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Constitutional Law: Health and Housing Inspection of Private Homes without Search Warrants

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as one and the annuity payments would then be, in fact, derived solely from the premiums paid for the annuity. The fact that the substance of the investment *could have been* altered should not be allowed to distort what actually happened, however.¹⁵ It was in this area that the Court relied rather heavily on form rather than substance in reasoning that the annuity could normally have been acquired separately. The practical result of surrendering the life insurance policies prior to the death of the insured would be to eliminate the guarantee of the return of the insured's initial premium investment.¹⁶

When consideration is given to the federal income tax implications, the insurance-annuity combination becomes even more attractive to the tax planner. The income to the insured in these cases has been held to be taxable as an annuity¹⁷ rather than as interest as contended by the commissioner.¹⁸ The courts have thus limited the taxable portion of the annual payments to the excess of the total expected return on the annuity over the total cost pro-rated on an annual basis.

Heretofore, in the field of taxation, the courts have often stated that they will look to substance rather than form or legal niceties of the art of conveyancing.¹⁹ However, the principal case indicates that form can triumph over substance in instances where there is a very delicate line of demarcation between the two. It also points the way to substantial tax savings for individuals with enough cash and longevity to profitably utilize the insurance-annuity combination as a tax planning device.

John Convery

CONSTITUTIONAL LAW: HEALTH AND HOUSING INSPECTION OF PRIVATE HOMES WITHOUT SEARCH WARRANTS

A man's home is his castle . . . for where shall a man be safe if it be not in his house?
—Coke¹

But Coke has been "overruled." A home is apparently no longer a castle in Ohio where public officials may inspect private houses with no more documentary authority than an identification card.

The ever increasing web of municipal police power ordinances relating to health, safety, and fire protection has brought forth a controversy as to the scope of a constitutional guaranty considered by the average American as basic.² He has, perhaps, taken it for granted too long for he may be losing it. The question is this: Does the state or municipality have the power to enact and enforce a statute that authorizes inspections of private homes without a search warrant or a court order? The Supreme Court of Ohio in *State ex rel. Eaton v. Price*³ ruled that Ohio municipalities do have such power.

Earl Taylor, a plumber residing in the city of Dayton, refused entrance into

¹⁵ *Goldstone v. United States*, 325 U.S. 687 (1945).

¹⁶ In the principal case, the cash surrender value at date of death was \$326,000 or \$24,000 less than face value.

¹⁷ INT. REV. CODE OF 1954, § 72.

¹⁸ *Helvering v. Meredith*, 140 F.2d 973 (8th Cir. 1944); *Commissioner v. Meyer*, 139 F.2d 256 (6th Cir. 1943).

¹⁹ *E.g. Klein v. United States*, 283 U.S. 231, 234 (1931).

¹ COKE, *INSTITUTES III* (1644).

² Against unreasonable searches U.S. CONST. amend. IV.

³ 168 Ohio St. 123, 151 N.E.2d 523 (1958).

his private dwelling house to city housing inspectors on three separate occasions. The inspectors were making a house by house survey of the area. They called at reasonable hours, but were unknown to Taylor and identified themselves only in the usual way by quickly flashing an identification card. The householder informed the inspectors in plain language that they had nothing in writing authorizing them to come into his home and that there would be no inspection without a search warrant.

Taylor soon found himself in jail charged with violating the city housing code.⁴ Specifically, he was accused of denying free access to his home to the housing inspector. The ordinance authorizes and directs the city housing inspector to make inspections to determine the conditions of dwellings within the city of Dayton. The object of such inspections is stated to be the protection of the health and safety of occupants and the general public. All owners and occupants must, under the terms of the ordinance, allow the inspector free access to premises they control at any reasonable hour.⁵

Conviction would impose upon Taylor penalties of a fine of not more than \$200.00 or thirty days in jail or both.⁶ A writ of habeas corpus served to release the defendant from jail and upon later hearing the lower court allowed the writ. The court found that the unlimited inspection statute was unconstitutional because it offended the Ohio constitutional provision against unreasonable searches and seizures.⁷

The case was appealed by the Dayton City Attorney. Taylor lost his case in the intermediate appellate court⁸ and also in the Supreme Court of Ohio.⁹ The latter tribunal after a review of the cases concluded that:¹⁰

The right of a homeowner to the inviolability of his "castle" should be subordinate to the general health and safety of the community where he lives. Certainly the ordinance does not contemplate the invasion of the privacy of the home, and as applied to the relator here, the record confirms the reasonableness of the Housing Inspector's actions.

This holding seems to be in direct conflict with the letter and the spirit of the fourth amendment to the United States Constitution and its counterpart in state constitutions.¹¹ An examination of the intent behind the adoption of the basic prohibition against unreasonable searches shows that the invasion of privacy of the home was precisely the evil that was sought to be prevented. The provision was made by men who feared a recurrence of the use of the infamous Writ of Assistance. This instrument prior to 1776 was used to make searches of the colonist's homes in efforts to enforce the customs laws. It did not need to be supported by any showing of probable cause. In actual practice, the King's officers used it arbitrarily and vexatiously.¹²

⁴ DAYTON, OHIO, CODE OF GEN. ORDINANCES 18099 § 806-30 (1954). Enacted pursuant to enabling legislation OHIO REV. CODE § 715.26 (1953).

