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THE

INVIOLABILITY OF TELEGRAPHIC DISPATCHES.

ARGUMENT

BEFORE THE

JUDGES OF THE COURT OF COMMON PLEAS FOR THE COUNTY OF DAUPHIN, IN THE STATE OF PENNSYLVANIA,

In the matter of

COMMONWEALTH *vs.* KEMBLE *et al.*

IN RE WESTERN UNION TELEGRAPH COMPANY *SUR SUBPŒNA DUCES TECUM.*

BY

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Commonwealth vs. *Kemble* et al. } *In re* Western Union Telegraph Company, *sur subpœna duces tecum.*

The subject now before the court in the above case, and presented by the return to its writ of *duces tecum*, has been recently much considered and treated of by eminent men in the law, in dissertations and in argument in litigated cases. The February number of the American Law Register contains an excellent essay, written by Judge Cooley, and in August, 1879, at the second annual meeting of the American Bar Association, held at Saratoga Springs, Mr. Henry Hitchcock, of the St. Louis bar, read a very thorough essay upon the inviolability of telegrams. These I will present to the court.

I have also had sent to me recently an argument delivered by John L. Thompson, Esq., of the Chicago bar, upon the same subject, before the Committee on Privileges and Elections of the United States Senate, on Tuesday, December 16th, 1879. It is full and complete. That argument and Judge Cooley's essay both maintain the proposition that I stand here to make good. The dissertation of Mr. Hitchcock is rather an impartial review of both sides of the question. The result of his investigation tends, however, to strengthen the argument I shall here present, and to maintain the proposition I hope to establish. There have been but five American cases decided on the subject. All of those are fairly recited, discussed, and considered by Mr. Hitchcock and by Judge Cooley too, and of them all, there are but really three that meet the questions as we present them; that is to say, the State *vs.* Litchfield, 58 Maine,

267; National Bank *vs.* National Bank, 7 West Virginia, 544; *Ex parte* Brown, American Law Review, vol. 13, No. 1, July, 1879.

The only Pennsylvania case being the case of Henisler *vs.* Freedman, 2 Parsons, 274, and that is of no authority now to control the questions as they stand before the court.

And the other cases I have cited will be hardly persuasive to any result with this court; for, as I consider it, the statutes of this State furnish the rule with sufficient certainty to enable me to say that the law here is not law as it is propounded in those three cases decided in other States.

Really this is a question of Pennsylvania statutory law; nevertheless I will be obliged to present the case in all its aspects, and to do so will first ask this court to pause and recall the cases so celebrated in the history of the law in England, in which the right of search and seizure of private papers was set at rest forever. The dominant principles established in those cases have direct application here, and I have no doubt that the court will read them with satisfaction, as I have with instruction and admiration. The passages I shall here cite are from the noted cases reported in Lofft's Reports and 11th State Trials upon the subject of seizure of papers.

Let me here observe that because this is an interlocutory argument injected into another case, the current of which it now suspends, that I have thought it to be prudent and proper to give the court full copies of all that I shall cite, either in the text of my argument or in the appendix. It would not be right to prolong this discussion by giving lengthy recitation from all the books I shall have occasion to use, and I can not afford to omit any that I depend upon. When I have done the court will thus have before it everything that I

have presented. It will abridge the time consumed in discussion, and it will aid the court to give it a prompt and instant consideration. Neither the statutes nor decisions that I deem important and essential shall be wanting; the very text shall be here to command.

And, first in order, let me again ask the court to read these memorable sentences of Dunning, the illustrious advocate, and of Camden, the most patriotic, learned, able, and eloquent of England's judges—the rival and peer of Mansfield.

From this we learn what was received as undisputed law. In the face of arbitrary government, and in an arbitrary age, these bold sentences were pronounced and applaudingly received by the whole profession and the English public, and submissively accepted even by the illiberal partisans of absolute authority as a necessity as a surrender to the common law, that in this maintained inviolate the common right of the commonest man.

Mr. Dunning argued:—"A power to issue such a warrant as this is contrary to the genius of the law of England; and even if they had found what they searched for, they could not have justified under it. But they did not find what they searched for, nor does it appear that the plaintiff was the author of any of the supposed seditious papers mentioned in the warrant; so that it now appears that this enormous trespass, and violent proceeding, has been done upon mere (meer) surmise. But the verdict says, such warrants have been granted by secretaries of State ever since the revolution. If they have, it is high time to put an end to them; for if they are held to be legal, the liberty of this country is at an end. It is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study. But if having it in one's custody was the

crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish Inquisition; for, ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiffs' books and papers without exception, and carry them before Lord Halifax. What? Has a secretary of State a right to see all a man's private letters of correspondence, family concerns, trade, and business? This would be monstrous, indeed! And if it were lawful, no man could endure to live in this country. In the case of a search-warrant for stolen goods, it is never granted, but upon the strongest evidence that a felony has been committed, and the goods are secreted in such a house; and it is to seize such goods as were stolen, not all the goods in the house; but if stolen goods are not found there, all who entered with the warrant are trespassers. However frequently these warrants have been granted since the revolution that will not make them lawful; for if they were unreasonable, or unlawful, when first granted, no usage or continuance can make them good. Even customs, which have been used time out of mind, have been often adjudged void, as being unreasonable, contrary to common right, or purely against law, if, upon considering their nature and quality, they shall be found injurious to a multitude, and prejudicial to the Commonwealth, and to have their commencement, for the most part, through the oppression and extortion of lords and great men. Davis, 32 b. These warrants are not by custom; they go no farther back than eighty years; and most amazing it is, they have never before this time been opposed or controverted, considering the great men that have presided in the King's Bench since

that time. But it was reserved for the honor of this court, which has ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of star-chamber tyranny."

Lord Chief Justice Pratt, in pronouncing his opinion, said as follows:—

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

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

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

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

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

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

It is to be remembered that while Lord Camden thus stood up for the law, as it guarded the subject from search and seizure, yet in strong terms he censured the offender and the offense—not favoring him or it. He did not wish his escape, as these words will show:—

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

"After this description, I shall hardly be considered as a favorer of these pernicious productions. I will always set my face against them, when they come before me, and shall recommend it most

warmly to the jury always to convict when the proof is clear. They will do well to consider that unjust acquittals bring an odium upon the press itself, the consequence whereof may be fatal to liberty: for if kings and great men can not obtain justice at their hands, by the ordinary course of law, they may at last be provoked to restrain that press which the juries of their country refuse to regulate. When licentiousness is tolerated, liberty is in the utmost danger; because tyranny, bad as it is, is better than anarchy; and the worst of governments is more tolerable than no government at all."

Lord CAMDEN really ruled in that case that to examine the freeman's private papers, much of which would relate to matters not connected with the object and purpose of the search, and thus expose things and thoughts that no one has the privilege to expose, in which it is the privilege of his freedom, manhood, and citizenship against all the world to keep to himself secret, as if sacred, would not be tolerated. So is it now with the telegraph. The political, commercial, and social necessity of which makes this great instrument of intercourse essential, and the State, by its written statutes, commands, guides, regulates, encourages, and invites its use, and for the same general reason of public policy that ruled the judges to maintain legal confidence given to its officers, the law guards as a privilege the confidences intrusted to this public and universal means of private intercourse—the greatest element and instrument of modern civilization. Suddenly destroy this, and public life, commercial life, and domestic life would be shocked. It would subvert the very order of all social, commercial, and political existence.

It owes its life and usefulness to this very principle of privilege and immunity from inquisition

of any kind, no matter from what pretext or by what authority. If communications could be made by telephone, there would be no need of this privilege, for there would be no confidence given and no trust imposed. But for long and remote distances, and for the necessities of the general public, the telegraph must be the only means of intercourse, and as such is as inviolable and free from search or inquisition, as the postmaster and the letters, or the lawyer and his confidence, or the physician, or the priest, or the private papers in the home and possession of the citizen.

