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

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

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

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

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

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

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

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

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

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

Ulterius concilium.

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

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

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

Per Cur.—unanimously,

Let there be judgment for the plaintiff.

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

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

Roll 60.

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

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

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

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

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

* V. ante, p. 1692.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. de Grey divided his argument into three points—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

† Fortescue's Rep. 140.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Therefore the plaintiff is barred of this action.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So much for the noble lord.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Therefore he prayed judgment for the defendant in error.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Therefore it must stand upon principles of common law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

The consequence is, that the judgment must be affirmed.

The other Judges assenting,

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

Judgment affirmed.

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

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

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

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

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

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

Mr. Walker argued for the defendants.

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

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

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

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

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

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