541. The Case of Seizure of Papers, being an Action of Trespass by JOHN ENTICK, Clerk, against NATHAN CARRINGTON and three other Messengers in ordinary to the King, Court of Common-Pleas, Mich. Term: 6 GEORGE III. A. D. 1765.

[This Case is given with the above-mentioned title; because the chief point adjudged was, That a warrant to search for and seize the papers of the accused, in the case of a seditious libel, is contrary to law. But this was not the only question in the Case. All the other interesting subjects, which were discussed in the immediately preceding Case, except the question of General Warrants, were also argued in the following one; and most of them seem to have received a judicial opinion from the Court.

The state of the case, with the arguments of the counsel, is taken from Mr. Serjeant Wilson's Reports, 2 Wils. 275. But instead of his short note of the Judgment of the Court, the Editor has the pleasing satisfaction to present to the reader the Judgment itself at length, as delivered by the Lord Chief Justice of the Common-Pleas from written notes. It was not without some difficulty, that the copy of this Judgment was obtained by the Editor. He has reason to believe, that the original, most excellent and most valuable as its contents are, was not deemed worthy of preservation by its author, but was actually committed to the flames. Fortunately, the Editor remembered to have formerly seen a copy of the Judgment in the hands of a friend; and upon application to him, it was immediately obtained, with liberty to the Editor to make use of it at his discretion. Before, however, he presumed to consult his own wishes in the use, the Editor took care to convince himself, both that the copy was authentic, and that the introduction of it into this Collection would not give offence. Indeed, as to the authenticity of the Judgment, except in some trifling inaccuracies, the probable effect of careless transcribing, a first reading left the Editor's mind without a doubt on the subject. But it was a respectful delicacy due to the noble lord by whom the Judgment was delivered, not to publish it, without first endeavouring to know, whether such a step was likely to be displeasing to his lordship; and though from the want of any authority from him, the Editor exposes himself to some risk of disapprobation, yet his precautions to guard against it, with the disinterestedness of his motives, will, he is confident, if ever it should become necessary to explain the circumstances to his lordship, be received as a very adequate apology for the liberty thus hazarded. Hargrave.]

Trespass for breaking and entering plaintiff's house, &c.

IN trespass; the plaintiff declares that the defendants on the 11th day of November in the year of our Lord 1762, at Westminster in Middlesex, with force and arms broke and entered the dwelling-house of the plaintiff in the parish of St. Dunstan, Stepney, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c. thereto affixed, and broke open the boxes, chests, drawers, &c. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and read over, pried into and examined all the private papers, books, &c. of the plaintiff there found, whereby the secret affairs, &c. of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, &c. &c. of the plaintiff there found, and other 100 charts, &c. &c. took and carried away, to the damage of the plaintiff 2,000*l*.

Special justification under a warrant of the secretary of state.

The defendants plead 1st, not guilty to the whole declaration, whereupon issue is joined. 2dly, as to the breaking and entering the dwelling-house, and continuing four hours, and all that time disturbing him in the possession thereof, and breaking open the doors to the rooms, and breaking open the boxes, chests, drawers, &c. of the plaintiff in his house, and the searching and examining all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and reading over, prying into, and examining the private papers, books, &c. of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration first mentioned there found, and also as to taking and carrying away the goods and chattels in the declaration last mentioned, the defendants say, the plaintiff ought not to have his action against them, because they say, that before the supposed tres-

pass, on the 6th of November 1762, and before, until, and all the time of the supposed trespass, the earl of Halifax was, and yet is one of the lords of the king's privy council, and one of his principal secretaries of state, and that the earl before the trespass on the 6th of November 1762, made his warrant under his hand and seal directed to the defendants, by which the earl did in the king's name authorize and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warraut to be the author, or one concerned in the writing of several weekly very seditious papers, intitled, 'The Monitor or British Freeholder, N° 357, 358. 360. 373. 376. 378. and 380, London, printed for J. Wilson and J. Fell in Paternoster-row,' containing gross and scandalous reflections and invectives upon his majesty's government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody before the earl of Halifax to be examined concerning the premisses, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all other his majesty's officers civil and military, and loving subjects, whom it might concern, were to be aiding and assisting to them the defendants, as there should be occasion. And the defendants further say, that afterwards and before the trespass on the same day and year, the warrant was delivered to them to be executed, and thereupon they on the same day and year in the declaration, in the day time about eleven o'clock, being the said time when, &c. by virtue and for the execution of the said warrant entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize the plaintiff and his books and papers in order to bring him and them before the earl of Halifax, according to the warrant; and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, &c. there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at Westminster, where the said earl then and long before transacted the business of his office, and delivered the same to Lovel Stanhope, esq. who then was and yet is an assistant to the earl in his office of secretary of state, to be examined, and who was then authorized to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards (to wit) on the 17th of November in the said year was discharged out of their custody; and in searching for the books and papers of the plaintiff the defendants did necessarily read over, pry into, and examine the said private papers, books, &c. of the plaintiff in the declaration mentioned then found in his house; and because at the said time when, &c. the said doors in the said house leading to the rooms therein, and the said boxes, chests, &c. were shut and fastened so that the defendants could not search and examine the said rooms, boxes, chests, &c. they, for the necessary searching and examining the same, did then necessarily break and force open the said doors, boxes, chests, &c. as it was lawful for them to do; and on the said occasion the defendants necessarily stayed in the house of the plaintiff for the said four hours, and unavoidably during that time disturbed him in the possession thereof, they the defendants doing as little damage to the plaintiff as they possibly could, which are the same breaking and entering the house of the plaintiff, &c. (and so repeat the trespass covered by this plea) whereof the plaintiff above complains; and this, &c. wherefore they pray judgment, &c.

The plaintiff replies to the plea of justification above, that (as to the trespass thereby covered) he by any thing alledged by the defendants therein ought not to be barred from having his action against them, because he says, that the defendants at the parish of Stepney, of their own wrong, and without the cause by them in that plea alledged, broke and entered the house of the plaintiff, &c. &c. in manner and form as the plaintiff hath complained above; and this he prays may be inquired of by the country; and the defendants do so likewise.—There is another plea of justification like the first, with this difference only; that in the last plea it is alledged, the plaintiff and his papers, &c. were carried before lord Halifax, but in the first, it is before Lovel Stanhope, his assistant or law clerk; and the like replication of 'de injuria 'sua propria absq; tali causa,' whereupon a third issue is joined. Replication de injuria sua propria.

This cause was tried at Westminster-hall before the lord chief justice, when the jury found a Special Verdict to the following purport.

"The jurors upon their oath say, as to the issue first joined (upon the plea not guilty to the whole trespass in the declaration) that as to the coming with force and arms, and also the trespass in declaration, except the breaking and entering the dwelling-house of the plaintiff, and continuing therein for the space of four hours, and all that time disturbing him in the possession thereof, and searching several rooms therein, and in one bureau, one writing desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found, in the declaration complained of, the said defendants are not guilty. As to breaking and entering the dwelling-house, &c. (above excepted) the jurors on their oath say, that at the time of making the following information, Special Verdict.

and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the earl of Halifax was, and still is one of the lords of the king's privy council, and one of his principal secretaries of state, and that before the time in the declaration, viz. on the 11th of October 1762, at St. James's Westminster, one Jonathan Scott of London, bookseller and publisher, came before Edward Weston, esq. an assistant to the said earl, and a justice of peace for the city and liberty of Westminster, and there made and gave information in writing to and before the said Edward Weston against the said John Entick and others, the tenor of which information now produced and given in evidence to the jurors followeth in these words and figures, to wit, 'The voluntary information 'of J. Scott. In the year 1755, I 'proposed setting up a paper, and 'mentioned it to Dr. Shebbeare, and in a few 'days one Arthur Beardmore an attorney at 'law sent for me, hearing of my intention, and 'desired I would mention it to Dr. Shebbeare, 'that he Beardmore and some others of his 'friends had an intention of setting up a paper 'in the city. Shebbeare met Beardmore, and 'myself and Entick (the plaintiff) at the Horn 'tavern, and agreed upon the setting up the 'paper by the name of the Monitor, and that 'Dr. Shebbeare and Mr. Entick should have '200*l.* a-year each. Dr. Shebbeare put into 'Beardmore's and Entick's hands some papers, 'but before the papers appeared Beardmore 'sent them back to me (Scott). Shebbeare 'insisted on having the proportion of his salary 'paid him; he had 50*l.* which I (Scott) fetched 'from Vere and Asgill's by their note, which 'Beardmore gave him; Dr. Shebbeare upon 'this was quite left out, and the monies have 'been continued to Beardmore and Entick 'ever since, by subscription, as I supposed, 'raised I know not by whom: it has been continued in these hands ever since. Shebbeare, 'Beardmore and Entick all told me that the 'late alderman Beckford countenanced the 'paper: they agreed with me that the profits 'of the paper, paying all charges belonging 'to it, should be allowed me. In the paper of 'the 22d May, called Sejanus, I apprehend 'the character of Sejanus meant lord Bute: 'the original manuscript was in the hand-'writing of David Meredith, Mr. Beardmore's 'clerk. I before received the manuscript for 'several years till very lately from the said 'hands, and do believe that they continue still 'to write it. Jona. Scott, St. James's 11th 'October 1762.'

Scott's information before a justice of peace.

'The above information was given voluntari-'ly before me, and signed in my presence by 'Jona. Scott. J. Weston.'

"And the jurors further say, that on the 6th of November 1762, the said information was shewn to the earl of H. and thereupon the earl did then make and issue his warrant directed to the defendants, then and still being the king's messengers, and duly sworn to that office, for apprehending the plaintiff, &c. the tenor of which warrant produced in evidence to the jurors, follows in these words and figures: 'George Mon-'tagu Dunk, earl of Halifax, vis-'count Sunbury, and baron Halifax, 'one of the lords of his majesty's 'honourable privy council, lieutenant general of 'his majesty's forces, lord lieutenant general 'and general governor of the kingdom of Ire-'laud, and principal secretary of state, &c. 'these are in his majesty's name to authorize 'and require you, taking a constable to your 'assistance, to make strict and diligent search 'for John Entick, the author, or one concerned 'in writing of several weekly very seditious 'papers, intitled the Monitor, or British Free-'holder, N° 357, 358, 360, 373, 376, 378, 379, 'and 380, London, printed for J. Wilson and 'J. Fell in Pater Noster Row, which contain 'gross and scandalous reflections and invec-'tives upon his majesty's government, and 'upon both houses of parliament; and him, 'having found you are to seize and apprehend, 'and to bring, together with his books and 'papers, in safe custody before me to be exa-'mined concerning the premisses, and further 'dealt with according to law; in the due exe-'cution whereof all mayors, sheriffs, justices 'of the peace, constables, and other his majes-'ty's officers civil and military, and loving sub-'jects whom it may concern, are to be aiding 'and assisting to you as there shall be occa-'sion; and for so doing this shall be your war-'rant. Given at St. James's the 6th day of 'November 1762, in the third year of his ma-'jesty's reign, Dunk Halifax. To Nathan 'Carrington, James Watson, Thomas Ardran 'and Robert Blackmore, four of his majesty's 'messengers in ordinary.' And the jurors further say, the earl caused this warrant to be delivered to the defendants to be executed. And that the defendants afterwards on the 11th of November 1762, at 11 o'clock in the day time, by virtue and for execution of the warrant, but without any constable taken by them to their assistance, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there, and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing desk, and several drawers of the plaintiff there in order to find and seize the same, and bring them along with the plaintiff before the earl according to the warrant, and did then find and seize there some of the books and papers of the plaintiff, and perused and read over several other of his papers which they found in the house, and chose to read

