HABEAS CORPUS CUM CAUSA — THE EMERGENCE OF THE MODERN WRIT — II *

I

Until about 1640 *habeas corpus* had had only a limited effect on the judicial and administrative powers of the Council. And when that body occasionally did submit to the common law courts there was always the Star-Chamber in the background capable of stepping in and executing the executive will. *Chambers' Case*[1] had illustrated this neat machinery and the House was realizing that the system of commitments for reasons of state, combined with judicial indifference in proper cases, required legislative attention. Moreover, in civil commitments where a *corpus cum causa ad faciendum et recipiendum* issued, the courts would never have been satisfied with a bare return that the prisoner was held at the command of another court. In fact, the entire early history of *corpus cum causa* turned on this point, namely, that the tribunal awarding the writ demanded the details of time, place, and reason for the arrest and the detention, and would not be put off with a recital of the mere act of arrest at the instance of some other authority.[2] But because of the political considerations inherent in these special commitments by the King or his Council the courts of common law were probably influenced by the historic right of the monarch to imprison when the exigencies of state so required.[3] Thus they refrained from inquiring too deeply into these cases, although from the most ancient times they could have bailed even in cases of treason.[4] So it was to combat the problems arising out of the judicial authority of the Council and the Court of Star Chamber, as well as to meet the relative ineffectualness of the writ of *habeas corpus ad subjiciendum* in what might be termed politico-criminal detentions, that the *Habeas Corpus Act* of 1641[5] was framed.

Like the Petition of Right before it, the Act opens with a statement of the liberties and privileges of the subject that

* The first part of the present article appeared in (1940), 18 Can. Bar Rev. 10.

[1] (1629), Cro. Car. 133; WHITLOCK, MEMORIALS OF THE ENGLISH AFFAIRS (1687) 11, 13.

[2] Frequently Judges delayed the granting of the writ in these cases. See *Darnel's Case* (1627) 3 St. Tr. 1.

[3] See the argument of Attorney-General Heath in (1627), 3 St. Tr. 304, 325, where he claims for the King a reserve of power, "*an absolute potesta*", which overrides the claims of the common law.

[4] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 243.

[5] (1641), 16 Car. I c. 10.

from the time of Henry III have been protected by statute. It then recites the legislation in point,[6] and proceeds to recount the establishment of the Court of Star Chamber by Henry VII[7] and its improvement by Henry VIII;[8] that this court and its Judges have exceeded what authority they had and as well have exacted "heavier punishments than by any law is warranted";[9] that any justification for the court's existence had ceased[10] and any matters determinable before it could be heard as well by the ordinary courts of justice;[11] that its decrees were intolerable and a means to arbitrary government, and that the 'Council Table' too, had assumed judicial power in ordinary civil causes contrary to the law of the land.[12] For these reasons the Court of Star Chamber is "absolutely dissolved",[13] and the same with regard to the Court before the President and Council in the Marches of Wales,[14] the Court of the Council of the North,[15] the Court of the Duchy of Lancaster,[16] the Court of the Exchequer of the County Palatine of Chester,[17] and the jurisdiction of the Privy Council over a man's estate.[18]

The section dealing with *habeas corpus* provides that if anyone was imprisoned by any of the above courts,[19] or by the command of the King or his Council Board or any of the Lords of the Privy Council,[20] such person upon motion before the "*King's Bench or Common Pleas*" shall have "forthwith granted unto him a writ of *Habeas Corpus.*"[21] The sheriff or gaoler must certify the true cause of his commitment or detainer,[22] and within three days after the return, the court "shall proceed to examine and determine whether the cause of such commitment be just or legal".[23] Any judge or officer who wilfully does or omits to do anything contrary to "the true meaning" of the Act is liable, to the person offended, in treble damages.[24]

[6] Id., s. 1, (1), (2), (3), (4), (5), (6).
[7] Id., s. 1 (7).
[8] Id., s. 1 (8).
[9] Id., s. 1 (9).
[10] Id., s. 2 (2).
[11] Id., s. 2 (1).
[12] Id., s. 2 (3).
[13] Id., s. 3.
[14] Id., s. 4 (1).
[15] Id., s. 4 (2).
[16] Id., s. 4 (3).
[17] Id., s. 4 (4).
[18] Id., s. 5.
[19] Id., s. 8 (1).
[20] Id., s. 8 (2).
[21] Id., s. 8 (3).
[22] Id., s. 8 (4).
[23] Id., s. 8 (5).
[24] Id., s. 8 (6).

The effect of the Act was to remove the Star Chamber and eliminate the judicial power of the various councils including the Privy Council. This last body, however, was, by implication, unaffected in its jurisdiction over matters not relating to "a man's estates", and its power to commit in politico-criminal cases, therefore, was untouched. But the statute did make clear certain matters of procedure with regard to *habeas corpus*, viz : a) the writ was immediately available to anyone imprisoned by the King or Council; b) the sheriff was to make a statement as to the true cause of detention; c) within three days after the return the court must ajudicate upon the matter. Most significant were the penal provisions, being perhaps the first instance where a judge was made pecuniarily liable for his failure to comply strictly with a statute. It should be noticed, however, that the imprisonments which the Act refers to are only imprisonments by the King or Council, so that the writ has not yet become the accepted remedy for bail or discharge in ordinary criminal matters.[25]

Now if it is agreed that the writ of *habeas corpus* dealt with here was the same as that in the Petition of Right, then the *habeas corpus* of this Act is, of course, the *ad subjiciendum*. And since the statute provides that the motion may be made to the King's Bench or *Common Pleas*, it indicated an intention to remove the uncertainty which attached to the power of Common Pleas in these cases. The authority so conferred upon the Common Pleas, however, was limited to the purpose of the section, and in commitments other than by the King and Council its jurisdiction remained much as it had been before the Act.

II

From the passing of the *Habeas Corpus Act* of 1641 until the end of Charles' reign the reports are very unsatisfactory and the *habeas corpus* cases infrequent. An interesting writ in 1645 was directed to the House of Lords which had apprehended the servant of a member of the House of Commons, and the circumstances of the case hint of the impending struggle between the Commons and those members of the Lords who later sided with the Crown.[26]

By this time the writ, however, must have been the most common of summary procedures to obtain releases in almost every case, for in 1649 the court refused to grant a *habeas corpus*

[25] It was soon, however, to become the regular method to obtain bail; see HIGHMORE, BAIL (1791) 214 et seq.

[26] WHITLOCK, *op. cit.*, *supra* note 1, at 187.

ad testificandum to a plaintiff who required the evidence of an imprisoned witness, declaring "this is but a trick of the party to gain his liberty".[27] In another case it refused to discharge one from the custody of the Admiralty even when that Court had infringed upon its rules but where no excess of jurisdiction was alleged.[28] At the same time there is evidence of the writ's continued association with the *audita querela* when the court on a *habeas corpus* discharged one arrested upon an execution, the facts being the same as upon a previous arrest and discharge; but it demurred to this practice and said the party should first have had his *audita querela*.[29] The next year the Court was more liberal in its attitude towards *'ad testificandum'* but placed the responsibility for the prisoner's return on the party requiring the testimony.[30] By 1651 the *habeas corpus* with the *'bail piece'*[31] was a common practice, and whenever the Sessions of the Peace in a minor case demanded excessive sureties a writ would issue, frequently leading to a reduction in bail with only "good sureties" required.[32]

These were the first years of the interregnum[33] and it is startling to find that one of the earliest legislative acts of the Commonwealth was to make the *corpus cum causa*[34] available to poor prisoners held in execution for "debt, breach of promise, contract or covenant".[35] Only two writers appear to have paid any attention to this period for its effect on the writ, Holdsworth[36] and Pike,[37] but they barely mention it, and what they have to say is not too illuminating. The former ignores the civil improvements and condemns the special bodies set up to deal with the disaffected as being more arbitrary than the Tudor-Stuart Council or Star Chamber, and the latter gives the Roundheads great credit for something with which they probably had not the remotest connection — the contents of the *Habeas Corpus Act* of 1679.[38]

[27] *Anonymous* (1649) Styles 128. This is one of the first cases in which the writer has observed the actual direction *'Habeas corpus ad testificandum'*.

