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ORIGINS OF WRIT OF ASSISTANCE SEARCH IN ENGLAND, AND ITS HISTORICAL BACKGROUND IN CANADA

by

Maurice H. Smith

Canada

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M.H.S.

Broxbourne, England

INTRODUCTION

This paper describes the English origins of the wide and peremptory power to search private premises, identified with the writ of assistance; its introduction into British North America; and its provenance in current Canadian federal law.

Part I tells how writ of assistance search began, in customs enforcement; how, with the conciliar jurisdictions formerly sustaining them no longer available, customs powers to seek out smuggled goods ashore were established by statute in the Restoration period. Single-instance search warrants for undutied goods were authorized by a stop-gap Act in 1660. Writ of assistance search, altogether more novel juridically, arrived in 1662, with section 5(2) of the Act for preventing Frauds, and regulating Abuses in his Majesty's Customs, a compendium of customs enforcement law usually known as the Act of Frauds, 1662.

Section 5(2)'s power of search, conferred upon "Persons authorised by Writ of Assistance", was to father much misunderstanding. The writ it spoke of was not among the various kinds of writs of assistance already in being. It added to them, as an instrument which bade practically everyone in the kingdom facilitate the customs officer's search. Especially in point would be the local peace officer whose attendance - "assistance" in contemporary usage - section 5(2) went on to make another precondition of the search (probably the more substantive condition, indeed). Essentially a mandate for assistance, the writ deployed under the 1662 Act manifestly was not the source of the search power. A contrary notion, that the writ of assistance was like a search warrant, has been encouraged to persist by an accident of language. Section 5(2)'s "Persons, authorised by Writ of Assistance" signified identity vouched for by the writ. Used in this sense, now long obsolete, "authorised" has helped mask the truth that the search power involving a writ of assistance stemmed from the statute direct.

Sanction for this newly begotten writ of assistance was in a common law doctrine, propounded by Coke as "a secret in law", by which writs might be invented for the better implementation of a public Act of Parliament, "according to the force and effect of the act". The Act of

Frauds, 1662, bespoke the writ of assistance in section 5(2); validation for the actual content of the writ was in section 32, wherein was an almost universal obligation to assist in customs law enforcement.

Part II considers further legislative curiosities, all impacting on British North America. Prominent among them, section 5(2)'s definition of what writ of assistance search was targeted upon: "any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed". Only at a very implausible pinch could the "and" be read disjunctively. However else they might offend - duty evasion, even - goods were not legally susceptible of writ of assistance search unless they were a prohibited import or export. A formula thus limited was suitable in 1662: the customs were in farm, and governmental concern was less with revenue protection than with maintaining the infant system of imperial shipping and trade regulation, the matrix of most prohibitions. Yet, when the customs were returned to Crown management in 1671, the now inappropriately constrictive definition was not broadened to include goods simply undutied. Perhaps, with strict construction of section 5(2) more theory in lawyers' chambers than practice at the ports, there seemed no real need. There was a price for this neglect, however, when English-style customs enforcement was planned for the colonies. A blind eye towards workaday sub-legality was one thing; to legislate as if it did not matter, quite another. To adjust the deficient formula openly, though, would be to invite retribution for all those sub-legalities: the total damages liability could be enormous. The 1696 Act of Frauds - in full, the Act for preventing Frauds, and regulating Abuses in the Plantation Trade - coped with the problem by fudging it. Discernible far down in section 6, an uninviting mass of prolixity, were references from which an impression could be formed that, together with miscellaneous other enforcement powers originating in the 1662 Act, writ of assistance search would operate in the colonies. But it was only an impression. Indeed, such was the fractured syntax of what little section 6 actually spelt out on the subject that it was impossible to extract any certain meaning whatever.

The artistry succeeded rather well. Seventy years were to pass before it came unstuck; without falling wholly apart even then. The construction had gained acceptance in America that writ of assistance search was what the 1696 Act intended (witness James Otis' famous polemic against the Massachusetts writ, in 1761). In 1766, however, judicial

puzzlement in Connecticut led to a pronouncement from the English attorney general to very different effect. It centred upon yet another peculiarity in section 5(2) of the Act of Frauds, 1662: the writ of assistance was to be "under the Seal of His Majesty's Court of Exchequer". Nothing else would do, it was insisted; not even the seal of a colonial court with exchequer jurisdiction. And since the process of the Court of Exchequer did not extend to the colonies, writ of assistance search could have no lawful place there.

Incredulous indignation in the Treasury notwithstanding, there was nothing for it but remedial legislation. A convenient vehicle was Charles Townshend's extensive revamping of the colonial customs system in 1767. The onset of the new search provision, section 10 of the Revenue Act, 1767, is described in Part III.

Professedly for the obviation of doubt (a dodge different from that of 1696, but likewise designed to head off lawsuits over searches now appearing to have been unlawful), section 10 went straight to the jurisdictional problem. In future, writs of assistance would be issuable by a colonial superior or supreme court. And opportunity was taken for another, less pressing, adjustment. Incorporating by reference various relevant provisions of the still basic 1662 Act, the section finessed the inadequate "prohibited and uncustomed" formula (denoting the things susceptible of writ of assistance search) into a more commodious "prohibited or uncustomed".

That the power of search contemplated by section 10 was intended as a general one - and the writ of assistance to match - is certain, if only from the combativeness British authority was to show towards a disposition in some colonies to limit the writ, and hence the search power, to a specified occasion. Section 10 was silent on this vexed point. It would have done better actually to spell out that it was providing for a search power general in scope.

Part IV considers further textual defectiveness in section 10, and its implications for later law in Canada. In particular, and most important, section 10's provision for "writs of Assistance, to authorise and impower the Officers of His Majesty's Customs ... to search": which, drawing upon the original formula's "Persons, authorised by Writ of Assistance ...", missed the fact that in 1662 "authorised" also meant "vouched for". British attempts to

neutralize the blunder met with greater success in northern colonies than in those to the south. Even so, the wording of Canadian writs soon came to reflect the meaning suggested by the wording of section 10. Eventually a hybrid writ emerged, which both authorized search and compelled assistance.

In 1825 major legislative change occurred again, in the form of an Act to regulate the Trade of the British Possessions Abroad. This Act replaced all former legislation, and by section 53 provided for search "under Authority of a Writ of Assistance". This subtle change in statutory language - which reappeared in superseding legislation in 1833 - might have had a dual purpose: to permit the continuance of extant writs and to leave room for a doctrinal re-orientation of the writ on its original base.

One of the first efforts of the Canadian Parliament in this field is seen in the Customs Act of 1867. Section 92 provided for writ of assistance search; the provision, however, seems closer to the 1767 model than to that of 1662 in suggesting the source of authority. Modern Canadian statutes - the Customs Act, Excise Act, Narcotic Control Act and Food and Drugs Act - appear to reinforce the notion that authority derives from the writ.

This view was controverted in 1965 by Jackett P. in the In re Writs of Assistance case, where he stated that authority was derived only from the statute, and not through the writ or from the court. This judgment appears to have brought the writ back to its original character as a species of identity card, and to the theory propounded by Coke. However, with the exception of writs issued under the Excise Act, modern Canadian writs - and their statutory bases - lack a requisition for assistance. Its absence may stem from the legislation of 1825, which, in sweeping away all prior enactments on the subject, failed to provide a replacement for the original section 32 of the 1662 Act of Frauds.

In Part V, the theme of Part III is elaborated further. The coherence of the original legislation has been diminished through historical evolution, leading to the existence of various anomalies in the present form of writ. The root of much of this error may be the legislation of 1767, whose unfortunate wording gave rise to much confusion surrounding the nature of writs of assistance.

The lack of material on this subject - specimen writs, cases and texts - may be due to the circumspection with which writs have actually been used, and may have contributed to the separation of writs from their original doctrinal roots. Seen particularly in light of Coke's "secret in law", the modern writ appears to have evolved from its original base - a device to facilitate the implementation of legislation - to an instrument that resembles a source of authority in its own right.

PART I

BEGINNINGS

1. FOCUS

The year 1767 brought extensive changes in the customs regime of British North America. Hitherto the imperial system of shipping, trade and revenue regulation had been a responsibility, as much in the colonies as in England itself, of the English board of customs commissioners in London. Now, at the initiative of Charles Townshend, Chancellor of the Exchequer (though not for long: Townshend was to die before his measures took effect), Westminster legislated for a separate American board of customs commissioners, to be located at Boston, and for a modest set of new import duties for them to manage. There was also this provision in the Revenue Act of 1767:

> [W]rits of Assistants, to authorise and impower 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 ... shall and may be granted by the ... Superior, or Supreme Court of Justice having Jurisdiction within such Colony or Plantation....[1]

It was with this that the history of the writ of assistance - a more usual spelling than "assistants" - began in Canada.

History at large has concentrated more on the writ of assistance in the breakaway colonies to the south. Urged by advice from the law officers of the Crown in England, American customs commissioners sought to badger the various colonial judicatures into issuing writs of assistance that were general in form and thus available to set in motion a search for smuggled goods, as and where the customs officer might think fit. Little success attended these efforts, because of equivocal inaction, or, at least as often, plain refusal by the court to issue these new-fangled instruments of customs law enforcement - for in most colonies the writ of assistance had been quite unknown - otherwise than by reference to a sworn statement specifying

a particular building and a particular occasion. Of course, all this was in the wake of the noisy parliamentary and judicial anathemas in England, having to do with John Wilkes, against general search warrants; and it undoubtedly owed something to the inspiration of those excitements. But there were echoes as well of an earlier controversy in America, which involved the writ of assistance itself, when James Otis had striven (in vain) to rid his province of the general writ that local official and judicial zeal had teased out of older customs statutes; a controversy in which John Adams was to discern the birth of "the child Independence".[2] Both as the target of Otis's attack in 1761 and as the subject of intercolonial defiance in the post-Townshend years, the general writ of assistance has become a standard element in the history of the United States. It imparts to that country's institutionalized aversion to peremptory powers of search, expressed most notably in the Fourth Amendment to the Constitution,[3] a distinctively American flavour.

In Canada the legacy has been different. Here, powers of entry and search with writ of assistance have survived, almost flourished. They are not only in customs law nowadays, but excise and drugs control law as well;[4] nor are they absent from provincial legislation. With upwards of two hundred years' continuous, not to say burgeoning, existence, writ of assistance search seems to have taken firm root in Canada.

Transplanted root, that is. The originating Townshend legislation of 1767 had a history of its own, in England.

2. THE WRIT OF ASSISTANCE: PRELIMINARY INSPECTION

Reproduced in Appendix A is the text of an English writ of assistance issued late in the reign of George II. It showed up in Nova Scotia in the spring of 1768,[5] an opening stage in the American customs commissioners' long campaign to educate or persuade colonial judicatures into satisfactory compliance with the 1767 enactment. (Not improbably, it is the earliest English text of a writ of assistance still extant.)

Soon afterwards, when the Treasury at Westminster had been told of the difficulties the commissioners were experiencing in many of the colonies, they dispatched across the Atlantic an opinion, dated August 20, 1768, by the Attorney

General of England, William De Grey. This also is reproduced in full, in Appendix B, the foremost reason being that it is the most authoritative pronouncement on the juridical and practical provenance of the customs writ of assistance ever to have appeared.[6] Attorney General De Grey had played a decisive role in the inception of the 1767 enactment, as later pages will elaborate; and it was a role uneven in quality. By August 1768, however, his thinking was in better order, and the opinion he delivered at that time will be drawn upon again and again.

It is convenient at this stage to notice a corrective he administered to the notion (which has remained exceedingly resilient, nevertheless) that the customs writ of assistance was of the nature of a search warrant, a document that in itself constituted the customs officer's authority to make his way in and search. Said De Grey, in 1768:

> [T]he Power of the Custom-House Officer is given by Act of Parliament, & not by This Writ, wch. does nothing more than facilitate the Execution of the Power by making the disobedience of the Writ a Contempt of the Court; The Writ only requiring all Subjects to permit the Exercise of it & to aid it.

The fact that the writ of assistance did no more for the customs officer than order help for him can be seen, by anyone up to it, from a reading of the George II writ already mentioned. Stripped of its repellent verbosity, it simply amounts to a directive, in the name of the King, that the generality of naval, military and civic functionaries, and the public at large, turn to and further the work of the customs man.

A tendency of the last few paragraphs has been to speak of the customs writ of assistance. Accordingly, the reader may have been alerted to the discommoding fact that there are, or have been, other writs of assistance besides the customs writ. The centuries have produced a miscellany of instruments, having nothing whatever to do with customs enforcement and bearing no substantive relation even to one another, known as writs of assistance. Some of these pertained to the duties of a sheriff; for example, ordering him to assist a debtor to the King in recovering money that the debtor himself was owed, so that he in turn might pay the King; or to assist in levying executions for which his predecessor in office was accountable.[7] There was also a

document, sometimes called a writ of assistance, by which judges and the law officers of the Crown were required to attend the House of Lords at the opening of a Parliament (here, "assistance" perhaps smacked of an old meaning it had: a collection of persons merely present, who were not expected to render anything in the nature of active participation). Conceivably, uninventive nomenclature bears some responsibility for the error and confusion that occasionally blight commentary on the customs writ of assistance, even today.

3. THE ACT BESPEAKING THE WRIT

Attorney General De Grey's 1768 opinion was explicit in stating that the power of entry and search associated with the customs writ of assistance derived, not from the writ itself, but from "Act of Parliament". The act referred to was the Act for preventing Frauds, and regulating Abuses in his Majesty's Customs of 1662,[8] usually known as the Act of Frauds, section 5(2) of which read thus:

> And it shall be lawful to or for any Person or Persons, authorised by Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable, Headborough or other publick 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, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's Store-house, in the Port next to the Place where such Seizure shall be made.

In fact, it was here that the customs writ of assistance was first brought forth.

A line of questions occurs at once. If the writ of assistance was different from a search warrant, in that it commanded not a customs officer to search but everyone at large to facilitate a search, how did the statute come to speak of the searcher being "authorised" by it? Was not this very much the same as saying that it was to the writ that the searcher looked for his power, his authority? How, in face of the wording of section 5(2), could Attorney

General De Grey have stated that "the Power of the Custom-House Officer is given by Act of Parliament, & not by this Writ"? The answer is not altogether obvious (indeed, and as will become evident later on, its elusiveness has had great importance in the transplantation of writ of assistance search into British North America).

It is to be found in an accident of language. When the Act of Frauds of 1662 spoke of someone "authorised" it was using the word in the sense, soon to become obsolete but in the seventeenth century still current, of his being vouched for. As the De Grey opinion of 1768 was to put it,

> The Writ is a Notification of the Character of the Bearer to the Constable & others to Whom he applies & a Security to the Subject agst. others Who might pretend to such authority.

Until well into the eighteenth century, writs of assistance were issued by the King's Remembrancer, an official of the Court of Exchequer who handled such business, in the form of a large sheet of vellum the more or less Latin text of which was set forth in an elegantly stylized but practically indecipherable variant of Chancery hand, the whole embellished by an ornate portrait of the monarch and, suspended from a stout plaited cord, a massive wax seal. Depiction of so formidable a document as merely a species of identity card seems a little queer, but in principle it was accurate enough.

The main point is established, in any case. Properly understood, section 5(2) of the Act of Frauds of 1662 conferred its power of entry and search directly. Its requirement that the searcher have a writ of assistance no more meant that the power was devolved through the writ than the companion pre-condition meant that it was somehow channelled through the attendant peace officer.

4. DOCTRINAL PROVENANCE OF THE WRIT

There is another, quite different, regard in which the draftsmanship of section 5(2) has proved misleading. And to a chief justice at that. Lord Tenterden C.J., in one of the very few reported English cases touching on the customs writ of assistance, said this:

> A writ of assistance is certainly an ancient writ. It is mentioned in the statute 13 & 14 Car. 2, c. 11, s. 5. It was probably in the same form at that time as at the present, and it seems to be mentioned in that statute as a matter then known and in use, but whether precisely in the same form as at present, has not been ascertained.[9]

With respect, as the saying goes, the learned chief justice was not at his brightest here. True, section 5(2) of the Act of Frauds of 1662 read as though the writ of assistance was already on hand among the antiquities of the law, waiting to be dusted off and brought into service. But would there not have been something unconvincingly providential about a writ so conveniently tailored to the 1662 legislation being already in existence? Furthermore - and black mark again, Tenterden[10] - a writ angled to a power of search for smuggled goods scarcely could have been "ancient", when the only things for which a power of search was available under the common law were things that had been stolen.

A kind of ellipsis in section 5(2) masked the fact that the writ of assistance was no older than the 1662 Act itself. The more so, perhaps, because how such a thing could be so newly begotten was none too obvious. And it may be as much intriguing as immediately illuminating to see the 1768 opinion of Attorney General De Grey pronouncing the writ "founded upon the Common Law" (a circumstance to which the Latin of the first few generations of the writ bore witness). De Grey, too, might have made himself plainer. What he was getting at was a little-known common-law doctrine that Coke's Third Institute expounds as follows:

> And here is a secret in law, that upon any statute made for the common peace, or good of the realm, a writ may be devised for the better execution of the same, according to the force and effect of the act.[11]

It remains to consider, in the round, how this "secret in law" formed the basis for the customs writ of assistance.

In part, of course, it is self-evident. That the writ was "for the better execution" of the entry and search provision in section 5(2) of the Act of Frauds of 1662 is established by section 5(2) having explicitly bespoken it. This is not all, however. The De Grey opinion stated that

"disobedience of the Writ" was "a Contempt of the Court". Disobedience could consist only in an addressee of the writ - one of the infinite multitude - refusing or neglecting to render the customs officer the aid and assistance the writ requisitioned. There was nothing corresponding to this in section 5(2), which did little more than enunciate a power of entry and search and various conditions or whatever hedging it about. For "the force and effect of the act" sustaining the writ's directives for aid and assistance - the writ itself, in fact - it is necessary to look elsewhere in the 1662 Act. It is with section 32 of the Act that the writ falls fully into place:

> And be it further enacted and ordained, That all Officers belonging to the Admiralty, Captains and Commanders of Ships, Forts, Castles and Block-houses, as also all Justices of the Peace, Mayors, Sheriffs, Bailiffs, Constables and Headboroughs, and all the King's Majesty's Officers, Ministers and Subjects whatsoever whom it may concern, shall be aiding and assisting to all and every Person and Persons which are or shall be appointed by his Majesty to manage his Customs, and the Officers of his Majesty's Customs, and their respective Deputies, in the due Execution of all and every Act and Thing in and by this present Act required and enjoined....

Here was the substantive statutory backing that common-law doctrine - Coke's "secret in law" - required for the customs writ of assistance to be brought into being.

Words of Maitland are in point: "the fact that a writ was penned, and that it passed the seal, was not a fact that altered rights ... it had still to run the gauntlet in court, and might ultimately be quashed as unprecedented and unlawful".[12] A writ calling for aid and assistance to the customs officer might bear the seal of the Court of Exchequer in accordance with section 5(2) of the Act of Frauds of 1662, but, without the authenticating text of section 32, it would have been nothing more than a piece of ornamented penmanship from the office of the King's Remembrancer. However impressive to look at, it would not have answered to the common-law doctrine upon which it depended and no court could lawfully have punished disobedience of it.

5. EXCHEQUER ISSUANCE OF THE WRIT

The customs writ of assistance was bespoken by section 5(2) of the Act of 1662 as "under the Seal of his Majesty's Court of Exchequer".

In the ordinary course, writs invented under Coke's "secret in law" would have issued from the Chancery under the great seal. What section 5(2) did was to authorize - indeed, require - a variation from this norm in the case of the writ of assistance it contemplated. The general requisition for assistance laid down by section 32 of the 1662 Act could have sustained a writ under the great seal or any other accredited seal; for the purposes of a section 5(2) entry and search, however, only a writ under the Exchequer seal would suffice.

