

SOME CONSIDERATIONS ON THE ORIGINS OF HABEAS CORPUS *

I.

"There is no book," wrote Professor Jenks a generation ago,¹ "which gives in succinct and intelligent form an account of the origin of this famous bulwark of our liberties."² He might have indicated the absence of any adequate description of the evolution of the writ of *habeas corpus* down to relatively modern times when it assumed the character now familiar to Anglo-American jurisprudence.³ This is not to say that *habeas corpus* has been a step-child of research, for on the contrary, a very considerable volume of literature stands in its name.⁴ But no one has yet essayed the task of exhausting the primary sources of medieval and early modern English law and history with this writ alone in mind. There is need, too, for some corroboration of those conclusions already published based upon more or less casual examinations of selections only of such original material.⁵ If, however, a definitive history of the writ is to be written it can only be done by a patient tracing of the evidence through centuries of English law and procedure.⁶ Even then an accurate understanding of its origins may not be possible, for much which may appear to be indigenous to the ancient common

*This article represents the first chapters in an extensive study of the writ from the earliest times down to the act of 1679, and the subsequent development in the early eighteenth century. Other articles appearing here and elsewhere will cover these periods. The whole was a thesis submitted to and accepted by the Committee on Graduate Studies, School of Law, Northwestern University, in partial fulfilment of the requirements for the degree of Master of Laws. At the time the present study was made, all of the published source materials, particularly those relating to the 12th and 13th centuries, were not available to the writer.

¹ Edward Jenks, *The Story of Habeas Corpus* (1902), 18 L.Q.R. 64: 2 Select Essays in Anglo-American Legal History 531.

² The phrase 'Bulwark of our Liberties' may have originated with BLACKSTONE, 3 Comm. 131; A variation is 'Palladium of our Liberties', see Jenks, *The Prerogative Writs* (1922-23), 32 Yale L.J. 533; Also Bentwich, *Habeas Corpus in the British Empire* (1911), 27 L.Q.R. 454. It has been used in praise of the jury system, see FIFoot, *ENGLISH LAW AND ITS BACKGROUND* (1932) 68.

³ 9 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1924-25) 109-25; Jenks, *supra* note 1; CHURCH *HABEAS CORPUS* (2d. ed. 1893), 2-53; HURD, *HABEAS CORPUS* (2d. ed. 1876) 66-90, 129-133; see *infra* note 5.

⁴ Jenks, *supra*, note 2, at p. 527.

⁵ Three very valuable papers in the field have not been available to the writer, Fry, *The Writ of Habeas Corpus*, (1838, out of print); Van Der Veen, *De Engelsche Habeas Corpus Act*, (Leiden, 1878); Solly-Flood, *History of the Writ of Habeas Corpus* (Mss. Royal Historical Society, London.) These have been examined and included in Jenks, *supra* note 1. One other very learned paper on the earliest phase of the writ is Fox, *Process of Imprisonment at Common Law* (1923), 39 L.Q.R. 46.

⁶ 1 STATHAM'S ABRIDGEMENT (Klingelsmith, 1915) 404, n. 37.

law owes not a little to the contemporaneous practices in medieval continental systems, and hence their prevailing judicial techniques would require investigation, if some absolute origin (were that possible) is desired.⁷

This paper does not pretend to satisfy these requirements. Rather, its object is to gather the threads of the writ's earliest history through what has already been published⁸ and to search somewhat more intensely among sources exposed by these considerable excursions.⁹

Much of what has been written has only led to further confusion,¹⁰ and it is therefore necessary to formulate and discuss the basic issues if there is to be any satisfactory understanding of *habeas corpus* and its early evolution.¹¹

II.

The writ of *habeas corpus* as we know it today^{11A} is largely concerned with the question of personal liberty and freedom from unlawful imprisonment of any kind.¹² Consequently, most approaches to the study of its history are influenced by the nature of its present function.¹³ There is, in other words, a tendency to associate the search for the origins and development of the writ with the evolution of the concept of "liberty", and the avoidance of imprisonment. But is the history of *habeas corpus* really, from its inception, the history of personal freedom? The first answer to this question is implied in an examination of the means available to the medieval Englishman to defend his bodily liberty against King and neighbour,¹⁴ the others, in the nature of the growth of the writ itself.

⁷ For influences of the contemporaneous continental systems on English law see 8 HOLDSWORTH, *op. cit.*, *supra* note 3, at p. 229; 9 *ibid.*, at pp. 219-33; 2 BRACTON, *DE LEGIBUS ANGLIAE*, (Twiss, 1879), introduction.

⁸ *Supra*, note 5.

⁹ For an example of writers accepting the dicta of secondary authorities without further examination, Glass, *Historical Aspects of Habeas Corpus*, (1934) 9 St. John L. Rev. 55.

¹⁰ *Ibid.*

¹¹ Inasmuch as this paper is but a part of a more extensive study of the history of the writ, it should be read as though it were leading up to that modern period when the writ took the shape in which it is known today. A further article will carry the search for Habeas Corpus onward a few centuries.

^{11A} HURD, *op. cit.*, *supra* note 3, at pp. 136-37.

¹² *Ibid.* See also *Secretary of State v. O'Brien*, [1923] A. C. 603; *Ex Parte Craig*, 282 F. 138 (C.C.A. 2d. 1923); *Mikell v. Hines*, 253 F. 817 (C.C.A. 4th 1919).

¹³ For this approach, see 9 HOLDSWORTH, *op. cit.*, *supra*, note 3; HURD, *op. cit.*, *supra*, note 3; CHURCH, *op. cit.*, *supra*, note 3.

¹⁴ No study of the criminal law of this period is intended except insofar as it concerns the question of release from imprisonment. This paper is concerned only with the first question asked above.

Any discussion of individual freedom from arbitrary restraints in those jurisdictions where the rules of English law prevail almost always has for its point of origin Magna Carta.¹⁵ This document besides evoking much rhetoric has been credited at various times with almost everything that forms the base of Anglo-American civil liberty.¹⁶ Until a generation or two ago legal historians were inclined to accept this tradition, but a more critical spirit has since prevailed and now the realities and limitations of Magna Carta are becoming more widely appreciated.¹⁷ So it was that *habeas corpus* had long been associated with the Great Charter. In fact, until Professor McKechnie and others dealt with the problem it had been generally believed that the Charter itself was the parent of the writ.¹⁸ Coke¹⁹ and Blackstone²⁰ accepted this conclusion and to them the evidence was in the 39th chapter,²¹ while others saw in the 36th chapter the germ of a writ which would protect the subject from every encroachment upon his freedom.²² But now it is generally agreed that there was in fact no strict connection between the writ and Magna Carta.²³ Moreover, it will subsequently appear that if there existed at the time a writ of *habeas corpus* it bore little resemblance to the instrument now in use and whose function as a guarantee against unlawful detentions is the quality which suggested association with the Charter.²⁴ At best the "liberty" represented by Magna Carta was a "liberty" which was intended to favour local, feudal action as against monarchical centralization. So the spirit of liberty which the

¹⁵ *Supra*, note 3; also 2 COKE, INST. 1-78; 1 BL. COMM. 127. For the Charter itself, see 1 STATUTES OF THE REALM (1810), 6-7; STUBBS, SELECT CHARTERS, (1900) 296-306; THOMPSON, MAGNA CARTA (1829) 63-101; MCKECHNIE, MAGNA CARTA (1905) 222-564.

¹⁶ "The whole constitutional history of England is a commentary on this Chapter." — STUBBS, *id.*, at p. 296; See also Masters, *The Writ of Habeas Corpus* (1912), 7 Ill. L. Rev. 15-29; THOMPSON, *id.* at p. 229; TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY (1929) 572.

¹⁷ "The predominant strain in the analysis of the Great Charter by modern scholars may be characterized as a skeptical reaction against the great constitutional claims for Magna Carta since the days of Coke." — Vinogradoff, *Magna Carta* c. 39, *Magna Carta Commemoration Essays* (1915), 79.

¹⁸ MCKECHNIE, *op. cit.*, *supra*, note 15, at pp. 156, 421-122; Jenks, *supra*, note 1.

¹⁹ 2 COKE INST., 52-53.

²⁰ 3 BL. COMM. 131.

²¹ "Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlegetur, aut exuletur, aut alicue modo destratur, nec super cum ibimus, nec super cum mittimus, nisi per legale iudicium parium suorum, vel per legem terrae."

²² 1 HOLDSWORTH, *op. cit.*, *supra*, note 3, at p. 57; ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND, (1935) 136.

²³ MCKECHNIE, *op. cit.*, *supra*, note 15, at pp. 156, 421-422.

²⁴ See the language of the court in *Bushell's Case* (1670), Vaughan 135-158; 6 St. Tr. 999; 3 Keble 322.

