uninclosed, some of the witnesses said that such owners of the uninclosed lands had a right of common without stint; but that after any of them had inclosed his land, such person had no right of common at all in the said fields, or either of them. Another witness said, if a man inclosed all his lands in the fields, he lost his right of common totally; but that if he left any bit, only an acre uninclosed, he used to enjoy his common in regard to that acre uninclosed, just as before, and used to put in any number of cattle without stint. Several other old witnesses swore to the same effect, and here the defendants rested their case; whereupon the Judge was of opinion that the defendant had not proved the custom, which he said was entire, that several of the witnesses had proved that if a man inclosed 19 acres out of 20, it was the custom for him in respect to the one acre not inclosed, [274] to put on to the uninclosed lands as many cattle as he pleased without stint, and as he had done before he inclosed the 19 acres, and therefore the Judge was pleased to tell the jury, that he thought the defendant had not proved the custom entirely, and that if they believed the land inclosed in question was discharged and freed from any person having a right of common thereon, they should find for the defendant; if not, that they should find for the plaintiff; whereupon the jury gave a verdict for the plaintiff.

It was now moved for a new trial, for the misdirection of the Judge; 1st, for that the custom to inclose was fully and clearly proved; and 2dly, that the right of common before inclosure made, was for cattle levant and couchant upon each person's uninclosed lands; and this matter is not at all in issue, but is admitted on the pleadings by both sides; the right of inclosure with its consequence, viz. its being freed from any person's former right of common thereon, was the only matter in issue, the other was a legal consequence, and not traversable, (to wit,) that the owner of such inclosed land is barred of any future right to common on the uninclosed land in these fields, and what some of the witnesses said of common without stint is nothing to the purpose, for there is no such thing as common without stint belonging to land; common belonging to land can only be for cattle levant and couchant thereon: that the custom to inclose was clearly proved, as appears by the evidence before stated; and when the land is inclosed, it is freed and discharged from any person's former right of common thereon: and of this opinion was the whole Court, and said, 1st, that the parties agree by the pleadings, that while the lands in these open fields are uninclosed, all have a right of common for cattle levant and couchant; 2dly, the custom to inclose, and that the land as soon as, and while inclosed, is free from common, is fully proved; the 3d matter is a consequence in law, and wanted no proof, viz. that as soon as any person has inclosed, he has excluded himself from any right of common on any of the uninclosed lands; and any judgment given upon this record cannot be a bar to any other party who may claim common in these fields without levancy and couchancy. Per totam Curiam.—The verdict must be set aside for misdirection of the Judge, and there must be a new trial.

[275] JOHN ENTICK, Clerk, *versus* NATHAN CARRINGTON AND THREE OTHERS, Messengers in Ordinary to the King. C. B. Trespass for breaking and entering plaintiff's house, &c. Special justification under a warrant of the Secretary of State.

[S. C. 19 How. St. Tri. 1030. Referred to, *Dillon* v. *O'Brien*, 1887, 20 L. R. Ir. 316; *Jones* v. *German* [1896], 2 Q. B. 423; [1897], 1 Q. B. 374.]

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

100 charts, &c. &c. took and carried away, to the damage of the plaintiff 2000l. The defendants plead, 1st, not guilty to the whole declaration, whereupon issue is joined. 2dly, as to the breaking and entering the dwelling-house, and continuing four hours, and all that time disturbing him in the possession thereof, and breaking open the doors to the rooms, and breaking open the boxes, chests, drawers, &c. of the plaintiff in his house, and the searching and examining all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and reading over, prying into, and examining the private papers, books, &c. of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration first mentioned there found, and also as to taking and carrying away the goods and chattels in the declaration last mentioned, the defendants say, the plaintiff ought not to have his action against them, because they say, that before the supposed trespass, on the 6th of November 1762, and before, until, and all the time of the supposed trespass, the Earl of Halifax was, and yet is, one of the Lords of the King's Privy Council, and one of his principal Secretaries of State, and that the earl, before the trespass on the 6th of November 1762, made his warrant under his hand and seal directed to the defendants, by which the earl did in the King's name authorize and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled *The Monitor, or British Freeholder*, No. 357, 358, 360, 373, 376, 378, and 380; **[276]** London, printed for J. Wilson and J. Fell in Paternoster-Row, containing gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody, before the Earl of Halifax to be examined concerning the 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 might concern, were to be aiding and assisting to them the defendants, as there should be occasion: and the defendants further say, that afterwards and before the trespass, on the same day and year, the warrant was delivered to them to be executed, and thereupon they on the same day and year in the declaration, in the day time about 11 o'clock, being the said time when, &c. by virtue and for the execution of the said warrant, entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize the plaintiff and his books and papers in order to bring him and them before the Earl of Halifax, according to the warrant, and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, &c. there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at Westminster, where the said earl then and long before transacted the business of his office, and delivered the same to Lovel Stanhope Esq. who then was, and yet is an assistant to the earl in his office as Secretary of State, to be examined, and who was then authorized to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards, (to wit) on the 17th of November in the said year, was discharged out of their custody, and in searching for the books and papers of the plaintiff the defendants did necessarily read over, pry into, and examine the said private papers, books, &c. of the plaintiff in the declaration mentioned then found in his house; and because at the said time when, &c. the said doors in the said house leading to the rooms therein, and the said boxes, chests, &c. were shut and fastened so that the defendants could not search and examine the said rooms, boxes, chests, &c. they, for the necessary searching and examining the same, did then necessarily break and force open the said doors, boxes, chests, &c. as it was lawful for them to do; and on the said occasion the defendants necessarily stayed in the house of the plaintiff for the said four hours, and unavoidably during that time disturbed him in the possession thereof, they the defendants doing as little **[277]** damage to the plaintiff as they possibly could, which are the same breaking and entering the house of the plaintiff, &c. (and so repeat the trespass covered by this plea) whereof the plaintiff above complains; and this, &c., wherefore they pray judgment, &c. The

