Aspects of the Beginning of the American Revolution in Massachusetts Bay, 1760-1762

BY LAWRENCE HENRY GIPSON

IT IS one of the ironies of the history of the old British Empire that William Pitt, the idol of the American colonials, should have been responsible for helping to lay the foundation of what was to become the War for American Independence.

In the midst of the French and Indian War, a phase of what I call the Great War for the Empire, and in the face of what he described some weeks later in a circular letter to the governors of the colonies, under date of August 23, 1760, as "an illegal and most pernicious Trade," Pitt ordered the strict enforcement of the trade and navigation acts, so as to bring those "henious Offenders to the most exemplary and Condign Punishment," who persisted in supplying the enemy with provisions and other necessities, thus protracting "this long and expensive War."[1] What is more, he meant what he said and utilized the navy as well as the customs service to help stamp out this trade.

Unhappily, Pitt, in taking the above step, struck at the very lucrative activities of those who, he felt, were putting self-interest above the welfare of the Empire. The mer-

[1] *Correspondence of William Pitt* . . . (ed. G. S. Kimball, New York, 1906), II, 320–321. In the instructions that were issued to Sir Francis Bernard on March 18, 1760, as the newly appointed Governor of Massachusetts Bay, he was called upon to "be aiding and assisting to the collectors and other officers of our admiralty and customs in putting [the acts of trade] in execution" (Bernard Papers, XIII, 149, 196, Houghton Library, Harvard University).

chants who were involved in this traffic with the French, perhaps not unnaturally, reacted sharply against this attempt to interfere with their commercial activities even in time of war.[2] Indeed, in no other colony—outside of little Rhode Island which was a law unto itself—was the opposition to this Pitt policy of a rigid upholding of the navigation and trade system more powerful and sustained between 1760 and 1775 than in Massachusetts Bay. The basis for it is not far to seek—the long period of laxity of the British government in its failure to see that the trade acts were properly observed before the year in question when the orders were issued. For example, in the so-called "Admiralty Book of Accounts," covering the condemnation proceedings of the court of vice-admiralty within the province between the years 1743–1765, there is no account given of any seizure that was prosecuted in that court between December 13, 1744, and May 16, 1760.[3] This would strongly suggest that cases involving contraband trading between these dates, including trade with the enemy, were settled by the customs officials by the well-known practice of "compounding," without interference of the court.[4] But now under pressure exerted by the Great Commoner, with his eyes fixed on the successful termination of the war, the machinery of law enforcement began to operate with unprecedented vigour, at least in Massachusetts Bay.

[2] For a treatment of the subject of trade with the enemy see Volume VIII of the author's series on *The British Empire before the American Revolution*, pages 78–82; see also the author's *The Coming of the Revolution, 1763–1775* (New York, 1954), pp. 28–34.

[3] With respect to the Admiralty Book of Accounts referred to in the text, it may be noted that the items of expense arising from the sale of the ship *Success* and its cargo on December 13, 1744, recorded on pages 28 and 29 are followed immediately on pages 29–30 by the account of the sale on May 16, 1760, of a quantity of smuggled rum that was seized. Thereafter, until the year 1772 the record of accounts is quite full. The two volumes of Admiralty accounts are in the record room of the Supreme Judicial Court of Suffolk County in Boston.

The May 16, 1760, vice-admiralty proceedings, previously mentioned, involved the seizure of twenty-six hogsheads of rum[5] by Charles Paxton, Surveyor of Customs for the port of Boston, which, after being condemned by the vice-admiralty court, were sold at auction for the sum of £544. Of this sum £178 went to Governor Thomas Pownall, the same amount to the informer and the remainder to "His Majesty".[6] This condemnation was followed by that of a quantity of smuggled tea on May 22[7] and still later in the month by that of a number of barrels of sugar.[8] In June the brigantine *Sarah* and part of her cargo owned by John

[4] The British Commissioners of the Customs, in their report of September 16, 1763, concerning further checks and restraints that might be necessary for Parliament to apply with respect to the problem of collecting duties in the colonies, pointed out that the meager collections of the duties laid on foreign molasses, sugar, and rum by 6 George II, c. 13 would make it appear that they were "either evaded or fraudulently compounded" (P.R.O., Treas. 1. 426:489). As for compounding, the practice involved the local customs officials, who when they seized articles that were smuggled turned them back to the importer after receiving something in the way of payment. The above act provided for penalties of threefold the value of the article (sec. V). It should be added that, doubtless in view of the Customs Commissioners' report, there was embodied in the Sugar Act of 1764 (4 George III, c. 15) a clause (sec. XXXVIII), providing a penalty of £500 and disqualification to serve in any public office in the gift of the King for any customs officer who should accept any bribe or reward for conniving at any false entry of goods into an American port or for any collusive seizure or agreement whereby his Majesty should be defrauded of his duties.

[5] Under terms laid down in the revenue act of 1733, generally called the Molasses Act (6 George II, c. 13), rum and spirits of foreign production imported into America were liable to an import duty of ninepence a gallon. See *Statutes at Large* (Eyre and Strahan, London, 1786), V, 616–619.

[6] Admiralty Book of Accounts, 1743–1765, pp. 29–30. With respect to the portion allotted to the King, £90 was expended in establishing proofs that the rum was smuggled; allowances of five per cent of the value of the seizure as condemnation dues came to £27; the register of the court was awarded three per cent of the same, which came to £16, for receiving and paying out the money brought in by the sale of the rum; the marshall, as vendue master, was given two per cent of its value or £10. With various other items of expense, such as a fee of £10 to the lawyer Benjamin Prat, and charges of £6 for storage, the whole amounted to £186, which was slightly more than the customary one third set aside for the King's use.

