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231. Case of the Imprisonment of Edward Bushell,[1] for alleged Misconduct as a Juryman: 22 Charles II. A. D. 1670. [Vaughan's Reports, 135.][2]

THIS important Case, which arose out of the preceding, is thus reported by Chief Justice Vaughan:

The king's Writ of Habeas Corpus, dat. 9 die Novembris, 22 Car. 2. issued out of this court directed to the then Sheriffs of London, to have the body of Edward Bushell, by them detained in Prison, together with the day and cause of his caption and detention, on Friday then next following, before this court, to do and receive as the court should consider; as also to have then the said writ in court.

Of which Writ, Patient Ward and Dannet Foorth, then Sheriffs of London, made the return following, annexed to the said Writ.

That at the king's court of a session of Oyer and Terminer, held for the City of London, at Justice Hall in the Old Bailey, London, in the parish of St. Sepulchre's in Farringdon ward without London, on Wednesday 31 die August 22 Car. 2. before sir Samuel Sterling then mayor of London, and divers other his majesty's justices, by virtue of his majesty's letters patents, under the great seal of England, to them, or any four or more of them, directed to enquire, hear, and determine, according to the tenor of the said letters patents, the offences therein specified; and amongst others, the offences of unlawful congregating and assemblies, within the limits appointed by the said commission within the said city, as well within liberties as without. Edward Bushel, the prisoner at the bar, was committed to the gaol of Newgate, to be there safely kept, under the custody of John Smith knight, and James Edwards, then sheriffs of the said city, by virtue of a certain Order, then and there made by the said court of sessions, as followeth:

Ordinatum est per curiam hic quod Finis 40 marcarum separatim ponatur super Edwardum Bushell, and other eleven persons particularly named, and upon every of them, being the 12 jurors, then and there sworn, and charged to try several issues then and there joined between our lord the king, and William Penn and William Mead, for certain trespasses, contempts, unlawful assemblies and tumults, made and perpetrated by the said Penn and Mead, together with divers other unknown persons, to the number of three hundred, unlawfully and tumultuously assembled in Grace-Church-street in London, to the disturbance of the peace, whereof the said Penn and Mead were then indicted before the said justices. Upon which indictment, the said Penn and Mead pleaded they were Not Guilty. For that they, the said jurors, then and there, the said William Penn and William Mead, of the said trespasses, contempts, unlawful assemblies and tumults, 'Contra legem hujus regni Angliæ, et contra plenum et manifestum evidentiam, et contra directionem curiæ in materia legis, hic, de et super præmissis eisdem juratoribus versus præfatos Will. Penn et Will. Mead, in curia hic aperta datam, et declaratam de præmissis, iis impositis in indictamento prædicto acquietaverunt, in contemptum domini regis nunc, legumque suarum, et ad magnum impedimentum et obstructionem justiciæ, necnon ad malum exemplum omnium aliorum juratorum in consimili casu delinquentium. Ac super inde modo ulterius ordinatum est per curiam hic quod præfatus Ed. Bushell, capiatur et committatur gaolæ dicti domini regis de Newgate, ibidem remansurus quousque solvat dicto domino regi 40 Marcas pro fine suo prædicto, vel deliberatus fuerit, per debitum legis cursum. Ac eodem Edwardo Bushell ad tunc, et ibidem capto et commisso existente ad dictam gaolam de Newgate, sub custodia præfat. Johannis Smith et Jacobi Edwards adtunc vic, civitatis Lond. prædict, et in eorum custodia in gaola predict existente et remanente virtute ordinis prædict', iidem Johannis Smith et Jacobus Edwards, postea in eorum exitu ab officio vic. civitatis Lond. prædict. scilicet 28 die Septembris, anno 22. supra dicto eundem Edwardum Bushell in dicta gaola dicti domini regis adtunc existentem, deliberaverunt nobis præfatis nunc vice comitibus civitatis prædict in eadem gaola, salvo custodiendum secundum tenorem, et effectum ordinis prædictæ. Et quia prædictus Edwardus, nondem solvit dicto domino regi prædictum finem 40 marcarum, nos iidem nunc vicecomites corpus ejusdem Edwardi in gaola prædicta, hucusque detinuimus, et hæc est causa captionis et detentionis præfati Edwardi, cujus quidem corpus coram præfatis justitiariis paratum habemus.'

The Writ of Habeas Corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it.

Therefore the writ commands the day, and the cause of the caption and detaining of the prisoner to be certified upon the return, which if not done, the Court cannot possibly judge whether the cause of the commitment and detainer be according to law or against it.

Therefore the cause of the imprisonment ought, by the return, to appear as specifically and certainly to the judges of the return, as it did appear to the court or person authorized to commit; else the return is insufficient, and the consequence must be.

That either the prisoner, because the cause returned of his imprisonment is too general, must be discharged; when as if the cause had been more particularly returned, he ought to have been remanded; or else he must be remanded, when if the cause had been particularly returned, he ought to have been discharged: Both which are inconveniences not agreeing with the dignity of the law. (There is a specious exception to this rule, but doth not materially vary it, as shall appear.)

In the present case it is returned, That the prisoner, being a juryman, among others charged at the Sessions Court of the Old Bailey, to try the issue between the king, and Penn, and Mead, upon an indictment, for assembling unlawfully and tumultuously, did 'contra plenam et manifestam evidentiam,' openly given in court, acquit the prisoners indicted, in contempt of the king, &c.

The court hath no knowledge by this return, whether the evidence given were full and manifest, or doubtful, lame, and dark, or indeed evidence at all material to the issue, because it is not returned what evidence in particular, and as it was delivered, was given. For it is not possible to judge of that rightly, which is not exposed to a man's judgment. But here the evidence given to the jury is not exposed at all to this court, but the judgment of the Court of Sessions upon that evidence is only exposed to us; who tell us it was full and manifest. But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs.

It was said by a learned judge, If the jury might be fined for finding against manifest evidence, the return was good, though it did not express what the evidence particularly was, whereby the court might judge of it, because returning all the evidence would be too long. A strange reason : For if the law allow me remedy for wrong imprisonment, and that must be by judging whether the cause of it were good, or not, to say the cause is too long to be made known, is to say the law gives a remedy which it will not let me have, or I must be wrongfully imprisoned still, because it is too long to know that I ought to be freed? What is necessary to an end, the law allows is never too long. 'Non sum longa quibus nihil est quod demere possis,' is as true as any axiom in Euclid. Besides, one manifest evidence returned had sufficed, without returning all the evidence. But the other judges were not of his mind.

If the return had been, That the jurors were committed by an order of the Court of Sessions, because they did, 'minus juste,' acquit the persons indicted. Or because they did, 'contra legem,' acquit the person indicted. Or because they did, 'contra Sacramentum suum,' acquit them.

