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rights. More than one writer has pointed out that the liberal constructions of the Fourth during the twenties were due in some part to the general unpopularity of the Volstead Act.[28] In view of the growing probability of some sort of federal anti-sedition law enacted in the heat of the moment such a rule would be of obvious benefit in curbing a too zealous enforcement.

Former Court majorities have apparently felt that the cost of letting a few offenders go free was not too great in exchange for the hope of a proper observance of the Constitutional dictates in the future. As Mr. Justice Holmes said, "We have to chose, and for my part I think it a less evil that some criminal should escape than that the Government should play an ignoble part."[29] While this attitude prevailed the Court could easily adhere to its body of precedent in determining which searches were "reasonable" and which were not without qualms about the legal consequences that followed. The present tendency, however, to sustain an obviously just conviction and yet accord civil liberties the respect they have been paid in the past (by retention of the exclusionary rule) produces an obvious conflict. The way out that the Court has chosen is to expand the concept of a "reasonable search" and in effect to decrease the scope of protection afforded the individual.[30] In most state jurisdictions where the exclusionary rule does not obtain the police conduct herein reviewed would probably be condemned, and although the evidence seized would be allowed, the resulting civil liability of the offending officers would perhaps be some deterrent against similar conduct in the future. The disposition of the present Court to absolve the officers completely would remove even that illusory remedy. Therefore, it may well happen that by allowing more and more questionable police tactics to go unreproved the Court will achieve the anomalous result of actually affording less protection to the individual's right of privacy than is shown in those states which have never interpreted their constitutional search and seizure provisions so liberally.

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The Inspection of State's Evidence by a Defendant in Advance of Trial

The Maryland Court of Appeals, in the recent case of *State* v. *Haas*,[1] had occasion to reaffirm the existence of a discretionary power in trial courts to compel the production of state's evidence in advance of trial for the benefit of accused persons. The defendants were subjected to questioning by the police department of Baltimore and denied the right to communicate with counsel. When they were able to enforce the latter right through writs of habeas corpus, they requested an order of court directing the prosecution to furnish them copies of statements

28 Wigmore, Evidence (3rd ed. 1940) Vol. 7 §2184, p. 34; Grant, Circumventing the Fourth Amendment (1944), 14 So. Calif. L. Rev. 359; Atkinson, Prohibition and the Doctrine of the Weeks Case (1925), 59 Am. L. Rev. 728; Comment (1940) 25 Marquette L. Rev. 13; and see remarks by Bourquin, J. in United States v. Rogers, 53 F. (2d) 874 (D.C. N.D., N.J., 1931).

29 See dissenting opinion, Olmstead v. U.S., 277 U.S. 438 (1928).

30 Comment (1943) 42 Mich. L. Rev. 147.

1 .... Md. ...., 51 A. (2d) 647 (1947).

made by them to the police during the period of arrest. The trial court allowed the petition but stayed execution of its order pending appeal by the state. Although the Court of Appeals was of the opinion that it lacked jurisdiction under Maryland procedures to grant certiorari for review of a preliminary order[2], it nevertheless decided to state its views for the guidance of trial judges because of the great public interest in the determination of the issue and the moot nature of the problem once there had been a compliance with the order.[3]

The only question presented was as to the authority of the trial court to make the order allowing inspection.[4] The state took the position that since there had been no such authority at common law[5] the court was historically precluded from finding a judicial source of power. In other words, any such authority must be created by an act of legislature.

Although at common law there was no inspection, either in civil or in criminal cases, equity early gave some remedy in civil suits for the elicitation of facts through inquiry[6]. For the most part the rules relating to inspection in civil suits are now governed by statute[7]. But in criminal proceedings these statutes have hitherto been available only

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2 *Contra:* State ex rel. Robertson v. Steele, 117 Minn. 384, 135 N.W. 1128 (1912) (certiorari may be taken from interlocutory order where no appeal lies upon final judgment); State ex rel. Wagner v. Circuit Court of Minnehaha, 60 S.D. 115, 244 N.W. 100(1931); *cf.* People *ex rel.* Lemon v. Supreme Court of New York, 245 N.Y. 24, 156 N.E. 84 (1927) (procedure providing writ of prohibition); State *ex rel.* Page v. Terte, 324 Mo. 925, 25 S.W. (2d) 459 (1930).

