Indiana Law Journal

Volume 23 | Issue 3 Article 11

Spring 1948

Inspection of Opponent's Chattels Before Trial

EVIDENCE

INSPECTION OF OPPONENT'S CHATTELS BEFORE TRIAL

An action was brought for damages against a soft-drink bottling company on account of illness allegedly resulting from the presence of poisonous foreign matter in the bottle from which the plaintiff drank. Prior to the trial plaintiff refused defendant permission to have a chemical analysis made of the contents of the bottle and the court denied defendant's motion to require plaintiff to deposit the bottle with the court so that an analysis could be made. During the trial plaintiff's attorney stated that he had never had a chemical analysis made but objected to testifying that he had refused to permit the defendant to make such an analysis. Objection sustained, verdict and judgment for the plaintiff. On appeal the Supreme Court of South Carolina upheld the order denying defendant's motion but reversed the judgment and ordered a new trial. The evidence excluded was a circumstance which the jury should have been permitted to consider. *Welsh v. Gibbons*, 46 S.E. 2d 147 (S.C. 1948).

That litigants in a modern trial, where the main issue is whether or not deleterious substances were present in consumer's goods, can carry the case to judgment without sub-

---

16. Richcreek v. Richcreek, 116 Ind. App. 422, 64 N.E.2d 308 (1945). See also Hetzell v. Morrison, 115 Ind. App. 512, 60 N.E.2d 150 (1945), where although the correct result was undoubtedly reached in view of the other facts of the case, the Appellate Court argued in terms of title.

mitting scientific proof of the presence of the foreign matter must seem utterly fantastic to one untrained in the law. Yet the South Carolina Court apparently felt it had no alternative but to deny defendant's motion ordering the bottle to be brought into court so that an inspection could be made. This conclusion was based on two grounds: (1) a South Carolina statute expressly abolished discovery except as provided therein,[1] and (2) the court did not have the inherent power to grant such an order.

There can be little doubt that the relief sought by the defendant was in the nature of an equitable bill of discovery. At common law one of the rules of the game was every man for himself, which meant that evidence and witnesses were the secret weapons of the party who had them.[2] However a proceeding developed in chancery whereby the parties could gain some insight into the nature of their opponent's case[3] as well as to help their own.[4] This proceeding was known as a bill of discovery and it lay either in equitable suits or in aid of an action at law where discovery was essential to the proper determination of the question in dispute.[5] As a rule the only relief granted in those bills was to require written interrogatories to be answered under oath.[6] On occasion however, the chancellor went further and also ordered the production and inspection of documents,[7] chattels and premises.[8] There are a few isolated cases of inspection itself being ordered in equity without any mention of discovery[9] which

1. S.C. Code (1942) §674. "No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner presented by this chapter." The sections which follow authorize the examination of a party at or before a trial at the instance of the adverse party and outline the procedure to be followed in obtaining such examination. This is the only section of the South Carolina Code which has any relation to discovery with the exception of § 673. The latter section provides for inspection of books and documents.
2. 6 Wigmore, "Evidence" §1845 (3rd ed. 1940); 5 Jones, "Evidence" §2040 (2d ed. 1926).
3. This of course only incidentally because of what they discovered about their own cause of action. 6 Wigmore, "Evidence" §1846. Cf. 5 Jones, "Evidence" §§2041-2.
4. 6 Wigmore, "Evidence" §§1846, 1856; 5 Jones, "Evidence" §2041.
5. See n. 4 supra.
6. See n. 4 supra.
7. 6 Wigmore, "Evidence" §1857; 5 Jones, "Evidence" §2044.
8. 6 Wigmore, "Evidence" §1862; 5 Jones, "Evidence" §2045.
9. See cases collected in 6 Wigmore, "Evidence" §1862, n.4; 5 Jones, "Evidence" §2045, n.16.

may have given rise to the argument that inspection was a separate equitable remedy.[10] But in the light of the history of discovery it probably must be conceded that production and inspection were both parts of the remedy of discovery prior to statutory changes. However the common law courts slowly developed a system of profert and oyer which allowed a limited inspection of documentary evidence before trial.[11] The right to inspection of documents and writings was finally expressly given to the common law courts in England by statute in 1851[12] and in 1854 the right to inspection was extended to premises and chattels.[13] Most of the states today have statutes allowing inspection of documents and writings.[14] Where the statute does not expressly authorize discovery and inspection of chattels, the courts have sharply split over the power of the court to grant such a motion.[15] Today the formal distinctions between law and equity have been discarded in all but a handful of the states. In the absence of a statute expressly forbidding discovery of chattels, or purporting to supercede all prior remedies, it is difficult to see why a court is without at least the implied power to see that justice is done by exercising the power of the chancellor.[16]

