HIGH COURT OF AUSTRALIA

GIBBS C.J. MASON, WILSON, BRENNAN AND DEANE JJ.

Halliday v Nevill
[1984] HCA 80

ORDER

Appeal dismissed with costs.

Cur. adv. vult.

The following written judgments were delivered:—

Dec. 6

GIBBS C.J., MASON, WILSON AND DEANE JJ.

This is an appeal by special leave from the decision of Brooking J. of the Supreme Court of Victoria in which his Honour made absolute orders nisi to review five decisions of a stipendiary magistrate dismissing five informations laid against the appellant. The informations charged the appellant with one offence of escaping from legal custody, two offences of resisting police in the execution of their duty and two offences of assault. These charges, together with a charge of driving a motor car while disqualified from obtaining a licence and driving a motor car whilst his blood alcohol content exceeded the prescribed maximum on each of which the appellant was convicted, all arose from an incident which occurred in West Heidelberg shortly after five o'clock one afternoon in January 1982. At that time two police officers named Nevill and Brida were on a motorized patrol of the area. As they drove along Liberty Parade they saw the appellant, who was known to Police Constable Brida as a disqualified driver, reversing a motor car out of the driveway of premises at 375 Liberty Parade. Having driven out into the street, the appellant apparently saw the police car approaching and immediately drove back into the driveway from which he had come. The police officers stopped their vehicle across the mouth of the driveway, alighted and entered the premises at 375 Liberty Parade by walking down the open driveway. There they engaged the appellant in conversation. He had been drinking. He was aggressive and denied that he had driven on the roadway. Police Constable Nevill then arrested the appellant for driving whilst disqualified; this happened while the three men were standing on the driveway inside the premises near the rear of the car that the appellant had been driving.

Then, while the appellant and Police Constable Nevill were walking back down the driveway towards the police car, the appellant suddenly broke away from Police Constable Nevill's grasp and ran across Liberty Parade and entered his own home at No. 370. The police officers pursued him into the house where a scuffle took place before he was finally overcome. The two charges of resisting the police officers and the two charges of assault all relate to the scuffle that occurred in his own home.

The magistrate held that the arrest of the appellant in the driveway of 375 Liberty Parade was unlawful because the arresting officer was a trespasser on those premises at the time of the arrest. He therefore dismissed the five informations to which we have referred.

On the return of the orders nisi to review, Brooking J. proceeded on the basis, (a) that the stipendiary magistrate must be taken to have found that at the time of the arrest Police Constable Nevill was in the driveway without the permission of the occupier of 375 Liberty Parade and that he was not prepared to dispute such a finding, and (b) that the power to arrest without warrant conferred by s. 458 of the *Crimes Act 1958 Vict.*, as amended, did not confer by implication a power to follow the suspect on to private property for the purpose of effecting the arrest. On that basis, Police Constable Nevill was a trespasser on the premises at 375 Liberty Parade at the time when he purported to arrest the appellant. His Honour came to the conclusion however that, even if that were so, the arrest itself was lawful. It followed, in his Honour's view, that the appellant escaped from lawful custody in breaking away from Police Constable Nevill and that the entry of the police officers into the appellant's home at 370 Liberty Parade in pursuit of him was authorized by s. 459A of the *Crimes Act*.

In the course of his argument, counsel for the appellant has raised issues of fundamental importance touching the liberty of the subject. It is unnecessary however that we embark on a consideration of those issues. It is common ground that the appeal must fail unless Police Constable Nevill was, at the time he arrested the appellant in the driveway of premises at 375 Liberty Parade, a trespasser on that driveway. The evidence on that question is sparse. On that evidence however, we consider that the only conclusion which is open as a matter of law is that Police Constable Nevill had an implied licence from the occupier of the premises to be upon the driveway.

