



[\[Home\]](#) [\[Databases\]](#) [\[WorldLII\]](#) [\[Search\]](#) [\[Feedback\]](#)

# High Court of Australia

You are here: [AustLII](#) >> [Databases](#) >> [High Court of Australia](#) >> [1991](#) >> [\[1991\] HCA 5](#)

[\[Database Search\]](#) [\[Name Search\]](#) [\[Recent Decisions\]](#) [\[Noteup\]](#) [\[LawCite\]](#) [\[Help\]](#)

---

## Plenty v Dillon [1991] HCA 5; (1991) 171 CLR 635 (7 March 1991)

### HIGH COURT OF AUSTRALIA

PLENTY v. DILLON [\[1991\] HCA 5](#); [\(1991\) 171 CLR 635](#)  
F.C. 91/004

Trespass

High Court of Australia

Mason C.J.(1), Brennan(1), Toohey(1), Gaudron(2) and McHugh(2) JJ.

#### CATCHWORDS

Trespass - Access to premises for service of summons - Whether common law right to enter - Statute permitting service of summons personally or by leaving at usual place of abode or business - Whether implied power to enter - Damages - Justices Act 1921-1975 (S.A.), s.27.

#### HEARING

Adelaide, 1990, August 20, 21; 1991, March 7. 7:3:1991  
APPEAL from the Supreme Court of South Australia.

#### DECISION

MASON C.J., BRENNAN AND TOOHEY JJ. Mr Plenty is the owner and occupier of a small farm at Napperby near Port Pirie, South Australia. He and Mrs Plenty are the parents of a girl who, at the time of the events giving rise to the present litigation, was aged 14 years. An allegation was made in July 1978 that the child had committed an offence and, pursuant to ss.8 and 15 of the Juvenile Courts Act 1971-1975 (S.A.), a complaint was laid against the child alleging that she was in need of care and control. That is the procedure which the Juvenile Courts Act prescribes for dealing with a child against whom an allegation of an offence is made. When such a complaint is laid a justice is authorized to issue a summons to the child to appear before a Juvenile Court: s.61. A justice issued a summons to the child to appear. The service of that summons was governed by s.27 of the Justices Act 1921-1975 (S.A.). Section 27 (as it then stood) provided:

" Subject to the provisions of this or any other enactment specially applicable to the particular case, any summons or notice required or authorized by this Act to be served upon any person may be served upon such person by -

- (a) delivering the same to him personally; or
- (b) leaving the same for him at his last or most usual place of abode or of business with some other person, apparently an inmate thereof or employed

thereat, and apparently not less than sixteen years of age:

Provided that any court or justice before whom the matter comes may refuse to act upon any non-personal service as aforesaid, and may require the summons or notice to be re-served, if it or he is of opinion that there is a reasonable probability -

I. that the summons or notice has not come to the knowledge of the person so served; and

II. that such person would have complied with or acted upon such summons or notice if it had come to his knowledge."

2. On 6 and 31 October 1978 the police attempted to serve the summons on the child. On the latter occasion the police effected non-personal service of the summons by leaving it with her father. The child did not appear. Instead of ordering reservice of the summons, the magistrate ordered that a fresh summons be issued. In addition, notices were issued to Mr and Mrs Plenty, pursuant to s.29 of the Juvenile Courts Act, ordering them to attend at the hearing of the complaint against their child.

3. Constable Dillon, accompanied by Constable Will, went to Mr Plenty's farm in order to serve the fresh summons either personally on the child or, by non-personal service, on the father. Their entry onto the farm for this purpose was the occasion of an alleged trespass for which Mr Plenty brought the present action. He joined as defendants Constables Dillon and Will, their senior officer and the State of South Australia. It is unnecessary to trace the full history of the matter except to say that, in the view taken of the facts by a majority of the Full Court of the Supreme Court of South Australia, Mr Plenty had expressly revoked any implied consent given to any police constable to enter upon his farm in order to serve the summons or any other document relating to the matter concerning his child. The appeal to the Full Court proceeded on that footing and the defendants were content to argue the present appeal on the same footing. Thus the issue for determination is simply whether a police officer who is charged with the duty of serving a summons is authorized, without the consent of the person in possession or entitled to possession of land and without any implied leave or licence, to go upon the land in order to serve the summons.

4. The starting point is the judgment of Lord Camden L.C.J. in *Entick v. Carrington* ([1765](#)) [19 St Tr 1029](#), at p 1066:

"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."

And see *Great Central Railway Co. v. Bates* ([1921](#)) [3 KB 578](#), at p 582; *Morris v. Beardmore* ([1981](#)) [AC 446](#), at p 464. The principle applies to entry by persons purporting to act with the authority of the Crown as well as to entry by other persons. As Lord Denning M.R. said in *Southam v. Smout* ([1964](#)) [1 QB 308](#), at p 320, adopting a quotation from the Earl of Chatham:

"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.' So be it - unless he has justification by law."