Barons sought to protect was hardly the same high sentiment which Coke²⁵ and Seldon²⁶ had in mind when they debated the merits of *habeas corpus*. For "Equality," as McKechnie has said,^{26A} "is a modern ideal" quite out of place amid the Baronial arrogance of medieval England. And so it is one thing to look back over the centuries and say that in the slow growth of English institutions there can be seen the relationship of one form to another, of *habeas corpus* and Magna Carta, but it is another and vastly different matter to look squarely at the particular institution under consideration, and to interpret it not in the light of a modern unity but rather in terms of its primitive context.²⁷ And when this is done to Magna Carta and *habeas corpus* the effect is to leave yet unanswered the origin of the writ.²⁸

Before leaving the Great Charter of John it is well to remember that at this period and for several centuries afterward, the medieval subject with political rights was not the rank and file Englishman. John's Charter no more intended to protect the villein and small tenant who made up the greater part of the population^{28A} than the Charters which preceded it²⁹ and those which followed.³⁰ The freeman to which this Charter alludes³¹ contemplated at most the freeholders, a special and minority class, thus excluding the "peasantry and villagers" of the time.³² Even at a considerably later period, Fortescue could regard the "unfree"^{32A} status as an accepted fact and yet speak of liberty and the laws of England in the same breath.^{32B} Altogether there should be no illusions as to the essential privilege³³ implied in the demands embodied in the

²⁵ (1627-28) 3 St. Tr. 133.

²⁶ *Id.*, at pp. 78, 94.

^{26A} MCKECHNIE, *op. cit.*, *supra*, note 15, at p. 135.

²⁷ POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 57.

²⁸ WINFIELD, *HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* (1921) 20.

^{28A} Seeböhm, *The Population of England before the Black Death* (1888), 4 *Fortnightly Review*, 98; Hatcher, *Magna Carta and the Jury System* (1935), 42 W. Va. L.Q. 3-6.

²⁹ For the first and second Charters of Stephen see, STUBBS, *op. cit.*, *supra*, note 15 at pp. 119-21; Charters of Henry 1 (A.D. 1100), Charter Henry II, see MCKECHNIE, *op. cit.*, *supra*, note 15, at pp. 565-570.

³⁰ Charters of Henry III, STUBBS, *id.*, at pp. 337-54; MCKECHNIE, *id.*, at pp. 581-89.

³¹ Caps. 1, 15, 27, 30, 34, 39.

³² MCKECHNIE, *op. cit.*, *supra*, note 15, at pp. 136-37, n. 1; 1 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (1899) 432: "The greater half of the rural population is unfree."

^{32A} 1 POLLOCK AND MAITLAND, *id.*, at p. 412.

^{32B} FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (Amos ed., 1825) 157.

³³ To the extent that the majority gained little from the Charters, it was privilege for those who did so benefit.

Charters throughout this period. In this period too, there was "as yet no powerful centralization of justice working through the kings courts".³⁴ Gradually through the fiction of "the King's peace" the extent of executive and judicial control increased and methods arose to meet new requirements.³⁵ Among these were the procedures by which the subject could obtain his release from imprisonment of a public or private nature; the writs *de odio et atia*, *de homine replegiendo*, and *de manucaptio* or *mainprize*. These writs have received much detailed attention and no purpose can be served by repeating the available learning.³⁶ But certain of their characteristics should be noticed to understand their relation to the problem of imprisonment and release and thus to that aspect of *habeas corpus*.

All three were very ancient and appear in the earliest registers,³⁷ although *de homine replegiendo* may have been the oldest since the very first registers of 1227³⁸ mention it but not the others; while they all are entered in another compilation of writs a generation later.³⁹ In this connection it is interesting to observe that the *de homine replegiendo* was introduced into Ireland as an available remedy (along with the other writs mentioned in this first register)⁴⁰ which suggests that by this time it was probably long in use in England: and since writs in English law were at the heart of the development of royal justice by means of selling the right to have the king take a particular matter "under his eye",⁴¹ the *de homine replegiendo* was probably at the very beginning of this extension of royal power over the administration of justice.

The *de homine* was a popular and most usual remedy to obtain a release from simple custodies.⁴² Practically all of the

³⁴ 2 POLLOCK AND MAITLAND, *op. cit.*, *supra*, note 32, vol. II, 586. See also Charles Johnson, *Royal Power and Administration*, in *The Legacy of the Middle Ages*, (Crump) 487-504. MADOX, *HISTORY OF THE EXCHEQUER*, (1711) 80.

³⁵ 1 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883), 185. See *infra*, note 195.

³⁶ See *infra*, note 195.

³⁷ Maitland, *The Register of Writs*, (1889-90) 3 Harv. L. Rev. 97, 167, 212, 2 Select Essays Anglo-American Legal History 549. Page numbers of the latter will be used in the following footnotes.

³⁸ Registrum Hibernium, Nov. 10, A.D. 1227. *id.*, at pp. 567-569. no. 35: English Register, (same date approximately) *id.*, at pp. 567-569. no. 24.

³⁹ Registrum Brevium (1236-1267 ?) *id.* 572-78 De Homine, No. 54; De Odio et Atia No. 110; Mainprize No. 112.

⁴⁰ 58 writs appear in this first known register, of 1227.

⁴¹ Maitland, *op. cit.*, *supra* note 37, at p. 579; MADOX, *op. cit.*, *supra*, note 34, at pp. 59, 80.

⁴² Jenks, *supra*, note 1, at p. 66.

older works are familiar with it,⁴³ and the Register of 1595 devotes to it two full folios.⁴⁴ It was a writ directed to a sheriff or to a private person commanding him to give up one imprisoned to another, upon bail.⁴⁵ But it was circumscribed by so many exceptions on its face that it could not be used for the most important imprisonments as in felonies, or by special command of the King, or his Chief Justiciar,⁴⁶ and it was probably used only in cases of private detentions or breaches of the peace not amounting to felony. In an earlier day the use of *replegiatus*⁴⁷ to replevy the imprisoned did not stop at felony or the other limitations, falling just short of homicide,⁴⁸ while it appears to have been possible in cases of treason.⁴⁹ Of course this was in the 12th century "when it was not common to keep men in prison for it was costly and troublesome", and with escapes from the sheriff a common occurrence bailing was regarded as desirable in almost every case.⁵⁰ But by the thirteenth century there was a general movement toward restrictions against prisoners and the efficacy of *de homine* was substantially reduced.⁵¹ Moreover, in this early stage the sureties were subjected to much potential hardship since they were made responsible with their "bodies" for the prisoner's attendance,⁵² a procedure which continued for several centuries, although by Hale's time it was treated as obsolete.⁵³ But as Maitland has said, the striking thing about the writ is the "obvious connection between Replevin and Liberty⁵⁴ the unity of which is secured by the fact that when a man is wrongfully deprived of his liberty he ought to be replevied."⁵⁵

Mainprize or *de manucaptio* is a writ of uncertain origin. It has been suggested that it is based on the "latter part" of

⁴³ LA VIEUX NATURA BREVIVM (1572), 41; FITZHERBERT NATURA BREVIVM (1718), 66; 3 BL. COMM., 128; 2 COKE INST. 186; RASTELL ENTRIES (1566).

⁴⁴ REGISTRUM BREVIVM TAM OGIRINALIVM QUAM JUDICIALIVM (YETSWERT, 1595), Fol. 77.

⁴⁵ *Supra*, Note 43.

⁴⁶ "Nisi Captum sunt per speciale praeceptum nostrum vel capitalis iustitiarum nostri, vel pro morte hominis, vel pro foresta nostra, vel pro aliquo alio recto, quare secundum consuetudinem Angliae non sint replegiabiles".

⁴⁷ 2 POLLOCK AND MAITLAND, *op. cit.*, *supra*, note 32 at p. 584.

⁴⁸ *Id.* 582.

⁴⁹ *Ibid.*

⁵⁰ *Id.*, 584, 586, citing Gloucestershire Pleas A.D. 1221, Pl. 245.

⁵¹ STATUTE WESTMINSTER I, (1275) 3 Ed. I c. 15.

⁵² 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 32 at pl 584.

⁵³ 2 HALE PLEAS OF THE CROWN, (1778) 125, "corpus pro corpore."

⁵⁴ MAITLAND, *op. cit.*, *supra* note 32, at p. 589.

⁵⁵ *Id.*, 587.

the Statute of Westminster I.⁵⁶ But an examination⁵⁷ points instead to the probability that it was well known and in common use before that time. It is chiefly concerned with obtaining bail for one imprisoned and properly bailable to be released on sureties known as mainpernors,⁵⁸ and it likely came into prominence as an effective method for obtaining a release after an appeal or indictment of felony.⁵⁹ Here again we find that effective administration required some restriction on its operation and this is what the Statute of Westminster I must have intended.⁶⁰

The fact is, however, that the sureties in *mainprize*, and bail in the *de homine replegiendo* came to be regarded as one and the same,⁶¹ and the "early difference was obscured", although the rules regarding the sureties in the first were supposedly much less exacting than in the second.⁶²

Again, the writ seems to have been an adjunct of other proceeding such as *odio et atia*,⁶³ since in a register of Henry III, it is treated as the method to obtain a release after the *odio et atia* has been found for the prisoner,⁶⁴ and this association continued throughout the registers and appears in the 1595 edition.⁶⁵ But of course it had an identity of its own and the same register lists five other forms.⁶⁶

Odio et atia^{66A} was a very ancient writ,⁶⁷ and widely used.⁶⁸ It has been established that it is the writ referred to in c. 36 of John's Charter, "the writ of inquisition of life or limbs",⁶⁹ mentioned by Bracton,⁷⁰ discussed in "The Mirror",^{70A} and

⁵⁶ Jenks, *op. cit.*, *supra* note 32, at p. 589.