The secretary of state's warrant to seize plaintiff and his books and papers,

delivered to the defendants to be executed, who on 11th of Nov. 1762, did execute the same without a constable,

and that they necessarily continued there in the execution of the warrant four hours, and disturbed the plaintiff in his house, and then took him and his said books and papers from thence, and forthwith gave notice at the office of the said secretary of state in Westminster unto Lovel Stanhope, esq. then before, and still being an assistant to the earl in the examinations of persons, books and papers seized by virtue of warrants issued by secretaries of state, and also then and still being a justice of peace for the city and liberty of Westminster and county of Middlesex, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined, and they then and there at the instance of the said Lovel Stanhope delivered the said books and papers to him. And the jurors further say, that, on the 13th of April in the first year of the king, his majesty, by his letters patent under the great seal, gave and granted to the said Lovel Stanhope the office of law-clerk to the secretaries of state. And the king did thereby ordain, constitute and appoint the law-clerk to attend the offices of his secretaries of state, in order to take the depositions of all such persons whom it may be necessary to examine upon affairs which might concern the public, &c. (and then the verdict sets out the letters patent to the law-clerk in *hæc verba*) as by the letters patent produced in evidence to the jurors appears. And the jurors further say, that Lovel Stanhope, by virtue of the said letters patent long before the time when, &c. on the 13th of April in the first year of the king was, and ever since hath been and still is law-clerk to the king's secretaries of state, and hath executed that office all the time. And the jurors further say, that at different times from the time of the Revolution to this present time, the like warrants with that issued against the plaintiff, have been frequently granted by the secretaries of state, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the king, &c. in the place of a messenger in ordinary, &c. And the jurors further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent in writing of the perusal and copy of the said warrant, so issued against the plaintiff as aforesaid, neither did the plaintiff commence or bring his said action against the defendants, or any of them, within six calendar months next after the several acts aforesaid, and each of them were and was done and committed by them as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, the said defendants are guilty of the trespass herein before particularly specified in breaking and entering the house of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found; or the said plaintiff ought to maintain his said action against them; the jurors are altogether ignorant, and pray the advice of the Court thereupon. And if upon the whole matter aforesaid by the jurors found, it shall seem to the Court that the defendants are guilty of the said trespass, and that the plaintiff ought to maintain his action against them, the jurors say upon their said oath, that the defendants are guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them; and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out to 300*l.* and for those costs and charges, to 40*s.* But if upon the whole matter by the jurors found, it shall seem to the Court that the said defendants are not guilty of the said trespass; or that the plaintiff ought not to maintain his action against them; then the jurors do say upon their oath that the defendants are not guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them.

and carried the books, &c. to Lovel Stanhope, the law clerk, who is appointed to that office by the king's letters patent, and is a justice of peace.

Special verdict concludes in the common form.

Damages 300*l.*

"And as to the last issue on the second special justification, the jury found for the plaintiff, that the defendants in their own wrong broke and entered, and did the trespass, as the plaintiff in his replication has alleged."

The last issue found for plaintiff.

That the like warrants have issued since the Revolution.

That no demand was made by plaintiff of a copy of the warrant, nor did plaintiff bring his action within six months after the facts done by defendants.

This Special Verdict was twice solemnly argued at the bar; in Easter Term last by serjeant Leigh for the plaintiff, and Burland, one of the king's serjeants, for the defendants; and in this present term by serjeant Glynn for the plaintiff, and Nares, one of the king's serjeants, for the defendants.

Easter Term, 5 Geo. 3.

Counsel for the Plaintiff. At the trial of this cause the defendants relied upon two defences; 1st, That a secretary of state as a justice or conservator of the peace, and these messengers acting under his warrant, are within the statute of the 24th of Geo. 2, c. 44, which enacts, (among other things) that 'no action shall be 'brought against any constable or other officer, 'or any person acting by his order and in his 'aid, for any thing done in obedience to the war- 'rant of a justice, until demand hath been made 'or left at the usual place of his abode by the 'party, or by his attorney in writing signed by 'the party, demanding the same, or the perusal 'and copy of such warrant, and the same hath 'been refused or neglected for six days after

'such demand,' and that no demand was ever made by the plaintiff of a perusal or copy of the warrant in this case, according to that statute, and therefore he shall not have this action against the defendants, who are merely ministerial officers acting under the secretary of state, who is a justice and conservator of the peace. 2dly, That the warrant under which the defendants acted, is a legal warrant, and that they well can justify what they have done by virtue thereof, for that at many different times from the time of the Revolution till this time, the like warrants with that issued against the plaintiff in this case have been granted by secretaries of state, and executed by the messengers in ordinary for the time being.

As to the first. It is most clear and manifest upon this verdict, that the earl of Halifax acted as secretary of state when he granted the warrant, and not merely as a justice of the peace, and therefore cannot be within the statute 24 Geo. 2, c. 44, neither would he be within the statute if he was a conservator of the peace, such person not being once named therein; and there is no book in the law whatever, that ranks a secretary of state *quasi* secretary, among the conservators of the peace. Lambert, Coke, Hawkins, lord Hale, &c. &c. none of them take any notice of a secretary of state being a conservator of the peace, and until of late days he was no more indeed than a mere clerk. A conservator of the peace had no more power than a constable has now, who is a conservator of the peace at common law. At the time of making this statute, a justice of peace, constable, headborough and other officers of the peace, borsholders and tithingmen, as well as secretary of state, conservator of the peace, and messenger in ordinary, were all very well known; and if it had been the intent of the statute, that a secretary of state, conservator of the peace, and messenger in ordinary, should have been within the statute, it would have mentioned all or some of them; and it not having done so, they cannot be within it. A messenger certainly cannot be within it, who is nothing more than a mere porter; and lord Halifax's footmen might as well be said to be officers within the statute as these defendants. Besides, the verdict finds that these defendants executed the warrant without taking a constable to their assistance. This disobedience will not only take them out of the protection of the statute, (if they had been within it), but will also disable them to justify what they have done, by any plea whatever. The office of these defendants is a place of considerable profit, and as unlike that of a constable and tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in person, and cannot substitute another in his room, though he may call persons to assist him. 1 Hale's P. C. 581. This warrant is more like a warrant to search for stolen goods and to seize them, than any other kind of warrant, which ought to be directed to constables and other public officers which the law takes notice of. (4 Inst. 176.) 2 Hale's P. C. 149, 150. How much more necessary in the present case was it to take a constable to the defendants' assistance. The defendants have also disobeyed the warrant in another matter: being commanded to bring the plaintiff, and his books and papers before lord Halifax, they carried him and them before Lovel Stanhope, the law-clerk; and though he is a justice of the peace, that avails nothing; for no single justice of peace ever claimed a right to issue such a warrant as this, nor did he act therein as a justice of peace, but as the law-clerk to lord Halifax. The information was made before justice Weston. The secretary of state in this case never saw the accuser or accused. It seems to have been below his dignity. The names of the officers introduced here are not to be found in the law-books, from the first year-book to the present time.

As to the second. A power to issue such a warrant as this is contrary to the genius of the law of England; and even if they had found what they searched for, they could not have justified under it. But they did not find what they searched for, nor does it appear that the plaintiff was the author of any of the supposed seditious papers mentioned in the warrant; so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise. But the verdict says, such warrants have been granted by secretaries of state ever since the Revolution. If they have, it is high time to put an end to them; for if they are held to be legal, the liberty of this country is at an end. It is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study. But if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before lord Halifax. What? Has a secretary of state a right to see all a man's private letters of correspondence, family concerns, trade and business?* This would be monstrous indeed! and if it were lawful, no man could endure to live in this country. In

* Mr. Burke in his Short Account of a late short Administration, (this administration came into employment under the mediation of the duke of Cumberland, son to George the second, in July 1765, and was removed in July 1766: during its continuance in office the marquis of Rockingham was First Lord of the Treasury, and Mr. Dowdeswell Chancellor of the Exchequer) says, 'The lawful secrets of business and friendship were rendered inviolable by the Resolution for condemning the seizure of papers.' See New Parl. Hist. vol. 16, p. 207.

the case of a search-warrant for stolen goods, it is never granted, but upon the strongest evidence that a felony has been committed, and that the goods are secreted in such a house; and it is to seize such goods as were stolen, not all the goods in the house; but if stolen goods are not found there, all who entered with the warrant are trespassers. However frequently these warrants have been granted since the Revolution, that will not make them lawful; for if they were unreasonable or unlawful when first granted, no usage or continuance can make them good. Even customs, which have been used time out of mind, have been often adjudged void, as being unreasonable, contrary to common right, or purely against law, if upon considering their nature and quality they shall be found injurious to a multitude, and prejudicial to the commonwealth, and to have their commencement (for the most part) through the oppression and extortion of lords and great men. Davis 32 b. These warrants are not by custom; they go no farther back than eighty years; and most amazing it is they have never before this time been opposed or controverted, considering the great men that have presided in the King's-bench since that time. But it was reserved for the honour of this Court, which has ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star-chamber tyranny.

Counsel for the Defendants. I am not at all alarmed, if this power is established to be in the secretaries of state. It has been used in the best of times, often since the Revolution. I shall argue, first, that the secretary of state has power to grant these warrants; and if I cannot maintain this, I must, secondly, shew that by the statute 24 Geo. 2, c. 24, this action does not lie against the defendants the messengers. 1. A secretary of state has the same power to commit for treason as a justice of peace. Kendall and Roe,* Skin. 596. 1 Salk. 346, S. C. 1 lord Raym. 65. 5 Mod. 78, S. C. Sir William Wyndham was committed by James Stanhope, secretary of state, to the Tower, for high treason the 7th of October, 1715. See the case 1 Stra. 2. And serjeant Hawkins says, it is certain, that the privy council, or any one or two of them, or a secretary of state, may lawfully commit† persons for treason, and for other offences against the state, as in all ages they have done. 2 Hawk. P. C. 117, sect. 4. 1 Leon. 70, 71. Carth. 291. 2 Leon. 175. If it is clear that a secretary of state may commit for treason and other offences against the state, he certainly may commit for a seditious libel against the government; for there can hardly be a greater offence against the state, except actual treason. A secretary of state is within the Habeas Corpus Act. But a power to commit without a power to issue his warrant to seize the offender and the libel would be nothing; so it must be concluded that he has the same power upon information to issue a warrant to search for and seize a seditious libel, and its author and publisher, as a justice of peace has for granting a warrant to search for stolen goods, upon an information that a theft has been committed, and that the goods are concealed in such a place; in which case the constables and officers assisting him in the search, may break open doors, boxes, &c. to come at such stolen goods. Supposing the practice of granting warrants to search for libels against the state be admitted to be an evil in particular cases, yet to let such libellers escape, who endeavour to raise rebellion, is a greater evil, and may be compared to the reason of Mr. Justice Foster in the Case of Pressing, [Vol. 18, p. 1323,] where he says, 'That war is a great evil, but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war brings with it; but it is a maxim in law and good policy too, that all private mischiefs must be borne with patience, for preventing a national calamity, &c.'

2. Supposing there is a defect of jurisdiction in the secretary of state, yet the defendants are within the stat. 24 Geo. 2, c. 44, and though not within the words, yet they are within the reason of it. That it is not unusual in acts of parliament to comprehend by construction a generality, where express mention is made only of a particular. The statute of *Circumspecte agatis* concerning the bishop of Norwich extends to all bishops. Fitz. Prohibition 3, and 2 Inst. on this statute, 25 Edw. 3, c. enables the incumbent to plead in *quare impedit*, to the king's suit. This also extends to the suits of all persons, 38 E. 3, 31. The act 1 Ric. 2, ordains that the warden of the Fleet shall not permit prisoners in execution to go out of prison by bail or baston, yet it is adjudged that this act extends to all gaolers. Plowd. Com. case of Platt, 35 b. The stat. *de donis conditionalibus* extends to all other limitations in tail not there particularly mentioned, and the like construction has been put upon several other

* See this Case, in vol. 12, p. 1299.