The judges cannot upon the present more judge of the legal cause of their commitment, than they could if any of these causes, as general as they are, had been returned for the cause of their commitment. And the same argument may be exactly made to justify any of these returns, had they been made, as to justify the present return, they being equally as legal, equally as certain, and equally as far from possessing the court with the truth of the cause: and in what condition should all men be for the just liberty of their persons, if such causes should be admitted sufficient causes to remand persons to prison.

To those Objections made by the prisoners counsel against the return, as too general.

1. It hath been said, That 'Institutum est quod non inquiratur de discretione Judicis.'

2. That the Court of Sessions in London, is not to be looked on as an inferior court, having all the judges commissioners. That the court having heard the evidence, it must be credited, that the evidence given to the jury of the fact was clear, and not to be doubted.

As for any such institution pretended, I know no such, nor believe any such, as it was applied to the present cause; but taking it in another, and in the true sense, I admit it for truth: that is, when the king hath constituted any man a judge under him, his ability, parts, fitness for his place, are not to be reflected on, censured,

defamed, or vilified by any other person, being allowed and stampt with the king's approbation, to whom only it belongs to judge of the fitness of his ministers. And such scandalous assertions or inquiries upon the judges of both benches, is forbidden by the statute of scandalum magnatum, 2 R. 2. c. 5. Nor must we, upon supposition only, either admit judges deficient in their office, for so they should never do any thing right; nor on the other side, must we admit them unerring in their places, for so they should never do any thing wrong.

And in that sense the saying concerns not the present case.

But if any man thinks that a person concerned in interest, by the judgment, action, or authority exercised upon his person or fortunes by a judge, must submit in all, or any of these, to the implied discretion and unerringness of his judge, without seeking such redress as the law allows him, it is a persuasion against common reason, the received law, and usage both of this kingdom, and almost all others.

If a court, inferior or superior, hath given a false or erroneous judgment, is any thing more frequent than to reverse such judgments, by writs of false judgment, of error, or appeals, according to the course of the kingdom.

If they have given corrupt and dishonest judgments, they have in all ages been complained of to the king in the Star Chamber, or to the parliament.

Andrew Home, in his Mirror of Justices (f. 296.) mentions many judges punished by king Alfred before the conquest, for corrupt judgments,and their particular names and offences, which could not be had but from the records of those times.

Our stories mention many punished in the time of Edward 1. our parliament rolls of Edward 3.'s time, of Richard 2.'s time, for the pernicious resolutions given at Nottingham castle, afford examples of this kind: in later times, the parliament journals of 18 and 21 Jac. the Judgment of the Ship-money[3] in the time of Charles 1. questioned, and the particular judges impeached. These instances are obvious, and therefore I but mention them.

In cases of returns too general upon writs of Habeas Corpus, of many I could urge, I will instance in two only.

One Astwick brought by Habeas Corpus to the king's bench, was returned to be committed, per mandatum Nicholai Bacon militis, domini custodis magni sigilli Angliæ virtute cujusdam contemptus in curia cancellar. facti, and was presently bailed. (9 El.)

One Apsley, prisoner in the Fleet, upon a Habeas Corpus, was returned to be committed, per considerationem curiæ cancellar pro contemptu eidem curiæ illato, and upon this return set at liberty. (13 Jac.)

In both these cases, no inquiry was made or consideration had, whether the contempts were to the law court, or equitable court of Chancery, either was alike to the judges, lest any man should think a difference might arise thence.

The reason of discharging the prisoners upon those returns, was the generality of them being for contempts to the court, but no particular of the contempt exprest, whereby the King's Bench could judge, whether it were a cause for commitment or not.

And was it not as supposeable, and as much to be credited, that the lord keeper and court of Chancery, did well understand what was a contempt deserving commitment, as it is now to be credited, that the court of sessions did understand perfectly what was full and manifest evidence against the persons indicted at the sessions, and therefore it needed not to be revealed to us upon the return? Hence it is apparent, that the commitment and return pursuing it, being in itself too general and uncertain, we ought not implicitly to think the commitment was *re vera*, for cause particular and sufficient enough, because it was the act of the court of sessions.

And as to the other part, that the court of sessions in London is not to be resembled to other, inferior courts of oyer and terminer, because all the judges are commissioned here (which is true) but few are there, at the same time, and as I have heard, when this trial was, none of them were present. However persons of great quality

are in the commissions of oyer and terminer, through the shires of the kingdom, and always some of the judges; nor doth one commission of oyer and terminer differ in its essence, nature, and power from another, if they be general commissions; but all differ in the accidents of the commissioners, which makes no alteration in their actings in the eye of law.

Another fault in the return is, that the jurors are not said to have acquitted the persons indicted, against full and manifest evidence corruptly, and knowing the said evidence to be full and manifest against the persons indicted, for how manifest soever the evidence was, if it were not manifest to them, and that they believed it such, it was not a finable fault, nor deserving imprisonment, upon which difference the law of punishing jurors for false verdicts principally depends.

A passage in Bracton is remarkable to this purpose concerning attainting inquests. 'Committit Jurator per jurium propter falsum Sacramentum, ut ex certa scientia aliter juraverit quam res veritate se habuerit, si autem Sacramentum fatuum fuerit licet falsum tamen non committit perjurium licet re vera res aliter se habeat quam juraverat, et quia jurat secundum conscientiam eo quod non vadit contra mentem. Sunt quidam qui verum 'dicunt'. mentiendo, sed se perjerant quia contra mentem vadunt.' Bracton, 1. 4, c. 4 f. 288, b.

The same words, and upon the same occasion, are in effect in Fleta. 'Committit enim jurator perjurium quandoque propter falsum Sacramentum, ut si ex certa scientia aliter juraverit quam res in veritate se habuerit secus enim propter factum quamvis falsum;' Fleta, 1. 5, c. 22, f. 336, n. 9. and lest any should think that these passages are to be understood only of jury-mens perjuries *in foro conscientiæ*, it is clearly otherwise by both those books, which shew how, by the discreet examination of the judge, the error of the jury not wilful, may be prevented and corrected, and heir Verdict rectified.

And in another place of Bracton, in the same chapter: 'Judex enim sive Justiciatius ad quem pertinet examinatio, si minus diligenter examinaverit, occasionem prebet perjurii Juratoribus.' And after, ′Et si examinati cum justo deducantur errore dictum suuni emendaverint, hoc bene facere possunt, ante judicium et impune, sed post judicium non sine pœnâ.' Bract. 1. 4. f. 289. a.

