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IN THE SUPREME COURT OF PENNSYLVANIA

No. 67 MAP 2026

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

KEITH ANTHONY CHOICE,

Appellant.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF APPELLANT

Appeal from the Order of the Superior Court at No. 1252 EDA 2024 dated September 18, 2025, affirming the Judgment of Sentence from the Montgomery County Court of Common Pleas, Criminal Division, at No. CP-46-CR-0001125-2022 dated April 9, 2024.

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STATEMENT OF INTEREST OF AMICI CURIAE

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the federal Constitution and our nation's civil rights laws. The **ACLU of Pennsylvania** is a state affiliate of the ACLU. The ACLU and its affiliates have a longstanding interest in protecting privacy rights in the face of evolving technologies, and have frequently appeared before this Court and other state and federal courts across the country in cases involving searches of digital data, including as counsel in *Carpenter v. United States*, 585 U.S. 296 (2018) (search of historical cell-site location information) and as amicus in *Chatrie v. United States*, 609 U.S. 605 (2026) (geofence search), *Riley v. California*, 573 U.S. 373 (2014) (search of cell phone), *Commonwealth v. Dunkins*, 263 A.3d 247 (Pa. 2021) (search of college's wireless internet network (WiFi) connection records to obtain location information), *Commonwealth v. Pacheco*, 263 A.3d 626 (Pa. 2021) (real-time cell phone location tracking), *Nguyen v. State of Texas*, No. PD-0523-25 (Tex. Crim. App. 2026) (geofence search), *United States v. Spurlock*, No. 26-689 (9th Cir. 2026) (tower-dump search), and *State v. Bryant*, No. A-43/44/45-25 (091575) (N.J. 2026) (same).

Pursuant to Pa.R.A.P. 531, amici certify that no person or entity other than amici curiae, their members, or their counsel (i) paid in whole or in part for the

preparation of the amici curiae brief or (ii) authored in whole or in part the amici curiae brief.

INTRODUCTION

Today's general searches look different than those of the colonial era. Instead of going door to door, physically searching every house in a neighborhood for evidence, modern police departments can simply tap into an "all-encompassing database," allowing them "to undertake nearly perfect, retrospective surveillance of countless persons and places." *Chatrie*, 609 U.S. at 629, 634. But the evil that a general warrant authorizes remains the same as ever: arbitrary invasions into individuals' privacy without probable cause.

The proliferation of personal, Internet-connected devices and the expansion of government and corporate surveillance have created troves of sensitive, personal information capable of revealing, for example, everyone who was in the vicinity of a certain church, medical office, protest, or crime scene weeks or months in the past. "What in the past was 'unknowable' suddenly becomes open to view, presenting formerly unimaginable 'privacy concerns.'" *Chatrie*, 609 U.S. at 624 (quoting *Carpenter*, 585 U.S. at 311–12).

For example, at all times relevant to this case, there were "[h]undreds of millions of Google users" using Google's "Location History" service, which "records the location of a user's cell phone every two minutes or so." *Chatrie*, 609

U.S. at 611. The availability of this information spurred police departments to experiment with a novel form of warrant, the "geofence warrant," which "effectively 'work[s] in reverse' from traditional search warrants." *United States v. Smith*, 110 F.4th 817, 822 (5th Cir. 2024) (quoting Haley Amster & Brett Diehl, Note, *Against Geofences*, 74 Stan. L. Rev. 385, 388 (2022)).

A geofence warrant is "an uncommon, multi-step" warrant used when law enforcement knows where and when a crime was committed but has not identified any suspects. *Chatrie*, 609 U.S. at 610, 639. Instead of using traditional investigative processes to develop probable cause with respect to an individual suspect, geofence warrants allow officers to obtain information about *everyone* who was in the area around the time a crime was committed. They do this by directing a company like Google to provide law enforcement with an anonymized list of all devices that were located in a given area at a given time, *Commonwealth v. Choice*, 345 A.3d 719, 726 (Pa. Super. Ct. 2025). Geofence warrants further authorize law enforcement to select any devices from that anonymized list that they deem relevant, and then obtain additional location information about those devices from the company—all without returning to the magistrate for approval. *Id.* at 726–27. In other words, geofence warrants purport to authorize searches without individualized probable cause and without sufficient judicial oversight.

As "[s]ubtler and more far-reaching means of invading privacy have become available to the Government," courts are "obligated . . . to ensure that the 'progress of science' does not erode Fourth Amendment protections." *Chatrie*, 609 U.S. at 640 (alteration in original) (quoting *Carpenter*, 585 U.S. at 320). The Fourth Amendment—and Article 1, Section 8—must continue to "protect against 'every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed.'" *Id.* at 641 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

Law enforcement's newfound ability to retrospectively search the location history of every person who happened to be in a given location at a given time fundamentally alters the traditional "relationship between citizen and government in a way that is inimical to democratic society." *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (citation omitted). Geofence warrants are particularly dangerous because they "allow[] officers to target one-off events of potential interest: a gun show, say, or a political rally." *Chatrie*, 609 U.S. at 629. "[W]herever a location of interest turns out to be (whether a crime scene or a protest march or even a private home)," the place and everyone in it "has effectively been surveilled for . . . boundless time." *Id.* at 626.

Preserving Fourth Amendment and Article 1, Section 8 protections requires this Court to recognize and reject modern reincarnations of general warrants. Amici

respectfully submit that geofence warrants are modern reincarnations of the reviled general warrant—and are *per se* unconstitutional. Amici also contend that the modern ubiquity of cell phones does not obviate the federal and state constitutional requirements that searches be supported by case-specific probable cause. For these reasons, Amici urge the Court to reverse the decision below.

I. Geofence warrants are unconstitutional general warrants.

While geofence warrants "afford[] law enforcement a powerful new tool to carry out its important responsibilities," they also "risk[] Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent." *Carpenter*, 585 U.S. at 320 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). As explained below, the Fourth Amendment of the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution were intended to outlaw general warrants. To "assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted," *id.* at 305 (alteration in original) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)), this Court should hold that geofence warrants are general warrants and, as such, are *per se* unconstitutional.

A. Article I, Section 8 and the Fourth Amendment were intended to eliminate general warrants.

In the decades preceding American independence from British colonial rule, magistrates regularly issued general warrants and writs of assistance to enable

colonial law enforcement to search any house where they suspected individuals were concealing uncustomed goods. However, English courts had begun to condemn the discretion that these warrants afforded to officers. In the seminal case of *Wilkes v. Wood*, for example, the Court of Common Pleas at Westminster recognized that if "no offenders['] names are specified in the warrant," then the warrant gives "a discretionary power" to officers "to search wherever their suspicions may chance to fall." 98 Eng. Rep. 489, 498 (C.P. 1763). Such power "certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." *Id.* The court stressed that no magistrate can delegate to officers such "infinite power to search." *Id.* at 490.

Similarly, in *Money v. Leach*, 97 Eng. Rep. 1075, 1088 (K.B. 1765), the Court of King's Bench held that a warrant that failed to identify the person to be apprehended was "illegal and bad" because "the receiving or judging of the information should [not] be left to the discretion of the officer" but rather should be the duty of the issuing magistrate. The court took issue with the warrant's delegation of authority to the executing officers to select targets and required that the warrant itself name the person to be apprehended. *Id.* And in *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), the court rejected the use of a warrant that failed to specify the person to be searched or the objects to be seized, decrying the lack of specificity

as "pernicious to the innocent" and akin to the abuses of the Star Chamber. *Id.* at 1073.

Colonial opposition to writs of assistance likewise focused on the excessive discretion afforded to officers. In 1761, representing a group of Boston merchants who had lodged a petition opposing issuance of further writs of assistance in the Massachusetts Bay colony, attorney James Otis, Jr. argued that the writs were unlawful because they granted officers unbridled authority to conduct a search before the scope and grounds for searching had been properly established. John Adams, *Adams' "Abstract of the Argument": Ca. April 1761*, Founders Online (Apr. 1761), available at https://perma.cc/N3GU-E5XD. He asserted that the writs "place[d] the liberty of every man in the hands of every petty officer," *id.*, and because the authority could pass from one officer to another, there was "no opportunity of judging the persons to whom this vast power is delegated." Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, at 475 n.28 (Samuel M. Quincy ed., 1865). Otis famously called the writs "the worst instrument of arbitrary power . . . that ever was found in an English law-book." Laura Donahue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1250 (2016) (citation omitted).

The colonial court in *Paxton's Case* rejected Otis' demands for a requirement that judges issue writs only upon the delineation of specific information, such as the name of the house to be searched. But in the following years, as writs of assistance continued to issue to customs officers in the colonies, Pennsylvania's highest court increasingly required that customs searches proceed under particularized authority. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning: 602-1791* 516–20 (2009).

In 1769, the Pennsylvania Colony's attorney general requested a writ of assistance from the Pennsylvania Supreme Court, relying on the Boston court's willingness to issue such writs as support for his request. Letter from Edward Burd to Jasper Yeates (Apr. 18, 1769), in *Selections from Letters Written by Edward Burd, 1763–1828* 36–37 (Lewis Burd Walker ed., 1899). The Court concluded that it was not positioned to lawfully grant general writs of assistance. *Id.; see also* Cuddihy, *supra* at 519.

In 1771, Chief Justice Allen of the Pennsylvania Supreme Court recognized that writs of assistance were unlawful and required that customs officers identify a particular place where uncustomed goods were reportedly concealed before he would authorize a search. Letter from John Swift & Joseph Loring to the Commissioners of Customs (Nov. 30, 1771), reprinted in Thomas Willing Balch, *The Swift Family of Philadelphia*, 30 Pa. Mag. Hist. & Biography 129, 148 (1906)

("If you will make Oath that you have had an information that they are in any particular place I will give you a Writ to search that particular place, but no general Writ to search every House . . . I would not [grant a general Writ] upon any consideration.").

Two years later, the Court explained, "arming officers of the Customs with so extensive a power, to be exercised totally at their own discretion would be of dangerous consequences and was not warranted by Law." Letter of the Customs Officers at Philadelphia to the Customs Commissioners (Jul. 3, 1773), in O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution, in The Era of the American Revolution* 40, 60–61 (Richard B. Morris ed., 1939).

Pennsylvania's 1776 Declaration of Rights, adopted a dozen years before the ratification of the U.S. Constitution, officially prohibited insufficiently particularized warrants. Pa. Const. of 1776, ch. 10, art. X ("[W]arrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described . . . ought not to be granted."). That provision was strengthened in 1790, when it was revised to require that warrants describe the scope of the proposed search not just particularly, but "as nearly as may be." See Pa. Const. of 1790, art. IX, § 8;

Commonwealth v. Edmunds, 586 A.2d 887, 896 (Pa. 1991). That language persists in Article 1, Section 8 of the Pennsylvania Constitution today.

As this Court has explained, the phrase "as nearly as may be" renders the Pennsylvania Constitution even more protective than the Fourth Amendment. *See Commonwealth v. Laventure*, 894 A.2d 109, 118 (Pa. 2006) ("[It] it is clear that the mere specification of all information that is available is not in and of itself enough; rather, actual reasonable particularity is required sufficient to limit governmental discretion in the execution of the warrant and pursuit of the associated criminal process." (footnote omitted)); *Commonwealth v. Turpin*, 216 A.3d 1055, 1066 (Pa. 2019) (noting that Article I, Section 8 affords greater protection than the Fourth Amendment through its "more stringent particularity requirement.").

This Court has identified as the primary purpose of Pennsylvania's warrant provision the abolition of general warrants that enabled sweeping searches based on generalized suspicions. *Edmunds*, 586 A.3d at 897. Pennsylvania's heightened particularity requirement reflects a deliberate constraint on the discretion delegated to executing officers and evidences the Commonwealth's special intolerance of general warrants.

Fifteen years after Pennsylvania enshrined its prohibition against general warrants in Article I, Section 8, the federal framers enacted the Fourth Amendment as their "response to the reviled 'general warrants' and 'writs of assistance' of the

colonial era." *Riley*, 573 U.S. at 403. *See also Boyd v. United States*, 116 U.S. 616, 627–28 (1886) ("[Lord Camden's opinion in *Entick v. Carrington*] was welcomed and applauded by the lovers of liberty in the colonies . . . . [I]t may be confidently asserted that its propositions were in the minds of those who framed the [F]ourth [A]mendment to the constitution."); *Marcus v. Search Warrants of Prop. At 104 E. Tenth St.*, 367 U.S. 717, 729 (1961) ("This [colonial] history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped.").

The histories of Article I, Section 8 and the Fourth Amendment make clear that general warrants cannot be tolerated. As technological advances permit more sweeping and intrusive searches, this Court must ensure that the carefully crafted protections against general searches are not lost to history.

B. The challenged geofence warrant is an unconstitutional general warrant.

"Geofence warrants present the exact sort of 'general, exploratory rummaging' that the Fourth Amendment was designed to prevent." *Smith*, 110 F.4th at 837 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)). The geofence warrant at issue here, like the warrants in *Wilkes*, *Money*, and *Entick*, failed to specify any particular offender and left the executing officers discretion to determine the scope of the search.

The warrant here purported to authorize a two-step search. At the first step ("Step 1"), the warrant required Google to provide an anonymized list of unique device IDs for all electronic devices that Google's system placed in a geofence area. *Choice*, 345 A.3d at 726. At the second step ("Step 2"), the warrant directed law enforcement to "review the anonymized list to remove devices that are not relevant to the investigation, for example, devices that were not in the location for a sufficient period of time." *Id.* The warrant provided that, "[i]f additional location information for a given device ID is needed in order to determine whether that device is relevant to the investigation, law enforcement may request that Google provide additional location coordinates for the time period that falls outside [the] target location." *Id.* at 726–27 (second alteration in original). A second warrant would authorize Google's disclosure of deanonymizing information for a particular device. The stated purpose of the searches was to "potentially develop [s]uspects or potential witnesses to the shooting." Pa. State Police Incident Rep. 2019-96951 at 9.

Step 1 authorizes a search of sensitive location history information of an unknown and unlimited number of people who simply happened to be in the vicinity of an alleged crime that took place on a suburban road lined with homes. During Step 1, "law enforcement officials have *no idea* who they are looking for, or whether the search will even turn up a result." *United States v. Smith*, 110 F.4th at 837 (emphasis in original), *cert. denied,* 146 S. Ct. 356 (2025) (mem.).

Regardless of any geographical or temporal restrictions placed on the first step of a geofence search, the search still proceeds without individualized probable cause, and the existing limitations fade away at Step 2.

Step 2 authorizes the executing officer to decide, at his discretion, which individuals to subject to an even more intrusive search that extends beyond the geographical and temporal limitations imposed at Step 1.[1] The warrant offers no clarity as to what constitutes a "sufficient period of time" to make a device relevant, nor does it provide any geographical or temporal limitations on Step 2. Instead, the warrant grants officers "a discretionary power . . . to search wherever their suspicions may chance to fall." *Wilkes v. Wood*, 98 Eng. Rep. at 498. There was nothing stopping law enforcement from deeming every device relevant and seeking years' worth of location history for all of them.

[1] Even the devices listed at Step 1 may fall outside the defined geographical area, as Google cannot always identify a device's location with precision. At Step 1, Google typically provides a confidence interval for each data point, indicating Google's confidence in its estimation of the device's location. *United States v. Chatrie*, 590 F. Supp. 3d 901, 909 (E.D. Va. 2022), *aff'd,* 107 F.4th 319 (4th Cir. 2024), *aff'd on reh'g en banc,* 136 F.4th 100 (4th Cir. 2025), *vacated and remanded,* 609 U.S. 605 (2026). Google generally "'aims to accurately capture roughly 68 percent of users' within its confidence intervals," *Chatrie*, 590 F. Supp. 3d at 909, meaning there is a 32 percent likelihood that a user was not inside Google's confidence interval—and, in some cases, not inside the geofenced area at all.

The warrant's failure to identify particular suspects or records of interest and to constrain the executing officers' discretion to rummage at will is emblematic of historical general warrants. Constitutional warrant requirements are meant to "subject[] the officials' assessment of a search's propriety to the 'deliberate, impartial judgment of a judicial officer.'" *Chatrie*, 609 U.S. at 638 (quoting *United States v. Grubbs*, 547 U.S. 90, 99 (2006)); *see also Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer."). Yet the warrant here permitted officers to amass data about everyone in the vicinity of the alleged crime at Step 1 and then decide for themselves which citizens' private information should be subject to further invasion. This process violates "the very heart of the Fourth Amendment directive," which is that a search requires "both the efforts of the officer to gather evidence . . . and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 316 (1972).

Although the Supreme Court in *Chatrie*, after holding that geofence warrants effectuate a Fourth Amendment search, did not reach the question of whether they are unconstitutional general warrants, the Fifth Circuit has correctly held that geofence warrants are "categorically prohibited by the Fourth Amendment" because they "*never* include a specific user to be identified, only a temporal and geographic

location where any given user *may* turn up post-search." *Smith*, 110 F.4th at 837, 838 (footnoted omitted).

Moreover, almost half a century ago, the Supreme Court in *Ybarra v. Illinois* rejected the notion that warrants could authorize a search on the basis of mere propinquity to a suspect or crime—as geofence warrants do. 444 U.S. 85, 91 (1979). There, officers searched all people present in a tavern despite having probable cause only with respect to the bartender. *Id.* at 88, 90. While the officers permissibly searched the bartender, they had "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers," *id.* at 92 (footnote omitted), each of whom "was clothed with constitutional protection against an unreasonable search or an unreasonable seizure" when they walked into the tavern—the scene of the alleged crime, *id.* at 91.

Individuals using cell phones as they go about their daily lives are similarly clothed in constitutional protection against unreasonable, indiscriminate searches. Permitting officers to amass sensitive information about all people in an area without probable cause to believe they were all involved in the criminal activity under investigation and then exercising unbridled discretion to determine who should be subjected to more expansive—and limitless—searches, reproduces the evils of general warrants and must be proscribed.

II. The ubiquity of cell phones does not obviate the constitutional requirement that searches be supported by case-specific probable cause.

It is axiomatic that, when law enforcement seeks to conduct any search or seizure, their warrant application must establish "a nexus . . . between the item to be seized and criminal behavior." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967). "[I]t is not enough that the object of the search *may* be found in the place subject to search . . . Rather, the affidavit must demonstrate that there is a reasonable expectation that the items sought *will* be located in the particular data file or other specifically identified electronic location that is to be searched." *Commonwealth v. Broom*, 52 N.E.3d 81, 89 (Mass. 2016) (citations omitted); *see also State v. Keodara*, 364 P.3d 777, 782 (Wash. Ct. App. 2015) ("more is required for the necessary nexus than the mere possibility of finding records of criminal activity.").

By requiring that warrants "contain sufficiently particularized language that creates a nexus between the suspected crime and the items to be seized" and searched, the Fourth Amendment prevents searches of private information until law enforcement develops probable cause to justify the search. *Mink v. Knox*, 613 F.3d 995, 1010 (10th Cir. 2010) (citations omitted). These guardrails were imposed "not to shield criminals" or to make private spaces "safe haven[s] for illegal activities." *Chimel v. California*, 395 U.S. 752, 761 (1969). They were imposed to serve the "high function" of protecting the "precious" right of privacy by ensuring that there

is reason to believe evidence will be found in the place to be searched before permitting police to "violate the privacy" of a private space. *Id.*

The court below held that "the ubiquity of cell phone usage" was sufficient to infer that "Appellant likely possessed such a device," and no "concrete evidence" was needed to justify the geofence warrant. *Choice*, 345 A.3d at 739. But replacing a probable cause showing with an assertion that cell phones are ubiquitous would lead to indiscriminate searches of cell phone data. And the Supreme Court has already rejected a standard that "would prove no practical limit at all when it comes to cell phone searches." *Riley v. California*, 573 U.S. at 399.

When law enforcement seeks to obtain private data about a digital device, such as its location, law enforcement must inform the magistrate judge of *case-specific facts* linking the cell phone to the particular crime under investigation—making it likely that the evidence sought will be located in the electronic location to be searched. *See, e.g.*, *United States v. Harris*, 837 F. Supp. 3d 114, 129 (D.D.C. 2026); *Commonwealth v. White*, 59 N.E.3d 369, 376 (Mass. 2016); *Keodara*, 364 P.3d at 782; *People v. Matthew*, 2026 VI 9, ¶ 19 (V.I. May 28, 2026).