And in *Halliday v. Nevill* [\[1984\] HCA 80](#); [\(1984\) 155 CLR 1](#), Brennan J. said (at p 10):

"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."

5. The proposition that any person who "set(s) his foot upon my ground without my licence ... is liable to an action" in trespass is qualified by exceptions both at common law and by statute. The first ground relied on to authorize or excuse the entry of Constables Dillon and Will on Mr Plenty's farm on the occasion of the attempted service of the fresh summons was the common law rule known as the third rule in *Semayne's Case* [\[1572\] EngR 333](#); [\(1604\) 5 Co Rep 91a](#), at p 91b [\[1572\] EngR 333](#); [\(77 ER 194](#), at p 195) which reads:

" 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 (King)'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".

6. The scope of the third rule in *Semayne's Case* is stated in Tomlins' *Law-Dictionary*, 4th ed. (1835), vol.I, tit. Execution, III. 3:

"It is laid down as a general rule in our books, that the sheriff, in executing any judicial writ, cannot break open the door of a dwelling-house; this privilege, which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from the inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; hence, every man's house is called his castle. 5 Co 91: [3 Inst 162](#); Moor, [668](#); [Yelv. 28](#); Cro Eliz 908: Dalt Shar 350.

Yet in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, this general case has the following exceptions:

1st. That whenever the process is at the suit of the king, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 Co 91 b."

The third rule in *Semayne's Case* provides justification for more than a mere entry onto land; in terms it relates to breaking into a dwelling-house. The justification afforded by the rule is needed only when the alleged trespass is of that kind: see, for example, *Penton v. Brown* [\[1803\] EngR 374](#); [\(1664\) 1 Keb 698 \(83 ER 193\)](#); *Southam v. Smout*, at p 321 et seq. Of course, justification for breaking into a dwelling is justification for entering on the land on which the dwelling stands. However, the third rule in *Semayne's Case* affords justification for an entry, whether by breaking into a dwelling-house or not, only when the purpose of the person making the entry is either "to arrest ... or to do other execution of the (King)'s process". It is not suggested that the defendant police officers proposed to arrest Mr Plenty's daughter. They had no authority to do so. The magistrate had power to issue a warrant for her

arrest (Juvenile Courts Act, s.61(2)), but he did not do so. So the question is whether the police officers were engaged in "execution of the (King)'s process".

7. The cases draw a distinction between execution of the King's process and the execution of process sued out for a litigant's private benefit. The distinction is based on the difference between the public interest which is served by execution of the King's process and the private interest which is served by execution of other process: *Burdett v. Abbot* [1811] EngR 83; (1811) 14 East 1, at p 162 [1811] EngR 83; (104 ER 501, at p 563); *Harvey v. Harvey* (1884) 26 ChD 644. It is by no means clear that proceedings under ss.8 and 15 of the Juvenile Courts Act are proceedings "when the King is party" (cf. *Munday v. Gill* [1930] HCA 20; (1930) 44 CLR 38, at p 86; *John L Pty. Ltd. v. Attorney-General (N.S.W.)* [1987] HCA 42; (1987) 163 CLR 508, at pp 518-519, 523-524, 540) but, assuming that the public interest in such proceedings makes "the King ... party" for the purposes of the third rule in *Semayne's Case*, the question remains whether the service of a summons pursuant to s.27 of the *Justices Act* is an "execution of the (King)'s process"? There is a surprising dearth of authority on this question.

8. The present case is not concerned with the application of the third rule in *Semayne's Case* to an arrest without warrant on a criminal charge (a problem addressed in *Lippl v. Haines* (1989) 18 NSWLR 620; and see *Dinan v. Brereton* (1960) SASR 101, at p 105), nor with its application to the execution of a justice's warrant authorizing either arrest or search and seizure (a problem addressed in *Launock v. Brown* (1819) 2 B and Ald 592 (106 ER 482)), nor with its application to the carrying into effect of a court's judgment, order or warrant. It is concerned only with the application of the third rule in *Semayne's Case* to the service of a summons. It would be surprising to find that the third rule does apply to the service of a summons, for that would mean that the defendants in this case were authorized not only to go onto Mr Plenty's farm but, if need be, after demand for entry, to break down the door of his home to effect service on his daughter. We do not think that so invasive an operation can be attributed to the third rule. We take the third rule's reference to execution of process to relate to the enforcement of process which is coercive in nature, that is, to the execution of process against person or property. That is how the rule was understood in *Tomlins' Law-Dictionary*: "to do execution, either on the party's goods, or take his body, as the case shall be". The service of a summons is not an execution of process of that nature.