After these Authorities,

I would know whether any thing be more common, than for two men students, barristers, or judges, to deduce contrary and opposite conclusions out of the same case in law? And is here any difference that two men should infer distinct conclusions from the same testimony? Is any thing more known than that the same author, and place in that author, is forcibly urged to maintain contrary conclusions, and the decision hard, which is in the right? Is any thing more frequent in the controversies of religion, than to press the same text for opposite tenets? how then comes it to pass that two persons may, not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing? Must therefore one of these merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the judge and jury.

I conclude therefore, That this return, charging the prisoners to have acquitted Penn and Mead, against full and manifest evidence, first and next, without saying that they did know and believe that Evidence to be full and manifest against the indicted persons, is no cause of fine or imprisonment.[4]

And by the way I must here note, That the Verdict of a Jury, and Evidence of a Witness are very different things, in the truth and falshood of them: A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a jury-man swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be the law in the question before him. Therefore Bracton, 'Et licet narratio facti contraria sit sacramento, et dicto præcedenti, tamen falsum non faciunt Sacramentum licet faciunt fatuum Judicium, quia loquuntur secundum conscientiam quia falli possunt in Judiciis suis, sicut ipse Justitiarius.' Bract. f. 289. a. There is one objection which hath been made by none, as I remember, to justify this general Return, I would give answer to.

A man committed for treason or felony, and bringing a Habeas Corpus, hath returned upon it, That he was committed for High Treason or Felony; and this is a sufficient return to remand him, though in truth this is a general return: for if the specifical fact for which the party was committed, were expressed in the Warrant, it might then perhaps appear to be no treason or felony, but a trespass, as in the Case of the earl of Northumberland, 5 H. 4. questioned for Treason in raising power. The Lords adjudged it a trespass; for the powers raised were not against the king, but some subjects.

Why then by like reason may not this return be sufficient, though the fact for which the prisoners stood committed particularly expressed, might be no cause of commitment?

The cases are not alike; for upon a general commitment for treason or felony, the prisoner (the cause appearing) may press for his trial, which ought not to be denied or delayed, and upon his indictment and trial, the particular cause of his imprisonment must appear, which proving no treason or felony, the prisoner shall have the benefit of it. But in this case, though the evidence given were no full nor manifest evidence against the persons indicted, but such as the jury upon it ought to have acquitted those indicted, the prisoner shall never have any benefit of it, but must continue in prison, when remanded, until he hath paid the fine unjustly imposed on him, which was the whole end of his imprisonment.

We come now to the next part of the Return, viz. 'That the jury acquitted those indicted against the direction of the court in matter of law, openly given and declared to them in court.'

1. The words, That the jury did acquit, against the direction of the court, in matter of law, literally taken, and *de plano*, are insignificant and not intelligible, for no issue can be joined of matter in law, no jury can be charged with the trial of matter in law barely, no evidence ever was, or can be given to a jury of what is law, or not; nor no such oath can be given to, or taken by, a jury, to try matter in law; nor no attaint can lye for such a false oath.

Therefore we must take off this vail and colour of words, which make a shew of being something, and in truth are nothing.

If the meaning of these words, finding against the direction of the court in matter of law, be, That if the judge having heard the evidence given in court (for he knows no other) shall tell the jury, upon this evidence, The law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do; Every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the trials by them may be better abolished than continued : which were a strange new-found conclusion, after a trial so celebrated for many hundreds of years.

For if the judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all?

But if the jury be not obliged in all trials to follow such directions, if given, but only in some sort of trials (as for instance, in trials for criminal matters upon indictments or appeals) why then the consequence will be, though not in all, yet in criminal trials, the jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in civil trials.

And how the jury should, in any other manner, according to the course of trials used, find against the direction of the court in matter of law, is really not conceptible.

True it is, if it fall out upon some special trial, that the jury being ready to give their Verdict, and before it is given, the judge shall ask, whether they find such a particular thing propounded by him? or whether they find the matter of fact to be as such a witness, or witnesses have deposed? and the jury answer, they find the matter of fact to be so; if then the judge shall declare, The matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him.

If notwithstanding they find for the defendant, this may be thought a finding in matter of law against the direction of the court: for in that case the jury first declare the fact, as it is found by themselves, to which fact the judge declares how the law is consequent.

And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant though they found for the plaintiff, or *è contrario*, and thereupon they rectify their verdict.

And in these cases the jury, and not the judge, resolve and find what the fact is.

Wherefore always in discreet and lawful assistance of the jury, the judge his direction is hypothetical, and upon supposition, and not positive, and upon coercion, viz. If you find the fact thus (leaving it to them what to find) then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant.

But in the case propounded by me, where it is possible in that special manner, the jury may find against the direction of the court in matter of law, it will not follow they are therefore finable; for if an attaint will lie upon the verdict so given by them, they ought not to be fined and imprisoned by the judge for that verdict; for all the judges have agreed upon a full conference at Serjeants-Inn, in this case. And it was formerly so agreed by the then judges in a case where justice Hyde had fined a jury at Oxford, for finding against their evidence in a civil cause. That a jury is not finable for going against their evidence, where an attaint lies; for if an attaint be brought upon that verdict, it may be affirmed and found upon the attaint a true verdict, and the same verdict cannot be a false verdict, and therefore the jury fined for it as such by the judge, and yet no false verdict, because affirmed upon the attaint.

Another reason that the jury may not be fined in such case, is, because until a jury have consummated their verdict, which is not done until they find for the plaintiff or defendant, and that also be entered of Record; they have time still of deliberation, and whatsoever they have answered the judge upon an interlocutory question or discourse, they may lawfully have from it if they find cause, and are not thereby concluded.

Whence it follows upon this last reason, that upon trials wherein no attaint lies, as well as upon such where it doth, no case can be invented; wherein it can be maintained that a jury can find, in matter of law, nakedly against the direction of the judge.

And the judges were(as before) all of opinion that the return in this latter part of it, is also insufficient; as in the former, and so wholly insufficient.

But that this question may not hereafter revive if possible, it is evident by several resolutions of all the judges, that where an attaint lies, the judge cannot fine the jury for going against their evidence or direction of the court, without other misdemeanour.

For in such case, finding against, or following the direction of the court barely, will not barr an attaint, but in some case the judge being demanded by, and declaring to, the jury what is the law. Though he declares it erroneously, and they find accordingly, this may excuse the jury from the forfeitures; for though their verdict be false, yet it is not corrupt, but the judgment is to be reversed however upon the attaint ; for a man loseth not his right by the judge's mistake in the law. Ingeralls C. Cr. 35 El. f. 309, n. 18.

