Entick v. Carrington

19 Howell's State Trials 1029 (1765)

The Case of Seizure of Papers, being an Action of Trespass by JOHN ENTICK, against NATHAN CARRINGTON and three other Messengers in Ordinary to the King, Court of Common Pleas, Michaelmus Term: George III A.D. 1765

In Trespass

The plaintiff declares that the defendants on the 11th day of November in the year of our lord 1762, at Westminster in Middlesex, with force and arms broke and entered the dwelling-house of the plaintiff in St. Dunstan, Stepney, and continued there four hours without his consent and against his peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, etc. thereto affixed, and broke open the boxes, chests, drawers, etc. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the roooms, etc., in his dwelling house, and all the boxes, etc., so broke open, and read over, pried into and examined all the private papers, books, etc. of the plaintiff there found, whereby the secret affairs, etc., of the plaintiff became wrongfully discovered and made public and took and carried away 100 printed charts, 100 printed in pamphlets, etc. etc. of the plaintiff there found, and other 100 charts etc etc took and carried away, to the damage of the plaintiff 2000*l*

The defendants plead 1st not guilty to the whole declaration, whereupon issue is joined. 2dly, as to the breaking and entering the dwelling house, and continuing four hours, and all that time disturbing him in the possession thereof, and breaking open the doors to the rooms, and breaking open the boxes, chests, drawers, etc of the plaintiff in his house, and searching and examining all the rooms, etc. in his dwelling house, and all the boxes, etc so broke open, and reading over, prying into, and examining the private papers, books, etc of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration first mentioned there found, and also as to taking and carrying away the goods and chattels in the declaration last mentioned, the defendants say, the plaintiff ought not to have his action against them, because they say, that before the supposed trespass…because the earl of Halifax was, and yet is on of the lords of the king's privy council, and one of his principal secretaries of state, and that the earl before the trespass…made his warrant under this hand and seal directed to the defendants, by which the earl did in the king's name authorize and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers intitled, "the Monitor or British Freeholder…printed to J. Wilson and J. Fell in Paternoster Row," containing gross and scandalous reflections and invectives upon his majesty's government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend an bring together with his books and papers in safe custody before the earl of Halifax to be examined concerning the premisses, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all other his majesty's officers civil and military, and loving subjects, whom it might concern, were to be aiding and assisting to them the defendants, as there should be occasion. And the defendants further say, that afterwards and before the trespass on the same day and year, the warrant was delivered to them to be executed, and thereupon they on the same day and year…about eleven o'clock, being the said time when by virtue of the and for the execution of the said warrant, entered the plaintiff's dwelling house, the outer door being open, to search for and seize the plaintiff and his books and papers in order to bring him and them before the earl of Halifax, according to the warrant; and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, etc there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at Westminster, where the said earl then and long before transacted business of his office, and delivered the same to Lovel Stanhope, esq. Who then was and yet is an assistant to the earl in his office of secretary of state, to be examined, and who was then authorized to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards, on the 17th of November, 1762 was discharged out of their

custody; and in searching for the books an papers of the plaintiff the defendants did necessarily read over, pry into, and examine the said private papers, books etc of the plaintiff…then found in his house; and because at the said time when, the said doors in the house leading to the rooms therein, and the boxes, chests, etc were shut and fastened so that the defendants could not search and examine, the rooms, boxes, chests for the necessary searching and examining the same, did then necessarily break and force open the doors, boxes, chests, etc. as it was lawful for them to do; and on the occasion the defendants necessarily stayed in the house of the plaintiff for the four hours, and unavoidably during that time disturbed him in the possession thereof, they the defendants doing as little damage to the plaintiff as they possibly could, which are the same breaking and entering the house of the plaintiff…whereof the plaintiff above complains; and wherefore they pray judgment.

This cause was tried at Westminster Hall before the lord chief justice, [Lord Camden] when the jury found a special verdict to the following purport.

The jurors upon their oath say, as to the issue first joined (to the plea of guilty to the whole trespass) that as to the com9ng with force and arms, and also the first trespass…except the breaking and entering the dwelling house of the plaintiff and continuing therein for the space of four hours, and all that time disturbing him in his possession thereof, , and searching several rooms, and in one bureau on writing desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found, in the declaration complained of, the said defendants are not guilty.

