STATUTORY LIMITATIONS ON THE POWER OF THE PREROGATIVE ORDERS IN ENGLAND

The purpose of this article is to examine the various ways in which the British Parliament has, from time to time, attempted to curb the power of the prerogative orders,[1] and to assess the success which has attended such efforts. Although it is plain that a statute may create a new tribunal and exclude the High Court from any jurisdiction of review, yet this has by no means necessarily precluded the High Court from having the last word. The consequent uncertainty is not desirable, and a consistent effort by the courts to establish settled rules upon the subject would be welcome. It is believed that the ensuing account of the English position will be of interest to readers whose own law now differs considerably from that of England.

A. Statutory Limitations on the Scope of Certiorari

Limitations and restraints on the use of certiorari were instituted by Acts of Parliament in the seventeenth century,[2] and by subsequent case-law,[3] but these obstacles could be overcome by consent of both parties to an action.[4] By far the most important limitation, however, is where a statute has taken away completely the right to obtain the remedy in particular cases, and many instances have arisen in which statutes appear to have done this.[5]

1. The prerogative orders of certiorari, prohibition and mandamus were substituted for the old prerogative writs by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 7, but only the form and procedure have been changed. The substantive law surrounding the orders remains the same as before, and the three remedies, together with the injunction and the action for a declaration, are the principal methods whereby the High Court maintains its power of judicial review of inferior courts and also of statutory tribunals, when the latter are or ought to be acting judicially. On this subject the literature in England is voluminous, but see especially C. K. Allen, *Law and Orders*, 2nd ed., 1956.

   The attitude of the courts of the various Commonwealth countries towards statutory exclusion or limitation of the prerogative writs or orders differs. It is not proposed to discuss this wider aspect here, but see generally Ross Anderson, *Parliament v. Court* (1950) 1 U. of Queensld. L.J. (No. 2) 39; and de Smith, *Statutory Restriction of Judicial Review* (1955) 18 Mod. L.R. 575, 577, 579-80.

2. *e.g.* 43 Eliz. c. 5 (1600); 21 Jac. I c. 23 (1623); 3 Car. I c. 4 (1627); 16 Car. I c. 4 (1640): all of these imposed time limits for application, etc.

3. See Bacon, *Abridgment* (5th ed. 1798), "Certiorari", for a list of cases cited as illustrating limitations on certiorari; see also the Rule in Salkeld (1702) 1 Salk. 147; and *Re Llanbeblig and Llandyfrydog* (1846) 15 L.J.M.C. 92, where an application for the writ was refused as being "out of time".

4. *R. v. Dickenson* (1857) 7 E. & B. 831, cited by Denning L.J. in *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 353.

5. See Comyns, *Digest* (5th ed. 1822); and de Smith, *op. cit.*

It had been well settled by the time of the Bloodless Revolution that, so far as certiorari was concerned, the King's Bench could not be "ousted of its jurisdiction without special words",[6] and that the right to a certiorari was not necessarily taken away by a statute giving justices power to "hear and finally determine", for it only made the justices' determination final as to matters of fact.[7] The point was made emphatically by Lord Holt C.J. in *Groenvelt v. Burwell*[8] that only the express words of an Act of Parliament could exclude the right to a certiorari or the general control of the courts by the King's Bench, and more modern cases have shown that such express words in a statute are still held to exclude the remedy,[9] whereas anything short of express words has failed to have that effect.[10] An illuminating case is *R. v. Derbyshire JJ.* in 1759.[11] General quarter sessions ordered past highway surveyors to pass their accounts and pay the balance in their hands to a person who had succeeded them as surveyor. Under the statute 3 & 4 W. & M. c. 12, s. 23, "all matters concerning highways. . . mentioned in this Act shall be determined in the county where the same do lie, and not elsewhere; and . . . no presentment, indictment or order, made by virtue of this Act, shall be removed by certiorari out of the said county into any other court". The wording of this section appears to be clear and express in exclusion of the writ, but, since the order should have been made at special sessions, it was out of the jurisdiction of the justices at general quarter sessions, and it was held that the order could be removed by means of a certiorari.

Thus half a century after *Groenvelt v. Burwell* we find the words of Lord Holt being construed very strictly, as no doubt he intended them to be construed, for his object was to uphold the power of certiorari and the King's Bench. Most of the decisions, like *R. v. Derbyshire JJ.*, have been based on absence of jurisdiction in the court below. A strong case was *R. v. Moreley*,[12] which concerned the Conventicle Act.[13] A certiorari was sought in order

6. *Smith's Case* (1682) 1 Ventr. 66; see also *Crofton's Case* (1682) 1 Ventr. 63; *cf. Castle's Case* (1622) Cro. Jac. 644.
7. *R. v. Plowright* (1685) 3 Mod. 95; *cf. R. et Reg. v. Marriot* (1692) 4 Mod. 144, in which Lord Holt C.J. was the dissenting judge in a decision of two judges against one.
8. (1699) 1 Ld. Raym. 454, 469, 1 Salk. 263, 12 Mod. 386, 390.
9. *R. v. Sussex JJ.* (1813) 1 M. & S. 631; *R. v. Chantrell* (1875) L.R. 10 Q.B. 587.
10. *Case of Foxham Tithing* (1704) 2 Salk. 607; *Great Chartre v. Kennington* (1742) 2 Stra. 1173; *R. v. Medical Appeal Tribunal, ex p. Gilmore* [1957] 2 W.L.R. 498, discussed below; *cf. R. v. Wright* (1758) 1 Burr. 543 (an indictment excluded by implication).
11. 2 Keny. 299.
12. (1760) 2 Burr. 1040.
13. 22 Car. II c. 1 (1670).

to reverse several orders made by a magistrate, convicting a Methodist preacher and "a Master of the House wherein he preached and several of the audience." The Act provided that "no other court whatsoever should intermeddle with any cause or cause of appeal upon that Act, but they should be finally determined in the quarter sessions only", and yet it was held that a certiorari issued on the question of jurisdiction, for "the jurisdiction of this court is not taken away, unless there be express words to take it away; this is a point settled". The King's Bench had found its way of getting round statutes excluding the writ, provided it was satisfied there was good reason for doing so.[14]

Wherever a newly-created offence has been directed to be tried in an inferior court according to the course of the common law such trial has been held to be subject always to certiorari, unless the creating statute contained express words to the contrary.[15] Again, where a statute creates an offence and gives cognizance of it to one justice, with an appeal to sessions, and takes away the right to certiorari as to all such proceedings, and then a later statute gives further powers of punishment, but does not expressly exclude the remedy, the former exclusion has been held not to apply by implication to the latter extension. Thus, where there are proceedings under both statutes, those under the former Act cannot be removed by means of the writ, but those under the latter can.[16]

