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SOME EXAMPLES OF ROYAL INTERVENTION IN PRIVATE LITIGATION DURING THE REIGNS OF EDWARD I, EDWARD II AND EDWARD III

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Any of Shakespeare's allusions to the legally peculiar position of the monarch would serve to illustrate that men were clearly aware of his unique position in relation to the law.[1] But this would be merely to state a truism. The king is the king, and everyone else is not. Yet the very existence of some special prerogative attributable to him, which may be discerned in the process of actual litigation, leads the curious to attempt definition, however feebly. Since there are indeed many ways in which one may approach the subject of the royal prerogative, the definition of that term appears to be as variable as the context in which one works. In what is perhaps its broadest sense, it may be thought of as all those relatively undefined yet real privileges and powers, the possession of which distinguishes the king from all others in the realm. It was necessary for the medieval lawyer to become familiar with a special body of law, the *droit le roi,* which became pertinent to litigation whenever the king or his interests became involved in some way.[2] There was in existence during the time of early Edward I a sort of quasi-treatise on the subject, the Prerogativa Regis,[3] dealing with legal rules applicable to the king as tenant in chief. So the position of

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1. For example:

> Now trust me, were it not against our laws
> Against my crown, my oath, my dignity,
> Which princes would they, may not disannul,
> My soul should sue as advocate for thee.
>
> Commedy of Errors (I:143)

2. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 58, p. XLIV (1939).

3. *Id.* This is the most widely held view of the time of its origin, and was the view adopted by Maitland in refutation of the previous theory placing the origin of the treaties in the reign of Henry II. *Id.* p. lii.

the king had at least some degree of specificity in particular areas of the Law. It is with this sort of specific evidence that we are here concerned. It is true that the ramifications of the legal distinction between the king and ordinary persons are as broad as the nature of sovereignty itself, and the treatment of the subject in this, its most extreme sense is essential and of truly constitutional significance.[4] But an equally interesting expression of the prerogative may be found in its effect on private litigation, that is the specific, permissible procedural and pleading rights and concurrent substantive rights allowed the crown in actual cases.

Naturally the analysis of the prerogative on this level offers certain possibilities for deductions concerning the actual functional tools used by the courts and lawyers to accommodate the person of the king with the rights and interests given to private parties by the common law. Evidence of the involvement of the king in litigation takes many forms, from seemingly gratuitous instructions to the justices, to conciliar action directed at a specific piece of litigation, or to actual participation by the king himself. Thus it will be necessary to analyse to some extent the nature of the procedures involved in the resolution of disputes. The importance which contemporaries may have attached to the several procedural forms and their expressed ideas about them are important regarding the deductions which may be drawn from each bit of evidence. The worth of any pronouncement made in the proceedings is certainly related to the form employed, just as dicta in an opinion of our Supreme Court may be valued much more highly by those seeking a practical knowledge of the law than a resolute pronouncement of a county tribunal on some disputable point.

The scope of this paper, then, will be to treat the prerogative in its narrower sense by examining several instances wherein the royal interests become involved in private ones in various ways, and enable ourselves to consider some of the implications of the prerogative by looking at the procedural devices employed to resolve the cases. To determine what is possible, or at least arguably possible, will hopefully contribute something toward the understanding of the relation-

4. S. B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY, pp. 1-62 (1936). *See also* SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW, pp. 458-490 (4th Ed. 1935).

ship between the common law and the crown during this period.

I. THE KING'S INVOLVEMENT IN LITIGATION: GENERAL POWERS AND PROCEDURES

For the sake of perspective it will be useful to examine certain widely held concepts about the relationship of the king to the society he governed, and thereafter proceed to treat the factual, specific evidence on the accommodation of his office to the everyday workings of the law.

What was the relationship between the king and the law generally? Professor Turner cited Bracton and John of Salisbury as stating that the king was subject to the law and was not one who ruled solely by will, without restraint.[5] But in a

5. R. V. TURNER, THE KING AND HIS COURTS, pp. 102-103 (1st Ed. 1968). *See also* FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES, pp. 69-79 (3rd Ed. 1970). Professor Kern's work is a sort of synthesis of many of the common principles in the general constitutional development of the countries of Western Europe. *Id.* p. xvi. Kern states that there was no legally absolute monarchy realized in medieval conceptions of kingship. Kern seeks to describe how there were certain limits on the free exercise of the monarch's will which were imposed by the legal system. As Prof. Chrimes points out in the introduction, there was apparently no difference between the different sorts of law which might hamper the king's will. The moral and the positive, the objective and subjective were all the same. Everyone was merely obliged to protect the 'good old law.' *Id.* p. xxi. Thus it could be that it is a misleading and fruitless task to approach the subject of legal limitations on the prerogative in the forced terms imposed by legal categories, which during the middle ages may have been rather irrelevant.

Professor Kern pictures a process wherein royal acts consistent with the law are sanctioned as proper positive law by an act of the community, manifested in a great variety of ways. He pictures a fluctuating consent mechanism without a really set pattern of expression as being inherent in the medieval constitution. *See id.* pp. 69-79. He says that, "Should a royal decree deviate from the true living law that passed current among the community, the king's power might force people to accept it as a positive law; but it was regarded as 'wrongful' law, and the people had the right to abrogate it." Cases are not rare where a monarch condemns his own or a predecessor's decree as being contrary to law. *Id.* p. 75. Kern interestingly comments that the very act of the creation of a monarch by the coronation oath places him within and under the legal system.

The monarch simply never possessed an unlimited right to command. *Id.* p. 83. The whole process is a balancing between the ill defined yet real device of community consent and the prerogative. Any blatant despotism would ultimately fall victim to the final authority or the 'good law,' and the refusal of the community to sanction such acts would ultimately cause them to meet theoretical condemnation, even though the arbitrary act was a current practical reality without immediate redress.

very real sense the political theory of the day was rather useless as a guide to reality, for, according to some, the Angevin monarchs at least seemed to rule pretty much as they saw fit on many occasions.[6] The theoretical legal guide for the responsible monarch seemed to provide no method of coercing the irresponsible one to conform to proper behavior. As Professor Turner states, there was a familiar notion in the thirteenth century that there existed a body of men legally competent to judge the king, but the concept here again had little or no practical value in the everyday workings of justice.[7] Some have phrased the matter differently by contending that the king was believed to *be able* to turn the law to his own will, but he was *expected* to rule with an eye to justice.[8]

All in all it seems that men specifically addressed their attention to the problem of the possible inconsistency between pure monarchy and the expectations which those governed had regarding their legal treatment. Despite the fact that no discernible legal machinery existed for resolving this anomaly, they nonetheless talked of certain limits on what the king might do. The idea was there. Morever the vagueness of the judicial machinery attributable to that idea is really no wonder in the context of the 12th and 13th centuries or later.

Proceeding to the more specific, how were the 'rights' of the king expressed in his courts, or conversely what expression was given to the 'rights' of those whose interests may be contrary to those of the king? The continued involvement of the institution of monarchy and central government with traditional and often outworn feudal concepts gave rise to much discussion in the king's courts. The king was the ultimate lord over all the lands in the kingdom. The importance

6. R. V. TURNER, THE KING AND HIS COURTS, p. 103 (1st Ed. 1968), *citing* JOLIFFE, ANGEVIN KINGSHIP (1955).

7. *Id.*, p. 237. The *universitas regni* or *baronagium* which Bracton mentions in the famous *addicio de cartis* as being the legal vehicle for passing judgment on the king certainly wasn't a conventional part of the legal system. Indeed there exists real doubt even as to the authenticity of this part of the manuscript, at least so far as it may be attributed to Bracton himself. There was once the utilization of an expedient to bridle the king which could be the factual counterpart of the theory in the *addicio,* during the reign of Henry III. *Id.* p. 238. But this is on the level of a political controversy, a measure taken in times of extreme angry confrontation between the king and the magnates, rather than a recognized matter of course judicial sanction.

8. S. B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY, pp. 8-9 (1936).

of this feudal basis is the fact that, though the office of the king was ever increasingly being regarded as one of a public character, and not a position strictly governed by rules of succession applicable to all estates in land, these times seemed to provide the only legal basis for analogically determining the legal rules for acquiring the rights to that office.[9] And equally as important, kingship was an integral part of the system of property law under which all held and enjoyed their lands, so the actual expression of sovereign rights must occur to a large extent within the growing framework of laws concerning property 'rights'.[10]

However, these royal rights were not expressed in a manner common to all litigants. Generally, the manner in which the interests of the king were expressed in the context of the common law gave rise to a peculiar body of law especially applicable to the king. The Prerogativa Regis which we have already mentioned demonstrates the concern which lawyers had in familiarizing themselves with laws pertinent to the rights of the king.[11] The extent of the king's involvement in litigation which is indicated by this treatise is more than borne out in the cases during any given period. There may be a constant variation in the motive for exerting royal influence, especially when one contrasts the evidence of intervention and interference in cases occurring under different rulers,[12] but the strikingly pervasive influence and power is always there.

Since it is obvious that the king is legally a special sort of person with respect to his rights in litigation, the question naturally arises as to how, practically speaking, these rights are expressed. An examination of some typical ways of expressing royal interests may serve to better equip us to make reasonable deductions about the meaning of several particular and interesting cases which will be the subject of discussion later. Looking at almost any accumulation of case materials

9. *Id.*, pp. 12-13.

10. "Rights" of course merely means the expectancies upon which men felt able to rely as a part of the evolving legal system, rather than a definable, inviolable legal position, such as pertains to our current day ideas on constitutional rights. The thirteenth century did not appear to be a time when there was much theorizing about constitutional rights. *See* SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 58, p. xxxvii (1939).

11. *Id.*, p. xliv.

