Erskine May, Vol. III, Chapter XI, pp. 1-10

General Warrants

DURING the last hundred years, every institution has been popularised,—every public liberty extended. Long before this period, however, Englishmen had enjoyed personal liberty, as their birthright. More prized than any other civil right, and more jealously guarded,—it had been secured earlier than those political privileges, of which we have been tracing the development. The franchises of Magna Charta had been firmly established in the seventeenth century. The Star Chamber had fallen: the power of arbitrary imprisonment had been wrested from the crown and privy council: liberty had been guarded by the Habeas Corpus Act: judges redeemed from dependence and corruption; and juries from intimidation and servile compliance. The landmarks of civil liberty were fixed: but relics of old abuses were yet to he swept away; and traditions of times less favourable to freedom to be forgotten. Much remained to be done for the consolidation of rights [2] already recognised; and we may trace progress, not less remarkable than that which has characterised the history of our political liberties.

Wilkes and the 'North Briton'

Among the remnants of a jurisprudence which had favoured prerogative at the expense of liberty, was that of the arrest of persons under general warrants, without previous evidence of their guilt, or identification of their persons. This practice survived the Revolution, and was continued without question, on the ground of usage, until the reign of George III., when it received its death-blow from the boldness of Wilkes, and the wisdom of Lord Camden. This question was brought to an issue by No. 45 of the 'North Briton,' already so often mentioned. There was the libel, but who was the libeller? Ministers knew not, nor waited to inquire, after the accustomed forms of law: but forthwith Lord Halifax, one of the secretaries of state, issued a warrant, directing four messengers, taking with them a constable, to search for the authors, printers, and publishers; and to apprehend and seize them, together with their papers, and bring them in safe custody before him. No one having been charged, or even suspected,—no evidence of crime having been offered,—no one was named in this dread instrument. The offence only was pointed at,—not the offender. The magistrate, who should have sought proofs of crime, deputed this office to his messengers. Armed with their roving commission, they set, forth in quest of unknown offenders; and unable to take evidence, listened to rumours, idle tales, and curious guesses. They held in their [3] hands the liberty of every man, whom they were pleased to suspect. Nor were they triflers in their work. In three days, they arrested no less than forty-nine persons on suspicion,—many as innocent as Lord Halifax himself. Among the number was Dryden Leach, a printer, whom they took from his bed at night. They seized his papers; and even apprehended his journeymen and servants. He had printed one number of the 'North Briton,' and was then reprinting some other numbers: but as he happened not to have printed No. 45, he was released, without being brought before Lord Halifax. They succeeded, however, in arresting Kearsley, the publisher, and Balfe the printer, of the obnoxious number, with all their workmen. From them it was discovered that Wilkes was the culprit of whom they were in search: but the evidence was not on oath: and the messengers received verbal directions to apprehend Wilkes, under the general warrant. Wilkes, far keener than the crown lawyers, not seeing his own name there, declared it 'a ridiculous warrant against the whole English nation,' and refused to obey it. But after being in custody of the messengers for some hours, in his own house, he was taken away in a chair, to appear before the secretaries of state. No sooner had he been removed, than the messengers,

returning to his house, proceeded to ransack his drawers; and carried off all his private papers, including even his will and pocket-book. When brought into the presence of Lord Halifax and Lord Egremont, questions were put to Wilkes, which he refused to answer: [4] whereupon he was committed, close prisoner, to the Tower,—denied the use of pen and paper, and interdicted from receiving the visits of his friends, or even of his professional advisers. From this imprisonment, however, he was shortly released, on a writ of habeas Corpus, by reason of his privilege, as a member of the House of Commons.

The Warrant before the Courts

Wilkes and the printers, supported by Lord Temple's liberality, soon questioned the legality of the general warrant. First, several journeymen printers brought actions against the messengers. On the first trial, Lord Chief Justice Pratt,—not allowing bad precedents to set aside the sound principles of English law,—held that the general warrant was illegal: that it was illegally executed; and that the messengers were not indemnified by statute. The journeymen recovered £300 damages; and the other plaintiffs also obtained verdicts. In all these cases, however, bills of exceptions were tendered and allowed.

Mr. Wilkes himself brought an action against Mr. Wood, under-secretary of state, who had personally superintended the execution of the warrant. At this trial it was proved that Mr. Wood and the messengers, after Wilkes' removal in custody, had taken entire possession of his house, refusing admission to his friends; had sent for a blacksmith, who opened the drawers of his bureau; and having taken out the papers, had carried them away in a sack, without taking any list [5] or inventory. All his private manuscripts were seized, and his pocket-book filled up the mouth of the sack.(1) Lord Halifax was examined, and admitted that the warrant had been made out, three days before he had received evidence that Wilkes was the author of the 'North Briton.' Lord Chief Justice Pratt thus spoke of the warrant:—'The defendant claimed a right, under precedents, to force persons' houses, break open escritoires, and seize their papers, upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.' The jury found a verdict for the plaintiff, with £1000 damages.

Four days after Wilkes had obtained his verdict against Mr. Wood, Dryden Leach, the printer, gained another verdict, with £400 damages, against the messengers. A bill of exceptions, however, was tendered and received in this, as in other cases, and came on for hearing before the Court of King's Bench, in 1766. After much argument, and the citing of precedents showing the practice of the secretary of state's office ever since [6] the Revolution, Lord Mansfield pronounced the warrant illegal, saying, 'It is not fit that the judging of the information should be left to the discretion of the officer. The magistrate should judge and give certain directions to the officer.' The other three judges agreed that the warrant was illegal and bad, believing that 'no degree of antiquity can give sanction to an usage bad in itself.' The judgment was therefore affirmed.

