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# *HABEAS CORPUS* IN JERSEY

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1 *Habeas corpus* in England is a prerogative writ used to challenge the detention of a person either in official custody or in private hands. *Habeas corpus ad subjiciendum* was directed to the keeper of the prison commanding him to bring up the body of the prisoner with the case of his detention for scrutiny. It allows one to apply to court for an order that somebody, *i.e.* a custodian, be produced before the court to ensure that a prisoner's safety be protected. In Jersey an application can also be made to the Royal Court under its inherent jurisdiction to review detention, but it comes to the same thing.[1]

2 On hearing a *habeas corpus* application, the court will not determine guilt or innocence, merely whether the person is lawfully imprisoned. If the court is satisfied that the detention is *prima facie* unlawful the custodian is then ordered to appear to justify it and if he cannot do so the person is released. The name is taken from the opening words of the writ in Medieval Latin.[2]

3 In 1737 the Crown was advised that, as a general principle, English writs were not enforceable within the Channel Islands.[3] One exception to this was *habeas corpus*. The *Habeas Corpus* Acts of 1679 and 1816 (the "Acts") were both clearly intended to extend to Jersey.[4] Section 10 of the *Habeas Corpus* Act 1679, which is still in force, states that—

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[1] Statement by the then Attorney General (W Bailhache) regarding the implications of the Police Procedures and Criminal Evidence (Codes of Practice) (Jersey) Law, 17 June 2008, at 9.

[2] *Praecipimus tibi quod corpus in prisona nostra sub custodia tua detentum, ut dicitur, una cum die et causa captionis et detentionis suae, quocumque nomine praedictus censeatur in eadem, habeas coram nobis . . . ad subjiciendum et recipiendum ea quae curia nostra de eo adtunc et ibidem ordinare contigerit in hac parte. Et hoc nullatenus omittatis periculo incumbente. Et habeas ibi hoc breze.*

[3] Chalmers, *Opinions of Eminent Lawyers*, vol I, 1814, at 57–59.

[4] See s 10 of the *Habeas Corpus* Act 1679 and s 5 of the *Habeas Corpus* Act 1816.

> "AND an *Habeas corpus* according to the true intent and meaning of this Act may be directed and runn into any County Palatine The Cinque Ports or other priviledged Places within the Kingdome of England Dominion of Wales or Towne of Berwicke upon Tweede and the Islands of Jersey or Guernsey Any Law or Usage to the contrary notwithstanding."

4 Section 5 of the 1816 Act, which is drafted in a similar manner to the above section, is also still in force. The 1816 Act applied to England, Wales, Scotland and Northern Ireland. The Acts expressly provided Jersey residents with the right to challenge their detention through the English, Scottish, Welsh or Northern Irish courts.

5 Records show that the writ of *habeas corpus* has been used in the Jersey courts. In 1860, Royal Commissioners heard evidence that a person kept in confinement, by a public authority or otherwise, could apply by Remonstrance to the Royal Court and that the court would have him brought before it and would investigate his complaint.[5] Moreover, following a lively discussion before the Commissioners, RP Marett, then Solicitor General, stated that a prisoner had a further remedy "to sue out a writ of *habeas corpus* returnable in England". Perhaps Marett had in mind the ambit of the 1679 Act.

6 Any defendant in Jersey seeking to have a writ issued by an English court would face the difficulties set out in the note entitled 'Elementary Constitutional Law' contained within the October 2008 issue of this publication—

> "The Channel Islands enjoy judicial independence. They have their own courts and judges. They have had their own separate systems of law since 1204. The Constitutions of King John empowered the Islanders to choose their own Jurats to keep the pleas.[6] In Professor Le Patourel's memorable phrase 'The Islanders . . . found judicial autonomy through the liberties of their jurats as custodians of the customary law'.[7] No advocate can plead before the Jersey courts unless he has been admitted to the Jersey bar. No judge can preside over the Royal Court unless he be the Bailiff, Deputy Bailiff, Lieutenant Bailiff or a

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[5] Report of the Commissioners into the Civil Ecclesiastical and Municipal Laws of the Island of Jersey, 1860. Minutes of Evidence, Question 10,995 and Answer 11017.

[6] See Holt, "A note on the Constitutions of King John", in A Celebration of Autonomy 1204–2004, Jersey Law Review Ltd, 2005.

[7] Le Patourel, The Medieval Administration of the Channel Islands, 1199–1399, OUP, 1937, at 113.

> Commissioner appointed by the Bailiff pursuant to the Royal Court (Jersey) Law 1948."
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> It is true that Sir Edward Coke[8] purported to qualify the position, when commenting on the failed attempt to bring an action of trespass, committed in Jersey, before the Court of King's Bench in 1368, by stating 'By this it appeareth that albeit the King's Writ runneth not into these Isles, yet his Commission under the Great Seal doth, but the Commissioners must judge according to the Lawes and Customes of these Isles'.[9] But Coke appears not to have considered the important Royal Charters granted subsequent to 1368 which confirmed the privileges of the Islanders. In particular the Charter of Elizabeth I, granted in 1562, confirmed the exclusive jurisdiction[10] of the Royal Court in all causes criminal and civil arising in the Island.[11] There is no doubt, whatever views may have been expressed in the early 17th century, that today it is not open to the Crown to send commissioners to Jersey to usurp the functions of the Royal Court."[12]

*Habeas Corpus* Act 1862

8 With regard to the right to issue *habeas corpus* proceedings out of England, s 1 of the UK *Habeas corpus* Act of 1862 (the "1862 Act") states that—

> "No writ of *habeas corpus* shall issue out of England, by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion."

