HABEAS CORPUS CUM CAUSA — THE EMERGENCE OF THE MODERN WRIT—I

I

The origins of the writ of *habeas corpus* are faint threads, woven deeply within Maitland's "seamless web of history". Indeed, they remain concealed and perhaps untraceable among the countless incidents that constitute the total historical pattern.

Some attempt already has been made to suggest the salient characteristics of the writ's "first" years.[1] As part of the *mesne* process in ordinary civil pleas[2] and occasionally as a procedural step in certain pleas of the crown[3] the writ had been observed in Norman England as early as the 12th century. For in its "earliest period"[4] *habeas corpus* was a bare summoning-production process executing in a very informal but nevertheless effective fashion, the will of the King's judges when other procedural devices had failed. Thus when "summons" could not reach a party and compel appearance, *habeas corpus*, either by *breve* or by "word of mouth"[5] issued from the Royal Justices to the Sheriffs and thereupon these were charged with the difficult task of bringing an "unwilling"[6] party to court and to issue. In medieval days this was no small feat. One sheriff might never know what lay in another county and pursuit into the next shire was high adventure.[7]

Moreover, the very personal character of this mandate—*to have the body of A.B.*—compels the belief that it must have existed under conditions which presumed a measure of real central government. The Royal courts scarcely would have dared to issue a command "to have the body" unless there were officers to execute it and some reasonable certainty that subjects of the realm would respect the order or at the least do little to interfere with it. Hence, the appearance of *habeas corpus* in

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[1] Cohen, *Some Considerations on the Origins of Habeas Corpus* (1938), 16 Can. Bar Rev. 92.

[2] *Id.*, at pp. 105 - 6; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1899) 593.

[3] *Id.*, at 109 - 110.

[4] No attempt was made in the article cited supra note 1, to give a definitive outline of the writ's origins. The materials available to the writer at the time of composition were limited, and moreover, there are good reasons why—as Maitland might have said—the history of *Habeas Corpus* may never be written; see MAITLAND, *Why the History of English Law is not Written*, I COLLECTED PAPERS (1911) 480.

[5] *"Praeceptum fuit in Banco"*; see SELECT PLEAS OF THE CROWN, (1 Seldon Society) 75.

[6] Unwilling in the sense of the party having refused to answer the regular processes; see Cohen, *loc. cit.*, *supra* note 1.

[7] 2 POLLOCK AND MAITLAND, *op. cit.*, *supra* note 2.

the formative days of the Norman monarchy suggests that it may already have been used—or some instrument akin to it—in ducal Normandy where the central authority had achieved a measure of success and continuity. *Habeas corpus* as a special "producing" procedure may have been, therefore, a technique already familiar in some respects to Norman judges. So it is not improbable to believe that by the time of Henry II what once had been a casual order—"*Praeceptum fuit in Banco*"—had become a formal judicial writ.

But while *habeas corpus* was known and used in the twelfth and thirteenth centuries, its simple character as a special kind of summons remained unaltered as late as the first decades of the fourteenth century.[8] Parties were brought before the King's judges, whether such parties were free or *in detention* at the time of the writ's issue.[9] Upon delivery of the "body" named in the instrument the duties of the sheriff or other directed person were at an end. As yet there was no mention in the writ of production accompanied by a statement as to the *cause* of detention at the time of the command. Indeed, in most cases the writ was aimed at persons not in custody, but at large. There was no reason to ask for the explanation of a detention. Only production itself was important.

This strict character of the writ has permitted its easy confusion with the *capias ad respondendum*.[10] For while the purpose of the *capias* clearly was arrest and detention, the object of *habeas corpus* was a simple production of a designated "body" to the court. The effect of both was, of course, to place the person so arrested or to be "produced" under the temporary control of the sheriff. This circumstance combined with the belief that *habeas corpus* disappeared from the records of the first half of the fourteenth century leads Professor Jenks to say that *habeas corpus* and the *capias ad respondendum* were one and the same, and that the latter remained an available instrument even while the writ of *habeas corpus* vanished for two generations.[11] It has already been demonstrated, however, that even at this early date the two writs were distinct enough to have made substitution unlikely.[12] More important, Professor Jenks and

[8] Cohen, *loc. cit., supra* note 1 at 105 - 12.

[9] *Id.*, at 111 .

[10] Jenks, *The Story of Habeas Corpus* (1902), 18 L.Q.R. 64; 2 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY.

[11] *Id.*, at pp. 64 - 65; For the same argument see STATHAM'S ABRIDGEMENT (Klingelsmith, 1915).

[12] Cohen, *loc. cit., supra* note 1, at 112 - 114; For the fully developed argument see Fox, *Process of Imprisonment at Common Law* (1923), 39 L.Q.R. 46.

others have been too ready to believe that *habeas corpus* did not put in an appearance for half or more of the fourteenth century. That assumption is not justified.

II

It is known for example, that at the time of Edward I[13] the writ was regularly employed by the courts[14] and Hale speaks of "that great instance"[15] — in 1305 — "of punishing the Bishop of Durham for refusing to execute a writ of *habeas corpus* out of the King's Bench".[16] A few years later there is a case where the court says "*prenez son corp*".[17] This wording is, strictly, a *capias*, and so it is not too difficult to understand how the writers might have confused this form with the *habeas corpus ad respondendum*. But when in 1344 there appears an *audita querela* with an *habeas corpus* to have a judgment debtor before the court,[18] it becomes evident that the extent of the suggested interruption in the historical continuity of the writ may have been exaggerated. This case is interesting for several reasons : it indicates the early association of *habeas corpus* with the *audita querela*[19] and is a very early instance of an imprisoned petitioner.[20] Even more significant is the fact that it was granted by the Chancery during vacation, thus demonstrating the reliance upon Chancery out of term because had it been *in term* the King's bench would itself have 'tested the writ'.[21] Like its predecessors throughout the thirteenth century the writ in this case was a mere command to have the party appear before the court.[22]

At the same time *habeas corpus* was undergoing another development. It will be remembered that the earliest writs of *habeas corpus*—and those which have so far been examined—had only a single purpose in view, to have a desired party before the court. As yet there was nothing to suggest that the cause

[13] A.D. 1272 - 1307.
[14] 2 POLLOCK AND MAITLAND, *op. cit., supra* note 7, at 583.
[15] 33 Edw. I.
[16] 2 HALE, HISTORY OF THE COMMON LAW, (1794) Part 1, 43.
[17] Y.B. (1311) 4 Edw. II Mich. Pl. 83. (Seldon Society vol. 22, 195). Bereford C. J. "*Prenez son corp et menez de la Flete . . . .*"
[18] Y.B. (1344) 17 Edw. III. Mich fol. 37, Pl. 9. The court ordered "*avoir son corp icy*".
[19] REGISTRUM BREVIUM TAM ORIGINALUM QUAM JUDICIALUM (Yetsweirt, 1595). Fol. 114; other examples will be seen infra.
[20] This was unusual since most persons ordered to be delivered were at large and the writ was a method to have them appear; see Cohen *op. cit., supra* note 1.
[21] The question of the right to have the writ in vacation became very important at a later date.
[22] *Supra*, 10-11.

of the arrest or detention be given to the courts *i.e.* the *habeas corpus* was not yet a *"corpus una cum causa captis et detentionis"*, a phrase whose addition to the writ prepared the wording substantially in use today.[23]

Habeas corpus cum causa, or *corpus cum causa* as it is termed by the early writers,[24] may have made its appearance in the first years of the 14th century. Certainly it is much older than the fifteenth century which is the date accepted by Jenks and others.[25] A case appears as early as 1341[26] where the King's court directed a writ to a goaler having in his custody one held under the provisions of the Statutes Staple. The writ resembles its predecessor the *habeas corpus ad respondendum,*[27] but instead of merely commanding the sheriff to 'have the body' of the person therein named, adds 'with the cause of the arrest and detention'. The significance of this wording is two-fold; it presumes that there is detention, and it asserts the court's right to enquire into the case, with the inference that the court will do as it deems just. It is, in truth, only an inference in these early cases of *corpus cum causa* because the court does not disclose what it intends to do upon the arrival of the prisoner as it does in later writs, i.e. by such language as *'ad faciendum et recipiendum'*. Cases in 1351[28] and 1388[29] illustrate this condition. The first was a writ directed to the Sheriff of London for one imprisoned in Newgate and who sued out an *audita querela,* but the writ of *habeas corpus* merely says to 'have the body with cause' but nothing as to what the courts intend. The second case was a writ commanding the Sheriff of London to have the body of a named person before the Chancellor *'una cum causa arresticionis et detentionis'*, without further language.

Meanwhile the *habeas corpus* without cause continued to appear and to be used for many purposes, such as a simple petition to be delivered from the custody of the Sheriff of London[30] as well as an *alias habeas corpora* for the summoning

[23] See *infra.*

[24] FITZHERBERT'S ABRIDGEMENT (1577) Fol. 195; RASTELL'S ENTRIES (1556) Fol. 132: BROOK'S ABR. (1568) 157; 4 COKE INST. 182; COWELL'S INTERPRETER (1607); all use the phrase *"Corpus cum causa".*

[25] Jenks, *op. cit., supra* note 10, at 69; 9 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924-25) at 109 111.

[26] Y.B. (1341) 14 Edw. III. Trin. (Rolls Series) Folio 20, Case 12.

[27] Cohen, *op. cit., supra* note 1.

[28] Y.B. (1351) 24 Edw. III. Trin. Fol. 27, Pl. 3; also cited in STATHAM, *op. cit., supra* note 6, vol. 1, at 402; FITZ. *op. cit., supra* note 24, Fol. 195, case 22.

[29] Milner's Case (1388) SELECT CASES IN CHANCERY, 1364 - 1471, 8. (Seldon Society vol. 10, p. 9).