While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked: cf. Edwards v. Railway Executive [1] . The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done nor said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it: see, generally, *Robson v. Hallett* [2] ; *Lipman v. Clendinnen* [3] ; Lambert v. Roberts [4] . Nor, in such a case, will the implied licence ordinarily be restricted to presence on the open driveway or path for the purpose of going to the entrance of the house. A passer-by is not a trespasser if, on passing an open driveway with no indication that entry is forbidden or unauthorized, he or she steps upon it either unintentionally or to avoid an obstruction such as a vehicle parked across the footpath. Nor will such a passer-by be a trespasser if, for example, he or she goes upon the driveway to recover some item of his or her property which has fallen or blown upon it or to lead away an errant child. To adapt the words of Lord Parker C.J. in *Robson* [5] , the law is not such an ass that the implied or tacit licence in such a case is restricted to stepping over the item of property or around the child for the purpose of going to the entrance and asking the householder whether the item of property can be reclaimed or the child led away. The path or driveway is, in such circumstances,

held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property.

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(1) [1952] A.C. 737, at p. 744.
(2) [1967] 2 Q.B. 939, at pp. 950-952, 953-954.
(3) (1932) 46 C.L.R. 550, at pp. 556-557.
(4) (1980) 72 Cr.App.R. 223, at p. 230.
(5) [1967] 2 Q.B., at p. 950.

The evidence indicates that the premises at 375 Liberty Parade were residential premises with an open driveway to the roadway. There is no suggestion that the driveway was closed off by a locked gate or any other obstruction or that there was any notice or other indication advising either visitors generally or a particular class or type of visitor that intrusion upon the open driveway was forbidden. That being so, a variety of persons with a variety of legitimate purposes had, as a matter of law, an implied licence from the occupier to go upon the driveway. The question which arises is whether, in those circumstances, the proper inference as a matter of law is that a member of the police force had an implied or tacit licence from the occupier to set foot on the open driveway for the purpose of questioning or arresting a person whom he had observed committing an offence on a public street in the immediate vicinity of that driveway. The conclusion which we have reached is that common sense, reinforced by considerations of public policy, requires that that question be answered in the affirmative. That conclusion does not involve any derogation of the right of an occupier of a suburban dwelling to prevent a member of the police force who has no overriding statutory or common law right of entry from coming upon his land. Any such occupier who desires to convert his path or driveway adjoining the public road into a haven for minor miscreants can, by taking appropriate steps, preclude the implication of a licence to a member of the police force to enter upon the path or driveway to effect an arrest with the result that a police officer's rights of entry are restricted to whatever overriding rights he might possess under some express provision or necessary implication of a statute (cf. *Crimes Act*, s. 459A and note generally Morris v. Beardmore [6] and the discussion in the judgment of Kennedy J. in Dobie v. Pinker [7]) of the common law. All that that conclusion involves is that, in the absence of any indication to the contrary, the implied or tacit licence to persons to go upon the open driveway of a suburban dwelling for legitimate purposes is not so confined as to exclude from its scope a member of the police force who goes upon the driveway in the ordinary course of his duty for the purpose of questioning or arresting a trespasser or a lawful visitor upon it. It follows that Police Constable Nevill was lawfully upon the driveway of 375 Liberty Parade when he arrested the appellant.

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(6) [1981] A.C. 446.
(7) [1983] W.A.R. 48, at p. 53ff.

It should be mentioned that it was submitted on behalf of the appellant that the Court should not substitute a different conclusion of its own for the finding at first instance that Police Constable Nevill was on the driveway without the permission or licence of the occupier. The matter having come before the Supreme Court by way of order to review, the finding of the magistrate should not, so it was said, be disturbed unless there was no evidence upon which "the magistrate might, as a reasonable man, come to the conclusion to which he did come": see Spurling v. Development Underwriting (Vic.) Pty. Ltd. [8] . The answer to that submission is that, there being no real dispute about the underlying objective facts and no suggestion that the occupier of 375 Liberty Parade did anything to negate or rescind any implied licence, the question whether those facts gave rise to an implied licence in favour of Police Constable Nevill was and is a question of law.

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(8) [1973] V.R. 1, at p. 11.

We would dismiss the appeal.

BRENNAN J.

