AN

INQUIRY

INTO THE

NATURE and EFFECT

Of the Writ of

HABEAS CORPUS,

The great Bulwark of *Britiſh* Liberty,

Both at Common Law, and under the Act of Parliament.

AND ALSO

Into the Propriety of Explaining and Extending that Act.

Nullus liber homo capiatur vel impriſonetur aut diſſeiſietur de libero tenemento ſuo vel libertatibus vel liberis conſuetudinibus ſuis aut utlagetur aut exuletur aut aliquo modo deſtruatur nec ſuper eum ibimus nec ſuper eum mittemus niſi per legale judicium parium ſuorum vel per legem terræ.

Mag. Chart. C. 29.

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AN

INQUIRY

INTO THE

Nature and Effect of the Writ of
HABEAS CORPUS.

WHETHER we conſider mankind as naturally inclined to ſocial life, or as having been reduced to it by neceſſity or accident; from whatever cauſe we ſuppoſe political ſocieties to have taken their riſe, whether from the choice and compact of the many, or from the power and conqueſt of a few; or whether in fact the ſtate be ſo formed as beſt to promote the happineſs of every member, or to ſatisfy the pride and ambition of its governors; we cannot conceive it void of that principle of ſelf-preſervation, which is common to every congregate, as well as to every ſingle body. Whether therefore the government be eſtabliſhed on the plan of liberty or tyranny, it will certainly make ſome laws for the preſervation of the properties and perſons of the ſubjects, ſince ſome ſuch are

neceſſary to the very exiſtence of the ſtate, and without ſuch, either more or leſs liberal, it wants an eſſential quality, and muſt degenerate into abſolute anarchy and confuſion. There is no civilized nation in the world that has not ſome legal inſtitution or ſyſtem, at leaſt for the defence of the ſubject's body and eſtate againſt the encroachment of others of *equal* rank.

In thoſe governments, where certain individuals, in right of their public poſts, or of their poſſeſſions, are intitled, by the laws themſelves, to make uſe of the perſons and fortunes of their inferiors at their free will and pleaſure (which is the caſe more or leſs in every arbitrary and deſpotic government) the laws relating to liberty and property are few, and extend to the preſervation of them only as between private perſons of equal rank in the community, and every ſubject ſtill remains under the arbitrary power of his ſovereign; every tenant, villein or ſlave, under the abſolute controul of his particular lord or maſter: but as it is the intereſt of the ſovereign, the lord, and the maſter, to protect his particular ſubject, tenant, or ſlave, from the oppreſſion of any other than himſelf; you will find no country where the government is ſo arbitrary as not to have ſome laws to prevent *ſuch* oppreſſion.

On

On the other hand, under a free government, under which (if we ſuppoſe, as it is reaſonable to think, ſociety ſprung from compact) all ſtates are or ought to be, the laws in ſupport of liberty and property are many and extenſive, binding not only the common and lower claſs of people, but every degree and order in the ſtate, all being ſubject to the ſame laws, and no man's liberty any further reſtrained than the welfare and preſervation of the whole community requires.

The difference between free and arbitrary governments conſiſts in the nature and extent of the laws for the defence of liberty and property; and not in a licenſe to diſobey ſuch laws as are in force; for all ſtates, of whatever nature or origin, neceſſarily have this one fundamental law, that the perſons and properties of its ſubjects are to be free from any *wrongful* or *illegal* encroachment of any other ſubject.

The motto, which I have placed in my title page, is a declaration of thoſe liberties, which by the common law of the land every ſubject of the Engliſh government is, and was many centuries ſince, intitled to the full enjoyment of. It is taken out of that charter of liberties, which is by way of eminence called the Great

 Charter

Charter, made by King Henry the third in the year 1225, confirmed by King Edward the firſt, and many times ratified and inforced by ſubſequent acts of parliament. It has, ever ſince its paſſing, been conſidered as the fundamental plan of Engliſh liberty, ſo that, whatever was before the paſſing that charter, or is now, called the common law of the land has been conſidered as either founded on, or declared by, this charter; the moſt material article of it I have therefore choſen for my motto. And that the unlearned reader may not be ignorant on what ſtrong foundation his liberty and property are ſecured to him, I ſhall here repeat it in Engliſh: No FREEMAN SHALL BE TAKEN, OR IMPRISONED, OR BE DISSEISSED OF HIS FREEHOLD, OR LIBERTIES, OR FREE CUSTOMS, OR BE OUTLAWED, OR EXILED, OR ANY OTHERWISE DESTROYED; NOR WILL WE PASS UPON HIM, OR CONDEMN HIM BUT BY LAWFUL JUDGMENT OF HIS PEERS [or equals] OR BY THE LAW OF THE LAND.