9. A summons to appear before a court of summary jurisdiction to answer an information or complaint does not itself compel a defendant to appear. Its primary purpose is to ensure that natural justice is accorded to a defendant by giving the defendant notice of the subject of the complaint and an opportunity to be heard. Service of a summons, unlike the execution of a warrant of arrest, does not coerce a defendant to appear, though a failure to appear in answer to the summons may lead to the issue of a warrant (see *Jervis' Act - the Summary Jurisdiction Act 1848 (U.K.)* (11 and 12 Vict. c.43). The essential nature of a summons as the means of according natural justice has been established by long practice. In *Reg. v. Simpson* (1716) 10 Mod 378 (88 ER 771), when the validity of summary convictions was challenged on the ground that the defendant was not present, Lord Parker C.J., speaking for the Court of King's Bench, said (at pp 378-379 (pp 771-772)):

" The great objection against these convictions is, that the justices of the peace have no authority to proceed against the party, and convict him of the offence in his absence. As to this matter we are all of opinion, that the conviction is a good conviction, though taken in the absence of the party. And here it is to be observed, that the statute does not give the justices any particular direction, or prescribe any particular form to be observed in the convictions before them; all that the statute requires is, that this conviction be 'by oath of one credible witness.' So that the justices are not obliged to the observance of any rules, unless those of natural justice, which all men are bound to observe. One of those rules I readily own is, that the offender should be heard before he be condemned. But this rule must admit of this limitation, viz. unless the party refuse to appear. For

as it would be unjust not to require the justices to summon the party, and give him notice to appear and make his defence, so to require more from the justices, would be to put it in the power of the offender to elude justice, and render his conviction impossible, by wilfully absenting himself."

Thus Blackstone wrote (Commentaries on the Laws of England, (1769), Bk IV, Ch 20, pp 279-280):

" The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to summon the party accused before he is condemned. This is now held to be an indispensable requisite (Salk 181 2 Lord Raym 1405): though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

'Qui statuit aliquid, parte inaudita altera, Aequom licet statuerit, haud aequus suit.'

A rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed: the Roman law requiring a citation at the least; and our own common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the offender, in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred, by distress and sale of his goods."

In Burn's Justice of the Peace, 30th ed. (1869), vol.I, p 1126, the author states:

"It was before (the Summary Jurisdiction Act 1848) absolutely requisite in all cases, unless where the legislature has in express terms dispensed therewith, that the defendant should be summoned, in order that he may have an opportunity of being heard and making his defence. (R. v. Allington, 2 Stra 678; R. v. Benn, [\[1795\] EngR 4051](#); [6 TR 198](#); R. v. Commins, 8 D and R 344; Child v. Capel, 2 C and J 579, per Bayley, B.; R. v. Hall, 6 D and R 84; R. v. Justices of Stafford, 5 N and M 94; 1 H and W 328; Painter v. Liverpool Gas Company, 3 A and E 433; R. v. Martyr, [13 East, 56](#); [11 Co Rep 99](#).) This is but natural justice, and if a magistrate should proceed against a person without summoning or hearing him, he would be guilty of a misdemeanour, punishable either by information or indictment. (R. v. Allington, 2 Stra 678; R. v. Venables, [2 Ld Raym 1406](#); 2 Stra 630; R. v. Constable, 7 D and R 663.)"

Stephen's Commentaries on the Laws of England, 8th ed. (1880), vol.IV, ch.XI, pp 330-331, stated the effect of the

Summary Jurisdiction Act as follows:

" Where a written information has been laid before any justice of the peace for any county or place in England or Wales, of any offence committed within his jurisdiction, and made punishable on summary conviction, - he is to issue his summons to the party charged, requiring him to appear and answer the charge: and, if the summons be disobeyed, he may then issue a warrant to apprehend him, and bring him before the court".

In *Blake v. Beech* ([1876](#)) [1 Ex D 320](#), at p 330, Field J. said:

"The office of a summons is to inform the party to be charged of the offence which he has to meet, and when he has to meet it, and to require his attendance; and the current of modern authority is to shew that if parties are before a magistrate who has jurisdiction as to time and place, no summons or information is necessary".

(See also Paley on Summary Convictions, 9th ed. (1926), p 212.) The coercive nature of a warrant of arrest has long been contrasted with the non-coercive nature of a summons. Burn, *The Justice of the Peace, and Parish Officer*, 17th ed. (1793), vol.IV, p 285, comments:

"In other cases, where it is left discretionary in the justices, it seemeth most agreeable to the mildness of our laws to put the party to no more inconvenience than needs must; and therefore where the case will bear it, a summons seems more apposite than a compulsory process."