12. R. V. TURNER, THE KING AND HIS COURTS, p. 276 (1st Ed. 1968).

pertaining to the king's courts, it immediately becomes evident that the variety of the procedural expedients which the king may use to vindicate his special interests is immense.[13] Taking some random, typical examples of royal intervention running throughout the thirteenth century and into the fourteenth, we see the king advantaged by certain marked procedural concessions and rights. In a case wherein a defendant would normally be privileged to have use of counsel, he may have none where the king sues,[14] nor may one have judgment of the king's suit in one day.[15] Discussions of the king's rights occurring in the common pleas indicate that statutes have no effect on the royal prerogative,[16] and the king is not prejudiced by a mistake of the royal attorney made in his name.[17] The king must be answered in whatever court he pleases,[18] and it is doubtful whether one may rely on ordinary law where the king is involved.[19] The king personally issues

13. Speaking in terms of procedure, the general categories provided by Professor Turner are helpful in sorting out specific instances of royal intervention. He says that there are basically four ways in which the king can be seen to interfere with the customary operation of the common law:

(1) The use of special proceedings where no possessory assize is appropriate;

(2) The issuance of orders contrary to rules on eligibility to plead;

(3) Commands directly overruling the usual rules of law;

(4) The use of special types of juries to take assizes. *Id.*, p. 111.

Also there are four basic substantive categories in which we may lump together expressions of royal interest:

(1) Instances where the king rules directly on points by law;

(2) Instances where the king interprets royal charters or grants;

(3) The king's participation in compromises or concords;

(4) Decisions affecting the punishment of wrongdoers such as the increasing of one's amercements, or granting a pardon. *Id.*, p. 123.

Though our purpose here relates to the determination of answers to substantive questions which may fall into any of the above procedural categories, the well recognized relationship between the substantive right and the procedure employed necessitates that we keep in mind some rather general categorical concepts such as these, but seek more to analyse each case individually rather than adopt the pigeon-holing of each case into some category as our objective.

14. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society Vol. 58 p. xliv, n. 4, (1939).

15. *Id.*, n. 5. Note that the king could order suits to proceed as well as delay them when he wished. R. V. TURNER, THE KING AND HIS COURTS, p. 90 (1st Ed. 1968).

16. *Id.*, n. 6; see n. 15, p. xxxviii.

17. *Id.* n. 7.

18. *Id.* n. 9.

19. *Id.* n. 8.

directions in all manner of cases, sometimes instructing that a particular procedural act be done,[20] or sometimes phrasing his orders in more general terms.[21] These instructions oftentimes issue directly from the king by word of mouth.[22] The king often claims special privileges relative to his position as ultimate lord, claiming that transactions concerning land which would be possible in the ordinary course of dealings between private parties necessitates a special license from him when his interests are thereby affected.[23] The king may post-

20. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 56, p. xxxv, (1936), wherein Sayles points to the resumption of this practice by Henry III after his minority, during which the practice was abated even though orders still issued in his name. A certain constant body of rights pertinent to the crown seems evident, though the manner of their expression may change. See also *Id.* p. lxx; p. 42. "Afterwards the lord king . . . instructed Walter of Wimborne to withdraw from that writ." Here Edward I was instructing his attorney to withdraw suit against an abbot for the advowson of a church which the attorney had claimed was due Edward through one of his predecessors, John. Edward, however, was satisfied by an assize or jury of recognition that the abbott had the greater right.

21. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 58, p. 22 (1938). "And on this there came the lord king himself who clearly understood that deed, and at once ordered speedy justice to be done to the aforesaid Agnes."

22. *Id.*, p. 22; 57, where Edward I gave instructions by word of mouth to Gilbert de Thornton to forgive the trespass of one appointed to deliver goal. The trespass was occasioned by the mismanagement of records which caused the detention of one already acquitted of an alleged offense; *Id.* Vol. 58, pp. xliv, 5, where a jurisdictional dispute arose between the clergy and Edward I over Master Wynand, accused of poisoning another man in Snodland. "And afterwards the lord king at Eastry in the county of Kent after Christmas in the twenty-second year of his reign enjoined Gilbert of Thornton and master John Lovel by word of mouth that, if the prior of Canterbury, to whom the aforesaid Wynand was handed over, wished to hand that aforesaid Wynand back again to the lord king, they were to receive the aforesaid Wynand . . ." *Id.*, Vol. 57, p. lxxii.

23. A frequent claim of this sort pertains to advowsons. It is claimed on behalf of the king that to alienate a fee to which a royal advowson was attached without special license from the king was contrary to his special prerogative, and we find language indicating that if permission had not been obtained, the fine should be quashed as being a disinheritance of the king. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 58, p. xlvii (1939). *Id.* Vol. 55, p. 48. "And Walter of Wimborne says for the lord king that the aforesaid fine ought not to harm the lord king. For he says that the lord king has a special prerogative attached to his crown, namely, that it is not lawful for anyone to alienate his fee without his special license, nor was it usual or permissible for a fine of such alienations to be levied without his consent, it cannot be prejudicial to him in anything, rather shall it be deservedly quashed as

pone actions against those in his service,[24] and any pleas concerning charters granted by the king may be decided by him alone.[25] Just as Turner tells us was the practice under John and Henry III,[26] special concessions appear to be made to important people to have their cases heard before the king[27] in the reign of Edward I, and nothing indicates that the practice was abated thereafter.

So both in theory and in practice, the king seems to be an omnipresent arbiter over the decisions of the courts in his kingdom, possibly even unto pre-conquest days.[28] Professor Sayles sees the growth of the practice of intervening in local or private affairs in the courts as a rather continuous process dating from about the time of Henry II,[29] and, as the above evidence illustrates, the exact scope of the interests vindicated by such intervention as well as the methods of accomplishing it are rather vague. This brings us to the more specific inquiry about evidence of possible substantive or procedural limits on the prerogative as it is exercised in private litigation.

II. SOURCES OF EVIDENCE ON THE SCOPE OF THE PREROGATIVE

Having been impressed with the seemingly boundless involvement of the king in private litigation, we now face the narrower or more specific task of seeking to sift out certain discriminating evidence which bears on the extent of the prerogative. Relatedly we must examine some of the ostensible limits on the procedural expedients which the monarch may use in expressing the prerogative. We are in a way attempting to scan the voluminous records of the day to day royal participation and intervention in the copious litigation in the various courts, simultaneously weigh or evaluate the

levied to the disinheritance of the lord king against the prerogative which the lord king and his ancestors have so far used."

See Id., Vol. 57, p. 79, concerning alienation "without the lord king's will." *See also id.*, p. lxxii.

24. R. V. TURNER, THE KING AND HIS COURTS, pp. 79-89 (1st Ed. 1968).

25. *Id.*, p. 39.

26. *Id.*, p. 276.

27. SELECT CASES IN THE COURT OF THE KING'S BENCH, Seldon Society, Vol. 57, p. lxxii (1938).

28. *Id.*, Vol. 55, pp. xvii-xviii.

29. *Id.*, p. xx. *See* pp. xxxiv-xxxv, illustrating the recrudescence of the involvement of the king in litigation by Henry III after the period of his minority. The resort to unusual or special procedural expedients to express certain royal interests seems to be a custom or practice incapable of being eradicated by a period of royal minority.

manner in which the prerogative is effectuated, and attempt to spot certain extremes which do not appear to fall within the day to day course of judicial business. So we must adopt certain criteria for weighing the evidence found which will make each bit relate to the others. Put another way, we must simultaneously weight the manner in which the royal interest is effectuated against the pronouncement about that interest which it seems to make. Sometimes the royal prerogative is vindicated by one speaking on behalf of the king, especially a royal attorney, or less directly perhaps by one who is only a private party but claims certain procedural and related substantive rights because of the presence of a demonstrable royal interest in the litigation, without the resolution of which the court should not proceed.[30] Sometimes the king's representative contends that decisions ought to be based on the effectuation of the prerogative,[31] and sometimes the king himself instructs the court to rule in a way that will effectuate it.[32] Sometimes the case itself will for some reason be referred to the king in order to secure his advice before the justices proceed, or on rarer occasions the whole case is actually decided before the king himself sitting with an afforced council of magnates or important and learned advisors.[33] Sometimes glimpses of the possible limits of the prerogative are caught in the often extreme allegations of a private party to the litigation,[34] or even in the sometimes ambitious claims of the king's representatives.[35] We must attempt to evaluate the truth of each claim or contention by examining the outcome of the case and its compatability with these allegations made on behalf of the royal interests, taking into account possible alternative reasons for the decision which would render the contentions on the prerogative perhaps less reliable.

Naturally an attempt to make observations on such a slippery subject must be based on certain initial assumptions about the source of the material used. Though these initial assumptions may themselves be debatable, I feel that certain considerations tend to justify the use of the several cases in

30. *Id.*, Vol. 57, p. 67.
31. *Id.*, Vol. 55, p. 48.
32. *Id.*, Vol. 58, pp. lii-liii.
33. *Id.*, Vol. 57, p. 67.
34. *Id.*
35. *Id.*, Vol. 55, p. 54.

the next section herein which were chosen for analysis, and perhaps make the deductions which may be drawn from these cases of some worth. I have chosen to center my investigation around several cases of different sorts arising in the reigns of Edward I, Edward II and Edward III.[36] The considerations justifying the choice of this material indicate that it has some discriminating power as to an assessment of the scope of the royal prerogative expressed in actual intervention in judicial business. First we know that the debates on the subject of the royal prerogative took place almost exclusively in the court of common pleas for some reason.[37] The Year Books paid hardly any attention to the king's bench, which was the court especially engaged in watching after the king's interests. Royal matters and rights definitely came up for consideration in the course of adjudication there much more frequently than elsewhere.[38] One gets the feeling of a body of justices which seem to be remarkably well acquainted with the nature and operation of the prerogative, despite the fact that it is a problem that is at once theoretical and concrete, in the sense that its effectuation demands positive action in the course of actual litigation. It should not seem so unreasonable to suppose that the group of royal judicial servants in the king's bench obtained much the same knack or feel for the presence of the elusive prerogative in specific procedural problems as a present day practitioner in some specialized area of law obtains in his particular field, as is the case in admiralty or bankruptcy practice. The surviving records do not, and cannot, explain things exactly as litigants or judges saw them, just as a current day treatise on admiralty, for example, can not endow a casual reader with any sensitivity to the possibility of a lien priority dispute, for instance, lurking in the background of a series of maritime transactions.

