114. DAY *versus* SAVADGE.

[See *Lee* v. *Bude and Torrington Junction Railway Company*, 1871, L. R. 6 C. P. 582.]

Trespass.

Brownlow. Tr. 12 Jac. Rot. 619. Custom of London to certifie their custom upon the mouth of the recorder. Mo. 871. Jones, 412. 2 Ro. 579, 580.

Matthew Day brought an action of trespass against John Savadge for taking away a bag of nutmegs. The defendant pleaded that the City of London is an ancient city, and so had been time out of mind, and that the mayor, citizens, and commonalty had been all that time a corporate body, and seised of a bank or wharf in London called Queen-Hithe, and by all that time have used to have and take for goods laid upon the same wharf, to be conveyed from thence by water, of persons not lawfully thereof discharged wharfage, that is to say, a half-penny for every porters burthen there laid to be so conveyed, and for default of payment, to distress such goods upon the said wharf, by a person by the mayor to be appointed, for the collection, and then shews, that two persons unknown brought two porters burthens of the goods of the said plaintiff, being no person lawfully discharged, whereof the bag of nutmegs in question was part, and laid them upon the said wharf to be conveyed by water. And that the defendant being appointed collector, &c. demands two half-pence, and because they were not paid, distrained, &c. as was lawful for him to do: the plaintiff by way of replication confessed all the bar in general, and laid, that within the said city there was, and time out of mind had been a custom, that all the freemen of the said city, had been, and ought to be discharged of the said payment of wharfage of their goods, and averred that he was a freeman of the said city, &c. The said defendant said, that there was no such custom within the said city, & hoc paratus est verificare ubi & quando, & prout Curia consideraverit: and then adds a surmise thus: super quo præd. Joh. Savadge dicit quod in civitate præd. there is, and time out of mind hath been a custom, that when any issue, &c. upon any custom of the said city is joined, though the mayor, commonalty, and citizens be parties to the action, the mayor and aldermen of the city have used to certifie to the justices the truth of such custom; and that the said custom and all other customs of the said city, by authority of Parliament in the seventh year of Richard the Second was confirmed. And prayed the King's writ to the mayor and aldermen of the said city to certifie, &c. And the said plaintiff saith, that the said issue ought to be tried by jury, and not by certificate, and that such custom alledged by the defendant for the tryal by certificate ut supra, is against the law and common reason, and prayeth judgment, and that the cause may be tried by jury, whereupon the defendant demurreth.

After some arguments at the Bar pro & contra, wherein nothing was questioned, but whether the custom in this special case were good, that the mayor and aldermen should certifie a custom which concerned the interest of the corporation whereof they were a part.

The Court now being agreed determined to give judgment, and intreated me to pronounce it for them all, and so we gave judgment, that this **[86]** custom was not to be tryed by certificate, but by the jury, whereof I gave three reasons.

The first, that it was not properly a custom, but a kind of prescription, or in the nature of a prescription, and then clearly it was not within their custom.

Secondly, that it was no such custom as was within the reason or meaning of that special peculiar form of tryal by certificate, that was granted and used in London.

Thirdly, it was against right and justice, and against natural equity to allow them their certificate, wherein they are to try and judge their own cause.

As to the first it is apparent, that as Savadge pleads it for the city, it is a meer prescription in the corporation, and if he had joined unto it (as he ought to have done) the point of discharge of citizens expresly, as he did generally, under the name of person discharged, it had been a meer intire prescription throughout, and so pleaded.

Now though he omitted that part, yet when it comes to be shewed on the other side, if it be true, it appears to be a branch of the said prescription, and of the same nature, and no custom.

And yet it is true, that being pleaded apart by it self by the inhabitants as to a discharge of free-men, it must be pleaded by way of custom, and not by way of prescription, not because of the nature of the thing, but because the freemen cannot prescribe in their persons, and therefore are allowed to lay a custom for their discharge, so that naturally a prescription or a thing prescriptible is so to be laid, where by law it may be, and not by way of custom, and where it cannot be by law, and therefore is pleaded by way of custom, the nature of the thing is not changed, but remains still a prescription in his kind, though it be allowed to be pleaded by way of custom for necessities sake. And this learning appears well in *Gateward's case*, Co. lib. 6. 59. b. where it appears, that a thing lying properly in prescription, as common did in that case being an interest, which must inhere in some body, cannot be pleaded by way of custom, nor cannot stand by custom where it cannot stand by prescription, as there they would have made it for inhabitants, that are not permanent to prescribe, but yet common for copyholders in the lord's soil is allowed to be pleaded by custom for necessities sake, whereas in the soil of another, it must be laid by prescription in the lord, and yet the nature of both is a prescription.