[28] *Anonymous* (1649) Styles 129.

[29] *Walker* v. *Allen* (1649) Styles 147.

[30] *Treton* v. *Squire* (1650) Styles 230.

[31] *Peace* v. *Shrimpton* (1651) Styles 261.

[32] *Anonymous* (1652) Styles 322.

[33] 1649-1660.

[34] *"Habeas corpus cum causa ad faciendum et recipiendum"*.

[35] SCOBELL, ACTS AND ORDINANCES OF PARLIAMENT 1640-1657 (1658) 1649, c. 65, (pt. 2, at 99).

[36] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924-25) at 515 n. 1.

[37] 2 PIKE, HISTORY OF CRIME IN ENGLAND (1873) at 192.

[38] *Ibid.* "To them we owe the principle of the *Habeas Corpus Act* if not the Act itself."

The ordinance of 1649[39] entitled *"Further relief for poor prisoners"* gave to those committed in the above cases, where they had not assets in excess of five pounds exclusive of their tools of occupation and wearing apparel, the right to have a *habeas corpus cum causa* from the Justice of the Peace in the town or village where such person was detained, directing the sheriff to bring such prisoner before the Justice who would then examine him as to his poverty. Whereupon the Justice is to certify his record of the case to the court out of which the process of imprisonment was issued, and that court was to issue a *scire facias* to all such parties to the original cause, who, failing to answer within fourteen days, lost their claim and the prisoner thereafter was discharged.

The procedure was improved upon in the following year by a further ordinance[40] permitting prisoners, when once they received the writ from the Justice, to be set free, pending the return day of the case or such time as was set out in the writ, upon their own recognizances or such sureties as they are able to offer. No fees were to be taken for such sureties, and in case the prisoner escaped and did not return the warden or gaoler was protected against the suit or claim of the party at whose instance the prisoner was held. But such a temporary release was not to be considered a discharge of the execution. At the same time the right to issue writs of *habeas corpus* was extended to the Lord Commissioners of the Great Seal of England. Both of the above ordinances were extended by another ordinance in 1656.[41]

These provisions are really quite remarkable when it is considered that while at early common law there had been no imprisonment in personal actions where force was not alleged[42] yet commercial developments had led to legislation which eventually made imprisonment for debt and like defaults[43] a very common procedure. So to the extent that this Commonwealth legislation attempted to deal with a problem which reached shocking proportions in the nineteenth century it was almost two hundred years in advance of its time.[44]

But the Commonwealth, too, learned that *habeas corpus* could interfere with matters of public policy when it was

[39] SCOBELL, *op. cit., supra* note 35.
[40] SCOBELL, *op. cit., supra* note 35, 1650, c. 6, (pt. 2, at 116).
[41] *Id.*, 1656, c. 10 (pt. 2, at 389).
[42] Fox, *Process of Imprisonment at Common Law* (1923) 39 L.Q.R. 46.
[43] HARGRAVE, TRACTS (1787).
[44] That is to the extent that this commonwealth legislation was directed toward *civil* imprisonments. See *infra* page 177 and 196.

discovered that the government's strict control over the "buying, selling, searching, viewing, ordering, or disposing of any corn, wine, beer, ale, fish, flesh, salt, butter, cheese" was being subverted by way of writs of *habeas corpus cum causa* with *certiorari* out of the "Upper Bench"[45] against the prosecutors and justices who tried offences against these regulations. An Act was passed forbidding the issuing of such writs in those cases, and where they were granted by the judges, prosecutors and informers were empowered to ignore them.[46]

But while the Commonwealth may have been relatively liberal in its extension of the writ to such civil pleas, when it came to political matters the Lord Protector and his Council of State were no more sympathetic toward the use of the *habeas corpus ad subjiciendum* on behalf of their prisoners than had been King Charles or his Privy Council before them. Two cases in 1653 illustrate the manner in which the Commonwealth resorted to the same methods as had Charles and his Councillors to suppress opposition,—*Captain Streater's Case*[47] and *Lilburne's Case*.[48] These were two of the great state trials of the Commonwealth, and it was by way of *habeas corpus* that Streater and Lilburne as well as other political prisoners[49] of the time were afforded a hearing.[50]

Streater was committed to the 'gate-house' for writing and publishing seditious pamphlets. He was brought before the Upper Bench by an *habeas corpus ad subjiciendum* where it was returned that (1) he was held by a warrant of the Council of State for publishing pamphlets, and (2) he was further held by a warrant under the hand of the Speaker of Parliament by virtue of an order of Parliament. The court held that the order of Parliament was binding upon the court and Streater was remanded. Later he was brought up again by way of another writ before Rolle C.J., and the returns were the same as before, with the addition of the court order in the prior remand. But the only return which the Chief Justice adjudged important was the order of Parliament since the warrant by the Council of State was considered too general; and since Parliament had adjourned, its orders like its committees were dissolved and therefore Streater ought to be discharged.

[45] The name of the Court of King's Bench during the Commonwealth; see BROWNLOW, WRITS JUDICIALL (1653).

[46] 1650 c. 31; SCOBELL, *op. cit.*, *supra* note 35 (pt. 2, at 142).

[47] (1653) 5 St. Tr. 365; Styles 397.

[48] (1653) 5 St. Tr. 371; Styles 397.

[49] 5 St. Tr. 1-936 for the state trials of the Commonwealth.

[50] *Id.*, at pp. 936 - 48, for references to the administration of justice during the period.

In *Lilburne's Case* the Lieutenant of the Tower returned that the prisoner had been committed by the Council of State and that the gaoler had been commanded not to bring him before the bar on a writ of *habeas corpus*; to which Rolle retorted by issuing an *alias* writ.

Both cases demonstrate the similarity in methods between the Council of State and Charles' 'Board'. They testify also to the resistance of which an independent court was capable even against a powerful executive. In the course of his argument Streater had pointed out that when a *corpus cum causa* required 'cause' on its return, it did not mean "who" committed but rather "why", in specific terms. But, of course, the King's personal command or that of a Council of State must needs have great weight irrespective of cause.[51] Yet in 1654, despite the personal request of Cromwell that a *habeas corpus* not issue, Rolle had a prisoner brought before him.[52]

The cases at this time testify to the writ's wide operation in other than political matters.[53] But so disturbed were the administrative officers of the Commonwealth at its use against them that on one occasion they even arrested at the bar itself counsel for a prisoner who appeared with his client to argue the case.[54] In general it may be said that the interregnum further proved the utility — more or less — of the writ in political cases. But the distinctive contribution of the period to *habeas corpus* was in the field of imprisonment upon civil executions. Here the Protectorate was far in advance of its day, and the abrogation of this legislation upon the return of the Stuarts postponed for generations any adequate attention to the problem of imprisonment of indigent debtors.

