

The Arguments Made in the Greate Case of Habeas Corpus (22 November 1627)

Sir John Bramston the Elder, William Noy, Sir Henry Calthorpe and Sir Robert Heath

Transcript

British Library, Additional MS 35331, ff. 4r–8r

4r

An[n]o: 3: Carolj Regis, An[n]o: Dom: 1627.

The came out A Com[m]ission from the kinge to require a loane of all subiectes (throughe the kingdome) of asmuch as every man was upon the booke of Subsedie, beinge 5. subsedyes. As hee that was founde xx:l lande upon the laste subsedy booke was to lende the kinge xx:l Hee that was xx:l goodes upon the Subsedy booke was to lende xij l vi s viij.d et sic de cæteris/

Some gentlemen beinge Com[m]issioners refused to sitte upon this Com[m]ission, others refused to lende: and some of both opinions were by the kinges com[m]aunde Com[m]itted to prison, and detayned aboute three quarters of a yere in prison, for there refusall: But att laste the saide prisoners broughte an habeas Corpus in the kinges benche Ter: Mich: An[n]o:3. Caroli Regis. 1627. where the case was argued; the argum[en]tes of w[hi]ch case followe as they were taken by some p[re]sente./

The argum[en]ts made in the greate case of habeas Corpas 22:° Novemb[e]r 3:° Carolj in Banco Regis. Betweene the kinge and S[i]r Iohn Heningham, S[i]r walter Erle, S[i]r Edwarde Hambdem, and S[i]r Iohn Corbett./

Argum[en]ts of S[e]rgeant Bramston for S[i]r John Heningham.

The retourne beinge reade hee moved that it was insufficente, and that the prisoner oughte to bee bayled: And saide as it was his parte to move the petition of S[e]r Iohn Heningham, soe hee woulde move nothinge w[hi]ch was againste lawe:/

[*Left margin:* see this arugm[en]t pag: 59. more att large /] Hee tooke exception to the retourne, to the manner and legall forme: and also to the matter & substance. To the matter it is to generall, for noe cause of imp[ri]sonm[en]t is shewed, soe also there is noe tyme menc[i]oned when hee was taken and impr[i]soned, and therefore insufficente for matters of substance for these two causes./

The cause w[hi]ch is returned is only *Mandatu[m] Regis*, w[hi]ch is altogether uncertayne and to generall.

His exception to the legall forme; for that it is not-fully and pr[e]cisely returned: as yo[u]r retournes of Gaylors oughte to be: but it is a retourne of anothers certificate, and not of his owne Conusance. Firste there ought to bee a cause in speciall, or generall: for its the purpose of that write, and the meanes appointed by the lawe for the enlargem[en]t and libertie of the subiecte. And all the meanes in the wryte *de homine Repleqiando* is for that there is a speciall exception that hee is com[m]itted by the com[m]aundm[en]t of the kinge. *salie nisi captus sit pper speciale præceptu[m] meu[m].*/

A cause oughte to bee returned that the lawe maye iudge of the insufficiency of it./ yf it maye not bee returned p[ar]ticularly, yet generally yt oughte: for otherwise nothinge may appeare to the Courte wherupo[n] they maye iudge: and also that yt maye appeare that there

imp[ri]sonm[en]t is not againste the statute of 25: Ed: 3: cap: 4./ soe by the stat: of 42: Ed: 3. 3. Noe man shalbee taken upon A Suggestion made to the kinge or his Councell, unlesse it bee upon p[re]sente matter of recorde, or by proces and write originall, accordinge to the olde Lawes of the lande: See the tytyle of the acte yf it bee soe that they neede not an expresse cause p[ar]ticularly or generally, then the subiecte shalbee disinherited of the lawe, w[hi]ch is his birth-righte, and inheritance: And therefore hee holdeth all that hee hath retourned voide and evill: For as the subiectes of the kinge are borne for the kinge to doe him and the com[m]on wealthe service: soe they are borne to inherite and enioye the lawes, and that every man maye equally haue the benefite of the lawe./

Secondly there is not any tyme expreste of his com[m]ittm[en]t and then noe cause to remaunde him: the write is to bringe the body w[i]th the cause: here is a cause expressed for his retayner, but not for his com[m]ittm[en]t/ For what ende was this write ordayned? for the libertie of the subiecte, that yf there bee a sufficiente cause, yf noe cause bee, then hee is to bee enlarged; and maye not bee unlesse the tyme of his impr[i]sonm[en]t and cause bee expressed. The tyme is the matter it selfe, for it intendes the most highe cause viz: High Treason yf a man bee imprisoned for suspition before conviction or tryall the p[ar]tie maye have an habeas corpus./

The tyme when hee was imprisoned oughte to appeare that the Courte maye adiudge yf hee [*Left margin: none is to bee kept imp[ri]son over longe.]* hath bynn a longe tyme in prison before hee bee put to answeere: for otherwise one maye bee kepte in prison duringe his life, only for a suspition, and hee never suffred to have a tryall: w[hi]ch shalbee againste the saide Stat: and lawes of Magna Carta cap:29. *nullus liber homo capiatur, vel imprisonetur nisi per legem terræ* . And Stat: 28: Ed:3: cap:3. noe free man shalbee taken, or imprisoned w[i]thout beinge broughte to answeere by due proces of lawe: admitte there bee a sufficiente cause retourned w[hi]ch appeares not, then there wilbee a p[er]petuall imp[ri]sonm[en]t/ The Iudge oughte not to come upon the p[re]sente subiecte but upon that w[hi]ch may happen yf that retourene bee lafull: yf that retourne bee good, then its but the makinge of a neue warrante, and soe the cause shall never appeare, nor the p[ar]tie ever enlarged w[hi]ch is againste the lawe expreste in the booke of 19: H: 6: 3. where its helde that the lawe is the moste highe inheritance w[hi]ch the kinge hath, for by the lawe hee himself and all his subiectes are

are ruled, and yf

4v

An[n]o Dom[in]i 1627

are to bee ruled, and yf his lawe were not, noe kinge nor noe inheritance shalbee.