One reason for this may have been that the customs had a traditional, almost organic, link with the Exchequer and its court. Customs seizures were adjudicated in the Court of Exchequer; customs officers, if prosecuted, were tried there; and so forth. So it may have seemed natural and fitting that this new instrument for facilitating customs enforcement work should belong there as well.

There is an altogether likelier possibility, however. It is that section 5(2) prescribed the Exchequer seal, ousting the great seal (which silence on the subject would have let in, perhaps exclusively), because of the great seal's territorial limitations. Writs under the great seal did not run in Wales or in all those regions of England, jurisdictionally as well as geographically remote from Westminster, known as counties palatine. Writs under the Exchequer seal, on the other hand, were good everywhere in the country. The advantage would not have been overlooked in the preparation of section 5(2).

A note in passing: the seal of the Court of Exchequer had territorial limitations of its own. Indeed, and as will be seen later on, the fact that its authority did not extend to the colonies was to have important implications for writ of assistance search in British North America. But that was not a problem in 1662.

6. RATIONALE OF THE WRIT

Declaimed William Pitt the elder:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.[13]

Rather overblown in manner, perhaps, but the emphasis was fair enough. A strong common-law tradition available for eighteenth-century libertarianism to nourish itself upon was beady-eyed antipathy towards invasions of hearth and home. It probably had to do with the common law's ancient preoccupation with maintenance of the peace: few things were more apt to cause violent disturbance than intrusion upon a man's household and family.

The 1660s for some reason - recent memories of the rough methods of Cromwell's major-generals, perhaps - seem to have been a period of especially abrasive sensitivity to unwanted domestic visitations by agents of government. Evidence of this exists in plenty; but none so telling as a 1661 royal proclamation which went almost so far as to apologize to the nation at large for numbers of the King's soldiers, in search of insurrectionist arms, having made their way into the houses of suspected republicans (not everyone rejoiced at the royal restoration). In future, said the proclamation, any such searches would take place only under a lawful warrant. And there was a further promise: the warrant would be "directed to some Constable, or other known Legal Officer".[14] The principle is not hard to see. If the call to open up came from someone whom the householder would in all probability recognize as the local constable, the chances of his putting up a combative resistance would diminish; he would see that the demand for admittance was in order and not a ruse for a robbery.

That same principle was at work in section 5(2) of the Act of Frauds of 1662, which laid down that the customs man with a writ of assistance should be accompanied by "a Constable ... or other Publick Officer inhabiting near unto the Place". At work at one remove, as it were. Here it could not be assumed with reasonable safety that the customs man would be recognized on sight for what he was; let the

desired reassurance be provided, then, by the familiar face of the local peace officer who came with him. "The spirit of all the revenue laws is, that the accompanying officer must be an officer of the place, that the subject may not be unreasonably terrified at his house being entered ... by mere strangers". So said Blackstone J. (he of the Commentaries), reviewing, long afterwards, enactments such as section 5(2).[15]

It was one thing to legislate, as did the 1662 Act, an obligation upon all manner of constables and so forth to aid and assist the customs man (and even to provide, as in section 32 of the Act, for them to be "defended and saved harmless" in the event of the venture aborting and proving tortious). It was quite another thing to persuade the real-life, but part-time and unsalaried, constable down on the farm or wherever to drop his ordinary work and go along like the customs man said, even if the customs man had somehow procured a print of the actual legislation: the constable might well be illiterate anyway. A writ of assistance, however, was something else. Not that the constable would have been better able to read it, of course. On the contrary: none but an expert could decipher that fancy handwriting, and the truncated Latin (penmen of such instruments habitually made life easier for themselves by omitting case-endings) could scarcely be read at all. In fact, judged by what it actually said, the customs writ of assistance in its early format had little going for it as an article of utility. However, one remembers not only the cabbalistic script and the chopped-off Latin but equally the rich vellum, the royal portrait and the enormous dangling seal. The writ did not put itself across well in words, but it was an effective "Notification of the Character of the Bearer" (Attorney General De Grey's designation)[16] for all that, by virtue of sheer visual impact. An accreditation as charismatic as this marked the bearer as a man to be heeded. It would be a bold constable who refused to take the customs officer's word for what it was all about.

The same applied to the owner of premises to be searched, to whom (again according to Attorney General De Grey) the writ was "a Security" against impostors. And it perhaps is arguable that the writ of assistance signified an obligation upon him to let the customs officer in, under the general requirement, applicable to him no less than to practically everyone in the country, that the customs officer's activities be facilitated. If he was given the impression that the highly ornamented document presented by

the customs officer were some kind of general search warrant, there was a sense in which he had not been altogether bamboozled.

In 1731 an Act was passed[17] which signalled the end of Latin and of Chancery hand in instruments such as the customs writ of assistance. In future they would be in legible English. Yet, as the George II specimen in Appendix A shows, the writ of assistance continued to present the appearance of something more to be daunted by than actually perused and understood. Even a person fully able to read would be unlikely to put himself to the stupefying labour of ascertaining by his own efforts precisely what those countless lines of unpunctuated text were saying to him. Few they would be who, faced with the writ of assistance in its modernized format, were not as ready as before to accept the customs officer's story of what it meant.

7. PREHISTORY OF WRIT OF ASSISTANCE SEARCH

For all its novelty, involving indeed "a secret in law", customs search with writ of assistance as contemplated by the Act of Frauds of 1662 was not without antecedents of a sort.

These had nothing to do with a recent precursor on the statute book, an Act of 1660,[18] scheduled to expire within a matter of months, which authorized the granting of search warrants for the seizure of undutied goods. That temporary measure aside, section 5(2) of the Act of Frauds of 1662 was the first substantive provision for customs search to be made by statute; even the weighty customs enforcement Act of Elizabeth I[19] was silent on the subject. It does not follow, however, that search of premises for smuggled goods had no place in customs enforcement practice before the Restoration period. Indeed, there would be something markedly improbable about the Tudor monarchs, bulging with governmental muscle, or even the earlier Stuarts, themselves not backward in matters of executive action, doing without so valuable a technique of customs enforcement as entry and search of premises.

How entry and search in pursuance of a governmental interest were managed in those times is amply illustrated in surviving documentation, notably the published volumes of Acts of the Privy Council. Particularly apt is an "open warrant" of 1629,[20] a year of obstreperous opposition to

Charles I's exactions of tunnage and poundage. In the warrant the Council began with a stricture upon clandestine landings of cargoes in evasion of customs duty, and upon "many disorderly people frequenting the waterside" and harassing customs officers; in the future, the customs officers would be given the support of henchmen known as King's messengers in "the taking and keeping possession of all such goodes as have not payd all the duties payable". Search was also allowed for:

> [I]t is further ordered that the Messingers upon notice given of any such goodes which have beene ... landed or howsed without payment of all the duties aforesaid shall enter into any Shippe, hoye, barque, boate or any other Vessell, as also into any Shopp, howse, warehouse, seller, soller, or any other place to try and make diligent search in any trunke, cheste, press or any bulke whatsoever, for any goodes as well going out of this Kingdome as coming into the same which hath not paid all the duties aforesaid, and any such goodes so found, to seaze, attach and carry away to his Majesties Storehouse there to be kept....

Distinct intimations here, of the 1662 Act's power of entry into "any House, Shop, Cellar, Warehouse or Room, or other Place" and provision for the breaking open of "Chests, Trunks and other Package".

And then, at the end of the 1629 "open warrant", there was this:

> [T]he Sherriffes of London and all other His Majesties Officers and loveing Subjects being required there unto shall be aydeing and assisting unto the Officers and messingers aforesaid wheresoever there shall be occasion in any part of his Majesties Dominions in this behalfe, as they will answer to the contrary in their perills.

This universal directive to be "aydeing and assisting" was nothing remarkable in itself; a "clause of assistance" along these lines was a fairly common feature of governmental fiats as exemplified by the 1629 warrant. Of greater interest is its affinity of ambience and purport with the mode of customs search to be brought forth some thirty-odd years later, in the Act of Frauds of 1662.

8. A CONSTITUTIONAL MEDITATION

Statutory provision in the Restoration period for powers of entry and search of private premises - and there were various purposes, besides customs enforcement, for which such powers were enacted - was illustrative of an immensely important constitutional change that had taken place.

Powers such as those in the conciliar "open warrant" of 1629 were no more. Not that they had been formally abolished; rather, they no longer had any kind of judicial backing. Public authority is in the last analysis empty if a court does not exist to punish defiance of it; and thus it would have been in the 1660s with instruments - again such as the 1629 warrant - of purely executive derivation. In 1641 the Star Chamber and other courts that had served to enforce the royal or governmental will had been legislated out of existence. For all practical purposes (at least, having to do with public order) the only courts left were courts of common law, in which there was no other recognized external lawgiver than Parliament.

Nor could there be any repudiating the 1641 abolitions when the King came back in 1660. Having been properly passed by an indisputably lawful Parliament, it was no part of the detritus of the Interregnum that naturally and automatically lapsed into oblivion. Had the civil wars gone the other way, well might the 1641 Act have been repealed and the conciliar courts re-established; but, as events actually were, and glad as parliamentarians may have been in 1660 to have a King again, it was not to be expected that the Restoration deal would include surrender of the lawmaking monopoly they had won those nineteen years ago.

And so, after the Restoration, if customs men were to have a power of entry and search for which the common law made no provision of its own but which a common-law court would nevertheless acknowledge, Parliament must be persuaded to legislate it into the statute book.

9. COMMON-LAW INFLUENCES ON THE 1662 LEGISLATION

It became evident earlier that the absence of common-law provision for customs search of premises did not mean that the legislation of the 1660s was enacted in a vacuum. The insistence woven into section 5(2) of the Act of Frauds of 1662 that the customs officer be accompanied by a local

peace officer owed something to an ancient juridical nervousness lest intrusion upon the domestic scene provoke violent reaction and breach of public order. This was not all. In fact, it would be no great exaggeration to say that section 5(2) was shot through with marks of common-law influence. The text again:

> And it shall be lawful to or for any Person or Persons, authorised by Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable, Headborough or other publick 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, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's Store-house, in the Port next to the Place where such Seizure shall be made.

Further indication of common-law infuence is in the three passages underlined.

To take the last of them first. Ever since the middle ages, when strong-arm methods of dispossession tended to be resorted to among the landed classes, the courts of common law, whether in obedience to statute or from their own disposition, had strenuously discountenanced forcible entries on to land. Instances did occur in which the common law sanctioned force in the pursuance of a lawful right to enter, but they were not numerous and the conditions hedging them about allowed little scope for abuse. The draftsman of section 5(2) of the Act of Frauds of 1662 could not have assumed that the courts would be any less restrictive towards a power of entry given by statute but in terms that spoke only of entry; silence on the use of force might well be interpreted as signifying peaceable entry and nothing more. On the other hand, a power of entry to search for smuggled goods could not be expected to serve its purpose to full effect if it always had to depend upon doors being opened freely. It will have been noticed, however, that the express provision for force that section 5(2) was thus constrained to make did not go the whole way. Force was sanctioned only "in case of Resistance". And there was a limitation even then. Once in the building, the customs officer might thwart resistance to his actual search by

breaking open "Doors, Chests, Trunks and other Package" - practically anything that obstructed his way, in fact; but he could have forced his entry into the building itself only through a door, not through a window or other aperture. Section 5(2) was distinctly sparing when it came to set aside or override established inhibitions against entry of private premises by force.

Less so, it might appear, in its blanket and unqualified affirmation that writ of assistance search should be for "any Person or Persons" to undertake. This cut right across the grain of contemporary legal thinking. The search warrants promised by the royal proclamation of 1661 (quoted on page 15) were to be issued not to just anybody but to "some Constable, or other known Legal Officer". More tellingly still, the principle was espoused by that great common-law luminary of the time - of all time, come to that - Sir Matthew Hale. In his History of the Pleas of the Crown, Hale discoursed in some detail upon the common-law provisions for power of entry on to private premises, in particular upon the common-law search warrant for stolen goods. Of the latter he wrote:

> They ought to be directed to constables and other public officers, whereof the law takes notice, and not to private persons....[21]

With views such as this prevalent in the highest counsels of the kingdom, a statute that provided for powers of entry and search without stating by whom they might be exercised would be at the same sort of risk as if it remained silent on the use of force: the risk of the courts construing it more narrowly than its begetters intended and confining those powers to persons who could be regarded in law as "public officers". The point is, the men who obviously ought to be empowered to conduct searches for smuggled goods - the ordinary custom-house staff - might well not be rated "public officers". Doubt was the deeper because in 1661 the customs had been put "in farm", an arrangement whereby the King made over future duty receipts to private contractors in return for advances of ready cash; working for the farmers, customs men could hardly rank as other than private persons themselves. To have section 5(2) state that customs searchers might be "any Person or Persons" ensured against their being faulted for want of status as public officers.

On first impression, section 5(2)'s neutralizing of common-law predisposition was more thoroughgoing here than

in the cautiously circumscribed provision for the use of force. In reality, however, writ of assistance search was not thrown open to every Tom, Dick and Harry. Another section of the Act of Frauds must be taken into account. Section 15 had the effect of restricting the right to seize forfeitable goods (which at common law extended to anyone willing to undertake the responsibility of getting the seizure condemned in court) to persons with a definite occupational interest in customs law enforcement; this meant, of course, that the section 5(2) power of entry and search, the object of which was to enable a seizure to be made, in practice was likewise limited to customs men proper.[22]

The remaining section 5(2) passage marked for attention required that writ of assistance search take place only "in the Day-time". In this, the statute was not so much anticipating a likely common-law position and adjusting away from it as making firm a position that legal opinion favoured but stopped short of asserting as doctrine. Here is Hale's History of the Pleas of the Crown again, on the common-law search warrant for stolen goods:

> It is fit that such warrants to search do express, that search be made in the day-time, and tho I will not say they are unlawful without such restriction, yet they are very inconvenient without it, for many times under pretense of searches made in the night robberies and burglaries have been committed, and at best it causes great disturbance.[23]

And so, with its operative effect limited to the hours of daylight, section 5(2) of the Act of Frauds of 1662 once more exhibited the old concern to avert disorder caused by violation of hearth and home.

10. THE BEGETTER?

It is unlikely to have been accidental that considerations that the foremost lawyer of the time brought to bear upon search for stolen goods influenced the drafting of Restoration legislation on search for smuggled goods. Nor was this a matter of the draftsman of section 5(2) of the Act of Frauds of 1662 taking his cue from Sir Matthew Hale in History of the Pleas of the Crown, for that work did not get into print until 1736. Rather, the proposition is that

Hale himself was involved in the drafting. The writ of assistance as bespoken by section 5(2) was to be "under the Seal of his Majesty's Court of Exchequer"; it is simply not possible that this prescription would have been woven into the law without the privity of the chief baron of the Exchequer (for one thing, it would be by the authority of his name - the teste - that the Exchequer seal were affixed to the writ), and in 1662 the chief baron was Hale.

The mind that conceived the customs search provisions in the Act of 1662, with their echoes of the way such things had been done under the old executive-oriented constitutional regime that could not survive the downfall of the Star Chamber and its companion conciliar jurisdictions, plainly was a mind in tune with history; and a mind sufficiently confident in its recondite learning both to have unearthed and actually to have utilized Coke's "secret in law". The writings of Hale abound in historical research; "a first-rate legal historian", a leading twentieth-century English legal historian called him.[24] And it does not have to be a matter of assumption merely, that Hale was aware of the doctrine upon which the customs writ of assistance depended for its introduction. In the British Library is a copy of Fitzherbert's La Novel Natura Brevium, which that distinguished repository identifies as having belonged to Sir Matthew Hale. It is interleaved with folios of manuscript commentary. Opposite a page showing a writ related to the Statute of Northampton, 1328, and in a hand recognizable from the Hale papers in Lincoln's Inn, is a citation of the Cokeian "secret in law" together with the comment, "ceo brev. ft. frame gr... selong le effect d'Act". Not only did Hale know of the doctrine by which the common law sanctioned the invention of writs for the better implementation of public statutes; he assured himself that it was not just something got up by Coke (who had been known to resort to originality).

Among Hale's many writings is a treatise on the customs.[25] It is a pity that this omits all reference to writ of assistance search, and hence affords nothing by way of positive and direct evidence as to how that most singular institution of customs law came to be thought of. The conjecture that he himself had much to do with it is all but irresistible, however.

PART II

LEGISLATIVE LEGERDEMAIN

1. SCOPE OF THE 1662 PROVISION

Very relevant to an understanding of the legislative history of customs search of premises, not least in British North America, are the words in which section 5(2) of the Act of Frauds of 1662 defined the target-matter of writ of assistance search: "any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed".

This is a turn of phrase with a slight jerk in it; as though the draftsman realized only in the nick of time that his clause's power of entry and search could not apply to literally "any Kind of Goods ... whatsoever", and added the limitation "prohibited and uncustomed" as a hasty afterthought. However, what is significant is not this trifling infelicity but the limiting words themselves. On a strict construction - indeed, on the plain meaning of "prohibited and uncustomed" - the only things that could be legitimate quarry for a section 5(2) search (with writ of assistance and a local peace officer) were things that answered not just to one or the other category of wrongdoing but to both. This had a weighty implication.

It goes without saying that if goods liable to customs duty bypassed the appropriate customs control procedures, they were uncustomed. But they could not be classed as prohibited unless they happened also to be subject to a restriction, which obtained quite independently of their status vis-à-vis the revenue regime, upon their movement into or (as the case might be) from the kingdom. This coincidence of "uncustomed" and "prohibited" designations was not especially likely. Restrictions affecting overseas traffic certainly existed, by reference either to the particular class of item or (notably in connection with the imperial system of shipping and trade regulation) to circumstances of transportation; but the cargoes upon which they actually bit were few in comparison with those attracting a duty charge, which were a near-totality.

The "prohibited and uncustomed" formula with which section 5(2) backtracked on itself left the scope of writ of assistance search pretty narrow.

2. CONDITIONING

The dual requirement in section 5(2) of the 1662 Act that to be susceptible of writ of assistance search, goods must be both prohibited and uncustomed, was to cause difficulty in subsequent lawmaking (as when, in 1696, an English-style customs enforcement Apparat was legislated for North America). As will become very evident later on, the task of future draftsmen would have been much lighter, and the products of their labours probably more satisfactory, if the originating formula for writ of assistance search had been "prohibited or uncustomed" instead of "prohibited and uncustomed". And there could be no supposing that "prohibited and uncustomed" had been intended disjunctively; for, if that had been the case, why should the 1662 Act elsewhere - most noticeably in relation to customs search on board ship - have actually expressed itself in the disjunctive form, "prohibited or uncustomed"?

Besides, section 5(2) was in general a well thought out, even sophisticated (witness its resourceful exploitation of Coke's "secret in law"), piece of work. More tellingly still, it passed the scrutiny of no less a luminary than Sir Matthew Hale; and perhaps was actually conceived by him. So crass an error as "prohibited and uncustomed" when "prohibited or uncustomed" was meant would have been altogether out of keeping.

So it is unlikely to have been through mere inadvertence that writ of assistance search had no proper application to simple revenue law enforcement. The historical circumstances suggest an explanation. In 1662, it will be recalled, the customs were in farm. Therefore, from the standpoint of maximized revenue yield, anti-smuggling measures inured to the benefit of the farmers. That a purely private interest should be served by a power of entry and search - and a power, at that, as unmonitored as the section 5(2) power (no prior establishment of probable cause) - seems pretty unthinkable, given contemporary sensitivities[26] and traditional predispositions. The "prohibited and uncustomed" formula was a bar against this, since it was always for purposes of a public kind that goods were placed under import or export prohibition. In theory a bar, anyway. Practice may well have been something else.