The privilege as to counsel was the result of the desire of the courts to have litigants retain men learned and capable in the law, to aid in the administration of justice and to assist in the dispatch of business. When the clergymen, who were the first lawyers, were excluded from appearing in the courts, some substitute was necessary, and judges, for their own sakes, as business multiplied, felt the advantage of the help of experts in the law. Before that, parties conducted their own cases under great disadvantage, and they hesitated to disclose their secrets, fearing that their confidence relating to their suits might be revealed, and so they were reluctant to employ counsel. At which the court said, advise freely with your officers as your substitute (*ponere in loco suo*), and you shall be free and your counsel shall have the same immunity that you have, and shall stand before us as you would if you, in person, were conducting your own suit, protected from any one who may ask or demand that he shall tell what he has learned from you.

The case of Heniseler *vs.* Freedman, 2 Parsons, 274, is no authority in this case. In the first place it was a *civil* issue, and in the second place the messages were specified and described as signed by the defendant, and in the third place the pur-

pose for which they were offered and their materiality was distinctly pointed out and expressed. Indeed, it was admitted that the evidence designed to be adduced to the issue before the court was material. In the fourth place, they were sent by the defendants to one of their partners. And in the fifth place, the case was decided in 1851, before the passage of the act of 1855, in which, as it has been before shown, the law expressly defines the duties of the telegraph operators and the rights of the senders and receivers, providing that they alone, or their counsel, should be able to command the production of their messages in evidence.

Then, again, the opinion treats of the subject outside of the real question before the court, and by mere *obiter* passes upon matters that were not well considered or well understood, and that have no binding authority.

The case was decided when telegraphy was almost in its infancy, and before its importance was felt or known, and before it had been adopted as one of the instruments and necessities of public authority. Before it was decided in England that it was a confidence publicly invited by the law, and therefore to be kept inviolate.

And then again, the decision was a rash one; for it was made directly against the positive terms of the act of 1851, that gave to telegraphic communications the same inviolability that was given by law to letters.

The cases in which these principles, announced by Lord Camden, were decided, occasioned the clauses of our National and State Constitutions which prohibited unreasonable searches and seizures, and they are fundamental principles of private right that must remain inviolate and forever receive the cordial encouragement of the

courts. By the light of those cases, and under the shelter of our constitutional immunities, derived from them, must the doctrine I contend for find life. The writ to which we have made return is defective, and fatally so in every essential particular.

It is defective in want of certainty, inasmuch as it does not describe the papers called for and show what we are bound by law to produce. What the law does not require we are under no obligation to have here. It asks for telegrams that no one has a right to have produced. This is its language: "All telegrams and copies of telegrams sent and received by William H. Kemble, Charles B. Salter, and M. S. Quay, * * * * * * * * to be used and given in evidence on behalf of the Commonwealth on an indictment pending against them." Now, this covers all kinds and all character of messages and on every subject, no matter if they are connected with the private business of any of them or all of them, or of any person in the State or out of it,—citizens or foreigners, residents or strangers connected with this proceeding or unknown to it. Also, all correspondence of a public and official nature to and from these people: to and by people official and unofficial. Also, relating to domestic affairs of the most secret and sacred character sent by them or sent to them. Also, matters of a public, political, and religious and intimately social character from them or to them. No one will say that the law can require such messages to be uncovered. Certainly not, unless they are specified, identified, and shown with sufficient certainty to apply to the issue here joined and to be necessary for the purposes of the prosecution.

Then, again, the subpœna does not express the

subject or matter to which the messages called for relate or apply. The call is universal and unrestricted in its terms. Nothing but that which relates and applies to this prosecution can be exacted or used here. A general call for all papers that relate to an issue is bad.

Troubat & Haly's Practice, vol. 1, part I., page 541; 1 Wharton's Law of Evidence, section 377.

Such calls are too vague, and when so made the witness is entitled to refuse production. Lee *vs.* Angus, 2 Equity Cases (Law Reports, 1866), page 69.

Books and papers that belong to others in the custody of one called for in a general call for all books of account and entries relating certain stock and dividends in them, or the application or disposition of them, or relating to the matters in dispute in the suit, can not be had. The witness is not obliged to produce them—the language of the subpœna being too general. And, further, the books being the property of others, *their consent* must be had.

Attorney-General *vs.* Wilson, 9 Simons, 526.

By our act of Assembly of 8th of May, 1855, section 2d, a copy of which is printed in the appendix to this book, it is stated who alone can compel the production of telegrams, and in what way and under what circumstances. The statute is very clear. We have but to read it, and its purposes, simply and directly expressed, are easily understood.

First.—The sender and receiver, or their counsel, only can call on the officers to produce their messages.

Second.—And that must be made in some court of justice or before a committee of the legislature.

Third.—And the messages must be adjudged by the court to be material to some issue or matter there to be determined.

Fourth.—The act is express, and says that the court shall decide that the messages are material to an issue there to be tried or determined. That a decision must first be had, certainly upon petition setting forth the facts and showing the materiality, and upon that obtaining a special decision of the court, and then and not till then can a subpœna *duces tecum* be had for such messages, and only for such messages.

And this right to exact and compel production is restricted and confined to the sender or receiver or their counsel, in the *very terms* of the statute, and the necessary legal implication is that it is denied to all others. The maxim of the law is, "*Expressio unius est exclusio alterius.*" "As exceptions strengthen the force of a case not excepted; so, according to Lord BACON, *enumeration* weakens in a case not enumerated." Potter's Dwarris on Statutes, 221.

"*Expressum facit cessare tacitum*"—specification excludes implication.

The legislature intended to express and indicate the purpose for which and the persons who may call for messages. And this being the intention of the act, its language must be construed to exclude all other purposes or persons.

In this case there has been no adjudication of the subject of this subpœna by this court, and there has been no affidavit or proof submitted to the court to procure its decision—the decision required by the statute to be had in advance. No proof shown to this court that such telegrams as they are called for really exist, or that they are material.

And it is submitted here, that neither under the act of 1855 or of any principle of law known and practised upon, is the operator or agent of the company obliged to examine the multitude of messages in his possession, to answer the call of

this subpœna, or to determine whether they are connected with or material to this issue.

This act makes it the duty of the company and its agents to preserve for at least three years the originals of all messages sent by them.

The object of this is plain. They are obliged to be kept to protect the rights of the parties concerned and connected with the sending or receiving the message; so that they may be used between individuals as the act says: contending for their private rights in civil proceedings, and in no wise relating to prosecutions or criminal proceedings. They may be evidence between parties to them, and they may command their production, and the operator is obliged to produce them for them, and them only, and they are excluded from producing them to any other person or for any other purpose. This is the last statute on the subject.

The company, for its own protection, would retain the messages for a reasonable time. Here, by the act for the protection of the parties concerned sending or receiving them, they must keep them for three years.

Again, the public policy of the State, as expressed by its former legislation, forbids the call of this subpœna. (See act of 29th March, 1849, section 15; act of 14th April, 1851, section 2, printed in the appendix, and act of 8th April, 1862, section 1).

The act of 1849 is a penal act. By it the companies are compelled to receive and forward all messages offered to be sent and paid for. If they refuse they are subject to punishment. This statute makes them official in their character, and brings them in direct connection with the State politically. It ceases to be a mere private business. They stand in the same relation to the public and to the State as common carriers or postmasters. They are not only thus public agents

and *quasi* officials; but the operators, the assistant operators, clerks, and other persons in the employ of the different telegraph companies in this State, while doing duty in the office of said companies or along the routes of their lines, by the act of 8th of April, 1862, section 1, are exempt from militia duties and serving on juries, or from any fine or penalty for neglect thereof.

And further, the penal code of this State expressly punishes the forgery of telegraphic dispatches.

Is this not a full recognition of this business and these men as officials and a legal adoption of them, imposing duties and conferring exemptions and privileges as servants and instruments of the public and the State?

But again, the act of 1851 forbids operators, under very sharp penalties, to use or cause to be used or make known the contents of any dispatch, of whatsoever nature, which may be sent or received, without the consent or direction of either the parties sending or receiving.

And it commands that all dispatches which may be filed at any office in this Commonwealth, for transmission, shall be so transmitted without being made public or their purport in any manner divulged, at any intermediate point, on any pretense whatever, and in terms it says:—"In all respects the same inviolable secrecy, safe-keeping, and conveyance shall be maintained by the officers and agents employed in relation to all dispatches which may be sent or received as is now enjoined by the laws of the United States in reference to the ordinary mail service."

