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3 William Blackstone, Commentary on the Laws of England, Ch. 8, at 129–38 (1765).

Commentaries on the Laws of England

William Blackstone

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VOLUME III

Of Private Wrongs

(1768)

With an Introduction by John H. Langbein

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13 Edw. I. c. 29. But the ſtatute of Gloceſter, 6 Edw. I. c. 9. reſtrained it in the caſe of killing by miſadventure or ſelf-defence, and the ſtatute 28 Edw. III. c. 9. aboliſhed it in all caſes whatſoever: but as the ſtatute 42 Edw. III. c. 1. repealed all ſtatutes then in being, contrary to the great charter, ſir Edward Coke is of opinion [k] that the writ *de otio et atia* was thereby revived.

3. THE writ *de homine replegiando* [l] lies to replevy a man out of priſon, or out of the cuſtody of any private perſon, (in the ſame manner that chattels taken in diſtreſs may be replevied, of which in the next chapter) upon giving ſecurity to the ſheriff that the man ſhall be forthcoming to anſwer any charge againſt him. And, if the perſon be conveyed out of the ſheriff's juriſdiction, the ſheriff may return that he is eloigned, *elongatus*; upon which a proceſs iſſues (called a *capias in withernam*) to impriſon the defendant himſelf, without bail or mainprize [m], till he produces the party. But this writ is guarded with ſo many exceptions [n], that it is not an effectual remedy in numerous inſtances, eſpecially where the crown is concerned. The incapacity therefore of theſe three remedies to give complete relief in every caſe hath almoſt intirely antiquated them, and hath cauſed a general recourſe to be had, in behalf of perſons aggrieved by illegal impriſonment, to

4. THE writ of *habeas corpus*, the moſt celebrated writ in the Engliſh law. Of this there are various kinds made uſe of by the courts at Weſtminſter, for removing priſoners from one court into another for the more eaſy adminiſtration of juſtice. Such is the *habeas corpus ad reſpondendum*, when a man hath a cauſe of action againſt one who is confined by the proceſs of ſome inferior court; in order to remove the priſoner, and charge him with

[k] 2 Inſt. 43. 55. 315.
[l] F. N. B. 66.
[m] Raym. 474.
[n] *Niſi captus eſt per ſpeciale praeceptum noſtrum, vel capitalis juſtitiarii noſtri, vel pro morte hominis, vel pro foreſta noſtra, vel pro aliquo alio retto, quare ſecundum conſuetudinem Angliae non ſint replegiabilis.* (*Regiſtr.* 77.)

this new action in the courts above [o]. Such is that *ad ſatisfaciendum*, when a priſoner hath had judgment againſt him in an action, and the plaintiff is deſirous to bring him up to ſome ſuperior court to charge him with proceſs of execution [p]. Such alſo are thoſe *ad proſequendum, teſtificandum, deliberandum, &c*; which iſſue when it is neceſſary to remove a priſoner, in order to proſecute or bear teſtimony in any court, or to be tried in the proper juriſdiction wherein the fact was committed. Such is, laſtly the common writ *ad faciendum et recipiendum*, which iſſues out of any of the courts of Weſtminſter-hall, when a perſon is ſued in ſome inferior juriſdiction, and is deſirous to remove the action into the ſuperior court; commanding the inferior judges to produce the body of the defendant, together with the day and cauſe of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum cauſa*) to *do and receive* whatſoever the king's court ſhall conſider in that behalf. This is a writ grantable of common right, without any motion in court [q]; and it inſtantly ſuperſedes all proceedings in the court below. But, in order to prevent the ſurreptitious diſcharge of priſoners, it is ordered by ſtatute 1 & 2 P. & M. c. 13. that no *habeas corpus* ſhall iſſue to remove any priſoner out of any gaol, unleſs ſigned by ſome judge of the court out of which it is awarded. And, to avoid vexatious delays by removal of frivolous cauſes, it is enacted by ſtatute 21 Jac. I. c. 23. that, where the judge of an inferior court of record is a barriſter of three years ſtanding, no cauſe ſhall be removed from thence by *habeas corpus* or other writ, after iſſue or demurrer deliberately joined: that no cauſe, if once remanded to the inferior court by writ of *procedendo* or otherwiſe, ſhall ever afterwards be again removed: and that no cauſe ſhall be removed at all, if the debt or damages laid in the declaration do not amount to the ſum of five pounds. But an *expedient* [r] having been found out to elude the latter branch of the ſtatute, by procuring a nominal plaintiff to bring another action for five pounds or upwards, (and then by the courſe of the court