⁵⁷ *Supra*, note 51.

⁵⁸ 3 BL. COMM., 128.

⁵⁹ 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 37, at 582.

⁶⁰ The title of the Act of 1275, *supra* note 57, reads "which prisoners be mainpernable and which not".

⁶¹ 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 37 at p. 589.

⁶² *Supra* note 52, 53. See also COKE, LITTLE TREATISE ON BAIL AND MAINPRIZE, 4 Inst. c. 31. 178, "Every Bail is a Mainprize but not every Mainprize is a Bail. . . . The Mainpernors were never liable with their bodies."

⁶³ See *infra*.

⁶⁴ Register of Henry III, *supra*, note 39.

⁶⁵ Registrum Brevium, *supra* note 44. Fol. 133.

⁶⁶ *Id.* Folios, 123, 268, 291, 131, 79, 80, 83.

^{66A} In the register of Henry III it is spelled 'Odio et Hatia'.

⁶⁷ Cases as early as 1202 appear frequently, and it was probably well known in Henry II's time. SELECT PLEAS OF THE CROWN, Pl. 25, 78, 81. (Selden Society vol. 1.). Also Winfield, *op. cit.*, *supra* note 28, at p. 17. The early cases refer to the writ as "per athiam".

⁶⁸ *Ibid.*

⁶⁹ MCKECHNIE, *op. cit.*, *supra* note 15 at p. 420, "brevi inquisitionis de vita vel membri."

⁷⁰ 3 BRACTON, *op. cit.*, *supra* note 7, Fol. 123, no. 6, 7, (Vol. 2, 293, 294).

^{70A} MIRROR OF THE JUSTICES (Selden Society, vol. 7, at 179 - 80).

confirmed in its connection with the Charter by the Statute of Westminster II.⁷¹ Its most common use was to obtain a release of one imprisoned on an appeal of homicide,⁷² which neither *de homine* or *mainprize* could do,⁷³ but it was not limited exclusively to homicide, which later writers like Blackstone⁷⁴ and Coke⁷⁵ assume, since there is evidence that early in the thirteenth century it had been granted frequently to obtain releases for a host of other felonies,⁷⁶ and Hale even at his late date seems to imply such wide employment of the writ.⁷⁷ In its method it differed materially from its two contemporaries. The others sought only a temporary release on bail, but this was directed to the sheriff to inquire whether the prisoner had been "appealed" in good faith or "out of spite and hatred".⁷⁸ It was concerned with the *bona fides* of the charge rather than with the actual committing of the offence.⁷⁹ To test this good faith, the appellee brought in jurors who determined that question alone.⁸⁰ If they found against the prisoner he was remanded and must stand his trial by battle or "be hanged forthwith";^{80a} but if malice in the appellor was found then the person charged might be freed.⁸¹ Later, however, he was not "wholly acquitted" but only bailed until the next eyre and the arrival of the King's justices.⁸² It is also believed that the writ was used to "substitute the sworn verdict of the jurors for the duellum" and, of course, when this became obsolete this subsidiary use disappeared.⁸³ There was no doubt as to its

⁷¹ (1285) 13 *Ed. I.*, c. 29. "But lest the parties appealed or indicted be left long in prison they shall have a writ of Odio et Atia like as it is declared in Magna Carta and other statutes."

⁷² POLLOCK AND MAITLAND, *op. cit.*, *supra* note 32, at pp. 587-88.

⁷³ *Supra*.

⁷⁴ 3 BL. COMM. 128.

⁷⁵ 4 COKE INST. 182.

⁷⁶ SELECT PLEAS, *op. cit.*, *supra* note 67. Pl. 25 (arson); Pl. 78 (harboring outlaws) Pl. 84. (robbery); pl. 86 (breaking and entering); pl. 88 (assault and robbery), Pl. 91, 92, 93, 94, 95, 104, 202, 203, for other examples.

⁷⁷ 2 HALE, HISTORY OF THE COMMON LAW (1794), pt. II, 95.

⁷⁸ "Propter Odium et Atiam." For forms of the writ see *supra* note 65.

⁷⁹ This is apparent on the face of the writ. POLLOCK AND MAITLAND, *op. cit.*, *supra* note 37 at p. 588.

⁸⁰ *Ibid.*; MCKECHNIE, *op. cit.*, *supra* note 15 at pp. 420-21; for a clear example of the procedure see SELECT PLEAS *op. cit.*, *supra* note 67, pl. 94. (page 50-51). Here the term is phrased "Verum vel Atia".

^{80a} PLEAS OF CROWN AT WORCESTERSHIRE A.D. 1221, pl. 1099 (Seldon Society, vol. 53, 544) "de bono et malo" is another form used here.

⁸¹ WINFIELD, *op. cit.*, *supra* note 28 at pp. 16-18; MCKECHNIE, *op. cit.*, *supra* note 15 at p. 423; POLLOCK AND MAITLAND *op. cit.*, *supra* note 32 at p. 588.

⁸² *Ibid.*

⁸³ MCKECHNIE, *op. cit.*, *supra* note 15 at p. 421; WINFIELD, *op. cit.*, *supra* note 28 at p. 21.

popularity^{83A} but it was expensive.⁸⁴ Later, the fee was abolished by John's Charter.⁸⁵ It was, however, the only method to have a release on bail for those charged with murder who otherwise would be imprisoned for many weary months until the verdict.^{85A} But it could not operate in cases where the prisoner lay confined at the suit of the king.⁸⁶

It is this writ of *odio et atia*, moreover, which many writers have assumed to be the source of *habeas corpus*.⁸⁷ This is a questionable position,⁸⁸ not only because the nature and methods of the writ bear little resemblance to the *habeas corpus* of modern times but as will be seen, the writ bore no likeness whatever to a contemporary instrument and more likely ancestor.⁸⁹

All three writs lingered on in the books beyond the point at which they seem to have been employed. The *de odio et atia* was in use in the fourteenth century,⁹⁰ and while there is no reason to believe that it was ever expressly discarded, the argument has been made⁹¹ that it was eliminated in 1354⁹² only to be revived in 1368.⁹³ But an examination of the statutes in question shows otherwise and it probably never suffered legislative destruction.⁹⁴ Statham⁹⁵ and Fitzherbert⁹⁶ do not mention it, although Cowell,⁹⁷ Coke⁹⁸ and the 1595 Register⁹⁹ all treat it as a then existing remedy. Even as late as Hale and Hawkins¹⁰⁰ it was regarded as available, but by the eighteenth century

^{83A} *Supra*, notes 67, 76.

⁸⁴ "Nothing was to be had for nothing" in Henry II and John's time, Maitland, *op. cit.*, 37, at 561.; TWISS, *op. cit.*, *supra* note 7 at p. lxii.

⁸⁵ "Nihil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris, sed gratis concedatur, et non negatur." cap 36.

^{85A} MCKECHNIE, *op. cit.*, *supra* note 15, at p. 422; Statute of Westminster II, c. 29, seems to imply as much.

⁸⁶ *Supra* note 46.

⁸⁷ *Supra* note 22.

⁸⁸ MCKECHNIE, *op. cit.*, note 15, at p. 421; WINFIELD, *op. cit.*, *supra* note 28, at p. 16.

⁸⁹ *Infra*.

⁹⁰ Y.B. (1313 - 14) 6 and 7 Ed. II, Eyre of Kent 1313, First Day (Seldon Society vol. 24 p. 7.) Toubeday (Judge) "All those concerned in pleas of the crown or in proceedings by *Odio et Atia*, who had been enlarged till the sitting of the Eyre by mainprize must be surrendered by their mainperners at the first day of the sittings."

⁹¹ 4 COKE INST. 42, 55.

⁹² 28 Ed. III, c. 9.

⁹³ 42 Ed. III, c. 1. It was revived by implication according to Coke, *supra* note 91, because this act repealed all acts against the Great Charter, which thus included this writ.

⁹⁴ 28 Ed. III, c. 1.

⁹⁵ 1 and 2 STATHAM, *op. cit.*, *supra* note 6.

⁹⁶ FITZHERBERT'S ABRIDGEMENT, (1577).

⁹⁷ COWELL'S INTERPRETER (1607).

⁹⁸ COKE INST. 182; 2 Inst. 42, 43, 55, 315.

⁹⁹ Registrum Brevium, *op. cit.*, *supra* note 44, fol. 133.