14. The magic wand of "jurisdiction" has been cast quite widely by the superior court: see *R. v. Deny* (1851) 2 L.M. & P. 230; *R. v. Wood* (1855) 5 E. & B. 49; *R. v. Badger* (1856) 6 E. & B. 137; *Ex p. Bradlaugh* (1878) 3 Q.B.D. 509; *R. v. L.C.C., ex p. The Entertainments Protection Ass. Ltd.* [1931] 2 K.B. 215; *Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417 (an Australian appeal in the Privy Council); *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Philippe* [1950] 2 All E.R. 211. But the wand is not all-embracing, and in particular it has been held several times that no certiorari will issue where the court is satisfied that the purpose is merely to evade a statute only: *R. v. Binney* (1853) 22 L.J.M.C. 127; *Dr. Sand's Case* (1697) 1 Salk. 145 (*cf.* the case of *James, Duke of York*, unreported, but mentioned in *Dr. Sand's Case*, decided the other way for "reasons of royalty"); *R. v. Minister of Health* [1939] 1 K.B. 232; *cf. Ex p. Hopwood* (1850) 15 Q.B. 121. Note also that some statutes have either given someone the right to apply for a certiorari or have restored such a previous right, as *e.g.* 7 Will. IV & 1 Vict. c. 69, s. 2; see *Re Dent Tithe Commutation* (1845) 8 Q.B. 43.

15. *Hartley v. Hooker* (1777) 2 Cowp. 524, *per* Lord Mansfield: "If a new offence be created by statute, and a special jurisdiction out of the course of the common law prescribed, it must be followed; in such cases there is no occasion to oust the common law courts, because they never could have jurisdiction. But where a new offence is created, and directed to be tried in an inferior court established according to the course of the common law, such inferior court tries the offence as a common law court, subject to be removed by writs of error, habeas corpus, certiorari, and to all the consequences of common law proceedings. In that case this court cannot be ousted of its jurisdiction without express negative words."

16. *R. v. Terret* (1788) 2 T.R. 735; *Re Kaye* (1822) 1 D. & R. 436, in which certiorari was held to lie; *R. v. Mayor of Liverpool* (1823) 2 D. & R. Mag. Ca. 4, where the writ was held not to be available.

An ingenious way of getting round a statutory exclusion of the writ was apparent in *R. v. West Riding of Yorkshire JJ.*,[17] where an Act had taken away the right both to obtain a certiorari and to appeal to quarter sessions. It was therefore held that, where there had been an appeal to quarter sessions, the sessions had no jurisdiction and so certiorari lay to remove the proceedings. No doubt the decision in this case was just, but one suspects that in many of these earlier cases the courts, far from implementing and enforcing Acts of Parliament, used their powers of interpretation to thwart them.[18] It is indeed strange how far the pendulum has swung the other way in some very recent English decisions,[19] where the courts have tended to exclude certiorari, even though statutes have not attempted to do so in the instances concerned, on the ground that the decision of an inferior court or body had no judicial or quasi-judicial quality. It seems a pity that the judicature has been unable to steer a consistent middle course, applying the letter and spirit of exclusionary statutes (for it is no business of the courts to concern themselves with the policy behind such Acts of Parliament), but allowing a free operation of the prerogative orders in proper cases outside the statutes.

But perhaps the most interesting case of recent years upon the problem of pure statutory exclusion of certiorari has been *R. v. Medical Appeal Tribunal, ex p. Gilmore* in 1957.[20] "Error of law on the face of the record" is a well-established ground for certiorari,[21] but it has been commonly believed that the remedy will not be applicable unless the actual error of law really does

17. (1794) 5 T.R. 629; and see *R. v. Jukes* (1800) 8 T.R. 542, 544.

18. See *supra*, footnote 14.

19. See *Miller v. Minister of Health* [1946] K.B. 626; *Price v. Minister of Health* [1947] 1 All E.R. 47; *Summers v. Minister of Health* [1947] 1 All E.R. 184; *Johnson v. Minister of Health* [1947] 2 All E.R. 395; *Howell v. Addison* [1943] 1 All E.R. 29; *Nakkuda Ali v. Jayaratne* [1951] A.C. 66 (an appeal to the Privy Council from the Supreme Court of Ceylon); *R. v. Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150; but *cf. Stafford v. Minister of Health* [1946] K.B. 621; S, 1950, 111, 41 (a French case in the Conseil d'Etat); and *New Zealand Dairy Board v. Okitu Dairy Co. Ltd.* [1953] N.Z.L.R. 366 (in the New Zealand Court of Appeal). All these cases are discussed by the author in *Revocation of Licences—An English Dilemma* (1956) Juridical Review (N.S.) 240. See also particularly *Sydney Corporation v. Harris* (1912) 14 C.L.R. 1; and *Delta Properties Ltd. v. Brisbane City Council* (1955) 95 C.L.R. at 18 (both mandamus cases). I am most grateful to Mr. H. Ross Anderson of the University of Queensland Department of Law for drawing my attention to these last two cases.

20. [1957] 1 Q.B. 574; see a note on this case by Mr. S. A. de Smith in (1957) 20 Mod. L.R. 394.

21. See particularly *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, and the authorities discussed in the judgments there.

appear upon the face of the record.[22] In 1936 Gilmore was injured while at work, and was almost blinded in his right eye. In 1955 he was again injured at work, this time becoming almost blind in his other eye. Under the National Insurance (Industrial Injuries) Act, 1946, anyone who suffers injury to one of two paired organs of which the other was already disabled was entitled to have his benefit assessed as if the prior disability had been incurred as a result of the subsequent injury. Gilmore was now totally incapable of working, and thus his disablement should have been assessed at 100 per cent. for the purpose of an award. After originally receiving no award at all, he appealed to the Medical Appeal Tribunal, which, on receipt of a specialist's report, which was favourable to Gilmore, nevertheless assessed his disablement at 20 per cent. The Act made it obligatory upon the Tribunal to record its decision in writing, together with a statement of the reasons and findings on all material facts. It did not set out fully the material facts, but it did include one sentence from the specialist's report. Sections 36 (2) and 40 of the Act laid down that the decision of the Tribunal was to be final, subject to a further review by a medical board where the decision had been given in consequence of non-disclosure or misrepresentation of material facts. Gilmore sought this latter remedy without success, and then moved out of time for leave to apply for a certiorari to quash the original decision of the Appeal Tribunal. Although this was rejected by the Divisional Court, the Court of Appeal granted it and gave an extension of time. Denning L.J., with the full approval of the other members of the Court, held that the inclusion of the extract from the specialist's report in the adjudication had the effect of making the whole of the report part of the record, thus showing that there was an error of law on the face of it. His Lordship was even bold enough to assert that the superior courts had an inherent power to order inferior courts and tribunals to complete their records, if necessary. After this fearless judicial stroke it is no surprise that the Court went on to follow the precedents already quoted in this article, in which it has frequently been held that certiorari to quash for jurisdictional defects is not taken away by attempts at statutory exclusion of the remedy, at least without clear express words, and to extend them to the case of certiorari on the ground of error of law on the face of the record.[23]