The requisite nexus cannot be established by "rely[ing] on the general ubiquitous presence of cellular telephones in daily life, or an inference that friends or associates most often communicate by cellular telephone." *Commonwealth v. Morin*, 85 N.E.3d 949, 960 (Mass. 2017) (holding warrant to search defendant's cell

phone was not supported by probable cause); *see also Buckham v. State*, 185 A.3d 1, 17 (Del. 2018) ("Particularly unpersuasive was the statement that 'criminals often communicate through cellular phones' (who doesn't in this day and age?)"); *State v. Baldwin*, 664 S.W.3d 122, 134 (Tex. Crim. App. 2022) (footnote omitted) (holding "generic, boilerplate language about cell phone use among criminals" is insufficient to establish probable cause to search a cell phone).

"[I]n the context of [cell site location information], it must be the case that probable cause is required for 'each person's obtained records,' meaning here 'each phone number contained within the dump.'" *In re Four Applications for Search Warrants Seeking Info. Associated With Particular Cellular Towers*, 2026 WL 2260371, at *10 (S.D. Miss. 2026) (citing *Smith*, 110 F.4th at 837 n.11). The geofence warrant here failed to establish probable cause for *any* of the cell phone users swept up in the search—let alone all of them. It therefore violates the federal and state constitutions.

CONCLUSION

For the above reasons, amici urge this Court to hold that geofence warrants are unconstitutional general warrants, and to reaffirm that the probable cause requirement demands case-specific facts indicating that evidence of the crime under investigation will be found in the place to be searched.

Dated: November 16, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.Ps. 531 and 2135 that this brief does not exceed 4,281 words.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties at the addresses and in the manner listed below:

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APPENDIX

REPORTS of CASES ADJUDGED in the COURT of KING'S BENCH, from Easter Term, 12 GEO. III. to Michaelmas, 14 GEO. III. (both inclusive). With Some SELECT CASES in the COURT of CHANCERY, and of the COMMON PLEAS, which are within the same Period. To which is added, the CASE of GENERAL WARRANTS. By CAPEL LOFFT, Esquire, of Lincoln's Inn. 1790.

[1] MICHAELMAS TERM, 3 GEO. 3, 1763, C. B.

NOTE.—*This case was not taken by myself, but communicated by the favour of a gentleman to whom I am much obliged, and whose permission I have to publish it.*

JOHN WILKES, ESQ. *against* WOOD.

The Case of General Warrants. Middlesex to wit, 6th of December 1763.

At the Court of Common Pleas, at Westminster. Sittings after Michaelmas term, before Lord Chief Justice Pratt, John Wilkes, Esq; plaintiff; Robert Wood Esq; defendant.

In an action of trespass, for entering the plaintiff's house, breaking his locks, and seizing his papers, &c.

The plaintiff's counsel were—

Serjeant Glyn, Mr. Recorder Eyre, Mr. Stow, Mr. Wallace, Mr. Dunning, Mr. Gardiner.

The defendant's counsel were—

Solicitor-General Norton, Serjeant Nares, Serjeant Davy, Serjeant Yeates. Attorney for the plaintiff, Mr. Philips of Cecil-Street.

For the defendant—

Philip Cartaret Webb, Esq; Solicitor to the Treasury, and Mr. Secondary Barnes.

[2] The special jury—

Plukenet Woodroffe, Esq; of Chiswick; William Baker, Esq; of Isleworth; William Clark, Esq; of Edmonton; James Gould, Esq; of Edmonton; Stephen Pitt, Esq; of Kensington; Nathaniel Turner, Esq; of Hampstead; Jonathan Richardson, Esq; of Queen-Square; John Weston, Esq; of Hatton-Garden; Harry Blunt, Esq; of Hatton-Garden; Henry Bostock, Esq; of Hatton-Garden; John Boldero, Esq; of Hatton-Garden; John Egerton, Esq; of St. John's-Street.

Mr. Gardener opened the case, with declaring the foundation, that on the 30th of April last, Mr. Wood, with several of the King's messengers, and a constable, entered Mr. Wilkes's house; that Mr. Wood was aiding and assisting to the messengers, and gave directions concerning breaking open Mr. Wilkes's locks, and seizing his papers, &c. for which Mr. Wilkes laid his damages at five thousand pounds.

Serjeant Glynn, then enlarged fully, on the particular circumstances of the case, but remarked that the case extended far beyond Mr. Wilkes personally, that it touched the liberty of every subject of this country, and if found to be legal, would shake that most precious inheritance of Englishmen. In vain has our house been declared, by the law, our asylum and defence, if it is capable of being entered, upon any frivolous or no pretence at all, by a Secretary of State. Mr. Wilkes, unconvicted of any offence, has undergone the punishment. That of all offences that of a seizure of papers was the least capable of reparation; that, for other offences, an acknowledgement might make amends; but that for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation whatsoever could be made. That the law never admits of a general search-warrant. That in France, or Spain, even in the Inquisition itself, they never delegate an infinite power to search, and that no magistrate is capable of delegating any such power. That some papers, quite innocent in themselves, might, by the slightest alteration, be converted to criminal action. Mr. Wilkes, as a member of Parliament, demanded the more caution to be used, with regard to the seizure of his papers, as it might have been naturally supposed, that one of the legislative body might have papers of a national concern, not proper to be exposed to every eye. When we consider the persons concerned in this affair, it ceases to be an outrage to Mr. Wilkes personally, it is an outrage to the constitution itself. That Mr. Wood had talked highly of the power of a Secretary of State; but he hoped by the verdict he would be brought to think more meanly of it. That if the warrants were once found to be legal, it would fling our liberties into a very unequal ballance. That the constitution of our country had been so fatally wounded, **[3]** that it called aloud for the redress of a jury of Englishmen. That their resentment against such proceedings was to be expressed by large and exemplary damages; that trifling damages would put no stop at all to such proceedings: which would plainly appear, when they would consider the persons concerned in the present prosecution, persons, who by their duty and office should have been the protectors of the constitution, instead of the violators of it.

Mr. Eyre, the Recorder of London, then stood up: he apologized to the Bench for appearing in the present cause, considering the office he bore, but that he thought it was a cause which affected the liberty of every individual.

The Lord Chief Justice desired he would make no apology. He then observed, that the present cause chiefly turned upon the general question, whether a Secretary of State has a power to force persons houses, break open their locks, seize their papers, &c. upon a bare suspicion of a libel by a general warrant, without name of the person charged. A strange question, to be agitated in these days, when the constitution is so well fixed, when we have a prince upon the throne, whose virtues are so great and amiable, and whose regard for the subject is such, that he must frown at every incroachment upon their liberty. Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom. No legal authority, in the present case, to justify the action. No precedents, no legal determinations, not an Act of Parliament itself, is sufficient to warrant any proceeding contrary to the spirit of the constitution.

Secretary Williamson, in Charles the Second's time, for backing an illegal warrant, was sent to the Tower by the House of Commons. The jury, he observed, had no such power to commit; he knew it well; but, for his part, he wished they had, as he was persuaded they would exercise it, in the present case, as it ought to be.

On the famous certificate in Queen Elizabeth's time, how far a man might be detained by a warrant of a Privy Counsellor, the answer of the Judges, even in those days, confined it to high treason only, and the power to arrest to be derived from the personal command of the King, or a Privy Counsellor. He then congratulated the jury, that they had now in their power the present cause, which had been by so much art and chicanery so long postponed. Seventy years had now elapsed, since the Revolution, without any occasion to enquire into this power of the Secretary of State, and he made no doubt but the jury would effectually prevent the question from being ever revived again. He therefore recommends it to them to embrace this opportunity (least another should not offer, in haste) of instructing those great **[4]** officers in their duty, and that they (the jury) would now erect a great sea mark, by which our State pilots might avoid, for the future, those rocks upon which they now lay shipwrecked.

N.B. The Recorder shone extremely.

The first witness on the prosecution was Matthew Brown.—Says, that he is butler to Mr. Wilkes. That on the thirtieth of April last, about nine o'clock in the morning, Watson, Blackmore, Mony, and Man, King's messengers, and Chisholm, a constable, came to Mr. Wilkes's house. That Watson followed Mr. Wilkes into the house, and Mony came next; Blackmore and Man followed after. That this witness never heard them, or either of them, declare their business, or the purpose of their coming. That as soon as Mr. Wilkes was carried away, which was about noon, Mr. Wood and Mr. Stanhope came: that Mr. Wood asked Mr. Watson, "Have you locked up all the rooms where Mr. Wilkes's papers are?" He answered "Yes; I have got the key of the study." That Mr. Wood and Mr. Stanhope then went into the parlour; the messengers continued waiting in the passage. That soon after Mr. Webb knocked at the door; upon it's being opened this witness attempted to stop him, but he rushed in. That Mr. Wood staid that time about half an hour; that when he went away he gave orders to the messengers, that no one should come in or go out till he returned, but bade them lock up all the doors. That he came back again in about an hour. That in the mean time several of Mr. Wilkes's friends came, viz. Humphry Cotes, Gardiner, Philips, Hopkins, &c. and were denied admittance by the constable: that Watson, the messenger, upon being called upon by these gentlemen to produce his orders for refusing them admittance, said he had only a verbal order from Mr. Wood. That the messengers, however, did at last permit the gentlemen to come in.

That soon after Lord Temple came; that in a short time after Mr. Wood returned, and appeared to be very angry that the gentlemen had been admitted, "Who let these men in?" That the messengers answered, "They would come in." Mr. Wood then asked, "Who would come in?" Mr. Gardiner answered, "'Twas I, sir."

That soon after that Mr. Wilkes's friends went away; that Mr. Wood then called for a candle, which was brought him, and he and Mr. Stanhope then went up stairs, with Mony and Blackmore, the messengers, who appeared to take their orders from Mr. Wood and Mr. Stanhope. That they rummaged all the papers together they could find, in and about the room; that they (the messengers) fetched a sack, and filled it with the papers. That Blackmore then went down stairs, and fetched a smith to open the locks. That Mann, a messenger, then came, and would whisper Mr. Wood, [5] who bade him speak out; he then said he brought orders from Lord Hallifax to seize all manuscripts. That the smith then came, and, by the direction of Blackmore, the messenger, opened four locks of the lower drawers of a bureau; that they took out all the papers in those drawers and a pocket-book of Mr. Wilkes's, and put them all into the sack together, and then sealed up the sack. That this witness was present during all this time; that the messengers were obedient, and paid an entire regard to the directions of Mr. Wood and Mr. Stanhope. That when Mr. Wood went away it was near two o'clock in the afternoon; that Mr. Wood, upon the whole, might be near two hours and an half in Mr. Wilkes's house. That no kind of inventory was made of the papers which were put into the sack. That Mr. Stanhope appeared all along to be favourable, and frequently bade the messengers be cautious and careful.

Upon his being cross-examined, he said,

That Mr. Wilkes was carried away about noon.

That Mr. Wilkes went out in the morning about six, and returned home about nine o'clock.

That Mr. Hopkins had been there that morning before.

That Mr. Wood did absolutely and positively (this witness avers it) order, upon his going out, that all the doors should be locked up, particularly the street door: that Mr. Wood told the messengers they knew their orders, and bade them execute them. That he remembers Mr. Stanhope bid them be careful in rummaging, but don't recollect Mr. Wood said so. That Chisholm, the constable, held the sack, whilst the messengers filled it with papers.

That Mr. Wood was not there when the locks were opened: he now says, that Mr. Wood had before declared that the locks must be opened.

That Mr. Stanhope said, to be sure, the locks must be opened. That Mr. Wood, he now says, was at one time above an hour in Mr. Wilkes's study.

That Mr. Stanhope was there with Mr. Wood at the time the papers were carried away.

That Mr. Webb was gone away some time before.

Richard Schofield says, that he is a livery servant to Mr. Wilkes: that he let Mr. Wood in at the door on the 30th of April, about eleven o'clock in the morning, as he thinks, [6] to the best of his remembrance; that Mr. Wood staid the first time about a quarter of an hour. He confirms in general the last witness.

That Wood went away, and returned in about an hour.

That the messenger, upon being asked by Mr. Gardiner for his orders, said he had only verbal ones, from Mr. Wood.

That he can give no account of what passed up stairs, as he remained all that time in the passage below.

He confirms the last witness on that circumstance of the messenger, Mann's, coming from Lord Hallifax, with fresh orders.

That a post-letter came, in the mean time, directed to Mr. Wilkes, which the messenger, Watson, received, and would not deliver till Mr. Wood returned, who immediately delivered it, unopened, into this witness's hands.

That Mr. Wood, when he went away, ordered the doors to be kept fast locked, particularly the street door.

That Blackmore came down stairs, and asked this witness where Mr. Wilkes's smith lived, and he answered him he believed in Cheapside.

Upon his being cross-examined, he said,

That Mr. Wood came about a quarter of an hour after Mr. Wilkes was carried away to Lord Hallifax.

That Mr. Wood, Mr. Stanhope, the four messengers, with the constable, together with another gentleman, whom he did not know, were the persons who came into the house.

Humphry Cotes says, that he was at Mr. Wilkes's the 30th of April last, in the morning, about eleven o'clock, being sent for by Mr. Wilkes.

That Mr. Wood came in between twelve and one: that he (this witness) had been down to the Court of Common Pleas, to apply for a habeas corpus, and, upon his return to Mr. Wilkes's house, was told that Mr. Wilkes was not at home, and that he, Cotes, must not come in; this was between twelve and one o'clock. He demanded the reason why he must not come in, and by whose authority the door was locked. The man at the door answered, by the Secretary of State's.

[7] The Solicitor-General disputed this evidence, as Mr. Cotes did not declare the man's name.

But Cotes then said, that the door-keeper called Watson, the messenger, to him; who said he had the secretary's verbal order only, but not a written one.

That this witness did then insist upon being admitted, and did accordingly enter the house.

That Mr. Wood presently after came in, and said, with anger, "What do these men do here?"

That this witness then said, "What business have you here, sir?" Mr. Wood answered, that he was the Secretary of State's secretary.

That this witness then said, he had nothing to do with the Secretary of State, nor his secretary neither; that his name was Humphry Cotes, and was to be spoken with at any time.

That he (this witness) staid at Mr. Wilkes's house till past two o'clock.

That he was desired by Mr. Wood to be present when Mr. Wilkes's papers were sealed up, which he refused to do.

The Solicitor-General did not cross-examine him.

Richard Hopkins, Esq; says, that he went to Mr. Wilkes on the 30th of April last, at half an hour past nine o'clock in the morning, and staid two hours; found then no kind of obstruction.

That Mr. Wood was not there at this time, as this witness verily believes; but that when he returned, Mr. Wood had been there.

Confirms the last witness's account, of the obstructions to his entring the house, at this his last coming. That he was desired to be present at the sealing up Mr. Wilkes's papers, which he declined doing.

Arthur Beardmore says, that he was in Westminster-Hall on the 30th of April last, and, hearing of Mr. Wilkes's arrest, he went directly to his house, and, with some difficulty, gained admittance. That when he gained admittance, and came into the parlour, Mr. Wood was there, altercating with the last witness, Mr. Hopkins.

[8] That Mr. Gardiner and Mr. Cotes were then there.

That Lord Temple was likewise there.

That he (this witness) observing much confusion, demanded of Mr. Wood to shew his authority, and that much wrangling then ensued. That Mr. Wood and Mr. Webb were both there at this time. That Mr. Wood intreated the company to believe, that the secretaries had acted entirely pursuant to the advice and direction of the Attorney and Solicitor Generals; to which this witness answered, that he very much doubted it.

That this witness, coming into the parlour again through the passage, saw Mr. Webb standing at the foot of the stairs, with some keys in his hand, which this witness did presume, and verily did believe, to be some of Mr. Wilkes's keys to his private escrutoires and drawers.

That Mr. Wood did desire him (this witness) to be present at the sealing up Mr. Wilkes's papers, which he utterly refused to do.

The council for the prosecution declined examining Mr. Gardiner and Mr. Philips, (who had both been present) on account of their being employed in the cause; and therefore rest here.

The Solicitor-General then stood up to make the defence which he divided into two parts; and first, he maintained the plea of not guilty; but if the jury should be of opinion that would not stand good, and that the evidence he should bring would not be capable of setting aside the evidence already produced in the Court on the other side; he then, secondly, relied on the special justification. He was at a loss, he said, to understand what Mr. Wilkes meant by bringing an action against Mr. Wood, as he was neither the issuer of the warrant, nor the executioner of it. If the constitution had been in such an egregious manner attacked, why not bring the Secretaries of State, themselves, into Court? Why should Mr. Wilkes commence separate actions against each person? Is Mr. Wilkes, at any event, entitled to tenfold damages? This was the first time he ever knew a private action represented as the cause of all the good people of England. If the constitution has, in any instance, been violated, the Crown must be the prosecutor, as it is in all criminal cases. The constitution does not consist in any one particular part of the law; the whole law is the constitution of the country, and a breach in one part of the law is as much a violation of the constitution as of another. Though so much has been said on the other side, with regard to the injury that might result from the promulgation of secrets, no proof had been brought of any thing being [9] promulgated that was not proper to be so. The arguments which had been used against seizing of papers, to procure proof, were felo de se, unless the major was denied to include the minor. He then went upon the argument touching the warrant, and observed that these warrants had been issued as far back as the Courts of Justice could lead them. That the late Act of Parliament of George the Second for taking up vagrants was a general search-warrant, and he never knew it was ever esteemed an infringement of our constitution. That these warrants had existed before, at, and since the Revolution, and had been till this case unimpeached; that if so contradictory to the constitution of this country, they could never have remained to this time.

He then made a general observation to the jury, that it was their duty to hear the cause coolly and dispassionately, without any bias to one side or the other. He then went on to make remarks on the evidence which had been given by the plaintiff; remarked that the question of liberty had nothing to do with the present cause, which only respected the seizure of papers. That the messengers went bunglingly about their business; Mr. Wood was only sent to see they did their duty.

He then went on to make remarks on *The North Briton*, No. 45. That it was a libel on the three branches of the legislative body, King, Lords, and Commons; that it was a libel of such a nature, that when it was before the two Houses of Parliament not one single person, in either House, ever uttered one single word in defence of it. That the whole of *The North Britons* were of such a nature, that it astonished most considerate persons how they should have passed so long unnoticed; that it had attacked private persons, persons in public stations, with their names written at full length; which had already produced bloodshed, in an instance which they all well knew: and what farther fatal consequences might result from those publications, who would be answerable! If Mr. Wilkes should be proved to be the author of these papers, and of that libel of libels, No. 45, (an equal to which he defied this or any other age to

produce) if he should be proved to be the author of that paper, which he was confident he should be able to prove, to the full satisfaction of the Court and jury; in that case, so far from thinking him worthy of exemplary damages, he was certain they would view him in his true and native colours, as a most vile and wicked incendiary, and a sower of dissention amongst His Majesty's subjects. He then observed, that the freedom of this country consists, that there is no man so high, that he is out of the reach of the law, nor any man so low, that he is beneath the protection of it.

That the warrant was legal in itself. That the authority of a Secretary of State was sufficiently established. That [10] damages should always be reckoned according to the injury received. A jury that ever acted on any other principles certainly forswore themselves.

Lord Hallifax then came into Court, and being sworn, said, that he did receive information concerning No. 45.

That he did issue warrants in consequence of such information. That he did desire Mr. Weston, his secretary, to go to Mr. Wilkes's, and see that the messengers did their duty; that Mr. Weston declined it, beseeching his Lordship to excuse him, on account of his weak nerves, and ill state of health; that he then did desire Mr. Wood to go, who accordingly went. That he had reason to believe that Mr. Wilkes was the author of No. 45.

That he had information previous to the apprehending Mr. Wilkes, and his Lordship believes, to the best of his remembrance, it was on the very day the warrant was put in execution.

That this information tended to prove Mr. Wilkes the author of No. 45; but he cannot pretend to charge his memory with the entire contents of the information.

That orders were given by his lordship to the messengers, but he declares that he cannot, at this time, pretend to recollect either their names or their persons. That these orders were given by his lordship previous to the apprehension of Mr. Wilkes.

Upon the Lord Chief Justice expressing a desire to be informed by his lordship concerning the nature of the information said to be received at his office, and about which his lordship appeared rather shy, and cautious of entering upon, the Solicitor-General then produced an affidavit of Walter Balff, a printer in the Old Bailey, which was read, in order to prove Mr. Wilkes the author of No. 45.

[I cannot recollect the whole of this affidavit, but it had in general a tendency to prove Wilkes the author and this Balff the printer of No. 45.]

Upon Lord Hallifax's being cross-examined, he said, that Mr. Weston is his own secretary, and that Mr. Wood was Lord Egremont's secretary.

