

Entick v Carrington in Scots Law

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I. Introduction

This chapter considers the significance of the landmark case of *Entick v Carrington*¹ for Scots law and for Scots lawyers, and others in Scotland interested in constitutional matters. How far, if at all, has it been influential and in what ways? In order to pursue this question, it is necessary to consider the different aspects of the case, ie, the varying propositions of law or constitutional principle for which it is thought to stand. It can be understood in at least four ways. First, it can be seen as a case about the law of search warrants. It supports the proposition that a search warrant must be specific and that a general warrant is not a lawful means of authorising a search of private premises. Second, it can be understood as a case affirming the importance of property rights in English law.² Third, it has been seen as an important illustration of the role of the courts in protecting liberty or fundamental rights generally.³ Fourth, it has also been taken to support the much broader proposition of constitutional law that executive government must always be able to show legal authority for its actions (either in the common law or statute) and that there is no general justification for executive action by reference to public interest or state necessity.⁴ This principle is often referred to as an aspect of the rule of law.

Although it is Dicey's exposition of the rule of law which has been most discussed, and *Entick v Carrington* is routinely cited in textbook discussions of the rule of law, Dicey relegates the case to a footnote. It is cited as an example of the application of his second meaning of the rule of law, the principle of equality before the law, which meant that public officials could be sued in the ordinary courts for legal wrongs committed in the same way as

¹ (1765) 19 *Howell's State Trials* 1029.

² KD Ewing, 'The Politics of the British Constitution' [2000] *PL* 405, 408.

³ W Holdsworth, *A History of English Law* (London, Methuen/Sweet & Maxwell, 1938) vol X, 515, 658–72.

⁴ DL Keir and FH Lawson, *Cases in Constitutional Law*, 5th edn (Oxford, Clarendon, 1967) 101, 307; RVF Heuston, *Essays in Constitutional Law* (London, Stevens, 1964) 35–36; ECS Wade & AW Bradley, *Constitutional and Administrative Law*, 15th edn (London, Longman, 2011), 92

a private citizen.⁵ This ability to sue officials is a specific application of each of the four propositions mentioned above.

In this chapter, I will consider the influences that *Entick v Carrington* has had in Scotland in relation to the law of warrants and searches, the protection of liberty and fundamental rights, and the principle of executive government being subject to law. I will not consider its influence (if any) on Scots property law. I will deal first with the law of warrants and searches, and then the broader principles of constitutional law.

II. Search Warrants and the Criminal Process

The earliest reference to *Entick v Carrington* I have identified in a Scottish law report appears, not surprisingly, in *Bell v Black and Morrison*,⁶ the first of three reported cases arising out of an illegal search. Before discussing the details of those cases, it is helpful to put them into the context of the Scots law on warrants as it was before they were decided.

A. The Law before the Scottish General Warrant Cases

The law on search warrants is discussed by, amongst others, Hume and Alison, who are both regarded as institutional writers on Scots criminal law. Hume sets out the law on warrants in his *Commentaries*.⁷ He does not identify search warrants as a distinct category, but does comment on searches in his discussion of arrest warrants. He describes the degree of specification required in a warrant as follows:

In like manner, though it is certainly the better and more equitable course, to express the special cause for which a warrant is given; yet I do not know that the officer be justified if he refuse to execute, or the party if he resist, a more general warrant, which orders him to answer to such matters as shall, on examination before the magistrate, be laid his charge. But it is a different, and a far more exceptionable sort of warrant, which is general as to the person charged, and commands the bearer to apprehend all persons suspected of the matters there set forth, or to make search every where for stolen goods or the like. For, under a writ of this shape, every thing is committed to the judgment and discretion of the officer; which is very dangerous, and may prove the occasion of great abuses. Nay, more, though there have been no purpose to grant a general warrant, yet still if it so happen, *per incuriam*, that the writing

⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (Indianapolis, Liberty Fund, 1982) 114.

⁶ *Bell v Black and Morrison* (1867) 5 Irv 57.

⁷ D Hume, *Commentaries on the Law of Scotland Respecting Crimes* (Edinburgh, Law Society of Scotland, 1986 reprint) ii, 78,

omits, either *in gremio*, or by some plain and intelligible reference, to specify the person against whom it issues, it seems not to be a safe or lawful ground for taking anyone.⁸

As in a number of other instances, Hume draws a comparison with English law. At the end of the first sentence quoted above, there is a footnote stating:

Generally speaking, the law of England is more scrupulous in such matters than ours; yet Hale, (vol. ii. P.111); and Hawkins, (b. 2, c. 13, No. 10. No. 25) are of the opinion, that this holds in their practice too.⁹

Alison does treat search warrants as a distinct category.¹⁰ He states that a search warrant must be specific:

The search warrant must be special as to the goods intended to be searched for, or at least the felony which it is intended to elucidate, and bring to punishment by the warrant craved for; but it does not appear to be indispensable that it should set forth the particular house meant to be searched for these goods, any more than the particular place where the criminal is suspected to be concealed. It seems in short to be a sufficient authority to search for the goods specified, taken on the felonious occasion charged, everywhere, in the same manner as it is sufficient warrant to search for the individual suspected wherever he is to be found.¹¹