Therefore if an attaint lies for a false verdict upon indictment not capital (as this is) either by the common or statute law, by those resolutions the court would not fine the jury in this case forgoing against evidence, because an attaint lay. But admitting an attaint did not lie (as I think the law clear it did not) for there is no case in all the law of such an attaint, nor opinion, but that of Thirnings 10 H. 4. Attaint 60. and 64, for which there is no warrant in law, though there be other specious authority against it, touched by none that argued this case. The question then will be, Whether before the several acts of parliament, which granted attaints, and are enumerated in their order in the Register, [f. 122. a.] the judge by the common law, in all cases, might have fined the jury, going against their evidence and direction of the court, where no attaint did lie, or could so do, yet if the statutes which gave the attaints were repealed.

If he could not in civil causes before attaints granted in them, he could not in criminal causes upon indictment (wherein I have admitted attaint lies not) for the fault in both was the same, viz. finding against evidence and direction of the court, and by the common law; the reason being the same in both, the law is the same.

That the court could not fine a jury at the common law, where attaint did not lie (for where it did, is agreed he could not) I think to be the clearest position that ever I considered, either for authority of reason of law.

After attaints were granted by statutes generally; as by Westminster the first c. 38. in pleas real, and by 34 E. 3. c. 7. in pleas personal, and where they did lie at common law (which was only in writs of assise) the examples are frequent in our books of punishing jurors by attaint.

But no case can be offered, either before attaints granted in general, or after, that ever a jury was punished by fine and imprisonment by the judge, for not finding according to their evidence, and his direction, until Popham's time, nor is there clear proof that he ever fined them for that reason, separated from other misdemeanor. If juries might be fined in such case before attaints granted, why not since; for no statute hath taken that power from the judge. But since attaints granted, the judges resolved they cannot find where the attaint lies, therefore they could not fine before. Sure this latter age did not first discover that the verdicts of juries were many times not according to the judge's opinion and liking.

But the reasons are, I conceive, most clear, that the judge could not, nor can fine and imprison the jury in such cases.

Without a fact agreed, it is as impossible for a judge, or any other, to know the law relating to that fact or direct concerning it, as to know an accident that hath no subject.

Hence it follows, that the judge can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot go against his direction in law, for he could not direct.

But the judge, *quâ* judge, cannot know the fact possibly but from the evidence which the jury have, but (as will appear) he can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is.

It is true, if the jury were to have no other evidence for the fact, but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

But the evidence which the jury have of the fact is much other than that: for,

1. Being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is a stranger.

2. They may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court, is absolutely false: but to this the judge is a stranger, and he knows no more of the fact than he hath learned in court, and perhaps by false depositions, and consequently knows nothing.

3. The jury may know the witnesses to be stigmatized and infamous, which may be unknown to the parties, and consequently to the court.

4. In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the judge is a stranger.

5. If they do follow his direction, they may be attainted and the judgment reversed for doing that, which if they had not done, they should have been fined and imprisoned by the judge, which is unreasonable.

6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punished by distinct judicatures for the same offence, which the common law admits not.

A fine reversed in Banco Regis for infancy,[5] per inspectionem et per testimonium del. 4. fide dignorum. After upon examination of divers witnesses in chancery, the supposed infant was proved to he of age, 'tempore finis levati,' which testimonies were exemplified, and given in evidence after in Communi Banco in a writ of entry in the quibus there brought. And though it was the opinion of the court, that those testimonies were of no force against the judgment in the King's-Bench, yet the jury found, with the testimony in

chancery, against direction of the court, upon a point in law, and their verdict after affirmed in an attaint brought, and after a writ of right was brought and battlejoined.[6]

7. To what end is the jury to be returned out of the vicinage, whence the cause of action ariseth? To what end must hundredors be of he jury, whom the law supposeth to have nearer knowledge of the fact than those of he vicinage in general: To what end are they challenged so scrupulously to array and pole? To what end must they have such a certain free-hold, and be 'probi et legales homines,' and not of affinity with the parties concerned? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge?

A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or infer the thing to be resolved by anothers understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understand ing, are forsworn, at least *in foro conscientiæ*.

9. It is absurd a jury should be fined by the judge for going against their evidence,.when he who fineth knows not what it is, as where a jury find without evidence, in court of either side, so if the jury find, upon their own knowledge, as the course is if the defendant plead solvit ad diem, to a bond proved, and offers no proof. The jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea. [14 K. 7. f. 29 per Vavasor in Camer. Scacc. without contradiction Hob. f. 227.]

And it is as absurd to fine a jury for finding against their evidence, when the judge knows but part of it; for the better and greater part of the evidence may be wholly unknown to him, and this may happen in most cases, and often both, as in Graves and Short's case, [40 El. Cro. f. 610.]

Error of a Judgment in the Common Bench, the error assigned was, The issue being, whether a feoffment were made? and the Jurors being gone together to confer of their verdict, one of them shewed to the rest an 'Escrow pro petentibus,' not given in evidence by the parties *per quod*, they found for the demandant, upon demurrer adjudged no error; for it appears not to be given him by any of the parties, or any far them, it must be intended he had it as a piece of evidence about him before, and shewed it to inform himself and his fellows, and as he might declare it as a witness, that he knew it to be true.[7] They resolved, if that might have avoided the verdict, which they agreed it could not, yet it ought to have been done by examination, and not by error.

That Decantatum in our books, 'Ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores,' literally taken is true; for if it be demanded, What is the fact? the Judge cannot answer it: if it be asked, What is the law in the case, the Jury cannot answer it.

Therefore the parties agree the fact by their pleading upon Demurrer, and ask the Judgment of the Court for the law.

In special verdicts the Jury inform the naked fact, and the Court deliver the law; and so is it in Demurrers upon evidence, in arrest of judgments upon challenges, and often upon the judge's opinion of the evidence given in Court, the plaintiff becomes nonsuit, when if the matter had been left to the Jury, they might well have found for the plaintiff.

But upon all general issues; as upon not culpable pleaded in trespass, 'nil debet' in debt, nul tort, nul disseisin' in assize, 'ne disturba pas' in 'quare impedit,' and the like; though it be matter of law whether the defendant be a trespasser, a debtor, disseisor, or disturber in the particular cases in issue; yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself; so as though they answer not singly to the question what is the law, yet they determine the law in all matters, where issue is joined, and tried in the principal case, but where the verdict is special.