[7] *Ibid.*, p. 31.

[8] *Ibid.*

Irvine, Esq., were likewise condemned and sold for £412,[9] and the following month came the seizure and condemnation of a number of chests of tea which were sold for £240. In August the small schooner *Success* was condemned and sold for £121; in November it was eighteen hogsheads of spirits, that were sold for £234,[10] and on February 16, 1761, it was ten chests of tea, that sold for the sum of £566.[11]

It will be noted in this brief survey of Massachusetts Bay vice-admiralty court proceedings covering the period between May, 1760, and February, 1761, that none of the cases recorded up to this point involved the clandestine importation of molasses into the province, although undoubtedly carried on on a vast scale,[12] but rather other

[9] *Ibid.*, p. 32. Irving, according to the records in the Suffolk County court, took on board at Kirkwall in the Orkneys—a great smuggling center—certain goods that had been brought from Holland. For an extended account of this seizure see Suffolk County court files, Volume 486, pages 139–143. It may be a matter of interest that the share of the forfeiture that fell to Governor, amounting to £160, was received from the office of the Register of the vice-admiralty court by Thomas Hancock, acting as Pownall's agent.

[10] *Ibid.*, pp. 33–34.

[11] *Ibid.*, pp. 34–35.

[12] The latest case involving the smuggling of molasses that was tried in the Massachusetts Bay court of vice-admiralty before 1763 occurred in 1742 when Henry Frankland, Collector of Customs at Boston, brought before the court a mariner by name of John Brauh, as an unwilling witness in the suit involving Peter Faneuil and Joshua Botin, mariner, for putting ashore from the snow *Cockey* "Forty Hogsheads of Foreign Molasses belonging to them contrary to the Form of the Statute in that Case provided . . . ." Brauh, doubtless well advised legally, indicated that he himself was an interested party and thereupon delivered to the court in writing a declaration to the effect, that as he was ready to swear that he was interested in the cause and might gain or lose by the event he therefore prayed to be excused from answering further interrogatories upon oath "because no man is obliged by Law to accuse himself." When he persisted in his refusal to be sworn, the marshall of the court was ordered to take "the Body of the said John Brauh and commit him to our Goal in Boston & there Detain him in Safe and Close Custody untill he submit to be Sworn in our said Court . . . or be discharged by order of Law and all our Judges Justices Sheriffs & other of our officers and Liege People are hereby Commended to be aiding and assisting unto you as occasion may require. Hereof, Fail not" (Order to the Marshall of the Court of Vice-Admiralty, December 16, 1742, Stowe Americana, Miscellaneous File, 1670–1813, Huntington Library). As for the subsequent seizure of molasses, the first instance of this recorded in the Admiralty Book of Accounts (p. 63) was when the schooner *Swan* and cargo of molasses was condemned and sold at auction on July 13, 1764.

smuggled goods.[13] Nevertheless, the resentment thus raised by these proceedings, so much against the personal interests of many of the merchants, was not long in expressing itself.

As has already been stated, one third of the forfeitures went to the King's use. This led on December 19, 1760, to a petition by "sundry Inhabitants" to the General Court, in which it was charged that "large Sums of Money due to said Province by Decrees of the Court of Vice-Admiralty, as the Thirds of Forfeitures upon Seizures," had been misappropriated. Later, James Otis, Jr., as counsel for the petitioners was permitted to appear before the House of Representatives and state their grievances. As a result, the House appointed a committee to join with one from the Council to take the petition into consideration.[14] The issue involved that portion of the forfeitures which was the King's share, much of it having hitherto gone to pay informers, but which the House of Representatives now claimed to belong to the province.[15] The amount of this share, involving the first six seizures referred to above, was given as £475.9.11.[16]

It should at this point be mentioned that on June 3, 1760, Thomas Pownall gave up the governorship of Massachusetts

[13] For example, according to the port of Boston Naval Office records in the Public Record Office in London, between the year October, 1754, and October, 1755, only thirteen vessels from the West Indies legally entered the port and declared their molasses, which totalled but 384 hogsheads, all the produce of the British West Indies. Yet, in order to keep in operation the sixty-three distilleries located within the province must have required the importation of a minimum of forty thousand hogsheads a year. See the author's "A Critique of the Papers upon the American Revolution Presented . . . before the American Historical Association, December 30, 1941," *Canadian Historical Review*, XXIII, 38. I have found no evidence that during the course of the war those distilleries ceased operation, nor does there seem to be evidence that those in other colonies, such as Rhode Island, did.

[14] *Journal of the House of Representatives, 1760–1761*, pp. 107, 122.

[15] Thomas Hutchinson, *The History of the Province of Massachusetts Bay from the Year 1750, until June 1774* (London, 1828), p. 89.

[16] *Journal of the House of Representatives, 1760–1761*, pp. 181, 339.

