

ENGLISH ORIGINS OF JUDICIAL REVIEW BY PREROGATIVE WRIT: CERTIORARI AND MANDAMUS*

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FROM the late middle ages certiorari and mandamus have retained an important place in Anglo-American legal history despite origins which are obscured by the passage of time and by usages long since discarded. These writs are among the early innovations of the nascent common law,¹ and surprisingly retain their sway in vital areas of contemporary public law although both Great Britain² and New York³ in recent years have revised the prerogative writ system to make it more amenable to current needs and demands. The New York Court of Appeals has plainly informed the Bench and the Bar that despite the abolition of the writ terminology, the purposes and remedies afforded by the use of these writs have not been altered, but only the forms of procedure.⁴

This reminder from our highest state appellate court underlines Mr. Justice Holmes' admonition that: "The history of what the law has been is necessary to the knowledge of what the law is."⁵ Maitland integrated that apothegm into his interpretation of our legal history: "Hardly a writ of law remains unaltered, and yet the body of law that now lives among us is the same body that Blackstone described in the eighteenth century, Coke in the seventeenth, Littleton in the fifteenth, Bracton in the thirteenth, Glanvill in the twelfth."⁶ Hence this short excursion into some remote recesses of the common law to examine the line of ancestry which links us with the antiquarian forms of certiorari and mandamus, stretching from article 78 far back to legal landmarks first established by Henry II in the twelfth century.⁷

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¹ Jenks, *The Prerogative Writs in English Law*, 32 *Yale L.J.* 523 (1923).

² *Administration of Justice Act*, 1938, 1 & 2 *Geo. 6*, c. 63, § 7.

³ *N.Y. Sess. Laws* 1937, ch. 526.

⁴ *Matter of Newbrand v. City of Yonkers*, 285 *N.Y.* 164, 174, 33 *N.E.2d* 75, 80 (1941); *Toscano v. McGoldrick*, 300 *N.Y.* 156, 161, 89 *N.E.2d* 873, 875 (1949); *Matter of Gimprich v. Bd. of Ed.*, 306 *N.Y.* 401, 406, 118 *N.E.2d* 578, 580 (1954).

⁵ Holmes, *The Common Law* 37 (1881). See also Kent, 1 *Commentaries on American Law* *503-505.

⁶ Maitland, *Outlines of English Legal History*, 560-1600, in 2 *The Collected Papers* 418 (1911).

⁷ Trevelyan, *A Shortened History of England* 119 (1944).

In English legal contemplation, the king was the fount of all justice and the responsibility for dispensing even-handed justice was his alone, through his councilors and judges.⁸ The writ system, which was evolved about this time, became the motive power whereby the royal administrative machinery went into action, carrying orders to judges, sherriffs, and sometimes even to private individuals, requiring them and other royal officials to proceed to perform certain functions, some of which in later years came to be denominated as judicial.⁹

Among these writs were certain royal commands which, in their rudimentary form, could be classified as the forerunners of the certiorari and mandamus of subsequent centuries.¹⁰ The former was employed to direct the consignment of a record to the legal division of the King's Council, the *curia regis*, from any lesser jurisdiction, though not necessarily a judicial one. This writ was sent 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."¹¹ The record was requested in order to enable the *curia regis* to determine, upon review, whether these functionaries had exceeded their proper jurisdiction.¹² This form of review procedure, which in time came to be assumed by the Court of King's Bench, was employed to decide whether the questioned action would be permitted to stand, be annulled, be tried anew by the *curia regis*, or be sent back for a new trial or for other proceedings. The chief basis for setting aside the initial action was a lack of jurisdiction in the tribunal or the official for taking cognizance of the matter, or, because it was simply deemed to be in the best interests of the state to have the matter decided anew, or by another body. No objective rules or standards governed the disposition of the record. Within a fairly short time, the writ of certiorari emerged into a formal, common law method for bringing lower, criminal court judgments up for review to the Court of King's Bench.¹³ A precursor of certiorari was the writ of recordari, used for bringing up records from the county court to the *curia regis* in the time of Henry II.¹⁴

Mandamus, as it emerged in early recorded legal history, was nothing more than the king's order, issued through appropriate officials,

⁸ Ehrlich, *Proceedings Against The Crown (1216-1377)*, in 6 *Oxford Studies in Social and Legal History* 9 (1921) [hereinafter cited at Ehrlich].

⁹ Jenks, *supra* note 1, at 530; Adams, *Constitutional History of England* 86 (1921); Archer, *The Queen's Courts* 32 (1956).

¹⁰ Plucknett, *A Concise History of the Common Law* 57 (5th ed. 1956).

¹¹ Jenks, *supra* note 1, at 529.

¹² Hanbury, *English Courts of Law* 100 (1944).

¹³ Plucknett, *op. cit. supra* note 10, at 169.

¹⁴ Crabb, *A History of English Law* 116 (1st Am. ed. 1831).

directing that certain action be done. It had none of the hallmarks which we associate with the later writ of mandamus and was hardly more than a royal wish or an administrative direction conveyed to subordinates regarding something which the king of the *curia regis* deemed necessary to be done in the interests of state.¹⁵

It is important to remember that, unlike American constitutions and state court systems, "No one ever sat down and drafted the English legal system."¹⁶ For example, Magna Carta was the progeny of an ultimatum to which King John had to accede in order to retain his throne. Its importance to administrative law rests not alone in the specific formulation of the unique "due process" article, but also in the remarkable thirteenth century concept that the sovereign power has limitations which should be marked out by law. Generation upon generation of jurists and lawyers have invoked this most fundamental principle to withstand successive waves of royal absolutism.¹⁷ It established the rule of law at the dawn of English law as we know it.

But even as early as the Inquest of Sheriffs, in 1170, which directed that inquiries be conducted into the abuses of power by sheriffs and local magnates, there was exhibited the recurrent medieval recognition that naked governmental power exercised by lesser officials must be bridled.¹⁸ This commission of inquiry, directed to and pursued by the king's justices, was followed by a long series of orders and statutes designed to curb and to punish improper acts of subordinate officials where oppression of the individual was involved.¹⁹ In this manner an early English tradition of official accountability was instituted, which gradually became accepted and practised, and the submission of the state to the law became the received principle. When Bracton came to write his classic treatise, *Of the Laws and Customs of England*, circa 1250, he was able to safely premise the notion that the king was, like his subjects, subject to the law.²⁰

Another method of securing redress against an errant sheriff or bailiff acting overzealously in the king's name or even in his own illegal self-interest under color of his authority, was to obtain a writ returnable in the exchequer chamber, ordering the offending officer to justify

¹⁵ *Rex v. New College in Oxford*, 2 Lev. 14, 83 Eng. Rep. 430 (K.B. 1670); *Regina v. Buckingham Corp.*, 10 Mod. 173, 88 Eng. Rep. 680 (Q.B. 1714); *Rex v. Dublin*, 1 Strange 536, 93 Eng. Rep. 685 (K.B. 1723); cf. 3 Stubbs, *The Constitutional History of England* 598 (3d ed. 1884).

¹⁶ Archer, *op. cit. supra* note 9, at 13.

¹⁷ Adams, *op. cit. supra* note 9, at 129, 138, 142.

¹⁸ *Id.* at 117.

¹⁹ 2 Holdsworth, *A History of English Law* 415, 448-449 (3d ed. 1922) [hereinafter cited as H.E.L.].

²⁰ 2 H.E.L. 254, 402.

his action.²¹ Crude and uncertain as such methods may have been, they helped shape the emerging common law principle of personal liability of such officers in a private suit between the parties.²² Before we can reach the point where legal redress is granted for a wrong, the wrong must become legally cognizable in some court or forum. It becomes legally cognizable when there is a spirit abroad which supports the right asserted and finds a department of the state, in this instance the king and his council, ready to act upon the complaint in a particular case.

Proof that the spirit and the principle of rectifying abuses of power were an active force at this period is found in a proclamation made in Parliament in 1341²³ which stated that everyone who felt aggrieved by the king or by his ministers should present a petition to which a remedy would be awarded. Of course, it is useful to remember that this was a concession, wrung from a reluctant king by nobles and landed gentry, and not effected by or in behalf of the common mass of the population. Nevertheless, by this further development, the door was opened somewhat wider to the general reception of such grievances, and we consequently observe an increasing stream of such proclamations and statutes being issued during the entire medieval period, laying the solid groundwork for erecting the later principle of non-inviolability of official action.²⁴

Although the questioning and review of official action touching individual interests had not at this time progressed to a point where it is fully laid down as an established legal practice or a state policy, nor the methods of redress institutionalized, nevertheless the king was constantly granting applications for writs which question the action of one of his functionaries. He issued orders declaring that the pleadings in such cases should be in writing, appointing commissions or single officials to hear and report upon the complaints made, and, if need be, to award monetary damages. From all this we can conclude that, though the right to have official action reviewed is steadily gaining royal acceptance, each situation is treated *ad hoc*, rather than by channeling such matters to a special official or tribunal which would accord them uniform treatment.²⁵ We observe, too, that the Court of King's Bench is not yet the instrumentality to which the subject must repair for redress, for it will be several hundred years later that Coke arrogates these powers to his Court of King's Bench, powers theretofore exercised

²¹ Ehrlich 28.

²² 2 H.E.L. 449.

²³ Ehrlich 128.

²⁴ Id. at 95, 128, 157-158, 176, 182; 2 H.E.L. 415, 448-449.

²⁵ 4 H.E.L. 68-69, 72-73. See also Pound, *The Development of American Law and Its Deviation From English Law*, 67 L.Q. Rev. 49, 58 (1951).

by the King's Council, either directly or through its Star Chamber proceedings.

In the medieval period, the bulk of litigation stemmed from ownership and interest in land, casting most of the controversies upon issues which would later constitute Littleton's claim to fame. Where the state or the royal officials were involved in such litigation, whether in matters of land or otherwise, they became as answerable for wrongful action as an individual. This development was later to be institutionalized to provide judicial review on a wide spectrum of actionable wrongs, first in common law actions and later via the prerogative writs which continued to assimilate the *res* in issue to that of a freehold in land.

But whether it was land litigation with the Crown or a complaint of abuse of power against an official, we find no established body of precedent to govern the disposition of controversies involving the state; the common law courts still had no special jurisdiction and had not built up a body of precedent to deal with the unique problem of official wrongdoing touching a subject's interests except to authorize monetary damages or to punish criminally. Indeed, the interests of private parties were still considered secondary to the power and necessity of the Crown to maintain its revenues and to preserve peace and order among the populace. A distinct concept of individual rights *vis-à-vis* governmental action would not clearly emerge until the time of the struggle with the Stuarts in the seventeenth century. The precedents which would then be cited would be those of the age we now have under consideration, despite the medievalists' unawareness that they had broken new ground. Consequently, when Coke came to define the grounds of jurisdiction for intervention of the Court of King's Bench in the Crown-subject controversy, it was the medievalists' reasons of "preventing disorder from a failure of justice, and defect of police."²⁶ These had continued to be among the chief tasks of medieval justice, bridging the period of the Tudor dynasty.²⁷

The latter, in the interlude after the War of the Roses, were able to bring a large measure of law and order to England out of the confusion and conflict wrought by the contest between York and Lancaster. The Tudors, however, continued to use "the medieval law courts, the medieval law officers and institutions, justice of the peace and juries in the counties."²⁸ The justice of peace machinery was largely employed

²⁶ Coke, 4 Institutes of the Law of England *70.

²⁷ 2 H.E.L. 80.