36. Translation of these cases taken selectively from the coram rege rolls of this period are made available in volumes 55, 57, 58, 74, 76, and 82 of the Selden Society publications, and the introductory material relative to these cases substantiates the choice of the case material as a proper means of investigating the subject of the royal prerogative. The primary emphasis on these cases relates to weight, rather than suggesting the total exclusion of other case material, for certain discussions of the prerogative in the common pleas are a helpful source of information on the subject, and are discussed later herein.

37. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 58, p. xliv (1939).

38. *Id.*

The general practitioner would be blind to the problem that would leap out at an experienced proctor. The admiralty lawyer knows what admiralty law means in reality, and moreover he knows what maritime commerce does and appreciates the factual counterparts to the theoretical words of law embodied in cases and treatises. So it must have been to some extent at least with those who handled much of the king's judicial business, who knew his wishes, his 'rights', who knew him. The justices in the common pleas seem to face the dilemma of the general practitioner with a specialized admiralty problem. Their discussions are valuable in educating us, the surviving generations of the curious, as to some of the ideas people entertained about the prerogative, but then pronouncements doubtless do not represent the skilled and sensitive actions of those who, as it were, had a sort of special training with the prerogative.[39]

Also it was natural for the king to receive as favored a treatment at the hands of the justices as was practically possible, since they were his men.[40] Thus we must take any limits which they feel forced to place on the expression of the royal interest as serious, valuable evidence on the extent of the prerogative. Further, it seems that the involvement of the king's bench with the interests of the Crown culminated in a procedural custom concomitant to this specialization. By the latter half of the reign of Edward II, it became the practice to separate the records of pleas between purely private parties and those affecting the interests of the crown. The peculiarly 'common' pleas and those concerning the king were regarded as entirely different matters, and the latter, or 'rex role', became a separate portion of the rolls of the king's bench.[41]

39. For the sake of comparison certain examples of the discussions in the common bench will be discussed later, so as to more thoroughly canvass opinion and practice on the subject. The term 'private litigation', with which we profess to be primarily involved, should be taken to include the examples wherein the king or his representative is the complaining party. Such cases represent an involvement of the king in private matters or transactions, just as where the king intervenes or interferes with litigation already in process between two or more private parties. In both cases he is expressing his own interests as contrasted with private ones, which parties have sought to effectuate through otherwise seemingly legal private transactions.

40. *See* n. 37, *supra.*

41. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 57, p. xxviii (1938).

Indeed, during this early developmental period, when the jurisdictional concepts attributable to different branches of the curia regis were evolving, the real distinction between pleas in the common bench and those in the court of the king's bench was one between cases of a purely private nature and those that somehow affected the king.[42] The jurisdictional separation based on the distinction between purely civil and criminal matters was a development which really only began in the mid-fourteenth century.[43] The distinction between private and crown interests as a criterion for the assertion of jurisdiction by the common bench on one hand and the king's bench on the other is not hard and fast, however, but should rather be viewed in this fluctuating and formative age as a recognized tendency, and not an absolute rule.

We may, then, with caution, take the judicial actions of the king's bench as perhaps being entitled to more weight as being the most accurate indications of what the royal prerogative in its litigational aspect actually meant to men then. We can therefore feel justified in focusing most of our attention on the king's bench side of the curia regis is searching for the most discriminating evidence about the king's prerogative rights. In doing so, we may soon see that within this sphere of interest there are certain procedural sub-categories, which further enable us to distinguish between cases furnishing insights into the royal prerogative to an even greater degree.

More specifically, cases affecting royal interests may be decided in several different ways, and the manner employed says much about the matter stated. The king's judicial servants were, as we have noted, 'his' men, no matter where they sat and no matter if he supervised them directly or not.[44] Regarding the different permutations of the judicial arm of the king's bureaucracy, Bracton indicates that no vital distinction existed between them as relates to their subservience to the king.[45] They were all part of the curia regis, and were expedients utilized as the case demanded. However, though all appeared to be directed toward the same end, a different attitude about the cases coming before a particular arm of the curia regis—the council—appears obvious. Evidence ap-

42. *Id.*, p. xxxviii.
43. *Id.*, pp. xxxvii-xxxviii.
44. R. V. TURNER, THE KING AND HIS COURTS, p. 141 (1st Ed. 1968).
45. *Id.*, p. 168.

pears conclusive that there were many meetings of the king's council that were not a part of the sessions of the king's bench.[46] The fact that contemporaries saw a distinct difference between the two naturally suggests a difference in function, and such seems to be the case. Though a matter might come before the council in several different ways, its presence there normally denoted a problem involving crown rights, great people or difficult problems about which the king's decision was assumed to be necessary.[47] The tradition seems to have been of long standing by the fourteenth century that great or novel problems were to be threshed out with the benefit of the superior advice available from the afforced court, the king's council.[48] We may expect then, allowing for the exceptions inherent in an age less exact and predictable in its legal process than our own, that cases generally of crown interest will more than likely be initially before the king's bench or in cases of great crown interest, before the council. Naturally cases may be supervised by the council after initial assumption by the king's bench where crown interests become obvious and vital.

In seeking to choose and analyse several different cases which may be said to reveal something of the scope or limits of the royal prerogative in litigation, we seem to be faced with a dual task, toward which the preceeding information has been accumulated and should be applied by reference. That is, we are given in the various cases the written statements about or pertaining to the king's prerogative, and,

46. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 57, pp. lxvii-lxx (1938). "There can be no doubt that the king's bench and council are distinguishable bodies."

47. *Id.*, p. lxvii. Actions may be transferred by the king's bench to the council when to proceed without consulting the king would somehow prejudice him.

See id., Vol. 58, p. cxxxv, for a certification of a problem to the council by the justices of the king's bench. The council interfered with all manner of judicial proceedings, but noticeably interfered the most with the work of the king's bench. This was so because, as Professor Sayles says, it was indeed his bench and was to look after his business. *Id.*, p. lxvi. This further confirms our observation that it is before the king's bench and his council that we should look most closely for indications about the extent of the *prerogativa*.

To be sure, there were meetings of the king's bench which were afforced by other justices, but these were not council meetings since they required the attendance of advisors who had no judicial status. *Id.*, p. lxviii.

48. Turner notes that Bracton knew of this practice. *See* R. V. TURNER, THE KING AND HIS COURTS, p. 168 (1st Ed. 1968).

assuming all other things to be equal, we must unravel certain semantic difficulties that always surround an attempt to discern the factual counterparts which one using a certain combination of words sought to symbolize by those words. Even if the words or symbols, were used impartially and in a dispassionate attempt to describe the nature of the prerogative as it stood at the time of the writing, we would still be faced with great difficulties in interpretation.[49] But description for posterity was not usually the motivation for the statements of those who provide us with the almost singular source of information on the prerogative as we are approaching it. We must consider the context of the words and their purpose, as well as what might be considered their ordinary meaning, if such a thing exists. As we shall see, the speaking party may be a royal attorney, intent on vindicating his master's interests, as he may be a disappointed suitor whose only claim in the contested matter may depend upon the involvement of the king, or his willingness to exert or abate royal power on behalf of the litigant. Descriptions of the limits of the prerogative given by these two may not be exactly compatable.

Next the procedural context must be accounted for in assessing the weight of the words employed. As our introduction indicated, the designation and purpose of the judicial machinery employed—the king's bench alone, the king's council, the king himself instructing the court, or whatever form employed—must be viewed simultaeously with what each case purports to say. We should not create a hard and fast scale between the king in his council coupled with an unequivocal pronouncement by the king on the subject of his preroga-

49. One is reminded of Hayakawa's demonstration illustrating the difficulty of conveying meaningful, discriminating communication, even where the words used are employed with no other purpose ulterior to the factual description of an object. He suggested that one take a bag of thirty or so similar oranges, each of which by nature is somewhat different from the others, but also, assuming no extraordinary markings, is quite like all the others. Then he should proceed to utilize all his verbal descriptive and linguistic skill in describing a single one of those oranges, place it back among its fellows, and then hand the whole bag and his wonderful biography of the chosen fruit to a second party with instructions to read, then select the orange which was so carefully interviewed. Not an easy task when one's only purpose is to relate the facts, which is not commonly the sole motivation behind many of the comments in our recorded cases. *See* S. I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION.

tive, running down from this extreme to the bottom of the table, where is listed the outcry of a private litigant in the king's bench, unattended or uninstructed by the king, but at least this suggests an attitude which we may discreetly use to some purpose.

Some have said that the king's involvement or participation in what we may term 'justice' during the Angevin period was just what a hasty examination of the multifarious ways in which the king could intervene in judicial affairs would indicate—a rather uncontrolled, personally motivated effort directed toward personal gain and self aggrandizement.[50] Others seem generally to feel that the tradition prior to Edward I was not so black, and that, though a monarch such as John actually cared little for providing justice for his subjects and was all too willing to avail himself of the financial benefits of judicial meddling, the intervention occasioned did not work a wholesale alteration of the judicial system.[51] Moreover the recognizable tradition did not entail massive intervention in judicial processes.[52] Professor Turner openly states that evidence shows that the king did not intervene in judicial matters as a matter of whim, but rather his actions were a companion to customary law, and a useful leavening for its smooth operation.[53]

Just what was the tradition of royal intervention as we move into the time of Edward I? Obviously the answer is unclear and disputed, and we hear many voices urging different and contrary positions. John himself at least once openly insisted that his command should take precedence over the custom of the realm.[54] And yet we hear his son's

50. J. E. A. JOLIFFE, ANGEVIN KINGSHIP (1970). Professor Joliffe feels that "every membrance of the curia regis rolls" reveals the evidence of royal intervention which is employed along no set pattern but is aimed at many divergent purposes personal to the monarch. *Id.*, p. 58.