At the time this charter was paſſed, every man was conſidered as free, with reſpect to every other than his own particular lord, ſo that even he, who in reſpect of tenure was, with regard to the particular lord under whom he held his eſtate, called a villein or ſlave; yet with regard to every other member of the commu-

community, he came under the deſcription of a freeman*; nay the power of his own lord over him was not without reſtraint. But tenures by villenage being long ſince aboliſhed, that diſtinction no longer takes place, and every ſubject is now to all intents a freeman. It was then and is now the common law of this land, that no freeman be deprived of life, liberty, or property, but by the law of the land, that is, by due proceſs of law, founded on ſuch laws as are or ſhall be made in reſtriction of the liberty of the individual, for the peace and ſafety of the whole community, or by the judgment of 12 men (his equals) legally impanelled and ſworn to enquire of his offence. Even in thoſe days when the martial diſpoſition and unpoliſhed manners of the people, and the military tenures by which lands were held were conſiderable reſtraints upon liberty, yet ſo tenderly was the perſon of the ſubject treated in matters of public offence, that at common law, in every criminal caſe without exception, every man ſuſpected of a crime had an opportunity of retaining his liberty till after conviction, by giving ſecurity for his appearance to abide the ſentence of the law†.

* 2 Inſtitutes 45.

† In omnibus autem placitis de felonia ſolet accuſatus per plegios dimitti, præterquam in placito de homicidio, ubi in terrorem aliter ſtatutum eſt. Glanvil. lib. xiii. cap. 1.

Im-

Impriſonment was warranted by the law as a ſecurity for the ſuppoſed offender's appearance to anſwer the charge againſt him, and this impriſonment was to take place only in conſequence of legal proceſs, legally iſſued, and by virtue of a legal warrant thereon under the hand of ſome public and known officer, authoriſed by the law of the land to grant ſuch warrant, ſuch as the judges of the ſeveral courts in Weſtminſter-hall, the juſtices of the peace, and the like; and ſuch warrant was to ſet forth the cauſe or ground of the commitment; and whenever the party accuſed could procure ſecurity for his forthcoming to juſtice, he was intitled to be enlarged or freed from his confinment, the goal being *his* ſecurity *only* who could procure no other. Impriſonment of a freeman's perſon was alſo legal, when it was inflicted as a puniſhment for an offence againſt the public, of which the party had been legally convicted by the judgment of his peers, the ſentence being pronounced by a court having juriſdiction in the cauſe, and authority to paſs ſuch ſentence; ſo that at the common law, every man was free, and had a right ſo to remain, unleſs accuſed of ſome offence; nay, though accuſed, until his guilt was proved, and ſentence paſſed on him (which could not legally paſs but by the judgment of his

his peers) he had an opportunity to continue free upon his finding bail, pledges, or ſecurity for his appearance. But no man ought to be impriſoned but for ſome certain cauſe which is a legal ground of impriſonment; and if any man, by colour of authority, where he hath not any *in that particular caſe*, arreſt or impriſon another, though there might be good cauſe of impriſonment, yet ſuch impriſonment is illegal, an infringement of the ſubject's liberty, and a breach of the law of the land *.

The right to liberty and the prohibition of an invaſion of that right was general; *no freeman, no freeman whatſoever ſhall be taken.* The reſtriction of that right was particular and accidental. Every freeman was intitled as a member of the community, to the enjoyment of liberty, ſubject to a condition or exception, in fact of his own creating, the doing ſome act which by the law of the land limited or took away his general right. To ſuppoſe any member of a political ſociety to have a right without a legal means of attaining it, or of regaining it, when taken from him, is the higheſt abſurdity. In all well regulated ſtates there is a power lodged with ſome part or other of the ſtate to redreſs grievances. In England that

* 2 Inſtitutes 52, 53, and 54.

