

RIGHTS OF ENTRY IN ADMINISTRATIVE OFFICERS

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THE MAN on the London omnibus shares at least one complaint with his counterpart on any American conveyance; the subjection of each in his home or business premises to the periodic entry of a variety of public officials. Those who wish to inspect, those who come to survey and to measure, and those who want to carry out works under the land, build an erection upon the land, raze an existing erection, or compulsorily purchase land and buildings—they are all surely a shared inheritance.

In this important field, however, English law is by no means consistent or clear, and it is for this reason that the closely divided decision of the Supreme Court in *Frank v. Maryland*¹ is of particular interest to an English lawyer. It will be recalled that in that case the Court upheld the right of a health inspector to enter a private house without a warrant, rejecting the occupier's contention that under the Fourth and Fourteenth Amendments he was entitled to the production by the inspector of a search warrant.

Acting under section 120 of article 12 of the Baltimore City Code, a city health inspector, having received a complaint from a householder of rats in her basement, knocked on the door of the appellant's detached house, and, receiving no answer, searched the exterior of the premises where he found a large pile of rotting matter containing rodent feces. During this inspection the appellant came out of the house, asked why the inspector was there, and refused entry by the inspector into the house. Next day the inspector returned with two police officers, and, receiving no response to his knocking, again searched the exterior area, and then swore out a warrant for the appellant's arrest. Section 120 imposes a fine for every refusal or delay in admitting an inspector to inspect any premises, and the appellant was duly convicted and fined. He appealed to the Criminal Court of Baltimore, but was again found guilty in a de novo action, and the Supreme Court of Maryland refused certiorari. The appellant now challenged section 120 on the grounds that a conviction under it would be in contravention of the Fourth and Fourteenth Amendments.

A foreign observer would not assume to appraise the merits of the Court's, or the dissent's, interpretation of the American precedents, or the accordance

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¹ 359 U.S. 360 (1959).

of this right of entry with the terms of the American Constitution, but on this occasion both the Court and the dissent made reference to English law. In the result the judgments appear to have drawn different conclusions on its meaning, and the dissent was able to quote English law in direct support of its argument. It will be the object of this note to examine the law which gave rise to this divergence of viewpoint.

THE INTERPRETATION OF *ENTICK V. CARRINGTON*

It was the interpretation to be put upon Lord Camden's decision in *Entick v. Carrington*,² which principally divided the Justices. This decision of 1765 is, of course, one of the milestones of English constitutional history. It draws that reputation, together with *Wilkes v. Wood*³ and *Leach v. Money*,⁴ from its part in the long drawn out struggle of the courts and Parliament with the Crown. These cases effectively mark the close of the Crown's contention that its prerogative is part of the common law, and that that prerogative permits action denied to others. In this case the Secretary of State, the Earl of Halifax, had personally issued a warrant requiring the arrest of the plaintiff, and that the plaintiff should be brought "with his papers to be examined before the secretary of state."⁵ In fact, as Lord Camden pointed out, this warrant went further than any "superintendence over the press" carried out by the Star Chamber, after 1641 through ordinance by the Long Parliament, or by the Secretary of State under the Licensing Act of Charles II's reign. Those procedures merely permitted the search for, and seizure of, suspected criminal libels; this was a power to seize all papers whether criminal or civil. No justice of the peace had such a power, and Lord Camden directed his thought to every possible root which might justify the Crown's personal claim. The incentive was considerable for such an inquiry. "The search in such cases will be general, and every house will fall under the power of a secretary of state to be rummaged before proper conviction."⁶

Crown prerogative and state necessity were each considered and rejected, and finally Lord Camden turned to the "argument of utility, that such a search is a means of detecting offenders by discovering evidence." "There is no process against papers in civil causes," and equally "in the criminal law such a proceeding was never heard of," though in fact there were crimes which were "more atrocious" than libelling.⁷

In *Frank v. Maryland* Mr. Justice Frankfurter (for the Court) spoke of two constitutional protections. The first was the right of personal privacy, and the second the right of self-protection. The second was invoked in *Entick v. Carrington*—"evidence of criminal action may not, save in very limited and

² 19 How. St. Tr. col. 1029 (K.B. 1765).

³ 19 How St. Tr. col. 1153 (K.B. 1763).

⁴ 19 How. St. Tr. col. 1001 (K.B. 1765).

⁵ 19 How. St. Tr. at 1063.

⁶ *Id.* at col. 1071.

⁷ *Id.* at col. 1073.

closely confined situations, be seized without a judicially issued search warrant."⁸ To Mr. Justice Douglas (for the dissent), however, privacy and protection against self-incrimination, together with "conscience and human dignity and freedom of expression," all found their earliest teaching in *Entick v. Carrington*. "It was in the setting of freedom of expression that Lord Camden denounced the general warrants."⁹ Looked at from this angle, *Entick v. Carrington* was not to be taken as restricted to the issue of the search for evidence to be used in criminal prosecutions.