51. R. V. TURNER, THE KING AND HIS COURTS, pp. 119-120, 268-276 (1st Ed., 1968).

52. *Id.*, pp. 119-120.

53. *Id.*, "Although there is no great evidence that John had any deep respect for custom or tradition, there is no more support for the view that he dictated procedures contrary to custom solely on the basis of personal whim. Neither the commands of John nor those of Henry III indicated any conception that the king was not bound by law. The king's will was not regarded as something above the law but as a vital companion of the law, something necessary to regulate the machinery of royal justice."

54. *Id.*, p. 104.

contemporaries saying that this cannot be so, and in one case, in 1242, the justices openly agree.[55] Where this occurs, however, it is interesting to note that we have no recorded expression of the king's will, and given the tenor of this period, we may suspect that it was not offended. But, contrarily, this case intimating some resistance to the royal prerogative posed by the common law has a counterpart in a later time, under Edward II, wherein the king's will is openly known through express orders, and yet to our amazement the judges hold firm anyway.[56] Perhaps the common law had toughened up considerably between 1242 and 1329.

55. Turner provides several such cases, one of which, occurring in 1219, involved a plea by the prior of Hospitalers that, in regard to a royal writ supposedly supporting the seisin of the defendant in the prior's action of novel deseisin, the writ, if authentic, was *contra legem terrae et consuetudinem regni. Id.*, p. 72. No result is given on the plea rolls.

On another occasion the royal judges, in 1242, dismissed a suit on the grounds that the grant in question was contrary to the common law and the king "had no wish to change" the customary law. *Id.*, pp. 110-111. The plaintiff countered by petitioning the king to proceed, since "the king himself is above all law." *Id.* The judges, however, had taken action, and their action seems to imply a much more rigid or 'tough' common law vis a vis the royal prerogative than one normally assumes was present. It instinctively seems hard to imagine such a decision being struck off totally out of harmony with what the king would wish for the case and with not thought to his interests or desires. Offhand, one might hazard that such decisions are usually not a cursory pronouncement of "it can't be done", relegating the king to the position of anyone else who bends the law, but were rather made by men who knew in advance how it would sit with the king. Turner flatly states that this was not a time when we had an independent judiciary or a notion that such existed apart from the necessity of knowing the king's will when his rights were involved. *Id.*, p. 270.

56. This occurred in the exchequer in 1329. The abbess of Benedictine nunnery at Elstow had obtained a decision in the king's council in parliament that she might obtain judgment in the exchequer upon her cause. This case involved freehold property and the defendants claimed that to proceed in this Court would be in contravention of the law and custom of the realm. The court agreed and went no further. The abbess complained to the king, who told the court that "because it is not right that pleas and processes began by writs authorized in parliament by us and our council should be hindered in this fashion," they should proceed with the case. The court, however, went on adjourning the case until the record was ordered to the chancery for deposition there, the king seemingly feeling that further pressure to continue was not called for. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Vol. 76, p. lxxxv (1957). Is this further evidence concerning our suspicion that the royal prerogative is seen most easily in the king's bench, in that the judges here were uncertain? Or were they certain as to what the prerogative called for, yet persistent anyway? The decision from the king in council and the

Having made mention of the theoretical extent of the king's prerogative, examined some typical methods through which it was expressed, and considered the implications of the employment of one legal expedient as opposed to another, naturally one begins to question whether any guidelines or extreme limits may be discerned in the expression of royal interests. So the examination of some specific cases is in order, and may help clarify our impressions about the drift of the prerogative during this period.

III. CASES IN THE COMMON PLEAS

Since the methods of intervention in private litigation employed by the king are the same in both the king's bench and the common pleas, the discussions in the common pleas are an interesting source of information on generally held ideas concerning the prerogative. The statements made in some of the more thorough discussions can be weighed against the more authoritative king's bench material to be discussed subsequently.

In 1312 the king brought a writ of quare impedit against Thomas of Hothwayt,[57] and while this writ was pending, Hugh of Courtenay brought a like action against this same Thomas, and thereby recovered the presentation of the contested advowson by judgment. But because the king had taken action the Ordinaries would not accept Courtenay's presentation. So Courtenay brought a bill or petition in parliament. Certain justices were assigned to do him right and he was allowed a writ in the king's bench.[58] The attorney for Thomas attempted to point out that one Isabel held her seisin on recovery from Gilbert, the father of Thomas, who was dead at the time of judgment. Thus her judgment was based on error so that the court should examine it in assessing the king's rights. The court, per Brabezon, C.J., replied that the king has nought to do with writs between private persons and that, 'by reason of his prerogative', it is sufficient that he merely allege that

personal instructions from the king seem to make the situation pretty clear. So the resistance to unequivocally expressed royal will seems to come more from a reliance on the law and custom than from uncertainty. The objectionable qualities of the prerogative as here expressed seem to be most in their minds.

57. Year Books 5 Edward II, 1311-1312, Selden Society, Volume 31, p. 131 (1915).

58. *Id.*, p. 130. The king based his claim upon the fact that his tenant in chief died seised of the advowson, and thus it came into his hands.

his tenant died seised.[59] However, the court emphasized the fact that Isabel made a presentation, apparently believing her title good, and that this was sufficient to affirm the king's possession, especially since Courtenay could sue the advowson out of the king's hands as heir of Isabel, but had not done so. Thus, since he had not done so, the king ought to have judgment.[60]

This was therefore not a case where the prerogative flatly overrode rightful claims based on the common law, but here the king in the last analysis merely claimed a certain advantageous position in a series of preferences allowed by the common law. Isabel's action was sufficient to overcome the alleged defect in her title at common law, and this title would withstand attack based on the initial error in judgment made when title was first acquired. A later suit by Courtenay *could* displace the king's position, but since it has not been instituted the king has the superior right in relation to Thomas. The judges seemed to view the problem actually as a question of priorities allowed by the common law, rather than one of the prerogative versus the common law.

Later, in 1313, the king brought a writ of quare impedit against William of the Boys (du Boys), alleging that William had disturbed his presentation of an advowson.[61] The king alleged that the advowson was his because Robert, former Bishop of Canterbury, was seised of the advowson and gave the church to his clerk, by whose death it became void. He also alleged that it became void during the vacancy of the See of Canterbury and came into the lands of the king in guardianship, so that he should now present it.

The reply to these allegations was that the Church had not become vacant because of the death of Simon, the clerk, and thereupon the king sought to vary his title, alleging that the voidance of the see was the basis of his claim. The wordy reply made on the king's behalf seemed to say that the fact of the voidance was the real basis of the cause and how it came about is of no consequence, so that any apparent variation should not prove fatal.[62] The opposition thought that the

59. *Id.*, p. 131.
60. *Id.*, p. 132.
61. Year Books 7 Edward II, 1313-1314, Selden Society, Volume 39, p. 64 (1922).
62. *Id.*, p. 65.

change from dependence on the death of one occupying the church to the vacancy of the see was a variation in the right of action itself. As to that, Scrope, J. allowed that, "He that sueth for the king cannot omit or change aught to the king's possible disadvantage, for he is not in the position of an attorney. Any stranger may appear on behalf of the king, and if he made a slip, the king's right ought not to be lost."[63] Inge, J. felt that the right of action, dependent upon the fact of the voidance, remained just as it had been before, and Bereford, C.J., in basic agreement stated that "no one would believe that the king could change his count or make a different count under one and the same writ, but he can make this change because he is not changing aught that is of the essence of his right of action; and if this were not so, *he could not make the change.*" (emphasis added).[64]

This, however, did not settle matters. The defendant's attorney stated that such a writ "is not based upon the common law, for the common law alloweth a man to retain his benefice notwithstanding that he hath received a dignity or some other benefice. The right of action therefore upon which the king supporteth his count is founded rather upon the counsel of the spiritual clerks than upon the common law, and consequently we do not think that our lord the king ought to be, or will wish to be, answered in such a counting."[65] The defendant's attorney continued to claim that a voidance can only be occasioned by a suit in court Christian, and when a church is there declared void, a patron's right to present accrues. Then only will such a writ for disturbance of that right exist. To reverse this sequence would be 'to put the cart before the horse'.[66] Further, "The church doth not become void by cession. Nought that he hath said proveth it to be void. Is the defendant deprivable on that ground? He is not. But say they he is deprived. First get the church void, and then, if anyone disturb you, bring your quare impedit, but the king is now bringing the writ against us who are parson. If the plaintiff were any other than the king he could not use such a writ against us."[67] Clearly this implies that even the king ought not to be able to bend the common law this far. If we

63. *Id.*
64. *Id.*, p. 66.
65. *Id.*
66. *Id.*
67. *Id.*, pp. 66-67.

accept the defendant's exposition of the proper procedure, we cannot help but feel that some element of the common law has been abused. Yet the judges themselves see the problem as a rather harmless pleading alteration which does not go to the cause of action. They are not outwardly deciding against the defendant on the issues which he outlines, but seem merely to visualize the issue in a different way. The real point is that the position sought by both parties appears to be one of accommodation to the common law. Nobody seems to feel or admit that the presence of the king as litigant should abrogate the common law. Rather there appears to be a disagreement as to just what the law is in such a case. The defendant feels that the law is abused by the king because he sees the law differently rather than because he alone feels that the king is powerless to override the law. All profess to agree on the latter point, but disagreement centers around what constitutes overriding the common law.[68]