22. Hence the feeling among many jurists that error of law upon the face of the record is often an abortive ground for certiorari, because tribunals rarely give reasons for their decisions unless compelled to do so by statute. See the dictum of Lord Sumner in *R. v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 159.

23. This resolves the point expressly left open by the court in *R. v. National Insurance Commissioner, ex p. Timmis* [1955] 1 Q.B. 139.

The case speaks for itself about the current judicial view of such exclusionary attempts by the legislature.[24]

Certiorari as a last resort.

Certiorari has sometimes been held available as a last resort where there has been an obvious violation of justice. Where a judgment amounts to a total omission to give compensation for a distinct interest the remedy will lie, although a ruling statute only allows an appeal,[25] and in *Thorpe v. Cooper*,[26] where a judgment was held to be a "total void", it was decided that "a party is not concluded by not appealing against a nullity"; the error of law would be apparent on the face of the record. But a later case[27] concerned a Railway Act, which directed that compensation for lands taken by the company in certain cases should be assessed by a special jury, and that no proceeding taken in pursuance of the Act should be removed by certiorari. It appeared from the inquisition that the jury was not special, though the case was one in which a special jury was requisite, both under the Act and under the general law previous to the Act. It was held, however, that certiorari would not issue to remove it, because the Act excluded the remedy, and because, even if it had not been a case within the Act, the general law made the proceedings void. Thus it seems that where an act is visibly out of the jurisdiction of the court performing it it is wholly void, and the party aggrieved has a sufficient remedy by action. This is a contradiction of *Thorpe v. Cooper*, which can perhaps only apply within a limited group of cases, for the party aggrieved nearly always has a sufficient remedy by action where a judgment is a total void.

The Crown.

Exclusionary statutes have always left the Crown in a peculiar position, for the Crown may always have a certiorari in the name

24. It is highly indicative that the Report of the Committee on Administrative Tribunals and Enquiries (Cmd. 218, July 1957) recognises that "it is now clear that the fact that the decision of the tribunal may be expressed in the statute as 'final' does not oust this (the court's) jurisdiction" (para. 107). Further, in recommending that the remedies by way of orders of certiorari, prohibition and mandamus should continue, the Committee states that "no statute should contain words purporting to oust these remedies" (para. 117).

25. *Cooper v. Walker* (1825) 4 B. & C. 36; *cf. Rigby v. Woodward* [1957] 1 W.L.R. 250: at a summary trial the magistrates wrongly refused to allow the appellant to cross-examine a co-defendant who had given evidence which implicated him. The appellant was convicted and the co-defendant acquitted. The Divisional Court held that an appeal by case stated would lie, although an application for an order of certiorari would have been more usual in such a case.

26. (1828) 2 Y. & J. 445.

27. *R. v. Bristol and Exeter Rly. Co.* (1838) 11 A. & E. 202n; *cf. R. v. Wadley* (1816) 4 M. & S. 508, in which indictment and possible removal by certiorari before trial (*e.g.* on the ground of local prejudice) were still available.

of the defendant without laying any special ground, and without regard to any restrictions imposed in ordinary cases as to the time for applying for it.[28] No Act is held to have excluded the Crown from certiorari unless it does so expressly,[29] and it would be hard to find a statute going as far as to do that even in the present century.

B. Statutory Limitations on the Scope of Prohibition

Historically Parliament has had far more success in its attempts to restrict the issue of prohibition than of certiorari. It may be that prohibition has never been a serious threat to the power of bodies owing their jurisdiction to Parliamentary creation, since it would issue only if there was a usurpation of such power, and then its effect is merely to stop such an illegitimate exercise of power. Perhaps Parliament has not had so much occasion to come into conflict with the courts in an effort to protect its creatures from judicial interference, or *vice versa*.

In a case of 1843[30] there was a strong argument for the issue of the writ, and yet it was held to be excluded. H. was convicted at petty sessions of angling in a part of a river in which B. had a private right of fishery. H.'s attorney had stated, as a preliminary objection, that he *bona fide* claimed a right of fishery over the place in question, and the justices had overruled the objection, and refused to allow an adjournment for him to produce evidence of his right. No appeal lay, a statute had expressly taken away the right to a certiorari (and it seems that H. did not attempt to question the finality of this), and a criminal information would afford no relief to the party; thus prohibition was the only possible remedy. It was determined, however, that the justices had jurisdiction, and so no prohibition would lie: to entertain applications of this nature would nullify all clauses in statutes taking away the right to a certiorari (although, as has been seen above, this latter proposition is of doubtful validity). But the court asserted that its decision would have been otherwise if the magistrates had refused to hear legal evidence, or decided improperly on the evidence, since there would then have been misconduct. Forty

28. *R. v. James* (1801) 1 East 303n; and see Yardley, *Certiorari and the Problem of Locus Standi* (1955) 71 L.Q.R. 388, 397-401.

29. *R. v. Tindal* (1754) unreported, but referred to in *R. v. Allen, infra*; *R. v. Bodenham Inhabitants* (1774) Cowp. 78; *R. v. Davies* (1794) 5 T.R. 626, 628-9; *R. v. Cumberland Inhabitants* (1795) 6 T.R. 194, 3 Bos. & Pull. 354; *R. v. Allen* (1812) 15 East 333.