This case is about privacy in the home, the garden and the yard. It is about the lawfulness of police entering on private premises without asking for permission. It is a contest between public authority and the security of private dwellings.

The joint judgment sets out the material facts. I need not repeat them. The charges laid against the appellant include escaping from lawful custody, resisting a police officer in the execution of his duty (two charges), assaulting a police officer in the execution of his duty and assault by kicking. The charge of assaulting a police officer in the execution of his duty is an alternative to the charge of assault by kicking. A stipendiary magistrate dismissed the five charges mentioned, but Brooking J. in the Supreme Court of Victoria made absolute orders nisi to review the orders of dismissal. His Honour ordered that the appellant be convicted on four of the charges and that the alternative charge be withdrawn.

The stipendiary magistrate had accepted a submission that the arrest of the appellant on private property — the driveway of 375 Liberty Parade — was unlawful, that the police officers had not been acting in the execution of their duty when they re-arrested the appellant in his mother's home at 370 Liberty Parade and that the appellant had been entitled to use reasonable force in resisting the re-arrest. Brooking J. held that the arrest of the appellant in the driveway of 375 Liberty Parade was lawful. Having reached that conclusion, his Honour held that conviction on four of the charges followed. The premises at 375 Liberty Parade were occupied by a person known to the appellant. The police officers did not seek and were not given permission by that person to enter on the driveway of 375 Liberty Parade. He had no interest in the arrest of the appellant on his driveway.

The common law principles relevant to the present case are of ancient origin but of enduring importance. In Entick v. Carrington [9] Lord Camden L.C.J. said:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.

That statement, as Lord Scarman said in Morris v. Beardmore [10] , is still true. The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law. Thus in Great Central Railway Co. v. Bates [11] , a police officer who had the powers of a common law constable and who, seeing the door of a warehouse open after dark, entered it in order to see that everything was all right, was held to be a trespasser. Atkin L.J. said [12] :

> Now it appears to me that he had no right to enter these premises at all It can hardly be suggested that the right exists in respect of a dwelling house. If it did the privacy of an Englishman's dwelling house would be most materially curtailed. In view of the limitations that have been laid down over and over again as to the right of a constable to force a door, and as to the limitations of his powers unless he has a warrant, or in cases of felony, it appears to me quite impossible to suggest, merely because a constable may suspect there is something wrong, that he has a right to enter a dwelling house either by opening a door or by entering an open door or an open window and go into the house. It is true that a reasonable householder would not as a rule object if the matter was done bona fide and no nuisance was caused. But the question is whether the constable has the right to enter.
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> This is a matter of very considerable importance, because the case has been put on the analogy of a person having a right as a matter of public duty to enter into premises, and we know that such powers and privileges are occasionally given to persons who are not constables. It appears to be very important that it should be established that nobody has a right to enter premises except strictly in accordance with authority.

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(9) (1765) 19 St.Tr. 1029, at p. 1066.
(10) [1981] A.C. 446, at p. 464.
(11) [1921] 3 K.B. 578.
(12) [1921] 3 K.B., at pp. 581-582.

His Lordship put the question in terms of the constable's right to enter, not in terms of a licence to do so. In *Robson v. Hallett* [13] , Diplock L.J. said that a police officer who enters upon private land may fail to be a trespasser in one of two ways: "One is leave and licence of the person entitled to possession ; the other is in the exercise of an independent right to proceed on the land." I would add the leave and licence of the person in actual possession as a good authority to enter: see Mount Bischoff Tin Mining Co. Reg. v. Mount Bischoff Extended Tin Mining Co. N.L. [14] . A licence is revocable, and a police officer who has no right to remain on premises must leave if the licence is revoked. He is not acting in the execution of his duty once he becomes a trespasser: Morris v. Beardmore [15] ; Davis v. Lisle [16] ; McArdle v. Wallace [17] ; at all events where the trespass is more than trivial: cf. the cases discussed by Lanham, Arrest, Detention and Compulsion, The Criminal Law Review (1974), p. 288. A police officer who has grounds for arresting a person on a criminal charge needs to be armed with more than leave and licence if he is not to be frustrated in effecting the arrest. He needs the authority of an independent right, else

offenders can find an Alsatia in their homes or in the homes of their friends. But, as Chitty's Criminal Law, 2nd ed. (1826), vol. 1, p. 15 notes:

> Since the privileges of sanctuary and abjuration were abolished, no place affords protection to offenders against the criminal law even the clergy may, on a criminal charge, be arrested whilst in their churches

The common law power to arrest on a criminal charge can be exercised as of right on private as well as on public property, in the home of a fugitive offender or in the homes of his friends. No leave or licence is necessary to enter if no force be needed, and in some cases force may be used.

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(13) [1967] 2 Q.B. 939, at p. 954.
(14) (1913) 15 C.L.R. 549, at p. 562.
(15) [1981] A.C., at pp. 458-459.
(16) [1936] 2 K.B. 434.
(17) (1964) 108 Sol. Jo. 483.

Although the common law has long protected the privacy of the home, it has never treated that privacy as inviolate against the exercise of a power to arrest. The first proposition laid down in Semayne's Case [18] that everyone's house "is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose" was qualified by the third proposition in the same case. It was laid down [19] :

> 3. In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors.

Where entry is sought to effect an arrest for a criminal offence, it is a case "when the King is party". The person effecting the arrest is entitled not only to enter as of right but to break down the outer doors of the offender's home after making the customary demand — "Open in the name of the King": per Lord Denning M.R. in Southam v. Smout [20] . The privilege of keeping the outer doors shut against process was confined to execution at the suit of a private individual. Semayne's Case gives an offender no immunity from arrest on criminal process: Burdett v. Abbot [21] ; Harvey v. Harvey [22] ; Southam v. Smout. Nor does Semayne's Case give an offender any such immunity if he takes refuge in the home of another for "the house of any one is not a castle or privilege but for himself" and the offender cannot claim the benefit of sanctuary in the other's home [23] ; and see Foster's Crown Law, 3rd ed. (1809), p. 320, s. 21.

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(18) (1604) 5 Co. Rep. 91a, at p. 91b [77 E.R. 194, at p. 195].
(19) (1604) 5 Co. Rep., at p. 91b [77 E.R., at p. 195].
(20) [1964] 1 Q.B. 308, at p. 320.
(21) (1811) 14 East 1, at p. 162 [104 E.R. 501, at p. 563].
(22) (1884) 26 Ch.D. 644.
(23) (1604) 5 Co. Rep., at p. 93a [77 E.R., at p. 198].

Of course, a constable's power to arrest without warrant is limited. At common law, a constable is empowered to arrest without warrant any person whom he suspects on reasonable grounds of having committed a felony, but he is not empowered to arrest a person guilty or suspected of misdemeanours except where an actual breach of the peace by an affray or by personal violence occurs and the offender is arrested while committing the misdemeanour or immediately after its commission: Stephen, History of the Criminal Law of England (1883), vol. 1, p. 193; Hale's Pleas of the Crown (1800), vol. 2, p. 85. And so it was held that a constable could not lawfully arrest an offender who, having assaulted the constable an hour earlier, retires to his house and closes and fastens his door: Reg. v. Marsden [24] . At common law, a constable is entitled to enter on private property to effect an arrest within the limits of his common law power to arrest without warrant, although he would be a trespasser if he entered or remained on the property for any other purpose.

(24) (1868) L.R. 1 C.C.R. 131.

In Victoria, the distinction between felonies and misdemeanours has been abolished and, by s. 457 of the *Crimes Act 1958 Vict.* ("the Act"), common law powers to arrest without warrant have been abolished. In place of the common law power to arrest without warrant, a statute now confers power to arrest without warrant for various offences. The question arises whether the conferment of the statutory power carries with it a power to enter on private property without a licence (by force, if necessary) or whether there is a territorial restriction on the exercise of the statutory power to arrest.