It is always more difficult to assess the "setting" of a case than the principle which it establishes, but, with respect to the dissent, it may be misleading to suggest that a case is authority for anything more than the ratio decidendi. While it is true that the seventeenth and eighteenth centuries provided a period of major constitutional decisions when the challenges to the common law were varied and powerful, *Entick v. Carrington* merely decided that, as the common law withheld from all the right to search for and seize evidence to support a civil action, so it withheld from Crown and commoner a similar right in relation to a criminal prosecution—in particular, the utterance of a libel.¹⁰ Indeed, even in approaching this conclusion Lord Camden felt bound to qualify; "the cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good."¹¹

It is to be noted that, despite the social and constitutional background of 1765, his Lordship admitted limits to the right of property, and legitimate methods for its invasion. "That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole." Otherwise than in the cases mentioned, "the justification [for entry] is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principle of common law."¹² The statute was the instrument of a now sovereign Parliament, and interpretation of the common law was a matter for the judges alone. To the eighteenth century judge Parliament and the judges could be motivated only by thoughts of the common good; it was the Crown whose assumptions of power boded ill for the body politic.

But, whatever the significance of Lord Camden's concessions, the truth of the matter is that he and his contemporaries could not foresee the vast

⁸ 359 U.S. 360, 365 (1959).

⁹ *Id.* at 376.

¹⁰ It is implicit in Lord Camden's ruling that the would-be, or actual, plaintiff in a civil action had no right to search for, and seize, evidence on the defendant's property. It was no doubt Lord Camden's words on this matter which Mr. Justice Douglas had in mind, when he spoke (*Id.* at 377.) of the Fourth Amendment having "a much wider frame of reference than mere criminal prosecutions."

¹¹ 19 How. St. Tr. at col. 1066.

¹² *Ibid.*

extent to which legislation was to become the medium of reform in the nineteenth century, nor did they envisage a situation where statute law would come to overlay large tracts of the common law.¹³ The economic theories and the social legislation advocated by Bentham and his supporters ultimately produced a situation where it was evident that the law would have to insert itself into every field of human affairs, and in this way the State became a Leviathan whose interests often failed to coincide with those of the individual. As Professor Lloyd has recently said,¹⁴

Increasingly from the middle of the nineteenth century the law reformers, though inspired by Bentham, abandoned doctrinaire *laissez faire* and came to recognise the socially beneficent function of legislation in practically every sphere of human activity. . . . And with the recognition that the law may be required in the interests of society to intervene at almost every point of human activities grew the realisation that not only was there no automatic solution of human conflicts by the merger of the individual in the common interest, but that on the contrary perhaps the fundamental problem of our times was the clash between the public interest and the interests of the individual citizen.

In a sense, however, the State has taken the place of the Crown, and the old constitutional cases still have importance in their reiteration of the primacy of the individual in the common law. But how much further do they go? Power is no longer seated in an hereditary Crown, armed to the teeth with prerogative, but in an omnipresent machinery of government claiming a *raison d'être* in the will of the majority. "The fundamental problem" of this age might also be described as the increasing remoteness of the governed from the processes of democratic government, and the attendant consignment of the individual to an even more remote periphery. Interestingly enough, an English lawyer would barely see the relevance of *Entick v. Carrington* to the solution of this sophisticated problem.¹⁵

ENGLISH STATUTORY RIGHTS OF ENTRY

In the field of public rights of entry English law could hardly be said to have attempted a solution of this problem. In a recent paper delivered in London,¹⁶ the present writer analysed the various statutory rights of entry possessed by official persons. The conclusion was that since the mid-nineteenth century *ad hoc* rights of entry have been attached to each statutory measure

¹³ It is very much a question whether Lord Camden would have accepted unequivocally the justification of statute had he foreseen this development.

¹⁴ LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY, 102-03. (London: Stevens & Sons, Ltd.: 1959). A lecture on "The Law of Associations."

¹⁵ The justification of statute, which Lord Camden conceded, now provides the problem, and in 1959 such a concession is clearly untenable. *The Times'* Washington Correspondent, reporting *Frank v. Maryland* (May 14, 1959), said, "The court's ruling and the dissent, rhetoric aside, do not seem in fact to be far apart." This may be an example of the English attitude in this respect towards *Entick v. Carrington*.

¹⁶ 11 CURRENT LEGAL PROBLEMS, 132 (London: Stevens & Sons, Ltd.: 1958).

imposing new duties upon the public official, so that today the private occupier is faced with a bewildering number of persons claiming a variety of rights. The English occupier¹⁷ has no immediate opportunity of recognising the would-be entrant since uniformed police fulfill only some of the official roles, and, since there exists no uniformity of authorising document, he has little means of recognising a valid authority. Moreover, though he is sometimes entitled to notice of a forthcoming claim to enter, the period of notice differs from Act to Act, and sometimes, even when notice could be given, the Act entitles him to none. The prevailing practice is for notice, if any, to be given to the occupier only. Should not the owner also be informed if he is another person, and work is to be done on the land? And what should compensation cover—disturbance or only damage done? Here again Acts of Parliament are in no way consistent.

