



1923

# THE PREROGATIVE WRITS IN ENGLISH LAW

EDWARD JENKS

Follow this and additional works at: <http://digitalcommons.law.yale.edu/ylj>

## Recommended Citation

EDWARD JENKS, *THE PREROGATIVE WRITS IN ENGLISH LAW*, 32 *Yale L.J.* (1923).  
Available at: <http://digitalcommons.law.yale.edu/ylj/vol32/iss6/1>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

# YALE LAW JOURNAL

Vol. XXXII

APRIL, 1923

No. 6

## THE PREROGATIVE WRITS IN ENGLISH LAW

EDWARD JENKS, D.C.L.

As is well known, the *breve*, or "writ," was originally a short written command issued by a person in authority, and "tested" or sealed by him in proof of its genuineness. In the days when writing was a rare art, the fact that a command was written was in itself a feature which distinguished a "writ" from a mere hasty spoken command, the receipt of which, or its terms, could be denied or questioned. By a process familiar in other branches of social economy—coinage, measures of weight and distance, the maintenance of "the peace," the organization of offices, and the like—the King's writ, soon after the Norman Conquest and the establishment of a strong, centralized monarchy, swallowed up, as it were, all the rival and inferior writs; and when people spoke of a "writ" they soon thought exclusively of the King's writ, just as a "shilling" came to mean exclusively a King's shilling, and a "chancellor" or "judge" (though other authorities had chancellors and judges) meant, unless the contrary was stated, the King's Chancellor, or one of his judges.

But even with this restriction, the "writ" took many forms. It was used to summon the feudal array, to assess taxes, to commence an action at law, to summon jurors, to ennoble a commoner, to levy fines and purveyance, to appoint a chief justice, to authorize a sheriff to seize the goods of a debtor, and so on. The writs of most interest to lawyers are naturally those which were used in the course of legal proceedings. Some of the "writs original," which were, after the twelfth century, the normal method of commencing a civil action in the King's courts, soon became *de cursu*, or, as it was sometimes put, "ministerial," that is, they could be obtained<sup>1</sup> by any one who chose to pay the appropriate fee. Thus the *Registrum Brevium: tam Originalium quam Judi-*

<sup>1</sup> A typical metamorphosis of a common word appears in the practice, almost universal, of describing the plaintiff as "issuing" a writ. Of course it is the chancery office or the court that issues the writ, on the application of the plaintiff. Medieval forms, more correctly, spoke of "purchasing" a writ.

*cialium* became the handbook of the practitioner in the royal tribunals; and its history is of vital importance in tracing the development of the common law.<sup>2</sup> But some writs were never *de cursu*; they were at first never issued except to carry out the direct purposes of the Crown, or, later, as a special favour, to place at the disposal of some specially favoured suitor the peculiar remedies of the Crown.

It is the fashion to speak of the *Habeas Corpus* as a "common law" writ. If by this phrase it is merely intended to suggest that long before the passing of the earliest of the *Habeas Corpus* Acts<sup>3</sup> in the year 1640 the writ was familiar to lawyers, the suggestion is both true and obvious. The statutes treat the writ as a thing well known; though the most famous of them all, the Act of 1679,<sup>4</sup> reveals the fact that there were many obscurities and anomalies in the use of it which only Parliament could sweep away. But if by the phrase "common-law writ" it is intended to suggest that the *Habeas Corpus* was a remedy descending from ancient popular custom, then the phrase is quite misleading. The writ bears upon the face of it its character as a royal command; and it so happens, that we can probably indicate, with almost complete accuracy, its earliest use. This appears in the famous Royal Ordinance or Assise of Clarendon, issued by Henry II in 1166. As is well known, that Ordinance, by establishing the institution of the grand jury in regular form, laid the basis of the true English criminal law, that is, the law in which, after a "presentment" by a local jury of an offence committed against The Peace of "Our Lord the King, His Crown and His Dignity," the King's officer proceeds to "indict" or accuse the alleged offender before the King's Justices. Save for the gradual evolution of the petty jury, or "jury of deliverance," as a substitute for the ancient and discarded methods of trial by ordeal or clearing oath, the procedure in an English criminal trial for an indictable offence has not changed in essence since the issue of the famous Ordinance of 1166, though the preliminary procedure of apprehending and detaining the accused has been taken from the sheriff, and handed over to the justices of the peace and their subordinates, the police.