power

power is legally veſted in the king, who adminiſters juſtice by his judges. To them therefore muſt there be ſome method of application, and from them muſt the party be intitled to have redreſs, and to have it *immediately*, and *without hearing*, if there were *no* law to *reſtrain* and *limit* the general right in particular caſes. But as the title is not ſo general as to be without exception, there muſt be ſuppoſed to be ſome method of bringing the matter before thoſe who have a right to determine, whether it is a caſe excepted out of the general law or not; and as this can only be done by legal proceſs or writ, it follows that ſuch writ muſt *neceſſarily* reſult from, and be coeval with, the grant of the right. As this writ or proceſs is to enforce a *common* and *general* right, and not one that is *particular* or *ſingular*, or grounded on certain circumſtances, and confined to a few members of the ſtate, and as it is a proceſs iſſued only for the purpoſe of bringing the parties, and the matter in queſtion, before the proper judicature, where the determination is afterwards to be made, on the hearing; the party impriſoned, or deprived of liberty, muſt be ſuppoſed to be *of right* intitled to ſuch proceſs, which is therefore called a writ of right, and the king's courts are the officinæ juſtitiæ, from which ſuch proceſſes iſſue.

By,

By the common law of the land therefore, with the right to liberty ſprung up the right of every freeman, deprived of that liberty, to have a writ of Habeas Corpus for the bringing up his body, with the cauſe of his detainer, before the King as adminiſtring juſtice by his judges; and the end of this writ, as appears by the words of it, was, that the perſon impriſoned might *undergo* and *receive* whatever the court ſhould then and there order according to law; which Sir Edward (uſually called Lord) Coke thus explains: "If it appeareth that his "impriſonment was lawful and juſt he ſhall "be remanded, but if it ſhall appear that he "was impriſoned againſt the law of the "land, they *ought* by force of the Great "Charter to deliver him: if it be doubtful, "and under conſideration he may be bailed*."

There were other methods of procuring an enlargement from priſon, but theſe were only ſuited to particular caſes; the writ de homine replegiando, for taking pledges, was confined to impriſonment by ſherriffs, who had a right to take bail; the writ de odio et atia, to inquire if the priſoner was accuſed out of hatred and malice, only related to ſuch as were charged with homicide; ſo that the Habeas Corpus

* 2 Inſtitutes 55.

was the only general method of obtaining liberty in all cases.

That this writ of Habeas Corpus was, at common law, a writ of right, which iſſued out of the king's courts, and was in the nature of meſne proceſs or ductory writs, that the party impriſoned might be brought to his anſwer, and have right *, appears not only from the nature and uſe of it, conſidering it as a remedial writ, not to give but to attain juſtice, but alſo from its form †, being *to undergo and receive*, and reciting the confinement by way of allegation only, like other common proceſs, being in your cuſtody, *ut dicitur, as it is ſaid*. It ſhould ſeem that this writ iſſued of courſe till the time of Philip and Mary, a reign by no means favourable to the liberty of the ſubject, when it was enacted, that no Habeas Corpus ſhould iſſue, unleſs ſigned by the chief-juſtice, or one of the judges of the court whence it iſſued ‡. But whether it iſſued merely of courſe or not, it was certainly always a writ of right, and to ſuppoſe it in the diſcretion of the judges of the court to

* 2 Inſtitutes 54.

† Rex &c. precipimus vobis, quod corpus A. B. in cuſtodia veſtra detentum, ut dicitur, una cum cauſa detentionis ſuæ, habeatis coram nobis &c ad ſubjiciendum et recipiendum ea, quæ curia noſtra de eo ad tunc et ibidem ordinare contigerit in hac parte &c. 2 Inſt. 52.

‡ 1 and 2 Phil. and Mary, C. 13. S. 7.

grant it or not, is to ſuppoſe it not a remedial but a judicial writ, not in ſupport of a general, but a particular right; not to bring the party to receive judgment, but to carry it into execution. To ſay the power of granting it was diſcretionary, is to ſay, that the court were to determine before they had heard. At the common law, even 1000 years ſince in the time of king Alfred, The mirror of juſtices, the moſt antient book in the law, ſays, that there was no ſuch thing as a writ of favour, for they were all remedial writs, grantable as of debt, as due of right *. The words of the Statute of 36 Edward III, are " if any man " that feeleth himſelf grieved, contrary to any " of the articles abovewritten, or others con- " tained in divers ſtatutes (among which Mag- " na Charta is mentioned) will come into the " chancery, or any for him, and thereof " make his complaint, he ſhall *preſently* there " have remedy by force of the ſaid ſtatutes." And by the ſtatute of Marlbridge, made 52 H. III. and cited in the abovementioned act, it is enacted, " that all writs ſhall be *freely* " granted." In the beginning of the reign of king Charles I. though the judges thought fit to remand Sir Walter Earl, who was brought up to the bar of the court of Kings-

* In temps le roy Alfred neſtoit nul brief de grace, eins fueront touts briefs remedials grantable come de Det. Mirr. C. 5. S. 1.