⁵ *Ibid.*

⁶ DAYTON, OHIO, CODE OF GEN. ORDINANCES 18099 § 806-83 (1953).

⁷ OHIO CONST. art. I, § 14. A near duplicate of U.S. CONST. amend. IV.

⁸ State *ex rel.* Eaton v. Price, 105 Ohio App. 376, 152 N.E.2d 776 (1957).

⁹ See note 3 *supra*.

¹⁰ 168 Ohio St. at....., 151 N.E.2d at 532.

¹¹ Including California; CAL. CONST. art. I, § 19. Another duplicate of U.S. CONST. amend. IV.

¹² See James Otis' denunciation of the Writ of Assistance: II THE WORKS OF JOHN ADAMS 523-25 (1850-56).

The framers of the fourth amendment considered that the traditional common law right of a citizen to be secure in his person and property, without a showing of good cause for invasion, required clear and unequivocal protection. They desired to preclude the use of unfettered governmental power to invade the homeowner's privacy. Their quarrel was with the *general* warrant, under which a search might be made with nothing but bare suspicion as basis for the intrusion. It was unencumbered by limitations as to times, places, or frequency of search.

While there is a well established line of federal decisions interpreting the fourth amendment as to unreasonable searches in purely criminal matters, the federal courts have dealt with this precise question on but one occasion.

In *District of Columbia v. Little*,¹³ a health inspector acting upon a neighbor's complaint was denied access to defendant's home. She simply stated that on constitutional grounds she would not unlock the door. She was tried and convicted of a misdemeanor in the municipal court for "hindering, obstructing and interfering with the inspector in the performance of his duty."¹⁴

The District of Columbia Municipal Court of Appeals reversed and its judgment was affirmed by the United States Court of Appeals, District of Columbia Circuit.¹⁵ A majority of the divided court found a paucity of cases on the inspection of private houses by such enforcement authorities. They reasoned that, if the worst criminal could enjoy his privacy unless a judicial officer decided that probable cause existed for an intrusion, certainly the average citizen should have no less a right.

The dissent took the view that the right of the citizen to be protected against unreasonable searches extends only to matters of a criminal nature; that an inspection under the police power for health and safety purposes is not the search proscribed by the fourth amendment; and that for the enforcement of health and safety codes "It has always been assumed that no search warrant is necessary."¹⁶

Somewhere in its argument, the dissent lost sight of the fact that violations of the District of Columbia Health and Safety Ordinances are made *misdemeanors* punishable by fines or imprisonment. They are therefore crimes.¹⁷ In the second place, the fourth amendment's protection does not end where crime is no longer being investigated. On the contrary, where no crime is involved the amendment in effect declares the principle that the citizen shall be secure in his home from governmental interference. Crime is the *only exception*, and for crime the fourth amendment provides the government with the search warrant remedy. To assume that no search warrant is necessary for cases where no crime is involved but some form of inspection is to be made is fallacious.¹⁸ In such cases the government must bring a civil action and rely on discovery procedures.¹⁹

The decision in the *Little* case is probably correct, since it recognizes the underlying purpose of the fourth amendment and refuses to curtail the protection it affords to the citizen against the invasion of his privacy. Upon review by the United States Supreme Court the *Little* case was affirmed, but the Court dodged

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

¹⁴ Administrative regulation promulgated by the commissioners of the District of Columbia pursuant to authority granted by Congress. Act of Feb. 26, 1892, 27 Stat. 394 (1892).

¹⁵ See note 13 *supra*.

¹⁶ 178 F.2d at 23.

¹⁷ BLACK, LAW DICTIONARY 444 (4th ed. 1951).

¹⁸ A search warrant will not issue in civil cases. *Robinson v. Richardson*, 79 Mass. (13 Gray) 454 (1859).

¹⁹ FED. R. CIV. P. 34; CAL. CODE CIV. PROC. § 2031.

the constitutional issue and held simply that defendant's actions were not such as could be construed to be an interference with an inspector in the performance of his duty.²⁰ There is consequently no Supreme Court interpretation of the fourth amendment on this point.^{20a}

Statutes which in effect confer the "general warrant" power on health and safety inspectors are on the books in California and its municipalities.²¹ For instance, San Francisco has a strictly written Municipal Code in which such provisions appear in different chapters:²²

Right to Enter Buildings: Authorized employees of the city departments or city agencies so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter at reasonable times any building, structure or premises in the city to perform any duty imposed upon them by the Municipal Code.

