THE PREROGATIVE WRITS

S. A. DE SMITH

THE object of this paper is to give a general account of the nature and development of the prerogative writs.[1] Of these writs the best known are *habeas corpus ad subjiciendum*, to bring up the body of a person imprisoned on a criminal charge or in private detention; *certiorari*, to review orders and convictions of inferior tribunals and to remove indictments for trial; prohibition, to prevent inferior tribunals from going beyond their jurisdiction; and *mandamus*, to compel the performance of a public duty. All four are of high constitutional importance, and the last three in particular play a central role in administrative and magisterial law. In the common-law jurisdictions overseas their significance is not less than in England, and in some instances it is even greater because of the more extensive spheres of operation conferred upon them. In England an Act of 1938 [2] replaced the prerogative writs of *certiorari*, prohibition and *mandamus* by orders of the same names, but the change of designation reflected only a simplification of procedure [3]; the substantive law remains the same, and for convenience they will here be described as if they were still prerogative writs.

What is a prerogative writ? The name indicates that it is a writ especially associated with the King.[4] Most modern writers have said that prerogative writs are writs which originally were issued only at the suit of the King but which were later made available to the subject. This view cannot be accepted without a number of reservations. Prohibition and *habeas corpus* appear to have issued on the application of subjects from the very first; and although writs of *certiorari* and *mandamus* were initially royal

[1] For the only other general account, see E. Jenks, 'The Prerogative Writs in English Law' (1923) 32 Yale L.J. 523. This article, although sometimes inaccurate, contains several valuable suggestions.

[2] Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. 6, c. 63).

[3] The Act left *habeas corpus* inviolate as a prerogative writ with the old procedure; it was apparently thought that to meddle with *habeas corpus* might be misconstrued as subversive activity: R. M. Jackson, *Machinery of Justice in England*, 37. 'Never change native names, for there are Names in every nation God-given, of unexplained power in the mysteries' (Chaldean Oracle).

[4] Of course, all writs are in form commands issuing in the name of the King; but only writs that were conceived as standing in a *special* relationship with the Crown came to be regarded as 'prerogative' writs.

mandates issued for diverse purposes of government, their earliest use in judicial proceedings seems to have been to rectify wrongs done to subjects. It is nevertheless true to say that when, in the seventeenth and eighteenth centuries, these various writs came to be called 'prerogative', it was because they were conceived as being intimately connected with the rights of the Crown. The nature of that connection will be discussed at a later stage.

The theory that prerogative writs were in origin writs peculiar to the King himself is valid only with respect to certain obsolete and obsolescent writs.[5] They include:

(a) The writ *de non procedendo rege inconsulto*, a 'writ of prerogative'[6] by which the King intervened to withdraw from the cognisance of the common-law courts proceedings in which he claimed to have an interest. James I's use of the writ in *Brownlow's Case*[7] was successfully resisted by Coke and his fellows, in spite of Bacon's brilliant argument in support of the prerogative.[8] Coke's attitude in that case made a decisive clash with the King inevitable, and a year later he was removed from the Bench. After Coke's dismissal the King employed more informal methods for putting pressure upon the judges, and the writ fell into desuetude.

(b) *Scire facias* for the purpose of rescinding royal grants, charters and franchises. It seems to have often been obtained by subjects in the sixteenth century,[9] but the rule was established that the Attorney-General's fiat had first to be granted.[10] The writ is now almost obsolete, but it appears to have escaped the fate of other forms of *scire facias* which were abolished by the Crown Proceedings Act, 1947.[11]

[5] It is often said that *quo warranto* (which is usually classified as a prerogative writ: *e.g.*, 2 Pollock & Maitland 661), was only made available to the subject in modern times, but this view is wrong: Plucknett, *Legislation of Edward I*, 35 f. Under Edward I it became a potent royal weapon against the usurpers of franchise jurisdictions, but it had been used by private suitors long before that time: see Helen M. Cam (1926) 11 *History*, 143 f.; G. Lapsley (1927) 2 *Cambridge Historical Journal*, 110 f. In the sixteenth century it was replaced by an information filed by the Attorney-General. As with some of the prerogative writs, subjects required leave of the court to exhibit the information. Section 9 of the Administration of Justice Act, 1938, replaced *quo warranto* informations by injunction.

[6] 3 Bulst. 32 at 33.

[7] (1615) 3 Bulst. 32; Moo.K.B. 842; 1 Rolle R. 188, 206, 288. The political background to the case is described by S. R. Gardiner, *History of England, 1603–42*, iii, 7, and Holdsworth, *H.E.L.*, v. 439.

[8] Bacon, *Works* (ed. Spedding), vii, 687 f.

[9] 17 Viner *Abridgment*, Prerogative of the King, U (b).

[10] For the modern law, see Robertson, *Civil Proceedings by and against the Crown*, 537; *R.* v. *Hughes* (1866) L.R. 1 P.C. 81; *Eastern Archipelago Co.* v. *R.* (1853) 2 El. & Bl. 856.

[11] Crown Proceedings Act, 1947 (10 & 11 Geo. 6, c. 44), Schedule I; Bickford Smith, *Crown Proceedings Act, 1947*, 108.

(c) *Ne exeat regno*, a writ restraining the subject from leaving the Kingdom.[12] It issued out of the Chancery as of course when applied for on behalf of the Crown,[13] but the subject (to whom it was made available in the sixteenth century [14]) had to show cause by motion or affidavit why he should have the writ, and until 1700 the court had an unfettered discretion to refuse it to him.[15] Lord Eldon called it 'a high prerogative writ' which was 'applied to cases of private right always with great caution and jealousy'.[16] Today it issues only under the provisions of section 6 of the Debtors Act, 1869.[17]

Since this survey is concerned with the living rather than with the dead or moribund, only the four main prerogative writs will be further considered. We shall attempt to explain how the term 'prerogative writ' came into general use and why each of the four writs was assigned to the prerogative group. Something will be said of the history and special characteristics of *certiorari*, prohibition and *mandamus* in turn; *habeas corpus* will not be treated separately, as accounts of its history are readily accessible.[18] But before the writs are discussed individually, the general characteristics common to all or most of them will be described. These characteristics are as follows:

(a) They are not writs of course; they cannot be had for the asking, but proper cause must be shown to the satisfaction of a court why they should issue.

