

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 of time without naming any particular location. The writ of assistance, which so angered the American colonists, originally issued from the Court of Exchequer to customs officials to seize goods upon which the duty had not been paid.

General warrants were unauthorized at common law.^{1/} This not to say that Parliament could not authorize the issuance of such writs. In fact, the Court of Exchequer frequently issued general warrants^{2/} for uncustomed goods, on the authority of the statute of 1662, 13 & 14 Car. 2, c. 11, §5, and for unlicensed publications, under the statute of 1662, 13 & 14 Car. 2, c. 33, §15. Apparently no judicial complaint was made of these warrants.

Whether there was actually any statutory sanction

for general writs of assistance is open, however, to serious question. Provision for a type of special warrant for uncustomed goods was made in the statute of 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] . . . 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, specifically named the writ, 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, shop, 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 that the writ mentioned in the 1662 act referred to the warrant described in the earlier statute. However, the Court of Exchequer apparently never approved this interpretation for it frequently issued general writs of assistance. This may have been due to the fact that informants had to be named in special writs and they would not be likely to come forward without the protection of anonymity since the great dislike of the populace for the customs laws might vent itself on the person of the informer.

The first recorded writ of assistance in America was issued by the Superior Court of Judicature of the Massachusetts-Bay Colony in 1755.^{4/} In pertinent part 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[ped] 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 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 and two in 1760,^{5/} all with apparently little opposition from the colonists.

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 Superior Court of Judicature in February, 1761. Three grounds were raised against the issuance of the writs.^{7/} First, it was claimed that if the Act of Parliament (1662, 13 & 14 Car. 2, c. 11, §5, supra) 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 Court of Judicature of the Colony 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, and rationally so, because it was the highest court in the Colony and if such writs were to be issued, it was the logical choice. However, 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 postponed any decision. Oral argument was again had in November of that year. It was then conclusively shown that the English Court of Exchequer commonly issued general writs of assistance. The court then immediately granted the two writs.^{9/}

Resistance to the writs continued to mount, however.

Several months later, in March, 1762, the Massachusetts General Court 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 and prohibited any general writs.^{10/} Governor Bernard refused to sign it, however, 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. Dissatisfied with the activity of the customs officials, a mob, in August, 1765, sacked the houses of the chief collector for Boston, his deputy and the Chief Justice of the Superior Court, whom it correctly considered primarily responsible for the 1761 decision authorizing the issuance of the writs. Rescues, i.e., seizing confiscated from customs officers, became commonplace. Instances of open resistance to searches under general warrants occurred.^{11/}

Prior to 1767 apparently none of the other colonies, except New Hampshire, had issued general writs of assistance. The warrant 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 of 7 Geo. 3, c. 46, §10, which stated:

" . . . [S]uch writs of assistants, to authorise and empower 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 [1696, 7 & 8 W. 3, c. 22, §6 and 1662, 13 & 14 Car. 2, c. 11, §5, supra], shall and may be granted by the said Superior, or Supreme Court of Justice having jurisdiction within such colony or plantation respectively."

Subsequently, general writs were issued in New York.^{13/} Connecticut and Virginia seem to have continued to refuse to issue such writs.^{14/} The records of the other colonies do not indicate that any writs of assistance were sought there.^{15/}

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 [1662, 13 & 14 Car. 2, c. 11, supra] 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 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 England issues in similar cases, to the officers of the customs."^{16/}

On November 2, 1772, the Committee of Boston on 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 concerned the writs of assistance. The report stated that "[t]hese [customs] officers by their commissions [are] invested with powers altogether unconstitutional, and entirely destructive to that security which was a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives:" The report continued:

"Thus our houses, and even our bed-chambers, are exposed to be ransacked, our boxes, trunks and chests broke[n] open, 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 men[']s houses, destroy their securities, carry off their property, and with little danger to themselves commit the most horrid murders."

The issue of general writs declined rapidly in importance in Massachusetts after the closing of the port of Boston in 1774 by the statute of 13 G. 3, c. 45.