West:1:cap:15. The letter of the Stat: is.

{ gap: }

Forasmuch as before this tyme it was not determined what p[er]sons are replevisable and what not, but only of them w[hi]ch are taken for the deathe of a man, or by the com[m]aundem[en]t of the [*Left margin: West:1: Expounded]* kinge &c. But our case touchethe not upon that Statute: For there the com[m]aundem[en]t of the kinge is intended by wryte, and not by worde: Howe bee it that Stamforde fol: 72: E. saithe that it is understoode of the com[m]aundem[en]t of his owne mouthe, or of his Councell w[hi]ch is incorporate to him, spakinge w[i]th the mouthe of the kinge himselfe: the same Stat: saithe that such &c shalbee in noe wise replevisable by the com[m]on write, that is intended, by the write *de homine replegiando* expressed in Fitz. Nat: Brev: will any man saye that in all the 4: cases

expressed in the Stat: West:1: cap:15. that a man here shalbee p[er]petually impr[i]soned, or taken for the deathe of a man is not bayleable, by the com[m]on lawe; [*Left margin:*Note As sherifs are forbidden to bayle any man ag[ains]t Stat: West:1:cap:15. Soe likewise are Iustices of P: by 1:&2: Phil:&Mar: cap:13. But Iudges of Asszes or of the K: benche are not restrayned by any Statutes but they maye Bayle a prisoner where th'other cannot./] but shall hee not bee baylyed? hee shall by the write of Odio & Atia. Cok lib:9:fol:56./ Bracton Coroner: 24. But by the Stat: 28: Ed:3: cap:9. that speciall write of Odio & atia was for that the impr[i]sonm[en]t shall not bee to longe: For the interpr[e]tacon of the acte of West:1. men have bynn bayled for highe Treason./ Another exception to the matter, in respette of the generality of the cause of impr[i]sonm[en]t and detayning viz: *per Speciale mandatum Domini Regis* , howe that shalbee intended, yf that were by write, or otherwise. The Statute of Marleb: cap:8. saythe, they w[hi]ch bee taken & imprisoned for a Redisseisen, shall not be deliuered w[i]thout speciall com[m]aunde, that is intended by wryte, for as hee is imprisoned by wryte, soe shall hee bee enlarged by wryte./

The exception of the manner of the retourne was, for that it hath relation to the signification of another: and the officer himselve oughte to retourne the cause of his cognizance, and not as hee is certified: therefore yt behoofethe that the retourne bee *per mandatu[m] D[omi]ni regis*, and not by these wordes *nihil significatu[m]* , for hee is an Officer of the Courte. Soe that yf there bee a false retourne, the p[ar]tie maye haue remedy, and then the Courte maye punishe him./ This case is not upon p[re]sidentes but upon the fundamentall rules of lawe: yet hee recited p[re]sidentes in the poynte./ Some of them where the kinge com[m]ittethe a man w[i]thout his Councell: some where the kinge and Councell: and some where the Councell alone com[m]itteth. 7. H: 8: rotulo.8. Hamson was com[m]itted to the Marshalsey *per mandatu[m] D[omi]ni Regis*, and hee was bayled upon a habeas corpus./ 22: H: 8. rott. 37. Iohn Parker was com[m]itted to the Marshalsey, and that cause was retourned to bee *per mandatu[m] D[omi]ni Regis*, and upon a habeas corpus hee was bayled. 40: Eliz: Wendon was com[m]itted to the Fleete *per mandatu[m] Reginae & consilij sui* and hee was bayled upon such a retourne. 8: Iacobi. Cæsar was com[m]itted *p[er] mandatu[m] D[omi]ni Regis*, and hee was broughte hither by a heabeas corpus cu[m] causa, and there was a Rule, vnlesse the retourne was amended, the prisoner shoulde bee deliuered. Stamf fol: 72. vpon the Statute of west. 1. hee saithe that the com[m]aunde of the Councell is the com[m]aunde of the kinge, & that the Councell is the mouthe and body of the kinge. 40: Eliz: Thomas Cawridge was bayled out of the Towre upon a habeas corpus. 40: Eliz: Harcote from the Gate-howse; in the same yere S[i]r Rob[ert] Vernon was com[m]itted for suspition of Treason *per speciale mandatu[m] D[omi]ne Reginae* and hee was bayled upon a habeas corpus: For hee oughte not to bee p[er]petually impr[i]soned, but oughte to come in due tyme to his tryall./ 12: Iacobi Miles Regnor was deliuered out of the Gatehowse upon an habeas corpus, and in the same yere was Tho[mas] Beckwich bayled./ and in 14: Iacobi S[i]r Tho[mas] Manson was bayled out of the Towre, and soe hee prayed that S[i]r Io[hn] Hemingham mighte bee bayled./

Argum[en]te of Noy Councell for S[i]r Walter Erle.