He then echoes Hume's comment about the law of England, saying that:

The English law, at the same time, is much more scrupulous in this matter of warrants than our practice [citing, inter alia, Hawkins and Hale]. Beyond all question a warrant is illegal which should authorise officers to search everywhere for stolen goods generally, without specifying either the goods sought for, or the houses suspected. If the former is not known and specified, the latter must be enumerated by place and name.¹²

It is interesting to compare the Scots position as set out by Hume and Alison with that set out in *Entick v Carrington* and the other cases on general warrants. Both Hume and Alison agree that a warrant to search everywhere for stolen goods would be invalid. Alison, however, does not seem to regard it as necessary that a search warrant specify the particular house to be searched for stolen goods, provided that the warrant specifies the goods which have been stolen and the occasion on which they were taken. Similarly, a warrant to search a named house is valid even though the goods to be searched for are not specified in the warrant. It is not clear whether Hume believes similar latitude is allowed. The equivalent passage may be read either as saying that a warrant that failure to specify the place(s) to be searched is in itself enough to make the warrant invalid or that the combination of a failure to specify the person charged and a failure to specify the place(s) to be searched makes the warrant invalid.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ Of course, a power to arrest and a power to search could be included in the same warrant.

¹¹ A Alison, *Practice of the Criminal Law of Scotland* (Edinburgh, W Blackwood, 1833) 146–47.

¹² *ibid* 147.

Both in Scots and English law, a warrant which merely specified the crime(s) alleged to have been committed but not the person(s) to be arrested would have been regarded as illegal.¹³ However, Alison's view certainly seems to give the investigating authorities more latitude in search warrants than did English law. Hale thought that a search warrant should specify the places to be searched¹⁴ and, although none of the group of general warrant cases of which *Entick v Carrington* is one dealt with such a warrant, it can be assumed that judges in those cases took for granted that a warrant which failed to specify the places to be searched was invalid.

B. The Scottish General Warrant Cases

As noted above, the earliest Scottish case referring to *Entick v Carrington* is *Bell v Black and Morrison*,¹⁵ the first of three reported cases arising out of the same set of facts. It is also the nearest equivalent Scottish case on its facts to the warrant in question purported to authorise an unlimited search for papers relevant to an offence. However, the first of the Scottish general warrant cases was decided a few years earlier.

In *Webster v Bethune*,¹⁶ following an allegation that furniture and other effects had been stolen from a house, a warrant was granted to 'search, and detain, and inventory the said articles, and carry away the same to a place of security; and, if necessary, to break and force open all shut and lockfast places'. The warrant did not specify the person accused of the theft, the time when the offence had been committed or the particular place to be searched. On the strength of this warrant, Webster's house was searched three times. The headnote states that it was suspended as being an illegal general warrant. The summary of the argument in the report notes that counsel for the respondent admitted that he could not maintain the legality of such a general warrant. The very brief judgment given by Lord Justice-Clerk Hope states:

[T]his party is entitled to get rid of this warrant, which is admitted to be indefensible. If we refuse to suspend he might suffer considerable damage. I never saw or heard of such a proceeding as this.¹⁷

The case does not state what the minimum requirements of a valid search warrant are, probably because the warrant and its execution were so obviously irregular.

¹³ See Hume, passage quoted above; *Leach v Money, Watson and Blackmore* (1763) 19 ST 1001.

¹⁴ Sir M Hale, *The History of the Pleas of the Crown*, vol II, (London, Nutt and Gosling, 1736) 111.

¹⁵ *Bell v Black and Morrison* (n 6).

¹⁶ *Webster v Bethune* (1857) 2 Irv 596.

¹⁷ *ibid* 598.

In *Bell v Black and Morrison*, Bell brought a bill of suspension of a warrant granted by the Sheriff-Substitute of Fifeshire (sic). The case was heard by the High Court of Justiciary. The petition on which the warrant was based stated that the joint procurator-fiscals for the county were taking a precognition against one James Pringle, then in custody, who was accused along with other persons unknown of conspiring to kill or injure the Reverend James Edgar and John Ballingall, a farmer, and to set fire to their houses, and of sending them threatening letters. It also narrated their suspicion that Bell and four others were involved in the conspiracy and that they were informed and had reason to believe that written documents connected to the conspiracy and threatening letters were in Bell's possession. The petition asked the Sheriff-Substitute to grant warrant to officers of court to search Bell's house for 'the said written documents, and all other articles tending to establish guilt, or participation in said crimes, and to take possession thereof'. The warrant was granted as requested. It was executed and various writings, books and documents, including private letters, were removed.

Although suspected, Bell was not accused of any offence at that stage, so this was a warrant issued to find evidence against persons who were not only not charged but whose identities were unknown, and to seek that evidence in the house of another person who had not yet been charged. The Second Division with a single opinion delivered by Lord Justice-Clerk Inglis suspended the warrant. The petitioner's argument was framed in terms of Scots law, but he did refer to a warrant of this kind having been held to be illegal in England in *Entick v Carrington*. *Entick* is not, however, referred to in the judgment—nor indeed are any other authorities.