Bench on a writ of Habeas Corpus, directed to the warden of the Fleet, who returned that he was committed and detained by his Majeſty's ſpecial command, and held the cauſe of detainer ſufficient; yet they made no queſtion of the priſoner's right to the Habeas Corpus. And though the judges of thoſe times ſeemed to be deſirous as much as poſſible to ſupport the crown in its arbitrary proceedings, yet they never refuſed the writ of Habeas Corpus; but had it been *then* a doubt whether it were a writ of right or not, that has been ſufficiently cleared up by the ſecond reſolution of the houſe of commons unanimouſly paſſed there, and which the managers for that houſe ſuported and proved by ſeveral ſtatutes and many precedents to be the law of the land at a conference with the houſe of lords; and upon which and other reſolutions the famous petition of right was formed. It is there reſolved "That the writ of Habeas Corpus *may* "*not be denied*, but ought to be granted to every "man that is committed or detained in priſon, "or otherwiſe reſtrained, though it be by the "command of the king, the privy council, or "any other, he praying the ſame.

The petition of right preſented by the lords and commons in parliament aſſembled, which by the king's anſwer and aſſent gained the form and force of an act of parliament, is too notable

able a declaration of the rights and liberties of the ſubject, to be paſſed over: That petition ſtating, that "againſt the tenor of the Great "Charter, and other the good laws and ſta-"tutes of the realm there mentioned, diverſe "of his Majeſty's ſubjects had of late been "impriſoned, without any cauſe ſhewn; and "when for their deliverance they were brought "before his Majeſty's juſtices, by his Maje-"ſty's writ of Habeas Corpus, there to un-"dergo and receive as the court ſhould order, "and their keepers commanded to certify the "cauſes of their detainer, no cauſe was certi-"fied, but that they were detained by his "Majeſty's ſpecial command, ſignified by the "lords of his privy council, and yet were re-"turned back to their ſeveral priſons, with-"out being charged with any thing, by which "they might make anſwer according to the "law; It is prayed (among other things) "and, by his Majeſty's aſſent to that prayer, "provided and enacted, That no freeman be "in any ſuch manner as is before mentioned "impriſoned or detained *. Notwithſtanding this ſolemn aſſertion, and acknowledgment by the crown, of the rights and liberties of the ſubject, a ſmall acquaintance with the hiſtory of thoſe times will convince us, that thoſe liberties were often infringed, both in the reigns

* Statutes at large, 3d Charles I.

of

of Charles the First and Second: but it does not appear that the exertion of arbitrary power was ever so far countenanced by the judges of the king's courts as to induce them, in any case, to refuse the writ of Habeas Corpus to one imprisoned by any authority whatever. And in the 29th year of king Charles the Second about two years before the passing the Habeas Corpus act, in the famous case of my lord Shaftsbury *, when he and two other lords, having been committed to the tower by the house of lords, for a contempt of that house, and having obtained a Habeas Corpus, the cause of detainer was returned, and the sufficiency of the cause argued at the bar by serjeant Maynard and the king's attorney and solicitor general, in maintenance of the return, when not one of them disputed the Earl's right to the writ, but on the contrary Winnington, the sollicitor general, expressly said, "That the court was *obliged in justice* "to grant the Habeas Corpus."