The retournes are much of one tenore. The firste habeas corpus was dated 4: November yet the prisoner came in upon a sicut alias: and the warrante for his restraynte was dated the 7:th of November: for the cause of detayninge was after the write was directed to him. The alias, is to retourne the body w[i]th the cause, then the Guardian of [th]e Fleete retourned for what cause hee is detayned: howe bee yt, its certified that it is not good: And as the p[ar]tie is to

bee bayled when the retourne is insufficente, soe when noe cause is returned, then when as sufficiente cause is returned.

In the retourne there is a signification of the kinges pleasure, aswell as the firste com[m]aundm[en]t/ 9: Ed:3:xl:30. in a Cessavit seriante {Pecuell} saide {for} the Com[m]ons of Northumberlande that they had made there complainte to the kinge, Father of the then Kinge that the Country was destroyed by the warre of the Scottes, soe that the people maye not make profite of there landes: hee signifies his pleasure that noe Cessavit of the people in the same County shoulde bee duringe the warre &c./ And averred that

the warre yet endurige by w[hi]ch &c./

5r

An[n]o Dom[ini] 1627

yet endurige by w[hi]ch &c./ here wee haue com[m]aundem[en]t by write of the kinge that nowe is to holde his plea, and therefore wee shall not {sucease}./ Out of w[hi]ch hee intendethe two thinges. Firste that the significac[i]on of the kinge ended w[i]th his deathe. 2:ly that yf the kinge signifieth his pleasure one waye, and after signifie his pleasure another waye, that it shalbee as the laste signification is./ Here the kinge by his habeas corpus signifieth his pleasure that hee will haue there bodyes w[i]th there cause removed hither *ad subijciendu[m] et recipiendu[m]*, that is to submitte and receive the lawe./ Every officer of the Courte oughte to make his retourne of his owne cognisance, and not of the certificate of another to him: hee retournes not that the kinge com[m]aundes him to detayne him in prison, but hee retournes that the Courtes certifies to him &c Nowe hee oughte to retourne the ymediate and primary cause. 23: Ed: 3. *Retourne del vicount 87. in ho[mi]ne replegiando* the vicount retourne that hee had a com[m]aunde to the Baylife of an Abbott, whoe answered him that hee was villaine to the Abbott, by w[hi]ch hee maye not make deliuerance, and for that the answeere was not sufficiente a sicut alias was awarded for hee oughte to retourne upon his owne conuzance. for yf the Sherife returned that the saide Abbott had claymed him to bee his villaine, then it had bynn good. T: 31 Ed:3: rott: 46. banco regis. In the booke there is but a parte of the case, but the role is more. [*Left margin*:# Excommunication for d[eliverin]g the K[ings] wryte./] The Abbot of {Buns..ed} & Prysell in the Courte Christian, and Prysell broughte a p[ro]hibition and the B[ishop] of Norwiche excommunicated him for bringinge in the p[ro]hibition, and Prisell loste by a defaulte, and then is a Quære made for a contempte for excommunicatinge him for deliueringe of the kinges wryte. And the Abbot saide hee oughte not to bee answered and shewed an excomunicac[i]on: there two exceptions are taken, and both in one case. Firste because the cause of ecomication appeared not, for hee was excommunicated for deliuey of that wryte, and that excommunication maye bee for the same matter, and then wee obiecte not againste him the same excommunication for w[hi]ch hee complayneth. 2:ly every man that informes the Courte oughte to doe that by ymediate cause that hee knowethe: soe here it is insufficente for that hee reretournes the certificate of another another cause, for that, the retourne is not good./

The Stat. of Magna Carta. *Nullus liber homo est &c* for these wordes *per legem terræ*, are to bee expounded Proces of Lawe, by wryte, or attaychmente of the body./ 36:Ed:3: [*Left margin*: answeere to the petition 36: Ed:3: numero. 9: & numero. 20./ Two horizontally-aligned dots beneath an upward-pointing arrow] numero:9. & number 20 a private Statute, and the same yere numero:20. yt was complayned in p[ar]liamente that diu[er]se p[er]sons

were imp[ri]soned *per speciale mandatu[m] D[omi]ni regis* and otherwise, and it was desired that the former Stat. shoulde bee putt in execution, and it was answered bee it done w[i]thout disturbance./ 37: Ed:3: cap:18. there is an exposition of the greate Charter./ 16: H: 6: means de faits, ^{Fitz:82.} an action of trespas was broughte for cuttinge trees the def iustifies the cuttinge *per mandatu[m] D[om]ini regis*, and adiudged yt was noe plea, w[i]thout shewinge espetialtie of the com[m]aunde: and there it is holden by the Courte, that yf the Kinge com[m]aunde to arreste one, hee maye not averre in an action of false imp[ri]sonm[en]t [*Left margin:Note.*] ~~{gap: illegible}~~^{althoughe} it bee in the kinges pr[e]sence./ 1: H:7: 4. Hussey saith that markham saide to Ed: 4. that the kinge maye not arreste one ^{upon suspition { } ~~{gap: illegible}~~} the p[ar]tie maye not haue remedy against him, yf hee were falsely imp[ri]soned. Here the kinge makes you Iudges of the cause of his com[m]ittm[en]t by the bringinge of the wryte, and yf the cause bee not sufficiente hee is to bee bayled, but there is noe cause expressed, therefore hee shalbee bayled./