3 The question can arise under two situations: (1) Upon a refusal of the trial court to allow inspection, conviction, and appeal by the defendant citing such refusal as error; (2) upon appeal by the state from the preliminary order granting the application, procedures admitting, *supra* note 2. Under situation (1) it would first have to be considered whether such refusal constituted an abuse of discretion, and, if it did, whether under any facts the trial court had the power to compel discovery. Under situation (2) the logical order of these questions is reversed, but both are presented.

4 Unfortunately the court limited the effect of its discussion to a discretionary power to compel the inspection of confessions—the problem with which it was dealing has a much larger scope and includes the inspection of all forms of evidence the discovery of which might aid a defendant in his preparation for trial. Everything the court says to vindicate a discretionary power over confessions is equally applicable to other forms of evidence.

5 Discussion of what has been termed the common law rule denying any power in trial courts to compel inspection in criminal cases begins usually with the case of Rex v. Holland, 4 Durn. & East 691, 100 Eng. Rep. 1248 (1792). The defendant, a public officer in India, was charged with misprision. He asked to inspect a deposition of the evidence taken against him by a committee of the East India Company. The difficulty upon trial of meeting surprise with competent refutation, the length of time necessary to secure witnesses, etc., was considered, but all the judges concurred in thinking there could be no discretion. "To assume such would be dangerous in the extreme", Grosse, J. The rule has never found an adequate expression in this country but in practice was probably never questioned before the latter part of the 19th century. Whatever its subsequent modifications in England, under present English procedures it is only a legal relic. 6 Wigmore, Evidence, (3d. ed., 1940) § 1840 at p. 347.

6 Id. § 1857.

7 Id. § 1859, note 1.

by a process of interpretation.[8] Several state codes of civil procedure have supplementary sections which make the rules of practice there set forth applicable to criminal cases where no contrary provision has been made.[9] The question in these states has been whether these sections can carry over the civil remedy. In the case of *State ex. rel. Lemon* v. *Supreme Court of New York*[10], the New York Court of Appeals expressed the opinion that the sections there under consideration did not. There were two considerations which make this result defensible: the wording of the civil statutes which make inspection available to either party in the action[11]; and the fact that the legislature might well have clarified the matter if such an effect were intended. The Supreme Court of South Dakota in *State ex rel. Wagner* v. *Circuit Court of Minnehaha*[12] thought these arguments sound and conceded the inappropriateness of construing the statutes together to give a remedy, but concluded that a power could be found "by virtue of a process of analogy to civil procedures which has made the practice . . . part of the procedural system of the state"[13].

It appears that the courts in going to acts of legislature to find therein the "source" of a power, or in reasoning by analogy, have done so to escape the putative force of the common law rule[14]; but "the question is one of policy, not of power"[15]. Accordingly, a majority of American

8 There are now statutes making inspection discretionary in the federal courts and in Florida. Fed. R. Crim. p. 16, "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." The rule in the form originally proposed read: . . . "*obtained from or belonging to the defendant or constituting evidence in the proceeding.*" Federal Rules of Criminal Procedure, Report of the Advisory Committee (1942), 1st draft, rule 18. Fla. Stats. 1941, Ch. 909, § 909.18. *But see* Williams v. State, 143 Fla. 826, 197 So. 562 (1940).

9 People v. Nields, 70 Cal. App. 191, 232 Pac. 985 (1924) (construing § 1000 of Calif. Code Civ. Proc.); State v. Tippett, 317 Mo. 319, 296 S. W. 132 (1927), and State *ex rel.* Page v. Terte, 324 Mo. 925, 25 S. W. (2d) 459 (1930) (both applying § 1378 Mo. R. S. 1919); New York *ex rel.* Lemon v. Supreme Court of New York, 245 N. Y. 24, 156 N. E. 84 (1927) (§ 324 of N. Y. Civ. Prac. Act).

