LX BURSTON, G. The police power of search incidental to arrest.

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THE POLICE POWER OF SEARCH INCIDENTAL TO ARREST : RUDLING v. POLICE

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Each individual in society has an important interest in protecting the privacy of his person and possessions from interference. Society as a whole also has an interest in preserving the right to privacy of its individual citizens. Opposed to this privacy interest is the law enforcement interest. The law enforcement interest is the interest of the state in the apprehension and sanctioning of offenders against the criminal law as a means of protecting its individual citizens from criminal activity. An individual may recognise the importance of the law enforement interest by consenting to a search by the police, the agency which the state has created to carry out its function of enforcing the criminal law, of his person and possessions. In circumstances where an individual expressly consents to a search his interests and the interests of the state are not in conflict. The individual can revoke his consent to the search at any time and is therefore, in theory at least, in control of the extent to which his privacy is to be interfered with.

In circumstances where an individual will not consent to a search by the police however, the interest of privacy and of law enforcement come into direct conflict. The law governing the police power to search the person and possessions of individuals in society is an attempt to balance these competing interests. The law creates two major powers of search which are available to police officers in New Zealand. They are search pursuant to warrant and search incidental to arrest.

The police power to search pursuant to warrant is created by statute. Section 198 of the Summary Proceedings Act 1957 gives the police wide powers to obtain search warrants. A police officer must apply to a judicial officer for a search warrant. The judicial officer may then issue a search warrant if he is satisfied that there is a reasonable ground for believing that

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there exists in any place anything on or in respect of which an offence has been committed, or any evidence as to the commission of an offence, or anything believed to be intended to be used in the commission of an offence, if the offence is punishable by imprisonment. A search warrant must list specific offences which it relates to, it must list specific places to which the power of search extends, and it must state what is being searched for either specifically or in a more general class of things. An important provision of section 198 of the Act is that every police officer executing a search warrant must have it with him and produce it if he is required to do so. The requirements of a search warrant issued under section 198 of the Act provide three important checks on the police power to search pursuant to warrant. The power to search is restricted to specific places, for a specific type of thing, for a specific offence and within a specified time. An independent judicial officer has the discretion to refuse to issue a search warrant if in his opinion reasonable grounds do not exist for a search. The person being searched is given a warning as to the extent that his privacy is to be invaded. Therefore section 198 of the Act has the effect of creating a power of search which assists the police in the enforcement of the criminal law but through careful drafting contains built in checks which ensure that an individual who is being searched pursuant to a warrant is safeguarded against arbitrary and excessive uses of the power. Thus the police power to search pursuant to warrant in New Zealand represents a compromise between the interest in individual privacy and the interest in efficient law enforcement.[1]

The power of search pursuant to warrant provided by section 198 of the Summary Proceedings Act 1957 was first enacted in section 341 of the Criminal Code Act 1893. That Act was substantially an adoption of the Model Criminal Code formulated by Sir James Fitzjames Stephen in 1860. The Model Criminal Code

was an attempt at codification of the criminal law as it existed in the cases at that time. The police power of search incidental to arrest is, unlike the power of search pursuant to warrant, a creature of the common law. Its genesis was in two civil cases,[2] both of which were decided in 1853. Because the police power of search incidental to arrest was established in civil cases and had not long been recognised by the judiciary at the time that the Model Criminal Code was formulated, the power was not codified in the original Model Criminal Code and therefore was not subsequently adopted in New Zealand legislation. This is surprising in view of the importance of the interests that must be balanced in the creation of any police power of search. A New Zealand writer has noted that this omission is particularly surprising in view of the great care with which other branches of criminal law and practice have been legislated by Parliament in New Zealand.[3]

It is possible to justify the existence of a police power of search incidental to arrest in four separate situations. The first situation in which a police power of search incidental to arrest might be justified is where a police officer searched an arrested person to ensure that the arrested person has no means of injuring himself or others while in custody. The justification for the power of search in this situation was stated by Williams J in the case of Leigh v. Cole:[4]

> "It is clear that the police ought to be fully protected in the discharge of an onerous, arduos, and difficult duty - a duty necessary for the comfort and security of the community"

The interest that might justify a power of search in this situation is then the interest of police officers, and by implication of other persons, in being protected from any injury that an arrested person might cause them.

The second situation in which a police power to search an arrested person might be justified is where a police officer searches an arrested person in order to obtain evidence of the offence with which that person is charged. The justification for the power of search in this situation is stated by Palles C.B. in Dillon v. O'Brien.[5] In that case it was held that there was a right to detain property in the possession of the person arrested. The learned judge stated that this right was based on the principle that:[6]

> "the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form"

The third situation in which a police power to search an arrested person might be justified is where a police officer searches an arrested person in order to obtain evidence of any offence. In Elias v. Pasmore[7] Horridge J extended the principle on which Dillon v. O'Brien was decided to justify the power of search in this situation also:[8]

> "It therefore seems to me that the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, it if appears in fact that such documents were evidence of a crime committed by anyone."

The final situation in which a police to search an arrested person might be justified is where a police officer searches an arrested person in order to remove his valuables. The justification

For this power of search is that if the police do not have the power to remove an arrested persons property then it may be taken from him or damaged in the time that he is in custody. This would of course be detrimental to the interests of the arrested person. Such situation would also be detrimental to the interests of the police as they would be open to allegations of misconduct.

A police power of search incidental to arrest might then be justified in these four situations in order to protect the specific interests involved in law enforcement which have been identified separately in each situation. Standing in opposition to these law enforcement interests however, is the privacy interest as expressed by Williams J in the case of Leigh v. Cole:[9]

> "it is ... incumbent on everyone engaged in the administration of justice, to take care that the powers necessarily entrusted to the police are not made an instrument of oppression or of tyranny towards even the meanest, most depraved and basest subjects of the realm."