Indeed, even since that paper was delivered, further Acts have continued this process of *ad hoc* rights of entry, and to the English reader of the dissenting judgment in *Frank v. Maryland* the notion that English law is “conscious of civil liberties” in this respect can cause a wry smile. A glance at the recent legislation will reveal why this is so.

The Land Drainage (Scotland) Act, 1958,¹⁸ makes provision for the drainage of agricultural land, and the Secretary of State for Scotland is enabled to make orders for drainage schemes on the application of owners of agricultural land. In this Act a right of inspection and surveying is given to “any person authorised by the Secretary of State”; the entrant is required to produce “some duly authenticated document” if authority is sought, and the occupier (and he alone) is to be given fourteen days’ notice of intended entry. However, the Land Powers (Defence) Act, 1958, which revises the powers of the military authorities in the use of land for manoeuvres, approaches the matter in its own fashion. Under section 21(1) any Minister concerned may dispatch “any person duly authorised in writing” to enter and survey, but this subsection is not to derogate in any way from any other right of entry conferred by the Act. So that, if under section 9(3) the entrant wishes to enter and survey in connection with highway construction, the occupier will be faced with “any person authorised in that behalf by the Minister of Transport and Civil Aviation or a local authority.” In effect, therefore, there may be as many forms of document for this purpose as there are local authorities.¹⁹ And again under section 10(3) the entrant is only nebulously “authorised in that behalf by the Minister” though he is thereby empowered to remove trees, poles, and other such objects on the land. Notice provisions are also different. The Act requires seven days’ notice of intended entry to be given, but when the power “to search and bore” is involved twenty-eight days’ notice is required.²⁰ Except that, and beyond

¹⁷ Including Welsh and Scottish.

¹⁸ Section 11.

¹⁹ Plus one—the Ministry’s document.

²⁰ Fourth Schedule, para. 1 and Proviso.

cases of emergency, where inspection of, or work on, oil pipe-lines is concerned, seven days' notice is sufficient.²¹ It is worth noticing, too, that in all cases²² this Act is concerned only with the occupier. Moreover, the Land Drainage Act makes no mention of compensation, while the Land Powers Act gives compensation for disturbance and damage done.²³

Nevertheless, the reader of the dissent in *Frank v. Maryland* may well remark that Mr. Justice Douglas was merely concerned to observe that the English Public Health Act, 1936, requires a warrant in the hands of the would-be entrant if his entrance should be opposed. The Baltimore City Code does not, and Americans "cannot do less and still be true to the command of the Fourth Amendment."²⁴

Indeed, if attention were given to this subject, many in England and Scotland would agree that section 287 of the Public Health Act, 1936, provides a useful pattern for legislation conferring rights of entry. Subsection 1 permits "any authorised officer of a [local] council, on producing, if required, some duly authenticated document showing his authority" to enter and inspect or carry out authorised work on the premises, and, in the case of premises other than a factory, workshop, or workplace, the occupier must be given twenty-four hours' notice. It is arguable, of course, that this period of notice is very short, especially if work is to be carried out upon the premises, and such criticism is reflected in later legislation.²⁵ But it is also arguable that the shortcomings of this subsection are recompensed in the next. Under subsection 2 the occupier is entitled to refuse entry. In this event, or if his refusal is apprehended, notice of the intention to apply for a warrant must be given to the occupier, and such notice can only be dispensed with if it would defeat the object of entry, the case is urgent, the premises are unoccupied, or the occupier is temporarily absent. The local authority must then provide a justice of the peace with sworn information in writing. However, before he can issue a warrant authorising, if necessary, forcible entry, the justice must be satisfied that there is "reasonable ground for entry into any premises for any such purpose" as is defined in subsection 1.

This machinery was intended to provide a uniform code in respect of entry for all the purposes of the 1936 Act,²⁶ and it replaced specific powers of entry scattered throughout a number of statutory provisions which were repealed and replaced by the 1936 Act.²⁷ As a code it attracted support, and, despite

²¹ Land Drainage (Scotland) Act, 1958, §15(1).

²² Except Land Drainage (Scotland) Act, 1958, Fourth Schedule, para. 3.

²³ *Ibid.*

²⁴ 359 U.S. at 384.

²⁵ *E.g.*, Electricity Act, 1957, 5 & 6 Eliz. 2, c. 48, §35(2).

²⁶ Sections 191, 241, and 255 were in fact excepted from the operation of §287.

²⁷ Public Health Act, 1875, §§41, 102, 137, 305; Public Health (Water) Act, Act, 1878, §§3, 7; Public Health Acts Amendment Act, 1890, §36; Public Health Acts Amendment Act, 1907, §§41, 66.

the numerous statutory precedents for right of entry without warrant, a section on very similar lines was adopted in the Food and Drugs Act, 1938.²⁸ This section was the parent of the present almost identical section in the current Food and Drugs Act, 1955.²⁹ In 1945 a Water Act was passed which provided for the conservation and use of water resources. This Act also reproduced section 287(2) of the Public Health Act, 1936.³⁰ Again the parent inspired the child, and the reproduction was explicitly applied to the Water Act, 1948.³¹ Finally, in 1956 the machinery of section 287 was imported into the provisions of the Clean Air Act,³² a measure which was designed to introduce zones where air pollution would be an offence.