¹⁰⁰ HALE, *op. cit.*, *supra* note 77. 2 HAWKINS PLEAS OF THE CROWN (1785) sec. 28, p. 148.

the books considered it obsolete.¹⁰¹ Its importance, however, was that "it marked the transition from liberty to crime", and it was a writ, "for one who says he is imprisoned on a false accusation of crime".¹⁰²

Mainprize was known down to the 18th century. Statham,¹⁰³ Fitzherbert,¹⁰⁴ Cowell,¹⁰⁵ the Register¹⁰⁶ and Coke¹⁰⁷ all give it considerable attention, but Statham in citing several cases has none that go beyond 1400.¹⁰⁸ But cases are to be found in the 16th century.^{108A} An application was made for it in 1676, but the court refused it on the ground that the precedents cited were too old, none going beyond Edward III.¹⁰⁹

The *de homine replegiendo*, however, was in use long after its contemporaries had atrophied or disappeared. The writers in the 17th century¹¹⁰ were very familiar with it and cases appeared as late as 1700^{110A} and 1736.¹¹¹ In the latter, the language of the Lord Chancellor (Hensol) was strong enough to indicate the favour with which the writ was still regarded.¹¹² Moreover, Wilmot C. J. in 1758 believed that it was very much alive and not to be denied;^{112A} although there is no evidence of any case after this time. And, strangely, it was adopted by at least one of the United States of America, Maine, which found it useful enough to be retained to the present day,¹¹³ but here the required form bears only a faint resemblance to that used in the 17th century.¹¹⁴ Moreover, the cases arising under this

¹⁰¹ BLACKSTONE, *op. cit.*, *supra* note 20. No mention of the writ is made in the following books of the time; TREMAINE, *PLEAS OF THE CROWN*, (1703); HERBERT, *THESARUS BREVIVM* (1687); TOWNSEND, *COMMON LAW TABLES OF PRECEDENTS* (1667).

¹⁰² Maitland, *op. cit.*, *supra* note 37 at p. 595.

¹⁰³ STATHAM, *op. cit.*, *supra* note 95. Vol. 2, 868.

¹⁰⁴ FITZHERBERT, *op. cit.*, *supra* note 96. fol. 65; F.N.B. 249.

¹⁰⁵ COWELL, *op. cit.*, *supra* note 97.

¹⁰⁶ *Supra* note 66.

¹⁰⁷ COKE, *op. cit.*, *supra* note 75, at p. 178 *et seq.*

¹⁰⁸ Y.B. Hill. 2 Henry IV, p. 14, Pl. 10 cited in STATHAM, *supra* note

103. But, of course, Statham has few cases generally beyond this date.

^{108A} *Anonymous* (1537), Benloe 18.

¹⁰⁹ *Jenks' Case* (1776), 6 St. Tr. 1203-1207. All the precedent cited in the case by counsel for Jenks were about, time the of or before Ed. III.

¹¹⁰ COKE *op. cit.*, *supra* note 75, at 178 *et seq.*; HALE *op. cit.*, *supra* note 53 at cap IV, p. 124; *THESARUS BREVIVM op. cit.*, *supra* note 101 at 140; COWELL *op. cit.*, *supra* note 97; HAWKINS, *op. cit.*, *supra* note 100, at 149.

^{110A} LILLY'S ENTRIES (1758) 293.

¹¹¹ *Trebelock's Case* (1736), 1 Atk. 633.

¹¹² *Ibid.*: "It is an original writ of right granted on motion or petition without showing cause."

^{112A} Wilmot, *Opinions and Judgments*, 123, cited in 9 HOLDSWORTH, *op. cit.*, *supra* note 3, at p. 120 (note 6).

¹¹³ REV. STAT. MAINE, (1930), c. 115.

¹¹⁴ *Id.*, sec. 3.

statute do not go beyond 1862.¹¹⁵ But one modern writer at least believed the *de homine* a far more effective measure against imprisonment than the modern *habeas corpus*, and urged its use instead.¹¹⁶

These writs alone were available to the medieval subject to compel those who detained him to set him free. And it is interesting to observe how they "clustered" together in the registers.¹¹⁷ *De homine* remained throughout with the "Liberty and Replevin" group, which variety included the return of chattels and of villeins or the proof of a freeman.¹¹⁸ *De odio et atia* and *manu captio* along with *conspiratio* in the criminal group continued down through centuries of successive registers with more or less proximity.¹¹⁹ All, by the time of these registers, were writs *de cursu*,¹²⁰ released from the exacting charges of the previous century.¹²¹

Personal liberty then, in these early days, for all it may have been worth,¹²² had the above for its guardians. There is no mention anywhere at this time of a *habeas corpus* that is in any way concerned with the imprisonment and release. It is absent, of course, from the Registers of Originals, for it could never have had a place at the commencement of proceedings, which was the most obvious characteristic of the Original writs.¹²³ It must be concluded, therefore, that if there was a *habeas corpus* in this period, its character was profoundly dissimilar from the writ which later¹²⁴ would become so familiar as a judicial mandate to test the validity of a confinement, and had no part in the problem of detentions which was then and for several centuries

¹¹⁵ *Bridges v. Bridges* (1836), 13 Me. 408; *Guerney v. Tufis* (1853), 37 Me. 130; *Nason v. Staples* (1861), 48 Me. 123.

¹¹⁶ Anonymous, *Some Defects in the Law of Habeas Corpus*, (1855), 22 Law Rev., 149.

¹¹⁷ Maitland, *op. cit.*, *supra* note 37, at p. 570.

¹¹⁸ *Id.* at p. 564, the Irish Register (1227), No. 30. *De Nativo Habendo*: no. 31 *De Libertate Probanda*; no. 35 *De Homine Replegiendo*; *id.* at p. 568, English Register (about 1227) 17 *De Nativo Habendo*; no. 18 *De Libertate Probanda*; no. 21 *Replevin*: 24 *De Homine Replegiendo*; *id.* at p. 573, English Register (1236-37) no. 54, *De Homine Replegiendo*; no. 60 *Replevin*; no. 68 *De Nativo Habendo*; no. 69 *De Libertate Probanda*. Register (1595) no. 77 *De Homine Replegiendo*; no. 81 *De Replegiendo auerijs*; no. 87 *De Nativo Habendo*.

¹¹⁹ Register 1236-1267, no. 110 *De Odio et Atia*; no. 112, *Mainprize*, (no *Conspiratio* as yet) Register (1595) no. 133; *De Odio et Atia* with *Mainprize*; no. 134 *De Conspiratio*.

¹²⁰ Maitland, *op. cit.*, *supra* note 37 at p. 561.

¹²¹ MIRROR OF THE JUSTICES, *op. cit.*, *supra* note 70a.

¹²² *Supra*.

¹²³ Y.B. (1293) II Ed. 1, pl. 2 (Horwood 21 & 22 Ed. I, page 160-61), for a very early discussion of the difference between an original and a judicial writ. Cf. also Madox, *op. cit.*, *supra* note 34, at p. 59; Maitland, *op. cit.*, *supra* note 37, at p. 559.

¹²⁴ *Infra*.

afterward the exclusive concern of the aforementioned writs.¹²⁵ The search for *habeas corpus* becomes at this time, therefore, not so much a tracing of the path traversed by the concept of personal liberty and the methods devised for its protection, as an investigation into the source and development of that unique latin expression *habeas corpus*¹²⁶ as it makes its appearance in the language of English law.

But before leaving these writs, it is necessary to examine the claim that together with the modern *habeas corpus* they have been unique among western legal systems in that the liberty of the subject against an arbitrary state or individual has been provided for by special remedies. To this may be replied that the common law had no monopoly in political idealism, for some earlier systems were equally experienced in the use of methods to prohibit unlawful restraints. In Spain the jurists of the 11th and 12th centuries had already developed instruments to prevent "arrests without competent authority and condemnation except according to law".¹²⁸ Some municipal statutes and ordinances, and the Cortes of 1188 specifically refer to devices to protect the individual,¹²⁹ and by the 14th century the Spanish courts had achieved a considerable degree of independence against the executive and were able to protect subjects from monarchical caprice by an instrument of judicial command, "The Manifestation".¹³⁰

At a more ancient day, however, the Romans knew of a like device, for the Praetorian interdict *de homine libero exhibendo* was commonly used, in certain imprisonments.¹³¹ This right was available, however, only to a free man, *liber homo*,¹³² and it might be interesting to compare the *liber homo* of Rome with that of John's Charter.¹³³ Even more important is the fact that the interdict was effective only in cases of private detention and not where ordered by the state or for a crime.¹³⁴ Altogether Roman law was very severe against those who privately imprisoned others, and banishment was meted

¹²⁵ De Homine Replegiendo, De Odio et Atia, De Manucaptione.

¹²⁶ "You have the body."

¹²⁷ DICEY, *THE LAW OF THE CONSTITUTION* (1908) 203-226.

¹²⁸ Rafael Altimira, *Magna Carta and Spanish Medieval Jurisprudence*, *Magna Carta Essays*, *supra* note, 17, at p. 233.

¹²⁹ *Ibid.*

¹³⁰ HALLAM, *THE MIDDLE AGES*, 222; HURD, *op. cit.*, *supra* note 3, at p. 131.

¹³¹ PHILLIMORE, *PRIVATE LAW AMONG THE ROMANS* (1863), 182.

¹³² 2 ROBY, *ROMAN PRIVATE LAW* (1902) p. 225.

¹³³ C. 39 "Nullus liber homo capiatur." Cf. Stubbs, *op. cit.*, *supra* note 15, at p. 301; McKECHNIE, *op. cit.*, *supra*, note 15, at p. 436.