The court noted three peculiarities in the petition and warrant:

- It was granted against five different people, none of whom was charged with any crime.
- There was no limitation as to the kind of papers sought to be obtained other than that they related to the alleged conspiracy.
- The execution of the warrant was entrusted absolutely and without control to ordinary sheriff officers and their assistants.

It appeared to be the combination of circumstances which made the warrant illegal. The court did not make a specific statement as to the minimum requirements for the validity of a search warrant and did not state that any one of the three peculiarities was by itself fatal to the validity of the warrant.

Although the background to the case lacks the high political drama of the English general warrant cases, the court clearly thought it was dealing with a constitutional case:

It involves considerations of such high constitutional principle, that if we had felt any hesitation as to the judgment we should pronounce, we should have asked the assistance and advice of the other Judges of this court. But entertaining no doubt at all, we consider it our duty at once to pronounce this warrant to be illegal.¹⁸

There are close parallels to Lord Camden's judgment in *Entick*. Some of the language is similar; Lord Inglis says: 'But the seizure of papers made in the circumstances with which we have to deal is a proceeding quite unknown to the law of Scotland.'¹⁹ He also rejects the argument from practice in much the same manner as Lord Camden did, saying:

We think it right to say that no mere official practice would, in our eyes, justify such a warrant. Nothing short of an Act of Parliament, or a rule of the common law founded on a usage known to and recognised by the Court, would at all affect our judgment on this question. If any such practice really exists, which we do not believe, the sooner it is put an end to the better.²⁰

Lord Inglis expressed himself even more trenchantly in the first of two subsequent actions for damages based on the illegality of the warrant. As civil cases, these were brought in the Court of Session. Bell and his wife brought an action also reported under the name *Bell v Black and Morrison*.²¹ The defenders argued that they would only be liable in case of malice and want of probable cause. Lord Inglis responded to this argument by saying:

I can conceive nothing more startling or unconstitutional, than that the defence put forward in this action should be sustained.

...

[A] more illegal proceeding it never was my duty as a judge to consider. It is as illegal as if it had been a warrant to bring up a party for examination under torture, and therefore the sense in which the warrant is illegal is the highest in which that word can be used.²²

In the same case, Lord Neaves said:

If these pleas were to be sustained, it would make a most serious alteration in our constitutional law.

...

It seems to me to be one of the most illegal warrants I ever heard of. Some of us can remember a time when, if such a warrant had been obtained in connection with a political

¹⁸ *Bell v Black and Morrison* (n 6) 64.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *Bell v Black and Morrison* (1865) 3 M 1026.

²² *ibid* 1029.

offence, the dissatisfaction that would have been excited would not have been appeased by a mere claim of damages against a procurator fiscal.²³

The other case, *Nelson v Black and Morrison*,²⁴ was brought by a man who thought he had been defamed by being named in the petition for the warrant. This case came before the First Division rather than the Second Division. All four of the judges were different from those who heard the civil action brought by Bell and his wife. However, one of the four judges, Lord Ardmillan, had participated in the justiciary proceedings which had declared the warrant illegal.

In *Nelson*, Lord President McNeill, with whom the other judges concurred, drew a distinction between two different types of illegality. If the search was ‘out of all law and reason’, that was one kind of illegality which he described as relating to ‘the substance of the proceedings’. If, on the other hand, the objection was ‘merely that the premises ought not to have been searched in this particular form’, that was another matter.²⁵

In the case of a substantive illegality, the pursuer need not prove malice and want of probable cause. In the case of formal illegality, it was necessary to show that the defender’s statements were made maliciously and without probable cause. Lord McNeill thought that the case fell into the latter category. A legal warrant could have been granted on the basis of the petition. If the Sheriff had limited the search to particular documents or required it to be carried out under his supervision, it would not have been illegal.

Lord Deas agreed that a warrant in the terms asked for would have been legal if the Sheriff required it to be executed under his supervision. Lord Ardmillan remained of the view that the warrant granted to search Bell’s house had been illegal. Nonetheless, although he emphasised that:

...a general warrant for a sweeping and indefinite search in the dwelling-house of a person not put under charge, for written documents ... which must be read before it can be seen what they instruct ... is a very strong and startling procedure ...²⁶

he also suggested that such a warrant would be legal ‘if accompanied by proper securities against oppressive execution’ such as supervision of its execution by the sheriff. ‘The illegality of the warrant lay in the absence of such securities.’²⁷

²³ *ibid* 1031. It is not clear what past political controversies Lord Neaves is referring to here.

²⁴ *Nelson v Black and Morrison* (1866) 4 M 328.

²⁵ *ibid* 330–31.

²⁶ *ibid* 332.

²⁷ *ibid*.