Section 458 of the Act confers on any person a power to arrest for any offence in the circumstances therein prescribed and s. 459 confers on a police officer additional powers to arrest without warrant if he believes on reasonable grounds that the person arrested has committed an indictable offence. The respondents in the present case rely on the power to arrest conferred by s. 458(1)(a). The relevant provisions of s. 458 read as follows:

> (1) Any person, whether a member of the police force or not, may at any time without warrant apprehend and take before a justice to be dealt with according to law or deliver to a member of the police force to be so taken, any person —
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> (a) he finds committing any offence (whether an indictable offence or an offence punishable on summary conviction) where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons, namely —
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> (i) to ensure the appearance of the offender before a court of competent jurisdiction;
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> (ii) to preserve public order;
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> (iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or

(iv) for the safety or welfare of members of the public or of the offender;

(b) when instructed so to do by any member of the police force having power under this Act to apprehend that person; or

(c) he believes on reasonable grounds is escaping from legal custody or avoiding apprehension by some person having authority to apprehend that person in the circumstances of the case.

When ss. 458 and 459 were inserted into the Act in their present form by the *Crimes (Powers of Arrest) Act 1972 Vict.*, the Act contained no express power to enter on and search private property for the purpose of arresting an offender or a suspected offender. The *Crimes (Classification of Offences) Act 1981 Vict.* inserted s. 459A in the Act, and a limited power of entry and search is conferred by that section:

(1) A member of the police force may, for the purpose of arresting under section 458 or 459 or any other enactment a person whom he —

(a) believes on reasonable grounds —

(i) to have committed in Victoria a serious indictable offence;

(ii) to have committed an offence elsewhere which if committed in Victoria would be a serious indictable offence; or

(iii) to be escaping from legal custody; or

(b) finds committing a serious indictable offence —

enter and search any place where the member of the police force on reasonable grounds believes him to be.

(2) In order to enter a place pursuant to sub-section (1), a member of the police force may, if it is necessary to do so, use reasonable force.

(3) In this section "serious indictable offence" has the same meaning as it has in section 325.

Section 459A has no application in the present case.

The appellant submits that the power to arrest conferred by s. 458 is restricted and that an arrest in purported exercise of that power cannot be effected lawfully on private property unless the case falls within s. 459A, and this case does not. The appellant's argument rests substantially on the speeches in two cases decided in the House of Lords on the operation of s. 8 — the breathalyzer provisions — of the *Road Traffic Act 1972 U.K.*.

In the first of those cases, Morris v. Beardmore [25] , it was held that a power conferred by s. 8(2) on a constable in uniform to require a driver to provide a specimen of his breath does not authorize the constable to trespass on private property and does not enable a constable who is trespassing to make a valid requirement of a person that he provide a specimen of his breath. The case was not concerned with a power to arrest but with a statutory power of a wholly different legal nature, as Lord Diplock pointed out [26] . In the second case, Clowser v. Chaplin [27] , their Lordships dealt with the power to arrest without warrant conferred on a constable by s. 8(5) of the *Road Traffic Act* when a person required

to provide a specimen of breath failed to do so. It was held that the power to arrest did not authorize a constable to enter private premises to carry out an arrest. The reasoning in that case owes much to the broad scope of the general arrest provisions and particularly to the width of the provisions authorizing entry and search which had been enacted in the *Criminal Law Act 1967 U.K.*. Lord Keith of Kinkel, in whose speech the other members of the House agreed, said [28] :

> The question accordingly comes to be whether the power to arrest without warrant conferred by section 8(5) carries with it the power lawfully to enter, by force if need be, the dwelling house of the person whom it is intended to arrest, for the purpose of carrying out that intention.
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> It may confidently be stated as a matter of general principle that the mere conferment by statute of a power to arrest without warrant in given circumstances does not carry with it any power to enter private premises without the permission of the occupier, forcibly or otherwise. Section 2 of the *Criminal Law Act 1967* creates a category of "arrestable offences" in respect of which the power of arrest without warrant may be exercised. Such offences are extremely serious, being those punishable by five years' imprisonment on first conviction, and attempts thereat. Sub-section (6) specifically provides: "For the purpose of arresting a person under any power conferred by this section a constable may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be." Apart from the category of arrestable offences, there are a considerable number of instances where a specific power of arrest without warrant is conferred in relation to particular statutory offences. The proper inference, in my opinion, is that where Parliament considers it appropriate that a power of arrest without warrant should be reinforced by a power to enter private premises, it is in the habit of saying so specifically, and that the omission of any such specific power is deliberate.