† With respect to the power of a secretary of state to commit, see the Cases of Wilkes, p. 982, of this volume, and of Leach against Money and others, p. 1002 of this volume.

"If we are to learn from the records in courts of justice, and from the received practice at all times what is the law of the land, I have no difficulty in saying that the secretaries of state have the right to commit. This right was not even doubted by lord Camden, who expressed as great anxiety for the liberty of the subject as any man; indeed it has been thought by some persons eminent in our possession, who have considered the point since, that he rather overstepped the line of the law in the Case of R. *v.* Wilkes, and certainly if that judgment can be supported, many other cases that have been solemnly determined, cannot be reconciled with it." Per lord Kenyon, C. J. in the Case of the King against Despard, 7 T. Rep. 742.

statutes. Tho. Jones 62. The stat. 7 Jac. 1, c. 5, the word 'constable' therein extends to a deputy constable. Moor 845. These messengers in ordinary have always been considered as officers of the secretary of state, and a commitment may be to their custody, as in sir W. Wyndham's case. A justice of peace may make a constable *pro hac vice* to execute a warrant, who would be within the stat. 24 Geo. 2. So if these defendants are not constables, yet as officers they have power to execute a warrant of a justice of peace. A constable may, but cannot be compelled to execute a warrant out of his jurisdiction. Officers acting under colour of office, though doing an illegal act, are within this statute. Vaugh. 113. So that no demand having ever been made of the warrant, nor any action commenced within six months, the plaintiff has no right of action. It was said, that a conservator of the peace had no more power than a constable has now. I answer, they had power to bind over at common law, but a constable has not. Dalton, cap. 1.

Counsel for the Plaintiff, in reply. It is said, this has been done in the best of times ever since the Revolution. The conclusion from thence is, that it is the more inexcusable, because done in the best of times, in an æra when the common law (which had been trampled under the foot of arbitrary power) was revived. We do not deny but the secretary of state hath power to commit for treason and other offences against the state; but that is not the present case, which is breaking into the house of a subject, breaking into his drawers and boxes, ransacking all the rooms in his house, and prying into all his private affairs. But it is said, if the secretary of state has power to commit, he has power to search, &c. as in the case of stolen goods. This is a false consequence, and it might as well be said he has a power to torture. As to stolen goods, if the officers find none, have they a right to take away a man's goods which were not stolen? Pressing is said to be a dangerous power, and yet it has been allowed for the benefit of the state. But that is only the argument and opinion of a single judge, from ancient history and records, in times when the lower part of the subjects were little better than slaves to their lords and great men, and has not been allowed to be lawful without an act of parliament since the time of the Revolution. The stat. 24 Geo. 2, has been compared to ancient statutes, naming particular persons and districts, which have been construed to extend to many others not named therein; and so the defendants, though no such officers are mentioned, by like reason, are within the statute of 24 Geo. 2. But the law knows no such officers as messengers in ordinary to the king. It is said the Habeas Corpus Act extends to commitments by secretaries of state, though they are not mentioned therein. True, but that statute was made to protect the innocent against illegal and arbitrary power. It is said, the secretary of state is a justice of peace, and the messengers are his officers. Why then did the warrant direct them to take a constable to their assistance, if they were themselves the proper officers? It seems to admit they were not the proper officers. If a man be made an officer for a special purpose to arrest another, he must shew his authority; and if he refuses, it is not murder to kill him. But a constable or other known officer in the law need not shew his warrant.

Lord Chief Justice. I shall not give any opinion at present, because this case, which is of the utmost consequence to the public, is to be argued again. I shall only just mention a matter which has slipt the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument. Suppose a warrant which is against law be granted, such as no justice of peace, or other magistrate high or low whomsoever, has power to issue, whether that magistrate or justice who grants such warrant, or the officer who executes it, is within the stat. 24 Geo. 2, c. 44. To put one case (among an hundred that might happen): suppose a justice of peace issues a warrant to search a house for stolen goods, and directs it to four of his servants, who search and find no stolen goods, but seize all the books and papers of the owners of the house, whether in such a case would the justice of peace, his officers or servants, be within the stat. 24 Geo. 2.? I desire that every point of this case may be argued to the bottom, for I shall think myself bound, when I come to give judgment, to give my opinion upon every point in the case.

Mich. 6 Geo. 3.

Counsel for the Plaintiff on the second argument. If the secretary of state, or a privy counsellor, justice of peace, or other magistrate whatever, have no legal power to grant the warrant in the present case, it will follow, that the magistrate usurping such an illegal power, can never be construed to be within the meaning or reason of the statute of 24 Geo. 2, c. 44, which was made to protect justices of the peace, &c. where they made blunders, or erred in judgment in cases within their jurisdiction, and not to give them arbitrary power to issue warrants totally illegal from beginning to end, and in cases wherein they had no jurisdiction at all. If any such power in a secretary of state, or a privy counsellor, had ever existed, it would appear from our law-books. All the ancient books are silent on this head. Lambert never once mentions a secretary of state. Neither he nor a privy counsellor, were ever considered as magistrates. In all the arguments touching the Star-Chamber, and Petition of Right, nothing of this power was ever dreamt of. State-commitments anciently were either *per mandatum regis* in person, or by warrant of several of the privy counsellors in the plural number. The king has this

power in a particular mode, viz. by the advice of his privy council, who are to be answerable to the people if wrong is done. He has no other way but in council to signify his mandate. In the Case of the Seven Bishops, this matter was insisted upon at the bar, when the Court presumed the commitment of them was by the advice of the privy council; but that a single privy counsellor had this power, was not contended for by the crown-lawyers then. This Court will require it to be shewn that there have been ancient commitments of this sort. Neither the secretary of state, or a privy counsellor, ever claimed a right to administer an oath, but they employ a person as a law-clerk, who is a justice of peace, to administer oaths, and take recognizances. Sir Barth. Shower, in Kendall and Roe's case, insisted they never had such power. It would be a solecism in our law to say, there is a person who has power to commit, and has not power to examine on oath, and bail the party. Therefore whoever has power to commit, has power to bail. It was a question formerly, whether a constable as an ancient conservator of the peace should take a recognizance or bond. In the time of queen Elizabeth there was a case wherein some of the judges were of one opinion and some of another. A secretary of state was so inconsiderable formerly, that he is not mentioned in the statute of *scandalum magnatum*. His office was thought of no great importance. He takes no oath of office as secretary of state, gives no kind of security for the exercise of such judicial power as he now usurps. If this was an ancient power, it must have been annexed to his office anciently; it cannot be now given to him by the king. The king cannot make two chief justices of the Common-Pleas; nor could the king put the great seal in commission before an act of parliament was made for that purpose. There was only one secretary of state formerly: there are now two appointed by the king. If they have this power of magistracy, it should seem to require some law to be made to give that power to two secretaries of state which was formerly in one only. As to commitments *per mandatum regis*, see Staunf. Pl. Coron. 72. 4 Inst. c. 5, court of Star-Chamber. Admitting they have power to commit in high treason, it will not follow they have power to commit for a misdemeanor. It is of necessity that they can commit in high treason, which requires immediate interposition for the benefit of the public. In the case of commitment by Walsingham secretary of state, 1 Leon. 71, it was returned on the Habeas Corpus at last, that the party was committed 'ex sententia et 'mandato totius concilii privati dominæ reginæ.' Because he found he had not that power of himself, he had recourse to the whole privy council's power, so that this case is rather for the plaintiff. Commitment by the High Commission Court of York was declared by parliament illegal from the beginning; so in the Case of Ship-Money the parliament declared it illegal.

Counsel for the Defendants on the second argument. The most able judges and advocates, ever since the Revolution, seem to have agreed, that the secretaries of state have this power to commit for a misdemeanor. Secretaries of state have been looked upon in a very high light for two hundred years past. 27 H. 8, c. 11. Their rank and place is settled by 31 H. 8, c. 10. 4 Inst. 362, c. 77, of Precedency. 4 Inst. 56. Selden's Titles of Honour, c. Officers of State. So that a secretary of state is something more than a mere clerk, as was said. Minshew verb. Secretary. He is 'è secretioribus consiliis domini regis.' Serjeant Pengelly moved, that sir William Wyndham might be bailed. If he could not be committed by the secretary of state for something less than treason, why did he move to have him bailed? This seems a concession that he might be committed in that case for something less than treason. Lord Holt seems to agree that a commitment by a secretary of state is good. Skin. 598. 1 lord Raym. 65. There is no case in the books that says in what cases a secretary of state can or cannot commit; by what power is it that he can commit in the case of treason, and in no other case? The resolution of the House of Commons touching the Petition of Right, [Selden last volume, Parliamentary History, vol. 2, p. 374.] Secretary Coke told the Lords, it was his duty to commit by the king's command. Yoxley's case, Carth. 291, he was committed by the secretary of state on the statute of Elizabeth for refusing to answer whether he was a Romish priest. The Queen and Derby, Fortescue's Reports, 140, the commitment was by a secretary of state, Mich. 10 Annæ, for a libel, and held good. (Note. Bathurst J. said he had seen the Habeas Corpus and the Return, and that this was a commitment by a secretary of state.) The King and Earbury, Mich. 7 Geo. 2, 2 Barnard 346, was a motion to discharge a recognizance entered into for writing a paper called The Royal Oak. Lord Hardwicke said it was settled in Kendall and Roe's case, that a secretary of state might apprehend persons suspected of treasonable practices; and there are a great number of precedents in the Crown-office of commitments by secretaries of state for libels against the government.

After time taken to consider, Lord Camden, Lord Chief Justice, delivered the Judgment of the Court for the Plaintiff, in the following words:

L. C. J. This record hath set up two defences to the action, on both of which the defendants have relied.

The first arises from the facts disclosed in the special verdict; whereby the defendants put their case upon the statute of 24 Geo. 2, insisting, that they have nothing to do with the legality of the warrants, but that they ought to have been acquitted as officers within the meaning of that act.

The second defence stands upon the legality of the warrants; for this being a justification at common law, the officer is answerable if the magistrate has no jurisdiction.

These two defences have drawn several points into question, upon which the public, as well as the parties, have a right to our opinion.

Under the first, it is incumbent upon the officers to shew, that they are officers within the meaning of the act of parliament, and likewise that they have acted in obedience to the warrant.

The question, whether officers or not, involves another; whether the secretary of state, whose ministers they are, can he deemed a justice of the peace, or taken within the equity of the description; for officers and justices are here co-relative terms: therefore either both must be comprised, or both excluded.

This question leads me to an inquiry into the authority of that minister, as he stands described upon the record in two capacities, viz. secretary of state and privy counsellor. And since no statute has conferred any such jurisdiction as this before us, it must be given, if it does really exist, by the common law; and upon this ground he has been treated as a conservator of the peace.

The matter thus opened, the questions that naturally arise upon the special verdict, are;

First, whether in either of these characters, or upon any other foundation, he is a conservator of the peace.

Secondly, admitting him to be so, whether he is within the equity of the 24th Geo. 2.

These points being disposed of, the next in order is, whether the defendants have acted in obedience to the warrant.

In the last place, the great question upon the justification will be, whether the warrant to seize and carry away the plaintiff's papers is lawful.

First Question.

The power of this minister, in the way wherein it has been usually exercised, is pretty singular.

If he is considered in the light of a privy counsellor, although every member of that board is equally entitled to it with himself, yet he is the only one of that body who exerts it. His power is so extensive in place, that it spreads throughout the whole realm; yet in the object it is so confined, that except in libels and some few state crimes, as they are called, the secretary of state does not pretend to the authority of a constable.