30. *R. v. Higgins* (1845) 8 Q.B. 149n (decided in 1843, but not reported till 1845); see also *R. v. Essex JJ.* (1816) 5 M. & S. 513 (a statute allowed justices to make orders as to rates, but prohibition was excluded by implication in the Act, and it would not issue); *R. v. Bolingbroke* [1893] 2 Q.B. 347; *Ex p. Workington Overseers* (1893) 10 T.L.R. 173.

years later,[31] where another statute provided for an appeal in certain circumstances, a prohibition was held excluded, but there were *dicta* that courts ought to control all bodies imposing obligations upon individuals, if they exceed the power given them by Act of Parliament; the High Court was not slow to exercise its powers against *any* usurpation of judicial function. Again, the fact that an appeal on the grounds of absence or excess of jurisdiction had failed was held not to be a bar to prohibition, although a statute had stated that such a decision on the appeal should be "final and conclusive on all parties."[32]

The courts, therefore, have been, and still are, more willing to carry out statutory provisions taking away the right to this remedy than they have been with similar provisions concerning certiorari. But they still retain a discretion to issue prohibition whenever they think it desirable.[33]

Territorial scope of certiorari and prohibition.

A special sub-division of the problem under examination concerns the limits that have been placed upon the territorial scope of certiorari and prohibition, though such limits have really been imposed by case-law, not statute. There appears to have been some early doubt whether either remedy lay in cases outside England.[34] In *R. v. Cowle*[35] an early case of 1609[36] was quoted,

31. *R. v. Local Government Board* (1882) 10 Q.B.D. 309, 321.
32. The Irish case of *Duke of Devonshire v. Foott* (1871) 5 Ir.R.Eq. 314. Note also the cases on the Mayor's Court of London Procedure Act, 1857, and the Salford Hundred Court of Record Act, 1868: *Manning v. Farquharson* (1860) 30 L.J.Q.B. 22; *Baker v. Clark* (1873) L.R. 8 C.P. 121; *Quartly v. Timmins* (1874) L.R. 9 C.P. 416; *Jacobs v. Brett* (1875) L.R. 20 Eq. 1; *Oram v. Brearey* (1877) 2 Exch. D. 346. From these cases it appeared that the Acts, in providing for an exclusive procedure, were merely doing so as far as procedure *within* the courts was concerned, and that it was still open to an applicant to seek a prohibition.
33. *Channel Coaling Co. v. Ross* [1907] 1 K.B. 145 (prohibition issued despite the existence of another available remedy); *cf. Payne v. Hogg* [1900] 2 Q.B. 43; *Turner v. Kingsbury Collieries Ltd.* [1921] 3 K.B. 169. In *R. v. Industrial Disputes Tribunal, ex p. Portland U.D.C.* [1955] 1 W.L.R. 949, proceedings before the tribunal were held to be an "issue" within the Industrial Disputes Order, 1951, art. 2 (*b*), and there was no case for prohibition. In *R. v. Warren* [1954] 1 W.L.R. 531, the Divisional Court held that, where a person who is convicted summarily and committed to quarter sessions for sentence appeals against the sentence to the Court of Criminal Appeal, he cannot on that appeal raise the question of the validity of his committal to sessions for sentence on the ground that there was no evidence of his "character and antecedents" justifying the committal. *Per curiam*, the remedy in such a case was to apply for an order of prohibition directed to quarter sessions, or an order of certiorari (to quash the committal) directed to the magistrates' court.
34. It may be concluded safely that prohibition is governed by the same principles as certiorari in this respect, although most of the cases concern certiorari. The remedy is a part of the whole body of English law, and thus will lie to any appropriate body or person within the physical area subject to the law of England as such.
35. (1759) 2 Burr. 834.
36. *Calvin's Case* 7 Co.Rep. 20a.

in which certiorari was described as a "mandatory writ remedial", but it was not decided whether it could extend beyond the realms of England. Mansfield considered that the matter was settled in the eighteenth century, and he declared that in a proper case the writ might issue to "every dominion of the Crown of England."[37] This decision followed a line of seventeenth century cases in which the courts had held that habeas corpus ad subjiciendum,[38] prohibition,[39] mandamus,[40] and certiorari[41] would issue to the courts of Chester, Lancaster, Durham, the Cinque Ports and other exempt jurisdictions.[42] But it has hardly been suggested in recent years that these remedies, the tools of the English High Court, still lie to control bodies throughout the Commonwealth and Empire. The "exempt jurisdictions" mentioned above were merely special "palatinates" within the territorial boundaries of England and Wales. All independent members of the Commonwealth administer their own entirely separate systems of law, even though most of them, and particularly Canada, Australia and New Zealand, have been much influenced by the common law. The prerogative orders in English law are now purely domestic weapons for England and Wales. All colonies maintain their own legal provisions, and it can now be considered only incidental, or the product of development, that several British possessions, as well as the independent members of the Commonwealth and also the United States of America, may have their own prerogative writs or orders, or their equivalent.[43]

37. In *R. v. Inhabitants of .... in Glamorganshire* (1700) 1 Ld.Raym. 580, there was an order by justices for levying money for the repair of Cardiff Bridge, and it was held that certiorari lay to remove proceedings before justices in Wales. See also Hale, *Pleas of the Crown* (1736), vol. 1, p. 157, where it is stated that a criminal cause, other than a capital one, such as an indictment of a riot, committed in Wales, might be removed by certiorari into the King's Bench; and when issue was joined it might be tried in the next English county.

38. *Wetherley v. Wetherley* (1686) 2 Roll.Abr. 69; *Richard Bourn's Case* (1620) Cro.Jac. 543; *Jobson's Case* (1626) Latch. 160.

39. *Warner v. Suckerman* (1615) 3 Bulst. 119; *Williams v. Lister* (1669) Hardres 475.

40. *Richard Bourn's Case, supra*; .... *v. Wiggon* (*Mayor*) 1 Sid. 92.

41. Certiorari would go to remove indictments: "although the King grant *jura regalia*, yet it shall not exclude the King himself": *Anonymous* (1641) March 165; but certiorari would not go to remove ordinary civil actions between subjects: *R. v. Mayor of Winchelsey* (1673) Freem.K.B. 99.

42. De Smith, *The Prerogative Writs* (1951) 11 Camb. L.J. 40. An amusing case, not unrelated to this line of decisions, is an anonymous one of 1703, 1 Salk. 149, in which it was decided that a return of a certiorari in English was good.

43. See *e.g. Nakkuda Ali v. Jayaratne* [1951] A.C. 66, in which it appeared that Ceylon, before it became independent, had a "mandate in the nature of a certiorari", provided by s. 42 of the Courts Ordinance. Probably Lord Mansfield overstated the position even in his own time, certainly as far as Scotland was concerned, where the place of certiorari appears to have been taken by the interdict.

C. Statutory Limitations on the Scope of Mandamus.

Limitations on the scope of mandamus have been imposed partly in the shape of certain statutory forms of mandamus, and partly by case-law, unaffected by statute. It is proposed to consider the latter aspect first before proceeding to an examination of the statutory limitations themselves.