One might imagine from the very diversity of measures into which section 287(2) has been introduced that the policy of that subsection has been commonly applied at least since 1936, but these Acts are in fact an exception to the rule. (Since 1946, for instance, at least seventeen statutes still in force have conferred rights of entry upon various public officials without requiring in any circumstances the necessity of a magistrate's warrant.³³) The Land Drainage (Scotland) Act and the Land Powers (Defence) Act, both of 1958, are but two very recent examples. Indeed, there is even a particular trend against the 1936 Act provision, for the Water Act, 1958, which confers powers upon officials to meet deficiencies of water due to rain shortage, fails to require a warrant though, as here pointed out, other water measures have included it. Why Parliament has not been consistent in this matter has never, to the writer's

²⁸ Food and Drugs Act, 1938, 1 & 2 Geo. 6, c. 56, §77(2) (amended by Food and Drugs Amendment Act, 1954, 2 & 3 Eliz. 2, c. 67, §36(1) and (2), Third Schedule, Fourth Schedule, and §29(3)).

²⁹ Food and Drugs Act, 1955, 4 & 5 Eliz. 2, c. 16, §100(2).

³⁰ Water Act, 1945, 8 & 9 Geo. 6, c. 42, §48(3).

³¹ Water Act, 1948, 11 & 12 Geo. 6, c. 22, §8(2).

³² Clean Air Act, 1956, 4 & 5 Eliz. 2, c. 52, §§31 and 32; Third Schedule, pt. 1, para. 1.

³³ Building Restrictions (War-Time Contraventions) Act, 1946, 9 & 10 Geo. 6, c. 35.

Fire Services Act, 1947, 10 & 11 Geo. 6, c. 41.

Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 8.

Agriculture Act, 1947, 10 & 11 Geo. 6, c. 48.

Civil Defence Act, 1948, 12 & 13 Geo. 6, c. 5.

Requisitioned Land and War Works Act, 1948, 11 & 12 Geo. 6, c. 17.

National Parks and Access to the Countryside Act, 1949, 12, 13, & 14 Geo. 6, c. 97.

Civil Aviation Act, 1949, 12 & 13 Geo. 6, c. 67.

Diseases of Animals Act, 1950, 14 Geo. 6, c. 36.

Mineral Workings Act, 1951, 14 & 15 Geo. 6, c. 60.

Heating Appliances (Fireguards) Act, 1952, 15 & 16 Geo. 6 and 1 Eliz. 2, c. 42.

Town and Country Planning Act, 1954, 2 & 3 Eliz. 2, c. 72.

Electricity Act, 1957, 5 & 6 Eliz. 2, c. 48. (N.B. This Act must probably be read

in the light of the Rights of Entry (Gas and Electricity Boards) Act, 1954, 2 & 3 Eliz. 2, c. 21; but there has as yet been no decision on this point).

Land Drainage (Scotland) Act, 1958.

Land Powers (Defence) Act, 1958.

Water Act, 1958.

knowledge, been explained. No solution appears in the type of measure to which the machinery of section 287 is or is not applied. It might be argued that entry into the private dwelling house attracts section 287, but several of the no-warrant Acts involve entry into the dwelling house, while the Food and Drugs Act, where a warrant can be required, is mostly concerned with business premises. It is also possible that it is no coincidence that eleven of the no-warrant Acts were passed during the first six years after the Second World War when the political party in power was fully occupied with major measures of social reform. But this does not explain the continuance of the practice thirteen years after the War, and under a party of the opposite political complexion, whose predecessors introduced the 1936 Act.

The answer may well lie in the *ad hoc* nature of statutory rights of entry. The legislature's attention is absorbed with the major aspects of the particular measure under review, and what are often the concluding "general and supplementary" clauses attract little attention. But Parliament can feel strongly about this matter. In *Grove v. Eastern Gas Board*³⁴ the Court of Appeal decided that the statutory right of entry in issue was a right of forcible entry, though no warrant was needed. A storm arose on the backbenches of the House of Commons, and the result was a Private Member's Bill which was eventually passed as the Rights of Entry (Gas and Electricity Boards) Act, 1954. Henceforth, except in an emergency (which was defined), these boards were only to enjoy a right of forcible entry if the entrant possessed a magistrate's warrant.