III

The generation between the return of the Stuarts and the Revolution of 1688 was perhaps the most important in the long history of *habeas corpus*. Not that any new principle was introduced, but rather the decisions and legislation of the period climaxed centuries of development and more or less wrote finis to some of the writ's romantic uncertainties.

[51] See the argument *supra* p. 172.
[52] *Anonymous* (1654) Styles 418.
[53] *Elizabeth Bayne's Case* (1654) Styles 433; *Anonymous* (1654), Styles 432.
[54] *Cony's Case* (1655) 5 St. Tr. 940.

The position of the writ at the Restoration may be best observed in the form books of the period. Brownlow,[55] Hughes,[56] Townsend,[57] and Kitchen[58] all contain a great many varieties of *habeas corpus*, and returns thereto. Brownlow has several forms in the Common Bench, mostly writs of *corpus cum causa ad faciendum et recipiendum*[59] and *habeas corpus juratorum*.[60] In the King's Bench are writs to the Sheriff of London, with *certiorari*[61] and without it,[62] as well as others without "cause", such as *ad satisfaciendum*.[63] Curiously no *ad subjiciendum* appears and probably the reason is that by this time that writ was becoming more or less identified with the criminal procedure, and here the author was dealing only with civil process. Hughes mentions several varieties, most of which have to do with confinements in London[64] and matters of privilege, citing in an annotation cases of 1487.[65] Townsend is most complete, citing writs and returns for almost every known use of *habeas corpus*. In the King's Bench all forms are listed with several examples of the *ad subjiciendum*.[66] In the Common Pleas, there are writs of the *corpus cum causa* to the Fleet, to London, with *privilege*, together with six variations of the commonly used *habeas corpus ad juratorum*.[67] Many forms for proper returns[68] are also included, and in general the practice in *habeas corpus* matters appears to have been extensive.[69] But nowhere is an *ad subjiciendum* included in the Common Pleas group. Other books of precedents published at a slightly later period follow these patterns.[70] In one there is a *corpus cum causa ad faciendum* which includes the following language, *"immediate post recipiendi hujus brevi"*,[71] a form which made infrequent appearances since it was first noticed in the language of an *ad subjiciendum* in 1601.[72]

[55] BROWNLOW, *op. cit., supra* note 45.
[56] HUGHES, COMMENTAIRES ON THE ORIGINAL WRITS (1655).
[57] TOWNSEND, COMMON LAW TABLES OF PRECEDENTS (1667).
[58] KITCHEN, JURISDICTIONS (Court Leet) (1656).
[59] BROWNLOW, *op. cit., supra* note 55, at 79, 80.
[60] *Id.*, at 80.
[61] *Id.*, at 13.
[62] *Id.*, at 27.
[63] *Id.*
[64] HUGHES, *op. cit., supra* note 56, at pp. 96, 108, 121.
[65] *Id.*, citing Y.B. (1487) 2 Hen. VII. (2) Pl. 2.
[66] TOWNSEND, *op. cit., supra* note 57 at 415.
[67] *Id.*, at 447 - 48.
[68] *Id.*, at 490 - 91.
[69] KITCHEN, *op. cit., supra* note 58, at 530, 531, 534.
[70] BREVIA SELECTA, ANTROBUS AND IMPY (1675), 3; BROWN, PRECEDENTS (1678) 546.
[71] *Id.*, BREVIA, at 3, No. 2.
[72] *Rex* v. *Gardner* (1601) cited in TREMAINE, PLEAS OF THE CROWN (1723) 354.

Early in the reign of Charles II, an Act[73] "for the Prevention of Vexations and Oppressions by Arrests, and of Delays in Suits of Law" included in its provisions a section which recited that many persons remained in the Fleet to escape their creditors who could not during this imprisonment proceed as well against debtors as if they were at large and therefore . . . . . for the better enabling of all persons to collect their just debts", where any such debtor was a prisoner in the Fleet, the creditor may sue out his 'original', and upon that a writ of *habeas corpus* would be granted to 'have the body' of such debtor prisoner brought to answer the plaintiff's cause of action.[74]

But as a method to obtain releases in all cases, the difficulties surrounding the writ were still formidable. The absence of any precise rules regulating the powers of the courts to issue the writ in vacation or to permit its return before the commencement of the second term, if it had been issued at the end of the first, all resulted in delays and prolonged detentions in cases where a person properly might be bailable. Hale at this time, in conference with all the Judges and Barons, held that where the writ had issued from the Exchequer to the Admiralty and before its return vacation had intervened, the sheriff or gaoler could not release the prisoner in the meantime or have his body brought forward before the court, and if he did otherwise it was at his peril.[75] In the following year, 1668, the *Proceedings Against the Earl of Clarendon*[76] illustrated the weakness of the prevailing procedure with regard to commitments by the Council. One of the charges against Clarendon was that he had illegally imprisoned and sent persons to "remote islands, garrisons and other places", so as to prevent them from obtaining any legal redress, especially the writ of *habeas corpus*.[77] His defense was that if he, as a member of the Council at the Council-Board, did thus commit and send out of the country, it was "by the wisdom of that Board . . . . . thought just and necessary".[78] Obviously a writ which was powerless against such actions designed to avoid its command was in need of legislative support, for there was nothing in the existing law which prevented the Council from committing and, to avoid justifying its decisions, sending the prisoner out of the jurisdiction.

[73] (1661) 13 Car. II, St. 2, c. 2.
[74] *Id.*, s. 5. The writ referred to was the *habeas corpus ad respondendum*.
[75] (1667) Hardres 476.
[76] (1668) 6 St. Tr. 291 - 512.
[77] *Id.*, at 330, 395.
[78] *Id.*, at 414.

Two years later, the celebrated *Bushell's Case*[79] had not only to do with the immunity of jurors giving perverse verdicts, but since it arose by way of a *habeas corpus* to produce the body of a juror—Bushell—confined to the Fleet, the question of the power of the court of Common Pleas to issue the writ was debated. The writ was a *habeas corpus cum causa ad faciendum et recipiendum* and the issue was whether the Court of Common Pleas could award the writ without a privilege to support it, there being admittedly no privilege here. It was held that the Court could do so, and it is difficult to see why the Judge should have been so troubled when a wealth of precedents warranted the practice.[80] In the course of its decision, the Court declared that "the writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty if he hath been against law deprived of it",[81] which established the writ as the ranking instrument by which the validity of an imprisonment was to be examined. This claim Coke and Seldon had made at the beginning of the century when it had been only a half truth.[82]

The independent use of *habeas corpus* both *ad subjiciendum* and *ad faciendum* is evident from numerous cases concerned especially with imprisonment in London[83] under its customs, and detentions in the other privileged jurisdictions such as Durham and Chester,[84] and by special authorities such as the Deanery of Canterbury.[85] But defects in the prevailing procedure were evident. Persons in high office could not be compelled to attend upon the writ as in the case of *Rex* v. *Viner*,[86] where the Mayor of London harbored another's ward and refused to appear upon several writs issued against him, the court saying that he was a privileged officer.[87] Moreover, the case also demonstrated that the truth of the return to a writ had to be accepted on its face and could not be traversed, so that false returns would and did work hardships upon prisoners entitled to be bailed or discharged. But the court suggested

[79] (1670) Vaughan 135-158; 6 St. Tr. 999; 3 Keble 322.