Was the approach taken by the court in *Nelson* consistent with that taken in the other two cases? Certainly, the courts were addressing different questions. As Lord Deas noted, the cases are distinguishable because Bell's action for damages was based on an actual search of Bell's house, whereas Nelson against whom the warrant had not been executed was suing for defamation. Also, both Lords McNeill and Deas thought that the cause of action was a judicial slander and there was authority that a prosecutor was not liable for slander unless he had acted maliciously and without probable cause.²⁸

As far as criminal procedure goes, the cases can be reconciled on the basis that the judgment of the court in the first case can be read as holding that the warrant was illegal because a lack of limitation as to the papers to be searched was combined with the absence of judicial supervision of its execution. Based on these authorities, the minimum requirements of a search warrant in Scots law appear to be that the premises to be searched are specified and that *either* the papers or articles to be searched for are specified or, if they are not, that the execution of the warrant is judicially supervised. It is not clear if by this time a Scottish court would have endorsed Alison's suggestion that the particular house to be searched need not be specified. However, as a practical matter, it is unlikely that a sheriff or justice of the peace would have asked for such a warrant. Nonetheless, although the cases can be reconciled in this way, Lord McNeill's categorisation of the defect in the warrant as a 'want of formality' or 'want of caution' in execution rather than a defect of substance suggests a more relaxed attitude to the legality of warrants than is held by Lord Inglis.

However, as a matter of private law, ie, liability in damages, there is a clear inconsistency between the decision in the second *Bell v Black and Morrison* case and the decision in *Nelson*. In the first case, all four judges were agreed that proof of malice and want of probable cause were not required in the case of this warrant as it was wholly illegal and ultra vires. This was plainly inconsistent with the view taken in *Nelson* that the pursuer did need to prove malice and want of probable cause in respect of the same warrant!

So, viewed in isolation, *Bell v Black and Morrison* may seem to be a Scottish equivalent of *Entick v Carrington*. Viewed in the context of the related litigation, this interpretation seems less compelling. However, if we take a longer-term view, it is clear that the stricter attitude of Lord Inglis has prevailed. *Webster*, *Bell* and *Nelson* continue to be cited as the primary authorities for the proposition that general warrants are illegal and for the

²⁸ *ibid* 331–33.

degree of specificity required in warrants,²⁹ and it is assumed, contrary to what Alison states, that a search warrant must specify the premises to be searched.³⁰ It is also clear that *Bell v Black and Morrison* did not subsequently catch the imagination of lawyers in the way that *Entick v Carrington* has and never achieved the same iconic status.

Interestingly, and as a warning against complacency, Scottish prosecutors did apply for a general warrant as recently as 1987 in the Zircon affair. The BBC had made a series of television programmes on secrecy. One programme mentioned the existence of a secret spy satellite programme (Zircon). The government thought that there might have been breaches of section 2 of the Official Secrets Act 1911. A sheriff granted a warrant that authorised police to search the premises and if necessary any person found there for ‘any sketch, plan, model, article, note or document or anything of a like nature including in particular any film which is evidence of an offence under said Act [the Official Secrets Act]’. This warrant was successfully challenged as it failed to specify the offence that had been or was about to be committed.³¹ The warrant made no reference to any section of the Act, even though there were many different offences under it.³²

C. Did *Entick v Carrington* Influence the Decision in the Scottish General Warrant Cases?

The obvious question is whether *Entick v Carrington* influenced the decision in the *Bell* litigation. Certainly, the nature of the warrant in *Bell* was similar to that in *Entick*, the latter was referred to by counsel in argument, the case was perceived by Lord Inglis to be of constitutional importance and the judgment includes rhetorical flourishes reminiscent of those in Lord Camden’s judgment. However, these circumstances only make it plausible that *Entick* was influential. The terms of the judgment are equally compatible with the decision being grounded in Scots law. Counsel’s argument referred to several Scots authorities—Hume, Alison and Hutcheson’s *Treatise on the Offices of Justice of the Peace*—as well as *Entick*.

²⁹ See, eg, RW Renton and HH Brown, *Criminal Procedure According to the Law of Scotland*, 6th edn (Edinburgh, W Green, 1996) pt II, 5-09 and 5-10; CN Stoddart, *Criminal Warrants*, 2nd edn (Edinburgh, Butterworths, 1999) 1.19, 5.05.

³⁰ See Stoddart (n 29) 1.19, who cites Hume, Alison, *Nelson* and *Webster* to support this proposition.

³¹ *BBC v Jessop* (February 1987, unreported, High Court of Justiciary).

³² A subsequent application for a more narrowly drawn warrant relating to suspected offences under s 2 of the Act was granted.

There is no evidence within the judgment itself of influences as no authorities of any kind are cited, no doubt because, as Lord Inglis says, the illegality was particularly blatant.

Subsequent developments suggest that *Entick v Carrington* was not a major influence on Scots law with regard to search warrants. The Scottish courts applied similar principles, but the case is not referred to in subsequent cases on warrants or in textbooks on the criminal process. Instead, the Scottish authorities are relied on.

That *Entick v Carrington* has not had a major influence on the law on searches is not surprising in view of the separate development of Scots criminal law, criminal procedure and policing, and the absence of any strong pressure for convergence between Scotland and England in criminal matters.³³ The fact that the law on search warrants came to be very similar in the two jurisdictions is more likely to be a case of parallel evolution.

