SEARCH AND YOU SHALL FIND: SOME RECENT DEVELOPMENTS IN THE LAW OF SEARCH WARRANTS*

In *T.V.W. Ltd. v. Robinson*,[1] Negus J. said:

> The issue of a search warrant is a very serious matter indeed because it authorizes the invasion of the privacy of the subject in his home or in his business premises. It necessarily involves an interference with the rights of the individual and affects his liberty.

In addition, such an authorization may only be justified when public rights are concerned.[2] The Common Law has a history of suspicious regard in relation to the issue and execution of search warrants,[3] an attitude which has found modern expression in a number of recent cases,[4] all involving the interpretation of various statutory authority for the use of search warrants. In particular, the decision of Fox J. in *The Queen v. Tillett; ex parte Newton*[5] is an indication of the determination of the superior courts in ensuring strict compliance with the statutory authorizations. This case arose out of the issue of three search warrants by Mr Tillett, a Justice of the Peace for the Australian Capital Territory, on the application of three officers of the Commonwealth Police Force. The warrants were to authorize the police officers to search private premises owned by Mr Newton, a Canberra publisher, the business premises owned by his wife, and the premises of a Canberra branch of the Bank of New South Wales. The warrants purported to authorize a search for and the seizure of 'books, papers, documents'. Although the warrants specified no offence, and no offence was named in the informations, verbal evidence given before the Justice indicated that the police officers suspected that such books, papers and documents would provide evidence of some

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* A paper read before the twenty-fifth Annual Conference of the Australasian Universities Law Schools Association, Brisbane, 1970.

1 [1964] W.A.R. 33, 37.

2 See Coghill v. Warrell, (1890) 16 V.L.R. 238. See also the judgment of Chase J. in People ex rel. Simpson v. Kempner, 101 N.E. 794 (1913).

3 See Part 1 below.

4 King v. The Queen, [1968] 3 W.L.R. 391; T.V.W. Ltd. v. Robinson, [1964] W.A.R. 33; S.S. Publishing Pty. Ltd. v. Sullivan, [1968] N.Z.L.R. 663; The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101.

5 (1969) 14 F.L.R. 101.

involvement in the commission of an offence against section 70 of the Commonwealth Crimes Act. This section covers unlawful communication by a Commonwealth officer of government information to some person not authorized to receive it. The case came before the Supreme Court of the Australian Capital Territory on an application to make absolute rules nisi for prohibition and certiorari.

Against these cases, however, must be set the decision in *Chic Fashions (West Wales) Ltd. v. Jones*,[6] which not only seems to embody a totally different attitude to all aspects of the use of search warrants, but is specifically claimed to be expressive of the Common Law on the subject.[7]

I

There is no doubt that a warrant could be issued at Common Law to authorize a search for stolen goods. One of the earliest references to the practice is in Coke,[8] and although he is convinced that the use of such warrants is unlawful, his remarks indicate that the practice must have been reasonably widespread. By the time of Hale, the lawfulness of the warrants seems more secure;[9] and in *Entick v. Carrington*,[10] there seems to be no doubt. In that case, the Court specifically rejects Coke's statement as representing the law, and allows that '[t]he case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with'.[11] As *Entick v. Carrington* involved the rejection of the claim that the validity of a general warrant could be founded on historical practice, it would be reasonable to imply that the Common Law warrant to search for stolen goods had become firmly entrenched. So much so that the Court was able to set out and describe the procedure for such warrant.

> Observe too the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged

6 [1968] 2 Q.B. 299.

7 Id. at 309, 314, 318.

8 4 INST. 176, 177: 'For justices of the peace to make warrants upon surmises for breaking the house of any suspect to search for felons or stolen goods is against Magna Carta'.

9 HALE, PLEAS OF THE CROWN, VOL. 2, 149: '. . . I can by no means subscribe to that opinion of my Lord Coke's'.

10 19 Howell's State Trials 1030; (1765) 2 Wilson 275.

11 19 Ho. St. Tri. 1030, 1067 per Lord Camden. The report in 2 Wilson does not contain this remark.

> in such a place.—He must attend at the execution of the warrant to show them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found he is a tresspasser; and the officer being an innocent person, will be always a ready and convenient witness against him.[12]

And Hale[13] had previously indicated that force might be used, if admittance were refused.

Entick v. Carrington makes it clear that the only warrant authorized by the Common Law is one which is used to search for stolen goods. In 1782, the Act 22 Geo. 3, c. 58,[14] section 2, provided for the issue of search warrants by Justices in cases where 'there is reason to suspect that stolen goods are knowingly concealed', but at no time have the courts regarded this Act, or subsequent Acts, as affecting the Common Law authority in any way. The Court in *Elsee v. Smith*[15] gave judgment on the basis that the warrant with which they were dealing was governed by Common Law, not statute. In *Jones v. German*,[16] in 1896, Lord Russell of Killowen C.J. expressly states that he is dealing with a Common Law warrant, even though it had been claimed in argument that the warrant was granted pursuant to statute. The clearest expression of this parallel running of Common Law and statutory power is in the judgment of Denning M.R. in *Chic Fashions (West Wales) Ltd. v. Jones*:[17]

> In a great many cases now Acts of Parliament permit magistrates to grant search warrants. . . . But with none of these are we concerned today. We have to deal with stolen goods, for which the common law always allowed a search warrant to be granted. There is, to be sure, a statute on the matter, section 42 of the Larceny Act, 1916. . . . That section deals with goods mentioned

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12 Ibid. There are significant differences in the report of this passage in 2 Wilson 275, 291-292: 'but in that case the justice and the informer must proceed with great caution; there must be an oath that the 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'.

13 PLEAS OF THE CROWN, VOL. 2, 113. Both HALE and Entick v. Carrington are cited as authority for Common Law search warrants in BURN'S JUSTICE OF THE PEACE (30th ed., 1869), VOL. 5, 1179-1180.

14 See 34 STATUTES AT LARGE 63.

15 (1822) 1 Dowl. & Ry. K.B. 97; 24 Rev. Rep. 639. See also Wyatt v. White, (1860) 29 L.J. Ex. (N.S.) 193.

16 [1896] 2 Q.B. 418. On appeal, [1897] 1 Q.B. 374. The judgments on appeal are very short, and add nothing to the judgment of Lord Russell.

17 [1968] 2 Q.B. 299, 308-309.

> in the warrant. It does not say whether the constable can seize goods not mentioned in the warrant. To solve this question we must resort to the cases.

In that case the police had obtained a warrant to search the plaintiff's shop for clothes stolen from a firm called "Ian Peters". No such clothes were found but the police did find clothes which they reasonably believed to have been stolen from other firms. These they seized and took away. In fact, the clothes were not stolen, nor was the plaintiff's possession of them unlawful in any way. They were returned several days later. The plaintiff sued the Chief Constable for damages for trespass to goods. The Court of Appeal[18] was unanimous in rejecting the claim and declaring the seizure to be lawful at Common Law.[19] The practical effect of this conclusion is to allow, in the case of search for stolen goods,[20] the officers executing the warrant to step outside the strictness of its requirements should *they* happen to consider it reasonable to do so. It can be seen that this decision creates conflict in two areas of the law relating to search warrants. First, is it consistent with the duties of the Justice who issues the warrant?[21] And second, how close does it come to the re-introduction of something akin to a general warrant?

