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# PROHIBITION - IS THE WRIT OF PROHIBITION A PREROGATIVE WRIT?

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PROHIBITION — IS THE WRIT OF PROHIBITION A PREROGATIVE WRIT? — The writ of prohibition originally issued from the king's temporal courts to the ecclesiastical courts to prevent any usurpation of jurisdiction of the king's courts by the spiritual courts.[1] Prohibition has been classed as one of the prerogative writs, that is, a writ issued by the extraordinary power of the sovereign to interfere with private rights in order to preserve the prerogatives and franchises of the state.[2] The writ of prohibition differed historically from the other prerogative writs in that its issuance was not discretionary with the court,[3] but rather it was held to issue as a matter of right where lack of jurisdiction

[1] 2 REEVES, HISTORY OF ENGLISH LAW, Finlason ed., 234 (1880); Adams, "The Writ of Prohibition to Court Christian," 20 MINN. L. REV. 272 (1936); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 94 (1903), 3d ed., 229 (1922); Jenks, "The Prerogative Writs in English Law," 32 YALE L. J. 523 at 528 (1923).

[2] 6 WORDS AND PHRASES, "Prerogative" "Prerogative Writs," and "Prohibition," 5518-5519, 5673 (1904); 6 ibid., 3d ser., 212 (1929).

[3] Jenks, "The Prerogative Writs in English Law," 32 YALE L. J. 523 (1923).

in the inferior court was apparent on the face of the proceedings.[4] The purposes of prohibition as presented by the early cases,—viz., to maintain the king's rights and to secure an orderly administration of justice according to the rules established by the king,[5]—emphasize the prerogative nature of the writ. It was considered to be to the king's interest to prevent jurisdictional usurpations from becoming precedents for a constant exercise of superior jurisdiction by inferior courts,[6] with resultant strengthening of power and income of the spiritual courts at the expense of the temporal courts. Incidentally, the common-law courts recognized a secondary purpose of the writ, that of securing "ease and quiet of the subjects."[7] Private interest or need for prohibition is shown to have been of minor importance by the following quotation from *Worthington v. Jeffries*,[8]

> "the ground of decision in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed."

The king's right to petition for prohibition was recognized even though "the plea in the spiritual court be betwixt two common persons, because the suit is in derogation of his crown and dignity."[9] Quite often, a usurpation of jurisdiction was described, as "in contempt"[10] or, as above, "in derogation"[11] of the crown such that if it was brought to the attention of the superior court, even by a complete stranger, prohibition

[4] Worthington v. Jeffries, 32 L. T. R. (C. P.) 606 (1875); Howe v. Napier, 4 Burr. 1945, 98 Eng. Rep. 13 (1766); Burder v. Veley, 9 L. J. (N. S.) (Q. B.) 267 (1840); Farquharson v. Morgan, [1894] 1 Q. B. 552; Marsden v. Wardle, 3 El. & Bl. 695, 118 Eng. Rep. 1302 (1854). But see, Chambers v. Green, 44 L. J. (N. S.) (Ch.) 600 (1875).

[5] 3 BLACKSTONE, COMMENTARIES 111-114 (1844); BACON'S ABRIDGEMENT, "Prohibition"; Ede v. Jackson, Fort. 345, 92 Eng. Rep. 883 (1732); De Haber v. Queen of Portugal, 20 L. J. (N. S.) (Q. B.) 488 (1851); 1 FITZHERBERT, NATURA BREVIUM, 9th ed., 39 (1794).

[6] Ricketts v. Bodenham, 4 Ad. & E. 433, 111 Eng. Rep. 850 (1836); Roberts v. Humby, 3 M. & W. 120, 150 Eng. Rep. 1081 (1837).

[7] BACON'S ABRIDGEMENT, "Prohibition"; Ede v. Jackson, Fort. 345, 92 Eng. Rep. 883 (1732).

[8] 32 L. T. R. (C. P.) 606 at 608 (1875).

[9] 1 FITZHERBERT, NATURA BREVIUM, 9th ed., 40E (1794); BACON'S ABRIDGEMENT, "Prohibition," § C. See also Anonymous Case 296, 1 Vern. 301, 23 Eng. Rep. 482 (1864).