10 People *ex rel.* Lemon v. Supreme Court of New York, 245 N. Y. 24, 156 N. E. 84 (1927).

11 The accused cannot, of course, be compelled to extend a similar courtesy to the prosecution because of the privilege against self-incrimination.

12 60 S. D. 115, 244 N. W. 100 (1931).

13 Id. at 117 and 101.

14 "But what at least ought to be clear is that the judiciary power, as exercised by the Supreme Court is ample to grant such inspection in proper cases without waiting for a remedial statute". Wigmore, *op. cit. supra* note 5, § 1850, p. 395. This is not strictly accurate. In the *Haas* case the state contended that the civil remedy of inspection had been given by a statute which specifically denied the power of the court to make rules in criminal cases, and hence was conclusive of legislative intent; but the court pointed out that rule-making powers, although not yet exercised, had been subsequently given by § 68 A. of Article IV of the Maryland Constitution. In State v. Dorsey, 207 La. 928, 22 So. (2d) 273 (1946), a statute providing that "rules of evidence and all other proceedings in the prosecution of crimes . . . should be according to the common law . . ." was declared unconstitutional insofar as it denied the defendant a fair trial.

15 Wigmore, *op. cit. supra* note 5, § 1850, p. 395.

jurisdictions have recognized a discretionary power.[16] The cases cited by the prosecution in the *Haas* case as upholding the common law rule were for the most part instances in which the question arose upon appeal by the defendant from an adverse ruling of the trial court and represent a refusal by the upper courts to reverse for error upon this single ground.[17] Such a refusal is not *per se* inconsistent with the existence of a discretionary power but may indicate the scope within which discretion is operative.

The arguments in favor of inspection, in principle deriving from the desire to purge criminal justice of its adversary character[18], begin with the proposition that an accused should be given every practical opportunity to prepare a defense[19]. In theory this consideration is subserved by the presumption of innocence.[20] In reality the attitude of fair play still admits that a guilty man is entitled to a defense equally with an innocent one even though the ascertainment of truth (guilt or innocence) is the ideal to which the form of our procedures must attain. Thus, the placing of a discretionary power in trial courts to compel inspection in meritorious cases appears to be the most sensible method presently available to adjust practice to obtaining conditions. The objection sometimes raised, that to allow inspection would be to encounter the danger of tampering with evidence by unscrupulous counsel, is no longer given credence[21]. The more substantial fear that guilty persons will have opportunity to falsify alibis and manufacture refutations if inspection is made permissive is, to the thinking of most courts, not sufficient to outweigh the possibility of real prejudice which might result in unjust convictions. The danger is to a large degree minimized by the limitations put upon the privilege, and by other procedural

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16 *Cases expressly postulating a discretionary power:* Wendling v. Common., 143 Ky. 387, 137 S. W. 205 (1911); Common. v. Noxon, 319 Mass. 495, 66 N. E. (2d) 814 (1946); Cramer v. State, 145 Neb. 88, 15 N. W. (2d) 323 (1944). *Cases implicitly recognizing a discretionary power:* State *ex rel.* Page v. Terte, 324 Mo. 925, 25 S. W. (2d) 459 (1930); State v. diNoi, 59 R. I. 348, 195 Atl. 497 (1937); State v. Morrison, 175 Wash. 656, 27 P. (2d) 1065 (1933) and cases cited *infra,* note 26. *Cases assuming a discretionary power without deciding:* New York *ex rel.* Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84 (1927); People v. Nields, 70 Cal. App. 191, 232 Pac. 985 (1924).

17 People v. Bermijo, 2 Cal. (2d) 270, 40 P. (2d) 823 (1935); People v. Parisi, 270 Mich. 429, 259 N.W. 127 (1935); State v. Kupis, Del. Ct. Oyer & Ter., 179 Atl. 640 (1935). But *cf.* State ex rel. Robertson v. Steele, 117 Minn. 384, 135 N. W. 1128 (1912). The one recent case which might have forwarded the argument of the state in the *Haas* case is that of Silliman v. People, 114 Colo. 130, 162 P. (2d) 793 (1945) (entitled to inspection of confession upon trial, "then and only then"). *But see* Massie v. People, 82 Colo. 205, 258 Pac. 226 (1927) (if under any circumstances motion is good, its allowance is discretionary).