3. FOG SIGNAL

Passing reference was made, on page 17, to an enactment for customs search that preceded the 1662 writ of assistance provision by some two years. This was the Act to prevent Frauds and Concealments of his Majesty's Customs of 1660; and it now merits a little attention.

The 1660 Act reached the statute book soon after the discovery that recent legislation granting the King a customs revenue had omitted to complement seizure and forfeiture of goods in default with a power to enter premises in search of them. Henceforth search warrants would be obtainable, on oath as to the occasion for them. Only for a few months, however. Written into the customs search warrant Act was a term set on its life: at the end of the first session of the next Parliament it would automatically expire.

More than a hundred years later, when responding to American intransigence over writs of assistance under the Revenue Act of 1767, two successive attorneys general of England were to stigmatize the 1660 Act and its search warrants as unsatisfactory.[27] Neither said why; but it is not hard to imagine practical difficulties resulting from warrants being issuable only by the lord treasurer, a baron of the exchequer, "or Chief Magistrate of the Port or Place ... or the Place next adjoining thereto". (The number one on a county bench, remote from London, might reside a day's ride away - even if he could be identified with certainty.) Any notion, however, that writ of assistance search superseded the 1660 Act's warrants would be a mistaken one. As if to underline the fact that since the expiry of the Act in 1662 there had been no legal foundation for customs search for goods that were simply undutied (and not prohibited as well), the search warrant Act of 1660 was revived in 1685.[28] That this happened also fits in with the proposition demonstrated earlier, that the writ of assistance mode of customs search introduced by section 5(2) of the Act of Frauds of 1662 had no application to undutied goods as such because, with the customs then in farm, revenue law enforcement was for the most part a private concern having insufficient clout to justify invasion of property in its furtherance. In 1685, customs were no longer in farm. Since 1671 they had been restored to Crown management under a board of customs commissioners. It had therefore long ceased to be a matter of letting someone else do the worrying about revenue smuggling. Measures to combat revenue smuggling, including powers to enter and search premises, were again matters of direct public interest.

Yet when the occasion presented itself in 1685 for legislation to widen the scope of customs search, why should action have been limited to reviving - of all things - the clumsy and discredited search warrant Act of 1660? Why was a decent job not made of it? Such as, for instance, amending section 5(2) of the Act of Frauds of 1662 so that the constrictive "prohibited and uncustomed" formula was replaced by "prohibited or uncustomed" (which would probably have sufficed to catch goods that had dodged the revenue procedures)? The best guess lies with the exigencies of real life, which, notoriously, do not always go by the book.

Whatever the limitations upon customs search in strict law, it is not necessarily to be supposed that practice at the ports was overmuch inhibited by them. Evidence exists that even at the topmost levels of government, realization that the 1660 Act had set a short term on its life was tardy;[29] and it seems reasonable to surmise that not all customs officers and local magistrates, having become used to 1660-style search warrants, understood that such things ought to have been discontinued as long ago as 1662. Similarly, somewhat, with the 1662 writ of assistance mode of customs search. A strict appraisal of the "prohibited and uncustomed" formula might cause uneasiness in a lawyer's chambers or in the higher echelons of the customs administration; but rarefied interpretation of statute was not the forte of the workaday customs officer in the outfield, who was more likely to assume that entry and search with his impressive writ of assistance was good for seizures of all sorts and to give not a thought to limiting himself to goods that answered to a prohibited category.

The 1685 decision to reintroduce the unsatisfactory search warrant Act of 1660 rather than loosen "prohibited and uncustomed" in the 1662 Act makes sense against this background; a background of widespread customs search actually and notoriously going on, but often - usually, perhaps - with non-existent or highly dubious legal justification. The authorities would have been conscious that explicitly and manifestly new legislation on customs search might provoke embarrassing questions (and possibly litigation) on the lawfulness of all the searches with warrants and many of the searches with writ of assistance that customs officers had been engaging in for years. Better, then, an unobtrusive regularization of 1660-type warrants (the 1685 re-enactment was wrapped up in run-of-the-mill legislation granting customs duties to James II), and a blind eye towards writ of assistance activity that ranged more widely than it ought to.

The position created in 1685 remained substantially unchanged for many years. The provisions in the customs search warrant Act of 1660 were re-enacted again and again; and it was well into the reign of George I before opportunity was taken to gloss the narrow and long outdated "prohibited and uncustomed" in the writs of assistance enactment of 1662 into an ampler "prohibited or uncustomed".[30] In the meantime, the mess that was the law on customs search in those early years had infected plans for North America.

4. THE ACT OF 1696

In 1696 an Act of Parliament was passed with the object of constructing in the North American colonies a regime of customs enforcement as similar as might be to that which already existed in England under the Act of Frauds of 1662. This Act for preventing Frauds, and regulating Abuses in the Plantation Trade[31] came to be known as the Act of Frauds of 1696.

Section 6 of the 1696 Act was something of a compendium, with powers of entry and search among its subjects. Earlier sections having mentioned the various acts under which import and export merchandise might be prohibited or dutiable, section 6 set forth that ships lading or unlading in a colonial port, and their masters, should be amenable to "the same Rules, Visitations, Searches, Penalties and Forfeitures" as applied in England under the Act of Frauds of 1662; and it went on to provide that customs officers in the colonies

> shall have the same Powers and Authorities, for visiting and searching of Ships, and taking their Entries, and for seizing and securing or bringing on Shore any of the Goods prohibited to be imported or exported into or out of any of the said Plantations, or for which any Duties are payable, or ought to have been paid, by any of the before mentioned Acts, as are provided for the Officers of the Customs in England by the said ... Act made in the fourteenth Year of the Reign of King Charles the Second, and also to enter Houses or Warehouses, to search for and seize any such Goods....

The italicized words clearly denoted an intention that customs officers in North America should have a power of entry and search on land. But that was as far as clarity went. The impression conveyed is that search on land as well as on board ship should be the same in the colonies as in England under the Act of 1662, but it is an impression that soon gives way to doubt. For one thing, the syntax is faulty. It is in fact impossible to know for certain exactly how the words "and also to enter Houses or Warehouses, to search for and seize any such Goods" should be read in relation to the rest of the text. If a replica of the 1662 power of entry was intended, why the limitation to "Houses or Warehouses" when the 1662 power extended to "any House, Shop, Cellar, Warehouse or Room, or other Place"? Above all, why was the purpose not spelt out plainly?

These delphic perplexities (which were to have important practical significance for the future of customs search - particularly the writ of assistance - in North America) are not attributable to carelessness. Much more probably, a straight extension of the 1662 power to the colonies was deliberately fudged. It has to be recognized that the draftsman of the 1696 Act had a problem. One is not thinking of peripheral difficulties that could have been dealt with by small textual adjustments; thus, the 1662 Act's requirement that the writ of assistance should be under the seal of the Court of Exchequer, an institution whose processes did not run in the colonies, was a detail easily capable of being written out of the 1696 legislation. The problem was considerably more serious and intractable than this. At the centre of it was the factor that had confounded the establishment of a clear-cut law of customs search in England - the fateful "prohibited and uncustomed" formula in section 5(2) of the Act of Frauds of 1662.

The problem confronting the 1696 draftsman can conveniently be presented in terms of contrast. With search of ships there was no difficulty. The 1662 Act, in section 4, had provided a power of shipboard search for goods "prohibited or uncustomed"; and it was therefore simple for the 1696 legislation to give "the same Powers and Authorities, for visiting and searching of Ships" in relation to "any of the Goods prohibited to be imported or exported into or out of any of the said Plantations ... as are provided for the Officers of the Customs in England [by the Act of 1662]". But a similarly simple extension of the 1662 provision for search on land was impossible. Here it

was not goods "prohibited or uncustomed" but goods "prohibited and uncustomed". This double-barreled formula, it will be recalled, suited the circumstances obtaining in England in 1662, but times soon changed and it became embarrassingly insufficient; so much so that the intrinsically unsatisfactory customs search warrant Act of 1660 had to be resurrected to supplement it. Obviously, if the 1696 Act had extended section 5(2) of the 1662 Act to the colonies, "prohibited and uncustomed" would have produced a like (if lesser) deficiency there. Yet it would not have been practical politics, either, to have made the 1696 legislation say that the power of search to be introduced into the colonies should be the same as that of 1662, but with "prohibited or uncustomed" instead of "prohibited and uncustomed". The position in England had to be borne in mind. There, the law of 1662, "prohibited and uncustomed" and all, would remain as before. Even with the revived customs search warrant Act of 1660 - indeed, all the more because of it - the law on customs search of premises in the metropolitan country was in a condition where the less said and seen of it the better. It would have been imprudent for the 1696 provision to spotlight the defectiveness of its 1662 stable-mate.

That the 1696 Act's strangely unintelligible draftsmanship was no accident gains credence in another way. The words from section 6, quoted three paragraphs above, were only a fragment of the whole. In its entirety section 6 was a series of regulatory and other provisions, all strung together in a single sentence of more than five hundred words. The piece about search occurred about one-third of the way through this teeming verbiage, where its impossible construction was much less apparent than when extracted and examined in isolation. Well might the calculation have been that of the resilient few whom that daunting density of letterpress did not deter on sight, fewer still would persevere to the end and remain in fit mental condition to cavil at a point of syntax two-thirds of the way back. Not least would this go for members of Parliament by whom clause 6 had to be passed, and whose scrutiny the draftsman might hope was not at its sharpest; for if his finagling did not get through on the nod it might not get through at all.

5. DÉNOUEMENT

The conundrums of statutory construction thus dispatched three thousand miles across the sea were not quick to surface. Nothing much seems to have happened for some fifty-odd years, when, for reasons peculiar to that prov-

ince, customs search of premises became an active issue in Massachusetts Bay. After a brief period of varying practice, strongly suggestive of uncertainty as to what the law on the subject (section 6 of the Act of Frauds of 1696) really meant, the judicial authorities there apparently settled for a construction of section 6 that simply borrowed section 5(2) of the Act of Frauds of 1662, writ of assistance and all. Certainly it is only upon this construction that the celebrated protest of James Otis in 1761 (that issuance of the writ should be so regulated that the power of entry and search conferred by section 5(2) was not general, but limited to particular cases specifically sworn to) can be understood;[32] likewise the decision of the Superior Court of Massachusetts to continue with the writ more or less as before. Later, culminating, events were not to vindicate it, however.

It was "the arbitrary Claims of Great Britain" that fired the Massachusetts controversy and hence the onset of the American revolution, according to John Adams. But it is closer to historical truth to affirm that the authorities in Great Britain did not so much as know of the famous writs of assistance case until it was over, and knew precious little of it even then. The first occasion for London to consider the legal standing of writ of assistance search in North America arose less from Massachusetts than from the neighbouring colony of Connecticut. In the spring of 1766 the custom house at New London was having trouble with the local merchant community and smuggling. Part of the problem had to do with customs officers' powers of entry and search on private premises, and it was included in a case that the customs commissioners in England, to whom the New London difficulties had been reported, addressed to the attorney general. The commissioners recounted how the Superior Court of Connecticut had reacted to the question of issuing a writ of assistance:

> [S]ome doubts having lately arisen at New London the Collector applyed for advice to the Kings Attorney there who returned him the following answer, Vizt. "I carried your Papers to Newhaven, and mentioned the Affair to the Judges relative to the Writ of Assistants, they considered it as a matter of Importance, but were at a great Loss with Regard to the Affair - As the Act of Parliament has made express Provision that it shall issue under the Seal of the Court of Exchequer, and we have no Statute here relative to it, the Judges therefore made no determination about it."[33]

Practical puzzlements posed by the law on customs search in North America were at last being experienced in England, where responsibility for the law belonged.

It will be recalled that under section 6 of the Act of Frauds of 1696, customs officers in the colonies were to have

> the same Powers and Authorities, for visiting and searching of Ships ... as are provided for the Officers of the Customs in England by the ... Act made in the fourteenth Year of the Reign of King Charles the Second [the Act of Frauds of 1662], and also to enter Houses or Warehouses, to search....

Strengthening the impression that customs search was to be the same on both sides of the Atlantic - particularly in point of the writ of assistance - the Act prescribed a little farther down that "the like Assistance" should be accorded to customs officers in the colonies as the 1662 Act required for their colleagues in England. It could be no more than an impression, however. That the English law on shipboard search extended to the colonies was stated plainly enough; but the words "and also to enter Houses or Warehouses" might on a second glance have seemed deliberately disconnected from the English prototype and to give customs officers in the colonies an unqualified power to enter and search "Houses or Warehouses" (though no place else) as it were ex officio. Yet on still another rereading they could not quite bear this meaning; for did they not relate back, as the reference to shipboard search had done, to "the same Powers and Authorities ... as are provided for the Officers of the Customs in England" under the Act of 1662?

Although it was not until 1766 that these obscurities in the Act of Frauds of 1696 produced an actual problem for the authorities in Great Britain, awareness of them was not new. They had long impinged upon the recital of a customs officer's powers in his document of appointment. Witness this explanation in the customs commissioners' case to the attorney general:

> In the Deputations granted to the Officers of the Customs in England there is the following Clause, Vizt. "He hath Power to enter into any Ship, Bottom, Boat or other Vessel & also in the

> day Time with a Writ of Assistants under the Seal of his Majestys Court of Exchequer & taking with him a Constable, Headborough or other public Officer next inhabiting to enter into any House, Shop, Cellar, Warehouse or other Places whatsoever there to make diligent Search &c" but there never having been any Writ of Assistants granted by the Court of Exchequer in England for the use of the Officers in the Plantations, the Deputations granted for such Officers have been as follows Vizt. "he hath Power to enter into any Ship, Bottom, Boat or other Vessel; as also to enter into any Shop, House, Warehouse, Hostery or other Place whatsoever to make diligent search &ca."

In other words, a writ of assistance under the seal of the Court of Exchequer was available to customs officers in England, whose deputations[34] accordingly specified possession of a writ of assistance and the attendance of a local peace officer as pre-conditions of entry and search; but, no such requirement was included in the documents of appointment of customs officers in the colonies because the Court of Exchequer had not (as, indeed, it could not have) granted writs of assistance for use there.

Conscious that the writ of assistance and the attendant peace officer were mandatory in England under the Act of Frauds of 1662, the customs commissioners went on to suggest a justification for doing without the writ and the peace officer in North America. The justification was that the Act of Frauds of 1696 was different:

> And It has been understood that such Writ of Assistants was not required by the 7 & 8 Wm. 3d. the Power given by that Law - vizt. "And also to enter Houses or Warehouses to search for and seize any such Goods" not expressly mentioning a Writ of Assistants, or even in this Particular referring to the Act of the 14th Car. 2d, as it does in every other Instance in the Clause where either any Powers are given to Officers, or Restrictions prescribed in this Power to enter Houses &c. therefore seems to have been inserted after the Reference to the 14th. Car. 2d. with design to make the Writ of Assistants unnecessary, as no particular Court had any Power to grant One.

This was not completely satisfactory. Aside from the fact that the 1696 Act did not read so straightforwardly, the colonial deputations the commissioners themselves had quoted went further than the Act in terms of the locations to which the power of entry and search purportedly applied. The deputations spoke of "any Shop, House, Warehouse, Hostery or other Place whatsoever";[35] the Act spoke only of "Houses or Warehouses". Preparation of the case cannot have been an easy task for the commissioners.

Again, the next paragraph of their case:

> However in the subsequent Part of the same Clause of 7th. & 8th. Wm. 3d, It is enacted that the like Assistance shall be given to the said Officers in the Execution of their Office as by the last mentioned Act 14 Car. 2d Ch 11 is provided for the Officers in England upon which Words the Collector of Boston in New England a few Years since obtained a Writ of Assistants from the Chief Justice for that Colony & frequently entered Houses without any Objection....

The reference here was to the granting of writs of assistance by the Superior Court of Massachusetts, which the celebrated hearing in 1761 had established as settled practice in that province. But it represented another half-somersault by the commissioners. Immediately after having questioned the need for customs search in the colonies to be under writ of assistance, and even whether the requisite writ could lawfully obtain there, they were now affirming that writ of assistance search in fact took place in North America and suggesting a legal basis for it.[36]

From this the customs commissioners proceeded to tell of the contrasting unhelpfulness of the Superior Court of Connecticut, and to crystallize the problem. Attorney General William De Grey was asked:

> Does the Act 7th & 8th. Wm. 3d. empower the Officers of the Customs in the Plantations to enter Houses & Warehouses to search for & seize any prohibited or run Goods without a Writ of Assistants & if you are of Opinion it does not, can such Writ of Assistants issue under Seal of the Court of Exchequer in England, or from any and what Court in the Plantations.

De Grey replied on October 17, 1766. He could not have been more negative:

> I think the Words of the Act will not admit of the Construction put upon them in this Case, for the Words "and also to enter" & ca. must be connected with the preceding Words "the same Powers and Authorities" so as to run in this manner, Vizt. "the Officers of the Revenue shall have the same Powers and Authorities as they have in England for visiting Ships & c. and also to enter Houses & ca." which words give only a relative and not an absolute Power; and the Court of Exchequer in England do not send their Process into the Plantations, nor is there any Process in the Plantations that corresponds, with the description in the Act of K.W.[37]

The chain of reasoning was none too tidily articulated, but it comes through. The power of entry and search that the Act of Frauds of 1696 contemplated for "Houses or Warehouses" in the colonies partook of the corresponding power that existed in England under the Act of Frauds of 1662; but the 1662 power was conditional upon a writ of assistance under the seal of the Court of Exchequer, and writs under that seal did not run in the colonies.

Attorney General De Grey's opinion signified that the power contemplated by the 1696 Act for customs officers "to enter Houses or Warehouses" depended upon a condition incapable of fulfilment. It perhaps might be questioned whether De Grey was correct in thus draining a statutory text of all operative meaning. What of the old common-law dictum in Heydon's Case,[38] that Acts of Parliament should be construed so as to "suppress the mischief and advance the remedy ... according to the true intent of the makers of the Act pro bono publico"? But there it was: a conclusion reached by the Crown's chief legal adviser, to the effect that the foxy draftsmanship of 1696, occasioned as it had been by an unsatisfactory turn of phrase in the exemplar Act of 1662 ("prohibited and uncustomed") and exigent circumstances which inhibited the fashioning of something better, had at last tripped itself up. The sequel, another legislative endeavour, was to prove even more unfortunate.

PART III

TRANSPLANT

1. THE TOWNSHEND ENACTMENT IN PROSPECT[39]

Section 10 of the Revenue Act of 1767, one element in a legislative package by which Charles Townshend as chancellor of the Exchequer purposed to remodel the customs system in North America, was the start of writ of assistance search in Canada. The origin of section 10 lay with the opinion of Attorney General De Grey in October 1766 to the effect that what the Act of Frauds of 1696 had prescribed for customs search of premises was inoperative (because it involved a writ of assistance under the seal of the Court of Exchequer in England, a jurisdiction which did not extend to the colonies). It was not a matter of instant action, however.

Transmitting the De Grey opinion to their Treasury overlords on October 31, 1766, the English customs commissioners offered the unsurprising recommendation that it was "expedient to have the interposition of Parliament for granting the proper power to the Officers of the Revenue in America". But there was to be something else besides. The Treasury had not yet replied to the customs commissioners when they heard from them again. A few weeks previously, in Boston, a suspected smuggler named Daniel Malcom had successfully defied a customs party, in full fig with a writ of assistance from the Superior Court of Massachusetts and a local peace officer in tow, attempting to enter and search a cellar in his house. Reporting this episode to the Treasury on November 22, 1766 the customs commissioners drew special attention to the writ of assistance, only to discount it in the manner of Attorney General De Grey; so there really was nothing for it - they said in so many words - but to act on their recommendation of October 31, 1766, and legislate.