[30] Wallingford's case, *id.,* at p. 106.

of a jury.[31] By this time the Chancellor was sitting alone as an exclusive judge and not with the other members of the *Curia*[32] and he was entertaining matters frequently brought before his court by the *corpus cum causa*[33] although the *subpoena* was the more usual practice.[34]

Henceforth there are few gaps in the story of the *corpus cum causa* and the books of the fifteenth and succeeding centuries are replete with evidence of its extensive employment.[35]

About the first quarter of the fifteenth century a singular advance in the use of the writ was made, for at that time it definitely became associated with the writs of *certiorari* and *privilege*[36] and there thus began a relationship which caused the writ to lose much of its independent identity.[37] This association had several important consequences and it is necessary to examine the operation of the *corpus cum causa* with *certiorari* and *privilege* as it progressed in the following three centuries.

The joint activity of *corpus cum causa* and *certiorari*[38] must have begun not later than the last quarter of the fourteenth century, because in 1414 a statute recited that many debtors imprisoned by inferior courts for not satisfying their creditors obtained their freedom by writs of *certiorari* and *corpus cum causa* out of Chancery and were discharged or released on *bail* or *mainprize*,[39] either of which proceedings led to the creditor's eventual loss. It was enacted, therefore, that no such discharge or release on *bail* or *mainprize* would be awarded where the return showed that the prisoner was held for debt.[40] It is improbable that these abuses had arisen only within a few years of the date of the legislation. Rather, the nature of the bill points to an old abuse of process, arising out of an early association of these writs. But the *corpus cum causa* was *itself* employed to defeat causes in inferior courts. For twenty years

[31] Y.B. (1388) 12 Ric. II, (Hill) Pl. 18 (Ames Foundation, p. 127).
[32] SELECT CASES IN CHANCERY, *op. cit.*, *supra* note 29 at xviii.
[33] *Id.*, at xiv.
[34] *Ibid.*
[35] *Id.*, case 27, 124. See also, cases cited in FITZ. *op. cit.*, *supra* note 24, and STATHAM, *op. cit.*, *supra* note 11.
[36] For a brief analysis of the writs of *Certiorari* and *Privilege* see Jenks, *The Prerogative Writs* (1922-23) Yale L. J. 533, FITZ. N.B. (1718) 245.
[37] This is at once apparent from many of the books *cf.* FITZ. *op. cit.*, *supra* note 24, and STATHAM, *op. cit.*, *supra* note 11; COWELL, *op. cit.*, *supra* note 24, and other authorities of the period. Professor Jenks clearly demonstrates the connection; *loc. cit. supra* note 10, at 69 - 73.
[38] For the history of the writ of *certiorari*, see Jenks, *supra* note 36.
[39] Whatever original differences had marked *bail* and *mainprize* were quickly disappearing in practice, 2 P. & M. *op. cit.*, *supra* note 7, at 589.
[40] (1414) 2 Hen. V. St. 1. c. 2.

after the enactment of the above statute another was directed against the writ alone.[41] Here the object was to prevent recognitors held under the process of an inferior tribunal from defeating their recognizances by obtaining writs of *corpus cum causa* out of Chancery and thus when once out of the control of such inferior courts to have a *scire facias* sued out against their recognizance with a view to defeating the entire proceedings below.[42] Legislation to curb the uses to which these writs were being applied continued throughout the sixteenth and seventeenth centuries and by the time of Charles I the removal of causes and the body from inferior courts in abuse of process was rendered quite difficult.[43] An act of 1554 prohibited writs of *certiorari* and *corpus cum causa* from removing a person out of gaol and a recognizance from an inferior court unless such writs were signed "with the proper hand of the Chief Justice or in his absence one of the Justices of the court out of which the same writ shall be awarded."[44] Late in Elizabeth's reign another attempt was made to limit the scope of the writ.[45] The extent to which the abuse had been practised throughout the sixteenth century is reflected in the references to *habeas corpus* in the satirical drama of the period.[46] And it may be assumed if it was notorious enough to come to the attention of contemporary playwrights, there could be small doubt as to its popularity.[47] There was more legislative activity in 1624 and the attempt now was made to augment the power of the inferior courts by giving them the right to refuse to recognize a *corpus cum causa* with *certiorari* once they had become seized of the case and possessed jurisdiction.[48] This Act resulted in considerable controversy because while the King's Bench was willing enough to permit these inferior courts to try matters of which they were properly conusant yet it was insisted that such judges must have the rank, at least, of *"Utter Barristers"*.[49]

[41] (1433) 11 Hen. VI. c. 10.
[42] *Id.*, s. 2.
[43] *Cf.* statutes *infra*.
[44] (1554) 1 PH. & M. c. 13, s. 7.
[45] (1601) 43 Eliz. c. 5; extended by (1628), 3 Car. 1. c. 4 and (1641), 16 Car. 1. c. 4.
[46] THOMAS DEKKER, LANTERN AND CANDLELIGHT, (1608) 320; THOMAS FENNOR, THE COUNTER'S COMMONWEALTH (1617) 432; Both of these selections are in THE ELIZABETHAN UNDERWORLD, (1930) Edited by A. V. Judges.
[47] *Langham* v. *The wife of John Bewett* (1628), Cro. Car. 68. This is a typical case.
[48] (1624), 21 Jac. 1 c. 3.
[49] *Anonymous* (1604), 3 Mod. 85. "Utter Barristers" were members of the Temple second in rank to 'Readers' or 'Benchers'. See I CALENDAR OF INNER TEMPLE RECORDS 1505 - 1603, xxvii, 109, 277, 380.

But by the middle of the seventeenth century, however, *habeas corpus* and *certiorari* began to develop independent legislative histories.[50]

Cases of *corpus cum causa* and *certiorari* were quite frequent throughout the fifteenth and sixteenth centuries,[51] and Statham,[52] Fitzherbert[53] and Brooke[54] have numerous citations. *Certiorari* had a great number of forms and it seemed to issue to almost every inferior and petty officer whose actions the original *curia* and the later courts of King's Bench and Chancery wished to review.[55] Many of the forms, of course, had nothing to do with the purposes of a *corpus cum causa* but a substantial number could so be employed,[56] and the two writs were especially common in removing causes and parties from the Custom of London.[57]

The association of the writ of *privilege* with *habeas corpus* probably was well established by the middle of the fifteenth century. The practice of designating certain classes as privileged in relation to the jurisdiction exercisable over them by the inferior or special courts was very old, and as early as 1344 an enactment which appears to deal with the question of privilege is in force[58] and writs of *privilege* issued in 1355.[59] The clergy,[60] members of parliament,[61] ministers of the King[62] and clerks and officers of the various superior courts[63] were the chief classes to whom the advantage enured. The writ was as a rule returnable in the courts of Common Bench or Exchequer[64] as well as, of course, in the court of Chancery. The theory of the writ was that anyone who had a special connection with a recognized tribunal was entitled, in the event of proceedings against him, to have the case adjudged in the court of which

[50] (1624), 21 Jac. 1 c. 8; (1670), 22 Car II. c. 12, s. 4; (1694), 5 and 6 Wm. and Mary c. 11.

[51] *Anonymous* (1485), Jenk. 170, is a good illustration. This case is also interesting for its demonstration of the collusive methods to get a removal of the case—a release from the inferior court by *habeas corpus*.

[52] 1 STATHAM, *op. cit., supra* note 11, at 402 - 3.

[53] FITZ., *op. cit., supra* note 24.

[54] BROOKE, *op. cit., supra* note 24.

[55] Jenks, *loc. cit. supra*, note 36, at 529; For many varieties of the writ see REGISTRUM BREVIUM ORIGINALIUM, *op. cit., supra* note 19, Folios 14, 24, 31, 90, 104, 151, 167, 169, 170, 217, 283, 293, 296.

[56] FITZ., *op. cit., supra* note 36, at pp. 242 *et seq.*

[57] BOHUN, PIVILEGIA LONDINI. (1723) 201.

[58] (1344), 18 Edw. III. St. 3, c. 7.

[59] (39 Edw. III) RASTELL'S REGISTRUM, fol. 91, cited in Jenks, *loc. cit. supra* note 10, at p. 70.

[60] 2 COKE, INST. 3, 4, 150, 212.

[61] 4 COKE, INST. 24, 25, 363.

[62] *Id.*, at pp. 71, 72.

[63] 2 COKE INST. 551.

[64] *Id.*, at p. 55; 2 HALE, PLEAS OF THE CROWN, (1778) 144, 312.

he was an official[65] or where his class, as in the case of clergy, held its own court.[66] The practice also applied to those cases where one had already been sued, say, in the Common Bench or was supposed to be so sued and in the meantime was arrested for a misdemeanor or felony, such party would be entitled to his privilege and on the return of the writ with *corpus cum causa* a discharge, if proper, would follow,[67] otherwise the party would be bailed to appear later in the King's bench; and so it was in ordinary suits as well.[68] Hale, in discussing the matter, points out that since the King's Bench and Chancery had original jurisdiction to issue the *habeas corpus*, they could do so in any case without *privilege* while the same would not apply, however, to the Common Pleas or Exchequer.[69]

The long line of cases where the *privilege* and *habeas corpus* are cooperating to obtain releases from custody begins well in the first half of the fifteenth century,[70] and the writ was used most frequently for those imprisoned under the custom of London.[71] But by the time of Henry VI the courts have discovered abuses of process and are determined to curtail such use of the writ. So it became the judicial policy to deny *corpus cum causa* based on *privilege* where it was evident that a debtor was attempting to evade his obligation. Thus the courts refused the writ unless the person arrested by an inferior court was at the time of arrest engaged upon the business of his case in the superior court.[72] A few years later a superior court was confronted with the problem where a suitor in such court was arrested while upon the business of his case but the imprisonment was at the King's command or in a matter where the King had a special interest, and here the King's writ was held unable to defeat the King's personal interest in the case.[73] Moreover, when an application for a *privilege* and *corpus cum causa* was made in vacation it could not succeed because obviously such suitor applicant could not be on the business of his case during vacation.[74] At the same time the court insisted