[10] Ede v. Jackson, Fort. 345, 92 Eng. Rep. 883 (1732); De Haber v. Queen of Portugal, 20 L. J. (N. S.) (Q. B.) 488 (1851).

[11] 1 FITZHERBERT, NATURA BREVIUM, 9th ed., 40E (1794); BACON'S ABRIDGEMENT, "Prohibition," § C.

issued.[12] Thus, in its inception, although the writ of prohibition lacked the discretionary feature of the normal prerogative writ, it was nevertheless essentially prerogative in nature and purpose.

Although the writ seems to have retained its prerogative nature in England up to modern times,[13] there has been a decided trend away from this feature under decisions of the courts of the United States. There are cases in some states upholding the prerogative features,[14] but the majority have so far departed from the idea that protection of the state's interests is the end to be attained by prohibition that in each case they demand interest or injury in the party seeking the writ as a condition of its issuance.[15] Such emphasis on parties to the action is an absolute about-face from the common-law attitude as expressed in the quotation above from *Worthington v. Jeffries*. There are other limitations pointing away from the prerogative character of the writ as it existed at common law. A party guilty of laches in seeking his remedy is barred from petitioning for prohibition,[16] and the writ issues only in the sound discretion of the court.[17] As a consequence of these changes, it would seem that protection of the sovereign rights has been supplanted by protection of the rights of private parties as the central purpose of prohibition. The sovereign interest is not protected unless there is first a private party in distress.

[12] De Haber v. Queen of Portugal, 20 L. J. (N. S.) (Q. B.) 488 (1851); Worthington v. Jefferies, 32 L. T. R. (C. P.) 606 (1875); Forster v. Forster and Berridge, 4 B. & S. 187, 122 Eng. Rep. 430 (1863); Mayor of London v. Cox, 36 L. J. (N. S.) (Exch.) 225 (1867); Cooke v. Gill, L. R. 8 C. P. 107 (1873).

[13] Jenks, "The Prerogative Writs in English Law," 32 YALE L. J. 523 at 528 (1923).

[14] Trainer v. Porter, 45 Mo. 336 (1870); State ex rel. West v. Clark County Court, 41 Mo. 44 (1867); State ex rel. Collier v. Mingo County Court, 97 W. Va. 615, 125 S. E. 576 (1924); Walton v. Greenwood, 60 Me. 356 (1872). See also, State ex rel. Anheuser-Busch Brewing Assn. v. Eby, 170 Mo. 497, 71 S. W. 52 (1902); Mayo v. James, 12 Grat. (53 Va.) 17 (1855).

[15] State ex rel. McPherson Bros. Co. v. Superior Court, 139 Wash. 294, 247 P. 3 (1926); People ex rel. Fleming v. Mayer, 41 Misc. 289, 84 N. Y. S. 71 (1903); Miller v. Superior Court, 82 Cal. App. 634, 256 P. 431 (1927); Burke v. Richmond, 131 Misc. 588, 228 N. Y. S. 172 (1928); Fleming v. Guthrie, 32 W. Va. 1, 9 S. E. 23 (1889); Allen v. Sellers, 141 Ark. 206, 217 S. W. 257 (1920); Gage v. Fritz, 137 Cal. 108, 69 P. 854 (1902), involves a statute enacting a rule requiring interest by petitioner; State ex rel. Hackshaw v. District Court, 48 Mont. 477, 138 P. 1100 (1914).

[16] People ex rel. Jordan v. Wotherspoon, 94 Misc. 419, 157 N. Y. S. 923 (1916); People ex rel. Clay, Robinson & Co. v. District Court, 74 Colo. 40, 218 P. 745 (1923); Galloway v. LeCray, 169 Ark. 838, 277 S. W. 35 (1925).

[17] Haworth v. Sherman, 37 R. I. 249, 92 A. 209 (1914); Galloway v. LeCray, 169 Ark. 838, 277 S. W. 35 (1925); Sheridan v. Cadle, 24 Wyo. 293, 157 P. 892 (1916); Jones v. Pugh, 130 Okla. 291, 267 P. 272 (1928); Kilty v. Railroad Commissioners, 184 Mass. 310, 68 N. E. 236 (1903).