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

The jurors upon their oath say, as to the issue first joined, (upon the plea of not guilty to the whole trespass in the declaration,) that as to the coming with force and arms, and also the trespass in declaration, except the breaking and entering the dwelling-house of the plaintiff, and continuing therein for the space of four hours, and all that time disturbing him in the possession thereof, and searching several rooms therein, and in one bureau, one writing-desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found, in the declaration complained of, the said defendants are not guilty. As to breaking and entering the dwelling-house, &c. (above excepted,) the jurors on their oath say, that at the time of making the following information, and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the Earl of Halifax was, and still is one of the lords of the King's Privy Council, and one of his principal Secretaries of State, and that before the time in the declaration, viz. on the 11th of October 1762, at Saint James's, Westminster, one Jonathan Scott of London, book-seller and publisher, came before Edward Weston Esq. an assistant to the said earl, and a justice of peace for the City and liberty of Westminster, and there made and gave information in writing to and before the said Edward Weston against the said John Entick and others, the tenor of which information now produced and given in evidence to the jurors followeth in these words and figures, to wit, "The voluntary information of J. Scott, in the year 1755. I proposed setting up a paper, and mentioned it to Dr. Shebbeare, and in a few days one Arthur Beardmore, an **[278]** attorney at law, sent for me, hearing of my intention, and desired I would mention it to Dr. Shebbeare, that he, Beardmore, and some others of his friends had an intention of setting up a paper in the city. Shebbeare met Beardmore, and myself and Entick (the plaintiff), at the Horn Tavern, and agreed upon the setting up the paper by the name of *The Monitor*, and that Dr. Shebbeare and Mr. Entick should have 200l. a-year each. Dr. Shebbeare put into Beardmore's and Entick's hands some papers, but before the papers appeared Beardmore sent them back to me (Scott). Shebbeare insisted on having the proportion of his salary paid him; he had 50l. which I (Scott) fetched from Vere and Asgills by their note, which Beardmore gave him. Dr. Shebbeare upon this was quite left out, and the monies have been continued to Beardmore and Entick ever since, by subscription, as I supposed, raised, I know not by whom; it has been continued in these hands ever since. Shebbeare, Beardmore, and Entick all told me that the late Alderman Beckford countenanced the paper; they agreed with me, that the profits of the paper, paying all charges belonging to it, should be allowed me. In the paper of the 22d May, called *Sejanus*, I apprehend the character of Sejanus meant Lord Bute; the original manuscript was in the hand-writing of David Meredith, Mr. Beardmore's clerk: I before received the manuscript for several years till very lately from the said hands, and do believe that they continue still to write it. Jona. Scott, St. James's, 11th October 1762."

The above information was given voluntarily before me, and signed in my presence, by Jona. Scott. J. WESTON.

