

Result upon ~~could~~ be done by
~~statute~~

Supreme Court of the United States

Memorandum

-----, 19----- (London, 1736)

- 1 Hall, Pleas of the Crown 580 A A ("a general warrant upon a complaint of a robbery to apprehend all persons suspected... was ruled void")
- 2 id at 114 ("the general warrant to search all places [for stolen goods], whereof the party [Informant] and officers have suspicion, though it be usual, yet it is not so safe upon the reason of Justice Savellour's case [referred to immediately above].")

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2 id at 150 ("a general warrant to search in all suspected places is not good, but only to search in such ^{particular} places; where the party assigns before the justice his suspicion of probable cause there of, for these warrants are judicial acts, & must be granted upon examination of the facts")

2 Howland, Pleas of the Crown 132
(6th ed., 1787) (it seems to be very questionable etc)

Memorandum to Mr. Justice Clark
re: Writs of Assistance

Search warrants are of two general types: special and general. A special warrant is issued upon ^{information on} oath for the purpose of finding specified goods at a certain location. General warrants ^{on the other hand,} grant a power of search for a considerable duration without naming any location. The writ of assistance, which so angered the American colonists, ^{originally} issued from the Court of Exchequer ^{to customs officials} to seize uncustomed goods upon which the duty had not been paid.

General warrants were unauthorized at common law. ^{This is not} to say that Parliaments could not authorize the issuance of such writs. ^{In fact, the Court of Exchequer} frequently issued general warrants ^{for uncustomed goods} on the authority of the statute of 1662, 13 & 14 Car. 2, c. 11, § 5, and for unlicensed printed material, ^{under the statute of 1662, 13 & 14 Car. 2,} ~~Nevertheless they were frequently issued, particularly for uncustomed goods and illegally printed material.~~

Apparently no judicial complaint was made of these

warrants, ^{at that time} ~~Statutory sanction for a type of special~~

warrant for uncustomed goods was ^{made by statute of} given in 1660, 12 Car.

2, c. 19:

" . . . [I]f any person or persons . . . shall cause any goods for which . . . duties are due or payable . . . to be landed or conveyed away without due entry thereof first made, and the customer or collector . . . agreed with; That then and in such case, upon oath thereof made before the Lord Treasurer, . . . or Chief Magistrate of the port or place where the offense shall be committed, . . . it shall be lawful to and for [them]

Whether there was actually statutory sanction for general writs of assistance is open, however, to serious question.

// attached

2/ 2 Hale, op. cit. at 114; Dalton, Conty Justice 597-598 (1727); Opinion of English Attorney General William DeGrey, August 20, 1768, Quincy's Massachusetts Reports 452-454 [Quincy's case re Quincy]; Impediment of Lord Chief Justice Scruggs, 8 Howell's State Trials 174, 200 (1680). A sample general warrant is (over)

styled Breve Assistentis pro Officiali Custum, is included
in an early form book, Brown, Compendium of the Several
Branches of Practice in the Court of Exchequer at West-
minster 358-361 (1688).

Search warrants are of two general types: general

and special. A special warrant is issued upon oath

for the purpose of finding specified goods at a certain

location. General warrants grant a power of search

for a considerable distance without naming any location.

The writ of assistance which no longer is in use

originally issued from the Court of Exchequer to seize

uncustomed goods.

General warrants were authorized at common law

for uncustomed goods and for property of the Crown.

Apparently no judicial complaint was made of these

warrants until the late 18th century.

A warrant for uncustomed goods was given in 1800, 12 Car.

5, c. 187.

... [If any person or persons . . . shall cause
any goods for which . . . duties are due or payable
to be landed or conveyed away without due
entry thereof first made, and the collector or
collector . . . agreed with; that then and in
such case, upon oath first made before the
Lord Treasurer, . . . or Chief Magistrate of the
port or place where the offense shall be com-
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Handwritten notes:
The warrant for uncustomed goods was given in 1800, 12 Car. 5, c. 187.

Handwritten notes at bottom:
The warrant for uncustomed goods was given in 1800, 12 Car. 5, c. 187.

. . . to issue out a warrant to any person or persons, thereby enabling him or them, with the assistance of a sheriff . . . to enter into any house in the day-time, where such goods are suspected to be concealed; and in the case of resistance to break open such houses, and to seize and secure the same goods so concealed;"

The writ of assistance, as such, is not mentioned. Two years later, however, ^{the Statute of} 13 & 14 Car. 2, c. 11, § 5 (~~1662~~), specifically named the ~~warrant~~ ^{warrants, apparently for the first time.} ^{3/}

" . . . [I]t shall be lawful to or for any person or persons, authorized by writ of assistance under the seal of his Majesty's Court of Exchequer, to take a constable, headborough [mayor], or other public officer inhabiting near unto the place, and in the day-time to enter and go into any house, shpp, cellar, warehouse or room, or other place, and in case of resistance, to break open doors, chests, trunks and other package[s], there to seize, and from thence to bring, any kind of goods or merchandize whatsoever, prohibited and uncustomed"