To this purpose the lord Hobart (f. 227.) in Needler's Case against the bishop of Winchester, is very apposite: — 'Legally it will be very hard to quit a jury that finds against the law, either common law, or several statute law, whereof all men were to take knowledge, and whereupon verdict is to be given, whether any evidence be

given to them or not. As if a feoffment or devise were made to one *imperpetuum*, and the jury should find cross, either an estate for life, or in fee simple against the law, they should be subject to an attaint, though no man informed them what the law was in that case.' The legal verdict of the jury to be recorded, is finding for the plaintiff or defendant, what they answer, if asked to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives, wherefore, as well as judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary. I conclude with the statute of 26 H. 8, c. 4. 'That if any jurors in Wales do acquit any felon, murderer, or accessary, or give an untrue verdict against the king, upon the trial of any traverse, recognizance, or forfeiture, contrary to good and pregnant evidence ministered to them by persons sworn before the king's justiciar, That then such jurors should be bound to appear before the Council of the Marches, there to abide such fine or ransom for their offence, as that Court should think fit.' If jurors might have been fined before, by the law, for going against their evidence in matters criminal, there had been no cause for making this statute against jurors, for so doing in Wales only.

Objections out of the Ancient and Modern Books.

1. A juror kept his fellows a day and a night, without any reason or absenting, and therefore awarded to the Fleet. [8 Ass. pl. 35.]

This book rightly understood is law, That he staid his fellows a day and a night, without any reason or assenting, may be understood, That he would not in that time intend the verdict at all, more than if he had been absent from his fellows, but wilfully not find for either side: In this sense it was a misdemeanor against his oath, for his oath was truly to try the issue, which he could never do, that resolved not to confer with his fellows.

And in this sense it is the same with the Case 34 Ed. 3, where 12 being sworn, and put together to treat of their verdict, one secretly withdrew himself, and went away, for which he was justly fined and imprisoned; and it differs not to withdraw from a man's duty, by departing from his fellows, and to withdraw from it, though he stay in the same room, and so is that book to be understood. [34 E. 3 Bra. Title Jurors n. 46.]

But if a man differ in judgment from his fellows for a day and a night, though his dissent may not be as reasonable as the opinion of the rest that agree, yet if his judgment be not satisfied, one disagreeing can be no more criminal than four or five disagreeing with the rest.

2. A juror would not agree with his fellows for two days, and being demanded by the judges, if he would agree ; said, he would first die in prison ; whereupon he was committed, and the verdict of the 11 taken; but upon better advice the verdict of the 11 was quasht, and the juror discharged without fine, and the justices said, the way was to carry them in carts, until they agreed, and not by fining them; and as the judges erred in taking the verdict of 11, so they did in imprisoning the 12th; and this case makes strongly that the juror was not to be fined, who disagreed in judgment only. [41 Ass. p. 11.]

Much of the office of jurors, in order to their verdict, is ministerial, as not withdrawing from their fellows, after they are sworn, not withdrawing after challenge, and being tried in before they take their oath, not receiving from either side evidence after their oath not given in court, not eating and drinking before their verdict, refusing to give a verdict, and the like; wherein if they transgress, they are finable; but the verdict itself, when given, is not an act ministerial, but judicial, and according to the best of their judgment, for which they are not finable, nor to be punished, but by attaint. 36 H. 6, f. 27, Br. Jurors 18.

3. The Case of 7 R. 2, Title Coronæ; Fitz, 108, was cited, where upon acquittal of a common thief, the judge said. The jury ought to be bound to his good behaviour, during his life: But saith the book, 'quere per quel ley.' but that was only *gratis dictum* by the judge, for no such thing was done, as binding them.

4. Bradshaw and Salmon's Case was urged, where a jury had given excessive damages upon a trial in an action of covenant, and the court of Star Chamber gave damages to the complainant almost as high as the jury had given upon the trial: But the jury, who gave the damages, were not questioned: Though, saith the book, they might have been, because they received briefs from the plaintiff, for whom they gave damages, which was a misdemeanor; but the express book is, That the jury could not be punished by information for

the excessive damages, but only by attaint, therefore not for their false verdict without other misdemeanor ; which answers some other cases alledged. [Hob. f. 114.]

Nor can any man shew (though it was said) That a jury was ever punished upon an information, either in law, or in the Star Chamber, where the charge was only for finding against their evidence, or giving an untrue verdict, unless imbracery, subornation, or the like, were joined.

5. It was said, a perjury *in facie curiæ* is punishable by the judge; and such is it if jurors go against their evidence; perhaps a witness may be punished for perjury *in facie curiæ* (which I will not maintain to be law) but a jury can never be so punished, because the evidence in court is not binding evidence to a jury, as hath been shewed.

6. Some records were cited, of fines *pro concelamento*; no doubt it is an article inquirable in every Oyer and Terminer, and one jury may find it upon another.

7. Braynes Case was urged, but the jurors were there fined for a manifest combination to delude the court, by agreeing upon two verdicts, and concealing the latter, if the court would be satisfied with the former. [42 El. Cr. 778.]

8. Wharton's Case, reported by two reporters, Yelverton saith, That the judges, whereof Popham was one, and a privy counsellor, were very angry, and fined the jury for their verdict, and finding against direction.

In those reports that pass under the name of Noy's, the same case is reported with this, that the judges conceived the jury had been unlawfully dealt with to give that verdict; which, if true, the fining was lawful, and the case therein reported short by Yelverton.

9. Wagstaff's Case, in the King's Bench lately, was the same with the present Case; but by the record it is reasonable to think the jurors committed some fault besides going against their evidence, for they were unequally fined.

But however, all the judges having, upon this return, resolved, That finding against the evidence in court, or direction of the court barely, is no sufficient cause to fine; the jury answers all these cases, if not answered before.

10. There remains Southwell's Case, reported by Leonard; some cases out of the Court of Wards in Lannoy's Case, reported by serjeant Moore, f. 730, where jurors were sent to the Fleet, or threatened to be sent, for not finding offices according to the direction of the court. [Lannoys C. Moore 730.]

1. An inquest of office is not subject to an attaint.

2. It neither determines any man's right, nor doth any party put any trial upon them.

3. They are only to find naked matter of fact, as the books are of 3 H, 7, f. 10 b. and 2 H. 4, f. 5, a. but principally an office for the king is in many cases, as necessary, as an entry for a common person, without which he can never come by, or try his right, nor can the king, without an office, know whether he hath a right to a ward, a mortmain, or the like; and as it is an injury to hinder a man from his entry, whereby his right may be tried, so it is not to find an office for the king, whereby his right may be tried, which concludes no man, but enables the king to a trial of his right, and in truth is only a finding of matter of fact, and no more.

Therefore perhaps it may be an offence, as of a witness refusing his Testimony, not to find an office for the king, when clear proof is made of the matter of fact; but if proof be not made at all, or be altogether doubtful, or that the matter be matter of law, the Inquest may find an Ignoramus, which a jury, upon a trial, can never do: But of this I shall say no more, it concerning not the case in question.

PRECEDENTS. That the Court of Common Pleas, upon Habeas Corpus, hath discharged persons imprisoned by other Courts, upon the insufficiency of the return only, and not for privilege.