Lord Scarman's speech [29] contains a passage to the same effect. And in Swales v. Cox [30] , Donaldson L.J. said that Parliament, in enacting the *Criminal Law Act 1967* "was intending to provide a comprehensive code on the rights of a constable to enter a place in circumstances in which a constable with reasonable cause suspected that an arrestable offence had been committed or a constable, again with reasonable cause, suspected that an arrestable offence was about to be committed." The same observations cannot be made with respect to the *Crimes (Powers of Arrest) Act 1972* of Victoria. These cases do not answer the question whether the statutory powers to arrest created by ss. 458 and 459 in 1972, being unaccompanied at that time by any express power of entry and search, might be exercised as of right on private property. At that time, it would have been absurd to impute to the Parliament of Victoria an intention so to restrict the statutory power to arrest that they could not be exercised on private property without the permission of the person in possession of that property or entitled to possession of it. In Canada, where the powers to arrest conferred by s. 450 of the *Criminal Code* were unaccompanied by any express power of entry and search for the purpose of arrest, the Supreme Court held that a fugitive could not obtain sanctuary by residing with a friend: Eccles v. Bourque [31] . A right to enter for the purpose of arrest was admitted, but the court insisted on the common law restrictions on the use of force to effect entry. Dickson J., with the concurrence of the other members of the court, said [32] :

> I would wish to make it clear, however, that there is no question of an unrestricted right to enter in search of a fugitive. Entry can be made against the will of the householder only if (a) there are reasonable and probable grounds for the belief that the person sought is within the premises and (b) proper announcement is made prior to entry.

(25) [1981] A.C. 446.
(26) [1981] A.C., at pp. 454-455.
(27) [1981] 1 W.L.R. 837; [1981] 2 All E.R. 267.
(28) [1981] 1 W.L.R., at pp. 841-842; [1981] 2 All E.R., at p. 270.
(29) [1981] 1 W.L.R., at p. 842; [1981] 2 All E.R., at p. 270.
(30) [1981] 1 Q.B. 849, at p. 854.
(31) (1974) 50 D.L.R. (3d) 753.
(32) (1974) 50 D.L.R. (3d), at pp. 756-757.

In South Australia, Napier C.J. held that a statutory power conferred on a police officer to arrest a person reasonably suspected of having committed an offence gave the police officer authority to follow the person on to private property for the purpose of effecting the arrest: Dinan v. Brereton [33] . In New South Wales, Taylor C.J. at C.L. held that a similar statutory power gave a right to police officers to arrest suspected persons "wherever they may be": Kennedy v. Pagura [34] . In the Northern Territory, Muirhead J. held a statutory provision which conferred a power to enter "into or upon any premises, vehicle or vessel, by force if necessary" did not restrict a general statutory power to arrest so as to preclude its exercise on private property in cases that did not fall within the terms of the particular provision: McDowell v. Newchurch [35] .

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(33) [1960] S.A.S.R. 101.
(34) [1977] 2 N.S.W.L.R. 810.
(35) (1981) 9 N.T.R. 15.

In principle, a statute which creates a general power to arrest in substitution for the common law power to arrest ought not to be read down to preclude the exercise of the statutory power on private property. Whether the person seeking to arrest another for a criminal offence is exercising a common law or statutory power, the case is one "when the King is party" and when the public interest in the prosecution of crime prevails over private possessory interests in land. The *Crimes (Powers of Arrest) Act 1972* codified the general law governing powers of arrest but the code made no reference to powers of entry and search for the purpose of arrest. It is improbable that in 1972 Parliament intended that the powers conferred by ss. 458 and 459 of the Act should not carry with them the same authority to enter and remain on private premises to effect an arrest as were carried by the common law powers to arrest, subject to the common law restrictions on forcible entry. Prior to 1981, the statutory powers, like the powers conferred by s. 450 of the *Canadian Criminal Code*, must be taken to have authorized entry on to private premises for the purpose of effecting an arrest.