As to the breaking and entering the dwelling house (alone excepted) the jurors on their oath say, that at the time of making the following information, and before and until and at the time of granting the warrant the earl of Halifax was, and still is one of the lords of the king's privy council, and one of his principled secretaries of state, and that before the time in the declaration, viz. on the 11th of October 1762…one Jonathon Scott of London, bookseller,and publisher, came before Edward Weston, esq. An assistant to the said earl, and a justice of peace for the city and liberty of Westminster, and there made and gave information in writing to and before Edward Weston against John Entick and others, the tenor which information now produced and given in evidence to the jurors followeth in these words and figures, to wit:

> The voluntary information of J.Scott. In the year 1755, I proposed setting up a paper, and mentioned it to Dr. Shebbeare, and in a few days one Arthur Beardmore an attorney at law sent for me, hearing of my intention, and desired I would mention it to Dr. Shebbeare, that he Beardmore and some other o his friends had n intention of setting up a per in this city. Shebbeare met Beardmore, and myself nd Entick (the plaintiff) at the Horn Tavern and agreed upon the setting up the paper by the name of the Monitor, and that Dr. Shebbeare and Mr. Entick should have 200*l* a year each….The monies have been continued to Beardmore and Entick ever since, as I suppose by subscription, as I supposed, raised I know not by whom. It has been continued in these hands ever since….
>
> The above information waas given voluntarily before me, and signed in my presence by Jonathon Scott. Signed/ J. Weston

The jurors further say, that on the 6th of November 1762, the information was shown to the earl of H and the earl did then make and issue his warrant directed to the defendants, then and still being the king's messengers, and duly sworn to that office, for apprehending the plaintiff…in the following words and figures

> George Montagu Dunk, earl of Halifax, viscount Sunbury, and baron Halifax one of the lords of his majesty's honorable privy council, lieutenant general of his majesty' forces, lord lieutenant general and general governor of the kingdom of Ireland, and principal secretary of state, these are in his majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author, or one concerned in writing of several weekly very seditious papers, entitled the Monitor, or British Freeholder…which contains gross and scandalous reflections and invectives upon his majesty's government, and upon both Hoses of parliament; and him, having found you are to seize and apprehend, and to bring, together with his books and papers, in safe custody before me to be examined concerning the premises, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of

peace, constables…and all loving subjects whom it may concern, are to be aiding and assisting to you as there shall be occasion.; and for so doing this shall be your warrant.

Given at St. James's the 6th day of November 1762, in the third year of his majesty's reign, Dunk Halifax. To Nathan Carrington, James Watson, Thomas Ardran, and Robert Blackmore, four of the king's messengers in ordinary.

And the jurors further say, the earl caused this warrant to be delivered to the defendants to be executed. And that the defendants afterwards on the 11th of November 1762, at 11 o'clock in the day time, by virtue and for execution of the warrant, but without any constable take by them to their assistance, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there, and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing desk, and several drawers of the plaintiff there in order to find and seize the same, and bring them along within the plaintiff before the earl according to the warrant, and did then find and seize there some of the books and papers of the plaintiff, and perused and read over several other of his papers which they found in the house, and chose to read and that they dnecessarily continued ther in the execution of the warrant four hours, and disturbed the plaintiff in his house, and hten tookn him and his books and papers from thence, aand forthwith gave notice at the office of the secretary state…unto Lovel Stanhope…an assistant to the earl in the examination of persons, books, and papers seized by virtue of warrants issued by secretaries of state, and also then and still being a justice of peace for the city and liberty of Westminster and county of Middlesex, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined, and they then and there at the instance of Lovel Stanhope delivered the books and papers to him.

And the jurors further say, on the 13th of April of the first year of the king, his majesty, by his letters patent under the great seal, gave and granted to Lovel Stanhope the office of law clerk to the secretaries of state. And the king did thereby ordain, constitute, and appoint the law clerk to attend the offices of hi secretaries of state, in order to take the depositions of all such person whom it may be necessary to examine upon affairs which might concern the public….

And the jurors further say that at different times from the time of the Revolution to this present time, the like warrants with that issued against the plaintiff, have been frequently granted by the secretaries of state, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the king in the place of a messenger in ordinary.