68. It is interesting to note a 1312 case wherein the parties were contesting the proper jurisdiction of the court in which the cause was to be heard, and produced conflicting charters to support their claims. The defendant claimed the right to be impleaded only in the court of Shepway by a franchise granted by Edward I. Bereford, C. J., related how formerly the Barons of the Cinque Ports put forward a charter from the king allowing them to be impleaded only in their own franchise court of Shipway. Despite letters from the king for the judges to stay their hands, they proceeded anyway and held such a charter contrary to reason. Bereford then stated: "And we too, now, will rule that this charter which you have newly gotten, and that maketh Denge Marsh . . . to be of the franchise of the Cinque Ports, it contrary to reason? Then Bereford instructed that the parties should petition the king for clarification, since they both had royal charters. Year Books, 5 Edward II, 1312 Selden Society, p. 17 (1915). Thus the king's position certainly was not unassailable, as the defendant in the case involving William du Boys feared. *See* n.64, *supra.*

In another interesting case involving a procedural precedent favorable to the defendant, in 1313, a writ of quare impedit was brought for the king, who claimed that an advowson was his of right because one Harry of Guilford died seised of a manor to which the advowson was appendant, and the same Harry held of the king in chief. The defendant claimed that Harry had enfeoffed him of the manor before his death. In response, the king's attorney alleged that the lands had come to the king while the church was vacant and thereafter Harry's heir, John, sued the manor out of the king's hands. So the king need not plead as to the defendant's contention, as his claim should actually await judgment against John, who is now seised. However, the answer was commanded by Bereford, C. J., who agreed that, for the king to make out his case, he must allege seisin when the church became void. Yet the king's attorney was now indicating that the defendant had been in possession and was himself wrongfully disseised, so that any answer due him should await judgment against his disseisor, wherein the defendant's claim may well be found to be bad. The

In 1315 a writ of quare impedit was brought on behalf of the king alleging the seisin of Edward I, his father, of an advowson, the presentation of which was currently disturbed by the defendant.[69] The defendant pleaded that the present king's grandfather, Henry III, had granted the advowson to him, and that documentary evidence of the possession and right of the defendant was seized into the king's hands during the reign of the subsequent king, Edward I. Edward I had allegedly assumed possession of all of the lands during a period when the defendant and his religious order were being suppressed by the Pope. The defendant alleged that he should not answer until the king looked at the charter from Harry, which he alone could interpret, and also should be given a change to return the other documentary proof of the defendant's title. The natural objection was that the king should not be put in a worse position than a subject by allowing the charter of a grandfather to defeat the seisin of a father. Also he should not be prejudiced for the defendant's failure to sue for the documents. Nonetheless, the defendant persisted, and Bereford, C .J. attempted to reserve the king's relationship with the defendant, stating that "If you could appeal to a legal principle what you say would be well enough, but against the king, who is above the law, you cannot rely on legal principles."[70]

Yet the same legally superior position was urged on behalf of the defendant, who claimed that, regarding the charter of King Harry on which he relied, "There is Inge [referring to a justice on the bench] who can judge any other than the king, but the king's charter may not be judged by any other than the king, for he is without peer and is above all law, etc."[71]

A subsequent note from the record discloses that the defendant himself later alleged that the man named by Ed-

king's attorney then cautiously threw out the insinuation that to command an answer in such a case would be improper, and that he had never before seen a case in which such had been ordered.

But Bereford, perhaps looking down his nose and speaking severly, replied: "I have seen it; and so you must reply to him." Year Books, 6 Edward II, 1313, Selden Society, Volume 43, pp. 40-41 (1926).

69. Year Books, 8 Edward II, 1314-15, Selden Society, Vol. 41, p. 73 (1924).

70. *Id.*, p. 74.

71. *Id.*, p. 75.

ward I, father of the present king, was never admitted or instituted into the church. A jury was summoned to answer this question, but the defendant disappeared and thus suffered judgment.[72]

We here have from the bench a repetition of the familiar cliche that the king is above law. Yet any record of extralegal behavior attributable to the king is absent, as it always seems to be. The literal meaning of that cliche obtains here no more than elsewhere, and, though the king's legal position is different from that of others, we certainly do not see that law is irrelevant to him. In fact his right here as elsewhere is asserted in a conventional procedural fashion, and the defendant has merely somehow gone amiss in his suit. He has not called on the normally applicable law and found it to no avail against the king. After one postponement in the case, Inge, J., states rather admonitorily that "Our Lord the king has brought his writ and shown how he has a right of action, but you persist in running away from and avoiding any answer to the king's plea of right by talking about charters and confirmations, the existence of which you allege, and other defenses which you assert to be in the possession of the king, but of all that you give no proof to the court."[73]

Clearly the defendant had his chance, the day in court allowed by the common law, even though the king himself was plaintiff.

IV. CASES IN THE KING'S BENCH

In 1279 the king was suing Gilbert de Clare, earl of Gloucester and Hertford, for the manors of Portland and Wyke Regis. Gilbert alleged that these manors were given by Edward's father, Henry III, to Gilbert's father, Richard, to be held at the king's will.[75] Gilbert alleged that afterwards King Henry sent word to his father that the prior of St. Swithin's was to have peaceful possession of the land. Richard, his father, acceded to the king's wishes and gave the land

72. *Id.*, p. 79.

73. *Id.*, p. 76.

74. SELECTED CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Volume 55, p. 52 (1936); *Id.*, Volume 58, p. xlix, wherein Sayles refers to the case as being "one of the most interesting to be found on the plea rolls."

75. *Id.*, Volume 55, p. 54. "[T]he aforesaid king Henry committed the aforesaid manors to the aforesaid Richard, his father, to be kept as long as it pleased the aforesaid king Henry."

to the prior. But subsequenly the prior enfeoffed Richard of the manors in fee, and on Richard's death Gilbert inherited them on the same terms. Further, since the present king founds his action upon the former grant of Henry, allegedly based upon custody, and since that grant had been modified by the enfeoffment of Richard by the prior, then the writ so founded need not in the earl's opinion be answered.[76]

John le Fauconer, the king's attorney, thereupon alleged that the king is not bound by the laws and need not use ordinary writs. [77] The prior had no more than Richard had formerly anyway, so the grant was not really modified.[78] The king's attorney noted that this same action had begun under Henry in 1269, and that they were using the same suit in the present action, only with the name 'Henry' replaced with 'Edward'.[79] Then, in a highly unusual claim concerning the propriety of the king's writ, the king's attorney argued that the advisors of Henry utilized all their wisdom and skill in in framing the writ for Henry, and since these men had no equal in the kingdom at the current time, there should be no objection capable of quashing the writ.[80] Richard had nothing but custody of the land, and it actually was not even necessary for the king to plead in order to resume custody

76. *Id.* "[H]e prays judgment whether he ought to answer that writ, founded upon the grant made to the aforesaid Richard, his father, at the pleasure of the aforesaid king Henry, for this grant had been altered by the same King Henry, as is aforesaid" (altered by the confirmation of Richard's possession in fee).

77. *Id.*, p. 54. "One is that the lord king is not bound by the laws and has no necessity to use ordinary writs, rather he is able, as his predecessors were accustomed; to use any writs formed to recover these things which were seized from them. . . ." One of the earl's previous exceptions in a similar action for the same land, brought in 1269, had been that the great men of the realm had hitherto observed that writs should be common to everyone. *Id.*, p. xlix; p. 56. Hence the above reply from the king's attorney.

78. *Id.*, p. 55.

79. *Id.* "[N]othing being changed except the name 'Edward' in place of 'Henry'".

80. *Id.* "[T]his writ was framed by the advice of the magnates and those learned in law who were of the council of the aforesaid Henry. These men applied their wisdom and all their pains and framed that writ as that which could be quashed by no exception, wherefore, since there are not now in the kingdom any men of such outstanding diligence or wisdom as those who framed that writ, it does not seem to him that any exception put forward by the aforesaid Gilbert ought to be admitted to quash the aforesaid writ."

of the land, according to the king's representative. The king was allegedly using such a writ only out of kindness.[81]

We are left without any resolution of the case, but the contensions of the parties are interesting. In the first part of the protracted litigation, the king's attorney flatly stated that all writs were established for the entire community except the king.[82] However in the first piece of this litigation, occurring in 1269, the attorney seemed to say that the king never uses ordinary writs.[83] Yet, in the second phase of the dispute, he merely seems to say that the king need not do so.[84] But his general references to the king's superior position in litigation implies that this may be a minor point, as his claims for the king go so far as to allege that he is just not bound by the laws at all.[85] Certainly the king is allowed to formulate writs especially designed to serve his interests, and those of justice[86] anywhere in the English realm. But it seems that he could also use ordinary ones.[87] To say that he may exceed the norm, but *cannot* duplicate it, would doubtless seem as illogical then as it does now. We see also that the extreme claims made for the king's authority are made by his own representatives here. This is somewhat different from the case where a private party benefitted by the king's grace makes extravagant claim for his power.[88] Yet they are nonetheless extreme claims and seem to be patently out of line with the drift of practice regarding the king's prerogative to this date.[89] Further, the claim is general, theoretical, and very vague. It says nothing of the factual do's or don'ts touching the king in litigation, but rather states in capacious language an extreme which, taking its meaning at face value, we must be inclined to reject. That is, the fact that the king simply was not "above law" in the extreme sense of the term is evidenced by the utilization of ordinary legal process by his representatives to se-

81. *Id.*, p. 55.

82. *Id.*, p. 56.

83. *Id.* "[B]ecause he does not plead at any time by common writs."

84. *Id.*, p. 54. "[H]as not necessity to use ordinary writs."

85. *Id.*

86. *Id.*, Volume 55, p. 57, where the king's attorney introduced evidence that the kings in times past were wont to use whatever writs were necessary.