The Stat: West: 1:15. intendethe only *de homine replegiando*, when it saithe by the com[m]on wrtye: that in 4. causes hee shall not bee bayled and deliuered by the com[m]on wrtye. Bracton. 153. the wryte *de homine replegiando* was att the com[m]on lawe, and Bracton after the wryte menc[i]onethe the takinge w[i]thin the Forre { } w[hi]ch is one of the 4: causes expressed in the Stat: for that hee shall not bee deliuered by com[m]on wryte, therfore the Statute alterethe the allegac[i]on in the pointe. 21: Ed: 4:71. Wakefielde was bayled for an horrible murther for by the wrtye hee was broughte hither, hee shall not bee subiected & receaved for the Stat: of West: 1: 15. extende only to this com[m]on write, and so is the p[re]amble of the Statute after that the Statute declares what it was and whoe is to be replevisable then it adiudgeth a penaltie: and soe that Statute extendeth to noe others then the co[m]on Keepers and extendethe not to the Iudges, for then it woulde haue added a penaltie upon the Iudges, and the Statute makes menc[i]on of inferiours viz the Sherife keepers &c. & intendes not superiors the Iudges: soe hee prayed that S[i]r walter Erle mighte bee Bayled./

5v

An[n]o Dom[ini] 1627
Seldon for S[i]r Eduarde Hambden.

Seinge that hee was in the same case, hee hopethe that they woulde not expecte much from him after such lerned men: but hee will saye somethinge to the Forme, and somethinge to [th]e matter./ For the forme, hee retournes only the cause of the detayninge, but expresse the not any cause: ether the daye of caption or otherwise: soe as you maye not iudge upon the tyme of his imp[ri]sionm[en]t/ Here is a greate incertenty, it appeareth not when this com[m]aunde was, nor when this certifyinge was, and soe appeareth not when this warrante was./

The retourne is contradictory, *deteutus est per speciale mandatu[m] D[omi]ni regis*, and then com[m]ethe in and saithe, that the Councell com[m]aundes him to detayne the p[ri]soner, and that hee was com[m]itted *per speciale mandatu[m] Dominj Regis*. For the matter of the retourne, hee is not iustly imprisoned vnlesse the cause bee expressed viz: for what cause hee was impr[i]soned. Magna Carta cap:29. that Statute clerely expresse the that noe man, shalbee imprisoned w[i]thout due proces, for [th]e wordes *per legem terræ*, is to bee vnderstoode due proces of lawe, and needes not an explanation of the Statute made *tempore Ed: 3.*/ yf the Statute had not soe intended, then that had bynn a voyde Statute; for a man maye not

impr[i]son the villaine of another man, but hee maye bringe a trespass, for that it is not *per legem terræ*, yet it is not of the Statute for hee is noe free man./ 42: Ed:3. The kinge answeres the bill, wee will that this lawe take effecte, for it is the lawe of the greate Charter, w[hi]ch proves that the great Charter is intended by the wordes *per legem terræ*: and hee rites the p[re]sidentes before, and prayethe that S[i]r Iohn Hembden mighte bee bayled./

Caltrope for S[i]r Iohn Corbett./

The retourne is insufficente in manner and matter. For the manner it is retourned that hee is detayned *per mandatu[m] sub sigillo D[omi]ni regis*: that is not a directe affirmance w[hi]ch is *p[er] mandatu[m] D[omi]ni regis*. Plod: 121: 122./ 21: Ed: 4: 43. to saye in all actions of debte upon an obligac[i]on that the def stooode bounde to the plaintife in 20:l the w[hi]ch hee hath not paide to the pl[ain]t[iff] that declarac[i]on is not good, for every declarac[i]on oughte to bee certayne, and a retourne oughte to bee more certayne then pleadinge. Fitz: Nat. Br: 63. A./ {??ister} 63. in a wryte of excomunicac[i]on{capiend}: and there is not any directe affirmac[i]on, that hee is &c 33: Ed: 3. excom[m]engm[en]t 29. there it appeareth by the tenante of the B[ishop] of L: that the B[ishop] Waterforde had excommunicated him, and it was evill, for hee oughte to certifie of his Conusance. Cob: lib :8: 68./ Nat. Br: 65./

[*Left margin*: Doodle of a flower] Another reason, the warrante is that whereas hee was formerly com[m]itted, that was *per mandatu[m] D[omi]ni regis*. The tyme of his com[m]ittm[en]t is materiall, for the suiecte oughte not to bee imprisoned to longe, Ass: 38: pt: 22./ Brook Impr[i]sonm[en]t 100. The kinge [*Left margin*: Ses Stat: 18: Eliz: cap: 6. in what case a man may bee kepte in p[ri]son after Iudgm[en]t./] maye not him iustly detayne in prison, after the fyne bee tendred: For there is a tyme appointed for the impr[i]soned, that in tyme the p[ar]tie maye bee broughte to answer./ The lawe is tender to imprison a subiecte to longe: For Register. 273. the p[ar]tie is to bee deliuered out of prison, not by longe detayninge of his body, or by a detrymente to yt, but by due course of lawe. 3: H: 6: numero 46. one made a petition to the p[ar]liam[en]t for releife, for that many were com[m]itted to prison, and layde there longe, and the kinge answered, bee the lawe and Statutes in this case observed, and kepte./ The lawe is tender in the imp[ri]sonm[en]t of a man. 8: Ed: 4: 13./ Dyer [*Left margin*:

Note.