To consider him as a conservator. He never binds to the peace, or good behaviour, which seems to have been the principal duty of a conservator; at least he never does it in those cases, where the law requires those sureties. But he commits in certain other cases, where it is very doubtful, whether the conservator had any jurisdiction whatever.

His warrants are chiefly exerted against libellers, whom he binds in the first instance to their good behaviour, which no other conservator ever attempted, from the best intelligence that we can learn from our books.

And though he doth all these things, yet it seems agreed, that he hath no power whatsoever to administer an oath or take bail.

This jurisdiction, as extraordinary as I have described it, is so dark and obscure in its origin, that the counsel have not been able to form any certain opinion from whence it sprang.

Sometimes they annex it to the office of secretary of state, sometimes to the quality of privy counsellor; and in the last argument it has been derived from the king's royal prerogative to commit by his own personal command.

Whatever may have been the true source of this authority, it must be admitted, that at this day he is in the full legal exercise of it; because there has been not only a clear practice of it, at least since the Revolution, confirmed by a variety of precedents; but the authority has been recognized and confirmed by two cases in the very point since that period: and therefore we have not a power to unsettle or contradict it now, even though we are persuaded that the commencement of it was erroneous.

And yet, though the enquiry I am now upon cannot be attended with any consequence to the public, it is nevertheless indispensable; for I shall trace the power to its origin, in order to determine whether the person is within the equity of the 24th Geo. 2.

Before I argue upon that point, or even state the question, whether the secretary of state be within that act, we must know what he is. This is no very agreeable task, since it may possibly tend to create, in some minds, a doubt upon a practice that has been quietly submitted to, and which is of no moment to the liberty of the subject; for so long as the proceedings under these warrants are properly regulated by law, the public is very little concerned in the choice of that person by whom they are issued.

To proceed then upon the First Question, and to consider this person in the capacity of a secretary of state.

This officer is in truth the king's private secretary. He is keeper of the signet and seal used for the king's private letters, and backs the sign manual in transmitting grants to the privy seal. This seal is taken notice of in the Articuli super Chartas, cap. 6, and my lord Coke in his comment (2 Inst. 556,) upon that chapter, p. 556, describes the secretary as I have mentioned. He says he has four clerks, that sit at his board; and that the law in some cases takes notice of the signet; for a *ne exeat regno* may be by commandment under the privy seal, or under the signet; and in this case the subject ought to take notice of it; for it is but a signification of the king's commandment. If at the time my lord Coke wrote his 3d Institute he had been acquainted with the authority that is now ascribed to the secretary, he would certainly have mentioned it in this

place. It was too important a branch of the office to be omitted; and his silence therefore is a strong argument, to a man's belief at least, that no such power existed at that time. He has likewise taken notice of this officer in the Prince's case in the 8th Report. He is mentioned in the statute of the 27th H. 8, chap. 11, and in the statute of the same king touching precedency; and it is observable, that he is called in these two statutes by the single name of secretary, without the addition, which modern times has given him, of the dignity of a state-officer.

I do not know, nor do I believe, that he was anciently a member of the privy council; but if he was, he was not even in the times of James and Charles the 1st, according to my lord Clarendon, an officer of such magnitude as he grew up to after the Restoration, being only employed, by this account, to make up dispatches at the conclusion of councils, and not to govern or preside in those councils.

It is not difficult to account for the growth of this minister's importance. He became naturally significant from the time that all the courts in Europe began to admit resident ambassadors; for upon the establishment of this new policy, that whole foreign correspondence passed through the secretary's hands, who by this means grew to be an instructed and confidential minister.

This being the true description of his employment, I see no part of it that requires the authority of a magistrate. The custody of a signet can imply no such thing; nay, the contrary would rather be inferred from this circumstance; because if his power to commit was inherent in his office, his warrants would naturally be stamped with that seal; and in this light the privy seal, one should think, would have had the preference, as being highest in dignity and of more consideration in law. Besides all this, it is not in my opinion consonant to the wisdom or analogy of our law, to give a power to commit, without a power to examine upon oath, which to this day the secretary of state doth not presume to exercise. Mr. Justice Rokeby, in the case of Kendall and Rowe, says, that the one is incident to the other; (5 Mod. 78,) and I am strongly of that opinion: for how can he commit, who is not able to examine upon oath?* What magistrate can be found, in our law, so defectively constituted? The only instance of this kind, that can be produced, is the practice of the House of Commons. But this instance is no precedent for other cases. The rights of that assembly are original and self created; they are paramount to our jurisdiction, and above the reach of injunction, prohibition, or error.† So that I still say, notwithstanding that particular case, there is no magistrate in our law so framed, unless the secretary of state be an exception. Now Mr. Justice Rokeby and myself, though we agree in the principle, form our conclusions in a very different manner. He from the assumed power of committing, which ought first to have been proved, infers the incidental powers of administering an oath. I on the contrary, from the admitted incapacity to do the latter, am strongly inclined to deny the former.

Again, if the secretary of state is a common law magistrate, one should naturally expect to find some account of this in our books, whereas his very name is unknown; and there cannot be a stronger argument against his authority in that light, than the unsuccessful attempts that have been made at the bar to transform him into a conservator. These attempts have given us the trouble of looking into those books that have preserved the memory of these magistrates, who have been long since deceased and forgotten. Fitzherbert, Crompton, Lambard, Dalton, Pulton, and Bacon, have all been searched to see, if any such person could be found amongst the old conservators. It is not material to repeat the whole number, and to range them in their several classes; but it will be sufficient to enumerate the principal ones; because they may be referred to in some other other part of the argument.

The king is mentioned as the first. Then come the chancellor, the treasurer, the high steward, the master of the rolls, the chief justice and the justices of the King's-bench, all the judges in their several courts, sheriffs, coroners, constables; and some are said to be conservators by tenure, some by prescription, and others by commission. But no secretary of state is to be found in the catalogue; and I do affirm, that no treatise, case, record, or statute, has ever called him a conservator, from [illegible] down to the case of the [illegible] and Rowe.*

The first time, he appears in our books to be a granter of our warrants, is in 1 Leonard 70 and 71, 29 and 30 Elizabeth, where the return to a Habeas Corpus was a commitment by sir Francis Walsingham, principal secretary, and one of the privy council. The Court takes this distinction. Where a person is committed by one of the privy council, in such case the cause of the commitment should be set down in the return; but on the contrary, where the party is committed by the whole council, there no cause need be alleged. The Court upon this ordered the return to be amended, and then the return is a commitment by the whole council.

There is a like case in the 2 Leonard, p. 175, a little prior in point of time, where the commitment is by sir Francis Walsingham, one of the principal secretaries, &c. Because the warden of the Fleet did not return for what cause Helliard was committed, the Court gives

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 16, s. 4.

† Ibid, book 2, c. 15, s. 73,

* See Leach's Hawkins's Pleas of the Crown, book 1, c. 60, s. 1,

him day to mend his return, or otherwise the prisoner should be delivered. Nobody who reads this case can doubt, but that the &c. must be supplied by the addition of privy counsellor, as in the other case.

These authorities shew, that the judges of those days knew of no such committing magistrate as a secretary of state. They pay no regard to that office, but treat the commitment as the act of the privy counsellor only; and to shew farther that the privy counsellor as such was the only acting magistrate in state matters, all the twelve judges two years afterwards were obliged to remonstrate against the irregularities of their commitments, but take no notice of any such authorities practised by the secretaries of state.

In the 3d year of king Charles the 1st, when the House of Commons started that famous dispute, upon the right claimed by the king and the privy council to commit without shewing cause, it is natural to expect, that the secretary's warrant should have been handled, or at least named among the state commitments. But there is not throughout that long and learned discussion one word said about him, or his name so much as mentioned; and the Petition of Right, as well as all the proceedings that produced it, is equally silent upon the subject.

Again, when in the 16th year in the same king's reign the Habeas Corpus was granted by act of parliament (16 Cha. 1, c. 10, s. 8,) upon all the state commitments, and where the omission of one mode of committing would have been fatal to the subject, and frustrated all the remedy of that act, and where they have enumerated not only every method of committing that had been exercised, but every other that might probably exist in after times; yet the commitment by a secretary of state is not found amongst the number. If then he had power of his own to commit, this famous act of parliament was waste paper, and the subject still at the mercy of the crown, without the benefit of the Habeas Corpus; a supposition altogether incredible: for who can believe, that this parliament, so jealous, so learned, so industrious, so enthusiastic of the liberty of the subject, when they were making a law to relieve prisoners against the power of the crown, should bind the king, and leave his secretary of state at large?

Whoever attends to all these observations will see clearly, that the secretary of state in those days never exercised the power of committing in his own right; I say, in his own right, because that he did in fact commit, and that frequently even at the time when the matter of the Habeas Corpus was agitated in the 3d of king Charles the 1st, will appear from a passage in the Ephemeris Parliamentaria, page 162. This passage, when it comes to be attended to, will throw great light upon the present enquiry. It is sufficient of itself to convince me, from what source this practice first arose. It was from a delegation of the king's royal prerogative to commit by his own power, and from the king devolved in point of execution upon the secretary of state. The passage I allude to is a speech of secretary Cook.

Whilst the parliament were disputing the king's authority to commit, either by himself or by his council, without shewing the cause, the king, who was desirous to pacify those discontents, and yet unwilling to part with his prerogative, sent a message to the House of Commons to assure them, that if they would drop the business, he would promise them, upon his royal word, not to use this prerogative contrary to law. Secretary Cook delivers this message, and then the book proceeds in these words. After speaking of himself and the nature of his place, he says, "Give me leave freely to tell you, that I know by experience, that by the place I hold under his majesty, if I will discharge the duty of my place and the oath I have taken to his majesty, I must commit, and neither express the cause to the gaoler, nor to the judges, nor to any counsellor in England, but to the king himself. Yet do not think, I go without ground of reason, or take this power committed to me to be unlimited. Yea rather to me it is charge, burthen, and danger; for if I by this power commit the poorest porter, if I do not upon a just cause, if it may appear, the burthen will fall upon me heavier than the law can inflict; for I shall lose my credit with his majesty and my place: and I beseech you consider, whether those that have been in the same place, have not committed freely, and not any doubt made of it, or any complaint made by the subject."

To understand the meaning of this speech, I must briefly remind you of the nature of that famous struggle for the liberty of the subject between the crown and the parliament, which was then in agitation.

The points in controversy were these: whether a subject committing by the king's personal command, or by warrant of the privy council, ought to express the cause in the warrant, and whether the subject in that case was bailable.

The matter in dispute was confined to those two commitments. The crown claimed no such right for any other warrant; nor did the Commons demand redress against any other. The statute of Westminster the first, which was admitted on all sides to be the only foundation upon which the pretensions of the crown were built, speaks of no other arrests in the text, but the king's arrest only; and the comment of law had never added any other arrest by construction, but that only of the privy council. No other commitment whatever was deemed by any man to be within the equity of that act. The case, cited upon that occasion, speaks of no other commitments but these. Nay the House of Lords, who passed a resolution in the heat of this business in favour of the king's authority, resolves only, that the king or his council could commit, but meddle with no other commitment. Secretary Cook tells them

in this public manner, that he made a daily practice of committing without shewing the cause; yet the House takes no notice of any secretary's warrant as such, nor is the secretary's name mentioned in the course of all those proceedings. What then were those commitments mentioned by the secretary? They were certainly such only, as were 'per speciale mandatum domini regis.' They could be no other. They were the commitments then under debate. They, and they only, were referred to by the king's message, and were consequently the subject matter of the secretary's apology; for no other warrant claimed that extraordinary privilege of concealing the cause.