Unlike the Common Law warrant to search for stolen goods, the rise, and fall, of the general warrant is well documented and recorded, so well documented in fact that it tends to overshadow completely the Common Law warrant.[22] They first appeared as part of the practice of the Court of Star Chamber, which was particularly concerned with seditious libels by authors and printers.[23] The warrants were issued without normal judicial restraints, and a 'discretionary power given to messengers to search wherever their suspicions may chance to

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18 Denning M.R., Diplock and Salmon L.JJ.

19 See Part III for a discussion of the arguments used to reach this conclusion. For criticism of this case, see 26 CAMB. L.J. 193; 31 MOD. L. REV. 573.

20 But quaere the possibility of this effect not being limited to cases of stolen goods. Pringle v. Bremner and Stirling, (1867) 5 Macph. H.L. 55, allowed a seizure outside the warrant where the items seized implicated the appellant in an offence other than the offence forming the basis for the warrant. But see Part III.

21 See Part II.

22 A possible explanation of the remarks by Roach J.A. in Re Worrall, (1965) 48 D.L.R. (2d.) 673, 680.

23 A brief history of the general warrant is given in Entick v. Carrington, 19 Ho. St. Tri. 1030. See also FELLMAN, THE DEFENDANTS RIGHTS UNDER ENGLISH LAW, 52 *et seq.*; HOLDSWORTH, A HISTORY OF ENGLISH LAW, VOL. 10, 668-671.

fall'.[24] Star Chamber was abolished in 1640,[25] but on June 14 1643 an order of Parliament restored the licensing of the printing and selling of books, and thus provided the cause for the continuing of the practice of general search. The Licensing Act of 1662[26] granted power to administrative officials (the Secretaries of State) to issue warrants in order to suppress unlicensed books. Although this Act was expressed to be in force for only two years,[27] it was continued from time to time,[28] finally expiring in 1694; but the practice of issuing the warrants was not eradicated until 1765. This was finally done by three cases: *Wilkes v. Wood,*[29] *Leach v. Money,*[30] and *Entick v. Carrington.*[31] In *Wilkes v. Wood,* the Court declared the general warrant 'totally subversive of the liberty of the subject'[32] and held that it could not provide an authority to seize the goods of a person not named in the warrant. Although the legality of the warrant was not dealt with in *Leach v. Money,* it was held that it could not authorize the seizure of a person not named. And finally, in *Entick v. Carrington,* the claim that such a warrant is authority for a general search of the premises of a named person is rejected. The Court specifically emphasises two points: the lack of judicial control over the actions of the executing officers;[33] and the failure to limit the scope of the search by indicating the items to be seized.[34]

Although Parliament declared the general warrant to be illegal by resolution in 1766,[35] neither that nor the cases mentioned affect the legality of a general warrant based on statutory authority[36]—their

24 Wilkes v. Wood, 19 Ho. St. Tri. 1153, 1167.

25 Habeas Corpus Act 1640, 16 Car. I. c. 10, s. 3; 7 STATUTES AT LARGE 338. Significantly, the Court is abolished for acting 'contrary to the law of the land and the rights and privileges of the subject' (s. 2).

26 13 and 14 Car. II, c. 33, s. 15; 8 STATUTES AT LARGE 137.

27 Id., s. 25.

28 16 Car. II, c. 8; 1 Jac. II, c. 17, s. 15; 8 STATUTES AT LARGE 466.

29 (1763) 19 Ho. St. Tri. 1153. See generally on all these cases, RUDE, WILKES AND LIBERTY (1962).

30 (1766) 19 Ho. St. Tri. 1001.

31 (1765) 19 Ho. St. Tri. 1030.

32 Per Pratt L.C.J., 19 Ho. St. Tri. 1153, 1167.

33 19 Ho. St. Tri. 1030, 1064.

34 Id. at 1065.

35 April 22 and 25. See also Huckle v. Money, (1763) 2 Wilson 205.

36 For Australian examples of this, see Police Offences Act (Tas.) s. 60; Police Offences Act (S.A.) s. 56; Customs Act (Cth.) ss. 199, 214. See also the power to grant a Writ of Assistance, Customs Act (Cth.) s. 198. For similar provisions in other jurisdictions, see Parker, *The Extra-ordinary Power to Search and Seize and the Writ of Assistance,* (1963) 1 U.B.C.L. REV. 688; Trasewick, *Search Warrants and Writs of Assistance,* (1962) 5 CRIM. L.Q. 341.

concern is solely with the position at Common Law. That this concern is to be transferred to the interpretation of statutory provisions relating to warrants can be seen from the judgment of Griffith C.J. in *MacDonald v. Beare*.[37] The case concerned a warrant issued under the Games, Wagers and Betting Houses Act 1901 (Qld.); stolen goods were not involved and there was, therefore, no possibility that the Court would regard itself as dealing with a Common Law warrant. Yet Griffith C.J. approached the matter in this way: 'Now . . . if the common law has been altered, then some section, upon which those who make that contention rely, must be found in the Act'. In other words, in the absence of express statutory provision, warrants granted under statute are subject to the Common Law, and must comply with it. In this case, compliance with the Common Law allowed a broad interpretation of part of the relevant section of the Queensland Act, rather than a narrow one; but there is no reason to suppose that a statutory warrant should not be subject to the restrictions of the Common Law as well. This is certainly the approach running through the judgment of Fox J. in *The Queen v. Tillett; ex parte Newton*.[38] What are these general requirements, and how are they to be satisfied?

II

The Queen v. Tillett; ex parte Newton concerned the interpretation of section 10 of the Crimes Act 1914-1966 (Cth.), which required a Justice[39] to be 'satisfied by information on oath that there is reasonable ground for suspecting' certain things;[40] and one of the

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37 (1904) 1 C.L.R. 513, 521. Barton and O'Connor JJ. concurred in this judgment.

38 (1969) 14 F.L.R. 101.

39 The word "Justice" is used as a generic term. This article is not concerned with the extent of that term, nor with special provisions authorizing particular persons to issue warrants. See on this point CARTER, THE LAW RELATING TO SEARCH WARRANTS (1939), CH. 7.

40 There are hundreds of statutory provisions relating to the issue of search warrants. CARTER, *op. cit.* n. 39 above, CHS. 3 and 4, gives some idea of the extent. See also CAMPBELL AND WHITMORE, FREEDOM IN AUSTRALIA (1966), 48-50. This paper is limited to those provisions in each State which occupy the place occupied by s. 10 of the Crimes Act 1914-1966 (Cth.) in the field of Federal jurisdiction. See the Criminal Code (Qld.) s. 679; the Criminal Code (W.A.) s. 711; the Crimes Act 1900 (N.S.W.) ss. 354, 355, 357; the Police Act 1936 (S.A.) s. 57; the Crimes Act (Vic.) s. 464—all of which indicate quite clearly that the Justice himself must reasonably suspect. See also the Police Offences Act 1935 (Tas.) s. 59, where although this requirement is not present, the use of the phrase "may issue" would seem to indicate some discretion in the Justice.

main questions presented in the case was to what extent this imposed obligations on the Justice. There is considerable authority to say that a Justice, when issuing a search warrant, is acting judicially, that he is therefore exercising a judicial discretion when considering whether or not to issue the warrant, and that this discretion must be properly exercised. The matter is treated as well settled by Lord Coleridge C.J. in *Hope v. Evered;*[41] and there is considerable Australasian authority supporting it. In *Re Horne*[42] in 1878, a rule nisi for prohibition was supported on the ground that proper proof had not been put to a Justice to cause him to reasonably suspect certain matters. Twenty years later, in *Bridgeman v. Macalister,*[43] Griffith C.J. said:

> In order, therefore, that the justice may be authorised to issue a warrant, it must be proved *to him* that there is reasonable cause for suspecting. . . . The reasonable ground for suspicion is the foundation of his authority.

