# An historical account of the rise and fall of mandamus

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*This paper analyses the historical development of the prerogative writ of mandamus against its social background. The author discusses first the different contentions as to the conceptual origin of the remedy, and also advances views on the social and circumstantial factors which nourished its remarkable growth in the 18th and 19th centuries. This approach allows the reader a clearer understanding of the function of a mandamus-type remedy beyond its procedural intricacies. The text is based on a paper which won the 1976 prize of the Legal Research Foundation.*

## I. INTRODUCTION

The writ of mandamus is a device for securing by judicial means the enforcement of public duties. It is a command issued in the name of the Crown from a superior court of record, requiring an inferior authority to perform a public duty that has been imposed upon it. As a remedy, mandamus was at its zenith in the early 19th century, having grown dramatically in the 17th and 18th centuries, but by merely the mid-19th century it was clear that its significance was to "dwindle almost as swiftly as it had arisen".[1]

This article attempts to show that the spectacular rise of mandamus was a direct response to the acute political and social circumstances existing in English society in the 17th century and which could be remedied at the time and up to the mid-19th century only by judicial means. The swift fall of the writ was directly attributable to those circumstances being the subject of 19th century reforms and the growing influence in that century of more convenient and less expensive non-judicial remedies.

Before discussing these circumstances this article attempts to trace the conceptual development of the writ of mandamus. In particular, it focuses upon and attempts to explain two schools of thought: the first, that mandamus has a conceptual origin in Norman/feudal England, and perhaps a specific linkage with the Magna Carta; the second, that it was a creation of the 17th century jurists.

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1 J. M. Evans *de Smith's Judicial Review of Administrative Action* (4th ed., Stevens & Sons Ltd., London, 1980). Attention is also drawn to appendix 1 of this work, pp. 584-603, comprising a commentary: "The Prerogative Writs: Historical Origins".

## II. NATURE — A PREROGATIVE WRIT

Mandamus is in the small class of writs described as "(High) Prerogative Writs",[2] that issue "not as ordinary writs, of strict right, but at the discretion of the Sovereign acting through that Court [Kings/Queens Bench] in which the Sovereign is supposed to be personally present".[3] It is an allegation of a contempt of the Crown consisting in the neglect of a public duty,[4] with the Crown lending its prerogative to the subject to ensure "good and lawful government".[5] Most importantly, by the 17th century a citizen could invoke this remedy in the name of the Crown without having to first obtain the consent of the Crown.[6]

## III. POSSIBLE EARLY ORIGINS

Twentieth century writers regard *James Bagg's Case*[7] in 1615 as being "for practical purposes"[8] the beginning of mandamus. From a broader and more abstract perspective mandamus has earlier mediaeval links. These can be stated as follows.

### A. *The Old Executive Writ*

The phrase "old executive writ"[9] relates to a procedure of the post Conquest era when Anglo-Norman and Angevin (Plantagenet) Kings were rapidly centralising and strengthening government. Royal power was becoming predominant over local and lesser authorities, both Norman manorial and traditional Anglo-Saxon authority. Formal royal power was exercised chiefly by the issue of writs. At this stage there was not yet any differentiation of writs into classes. Rather there was simply one vast class. Law and administration reflected the King's personal will, and writs were issued with no justification other than that such was the will of the King and the good of the country.[10]

The subject matters of these authoritative and commanding instruments included control over feudal manorial administration,[11] the contemporary equivalent to the

2 S. A. de Smith in "The Prerogative Writs" [1951] C.L.J. 40, 51 attributes the term "prerogative writ", at least as part of a lawyer's vocabulary, to Lord Mansfield and Blackstone.

3 J. Shortt *Informations (Criminal and Quo Warranto) Mandamus and Prohibition* (reprinted: The Blackstone Publishing Company, Philadelphia, 1888) 243-244 (pagination referred to original edition: 223-224). See also T. Tapping *The Law and Practice of the High Prerogative Writ of Mandamus as it obtains both in England and Ireland* (London, 1848) 4 (a).

4 de Smith, supra n.2, 55.

5 H. W. R. Wade *Administrative Law* (5th ed. Clarendon Press, Oxford, 1982) 539.

6 Idem. This right vested in an applicant for a prerogative writ or order was acknowledged by Lord Wilberforce in *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435, 482-483 (H.L.).

7 11 Co. Rep. 93b; 77 E.R. 1271 (K.B.).

8 de Smith, supra, n.2, 50. See also E. Jenks "The Prerogative Writs in English Law" (1923) 32 Yale L.R. 523 at 530 and H. Weintraub "English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus" (1963) 9 N.Y.L.F. 478, 489.

9 R. C. Van Caenegem "Royal Writs in England from the Conquest to Glanvill", Selden Society, Vol. 77 (1958-1959) 177 et seq.

10 See G. C. Hazard, Jr. "The Early Evolution of the Common Law Writs: A Sketch" (1962) Am. J. Leg. Hist. 114, 117 and 121-122.

11 Van Caenegem, supra n.9, 179.

local authorities and inferior bodies that from the 17th century would be subjected to strict judicial supervision through the writ of mandamus. In such circumstances Van Caenegem acknowledges that our present day prerogative writs (and he expressly mentions mandamus) "are the lineal descendants of this wide primitive group".[12] Of course, this must be read in the context of the whole of Van Caenegem's commentary in order to avoid overstating the extent and significance of this linkage.[13] He is not saying that the legal system of the 12th and 13th centuries provided citizens with a procedure in the nature of the modern prerogative writs or orders. Instead, his focus is upon the well established existence of the writ as a matter of form, together with its underlying theory of a royal command issued as a matter of government by officers closely involved in the process of government, including the administration of justice, from the Curia Regis.[14]

B. *The Magna Carta (or Charta)*

Tapping, in his monumental nineteenth century work on mandamus, asserted that the writ is founded on the Magna Carta, Chapter 29,[15] which he cited in support of the 17th century view of mandamus as a residual constitutional remedy always available where no specific or adequate enforcement exists to remedy a violation of citizens' rights in public law. He relied upon *R.* v. *Heathcote*[16] in which there is a submission by counsel that "Mandamus's founded upon Magna Carta, cap. 29". However, the judges presiding did not comment specifically on this submission. The closest dictum is that of Powys J. where he rejects the view that *Bagg's* case marked the beginning of mandamus declaring it to be "of much greater antiquity".[17] He cites *Dr. Widdrington's Case* where there are dicta indicating that mandamus existed in the times of Edward II (1307 to 1327) and Edward III (1327 to 1377).[18]

The influence of the Magna Carta upon mandamus is also referred to, though as a passing comment, by de Smith[19] and Jenks, the latter remarking "Of course it has also been attributed to the Magna Carta. But that is common form".[20] This comment clearly illustrates the crux of the matter. There is no express linkage between mandamus and the Magna Carta. The linkage, if it exists at all, is merely

12 Ibid. 178 n.2.

13 The only sources cited by Van Caenegem on this point are the surveys by de Smith and Jenks, supra n.2 and 8 respectively. These writers do not draw a linkage as precise nor as definite as this phrase suggests. See in particular Jenks, supra n.8, 529-530 and 529 n.31 describing pre-15th century references to "mandamus" as simply generic for "order" without any legal connotation.