Mandamus only issues where no other remedy is proper.

A long line of decisions establishes that mandamus should not be employed if there is some other specific and sufficient remedy.[44] It is a last resort,[45] but, though it is easy to apply this principle where no other remedy is apparent, there is more difficulty if another remedy might possibly be adopted. Hill J. said in 1861:[46]

> "This is not a rule of law, but a rule regulating the discretion of the courts in granting writs of mandamus; and unless the court can see clearly that there is another remedy equally convenient, beneficial and effectual, the writ of mandamus will be granted, provided the circumstances are such in other respects as to warrant the granting of the writ."

Thus where a beer-house licence was refused a mandamus lay because the applicant had not been told of the grounds of the refusal. Appeal to quarter sessions would not have been a suitable remedy, although it was an alternative one, because, in the circumstances, it was held to be less convenient, beneficial and effectual.[47]

44. *Case of Andover* (1701) Holt 442; *R. v. Colchester Corporation* (1788) 2 T.R. 259; *R. v. Bristow* (1795) 6 T.R. 168; *R. v. Harrison* (1846) 16 L.J.M.C. 33; *R. v. West Riding of Yorkshire JJ.* (1849) 14 Q.B. 396; *R. v. Wood Ditton Highway Surveyors* (1849) 18 L.J.M.C. 218; *Bush v. Beavan* (1862) 32 L.J.Ex. 54 (nor will an *action* of mandamus, see *infra*, be allowed where there is another specific remedy); *R. v. Registrar of Joint Stock Companies* (1888) 21 Q.B.D. 131; *R. v. Lambourn Valley Rly. Co.* (1888) 22 Q.B.D. 463; *R. v. Incorporated Law Society* [1895] 2 Q.B. 456; *R. v. Vestry of St. Giles, Camberwell* (1897) 66 L.J.Q.B. 337 (action of mandamus was more appropriate); *Pasmore v. Oswaldtwistle U.D.C.* [1898] A.C. 387; *Davies v. Gas, Light and Coke Co.* [1909] 1 Ch. 708; *R. v. Army Council, ex p. Ravenscroft* [1917] 2 K.B. 504; *R. v. Dunsheath, ex p. Meredith* [1951] 1 K.B. 127; *Smyth v. Smyth* [1956] P. 427; see also *R. v. Bishop of Chester* (1786) 1 T.R. 396; *R. v. Lords Commissioners of the Treasury* (1835) 4 A. & E. 286.

On the other hand, mandamus is proper where no other specific and sufficient remedy offers itself: *R. v. Barker* (1762) 3 Burr. 1265; *R. v. Bank of England* (1780) 2 Doug. 524; Blackstone, *Commentaries* (12th ed., 1794), Bk. III, p. 110; *Rochester Corporation v. R.* (1858) E. B. & E. 1024 (though Williams J. says, at p. 1033, that "the writ cannot impose a new duty or create a fresh power"); *Morgan v. Metropolitan Rly. Co.* (1868) L.R. 4 C.P. 97, 101; *Glossop v. Heston and Isleworth Local Board* (1879) 12 Ch.D. 102; *Re Barnes Corporation, ex p. Hutter* [1933] 1 K.B. 668.

45. *R. v. Archbishop of Canterbury and Bishop of London* (1812) 15 East 117, 136; *R. v. Owen, ex p. Scovell* (1908) 72 J.P. 60.

46. *Re Barlow, Rector of Ewhurst* 30 L.J.Q.B. 271; see also *R. v. Leicester Guardians* [1899] 2 Q.B. 632.

47. *R. v. Thomas* [1892] 1 Q.B. 426; *cf. R. v. Bristol JJ.* (1893) 9 T.L.R. 273, another licensing case, in which appeal, not mandamus, was held to be the proper remedy, because there had been a neglect to give proper notice of appeal.

Again, it has been held in the present century that the test laid down in 1861 is equally applicable today, and mandamus only issues sparingly.[48]

What is the reason for the status of mandamus as a "last ditch" remedy? Though no theory can be perfectly satisfying, yet three might be put forward. First, it might be that the courts have been loath to use the weapon of attachment, which is the sole sanction against a recalcitrant party. Secondly, courts seldom like to order the doing of a positive act: they are much happier when they are forbidding something[49]—and mandamus, alone of the three prerogative orders, is a positive remedy. And thirdly, the notion of a residuary remedy may have grown up as an inevitable adjunct to a system based on forms of action. A parallel exists in the development of equitable remedies, which are not granted where there is an adequate legal remedy.[50] The most serious propositions are these last two, but each provides an objection to the other. If the remedy of mandamus were merely residuary it would be nonsensical to draw a distinction between orders of a positive and negative content. But mandamus is not merely residuary, for it has a definite jurisdiction of its own. Some judges often appear to state that it is only used as a residuary remedy, but to state that it is a last resort does not necessarily mean that its jurisdiction is entirely residuary—it only implies that the scope of the remedy will not be widened in order to encroach upon the jurisdiction of another remedy. If a duty or right sought to be enforced is positive the question often arises whether some other more direct remedy, such as an action for damages, would be more suitable in a particular instance, and it is in this sense that mandamus gives place to other forms of action. The difference between the positive and negative characters of a right should not be over-emphasised, although the difficulty of supervising the obedience to a positive order is always a drawback to mandamus, and sometimes leads to the adoption of some other remedy. Any one of the three theories would have been a slender ground upon which to have based the strong rule that mandamus is a last resort. But the true reason is probably a combination of the three. Although the modern rule is certain, the seed from which it sprang has long since been buried from sight.

48. See *R. v. Stepney Corporation* [1902] 1 K.B. 317; *R. v. Port of London Authority, ex p. Kynoch Ltd.* [1919] 1 K.B. 176; *R. v. Bedwellty U.D.C., ex p. Price* [1934] 1 K.B. 333.
49. *e.g.* courts are more ready to grant an injunction than they are to grant specific performance. Many more applications can be found of the former remedy than of the latter: see Hanbury, *Modern Equity* (6th ed., 1952), chapters 24 and 25.
50. Another parallel is the Roman *actio doli*, a penal action for any craft or deceit employed for the circumvention or entrapping of another person: Buckland, *A Text-book of Roman Law* (1921), p. 589.

For the future, however, there is a possible limitation to be placed upon the rule. The equitable remedy of injunction is a rival in the field occupied by the prerogative orders, and a court may well decide that the "last resort" rule is limited to legal remedies only.[51] Perhaps the rule may actually be that mandamus will not be granted if any more efficacious *legal* remedy is available, and that it will be granted in a case notwithstanding that an injunction also lies. There is no direct authority for this view, but there seems no logical reason why the scope of mandamus should not be slightly enlarged in this way.