Bay and was succeeded on August 13 by Francis Bernard, who for the preceding two years had been Governor of New Jersey. Bernard, very anxious to avoid a serious conflict with the General Court at the beginning of his administration, was quite prepared to agree with the position taken by the two houses on the question of forfeitures; at the same time he felt that the recovery of the money already due the province required a different procedure than the House had approved.[17] In line with this desire for friendly relations with the General Court, the Governor wrote to the Register of vice-admiralty court requesting that he should not for the future deduct from the King's third any amount paid to informers, which request was thereafter observed.[18] As a result, there is recorded for the first time on April 20, 1761,

[17] The position of the General Court was that the Treasurer of the province, Harrison Gray, should make his demand upon the Register of the court of vice-admiralty for the money in question and, if refused, to bring action at common law. The Governor's position was that until the money had been actually paid to the province it belonged to the King and that under the common law of England the latter could be sued by no other than his Attorney-General. *Ibid.*, pp. 243–245. The money had already been disbursed and the problem was, how to recover it for the use of the province. In July, 1761, the case of "Harrison Gray, Treasurer, versus Paxton, Surveyor and Searcher of the port of Boston" was argued in the inferior court on a claim for £357.1.8 demanded by Gray as the amount of the total sum received by Paxton. A jury decided in favour of Gray and the case was taken on appeal to the Superior Court of Judicature. The case was argued without jury before this court in August, when the judgment of the inferior court was reversed and Paxton was given costs amounting to £4.6.9. The position of the judges was that the action should have been brought by the province and not the Treasurer. Then in January, 1762, suit was again begun against Paxton, this time in the name of the Province of Massachusetts Bay. The inferior court decided again that Paxton must make payment but again the Superior Court, this time employing a jury, reversed the decision and allowed Paxton to recover from the province his costs placed now at £6.1. See the records of the Superior Court of Judicature, 1761–1763, p. 303. The learned jurist Horace Gray indicated, by citing a number of precedents, that the decision given in the case of Gray versus Paxton by the Superior Court was undoubtedly correct. As for the second trial, his position was that the case for the plaintiff, that is, for the province, was very weakly handled and that after Hutchinson had summarized the proceedings for the jury there was little that this body could do except find for the defendant. See *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay between 1761 and 1772* (compiled by Josiah Quincy, edited by S. M. Quincy with an Appendix by Horace Gray, Boston, 1865), pp. 545–552.

[18] See Admiralty Book of Accounts, 1743–1765, under date April 4, 1761, p. 34.

the payment by the vice-admiralty court to the Treasurer of the province's share in the forfeitures.[19]

But this action on the part of the merchants—in appealing to the General Court against the payment of any of the King's share to informers—was but the opening gun against the newly established practice of the seizure and condemnation of articles spirited into the province. The next step involved a challenge of the legal right of the customs officials, in the performance of their duties to summon to their assistance local police officers.

In the temporary statute passed in 1660 by Parliament, entitled "An Act to prevent Frauds and Concealments of his Majesty's Customs and Subsidies," the right of search under a warrant given by the Lord Treasurer or by the Barons of the Exchequer was allowed to customs officers, provided they had the assistance of a sheriff, or justice of the peace, or constable; thereupon, they might enter any Englishman's house in day time, by force, if need be, to seize smuggled goods.[20] In 1662 a permanent statute entitled "An Act for preventing Frauds and regulating abuses in his Majestys customs" was passed and was confirmed by later legislation.[21] It provided that all officers belonging to the admiralty, all commanders of ships and forts, all justices of the peace, mayors, sheriffs, bailiffs, constables, and headboroughs, as well as all other of the King's subjects, should aid the officers of His Majesty's customs in the due

[19] *Ibid.* On April 20, 1761, Gray acknowledged the receipt of £39 from the Register of vice-admiralty court, "being the Province share of the above seizure" of thirteen hogsheads of distilled spirits which were sold after condemnation on November 17, 1760, for a total of £234.3.4. Although the sum was not one third of the total amount by almost one half, the important thing in the eyes of the merchants was that no portion of it was given for information of the illegal entry of the goods forfeited.

[20] 12 Charles II, c. 19, *Statutes at Large* (ed. Eyre and Strahan, London, 1786), III, 169–170.

[21] 13 and 14 Charles II, c. 11, *ibid.*, III, 216–223. This law was confirmed by 1 Anne, st. 1, c. 13, 9 Anne, c. 6, and 3 George I, c. 7, *ibid.*, IV, 95, 406–414; V, 71–78.

execution of every act required of them by law. The above provisions of this statute were then extended in the year 1696 to the colonies in "An Act for preventing Frauds, and regulating abuses in the Plantation Trade."[22]

Whenever a customs officer required assistance, it was expected that he should apply in Great Britain to the Court of Exchequer for a writ, which, when issued, made it mandatory under penalties for those who were called upon, to aid him in the performance of his duties. In the colonies such a writ could be legally granted by any court having powers comparable to that of the Court of Exchequer. In the course of the French and Indian War such writs from time to time were issued in Massachusetts Bay by the judges of the Superior Court of Judicature.[23] For example, this court granted a writ of assistance to Charles Paxton of the port of Boston on August 30, 1755, that was signed by Chief Justice Sewall.[24] Then, at the January term, 1758, a writ was provided for Richard Lechmere of the port of Salem[25] and in April of that year Francis Waldo, collector and surveyor of the port of Falmouth, likewise received one. In his petition Waldo declared

that he cannot fully exercise said office in such manner as his Majesty's service & the Laws in such cases require unless your Honours, who are vested with the power of a Court of Exchequer for this Province will

[22] 7 and 8 William III, c. 22, *ibid.*, III, 584–589.

[23] It may be pointed out that Governor Shirley—doubtless relying upon 12 Charles II c. 19, which provided that warrants to search for concealed goods might be issued in England by "the Lord Treasurer, or any of the Barons of the Exchequer, or Chief Magistrate of the Port or Place where the Offense was committed"—issued a warrant on February 28, 1753, to a customs officer to prevent one Follingworth from trading with the enemy on Cape Breton Island. Later, when his authority to do so was called into question, he directed the officers of the customs to apply for warrants from the Supreme Court. See Thomas Hutchinson, *op. cit.*, pp. 92–93.