[65] 2 COKE INST.; 4 COKE, *op. cit., supra* note 61.
[66] 2 COKE INST. 4.
[67] *Anonymous, supra,* note 51.
[68] 2 HALE, *op. cit., supra,* note 273, at 144.
[69] *Ibid.*
[70] Y.B. (1431) Mich. 9. Hen. VI. Pl. 40.
[71] 2 STATHAM, *op. cit., supra* note 11, at pp. 984 - 85; I FITZHERBERT, *op. cit., supra* note 24 at p. 103 (cases of privilege appear here as early as 1354).
[72] Y.B. (1431) 9 Hen. VI Pasch. Pl. 16; see also Trin. 22 Hen. VI, cited in FITZ. *ibid.*
[73] Y.B. (1444) 22 Hen. VI. (Hill) Pl. 34, cited in Jenks, *loc. cit. supra* note 10, at p. 71.
[74] Y.B. (1487) 2 Hen. VII. (Mich.) Pl. 6.

upon the presence in court of the party claiming the *privilege* when the application was made, so that the applicant could be examined on his *privilege*, otherwise that writ with the *corpus cum causa* would not issue.[75] Even where the party had been entitled to the *privilege* before execution but failed to sue out the writ until after, a release from the inferior court could not be obtained.[76] Moreover, where a court of record had already become seized of a case Chancery would not issue the writ even though one of its own clerks was the suitor below.[77]

Parliament, too, was at this time anxiously protecting its prerogatives and it was early decided that one arrested by the House could not have his *privilege* and *corpus cum causa*[78] against the higher privilege of the House. This insistence by Parliament upon its special position in relation to the courts took a different turn at a later period when the same body was insisting not only upon its powers to arrest but also upon the freedom of its members from extra-parliamentary seizure and imprisonment.[79] And common law attorneys imprisoned by some special court such as the High Commission also found the common law courts ready to aid in obtaining discharge by means of *privilege* and *corpus cum causa*.[80] Thus by the end of the sixteenth and beginning of the seventeenth century *habeas corpus* and *privilege* was a widely known and commonly used process.[81]

Meanwhile *habeas corpus* apart from its development along with *certiorari* and *privilege* was used extensively in the form of *habeas corpora*. Its operation in the fourteenth century has already been noticed,[82] and in the fifteenth it is a recognized method by which the court can order bodies of men to come before it and perform special duties or receive particular commands. The writ seems to have been used chiefly by the Common Pleas, for in an early case Markham C.J.K.B., Moyle and Littleton JJ., discussed its general application and decided that in the King's Bench a *habeas corpora* was not required to compel the appearance of jurors before a distress could be issued

[75] *Anonymous* (1487), Jenk. 172.
[76] *Ibid.*
[77] WINGATE, MAXIMES (1658) 471, citing cases of 1537 - 38.
[78] Y.B. (1463) (Pasch.) 2 Edw. IV. Pl. 8; also in FITZ., *op. cit.*, *supra* note 24, case 11.
[79] *Infra* note 205; See PROTHERO, STATUTES AND CONSTITUTIONAL DOCUMENTS 1559 - 1625 (1894) 320 - 25; LEX PARLIAMENTARIA (1748) c. 8, 136 - 48.
[80] *Thomas L's. case* (1568) in MOYLE, ENTRIES (1656), 61.
[81] For various examples of the writ see HERBERT, THESARUS BREVIUM (1687), 132, 134.
[82] *Supra*, 13-14.

for default, but that such procedure was necessary in the Common Pleas.[83] There is no doubt that the *habeas corpora* was an important method to force stubborn jurors to their duty,[84] and it so continued on through the seventeenth century.[85]

Moreover, the *corpus cum causa* in the fifteenth and sixteenth century in addition to its association with the writs of *privilege* and *certiorari* retained its very early association with the *audita querela*.[86] A very interesting case in 1458 describes this connection in detail.[87] Quatermaynes, the Sheriff of Oxford, was arrested by order of the Barons of the Exchequer for failure to pay an amercement levied because of a false outlawry. He sued out an *audita querela* on the ground of his special letters patent as Sheriff. The King's Bench issued a *corpus cum causa* and on the return the applicant presented his letters patent and the King's Bench discharged him, ordering at the same time that the Exchequer proceed no further against him. Another case in the following year had the King's Bench discharge someone committed by the Exchequer where the debtor had been pardoned by the King.[88]

There is every reason to believe that by the beginning of the sixteenth century the *corpus cum causa* was employed by itself and not altogether dependent for the initial step in its issuance upon *certiorari, privilege,* or *audita querela.* A case in 1557 excuses the Warden of the Fleet from the escape of one who has been enlarged by *habeas corpus* at the King's command.[89] The case refers to an early statute of Richard II[90] where such a release by the King would afford the sheriff adequate indemnity. The King's writ was thus gradually being used to avoid the authority of a goaler who himself might be the agent of the King. But it is clear that independently of its ancillary processes as described above, the writ of *habeas corpus* was avail-

[83] SELECT CASES IN THE EXCHEQUER CHAMBER, 36 (Seldon Society vol. 51) 177 - 79.

[84] "*Habeas corpora* is a writ which lies against a jury or any one of them that refuse to come upon the *venire facias* for the trial of a cause brought to issue" TERMES DE LA LEY, cited *id.*, at p. 177 n. 2.

[85] COWELL, *op. cit., supra* note 24; BROWNLOW, DECLARATIONS (1653), 64; REGISTRUM, *op. cit., supra* note 19, fol. 23, 24, 25, 30, 47, 74, 75.

[86] *Supra,* note 28.

[87] Coram Rege Roll (1458) 36, Hen. VI. (Hill) Rot. 128, cited in SELECT CASES *op. cit., supra* note 83, at 169 *et seq.*

[88] Y.B. (1459) 37 Hen. VI, Pasch, Pl. 21, cited in BROOKE, *op. cit., supra* note 24, at 158.

[89] *Anonymous* (1557) JENKS 213. The case also decided that where one is in execution for debt, and is a skillful warrior, yet he cannot be discharged under the King's protection to go to Berwick even in defense of the Kingdom.

[90] (1377) 1. RIC. II, c. 12.

able at the beginning of the sixteenth century to effect a discharge, and Professor Jenks exaggerates the dependency of the writ upon *certiorari* and *privilege*[91] alone.

III

Before examining the *corpus cum causa* as it evolved in the latter sixteenth century it is important to remember that for over a hundred years the growing *habeas corpus* in the form of the *corpus cum causa* had become involved in a struggle among the courts themselves. Essentially the issue was between the courts of King's Bench and Common pleas on the one hand against the rising power of the courts of Chancery and Exchequer, as well as the special courts such as the Council, Admiralty, Requests and High Commission that flourished under the Tudors, on the other.[92] And in this struggle for supremacy the *corpus cum causa* came to be a most effective weapon in the hands of the common lawyers. Why it should have so become is perhaps best explained by a word as to the nature of the conflict.

The struggle took the form of the assertion of jurisdiction on the part of combatant courts over matters as well as persons. Now the *corpus cum causa* was essentially a personal writ in the sense that the person of the party named was the subject matter to be had and dealt with by the court. It will at once be apparent that if the Chancery or Exchequer or the special courts could not retain control over the bodies of parties and suitors before them and, further, could not control their actions upon the determination of the suit so as to ensure execution of their judgments, their power would be seriously impaired. This was precisely what the King's Bench and Common Pleas had in mind when they issued writs of *habeas corpus* to applicants held under the process of some rival tribunal. But since the Chancery itself issued such writs its defence against the common law courts was much more effective than that of the other judicial bodies against which "serious encroachments of jurisdiction" were being made by the King's Bench and Common Pleas.[93]

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[91] Jenks, *loc. cit. supra*, note 10, at 72.

[92] For a brief survey of this contest see 2 HOLDSWORTH, *op. cit.*, *supra* note 25 at p. 227, 5 at 300; RIED, THE KING'S COUNCIL IN THE NORTH (1921) 355.

[93] RIED, *ibid.*

The earliest use of the writ of *habeas corpus* in this manner seems to have been against the Ecclesiastical courts.[94] The Ecclesiastical authority with its important powers of imprisonment in heresy and other spiritual offences often committed with scant evidence and employed the weapon of imprisonment to fight the battles of the Church.[95] Hale's example of the writ in operation at the time of Edward I no doubt refers to a case where the Bishop had imprisoned someone in a matter of which a temporal court was not properly conusant[96] while Coke[97] offers other examples. This early conflict by means of *habeas corpus* continued when the court of High Commission was established.[98] Clashes between this court and the common law courts are clear from the cases in the last quarter of the sixteenth and in the early seventeenth centuries.[99] One of the earliest—*Thomas L's Case*—where a writ was directed against the Commission just when it was developing into a court of law,[100] has already been mentioned in connection with the operation at this time of the writ of *privilege*.[101] By the turn of the century the common law courts were interfering by way of *habeas corpus* in cases where the High Commission obviously had jurisdiction such as the owing of a debt to a vicar.[102] A few years later they had decided that the High Commission has no jurisdiction in alimony matters, although domestic relations were a traditional province of Ecclesiastical jurisdiction.[103] But the common law courts were not merely invading the proper jurisdiction of the High Commission, for at the same time they were protecting themselves against the tendency of this court to acquire authority it was never intended to have. Through its powers of committment it had taken prompt advantage of petty violations of ecclesiastical regulations.[104] But by the

[94] 2 PIKE, HISTORY OF CRIME IN ENGLAND (1873), 24.
[95] *Ibid.*
[96] 2 HALE, *op. cit., supra* note 16, at 43.
[97] 2 COKE, INST. 615; 4 INST. 333 - 34; 1 HAWKINS, PLEAS OF THE CROWN (1785) 6, s. 7.
[98] USHER, THE RISE AND FALL OF THE HIGH COMMISSION, (1913) 64-90.
[99] *Id.*, 167 - 68, 170 - 72, 177 - 78, 202, 212: In addition to the cases discussed *infra* see *Chaney's* case (1612), 12 COKE 62; *Lady Throgmorton's case*, (1611) 12 COKE 69; *Bradston's case* (1615) ROLLE 110; *Torles case* (1641) CRO. CAR. 582; *Anonymous* (1641) CRO. CAR. 580; Other precedents are cited in TOWNSEND, *op. cit. supra* note 101, at 176.
[100] *Id.*, at 64 - 70.
[101] *Supra*, note 80.
[102] *Sir Anthony Roper's case* (1608) 12 COKE 45; also cited in MOYLE, *op. cit., supra* note 80, at 59.
[103] *Broke's case* (1616) MOORE (K.B.) 840.
[104] *Dayton's case* (1616) MOORE (K.B.) 840; also cited in ROLLE 220. The offence here was a violation of one of the rules of the Book of Common Prayer, and the King's Bench showed no hesitancy in bailing the prisoner.

early years of Charles I the court was almost hamstrung in its authority even over the servants of the church, as where a person was imprisoned for contempt against the Archdeacon of Canterbury and then brought to the bar of the King's Bench on a writ of *habeas corpus*, it was held that a return "default of his canonical obedience" was insufficient,[105] and a discharge followed.