No mandamus where it would prove ineffectual.

In an early case[52] it was held that the writ would not be granted if the party complained of had powers which would enable him to make the writ inoperative. One reason for refusing it in that particular case, where mandamus had been sought to restore a Town Clerk to office, was that the corporation "would undoubtedly remove him again the very instant he should be restored". Again a mandamus to compel the stating of a special case would not issue if it appeared that the case, when stated, would exclude the point of law relied upon by the applicant.[53] A harsh rule had seemed to arise from the case of *R. v. Birmingham and Gloucester Rly. Co.*[54] To carry out a provision for the widening of a road, contained in a statute, a railway company would have had to take or purchase land for the purpose, and the company's powers of compulsory purchase under the Act had already expired before they were called upon to widen the road; and yet a mandamus to compel the widening of the road still issued. As Lord Denman C.J. remarked:[55]

> "With respect to the rest of the return, to which we have referred generally, that the company cannot now obey the writ for the reasons therein specified, we have had frequent occasion to observe that we consider such an excuse inadmissible."

The rigidity of this rule has perhaps been mitigated now, for in a later case[56] the court, within its discretion, would not allow the writ to issue where it would have been ineffectual. An order of

51. *Cf. Pride of Derby Angling Association v. British Celanese* [1953] Ch. 149, where *Jones v. Llanwrst U.D.C.* [1911] 1 Ch. 393, is cited. In the latter case Parker J. spoke of a plaintiff being "thrown back on" mandamus through inability to proceed by mandatory injunction to compel a local authority to perform a statutory duty.

52. *R. v. Uxbridge Corporation* (1777) 2 Cowp. 523.

53. *R. v. Pembrokeshire JJ.* (1831) 2 B. & A. 391.

54. (1841) 2 Q.B. 47; see also *R. v. Woods and Forests Commissioners, Re Budge* (1848) 17 L.J.Q.B. 341 (a mandamus lay to the Commissioners to compel them to issue their warrant to the Sheriff to summon a jury to assess compensation for land acquired by them. The fact that the Commissioners had no funds was a matter for return to the writ).

55. (1841) 2 Q.B. at 61.

56. *Re Bristol and North Somerset Rly. Co.* (1878) 3 Q.B.D. 10.

the Board of Trade had been made upon a railway company to build a bridge, although the company, through no fault of its own, was incapable, on account of lack of funds, of carrying out the work; and no mandamus would issue to compel obedience to the order. *R. v. Army Council, ex p. Ravenscroft*[57] also appears to support that view, for one of the grounds upon which the writ was refused was that it would be ineffective.[58] This seems to be the only logical principle upon which the future law can rest.

The effect of delay in applications for mandamus.

Mere delay is no bar to the issue of mandamus,[59] and the Statute of Limitations has been held no obstacle to an application for the writ.[60] But the delay, if of an aggravated nature, has the reverse effect. In *Coke v. Jones*[61] a County Court Judge had directed the jury that the plaintiffs were entitled to the verdict, with only nominal damages, but the jury returned a verdict for £10, whereupon the Judge directed a verdict for one shilling to be entered. More than a year was suffered to elapse before the plaintiffs moved for a rule calling upon the Judge to enter the verdict pursuant to the finding of the jury, and the application was held to be too late. A similar delay of only three months has been held to be a subsidiary ground for the refusal of the writ, though it is doubtful whether a delay of such short duration could stand alone as a bar.[62] It seems now to be settled that any unreasonable delay in an application will be fatal.[63] An illustrative case was *Croydon Corporation v. Croydon R.D.C.*[64] Special expenses for drainage works had been incurred by the plaintiffs upon terms the result of which was that money was due each year from the defendants to the plaintiffs, and the amount so due was recoverable by the defendants from three contributory parishes, for whose benefit the special expenses were incurred. By mistake the plaintiffs

57. [1917] 2 K.B. 504.

58. This ground would not be peculiar to mandamus, but would apply to any positive order.

59. *R. v. York Corporation* (1792) 5 T.R. 66; Yardley, Note, (1955) 18 Mod. L.R. 493.

60. *Ward v. Lowndres* (1859) 29 L.J.Q.B. 40.

61. (1861) 4 L.T. 306.

62. *R. v. Robson* (1893) 9 T.L.R. 163. In *Ex p. Lewis* (1888) 21 Q.B.D. 191, twelve months' delay was held to be a subsidiary ground for the refusal of a rule under the Justices' Protection Act, 1848.

63. Neither the Limitation Act, 1939, nor the Law Reform (Limitation of Actions etc.) Act, 1954, appear to affect the position. But one situation is now provided for by R.S.C., Order LIX, rule 4: a mandamus sought because of the refusal of quarter sessions to hear an appeal must be applied for within two months of such refusal.

Where the applicant is the Crown the maxim ***nullum tempus occurrit regi*** may be relevant, though the point has never yet arisen.

64. [1908] 2 Ch. 321; *cf. Re Brixham U.D.C., Re Totnes U.D.C.* [1955] 1 W.L.R. 426. Both cases are discussed by the author in (1955) 18 Mod.L.R. 493.

did not for several years call upon the defendants to pay the full amount properly due, and less was paid until September 1904. In April 1905 the plaintiffs drew attention to the mistake and called upon the defendants to pay the balance due in respect of several previous years up to September 1904, and to make payments for the future on a proper footing. The defendants paid on the lower scale till September 1905, and thenceforward paid in full. They were unable to recover part of the arrears from the contributory parishes, and declined themselves to pay the arrears demanded; whereupon the plaintiffs brought an action to recover the arrears, and for a mandamus to enforce the levy of a rate to satisfy them. The defendants admitted that the plaintiffs were entitled to judgment for the arrears, but contended that a mandamus to enforce payment of a retrospective rate would be illegal. Cozens-Hardy M.R., Buckley and Kennedy L.JJ. in the Court of Appeal held that the court had a discretion to grant a mandamus to enforce the levying of a rate to meet obligations for special expenses of former years, if the circumstances justified it; that there was no reason for granting a mandamus to enforce payment of the arrears up to 1904; but that, inasmuch as a demand was made and might have been complied with in the course of the current year 1904-5, a mandamus ought to be granted to enforce payment of the amount due for that period.

In addition, it seems well established that great negligence on the part of persons on whose behalf an application has been made will exclude the issue of the remedy. *Vigilantibus et non dormientibus jura subserviunt.*[65]

Appeal from a grant of, or refusal to issue, mandamus.