²⁸ Hurstfield, Constitutional Development, in *Life Under the Tudors* 31 (1950); Chrimes, *An Introduction to the Administrative History of Mediaeval England* 262 (1959).

by the central government to carry out judicial and administrative mandates in the hinterlands. The Privy Council used the justices as fiscal agents, but could also order them "to hear cases, to rehear them, to stay proceedings," to hear complaints made by private persons against local officials, *i.e.*, encompassing the full range of administrative activity as we know it today, but undifferentiated between executive, legislative and judicial actions.²⁹

"But the Privy Council and its servants operated, during the Tudor period, through the prerogative courts of Star Chamber, Requests, High Commission. . . . These courts were uninhibited by common law principles and were able to bring a complete and inexorable justice to those who could be brought within their jurisdiction."³⁰

As a practical matter, jurisdiction of the Privy Council was as broad as the king's wishes and it, functioning primarily through the Star Chamber, was thereby enabled to cast a wide net, leaving only the most traditional common law matters to the common law courts.³¹

This broad assumption of judicial and administrative power was not accomplished, however, at the expense of the subject. Star Chamber records show that it stood ready to protect him ". . . against the exactions and corruptions of the king's officials."³² It was enlisted in the aid of distressed subjects when no remedy seemed possible in the common law courts.³³ This was direct, pragmatic action, devised by a responsible, central government in the absence of other traditional methods capable of coping with an increasing host of new problems; in a word, the Star Chamber was the forerunner of the modern administrative agency. It introduced ". . . a conception of the legal relations of the crown and its servants to the law and to the subject very different from that which had been held in the Middle Ages." This had previously been controlled almost entirely by the common conceptions of justice.³⁴ All problems had theretofore been approached from the standpoint of private law; there was no public law except criminal law.

The Star Chamber, acting as an arm of the Privy Council, made no distinction between civil and criminal matters, addressing itself to injustice wherever it reared its head.³⁵ Viewing the Star Chamber in

²⁹ 4 H.E.L. 73-74, 77.

³⁰ Hurstfield, *supra* note 28, at 31-32.

³¹ *Id.* at 37; Chrimes, *op. cit.* *supra* note 28, at 261.

³² *Id.* at 38; see also *Select Cases in the Council of Henry VII*, xi (Selden Soc. No. 75, Bayne ed. 1958) [hereinafter cited as *Select Cases*].

³³ *Select Cases* lxxxi.

³⁴ 4 H.E.L. 85.

³⁵ *Select Cases* cvii; see Ogilvie, *The King's Government and the Common Law*

this capacity is somewhat at variance with the picture of an agency long abominated as oppressive and brutal.³⁶ However, the bulk of its activities were cast in a more placid course of administrative assistance to the executive arm of the government, the Privy Council.

Thus, one Saunders had challenged the Corporation of Coventry for treating a certain area on the outskirts as private land, Saunders maintaining that it was a common and therefore open to the use of the neighboring freeholders.³⁷ The corporation had fined and imprisoned Saunders for this impertinence. In 1496, he had the issue brought before the Star Chamber, composed in part of the Privy Council and attended by a judge or two of King's Bench, for determination by a superior body. The outcome of the dispute is not recorded, but it sounds just as contemporary in its substance as the article 78 proceeding brought against Robert Moses to prevent the further invasion of Central Park land in New York City for use as additional parking space by the Tavern on the Green restaurant.³⁸

As noted earlier, wealth and power were in this period still derived from ownership of land and the major portion of the controversies brought to the Star Chamber touched this subject in some form or another.³⁹ In *Jones v. Litchfield*,⁴⁰ 1506, the plaintiff accused the defendant, while Mayor of Winchester, of having unjustly seized his land and imprisoned him, combining civil and criminal grievances. In classic administrative law fashion, the mayor admitted the facts but answered: ". . . [T]hat his action against Jones had been taken in his capacity of Mayor and was in accordance with law." Here, again, the distinction between the civil and criminal has not yet come to be drawn fine. But, notwithstanding the absence of such refinements, a remedy would be made available if the subject could show infringement of right resulting in his damage or detriment even though the mayor's action was taken under guise of governmental power and authority. The accumulation of such cases which brought errant officials to book for departing from current conceptions of fair and proper action tended to acquaint the common law courts with a new area of responsibility and was, undoubtedly, instrumental in fortifying Lord Coke in his lengthy disquisition

(1471-1641) 104-105, 110 (1958); Rowse, *The England of Elizabeth, The Structure of Society*, 364 (1961).

³⁶ See *Fischer v. Post-Standard Co.*, 14 App. Div. 2d 130, 132, 217 N.Y.S.2d 947, 949 (3d Dep't 1961); *Jones v. SEC*, 298 U.S. 1, 28 (1936). Contra, Barnes, *Star Chamber Mythology*, 5 *Amer. J. Legal Hist.* 1, 6-8 (1961).

³⁷ *Select Cases cvii*.

³⁸ *Freidburg v. City of New York*, 2 App. Div. 2d 664, 151 N.Y.S. 2d 258 (1956); see also Carr, *Concerning English Administrative Law* 125 (1941).

³⁹ *Select Cases cxxxix*; *Ogilvie*, op. cit. supra note 35, at 13, 58.

⁴⁰ *Select Cases cl*.

on the limits of government power with which the decision in *Bagg's Case* is interlaced.⁴¹

Because Star Chamber was a prerogative court, the relief afforded to suitors was not dictated by the traditional requisites of the common law forms of action system, nor inhibited by narrow statutory limitations. By reason of its pre-eminent position and superintendent authority, it could mould the relief to the exigencies of the cause presented for its consideration, not unlike the Equity of an earlier day. Precedent counted for almost nothing; but at the same time, the Court of Star Chamber was eminently successful in keeping pace with the avalanche of new problems which had descended upon England while the nation was engaged in consolidating its position as a major territorial state.⁴² The Star Chamber and other prerogative courts assumed the burdens of these newly imposed domestic responsibilities while the common law courts busied themselves with traditional matters,⁴³ a situation not unlike that which faced the United States at the time of the New Deal.

What is instructive to this generation from the standpoint of administrative law is that when the Parliamentary forces later triumphed over the Stuarts and the royal prerogative jurisdictions were abridged or abolished, the common law courts were easily able to step in and quickly assume a broader responsibility over official action than they had at any time in their prior history. Therefore, we can readily discern in Coke's definition for the exercise of mandamus jurisdiction by King's Bench, the wide swath of authority formerly exercised by the Star Chamber; for he had the imagination and the learning to borrow boldly from the actual jurisdiction exercised by the prerogative courts in the times of the Tudors.⁴⁴ He was not unfamiliar with these practices, having served as attorney general under Elizabeth, and, later, he sat on the tribunal by virtue of his capacity as Chief Justice of Common Pleas.

The common law courts under the Tudors had not entirely relinquished jurisdiction to the prerogative tribunals over matters pertaining to the activities of government officials which were brought into question before them.⁴⁵ There continued to be available the common law methods of criminal presentment for official action taken in contraven-

⁴¹ 11 Co. 93b, 77 Eng. Rep. 1271 (K.B. 1615). See also Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 *Amer. J. Legal Hist.* 221, 224-225, 336-338 (1962).

⁴² 5 H.E.L. 423.

⁴³ 4 H.E.L. 284; 5 H.E.L. 155.

⁴⁴ *Bagg's Case*, supra note 41. At this time the question of review was more a matter of grace than of right. In the common law courts the right to review was tested by the rule of law but in the Council and in the Court of Star Chamber, by expediency. See 5 H.E.L. 424, 428; 6 H.E.L. 26.

⁴⁵ 5 H.E.L. 420.

tion of law, though not necessarily corrupt in itself. This method, however, provided no recompense to the injured subject. Civil actions in trespass and replevin were frequently resorted to by aggrieved subjects but in that case, the form of action limited the range of activities for which its help could be sought.⁴⁶

MANDAMUS

Although employed since the time of Henry III to recover the presentation to a minor ecclesiastical office,⁴⁷ the writ of *quare impedit* grew into wider use with the derangements resulting from Henry VIII's schismatic action against the Church. In one such proceeding, *Bell v. Bishop of Norwich*,⁴⁸ a church living was the matter in issue and the report states that the Bishop, in his return to the "*alias* writ," argued that the presentee "haunted taverns and illegal games." King's Bench studied this plea in bar, and, in rejecting it, held that even if true, it did not warrant the Bishop's refusal to admit. By simply transposing some of the nomenclature, this writ of *quare impedit* proceeding could quite easily be assimilated to the practice followed in current article 78 proceedings which question the power of an administrative official to erect broad standards where none had theretofore been established by statute. In any event, in this *quare impedit* proceeding of respectable and ancient vintage can be discerned some of the embryonic outlines of the form which the later mandamus proceeding will take. Although an *alias* writ was not uncommon in the sixteenth century, its interest for us stems largely from the fact that it was used in the very manner that the alternative writ of mandamus later functioned to put an official person or body to its defense on the facts, in regard to action taken concerning a matter of public concern. It was in a later *quare impedit* that King's Bench held that the writ should not be awarded until both sides had been heard, saying: ". . . for he hath no day in Court."⁴⁹ This indicated a vigilant warning, resting on precedent, that a fair determination always required hearing both sides of the question.

In the same way, the writ of restitution came to be employed by the common law courts in circumstances where a person had been deprived or divested of a public office. As Dean Roscoe Pound points out, many offices were then hereditary, with the receipt of certain fees often

⁴⁶ Sledd's Case, 3 Leonard 259, 74 Eng. Rep. 671 (Q.B. 1590); *Wilkins v. Lincoln Corp.*, Noy 33, 74 Eng. Rep. 1003 (Q.B. 1601).

⁴⁷ Statute of Marlborough, 1267, 52 Hen. 3, c.12; 13 Edw. 1, c.5 (1285).

⁴⁸ 3 Dy. 254b, 73 Eng. Rep. 564 (Q.B. 1566); see also *Moore v. Bishop of Norwich*, 3 Leonard 138, 74 Eng. Rep. 591 (Q.B. 1586); *Specot's Case*, 3 Leonard 198, 74 Eng. Rep. 630 (C.P. 1588).

⁴⁹ *Boswel's Case*, 6 Co. 48b, 52a, 77 Eng. Rep. 326, 332 (K.B. 1606).

attached to them, and in consequence an "estate in the office was property."⁵⁰ Restitution itself was normally nothing more than remedial action taken in support of a substantive judgment issued by a court on the merits.⁵¹ So, in *Proctor's Case*,⁵² a writ of restitution was awarded by King's Bench to Proctor to enable the Sheriff of York to restore his goods after the allegations of his outlawry had proven unfounded. It is noteworthy that this case also recites the use of a writ of certiorari to secure official information regarding Proctor's alleged outlawry, the court stating that the writ is both "original and judicial also." An original writ started a common law proceeding while a judicial writ was an intermediate order issued by the court in aid of its jurisdiction during the progress of the proceeding.

To return to the writ of restitution, one Middleton was disenfranchised by certain aldermen of London and he brought suit in Common Pleas to be restored.⁵³ Relying upon a precedent established by Fortescue, J., in the time of Henry VI (1422-1462), King's Bench awarded Middleton a writ of restitution, the reporter of the case, Dyer, citing in the margin the later case of *Thompson v. Edwards*, 4 Jac. B.R. 1607, [unreported] in which Thompson was restored as bailiff because he "was removed without cause." Certain judicial records of the time of 6 Edw. 2 (1313) are also cited to support the action of ordering the reinstatement of Middleton. It should be noted that medieval precedents continued to crop up in the common law courts during the formative period of the prerogative writs. They are not always exactly in point, but they permit the court to take a step further in the direction of independent review of official action. Although *Middleton's Case* has been viewed as an integral part of the development of the later writ of mandamus, it resembles mandamus only in the nature of the final relief awarded. Nothing in the opinion, except as the facts in the Middleton situation and in Fortescue's cited case are set forth, elucidates the concept or the public policy upon which the court acted to reverse the decision of the two London aldermen. What is of overriding importance is the initiative shown by the judicial arm of the Crown in intervening to examine and set aside the purported illegal action of local government officials.