In *T.V.W. Ltd. v. Robinson and Cant,*[44] Wolff C.J., dealing with section 711 of the Criminal Code (W.A.) held that 'the authority to issue the warrant is discretionary and the discretion is to be exercised judicially after consideration of evidence'.

A similar position has been reached in New Zealand as the result of a series of cases, beginning with *Bowden v. Box.*[45] There, the Court was concerned with section 228 of the Licensing Act 1908 (N.Z.), which required the Justice to be "satisfied" before granting a warrant. It was held that the Justice could not issue a warrant solely on the oath of a policeman (or anyone else) that *he* reasonably suspected certain things; and that if the Justice did, he would be discharging his judicial duty in a 'parrot-like' fashion, that is, not discharging it at all. This case was followed in *Mitchell v. New Plymouth Club (Inc.)*[46] and in *Seven Seas Publishing Pty. Ltd. v. Sullivan.*[47]

The three New Zealand cases dealt with statutory provisions requiring the Justice to be "satisfied"; section 711 of the Criminal Code (W.A.) requires reasonable grounds for suspicion to "appear" to the Justice. *Re Horne* and *Bridgeman v. Macalister* dealt with statutory provisions calling for information or proof on oath that there was

41 (1886) 17 Q.B.D. 338. See also Lea v. Charrington, (1889) 23 Q.B.D. 45.
42 8 AUSTRALIAN DIGEST (2nd ed.), col. 90.
43 (1898) 8 Q.L.J. 151, 152 (emphasis added).
44 [1964] W.A.R. 33, 34.
45 [1916] G.L.R. (N.Z.) 443.
46 [1958] N.Z.L.R. 1070.
47 [1968] N.Z.L.R. 663.

"reasonable cause to suspect". The decisions in these two cases would seem to interpret this as requiring the "reasonable cause" to be an "objective" one, as capable of being seen by the Justice as by the informant. In *Feather v. Rogers*,[48] the Court compared the different powers to grant warrants contained in the Crimes Act 1900 (N.S.W.) sections 354 and 357. Section 354 requires a 'credible person, on oath before a Justice, [to show] reasonable cause to suspect'; this was interpreted to mean that there must be *in fact* reasonable cause to suspect, and the Justice must see this. To this extent, the case adds little to *Bridgeman v. Macalister*. But section 357 requires a 'credible person, on oath before a Justice, [to state] that he believes, and if such Justice sees cause to believe', certain facts. This was held to mean that it was 'sufficient if the Justice, upon a statement made to him on oath, sees cause to believe the truth of that statement'. It is submitted that this explanation of section 357 is dangerously imprecise. An examination of the section makes it quite clear that the Justice must believe the truth of the facts recited in the statement. It would not be sufficient for him to believe that the informant had a belief in the truth of those facts. Again, the conclusion is that the Justice must satisfy himself, rather than relying simply on the fact that certain matters have been put before him.

It is submitted that these cases, few as they are, reveal a trend toward a generally strict approach by the courts in deciding whether a warrant was properly issued. *Palethorpe v. Nebbia*[49] is a case which reveals the extent to which an Australian court has been prepared to take this trend. It concerned a warrant issued under the authority of section 159 of the Liquor Acts 1912-1935 (Qld.), which provided: 'Upon complaint on oath before any justice of the peace by any person that *he* reasonably suspects' (emphasis added). It might be thought that this would enable a Justice to issue a warrant on the basis of a complaint which does no more than allege that the complainant has a reasonable suspicion, and that this would be sufficient for the discharge of his judicial duty. After all, he is not required to be "satisfied", or to be "shown" certain things, or to have them "appear" to him; surely such a difference in the wording of a statutory section would call for a different obligation on the Justice. These arguments were rejected by the Court.[50] The section

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48 (1909) 9 S.R. (N.S.W.) 192. But see Ex parte Gleeson, [1907] V.L.R. 463.

49 [1937] Q.W.N. 33. See the criticism of this case in CARTER, *op. cit.* n. 39 above, CH. 12, and at 44.

50 Macrossan S.P.J., Webb and E. A. Douglas JJ.

> imports that the justice has a discretion to exercise, and to exercise it judicially it would appear essential that he should have proper material on which to exercise it. "Reasonably suspects" means suspects on reasonable grounds . . .

The Justice must know the grounds relied upon in forming the suspicion and must be able to see from them that the suspicion is in fact reasonable. The Justice's duty might be expressed this way: he has to examine the information laid before him, and determine that the complainant is acting reasonably in coming to his suspicion. Where an Act requires a Justice to be "satisfied", he has to examine the information laid before him in order to see if it would induce a reasonable suspicion in himself. Can it be said that there is any real distinction between the two duties?

Palethorpe v. Nebbia has been criticised by Carter,[51] who points out that the Full Court of the Supreme Court of New South Wales declined to follow it in the case of *Ex parte Cross, Re Chuck and Anor.*[52] It is submitted that these criticisms indicate a failure to understand what the Court was doing in that case. The judges considered themselves to be applying the principle in *Bridgeman v. Macalister*;[53] but they have gone further than this. What they have done is to apply the *attitude* expressed in that case, an attitude equivalent to that held by the Common Law.[54] The decision of Fox J. in *The Queen v. Tillett; ex parte Newton*[55] is well within this tradition. As section 10 of the Crimes Act 1914-1966 (Cth.) requires the Justice to be "satisfied", Fox J. relies more on the New Zealand cases than the Australian ones; but he does cite *Bridgeman v. Macalister* on this point. He stresses that

> the justice being satisfied by information on oath as to the matters mentioned is a condition precedent to the power the section gives.[56]

Only if the Justice has satisfied himself that there is reasonable cause

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51 See n. 49 above.

52 CARTER, *op. cit.* n. 39 above, at 44, gives only a newspaper reference. There seems to be no other report of, or reference to, this case.

53 (1898) 8 Q.L.J. 151.

54 In 1898, Sir Samuel Griffiths was Chief Justice of the Queensland Supreme Court. In 1904, he was Chief Justice of the High Court of Australia, and he expressed his Bridgeman v. Macalister approach again in MacDonald v. Beare, (1904) 1 C.L.R. 513, 521. This later case was not cited in Palethorpe v. Nebbia.

55 (1969) 14 F.L.R. 101.

56 Id. at 108.

for suspicion does the section authorize the exercise of the power to issue a warrant.

This places the information in a position of considerable importance. As the Justice is required to base his assessment of the reasonableness of the suspicion (such suspicion being either in his own mind or in the mind of his informant) upon the information given to him on oath, it follows that the information should contain all those particulars necessary to ground such a suspicion. Although Fox J. does no more than imply that this is necessary,[57] the authorities he cites are quite explicit. In *Bowden v. Box*,[58] Edwards J. has no doubt that all relevant facts should be presented in the information:

> it seems to me but reasonable that a person the sanctity of whose home or premises is invaded under a search warrant should be able to ascertain from the information what justification there is for that invasion.

This view is supported, not only by the later New Zealand cases,[59] but also by the Australian authorities.