His lordship was asked, whether he should think himself then authorized to command the secretary of Lord Egremont to do any thing. After some hesitation, his lordship answered, not without consulting Lord Egremont.

[11] Said, that the offices are carried on in separate departments, but form only one complete secretary's office. He owns, however, that each secretary has the entire choosing and appointing his own officers.

That the warrant for the apprehension of Mr. Wilkes was issued (as he calls it, which, being explained, signifies made out) on the 26th of April last, and the information he now fixes to have been received on the 29th of April, and the arresting Wilkes's person the 30th day of April.

N.B. His lordship here fairly acknowledges that he issued the warrant three whole days before he received any information at all; and that during these three days the warrant lay dormant, whilst they were upon the hunt for intelligence.

The King's speech at the close of the last sessions of Parliament was then read.

The North Briton, No. 45, was afterwards read.

Some strictures of the Solicitor-General then ensued, upon the heinousness of the author's crime.

Thomas Caddell says, that he is apprentice to Andrew Millar, a bookseller in the Strand; that he is nearly out of his apprenticeship. That Mr. Wilkes called there in the summer of 1762, and left word with him, (this witness) that his master should advertise a new paper, shortly to come out, entitled *The North Briton*, and to be published by him (Millar). That his master did, in consequence, advertise it, and was paid by Mr. Wilkes the sum of one pound eight shillings, for advertisements.

[N.B. The receipt was produced in Court.]

That his master did afterwards, upon considering the affair, decline publishing *The North Briton;* saying he would publish no political matters.

Serjeant Glynn then objected to their going into the evidence, to prove Mr. Wilkes the author of other papers, which had no respect to the paper in question; but

The Lord Chief Justice allowed it to be a good corroborating chain: but observed, if they failed in the last link, the whole would fall to the ground.

[12] William Johnston says, that he is a bookseller in Ludgate-Street. That Mr. Wilkes applied to him to publish *The North Briton*, previous to it's appearing: that Mr. Wilkes did explain to him the general design; that he said he must have a publisher who would not stand in fear of the censures of justice.

That he never met Mr. Wilkes any where on this account; but that Mr. Wilkes always came to him.

That he, (this witness) upon consideration of this matter, declined publishing *The North Briton.*

That Mr. Wilkes then desired him to recommend a publisher: that he recommended Mr. Kearsly to him.

That he (this witness) had a correspondence with Mr. Wilkes, concerning *The North Britons*, and revising them for the press; but that, after three or four numbers of the paper were published, he (this witness) did, upon considering the affair, decline that also.

Jonathan Scott says, that he knows Mr. Wilkes's hand-writing, and proves a number of letters shewn him to be Mr. Wilkes's hand-writing, viz.

No.	1,	dated Westminster,	26 July 1762.
	2,	ditto,	29.
	3,	ditto,	8 August.
	4,	Aylesbury,	15.
	5,	ditto,	25.
	6,	Great George-Street,	7 October.
	7,	Winchester,	14.
	8,	ditto,	31.
	9,	Great George-Street,	Friday morning.
	10,	ditto,	27 November.
	11,	ditto,	12 December.
	12,	ditto,	17.

All these were read; they are to Kearsly, and relate to *North Britons*, then sent to be published.

[N.B. Between twenty and thirty letters were produced, but these only were read.]

Walter Balff says, in the first place, that he is under a recognizance, and therefore prays he may be excused from answering any question which may tend to affect or injure himself.

[13] A debate ensued for near an hour, whether he may or may not be allowed the privilege.

The Solicitor-General very strenuously asserts, that in the present case he may not be allowed it.

Serjeant Glynn, and the Recorder, reply to him.

The Lord Chief Justice gives it as his opinion, that the man is not bound to answer to any matter which may tend to accuse himself.*

Balff, then says, that he is a printer in the Old Bailey, and that he knows Mr. Wilkes.

Question.—Did you receive this letter? One being shewn to him. Answer.—Yes.

A letter of the 22d of April was then read of Mr. Wilkes to Walter Balff, which, from the purport of it, has a strong tendency to prove Wilkes the author of No. 45.

This letter of Wilkes refers to an inclosed paper (which paper does not appear) which he directs Balff to bring in, in the form of a letter, betwixt the conclusion of the next *North Briton*, and his proposals.

This letter likewise directs Balff to print *The North Briton* spoken of, in the compass of two sheets.

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* Nemo tenetur seipsum accusare.

Charles Shaw says, that he is an apprentice to Walter Balff the last witness. That *The North Briton*, No. 45, was printed at his master's house. That he knows Mr. Wilkes, and has seen him often at his master's house, but that he does not know the business upon which he came there.

George Kearsley sworn, but not suffered to be examined, being under a prosecution at this time.

Michael Curry says, that he is a journeyman printer, that he was employed by Mr. Wilkes to work at the press in Great George-Street; that Mr. Wilkes gave them the whole set of *The North Britons* to be printed, and called them at that time his *North Britons*.

[14] The counsel for the prosecution objected to this last being a proper evidence at all to the questions; as Mr. Wilkes or any other person's republishing a work, against which there was no judicial determination, could never affect them, as the original author and publisher of it.

They then went into the legality of the warrant, and many precedents of the same kinds of warrants were produced in Court, to prove such warrants the constant uninterrupted course of the secretaries office from the Revolution.

The warrants from Lord Hallifax, for apprehending the authors, printers and publishers of *The North Briton* No. 45, were likewise read.

Loveill Stanhope, Esq; says that he came to Mr. Wilkes's house immediately after he was carried away to Lord Hallifax's; that he went with Mr. Wood, and stayed there half an hour; that he was there but once, and stayed till the papers were sealed up; that he never went out of the study; that Mr. Wood was in the study but part of the time, and did nothing at all but observe what past; that he (Mr. Wood,) gave no orders to break locks by any kind of means, nor gave the messengers any orders or directions at all, but only bade them do their duty, and use civility!

That Mr. Wood was not in the room when the smith was sent for, nor gave any orders for that purpose, as Mr. Stanhope observed; that Mr. Wood was not present when the locks were opened.

But that it was Blackmore, the messenger, who broke open the locks, (in this circumstance Mr. Stanhope exactly confirms Matthew Brown's evidence).

That Mr. Wood went to Mr. Wilkes, merely at the instance of Lord Hallifax, in order to inforce a due and proper obedience to, and execution of, the warrant, and to prevent the messengers from committing any blunders.

That a debate arising, whether a table with a locked drawer should be removed entire or be opened, Mr. Mann was sent to Lord Hallifax for directions, and brought word that the drawers must be opened.

Upon his being cross examined, said that the messengers were to take manuscript papers only, and not meddle with improper matters, such as printed books, papers, &c. That he did think it incumbent upon him (this witness) to see that all the proper papers should be removed.

[15] Robert Chisholm says that he was the constable called upon to attend the messengers to Mr. Wilkes; that it was on the 30th of April last, at six o'clock in the morning, that he was called upon; that Mr. Wood came immediately after Mr. Wilkes was carried away; that he (this witness) heard Mr. Wood give no kind of orders at all; in short, that his opinion is, Mr. Wood only came to take care that the messengers did nothing that was wrong or improper.

Mr. Dunning asked this witness, whether he then imagined, that Mr. Wood appeared there merely on behalf of Mr. Wilkes, as his friend—he answered not so neither.

This witness shuffled and prevaricated very much, and contradicted his own evidence more than once.

Philip Carteret Webb, Esq; says that Mr. Wood was sent by the secretaries, merely to see that the messengers executed their warrants in due form and order; that he (this witness) was only once at Mr. Wilkes's, and then not more than half an hour; that he went because the Secretary of State was uneasy, and anxious to know what was doing at Mr. Wilkes's; that he (this witness) was never up stairs at Mr. Wilkes's; that he had a conversation with Lord Temple in the parlour. That he denies he had ever any keys of Mr. Wilkes in his hands; that he verily believes he had no keys at all in his hands; but that if he had any, they were his own and not Mr. Wilkes's.

Upon being cross-examined by Mr. Dunning, Philip Carteret Webb then said, that upon recollection he was absolutely certain, that he had no keys at that time in his hands.

That Mr. Weston was desired by Lord Hallifax to go, but that he excused himself on account of his weak nerves, and ill state of health, and that upon his (Mr. Weston) declining it Mr. Wood was desired by my lord to go, which he accordingly did.

Richard Watson says he is a King's messenger, that he was at Mr. Wilkes's on the 30th of April last, that Mr. Wood was there and did nothing at all as this witness observed, but only gave them directions how to act.

The Solicitor-General observed, when Balff and Kearsley's evidence were set aside, that he placed little dependence on their evidence, as to the proof of Mr. Wilkes being the author of No. 45, and indeed he said it was not very material, for that the letter from Mr. Wilkes to Balff the printer which had been read, see page 26, and which he then held in his hand, was conclusive evidence against [16] him. Norton expatiated long upon the circumstance of this letter: he observed that it was a lucky circumstance for them that No. 45 was the only number of *The North Briton* which was printed on two sheets of paper, that it was the only number that had a letter at the end of it, with the proposals following. He enlarged very fully on all these corresponding circumstances.

Lord Chief Justice Pratt asked for the letter which was enclosed, that he might compare it with the letter at the end of *The North Briton*, No. 45.

But the Solicitor-General answered, he had it not.

Serjeant Glynn in his reply observed, that the manner of defence that had been set up would necessarily make his reply longer than it otherwise would have been. What he had to remark he should divide under two heads, 1st, as to the defence which had been set up of not guilty; and 2dly, make observations on the special justification that had been pleaded.

The evidence proved, uncontroverted, that Mr. Wood was the prime actor in the whole affair. He then observed that the three witnesses on the side of the defendant gave different evidences of the business Mr. Wood came about: Mr. Philip Carteret Webb's account was quite inconsistent: was it possible to suppose that a man of Mr. Wood's character and known abilities should be sent only with a message that any menial servant could have delivered as well; and that he should have nothing else to do with the affair. He then observed that all the witnesses called to oppose the evidence of their side were all parties, and against whom prosecutions of a like nature were at present depending. He then went upon the point of justification, and observed, that as to Mr. Wilkes being the author of No. 45, they had totally failed in any kind of proof whatsoever; or if they had produced the appearance of a proof, it was quite aside to the present question, and to which he should not at any event have made any reply, as there was at present depending a prosecution, as to that particular point, in his defence of which he made no doubt he should be able fully to prove, that Mr. Wilkes was not the author.—That Mr. Wilkes could not be supposed or even suspected of any design against the present establishment; that he was educated in and had always adopted Whig principles; that he was known to be attached to and to have the highest opinion of the present prince on the throne, which he had often and upon many occasions declared; and his conduct had always been answerable to these declarations. When crimes have been exaggerated, and so much declamation made use of as there has been on the present occasion, one would naturally have expected that some proof would have followed; but that in reality could never have been the case, as the sole [17] design was to blacken Mr. Wilkes's character, without any foundation in fact. He then observed that various hands were commonly employed in most periodical works; that Mr. Wilkes was not denied to be the author of some of *The North Britons;* but that it was not likely he was the author of No. 45, and that indeed the republication of the work in volumes, in which was No. 45, so far from being a presumption against him, certainly affords the strongest reason to think he was not the author; for if he had been so, it is not likely he would have been concerned in a publication, whilst a criminal process was depending. He then observed as to the warrant, that it was destitute of those things necessary to make it legal: that a previous information was always necessary. That the defendants had nothing to entitle them to a verdict; that the evidence they had set up was perfectly declamatory and unfair: possibly Mr. Solicitor-General's office, might demand from

him what he had said; but that he was well satisfied, from that gentleman's known good character and great abilities, that he would have refused to plead in a cause of a similar nature, which he was not forced to do ex officio. He was satisfied the jury would not view Mr. Wilkes as not entitled to a verdict, because loaded with calumny: that the case was a wound given to the constitution, and demanded damages accordingly: that Mr. Wilkes's papers had undergone the inspection of very improper persons to examine his private concerns, and called for an increase of damages on that score. The evidence brought of precedents of these kind of warrants only shew how easy things may creep into our constitution, subversive of its very foundation. He then closed with telling the jury he made no doubt, but they would find a verdict for the plaintiff, with large and exemplary damages.

The Lord Chief Justice then summoned up the evidence of the whole, and observed it was an action of trespass, to which the defendant had pleaded first not guilty, and then a special justification. He then went through the particulars relating to the justification, the King's speech, the libel No. 45.

Information given, that such a libel was published,

Lord Hallifax granting a warrant; messengers entering Mr. Wilkes's house; Mr. Wood directed to go thither only with a message, and remaining altogether inactive in the affair.

If the jury should be of opinion, that every step was properly taken as represented in the justification, and should esteem it fully proved, they must find a verdict for the defendant. But if on the other hand they should view Mr. Wood as a party in the affair, they must find a verdict for the plaintiff, with damages. This was a general direction **[18]** his Lordship gave the jury, and he then went into the particulars of the evidence. The chief part of the justification, he observed, consisted in proving Mr. Wilkes the author, and the evidence given, together with the letters to Kearsley plainly shew, that Mr. Wilkes was generally so. Then as to No. 45, the evidence was of two sorts, first a letter to fix it upon him, and the other general: as to the proof of the republication of *The North Britons* given by Currie, supposing it of itself sufficient, of which there was a doubt, it did not extend to the present case, to justify a warrant issued several weeks previous to that period. As to the letter, the gentlemen must take that out with them, together with *The North Briton*, No. 45, and allow all the weight to the circumstance they think it will admit of.

If upon the whole they should esteem Mr. Wilkes to be the author and publisher, the justification would be fully proved. But that, to do this, it was essentially necessary to have the enclosed paper in the letter to Balff, as, without that, all the rest was but inference, and not the proof positive which the law required. As to Mr. Wood, he was described on one side as very active in the affair, and on the other side as quite inoffensive. Aiders and abetters are always esteemed parties: but if a person present remains only a spectator, he cannot be affected. The evidence on the one side had been positive, and on the other side only negative. Mr. Wood might have said and done as represented on the one side, when the evidences on the other side were not present: if upon the whole they should be of opinion, that Mr. Wood was active in the affair, they must find a verdict for the plaintiff with damages. His Lordship then went upon the warrant, which he declared was a point of the greatest consequence he had ever met with in his whole practice. The defendants claimed a right, under precedents, to force persons houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.

And as for the precedents, will that be esteemed law in a Secretary of State which is not law in any other magistrate of this kingdom? If they should be found to be legal, they are certainly of the most dangerous consequences; if not legal, must aggravate damages. Notwithstanding what Mr. Solicitor-General has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but **[19]** likewise as a punishment to the guilty, to deter from any such

proceeding for the future, and as a proof of the detestation of the jury to the action itself.†

As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lays upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the office precedents, which had been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution; though its having been the constant practice of the office, might fairly be pleaded in mitigation of damages.*

He then told the jury they had a very material affair to determine upon, and recommended it to them to be particularly cautious in bringing in their verdict. Observed, that if the jury found Mr. Wilkes the author or publisher of No. 45, it will be filed, and stand upon record in the Court of Common Pleas, and of course be produced as proof, upon the criminal cause depending, in barr of any future more ample discussion of that matter on both sides; that on the other side they should be equally careful to do justice, according to the evidence; he therefore left it to their consideration.

The jury, after withdrawing for near half an hour, returned, and found a general verdict upon both issues for the plaintiff, with a thousand pounds damages.

After the verdict was recorded, the Solicitor-General offered to prefer a bill of exceptions, which the Lord Chief Justice refused to accept, saying it was out of time.

The Court sat at nine o'clock in the morning, and the verdict was brought in at twenty minutes past eleven o'clock at night.

[1] EASTER TERM, 12 GEO. 3, 1772, K. B.

SOMERSET *against* STEWART. May 14, 1772.

On return to an habeas corpus, requiring Captain Knowles to shew cause for the seizure and detainure of the complainant Somerset, a negro—the case appeared to be this—

That the negro had been a slave to Mr. Stewart, in Virginia, had been purchased from the African coast, in the course of the slave-trade, as tolerated in the plantations; that he had been brought over to England by his master, who intending to return, by force sent him on board of Captain Knowles's vessel, lying in the river; and was there, by the order of his master, in the custody of Captain Knowles, detained against his consent; until returned in obedience to the writ. And under this order, and the facts stated, Captain Knowles relied in his justification.

Upon the second argument, (Serjeant Glynn was in the first, and, I think, Mr. Mansfield) the pleading on behalf of the negro was opened by Mr. Hargrave. I need not say that it will be found at large, and I presume has been read by most of the profession, he having obliged the public with it himself: but I hope this summary note, which I took of it at the time, will not be thought impertinent; as it is not easy for a cause in which that gentleman has appeared, not to be materially injured by a total omission of his share in it.

Mr. Hargrave.—The importance of the question will I hope justify to your Lordships the solicitude with which I rise to defend it; and however unequal I feel myself, will command attention. I trust, indeed, this is a cause sufficient to support my own [2] unworthiness by its single intrinsic merit. I shall endeavour to state the grounds from which Mr. Stewart's supposed right arises; and then offer, as appears to me, sufficient confutation to his claim over the negro, as property, after having him brought over to England; (an absolute and unlimited property, or as right accruing from contract;) Mr. Stewart insists on the former. The question on that is not whether slavery is lawful in the colonies, (where a concurrence of unhappy circumstances has caused it to be established as necessary;) but whether in England? Not whether it

† Vita reipublicæ pax, et animi libertas et libertatis, firmissimum propugnaculum sua cuique domus legibus munita.

* Ut pœna ad paucos, metus ad omnes pertingat,
Judicandum est legibus non exemplis.

able by the law of nations. And if the contract is allowed by the law of nations, the action must lie in them all.

[1741] He made some observations in answer to Mr. Dunning.

In this declaration, it only appears that the capture was during the war; it does not appear that the contract was so.

A right may commence, before the right of suing accrues. But supposing he could not have brought his action during the war; yet he may in time of peace. A right may revive.

An alien enemy may sue as executor; or for an account.

In a case in Chancery, Lord Hardwicke over-ruled a plea of "alien enemy," pleaded by Serjeant Kettleby, to a bill brought for an account.

A contract made during a war may be effectuated during a peace.

It is for general convenience, that an alien enemy may be an executor. And 19 E. 4, 6, and Brooke title Denizen and Alien, pl. 20, are not law.

The hostage is not the principal security; but collateral, and not the subject matter of the contract: for which he cited Zouch, Grotius, and other authorities. But if the hostage were the principal security, yet his death does not discharge the debt.

Molloy, lib. 1, c. 8, relates to public hostages, upon leagues and treaties. Besides, other opinions are against him.

Ulterius concilium.

Mr. Blackstone who was to have argued for the defendant, upon a second argument now said, he had made inquiries abroad, and had answers from very eminent lawyers of France and Holland, "that such an action had been allowed, and upon principles that could not be disputed." Therefore he did not choose to argue it. For, the only objection which seemed to weigh upon the former argument, was, "that such an action would not lie in the other countries of Europe."

Lord Mansfield said, the Court were all of the same opinion.

[1742] N.B. There were a few other actions of the same kind depending: but upon this judgment, (which gave universal satisfaction) the ransoms were paid.

Per Cur.—unanimously,

Let there be judgment for the plaintiff.

See Puffendorf, lib. 8, c. 7, § 14, and Grotius, lib. 3, c. 23, de fide privatâ in bello.

MONEY ET AL'. *versus* LEACH. 1765. [S. C. 1 Bl. 555.] General warrants illegal.

Roll 60.

[See *Hoye* v. *Bush*, 1840, 2 Scott, N. R. 94; 1 Man. & G. 788; *Dillon* v. *O'Brien*, 1887, 20 L. R. Ir. 320.]

Errors having been assigned upon the * bill of exceptions mentioned in page 1622, they now came on to be argued.

This was an action of † trespass brought in the Court of Common Pleas by Dryden Leach, against three King's messengers, John Money, James Watson, and Robert Blackmore, for breaking and entering the plaintiff's house, and imprisoning him, without any lawful or probable cause; to the plaintiff's damage of 2000l.

The defendants below, pleaded two pleas. The first was the general issue, "not guilty:" on which issue was joined.

The other plea (pleaded by leave of the Court) was a special justification, as to the breaking and entering of the plaintiff's dwelling-house, and staying and continuing therein for six hours, and making the assault upon him, and seizing, taking, and imprisoning him, and keeping and detaining him in prison for four days; as to all which, they say, that before the committing of the supposed trespass, viz. on 19th April 1763, the King made a speech from the throne, &c. in which speech was contained the following declaration, &c. &c. That on the 23d April 1763, a certain seditious and scandalous libel or composition, intitled *The North Briton*, No. 45, was unlawfully and seditiously composed, printed, and published concerning the King

* V. ante, p. 1692.