Within a short time, when a Lord Coke appears on the scene, these and other unrelated minor precedents are magically transformed into powerful pronouncements from which generations of jurists and law-

⁵⁰ Pound, *The Development of Constitutional Guarantees of Liberty* 34 (1957).

⁵¹ "A writ which lies, after the reversal of a judgment, to restore a party to all that he has lost by occasion of the judgment." 2 Burrill, *Law Dictionary* 416 (2 ed. 1869).

⁵² 2 Dy. 222b, 73 Eng. Rep. 493 (Q.B. 1563).

⁵³ *Middleton's Case*, 3 Dy. 332b, 73 Eng. Rep. 752 (Q.B. 1574).

yers will draw sustenance. Nevertheless, scattered minor precedents fused by the innovating hand of Coke would still yield small results if the spirit of the time did not also combine to endow the effort with encouragement and meaning. This receptive climate to stricter accountability for government action moved almost imperceptibly but irresistibly forward in the later years of Elizabeth. Stronger voices were now heard in Parliament in support of individual rights and liberties.⁵⁴

The Queen's own judges even demurred when she issued an order that one Cavendish, a royal favorite, be empowered to issue certain writs in the Court of Common Pleas. The court held this order improper, especially in the failure to allow the current incumbents of the position, who had been ousted, the right to be heard in the matter.⁵⁵ Although the issue was apparently one of private right to a court sinecure as against the Queen's wish to override this existing private right, the vindication of the right against royal fiat opened new, broad vistas of right and wrong in the public domain, subjecting them to correction in a common law court. The men of law gained new courage from decisions such as *Cavendish*, in a period when dissenters were summarily clapped into the Tower.⁵⁶

The advantage gained in the *Matter of Cavendish* was pressed forward in another suit where Elizabeth was again bested in her own royal court on the question of her authority to exercise certain powers in granting patents of monopoly. In *Darcy v. Allin*,⁵⁷ the plaintiff, who had been granted the monopoly for the importation, manufacture and sale of playing cards in England by his friend, the Queen, complained of defendant's infringement of his monopoly. The case has an added note of interest because Coke participated in the litigation as the Queen's Attorney General, and his own report of the proceedings allows broader latitude to the arguments of Darcy, the monopolist. On the other hand, Noy's report is a veritable defendant's brief, spiced with arguments and concepts which are far in advance of their time, which surely must have left a strong impression with the "father" of mandamus, Lord Coke. These remarks in Noy's report are so noteworthy and cogent, an excerpt is set forth below.⁵⁸

⁵⁴ Hallam, 1 *The Constitutional History of England* 232, 236-237, 247 (Everyman's Lib. ed. 1912).

⁵⁵ *Matter of Cavendish*, 1 Anderson 152, 123 Eng. Rep. 403 (C.P. 1587).

⁵⁶ Hallam, *op. cit.* supra note 54, at 239.

⁵⁷ Noy 173, 74 Eng. Rep. 1131, 11 Co. 84b, 77 Eng. Rep. 1260 (Q.B. 1602).

⁵⁸ Thus it appeareth how all the attributes given to the King, of power, justice and mercy are in him to dispose to the good of the subjects: that justice controlleth both power and mercy in grants, commissions, protections, pardons, as for the good of the subject in the time of 1 E.3 H.4 H.6 E.4 H.7, etc. why did the Judges withstand the

The net result of these isolated but successful skirmishes with royal authority, which placed restraints upon royal power, is that the courts are slowly girding themselves in their newly found voices of independence, and are beginning to exercise some authority in overturning official action not theretofore dreamed possible. How could we earlier conceive the Queen's court discountenancing her own royal patent? But the scholarly efforts of a handful of men carefully organizing earlier precedents with steadfast courage had greatly hastened the process of eroding the existing concepts of absolute power in government.

One of the chief protagonists of this absolutist power in the *Darcy v. Allin* contest shortly embarked upon a reversal of these views, and fourteen years later, in *James Bagg's Case*,⁵⁹ announced the germinating principle that to,

"King's Bench belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subject, or to the raising of faction, controversy, debate, or to any manner of misgovernment so that no wrong or injury, either public or private, can be done but that it should be [here] reformed or punished by due course of law."⁶⁰

This was an extraordinary assertion of power, authority and independence, inasmuch as the Star Chamber, the wide-ranging, efficacious arm of the King's Privy Council, had been long operating in the very same sphere, closely responsive to the wishes of a ruler, James I, extremely jealous of his powers.⁶¹ In *Bagg's Case* and other judicial pronouncements,⁶² Coke threw down the gauntlet to absolutism, consistently arguing the cause of the rule of law as pronounced by the common law courts performing their duties reputedly according to long standing tradition. For this display of independence and effrontery to the King's wishes, Coke was shortly deposed from his Chief Justiceship. His words, however, went ringing down through the decades of the Parliament-Stuart struggle, culminating in the abolition of the

Kings letters patents in this sort? And why are these things recorded and left to us, but that it may appear to the ages following what great care those reverend Judges had to leave the land and people in like liberty to the ages following as they found it, and so ought every man in conscience in his place to have the like care. Noy 177, 74 Eng. Rep. 1135.

⁵⁹ 11 Co. 93b, 77 Eng. Rep. 1271 (K.B. 1615).

⁶⁰ Id. at 98a, 77 Eng. Rep. at 1278; see also 5 H.E.L. 491, citing Coke to the effect that:

[C]ommon law ought to be the supreme law in and over the state.

⁶¹ 5 H.E.L. 420.

⁶² Case of Proclamations, 12 Co. 74, 77 Eng. Rep. 1352 (1611); Prohibitions Del Roy, 12 Co. 63, 77 Eng. Rep. 1342 (1607).

Court of Star Chamber in 1641⁶³ and the eventual investiture of King's Bench with full power to review government action of non-prerogative nature.

Bagg's Case is notable on several other counts. In the first place, Coke invokes chapter 29 of Magna Carta, saying that no man should be disenfranchised by a [municipal] corporation unless it has authority to do it, which is the precursor of our law on this subject today. For another, Coke notes that even if they had lawful authority by charter or custom to remove someone, the Burgesses of Plymouth had proceeded against Bagg without warning him of the charge and affording him an opportunity to answer. The removal was therefore void as contrary to "justice and right."⁶⁴ Thus, a fundamental prerequisite to valid action by any inferior body is categorically established for all time. The opinion is quite notable for constructing at one fell swoop an extensive procedure for presenting and handling such questions. It is a veritable attorney's guide for challenging government action. In particular, Coke lays it down that ". . . the return must set out all the necessary facts precisely, to show that the person is removed in a legal and proper manner, and for a legal cause." Note this caution: "It is not sufficient to set out conclusions only; they must set the facts out precisely, that the Court may be able to judge of the matter." Although addressed to returns, this means, in contemporary legal terminology, that administrative bodies should make findings which support the determination made by them, a recurrent problem, if a sampling of current law reports is any indication of the practices of the administrative bodies of our day.

Finally, the court considers the merits of the case, as many appellate courts do even as they dispose of a case on procedural grounds. Although the return had detailed a series of insults which Bagg had offered to several Mayors and Burgesses of Plymouth, in which he had impugned their loyalty and had exhorted the citizenry not to pay the wine tax, the court found them insufficient cause to justify his removal and ". . . therefore by the whole court a writ was awarded to restore him to his franchise and freedom, and so he was."⁶⁵

It was doubted by some that King's Bench had acted judiciously and judicially. Lord Ellesmere, Lord Chancellor to King James, an ardent supporter of Stuart absolutism, and Coke's bitter antagonist, asserted in his *Observations* that Coke was "assuming to manage the state;" that Coke's decision had gone beyond the necessities of the

⁶³ Star Chamber Act of 1641, 16 Car. 1, c.10.

⁶⁴ 11 Co. 99a, 77 Eng. Rep. at 1279-1280.

⁶⁵ Id. at 99b, 77 Eng. Rep. at 1280.

case and implying that the return sufficiently justified Bagg's removal.⁶⁶

It would appear that Lord Coke promulgated valid and necessary procedural requirements, but by current standards went awry on the merits of the case. Bagg had certainly given sufficient cause for his removal and if the Plymouth Burgesses had but given him a hearing to air the charges, the decision would have been irreproachable. Lord Coke also laid it down as law that nothing less than a criminal conviction on these charges would suffice to support the removal, which is somewhat at variance with his insistence that a hearing by the Burgesses on the charges was a prerequisite to removal. These inconsistencies are smoothed out in succeeding cases, but a deeper and as yet unresolved problem was revealed by Lord Ellesmere's criticism of the decision.

This quarrel remains alive today: when shall the court step in, absent a clear violation of law, and when shall it keep to the sidelines, allowing other arms of government to work out particular problems in their field of specialty, in their own way? These are questions which are not susceptible to categorical answer, and require forbearance and understanding on both sides. Coke was, in 1615, acting in a normal, common law, judicial capacity, legislating for novel situations, adapting old forms to new needs and to altered conditions.⁶⁷ This was not judicial usurpation of legislative functions because Parliament did not, as a rule, act on such interstitial matters in that period. Coke, therefore, opened wide the gates to provide remedy and relief upon stated conditions which the men of law could thereafter understand and adapt to future contingencies. It remained to his successors, Holt and Mansfield, to refine his innovations and to firmly establish the place of the prerogative writs in common law judicature. By the time of the American Revolution, a complete system had been fairly well established upon Coke's pioneering handiwork, and today, for example, "notice and hearing" are the cornerstones of procedural due process, emanating directly from the rule laid down in *James Bagg's Case*.

By 1618, when John Taylor, a citizen and alderman of Gloucester, sued out a writ of restitution for having been put out of his place by the common council of the city, King's Bench now had Bagg's precedent as a guide for sustaining Taylor's prayer for relief and "his writ was allowed."⁶⁸ Likewise, in *Awdley v. Joy*,⁶⁹ the court repeated the broad scope of Coke's jurisdictional dictum in *Bagg's Case*, without citing it, and awarded Awdley a writ of restitution to be re-

⁶⁶ 77 Eng. Rep. at 1278, n. (B).

⁶⁷ 5 H.E.L. 489-490.

⁶⁸ Taylor's Case, Popham 133, 79 Eng. Rep. 1236 (K.B. 1618).

⁶⁹ Popham 176, 79 Eng. Rep. 1272 (K.B. 1626).

stored to the townclerkship of Bedford. The remedy was now enrolled in the common law precedents of the High Court and any aggrieved person could secure its assistance if his cause was just.⁷⁰

Restitution, however, continued as the form and mode of relief against ouster from a public office during the Commonwealth.⁷¹ Before this time, mandamus had been exclusively used by the King and by the courts to require specified administrative action to be performed in aid of larger measures afoot.⁷² Just prior to Charles I's downfall, an executor had secured a writ of mandamus from King's Bench to compel a prerogative court to grant him his rights of administration according to the will.⁷³ It was not a fullbodied mandamus because it was somewhat ancillary to proceedings in another court of judicature, nor did it pertain to ouster from a public office or to a public right. Nevertheless, it seems to be the first record of the use of mandamus in the nature of an original writ rather than as a writ supporting either judicial or administrative action.

