Washington Law Review

Volume 41
Number 3 *The Common Market—A Symposium; Annual Survey of Washington Law*

6-1-1966

Constitutionality of Civil Inspection Without Warrant or Probable Cause

anon

a "contested case." Since the two former methods would require the bringing of a suit to determine whether the APA applies to the Board, doubt can best be resolved by the legislature acting to bring the actions of the Liquor Control Board unambiguously within the provisions of the APA.

CONSTITUTIONALITY OF CIVIL INSPECTION WITHOUT WARRANT OR PROBABLE CAUSE

The Seattle Municipal Code requires intermittent inspections by the fire chief of nonresidential buildings for the purpose of discovering and correcting fire hazards.[1] Pursuant to the Code, an inspector, without a search warrant and without cause to believe that a fire hazard existed, sought entry into defendant's locked warehouse. Upon his refusal to allow entrance, defendant was tried and convicted for failing to submit to a fire inspection.[2] On appeal, the conviction was affirmed. *Held:* The fourth amendment's prohibition of unreasonable search and seizure is not violated by a conviction for refusal to permit entrance into a commercial building for purposes of a fire inspection authorized by a municipal ordinance, even though the inspector does not have a search warrant or probable cause to believe that a fire hazard exists. *City of Seattle v. See*, 67 Wash. Dec. 2d 465, 408 P.2d 262 (1965).

The adage that prevention is better than cure has prompted municipalities to employ building inspections to detect and minimize hazards created by increased urbanization. That such a practice may raise fourth amendment questions concerning rights of privacy is well illustrated by the United States Supreme Court's divided attitude toward the status of these inspections.[3] The principal case represents the first consideration in Washington of this conflict between public de-

[1] SEATTLE, WASH., MUNICIPAL CODE § 8.01.050 (1959).

[2] SEATTLE, WASH., MUNICIPAL CODE § 8.01.050 (1959) provides that the fire chief may enter all buildings, other than residences, for the purpose of inspections. Section 8.01.140 provides that anyone who fails to comply with any provision of the fire code shall be subject to certain criminal penalties. While no provision expressly requires a building owner to permit an inspector's entry, the case proceeded on that assumption. For a contrary ruling on this question, see City of St. Louis v. Evans, 337 S.W.2d 948 (Mo. 1960).

[3] Frank v. Maryland, 359 U.S. 360 (1959), was a 5-4 decision, while Ohio *ex rel.* Eaton v. Price, 360 U.S. 246 (1959), was affirmed by an equally divided court. It has been frequently suggested that personnel changes on the Court would result in contrary decisions if those cases were now presented. See, *e.g.*, Comment, 11 VILL. L. REV. 357, 368-69 (1966).

mands for prevention through inspections and individual rights of privacy.[4]

The court recognized that the inspection involved in the principal case differed from inspections which had been upheld in its former decisions, since the warehouse in question did not constitute a regulated activity.[5] Relying heavily on *Frank v. Maryland*[6] and *Ohio ex rel. Eaton v. Price*,[7] the court reasoned that administrative inspections could be conducted without a search warrant or probable cause, even though the inspected premises were not otherwise regulated, because of the fundamental distinction between regulatory inspections and those involved in criminal law enforcement. Following the rationale of *Frank* that the fourth amendment's primary area of application is to criminal searches and seizures, the court noted that, in this case, "there was no threat of criminal penalty even if fire hazards were detected,"[8] so that constitutional safeguards were less stringent. The court also emphasized that *Frank* and *Eaton* were concerned with inspections of private dwellings, while the principal case dealt with a commercial building, suggesting that even the dissenters in *Frank* would have applied a different standard under these circumstances. From these propositions the court balanced the conflicting interests and concluded that the need for routine fire inspections, for which probable cause for the issuance of a warrant could not ordinarily be established, outweighed the warehouse owner's right of privacy and thereby met the reasonableness requirement of the fourth amendment.

That fourth amendment protection extends to commercial establishments in criminal cases is beyond question.[9] In such instances, nothing less than a search warrant issued upon probable cause, or a search incident to a valid arrest, will satisfy the amendment's requirements.[10] When the immediate purpose of the search, however, is not to acquire

[4] In Kelleher v. Minshull, 11 Wn. 2d 380, 119 P.2d 302 (1941), civil inspection of small loan business records pursuant to a state statute was upheld against a challenge under the *state* constitution. WASH. CONST. art. I, § 7 does not require probable cause or a warrant. *Kelleher* preceded Wolf v. Colorado, 338 U.S. 25 (1949), which made the fourth amendment's prohibition against unreasonable searches and seizures applicable to the states.

