法学文库

何勤华 主编

普通法令状制度研究

A Study of the Common Law Writs

屈文生 著

商務印書館

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总　序

商务印书馆与法律著作的出版有着非常深的渊源，学界对此尽人皆知。民国时期的法律著作和教材，除少量为上海法学编译社、上海大东书局等出版之外，绝大多数是由商务印书馆出版的。尤其是一些经典法律作品，如《法律进化论》、《英宪精义》、《公法与私法》、《法律发达史》、《宪法学原理》、《欧陆法律发达史》、《民法与社会主义》等，几乎无一例外地皆由商务印书馆出版。

目下，商务印书馆领导高瞻远瞩，加强法律图书出版的力度和规模，期望以更好、更多的法律学术著作，为法学的繁荣和法治的推进做出更大的贡献。其举措之一，就是策划出版一套“法学文库”。

在当前国内已出版多种法学“文库”的情况下，如何体现商务版“法学文库”的特色？我不禁想起程树德在《九朝律考》中所引明末清初大儒顾炎武(1613—1682)的一句名言。顾氏曾将著书之价值界定在：“古人所未及就，后世所不可无者。”并以此为宗旨，终于创作了一代名著《日知录》。

顾氏此言，实际上包含了两层意思：一是研究成果必须具有填补学术空白之价值；二是研究对象必须是后人所无法绕开的社会或学术上之重大问题，即使我们现在不去触碰，后人也必须要去研究。这两层意思总的表达了学术研究的根本追求——原创性，这也是我们编辑这套“法学文库”的立意和目标。

具体落实到选题上，我的理解是：一、本“文库”的各个选题，应是国

内学术界还没有涉及的课题，具有填补法学研究空白的特点；二、各个选题，是国内外法学界都很感兴趣，但还没有比较系统、集中的成果；三、各选题中的子课题，或阶段性成果已在国内外高质量的刊物上发表，在学术界产生了重要的影响；四、具有比较高的文献史料价值，能为学术界的进一步研究提供基础性材料。

法律是人类之心灵的透视，意志的体现，智慧的结晶，行为的准则。在西方，因法治传统的长期浸染，法律，作为调整人们生活的首要规范，其位亦尊，其学亦盛。而在中国，由于两千年法律虚无主义的肆虐，法律之位亦卑，其学亦微。至目前，法律的春天才可以算是刚刚来临。但正因为是春天，所以也是一个播种的季节，希望的季节。

春天的嫩芽，总会结出累累的果实；涓涓之细流，必将汇成浩瀚之大海。希望“法学文库”能够以“原创性”之特色为中国法学领域的学术积累作贡献；也真切地期盼“法学文库”的编辑和出版能够得到各位法学界同仁的参与和关爱，使之成为展示理论法学研究前沿成果的一个窗口。

我们虽然还不够成熟，

但我们一直在努力探索……

何勤华

于上海·华东政法大学

法律史研究中心

2004年5月1日

General Preface

It's well known in the academic community that the Commercial Press has a long tradition of publishing books on Legal science. During the period of Republic of China (1912—1949), most of the works and text books on legal science were published by the Commercial Press, only a few of them were published by Shanghai Edition and Translation Agency of Legal Science or Shanghai Dadong Publishing House. Especially the publishing of some classical works, such as *on Evolution of Laws*, *Introduction to the Study of the Law of the Constitution*, *Public Laws and Private Laws*, *the History of Laws*, *Theory of Constitution*, *History of the Laws in European Continents*, *Civil Law and Socialism* were all undertaken by the Commercial Press.

Now, the executors of the Commercial Press, with great foresight, are seeking to strengthen the publishing of the works on the study of laws, and trying to devote more to the prosperity of legal science and the progress of the career of ruling of law by more and better academic works. One of their measures is to publish a set of books named "Jurisprudential Library".

Actually, several sets of "library" on legal science have been published in our country, what should be unique to this set of "Juris-

prudential Library"? It reminded me of Gu Yanwu's(1613—1682) famous saying which has been quoted by Cheng Shude(1876—1944) in *Jiu Chao Lv Cao* (*Collection and Complication of the Laws in the Nine Dynasties*). Gu Yanwu was the great scholar of Confucianism in late Ming and early Qing Dynasties. He defined the value of a book like this: "the subject covered by the book has not been studied by our predecessors, and it is necessary to our descendents". According to this principal, he created the famous work *Ri Zhi Lu* (*Notes on Knowledge Accumulated Day by Day*).