Sir Anthony Roper, committed by the High Commission Court, discharged absolutely in the Common Pleas, as unlawfully committed and detained, without any mention of privilege.

George Milton, imprisoned for contempt, scandalous words of the Court, and convicted of drunkenness; the causes resolved insufficient, and therefore *dimittitur á prisona*, and the gaoler discharged of him; but he gave bail to attend the pleasure of the Court. [5 Jac. Sir Anthony Roper's Case, 12 Rep. Sir William Chanseys C. and Edward Thicknes C. 12 Rep. 8 Jac.]

Elizabeth Ash committed by the High Commission, *pro lenocimo*, in like manner discharged; the cause being insufficient to detain her in prison, or to hinder her from the privilege of that Court, but no other mention of privilege put in bail. [4 Car, 1.]

Richard Hayes, for refusing to do penance, as injoined, committed by the High Commission, the cause judged insufficient to commit, but gave bail as before; he demanded a Habeas Corpus by reason of privilege. [7 Jac.]

But it is to be observed, That privilege lies only where a man is officer of the Court, or hath a prior suit in the Common Pleas depending, and is elsewhere arrested to answer, and molested, that he cannot prosecute his suit, he is then privileged justly, and without wrong, because his prosecutor, elsewhere might have sued, if he pleased, in the Common Pleas.

All privilege is either for officers, clerks, or attorneys of the Court, not to be sued elsewhere; or for persons impleading or impleaded, having priority of suit in the Common Pleas, arrested or sued in other jurisdictions; or for the menial servants of such officers.

These privileges are not detrimental to any, because whoever hath occasion to sue an officer, or any other, having priority of suit as before, is not restrained to sue them in the Common Pleas, but is restrained from suing elsewhere. And this is the true privilege of the Court.

And the way of enjoying this privilege, was, by writs of privilege to supersede the proceeding of other Courts against such, who had the privilege of the Common Pleas, as is yet ordinary in the cases of attorneys, officers, and clerks.

And in such writs the cause of privilege is mentioned, and as to their menial servants, if not true, may be traversed. As 22 H. 6. 38. Debt was brought against baron and feme, and a supersedeas out of the Chancery, was cast for the baron, as menial servant to an officer of Chancery; whereupon the plaintiff said it was contained in the writ that the husband was menial servant to R. J. del Chancery, whereas he was not his menial servant, and thereupon issue was taken. But quere of the officers appearing of record in the Court may be traversed.[8]

Hence it follows, Though proceeding in other Courts against a person privileged in Banco, might be superseded, yet it was when the matter proceeded upon in such Courts, might as well be prosecuted in the Common bench; but if a privileged person, in Banco, were sued in the Ecclesiastical Courts, or before the High Commission, or constable and marshal, for things whereof the Common Pleas had no cognizance, they could not supersede that proceeding by privilege. And this was the ancient reason and course of privilege.

1. Another way of privilege, by reason of suit depending in a superior Court, is, when a person impleading or impleaded, as in the Common Bench, is after arrested in a civil action or plaint in London, or elsewhere, and by Habeas Corpus is brought to the Common Pleas, and the arrest and cause returned; if it appear to the Court, That the arrest in London was after the party ought to have had the privilege of the Common Pleas; he shall have his privilege allowed, and be discharged of his arrest, and the party left to prosecute his cause of action in London, in the Common Pleas, if he will.

2. If the cause of the imprisonment returned, be a lawful cause, but which cannot be prosecuted in the Common Pleas, as felony, treason, or some cause wherein the High Commission, Admiralty, or other Court, had power to imprison lawfully, then the party imprisoned, which did implead, or was impleaded in the Common Bench before such imprisonment, shall not be allowed privilege, but ought to be remanded.

3. The third way is, when a man is brought by Habeas Corpus to the Court, and upon return of it, it appears to the Court, That he was against law imprisoned and detained, though there be no cause of privilege for him in this Court, he shall never be by the act of the Court remanded to his unlawful imprisonment, for then the Court should do an act of injustice in imprisoning him, *de novo*, against law, whereas the Great Charter is, 'Quod nullus liber homo imprisonetur nisi per legem terræ;' This is the present case, and this was the ease upon all the precedents produced and many more that might be produced, where upon Habeas Corpus, many have been discharged and bailed, though there was no cause of privilege in the case.

This appears plainly by many old books, if the reason of them be rightly taken, For insufficient causes are as no causes returned; and to send a man back to prison for no cause returned, seems unworthy of a Court.

If a man be impleaded by writ in the Common Pleas, and is after arrested in London upon a plaint, thereupon a Habeas Corpus he shall have privilege in the Common Pleas, if the writ, upon which he is impleaded, bear date before the arrest in London, and he returned, although the plaintiff in the Common Pleas be nonsuit, essoined, or will not appear, and consequently the case of priviledge at an end before the *Corpus cum causa* returned; but if the first writ be not returned, there is no record in Court that there is such a defendant. [9 H. 6. 54. 58. Br. n. 5. 14 H. 7. f. 6. n. 19. 9 E. 4. 47. n. 24. 12 H. 4. f. 21. n. 11. Br.]

The like where a man brought debt, in Banco, and after for the same debt arrested the defendant in London, and became nonsuit in Banco; yet the defendant, upon a Habeas Corpus, had his privilege, because he had cause of privilege at the time of the arrest, 14 H. 7. 6. Br. Privilege, n. 19.

The like case 9 E. 4, where a man appeared in Banco, by a Cepi Corpus, and found mainprise, and had a day to appear in Court, and before his day was arrested in London, and brought a Corpus cum causa in Banco Regis, at which day the plaintiff became nonsuit, yet he was discharged from the serjeant at London, because his arrest there was after his arrest in Banco, and consequently unlawful, 9 E. 4. f. 47. Br. privilege 24, and a man cannot be imprisoned at the same time lawfully in two Courts.

The Court of King's Bench cannot pretend to the only discharging of prisoners upon Habeas Corpus, unless in case of privilege, for the Chancery may do it without question.

And the same book is, That the Common Pleas or Exchequer may do it, if upon return of the Habeas Corpus, it appear the imprisonment is against law.

An Habeas Corpus may be had out of the King's Bench or Chancery, though there be no privilege, &c. or in the Court of Common-Pleas, or Exchequer, for any officer or privileged person there; upon which writ the gaoler must return by whom he was committed, and the cause of his imprisonment; and if it appeareth that his imprisonment be just and lawful, he shall be remanded to the former gaoler; but if it shall appear to the Court that he was imprisoned against the law of the land, they ought, by force of this statute, to deliver him; if it be doubtful and under consideration, he may be bailed, — The King's Bench may bail, if they please, in all cases; but the Common-bench must remand, if the cause of the imprisonment returned be just.

