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Constitutional Law -- Search Without Warrant Under State Police Power

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in the absence of sufficient interests, a "suit limiting clause" can not be characterized as being so repugnant to a state's vital interests as to justify its being disregarded on the basis of public policy. What factors will be legally sufficient to balance the demands of due process against the public policy of the forum have not yet been decided in this area, and will be subject to final determination through review by the United States Supreme Court.[23]

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CONSTITUTIONAL LAW — SEARCH WITHOUT WARRANT UNDER STATE POLICE POWER

The defendant's refusal to permit entry to the Commisioner of Health, who acted after finding a pile of rat-infested debris on defendant's property, resulted in a fine under the Baltimore City Code,[1] which permits daylight demands for entry without warrant by the Commissioner. *Held*: a penalty imposed for resisting the inspection of a health official, without warrant, prompted by a danger to the public health, does not violate due process of law under the fourteenth amendment. *Frank v. State of Maryland*, 359 U.S. 360 (1959).

The authorization of searches by an administrative officer without warrant, under the state police power, has undergone a progressive development in the law. It is acknowledged that the guaranty of the fourth amendment to be secure against unreasonable searches and seizures, does not apply directly to state actions.[2] However, that security is "implicit in the concept of ordered liberty, and as such, enforceable against the states through the Due Process Clause."[3] Generally, this limitation has been construed to allow reasonable searches by implication[4] and has not been held enforceable against the unlawful acts of individuals in which the government has no part.[5] A search without a warrant demands

23. Sun. Ins. Office, Ltd. v. Clay, 265 F.2d 522 (5th Cir.), *cert. granted*, 361 U.S. 874 (1959).

1. BALTIMORE, MD., HEALTH CODE art. 12, §120 (1950): "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the daytime, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

2. Weeks v. United States, 232 U.S. 383 (1914); National Safe Deposit Co. v. Stead, 232 U.S. 58 (1914); Boyd v. United States, 116 U.S. 616 (1896).

3. Wolf v. People of the State of Colorado, 338 U.S. 25, 27 (1949).

4. United States v. Rabinowitz, 339 U.S. 56 (1914); Harris v. United States, 331 U.S. 145 (1946); Co-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

5. Burdeau v. McDowell, 256 U.S. 465 (1921); Gouled v. United States, 255 U.S. 298 (1921); Perlman v. United States, 247 U.S. 7 (1918); Boyd v. United States, 116 U.S. 616 (1886); United States v. Jordan, 79 F. Supp. 411 (E.D. Pa. 1948).

exceptional circumstances,[6] and if officers are not responding to an emergency or making a search incident to a lawful arrest,[7] "there must be compelling reasons to justify the absence of a search warrant."[8] Most of these instances have occurred in the area of criminal prosecutions, but the allowance of warrantless searches in administrative areas of the police power is a development seemingly based on the historical antecedents of the fourth amendment.[9] Only six cases, excluding the instant case, have considered this point. In a 1936 New Hampshire case,[10] a statute empowering the Commissioner of Agriculture to search barns,[11] without a warrant, for signs of infected domestic animals, was upheld as not violative of due process of law. Here the court weighed public necessity under the police power "against the seriousness of the restriction of private right sought to be imposed,"[12] in order to determine the statute's reasonableness. A South Carolina municipal ordinance[13] provided for alteration, repair, or destruction of substandard dwellings and empowered the Rehabilitation Director to make inspections thereof without a warrant, in order to determine fitness for human habitation. When construed by the South Carolina Supreme Court in *Richards v. City of Columbia*,[14] the statute was upheld as a constitutional exercise of the police power. While the question of an unreasonable search was not directly presented to the court,[15] it noted that "there is doubt whether such an entrance would come within the constitutional guaranties against unreasonable searches."[16] The same section of the Baltimore Code under consideration in the instant case,[17] was considered in the 1956 decision of *Givner v. State of Maryland*.[18] The court considered the daylight search a reasonable one, as allowed by the constitution, and held that "municipalities and

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6. Johnson v. United States, 333 U.S. 10 (1948).

