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Ordinance Allowing Search Without a Warrant Held Invalid

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RECENT DECISIONS

Ordinance Allowing Search Without a Warrant Held Invalid

Appellant-homeowner was convicted of violating a zoning ordinance which prohibited business operations in a residential area. The incriminating evidence was obtained by a building inspector, who, acting pursuant to a village ordinance,[1] entered petitioner's home without a warrant and against his consent. In reversing the county court, the New York Court of Appeals *held* that a conviction for violating a zoning ordinance which imposed criminal penalties was a denial of due process if based on illegally obtained evidence. *People v. Laverne,* 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

The right of municipal authorities to inspect premises for possible violations of regulatory ordinances concerning the public health and safety has long been recognized as a valid exercise of the police power.[2] If the particular ordinance authorizing a regulatory search afforded the individual reasonable safeguards it was generally held valid. Thus, if an ordinance provided that inspections take place only during certain hours of the day and that the scope of the inspection be limited, it was thought that the rights of the individual were sufficiently protected.[3]

It appears that the other constitutional limitations on searches and seizures were not thought of as applying to regulatory searches, or inspections as they later came to be called.[4] It did not seem logical or practical to subject the termite inspector to the same procedural limitations as were imposed upon the policeman in pursuit of a criminal. Thus a search warrant was not

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[1] The ordinance as far as it is relevant is set out in the dissenting opinion of Judge Burke: "It shall be the duty of the Building Inspector, and he hereby is given authority, to enforce the provisions of this ordinance. The Building Inspector in the discharge of his duties shall have authority to enter any building or premises at any reasonable hour." People v. Laverne, 14 N.Y.2d 304, 312, 200 N.E.2d 441, 445, 251 N.Y.S.2d 452, 458 (1964).

[2] Frank v. Maryland, 359 U.S. 360 (1959). See generally Mitchell, *Foreword* to MULT. DWEL. LAW at ix-xxi (McKinney 1946); Stahl & Kuhn, *Inspections and the Fourth Amendment,* 11 U. PITT. L. REV. 256 (1950).

[3] Frank v. Maryland, *supra* note 2, at 366-67; City of St. Louis v. Evans, 337 S.W.2d 948, 958 (Mo. 1960); Sunderman v. Warnken, 251 Wis. 471, —, 29 N.W.2d 496, 498 (1947); CORNELIUS, SEARCH & SEIZURE § 35 (2d ed. 1926).

[4] The distinctions between "searches" and "inspections" are discussed in FREUND, POLICE POWER § 47 (1904) and Sunderman v. Warnken, *supra* note 3. *But see* District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), wherein these distinctions are refuted.

generally required to validate reasonable search by an inspector acting under a municipal ordinance.[5]

It was not until 1949 that any real dispute arose as to the validity of these inspections. In *District of Columbia v. Little*[6] a federal appellate court held unconstitutional a municipal ordinance penalizing a homeowner who had refused to admit a health inspector. Judge Prettyman concluded: (1) that the basic premise of the fourth amendment "was the common law right of a man to privacy in his home";[7] (2) that Congress had never authorized a search of a home without a warrant, save in those instances to be "adjudged solely by the extremity of the circumstances of the moment and not by any characteristic of the officer or his mission";[8] and (3) that to allow a criminal suspect the protection of the fourth amendment while denying it to a man not suspected of a crime would be "a fantastic absurdity."[9] The United States Supreme Court affirmed on other grounds[10] and consequently it was not until ten years later that the Court was directly confronted with the issue. In *Frank v. Maryland,*[11] a case involving a Baltimore health ordinance,[12] the inspector, in responding to a complaint, detected evidence of the presence of rats outside defendant's house and demanded entry. The homeowner refused to admit him and as a result was convicted of a civil violation of the ordinance. The Court, with no reference to the *Little* case, held that where the demands of the public welfare outweigh the interest of an individual's privacy, inspections are to be allowed.

Both Mr. Justice Frankfurter, representing the majority, and Mr. Justice Douglas, writing the dissent, sought to determine the intent of the framers of the Constitution in light of the events surrounding the passage of the fourth amendment. The majority found that this provision related primarily to criminal matters and that the right to be secure from unreasonable searches and seizures was based upon an interrelationship of the fourth amendment and fifth amendment guarantees against self-incrimination.[13]

However, the dissent argued that "the fourth amendment has a much wider frame of reference than mere criminal prosecutions,"[14] and that "the security of one's privacy against arbitrary intrusion by the police . . . is at the core of the fourth amendment. . . ."[15] Mr. Justice Douglas, endorsing and expanding upon the holding in *Little,* stated that whatever the purpose of a public official, he is still subject to constitutional limitations on his activity. It is not a question of balancing interests, because the police power cannot be superimposed upon the Constitution. So much as a warrant "hobbles" an inspector

[5] Stahl & Kuhn, *supra* note 2.