The police power of search incidental to arrest should represent a balance between these important competing interests of on the one hand the privacy of the individual, and the interest of society as a whole in maintaining the privacy interests of its individual citizens, and on the other hand the interests of the state and individual citizens in the collection of evidence in relation to offences committed by an arrested person, the protection of the police and others from the arrested person, and the protection of the arrested persons property. Before it is possible to consider the balance that the common law has in fact achieved between these interests it is necessary to determine precisely the limits of the police power to search incidental to arrest (hereinafter referred to as "the common law power").

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The general question of what are the limits of the common law power came before the Supreme Court of New Zealand in the case of Rudling v. Police.[10] The material facts of that case were as follows. Rudling was arrested at his home on a charge of misuse of the telephone under section 108 (2) (c) of the Post Office Act 1959. It was alleged that Rudling had used abusive and insulting language to the police over the telephone in the early hours of the morning. He was taken to the Central Police Station by Constable Brown. The evidence showed that at the time Rudling was abusive, argumentative, using obscene language and generally insulting the police. He was affected by liquor. The constable in charge of the watch-house, Constable Glazebrook, asked Constable Brown to search Rudling. When Constable Brown attempted to do so Rudling became aggressive and would not permit him to search his pockets. Both constables then held Rudling and began to search him. Rudling calmed down and said "You can search me". Both constables released their hold of him and Constable Glazebrook turned to walk away leaving the search to be continued by Constable Brown. Rudling became violent again. He hit Constable Glazebrook and then tried to fight both constables. They subdued him with force, removed his valuables, and placed him in the cells.

Rudling was charged with assaulting Constable Glazebrook in the execution of his duty, contrary to section 77 (a) of the Police Offences Act 1927. He was convicted of this offence in the Magistrates Court.

Rudling appealed against this conviction to the Supreme Court. It was submitted for the appeallant that at the time Constable Glazebrook was assaulted he was not acting in the execution of his duty for the reason that the police do not have an automatic or standard right of search of an arrested person, and that they have no specific right of search for the purpose of protecting his valuables.

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After reviewing the existing authority Holland J held:[11]

> "There is undoubtedly a right to search a person upon his arrest provided the circumstances warrant it, but there is nothing I can find in the cases which support the proposition that there is a general right to search every arrested person. A fortiori there can be no right to search an arrested person against his will merely for the purpose of taking from him against his will his valuables."

The learned judge found as a fact that the police were searching Rudling for the purpose of taking possession of his valuables. For that reason he was bound to hold that such a search was unauthorised and illegal. Therefore Rudling could not be convicted of assaulting Constable Glazebrook in the execution of his duty. The appeal was accordingly allowed. However, Holland J exercised a power provided by section 132[12] of the Summary Proceedings Act 1957 and ammended the conviction for assaulting a constable in the execution of his duty to one of common assault. On the ammended charge Rudling was given the same sentence as that imposed by the learned Magistrate for his original conviction in the Magistrates Court.

The case of Rudling v. Police is a direct authority for the proposition that the common law power does not extend to confer a right on police officers to search arrested persons for the purpose of taking possession of their valuables. The respondents argued before Holland J that Constable Glazebrook by attempting to search Rudling was acting in accordance with the established police procedure of removing all valuables from arrested persons before they are placed in the cells. Under cross-examination Constable Brown referred to this procedure as[13] "Standard Police practice for their protection, expecially when they are down in the cells - other people take

their property." The effect of the decision in Rudling v. Police is to deny lawful justification to this established police procedure.

Holland J went on in the case to propose a test of the circumstances in which a right to search a person upon his arrest did exist:[14]

> "the test must be whether the person arrested gives reason to suspect that he might have on him either evidence relating to the crime in respect of which he had been arrested or other crimes or something which could cause injury to himself or other persons or property of others while he was under arrest ... The test must be an objective one as to whether it was reasonable to conduct the search."

Rudling v. Police contains then a statement of the limits of the common law power. The statement is obiter dictum. This statement of the common law power can be taken to confer legal justification for police searches in three situations; where an arrested person gives reason to suspect that he might have on him a means of injuring himself or others or the property of others while in custody (hereinafter referred to as a "power to search for a means of committing injury"), where an arrested man gives reason to suspect that he might have on him evidence of the offence with which he is charged (hereinafter referred to as a "power to search for evidence of the offence charged"), and where an arrested person gives reason to suspect that he might have on him evidence of any offence (hereinafter referred to as a "power of search for any evidence").

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We will now examine the extent to which common law authority supports the formulation of the limits of the common law power as stated by Holland J.

In Rudling v. Police the learned judge turned to five learned authors for aid in answering the question as to what are the limits of the common law power.[15] The conclusion that the learned judge arrived at was that the weight of authority in the textbooks and reference work to which he referred was against a general right of search but that the law was unclear as to this point.[16]

Four of the works referred to by Holland J support the proposition that there is no general common law power to search an arrested person.[17] These works support the proposition that there is a power to search arrested persons but that it is a power limited to particular situations. Only one textbook lends support to the proposition that there is a general power to search arrested persons.[18] It is submitted that the weight of authority in these works is clearly against a general power of search. The reference work and textbooks are clear that no automatic power to search every arrested person exists but that the power of search only arises in particular situations. The common law power is therefore a limited power. It is the extent of that limited power of search which is unclear.

Three of the works support the proposition that there is a power to search for a means of committing injury. They describe this power in differing terms however. Halsbury states that an arrested person may be searched where there are reasonable grounds for believing that he has on his person any weapon with which he might do himself or others an injury or any implement with which he might effect escape.[19] Leigh describes it as a power to search an arrested person for any weapon or implement which might enable the prisoner to commit an act of

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violence or effect his escape.[20] Adams provides the most general description of this power in stating that there is a power to search an arrested person to ensure that he has no offensive weapon or other means of injuring himself or others while in custody.[21] Thus while these works provide support for the proposition that there is a power to search for a means of committing injury they are unclear as to the precise limits of that power.