No definition of the writ is given, the statute seemingly assuming that it was already well known. If the doctrine of pari materia is utilized in construing these two obviously closely related statutes, it would ^{appear} ~~seem~~ that

^{3/} Lord Mansfield, in Cooper v. Boot, 4 Doug. 339, 99 Eng. Rep. 911 (C.P. 1785), sought to determine "whether the writ of assistance was not founded entirely upon the Statute of Charles II, and granted from the general direction of that Act." 4 Doug. 347, 99 Eng. Rep. 915. Judgment was deferred pending answer to this inquiry but no earlier mention of the writ was found.

the writ referred to the warrant described in the 1660

statute, which ^{was} ~~is~~ special, not general. However, ~~many~~ ^{the} Court of

Eschey was apparently never approved this was for many years due to the fact that the informant had to be named in a special writ and such would not be likely to come forward without the protection of anonymity since the great dislike of the people for the system shows might not itself on the informant.

general writs of assistance were issued in England. ^{This may have been due to the fact that the informant had to be named in a special writ and such would not be likely to come forward without the protection of anonymity since the great dislike of the people for the system shows might not itself on the informant.} The first recorded writ of assistance in America~~x~~

was issued by the Superior Court of ^{Judicature} Massachusetts in

1755. ^{in pertinent part} The ~~pertinent~~ part of it read:

" . . . We therefore command you and each of you that you permit the said C[harles] P[axton] [Surveyor of His Majesty's Customs for the Port of Boston] and his deputies and servants from time to time at his or their will . . . in the day time together with a constable or other public officer inhabiting near unto the place to enter and go into any vaults, cellars, warehouses, shops or other places to search and see whether any goods, wares or merchandise, in the same . . . vaults, cellars, warehouses, shops or other places are or shall be there hid or concealed, having been imported, ship[ed] or laden in order to be exported from or out of the said port [Boston] or any creeks or places appertain[ing] to the same port; and to open any trunks, chests, boxes, fardells [bundles] or packs made up or in bulk, whatever in ~~wixixxaxx~~ w[hich] any goods, wares or merchandises are suspected to be packed or concealed "

Two more such writs were issued by that court in 1758, three in 1759 ~~xx~~ and two in 1760, ^{5/} all with apparently little opposition by the colonists.

4 2 John Adams's Works 523
5 Quincy's Massachusetts Reports, App. 1, 405-406.

When two writs of assistance were sought to be renewed in 1761 in Massachusetts, they were strongly opposed.^{6/} Oral argument was had before the court in February, 1761.^{6/} Three grounds were raised against the writs' issuance.^{7/} First, it was claimed that if the Act of Parliament (13 & 14 Car. 2, c. 11, §5) did authorize a general writ of assistance, then the Act was unconstitutional. Second, it was argued that the Act did not authorize the issuance of a general warrant. Finally, it was contended that ~~the Superior~~ the Superior Court of Judicature of the Province did not have the powers of the English Court of Exchequer and hence could not issue the writ.

The argument of unconstitutionality, while a favorite of the colonists, never gained recognition in England and even today, no Act of Parliament may be declared invalid. Apparently the claim concerning the court's power gave little pause to the court, and ~~legislatively~~ ^{rationably} so, because it was the highest court in the Province and if such writs were to be issued, it was the logical ~~court~~ ^{choice}. However,

~~Parson's Case, 2 Summ. 257 (1761).~~
^{6/} See generally ~~Summ. 257 (1761), 412-422;~~
3 Hutchesson, History of Massachusetts - Bay 67-68, (Mayo ed. 1936).
^{7/} 2 John Adams Works 521-23

the second argument, based on the meaning of the statute, evidently very nearly convinced the court not to issue the writs.^{8/} Evidence indicated that the current practice in England was not to issue general writs, but only special ones. In order to correctly ascertain the English practice, the court deferred decision. Oral argument was again had in November 1761. Then it was conclusively shown that the English Court of Exchequer commonly issued general writs of assistance. The court then immediately granted the writs.^{9/} American writs were then granted immediately.

Several months later, in March, 1762, the ^{Massachusetts} General Court ~~Legislature~~ passed a bill authorizing any judge or justice of the peace, upon information on oath by any officer of the customs, to issue a special writ of assistance,^{10/} and prohibiting all others. But Governor Bernard refused to sign it and prorogued the General Court. Smuggling continued to be widespread and many

writs of assistance were issued to the customs officers by the Massachusetts Court.

Apparently dissatisfied with the activity of the customs officials, a mob ^{in August, 1765,} sacked the house of the chief collector for Boston and ^{shot} ~~the house~~ of the Chief

^{8/3} Hutchinson, History of Massachusetts - Boy 68 (Mayo ed. 1936).