Even in the early formative period of the common law a distinction was recognised between writs of course (writs that had acquired a common form and could be purchased by or on behalf of [19] any applicant from the Royal Chancery) and other writs. The term 'writs of course' was used in relation to Henry III's *Register of Writs* compiled in 1227 and sent to Ireland,[20] and it occurs in the Provisions of Oxford (1258)[21] and in Bracton's

[12] For its history, see Beames, *Ne Exeat Regno* (2nd ed., 1824).
[13] Bacon, Orders, No. 89 (Sanders, *Orders in Chancery*, i, 120).
[14] Beames, *op. cit.*, 18–19.
[15] Bohun, *Cursus Cancellariae* (2nd ed.) 455.
[16] *Tomlinson* v. *Harrison* (1802) 8 Ves. 32 at 33; cf. *Jackson* v. *Petrie* (1804) 10 Ves. 164 at 165.
[17] 32 & 33 Vict. c. 62; see also Crown Proceedings Act, 1947, s. 31 (2), and Glanville Williams in (1948) 10 Camb.L.J. at 70, n. 31.
[18] See Holdsworth, *H.E.L.*, x, 108–125; Maxwell Cohen (1938) 16 Can.Bar Rev. 92. (1940) 18 Can.Bar Rev. 10, 172; Jenks (1902) 18 L.Q.R. 64 (reprinted in 2 *Select Essays in Anglo-American Legal History* 531). Holdsworth and Cohen have exposed several misconceptions in Jenks' account.
[19] G. O. Sayles, Introduction to Vol. 57, Selden Soc., lxxxvii.
[20] See Maitland, 'History of the Register of Original Writs', *Collected Papers*, ii, 110 at 130. This monograph also appears in (1889) 3 Harv.L.R. and 2 *Select Essays* 549.
[21] '*Ke il* [the Chancellor] *ne enselera nul bref fors bref de curs sanz le commandement le rei, e de sun cunseil ke serra present.*'

treatise.[22] Bracton contrasts *brevia de cursu* with *brevia magistralia*; the latter were writs of grace. It is not known whether any of the modern prerogative writs were then regarded as writs of grace[23]; but if we leap over the centuries to the later years of Elizabeth's reign, we find some coincidence between writs of grace and what were soon to be called prerogative writs. The anonymous author of *A Treatise of the Maisters of the Chauncerie*[24] equates writs of grace with writs magisterial, and says that they ought properly to be awarded only by the Masters. As examples of such writs he mentions *subpœna*, *certiorari* and *ne exeat regno*. The Masters, as men learned in the civil and canon law, were also suited to the awarding of prohibitions to ecclesiastical courts; and he laments that these have come to be composed by others 'cunninge in the secular lawe onely'.[25] When Bacon became Chancellor he issued a number of Orders designed to cure the laxity prevalent in the Chancery. One of these[26] directed that no writs of (*inter alia*) *ne exeat regno*, prohibition or *habeas corpus*, or certain forms of *certiorari*, were to pass without warrant under his hand. The primary object of this reform was to check abuses of legal process by dishonest and vexatious persons whose machinations were bringing the administration of justice into disrepute. Parliament had indeed already made several attempts to erect safeguards restricting the issue of writs of *habeas corpus* and *certiorari*.[27] But it seems clear that Bacon's reform had another object: that of maintaining the principle that writs closely associated with the rights of the Crown should not issue out of the Chancery to the subject as of course.[28]

By the time of Charles II applications for *habeas corpus*, *certiorari* and prohibition were usually made to the Court of King's Bench rather than to the Chancery,[28a] and *mandamus* was awarded

[22] *De Legibus*, f. 413b.

[23] One of the earliest writs of grace was *de odio et atia*: Glanvill, xiv, c. 3. Magna Carta, c. 36, converted it into a writ of course. For early references to writs of grace in parliamentary petitions, see *Rotuli Parliamentorum* (*Rot.Parl.*), ii, 376, 241.

[24] Written c. 1596–1603; printed in Hargrave's *Law Tracts* 293.

[25] *Op. cit.* at 313.

[26] No. 85; cf. Orders of Puckering and Egerton (1596): Sanders, *op. cit.*, i, 70.

[27] See (1414) 2 Hen. 5, St. 1, c. 2; (1433) 11 Hen. 6, c. 10; (1554) 1 P. & M., c. 13; (1601) 43 Eliz. c. 5.

[28] It has been said that *habeas corpus ad subjiciendum* (the prerogative form of *habeas corpus*) was never regarded as a writ of course: Wilmot, *Opinion on the Writ of Habeas Corpus* (1758) at 88. It was decided in the seventeenth century, however, that other forms of the writ would issue out of the common law courts as of course: *Slater* v. *Slater* (1660) Lev. 1; *Penrice and Wynn's Case* (1679) 2 Mod. 306; *Anon.* (1671) Cart. 221.

[28a] The history of the assumption by the common-law courts of the power to award the writs still awaits detailed investigation; but Jenks was clearly wrong in saying that the development took place after 1688.

almost exclusively out of the King's Bench.[29] The writs issued only upon cause shown by motion when applied for by the subject, but the Crown would have a *certiorari* to remove an indictment as of course.[30] This distinction between applications on behalf of the Crown and applications by the subject—a distinction already noted in connection with *ne exeat regno*[31]—derived from a conception that the writs were in a special sense the King's own writs.