There is a long lapse between *Luskins' Case* and the next important litigation touching mandamus; it bridges the entire Protectorate, and the Restoration courts are in full operation before one Dr. Goddard moved King's Bench for a mandamus to restore him to his fellowship in the College of Physicians.⁷⁴ Dr. Goddard, however, was denied his requested relief. Another doctor, Widdrington by name, made application soon after for a mandamus and it, too, was denied. This was on the good administrative law ground that Christ College, to which Dr. Widdrington desired restoration, had a special visitor (*i.e.*, administrative appeals board) which had jurisdiction to consider such requests and Dr. Widdrington had failed, in modern parlance, to exhaust his administrative remedies.⁷⁵ The same answer was given to a third doctor, one Patrick,⁷⁶ where the court told him that ". . . the visitors are the proper judges of their laws and statutes, and not this court."⁷⁷ However, King's Bench would look into "matters of interests in property,"⁷⁸ because ". . . the common law shall judge

⁷⁰ See also *Estwick v. City of London*, Style 42, 82 Eng. Rep. 515 (K.B. 1648).

⁷¹ *The Protector and the Town of Colchester*, Style 446, 82 Eng. Rep. 850 (K.B. 1655), where one Bernardiston was fully restored to his place of Recorder because he was ousted without a hearing, following *Baggs' Case*, which is cited in this opinion.

⁷² See *Vivion's Case*, 3 Dy. 302a, 73 Eng. Rep. 678 (Q.B. 1571); *Owen Ap. David's Case*, 3 Dy. 344b, 73 Eng. Rep. 775 (Q.B. 1575); *Raysing's Case*, 2 Dy. 208b, 73 Eng. Rep. 460 (Q.B. 1561).

⁷³ *Luskins and Carver*, Style 7, 82 Eng. Rep. 488 (K.B. 1646).

⁷⁴ *Dr. Goddard's Case*, 1 Lev. 19, 83 Eng. Rep. 276 (K.B. 1660).

⁷⁵ *Dr. Widdrington's Case*, 1 Lev. 23, 83 Eng. Rep. 278 (K.B. 1661).

⁷⁶ *Dr. Patrick's Case*, 1 Lev. 65, 83 Eng. Rep. 299 (K.B. 1662).

⁷⁷ *Id.* at 66, 83 Eng. Rep. at 300.

⁷⁸ *Id.* reported also in 1 Keble 610, 81 Eng. Rep. 1141 (K.B. 1662).

whither they [the law] be broken, or not, else it would set up an uncontrollable jurisdiction against the King. . . ."⁷⁹ This passage breaks new ground in asserting the supremacy of the courts where palpable questions of law arise—even where so-called self-governing bodies such as colleges and professional societies authorized by statute are concerned. This principle received further elaboration in *Parkinson's Case* later.⁸⁰

Mandamus applications in large numbers follow from this point, now that the way has been cleared, and it only remains for the later moulders of the common law, Holt and Mansfield, to establish the refinements of this comparatively new remedy. This judicial leadership came about quite naturally through the collapse of the Stuarts, the impetus to judicial independence gained from the Act of Settlement of 1700,⁸¹ and the absence, from the onset of the struggle with the Stuarts, of a central, supervisory authority over local activities. The revitalized role of the writ of mandamus, and also of certiorari, is therefore the offspring of accidents of English constitutional history. As Holdsworth points out, the system we inherited from England could easily have come under full executive control, if the Stuarts had prevailed, rather than under judicial surveillance.⁸²

During the troubled Stuart-Parliament struggle and through the periods of Commonwealth, Restoration, Revolution and New Royalty, the common law courts rose to meet a pressing need in this particular area. The courts filled a vital gap in the law of the seventeenth century by exercising a sparing veto power, in the default of the executive branch, to superintend the actions of local bodies and officials. The judges utilized and re-moulded the techniques of mandamus, certiorari, criminal presentment and civil actions to this end.⁸³ This newly assumed responsibility was expressed in *Philips v. Bury*,⁸⁴ where it was ruled that the sprawling municipal corporations were subject to "the general and common laws of the realm." This refers, of course, to the supervision of the judiciary via the techniques referred to above. It must be remembered also that all parties concerned, *viz.*, executive, legislative and judicial had just come through a most devastating ordeal, *i.e.*, a king executed, civil war, religious strife, and finally, the articulation of new concepts of the power and functions of

⁷⁹ Id. at 611-612, 81 Eng. Rep. at 1141-1142.

⁸⁰ Holt 143, 90 Eng. Rep. 977 (K.B. 1689).

⁸¹ 12 & 13 Will. 3, c.2; Plucknett, *op. cit. supra* note 10, at 60; Marriott, *English Political Institutions* 290-291 (1910).

⁸² 4 H.E.L. 217, 284; 5 H.E.L. 155; 6 H.E.L. 66.

⁸³ 6 H.E.L. 258; Wade, *Law, Opinion and Administration*, 78 L.Q. Rev. 188, 193 (1962).

⁸⁴ 1 Ld. Raym. 5, 91 Eng. Rep. 900 (K.B. 1694).

government.⁸⁵ At this juncture and under such impetus, the judiciary was able to elevate the common law to an uncommonly high status in the new order. In part, the common law was responsible for the new order because its precedents and its concepts had been utilized throughout the period of struggle.

Before this time, local government was largely free of control by law except for intermittent periods when a powerful sovereign or a strong Chief Justice was in the saddle.⁸⁶ The rule of law had not fully permeated the transactions of government officials to the extent that it was accepted practice for them to act and to exercise their power and discretion according to ascertainable objective standards, and to stand review if they failed to meet these standards. It was now a period of flux in the reorganized and realigned British establishment and in the eddying currents which brought power within the reach of new hands. Lord Holt, one of the giants of the common law, reached out to bring a great measure of order and stability in the area of public law. He arrogated, following Coke's lead, a part of this power of the state to the judiciary,⁸⁷ a power anciently exercised by the courts only as an arm of the sovereign.⁸⁸ But now, judicial control, as a practical matter, became "the only control to which the organs of local government was subject."⁸⁹ The medieval idea that the organs of local government were autonomous, but subject to the control of the law, was again applied in Westminster. It was applied in the eighteenth and nineteenth centuries much as it was applied in the middle ages and in the sixteenth and seventeenth centuries.⁹⁰ It is this transformed law, pronounced by Holt and Mansfield, which will now be examined in part, the interregnum of the Commonwealth period having produced but small progress in this area.⁹¹

In a case where the return to an application for mandamus alleged that Glyde, an ousted alderman, had departed the city, lived somewhere else and failed to attend the courts, Lord Holt voted for a peremptory mandamus to restore him.⁹² He recognized the implicit validity of the argument that an officer of the city should live within

⁸⁵ Locke, *Second Treatise on Civil Government*, ch. 9 passim (Everyman's Lib. ed. 1924).

⁸⁶ 10 H.E.L. 126, 134, 140, 142.

⁸⁷ 6 H.E.L. 258, 263; 10 H.E.L. 149, 151-152.

⁸⁸ 10 H.E.L. 155.

⁸⁹ 10 H.E.L. 156-157, 243.

⁹⁰ 10 H.E.L. 158. Within the sphere assigned to them by law, they were free to perform their functions in their own way. *Id.* at 220. Consequently, a Fourth Branch of Government existed long before the President's Committee on Administrative Management discovered its existence in 1937 (Report 36); cf., 10 H.E.L. 228, 236, 717.

⁹¹ Wedgwood, *The King's Peace* 453 (1956).

⁹² *The King v. Mayor of Exon*, 1 Show. 258, 89 Eng. Rep. 558 (K.B. 1693).

the territorial limits and attend to his duties there, but he insisted that forfeiture of the office required something more, *viz.*, “. . . a reasonable summons for him to answer the particular matters.” Here are the requirements of “notice and hearing,” again following Coke, spelled out in the plainest terms, well in advance of any constitutional prescriptions. Holt catalogues the range of possibilities which might have been accepted by the hearing body to excuse each of the grounds cited as the basis of Glyde’s ouster, saying only that they might have been deemed sufficient if he had not been granted the right to defend against them. The other judges did not concur in this view; later generations did.

In *Knipe v. Edwin*,⁹³ a mandamus was sought by defendant to admit him to the office of “balif.” The respondent argued in opposition to the issuance of the writ that mandamus is prerogative writ and is only granted where the public justice of the nation is concerned, which is not the case here. This is merely a quarrel between two men over nomination to an office to which Knipe has already been admitted and had thereby secured a freehold for life. Edwin’s remedy, the respondent urged, was restricted to an action on the case, and he asked the court to deny the mandamus. King’s Bench made short shrift of this argument in a terse statement: “An action on the case will not put the man in possession of the office, for that he shall only recover damages. A mandamus was granted; but without prejudice.” This is a far-reaching decision in the same way that early injunction decrees perceived and preserved legal interests that no amount of monetary damages could compensate. The long standing restriction to monetary damages by civil action against public officials for wrongdoing was now greatly relaxed. Litigants could thereafter pursue the very thing in issue itself, *i.e.*, the office or the right, rather than the vicarious and dubious satisfaction of a prolonged suit for money damages.

Even where the established order of things would be seriously disturbed and substantial interests in London affected, Holt did not hesitate to follow the mandate of the law, rather than the easy path of expediency. Under an act of Parliament,⁹⁴ the Barbers and Surgeons of London were united in one Company to be governed and regulated by two masters of each calling. In the course of time, men of means and standing who were neither surgeons nor barbers were admitted to the Company. Some of these latter had come to be elected master barbers which became the point at issue in a mandamus proceeding, and which presently arose on an information against them for a false

⁹³ 4 Mod. 281, 87 Eng. Rep. 394 (K.B. 1695).

⁹⁴ 32 Hen. 8, c. 42 (1540).

return.⁹⁵ Holt recognized the immense prestige which accrued to the Company by the addition of men of substance and means who were neither barbers nor surgeons, but he noted also the key importance of having a master who is experienced as a barber to sit in judgment on improprieties of barbers who are brought to book under the law creating the Company. He is brought to the irrevocable conclusion, therefore, that the usages and by-laws of the Company "can never repeal the Act of Parliament." A peremptory mandamus was granted against the defendant. This principle of the supremacy of the legislative enactment over administrative rule or usage has continued to rule our law from that time to this. The pronouncement did not emanate from any political concept of the separation of powers, but simply from a belief that what the superior law-making body had clearly established should not be set aside at the instance of a lesser body.

The fundamental necessity for a mandamus writ in common law procedure was founded upon the patent proposition ". . . that unless some mandamus . . . will lie in this case, there is no remedy."⁹⁶ This is a case of first impression, without direct precedent, as are many of the reported cases in the seventeenth and eighteenth centuries. It involved an election controversy where the procedure adopted by the Lord Mayor of London in nominating those persons other than the parties elected in the Wards presented a problem in frustration of the wishes of the electorate, and a divided King's Bench let the mandamus go. The principle that the existence of no other available remedy created a basis here for issuing mandamus was later erected into a formidable principle by Lord Mansfield. In the present case, the decision on the question of issuing the writ in the first instance, to require answer by the Lord Mayor, not in judging the merits of the controversy.

Lord Holt was a pioneer on a grand scale; he laid down rules of the broadest scope in his capacity as a common law judge meeting the problems of a new age. But he did not shrink from also laboring to elaborate the minor details so that the rule of law would stand muster to all exigencies and ultimately find reception throughout the far flung dominions and in this country. His keen appreciation of common right and fairness led to the establishment of mandamus requirements which have mainly withstood the ravages of two and one-half centuries, and of the crucial test posed by the transference of power from the few to the many. But Holt functioned in a period of such rapid change and growth and in so many areas of the law that it is small wonder that some of his rulings have nevertheless fallen by the wayside.

⁹⁵ *The King v. The Company of Barber Surgeons in London*, 1 Ld. Raym. 584, 91 Eng. Rep. 1291 (K.B. 1701).