7. Harris v. United States, 331 U.S. 145 (1946); United States v. Lee, 274 U.S. 559 (1927); Weeks v. United States, 232 U.S. 383 (1914); Mattews v. Correa, 135 F.2d 534 (2d Cir. 1943); Parks v. United States, 76 F.2d 709 (5th Cir. 1935).

8. McDonald v. United States, 335 U.S. 451, 454 (1948).

9. Viewing the Fourth Amendment in its historical background, it was said that: "The constitutional provision in question does not apply to reasonable rules and regulations adopted in the exercise of the police powers for the protection of the public health, morals and welfare." CORNELIUS, SEARCHES AND SEIZURES § 35 (2d ed. 1930).

10. Dedrick v. Smith, 88 N.H. 63, 184 Atl. 595 (1936), *appeal dismissed*, 299 U.S. 506 (1936).

11. N. H. PUBLIC LAWS ch. 187, § 29 (1926).

12. Dedrick v. Smith, 88 N.H. 63, 184 Atl. 595 (1936), *appeal dismissed*, 299 U.S. 506 (1936).

13. COLUMBIA, S.C., CODE § 36-501 (1952). This provides for the Rehabilitation Director to "enter upon premises for the purpose of making examinations, provided that such entries shall be made in such manner as to cause the least possible inconvenience to the persons in possession."

14. 227 S.C. 538, 88 S.E.2d 683 (1955).

15. The action was an injunction to prevent the enforcement of the ordinance and therefore no entrance or search of any premises had been made by the Director over the objection of an occupant.

16. Richards v. City of Columbia, 227 S.C. 538, 556, 88 S.E.2d 683, 692 (1955).

17. BALTIMORE, MD., HEALTH CODE art. 12, § 120 (1950). This allowed the Commissioner of Health to make a "demand for entry therein in the daytime."

18. 210 Md. 484, 124 A.2d 764 (1956).

other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants."[19] In *State ex rel. Eaton v. Price*,[20] the Ohio Supreme Court held that a search, under a municipal inspection ordinance,[21] did not violate the provisions of the fourth or fourteenth amendments since, "the right of a home owner to the inviolability of his 'castle' should be subordinate to the general health and safety of the community where he lives."[22]

Only two cases have denied the power to make such administrative searches without a warrant. In the 1949 case of *Little v. District of Columbia*,[23] a homeowner was convicted for failure to allow an inspection, by the Health Commissioner, of her home, as provided for under the laws of the District of Columbia.[24] The United States Court of Appeals, District of Columbia Circuit, in a 2-1 decision, reversed the conviction,[25] holding that the defendant was within her fourth amendment rights in refusing to allow such an inspection without a warrant. Judge Holtzoff wrote a vigorous dissent based on the non-applicability of the fourth amendment to areas outside of criminal and penal actions, therefore not affecting "inspections conducted in the course of the administration of statutes and regulations intended to promote public health or public safety."[26] Upon appeal to the United States Supreme Court,[27] the decision was affirmed on other grounds,[28] the court refusing as has been its custom,[29] to discuss the constitutional issue when it can be avoided. However, Justices Burton and Reed dissented, stating that "the duties which the inspector was seeking to perform were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth Amendment."[30] The only

19. *Id.* at 505, 124 A.2d at 775.
20. 105 Ohio App. 376, 152 N.E.2d 776 (1957), *aff'd*, 168 Ohio St. 123, 151 N.E.2d 523 (1958), *prob. juris. noted*, 360 U.S. 246 (1959).
21. DAYTON, OHIO, CODE OF GENERAL ORDINANCES § 806-30 (1954). This provides that the occupant "shall give free access to such dwelling . . . at any reasonable hour for the purpose of inspection."
22. State *ex rel. Eaton* v. Price, 168 Ohio St. 123, 138, 151 N.E.2d 523, 532 (1958), *affirming* 105 Ohio App. 376, 152 N.E.2d 776 (1957).
23. 62 A.2d 874 (D.C. Munic. App. 1948), *rev'd*, 85 App. D.C. 242, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).
24. This provided in § 10 that: "The Health Officer shall examine or cause to be examined any building supposed or reported to be in an unsanitary condition."
25. District of Columbia v. Little, 85 App. D.C. 242, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).
26. *Id.* at 254, 178 F.2d at 25. Also note that while the *Little* decision was specifically mentioned in the Ohio, South Carolina, and Maryland cases, all these courts chose to follow the reasoning of Judge Holtzoff's dissent.
27. District of Columbia v. Little, 339 U.S. 1 (1950).
28. The United States Supreme Court affirmed the decision of the court of appeals on the basis that the defendant's actions did not constitute "interference" with the performance of the inspector's duties.
29. Rescue Army v. Municipal Court, 331 U.S. 549 (1947); Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129 (1946); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).
30. District of Columbia v. Little, 339 U.S. 1 (1950).