87. *Id.*, Volume 58, p. xlix.

88. *Id.*, Volume 58, p. xlviii, *citing* Volume 57, p. 68.

89. Witness the aforementioned dismissal of a suit based on a grant by King John, as it was said to be contrary to the common law. R. V. TURNER, THE KING AND HIS COURTS, p. 110 (1st Ed. 1968). *See also* pp. 119-120.

cure his rights. If he was truly "above law", he would merely have sent some official to forcibly reclaim the property and be done with it. But, though his position is admittedly special, he often expresses his interests through court processes, just as anyone else would do. Then what does the king's attorney mean by his claim? If factually he cannot correctly be describing the real situation as to the king's legal position, at least as it was in practice, we must give another meaning to his words. He may be "above law" in the sense that he need not follow the perfectly ordinary processes which the law provides for the average litigant, but he is not so far above the law that it makes no difference to him, as the very fact of his involvement in a court of law indicates.

Coupled with the other evidence about the standing practices of kings in their courts, we must be content at this point to say that he is somewhere in between the ordinary and the absolutely superior, and take the claim of his attorney as being a sort of emotive general argument, definitely biased towards the interests of his master, much as one sees in trials of our own day.

Another case under Edward I is of some interest regarding this sort of claim for royal legal supremacy, this time made by a private litigant. In the Hilary term of 1292, Hawise, the wife of Griffith, prayed for the restoration of certain lands taken from her in wartime.[90] The lands were allegedly given to Hawise by her husband as dower in accordance with a charter granted to the husband which would allow him to make the appropriate grant. Hawise claimed that Griffith assigned the lands to her when "she gave him her troth", and Henry confirmed the deed by a charter, which she produced in the litigation.[91] She admitted that Griffith had no other lands in England, and the king's attorney proceeded to make much of this, in that he alleged that "it is contained in the Great Charter of the lord king that a woman ought not after her husband's death be dowered save in the third part of the lands which belonged to her husband or of less . . . ."[92] Such a grant, then, giving as dower a parcel of land which does not bear this fractional relationship with

90. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Volume 57, p. 67 (1938).

91. *Id.*, pp. 67-68.

92. *Id.*, p. 68.

other lands held by the giver is "entirely contrary to the common law, neither ought the royal grant, made upon this, to hold or be valid, especially as the lord king had no wish by that grant to change the common law of his realm."[93]

Hawise stated, rather redundantly, that she was ready to prove that she received the land as dower, the defining of which was at the heart of the royal attorney's objections, and then, as if to show these matters irrelevant, alleged that the king was "above all law".[94]

As always appears to be the case, one can only conjecture as to how much of each party's agreement was adopted by the judges in their decision, but seemingly nothing submitted by Hawise persuaded them. We find the case closed with "afterwards, before day was given to the aforesaid Hawise, she withdrew from her petition after she was solemnly called in court. Therefore, it was awarded that the aforesaid Hawise be in mercy".[95]

If this is all there is to be said of the case, it seems almost inescapable that, if the grant of land in such a manner was contrary to common law requirements concerning dower, the king could do nothing to overcome this even by charter. Though charters concerning the king are subject to interpretation by him alone,[96] as our general rule says, it may be that his interpretation is needed only when it could conceivably in some way render a transaction proper according to the common law, but will prove useless when the only purpose of the charter would be contrary to that law. Here again we seem to find the king limited in his indirect interference with

93. *Id. See* Volume 55, p. 132. Here a charter was put forward by the prior of Malton in a suit against him in manorial court for a debt. The charter granted him the liberty to be free from suit save before the king or his justices. The plaintiff, Richard, claimed that the king's charter should not be prejudicial to him, "inasmuch as the lord king does not grant save what is his own and does not take anyone's court away from him." The record says that the charter was shown to the king "because it does not belong to anyone to adjudge or in any way interpret the charters of the lord king's predecessors except the lord king alone." The judges in 1292 were certainly willing to come to judgment without the king. *See* n.66, *supra*. But the king here interpreted the charter so as to allow the suit in the court baron, the seemingly clear liberty granted therein notwithstanding.

94. *Id.*

95. *Id.*

96. *Id.*, Volume 58, p. xlvii; R. V. TURNER, THE KING AND HIS COURTS, p. 39 (1st Ed. 1968).

common law applied in litigation.[97] Naturally we must recognize that the interference which a royal act would have worked here is indirect, and this is somewhat differnt from a situation in which the king directly orders justices to do something.[98] But nonetheless, the king hardly seems to be "above all law" in any literal sense, for otherwise the mere identification of the grant as a royal one would have settled the matter in this case. One could make so bold as to say that there seems to have been no single interpretation of the facts or expressions of interests, on behalf of the crown which here would have altered the effects of the common law, lest the judges would have called on the king. But this seems to swing to the opposite extreme and attribute too much resiliance to the common law, which, as we have seen, must admittedly recognize the king as a very special person. One gets the feeling that all parties during this time align at will with either of two 'factions'—the common law on one hand, and the crown on the other—and the pursuit of rival interests seems to insure some opposition between each of these two forces. All thus seem to strive for a sort of balance, though none know the rules precisely, if there be any. Let the king be the king as he ought, and let the common law be the common law, and let conflicts be settled as the situation demands, so that hopefully we may someday know more clearly what the rules really are. Though each party in the many cases, and the judges therein, must have all had each their own individual picture of how things stacked up between the king and the law, the pictures were apparently all quite different, and sometimes one side seems to push its position as far as the graciousness or inattention of the other side will permit. But this is, after all, much of the litigational process in the common law system of our own times. Thus, functionally speaking, we may here see a striking similarity, and a rivalry between these two forces that makes the king in many ways more a contestant than a dictator, as the some-

97. *See* n. 14, *supra*. This would fit into category three in the methods of indirect interference by the king which Turner gives.

98. The example of judicial balking at direct intervention which occurred in 1329 always seems to serve to demonstrate that perhaps the time comes when the difference between direct and indirect interference may not mean very much. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Volume 76, p. lxxxv (1957).

times extreme claims for royal authority would falsely have us believe.

Another fascinating case occurred under the next king, Edward II, at the beginning of his reign in 1308.[99] Therein it was alleged that William de Braose and Henry of Whiteway had levied a fine in 1285 with respect to the manors of Washington Sedgwick, and Findon. The fine stated that William acknowledged the manors, with advowsons and appurtenances, belong to Henry in return for Henry's grant of such to hold for his life for certain services. After William's decease, the manors were to go to William's son, Richard, and the heirs of his body to be held forever by the same services. But if Richard were to die without heirs begotten of his body, the manors were to go to Peter, Richard's brother, and the heirs of his body forever.

William de Braose had levied another fine in 1280 with one Amice de Ripariis with respect to the manors of Chesworth, Grinstead, and Bidlington, on the same terms as the fine between himself and Henry of Whiteway.[100] Peter, William's son, sued complaining that William de Braose the younger, his older brother, and Mary, the widow of William the older, had taken the manors of Washington and Findon, treated in the fine of 1285, and Grinstead, treated in the fine of 1280.

The sheriff was ordered by writs to let William and Mary know that they should come before the king and answer for this. Mary first appeared and claimed to hold the lands by dower, and, after some delay, William appeared and prayed that the fines should not be executed as Peter had asked. He alleged that his father had died seised of all the contested manors, and the king's escheator had seized the manors, reserving the rights of all interested. William also alleged that he had sued as son and heir of William the older, to have the seisin in the manors placed in him, which was done. He then endowed Mary from the lands. Thereafter, Richard came complaining that the terms of the fines had not been observed, and sued in the king's court. The king was concerned that the success of Richard's action would work a dis-

99. *Id.*, Volume 74, p. 7.
100. *Id.*, p. 8.

memberment of the barony[101] to which the lands belonged, and would have preferred that William and his heirs hold the lands intact. So an agreement was reached between William and Richard before the king and his council,[102] with the king's consent. Under the terms of the agreement, the king's valuers were to value everything pertaining to the barony and another manor. If the other manor was of sufficient value, it was to be given to Richard in return for the lands in the barony, with a provision that certain other additional lands would be given if it was insufficient. William and Richard agreed not to thereafter institute any claim or proceeding contrary to the rights of the other party as agreed upon, and all gave security. The terms of this agreement were enrolled in an "ordinance and provision" on the rolls of the king's council.[103] The lands

101. It seems that the division of barionies, often a question in the settlement of inheritances, was always of interest to the king. R. V. TURNER, THE KING AND HIS COURTS, p. 53 (1st Ed. 1968). The 1308 case states that such a division "would clearly be to the prejudice of his demesne." SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Volume 74, p. 10 (1955).

102. As discussed earlier, this a procedural expedient reserved for the most important cases, or those most directly affecting the interests of the king in some way. *See* n. 47, *supra*. Perhaps the king was specifically interested in the parties or the particular manors in question. It could be that the subject of these divisions was one which Edward considered to be generally important enough to involve himself or his council.

103. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Volume 58, pp. xi-xiv, especially p. xi, n. 3 (1939). Relating to the term 'ordinance and provision', it seems that it was earlier on equated with statutes, assizes or other pronouncements of law. Sayles says, however, that by the time of Edward I, the term statute had come to embody whatever notion of special 'legislation' or lawmaking that existed. The distinctions between forms of law that people valued as having any significance during this time were based on differences in the practical results achieved by different legal forms. When we seek to answer the question of whether or not the term 'ordinance and provision' had any special legal significance or constituted a legal pronouncement of any more weight than pronouncements in court, at least so far as the prerogative is concerned, we seem to find no definite answer. The king's involvement in the process would it seems be of more significance than the peculiar force of a special sort of law, styled 'ordinance and provision'.