⁹⁶ *The Queen v. Heathcote*, 10 Mod. 48, 88 Eng. Rep. 620 (Q.B. 1712).

For example, he ruled that it was "not fit that a common council should try [a capital burgess who wrote a scandalous letter] a thing that is triable at the common law." They should first await conviction.⁹⁷ This is not the law today, and there is no sound reason for his requirement that an administrative body must wait upon the completion of a civil or criminal suit before taking action within its own area of competence; each action should be able to stand upon its own postulates.

But our debt to Lord Holt grows larger with the list of mandamus decisions which he issued in the period of his service as Chief Justice of King's Bench, 1689-1710. A notable opinion which discloses an unusual grasp of fundamental legal theory is *Rex v. Mayor of Oxon* (Oxford).⁹⁸ This involved the case of a local official serving at will who was ousted, as the return showed, for failure to take the oath of allegiance, which, in this particular case was found to be an insufficient reason, of itself. The court, under Holt's headship, ruled that it was not called upon in the present state of the case "to determine whether there ought to be a good cause, or not, for such removal." However, the court is still required to judge the matter according to law, and if the corporation has not determined "their will," *i.e.*, acted according to law, the ouster did not have a valid legal basis and a peremptory mandamus was granted for his restoration.⁹⁹ A variation on this theme arose in *Serjeant Whitacre's Case* about ten years later.¹⁰⁰ The notice to Whitacre regarding his removal was to answer for non-attendance as recorder at a session of oyer and terminer, "whereas he is turned out for non-attendance at a session of peace, and indeed answered to that, though not charged therewith." Again, to the argument that Serjeant Whitacre held his post at will only, the court answered: ". . . [F]or the corporation had not returned that; they have relied upon his misdemeanors, and not upon their power," issuing a peremptory mandamus.

Lord Holt's enhancement of the powers of King's Bench in the area of prerogative writs reached its apogee in two decisions relating to certiorari.¹⁰¹ "He moulded the old system which he found established,

⁹⁷ *The Queen v. Mayor of Gloucester*, Holt 450, 90 Eng. Rep. 1148 (Q.B. 1710). This follows Coke's view, in *Bagg's Case*, page 491 *supra*, that such statements should be subjected to criminal action in the first instance.

⁹⁸ 2 Salk. 428, 91 Eng. Rep. 372 (K.B. 1697).

⁹⁹ This position was later overruled, in effect, by Lord Mansfield in *Rex v. Mayor of Axbridge*, 2 Cowp. 523, 98 Eng. Rep. 1220 (K.B. 1777).

¹⁰⁰ *Regina v. Bailiffs of Ipswich*, 2 Salk. 434, 91 Eng. Rep. 378 (Q.B. 1706). See *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 95 (1943); *Matter of Blum v. D'Angelo*, 15 App. Div. 2d 909 (1st Dep't 1962); *Matter of Barry v. O'Connell*, 303 N.Y. 46, 50, 100 N.E.2d 127, 129 (1951).

¹⁰¹ *Groenvelt v. Burwell*, 1 Ld. Raym. 454, 91 Eng. Rep. 1202 (K.B. 1699); *Case of Cardiff Bridge*, 1 Ld. Raym. 580, 91 Eng. Rep. 1287 (K.B. 1700).

to the new wants of an altered state of society."¹⁰² It was his steadfast opinion that "If the plaintiff has a right he must of necessity have a means to vindicate and maintain it, . . . and indeed it is a vain thing to imagine a right without remedy."¹⁰³ Although *Ashby v. White* dealt with a suit for damages as a result of being denied the privilege to vote, Holt constantly sought "to adapt established principles to the new exigencies of social life."¹⁰⁴

Parliament, primarily engaged in larger concerns,¹⁰⁵ continued the centuries-long custom of leaving the field clear to the common law courts to meet the "new exigencies of social life." In regard to mandamus, it remained for Lord Mansfield to place the finishing touches to a newly discovered but widely employed implement of the common law. Where Holt had followed a careful, piecemeal method of adapting mandamus, to both old and new circumstances, Mansfield, in a series of mid-eighteenth century cases, issued the broadest possible pronouncements to encompass a new spectrum of wrongs under mandamus jurisdiction.

In one of these cases, *Rex v. Bloer*,¹⁰⁶ the petitioner sought a mandamus for being illegally turned out of his clerkship of a chapel. The respondent argued that this was a private chapel and, therefore, was not a public office against which a mandamus would lie. Lord Mansfield proceeds to place the weight of mandamus behind the grievance of any person who "is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established course of law has not provided a *specific* remedy by another form of proceeding." He also examines the various possible remedies such as ejection and trespass, and rejecting them, awards the mandamus.

It is shortly thereafter in one of the landmark cases of mandamus law, *Rex v. Barker*,¹⁰⁷ that Lord Mansfield fully invigorates the tentative searchings of *Rex v. Bloer*. The petitioner sought to be admitted to the office of pastor although he was a dissenting Protestant. After *Bagg's Case*, this is one of the high points in the evolution of mandamus. We can clearly observe a common law court achieving its higher purposes and accomplishing what it is most qualified to contribute: administering substantial justice in new situations by building upon the

¹⁰² Campbell, 3 Lives of the Chief Justices of England 20 (1873).

¹⁰³ *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (Q.B. 1703).

¹⁰⁴ Campbell, op. cit. supra note 102, at 56.

¹⁰⁵ Gough, Fundamental Law in English Constitutional History 24-25 (1955). But see 9 Anne, ch. 20 (1710) which provided a modicum of procedure.

¹⁰⁶ 2 Burr. 1043, 97 Eng. Rep. 697 (K.B. 1760).

¹⁰⁷ 3 Burr. 1265, 97 Eng. Rep. 823 (K.B. 1762).

accumulated experience and wisdom of the best of its predecessors. Lord Mansfield does not temporize.

“Where there is a right to execute an office, perform a service, or exercise a franchise; (more especially, if it be in a matter of public concern, or attended with profit;) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy; this Court ought to assist by a mandamus; upon reasons of justice, as the writ expresses— . . . and upon reasons of public policy, to preserve peace, order and good government.”¹⁰⁸

The latter phraseology, and more that follows, is directly borrowed from Coke's description of King's Bench jurisdiction in *Bagg's Case* and in his Fourth Institute.¹⁰⁹ Mansfield exhibits a lively concern that a remedy be available where an apparent right is invaded. He says: “The value of the matter, or the degree of its importance to the public police, [*i.e.*, “policy”] is not scrupulously weighed. If there be a right and no other specific remedy, this should not be denied.” *Barker*, building upon *Bloer*, established the principle that fine distinctions between private and public action would not be observed in order to bar the award of a writ of mandamus if a specific legal remedy were lacking. In the case of *The King v. Vice-Chancellor of Cambridge*,¹¹⁰ which involved a disputed election to the post of High Steward of the University, the question of availability of mandamus was again raised and Mansfield answered that if the office be of consequence and value and no other remedy was available, the mandamus would issue.

However, Lord Mansfield, one of the outstanding architects of the common law, was not one to throw the gates wide open and cast all legal caution to the winds. He was also sensible of the vast burdens which administrative bodies must shoulder and the consideration which they must give to a wide scope of variegated factors; much broader than those which ordinarily come within the legal cognizance of a common law court. Lord Mansfield only insisted that such administrative action, in its totality, be in conformity with law.

His view of what constituted a question of law in a mandamus proceeding is perceptively set forth at some length in *Rex v. Dr. Askew*.¹¹¹ One Letch had applied to be received into the College of Physicians and upon his rejection applied to King's Bench for a man-

¹⁰⁸ Id. at 1266, 97 Eng. Rep. at 824.

¹⁰⁹ 11 Co. 93b, 77 Eng. Rep. 1271 (K.B. 1615); Coke 4 Institutes of the Law of England *70.

¹¹⁰ *Rex v. Vice-Chancellor of Cambridge*, 3 Burr. 1647, 97 Eng. Rep. 1027 (K.B. 1765). See also *King v. Dr. Bland*, 7 Mod. 355, 87 Eng. Rep. 1287 (K.B. 1741).

¹¹¹ 4 Burr. 2186, 98 Eng. Rep. 139 (K.B. 1768).

damus to command his admission as a Doctor of Physic. Again, Mansfield premises the rule that where a party has a right and there is "no other specific legal remedy, the Court will assist him by issuing this prerogative writ in order to his obtaining such right." Lord Mansfield concedes, however,

"that the judgment and discretion [of the College] of determining upon this skill, ability, learning, and sufficiency to exercise and practice this profession is trusted to the College of Physicians: and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike."¹¹²

He recognizes, moreover, that an applicant may be rejected upon grounds other than "insufficiency in point of skill and ability or knowledge." But whatever the point of rejection, "The Court are to judge of such objections and the reasons of them." In this decision, where the mandamus was refused, Mansfield posed the major problem which still fazes the courts. It is recognized that special responsibilities are committed to regulatory bodies and the experience which they acquire in discharging these responsibilities uniquely qualifies them to reach an informed judgment on these problems. Nevertheless, the substance and scope of the administrative decision and the manner whereby that decision has been reached leave residual questions to be determined by a court of law. The major problem faced by the courts is when to set aside determinations made for reasons and in a manner not in strict accordance with judicial standards. In addition to current precedents, it is likely that the "felt necessities of the time" will dictate the answer for each generation of judges.

In a case decided a year earlier than *Dr. Askew's Case*, Mansfield took a position diametrically opposite to the views expressed in the *Askew* decision.¹¹³ This was a mandamus to restore one Burland as Recorder of Wells after his removal because he absented himself from April Sessions; administered the oath to the Mayor and another when only the Mayor should have been sworn; and when the Mayor adjourned the election, Burland ordered it continued. Lord Mansfield excused Burland's absence from Sessions because it happened only once; on the other two counts he characterized Burland as being merely wrong in his opinion. From a perspective of two centuries, there is no question that each count was sustained and it really boiled down to whether

¹¹² Id. at 2188, 98 Eng. Rep. at 141.

¹¹³ Rex v. Wells, 4 Burr. 1999, 98 Eng. Rep. 41 (K.B. 1767).

there was a "breach of his corporate duty." Each of the counts pertained to the performance of his office of Recorder, and particularly when he had countermanded the Mayor's orders on adjourning the election, he had plainly set himself in defiance of his superior. There was no contest regarding the facts in each count and it is difficult to ascertain why Lord Mansfield departed from his usual fine appreciation of the right of a regulatory body to be sustained where its action is not taken contrary to law and is not arbitrary or capricious. Perhaps there are political elements in this case which moved Lord Mansfield to refuse the mandamus, but this is plainly a case where the judiciary arrogated to itself more power and authority to annul the action of the administrative body than was warranted by the reported facts of the case.

Of course, in our scheme of things, the courts are the final arbiters in the limited sense in which we now refer to them, and there is really no definitive measuring guide for calculating the validity of their conclusions *vis-à-vis* the regulatory bodies. The common law process of building decision upon decision, in case by case, helps delineate the boundries referred to above, but the reasonableness of the action of the courts is nowhere subjected to rigorous examination, except by the writers on law. The last word, however, remains with the courts. There is little doubt in Mansfield's judgment that "the Court are to judge of such objections and the reasons of them," but under his standards the judicial power is not absolutist; his lady of justice is not blinded to the mote in the eye of the courts themselves. He firmly insists that "the Court ought to be satisfied that they have grounds to grant a mandamus: it is not a writ that is to issue of course, or to be granted merely for asking." Each pioneer of the common law prepares the groundwork for the part of the structure which is to follow, though what is groundwork and what is structure may become a debatable question. It is likely that very few contemporary practioners know that when they describe an administrative act as "arbitrary and capricious," they are borrowing, for example, both the precise terminology and the judicial concepts of High Court review enunciated in opinions rendered by our Lord Mansfield.