> He cannot satisfy himself about those matters in accordance with the requirements of the Criminal Code unless the grounds are stated on oath, preferably in the complaint (cf. *Bridgeman v. Macalister* (1898), 8 Q.L.J. 151; *Feather v. Rogers* (1909), 9 S.R. (N.S.W.) 192); and unless the offence is adequately particularized.[60]

Fox J. has pointed out[61] that the warrant and the information form the record of the judicial action involved in granting the warrant. Would this not require that those facts necessary to ground the jurisdiction of the Justice should be set down in writing, either as part of the information, or as an annexure to it? Both Fox J. and T. A. Gresson J.[62] recommend this; but their recommendations are made while considering whether or not "information" implies "information in writing" (in circumstances where the appropriate statute might not have settled the matter). Fox J. comes to no conclusion on the

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57 Id. at 106, 108.

58 [1916] G.L.R. (N.Z.) 443, 445.

59 Mitchell v. New Plymouth Club (Inc.), [1958] N.Z.L.R. 1070; Seven Seas Publishing Pty. Ltd. v. Sullivan, [1968] N.Z.L.R. 663.

60 Negus J. in T.V.W. Ltd. v. Robinson and Cant, [1964] W.A.R. 33, 37. He might well have added Palethorpe v. Nebbia, [1937] Q.W.N. 33. The same situation applies at Common Law: see Jones v. German, [1896] 2 Q.B. 418.

61 (1969) 14 F.L.R. 101, 120.

62 Mitchell v. New Plymouth Club (Inc.), [1958] N.Z.L.R. 1070, 1073.

matter, and goes no further than citing the conflicting authorities on the point. Only two cases call for the information to be solely in writing: *Bowden v. Box*,[63] where the Court warns that it is not deciding the point, merely offering an opinion; and *Montague v. Ah Shen*,[64] which it is submitted, depends to a large extent on the particular wording of section 57 of the Police Offences Act 1890 (Vic.). It is submitted that these cases are not sufficient to give rise to a general duty that an information must be solely in writing; and that the Justice is entitled to accept sworn verbal evidence in support of the written information laid before him.[65]

But even when verbal evidence is taken, the warrant and the information form the record; certiorari for error of law on the face of the record will lie[66] unless the record reveals on its face all the requirements of the authority (statutory or otherwise) for granting the warrant. In particular, the warrant must show its jurisdiction on its face. In his discussion of this point, Fox J.[67] points out that there is no "presumption of regularity" applicable to the case, and that if "subordinate authority" is to act, then it must do so in such a way that its jurisdiction to act will be apparent in its action.

> [I]n the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act . . . ought, according to the course of decisions, to show their authority on the face of them by direct averment or reasonable intendment.[68]

In *The Queen v. Tillett; ex parte Newton*, it was held that in order to show jurisdiction, and to comply with section 10 of the Crimes Act 1914-1966 (Cth.), it was not sufficient to show that sworn evidence was given 'which if accepted, could be sufficient proof' and that the Justice then issued the warrant. It must be shown, on the face of the warrant, that the Justice in fact addressed his mind to the proper question (as specified in the statute—in this case, his own satisfaction

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63 [1916] G.L.R. (N.Z.) 443, 445.

64 [1907] V.L.R. 458.

65 See Yirrell v. Yirrell, (1939) 62 C.L.R. 287; Mitchell v. New Plymouth Club (Inc.), [1958] N.Z.L.R. 1070; and Ex parte Walker, (1945) 45 S.R. (N.S.W.) 103.

66 The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101; Seven Seas Publishing Pty. Ltd. v. Sullivan, [1968] N.Z.L.R. 663.

67 The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101, 106-107.

68 Gossett v. Howard, (1845) 116 E.R. 158, 173, cited by Fox J. See also Caudle v. Seymour, (1841) 113 E.R. 1372 (also cited); R. v. Totness, (1849) 116 E.R. 406; and R. v. Treasurer of Kent, (1889) 22 Q.B.D. 603.

that the evidence had produced in him a reasonable suspicion), and that he answered that question in the affirmative.

The powers which the Common Law granted to an officer when a search warrant was issued are set out by Carter.[69] They are:

1. The power to enter premises specified therein,
2. The power to search such premises,
3. The power to seize certain articles found therein,
4. The power to arrest particular persons . . . , and
5. The power to bring the articles seized and the persons arrested before a Court to be dealt with according to law.

But these powers are not without restriction. Because the Common Law recognised the degree to which the execution of a warrant was an interference with personal liberty, it demanded the interposition of a judicial act between the policeman's desire to make a search, and the actual authority to do so. Further, it required judicial control over the extent and nature of the search. Because both these aspects of control were missing, *Entick v. Carrington*[70] struck down the general warrant; and quite stringent rules were applied to ensure that any generality in a warrant would lead to invalidity. Attacks on the validity of warrants, based on claims of generality, are to be found, both at Common Law,[71] and under the provisions of statute.[72]

There can be no doubt that the premises to be searched should be accurately and clearly described;[73] for without such description the warrant would be one for general search, and valid only if issued under a provision containing an express authority.[74] But premises are invariably described in a proper manner; such problems as are shown by the cases involve the naming of the offence and the describing of the goods which may be relevant to such offence. In *The Queen v. Tillett; ex parte Newton,*[75] no offence was specified in the warrant, nor in the information, although the sworn verbal evidence given before the Justice had in fact referred to a particular offence. Fox J. approached the point in three ways. First, section 10 of the Crimes Act 1914-1966 (Cth.) refers to 'any offence against any law of the

69 *Op. cit.* n. 39 above, at 60.
70 19 Ho. St. Tri. 1030.
71 See e.g. Jones v. German, [1896] 2 Q.B. 418.
72 See e.g. Seven Seas Publishing Pty. Ltd. v. Sullivan, [1968] N.Z.L.R. 663.
73 See the analogous cases of warrants to arrest specified persons: e.g. Hoye v. Bush, (1840) 10 L.J.M.C. 168. Note that the premises need not be those of a suspect: The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101, 112.
74 See n. 36 above.
75 (1969) 14 F.L.R. 101.

Commonwealth . . . [which] has been, or is suspected on reasonable grounds to have been, committed'. This, it was held, meant that the power to issue a warrant to search for items involved in some way in an offence, was a power which could properly be used where any particular offence was under investigation; but in no way meant that there was no need to specify the offence.

> The word "any" is unlimited in the sense that it invites selection from an entire field, but primarily it denotes one from that field and in my opinion it is necessary that one be selected.[76]

Second, the warrant authorizes seizure, and this seizure must be related to a particular offence. Just as a warrant cannot authorize a search to try to find evidence of the commission of some offence, no matter what, it cannot authorize the seizure of any items, no matter what. The naming of an offence is necessary to limit not only what may be seized, but indirectly, the breadth of the search. And third, the naming of the offence is essential to the exercise of the Justice's judicial discretion.

> It would be absurd if the justice were required to be satisfied by the information in relation to a particular offence, and yet required or permitted to issue a warrant unrelated to any offence. If the information did not have to relate to a particular offence, the justice, who is obviously intended to be an independent authority, would have virtually no criteria to guide his decision on the facts and the exercise of his discretion.[76]

It should be noted that it is not necessary to allege either in the information or the warrant that an offence has in fact been committed; reasonable suspicion that it has been committed is enough.[77] In this, the statutory provisions follow the Common Law. *Jones v. German*[78] is authority for the proposition that Common Law did not require an allegation as to the actual commission of the felony (larceny), and that enough evidence to show reasonable suspicion would suffice to ground the issue of the warrant. At Common Law, a warrant to search for stolen goods would only be granted to search the premises of a person suspected of complicity in the theft—either in the larceny itself, or as a receiver, or as being in possession of stolen goods. But under the authority of statute, a warrant may be issued to search any premises wherein the relevant items might be found (subject, of

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[76] Id. at 112.

