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Constitutional Law--Search and Seizure--Right of Privacy of the Home

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by statute of an absolute privilege; (3) or the enactment of a statute granting a qualified privilege.

The storm of controversy that the principal case has fomented has found support for each of these several alternatives. In the tone of the policy discussion that has arisen around this case, which by now greatly overshadows the legal controversy involved, the writer, while subscribing to the correctness of the decision itself, would espouse the enactment of statutes granting the qualified privilege.

L. B. S.

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—RIGHT OF PRIVACY OF THE HOME.—Petitioner refused to permit a duly authorized municipal housing inspector to enter and make an inspection of his home pursuant to a housing standard ordinance of Dayton, Ohio. The ordinance provided for the inspection of dwellings at any reasonable hour to determine their condition for the purpose of safeguarding the health and safety of the occupants of dwellings and the general public. It also fixed a penalty for refusal to allow inspection. Petitioner was convicted of violating the ordinance and applied for a writ of habeas corpus, contending that the ordinance violated both the federal and state constitutional provisions against unreasonable search and seizure. The court of appeals denied the writ. *Held*, on appeal, that the city ordinance was a valid exercise of police power, and as such was not violative of the Ohio constitution prohibiting unreasonable searches and seizures. *State ex rel. Eaton v. Price*, 151 N.E.2d 523 (Ohio 1958).

The problem presented by the principal case is the conflict between the privacy of an individual in his home as guaranteed by constitutional provisions against unreasonable search and seizure and the police power of the municipality in the regulation of public health, safety and welfare. The maxim that "every man's home is his castle" has been fashioned as a part of the constitutional law of the United States by the fourth amendment and similar provisions against unreasonable searches and seizures in state constitutions.

"The basic premise of the prohibition against searches was not protection against self incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization." *District of Columbia v. Little*, 178 F.2d 13, 16 (D.C. Cir. 1949).

In the principal case the court held that a municipality in the exercise of its police power could inspect the dwellings of its citizens without first obtaining a search warrant and that a man's home is not a "castle" free and above the police power. The reasoning underlying the court's decision is that the police power of a municipality in regulating the general health and safety of the community overrides the right of a homeowner to the privacy of his home.

Previous decisions have gone so far as to permit municipalities to inspect private institutions and business premises for health purposes by holding that statutes authorizing such inspections do not contravene constitutional provisions against unreasonable searches and seizures. *Reinhart v. State*, 193 Tenn. 15, 241 S.W.2d 854 (1951); *Sister Felicitas v. Hartridge*, 148 Ga. 832, 98 S.E. 538 (1919); *Hubbell v. Higgins*, 148 Iowa 36, 126 N.W. 914 (1910). The effect of the court's decision in the principal case is to extend this proposition to the search of a private home.

As a rule, the search warrant is the only legal means which can be employed to search the premises of a private individual. Except in cases of extreme necessity, it is a judicial officer who is to decide when the right of privacy is to submit to the power to search. *Johnson v. United States*, 333 U.S. 10 (1948).

The precise point raised in the principal case was before the court in the *Little* case, *supra*. In that case the court held that an inspector of the health department could not enter an individual's home to make an inspection without a search warrant. The reasoning of the court was that it was unreasonable to invade a private home to inspect and control unsanitary conditions when there is adequate time to obtain a search warrant without endangering the public safety. The *Little* case, *supra*, indicated that, except for the most urgent necessities, a search warrant is required when the premises to be inspected are private homes and the circumstances present no immediate danger to the public.

Housing ordinances which set forth regulations for the maintenance of buildings are necessarily concerned with the health and safety requirements of buildings and these ordinances to be effective must be supported by adequate police power measures. *Richards v. Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955); *State v. Building Comm'n of Trumbull*, 135 Conn. 415, 65 A.2d 165 (1948); 25 GEO. WASH. L. REV. 1 (1956). However, while the police power

is broad in scope, it is not an unlimited power. It may not transcend constitutional limitations.

"A reasonable exercise of the police power is one required by public necessity, and a public necessity is the legitimate exercise of its power." 6 McQUILLIN, MUNICIPAL CORPORATIONS § 24.09, 460 (3d ed. 1949).

The court in the principal case, in reaching its decision, relied on the case of *Givner v. State*, 210 Md. 484, 124 A.2d 764 (1956), which held that an ordinance, reciting that inspection was necessary to combat growth of slum conditions, was not unconstitutional when the inspections were to be made at reasonable, daylight hours and were of a routine nature.

However, it would seem that in view of the firmness with which the right of a man to the privacy of his home has been established, the better view would be to protect this right in the absence of a clear necessity for its invasion. As was stated in the *Little* case, *supra*: "If an acute emergency occurs precluding reference to a court or magistrate, public officials must take such steps as are necessary to protect the public. But, absent such emergency, health laws are enforced by the police power and are subject to the same constitutional limitations as are other police powers. It is wholly fallacious to say that any particular police power is immune from constitutional restrictions." At 16. Thus, in balancing the power of a municipality to protect the health, safety and welfare of its citizens against the individual's right to the privacy of his home, the test of reasonableness now appears to be the deciding factor. It is submitted that considerations of health, safety and welfare of the community may require that a municipality be permitted to exercise the police power to its fullest extent. On the other hand, the privacy of the home has long been considered a most sacred right, one not to be hastily surrendered or chipped or frittered or worn away by the exigencies of the times. COOLEY, CONSTITUTIONAL LIMITATIONS 73 (8th ed. 1927).

A. G. H.

MUNICIPAL CORPORATIONS—TAXATION—VALIDITY OF LICENSE AND USE TAXES ON PUBLIC UTILITY.—Upon expiration of P's public utility franchise for telephone services in a municipality, the utility continued to use and occupy the city streets for its telephone facilities and equipment. Five of P's employees were arrested by the municipi-