† See the 549th and 559th rolls of C. B. of Mich. term, 4 G. 3, and below, p. 1746, at large.

and his said speech: in which libel were contained, &c. &c. &c. That the Earl of Halifax was then one of the Privy Council, and one of His Majesty's principal Secretaries of State; and that information was given to him of the said publication of the aforesaid libel; and the said libel was then shewn and produced to the said earl; and he thereupon in due manner [1743] issued his warrant in writing under his hand and seal, directed to Nathan Carrington, and these three defendants who were then four of His Majesty's messengers in ordinary; by which warrant, the said earl did in His Majesty's name authorise and require them, taking a constable to their assistance, to make strict and diligent search for the said authors, printers, and publishers of the aforesaid seditious libel intitled *The North Briton*, No. 45, April 23d, 1763; and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before the said earl, to be examined concerning the premises, and to be further dealt with according to law: in the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all others His said Majesty's messengers, officers civil and military, and loving subjects whom it might concern, were to be aiding and assisting to them the said Nathan Carrington, John Money, James Watson, and Robert Blackmore, as there should be occasion. They further say, that for 44 weeks and upwards before the issuing of the said warrant, certain weekly compositions intitled *The North Briton*, and respectively numbered, in a progressive order, had been printed and published on Saturday in every week: and that the said seditious libel intitled *The North Briton*, No. 45, Saturday April 23d, 1763, was one of the said weekly compositions. They say that the plaintiff followed and exercised the art and business of a printer; and did in fact print and cause to be printed one of the said weekly compositions intitled *The North Briton;* to wit, *The North Briton*, No. 26, and that after the issuing of the aforesaid warrant and before the committing of the said supposed trespass, to wit, on 27th April 1763, information was given to them the defendants, "that the said Dryden Leach and his servants were the printers of the aforesaid seditious libel intitled *The North Briton*, No. 45, Saturday, April 23d, 1763." Whereupon the defendants, being His Majesty's messengers in ordinary as aforesaid, took to their assistance a certain constable, to wit, one Thomas Freeman, who was then a constable of the parish of St. Margaret, Westminster, in the county of Middlesex, to aid them in the execution of the aforesaid warrant; and, together with the said constable entered into the aforesaid dwelling-house of the said Dryden Leach, in which the said Dryden Leach carried on his aforesaid business of a printer, the door thereof being then open, to search for the printers of the said seditious libel, in order to carry them before the said Earl of Halifax, to be examined concerning the same; and thereupon, the said defendants, together with the constable aforesaid, did then and there find, within the [1744] same house, a newly printed copy of one of the said weekly compositions intitled *The North Briton*, and also an unfinished copy of part of another of the said compositions then also newly printed, and which said newly printed copies were part of a new edition, which the said Dryden Leach and his servants were then and there reprinting, of the aforesaid weekly compositions. Whereupon, the defendants, together with the constable above-named, did gently lay their hands on the said Dryden Leach, and seized and took him into their custody, in order to bring him before the said Earl of Halifax, to be examined concerning the said seditious libel, and in so searching for the printers of the seditious libel, and seizing and taking the said Dryden as aforesaid, did then and there necessarily stay and continue in the said house of the said Dryden for the space of six hours, part of the time in the declaration mentioned. And because the said Earl of Halifax was, during all the said space of four days, part of the aforesaid five days in the said declaration mentioned, employed in other business belonging to his said office of Secretary of State, so that the said Dryden Leach could not then or during the said four days be brought before the said earl for the purpose aforesaid, they the said defendants, together with the constable aforesaid, did keep and detain the said Dryden Leach in their custody for the said space of four days, part of the said time in the declaration mentioned, in order to carry him before the said Earl of Halifax, for the purpose aforesaid. They further say, that at the end of the aforesaid four days, and not before, upon the examination of the said Dryden Leach and certain other persons who were then and there examined concerning the premises, it appeared to the said Earl of Halifax, "that the said Dryden Leach did not print the said seditious libel intitled *The North Briton*, No. 45, Saturday, April the 23d, 1763:" and

thereupon, the said defendants, by the command of the said Earl of Halifax, did then and there release the said Dryden Leach out of their custody, and discharged and set him free from that imprisonment. Which are the same breaking and entering of the aforesaid dwelling-house of the said Dryden Leach, in the declaration mentioned, in which, &c. and staying and continuing therein for the space of six hours, part of the time in the same declaration mentioned; and also as to the making of the aforesaid assault upon the said Dryden Leach and seizing, taking and imprisoning of the said Dryden Leach, and detaining him in prison for the space of four days, part of the said time in the said declaration mentioned, above supposed to have been done by the defendants, whereof the said Dryden hath above complained against them. And this they are ready to verify. Wherefore they pray judgment, if the said Dryden ought to have or maintain his aforesaid action thereof against them, &c.

[1745] The plaintiff replied, as to the said plea in bar as to the breaking and entering the dwelling-house, and staying and continuing there six hours (part of the time in the declaration mentioned,) and also as to the making of the assault upon him, and seizing, taking and imprisoning of him, and keeping and detaining him in prison for four days (part of the time in the declaration mentioned;) that the defendants, of their own wrong and without the cause by them in their plea alledged, broke and entered his dwelling-house, and staid and continued therein for six hours and made an assault upon him, and seized, took and imprisoned him, and kept and detained him in prison for the four days in plea mentioned (part of the time in the declaration mentioned,) in manner and form as he has above complained against them. And upon this issue was joined.

The cause came on to be tried before Ld. Ch. Just. Pratt, on the 10th of December 1763, at Guildhall: and the jury found a verdict for the plaintiff upon both issues; and gave him damages 400l. besides his costs and charges, &c. On 16th June 1764, judgment was signed for the plaintiff, for 400l. damages, and 51l. 16s. 8d. costs.

At the trial, a bill of exceptions was tendered and received; which stated the issues, the coming on to trial, &c. and the evidence, and described a printed paper intitled *The North Briton*, No. 45, and the information given thereof to the Secretary of State, and his warrant to the defendants below, together with another King's messenger, Nathan Carrington; and what Mr. Carrington had been told of Mr. Leach's being the printer of it; and their thereupon entering his house, and finding some of the other numbers of the same paper newly printed by him; and their thereupon taking him into custody, in order to carry him before the Earl of Halifax, one of His Majesty's principal Secretaries of State; and that he, appearing not to be either author, printer or publisher of the said paper called *The North Briton*, No. 45, was discharged by them, by the earl's order, without being ever carried before him. They say, that their evidence intitled them to the benefit of the statute of 24 G. 2, c. 44. Though it was denied by the counsel for the plaintiff Leach, that either they or the Secretary of State himself were within that statute, or those of 7 Jac. 1, c. 5, or 21 Jac. 1, c. 12 (the former of which, being only temporary, was made perpetual by the latter, and by which liberty is given to justices of peace and all others acting under their command "to plead the general issue, and give the special matter in evidence").

[1746] That the Chief Justice of the Common Pleas was of "opinion that their evidence was not sufficient to bar the plaintiff of his action:" whereas, the bill of exceptions insists "that it was."

This bill of exceptions being sealed, and the seal acknowledged as is beforementioned, the defendants below assign errors: and a joinder in error was put in by the plaintiff Leach.

The assignment of errors was to the following effect: (it may be seen at large, in the 60th roll of Easter term 5 G. 3, B. R.

The defendants come, on Wednesday next after fifteen days of Easter 4 G. 3, before our lord the King at Westminster, and say, that at the trial, their counsel proposed exceptions to the opinion of the Lord Chief Justice Pratt; which exceptions were written in a bill, and sealed by the Chief Justice; which bill of exceptions the defendants now bring into this Court, and pray a writ to the Chief Justice, to confess or deny his seal; which writ is granted to them returnable on the morrow of the Ascension. At which day, before our lord the King at Westminster come the defendants in their proper person, and the said Chief Justice of the Common Pleas

likewise in his proper person, and acknowledges his seal put to the said bill of exceptions. (The form and ceremony of his doing this may be seen in page 1692.) Then they set out the bill of exceptions, verbatim, "Be it remembered, &c." It recites all the proceedings particularly and minutely, from the very beginning to the end, concluding with the verdict of the jury: which it would be tedious to repeat, as they have been already sufficiently specified. They are entered upon the rolls 549 and 550 of the Court of Common Pleas, (in Michaelmas term 4 G. 3). The defendants (now become plaintiffs in error) then alledge, (in their said bill of exceptions) that upon the trial, the counsel for the plaintiff Leach, in order to prove the defendants guilty of the trespass, gave in evidence "that on 29th April 1763, the defendants entered the plaintiff's dwelling-house, searched it, and continued in it four hours; seized and took Leach into their custody against his will and consent; and kept and detained him in their custody against his will and consent for four days:" which was all the trespass, assault and imprisonment committed by the defendants or any of them. Whereupon their counsel, in order to bar the said action, and to acquit them thereof under the general issue above pleaded, gave in evidence and proved "that before the committing of the trespass, the King made a speech from the throne, &c. containing the [1747] several expressions stated in the second plea of the defendants: and that afterwards and before the supposed trespass, a paper intitled *The North Briton*, No. 45, &c. was printed and published; and that the same contained the several matters set forth in their said second plea:" and it was proved on their behalf, "that the Earl of Halifax was, all that time, one of His Majesty's principal Secretaries of State, and one of the Privy Council; and that information was given to him of the said publication of the abovementioned paper; and the same was then shewn to him; and that thereupon the said earl issued his warrant in writing under his hand and seal directed to Nathan Carrington and the defendants, who were then four of His Majesty's messengers in ordinary." And their counsel then produced and gave in evidence the warrant aforesaid, which was in the words and figures following, that is to say, "George Montagu Dunk, Earl of Halifax, Viscount Sunbury and Baron Halifax, one of the Lords of His Majesty's Most Honourable Privy Council, Lieutenant-General of His Majesty's Forces, 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 the authors, printers and publishers of a seditious and treasonable paper intitled *The North Briton*, No. 45, Saturday April 23, 1763, printed for G. Kearsley in Ludgate Street London; and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before me, to be examined concerning the premises 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 may concern, are to be aiding and assisting to you, as there shall be occasion. And for your so doing, this shall be your warrant. Given at St. James's the 26th day of April 1763, in the third year of His Majesty's reign. Dunk Halifax. To Nathan Carrington, John Money, James Watson, and Robert Blackmore, four of His Majesty's messengers in ordinary." And it was further proved on behalf of the said defendants, "that several of the like warrants had been granted, at different times, from the time of the Revolution to the present time, by the principal Secretaries of State, and had been executed by the messengers in ordinary, for the time being; and that the paper in the said warrant described was the said paper so printed and published as aforesaid; and that the warrant aforesaid, before the committing of the supposed trespass, to wit, on the 26th day of April aforesaid in the year of our Lord 1763, was delivered to the defendants, to be executed;" and "that they [1748] were then three of His Majesty's messengers in ordinary and still are so." It was also proved, on their behalf, "that for forty weeks and upwards next before the issuing of the aforesaid warrant, certain weekly compositions intitled *The North Briton* had been printed and published on Saturday in every week; and that the aforesaid paper intitled *The North Briton*, No. 45, Saturday, April 23, 1763, described in the said warrant, being one of the said weekly compositions, was printed and published before the issuing of the said warrant, to wit, on the 23d day of April 1763; and that after the issuing of the above-mentioned warrant, and before the committing of the said supposed trespass, to wit, on the 28th day of April in the year aforesaid, the defendants were informed by Nathan Carrington, one other of the

messengers in the said warrant named and one of the persons to whom the said warrant was directed, that from the information he had received he was of opinion that the said Dryden Leach who then and long before was and still is a printer in the City of London aforesaid, was the printer of the said weekly compositions intitled *The North Briton;* for that he the said Carrington had been informed that one Mr. Wilkes, a person supposed to be the author of the said weekly compositions, had been seen frequently to go into the said Mr. Leach's house, and that an old printer, whose name he the said Carrington did not mention to the defendants, had told him that the said Mr. Leach was the printer of the said compositions; and that thereupon the defendants took to their assistance a constable, and with the constable entered Leach's dwelling-house (the door being open) to search for the said Leach and his books and papers, and to bring him together with his books and papers in safe custody before the said Earl of Halifax, to be examined concerning the premises and to be further dealt with according to law; and upon that occasion did search the said house, and necessarily continued therein for the said space of four hours." And it was further given in evidence and proved on the part of the said defendants, "that upon that search, the defendants did find Leach in the said house, and did also then find a newly-printed sheet containing a copy of one of the said weekly compositions, intitled *The North Briton*, No. 1, and part of a copy of another of the said weekly compositions, intitled *The North Briton*, No. 2: which sheet was printed by the said Dryden Leach." And it was further proved, "that the said Dryden Leach did also print one of the said weekly compositions, intitled *The North Briton*, No. 26. And the defendants, with the assistance of the constable did seize and take into their custody the said Dryden Leach, in order to [1749] bring him in safe custody before the said Earl of Halifax, to be examined concerning the premises; and on that occasion did keep and detain him in their custody for the space of four days; at the end of which time, it appearing by the examination of divers persons then taken, touching the author, printer and publisher of the said paper, that the said Dryden Leach was not the author, printer or publisher thereof, the defendants, by the command of the said Earl of Halifax, released and discharged him from that imprisonment: but the said Dryden Leach was never carried before or examined by the said Earl of Halifax. And that the entering the house of the said Dryden Leach, and searching the same, and taking into and detaining in their custody him the said Dryden Leach in the manner and on the occasion herein before stated, were the whole of the trespass, assault and imprisonment committed by the said defendants or any of them." But it was proved on the part of the said Dryden Leach, "that he was not the author, printer or publisher of the said paper intitled *The North Briton* No. 45, in the said warrant mentioned, nor of any other numbers of the said weekly compositions, except as before stated." Whereupon the counsel for the defendants insisted before the said Chief Justice, that the said several matters so produced and given in evidence on their part as aforesaid were sufficient and ought to be admitted and allowed as decisive evidence to intitle them to the benefit of the Statute of 24 G. 2, intitled "An Act for Rendering Justices of the Peace more Safe in the Execution of their Office, and for Indemnifying Constables and Others Acting in Obedience to their Warrants;" and that therefore the said Dryden Leach ought to be barred of his aforesaid action, and the said defendants acquitted thereof. And thereupon the said defendants, by their counsel aforesaid, did then and there pray of the said Chief Justice to admit and allow the said matters and proof so produced and given in evidence for the said defendants as aforesaid, to be conclusive evidence to intitle the said defendants to the benefit of the statute aforesaid, and to bar the said Dryden Leach of his action aforesaid. But to this, the counsel for the plaintiff then and there insisted before the Chief Justice, that the matters and evidence aforesaid so produced and proved on the part of the defendants as aforesaid, were not sufficient, nor ought to be admitted or allowed to intitle the said defendants to the benefit of the statute aforesaid, or to bar the said Dryden Leach of his aforesaid action; and that neither the said defendants or any of them, nor the said Earl of Halifax, were or was within the words or meaning of the statute made in the seventh year of His late Majesty King James the First, intitled "An Act for Ease in Pleading against Troublesome and Contentious Suits Prosecuted against [1750] Justices of the Peace, Mayors, Constables, and Certain Other His Majesty's Officers, for the Lawful Execution of their Office;" nor of the statute made in the twenty-first year of the reign of the same late King, intitled "An Act to Enlarge and

Make Perpetual the Act made for Ease in Pleading against Troublesome and Contentious Suits, Prosecuted against Justices of the Peace, Mayors, Constables, and Certain Other His Majesty's Officers, for the Lawful Execution of their Office, made in the 7th Year of His Majesty's Most Happy Reign;" nor of the said statute made in the twenty-fourth year of the reign of His late Majesty King George the Second; nor in any wise intitled to the benefit of any of those statutes. And the counsel for the said Dryden Leach further insisted, that the seizure and imprisonment of the said Dryden Leach were not made and done in obedience to the said warrant, nor had the said defendants or any of them, in that behalf, any authority thereby. And the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, "that the said several matters so produced and proved on the part of the defendants were not, upon the whole case, sufficient to bar the said Dryden Leach of his aforesaid action against them;" and, with that opinion, left the same to the said jury. Whereupon the said counsel for the said defendants did then and there, on behalf of the said defendants, except to the aforesaid opinion of the said Chief Justice: and insisted on the said several matters and proofs as an absolute bar to the aforesaid action, by virtue of the last mentioned statute. And inasmuch as the said several matters so produced and given in evidence on the part of the said defendants, and by their counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the aforesaid defendants did then and there propose their aforesaid exception to the opinion of the said Chief Justice, and requested the said Chief Justice to put his seal to this bill of exception containing the said several matters so produced and given in evidence on the part of the said defendants as aforesaid, according to the form of the statute in such case made and provided: and thereupon the aforesaid Chief Justice, at the request of the said counsel for the abovenamed defendants, did put his seal to this bill of exception, pursuant to the aforesaid statute in such case made, and provided, on the 10th day of December aforesaid, in the said fourth year of the reign of His said present Majesty. C. PRATT, L.S.

And hereupon the said John Money, James Watson, and Robert Blackmore say, that in the record and pro-[1751]-ceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict upon the said issue between the parties aforesaid first above joined, and also in giving the judgment aforesaid, there is manifest error, in this, that the Chief Justice before whom, &c. at and upon the trial of the said issue between the parties aforesaid first above joined, did declare and deliver his opinion to the jury aforesaid, "that the said several matters mentioned in the said bill of exceptions, and so as aforesaid produced and proved on the part of the said John Money, James Watson, and Robert Blackmore, were not, upon the whole of the case, sufficient to bar the said Dryden Leach of his action aforesaid against them:" and, with that opinion, left the same to the jury. There is also error in this, that by the record aforesaid it appears that the verdict aforesaid was given upon the said issue first above joined, for the said Dryden Leach, against them the said John Money, James Watson, and Robert Blackmore: whereas, by the law of the land, the verdict on that issue ought to have been given for the said John Money, James Watson, and Robert Blackmore, against the said Dryden Leach. There is also error in this, that it appears by the record aforesaid, that judgment in form aforesaid was given for the said Dryden Leach, against them the said John Money, James Watson and Robert Blackmore: whereas, by the law of the land, the judgment aforesaid ought to have been given for them the said John Money, James Watson, and Robert Blackmore, against the said Dryden Leach. And the said John Money, James Watson, and Robert Blackmore pray that the judgment aforesaid, for the errors aforesaid, and others in the record and proceedings aforesaid, may be reversed, annulled and altogether had for nothing; and that they may be restored to all which they have lost by occasion of the judgment aforesaid, &c.

And hereupon, the said Dryden Leach, in his proper person, voluntarily comes here into Court, and prays leave to rejoin to the errors aforesaid, before our lord the King, until on the morrow of the Holy Trinity, wheresoever, &c.: and he hath it, &c. The same day is given to the said J. M. J. W. and R. B. at which day come the parties aforesaid in their proper persons: and the said Dryden Leach says "that there is not, either in the record and proceedings aforesaid, or in the matters recited and contained

in the said bill of exceptions, or in giving the verdict aforesaid or in the judgment aforesaid, any error:" and prays that the Court here may proceed to the examination as well of the record and proceedings, as of the matters aforesaid above assigned for error; and that the judgment aforesaid may be affirmed in all things.

[1752] This case was first argued on Tuesday 18th of June last, by Mr. Solicitor General de Grey for the plaintiffs in error; and by Mr. Dunning, for the defendant in error.

Mr. de Grey divided his argument into three points—

1st. The defendants had a right to plead the general issue, and to give the special matter in evidence, under 7 Jac. 1, c. 5: or, in other words, Lord Halifax, the Secretary of State, was a justice of peace, within the intention of that Act.

2dly. The evidence was sufficient to intitle the defendants to a verdict. Which will take in both the validity of the warrant itself, and the manner of executing it.

3dly. They were also intitled to a verdict within the meaning of 24 G. 2, c. 44, the plaintiff not having observed the terms required by it.

First point—Before the statute of 7 Jac. c. 5, a matter of special justification could not be given in evidence by a justice of peace, upon the general issue pleaded by him.

The question is—who were meant, in that Act of Parliament, by justices of the peace.

Some persons were, from ancient times, so, by office; some are so by special commission; some, by corporation-charters; some, by tenure: some, by prescription.

In the time of Edward the Third, other persons were authorized to act within particular districts.