(b) The award of the writs usually lies within the discretion of the court.

The court is entitled to refuse *certiorari*[32] and *mandamus*[33] to applicants if they have been guilty of laches or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty. On applications by subjects for *certiorari* to remove indictments the courts have always exercised a very wide discretion.[34]

The fact that some of the prerogative writs were discretionary came to be directly linked with their designation as prerogative writs. Thus, in one case, it was said: 'An application for *mandamus* is an application to the discretion of the court; a *mandamus* is a prerogative writ and is not a writ of right'.[35] But although none of the prerogative writs are writs of course, not all are discretionary. Prohibition, for example, issues as of right in certain cases[36]; and *habeas corpus ad subjiciendum*, the most famous of them all, is a writ of right which issues *ex debito iustitiæ* when the applicant has satisfied the court that his detention was unlawful.[37] These two writs, therefore, are not in the fullest sense writs of grace.

[29] In *Awdley* v. *Joy* (1626) Poph. 170 it was called 'peculiar to the King's Bench' and 'one of the flowers of it'. See, however, *Mayor of Coventry's Case* 2 Salk. 429 for a reference to *mandamus* issuing out of the Chancery.

[30] *Adrian Lampriere's Case* (1670) 1 Mod. 41.

[31] *Ante*, p. 42; cf. also the restrictions on the right of subjects to have the prerogative writ of *scire facias*, and to exhibit *quo warranto* informations.

[32] For an authoritative modern statement of the law, see *R.* v. *Stafford JJ., Ex p. Stafford Corporation* [1940] 2 K.B. 33.

[33] See, however, *R.* v. *Bishop of Sarum* [1916] 1 K.B. 466.

[34] See, *e.g.*, *Anon.* 1 Sid. 54, where the court resolved not to award *certiorari* to remove indictments for perjury, forgery, or 'ascun tiel grand misdemeaner' because where indictments were thus removed they were not further prosecuted.

[35] *R.* v. *Commissioners of Excise* (1788) 2 T.R. 381 at 385; see also *R.* v. *Churchwardens of All Saints, Wigan* (1876) 1 App.Cas. 611 at 620; High, *Extraordinary Legal Remedies* (1874) 8, n. 1; Goodnow, *Comparative Administrative Law*, ii, 195.

[36] Short and Mellor, *Crown Practice* (2nd ed.), 254–5; Halsbury (Hailsham ed.) ix, 819–20, 826–8; Shortt, *Informations, Mandamus and Prohibition*, 441–6. The law on this point is not altogether clear. For early conflicts of opinion, see Bacon, *Abridgment*, Prohibition (B).

[37] *Jenkes' Case* (1676) 6 St.Tr. 1189 at 1207–8; *Hobhouse's Case* (1820) 3 B. & A. 420.

(c) They were awarded pre-eminently out of the Court of King's Bench.[38]

(d) At common law they would go to exempt jurisdictions (*e.g.*, the Counties Palatine, the Cinque Ports), to which the King's writs did not normally run.

The significance of these two characteristics will be further considered after we have discussed the writs of *certiorari*, prohibition and *mandamus*.

Certiorari[39] was essentially a royal demand for information; the King, wishing to be certified of some matter, orders that the necessary information be provided for him. Thus, the King wishes to be more fully informed of allegations of extortion made by his subjects in Lincoln, and therefore appoints commissioners to inquire into them.[40] *The Calendar of Inquisitions* mentions numerous writs of *certiorari*, addressed to the escheator[41] or the sheriff, to make inquisitions; the earliest are for the year 1260.[42] When Parliament grants Edward II one foot-soldier for every township, the writ addressed to the sheriffs to send in returns of their townships to the Exchequer is a writ of *certiorari*.[43] It was, in fact, one of the King's own writs, used for general governmental purposes. Very soon after its first appearance it was used to remove to the King's Courts at Westminster the proceedings of inferior courts of record. In 1271 the proceedings in an assize of darrein presentment are transferred there because of their dilatoriness.[44] In a later case in the same term[45] the writ does not specify the reasons for removal; the case is removed simply because the King wishes '*certis de causis*' to be certified of the record and process. The same phrase appears later in the writs used for summoning defendants before the Chancellor and the Council.[46] Although complaints were often raised that commands issued 'for certain

[38] Proceedings upon the writ *ne exeat regno* were confined to the Court of Chancery.

[39] The word is not, apparently, of classical origin: Du Cange, *Glossarium Mediae et Infimae Latinitatis*, Vol. 2. The first example of its use that I have traced in the printed records is in a letter written in 1252, from Henry III to the Mayor and commonalty of Bordeaux, expressing the King's readiness to be informed of the grievances of his subjects in that city: *Close Rolls*, 36 Hen. 3, m. 27d. The word *certificari* was more common at that time.

[40] *Placitorum Abbreviatio* (*Plac.Abbr.*) 155 (49 Hen. 3).

[41] Cf. *Register of Original Writs*, ff. 293, 296; for history of the escheator, see *The English Government at Work*, 1327–36 (ed. Morris and Strayer), ii, 109–67.

[42] *Calendar of Inquisitions*, i, 130, 131.

[43] *Inquisitions and Assessments Relating to Feudal Aids*, i, 16; see also Introduction, xxiii.

[44] *Plac.Abbr.* 182, r. 14 (Hil. 56 Hen. 3).

[45] *Ibid.*, 184, r. 23d.

[46] For a general discussion, see Plucknett, *Concise History of the Common Law* (4th ed.) 645.

reasons' were issued for oppressive reasons,[47] the use of the indefinite formula in writs of *certiorari* seems to have evoked no protests, and the phrase continued until 1938 to appear in modern forms of the writ.