D. Search without a Warrant

Lord Camden's judgment in *Entick v Carrington* was broadly enough expressed to make it possible to use it as authority on searches without a warrant given its emphasis on the inviolability of property rights. It is in this context that the only recent reference to it in a Scottish criminal case occurs. That case is *Gillies v Ralph*.³⁴ Although it does not concern a search warrant, it does concern entry to premises by the police for the purposes of investigating crime. Section 14 of the Criminal Procedure (Scotland) Act 1995³⁵ allowed the police to detain a person reasonably suspected of having committed an offence punishable by imprisonment for up to six hours at a time without arrest or charge (later increased to 12 hours). In this case, the police went to the flat of which Gillies was the householder to try and find out the whereabouts of a man, James Scott, believed to be her boyfriend, in connection with an act of vandalism of which he was suspected. Gillies told them that Scott was not there and refused permission to search her flat. Then officers saw Scott in the hallway. One officer cautioned him and told him he was being detained under section 14 of the 1995 Act. He moved briskly up the hallway away from the officers and Gillies tried to close the front door. The police forced their way in and removed Scott from the flat. Gillies, the householder, was

³³ There are some exceptions, eg, legislation on traffic offences, controlled drugs and national security issues.

³⁴ *Gillies v Ralph* 2008 SLT 978.

³⁵ Since repealed and replaced by the Criminal Justice (Scotland) Act 2014, sched 1, para 27(a).

then charged and convicted of obstructing police officers in the execution of their duty under section 41 of the Police (Scotland) Act 1967.

On appeal, Gillies argued that the police had acted unlawfully in entering her house without consent or a warrant. The High Court of Justiciary allowed the appeal. The police had had no lawful authority to enter the house and Gillies was entitled to close her door to prevent their entry. The court accepted that there were some circumstances in which police officers were entitled to enter private property without consent or a warrant, but they declined to develop the common law further to authorise entry to private property in order to detain a person. Lord Reed, giving the opinion of the court, stated:

If a police officer enters private property without permission to do so, he is (unless authorised by common law or statute) acting unlawfully under the civil law: *a fortiori*, if force is used without lawful justification. As Brennan J observed in *Halliday v Nevill* (para 4):

A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorised or excused by law.

That principle is, in Brennan J's words, 'of ancient origin but of enduring importance', and forms part of the common heritage of the legal systems of the United Kingdom and the wider common law world (cf. *Entick v Carrington*; *Great Central Rly v Bates*; *Eccles v Bourque*; *Kuru v State of New South Wales*).

Whilst it is interesting to see *Entick v Carrington* used in this way, it does not suggest that it has been a strong influence in itself; rather, it provides an example of parallel development. In fact, *Entick v Carrington* seems to have been more influential for the broader propositions of constitutional law for which it is thought to stand. It is to these which I now turn.

III. Fundamental Rights and the Constitutional Limits of Executive Power

A. Cases Citing *Entick v Carrington*

The influence in Scotland of *Entick v Carrington* in relation to these broader propositions is to be found in the literature of constitutional law rather than in the cases. I have found only one case in which it is discussed, *Davidson v Scottish Ministers (No 2)*.³⁶ In two other cases

³⁶ *Davidson v Scottish Ministers (No 2)* [2005] UKHL 74; 2006 SC (HL) 41.

there are passing references, but nothing substantive.³⁷ In *Davidson*, the House of Lords had to decide whether the apparent exclusion of coercive remedies against the Crown in section 21 of the Crown Proceedings Act 1947 prevented interdict and specific performance being granted against the Crown in judicial review proceedings in Scotland. Lord Rodger made these comments on the historical importance of the law of tort or delict as a way of vindicating the subject's rights and freedoms:

Reform of the private law and its procedures in respect of the Crown was no insignificant matter. By concentrating on judicial review, lawyers and judges today may tend to forget the historical importance of the law of tort or delict as a way of vindicating the subject's rights and freedoms. To take only the most obvious example, *Entick v Carrington* was an action of trespass for breaking and entering the plaintiff's house and seizing his papers. As Weir puts it in his peerless *Casebook on Tort* (p 18), in addition to providing compensation, the other function of the law of tort is 'to vindicate the rights of the citizen and to sanction their infringement. In this respect the flagship of the fleet is not negligence but trespass, protecting as it does the rights of freedom of movement, physical integrity, and the land and goods in one's possession'. So, if pushed too far, the doctrine that the Crown can do no wrong and so cannot be liable in tort could have been an engine of tyranny. But actions against officers of the Crown (such as Carrington, a King's messenger) as individuals meant that the law of tort could be used to protect the liberties and property of the subject.³⁸

He ends that paragraph by commenting:

Indeed Dicey's second meaning of the 'rule of law' as a characteristic of England was 'that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals' (*Introduction to the Law of the Constitution*, p 193). The same applied in Scotland (*McDonald v Secretary of State for Scotland*³⁹ is indeed a more recent case in point).