From what has been said, I hope, it sufficiently appears, that by the common law of this land, confirmed by various acts of parliament, every subject restrained or deprived of personal liberty has a right to have *freely and*

* 1 Mod. Rep. 156.

with-

without denial a writ of Habeas Corpus, to be issued out of and returnable in the court of kings bench in term time, and out of the chancery in vacation, directed to the goaler, or other person, in whose custody he is, for the bringing him into either of the said courts, with a certificate or return of the cause of his detainer; that if it appear, upon such return, he was wrongfully committed or confined, or by one that had not jurisdiction, or for a cause for which a man ought not to be imprisoned, he may *and ought*, by such court, to be discharged from his imprisonment, or if legally committed for a baileable offence, be bailed, or if for an offence not baileable by law, be remanded. It some how or other became the custom of the courts, to grant a second and third writ of Habeas Corpus, before they enforced the return by granting process against the person who ought to have made it, in order to punish his disobedience. From this custom, which in many cases rendered the remedy entirely useless, as well as from the impossibility of procuring an Habeas Corpus, except out of chancery, in the vacation time, and the difficulty of getting it in that court in the middle of a vacation, when the lord chancellor or keeper might be at a distance from London, and also from the uncertainty of obtaining a speedy return of it when issued,

and

and the ſtill greater delay occaſioned by the practice of allowing a ſecond and third writ, and no leſs from the influence of the crown over the then judges and goalers, and from many, then recent, inſtances of the arbitrary deſigns of king Charles the ſecond's governors, the parliament found it neceſſary in the 31ſt year of his reign, to paſs that ſtatute, which is called the Habeas Corpus act, but which is properly intitled, An act for the better ſecuring the liberty of the ſubject, and has been always eſteemed *the great bulwark of Engliſh liberty*. Whereby, after reciting * " That great delays " had been uſed by ſheriffs, goalers, and other " officers, to whoſe cuſtody any of the king's " ſubjects had been committed for criminal or " *ſuppoſed criminal* matters, in making returns " of writs of Habeas Corpus, to them direc- " ted, by ſtanding out an alias and plures, and " ſometimes more, and by other ſhifts, &c. " contrary to their duty, and the known laws " of the land, whereby many of the king's " ſubjects had been, and thereafter might be " long detained in priſon; for the prevention " thereof, and for the more ſpeedy relief of " all perſons impriſoned for any ſuch criminal " or ſuppoſed criminal matters, It was enac-

* Statutes at large 31 Charles II. c. 2.

ted

" ted, that whenſoever any perſon or perſons " ſhould bring any Habeas Corpus, directed " unto any ſheriff, goaler, miniſter, or other per- " ſon whatſoever, for any perſon in his or their " cuſtody; and the ſaid writ ſhould be ſerved " on ſuch officer, or left at the goal, ſuch of- " ficer, &c. ſhould under the penalty of one " hundred pounds for the firſt offence, and " two hundred pounds and incapacity to hold " his office for the ſecond, within three days " after ſervice thereof, unleſs the commitment " were for treaſon or felony plainly and ſpeci- " ally expreſſed in the warrant of commit- " ment, upon payment or tender of the " charges of bringing the priſoner up, to be aſ- " certained by the judge or court, who award- " ed the writ, and ſecurity given for the par- " ty's going back, and not eſcaping (if re- " manded) make return of ſuch writ and " bring the body of the party ſo committed " or reſtrained before the lord chancellor &c. " or ſuch other perſon, before whom the ſaid " writ was made returnable, according to the " command thereof, and likewiſe then cer- " tify the true cauſes of his detainer and im- " priſonment, unleſs the place of confinement " were above twenty miles diſtant from ſuch " court &c. but if above twenty miles, and " within one hundred, then within ten days, " and if above one hundred miles, then

 within

" within 20 days and not longer. And that
" if any perſon ſo ſtanding committed or de-
" tained in vacation time, other than perſons
" convict or in execution, or any one on his
" behalf complained to the lord chancellor,
" or lord keeper, or any one of his Majeſty's
" juſtices, either of the one bench or of the
" other, or the barons of the exchequer of the
" degree of the coif, the ſaid lord chancellor
" &c. or any of them, upon view of the copy
" of the warrant of commitment or detainer,
" or otherwiſe upon oath made that ſuch copy
" was denied to be given by the perſon in
" whoſe cuſtody the priſoner was detained,
" were authoriſed and required under the pe-
" nalty of 500 pounds, upon requeſt made in
" writing by ſuch perſon or any on his behalf
" atteſted and ſubſcribed by two witneſſes,
" who were preſent at the delivery of the ſame,
" to award an Habeas Corpus under the ſeal
" of ſuch court, whereof he ſhould then be
" one of the judges, to be directed to the offi-
" cer &c. in whoſe cuſtody the party ſhould
" be, returnable immediately before the lord
" chancellor or ſuch juſtice, &c." to be re-
turned as aforeſaid within the times abovemen-
tioned," and the chancellor or ſuch juſtice &c.
" before whom the ſaid party was brought
" ſhould diſcharge him from his impriſon-
" ment, taking his recognizance with one or
more