The powers conferred by ss. 458 and 459 were not novel statutory powers, such as the power to require the provision of a sample of breath. The presumption that a statute creating general powers of arrest intends to confer a power of entry corresponding with the common law is not applied to a statute creating a novel power of a different nature. The common law presumes that when Parliament creates a novel power, it does not intend thereby to authorize the commission of a trespass to facilitate its exercise: Morris v. Beardmore [36] ; Colet v. The Queen [37] . The general protection which the common law

accords to persons in possession of private property is undiminished by the creation of the novel power unless Parliament expressly provides otherwise.

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(36) [1981] A.C. 446.
(37) (1981) 119 D.L.R. (3d) 521.

In 1981, when s. 459A was inserted in the Act, Parliament clearly intended to attach an express statutory right of entry to the general arrest powers conferred by ss. 458 and 459; equally clearly, Parliament intended to restrict the right of entry and search for the purpose of effecting an arrest under those sections to cases falling within the terms of s. 459A. Section 459A was itself a code of the power of entry and search for the purpose of effecting an arrest under s. 458 or s. 459. Unlike the provision considered by Muirhead J. in McDowell v. Newchurch, s. 459A conferred power to enter and search "any place", whether the place be "premises" or not. But conditions were imposed. The power of entry and search for the purpose of arresting was conferred only on a member of the police force, and only in respect of persons found committing or believed on reasonable grounds to have committed a "serious indictable offence" (a term defined by s. 325(6) of the Act). The common law restriction on forcible entry was altered to authorize the use of necessary and reasonable force to effect an entry. In the light of the legislative intervention in 1981, the general powers to arrest conferred by ss. 458 and 459 cannot now be construed as carrying with them any powers of entry and search save those conferred by s. 459A. From that conclusion, it follows that police officers have no independent right to enter or remain on private property to effect an arrest under s. 458 or s. 459 in cases that fall outside s. 459A.

In cases falling outside s. 459A, the statutory powers to arrest — shorn of any power of entry — stand in no different position from those novel statutory powers that cannot be exercised on private property without the leave and licence of the person in possession of the property or the person entitled to possession: see Transport Ministry v. Payn [38] ; Allen v. Napier City Council [39] . The statutory powers to arrest are no longer effective to diminish the common law rights of persons in possession of land except in the circumstances specified in s. 459A. Those powers cannot now be construed as authorizing an arrest which can be effected only by trespassing on private property. If a purported arrest is made in circumstances where the power is not intended to be exercised, the arrest is invalid. The arrest is not struck with invalidity because the person arrested is not liable to arrest under s. 458 or s. 459 but because the power conferred by those sections can be exercised only if it is otherwise lawful to act in execution of the power. If a police officer could validly arrest by entering a place which he has no power to enter and which he is given no permission to enter, the statutory limitation on the power of entry would be nugatory and the protection of individual privacy which Parliament intended would be denied in practice.

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(38) [1977] 2 N.Z.L.R. 50.
(39) [1978] 1 N.Z.L.R. 273.