¹³⁴ ROBY, *op. cit.*, *supra*, note 132.

out to offenders.¹³⁵ Is it possible that the idea of a special proceeding where one is unlawfully detained reached English law from Rome through the medium of some canonist?¹³⁶ There is no doubt that the flourishing canonical law schools and their pupils influenced Bracton.¹³⁷ Why should it not be reasoned that the method of obtaining a quick release may have been thus introduced into English practice? But these are extrapolations which the evidence scarcely justifies. For one thing, the *de homine replegiendo* bears only a faint resemblance to the *interdict* and the latter's efficacy was only against private restraints. Again the technique behind the *exhibendo* was to free someone directly while the *replegiendo* was a replevin of the prisoner from another,¹³⁸ just as a chattel was replevied by its rightful owner. The ready acceptance therefore of this *interdict* as the true ancestor of *habeas corpus* (as some have said)¹³⁹ can only be done by ignoring the actual form, quality, and evolution of *habeas corpus*, and, a fortiori, if there was any relationship to be found between Roman and English practices it would be between the *interdict* and the *de homine replegiendo* since they have much more in common. But the most interesting feature of this ancient *interdict*, is that to this day it is in operation in one jurisdiction where it serves side by side with the modern *habeas corpus*. For the Union of South Africa, having first been administered by the Dutch, continues with much of the Roman-Dutch law which possessed the *interdict* to which has been added some of the technique and principles of English common law.¹⁴⁰ Moreover, it has been decided that a writ of *habeas corpus* as well as the *interdict* are available to an applicant in proper cases and that the judges of superior courts had jurisdiction to issue both.¹⁴¹ Thus, while Roman and English legal history have no certain answer to the possible kinship of the *interdict* and the writ, a modern political accident has compelled a union much more intimate than any in the past could have been.

¹³⁵ HUNTER, ROMAN LAW (1876) 910. "To shut up or imprison a man wilfully was punished with banishment by the 'Lex Julia de Vi'."

¹³⁶ PHILLIMORE, *op. cit.*, *supra* note 131.

¹³⁷ TWISS, *op. cit.*, *supra* note 7, at pp. lix - lx.

¹³⁸ Maitland, *op. cit.*, *supra* note 37, at p. 589.

¹³⁹ CHURCH, *op. cit.*, *supra* note 3, at pp. 2 - 3; PHILLIMORE, *op. cit.*, *supra* note 131; GLASS, *supra* note 9. The following extravagant claims for the Roman practice have been made by PIKE, HISTORY OF CRIME IN ENGLAND (1873), 17. "It is strange to find in the laws of a people which had always been familiar with slavery a regard for personal liberty such as was not to be discovered in English laws before the Habeas Corpus act was passed."

¹⁴⁰ 4 NATHAN, THE COMMON LAW OF SOUTH AFRICA (1907), 2343 - 45.

¹⁴¹ *Id.*, at p. 2344, *Rex v. Fourie*, 10 C. T. R. 199.

III.

The search for the writ, then, must be directed toward the expression *habeas corpus* itself rather than to a study of medieval criminal procedure. But there is no point at which it can be declared "here is the first occasion upon which a court or judge commanded '*habeas corpus*' and thus here it began". It has been said¹⁴² that the expression originated with the *Assize of Clarendon*¹⁴³ but an examination of the pertinent clause¹⁴⁴ fails to reveal any *habeas corpus* or other similar phrase. At the most there is a direction to the sheriff as to the disposition of criminals pending the arrival of the justices, but not specifically to "have their bodies" present.¹⁴⁵

Where, then, shall the start be made? Shall it be with Pollock and Maitland when they say of the end of the thirteenth century "those famous words *habeas corpus* are making their way into divers writs"?¹⁴⁶ There is no doubt that the beginnings must be much earlier and the learned authors recognize this when they find that according to Bracton *habeas corpus* was a part of the mesne process in personal actions at least as early as the first quarter of the thirteenth century,¹⁴⁷ and that in his scheme of procedure he had placed a *habeas corpus* between *attachment* and *distress*.¹⁴⁸ The significant fact is that there is a *habeas corpus* at this time and, in one aspect at least, it is concerned with the civil process. Moreover, taking the words *habeas corpus* literally, they could have been made to fit any number of situations where the courts desired to issue commands to have particular matters attended to, and this is precisely what occurred in the thirteenth century.

But first let Bracton's Note Book¹⁴⁹ tell its story. Here we find how frequently at this time the words *habeas corpus* are to be found in the midst of actions. The examples are

¹⁴² JENKS, *supra* note 2, at 524.

¹⁴³ For the *Assize of Clarendon* see STUBBS, *op. cit.*, *supra* note 15, at p. 143.

¹⁴⁴ Clause 4.

¹⁴⁵ "Et vicecomites illos ducant ante Justitias", is the only phrase in the passage that could possibly be construed as having a connection, with the later command to "have the body".

¹⁴⁶ 2 POLLOCK AND MAITLAND *op. cit. supra* note 32, at 586-87.

¹⁴⁷ *Id.*, at p. 593. The following is Bracton's scheme to compel the appearance of the defendant. (1) summons, (2) attachment by pledges, (3) attachment by better pledges, (4) Habeas Corpus, (5) nominal distraint, (6) lesser distraint, (7) grand distraint, (8) Exaction and outlawry.

¹⁴⁸ Bracton's Note Book (1887) (referred to hereafter as B.N.B.). The following pleas have a *habeas corpus* among their processes and will be examined later. Pl. 526, 527, 1370, 1376, 1407, 1408, 1420, 1421, 1446. mentioned, *ibid.* Maitland (note 4).

¹⁴⁹ *Ibid.*

numerous and those which are here investigated account only for a very small part of the appearances they made throughout the cases.

Bracton had evolved a scheme of processes which had the *habeas corpus* as a separate item on the list of the plaintiff's remedies to compel the defendant's appearance,¹⁵⁰ and a close examination of the cases reveals that the court was simply exercising its power of judicial command to force the appearance of an unwilling defendant, something which neither summons nor attachments by pledges and better pledges had been able to do. Take the first¹⁵¹ and second cases.¹⁵² In both there has been a plea, but the plaintiff has been unable to compel the defendant's appearance "et Hugo (the defendant) non venit et pluries fecit defaultas. Et ideo vicecomes *habeat corpus* eius a die etc. . . ."¹⁵³ Again, in the second, "Et Alicia (defendant) non venit etc., et pluries facit defaultas et testatur quod languida est nec potest intinerare. Preceptum est vicomtes quod *habeat corpus* eius"¹⁵⁴ Both of these cases are dated 1231¹⁵⁵ but many older ones are cited subsequently. For example there is the case eleven years earlier where the sheriff was ordered to have an Abbey and Prior before the court on a day certain but here the word *corpus* is for some reason not used and it is simply directed to the person's name.¹⁵⁶ Again on the same date there is an interesting case of Isaac the Jew of Norwich who being summoned to answer a plea comes not and because Isaac is a Jew and not having land in fee "per consilium curie preceptum est vicecomiti quod *habeas corpus* eius tali die etc. . . ."¹⁵⁷ But here the order to "have the body" is not by a particular judge but rather "per consilium curie". Another case sets out that the defendant has not come and after several attachments and many pledges the sheriff is therefore ordered that he "have his body".¹⁵⁸ Another of the same time ordered the sheriff "quod *haberet corpus* eius" but not being able to find the defendant the sheriff is next ordered to distrain

¹⁵⁰ *Supra* note 148.

¹⁵¹ B.N.B. *op. cit.*, *supra* note 149, Pl. 526.

¹⁵² *Id.*, p. 527.

¹⁵³ Pl. 526. "And Hugo comes not and maketh several defaults. And therefore let the Sherrif have his body."

¹⁵⁴ Pl. 527, "and Alicia comes not and maketh several defaults. And therefore let the Sherrif have his body."

¹⁵⁵ B.N.B., *op. cit.*, *supra* note 149, Vol. 2, 340-341.

¹⁵⁶ *Id.*, Pl. 1370. Trinity, 1220) A.R. 4) "quod habeat ipsos Abbatem et Priorem tali die. . . ."

¹⁵⁷ *Id.*, Pl. 1376.

¹⁵⁸ *Id.*, Pl. 1407, (A.D. 1220).

all the lands and chattels of the defendant.¹⁵⁹ All of which points to the merit in the Bractonian system of a *habeas corpus* between attachment and distress, as the above two cases when read together reveal. Another report has the sheriff "*habeat corpora eorum*" where the pledgors cannot be found.¹⁶⁰ The next case is interesting because it spells out the abbreviations in the command to the sheriff "*Habeat corpora eorum etc., ad audiendum iudicium suum et ad ostendendum quare non fecerunt sicut eis preceptum fuit etc.*"¹⁶¹ So we have here, in effect, an *habeat corpora ad audiendum et ostendendum*, whose purpose is obviously to have the defendant hear the judgment of the court and equally to have the defendant "manifest" to the court the reasons for not obeying its previous commands, and it bears a striking resemblance to the *Habeas corpus ad audiendum* that is to be found in the form books of the 17th century.¹⁶²

From all this it may be concluded that *habeas corpus* in the middle 13th century was a familiar command issued as a mesne process in actions seemingly where force was not alleged¹⁶³ but where every method save distraint and outlawry had failed to compel the party's appearance to the summons. It was almost the natural way in which the King's judges, becoming gradually more powerful,¹⁶⁴ would issue their commands to get a particular act done. And one of the most vital matters with which they had to concern themselves was to get defendants, without whose presence their assertion of Royal justice was meaningless, before their courts. But in these civil actions *habeas corpus* was definitely limited to the mere producing of the party as ordered by the court; nothing was said whatever as to detention because no detention had taken place or was intended at this point. All that the court and the command was concerned with was the production of the defendant's body at a time and place certain, to answer to the court or a party on matters already set in motion. But as to "cause" there was none and could be none since the command had nothing to do with imprisonment in these cases.¹⁶⁵

¹⁵⁹ *Id.*, pl. 1408.