[6] *Supra* note 4.

[7] *Id.* at 16-17.

[8] *Id.* at 16.

[9] *Id.* at 17.

[10] District of Columbia v. Little, 339 U.S. 1 (1949).

[11] 359 U.S. 360 (1959).

[12] BALTIMORE CITY CODE, art. 12, § 120: "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house . . . he may demand entry therein in the day time, and if the owner . . . shall refuse . . . to . . . admit a free examination, he shall forfeit and pay for every such refusal . . . Twenty Dollars."

[13] Frank v. Maryland, 359 U.S. 360, 364-65 (1959).

[14] *Id.* at 377.

[15] *Id.* at 375.

in enforcing the law, it "hobbles" a policeman, and where there are conflicts between public enforcement and the rights of the individual, they must be resolved in favor of the latter.

Thus, the majority, fearing the unchecked growth of slums in an increasingly complex society, sustained the validity of the ordinance, while the dissent, envisioning the disguise of policemen in inspectors' clothing and the growing power of government leading to further sacrifices of the rights of the individual, considered it unconstitutional. Also, there is apparent disagreement as to the status of the inspector, *i.e.,* whether he is in essence a peace officer. If it is found that he is not, there is the further question of whether it logically follows that the inspector should be given broader latitude under the fourth amendment.

Despite the comprehensive handling of the issues raised, neither side to the dispute got beyond the issue of the validity of health and safety inspections without a warrant. The majority did not define the limits and scope of these inspections, and the dissent did not discuss the problems involved in placing such inspections within the traditional pattern of search warrant requirements.

A situation somewhat analogous to that in *Frank* arose in the instant case.[16] However, there are significant differences between these two cases. The principal case involved a zoning ordinance as opposed to a health ordinance; an unconsented-to entry resulting in fine and imprisonment as opposed to a refusal of entry resulting in fine; and a seemingly arbitrary entry contrasted with an entry upon probable cause.

The first difference is not generally considered significant in "regulatory inspection cases," nor was it so considered in the instant case. The second is the basis for the majority opinion, and the third the ground for the special concurrence by Judge Desmond. The dissenting judges saw none of the distinctions as operative and found *Frank* to be controlling.

The majority opinion placed reliance upon the statement by Mr. Justice Frankfurter in *Frank* that "inspections without a warrant as an adjunct to a regulatory scheme for the general welfare . . . and not as a means of enforcing the criminal law" have long been recognized.[17] Judge Bergan pointed out that this entry resulted in a criminal conviction based upon the fruits of an official search without a warrant and as such was controlled by *Mapp v. Ohio.*[18] Thus, the evidence gathered was erroneously admitted in the court below. The Court distinguished the *Frank* case because it did not involve a search leading to a *criminal* conviction. The Court found that all inspections are only "probably valid" and that the defendant argued "with some force" that every entry without a warrant is invalid. But this is not explained, apparently because it was considered extraneous to the holding. It is

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[16] There are three common characteristics of the two cases: an administrative ordinance, enacted to promote the public health and safety, and providing for regulatory inspection without the requirement of a search warrant.

[17] People v. Laverne, *supra* note 1, at 308, 200 N.E.2d at 443, 251 N.Y.S.2d at 455, citing Frank v. Maryland, *supra* note 13, at 367.

[18] 367 U.S. 643 (1961). The majority of state courts take the view that a violation of an ordinance cannot constitute a crime. CLARK & MARSHALL, CRIMES § 1 (5th ed. 1952). But some courts have held that violation of a municipal ordinance designed to protect health and safety is a crime. MILLER, CRIMINAL LAW § 12 (1934).

intimated, however, that the Court thought that the holding of *Frank* rested on tenuous grounds and should be applied restrictively.

Judge Desmond, in his concurring opinion, found that the absence of the necessity of "reasonable grounds" made the ensuing inspection unreasonable and the ordinance invalid. Since the Chief Judge concurred "solely . . . on this ground,"[19] it appears that on all the other substantive matters he was in agreement with the dissent.

Only the dissent sought to expand upon the broad problems raised in *Frank*. Judge Burke disagreed with both the basic premise and conclusion of the majority. He stated that a criminal conviction was not herein involved, but rather a violation of a municipal ordinance whose sanctions are analogous to "offenses" and merely resemble the criminal law. Finding the entry itself valid, the condition which eventually was used as evidence to convict the defendant, obviously, was admissible against him.