But the great officers of the State had the jurisdiction, as incident to their offices. So had, in some degree, coroners and other inferior officers.

The Secretaries of State must have had it as incident to an office so ancient as to be coeval with the Crown itself.

A statute in Edward the First's reign says,*1 "Desouth le Petit Seale, ne issera desormes nul briefe que touch le common ley." And Lord Coke, in his comment upon it, in his 2 Inst. 556, calls it the signettum, the King's signet, [1753] which at the making of that statute the King had: and says—"This seale is ever in the custody of the principal secretary: and there be four clerks of the signet attending on him."

This seal is as ancient as the Crown; and the officer that keeps it, as ancient as the seal itself: and he is an officer well known, and recognized by many Acts of Parliament; and the King's warrants are countersigned by him.

In cases of treason, and of felony, the Courts of Law recognize his authority: and these is equal reason for it, in cases of misdemeanour; which equally affect Government, and disturb the public peace.

A seditious libel is an offence against Government and the public peace; and effectually undermines Government.

A Secretary of State is a centinel for the public peace: it is his duty to prevent the violation of it, and to bring the offenders to justice; and it is necessary that he should be invested with this power, in order to enable him to execute this his duty.

The case of *Rex* v. *Kendal and Roe*, 1 Salk. 347,*2 has settled this point, as to treason: for, it was there holden "that Secretaries of State might commit for suspicion of treason, as conservators of the peace did at Common Law; and that it was incident to the office, as it is to the office of justices of peace, who do it ratione officij." And the commitment to a messenger was there holden good.

In the case of *The Queen* v. *Derby*, B. R. 1709, 10 Ann.† for publishing a scandalous and seditious libel called *The Observator*—the two points above mentioned were admitted by Mr. Lechmere, who was counsel for the defendant. He agreed to the power of a Secretary of State to commit for treason or felony; and that the messenger was a proper officer. And in that case, the Court held the warrant good and legal.

In the case of *Rex* v. *Earbury*, M. 7 G. 2, 1733, who was arrested and committed by warrant from a Secretary of State; and his papers seized, which he applied to have restored: Lord Hardwicke held that they could not be restored, in a summary

*1 V. Artic. Super Chartas, 28 E. 1, c. 6.

*2 V. 5 Mod. 78, S. C. and State Trials, vol. 4, p. 854, and Comberb. 343. Holt, 144. Skinner, 596, and 12 Mod. 82.

† Fortescue's Rep. 140.

way, on motion. The warrant there was "to search for the papers and to bring the author before the Secretary of State."

The Statute of 1 E. 3 enacts, "for the better keeping, and maintenance of the peace, good men and lawful shall in every county be assigned to keep the peace." So, 4 E. 3, c. 2.

[1754] The 18 E. 3, stat. 2, c. 2, is the first statute that gives the judicature of hearing and determining. 34 E. 3, c. 5, enlarges their powers. The 2 Ed. 5, c. 4,‡ calls them by the express name of "justices of peace." Their commission impowers them to keep the peace; and also contains a distinct clause "to hear and determine."

Therefore, the old conservators of the peace still remain: they have also power to hear and determine as justices, they are wardens of the peace too, by their commission, as well as by common law: and they may likewise by the common law, without any special commission or warrant, use force to suppress rebels. For which last assertion, he cited Kelyng, 76.

The statute of 7 Jac. 1, c. 5, (about pleading the general issue,) means to protect all that Act as conservators or wardens or justices of the peace, as well as those that act under special commissions.

The Act of 2 Ph. & M. c. 18, (relating to corporation-justices) calls them "commissioners for the conservation of the peace." Justice of peace is not a strict technical name: they may be called custodes pacis. In 2 Rol. Abr. 95, title, Justices de Peace, it is said, "that an indictment taken before them, naming them custodes pacis, and not justices of the peace (as the statute names them) is a good indictment: for, it is all one." It is not material how the appointment is made. The statutes mean to include all conservators of the peace: they may all now plead the general issue, and give the special matter in evidence. The Act of 7 J. 1, c. 5, does not indeed extend to any justices sitting in sessions: it only extends to them in their single jurisdiction.

The statute of 11 H. 6, c. 6, "that suits and processes before justices of the peace shall not be discontinued by new commissioners," is no exception to this rule: neither is 2 H. 5, stat. 1, c. 4, § 2, "that justices of the peace of the quorum shall be resiant in their shire; (except lords named in the commission, &c., &c.").

Acts of Parliament shall be taken with latitude, and extended to cases within the same reason and calling for the same remedy. Plowd. 366, *Ld. Zouch's case.* Co. Litt. 24 b. 10 Co. 101 b. *Beaufage's case.* Plowd. 147, *Iston* v. *Studd.* Plowd. 36, *Platt* v. *The Sheriffs of London.* Bro. Parliament, 20. Wentworth's Office of Executors, 67. Sir T. Jones, 62, *Plummer* v. *Whitchcot.*

[1755] The rule about "several particulars of an inferior nature being enumerated, excluding those that are of a higher nature and not enumerated," will not hold here. This act is not done as a higher officer; but only as a justice of peace. The Bishop of Norwich being named extended to all bishops: so the warden of the Fleet being named, extends to all gaolers. In Moore, 845, *Phelps* v. *Winchcombe,* it was resolved "that a deputy constable may by the equity of the statute of 7 J. 1, c. 5, plead the general issue."

Persons acting for preservation of the public peace ought to be protected: and these old conservators of it are more reasonably intitled to protection, than other persons are.

Second point—If the special matter may be given in evidence, then the question will be "whether this matter given in evidence would, if it had been pleaded, amount to a justification."

It is objected, "that the warrant is not legal; and that it was ill executed."

1st. As to the warrant itself—No such action has ever been brought upon these warrants, by persons apprehended by virtue of them: or, at least, there is none upon record.

It is said, "that this warrant is too extensive in the description of the person: and that it has been abused."

Answer—The power is not illegal: and the abuse of it is no objection to the warrant itself. Such warrants are agreeable to long practice and usage.

Whatever the present determination may be, in point of law, it will be in the breast of the Legislature to set it right.

In the *Bewdley case,* reported 1 Peere Williams, 207, (*Regina* v. *Ballivos, &c. of*

‡ V. stat. 1, c. 4, s. 2, and stat. 2, c. 1.

Bewdley) a construction of an Act of Parliament contrary to the words of it was allowed, founded upon only seven years practice. In Comberb. 342, *The India Company* v. *Skinner*—where the warrant was granted before any default; Holt said, "that the practice having been, in case of taxes, to grant a conditional warrant to distrain, communis error facit jus."

The power of justices of peace "to commit before indictment," stands supported only by practice and usage. [1756] In 6 Mod. 178, *Regina* v. *Tracy*, Holt Ch.J. says, formerly, none "could be taken up for a misdemeanor, till indictment found: but now the practice all over England is otherwise." And per Hale, "that practice is become a law." So likewise has usage and practice established ac-ecians, quo minus, new trials, &c.

The greatest Judges have bailed persons taken up upon these warrants; and they have not been objected to, by either Courts, or counsel of the greatest eminence: whereas, if they were not legal, the persons apprehended upon them ought to have been discharged. For which he cited, 1 Hale's Hist. P. C. 578. The Court will not make orders upon illegal warrants: consequently, they saw no objection to them. Even the greatest friends to the Revolution have not objected to these warrants. From whence, it must be inferred, that no objection lies against them.

On 6 July 1641, in the case of *Sir John Elliot, &c.* the House of Commons resolved, that it was a breach of privilege: but they did not vote it illegal.

Lord Hardwicke, in *Earbury's case*, only said "he would not then determine it."

In treason, it will scarce be objected to; nor in felony.

In *Miss Blandy's case*, her bureau was broken open; and her papers seized; and given in evidence.

Indecent prints or books may be seized by a magistrate: and they often have been so.

Evidence taken from felons or other criminals may be produced against them; though a criminal shall not be compelled to produce such evidence against himself.

It is said "that this warrant is illegal, because it is general to take up the author, printer, or publisher." But it is legal to issue and execute a warrant against a person unknown, but only described. Indeed the magistrate issues it, and the officer must execute it, at their peril. And though the warrant includes seizing the papers, yet that part of it has not been executed: and the bare insertion of it shall not affect the officer who executed the other part of the warrant.

The facts are these—A warrant was directed to four messengers: Carrington, one of them, is informed "that [1757] Leach was the printer: and that the reputed author was frequently at Leach's house." The other three act on this information. And this information was not groundless: for, they found a sheet of another number, wet and just printed. They take him up, and carry him to Lord Halifax's office; who was not then at leisure to examine him: but when he did examine him (four days after,) he discharged him. Here was probable cause for taking him up.

A justice of peace having jurisdiction, may grant a proper warrant on probable cause: and ministerial officers (constables, &c.) are not to be affected by the illegality of the warrant, in other parts of it. This warrant was executed honestly, and upon a probable cause.

Third point—The plaintiff's action is sufficiently barred by 24 G. 2, c. 44, for want of observing the terms required by it. They neither proved notice, as the third section requires; nor made the demand required by the sixth section.

The defendants have acted in obedience to the warrant of a magistrate who is a justice of peace within the meaning of this Act; and by his order, and in his aid.

The only doubt is, "whether the action is brought for any thing done in obedience to the warrant; or not."

The defendants have obeyed it to the best of their power.

However, as they have acted under colour of the warrant, meaning to obey it, they are not answerable, although they may have erred in the execution of it. They are protected by this Act, if they have acted bonâ fide; even though the warrants and the execution be illegal. They are not to judge of arduous points of law: the statute means to protect them from it.

2dly. The previous step to bringing this action was not taken; viz. the demanding a perusal and copy of the warrant, and shewing a refusal of it.

If there was a fault, or negligence, or mistake in this proceeding, the fault was in

the magistrate: there was none in the officer who executed it. And the requisite steps have not been taken, in order to maintain the suits.

Therefore the plaintiff is barred of this action.

[1758] Mr. Dunning, contra—For Mr. Leach, the plaintiff below.

The first question is "whether this be a case within 24 G. 2, c. 44:" which question will involve the question "whether it be within the Acts of 7 J. 1, c. 5, or 21 J. 1, c. 12."

All these statutes, being in pari materia, must receive the same construction: and they are all unapplicable to the present case.

He then made three sub-divisions of his first question: viz.

1st. Whether Lord Halifax, being Secretary of State, is a conservator or justice of peace within the true intent and meaning of the Act of 24 G. 2, c. 44.

2dly. Whether the defendants are constables, head-boroughs, or officers, &c. within the intent and meaning of that Act.

3dly. Whether this action be brought and properly pursued within the true intent and meaning of it; and for a matter done in obedience to the warrant.

First point—Lord Halifax is not a justice of peace within 24 G. 2. He is not so by commission: he is not so, as incident to his offices, either of Secretary of State, or of Privy Counsellor.

But it has been said "he is a conservator of the peace; and therefore within the meaning of the Act."

I deny the principle, and also the conclusion. I admit the case of *Rex* v. *Kendal and Roe;* though the reasons of it do not appear; but I submit to the authority of it, that "a Secretary of State has a power to commit for high treason."

Serjeant Hawkins's reasons do not support his assertion: and I deny that a Secretary of State is a conservator of the peace. He has only a power of committing for high treason, as conservators of the peace had in other cases: and *Kendal and Roe's case* carries it no further. The Court never meant to resolve any thing further.

All the Crown-writers are silent on this subject of a Secretary of State's having this jurisdiction. None of them [1759] even hint that a Secretary of State is a conservator of the peace. Staundford, Fitz-Herbert, Lambard, &c. say no such thing.

*Lambard gives the list of those officers who are conservators of the peace: but there is no mention therein, of Secretaries of State. Serjeant† Hawkins copies the same list, without adding Secretaries of State.

There is no proof or pretence that the conservatorship of the peace is incident to their office: nor is there any usage, to support such a notion. Their claim of a power to grant such warrants as the present one is not pretended to be older than the Revolution.

If they were justices of the peace or conservators of the peace, they would be bound to execute the powers given to justices, or residing in constables; and they would be subject to the control of this Court.

The offices are different in creation, constitution, and execution.

The very language of the warrant shews that the Secretary of State did not consider himself as a justice, conservator, or constable.

This statute is not to be extended beyond the letter of it: it is not within the maxims or reasons of extensions of Acts of Parliament.

It is necessary to consider the former statutes of 7 J. 1, c. 5, and 21 J. 1, c. 12: (both of which he rehearsed and observed upon).

In these, there is no mention of Secretaries of State: nor is there any reason to add others not there enumerated; the rather, as the enumeration begins with persons inferior to Secretaries of State. Neither is there any ground to imagine that the Legislature intended to include Secretaries of State within their provision: the preamble shews rather the contrary. The line drawn between those enumerated and those omitted, shews the same thing. The persons intended to be protected, are persons bound to act, and acting for the public good, without reward; not great officers with great salaries, who are not lawyers and are not bound to act.

[1760] The persons introduced by the second Act (churchwardens, sworn-men, overseers, &c.) are persons within the mischief of the former: yet even they were

* V. lib. 1, c. 3.
† Lib. 2, c. 8, s. 2.

not virtually included in the former, and are therefore particularly named in the latter.

This latter explanatory Act omits, nevertheless, to name Secretaries of State. But constables are within the letter: and it extends to no others. And he referred to 4 Inst. 174, and the two marginal notes there; one on 7 J. c. 5, and the other, on 21 J. c. 12.

From all which premises he argued that these Acts of Jac. 1 are not to be extended beyond the letter: and if they were, yet there is no reason to extend them to Secretaries of State, as not being within the same inconvenience.

No more reason is there to extend that of 24 G. 2, c. 44. If the Legislature had so intended, they would not have confined it to justices of the peace, a species of magistrates well known and understood in our law.

So much for the noble lord.

As to the messengers—They do not fall within the words or meaning of the Act of 7 J. 1, c. 5, which is confined to officers, who are persons known in our law, and bound to execute the warrant of a justice of peace; an office of burthen, not of profit; and incapable to distinguish the precise limits of a jurisdiction.

This is in no respect the case of the King's messengers in ordinary; who are persons unknown in our law, and mere volunteers in executing warrants of justices.

The words, "other officers, &c." mean borsholders, &c. officers of the same sort as constables and tythingmen: not King's messengers: these persons can not be considered as aiding and assisting the constables. The warrant and the fact are quite the reverse: the constables are directed to assist them. They do not act under the command of a justice of peace, or in his assistance.

This warrant is not under the hand and seal of a justice of peace. Therefore the Act does not protect the defendants.

[1761] Nor is the act done in obedience to this warrant. The warrant was "to apprehend the author, printer, or publisher:" but they have executed it upon a person who was not the author, printer, or publisher. Consequently, as they have not acted under it, they can not be protected by it.

It is said, "that a description is equivalent to naming the persons; and that here is a sufficient description."

But the description of an offence is no description of the person offending: and this is only a description of the offence.

The obedience to the warrant is the condition of the protection which the Act gives to the officer. Therefore, the condition failing, the protection does not take place.

Here is no probable cause, nor any reason for justifying the officer under a probable cause. It is not like the cases of apprehending traitors or felons. Here is only information from one of their own body, "that the author of the paper had been seen going into Leach's house, and that Leach was the printer of the composition in general;" not of this particular paper.

But though neither this hearsay-information was in itself true; nor would the consequence follow, if it had been true; yet they thereupon arrest and imprison an innocent man. Therefore these men themselves are to answer for doing this: not the person who issued the warrant. The warrant did not command nor authorize them to do what they have done. It is necessary for them to shew an acting in obedience to the warrant: otherwise they are not within the protection of the Act. In proof of which, he cited two cases; one, by the name of * *Lawson* v. *Clark;* and the other, a Norwich-case, where a bailiff had executed the warrant out of the proper jurisdiction. (V. post, 1816.)

Upon these authorities, upon the reason of the thing, and upon the words of the Act, the officer is not intitled to the protection of the Act; nor needs the justice be made a party, but where the officer acts in obedience to the warrant: acting under colour of it only, is not sufficient.

Besides, the party apprehended was not carried before Lord Halifax, or dealt with according to law. Surely, this was the act of the officer; not of the person who [1762] signed the warrant. And no reason is given, stated, pretended, or even existed,

* Or *Dawson*, qu. [3 Wils. 317.]

why this matter was so transacted. Therefore there was no probable cause or reason whereupon to ground a justification of this their conduct.

So that even allowing the Secretary of State to be a justice of peace, and the officers to be constables; yet the action lies against the plaintiffs in error, who have acted in this unjustifiable manner.

It appears therefore, that even if they had had a defence upon the merits, they have not properly pleaded it. However, in fact they had no defence upon the merits: the plaintiff Leach was neither author, printer, nor publisher of the paper; nor at all within the description of the warrant.

But the warrant itself is illegal. It is against the author, printer, and publisher of the paper, generally, without naming or describing them; and not founded on any charge upon oath: it is also, "to seize his papers;" that is, all his papers.

No justice of peace has power to issue such a warrant. Therefore Lord Halifax could not do it as a justice of peace. Nor is there any pretence of usage to support such a claim of doing it as Secretary of State, further back than the Revolution.

It lies upon them, to prove their claim, and to shew their authority.

The practice of a particular magistrate cannot controul the law. Communis error is not, in this case, sufficient to make law. It is the duty, and it is therefore, doubtless, the inclination of the Court, to stop the mischief, as soon as it is complained of to them.

If "author, printer, and publisher," without naming any particular person, be sufficient in such a warrant as this is, it would be equally so, to issue a warrant generally, "to take up the robber or murderer of such a one." This is no description of the person; but only of the offence: it is making the officer to be judge of the matter, in the place of the person who issues the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

To ransack private studies in order to search for evidence, and even without a previous charge on oath, is contrary to natural justice, as well as to the liberty of the subject: and it is as useless as it is cruel, in the case of libels; **[1763]** because it is the publication only that makes the crime of a libel.

To search a man's private papers ad libitum, and even without accusation, is an infringement of the natural rights of mankind. And this is a warrant "to seize all a man's papers," without any particular relation even to the crime they would suppose him chargeable with.

No case of this sort has ever undergone judicial discussion and determination. And as the Court does not interpose in cases not objected to, no arguments can be drawn from such as passed sub silentio, or were never objected to.

All the writers upon the Crown-law say, "that there must be an accusation; that the person to be apprehended must be named; and that the officer is not to be left to arrest who he thinks fit." For which, he vouched Hale's Hist. P. C. 1st part, page 580 and 586, and Hawkins's P. C. book 2, c. 13, § 10, pages 81 and 82.

Here, it is left to the officer, to take up any person whom he himself suspects.

Lord Ch. J. Scroggs was impeached for issuing such warrants as this is.

Therefore he prayed judgment for the defendant in error.

Mr. Solicitor General de Grey, in reply, on behalf of the plaintiffs in error.

A Secretary of State is an officer by prescription; and his office must be as ancient as the office of the person to whom he is secretary: for, he is and always has been an officer necessary to the Crown; and the constitution always required the support of this office. And as his power to commit for treason depends upon prescriptive right and the nature of his office; so likewise it does in all cases of preserving the public peace.

In the case of *Kendal and Roe*, the power, in treason, was acknowledged. In *Darby's case*, it was recognized, in felony. In *Earbury's case*, (where the warrant was general, as this is,) he was continued on his recognizance. A Secretary of State has these powers, upon the foundation of prescription; not on our law-books: and he has, **[1764]** equally, the power in him: whether he does or does not exert it in low and common instances. I suppose he is as compellable to act, as a conservator of the peace formerly was, before the Acts of Parliament which give power to justices of peace.

Charter-justices can scarce be called commission-justices: and yet these statutes extend to them.

A "justice of the peace," means a conservator, a warden of the peace. Therefore there was no need to name Secretaries of State, in the Acts of Parliament: they were included, without naming them particularly.

The marginal note in Lord Coke is no authority. However these officers are named in the text, "and certain others His Majesty's officers."

This action is brought for what was done in obedience to the warrant; which the officer was obliged to execute, in the best manner he could.

If there is any fault, it is in the magistrate: he should have described the offender with greater certainty. If the executing officer acts to the best of his ability; he is justified, and acts in obedience to his warrant.

Here the officers did so: they were reasonably satisfied "that Leach was the printer." And on search, this probable cause was increased to a higher degree: for, they found another fresh sheet of the same work, just printed off, and wet. They detained him on occasion of his being to be carried before Lord Halifax, to be examined. The officers had nothing to do with his examination: that was the affair of Lord Halifax; and if he discharged the persons apprehended and brought before him without examination, it was the better for them.