" more ſureties in any ſum, according to their
" diſcretions, having regard to the quality of the
" priſoner and nature of the offence, for his
" appearance in the court of king's bench the
" term following, or at the next aſſizes, &c. or
" in ſuch other court where the offence ſhould
" be properly cognizable, as the caſe ſhould re-
" quire, unleſs it ſhould appear unto the ſaid
" lord chancellor &c. that the party ſo com-
" mitted was detained upon a legal proceſs, or-
" der, or warrant, out of ſome court having
" juriſdiction of criminal matters, or by ſome
" warrant ſigned and ſealed with the hand and
" ſeal of any of the ſaid juſtices or barons, or
" ſome juſtice of the peace, for ſuch matters
" or offences for which by law the priſoner
" was not baileable."

This act was made in affirmance of the li-
berty of the ſubject, and ought to be conſtrued
liberally, and as far as either the intent appears,
or the words will by any means bear ſuch con-
ſtruction, ſo as to make it, if poſſible, coexten-
ſive with the wants of the ſubject. It does
not in fact enlarge or extend the ſubject's com-
mon law right to the writ of Habeas Corpus,
but is only calculated to give a *more ſpeedy*
relief. It ſhould ſeem therefore to admit of
that equitable conſtruction, which brings with-
in the reach of the remedy whatever is within

the grievance. If it is conſtrued according to theſe rules, it may, I conceive, not improperly be extended to all caſes of reſtraint (except upon civil proceſs) whether it be under any warrant or not, or whether the confinement be by a public officer or private perſon. The ſtatute indeed is not very accurately penned, and the ſecond and third ſections (the two which I have above quoted) ſeem to be tranſpoſed: but from the general title, and from the words, "or other perſons whatſoever," being added after the words "ſherriff &c," in the ſecond ſection, it ſhould ſeem as if the words "criminal offence" were intended to be uſed in oppoſition to civil proceſs. The legiſlature underſtanding that there was an Habeas Corpus which iſſued in civil caſes to remove priſoners on arreſt for debt from one goal to another, and to remove their cauſes out of inferior courts, and that there could be no *legal* confinement except either on ſuppoſition of ſome crime, or under the authority of 52 Henry the third C. 23. and 25 Edward the third, C. 17. which gave the creditor a right to attach the perſon of his debtor by civil proceſs, and as the law knows of no other cauſe of impriſonment, the legiſlature might think it ſufficient to diſtinguiſh between theſe two caſes, ſo as to ſhew they did not intend to take in the latter, which it was unneceſſary

ceſſary to do, as it had been always uſual to iſſue Habeas Corpus's in civil caſes in vacation time, and to enforce as ſpeedy an obedience to them as was neceſſary. And the preamble of the act, referring to only one ſpecies of impriſonment within the former caſe, can hardly be a ſufficient ground for limiting the meaning of the ſubſequent general enacting words.

The rule is, to conſtrue penal ſtatutes literally and ſtrictly, but remedial acts equitably and liberally, in ſuch a manner as to make them moſt beneficial to the ſubject. And upon this foundation many writs of Habeas Corpus have ſince the paſſing this act been awarded in vacation time, even where there was in fact no colour or pretence of legal proceſs, or ſuppoſed crime againſt the public, but where the confinement was by a private perſon, for ſome private end to himſelf. And this has, I am informed, been the general and almoſt univerſal practice; but ſome doubts having ariſen as to the true meaning of the ſtatute, whether or no it extended to any other caſes than commitments and detainers for criminal or ſuppoſed criminal matters, relating to the public, by ſome public officer, under colour of ſome legal proceſs or warrant, a bill is now depending in parliament to extend the proviſions in the ſtatute of Charles II., and ſome others

others, to all, except civil caſes, and thoſe expreſly excepted in that act. The uncertainty of the law is in all caſes highly inconvenient, but more eſpecially ſo where liberty, an enjoyment as dear to a true Briton as life itſelf, is concerned. To clear up any ſuch doubt muſt be not only proper, but neceſſary.