This observation explains him, when he calls it a power committed to him; which I construe, not as annexed to his office, but specially delegated. This accounts too for his notion, that the law could not touch him; but that if he abused his trust, he should lose his credit with the king and his place, which he describes as a heavier punishment than the law could inflict upon him. Upon this ground it will be easy to explain the notable singularities of this minister's proceeding, which are not to be reconciled to any idea of a common-law magistrate. Such are his meddling only with a few state-offences, his reach over the whole kingdom, his committing without the power of administering an oath, his employment of none but the messenger of the king's chamber, and his command to mayors, justices, sheriffs, &c. to assist him; all which particularities are congruous enough to the idea of the king's personal warrant, but utterly inconsistent with all the principles of magistracy in a subject.

If on the other hand it can be understood, that he could and did commit without shewing the cause in his own right and by virtue of his office, then was his warrant admitted to be legal by the whole House, and without censure or animadversion. It was neither condemned by the Petition of Right, nor subject to the Habeas Corpus Act of 16th of Charles the First, (c. 10.)

The truth of the case was no more than this. The council-board were too numerous to be acquainted with every secret transaction that required immediate confinement; and the delay by summoning was inconvenient in cases that required dispatch. The secretary of state, as most entrusted, was the fittest hand to issue sudden warrants; and therefore we find him so employed by queen Elizabeth under the quality of a privy counsellor. But when the attempt failed, the judges declaring, that he must shew the cause, and that they would remand none of his prisoners in any case but that of high treason, those warrants ceased, and then a new method was taken by making him the instrument of the king's *speciale mandatum;* for that is the form in which all warrants and returns were drawn, that were produced upon that famous argument.

Having thus shewn, not only negatively that this power of committing was not annexed to the secretary's office, but affirmatively likewise that he was notifier or countersigner of the king's personal warrant acting *in alio jure* down to the times of the 16th of Charles the first, and consequently to the Restoration, for there was no secretary in that interval, I have but little to add upon this head, but observing what passed between that time and the case of Kendall and Rowe.

The Licensing Act, that took place in the 13th and 14th of Charles the Second, (c. 33), gave him his first right to issue a warrant in his own name; not indeed to commit persons, but a warrant to search for papers. Whether upon this new power he grafted any authority to commit persons in his own right, as it should seem he did by the precedent produced the other day, is not very material. But it is remarkable, that during that interval he adhered in some cases to the old form, by specifying the express command of the king in this warrant.

With respect to the cases that have passed since the Revolution, such as the King against Kendall and Rowe, the Queen against Darby, and the King and Earbery, I shall take no other notice of them in this place, than to say, they afford no light in the present inquiry by shewing the ground of the officer's authority, though they are strong cases to confirm it.

But before I can fairly conclude, that the secretary of state's power was derived from the king's personal prerogative and from no other origin, I must examine, what has passed relative to the power of a separate privy counsellor in this respect. This is the more necessary to be done, because my lord chief justice Holt has built all his authority upon this ground; and the subsequent cases, instead of striking out any new light upon the subject, do all lean upon and support themselves by my lord chief justice Holt's opinion in the case of Kendall and Rowe.

I will therefore fairly state all that I have been able to discover touching the matter; and then, after I have declared my own opinion, shall leave others to judge for themselves.

In the first place it is proper to observe, that a privy counsellor cannot derive his authority from the statute of Westminster the first; which recites an arrest by the command of the king to be one of those cases that were irrepleviseable by the common law. The principal commentator upon these words is Staundford, (Pl. fo. 72, b.) who says, as to the commandment of the king, this is to be understood of the commandment of his own mouth, or of his council, which is incorporate to him, and speaks with the mouth of the king himself; for otherwise, if you will take these words of commandment generally, you may say that every Capias in a personal action is the command of the king." Lambard in his chapter of Bailment, where he cites this act of parliament, gives it the same construction, by allowing a commitment by the council to be within the equity of these words, "command-

ment of the king." (Lamb. Eirenarch, & b. 3, c. 2, p. 335.) Thus far, and no further, did the crown lawyers in the third of king Charles the first endeavour to extend the text of the law; and it is plain from the cases before cited, that the judges in queen Elizabeth's time were of the same opinion, that the argument could not be extended in favour of the single counsellor; because they held, that he is bound to shew the cause upon his warrant, as distinguished from the other warrants, where they admit the cause need not be shewn.

If he is not then entitled by this statute, is he empowered by the common law? They, who contend he is, would do well to shew some authority in proof of their opinion. It is clear, he is not numbered among the conservators. It is as clear, that he is not mentioned by any book as one of the ordinary magistrates of justice with any such general authority.

The first place, in which any thing of this kind is to be found, is in the year-book of Henry the sixth, where the sheriff returns a detainer under the warrant of 'duos de concilio pr[illegible] has an[illegible] is doub[illegible]ing as well for *dominos*, as for *duos*; so that till the reading is settled, which is beyond my skill, the authority must be suspended.

The next time you meet with a privy counsellor in the light of a magistrate is in the first of Edward the sixth, chap. 12, s. 19, where one of the privy council is empowered to take the accusation in some new treasons therein mentioned; and he is for this purpose joined with the justice of assize and justice of the peace. The like power is given to him by the 5th and 6th of the same king, c. 11, s. 10, in a like case; and I find in Kelyng, p. 19, that when the judges met to resolve certain points before the trial of the Regicides, they resolved, that a confession upon examination before a privy counsellor, though he be not a justice of the peace, is a confession within the meaning of the statute of the 5th and 6th of Edward the 6th. That act of parliament in the twelfth section had provided, that no person should be attainted of treason, but upon the testimony of two lawful accusers, unless the said party arraigned should willingly without violence confess the same.

It seems to me, that the ground upon which the judges proceeded in this resolution, was the express power given to the privy council in the clause next but one before that just mentioned, where the act enables them to take the accusation in the new treasons there mentioned.

Whether they reasoned in that way, or whether they conceived that the power there given was a proof of some like power which they enjoyed to take accusation in the case of treasons at the common law, the book has not explained; so that hitherto this authority in the case of high treason stands upon a very poor foundation, being in truth no more than a conjecture of law without authority to support it.

The next authorities are the cases already recited in Leonard, which to the present point prove nothing more than this; that the judges do admit a power in a privy counsellor to commit without specifying in what cases. They demand the cause, and a better return; whereupon sir Francis Walsingham, instead of relying upon his power as privy counsellor, returns a new warrant signed by the whole board.

Two years after this came forth that famous resolution of all the judges, which is reported in 1 Anderson 297, 34th of Elizabeth. There is no occasion to observe, how arbitrary the prerogative grew, and how fast it increased towards the end of this queen's reign. It seems to me, as if the privilege claimed by the king's personal warrant, and from him derived to the council-board, by construction, had some-how or other been adopted by every individual of that board; for in fact these warrants became so frequent and oppressive, that the courts of justice were obliged at last to interpose.

However they might be overborne by the terror of the king's special command either in or out of council, they had courage enough to resist the novel encroachments of the separate members; and therefore they did in the courts of King's-bench and Common Pleas set at large many persons so committed; upon which occasion a question being put to the judges, to specify in what cases the prisoner was to be remanded, they answer the question with a remonstrance of their own against the illegal warrants granted by the privy counsellors. The preamble relates entirely to these commitments, wherein they desire, that some good order may be taken, that her highness's subjects may not be committed or detained in prison by commandment of any nobleman, against the laws of the realm.

The question is this: In what cases prisoners sent to custody by her majesty, her council, or any one or more of her council, are to be detained in prison, and not to be delivered by her majesty's courts or judges.

The answer is, "We think, that if any person be committed by her majesty's command from her person, or by order from the council-board, or if any one or two of her council commit one for high treason, such persons so in the case before committed may not be delivered by any of her courts without due trial by the law and judgment of acquittal had. Nevertheless the judges may award the queen's writs to bring the bodies of such persons before them; and if upon return thereof the causes of their commitment be certified to the judges, as it ought to be, then the judges in the cases before ought not to deliver him, but to remand the prisoner to the place from whence he came; which cannot conveniently be done, unless notice of the causes in generality, or else specially, be given to the keeper or gaoler that shall have the custody of such prisoner."

There is a studied obscurity in this opinion, which shews, how cautious the judges were obliged to be in those dangerous times; for

whether they meant to acknowledge a general power in the king or his council to commit, as distinguished from a special power in one or more of his council to commit, only in the case of high treason; or whether this case of high treason is to be referred to all the commitments as the only unbailable case; or again, whether in the superior commitment by the royal person or his council, they would deliver the prisoner though no cause was specified; or if one of the council committed for offences below high treason where they declare they would not remand, yet whether they would absolutely discharge or only upon bail; is altogether either ambignous or uncertain.

It is evident to me, that the judges did not intend to be understood touching these matters; and the only propositions, that are clearly laid down in this resolution, are these.

First, that they would never remand upon the counsellor's commitment but in high-treason.

Secondly, that the cause ought to be shewed in all cases.

This resolution grew to be much agitated afterwards in the third of Charles the first, and had the honour, like other dark oracles, to be cited on both sides.

Thus much it was necessary to observe upon this famous opinion; because it was upon this opinion, that lord chief justice Holt principally relied. At this time it is apparent, that all the privy counsellors exercised this right in common. Whatever it was, the complaint shews, it was a general practice, and a privilege enjoyed by all the members of that board; from whence it is natural to suppose, that if the power was well founded, the same practice would have continued to this time in the same way, seeing how tenacious all men are of those things that are called rights and privileges. Instead of this it doth not appear, that the council from that æra have ever asserted their rights; and now at last, when the secretary of state has revived the claim, for the common benefit, as it should seem, of the whole body, no other person has followed this example, or knows to this moment that he is entitled to such right. Any body who considers what the consequence must have been from these determinations of the judges, might venture to affirm, that the privy counsellor's warrant from this period ceased and grew out of use; for as the cause in this case was necessary to be specified, and the prisoner was never to be remanded but in the case of high treason, that warrant became at once unserviceable, and the crown was forced to resort to the royal mandate or the board-warrant, which, notwithstanding the case in Anderson, was still insisted to be unbailable and good without a cause.

Hence happened, that in the great debate in the third of king Charles the first, no privy counsellor's warrants do once occur; but instead thereof you find the secretary of state dealing forth the king's royal mandate, and the privy counsellor's authority at rest.

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The only reason, why I touch upon these proceedings, is for the sake of observing, that no notice is taken in those arguments of the privy counsellor's right to commit; and yet the power of the king himself, and of his council, by the statute of Westminster the first, is largely discussed, and so fully handled, that if the warrant of one privy counsellor had then been in use, it must have been brought forth in the argument; for if it could have served no other purpose, it would have been material, in order to mark the distinction between that and the warrant of the whole board.

From these observations I conclude, that these warrants were then deceased and gone, and would probably have never made their appearance again even in description, if the bill in the 16th of Charles the first, c. 10, had not recalled them to memory, not as things either then in use or admitted to be legal, but as one of the modes of commitment which might be again revived, because it had been formerly practised.* Therefore when this form of warrant appears, as it does in the catalogue of other forms, both legal and illegal, no argument can be raised from a pretended recognition of this particular warrant; since it was necessary to name every mode, that ever had been used by the king, the council, or the Star-Chamber, in order to make the remedy by Habeas Corpus universal.

But if there can be a doubt, whether this act of parliament is to be deemed a recognition of this authority, there is a passage in the Journal of the House of Commons, that proves the contrary in direct terms.

Whilst this bill was passing, the House makes an amendment, which appears by the question put to be this, whether the House should assent to the putting the word 'liberties' out of the bill.

But as the passage in the bill is not mentioned in the Journals, it must be collected by inferences. By the phrase 'left out of the bill, I' presume it was permitted to stand in the preamble. Now when you look into the preamble, the word 'liberties' is there to be found in that part of the preamble which recites this usurpation of the privy council upon the liberties, as well as the properties of the subject; whereas the enacting clause condemns only the jurisdiction of that board, so far as it assumed a jurisdiction over the property of the subject; from whence I collect that the word 'liberties' stood in that clause; and the passage that follows in the Journal does strongly confirm it.