Apart from the 1954 Act provisions, however, localised as they are, those Acts which require warrants seem merely to have acquired this feature quite by chance at some time in the past, and subsequent repeals and re-enactments on the subject have simply perpetuated familiar and uncontroversial features. Section 287 of the Public Health Act, 1936, can be traced back to section 143 of the first major Public Health Act of 1858. And there is a long history to section 48 of the Weights and Measures Act, 1878, which requires the inspector of weights and measures to be armed with a warrant.³⁵ The courts have decided³⁶

³⁴ *Grove v. Eastern Gas Board* [1951] 2 All E.R. 1051 (C.A.).

³⁵ This section was invoked in *Creasy v. Hoskins*, *The Times*, July 31, 1953. The inspector called at the appellant's farm and asked to inspect the appellant's weights and measures. The inspector introduced himself, but the appellant told him to go away and make an appointment, whereupon the inspector attempted to explain that the object of the Act would be ruined if appointments had to be made. The appellant did not ask to see the inspector's warrant, nor was he shown it; instead the appellant interrupted the inspector's explanations and slammed the door in his face. This event was followed by the appellant's conviction for failure to produce for inspection his weights and measures and in this appeal he claimed that an appointment must be made. He got short shrift from the Divisional Court of the Queen's Bench Division. During argument Lord Goddard, then Chief Justice, remarked in his typical fashion, "This is Magna Carta and the Bill of Rights, hoisting the Union Jack over the farm and everything else; it is all rubbish, is it not? The appellant said that the inspector must make an appointment and slammed the door, and now he takes the point that the inspector did not produce his warrant." In giving judgment, his Lordship discussed the object of §48, noted that the magistrates had fined the appellant £5, and remarked in closing, "It served him right."

³⁶ *Hutchings v. Reeves and Boxall*, 9 M. & W. 747 (Ex. 1842).

that this warrant may be general in the sense that it make no specific reference to premises or person, and the explanation of this surprising feature is that it stems from an ancient jurisdiction. Prior to 1878 the inspector was appointed by all the justices of the county assembled at quarter sessions, and a magistrate would subsequently confer upon the inspector a magistral jurisdiction. As Lord Abinger said in *Hutchings v. Reeves*, "It was intended to give him the same authority and supervision that the leet jury had before; and they did not require any specific authority to enter into any particular house, but entered into all houses at all seasonable times."³⁷ In 1926 in the Sale of Food (Weights and Measures) Act³⁸ section 48 was simply extended to the inspection and weighing of pre-packed food, and in 1955 in the Food and Drugs Act³⁹ it was extended again to the labelling and marking of food.

A RIGHT OF FORCIBLE ENTRY

Section 120 of article 12 of the Baltimore City Code confers a right of entry upon the Commissioner of Health, and imposes a fine upon those who refuse or even delay entry. Does this create a right of forcible entry? Mr. Justice Frankfurter was categorical that it did not; "a fine is imposed for resistance, but officials are not authorised to break past the unwilling occupant."

As the present writer has pointed out elsewhere,⁴⁰ English law is left in some doubt about such rights as a result of *Grove v. Eastern Gas Board*. Paragraph 34(1) of the Third Schedule to the Gas Act, 1948, gave a simple right of entry to inspect;⁴¹ it was paragraph 36 which required the premises to be left as secure against trespassers as when found, and compensation to be paid for damage.⁴² In view of Mr. Justice Frankfurter's finding, the words of Somervell, L.J., are most interesting. "In the context of [paragraph 36] of the schedule, and, perhaps, broadly speaking, a power of entry conferred by a statute is, prima facie, a power, if necessary, of forcible entry. There would be no need for statutory authorisation if all that the representatives of the gas board were allowed to do was to enter and read the meter if the consumer was willing to admit them to the place where the meter was. Therefore, prima facie, I would have said that paragraph 34(1) imposed a power of forcible entry, and

³⁷ *Id.* at 753.

³⁸ Sale of Food (Weights and Measures) Act, 1926, 16 & 17 Geo. 5, c. 63, §10.

³⁹ Food and Drugs Act, 1955, 4 & 5 Eliz. 2, c. 16, §7.

⁴⁰ Waters, *Public Rights of Entry*, 11 CURRENT LEGAL PROBLEMS 144 (Keeton & Schwarzenberger ed. 1958).

⁴¹ Gas Act, 1948, 11 & 12 Geo. 6, c. 67, Third Schedule, para. 34(1): "Any officer authorized by an Area Board may at all reasonable times, on the production of some duly authenticated document showing his authority, enter any premises . . . in order to inspect the meters . . . or for the purpose of ascertaining the quantity of the gas consumed or supplied. . . ."