And the jurors further say that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent in writing of the perusal and copy of the said warrant, so issued against the plaintiff, neither did the plaintiff commence or bring his action against the defendants, or any of them, within six calendar months next after the several acts, and each of them were and was done and committed by them; but whether, upon the whole matter by the jurors found, the defendants are guilty of the trespass, particularly specified in breaking and entering the house of the plaintiff…and continuing four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing and taking and carrying away some of his books and papers there found; or the said plaintiff ought to maintain his action against them; the jurors are altogether ignorant and pray the advice of the Court thereupon. And, if upon the whole matter by the jurors found, it shall seem to the Court that the defendants are guilty of the trespass, and that the plaintiff ought to maintain his action against them, the jurors say upon their oath, that the defendants are guilty of the trespass in manner and form as the plaintiff hath complained against the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out to 300*l.* and for those costs and obligations 40 shillings. But if upon the whole matter by the jurors found, it shall seem to the Court that the defendants are not guilty of the trespass; or that the plaintiff ought not to maintain his action against them; then the jurors do say upon their oath that the defendants are not guilty of the trespass...complained against them.

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

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

Easter Term 1762

Counsel for Plaintiff

At the trial of the cause the defendants relied upon two defenses.

1st, that a secretary of state is a justice or conservator of the peace, and these messengers acting under his warrant are within the statute of George II which provides that

> no action shall be brought against any constable or other officer or by any person acting by his order in his aid, for any thing done in obedience to the warrant of a justice, until demand hath been made or left at the usual place of his abode by the party, or by his attorney in writing signed by the party, demanding the same, or the ? and copy of such warrant, and the same has been refused or neglected for six days after such demand.

And that no demand was ever made by the plaintiff of a perusal or copy of the warrant in this case, according to that statute, and therefore he shall not have this action against the defendants, who are merely ministerial officers acting under the secretary of state, who is a justice and conservator of the peace.

2dly, that a warrant under which the defendants acted, is a legal warrant under which the defendants acted, and that they well can justify what they have done by virtue thereof, for that at many different times from the time of the Revolution till this time, the like warrants with that issued aganst the plaintiff in this case have been granted by secretaries of state, and executed by the messengers in ordinary for the time being.

As to the first. It is most clear and manifest upon this verdict, that the earl of Halifax acted as secretary of state when he granted the warrant, and not merely as a justice of the peace, and therefore cannot be within the statute of George II, neither would he be within the statute if when he was a conservator of the peace, such person not being once names therein; and there is no book of law whatever, that ranks a secretary of state… among the conservators of the peace. Lambert, Coke, Hawkins, lord Hale, none of them take any notice of a secretary of state being a conservator of the peace, and until of late days he was no more indeed than a mere clerk. A conservator of the peace had no more than a constable has now, who is a conservator of the peace at common law… A messenger certainly cannot be within it, who is nothing more than a mere porter, and lord Halifax's footmen might as well be said to be officers within the statute as these defendants. Besides, the verdict finds that these defendants executed the warrant without taking a constable to their assistance. This disobedience will not only take them out of the protection of the statute, (if they had been within it), but will also disable them to justify what they have done, by any plea whatever…. This warrant is more like a warrant to search for stolen goods and to seize them, than any other kind of warrant, which ought to be directed to constables and other public officers which the law takes notice of. How much more necessary in the present case was it to take a constable to the defendants' assistance. The defendants have also disobeyed the warrant in another matter: being commanded to bring the plaintiff, and his books and papers before Lord Halifax, they carried him and them before Lovel Stanhope, the law-clerk; and though he is a justice of the peace, that avails nothing; for no single justice of the peace ever claimed a right to issue such a warrant as this, nor did he act therein as a justice of peace, but as the law-clerk to lord Halifax. The information was made before justice Weston. The secretary f state in this case never saw the accuser or accused. It seems to have been below his dignity. The names of the officers introduced here are not to be found in the law-books, from the first yearbook to the present.