With the Court of Requests[106] the issue was much the same if less obtrusive. The cases are not so frequent and a good example in 1572—*Humphreys* v. *Humphreys*[107]—demonstrates the problem. Here the court had commanded the holder of a judgment not to execute it and when he disobeyed the court had him committed to the Fleet. The judgment had been obtained in the Common Pleas and upon an application to this court the plaintiff was released upon *habeas corpus* with the order adding that if the plaintiff was again threatened by the Chancery if he tried to have execution the Common Pleas would once more award an *habeas corpus*.

In the Admiralty cases the same problem confronts the court; the Court of Admiralty[108] frantically trying to preserve its authority against the common law courts,[109] and the latter making every effort to assert its power over Admiralty matters and persons before such courts.[110] Coke was in his day the strongest opponent of an enlarged admiralty jurisdiction and although the court by its procedure and experience was much better equipped to deal with such cases yet it was often deprived of its proper authority by means of writs of *prohibition* and *habeas corpus*.[111]

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[105] *Huntley's case* (1629) cited in WHITLOCK'S, MEMORIALS OF ENGLISH AFFAIRS (1687) 13.

[106] "A minor court of Equity". *Cf.* 4 REEVES, HISTORY OF ENGLISH LAW (2nd ed. 1287) 377. COWELL, *op. cit., supra* note 24; 1 HOLDSWORTH, *op. cit., supra* note 25, at 412 - 416. Strictly it may not have been a court for prohibitions addressed to it were styled "That the party did prefer a Bill to the Master of Requests"; *Swenfield's Case* (1602) HOBART. 77.

[107] (1572) 3 Leon. 18, see 4 BACON ABR. (1854) 578 - 580, where the learned author in this case deals with the writ as if it were a *habeas corpus ad subjiciendum* when he probably should have said '*ad faciendum*' for reasons which will appear shortly.

[108] For a brief outline of the history of admiralty jurisdiction see 1 SELECT CASES IN ADMIRALTY, Introduction xv—lix. (Seldon Society vol. 6); for the origin of its jurisdiction see 2 STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND, (1880) 313 - 14.

[109] In re *Felton, Willys* v. *Felton*, SELECT CASES, *id.*, at 39.

[110] *Scodding's Case*, (1609) Yelverton 134.

[111] RIED, *op. cit., supra* note 92.

Of these special courts the various Councils[112] were particularly objectionable to common lawyers and were made an especial target for interference by way of *habeas corpus*.[113] For to common lawyers the Councils along with the Court of Star Chamber represented a threat to the supremacy of the regular courts since the former were administrative bodies and administrators asserting extensive judicial powers.[114] By the time of Charles I, however, the Council of the North had been so seriously interfered with in the exercise of its judicial duties that the Earl of Stafford made a determined effort to circumvent the power of the common law courts to interfere with the judgments of the council by writs of *habeas corpus* issued to assist those who disobeyed the Council's decrees.[115] But at a later day Rolle was of the opinion that " if a man be imprisoned by the Council of the Marches the King will decree an award to remove him".[116] *Glanvil's Case*[117] was probably the clearest instance of the determination by common lawyers to permit discharges by *habeas corpus* wherever there had been commitment by the Council, especially where a single councillor alone appeared on the warrant. For here a discharge on a *habeas corpus* in the King's Bench was ordered when the return stated only "by command of Lord Ellesmere, Lord Chancellor of England". Many precedents are cited in the reports immediately following the decision to prove that the order of a single member of the Council was insufficient and that a *habeas corpus* was properly issuable.[118] And it is interesting to notice that although Coke fought bitterly against such commitments he at one time had held them to be valid.[119] Notwithstanding the attempts on the part of Stafford and others to have the Council's courts and its jurisdiction respected by the judges, nevertheless they insisted on treating proceedings before such tribunals as without legal basis and ignored evidence given by parties and

[112] The Council of the North; The Council of Wales and The Marches; The Council of York; The Council of the King at Westminster; The Council of the Duchy of Lancaster; The Council of the County Palatine of Chester.

[113] RIED, *op. cit., supra* note 92, at 343 - 347.

[114] BALDWIN, SELECT CASES BEFORE THE KING'S COUNCIL 1247-1487, Introduction xi - xxvii (Seldon Society vol. 36) for an outline of the origins and development of the judicial authority of the Council.

[115] RIED, *op. cit., supra* note 92, at 411.

[116] ROLLE'S ABRIDGEMENT (1668) 69b.

[117] (1615) MOORE (K.B.) 838.

[118] (1615) MOORE (K.B.) 839.

[119] *Raynard's Case*, cited in 2 COBBET'S PARLIAMENTARY HISTORY (1808) 292.

received before any of the Councils, particularly the Council of York.[120]

The insistence upon their paramount position compelled the King's Bench and Common Pleas also to discipline the Exchequer whenever that court appeared to have exercised an improper jurisdiction. Examples of this have already been seen in connection with the operation of the *corpus cum causa* and the *audita querela* where the King's Bench did not hesitate to discharge by *habeas corpus* anyone wrongfully committed by such court.[121]

The conflict between the Chancellor and the developed court of Chancery on the one hand and the courts of common law on the other placed the writ of *habeas corpus* in a curious position. Whereas in its struggles with the other courts the common law tribunals could and did use the writ of *habeas corpus* to its advantage, they met substantial opposition from the Chancery because it too was capable of issuing the writ and had done so from the earliest times.[122] And when the Chancellor at last sat as a Judge apart from the *curia* as a whole,[123] the court had the advantage of not only being the office where all the writs were issued but, too, where cases themselves were heard. Again the writ was also issued out of the court of King's Bench and was 'tested[124] by any of the judges there, and it has been suggested that one of the reasons that the *corpus cum causa* was a popular remedy with the common law lawyers from the end of the fifteenth century onward was the fact that being a judicial writ it did not require the stamp of the great seal out of Chancery and could be issued by any judge with authority,[125] even perhaps by "word of mouth" if the goaler were present to hear the command.[126]

At least from the time of Edward IV this conflict was in full swing and the Chancellor's authority was challenged by the common law judges who determined that if and when the chancellor would commit for contempt in disobedience of his orders where such disobedience was the result of decisions out

[120] RIED, *op. cit., supra* note 92, at 426, citing *Turner* v. *Askwith* (1634) 2 COKE MSS; 55; *Musgrave* v. *Vaux* (1635) 2 COKE MSS; 95.
[121] *Quatermayne's Case, supra,* note 293.
[122] *Supra,* p. 12.
[123] *Supra,* note 32.
[124] *"teste meipso apud Westm".* See the writ in PROTHERO, *op. cit., supra* note 79, at 323.
[125] Jenks, *loc. cit. supra,* note 36 at p. 533.
[126] *Tyrel's Case* (1214) Trin. I SELECT PLEAS OF THE CROWN, Pl. 115 (I Seldon Society 67 - 75).

of the King's Bench or Common Pleas the latter would continue to issue writs of *habeas corpus* and discharge the prisoner, in contempt, upon his every appearance.[127] As late as 1605 the Chancery attempted to give its clerks the benefit of a *privilege* against a suit in the King's Bench but it was decided by all the judges in England that if the King's Bench is seized of a case even though a suitor was an officer of the Chancery a *privilege* and a *habeas corpus* to remove the person so sued will not be issued against the King's Bench because the King's Bench is *the* superior court.[128] But the law was by no means settled as to discharges when the one or the other court was interested, and there was, in consequence, much conflict in decisions. Thus is 1616 the King's Bench delivered by *habeas corpus* an applicant who was held upon a return *"per considerationem cur' 'Cancellar contemptu' eadem cur illat"*;[129] while in the same year and in the next reported case where the return was *"per Thomam Dominium Ellesmere Dominium Cancellar pro Contemptu"* a discharge was refused.[130]

IV

Having observed the place of *habeas corpus* in the struggle of the fifteenth, sixteenth and early seventeenth centuries between the common law courts and their rivals, it is now necessary to retrace the steps and examine the writ of *habeas corpus* in its form of *corpus cum causa* as it developed in the sixteenth century independently of any ancillary process.[131]

There is no reason to believe that at any time from the first observed *habeas corpus cum causa*[132] the writ was ever wholly dependent upon other instruments to permit its use in any given case. And while *certiorari* and *privilege* frequently accompany the writ, the reports in the sixteenth century yield many instances where the writ apparently operated by itself.[133] A case of 1557 has already been cited where a *habeas corpus* was used to discharge one confined to the Fleet.[134] In the *Humphreys* v. *Humphreys Case*[135] no other process is evident and there

[127] Y.B. (1483) 22 Edw. IV. (Mich.) Pl. 21.
[128] *Anonymous* (1605) MOORE (K.B.) 753.
[129] *Apsley's Case*, (1616) MOORE (K.B.) 840; also reported in ROLLE, 192.
[130] *Allen's Case* (1616) MOORE (K.B.) 840; see also *Glanfield* v. *Courtney* (1615) ROLLE 111, where one imprisoned for contempt was discharged by the K.B., also *Rushwell's Case* (1616) ROLLE, 218.
[131] *Certiorari, privilege, audita querela.*
[132] *Supra*, note 26.
[133] *Supra*, 19 - 20.
[134] *Anonymous, supra* note 89.
[135] *Supra*, note 107.

was a discharge by the Common Pleas by way of *habeas corpus* from a commitment by the Court of Requests. An examination of the reports adds to the conviction that the courts were employing the writ to test the validity of commitments in many different cases.[136]