No innovator, especially a Chief Justice of King's Bench, can be a paragon of perfection, and Mansfield betrayed the normal degree of human frailty, as witness *Rex v. Wells*, supra. A more surprising departure occurred in *Rex v. Mayor of Axbridge*,¹¹⁴ where despite the admitted fact that a removal from office had occurred without notice

¹¹⁴ 2 Cowp. 523, 98 Eng. Rep. 1220 (K.B. 1777); see also *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

and hearing, Mansfield refused to let the mandamus go, stating that "they would undoubtedly remove him again, the very instant he should be restored." This exemplifies a rule of expediency, and Mansfield momentarily lost sight of the fact that he was sitting in King's Bench to enunciate the rule of law on the narrow issues presented to the court, and not to decide ultimates nor give comfort to those who would disobey the law. In *Dr. Gower's Case*,¹¹⁵ 1694, Lord Holt had ruled that action could not be taken against a party unless he had an opportunity to be heard; here, Mansfield momentarily reverted to his role as practical politician and abdicated his judicial responsibility for applying the correct and established rule of law to the case presented to him.

Nevertheless, by any standards, Mansfield was a great and outstanding jurist, and his contributions toward nurturing the growth of administrative law were manifold. During his long tenure as Chief Justice, mandamus became securely established in his majesty's Court of King's Bench as a remedial measure in aid of distressed subjects asserting a grievance against a government officer or body. In the period between the services of Lord Holt and Lord Mansfield, which spans approximately 100 years and leads right into the time of the American Revolution, many local bodies in England had been created and had become invested with ever-increasing responsibilities. However, the decisions issued by the High Court placed them on notice that they could not use their powers oppressively or unreasonably; their action must be in alignment with the law. In Mansfield's time, the major outlines of the writ of mandamus had come to be clearly delineated: all inferior jurisdictions must observe the law according to the formulas which had been detailed in the cases decided by the Court of King's Bench. A wide latitude remained for local initiative to function and to flourish, but the time-honored requirements of common law fairness must be observed as closely as was possible.

At the close of this period, the oracle of the common law, Blackstone, gathered the diffuse rhetoric of the judicial opinions into the following definition of the writ of mandamus:

"A writ of *mandamus* is in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes to be consonant with right and justice."¹¹⁶

¹¹⁵ 3 Salk. 230, 91 Eng. Rep. 794 (K.B. 1694).

¹¹⁶ 3 Blackstone, Commentaries *110.

CERTIORARI

The term "jurisdiction" bears a close relationship to the development of certiorari as a prerogative writ and therefore some consideration of that aspect of English common law is required. Pollock and Maitland state that the "law of jurisdiction was intertwined with the law of property and the law of personal status,"¹¹⁷ *i.e.*, that jurisdiction was a proprietary right emanating from the tenure of land. It is one of the main ties which keeps medieval society together, binding each man to his master. Jurisdiction is inseparable from the feudal system and medieval law, and implies full power and authority to act within certain bounds. With jurisdiction went power, power to hear and power to adjudicate.

In another place, the concept is made plain by these eminent legal historians of early English law that tenure implies jurisdiction, which thereby embraces the broad exercise of power, subject only to the intervention of royal justice under stipulated conditions,¹¹⁸ because in the middle ages exercise of jurisdiction is never clearly separated from the exercise of the power of government itself.¹¹⁹ So, ownership of land, together with the feudal relation of lord and master, conferred varying degrees of jurisdiction, which is the right in the one to exercise certain unrestricted powers in regard to the other. In the organized communities a similar type of autonomy by local authority grew up whereby the local government unit exercised broad powers over its inhabitants, subject only to the rule of the common law.¹²⁰ It is notable that royal justice and the common law have the final word in regard to the autonomous powers exercised by these medieval "jurisdictions." The Court of King's Bench later assumed such supervisory power in more formal terms.

Ancillary to the supremacy principle of the lord acting within his jurisdiction is the rule that appellate jurisdiction belonged only to the King's courts upon which rested the ultimate responsibility for administering justice in the land.¹²¹ The king exercised his appellate jurisdiction in criminal matters by a writ of certiorari which ordered the record of proceedings in a lower jurisdiction to be brought up to the royal court for examination.¹²² Of course, in the fourteenth and fifteenth centuries the writ of certiorari in nowise resembled, in its

¹¹⁷ 1 Pollock & Maitland, *The History of English Law* 527 (2d ed. 1898) [hereinafter cited as 1 P. & M.].

¹¹⁸ 1 P. & M. 584-586.

¹¹⁹ 1 P. & M. 554.

¹²⁰ 10 H.E.L. 717.

¹²¹ 1 P. & M. 525, 590.

¹²² Harris, *Certiorari* 5, § 3 (1893); Hanbury, *English Courts of Law* 107-108 (1944).

practice or in its function, the writ which was to later become the vehicle for reviewing actions of officials and official bodies in regard to exercise of jurisdiction. The earlier writ of certiorari was technical nomenclature denoting that certain records or documents were certified and transmitted at the request of the Crown. By the year 1414, the use of certiorari for sundry purposes had become so widespread that abuses had already crept into the usages attending it. It was accordingly enacted¹²³ that where a writ of certiorari was issued for the delivery of a person held prisoner by reason of failure to pay a sum of money, he should not be released from custody “. . . until agreement be made to them of the sums so adjudged.”

This early statutory measure for dealing with abuses of the writ of certiorari places its development in legal history at an early date in the common law. Its antiquity is also vouchsafed by the fact that it is described at length in the major attorneys' handbook of the Tudor Age, Fitzherbert's *Natura Brevium*,¹²⁴ and Maitland cites its presence in the Register of Original Writs.¹²⁵

In the late Tudor period, certiorari still retained its narrow, mechanical function and was widely used in criminal proceedings, to bring up records on appeal and to secure certification of official acts. A bare report under the headnote of “Cerciorari” in Brooks New Cases, 31 (*i.e.*, Brooke's *Abridgement*, 1574), adverts to the fact that the writ is used to bring records up to the higher courts on review and it cites a case of the 44th year of Edw. 3, 1371, as authority. *Bourne v. Russel*,¹²⁶ in the same period, cites a case of the year 1343 as precedent for ordering a record up to the King's Court by certiorari. A host of cases, both civil and criminal, testify to the existence of this common practice.¹²⁷

In an untitled case decided by John Popham in 1601,¹²⁸ the Chief Justice also cites ancient statutes,¹²⁹ which authorized the royal courts to require “inferior Courts which have peculiar jurisdictions . . . to do justly, for if these courts shall not be restrained with penalties, justice will be neglected.” Such language was closely followed one hundred years later by Lord Holt in asserting the broad power of King's Bench

¹²³ 2 Hen. 5, c. 2 (1414).

¹²⁴ F.N.B. 245A.

¹²⁵ Maitland, *The History of the Register of Original Writs*, 3 Harv. L. Rev. 97, 106 (1889); see also *Carew's Case*, Cro. Jac. 484, 79 Eng. Rep. 413 (K.B. 1619).

¹²⁶ 3 Dy. 274b, 73 Eng. Rep. 614 (Q.B. 1568).

¹²⁷ See also [Case 5] 1 Dy. 32a, 73 Eng. Rep. 71 (K.B. 1537); *Duke of Norfolk's Case*, 1 Dy. 93a, 73 Eng. Rep. 202 (K.B. 1553); [Case 49] 2 Dy. 180b, 73 Eng. Rep. 398 (Q.B. 1561); *Proctor's Case*, 2 Dy. 222b, 73 Eng. Rep. 493 (Q.B. 1563); *Dayrel & Thinn's Case*, 1 Len. 22, 74 Eng. Rep. 20 (Q.B. 1584).

¹²⁸ Case 63, *Gouldsborough* 146, 75 Eng. Rep. 1055 (Q.B. 1601).

¹²⁹ 28 Edw. 3, c. 10 (1354); 1 Hen. 4, c. 15 (1399).

to examine the determinations of inferior tribunals by issuing a writ of certiorari.¹³⁰

In contradistinction to the lag in mandamus-type review, judicial review of action taken by officials and inferior tribunals was widespread prior to the Parliamentary struggle with the Stuarts. The forms of action employed to review and sometimes revise such decisions were various, including trespass, false imprisonment and replevin.

The question of examining the activities of inferior tribunals came to the fore in the early seventeenth century in regard to the work of the Sewer Commissioners.¹³¹ From earliest times, the island kingdom had to contend with swamp, marsh, and lowlands which were frequently overrun by the seas. For the proper protection and reclamation of these areas, individual commissions had been issued by the king from time to time, beginning in the middle ages, to build dikes, drain areas and provide retaining walls and the like. During the reigns of Henry VI and Henry VIII, this practice was taken over by full length statutes confiding broad powers of discretion in the Sewer Commissioners to order repairs, assess costs and punish delinquents.¹³²

In a replevin action, *Rooke's Case*,¹³³ the plaintiff complained of property taken by reason of his non-payment of an order made by the Sewer Commissioners for the repair of banks of the Thames River adjacent to his property. The Commissioners had acted under authority granted by statute.¹³⁴ The question presented for determination was whether an assessment against Rooke alone, whose property directly adjoined the Thames where the repair was to be made, and not upon neighboring property owners, was valid and legal. The court, Common Pleas, arrived at its decision by noting that all who are in danger of flooding fall within the purport of the enactment, and that the proper administration of the statute mandates equal treatment for all falling within the ambit of the act. Despite the grant of ". . . authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law." Discretion, at this early date, is already circumscribed as being concordant to "reason and law," as distinguished from the illegal exercise of discretion "according to their wills and private affections." Although the court treated the problem as one involving the discretion of the com-

¹³⁰ *Groenvelt v. Burwell*, 1 Ld. Raym. 454, 91 Eng. Rep. 1202 (K.B. 1699); *Cardiff Bridge Case*, 1 Ld. Raym. 580, 91 Eng. Rep. 1287 (K.B. 1700).

¹³¹ Henderson, *Foundations of English Administrative Law* 28 (1963); see also de Smith, *The Prerogative Writs*, 11 Camb. L.J. 40 (1951).

¹³² 6 Hen. 6, c. 5 (1427); 23 Hen. 8, c. 5 (1532); 10 H.E.L. 196.

¹³³ 5 Co. 99b, 77 Eng. Rep. 209 (C.P. 1598).

¹³⁴ See note 132 *supra*.

missioners, it was actually a mixed question of law and fact which had to be decided with regard to which owners were subject to the assessment within the intendment of the enabling statute. The court sustained the plaintiff's replevin action, ruling the assessment illegal and holding that all the landowners in the area were equally in danger of overflow from the Thames and consequently all should have been assessed. The court carefully examined the multifarious factors which were involved in the administrative decision of the Commissioners and concluded that a tribunal, though not a common law court, must nevertheless adhere to the common law rules of justice, and that the statute was not to the contrary.