Now, before I advert to the connection directly made to the laws of the United States and the mail service in this act of 1851, I will refer to another and subsequent statute of our State, passed March 31st, 1860, a part of our penal code,

being the seventy-second section of that act, vide P. L., 1860, page 401, which says :—"If any superintendent, operator, or other person who may be engaged in any telegraph line, shall use or cause to be used, or make known or cause to be made known, the contents of any dispatch, or any part thereof, sent from or received at any telegraph office in this Commonwealth, or in anywise unlaw-lawfully expose another's business or secret, or in anywise impair the value of any correspondence so sent or received, such persons shall be guilty of a misdemeanor," &c.

Here again the law classes these men as a part of their official staff, responsible to it for the trust and confidence reposed in them. The "unlawful exposure" forbidden by this act means that which was declared to be unlawful before by the acts of 1851 and 1855. The act of 1855 makes it lawful only for superintendents or operators to produce messages confided to them when called upon and subpœnaed to do so by the individual or individuals sending or receiving them, &c.

None of these acts were intended to enlarge the power of criminal courts; they do not express it, and the law will never imply any increase of criminal authority.

The seventy-second section of the act of 1860 gave no inquisitorial authority or duties to courts. The act of 1855 was intended to protect those who confided in and trusted telegraph companies as a public legal instrument of intercommunication from just such inquisitions.

The lawful authority expressed in that act of 1860 was that which could lawfully be done under the second section of the act of 1855.

These acts were never intended as snares by which men might be made to criminate and accuse themselves.

It has been seen that the act of 1851 says these messages shall be kept inviolably secret, as is enjoined by the laws of the United States in reference to the ordinary mail service.

These statutes of the United States, here referred to, are those of 1825; for they were in force at that time. The act of 1851 says: "is *now* enjoined," &c. Those acts are printed in the appendix to the argument. And so are also the acts relating to the mail service contained in the Revised Statutes.

It is to be observed that as all of the statutes of the United States upon the subject of the ordinary mail service, and of the Pennsylvania acts upon the subject of the telegraph laws, being thus shown to be *in pari materia*, they must receive the same construction.

In England it has been recently and expressly ruled that telegraphic operators, being officers of the government, and connected with the postal department, they can not be obliged to produce messages confided to them.

Stroud's case, 2 O'Malley & Hardcastle Election Petition Reports, 72.

Also, Taunton's case, reported in same book, 112.

(These cases are printed in the appendix to this argument.)

The judge says that the government, by accepting the messages, invited a confidence on the part of private persons sending them which it was against public policy to violate.

Has it not been shown by the acts of Assembly, which are here cited, that these telegraphic messages are to be kept inviolably secret the same as letters are kept by the laws of the United States? Has it not been shown that the telegraph and its officials are punishable, are privileged, are con-

trolled, directed, and exempted, as officials of the State? Does not the State, by the acts of 1851, 1855, and 1860, invite a confidence on the part of private persons sending messages, which it is against public policy to violate? The same trust exists as to telegrams and with telegraph companies as with the government, as to letters. The trust of the letter is fulfilled on its delivery. The trust on the telegram remains, for the law obliges the company to keep it for three years, and the company often kept it, before the statute, to verify its acts, if dispute should happen between it and the sender or receiver, or between sender and receiver. A letter could be destroyed, and he who kept it did so subject to legal consequences, and took the risk of keeping it; but the telegram is kept by order of the law.

In 6th Otto, 9–13 (Pensacola Tel. Co. *vs.* Western Union Tel. Co.), the court decides that the telegraph is an instrument of commerce.

Before the early Saxon times in England, there was known what was called the *trinoda necessitas* of the State.

First.—Building and repair of fortresses.

Second.—Repair of bridges and public ways.

Third.—Military service for defense of the State, including providing ships for that purpose. These were functions of government fundamental, because necessary. Civilization has added other duties and necessities, permanently among which is the regulation of commerce and commercial intercourse, and the control and the monopoly of intercourse between men, known as postal duty. Within a short time past to this has been added telegraphic communication, and, as I have before said, in 6th Otto, the Supreme Court of the United States decides that the telegraph is an instrument of commerce and commercial intercourse, and, as such, is one of the instruments of Government.

Books of high authority, institutional and historical works, censure and expose the abuse of the postal laws by continental governments and sometimes by the English Government, where, for professed political reasons, the secrecy of the post-office is violated and correspondence is opened. And by such species of inquisition men, their thoughts, their private affairs, their confidences, are all exposed and pried into. And such things are pronounced odious and infamous, as they truly are; such as no free people ever could submit to or live under.

Appended to this argument is a passage from May's Constitutional History and likewise from Dr. Lieber's Civil Liberty, which the court is invited to read and to consider.

The law teaches there is something more than mere state policy. It also teaches that it would be better that nine hundred and ninety-nine guilty men should escape than that one innocent should be punished.

There is something higher than the administration of punitory law, and that is the right of the subject and citizen to be secure in his person and property from tyrannical and oppressive invasion of his house, his effects, his confidences, or his personal liberty, by mere ministerial officers, under color of aiding in the administration of public justice. Better that accusations fail than that citizens should have their confidences revealed, their privacy violated, their papers seized, their private letters exposed, their books scrutinized in search of proof to maintain them; for that is all that is here proposed to be done. To scrutinize in search of proof —the prying curiosity of the minister of the law, based only on their unsustained suspicions. It is not this case that is protected, but it is the case of every man in the Commonwealth, on a principle

higher than that of maintaining accusations. The principle that in England rebuked the ministers of the crown when they seized the private papers of Mr. Wilkes for the same purpose that these papers are here asked for. In his case the papers were in his own possession and had not to be acquired by a confidence inviting and offering protection from curiosity.

The court are here asked not to do a judicial act, but an inquisitorial act. Lord Denman, in Carter *vs.* James, in 2 Moody & Robinson, page 47, says, speaking of a paper which an attorney was called upon to produce and declined to do so:—"I don't think I can call on him to produce it. It is suggested that I may refer to it to ascertain whether it is a will of personalty; but I do not think that a judge has any more privilege to examine the document than any one else."

In this connection I will ask the court to read the passages that are printed from Wigram on Discovery in the appendix to this argument.

A *duces tecum* such as this, is issued on suspicion, only fishing for evidence without proofs, and is the counterpart of a search-warrant, such as was issued in Wilkes' case, such as was condemned by Lord Camden, the effect of which was to extort proof of guilt from a man, and of which Mr. Recorder Eyre, afterwards Chief Justice Eyre, speaking in that case, said, "Nothing can be more unjust in itself than that the proof of a man's guilt shall be extorted from his own bosom."

The plain object of this subpœna is not to obtain the production of certain known and described papers, so that they may be used in evidence in court, but to exhibit in a public court-room a large volume of papers pertinent or not, private or not, confidential or not, and expose them to view and subject them to examination, so as to cull out

such as they want. No such thing was ever known as a thing to be done lawfully. The writ that will require this is a general warrant, if ever there was one, and it is a direct violation of the fourth amendment of the Constitution of the United States and the eighth section of the first article of the Constitution of this State, which prohibits unreasonable searches and seizures.

A court must have the power to admit or reject testimony offered in an issue before it; but that is not what the court is asked to do here. It is asked to order the production of an unspecified quantity of papers belonging to strangers to this issue; so that they may be scrutinized to discover whether any can be found that would answer the purposes of the prosecution. If these telegrams were all brought here, who will examine them? Can the judges do so? Have they the power to do so? Is it one of the functions of a judge thus to assort papers and prepare a case for the Commonwealth? Is it not in conflict with the impartiality of his position? Can the prosecuting officers be allowed thus, under color of selecting, to plunge in publicly before strangers to the private and secret and confidential messages sent to these men by those who are absent, when their confidences are unveiled and undefended and unprotected here: sent by men who are unknown until their messages are read, and who are confessedly wholly unconnected with this prosecution?