Adams states that there is also a power to search an arrested person for possible evidence.[22] Phipsön states that on the arrest of a prisoner for any crime the police may seize and retain all material evidence in his possession for production in court.[23] Leigh states that there is a power to search an arrested person for any articles in his possession which the police officer believes to be connected with the offence charged, or which may be used in evidence against him, or which may give a clue to the commission of the crime, or the identification of the criminal.[24] It is unclear from these works however, whether the power is only to search for evidence of the offence charged, or to search for any evidence. Halsbury states that an arrested person may be searched where there are reasonable grounds for believing that he has in his possession evidence which is material to the offence with which he is charged.[25] On the other hand Kenny states that any property may be taken which is found in the possession of the arrested person and which would form material evidence on the prosecution of any criminal charge against any person.[26] Archbold, which was not referred to by Holland J, adopts an intermediate position taking it to be settled law that the police may take any goods found in the possession or house of an arrested person which they reasonably believe to be material evidence in relation to the crime which he was arrested. If in the course of the search the police come on any other goods which show the arrested person to be implicated in some other crime they may take them provided they act reasonably and detain them no longer than necessary.[27]

To determine precisely what the limits of the common law power are, it is necessary to review the cases which have given rise to the power.

The leading New Zealand case in relation to the limits of the common law power is Barnett and Grant v. Campbell.[28] In that case Campbell, a police constable, entered and searched the premises of Grant. He was acting under the authority of a warrant alleging that those premises were kept and used as a gaming house. The warrant authorised Campbell to enter Grant's premises and search and seize all instruments of unlawful gaming which might be found therein, and to arrest, search, and bring before a Justic of the Peace, Grant, among others, as a keeper of the premises. Campbell found Grant on the premises and also found books and papers, being the property of Grant and Barnett, which constituted evidence of unlawful gaming. Campbell left taking nothing with him, but returned twenty minutes later and took away the books and papers. He did not arrest Grant. Grant was in fact never arrested. He was proceeded against sometime afterward in respect of another charge, not being that contained in the information on which the warrant was issued. The books and papers were in the meantime detained by Campbell.

The New Zealand Court ofAppeal in a judgement delivered by Cooper J held, inter alia, that the seizure of the books and papers was not justified as being pursuant to the common law power:[29]

> "This power to seize ... upon arrest, is involved in and is a part of the power to search the alleged offender, and it is clear that before the right to search the person of the offender arises the arrest must be effected. The right to a personal search is clearly dependent not upon the right to arrest, but the fact of arrest, and that at the time of search the person is in custodia legis."

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The effect of this decision is to limit the situations in which the common law power can be exercised to those situations in which a police officer has actually arrested a person.

In the recent case of McFarlane v. Sharp[30] the Court of Appeal expressly left open the possibility that the situations in which the common law power can be exercised may be extended however.[31] The facts of that case were that the police suspected McFarlane of being involved in a bank robbery. They entered his house pursuant to a valid search warrant. The search revealed no evidence relating to the robbery but the police did discover and seize documents which constituted evidence of bookmaking which were not covered by the warrant. McFarlane consented to accompany the police officers to the police station where he was questioned by them. Two hours later he was arrested on a charge of bookmaking.

It was not argued before the Court of Appeal that McFarlane v. Sharp was distinguishable on the facts from the earlier case of Barnett and Grant v. Campbell. Therefore the court was bound to treat the case before it as one in which the documents relating to bookmaking were seized unlawfully. However, the Court of Appeal left open the point as to whether a police officer who lawfully came across evidence of an offence could sieze that evidence and then arrest the person in possession of the evidence, treating the arrest and the seizure as one continuous transaction. The search and seizure could then be justified as notionally contemporaneous with the arrest and therefore "incidental to the arrest" pursuant to the common law power. If it were to be decided that the seizure of evidence in such circumstances was justified it would not abrogate the rule in Barnett and Grant v. Campbell that the power of search is dependant not on the right to arrest but upon the fact of arrest. The effect of such a decision would be to extend the concept of when a search and seizure is "incidental to arrest".

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The leading cases in support of the formulation of the limits of the common law power as stated by Holland J in Rudling v. Police are the civil cases of Leigh v. Cole [32] and Bessell v. Wilson .[33]

Leigh v. Cole is the leading case in support of the proposition that there is a power to search for a means of committing injury. In the case the plaintiff alleged that the defendant, a Superintendent of Police, did, inter alia, unlawfully search the plaintiffs clothes. The plaintiff had been arrested for being drunk and taken to the station house where, at the direction of the defendant, the plaintiff was searched and certain articles taken from him. In his summing up of the case to the jury Williams J stated in relation to the search of a prisoner that:[34]

> "Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend on all the circumstances of the case."

The learned judge thus states that the common law power is not a general power which may be exercised in the case of all arrested persons, but that it is a limited power.

What then are the limits of the power to search for a means of committing injury? Williams J stated that:[35]

> "a man when in custody may so conduct himself by reason of violence of language or conduct, that a police officer may think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace."

Essentially the learned judge is proposing a reasonableness test of the limits of the power to search for a mean of committing injury, the test being whether a police officer, taking into account all the circumstances of the case, could reasonably believe, from the violence of language or conduct of an arrested man, it to be prudent and right to search the man in order to find out whether he has any weapon with which he might either; injure himself, or another person, or commit a breach of the peace. A breach of the peace is[36] "apparently any crime or offence whatever". Any other offences which an arrested man could be reasonably expected to commit with a weapon apart from injury to the person would appear to be limited to an attempt to escape or damaging the property of others. If the police officer could reasonably have believed it prudent and right to search the arrested man in these circumstances then the search is justified; if he could not, then it is illegal.

In Bessell v. Wilson Lord Campbell provides an illustration of the limits of the power to search for a means of committing injury. In the case before the learned judge a man was apprehended pursuant to a warrant not charging him with any crime, but merely to make him appear in person before an alderman. The man was searched. Lord Campbell stated:[37]

> "It is said that the search here was justified, because the person in custody might have some instrument about him with which he might make away with or injure himself, or the alderman before whom he was brought. This does not appear a satisfactory reason; it assumes that when a man is apprehended, because he has in the first instance appeared by counsel, and not in person, he will take with him the means of committing suicide or murder. This is a most absurd supposition."