From about 1280 the writ was in common use,[48] issuing on the application of ordinary litigants. Sometimes it was in the nature of a writ of error; sometimes the proceedings at Westminster were in effect general appellate proceedings. The breadth of the issues that could be raised is amply illustrated in the volumes of King's Bench Cases for the reign of Edward I, edited by Professor G. O. Sayles.[49] The conception then prevailing was well expressed in a modern Canadian case: 'The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him by an inferior court; whereupon the Sovereign, saying that he wishes to be certified—*certiorari*—of the matter, orders that the record, etc., be transmitted into a court in which he is sitting'.[50] Much of this very broad remedial jurisdiction passed from the courts of common law to the Court of Chancery, and in the Tudor and early Stuart periods writs of *certiorari* frequently issued to bring the proceedings of inferior courts of common law before the Chancellor.[51] Later, however, the Chancery confined its supervisory functions to inferior courts of equity.[52]

From the fourteenth century until the middle of the seventeenth century the following seem to have been the main purposes served by *certiorari*:

(a) To supervise the proceedings of inferior courts of specialised jurisdiction—*e.g.*, the Commissioners of Sewers, the Courts Merchant,[53] the Court of Admiralty,[54] the Courts of the Forests[55]—particularly in order to keep them within their spheres of jurisdiction.

(b) To obtain information for administrative purposes: *e.g.*, the sheriff is told to find out whether one who has been granted the King's protection is tarrying in the city instead of journeying

[47] See, *e.g.*, *Close Rolls*, 1327–30, pp. 25, 32, 286.
[48] For example of *certiorari* issuing in consequence of petitions to the King in Parliament, see *Rot.Parl.* i, 17b, 18a, 105a.
[49] Selden Soc., Vols. 55, 57, 58.
[50] *R.* v. *Titchmarsh* (1915) 22 D.L.R. 272 at 277–8.
[51] Cowell, *Interpreter*, M2; Spence, *Equitable Jurisdiction*, i, 686, 687.
[52] The proceedings were removed upon a Certiorari Bill: see *Register*, Appendix, 52d; 1 Eq.Ca.Abr. 81; *Hilton* v. *Lawson*, Cary 48.
[53] *Select Cases Concerning the Law Merchant*, Vols. I–III, *passim* (Selden Soc., Vols. 23, 46, 49).
[54] *Select Pleas in the Court of Admiralty*, I (Selden Soc. Vol. 6), 2; Introduction to Vol. II (Selden Soc., Vol. 11), xli.
[55] Nellie Neilson in *The English Government at Work, 1327–36* (ed. Willard and Morris), ii, 422.

forth in the King's service[56]; the escheator must certify into the Chancery the value of knights' fees and advowsons which have escheated to the King.[57]

(c) To bring into the Chancery or before the common-law courts judicial records and other formal documents for a wide diversity of purposes. The *Register of Writs* gives many examples. Thus *certiorari* lies to order the return of securities of the peace, recognisances, annuities, feet of fines, statutes merchant and staple, Acts of Parliament. Judgments of inferior courts are brought up in order that execution may be obtained. Where in proceedings in error diminution of the record is alleged (*i.e.*, where the record of the inferior court is alleged to be incomplete), *certiorari* issues to order the remainder of the record to be returned. The Treasurer and Chamberlains of the Exchequer are ordered to find out whether a manor is held in ancient demesne '*scrutato libro nostro qui vocatur Domesday*'.[58] Records of convictions and outlawries are certified to the King for pardons to be granted.[59]

(d) To remove coroners' inquisitions and indictments into the King's Bench. The use of *certiorari* to remove indictments is of particular interest. In Edward III's time the perambulating Court of King's Bench supervised the newly established Sessions of the Peace by issuing writs of *certiorari* to remove before it all unfinished indictments lying before the Justices in the county it was visiting.[60] In the fifteenth and sixteenth centuries the trial of indictments removed by *certiorari* constituted an important part of the work of the King's Bench.[61] The special position of the Crown in criminal proceedings—'the King has undoubtedly a right to prosecute in what court he pleases'[62]—was reflected in the rule finally established in the seventeenth century that *certiorari* to remove an indictment was a writ of right for the Crown but a writ of grace for the subject.[63] In the eighteenth century it was settled that statutes taking away *certiorari* did not bind the Crown in the absence of express words to that effect, for 'the King has . . . an inherent common law right . . . to have a *certiorari*'.[64]

[56] *Register*, f. 24; cf. Y.B. Hil. 21 Edw. 4, pl. 26.
[57] *Register*, ff. 293, 296.
[58] In 1 Salk. 57 the Book is described as having been brought into court by a porter.
[59] For very early examples, see Selden Soc., Vol. 57, 41 (1291); *Rot.Parl.*, i, 57a.
[60] B. H. Putnam, *Proceedings before Justices of the Peace in the Fourteenth and Fifteenth Centuries* (Ames Foundation, 1938), Introduction, lxx *et passim*.
[61] See figures quoted by Stephen, *History of Criminal Law*, i, 96.
[62] *R.* v. *Clace (Inhabitants)* (1769) 4 Burr. 2456 at 2458 (*per* Lord Mansfield C.J.).
[63] See p. 44, *ante*.
[64] *R.* v. *Berkley and Bragge* (1754) 1 Keny. 80 at 102.