This can never be permitted. What frightful consequences would ensue!

Under color of a fictitious suit or of a real suit, a man's enemy or enemies might subject him to a torture, and expose him to indignities that human nature could not bear. The law and its process can not be abused for such cruel and vile purposes.

Why, as was suggested in an English case, if this could be done, a bad man might thus obtain knowledge of papers that would be injurious to his adversary, but had no relation to the case on trial, which was plain upon their face, and then by offering them in evidence and having them rejected, place them upon the record by exception taken, and thus be able to spread them to the world.

To obtain evidence to maintain a prosecution or a case, no man has a right to take the process of the law, and enter upon the premises of a third party and search for proof. All this was decided in the Wilkes cases, that I have cited and referred to.

In pursuit of stolen property, an oath must be made asserting the theft, naming the place to be searched, and the thing to be searched for, and setting forth a reason or probable cause of suspicion, and this can not be done to obtain evidence of intended crime. The crime, too, must have been committed.

The law in Pennsylvania now permits persons accused of crime to testify in their own behalf, and in the spirit of its old humanity, and for love of fair play, it is tender of his rights, and the act expressly provides in terms that a neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, nor shall any comment be made upon, such neglect or refusal by counsel in the case during the trial of the cause.

Can it be said, remembering this humanity, that our law will, in a proceeding like this, under color of judicial action, suffer him to accuse himself, or others to betray and expose confidential communications given by invitation of law and to a public agent? Is this not rather an attempt to obtain

by the torture of a species of judicial inquisition a self-accusation? Formerly the law excluded defendants in felonies from being heard by counsel, but then the judge protected him. Now the judge is to be used as his inquisitor. Then the law forbade its officers to persuade or invite, or intimidate men who were accused to obtain confessions; then the law protected the papers of the prisoner from search, now the prisoner has counsel, and all of these old humanities and shields are about him, and he may testify for himself if he pleases, and not be reproached if he declines, and have no presumptions against him; and yet we are told that all his confidence conveyed by telegraph, no matter to whom, whether it be his father, mother, or his wife, his son, his daughter, sister, or brother, or his *lawyer*, shall be exposed in one mass before the court, to be sifted and examined and revealed. All to be exposed to the world and used to his ruin.

Then it is to be remembered that telegrams, from necessity, are elliptical and elusive; they are written sometimes expressing facts and thoughts purposely to conceal to the eye of the casual reader the sense intended to be conveyed to the receiver who has a key or a private understanding by which he can interpret them. Then words are omitted to condense a sentence and abridge expense. Such telegrams, innocent and honest, and lawful and free from the taint of evil act, of evil thought or evil purpose, might read to the prejudice and ruin of both writer and receiver. Can it be said in answer to this that the writer is in fault for sending such messages? Not at all. Prudent economy requires it; for it is an expensive means of intercourse. Reasonable caution requires it, for it is open, exposed enough from the very necessity of its method of operation.

In the case of *Ex parte* Brown, lately decided in St. Louis Court of Appeals, the judge (Hayden) discusses the question of general warrants in England and the writs of assistance in this country, an account of which is found in Quincy's (Mass.) Reports, and endeavors to show that they differed in their nature from communications of this character, because the privacy of a man's home was invaded, and by force he was compelled to communicate the contents of his papers and thereby become his own accuser. He said the communication to the telegraph operator was the voluntary act of the party himself, and not at all involuntary, and, when papers were seized, the writer was, against his will, forced to expose his thoughts and his acts as expressed by him in writing; but I submit that which a man writes in his study is a voluntary act, and if it is entitled to be protected from scrutiny and exposure by force of legal process, so should his communication to telegraph operator, given in confidence, be subject to the same protection. But it is argued that for the purposes of criminal justice the best evidence should be had, and that the courts of law, to protect life, property, and public peace, depend upon such evidence. That is true; but it is not true that to obtain such evidence the law, by its officers, can violate all secret and sacred relations. It can not compel a wife to testify against her husband, or counsel against his client; a priest against his penitent (for in some States the confidence given to a physician or clergyman is privileged: 2 Revised Statutes, N. Y., 406, sections 91, 92), a doctor and his patient or a postmaster to surrender the letters confided to him. And we contend, for a like reason of general public policy, it can not compel a telegraph operator to expose the confidence bestowed on him. The sender or receiver

might be obliged to tell, but not the telegraph operator.

It is because the law knows that an agent possesses information that he can be called upon to disclose what he knows; but there is a great distinction between a judicial action of the court based on knowledge, and an inquisitorial action based upon mere suspicion. The law will permit its prosecuting officer to call for the production of a certain letter or of certain letters in the custody of a person; but the law will not permit a prosecuting officer or an individual in pursuit of a private right to seize and take all papers and letters within the custody of a person and go through them in a reckless way, hunting for facts, upon mere conjecture and suspicion. No subpœna *duces tecum* or bill of discovery can go that far; much the less can the law in a like indiscriminate way, upon a like lurking suspicion, oblige a telegraph operator to produce all messages sent by certain parties to any person or party, as is done in this case, or even for one message upon mere conjecture as to its contents, for it was given in trust, a trust which, from motives of public policy, the law will not allow to be betrayed. As I said before, if the contents are known, then the party receiving or the party sending may be obliged to tell; but that which is written and given to the operator under the obligation of a confidence invited by the law, the law can not touch. The terms upon which the dispatch was written are sacred and inviolate as the lock which was protected by the law in the Wilkes case.

And this, from motives of public policy, our law forbids—abhorring all legal action based on mere suspicion or conjecture, and all proceedings by inquisitorial and tyrannous ways to obtain proof.

A man is obliged by law to send his letters by mail, the law protects that while in the hands of the trustee, the postmaster or his agent; necessity obliges a man to deliver his message to the operator as the man is obliged to deliver his letter to the postmaster; the one is sealed or closed with gum, and that seal or that gum can not be broken. When the receiver of the letter breaks the seal, then the law may oblige him to disclose its contents, but the postmaster, never! He dare not.

A postal-card is as open as a telegraphic message. If a postmaster or his agent sees that card and seeing reads it, he can not, and he dare not, at any time, in court or out of court, disclose its contents or give his knowledge. Neither can a telegraph operator, being trusted in a like way with an open piece of paper on which is writing, tell or produce the contents or the paper. And why? Because the same legal policy that protects the one will protect the other. The writer sends by post because he is obliged to by law. The writer sends by telegram because he is obliged to by necessity, and is invited to do so by a promise of immunity from search by a statute of the State. While in transit the letter is inviolable. While in the knowledge of or custody of the operator, the message is inviolable just as the contents of a postal-card known to a postmaster is inviolable, for *quoad* him it is ever in transit. The telegraph operator is obliged by law to keep the message to protect himself and to protect the rights of the parties. If he were not by law so obliged to keep the papers, then the party trusting him would take a risk, and the law would reach such papers.

If he could be permitted to require the operator to surrender them to him after the message had been transmitted, and he left them in his

hands, then he would be exposed to a risk he had assumed; but where he can not do that, the secrecy which he exacted as the condition precedent of his message, will live to protect that message. It is asserted that the sender and receiver know that in due process of law original messages and copies must be produced. That is a very bold way of begging the question we are considering by such a broad assertion. The inquiry is, can due process of law oblige their production? The seal attached to a letter, whether it be wax or gum, it has been decided in *Ex parte* Jackson, 96 U. S., 727, preserves its contents as private, until the receiver unseals it, as if the package had never left the sender's desk.

Why should wax or gum be more sacred to privacy than a promise given by the operator and in this State imposed by law to violate that which is punishable as a penal offense?

It is said that the post is protected by statutory enactment; yes, by a statute, which is but a mere affirmance of what would be common law without a statute, common law based upon a principle of great public policy—*pro salus populi.*

The post is directly an instrument of government, because of its necessity as a great, ubiquitous means of public and private intercourse; but it is not protected only because it is an instrument of the Government, it is protected because the *supreme* law always protects as inviolate and inviolable the secret thoughts and utterances of men; and it is protected, also, because it could not exist for a day, whether in public or private hands, if the sanctity of that secrecy was not enforced and respected and also maintained against judicial inquisitorial attempts to unveil them for

legal purposes, or governmental inquisitorial attempts to use them for political or public purposes.