But a matter of discharge as the principal case is, and discharge of tithes, as *Gateward's case* says, may be laid by way of custom, for that is not an interest, but an exemption, not positive but privative of the general possession. So it is indeed but an exception out of the interest, and in truth should be so pleaded as in the principal.

To the second point, this privilege of London is to be understood of such customs as are of the nature of local laws, peculiar laws for that city, general to all the citizens, differing from the general law of the kingdom, such as Littleton calls in his Chapter of Burgage, the customs and usages in many boroughs; and samples them that the younger son shall inherit, that the wife shall have the whole land in dower, and that their houses and lands are devisable, such are the customs in London, of foreign attachment, 7 E. 6. Dyer, 85. & 3 Eliz. Dyer, 196. and the custom 5 E. 4. fo. 30. that if a debtor become fugitive, he may be arrested before the day of payment. And Co. 5. lib. fol. 82. *Snelling's case*, that if one citizen be indebted to another in a single contract, it shall be equal to an obligation. And 21 E. 4. 16. 74, 75. And 21 E. 3. 46. a good case to this very purpose, where in an assize of fresh force, in the Court of Oxford, it was pleaded that the custom of the town was, that if a man had possession of lands by 40 weeks, he could not be put out but by the King's writ, whereupon the other would have taken issue no such custom. But it was resolved, that this, being the law of the city, was not to be tried by jury, but by the Judges as a matter of law, and so indeed in nature of a demurrer.

[87] And the reason thereof is, that the Judges of every place are supposed to have knowledge of the laws of the place whereby they do judge, and to have customaries among them. And therefore in suits in their own Courts do determine them, as the Judges at the common law do in the King's Courts judge the general customs of the whole kingdom, being the common law. And so in London by special priviledge they certifie also their customs of this nature, into the King's Bench, which other towns do not. But their customs, even those that are their local laws, are triable by jury, if they come to issue in the King's Courts. And agreeing with this was found, and shewed a precedent Mich. 37, 38 Eliz. Rotulo 418. in the Common Pleas London, between Bilford plaintiff, and Lowe defendant, in an action upon the case for certain parcels of plate. And the issue was, whether the custom of London were, that there was a common market in London, for all goods in all open shops, all days, except Sundays and holy days, from the sun-rising to the sun-set; and concluded, et hoc parati sunt verificare, ubi & quando ac prout Curia consideraverit. And then the defendants made their surmise for the trial of their custom by the mouth of their

recorder, and prayed a writ accordingly: and it was granted returnable in Trinity term, and continued per non misit bre. 'till Octabis Mich. And then it is entred, that the conclusions of the defendants plea, ought to have been et de hoc ponit se super patriam, whereupon the plea was so made and issue taken, and upon venire fac. to the Sheriff of London found for the plaintiff, and had judgment: which is a stronger case than this at the Bar.

And further in the principal case it cannot properly be said to be a custom of the whole city, nor for all the citizens personally, as all the customs in the nature of laws are, and as the form of surmise, for the trial doth import, for it concerns only the body corporate of the city, and the place Queen-Hithe only where the profit ariseth, and where the distress is to be taken for it.

As to the third point, the books are full, that challenges are allowed, where the issue concerns a city, or corporation, and they are to make the pannel, or where any of their body be to go on the jury, or any of kin unto them, though the body corporate be not directly party to this suit, for which purpose see 15 E. 4. 18. 28 Ass. 18. 21 E. 4. 11. where a dean and chapter bringing an assize, a juror was challenged, because he was brother to one of the prebendaries.

Now if such challenges be allowed, where an attaint lies for a false verdict, much more here where there is no ways to reverse a false certificate, and yet it is true that the certificate is no judicial act, but ministerial. And therefore if the certificate be false, the party shall have his remedy by action of the case, and that not against the recorder, but against the mayor and aldermen; for it is their certificate by their recorder, and so is the pleading and surmise, and the writ to certifie is a warrant to them, which takes away one defence made against their partiality to themselves, that they did not certifie, but their recorder. As where a grant is of a cognizance of pleas to be holden before the steward of the grantee, licet the grantee fuerit pars, but there the steward is Judge himself, and not the grantee, as the King's Judges are between him and the parties, but here the recorder is but their mouth to speak for them, as they command him.

By that which hath been said it appears, that though in pleading it were confessed, that the custom of certificate of the customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, and because even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in it self, for jura naturæ sunt immutabilia, and they are leges legum.