[5] See State v. McFarland, 60 Wash. 98, 110 Pac. 792 (1910) (inspection of hotels); Kelleher v. Minshull, *supra* note 4 (inspection of small loan business records). Arguably, all businesses are regulated activities since they are required to comply with numerous requirements, *e.g.*, zoning, taxing, and labor regulations.

[6] 359 U.S. 360 (1959).

[7] 360 U.S. 246 (1959).

[8] 67 Wash. Dec. 2d at 474, 408 P.2d at 268.

[9] *E.g.*, Davis v. United States, 328 U.S. 582 (1946); Gouled v. United States, 255 U.S. 298 (1921).

[10] *Compare* Preston v. United States, 376 U.S. 364 (1964), *with* United States v. Rabinowitz, 339 U.S. 56 (1950).

evidence for criminal prosecution, but rather to inspect for fire hazards, the probable cause requirement assumes a different perspective. While judicial reaction to attempted searches during the infancy of administrative agencies was predictably hostile,[11] courts relaxed their application of the fourth amendment to administrative investigations as recognition of the necessity for active government increased.[12] Judicial acquiescence in legislative exercises of police power, particularly over economic matters, had generally left commercial privacy protected only by a required showing of reasonableness of the legislative judgment.[13] That this has become a substitute for probable cause and a warrant does not, however, signify the demise of fourth amendment application to civil inspections of commercial establishments. Legislative reasonableness may constitute probable cause,[14] and statutory authority to inspect may constitute a warrant,[15] but the issue of reasonableness as applied to a *particular* inspection, an issue not discussed in the principal case, necessarily remains a judicial question.[16] As Justice Douglas observed, "history shows that all officers tend to be officious . . . ."[17] The requirement of reasonableness, as announced in the principal case, must still be determined upon the facts

[11] In FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924), Justice Holmes said, "It is contrary to first principles of justice to allow a search . . . in the hope that something will turn up." See generally 1 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.05-.06 (1958).

[12] See, *e.g.*, United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

[13] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); United States v. Kanan, 225 F. Supp. 711 (D. Ariz. 1963). For a discussion of the historical recognition of needed protection from unreasonable searches and seizures, even in the absence of criminal jeopardy, see Comment, 44 MINN. L. REV. 513, 521-27 (1960).

[14] The court in the principal case observed that probable cause, in the ordinary context, could not normally be established for civil inspections. 67 Wash. Dec. 2d at 475, 408 P.2d at 268. In Comment, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 COLUM. L. REV. 288 (1965), it is suggested that search warrants for civil inspections would be of dubious value and would merely result in a dilution of the probable cause requirement.

[15] See Camara v. Municipal Court, 237 Cal. App. 2d 136, 46 Cal. Rptr. 585 (Dist. Ct. App. 1965), *appeal docketed*, 34 U.S.L. WEEK 3335 (U.S. Mar. 29, 1966) (No. 1139); City of St. Louis v. Evans, 337 S.W.2d 948 (Mo. 1960). WASH. REV. CODE § 35.22.280(24),(31),(36)(1965), contain the statutory authority for enactment of municipal ordinances necessary for public health and safety, and authorizes prescribing of penalties for violations.

[16] See Way, *Application of the Fourth Amendment to Civil Proceedings*, 14 FOOD DRUG COSM. L.J. 534, 545-46 (1959):

> [T]he distinctions between civil proceedings to which the government is a party and criminal proceedings obscure the fundamental question of whether the government has committed an unreasonable search and seizure. . . . In the interest of the government as well as the individual, the government must have the power to undertake civil proceedings in these areas. This power, however, does not need to carry with it any right to proceed in a lawless fashion.