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It may be argued that this situation is distinguishable from the situation in which a man was in custody because he was charged with a felony, and that in that case a search might be justified solely on the grounds that the man may have taken into custody with him the means of committing suicide or murder. It is submitted however, that this argument should not be accepted as a statement of the common law. The principle which led Lord Campbell to decide that a search was not justified in the case before him was that the fact a man was taken into custody was not a satisfactory reason for searching that man in order to ensure that he did not have with him the means of injuring himself or others. It is submitted that by the use of this illustration Lord Campbell is suggesting that something more than the mere fact of custody is required to justify such a search, be it custody as the result of a warrant to make the man appear in person before an alderman as in the case before his lordship, or custody on the result of having been charged with a felony. Thus the police would not for example be justified in searching a man charged with the felony of theft solely for the reason that he may have taken into custody with him the means of committing suicide or murder.

This interpretation of the illustration given by Lord Campbell in Bessell v. Wilson of the limits of the power to search for the means to commit injury is consistent with the statement of Williams J in Leigh v. Cole to the effect that a police officer who undertakes a search under this power must have reason to suspect, arising out of the violence of language or conduct of an arrested man and taking into account all the circumstances of the case, that the arrested man may have a weapon with which he might either injure himself, or others, or attempt to escape, or damage the property of others.

Logically the power to search for the means to commit injury could be exercised at any time in the period of the arrested mans custody. The power does not arise from the offence for

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which the man is arrested but from the violence of his language or conduct while in custody. It is that violence of language or conduct which may give a police officer reason to suspect that the man has a weapon. Such violence may not manifest itself at the time of arrest but only at a later period of the arrested mans custody.

Bessell v. Wilson is the leading case in support of the proposition that there is a power to search for evidence of the offence charged. The case involved a civil claim in which the plaintiff brought on action for false imprisonment against an alderman who issued a warrant for his apprehension requiring the plaintiff to be brought in custody before a Justice of the Peace. Under the warrant the plaintiff was apprehended and imprisoned in a police station. In compliance with the general rule acted upon at the police station the plaintiff was searched.

In an addendum to the report of the case it is stated that at the close of the argument the Chief Justice, Lord Campbell, made some observations in reference to the practice of searching prisoners, Lord Campbell said that it was not his opinion with respect to the searching of persons who are charged with offences that there was no right in anyone to search a prisoner at anytime:[38]

> "It is often the duty of an officer to search a prisoner. If, for instance, a man is taken in the commission of a felony, he may be searched to see whether the stolen articles are in his possession; or whether he has any instruments of violence about him; and in like manner if he be taken on a charge of arson, he may be searched to see whether he has any fireboxes or matches about his person. ... It may be highly satisfactory and indeed necessary that the prisoner should be searched."

As it has been seen Lord Campbell did not think that the search in the case before him was justified.

It could be argued that the learned judge in Bessell v. Wilson is citing examples of a general power to search any person charged with certain types of offences. Thus, any person charged with a felony could be searched for evidence of the commission of any felony. Similarly any person charged with the commission of a particular offence of arson could be searched for evidence of the commission of any offence of arson. It is submitted that Lord Campbell is proposing no such general power however. The examples of the circumstances in which a search would be "satisfactory and indeed necessary" which Lord Campbell cites relate to specific offences where evidence exists as to the commission of those offences. The evidence that the police are justified in searching for is only evidence in relation to the specific offence for which the arrested person is taken into custody. Thus a police search of an arrested person would be justified if the person was arrested for stealing bread, and the search was for stolen bread; or if the person was arrested for assault with a weapon, and the search was for the weapon; or if the person was arrested for arson, and the search was for the means to commit the arson. The power of search that is described by Lord Campbell then only applies to evidence of the commission of the specific offence for which the person being searched has been arrested.

It could also be argued that the statement of Lord Campbell that[39] "It is often the duty of an officer to search a prisoner. If for instance, a man is taken in the commission of a felony, he may be searched to see whether ... he has any instruments of violence about him." lends support to the proposition that there is a power to search for a means of committing injury. Prima facie this statement can be taken as an authority for the proposition that this power of search is a general power to search

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a person, upon arrest for any felony, in order to ascertain whether he has any instruments of violence about him. It has been argued above that this statement of Lord Campbell's appears in the context of a discussion of the power to search for evidence of the offence charged. The example of a search for instruments of violence cited by Lord Campbell relates then to a search for evidence of the commission of a specific felony. It does not relate to the power to search for a means of committing injury, as the learned judge was not directing his mind to that point. It is therefore submitted that Bessell v. Wilson is not an authority for the proposition that the power to search for a means of committing injury is a general power to search a person, upon arrest for any felony in order to ascertain whether he has any instruments of violence about him.

Before a police officer could exercise the power to search for evidence of the offence charged, he would have to show a reasonable ground for suspecting that the arrested person had possession of evidence of the offence for which he had been arrested. In the examples cited by Lord Campbell in Bessell v. Wilson the arrested persons have all been "taken" in the commission of an offence. The fact that they are caught in the commission of an offence might give the arresting officer the reasonable ground to suspect that the arrested person had evidence in his possession which he needs to show in order to justify a search for that evidence. However, in situations in which a man is arrested on suspicion of having committed an offence, but has not been caught in the commission of that offence, the arresting officer has to show a reasonable ground for suspecting that the arrested person has in his possession evidence of the offence, which is over and above that of a reasonable belief in the actual commission of the offence. In such situations it would be incumbent upon the arresting officer to show that some additional factor, for example information from a reliable informant to the effect that the man had stolen goods in his possession, afforded him reasonable grounds for suspecting

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that the man had in his possession evidence of the offence for which he was arrested at the time of his arrest.