The nudge was unproductive. The customs commissioners' report of November 22, 1766 was overtaken by the arrival at the Treasury of a batch of papers on the Malcom episode which the Governor of Massachusetts had sent to the Board of Trade, and which told of noisy scenes among bystanders in the street outside the Malcom dwelling.

Perhaps stimulated by Board of Trade agitation over yet another manifestation of mob disorder in turbulent Boston (and perhaps doubting whether De Grey's sweeping disavowal of all customs search was good law), the Treasury set aside the customs commissioners' low-key suggestion for legislative amendment and took the bit between their teeth. It was not enough just to accept the De Grey opinion and look towards better things in the future; something ought to be done to punish strong-arm resistance of Crown authority by the likes of Daniel Malcom and his roughneck well-wishers. The Crown's legal advisers must be asked to think again. On January 14, 1767, causing all the Malcom papers to be sent to the law officers, the Treasury came on strongly against "the violent Resistance made by ... [Malcom] ... and others to the Execution of a legal Writ commanding Aid and Assistance to be given to the Officers of his Majesty's Customs", and squarely demanded "what proceedings may be fit to be carried on against the sd. Daniel Malcom for his Offences".[40]

De Grey and his colleague, the Solicitor General, were unmoved. On February 6, 1767, word had been received from them that

> no Civil Action or Criminal Prosecution can be brought against any of the Parties complained of, for obstructing the Officers of the Customs in the Execution of their office, inasmuch as the Writ of Assistance by virtue of which they entered the House and Cellar was not in this case a legal Authority.[41]

The Treasury did not give up, even now. Back they went to the law officers on February 14, 1767, with an argument that the fatal jurisdictional objection to a colonial writ of assistance need not apply in the Malcom case because the Superior Court of Massachusetts issued writs of assistance in its capacity as a Court of Exchequer, allowed to it under a province law.

This second attempt to persuade the law officers fared no better than the first. Perhaps the argument seemed to smack a little of the error that the customs writ of assistance pertained inherently to Exchequer jurisdiction (whereas, in fact, when section 5(2) of the Act of Frauds of 1662 spoke of a "writ of assistance under the Seal of his Majesty's Court of Exchequer" it did so more in the sense of conferring a jurisdiction).[42] Perhaps the law officers, as

practical men of affairs, foresaw more embarrassment than advantage from a trial in which a Boston jury were all too likely to vindicate Malcom in triumph. One last speculation (for there is no record of the law officers having replied at all) - perhaps the exchange was brought to an end by a silent snub. One of the mere working departments of state, even the mighty Treasury, ought not to be encouraged in bandying points of law with attorneys and solicitors general.

So it was only after all this that the British government decided to do what the customs commissioners had recommended at the outset: legislate.

2. THE TOWNSHEND ENACTMENT

To reproduce section 10 of the Revenue Act of 1767 in its entirety is not to recommend that it actually be read:

> And whereas by an Act of Parliament made in the thirteenth and fourteenth Year of the Reign of King Charles the Second, intituled, An Act for preventing Frauds, and regulating Abuses, in his Majesty's Customs, and several other Acts now in Force, it is lawful for any Officer of his Majesty's Customs authorised by Writ of Assistants under the Seal of his Majesty's Court of Exchequer, to take a Constable, Headborough, or other Publick 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 there, to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever prohibited or uncustomed, and to put and secure the same in his Majesty's Storehouse next to the Place where the Seizure shall be made: And whereas by an Act made in the seventh and eighth Years of the Reign of King William the Third, intituled, An Act for preventing Frauds, and Regulating Abuses, in the Plantation Trade, it is, amongst other Things, enacted, that the Officers for collecting and managing his Majesty's Revenue, and inspecting the Plantation Trade, in America, shall have the same Powers and Authorities to enter Houses or Warehouses, to search for and seize Goods probihited to be

> imported or exported into or out of any of the said Plantations, or for which any Duties are payable, or ought to have been paid; and that the like Assistance shall be given to the said Officers in the Execution of their Office, as, by the said recited Act of the fourteenth Year of King Charles the Second, is provided for the Officers in England: But, no Authority being expressly given by the said Act, made in the seventh and eighth Year of the Reign of King William the Third, to any particular Court to grant such Writs of Assistants for the Officers of the Customs in the said Plantations, it is doubted whether such Officers can legally enter Houses and other Places on Land, to search for and seize Goods, in the Manner directed by the said recited Acts: To obviate which Doubts for the future, and in order to carry the Intention of the said recited Acts into effectual Execution, be it enacted, and it is hereby enacted by the Authority aforesaid, That from and after the said twentieth Day of November, one thousand seven hundred and sixty-seven, such Writs of Assistants, to authorise and impower 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 Jurisdiction within such Colony or Plantation respectively.

From this, the full text of the originating statute for writ of assistance search in Canada, it is possible to pick out several points of interest. And, remembering how anaesthetizing verbiage enabled the meaningless piece about customs search of "Houses or Warehouses" in the Act of Frauds of 1696 to get by on one sort of nod or another (and for some seventy-odd years),[43] one is not astonished by elements of politico-legal artifice in this similarly enervating text of 1767.

3. A TRICK OF THE TRADE

The professed objective of section 10 is an illustration in itself. Section 10, having trundled its readers through wearying recitals of earlier legislation, at length

led into the proposition that because the Act of Frauds of 1696 did not expressly provide for issuance of writs of assistance in the colonies, it was "doubted" whether customs search on land could legally be carried out there. And so, "To obviate which Doubts for the future", the section proceeded to enunciate an issuance jurisdiction henceforth to be reposed in the topmost court of each colony. One notices, in passing, that this was not precisely the perspective that Attorney General De Grey had brought to bear upon the earlier legislation (with the consequence that section 10 became necessary). A more significant discrepancy exists: the unambiguous falsity of the pretence that section 10 was merely for the removal of doubt - not so much making new law as facilitating implementation of law that already existed. Seldom can legislation have masked reality more suffocatingly. What contemporary observer, unaware of the facts behind the low-key, almost throwaway, blandness of section 10's text, could have guessed how the law officers of the Crown, far from teetering in uncertainty over the 1696 enactment, had repeatedly affirmed that it lacked all operative force?

Explanation of the section 10 fib is not far to seek. Prominent among the draftsman's problems was the fact that the phraseology of section 10 must not allow it to suggest, still less say outright, that up to now customs search on land in the colonies had been unlawful. The law officers might feel free to affirm it in private exchanges with the customs commissioners and the Treasury; but when it came to repairing the deficiency, and composing a statutory text on a power of customs search for the future, care had to be taken that those notoriously litigious colonials were not given ideas. In Massachusetts particularly, searches with writ of assistance had been known for years and cordially resented; if the wording of the new legislation were to carry the implication that every one of them had been defective legally (because the writ did not answer), the customs officers responsible might well face ruinous liability in damages. Thus it most probably was that section 10's recital of the existing law, while initially faithful enough to the originating opinion given in 1766 by Attorney General De Grey - spelling out the 1662 enactment for writ of assistance search and bracketing the difficult 1696 text on to it - eased itself towards an altogether less negative position than De Grey had arrived at. In contrast to the law officers' absolute and insistent repudiation of colonial writs of assistance, section 10 did not close the door on all possibility of such writs being valid; what

intradepartmental files showed to be a firm denial was presented to the public as no more than a doubt. To all appearances, the new law signified not a headlong rush to panic stations but merely the adjustment of some antiquated law that perhaps had fallen in need of a little toning up.

By way of footnote: section 10's "removal of doubt" contrivance worked, for there appears to have been no move anywhere to mulct customs men in damages for past searches that, according to the English law officers, were illegal.

4. MORE FINESSE

Another point for incidental remark is that section 10 of the Revenue Act of 1767, in its long and in parts particularized preamble about previous legislation, referred to the original provision for writ of assistance search, in the Act of Frauds of 1662, as aimed at goods "prohibited or uncustomed". Historically, this had not been the case at all. Indeed, that the actual 1662 text was not "prohibited or uncustomed" but "prohibited and uncustomed", and thus too narrow for goods smuggled in contravention of revenue law only, has been identified in these pages as significantly influencing subsequent legislation on customs search, both for England itself (the revival of the 1660 search warrant Act) and for the colonies (the impossibly obscure text in the Act of Frauds of 1696). By 1767, however, there had been a change. As was also touched upon earlier, there had come a time when, for practical purposes, the constrictive "prohibited and uncustomed" was expanded into "prohibited or uncustomed".

Among the various adjustments to customs enforcement law brought in by the Act for preventing Frauds and Abuses in the Publick Revenues of 1719[44] was one that recognized circumstances in which "prohibited or customable" goods found in course of a writ of assistance search under the Act of 1662 might be held, pending proof of their being fiscally clean. In its introductory reference to writ of assistance search for "prohibited or uncustomed" goods, section 10 of the Revenue Act of 1767 spoke not only of the Act of Frauds of 1662 but also of "several other Acts now in Force". Within that batch was the Act of 1719, which in its application could be construed as extending the 1662 Act's writ of assistance search to goods "uncustomed" in the sense denoting revenue evasion, regardless of whether they were "prohibited" as well; and hence as glossing "prohibited and uncustomed" into "prohibited or uncustomed".

This neat item of legislative sleight-of-hand was especially opportune by reason of the new import duties that were a central component of the restyled customs regime of 1767. Until the middle 1760s, almost no transatlantic importations into British North America attracted an imperial customs duty there; any revenue incidence would have occurred in Great Britain, where, under the acts of trade, practically all such traffic should have been shipped or on-shipped; uncustomed importations signified contravention not strictly of revenue law but of an act of trade prohibition. Most transatlantic smuggling into the colonies had been of goods thus prohibited; and so, in great part, it doubtless would remain after 1767. To that extent it did not much matter that the Revenue Act contrived to displace "prohibited and uncustomed" by "prohibited or uncustomed" in its provision for writ of assistance search. Yet, inasmuch as the goods to which the new import duties applied were chargeable even when they had come from or via Great Britain (in which case, obviously, there would be no act of trade prohibition), there may have seemed an imperative logic in wording the provision so as to ensure that no undutied goods whatever were outside its scope.

5. ERROR OF OMISSION

Astute though it was on peripheral matters, the draftsmanship of section 10 of the Revenue Act of 1767 did less well substantively.

Again and again the newly instituted American board of customs commissioners at Boston suffered rebuff in their attempts to persuade colonial courts that the writ of assistance bespoken by section 10 should be general in purport and usable whenever and wherever the customs officer might think fit. A countervailing tendency, at any rate in colonies that later rebelled, was for the court to limit the writ to a single sworn and specified case.[45]

This intransigence (which persisted in face not only of the customs commissioners' endeavours, but also of admonitory opinions from successive English attorneys general) doubtless drew inspiration from the recent judicial and parliamentary denunciations of general warrants back in England, related to the activities of John Wilkes. Conceivably, word perhaps had reached the colonies of the use of the writ of assistance in England being limited in practice to cases attested by solid information;[46] confused,

however, into an erroneous notion that it was the actual issuance of the writ in the Court of Exchequer, and not simply occasion for its use, that was disciplined in this way. Just possibly again, the American courts were harking back to an argument occurring nearer to home. In the celebrated writs of assistance case before the Superior Court of Massachusetts in February 1761, James Otis had contended for the writ to be sworn to and specific; building an analogy from the common-law search warrant for stolen goods having at first been general, but later trimmed down by judicial decision to sworn specificity: the statutory foundation of writ of assistance search, which was not explicit that the entry and search power should be general, ought to be construed according to the same principle, such construction being given effect by suitably regulated issuance of the writ.[47]

Whatever reasoning motivated the American courts, one thing is certain. Their unwillingness to issue writs of assistance otherwise than on specifically sworn information was not contradicted by section 10. The section required them to issue writs of assistance, and left them free - for all it said to the contrary - to superimpose upon the issuance process any regulatory usage they thought proper. Judged by what was actually to happen - indeed, on the showing of the argument with which James Otis had very nearly succeeded against the general writ in 1761 - section 10 would have done better to express its intention that the power of search it contemplated was a general one.

That the intention was for a general power cannot be doubted. This might be protested as unfair, when the practice in England had long been to limit writ of assistance search to cases where the customs had firm information. (A practice backed by statute, too: an object of the Act of 1719, referred to on page 42, was to strengthen the position of customs officers seizing goods in a writ of assistance search, if they acted "upon the Information of one or more credible Person or Persons".[48]) But there it was. Section 10 of the Revenue Act of 1767 was about the issuance of writs of assistance, not regimes governing their use. It presented itself as part and parcel of the originating enactment on writ of assistance search, section 5(2) of the Act of Frauds of 1662; and, whatever else might have happened to the operation of section 5(2) in law or practice, the prescribed mode of issuance of the writ remained as it always had been. It is in point to recall what this was. Section 5(2) required the writ to be "under

the Seal of his Majesty's Court of Exchequer". The location of the Court of Exchequer - in actuality, of the office of the King's Remembrancer - was London and nowhere else. England is not a large country, but it is not so small, either, that in the seventeenth century London would have been within convenient reach of every port on the coastline where search for smuggled goods might need to be made. From a northern port, it might be several days' ride; twice as many there and back. Outside London itself, successful searches would have been very few and far between if a separate writ of assistance had to be obtained for each one: the offending goods could not be relied upon to stay put till the customs officer had completed a round trip to the capital. (This aside from the fact that, so elaborate was the seventeenth-century writ - a portrait of the King, highly stylized Latin script, and so forth - that physical production of the thing could take days, if not weeks.) If only in common sense and practical necessity, the power of entry and search given by the Act of 1662 could not but be general. And inasmuch as the 1662 enactment was one of those whose "Intention" section 10 of the 1767 Act purported "to carry ... into effectual Execution", to narrow the scope of writ of assistance search by manipulating the issuance of the writ was misconceived. This parenthetical paragraph cannot close without surprised remark that the acute intelligence of James Otis seems not to have lighted upon so obvious and conclusive an objection to his argument that a one-time-only writ of assistance was compatible with the originating statute.

One explanation for the draftsman of section 10 of the Revenue Act of 1767 neglecting to anticipate and avert the American courts stultifying it with one-time-only writs of assistance - he almost certainly knew nothing of Otis' thrust in that direction (unsuccessful, in any case) years before - may be that something so patently wrong-headed did not occur to him as needing to be guarded against. A less speculative reason comes to mind, however. It is suggested by Attorney General De Grey's opinion of October 1766, which signaled this legislative exercise in the first place and presumably constituted the draftsman's principal working document. So far as appeared in the opinion, the only difficulty about writ of assistance search in the colonies was a jurisdictional one: the original 1662 English enactment on writ of assistance search had been extended to British North America by the Act of Frauds of 1696, but the writ bespoken by the 1662 Act had to be under the seal of the English Court of Exchequer (whose process did not run in

the colonies). The draftsman accordingly limited his substantive handiwork - all that presentational finesse was something different, of course - to a single and unelaborated provision that put writs of assistance for customs search within the competence of colonial courts.

6. A CORNERSTONE

Inasmuch as the writs of assistance henceforth to be issued in the colonies kept to the English prototype as conceived by the Act of Frauds of 1662, they would be, in essence, simply a directive to a wide generality of naval, military, civic and private persons to facilitate the customs officer's search. For such a directive to have legal force, the writ itself needed to correspond to the common-law doctrine that authenticated it: Coke's "secret in law", whereby "upon any statute made for the common peace, or good of the realm, a writ may be devised for the better execution of the same, according to the force and effect of the act". The writ of assistance necessary for entry and search under section 5(2) of the 1662 Act was grounded on an obligation to assist imposed by section 32 which, with its even wider application, supplied doctrinal support for the writ in ample measure. The Revenue Act of 1767 made no such separate provision. Consistently enough with its claim to be simply sprucing up law already in existence, section 10 included in its recitals the fact that the Act of Frauds of 1696 entitled customs officers in the colonies to "the like Assistance" as their English colleagues enjoyed under the Act of 1662; and it would be this by which the new North American writs of assistance were sustained.

Nicely honed historicity, perhaps. Yet there was a respect in which section 10 of the Revenue Act of 1767 came badly unstuck from its antecedents, and to which may be traced much that has happened since.

PART IV

MUTATION

1. HARK-BACK TO 1767

The board of customs commissioners appointed to Boston in 1767 quickly encountered difficulty with the writs of assistance that the Revenue Act of that year wished upon British North America. Colonial judicatures might be willing to issue a writ good for the single specified occasion, but - for the most part - not in the general, open-ended format the commissioners considered proper and necessary. Report having been received at Westminster in the summer of 1768, the Attorney General of England, William De Grey, wrote the admonitory opinion reproduced in Appendix B (and repeatedly drawn upon here for definitive information on the writ of assistance and its juridical provenance). De Grey recommended that the colonial courts be given a specimen of the writ of assistance used in England and an account of its issuance there, in the belief that they would then see "that the Power of the Custom House Officer is given by Act of Parliament, & not by This Writ".

Inasmuch as it was the Act of Frauds of 1662 that De Grey was referring to, this was clearly true. The words of that Act could bear no other construction: "And it shall be lawful to or for any Person or Persons, authorised by Writ of Assistance ... to enter, and go into any House". It being understood of course - as Attorney General De Grey went on to indicate (though again only obliquely) - that "authorised" was meant in the old-fashioned sense, denoting "a Notification of the Character of the Bearer".

All this, however, was to take for granted that anyone who read section 10 of the Revenue Act of 1767 would perfectly well see that its effect was to extend the 1662 provision to the colonies. In actuality, section 10 lent itself to a quite different construction (which, if the truth were knowable, De Grey may have been aware of and hoping to scotch). It was noted when section 10 was under discussion in Part III of this Paper that the draftsman would have done better to forestall writs of assistance limited to the one specified occasion by expressly requiring them to be general. A further fault is now to be nailed,

and less hindsightedly. The American inclination to regard the writ as a species of search warrant, and hence susceptible of the constraints associated with that instrument, in particular those proceeding from the common-law objection to generality, can only have been encouraged by section 10 seeming to project the writ as constitutive of the searching officer's power. In the words of section 10, it would be "Writs of Assistants, to authorise and impower the Officers of his Majesty's Customs to enter and go into any House" that the colonial courts were to issue.

What had happened is obvious. In the hundred and more years that had passed, the old meaning of "authorised" as it occurred in the Act of Frauds of 1662 - an attestation of identity - had become obsolete, and had been lost sight of. The 1767 draftsman took it and applied it in a way suggestive of its familiar modern signification; not any the less, either, by coupling "impower" on to it.

Something else is quite plain. Better primed with sound law though Attorney General De Grey may have become in time for that invaluably informative 1768 opinion touching the writ of assistance and its juridical orientation, in 1767 learning on that undeniably esoteric subject was still in need of filling out.

2. THE WRIT AS IT BEGAN IN CANADA

The American customs commissioners had the 1768 De Grey opinion printed (together with the case to which it responded) and circulated to their staff at the ports;[49] and also to each of the various colonial attorneys general, with a request that he "move the superior Court of your Province, that Writs of Assistants may be issued". Included in the distribution was a printed standard form of writ of assistance, with blanks left for local particularities, which the commissioners' solicitor had drafted in the light of the materials from England.[50]

In most of the colonies that were to become the United States inaction or stalemate continued, the De Grey opinion notwithstanding.[51] To the north, however, the commissioners did better. Reporting to the Treasury at Westminster on October 20, 1772,[52] they stated that their officers at Quebec[53] and Halifax had been "furnished with a Writ of Assistants agreable to the Form transmitted". Apparently the Island of St. John had not yet come into

line, though other evidence suggests that it was shortly to do so.[54] If there was total default, it probably was only in Newfoundland, and that not from contumaciousness so much as genuine procedural difficulty.[55]

The form of writ of assistance that was prepared for the American customs commissioners in 1768-69 is reproduced in Appendix C. As with the English prototype (of which Appendix A could be an example), its stupefying prolixity amounts in substance to nothing more than a directive that its miscellany of addressees - "all ... our Officers, Ministers, and Subjects", to round them up - turn to and facilitate the customs man in his search.[56]

So closely was this writ modelled on the English writ that for all the mention it made of its real begetter, section 10 of the Revenue Act of 1767 (or, for that matter, of the Act of Frauds of 1696, whose flawed attempt to give customs officers in North America an English-style power of search on land had occasioned the 1767 provision), the only legislation in point might have been the 1662 enactment on which the English writ was based. Not a hint did it betray of that unfortunate wording of section 10, so easily capable of meaning that a writ of assistance "to authorise and impower the Officers of his Majesty's Customs to enter and go into any House" constituted in itself the source, or at least the channel, of the officer's lawful competence.