¹⁶⁰ *Id.*, Pl. 1420.

¹⁶¹ *Id.*, Pl. 1421.

¹⁶² *THESARUS BREVIVM*, *op. cit.*, *supra* note 101, at p. 132.

¹⁶³ But see a very interesting case in Bracton's Note Book, Pl. 85 where in an action for 'trespass vi et armis'; a writ '*habeat corpora eorum*' was issued.

¹⁶⁴ STUBBS, *op. cit.*, *supra* note 15, at p. 141. See *infra*.

¹⁶⁵ *Supra*.

Soon after this period, probably in the second half of the 13th century, this Bractonian process,¹⁶⁶ which has a separate *habeas corpus* between *attachment* and *distress*, seemed to disappear and the *distress* itself contained an added command "*quod distringat* etc. . . . *et habeat corpus*" thus combining *distress* and production of the body in a single order,¹⁶⁷ a form which continued until the 17th century.^{167A} Then the Statute of Marlborough¹⁶⁸ and Statute of Westminster II¹⁶⁹ did much to eliminate the many steps between the first attachment and last distress including, presumably, any intermediate *habeat corpus*. And when the process set out by Britton¹⁷⁰ on the same point is examined, no such "having the body" is mentioned. It is not unlikely that this practice may have gradually diminished because it was impossible for the sheriff to go out on the day the body was to be brought and actually find the party; since this *habeas corpus* would only "justify the sheriff in arresting the defendant when court day was approaching in order to bring him into court,"¹⁷¹ but not to take the defendant's body and detain it.^{171A}

The expression *habeas corpus* is thus to be found everywhere among the common pleas¹⁷² at this time.

The Court of Exchequer, too, was familiar with *habeas corpus* as a convenient method to have its commands obeyed, and throughout its records after the second quarter of the thirteenth century the writ is present in a variety of forms. In the very early memoranda rolls¹⁷³ of Henry III¹⁷⁴ are many entries of *habeas corpus* side by side with writs of summons, *venire facias* and *pone per vadium*. Again, an "*habeas corpus ad respondendum* and an interesting "*habeas corpus coram baronibus ad respondendum*"¹⁷⁵ are reported in two cases in 1236.¹⁷⁶

¹⁶⁶ *Supra* note 147.

¹⁶⁷ Northumberland Assize Rolls, pp. 51, 59, 60, 178, 199, etc., cited in 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 32, at p. 593 (note 4).

^{167A} *Registrum Brevium Judiciale*, *op. cit.*, note 44, Fol. 1.

¹⁶⁸ (1267), 52 Henry III, c. 12.

¹⁶⁹ (1235), 13 Ed. I, c. 14.

¹⁷⁰ BRITTON, (Nicholas 1901) 125-34.

¹⁷¹ 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 32, at p. 593 (note 4).

^{171A} FOX, *supra*, note 5, at pp. 47-49, for an exhaustive discussion of this process particularly the effect of the *distringas*.

¹⁷² PLEAS AND ASSIZES AT LINCOLN, July 1219, Pl. 885 *et seq.* (Selons Society vol. 53 at p. 423). Here in an Assize Mort d'Ancestor, the sheriff is ordered "to have the body of the defendant for default of recognitors."

¹⁷³ Memoranda Rolls were "a known and established form of exchequer record". SELECT CASES IN THE EXCHEQUER OF PLEAS. Introduction, xxix (Seldon Society, vol. 48).

¹⁷⁴ *Ibid.*, (about A.D. 1220).

¹⁷⁵ *Id.*, at p. xlvi.

¹⁷⁶ *Id.*, at p. xlviii.

By 1259 the memoranda rolls¹⁷⁷ have multiplied in volume from a mere three score of entries to some five hundred and forty, and many are orders to produce bodies of defendants by *habeas corpus*.¹⁷⁸ But the most interesting development of the *habeas corpus* in the Exchequer was bound up with the exchequer practice in early times that "any writ original or judicial which could issue out of the Exchequer might be replaced by a Bill".¹⁷⁹ This could only be done where the sheriff or officer ordered was of the City of London or the County of Middlesex and to them the Exchequer frequently issued *Bills of habeas corpus*.¹⁸⁰ But when the formative stages of Exchequer pleading and procedure had been passed this practice seems to have disappeared.¹⁸¹

But was this early *habeas corpus* confined only to civil pleas? Did it have no place in the criminal procedure of the time?^{181A} Most of the writers would seem to infer as much and those who have recognized its presence and operation at this early period have done so only within the above limitations.¹⁸² But if this was true and the *habeas corpus* of the twelfth and thirteenth centuries was thus restricted in its use, how then account for a case appearing earlier than any of the above cited pleas, in 1214, which is a *criminal plea* and in the language of whose report at least three varieties of the command are to be found.¹⁸³ The case concerns an appeal against one Baldwin Tyrell by Ranulf of Devonsby and Gilbert of Germunville for "denouncing the King's death",¹⁸⁴ and the sheriff is ordered "*quod haberet coram domino Rege corpus Baldewini Tyrell ad respondendum* (R. and G.) *de appello*." ¹⁸⁵ On the proper day the sheriff produced Tyrell but the appellors failed to appear even after an eight day wait by the appellee and the court. And the sheriff was this time commanded "*quod haberet ibi corpora R. and G. ad proseguendum appellum suum*".¹⁸⁶ Following this the appellee proceeded to

¹⁷⁷ *Ibid.* 43 & 44 Hen. III.

¹⁷⁸ *Id.*, at p. lvii.

¹⁷⁹ *Id.*, at p. cxxxi.

¹⁸⁰ *Id.* at p. cxxxii.

¹⁸¹ *Ibid.*

^{181A} The writer does not mean to draw any sharp line between criminal and civil proceedings at this early period.

¹⁸² 2 POLLOCK AND MATTLAND, *op. cit.*, *supra* note 32, at p. 593; JENKS, *loc. cit.*, *supra* note 1; 9 HOLDSWORTH, *op. cit.*, *supra* note 3, at p. 105.

¹⁸³ *Tyrell's Case*, Trin. A.D. 1214, SELECT PLEAS OF THE CROWN, vol. 1, Pl. 115, (Seldon Society Vol. 1, 67-75).

¹⁸⁴ "*De denunciatione mortis domini regia*", apparently an early form of treasonable utterance. See *infra* note 195.

¹⁸⁵ "To have the body of Baldwin Tyrell before the court of our Lord the King to answer the appeal of R. and G."

¹⁸⁶ "That he should have their bodies (Rand G) to prosecute the appeal."

attack the good faith of his accusers and charged that they appealed against him "per athiam" (out of spite) and the early form and operation of the well known writ *de odio et atia*¹⁸⁷ is to be seen in this plea. Finally the court after hearing evidence apparently in the absence of the appellors issued a last command to the sheriff "*quod haberet corpora eorum (R. and G.) . . . et habeat corpus Gaufridi Coffin (another party involved) ad audiendum judicium suum.*"¹⁸⁸

There are, it will be observed, three variations of the familiar command to "*have the body*" in this case and they have to do both with compelling the presence of the accusers no less than the accused. The case was tried more than a year before John's Charter was signed¹⁸⁹ and it may be presumed from the familiarity with which the King's court sitting in pleas of the crown used the command, that it had done so for many years in similar pleas.

Without this case or another akin to it (and there are probably many to be found) it might have been presumed that while *habeas corpus* was well known to the clerks and courts its use for some reason had been confined to only one branch of the judicial administration—the civil process.^{189A} But with it, and the frequency with which the court resorts to the command to achieve its ends in the above illustration the conclusion is irresistible that probably from the second half of the 12th century on the command to a proper officer or person "to have the body" of someone desired by the court applied irrespective of the nature of the plea. Every branch of the judicial process of the day knew of it as a ready device to compel the persons or parties to pleas, civil and criminal, to appear if the initial processes failed to achieve the purpose.¹⁹⁰ For the *habeas corpus* was always a command issued after some proceedings had been commenced and usually when they were well on their way but through the contumacy of an evading party the cause was being delayed. It never, like the summons, put the courts into motion, but like the summons it was employed to have a particular party appear. In the former case this appearance was voluntary, but with the *habeas corpus* the very words of the command charged the party so ordered with insuring the presence

¹⁸⁷ *Supra*.

¹⁸⁸ "That he have their bodies and have the body of Geoffrey Coffin to hear judgment. . . ."

¹⁸⁹ June 15, A.D. 1215. But see McKECHNIE, *op. cit.*, *supra* note 15, at p. 49, for a discussion of this date as the true date of signing.

^{189A} See *supra*, note 181A.