[17] Frank v. Maryland, 359 U.S. 360, 382 (1959) (dissent).

by considering the time and circumstances of inspection, evidence of official harrassment, and the relation of a particular inspection to the statutory authority relied upon.[18]

A more difficult question presented by the principal case relates to the possible use of knowledge gained by an inspector for a subsequent criminal prosecution. The court considered this issue as prematurely presented and refused to decide it, but any determination of the validity of a given inspection process must cope with this problem.[19] The ordinance provides that, upon discovery of a fire hazard, the fire chief "shall order such dangerous conditions or material to be removed or remedied in such manner as may be specified."[20] For the city's fire prevention program to be effective, it will then be necessary to conduct a follow-up inspection to determine compliance with such an order. While the ordinance makes no distinction between these inspections, it would seem that the second inspection is actually a search for criminal evidence for which the fourth amendment compels a search warrant,[21] since noncompliance may result in prosecution.[22] The evidence of probable cause required for issuance of the warrant would have to be derived independently of knowledge gained during the first inspection. An assertion that substandard conditions were observed previously, and that the inspector desired to determine whether or not they had been corrected as ordered, would be insufficient to constitute probable cause, since the assumption that the owner had complied would be just as reasonable as the assumption that he had not.[23]

While civil inspections of commercial buildings may be constitutionally valid without a warrant or probable cause, there remains the need for a rule to bar from collateral use evidence of criminality observed during the inspection. The objective of inspection is to correct fire hazards deemed dangerous to public health and safety, and the use of evidence for criminal prosecution unrelated to the authorizing ordinance's purpose would be in excess of that authority. The development of an exclusionary rule for such evidence is necessary to avoid transforming a limited inspection authority into a general war-

[18] Comment, *Administrative Searches and the Fourth Amendment*, 30 Mo. L. REV. 612, 614 (1965).

[19] It might be argued that the first inspection, being the initial step in a series of events which may culminate in prosecution, requires official compliance with the probable cause and warrant requirements of the fourth amendment. Such an argument is, of course, inconsistent with *Frank*.

[20] SEATTLE, WASH., MUNICIPAL CODE § 8.01.060 (1959).

[21] 34 WASH. L. REV. 437 n.6 (1959).

[22] Everett v. Unsworth, 54 Wn. 2d 760, 344 P.2d 728 (1959).

[23] See Note, 108 U. PA. L. REV. 265, 273-74 (1959).

rant and thereby circumventing the requirements of the fourth amendment.[24]

SUFFICIENCY OF PROOF TO ESTABLISH IMPLIED CONTRACT

Plaintiffs, husband and wife, brought suit against decedent's estate for specific performance of an oral contract to convey or devise real property in return for personal services. An alternative claim asked for the reasonable value of services rendered and expenses paid by plaintiffs in decedent's behalf, and at his request, during the three years preceding his death. Plaintiff wife served as decedent's nurse, housekeeper and occasional provider during this period.[1] Plaintiff husband performed various odd jobs at decedent's request.[2] Throughout this period, plaintiffs received no compensation beyond infrequent use of decedent's lake cabin. Two witnesses testified that decedent told them that he intended to give his lake property to plaintiffs. Decedent's will, however, devised the property to a great-great-niece. At the close of plaintiffs' uncontroverted evidence, the trial court granted defendant's motion to dismiss, apparently for failure to establish a prima facie case.[3] Plaintiffs conceded a failure of proof on their claim for specific performance and appealed only the order dismissing their claim for reasonable value of services. A divided court reversed and remanded for a new trial. *Held:* Clear, cogent and convincing evidence that personal services which were requested and rendered with expectation of compensation is sufficient to imply, in fact, a

[24] See Comment, 11 VILL. L. REV. 357, 363-66 (1966). The adumbration of such a rule can be found in People v. Laverne, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (Ct. App. 1964), in which the court held that evidence of criminal violations observed by an official conducting a valid inspection was inadmissible. *But see* State v. Rees, 139 N.W.2d 406 (Iowa 1966).

[1] Among other duties, plaintiff wife prepared decedent's meals, did his washing, occasionally purchased his supplies with her own funds, provided automobile transportation without remuneration for gasoline, kept house, canned food for him, and cared for his six cats. Decedent was quite ill and suffered serious elimination problems, making plaintiff's work most unpleasant and difficult.

[2] These odd jobs included furnace, electrical, and plumbing repairs, and cutting and hauling firewood.

[3] "[I]t appears the motion for dismissal was granted on the ground that treating the plaintiffs' evidence as true it was insufficient to establish a prima facie case. We thus may review the record to determine whether there is sufficient evidence or reasonable inferences therefrom to establish a prima facie case for plaintiffs." Jacobs v. Brock, 66 Wash. Dec. 2d 865, 869, 406 P.2d 17, 19 (1965). The dissent disagreed, contending that the lower court had weighed the evidence, and chastised the majority for making its own finding of fact.