18 State v. Tippett, 317 Mo. 319, 296 S. W. 132 (1927) ("That it was desired that state's evidence remain undisclosed partakes of the nature of a game rather than judicial proceedings").

19 U. S. v. Rich, 6 Alaska Rep. 670 (1922), Daly v. Dimock, 55 Conn. 579, 12 Atl. 405 (1887). But see People ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927) (not for mere reason that it will be useful in supplying a clue whereby evidence may be gathered). State v. diNoi, 59 R. I. 348, 195 Atl. 497 (1937).

20 Daly v. Dimock, 55 Conn. 579, 12 Atl. 405 (1887), State v. Dorsey, 207 La. 928, 22 So. (2d) 273 (1945).

21 Wigmore, *op. cit. supra* note 5, § 1850, p. 395. Both the Federal and Florida statutes provide for the manner in which inspection shall be accomplished, see *supra* note 8.

precautions[22]. The practical advantages of allowing inspection in the discretion of the trial judge will be manifest in the time saved upon trial: in pleading[23], presentation and inspection of evidence[24], and rebuttal[25].

While the *existence* of a discretionary power can no longer be suspect, the recent tendency of counsel has been to argue that inspection devolved as right, not as privilege[26]. In only one jurisdiction has this novel augmentation to the body of rights already accorded defendants gained acceptance[27]. In *State* v. *Dorsey*[28] the Louisiana Supreme Court reversed a conviction solely upon the ground that pre-trial inspection of a confession had been denied the defendant, and that this opportunity to inspect was included in the constitutional guarantee of a fair trial. The court in reaching its decision was avowedly influenced by the pre-trial procedures followed in England which it characterized as "more civilized" than our own. It is questionable whether this one instance of English practice should be isolated and applied out of context to a system of criminal apprehension, investigation, and prosecution unlike the environment in which it was formulated.

The courts which have not found a source of discretionary power by analogy to civil procedures have by analogy found its limitations.[29] Evidence may not be inspected if it is not material,[30] or if it is inadmissible upon trial.[31] While the reasons for not allowing inspection of evidence inadmissible upon trial are persuasive in civil suits, the limitation applied to criminal cases is not always consistent with the policy of permitting counsel a more thorough preparation for trial. The requirement that evidence be material is meant to protect the prosecution from

22 In States in which the accused is required by statute to give notice before trial of witnesses intended to be called, 6 Wigmore, *op. cit. supra,* note 5, § 1855b, the danger may be lessened.

23 People v. Rogas, 287 N.Y.S. 1005 (1935). (Alienists may examine statements to determine sanity at time of act.) *But cf.* People v. Skoyec, 50 N.Y.S. (2d) 438 (1944).

24 Reg. v. Spry & Dore, 3 Cox Cr. Cas. 221 (1848) (examination of body; obliged to stop trial until examination made unless inspection granted).

25 Rex v. Holland, 4 Durn. & East 691, 100 Eng. Rep. 1248 (1792). See also, cases on impeachment, *infra* note 42.

26 State v. Weer, 219 Ind. 217, 36 N.E. (2d) 787 (1941), State v. Cala, ... Ohio App. ..., 35 N.E. (2d) 758 (1940) (public interest should be considered in construing a statute under which right is claimed never before accorded defendants).

27 State v. Dorsey, 207 La. 928, 22 So. (2d) 273 (1945), Note (1946) 20 Tul. L.R. 133.

28 *Ibid.*

29 People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 34, 156 N.E. 84, 85 (1927): "No precedent can be found in civil causes for compelling disclosure in advance of trial of the office notes or memoranda prepared by an attorney after consultation with his client and summarizing his understanding of the testimony that is likely or expected." It is precisely here that the theory which predicates the existence of a discretionary power upon civil analogy breaks down: the character of the search and the penalties attending failure are not the same in criminal and civil proceedings.