Now in clause 4 of the common printed versions of this Clarendon Ordinance, the King is dealing with the case of accused persons captured and held for trial at a time when the Justices of the King do not happen to be in the county and there is no immediate prospect of

<sup>2</sup> It is hardly necessary to refer American readers to the brilliant articles of the late Professor Maitland on *The History of the Register of Original Writs*, which appeared in (1890) 3 HARV. L. REV. 97, 167, 212, and are reprinted in 2 Maitland, *Collected Papers* (1911) 110-173, and in 2 *Select Essays in Anglo-American Legal History* (1908) 549-596. They are the foundation of all sound knowledge of the subject.

<sup>3</sup> 16 Car. I, c. 10.

<sup>4</sup> 31 Car. II, c. 2.

their arrival. He directs that word shall be sent by the sheriff to the nearest Justice, and that the latter shall inform the sheriff in reply of the place where he wishes the accused to be brought before him. In other words, the sheriff is commanded to "have the bodies" of the accused before the Justice (doubtless on a day named); the accused in the meanwhile to be kept in one of the new gaols ordered by the Assise (clause 7) to be built for the purpose in every county, in some borough or royal castle, at the King's expense, and if possible of the King's timber. Such messages to and fro must soon have become a regular feature of every circuit of the King's judges; and the orders sent by the Judges in the King's name would naturally acquire the name of 'writs.' It seems hardly too much to assume that this message under the Ordinance crystallized into the later *Habeas Corpus ad respondendum* which appears in the classical edition of the *Register*.<sup>5</sup> And it is well known that the writ of *Habeas Corpus* was used (under the more familiar name of *Capias*) as the order of arrest on mesne process in civil actions, which developed in the fourteenth and fifteenth centuries; also to give effect, by seizure of an unsuccessful litigant's body, to the judgment pronounced against him.<sup>6</sup> This real abuse of arrest on mesne or final civil process was not abolished until, largely owing to the efforts of the novelist, Charles Dickens, it was practically swept away in 1869.

Meanwhile, there is clear evidence in the common books that the writ of *Habeas Corpus* was freely used in the fifteenth and sixteenth centuries to decide claims of privilege, that is, exemption from jurisdiction. Such exemptions were, as is well known, a conspicuous feature of medieval law; and if, for example, an official of the Common Pleas Court were sued in another court, it was a natural step for him to gain a point over his adversary by getting a *Habeas Corpus* from his own tribunal, directed to the sheriff or other custodian of his body, bidding him "have the body" of the privileged person before his own court on a given day. Presumably the pretext was that his own court required the attendance of its official; and some of the difficulties afterwards arising in the use of the writ were doubtless due to the character of this fiction.<sup>7</sup>

<sup>5</sup> *Registrum Brevium: tam Originalium quam Judicialium* (Theloall ed. 1687). In the *Registrum Judicialium*, at f. 76: "Rex vicecomiti salutem. Praecipimus tibi sub poena 40 lib. quod *corpus* T. capti in prisona nostra de K. in custodia tua detenti, prout in 15 Hillarii nobis retornasti sub salva &c, *habeas* coram nobis tali die ubicunque &c, ad respondendum nobis de diversis felonis et transgressionibus unde indictatus est. (And, look here, we find you 100/— for your fool return.)"

<sup>6</sup> Both forms are given in Theloall's *Register*, *supra* note 5 (ff. 1 and 21). Each contains the words "*habeas corpus*."