[o] 2 Mod. 198.
[p] 2 Lilly prac. reg. 4.
[q] 2 Mod. 306.
[r] Bohun *inſtit. legal.* 85. *edit.* 1708.

the

the *habeas corpus* removed both actions together) it is therefore enacted by ſtatute 12 Geo. I. c. 29. that the inferior court may proceed in ſuch actions as are under the value of five pounds, notwithſtanding other actions may be brought againſt the ſame defendant to a greater amount.

BUT the great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad ſubjiciendum*; directed to the perſon detaining another, and commanding him to produce the body of the priſoner with the day and cauſe of his caption and detention, *ad faciendum, ſubjiciendum, et recipiendum*, to do, ſubmit to, and receive, whatſoever the judge or court awarding ſuch writ ſhall conſider in that behalf[s]. This is a high prerogative writ, and therefore by the common law iſſuing out of the court of king's bench not only in term-time, but alſo during the vacation[t], by a *fiat* from the chief juſtice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his ſubjects is reſtrained[u], wherever that reſtraint may be inflicted. If it iſſues in vacation, it is uſually returnable before the judge himſelf who awarded it, and he proceeds by himſelf thereon[w]; unleſs the term ſhould intervene, and then it may be returned in court[x]. Indeed, if the party were privileged in the courts of common pleas and exchequer, as being an officer or ſuitor of the court, an *habeas corpus ad ſubjiciendum* might alſo have been awarded from thence[y]: and, if the cauſe of impriſonment were palpably illegal, they might have diſcharged him[z]; but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his

[s] St. Trials. viii. 142.

[t] The *pluries habeas corpus* directed to Berwick in 43 Eliz. (cited 4 Burr. 856.) was *teſte'd die Jovis prox' poſt quinden' ſanctæ Martini*. It appears, by referring to the dominical letter of that year, that this *quindena* (Nov. 25.) happened that year on a ſaturday. The thurſday after was therefore the 30th of November, two days after the expiration of the term.

[u] Cro. Jac. 543.

[w] 4 Burr. 856.

[x] *Ibid.* 460. 542. 606.

[y] 2 Inſt. 55. 4 Inſt. 293. 2 Hal. P. C. 144. 2 Ventr. 22.

[z] Vaugh. 155.

appearance in the court of king's bench [a]; which occaſioned the common pleas to diſcountenance ſuch applications. It hath alſo been ſaid, and by very reſpectable authorities [b], that the like *habeas corpus* may iſſue out of the court of chancery in vacation: but, upon the famous application to lord Nottingham by Jenks, notwithſtanding the moſt diligent ſearches, no precedent could be found where the chancellor had iſſued ſuch a writ in vacation [c], and therefore his lordſhip refuſed it.

IN the court of king's bench it was, and is ſtill, neceſſary to apply for it by motion to the court [d], as in the caſe of all other prerogative writs (*certiorari*, prohibition, *mandamus*, &c) which do not iſſue as of mere courſe, without ſhewing ſome probable cauſe why the extraordinary power of the crown is called in to the party's aſſiſtance. For, as was argued by lord chief juſtice Vaughan [e], "it is granted on motion, becauſe it cannot be had of "courſe; and there is therefore no *neceſſity* to grant it: for the "court ought to be ſatisfied that the party hath a probable cauſe "to be delivered." And this ſeems the more reaſonable, becauſe (when once granted) the perſon to whom it is directed can return no ſatisfactory excuſe for not bringing up the body of the priſoner [f]. So that, if it iſſued of mere courſe, without ſhewing to the court or judge ſome reaſonable ground for awarding it, a traitor or felon under ſentence of death, a ſoldier or mariner in the king's ſervice, a wife, a child, a relation, or a domeſtic, confined for inſanity or other prudential reaſons, might obtain a temporary enlargement by ſuing out an *habeas corpus*, though ſure to be remanded as ſoon as brought up to the court. And therefore ſir Edward Coke, when chief juſtice, did not ſcruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his own ſhewing, ſufficient grounds to confine him [g]. On the other hand, if a