As to the second. A power to issue such a warrant as this is contrary to the genius of the law of England; and even if they had found what they searched for, they could not have justified under it. But they did not find what they searched for, nor does it appear that the plaintiff was the author of any of the supposed seditious papers mentioned in the warrant; so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise. But the verdict says, such warrants have been granted by secretaries since the Revolution. If they have, it is high time to put and end to them; for if they are held to be legal, the liberty of this country is at an end. It is the publishing of a libel which is the crime, and not the having of it locked

up in a private drawer in a man's study. But if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before lord Halifax. What? Has a secretary of state a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed! And if it were lawful, no man could endure to live in this country. In the case of a search warrant for stolen goods, it is never granted, but upon the strongest evidence that a felony has been committed, and that the goods are secreted in such a house; and it is to seize such goods as were stolen, not all the goods in the house but if stolen goods are not found there, all who entered with the warrant are trespassers. However frequently these warrants have been granted since the Revolution, that will not make them lawful; for if they were unreasonable or unlawful when first granted, no usage or continuance can make them good. Even customs, which have been used time out of mind, have been often adjudged void, as being unreasonable, contrary to common right, or purely against the law, if upon considering they nature and quality they shall be found injurious to a multitude, and prejudicial to the commonwealth, and to have their commencement through the oppression and extortion of lords and great men. These warrants are not by custom; they go no farther back than eighty years; and most amazing it is they have never before this time been opposed or controverted, considering the great men that have presided in the King's bench since that time. But it was reserved for the honor of this Court, which as ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star Chamber tyranny.

Counsel for the Defendants.

I am not at all alarmed, if this power is established to be in the secretaries of state. It has been used in the best of times, often since the Revolution. I shall argue, first, that the secretary of state has powers to grant these warrants; and if I cannot maintain this, I must, secondly, show that by the statute 25 Geo.2 c.24, this action does not lie against the defendants the messengers.

[First argument] A secretary of state has the same power to commit for treason as a justice of peace…. If it is clear that a secretary of state may commit for treason and other offenses against the state, he certainly may commit for a seditious libel against the government; for there can hardly be a greater offense against the state, except actual treason…. But a power to commit without a power to issue his warrant to seize the offender and the libel would be nothing; so it must be concluded that he has the same power upon information to issue a warrant to search for and seize a seditious libel, and its author and publisher, as a justice of peace has for granting a warrant to search for stolen goods, upon an information that a theft has been committed, and that the goods are concealed in such a place; and that the goods are concealed in such a place; in which case the constables and officers assisting him in the search, may break open doors, boxes, etc. to come at such stolen goods. Supposing the practice of granting warrants to search for libels against the state be admitted to be an evil in particular cases, yet to let such libellers escape, who endeavor to raise rebellion, is a greater evil, and may be compared to the reason of Mr. Justice Foster in the Case of Pressing, where he says, "That war is a great evil, but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war brings with it; but it is a maxim in law and good policy too, that all private mischiefs must be borne with patience, for preventing a national calamity.

Lord Chief Justice Camden's Judgment

This record hath set up two defenses to the action, on both of which the defendants have relied.

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

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

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

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

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

This question leads me to an inquiry into the authority of that minister, as he stands described upon the record in two capacities, viz. Secretary of state and privy counsellor. And since no statute has cnferr3d any such jurisdiction as this before us, it must be given , if does really exist, by the common law; and upon this ground he has been treated as a conservator of the peace.

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

1. First, whether in either of these characters, or upon any other foundation, he is a conservator of the peace.
2. Secondly, admitting him to be so, whether he is within the equity of the 25th Geo 2.
3. These points being disposed of, the next in order is, whether the defendants have acted in obedience to the warrant.
4. In the last place, the great question upon the justification will be, whether the warrant to seize and carry away the plaintiff's papers is lawful.

First question

[Secretaries of state and privy counsellors have never been and are not now conservators of the peace.]

…

The whole body of the law, if I may use the phrase, were as ignorant at that time [1636] of a privy counseller's right to commit in the case of a libel, as the whole body of privy counsellers are at this day.

…

I have no finished all I have to say upon this head; and am satisfied, that the secretary of state hath assumed this power as a transfer, I know no how, of the royal authority to himself; and that the common law of England knows no such magistrate…. However, I will for a time admis the secretary of state to be a conservator, in order to examine, whether in that character he can be within the equity of this act.