In Vaughan 111, *Stiles* v. *Sir Richard Coxe and Others*—It was determined, that the defendants should have the benefit of the Act; because they acted by colour of the warrant.

As to the warrant itself—It is objected, "that there is no charge upon oath." But there was no occasion, he said, for it: and to that purpose, he cited *The Queen* v. *Darby* (v. *Fortescue*, 141), *Rex* v. *Earbury*, Mich. 7 G. 2, and 1 Hale H. P. C. 582, where it is laid down, that "it is convenient, though not always necessary to take an information upon oath of the person that desires the warrant."

It is objected "that this warrant is not authorized by any length of usage."

[1765] But the usage, as here stated, is sufficient: and it must be taken to be coeval with the office. The bill of exceptions indeed only takes it up from the Revolution; asserting that it has been so ever since that time: but the facts go up to the Restoration; and none of a different form were produced, prior to the Revolution.

As to seizing papers—It is difficult indeed to draw the exact line. But is certainly necessary, in some degree: and no instance is produced, of such warrants having ever been abused as instruments of oppression.

He concluded, upon the whole, that the plaintiff had no right to bring his action.

Lord Mansfield—I suppose, this is intended to be argued again. However, I will say something, at present, upon it.

A bill of exceptions supposes the evidence true; and questions the competency or propriety of it.

"Whether there was a probable cause or ground of suspicion," was a matter for the jury to determine: that is not now before the Court. So—"whether the defendants detained the plaintiff an unreasonable time."

But if it had been found to have been a reasonable time; yet it would be no justification to the defendants; because it is stated "that this man was neither author, printer, or publisher:" and if he was not, then they have taken up a man who was not the subject of the warrant.

The three material questions are—1st. "Whether a Secretary of State acting as a conservator of the peace by the common law, is to be construed within the Statutes of James the First, and of the late King."

The protection of the officers, if they have acted in obedience to the warrant, is consequential, in case a Secretary of State is within these statutes.

As to the arrest being made in obedience to the warrant, or only under colour of it and without authority from it—[1766] This question depends upon the construction of the warrant; whether it must not be construed to mean "such persons as are under a violent suspicion of being guilty of the charge;" (for they cannot be conclusively considered as guilty, till after trial and conviction). The warrant itself imports only suspicion; for, it says,—"To be brought before me, and examined, and dealt with according to law:" and this suspicion must eventually depend upon future trial. Therefore the warrant does not seem to me, to mean conclusive guilt; but only violent suspicion. If the person apprehended should be tried and acquitted, it would shew "that he was not guilty:" yet there might be a sufficient cause of suspicion.

Mr. Dunning says, very rightly, that "to bring a person within 24 G. 2, the act must be done in obedience to the warrant."

The last point is, "whether this general warrant be good."—

One part of it may be laid out of the case: for, as to what relates to the seizing his papers, that part of it was never executed; and therefore it is out of the case.

It is not material to determine, "whether the warrant be good or bad;" except in the event of the case being within 7 J. 1, but not within 24 G. 2.

At present—As to the validity of the warrant, upon the single objection of the incertainty of the person, being neither named nor described—The common law, in many cases, gives authority to arrest without warrant; more especially, where taken in the very act: and there are many cases where particular Acts of Parliament have given authority to apprehend, under general warrants; as in the case of writs of assistance, or warrants to take up loose, idle and disorderly people. But here it is not contended, that the common law gave the officer authority to apprehend; nor that there is any Act of Parliament which warrants this case.

Therefore it must stand upon principles of common law.

It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. This is so, upon reason and convenience.

[1767] Then as to authorities—Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary.

It is said, "that the usage has been so; and that many such have been issued, since the Revolution, down to this time."

But a usage, to grow into law, ought to be a general usage, communiter usitata et approbata; and which, after a long continuance, it would be mischievous to overturn.

This is only the usage of a particular office, and contrary to the usage of all other justices and conservators of the peace.

There is the less reason for regarding this usage; because the form of the warrant probably took its rise from a positive statute; and the former precedents were inadvertently followed, after that law was expired.

Mr. Justice Wilmot declared, that he had no doubt, nor ever had, upon these warrants: he thought them illegal and void.

Neither had the two other Judges, Mr. Justice Yates, and Mr. Justice Aston, any doubt (upon this first argument) of the illegality of them: for, no degree of antiquity can give sanction to a usage bad in itself. And they esteemed this usage to be so. They were clear and unanimous in opinion "that this warrant was illegal and bad."

Lord Mansfield—Let it stand over, for further argument.

The case standing in the paper, on Friday 8th Nov. 1765, for further argument—

Mr. Yorke, Attorney General, was now to have argued on behalf of the plaintiffs in error; and begun to enter into his argument: but when he came to mention the two cases cited by Mr. Dunning, both of which were determined before Lord Mansfield, upon 24 G. 2, c. 44, one of them at Norwich, Summer Assizes, 1761; (where damages were given;) the other* of them, on a warrant under the Vagrant Act of 17 G. 2, (where his Lordship held "that the defendant ought to shew that the officer had acted in obedience to the warrant;" and he did so;) he seemed to intimate that this objection "of their not having done so, in the present case," was too great a **[1768]** difficulty for him to encounter; and therefore rested the matter where it was, without proceeding any further in his argument.

Lord Mansfield remembered both these cases; and said, he still continued of the same opinion.

Where the justice can not be liable, the officer is not within the protection of the Act. The case in Middlesex concludes exactly to the present case. For, here the warrant is to take up the author, printer, or publisher: but they took up a person who was neither author, printer, nor publisher: so, that case was a warrant "to take up a disorderly woman:" and the defendant took up a woman who was not so.

And he held the same opinion now, he said, as he did before, in the case at Norwich.

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* *Dawson* or *Lawson* v. *Clarke*. V. ante, p. 1761. [See also 2 Bosan. 160.]

This makes an end of the present case: for, this is a previous question; and the foundation of the defence fails.

The consequence is, that the judgment must be affirmed.

The other Judges assenting,

The rule of the Court was "that the judgment be affirmed."

Judgment affirmed.

BULBROOK *versus* SIR ROBERT GOODERE AND OTHERS. 1765. [S. C. 1 Bl. 569.]

Water bailiff of the river Thames cannot justify seizing nets in a private fishery.

This was a demurrer to an action of trespass for breaking and entering the plaintiff's close called the river Thames; and taking up, breaking and destroying his bucks there erected and placed for the catching of fish; and taking his fish out of the bucks, and carrying them away, and converting them to their own use.

The defendants, in their plea, alledge, that the close in question is part of the river Thames, and lies between Staines Bridge, and the head of the river; and that the conservacy of that part of the river is in the Crown. Then they alledge that the office of water-bailiff is in the gift of the Crown. Then they set forth the statute of 1 Eliz. c. 17, which prohibits the taking of fish but only with the particular nets or tramels therein specified, under forfeiture [1769] of a pecuniary sum, and of the fish so taken, and also of the unlawful engines.(*a*) Then they shew a grant from the Crown to two of them, of the office of water-bailiff between Staines Bridge and the head of the river. They alledge that these bucks were engines for catching of fish, other than the nets and tramels allowed by the said Act of Parliament; and were unlawful engines; and were wrongfully and unjustly erected there: and therefore they justify the taking up the bucks and throwing the fish into the river; two of them, as water-bailiff; and the other two, as their servants and by their command.(*b*)

The plaintiff in his replication admits the conservacy to be in the Crown: and that the office of water-bailiff is in the gift of the Crown; and admits the Act of 1 Eliz. c. 17, as stated in the plea; and admits the grant to Sir Robert Goodere and others: but protesting that the bucks which were taken away by the defendants, were not unlawful engines: for replication, he says, and insists, that all offences done and committed by unlawful fishings in the said river Thames, by the laws and statutes of this realm ought to have been and ought to be in due and legal manner presented, or information concerning such offences ought in due and legal manner to be made at a Court of Conservacy, or other Court having sufficient and competent authority in that behalf; and there ought to have been and ought to be discussed, tried and determined, according to the laws and statutes of this realm. Then he avers, that no information, presentation, conviction, or adjudication whatsoever had ever been made before the committing this trespass, at any Court of Conservacy, or other Court concerning the said offence in the plea mentioned. He concludes therefore, that the defendants committed the trespass in their own wrong; and prays judgment against them.

The defendants demur generally. To which there is a joinder in demurrer.

Mr. Walker argued for the defendants.

There is no one fact suggested, but a matter of law; nothing that we could take issue upon.

The only fact alledged in our justification, and not admitted by the replication, is denied by protestation only.

If we had rejoined, we could only deny facts suggested: we could not meddle with matter of law. Here they only suggest matter of law; viz. "that it ought to have been presented." We could not, by a rejoinder, take issue upon that matter of law.

[1770] Lord Mansfield—The point lies in a nut-shell: the only question is "whether they could seize the nets before conviction."

(*a*) Qu. If the defendant was not intitled to judgment by the 5th section of the stat. referred to?

(*b*) The defendants seem to have been justified in what they did, if they had pleaded the stat. 30 G. 2, c. 21, s. 5, (in note (*d*) infra) and had brought the case within that stat.; which, if they acted properly, they might have done. Vid. the above sect. of the Act.

August Term (1)

Georgii Ter. in Sup. Cur.

Paxton's Caſe of the Writ of Aſſiſtance.

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Rec. 1761. Fol. 225.

CHARLES PAXTON, Eſq., applied to the Superiour Court for the Writ of Aſſiſtants, as by Act of Parliament to be granted to him.

This Court has Power to iſſue general Writs of Aſſiſtance to Officers of the Cuſtoms.

Upon this, the Court deſired the Opinion of the Bar, whether they had a Right and ought to grant it.

Mr. Otis & Mr. Thacher ſpoke againſt.

Meſſrs. Gridley & Auchmuty (2) for granting it.

Mr. Thacher firſt read the Acts of 14 Car. 2, ch. 22, and 7 & 8 of Wm. & Mary, upon which the Requeſt for this Writ is founded. (3)

Though this Act of Parliament has exiſted 60 Years, yet it was never applied for, nor ever granted, till

(1) Auguſt term 1 Geo. 3, which was adjourned without day on Thurſday, November 19th, 1761. Rec. 1761, fol. 239. The argument and decision, here reported, were made upon Wedneſday, the 18th of November. Boſton Gazette of November 23, 1761.

(2) Auchmuty was ſoon after appointed Advocate General, in the place of Otis, who had reſigned to avoid arguing for these Writs. Waſhburn's Jud. Hiſt. Maſs. 185, 186.

(3) Sts. 13 & 14 Car. 2, c. 11, § 5; 7 & 8 W. 3, c. 22, § 6; quoted in Gridley's firſt argument, *poſt*, 480, 481.

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till 1756;(4) which is a great Argument againſt granting it; not that an Act of Parliament can be antiquated, but Non-uſer is a great Preſumption that the Law will not bear it; this is the Reaſoning of Littleton and Coke. Knight Service, p. 80, Sect. 108.(5) Moreover, when an Act of Parliament is not expreſs, but even doubtfull, and then has been neglected and not executed, in ſuch a Caſe the Preſumption is more violent.

Ch. Juſtice. (6) The Cuſtom Houſe Officers have frequently applied to the Governour for this Writ, and have had it granted them by him,(7) and therefore, though he had no Power to grant it, yet that removes the Argument of Non-uſer.

Mr. Thacher. If this Court have a Right to grant this Writ, it muſt be either *ex debita Juſtitia* or diſcretionary. If *ex debita Juſtitia*, it cannot in any Caſe be refuſed; which from the Act itſelf and its Conſequences, he argued, could not be intended. It can't be diſcretionary; for it can't be in the Power of any Judge at diſcretion to determine that I ſhall have my Houſe broken open or not. As ſays Juſt. Holt, "There can be no diſcretionary Power whether a Man ſhall be hanged or no." (8)

He moved further that ſuch a Writ is granted and muſt iſſue from the Exchequer Court, and no other

(4) *Paxton's caſe*, Auguſt term, 1755; *poſt*, 402–404, & notes.
(5) Co. Lit. 81 a, 81 b. S. P. 11 Met. 291.
(6) Hutchinſon, appointed November 13th, 1760. *Poſt*, 410, 411.
(7) S. P. 3 Hutchinſon's Hiſt. Maſs. 92. *Post*, 401.
(8) *Armſtrong* v. *Liſle*, (1697) Comb. 410. *S. C.* J. Kel. 95, 105; Skin.

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other can grant it; 4 Inſt. 103; and that no other Officers but ſuch as conſtitute that Court can grant it.

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Skin. 671; Holt, 63; 12 Mod. 109, 157; Carth. 395; 1 Salk. 63. The deciſion in that caſe was, that a conviction of manſlaughter and allowance of benefit of clergy were a bar to an appeal of murder by the heir of the deceaſed; and that the defendant was entitled to be allowed his clergy at once, without waiting for the trial of the appeal, on which, if convicted, he might be hanged. S. P. 3 Inſt. 130; *Smith* v. *Taylor*, (1771) 5 Bur. 2778.

Benefit of clergy does not appear to have been allowed in the Colony of Maſſachuſetts. 1 Hutchinſon's Hiſt. Maſs. (3d ed.) 388, note. At a later period, it was allowed in the Province in caſes of manſlaughter and burglary. *Trial of the Britiſh Soldiers*, (ed. 1770) 209. Waſhburn's Jud. Hiſt. Maſs. 194. But it was not ſettled to what other crimes it extended. Reſolution of General Court in February, 1768, 14 Maſs. Archives, 507. 2 John Adams's Works, 534. Opinion of Trowbridge on "Benefit of Clergy reſpecting Rape," Keith MS. No. 11. (*Vid. post*, 478.) It was abolished here by St. 1784, c. 56.

Benefit of clergy in Maſſachuſetts.

The appeal of death was by Lord Holt "eſteemed a noble remedy, and a badge of the rights and liberties of an Engliſhman." *Rex* v. *Toler*, 1 Ld. Raym. 557; 12 Mod. 375; Holt, 483. See Barrington on Sts. (5th ed.) 27. In the early part of the laſt century in England, persons who had been acquitted on indictments for murder, were often tried, convicted and executed on appeals. Kendall on Trial by Battel (3d ed.), 44–47. In 1770 its abolition was ſuggeſted in the Houſe of Commons, but not preſſed. 2 Cavendiſh Debates, 13. 20 Howell's State Trials, 716. An appeal of murder was brought in England as lately as 1817, but defeated by the appellant's declining to accept the wager of battel. *Aſhford* v. *Thornton*, 1 B. & Ald. 403. Such appeals, as well as all trials by battel, were then aboliſhed by St. 59 G. 3, c. 46.

Appeal of death in England.

The Engliſh Sts. of 9 H. 3, c. 34, & 6 Edw. 1, c. 9, concerning appeals of murder, were in force in the Provinces of Pennſylvania and Maryland. Report of Judges, 6 Binn. 599, 604. Kilty on Maryland Sts. 141, 143, 158. It is ſaid that no ſuch appeal was ever brought in Pennſylvania. Roberts on British Statutes in Pennſylvania, 59, 60. But in Maryland in 1765 a negro was convicted and executed upon ſuch an appeal. *Soaper* v. *Tom*, 1 Har. & McHen. 227. The St. of 9 H. 3 was expreſſly adopted in South Carolina in 1712; and Mr. Cooper, the ſtate editor of its ſtatutes, doubts whether trial by battel and appeal of death were not both ſtill in force there in 1837. 2 Sts. at Large of South Carolina, 401, 403, 715.

Appeal of murder in the other Colonies.

On the debate in the Houſe of Commons in 1774 on the bill "for the better adminiſtration of Juſtice in Maſſachuſetts Bay," a clauſe ſuſpending

In Maſſachuſetts Bay.

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it. 2 Inſt. 551. That this Court is not ſuch a one, vid. Prov. Law. (9) This Court has in the moſt ſolemn Manner diſclaimed the Authority of the Exchequer; this they did in the Caſe of McNeal of Ireland & McNeal of Boſton. (10) This they cannot do in Part; if the Province Law gives them any, it gives them all the Power of the Exchequer Court; nor can they chuſe and refuſe to act at Pleaſure. But ſuppoſing this Court has the Power of the Exchequer, yet there are many Circumſtances which render that Court in this Caſe an improper Precedent; for there the Officers are ſworn in that Court, and are accountable to it, are obliged there to paſs their Accounts weekly; which is not the Caſe here. In that Court, there Caſes are tried, and there finally; which is another Diverſity. Beſides, the Officers of the Cuſtoms are their Officers, and under their Check, and that ſo much, that

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ſuſpending the appeal of murder was vigorouſly aſſailed by Dunning, Burke, Fox, and others, and withdrawn. 17 Parl. Hiſt. 1291, 1292, 1296. And Mr. Kendall thinks, it exiſted in the Colonies. Kendall, 248, 249, 272. But Mr. Dane ſays, the appeal of felony did not exist here. 7 Dane Ab. 336. And ſee Conſtitution of Maſſachuſetts, c. 6, art. 6; Declaration of Rights, arts. 12, 15; U. S. Conſtitution, amendment 5.

Trial by battel.

In England, the last joinder of iſſue for trial by battel was on a writ of right in 1638; but the judges deferred the combat from time to time for error in the record until 1641, when the Houſe of Commons, upon the petition of the tenant, "ordered a bill to be brought in to take away trial by battel." *Claxton* v. *Lilburne*, 2 Ruſhw. Hiſt. Coll. 788, 790; 3 Ib. 356. Commons & Lords Journals 1620–1641, quoted in Kendall, 135, note. 3 Bl. Com. 337 *& ſeq.* But no ſuch bill was paſſed in England until 1820, *ut sup.* This mode of trial is not ſuppoſed to have been introduced in America, unleſs in South Carolina, *ut sup.* *Poſt*, 178. 3 Wilſon's Works, 142. 3 Dall. 350. 2 Sumner, 68.

(9) Prov. St. 11 W. 3, Anc. Chart. 330, 331.

(10) *McNeal* v. *Brideoak*, *post*, 470, note.

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that for Miſbehaviour they may puniſh with corporal Puniſhment. 3 & 4 Car. 2, § 8. (11) 7 & 8 W. & M. does not give the Authority. (12)

(*Mr. Otis* was of the ſame Side, but I was abſent, while he was speaking, moſt of the Time, and so have but few Notes.)

Mr. Otis. 12 Car. 2, 19. (13) 13 & 14 Car. 2, p. 56. Let a Warrant come from whence it will improperly, it is to be refuſed, and the higher the Power granting it, the more dangerous. The Exchequer itſelf was thought a Hardſhip in the firſt Conſtitution. Vid. Rapin, Vol. 1ſt, p. 178, 386, 403, 404. (14) Vol. 2, 285, (15) 375. (16)

It

(11) St. 13 & 14 Car. 2, c. 11, § 8.

(12) St. 7 & 8 W. 3, c. 22, § 6.

(13) St. 12 Car. 2, c. 19, *poſt*, 395, note.

(14) Rapin's Hiſt. of Eng. (2d ed.) London, 1732. The pages referred to in the firſt volume relate to the Court of Exchequer and proceedings therein.

(15) Where Rapin ſays, that in 1629 the privy council of Charles 1 gave orders, "impowering the officers of the cuſtoms to enter into any ſhip, veſſel, or houſe, and to ſearch in any trunk or cheſt, and break any bulk whatſoever, in default of the payment of cuſtoms. But beſides that this had never been practiſed before, another inconvenience aroſe. Theſe officers, under colour of ſearching, uſed many oppreſſions and rogueries, which cauſed the people ſtill the more to exclaim." See alſo 1 Ruſhworth's Hiſt. Coll. 665, 668, 669; 2 Ib. 8, 9.

Breaking of houſes, &c., by officers of cuſtoms in England in 1629:

Before writs of aſſiſtance were iſſued in Maſſachuſetts, the officers of the customs, "merely by the authority derived from their commiſſions, had forcibly entered warehouſes, and even dwelling-houſes, upon information that contraband goods were concealed in them." But "the people grew uneaſy under the exerciſe of this aſſumed authority," and reſiſted or ſued the officers. 3 Hutchinſon's Hiſt. Maſs. 92.

In Maſſachuſetts before 1755.

(16) The articles of impeachment againſt the Earl of Strafford in 1641, beginning with the ninth article, which charged him with iſſuing general warrants of arreſt. *S. C.* & *S. P.* in Ruſhw. Hiſt. Coll. 65, 236–240; 3 Howell's State Trial 1391, 1404, 1427.

Impeachment of Strafford.