And the jurors further say, that on the 6th November 1762, the said information was shewn to the Earl of H. and thereupon the earl did then make and issue his warrant directed to the defendants, then and still being the King's messengers, and

duly sworn to that office, for apprehending the plaintiff, &c. the tenor of which warrant produced in evidence to the jurors, follows in these words and figures: "George Montagu Dunk, Earl of Halifax, Viscount Sunbury, and Baron Halifax, one of the Lords of His Majesty's Honourable Privy Council, Lieutenant-General of His Majesty's Forces, Lord Lieutenant-General and General Governor of the kingdom of Ireland, and principal Secretary of State, &c. These are in His Majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author, or one concerned in the writing of several weekly very seditious papers, intitled *The Monitor, or British Freeholder*, No. 357, 358, 360, 373, 376, 378, 379, and 380; London, printed for J. Wilson and J. Fell in Paternoster-Row; which contain gross and scanda-[279]-lous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament, and him having found, you are to seize and apprehend, and to bring, together with his books and papers, in safe custody before me to be 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 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 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 His Majesty's messengers in ordinary." And the jurors further say, the earl caused this warrant to be delivered to the defendants to be executed, and that the defendants afterwards on the 11th of November 1762, at 11 o'clock in the day-time, by virtue and for the execution of the warrant, but without any constable taken by them to their assistance, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing-desk, and several drawers of the plaintiff there, in order to find and seize the same, and bring them along with the plaintiff before the earl according to the warrant, and did then find and seize there some of the books and papers of the plaintiff, and perused and read over several other of his papers which they found in the house, and chose to read, and that they necessarily continued there in the execution of the warrant four hours, and disturbed the plaintiff in his house, and then took him and his said books and papers from thence, and forthwith gave notice at the office of the said Secretary of State in Westminster unto Lovel Stanhope Esq. then before, and still being an assistant to the earl in the examinations of persons, books, and papers seized by virtue of warrants issued by Secretaries of State, and also then and still being a justice of peace for the City and liberty of Westminster and county of Middlesex, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined; and they then and there, at the instance of the said Lovel Stanhope, delivered the said books and papers to him: and the jurors further say, that, on the 13th of April in the first year of the King, His Majesty, by his letters patent under the Great Seal, gave and granted to the said Lovel Stanhope the office of law-clerk to the Secretaries of State; and the King did thereby ordain, constitute, and appoint the law-clerk to attend the offices of his Secretaries of State, in order to take the depositions of all such persons whom it may be [280] necessary to examine upon affairs which might concern the public, &c. (and then the verdict sets out the letters patent to the law-clerk in hæc verba,) as by the letters patent produced in evidence to the jurors appears. And the jurors further say, that Lovel Stanhope, by virtue of the said letters patent long before the time when, &c. on the 13th of April in the first year of the King was, and ever since hath been, and still is law-clerk to the King's Secretaries of State, and hath executed that office all that time. And the jurors further say, that at different times from the time of the Revolution to this present time, the like warrants with that issued against the plaintiff, have been frequently granted by the Secretaries of State, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the King, &c. in the place of a messenger in ordinary, &c. And the jurors

further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent, in writing, of the perusal and copy of the said warrant so issued against the plaintiff as aforesaid, neither did the plaintiff commence or bring his said action against the defendants, or any of them, within six calendar months next, after the several acts aforesaid, and each of them were and was done and committed by them as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, the said defendants are guilty of the trespass hereinbefore particularly specified in breaking and entering the house of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing-desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found; or the said plaintiff ought to maintain his said action against them, the jurors are altogether ignorant, and pray the advice of the Court thereupon; and if upon the whole matter aforesaid by the jurors found, it shall seem to the Court that the defendants are guilty of the said trespass, and that the plaintiff ought to maintain his action against them the jurors say upon their said oath, that the defendants are guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them; and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out, to 300l., and for those costs and charges to 40s.; but if upon the whole matter by the jurors found, it shall seem to the Court that the said defendants are not guilty of the said trespass, or that the plaintiff ought not to maintain his action against them, then the jurors do say upon their oath that the defendants are not guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them: and as to the [281] last issue on the second special justification, the jury found for the plaintiff, that the defendants in their own wrong broke and entered, and did the trespass as the plaintiff in his replication has alledged.

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.

Counsel for the plaintiff.—At the trial of this cause the defendants relied upon two defences; 1st, that a Secretary of State as a justice or conservator of the peace, and these messengers acting under his warrant, are within the statute of the 24th of Geo. 2, c. 44, which enacts, (among other things,) that "no action shall be brought against any constable or other officer, or any person acting by his order and in his aid, for any thing done in obedience to the 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, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand," and that no demand was ever made by the plaintiff of a perusal or copy of the warrant in this case, according to that statute, and therefore he shall not have this action against these defendants, who are merely ministerial officers acting under the Secretary of State, who is a justice and conservator of the peace. 2dly, that the warrant under which the defendants acted is a legal warrant, and that they can well justify what they have done by virtue thereof, for that at many different times, from the time of the Revolution till this time, the like warrants with that issued against the plaintiff in this case have been granted by Secretaries of State, and executed by the messengers in ordinary for the time being.