14 A linkage of this more general nature is not incompatible with the view expressed by Jenks, ibid., who focuses more precisely upon the modern procedure of an aggrieved party applying to the judicial branch for an order forcing an executive official to perform a public duty: ibid. 530. Similarly with Weintraub who looks to *Bagg's Case* from the perspective of establishing a "due process" procedure of "notice and hearing", supra n.8, 491.

15 Supra n.3, 5.

16 (1713) 10 Mod. 48, 53; 88 E.R. 620, 622.

17 Ibid. at 57; 624.

18 See *Dr Widdrington's Case* (1673) 1 Lev. 23; 83 E.R. 278 (K.B.)

19 Supra n.2, 53 n.4.

20 Supra n.8, 530 n.33.

from the perspective of principle.[21] The above authorities refer to Chapter 29 of the Charter.[22] The provisions of this chapter have been claimed to safeguard "free men" from arbitrary rule by establishing the supremacy of the rule of law rather than man. The law is referred to there as the "law of the land" which today is referred to as "due process of law".[23] Mandamus fits this criterion, but so do other aspects of our legal process and therefore it is difficult to see why mandamus should be regarded as in any way having a special link with the Charter, hence the significance of Jenks' remarks above. Perhaps it is because mandamus, like all prerogative writs, is more obviously concerned with governmental action (or inaction) or "due process" than are other areas of law, so that the significance of the Charter is more apparent.[24] More likely, the alleged linkage between mandamus and the Magna Carta is the result of constitutional indoctrination beginning with 17th century jurists, who, in response to the political turbulence of the period, espoused the principle of supremacy of law. To this end they sought to establish the authority of Common Law from its antiquity and looked inter alia to the constitutional basis of Chapter 29 of the Magna Carta,[25] or generally found authority "out of the foundation of law".[26] That mandamus was chosen as the vehicle to bear this residual constitutional remedy was probably purely a matter of chance. The principal form of abuse of the time was the disfranchisement of municipal office holders (particularly Whigs)[27] by Stuart-packed municipal corporations.[28] Therefore the remedial need of the time was a procedure to secure restitution. Mandamus, as a matter of form and concept, was able to do this.[29]

C. *Early Mediaeval Judicial Reference to Mandamus*

There are clear indications that the term "mandamus" was used prior to *Bagg's Case* (1615) to describe certain legal processes. First there is *Dr. Widdrington's Case*

21 Jenks has argued for a strictly feudal interpretation of the Charter and against the view that broad liberties could be drawn from it. See generally J. C. Holt (ed.) *Magna Carta and the Idea of Liberty* (John Wiley & Sons, Inc., New York, 1972) 25-27.

22 Of the 1225 draft (Chapter 39 of the 1215 draft). The drafts have been divided and numbered by commentators. See A. E. Dick-Howard *Magna Carta, Text and Commentary* (University Press, Charlottesville, Virginia, 1964) 9.

23 A. E. Dick-Howard, ibid. 14. See also Holdsworth *A History of English Law,* Vol. 1 (7th ed. Sweet & Maxwell, London, 1956) 62-63.

24 Generally the principles of habeas corpus and "trial by jury" are regarded as having the most direct link with Chapter 29 of the Charter but even these principles have no express or literal connection — see Holdsworth, ibid. Vol. 2 (4th ed., 1936) 214-215.

25 Edith G. Henderson *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press, Camb. Mass., 1963), 72.

26 *Dr Patrick's Case* (1676) T. Raym, 101, 104: 83 E.R. 54, 56. See Henderson, ibid. 68. The quote is from counsel's submissions which in its full context reads "And for authorities, there was no [precedent] for *Bagg's Case*; but the Judges finding the mischief, did out of the foundation of law frame [the writ of mandamus]".

27 Being those who opposed the succession of James, Duke of York, as James II on the ground of his being a Roman Catholic. After the revolution of 1689 and the acceptance of the Crown by William and Mary, the Parliament split into the two great parties of Whigs (later Liberals) and Tories.

28 Jenks, supra n.8, 530-531.

29 See infra n.42 noting that in the 17th century mandamus was often referred to as a "writ of restitution".

involving a motion for mandamus to restore Dr. Widdrington to a fellowship in Christ's College in Cambridge. Ultimately, after argument on the return of the writ, the issue of a mandamus was denied because of the existence of a college Visitor who could provide an "alternative remedy". However on the question of precedent the report adds:[30]

> . . . but two precedents were remembered to have been cited by [counsel] in *Dr. Godland's Case,* of mandamus's granted in the like case, the one in the time of Edw. 2 [1307-1326], and the other in the time of Edw. 3. [1326-1377] To which [counsel for Cambridge University] said that no mandamus had been granted since those till within these ten years: but Foster, Chief Justice, said, that there was one about the end of Queen Elizabeth's reign, or the beginning of King James's; and thereupon the mandamus was granted.

Further reference is made to these early mediaeval mandamuses by Lord Mansfield in *R.* v. *Doctor Askew*[31] where he stated:

> In a manuscript book of reports which I have seen, the reporter cites (in reporting *Dr. Bonham's case*) a mandamus in the time of Edw. 3 directed to the University of Oxford, commanding them to restore a man that was bannitus [an outlaw, a banished man] which shows both the antiquity and extent of this remedy by mandamus.[32]

Earlier still, the Close Rolls of the sixth year of the reign of Edward II (i.e. 1312-1313) have been noted to record a writ apparently termed mandamus commanding the mayor and commonalty of Bristol to restore certain burgesses to the liberty of the city and to their goods.[33]

Other views deprecate these early mandamuses on the basis that they were mere exercises of the Crown's executive function.[34] It is not sought to deny this. To the contrary, this article has already noted the existence of some linkage between the modern writ of mandamus and the "old executive writ',[35] and the dicta in the

30 (1673) 1 Lev. 23; 83 E.R. 278. It appears that the reference to *"Dr Godland's Case"* is a mis-quote as there is no reported case as such. There is, however, a *Dr Goddard's Case* reported by the same reporter, Levinz (Lev.) in the immediately prior Hilary Term (1 Lev. 19; 83 E.R. 276). The report is only a brief paragraph and there is no note of the precedents cited by counsel. Mandamus was granted to restore Dr Goddard to the College of Physicians. In a later case (*R.* v. *Doctor Askew* (1768) 4 Burr. 2185, 2188; 98 E.R. 139, 140-141) *Dr Goddard's Case* (not a *Dr Godland's Case*) is cited as a precedent.