At this point another problem arises as to the nature of the writ. The earliest writs of *habeas corpus* 'without cause' included in their wording such phrases as *'ad respondendum'*,[137] *'ad audiendum judicium'*[138] and others, indicating in general terms the purpose for which the court was issuing the writ and was desiring the presence of the party named. But when the first forms of the *corpus cum causa* are examined no such general explanation is included.[139] Somewhere in the fifteenth century, however, the practice probably began of including with the demand for the cause of the detention a statement declaring that party was to 'do and receive'[140] whatever the court ordered, thus describing the purpose without detracting from the discretion which the court had, without these descriptive terms, to do justice to those so deprived. At any rate by the time Rastell is writing he takes for granted that the *corpus cum causa* is an *habeas corpus ad faciendum et recipiendum.*[141] So that in the sixteenth century at least the form *habeas corpus unacum causa captis et detentionis* includes *ad faciendum et recipiendum* and is the one most commonly used either alone or with the other aforementioned writs. Thus by the second half of the sixteenth century the situation with regard to the writ of *habeas corpus* would appear to be as follows :

1. Writs of *habeas corpus without cause* are used to bring parties before the courts, e.g. in a distress with *habeas corpus ad respondenum;*
2. Writs of *habeas corpus*, without cause, against jurors;
3. Writs of *habeas corpus cum causa* are in wide use;
   a) with writs of *certiorari,*

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[136] *Infra*, note 154.
[137] *Tyrel's Case, supra*, note 126.
[138] BRACTON'S NOTE BOOK (1887) Pl. 1421.
[139] *Milner's Case, supra*, note 29.
[140] *"Ad faciendum et recipiendum."* This form was the most common of all the *Corpus Cum Causa* writs from the 16th century until the third quarter of the 17th. By the end of the 16th century the writ was receiving theoretical support from the proposition that "The King ought to have accounted to him why any of his subjects are restrained of their liberty" ROLLE *op. cit. supra* note 116. And once the King is made aware of the imprisonment he has the power *'to have the body'* before him so that it may *'do and receive'* whatever he, through his Judges, may command.
[141] RASTELL, ENTRIES (1506).

b) with writs of *privilege*,
c) sometimes with the writ of *audita querela*,
d) by themselves.

4. In nearly all cases the *corpus cum causa* is a *corpus cum causa ad faciendum et recipiendum*;

5. Writs of *habeas corpus* are used to obtain releases by way of testing the validity of detentions by courts other than common law;

6. In so being used the writ has come to be a weapon in the struggle between the common law courts and the special courts.

But the nature and operation of the writ had not yet become defined, nor its tendencies clear, and two questions were presenting themselves. First, what courts could issue the writ, and second, under what circumstances would a discharge from an imprisonment be granted under an *habeas corpus* awarded to inquire into such detention?

From the earliest times the courts of Chancery[142] Common Pleas[143] Exchequer,[144] and King's Bench[145] had issued writs of *habeas corpus*. With the growth of the writ of *privilege* it came to be thought that the Common Pleas and Exchequer could award a *corpus cum causa* only if and when a *privilege* attached, but that the inherent jurisdiction of the King's Bench, and the Chancery as the home of all writs,[146] gave to these last two the power to award without any ancillary procedure. Coke[147] and Hale[148] so declared the law but while both agreed that Chancery could issue the *habeas corpus ad faciendum* at any time because "the court of Chancery is *officina justiciae* and is ever opened and never adjourned",[149] Hale went further and declared that the King's Bench also could issue the writ both in vacation and in term.[150] But this was doubtful and Hale himself strictly limited the Exchequer to term time.[151] The question as to the authority of these courts to issue either

[142] *Milner's Case*, *supra*, note 29.
[143] SELECT CASES IN THE EXCHEQUER CHAMBER, *op. cit.*, *supra*, note 83, at 177.
[144] *Ibid.*
[145] *Quartermayne's Case*, *supra*, note 87.
[146] *Cohen*, *op. cit.*, *supra* note 1.
[147] 2 COKE INST. 52, 53, 55.
[148] 2 HALE, *op. cit.*, *supra* note 64, at 144-45.
[149] 2 COKE INST. 55.
[150] 2 HALE, *op. cit.*, *supra* note 64, at 145.
[151] *Anonymous* (1667) HARDRES 476.

in term or in vacation was settled by subsequent legislation whose effect will be discussed in another chapter.[152]

The importance however, of ascertaining the courts empowered to issue the *corpus cum causa ad faciendum et recipiendum* at this time, is the bearing it had upon the most significant development of the writ in the sixteenth and seventeenth centuries, namely, the rise of the *habeas corpus ad subjiciendum* and the use of the writ to test the validity of every imprisonment.[153]

V.

The rise of the *habeas corpus ad subjiciendum*, and the occasions of its first use are not all clear even from an extensive examination of many reports and books of the sixteenth century.[154] On its face the writ has a special meaning depending upon whether an interpreter regards it in the light of its use and position in the late seventeenth century and afterwards or at the point of its earliest appearance.[155] The words *ad subjiciendum* are, of course, its distinguishing language, and translated literally, read 'to submit to' or 'to undergo'.[156] In no other respect does the writ differ from the *ad faciendum et recipiendum* and many writs *'ad subjiciendum'* have in their body *'ad faciendum'* or *'ad recipiendum'*[157] or both.[158]

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[152] Considered in a second article to be published in a future number of this REVIEW.

[153] 3 BL. COMM. 130.

[154] The Reports, Entries and Abridgements of the 16th and 17th centuries referred to in the foregoing and subsequent citations, yield nothing except inferences.

[155] None of the authorities seem to have considered the transitory period in which the *ad subjiciendum* took form. They all agree as to its absence in the early 16th century. There is further agreement as to its wide use at the beginning of the 17th, but beyond recognizing that the writ had evolved into a higher form and that it had a political value, little more is said: see, Jenks, *supra*, note 10; 9 HOLDSWORTH, *op. cit., supra*, note 25; CHURCH, HABEAS CORPUS (2d. ed. 1893) 2-58. HURD, HABEAS *Corpus* (2d. ed. 1876). Only Sir John Fox has recognized the special problem of the *ad subjiciendum*, and his views have already been discussed, *cf.* FOX, *loc. cit. supra*, note 12.

[156] For the modern English form see SHORT AND MELLOR, THE PRACTICE OF THE CROWN OFFICE, (2d. ed. 1908) 570; For the American forms see, CHURCH, *op. cit., supra*, note 155, at p. 879; also at p. 878, for a form of the *'ad faciendum et recipiendum'* which he implies is to be used in the same proceedings as the *'ad subjiciendum'*. The word *'subjiciendum'* is derived from the verb *'subjicio'*, I submit; see FRUEND, LATIN-ENGLISH LEXICON (1874) *Subjicio* II-A, at 1473.

[157] TREMAINE, PLEAS OF THE CROWN, (1723) 354, 358; 4 BACON, *op. cit., supra*, note 107 at p. 568; 2 COKE INST. 52; 4 COMYN'S DIGEST (1822) 431.

[158] 3 BL. COMM. 130.

Now whatever may be the meanings attributable to the words "undergo" or "submit to"—and they have a connotation differing somewhat from that of 'to do and receive'—the distinction in itself was scarcely enough to have led to the subsequent distinctive spheres of operation of the *ad subjiciendum* and the *ad faciendum et recipiendum.* So it becomes necessary to examine the *corpus cum causa* of the latter sixteenth century with an eye to its use independently of other writs and where it presumes to demand from goalers and keepers an accounting as to their prisoners in every case, *civil and criminal alike.* For it was this activity which characterized the developing *ad subjiciendum* until no jurisdiction or cause could resist its authority.[159]

From the end of the fifteenth century the common law courts had been willing to use their machinery to assist someone confined by other courts in the course of litigation, but as a rule they would only test the validity of such confinements when a *privilege* by the Common Pleas and Exchequer or a *certiorari* out of the King's Bench was in order.[160] It has been seen, however, that in these cases, unless the applicant was an evading debtor, the least suggestion of a *privilege* was enough to encourage the Common Pleas to assert its authority and issue a *habeas corpus cum causa.*[161] Thus the cases reveal a conflict in tendencies, in that the courts are determined to prevent abuses of the *corpus cum causa* to protect creditors, while at the same time they are even more anxious to maintain and increase the extent of their power and here the *corpus cum causa* was an indispensable ally.[162] The latter consideration seems to have been the more compelling and furnishes the explanation to the relative freedom with which writs of *habeas corpus* and discharges upon them were awarded in conjunction with *privilege* and *certiorari.*[163] Moreover, it was partly this tendency which influenced the common lawyers to use the *corpus cum causa* without any ancillary process where someone lay in execution particularly in the local and franchise courts.[164]

[159] "The highest remedy in law for any man that is imprisoned" Seldon, in the debates relating to the *Liberty of the Subject* (1627 - 28) 3 St. Tr. 95.

[160] *Supra,* 14 *et seq.*

[161] *Supra,* 16-18.

[162] *Supra,* 20 *et seq.*

[163] For an *habeas corpus* and *certiorari* see BROWNLOW, WRITS JUDICIALL (1653) 13; for the *corpus cum causa* and *privilege,* see THESARUS BREVIUM *op. cit., supra,* note 81, at p. 134.

[164] This was particularly so in cases where prisoners were confined under the customs of London; *Trussell's Case* (1589) 1 LEON. 460; BROWNLOW id. 28; HUGHES, COMMENTARIES ON THE ORIGINAL WRITS, 96, 108, 124.