It has been argued that Bessell v. Wilson only supports the proposition that the common law power includes the power to search for evidence of the offence charged. The case of Elias v. Pasmore[40] on the other hand supports the proposition that the common law power includes the power to search for any evidence. The facts of that case were as follows. Acting under the authority of a warrant for the arrest of Hannington alleging a charge of sedition, police officers entered the premises of Elias. Hannington was on the premises and was arrested. The police officers searched Hannington and further searched the premises. A letter was found in the possession of Hannington which was material evidence that Elias was inciting Hannington to commit sedition. A number of other seditious documents were found on the premises. They also showed that Elias had been inciting Hannington to commit sedition. The police prosecuted Elias and the documents were used at his trial. He was convicted. Elias afterwards said that the police officers had no right to take his papers and brought an action for damages for trespass against them.

Before Horridge J it was contended that the police officers were entitled to seize, remove and retain the documents on the following grounds, inter alia:[41]

> "1. that there was a right to search the person arrested;
> 2. that the police may take all articles which were in the possession or control of the person arrested and which may be or are material on a charge against him or any other person;
> 3. that the police, having lawfully entered, are protected if they take documents which subsequently turn out to be relevant on a charge of a criminal nature against any person whatever."

As to the first ground Horridge J held that the right to search on arrest, through clearly established in Bessell v. Wilson, did not authorise what was done in the case before him, namely the seizure and taking away of large quantities of documents and other property found on premises occupied by persons other than the person of whom the arrest was made.[42]

As to the second ground the learned judge held that the case of Dillon v. O'Brien clearly established that police officers are entitled upon a lawful arrest to take and detain property found in the possession of the arrested person which is material evidence of that crime. The learned judge further held that police officers are also entitled to take and detain property found in the possession of the arrested person which is material evidence of any crime.[43]

As to the third ground the learned judge held that the seizure of documents, which seizure would otherwise be unlawful must be excused if it appears in fact that such documents were evidence of a crime committed by anyone.[44]

Horridge J's decisions as to the second and third grounds contended in support of the proposition that the police officers were entitled to seize and retain the documents are then, prima facie, authority for two distinct powers of seizure. The decision as to the second ground excuses the seizure of evidence in the possession of an arrested man which is evidence of any criminal charge. The decision as to the third ground excuses the seizure of evidence which would otherwise be unlawful, if in fact such evidence were evidence of a crime committed by anyone. The learned judge relied on the cases of Pringle v. Bremner and Stirling,[45] and Dillon v. O'Brien[46] as his principal support in reaching these decisions.

Pringle v. Bremner and Stirling was a Scotch case. In the course of a search of the premises of the pursuer (appellant), pursuant to a warrant, for pieces of wood used in exploding a cart outside the manse of a minister, police officers discovered

evidence implicating the pursuer in the sending of a threatening letter to the minister. It is clear from the facts of the case that the issue before the court related to the seizure of the pursuers property and its possible use in prosecuting him for an alleged criminal offence. The issue could not have been whether the property which was seized could be used in the prosecution of anyone else because the police in that case did not seize any property which could be used in the prosecution of anyone else. It is therefore difficult to deduce from Pringle v. Bremner and Stirling the proposition that the police can seize documents which are evidence of a crime committed by anyone. It is therefore submitted that the case of Pringle v. Bremner and Stirling should not be regarded as providing support for the decision in Elias v. Pasmore that the seizure of evidence, which would otherwise be unlawful, must be excused if it appears in fact that such documents were evidence to a crime committed by anyone.

Despite this Horridge J took the opinions of Lord Chelmsford and Lord Colonsay in that case to show:[47]

> "though the seizure of documents was originally wrongful, if it in fact turned out that the documents seized were documents which might be properly used in a prosecution against anyone, then the seizure would become excused."

As Pringle v. Bremner and Stirling was a Scotch case Horridge J went on to consider whether this doctrine which he took the case to decide could in principle be applied to a seizure of documents in England.

The learned judge thus went on to examine the Irish case of Dillon v. O'Brien. In that case Dillon, an M.P., was arrested by O'Brien and Davis acting under the authority of a warrant ordering Dillon's arrest for conspiracy. O'Brien and Davis took and detained banknotes and other property found on the

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premises where the arrest was effected for the purpose of producing them as evidence in the prosecution of Dillon.

Dillon v. O'Brien was decided on the principle that the interest of the state in the person charged being brought to trial necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial.[48] Horridge J extended this principle to the situation in Elias v. Pasmore which involved the seizure of evidence of a crime committed by a man following the arrest of another man. The learned judge stated:[49]

> "the interests of the State must excuse the seizure of documents, which would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by anyone."

It is submitted that this extension of the princple stated in Dillon v. O'Brien to the situation in Elias v. Pasmore was made by Horridge J on a misreading of the way in which Palles C.B. had distinguished Entick v. Carrington[50] from the issue to be decided in Dillon v. O'Brien.

In Dillon v. O'Brien Palles C.B. had said of Entick v. Carrington:[51]

> "in that case there was no allegation of the plaintiffs guilt, nor that there was reasonable or probable cause for believing him guilty, nor that a crime had, in fact, been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or anyone else."

Horridge J placed more emphasis on the last three words of this statement than perhaps was intended. The learned judge took the statement to mean that if there had been evidence of a crime committed by anyone other than Dillon in the case of Dillon v. O'Brien then the seizure of that evidence might have been lawful

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as being in the interests of the state. Dillon v. O'Brien cannot be taken to suggest this position however. Palles C.B. distinguished Entick v. Carrington from the case before him on the issue of whether the rule[52] "that, at least in cases of treason and felony, constables ... are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime" should be extended to the cases of misdemeanour. From this statement it is clear that Palles C.B. was not considering the issue of whether the seizure of evidence of a crime committed by anyone other than the arrested person would be justified. It is therefore submitted that Horridge J was wrong in law in deciding that the seizure of evidence, which would otherwise be unlawful, must be excused if it appears in fact that such documents were evidence of a crime committed by anyone.