[77] See e.g. Crimes Act 1914-1966 (Cth.) s. 10; Criminal Code (Qld.) s. 679; Criminal Code (W.A.) s. 711.

[78] [1896] 2 Q.B. 418.

course, to reasonable suspicion that they are there having been shown). This means that the premises need not be those of a person suspected of complicity in the offence; and that although the commission of the offence may be known or reasonably suspected, the name of the offender need not be known or suspected, and need not be specified in the warrant.[79]

To what extent is it necessary to specify those items for which the search is being made? The answer to this question involves the relationship between the Justice's discretion, and that of the person executing the warrant. Although the granting of authority to make a search, and the extent of the search made thereunder, were to be subject to judicial decision, it was clearly impossible for every aspect of the search to be subject to the discretion of the Justice.[80] It was therefore necessary to grant some discretion to the officer executing the warrant, and this the law did in two ways. First, some warrants grant authority for the officer executing it to search for a particular thing or group of things. In *Price v. Messenger,*[81] the warrant authorized the officer to search for, and seize, stolen sugar. The officer seized some sugar, but it was not proved that the sugar was stolen, no prosecution was brought, and the sugar was returned. In an action for trespass it was contended that, as the warrant referred to 'stolen sugar', the officer was 'bound at [his] peril to seize stolen sugar or none at all'. The Court rejected this argument. Lord Denning[82] regards this case as authority for the proposition 'that a constable is entitled to seize, by virtue of the warrant, any goods which he reasonably believes to be included in the warrant, even though it should turn out afterwards that his belief was mistaken'. This can certainly be implied from the case, and indicates one aspect of the discretion granted an officer executing a warrant. Thus, where a warrant refers to specific items, it is proper for the officer to seize items which he reasonably believes are those referred to.

Is it necessary for the warrant to refer to specific items, or will it be sufficient if a general description is given? In *Jones v. German,*[83] one Thomas Wood swore an information alleging that a William Jones had 'certain property belonging to' him. Wood was able to convince

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79 The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101, 112, 114.

80 Unless he went along; and it was surely the desire to escape this obligation that led to the introduction of the search warrant in the first place.

81 (1800) 2 Bos. & Pul. 158; 126 E.R. 1213.

82 Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299, 309.

83 [1896] 2 Q.B. 418.

the Justice that there was reasonable cause to suspect that larceny had occurred, that William Jones had committed it, but he was unable to say what it was that had been stolen. The warrant was attacked on the ground of generality, in that it did not specify the goods. Lord Russell C.J. could not 'find it anywhere laid down that a search-warrant must specify the goods; and, indeed, it is easy to suggest many cases where it might be impossible for the person laying the information to do so'.[84] It should be remembered that this case involved a Common Law warrant, and that the owner of the goods would accompany the officer in order to identify any of his goods which might be found. Further, the warrant was one expressly restricted to a search for stolen goods; 'the search must have a purpose and what may be searched as relevant to one purpose may, or may not, be as extensive as that which has to be searched as relevant to another purpose'.[85] Both these considerations operated to restrict the search that might be made, and to prevent the warrant from being regarded as general.

At Common Law, it was not necessary to specify each item that might be seized. Statutory provisions relating to the granting of search warrants can be divided into three groups:

1. Those where the warrant is to authorize search for a particular thing;[86]
2. Those where the warrant is to authorize search for a particular class of things;[87] and
3. Those where the power is general, and the warrant might relate to all manner of things.[88]

The only problem which might arise in relation to group 1 is that which was settled in *Price v. Messenger*.[89] Where the warrant is for a search for a particular class of things, is it enough to refer to the class, or do individual items have to be specified? And where the statute places no limits (other than by reference to an offence) on the items which may be the subject of a search, how general may the warrant be?

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84 Id. at 424.

85 Fox J. in The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101, 113. This was one of the reasons for his insistence on the naming of an offence.

86 Such as a search for opium. See e.g. Police Offences Act 1935 (Tas.) s. 59 (1) (b).

87 Such as indecent documents. See Seven Seas Publishing Pty. Ltd. v. Sullivan, [1968] N.Z.L.R. 663.

88 See e.g. the provisions listed in n. 77 above.

89 (1800) 2 Bos. & Pul. 158; 126 E.R. 1213.

In *Seven Seas Publishing Pty. Ltd. v. Sullivan*,[90] a warrant had been issued to search certain premises for indecent documents, namely magazines and books. The information had named two books, and put forward grounds for suspicion that other like books were also present on the plaintiff's premises. When the search was conducted, 3,449 books and magazines, comprising 34 different titles, were seized and removed. It was contended that the provisions of section 25 of the Indecent Publications Act 1963 (N.Z.), under which the warrant was issued, required identification of the "indecent documents" with "reasonable particularity"; and that it was improper for police officers to seize books which they thought might possibly be indecent. The Court did not accept either of these contentions.

> It seems to me impossible in the warrant to describe documents individually or in more than generic terms. . . . I do not think the warrant is bad in that it refers only to indecent documents, to wit, magazines and books. It is limited to such things or material. . . . The search warrant would not authorize the seizure of material of a nature other than that specified in s. 25(1). In this respect I do not think the warrant is bad or defective, although I fully appreciate that it confers on the searching officer the right to make a decision as to the likelihood of indecency in the document seized.[91]

In fact, McGregor J. is quite adamant that the police officer should have the right to make such decisions.[92] Where the search is for items of a particular class, there are clear and obvious difficulties in attempting to list each item to be seized; and the executing officer must be given a discretion to examine likely items and select those which "seem", in his judgment, to come within the class. It is because of the generality of the description of the items to be seized, and the accompanying discretion in the officer, that it is so important to specify the offence. The officer then exercises his discretion within the boundaries of a particular offence, and his search is thus limited and controlled. McGregor J. makes this clear in the passage quoted; and Fox J. makes the same point in relation to group 3 statutory provisions.[93]

> [I]t is argued . . . that the warrant is also defective because (a) it does not sufficiently specify the documents or things to be

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90 [1968] N.Z.L.R. 663.

91 Id. at 671.

92 Id. at 669-670.

93 The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101, 114 (emphasis added). But see his remarks at 125.

> seized. . . . Submission (a) is not in my opinion a valid objection in so far as it involves that there must necessarily be something in the nature of an itemization or specific description of particular documents or things. *The generality of the warrant will be sufficiently narrowed in the present case if the offence is specified. This doubtless leaves the constable with some degree of discretion, but clearly that was intended. The fact is that the ambit of the discretion is to some extent circumscribed, and there is some basis for keeping his activities within proper limits.*

III

The existence of the discretion just discussed gives the officer executing the warrant a limited authority to select the items to be seized. Apart from this discretion, his conduct is governed by the warrant, by the requirements of any statutory authority for the warrant, and by the Common Law. For instance, at Common Law, a warrant was to be executed during the day-time,[94] but many statutes have permitted execution at night, or at any time.[95] The general rule would still apply where a statute was silent on the point.[96] Similarly at Common Law, the officer was required to carry the warrant at the time of the search, and produce it if called upon to do so;[97] but he should not part with it, and was entitled to use necessary force in order to ensure that he retained it.[98] The Privy Council case of *King v. The Queen*[99] is an example of the strictness the courts require in compliance with the statute under which a warrant was granted, and the terms of the warrant itself. In that case the warrant was declared defective because the statute required a constable to be "named", and this had been omitted. Further, the search which had been made included a search of the appellant's person. Although the statute authorized personal searches under a warrant, this particular warrant had omitted to include the words which conveyed this authority, and the search of the appellant was held to be unlawful. It would seem that an officer executing a warrant steps outside its terms at his own peril.