Inasmuch as it may have been part of the intention of the De Grey opinion in 1768 to play down the error in the 1767 statute, the solicitor to the American customs commissioners drafted his writ not at all badly.[57]

3. THE SLIP SHOWING

Nevertheless, section 10 was there, and it did not go away. The American board of customs commissioners was dissolved in 1784, but the writs of assistance legislation that had coincided with the establishment of that ill-starred body continued intact, still warped by the slip in draftsmanship which caused it to imply that the sanction for the customs officer's search was the writ of assistance itself.

Although, despite this, the American commissioners as advised by Attorney General De Grey had drafted and procured writs on the orthodox English pattern - in essence, a

requisition upon the addressees that the customs officer's search be facilitated - the time was to come when the text of section 10 of the Revenue Act of 1767 would be taken at face value. Here is a writ of assistance as issued by the Supreme Court of New Brunswick in Hilary term 1823:

> George the fourth by the Grace of God of the United Kingdom of Great Britain and Ireland, King, defender of the faith, & c. To Henry Wright Eqr Collector of our Customs for the Port of Saint John in our Province of New Brunswick, Robert Parker Eqr Comptroller of our Customs for the same Port, James C. Kelly Eqr Surveyor and Searcher of our Customs for the same Port, Henry George Clopper Preventive Officer of our Customs for the Port of Fredericton and the vicinity thereof, and all other officers of our Customs for the same Ports - Greeting
>
> We do hereby authorize and empower you, and each and every one of you, by virtue of this Writ, to take a constable 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 any other place within our said Port of Fredericton or the vicinity thereof; and in Case of Resistance, to break open the doors thereof, and all Chests, trunks, and other packages therein, and there to Seize and from thence to bring any kind of Goods and Merchandize whatsoever prohibited and uncustomed, and to put and secure the same in our Storehouse in our said Port of Fredericton. And We do hereby authorize, and strictly enjoin and require, all Justices of the Peace, Mayors, Sheriffs and Bailiffs, and all our Officers Ministers and Subjects whatsoever, to be aiding and assisting to you and each and every of you, in the due execution hereof.
>
> Witness John Sanders Esquire, Chief Justice, at Fredericton the twenty second day of February in the fourth Year of our Reign A D 1823
>
> By order of the Court and Chief Justice's Fiat indorsed
>
> [signature]

This is among the records of the English board of customs commissioners,[58] to whom the responsibilities of the American commissioners had reverted. It does not appear to have evoked adverse comment in London; the presumption might be, indeed, that the originating draft came from there, for adoption in all the North American provinces.

In enjoining an anonymous generality of public officers and private persons to be aiding and assisting, and in its recital of scope and circumstances of use - practically in the very terms of section 5(2) of the Act of Frauds of 1662 - the text of this New Brunswick writ of assistance showed the influence of the English model. But it was not only, or even primarily, to the putative "assistants" that the writ was addressed; nor was the directive to give assistance its foremost purport. The persons to whom the writ bade greeting, and spoke first, were the various named and other officers of the customs; and what it communicated to these was the power to take a local peace officer "and in the day time to enter and go into any house" - for all the world as if section 5(2) of the 1662 Act of Frauds had not deployed that same formula to confer the power directly. It was a curious hybrid that came forth from the Supreme Court of New Brunswick in 1823, not least for its problematic correspondence to the writ of assistance's doctrinal matrix: the "secret in law" enunciated by Coke, which required a writ invented for the better implementation of a public statute to accord with "the force and effect of the act".

The fault was not with the drafting of the writ, of course. Even if the 1768 opinion of Attorney General De Grey was still remembered fifty-odd years later on (assuming the English customs commissioners so much as knew of it), the writ of assistance in British North America could not have continued indefinitely imitating the English prototype and ignoring the words of the statute by which it existed: on a plain reading, section 10 of the Revenue Act of 1767 meant that the customs officer's power of search derived from his writ of assistance, and it is not surprising that in course of time the wording of the writ came to reflect this. The writ of assistance that, falsely to its proper doctrinal provenance, began to take on the character of a search warrant was the product not of error in its own preparation but of defective legislative draftsmanship carrying over from 1767. Probably enough, something on the lines of the New Brunswick writ was the best that could be made of the English commissioners' legislative inheritance in North America.

4. THE SLIP COMPOUNDED

Here is another surviving text from the early middle history of the writ of assistance in Canada (from the province of Canada, in fact):

> Victoria by the Grace of GOD, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Collector, and to every other Officer of our Customs in and for the Town of Hamilton at Burlington Bay in the District of Gore and to all and singular the Constables and other Peace Officers in and for the said District of Gore and to all others whom it may concern - GREETING:
>
> We do, by this our Writ, give to you our Collector, and to every other our Officer of our Customs in and for the Town of Hamilton in Burlington Bay full power and authority; And we do strictly command you, taking with you a Peace Officer of our said District, to enter any Building or other place, in the day time, and to search for and seize and secure any Goods liable to forfeiture under a certain Act of Parliament of our United Kingdom of Great Britain and Ireland, passed in the third and fourth years of the Reign of His late Majesty King William the Fourth, late King of the United Kingdom of Great Britain and Ireland, entitled, "An Act to regulate the Trade of the British Possessions Abroad"; and in case of necessity, to break open any Doors, and any Chests, or other Packages, for that Purpose. And we do further command all Constables and other Peace Officers of the said District, that they may be aiding and assisting you in the premises as it behoveth.
>
> WITNESS, the Honourable JOHN BEVERLY ROBINSON, Chief Justice, at Toronto, the Seventh day of August in the Seventh year of our Reign.
>
> By Rule of Court
> Dated 9 August 1843
> [Signature of Solicitor General] [Signature][59]

In this Canadian specimen of 1843, the trend towards constituting the writ itself as the source of the power to enter and search is even more pronounced than in the New Brunswick specimen of twenty years earlier.

However, it was not the fateful legislation of 1767 that made for this further wrench away from true doctrine and authentic antecedent. Westminster's customs statutes for the United Kingdom and for the colonies had become an unintelligible accumulation of graftings and amendments, and the mid-1820s brought extensive reformulation. Out went section 10 of the Revenue Act of 1767, and in came section 53 of the Act to regulate the Trade of the British Possessions Abroad of 1825:[60]

> And be it further enacted, That under Authority of a Writ of Assistance granted by the Superior or Supreme Court of Justice, or Court of Vice-Admiralty having Jurisdiction in the Place (who are hereby authorized and required to grant such Writ of Assistance, upon Application made to them for that purpose by the principal Officers of His Majesty's Customs), it shall be lawful for any Officer of the Customs, taking with him a Peace Officer, to enter any Building or other Place in the Daytime, and to search for and seize and secure any Goods liable to Forfeiture under this Act; and in case of Necessity, to break open any Doors and any Chests or other Packages for that Purpose; and such Writ of Assistance, when issued, shall be deemed to be in force during the whole of the Reign in which the same shall have been granted, and for Twelve Months from the Conclusion of such Reign.

A few peripheral points should be made in passing. In the colonies, the common-law principle that a customs seizure became perfected into a forfeiture only by judicial process[61] had long been set askew by statutes that permitted the process to be an admiralty one.[62] Thanks to the Act of 1825 another common-law original, the customs writ of assistance, also might partake of that exotic provenance. The Act of Frauds of 1662, with which writ of assistance search began, had sanctioned the use of force only "in Case of Resistance"; the 1825 Act softened this to the less determinate "case of Necessity". The principle that made practical sense of the writ of assistance - that the customs officer be accompanied by a peace officer - was preserved in the 1825 Act. The 1662 Act had specified that the peace officer be a local man, but the 1825 Act did not. At common law, the customs writ of assistance, like a good many other instruments that spoke in the name of the King, could not survive him unless statute had so provided; hence the tailpiece in the 1825 enactment giving it an extra twelve months (though something of the sort had existed, in the colonies as well as in England, since 1702.)[63]

Of more central interest are the words in which the Act of 1825 declared it lawful for a customs officer (accompanied by a peace officer) to enter and search buildings and so forth, "under Authority of a Writ of Assistance". Or, to be strictly in point, the corresponding words in an exactly similar provision, section 61 of the Act to regulate the Trade of the British Possessions Abroad[64] which in 1833 superseded the Act of 1825. This was the Act referred to in the 1843 Canadian writ of assistance that asserted itself so positively as the foundation of the customs officers' power of entry and search - more positively than had the New Brunswick specimen of twenty years previously, when section 10 of the Revenue Act of 1767 was still the related legislation. It was as if section 10 had been succeeded by something worded at least as unsatisfactorily as its own blueprint for error, "Writs of Assistants, to authorise and impower the Officers of his Majesty's Customs to enter and go into any House".

5. LEGISLATIVE FOG YET AGAIN

The draftsman of the 1825 provision was far better placed than his predecessor of 1767 had been. The 1767 man confronted a complex presentational problem: to produce a text ostensibly for the removal of doubt but which in reality adapted a cumulatively unsatisfactory combination of old enactments to a law officer's opinion that had emptied them of effective application in the colonies. Those ancient and inadequate relics - including the whole of the Act of Frauds of 1662 and as much as matters of the Act of Frauds of 1696 - were now being swept away, along with the 1767 penmanship that had parlayed them so dextrously.[65] For what little bygone legislation survived to impede him, the 1825 draftsman started on a clean slate.

The intention of section 5(2) of the Act of Frauds of 1662 that the customs officer's power of entry and search stemmed directly from the statute (neither channeled nor relayed through the writ of assistance) had been expressed thus: "And it shall be lawful to or for any Person ... to enter, and go into any House". It became clouded, however, by a misreading of one of the conditions attaching to the power; namely, that the person be "authorized by Writ of Assistance". People forgot that in the mid-seventeenth century, "authorized" still had the secondary meaning: attestation of a particular identity or status. They also assumed, wrongly, that section 5(2) contemplated writs of assistance that actually conferred the power somehow. The

confusion went so far as to infect the wording of the 1767 legislation for customs search in British North America, which in explicit terms prescribed "writs of Assistants, to authorize and impower the Officers of his Majesty's Customs to enter and go into any House". The 1825 Act did not repeat this blunder. Rather to the contrary. Section 53 dropped all mention of writs of assistance to "impower" customs officers to enter and search. The wording it did adopt, "That, under the Authority of a Writ of Assistance ... it shall be lawful for any Officer of the Customs to enter any Building" smacked more of 1662 than of 1767.

Still, it was not entirely in agreement with the 1662 formula. This is the more noticeable in that the companion enactment for the United Kingdom (where the repeal of the Act of Frauds of 1662 made a replacement provision for writ of assistance search as necessary as in the colonies) stuck to the old formula practically word for word: "And it shall and may be lawful for any Officer of Customs ... authorized by Writ of Assistance ... to enter any House".[66] Why did the Act for the colonies not take the opportunity and likewise return to the authentic "authorised by Writ of Assistance" rather than produce the wholly new formula, "under the Authority of a Writ of Assistance"? Perhaps because the draftsman, imagining or hoping that the new formula meant the same as the old, saw advantage in a slightly different wording that arguably left room for a different writ of assistance; in particular, for a writ of assistance of the hybrid kind, such as had been issued in New Brunswick: a writ addressed both to customs officers, bidding them search, and to peace officers, bidding them assist.

On the evidence of the New Brunswick specimen reproduced on page 50, which was dated 1823, these hybrid writs were in use at the time of the 1825 legislation, probably in all the North American provinces. For the wording of the new enactment to be such that all of them must at once be called in and replaced - as the logic of a text on the old 1662 lines surely would insist - by writs on the English model, which limited themselves to a single miscellany of addressees and to a single purport (peace officers and the rest, to "assist"), would be highly inconvenient. And possibly embarrassing, if the innovation were thought to repudiate former practice. After all, there had been a time, not so very long ago either, when people in British North America who disliked having their houses searched took a quite narrow view on writs of assistance.

Since the colonial hybrid writ of assistance apparently had the blessing of the customs commissioners in London, it perhaps is understandable that the new legislation in 1825 exhibited a somewhat similar duality, by dint of which it could be read both as conferring a power of search directly to the customs officer, and yet making it appear as if he got it from his writ of assistance. Because of a calculated ambiguity, customs officers could continue with their searches "under the Authority of a writ of Assistance" of the familiar hybrid kind; while the commissioners, also in the shelter of that opaque formula (in the composition of which they certainly would have had a say), perhaps awaited occasion to edge towards introduction into the colonies of writs of assistance of the more orthodox kind, as used in England.

6. THE LEGACY OF 1825

If that was the thinking behind the 1825 legislation it did not work. The hazards of a quick switch to writs of assistance that ordered no more than assistance and left the power of search squarely grounded in the statute were averted. But, far from making way for a transition to writs of the English type, the status quo hardened still more. The writ issued in the province of Canada in 1843 illustrates this: plainly linked to the 1833 successor of the 1825 Act, which in point of writ of assistance search was re-enacted verbatim, this writ was even more like a search warrant and less a mandate for assistance than the specimen from New Brunswick twenty years before.

In parenthesis, irony. Writ of assistance provision strictly provincial in scope is outside the limits of this study; but here is an exception. In 1807 the New Brunswick legislature passed An Act to prevent illicit and clandestine Trade, and for imposing a Duty upon Articles illegally imported or brought into this Province, to be levied and paid after the condemnation thereof, section 3 of which said this:

> [I]t shall and may be lawful for the said Treasurer or his Deputies respectively at all times to enter or board any ship or vessel arriving in this Province and to examine and search throughout the same for prohibited Articles and then to seize and from thence to carry away all such prohibited articles; and

> being authorised by Writ of assistance under the Seal of His Majesty's Supreme Court, or of the Inferior Court of Common Pleas of the County in which the prohibited articles shall be found, which Writ the proper Officers of the said Courts are hereby authorised and required to issue upon the allowance or fiat of one of the Justices of the said Courts, to be filed together with the affidavit upon which the same is grounded, to take the High Sheriff, in person or his Deputy, or any Coroner of the County, and in the day time to enter and go into any House, Store, Warehouse or Outhouse, and in case of resistance to break open doors, and open and examine Casks, Chests, or other Packages, and there to seize and from thence to carry away any prohibited articles whatsoever which shall have been landed from any Ship, Vessel or Boat, or otherwise imported contrary to the provisions and the true intent and meaning of any Act of Parliament in that behalf made.[67]

Immediately noticeable is the essential similarity between this New Brunswick enactment of 1807 and the English archetype of writ of assistance search, section 5(2) of the Act of Frauds of 1662. Notwithstanding that section 10 of the Revenue Act of 1767 was still the operative imperial statute on writ of assistance search in British North America, New Brunswick preferred to reach back beyond that unsatisfactorily worded provision to the old original. Inasmuch as "authorised by Writ of Assistance" meant "accredited by writ of assistance" in the 1662 Act, it could carry the same meaning in the New Brunswick Act too; so that in the latter case as well as in the former, the actual power of search stemmed from the statute itself.

The irony is, of course, that in terms of fidelity to origins, later legislation on writ of assistance search for British North America would have done better to follow the example that had been set there in 1807.

7. THE CANADIAN MATRIX

However, when in 1867 the Canadian Parliament passed the first Customs Act,[68] this was how it provided for writ of assistance search (in section 92):

> Under authority of a Writ of Assistance granted either before or after the coming into force of this Act, (and all such Writs theretofore granted shall remain in full force for the purposes of this Act,) by any Judge of the Court of Queen's Bench or of the Common Pleas in the Province of Ontario, of the Superior Court or of the Court of Vice Admiralty in the Province of Quebec, or of the Supreme Court in Nova Scotia, or of the Court of Queen's Bench in New Brunswick, having jurisdiction in the place (who shall grant such Writ of assistance upon application made to him for that purpose by the Collector or principal officer of the Customs at the port or place, or by Her Majesty's Attorney General for Canada,) - any officer of the Customs, or any person employed for that purpose with the concurrence of the Governor in Council, expressed either by special order or appointment or by general regulation, taking with him a peace officer, may enter at any time in the day or night into any building or other place within the jurisdiction of the Court granting such Writ, and may search for and seize and secure any goods liable to forfeiture under this Act, and in case of necessity, may break open any doors and any chests or other packages for that purpose; - And such Writ of Assistance, when issued, shall be in force during the whole of the Reign in which the same shall have been granted, and for twelve months from the conclusion of such Reign.

The pattern having been long since set for writs of assistance to express themselves as if actually constituting the officer's authority to enter and search, it is hard to think there was any other sense in which this 1867 enactment was intended to be construed.[69]

To all appearances, the new Canadian regime of writ of assistance search had opted for a mode (which the legislation of the later colonial period had served only to promote) that, in this essential respect, was much more in the erroneous tradition of section 10 of the Revenue Act of 1767 than consonant with the authentic prescription founded by section 5(2) of the Act of Frauds of 1662.

8. A TWITCH OF ATAVISM?

The same is true in modern times. Take section 139 of the current Customs Act:

> Under the authority of a writ of assistance, any officer or any person employed for that purpose with the concurrence of the Governor in Council expressed either by special order or appointment or by general regulation, may enter, at any time in the day or night, into any building or other place within the jurisdiction of the court from which such writ issues, and may search for and seize and secure any goods that he has reasonable grounds to believe are liable to forfeiture under this Act, and, in case of necessity, may break open any doors and any chests or other packages for that purpose.

Issuance and duration of the writ of assistance are provided for in section 145:

> A judge of the Exchequer Court of Canada may grant a writ of assistance to an officer upon the application of the Attorney General of Canada, and such writ shall remain in force for as long as the person named therein remains an officer, whether in the same capacity or not.

(The Exchequer Court of Canada is now the Federal Court of Canada.)

However, sections 139 and 145 of the Customs Act - and corresponding provisions in the Excise Act, Narcotic Control Act and Food and Drugs Act - have undergone a remarkable exegesis, which bids fair to rule out the writ of assistance as itself constituting (in the manner of a search warrant) the authority for the search, or even as a conduit for it. In what probably ranks as the leading Canadian case on writs of assistance, In re Writs of Assistance, in 1965, Jackett P. said this:

> [W]hen a person holding a Writ of Assistance is exercising the powers conferred upon him thereby, he is exercising powers conferred upon him by statute pursuant to designation by the Attorney General of Canada or the Minister of National Health and Welfare, as the case may be,

> and is not executing an order or judgment of the Exchequer Court of Canada, or a judge thereof. Parliament, in its wisdom, has ordained that the authority conferred upon such officer shall be evidenced in the form of a writ issuing out of the Exchequer Court of Canada and the Court must bow to such statutory direction.[70]

Given this construction, the provisions for writ of assistance search in the Customs Act - and their counterparts in the Excise Act, Narcotic Control Act and Food and Drugs Act - present an unexpected face. The officer gets his power of search, not from or through the writ after all, and particularly not from the court or judge whom the legislature allowed no choice about granting the writ, but straight from the statute - almost like old times back in England, under the 1662 Act.