The Building Code, which is part of the San Francisco Municipal Code, has a similar provision, supplemented by a section authorizing the Superintendent of Public Works to secure police assistance in enforcing any part thereof.²³ Upon being asked if the San Francisco building inspectors had a standard operating procedure for effecting an inspection where entry was refused, an employee in the Building Inspector's Office told this writer: "If they don't let us in, we just call a cop." This procedure is apparently effective, but like many other effective actions does not conform to our traditional ideals of individual rights.²⁴

The constitutionality of these statutes has never been litigated in California. But if the trend in municipal redevelopment and regulation continues in the direction of stricter enforcement of already strict codes, the case is certain to arise. When this happens, the California courts will be faced with the same problem Ohio had in *State v. Price*: a choice between upholding these statutes on the grounds of police power or protecting individual civil liberties.

The argument in favor of unencumbered and almost unlimited inspection powers of health and safety enforcement agencies is that without an adequate enforceable inspection system no municipality can carry out programs for civic improvement. Urban redevelopment, slum clearance, rodent and disease control, and slum prevention are admittedly desirable ends.²⁵ Propounders of this point of view point out that were we to require a judicial order to permit inspection of private homes by health and safety enforcement agencies, we would be imposing on the judiciary the duties of administering such programs.²⁶

It is submitted that health and safety enforcement will not likely suffer if the constitutional civil liberties road is taken. While it is true that an adequate, sys-

²⁰ 339 U.S. 1 (1950).

^{20a} Since the printing of this note the Supreme Court, in a 5-4 decision, has held that a health inspector needs no warrant to make an inspection. *Frank v. Maryland*, 358 U.S. (1959). For the reasons stated, the writer feels that this decision is erroneous.

²¹ CAL. HEALTH AND SAFETY CODE §§ 15270, 15272.

²² SAN FRANCISCO, CAL., MUNICIPAL CODE, part II, ch. XII, § 503 (1958).

²³ SAN FRANCISCO, CAL., MUNICIPAL CODE, part II, ch. I, §§ 801, 802 (1956).

²⁴ Personnel in this office when asked if they had not thought that the householder might have a constitutional right to the privacy of his home under the unreasonable search provision, admitted that to them the idea was a novel proposition.

²⁵ For a general discussion of municipal inspection practices and administration of anti-slum programs see SEGAL & BROOKS, *SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION*, a report submitted to the subcommittee on Urban Redevelopment, Rehabilitation and Conservation of the President's Advisory Committee on Government Housing Policies and Programs (Nov. 1953).

²⁶ See dissenting opinion of Holtzoff, J., 178 F.2d at 23.

tematic inspection program is essential to the success of civic improvement, it need not infringe on the occupant's right of privacy nor unduly burden the judiciary. As a practical matter the inspector's access to private homes is quite broad. There is no legal objection to his entry in an emergency. The health officer chasing the rabid animal and the housing inspector surveying damage during a series of earthquakes have not time to procure authority to enter and need not do so.²⁷

We are concerned with the *routine* inspection. The *homeowner* is, in the first instance, likely to give his consent to the routine inspection. Either he accepts the inconvenience as a civic duty or feels that it is, like high taxes, a price that he must pay for living in an urban community. The *tenant* is rather unlikely to resist inspection. It is usually in his own interest to have the municipality require his landlord to make necessary improvements in safety and sanitation.

The building being constructed or undergoing obvious repairs hardly ever poses an inspection problem. The municipality generally requires a permit for such activity, express conditions of which include consent by the owner to inspection. If work is being carried on without permit and can be seen from the street, no inspection is necessary. Direct action may be taken against the owner administratively or through the courts for failure to get the permit.²⁸

Persons for whom an inspection is inconvenient at the moment will usually agree to make arrangements for a later time if the inspecting personnel are reasonable and considerate. Many objections of this type can be obviated by prior notice to householders of areas to be inspected and a display of a general public relations policy of service to the homeowner.

That the objector to inspection on constitutional grounds is a rarity is borne out by the novelty of the problem and the scant authority on it. The fact is that most occupants simply consent to inspection out of fear of entanglement in the municipality's bureaucratic machine.

In any jurisdiction where health and housing codes declare their violations to be crimes, the occasional constitutional objector can be easily confronted with a search warrant. Most inspection situations provide the inspector with ample grounds for swearing to the existence of probable cause to suspect code violations. For example, the area might be designated officially as blighted or earmarked for re-development; evidence of violations might be visible from the outside of the structure; the age of the building might show that there is good reason to believe it does not now conform to the codes;²⁹ or a complaint may have been lodged by a neighbor as in the *Little* case. In all these situations the inspector can make short work of obtaining a search warrant on his next trip to City Hall.

Apparently one of the very few serious problems that an enforcement agency might face will be the refusal of access by a constitutional objector in a non-blighted area, occupying premises that give no outward evidence of violation of the health and safety codes and against whom no complaint has been lodged. Inspectors would encounter such a person only in a systematic block by block, house by house routine inspection as in the *Price* case. *Here there is no right to make the inspection.* The federal and state constitutional prohibitions against unreasonable searches should apply and a search warrant denied until there are reasonable grounds to suspect code violations.

²⁷ 79 C.J.S., *Searches and Seizures* §8 (1952).

²⁸ See, e.g., San Francisco Central Permit Bureau form F 435.

²⁹ See *Rau v. Redwood City Woman's Club*, 111 Cal. App. 2d 546, 245 P.2d 12 (1952).