[24] For the writ see *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, between 1761 and 1772*, pp. 402–405. This work will be cited subsequently as Quincy's *Reports*.

[25] *Ibid.*, p. 405.

please to grant him a Writ of Assistants; he therefore prays he and his Deputies may be aided in the Execution of said Office within his District by a Writ of Assistants under the seal of the Supreme Court in legal Form and according to Usage in his Majesty's Court of Exchequer in Great Britain.[26]

Thereupon, as a matter of routine, the writ was granted to him without argument or delay.[27] On February 5, 1759, on the petition of James Nevin, Collector and Surveyor of Customs of the port of Piscataqua, one was likewise given without hesitation,[28] as was another issued on March 8 of that year to Thomas Lechmere, Surveyor General for his Majesty's Customs for the Northern District of North America and to his deputies.[29] These writs and others that were granted were in the form of solemn notification to justices of the peace, sheriffs, constables, and others who were law-enforcement officers within the province. After stating the powers conferred by law on the officers of the customs, both on land and sea, they recite:

And whereas in and by act of parliament made in the seventh and eighth year of the reign of the late King William the Third there is granted to the officers for collecting and managing our revenue & inspecting the plantation trade in "our plantations the same power and authorities for visiting and searching . . . ships and . . . houses or warehouses." . . . And whereas in and by an Act of our said Province of Massachusetts Bay made in the eleventh year of the reign of the late King William the third [1700] it is enacted and declared that our Superior Court of Judicature, Court of Assize and General Goal Delivery for our said Province shall have cognizance of all matters and things . . . as fully and amply to all intents and purposes as our Courts of King's Bench, Common Pleas and Exchequer have or ought to have. . . .

[26] Superior Court of Suffolk County, Court Records, 471:127.

[27] There was endorsed on the back of the petition referred to above the following words: "Writ of Assistance issued April 1758 to F. Waldo." It will be noted that Waldo begged for a "Writ of Assistants" and the court granted him a "Writ of Assistance." The latter term is the more usual one, although the two have the same meaning.

[28] Court Records, 476:49.

[29] *Ibid.*, 476:79. During the same court term a writ of assistance was likewise granted to William Sheaf, Collector of the port of Boston. Likewise on March 1, 1760, two writs were issued, one to George Cradock, who took Sheaf's place as Collector at Boston and one to William Walter, Collector at Salem and Marblehead. See Quincy *Reports*, p. 406.

The officers so notified were enjoined to assist the customs officials in possession of such writs in the performance of their duty.[30] It may be mentioned in passing, that when the writs were issued in 1759 and 1760 the whole bench of judges, including Chief Justice Sewall, was present and no dissenting voice was raised so far as the records would indicate.[31]

In fact, it was not until early in 1761, it would appear, that any general movement developed to challenge the use of these writs. By that time Canada had been conquered and British Americans could feel assured respecting the future of North America. The war, nevertheless, continued in the New World with all its fury, with the center of hostilities now transferred to the West Indies, and therefore with the Pitt policy of strict enforcement of the trade laws still being executed in so far as seemed possible with the limited means at hand. Then it was that on the third Tuesday in February a petition, signed by sixty-three merchants, among whom were Thomas Greene, Daniel Malcom, Thomas Boylston, John Tudor, and John Waldo,[32] was presented to the Superior Court of Judicature. It read:

The Petitioners, Inhabitants of the Province of the Massachusetts Bay, Humbly Pray That they may be heard by themselves and counsel upon the Subject of Writs of Assistance & your Petitioners shall (as in Duty bound) ever pray.[33]

The petition was framed at a time when all writs of assistance that had been granted both in Great Britain and America would soon become ineffective as the result of the passing of George II on October 25, 1760. The news of

[30] The writ given above was issued to Nathaniel Hatch, comptroller of the Customs at Boston, on June 2, 1762 (*ibid.*, 573:79). The wording of the writs varied slightly but the substance remains the same.

[31] Josiah Quincy, *op. cit.*, p. 406.

[32] John Waldo is to be distinguished from Francis Waldo, Collector and Surveyor of Falmouth.

[33] Court Records, 573:80.

the death of the King reached Boston on December 27. Under the terms of the law, writs could be used upon the death of the ruler who granted them but six months after his or her demise.[34] It would therefore be necessary for the customs officials to petition for new writs should they feel the need of them. This had been done by Thomas Lechmere, Surveyor-General of the Customs, in behalf of Charles Paxton of the port of Boston. To counter this move was the purpose of the above petition. James Otis, who had been acting as Advocate General of the vice-admiralty court but who had resigned this post, undertook to represent the petitioners.

It was unfortunate that, at a time when many grave problems were to face the provincial government, Chief Justice Stephen Sewall passed away (September 11, 1760) and that to fill the place in the Superior Court of Judicature with some person of tried ability who could be expected to uphold the hands of the Governor in all law-enforcement measures, Lieutenant-Governor Thomas Hutchinson was appointed to the vacancy.[35] For the post, according to John Adams, "had been promised in two former administrations [those of William Shirley and Thomas Pownall], to Colonel James Otis, of Barnstable,"[36] who was Speaker

[34] 1 Anne, st. 1, c. 8, *Statutes at Large* (Eyre and Strahan), IV, 91–92.