In *Munday v. Gill*, Dixon J. (at p 86) distinguished trial on indictment from summary proceedings by pointing, inter alia, to the bringing of the prisoner to the bar of the court "in his own proper person" to stand trial on indictment while, in summary proceedings, "the defendant is given a sufficient opportunity to appear which (unless he be in custody because it is considered that he will abscond) he may exercise or not at his choice, and, whether he avails himself or not of his right to be present, he is dealt with by those assigned to keep the peace, who judge both law and fact." The service of a summons is not the execution of coercive process against either person or property. As Lord Goddard C.J. said in *R. v. Holsworthy Justices; Ex parte Edwards* ([1952](#)) [1 All ER 411](#), at p 412:

"Serving a summons is not an 'execution under the process of any court of justice'; it is simply the commencement of process."

Common law authority tends against the proposition that the third rule in *Semayne's Case* applies to service of a summons on premises entry onto which has been forbidden by the person in possession and entitled to possession thereof. It follows that the common law gave no authority to Constables Dillon and Will to go onto Mr Plenty's farm in an attempt to serve the fresh summons on Mr Plenty's daughter.

10. Next, it is submitted that the statutory power to serve a summons, either personally or non-personally, carries with it the right to make such entry on land as is necessary to effect service. This argument, which had the support of the courts below, would construe the statute as conferring a right to enter private premises without consent even though the person in possession has no connection with the matter to which the summons relates. Some statutes which confer a power to arrest have not been construed as carrying a right to enter on private property (see per Lord Keith of Kinkel in *Clowser v. Chaplin* ([1981](#)) [1 WLR 837](#), at p 842; ([1981](#)) [2 All ER 267](#), at p 270) although, in other cases, a statutory power of arrest has been held to carry a qualified right to enter: see *Eccles v. Bourque* ([1975](#)) [2 SCR 739](#); ([1974](#)) [50 DLR \(3d\) 753](#); *Halliday v. Nevill*, at pp 15-16. But a statute which confers a power

to arrest is of a different order from a statute which prescribes the manner of service of a summons and which confers no power on a person to do a thing that that person is not free to do at common law. [Section 27](#) of the [Justices Act](#) is merely facultative, giving to the process-server an option as to the manner of service. It confers no relevant power. The option of personal or non-personal service for which [s.27](#) provides relates simply to the sufficiency of the giving of notice to a defendant after which the justices may proceed to hear and determine the matter in the exercise of their jurisdiction. In truth, the provisions of [s.27](#) do nothing to create an implication that a process-server availing himself of either of the options acquires a power to enter upon private land without the leave or licence of the person in possession or entitled to possession thereof.

11. The grounds advanced by the defendants to justify their entry fail. Their entry was wrongful, and the plaintiff is entitled to judgment and an award of some damages. The vicarious liability of the third and fourth defendants was not argued and that question may require further consideration. At first instance, Mohr J. said that, even if a trespass had occurred, the trespass was "of such a trifling nature as not to found (sic) in damages." But this is an action in trespass not in case and the plaintiff is entitled to some damages in vindication of his right to exclude the defendants from his farm. As the subject of damages was not argued before us, it will be necessary to remit the assessment of damages to the Supreme Court. Similarly, the question of vicarious liability should be remitted. Although the plaintiff ultimately succeeds, he failed on many of the issues litigated in the Supreme Court and the question of costs in that Court should be dealt with by that Court. It is desirable to remit these questions to the Full Court where, hopefully, the parties may agree on the orders to be made but where, in any event, the Full Court may make such orders for determining the questions remitted as it may be advised.

12. We would allow the appeal with costs, set aside the order of the Full Court dismissing the appeal against the dismissal of the plaintiff's claim in trespass and in lieu thereof allow the appeal to that Court against the dismissal of that claim. In lieu of the Full Court's order in that respect order that the judgment for the defendants pronounced by Mohr J. be set aside and in lieu thereof judgment be entered for the plaintiff against the first two defendants and against such other defendants as the Supreme Court shall determine for damages for trespass to land to be assessed and that the matter be remitted to the Full Court of the Supreme Court of South Australia to assess the plaintiff's damages, to determine whether the judgment be entered against the third or fourth defendants or both of them and to determine what costs, if any, of the proceedings in the Supreme Court the defendants or any of them should pay to the plaintiff or to direct the manner in which these questions shall be determined.

GAUDRON AND McHUGH JJ. The question in this appeal is whether a police officer has the right under the law of South Australia to enter private property for the purpose of serving a summons after the occupier of the property has notified the officer that he or she has no permission to enter the land.