The suggestion that Scots and English law both satisfied Dicey's second meaning of the rule of law was uncontroversial. Having considered the case law, I now move on to the literature.

B. Books and Articles on Constitutional Law

Although *Entick v Carrington* has not been cited in works on the criminal process, it has been regularly cited in books on constitutional law to illustrate both the role of the courts and common law in protecting liberty or fundamental rights and the general proposition that

³⁷ In *Dalziel School Board v Scotch Education Department* 1914 2 SLT 449, a dispute over the dismissal of a teacher, *Entick v Carrington* was apparently referred to in argument, but not in any of the judgments. More recently, in *Sovereign Dimensional Survey Ltd v Cooper* 2009 SC 382, in which the Court of Session had made an order equivalent to an Anton Piller order, the court merely quoted a passage from Lord Denning's judgment in *Anton Piller* which itself referred to *Entick v Carrington*, but the Inner House makes no comment on *Entick v Carrington*.

³⁸ *Davidson v Scottish Ministers (No 2)* [2005] UKHL 74 [73].

³⁹ *McDonald v Secretary of State for Scotland* 1994 SC 234.

executive government must always be able to show legal authority for its actions (the principle of executive legality).

The earliest reference that I have found in a work written by a Scots lawyer is in the *Source Book of Constitutional History from 1660*⁴⁰ by D Oswald Dykes, Professor of Constitutional Law and Constitutional History in the University of Edinburgh. Dykes reproduces a substantial excerpt from the State Trials report in chapter XI, which is entitled ‘Personal Liberty and Habeas Corpus’, along with *Leach v Money* and *Wilkes v Wood*, and includes a paragraph on the general warrants cases in his introduction.⁴¹ It is not clear to what extent Dykes’ source book was read by lawyers. The preface makes clear that it was aimed principally at advanced students in history (ie, those studying for the honours degree). In any event, it does not claim to be a book on Scots law or to provide a Scottish perspective on the constitution. The preface refers to the constitutional history of ‘this country’ and the introduction refers to changes in the governmental machinery of ‘this country’. This country is plainly the UK even though the book includes a substantial period before the Acts of Union (1660–1706).

A few years later, WIR Fraser, Advocate and Lecturer in Constitutional Law at the University of Edinburgh⁴² and who later became Lord Fraser of Tullybelton, published a book which was aimed at lawyers, *An Outline of Constitutional Law* (1938).⁴³ The preface states that it was written at the suggestion of the General Council of the Law Society of Scotland and was intended primarily for candidates for professional examinations, although the author hoped that it would also prove to be useful to university students, particularly as there was no other book ‘dealing with constitutional law from the point of view of the Scottish lawyer’, with the exception of Dykes and Philip’s *Chapters in Constitutional Law*.

Fraser does not cite *Entick v Carrington* in the context of search warrants. He discusses search warrants in his chapter on ‘The Right to Freedom of the Person’, where he says: ‘the warrant must specify the premises to be searched and the articles to be seized. A general search warrant is illegal’.⁴⁴ There follows a summary of *Bell v Black and Morrison*. However, he does refer to *Entick v Carrington* in his chapter on the rule of law, specifically

⁴⁰ DO Dykes & JR Philip, *Source Book of Constitutional History from 1660* (London, Longmans, Green & Co, 1930).

⁴¹ *ibid* 56–57.

⁴² Fraser had previously been Lecturer in Constitutional Law at the University of Glasgow.

⁴³ WIR Fraser, *An Outline of Constitutional Law* (London, William Hodge & Co, 1938).

⁴⁴ *ibid* 191–92.

in his discussion of Dicey's second meaning of the rule of law, namely that of equality before the law. Having made the point that public officials are subject to the law in the same way as private individuals and can be sued for a legally wrongful act, he says that it is no defence that an action was necessary in the public interest and that this point was decided in *Entick v Carrington*, quoting the relevant passage from Lord Camden's judgment.⁴⁵

The next comprehensive account of Scots constitutional law was published in 1964, JDB Mitchell's *Constitutional Law*.⁴⁶ Mitchell cites *Entick v Carrington* in a footnote at p 144 and in the text at p 180 in the course of a discussion of the prerogative, citing the passage from Camden's judgment on state necessity at the latter page. He also refers to it at p 334, in the chapter on fundamental rights, in the course of a discussion of freedom of property. He discusses the requirement for a warrant to enter property to be specific, which he notes was established in England in *Wilkes v Wood* and *Entick v Carrington*, and comments that similar principles were affirmed in Scotland in *Bell v Black and Morrison*.

After this, references to *Entick v Carrington* become commonplace. It is typically referred to on the context of discussion of the rule of law, particularly to support the proposition that executive government has no inherent powers and must always be able to show legal authority for its actions. Thus, for example, Clyde and Edwards refer to it in their textbook *Judicial Review*,⁴⁷ quoting the relevant passage from Lord Camden's judgment. Similar use is made of the case by Ashton and Finch,⁴⁸ Munro⁴⁹ and Himsworth and O'Neill.⁵⁰

Through these, and also through constitutional law texts written from an English perspective but widely read in Scotland, *Entick v Carrington* has become familiar to generations on Scots lawyers, but it is also worth examining whether it has become more widely known.