[35] While Thomas Hutchinson had not been trained to the law the Hutchinson family had long been prominent in the legal profession and continued to be until the outbreak of the War for American Independence. From 1693 to 1717 Elisha Hutchinson was Chief Justice of the Court of Common Pleas of Suffolk County; Edward Hutchinson, the uncle of Thomas Hutchinson, occupied that post from 1723 to 1731 and from 1740 to 1752; Eliakim Hutchinson, a distant kinsman of Thomas Hutchinson, was also for a time a member of the above court as was Foster Hutchinson, and Thomas Hutchinson, Jr. See Emory Washburn, *Sketches of the Judicial History of Massachusetts*, pp. 318–336. That Hutchinson, who was then Lieutenant Governor, did not apply for the post of Chief Justice or seek it is indicated by a letter written by Judge Peter Oliver to his friend Israel Williams on December 3, 1760. Oliver writes: "The Lieutenant Governor is so diffident of his own fitness that [even] if he could be brought to accept the place . . . I am persuaded he would never move in it" (Williams Papers, II, 118, Mass. Hist. Soc.).

[36] *Works of John Adams* (Boston, 1850–56), II, 124; X, 183.

of the House of Representatives and a popular figure. About his willingness to uphold imperial regulations Bernard, however, had strong misgivings. In fact, the Governor, even had Hutchinson refused the appointment, had, it would appear, determined not to give it to the elder Otis.[37] Writing to his friend Colonel Israel Williams on January 31, 1761, with reference to the post, Hutchinson stated: "Upon the Governor's nominating me to [the] Office, one of the Gentleman's sons who was sollicitous for it swore revenge."[38] Whether or not Hutchinson was correct or whether or not, the younger Otis, according to common report, swore in his anger "that he would set the province in flames, though he perished in the fire,"[39] there is no doubt that he now became the most dangerous opponent that the Governor and the new Chief Justice had to face.

When the petition against the writs of assistance came before the court at its February session in 1761 the council chamber of the Boston Town House was crowded. That the occasion was considered to be a momentous one is indicated by the fact that, according to John Adams, "all the barristers at law of Boston and of the neighbouring county of Middlesex" were present.[40] Otis, as leading counsel for the merchants, was supported by another distinguished Boston lawyer, Oxenbridge Thacher. Opposing them was the government counsel, incidentally a high Mason and "Whig," Jeremiah Gridley, who, in fact, had prepared Otis for the bar. This was Hutchinson's first important case. In fact, he had taken his seat as Chief Justice only on January 27. With him on the bench were his four associates: Benjamin

[37] Thomas Hutchinson, *op. cit.*, pp. 86–88.

[38] Israel Williams Papers, II, 155.

[39] William Tudor, *Life of James Otis* (Boston, 1823), p. 54.

[40] *Works of Adams*, X, 245.

Lynde, John Cushing, Chambers Russell, and Peter Oliver.[41]

Gridley began the argument in support of the request for new writs on the part of the customs service in Massachusetts Bay.[42] His position was simply stated: that without such writs of assistance the customs officials could not properly exercise their office. The use of such writs, he pointed out, was provided for by acts of Parliament. In Great Britain they were issued by the Court of Exchequer and in Massachusetts by the Superior Court of Judicature. The legality of this practice in the province he based upon the statute of 7 and 8 William III, c. 23, which extended to the higher courts of the colonies the authority to issue such

[41] Lynde succeeded Thomas Hutchinson as Chief Justice of the Superior Court of Judicature in 1771 and was in turn succeeded by Peter Oliver. Chambers Russell was also the judge of the court of vice-admiralty.

[42] The most extended account of the Gridley speech that has come to the attention of the writer is to be found in Israel Keith's manuscript volume entitled, "Pleadings, Arguments, Extracts, etc." Keith's home was in Pittsford, Vermont, and he died in 1819. The account he left was printed by Horace Gray in the Appendix to Quincy's *Reports* (pp. 479–481). Keith could not have been present at the trial and have taken notes upon it since he was at the time but nine years of age. The next most extensive account of the Gridley speech is to be found in the "Common-place Book" of the distinguished Massachusetts Bay lawyer Joseph Hawley who passed away in 1788. This commonplace book is in the Manuscript Division, New York Public Library. The Keith version, outside of minor matters, such as punctuation and capitalization, is identical with that left by Hawley. In addition, the Keith version supplies information in two or three instances not to be found in that embodied in the "Common-place Book," which notes omissions in the Gridley argument simply by an "etc.". It is clear that both versions depended on a third or master version. Judge Minot, who published his *Continuation of the History of the Province of Massachusetts Bay* in 1803, quotes word for word the latter part of the speech as given in these two versions. John Adams in later years identified it as his own version, outside of certain passages which were interpolated by Minot (*Works*, II, 523). As for his original notes taken during the trial Adams stated (*ibid.*, II, 124, note): "I took a few minutes in a very careless manner." These rough notes, covering the Gridley speech, were carefully edited and published by Gray (*op. cit.*, 476–477). There is no conflict in the statements made with those in the two versions referred to above. Indeed, the fact that it cited "the 6th of Anne," instead of "1 Anne st. 1, c. 3," for the continuation of all writs six months after the death of the ruling monarch, which error is repeated in both the Keith and Hawley versions, would point to the fact that they both were drawn from an extended version that Adams apparently drew up at the close of the trial. This would then also help to explain the fact that it was "the style" of this extended version of his that some one highly praised in the spring of 1761 (*Works*, II, 125). No one could possibly have praised the style of the rough notes.

writs and was reinforced by another, 1 Anne st. 1. c. 8,[43] which continued in force all writs issued by the Crown in a particular reign six months after the demise of the ruler under whom they were granted. He also cited the provincial statute (11 William III, c. 3),[44] which declared that there should be a Superior Court that would have cognizance of all pleas and of all other matters as fully as the Court of King's Bench, Common Pleas, and Exchequer within his Majesty's Kingdom have or ought to have.

