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CONSTITUTIONAL LAW-SEARCH AND SEIZURE -INSPECTION OF PRIVATE DWELLING BY HEALTH OFFICER WITHOUT A WARRANT

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CONSTITUTIONAL LAW — SEARCH AND SEIZURE — INSPECTION OF PRIVATE DWELLING BY HEALTH OFFICER WITHOUT A WARRANT—A health officer sought to enter and inspect respondent's private home without a search warrant after a neighbor complained that the premises were not "clean and wholesome" as required by a District of Columbia ordinance.[1] Respondent denied the officer permission to enter and refused to unlock the door, maintaining that his entry

[1] Regulation promulgated by Commissioners of District of Columbia (April 22, 1897) pursuant to authority granted by joint resolution of Congress. 27 Stat. L. 394 (1892). See principal case at 4, n. 2.

would violate her constitutional rights. As a result, respondent was convicted in municipal court of violating an ordinance making it a misdemeanor to interfere with or prevent an authorized sanitation inspection.[2] On appeal, reversal of the conviction by the Municipal Court of Appeals[3] was affirmed by the Court of Appeals for the District of Columbia[4] on the ground that the constitutional guaranty against unreasonable search and seizure made the ordinance invalid as applied to respondent. On certiorari, the United States Supreme Court, *held*, affirmed. Since a mere refusal by the occupant of a private dwelling to unlock the door does not amount to interference with or prevention of inspection within the meaning of the District ordinance, consideration of the constitutional issues is unnecessary. Two justices dissented.[5] *District of Columbia v. Little*, 339 U.S. 1, 70 S.Ct. 468 (1950).

The principal case leaves unanswered the question whether health and safety inspections of private dwellings may be conducted without search warrants consistent with the unreasonable search prohibition of the Fourth Amendment.[6] To avoid a decision on the far-reaching issue, the majority of the Court, speaking through Justice Black, was compelled to rest on a technical and somewhat tenuous ground of statutory construction which was ignored altogether by the courts below.[7] The bulk of judicial opinion implementing the Fourth Amendment is concerned with the admissibility in criminal trials of evidence obtained by means of "unreasonable" search and seizure.[8] From a long line of decisions beginning with the *Boyd*[9] case and culminating in the *Johnson*,[10] and *McDonald*[11] cases there has evolved the doctrine that any search without a warrant, except when incident to a lawful arrest,[12] is unreasonable in the absence of "ex-

[2] "That any person . . . interfering with or preventing any inspection authorized thereby, shall be deemed guilty of a misdemeanor, and shall, upon conviction . . . be punished by a fine of not less than $5 nor more than $45." Ibid.

[3] Little v. District of Columbia, (D.C. Mun. App. 1948) 62 A. (2d) 874.

[4] District of Columbia v. Little, (D.C. Cir. 1949) 178 F. (2d) 13; 63 HARV. L. REV. 349 (1949); 23 So. CAL. L. REV. 96 (1949).

[5] Justices Burton and Reed considered respondent's action to be a violation of the ordinance and punishable on the ground that such an inspection without a warrant, being of "a reasonable, general, routine, accepted and important character, in the protection of public health and safety," would not contravene the Fourth Amendment. Principal case at 7.

[6] The opinion of the court of appeals was the first to consider extensively the constitutional issue suggested by the principal case. District of Columbia v. Little, (D.C. Cir. 1949) 178 F. (2d) 13.

[7] Principal case at 4, n. 1.

[8] In general see: Mezansky, "The Battle of the Fourth Amendment," 20 PA. B.A.Q. 231 (1949); Doyle, "Unreasonable Search and Seizure," 37 ILL. B.J. 362 (1949); Waite, "Unreasonable Search and Research," 86 UNIV. PA. L. REV. 623 (1938).

Regarding the decided split of authority as to the admissibility in criminal trials of evidence obtained by means of illegal search, see collections of cases: 150 A.L.R. 566 (1944); 134 A.L.R. 819 (1941); 88 A.L.R. 348 (1934).