Mr. Gu's words includes the following two points: the fruit of study must have the value of fulfilling the academic blanks; the object of research must be the significant question that our descendants cannot detour or omit, that means even if we didn't touch them, the descendants have to face them sooner or later. The two levels of the meaning expressed the fundamental pursuit of academy: originality, and this is the conception and purpose of our compiling this set of "Jurisprudential Library".

As for the requirement of choosing subjects, my opinion can be articulated like this: Ⅰ. All the subjects in this library have not been touched in our country, so they have the value of fulfilling the academic blanks; Ⅱ. The scholars, no matter at home and or abroad are interested in these subjects, but they have not published systematic and concentrated results; Ⅲ. All the sub-subjects included in the subjects chosen or the initial results have been published in the publication which is of high quality at home or abroad; Ⅳ. The subjects chosen should have comparatively high value of historical data, they can

provide basic materials for the further research.

The law is the perspective of human hearts, reflection of their will, crystallization of their wisdom and the norms of their action. In western countries, because of the long tradition of ruling of law, law, the primary standard regulating people's conducts, is in a high position, and the study of law is also prosperous. But, in China, the rampancy of legal nihilism had been lasting for 2000 years, consequently, law is in a low position, and the study of law is also weak. Until now, the spring of legal science has just arrived. However, spring is a sowing season, and a season full of hopes and wishes.

The fresh bud in spring will surely be thickly hung with fruits; the little creeks will coverage into endless sea. I hope "Jurisprudential Library" can make great contribution to the academic accumulation of the area of Chinese legal science by it's originality; I also heartily hope the colleagues in the area of legal study can award their participation and love to the complication and publication of "Jurisprudential Library" and make it a wonderful window showing the theoretical frontier results in the area of legal research.

We are not mature enough
We are keeping on exploring and seeking

He Qinhua
In the Research Center of Legal History
East China University of Politics and Law, Shanghai, P. R. C.
May 1st, 2004

Abstract
(英文摘要)

The writ system can be considered as a milestone of the birth or building of English common law. In western legal history, there were a large group of legal historians and jurists who had devoted to the studies of the common law writs. Among them there were famous medieval jurists Glanvill, Bracton and Edward Coke. Other scholars in the early modern period include Blackstone, Sir Henry Maine, Sir Frederick Pollock, and Frederick William Maitland. From 1900 onwards, Sir William Holdsworth, Edward Jenks, Theodre Plucknett, Florence Harmer, Milsom, Sir John Baker, and James Holt have all had great achievements in the research field of common law writs. Besides, the Belgium distinguished jurist R. C. van Caenegem is another important scholar in this research area. As Caenegem once said, anyone who studies English institutions at any time from the reign of Aethelred II to our own day is bound to come across the writs and the writ system.

This book is a study of the common law writs. It attempts to clarify the Definition, Origin, Evolution, Classifications, and the judicialization of the wirts. It also discusses the interrelationship between the writs and forms of action, the history and present of the

writ of *Habeas Corpus*, and the function or the historical value of the common law writs. The paper is to argue that the common law writs had gone through development processes from the executive writs to judicialized writs. The common law spirit which values procedure over substantive rights was formed in these processes. When their mission had been fulfilled, the writs and the corresponding forms of action must disappear. However, like Maitland once said: "The forms of action we have buried, but they still rule us from their graves", the Anglo-American law is still haunted by the writ system and the forms of action.

Besides the introductory chapter, the book falls into seven chapters. In the first Chapter, the historical background of the common law writs is outlined with special reference to the ancient English law courts. There used to be three categories of judicial power in England, viz. communal judicial power, seigniorial judicial power, and royal judicial power; these three kinds of judicial power are carried out separately by three different court systems, the communal courts, the feudal courts and the royal courts. The communal courts are mainly comprised of the county court, the hundred court, and the frankpledge. The feudal courts are composed of the seigniorial court and the manorial courts. The royal courts or King's Courts, also known as the "*curia regis*", are divided into three courts, namely the court of common pleas, king's (queen's) bench and the exchequer.

The second Chapter deals with the definition, origin and the several phases of the English writs. This article concludes that the common law writs are different from the *interdictum* in Roman law. The

formal origin of the common law writs can be traced to the Anglo-Saxon period, approximately the 9th or 10th century. The old Anglo-Saxon writs continued to be used in the reigns of the Conqueror William I and the William II (1066—1100); Writs were greatly developed in the reigns of Henry I and Stephen (1100—1154); and the writs were in their blossom in the reign of the Henry II (1154—1189). The common law writs were continued to be developed in the reigns of the Richard I, John and Henry III (1189—1272), and they got into shape and became fixed in the reign of Edward I (1272—1307). From the reign of Edward II (1307—1327) onward, the writs became decadent and were gradually repealed.