Gridley then turned upon the necessity of the revenue officers having such powers of summoning officers to render "like assistance" as was the custom in England. Without revenue a nation could not protect itself or maintain itself. To apprehend a thief or a murderer, houses may be broken into; a tax collector may under the law of the province distrain an individual's goods and chattels and for want of them arrest him and throw him into prison. But the need for the effectual and speedy collection of public taxes is of infinitely greater moment to the whole nation than the liberty of any individual. Therefore, it was the necessity of the case that justified the writ requested.

Oxenbridge Thacher in opening the rebuttal stated that in searching for precedents "he found no such writ in the ancient books." Then he raised "the most material question . . . whether the practice of the Exchequer was good ground for this Court . . . for in England all informations of uncustomed or prohibited goods were in the Exchequer; so the Custom-House officers were the officers of the court, under the eye and discretion of the Barons, and so accountable for any wanton exercise of power." As for the writ

[43] The above statute, as indicated in the preceding footnote, is incorrectly given in Adams' notes and repeated in the Hawley and Keith versions of Gridley's address, as 6 Anne.

[44] Again, in both the Hawley and Keith versions of the speech, it is incorrectly given as 2 William III, c. 3, but is not mentioned in the Adams notes.

now prayed for, it, once granted, was not returnable. In contrast in "England they seized [goods] at their peril, even with probable cause."[45]

Up to this point the proceedings of the court had been quiet and formal, concerned with technical points in the law. Otis now arose, and spoke, it appears, for between four and five hours. According to the young lawyer, John Adams, who was present, his address was well-organized. With respect to the rights of man he is said to have asserted,

> that every man, merely natural, was an independent sovereign, subject to no law, but the law written on his heart, and revealed to him by his maker. . . . His right to his life, his liberty, no created being could rightfully contest. Nor was his right to his property less incontestable.[46]

Otis thereupon referred—still following Adams' account—to men in society, drawn together "by equal rules and general consent for the mutual defence and security of each individual's right to life, liberty and property." These rights were "inherent, inalienable, and indefeasible by any laws, pacts, contracts, covenants, or stipulations, which man could devise and were wrought into the English constitution as fundamental laws." Then turning to the navigation act of 1660 passed in the reign of Charles II (12 Charles II, c. 18), he emphasized "its narrow, contracted, selfish, and exclusive spirit abounding with penalties and forfeitures, and with bribes to governors and informers, and

[45] For Thacher's argument reproduced by Horace Gray from Adams' notes and carefully edited, see Quincy *Reports*, pp. 46–71.

[46] John Adams to William Tudor, June 1, 1818, *Works*, X, 314–315. Adams wrote this letter in his old age, aided by notes he had taken at the time the speech was made. In commenting in the same letter on Otis' natural rights views, he declared to his friend, whom, incidentally, he had helped to prepare for the law: "Young as I was, and ignorant as I was, I shuddered at the doctrine he taught; and I have all my life time shuddered, and still shudder, at the consequences that may be drawn from these premises" (*ibid.*). For Adams' notes covering the Otis speech, and edited by Horace Gray see the Quincy *Reports* (Appendix, pp. 471–476). There can be little doubt that the above quotation from the speech is fairly accurate in view of very strong statement of natural rights that the General Court, apparently under Otis' guidance, embodied in its instructions to its London Agent the following year to which reference will be made later in this paper.

custom-house officers and naval commanders; but [at least] it imposed no taxes." "Nevertheless, this was one of the acts that were to be carried into strict execution, by these writs of assistance. Houses were to be broken open, and if a piece of Dutch linen could be found, from the cellar to the cock-loft, it was to be seized and become the prey of governors, informers, and majesty." As for the navigation act of 1663 (15 Charles II, c. 7), which provided for the canalization of the trade of the colonies, he called it "an odious instrument of mischief and misery to mankind calculated to fortify by oaths and penalties the tyrannical ordinances . . . ." This act, he stressed, was followed by other similar statutes. "All those rigorous statutes were now to be carried into rigorous execution by the still more rigorous instruments of arbitrary power, 'writs of assistance'."[47] He therefore solemnly declared:

> I will to my dying day . . . oppose all such instruments of slavery on the one hand or villany on the other as this writ of assistance is. . . . And as it is in opposition to a kind of power . . . which in former periods of English history, cost one King of England his head and another his throne—I have taken more pains in this cause than ever I will take again. . . . No acts of parliament can establish such a writ; tho it would be in the very words of the petition 'twould be void. An act against the constitution is void.[48]

According to the version of the speech embodied in the

[47] *Works*, X, 315–316, 319–321.