This case was decided only a few months before the decision in *Chic Fashions (West Wales) Ltd. v. Jones*[100] in the Court of Appeal; the difference in approach is significant. It is not clear from the

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94 HALE, PLEAS OF THE CROWN, VOL. 2, 150.
95 See the examples given in CARTER, *op cit.* n. 39 above, at 66-67.
96 See Nolan v. Clifford, (1904) 1 C.L.R. 429.
97 See Galliard v. Laxton, (1862) 2 B. & S. 363; 121 E.R. 1109.
98 R. v. Mitton, (1827) 3 C. & P. 31; 172 E.R. 309.
99 [1968] 3 W.L.R. 391.
100 [1968] 2 Q.B. 299. It is also reported in [1968] 1 All E.R. 229.

reports whether the warrant in *Chic Fashions (West Wales) Ltd. v. Jones* was a Common Law warrant, or issued under the authority of section 42 of the Larceny Act 1916 (U.K.). The question before the Court was regarded as one to be solved by application of the Common Law; and Lord Denning M.R. regarded section 42 as doing no more than state the Common Law.[101] It is difficult to know, therefore, whether the decision could be used to validate actions which were outside the authority of a warrant issued under statute; and if it could be used, whether it would be necessary for the warrant to be for a search for stolen goods; or could the Common Law, as expressed in that case, come to the aid of actions taken in relation to any offence? In the past, the Common Law has been used to keep narrow the operation of statutes granting the power to issue warrants. Might it be, as a result of this case, that the Common Law would be turned on its head, and used to justify, not only *width* of operation, but *excess* in execution?

The judgments in *Chic Fashions (West Wales) Ltd. v. Jones* reveal two approaches: one based on previous authority, and another based on public policy type considerations. The authorities cited (especially in the judgment of Lord Denning M.R.) may be divided into three classes: those dealing with actions interpreted as being within the authority of the warrant (*Price v. Messenger;*[102] *Crozier v. Cundy*[103]); one case dealing with actions outside the authority of the warrant (*Pringle v. Bremner and Stirling*[104]); and those dealing with seizure as a consequence of the execution of a warrant of arrest (*Dillon v. O'Brien and Davis;*[105] *Elias v. Pasmore*[106]).

Price v. Messenger has already been discussed, and clearly has no relevance to the point at issue in *Chic Fashions (West Wales) Ltd. v. Jones. Crozier v. Cundy* does have relevance, but is capable of different interpretations. Some cotton copps, contained in two packing cases, were stolen from Cundy. A warrant was taken out to search Crozier's house, but it referred only to the cotton copps, and not to the packing cases. The cotton was found, still in the packing cases, and they were taken away. Also taken were a tin pan and a sieve. The Court held that it was proper to take the packing cases, as they were likely to

101 But see Seven Seas Publishing Pty. Ltd. v. Sullivan, [1968] N.Z.L.R. 663, 666 lines 45-50.
102 (1800) 2 Bos. & Pul. 158; 126 E.R. 1213.
103 (1827) 6 B. & C. 232; 108 E.R. 439.
104 (1867) 5 Macph. H.L. 55.
105 (1887) 16 Cox C.C. 245.
106 [1934] 2 K.B. 164.

furnish evidence of the identity of the cotton copps; but that the taking of the tin pan and sieve was unlawful. The case may be seen as one where the seizing of stolen goods not specified in the warrant was approved by the Court, but this is to overlook the tin pan and sieve. The taking of the packing cases was a taking of items *relating to* those specified in the warrant, which items had also been seized. The tin pan and sieve were items which would have involved the same offence (i.e. stealing, or receiving, or possession) but, not being specified, the taking was unlawful. Were it not for the fact that *Chic Fashions (West Wales) Ltd. v. Jones* involved two sets of similar items, it would be completely similar to the tin pan situation. And is the distinction relevant? If the police are prepared to be so particular as to specify that they are looking for dresses of a particular brand, does it matter whether they find dresses of another, different brand, or tin pans? Neither will relate to the dresses which were specified in the warrant in the way the packing cases related to the cotton: and *Crozier v. Cundy* is surely authority for the proposition that the discovery of items which were not specified in the warrant, but which could constitute evidence of an offence of the same nature as the offence specified in the warrant, could in no way make this seizure lawful.

Dillon v. O'Brien and Davis decided that when a man is arrested, and items, which are material evidence of the offence for which he is being arrested, are in his possession at the time, they may be seized and detained, for use as evidence at his trial, on the authority of the warrant to arrest. Or rather, the case reiterated that rule, which had been well settled for some time. *Elias v. Pasmore* extended the rule to cover a situation where the whole of the premises in which the arrest was made was searched, and items were seized, which were not in the possession of the arrested man, were not intended to be used in evidence at his trial, but were used in the prosecution of another man. Although on the facts of this case, the offence of the second man was one related to the offence of the first man, Horridge J. held[107] that items which were 'evidence of a crime committed by anyone' could be lawfully seized. The judgment in this case has been severely criticized,[108] and in particular Lord Denning M.R.[109] thought that Horridge J. had expressed himself too widely. And even Horridge

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107 Id. at 173.

108 See Wade, *Police Search,* (1934) 50 L.Q.R. 354; Stephens, *Search and Seizure of Chattels,* [1970] CRIM. L. REV. 74.

109 Ghani v. Jones, [1969] 3 W.L.R. 1158, 1166.

J. himself doubted that the seizure was lawful, but was prepared to regard it as 'excused' by the 'interests of the State'.[110] There is doubt as to whether *Elias v. Pasmore* should be regarded as a good authority,[111] and particularly one may doubt whether it had anything to say on the question posed in *Chic Fashions (West Wales) Ltd. v. Jones.* It did not regard the seizure as lawful; and it concerned the execution of an arrest warrant. It is submitted that the principles involved in arrest warrants and those involved in search warrants are not necessarily interchangeable.[112] And significantly, the only reference in *Elias v. Pasmore* to *Entick v. Carrington*[113] is by way of quotation from a third case, *Dillon v. O'Brien and Davis,* a quotation which it is submitted in no way deals with the issues which would have been raised had the situation in *Elias v. Pasmore* been judged by the principles of *Entick v. Carrington.*

Pringle v. Bremner and Stirling was a case where constables were searching for items specified in their warrant, which, if found, would implicate the plaintiff in an offence involving an unlawful explosion. They found, and took away, documents implicating the plaintiff in the sending of menacing letters. Again, the case is not clear authority that such taking is lawful; rather it is excused 'by the result of the search'. If the case were good authority, it would cover the situation in *Chic Fashions (West Wales) Ltd. v. Jones.* Yet Lord Denning M.R. is at pains to point out[114] that the seizure 'cannot be made lawful or unlawful according to what happens afterwards'; that it must be 'justified at the time'. And Horridge J., in *Elias v. Pasmore,*[115] considered it to be 'a Scotch case, and must not be taken to have been decided on the law of England'.