⁴² In *Grove's* case the inspector and his companion entered through a window at the rear of the premises while the occupier was out. No damage was done, and the house was left secure.

that construction is reinforced by paragraph 36.⁴³ Hodson, L. J., also found it difficult to see the necessity for paragraph 34 unless the paragraph justified forcible entry.⁴⁴ Moreover, in the former and repealed Act of 1871⁴⁵ section 21 had given a right of entry and imposed a fine for its obstruction; section 22 created a further right and awarded compensation for entrance. Somervell, L. J., was still only prepared to say there was "a possible argument," and Jenkins, L. J., "more room for argument," that in this context section 21 did not create a right of forcible entry.⁴⁶ Emphasizing the importance of paragraph 36 in the 1948 Act, Hodson, L.J., also thought that the position under the 1871 Act was "not so clear."⁴⁷

Unfortunately, this unanimous attitude of the English Court of Appeal could not be reflected in the judgment of Mr. Justice Frankfurter, since the Supreme Court was bound to accept conclusively the construction of the Maryland Court of Appeals that under section 120 forcible entry was not authorised. Nevertheless, one wonders at the construction made by the Maryland court. If section 120 is to be read in isolation, is the demand for admittance but a justification for the imposition of a fine? Such a construction would suggest that a fine is the first consideration, and this is absurd, yet if the words conferring upon the Commissioner the right to "demand entry" add nothing in the absence upon request of the occupier's invitation, then only the second part of the section has meaning. If this argument is valid, then the section need only have been worded in this way: "If the owner or occupier shall refuse or delay to open in the daytime [any house, cellar or enclosure] and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars. The Commissioner of Health shall have cause to suspect a nuisance before making any request for admittance." It is submitted that this is not a mere study in word play; the reasoning of *Grove v. Eastern Gas Board* would at present suggest that the Maryland Court of Appeals may have rendered otiose the words "he may demand entry therein." Seen from these shores, it is perhaps to be regretted that Mr. Justice Frankfurter was not able to consider this construction.⁴⁸

⁴³ [1951] 2 All E.R. at 1053. And Jenkins, L. J. (at 1056) thought that the absence of the requirement of notice, when the object of entry was merely to inspect, did not argue against the right of entry being a right of forcible entry. No notice appears to have been necessary for entry under BALTIMORE, MD. CITY CODE, art. 12, §120.

⁴⁴ *Id.* at 1057.

⁴⁵ Gasworks Clauses Act, 1871, 10 & 11 Vict., c. 15 (amended, 1871, 34 & 35 Vict., c. 41; amended by Gas Undertakings Act, 1934, 24 & 25 Geo. 5, c. 28, §21.)

⁴⁶ [1951] 2 All E.R. 1051 at 1055 & 1057 respectively.

⁴⁷ *Id.* at 1057.

⁴⁸ If the section had conferred "a right of entry" upon the Commissioner, rather than provide that "he may demand entry," would there have been a more powerful argument that this language authorized forcible entry? Had the occupier pursued a policy of never answering the door to the knocking of an inspector (and it does not appear from the report that the inspector

THE VALUE OF A WARRANT

On the finding *inter alia* that this was not a right of forcible entry, the majority placed the burden of their argument on the fact that, if adequate justification for its issue lay in the mere passage of time since the last entry and inspection, to require a search warrant in these circumstances added nothing in protection of the right of privacy. The dissent on the other hand was equally firmly of the opinion that such a warrant was not "synthetic," but "recognize[d] that the showing of probable cause in a health case may have quite different requirements than the one required in graver situations."⁴⁹ The health inspector ought not to be relieved from "making an appropriate showing" to a magistrate.

Would such a warrant play the constitutional role of "keeping up appearances"? Does it merely add to the labour of the public official's duties without commensurate gain to the aggrieved citizen? English experience with the statutes, which do require a search warrant, may be of interest at this point.

There has been relatively little litigation on the subject, and none of the cases is more recent than 1903. But two things have been clearly established. First, that it depends upon the exact wording of the statute in question to what extent the magistrates are excluded from determining the validity of the facts upon which the official claims his right to enter, and English courts are hostile to the argument of a highly restricted jurisdiction. Secondly, that if the particular statute confers a discretion upon the magistrate in the issue of a warrant (and the writer knows of no statute to the contrary), the higher courts are loth to interfere in its exercise whatever the wording of the statute.

The extent of a magistrate's jurisdiction is not an easy issue, and the desire so to interpret the statutory language as to retain an effective field of operation both for the action of the official and the discretion of the magistrate has not always resulted in clarity of judicial language. In 1899 *Robinson v. Corporation of Sunderland*⁵⁰ was heard, and it was held that section 36 of the Public Health Act, 1875, under which the local official desired to enter, clearly left judgment of sufficiency to the local authority. The words were, "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient watercloset. . . ." But this section was controlled by section 305 which enabled the magistrates

had to give notice of his forthcoming visit), it might be a perverse interpretation of "he may demand entry" to hold that the Commissioner was thereby rendered powerless to enter or impose a fine in the absence of evidence of the occupier's policy. This means that the power to demand entry is at least a right of entry, if not of forcible entry. And, if this was a right of entry, it would be interesting to know whether the inspector could have entered by opening a door or window if no response was received to his prolonged knocking.

⁴⁹ *Frank v. Maryland*, 359 U.S. 360 (1959). "Probable cause" as required by the Fourth Amendment.