In England the telegraph is possessed by the government as the post is, and it is there protected as the post is. Now the argument that a man, when he selects the telegraph as his mode of communication, elects to take a risk of legal exposure, by the act of election, when he could have protected himself by writing a letter, fails in England; for the judges there have solemnly determined and decided that giving the confidence of his communication to the telegraph, as he gives his letter to the post, is a confidence of equal dignity and like nature, and both are protected and beyond the reach of a *duces tecum* in the hands of the postmaster and telegraph operator. The English judges repel the idea that by taking the telegraph the man had elected to run the risk of a legal exposure. Here the telegraph is in the hands of creatures of the law, agents of corporations, men who, in this State, are subject to penalties for refusing to transmit a message, and punished if they expose one, and who, as operators, enjoy legal exemption from search, because of the nature of their calling. It is as much of a necessity here as it is in England. Why, in 9 Otto, page 9, it is decided to be an instrument of commerce, and, as such, within the purview of the clause of the Federal Constitution that gives the National Government jurisdiction over and power to regulate commerce between States. An operator, because he holds a Government position, from the reason of the thing, has no greater immunity than if he is employed by a corporation. In fact, the privilege is not the privilege of the operator in his immunity, but it is the privilege of the sender and of the receiver—certainly of the sender, just as the confidence given to an attorney

at law is kept by him sacred and secret, as the right or privilege of the client—the right or privilege of secrecy is the client's; the duty of secrecy is the duty of the lawyer and the postmaster and the telegraph operator; both perform the same duties and stand in the same relation to the senders and receivers of messages, and both should be governed by the same rules.

Indeed, I shall contend and maintain that in this State it is put beyond judicial authority, and that which in England has been ruled by judges to be a legal consequence is, by our statute, positively commanded, to wit, that these messages are inviolate and can not be the subject of inquisitorial investigation, under color of judicial action, and that only parties and privies to these messages, requiring them to adjust their own rights, or committees of the legislature demanding them for great public purposes, under restraint expressed in the statute, may obtain and use them.

BENJAMIN HARRIS BREWSTER,
Of Counsel with the Western Union Telegraph Company.

RETURN TO WRIT.

I, Horace A. Clute, of the city of Harrisburg, having been served with a subpœna (a copy of which is hereto annexed) to testify in a certain prosecution therein stated, and having submitted to examination and answered such questions as have been propounded to me, being now required by the terms of said subpœna, and by your directions, to "bring all the telegrams received and sent by William H. Kemble, Charles B. Salter, and M. S. Quay, during the months of January, February, March, April, May, and June, 1879," do hereby respectfully decline to comply with the said requirement, for the following reasons, viz.:—

First.—Because the said writ of subpœna is, as I am advised by counsel, defective and illegal in its form and substance, in that it does not designate, with any certainty, the particular papers required to be produced, either by description, or date, or by stating the subject to which they relate, or by distinguishing such messages as are official, or as refer to merely private and personal matters, from such as refer to any inquiry which is or can be pending before your body, or by naming the persons between whom such messages, if any, passed. The said writ calls for the production of all telegrams sent or received by the persons named during a period of six months, necessarily including such as relate to the purely private family affairs of the persons named, and of all other persons who may have sent to or received from them telegraphic messages during the period stated, and such, also, as do or may relate to the

private business transactions, the social relations, the official communications, confidential communications between attorney and client, and husband and wife, and the political and religious affairs of all the persons whose names are mentioned in the said writ, and all such other persons as were in telegraphic correspondence with them during the whole time designated. I am advised that such process is entirely without authority in the law, and is expressly contrary to the principles of the common law, and inconsistent with the provisions of our statute law.

Second.—It has not been possible for me, in connection with the discharge of the duties of my office, to comply with the command of the said writ within the time that has elapsed since the same was served on me, to wit, November
A. D. 1879, by selecting from the mass of telegrams in my office those specified in said writ, for the reason that the total number of messages received at the office of which I am manager, during the time stated, is so great that I could not possibly examine them all. They amount to between three and four hundred on each business day, or an aggregate of upwards of fifty thousand messages in all, during the months named in the said subpœna. It will require several weeks of all the labor I am able to bestow upon it to complete the examination, and make the selection aforesaid, and will involve expense which I do not feel called upon to incur.

Third.—Because, as I am advised, the command of the said writ is clearly contrary to public policy, and to the express provisions of the statute law of the Commonwealth of Pennsylvania, which prohibits the making public, or in any manner divulging, the contents of telegraphic messages by any persons connected with any line of telegraph

"on any pretense whatever;" and which further provides that the same inviolable secrecy, safe-keeping, and conveyance, shall be maintained by the officers and agents employed upon the several telegraph lines of this Commonwealth, in relation to all dispatches which may be sent or received, as is now enjoined by the laws of the United States in reference to the ordinary mail service. "It is further provided by our said statute law, that original messages shall be produced in courts of justice by the officers of telegraph companies, whenever duly subpœnaed to do so by the individual or individuals, or counsel of the individual or individuals, sending or receiving a copy of such messages," and then only when it shall be decided by such court that such messages are material to any issue or matter there to be tried or determined; thus clearly implying, if not expressing, that none but the sender or receiver of such messages shall have the right to compel their production in court, and not even they, except as to such messages as shall be adjudged by the court to be material to some pending issue. And by another section of the said statute law the production and exposure of telegraphic messages is made a crime, punishable with fine and imprisonment. It further appears, and I am informed that it is a fact, that the said subpœna was not issued by or at the instance of any of the persons named therein, or of their counsel, and such fact should appear and be established to the satisfaction of the court.

Fourth.—Because, as I am advised, the command of the said subpœna involves a violation of the provision of article 4 of the amendments to the Constitution of the United States, and of article 1, section 8 of the Constitution of Pennsylvania, both of which guaranty the right of the people

to be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures.

Fifth.—Because I have no personal or individual possession, control, or ownership of, or interest in the telegrams referred to in the said writ of subpœna. I am in the employment of the Western Union Telegraph Company, a corporation duly created by law, to which, during a temporary period of the statute law of our State, the said original telegrams belong, and my custody or possession thereof is the custody and possession of the said corporation. I am but the managing agent of the said corporation at the city of Harrisburg, for the transaction of its lawful business at that place, and am subject to all its rules and regulations. Some of those rules and regulations, a copy of which is hereto annexed, strictly prohibit the furnishing of any copies of messages to any persons, except the senders and receivers, and they expressly provide that no original or sent message or duplicate thereof, shall be allowed to pass out of the possession of the company, except by authority of an executive officer, and I am not an executive officer, nor do I have the authority of any such officer for the production or exposure of the said telegrams or any of them. I can not, therefore, obey the command of the said writ, without disobeying my positive instructions, and the rules and regulations of the said corporation to which I am subject, and incurring all the penalties and injurious consequences which may result therefrom.

Sixth.—Because one of the persons named in the *duces tecum* clause of the said subpœna is M. S. Quay, a person who was, during nearly all the time mentioned in the said writ, and is yet, the Secretary of the Commonwealth of Pennsylvania,

and also a member of the Board of Pardons, holding the said offices and exercising the functions thereof; and he is not either personally or officially, as I am advised, a party to any proceeding or inquiry now pending before your honorable body. The command of said writ would require me to produce and expose any and all official telegraphic communications which I know were sent and received by him, and it would also require me to produce all merely personal and private telegrams sent by or to him, although he is, apparently, a stranger to any proceeding or inquiry now pending before you.

HORACE A. CLUTE.

COPY OF SUBPŒNA *DUCES TECUM*.