In the third Chapter, the divisions of the common law writs were examined. The writs can be either roughly divided into the executive writs and the judicialized writs or divided into the writs of right and the prerogative writs (extraordinary writs). The writs of right include the Writs of Right Proper and the Writs in the Nature of Writs of Right. The Writs of Right Proper can be further divided into the Writ of Right Patent and the Writ of Right *Praecipe in Capite*. The Writs in the Nature of Writs of Right mainly include the Writ of Right *de rationabili parte*, the Writ of Right of Advowson, the Writ of Right of Dower, the Writ of Dower *Unde nihil habet*, and the Writ of Formedon. The writs of right can also be divided into the original writs and the judicial writs. The original writs can be best represented by the Praecipe Writs, Plaints of Wrong, Trespass and Trespass on the Case. Lastly, the prerogative writs are comprised of the following writs: the writ of *habeas corpus*, the writ of mandamus, the

writ of *certiorari*, the writ of *prohibitionquo warranto*, the writ of *Ne exeat*, the writ of *Scire facias*, and the writ of *procedendo*.

The fourth Chapter is to argue that the judicialization of the writs plays a key role in the realization of the centralization in England. This chapter fully explains the legal reforms of Henry II. The several innovative means employed by Henry II included the enacts or the edicts passed by the King, e. g. the *Constitutions of Clarendon*, the *Assize of Clarendon*, the *Assize of Novel Disseisin*, Inquest of Sheriffs, the *Assize of Northampton*, and the *Assize of Arms*. In addition, through the use of professional courts composed of the professional lawyers, the development of the writs system, the assize system and the jury system, Henry II successfully established a centralized nation. The paper concludes that the judicialization of the writs was of primary importance in the governance of the county in England.

The Chapter V is about the practical usages of the writs. In this chapter, the author mainly focus on the forms of action. The article concludes that the procedural system of a county either belongs to a formulary system of procedure or a non-formulary system of procedure. Undoubtedly, the English procedural system was strongly characterized by its strict forms of action. The forms of action in England went through five historical periods. The first period, 1066—1154; the second period, 1154—1189; the third period, 1189—1272; the fourth period, 1272—1307; and the fifth period, 1307—1833. The forms of action were classified into three forms, and they were real actions, personal actions, and mixed actions.

There were 10 most important actions in the English legal history, (1) Debt, (2) Detinue, (3) Covenant, (4) Replevin, (5) Special Assumpsit, (6) General Assumpsit, (7) Trespass, (8) Trespass on the Case, (9) Ejectment, and (10) Trover.

The Chapter VI pays particular attention to the most important prerogative writ, the writ of *habeas corpus*. This chapter examines the definition, origin, and the development of the *habeas corpus*. *Habeas Corpus Act* in the English legal history can be compared with the *Magna Carta* of 1215. When the *habeas corpus* was brought to America by the colonists, it took root in the U. S. A. and became the only common law writ written in the U. S. Constitution. The sources of this constitutional clause include its practice in England, *Address to the People of Quebec*, early state constitutions, *Ordinance of 1787 for the Government of the North-west Territory*, the colony charters and doctrinal writings. In U. S. history, Jefferson, Jackon, Lincon and George W. Bush all attempted to suspend the *habeas corpus*. As the outcome of the tradition of the separation of powers and the checks and balances, *habeas corpus* naturally faces its fate as the executive power dominates in the U. S. A.. The Boumediene v. Bush of 2008 temporarily saved the life of *habeas corpus*.

The Chapter VII (concluding chapter) deals with the historical value of the common law writs. The paper concludes that the writ system is of affirmative significance to the formation of the procedural law. And since the writ system requires specific forms of action and proper procedures while strengthening the priority of the procedure over the substantive rights, it plays a key role in the birth of the doc-

trine of "remedies precede rights". The common law writ system is also crucial to the development of the substantive law, practically the modern contract law, tort law, property law, and inheritance law. The path of the writs shows a process from the specific to the abstract, and this is well illustrated by the forms of action. In addition, the historical functions or influences of the common law writs can also be found in the following aspects, the formation of the legal profession, the perfection of the court system, the establishment of the centralization, the limitation of the monarchical power, the independence of judicature, and the Anglo-American legal education with its unique characteristics.

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