1. It is most clear and manifest upon this verdict, that the Earl of Halifax acted as Secretary of State when he granted the warrant, and not merely as a justice of the peace, and therefore cannot be within the statute 24 Geo. 2, c. 44, neither would he be within the statute if he was a conservator of the peace, such person not being once named therein; and there is no book in the law whatever that ranks a Secretary of State quasi secretary among the conservators of the peace; Lambert, Coke, Hawkins, Lord Hale, &c. &c. none of them take any notice of a Secretary of State being a conservator of the peace, and until of late days he was no more indeed than a mere clerk; a conservator of the peace had no more power than a constable has now, who is a conservator of the peace at common law. At the time of making this statute,

a justice of peace, constable, headborough, and [282] other officers of the peace, borsholders and tithingmen, as well as Secretary of State, conservator of the peace and messenger in ordinary, were all very well known; and if it had been the intent of the statute, that a Secretary of State, conservator of the peace, and messenger in ordinary, should have been within the statute, it would have mentioned all or some of them, and it not having done so, they cannot be within it. A messenger certainly cannot be within it, who is nothing more than a mere porter, and Lord Halifax's footmen might as well be said to be officers within the statute as these defendants. Besides, the verdict finds that these defendants executed the warrant without taking a constable to their assistance; this disobedience will not only take them out of the protection of the statute, (if they had been within it,) but will also disable them to justify what they have done, by any plea whatever; the office of these defendants is a place of considerable profit, and as unlike that of a constable or tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in person, and cannot substitute another in his room, though he may call persons to assist him. 1 Hale's P. C. 581. This warrant is more like a warrant to search for stolen goods and to seize them, than any other kind of warrant, which ought to be directed to constables and other public officers which the law takes notice of. 2 Hale's P. C. 149, 150. How much more necessary in the present case was it to take a constable to the defendants' assistance? The defendants have also disobeyed the warrant in another matter, being commanded to bring the plaintiff and his books and papers before Lord Halifax; they carried him and them before Lovel Stanhope, the law-clerk, and though he is a justice of peace, that avails nothing, for no single justice of peace ever claimed a right to issue such a warrant as this, nor did he act therein as a justice of peace, but as the law-clerk to Lord Halifax. The information was made before Justice Weston; the Secretary of State in this case never saw the accuser nor the accused; it seems to have been below his dignity; the names of the officers introduced here are not to be found in the law-books, from the first Year-Book to the present time.

2. 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 author of any of the supposed seditious papers mentioned in the warrant, so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise; but the verdict says such warrants have been granted by Secretaries of State ever since the Revolution; if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end; it is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's cus-[283]-tody 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 law, if upon considering their nature and quality they shall be found injurious to a multitude, and prejudicial to the common wealth, and to have their commencement (for the most part) through the oppression and extortion of lords and great men. Davis 32 b. These warrants are not by custom; they go no farther back than 80 years and most amazing it is they have never before this time been opposed or controverted, con-

sidering the great men that have presided in the King's Bench since that time; but it was reserved for the honour of this Court, which has ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star-Chamber tyranny.

Counsel for the defendants.—I am not at all alarmed, if this power is established to be in the Secretaries of State; it has been used in the best of times, often since the Revolution. I shall argue, 1st, that the Secretary of State has power to grant these warrants, and if I cannot maintain this, I must 2dly shew that by the statute 24 Geo. 2, c. 24, this action does not lie against the defendants the messengers. 1. A Secretary of State has the same power to commit for treason as a justice of peace. *Kendale and Roe*, Skin. 596. 1 Salk. 346, S. C. 1 Ld. Raym. 65. 5 Mod. 78, S. C. Sir Wm. Wyndham was committed by James Stanhope, Secretary of State, to the Tower for high treason the 7th of October 1715; see the case 1 Stra. 2; and Serjeant Hawkins says, it is certain that the Privy Council, or any one or two of them, or a Secretary of State, may lawfully commit persons for treason, and for [284] other offences against the State, as in all ages they have done. 2 Hawk. P. C. 117, sect. 4. 1 Leon. 70, 71. Carth. 291. 2 Leon. 175. If it is clear that a Secretary of State may commit for treason and other offences against the State, he certainly may commit for a seditious libel against the Government, for there can hardly be a greater offence against the State, except actual treason. A Secretary of State is within the Habeas Corpus Act, but a power to commit without a power to issue his warrant to seize the offender and the libel would be nothing; so it must be concluded that he has the same power upon information to issue a warrant to search for and seize a seditious libel, and its author and publisher, as a justice of peace has for granting a warrant to search for stolen goods, upon an information that a theft has been committed, and that the goods are concealed in such a place; in which case the constable and officers assisting him in the search, may break open doors, boxes, &c. to come at such stolen goods. Supposing the practice of granting warrants to search for libels against the State be admitted to be an evil in particular cases, yet to let such libellers escape who endeavour to raise rebellion is a greater evil, and may be compared to the reasoning of Mr. Justice Foster in the case of pressing, 159, where he says, "that war is a great evil, but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war brings with it; but it is a maxim in law and good policy too, that all private mischiefs must be borne with patience, for preventing a national calamity," &c.