9. THE NUB OF THE MODERN CANADIAN WRIT

Here is the text of a writ of assistance framed on the In re Writs of Assistance prescription:

> In the Federal Court of Canada
> Trial Division
>
> Elizabeth II, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.
>
> To
>
> a member of the Royal Canadian Mounted Police Force,
>
> GREETING:
>
> You are hereby authorized, pursuant to Section 145 of the CUSTOMS ACT, to enter, at any time in the day or night, into any building or other place within the jurisdiction of this Court, to search for and seize and secure any goods which you have reasonable grounds to believe are liable to forfeiture under the CUSTOMS ACT, and, in case of necessity, to break open any doors and any chests or other packages for that purpose.

Witness a Judge of our Federal Court of Canada, at Ottawa, this day of in the year of our Lord one thousand nine hundred and and in the year of our Reign

L.S.

[Then follows the French text]

[signed]
Registry Officer
Fonctionnaire du greffe

The key to recognizing this as something that does not constitute the holder's authority to enter and search is the reference to section 145 of the Customs Act (which has to do with the prescribed issuance process; it is section 139 that provides the authority as such). Writs denoting like authority under the Excise, Narcotic Control, or Food and Drugs Acts are similar. All the writs are on models set forth by Jackett P. in In re Writs of Assistance, and all must therefore be seen as simply evidencing the holder as a person duly accredited and authorized to exercise a power conferred upon him by statute and by nothing else. The English writ of assistance evoked by the Act of Frauds of 1662 was not entirely like this; for one thing, its function was never merely evidentiary (at least in theory, it served to put the obligatory peace officer on notice of his legal duty to assist). On the other hand, equally with Jackett P., the Court of Exchequer, under whose seal it had to be issued, could have disowned substantive responsibility for the power with which it was associated.

10. A SECRET STUMBLED UPON?

There is another respect in which the ruling of Jackett P. has had the effect of remodelling the Canadian position on old lines. As if distancing the court still further from what he had called "the extraordinarily wide powers" linked to the writ of assistance, the learned judge said this:

> [C]are must be taken to insure that the writs do not say anything other than that which Parliament has directed and [do] not contain anything that is calculated to mislead the reader into thinking that the writ is anything other than that which the terms of the legislation require.[71]

The "secret in law" in Coke's Third Institute will be recalled, particularly its closing words:

> [U]pon any statute made for the common peace, or good of the realm, a writ may be devised for the better execution of the same, according to the force and effect of the act.

Jackett P.'s insistence that the various writs of assistance correspond precisely to their sponsoring legislation answers well to this "secret", the doctrinal source of their English forerunner.

11. WRITS OF WHAT ASSISTANCE?

However, and less ticklesome to the historical fancy, there is a respect in which the modern Canadian writs of assistance conspicuously do not chime in with how it all began. The tendency observed in the writ issued in the province of Canada in 1843, for the directive that peace officers assist in the search increasingly to take second place to the directive that the customs officer make the search, has reached the point where assistance is not enjoined at all.

In the present-day customs writ of assistance set forth on pages 60 and 61 this ultimate swerve out of line is apparent: assistance, or having someone accompany the searching officer, is not so much as mentioned. And it is not really different with the narcotic control and the food and drugs writs, which say:

> You are hereby authorized and empowered ... aided and assisted by such person as you may require, at any time, to enter any dwelling house....

Or with the excise writ, and its statement that:

> You are hereby authorized ... to enter, in the night time, if accompanied by a peace officer, and in the day time without being so accompanied, any building or other place....

To allow of assistance, or even - as with excise search at night - to stipulate it, is not necessarily to put anyone under obligation actually to give it. Yet it was exactly such an obligation that the writ of assistance, in its original format, represented.

12. LEGISLATION ON THE LOOSE AGAIN

The question is, though, whether these latter-day Canadian writs of assistance - "so-called writs of assistance", one is tempted to dub them, all eponymity having gone - could properly have conformed to the old style in any case. What made possible (under Coke's "secret in law") the writ of assistance called for by the 1662 Act's section 5(2) was the general obligation to lend assistance to customs men imposed by section 32. Is a comparable obligation to be found in the modern Canadian statutes providing for writ of assistance search, that might sustain a writ of the old kind?

Not in the Narcotic Control Act or the Food and Drugs Act, certainly, which are quite silent on the subject. The Customs Act, section 140, has this:

> Any officer or person in the discharge of the duty of seizing goods, vessels, vehicles or property liable to forfeiture under this Act, may call in such lawful aid and assistance in the Queen's name, as is necessary for securing and protecting such seized goods, vessels, vehicles or property.

Whether this might or might not be construed as a general obligation to assist in the safekeeping of things already seized, it surely does not constitute a general obligation in the seeking out of seizures.

The Excise Act does better. Section 77 states:

> All justices of the peace, mayors, bailiffs, constables and all persons serving under Her Majesty by commission, warrant or otherwise, and all other persons whomsoever shall aid and assist, and they are hereby respectively required to aid and assist, every officer in the due execution of any act or thing authorized, required or enjoined by this or any other Act.

This clearly is wide enough for the excise writ of assistance actually to requisition the attendance of a peace officer when needed (and not merely allude to it).[72]

Section 77 had a predecessor in the Canadian Parliament's first excise legislation, the Inland Revenue

Act of 1867.[73] But, as it is at the present day so it was then: the contrast that no comparable statutory obligation to assist existed on the customs side - that is, in the Customs Act of 1867. Yet both 1867 Acts legislated for writ of assistance search, and in terms broadly similar to each other - again much as today. The Inland Revenue Act's writ of assistance search provision, in section 125, was followed immediately, in section 126, by the general obligation to assist; and it is little different with sections 76 and 77 of the current Excise Act. It is doubtful, however, whether the proximity has ever signified a connection. If the intention in the excise legislation was to underpin the writ of assistance with a statutory obligation of assistance, why not in the customs legislation also?

13. ROOT OF THE ROT

One can conclude that no directive for assistance is to be found in modern Canadian writs of assistance because the governing legislation has long since ceased to see them as predicating it.[74]

Signs in British North America of writ of assistance search drifting from its doctrinal moorings go back long before the Acts of 1867, however. This time, the blame does not lie with section 10 of the Revenue Act of 1767. When section 10 was still in force, the writ of assistance was backed, through a link in the Act of Frauds of 1696, by the same blanket provision for assistance as had always sustained it in England; namely, section 32 of the Act of Frauds of 1662. The reformulation of the imperial customs laws in 1825 involved repeal of the 1662 Act. But nothing was brought in to take the place of section 32.

Writ of assistance search having got by thus denuded for some forty-odd years, the promoters of the Canadian customs legislation in 1867 presumably saw no reason not to go on that way (while those responsible for the 1867 excise legislation, which did include a provision for assistance, similarly had no inkling of its relevance to the writ of assistance in their own enactment). And so, it appears, things have continued.

Beyond doubt, a writ of assistance ordering assistance, without the legislative infrastructure to support it, would be something of an excrescence doctrinally. From this point of view, the Canadian writs' abandonment of this feature has been just as well. But what they may have become in consequence beggars classification.

Part V

RETROSPECT FROM LIMBO

1. HISTORICAL MISCELLANEA

A miscellany of common-law influences played upon the originating English legislation for writ of assistance search: unease lest nocturnal visitations, to hearth and home particularly, occasion violent disorder; preference that powers of entry and search be entrusted to known public officers; reluctance to concede a right of entry by force; and more besides. Traces of such ancient common-law predispositions have survived in the modern Canadian legislation - for instance, in the explicit or special provisions made for entry and search in the night, and in it still being considered advisable to have the use of force sanctioned specifically.

However, with the passage of time, the historical baggage has become a little ragged and untidy. "Resistance" has been displaced by "necessity" as justification for force (a change dating from the colonial era:[75] less sharpness of definition, one would have thought). Under the old law, justification of even mere entry depended upon something lawfully seizable being actually found;[76] nowadays the statutes temper this by indicating "reasonable grounds to believe" and the like to be sufficient justification. (Though might not that looser rein prove more a trip-wire if the grounds and their reasonableness were argued to be not determinable ex post facto merely, but were for verification in advance?) Some jettisonings are less noteworthy than others, of course. It obviously does not matter that the location for storage of the seized goods is no longer legislated for. On the other hand it is paradoxical, to say the least, that the attendant peace officer should mostly have been dropped, whose presence at the entry and search it had been a prime practical purpose of the writ of assistance to secure. (Nor is the illogicality much alleviated by the circumstance that the searching officer is likely to be a member of the Royal Canadian Mounted Police, and hence himself a peace officer.)

Accretions, as well as bits falling off, also account for some of the old coherence being lost. Again, there are

particular instances that signify little. Legislated provision that the writ of assistance "shall remain in force so long as any person named therein remains an officer" disposes of any question about the writ expiring at the end of the reign (which the common-law position would have suggested[77]); and if the intention was also to inhibit issuance of writs good for the one time only - the heresy prevalent among the breakaway colonies around the turn of the 1770s - then, viewed alongside the more or less standard substantive search provision, it looks to have been ex abundanti cautela. One does notice, however, that the practice - not adopted in England, but going back more than two hundred years in British North America - of having the writ of assistance made out to a named holder, is at the centre here; as it is in another Canadian connection - delegation to another officer (section 79 of the Excise Act affords an example). To the extent that personal designation of the holder of a writ of assistance is a factor in the conferment of the search power associated with the writ,[78] delegation perhaps involves some conflict of principle; though none that could be made much of.

Not all the implants are free from practical anomaly, however. In point are the procedures prescribed for issuance of writs of assistance. It surely seems extravagant that application must perforce be by the Attorney General of Canada.[79] If there does exist cogent reason why the country's principal law officer should be required to undertake a simple executive duty more suited to a groundling clerk, it is not apparent to the naked eye. An explanation of sorts is suggested by history. In the late 1760s and the early 1770s, direct applications by their officers mostly having failed, the American customs commissioners at Boston took to engaging the respective attorneys general for the task of persuading colonial and provincial courts to issue the writs of assistance mandated by section 10 of the Revenue Act of 1767. Notwithstanding a more compliant disposition among the northern courts, attorneys general of the provinces later to be Canadian were included. One wonders, then, whether the present laws that dictate so strangely that application for a writ of assistance be by the Attorney General of Canada may not be traceable to an emergency measure provoked by events elsewhere more than two hundred years ago.

Even more odd is the companion requirement, that applications for writs of assistance be dealt with by a judge of the Federal Court. What, in England, is literally

a rubber-stamp routine in the office of the Queen's Remembrancer has, in Canada, been propelled into the judicial stratosphere. And, it must be remarked, to some perplexity up there. The terms of the legislation, in all cases, divest the judge of any deliberative function. Thus Jackett P. in the In re Writs of Assistance case:

> Having regard to the fact that the Writ of Assistance confers authority upon the person named therein to exercise the wide powers of search throughout the whole of his career and without limit as to place, I find it very difficult, if not impossible, to conceive of any basis upon which a judicial discretion might be exercised. What advantage does it serve to determine that, at the time of the issuance of the writ, the officer is an appropriate person in whom to vest such extraordinary powers, when, by the terms of the statute, he is to continue to have the powers for a period that may extend to twenty or thirty years? Similarly, it is not possible for the Court to exercise a discretion as to whether the particular circumstances in which the powers of search are to be used are appropriate for the exercise of such wide powers of search.[80]

Extensively citing Jackett P. ten years later, Collier J. in Re Writs of Assistance[81] saw the court

> reluctantly bowing to the dictates of the statute and [having] no say or discretion in the matter of issuing these writs which are then placed in the hands of persons who, in individual cases, may seriously abuse the unrestrained invasionary powers given....[82]

As for himself:

> I was ... shocked and incredulous that the Court should be asked or required, on such fragile and unenlightening material, to lend its authority to the clothing of an unknown Government officer with such extensive unlimited powers.[83]

Judicial disquiet was deepening, by the look of it.

On the ratiocination of Jackett P., the judge granting the writ of assistance bore no responsibility for the power it signified, which went to the officer direct from the statute. All the same, the statute's casting the judge in a role so jejune and so intrinsically out of keeping with his office could be seen as making sense only as a contrivance for presenting a rather ugly power of peremptory intrusion in respectable court dress. Yet, once again, it would be unwise to leave history out of account.

For it may well be that section 10 of the Revenue Act of 1767, that fountain-head of so much that went wrong with writ of assistance search in British North America, has something to answer for here too. What gave rise to section 10, it will be recalled, was linked to the circumstance that the pivotal enactment on writ of assistance search, section 5(2) of the Act of Frauds of 1662, required the writ to be "under the Seal of his Majesty's Court of Exchequer", and that the Court of Exchequer's process did not extend to the colonies. The 1767 enactment intended to remedy the stultification that exposure of this brought about, by providing that writs of assistance "shall and may be granted by the Superior, or Supreme Court of Justice having Jurisdiction" in the respective colony. It perhaps would have done better to follow the 1662 Act more closely, and speak of issuance of the writ as under the seal of the colonial court; for, as it was, and what with its talk of writs of assistance being "granted" and of "Jurisdiction", applications for the writ looked as if they needed to be dealt with by a bench of judges, and not by just a clerk in the court registry. However, the 1767 style of wording was carried over into the subsequent legislation, probably deepening the impression that the issuance of a writ of assistance was more judicial than prothonotarial in character. In this perspective one can surmise how the modern norm, the writ granted by a judge, came about. In course of time - certainly by 1867, and the Canadian Parliament's first legislation for writ of assistance search - it became evident that a process of such small substance did not need the attention of a full court, even nominally, so the duty was made over to a judge sitting alone. However, the principle was no different - that is, if principle can evolve from error.

2. A JOB SKIMPED?

The law on writ of assistance search has been under blight of one sort or another almost from the beginning.

Applicable only to goods that were both "prohibited and uncustomed", the first enactment of them all, in 1662, quickly proved too constrictive and narrow and had to be complemented by the formal resurrection of a discredited scheme for individual seach warrants.[84] In 1696, the mess that law and practice had got into in England infected customs enforcement legislation then being introduced for North America, with the consequence that search of buildings there depended upon a statutory text incapable of being read, let alone understood. When occasion for a corrective at last presented itself, what was produced was the ineffable section 10 of the Revenue Act of 1767. Looking back from the state of the law in Canada today, and through the various bits and pieces of legislation in between (notably that of 1825), one sees quite clearly that what possibility there might ever have been of fixing writ of assistance search in British North America on to an historically authentic juridical frame was enfeebled, to the point of fatality, by the muffing of the opportunity in 1767.

Something to be noticed is that within a year of the flawed 1767 enactment, the English attorney general William De Grey delivered the opinion which to this day constitutes virtually all the ex officio learning that exists on writ of assistance search in its earlier, classical mode. (Set forth in full in Appendix B, it is learning that this present study has been grateful to exploit more than once.) The case to which the opinion was responding had to do with the unwillingness of most of the colonial judicatures to issue writs of assistance in the general open-ended form that the customs authorities believed the 1767 Act intended. One cannot help wondering whether the gentleness of tone in which Attorney General De Grey addressed such recalcitrance - "this Process was probably new to many of the Judges"; "they seem to have had no opportunity of Informing Themselves about it"; "excuseable that They wished to have Time to consider of it"; and so forth - perhaps did not reflect, in some degree, reasons nearer to home for understanding how easy it was to go wrong. Certainly, when insisting that "the Power of the Custom-House Officer is given by Act of Parliament, & not by This Writ", De Grey cannot but have been uncomfortably aware of the recent Act's explicit provision for "Writs of Assistants, to authorise and impower the Officers of his Majesty's Customs to enter and go into any House". Indeed, his recommendation that "the Text of the Writ issued by the Court of Exchequer in England shd. be sent over to the Several Colonies in America, together with the Manner of applying for it & of

granting it" intended the effect that the text of the statute be disregarded. The second part of the recommendation, that the issuance process (by the King's Remembrancer) be explained to the colonial judicatures, in disabusing them of the notion that the writ of assistance should be good for the specifically attested occasion only and hence predicated on some measure of judicial deliberation, would also have the effect of dislodging any presumption that when section 10 of the 1767 Act spoke of writs being "granted" and of the court "having Jurisdiction", it contemplated action by the bench rather than by just the registrar.

It follows from all this that if the draftsmanship behind section 10 of the Revenue Act of 1767 had been informed by the learning deployed by Attorney General De Grey in the summer of 1768, a far better job would have resulted. Or if, like the colonial judicatures, the draftsman had been equipped with the text of the customs writ of assistance, and put himself to the trouble of actually reading it. Either way, he surely would have realized that what that protracted and turgid rigmarole boiled down to was a simple directive to its multiple addressees to facilitate the customs officer in his search. Which is much as to say that he would not have fallen into the error of having the writ "authorise and impower" the officer to make the search. And there is something else, touching on the judicial quality that section 10 misleadingly tended to impart to issuance of the writ. Just possibly, the draftsman mistook for the customs writ of assistance one of those other, less unfamiliar, writs of assistance, which truly did pertain to a judicial process.[85] In particular, perhaps, he may have been thinking of the specimen that ordered the sheriff to help a party gain possession of land, issued as it commonly was by the Court of Exchequer (on the equity side, however; the customs writ of assistance naturally belonged on the common-law side).

Be that speculative detail as it may. What emerges as incontrovertible is that those responsible for section 10 of the Revenue Act of 1767, whatever their cleverness with its presentational aspects, were light on substantive knowledge. Not to put too fine a point on it, they went ahead without having found out what the customs writ of assistance really was.

3. TOOLS TOO FEW

So far as published materials go, writ of assistance search has been enveloped in misunderstanding and obscurity

even into modern times.[86] A (somewhat dubious) specimen of the writ, dating probably from the 1680s and in Latin of sorts, appeared in a manual of exchequer practice that was last printed in 1725.[87] Writ of assistance search has attracted scholarly comment in Canada, and if only because of the historic court room debate on it in Boston in 1761 - "Then and there the child Independence was born" - it features often enough in accounts of the American Revolution. But in England, where it began, and where it still goes on in roughly the old way, learned treatises have accorded it scarcely a muttered footnote.[88]

Reported cases bearing informatively on the writ and its juridical orientation are all but non-existent in England. The few cases that give it a mention for the most part do so only incidentally, or for the sake of comparing something else. The earliest, Horne v. Boosey, decided in 1733,[89] was about a seizure by a man who ought to have had a writ of assistance but did not. The most recent, in 1830, might perhaps rank as the leading case, except that it leads to confusion. In between, there was a thin scattering of sidelong references. An unfortunate one is on record from Lord Mansfield C.J., no less, in a case belonging to the Wilkesite general warrants cluster, Leach v. Money,[90] in 1765: "there are many cases where particular acts of parliament have given authority to apprehend, under general warrants; as in the case of writ of assistance". One wonders whether this early and, given the source, weighty promulgation of the false identification of the writ of assistance with a search warrant perhaps did not contribute to the like error in and deriving from section 10 of the Revenue Act of 1767. Twenty years later, in Cooper v. Boot,[91] Lord Mansfield C.J. in effect admitted the insufficiency of his learning on the subject: writ of assistance search having been brought into the argument, he postponed judgment for counsel to find out more about it. To no great avail, apparently; but there was at any rate one point on which Mansfield did better than in 1765. "The writ of assistance ... is no warrant", he now said. It is still spoken of as such, though, even today.