<sup>7</sup> See this point worked out in the writer's *Story of the Habeas Corpus* (1902) 18 L. QUART. REV. 64. It was the view of Coke (2 *Inst.* 52) that the King's Bench and the Chancery had jurisdiction to issue the *Habeas Corpus* in all cases; the Common Pleas and Exchequer only in cases of privilege. But, even if the

Then, as is also well known, in the sixteenth century the common lawyers who were waging the battle of liberty against the Crown made powerful use of the *Habeas Corpus* to test the validity of imprisonment by their rivals, the Court of Star Chamber and the other Tudor "prerogative" courts, as well as the validity of arbitrary arrest by the Privy Council or its members, who were the upholders of the power of the Executive. The story of that struggle is too long to tell here;<sup>8</sup> but, briefly, it culminated in the famous clause of the statute of 1640,<sup>9</sup> which guaranteed to every one imprisoned by order of the Star Chamber, on warrant or order of the King, the Privy Council, or any of the members of that Council, his full right to a *Habeas Corpus*, which would involve a solemn adjudication by the court issuing the writ of the validity of his imprisonment. The Act of 1640, one of the great achievements of the Long Parliament on the eve of the Civil War—marks the final triumph of the *Habeas Corpus* as an assertion of popular liberties against the Crown. The better known Act of 1679,<sup>10</sup> valuable as it was, was mainly concerned with defects in procedure. But the Act of 1640 is remarkable as establishing the only exception known to English law to the great rule that a judge is not answerable at the suit of a private litigant for alleged misconduct in office. Any judge, be he the highest in the land, who, being applied to when the courts are not sitting, improperly "denies" the grant of a *Habeas Corpus* to a qualified applicant, is liable to a fine of £500, payable to the party aggrieved.<sup>11</sup>

Thus we have seen, that a writ which was originally invented to further an ordinary step in judicial proceedings, had become, by the end of the seventeenth century, one of the most powerful engines of popular liberty. But yet another development claims our attention.

Even before the passing of the Act of 1679, it had occurred to various persons that the famous writ might conveniently be used to test the legality, not merely of State action, but of private authority. True, where abuse of private authority had resulted in wrongful detention, there lay the ordinary common-law action of false imprisonment. But such a proceeding might be tedious, while the immediate need was for

---

plea of privilege broke down, these courts would naturally shrink from remanding a prisoner to a custody manifestly illegal; and so they too, at any rate later, assumed a general jurisdiction to protect the liberty of the subject. At least this was the view of Vaughan, C. J., in the celebrated *Bushell's Case* (1671, C. P.) Vaughan, 135, 156.

<sup>8</sup> See Jenks, *op. cit.* at pp. 73-76. By the date of *Bushell's Case*, *supra* note 7, in the words of the Chief Justice, at p. 136: "The writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it." The older remedy of the writ *de homine replegiando* had proved valueless against the royal prerogative, for reasons which will be obvious to anyone who looks at it.

<sup>9</sup> 16 Car. I, c. 10, sec. 8.

<sup>10</sup> *Supra* note 4.

<sup>11</sup> 16 Car. I, c. 10, sec. 6.

speedy remedy. Accordingly, in the year 1675, when Sir Robert Vyner,<sup>12</sup> then Lord Mayor of London, declined to give up the custody of a wealthy city heiress of tender years to her lawful guardian, the latter obtained the issue of a writ of *Habeas Corpus* against Sir Robert, who was compelled to produce the young lady in court, though the damsel disappointed her affectionate relative by publicly proclaiming her preference for the society of the Lord Mayor. Other cases of about the same date show us that the writ was being freely used to settle matrimonial and other family disputes;<sup>13</sup> and, ever since the Revolution of 1688, it has been a commonplace of English law, that any restraint of liberty, whether by the State or by a private person, can be promptly and effectively tested by means of this summary process. The great Chief Justice of the Revolution, Sir John Holt, actually allowed it to be issued to try the validity of his own warrants.<sup>14</sup>

But, as the writer is inclined to think, the political importance of the *Habeas Corpus* has somewhat obscured the almost equally suggestive history of the other members of the so-called "prerogative" group—the Prohibition, the *Quo Warranto*, the *Certiorari*, and the *Mandamus*. A few words about these writs may not be amiss.