2. Supposing there is a defect of jurisdiction in the Secretary of State, yet the defendants are within the stat. 24 Geo. 2, c. 44, and though not within the words, yet they are within the reason of it; that it is not unusual in Acts of Parliament to comprehend by construction a generality where express mention is made only of a particular; the Statute of Circumspectè Agatis concerning the Bishop of Norwich extends to all bishops. Fitz. Prohibition 3, and 2 Inst. on this statute. 25 Ed. 3 enables the incumbent to plead in quare impedit to the King's suit; this also extends to the suits of all persons. 38 Ed. 3, 31, the Act 1 Rich. 2 ordains, that the warden of the Fleet shall not permit prisoners in execution to go out of prison by bail or baston, yet it is adjudged that this Act extends to all gaolers. Plowd. Com. case of *Platt*, 35 b. the Stat. de Donis Conditionalibus extends to all other limitations in tail not there particularly mentioned, and the like construction has been put upon several other statutes. Tho. Jones 62. The stat. 7 Jac. 1, c. 5, the word constable therein extends to a deputy constable. Moor 845. These messengers in ordinary have always been considered as officers of the Secretaries of State, and a commitment may be to their custody, as in *Sir W. Wyndham's case*. A justice of peace may make a constable pro hac vicê to execute a warrant, who would be within the Stat. 24 Geo. 2. [285] So if these defendants are not constables, yet as officers they have power to execute a warrant of a justice of peace; a constable may, but cannot be compelled to execute a warrant out of his jurisdiction; officers acting under colour of office, though doing an illegal act, are within this statute. Vaugh. 113. So that no demand having ever been made of the warrant, nor any action commenced within six months, the plaintiff has no right of action. It was said that a conservator of the peace had no more power than a constable has now. I answer, they had power to bind over at common law, but a constable has not. Dalton, cap. 1.

Counsel for the plaintiff in reply.—It is said this has been done in the best of times ever since the Revolution; the conclusion from thence is, that it is the more

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

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

Counsel for the plaintiff on the second argument.—If the Secretary of State, or a Privy Counsellor, Justice of Peace, or other magistrate whatever, have no legal power to grant the warrant in the present case, it will follow, that the magistrate usurping such an illegal power can never be construed to be within the meaning or reason of the statute of 24 Geo. 2, c. 44, which was made to protect justices of peace, &c. where they made blunders, or erred in judgment in cases within their jurisdiction, and not to give them arbitrary power to issue warrants totally illegal from beginning to end, and in cases wherein they had no jurisdiction at all. If any such power in a Secretary of State, or a Privy Counsellor, had ever existed, it would appear from our law-books; all the ancient books are silent on this head; Lambert never once mentions a Secretary of State; neither he, nor a Privy Counsellor, were ever considered as magistrates; in all the arguments touching the Star-Chamber, and petition of right, nothing of this power was ever dreamt of; State commitments anciently were either per mandatum Regis in person, or by warrant of several of the Privy Counsellors in the plural number; the King has this power in a particular mode, viz. by the advice of his Privy Council, who are to be answerable to the people if wrong is done; he has no other way but in Council to signify his mandate. In the case of *The Seven Bishops* this matter was insisted upon at the Bar, when the Court presumed the commitment of them was by advice of the Privy Council, but that a single Privy Counsellor had this power was not contended for by the Crown lawyers then. This Court will require it to be shewn