Whether or not courts have the inherent power, presumably based on the function of a court to see that justice is done, to grant an order for inspection presents a very difficult problem. For if the courts have such a power, enabling statutes are surplusage and attempts by the legislature to take

10. Hall v. Joiner, 1 S. C. 186 (1869); Thomas v. Spartanburg Ry., 107 S. C. 109, 91 S.E. 258 (1917).
11. 6 Wigmore, "Evidence" §§1858-60.
12. 14 & 15 Vict., C.99, §6.
13. 17 & 18 Vict., C. 125, §58.
14. For a collection of citations of the state statutes see 6 Wigmore, "Evidence" §1859, n. 1 (pp. 454-64).
15. The courts have the power: Skinner v. Judson, 8 Conn. 528 (1831); Coca-Cola Co. v. City of Atlanta, 152 Ga. 558, 110 S.E. 730 (1922); Cleveland R. W. Co. v. Huddleston, 151 Ind. 540, 46 N. E. 678 (1897); Culbertson v. Iola Portland Cement Co., 87 Kan. 529, 125 Pac. 81 (1912); McGuire v. Village of Caledonia, 140 Minn. 151, 167 N. W. 426 (1918); State ex rel. American Mfg. Co. v. Anderson, 270 Mo. 533, 194 S. W. 268 (1917); Ingram v. Boston & Maine R. R., 89 N. H. 292, 197 A. 824 (1938). Contra: Wilson v. Collins, 57 Misc. 363, 109 N. Y. S. 660 (1908); O'Reilly v. Superior Court, 46 R. I. 37, 124 A. 726 (1924); Cargill v. Kountz, 86 Tex. 386, 22 S. W. 1015 (1893); Larson v. Salt Lake City, 34 Utah 318, 97 P. 483 (1908).
16. See n. 15 supra.

the power away from the courts would be void.[17] This seems to be a problem that each state must decide for itself. The Supreme Court of South Carolina has previously decided that their courts do not have the inherent power to order a plaintiff in a personal injury suit to submit to a physical examination.[18] From this analogy the court in the principal case reluctantly concludes they are without inherent power to grant the defendant's motion for inspection.[19]

In reversing the present case, the court holds that the jury might draw an inference against the plaintiff because of his failure to permit an inspection. Whether the inferenec will go to the credibility of the plaintiff as a witness or to the withholding of evidence is not pointed out. At any rate this should tend to reach the desired result and is in accord with other states.[20]

---

17. This is true of course only under a separation of powers doctrine under which the state courts derive their authority from the state constitutions. See: Holman v. State, 105 Ind. 513, 5 N. E. 556 (1886); Ratliff v. Stretch, 130 Ind. 282, 30 N. E. 30 (1892); Fuller v. State, 100 Miss. 811, 57 So. 806 (1912); State v. Superior Court, 39 Ariz. 242, 5. P 2d 192 (1931).

18. This result which seems well settled in South Carolina now, was not reached without several strong dissents in earlier years. The cases are discussed by the court in the principal case at page 149. Other states have come to the opposite conclusion on this point. Indiana for example, after holding for years that the courts do not have the power to order physical examination of litigants in personal injury suits, now holds that the courts do have the power. The leading case is City of South Bend v. Turner, 156 Ind. 418, 60 N. E. 271 (1901) which overruled the prior cases. It is dificult to tell from this decision whether the Indiana court relies on inherent power or implied power in the absence of statutes since both terms are used in the opinion.

19. Using the same reasoning it would appear that defendant's motion for inspection in this case would have been granted in Indiana since the Indiana courts allow physical examination in the absence of a statute, n. 17 supra. The only Indiana statutes on the subject are Ind. Stat. Ann. (Burns 1933) §§2-1644, 2-1645 (production and inspection of books, papers and documents). See Cleveland R. W. Co. v. Huddleston, 151 Ind. 540, 46 N. E. 678 (1897) (allowing motion to produce a specimen of urine for inspection and analysis).

20. Morris v. Buchanan, 220 Ind. 510, 519, 44 N. E. 2d 166 (1942). It is possible to make the argument that if plaintiff is not required to let the defendant inspect chattels in his conrol it must be because the plaintiff has a privilege not to do so, and failing to do that which one had a privilege not to do is not the proper basis for an inference. 2 Wigmore, "Evidence" §291.