C. Publications for a Lay Readership

⁴⁵ *ibid* 17–18, quoting the passage at (1765) 19 *Howell's State Trials* 1029, 1073.

⁴⁶ JDB Mitchell, *Constitutional Law* (Edinburgh, W Green, 1964; 2nd edn, 1968).

⁴⁷ Rt Hon Lord Clyde and DJ Edwards (Edinburgh, W Green, 2000) 4.14.

⁴⁸ C Ashton and V Finch, *Constitutional Law in Scotland* (Edinburgh, W Green, 2000) 63, 18.05.

⁴⁹ J Munro, *Public Law*, 2nd edn (Edinburgh, W Green, 2004).

⁵⁰ C Himsworth and C O'Neill, *Scotland's Constitution: Law and Practice*, 2nd edn (Haywards Heath, Bloomsbury Professional, 2009).

I have not conducted an exhaustive search of newspaper and periodical literature, but have identified several references to *Entick v Carrington* in Scottish publications aimed at the general reading public as opposed to lawyers or historians. The earliest reference I have found is in a lengthy article on the Aliens Acts 1793, which appeared in the *Edinburgh Review* for April 1825.⁵¹ The article concerned the right of the Crown to exclude or dismiss an alien from the realm at pleasure. In analysing the reasons that had been given in the past to support the existence of such a prerogative, the author states:

In the most important judgment, which determined, that a warrant to search for, and seize the papers of the accused, in the case of a seditious libel is contrary to law, Lord Camden said, (*Entick v Carrington* 19 St. Tr. 1067) ‘The judges must look into their books. If it is law, it will be found in our books. If it is not to be found there, it is not law.’

Here, the case is being used to support the principle of executive legality. In a sense this is a passing reference, but the description of the case as ‘most important’ seems noteworthy. What is also striking about the piece is the particularly detailed historical and legal analysis; the piece presupposed a highly educated and engaged readership.

Another reference appears in the *Glasgow Herald* of 3 January 1868. This article is a reproduction of an item from *The Times* of the previous day (something the *Glasgow Herald* regularly did at that time), under the title ‘The Irish Fenian Press’.⁵² *The Times* had been publishing extracts from Irish newspapers which the author regarded as seditious and the purpose of the article had been to explain the law of sedition to *The Times*’ readers and to call for the law to be enforced against Irish nationalists. The author quotes a passage from Lord Camden’s judgment in which he explains the reasons for punishing seditious libel. This is therefore an aspect of the case which is less resonant today and perhaps we should not read too much into it, as the piece was originally written for an English audience.

Rather more recently, a reference to *Entick v Carrington* appears in a book review in *The Scotsman* of 10 January 1924. The book in question was *The Principal Secretary of State: A Survey of the Office from 1558 to 1680* by FM Grier Evans.⁵³ The reviewer comments:

⁵¹ ‘Art IV. On the Alien Bill’ *Edinburgh Review* (April 1825), 99–174. The article bears to have been written ‘By an Alien’. The use of pseudonyms was not uncommon at the time. The content and forms of expression used suggest that the author was not in fact an alien.

⁵² *Glasgow Herald*, 3 January 1869. The author of the item in *The Times* was described as ‘Scaevola’.

⁵³ FM Grier Evans, *The Principal Secretary of State: A Survey of the Office from 1558 to 1680* (London, Longmans, 1923).

The great battle fought over his right of commitment and of seizure of papers *receives adequate treatment* (my italics)., ‘The author examines the conclusions reached in the various eighteenth century trials, especially *Entick v Carrington* and then illustrates by a brief survey of the records what in fact was the seventeenth century procedure. She shows that secretarial commitments upon warrants in which the cause of commitment was not shown were common. The abuse of this practice, *as is well known*, led to the passing of the Habeas Corpus Act. (Emphasis added)

This passage suggests both that the writer of the review was familiar with the general warrant cases and that the readers of *The Scotsman* were expected to have some idea of the eighteenth-century constitutional struggles.

Although this has been a highly selective survey, it suggests that the perception of *Entick v Carrington* as a key constitutional case was neither restricted to England nor to lawyers.

D. The Influence of *Entick v Carrington* in Scots Constitutional Law

Having reviewed a number of sources referring to *Entick v Carrington*, I will now consider how significant it has been as a point of reference in Scots constitutional law and history. The references above show that in both the nineteenth and twentieth centuries, *Entick v Carrington* has been taken to illustrate principles common to Scots and English law.