that there have been ancient commitments of this sort; neither the Secretary of State or a Privy Counsellor ever claimed a right to administer an oath (but they employ a person as a law-clerk, [287] who is a justice of peace, to administer oaths, and take recognizances); Sir Barth. Shower in *Kendale and Roe's case*, insisted they never had such power. It would be a solecism in our law to say, there is a person who has power to commit, and has not power to examine on oath, and bail the party; therefore whoever has power to commit has power to bail; it was a question formerly, whether a constable as an ancient conservator of the peace could take a recognizance or bond? In the time of Queen Eliz. there was a case wherein some of the Judges were of one opinion and some of another. A Secretary of State was so inconsiderable formerly, that he is not mentioned in the Statute of Scandalum Magnatum; his office was thought of no great importance; he takes no oath of office as Secretary of State, gives no kind of security for the exercise of such judicial power as he now usurps. If this was an ancient power it must have been annexed to his office anciently, it cannot now be given to him by the King; the King cannot make two Chief Justices of the Common Pleas, nor could the King put the Great Seal in commission before an Act of Parliament was made for that purpose. There was only one Secretary of State formerly, there are now two appointed by the King; if they have this power of magistracy, it should seem to require some law to be made to give that power to two Secretaries of State which was formerly in one only. As to commitments per mandatum Regis, see Stamf. Pl. Coron. 72. 4 Inst. c. 5, Court of Star-Chamber. Admitting they have power to commit in high treason, it will not follow they have power to commit for a misdemeanor; it is of necessity that they can commit in high treason, which requires immediate interposition for the benefit of the public. In the case of commitment by Walsingham Secretary of State, 1 Leon. 71, it was returned on the habeas corpus at last, that the party was committed ex sententia & mandato totius Concilii Privati dominæ Reginæ; because he found he had not that power of himself, he had recourse to the whole Privy Council's power; so that this case is rather for the plaintiff. Commitment by the High Commission Court of York was declared by Parliament illegal from the beginning; so in the case of ship-money the Parliament declared it illegal.

Counsel for the defendants on the second argument.—The most able Judges and advocates ever since the Revolution, seem to have agreed that the Secretaries of State have this power to commit for a misdemeanor. Secretaries of State have been looked upon in a very high light for two hundred years past. 27 H. 8, c. 11, their rank and place is settled by 31 H. 8, c. 10. 4 Inst. 362, cap. 77, of precedency. 4 Inst. 56, Selden's Titles of Honour, C. Officers of State; so that a Secretary of State is something more than a mere clerk, as was said. Minshew verb. Secretary; he is é Secretioribus Conciliis domini Regis. Serjeant Pengelly moved that Sir Wm. Windham might be bailed; if he could not be [288] committed by the Secretary of State for something less than treason, why did he move to have him bailed? this seems a concession that he might be committed in that case for something less than treason. Lord Holt seems to agree that a commitment by a Secretary of State is good. Skin. 598. 1 Ld. Raym. 65. There is no case in the books that says in what cases a Secretary of State can or cannot commit; by what power is it that he can commit in the case of treason, and in no other case? The resolution of the House of Commons touching the Petition of Right, Selden, last volume, Parliamentary History, vol. 8, fol. 95, 96. Secretary Coke told the Lords, it was his duty to commit by the King's command. *Yoxley's case*, Carth. 291: He was committed by the Secretary of State on the Statute of Eliz. for refusing to answer whether he was a Romish priest; *The Queen and Derby*, Fortescue's Rep. the commitment was by a Secretary of State, Mich. 10 Annæ, for a libel, and held good. (Note; Bathurst, J. said, he had seen the habeas corpus and the return, and that this was a commitment by a Secretary of State.) *The King and Earbury*, Mich. 7 Geo. 2, 2 Bernard. 346, was a motion to discharge a recognizance entered into for writing a paper called the *Royal Oak*. Lord Hardwicke said it was settled in *Kendale and Roe's case*, that a Secretary of State might apprehend persons suspected of treasonable practices; and there are a great number of precedents in the Crown-Office of commitments by Secretaries of State for libels against the Government. After time taken to consider, the whole Court gave judgment this term for the plaintiff.

Curia.—The defendants make two defences; first, that they are within the stat.

24 Geo. 2, c. 44; 2dly, that such warrants have frequently been granted by Secretaries of State ever since the Revolution, and have never been controverted, and that they are legal; upon both which defences the defendants rely.

A Secretary of State, who is a Privy Counsellor, if he be a conservator of the peace, whatever power he has to commit is by the common law: if he be considered only as a Privy Counsellor, he is the only one at the board who has exercised this authority of late years; if as a conservator, he never binds to the peace; no other conservator ever did that we can find: he has no power to administer an oath, or take bail; but yet it must be admitted that he is in the full exercise of this power to commit, for treason and seditious libels against the Government, whatever was the original source of that power; as appears from the cases of *The Queen and Derby*, *The King and Earbury*, and *Kendale and Roe's case*.