[a] Carter. 221. 2 Jon. 13.
[b] 4 Inſt. 182. 2 Hal. P. C. 147.
[c] Lord Nott. MSS Rep. July 1676.
[d] 2 Mod. 306. 1 Lev. 1.
[e] Buſhell's caſe. 2 Jon. 13.
[f] Cro. Jac. 543.
[g] 3 Bulſtr. 27.

probable

probable ground be ſhewn, that the party is impriſoned without juſt cauſe[h], and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be "denied, but ought to be granted to every man that is com- "mitted, or detained in priſon, or otherwiſe reſtrained, though "it be by the command of the king, the privy council, or any "other[i]."

IN a former part of theſe commentaries[k] we expatiated at large on the perſonal liberty of the ſubject. It was ſhewn to be a natural inherent right, which could not be ſurrendered or forfeited unleſs by the commiſſion of ſome great and atrocious crime, nor ought to be abridged in any caſe without the ſpecial permiſſion of law. A doctrine co-eval with the firſt rudiments of the Engliſh conſtitution; and handed down to us from our Saxon anceſtors, notwithſtanding all their ſtruggles with the Danes, and the violence of the Norman conqueſt: aſſerted afterwards and confirmed by the conqueror himſelf and his deſcendants: and though ſometimes a little impaired by the ferocity of the times, and the occaſional deſpotiſm of jealous or uſurping princes, yet eſtabliſhed on the firmeſt baſis by the proviſions of *magna carta*, and a long ſucceſſion of ſtatutes enacted under Edward III. To aſſert an abſolute exemption from impriſonment in all caſes, is inconſiſtent with every idea of law and political ſociety; and in the end would deſtroy all civil liberty, by rendering it's protection impoſſible: but the glory of the Engliſh law conſiſts in clearly defining the times, the cauſes, and the extent, when, wherefore, and to what degree, the impriſonment of the ſubject may be lawful. This induces an abſolute neceſſity of expreſſing upon every commitment the reaſon for which it is made; that the court upon an *habeas corpus* may examine into it's validity; and according to the circumſtances of the caſe may diſcharge, admit to bail, or remand the priſoner.

[h] 2 Inſt. 615.

[i] Com. journ. 1 Apr. 1628.

[k] Book I. ch. 1.

AND

AND yet, early in the reign of Charles I, the court of king's bench, relying on ſome arbitrary precedents (and thoſe perhaps miſunderſtood) determined[l] that they could not upon an *habeas corpus* either bail or deliver a priſoner, though committed without any cauſe aſſigned, in caſe he was committed by the ſpecial command of the king, or by the lords of the privy council. This drew on a parliamentary enquiry, and produced the *petition of right*, 3 Car. I. which recites this illegal judgment, and enacts that no freeman hereafter ſhall be ſo impriſoned or detained. But when, in the following year, Mr Selden and others were committed by the lords of the council, in purſuance of his majeſty's ſpecial command, under a general charge of "notable contempts "and ſtirring up ſedition againſt the king and government," the judges delayed for two terms (including alſo the long vacation) to deliver an opinion how far ſuch a charge was bailable. And, when at length they agreed that it was, they however annexed a condition of finding ſureties for the good behaviour, which ſtill protracted their impriſonment; the chief juſtice, ſir Nicholas Hyde, at the ſame time declaring[m], that "if they were again re-"manded for that cauſe, perhaps the court would not afterwards "grant a *habeas corpus*, being already made acquainted with the "cauſe of the impriſonment." But this was heard with indignation and aſtoniſhment by every lawyer preſent; according to Mr Selden's own account of the matter, whoſe reſentment was not cooled at the diſtance of four and twenty years[n].