Oddly, marginalia of this sort also supply what little other English authority exists on writ of assistance search. Counsel in Cooper v. Boot cited an unreported case before Lord Camden C.J. in the mid-1760s, Shipley v. Redmain, "on a writ of assistance, when it was considered settled law that a person acting under the writ, and finding nothing, was not justified". Similarly De Grey C.J., who as

attorney general had been busied with the writ of assistance in British North America, in Bostock v. Saunders (1773: a case that Cooper v. Boot overturned, though not on this point):[92] the searcher with writ of assistance was "only justifiable in an action of trespass by the event". Constraints on the searcher were elaborated in De Grey's private papers,[93] which show him glossing the briefly reported Oldfield v. Licet (1775)[94] with an attribution to Gould J.: the "Custom H. officer, exceeding or abusing in a legal Search" was liable as a trespasser ab initio (rather than in case, apparently). Gould J. seems to have been touching on another hazard of writ of assistance search in an interjection in Hill v. Barnes (1777);[95] this time, seemingly, the requirement in the Act of Frauds of 1662 that the accompanying peace officer be "inhabiting near unto the Place". Said Gould, "I had a ... case once before me in Poole. - A Custom-House officer, who had seized some smuggled cambrick, had a verdict, with very large damages, against him, because he was attended by a constable, not of the town of Poole, but of the county of Dorset". Finally - at any rate, there has been no case since - R. v. Watts and Watts in 1830, which occasioned the off-target comments by Lord Tenterden C.J. animadverted upon earlier.[96]

That writ of assistance search has appeared only so seldom and so tangentially in the English law reports may owe something to the restraint, partly statutory in its operation, which the customs commissioners imposed on the use actually made of the writ.[97] For all its unfetteredness in theory or strict law, from early in the eighteenth century till well into the nineteenth writ of assistance search in England was in practice regulated according to specifically attested - even sworn - occasion for it. Such circumspection may have steered the customs authorities clear of troublesome protest, but the silence of the law reports does not signify advantage all along the line. What with the dearth of reported cases and the total lack of learned commentary in the books, authentic information on writ of assistance search was never available in sufficiency. It seems to have been none too abundant in the arcana imperii either. Why else the disfigurements in the legislative history of the subject - which has led in Canada to writ of assistance search parting from its doctrinal roots to become something altogether exotic - than that reference materials were hard to come by even for the Crown's own lawyers?

Particularly lost sight of, one suspects, was the germinal "secret in law" enshrined in Coke's Third

Institute. In that valuable 1768 opinion, circulated among all the topmost courts in British North America, Attorney General William De Grey identified the customs writ of assistance as "founded upon the Common Law". He did not say exactly where, however. Had he done so, posterity would have been still better served. As it was, the "secret" stayed under wraps too long.

APPENDIX A

Writ of Assistance (English), Mid-Eighteenth Century

George the Second by the Grace of God of Great Britain France and Ireland King Defender of the Faith & c. -

To all and every the Officers and Ministers who now have, or hereafter shall have, any Office, power or Authority from or under the Jurisdiction of the Lord High Admiral, or our Admiralty of England, and to all and every our Vice Admirals, Justices of the peace, mayors, Sheriffs, Constables, Bailiffs, Headboroughs and all other our Officers Ministers and Subjects within every City Borough Town & County of England, the Dominion of Wales, and Town of Berwick upon Tweed, and to every of you -

Greeting: Know Ye, that Whereas we by our Letters patent under our Great Seal of Great Britain bearing date the 4th. day of July in the 32d Year of our Reign have constituted, appointed and Assigned our Trusty and well beloved Sr. John Evelyn Bart., Richard Cavendish, Beaumont Hotham, Samuel Mead, Henry Pelham, William Levinz, Edward Hooper, Thomas Tash and Claudius Amyand Esqrs. Commissioners for Managing and Causing to be levied and Collected our Customs, Subsidies and Other Duties in the Said Letters Patent mentioned: during our pleasure and by our Commission aforesaid we have given and Granted unto our Said Commissioners or any four or more of them full power and Authority to manage and cause to be levied, all and every the Customs subsidies, duties of Tonage and Poundage and all Other Sums of Money growing and renewing due and payable to us, for or by reason of any Goods wares or Merchandizes imported or brought into England, the Dominion of Wales or Town of Berwick upon Tweed, or Exported out of England the Dominion of Wales or Town of Berwick upon Tweed by way of merchandize according to the Tenor and Effect of a Certain Act or reputed Act of Parliament made at Westminster the 25th. day of April in the 12th. Year of the Reign of the Late King Charles the Second and afterwards ratified and Confirmed in and by another Act of Parliament made at Westminster the Eighth day of May in the 13th. Year of the Reign of the Said late King Charles the Second, and according to the Said Several particulars Rates & Values of the Said Goods and Merchandizes mentioned and Expressed in a

Certain book of Rates and Certain Rules, Orders and directions and allowances to the Said Book of Rates annexed, and in and by the Said Acts, or one of them enacted, and in and by the Said Acts, or one of them enacted, approved, ratified and Confirmed according to the Tenor or Effect of another Act of Parliament made in the first Year of his late Majesty King James the Second intituled an Act for Settling the revenue on his Majesty for his life and also full power & Authority to manage & Cause to be levied & Collected all and every the Customs, Rates, Subsidies, Dutys Payments and Sums of Money; arising & Growing due and payable to us according to the tenor and Effect of Several Acts of Parliament in the Said Letters patent mentioned as also full power and Authority to Manage and Cause to be Levied and Collected, all Other the Customs, Rates, Duties and payments which are or shall be in any wise due or payable to us for or upon the Importation or Exportation of the same Goods, Wares or Merchandizes into or out of England, the Dominion of Wales or Town of Berwick upon Tweed and further by our Said Letters Patent we have given and Granted to our Said Commissioners or any four or more of them during our Pleasure aforesaid full power and Authority to Cause to be put into Execution all and every the Clauses in the Same or in any other Act or Acts of parliament contained, touching or Concerning the Collecting Levying receiving or Securing of the Duties therein mentioned, or any of them, or any part or parts thereof, and to do all Other Matters or things whatsoever Which by any of the Commissioners for the time being intrusted with the Receipt and Management of our Customs can or may be lawfully done, and further by our Commission aforesaid we have given full Power and Authority to our Said Commissioners or any four or more of them from time to time to Constitute and appoint by any Writing under the hands and Seals of them or any four or more of them such Inferior Officers in all and every the ports of England, the Dominion of Wales or Town of Berwick upon Tweed, as by nomination, Warrant and directions from the Commissioners of the Treasury, then, or for the time being, or from the Lord Treasurer for the time being, as our Said Commissioners Shall direct, and them from time to time to suspend remove and displace, as our Said Commissioners or any four or more of them shall seem necessary or expedient for our Service in the premises, and further that all and every the Customs and Subsidies of Tonage and Poundage, and all and Singular the Sums of Money and other premisses may be duly paid to us, and we may be truly & faithfully Answered the Same we have given and Granted unto our Said Commissioners or any Four or more of them and to all and every the Collectors,

Deputy Collectors, Ministers, Servants or Other Officers serving and Attending in all and Every the Ports of England, Dominion of Wales or Town of Berwick upon Tweed, full power and Authority from time to time at their and every of their Will and pleasure as well by night as by Day to enter and go on board any Ship, Boat or other Vessell riding, lying, or being within and coming to any Port, Crek, or Haven in England, the Dominion of Wales or Town of Berwick upon Tweed, and Such Ship Boat or Vessell then and there found, to search and look into, and the persons therein being Strictly to examine touching or concerning the premises aforesaid as also in the Day time to enter into the Vaults, Cellers, warehouses, Shops and other places, where any Goods, wares or Merchandizes lye concealed or are Suspected to be concealed for which the Customs and Subsidies and other the Duties and Sums of Money aforesaid are not or shall not be duly and truly Answered satisfied and paid to the Collectors, Deputy Collectors, Ministers, Servants and Other Officers aforesaid respectively, or Otherwise agreed for according to the true intent of the Law and the Same vaults, Cellars, warehouses, Shops and other places aforesaid to Search and look into, and all and every the Trunks, Chests, Boxes, & packs then and there found to Break open, and do all other Matters which Shall be found necessary for our Services in Such Cases and agreeable to the Law and Statutes of England, as in the said Commission (among other things) is more fully contained. Therefore we Strictly enjoin and Command you, and every one of you that all Excuses apart, you and every one of you permit the Said Sir John Evelyn Bart., Richard Cavendish, Beaumont Hotham, Samuel Mead, Henry Pelham, William Levinz, Edward Hooper, Thomas Tash & Claudius Amyand Esqrs. and the Deputies, Ministers, Servants and Other Officers of our Said Commissioners, and every one of them from time to time, as they Shall think proper, as well by Night as by Day to enter and go on board any Ship Boat or Other Vessell riding lying or being within and coming to any Port Creek or Haven of England, the Dominion of Wales and Town of Berwick upon Tweed, and such Ship Boat and Vessell then and there found to Search and oversee, and the persons therein being strictly to examine touching & Concerning the premises aforesaid according to the form Effect and true Intent of our Commission and the Laws and Statutes of England in that behalf made and provided, and in the day time to enter and go into the Vaults, Cellars warehouses Shops and other places where any Goods, Wares or Merchandizes lye Concealed or are Suspected to be concealed, for which the Customs and Subsidies of Tonage & poundage and other the Sums of money

are not or Shall not be duly or truly Answered satisfied and paid to our Collectors, Deputy Collectors, Ministers Servants and other Officers respectively or otherwise agreed for, according to the true intent of the Law to inspect and oversee and Search for the Said Goods, Wares and Merchandizes, and further to do and Exercise all things which of Right and according to the Laws and Statutes of England in this behalf shall be to be done according to the Effect and true meaning of our Commission aforesaid and the Laws and Statutes of England and we further Strictly enjoin and Command you and every one of you that to the said Sir John Evelyn Bart., Richard Cavendish, Beaumont Hotham, Samuel Mead, Henry Pelham, William Levinz, Edward Hooper, Thomas Tash and Claudius Amyand Esqrs. our Commissioners and to their Deputies, Ministers, Servants, and Other Officers and every one of them, you and every one of you be aiding assisting and helping in the Execution of the premises as is meet, and this you, or any of you in no wise omit at your perils, Witness Sir Thomas Parker Knt. at Westminster the 28th. day of May in the 23d. Year of our Reign. By the Remembrance Rolls & so forth and by the Barons

Signed
Masham

APPENDIX B

Case for the Opinion of Attorney General William De Grey "touching the Granting Writts of Assistants in America", 1768

7th. Geo. 3d.
Ch.46

By this Act of Parliament, after Reciting "That by an Act of Parliament made in the 14th. Cha. 2d. Intitled An Act for Preventing ffrauds and regulating Abuses in His Majesty's Customs, and several other Acts now in Force, it is lawful for any Officer of His Majesty's Customs authorized by writ of Assistants under the Seal of His Majesty's Court of Exchequer to take a Constable, Headborough or any 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 there to seize and from thence to bring any Kinds of Goods or Merchandize whatsoever, Prohibited, or uncustomed, and to put and secure the same in his Majesty's Storehouse next to the Place where the Seizure shall be made; And further Reciting that by an Act made in the 7th. and 8th. of William the 3d. intituled An Act for Preventing ffrauds and regulating Abuses in the Plantation Trade, It was amongst other Things Enacted, that the Officers for collecting and managing his Majesty's Revenue and inspecting the Plantation Trade in America should have the same Powers and Authorities to enter Houses or Warehouses to search for and seize Goods Prohibited to be imported or exported into or out of the any of the said Plantations or for which any Duties were payable or ought to have been Paid, and that the like Assistance should be given to the said Officers in the Execution of their Office as by the said recited Act of the 14th. Charles 2d. is Provided for the Officers in England, But no Authority being Expressly given by the said Act of 7th. and 8th. William 3d. to any particular Court to Grant such Writs of Assistants for the Officers of the Customs in the said Plantations it was doubted whether such Officers could legally Enter Houses and other Places on Land to search for and Seize Goods in the Manner directed by the said Acts, To obviate which Doubts for the future and in order to carry the Intention of the said Acts into Effectual Execution.

it is Enacted, That after the 20th. of November 1767 such writs of Assistance to Authorize and Empower the Officers of his Majesty's Customs to Enter and go into any House Warehouse Shop Sellar 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 Superior or Supreme Court of Justice having Jurisdiction within such Colony or Plantation respectively

In Pursuance of this Act of Parliament the Officers of the Customs in America have applied to the Judges of the Superior Courts of Judicature in the respective Provinces for writs of Assistants but most of them have refused to Grant such Writs, seemingly for this reason, that no Information had been made to them of any special occasion for such Writ, and that it will be unconstitutional to lodge such writ in the hands of the Officer, as it will give him a discretionary Power to Act under it in such manner as he shall think necessary.

But it must be observed that if such a General writ of Assistants is not Granted to the Officer, the true Intent of the Act may in almost every Case be evaded, for if he is obliged, every time he knows, or has received Information, of Prohibited or unaccustomed 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 Commrs. 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 Commrs. direct their Solr. to procure a writ of Assistants, which is issued as a Matter of Course by the Clerks of the Excheqr. without any application to the Court - This writ is directed to all Officers and Ministers who have any Office Power or Authority from or under the Lord High Admiral of England, To all and every Vice Admirals Justices of the Peace Mayors Sheriffs Constables Bailiffs Headboroughs and all other the Kings Officers Ministers and Subjects, Commanding them to be aiding Assisting and helping the Commissioners of the Customs and their Deputys Ministers Servants and other Officers in the Execution of their Duty.

Q. Whether the Superior Courts of Justice in the British Colonies or Plantations in America, ought not upon Application, to Issue writs of Assistants in the same manner as is Practised in the Court of Exchequer in England, and what Steps should be taken by Government in Order to Enforce the Issuing of these writs, for the Protection of the Officers of the Customs Abroad.

There can be no Doubt, but that the Superior Courts of Justice in America are bound by the 7. G. 3. to issue such Writs of Assistance, as the Court of Exchequer in England issues in similar Cases, to the Officers of the Customs.

As this Process was probably new to many of the Judges there, & They seem to have had no opportunity of Informing Themselves about it, it is Perhaps in some Measure excuseable that They wished to have Time to consider of it & to inquire into the practise of the Court of Exchequer & of other Colonies; & I think it can only be because the Subject was entirely misunderstood & the Practise in England unknown, that the Chief Justice of Pensilvania, Who is generally well spoken of, cou'd Imagine, that "He was not warranted by Law" to issue a Writ commanded by the Legislature; wch. Writ was founded upon the Common Law, enforced by Acts of Parliament & in dayley use in England, & wch. from the General Import of the 7.W.3. ought to have been set on Foot from that Time in America; & wch. Statute the Late Act only meant to explain. & it appears accordingly, that in Boston, where a very able Judge presides & some Experience had been had upon the Subject, no difficulty was made in granting it.

I think therefore it is adviseable that the Text of the Writ issued by the Court of Exchequer in England shd. be sent over to the Several Colonies in America, together with the Manner of applying for it & of granting it. By wch. They will see, that the Power of the Custom House Officer is given by Act of Parliament, & not by This Writ, wch. does nothing more than facilitate the Execution of the Power by making the disobedience of the Writ a Contempt of the Court; The Writ only requiring all Subjects to permit the Exercise of it & to aid it. The Writ is a Notification of the Character of the Bearer to the Constable & others to Whom He applies & a Security to the Subject agst. others Who might pretend to such authority. Nobody has it but a Custom House Officer armed with such a Writ.

The Writ is not granted upon a Previous Information, nor to any Particular Person, nor on a special occasion. The Inconvenience of That was experienced upon the Act of 12. C. 2. C. 19, & the Present Method of Proceeding adopted in Lieu of what That Statute had prescribed.

[signed] Wm. De Grey
Aug. 20. 1768

(PRO T1/465)

APPENDIX C

Form of Writ of Assistance for British North America, 1768-69

Province of

GEORGE the Third, by the Grace of GOD of Great-Britain, France and Ireland, KING, Defender of the Faith, and so forth.

To all and every the Officers and Ministers who now have or hereafter shall have any Office, Power or Authority, from or under the Jurisdiction of the Lord High Admiral of our Admiralty of England, to all and every our Vice Admirals, Justices of the Peace, Sheriffs, Mayors, Constables, Bailiffs, Head Boroughs, and all other our Officers, Ministers and Subjects, within every City, Town and County within our said Province.

KNOW YE, That whereas We by Our Letters Patent under Our Seal of Great-Britain, bearing Date the eighth Day of September, in the Seventh Year of Our Reign, have constituted appointed and assigned Our trusty and well beloved Henry Hulton, John Temple, William Burch, Charles Paxton, and John Robinson, Esquires, Commissioners for managing and causing to be collected and levied Our Customs and other Duties in Our said Letters Patent mentioned, during Our Pleasure, and by Our Commission aforesaid, We have given and granted to Our said Commissioners, or any three or more of them, full Power and Authority to manage and cause to be levied and collected, all and every the Customs and other Duties, and all other Sums growing and renewing, due and payable to Us, for and by Reason of any Goods, Wares or Merchandizes, imported or brought into any of Our Colonies, Plantations and Provinces, lying and being on the Continent of America, from the Streights commonly called Davis's Streights, to the Capes of Florida, and the Islands and Territories to such Colonies and Plantations respectively adjoining and belonging; together with Our Island of Bermuda, and Our Islands called and known by the Name of the Bahama Islands, by way of Merchandize, according

to the tenor and effect of several Acts of Parliament in that Case made and provided, and also full Power and Authority to manage and cause to be levied and collected all and every the Customs, Rates, Duties, Payments and Sums of Money arising and growing due and payable to Us according to the tenor and effect of several Acts of Parliament in the said Letters Patent mentioned, as also full Power and Authority to manage and cause to be collected and levied all other the Customs, Rates, Duties and Payments which are or shall be in any wise due, or payable to Us, for or upon the Importation or Exportation of any Goods, Wares or Merchandize into, or out of any of Our Colonies, Plantations and Provinces, lying and being on the Continent of America, from the Streights commonly called Davis's-Streights, to the Capes of Florida, and the Islands and Territories to such Colonies and Plantations respectively adjoining and belonging; together with Our Island of Bermuda, and Our Islands called and known by the Name of Bahama-Islands. Further, by Our said Letters Patent We have given and granted to Our said Commissoners, or any three or more of them during Our Pleasure aforesaid, full Power and Authority to Cause to be put in Execution, all and every the Clauses in the same or in any other Act or Acts of Parliament contained, touching or concerning the collecting, levying, receiving or securing of the Duties therein mentioned, or any of them, or any Part or Parts thereof; and to do all other Matters or Things whatsoever, which by any of the Commissioners for the Time being, intrusted with the Receipt and Management of our Customs can or may be lawfully done. And further by Our Commission aforesaid, we have given full Power and Authority to Our said Commissioners or any three or more of them, from Time to Time to constitute and appoint by any Writing under the Hands and Seals of them, or any three or more of them, such inferiour Officers in all and every the Ports in Our Colonies, Plantations and Provinces, lying and being on the Continent of America, from the Streights commonly called Davis's-Streights, to the Capes of Florida, and the Islands and Territories to such Colonies and Plantations respectively adjoining and belonging, together with Our Island of Bermuda, and Our Islands called and known by the Name of the Bahama-Islands, as by Nomination, Warrant and Directions from the Commissioners of the Treasury, then or for the Time being, as Our said Commissioners shall direct, and them from Time to Time to suspend, remove and displace, as to Our said Commissioners or any three or more of them shall seem necessary or expedient for our Service in the premises. And Further, that all and every the Customs and other Duties, and all and

singular the Sums of Money and other the Premises may be duly paid to Us, and We may be truly and faithfully answered the same, We have given and granted to Our said Commissioners or any three or more of them, and to all and every the Collectors, Deputy Collectors, Ministers, Servants or other Officers serving and attending in all and every the Ports in our Colonies, Plantations and Provinces lying and being on the Continent of America, from the Streights commonly called Davis's-Streights to the Capes of Florida, and the Islands and Territories to such Colonies and Plantations, respectively adjoining and belonging, together with Our Island of Bermuda, and Our Islands called and known by the Name of the Bahama Islands, full Power and Authority from Time to Time at their and every of their Wills and Pleasures, as well by Night as by Day to enter and go on board any Ship or Boat or other Vessel, riding, lying, or being within and coming to any Port, Creek or Haven, in Our Colonies, Plantations and Provinces, lying and being on the Continent of America, from the Streights commonly called Davis's-Streights to the Capes of Florida, and the Islands and Territories to such Colonies and Plantations, respectively adjoining and belonging, together with Our Island of Bermuda, and Our Islands called and known by the Name of the Bahama-Islands, such ship, Boat, and Vessel then and there found, to search and look into, the Persons therein being strictly to examine, touching or concerning the Premises aforesaid, as also, in the Day Time, to enter into the Vaults, Cellars, Warehouses, Shops and other Places where any Goods, Wares or Merchandizes lye concealed, or are suspected to be concealed, for which the Customs and other the Duties and Sums of Money aforesaid are not or shall not be duly and truly answered, satisfied and paid to the Collectors, Deputy-Collectors, Ministers, Servants or other Officers aforesaid respectively, or otherwise agreed for, according to the true Intent of the Law, and the same Vaults, Cellars, Warehouses, Shops and other Places aforesaid, to search and look into, and all and every the Trunks, Chests, Boxes and Packs, then and there found, to break open, and to do all other matters which shall be found necessary for Our Services in such Cases, and agreeable to the Laws and Statutes of England, as in the said Commission among other Things is more fully contained. Therefore, We strictly injoin and command you, and every one of you, that (all Excuses apart) you and every one of you, permit the said Henry Hulton, John Temple, William Burch, Charles Paxton, and John Robinson, Esquires, and the Deputies, Ministers, Servants and other Officers of the said Commissioners and every one of them, from Time to Time as

they think proper, as well by Night as by Day, to enter and go on board any Ship, Boat, or Vessel, riding, lying or being within, any Port, Creek or Haven, within our said Province, and such Ship, Boat and Vessel; then and there found, to search and oversee, and the Persons therein strictly to examine touching and concerning the Premises aforesaid, according to the Tenor, Effect, and true Intent of our Commission, and the Laws and Statutes of England, in that Case made and provided; and in the Day Time, to enter and go into the Vaults, Cellars, Warehouses, Shops and other Places, where any Goods, Wares or Merchandizes lye concealed, or are suspected to be concealed for which the Customs and other the Sums of Money are not or shall not be duly and truly answered, satisfied and paid to our Collector, Deputy Collectors, Ministers, Servants, and other Officers respectively, or otherwise agreed for, according to the true Intent of the Law, to inspect and oversee and search for the said Goods, Wares or Merchandizes; and further to do and execute all Things which of right and according to the Laws and Statutes of England in this behalf shall be done according to the Effect and true Meaning of our Commission aforesaid, and the Laws and Statutes of England. And We further strictly injoyn and command you and every one of you, That to the said Henry Hulton, John Temple, William Burch, Charles Paxton, and John Robinson, Esquires Our Commissioners, and to their Deputies, Ministers, Servants and other Officers, and every one of them, you, and every one of you, from Time to Time be aiding and assisting and helping in the execution of the Premises as is meet, and this you, or any of you, in no wise omit at your Perils.