[80] *Id.*, *Vaughan*, at 154, for a list of precedents as to the Common Pleas' authority to award the writ without *privilege*.

[81] *Id.*, at 136.

[82] (1627) 3 St. Tr. 95, 126-131.

[83] *Seaman's Case* (1669) cited in TREMAINE, *op. cit.*, *supra* note 72 at 397; for other writs and returns out of the King's Bench to London see 398-425.

[84] *Rex* v. *Lloyd* (1665) *id.*, at 364; *Rex* v. *Pell and Offly* (1673) 3 Keble 279, also cited in *Tremaine*, *id.*, at 362.

[85] *Rex* v. *Barrington*, (undated) TREMAINE, *id.*, at 363.

[86] (1675) 3 Keble 470, 504.

[87] *Id.*, at 504.

that where the King had an interest in the release, the truth then could be examined.[88]

The unsettled question as to the authority of Common Pleas again arose in 1677 in *Jone's Case*.[89] Here there was a petition for a *habeas corpus ad subjiciendum* in a plainly criminal matter, the prisoner having been commited by justices of the peace for refusing to give security for his good behavior. Chief Justice North doubted "whether the court of Common Pleas could grant this writ in a criminal case".[90] He set out the writs properly returnable in his court, as follows :

(1) *habeas corpus ad respondendum*, where the defendant is in prison;

(2) *habeas corpus ad faciendum et recipiendum*, "which defendants may have that are sued in courts below, to remove their causes before us";

(3) *habeas corpus* for privileged persons.

". . . but a *habeas corpus ad subjiciendum* is not warranted by any precedents I have seen". That North was placing a very narrow limit to the authority of the Common Pleas must be evident from the history of the writ in its relation to that Court, particularly since the *Habeas Corpus Act* of 1641,[91] which had given the Common Pleas authority to grant the *ad subjiciendum* in cases of imprisonment by the King and Council.[92] So that while it may have been the correct view that the Common Pleas had not the right to issue *this* writ in ordinary matters, that is not to say that the writ had never properly issued out of that Court.

In the same year the Earl of Shaftesbury,[93] having been committed to the Tower by the House of Lords, sued out successive writs of *habeas corpus* returnable before the King's Bench. The gaoler at length returned that he had been committed "for high contempts against this House".[94] The judges all agreed upon the insufficiency of this return but said that the Court of King's Bench had not jurisdiction over one committed by Parliament and remanded him. Here the regular procedure was unable to compel an immediate return and to overcome the privilege of Parliament. Again, in 1676, *Jenk's*

[88] *Id.*, at 470.
[89] (1677) 1 Mod. 236.
[90] Id.
[91] 16. Car I, c. 10.
[92] *Id.*, s. 8.
[93] (1677) 6 St. Tr. 1269.
[94] *Id.*, at 1273.

Case[95] had exposed the weakness of the procedure in its failure to compel the King's Bench or the Chancellor to grant the writ in vacation, particularly when the warrant was signed by the Council Board. In fact, none of the judges in the case were quite certain as to the procedure in vacation, and Lord Chancellor Finch (afterwards Lord Nottingham) refused to accept[96] the authority of Coke for the statement that the Chancellor and the Court of Chancery are always open, and the writ therefore available in vacation as well as in term.[97] The case decided too, that the writ was a writ of right,[98] to which the subject was entitled; and while it had never been a *'breve de cursu'*[99] its availability, even where probable cause was shown, was more or less unsettled in England, despite this case, until the beginning of the nineteenth century when *Hobhouse's Case*[100] held that at common law it was granted only as a writ of right on motion supported by affidavit.

But the equivocal position of the writ made its use in many respects unsatisfactory, and by this time the following difficulties were usually encountered in practice :

(1) The uncertain authority of the Common Pleas (and the Exchequer) to issue the *habeas corpus ad subjiciendum*.[101]

(2) The confusion with regard to issuing every form of the writ in vacation, and if awardable, which court had the necessary authority.[102]

(3) The absence of any procedure compelling gaolers and wardens to act *immediately* upon receipt of the first writ, and their practice of awaiting *alias* and *pluries* writs.[103]

(4) The absence of any procedure to prevent the spiriting out of the jurisdiction anyone for whom a writ had or

[95] (1676) *id.*, at 1190.

[96] *Id.*, at p. 1196, Finch L.C.: "The Lord Coke was not infallible". But the Chancery as early as 1344 had issued it in vacation; see Y.B. (1344), 17 Edw. III (Mich.) Fol. 37, Pl. 9.

[97] 2 COKE INST. 53; 4 INST. 88, 182, 190.

[98] 6 St. Tr. 1208.

[99] *'Breve de cursu'*. The original meaning of this term was that these writs, in the 12th and early 13th centuries, were to be had without charge; but there were scarcely any such writs until Henry III. Later it came to mean not only a writ had free but also *as a matter of course*, in which cause for it did not need to be shown: cf. Maitland, *The Register of Writs* (1889-90), 3 Harv. L. Rev. 97, 167, 212; 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 549 at 561.

[100] (1820) 3 B. & A. 420.

[101] *Jones' Case, supra*, note 89.

[102] *Jenks' Case, supra*, note 96.

[103] *Lilburne's Case, supra*, note 48.

was about to be issued, and thus evading the purpose of the writ.[104]

(5) The practice of commitments by Council and the ambiguous attitude of the courts towards bailing prisoners on *habeas corpus* in these cases.[105]

(6) The recognition by courts of privileged persons who were permitted to ignore the command of the writ to appear upon the return,[106] and the failure of the writ to operate in commitments by Parliament, even where the return showed insufficient cause.[107]

(7) The refusal of the courts to permit traverses of the returns, thus subjecting the prisoner to the perjury of gaolers and other keepers.[108]

(8) The power of the courts in a bailable case arising on *habeas corpus* to demand prohibitive bail.[109]

It was inevitable that such an imposing list of objections should require the attention of the legislature. This was particularly so since the writ was at the very heart of the constitutional struggle whose final stages were close at hand, and was indispensable to the elements which dominated the House of Commons. Hence for some time they had been considering legislation to amend the common law procedure,[110] especially since the *Proceedings Against Clarendon*.[111]

In 1668, the House considered a bill to amend the procedure,[112] but it failed in committee. Two years afterwards the House passed an Act which prohibited the transporting of prisoners out of England; this was later defeated by the Lords.[113] In 1673, the bill again passed the Commons,[114] and reached the committee stage in the Lords, where at the same time it met another bill which had passed the Commons and which dealt with the procedure alone, but the life of both was interfered with by a prorogation.[115] The debates in the House in 1673 show how keenly were the members aware that they themselves were constantly in danger of being committed by

[104] *Proceedings against Clarendon, supra*, note 76.
[105] *Darnel's Case* (1627) 3 St. Tr. 1; *Streater's Case, supra*, note 47.
[106] *Rex* v. *Viner, supra*, note 86.
[107] *Shaftesbury's Case, supra*, note 94.
[108] *Rex* v. *Viner, supra*, note 86.
[109] *Anonymous* (1652), Styles 322.
[110] 9 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924 - 25) 117.
[111] *Supra*, note 76.
[112] 9 HOLDSWORTH, *op. cit., supra*, note 110, at 117.
[113] *Ibid.*
[114] 4 COBBETT'S PARLIAMENTARY HISTORY (1808) p. 665.
[115] 9 HOLDSWORTH, *op. cit., supra*, note 110, at 117.