Thus, it would seem that the minority in *Laverne* captured, and the majority ignored, the essential meaning of *Frank*. The reason for the Court's reaching a decision inconsistent with *Frank* may be attributed to its fundamental uncertainty as to the force of that case as precedent. The current tendency of the Supreme Court to expand upon the protections of the rights of the individual and the close division of the Court in that case intimate that *Frank* might be overruled. The *Mapp* case represents the key turn in that direction. Although it implicitly seemed to mitigate the *Frank* holding, it did not specifically address itself to that area. Thus, it is not clear to what extent the earlier case is still binding. This perhaps explains the reference by the Court to inspections as only "probably valid," and to the proposition that the Constitution denies all entries without a warrant as an argument "with some force." The Court, in applying the *Mapp* holding within the *Frank* framework, tried to adhere to the rule of stare decisis while deciding consistently with the anticipated change of law.

The holding of the instant case makes it mandatory that all public ordinances which authorize administrative inspections without a search warrant and impose a criminal penalty be revised.

Perhaps the more significant effect of the case is that it casts doubt on the validity of all administrative inspections performed without a warrant, regardless of the penalty. If, when they acknowledged that the Constitution prohibits all entries without a warrant as an argument "with some force," the Court meant that even inspections authorized by ordinances similar to that in *Frank* are invalid in New York; this makes the present procedure for enforcing these ordinances inadequate.

There is no provision, either in New York or in the federal law, whereby a warrant may be obtained by an inspector. But even supposing there were such provisions, how could an inspector get one?[20] Perhaps in those inspections begun by a civilian complaint or by the suspicion of an inspector, the requirement of a warrant might be met.[21] But what of the systematic area-by-area inspection, where an investigation is being made to discover unsafe conditions? How is the inspector to de-

[19] People v. Laverne, *supra* note 1, at 310, 200 N.E.2d at 444, 251 N.Y.S.2d at 456.

[20] SOBEL, CURRENT PROBLEMS IN THE LAW OF SEARCH & SEIZURE 14, 73 (1964).

[21] See 33 TEMP. L.Q. 99 (1959).

termine in advance whether he will uncover a condition which will demand a punitive sanction? How is he to have the requisite probable cause to detect internally-caused rodent decay?

Description of the mechanics of an inspection illustrates this difficulty. Regulatory inspection generally proceeds in two stages: discovery and enforcement. Upon uncovering a dangerous condition, the inspector informs the party of the condition and directs him to correct it. Some time later he returns to see if there has been compliance. If there has not been, a penalty is imposed. But when in this chain of events could a warrant (if one were obtainable) have been obtained? Before the first entry there is no cause to suspect a violation, and before the second the "probable cause" is based upon the first, and any incriminating evidence subsequently obtained is inadmissible.

Thus, if we apply the intimations of the majority literally, administrative inspections, other than those where the threat to the public welfare is an accomplished fact and probable cause obviously exists, are impossible. This conclusion is unreasonable as administrative inspections are essential in today's society. The courts will have to recognize this fact and allow such inspections on something less than probable cause. Although something less than the requirement of probable cause is a practical necessity, it will be necessary to add substantial safeguards to the minimum requirements of *Frank v. Maryland.* This conclusion seems warranted by the trend of recent Supreme Court cases in this area, particularly *Mapp v. Ohio.*

Many different solutions may be possible.[22] What additional safeguards will be required by the courts as an essential minimum is difficult to determine in the absence of judicial decision. It is suggested, as one of the many conceivable alternatives, that the legislature authorize the issuance of an "inspection warrant" on less than probable cause. In order to meet constitutional objections, it is further suggested that the inspections be allowed only at certain times of the day, that the area to be inspected be limited and that they occur only at fixed intervals.

In these cases, where probable cause to believe a violation has occurred is not present, a systematic area-by-area inspection made every five years, conducted with the above safeguards, does not seem to be an undue deprivation of the citizen's liberty.

[22] It does not appear that there have been any concrete suggestions as to how a new system might be effected. There is some evidence, however, that the most economical method of enforcing housing regulations is by a planned coverage of significant areas. Pond, *Need for Systematic Evaluation of Substandard Housing,* 37 AM. J. PUB. HEALTH 967, 968 (1947). It has also been claimed that this is the most effective method, based upon the results of a report from five cities where such investigations were practiced. Stahl & Kuhn, *supra* note 2, relying upon *Systematic Inspection of Substandard Housing,* 63 AM. CITY 82 (1948).