In the recent decision of the English Court of Appeal in Ghani v. Jones,[53] Lord Denning restricted the decision in Elias v. Pasmore to the seizure of evidence implicated in the offence that the arrested person is charged with. His Lordship stated that the decision in Elias v. Pasmore that the seizure of documents would be excused if it appeared that those documents were evidence of a crime commited by anyone went too far.[54] Elias v. Pasmore is therefore no longer an authority for the power to seize evidence, which would otherwise be unlawful, if it is evidence of a crime committed by anyone.

Elias v. Pasmore remains an authority for the proposition that police officers upon a lawful arrest by them, have a power to seize evidence of any crime which the arrested man may have committed. The principal support for this proposition is found in the judgement of Lord Chelmsford in the case of Pringle v. Bremner and Stirling. The relevant passage is cited by Horridge J in Elias v. Pasmore.[55] Lord Chelmsford said:[56]

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> "But supposing that in a search which might have been improper originally, there were matters discovered which showed the complicity of the pursuer in a crime, then I think the officers, I can hardly say would have been justified, but would have been excused by the result of their search."

The seizure of evidence of any crime which the arrested man may have committed is then excused in law. It is not however, justified as being pursuant to the police officers power to search. The case of Barnett and Grant v. Campbell is an authority for the proposition that the common law power to search for evidence is limited to a power to search for evidence of the offence with which an arrested man is charged. The New Zealand Court of Appeal in that case took it to be settled law that:[57]

> "a constable who is legally authoried to arrest an accused person may, at the time of such arrest, and as incidental to it, seize and take possession of articles in the possession or under the control of the accused person as evidence tending to show the guilt of such person. This is a power of common law, and exists as an incident to the arrest ... It is founded on the right to search a person upon his arrest; and the police are entitled to hold and detain property so taken as instruments of proof against the accused, subject to the right of the proper authority to direct such property to be restored to the accused if it is found that it is in no way connected with the charge made against him."

An examination of the common law authority which existed prior to the decision in Rudling v. Police can then be seen to support the formulation of the limits of the common law power as stated by Holland J to the extent that there is an established power

to search an arrested person where there is a reasonable suspicion that he has in his possession a means of committing injury and for evidence of the offence charged. The law will excuse the seizure by police officers of evidence found in the possession of an arrested man during the course of a lawful search, which is evidence of any other offence that the arrested man may have committed. There is however, no persausive common law authority in support of the proposition that police officers have a power to search arrested persons for evidence of any offence other than that with which he was charged. It is therefore submitted that the test of whether a search by a police officer of an arrested person is justified as being pursuant to the common law power is:

> "whether the person arrested gives reason to suspect that he might have on him either evidence relating to the offence in respect of which he had been arrested, or something which could cause injury to himself or the persons or property of others while he was under arrest."

Now that the precise limits of the power have been determined it is possible to consider the balance that the common law power has achieved between the privacy interest and the interest in efficient law enforcement.

The common law limited the justification of a police search of an arrested person to two situations; where a search is for a means to commit injury, and where a search is for evidence of the offence charged.

In the first situation the prime interest in efficient law enforcement that is being protected by the existence of the power of search is the interest of the state in the safety of police officers and other persons, who come into contact with the arrested person. This is an important interest. The power of search to protect this interest is only justified where the

arrested person gives reason to suspect that he might have on him a means of injuring other persons. In situations where the arrested person does give such reason it is clearly necessary that a police officer should have a power to search him in order to establish whether that person does present a danger. This consideration overrides the interest of the arrested person in the privacy of his person and possessions because in such circumstances the injury to his privacy is clearly outweighed by the reasonable apprehension of injury to the interest of the police and other persons in their physical safety. Similar considerations apply where an arrested person gives reason to suspect that he might inflict injury upon himself. The reasonable apprehension of such injury would again clearly outweigh the injury to that persons privacy interest. The power of search for a means of committing injury represents then a balance of the interests of individual privacy and efficient law enforcement whereby the common law power recognised the importance of the interest in protecting both other persons and the arrested person himself in situations where an arrested person gives reason to suspect that he may present a danger to individual safety, as overriding individual privacy interests. The privacy interest of arrested persons remains safeguarded to a large extent however, by the fact that the power of search may only be exercised where an arrested person gives a police officer reason to suspect that he has on him a means of committing injury. This power of search has developed in accordance with the common law principle that the police should only be able to exercise powers entrusted to them in situations in which they can show a reason for exercising that power. In this way a judicial review is built into its operation. If on the other hand the power was an automatic right the police would have an unrestricted right to search every arrested person for a means of committing injury. Such a power would be open to abuses. By limiting the operation of the power and thereby making it reviewable by an independent judicial officer the potential to abuse this power of search, thereby infringing unnecessarilly on the privacy rights of individuals who do not have means of committing injury, is minimised.

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In the second situation, where a search is for evidence of the offence charges the interest that ie being protected by the existence of the power of search is the interest of the state in the preservation of material evidence of the arrested mans guilt or innocence for the purpose of his trial. In the situation where a man had been arrested for an offence the common law adopted the position that the trial of the accused would be an empty form if evidence of the offence with which he was charged could not be produced in support of the charge. The dictates of expediency required that where it was impossible or impracticable to obtain a search warrant, and a man was reasonably suspected of the commission of an offence for which he was subsequently arrested, then if a police officer had further reason to suspect that at the time of his arrest the man had in his possession evidence of the offence charged, the officer should have the power to search for that evidence. Without such a power the evidence might be unavilable or disposed of. The result would be that many persons guilty of an offence would be acquitted merely because the police could not obtain sufficient evidence for a successful prosecution. Thus, in such situation, the common law recognised the interest of the state in ensuring that possible evidence of an offence for which a man could be arrested could be searched for to facilitate his prosecution, as overriding the privacy interest of the arrested man. Under section 198 of the Summary Proceedings Act 1957 the New Zealand Police enjoy much wider powers to obtain search warrants than were available to English Police officers at the time the common law power developed. The justification for the power to search for evidence of the offence charged remains valid however, as it is often not practicable to obtain a search warrant following the arrest of a person as the evidence of the offence may be disposed of before a search warrant could be obtained.