Three concentric hatched circles surrounding the text] 175. betweene the retourne of the Capias you have not a Terme for that the p[ar]tie shall then bee restrayned to longe of his libertie. 39: Ed:3: 6:7. howe bee yt the Sherife retournes not his wryte, yet the p[ar]tie maye appeare Gratis upon a Capias for savinge his imp[ri]sonm[en]t/ For these causes the defaulte of the tyme in the retourne doth vitiate the retourne./

6r

An[n]o Dom[ini] 1627

Upon the matter of the retourne. The Com[m]aunde of the kinge beinge verball is not sufficente to imprison. 16: H: 6. means de faits. 182 v./ 10: H: 7: 17. Frowicke. Howe be it the Iudges maye com[m]aunde by parroll, yet the p[ar]tie maye not iustifie vnlesse the com[m]aunde bee upon recorde. 39: h: 6: 17. seisure of goodes of one are utlawed by the verball com[m]aundm[en]t of the kinge is not good vnlesse the p[ar]tie w[hi]ch is seised bee Baylife, or other officer to the kinge./ There is another com[m]aunde and that is under the privy Seale or signett./ The Stat: An[n]o 1: R: 2: cap: 12. of an escape, instructes

punishm[en]t on the warden of the fleete vnlesse it bee by wryte, or other com[m]aunde of the kinge. dyer. 162. Thurland there deliuers a doubte of the com[m]aunde of the kinge: and there the p[ro]texion was not allowed, and the lawe is that the arreste is not a good com[m]aundem[en]t by wryte of the kinge. Cok: lib.7:20. Calvys case, that it appeareth there are 2. sortes of the kinges wrytes viz: Brevia mandatoria, & brevia Remedialia Register 70. there the com[m]aundem[en]t of the kinge is by wryte. Further the com[m]aunde of the kinge is breve mandatoriu[m], non remediale, as Com[m]ission of the kinge. Ass: 42: xl:5: adiudged, that com[m]ission is againste the lawe to take a man and his goodes w[i]thout inditem[en]t or suite of the p[ar]tie, or other due proces. Here the warrante is *per speciale mandatu[m] D[omi]ni regis* &c. is by write. Bracton 113. cap:12. *p[re]cipimus tibi quod non implacites sine speciali praetepo n[ost]ro*: then yf a wryte bee directed it is a good com[m]aundem[en]t/ and there your firste com[m]aunde is by wryte. Register. 171. B: H: *a prisona deliberari non possunt sine mandato n[ost]ro speciales, nos* &c. These cases prove that they maye bee imp[ri]soned by the speciall com[m]aunde of the kinge, by that com[m]aunde by parroll by wryte, or Com[m]ission in all cases the prisoner is bayled. 3. H: 6: numero 46. there was one com[m]itted *per speciale mandatu[m] D[omi]ni regis*, and was bayled. And soe hee prayed that S[i>r] Iohn Corbett mighte be bayled./

Attorney le Roy. Sir Ro: Hethe.

Divers have bynn the exceptions w[hi]ch haue bynn taken to, for the Forme of the Retournes. Firste that the retourne is not absolute: I confesse that yf it bee the relation of another, and not his owne wordes the Retourne is insufficente: but I saye that the retourne is absolute, and [th]e wordes of the Officer, and that w[hi]ch is added is *Ex abundantia*. And to shewe that hee detayneth him not of his owne {}, hee is detayned *per mandatu[m] D[omi]ni regis* and soe hee answered that obiection./

Secondly for that the officer retournes not the cause of his imp[ri]sonm[en]t hee answered, that the wryte demaundes nothings more then the cause of his detayninge, and soe hee hath returned: and yf the write had bynn speciall to haue the cause of his imprisonm[en]t then hee agreed that it oughte to bee returned./ The body of the Councell is repr[e]sentatively the body of the kinge, and here the wante is not the wordes of the Lordes of the Councell, but the declaration of the pleasure of the kinge: another daye a habeas corpus hath bynn directed to diuerse keepers of prisons to bringe the prisoners w[i]th there cause, that they maye have the com[m]on course of Iustice. Many obiections have bynn made: one to the forme, another to the matter. As to the firste, they have obiected 4: thinges 1:° that it is not positie, but referred to the signification of another. 2:° that hee retournes not the cause. 3:° that it is imp[er]fecte for that it is not returned howe longe they have bynn detayned, nor the cause of there imp[ri]sonm[en]t 4° that in yt there is a contradiction./

[Left margin:1.] Firste I agree that the grounde is truly layde. Ass: 27:xl:55. A sherife retournes that hee hath made a warrante to his Baylife, whoe hath returned to him, that it is not good vnlesse hee bee a Baylife of a libertie, for then it is a good retourne *null[m] dedit responsu[m]*, for hee is the officer of the Bayliweeke 33: H:6:20./ 2: H:4:4. that such a Baylife shoulde haue a retourne of the wryte, otherwise it is nut good./ And also hee agreed the p[re]sidente of {21} Ed:3./ 21: Ed:3. before cited to bee good lawe./ It is saide that an insufficente retourne is as noe retourne, but then the worste is, it shalbee amended. But our case differs from all the cases: for the firste wordes are positive viz: *per speciale mandatu[m]*

D[om]ini regis, and the wordes *nulis significatu[m]* is but a surplusage and noe parte of the retourne.

[*Left margin*: 2. 3.] The secunde dependes upon the firste, and for that hee saide it is *causa causeta, et cause causaus* and the laste is our case. 3:° The retourne oughte to bee sufficiente to answeere the com[m]aunde of the write, and that the officer hath done, for the com[m]aunde of the wryte is to have the p[ar]tie and the cause of his detayninge. 9:H:6: 44. there it is resolved

what

6v

An[n]o Dom[ini] 1627

what cause soever, that the warden of the Fleete retournes, that oughte to bee accepted. Therefore the officer hath done safely to shewe howe hee receaves his warrante.