Since the Judicature Act, 1873, the exercise of a court's discretion in granting or withholding a mandamus may be the subject of an appeal to the Court of Appeal.[66] But the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*a*), has provided an exception to this rule, for there it is enacted that no appeal shall lie, except as provided by the Criminal Appeal Act, 1907,[67] from any judgment of the High Court in any criminal cause or matter. If, therefore, a mandamus has been granted or refuse.

65. *R. v. Fowey Corporation* (1824) 2 B. & C. 584, 591, *per* Abbot C.J.
The effect of delayed applications is more clear-cut in the case of certiorari and prohibition. Certiorari must be applied for within six months of the decision etc. complained of (R.S.C., Order LIX rule 4; *cf.* Qld. R.S.C., O. 81 r. 7), although leave to apply for certiorari is occasionally given out of time, as in *R. v. Medical Appeal Tribunal, ex p. Gilmore*[1957] 2 W.L.R. 498, *supra*. Prohibition may always be obtained so long as there is still something to prohibit—thus the proceedings of the court or tribunal must still remain unfinished.

66. *R. v. Savin* (1881) 6 Q.B.D. 309.

67. *i.e.* appeals to the Court of Criminal Appeal.

in any criminal cause or matter no further appeal will lie. Thus if a mandamus is sought to compel magistrates to hear and determine some criminal case before them, the decision of the Divisional Court, whether it be to grant or refuse the application, is final.[68]

Statutory forms of mandamus.

Parliament has from time to time contrived to supplement the common law remedy provided by the prerogative writ of mandamus for certain purposes, and this very statutory supplementation has meant, at any rate at first, a diminished area in which the older remedy has been able to operate.

(*i*) *The action of mandamus.*

Section 68 of the Common Law Procedure Act, 1854,[69] enacted that a plaintiff may claim, *in any action*, a writ of mandamus "commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." Thus, instead of a plaintiff having to apply separately for a writ of mandamus, he could, under the provisions of the Act, incorporate an application for the writ direct in an action sounding, for instance, in contract or tort. In fact it was held in 1866[70] that a writ might issue in an action even though no actual damage had been sustained, and there could therefore be no claim for damages. Soon after the passage of the Act, however, it was decided that the cases in which mandamus would be granted in an action were confined to those in which the prerogative writ would have issued before the creation of the new action of mandamus.[71] It did not extend, for example, to a duty arising out of a mere personal contract to let in order to compel a defendant to draw up a lease in pursuance of the contract.

68. It would seem to follow that prior to 1951 a petition to the Army Council to mitigate a sentence of a court martial was a criminal cause or matter, and no appeal would lie from a refusal to issue a mandamus to the Army Council concerning the matter: *R. v. Army Council, ex p. Sandford* [1940] 1 K.B. 719. But the Courts-Martial (Appeals) Act, 1951, has now set up the Court-Martial Appeal Court, and an appeal will take the place of such a petition in most cases.

    The provisions of the 1925 Act will now also cover procedure in the case of certiorari and prohibition.

69. Repealed by the Statute Law Revision and Civil Procedure Act, 1883, s. 4, schedule, but substantially re-enacted by the Judicature Act, 1873, s. 25 (8), and R.S.C., Order LIII rule 1. *Cf.* Interdict Act of 1867 (Qld.), s. 44, and Qld. R.S.C., Order 57.

70. *Fotherby v. Metropolitan Rly. Co.* L.R. 2 C.P. 188; see also *Baxter v. L.C.C.* (1890) 63 L.T. 767, 771; *Ward v. Lowndres* (1859) 29 L.J.Q.B. 40 (the Statute of Limitations does not bar an application for the writ in an action).

71. *Benson v. Paul* (1856) 25 L.J.Q.B. 274; followed in *Norris v. Irish Land Co.* (1857) 27 L.J.Q.B. 115 (but Lord Campbell C.J., who had been a member of the Divisional Court sitting in *Benson v. Paul*, said, at p. 119, that he was not now prepared to say, on consideration, that the test of whether a prerogative writ would have issued was the exact limit of the scope of an action of mandamus); see also *Baxter v. L.C.C., supra.*

In a series of cases the scope of the remedy instituted in 1854 was examined, and in *Bush v. Beavan*[72] it was held inapplicable where another remedy was appropriate. In one case the remedy was even excluded in favour of the prerogative writ, even though the court made it clear that this was not a convenient mode of dealing with the matter or one to which resort ought ordinarily to be made.[73] On the other hand, in *R. v. Lambourne Valley Rly. Co.*,[74] an action of mandamus was held to be the proper course of action in preference to the prerogative writ, but Wright J. was largely responsible for whittling down the effect of this decision during the 1890's. In *R. v. Vestry of St. George the Martyr, Southwark*[75] he said:

> ". . . it appears to me that the decision in the *Lambourne Valley Railway* case is intended to apply, and must be understood as applying, only to a case where the duty sought to be enforced, as well as the right of claim, are, in substance, of a private nature, and that they do not extend to any case where the duties sought to be enforced are merely of a public nature. If it were otherwise, a very great part of the jurisdiction of this court in granting writs of mandamus would be taken away."

This contained suggestions for seriously limiting the scope of an action of mandamus, and since the *Southwark* case it appears only to have been employed where the problem concerned a small private matter, such as compelling a local authority to repair and maintain a sewer vested in them.[76]

The significance of the action of mandamus is now greatly diminished, but Order LIII rule 1 of the Rules of the Supreme Court retains a semblance of the old pre-1883 procedure.[77]

(*ii*) *The Summary Jurisdiction Act*, 1857.