31 (1768) 4 Burr. 2186, 2189; 98 E.R. 139, 141. This reference is cited to show the antiquity of mandamus by R. B. Allen "Mandamus, Quo Warranto, Prohibition, and Ne Exeat" [1960] U. Ill. L.F. 102, 103. The writer then moves on to American law.

32 The report does not include a citation to the "manuscript book of reports" noted by Lord Mansfield as containing Dr Bonham's application for mandamus, and a search of both the English Reports and the Revised Reports has not revealed such a case. However, there are three reports in 1609 and 1610 of proceedings before the Court of Common Pleas for false imprisonment of a Dr Bonham by the College of Physicians in a dispute concerning Dr Bonham's entitlement to practise. See *College of Physician's Case* (1609) 2 Brownl. & Golds. 255; 123 E.R. 928 (C.P.) and *Dr Bonham's Case* (1609) 8 Co. Rep. 107A; 77 E.R. 638 and (1610) 8 Co. Rep. 113b; 77 E.R. 646 (C.P.).

33 See de Smith, supra n.2, 50 n.82. The writer does not have access to the cited Close Rolls.

34 E.g. Windham J. in *R.* v. *Doctor Patrick* (1678) 2 Keb. 164, 167; 84 E.R. 103, 105 (K.B.). See also de Smith, supra n.2, 50 and Jenks, supra n.8, 530.

35 See supra text accompanying nn.9-14.

cases discussed in this part amply support that conclusion. What is denied here, is the assertion that the dichotomy between executive and judicial functions of government will preclude drawing a revolutionary linkage between earlier and later references to the writ. The Court of King's Bench during this period was still part of the Curia Regis and travelled the countryside with the King. This continued throughout the whole of the 14th century (i.e. well beyond the reign of Edward III which ceased in 1377) notwithstanding that a chief justice had been appointed to the court in 1268.[36] It was not until the 15th century that the Court of King's Bench settled in Westminster Hall as a court in which the King never again personally sat.[37] In the result, the judicial and executive functions of the King in Council during this period were obviously completely interwoven. Certainly, there was no separation of powers as that term is understood today, so that to evaluate contemporary functions and procedures from today's perspective is quite artificial. It is the function itself that should be looked to. Here there is ample evidence of the existence of a procedure (whether categorised as executive or judicial) performing the function of restoring to office, or to an entitlement, a person deprived of it unlawfully, or at least in circumstances that the council in those times would deem remedial. It was precisely for this function that the Court of King's Bench in the 17th century resorted to the writ of mandamus, so that its use and development at that time are more accurately described as an evolution rather than a creation of something entirely new. This focus upon function and evolution appears to be reflected in 19th century treatises. Note in particular the following passage in High's treatise:[38]

> the term mandamus derived from [the executive] seems gradually to have become confined in its application to the judicial writ issued by the King's Bench, which has by a steady growth developed into the present writ of mandamus.

### D. *The Cases of Middleton and Anable in the 15th Century*

Quite apart from the material discussed in the preceding part, there is *Middleton's Case*[39] which in turn cites and follows an earlier unreported decision of *Anable* "in the time of Henry VI" (1422 to 1461). These cases may possibly be pre-17th century (and therefore before *Bagg's Case*) illustrations of mandamus in a clearly judicial context. Both cases concerned the restitution of the applicants to the status of "freeman", with the attendant franchise in the City of London. The city had deprived the applicants of their status because they had earlier litigated a cause against other citizens in the royal courts instead of using the city's own adjudicatory processes. The report in *Middleton* is rather meagre, but it does reproduce the text of the writ issued in *Anable* and notes that it was adopted "in better form" in

36 A. K. R. Kiralfy *Potter's Historical Introduction to English Law and Its Institutions* (4th ed. Sweet & Maxwell Ltd., London, 1962) 123-124.

37 Idem. See also J. H. Baker *An Introduction to English Legal History* (2nd ed. Butterworths, London, 1979) 36 and generally 34-48 for a survey of the superior courts of Common Law and their interrelationship during this early period.

38 J. L. High *A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto, and Prohibition* (Callaghan & Company, Chicago, 1874) 5 cited with approval by Shortt, supra n.3, 243 (pagination 224) n.(e). Note also that both writers acknowledge the original "executive" nature of the writ.

39 (1573) 3 Dyer 332b, 332a; 73 E.R. 752, 753 (K.B.).

*Middleton.*[40] Although the report of the case in the English Reports does not contains an express reference to mandamus,[41] the latin version of the writ does, even though perhaps only in the sense of commanding speech. However, it is important that the situation in both *Middleton* and *Anable* was one of "restitution", which came to be the principal purpose and function of later mandamuses, as well as being that appertaining to the earlier indications of the writ. The synonymy of a "writ of restitution" and a "writ of mandamus" is well accepted.[42] Tapping was most explicit in his evaluation, focusing his assessment upon the function served by the order rather than its name:[43]

> Many Judges have, when speaking of the antiquity of the writ of mandamus, erroneously referred to *Bagg's Case* . . . as being the first writ that was granted for a municipal office. The above case [in the time of] Henry VI [i.e. *Anable*] and also *Middleton's case* prove the falsity of the assertion.

Henderson presents a different view of *Middleton* and *Anable.* Accepting *Bagg's Case* as the beginning of mandamus, she classifies *Middleton's Case* and other unreported decisions between 1606 and 1615 as clear "... adaptations of existing writs of privilege used by the central courts to protect their officers and litigants from arrest by the numerous local courts."[44] After examining the Controlment Rolls (recording all writs issued) of the Court of King's Bench she reports that she is unable to find any case of mandamus or restitution prior to 1606 with the exception of *Middleton's Case* in 1573.[45] Eight writs were issued between 1606 and 1615. Henderson's thesis is that the writs issued in the two earliest instances of the eight cases (unreported — *Thompson's Case* and *Powell* v. *Aldworth*) establish a link with the privilege of the Westminster courts in that although the cases involved restoration (in *Thompson's Case* to local office and in *Powell* v. *Aldworth* to liberties and privileges generally) this was really ancillary to the main complaint of the arrest of the persons concerned as they in each case were travelling to the royal courts at Westminster. With regard to *Middleton's Case* and the unreported *Anable's Case* noted in *Middleton,* Henderson, notwithstanding that neither litigant in those cases was arrested on his way to or from Westminster, argues that the cases still involved the privilege of the Westminster courts, in that the essence of the cases was that the litigants had previously sued a city official in the royal courts instead of the local London courts and that it was for this action that the city disfranchised them. Such circumstances would, she claims, clearly have been intolerable for the royal courts, so that the court's response was really on the

40 Ibid. 333b; 754.

41 Tapping reproduces the latin version in the appendix to his treatise, see supra n.3, 437-438. Near the end of the writ there appears the phrase "VOBIS igitur MANDAMUS" which the english version translates to "We therefore command you". The english version does not reproduce the emphasis given to this phrase in the latin version.