The words are these: "Resolved upon the question, that this House does assent to the putting the word 'liberties' out of the bill concerning the Star-Chamber and Council pleadings; because the House has a bill to be drawn to provide for the liberty of the subject in a large manner. Mr. Serjeant Wild and Mr. Whitelock are appointed to draw a bill to that

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 15, s. 71.

purpose upon the several points that have been here this day debated.

" Resolved upon the question, that the body of the lords of the council, nor any one of them in particular as a privy-counsellor, has any power to imprison any free-born subject, except in such cases as they are warranted by the statutes of the realm."

It is pretty plain from this passage, that the debate turned upon the meaning of the statute of Westminster the first, and the resolution of the judges in Anderson, about which it is not fit to give any opinion; my design by citing this passage being only to shew, that this act of parliament does not even prove the actual practice of such warrants at that time, much less does recognize their legality.

What follows is still more remarkable touching this business, upon a doubt started in the trial of the Seven Bishops.* They were committed by a warrant signed by no less than thirteen privy counsellors; but the warrant did not appear to be signed by them in council. The objection taken was, that the warrant was void, being signed only by the privy counsellors separately, and not in a body.. If any man in Westminster-hall at that time had understood, that one or more privy counsellors had a right to commit for a misdemeanour, that would have been a flat answer to the objection; but they are so far from insisting upon this, that all the king's counsellors, as well as the Court, do admit the warrant would have been void, if it could be taken to be executed by them out of council.

The solicitor-general upon that occasion cites the 16th of Charles the first, which statute is produced and read, and yet no argument is taken from thence to prove the authority of the separate lords, though the act is before them. Mr. Pollexfen in the course of the debate says, ' We do all pretty well agree, for ' aught I can perceive, in two things. We do ' not deny, but that the council-board has power ' to commit. They on the other side do not ' affirm, that the lords of the council can com- ' mit out of the council.

' *Attorney General.* Yes, they may as jus- ' tices of the peace.

' *Pollexfen.* This is not pretended to be so here.

' *L. C. J.* No, no, that is not the case.'

The Court at last got rid of the objection, by presuming the warrant to have been executed in council.

There cannot be a stronger authority than this I have now cited for the present purpose. The whole body of the law, if I may use the phrase, were as ignorant at that time of a privy counsellor's right to commit in the case of a libel, as the whole body of privy counsellors are at this day.

The counsel on both sides in that cause were the ablest of their time, and few times have produced abler. They had been concerned in all the state-cases during the whole reign of king Charles the second, on one side or the other; and to suppose that all these persons could be utterly ignorant of this extraordinary power, if it had been either legal or even practised, is a supposition not to be maintained.

This is the whole that I have been able to find, touching the power of one or more privy counsellors to commit; and to sum up the whole of this business in a word it stands thus:

The two cases in Leonard do pre-suppose some power in a privy counsellor to commit, without saying what; and the case in Anderson does plainly recognize such a power in high treason: but with respect to his jurisdiction in other offences, I do not find it was either claimed or exercised.

In consequence of all this reasoning, I am forced to deny the opinion of my lord chief justice Holt to be law, if it shall be taken to extend beyond the case of high treason. But there is no necessity to understand the book in a more general sense; nor is it fair indeed to give the words a more large construction: for as the conclusion ought always to be grounded on the premisses, and the premisses are confined to the case of high treason only, the opinion should naturally conform to the cases cited, more especially as the case there before the Court was a case of high treason, and they were under no necessity to lay down the doctrine larger than the case required.—Now whereas it has been argued, that if you admit a power of committing in high treason, the power of committingin lesser offences follows *à fortiori;* I beg leave to deny that consequence, for I take the rule with respect to all special authorities to be directly the reverse. They are always strictly confined to the letter; and when I see therefore, that a special power in any single case only has been permitted to a person, who in no other instance is known or recorded by the common law as a magistrate, I have no right to enlarge his authority one step beyond that case. Consider how strange it would sound, if I should declare at once, that every privy counsellor without exception is invested with a power to commit in all offences without exception from high treason down to trespass, when it is clear that he is not a conservator. It might be said of me, ' he should have explained himself a little more clearly, and told us where he had found the description of so singular a magistrate, who being no conservator was yet in the nature of a conservator.'

I have now finished all I have to say upon this head; and am satisfied, that the secretary of state hath assumed this power as a transfer, I know not how, of the royal authority to himself; and that the common law of England knows no such magistrate. At the same time I declare, wherein my brothers do all agree with me, that we are bound to adhere to the determination of the Queen against Derby, and the King against Earbury; and I have no right to

* See this Case, vol. 12, p. 183.

overturn those decisions, even though it should be admitted, that the practice, which has subsisted since the Revolution, had been erroneous in its commencement.

The secretary of state having now been considered in the two lights of secretary and privy counsellor, and likewise as the substitute of the royal mandate; in the two first he is clearly no conservator; in the last, if he can be supposed to have borrowed the right of conservatorship from the sovereign himself, yet no one will argue or pretend, that so great a person, one so high in authority, can be deemed a justice of the peace within the equity of the 24th of Geo. 2.

However, I will for a time admit the secretary of state to be a conservator, in order to examine, whether in that character he can be within the equity of this act.

SECOND QUESTION.

Upon this question, I shall take into consideration the 7th of James 1, c. 5, because, though it is not material upon this record to determine, whether the special evidence can be admitted under the general issue of not guilty, the defendant having in this instance justified; yet as that act is made in *eâdem materiâ*, and for the benefit of the same persons, the rule of construction observed in that will in great measure be an authority for this.

The 24th of Geo. 2 is entitled, 'An Act for 'the rendering justices of the peace more safe 'in the execution of their offices, and for indemnifying constables and others acting in obe- 'dience to their warrants.' The preamble runs thus: 'Whereas justices of the peace are 'discouraged in the execution of their offices, 'by vexatious actions brought against them, 'for or by reason of small and involuntary 'errors in their proceedings; and whereas it 'is necessary that they should be, as far as is 'consistent with justice and the safety and liberty of the subjects over whom their authority extends, rendered safe in the execution 'of the said office and trust; and whereas it is 'also necessary, that the subject should be 'protected from all wilful and oppressive abuse 'of the several laws committed to the care and 'execution of the said justices of peace.' Then comes the enacting part.

The only granter of the warrant in the enacting part, as well as the preamble, is the justice of the peace. The officers, as they are described, are constables, headboroughs, and other officers or persons acting by their order, or in their aid. If any person acting in obedience to such warrant, and producing the said warrant upon demand, is afterwards prosecuted for such act, the statute says, he shall be acquitted, upon the production of such warrant. The counsel for the defendants say, the secretary and the messengers are both within the equity of this act. The first is a justice of the peace, because he is a conservator. If so the latter is his officer, which I will admit. The proposition then is, that conservators are within the equity of this act. They are clearly not within the letter; for justice and conservator are not convertible terms; and though it should be admitted, that a justice of the peace is still a conservator, yet a conservator is not a justice.

The defendants have argued upon two rules of construction, which in truth are but one.

First, where in a general act a particular is put as an example, all other persons of like description shall be comprized.

Secondly, where the words of a statute enact a thing, it enacts all other things in like degree.

In Plowden 37, and 167, and 467, several cases are cited as authorities under these rules of construction; as, that the bishop of Norwich in one act shall mean all bishops; that the warden of the Fleet shall mean all gaolers; that justices of a division mean all justices of the county at large, that guardian in socage after the heir's attaining fourteen, shall be a bailiff in account; that executors shall include administrators, and tenant for years a tenant for one year or any less time; with several other instances to the like purpose.

In the first place, though the general rule be true enough, that where it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue; yet we ought to be sure, from the words and meaning of the act itself, that the thing or person is really inserted as an example.

This is a very inaccurate way of penning a law; and the instances of this sort are scarce ever to be found, except in some of the old acts of parliament. And wherever this rule is to take place, the act must be general, and the thing expressed must be particular; such as those cases of the warden of the Fleet and the bishop of Norwich: whereas the act before us is equally general in all its parts, and requires no addition or supply to give it the full effect. Therefore if this way of arguing can be maintained by either of the rules, it must fall under the second, which is, that where the words of a statute enact a thing, it enacts all other things in like degree.

In all cases that fall within this rule, there must be a perfect resemblance between the persons or things expressed and those implied. Thus for instance, administrators are the same thing with executors; tenant for half a year and tenant for years have both terms for a chattel interest, differing only in the duration of the term; and so of the rest, which I need not repeat one by one: and in all these cases, the persons or things to be implied are in all respects the objects of the law as much as those expressed. Does not every body see from hence, that you must first examine the law before you can apply the rule of construction? For the law must not be bent by the construction, but that must be adapted to the spirit and sense of the law. The fundamental rule then, by which all others are to be tried, is laid down in Wimbish and Tailbois, Plowden 57, 58, ac-

cording to which the best guide is to follow the intent of the statutes. Again, according to Plowden, p. 205 and 231, the construction is to be collected out of the words according to the true intent and meaning of the act, and the intent of the makers may be collected from the cause or necessity of making the act, or by foreign circumstances.

Let us try the present case by these rules; and let the justice of the peace stand for a moment in this act as a magistrate at large; and then compare him as he is here described with the conservator.

The justice here is a magistrate intrusted with the execution of many laws, liable to actions for involuntary errors, and actually discouraged by vexatious suits; in respect of which perilous situation he is intended to be rendered more safe in the execution of his office.—He is besides a magistrate, who acts by warrant directed to constables and other officers, namely, known officers who are bound to execute his warrants.

Now take the conservator.—He is intrusted with the execution of no laws, if the word 'law' is understood to mean statutes, as I apprehend it is.—He is liable to no actions, because he never acts; the keeping of the peace being so completely transferred to and so engrossed by the justice, that the name of conservator is almost forgot. He is far from being discouraged by actions. No man ever heard of an action brought against a conservator as such; unless you will call a constable a conservator, which will not serve the present purpose, because these persons can hardly be deemed justices within the act.—Again, how does it appear, that the conservator could either grant a warrant like the present, or command a constable to execute it? These powers are at least very doubtful; but I think I may take it for granted, that the conservator could not command a messenger of the king's chamber.

Did then this act of parliament refer to magistrates of known authority and daily employment, or to antiquated powers and persons known to have existed by historical tradition only? Did it mean to redress real grievances, or those that were never felt? 'Ad ea, quæ 'frequenter accidunt, jura adaptantur.'

From this comparison it may appear, how little there is to drag the conservator into the law, who hardly corresponds with the justice of the peace in any one point of the description. But further, it is unfortunate for the conservators upon this question, that one half of them are the objects of the statute by name, as constables, &c. and yet not one of their acts as conservators is within the provision.

And now give me leave to ask one question. Will the secretary of state be classed with the higher or the lower conservator? If with the higher, such as the king, the chancellor, &c. he is too much above the justice to be within the equity. If with the lower, he is too much below him. And as to the sheriff and the coroner, they cannot be within the law; because they never grant such warrants as these. So that at last, upon considering all the conservators, there is not one that does not stand most evidently excluded, unless the secretary of state himself shall be excepted.

But if there wanted arguments to confute this pretension, the construction that has prevailed upon the seventh of James the first, would decide the point. That is an act of like kind to relieve justices of the peace, mayors, constables, and certain other officers, in troublesome actions brought against them for the legal execution of their offices; who are enabled by that act to plead the general issue. Now that law has been taken so strictly, that neither church-wardens, nor overseers, were held to be within the equity of the word 'constables,' although they were clearly officers, and acted under the justice's warrants. Why? Because that act, being made to change the course of the common law, could not be extended beyond the letter. If then that privilege of giving the special matter in evidence upon the general issue is contrary to the common law, how much more substantially is this act an innovation of the common law, which indemnifies the officer upon the production of the warrant, and deprives the subject of his right of action?