#### Factual Background

2. The first and second respondents, who are police officers, went to the appellant's farm on 5 December 1978 in order to serve a summons on his daughter and notices on the appellant and his wife. The summons and the notices were issued pursuant to the provisions of the Juvenile Courts Act 1971 (S.A.) ("the Act"). It was common ground in this Court that the officers did not have any express or implied consent to go onto the appellant's land. In earlier statements and correspondence, he had made it plain that, if the summons was to be served, it had to be served by post. The officers found the appellant, his wife and two other persons having a conversation in a double garage, some distance from a dwelling-house on the farm. The garage had no door, the opening on each side being separated by a "pillar" of galvanised iron four feet in width. The appellant and his wife refused to accept the summons and the notices. The first respondent placed them on the car seat in which the appellant was sitting. As the first and second respondents were leaving the farm, the appellant attempted to strike the first respondent with a piece of wood. After a struggle, the appellant was arrested. He was subsequently convicted of assaulting the first respondent in the execution of his duty.

3. As a result of the incident, the appellant sued the respondents in the Supreme Court of South Australia for damages for assault and trespass. The trial judge gave judgment for the respondents. His judgment was upheld by the Full Court. This appeal concerns only the question whether the respondents are liable for trespass to the appellant's land.

The common law right of entry

4. The policy of the law is to protect the possession of property and the privacy and security of its occupier: *Semayne's Case* [1572] EngR 333; (1604) 5 Co Rep 91a, at p 91b [1572] EngR 333; (77 ER 194, at p 195); *Entick v. Carrington* (1765) 2 Wils KB 275, at p 291 [1765] EWHC J98; (95 ER 807, at p 817); *Southam v. Smout* (1964) 1 QB 308, at p 320; *Eccles v. Bourque* (1975) 2 SCR. 739, at pp 742-743; (1974) 50 DLR (3d) 753, at p 755; *Morris v. Beardmore* (1981) AC 446, at p 464. A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises: *Entick*, at p 291 (p 817 of ER); *Morris v. Beardmore*, at p 464; *Southam v. Smout*, at p 320; *Halliday v. Nevill* [1984] HCA 80; (1984) 155 CLR 1, at p 10. Except in the cases provided for by the common law and by statute, constables of police and those acting under the Crown have no special rights to enter land: *Halliday*, at p 10. Consent to an entry is implied if the person enters for a lawful purpose. In *Robson v. Hallett* (1967) 2 QB 939, Lord Parker C.J. said (at p 951):

"the occupier of any dwelling-house gives implied licence to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house."

This implied licence extends to the driveway of a dwelling-house: *Halliday*. However, the licence may be withdrawn by giving notice of its withdrawal. A person who enters or remains on property after the withdrawal of the licence is a trespasser. In *Davis v. Lisle* (1936) 2 KB 434, police officers who had lawfully entered a garage for the purpose of making enquiries were held to have become trespassers by remaining in the garage after they were told by the proprietor to "get outside".

5. The common law has a number of exceptions to the general rule that a person is a trespasser unless that person enters premises with the consent, express or implied, of the occupier. Thus, a constable or citizen can enter premises for the purpose of making an arrest if a felony has been committed and the felon has been followed to the premises. A constable or citizen can also enter premises to prevent the commission of a felony, and a constable can enter premises to arrest an offender running away from an affray. Moreover, a constable or citizen can enter premises to prevent a murder occurring. In these cases there is power not only to enter premises but, where necessary, to break into the premises. However, it is a condition of any lawful breaking of premises that the person seeking entry has demanded and been refused entry by the occupier. See *Swales v. Cox* (1981) QB 849, at p 853. Furthermore, a constable, holding a warrant to arrest, may enter premises forcibly, if necessary, for the purpose of executing the warrant provided that the constable has first signified "the cause of his coming, and ... (made) request to open doors": *Semayne's Case*, at p 91b (p 195 of ER); *Burdett v. Abbot* [1811] EngR 83; (1811) 14 East 1, at pp 158, 162-163 [1811] EngR 83; (104 ER 501, at pp 561, 563); *Lippl v. Haines* (1989) 18 NSWLR 620, at p 631. But no public official, police constable or citizen has any right at common law to enter a dwelling-house merely because he or she suspects that something is wrong: *Great Central Railway Co. v. Bates* (1921) 3 KB 578, at pp 581-582. Nor, except in the instances to which we have referred, can any person enter premises, without a warrant, to apprehend a fugitive who may be on the premises: *Lippl v. Haines*, at p 636. Another exception to the general rule that a person who enters premises without the express or implied consent of the occupier is a trespasser is the rule that the sheriff can enter premises, by force if necessary, for the purpose of executing process in cases where the Sovereign is a party to the action: see the third resolution in *Semayne's Case*, at p 91b (p 195 of ER). Moreover, if the door of premises is open the sheriff may enter "and do execut(ion) at the suit of any subject, either of the body, or of the goods" (at p 92a (p 197 of ER)). But the right to execute at the suit of a subject does not extend to breaking open the outer doors of a dwelling-house: *Semayne's Case*, at pp 92a, 92b (pp 197, 198 of ER); *Burdett v. Abbot*, at pp 154-155 (p 560 of ER); *Southam v. Smout*, at pp 322-323, 326, 329; *Tomlins' Law-Dictionary*, 4th ed. (1835), vol.1, tit. Execution, III. 3. It has been held, however, that, for the purpose of executing process at the suit of any subject, the sheriff may break open a barn or outhouse which is not part of a dwelling-house: *Penton v. Brown* [1685] EngR 709; [1685] EngR 709; (1664) 1 Keb. 698 (83 ER 1193).