¹⁹⁰ *Supra*.

of the person named in the writ. So that by the middle of the thirteenth century the courts, for whatever the purpose, are continually availing themselves of this direct command to their sheriffs and other officers both by writ as well as "by word of mouth"¹⁹¹ to have before them a defaulting defendant,¹⁹² an escaping accused¹⁹³ or a spiteful accuser,¹⁹⁴ so that justice may be done^{194A} and the *King's Peace* maintained.¹⁹⁵

But it should be observed that in criminal matters at this time the *habeas corpus* is only a command "to have the body" and nothing more. There is no word about cause and no suggestion of an arrest or a detention for which the cause is an explanation. Such a form must await a much later date. Not that the writ had not been used where someone was already detained, for in *Tyrell's Case*¹⁹⁶ the appellors were in custody at the time the *habeas corpus ad audiendum judicium*¹⁹⁷ was issued and the sheriff was ordered to bring them to Westminster. But here the fact of the detention was only accidental, as it were, and incidental to the principal object of the writ which, in this case, was to have R. & G. delivered from custody at the particular time and taken before the justices. In most cases, however, there was no detention to begin with and the person to be delivered was merely apprehended "when the court day was approaching in order to bring him into court".¹⁹⁸ But at a much later date the important clause of the writ was the statement of the arrest and detention and the cause therefore. So that the nature and function of this early—perhaps the earliest^{198A}—*habeas corpus* is, in view of the above, essentially simple, and the search for the development of the writ may thus pass to another phase.

¹⁹¹ "Praeceptum Fuit in Banco" (it was commanded from the Bench). These words have been translated to imply 'by word of mouth'. Cf. *PLEAS OF CROWN*, *op. cit.*, *supra* note 183, at p. 75.

¹⁹² *Hugo's Case*, *Supra*, note 155; *Alicia's Case*, *supra*, note 156.

¹⁹³ *Tyrell's Case*, *supra*, note 183, at p. 67.

¹⁹⁴ *Id.*, at p. 68.

^{194A} The growing power and independence of the King's Judges at this time is evidenced by the refusal of the Judges to outlaw Robert de Burgh although the King had so demanded, cf. 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 32, at p. 587.

¹⁹⁵ *Tyrell's Case*, *supra*, note 183, at p. 71, "And Baldwin comes and defends the breach of the King's peace." Throughout the case both sides always direct their arguments to the question of the Breach of the King's peace. The inference in the charge of "Denouncing the King's death" is that to breach the peace while the King was dead was no crime since he must be alive to preserve it, but when "the King was murdered or so hemmed in by his enemies that he would never escape", the liability for breaches of *His* peace disappeared. It was *His* peace in a very real sense.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Supra*, note 188.

¹⁹⁸ 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 32, at p. 593, n. 4.

^{198A} See *infra*.

Before leaving this period, however, it is necessary to examine the contention that as early as John there was in the making a separate process directed against private imprisonments, which process is the probable ancestor of the modern *habeas corpus ad subjiciendum*, rather than the *habeas corpus* in its many varieties as discussed above.¹⁹⁹ The argument is based on two writs of the time of John both of which are directed against private individuals who have under their power another for whose deliverance the writ is issued.²⁰⁰ Neither writ contains any such phrase as *habeas corpus* and merely declares that the parties are summoned to answer a charge of having someone "under their power". It is submitted that to interpret the later *habeas corpus* in this light is to give the writ a functional history which it did not have.^{200A} These writs differ but little in their intent from the *de homine replegiendo* and it would be just as well to argue that the *de homine* itself was the ancestor of *habeas corpus*, or that the modern *habeas corpus* had only a terminological relationship to the writ of the same name in the thirteenth century.

IV.

If the foregoing has been short of a definitive account of the early character of *habeas corpus*, the nature of the subject and the relevant and available materials are such that precision is scarcely possible. Two points, however, are clear: first that the writ was well known and used for a variety of purposes by the end of the twelfth century, and second, that it was a valuable aid to the King's courts in their struggle to extend Royal judicial authority over and against the local and franchise courts,²⁰¹ whose authority for these and other reasons was declining rapidly by the time of Edward I.²⁰² Examples of this use of the writ are extant throughout the period and take the form of a command by the King's courts to have the body of a defendant whose plaintiff would otherwise seek the justice of his local court.²⁰³

It is now necessary to examine the writ as it developed from the end of the thirteenth century down through the first half

¹⁹⁹ Fox, *supra*, note 5, at pp. 58 - 59.

²⁰⁰ *Id.*; 58: ses appendix, writs no. 2 and no. 3.

^{200A} "Our forefathers were not scientific. . . ." Maitland *op. cit.*, *supra* note 37, at p. 596.

²⁰¹ 9 HOLDSWORTH, *op. cit.*, *supra* note 3, at p. 109.

²⁰² 1 HALE, *op. cit.*, *supra*, note 77, at p. 274; but cf. 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 32, at p. 586 "As yet there is really no powerful centralization of justice."

²⁰³ *Supra*.

of the fourteenth, and it is at this point that an interesting problem arises. For, curiously, during this period the writ made only infrequent appearances,²⁰⁴ a fact which has led Professor Jenks, to conclude that the writ as it had been known and employed to compel the presence of parties, had been supplanted for the time being by some form of the writ of *capias*²⁰⁵ and that the *capias* is the mould in which the *habeas corpus* is fashioned for a great part of the fourteenth century. In further support of this theory he submits that unless the *habeas corpus* was at some period the *capias*, it is impossible to explain how it was that at a later period the "King's writ should be used to defeat the King's orders".²⁰⁶ Moreover gaolers could demand at a later day the alias and pluries *habeas corpus* but this was so only because the original *habeas corpus* had been a *capias*, "to arrest someone", and the sheriff might have had considerable difficulty, so repeated orders were issued.²⁰⁷ Finally, "the more one studies the ancient writs of *habeas corpus* the more clear grows the conviction that whatever may have been its ultimate use, the writ of *habeas corpus* was originally intended *not to get people out of prison but to put them in it*".²⁰⁸ This thesis however, has been challenged by another competent scholar—Sir John Fox—who points out that *habeas corpus*²⁰⁹ and *capias* were by their very terms dissimilar, since the former was a mere command to have the body on a specific day before the court, while the latter empowered the sheriff to take the person named.²¹⁰ His argument is based on the fact that the *capias* was a process of arrest and imprisonment but that there was no arrest or imprisonment at common law in actions where force was not alleged, and since it was in these actions that *habeas corpus* was chiefly employed (to have

²⁰⁴ A cursory examination of the Year Books of Ed. II and early Ed. III yield nothing in the way of the expression *Habeas Corpus*. The writer must admit however, that the inspection in this case was very limited and that a more patient examination of the pleas might reveal some interesting information. Nevertheless it is a curious fact, that a casual glance at the records of 75 or a hundred years previous finds them abounding in examples of the writ.

²⁰⁵ The *capias* in the form of the '*capias ad respondendum*' is the form here discussed. It was the original form of the writ, and upon its issuance the others depended, as it was early held "that a man shall not have a *ca' sa'* unless the *Capias* lies in the original". Y.B. (1401), 2 H. IV, Mich. Fol. 6, Pl. 24; cf. 2 STATHAM, *op. cit.*, *supra* note 6, at p. 968.

²⁰⁶ Jenks, *supra* note 1, at pp. 64-65.

²⁰⁷ Jenks's, *supra*, note 1, at p. 75.

²⁰⁸ *Id.*, at p. 65; which was the purpose of the *Capias*, cf. *supra*, note 205.

²⁰⁹ The *habeas corpus* referred to is, of course, the *habeas corpus ad respondendum*.

²¹⁰ Fox, *loc. cit.*, *supra* note 5.

defendants appear) the *habeas corpus* could not have been, and was not in fact, a process of imprisonment or arrest, and without so being, it cannot be identified with the writ of *capias* whose essential quality was that it gave the sheriff the right to arrest and keep the prisoner.²¹¹

An examination of the authorities relied upon by Professor Jenks and those of Sir John Fox gives the latter's case a considerable margin of victory. Professor Jenks receives his best support from Reeves²¹² who points out that the original *habeas corpus* which came between *attachment* and *distress* was nothing but a process of arrest,²¹³ and further that Coke was wrong in his assumption that without force being alleged in an action there could be no arrest.²¹⁴ An examination of Reeves' authorities are of little assistance and the weight of precedent is preponderantly against the theory of imprisonment at common law in actions without force, and therefore equally against the synonymity of the *habeas corpus* and the *capias*. As late as Coke it was laid down that the body of the defendant was not liable for execution at common law,²¹⁵ and other cases have likewise held.²¹⁶ Moreover, arrest was not a common method in medieval days "and the courts still prefer outlawry" (for) "arrest was made difficult and almost impossible by the county barriers".²¹⁷ Again the *capias* probably developed after the first *habeas corpus*²¹⁸ for some of the early records, although familiar with the command to "have the body", do not at this early period contain the expression *capias*.²¹⁹ Hale was convinced of its slow development before it came to be applied as a method of arrest to most personal actions²²⁰ and he insisted that at common law only in a few exceptional circumstances would it issue.^{220A} Blackstone, too, accepted limitations on arrests at common law,²²¹ and these writers were

²¹¹ *Id.* at pp. 46 - 49. 9 HOLDSWORTH, *op. cit.*, *supra* note 3, at p. 109, n. 1, accepts this view.

²¹² REEVES, HISTORY OF ENGLISH LAW (2d. 1787).

²¹³ *Id.*, vol. I. at 480 - 488, particularly p. 483.

²¹⁴ *Id.*, vol II. at 439. "the sheriff was commanded 'quod habeat corpus' to take the body".