30 State *ex rel.* Page v. Terte, 324 Mo. 925, 25 S.W. (2d) 459 (1930), State v. Hall, 55 Mont. 182, 175 Pac. 267 (1918), State v. diNoi, 59 R. I. 348, 195 Atl. 497 (1937).

31 People v. Santora, 51 Cal. App. (2d) 707, 125 P. (2d) 606 (1942) (police reports not used to refresh recollection): *cf.* U. S. v. Simonds (C.C.A. N.Y.) 148 F. (2d) 177, Common. v. Giacomazza, 311 Mass. 456, 42 N.E. (2d) 506 (1942) (confession of co-defendant).

"fishing" expeditions;[32] often cases take on the additional aspect of the good faith of counsel in making the request.[33] In the *Wagner* case the court appears to have gone furthest in converting the limitation into mere formality when it refused to find an abuse of discretion where the evidence was shown to be not material, ". . . if it might become material".[34]

Within these limits of materiality and admissibility the appellate courts have been able to vary the uses of discretion permitted trial judges from the limited prescription of the *Lemon* case to the wide powers granted by the *Wagner* case.[35] In the middle ground it has been suggested that rulings will be reversed only for "manifest abuse", "gross abuse", "that injustice may not be done".[36] This language is less helpful than an examination of the cases of a particular jurisdiction to determine under what facts inspection has been permitted.

The type of evidence to be inspected is the most significant factor underlying the decisions. In states in which there is no statutory provision for inspection of a kind of evidence which is at the basis of the charge, the practice of the courts is to allow inspection, and it has even been expressed as a "right".[37] Where inspection is asked of chattel evidence not the basis of charge but material for other reasons to the defendant's case, inspection has been allowed.[38] Where permission is asked to examine the body or parts of the body of a deceased victim, other circumstances are controlling.[39]

In approaching the question of documentary evidence it is advisable to distinguish between public and private documents, and particularly so in states which classify certain official and semi-official reports as "public" and regulate their inspection.[40] It has been argued, but un-

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32 U. S. v. Warren, 53 F. Supp. 435 (D.C. Conn.) (1944) (defendant learned of contents of package through newspapers); People v. Gatti, 4 N.Y.S. (2d) 130 (1938), Note (1938) 7 Ford L.R. 449.

33 People v. Skoyec, 50 N.Y.S. (2d) 438 (1938).

34 See *supra* note 12.

35 *Op. cit. supra* notes 10 and 12.

36 State v. Payne, 252 Wash. 407, 171 P. (2d) 227 (1946), U. S. v. Masuch, 30 F. Supp. 976 (S.D. N.Y.) (1939).

37 People v. Gerrold, 265 Ill. 448, 107 N.E. 165, (1916), Rex. v. Harrie, 6 Carr. &P. 105 (1833) (threatening letter basis of charge), Cramer v. State, 45 Neb. 88, 91, 15 N.W. (2d) 323, 327 (1944): "We think that when a prosecution is based upon a written instrument, as in a forgery case, the defendant *is entitled* to inspect . . . If a prosecution is based upon the correctness or incorrectness of certain records, such as is ofttimes the case in prosecutions for embezzlement, the examination of all such records *should be* granted" . . . (italics supplied). *But cf.* People v. Masuch, 30 F. Supp. 976 (S.D. N.Y. 1939) (no inspection of testimony given before S.E.C.).

38 U. S. v. Rich, 6 Alaska Rep. 670 (1922) (inspection of fingerprints), U. S. v. Warren, 53 F. Supp. 435 (D.C. Conn., 1944). *Contra:* People v. Gatti, 4 N.Y.S. (2d) 130 (1938). *Scene of crime:* Andrews v. Superior Court of Maricopa, 39 Ariz. 242, 5 P. (2d) 192 (1931), People v. Johnson, 219 Cal. 72, 25 P. (2d) 408 (1933).