the King or Council[116] and sent to some foreign place.[117] They were especially afraid of a committal in vacation, for there was the likelihood that a writ would probably not issue then at all.[118] In 1675 and 1676 - 77, a similar bill passed the Commons, but on both occasions the end of the Lord's session intervened. Finally in 1679, an Act which attempted to combine all of the best features of the previous measures passed the Commons, and after some considerable amendments by the Lords and conferences with the Commons to compromise upon modifications,[119] passed the Lords and received the assent of the King on May 26th, the day of prorogation.[120] It may be wondered that Charles assented to the measure[121] without a parliamentary battle but Macaulay explains it by saying that "the King would gladly have refused his consent . . . . . but he was about to appeal from his parliament to his people on the question of the succession and he could not venture at so critical a moment to reject a bill which was in the highest degree popular".[122] The passing of this Act—whose authorship has been attributed to Shaftesbury,[123] (later exiled)[124]—and even to the Cromwellians[125] —has been the subject of a parliamentary tradition which has it that the Lords passed the measure only because the count was erroneous. Lord Grey, one of the tellers, (in favor of the bill) counted "a very fat Lord for ten, as a jest at first, but seeing that Lord Norris, (the other teller who was opposed to the measure) had not observed it, went on with his reckoning".[126]

IV

Few, if any, Acts of Parliament have achieved the fame of this *Habeas Corpus Act* of 1679. Whether the praise has been justified requires an examination of its provisions to determine if it solved the manifold problems associated with the writ, or introduced any new principle not already part of its

[116] 4 COBBET, *op. cit., supra,* note 115, at 662.
[117] *Id.,* at 661, Sir Richard Temple, "Several have been sent to Tangiers".
[118] *Id.,* at 662.
[119] *Id.,* at 1149 (note)" it gave rise to several conferences between the two houses . . . . . it was almost a miracle that their Lordships suffered it to pass at all".
[120] *Id.,* at 1148.
[121] (1679) 31 Car. II c. 2.
[122] 1 MACAULAY'S HISTORY OF ENGLAND (1900) 230.
[123] Crawford, *The Writ of Habeas Corpus,* (1908) 42 Am. L. Rev. 481, citing 2 Mich. L.J. 37.
[124] (1681) 8 St. Tr. 759; 6 HOLDSWORTH, *op. cit., supra,* note 110 at 525: "He dabbled in treason and ended his days in exile".
[125] 2 PIKE, *op. cit., supra,* note 37, 294.
[126] JENNINGS, ANECDOTAL HISTORY OF THE BRITISH PARLIAMENT (1881) 40, citing BURNETT, HISTORY OF MY OWN TIMES (folio ed.).

long heritage.[127] The Act's title summarizes in a sentence much of the preceding legislative and judicial history of *habeas corpus* —"An Act for better securing the liberty of the Subject and for Prevention of Imprisonments beyond the Seas".[128] Plainly, the draftsmen recognized two evils; on the one hand, the general insecurity of the subject's liberty, and on the other, the opportunity for officials to evade what little security the law did afford by sending those deprived of that liberty beyond the reach of that law. Two problems, but so interdependent that a solution of one could only be achieved in terms of the other.

The Act begins with a recital declaring that sheriffs and gaolers to whose custody persons have been committed *for criminal or supposed criminal matters* . . . . "have delayed making returns to successive (*alias and pluries*) writs, with the result that many prisoners . . . . were long detained in prison . . . . where by law they are bailable . . . . to their great . . . . vexation".[129] The grievance here recited was not the writ's most important defect,[130] and the Act devotes only a minor section to the matter. But the recital is more important for its description of the conditions precedent upon the operation of the writ under this Act, namely "*in criminal or supposed criminal matters*". This limitation reappears throughout other portions of the Act[131] indicating that the framers intended the writ as it was improved by the bill to operate only in these cases, excluding the great field of non-criminal detentions in which was original *corpus cum causa* developed;[132] and the effect was to leave what may be termed *civil detentions*[133] to the vagaries of the common law procedure.[134]

[127] "The *Habeas Corpus* Act of 1679 created no new remedy"; Jenks, *The Story of Habeas Corpus*, (1902), 18 L.Q.R. 64.

[128] For copies of the Act see 5 STATUTES OF THE REALM (1810) 935-938; STUBBS, *op. cit., supra*, note 15, at pp. 517-23; 8 PICKERING, STATUTES AT LARGE (1763) 432; 5 HALSBURY, STATUTES OF ENGLAND, 82 (the sections are not here numbered as in the original).

[129] *Id.*, s. 1 (preamble).

[130] See *supra* 183 - 184.

[131] 31 Car. II, c. 2, ss. (1), 9 (1).

[132] See Cohen, *Habeas Corpus Cum Causa—The Emergence of The Modern Writ*—I (1940) 18 Can. Bar Rev. 10 *et seq.*

[133] The phrase 'civil detentions' is not very satisfactory, but it is intended to include not only those cases where there is an imprisonment under execution or like process at the suit of a party, but those cases of private detentions as well as commitments by bodies not being courts of law, yet having power to commit. The problems in this connection have been raised as recently as 1935; see *Rex* v. *Coleman*, [1935] 4 D.L.R. 444; also Cohen, *The Immigration Act and Limitations upon Judicial Power; Bail* (1936) 14 Can. Bar Rev. 405.

[134] Which procedure, in theory at least, remained unaltered by the Act for those cases not coming within the meaning of the Act; see *Crowley's Case* (1818) 2 Swans. 3 - 91.

Section II commands the sheriff or gaoler to make a return within three days from the time of service, unless *"the commitment were for treason or felony plainly and specially expressed in the warrant"*, and that the prisoner pay the transportation charges and give security for the further charges[135] in the case of a remand, provided also that the distance is not more than 20 miles from the place where the writ issues; and if more than 20, but not more than 100, the writ is returnable in ten days, and if more than 100 miles, 20 days and no longer. The sheriff or gaoler is *"to certify the true causes of the detainer or imprisonment"* and bring the body of the party committed before the court or judges of the court from which the writ issued, or such other persons before whom it is made returnable.

Here the former delays of the gaolers[136] are rendered impossible, yet ample provision is made for exceptional distances. It is not clear from the language, however, whether under this section, when the commitment is for "treason or felony plainly expressed on the warrant", the gaoler has the power to ignore the writ or merely to delay his return beyond the prescribed limits. Moreover, this phrase appears throughout the Act[137] and leaves no doubt that for these two classes of offences, the Act intends no relief. The expression, "true causes of his detainer" follows more or less exactly the wording in the Act of 1641.[138] And while the section pretends to guarantee the gaoler his charges for transporting the prisoner, the courts subsequently held that the fact that the prisoner was unable to pay the required mileage was no defence to the gaoler's contempt in failing to produce the body on the required day.[139]

Section III provides that all such writs shall be marked *"Per statutum tricesimo primo Caroli secundi Regis . . . ."* in order that such sheriffs or other officers shall not pretend ignorance of the writ. Any person committed for *"any crime"*, *except treason or felony plainly expressed on* the warrant, or anyone on his behalf, and where they are not "persons convict or in execution by legal process" may appeal in *"the vacation time and out of term . . . . to the Lord Chancellor or Lord Keeper, or any one of His Majesties Justices either of the one bench or the other, or the Barons of the Exchequer of the degree of coif"*, who, upon a view of the copy of the warrant, or affidavit that such copy