With the vast increase in the duties of the Justices out of Sessions after 1660, *certiorari* acquired a new importance. Not only did Parliament create numerous minor offences punishable summarily,[65] but it heaped new administrative duties upon the Justices and *ad hoc* authorities.[66] It had been decided before the end of Elizabeth's reign that a summary conviction tainted with irregularity or made without jurisdiction could be removed into the King's Bench by *certiorari* and quashed.[67] A century later the scope of *certiorari* was again widened by Holt C.J.'s judgment in the leading case of *Groenvelt* v. *Burwell*, where it was held that the writ would lie to review disciplinary decisions of the censors of the College of Physicians. Holt C.J. said: 'It is a consequence of all jurisdictions to have their proceedings returned here by *certiorari* to be examined here. . . . Where any court is erected by statute, a *certiorari* lies to it . . .'.[68] Thereafter the King's Bench became inundated with motions for *certiorari* to quash rates and orders made by Justices and other bodies exercising administrative functions under semi-judicial forms. It became what Gneist has called an *Oberverwaltungsgericht*,[69] a supreme court of administration, supervising much of the business of local government by keeping subordinate bodies within their legal limitations by writs of *certiorari* and prohibition, and ordering them to perform their duties by writs of *mandamus*. The modern High Court had succeeded to much of this jurisdiction, and there can be no doubt that the absence in the common-law systems of a distinct body of public law, whereby proceedings against public authorities are instituted only before special administrative courts and are governed by a special body of rules, is directly traceable to the extensive use of prerogative writs by the Court of King's Bench.

Prohibition is one of the oldest writs known to the law. From the first its primary function seems to have been to limit

[65] See Felix Frankfurter and Thomas G. Corcoran in (1926) 39 Harv.L.R. 917; and Paley, *Summary Convictions* (9th ed.), Introduction.

[66] Holdsworth, *H.E.L.*, x, Ch. II.

[67] *Gardener's Case* (1600) Cro.Eliz. 821. The case appears in (1591) 5 Co.Rep. 71 *sub nom. Saint John's Case*, but the term, year and name of defendant are given wrongly. The case was removed by a *corpus cum causa*; *certiorari* is not mentioned in the record in the *Rex* Roll, but it was presumably used in conjunction with the *corpus cum causa*. The next case in the *Rex* Roll, *R.* v. *Denys*, was removed by a *certiorari*; the record is transcribed in Tremaine, P.C., 330.

The writ of error was the appropriate means of impeaching the record of a judgment given on an indictment; but it would not lie to quash convictions and orders made by magistrates after summary proceedings, and the courts therefore allowed *certiorari* to issue for this purpose.

[68] (1700) 1 Ld.Raym. 454 at 459. See also *R.* v. *Inhabitants—in Glamorganshire*, 1 Ld.Raym. 580 (the *Cardiff Bridge Case*).

[69] *Englische Verfassungsgeschichte*, 574.

the jurisdiction of the ecclesiastical courts.[70] The example given by Glanvill[71] shows that it would issue at the suggestion of a subject, and the prohibitory clause recites that the suits in question '*ad coronam et dignitatem meam pertinent*'. It later came to be used as a weapon by the common-law courts in their conflicts with the Courts of Chancery and Admiralty.[72] The early history of the writ and its verbal identification with the rights of the Crown help to explain the extravagant language in which later lawyers were wont to describe its qualities. Thus, in *Warner* v. *Suckerman* (1615)[73] Croke J., holding that it would issue to the courts of the County Palatine of Lancaster, said: 'it is *breve regium* and *ius coronæ*, and if this writ shall be denied in such cases, this would be in *læsionem, exhereditationem, et derogationem coronæ*'. The matter was expressed more soberly in another case: 'the King is the indifferent arbitrator in all jurisdictions, as well spiritual and temporal, and [it] is a right of his Crown to . . . declare their bounds' by prohibitions.[74] Disobedience to a prohibition was conceived of as a contempt of the Crown.[75] Since it was 'the proper power and honour of the King's Bench to limit the jurisdiction of all other courts'[76] the writ usually issued out of that court; but it could also be awarded by the Chancery and the Common Pleas.[77]

The 'prerogative' character of the writ has been repeatedly stressed. Fitzherbert says that 'the King for himself may sue forth this writ, although the plea in the spiritual court be betwixt two common persons, because the suit is in derogation of his Crown'.[78] That the protection of private interests is only a secondary function of the writ is brought out in the comparatively modern case of *Worthington* v. *Jeffries*, where it was said that 'the ground of decision in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is whether the royal prerogative has been

[70] Norma Adams, 'The Writ of Prohibition to Court Christian' (1936) 20 Minnesota L.R. 272.
[71] Bk. iv, 14; reprinted in Holdsworth, *H.E.L.*, i, 656.
[72] For many other early uses of the writ, see Fitzherbert, *Natura Brevium* (*F.N.B.*), 39 H *et seq.*
[73] 3 Bulst. 119; see also Skin. 626.
[74] *James' Case* (1631) Hob. 17; 2 Roll.Abr. 313; see also Hale, *Analysis of the Law*, 21. Cf. Foster J. in *R.* v. *Berkley and Bragge*, 1 Keny. 80 at 104: 'It is the undoubted prerogative of the Crown, to see that all inferior jurisdictions are kept within their proper bounds, and on that principle the whole doctrine of certiorari depends'.
[75] Until 1831 (1 Wm. 4, c. 21) a declaration in prohibition had to be expressed to be on behalf of the King as well as the applicant, and had to allege a contempt of the Crown.
[76] *Case of Company of Horners in London* (1642) 2 Roll.R. 471.
[77] Bacon, *Abridgment*, Prohibition (A).
[78] *F.N.B.* 40 E.

encroached upon by reason of the prescribed order of the administration of justice having been disobeyed'.[79] Hence even a complete stranger to the proceedings in the other court could have the writ.[80]