other case denying such a search is the recent decision in *St. Louis v. Claspil*.[31] The city court held that a search by a building inspector was unreasonable because attempted at night, in the absence of an emergency, and for the enforcement of a minor regulation. While this case may be factually distinguishable from the *Little* case because attempted "at night," the court additionally held that the city did not have the right to inspect any and all premises at will.

Thus, in the instant case, the Supreme Court faced the problem it had avoided in 1950, and held that a reasonable administrative search conducted under the state police powers did not run contrary to fourteenth amendment due process. The majority[32] justified its holding on what appears to be three separate bases. First, they traced the historical background of the fourth amendment from the English case of *Entick v. Carrington*[33] to the present day. In doing this they concluded that it was "the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures"[34] that the fourth amendment was adopted to protect. Then the Court reasoned that since no evidence for criminal prosecutions was sought here,[35] the protection of this constitutional right, admittedly secured through the fourteenth amendment,[36] could not be invoked. However, the Court's very next sentence turned this entire historical tracing into dictum, by admitting that "the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment is of course not restricted within these historic bounds."[37] As its second, and likewise weak basis, the Court made a cursory reference to a justification founded upon the prevention and abatement of nuisances by public authorities. Yet, the Court refused to put any reliance on prior decisions which have recognized the right of local or state authorities to summarily abate nuisances without a prior judicial proceeding and hearing.[38] Rather it leaves to inference whether this case was, in fact, based in any part upon this power of the state

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31. Unreported, City Court of St. Louis, First Division, April 29, 1959.

32. The decision in the instant case was the weakest possible in constitutional law, being a 4-1-4 decision. The majority consisted of Justices Frankfurter, Stewart, Harlan, and Clark, with a concurrence by Justice Whittaker. The dissent was written by Justice Douglas and joined by the Chief Justice and Justices Black and Brennan.

33. 19 How. St. Tr. 1029 (C.P. 1765).

34. 359 U.S. 360, 365 (1959).

35. However, the majority admits that under the Code, the "failure to remove these hazards to community health gives rise to criminal prosecution." Therefore it would seem that evidence in such criminal prosecution would have to be obtained in a separate search conducted with a search warrant, rather than in the search the instant case allows.

36. Cases cited note 4 *supra*.

37. Frank v. State of Maryland, 359 U.S. 360, 366 (1959).

38. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Lawton v. Steele, 152 U.S. 133 (1894); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959); Dedrick v. Smith, 88 N.H. 63, 184 Atl. 595 (1936), *appeal dismissed*, 299 U.S. 506 (1936); Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E.2d 141 (1920).

to abate nuisances. The final justification for allowing the search is perhaps the most tenable of the three advanced. It is founded upon the basic constitutional principle that the fourth amendment does allow the conducting of reasonable searches. In concluding that the search was reasonable, the Court made reference to: (1) the daylight aspect of the search as opposed to a "midnight knock on the door,"[39] (2) the 200-year precedent in the State of Maryland for the conducting of such searches, (3) the great need for protective actions such as systematic area-by-area searches, and (4) the fact that the power of inspection in the instant case is strictly limited by the exacting code provisions. In contrast, the dissent of Mr. Justice Douglas took to task the majority's historical analysis of the fourth amendment and sought to refute the dictum that this amendment was limited in scope to criminal and penal actions. The remainder of the dissent was an adaptation of the reasoning in the *Little*[40] case, emphasizing the need for a search warrant in such inspections, and warning of the infringement on civil liberties.[41]

Obviously, in reaching this decision the Court ignored all of the previously mentioned state decisions.[42] However, despite this, the *Frank* decision[43] has secured, for the present,[44] the proposition that reasonable administrative searches can be conducted without a search warrant. The holding that such inspections could be constitutionally conducted in the absence of a warrant lends support and credence to the like opinions of the state tribunals. The reasoning of Judge Prettyman in the *Little* case[45] has been in effect impliedly overruled by the majority opinion, despite the tenacious attempt of Mr. Justice Douglas to keep it alive. The demise of this line of reasoning leaves the law in this narrow, but important area, clear and unencumbered. The only other case reaching a contrary conclusion, *St. Louis v. Claspil*,[46] is easily distinguished from the instant case because of its "midnight knock" and low position in

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39. Frank v. State of Maryland, 359 U.S. 360, 366 (1959).