The conclusion reached by the Court of Appeal in *Chic Fashions (West Wales) Ltd. v. Jones* is now to be found enacted in section 26(3) of the Theft Act 1968 (U.K.). To that extent, the concern of the Court has anticipated the Legislature, and the public policy issues discussed and ruled on by the Court have been ruled on by the Legislature as well. All three judges were convinced of two points. First, that the law did not, and should not, afford greater protection to

110 [1934] 2 K.B. 164, 173.
111 Stephens, *op. cit.* n. 108 above.
112 The submission is that different 'interests of the State' are involved in arrest and search. Substantiation would require a lengthy consideration of Common Law powers of arrest, something outside the scope of this paper.
113 19 Ho. St. Tri. 1030.
114 [1968] 2 Q.B. 299, 312.
115 [1934] 2 K.B. 164, 172.

property than to persons; they saw no reason why powers of search should be limited in ways that powers of arrest were not.[116] Second, that *Entick v. Carrington* was expressive, not of basic principles, but of the balance 'between the inviolability of private property and the pursuit of public weal'[117] which seemed appropriate at the time; that the language of its decision had an 'archaic and incongruous' ring;[118] and that now a new balance must be sought. It is submitted that this is an over-simplification of that decision, and that the case is one concerned with the liberty of the individual and his freedom from interference. If the eighteenth century saw fit to express this freedom in terms which would make the most impact upon its own listeners, it behoves us to do the same, and not deny the freedom by reason of our dislike for the clothes it wears. J. A. Weir, writing in the Cambridge Law Journal,[119] said of *Chic Fashions (West Wales) Ltd. v. Jones*:

> Diplock L.J. emphasised, for some reason, that he was laying down the law for today; tomorrow, we must hope, the House of Lords (who have granted leave to appeal) will give us back the better law of yesterday and the day before.

Unfortunately, there has been no appeal, and the hope expressed by Weir seems destined to remain just that.

IV

Chic Fashions (West Wales) Ltd. v. Jones was an action for damages for trespass to goods, the traditional method for obtaining redress in circumstances where it was alleged that either the warrant, or its execution, was defective. At Common Law, the owner of the goods allegedly stolen had to accompany the officer in order to identify his goods; and if the goods were not there, he became a trespasser, to which the officer was a witness.[120] The officer was able to be a witness because he was protected by the warrant, a judicial direction to him to do certain things. At Common Law, if the warrant was invalid for lack of jurisdiction, the officer could not rely on it as a defence to an action in trespass; and as the warrant was void, an action for trespass to land, as well as one to goods, would lie.[121] This places an intolerable

116 As to this, see n. 112 above, and text thereto.
117 [1968] 2 Q.B. 299, per Diplock L.J. at 315.
118 Id., per Salmon L.J. at 319.
119 [1968] CAMB. L.J. 193.
120 Entick v. Carrington. See n. 12 above, and text thereto.
121 Feather v. Rogers, (1909) 9 S.R. (N.S.W.) 192. Jones v. German, [1896] 2 Q.B. 418 was also a trespass case.

burden on the officer; how is he to determine the validity or invalidity, the jurisdiction or lack of it, of the warrant? And what if he does have doubts that the warrant might be invalid—is he to ignore it?[122] Various statutory provisions have been enacted to protect the officer, the earliest being the Act 24 Geo. II, c. 44 in 1751.[123] This statute provided, in section 6, that before any action should be brought against any constable (or such other officer) a request in writing must be made by the party bringing the action (or his lawyer or agent) that he be shown, and allowed to copy, the warrant. If this request was refused, or not complied with after six days, then the action should proceed, and the constable would be subject to the Common Law. If the request was complied with, then at the trial of the action, production and proof of the warrant would be a complete answer for the constable, or any person who assisted him. But the Justices would not be protected by such production and proof.

Feather v. Rogers[124] makes it clear that this Act is applicable in Australia, and that a failure to make the request set out in section 6 is a complete bar to an action. The section particularly applies to cases where there is a defect in jurisdiction. But it will only operate to protect an officer who has acted in obedience to the warrant. In *Horsfield v. Brown*,[125] Macnaghten J. set out the distinction.

> If the constable acts in obedience to the warrant, then . . . he is protected by the statute of 1750 [*sic*], but if the warrant be a lawful warrant, and he executes it in an unlawful way, then no action is maintainable against the magistrate, but an action is maintainable against the constable.

Again, the ordinary remedy is an action in trespass against the officer; but it should be noted that an execution which goes beyond the authority of the warrant and becomes to that extent unlawful, is unlikely to create a trespass *ab initio* to land.[126] And obviously, no amount of producing and proving the warrant can affect the liability of the officers.

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122 Lawrence J. in Jones v. Vaughn, (1804) 5 East 447; 102 E.R. 1141, points out that an officer who did this was subject to indictment.

123 20 STATUTES AT LARGE 279. The relevant section is freely copied in s. 69 of the Police Act 1937 (Qld.).

124 (1909) 9 S.R. (N.S.W.) 192.

125 [1932] 1 K.B. 355, 369. See also Price v. Messenger, (1800) 2 Bos. & Pul. 158; 126 E.R. 1213.

126 Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299. All three judges express a desire to be rid of the Six Carpenter's Case, (1610) 8 Co. Rep. 146a, and its consequences; but I make no comment as to the value of their reasoning. See 26 CAMB. L.J. 193.

Jones v. German[127] was an action for trepass, but against the Justice, not the officer. The Act of 1751 was not designed to protect Justices, but there is more modern legislation which does.[128] The general scheme is that no action may be brought against a Justice in respect of consequences of the performance of his duties unless it be an action in tort, with malice alleged; save that where the basis of the action is a claim that the Justice acted in excess of jurisdiction, no malice need be alleged. So long as the Justice can show that he acted properly and judicially, he has a good defence, even should the complaint be later shown to be untrue. In *Bridgeman v. Macalister,*[129] the Justice was liable in trespass when it was held that the complaint did not disclose reasonable grounds for the required belief, and that he had acted without jurisdiction in granting the warrant. And in *Caudle v. Seymour*[130] a Justice acting without jurisdiction was regarded as having no more powers than any other person.

The officer executing the warrant is to a large extent protected by the judicial nature of the warrant; the Justice is protected to a certain extent by the legislative rule that most cases will require an allegation of malice. Is there any liability in the informant? It is the information which sets the whole process in motion: what sanctions lie against a person who frivolously or maliciously sets the process going? The appropriate action is for the person aggrieved by the search to sue for malicious prosecution.

But the judicial nature of the Justice's act protects the informant as well as the officer who executes the act. If it can be shown that the information gave rise to the necessary reasonable suspicion about certain things, then the issue of the warrant closes the matter, as far as the informant is concerned. It is only when he acts mala fides that the courts will look behind the warrant, and allow the bringing of the action for malicious prosecution.[131]

Actions for trespass and malicious prosecution will bring both the warrant, and one or other of the persons connected with it, before the court for adjudication of the validity of what has occurred. These actions are not the only means capable of testing the lawfulness of a warrant, or an action claimed to be taken within its authority. In

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127 [1896] 2 Q.B. 418.

128 See, for example: The Justices Acts 1886-1932 (Qld.) s. 252; Justices Act 1959 (Tas.) ss. 126-128.

129 (1898) 8 Q.L.J. 151.

130 (1841) 113 E.R. 1372.