Witness Esq: at the Day of

in the Year of Our reign.

ENDNOTES

1. 7 Geo. 3, c. 46, s. 10.

2. C. F. Adams, ed., Life and Works of John Adams, vol. 10 (Boston, 1856), p. 248.

3. The Fourth Amendment to the Constitution of the United States reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4. Customs Act, R.S.C. 1970, c. C-40; Excise Act, R.S.C. 1970, c. E-12; Narcotic Control Act, R.S.C. 1970, c. N-1; Food and Drugs Act, R.S.C. 1970, c. F-27.

5. See note 52, below.

6. De Grey had rendered an opinion two years earlier on problems arising in the colonies, which related to writ of assistance search. His 1766 opinion, and its cause and effect, are discussed in greater detail at pp. 32 and following.

7. See the Appendix by Horace Gray, Jr. (later of the U.S. Supreme Court) in S. M. Quincy, ed., Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772 by Josiah Quincy Jr. (Boston, 1865) 395 at pp. 395-400.

8. 13 & 14 Car. 2, c. 11.

9. R. v. Watts and Watts (1830), 1 B. & Ad. 166 at p. 175.

10. Of Lord Tenterden C.J. in Lord Campbell's Lives of the Chief Justices of England, vol. 3 (London, 1857), p. 309: "[H]e did not reach the reputation of infallibility."

11. Edward Coke, The Third Part of the Institutes of the Laws of England, 6th ed. (London, 1680), p. 162.

12. F. W. Maitland, "The History of the Register of Original Writs", in Select Essays in Anglo-American Legal History II (Boston, 1908), p. 558; See also pp. 559-60.

13. Cited judicially from Brougham's Statesmen in the Times of George III by Lord Denning M.R. in Chic Fashions (West Wales) Ltd. v. Jones, [1968] 2 Q.B. 299 at p. 308.

14. More on this proclamation is in M. H. Smith, The Writs of Assistance Case (Berkeley, 1978), pp. 23-24.

15. Hill v. Barnes (1777), 2 W. Black. 1135 at p. 1137. Cf. also Scott v. Shearman (1775), 2 W. Black. 977 at p. 977, where the defendant, a customs officer, threatened the plaintiff and his wife "if they would not give up the keys, he would break open the locks, and accordingly got a constable, to whom he produced his writ of assistance, and broke open the locks of the chambers, closets, and drawers, and took away twenty pints of Geneva".

16. Appendix B, and page 11 above.

17. 4 Geo. 2, c. 26.

18. 12 Car. 2, c. 19. For further discussion of this, see pages 27-29 and note 84, below.

19. 1 Eliz. 1, c. 11.

20. Acts of the Privy Council May 1629 - May 1630 (London, 1960), p. 1135.

21. M. Hale, History of the Pleas of the Crown, vol. 2 (London, 1736), p. 150.

22. See the opinion of Attorney General De Grey at Appendix B, speaking of the "authority" given by section 5(2): "Nobody has it but a Custom-House Officer armed with such a Writ".

23. Note 21 above, p. 150.

24. W. S. Holdsworth, History of English Law, vol. 5 (London, 1924), p. 482.

25. "Concerning the Custom of Goods Imported and Exported", in F. Hargrave, ed., Law Tracts (Dublin, 1757).

26. Cf. M. H. Smith, The Writs of Assistance Case (Berkeley, 1978), pp. 23-24.

27. See note 84.

28. 1 Jac. 2, c. 1.

29. Cf. Smith, op. cit., p. 49.

30. (1719), 6 Geo. 1, c. 21.

31. 7 & 8 Gul. 3, c. 22.

32. Smith, op. cit., chapter 16.

33. PRO T1/543.

34. Deputations were documents of appointment issued by the customs commissioners under a warrant from the Treasury.

35. See, e.g., the text quoted at Quincy's Reports, p. 433.

36. It seems to have been a factor in the earlier Massachusetts decision in favour of writs of assistance that the Superior Court there had an exchequer jurisdiction, conferred by an act of the provincial legislature.

37. PRO T1/543. See note 33, above. See also note 6.

38. (1584), 3 Co. Rep. 7a.

39. The matters recounted in this section are dealt with in greater particularity in M. H. Smith, The Writs of Assistance Case (Berkeley, 1978), chapter 18.

40. PRO T27/29. Cf. Smith, op. cit., p. 451.

41. PRO T29/38. Cf. Smith, op. cit., p. 452.

42. See page 14 above.

43. Page 29 et seq. above.

44. 6 Geo. 1, c. 21.

45. Cf. O. M. Dickerson, "Writs of Assistance as a Cause of the Revolution" in Richard B. Morris, ed., The Era of the American Revolution (New York, 1939); and Smith, op. cit., chapter 1.

46. See pages 44-72 below.

47. Smith, op. cit., chapter 16.

48. Ibid., chapter 21, for a fuller treatment.

49. A print of the case and opinion - doubtless the one sent to Halifax - is in the Public Archives of Nova Scotia: RG 31. See also Quincy's Reports, pp. 452-54, where Horace Gray reproduces "a copy remaining upon the files of March term 1769 of the Superior Court of Judicature of the Colony of Rhode Island".

50. See Appendix C. The letter-book of the solicitor, David Lisle, which is among the Boylston papers in the Massachusetts Historical Society, Boston, tells of three hundred copies of the writ form having been printed (fol. 13: Lisle to Board, January 23, 1769). Lisle's draft had been approved by the (lay) Chief Justice of Massachusetts, Thomas Hutchinson (fol. 12: Lisle to Board, n.d.). It appears (fol. 14) that not only the blanks were circulated, but also - presumably for guidance in colonies where the writ of assistance was quite new - a specimen showing how the empty spaces had been filled in by the Massachusetts Superior Court. The specimen sent to Halifax is in the Public Archives of Nova Scotia: RG 31.

For the text of the letter (by Lisle) to the attorneys general see Quincy's Reports, p. 506, and fol. 14 in Lisle's letter-book.

51. The Boston Gazette, September 11, 1769, sought to shame the local establishment with an invidious report that "every Province in America, except Massachusetts-Bay and Halifax, have refused to grant General Warrants or Writs of Assistants ...: even the little Colonies of Georgia and the Florida's have absolutely refused it". However, on October 20, 1772 the American customs commissioners included East and West Florida among colonies where the desired writ had been granted; they also included New Hampshire (which indeed had followed Massachusetts in granting a similar writ in the early 1760s): PRO T1/492.

52. Ibid. Nova Scotia had shared the earlier hesitations, however. See PRO T1/465, for the Halifax custom house reporting to the commissioners on March 1, 1768, that Chief Justice Jonathan Belcher had said "that the Court would at all times be ready to grant such writs and give every other Aid and Assistance to the Officers of the Customs that the Law required" but was "at a Loss with Respect to the Practice in such Cases, and in some Doubt about the Propriety of lodging the Writs in the Hands of the Officers of the Customs, that for the present the Clerk of the Court should have such Writts ready to fill up when applied for, and that when the Court be informed that the Practice in other Colonies were to lodge such Writs with the Officers of the Customs, they would do the same". Exactly when and how Belcher was persuaded to come round has not been discovered (except that if the newspaper report in note 51 above is to be believed, it was by September 1769). However, among the RG31 and 40 (vol. 8) papers in the Nova Scotia Public Archives are the texts of two writs of assistance, one from England and bearing a date in 1759, and the other issued by the Superior Court of Massachusetts in 1761, in the wake of the celebrated controversy; each indicates that it was copied on April 20, 1768, in Halifax (after which the originals presumably were returned to Boston). It is possible that the Nova Scotia court was persuaded by this evidence of usage in Massachusetts into issuing similarly general writs in 1768 (i.e., well before the circulation of the 1768 De Grey opinion, etc. - cf. notes 49 and 50 and texts above - early in 1769).

The Massachusetts writ had been drafted by Chief Justice Hutchinson (note 50 above, and cf. M. H. Smith, The Writs of Assistance Case (Berkeley, 1978),

pp. 413-14) from an English specimen obtained by William Bollan, the province's agent in London. It could have been exactly that specimen that was copied in Halifax in 1768, for the Halifax copy bears the same endorsement as Bollan himself recounted writing on the writ he sent to Boston in 1761: "N.B. These writs upon any application by the commissrs. of the customs to the proper officer of the court of exchequer are made out of course by him without any affidavit or order of the court" (Smith, op. cit., p. 541). The Massachusetts writ was made out to Charles Paxton of the Boston custom house. Paxton almost certainly was acquainted with the Nova Scotia Chief Justice, Jonathan Belcher, whose father, when Governor of Massachusetts, had been a patron of Paxton. So, not inconceivably, it was through a Belcher-Paxton connection that the Massachusetts documents were seen and copied in Halifax in 1768. Paxton probably had access not only to the records of the Boston custom house but also to any in the Superior Court: he and Chief Justice Hutchinson were old friends.

53. In 1772 the common law wholly held sway in Québec; and the common-law provenance of the customs writ of assistance therefore presented no problem. So too since the Quebec Act of 1774, presumably; inasmuch as the writ partakes of criminal law.

54. PRO T1/492. Requests that the attorneys general of the various colonies apply for writs of assistance on customs officers' behalf first went out in 1769. Such a letter was sent to Phillips Calbeck, Attorney General of the Island of St. John, on October 17, 1772 (Lisle letter-book, note 49 above, fol. 49). That it was addressed to "the Island of St. John Newfoundland" perhaps suggests that earlier letters in similar vein had gone astray. Miscarried mail - what with Saint John, N.B. and St. John's, Nfld. - was a reason for the Island changing its name to Prince Edward Island in 1799.

55. PRO T1/492. On July 10, 1769 the custom-house at St. John's reacted in bafflement to a directive from the commissioners concerning an application for writs of assistance to be made by the Attorney General: "we have never hitherto had such an Officer here"; and similarly again on November 20, 1771.

56. The "deputations" by which the American customs commissioners appointed certain of their subordinate staff recited that the appointee

> hath power ... in the day Time with Writ of Assistants granted by his Majesty's Superior or supreme Court of Justice and taking with him a Constable Headborough or other public Officer next inhabiting, to enter into any House, Shop, Cellar, Warehouse or other place whatsoever: not only within the said Port but within any other Port or place within our Jurisdiction there to make diligent Search and in case of resistance to break open any Door, Trunk, Chest, Pack, Truss or any other parcel or package whatsoever for any Goods, Wares or Merchandizes, prohibited to be exported out of or imported into the said Port, or whereof the Customs or other Duties have not been duly paid: And the same to Seize to his Majesty's use and to put and secure the same in the Warehouse in the Port next to the Place of Seizure....

This recital formed the bulk of what the deputation had to say; and something like it still featured prominently in the United Kingdom customs and excise officer's document of appointment in the mid-twentieth century. (An excellent specimen of the American commissioners' deputation is in the library of the University of New Brunswick.) Cf. Horne v. Boosey (1733), 2 Str. 952.

57. As is indicated by the pro forma BNA writ of 1768-69 reproduced in Appendix C (which stuck to the English original and merely requisitioned assistance), it was not until later - when the remaining North American colonies were again under the distant and comparatively loose regime of the English customs commissioners ? - that the infection of section 10 spread to the writs. That there had been no intention in 1767 to introduce anything substantively new is further illustrated by De Grey's 1768 opinion, which was at pains to put the writs contemplated by section 10 of the Revenue Act of 1767 into the old 1662 framework.

58. PRO Customs 34/280.

59. Public Archives, Canada, RG5 B32. This writ was made out from a pro forma print, deriving from the reign of William IV and the province of Upper Canada; suitable manuscript amendments were incorporated.

60. 6 Geo. 4, c. 114; see note 62 and text, below.

61. Cf. Smith, op. cit., pp. 11-13.

62. Ibid., pp. 15-16, 56-58.

63. 1 Ann. stat. 1, c. 8: only six months at that time, however.

64. 3 & 4 Gul. 4, c. 59.

65. 6 Geo. 4, c. 105.

66. 6 Geo. 4, c. 108, s. 40.

67. 47 Geo. 3, c. 16 (in PRO Customs 34/519). A specimen of the writ of assistance thus bespoken has not been discovered; one speculates whether the reference to an affidavit perhaps did not signify writs good for the one time only. See also note 74 below.

68. 31 Vict., c. 6.

69. Comparable wording provided for excise writ of assistance search in the simultaneous Inland Revenue Act, 31 Vict., c. 8, s. 125.

70. [1965] 2 Ex. C.R. 645 at pp. 651-52.

71. Ibid., p. 652.

72. Notwithstanding its closing words, section 77 cannot be read as obligating assistance beyond the purposes of the Excise Act; the limitation derives from how "officer" is defined in section 2.

73. Note 69 above.

74. The otherwise admirable New Brunswick legislation in 1807 (pages 56-57 above) for writ of assistance search omitted to provide for assistance itself.

75. See page 53 above.

76. See page 71 below.

77. Cf. M. H. Smith, The Writs of Assistance Case, (Berkeley, 1978), p. 130.

78. See Jackett P., as quoted at pages 59-60 above.

79. The Narcotic Control Act and Food and Drugs Act in fact nominate the Minister of National Health and Welfare for this purpose. Since March 22, 1978, however, the responsibility for making application for writs under these statutes - and under the Customs Act and Excise Act - has resided exclusively with the Attorney General of Canada. By virtue of an order in Council (P.C. 1978-732, dated March 9, 1978 and registered March 22, 1978) made pursuant to the Public Service Rearrangement and Transfer of Duties Act, R.S.C. 1970, c. P-34 (which provides, in section 2, that the Governor in Council may "transfer any powers, duties or functions ... from one minister of the Crown to any other minister of the Crown"), responsibility for writ applications pursuant to the Narcotic Control Act and the Food and Drugs Act was transferred from the Minister of National Health and Welfare to the Attorney General of Canada.

80. [1965] 2 Ex. C.R. 645 at pp. 650-51.

81. (1977), 34 C.C.C. (2d) 62. The report was published two years after the judgment.

82. Ibid., at p. 64.

83. Ibid., at p. 63.

84. For the unsatisfactory 12 Car. 2, c. 19 see pages 17, 27-29 above and the reference to it in the closing words of Attorney General De Grey's opinion at Appendix B below. De Grey's successor, Edward Thurlow, also was critical of it: Smith, op. cit., pp. 522-23. Its resurrection, in one guise or another, has proved remarkably permanent and pervasive. In the United Kingdom it continues to coexist with writ of assistance search, as subsections (3), (4), and (5) of section 161 of the Customs and Excise Management Act, 1979 (1979, c. 2). A similar duality is to be seen in current Canadian legislation: Customs Act, sections 134 and 139; Excise

Act, sections 72 and 76; Narcotic Control Act, section 10 (warrant and writ both); Food and Drugs Act, section 37 (similarly). The likeliest explanation for there being two processes more or less duplicating each other, continuing into the late twentieth century and in Canada as well as in England, is nervous hesitation in successive generations of legislators to cut away from a status quo needing too much devilling to get to the bottom of. A fuller treatment of the origins of the warrant/writ relationship than has been possible here is in Smith, op. cit., chapter 4.

85. See pages 9-10 above.

86. The most recent work with some appearance of learning on the subject perhaps is John Phillip Reid, In a Rebellious Spirit (University Park and London: Pennsylvania State University Press, 1979). Mosty it has to do with events in pre-revolutionary Massachusetts, particularly the Malcom episode in 1766 (pages 37-38 above). If judged by the following, its law must be taken with caution. The writ of assistance visited upon Malcom "was, in summary, a search warrant, authorizing customs men during daylight hours to enter and, if necessary, break into warehouses, stores and homes to search for smuggled goods" (p. 25).

87. William Brown, Compendium of the Several Branches of Practice in the Court of Exchequer at Westminster.

88. Footnote (t) to paragraph 61 under title "Revenue" in the third edition of Halsbury's Laws of England (London, 1962) has this:

> A writ of assistance is a document issued by letters patent out of the office of the Queen's Remembrancer in the Central Office of the Supreme Court of Judicature. This writ is not to be confused with the writ of assistance which may be issued in certain circumstances in connexion with execution.... A number of such writs are issued shortly after the commencement of each reign. They remain in force during that reign and for six months thereafter [Cited: the statutory provision since displaced by s. 161(6) of the Customs and Excise Management Act, 1979].

This is probably the most expansive treatment ever to have been accorded to the writ of assistance in an English publication.

89. (1733), 2 Str. 952.

90. (1765), 19 St. Tr. 1002.

91. (1785), 4 Dougl. 339; sub nom. Cooper v. Booth (1785), 3 Esp. 135.

92. (1773), 2 W. Black. 912, 3 Wils. 434.

93. Norfolk Record Office, Norwich: Walsingham (Maton) Papers, WLS IV/17, 202.

94. (1775), 2 W. Black. 1002.

95. (1777), 2 W. Black. 1135.

96. Page 12 above and note.

97. See pages 43-44 above.