The *Quo Warranto* and the Prohibition appear to be "prerogative" in the strictest sense. They are both very old; and both date from the critical years of the thirteenth century, when the newly consolidated State was entering upon its struggle with rival jurisdictions for the sole custody of the Fount of Justice. The *Quo Warranto* is a statutory writ invented to try the validity of the feudal franchises. It took its rise in the great Statute of Gloucester of 1278, which initiated the sweeping reforms of the English Justinian; and, after the long and acrimonious enquiry which resulted in the compilation of the Hundred Rolls, and the concession of the "time whereof the memory of man," etc.,<sup>15</sup> it was consecrated as an established form, "to be awarded as an original out of the chancery," in 1301, when the old reformer, his great life's work done, was passing to his grave.<sup>16</sup> The paraphrase of Edward's statutes given in Britton<sup>17</sup> makes it fairly clear that the *Quo Warranto* was originally intended solely as a royal weapon; and it is worthy of notice that (seemingly) it does not appear in the ordinary printed *Register*. But it is equally clear that, at a later time, by the process of "informing" the royal officials of an alleged usurpation, a private person could make use of the writ; and though "informations" became unpopular after the

<sup>12</sup> *Rex v. Viner* (1675, K. B.) 2 Levinz, 128.

<sup>13</sup> *Rex v. Lee* (1675, K. B.) 2 Levinz, 128.

<sup>14</sup> *Rex v. Fowler* (1700, K. B.) Holt, 334.

<sup>15</sup> See the two statutes of 1290 ("before the time of King Richard our cousin, or in all his time").

<sup>16</sup> See the New Statute of *Quo Warranto* (30 Edw. I).

<sup>17</sup> Blk. I, ch. 20, sec. 3.

Restoration,<sup>18</sup> and were definitely checked at the Revolution,<sup>19</sup> the information in the nature of a *Quo Warranto*" took its place during the eighteenth century as a process open to the ordinary citizen. Though it could not be issued strictly as "of course," it was exhibited with leave of the courts at the relation of any person or persons desirous to sue or prosecute the same.<sup>20</sup>

The Prohibition was the special weapon of the King's courts against the ecclesiastical tribunals. Its scope, though varying from century to century, was more or less settled for pre-Reformation times by certain apocryphal statutes of the early fourteenth century—the so-called *Articuli Cleri*<sup>21</sup> and the Articles against Prohibitions.<sup>22</sup> Unlike the *Quo Warranto*, it appears in the ordinary *Register of Originals*; and it is quite clear that, from the very first, the royal judges relied largely on the private litigant to start proceedings under it.<sup>23</sup> Still, the fiction, of its prerogative character was kept up by a requirement that the party applying by "suggestion" should allege that the King's interest was threatened, until the year 1831, when it was formally abolished by statute.<sup>24</sup> After that step it became easy to apply the writ to all cases of exceeded jurisdiction in inferior tribunals, whether royal or not; and the writ is at the present day an ordinary means of deciding questions of jurisdiction. But it is significant that, unlike most of the so-called "prerogative writs," the Prohibition has always been, according to the better opinion, *ex debito justitiæ*, when the excess of jurisdiction is clear.<sup>25</sup>

The numerous writs of *Certiorari* given in the *Register* make it difficult to summarize the purposes for which the procedure was originally designed. It was largely concerned with documents, and especially those very important documents which were known as "records." The "Originals" collected in the *Register*<sup>26</sup> appear to deal merely with the

<sup>18</sup> In *Piper v. Dennis* (1691, K. B.) Holt, 170, the King's Bench went so far as to hold that a new charter granted by James II to Liskeard in Cornwall was void as being given on consideration of a void surrender (during the Restoration purges).

<sup>19</sup> (1692) 4 & 5 W. & M. c. 18, sec. 2 (held in *Rex v. Hertford* (1700, K. B.) 1 Salk. 376, to apply to *Quo Warranto* proceedings).

<sup>20</sup> (1710) 9 Anne, c. 20.

<sup>21</sup> Listed as (1315) 9 Edw. II.

