question); *State v. Cala*, 35 N.E. 2d 758 (Ohio App. 1940) (court recognizes discretionary power to permit inspection in criminal cases, but holds lower court refusal to permit inspection of confession not abuse of discretion).

12. *State ex rel. Wagner v. Circuit Court of Minnehaha*, 60 S.D. 115, 244 N.W. 100 (1932) (county highway superintendent and another indicted for defrauding the county in construction charges allowed to inspect estimates and sketches of materials used which were in custody of the state).

13. 1 WIGMORE, EVIDENCE §4.

14. *State v. Haas*, 188 Md. 63, 51 A. 2d 647 (1947) (confession permitted to be inspected before trial); *State v. Dorsey*, 207 La. 927, 22 So. 2d 273 (1945) (held denial to inspect a confession before trial was a violation of defendant's constitutional right to a fair trial); Comment, 38 J. CRIM. L. & CRIMINOLOGY, 249 (1947).

15. *State v. Bunk*, 63 A. 2d 842 (1949) (inspection of accused's confession denied while inspection of revolver and bullet allowed before trial).

16. FLA. GEN. LAW c. 19554, §154 (1939) "Discovery and Production of Documents and Things for Inspection, Copying or Photographing. Whenever a crime has been committed and the evidence of the State shall relate to ballistics, fingerprints, blood, semen, or other stains, or documents, paper, books, accounts, letters, photographs, objects, or other tangible things, upon motion showing good cause therefore, and upon notice to the prosecuting attorney, the court in which the action is pending, whether the committing magistrate's court, or the court having jurisdiction to try the cause may order the State to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated papers, books, accounts, letters, photographs, objects, or other tangible things; and in examinations to be conducted by representatives of the State, as to ballistics, fingerprints, blood, semen, and other stains, the defendant, upon motion and notice, as aforesaid, shall be permitted upon order of court, to be present, or have present, an expert of his own selection, during the course of such examination. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs, and may prescribe such terms and conditions as are just."

17. *Williams v. State*, 143 Fla. 826, 197 So. 562 (1940) (a confession held not to be within inspection provided by statute).

of the Federal Rules of Criminal Procedure which tries to accomplish the same thing.¹⁸

Thus, in the majority of jurisdictions a defendant can not get inspection of results of experiments conducted by the prosecution because these courts either do not recognize or do not enforce any power in the court to order inspection of any kind of evidence, be it document, chattel, or experiment, and those courts, in the minority, which do order the prosecution to make available to the defendant other evidence draw a line at experimental or test results. These courts invoke two reasons for denying relief. One is the standard argument that the state must not be forced to disclose its evidence.¹⁹ They do not explain, however, why such reason should apply with more force to experimental or test results than other evidence. The other reason given does explain the distinction. It is the old equity limitation that any results obtained from an inspection must be capable of being presented as evidence for the demanding party.²⁰ A report of the results of any experiment, unlike chattel or document evidence, is not admissible as evidence. The original purpose of this limitation was to prevent one party searching unnecessarily through the effects of another. This reasoning does not apply, however, with as much force to the affairs of a public agency. Looking at the results of experiments seems no more disturbing than granting defendant the right to take a bullet or fingerprint and conduct his own experiment, which is permitted (but useless since the average defendant has no practical opportunity for having such tests made). This highly technical extension of an obsolete rule of equity substitutes an irrelevant test of admissibility for the really important question of whether the matter sought is material to the issue and necessary to a preparation of a defense.

Florida, by statute, has specifically provided for a form of inspection of experimental results by permitting the accused to be present or to have present an expert of his own choice during the course of any tests.²¹ This would seem to be a complete satisfaction of the accused's need for knowledge of results, except that it does not specifically cover examinations before a defendant is identified. This statute discards all questions of admissibility as a test for inspection, and so far no cases have challenged it.

The primary objection to release of experimental or test results is that it forces the state to divulge information which will injure the possibility of a just conviction. All the various reasons given in the cases boil down to this net effect. In considering the validity of this conclusion it must be kept in mind that the state is supposedly as interested in acquitting the innocent as convicting the guilty.²² Moreover, the

18. FED. R. CRIM. P. 16, 18 U.S.C.A. following §687 (Supp. 1949) "Discovery and Inspection. Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just." U. S. v. Black, 6 F.R.D. 270 (N.D. Ind. 1946) (holds Fed. R. Crim. P. 16 limited to inspection of documents or objects in existence prior to government's obtaining of them by process or seizure; hence confession immune from inspection).

19. State v. Payne, 25 Wash. 2d 407, 171 P. 2d 227 (1946) (inspection of autopsy report before the trial not allowed to accused); Commonwealth v. Noxon, 319 Mass. 495, 66 N.E. 2d 814 (1946) (photos and slides of tissue removed from body of baby defendant accused of murdering not allowed to be inspected before trial).

20. Application of Hughes, 41 N.Y.S. 2d 843 (1943) (request for inspection of ballistics test results and medical report before trial denied, but permitted to conduct own examination of bullet and gun).

21. See note 16 *supra*.

22. Griffin v. U. S., 295 Fed. 437, 439 (3d Cir. 1924). "The (prosecuting attorneys) are