131 See Hope v. Evered, (1886) 17 Q.B.D. 338; Williamson v. McRavey, (1880) 6 V.L.R. 487.

Bowden v. Box,[132] the invalidity of the warrant was pleaded as an answer to the charge of obstructing a police officer in the execution of his duty. *Mitchell v. New Plymouth Club (Inc.)*[133] went to the New Zealand Supreme Court as a case stated under section 78 of the Summary Proceedings Act 1957 (N.Z.); it being stated by the magistrate who had to deal with the application for forfeiture of the liquor involved in that case. The route by which *T.V.W. Ltd. v. Robinson and Cant*[134] arrived before the Full Court of the Supreme Court of Western Australia was a little more complicated. An application for an order nisi to review, under section 197 of the Justices Act 1902-1962 (W.A.) was granted by D'Arcy J. The hearing to make absolute came on before Negus J., who referred the case to the Full Court. Three judges of the Court[135] held that it was proper to question a warrant by way of an order to review under section 197.

It is well established that certiorari will go to quash a warrant which reveals an error of law on the face of the record, and that prohibition will issue in an appropriate case.[136] But where an application for certiorari is made, account must be taken of the Act 13 Geo. II, c. 18 (1740).[137] That Act provides, in section 5, that where it is sought to sue 'forth writs of *Certiorari,* for the removal of convictions, judgments, orders, and other proceedings before justices' it shall be necessary to do so within six months of the date of the conviction, etc., and that six days notice must be given to the Justice or Justices concerned. The Act has been held to be law in New South Wales, so presumably it applies to the whole of Australia. Fox J. is not sure that it is the law in the Australian Capital Territory; but he does not decide the point, and his decision that the Act did not apply to the case before him is based on other considerations. First, the Act does not apply in cases where the warrant shows a lack of jurisdiction on its face; and second, a search warrant is not within the class of matters specified by the section. Thus, the application for certiorari

132 [1916] G.L.R. (N.Z.) 443.

133 [1958] N.Z.L.R. 1070.

134 [1964] W.A.R. 33.

135 Wolff C.J., Virtue and D'Arcy JJ. But note the dissent of Negus J. on this point.

136 See the lengthy discussion by Fox J. in The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101, 114-123. See also Seven Seas Publishing Pty. Ltd. v. Sullivan, [1968] N.Z.L.R. 663; Palethorpe v. Nebbia, [1937] Q.W.N. 33.

137 17 STATUTES AT LARGE 389. This is dealt with by Fox J. in The Queen v. Tillett; ex parte Newton, (1969) 14 F.L.R. 101, 114-117.

cannot be affected by this Act. Nor, it should be noted, is it affected by the fact that the warrant has been executed.

Fox J. was not prepared to issue prohibition.

> Even if it might otherwise have been possible to prohibit use, or retention, of the documents seized, the fact is that they are now in the custody of the court and I propose to exercise control over their disposition.[138]

In what type of case would a court be prepared to issue prohibition? Fox J. is certainly not deciding that the writ could go to prohibit use or retention of seized items by, say, the police. The cases where prohibition has been granted indicate that it will issue for one particular type of case. The normal practice for Licensing Acts is to provide for the seizure of liquor being unlawfully sold or otherwise dealt with, and then for an application to be made to Justices for the forfeiture of such liquor, with the person from whom it was seized entitled to oppose the application. The Licensing Acts of Queensland and New Zealand are no exception, and in both *Palethorpe v. Nebbia*[139] and *Mitchell v. New Plymouth Club (Inc.)*[140] prohibition was issued to prevent the continuance of forfeiture proceedings. And in *Seven Seas Publishing Pty. Ltd. v. Sullivan,*[141] prohibition lay to prevent proceedings against seized books, wherein the owner was required to show cause why they should not be destroyed. So where a warrant is invalid, and goods have been unlawfully seized thereunder, and proceedings are being taken against the goods themselves, prohibition will issue.

Is there any other way in which proceedings might be affected by the unlawfulness of the warrant or its execution? In the United States, evidence which is unlawfully obtained is normally not permitted to be used,[142] but this approach has not been adopted in Australia or the United Kingdom. Rather, the courts regard themselves as having a discretion to exclude evidence, which would otherwise be admissible, where it had been obtained unlawfully. The principles upon which the discretion is to be exercised are discussed in *King v. The Queen,*[143]

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138 Id. at 122.
139 [1937] Q.W.N. 33.
140 [1958] N.Z.L.R. 1070.
141 [1968] N.Z.L.R. 663.
142 For a discussion of this, and of the Australian position, see COWEN AND CARTER, ESSAYS ON THE LAW OF EVIDENCE, CH. 3; Baker, *Confessions and Improperly Obtained Evidence,* (1956) 30 A.L.J. 59; Neasey, *The Rights of the Accused and the Interests of the Community,* (1969) 43 A.L.J. 482.
143 [1968] 3 W.L.R. 391, 397-401.

and clearly indicate why such evidence is rarely excluded.[144] In *The Queen v. Tillett; ex parte Newton,*[145] this particular problem did not arise, but Fox J. was faced with making some order concerning the documents that had been seized. The documents had been tendered (but not admitted into evidence) and were within the control of the Court.

> . . . I do not think that I should allow them to be released to the police officers, in the ordinary way, as being documents produced by them and tendered on their behalf. They acquired them by virtue only of the warrants which I have held to be invalid. At the conclusion of argument the Solicitor-General intimated that some might be wanted for a prosecution or prosecutions and I was told that one prosecution was then pending. Without considering the strict right of the police officers to have any documents for such a purpose, or at all, I directed that on request documents might be released temporarily to the Crown Solicitor, upon photostat copies being substituted and on an undertaking to return the originals when no longer required for any prosecution. This course was not opposed by the applicants, and documents were released in this way and have since been returned.

Fox J. then reserved liberty to apply on the matter.

There seems to be an implication in these remarks that items might be prevented from becoming evidence in a prosecution, not by their exclusion at that point, but by preliminary application for an order that they were unlawfully obtained and should be returned. There is some support for this procedure in the South Australian case of *Miller v. Noblet,*[146] and in the Victorian case of *Levine v. O'Keefe.*[147] It might thus be possible to avoid the need to rely on the judicial discretion to exclude evidence in cases of unlawful seizure, and to rely instead on a preliminary application which concerns itself solely with the authority for such seizure.

V

The three recent major cases on search warrants create a conflict between themselves; a conflict, not of particular rules, but of basis of

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144 There are hardly any cases. For examples, see Lawrie v. Muir, [1950] S.C. (J.) 19; McGovern v. H.M. Advocate, [1950] Scots L.T. 133; H.M. Advocate v. Turnbull, [1951] S.C. (J.) 96; R. v. Payne, [1963] 1 W.L.R. 637. See also the South African cases discussed in COWEN AND CARTER, *op. cit.* n. 142 above.

145 (1969) 14 F.L.R. 101. See particularly at 127.

146 [1927] S.A.S.R. 385.

147 [1929] V.L.R. 302; affirmed on appeal, [1930] V.L.R. 70.

approach. *King v. The Queen* and *The Queen v. Tillett; ex parte Newton* express the traditional approach: cautious, strict in ensuring compliance with authority, concerned for the individual's liberty and privacy. *Chic Fashions (West Wales) Ltd. v. Jones,* on the other hand, casts the Common Law away from its old moorings; caution and strictness are replaced with a new kind of flexibility, while the concern is for the attainment of social goals. It remains to be seen whether this case will affect the tenor of future Australian decisions on search and search warrants; it is submitted that it should not.

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