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1761. PAXTON'S CASE.

It is worthy Conſideration whether this Writ was conſtitutional even in England; (17) and I think it plainly appears it was not; much leſs here, ſince it was not there invented till after our Conſtitution and Settlement. (18) Such a Writ is generally illegal. Hawkins, B. 2, ch. 1, Of Crim. Jur. (19) Viner, Tit. Commiſſion, A. (20) 1 Inſt. 464. (21) 29 M. (22)

Mr. Auchmuty. Bacon. (23) 4 Inſt. 100. From the Words of the Law, this Court may have the Power of the Exchequer. Now the Exchequer always had that Power; the Court cannot regard Conſequences, but muſt follow Law. As for the Argument of Non-uſer, that ends whenever the Law is once executed; and this Law has been executed in this Country, and this Writ granted, not only by the Governor, but alſo from this Court in Ch. Juſtice Sewall's Time. (24)

Mr. Gridley. This is properly a Writ of Aſſiſt-*ants*,

(17) An indication of the poſition, more diſtinctly ſtated in Otis's firſt argument in February, 1761: "An act of Parliament againſt the Conſtitution is void." *Vid. poſt*, 474, & Appendix I, J.

(18) *Qu.* Whether Otis here intended to deny that Acts of Parliament bound the Province. See Appendix I, J.

(19) 2 Hawk. c. 1, §§ 7, 8.

(20) "If commiſſion iſſues to take J. S. and his goods, without indictment, or ſuit of the party, or other proceſs, this is not good; for it is againſt the law."

(21) Probably 1 Inſt. 272 b, note to Lit. § 464: "The ſureſt conſtruction of a ſtatute is by the rule and reaſon of the common law."

(22) Probably c. 29 of Magna Charta: "*Nullus liber homo capiatur, vel impriſonetur*," *&c.* 2 Inſt. 45 *& ſeq.* See Appendix I, E.

(23) Bac. Ab. Court of Exchequer.

(24) 1755–1759, *poſt*, 403–406.

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1761.
PAXTON'S CASE.

ants, not Aſſiſtance; not to give the Officers a greater Power, but as a Check upon them. For by this they cannot enter into any Houſe, without the Preſence of the Sheriff or civil Officer, who will be always ſuppoſed to have an Eye over and be a Check upon them. Quoting Hiſtory is not ſpeaking like a Lawyer. If it is Law in England, it is Law here; it is extended to this Country by Act of Parliament. 7 & 8 Wm. & M. ch. 18. (25) By Act of Parliament they are entitled to like Aſſiſtants; (26) now how can they have like Aſſiſtants, (26) if the Court cannot grant them it; and how can the Court grant them like Aſſiſtance, if they cannot grant this Writ. Pity it would be, they ſhould have like Right, and not like Remedy; the Law abhors Right without Remedy. But the General Court has given this Court Authority to grant it, and ſo has every other Plantation Court given their Superiour Court. (27)

The Juſtices were unanimouſly of Opinion that this Writ might be granted, and ſome Time after, out of Term, it was granted. (28)

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(25) St. 7 & 8 W. 3, c. 22, § 6.

(26) Altered in the MS. from "Aſſiſtance" to "Aſſiſtants." The words of St. 7 & 8 W. 3, c. 22, § 6, are "like aſſiſtance."

(27) But it is ſaid that in other colonies the writs were refuſed. 7 John Adams's Works, 267. 4 Bancroft's Hist. U. S. 431, note.

(28) Judgment was given at the concluſion of the argument on the 18th of November, 1761. Boſton Gazette of November 23, 1761. And it appears by the court files that the writ was iſſued on the 2d of December, 1761. See App. I, C.

For a report of another caſe of public intereſt, decided ſoon after, to which Paxton was a party, ſee *Province of Maſſachuſetts Bay* v. *Paxton*, App. II.

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D. John Adams's Report of the First Argument in February 1761. (1)

GRIDLEY. — The Constables distraining for Rates. Gridley.
more inconsistent with Eng. Rts. & liberties than Writts of assistance. And Necessity, authorizes both.

Thatcher. I have searched, in all the ancient Repertories, of Precedents, in Fitzherberts Natura Brevium, and in the Register (Q. wt ye Reg. is) and have found no such Writt of assistance as this Petition prays. — I have found two Writts of ass. in the Reg. but they are very difft, from ye Writt prayd for. — (2) Thacher.

In

(1) This report, which has been once published in 2 John Adams's Works, 521–523, is by the courteous permission of Mr. *Charles Francis Adams* here reprinted as exactly as possible, with the original paragraphs, spelling, and punctuation, from the MS. notes of *John Adams*, who was present at the argument, though he was not admitted as a barrister until the 14th of November following. 2 John Adams's Works, 124 & note, 133. 10 Ib. 245. Rec. 1761, fol. 239. The only other contemporaneous report is an enlargement of this. *Vid. infra*, 477, note 39.

The elaborate narrative given more than half a century afterwards by *Adams* to *Tudor*, who printed an abstract of it as the argument of *Otis* in this case, is rather a recollection of the sentiments of the colonists between 1761 and 1766. 10 John Adams's Works, 232–362, & note. Tudor's Life of Otis, 68–86. 4 Bancroft's Hist. U. S. 417, note. *Ante*, 409, 417. It would seem to have been written by *Adams* without even referring to his own notes; for it substitutes Rastall's Entries for Registrum Brevium; and asserts that no precedent could be found of a writ of assistance to a custom house officer — in direct opposition to all the counsel in the case, as reported by himself in the text. 10 John Adams's Works, 322, 342. He seems also to attribute to *Otis* his own argument seven years later in the case of *The Liberty*, *ante*, 460, 461. 10 John Adams's Works, 348, 349.

(2) Reg. Brev. app. 46, 47; *ante*, 396 & note 4.

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1761. In a Book, intituled the Modern Practice of the Court of Exchequer there is indeed one ſuch Writt, and but one. (3)

By y^e^ Act of Pal^t^ any other private Perſon, may as well as a Cuſtom Houſe Officer, take an officer, a Sheriff, or Conſtable, &c and go into any Shop, Store &c & ſeize: any Perſon authorized by ſuch a Writt, under the Seal of the Court of Exchequer, may, not Cuſtom Houſe Officers only. — Strange. (4) — Only a temporary thing.

The moſt material Queſtion is, whether the Practice of the Exchequer, will warrant this Court in granting the ſame.

The Act impowers all the officers of y^e^ Revenue to enter and ſeiſe in the Plantations, as well as in England. 7. & 8 W^m^ 3, C. 22, § 6, gives the ſame as 13. & 14. of C. gives in England. (5) The Ground of M^r^ Gridleys arg^t^ is this, that this Court has the Power of the Court of Exchequer. — But This Court has renounced the Chancery Juriſdiction, w^h^ the Exchequer has in Caſes where either Party, is y^e^ Kings Debtor. (6) — Q. into y^t^ Caſe. (7)

In

(3) Copied in full *ante*, 398, note 10, *qu. vid.*

(4) Probably *Horne* v. *Boosey*, 2 Stra. 952, in which, notwithſtanding a condemnation of goods in the Exchequer, trover was maintained against "one not the proper officer" for ſeizing them, on the ground of his "being a tideſman, who could not enter a houſe without a writ of aſſiſtance and a peace officer, the words of his warrant being ſo reſtrained."

(5) *Vid.* Sts. 13 & 14 Car. 2, c. 11, § 5; 7 & 8 W. 3, *c.* 22, § 6; quoted in full by *Gridley arguendo*, *infra*, 480, 481.

(6) 3 Bl. Com. 45. That juriſdiction was transferred to the High Court of Chancery by St. 5 Vict. c. 5.

(7) That caſe was again cited by *Thacher* at the argument in November 1761, as "the Caſe of McNeal of Ireland & McNeal of Boſton," *ante*, 53. The only trace of it to be found in the clerk's office is the following entry on the records of February term, 1754, in Suffolk, which was held by *Sewall*, C. J., *Saltonstall*, *Lynde*, *Cushing* & *Oliver*, JJ.

"McNeal v. Brideoak." "Ann McNeal Widow and Mary McNeal Spinſter both of the "City of Dublin in the Kingdom of Ireland Debtors and Accountants "to his Majeſty Compl^t^ againſt Sarah Brideoak of Boſton in the "County

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1761.

In Eng. all Informations of uncusted (8) or prohibited Importations, are in y^e Exchequer. — So y^t y^e Custom House officers are the officers of y^t Court. — under the Eye, and Direction of the Barons.

The Writ of Assistance is not returnable. — If such seisure were brot before your Honours, youd often find a wanton Exercise of their Power.

At home, y^e officers, seise at their Peril, even with Probable Cause. — (9)

Otis.

Otis. This Writ is against the fundamental Principles of Law. — The Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle — notwithstanding all his Debts, & civil proceses of any Kind. — But

For flagrant Crimes, and in Cases of great public Necessity, the Priviledge may be incrohd (10) on. — For Felonies an officer may break, upon Proscess, and oath. — i. e. by a Special Warrant to search such an House, ~~f.s.p.~~ sworn to be suspected, and good Grounds of suspicion appearing.

Make oath cor^m Ld. Trea^er, or Exchequer, in Eng^d or a Magistrate

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"County of Suffolk in said Province Spinster commonly called Sarah "McNeal of said Boston Widow Defendant on a Bill in Equity filed "in Court Decem^r the 20th 1752 (and on file). This Bill hath been "continued from the Term of this Court for this County held at said "Boston in November A D 1752 by Adjourn^t from the third Tuesday "of August preceeding by Consent of both Partys unto this Court & "now both Partys appear'd & the said Bill is Dismist and the said "Sarah Brideoak is allowed her Costs Taxed at £ .

Rec. 1754. Fol. 150.

"The compl^t moved that they might be allowed an appeal to y^e "King in Council: Allow'd."

(8) Uncustomed. Compare enlarged report, *infra*, 482.

(9) S. P. *Shipley* v. *Redmain*, before Lord *Camden*, cited in 4 Doug. 347. *Per* Lord *Mansfield*, *Cooper* v. *Boot*, 4 Doug. 348, & 3 Esp. R. 145.

(10) This looks in the MS. like an indistinct abridgment of "incroached."

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1761. Magiſtrate here, and get a Special Warrant, for y^e^ public good, to infringe the Priviledge of Houſe. (11)

Gen^l^ Warrant to ſearch for Felonies. Hawk. Pleas Crown. (12) — every petty officer from the higheſt to y^e^ loweſt, and if ſome of 'em are ~~com̄, others~~ uncom̄ others are uncomm̄. (13) Gouv^t^ Juſtices uſed to iſſue ſuch perpetual Edicts. (Q, with w^t^ particular Reference?) (14)

But one Precedent, and y^t^ in y^e^ Reign of C. 2 when Star Chamber Powers, and all Powers but lawful & uſeful Powers were puſhed to Extremity. — (15)

The authority of this Modern Practice of the Court of Exchequer. — it has an Imprimatur. (16) — But w^t^ may not

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(11) *Vid.* St. 12 Car. 2, c. 19, quoted *ante*, 397, note 5.

(12) 2 Hawk. c. 13, § 10 — that such a warrant is illegal.

(13) The MS. is very obſcure here; but this ſeems to be the true reading, and to indicate that Adams, heſitating whether to put "commiſſioned" or "uncommiſſioned" firſt, accidentally repeated the latter. This interpretation makes the paſſage accord with the argument urged by *Thacher*, *supra*, 469, by *Otis*, *infra*, 475, and in the Boſton Gazette of February 4, 1762, *post*, F. — that by the words of St. 13 & 14 Car. 2, "any perſon" might execute the writ.

(14) Probably Dalton's Juſtice, 401, 402. See 3 Hutchinſon's Hiſt. Maſs. 93; 2 Minot's Hiſt. Maſs. 94; 2 John Adams's Works, 524. *Otis* admitted that ſpecial Writs of Aſſiſtance, to ſearch ſpecified places, might be granted upon information on oath. Ib.

(15) The one precedent of iſſuing general warrants in the time of Charles 2 was by Chief Juſtice *Scroggs*, for which he was afterwards impeached by the Houſe of Commons. Vid. 8 Howell's State Trials, 192, 193, 200; 19 Ib. 1071, 1072. In the extended ſketch of *Otis's* argument, the positions taken in this and the following paragraph are confuſed thus: "Not more than one inſtance can be found of it in all our law-books; and that was in the zenith of arbitrary power, viz. in the reign of Charles 2, when Star-Chamber powers were pushed to extremity by ſome ignorant clerk of the Exchequer." 2 Minot's Hiſt. Maſs. 98. 2 John Adams's Works, 525. It is hard to underſtand how ſuch extraordinary powers could be wielded by a clerk of the Exchequer; and the book of that ignorant clerk was not published until the laſt year of the reign of James 2; yet it is poſſible that it was the precedent therein to which *Otis* referred. *Vid. ante*, 398, notes 7, 8.

(16) Vid. *infra*, 476, & note 35.

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not have? — It may be owing to ſome ignorant Clerk of 1761.
y^e Exchequer. MARCH Fifteenth 1761

But all Precedents and this am'g y^e Reſt are under y^e Control of y^e Principles of Law. Ld. Talbot. better to obſerve the known Principles of Law y^n any one Precedent, tho in the Houſe of Lords. — (17)

As

(17) The caſe here referred to is evidently *Clare* v. *Clare*, where Lord *Talbot* diſregarded the decisions of Lord *Cowper* in *Higgins* v. *Dowler*, 2 Vern. 600, and Sir *Joſeph Jekyll* in *Stanley* v. *Leigh*, (ſince reported in 2 P. W. 686,) ſaying, "I think it much better to ſtick to the known general rules, than to follow any one particular precedent which may be founded on reaſons unknown to us;" and, after citing a deciſion of the Houſe of Lords in favor of his own concluſion, added, "Even had it not been in the Houſe of Lords, I ſhould have thought myſelf bound to go according to the general and known rules of law." Cas. temp. Talb. 26, 27. But the authority of the two caſes doubted by Lord *Talbot* has been ſince fully eſtabliſhed. Williams's note, Ib. 27. Cox's note to *Higgins* v. *Dowler*, 1 P. W. 98.

It is ſtill a vexed queſtion in England whether the Houſe of Lords can overrule or diſregard a previous deciſion of its own in another caſe; but it is well ſettled that a final deciſion of the Houſe of Lords is concluſive in the caſe in which it is made, and cannot be recalled or ſet aſide, even at the ſame term, except for fraud, or by a ſpecial Act of Parliament. *Bright* v. *Hutton*, 3 H. L. Cas. 388, 392. *Tommey* v. *White*, 3 Ib. 69–71, & 4 Ib. 334. *Wilſon* v. *Wilſon*, 5 Ib. 58, 63, 71. *Thelluſſon* v. *Rendleſham*, 7 Ib. 529, 530. *Attorney General* v. *Dean & Canons of Windſor*, 8 Ib. 381, 391–393, 459.

In the United States, the line between the legiſlative and judicial departments is better defined. The Supreme Court of the United States does not hold itſelf bound by its own erroneous deciſion in another caſe. *Geneſee Chief* v. *Fitzhugh*, 12 How. 456. *Louiſville, Cincinnati & Charleſton Railroad* v. *Letſon*, 2 Ib. 555. *Ohio & Miſſiſſippi Railroad* v. *Wheeler*, 1 Black, 296. And a rehearing may be granted at the ſame term at which judgment has been entered. *United States* v. *Knight*, Ib. 490. In ſome of the Colonies the legiſlature habitually exerciſed the power of granting reviews and new trials. St. 1642, Maſs. Col. Laws (ed. 1672) 152; Anc. Chart. 199. *Draper* v. *Bicknell*, *ante*, 166, note. Governor Hutchinſon's Speech to the General Court, April 8, 1772, Bradford's State Papers, 314. *Calder* v. *Bull*, 3 Dall. 392, 393, 395, 398. And this practice was continued in Maſſachuſetts and ſome of the other States even after the adoption of written Conſtitutions, eſtabliſhing diſtinct departments of government. But it is now well ſettled that the legiſlature cannot

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1761. As to Acts of Parliament. an Act againſt the Conſtitution is void: an Act againſt natural Equity is void: and if an Act of Parliament ſhould be made, in the very Words of this Petition, (18) it would be void. The Executive Courts (19) muſt paſs ſuch Acts into diſuſe — 8. Rep. 118. from Viner. (20) — Reaſon of ye Com̄ Law to control an Act of Parliament. — Iron Manufacture. noble Lord's Propoſal, yt we ſhould ſend our Horſes to Eng. to be ſhod. — (21)

If an officer will juſtify under a Writ he muſt return it. 12th Mod. 396. — perpetual Writ. (22)

Stat.

ſet aſide a judgment or grant a new trial in a particular caſe. *Holden* v. *James*, 11 Maſs. 396. *Denny* v. *Mattoon*, 2 Allen, 379. *Lewis* v. *Webb*, 3 Greenl. 326. *Durham* v. *Lewiſton*, 4 Greenl. 140. *Merrill* v. *Sherburne*, 1 N. H. 199. *Taylor* v. *Place*, 4 R. I. 339. *People* v. *Supervisors of New York*, 16 N. Y. 432. *De Chaſtellux* v. *Fairchild*, 15 Penn. State R. 18.

(18) It would ſeem from this expreſſion, as well as from the enlarged report of *Gridley's* argument, *infra*, 478, that *Adams* ſuppoſed a written petition to have been filed in this case. But it is more probable that the counſel referred to the form of petition which had been previouſly uſed; for there does not appear to have been any application in writing for the writ at this time, except the memorial of the Surveyor General in behalf of himſelf and all his officers. *Ante*, 413, 418, & note.

(19) The term "executive courts" was commonly applied to Courts of Juſtice, as diſtinguiſhed from the Legiſlature or "General Court." *Ante*, 200, 245, 280, 307. Quincy's Life of Quincy, 68. 2 John Adams's Works, 135, 155, 194, 234, 235. 3 Ib. 481. 3 Hutchinſon's Hiſt. Maſs. 505. 1 Doug. Hist. N. A. 517, 520.

(20) *Bonham's caſe*, 8 Rep. 118. Vin. Ab. Statute, E. 6, pl. 15. *Vid. poſt*, I.

(21) Perhaps in the debate in 1750 on St. 23 G. 3, c. 29, which prohibited the erection or maintenance in the Colonies of any rolling or ſlitting mill, plating forge, or furnace for making ſteel. See 1 Minot's Hiſt. Maſs. 170. *John Adams*, in a letter to Tudor of Auguſt 21, 1818, makes *Otis*, in 1761, quote, with this, the ſimilar remark "that a hobnail ſhould not be manufactured in America" — which was in fact a threat of *Chatham's* in 1766, in caſe the Americans should deny the power of Parliament over their trade. 10 John Adams's Works, 350. 4 Bancroft's Hiſt. U. S. 417, note. 5 Ib. 387.

(22) "He, that has not ſhewed to the Court that he hath done his duty in what the proceſs of the Court required him, shall not be juſtified

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Stat. C. 2. We have all as good Rt to inform as Cuſtom Houſe officers (23) — & every Man may have a general, irreturnable Commiſſion to break Houſes. — 1761.

By 12. of C. on oath before L^d Treaſurer, Barons of Exchequer, or Chief Magiſtrate to break with an officer. (24) — 14^th C. to iſſue a Warrant requiring ſheriffs &c to aſſiſt the officers to ſearch for Goods not entrd, or prohibitd (25); 7 & 8^th W. & M. gives Officers in Plantations ſame Powers with officers in England. — (26)

Continuance of Writts and Proſceſſes, (27) proves no more nor ſo much as I grant a ſpecial Writ of aſſ. on ſpecial oath, for ſpecl Purpoſe. —

Pew indorſd Warrant to Ware. — (28) Juſtice Walley

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fied by the proceſs." *Freeman* v. *Bluet*, 12 Mod. 396. In that caſe, the precept directed the officer to return it. *Otis* argued that the Writ of Aſſiſtance, not being returnable, was perpetual. 2 Minot's Hiſt. Maſs. 95. 2 John Adams's Works, 524.

(23) Compare *ſupra*, 469, 472, & note 13.

(24) St. 12 Car. 2, c. 19.

(25) St. 13 & 14 Car. 2, c. 11, § 5.

(26) St. 7 & 8 W. & M. c. 22, § 6.

(27) By St. 1 Anne, St. 1, c. 8, § 5, relied on by *Gridley*, *infra*, 481.