<sup>22</sup> Stat. *inc. temp.* In spite of its title, this document also favors the royal pretensions. On the other hand, the so-called statute *Circumspecte Agatis*, attributed to Edward I, is more favorable to the Church.

<sup>23</sup> See *Articuli Cleri*, *supra* note 21, c. 1.

<sup>24</sup> 1 Will. IV, c. 31.

<sup>25</sup> See the discussion in the modern case of *Farquharson v. Morgan* [1894] 1 Q. B. 552. Of course it is not suggested that the ministerial officers of the Crown are entrusted with the power of handing out Prohibitions on payments of fees. The leave of the court is required.

<sup>26</sup> *Supra* note 5, at ff. 283-287. Other specimens are scattered about.

internal ramifications of the vast system of administration which had grown up out of the *Curia Regis* of the twelfth century, and whose limbs, stretched out like tentacles over the land, appeared to have lost touch with one another. One point is worthy of remark. Unlike the ordinary "Originals" which start civil proceedings, the *Certiorari* is seldom addressed to the sheriff;<sup>27</sup> it goes to justices of assize, escheators, coroners, chief justices, treasurers and Barons of the Exchequer, mayors of boroughs, the clerk of the Common Bench, bidding them send records in their custody, or certify the contents thereof. Some of these records were of pending proceedings; and then, what more easy than for the authority to which the record was handed to continue the proceedings itself?

That is in fact the way in which the *Certiorari* comes into the group of prerogative writs. There may be cases in which a local or inferior court, though not attempting to exceed its jurisdiction, is manifestly unsuitable as a tribunal for a particular case. Middle-aged lawyers can easily remember more than one *cause célèbre* which has been removed from its natural venue at Assizes because no local jury could be trusted to give an impartial verdict.<sup>28</sup> Apparently in the later sixteenth century the writ was granted very much as "of course"; for there are clear traces of an unscrupulous practice, adopted by persons indicted at Quarter Sessions, of procuring the removal of the indictment by *Certiorari* to the King's Bench, in the well-grounded hope that the prosecution would not face the trouble and expense of a trial at Assizes. This practice was checked by a series of seventeenth century statutes;<sup>29</sup> and it is now regarded as settled that, while *Certiorari* to remove an indictment is granted as of course on the application of a Law Officer, the private applicant, even though he is carrying on proceedings in the name of the Crown, must satisfy the court that there is a substantial ground for the exercise of its discretion.<sup>30</sup> Thus, in a very real sense, the *Certiorari* is a prerogative writ.

The *Mandamus* is perhaps the most puzzling of all the prerogative writs. It is very doubtful whether any writ specifically known by that name is to be found in the common *Register*,<sup>31</sup> though of course the

<sup>27</sup> Except, apparently, when he was acting in the place of the coroner (see *ibid.*, f. 284 *dors.*) or was a municipal officer (f. 286 *dors.*).

<sup>28</sup> The *Certiorari* can also be used, in effect, to lodge an appeal in numerous cases where no direct appeal lies [see Short & Mellor, *Practice on the Crown Side* (2d ed. 1908) 29-81]. But these have little "prerogative" significance.

<sup>29</sup> (1623) 21 Jac. I, c. 8; (1670) 22 Car. II, c. 12, sec. 4; (1694) 5 & 6 W. & M. c. 11.

<sup>30</sup> Crown Office Rules, 1906, No. 12.

<sup>31</sup> There is a writ in the printed *Register*, *supra* note 5, at f. 293, which bears in the margin the word "*Mandamus*." It is a common order to one of the King's escheators on a purely fiscal matter; and the word *Mandamus* does not appear in it. A similar writ appears on f. 295 *dors.* (The King is very annoyed with a



words "*mandatum est*," or their equivalents, appear, naturally enough, over and over again in a collection into which, as Maitland reminds us in his celebrated articles, "fiscal or administrative writs have obtained admission among the writs by which litigation is begun."<sup>32</sup> Naturally the autocratic head of a vast administrative system will have occasion to "*mandamus*" his subordinates many times in the course of a day. Such orders are very different things from the prerogative writ of *Mandamus* whereby, on the application of a party grieved, a public body or official will be ordered to perform a public duty.