DAUPHIN COUNTY, *ss.*:

The Commonwealth of Pennsylvania,

To H. A. CLUTE,

GREETING:

We command you and every of you, that laying aside all business and excuse whatsoever, you be and appear in your proper person, and with you bring all telegrams and copies of telegrams sent and received by William H. Kemble, Charles B. Salter, and M. S. Quay, during the months of January, February, March, April, May, and June, A. D. 1879, before our Judges of the Peace in our said County of Dauphin, at a Court of Oyer and Terminer and General Quarter Sessions of the Peace, &c., to be holden at Harrisburg, in and for the said county, on the twentieth day of January, A. D. 1880, at the hour of nine o'clock in the forenoon of the same day, to testify to the truth and give evidence on an indictment there pending

against Charles B. Salter *et al.* for corrupt solicitation, &c., on behalf of the Commonwealth. And this you are in no wise to omit, under the penalty of one hundred dollars.

Witness the Hon. John J. Pearson, President of the said Court at Harrisburg, the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and seventy-nine.

THOS. G. FOX,
Clerk.

Rule 92.—All managers and other employés are strictly prohibited from furnishing copies of original messages, or from certifying to the correctness of any message or copy thereof, whether sent or received.

Rule 93.—When the sender or receiver of a message applies in person he will, if known or properly identified, be permitted to see or make a copy of his dispatch for himself. When the application is in writing, the signature must be identified as the genuine signature of the person or firm who sent it, precisely as if it were the signature of a bank check or draft. In no other case will such permission be allowed, without the order of an executive officer.

Rule 94.—No original sent message or duplicate of a received message will be permitted to leave the possession of the company, except by authority of an executive officer. Whenever a manager or other employé is subpœnaed to produce messages in court, or before commissioners, he will notify the secretary of the company at once, by telegraph, for instructions.

New York, May 2d, 1873.

Executive Order, No. 147.

RULE 94 is hereby modified as follows:—

No original sent message or duplicate of a received message will be allowed to pass out of the possession of the company, except by authority of an executive officer. Whenever a manager or other employé is subpœnaed on the part of the sender or receiver of a message to produce it before a court or other legal tribunal, he will comply with the subpœna and afterwards return the message to the files. When subpœnaed by another party than the sender or receiver, he will take the message into court, and submit to the judge that he ought not to produce it, the communication being privileged, and that he can not do so unless a rule of the court is entered requiring it. If such rule is entered the manager must obey it, asking the clerk to give him a copy of the rule and message. The subpœna and other papers in connection therewith should be retained on file with the message to which they relate.

(Signed) WILLIAM ORTON,
President.

APPENDIX.

ACT OF ASSEMBLY OF PENNSYLVANIA.

2 P. D. 1394.

29th March, 1849. Section 15, P. L., 266.

The various telegraph companies within the limits of this State (*shall*) *be required to forward and receive over their lines all messages that may be offered for transmission, by individuals or incorporated companies*, (*a*) *Provided*, The parties offering such messages or dispatches, tender for the transmission thereof, the amount of the usual fee for such transmission. And in case of a refusal or neglect on the part of any of the agents of the telegraph lines in this State to send or receive in their regular order, except as hereinbefore excepted, such messages or dispatches by telegraph, the company shall be liable to a fine of one hundred dollars for each and every message so refused or neglected, to be sued for and recovered before any justice of the peace of this Commonwealth, as debts of like amount are recovered, the one-half to go to the State and the other half to the party suing for the same: *And provided further*, That in any suit to be brought for the recovery of said fine, notice served on the president, director, agent, or either of them shall be sufficient.

SECTION 7. That from and after the passage of this act, it shall not be *lawful for any person* connected with any line of telegraph within this Commonwealth, whether as superintendent, operator, or in any other capacity whatsoever, to use or cause to be used, or make known or cause to be made known, the contents of any dispatch of

whatsoever nature, which may be sent or received over any line of telegraph in this Commonwealth, without the consent or direction of either the party sending or receiving the same; *and all dispatches which may be filed at any office in this Commonwealth* for transmission to any point, shall be so transmitted without being made public, *or their purport in any manner divulged at any intermediate point, on any pretense whatever*, and in all respects the *same inviolable secrecy*, safe-keeping, and conveyance shall *be maintained* by the officers and agents employed upon the several telegraph lines of this Commonwealth, *in relation to all dispatches which may be sent or received, as is now enjoined by the laws of the United States in reference to the ordinary mail service: Provided*, That nothing in this act contained shall be so construed as to prevent the publication, at any point, of any dispatch of a public nature, which may be sent by any person or persons with a view to general publicity.

Sec. 7, P. L., page 614. Act of 14th April, 1851.

SEC. 8. That in case any person, superintendent, operator, or who may be in any other capacity connected with any telegraph line in this Commonwealth, shall use or cause to be used, or make known or cause to be made known, the contents of any dispatch sent from or received at any office in this Commonwealth, or in any wise unlawfully expose another's business or secrets, or in any wise impair the value of any correspondence so sent or received, such person being duly convicted thereof shall, for every such offense, be subject to a fine of not less than one hundred dollars, or imprisonment not exceeding six months, or both, according to the circumstances and aggravation of the offense.

Sec. 8, P. Laws, page 614. Act April 14th, 1851.

It shall be the *duty* of *all* owners, superintendents, and operators to *preserve* the *originals* of *all*

messages sent from such office, other than those intended for publication, *for at least three years*, and to produce the same in evidence whensoever duly subpœnaed to do so, by the *individual or individuals*, or counsel of the individual or individuals *sending or receiving a copy* of such messages, in any court of justice, or before any committee of the legislature, and where the same shall be *decided* by such court or committee to be material to any *issue* or matter there to be tried or determined, under the like penalty as in other cases: *Provided*, That the confidential communications between attorney and client, so transmitted, shall in no case be divulged.

P. D. 1394. Act May 8th, 1855, section 2, P. L., 531.

If any superintendent, operator, or other person, who may be engaged in any telegraph line, *shall use*, cause to *be used*, or *make known* or cause to be *made known*, the *contents* of any dispatch, or any part thereof, sent from or received at any telegraph office in this Commonwealth, *or in any wise unlawfully expose another's business or secret*, or *any wise impair the value of any correspondence so sent* or received, such person shall be guilty of a misdemeanor, (*b*) and on conviction, be sentenced to pay a fine not exceeding four hundred dollars, and to undergo an imprisonment not exceeding six months, or both, or either, at the discretion of the court. (*c*)

Purdon's Digest. Act 31st March, 1860, Section 72, P. L., 402.

STATUTES OF THE UNITED STATES.

3d March, 1825, section 21, 4 Stat., 107.

That if any person employed in any of the departments of the post-office establishment, shall

unlawfully detain, delay, or open any letter, packet, bag, or mail of letters, with which he shall be intrusted, or which shall have come to his possession, and which are intended to be conveyed by post; or, if any such person shall secrete, embezzle, or destroy, any letter or packet intrusted to such person as aforesaid, and which shall not contain any security for, or assurance relating to money, as hereinafter described, every such offender, being thereof duly convicted, &c.

Note *a*. 3d March, 1825, section 22, 4 Stat., 107.

United States *vs.* Tanner, 6 McLean, 128. It is an offense against this section to open a letter which has been in the post-office, before delivery to the person to whom it is directed, though the letter is not sealed, and was not, at the time, in the lawful custody of any person, and even though it was written by the defendant himself. Nor is it necessary that the name to which the letter was addressed should be the true name of the person for whom it was intended. United States *vs.* Pond, 2 Curt., C. C., 265.

3d March, 1825, section 22, 4 Stat., 107.

Or, *if any person shall take the* mail, or any letter, or packet therefrom, or from any post-office, *whether with or without* the consent of the person having custody thereof, *and shall open, embezzle, or destroy* any such mail, letter, or packet, the same containing any article of value or evidence of any debt, due, demand, right or claim, or any release, receipt, acquittance, or discharge, or any other article, paper, or thing mentioned and described in the twenty-first section of this act; or if any person shall, by fraud or deception, obtain from any person having custody thereof, any mail, letter, or packet, containing any article of value, or evidence thereof, or either, of the writings referred to, or

next above mentioned, such offender or offenders, on conviction thereof, shall be imprisoned not less than two, nor exceeding ten years. And if any person shall take any letter or packet, not containing any article of value, or evidence thereof, out of a post-office, or shall open any letter or packet which shall have been in a post-office, or in custody of a mail-carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets; or shall secrete, embezzle, or destroy any such mail, letter, or packet, such offender, upon conviction, shall pay for every such offense a sum not exceeding five hundred dollars, and be imprisoned not exceeding twelve months.