(28) In the fuller report of Otis's ſpeech this illuſtration is thus introduced: "This wanton exerciſe of this power is not a chimerical ſuggeſtion of a heated brain. I will mention ſome facts. Mr. Pew had one of theſe writs, and when Mr. Ware ſucceeded him, he endorſed the writ over to Mr. Ware: so that these Writs are negotiable from one officer to another; and ſo your Honours have no opportunity of judging the perſons to whom this vaſt power is delegated." 2 Minot's Hiſt. Maſs. 96, 97. 2 John Adams's Works, 524, 525.

In April 1860, the ſergeant-at-arms of the United States Senate indorſed over to another perſon a precept, addreſſed to himſelf by name, to arreſt a witneſs who had refuſed to appear before a committee of the Senate; and the witneſs was arreſted by the deputy, but diſcharged by Chief Juſtice *Shaw*, with the concurrence of the other judges of the Supreme Judicial Court of Maſſachuſetts, upon the ground that the deputation was invalid. *Sanborn* v. *Carlton*, 15 Gray. In June 1860, the Committee on the Judiciary of the Senate, through Mr. *Bayard* of Delaware, their Chairman, made a report on this ſubject, controverting this deciſion, and accompanied by a bill expreſſly conferring on the ſergeants-at-arms of the Senate and Houſe of Repreſentatives

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1761. ley ſearc'd Houſe. (29) Law Prov. (30) Bill in Chancery. — this Court confined their Chancery Power to Revenue &c. (31)

Gridley. By the 7. & 8 of W^m C. 22. § 6^th — This authority, of breaking and entering Ships, Warehouſes Cellars &c given to the Cuſtom Houſe officers in England by the Statutes of the 12^th and 14^th of Charl. 2^d, is extended to the Cuſtom Houſe officers in y^e Plantations : (32) — and by the Statute of the 6^th of Anne, (33) ~~this~~ Writts of Aſſiſtance are continued, in Company with all other legal Proſceſſes for 6 months after the Demiſe of the Crown. — Now what this Writ of aſſiſtance is, we can know only by Books of Precedents. — And we have produced, in a Book intituld the modern Practice of the Court of Exchequer, a form of ſuch a Writ of aſſiſtance to the officers of the Cuſtoms. (34) The Book has the Imprimatur of Wright C. J. of

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atives the power to ſerve or execute by deputy the mandates, precepts, and warrants of their reſpective houſes. But Congreſs did not paſs the bill.

(29) "Another inſtance is this: Mr. Juſtice Walley had called this ſame Mr Ware before him by a conſtable to anſwer for a breach of Sabbath-day acts, or that of profane ſwearing. As ſoon as he had finished, Mr. Ware aſked him if he had done. He replied, Yes. Well then, ſaid Mr. Ware, I will shew you a little of my power. I command you to permit me to ſearch your houſe for uncuſtomed goods; and went on to ſearch his houſe from the garret to the cellar; and then ſerved the conſtable in the ſame manner." Otis's argument, as reported in 2 Minot's Hiſt. Maſs. 97, and 2 John Adams's Works, 525.

(30) Probably Prov. St. 11 W. 3, defining the juriſdiction of the Court, quoted by *Gridley*, *infra*, 479.

(31) *Vid ſupra*, 470, & notes 6 & 7.

(32) For theſe ſtatutes, *vid. ante*, 397, note 5; *infra*, 479, 480.

(33) St. 1 Anne, St. 1, c. 8, § 5, the context of which however is quite as conſiſtent with the ſuppoſition that only the ordinary writs of aſſiſtance, iſſuing out of chancery, were intended — "That no commiſſion of aſſociation, writ of admittance, or *ſi non omnes*, original writ, writ of *niſi prius*, writ of aſſiſtance, nor any commiſſion, proceſs, or proceedings whatſoever, in or iſſuing out of any Court of equity," &c. &c. should be determined by the demiſe of the King.

(34) Printed *ante*, 398, note 10.

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1761.

of the K.'s B. (35) w^h is as great a ſanction as any Books of Precedents ever have. altho Books of Reports are uſually approved by all the Judges (36) — and I take Brown the author of this Book to have been a very good Collector of Precedents. — I have two Volumes of Precedents of his Collection, (37) w^h I look upon as good as any, except Coke & Raſtal.

And the Power given in this Writ is no greater Infringement of our Liberty than the Method of collecting Taxes in this Province. — (38)

Every Body knows that the Subject has the Priviledge of Houſe only againſt his fellow Subjects, not vs y^e K. either in matters of Crime or fine. (39)

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(35) The value of the Imprimatur of *Wright, C. J.* may be judged from theſe facts: "He was ſo poor a lawyer, that he could not give an opinion on a written caſe, but uſed to bring ſuch caſes, as came to him, to his friend Mr. *North*, and he wrote the opinion on a paper, and the lawyer copied it, and ſigned under the caſe as if it had been his own." 2 North's Lives, (ed. 1826) 94. At the inſtance of Chief Juſtice *Jeffreys*, he was appointed by *James* 2 a Baron of the Exchequer, notwithſtanding the remonſtrances of Lord Keeper *Guilford* that he was "the moſt unfit perſon in England to be made a judge," "a dunce, and no lawyer," and "of no truth nor honeſty." Ib. 96, 97. By the ſame influence he was afterwards ſucceſſively advanced to be a Judge of the King's Bench, Chief Juſtice of the Common Pleas, and Chief Juſtice of England; and ſignalized the laſt appointment by ordering a capital execution to take place, according to the King's will, in a different county from the conviction, which Chief Juſtice Herbert, who was removed to make way for him, and another Judge who "had his *quietus* the night before," had juſt decided could not be done. 3 Mod. 71, 124, 125. For Lord *Camden's* opinion of him, see 19 Howell's State Trials, 989, 990, 991, 993.

Character of Chief Juſtice Wright.

(36) See Wallace's Reporters, (3d ed.) 34, & note.

(37) Probably W. Brown's "*Praxis Almæ Curiæ Cancellariæ*," 2 vols., London, 1704.

(38) Prov. Sts. 4 & 10 G. 2, Anc. Chart. 471, 512.

(39) These notes, the handwriting of which exhibits the haſte with which they were made, are followed by more diſtinctly written "extracts from the Acts of Parl^t" and "Prov. Law, Page 114" — being the ſame provisions which are incorporated into the extended ſketch of *Gridley's*

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Extended report from Keith MS.

Gridley's argument, *infra*, 479, 480; and by the forms of petition and writ printed *ante*, 402 & note, 404.

A more extended ſketch of this argument is contained in a manuſcript book entitled on the fly leaf "Iſrael Keith's Pleadings, Arguments, Extracts, &c.," in the poſſeſſion of *John G. Newell*, Eſqr., of Pittsford in the State of Vermont, who has kindly furniſhed the writer with the following information: "From what I can learn, *Iſrael Keith* was born in Boston; educated at Cambridge, Maſs.; was for a short time in the practice of the law in Boſton; and in 1798 or near that time he moved to this place, where he lived and died. He was 67 years of age. He died 5th June 1819, as appears from the record upon his monument. Col. *Keith* was a gentleman of the old ſchool; while living, ſuſtained the reputation of ſtrict integrity and correct morals. It was ſaid of him, that becauſe he could not be at the head of his profeſſion, he gave up the practice of the law, and left for the wilderneſs of Vermont. At one time he was aid to General *Waſhington* during the American Revolution. I have underſtood that while he was ſtudying his profeſſion, he took the notes of Mr. *Otis's* ſpeech. It is in Col. *Keith's* handwriting, and the manuſcript has been in my poſſeſſion ſince 1825, and before that time it was in poſſeſſion of his widow, Mrs. *Caroline Keith*. She died 23d May 1834, and was buried in this town." It may be added that *Iſrael Keith* appears in the Harvard College Catalogue among the graduates of 1771, and was admitted to practice as an attorney of the Superior Court of Judicature at March term 1780 in Suffolk, (Rec. 1780, fol. 155,) and is mentioned as an attorney of the Supreme Judicial Court in the Boſton Regiſters from that time until 1791, but not afterwards.

The book itſelf contains ſufficient evidence that Mr. *Keith* was a careful ſtudent of law, and had acceſs to ſome of *John Adams's* materials. Besides other curious caſes, opinions and extracts, it contains Governor *Pownall's* meſſage on Courts of Probate (*poſt*, Appendix, III.); the caſe of *Glover* v. *Le Teſtue*, decided in 1770, (printed *ante*, 225, note, from *Adams's* original notes); "Lord C. J. *Hale's* advice for the ſtudy of the Common Law" (being one long paragraph out of his preface to Rolle's Abridgment, reprinted 1 Collect. Jurid. 276, 277); "Lord C. J. *Reeve's* Advice to his nephew on the ſtudy of the Law" (ſince published by Mr. Hargrave from a leſs perfect copy in 1 Collect. Jurid. 79); a letter from Dr. *Dickins*, Regius Profeſſor of Law at Cambridge, to Mr. *Gridley* on the books neceſſary to a knowledge of the Civil Law; and a letter from Mr. *Gridley* to Judge *Lightfoot* of the Admiralty Court in Rhode Iſland on the ſtudy of the Admiralty Law. The four laſt were recommended in 1758 by *Gridley* to *Adams*, when a ſtudent at law. 2 John Adams's Works, 46.

Mr. *Keith's* cannot be an original report of the argument upon the Writs of Aſſiſtance; for he was only nine years old at the time of that argument. And the miſtakes of "2 W. 3" for "11 W. 3," and "Chance

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"Chance of Juriſdiction" for "Chancery Juriſdiction" (*infra*, 480, 481,) are not thoſe of one who had heard the argument, though eaſily made in copying.

But there are many reaſons for preſuming that it is a copy of a ſketch made by *John Adams*, from which the ſpeech of Otis, printed in 2 Minot's Hiſt. Maſs. 91–99, and, with ſome variations, in 2 John Adams's Works, 523–525, formed a part. *Otis's* argument is given, almoſt word for word, as in *Minot's* Hiſtory; and the arguments of *Gridley* and *Thacher* are evidently reported by the ſame hand, and correſpond with the abſtracts and quotations of parts of them by Minot, and in a remarkable degree with *Adams's* original notes. *Adams*, in his diary of the ſpring of 1761, quotes ſome one as praiſing the ſtyle of his "abſtract of the argument for and againſt the Writs of Aſſiſtance," and eſpecially of *Gridley's*, in a way that could hardly have been applied to his firſt rough notes, printed in the text. 2 John Adams's Works, 124, 125. And *Adams* himſelf many years after ſaid that the more extended notes printed by *Minot* were his own, except ſome paſſages which he pointed out. Ib. 525–527. A compariſon of his report with thoſe preſerved by *Minot* and *Keith* tends to the conviction that in repudiating thoſe paſſages he was guided by his taſte rather than his notes or his memory. The form of writ and petition preſerved by *Adams* correſpond with thoſe quoted by *Gridley*, according to this report. *Ante*, 403, note 4; *infra*, 480.

The antiquity and accuracy of the report copied by Mr. *Keith* are curiouſly corroborated by the following order, entered at the end of the Docket of Auguſt term 1759 of the Superior Court of Judicature in Suffolk:

Order of Court as to Special Matters.

"N. B. The Court determin'd that for the future the ſpecial pleadings ſhall come on the ſecond Tueſday in each term & continue from day to day till finish'd, & to allow the Bar the preceding Monday to prepare therefor."

In Mr. *Keith's* manuſcript the introductory ſtatements and the reports of the arguments of *Gridley* and *Thacher* (which have never been printed) are as follows:

"Boſton Superior Court February 1761.

"On the ſecond Tueſday of the Court's ſitting, appointed by the rule of the Court for argument of ſpecial matters, came on the diſpute on the petition of Mr Cockle & others on the one side, and the Inhabitants of Boſton on the other, concerning Writs of Aſſiſtance. Mr *Gridley* appeared for the former, Mr *Otis* for the latter. Mr *Thacher* was joined with him at the desire of the Court.

Gridley's argument.

"Mr *Gridley*. I appear on the behalf of Mr Cockle & others, who pray 'that as they cannot fully exerciſe their Offices in ſuch a manner as his Majeſty's Service and their Laws in ſuch caſes require, unleſs your Honors who are veſted with the power of a Court of Exchequer for this

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1761. this Province will pleaſe to grant them Writs of Aſſiſtance. They therefore pray that they & their Deputies may be aided in the Execution of their Offices by Writs of Aſſiſtance under the Seal of this Court and in legal form, & according to the Uſage of his Majeſty's Court of Exchequer in Great Britain.'

" May it pleaſe your Honors, it is certain it has been the practice of the Court of Exchequer in England, and of this Court in this Province, to grant Writs of Aſſiſtance to Cuſtom Houſe Officers. Such Writs are mentioned in ſeveral Acts of Parliament, in ſeveral Books of Reports; & in a Book called the Modern Practice of the Court of Exchequer, We have a Precedent, a form of a Writ, called a Writ of Aſſiſtance for Custom houſe Officers, of which the following a few years past to Mr Paxton under the Seal of this Court, & tested by the late Chief Justice Sewall is a literal Tranſlation." [Here follows the writ printed *ante*, 404.]

" The first Queſtion therefore for your Honors to determine is, whether this practice of the Court of Exchequer in England (which it is certain, has taken place heretofore, how long or short a time ſoever it continued) is legal or illegal. And the ſecond is, whether the practice of the Exchequer (admitting it to be legal) can warrant this Court in the ſame practice.

" In anſwer to the firſt, I cannot indeed find the Original of this Writ of Aſſistance. It may be of very antient, to which I am inclined, or it may be of modern date. This however is certain, that the Stat. of the 14th Char. 2nd has eſtabliſhed this Writ almoſt in the words of the Writ itſelf. 'And it shall be lawful to & for any perſon or perſons *authoriſed by Writ of Aſſiſtance under the ſeal of his Majeſty's Court of Exchequer* to take a Conſtable, Headborough, or other public Officer, inhabiting near unto the place, & in the day time to enter & go into any houſe, Shop, Cellar, Warehouſe, room, or any other place, and in caſe of Reſiſtance, to break open doors, Cheſts, Trunks & other Package, & there to ſeize any kind of Goods or Merchandize whatever prohibited, and to put the ſame into his Majeſty's Warehouſe in the Port where Seiſure is made.'

St. 13 & 14 Car. 2, c. 11, § 5.

" By this act & that of 12 Char. 2nd all the powers in the Writ of Aſſiſtance mentioned are given, & it is expreſſly ſaid, the perſons shall be authoriſed by Writs of Aſſistance under the ſeal of the Exchequer. Now the Books in which we should expect to find theſe Writs, & all that relates to them are Books of Precedents, & Reports in the Exchequer, which are extremely ſcarce in this Country; we have one, & but one that treats of Exchequer matters, and that is called the 'Modern practice of the Court of Exchequer,' & in this Book we find one Writ of Aſſiſtance, tranſlated above. Books of Reports have commonly the Sanction of all the Judges, but books of Precedents never have more than that of the Chief Juſtice. Now this Book has the Imprimatur of Wright, who was Chief Juſtice of the King's Bench, and

St. 12 Car. 2, c. 19, § 1.

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and it was wrote by Brown, whom I eſteem the beſt Collector of Precedents; I have Two Volumes of them by him, which I eſteem the beſt except Raſtall & Coke. But we have a further proof of the legality of theſe Writs, & of the ſettled practice at home of allowing them; becauſe by the Stat. 6th Anne which continues all Proceſſes & Writs after the Demiſe of the Crown, *Writs of Aſſiſtance are continued among the Reſt*.

St. 1 Anne, St. 1, c. 8, § 5.

"It being clear therefore that the Court of Exchequer at home has a power by Law of granting theſe Writs, I think there can be but little doubt, whether this Court as a Court of Exchequer for this Province has this power. By the Statute of the 7th & 8th W. 3d, it is enacted 'that all the Officers for collecting and managing his Majeſty's Revenue, and inſpecting the Plantation Trade in any of the ſaid Plantations, ſhall have the ſame powers &c. as are provided for the Officers of the Revenue in England; alſo to enter Houſes, or Warehouſes, to ſearch for and ſeize any ſuch Goods, & that the *like Aſſiſtance* ſhall be given to the ſaid Officers as is the Cuſtom in England.'

Stat. 7 & 8 W. 3, c. 23, § 6.

"Now what is the Aſſiſtance which the Officers of the Revenue are to have here, which is like that they have in England? Writs of Aſſiſtance under the Seal of his Majeſty's Court of Exchequer at home will not run here. They muſt therefore be under the Seal of this Court. For by the law of this Province 2 W. 3d Ch. 3 'there ſhall 'be a Superior Court &c. over the whole Province &c. who ſhall have 'cognizance of all pleas &c. & generally of all other matters, as fully '& [amply] to all intents & purpoſes as the Courts of King's Bench, 'Common Pleas & *Exchequer* within his Majeſty's Kingdom of Eng-'land have or ought to have.'

Prov. St. 11 W. 3.

"It is true the common privileges of Engliſhmen are taken away in this Caſe, but even their privileges are not ſo in caſes of Crime and fine. 'Tis the neceſſity of the Caſe and the benefit of the Revenue that juſtifies this Writ. Is not the Revenue the ſole ſupport of Fleets & Armies abroad, & Miniſters at home? without which the Nation could neither be preſerved from the Invaſions of her foes, nor the Tumults of her own Subjects. Is not this I ſay infinitely more important, than the impriſonment of Thieves, or even Murderers? yet in theſe Caſes 'tis agreed Houſes may be broke open.

"In fine the power now under conſideration is the ſame with that given by the Law of this Province to Treaſurers towards Collectors, & to them towards the ſubject. A Collector may when he pleaſes diſtrain my goods and Chattels, and in want of them arreſt my perſon, and throw me instantly into Goal. What! ſhall my property be wreſted from me! — ſhall my Liberty be deſtroyed by a Collector, for a debt, unadjudged, without the common Indulgence and Lenity of the Law? So it is eſtabliſhed, and the neceſſity of having public taxes effectually and ſpeedily collected is of infinitely greater moment to the whole, than the Liberty of any Individual."

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Thacher's argument.

" *Thacher.* In obedience to the Order of this Court I have ſearched with a good deal of attention all the antient Reports of Precedents, Fitz. N. Brev. & the Register, but have not found any ſuch Writ as this Petition prays. In the latter indeed I have found Two Writs which bear the Title of Brev. Aſſiſtentice, but theſe are only to give poſſeſſion of Houſes &c. in caſes of Injunctions & Sequeſtration in Chancery. By the Act of Parliament any private Perſon as well as Cuſtom Houſe Officer may take a Sheriff or Conſtable & go into any Shop &c. & ſeize &c. (here M^r^ Thacher quoted an Authority from Strange which intended to ſhew that Writs of Aſſiſtance were only temporary things.)

" The moſt material queſtion is whether the practice of the Exchequer is good ground for this Court. But this Court has upon a ſolemn Argument, which laſted a whole day, renounc'd the Chance of [Chancery] Juriſdiction which the Exchequer has in Caſes where either party is the King's Debtor.

" In England all Informations of uncuſtomed or prohibited Goods are in the Exchequer, ſo that the Cuſtom Houſe Officers are the Officers of that Court under the Eye & Direction of the Barons & ſo accountable for any wanton exerciſe of power.

" The Writ now prayed for is not returnable. If the Seizures were ſo, before your Honors, and this Court ſhould enquire into them you'd often find a wanton exerciſe of power. At home they ſeize at their peril, even with probable Cauſe."

Otis's argument.

The extended ſketch of *Otis's* argument expreſſes his legal poſitions no better than *Adams's* original notes, reprinted in the text, and has been twice printed already, once in 2 Minot's Hiſt. Maſs. 91–99, and again, with little alteration, in 2 John Adams's Works, 523–525. *Vid. ſupra*, 478, 479. It is therefore omitted here. The Keith MS. is evidently from a more perfect copy; but the variations are trifling. The moſt important one is in the punctuation of the following paſſage, which is thus in the Keith MS.: " I have taken more pains in this cauſe than I ever will take again. Although my engaging in this & another popular Cauſe has raiſed much Reſentment, yet I think I can ſincerely declare that I cheerfully ſubmit myſelf to every odious name for Conſcience ſake." In the works of *Minot* and *Adams* there is a comma after " again," and a period after " Reſentment," followed by " But." " Another popular cauſe " was doubtleſs the controverſy between *the Province & Paxton*, *poſt*, Appendix, II.

Cur. adv. vult.

The report in the Keith MS. concludes thus: " The Court ſuſpended the abſolute determination of the matter." This accords with *Hutchinſon's* accounts. *Ante*, 415, note.

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