[48] *Ibid.*, II, 523–525. Charles Francis Adams, the grandson of John Adams and editor of the *Works* of the latter, in presenting the Otis address gave the above version approved by his grandfather (*ibid.*, II, 523). Horace Gray, commenting on this, expressed the view that a study of the notes preserved by Minot and Keith tends to the conviction that in repudiating certain passages embodied in Minot's *History*, the elderly Adams "was guided by his taste rather than by his notes or memory" (Quincy, *Reports*, p. 479). Manifestly, only a small part of a speech lasting between four and five hours could be compressed into less than three pages of a quarto book. It should be noted that Otis in his argument leaned upon such authorities as Sir Edward Coke, who in his famous *Institutes* (1628) and *Reports* (1600–1615) argued that an act of Parliament against equity was void, Sir Matthew Hale, who propounded that there existed a natural law that took precedence over man-made law in his *History of the Common Law* (London, 1713), and Vattel whose work on natural law, *Droit des gens* (Neuchâtel, 1758) also emphasized that there existed a fundamental law that took precedence over all other law. In this connection the student should consult C. F. Mullett, *Fundamental Law and the American Revolution* (New York, 1933).

Joseph Hawley's "Common-place Book," Otis ended his great philippic in declaring: "It is the business of this court to demolish this monster of oppression, & tear into shreds this remnant of Starchamber Tyranny."[49]

The total effect of Otis' great oratorical effort on those who were present must have been very great indeed. According to Adams, "Otis was a flame of fire; with . . . a rapid torrent of impetuous eloquence, he hurried away all before him. . . . Every man of an immense crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there, was the first scene of the first act of opposition, to the arbitrary claims of Great Britain. Then and there, the child Independence, was born."[50]

But to return to the legal principles involved in the application of Lechmere for a renewal of general writs of assistance and the opposition of the Boston merchants to them through their counsel. The contention of the latter was that such general writs were no longer given in England and could therefore not be employed in the colonies. This point had to be given special attention by the court, in view of the implication of the English statute of 1696 (7 and 8 William III, c. 22) extending the use of such writs to America. The only authority available in Boston was a book of precedents published in 1688 which gave such a writ.[51] In view of the uncertainty of the judges, with some of them inclining to refuse the application for the writ,

[49] Manuscript Division, New York Public Library. As was mentioned in the footnote accompanying the Gridley speech, the version of the latter in the Hawley Common-place Book seems to have been derived from an Adams reconstruction of it. The same is also true of the Otis speech.

[50] William Tudor, *op. cit.*, pp. 60–61.

[51] W. Brown, *Compendium of the Several Branches of Practice in the Court of Exchequer at Westminster* (London, 1688), pp. 398–399. The writ itself is mostly in law Latin with here and there such English words as "Headborough," "Vaults," "Warehouses," "Trunks" and "Packs" introduced for clarity.

Hutchinson secured the permission of his colleagues to suspend judgment until information could be secured from Great Britain whether such writs were still employed.[52] If such writs were still used then it was clear that the act of 1696 was still applicable in Massachusetts Bay.

It may be observed in this connection that in 1757 the General Court, while involved in the issue that arose with Lord Loudoun over the question of providing temporary quarters for his troops, had declared:

> The authority of all acts of parliament which concern the colonies, and extend to them, is ever acknowledged in all the courts of law, and made the rule of all judicial proceedings in the province. There is not a member of the general court, and we know no inhabitant within the bounds of the government, that ever questioned this authority.[53]

Moreover, on January 27, 1761, the General Court had also declared: "Every act we make, repugnant to an act of parliament extending to the plantations, is *ipso facto* null and void. . . ."[54]

When therefore the London Agent of the province, William Bollan, had assured the Chief Justice that such general writs were regularly and legally used and had sent over a copy of such a one,[55] there was really nothing that the Superior Court could do but to grant them. The matter, however, was again argued before the Superior Court in their August term with Otis and Thacher speaking against them and Gridley now supported by Auchmuty, in support of their legality. Gridley's concluding agreement, it may

[52] Hutchinson, *op. cit.*; p. 94. The statement made by John Adams in later years that Hutchinson, some days after the argument before the Superior Court, had said that the judges "could not at present see any foundation for the Writ of Assistance" (*Works*, X, 233, 248), was denied by Horace Gray. See Quincy, *Reports*, pp. 416–417.

[53] The address of the General Court is given in full in Hutchinson, *op. cit.*, pp. 65–66.

[54] *Ibid.*, Appendix, p. 463.

[55] Mass. Hist. Soc., *Proceedings*, LIX, 420–421. Such writs are still in use in Great Britain to aid the customs officials. See G. W. Walkins, "Writs of Assistance in England," *ibid.*, LXVI, 357–364.

be mentioned in passing, made the point that the writ should properly be called not a "writ of assistance" but rather a "writ of assistants" since it did not give the customs officers a greater power, but, by requiring a local officer to be present when entering premises, placed a check upon them.[56] At the conclusion of the argument on November 18, 1761, the judges therefore unanimously agreed that an application for such a writ could not be refused.

While the newspapers were silent with respect to the first hearing involving the writs, after the final decision of the Court a writer in the *Boston Gazette*, in its issue of November 23, declared that "this was a Matter in which the Liberty of the People was most nearly interested. . . ." Then, with reference to the arguments advanced in opposition to the writs, he stated "that nothing could have induced me to believe they were not conclusive." He thereupon affirmed that for sixty years after the province had invested the judges of the Superior Court with the power of the Court of Exchequer, it had never been exercised. "The Writ, which was the first instance of their exercising that Power now granted, was never asked for, or if asked, was constantly deny'd for this long Course of Years, until Charles Paxton, Esq., whose Regard for the Liberty and Property of the Subject, as well as the Revenue of the King, is well known, apply'd for it in 1754." Further, in the January 4, 1762, issue of this paper there was a very long article, attributed to Otis,[57] in which the writer stressed, among other things, the point that not only trade would be affected

[56] Hutchinson, *op. cit.*, pp. 56–57.