8th June, 1872, C. 335, S. 142, V. 17, page 301, section 145. Revised Statutes, section 3890.

Any postmaster who shall *unlawfully* detain in his office any letter or other mail matter, the posting of which is not prohibited by law, with intent to prevent the arrival and delivery of the same to the person to whom it is addressed, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than six months, and he shall be forever thereafter incapable of holding the office of postmaster.

8th June, 1872, S. 146, page 302. Revised Statutes, section 3891.

Any person employed in any department of the postal service who shall unlawfully detain, delay, or open any letter, packet, bag, or mail of letters intrusted to him, or which has come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier, or other person employed in any department of the

postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster-General; or who shall secrete, embezzle, or destroy any such letter, packet, bag, or mail of letters, although it does not contain any security for or assurance relating to money or other thing of value, shall be punishable by a fine of not more than five hundred dollars, or by imprisonment of not more than one year, or by both.

8th June, 1872, S. 147, page 302. Revised Statutes, 3892.

Any person who shall take any letter, postal-card, or packet, although it does not contain any article of value or evidence thereof, out of a post-office or branch post-office, or from a letter or mail carrier, or which has been in any post-office or branch post-office, or in the custody of any letter or mail carrier before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall secrete, embezzle, or destroy the same, shall, for every such offense, be punishable by a fine of not more than five hundred dollars, or by imprisonment at hard labor for not more than one year, or by both.

FULLER'S CASE FROM O'MALLEY AND HARDCASTLE ELECTION REPORTS, volume 11, pages 110, 112.

Mr. Casserley, an officer in the general post office, was called upon a "subpœna *duces tecum*," to produce certain telegrams which had passed between two persons, whose names were mentioned in the subpœna, between two certain dates; but he refused to produce them without an order from the court.

Mr. Baron Bramwell.—"It is just as well that the matter should proceed technically."

Mr. Giffard.—"I do not know whether your lordship's attention has been called to the provision in the statute. I have asked the witness to produce the telegrams between A. L. Leonard and H. S. Leonard between January 27th and February 4th."

Mr. Baron Bramwell, (to the witness).—"Do you object to produce them?"

A. "I do."

Mr. Baron Bramwell.—"As at present advised, I will not make you."

The Witness.—"May I explain my objection?"

Mr. Baron Bramwell.—"Your objection is that telegrams are of a confidential character, and the post-office desire to keep the confidence unviolated."

The Witness.—"That is broadly so, but it is regulated by the interpretation put upon the two acts of Parliament on the point. The telegraph act, 1868 (31 and 32 Vict. c. 110), section 20, enacts that 'any person having official duties connected with the post-office, or acting on behalf of the postmaster-general, who shall, contrary to his duties, disclose or in any way make known or intercept the contents, or any part of the contents of any telegraphic message, or any message addressed to the postmaster-general, shall be guilty of a misdemeanor! The act of 1869 (32 and 33 Vict., c. 73, section 23) enacts that nothing in this act contained shall have the effect of relieving any officer of the post-office from any liability which would, but for the passing of this act, have attached to a telegraph company, or to any other company or person, to produce in any court of law, when duly required so to do, any such written or printed message or communication.'"

Mr. Baron Bramwell.—"What do they mean by that?"

Witness.—"I will not pretend to interpret this section, but the view the post-office has taken of the section is this, that without the express direction of the court, it is contrary to the duty of the post-office, or any of its officers, to produce in court any telegram that may be called for having reference to the public interest at large. Your lordship may probably be aware that the question was raised in the recent case at Taunton?"

Mr. Baron Bramwell.—"I was not acquainted with the decision before it was announced, because Mr. Justice Grove consulted my brother Mellor and myself about it."

The Witness.—"The difference between that case and this is, that there they served a subpœna in general terms for the production of all telegrams sent to and from London during four months."

Mr. Baron Bramwell.—"I have a strong impression that these documents are in the custody of her Majesty, and that you have no right to bring them here any more than a banker's clerk has a right to bring his master's ledger. I have a very strong notion to that effect."

Mr. Gifford submitted that the telegrams ought to be produced.

Mr. Baron Bramwell.—"We must decide the matter technically. Do you ask him to produce the telegrams?"

Mr. Giffard.—"I do."

Mr. Baron Bramwell (to the witness).—"You are called upon to produce them. Do you produce them?"

Witness.—"My instructions are not to produce them unless the court directs me to do so. I must obey those directions."

Mr. Baron Bramwell.—"Then you do not produce them?"

Witness.—"I do not produce them."

Mr. Sergeant Ballentine.—"Then I call upon your lordship to order him to do so."

Mr. Baron Bramwell.—"I decline to do so. I have dealt with it technically, and I have great doubts whether there is a power of compelling any person to produce them for the reason I have named, namely, that they are in the custody of her Majesty, and I certainly have too much doubt about it to enforce it by the summary remedy of commitment for contempt for their non-production. I have little doubt that whoever drew that section in the act did intend that there should be some compulsion upon the post-office authorities to produce the documents, but I am by no means sure that the proper means are used for doing it. The proper test is this, if you subpœna the post-master-general, he may say, 'I have not got them; they are in my possession as a servant of the crown.' The matter is too doubtful for me to settle that question by the summary process of a committal for contempt, and more especially I am indisposed to do it, because I really think that for the public good there ought to be no such power of compelling the production of these documents. It is the necessary consequence that persons who correspond by telegram are obliged to repose confidence in the crown, and I believe it will be for the public good if it is found that that is a confidence that the crown can not be compelled to violate. Inconvenience might arise in many cases. It might arise in the case of a confidential communication between attorney and client, or husband and wife, therefore we must look to the general principle. I strongly incline to the opinion that it is for the good of the commu-

nity that the necessary confidence of a sender of a telegram in the post-office should not be violated. Therefore, taking that into account, and taking into account the doubt I have as to the power to compel the production, I will not enforce it by the summary proceeding of commitment for contempt of court. I should add to the remarks I have made that the crown could always say, 'We think this ought to be produced, and we shall raise no objection to its production.'"

ESPINASSE'S NISI PRIUS REPORTS, VOL. I., PAGE 405.

Miles et al. vs. *Dawson.* } Under a subpœna *duces tecum*, a witness is not compellable to produce private papers in his custody.

TRESPASS FOR SEIZING THE PLAINTIFF'S SHIP ON THE COAST OF AFRICA.

A witness was called to produce a power of attorney in his possession, he having been served with a subpœna *duces tecum*.

He appeared, but did not produce the papers pursuant to subpœna.

Gibbs, of counsel for the plaintiff, insisted that the witness, being served with a subpœna *duces tecum*, was obliged to produce every paper in his possession, so as that paper did not criminate himself.

Lord KENYON denied that position, and said that they could not compel the witness to produce the warrant of attorney. If that was the case, every man would be obliged to produce every paper in his

custody. It would occasion the ruin of millions. His lordship added, that it is a good plea in bar in the Court of Chancery that the defendant (although the legal title was in another) had an equitable title by honest means, without notice; and the court would not compel the production of those papers which, if produced, would strip the defendant of his fair and equitable title.

His lordship then told the witness he could not compel him to produce the warrant of attorney, but that he might do as he pleased; and the witness refused to produce it.

PASSAGE FROM WIGRAM ON DISCOVERY, PAGES 2 AND 3, SECTIONS 3, 4, AND 5.

3. The discovery, which is thus required and enforced, is not confined to a discovery of facts resting merely in the knowledge of the defendant, but extends, within certain limits, to deeds, papers, and writings in his possession or power.