It is impossible, that two acts of parliament can be more nearly allied or connected with one another, than that of 24 George 2, and the 7th of James 1. The objects in both are the same, and the remedies are similar in both, each of them changing the common law for the benefit of the parties concerned. The one, in truth, is the sequel or second part of the other. The first not being an adequate remedy in case of the several persons therein mentioned, the second is added to complete the work, and to make them as secure as they ought to be made from the nature of the case. If by a contrary construction any person should be admitted into the last that are not included in that first, the person, whoever he is, will be without the privilege of pleading the general issue, and giving the special matter in evidence, which the latter would have certainly given by express words, if the parliament could have imagined he was not comprized in the first.

Upon the whole, we are all of opinion, that neither secretary of state, nor the messenger, are within the meaning of this act of parliament.

THIRD QUESTION.

But if they were within the general equity, yet it behoved the messenger to shew, that they have acted in obedience to the warrant; for it is upon that condition, that they are intitled to the exemption of the act. When the legislature excused the officer from the perilous task of judging, they compelled him to an implicit obedience; which was but reasonable: so that now he must follow the dictates of his warrant, being no longer obliged to inquire, whether his superior had or had not any jurisdiction. The late decision of the Court of

King's-bench in the Case of General Warrants* was ruled upon this ground, and rightly determined.

This part of the case is clear, and shall be dispatched in very few words.

First, the defendants did not take with them a constable, which is a flat objection. They had no business to dispute either the propriety or the legality of this direction in the execution of the warrant; nor have their counsel any right to dispute it here in their behalf. They can have no other plea under this act of parliament, than ignorance and obedience.

Secondly, they did not bring the papers to the earl of Halifax, to be examined according to the tenor of the warrant, but to Mr. Lovell Stanhope. This command ought to have been literally pursued; nor is it any excuse to say now, as they do in their plea, that Mr. Lovell Stanhope was an assistant to the earl of Halifax. If he is a magistrate, he can have no assistant, nor deputy, to execute any part of that employment. The right is personal to himself, and a trust that he can no more delegate to another, than a justice of the peace can transfer his commission to his clerk.

I shall say no more upon this head. But I cannot help observing, that the secretary of state, who has not been many years intrusted with this authority, has already eased himself of every part of it, except the signing and sealing the warrant. The law clerk, as he is called, examines both persons and papers. He backs or discharges. This is not right. I could wish for the future, that the secretary would discharge this part of his office in his own person.

FOURTH AND LAST QUESTION.

The question that arises upon the special verdict being now dispatched, I come in my last place to the point, which is made by the justification; for the defendants, having failed in the attempt made to protect themselves by the statute of the 24th of Geo. 2, are under a necessity to maintain the legality of the warrants, under which they have acted, and to shew that the secretary of state in the instance now before us, had a jurisdiction to seize the defendants' papers. If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior.

This, though it is not the most difficult, is the most interesting question in the cause; because if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

The messenger, under this warrant, is commanded to seize the person described, and to bring him with his papers to be examined before the secretary of state. In consequence of this, the house must be searched; the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer.

This power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.

This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself: the great executive hand of criminal justice, the lord chief justice of the court of King's-bench, chief justice Scroggs excepted, never having assumed this authority.

The arguments, which the defendants' counsel have thought fit to urge in support of this practice, are of this kind.

That such warrants have issued frequently since the Revolution, which practice has been found by the special verdict; though I must observe, that the defendants have no right to avail themselves of that finding, because no such practice is averred in their justification.

That the case of the warrants bears a resemblance to the case of search for stolen goods.

They say too, that they have been executed without resistance upon many printers, booksellers, and authors, who have quietly submitted to the authority; that no action hath hitherto been brought to try the right; and that although they have been often read upon the returns of Habeas Corpus, yet no court of justice has ever declared them illegal.

And it is further insisted, that this power is essential to government, and the only means of quieting clamours and sedition.

These arguments, if they can be called arguments, shall be all taken notice of; because upon this question I am desirous of removing every colour or plausibility.

Before I state the question, it will be necessary to describe the power claimed by this warrant in its full extent.

If honestly exerted, it is a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man, who is so described in the warrant, though he be innocent.

It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown.

It is executed by messengers with or without a constable (for it can never be pretended, that such is necessary in point of law) in the presence or the absence of the party, as the

* Money and others against Leach, Mich. 6 Geo. 3, *ante*, p. 1002.

messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof.*

If this injury falls upon an innocent person, he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken.

It must not be here forgot, that no subject whatsoever is privileged from this search; because both Houses of Parliament have resolved, that there is no privilege in the case of a seditious libel.

Nor is there pretence to say, that the word 'papers' here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm, that it has been upon a late occasion executed in its utmost latitude: for in the case of Wilkes against Wood, when the messengers hesitated about taking all the manuscripts, and sent to the secretary of state for more express orders for that purpose, the answer was, "that all must be taken, manuscripts and all." Accordingly, all was taken, and Mr. Wilkes's private pocket-book filled up the mouth of the sack.

I was likewise told in the same cause by one of the most experienced messengers, that he held himself bound by his oath to pay an implicit obedience to the commands of the secretary of state; that in common cases he was contented to seize the printed impressions of the papers mentioned in the warrant; but when he received directions to search further, or to make a more general seizure, his rule was to sweep all. The practice has been correspondent to the warrant.

Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.

If it is law, it will be found in our books. If it is not to be found there, it is not law.

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, &c. are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. 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; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

According to this reasoning, it is now incumbent upon the defendants to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.

I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall intitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.

* "If a private person suspect another of felony, and lay such ground of suspicion before a constable, and require his assistance to take him, the constable may justify killing the party if he fly, though in truth he were innocent. But in such case, where no hue and cry is levied, certain precautions must be observed: 1. The party suspecting ought to be present; for the justification is, that the constable did aid him in taking the party suspected. 2. The constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it. From whence it should seem that there ought to be a reasonable ground shewn for it: otherwise it would be immaterial whether such information were given to the constable or not, as to the point of his justification. And it was formerly supposed to be necessary, that there should have been a felony committed in fact, of which the constable must have been ascertained at his peril." East's Pleas of the Crown, ch. 5, s. 69.

The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my lord Coke (4 Inst. 176,) denied its legality; and therefore if the two cases resembled each other more than they do, we have no right, without an act of parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.

Observe too the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed. —The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.*

On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner's behalf the officer's misbehaviour.—To say the truth, he cannot easily misbehave, unless he pilfers; for he cannot take more than all.

If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy: my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.

I come now to the practice since the Revolution, which has been strongly urged, with this emphatical addition, that an usage tolerated from the æra of liberty, and continued downwards to this time through the best ages of the constitution, must necessarily have a legal commencement. Now, though that pretence can have no place in the question made by this plea, because no such practice is there alleged; yet I will permit the defendant for the present to borrow a fact from the special verdict, for the sake of giving it an answer.

If the practice began then, it began too late to be law now. If it was more ancient, the Revolution is not to answer for it; and I could have wished, that upon this occasion the Revolution had not been considered as the only basis of our liberty.

The Revolution restored this constitution to its first principles. It did no more. It did not enlarge the liberty of the subject; but gave it a better security. It neither widened nor contracted the foundation, but repaired, and perhaps added a buttress or two to the fabric; and if any minister of state has since deviated from the principles at that time recognized, all that I can say is, that, so far from being sanctified, they are condemned by the Revolution.

With respect to the practice itself, if it goes no higher, every lawyer will tell you, it is much too modern to be evidence of the common law; and if it should be added, that these warrants ought to acquire some strength by the silence of those courts, which have heard them read so often upon returns without censure or animadversion, I am able to borrow my answer to that pretence from the Court of King's-bench, which lately declared with great unanimity in the Case of General Warrants, that as no objection was taken to them upon the returns, and the matter passed *sub silentio*, the precedents were of no weight. I most heartily concur in that opinion; and the reason is more pertinent here, because the Court had no authority in the present case to determine against the seizure of papers, which was not before them; whereas in the other they might, if they had thought fit, have declared the warrant void, and discharged the prisoner *ex officio*.

This is the first instance I have met with, where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office.

The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. Private customs indeed are still to be sought from private tradition. But whoever conceived a notion, that any part of the public law could be buried in the obscure practice of a particular person?

To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible. But if so strange a thing could be supposed, I do not see, how we could declare the law upon such evidence.

But still it is insisted, that there has been a general submission, and no action brought to try the right.

I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal booksellers have been afraid to dispute.

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 13, s. 17.

The defendants upon this occasion have stopped short at the Revolution. But I think it would be material to go further back, in order to see, how far the search and seizure of papers have been countenanced in the antecedent reigns.

First, I find no trace of such a warrant as the present before that period, except a very few that were produced the other day in the reign of king Charles 2.

But there did exist a search-warraut, which took its rise from a decree of the Star-Chamber. The decree is found at the end of the 3d volume of Rushworth's Collections. It was made in the year 1636, and recites an older decree upon the subject in the 28th of Elizabeth, by which probably the same power of search was given.

By this decree the messenger of the press was empowered to search in all places, where books were printing, in order to see if the printer had a licence; and if upon such search he found any books which he suspected to be libellous against the church or state, he was to seize them, and carry them before the proper magistrate.

It was very evident, that the Star-Chamber, how soon after the invention of printing I know not, took to itself the jurisdiction over public libels, which soon grew to be the peculiar business of that court. Not that the courts of Westminster-hall wanted the power of holding pleas in those cases; but the attorney-general for good reasons chose rather to proceed there; which is the reason, why we have no cases of libels in the King's-bench before the Restoration.

The Star-Chamber from this jurisdiction presently usurped a general superintendance over the press, and exercised a legislative power in all matters relating to the subject. They appointed licensers; they prohibited books; they inflicted penalties; and they dignified one of their officers with the name of the messenger of the press, and among other things enacted this warrant of search.

After that court was abolished, the press became free, but enjoyed its liberty not above two or three years; for the Long Parliament thought fit to restrain it again by ordinance. Whilst the press is free, I am afraid it will always be licentious, and all goverunents have an aversion to libels. This parliament, therefore, did by ordinance restore the Star-Chamber practice; they recalled the licences, and sent forth again the messenger. It was against the ordinance, that Milton wrote that famous pamphlet called Areopagitica. Upon the Restoration, the press was free once more, till the 13th and 14th of Charles 2, when the Licensing Act passed, which for the first time gave the secretary of state a power to issue search warrants: but these warrants were neither so oppressive, nor so inconvenient as the present. The right to enquire into the licence was the pretence of making the searches; and if during the search any suspected libels were found, they and they only could be seized.

This act expired the 32d year of that reign, or thereabouts. It was revived again in the 1st year of king James 2, and remained in force till the 5th of king William, after one of his parliaments had continued it for a year beyond its expiration.

I do very much suspect, that the present warrant took its rise from these search-warrants, that I have been describing; nothing being easier to account for than this engraftment; the difference between them being no more than this, that the apprehension of the person in the first was to follow the seizure of papers, but the seizure of papers in the latter was to follow the apprehension of the person. The same evidence would serve equally for both purposes. If it was charged for printing or publishing, that was sufficient for either of the warrants. Only this material difference must always be observed between them, that the search warrant only carried off the criminal papers, whereas this seizes all.

When the Licensing Act expired at the close of king Charles 2's reign, the twelve judges were assembled at the king's command, to discover whether the press might not be as effectually restrained by the common law, as it had been by that statute.