6. A number of statutes also confer power to enter land or premises without the consent of the occupier. But the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorise what would otherwise be tortious conduct: *Morris v. Beardmore*, per Lord Diplock at p 455. Thus, in *Colet v. The Queen* (1981) 1 SCR 2, the Supreme Court of Canada held that legislation which authorised the issue of a warrant

for "the seizure of any firearm" in the possession, custody or control of a person did not authorise entry onto and the searching of the premises of the person named in the warrant. In *Clowser v. Chaplin* ([\(1981\) 1 WLR 837](#); [\(1981\) 2 All ER 267](#)), the House of Lords held that a legislative power, authorising a constable to arrest without warrant a person who had refused to provide a specimen of breath, did not authorise him to enter private premises, without the permission of the occupier, for the purpose of making the arrest.

7. Although the respondents had no express or implied consent to enter the appellant's land, they contended that they were authorised to do so by the third resolution in *Semayne's Case* or s.27 of the Justices Act 1921 (S.A.) or both.

*Semayne's Case*

8. In *Semayne's Case*, the judges of England resolved that, while "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose" (at p 91b (p 195 of ER)), there were cases where the sheriff might enter private property without the consent of the occupier. The third resolution of the judges provided (at p 91b (pp 195-196 of ER)):

"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 (King)'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; and that appears well by the stat. of Westm 1 c 17 (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it ..."

9. The respondents submitted that the service of the summons and the notices in the present case constituted the execution of process for the purposes of the third resolution in *Semayne's Case*. Consequently, so it was contended, no trespass had occurred notwithstanding the refusal of the appellant to allow the first and second respondents to enter his land.

10. In terms, the third resolution in *Semayne's Case* does not deal with the question of entry onto land; it deals with the right to "break the party's house". However, by necessary implication, the right to break the house carries with it the right to enter the land on which the house is situated. Nevertheless, nothing in the third resolution supports the entry of the first and second respondents onto the appellant's land in the present case, for the service of the summons and notices was not the "execution of the (King)'s process".

11. First, the Sovereign is not a party to the present proceedings. In *Munday v. Gill* [[1930\] HCA 20](#); [\(1930\) 44 CLR 38](#), Dixon J. pointed out (at p 86):

"There is, however, a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment. Proceedings upon indictment, presentment, or ex officio information are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject."

The summons addressed to the appellant's daughter was the product of a complaint laid by an assistant police prosecutor. The notices ordering the appellant and his wife to attend the hearing were issued by a special magistrate in accordance with the power conferred on him by s.29 of the Act. In *John L Pty. Ltd. v. Attorney-*

General (N.S.W.) [\[1987\] HCA 42](#); [\(1987\) 163 CLR 508](#), Mason C.J., Deane and Dawson JJ. said (at pp 518-519) that the fact that an officer of the Department of Consumer Affairs had laid an information and that the proceedings were taken and prosecuted by him with the authority of the Acting Minister for Consumer Affairs did not make them proceedings "to which the Crown was a party in any accepted meaning of the words 'Crown' and 'party'".

12. Secondly, the service of a summons is not the execution of process for the purpose of the third resolution. In the third resolution in Semayne's Case, the judges, in referring to the execution of the King's process, were referring to the sorts of execution to which Sir Edward Coke referred in his Reports: final executions which ended the suit or those executions which tended to some end in the suit such as the writ of *capias ad satisfaciendum* by which a debtor was imprisoned until satisfaction was made for the debt costs and damages: see the discussion in Tomlins' Law-Dictionary under the heading "Execution". The reference to execution of process in the third resolution in Semayne's Case is a reference to the seizure of the body or goods of the defendant and not to the service of process. This can be seen from the use of the term "execution" in the fourth resolution in that case where it clearly refers to seizure and not service. The judges resolved (at p 92a (p 197 of ER)):

"In all cases when the door is open the sheriff may enter the house, and do execut(ion) at the suit of any subject, either of the body, or of the goods; and so may the lord in such case enter the house and distrain for his rent or service".