A series of decisions in 1610 by the Crown's highest judges firmly established that Sewer Commissioners must act within the limits of the statutory authority conferred upon them. That even in the exercise of discretion they must conform to the dictates of the common law, a veritable reiteration of the holding made in *Rooke's Case*. In one case¹³⁵ the Commissioners had ordered an opening to be made in a river wall and the two Chief Justices [of Common Pleas and King's Bench] and the Chief Baron of the Exchequer, to whom the Privy Council had referred the matter, decided that the Commissioners did not have the power in question. It was ruled that they were limited to repairing certain works erected before Edward I (1272-1307), and in any event, their power did not extend to breaking down but only to building up water works. In *Keighley's Case*,¹³⁶ a situation quite similar to that in *Rooke's Case* arose, *viz.*, shall one person or the entire vicinage be held liable for the repair of a seawall battered down by sudden squalls? The discretion of the Commissioners is again enjoined to be governed by "law and justice," and it was held that the law intended that all the persons safeguarded should be required to defray the cost. These are more than mere decisions of a superior appellate court; this is the result of a convocation ordered by the Privy Council and the pronouncement is the composite result of mature consideration given to the problem by the three highest law officers of the realm. It is virtually a letter of instruction to government officials to put aside all personal and petty interests in any matter henceforth decided by them, and to act as far as possible as a common law court, which for centuries has commanded the respect of the nation.

The admonition is repeated in the third holding handed down in that year, 1610, under the suzerainty of Lord Coke. In this case,¹³⁷

¹³⁵ The Case of Chester Mill Upon the River of Dee, 10 Co. 137b, 77 Eng. Rep. 1134 (1610).

¹³⁶ 10 Co. 139a, 77 Eng. Rep. 1136 (C.P. 1610).

¹³⁷ The Case of the Isle of Ely, 10 Co. 141a, 77 Eng. Rep. 1139 (K.B. 1610).

the Commissioners had issued an order for making a new river within the Isle of Ely, for which several towns in the area were taxed. The court examined all the statutes, the various powers given to the Commissioners, the problems which they were directed to solve, together with the earlier modes of practice in such matters. The court did not, in its evaluation of the problem, minimize the serious conditions faced by the Commissioners nor the broad powers which they have been granted to meet them. The court nevertheless concluded, for several reasons, that a new river could not be ordered by the Commissioners. It held that the very language of the statute confined the actions of the Commissioners "to reparation and new making of old walls, gutters, etc."¹³⁸ This was a finding of lack of power and the court even suggested that when the Commissioners operated beyond the bounds of the statute, it was not mere happenstance that "some time when the public good is pretended, a private benefit is intended . . . [and, as contemporary courts now disappointed suitors] there is no remedy but to complain to parliament. . . ." The method of apportionment and the cost of the improvement were also criticized by the court, but that was an *obiter dictum* because the main scheme had been stricken down.

It is worthy of consideration that in all of these cases where an administrative tribunal had been confided with large powers for taking remedial action, assessing pecuniary damages and even ordering imprisonment, it was, nevertheless, held to strict accountability where the extent of its power to act had been brought into question and challenged in a court of law. King's Bench evidenced full awareness of the competing considerations; on the one hand, the great national concern with regard to the constant danger from the sea, and on the other hand, the equally great national concern that all matters affecting the liberty and property of the subject should be determined according to established rules of "law and justice," *i.e.*, by common law standards.

The broad scope of the powers exercised by the Commissioners can be more fully appreciated if we consider what happened to one Hetley who refused to knuckle down to their commands.¹³⁹ A fine had been assessed upon the village in which Hetley resided and he sued the Commissioners and recovered for the improper sale of his cattle to meet part of the cost of the fine. Upon Hetley's refusal to cease and desist in his suit, the Commissioners had him jailed. In King's Bench, his application to be freed was granted and the Commissioners were fined and committed. The court found that the "discretion" given them

¹³⁸ *Id.* at 142a, 77 Eng. Rep. at 1140.

¹³⁹ *Hetley v. Boyer*, Cro. Jac. 336, 79 Eng. Rep. 287 (K.B. 1614).

in the statute did not relieve the Commissioners from acting justly. In this case, it was found to be unjust to fine only one man in the township whereas the tax should have been laid "severally and proportionately to every inhabitant."

Case by case, the higher courts are now ringing the Sewer Commissioners, an administrative tribunal directly affecting the general populace, with rules and precepts which require that substantial justice be accorded to each party brought within their jurisdiction, according to standards established by the common law. This was a decisive step because the prerogative tribunals, such as Star Chamber and High Commission, continued to conduct their proceedings without regard to objective standards. But in the remaining tribunals, discretion could not be used as a cachet for unrestrained freedom of action where the liberty or the property of the subject was involved. It was a discretion harnessed to the law, as pronounced by the common law judges. The triumph of the Parliamentary forces over the Stuarts ultimately tipped the scales in favor of the rule of law in this contest.

The first time that a writ of certiorari was employed as an original writ to challenge administrative action again involved the Sewer Commissioners.¹⁴⁰ This was a suit in behalf of a lessee for a term of years whose term shortly expired, and who died before the assessment for the repair of a sea wall was made against the property. One judge in the case observed that a kind of legislative power was given the Commissioners and none was reserved to King's Bench to review their proceedings. A variation on this argument is made almost daily by respondent officials in our own courts in order to avoid judicial review of their action.¹⁴¹ The Stuart judge had not been too far wrong because he had simply reverted to the medieval theory that if the Commissioners had jurisdiction and they proceeded pursuant to it, the court had no basis for interference.

Fortunately this is much like *Bagg's Case* because the court was quite conscious that it was setting a large precedent with the result that the rest of the court did not join the view first expressed. The balance of the court pointed out that (1) ". . . there is no Court whatsoever but is to be corrected by this court;" (2) ". . . if they proceed where they have no jurisdiction, or without commission [authority] or contrary to their commission, or not by jury, then they are to be corrected here."¹⁴² The court cites the Sewer Commission case of

¹⁴⁰ *Commins v. Massam*, March 196, 82 Eng. Rep. 473 (K.B. 1642).

¹⁴¹ *Matter of Long Island R.R. v. Hylan*, 240 N.Y. 199, 148 N.E. 189 (1925); *Neddo v. Schrade*, 270 N.Y. 97, 200 N.E. 657 (1936).

¹⁴² *Id.* note 140, at 197-198, 82 Eng. Rep. at 473. This quotation, among other things, implies that administrative action pursued within a given jurisdiction is equated with jury

Keighley,¹⁴³ which was brought in trespass, to substantiate the reviewing authority of King's Bench, although the present Sewer Commission proceeding is being reviewed pursuant to a writ of certiorari for the first time. The great disadvantage of the older forms of action, such as trespass and replevin, for reviewing an administrative act primarily rested in the serious deprivation and dislocation suffered by the subject before his rights were finally adjudicated in the court of last resort. He had to suffer loss of property and sometimes of liberty in order to test out the validity of an administrative act, with the ultimate result subject to all the caprices of the slow-moving procedures of the common law. The prerogative writ enabled the subject to abbreviate the time lapse between contested administrative action and the ultimate decision of the question by the courts.

In *Commins v. Massam*, the Chief Justice introduced a novel but human factor when he admitted, shamefacedly, that he had granted the writ almost unthinkingly, *viz.*, "but I confess, if I had thought of it, I would not have granted it so easily, but it was not made any scruple at the bar," and that is how the law is sometimes made! The Chief Justice conceded that he did not fully consider all the questions before issuing the writ and, as sometimes happens, the party opposing the writ did not raise appropriate objections to its issuance. Nevertheless, the decision to issue the writ and to review the action of the Sewer Commission by certiorari was fully justified by the cases of 1610 and 1614, and we are thus enabled to observe the true genius of the common law as it responds to the necessities of changed conditions.

This case is noteworthy on another score: to the argument that the Statute of Sewers did not authorize review by certiorari, the Chief Justice answers¹⁴⁴ that by the same token certiorari is not taken away by the statute and therefore it lies. Although *Commins v. Massam* did not stake out a broad area of judicial supervision over administrative bodies via certiorari, the legacy and the learning of the 1610 and 1614 cases were fully capitalized to place all concerned on notice that such judicial review would henceforth be entertained. Within a short time the practice of requiring the Sewer Commissioners to justify their action in King's Bench by means of a writ of certiorari will become fully established, and intricate questions of law will be presented for consideration on the same basis as common law actions.¹⁴⁵

action, to be treated as conclusive. See, e.g., *Terry v. Huntington*, Hardres 480, 145 Eng. Rep. 557 (Ex. 1680).

¹⁴³ See note 136 *supra*.

¹⁴⁴ *Id.* note 140, at 202, 82 Eng. Rep. at 475.

¹⁴⁵ See, e.g., *Petition v. Commissioners of Sewers*, Style 173, 82 Eng. Rep. 622 (K.B. 1649).

After a precedent has been created and becomes accepted, the period of refinement and delineation by the courts sets in. During the Restoration, the royal courts scrupulously implemented the dictum of *Commins v. Massam*. These refinements grew apace and in *Smith's Case*,¹⁴⁶ where Smith and other Commissioners of Sewers were brought before King's Bench on an attachment for twice failing to abide by the directions of the court, the Commissioners again claimed to be exempt from jurisdiction of the court. In an opinion that speaks as bluntly but incisively as did the New York Court of Appeals in *Matter of Guardian Life Ins. Co. v. Bohlinger*,¹⁴⁷ the Chief Justice replied: "[T]his Court cannot be ousted of its jurisdiction without special words; . . . and the King ought to have an account of what is done below in inferior jurisdictions. 'Tis for avoiding of oppressions, and other mischiefs . . . I know there is a great clamour, so soon as an inferior jurisdiction is touched; and 'tis though we deal hardly with them."¹⁴⁸

The Chief Justice has given the best possible reasons for judicial review of administrative action and his comments show that he was also a close observer of the passing scene. So soon as a court takes up questions which the administrative body believes to be solely amenable to its ministrations, "there is a great clamour." But the court was not easily put off the scent, and in this case the Commissioners were fined and committed, upon the attachment, for their contempt. However, the overriding outcome for generations yet unborn had been clearly established: the court is not arrested from its supervisory and reviewing jurisdiction unless the legislature has specifically barred it in such cases provided.

Rapid strides were now made in the development and application of certiorari. Where the Corporation of Winchelsey claimed immunity against a writ brought on by landowners claiming that it was purely a matter of private concern,¹⁴⁹ Chief Justice Hale rejected the demurrer out of hand. He ruled that the corporation must show that the petitioners have some remedy elsewhere before they are denied relief in King's Bench on such a basis, reasoning reminiscent of Lord Mansfield's views in asserting a broad jurisdiction for mandamus. Aptly, Chief Justice Hale noted that "this is neither purely the King's suit, nor the parties, but mixt," and the Court would not allow narrow distinctions about the nature of the proceeding to frustrate it from awarding a remedy where the facts showed that a need existed therefore.

¹⁴⁶ 1 Ventris 66, 86 Eng. Rep. 46 (K.B. 1669).

¹⁴⁷ 308 N.Y. 174, 124 N.E.2d 110 (1954).

¹⁴⁸ 1 Ventris 66, 68, 88 Eng. Rep. 46, 48.

¹⁴⁹ *Rex v. Corporation of Winchelsey*, 3 Keble 154, 84 Eng. Rep. 648 (K.B. 1685).

In *Rex v. Plowright*,¹⁵⁰ the rule of *Commins v. Massam* and *Smith's Case*, requiring review by King's Bench of all inferior jurisdictions, was again brought into sharp dispute. Here, there had been a distraint for chimney money and the certiorari for reviewing the seizure was contested on the ground that such questions "shall be heard and finally determined by one or more justices of the peace." It was further argued that the use of dilatory tactics by way of invoking the prerogative writ procedure would produce unnecessary trouble, delay and expense to poor men about small matters, a most persuasive argument. The Court turns the argument around as follows: "The statute doth not mention any *certiorari*, which shows that the intention of the law-makers was, that a *certiorari* might be brought, otherwise they would have enacted as they have done by several other statutes, that no *certiorari* shall lie." Then follows a further elaboration of the newly established office of certiorari: "Therefore the meaning of the Act must be, that the determination of the justices of the peace shall be final in matters of *fact* only;" reserving all questions of law to the common law courts, which has remained the rule to this day. A vital distinction in considering administrative action upon judicial review had been created out of response to a claim of non-reviewability.