42 *Bagg's Case* itself was a "restitution" case. See also infra text accompanying nn.56-60. de Smith speaks directly to the synonymy noting "In the seventeenth century the writ [of mandamus] was often called a writ of restitution", supra n.2, 50 n.85. See also Tapping, ibid. and Henderson, supra n.25, 46.

43 Ibid., 438 n.(a). See also Tapping, ibid. 2 n.(f) noting a dictum to another unreported mandamus case in the early 14th century.

44 Supra n.25, 49.

45 Idem.

basis of privilege to protect its jurisdiction. She notes that the writ in the later case of *Thompson* seems to have been "lifted straight from *Anable* and *Middleton*".[46] She sees the subsequent development in *Bagg's Case* as being different in both form and underlying theory, as reference to interference with the proceedings of the royal courts is omitted and attention is focused upon the generality that an injustice had been done and should be set right.[47]

Henderson's logic is persuasive and can be supported by passages from the *Anable* writ reproduced in *Middleton*.[48] However, two points must be made. First, Henderson admits that the circumstances in *Anable* and *Middleton* "do not quite parallel the typical case of privilege"[49] which concerned physical interference with a litigant in his journey to and from the court. The link between non-physical interference and the court's privilege flows from the logic that if a court can act to prevent physical interference then it should be able to prevent any interference that will cause a similar impact upon the litigant and the court. The problem is one of sequence. *Anable* and *Middleton* (involving non-physical interference) were decided before *Thompson,* which involved a physical interference and in which counsel (according to Henderson) perhaps copied the *Anable* and *Middleton* writs.[50] This suggests that either the privilege was already wide enough to cover non-physical interference or alternatively that the issue of the writs were, *from a procedural perspective,* quite unrelated to matters of privilege. This leads to the second point. Surely we must distinguish the procedure of ordering restoration or restitution from the substantive ground of illegality that motivates the court to make the order. The court in *Anable* and *Middleton* may well have been protecting its jurisdiction and enforcing its privilege. This would go to substance. It would give a reason for the court to act. On the other hand the way in which the court chose to act would depend upon the particular facts. In these cases in order to correct the wrong that had occurred it was necessary to order restitution to office. Thus the availability of this procedure need have no connection at all with the substantive matter of privilege.[51]

### E. *Conclusion*

The preceding discussion has revealed a divergence in opinion as to the antecedents of the writ. One view accepts the causative influence of the pre-17th century factors; while the other prefers to regard the writ as a 17th century creation, in particular from *Bagg's Case* in the Court of King's Bench in 1615. It is submitted

46 Henderson's discussion of her privilege theory is set out ibid. 49-58. The quotation is at 58.

47 Ibid. 58 et seq.

48 The writ records the reason for the claimant's disfranchisement as being his moving of a plaint in the royal courts and refers to the damage to the claimant together with "great derogation of our royal Crown and dignity" and that "every liegeman of ours who will prosecute that his right before us should there freely obtain it without any scorn, vexation, grievance or impediment on that occasion". See supra n.39, 333a; 754.

49 Supra n.25, 53.

50 Idem.

51 This argument should apply equally to an analogy drawn with early actions of *quare impedit* to restore a patron to his advowson (presentation to an ecclesiastical office). See Weintraub, supra n.8, 486 who appears to draw such an analogy.

that the difference lies in the degree or extent of abstraction to which one is prepared to go to find a linkage. This article has attempted to demonstrate that, from the perspectives of *form* and *function* at least, the pre-17th century factors were sufficiently proximate to be considered relevant in a causative sense to the development of the writ or order in its modern form. Upon these foundations rapid growth and shaping occurred in the 17th and 18th centuries. To a large extent, this development can be traced through the Chief Justiceships of Coke, Holt and Mansfield.

## IV. MODERN DEVELOPMENT

Coke became Chief Justice of the King's Bench in 1613 and presided in *James Bagg's Case* in 1615. The period was a watershed for the Common Law as it asserted its dominance over all other systems of courts (except Chancery) flourishing at the end of the 16th century. This ascendancy of the Common Law is attributed to a large extent to Coke's personal efforts in the context of a political and constitutional climate beginning to encourage the supremacy of law over the will of the monarch.[52] Perhaps it can even be said that Coke's personal background and politics encouraged an affinity between himself and specifically the prerogative writs. Prior to his elevation to the bench (first to Common Pleas in 1606) he held a number of executive offices including Attorney-General from 1594 to 1606, in which position he was said to be a champion of the Crown and its prerogatives.[53] He would therefore have been receptive to a centralising of control over local corporations and inferior bodies. Yet he was also an ardent proponent of the supremacy of the Common Law as the source of the central authority so that he would not have hesitated in asserting the right of King's Bench in his endeavour.[54]

The principal evolutionary step in the story of mandamus in Coke's time is the appearance in these writs of the general ground of doing justice as the basis for their issuance. This is evident not only in *Bagg's Case,* the first reported case of the era and of those issued by Coke, but also in three unreported cases in 1608-09 discovered by Henderson who reports the basis for the writs as "wishing that right and reason should be done" or "that due and prompt justice should be done."[55] This general criterion assured for mandamus the status of a remedy independent of any specific basis of illegality, such as breach of the court's privilege. The extent of this general jurisdiction is reflected in the following description by Coke[56]

52 Refer generally to Sir William Holdsworth in his 1937-38 Tagore Lecture series published in *Some Makers of English Law* (University Press, Cambridge, 1938) 111-132.

53 Holdsworth, ibid. 114-115 and D. M. Walker *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980) 240.

54 See Holdsworth and Walker, idem. Coke's loyalty to the Common Law prevailed and he later denounced many acts and doctrines he had earlier espoused. See Holdsworth, ibid. 115 and W. F. Swindler *Magna Carta, Legend and Legacy* (The Bobbs-Merrill Company, Inc., Indianapolis & New York, 1965) 172.

55 Supra n.25, 60 and 61.

56 *James Bagg's Case,* supra n.7, 98a and 1277-1278. For completeness, it should also be noted that *Bagg's Case* from a factual perspective did not involve any issue of privilege of the royal courts. Bagg had been disfranchised for repeatedly uttering words of contempt against other city officials.

> . . . that to this Court of 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 the peace, or oppression of the subjects, 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 shall be (here) reformed or punished by due course of law.