Wilkes had also brought actions for false imprisonment against both the secretaries of state. Lord Egremont's death put an end to the action against him; and Lord Halifax, by pleading privilege, and interposing other delays unworthy of his position and character, contrived to put off his appearance until after Wilkes had been outlawed,—when he appeared and pleaded the outlawry. But at length, in 1769, no further postponement could be contrived,—the action was tried, and Wilkes obtained no less than £4000 damages. Not only in this action, but throughout the proceedings in which persons aggrieved by the general warrant had sought redress, the government offered an obstinate and vexatious resistance. The defendants were

harassed by every obstacle which the law permitted, and subjected to ruinous costs.(2) The [7] expenses which government itself incurred in these various actions were said to have amounted to £100,000.

Seizure of Papers

The liberty of the subject was further assured, at this period, by another remarkable judgment of Lord Camden. In November, 1762, the Earl of Halifax, as secretary of state, had issued a warrant directing certain messengers, taking a constable to their assistance, to search for John Entinck, Clerk, the author, or one concerned in the writing, of several numbers of the 'Monitor, or British Freeholder,' and to seize him, 'together with his books and papers,' and to bring them in safe custody before the secretary of state. In execution of this warrant, the messengers apprehended Mr. Entinck in his house, and seized the books and papers in his bureau, writing-desk, and drawers. This case differed from that of Wilkes, as the warrant specified the name of the person against whom it was directed. In respect of the person, it was not a general warrant: but as regards the papers, it was a general search-warrant,—not specifying any particular papers to be seized, but giving authority to the messengers to take all his books and papers, according to their discretion.

Entinck v. Carrington

Mr. Entinck brought an action of trespass against the messengers for the seizure of his papers, (3) upon which the jury found a special verdict with £300 damages. This special verdict was twice learnedly argued before the Court of Common Pleas, where at [8] length, in 1765, Lord Camden pronounced an elaborate judgment. He even doubted the right of the secretary of state to commit persons at all, except for high treason: but in deference to prior decisions the court felt bound to acknowledge the right. The main question, however, was the legality of a search-warrant for papers. 'If this point should be determined in favour of the jurisdiction,' said Lord Camden, 'the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even suspect, a person to be the author, printer, or publisher of a seditious libel.' 'This power, so assumed by the secretary of state, is an execution upon all the party's papers in the first instance. His house is rifled, his most valuable papers are taken out of his possession, before the paper, for which he is charged, is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.' It had been found by the special verdict that many such warrants had been issued since the Revolution: but he wholly denied their legality. He referred the origin of the practice to the Star Chamber, which in pursuit of libels had given search-warrants to their messenger of the press,—a practice which, after the abolition of the Star Chamber, had been revived and authorised by the Licensing Act of Charles II. in the person of the [9] secretary of state. And he conjectured that this practice had been continued after the expiration of that act,—a conjecture shared by Lord Mansfield and the Court of King's Bench.(4) With the unanimous concurrence of the other judges of his court, this eminent magistrate now finally condemned this dangerous and unconstitutional practice.

Proceedings in Parliament

Meanwhile, the legality of a general warrant had been repeatedly discussed in Parliament.(5) Several motions were offered, in different forms, for declaring it unlawful. While trials were still pending, there were obvious objections to any proceeding by which the judgment of the courts would be anticipated: but in debate, such a warrant found few supporters. Those who were unwilling to condemn it by a vote of the House, had little to say in its defence. Even the attorney and solicitor-general did not venture to pronounce it legal. But whatever their opinion, the competency of the House to decide any matter of law was contemptuously

denied. Sir Fletcher Norton, the attorney-general, even went so far as to declare that 'he should regard a resolution of the members of the House of Commons no more than the oaths of so many drunken porters in Covent Garden,'—a sentiment as unconstitutional as it was insolent. Mr. Pitt affirmed 'that there was not a man to be found of sufficient profligacy to defend this warrant upon the principle of legality.'

[10] In 1766, the Court of King's Bench had condemned the warrant, and the objections to a declaratory resolution were therefore removed; the Court of Common Pleas had pronounced a search-warrant for papers to be illegal; and lastly, the more liberal administration of the Marquess of Rockingham had succeeded to that of Mr. Grenville. Accordingly, resolutions were now agreed to, condemning general warrants, whether for the seizure of persons or papers, as illegal; and declaring them, if executed against a member, to be a breach of privilege.

A bill was introduced to carry into effect these resolutions, and passed by the House of Commons: but was not agreed to by the Lords. A declaratory act was, however, no longer necessary. The illegality of general warrants had been judicially determined, and the judgment of the courts confirmed by the House of Commons, and approved as well by popular opinion, as by the first statesmen of the time. The cause of public liberty had been vindicated, and was henceforth secure.

Footnotes.

1. So stated by Lord Camden in Entinck v. Carrington.
2. On a motion for a new trial in one of these numerous cases on the ground of excessive damages, Ch. Justice Pratt said: 'They heard the king's counsel, and saw the solicitor of the treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner.'—St. Tr., xix. 1405.
3. Entinck v. Carrington, St. Tr., xix. 1030.
4. Leach v. Money and others, Burrow's Rep., iii. 1692, 1767. Sir W. Blackstone's Rep., 555. The same view was also adopted by Blackstone, Comm., i,. 336, n. (Kerr's Ed., 1862.)
5. Jan. 19th, Feb. 3rd, 6th, 13th, 14th, and 17th, 1764; Parl.Hist., xv. 1393-1418 Jan.29th 1765; Ibid., xvi. 6.

Next Contents Previous