By tradition this important writ of *Mandamus* is one of the numerous contributions of Sir Edward Coke to the efficiency and dignity of the King's Bench,<sup>33</sup> to the headship of which he had been transferred by way of penalty from the lower but more lucrative seat of the Common Pleas. The case in question is *Bagg's Case*, in 1616, a dispute over an election at Plymouth.<sup>34</sup> The case is reported by Coke himself and contains the writ in full. It is clearly no "Original"; for, mercifully, the *teste* is not abridged, and we see that it is in the name of the Chief Justice himself. The Mayor and Commonalty are bidden to restore James Bagg to the office of "capital burgess," from which he has been unjustly amoved (*ut dicitur*) "or that you signify the cause thereof to us." In other words, the question is raised whether the action of the corporation has been lawful. They are to make a return which will give their side of the case. The court will then have the parties before it; and if it considers the complainant's grievance sound, it will issue a "peremptory writ," that is, a mere executive order, to be obeyed under pain of fine and imprisonment. In other words, the unpopular Chief Justice simply takes the King's prerogative into his own hand, and uses it against a recalcitrant body professing to act under a Crown charter.

*Bagg's Case*, as has been said, has ever since been regarded as the well-head of *Mandamus*.<sup>35</sup> Naturally enough, after the high-handed action of Jeffreys, C. J., the unscrupulous agent of Charles II and his successor, had set the kingdom in a blaze by his *Quo Warranto* tour among the Puritan boroughs, the Whigs, so soon as they had brought the Revolution safely into port, bethought them of the famous precedent of Coke. Accordingly, when the packed corporations of Charles

---

widow who has taken a corporal oath not to re-marry without the royal license, and hasn't kept her oath.) Here again the marginal word "*Mandamus*" seems to be a mere freak of the scribe.

<sup>32</sup> 2 *Collected Papers* (1911) 150.

<sup>33</sup> Of course it has also been attributed to *Magna Carta*. But that is common form.

<sup>34</sup> 11 Co. Rep. 93.

<sup>35</sup> See the remarks of Powys, J., in *The Queen v. Heathcote* (1713, Q. B.) 10 Mod. 48, 57. This was one of the many moves in the quarrel between the Court and the City.

and James endeavored, despite the Toleration Act, still to exclude Whig candidates from municipal office, the latter countered with writs of *Mandamus*.<sup>36</sup> Holt, the great Chief Justice of the Revolution, took up again the work of Coke, and framed the scope of *Mandamus* on the lines since followed. "The true reason of *Mandamus* was," said he in the *Case of Andover*,<sup>37</sup> "when Aldermen, Capital Burgesses, or such other Officers concerning the Administration of Justice, were kept out, to swear them into, or at least restore them into, their places . . . and it is rare to grant it when one has any other remedy." Ten years before,<sup>38</sup> he had defined the writ as being applicable only to "something concerning the publick," and had refused to allow it to be used to restore a Fellow of a College, a proctor,<sup>39</sup> or the steward of a manor.<sup>40</sup>

Since Holt's day, the scope of the writ has been considerably extended; and it is no longer confined to the correction of municipal irregularities. But the essentials laid down by Coke and Holt have been preserved.

The above disjointed remarks appear to have no moral; but I would like in conclusion to range them up against a question which has bothered me a good deal, and of which, frankly, I see no complete solution. Is there a scientific classification of writs?

According to the well known passage in Bracton's great work,<sup>41</sup> writs are either (a) original or (b) judicial; "originals" are either (a) patent or (b) close; or they are (a) "of course" or (b) "magisterial"; or they are (a) "real" or (b) "personal" or (c) "mixed." With a medieval writer, it is usually difficult to tell whether his divisions are "sub" or "cross"; but, I take it that Bracton's three sub-divisions of "originals" are alternative. Anyhow, I do not propose to deal with them. But I should like to say something about the division of writs into "original" and "judicial"; because I think it leads to the nearest approach to a moral that can be found for these rambling observations.