As early as 1497 a *corpus cum causa* without any supporting proceeding was issued against a franchise goaler who had recaptured an escaping prisoner and upon the return to the writ the goaler omitted to state the cause, and it was held that the cause must be stated where one is held at the instance of a private suitor or else the party will be discharged.[165] In 1557[166] the courts discuss a discharge and the consequent responsibility of the Warden of the Fleet and the implication of a *habeas corpus* operating by itself is reasonably clear. Some years later in 1577—*Hinde's Case*[167]—a writ was issued by the Common Pleas to the Fleet where the party named was held by "commandment of the Commissioners in causes Ecclesiastical". This return was held insufficient and the warden was ordered to certify the exact cause. But the court went on to add "if one be committed to prison by commandment of the Privy Council there the cause need not be shewed in the return because it may concern the state of the realm, which ought not to be published."[168] Ten years later the Common Pleas again discharged on a *habeas corpus* one arrested in London who had a suit pending in the Common Pleas and while it appears to be a case of *privilege* yet no writ of *privilege* seems to have been necessary.[169]

The question which at this point suggests itself is what are these writs of *corpus cum causa*? The cases say nothing as to whether the form *ad faciendum et recipiendum* is implied, or some other wording.[170] But since it had been seen that the *corpus cum causa* of this period is largely the *habeas corpus ad faciendum et recipiendum*[171] and, moreover, that all the later writers assume that the Common Pleas could issue only this form and never the *'ad subjiciendum'*,[172] (and many of these cases where the *habeas corpus* is alone are issued out of the Common Pleas) therefore, it may be presumed that a good portion of the cases so far discussed where the writ has issued from the Common Pleas, irrespective of the quality of the imprisonment, are not the *habeas corpus ad subjiciendum*. And by the

[165] Y.B. (1497 - 98) 13 Hen. VII Mich. Pl. 1; here the woman had been arrested on a *Capias ad Satisfaciendum*.

[166] *Anonymous* (1557) JENK. 213.

[167] (1577) 2 LEON. 21.

[168] *Ibid.*

[169] *Peter's Case* (1587), 3 Leon. 194.

[170] In almost every instance the report states *'habeas corpus'* without any further details as to the writ itself.

[171] RASTELL, *op. cit., supra,* note 24, index, which refers to the *ad faciendum et recipiendum* under *Corpus cum causa.*

[172] 2 COKE INST. 53, 55; 2 HALE, *op. cit., supra* note 64, at 145; 3 BL. COMM. 131, 132, 133; 4 BACON, *op. cit., supra,* note 107, at 568.

end of the 16th century the writ was used on an extensive scale to inquire into detentions that are obviously neither private nor arising out of a civil matter, namely, in detentions by the King and Council. Now the Court of Common Pleas was concerned with common pleas while[173] pleas of the crown were the special concern of King's Bench.[174] Certainly arrests and imprisonment by the King and Council were matters of which the Common Pleas could scarcely be cognizant, and without being so empowered it was unlikely that they would issue writs to have before them parties detained in such cases, since they could not take upon themselves as the King's Bench could[175] the necessary inquiry to dispose of matters before them. The logic of the above combined with the claims of the later authorities[176] should lead to the conclusion that whenever the *habeas corpus* had to do with a criminal or seemingly criminal matter, such as a commitment by the Council, the court of Common Pleas was not the proper authority to whom an appeal should have been made. And since at a later period only the *ad subjiciendum* applied in a criminal[177] matter, the common pleas did not at any period have the right to award an *habeas corpus cum causa ad subjiciendum*.[178]

But does the evidence warrant such a conclusion? In *Hinde's*[179] case the judgment of the common pleas implied that it would entertain writs of *habeas corpus* in cases of imprisonment by the Council, and ten years later in *Hillyard's Case*[180] the court did issue an *habeas corpus* where the return showed that Hillyard was held in the Fleet "by the command of Francis Walsingham one of the Ministers and Principal Secretaries of our Lady the Queen".[181] Was this an *habeas corpus ad subjiciendum*? If it is judged in terms of its later function it would seem to be such a writ, and, too, Coke and Hale may have been stating the law as it had come to be when they were writing[182] when

[173] 2 COKE INST. 22 - 23.
[174] 4 *Id.*, at p. 71.
[175] *Ibid.*, also 3 *Id.*, at pp. 219 - 220.
[176] 2 *Id.*, at pp. 52 - 53; HALE, *loc. cit.*, *supra* note 172.
[177] *Ibid.*, particularly HALE.
[178] This problem of the power of the common pleas was fully discussed by the courts in 1670 (*Bushell's Case*, (1670) Vaughan 135) and in 1677, (*Jone's Case*, (1677) 1 Mod. 236).
[179] (1577 4 LEON. 21.
[180] (1587) 2 LEON. 175.
[181] *Ibid.* "*Per mandatum Francisi Walsingham Militis Unius Principalium Secretariorum Dominae Reginae*".
[182] COKE was probably writing from 1590 - 1620, while HALE from 1650-1675. See BRIDGEMAN, LEGAL BIBLIOGRAPHY (1807), 142, 72; BRUNNER, THE SOURCES OF THE LAW OF ENGLAND (1888), 41, 42; HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW (1925) 142, 150 - 54.

they insist that the *ad faciendum* would not be used other than in civil causes.[183] Of course the dates are not far apart but a change might have occurred in the meantime and there was nothing inherent in the *ad faciendum* or peculiar to the language of the *ad subjiciendum* which would have rendered either incapable of performing any of these functions.

Again, it should not be forgotten that in dealing with the *habeas corpus* as it was used to test the validity of imprisonments by the King and Council at this time the impending constitutional struggle[184] is evident, and that henceforth it has a bearing upon the fortunes of the writ. At this point, too, no instrument was available especially designed to test the validity of such commitments,[185] and the purposes to which the *habeas corpus*—an historically civil process—was being applied appears, in retrospect, as reflecting the needs of the time for such an instrument as well as the adaptable qualities of this writ. For if *habeas corpus* for some reason had proven less tractable it is not unlikely that some other device instead would have become the primary legal method — apart from trial—to ascertain the legality of an imprisonment.

It may be said then, that as late as 1587 there does not appear to be a precise distinction between an *habeas corpus ad faciendum et recipiendum* and the *ad subjiciendum* and, further, if the latter had already assumed the form which Coke described[186] the courts were not yet insistent upon its special relation to the King's Bench.

VI

The next step in the intricate career of the *corpus cum causa* in its *ad subjiciendum*[187] form involves an examination of the cases from 1585 onward as they deal with the great class of executive commitments.[188] *Hillyard's Case*[189] in 1587,

[183] 2 COKE, *op. cit.*, *supra* note 176; 2 HALE, *op. cit.*, *supra* note 176.

[184] *Infra.*

[185] The writs *de odio et atia* and *mainprize* were in disuse by this time, while imprisonments at the command of the King was one of the exceptions on the face of the *de homine replegiendo*. For brief summary of the writ's position in the 17th century see 2 HAWKINS, PLEAS OF THE CROWN (1785) 148.

[186] 2 COKE INST. 52.

[187] No deliberate separation of the writs probably took place. They developed contemporaneously and it is impossible to set out the considerations for or the points at which the changes took place.

[188] Some comment has already been directed, *supra*, to the conflict between the common law courts and the judicial functions of the various Councils, but here attention is focused upon the problems that arose out of executive action of the King's Council, when the Council was acting

represented a distinct advance over *Hinde's Case*[190] to the extent that the courts now requested the exact cause even where the warrant was signed by a Council member. Here the court gave the Warden of the Fleet a day to amend his return because it had stated only the bare command of the Queen's secretary,[191] and the decision implied that in default of a better return the court would be obliged to award a discharge.

In the following year two important decisions, *Searche's Case*[192] and *Howell's Case*,[193] both arising on a *habeas corpus* out of the Common Pleas, throw light on these political commitments. In the first, one Mabbe had Letters Patent from the Queen protecting himself and his sureties against arrest. Searche arrested a surety and for this was committed by the Marshal of the Queen's household for contempt of the Letters Patent. On petition to the Common Pleas a writ of *habeas corpus* was granted and a discharge followed, immediately after which the Marshal rearrested him. Whereupon the Common Pleas issued an attachment against the Marshal, apparently until Searche would be released. It is difficult to think of the writ here as the same as when a matter arose civilly on a *privilege* or *certiorari*, and the case resembles those which the later books refer to when they illustrate the *habeas corpus ad subjiciendum*, as the proper writ in a criminal matter.[194] But here the Common Pleas issued it notwithstanding its obviously "non-civil" purpose. Nevertheless it might have been the *'ad faciendum'*, all of which points to the thin line that distinguished the application of any form of *corpus cum causa* at this time.

Howell's Case[195] had to do with the same problem discussed in *Hillyard's Case*.[196] Here Howell had been committed by the Marshal and upon a *habeas corpus* issuing out of the Common Pleas, returned *"Per Mandatum Francisi Militis Principalis Secretarii et Unius de Privato Concilio Dominae Reginae"*. No other cause was reported and the court held the return insufficient. But the decision added that if the same return

in its administrative capacity. Of course it is difficult to separate the two functions for at the Council board matters of state were dispensed with at the same time as judicial decisions were being made. This duality of function can well be seen in the language of the Act of 1641, 16 Car. I c. 10, abolishing its civil jurisdiction; see, the next chapter in a future number of this REVIEW.

[189] *Supra*, notes 180, 181.
[190] *Supra*, note 167.
[191] *Supra*, note 180.
[192] (1588), 1 Leon. 70.
[193] (1588), 1 Leon. 71.
[194] 2 COKE INST. 52, 53; 2 HALE, *op. cit.*, *supra*, note 64, at 145.
[195] *Supra*, note 193.
[196] *Supra*, note 180.

had been made in the name of the *entire Council* no additional cause would have to be shown. It is evident here as in *Hillyard's Case* that the court approached the problem of commitments by Ministers of State with some diffidence and while they would dare to challenge the authority of a single member they could only acquiesce where the entire Privy Council had signified the command.

The uncertain state of the law with regard to these commitments led in 1592 to a conference of all the Judges and Barons and the promulgation of an unusual extra-judicial statement known as the *Resolution in Anderson*.[197] In an attempt to clarify the precedents the *Resolution* declared that "if any person be committed by Her Majesty's command from her person or by order from the Council Board, or if any one or two of her Council commit for high treason such persons . . . . may not be delivered by any of her courts without due trial by the law . . . . .", but nevertheless the courts may issue "the Queen's writs . . . . .", to have such persons before the court and if a proper return as described above is made, a remand will follow but such return must state "the cause in generality or specialty . . . . ." without which the judges cannot ascertain the propriety of the commitment. The effect of this statement was to eliminate, at least in theory, the validity of commitments by a single Council member, unless for treason, and to require in all cases a more or less detailed return, no matter who had committed—even from the Queen herself—so that the prisoner and the court had some idea as to the nature of the charge.