THESE pitiful evaſions gave riſe to the ſtatute 16 Car. I. c. 10. §. 8. whereby it was enacted, that if any perſon be committed by the king himſelf in perſon, or by his privy council, or by any

[l] State Tr. vii. 136.

[m] *Ibid.* 240.

[n] "*Etiam judicum tunc primarius, niſi illud* "*ſuccrevisset, reſcripti illius forenſis, qui liber-*"*tatis perſonalis omnimodae vindex legitimus eſt* "*fere ſolus, uſum omnimodum palam pronuntia-*"*vit (ſui ſemper ſimilis) nobis perpetuo in poſ-*"*terum denegandum. Quod, ut odioſiſſimum ju-*"*ris prodigium, ſcientioribus hic univerſis cen-*"*ſum.*" (*Vindic. Mar. claus. edit. A.D.* 1653.)

of

of the members thereof, he ſhall have granted unto him, without any delay upon any pretence whatſoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench *or common pleas*; who ſhall thereupon, within three court days after the return is made, examine and determine the legality of ſuch commitment, and do what to juſtice ſhall appertain, in delivering, bailing, or remanding ſuch priſoner. Yet ſtill in the caſe of Jenks, before alluded to [o], who in 1676 was committed by the king in council for a turbulent ſpeech at Guildhall [p], new ſhifts and devices were made uſe of to prevent his enlargement by law; the chief juſtice (as well as the chancellor) declining to award a writ of *habeas corpus ad ſubjiciendum* in vacation, though at laſt he thought proper to award the uſual writs *ad deliberandum*, *&c*, whereby the priſoner was diſcharged at the Old Bailey. Other abuſes had alſo crept into daily practice, which had in ſome meaſure defeated the benefit of this great conſtitutional remedy. The party impriſoning was at liberty to delay his obedience to the firſt writ, and might wait till a ſecond and a third, called an *alias* and a *pluries*, were iſſued, before he produced the party: and many other vexatious ſhifts were practiced to detain ſtate-priſoners in cuſtody. But whoever will attentively conſider the Engliſh hiſtory may obſerve, that the flagrant abuſe of any power, by the crown or it's miniſters, has always been productive of a ſtruggle; which either diſcovers the exerciſe of that power to be contrary to law, or (if legal) reſtrains it for the future. This was the caſe in the preſent inſtance. The oppreſſion of an obſcure individual gave birth to the famous *habeas corpus* act, 31 Car. II. c. 2. which is frequently conſidered as another *magna carta* [q] of the kingdom; and by conſequence has alſo in ſubſequent times reduced the method of proceeding on theſe writs (though not within the reach of that ſtatute, but iſſuing merely at the common law) to the true ſtandard of law and liberty.

[o] pag. 132.

[p] State Trials. vii. 471.

[q] See book I. ch. 1.

THE

THE ſtatute itſelf enacts, 1. That the writ ſhall be returned and the priſoner brought up within a limited time according to the diſtance, not exceeding in any caſe twenty days. 2. That ſuch writs ſhall be endorſed as granted in purſuance of this act, and ſigned by the perſon awarding them[r]. 3. That on complaint and requeſt in writing by or on behalf of any perſon committed and charged with any crime (unleſs committed for treaſon or felony expreſſed in the warrant, or for ſuſpicion of the ſame, or as acceſſory thereto before the fact, or convicted or charged in execution by legal proceſs) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant or affidavit that a copy is denied, ſhall (unleſs the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for ſuch priſoner, returnable immediately before himſelf or any other of the judges; and upon the return made ſhall diſcharge the party, if bailable, upon giving ſecurity to appear and anſwer to the accuſation in the proper court of judicature. 4. That officers and keepers neglecting to make due returns, or not delivering to the priſoner or his agent within ſix hours after demand a copy of the warrant of commitment, or ſhifting the cuſtody of a priſoner from one to another, without ſufficient reaſon or authority (ſpecified in the act) ſhall for the firſt offence forfeit 100*l.* and for the ſecond offence 200*l.* to the party grieved, and be diſabled to hold his office. 5. That no perſon, once delivered by *habeas corpus*, ſhall be recommitted for the ſame offence on penalty of 500*l.* 6. That every perſon committed for treaſon or felony ſhall, if he requires it the firſt week of the next term or the firſt day of the next ſeſſion of *oyer* and *terminer*, be indicted in that term or ſeſſion, or elſe admitted to bail; unleſs the king's witneſſes cannot be produced at that time: and if acquitted, or if not indicted and tried in the ſecond term or ſeſſion, he ſhall be diſcharged from his impriſonment for ſuch imputed offence: but that no perſon, after the aſſiſes ſhall be