Bracton, in the passage referred to, describes a judicial writ as "following out of" (original writs);<sup>42</sup> and *Britton*, the anonymous treatise largely founded upon Bracton's great work, obviously echoes this in alluding casually to a judicial writ as "issuing out of an original."<sup>43</sup> By the time the *Register* appeared in print (mid-sixteenth

<sup>36</sup> See the allusion in Lord Mansfield's judgment in *The King v. Barker* (1765, K. B.) 1 W. Bl. 352.

<sup>37</sup> (1701, K. B.) Holt, 442.

<sup>38</sup> *Parkinson's Case* (1689, K. B.) Holt, 143.

<sup>39</sup> *The King v. Otenden* (1691, K. B.) Holt, 435.

<sup>40</sup> *Parkinson's Case*, *supra* note 38.

<sup>41</sup> *De Legibus et Consuetudinibus Angliæ*, f. 413.

<sup>42</sup> "Sunt etiam brevia ex eis sequentia quae dicuntur judicialia."

<sup>43</sup> Bk. 2, ch. 19, sec. 1. "Mes ja pur nul bref judicial issuant de nuli original ne remeygne la assise." The author's bad French has misled his translator, Nichols, rather seriously.

century), the division had been accepted; and it is treated as commonplace in a nearly contemporary statute, the well known Act of 1535 abolishing franchises.<sup>44</sup>

Our best authorities assume that for the practitioner the technical distinction between "original" and "judicial" writs is that, while the former issued out of the chancery (not, of course, the court, but the office) under the Great Seal, the latter issued out of the court in which the proceedings had been begun, under the seal of that court.<sup>45</sup> The difference may appear to be trifling; but it will be remembered that Bracton treats writs "of course" as a subdivision only of "originals," that is, no judicial writs were "of course." Therefore, the court which issued them always retained a discretion as to their issue. Moreover, although until the end of the seventeenth century chancellor and judges were alike the King's servants in the strict sense, without security of tenure or independence, yet speedily thereafter came the famous clause of the Act of Settlement which made the law courts a real independent estate of the realm, holding the balance of justice equally between King and subject, and establishing firmly the great principle of the Rule of Law.<sup>46</sup> Then indeed it became of vital importance that the writs by which the liberty of the subject was protected should be really "judicial"; and it may be that Coke builded more surely than he knew when, in *Bagg's Case*,<sup>47</sup> he made it clear that the court, and the court alone, controlled the issue of the *Mandamus*.<sup>48</sup> Perhaps he is really the author of the explicit law now embodied in Rule No. 212 of the Crown Office Rules of 1906: "Every writ [sc. on the Crown side] except as otherwise by these Rules provided shall . . . be tested at the Royal Courts of Justice, London, in the name of the Lord Chief Justice of England." But what a curious requirement for a "prerogative" writ!

Further, let us for one moment see how far, if we apply the historical test, the modern "prerogative" writ falls under the category of "judicial." Turning once more to the printed *Register*, we get, to all appearance, the following curious results: The *Mandamus* and the *Quo Warranto* are not in the *Register* at all. The Prohibition appears as an "Original." The *Certiorari* is both "original" and "judicial." The

<sup>44</sup> 27 Hen. VIII, c. 24, sec. 3.

<sup>45</sup> Cf. 1 Pollock & Maitland, *History of English Law before the Time of Edward I.* (2d ed. 1905) 193-194. One of the many annoying things about the printed *Register*, *supra* note 5, is that, whereas it shows us that "originals" were always "tested" in the King's name ("teste meipso"), when we come to the judicial writs, we are given a bare "T &c."

<sup>46</sup> (1700) 12 & 13 Will. III, c. 2, sec. 3 ("That, after the said limitation shall take effect as aforesaid, Judges Commissions be made *Quamdiu se bene gesserint*, and their salaries ascertained and established.")

<sup>47</sup> *Supra* note 34.