We must know what a Secretary of State is, before we can tell whether he is within the stat. 24 Geo. 2, c. 44. He is the keeper of the King's signet wherewith the King's private letters are signed. [289] 2 Inst. 556. Coke upon Articuli Super Chartas, 28 Ed. 1. Lord Coke's silence is a strong presumption that no such power as he now exercises was in him at that time; formerly he was not a Privy Counsellor, or considered as a magistrate; he began to be significant about the time of the Revolution, and grew great when the princes of Europe sent ambassadors hither; it seems inconsistent that a Secretary of State should have power to commit, and no power to administer an oath, or take bail; who can commit and not have power to examine? the House of Commons indeed commit without oath, but that is nothing to the present case; there is no account in our law-books of Secretaries of State, except in the few cases mentioned; he is not to be found among the old conservators; in Lambert, Crompton, Fitzherbert, &c. &c. nor is a Privy Counsellor to be found among our old books till *Kendall and Roe's case*, and 1 Leon. 70, 71, 29 Eliz. is the first case that takes notice of a commitment by a Secretary of State; but in 2 Leon. 175 the Judges knew no such committing magistrate as the Secretary of State. It appears by the Petition of Right, that the King and Council claimed a power to commit; if the Secretary of State had claimed any such power, then certainly the Petition of Right would have taken notice of it; but from its silence on that head we may fairly conclude he neither claimed nor had any such power; the Stat. 16 Car. 1, for Regulating the Privy Council, and taking away the Court of Star-Chamber, binds the King not to commit, and in such case gives a habeas corpus; it is strange that House of Commons should take no notice of the Secretary of State, if he then had claimed power to commit. This power of a Secretary of State to commit was derivative from the commitment per mandatum Regis: Ephemeris Parliamentaria. Coke says in his speech to the House, "If I do my duty to the King, I must commit without shewing the cause;" 1 Leon. 70, 71, shews that a commitment by a single Privy Counsellor was not warranted. By the Licensing Statute of 13 & 14 Car. 2, cap. 33, sec. 15, licence is given to a messenger under a warrant of the Secretary of State to search for books unlicensed, and if they find any against the religion of the Church of England, to bring them before the Secretary of State; the warrant in that case expressed that it was by the King's command. See Stamford's comment on the mandate of the King, and Lambert, cap. Bailment. All the Judges temp. Eliz. held that in a warrant or commitment by one Privy Counsellor he must shew it was by the mandate of the King in Council. See And. 297, the opinion of all the Judges; they remonstrated to the King that no subject ought to be committed by a Privy Counsellor against the law of the realm. Before the 3 Car. 1 all the Privy Counsellors exercised this power to commit; from that æra they disused this power, but then they prescribed still to commit per mandatum Regis. Journal of the House of Commons 195. 16 Car. 1. Coke, Selden, &c. argued that the King's power to commit, meant that [290] he had such power by his Courts of Justice. In the case of *The Seven Bishops* all the Court and King's Council admit, that supposing the warrant had been signed out of the Council, that it would have been bad, but the Court presumed it to be signed at the board; Pollexfen in his argument says, we do not deny but the Council board have power to commit, but not out of Council; this is a very strong authority; the whole body of the law seem not to know that Privy Counsellors out of Council had any power to commit, if there had been any such power they could not have been ignorant of it; and this power was only in cases of high treason, they never claimed it in any other case. It was argued that if a Secretary of State hath power to commit in high

treason, he hath it in cases of lessor crimes: but this we deny, for if it appears that he hath power to commit in one case only, how can we then without authority say he has that power in other cases? he is not a conservator of the peace; Justice Rokeby only says he is in the nature of a conservator of the peace: we are now bound by the cases of *The Queen and Derby*, and *The King and Earbury*.

The Secretary of State is no conservator nor a justice of the peace, quasi secretary, within the words or equity of the Stat. 24 Geo. 2, admitting him (for arguments sake) to be a conservator, the preamble of the statute shews why it was made, and for what purpose; the only grantor of a warrant therein mentioned, is a justice of the peace; justice of peace and conservator are not convertible terms; the cases of construction upon old statutes, in regard to the warden of the Fleet, the Bishop of Norwich, &c. are not to be applied to cases upon modern statutes. The best way to construe modern statutes is to follow the words thereof; let us compare a justice of peace and a conservator; the justice is liable to actions, as the statute takes notice, it is applicable to him who acts by warrant directed to constables; a conservator is not intrusted with the execution of laws, which by this Act is meant statutes, which gives justices jurisdiction; a conservator is not liable to actions; he never acts: he is almost forgotten; there never was an action against a conservator of the peace as such; he is antiquated, and could never be thought of when this Act was made; and ad ea quæ frequenter accidunt jura adaptantur. There is no act of a constable or tithingman as conservator taken notice of in the statute; will the Secretary of State be ranked with the highest or lowest of these conservators? the Statute of Jac. 1, for officers acting by authority to plead the general issue, and give the special matter in evidence, when considered with this Statute of 24 Geo. 2, the latter seems to be a second part of the Act of Jac. 1, and we are all clearly of opinion that neither the Secretary of State, nor the messengers, are within the Stat. 24 Geo. 2, but if the messengers had been within it, as they did not take a constable [291] with them according to the warrant, that alone would have been fatal to them, nor did they pursue the warrant in the execution thereof, when they carried the plaintiff and his books, &c. before Lovel Stanhope, and not before Lord Halifax; that was wrong, because a Secretary of State cannot delegate his power, but ought to act in this part of his office personally.