^{9/} Report that the judgment immediately followed the argument further invited the colonists. See Boston Gazette of November 23, 1761, reprinted in Quincy Massachusetts Reports, 486-488.

^{10/} The statute is reprinted in Quincy 495-496

where it correctly considered primarily dependent on the existence of the writs,

Justice of the Superior Court of Judicature. Rescues, ^{11/}
i.e., seizing confiscated goods from customs officers,
became more and more common. Instances of open resistance
to ~~the writs~~ searches under general warrants occurred.

^{Prior to 1767,}
~~Apparently none of the other colonies, except New~~
Hampshire, had issued general writs of assistance, ~~on~~
~~the ostensible ground that it could only be done by~~
~~the Court of Exchequer.~~ The writ was issued in New
Hampshire as early as 1762. ^{12/} To remove all doubt about

the power of the highest provincial courts to issue the
writs, Parliament passed ^{in 1767, the Statute B} 7 Geo. 3, c. 46, §10, ^{which stated:} in 1767:

U . . . [S]uch writs of assistants, to authorise
and ^vempower the officers of his Majesty's customs
to enter and go into any house, warehouse, shop,
cellar, or other place, in the British colonies or
plantations in America, to search for and seize
prohibited or uncustomed goods, in the manner
directed by the said recited acts, shall and may
be granted by the said Superior, or Supreme Court
of Justice having ^{ing} jurisdiction within such
colony or plantation respectively. ^v

Subsequently, general writs were issued in New York. ^{13/}
Connecticut and Virginia seem to have continued to refuse
such writs. ^{14/} ~~No~~ The records of the other colonies do
not indicate that any ~~such writs~~ ^{writs of assistance} were sought. ^{15/}

^{11/} 88 Mass. Archives 191-198.
^{12/} Quincy 500.
^{13/} Quincy 507.

^{14/} Quincy 501-504, 510
^{15/} Rhode Island: Quincy 505-506 Md: Q 509
New Jersey: Quincy 508
Pennsylvania: Quincy 509
Other colonies: Q
510-511

On August 20, 1768, the Attorney General of England,
[William DeGray], issued an opinion on the lawfulness
of the writs of assistance. He stated:

" . . . [I]f such a general writ of assistants is
not granted to the officer, the true intent of the
Act [^{13 & 14 Geo. 2, c. 11} ~~7 G. 3, c. 46~~] may in almost every case be
evaded, for if he is obliged, every time he knows,
or has received information of prohibited or
uncustomed goods being concealed, to apply to the
Supreme Court of Judicature for a ~~writ~~ writ of
assistants, such concealed goods may be conveyed
away before the writ can be obtained. Inquiry
has been made into the manner of granting writs
of assistants in England, and it appears that
such writs are issued out of the Court of Exchequer
whenever the Commissioners of the customs apply
for them. Every officer of the customs here, is
armed with such a writ, and whenever a new officer
is appointed, the commissioners direct their
solicitor to procure a writ of assistants, which
is issued as a matter of course by the Clerks of
the Exchequer without any application to the court.
. . . There can be no doubt, but that the Superior
Courts of justice in America are bound by the 7th
Geo. 3d to issue such writs of assistants, as the
Court of Exchequer in Engalnd issues in similar
cases, to the officers of the customs. ^{14 14}

~~The~~ On November 2, 1772, the Committee of Boston on

16/ Journal 452-454.

Rights of the Colonists met at Faneuil Hall in Boston. It drew up a report, including a "List of Infringements and Violations of Rights."^{17/} One of the articles in this list indirectly concerns the writs of assistance. The report stated that "[t]hese [customs] officers by their [are] commissions/invested with powers altogether unconstitutional, and entirely destructive to that security which was have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives:. . . ." It was further stated:

" Thus ^{our} ~~her~~ houses, and even our bed-chambers, are exposed to be ^eransacked, our boxes, trunks and chests broken ^eopen, ravaged and plundered, by wretches, whom no prudent man would venture to employ even as menial servants; whenever they are pleased to say they suspect there are in the house, wares, &c. for which the duties have not been paid. Flagrant instances of the wanton exercise of this power, have frequently happened in this and other seaport towns. By this we are cut off from that domestic security which renders the lives of the most unhappy in some measure agreeable. These officers may under color of law and the cloak of a general warrant, break through the sacred rights of the Domicil, ransack mens ^houses, destroy

17/ Summary 466.

their securities, carry off their property, and with little danger to themselves commit the most horrid murders."

The issue declined rapidly in importance in Massachusetts after the closing of the port of Boston ~~by~~ in 1774 by ^{the Statute B} 13 G. 3, c. 45.

△ Argued need ^{specific} 35 warrant
to seize goods for 34 case - it said
didn't matter how seized under finding
= no change in finding by 1955
law of 35 re warrants = immaterial