⁵⁰ [1899] 1 Q.B. 751.

to make an order permitting forcible entry "if no sufficient cause is shown against the application." The occupier argued that this latter section permitted him to adduce evidence to show the condition of his house, and the sufficiency of a privy and ashpit already there. However, a court of the Queen's Bench Division rejected this contention, and, in view of section 36, Lawrence, J., said that under section 305 the magistrates were merely to refuse an order in the following types of circumstances. First, that the notice given by the local authority, requiring the occupier to do what was necessary, was irregular on the face of it. Secondly, that no report had been made by their surveyor or inspector. And, thirdly, that temporary matters, for example, illness among the family living in the house, made it dangerous and inconvenient to "lay open" the premises. Channell, J., agreed with this conclusion, and merely enlarged upon the points made. If, for example, the statute impliedly required the local authority to hear the owner before requiring him to do the work, and this has not been done, the magistrate could deny the warrant. This is an argument worth keeping in mind for English courts will deny a warrant where the occupier is being denied "natural justice."⁵¹ His Lordship also thought that the magistrates could inquire as to whether the person who made the report to the local authority was in fact the properly appointed surveyor or inspector.

It might be thought from this case that little effective jurisdiction is left to the magistrate, but earlier in *Diss Urban Sanitary Authority v. Aldrich*,⁵² with but a slight difference of statutory language, another court of the Queen's Bench Division had refused to interfere when magistrates exercised their discretion on the merits of the proposed action. On this occasion the local authority wished to carry a sewer under the respondent's house, exercising their right so to do under section 16 of the same Public Health Act. The respondent having refused to admit the authority, the latter sought an order from the magistrates under section 305, and the respondent's defence was that the sewer would foul the waters of a river into which the outfall was to be, thus contravening section 17 of the Act. The appellants contended that the magistrates had no power to consider this objection. The very short judgment of Mellor and Lush, JJ., is most unsatisfactory, but during the argument Mellor, J., appeared to regard consideration of the respondent's defence as being within the discretion the section gave the magistrates. Since the magistrates had accepted the defence and refused to make an order, one is left with the assumption that section 16, unlike section 36, did not make the local authority sole judges of sufficiency.⁵³ The section runs, "if on the report of the surveyor it appears necessary";

⁵¹ Cooper v. Wandsworth Bd. of Works, 14 C.B. (n.s.) 180 (1863).

⁵² [1877] 2 Q.B. 179.

⁵³ It is possible that the magistrates refused to issue a warrant because the proposed act was illegal, but, since a refusal in such circumstances would clearly be within their jurisdiction, the magistrates would hardly have stated a case for the High Court had illegality been the ground for their refusal.

twelve years later in *Lewis v. Weston-super-Mare Local Board*,⁵⁴ Stirling, J., held that this meant "necessary for the efficient discharge of the duty in the way which is most for the benefit of the public." "An independent judgment" was required—a remark which left open whether it was Stirling J.'s view that section 16 permitted the magistrates to inquire only into bona fides.

The difficulty of determining that an independent judgment has been made, without making another judgment on the same issue, was present in each of the three remaining English cases quoted by the dissent in *Frank v. Maryland*.

In the first of these, *Vines v. Governors of the North London Collegiate School*,⁵⁵ the local authority sanitary inspector gave notice to the headmistress that she desired to enter and inspect. Lawrance, J., supposed that the inspector wished to see whether there existed a nuisance under section 10, or whether the taps and drains were in good order under section 40 of the relevant Act.⁵⁶ The inspector, in fact, had merely quoted the sections to the headmistress, and the headmistress for her part had refused to admit the inspector. Thereupon the inspector applied for a warrant. Under section 115(3), however, the inspector was bound to show that she had a reasonable ground for such entry, and, as Channell, J., said, "when the statute first creates a right of entry, it cannot be a reasonable ground for entry that one wishes to enter. One already has the right."⁵⁷ The case might now be regarded as authority for the proposition that it is insufficient merely to say that one desires to enter in order to examine those objects on the premises which are described in the empowering section. One must have an additional purpose among those statutorily enumerated, which purpose relates to the particular premises. "The magistrate must be satisfied that there is a reasonable ground for exercising that right in respect of the premises in question."⁵⁸

The extent of inquiry into "a reasonable ground" was finally examined in *Wimbledon U.D.C. v. Hastings*.⁵⁹ The facts were somewhat similar to those of the *Vines* case except that on this occasion the local authority inspector sought an order of the magistrates under section 102 of the Public Health Act, 1875.⁶⁰ He was anxious to establish whether a nuisance existed on certain school premises. Again it fell to Channell, J., to pass judgment, and this time he was more explicit. "The object for which the person wants to go is certainly a matter to be inquired into by the justice, and it seems to me that the other party is

⁵⁴ 40 Ch. D. 55, 67 (1889).

⁵⁵ 63 J.P. 244 (1899).

⁵⁷ *Id.* at 246.

⁵⁶ *Id.* at 245.

⁵⁸ *Ibid.*

⁵⁹ (1902), 87 L.T.R. (n.s.) 118 (1902), followed in the third case, *Consett U.D.C. v. Crawford* [1903] 2 K.B. 183.