On the bill now depending a queſtion has aroſe whether the proviſions in the ſtatute of 31ſt Charles the ſecond ought to be declared to extend to all caſes of confinement, except upon civil proceſs, or whether they ſhould not be confined to commitments for ſuppoſed crimes againſt the public, by a public officer, under colour of ſome warrant.

The impropriety of ſo narrowly confining the benefit of that act appears from the very caſe, which gave riſe to the doubt, and application for removing it, I mean the caſe of a man confined as impreſſed by the commiſſioners under the late act * for the better recruiting his Majeſty's land forces and marines, " by which " the juſtices of peace and commiſſioners of " land tax are impowered to meet, and any " three of them, to raiſe and levy all *able-bo-*

* 30 Geo. 2. C. 8.

" *died*

" *died, idle and diſorderly* perſons, who cannot " upon examination prove themſelves to ex- " erciſe and induſtriouſly follow ſome lawful " trade or employment, or to have ſome ſub- " ſtance ſufficient for their ſupport and main- " tenance, to ſerve his Majeſty as ſoldiers, with " an expreſs exemption of every one who has " a vote for member of parliament;" ſuppoſing a man taken up under this act in the middle of the long vacation, he may indeed procure an Habeas Corpus out of chancery, but that can't be returnable till the next ſitting of the court, which may not be till ſome weeks after, and then how can he enforce an obedience to this writ; ſo that, however improper an object of the act, however unjuſtly or partially impreſſed, he may be ſent abroad as a marine long before the writ is returnable, or at leaſt long before the return of the ſecond and third Habeas Corpus. The act gives the commiſſioners a *limited* juriſdiction only, and to ſay, they can't be ſuppoſed *ever* to exceed it, is arguing againſt fact.

Suppoſe another caſe, a man who has a vote for members of parliament, and whoſe inclinations are known, may be ſent juſt before the election to ſome diſtant place, and there confined againſt his will in a private houſe, in order

der

der to prevent his coming to vote, a caſe which has in fact more than once happened.

Suppoſe a wife, child, or ſervant, is uſed with the utmoſt brutality, and in order to prevent an application to any friend, is confined to the houſe of the huſband, parent, or maſter, with the utmoſt riſk of life, and this is a caſe which is too frequent.

In every one of theſe caſes, and in many other inſtances, any delay in awarding or returning of the Habeas Corpus, may be attended with the moſt fatal conſequences to the perſons under reſtraint, and, by reaſon of ſuch delay, the relief intended to be given may come too late for ſuch perſon to be diſcharged from his reſtraint, or to receive any benefit from ſuch writ.

If the act of 31 king Charles II. does not extend to all caſes of confinement, why ſhould it not? if impriſonment by a *public and known* officer for a ſuppoſed criminal offence, not being treaſon or felony, under a written warrant, requires a ſpeedy relief, why is there not the ſame neceſſity, in caſe of confinement for a limited particular purpoſe, or by a private perſon, who has not the leaſt ſhadow of authority? That act was made in order to render the remedy eaſy and ſpeedy, why ſhould it not be

be ſo in all caſes, where the liberty of the Subject is concerned.

Under the reign of his preſent Majeſty, in purſuance of that mild ſyſtem of government which has prevailed ſince the revolution, there is leſs likelihood of infringement of liberty by the crown, than by limited inferior juriſdictions, or private perſons.

It is not propoſed to give a Habeas Corpus where there was none before, but only ſo to regulate the method of allowing and returning it in *all* caſes, as to make it uſeful and beneficial to the party injured. It is not deſigned to take away any diſcretion *which the courts or judges had at common law, or under the act of Charles* II. for I have already ſhewn, that the awarding of the writ of Habeas Corpus was due of right, and by no means diſcretional; and the judge at his chambers will ſtill have it in his power in doubtful caſes not to determine upon the return himſelf, by obliging the party, before he is diſcharged from actual impriſonment, to enter into a recognizance with ſureties for his appearance in the proper court, there to abide the determination of ſuch court.