The writ 'de homine replegiando,' is as well returnable in the Common Pleas, as in the King's Bench.

All prohibitions for incroaching jurisdiction issue as well out of the Common Pleas as King's Bench.

Quashing the order of commitment upon a *certiorari*, which the King's Bench may do, but not the Common Pleas, is not material in this case.

1. The prisoner is to be discharged or remanded barely upon the return, and nothing else, whether in the King's Bench, or Common Pleas.

2. Should the King's Bench have the order of commitment certified and quashed, before the return of the Habeas Corpus, or after, what will it avail the prisoners; they cannot plead *nul tiel record*, in the one case or the other.

3. In all the precedents shewed in the Common Pleas, or in any that can be shewed in the King's Bench, upon discharging the prisoner by Habeas Corpus, nothing can be shewed of quashing the orders or decrees of that Court, that made the wrong commitment.

4. It is manifest, where the King's Bench hath, upon Habeas Corpus, discharged a prisoner committed by the Chancery, the person hath been again re-committed for the same cause by the Chancery, and re-delivered by the King's Bench; but no quashing of the Chancery order for commitment ever heard of. [Glanvill's C. Moore f. 836.]

5. In such cases of re-commitment, the party hath other and proper remedy besides a new Habeas Corpus; of which I shall not speak now.

6. It is known, That if a man recover in assise, and after in a re-disseisin, if the first judgment be reversed in the assise, the judgment in the redisseisin is also reversed. So if a man recover in waste, and damages given, for which debt is brought (especially if the first judgment be reversed before execution) it destroys the process for the damages in debt, though by several originals. But it may be said, That in a Writ of Error in this kind, the foundation is destroyed, and no such record is left.

But as to that in Drury's case, 8 Rep. an outlawry issued, and process of Capias upon the outlawry, the sheriff returned, *non est inventus*; and the same day the party came into Court and demanded Oyer of the exigent which was the warrant of the outlawry; and shewed the exigent to be altogether uncertain and insufficient, and consequently the outlawry depending upon it to be null. And the Court gave judgment accordingly, though the record of the outlawry were never reversed by error; which differs not from this case, where the order of commitment is judicially declared illegal, though not quashed or reversed by error, and consequently whatever depends upon it, as the fine and commitment doth, and the outlawry in the former case was more the king's interest, than the fine in this.

The Chief Justice delivered the Opinion of the Court, and accordingly the Prisoners were discharged.

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[1] See also 3 Keble's Rep. 322. Freeman's Rep, 1. 2 Jones's 13, and 1 Modern Rep. 119.

[2] See the Observations of Lord Erskine upon this Case in his very able and eloquent Argument in the Court of King's Bench in support of an application for a new trial in the Case of the Dean of St. Asaph (Shiply) in Michaelmas Term 1784, *infra*.

[3] See vol. 3. p. 826, of this Collection.

[4] Of this mind were 10 judges of 11, the Chief Baron Tumor gave no opinion, because not at the arguments.

[5] Chevin and Paramour's Case, 3 El. Dyer 201. a. n. 63.

[6] The progress in this writ of right till judgment for Paramour the defendant, is at large 13 El. Dyer f. 321. n. 40.

[7] The late Mr. Justice Buller in conversation concerning a case which had been tried before him (Smith *v.* Hollings, Stafford, Spring Assizes, 1791) said to the editor of this work, that where a juryman has knowledge of any matter of evidence in a cause which he is trying, he ought not to impart the same privily to the rest of the jury, but should state to the court that he had such knowledge, and thereupon be examined, and subjected to cross examination, as a witness. See too what Chief Justice North says as to sir John Cutler in Reading's Case, A. D. 1679, *infra*. See also Burn's Justice, "Of the Demeanour of Jurors in giving their Verdicts," In the trial of an Impeachment, a peer, who is one of the judges, may be examined as a witness. Lord Stafford's Case, A. D. 1680, *infra*. Upon the Trial of the Earls of Essex and Southampton (*ante*, vol. 1, p. 1333) the Lord Keeper Egerton, the Earl of Worcester, (one of the Lords Tryers) and the Lord Chief Justice Popham gave evidence 'upon their honours' against the prisoners. Upon the trial of Hacker, one of the regicides, Secretary Morrice and Annesley President of the Council, who were both Commissioners for trial of the Prisoners, and as such sat on the bench, came off from the bench and being sworn gave evidence on the part of the Crown, but did not go up to the bench upon that man's trial, *ante*, vol. 5, p. 1181, and note. Oates in his trial for perjury, May 8th, 1685, *infra*, proposed that the Chief Justice (Jefferies) who tried him should be sworn to give an account of what had passed at a former trial, to which Jefferies answered, 'No, there will be no need of that: I will acknowledge any thing I said then.' [For more matter relating to these points, see sir John Hawles's Observation on Lord Shaftesbury's Grand Jury, A. D. 1681, and on Cornish's trial for treason,

A. D. 1685; also the speech in the House of Commons of the same sir John Hawles when Solicitor General upon the Bill of Attainder against sir John Fenwick, A. D. 1696, *post*.]

Mr. Barrington observes on the statute of York (12 Ed. 2.) that the witnesses to a deed seem to have been antiently a necessary part of the Jury, which was to try the validity of such an instrument.

"The most usual trial of matters of fact," says Lord Coke, (First Inst. 155, b.) "is by twelve such men ('liberi et legales homines') for 'ad quæstionum facti non respondent judices;' and matters in law the judges ought to decide and discuss, for 'ad quæstionem juris non respondent juratores.'"

Upon which passage his learned commentator, Mr. Hargrave, has given the following Note:

"This *decantatum*, as Lord Chief Justice Vaughan calls it on account of its frequency in the books, about the respective provinces of judge and jury, hath, since lord Coke's time, become the subject of very heated controversy, especially on prosecutions for state libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a compleat and unqualified independence. On the trial of John Lilburne for treason in 1649, high words passed between the Court and him, in consequence of his stating to the jury that they were judges both of law and fact, and citing passages in the Coke upon Littleton to prove it. (2 State Tr. 4th ed. 69 and *post*. 228, a.) In the case of Penn and Meade, who in 1670 were indicted for unlawfully assembling the people and preaching to them, the jury gave a verdict against the directions of the Court in point of law, and for this were committed to prison. But the commitment was questioned; and on a Habeas Corpus brought in the court of Common Pleas, it was declared illegal; Lord Chief Justice Vaughan distinguishing himself on the occasion by a most profound argument in favour of the rights of a jury. Bushell's. case 1 Freem. 1, and Vaughan 135. However the contest did not cease, as appears by sir John Hawles's famous Dialogue between a Barrister and a Juryman, which was published in 1680 to assert the claims of the latter against the then current doctrine decrying their authority. Since the Revolution also many cases have occurred, in which there has been much debate on the like topic. See King *v*. Poole in Cas. B. R. temp. Hardwicke 23. Franklin's case in the St. Tr. Peter Zenger's ibid. Owen's case in the St. Tr. and Woodfall's case 5 Burr. 261. By attending to the cases before referred to, it will be easy to trace the progress of this controversy on the limits of the jury's province.