Section 5 of the Summary Jurisdiction Act, 1857,[78] instituted a rule in the nature of a mandamus. This provided for the con-

72. (1862) 32 L.J.Ex. 54; see also *Morgan v. Metropolitan Rly. Co.* (1868) L.R. 4 C.P. 97; *Widnes Alkali Co. v. Sheffield and Midland Rly. Co.'s Committee* (1877) 37 L.T. 131; *Smith v. Cowell* (1880) 6 Q.B.D. 75; *Easton and Co. v. Nar Valley Drainage Commissioners* (1892) 8 T.L.R. 649; *Pasmore v. Oswaldtwistle U.D.C.* [1898] A.C. 387.
73. *R. v. L.N.W.R. and G.W.R.* (1896) 65 L.J.Q.B. 516.
74. (1888) 22 Q.B.D. 463; see also *Norris v. Irish Land Co., supra; cf. R. v. L.N.W.R. and G.W.R., supra.*
75. (1892) 61 L.J.Q.B. 398, 400; *cf.* his judgment in *R. v. L.N.W.R.* [1894] 2 Q.B. 512, 518.
76. *R. v. Vestry of St. Giles, Camberwell* (1897) 66 L.J.Q.B. 337. The action of mandamus was preferred by the court in this case to the remedy by way of prerogative writ. As Wright J. himself said, at p. 338, the application for the prerogative writ was "an attempt to make this court a machine for disposing of small private and personal grievances."
77. See footnotes 1 and 69, *supra.*
78. *Cf.* Justices Act of 1886 (Qld.), s. 230, repealed by the Justices Acts Amendment Act of 1949, s. 34.

tingency of justices refusing to state a case for the opinion of the superior court upon a point of law arising in an information or complaint, determinable by such magistrates in a summary way, upon an application of either party to the proceedings. The party asking for such a case may apply to the superior court, upon an affidavit of the facts, for a rule calling upon the justices and the other party to the proceedings in which the determination was made to show cause why such case should not be stated. In addition, section 33 of the Summary Jurisdiction Act, 1879, provided that any "person aggrieved" who desired to question a conviction, order, determination or other proceeding of a court of summary jurisdiction, on the ground that it was erroneous in point of law, or was in excess of jurisdiction, may, on such court of summary jurisdiction declining to state a case, apply to the High Court for an order requiring the case to be stated; and sub-section 2 of section 33 provided that the Act of 1857 should, so far as it was possible, apply to a case stated under that section. It was later held[79] that the two provisions should be read together, the result being that any "person aggrieved", whether he was a party to the original suit or not, could apply either for a rule in the nature of a mandamus under the 1857 Act or for an order requiring the case to be stated under the 1879 Act.

Little need be said about these provisions, for they are clear.[80] But in any case the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 8, has provided that "the power of the High Court under any enactment . . . to require any court of summary jurisdiction or court of quarter sessions to state a case for the opinion of the court in any case where immediately before the commencement of this Act the court had by virtue of any enactment jurisdiction . . . to make an order, . . . shall be exercisable by order of mandamus."[81]

(*iii*) *The Justices' Protection Act*, 1848.

The most important of the three statutory inroads on the common law was the rule in the nature of a mandamus under the Justices' Protection Act, 1848. By section 5 of that Act[82] pro-

79. *Stokes v. Mitcheson* [1902] 1 K.B. 857.

80. In *R. v. Shiel* (1900) 82 L.T. 587, it was held that a magistrate would not be ordered to state a case on a point of law which he had decided in accordance with a previous decision of the High Court upon the same point, and from which there was no right of appeal.

81. But see *R. v. Somerset JJ.* [1950] 1 K.B. 519, where justices at quarter sessions had declined, within the proper exercise of their discretion, to grant an application by a party aggrieved by their decision to state a case, and it was held that the King's Bench Division had no power to issue an order of mandamus directing them to do so.

82. In effect re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 1, 2 and 56. *Cf.* Justices Act of 1886 (Qld.), s. 38.

vision was made whereby, in cases where justices refused to do an act relating to the duties of their office, application might be made to the King's Bench, upon an affidavit of the facts, for a rule calling upon the justice or justices, and also the party to be affected by such act, to show cause why the act should not be done. If, after due service of the rule, good cause was not shown against it, the court could make the rule absolute, with or without, or upon payment of, costs. The justice or justices, upon being served with the rule absolute, were to obey the same and to do the act required; and by acting in obedience to any such rule they were protected from subsequent action in respect thereof. The principles upon which the courts acted in granting or refusing a rule under this Act were the same as those which operated when application was made for a writ of mandamus, the two proceedings being practically concurrent.[83] Furthermore, very many of the applications against magistrates, taking place after the enactment of this statute, were made either under this Act or under the Summary Jurisdiction Act, 1857, usually the former.[84]

It might be thought that the statutory remedy could only be invoked where the justices would need protection if they proceeded to do "any act relating to the duties of their office", but that this is not so is shown by *R. v. Phillimore and Pilling*.[85] An information had been laid against P. under the Highway Act, 1864, s. 51, for encroaching on a highway, and the justices had decided, on evidence given, that a claim of right set up by P. to the land alleged to have been encroached upon by him was *bona fide*, and had thereupon refused to hear the case on the ground of want of jurisdiction. The complainant applied for a rule under the Justices' Protection Act calling upon the justices to show cause why they should not hear and determine the case, and the court held that the application was properly made, the statute not being limited to cases in which the magistrates needed protection in the performance of their duties.

Once more, however, the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 8, has altered the practice. As the section provides, "the power of the High Court under any

83. *R. v. Dayman* (1857) 26 L.J.M.C. 128; *Fortescue v. Paton* (1860) 3 L.T. 268; *Ex p. Lewis* (1888) 21 Q.B.D. 191.

84. See Paley on *Summary Convictions* (9th ed., 1926), p. 874.

85. (1884) 51 L.T. 205; followed in *R. v. Biron* (1885) 14 Q.B.D. 474. The previous decision in *R. v. Percy* (1873) L.R. 9 Q.B. 64, was overruled in *R. v. Phillimore and Pilling*. In *R. v. Percy* justices had refused to hear a summons against a person for having a board over his door stating that he was licensed to retail beer etc., he not being so licensed, contrary to the statute 35 & 36 Vict. c. 74, s. 11. The justices would have incurred no liability by proceedings (as, for example, by way of a certiorari to quash their proceedings on account of excess or absence of jurisdiction), and so the Divisional Court refused to issue a rule calling upon them to show cause why they should not issue the summons.

enactment to require justices of the peace or a judge or officer of a county court to do any act relating to the duties of their respective offices, . . . in any case where immediately before the commencement of this Act the court had by virtue of any enactment jurisdiction to make a rule absolute . . ., shall be exercisable by order of mandamus." The Justices' Protection Act has in effect been amended so that in all cases where a justice refuses to perform some act relating to the duties of his office an order of mandamus will lie; and, if the court makes an order, no proceeding or action whatsoever shall be commenced or prosecuted against the magistrate for having obeyed the order.

D. Conclusions

In sum, it may be stated with some confidence that statutory limitations imposed upon certiorari have been practically nugatory; that the legislature has had a little more success in respect of prohibition, though the extent of the victory is probably not great; and that such strictures as have been placed on mandamus have been for the most part negatived by recent developments instigated by Parliament itself. It is curious that all lawyers should not have been aware of this innate power of the prerogative orders.

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