Subsequent growth and expansion of the writ from cases of mere restitution into the general area of enforcement of public duties is largely attributed to Holt, the great post-revolution Chief Justice of King's Bench[57] who built upon the foundations laid by Coke. Naturally, the experiences of the Stuart period and the subsequent offer to and acceptance by William and Mary of the English Crown as constitutional monarchs intensified the trend, already noted as existing at the beginning of the century,[58] to recognize the supremacy of law. During this period mandamuses came to be issued not only to restore but to compel the original admission, whether directly or by compelling a process of election, to inter alia corporations, academic fellowships in colleges and even ecclesiastical office. In the main however it was used as a means to ensure the admission of Whigs to Royalist-Tory-packed municipal corporations.[59]

The remedy was finally carried to its zenith in the 18th century by Lord Mansfield, Chief Justice of King's Bench from 1756 to 1788.[60] His role was essentially one of consolidation and rationalization. Despite the great advance brought by Coke and Holt, it still could not be said at the beginning of the 18th century that the law of mandamus was a coherent whole. To some extent each particular circumstance was still often regarded as a separate line of precedent in itself and any application for its issue in a new circumstance was reasoned by analogy.[61] In a series of judgments in the decade immediately following his appointment Lord Mansfield enunciated his consolidation of the law of mandamus which has existed to this day and which emphasises Coke's rejection of the remedy as a residual constitutional remedy. Two cases will serve to illustrate this. First there is *R.* v. *Barker,* which, though short, is said to be "the leading modern case".[62] Here Lord Mansfield did not consider any question concerning lines of precedent but declared:[63]

> A mandamus is certainly a prerogative writ, flowing from the King himself, sitting in this court, superintending the police, and preserving the peace of this country; and will be granted wherever a man is entitled to an office or a function and there is no other adequate legal remedy for it.

Similarly, six years later, in *R.* v. *Doctor Askew*[64] he declared:

57 Sir John Holt was a moderate Whig. He became Chief Justice of the King's Bench in 1686, after having played a leading role in the Revolution culminating in that year against James II. He held this position until his death in 1710. See Holdsworth, supra n.52, 153-160 and Walker, supra n.53, 577.

58 See supra text accompanying nn.24-29 concerning the influence during the 17th century of the Magna Carta.

59 See de Smith, supra n.2, 51 and Jenkins, supra n.8, 530-531.

60 See Holdsworth, supra n.52, 160-175 and Walker, supra n.53, 861-862 for a general survey of Lord Mansfield's contribution to the law.

61 Henderson, supra n.25, 140.

62 Henderson, ibid., 140-141.

63 (1762) 1 W. Bl. 352; 96 E.R. 196 (K.B.).

64 (1768) 4 Burr. 2186, 2188; 98 E.R. 139, 141 (K.B.).

> There is no doubt that where a party, who has a right, has no other specific legal remedy the court will assist him by issuing this prerogative writ in order to his obtaining such right.

## V. POLITICAL AND SOCIAL CIRCUMSTANCES

The discussion so far has focused upon the development of mandamus in a conceptual sense. It is now necessary to consider why there was such a phenomenal increase in its use in the 17th century and leading to its heyday in the 18th and 19th centuries, when the extent of usage was so great that 252 pages of Tapping's 1948 treatise consists of an alphabetically arranged catologue of all the circumstances in which it had been sought. Of course not all attempts were successful, but from a perusal of these pages it is evident that it entered into most spheres of community life, even to the rather jocular cause of enforcing the swearing-in of a village ale-taster.[65]

The reasons for such extensive use and prominence lie in the structure and nature of English local government and its historical relationship with the Crown, particularly during and after the period of Tudor sovereignty. However, the narrative begins at the Conquest. Norman sovereignty produced a broad conflict with respect to government and control. On the one hand the Norman conquerors were centralists focusing upon the centralizing of control; on the other hand the Anglo-Saxons were provincialists seeking significant local autonomy. The attention of the post-Conquest Anglo-Norman state was occupied in bridging this chasm. The compromise reached was the office of justice of the peace introduced by Edward III in 1327, the first year of his reign.[66] The centralists were satisfied because it was the King who appointed these justices who governed their local area and who were responsible to the King; and the provincialists were satisfied in that local personages were appointed. In the beginning their duties were, as their title suggests, simply to "keep the peace" by controlling law enforcement and punishing after a judicial hearing called "Quarter Sessions". By these means they gradually took over the feudal courts' judicial and administrative responsibilities, as well as that of the local Anglo-Saxon authorities. In most instances these earlier tribunals were simply deserted by the chief local men who were attracted to their new role as justices, and by lesser folk who now had to perform their duties as grand jurors.[67]

With this background in place the focus moves to the period of Tudor sovereignty, from the accession of Henry VII in 1485 until Elizabeth's death in 1603. Changes and circumstances of this period indirectly set the stage for later supervision of justices of the peace and local authorities by the Court of King's Bench, notwithstanding that Tudor policy and attitudes were generally quite contrary to the Common Law tradition. The relevant changes and circumstances of this period can be categorized as follows.

65 See Tapping, supra n.3, 41.

66 J. Redlich and F. W. Hirst *The History of Local Government in England* (ed. B. Keith-Lucas, Macmillan & Co. Ltd., London, 1958) 13 and 14. [Note: This book is a reissue of the now out of print Book 1 of Redlich and Hirst *Local Government in England* (Macmillan & Co. Ltd., London, 1903)].

67 Ibid. 17.

A. *The Attempt to Exert Central Executive Control*

The Tudors sought to strictly control the work of the justices of the peace and local authorities by subjecting them to supervision of the Privy Council (as an executive body) and, more importantly, the quasi-judicial Star Chamber, a specialist and administrative court within the council, staffed by civilians rather than Common Lawyers.[68] However, surprisingly but fortunately, the council did not purposefully move to formally exclude the King's Bench from any supervisory role, probably because control by the King's Bench was virtually non-existent in practical terms during the 16th century and was just beginning to reassert itself and develop in the 17th century under the Stuarts. This omission, aided by a period of internal peace brought about by the strict order that the council exerted, enabled the Common Law to adapt from mediaeval to modern times so that it could reassert itself in a later and more favourable political climate and "evolve new principles and to give a new point to old principles."[69] Furthermore, following first the abolition of the discredited Star Chamber in 1641 and secondly the victory of the Long Parliament in 1649, the council's administrative control no longer existed and therefore the whole field was left to the King's Bench at a time of strong alliance between Parliamentarians and Common Lawyers[70] making it natural for judicial supervision to fall to the Common Law.

B. *The Expansion of Functions Exercised Locally*

Despite their centralising tendencies, the Tudors with the aid of a willing Parliament pressed upon the justices of the peace responsibility for every conceivable aspect of administration within their locality.[71] Obviously as greater duties were drawn from the same class as were the justices of the peace (i.e. the landed in later times. There was no attempt by Parliament to stem this flood of delegation, even after the Civil War and subsequent Restoration because Parliamentarians were drawn from the same class as were the Justices of the Peace (i.e. the landed gentry and merchants) and, their interests being the same, neither sought to change the position. New duties continued to be imposed right up to the time of reform in the nineteenth century.[72]

68 See T. F. T. Plucknett *A Concise History of the Common Law* (5th ed., Butterworths, London, 1956) 43, noting that Henry VIII tended to look outside the traditional legal profession when recruiting administrative personnel, as Common Lawyers tended still to think in mediaeval terms and were suspected of being secret adherents of the old religion.