[135] Not exceeding 12 d. per mile.
[136] *Supra*, note 104.
[137] 31 Car. II, c. 2 s. 7 (1); here the wording is "high treason"; s. 3 (3).
[138] (1641), 16 Car. I, c. 10, s. 8 (5).
[139] *King* v. *Seneschal* (1682) Jones 178.

was given to the applicant by the persons detaining him, are *"authorized and required"* upon the written request of the prisoner or anyone on his behalf, if such request is witnessed by two others, to award a *habeas corpus* under the seal of the court of which he is a judge. The writ is directed to the custodian of the applicant and *"returnable immediate"* before the court or judge issuing the same. The officer, etc., so served must within the time prescribed (in section II) deliver the body and a true cause of the committment before the court or judge to whom it was returnable or any judge of the same court if the said judge is absent. Within *two days* after being brought before them, the court or judge *"shall discharge"* the prisoner, taking his recognizance *"with one or more sureties in any sum"* for his appearance next term in the Court of King's Bench at the next assizes, sessions or gaol-delivery of the county, city or place of commitment, or such other competent court; and the writ, the return, and the recognizances are to be certified into the court where the appearance is later to be made. But no such writ is to issue or discharge made if it appears that the prisoner is detained upon "legal process, order or warrant," out of some court of criminal jurisdiction, or upon some warrant *"signed and sealed with the hand and seal"* of any of the above justices or barons, or a justice of the peace for offences not by law bailable.

This section is the longest, the worst written, but one of the most important in the Bill. Its provision for distinguishing between the common law writ and statutory writ accentuated the distinction courts were later to draw,[140] while it is doubtful whether the additional words made the writ more impressive or recognizable to gaolers than was the old common law form. It states plainly its intention to cover "any crime" but the exceptions are obviously substantial, and the inclusion of the phrase "*in execution by legal process*" increased the writ's limitations. Most important, presuming the writ to be available in term, it specifically provides for its issuance in vacation, and in so doing only partly concluded the debate that has been raging since Coke's days,[141] for it yet left open the position of the common law writ in vacation.[142] And in describing the judges to whom the appeal for the writ in vacation may be made, it anticipates in ambiguous form, and repeats, the subse-

[140] *Wood's Case* (1771) 2 Black W. 145.
[141] *Supra* page 183.
[142] The question was finally settled in *Crowley's Case, supra*, note 134, where it was held that at common law the Lord Chancellor had power to issue the writ in vacation.

quent provisions[143] relating to the courts having authority to grant the writ.

The writ is made returnable "immediate", a form known since the beginning of the century.[144] Its effect in the Act was to put no limitations upon the minimum time of the return, while other provisions set the maximum.[145] The judge must discharge the prisoner within two days,[146] but the indirect control he exercises is through the provision *"sureties in any sum"*, which afforded judges out of sympathy with the Act an opportunity to suppress its benefits by demanding extravagant sureties before accepting bail.[147] This defect soon afterward received the attention of Parliament.[148]

Section IV: 'But if any prisoner neglects to seek a writ for two whole terms after his imprisonment he shall not have it in vacation time under this Act.'

Here anyone who does not avail himself of the relief within the reasonable limit of two terms loses his rights to have the statutory writ in vacation. But apparently his common law right to the writ, if a court would then have granted it to him, remains unaffected by his negligence.

Section V: 'If the officers so served refuse to make the returns or bring the body of the prisoner within the above specified times, or refuse to deliver to the prisoner a true copy of his commitment within six hours after a demand for the same', then "all such head gaolers or keepers" or such other custodian, shall for the first offence forfeit to the party grieved *"the sum of one hundred pounds"*; for the second offence *two hundred pounds and the said officer is prevented from holding his office.* These penalties are recoverable by the person aggrieved against the persons offending and their respective executors and administrators. The fact of a recovery or judgment is a sufficient conviction of the first offence, and the fact of a further recovery after the first judgment is a sufficient conviction to warrant the execution of the disabilities for second offences.

The penalties provided here are in addition to the contempt in which the gaoler will be held for failure to execute a judicial

[143] 31 Car. II, c. 2, s. 10.
[144] *Supra*, note 72.
[145] 31 Car. II, c. 2, s. 2 (4).
[146] The Act of 1641, 16 Car. I, c. 10, gave the court three days.
[147] *Impeachment of Scroggs* (1680) 8 St. Tr. 191; 4 COBBETT, *op. cit., supra*, note 115 at p. 1294.
[148] This became one of the grievances listed in the *Bill of Rights* (1689) 1 William and Mary, Sess. 2, c. 2, s. 10.

order,[149] and are devised not only to punish the officer but to compensate the prisoner, and finally to insure its non-occurrence after the second offence by removing the particular offender himself.

Section VI: 'No person once discharged upon any *habeas corpus* shall be committed or imprisoned for the same offence, except by legal process of the court in which he is bound by recognizance to appear, or such other court having *"jurisdiction of the cause"*. Any person who "knowingly" commits or causes such discharged party to be recommitted for the same offence shall forfeit to the discharged party the sum of *"five hundred pounds"* to be recovered as in section V, notwithstanding any pretended variation of the old cause in the new warrant.'

This section prohibits commitments after a discharge on the same facts,[150] yet the penalty for so doing can only apply where such guilty person has "knowingly" done or caused to be done that which the section forbids. On the other hand absolute liability appears to attach to an offence under section V.

Section VII: 'Where any person is committed for high treason or felony *"plainly and specially expressed on the warrant"* and in the first week of the term or on the first day of the sessions oyer and terminer, or general gaol delivery, prays, in open court, to be brought to trial but is not indicted in the term, the judges of the King's Bench, and the justices of oyer and terminer or general gaol delivery are *"authorized and required"* upon motion made to them on the last day of the term, sessions or gaol delivery, by the prisoner or on his behalf, to bail the prisoner unless upon oath it appears to the said judges, or justices that the king's witnesses could not at that time have been produced; and if the prisoner is not indicted or tried in the second term, sessions, or gaol delivery he must be discharged.'

This section is obviously directed towards giving some protection to that class heretofore excluded from the benefits of the Act; and since one charged with treason or felony was not likely to remain unindicted or untried for two successive terms the provision would probably apply only where the charge was not made in good faith in the first instance. Moreover, its application has been narrowed by judicial decision.[151]

[149] *King* v. *Seneschal, supra,* note 141.

[150] For the question as to what may constitute the same facts on a second charge, see *Attorney-General of Hong Kong* v. *Kwok-a-Sing* (1873) L.R. 5 P.C. 179.

[151] *Rex* v. *Bower* (1840) 9 C. & P. 509.

Section VIII: 'Nothing in the Act shall discharge any prisoner *"charged in debt or other action or with process in any civil cause"*, but if such prisoner is discharged at the same time for his criminal offence he shall continue in custody *"for such other suit"*.'

If the words *criminal or supposed criminal matters* were insufficient to limit the Act to the circumstances intended by the framers, the precise wording of this section leaves no doubt as to its purpose. It provides for the case where one is confined for a civil matter and covinously procures an additional commitment on a criminal charge with a view to obtaining a discharge therefrom upon a *habeas corpus;* such delivery was not to effect the detention upon the continuing civil process.