[r] Theſe two clauſes ſeem to be tranſpoſed, and ſhould properly be placed after the following proviſions.

opened

opened for the county in which he is detained, ſhall be removed by *habeas corpus*, till after the aſſiſes are ended; but ſhall be left to the juſtice of the judges of aſſiſe. 7. That any ſuch priſoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the ſame, on ſight of the warrant or oath that the ſame is refuſed, forfeit ſeverally to the party grieved the ſum of 500*l.* 8. That this writ of *habeas corpus* ſhall run into the counties palatine, cinque ports, and other privileged places, and the iſlands of Jerſey and Guernſey. 9. That no inhabitant of England (except perſons contracting, or convicts praying, to be tranſported; or having committed ſome capital offence in the place to which they are ſent) ſhall be ſent priſoner to Scotland, Ireland, Jerſey, Guernſey, or any places beyond the ſeas, within or without the king's dominions: on pain that the party committing, his adviſors, aiders, and aſſiſtants ſhall forfeit to the party grieved a ſum not leſs than 500*l.* to be recovered with treble coſts; ſhall be diſabled to bear any office of truſt or profit; ſhall incur the penalties of *praemunire*; and ſhall be incapable of the king's pardon.

THIS is the ſubſtance of that great and important ſtatute: which extends (we may obſerve) only to the caſe of commitments for ſuch criminal charge, as can produce no inconvenience to public juſtice by a temporary enlargement of the priſoner: all other caſes of unjuſt impriſonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to antient precedents[*] and the ſpirit of the act of parliament, that the writ ſhould be immediately obeyed, without waiting for any *alias* or *pluries*; otherwiſe an attachment will iſſue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for *removing* the injury of unjuſt and illegal confinement. A remedy the more neceſſary, becauſe the oppreſſion does not always ariſe from the ill-nature, but ſometimes from the mere inattention, of govern-

[*] 4 Burr. 856.

ment. For it frequently happens in foreign countries, (and has happened in England during temporary ſuſpenſions[t] of the ſtatute) that perſons apprehended upon ſuſpicion have ſuffered a long impriſonment, merely becauſe they were forgotten.

THE *ſatisfactory* remedy for this injury of falſe impriſonment, is by an action of treſpaſs, *vi et armis*, uſually called an action of falſe impriſonment; which is generally, and almoſt unavoidably, accompanied with a charge of aſſault and battery alſo: and therein the party ſhall recover damages for the injury he has received; and alſo the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.

III. WITH regard to the third abſolute right of individuals, or that of private property, though the enjoyment of it, when acquired, is ſtrictly a perſonal right; yet as it's nature and original, and the means of it's acquiſition or loſs, fell more directly under our ſecond general diviſion, of the *rights of things*; and as, of courſe, the wrongs that affect theſe rights muſt be referred to the correſponding diviſion in the preſent book of our commentaries; I conceive it will be more commodious and eaſy to conſider together, rather than in a ſeparate view, the injuries that may be offered to the *enjoyment*, as well as to the *rights*, of property. And therefore I ſhall here conclude the head of injuries affecting the *abſolute* rights of individuals.

WE are next to contemplate thoſe which affect their *relative* rights; or ſuch as are incident to perſons conſidered as members of ſociety, and connected to each other by various ties and relations: and, in particular, ſuch injuries as may be done to perſons under the four following relations; huſband and wife, parent and child, guardian and ward, maſter and ſervant.

[t] See Vol. I. pag. 136.

I. INJURIES