<sup>48</sup> Of course, all writs opened in the King's name. ("The King to the sheriff. Greeting.")

*Habeas Corpus* is purely "judicial." This seems to be pretty hopeless; and it would take too long to attempt to unravel the mystery. But if I were asked to define a "prerogative" writ, I should reply somewhat as follows:

There is no definition. That is not how we do things. But I have a faint idea what happened. Towards the end of the sixteenth century, the shrewder heads of the Parliamentary party, many of them lawyers, set to work to devise checks upon the exaggerated Tudor Executive, and found the *Corpus cum causa* most valuable for their purpose, not least because it did not require the affixing of the Great Seal by a Minister of State. So triumphantly successful was this step, that the *Habeas Corpus* threatened to rival trial by jury, only just then emerging into popularity, as the Palladium of British Liberty. The subservient judges of the later Stuarts, however, made it plain that the *Habeas Corpus* alone was not sufficient to protect popular liberties, which could be threatened by other methods than imprisonment. Consequently, their successors after the Revolution cast about for means to extend the principle of the *Habeas Corpus* to other suitable writs. The Prohibition gave them little difficulty; though it was clearly an "original" writ, which should normally have issued out of the chancery. But, so clearly had it been intended from the earliest days to be at the disposal of the subject, that the industrious Rolle had no difficulty in unearthing an old petition of 1290<sup>49</sup> in reply to which the King had apparently given leave both to the Chancellor and the Chief Justice to issue it. The *Mandamus* had the authority of Coke, though it was not in the *Register*.<sup>50</sup> Informations were not popular after the Revolution; but the Information in the Nature of a *Quo Warranto* had been freely used by the later Stuarts, and could hardly be declared illegal by their successors.<sup>51</sup> The "judicial" character of *Certiorari* sufficiently appeared from the *Register*. Thus, in the half-century following the Revolution, the judges, to the great advantage of the public, annexed from the Executive a whole area of authority. But why should they label their new remedies "prerogative"?

I am not satisfied that they did. It would be rash to make an assertion involving the proof of a negative. But we must remember that,

<sup>49</sup> 2 *Abridgement*, 316 (H). The entry of 1290 may be found in 1 *Rotuli Parliamentorum* [1278-1503] (ed. circ. 1780) 47. "Many of the people supplicate Our Lord the King and his Council, that there may be assigned some of the Council who can decide and order the ecclesiastical judges in what cases they ought to supersede by reason of a Prohibition, and in what cases to proceed, notwithstanding the Prohibition."

(Reply) "The Chancellor or the Chief Justice may have power therein."

The judicious reader must decide for himself whether the entry of 1290 justifies Rolle's deduction.

<sup>50</sup> *Supra* page 529 of the text, and note 31.

<sup>51</sup> It was finally declared by the Judicature Act of 1884, 47 & 48 Vict. c. 61, sec. 15, to be a civil proceeding for all purposes.

with the accession of the youthful George III, the lukewarm indifference with which the country had tolerated the occupants of the throne since the Revolution, was changed into an enthusiastic welcome for the first native-born ruler who had worn the Crown since 1688. In that enthusiasm (alas! too soon to be dissipated) it became the fashion to attribute all good things to a benevolent monarch; and the "high prerogative writ" appears in legal literature. The conspicuous example is, of course, Blackstone;<sup>52</sup> but the even greater authority of Lord Mansfield led the way. With him the *Mandamus*, if not "an high prerogative Writ," is at least "a prerogative writ";<sup>53</sup> and the laudatory addition "high" would come naturally from Blackstone, always a little inclined to the florid, and full of admiration for the young Prince who had been brought up on his (Blackstone's) famous lectures.<sup>54</sup>

All which is extremely English.

---

<sup>52</sup> 3 *Commentaries*, \*131.

<sup>53</sup> *The King v. Barker*, *supra* note 36; *The King v. University of Cambridge* (1765, K. B.) 1 W. Bl. 547.

<sup>54</sup> As will be noticed, Blackstone is actually the Reporter of the last mentioned cases.