4. Such is the purpose and general scope of the jurisdiction exercised by courts of equity in compelling discovery.

5. The exercise of a jurisdiction of this nature can not be otherwise than pregnant with danger to the interests of those against whom it may be enforced, unless careful provision were made for guarding against its abuse. Upon a motion for the production of documents, in the case of Cock *vs.* St. Bartholomew's Hospital, Lord Eldon said, "The Newcastle case is a good lesson upon this subject of production. They produced their charters to satisfy curiosity, some persons got hold of them, and the consequence was that the corporation lost £7000 a year." This observation applies to a specific case; but the mischief at

which it points is not confined to cases *in specie*, the same with that which produced it. Similar consequences *may*, in any case, ensue discovery —an observation which, without comment, proves the necessity of placing under strict regulation the jurisdiction exercised by courts of equity in compelling discovery.

MAY'S CONSTITUTIONAL HISTORY,

Chapter 11, Pages 292-3-4-5-6.

Akin to the use of spies, to watch and betray the acts of men, is the intrusion into the confidence of private letters, intrusted to the post-office. The State having assumed a monopoly in the transmission of letters on behalf of the people, its agents could not pry into their secrets without a flagrant breach of trust, which scarcely any necessity could justify. For the detection of crimes dangerous to the State or society, a power of opening letters was, indeed, reserved to the secretary of the State. But for many years ministers or their subordinate officers appear to have had no scruples in obtaining information through the post-office, not only of plots and conspiracies, but of the opinions and projects of their political opponents. Curiosity more often promoted this vexatious intrusion than motives of public policy.

The political correspondence of the reign of George III. affords conclusive evidence that the practice of opening letters of public men at the post-office was known to be general. We find statesmen of all parties alluding to the practice, without reserve or hesitation, and intrusting their letters to private hands whenever their communications were confidential.

Traces of this discreditable practice, so far as it ministered to idle or malignant curiosity, have disappeared since the early part of the present century. From that period, the general correspondence of the country through the post-office has been inviolable. But for purposes of police and diplomacy,—to thwart conspiracies at home or hostile combinations abroad,—the secretary of State has continued, until our own time, to issue warrants for opening the letters of persons suspected of crimes or of designs injurious to the State. This power, sanctioned by long usage and by many statutes, had been continually exercised for two centuries. But it had passed without observation until 1844, when a petition was presented to the House of Commons from four persons,—of whom the notorious Joseph Mazzini was one,—complaining that their letters had been detained at the post-office, broken open, and read. Sir James Graham, secretary of State, denied that the letters of three of these persons had been opened; but avowed that the letters of one of them had been detained and opened by his warrant, issued under the authority of a statute. Never had any avowal, from a minister, encountered so general a tumult of disapprobation. Even Lord Sidmouth's spy system had escaped more lightly. The public were ignorant of the law, though renewed seven years before, and wholly unconscious of the practice which it sanctioned. Having believed in the security of the post-office, they now dreaded the betrayal of all secrecy and confidence. A general system of espionage being suspected, was condemned with just indignation.

Five and twenty years earlier, a minister, secure of a parliamentary majority, having haughtily de-

fended his own conduct, would have been content to refuse further inquiry, and brave public opinion. And in this instance, inquiry was at first successfully resisted; but a few days later Sir James Graham adopted a course, at once significant of the times and of his own confidence in the integrity and good faith with which he had discharged a hateful duty, he proposed the appointment of a secret committee to investigate the law in regard to the opening of letters, and the mode in which it had been exercised.

A similar committee was also appointed in the House of Lords. These committees were constituted of the most eminent and impartial men to be found in Parliament, and these inquiries, while eliciting startling revelations as to the practice, entirely vindicated the personal conduct of Sir James Graham. It appeared that foreign letters had, in early times, been constantly searched to detect correspondence with Rome and other foreign powers; that by orders of both houses during the Long Parliament, foreign mails had been searched, and that Cromwell's postage act expressly authorized the opening of letters, in order "to discover and prevent dangerous and wicked designs against the peace and welfare of the Commonwealth."

Charles II. had interdicted, by proclamation, the opening of any letters except by warrant from the secretary of State. By the act of 9th Anne, the secretary of State first received statutory power to issue warrants for the opening of letters, and this authority had been continued by several later statutes for the regulation of the post-office. In 1783 a similar power had been intrusted to the Lord Lieutenant of Ireland. In 1722 several letters of Bishop Atterbury having been opened, copies were produced in evidence against him on

the bill of pains and penalties. During the rebellion of 1745 and at other periods of public danger, letters had been extensively opened. Nor were warrants restricted to the detection of crimes or practices dangerous to the State. They had been constantly issued for the discovery of forgery and other offences, on the application of the parties concerned in the apprehension of offenders. Since the commencement of this century, they have not exceeded an annual average of eight. They had been issued by successive secretaries of State of every party, and, except in periods of unusual disturbances, in about the same annual numbers. The public and private correspondence of the country, both foreign and domestic, practically enjoyed complete security. A power so rarely exercised could not have materially advanced the ends of justice. At the same time, if it were wholly withdrawn, the post-office would become the privileged medium of criminal correspondence. No amendment of the law was recommended, and the secretary of State retains his accustomed authority. But no one can doubt that, if used at all, it will be reserved for extreme occasions, when the safety of the State demands the utmost vigilance of its guardians.

CIVIL LIBERTY AND SELF-GOVERNMENT.

By Lieber. Pages 88, 89, 91, 93, and Note on page 91.

The English have established the right of communion, as so many other precious rights by common law, by decisions, by struggles, by revolution.

All the guarantee they have for the unstinted enjoyment of the right, lies in the fact that the whole nation says with one accord, as it were: let them try to take it away.

It is the same with our *epistolary communion*. The right of *freely corresponding* is unquestionably one of the dearest, as well as most necessary, of civilized man; yet our forefathers were so little acquainted with *a police government*, that no one thought of enumerating the sacredness of letters along with the freedom of speech and the liberty of the press. The liberty of correspondence stands between the two; *free word, free letter, free print.* The framers did not think of it, as the first law-makers of Rome are said to have omitted the punishment of parricide.

The sacredness of the letter appears the more important, when it is considered that in almost all civilized countries, the government is the carrier of letters, and actually forbids any individual to carry sealed letters. So soon as the letter, therefore, is dropped into the box, where, as it has just been stated, the government itself obliges the correspondent to deposit it, it is exclusively intrusted to the good faith and honorable dealing of government. If spies, informers, and mouchards are odious to every freeman and gentleman, the prying into letters carried on in France and other countries, with bureaucratic system, is tenfold so, for it strikes humanity in one of its vital points; and had the mail acquired as great an importance in the seventeenth century as in ours, as an agent of civilization, and had Charles I. threatened this agent as he invaded the right of personal liberty, the Petition of Right would have mentioned the sacredness of letters, as surely as it pointed out the billeting of soldiers as one of the four great

grievances of which the English would be freed before they would grant any supplies to the government.

Are we, then, wrong in calling such governments police governments? It is not *from a desire to stigmatize* these governments. *It is on account of the prevailing principle,* and the stigma is a natural consequence of this principle.

If it did it is not a benefit done by a second party, as when A makes a present to B; but government is simply and purely an agent, and what is more, the right of establishing post-offices is not an inherent attribute of government, such as the administration of justice or making war. Government merely becomes the public carrier, for the sake of general convenience. There are many private posts, and governments without government post-offices, for instance, the republic of Hamburg.

The opening of letters, without proper warrant, is a frightful perversion of power, and though government should be able to get at secret machinations, the secret of letters is a primordial condition. Government might, undoubtedly, know many useful things if the sacredness of Catholic confession were broken into; but that is considered a primordial and pre-political condition. So, many codes do not force a son to testify against a father, the family affection is considered a primordial condition. The very state of society, for which it is worth living, is invaded if the correspondence is exposed to this sort of government burglary.

It would be, however, a great mistake to suppose that governments alone interfere with correspondence and free communion. Governments are bodies of men, and all bodies of men act similarly under similar circumstances, if the power is allowed

them. All absolutism is the same. I have ever observed, *in all countries in which I have lived, that, if party struggle rises to factious passion, the different parties endeavor to get hold of the letters of their adversaries.* It is, therefore, of the last importance, both that the secret of letters and the *freedom of all communion be legally protected as much as possible,* and that *every true friend of liberty present the importance* of this right in the clearest manner possible to his own mind.