39 Common. v. Noxon, 319 Mass. 495, 66 N.E. (2d) 814 (1946), Silliman v. People, 114 Colo. 130, 164 P. (2d) 793 (1945).

40 Daly v. Dimock, 55 Conn. 579, 12 Atl. 405 (1886), State v. Payne, 252 Wash. 407, 171 P. (2d) 227 (1946) (no inspection of autopsy report): State v. Herman, 219 Wisc. 267, 262 N.W. 718 (1935) (no inspection of testimony in John Doe proceedings); State v. Strothers, 89 W. Va. 352, 109 S.W. 337 (1921); State v. Collett, 144 Ohio St. 639, 58 N.E. (2d) 417 (1944) (doctor's report).

successfully, that notes and memoranda in the hands of a district attorney, clerk of court, or other public servant ought to be so classified.[41] When the initial distinction between public and non-public documents is made, analysis becomes more simple. If the documents are stenographic notes and memoranda of the testimony of witnesses, unless otherwise governed by statute, courts are disinclined to allow inspection except for purposes of impeachment.[42] Where the statements of the accused are less than an admission of guilt there would seem to be the most likelihood of encountering the ulterior curiosity which engendered the no-inspection policy of the common law. This accounts for the fact that in this area courts have been most reluctant to extend the privilege.[43] If the statements go beyond mere testimony to directly implicate the defendant and charge him by his own tongue with crime, the idea seems to obtain that such statements, if true, will not be the less damaging if counsel is allowed to inspect and copy;[44] in such a case there are more compelling considerations of fairness in defendant's favor *e.g.*, the possibility of a forged signature or careless stenography.[45] Where inspection is requested of other documents not the basis of charge (*e.g.*, books,[46] letters,[47] private reports, etc.) lines of distinction are difficult to draw, and the result is dependent upon the necessities of the situation.

Heretofore the burden of showing good reason why inspection should be granted has been on the defense.[48] In *United States* v. *Masuch*[49] it was suggested by the attorney for the accused (but not adopted by the court) that the burden should be upon the government to show that "irreparable damage would be done, and disclosure would prejudice or handicap its case".[50] Such a test is not objectionable, because it is in keeping with the modern trial practice of allowing the defense adequately to prepare for trial without unduly handicapping the prosecution.

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41 McAden v. State, 155 Fla. 523, 21 So. (2d) 33 (1945).

42 State v. McDonald, 342 Mo. 998, 179 S.W. (2d) 286 (1938); State v. Hancock, 340 Mo. 918, 104 S.W. (2d) 241 (1937); Currie v. State, 102 Tex. Cr. App. 653, 279 S.W. 834 (1930). Inspection for purposes of impeachment should be treated as a distinct problem; *a fortiori*, the right of inspection of evidence upon trial.

43 People v. Bermijo, 2 Cal. (2d) 823, 40 P. (2d) 823 (1935); People v. Parisi, 270 Mich. 429, 259 N.W. 127 (1935).

44 People v. Rogas, 287 N.Y.S. 1005 (1935).

45 It was suggested in the *Lemon* case that inspection of a confession might be necessary where there was doubt as to the validity of the signature, or the danger of faulty transcription. This ignores what was well expressed in the *Haas* case: "On the other hand there seems to be a measure of elemental justice in permitting one accused of crime to see a confession alleged to have been made by him which he expects to be produced against him at his trial". See *supra* note 1 at 653.

46 People v. Kuberacki, 310 Mich. 162, 16 N.W. (2d) 703 (1944) (books and records of successful bidder for contract), U. S. v. Goedde & Co., 40 F. Supp. 523 (E.D. Ill. 1941). See also People v. Johnson, 219 Cal. 72, 25 P. (2d) 408 (1933), Idaho Galena Min. Co. v. Judge of District Court, 47 Idaho 195, 273 Pac. 952 (1929).

47 U. S. v. Warren, 53 F. Supp. 435 (D.C. Conn.) (1944), People v. Wargo, 268 N.Y.S. 400 (1932) (letter in Hungarian—privilege of interpretation).

48 May v. State, 129 Tex. Cr. App. 2, 83 S.W. (2d) 338 (1935), State v. diNoi, 59 R. I. 348, 195 Atl. 498 (1937), State v. Morrison, 175 Wash. 656, 27 P. (2d) 1065 (1933).

49 Cited *supra* note 36.

50 *Id.* at 978.