Although the history and qualities of prohibition well qualified it for inclusion in a 'prerogative' group of writs, the claims of *mandamus* are less obvious. It is true that in early times the King issued countless innominate writs that included the word *mandamus* —'the autocratic head of a vast administrative system will have occasion to "*mandamus*" his subjects many times in the course of a day'[81]—but the connection between most of these royal mandates and the modern judicial writ was verbal only.[82] Moreover, the writs called *mandamus* that appear in the early law books are concerned not with private grievances at all, but with steps to be taken by the escheator or the sheriff in connection with possible accretions to the royal revenues.[83] Not until 1573 do we find a reported case that centres around a judicial writ of *mandamus* serving purposes substantially similar to those of the modern writ[84]; it was issued to restore a citizen of London to his franchise of which he had been illegally deprived. For practical purposes, however, the history of *mandamus* begins with *Bagg's Case* (1615) 11 Co.Rep. 93b. The writ in this case is shown to have issued out of the King's Bench and to have been attested by Coke as Chief Justice; it recited that Bagg, a capital burgess of Plymouth, had been unjustly removed from his office by the mayor and commonalty, and commanded them to restore him unless they showed to the court good cause for their conduct. They failed to satisfy the court and a peremptory *mandamus* issued to restore Bagg. From then onward many such writs issued to compel restitution[85] to offices and liberties. By the

[79] (1875) L.R. 10 C.P. 379 at 382; see also R. T. Walker, 'Is the Writ of Prohibition a Prerogative Writ?' (1939) 37 Mich.L.R. 789; and Note (1923) 36 Harv.L.R. 863.

[80] *Worthington* v. *Jeffries*, *ante*; *De Haber* v. *Queen of Portugal*, 17 Q.B. 220; Co.Inst., ii, 607.

[81] Jenks (1923) 32 Yale L.J. at 530.

[82] See, however, a writ in the *Close Rolls*, 6 Edw. 2, m. 8, commanding the Mayor and commonalty of Bristol to restore certain burgesses to the liberty of that city and to their goods; cf. *Middleton's Case*, *post*. In *Dr. Widdrington's Case*, 1 Lev. 23, there is mentioned a writ of *mandamus* issuing *temp.* Edward II to restore Fellows of a College to their fellowships of which they had been unlawfully deprived; cf. *Tapping on Mandamus*, 78.

[83] *F.N.B.*, 253B; *Register*, 195d.

[84] *Middleton's Case*, 3 Dyer 332b. The writ in this case was modelled after one issued in an earlier unreported case of a similar character: *Anable's Case*, *temp.* Henry VI.

[85] In the seventeenth century the writ was often called a writ of restitution: *e.g.*, 1 Bulst. 174; Poph. 133; Poph. 176; Style 32; 3 Salk. 231; Hale's *Analysis of the Law*, 60.

early years of the eighteenth century it had become—thanks largely to the work of Holt—something more comprehensive than a writ of restitution. It would go, on the application of a party aggrieved, to compel the performance of a wide range of public or quasi-public duties, performance of which had been wrongfully refused. It would issue, for example, to compel the admission (as well as the restoration) of a duly qualified alderman to a corporation,[86] or to compel the holding of an election to the office[87]; and it became a valuable device to prevent the unlawful packing of corporations.[88] More important still, it would issue to inferior tribunals that wrongfully declined jurisdiction.[89] Through the writ of *mandamus* the King's Bench compelled the carrying out of ministerial duties incumbent upon both administrative and judicial bodies. The rules governing the issue of the writ gradually took shape until they were fully stated by Lord Mansfield in a series of cases.[90] What is particularly interesting about Mansfield's judgments is that he persistently refers to *mandamus* as a 'prerogative' writ.[91] Thus, in a typical passage, he calls it 'a prerogative writ flowing from the King himself, sitting in his court, superintending the police and preserving the peace of this country'.[92] Indeed, it is certain that he and Blackstone were responsible if not for the invention of the term 'prerogative writ' at least for its acceptance as part of the lawyer's vocabulary. But if we are to understand their conception of a prerogative writ, we must examine Coke's ideas about the functions of the King's Bench.

Coke began his discussion of the King's Bench by considering Bracton's description of the emergent court[93] as *aula regia* where the King's justices *proprias causas regis terminant.* This jurisdiction belonged peculiarly to the King's Bench, the court held (at one time in reality, but in Coke's time only in theory[94]) *coram rege*

[86] *R.* v. *Mayor of Norwich*, 2 Ld.Raym. 1244.
[87] *R.* v. *Mayor of Evesham*, 7 Mod. 166.
[88] It was regularly used after 1688 by the Whigs to secure admission to the Tory-packed borough corporations. Jenks, in 32 Yale L.J. at 530–1, mentions that the Whigs were being kept off the corporations in spite of the Toleration Act. That Act, however, had nothing whatsoever to do with corporate office.
[89] See, *e.g.*, *Groenvelt* v. *Burwell*, 1 Ld.Raym. at 469; *R.* v. *Montague*, Sess. Cas. 106.
[90] See esp. *R.* v. *Blooer* (1760) 2 Burr. 1043; *R.* v. *Barker* (1762) 1 W.Bl. 352; *Dr. Askew's Case* (1768) 4 Burr. 2186.
[91] *E.g.*, in *R.* v. *Cowle* (1759) 2 Burr. 834 at 855; *R.* v. *Barker* (1762) 1 W.Bl. 352; *R.* v. *V.-C. of Cambridge* (1765) 3 Burr. 1647 at 1659. For a similar early reference to *mandamus*, see *Knipe* v. *Edwin* (1694) 4 Mod. 281; cf. *R.* v. *Patrick*, 1 Keb. 610.
[92] *R.* v. *Barker*, *ante*.
[93] *De Legibus*, f. 150 b.
[94] *Case of Prohibitions* (1608) 12 Co.Rep. 65.

ipso.[95] It comprised the hearing of pleas of the Crown and the examination and correction of the errors of other courts. But Coke went further: 'this court hath not only jurisdiction to correct errors in judicial proceeding, but other misdemeanours extrajudicial tending to the breach of the peace, or oppression of the subject, . . . or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done but that this shall be reformed or punished . . .'.[96] He went on to illustrate this sweeping proposition by mentioning *habeas corpus* to secure release from unlawful imprisonment, the writ of prohibition, the granting of bail, and *mandamus* to rectify the disfranchisement of a freeman. Coke had already conceded that this jurisdiction was derived from the historic connection between the King and that court; and he might there and then have proceeded to classify *habeas corpus*, prohibition, *mandamus*, and *certiorari* to remove indictments, as prerogative writs. But for Coke to have designated them thus would have been wholly inconsistent with his views upon the relationship between the royal prerogative and the common law; for had not the King 'committed . . . his whole power of judicature to several courts of justice',[97] and was not the greatest of these the Court of King's Bench? These writs, then, were writs that issued pre-eminently out of the King's Bench; they were not the King's prerogative writs.