Thus it would seem that the prerogative character of prohibition has been to a large extent lost except as an historical classification. Nevertheless, these limitations should not and possibly have not served to annihilate the right of the state, on its own initiative, to petition for the writ of prohibition. If interest is required in the petitioning party, the state always has an interest in seeing that justice is properly administered. Any assumption of jurisdiction which departs from the course set up by the sovereign power of the state is an injury to and a contempt of the state's sovereignty. Finally, the state may be said to be interested in upholding the rights of its citizens, one of which is trial by the properly designated court. Aside from these considerations, however, there is some authority supporting the theory that a sufficient element of the prerogative character is retained to enable the state to maintain the action in cases where no special interest is shown to exist. The only case which has come to our notice in which this specific point is discussed is *State ex rel. O'Connor v. District Court.*[18] In this case the defense challenged the right of the attorney general, on behalf of the state of Iowa, to maintain a prohibition action on the ground that the state had no interest in the suits sought to be prohibited. The court said,

> "the important consideration in determining the sufficiency of the petition is not the form in which it is brought but the substance of the allegations which it contains."

This would seem to indicate that there is a sufficient ghost of the prerogative in the writ to sustain the state's action. It is still suggested, in spite of the trends previously discussed, that there is not such strictness with regard to parties in prohibition as in other extraordinary remedies and that mere technical objections will be overruled.[19] It is submitted that even if a special interest in the proceeding sought to be prohibited should be demanded of the state, that the attorney general should not be treated as an absolute stranger.[20] If the court should feel doubtful about his right to petition for the writ on behalf of the state, it can always suggest, as in the Iowa case above, that the right of the party

[18] 219 Iowa 1165 at 1177-1178, 260 N. W. 73 (1935). But see Walton v. Greenwood, 60 Me. 356 (1872), where the county attorney lacked power to proceed in prohibition.

[19] 2 SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES, 2d ed., 1502 (1901); Cronan v. District Court, 15 Idaho 184, 96 P. 768 (1908); Baldwin v. Cooley, 1 S. C. 256 (1869); HIGH, EXTRAORDINARY LEGAL REMEDIES, 3d ed., 733 (1896).

[20] State ex rel. Colvin v. Walla Walla Superior Court, 159 Wash. 335, 293 P. 986 (1930) (attorney general held interested for the public in seeking prohibition to stop habeas corpus proceedings to release a criminally insane person).

petitioning is not the most important thing to be considered. Or it can fall back on the normal duty of the attorney general to institute such actions as public interest may require,[21] pointing out that public interest always requires the orderly administration of justice.

A practical result of upholding the right of the state to institute a prohibition action is found in the recent case of *State ex rel. Wright v. Barney*.[22] In this case, the state of Nebraska, on relation of its attorney general, obtained a writ of prohibition from a superior court to prevent further action by a justice of the peace in 1,800 suits pending before him, of which he did not have jurisdiction. The right of the state to maintain the action seems to have gone without question as it was not discussed in the opinion. It is apparent that if in a suit of this nature the petitioning party was required to have an interest in the suit to be prohibited, it would have required 1,800 suits to end the usurpation of jurisdiction in the inferior court. Certainly this case points to the most efficient, economical, and speedy method of disposing of the problem which could arise where the inferior court assumes improper jurisdiction of several suits at one time. It would seem most desirable that this much of the prerogative character should be left in the writ of prohibition, and from the evidence we have before us it would appear that the state's right to maintain the action has not been lost. Consequently, to this extent at least, the writ of prohibition is still a prerogative writ.

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[21] State ex rel. Landis v. S. H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934); State ex rel. Porterie v. Smith, 182 La. 662, 162 So. 413 (1935); Pierce v. Superior Court, 1 Cal. (2d) 759, 37 P. (2d) 453, 460 (1934).

[22] 133 Neb. 676, 276 N. W. 676 (1937).