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The common law power did not develop to justify police searches in the two other situations where the state has an interest of efficient law enforcement in which a power of search of an arrested person could develop. These situations are where a search is for evidence of any offence, and where a search is to remove valuables.

The reason why the common law power did not develop to justify a search in the first of these situations was that the states interest in this situation is purely that of increased efficiency. If the common law power had been developed so that an arrested person who gave reason to suspect that he had possession of evidence of other offences than that for which he had originally been charged could be searched for evidence of those other offences, then it would be open to the police to search for evidence of offences to which they did not have a reasonable ground for arrest. In this situation the common law would be justifying searches in which the subject of the search has no warning of the extent to which his privacy interest is to be invaded. Society however, has an important interest in being seen to protect the privacy of its individual citizens from unreasonable intrusions by the state. The common law power thus did not develop to justify searches of an arrested person for any offences other than that with which the arrested person was charged. The common law does however, excuse the service of evidence found in the possession of an arrested person which is evidence of an offence other than that charged.

The second situation in which the common law power did not develop to justify police searches is where a police officer searches an arrested person in order to remove his valuables. Despite the fact that the common law power does not justify searches in this situation the police have an established procedure for such searches. Police information manuals list the removal and care of a prisoners property as one of the reasons for police searches of an arrested person. Police General Instruction P. 98 sets out clearly the rules governing

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the searching of prisoners which must be followed by all police officers. Part of the general instruction is to the effect that an arresting officer shall inform the watch-house keeper of the charge and where there is no prospect of the prisoner being bailed, search the prisoner thoroughly. The arresting officer shall then ensure that all property, including money, taken from the prisoner is entered on the property sheets, form Police 48, verifying the correctness of the property sheets and signing them. The justification put forward for this police searching procedure is that if it is not carried out then an arrested persons property may be taken from him or damaged during the time that he is in custody. The police would then find it difficult to disprove allegations of misconduct.

There is no legal basis for this police procedure at common law. The reason for this is that the interest of the arrested person in the privacy of his own property, which does not present a danger to himself or others and which is not evidence of the offence with which he was charged, is such that to deny him the freedom of choice as to what to do with this property would constitute an unwarranted intrusion of the power of the state on the rights of the arrested person. Society as a whole is committed to maintaining a personal freedom of choice in areas where the interests of the state do not demand that officers of the state should have a power to compel a citizen to relinquish his freedom of choice as to the action he will take. In most cases an arrested person would be willing to hand over his valuables to a police officer when asked to do so. In some cases however, an arrested person will refuse to do so. The reason for this refusal may be that he does not trust the police officer or it may be that he does not wish to co-operate with the police. It is submitted that such circumstances do not necessitate a power of search. If a procedure were adopted at police stations whereby secure individual lockers were provided in which prisoners could deposit their valuables, to

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which only the arrested person had a right of access, then a prisoner who did not wish to hand over his valuables to the police for safekeeping would have the choice of placing them in a locker or retaining them on his person.

A prisoner who chose to retain his valuables could be barred from an action for damages in respect of any loss or damage to his property while he was in custody. The interest of the police in protecting themselves from allegations of misconduct would thereby be protected. The interest of the prisoner in maintaining a freedom of choice as to what to do with his property would also be protected.

An examination of the limits of the common law power thus reveals that the power involes a careful and finely judged balancing of the interests involved in the privacy of the individual and of efficient law enforcement. As it is a common law power however, the precise limits of the power are subject to conflicting judicial interpretation and are therefore uncertain. The uncertainty of the limits of the common law search power works to the advantage of the police.

The uncertainty of the limits has the effect that the issue of whether a particular police search was authorised as being pursuant to the common law power is unlikely to arise frequently in the courts. An arrested person who is prosecuted as a result of evidence which came to light in an unlawful search is unlikely to challenge the lawfulness of that search because the lack of clarity as to the precise limits of the common law power makes it difficult to predict the outcome of any possible court proceedings. Similarly an arrested person who is the victim of an unlawful search, but who is not prosecuted on the basis of any evidence which is found in that search, is unlikely to consider the possibility that he might have grounds for commencing an action against the police alleging an unauthorised

search took place. Perhaps the main reason however, as to why the limits of the common law power are so rarely challenged in the courts is that an arrested person is at a great disadvantage in relation to the police during the period of his custody. He is in an alien environment and is confronted at every turn with the symbols of the authority of the state. Without ready access to a lawyer he is not in a position to know what the limits of the common power are. It is therefore not surprising that the arrested person usually passively consents to police searches of his person and possessions which are outside the purview of the law, and accepts that the police have a general right to search him.

The operation of the rule as to the administability of evidence also works to the advantage of the police. The rule relating to the admissibility of evidence stated in Karuma v. The Queen[58] was adopted by Wild C.J. in Mathewson v. Police.[59] The learned judge said in that case that the test as to the admissibility of evidence is whether the evidence is relevant to the matters in issue, the court not being concerned with how it was obtained. This rule is subject to the discretion of the presiding judge to disallow evidence if the strict rules of admissibility operate unfairly against the accused. The discretion is in practice usually only exercised where evidence is obtained by a trick however, as in the entrapment cases.[60] The effect of this rule as to the admissibility of evidence is that a court will admit evidence found in a search, not justified by the common law power, as evidence in the prosecution of any offence.