I cannot help observing in this place, that if the secretary of state was still invested with a power of issuing this warrant, there was no occasion for the application to the judges: for though he could not issue the general search-warrant, yet upon the least rumour of a libel he might have done more, and seized every thing. But that was not thought of, and therefore the judges met and resolved:

First, that it was criminal at common law, not only to write public seditious papers and false news; but likewise to publish any news without a licence from the king, though it was true and innocent.

Secondly, that libels were seizable. This is to be found in the State Trials; and because it is a curiosity, I will recite the passages at large.

"The Trial of Harris for a libel. Scroggs Chief Justice.

"Because my brethren shall be satisfied with the opinion of all the judges of England what this offence is, which they would insinuate, as if the mere selling of books was no offence; it is not long since that all the judges met by the king's commandment, as they did some time before: and they both times declared unanimously, that all persons, that do write, or print, or sell any pamphlet that is either scandalous to public or private persons, such books may be seized, and the persons punished by law; that all books which are scandalous to the government may be seized, and all persons so expounding may be punished: and further, that all writers of news, though not scandalous, seditious, nor reflective upon the government or state; yet if they are writers, as they are few others, of false news, they are indictable and punishable upon that account." [See vol. 7, p. 929.]

It seems the chief justice was a little incorrect in his report; for it should seem as if he meant to punish only the writer of false news. But he is more accurate afterwards in the trial of Carre for a libel.

"Sir *G. Jefferies*, Recorder. All the judges of England having met together to know, whether any person whatsoever may expose to the public knowledge any matter of intelligence, or any matter whatsoever that concerns the public, they give it in as their resolution, that no person whatsoever could expose to the public knowledge any thing that concerned the affairs of the public, without licence from the king, or from such persons as he thought fit to intrust with that power."

"Then Scroggs takes up the subject, and says, The words I remember are these. When by the king's command we were to give in our opinion, what was to be done in point of regulation of the press, we did all subscribe, that to print or publish any news-books or pamphlets, or any news whatsoever, is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose now that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicitè* done, and the author ought to be convicted for it." [See vol. 7, p. 1127.]

These are the opinions of all the twelve judges of England; a great and reverend authority.

Can the twelve judges extrajudicially make a thing law to bind the kingdom by a declaration, that such is their opinion?—I say No.—It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed it. Out of this doctrine sprang the famous general search-warrant, that was condemned by the House of Commons; and it was not unreasonable to suppose, that the form of it was settled by the twelve judges that subscribed the opinion.

The deduction from the opinion to the warrant is obvious. If you can seize a libel, you may search for it: if search is legal, a warrant to authorize that search is likewise legal: if any magistrate can issue such a warrant, the chief justice of the King's bench may clearly do it.

It falls here naturally in my way to ask, whether there be any authority besides this opinion of these twelve judges to say, that libels may be seized? If they may, I am afraid, that all the inconveniences of a general seizure will follow upon a right allowed to seize a part. The search in such cases will be general, and every house will fall under the power of a secretary of state to be rummaged before proper conviction.—Consider for a while how the law of libels now stands.

Lord Chief Justice Holt and the Court of King's-bench have resolved in the King and Bear*, that he who writes a libel, though he neither composes it nor publishes, is criminal.

In the 5th Report, 125, lord Coke cites it in the Star Chamber, that if a libel concerns a public person, he that hath it in his custody ought immediately to deliver it to a magistrate, that the author may be found out.

In the case of Lake and Hutton, Hobart 252, it is observed, that a libel, though the contents are true, is not to be justified; but the right way is to discover it to some magistrate or other, that they may have cognizance of the cause.

In 1st Ventris 31, it is said, that the having a libel, and not discovering it to a magistrate, was only punishable in the Star Chamber, unless the party maliciously publish it. But the Court corrected this doctrine in the King and Bear, where it said, though he never published it, yet his having it in readiness for that purpose, if any occasion should happen, is highly criminal: and though he might design to keep it private, yet after his death it might fall into such hands as might be injurious to the government; and therefore men ought not to be allowed to have such evil instruments in their keeping. Carthew 409. In Salkeld's report of the same case, Holt chief justice says, if a libel be publicly known, a written copy of it is evidence of a publication. Salk. 418.

If all this be law, and I have no right at present to deny it, whenever a favourite libel is published (and these compositions are apt to be favourites) the whole kingdom in a month or two becomes criminal, and it would be difficult to find one innocent jury amongst so many millions of offenders.

I can find no other authority to justify the seizure of a libel, than that of Scroggs and his brethren.

If the power of search is to follow the right of seizure, every body sees the consequence. He that has it or has had it in his custody; he that has published, copied, or maliciously reported it, may fairly be under a reasonable suspicion of having the thing in his custody, and consequently become the object of the search-warrant. If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution. All these particulars must be explained and proved to be law, before this general proposition can be established.

As therefore no authority in our books can be produced to support such a doctrine, and so many Star-Chamber decrees, ordinances, and acts have been thought necessary to establish a power of search, I cannot be persuaded, that such a power can be justified by the common law.

I have now done with the argument, which

* Reported Carth. 407. 1 L. Raym. 414. 12 Mod. 299. 2 Salk. 417. 646.

has endeavoured to support this warrant by the practice since the Revolution.

It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislation be of that opinion, they will revive the Licensing Act. But if they have not done that, I conceive they are not of that opinion. And with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

Serjeant Ashley was committed to the Tower in the 3d of Charles 1st, by the House of Lords only for asserting in argument, that there was a 'law of state' different from the common law; and the Ship-Money judges were impeached for holding, first, that state-necessity would justify the raising money without consent of parliament; and secondly, that the king was judge of that necessity.

If the king himself has no power to declare when the law ought to be violated for reason of state, I am sure we his judges have no such prerogative.

Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.

In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.

Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.

It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.

Observe the wisdom as well as mercy of the law. The strongest evidence before a trial, being only *ex parte*, is but suspicion; it is not proof. Weak evidence is a ground of suspicion, though in a lower degree; and if suspicion at large should be a ground of search, especially in the case of libels, whose house would be safe?

If, however, a right of search for the sake of discovering evidence ought in any case to be allowed, this crime above all others ought to be excepted, as wanting such a discovery less than any other. It is committed in open daylight, and in the face of the world; every act of publication makes new proof; and the solicitor of the treasury, if he pleases, may be the witness himself.

The messenger of the press, by the very constitution of his office, is directed to purchase every libel that comes forth, in order to be a witness.

Nay, if the vengeance of government requires a production of the author, it is hardly possible for him to escape the impeachment of the printer, who is sure to seal his own pardon by his discovery. But suppose he should happen to be obstinate, yet the publication is stopped, and the offence punished. By this means the law is satisfied, and the public secured.

I have now taken notice of every thing that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.

Before I conclude, I desire not to be understood as an advocate for libels. All civilized governments have punished calumny with severity; and with reason; for these compositions debauch the manners of the people; they excite a spirit of disobedience, and enervate the authority of government; they provoke and excite the passions of the people against their rulers, and the rulers oftentimes against the people.

After this description, I shall hardly be considered as a favourer of these pernicious productions. I will always set my face against them, when they come before me; and shall recommend it most warmly to the jury always to convict when the proof is clear. They will do well to consider, that unjust acquittals bring an odium upon the press itself, the consequence whereof may be fatal to liberty; for if kings and great men cannot obtain justice at their hands by the ordinary course of law, they may at last be provoked to restrain that press, which the juries of their country refuse to regulate. When licentiousness is tolerated, liberty is in the utmost danger; because tyranny, bad as it is, is better than anarchy; and the worst of governments is more tolerable than no government at all.

[A great change of the king's ministers happened in the July before the judgment in the preceding case; particularly the marquis of Rockingham was placed at the head of the treasury. The judgment was soon followed with a resolution of the House of Commons, declaring the seizure of papers in the case of a libel to be illegal. Journ. Com. 22 April, 1766. At the same time the Commons passed a resolution

condemning general warrants in the case of libels. The latter resolution was afterwards extended by a further vote, which included a declaration, that general warrants were universally illegal, except in cases provided for by act of parliament. Journ. Com. 25th April, 1766.—All these resolutions were in consequence of Mr. Wilkes's complaint of a breach of privilege above two years before. Journ. Com. 15th November, 1763. Two prior attempts were made to obtain a vote in condemnation of general warrants and the seizure of papers, one in 1764, the other in 1765. Journ. Com. 14th and 17th February, 1764; 29th January, 1765. [See, too, New Parl. Hist.] But they both had miscarried, and one of the reasons assigned for so long resisting such interposition of the House was the pendency of suits in the courts of law. This objection was in part removed by the solemn judgment of the Common Pleas against the seizure of papers, and the acquiescence in it. Whether the question of general warrants ever received the same full and pointed decision in any of the courts, it is not in our power at present to inform the reader. The point arose on the trial of an action by Mr. Wilkes against Mr. Wood; and lord Camden in his charge to the jury appears to have explicitly avowed his own opinion of the illegality of general warrants; but what was done afterwards is not stated. How a regular judgment of the point was avoided, in the case of error in the King's-bench between Money and Leach, by conceding that the warrant was not pursued, we have observed in a former Note, see p. 1028. As to the action, in which Mr. Wilkes finally recovered large damages from the earl of Halifax, it was not tried till after the declaratory vote of the Commons, which most probably prevented all argument on the subject. *Hargrave.*]

542. Proceedings in the Case of JOHN WILKES, esq. on two Informations for Libels, King's-Bench and House of Lords: 4 GEORGE III.—10 GEORGE III. A. D. 1763—1770.

[This Case is wholly extracted from sir James Burrow's Reports. 4 Burr. 2527.]

Wednesday, February 7, 1770.

AS this cause, in the several branches of it, came several times before the Court, it seemed better to reserve a general account of it till a final conclusion of the whole, than to report the particular parts of it disjointedly, in order of time as they were respectively argued and determined.

In Michaelmas Term 1763, the 4th year of his present majesty king George the 3d, sir Fletcher Norton, then his majesty's solicitor-general, (the office of attorney-general being then vacant,) exhibited an information against Mr. Wilkes, for having published, and caused to be printed and published a seditious and scandalous libel (the North Briton, N° 45.)

And soon after, he exhibited another information against him, (the office of attorney-general still remaining vacant,) for having printed and published, and caused to be printed and published, an obscene and impious libel (an Essay on Woman, &c.)

Mr. Wilkes having pleaded Not Guilty to both these informations, and the records being made up and sealed, and the causes * ready for trial, the counsel for the crown thought it expedient to amend them, by striking out the word 'purport,' and in its place inserting the word 'tenor.' The proposed amendments were in all those parts of the information where the charge was, that the libel printed and published by Mr. Wilkes contained matters 'to the purport and effect following, to wit:' which the counsel for the crown thought it advisable to alter into words importing that such libel contained matters 'to the tenor and effect following, to wit.'

Sir Fletcher Norton (then become himself attorney-general) directed Mr. Barlow, clerk in court for the crown, to apply to a judge for such an order; apprehending it (as he afterwards publicly declared) to be a matter of course.

Mr. Barlow, in pursuance of these directions, applied to lord Mansfield, for a summons to shew cause 'why such amendment should not be made.' And his lordship issued a summons in each cause, dated 18th of February, 1764, for the defendant's clerk in court, agent, attorney or solicitor, to attend him at his house in Bloomsbury-square on Monday the 20th of February at eight o'clock in the morning; to shew cause why the information should not be amended, by striking out the word 'purport,' in the several places where it is mentioned in the said information, and inserting instead thereof the word 'tenor.' N. B. The summons in the cause relating to the seditious libel excepted the first place—'except in the first place.'

On notice of this summons, Mr. Philips, agent and solicitor for Mr. Wilkes, and Mr. Hughes his clerk in court, and attorney for him upon the record, both attended his lordship, at his own house, upon the said 20th of February 1764, accordingly, (being now vacation time, and no court sitting;) and did not

* They were tried on the 21st of February, 1764.