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[8] 1552–1634.

[9] The Fourth Part of the Institutes of the Lawes of England, cap. LXX, quoted in Le Patourel, op cit, at 113.

[10] Save for high treason.

[11] [In translation] "Giving and attributing to the aforesaid bailiff and jurats and to all other magistrates . . . there constituted in office . . . full entire and absolute authority power and faculty to know give sentence and judge of themselves and upon all and all manner of pleas processes strifes actions complaints and causes whatsoever emerging in the Island and places aforesaid as well real personal and mixed as criminal and capital . . ."

[12] Miscellany "Elementary constitutional law" (2008) 12 J&G L Rev. 284.

9 Given the above, doubt has been cast as to whether *habeas corpus* applications can be made in Jersey at all. This relates to the wording of the Act, namely whether Jersey is a "colony or foreign dominion of the Crown" within the meaning of the Act.[13] It has also been stated that "it is a pity that the remedy afforded by the *Habeas Corpus* Act 1862 . . . was denied (possibly inadvertently) to the Channel Islands and the Isle of Man".[14] However, if the 1862 Act does apply to Jersey then a writ could theoretically be issued in Jersey returnable before the Royal Court as "Her Majesty has a lawfully established court or courts of justice [in Jersey] having authority to grant and issue the said writ".

10 The writ may still issue from the English, Scottish, Welsh or Northern Irish courts to the Isle of Man, that island not being a foreign dominion of the Crown within the meaning of the statute.[15] If the 1862 Act does not apply to Jersey, then the writ may still theoretically be able to issue from the English, Scottish, Welsh or Northern Irish courts to Jersey.

### *Bryce-Richards v Att Gen of Jersey & States of Jersey Police*

11 The case of *Bryce-Richards v Att Gen of Jersey & States of Jersey Police*[16] concerns proceedings of *habeas corpus* commenced by the applicant whilst in Wales. The applicant was a director of a Jersey trust company against whom 14 charges of fraudulent conversion of

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[13] Matthews, "Judicial review, Jersey and the First Queen Elizabeth", (2001) 5 JL Rev 68, refers to Jersey not being a "colony" (*Renouf v Att Gen for Jersey* [1936] AC 445, at 460), and is usually described as a Crown dependency: see *e.g.* the *Report of the Royal Commission on the Constitution*, 1969–1973 (the "Kilbrandon Report"), vol 1, part XI, at para 1347, and the *Review of Financial Regulation in the Crown Dependencies*, Cmnd 4109 (the "Edwards Report"), at para 1.1.2; as to "dependency" see *Halsbury's Laws of England*, 4th ed, vol 6, at para 802. In *Ex p Brown* (1864) 5 B & S, the Isle of Man was held not to be a "colony or foreign dominion" within the Act, and it may be doubted that Jersey would be held to be in a different position. Bois, *op cit*, at para 9/64, took the view that Jersey *was* caught by the 1862 Act, but did not refer to *Ex p Brown* or to *Renouf*. See, further, *R v Home Secy, ex p O'Brien* [1923] 3 KB 361 at 376 (Irish Free State held as "colony" for this purpose).

[14] *A Constitutional History of Jersey*, de L Bois, 1972, s 9/64, at 167, Acts of Parliament.

[15] *Re Brown* (1864) 33 LJQB 193; compare *Re Crawford* (1849) 13 QB 613. See also *R v Commandant of Knockaloe Camp, ex p Forman* (1917) 87 LJKB 43, DC (rule nisi granted to show cause why a writ should not issue to a person in the Isle of Man).

[16] [2003] EWHC 3365.

client funds were due to be brought in Jersey. An arrest warrant, which had been obtained by the Attorney General, was endorsed by a Cardiff magistrate pursuant to s 13 of the Indictable Offences Act 1848 (the "1848 Act") as the applicant was in Wales when the Jersey Police sought to execute the warrant. The applicant challenged the validity of her arrest in Wales pursuant to an arrest warrant issued in Jersey on the basis that, *inter alia*, she would not receive a fair trial in Jersey as the legal aid scheme would not provide her with proper representation and that the proper place for the trial was England or Wales. It was held by the High Court that the applicant's arguments relating to art 6 of the European Convention on Human Rights were a permissible ground for seeking *habeas corpus* in the context of the case.[17]

12 In *habeas corpus* proceedings the burden rests upon the respondents to show that the applicant's detention is lawful and in *Bryce-Richards* the High Court held that the respondents demonstrated that the applicant was detained lawfully pursuant to s 13 of the 1848 Act. It was also held that there had not been, and was not likely to be, any breach of art 5 or art 6 of the European Convention on Human Rights.

13 It should be noted that Lord Justice Rose refers to Jersey in the *Bryce-Richards* judgment as being "part of the United Kingdom",[18] something that an aspirant Jersey lawyer would be marked down for on the sources paper for the Jersey Law Course examinations.

## Conclusion

14 There is clearly controversy as to the availability of a writ of *habeas corpus* issuing from an English court to the Jersey authorities. However, it would seem likely that a writ of *habeas corpus* issued from an English (or Welsh) court to the Jersey authorities would only succeed in the event that the defendant was situated in England (or Wales) at the time of the application as in *Bryce-Richards*. Any attempt to commence *habeas corpus* proceedings in an English court while situated in Jersey would surely be unnecessary given the relief already available under Jersey statute.

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[17] Bryce-Richards v Att Gen of Jersey & States of Jersey Police [2003] EWHC 3365 at para 65.
[18] *Ibid*, at paras 59 and 104.