²¹⁵ *Hobart's Case* (1584), 3 Co. Rep. 116.

²¹⁶ *Foster v. Jackson* (1614), Hob. 52, 61.

²¹⁷ 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 32 at pp. 583 - 4.

²¹⁸ *Id.* at p. 593.

²¹⁹ See SELECT PLEAS OF THE CROWN, *op. cit.*, *supra* note 183; Rolls of the Justices in Eyre, *op. cit.*, *supra* note 172.

²²⁰ HARGRAVE, TRACTS (1787), 359. See also POLLOCK AND MAITLAND, *op. cit.*, *supra* note. 32 at p. 594.

^{220A} *Ibid.*, (a) vi et armis, (b) The King's debts, (c) Contempt of court or deceit, (d) Pleas of the crown.

²²¹ 2 BL. COMM., at p. 281.

supported by ancient authorities such as Fleta^{221A} and Britton,²²² while Bracton (on whom Reeves depended)²²³ is only such authority if it is remembered that when Bracton set out his scheme with a *habeas corpus* before distress he was declaring not so much the practice in every case but rather what it ought to be.²²⁴

Hence, whatever may be the relevance of these polemics one conclusion is clear, that although at certain periods and in some aspects there is a marked resemblance between the operation of *habeas corpus ad respondendum* and the *capias*, to argue that they ever became substituted for each other is to ignore the peculiar qualities which gave to each a very definite identity.

V.

Fifty years ago John Chipman Gray writing the preface to his first edition of the Rule against Perpetuities made the significant suggestion that "the chief need is for books on special topics, chosen with a view, not to their utility as the subjects of convenient manuals, but to their place and importance in the general system of law. . . . Such a book should deal with the whole of its subject, its history, its relation to other parts of the law, its present condition, the general principles which have been evolved and the errors which have been eliminated in its development, and the defects which still mark its logical symmetry, or, what is of vastly greater moment, lessen its value as a guide to conduct."²²⁵ This exacting standard he more than approached with a work that became a key to unlock the law of real property. And it is such a standard which should be required of an adequate and definitive study of *habeas corpus*. But the necessary materials have yet to be completely exposed before the undertaking would be possible. For, in truth, how little it is we know of the first days of the writ. How much did this technique—commanding someone capable of executing the court's desire to have another before it—owe to the practices and legal tradition of the people whence came the Conqueror? And how much in turn did the Normans learn from their teutonic neighbours? We do know that "In that process of fusion which during the twelfth and

^{221A} FLETA (Seldon, 1647), Lib. II, c. 65, sec. 15-18, p. 142.

²²² BRITTON, *op. cit. supra* note 170.

²²³ I. REEVES, *op. cit. supra* note 212, at p. 483.

²²⁴ FOX, *supra* note 5, at p. 50; POLLOCK AND MAITLAND, *op. cit. supra* note 32, at p. 593.

²²⁵ GRAY, PERPETUITIES (3rd Ed. 1915), vii.

thirteenth centuries juxtaposed and blended Germanic and Romano-Canonical institutions to form the procedure of the English Common law, the Germanic law contributed the preponderant element".²²⁶ To the ancient methods of the Germanic hearing, the familiar demurrer owes much of its development in English law.²²⁷ To the Germanic customs we turn again for the earliest kin of the later English use and trust,²²⁸ and the continental *Salman* was more than similar to the executor in the law of Glanvil's time.²²⁹ Some day in the future when comparative legal history reaches its deserved position it may be found that much more in English law is owed to the scattered customs and legal methodology of Western Europe than the common lawyer has been willing to admit.

Against this background of comparative law and history should be placed the detailed research into the records and writs of the twelfth and thirteenth centuries. Only then will a complete and accurate picture of *Habeas Corpus* be obtained.

But with what material has been available certain conclusions are rather impressive. First, the method of *habeas corpus* was probably familiar to the judges of Henry II and afterwards. Second, it was essentially a technique for getting something done which the ordinary processes of the courts apparently had been unable to do. But the quality of the writ which is most suggestive is its dependancy entirely upon the command of the court. For here we see the insignificant extension of Royal authority through the administration of the royal courts. The stronger the King's judges became in a relatively decentralized and anarchic feudal society, the more could they seek to impose their will. And what was more natural that the exercise of that will should take the form of *personal* commands from these same judges. So the process of centralization and the extension of Royal authority is indissolubly linked with effectiveness of instruments devised to enforce that power through the courts of the King. *Habeas corpus*, then, was at the very heart of the rise of a centralized and powerful monarchical order. And if it was so in England, why not the same process in Normandy where a measure of

²²⁶ Millar, *The Fortunes of the Demurrer* (1936), 31 Ill. L.Rev. 429, at p. 430.

²²⁷ *Ibid.*

²²⁸ O. W. Holmes, *Early English Equity*, (1884) 1 L.Q.R. 162; Ames, *The Origin of Uses and Trusts* (1906-7), 21 Harv. L. Rev. 261.

²²⁹ *Ibid.* For the older view that the Roman *fidei commissum* was its ancestor, see 4 KENT COMM. 290-291; 2 BL. COMM. 328; SANDERS, *USES AND TRUSTS* (1813), 14.

unity had already been achieved, and where such a command "to have the body" could issue from a court more or less secure in the knowledge that its mandate would be obeyed? Imagination, however, is a bad substitute for fact. Yet, until all this be done, the search for habeas corpus will not be ended, and fancy will have its days.

MAXWELL COHEN.*

Cambridge, Mass.

* B.A., LL.B. (Man.); LL.M. (Northwestern); Raymond Fellow, Northwestern University School of Law, 1935-36; Research Fellow, Harvard Law School, 1937-38.

APPENDIX

No. 1 *The earliest writs (Criminal pleas):*

A.D. 1214: "Preceptum fuit vicecomiti quod haberet coram domino Rege corpus Baldewini Tyrell ad respondendum de appello quod ipsi fecerunt in comitatu versus eum de denuntiatione mortis domini Regis."

A. D. 1214: "Mandatum fuit vicecomiti quod haberet ibi corpora Ranulfi et Giliberti ad prosequendum appellum suum."

No. 2 *Mr. Fox's Writs:*

A. D. 1214: P. I John Curia Regis Roll No. 16 m. 5. "Prior de Sancta Fredeswida dixit quod summonitus fuit apud West habiturus quendam clericum Sahier iuri peritur et quod ipse non est sub potestate sua nec aliquid vult facere."

No. 3 A. D. 1214: H. I John Curia Regis Roll No. 20 m. 13D. Northumb.

"Walterus de Ferlinton duxisse dicitur filiam henrice pappede que esse dicitur de donacione domini Regis. Invenit plegios standi recto apud Westmonasterium in iii. septiminas post pasch. Adam de Cardvill (and others) et preceptum est eidam Waltero quod tunc habeat Wimarcam uxorem sua ibi."

No. 4 *Early Writs in Civil Pleas:*

A. D. 1220: "Preceptum est Vicecomites quid haberent corpora eorum ad audiendum iudicium suum est ostendendum quare non fecerunt sicut eis preceptum fuit"

No. 5 A. D. 1220: "Et Alicia non venit et pluries fecit defaultas et testatur quod languida et nec potest intinerare. Preceptum sunt Vicecomites quod habeat corpus eius ad respondendum."

No. 6 *Very early forms of the Corpus Cum Causa:*

A. D. 1344: "Command fuit a la viscount avec le corps icy de William et John que fuerunt a prison."

No. 7 A. D. 1388: "Ricardus (etc.) Vicecomitibus London' Salutem. Precipimus vobis firmiter iniungentes quod omnibus aliis pretermisiss et excusacione quoacumque penitus cessante, Habeatis coram nobis in Cancellera nostra Johannem Milner de Takiley in Comitatu Essex per vos in prisiona nostra de Nuegate sub aresto detentum ut dicatur, unacum causa arestacionis et dettencionis sue Teste me ipso apus Westm'"

No. 8 *One of the first forms of the Ad Subjiciendum:*

A. D. 1601: "Dom' Regina mandavit Vic' Com' (etc.) Vic' Cantab' salutem precipimus tibi quod corpus Johannis Gardner

in prisona nostra sub custodia tua detent' ut dicitur una cum causa detentionis immediate post reception' hujus brevis ad subjiciendum et recipiendum Teste (etc.)"

No. 9 *An Ad Faciendum form of the same period:*

A. D. 1604: Jacobus Dei gratia (etc.) Salutem. Praecipimus tibi quod habeas coram nobis corpus Thomae

Shirley capti et in prisona nostra una cum causa captionis, ad respondendum et ad faciendum et recipiendum quod per nos in Parlamento nostro praedicto consideratum et ordinatum fuerit Teste"

No. 10 *The present English form:*

A. D. 1908: "Edward VII (etc.) We command you that you have in the King's Bench Division of our High Court of Justice immediately after the receipt of this our writ, the body of A. B. being taken and detained under your custody as is said, together with the day and cause of his being taken to undergo and receive such things as our said court shall consider in this behalf."

No. 11 *The Present American form:*

A. D. 1910: "We command that you have the body of by you detained and imprisoned, it is said, you have forthwith, before our courts at the city of Washington together with the cause of the detention of the said to undergo and receive what our said court shall consider Witness"