69 W. S. Holdsworth *A History of English Law,* Vol. 4 (3rd ed. Sweet & Maxwell, London, 1945) 165.

70 The close relationship between the 17th century English Parliament and the Common Law courts is reflected in Holdsworth's comment: "In the Middle Ages and in the sixteenth century the lawyers had helped to make the English Parliament an efficient representative assembly. In the seventeenth century Parliament handsomely repaid this debt by helping Coke to maintain the medieval conception of the supremacy of law, and to apply it to the government of a modern state". Holdsworth, supra n.52, 131.

71 J. P. Dawson *A History of Lay Judges* (Harvard University Press, Camb., Mass., 1960) 139. See also Holdsworth, Vol. 4 supra n.69 at 137.

72 Dawson, ibid. and Redlich and Hirst, supra n.66, 21 and 37.

C. *Selective Governing Bodies for Corporations*

Opportunities for corrupt practices by local authorities, particularly the town corporations, which were later to be a major target of the court's supervision, were greatly enhanced, if not created, by Tudor changes to the structure of local government. Previously towns were controlled by the local burgesses, being land-owning dignitaries. Charters of incorporation had been granted from the time of Henry VI (1422-1461) and these established the town as a separate legal entity. All burgesses were "shareholders" having a franchise to elect the town's managing committee. The Tudors adapted this system to remove local democracy. New charters were granted giving government to a narrow select body instead of all the burgesses. This body was also self-perpetuating in that it could co-opt new members who were not necessarily local inhabitants but who supported the policies of the select committee. In effect the general body of burgesses were excluded from participation in municipal affairs. Furthermore, as a result of decisions of Tudor-dominated courts in the 16th century, the property of the town gradually came to be vested not in the town itself but in the select committee. Again through the media of the courts the select committee was given authority to make by-laws that would bind all burgesses including the disfranchised.[73] Often, too, members of the municipal select committees became justices of the peace in the area, uniting within themselves the authority of both offices.[74]

The members of select committees came to be termed "freemen", a status which came to be vigorously protected by mandamus. The expression also included a larger but inferior group of selected persons whose political power was limited in a practical sense as the smaller select committee had full power to decide whether it would consult them. Indeed, their membership was chosen by the select committee.[75] Despite this, it was still an advantage to be a "freeman", even if not on the select committee, and this explains why disfranchised freemen (such as James Bagg) were willing to fight disfranchisement even to the extent of expensive litigation in the Court of King's Bench. For instance they were in a specially favoured economic position. Those in chartered companies and craft guilds had the exclusive right to carry on their trades within the borough. Strangers had to buy their right to trade except on odd days each week, but even then free burgesses claimed the right to act as middlemen between them and buyers.[76]

Judicial intervention was also encouraged by the ease with which a "freeman" could be disfranchised. Authority to disfranchise rested with the mayor and it was exercised for many reasons, some reasonable, others not. In particular, violation of by-laws and contempt of the mayor and aldermen (again the position in *Bagg's* case) were common grounds.[77] Such mayoral power was of course open to personal

73 See generally Redlich and Hirst, supra n.66, 27-29. A similar process is described at 30-33 in respect of country areas where "select vestries" of parishes were created. These, however, did not have the political influence of their municipal counterparts.

74 Ibid. 29.

75 Henderson, supra n.25, 36.

76 Ibid. 42-43.

77 Ibid. 44. Henderson also lists non-residence and failure to pay borough taxes. These grounds may have been legitimate so long as they were applied honestly and fairly.

and political abuse particularly before the Civil War when there was "little distinction between misconduct and legitimate disagreement with authority",[78] but even after the war there was no fundamental reform because, as has already been noted with respect to an earlier ground,[79] by then the class of persons who were Parliamentarians were of the class which also controlled the towns. Redlich and Hirst succinctly describe their situation as: "they had come into a King's inheritance and they intended to keep it."[80]

Parliament did, however, soon become prepared to directly promote the remedy of mandamus as a means of remedying abuses in particular cases. So much so that Tapping in the preface to his 1848 treatise felt able to assert "it is clearly the general policy of the Legislature, to promote [mandamus] as a remedy"[81] and in an appendix reproduces the relevant portions of a number of enactments from 1711 (9 Anne, c. 20) to 1843 (6 & 7 Vic., c. 89)[82] that aim to give greater access to the remedy. For instance, the statute 9 Anne, c. 20, after noting inter alia that persons had been illegally deprived of the privilege of various offices and franchises in corporations and boroughs and that in many cases their only remedy is by "writs of mandamus, the proceedings on which are very dilatory and expensive", went on to provide procedures to ensure speedy prosecutions and to facilitate the concurrent hearing of actions for damages and costs, rather than to force the relator in such cases to pursue a separate action on the case for compensatory relief. Similar themes appear in later statutes (all reproduced by Tapping in his appendix) indicating an awareness by Parliament of the valuable supervisory role of the Common Law.[83]

D. *The Enforcement of Public Duties of Public Companies*

The preceding three circumstances encouraging the use and development of mandamus have in this article been expressly linked to Tudor influences. One further important circumstance that also contributed to the rise of the writ, but which did not originate with the Tudors, is the enforcement of public statutory duties of public companies.

Developments in this context were linked closely with the birth and maturing of the industrial and commercial revolution, in particular with the growth of mass transport by first canal and then railway systems extending from the early

78 Ibid. 74.
79 See supra text accompanying n.72.
80 Supra n.66, 37.
81 Tapping, supra n.3, Preface vii-viii.
82 Ibid. 439-453.
83 When engaging in a wider examination of English statutes during the 18th and 19th centuries regard must be had to Shortt's warning to disregard certain statutes concerning court procedural matters in which the term "mandamus" is used. For example a procedure to "examine witnesses in India" (13 Geo. 3, c. 63) or any of the Sovereign's dominions (1 Will. 4, c. 22). See Shortt, supra n.3, 245-246 (pagination 225-226). The term "mandamus" is used in these statutes in its purely linguistic sense of "to command", which of course was its original usage in early mediaeval times from which the nomenclature of the prerogative writ was derived for the function of restoration to office. See supra text accompanying nn.11-13.