40. See the opinion of Judge Prettyman in District of Columbia v. Little, 85 App. D.C. 242, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

41. It was further contended that since out of the thousands of inspections each year (36,119 in 1958) only an average of one prosecution was conducted, the rest submitting voluntarily, the need was not great enough to counterbalance the loss of personal rights. Frank v. State of Maryland, 359 U.S. 360, 372 n. 16 (1959).

42. Givner v. State of Maryland, 210 Md. 484, 124 A.2d 764 (1956), was mentioned in Footnote 8 of the majority opinion, but only for the proposition that Article 26 of the Maryland Constitution is "*in pari materia*" with the Fourth Amendment.

43. 359 U.S. 360 (1959).

44. It is interesting to note that the Court has noted probable jurisdiction of State *ex rel.* Eaton v. Price in 360 U.S. 246 (1959), only two weeks after the *Frank* decision. However Justices Frankfurter, Clark, Harlan, and Whittaker were so strenuously opposed to this quick reconsideration that they wrote an opinion against it, which is very unusual in constitutional history. Since Mr. Justice Stewart will not hear the case, as his father is currently serving on the Ohio Supreme Court, this leaves a 4-4 split, which will not alter the current decision.

45. 85 App. D.C. 242, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

46. Unreported, City Court of St. Louis, First Division, April 29, 1959.

the judicial hierarchy, being the decision of a municipal court. Thus, in the remaining 33 cities whose health codes empower entrance without a warrant to inspect for violations,[47] it seems well settled that as long as the actions of the inspector are "reasonable" within themselves, they will be allowed. Any future denial of such a right to inspection under the state police power would have to be based upon the unreasonable actions of the inspecting officer while operating under the provisions of the various ordinances.

The problem of keeping large cities and their inhabitants free from disease and epidemic is indeed a serious task facing all municipal governments. Under the authority of the decision in the instant case, that task has been considerably eased and the way facilitated for the institution of practical inspection machinery to aid health officials.[48] The Court went to great lengths in this opinion to keep its holding as narrow as possible and yet still effectively support its conclusion with the law. The sometimes entangled and perhaps seemingly superfluous decision rendered by the majority may well be criticized by some for its lack of clarity, yet it cannot be denied that the Court has accomplished its goal effectively. With a minimum loss of personal rights, those being the rights to *absolute* inviolability of a man's "castle," the Court has precariously tightroped the fine lines of search and seizure and due process, and still reaches a reasonable result. Cities need the unencumbered right to make inspections for the purpose of discovering substandard health conditions, and this case has rightly granted it to them.

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EVIDENCE — AUTOMOBILE ACCIDENTS AND THE "DEAD MAN'S STATUTE"

Plaintiff sought recovery for personal injuries suffered in an automobile collision in which he was the sole survivor. The trial court construed the "Dead Man's Statute" to prohibit the plaintiff from testifying as to the facts of the accident and directed a verdict for the defendant-executor. *Held*, reversed: an automobile accident is not a "transaction" within the

47. The health codes of 57 cities were studied by the Urban Renewal Administration and out of these, 36 empowered officers to inspect without a warrant. See 3 URBAN RENEWAL BULL. (1956).

48. It has been argued that rather than allow these warrantless searches, a special type of warrant should be provided for. However as recognized by Mr. Justice Frankfurter, to set up "a loose basis for granting a search warrant for the situation before us is to enter by way of the back door to a recognition of the fact that by reason of its intrinsic elements . . . such a search . . . does not offend the protection of the Fourteenth Amendment." Frank v. State of Maryland, 359 U.S. 360,373 (1959).