[*Left margin*:4.] Fourthly as to the contradiction. Firste of the warrante that it is to require you &c. and the wordes of the Lordes of the Councell are the wordes of the kinge himselfe, for they rep[re]sente the body of the kinge. As to the matter of lawe, yf these gentlemen are replevisable./ There com[m]ittm[en]t is noe ordinary com[m]ittm[en]t but *per speciale mandatu[m] D[omi]ni Regis*, and is a proper and ymediate warrante, upon w[hi]ch hee desired to have them remaunded. There Cou[n]cell [*Left margin*:1.] have obiected 5. thinges for w[hi]ch they oughte to bee bayled. 1:° For the inconveniences [*Left margin*:2.] that maye happen to the subiecte by restraynte of libertie. 2:° diuerse authorities [*Left margin*:3:4.] of bookes. 3:° diuerse petitions to p[ar]liam[en]tes and there answeres. 4:° diuerse Statutes in [*Left margin*:5.] printe. 5:° diuerse p[re]sidentes of imprisonm[en]t by the Lo[rds] of the Councell, and some by the kinge himselfe. and yet the prisoner hath bynn bayled: I will endeavor to followe there waye and Answere.

[*Left margin*:1.] Firste, libertie is a thinge most pretious, and that I graunte, soe that it bee *secundu[m]* [*Left margin*:2.] *legem terræ*. Dyer. 175./ Ass 30:xl:22./ Bro: imp[ri]so[n]m[en]t 100./ means de faits. 128. 1: H:7:7., these were bookes rited to this purpose, and soe hee saide that is intended in an ordinary cause of Iudicature. For in Dyer there is a Capias for a contempe, and it is fitter for westminster Hall then the Councell table. In the later case hee conceaved that it is not fytted for the kinge to com[m]itte in such cases. But here the question is yf the Kinge maye com[m]itte by his prærogatiue. 4:Ed:3: 16. was cited and Herle in .1. Ed:3:6 the kinge com[m]aundes to retourne a plea, untill the p[ar]tie retourne out of Scotlande, there the Iudges saye his retourne is uncertayne and to contynewe that is matter of lawe of w[hi]ch the kinge hath noe experience, and that com[m]aundem[en]t is contrary to lawe, therefore they refuse to allowe of yt./ That the kinge maye not compounde, there is a difference betweene the absolute power of the kinge w[hi]ch concernes matters of State, and the petty ordinary causes of ordinary Iustice. The kinge as hee is the heade of the com[m]on wealthe, soe hee is the fountayne of Iustice, and Iustice it selfe, and that w[hi]ch hee hath done hee did in iustice: and yet hee is subiecte to the lawe: but hee is not subiecte to giue accompte to subiectes of his actions. yf the kinge make a warrant to com[m]itte one and saye *pro {rectis} causis*, or *pro causis ignotis* it is a good warrante by the kinge. And yf a subiecte beinge an officer make such a warrante it is not good: For its matter of State: & when noe matter is expressed that oughte to bee conceived matter of State, and that oughte not to bee examined by [th]e subiecte Magna Carta :29. *nullus liber homo* &c. that

Statute hath had many confirmac[i]ons [*Left margin:4*] and is positie, will you haue none impr[i]soned but hee w[hi]ch is indited? & convicted upon due proces of lawe? *Secundu[m] legem terræ* makes the difficulte, then yf the kinge com[m]itte one that is *lex terræ*, and is not to bee examined but by yo[u]r highe Iudge God himselfe. It was objected that the wordes in the recited booke of magna Carta cap: 29. was *nec in Carcerem mittemus nisi per legale iudicu[m] pariu[m] suor[um] vel per legem terræ*. And in Math: Parrus there the manuscripte of Magna Carta is att large, for hee liued in tyme of H.3. hee answered that it is not in the olde manuscripte and hee shewed an olde manuscripte: And as for mathewe Parris hee liued in the tyme of Kinge Iohn; and then this Statute was intended but was not p[er]fected untill H:3. But admitte the wordes to bee in the booke hee sees not what difference doth make./ the Statute of 25: Ed:3: cap:4. was saide to examine the Statute of Magna Carta. w[hi]ch was reade, the wordes are that none shalbee condemned w[i]thout tryall &c. And that was to p[re]vente p[ri]vate proceedinges & extends not to imp[ri]soninge them w[i]thout tryall, for that was the practise then, w[hi]ch yet contynewes, that is to saye, to imp[ri]son before tryall./ 28: Ed:3: 3.