But if Coke chose to exalt the King's Bench rather than the King, others were not so disposed. Thus, a contemporary writer (often thought to be Ellesmere,[98] Coke's great rival) sharply criticised Coke's words in regard to misdemeanours extrajudicial: 'Herein (giving excess of authority to the King's Bench) he hath as much insinuated that this court is all-sufficient in itself to manage the State'. If the King's Bench might in truth reform 'any manner of misgovernment' there was little or no place for the exercise of the King's personal authority or that of his council.[99] This represented the outlook of the royalist lawyers. Few royalists were more ardent than Montagu, Coke's successor in office[1]; and it is in a case decided by him and three brethren not noted for their independence of the Crown[2] that *habeas corpus* is for the first time

[95] Holdsworth, *H.E.L.*, i, 204–6.
[96] Co.Inst., iv, 71. These words are taken almost verbatim from the opening sentence of his reported judgment in *Bagg's Case*, 11 Co.Rep. at 98a.
[97] Co.Inst., iv, 70.
[98] See, however, *H.E.L.*, v, 478, n. 1.
[99] *Observations on Coke's Reports*, 11. Cf. Ellesmere's speech to Coke's successor on the duties of Chief Justice for similar language: Campbell, *Lives of the Chief Justices*, i, 355.
[1] Campbell, *op. cit.*, Ch. XI.
[2] Dodderidge, Houghton and Sir John Croke.

reported as being called a prerogative writ. In Montagu's words it is 'a prerogative writ, which concerns the King's justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned'.[3] His primary purpose was to emphasise that the writ would run to the Cinque Ports in spite of the fact that they were an exempt jurisdiction to which writs relating to ordinary suits between subjects would not run. Even so, it is reasonable to ascribe his use of the word 'prerogative' to his political inclinations. *Habeas corpus* was a beneficent remedy, and it was sound politics to associate its award with the King's personal solicitude for the welfare of his subjects. Its value became enhanced during the constitutional struggles of the seventeenth century—albeit, paradoxically, as a safeguard of the liberty of the King's political opponents—and it came to be regarded, with Magna Carta,[4] as the greatest bastion of individual liberty. It is therefore easy enough to explain why Mansfield and Blackstone, who were good King's men, should have insisted on the prerogative character of *habeas corpus*. And if these were the qualities which in their eyes entitled *habeas corpus* to classification as a prerogative writ, they were shared in large measure by *mandamus*, 'a command issuing in the King's name from the court of King's Bench' and 'a writ of a most extensively remedial nature'.[5] The writ of *mandamus*, moreover, expressly alleged a contempt of the Crown [6] consisting in the neglect of a public duty; and it was a writ of grace. The 'prerogative' characteristics of prohibition and *certiorari* were still more obvious. Prohibition had always been associated with the maintenance of the rights of the Crown. *Certiorari* was historically linked with the King's person as well as with the King's Bench; it was of high importance for the control of inferior tribunals, particularly with respect to the administration of criminal justice; it was a writ of course for the King but not for the subject.

In 1759 there is the first record of the four writs being collectively designated as prerogative writs. In *R.* v. *Cowle* Mansfield, answering the objection that a *certiorari* would not go to Berwick to remove an indictment because the King's writ did not run there,

[3] *Richard Bourn's Case* (1620) Cro.Jac. 543. See also the judgments of his brethren reported in Palm. 54 for like language. Similar reasoning was used in two slightly earlier cases in 2 Roll.Abr. 69; but the word 'prerogative' is not mentioned there.

[4] *Habeas corpus* was often said to be founded on Magna Carta: *H.E.L.*, i, 228. So, too, was *mandamus*: *R.* v. *Heathcote* (1712) 10 Mod. 48 at 53; Bac.Abr., *Mandamus*; *Tapping on Mandamus*, 2, 5.

[5] Blackstone, *Commentaries*, iii, 110.

[6] See the form of the writ in *Bagg's Case*, *ante*. The phrase also appeared in some modern forms of the writ: Short and Mellor, *op. cit.*, 518, 591 *et passim*.

said that the privileges of exempt jurisdictions applied only to writs summoning juries and 'perhaps to original writs which are the commencement of suits between party and party. . . . Writs not ministerially directed [7] (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of *mandamus*, prohibition, *habeas corpus*, *certiorari*, upon a proper case . . . may issue to every dominion of the Crown of England '.[8]

This decision followed a line of seventeenth-century cases in which the courts had held that *habeas corpus ad subjiciendum*,[9] prohibition,[10] *mandamus*,[11] and *certiorari* [12] would issue to the courts of Chester, Lancaster, Durham, the Cinque Ports and other exempt jurisdictions. So, too, would certain other writs which, like the prerogative writs, concerned 'not the particular rights or properties of the subjects, but the government and superintendency of the King '.[13] Of these other writs, the most important was the writ of error.[14]

Why was the writ of error *not* a prerogative writ? The question may seem insignificant, but the answer that will be suggested may serve to bring out more clearly why to Mansfield and Blackstone the four writs already discussed were 'prerogative' writs. The writ of error had certain characteristics that drew it close to the prerogative group. Thus, when it issued to exempt jurisdictions it was generally returnable into the King's Bench, and the proceedings in the King's Bench were readily associated with royal superintendence over those jurisdictions. Moreover, it closely resembled some forms of *certiorari*. Again, until 1705 [15] the grant of a writ of error in criminal cases lay entirely within the discretion of the Crown, and an admission of error by the Attorney-General on behalf of the Crown was conclusive.[16] On the other hand, it

[7] *I.e.*, writs directed to the tribunal or persons immediately concerned, and not to a royal official such as the sheriff.