⁶⁰ Section 102 merely says that, "if admission to premises for any of the purposes of this section is refused, any justice on complaint thereof . . . may, by order under his hand, require the person having custody of the premises to admit the local authority . . ." The appellants contended therefore that they had no obligation to show reasonable grounds for believing that a nuisance existed.

entitled to offer evidence not for the purpose of showing that there is no nuisance in fact, but for the purpose of showing there is no object in examining the premises."⁶¹ What he meant by this was brought out by his example; the occupier was entitled to say, "This is not a school. It is an entire mistake." Lord Alverstone, C.J., on the other hand, seemed to be prepared to go a little further. "[T]here is an obvious difference between cases of complaint of sanitary appliances or sufficiency of drains, as to which inspection may in many cases be the only way to decide if they are fit or not; but when allegations are based on questions of fact we think it would be going too far and [counsel for the appellant] did not ask us to go so far as to say that the justices ought not to be allowed to receive evidence as to what was the true state of facts before them on which they purport to act. . . . Therefore it must be in a proper case, where there is liberal ground for thinking there is necessity for inspection."⁶² In this case, however, the respondent alleged that the authority's allegations of fact were "wholly inaccurate,"⁶³ and it is to such a fundamental allegation that his Lordship's mind must be taken to have been directed.⁶⁴

From these cases it may be thought that English law supports, rather than detracts from, the "back door" argument of the majority in *Frank v. Maryland*. Indeed, it may be a matter of emphasis whether one regards this as the "maintenance of community health" threatened with being "hobbled by the blanket requirement"⁶⁵ of a search warrant, or as an "intrusion on the mere say-so of an official."⁶⁶ However, the argument in England in favour of the warrant is merely seeking consistency. The warrant may constitute a sledge-hammer with which to crack a nut, but in the last century, and particularly since 1945, the number of these statutory nuts has in the United Kingdom become a harvest. And the significance of this harvest to the property owner or occupier is such that already in several notable statutory cases, especially the Rights

⁶¹ 87 L.T.R. (n.s.) 118, 121 (1902).

⁶² *Id.* at 120.

⁶³ *Ibid.* The complaint made to the local authority, and taken up by the authority, was that the premises, a school, contained 400 pupils, and 32 pupils and a mistress per classroom. The nuisance alleged was overcrowding. The respondent tendered evidence to show that there were only 270 pupils in all, and that no classroom was used for 32 pupils and a mistress. It was therefore contended that there was no nuisance.

⁶⁴ In *Frank v. Maryland*, § 120 of article 12 reads: "Whenever the Commissioner of Health shall have cause to suspect." The English cases would suggest that this makes the Commissioner the sole judge of sufficiency. Certainly this language is nearer to § 36 in the *Robinson* case than any other statutory provision considered by the English courts. Mr. Justice Frankfurter merely said, "Valid grounds for suspicion of the existence of a nuisance must exist." Does this mean that, upon his summons for refusing or delaying to admit, the occupier could argue that the Commissioner had no reasonable cause to suspect? 359 U.S. 260, 366 (1959). If so, how far does this mean that, even without warrant procedure, the relevant court is the judge of sufficiency?

⁶⁵ *Frank v. Maryland*, 359 U.S. 360, 372 (1959).

⁶⁶ *Id.* at 384.

of Entry (Gas and Electricity Boards) Act, Parliament has demonstrated its unwillingness to shrug the shoulders, dismiss the heavy-handed warrant, and leave the matter at that. The fact is that, while the search warrant was not designed to deal with this type of entry by administrative officials, it is becoming increasingly evident that the right of privacy, which *inter alia* the warrant has always protected, should not go by default for want of legal machinery fashioned to accommodate the new situation. And, in lieu of such machinery, the availability of the warrant has seemed on some statutory occasions to be a small price to pay.

In recent years the continuous warfare in the overall battle on administrative procedures has shifted largely in favour of private property rights,⁶⁷ and it was the intention of my earlier paper to advocate that the protection afforded by a few Acts be now universally extended. The object should be the creation of warrant provisions in a statutory code of powers of entry, guaranteeing to the individual thereby the impartial, if rarely invoked, judgment by magistrates of the fairness and legality of any attempted entry. And the cases show, it is submitted, that in the magistrates a valuable scope of jurisdiction resides. For such a reform the spirit in Parliamentary quarters is no doubt willing, but Mr. Justice Douglas may have overlooked the fact that the consistent application to good works is yet lacking.

⁶⁷ See Report of the Committee on Administrative Tribunals and Enquiries (Cmnd. 218, 1957); Tribunals and Inquiries Act, 1958; and Griffiths, *Tribunals and Inquiries*, 22 MODERN L. REV. 125 (1959). But for a discussion of the current attitude of the Conservative party towards private property, see Burn, *The Conservative Tradition and its Reformulations*, a lecture published in LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY 42, especially at 59 *et seq.*