4v

An[n]o Dom[in]i 1627

28: Ed: 3: cap:3. that Statute is to bee intended of a due p[ro]ceedinge of lawe before finall imprisonm[en]t and hath no reference to the matter in question 37: Ed: 3: cap: 18. that Statute is againste petition and suggestion to the kinge and to the Councell not in a legall manner./ 42: Ed: 3: cap: 9. that Statute is of the same manner./ 1: Ri: 2: cap: 12. that Statute is againste the warden of the fleete vnlesse hee lett him goe att large by the speciall com[m]aunde of the kinge or otherwise: that was for his purpose, and the Statute inflictes 2. penalties .1.^o to forfeite his office. 2.^o to giue remedy to the p[ar]tie. Dyer 132 Vernons case, there the com[m]aunde of the kinge saves the forfeiture of his office, for upon an habeas corpus hee oughte to have the prisoner [*Left margin:3.*] here. They cited diu[er]se petitions in p[ar]liam[en]t and they answered to them as p[ri]vate recordes. 36: Ed: 3. numero .9. et 20: 38. numero. 28. the answeere is that it shalbee done but that is not to the pointe in question. The petition is to have righte, and to observe the lawe, and not to imprison upon false suggestion, and the kinge answered that hee will that all the lawes and statutes bee observed, but noe worde of the poynte in question. 3: H: 6. numero 46. hee coulde not finde therfore howe hee mighte safely conclude upon that recorde./

[*Left margin:5.*] The thirde pointe is yf the kinge, or Councell of the kinge may com[m]itte, and yf imp[ri]sonm[en]t without shewing cause of it, that such a p[ar]tie bee bayleable? West: 1: cap: 15. of maynprise that is a full exposition of magna Carta, and Courtes of Iustice are excluded out of that Stat of Westm. there was not anymore, but expresseth the lawe in 4. cases Magna Carta was made in the tyme of H: 3. and the statute of west. was made in his sonnes tyme, and yf they had understoode magna Carta otherwise, woulde they not have bynn carefull aswell of the greater as of the lesser? there is not any opinion to the contrary, but that the kinge maye by his speciall com[m]aunde imp[ri]son one, and hee shall not bee bayleable./ But hee founde opinion that they were not replevisable. 32: H:6:52. Newton, those that are com[m]itted *per mandatu[m] D[omi]ni regis* are not replevisable. There is an opinion and it is not denied. 32:H:6:28. the warden of the fleete retourned that hee was imp[ri]soned for diu[er]se causes *per mandatu[m] D[omi]ni regis*, and noe exception to the retourne: but the pointe was upon another thinge 21: Ed:3: rotulo:42./ The Sherife of

Lecester and Warwicke (for heretofore there was but one Sherife of both Counties) received a warrante from the kinge by write not to bayle those that were com[m]itted by the Erle of warwicke in his custody, the wordes are that the kinge sente to him to giue him noe grace, that is noe bayle, yet the Sherife lett him goe att large upon bayle, and that beinge debated in p[ar]liam[en]t the Sherife was condemned upon the Statute of West:1./ The use of this case is, ther was noe recitall of the cause of his imp[ri]sonm[en]t/ 2:° to explaine the Stat: of West:1. for yt was determined in p[ar]liam[en]t/ upon the wryte *de ho[m]i[n]e replegiando* there is an exception of *ius captus sit ad speciale mandatu[m] D[omi]ni regis*, w[hi]ch by the Custome of Englande are not replevisable. Fitz: Mat: Br: in his wryte he *de ho[m]i[n]e replegiando* saithe that there are also causes when a man shall not have libertie, when hee it taken by the com[m]aunde of the kinge, or cheife Iustice. Stamforde: fol:72. then a reverente Iudge in his pleas of the crowne upon the Stat: of West:1. saith that in 4 cases a man is not replevisable, and that is, when hee is com[m]itted *per mandatu[m] D[omi]ni regis* w[hi]ch is understoode by the com[m]aunde of his mouthe, or his Councell, those are his beste com[m]entaries upon the saide lawe of West:1. beinge two reverente Iudges. Hee hath seene the Lo[r]d Andersons reportes, and amonge them is recited a cause resolved 34: Eliz: by all the Iudges of Englande and they all subscribed under there handes in what causes p[ri]soners were bayleable and in what not, and amonge them one is yf hee bee com[m]itted by the com[m]aundem[en]t of the Queene, or by the body of the privy Councell, or when two or more of the Councell com[m]ittes one for Treason: soe here is a Iudgm[en]t by all the Iudges of Englande. It was objected that the subiecte hath a greate interest

intereste in that hee agreed

7v

An[n]o Dom[ini] 1627

hee agreed to yt. and saide that the kinge hath a greater intereste, for hee shalbee p[re]ferred before any subiecte. The question is not howe longe hee shalbee imp[ri]soned: for the Lawe intendes that the kinge maye not doe wronge. Dyer 48. The kinge maye not usurpe, for hee maye not doe wronge. Ymagine a Treason were com[m]itted by two, & both goe there waye, and one is taken and imp[ri]soned in the tower, yf hee bringe an habeas corpus yt needes not to shewe the cause of his imp[ri]sonm[en]t for yf yt shalbee revealed yt maye p[re]iudice the kinge: for by the revealinge of yt the other maye have notice for what cause hee is imp[ri]soned, and by that meanes secure himselfe, and the p[ar]tie is not to bee brought to tryall before due p[re]paration./ Diverse children were com[m]itted to the Towre, when they had not Conusance of good or evill, yet they coulde not be bayled for they were com[m]itted for matter of State. It was objected by this meanes w[ith]out cause shewed, [th]e subiecte shall have noe remedy: admitte the kinge converte all his coyne into brasse, that wilbee inconvenyente for the subiecte: yet it cannot bee remedied. But wee maye not p[re]sume the kinge will doe yt. And when it is for matters of State wee oughte to bee to wise to searche into matters of princes: The p[re]rogative of the kinge is greate, for the lawe puts confidence in the kinge for his Iustice and mercy. The kinge maye p[ar]don all Treasons, and it wilbee inconvenyente, but the kinge will not doe yt. The kinge maye expcepte all a County but two from beinge knightes of the Shire for the p[ar]liam[en]t that wilbee inconvenyente, that two shall beare the charges: so the kinge maye exempte such a County from beinge on Iuries, that wilbee inconvenyente to destroye the cheife tryall w[hi]ch the subiecte hath, and it wilbee a greate p[re]iudice to the subiecte, yet that the kinge maye doe: but hee will not