It is highly unlikely that the judges were using the term "execution" in the third resolution in a sense different from that used in the fourth resolution. This was obviously the view of the authors of the fourth edition of Tomlins' Law-Dictionary who stated (s.III.3) under the heading "Execution":

"whenever the process is at the suit of the king, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 Co 91 b."

13. In *R. v. Holsworthy Justices; Ex parte Edwards* [\(1952\) 1 All ER 411](#), at p 412, the Divisional Court had to consider the meaning of the phrase "any execution under the process of any court of justice" in s.46 of the Offences against the Person Act 1861 (U.K.) (24 and [25 Vict. c.100](#)) which ousted the jurisdiction of justices to hear and determine a charge of assault. Lord Goddard C.J., with whose judgment Byrne and Parker JJ. agreed, said (at p 412):

"Serving a summons is not an 'execution under the process of any court of justice'; it is simply the commencement of process."

14. For the two reasons set out above, the service of the summons and notices was not the execution of process within the meaning of the third resolution of Semayne's Case.

15. Furthermore, neither principle nor policy justifies the extension of the law expressed in that resolution to cover the case of service of a summons and a fortiori the case of the service of a notice. In principle, there is a fundamental difference between the arrest of a person or execution of process and the service of a summons. In the case of an arrest or execution against the body of a person, the object of the arrest or execution is to ensure that the defendant will meet his or her obligation or answer the charge. In the case of an execution against the goods of a person, the object is to satisfy a judgment already given. The object of serving a summons is different. It is to notify the defendant of the charge and to give him or her an opportunity to defend the charge: see Burn's Justice of the Peace, 30th ed. (1869), vol.I, p 1126; *Reg. v. Simpson* (1716) 10 Mod 378 [\(88 ER 771\)](#); *Blake v. Beech* [\(1876\) 1 Ex D 320](#); *Munday v. Gill*, at p 86. Service of a summons is the first step towards achieving procedural fairness in the litigation. It fulfils a basic requirement of the rules of natural justice. But it is not concerned to compel the

attendance of the defendant to answer the charge. If the defendant fails to appear at court on the return date, the magistrate or justice may issue a warrant for the apprehension of the defendant but is not required to do so. He or she may proceed to hear the charge even though the defendant does not appear.

16. Thus, the object of serving a summons is different from the object of an arrest or an execution against the goods or body of a person. There is no logical basis for extending a rule whose object is to ensure the satisfaction of a judgment or obligation or the attendance of a person before a court to the case of the service of a document whose object is the provision of information. The very limited nature of a constable's right to enter private property for the purpose of arrest is by itself a compelling argument for holding that, without making major changes to the law, the common law cannot logically recognise the service of a summons as a ground for entering premises against the will of the occupier. It would be incongruous for the common law to permit entry for the purpose of arrest in a few cases only but to permit entry for the purpose of serving a summons in every case whatsoever.

17. Furthermore, nothing in the policy which underpins the third resolution in Semayne's Case suggests that the achievement of its goal will be facilitated or promoted by extending the third resolution to cover the case of the service of a summons. The policy behind the third resolution is that the public interest in securing the Crown revenues and apprehending alleged offenders is greater than any consequential interference to the private rights of the occupiers of property. Serving a summons does not facilitate or promote this policy. The object of the service is not to bring the defendant before the court or to secure the revenues of the Crown but to apprise the defendant of the nature of the case which is alleged against him or her. Whether or not the defendant appears in answer to the summons is a matter entirely for that person.

18. Failure to make an arrest or issue execution may frustrate the administration of justice. But failure to serve a summons does not mean that the administration of justice is frustrated. When the defendant deliberately refuses to accept or evades service of the summons, judgment against him or her may still be entered. The defendant cannot complain in those circumstances that the rules of procedural fairness have been breached. Nor can he or she complain if execution subsequently issues. Of course, in most cases, a justice prefers to have a defendant, who evades service, apprehended and brought before the court by warrant. He or she will prefer to do so not merely for the purpose of ensuring that the defendant does not evade the penalties imposed by law but because of the deep reluctance of those trained in the common law system to permit a charge to be heard against a person in his or her absence. Nevertheless, in such cases it is the warrant and not the summons which secures the defendant's presence.

19. At this late stage in the development of the common law, it seems impossible to declare that, for the purpose of serving a summons, a constable has a common law right of entry upon private property without the consent of the occupier. The general policy of the law is against government officials having rights of entry on private property without the permission of the occupier, and nothing concerned with the service of a summons gives any ground for creating a new exception to the general rule that entry on property without the express or implied consent of the occupier is a trespass.