The defendants having failed in their defence under the Statute 24 Geo. 2; we shall now consider the special justification, whether it can be supported in law, and this depends upon the jurisdiction of the Secretary of State; for if he has no jurisdiction to grant a warrant to break open doors, locks, boxes, and to seize a man and all his books, &c. in the first instance upon an information of his being guilty of publishing a libel, the warrant will not justify the defendants: it was resolved by B. R. in the case of *Shergold* v. *Holloway*, that a justice's warrant expressly to arrest the party will not justify the officer, there being no jurisdiction. 2 Stran. 1002. The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing the plaintiff, or proof that he was the author of the supposed libels; a power claimed by no other magistrate whatever (Scroggs C.J. always excepted); it was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did; for they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed; there might be nobody to detect them. If this be lawful, both Houses of Parliament are involved in it, for they have both ruled, that privilege doth not extend to this case. In the case of *Wilkes*, a member of the Commons House, all his books and papers were seized and taken away; we were told by one of these messengers that he was obliged by his oath to sweep away all papers whatsoever; if this is law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. The defendants have no right to avail themselves of the usage of these warrants since the Revolution, and if that would have justified them they have not averred it in their plea, so it could not be put, nor was in issue at the trial; we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are

often the dearest property a man can have. This case was compared to that of stolen goods; Lord Coke denied the lawfulness of granting warrants to search for stolen goods, 4 Inst. 176, 177, though now it prevails to be law; but in that case the justice and the informer must proceed with great caution; there must be an oath that the [292] party has had his goods stolen, and his strong reason to believe they are concealed in such a place; but if the goods are not found there, he is a trespasser; the officer in that case is a witness; there are none in this case, no inventory taken; if it had been legal many guards of property would have attended it. We shall now consider the usage of these warrants since the Revolution; if it began then, it is too modern to be law; the common law did not begin with the Revolution; the ancient constitution which had been almost overthrown and destroyed, was then repaired and revived; the Revolution added a new buttress to the ancient venerable edifice: the K. B. lately said that no objection had ever been taken to general warrants, they have passed sub silentio: this is the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house, search for and take away all his books and papers in the first instance, to be law, which is not to be found in our books. It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful till this time. We are inclined to think the present warrant took its first rise from the Licensing Act, 13 & 14 Car. 2, c. 33, and are all of opinion that it cannot be justified by law, notwithstanding the resolution of the Judges in the time of Cha. 2, and Jac. 2, that such search warrants are lawful. State Trials, vol. 3, 58, the trial of Carr for a libel. There is no authority but of the Judges of that time that a house may be searched for a libel, but the twelve Judges cannot make law; and if a man is punishable for having a libel in his private custody, as many cases say he is, half the kingdom would be guilty in the case of a favourable libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit. It is said it is better for the Government and the public to seize the libel before it is published; if the Legislature be of that opinion they will make it lawful. Sir Samuel Astry was committed to the Tower, for asserting there was a law of State distinct from the common law. The law never forces evidence from the party in whose power it is; when an adversary has got your deeds, there is no lawful way of getting them again but by an action. 2 Stran. 1210, *The King and Cornelius. The King and Dr. Purnell*, Hil. 22 Geo. B. R. Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers: upon the whole, we are all of opinion that this warrant is wholly illegal and void. One word more for ourselves; we are no advocates for libels, all Governments must set their faces against them, and whenever they come before us and a jury we shall set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst Government better than none at all.

Judgment for the plaintiff.

[293] HILARY TERM, 6 GEO. III. 1766.

ADDISON *versus* GREY. C. B. Debt upon an arbitration-bond; an award good in part and bad in part.

Debt upon an arbitration-bond. The defendant craves oyer of the condition, which is, that if the defendant Gray and one Mary Birkwood shall perform the award of William Bradley and John Bellamy, arbitrators, chosen between the said Gray and Birkwood, and the plaintiff Addison, concerning all matters in difference between them, so as the award be made in writing on or before the first of September then next, then, &c. which being read and heard, the defendant pleads no award was made. The plaintiff replies, and sets out an award, whereby the arbitrators awarded that all actions, suits, quarrels, and disputes to the day of the date of the bond should cease between the parties, and that the plaintiff should hold and enjoy three acres of meadow in Glatton till the 10th of October then next, and then he should quit the