For our purposes analysing these cases according to conventional ideas about the prerogative generally seems to be more adequate than to attempt an evaluation of the various legal pronouncements based upon supposedly different sorts of law. This approach is further confirmed by the fact that the source of the prerogative and of statutory law are at this time the same anyway. *See* p. xxxviii. The personality of the parliament had not yet forced distinctions which would cause us to vary our analysis because of the legal nomenclature

given to Richard were to be held on the same terms as the original fines. After seisin in the substituted lands was delivered to Richard, an indenture was made between William, Mary, Richard, and Peter in order "to make what had been done more secure."[104] The indenture stated that Richard relinquished all claim whatsoever in the contested manors, in return for which the substituted lands were acknowledged to belong to Richard, and to be held in accordance with the earlier fines.

After Richard died without heirs, Peter came into possession of the substituted lands because they were held in accordance with the terms of the order fine. William alleged that Peter had thereby accepted and ratified the agreement and indenture, and prayed whether Peter could demand the tenements mentioned in the fines, thus effectively contravening both the agreement made before the king and his council, embodied in the ordinance and provision, and the indenture.

Peter replied that the agreement, which was based on the indenture, was made after the ordinance and provision, thus making the latter of no effect. Further, he was under age at the time the indenture was made, and was not even a party to the ordinance and provision. Thus he contended that he held the lands then in his possession as something merely acquired by Richard through the indenture, but the aforesaid fines should nonetheless still be in force. Should he be excluded from the benefits of those fines because of the later made agreement to which he was not a party?

The court could not have been too pleased with his almost persuasive but uncomfortable argument, and appreciated the impropriety of having one's cake and eating it too, for they then asked him about the exact nature of his claim to the lands he held through Richard at the time of the suit. Peter then definitely seems to have retraced his steps, for he then

involved. *See* p. xiv. *See also* S. E. THORNE, A DISCOURSE UPON THE STATUTES, pp. 3-100.

We may, however, take the legal action involved in this case as a reliable and sincere expression of the royal interest, due to the relative importance of problems treated by this procedure. Nothing, however, indicates that the use of an 'ordinance and provision' involves a power reaching beyond the prerogative.

104. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Volume 74, p. 13 (1955).

offered what one senses was a timidly delivered response, "stating he held by the fines."[105]

William was pushed to argument about the legal effects of the procedural juxtaposition of the various transactions. He contended that the agreement was made *by authority of* the provision, which was itself "made before the king and his council and agreed to by the king . . . and enrolled in the council rolls, and this provision, made with such solemnity in the presence of the king himself, ought to be considered and held to be of greater authority and effect than any fine levied in his court, especially when the execution of the fine has not been brought into effect."[106]

Further, Peter possesses his lands by virtue of the indenture, thus "accepting and confirming the provision and ordinance, etc."[107]

The king seems to have been perplexed by the possibilities raised by this case, in that he then sent letters under his privy seal ordering Roger le Brabezon and his fellows, and justices holding pleas before him to adjourn all cases involving fines until the next parliament.[108]

The record of the case terminates with the narration of many adjournments, but no court imposed solution is revealed. Seemingly the case was settled by the parties.

The implications of such a case, as indicated before, can be analysed by a conjunctive evalution of the pronouncements or allegations therein, the procedural expedients employed, and the positions which the ultimate outcome seems to vindicate. Here we have an unresolved procedural problem which could be critical to our assessment of the case. That is, Peter has claimed that the indenture amounted to a nullification of the ordinance and provision made before it, and William has contended that the indenture *confirmed* the ordinance and

105. The reversal of Peter's position is recorded unemotionally on the same page:

> "[H]e now holds Tetbury manor . . . as something acquired by Richard, his brother, in accordance with the terms of that indenture etc."
> "And he says [after the question was put to him by the judges concerning his current title] that is by virtue of the fine." *Id.*, p. 14.

106. *Id.*, pp. 14-15.
107. *Id.*, p. 15.
108. *Id.*

provision, and was wholly in accord with it. The exact effect of these two acts one upon the other is not determined. But a deeper look into the case indicates that these parties knew that arguments thereon were related to the prerogative in a very real way. William did not solely argue that the indenture was to be effective, which would have factually accomplished his objective. Rather, he also argued that it was in accordance with the ordinance and provision. To have gone only far enough to have possibly achieved his desired objective without reckoning with the implications of the ordinance would seem to imply that the parties could by private agreement somehow modify a solemn royal pronouncement.

Further, if private parties could do this, the possibility would exist that the alleged absence of Peter as a party to the indenture would leave William with no secondary argument. William, however, played all his cards. He did not even intimate that the king's wishes as expressed in the ordinance could be thus avoided, even if doing so would tend to confirm Peter's involvement in the later agreement, the indenture, his inclusion in which might preclude any further claim to the land through the older fines.

Peter also recognized the difficulty posed by the king's involvement. Not only must he somehow opt out of the indenture, but he must also use it to nullify the effects of the former royal act. The disclaimer of the indenture regarding any effective disposition of the contested lands, but the assertion of its efficacy as taking procedural precedence over the ordinance seems to typify the twinship of Peter's whole approach to this case. He ultimately decided to avoid connecting his title with the indenture, yet he insisted that it superseded the royal ordinance and provision. He clearly recognized the difficulty which the royal act made subsequent to the transaction upon which he rested his claim to title, the fines, posed to the effectuation of those fines. His insistence on avoiding any effect of the royal act may indicate that Peter felt that such a subsequently created ordinance *could* upset the private transactions, even if he was no party to the ordinance. A mere indenture could not, however, produce such a result unless he were a party thereto. It thus offered Peter a steppingstone over which to escape the royal act. Just how the previous fines would be revived is not clear. That is, why were they not superseded by the ordinance, just as he claimed

was itself superseded by the indenture? Is Peter arguing that in such cases there must be some sort of private acquiescence to the royal act, expressed in conventional legal terms, before that royal act may upset a purely private transaction? The very assumption that the fines still somehow exist after the ordinance and that William must base his defense on the indenture and not the ordinance seem to make such a contention implicit in Peter's argument.

The converse seems to be implicit in William's arguments. The solemn ordinance is of greater authority, period, no matter in which order things occurred. This accords with his argument that the indenture may only be in accord with the ordinance, and may certainly not overrule it.

All in all, the positions of the parties on this procedural point indicate an inconsistent approach to the scope of the prerogative. Is this merely another case of a party claiming extravagant powers for the king, since to do so serves his own interests? We must notice that, despite the great value of the lands at stake, nobody goes so far as to argue that the king is above all law. This seems to be the common thread running through the contentions and actions of all concerned, even the king. No one acted as if he believed the king to be above the law. The mere expression of his prerogative, unaided by private acquiescence, would have settled the whole matter if this were so. Yet no one believed the opposite extreme was true either—that the king was only to be counted as an ordinary party. As evidence of this, we see that Peter was not merely content with alleging that he was not a party to the agreement embodied in the ordinance, as he had alleged regarding the indenture, but felt that he also had to use a procedural argument to somehow nullify the ordinance. He knew royal transactions were not ordinary ones. He thus was driven to adopt a rather bifarious legal position before he felt safe.

Here again, we can only allow that the king was somewhere between two extremes. But we may also again marvel at the degree of conformity with the common law and custom which his acts assure. Neither normal litigant, nor all powerful despot, he actually appears closer to the former than the latter in the above fascinating case.

We find another interesting glance at the prerogative in litigation under the subsequent king, Edward III. It seems

that Robert of Clipston had sought redress in parliament in 1318 regarding the wardenship of a hospital, which was allegedly revoked by Edward II in a manner contrary to law.[109] Edward III had then ratified the revocation without knowing that Clipston had originally been removed illegally. Apparently Clipston obtained no redress for his claim and thus began a suit against one John Giffard in 1327 by a petition in parliament. It was agreed that Giffard should appear in the king's bench in the Easter term following, but the case was somehow postponed until 1333. In that year, the king sent a writ to the king's bench, along with the petition Clipston had presented to him in his council in the previous parliament, and also instructed that justice was to be done in the case. It appears that the justices did not proceed with Clipston's plea earlier on because they were uncertain as to whether or not a revocation could be repealed in accordance with the law and custom of the realm. Sir Richard Willoughby, a justice of the king's bench, had said that he could not proceed to judgment "unless the king and his council are agreed that the revocation can be repealed in accordance with the law and custom of your realm."[110] Willoughby stated also that he surmised that the instructions by the king to the justices were made without the knowledge of his council, and thus Clipston prayed that the matter should be clarified to Willoughby and that he should be clearly instructed to proceed to judgment. The judges were instructed to hear the arguments and judge according to the law and custom of the realm "notwithstanding the revocation and letters of the king, the father, etc.; and of the present king." In the dispute as to whether or not John needed to specify the original reasons for the revocation, John argued that the instructions from the king ordering him to do so were contrary to the

109. *Id.*, Volume 76, p. 1.

110. *Id.*, p. 2.

111. *Id.*, p. 3. John had alleged that he had entirely proved his case by submitting the letters of revocation made by Edward II and the letters patent of the present king approving the revocation. The reasons for the revocation, he claimed, were known only to the former king, and therefore they could not now be questioned. But Clipston contended that John should also come forward and specify the precise reasons why the wardenship was revoked, and the king in his instructions appeared to agree that such was necessary: "[T]he justices here were instructed to inspect the collations . . . and to hear the arguments and the specific reasons." *Id.*

original writ sent from the Hilary parliament of 1327, which was the original writ for beginning this proceeding as well as the answer to Clipston's petition of that year. He said that the Court should not begin anything new by the present writ which was not warranted by parliament. Further, he stated that the reasons for the revocation were known only to the previous king and could not now be questioned.[112]

The judges finally agreed that the revocation made by Edward II "for particular reasons touching his royal right"[113] still held good, and could not lawfully be repealed by judgment of the court in accordance with law and custom, nor could the reasons therefore be expounded.