Section IX: 'No prisoner committed *"for any criminal or supposed criminal matter,"* is to be removed from one prison or custody to another; *"unless it be by habeas corpus or other legal writ"*, or to take the prisoner to a common gaol, or to any common work-house or house of correction where so ordered by any judge or assize or justice of the peace, or to remove the prisoner from one place to another in the same county for his lawful trial or discharge, or *"in case of sudden fire, infection, or other necessity"*. Anyone who signs or countersigns any warrant of removal contrary to this Act or any officer that obeys and executes it *"shall suffer . . . . the pains and forfeitures"* for first and second offences mentioned in section V.'

This section was framed to insure the presence of a prisoner at all times in a known place over which the court can and will have control, and it gives statutory status to the *habeas corpus ad deliberandum,* and *ad audiendum judicium,* both of which were known to the courts from the early thirteenth century.[152] Moreover, the language dealing with the availability of the writ in time of infection or other necessity has a historic origin in the refusal of the judges in 1637 to award writs to prisoners of London during an epidemic in the city.[153] The English courts have been very strict in interpreting this section and have refused to apply it in any case not being a criminal matter.[154]

Section X: 'Any such prisoner may move to obtain his *habeas corpus* out of *"the high court of chancery, the court of exchequer . . . . the courts of King's Bench or Common Pleas,*

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

[153] (1637) Cro. Car. 466.

[154] *Cobbett* v. *Slowman* (1850) 4 Ex. 757.

or either of them". If the Lord Chancellor or Lord Keeper, or Judges, or Barons "*of the degree of coif*" of any of these courts, "*in the vacation time*" upon a view of a copy of the warrant or upon an affidavit that such copy was denied, shall refuse to grant a writ of *habeas corpus* as required by this act, "*they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds*", recoverable as stated in section V.'

This section and sections II, III, and XII are the chief provisions of the bill. Here at long last is put to rest the question as to the courts and judges having jurisdiction to issue the writ in criminal matters, both in term and vacation, and the issues left undetermined in *Jone's Case*[155] were thus disposed of. Equally significant is the provision penalizing the judge in the event that he fails to comply with the directions given in the Act. The precedent for the unusual exception to the rule of judicial immunity is to be found in the Act of 1641, where likewise a scheme of penalties was set up to enforce the granting of the writ in cases of commitment by the King and Council.[156]

Section XI: ' "*according to the true intent and meaning of this Act*" a *habeas corpus* may be directed to "*any county palatine, the cinque ports or other privileged placed within the Kingdom of England, dominion of Wales or town of Berwick, upon the Tweed, and the islands of Jersey and Guernsey*".'

This section confirms a more or less accepted practice with regard to the *ad subjiciendum*, but it did not affect what seems to have been the real problem, whether the *habeas corpus ad faciendum et recipiendum* in civil matters could be directed to these privileged places.[157]

Section XII: 'In order to prevent "*Illegal imprisonments in prisons beyond the seas*" no present subject or future resident of England, Wales or Berwick is to be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, within or without the King's dominions; " . . . . *every such imprisonment is* . . . . *illegal*". Anyone so imprisoned has an action for "*False imprison-in any of His Majesty's courts of record*" against anyone who *commits and* transports such prisoner (contrary to the true meaning of this Act) or who frames or writes the warrant for such commitment or transportation or aids and advises in any of the above acts, and the plaintiff "*shall have judgment* . . . .

[155] *Supra*, note 89.
[156] (1641) 16 Car. I, c. 10, s. 7, 8 (6).
[157] 4 BACON ABRIDGEMENT (1854) at 570.

for treble costs, besides damages which . . . . shall not be less than five hundred pounds". Anyone who "*knowingly*" commits any of the above offences "*shall be disabled from thenceforth to bear any office of trust or profit*" within England, Wales or Berwick, or any of their islands, dominions or territories, as well as sustain "*the pains, penalties and forfeitures*" of '*praemunire*' provided in statute of Richard II.[158] Such persons offending shall be incapable of any pardon from the King from such disabilities or forfeitures.'

The mention of the places where prisoners were usually sent is to be read in the light of the debates following the revelations in the *Proceedings against Clarendon*. His favorite port of destination for those whom he and the Council had committed was Tangier.[159]

But even this section was unable to prevent a celebrated deportation to Scotland in 1683 engineered by the Council for political reasons.[160] The total effect of this section remained undetermined (in England) until the Home Office attempted to deport an Irish rebel in 1923, and then the court affirmed the principle of non-transportation of prisoners, particularly for political offences.[161]

Section XIII: 'The Act does not apply to any person who contracts with and receives 'earnest' from any merchant or plantation owner to be sent to any place beyond the seas although such person afterwards renounces the contract.'

Section XIV: 'The Act does not apply to a convicted felon who in open court prays to be transported across the seas and the courts remand such felon for such purpose.'

Commercial considerations may have influenced the foregoing two sections since the need for labor in the plantations and colonies was probably increasing in the rush of colonial expansion.

Section XV: 'Nothing in the Act applies to any imprisonment or anything done with regard to the imprisonment of any person "before first day of June 1679".'

Section XVI: 'The Act does not apply to any person who "*at any time resident in this realm,* shall have committed any 'Capital Offence' " in Scotland, Ireland or any island or foreign plantation of the King, where such person ought to be tried

[158] (1393) 16 Ric. II, c. 5.
[159] *Supra*, note 117.
[160] Gray, *The Scottish-Deportees of 1683* (1923) 35 Juridical Rev. 353.
[161] *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603, which restated the right of a subject not to be sent out of the country.

for such offence, and he may be sent to such place where the offence was committed and receive such trial in the same manner as before the passing of this Act.'

Section XVII: 'No suit for any offence against this Act shall be taken unless within two years from the date of the offence if the party grieved is not then in prison. If such party is imprisoned, then within two years after his decease or discharge whichever first occurs.'

Section XVIII: 'In order to prevent a prisoner from avoiding trial once the assizes or general gaol-delivery has been proclaimed in the county where the prisoner is detained, he shall not be removed from the common gaol by a *habeas corpus* under this Act except to be brought before the judge of the assize in open court.'

Section XIX: 'At the end of the Assize, however, such prisoner may have his *habeas corpus* according to this act.'

Section XX: 'Anyone sued under the provision of this Act may plead in defence the general issue, but may give *"special matter in evidence to the jury"* as if the same had been pleaded, which matter if it had been pleaded would have been good and sufficient matter in law to have discharged the defendant from the suit.'

Section XXI: 'Where on the warrant of commitment it appears *"plainly and specially expressed"* that the prisoner is committed by any judge or justice of the peace charged as *"an accessory before the fact to any petty treason or felony or upon suspicion thereof,* or with *suspicion of petty treason or felony"* such prisoner shall not be removed or bailed by virtue of this Act, *or in any other manner they might have been before the making of this Act".*

The last seven sections do not require annotations for they have neither special considerations nor history.

It is now time to look at the Act as a whole, and a careful reading leads to an agreement with Stephen's description that ". . . . (it) . . . . is as ill drawn as it is celebrated".[162] There is throughout an unnecessary redundancy especially where it is dealing with the courts and judges having authority to issue the writ.[163] The exceptions to the application of the Act are

[162] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 243.
[163] 31 Car II, c. 2, s. 3, 10.

in many different sections without order or plan.[164] There is considerable ambiguity as to the need for *mens rea* for one series of offences[165] while the Act is very clear on the point[166] for another. There does not appear to be any logical order to the arrangement of the sections, nor is the frequent use[167] of the phrase *"supposed criminal matter"* an aid to clarity.[168] And the last section[169] dealing with petty treason and felony,[170] and bail therefor, bears little particular relation to the supposed purposes of the statute.