20. The contention that the respondents are not liable for trespass to the appellant's land because of the third resolution in Semayne's Case must be rejected.  
Justices Act 1921 (S.A.), s.27

21. Section 27 of the Justices Act provides in part:

"Subject to the provisions of this or any other enactment specially applicable to the particular case, any summons or notice required or authorized by this Act to be served upon any person may be served upon such person by -  
(a) delivering the same to him personally; or  
(b) leaving the same for him at his last or most usual place of abode or of business with some other person, apparently an inmate thereof or employed thereat, and apparently not less than sixteen

years of age".

In terms, s.27 has nothing to say about the right to enter property. In *Morris v. Beardmore*, Lord Diplock said (at p 455) that the presumption is "that in the absence of express provision to the contrary Parliament did not intend to authorise tortious conduct". If service of a summons could only be effected by entry on premises without the permission of the occupier, it would follow by necessary implication that Parliament intended to authorise what would otherwise be a trespass to property. But a summons can be served on a person without entering the property where he or she happens to be at the time of proposed service. Of course, inability to enter private property for the purpose of serving a summons may result in considerable inconvenience to a constable wishing to serve the defendant. But inconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights. As Woodhouse J. said in *Transport Ministry v. Payn* (1977) 2 NZLR 50, at p 64, where the New Zealand Court of Appeal had to deal with a similar problem:

"I am unable to accept the view that it is open to the courts to remedy a 'flaw in the working of the Act' by adding to or supplementing its provisions ... Nor am I able to think that in a matter of this importance Parliament can have taken it for granted that basic rights of citizens were inferentially being overridden."

In our opinion, s.27 of the Justices Act did not authorise the entry of the first and second respondents onto the appellant's property after they were informed that they did not have his consent to enter. The appeal should be allowed

22. The purported justification for the first and second respondents' entry onto the appellant's land has failed. The first and second respondents were trespassers. Judgment in favour of the respondents should be set aside and judgment entered for the appellant against all respondents on the claim of trespass, since the parties seemed to have accepted that the third and fourth respondents were vicariously responsible for the acts of the first and second respondents in entering the appellant's land.

23. The matter must be remitted to the Supreme Court for the purpose of assessing the appellant's damages.

24. In his judgment, the learned trial judge said that, even if a trespass had occurred, it was "of such a trifling nature as not to found (sic) in damages". However, once a plaintiff obtains a verdict in an action of trespass, he or she is entitled to an award of damages. In addition, we would unhesitatingly reject the suggestion that this trespass was of a trifling nature. The first and second respondents deliberately entered the appellant's land against his express wish. True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. Although the first and second respondents were acting honestly in the supposed execution of their duty, their entry was attended by circumstances of aggravation. They entered as police officers with all the power of the State behind them, knowing that their entry was against the wish of the appellant and in circumstances likely to cause him distress. It is not to the point that the appellant was unco-operative or even unreasonable. The first and second respondents had no right to enter his land. The appellant was entitled to resist their entry. If the occupier of property has a right not to be unlawfully invaded, then, as Mr Geoffrey Samuel has pointed out in another context, the "right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric": "The Right Approach?" (1980) 96 [Law Quarterly Review](#) 12, at p 14, cited by Lord Edmund-Davies in *Morris v. Beardmore*, at p 461. If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official. The appellant is entitled to have his right of property vindicated by a substantial award of damages.

25. Subject to the above, we agree with the orders proposed by Mason C.J., Brennan and Toohey JJ.

**ORDER**

Appeal allowed with costs.

Set aside the order of the Full Court of the Supreme Court of South Australia so far as it dismisses the appeal against the dismissal of the plaintiff's claim in trespass to land. In lieu thereof order that the appeal to that Court be allowed in part and that the judgment of Mohr J. dismissing the plaintiff's claim in trespass to land be set aside and in lieu thereof judgment for damages to be assessed be entered for the plaintiff against the first and second defendants and such other defendants as the Supreme Court may hold to be liable in trespass to land.

Remit the matter to the Full Court of the Supreme Court of South Australia to:

- (a) determine whether judgment for damages for trespass to land should be entered against the third and fourth defendants or either of them;
- (b) assess the plaintiff's damages against the first and second defendants and against such other defendants as the Supreme Court shall determine; and
- (c) determine what costs, if any, of the proceedings in the Supreme Court, including the Full Court, the defendants or any of them should pay to the plaintiff;

or to direct the manner in which these questions shall be determined.

---

**AustLII:** |||

URL: <http://www.austlii.edu.au/au/cases/cth/HCA/1991/5.html>