18th century to the mid 19th century. From a parliamentary perspective it was the age of private Bill legislation. Promoters of an enterprise would petition Parliament for a specific enactment granting them powers to achieve their objective and usually specifying the means and providing the enterprise with the status of incorporation.[84] This procedure itself was a consequence of the Revolution of the 17th century and the consolidation by Parliament unto itself of much of the administrative functions formerly exercised by the Crown, resulting in Parliament administering through legislation.[85] Private Bills given to associations and enterprises would impose upon them public duties. The need for a means of enforcement provided another opportunity for the Common Law, and specifically mandamus.[86]

Canal development[87] had its antecedents as early as the 16th century, but it was in the early to mid 18th century that there was serious construction rising to a period of "canal mania" between 1791 and 1794 when 42 new canals were opened,[88] each with its own Act imposing duties upon it. There was a similar railway development "mania" from 1835 to 1837 and 1844 to 1849 with over 800 companies being sanctioned.[89]

These developments were important, but their effect on the incidence of mandamus should not be overstated, as the companies were not as politically influential as were the local bodies and the justices of the peace. Furthermore, the duties they were called upon to enforce were not the type which interfered with individuals' rights to such an extent as to prompt an expensive legal action. Their main interference with individuals' rights was the compulsory purchase of land and the Company's Empowering Act would normally provide specifically for this.[90] Also, the railway companies in particular were throughout the century

84 It was not until 1844 that the first general Companies Act enabling incorporation by registration was passed (i.e. An Act for the Registration, Incorporation and Regulation of Joint Stock Companies, 7 and 8 Vict., c. 110). Prior to 1844 the only methods of obtaining incorporation were by Royal Charter or private enactment of Parliament as discussed in the text.

85 See Redlich and Hirst, supra n.66, 42-45. The authors note that Parliament had gathered in its hands "all the reins of government" and "refused even to employ the Cabinet, preferring to deal with the subject directly" (ibid. 43). de Smith, writing upon the development of the Cabinet and Prime Ministerial power as we know it today, notes that the system of Cabinet influence in the Parliament "could hardly [be said to be] securely established till the accession of Sir Robert Peel to office in 1841": S. A. de Smith *Constitutional and Administrative Law* (4th ed. H. Street and R. Brazier, ed., Penguin Books, Harmondsworth, England, 1981) 166.

86 This vacuum of executive or administrative power and the opportunity it brought for the Common Law and the King's Bench is discussed supra text accompanying nn.68-70 in the context of the control over local government.

87 Tapping, supra n.3, 60 discusses the issue of mandamus to compel canal companies to perform their statutory duties. Of particular importance was the duty to ensure that canals were kept in good repair.

88 P. S. Bagwell *The Transport Revolution from 1770* (B. T. Batsford Ltd., London, 1974) 15-17.

89 Ibid. 92 to 94. The number of companies has been calculated from the tables provided in this reference. See also B. Fullerton *The Development of British Transport Networks* (University Press, Oxford, 1975) 16-23 for a general survey.

90 Bagwell, supra n.88, 169.

subjected to much public debate and had almost the continuous attention of Parliamentary committees, the debate being whether they should be subjected to public control.[91] No doubt this would have kept the companies on their mettle.

## VI. DECLINE AND FALL

The heyday of mandamus was over by the mid-19th century when Tapping, unaware of the ebb, prepared and published his treatise. Like its ascent, possibly from roots deep in history but rising sharply to its peak, its decline was immediately sharp and swift but not to the point of extinction. The decline can be summed up by two broad comments. First, the very social and political circumstances and abuses that nourished the remedy and created a demand for it ceased to exist over a period of a few short years; secondly, from the perspective of form, the nature and characteristics of mandamus had by the 19th century become so firmly established that it could not re-emerge in a new form to cope with the new social and political order.[92] Specific factors and circumstances bringing out the decline can be categorised in the following way.

### A. *The Reform of the Municipal Corporations*

The major change was the reform of the oligarchical municipal corporations. The first step in this direction was the reform of the Parliamentary franchise itself. The Reform Act of 1832,[93] moved Parliamentary control from the land-owning aristocracy to the merchant middle class. Naturally enough, the latter then set about to establish themselves at municipal as well as national level. The principal reform came in 1835 in the Municipal Corporations Act,[94] following a report from a Royal Commission which expressly drew the attention of Parliament to the fact that the governing charters of corporations granted between the reign of Henry VIII and the Revolution "were calculated to take away power from the community, and to render the governing class independent of the main body of the burgesses."[95] The Act in effect reversed most of the adverse Tudor and Stuart influences. Redlich and Hirst summarise the principal changes, of which the following should be mentioned: the return of the legal entity of the towns to the town itself rather than the select or managing committee of the towns; all ratepayers with a residence qualification of three years were franchised to directly and equally elect local councillors and all who could vote were deemed to be burgesses; although the status "freeman" was continued with some privileges being retained (in particular a Parliamentary franchise), the major privilege of exclusive trading rights was revoked; the administration of municipal justice was separated from the corporation by providing for municipal magistrates to be appointed in the same manner as their country counterparts, by the Crown (instead of by

91 Ibid. chapter 7, p. 169 et seq.

92 Recall that at the time of the rise of the writ in the 17th century, it was still a very young and malleable remedy and could adapt to its advantage to new circumstances. See supra text accompanying n.69.

93 An Act to amend the Representation of the People in England and Wales, 2 Will. 4, c. 45 [June, 1832].

94 An Act to provide for the Regulation of Municipal Corporations in England and Wales, 5 & 6 Will. 4, c. 76 [September, 1835].

95 See Redlich and Hirst, supra n.66, 119.

the select committee) and for justices of the peace to be relieved of the administrative functions that had been passed to them by the Tudors, thereby separating the exercise of judicial functions from administrative functions; council meetings were to be open to the public; and there was to be central government financial supervision by way of auditing and prerequisite approval requirements for raising of loans and selling municipal property.[96] In all of these circumstances the opportunity for municipal irregularities that would give rise to an application for mandamus was considerably reduced.

B. *A Reassertion of Central Executive Control Over Municipalities*

As the 19th century progressed the control by central government increased particularly with the need for specialist services such as health, sanitation, police, education, drainage, etc. and, most importantly, upon the granting of financial aid to local bodies. As a consequence, central government came to exert executive control, particularly in the form of inspections to ensure the maintenance of standards.[97] By the end of the 19th century (after reform of the counties in the late 19th century in a manner similar to that of 1835 in municipalities[98]) "local administration throughout the length and breadth of the land had been subjected to a carefully restricted yet thoroughly practical scheme of central control."[99] This had a two-fold effect on mandamus. First, the possibility of maladministration in local bodies was even further reduced because of the need to satisfy central government inspections. Secondly there was available to the aggrieved citizen a remedy of complaint to the central government and this remedy was easier, quicker and less expensive than a High Court action for mandamus. This situation was in sharp contrast to that of the 17th and 18th centuries where, as described earlier,[100] Parliament by private Bill legislation was both legislator and executive, leaving supervision in particular instances to the court. The activation of separate executive supervision was in a sense a turn full circle back to the Tudor control by the executive Privy Council, except, of course, that the new executive control involved no notion of a separate administrative law jurisdiction as was exercised by the Star Chamber. Furthermore legislative reforms often included procedures giving persons a formal administrative right of objection or appeal to the central government,[101] reducing the demand for mandamus from both a practical perspective, and a technical perspective. The remedy of mandamus is discretionary and in the exercise of its discretion the courts traditionally will refuse the writ if

96 Ibid. 129-133.

97 Ibid. 166. This trend correlates with the growth of the system of modern parliamentary government with a strong focus upon the role of the Cabinet. See supra n.85.