It has been objected, that if the provisions in the act are extended to all cases, it may encourage the applying for an Habeas Corpus, in order only to harrass and trouble the party to whom it is directed, and to put him to considerable expence, or in cases where there is no other confinement than what is necessary for family government, as for instance, to prevent a wife or disobedient daughter running away with a gallant; and that it would be better in such cases to leave it as it was at common law to the court to use their discretion whether to grant the writ or not. To the first part of the objection I answer, that the suing an Habeas Corpus for vexation only is never likely to be the case, because the suing it out is attended with some expence, the charge of bringing the party up to be bailed, which must be paid by him who applies for the Habeas Corpus, is very considerable, and it is made necessary, by the bill now depending, that there should be an affidavit, either by the party confined, or some other on his behalf, of the actual confinement or restraint. All which circumstances will sufficiently prevent the praying writs of Habeas Corpus for vexation, or on frivolous occasions, or in short in any case where the family government is not carried beyond the bounds of prudence, or the laws of the land made for the preservation of liberty

liberty and property. But supposing such a case as is objected may now and then happen, is not every remedial process in all, even in civil, cases liable to the same, if not much greater abuse. And was it ever held a sufficient reason against giving a *general* power or right of redress that the exercise of that right might in *some* cases be abused, and rarely or accidentally be productive of an inconvenience to a particular person.

As to the objection, which arises from the supposed abridgment of the court's discretion, I think I have already answered it, by shewing that the common law allowed of no such discretion in *awarding* the writ of Habeas Corpus, especially where such affidavit was made of actual restraint, as is directed by the bill now depending. Upon the return there will be the same legal and sound discretion in the judge either to remand discharge or bail the party, as was in the court at common law. And this is an answer also to that argument against the bill, which is founded on what is truly, and cannot be too often, said of the learning, integrity, and regard to the subject's liberties, which distinguish the present judges upon all the benches. And what can be a more proper time for adding this further security (if there was not such before) for the liberty of the subject, than when

when the general approbation of the uprightneſs of the crown and its judges ſhows, that the meaſure does not proceed from any diſtruſt or ſuſpicions of them, but is intended only to ſtrengthen their hands, and enable them to act according to what every one is ſatisfied is the deſire of their hearts, and to ſecure the liberty of the ſubject in future times, when we may not happen to have a king and judges ſo tender of the rights of the people; whereas, to introduce ſuch a bill in a perilous time, or reign of oppreſſion, might, (as was the caſe in the reigns of Charles the firſt and ſecond) occaſion great diſputes and jealouſies between the king and his parliament.

It is ſaid alſo, That as the ſubject's liberty is ſecured againſt the oppreſſion of the crown in all criminal caſes by the Habeas Corpus act, as it now ſtands, even if you conſtrue it in the moſt narrow ſenſe, that is ſufficient, and it is by no means *neceſſary* to extend it any farther; but that in other caſes the party may be properly left to his action of falſe impriſonment. To this I anſwer, That in caſes where the pretended authority is exerciſed by *many* perſons, as it may be under the recruiting act, it will be very difficult and expenſive to bring the action. In the caſe of a wife, it cannot

cannot be brought againſt her huſband. In almoſt all caſes, the poverty or inferiority of the party impriſoned, in compariſon with the wealth or power of the perſon by whom he is impriſoned, renders it impracticable or imprudent to commence this action, which can only procure damages, and not a releaſe from confinement; and that in many caſes the true *quantum* of damages cannot be aſcertained, nor *ſufficient* damages given: and in many other caſes, it may be ſuing a beggar at a certain expence; and that too much can ſcarce be done to ſecure the liberty of the ſubject.

Upon the whole then, I conclude, that the writ of Habeas Corpus is every Engliſhman's right in *all* caſes of confinement or reſtraint, that it ought to be as eaſily and ſpeedily awarded and returned as poſſible in *every* caſe; and that as there has ariſen a doubt, whether the ſtatute of 31 Charles II. extends to *all* caſes, that doubt ought to be removed by ſome expreſs law, extending the ſame, or more advantageous, proviſions to *every* commitment or reſtraint of liberty (except in civil caſes, and in caſe of treaſon or felony, plainly expreſſed in the warrant) by whatever perſon or authority that commitment, confinement, or reſtraint may be.

It

It will not be, I hope, improper, before I conclude, to ſubmit it to the opinion of the legiſlature, whether the new act ſhould not give a power to the perſon before whom the Habeas Corpus is returnable, at leaſt in private caſes, at his diſcretion, upon the return to award to the party injured ſuch coſts and charges as he has been out of pocket, or paid for the procuring the Habeas Corpus, and for bringing him up; and whether alſo this act ſhould not be framed in ſuch a manner as not to imply that the ſtatute of Charles II. did not extend to *all* caſes, as the general practice has been *ſo* to conſtrue it.

F I N I S.