[8] (1759) 2 Burr. 834 at 855–6. This seems to be the first reference to *certiorari* as a prerogative writ.

[9] *Wetherley* v. *Wetherley*, 2 Roll.Abr. 69; *Richard Bourn's Case* (1620) Cro.Jac. 543; Palm. 54; *Jobson's Case* (1626) Latch. 160; but not *habeas corpus cum causa ad faciendum et recipiendum* (to bring up a defendant detained by an inferior civil court): *Anon.* 1 Sid. 431.

[10] *Warner* v. *Suckerman*, p. 49, *ante*; *Williams* v. *Lister* (1669) Hardres 475.

[11] *Richard Bourn's Case*, *ante*; —— v. *Wiggon* (*Mayor*) 1 Sid. 92.

[12] *Certiorari* would go to remove indictments: 'although the King grant *jura regalia*, yet it shall not exclude the King himself': *Anon.* (1641) March 165; but *certiorari* would not go to remove ordinary civil actions between subjects: *R.* v. *Winchelsea* (*Mayor*) (1673) Freem.K.B. 99.

[13] *Concerning Process into Wales*, Vaughan 395 at 401; cf. *Calvin's Case*, 7 Co. Rep. 1 at 20a.

[14] It went to the Counties Palatine and into Wales, but not to the Cinque Ports: Dyer 376a; Co.Inst., iv, 224.

[15] *Paty's Case* (1705) 1 Salk. 504.

[16] Stephen, *Hist.Cr.Law*, i, 309–10.

differed from the prerogative writs in important respects. In civil cases it was a writ of course,[17] and the plaintiff in error could not be denied his remedy once he proved the record to be faulty. But there was a far more decisive difference. Error was thought of as being essentially an ordinary rather than an extraordinary writ—as an everyday device whereby the private citizen could impugn the record of a lower court. And notwithstanding the Statutes of Jeofails (and perhaps because of them[18]) it was notorious that when the proceedings of the lower court were quashed it was only too often for trivial flaws on the record. Contemplation of the law of errors did not encourage flights of rhetoric. Mansfield and Blackstone were not so lacking in discrimination as to attempt to marry the royal prerogative with the unromantic writ of error.

To restate the salient features of this survey is by no means easy, for it has been a complex and tortuous tale, embodying not so much a continuous narrative as a collection of dicta and incidents. We have seen that the term 'prerogative writ' was applied to *habeas corpus* in the time of James I, in a case where the court was endeavouring to stress the superiority of *habeas corpus* over lesser writs that would not run to exempt jurisdictions. The choice of the word 'prerogative' for this purpose is explicable by the desire of royalist judges to assert the King's concern for the liberty of his subjects. Similar language was used to describe the writ of prohibition, and with greater justification, seeing that the award of prohibitions had always been connected with the rights of the Crown with respect to the administration of justice. Seventeenth-century cases also established that *certiorari* (except for ordinary civil suits between subjects) and *mandamus* would go to exempt jurisdictions; the public interest, which was commonly equated with the King's interest, demanded that they should. *Certiorari* had other good qualifications for membership of a prerogative group of writs: *e.g.*, it had originated as the King's personal command for information; it was often used to remove indictments into the King's Bench, and upon their removal the King would proceed to prosecute in his own court; it was a writ of grace for the subject. *Mandamus*, too, was a writ of grace; it alleged a contempt of the Crown consisting in the neglect of a public duty; it was at once of high governmental importance and a valuable remedy of last resort for the subject. All four writs were awarded primarily by the Court of King's Bench, a court

[17] Though the plaintiff had to assign his errors before the defendant was called into court by a *scire facias ad audiendum errores.*

[18] Plucknett, *Concise History of the Common Law* (4th ed.), 374.

which had always performed quasi-governmental functions and which was historically the court held *coram rege ipso*. In short, all four writs could well be described, by those who were so minded, as the King's prerogative writs. The King could be conceived as superintending the due course of justice and administration through the medium of his own court : as prosecuting indictments, preventing usurpations of jurisdiction and upholding the public rights and personal freedom of his subjects.

Perhaps the oddest feature of the story is that nobody seems to have thought of classifying the writs as a group until the time of Mansfield. Yet most of the writs had acquired their ' prerogative ' characteristics at least a century earlier; and the attribution of those characteristics had been due in part to an acknowledgment that they belonged to a peculiar class. But although a relationship between the writs was assumed to exist, its nature was not defined; there was no Bracton to undertake the task of systematic analysis and rationalisation. After Coke and until Mansfield and Blackstone no common lawyer except Hale was able to survey the whole field of the law with scholarship and insight. And by the time that Mansfield had perceived the close relationship between the writs [19] and had chosen to link them verbally with the rights of the Crown, each writ had developed piecemeal its own special characteristics, so that to define the class with precision in terms of characteristics common to all its members had become virtually impossible. The result, therefore, is that, although the term ' prerogative writ ' is well known wherever the language of the common law is spoken, no lawyer has ever been able to give a satisfactory answer to the question : What is a prerogative writ ?

[19] He may have obtained some of his ideas from the discussion of certain of the writs in the same context in the *Opinion on Habeas Corpus*, (1758) Wilmot 79.