As noted above, it does not seem that it has had much influence on the development of the law of search warrants. However, the broader significance of *Entick v Carrington*, whether as an exemplar of the importance with which the right of property was regarded, of the principle of executive legality or of the protection of liberty more generally, was clearly appreciated in Scotland. This is not surprising. From the mid eighteenth to the mid-twentieth centuries, political and legal thought was dominated by a unionist perspective.⁵⁴ There was widespread acceptance of the union and of Scotland’s place within it. Whilst it was very important that major institutional differences had been preserved (the established church, education, the courts and Scots law), there was also a strong tendency to treat much of the pre-union English constitutional history as part of a constitutional inheritance common to Great Britain. More generally, there was a tendency not to distinguish clearly between terms like England/English, Scotland/Scots and Britain/British, or the precise political communities to which these terms referred.

⁵⁴ C Kidd, *Union and Unionisms: Political Thought in Scotland 1500–2000* (Cambridge, Cambridge University Press, 2008).

More generally, broadening the focus beyond constitutional law, during the eighteenth century, there seems not to have been great enthusiasm for preserving some of the distinctive features of Scots law (eg, the continued importance of feudal principle) or great concern about the influence of English law and legal forms. The primary concern was with improvement in the law and the legal system to meet the needs of a developing society⁵⁵ and, in the nineteenth century, there was considerable support for the assimilation of Scots to English law, particularly in the field of commercial law.⁵⁶

We can see the assumption of a common constitutional inheritance at work in Fraser's account of constitutional doctrine which displays impeccably Diceyan orthodoxy. Whilst discussing a number of areas where Scots law was different, he treats the basic doctrines of the constitution (eg, the rule of law and the sovereignty of Parliament) as British with no distinct Scottish dimension. There is no hint of the distinct perspective that emerged in the celebrated case of *MacCormick v Lord Advocate*⁵⁷ a mere 15 years later. Similarly, we have Dykes' omission of any national qualifier in the title of his work on constitutional history and his referring to 'this country' without saying which country he means.

We can also see the same assumption in works aimed at a lay audience. The article on the Aliens Act in the *Edinburgh Review* discussed above refers on the first page to 'an outrage on the ancient policy of England',⁵⁸ then on the second to the Alien Act being 'no standing part of the constitution of Britain'.⁵⁹ There follow numerous references to 'England', 'the Crown' and the 'English constitution'. The article ends with a plea to repeal 'this odious enactment' so that 'as Englishmen we shall not need to blush in the presence of these strangers'.⁶⁰ Whilst this might be read as indicating that the author was: (a) English; and (b) insensitive to the Scottish dimension of the UK, it was clearly thought that the readership would find this article relevant to them and, as we have seen, even Scots lawyers such as Dykes were prone to the tendency to elide the distinctions between England, Scotland and Britain.

⁵⁵ *ibid* 178–90.

⁵⁶ *ibid* 190–98.

⁵⁷ *MacCormick v Lord Advocate* 1953 SC 396

⁵⁸ 'On the Alien Bill' (n 51) 99.

⁵⁹ *ibid* 100.

⁶⁰ *ibid* 173.

Legal nationalism did not arise as a significant phenomenon until the mid-twentieth century,⁶¹ but it did little to shake perceptions of a common constitutional inheritance. The reasons for this included that several of its exponents were unionist in their politics and that much of the emphasis was on private law rather than public law. One outstanding exception was the debate over the status of the Treaty of Union as fundamental law stimulated by Lord Cooper's remarks in *MacCormick v Lord Advocate*,⁶² but although those remarks suggested that the two legal systems might rest on different basic foundational norms, that did not lead legal nationalists to suggest that there were other major differences of constitutional principle between Scots and English law. Even the devolution settlement which creates greater scope for divergence in substantive law including much of the law relating to Scottish government is built on essentially UK foundations; devolved government follows the Westminster system with relatively modest alterations, and the areas of law most affected by the broader propositions for which *Entick v Carrington* is today cited—judicial review and the law of government liability—are very close in Scotland and England and seem to have converged further in recent decades.

IV. Conclusions

To return to the question with which I began—how far, if at all, *Entick v Carrington* has been influential in Scots law—as far as the law on search warrants goes, it seems not to have been a major influence, although the Scottish courts applied similar principles. As discussed above, this is not surprising in view of the separate development of Scots criminal law, criminal procedure and policing.

As to the broader significance of *Entick v Carrington*, the general ideas about the source and nature of the powers of executive government and the role of the courts in protecting individual liberty and controlling government power seem to have been pretty much the same in Scotland and England in the 250 years since it was decided, and the case

⁶¹ ID Willock, 'The Scottish Legal Heritage Revisited' in J Grant (ed), *Independence and Devolution: The Legal Implications for Scotland* (Edinburgh, W Green, 1976); Kidd (n 54) 198–210; L Farmer, 'Under the Shadow of Parliament House' in L Farmer and S Veitch (eds), *The State of Scots Law: Law and Government after the Devolution Settlement* (Edinburgh, Butterworths, 2001).

⁶² See, eg, TB Smith, 'The Union of 1707 as Fundamental Law' [1957] *PL* 99; N MacCormick, 'Does the United Kingdom have a Constitution?' (1978) 29 *Northern Ireland Law Quarterly* 1.

itself is routinely referred to by textbook writers. These aspects of the concept of the rule of law are conceived of in the same way by Scots lawyers as they are by English lawyers.