[9] Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886).

[10] Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948).

[11] McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191 (1948).

[12] United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950); compare Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229 (1948).

ceptional circumstances." It has been often repeated, but never actually decided, that the prohibition of the Fourth Amendment does not apply where entry and inspection of private dwellings is made in connection with non-criminal proceedings.[13] If the Fourth Amendment merely supplements the Fifth in setting forth the privilege against self-incrimination, perhaps such a distinction is sound.[14] It is doubtful, however, that the protection envisaged by the framers of the Fourth Amendment was intended to be limited by the Fifth; rather it seems likely that the creation of a separate and broad right of privacy was intended.[15] That such a right of privacy in the home should be protected from invasion when the purpose is to seize criminal evidence, but subordinated when only health and safety regulation is involved might seem somewhat absurd upon its face. It has been urged that inspections pursuant to local regulation are not "searches" within the meaning of the Fourth Amendment.[16] Whatever the basis in semantics for such a distinction, it does not appear well-founded in light of the historical purposes of the amendment. While logical arguments support the conclusion that the Fourth Amendment circumscribes all invasions of the privacy of the home, it may be argued that the approach is unduly doctrinaire. The basic conflict is one of policy. Requiring a warrant when officers are in search of evidence of crime does not seem an unreasonable burden on criminal law enforcement. But to require a warrant for every inspection to quell unsanitary conditions and fire hazards might well render local regulation ineffectual.[17] Here the privacy right appears comparatively less significant when balanced against the exigencies of the community. It has been clear since the leading case of *Hubbell v. Higgins*[18] that hotels and other public and quasi-public establishments may be subjected to routine inspection without a warrant. However, the decision is not persuasive authority for the applicability of a similar procedure in the inspection of private dwellings. The constitutionality of state statutes[19] which purport to authorize health inspections of private

[13] "The Fourth Amendment was intended and is to be construed to apply only to criminal prosecutions. . . . It does not apply to inspections, if no seizure is intended." Hortzoff, J. dissenting in District of Columbia v. Little, (D.C. Cir. 1949) 178 F. (2d) 13 at 22. Cf. Camden County Beverage Co. v. Blair, (D.C. N.J. 1930) 46 F. (2d) 648; United States v. Eighteen Cases of Tuna Fish, (D.C. Va. 1925) 5 F. (2d) 979.

[14] Historically, the adoption of the Fourth Amendment was probably prompted by the abusive use in colonial times of the general warrant. 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1902 (1891); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 364 (1890).

[15] Corporations are protected from "unreasonable search and seizure" by the Constitution despite the inapplicability of the self-incrimination clause. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182 (1920).

[16] See Mazanec v. Flannery, 176 Tenn. 125, 138 S.W. (2d) 441 (1940); State v. Armeno, 29 R.I. 431, 72 A. 216 (1909).

[17] That Congress apparently did not consider a warrant necessary for sanitation inspections is perhaps demonstrated by the fact that no procedure whatever is provided in the District of Columbia for obtaining such a warrant. Cf. Mass. Gen. Laws (1932) c. 111, §131.

[18] 148 Iowa 36, 126 N.W. 914 (1910).

[19] For example see Cal. Health and Safety Code (Deering 1945) §15270 et seq.; N.Y. Consol. Laws (McKinney 1943) Public Health Law, c. 45, §4 et seq.

homes without a warrant has been in jeopardy at least since *Wolf v. Colorado*.[20] In that case the Supreme Court indicated that the protection of the Fifth Amendment is incorporated in the due process clause of the Fourteenth Amendment, constituting thereby a restraint on state action.[21] A ruling by the Supreme Court on the important and far-reaching constitutional issues suggested by the principal decision must await a proper case.

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[20] 338 U.S. 25, 69 S.Ct. 1359 (1949).
[21] See 48 MICH. L. REV. 118 (1949); 30 BOST. UNIV. L. REV. 110 (1950).