It is certainly a different matter for a court to overrule the decision of a former king than to directly confront the decision of the present one, yet the court here let the decision stand anyway. However, they did not do so because of pressure from the ruling king or because of his wish for vindication of some special interest of his own, but appear to have been free to decide whether or not an annullment of the revocation would be consonant with law. Indeed, the reigning king seemed to be anxious that their decision should be based on the law of the realm, and solicited their opinion uninfluenced by undue weight given to the letters of revocation themselves. All in all we seem to have an unusual submissiveness displayed by the king toward the common law, though one must candidly assume that to so act in such a case was probably not disagreeable to him or contrary to any specific interest of his own in the case. The judgment in the case appears to give due weight to the special rights of the king, and is a refusal to overturn the king's action involving private rights. Yet again nothing indicates that the prerogative was forcibly superimposed over the common law. Rather, the place given to the king as a special legal person with special rights was a part of the common law. Though this case was chosen as an example of judicial vindication of a royal act, it is submitted that to interpret the case as an example of judicial timidity would be incorrect. To do so would place too much emphasis on the bare outcome of the case, and not enough on the reasons why it was reached.

112. *Id.*
113. *Id.*, p. 5.

It is interesting to recall in this connection the way in which Professor Sayles felt that the prerogative was accommodated to the common law.[114] In its early history, he felt, even the chancery dispensed the common law, rather than some aberration of it which came to known as equity. Edward II stated the ideal at the beginning of his reign, and, if we may take him at his word, the interpretations of the above cases are quite in accord with his expressed unwillingness to displace the common law.[115] To Sayles, petitions for the king's grace, or for the exercise of his will to favor the petitioner in some way were actually petitions to be placed *under* the common law conflicts between the common law and the prerogative could thus be lessened, though not wholly avoided. Yet even the example which Sayles cites relative to the extent of the prerogative in non-criminal matters suggests that it had limits inherent in itself, and oftentimes the conflict between the prerogative and the common law must be resolved in favor of the latter, grace notwithstanding.[116]

V. CONCLUSION

There is truly a danger in making too much out of isolated incidents of litigation which occurred during a time in which procedures and legal concepts such as jurisdiction were themselves still so malleable that even contemporaries were at times hard put to distinguish the permissible from the illegal. The common case note or comment in modern law journals contrasts certain bits of litigation with a rather well defined larger body of law, and this illustrates their irregularity or novelty. But in a situation where irregularity and novelty are themselves the norm, such discriminating contrast becomes more difficult. Yet we possess enough general information to believe that the bits and pieces we examine say some valuable things about the proper role of the king in relation to the business of his courts.

114. *Id.*, p. lxxxii.

115. *Id.*, p. lxxxiii. Edward instructed his chancery clerks to advise the king's bench on the manner in which a certain action was to be terminated "saving to us our right of our prerogative and also to the defendant his right in accordance with the common law, for it is not our intention to wrong anyone through our prerogative but to preserve to everyone his right."

116. See the discussion of the case in 1329 in which the judges persisted in postponement, despite clear instructions from the king to continue. N. 56, *supra.*

Considering the volume of medieval litigation, it seems moreover to be the exception where a situation will arise wherein the contest between the prerogative and private interests based on the common law is drawn into sharp focus. The very rarity of cases wherein the relative superiority of private vis a vis crown rights is brought into *direct* question indicates that the norm is a system in which the prerogative is rather smoothly accommodated to the interests of private litigants, and a system which makes both quite compatible. One just does not see the king riding roughshod over private interests, but rather friction is resolved in strikingly conventional legal terms. Moreover, where the king's acts arguably do go aganist the grain of the common law, the litigation occasioned is at least sometimes concluded in a manner which seems to correct the 'illegal' implications of the act within ordinary common law processes. No fanfare or openly bitter conflict ensues, but the king's act is in an indirect fashion adjudged out of rhythm with the common law, and things go on without protest from any quarter.

Much observable royal interference with litigation is taken as a matter of course, and only on occasion are the parties and judges openly aware that a sort of contest will actually determine the outcome of the litigation. The ways in which they handle themselves in these cases probably provide some of the best information available on the narrow question of the extent of the prerogative in litigation. Contrarily the often outlandish claims of private parties probably provide some the least reliable information on the subject, yet we must still notice that, when their arguments are contrary to the exercise of the prerogative, they are based upon normal common law concepts. They visualize the possibility of limits on the prerogative provided by the common law.

As we have seen, the actions of the judges and their apparent reasons for acting in actual rulings probably says more about the prerogative than any source. And, significantly, we have seen that they have at times been openly aware of the necessity of even the king's reckoning with the common law. Equally important are the statements and commands of the king himself, especially where the sought after illustrative conflict between the common law and the preroga-

117. The case invloving the dower of Hawise is a good example of this. *See* n. 90, *supra.*

tive can be seen in a judicial reluctance to obey those commands.

We also have extreme claims made for the extent of the prerogative by the king's own representatives,[118] but we are probably justified in placing these in much the same category as the self-serving allegations of private litigants. They are often so extreme as to be obviously incorrect and valueless when taken literally. Further, where we see such extreme allegations made by a private suitor on one occasion, we find a striking example wherein the judges seem in their ruling to allow for no conceivable interpretation of the prerogative which would modify the operation of a clear common law rule, with which the claimants position conflicts.[119]

Even where the king himself is concerned, we see him perplexed about the effects of his prerogative on the common law, and wholly unwilling to press his position without knowing what the law allows.[120] We see him willing to accord the common law whatever weight it will command in the face of a contrary royal act.[121] The judges themselves have from time to time made certain remarkably direct statements about the effects of the prerogative as opposed to the common law, as in 1242, when a royal writ contrary to the common law was dismissed.[122] We see them seeming to bow their necks at royal commands contrary to well defined common law, as the example of 1329 illustrates.[123]

Over all, we have the analysis made by those who have taken a thorough look at the predecessors of the Edwards,

118. *See* n. 74, *supra.*

119. *See* n. 91, *supra.*

120. *See* n. 108, *supra.*

121. *See* n. 109, *supra* (albeit the willingness was expressed regarding the contrary act of a predecessor king).

122. *See* n. 55, *supra.*

123. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society Volume 76, p. lxxxv (1957). Perhaps it may be said that the resistance which the judges were willing to pose to the royal will was fairly directly dependent upon the compelling nature of the common law rule concerned in each case. Earlier in 1294, the judges of the king's bench had refused to take proof of the age of an individual who was obviously a minor, as her appearance in court showed. Yet their hesitancy was remedied by a royal order to proceed, and proof was taken. *Id.*, Volume 58, p. liii. Or perhaps the difference in the results of 1294 and 1329 may be accounted for by the differences in the personalities of the different monarchs ruling in those years. *See* n. 127, *infra.* Or perhaps the common law itself had 'toughened up' quite a bit between those years, though this doesn't seem a likely answer.

and are assured by one of these that the exercise of the prerogative by kings at least as far back as John did not work to overhaul the judicial system, but rather was in accord with it.[124] John seems to be the king most willing to intervene in jurdicial business through his prerogative, and the most concerned with the economic benefits accruing from its exercise.[125] He is apparently the only king moved to claim that his will should take precedence over custom.[126] Yet neither he nor his son, says Turner, offered any massive interference with the operation of the common law, or provided any test case illustrating the sheer supremacy of the royal will over it. Indeed, the tradition by the time of Edward I seems not to have been one of an obsequious common law, wholly bent to the will of an egotistic king, but rather appears to have been one of a vital, growing common law, of which rules are very observant. Naturally this tradition cannot ignore the force of the personality of each individual monarch, and we must in part agree with Sayle's statement that the prerogative of the king was just about as elastic as his personality.[127] Yet we are compelled to admit the persistence of the common law, even when confronted by a highhanded monarch. Thus Sayle's statement cannot be taken to admit to absolute elasticity of power, for he also admits to ultimate limits on the prerogative in the very general, undocumented statement that the privileges exercised by the monarch must not "fly directly in the face of justice, or deprive his subjects of their rights under the common law."[128]

So even though evidence which will suggest the exact degree of interference with the common law which the king may not exceed is very skimpy, much suggests the general personality of the common law as a viable counterbalance to the prerogative. Moreover, on the other side of the coin, those who would argue otherwise are in a much more difficult position, since we find no real examples of the king being "above

124. R. V. TURNER, THE KING AND HIS COURTS, pp. 119-120 (1st Ed. 1968).

125. *Id.*, p. 276.

126. *Id.*, p. 105.

127. SELECT CASES IN THE COURT OF THE KING'S BENCH, Selden Society, Volume 58, p. xliii (1939). This accords with the marked difference in the approach used by John and that which Edward II professed to follow. *Id.*, Volume 76, p. lxxxiii.

128. *Id.*, p. xliv.

law", as some old cases and new theorists suggest. We simply never hear the king stating that pleading and procedural norms are irrelevant to him. Rather, evidence points to the persistence of the common law in the minds of the judges as a limit to the prerogative. The incident in 1242 has its counterpart in later times. To attempt to state, however, from such a case as that involving Hawise and her charter attempting to modify dower rules,[129] that no royal act can modify the common law emasculates the royal prerogative too much.

The legal climate of this period seems to be somewhere in between the two extremes discussd above, between an absolutely independent judiciary and a wholly subjugated one. Law and the prerogative appear in this system much more as companions than antagonistic forces, whether we say that the king does not wish to override the common law rights of his subjects, as did Edward II, or that he can not do so. The argument may not be far off that any unyielding exercise of the prerogative in a manner directly contrary to the common law, even in private litigation, rather than the granting of royal grace to alleviate the effects of the prerogative, is the real aberration in the fabric of medieval law.

129. *See* n. 91, *supra.*