As the last of the Stuarts passed from the scene in the latter part of the seventeenth century, an increasing array of new responsibilities were thrust upon the autonomous organs of local government. Their only checkrein had been the relatively undefined supervisory authority of the courts which had tentatively imposed intermittent legal requirements, in default of parliamentary action in this area, to bring the exercise of such new powers within the compass of the law. By 1700, the courts had been involved in this problem to an increasing degree for almost a century. At this juncture, Lord Holt had been Chief Justice of King's Bench for over ten years and was keenly aware of the problem of the local jurisdictions which were now enjoying the broadest powers of discretion.¹⁵¹ As noted above, a start has been made in bringing them under the control of the common law courts in a number of instances. However, in two outstanding judicial pronouncements Lord Holt brought stability and clarity to this loose system of supervision. Judicial control became firmly established as ". . . the only control to which the organs of local government were subject."¹⁵²

In *Groenvelt v. Burwell*¹⁵³ plaintiff physician brought suit for

¹⁵⁰ 3 Mod. 94, 95, 87 Eng. Rep. 60, 61 (K.B. 1686).

¹⁵¹ 10 H.E.L. 159, 185.

¹⁵² 10 H.E.L. 156.

¹⁵³ 1 Ld. Raym. 454, 91 Eng. Rep. 1202 (K.B. 1699).

false arrest, assault and false imprisonment against the Censors of the College of Physicians who had ordered him imprisoned upon their charge of malpractice. The plaintiff challenged the jurisdiction of the Censors to act in regard to him. Lord Holt dispelled any doubt on this score by stating that defendants had full jurisdiction over the plaintiff, and that with such jurisdiction went full power to act in the premises as authorized by law, *i.e.*, ordering his imprisonment. It was ruled that:

“the authority of the defendants is absolute, to hear and determine the offense; and when in pursuance of the said authority they have adjudged the plaintiff guilty, he cannot arraign [question] their judgment, but is concluded; for persons who are the Judges by law, should not be liable to have their judgments examined in actions brought against them.”¹⁵⁴

In addition, where a jurisdiction to act is conferred upon a person or a body, wide latitude in the exercise of judgment and discretion is reposed in them and the courts will not impugn their action on questions of fact.

To the plaintiff's plea that thereby he has “no remedy by error or attain,” it was answered that a certiorari would lie to bring the determination up for review, “. . . for it is a consequence of all jurisdictions to have their proceedings returned here by certiorari, to be examined here.” The court is rather vague as to what the nature and extent of certiorari review will comprehend, for in this very action it brushed aside plaintiff's argument that the proceedings of the Censors were void because the witnesses were not examined under oath, and in all, sustaining the action taken against the plaintiff. A reading of this case does not disclose that any considerable blow for the liberty of the subject was struck, as the opinion seemed more concerned and allotted greater space to the concept that the factual aspects of the proceedings were virtually immune from judicial scrutiny. In regard to matters which have been committed to their judgment and discretion, the courts will be duly respectful of the action of inferior bodies and of the primary responsibility which they bear. The saving grace of the decision is the holding that “by the common law” the court will examine such inferior jurisdictions but it, nevertheless, cedes a vast area of discretion to them by recognition of their jurisdiction, *i.e.*, power to act in respect to matters reserved to them by law. It is well to remember that this was a suit in tort and did not presume to examine the actions of the Censors in *stricti juris* as an administrative body pursuant to a writ of certiorari. The court, nevertheless, seized the opportunity to prescind an area of administrative action which it ruled must become,

¹⁵⁴ *Id.* at 467, 91 Eng. Rep. at 1211.

on future occasions, subject to the rule of law enunciated by the common law courts.

The other notable decision of Lord Holt asserting the supervisory power of the common law courts over administrative bodies by means of certiorari was handed down by the High Court at about the same time, 1700.¹⁵⁵ In that case, also known as *The Case of Cardiff Bridge*, justices of the peace, pursuant to statute, had levied taxes for the repair of Cardiff Bridge, and the question of their power to do so was brought to King's Bench by a writ of certiorari. At the outset, the attorneys for the justices objected to the authority of the court to grant a certiorari here because this was a new jurisdiction, but recently authorized by Parliament. Therefore, they argued, it was the intent of Parliament to trust the discretion of the justices entirely and the courts should not "intermeddle with it," leaving the parties to a suit at law if they are so disposed. This was not an original approach to the problem, as some of the foregoing cases indicate, and the court made direct answer as follows:

"For this Court will examine the proceedings of all jurisdictions erected by Parliament. And if they under pretense of such act, proceed to in-croach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here; to the end that this Court may see, that they keep themselves within their jurisdiction: and if they exceed it, to restrain them."¹⁵⁶

This assertion of judicial supremacy left little room for uncertainty, and shows that the court will stand for no nonsense about recourse to suits at law which would have the effect of permitting questioned administrative action to proceed unhindered with consequent ill-effect on liberty and property.

Proceeding somewhat differently from *Groenvelt v. Burwell*, the court next takes up the merits of the case. It considers a serious legal question which has been posed as a bar to the action of the justices of the peace. It was objected, apparently with close familiarity of the 1610 Sewer Commission cases, that the justices had no jurisdiction (*i.e.*, power) to impose a levy under the Act for repairing the wears [embankments] of the river, but only for the repair of the bridge. In the 1610 series of cases, the high judges had narrowly construed the powers and jurisdiction of the Sewer Commissioners and had refused to allow them to provide for ancillary conditions, even though they were inextricably involved with their sphere of responsibility. In the present

¹⁵⁵ *Rex v. Inhabitants-in Glamorganshire*, 1 Ld. Raym. 580, 91 Eng. Rep. 1287 (K.B. 1700).

¹⁵⁶ *Id.* at 580, 91 Eng. Rep. at 1288.

case, Lord Holt found, however, that the wears were necessary to provide general support for the bridge which was being rebuilt, and, important for us today, he held that the justices, in order to cope with the entire problem, had correctly construed their powers under the Act to include the rebuilding of the wears. By this latter pronouncement, Lord Holt introduced the concept that the administrative interpretation of a statute will be followed by a reviewing court where it is reasonable, although the formula was not labelled as such by the court.¹⁵⁷

In a larger and more enduring sense, the *Cardiff Bridge Case* stands forth for subjecting all inferior bodies to review of their proceedings in King's Bench if their power or jurisdiction to act is brought into question; a narrow view on the technical questions surrounding jurisdiction and power will not, moreover, be entertained. If the inferior body, in the course of its activities, has reached a reasonable interpretation of the applicable statute, the reviewing court will not set it aside.

One further comment regarding these two cases merits consideration. The central feature of judicial review revolves about whether the jurisdiction, *i.e.*, the power, of the inferior body to act in regard to the subject matter in the manner in which it did was in conformity with law. Once the court finds that such jurisdiction over the subject matter existed, any further judicial examination is virtually foreclosed because, as Pollack and Maitland showed earlier, jurisdiction denoted an unassailable right to exercise power.¹⁵⁸ This was the medieval view, and, in the main, it retained a large measure of potency even after the courts essayed closer control over local activities. The medieval view was founded upon writings of Bracton and Fleta, which are cited as authority for the following:

“[J]urisdiction is nothing else than the having authority of judging or of administering justice [declaring the law] between the parties to personal and real actions according as they may have been brought into court by ordinary or delegated authority.”¹⁵⁹

Holdsworth has stated¹⁶⁰ that the concepts of public law of the seventeenth and eighteenth centuries in regard to local autonomous units are the same as those which prevailed in the thirteenth century, and the

¹⁵⁷ Cf. *Gray v. Powell*, 314 U.S. 402 (1941); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). See also *Matter of Mounting & Finishing Co. v. McGoldrick*, 294 N.Y. 104, 60 N.E.2d 825 (1945).

¹⁵⁸ See note 118 *supra*.

¹⁵⁹ 2 Burrill, *Law Dictionary* 112 (2d ed. 1869).

¹⁶⁰ 10 H.E.L. 717.

leading cases of certiorari law which have just been examined amply support him in this position.

Although the new purposes to which mandamus and certiorari had been adapted continued to expand and to enjoy wider usage, the older common law remedies, though cumbersome and often indirect, had not been entirely discarded in the eighteenth century. In one such instance, *Rex v. Young and Pitts*,¹⁶¹ a criminal information was sought in King's Bench against two justices of the peace for "arbitrarily obstinately and unreasonably" refusing to grant a liquor license. The court minces no words in holding that, in such matters as licensing, the justices are endowed with a large degree of discretion especially as they function in local areas, are conversant with the customs and character of the local population, and Parliament has specifically invested them with broad responsibility in such matters. Lord Mansfield brushes aside any criminal imputations in this present case, but holds that where it is alleged:

"[T]hat their conduct was influenced by partial, oppressive, corrupt, or arbitrary views, instead of exercising a fair and candid discretion, the Court might call upon them to show the reasons whereby they guided their discretion; . . . it must not be permitted to them to exercise an arbitrary and uncontrolled power over the rights of other people, and in cases where their livelihoods are so essentially concerned."¹⁶²

Important from the standpoint of certiorari is the insistence that where a determination is made involving the livelihood of a citizen, it is of first importance that reasons be given for the decision so that the court can properly judge of their legal validity. This emphasis upon a statement of reasons is what assimilates *Young and Pitts' Case* to certiorari proceedings, where reasons for a decision should be given to enable the court to judge whether the inferior body properly acted within the compass of the authority assigned to it.

In order to clear up the question of what function the writ of certiorari plays, Lord Mansfield, in the case of a Methodist preacher convicted on religious grounds in a justice of the peace court, enunciated the rule that is yet observed by British courts this day.¹⁶³ It was held as follows: "A certiorari does not go, to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds." The concept of "jurisdiction" in this context has, of course, undergone broad modification to comprehend contemporary, higher standards of justice in the handling of a cause, but the basic rule remains unchanged

¹⁶¹ 1 Burr. 556, 97 Eng. Rep. 447 (K.B. 1758); see 10 H.E.L. 185.

¹⁶² Id. at 559, 97 Eng. Rep. at 448.

¹⁶³ *Rex v. Moreley*, 2 Burr. 1040, 1042, 97 Eng. Rep. 696 (K.B. 1760).

in the English courts.¹⁶⁴ It continued as the rule in New York until the mid-nineteenth century before the judicial attitude was altered in the direction of allowing broader review.

During the evolution of certiorari just outlined, the courts brought many new civil jurisdictions within their supervision and control; review in criminal matters had been afforded by the writ from earliest times. Certiorari, which started its career as a nominal writ for bringing up a record on review, became itself the mechanism of review. The common law courts looked at the record of the proceedings in each matter with an eye long accustomed to following the rule of law, no matter where it might lead. In this unobtrusive manner, a common law writ of great and long respectability was carefully moulded to the uses of a new age, and although its purview was not greatly enlarged, suitors, nevertheless, acquired the satisfying knowledge that a ready remedy was within reach if they wished to directly attack a determination made by an administrative body. In time, a more generous interpretation of the term "jurisdiction" enabled greater justice to be accomplished in King's Bench upon such review. The legacy handed over to the American Colonies on the eve of the Revolution was such that where any official body acted as a tribunal, and no other mode of review was available, the High Court would examine the proceedings by certiorari to ascertain that the law appertaining to the exercise of its jurisdiction had been observed. Fundamental principles were now firmly established by the English courts, but large areas for invigorating those principles remained to be implemented by the New York courts in the century following the American Revolution.

¹⁶⁴ de Smith, *Judicial Review of Administrative Action* 65-69 (1959).