But more important than the quality of its draftsmanship are the following questions: how far did the bill resolve those matters which the history of the writ in the 17th century demonstrated as requiring attention if the writ was to become, in all cases of imprisonment, a really effective instrument? Did it even do what it set out to do, namely, provide an effective method for testing the validity of imprisonments in criminal matters? How far did it go beyond the experience of the writ at common law to introduce any new principle?

It will be remembered that specific defects in the procedure of writ in criminal matters,[171] were well known by the time the Act was framed.[172] Many of these were remedied, viz., the power of the Common Pleas to issue the *ad subjiciendum*;[173] the availability of the writ in vacation;[174] the prevention of delays in returns or of the sending of prisoners out of the jurisdiction,[175] and the determination of privileges to refuse to make returns. But the Act failed to attend to the equally pressing problems of the extent of the parliamentary privilege to exclude the jurisdiction of the courts in *habeas corpus* matters, the extent of the authority of the Council to commit and the sufficiency of its return, and the refusal to permit the traversing of returns so as to establish their truth or falsity. Moreover, by giving judges, in the course of bailing persons under this

[164] *Id.*, ss. 1, 3 (3) (8), 8, 13, 14, 16.
[165] *Id.*, s. 2 (2).
[166] *Id.*, s. 6 (3).
[167] *Supra* note 131.
[168] *Supra* note 133.
[169] 31 Car 11, c. 2, s. 21.
[170] Petty treason was abolished in England by (1828) 9 Geo. IV, c. 31, s. 2.
[171] The term "criminal" is meant to include that class of political offences where neither treason nor sedition was alleged.
[172] *Supra* page 183 - 4.
[173] *Ibid.*
[174] *Ibid.*
[175] *Ibid.*

Act, the power to demand "*any sum*"[176] within their discretion, the way was left open for serious abuses.[177]

Thus the Act left undone almost as much as it accomplished, although this is not to deny the value of the certainty that its provisions attached to important matters of procedure. But save for the severe check upon gaolers and the prohibitions against the transportation of prisoners it introduced no practice not already known in some measure at common law. By implication, however, it did complete the relationship between this aspect of *habeas corpus* and the criminal procedure, a process that had been maturing for over one hundred years.

Much more important, the framers of the Act deliberately excluded the great field of civil imprisonments whose problems Cromwell had been quick to recognize and for whose evils his government had been prompt to provide.[178] The several issues left unsettled by the Bill were to await (in England) almost one hundred and fifty years for a satisfactory solution. During the 18th century English judges attempted to overcome the deficiencies of the common law procedure and the shortcomings of the Act.[179] But when in 1758 the Commons sought to introduce some necessary amendments, Lord Mansfield and Lord Hardwicke bitterly opposed any change and conjured up before the Lords visions of awful results if Parliament dared to disturb such a perfect instrument as the writ was said to have become since the Act.[180] Not until the first quarter of the 19th century did the wheel come full circle and the original non-criminal character of *habeas corpus* assert itself in legislation which set to rest many matters left exposed in 1679.[181]

V.

The search for *habeas corpus* has almost ended,[182] and a glance backward over the long history of the writ may perhaps leave the student with a vague sense of dissatisfaction. The canvass has been large and the picture, in sum, may lack

[176] 31 Car II, c. 2, s. 3 (7).

[177] *Impeachment of Scroggs*, *supra*, note 149.

[178] *Supra* page 175 - 177.

[179] 9 HOLDSWORTH, *op. cit.*, *supra* note 36 at 119 - 120.

[180] TUBERVILLE, THE HOUSE OF LORDS IN THE XVIIIth CENTURY, (1927) 299 - 305. But see Mansfield's recognition of the manner in which the writ was operating in *Rex* v. *Cowle* (1759), 2 Burr. 834.

[181] (1803) 43 Geo. III, c. 140.—Habeas Corpus to Court Martials.
(1804) 43 Geo. III, c. 102.—Habeas Corpus ad Testificandum.
(1816) 56 Geo. III, c. 100.—Habeas Corpus in all non-criminal cases except for debt or civil process. Truth of the returns in all writs to be examinable.

[182] "Ended" insofar as this paper is concerned the complete story of the writ and its origins remains, like so much else in English legal history, to be written — — if it can be written.

precision. Where and how did the expression *habeas corpus* arise; was its peculiar technique indigenous to English law or was it borrowed from some other system; at what point did the *corpus cum causa* make its initial appearance and under what circumstances; where in its development did the writ come to be used in testing the validity of a detention, and then of a criminal commitment; and what is the most acceptable explanation for the rise of the *'ad subjiciendum'*? These and other questions have no doubt suggested themselves, and some it is hoped, have, in part, been answered.

Certainly the most significant point of transition in its history was when it ceased to be a mere command to deliver the body and became instead a command to have 'with cause'. How this form arose no one definitely can say, but this much is apparent from the evidence: that the *corpus cum causa* was much concerned throughout its early history with commitments in London, and hence there is good reason to believe that in the struggle by the courts and ministers of the Crown against the special privileges of so important a center as the city of London, the King's judges used the power of their connection with the throne to insist that the officers of the city account to the King through his judges for any subject by them restrained. In this way by demanding that the officers show cause, and then by determining the sufficiency of that cause in terms of the law which these judges interpreted, the writ could be made an instrument assisting in the extension of the King's authority, and incidentally useful to those who would have recourse to its remedy.

In dealing with a historical subject, however, it is impossible to draw geometric lines and say 'here and thus something began and ended'. History is neither made nor remembered in such fashion. And to present definitive answers to the writ's many problems of history and procedure would beg a score of questions for every dogmatic affirmative. But from the many centuries surveyed here one conclusion concerning the evolution of *habeas corpus* is to this writer inescapable; and that is that the writ in the modern form, upon which rests its fame and utility, was the product of a purely procedural device employed by the courts in the ordinary course of their business, and that chance and a host of social and political considerations, combined with its singular adaptability to a variety of purposes, rather than any special principle or deliberate creation, made it the eminently useful weapon it became in English law.

Ottawa. MAXWELL COHEN.

APPENDIX

No. 1. *The earliest writs (Criminal plea)*

A.D. 1214: "Preceptum fuit vicecomiti quod haberet coram domino Rege corpus Baldewini Tyrell . . . . ad respondendum . . . . de appelo quod ipsi fecerunt in comitatu versus cum 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 diciture 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 habeas Wimarcam uxoram sua ibi".

No. 4. *Early Writs in Civil Pleas.*

A.D. 1220: "Precetum est Vicecomites quid haberent corpora eorum . . . . ad audiendum judicim suum . . . . est otendendum quare non fecerunt sicut eis preceptum fuit. . . ."

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

No. 6. *A very early form of the Corpus Cum Causa*

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

No. 7. A.D. 1388: "Ricardus (etc.) Vicecomitibus London' Salutem. Precipimus vobis firmiter iniungentes quod omnibus aliis pretermissis et excusiacione quoacumque penitus cessante, Habeatis coram nobis in cancellera nostra . . . . Johannem Milner de Takiley in Comitatu Essex per vos in prisona nostra de Nuegate sub aresto detentum ut dicatur, unacum causa arestacionis et detencionis sue . . . . Teste me ipso apud 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 custoda 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 Parliamento 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 . . . ."