In the light of the previous cases the *Resolution* was substantially an accurate summary of the existing law—perhaps it was even a liberal interpretation since it is clear from *Hillyard's Case*,[198] that a committal by a single Councillor would be valid in most cases where a lawful cause was set out in detail while this *Resolution* confined the right to commit in such single member only to cases of treason.

What were the "Queen's writs" to which the judges alluded? Did they have in mind the '*ad subjiciendum*'? Nothing was

[197] (1592) 1 *Anderson's Reports*, 298; But there is another version of the resolution in HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND (1880) 235-36, which implies a closer restriction on the powers of the Council and gives no authority to Councillors except as they all act together as at the Council Board. Hallam says that his source in the British Museum is the more authentic version; but see MAITLAND, LECTURES ON CONSTITUTIONAL HISTORY (1913), 274.

[198] *Supra*, note 180, 181.

said in this regard and it is doubtful whether the question had any meaning at this point for the *ad subjiciendum* had probably not yet become the writ with that special meaning which Coke[199] insisted upon a few years later and which Hale[200] and the writers that followed accepted as a matter of course.[201]

The problem was not settled, however, with a resolution and the cases of commitments by the Council with a subsequent testing of their validity by *habeas corpus* became even more frequent throughout the next one hundred years.

But political cases were not alone developing the *habeas corpus ad subjiciendum* for in 1601, in an ordinary criminal matter, this writ was issued. One Gardner was arrested by the Sheriff of Cambridge and upon application the King's Bench issued a *"habeas corpus cum causa detentione immediate post receptione hujus brevis ad subjiciendum et recipiendum . . . ."*[202] . The sheriff returned that he had found the prisoner in possession of powder and a hand-gun "contrary to the laws of the realm", but upon the appearance of the King's attorney who confessed the plea Gardner was discharged.[203] From this purely criminal proceeding, the writ swings to a case in 1604 where a ward challenged the right of her guardian to retain control over her. Here Lady Rochester held Lady Mallet Willmot and a writ was issued out of the King's Bench *"ad subjiciendum et recipiendum"* directed to Lady Rochester who delivered the body and returned that she held Lady Willmot "as Guardian in socage to her".[204] These two cases—considering the widely different circumstances to which the writs were applied—suggest rather forcibly that the *corpus cum causa ad subjiciendum* was by this time extensively employed. But certainly the above two situations are strikingly modern and run almost the entire gamut of the present day operation of the writ.

At the same time the assertion by Parliament of its privileges led in 1604 to the famous case of Sir Thomas Shirely,[205] a member of the House of Commons who was held in the Fleet because of a debt, and whom the Warden refused to free to attend the session. The House, raising its *privilege*, ordered that a warrant under the hand of the Speaker be issued

[199] 2 COKE INST. 52, 53.
[200] HALE, *op. cit., supra* note 64, at 144 - 46.
[201] 3 BL. COMM. 130; 4 BACON, *op. cit., supra* note 107, at 585, 4 COMYN, *op. cit., supra* 157, at 431 - 32.
[202] *Rex* v. *Gardner* (1601) cited in *Tremaine, op. cit., supra,* note 157, at 354.
[203] *Id.*, at pp. 355 - 56.
[204] *Id.*, at p. 358.
[205] PROTHERO, *op. cit., supra,* note, 79 at 289, 290, 320 - 25.

directing the Clerk of the Crown to grant a writ of *habeas corpus* to have the body of Shirely brought to the House.[206] Now, while the case arose out of an original civil proceeding it would seem to be such a cause where the seventeenth century writs would have a *habeas corpus ad subjiciendum*. But a close examination of the writ[207] reveals it to be only a *"habeas corpus una cum causa ad respondendum ad faciendum et recipiendum"* including additional language concerning Shirely himself and the intention of Parliament upon his appearance.

Five years later the King's Bench on a *habeas corpus* in *Scodding's Case*[208] refused to discharge one held in the Admiralty on a piracy matter and while this case has nothing to do with the Council its significance at this point is the frequency with which the King's Bench now appears in the reports where all manner of imprisonments are being examined with a view to their legality and by way of *independent motions*. And the following year in *Wagoner's Case*[209] the King's Bench indicated that it would issue the writ of *habeas corpus* to test the propriety of an imprisonment in the City of London and then issued a discharge upon the facts set out in that return. In 1615, *Glanvil's Case*[210] indirectly raised the question of the Council since here the prisoner had been committed by the Chancellor acting as court rather than in his position as a member of the Privy Council. The return stated only that he was held in the Fleet *"Per Mandatum Domini Ellesmere Domini Cancellarii Angliae"*. The report of the case is followed by a list of Elizabethan precedents[211] (that seem to have been part of Glanvil's brief) to support the proposition that anyone jailed by the command of the Council or a single Council member might be bailed or discharged by *habeas corpus*. The court without these precedents (and many of them were of doubtful authority) had before it the *Resolution in Anderson* and the insufficiency of the return was apparent on its face. However, had the Chancellor mentioned Glanvil's contempt the decision may have been otherwise,[212] and he was finally discharged by Chief Justice Coke[213] who on other occasions had sustained the legality of commitments by the King or Council without details

[206] *Id.*, at 320.
[207] *Id.*, at 322 - 23.
[208] (1609), *Supra*, note 110; 3 HUGHES, ABRIDGEMENT (1662), 2274.
[209] (1610), 8 Co. Rep. 121b.
[210] (1615), Moore (K.B.) 838.
[211] Id., at 839.
[212] *Allen's Case, supra*, note 130.
[213] (1627 - 28) 3 St. Tr. 59 *et seq.*

of the cause being given in the return.[214] But in the following year in *Salkinstowe's Case*,[215] he refused to bail on a *habeas corpus* where the return read only *"commit per le Privie Council"*, while in another case at the same time he bailed one who had been committed to the Fleet by the Chancellor for refusing to answer a bill out of the local court of Oxford.[216]

Following these was the case of *Richard Bourn*.[217] He had been detained by the warden of the *Cinq Ports* who refused to acknowledge a *habeas corpus cum causa* that was directed to him out of the King's Bench, on the ground that the King's writs did not run into these special jurisdictions. It was held otherwise and precedents of Henry VI were cited to show that the King's writ is a "Prerogative Writ"[219] and ran into all the dominions of the King. This *habeas corpus* would seem to be an *ad subjiciendum* but there can be no certainty even though one writer has insisted that the *ad faciendum et recipiendum* could never have operated into Barwick, Calais, or the Cinq Ports.[220] The variety of purposes to which the writ was by this time being applied may be seen in an unusual form in 1627 where to offset the effect of a *supersedeas* and permit the plaintiff to proceed and yet to protect himself against his violation the King's Bench granted him a *habeas corpus de bene esse*, available at any moment if he was attached for prosecuting his case.[221]

Meanwhile, the struggle between Parliament and the early Stuarts, now a generation old and reaching its crescendo, was reflecting itself in every aspect of government, and it is at this point, in 1627, that *Darnel's Case*[222] appeared. So much has been written about this case and the years immediately following that little can be served by repeating what is a very formidable body of learning in English constitutional history.[223] It is

[214] *Raynard's Case, supra*, note 119.
[215] (1616), ROLLE, 219.
[216] *Gooch and Smith's Case* (1616) ROLLE, 277.
[217] (1620), 2 CROKE 543; PALMER 55.
[218] One precedent was dated (1452) 30 Hen. VI.
[219] This seems to be one of the earliest occasions for the use of the term "prerogative writ" and Professor Jenks, *supra* note 2, at 533 - 34, is far from fact when he suggests that the use of the expression "prerogative writ" as it came to be applied to the writs of *habeas corpus, certiorari, mandamus* and *prohibition*, begins in the early 18th century.
[220] 4 BACON, *op. cit., supra*, note 107, at p. 570.
[221] *Blackwell's Case* (1627) BENLOE 201, 203.
[222] (1627) 3 St. Trials 1.
[223] MAITLAND, *op. cit., supra* note 197, at pp. 303, 313; ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND (1935), 291 *et seq;* 4 HALLAM, *op. cit., supra*, note 197, at pp. 367 - 498; 6 HOLDSWORTH, *op. cit., supra* note 25, at 33 - 37. 4 CAMBRIDGE, MODERN HISTORY, 267 *et seq.*

sufficient to state the case insofar as it related to the writ of *habeas corpus*.

Darnel and four other knights were brought before the Council and committed to the Fleet in November of 1627 for refusing to contribute to Charles' demand for loans. Through Sergeant Bramston, his counsel, Darnel moved within a few days for a writ of *habeas corpus cum causa* before the court of King's Bench, to be directed to the Fleet. The warden at first ignored the return day and when an *alias* writ was at length issued, he returned that Darnel was held "by the Special Command of His Majesty".[224] Very full arguments were made by such able counsel as Noye, Selden, Bramston, and Calthorpe.[225] They all pressed for a dismissal upon this return claiming that precedents from *Magna Carta* onward opposed imprisonment by the King or his Council.[226] But there is no doubt that on the law as it then stood, particularly with the *Resolution in Anderson*[227] still relatively fresh in the minds of the judges, a discharge as such would have been improper. On the other hand the refusal of the King or the Council to designate the cause in relative detail was not at all consistent with many of the decisions as well as with the spirit of the Resolution, and Chief Justice Hyde's claim "that the *habeas corpus* is not to return the cause of the imprisonment but of the detention in prison",[228] was scarcely warranted even though the result may, in any event, have been the same.

Here the importance of *habeas corpus* was that it had been made the basis for the attack upon an imprisonment commanded by the King himself and had proven a quick method, in spite of the temporary resistance of the goaler, to have one so imprisoned brought before a competent tribunal and there have himself charged and heard and the legality of the detention argued and adjudged. There was no other remedy available to

[224] "*Per speciale mandatum Domini Regis*".