98 The principal reforms were in 1884 and 1894. The former brought a broad extension of the voting franchise and was contained in the Representation of the People Act 1884, 48 Vict. c. 3. The latter brought to the counties administrative reforms in the nature of those brought to the municipalities in 1832. They were contained in the Local Government Act 1894, 56 & 57 Vict. c. 73. The reforms are discussed by Redlich and Hirst, ibid. 66, 192-195 and 216-219.

99 Ibid. 218.

100 See supra text accompanying nn.68-70 and 84-86.

101 *de Smith*, supra n.1, 539.

there is available an alternative legal remedy that is itself adequate.[102] Although this interpretation of mandamus as a remedy of last resort may be applied less strictly today[103] it would certainly have applied in the 19th century. Similarly, a statutory remedy was sometimes interpreted as the "exclusive remedy" thereby precluding mandamus in any event.[104]

C. *Other Social, Political or Administrative Changes*

Three remaining changes should be noted. First, the concept of "freehold office", which it will be recalled was the subject of many early mandamus proceedings, generally disappeared, or became only of ceremonial importance, after the municipal and counties reforms of the 19th century.[105] Prior to the reforms an alderman was assumed to hold his office for life unless the city charter otherwise specified,[106] and carried considerable benefits.[107] Secondly, attention is drawn to Shortt who notes in the late 19th century that "various changes in law and in the constitution of the courts had rendered unnecessary the remedy by mandamus."[108] Of those that are noted, the only one that appears to be of any real significance was the transfer of probate proceedings from the ecclesiastical courts to the Court of Probate in 1857[109] and the subsequent mergence of that court within the High Court of Justice. Shortt notes that formerly the ecclesiastical courts in this jurisdiction were subject to the issue of mandamus on "frequent occasions".[110] Thirdly, there was the awakening in the late 19th and early 20th centuries of the declaratory judgment as an independent remedial vehicle. de Smith reports that the history of this Chancery remedy "has never been thoroughly investigated", with some authorities asserting an ancient origin, while others looked upon it as a comparatively modern institution.[111] This article is not intended to encompass this debate. It is sufficient to note that at least from early this century the remedy was accepted by the courts[112] and is now one of the most popular forms of proceedings. The principal distinction between the declaration and other remedies, including the

102 See *de Smith,* ibid. 558 and 561-564 noting at 563 "the existence of a right of appeal against a refusal to carry out a duty has generally been regarded as a fatal impediment to an application for mandamus." See also Wade, supra n.5, 644 and D. J. Mullan *Administrative Law* (2nd ed. The Carswell Company Limited, Toronto) s.181 and s.194.

103 Wade, idem. suggests that today mandamus has lost this character, that it has become a "regular remedy" and that "the courts have grown accustomed to awarding it more freely even where some other remedy exists."

104 Wade, idem.

105 See *de Smith,* supra n.1, 539.

106 Henderson, supra n.25, 66.

107 See supra text accompanying nn.78-80.

108 Supra n.3, 290-291 (pagination 271-272).

109 An Act to amend the Law relating to Probates and Letters of Administration in England, 20 & 21 Vict. c. 77 (August 1857).

110 Supra n.3, 291 (pagination 271).

111 *de Smith,* supra n.1, 476.

112 *de Smith,* ibid. 478-481 gives a detailed survey of the position in England in the early 20th century dealing with the interrelationship between statutes, Supreme Court rules of procedure, Exchequer precedents and the responses of Chancery. All of these sources were relevant in deciding whether or not this jurisdiction existed. In New Zealand during this period and in this context see the Declaratory Judgments Act 1908.

prerogative writs, is that with a declaration the court merely declares the rights of parties but does not award a sanction against the defendant. This gives the courts more flexibility and freedom from various technical rules prohibiting judicial sanctions in certain circumstances. For instance, it is well established that mandamus cannot issue against the Crown itself or any servant of the Crown acting simply as such a servant.[113] There is, however, no prohibition against a declaration being given.[114] This procedural flexibility, together with the flexibility inherent in simply "declaring the law", ensured this century the popularity of the declaration over other more traditional and less flexible remedies, including the writ of mandamus.

## VII. THE FUTURE OF MANDAMUS

For the future, the most important historical issue may well be the validity of claims by Coke, Holt and Mansfield of a residual constitutional role for the writ.[115] This issue involves a much wider enquiry than a focus purely on mandamus, and obviously is beyond the scope of this article, but *Fitzgerald* v. *Muldoon* is a recent vivid illustration of the need to find the legitimacy of judicial jurisdiction in a constitutional context by reference to antiquity.[116] Even more specifically, mandamus has recently been expressly accepted as a residual remedy in the United Kingdom with the then Master of the Rolls commenting in a manner reminiscent of Coke:[117]

> On principle it seems to me that once a duty exists there should be a means of enforcing it. This duty can be enforced, I think either by action at the suit of the Attorney-General or by the prerogative writ of mandamus.

Finally, a note upon procedure. A number of Commonwealth jurisdictions, including the United Kingdom and New Zealand, have statutorily provided streamlined "Application for Review" procedures to obtain judicial orders formerly given under the nomenclature of one or more of the prerogative writs or orders.[118] The result will be a disappearance in these jurisdictions of the nomenclature and procedural technicalities of the prerogative writs. This brings a welcome modernisation, but does not as yet either supplement nor deplete the substantive administrative or constitutional powers of the judicial branch of government with respect to these prerogative powers.[119] While the name "mandamus" may disappear, the nature of judicial power that that name invokes will remain the same as before, howsoever it may be termed or described.

113 *de Smith,* ibid. 553.
114 *de Smith,* ibid. 512.
115 See supra nn.56, 63 and 64.
116 [1976] 2 N.Z.L.R. 615 (S.C.) invoking the English Bill of Rights, 1688. See also *Felton* v. *Callis* [1969] 1 Q.B. 200 (Q.B.) and *Parsons* v. *Burk* [1971] N.Z.L.R. 244 (S.C.) illustrating that a prerogative power does not become extinct by disuse.
117 *R.* v. *Commissioner of Police of the Metropolis Ex parte Blackburn* [1968] 2 Q.B. 18, 136 (C.A.). See also *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435, 482-483 (H.L.) (per Lord Wilberforce) and *Inland Revenue Commissioners* v. *National Federation of Self Employed and Small Businesses Ltd.* [1982] A.C. 617, 639, 649, 653 and 657-658 (H.L.) distinguishing relator actions for the sole purpose of general law enforcement.
118 See *de Smith,* supra n.1, 565-583. In New Zealand see the Judicature Amendment Act 1972, ss. 3 and 4 as amended by the Judicature Amendment Act 1977, ss. 10 and 11.
119 *Inland Revenue Commissioners,* supra n.117, 648 (per Lord Scarman).