[57] See Horace Gray in Quincy *Reports*, p. 488. In the article the writer refers to the supposition that some will regard the dangers of the writs as "*mere chimeras* of an overheated brain." In the version of Otis' speech, as given by Judge Minot in his *History of Massachusetts Bay* (II, 96), Otis says, "This wanton exercise of this power is not a chimerical suggestion of a heated brain." There are also other similarities between the article and the speech.

"by this new severity; every householder in this province, will necessarily become *less secure* than he was before this writ had any existence among us. . . . Will any one under *such* circumstances, ever again boast of *british* honor or *british* privilege?" The Court nevertheless, upon application of John Temple, Surveyor General of Customs, on December 2, 1761, granted a writ to Paxton, who, as already indicated, was Surveyor and Searcher of customs at Boston, and then on February 5 of the new year, again on Temple's application, gave one to James Cockle, Collector at Salem.[58]

But the granting of writs of assistance and the effective utilization of them within the province were two distinct things[59]—with the powerful mercantile and seafaring interests in the metropolis almost solidly arrayed against them and those who sought to use them. It is therefore not surprising that Otis, who in violent opposition to them had denied that Parliament could validate them, so far as America was concerned, should have been chosen in the May, 1761, election as one of the four Boston representatives to sit in the provincial House of Representatives. When the news of this event was reported to the conservative Judge Ruggles of the Court of Commons Pleas of Worcester County, he is said to have remarked: "Out of this election will arise a d—d faction, which will shake this province to its foundation."[60]

Ruggles was not far wrong. In vain Bernard pleaded with the members of the General Court on May 26, 1761, to "Lay

[58] Suffolk County Court Records, 573:81–82.

[59] For a broad discussion of writs of assistance as these related to the colonies see O.M. Dickenson, "Writs of Assistance as a Cause of the Revolution," *The Era of the American Revolution* (ed. R. B. Morris, New York, 1939), pp. 40–75.

[60] John Adams, *Works*, X, 248. John Adams, in commenting upon the election of Otis in later years, writes: "Ruggles's foresight reached not beyond his nose, That election has shaken two continents, and will shake all four" (*ibid.*).

aside all Divisions and Distinctions whatsoever" and "to give no Attention to Declamations tending to promote a suspicion of the Civil Rights of the People being in Danger. Such Harrangues might suit well the Reigns of Charles and James, but in the time of the Georges are groundless and unjust."[61] Instead of quiet reigning in the Province such as he found upon arriving the summer of 1760, "great Disorders in the night time" now took place, accompanied by the breaking of windows with "great Stones and Bricks" and other violent acts. This compelled him, likewise in vain, with the advice of the Council, to issue a proclamation on July 9, calling on the justices of the peace, sheriffs, and constables to bring to justice those involved in them and offering a reward for information leading to their conviction.[62]

As for Otis, from the vantage point of a seat in the House of Representatives, with the great prestige that he now enjoyed as a defender of American liberty, he came to exert a powerful influence for some years not only upon the proceedings of the General Court but also upon the course of American events. It is not without significance that in setting forth the rights of the colonies the following year in the instructions drawn up for the guidance of the new London Agent, Jasper Mauduit,[63] the General Court did not fail to include in them the fundamental position accorded to natural rights by Otis in his speech on the writs.[64]

[61] See *Boston News Letter*, June 4, 1761.

[62] *Ibid.*, July 9, 1761.

[63] It was James Otis, who at the desire of the Speaker, his father, wrote to Mauduit congratulating him on his election as London Agent. See Otis to Mauduit, April 23, 1762, *Jasper Mauduit, Agent in London for the Province of the Massachusetts Bay, 1762–1765* (Boston, 1918), p. 29.

[64] Otis was not on the joint committee appointed to frame the general instructions, which was composed of Thomas Hutchinson and James Bowdoin for the Council and Thomas Cushing, Colonel John Phillips, and Royall Tyler for the House. See *ibid.*, p. 39. The influence, however, of his thinking upon its work can hardly be questioned.

At the very beginning of these instructions it was declared:

> The natural rights of the Colonists, we humbly conceive to be the same with those of all other British Subjects, and indeed of all Mankind. The principal of these Rights is to be "freedom from any superior power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule."

Again, in order to elucidate this position, there appears the following statement:

> Our political or Civil Rights will best be understood by beginning at the Foundation, "The Liberty of all Men in Society is to be under no legislative power but that established by Consent in the Commonwealth, nor under the Dominion of any Will or Restraint of any Law, but what such legislative [authority] shall enact, according to the trust put in it. . . . This Liberty is not only the Right of Britons, and British Subjects, but the Right of all Men in Society, and is so inherent, that they Can't give it up without becoming Slaves, by which they forfeit even life itself.[65]

Here, indeed, was a mighty arsenal of natural right to be drawn upon whenever the need should arise to be used against the binding power of British statutes and regulations.

While the revolutionary movement in Massachusetts Bay was still in its incipiency by the beginning of 1762, it would soon gather momentum. For in each passing year, until the outbreak of the War for American Independence, the implication of the declaration of natural rights as set forth by the General Court in 1762 would take on increasing significance; so would, more specifically, Otis' correlative dictum that Parliament was strictly limited in its powers in attempting to extend British regulations to the American colonies.

[65] For these instructions, adopted on June 14, 1762, see *ibid.*, pp. 39–54.