Second Question

…

The 24th of Geo. 2 is entitled, "An act for the rendering justices of the peace more safe in the execution of their officers, and for indemnifying constables and others acting in obedience to their warrants." The preamble runs thus:

> Whereas justices of the peace are discouraged in the execution of their offices, by vexatious actions brought against them, for by reason of small and involuntary errors in their proceedings; and whereas it is necessary that they should be, as far as is consistent with justice and the safety and liberty of the subjects over whom their authority extends, rendered safe in the execution of the said office and trust; and whereas it is also necessary, that the subject should be protected from al willful and oppressive abuse of the several laws committed to the care and execution of the justices of the peace."

Then comes the enacting part.

…

…Justice and conservator are not convertible terms; and though it should be admitted, that a justice of the peace is still a conservator, yet a conservator is not a justice….

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

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

[Therefore, the act of 24 Geo. 2 does not give authority to secretaries of state who are conservators but not justices or ministers of justices.]

…

Upon the whole, we are all of the opinion, that neither secretary of state, nor the messenger, are within the meaning of this act of parliament [24 Geo. 2].

Third Question

[If messengers are equal to constables within the meaning of 24 Geo. 2]…it behooves them to show that they have acted in obedience to the warrant; for it is upon that condition that they are entitled to exemption of the act. [That is, they are not liable in trespass because they were only doing their job.] When the legislature excused the officer from the perilous task of judging, they compelled him to an implicit obedience; which was but reasonable; so that now he must follow the dictates of his warrant, being no longer obliged to inquire, whether his superior had or had not any jurisdiction. The late decision of the King's Bench in the Case of General Warrants was ruled upon this ground and rightly determined.

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

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

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

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

Fourth and Last Question

…The defendants…are under a necessity to maintain the legality of the warrants, under which they have acted, and to show that the secretary of state in the instance now before us, had a jurisdiction to seize the defendants' papers. If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

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

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

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

I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the

party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.

The practice of searching for stolen goods crept into the law by imperceptible practice. It is not the only case of the kind that is to be met with. No less a person than my lord Coke denied its legality; and therefore if the two cases resembled each other more than they do, we have no right, without an act of parliament to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.

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

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

On the contrary, in the case before us nothing is described, no distinguished. No charge is requisite to prove that the party has any criminal papers in his custody; no person present to separate or select; no person to prove in the owner's behalf the officer's misbehavior. To say the truth, he cannot easily misbehave, unless his pilfers; or he cannot take more than all.

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

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

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

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

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

With respect to the practice itself, if it goes no higher, every lawyer will tell you, it is much too modern to be evidence of the common law; and if it should be added, that these warrants ought to acquire some strength by the silence of these courts, which have heard them read so often upon returns without censure or

animadversion, I am able to borrow m answer to that pretence from the Court of King's Bench which lately declared with great unanimity in the Case of General Warrants, that as no objection was taken to them upon the return, and the matter passed *sub silentio*, the precedents were of no weight. I most heartily concur in that opinion; and the reason is more pertinent here, because the Court had no authority in the present case to determine against the seizure of the papers, which was not before them; whereas in the other they might, if they had thought fit, have declared the warrant void, and discharged the prisoner *ex officio*.

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

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

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

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

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

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

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

But there did exist a search warrant, which took its rise from a decree of the Star Chamber…. By this decree the messenger of the press was empowered to search in all places, where books were printing, in order to see if the printer had a license; and if upon such search he found an books which he suspected to be libellous against the church or state, he was to seize them, and carry them before the proper magistrate…. I do very much suspect that the present warrant took its rise from these search warrants that I have been describing….

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

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

Secondly, that libels were seizable. This is to be found in the State Trials….

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

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

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

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

…He who writes a libel, that though he neither composes it nor publishes, is criminal…. That if a libel concerns a public person, he that hath it in his custody ought immediately to deliver it to a magistrate, that the author may be found out…. That a libel, though the contents are true, is not to be justified; but the right way is to discover it to some magistrate or other that they may have cognizance of the cause. …That though he never publish it, yet his having it in readiness for that purpose, if any occasion should happen, is highly criminal; and though he might design to keep it private, yet after his death it migh fall into such hands as might be injurious to the government; and therefore men ought not to be allowed to have such evil instruments in their keeping. Lord Hold, chief justice, says if a libel be publicly known, a written copy of it is evidence of a publication.

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

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

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

I have done now with the argument, which has endeavored to support this warrant by the practice since the Revolution.

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

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

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

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

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

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

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

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

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

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

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

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

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