"In respect to my own ideas on this subject, they are at present to this effect; "On the one hand, as the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable, that they so far may decide upon the law as well as fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, who hereafter writes, That if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally. Post. sect. 368 and fol. 228.

"But on the other hand I think it seems clear, that questions of law generally and more properly belong to the judges; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations. I. If the parties litigating agree in their facts, the cause can never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that issues in law are ever determined by the judges, and only issues of fact are tried by a jury. Ant. 71. b. — II. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes. an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury; for in that case the law is reserved for the decision of the Court, from which the issue of fact comes, and the jury is either discharged or at the utmost only ascertains the damages. Ant. 72. a. Dougl. Rep. 127, 213. Buller's Nisi Pri. 2nd edition, 313. — III. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the judge who presides at the trial, to inform them what the law is; and as a check to the judge in the discharge of this duty, either party may under the statute of Westminster the 2nd, c. 31, make his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it. See *post*. 2 Inst. 426. Trials per Pais, 8th ed. 222, 466. Case of Fabrigas and Mostyn in the State Trials. Case of Money and others *v*. Leach, 3 Burr. 1742. Buller's Law of Nisi Pri. 2nd ed. 315. — IV. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large and leave the conclusion of law to the judges of the court from which the issue comes. Formerly indeed it was doubted, whether in certain cases, in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Downman's case, 9 Co. 11 b. and the rule now holds both in criminal and civil cases without exception. See *post*. 227. b. Staundf. Pl. C. 165. a. Oneby's case, 2 L. Raym. 1494. [A. D.

1726, *infra*.] — V. Whilst attaints which still subsist in law were in use, it was hazardous in a jury to find a general verdict, where the case was doubtful, and they were apprised of it by the judges; because if they mistook the law, they were in danger of an attaint. *Post*. 228. a. Hob. 227. Vaugh. 144. 2 Hal. Hist. Pl. C. 310. Gilb. Com. PL 2nd edit. 128.—VI. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges; but they have a right to controul the verdict, and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. Staundf. Pl. C. 165. a. Plowd. 114, a. b. 4 Co. 42, b. Hal. Hist. Pl. C. v. 1. p. 471, 476, 477. and v. 2. p. 302. — VII. The courts have long exercised the power of granting new trials in civil cases, where the jury find against that which the judge trying the cause or the court at large holds to be law, or where the jury find a general verdict, and the court conceives that on account of difficulty of law there ought to have been a special one. King *v*. Poole, Cas. B. R. *temp*. Hardwicke 26. Though too in criminal and penal cases the judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that nemo bis punitur aut vexatur pro eodem delicto,' or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence; and if this be so, it only shews that on that account an exception is made to a general rule. 4 Blackst. 8th ed. 361. 2 L. Raym. 1585. 2 Stra. 899. 4 Co. 40, a. and Wingate's Maxims, 695.

"Upon the whole, as my mind is affected with this interesting subject, the result is, that the immediate and direct right of deciding upon questions of law is entrusted to the judges; that in a jury it is only incidental; that in the exercise of this incidental right the latter are not only placed under the superintendance of the former, but are in some degree controulable by them; and therefore that in all points of law arising on a trial, juries ought to shew the most respectful deference to the advice and recommendation of judges. In favour of this conclusion the conduct of juries bears ample testimony; for to their honour it should be remembered, that the examples of their resisting the advice of a judge in points of law are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct, or betrayed into an unjust suspicion of his integrity by the misrepresentation and ill practice of others. In civil cases, particularly where the title to real property is in question, juries almost universally find a special verdict as often as the judge recommends their so doing; and though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it every person accused of a civil crime is enabled by the general plea of Not Guilty to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this benefit may be always enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace; which exception from the necessity of the times is continually, increasing, but which however cannot be too cautiously extended to new objects. Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries.

"It would be wrong to conclude this note, without referring the reader to the very forcible reasoning on the same subject, in a modern work, which contains much general legal instruction elegantly conveyed. See "Eunomus, or Dialogues concerning the Law and Constitution of England," vol. 3, p. 196.

"See further on the origin of English Juries, Spelm. Gloss. voc. *jurata*, Dissertat. Epistolar. in Ling. Septentrion. Thesaur. Hickes. Stiernh. de jure Sueon. et Goth. vetust. lib. 1, c. 3, and Dr. Pettingal's Enquiry into the Use and Practice of Juries amongst the Greeks and Romans." See, too, the dean of St. Asaph's Case, a. D. 1784, *infra*.

On the right of jurors to find general verdicts Blackstone is very decisive.

"Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a special verdict; which is grounded on the statute Westm. 2. 13 Edw. 1. c. 30, s. 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

"Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a special case stated by the counsel on both sides with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision : the *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law. Which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the case at length upon the *postea*. But in both these instances the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant." 3 Bl. Com. 377. "When the evidence on both sides is closed, the jury cannot be discharged till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case which touches life or member, give a privy verdict. But an open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the ease, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore chuse to leave it to the determination of the court: though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and, if their verdict be notoriously wrong, they may be punished and the verdict set aside by attaint at the suit of the king; but not at the suit of the prisoner." 4 Bl. Com. 361.

The following is the passage in Littleton, (sect. 368.)

"Item en tiel case l'ou l'enquest poit dìre lour verdict a large, s'ils voilent prendre sur eux le conusance de la ley sur le matter, ils poient dìre lour verdict generalment, come est mis en lour charge; come en le case avant dit ils poient bien dìre, que le lessor ne disseisa pas le lessee, s'ils voilent, &c."

Whereupon Lord Coke thus comments: —

"Although the jury if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for if they do mistake the law, they run into the danger of an attaint; therefore to find the special matter is the safest way where the case is doubtful." See also the Law Dictionary, Articles *Attaint*, *Jury*.

[8] 21 II. 6. f. 20. 22 II. 6. f. 38. 34 H. 6. f. 15. — Vide Dyer 12 El. f. 287. pl. 48. — Vid. the superset, for clerks of the Court, and for attorneys anciently, and their great difference. Reg. Jud. f. 84. a. But now attorneys ape inrolled as well as officers.

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