The combined effect of the uncertainty of the limits of the common law rule, and the operation of the rule as to the admissibility of evidence is that the balance of the interests of privacy and of law enforcement which the common law

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represents is thrown heavily in favour of efficient law enforcement to an extent which abrogates the individuals privacy rights in an unnecessary and legally unjustified manner. It is therefore respectfully submitted that to counteract this imbalance, and to give full effect to that balance which the common law has developed between an individual and society as a wholes interest in privacy, and the states interest in law enforcement, the common law power should be codified in a statutory provision. It is submitted that the form of that statutory provision might be:

> "A police officer is justified in searching an arrested person if an arrested person gives reason to suspect that he might have on him either evidence relating to the offence in respect of which he had been arrested, or something which could cause injury to himself or the person or property of others while he was under arrest. If in the course of such a search a police officer comes upon evidence of an offence other than that with which the arrested person is charged then the seizure of that evidence is excused."

The central concern of this article has been the determination of the limits of the common law power and the balance between the privacy interest and the law enforcement interest that it represents. Although space does not permit a discussion of the point, it is submitted that the codification of the common law power would present the legislature with an opportunity to consider in detail the issue of what are the appropriate penalties for an unlawful search of an arrested person incidental to arrest which would most effectively maintain that balance between the interests of privacy and of law enforcement which the common law represents.

F O O T N O T E S

1. See generally, in regard to the scope of police powers of search pursuant to a warrant, Adams ed., Criminal Law and Practice in New Zealand (2nd ed. 1971) paras. 2515-7526; Smillie, "McFarlane v. Sharp:" Affirmation or Extension of Police Powers of Search and Seizure "6N.Z.U.L.R. 271; Thomas, "The Law of Search and Seizure" (1967) Crim. L.R.3; Leigh, "Recent Developments in the Law of Search and Seizure" (1970)33M.L.R. 268.

2. Leigh v. Cole (1853)6 Cox C.C. 329.; Bessell v. Wilson (1853)20 L.T. (O.S.) 233.

3. Barton, "Police Powers : Criminal Procedure" from Essays on Human Rights, edited by K. J. Keith.

4. (1853) 6 Cox C.C. 329, at 332.

5. (1887) 16 Cox C.C. 245.

6. Ibid, at 250.

7. (1934) 2 K.B. 164, 50 T.L.R. 196.

8. (1934) 2 K.B. 164 at 173.

9. (1853) 6 Cox C.C. 329, at 332.

10. M. 1498/78; see also New Zealand Recent Law, 5 No. 4 (May 1979).

11. Ibid., at 8.

12. Section 132 of the Summary Proceedings Act 1957 authorises a court if it appears that the evidence before it is insufficient to support a conviction for the offence of which the appeallant has been charged but is sufficient to support a conviction for

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some other offence of a similar character within the jurisdiction of the convicting court, and the defendant has not been prejudiced in his defence, to ammend the conviction by substituting the last mentioned offence for the offence mentioned in the conviction.

13. M. 1498/78, at 2.

14. Ibid., at 9.

15. Halsbury, Laws of England (4th ed. 1973); Adams, Criminal Law and Practice in New Zealand (2nd ed. 1971); Kenny, Outlines of Criminal Law (19th ed. 1966); Phipson, Phipson on Evidence (12th ed. 1976); Leigh, Police Powers in England and Wales (1975).

16. M. 1498/78, at 5.

17. Halsbury, Laws of England (4th ed. 1973); Adams, Criminal Law and Practices in New Zealand (2nd ed. 1971); Leigh, Police Powers in England and Wales (1975); Phipson, Phipson on Evidence (12th ed. 1976).

18. Kenny, Outlines of Criminal Law (19th ed. 1966).

19. Halsbury, Laws of England (4th ed. 1973) XI, para. 121.

20. Leigh, Police Powers in England and Wales (1971), p. 50.

21. Adams, Criminal Law and Practice in New Zealand (2nd ed. 1971), para. 2528.

22. Ibid.

23. Phipson, Phipson on Evidence (12th ed. 1976), para. 14.

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24. Leigh, Police Powers in England and Wales (1973), p. 50.

25. Halsbury, Laws of England (4th ed. 1973) XI, para. 121.

26. Kenny, Outlines of Criminal Law, (19th ed. 1966) p. 576.

27. Archbold, Pleading, Evidence and Practice in Criminal Cases (38th ed. 1973), para. 1408.

28. (1902) 21 N.Z.L.R. 484.

29. Ibid, at 492.

30. (1972) N.Z.L.R. 838.

31. Ibid., 842.

32. (1853) 6 Cox C.C. 329.

33. (1853) 20 L.T. (O.S.) 233.

34. (1853) 6 Cox C.C. 329, at 332.

35. Ibid.

36. Osborn, A Concise Law Dictionary (5th ed. 1964).

37. 1853 20 L.T. (O.S.) 233, in an addendum to the report.

38. Ibid.

39. Ibid.

40. (1934) 2.Q.B. 164; see as to this case, Wade, "Police Search" (1930) L.Q.R. 354, Luxford, Police Law in New Zealand (3rd ed. 1967) at para. 361.

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41. Ibid, at 169.

42. Ibid.

43. Ibid, at 169 - 170.

44. Ibid, at 173.

45. (1867) 5 MacPherson (H.L.) 55.

46. (1887) 16 Cox C.C. 245.

47. (1934) 2.4.B 164, at 171-172.

48. £1887) 16 Cox C.C. 245, at 250.

49. (1934) 2.4.B. 164 at 173.

50. 19 How. S.T. 1029.

51. (1887) 16 Cox C.C. 245, at 251.

52. Ibid, at 249.

53. (1970) I.Q.B. 693.

54. Ibid, at 706.

55. (1934) 2. K.B. 164, at 170.

56. 5 M. (H.L.) 55, at 60.

57. (1902) 21 NZ.L.R. 484, at 491-492

58. (1955) A.C. 197.

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59. (1969) N.Z.L.R. 218.

60. See for a general discussion of the exclusion of evidence area, Heydon, "Illegally Obtained Evidence" 1973 Crim. L.R. 603 and 690.