[225] *Supra*, note 222 at pp. 3 - 58, 59 (n).

[226] HALLAM, *op. cit.*, *supra* note 197, at 376, re the argument in Darnel's Case; "The fundamental immunity of subjects from arbitrary detentions has never before been so fully canvassed. And it is to the discussion that arose of the case of these five gentlemen that we owe its continual assertion by Parliament and its ultimate establishment in full practical efficacy by the statute of Charles II".

[227] *Supra*, note 197.

[228] WHITLOCK, *op. cit.*, *supra* note 105, at 8. Hyde C.J. . . . "that the return was positive and absolute by the King's special command and that the signification of it by the Lords of the Council is only to inform the court. And that the *habeas corpus* is not to return the cause of the imprisonment but of the detention in prison. That the matter of the return is sufficient and the court is not to examine the truth of the return but must take it as it is."

accomplish the same purpose with the same efficiency. Even though the prisoners in this case were denied their freedom the writ did have their case completely aired before a court.[229]

The decision in *Darnel's Case,* though strictly legal, provoked the Commons into an attempt to restate the basis of their rights as subjects. One of the most discussed grievances was, of course, the refusal of the courts to bail on *habeas corpus* in cases of special commitments, and after a long debate it was resolved to bring to the attention of the King that 1) no freeman ought to be imprisoned without cause shown either by the King or Council; 2) that in such a case a *habeas corpus* should be awarded; 3) that if *no cause of commitment be returned the party should be bailed.*[230] These and other matters pertaining to the liberty of the subject were debated and the King's need of supplies gave the House an opportunity to bring the matter to his attention.[231] Charles asked the House not to press the point but to rely on his 'Royal word', to which certain members replied that "his word is to be taken in a parliamentary way".[232] After many conferences between the Lords and Commons during which time the King privately approached the Lords to permit him certain special commitments where no cause need be shown, (which request was afterward refused in conference between the Lords and Commons) the Petition of Right[233] was presented to which Charles gave assent in the following formula; *"soit droit fait comme est desire".*[234]

Of *habeas corpus* the Petition recited that contrary to many ancient statutes[235] "Divers subjects have been imprisoned without any cause shown",[236] and when they were brought by writs of *habeas corpus* before the justices "there to undergo and receive",[237] as the court ordered, no cause was certified by the

[229] See COKE'S nine reasons for the use of the writ of *habeas corpus* 3 St. Tri. 126 - 31.

[230] WHITLOCK, *op. cit., supra* note 105, at 9.

[231] *Id.,* at 10.

[232] *Ibid.*

[233] (1628) 3 CAR. I. c. 1; see STUBBS, SELECT CHARTERS (1900) 515 - 17; 1 HALLAM *op. cit., supra,* note 197, at 377; 4 CAMBRIDGE, *op. cit., supra,* note 223 at 270 - 71; MAITLAND, *op. cit., supra,* note 197, at pp. 313 - 14.

[234] This formula appears in 7 PICKERING, STATUTES AT LARGE (1763) 320, STUBBS, *id.,* at 517 who cites 4 STATUTES OF THE REALM, 24, 25; but WHITLOCK, *op. cit., supra* note 105, at p. 10, claims that assent was given in the following form, "that right be done according to law and the statutes be put into due execution".

[235] *Supra,* note 233, secs. 3 - 4.

[236] *Id.,* sec. 5. (1).

[237] "To undergo and receive", clearly points to the *habeas corpus ad subjiciendum et recipiendum'* and it is therefore *this* writ which was known to those who framed the statute as a remedy against imprisonments by the executive.

keepers except that "they were detained by your Majesties Special Command signified by the Lords of your Privy Council", and, were in consequence remanded to prison without being further charged with anything against which they might make answer according to law. . . . .[238] They do therefore humbly pray your Most Excellent Majesty . . . . .[239] that no free man in any such manner as is beforementioned be imprisoned or detained".[240]

The effect of the Petition was to modify the decision in *Darnel's Case*[241] insofar as it had permitted the King or Council to imprison without stating *the full cause* on the return, and the subsequent cases of commitments by the Council, while arising as frequently as heretofore, are characterized by the courts, as a rule, declining to accept returns to writs of *habeas corpus* which merely stated the plain fact of commitment by the Council.[242]

The year following the Petition a case arose[243] where a London merchant—Chambers—refused to pay his tonnage and poundage, and upon being brought before the Council declared that "Merchants were screwed up in England worse than in Turkey".[244] He was committed, and upon the return to a *habeas corpus* it was stated that he had been imprisoned "for insolent behaviour and words spoken at the Council-table".[245] The court held the return insufficient and the King's attorney was given a remand to add the words themselves with the offense charged, and when the words were returned as above he was adjudged bailable.[246]

In the same year *Selden's Case*[247] climaxed the series and demonstrated that the *habeas corpus ad subjiciendum* could do no more than the existing law permitted in these special imprisonments. Here nine members of the House were committed for seditious words spoken during a warm debate on personal liberty. Six sued out writs of *habeas corpus* asserting

[238] *Id.*, s. 5 (2).
[239] *Id.*, s. 10 (1).
[240] *Id.*, s. 10 (3).
[241] *Supra*, note 222.
[242] *Infra* at 42.
[243] *Chambers Case* (1629) CRO. CAR. 133; WHITLOCK, *op. cit; supra*, note 105, at pp. 11, 13; 4 CAMBRIDGE, *op. cit., supra*, note 223, at p. 281.
[244] *Id.*, WHITLOCK at p. 11.
[245] *Id.*, 11, 13.
[246] *Ibid.* Chambers was afterwards charged in the Star Chamber where he was fined £2000, the amount being estreated into the Exchequer; he was committed for default, and remanded when produced on several successive writs of *habeas corpus*. He remained in prison for this default until 1641.
[247] (1629) 3 St. Tr. 235.

the privilege of parliament. The King's attorney argued no *privilege* and too, that the court had no power to bail where the prisoner was held by the King's command.[248] And while it was true that if the return showed cause the court could not bail yet it was otherwise where no sufficient cause was evident.[249] For some reason the remarks of counsel and the court pointed to the uncertainty with which they all viewed the court's power to bail generally. It was contended for the King that whatever inherent power the King's Bench once had was removed by the Statute of Westminster I[250] and that this applied to these special commitments. But was this the case? That statute was concerned with abuses by sheriffs and not with the authority of the justices. Moreover as late as 1344 bail had been granted to one held at the command of the King.[251] While prior to that statute, by writs *de odio et atia*[252] and *mainprize*[253] felons and even those "appealed" of murder were almost always bailable. As Stephen says "the power of the superior courts to bail in all cases whatever, even high treason, has no history. I do not know, indeed, that it has ever been disputed or modified".[254] The doubts of the judges therefore as to their authority to bail was poorly founded. The importance of the question of bail as it arose here was that it pointed toward the direction in which *habeas corpus* was moving. Heretofore, at least up until the end of the 16th century, the writ has to do with civil pleas and arises out of such proceedings almost entirely. But by now it is active in criminal causes and henceforth its most important function is in such matters, until the major legislation of the century refers to the writ only in terms of the criminal law.[255] And it was to require over 100 years of experience before legislation was again introduced into England to assert its original civil qualities.[256]

But while the courts always were impressed with the authority of the Council as an administrative body they continued to resist its judicial adventures, and in two cases in 1634 and 1635[257]

[248] See the arguments of *Attorney General Heath*, id. 304, 323, 328.
[249] *Darnel's Case*, *supra*, note 222.
[250] (1275) 3 Edw. I. c. 11, 15.
[251] MAITLAND, *op. cit.*, *supra* note 197, at 273.
[252] Cohen, *op. cit.*, *supra*, note 1 at 96 - 100.
[253] *Ibid.*
[254] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 243. At any rate it was disputed in the above mentioned case.
[255] (1679), 31 Car. II. c. 2.
[256] (1803), 43 Geo. III. c. 140, (1804) 43 Geo. III. c. 102, (1816) 56 Geo. III. c. 100.
[257] *Turner* v. *Askwith*, *Musgrave* v. *Vaux*, *supra*, note 120.

they refused to recognize evidence taken before the Council of York.[258]

Even so early in its career as an instrument to test the validity of criminal imprisonments, however, the judges regarded the writ as subject to abuses and in 1637 a memorandum of all the common law judges rejected a proposal to permit prisoners held in London to be released temporarily by writs of *habeas corpus* because of a prevailing epidemic, declaring that this would be a further abuse of the writ.[259]

That year was the date of *Hampden's* trial[260] and other ship-money cases, some of which arose on *habeas corpus* after commitments by the Council. *Jenning's Case*,[261] *Pargiter's Case*,[262] and *Danver's Case*[263] are good illustrations. In the last two bail was refused where the return stated that the prisoners were "a danger to the Royal person", while the first, where bail was again refused on an equally flimsy return, provoked a discussion in the House by a committee of the whole.[264] But, generally, the courts were not disposed to accept returns that failed to state the cause in specific terms.[265]

From the point of view of those who were subject to the displeasure of the Council, however, the operation of the writ was not very satisfactory. Added to the procedural defects was the reluctance of judges to apply a very liberal interpretation to the existing law lest they incur the same displeasure, and this led the House in 1640 to debate the advisability of "giving prisoners (properly bailable) reparation out of the estates of judges who then sat in the King's Bench".[266]

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(To be Continued)

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[258] RIED, *op. cit., supra*, note 92.
[259] (1637), Cro. Car. 466.
[260] (1637), 3 St. Tr. 826.
[261] 2 RUSHWORTH, HISTORICAL COLLECTIONS (1686), 414.
[262] *Id.*, at 414 - 16.
[263] *Ibid.*
[264] 4 RUSHWORTH, *op. cit., supra* note 261, at 120 - 21.
[265] *Lawson's Case* (1639) 3 CROKE 365; *Barkham's Case* (1639) CRO. CAR. 507; *Seele's Case* (1640) CRO CAR. 558; *Freeman's Case* (1641) CRO. CAR. 579; *Wolnough's Case* (1640) CRO. CAR. 553.
[266] WHITLOCK, *op. cit., supra* note 105, at 37.