In England, after Morris v. Beardmore and before additional powers of entry were conferred by amending legislation (see s. 7(6) of the *Road Traffic Act* inserted by the *Transport Act 1981 U.K.* s. 25(3), Sch. 8), the validity of a requirement to provide a sample of breath was upheld in a line of cases by resort to the notion of an implied licence. There is, of course, no general licence implied by law permitting police officers on police business to enter on private property. It is clear from what Atkin L.J. said in Great Central Railway Co. v. Bates [40] that a police officer has no right to enter merely because most reasonable householders "would not as a rule object if the matter was done bona fide and no nuisance was caused". Is some licence to be inferred in fact, at least in the generality of cases? The circumstances of each case determine whether it is reasonable to infer that the person in possession of the premises has given permission to the police officer to enter and remain. However legitimate or even laudable from the public viewpoint the business of a police officer may be, it cannot be inferred that in general the police officer has an implied licence to enter and remain on private property to transact that business, at least where the business is of no benefit to the person in possession. Permission to enter to transact the business may be sought, but permission cannot be assumed. A police officer, in common with any other person on legitimate business, has an implied licence from the occupier of a dwelling-house "to come through the gate, up the steps, and knock on the door of the house": per Lord Parker C.J. in *Robson v. Hallett* [41] . That, as Lord Widgery C.J. explained in Brunner v. Williams [42] , "means that anyone who has any genuine reason for wishing to enter the house or the garden has implied licence from the occupier to approach the front or nearest door and ask whether he may be given permission for what he wishes to do". Now a licence in the terms thus discussed is fairly to be implied in the generality of cases as an incident of living in society. Unless a notice says "Keep Out" it is, generally speaking, reasonable to imply a licence to come up and ask "May I come in?" In the line of cases between Morris v. Beardmore and the insertion of s. 7(6) into the *Road Traffic Act*, however, the implied licence to enter on the curtilage of a dwelling to get permission to do something on the premises was treated as a licence to the police to perform their functions under s. 8 of that Act on any part of the premises between the entrance to the curtilage and the front door without seeking the permission of the person in possession. It then became a question of deciding whether the implied licence to perform those functions — on a path or driveway — had been revoked before the requirement to provide a sample of breath for the breathalyzer had been made. Perhaps the most extreme examples of these cases were Snook v. Mannion [43] and Gilham v. Breidenbach [44] where vulgar and vigorous injunctions to depart were construed as mere abuse falling short of an express withdrawal of a licence to be on the premises. With great respect, I am unable to adopt the reasoning in these cases. To imply that a police officer who is pursuing a fugitive on to his home ground has te fugitive's permission to enter and remain there until the police officer's work is done is, in my opinion, contrary to the inference ordinarily to be drawn from those facts. To hold that a licence impliedly given by the person in possession (who might or might not have been the fugitive) endures until it is revoked in unmistakable terms reverses the onus which Entick v. Carrington [45] places upon the person entering. Such an implied licence could be distinguished from a legal right of entry only by its revocability.

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(40) [1921] 3 K.B. 578, at p. 582.
(41) [1967] 2 Q.B., at p. 951.
(42) (1975) 73 L.G.R. 266, at p. 272.
(43) [1982] R.T.R. 321.
(44) [1982] R.T.R. 328.
(45) (1765) 19 St.Tr. 1029.

In the present case, if the police had an implied licence to enter on the driveway of 375 Liberty Parade, by whom was that licence revocable? Presumably not by the appellant, for he was not the person in possession of 375 Liberty Parade. For what purposes did the police have that person's implied licence to enter? Once it is admitted that the police officers have an implied licence to enter to arrest, might a licence for other police purposes be implied? To install a traffic radar device on the driveway? Or carry out surveillance of neighbouring premises from there? The presence of the police officers on the driveway of 375 Liberty Parade was not for any purpose with which the person in possession was concerned. I am unable to see in the facts of the case any ground for inferring that the police had a licence from that person to come on to his driveway without his permission for the purpose of arresting a suspected offender.

There is, of course, a tension between the common law privileges that secure the privacy of individuals in their own homes, gardens and yards and the efficient exercise of statutory powers in aid of law enforcement. The contest is not to be resolved by too ready an implication of a licence to police officers to enter on private property. The legislature has carefully defined the rights of the police to enter; it is not for the courts to alter the balance between individual privacy and the power of public officials. It is not incumbent on a person in possession to protect his privacy by a notice of revocation of a licence that he has not given; it is for those who infringe his privacy to justify their presence on his property. There may well be a case for enlarging police powers of entry and search, but that is a matter for the legislature.

I would allow the appeal, set aside the order of Brooking J. and the convictions of the appellant, and in lieu thereof order that the orders nisi to review be discharged.

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