for the lawe trustethe him w[i]th mercy and Iustice. In o[u]r case wee maye not p[re]sume that this imprisonm[en]t wilbee p[er]petuall for the lawe impliethe not wronge in the kinge. Presidents keepe the lawe: they have shewed diverse p[re]sidentes, but all are mistaken, and are *nihil ad rem*. 1:H:8. rotulo.9. Harrison was com[m]itted for suspition of Felony and there the com[m]aunde of the kinge was saide to bee certified by one of Cliffordes Inne, that hee shalbee bayled. 40. Eliz: Wendons case, hee was com[m]itted out of the Starre chamber upon legall p[ro]ceedinge 8: Jacobi. Cæsars case hee was com[m]itted and bayled. Vernons case, hee was com[m]itted for suspition of {Werburies} deathe, and was charged by the Councill. 8: H:7. Roger Cheney hee was arraigned and acquitted, therfore greate reason hee shoulde bee bayled. But hee cited some p[re]sidentes of the Towre. In the 4:th of Ed:3. Iames Fox was taken and imp[ri]soned for diuerse offences made in the Forreste, and hee was bayled by speciall warrante of the kinge. yf [*Left margin: this is farr fetchde for there are iudiciall p[ro]ceedinges paste and iudgm[en]t given, as a punishm[en]t by lawe. in this case hee never is charged, nor is broughte to answer. et ubi nullu[m] factu[m] nulla fortia.&c./*] men are Com[m]itted out of the Chauncery, highe Com[m]ission, Courte of Exchequer, Starre Chamber: upon an habeas corpus maye wee examine the decree and sentences? noe./ 10. Iacob. there was a private constitution in London betweene the white and browne breade Bakers [*Left margin: A corporation cannot make an ordinance to imp[ri]son a man: but only to fyne him. Coke lib :9: fol:64 Clarkes case./ because it is against Mag[na] Carta./ nullus liber homo &c.*] and Iohn Littlebagge was com[m]itted for a breache of the saide constitution and upon an habeas corpus here, hee Remaunded to London. And maye an inferior Iurisdiction haue the p[ri]viledge and maye not

the kinge himselfe?

8r

An[n]o Dom[ini] 1627

the kinge himselfe have that Iustice? P: 7: H:7. rotulo 2. Brage was com[m]itted *per speciale mandatu[m] D[omi]ni regis*, and *Termino Trinitatis* nexte ensuyng *dominus rex relaxavit mandatu[m] suu[m]* ./ And then Villia Battleman. P:7:H:7: rotulo. 13. and others were com[m]itted to the marshall of the kinges howse, and one of them had a release of the com[m]aunde of the kinge, and others detayned in prison. Bracton lib: 1: cap: 8./

The remedy is by petition and not by an habeas corpus, and therfore hee prayed that they mighte bee remaunded./

Iudicium

Which was pronounced by the cheife Iustice Hide in the names of all the Iudges. viz: Dodderidge, Whitelocke, and Iones, that the prisoners were to remayne in prison, as this case was, vntill of grace the kinge enlarged them, and that they were not to bee bayled upon an habeas corpus./

Other manuscript witnesses

- British Library, Additional MS 48051, iiii–115r
- British Library, Additional MS 48101, ff. 164r–175v
- British Library, Hargrave MS 39, ff. 25r–35v, 40r–42v, 55r–v
- British Library, Harley MS 252, ff. 37r–47v
- British Library, Harley MS 37, ff. 112r–116v

- British Library, Harley MS 37, ff. 172r–203v
- British Library, Harley MS 37, ff. 302r–313r
- British Library, Harley MS 4103, ff. 10r–96v
- British Library, Harley MS 4619, ff. 208r–217v
- British Library, Hargrave MS 245, ff84
- British Library, Harley MS 2217, ff. 61r–81v
- British Library, Harley MS 2234, ff. 282r–292v
- Bodleian Library, MS Eng. hist. c. 397, ff. 1r–40v
- Bodleian Library, MS Eng. hist. d. 231, ff. 5r–120v
- Bodleian Library, MS Rawlinson C 917, ff. 1–232
- Bodleian Library, MS Tanner 191, ff88
- Bodleian Library, MS Tanner 72, ff. 215r–225
- Cambridge University Library, MS Ff.3.17, ff. 116r–182r
- Folger Shakespeare Library, MS V.b.309, ff. 1r–133r
- Hertfordshire Archives and Local Studies, XII.A.27
- Harvard Law School, MS 1239
- Houghton Library, fMS Eng 1084, ff. 119–216
- Kent Archives, U1475/Z10
- Nottingham University Library, Pw V 85, ff. 1r–75v
- Parliamentary Archives, BRY/78, ff. 15r–113v
- Woburn Abbey, MS 4E-60, ff. 68r–76v

Modern print exemplars

- *State Trials*
- *The Constitutional Documents of the Puritan Revolution, 1625-1660* (3rd ed., Oxford, 1906)

© 2017–2021 University of Birmingham, University of Bristol. Provided under a Creative Commons Attribution 4.0 International (CC BY 4.0) licence.

<https://mpese.ac.uk/t/HabeasCorpus1627.html>