AT THE SITTINGS AFTER HILARY TERM.

In the Thirteenth of William the Third. At Guildhall, before Sir John Holt, Knt., Chief Justice. Sir Edward Ward, Knt., Chief Baron. Sir Henry Hatsell, Knt., Senior Baron.

[669] CASE 1070. THE CITY OF LONDON *against* WOOD.

Debt on a by-law in the Mayor's Court for refusing to serve as sheriff.—*Ante*, 269.

In an action brought in the Mayor's Court against Wood for four hundred pounds as a forfeiture, for that he being duly chosen sheriff did not serve, or otherwise discharge himself by fining, &c. according to the Act of Common Council made in the seventh year of Charles the First, it appeared *the plaint* was levied in the Court of the Mayor and Aldermen on the fifteenth of November, and that the defendant gave bail for his appearance the next day, viz. the sixteenth; and instead of continuing from the fifteenth to the sixteenth, that day is given from the said fifteenth to a certain day in June; and then the entry is, that the cause was removed by *habeas corpus* to the Common Pleas, and sent down by *procedendo*. And then the defendant pleaded "*nil debet*," "*et hoc parat. est verificare, ut liber homo* of the city," and offers to bring six freemen of the city to be his compurgators; and a demurrer to this plea; and judgment against the defendant; of which this error is now brought before the said Judges commissioners.

Hatsell, *one of the Barons of the Exchequer*, who argued first, divided the case into four points:

First, whether *wager of law* held in the case?

Secondly, whether there were *a discontinuance?*

Thirdly, in case there were *a discontinuance*, whether it was now amendable by the record in the Mayor's Court, supposing that to be right?

Fourthly, whether this action be brought in a proper Court *scilicet*, that of Mayor and Aldermen, it being for a forfeiture to the city?

And *per luy*, wager of law lies not here, for that never lies but in respect of the weakness and inconsiderableness of the plaintiff's ground or cause of demand; and when the ground of his demand is so small and weak that the defendant's oath, and that of compurgators, may be looked upon as an equal consideration with it, then a wager of law may well be; but never where the foundation of the demand is of greater regard than the defendant's oath, then it never lies. 1 Inst. 292, it lies not where there lies a specialty or deed to charge the defendant; **[670]** but only where the cause of action is only a bare parol transaction, which as it may create a duty, yet it is such a duty as may be discharged in the same manner that it is contracted; and the reason of it is grounded upon the presumption of law, that one for no worldly consideration will forswear himself; and it is an argument that the matter is of no great value, that the plaintiff did not take care to have better security for it than the slippery memory of man, and the incertainty of a verbal contract: so that since the lien or tie was so light, it is no wonder if the law will lightly discharge it. Another reason of a wager of law is laid down in 2 Inst. 45 b. that the defendant might have witnesses of his discharge, who might be dead, as none can keep his witnesses alive; and since nothing appears to charge him but a parol agreement, which might have been discharged with the like solemnity, which the defendant might have proved if his witnesses were not dead, for that reason too the law thought convenient to admit of a discharge by wager of law. Nor is there any hardship in all this, because the plaintiff might have prevented it by providing a specialty; but he held the first reason to be the only true reason, viz. the feebleness and exility of the ground of the plaintiff's demand; and it suffices, that the nature of the defendant's discharge be of equal validity with the ground of the plaintiff's charge. And wager of law is allowable in five cases: first, in debt upon simple contract, which is the common case; secondly, in debt upon an award upon a parol submission; thirdly, in an account against a receiver for receipts by his own hands; fourthly, in detinue, though the bailment

were by the hands of another; fifthly, in an amerciament in a court-baron, or other Inferior Courts not of record. And in every of these instances the action is grounded upon a feeble foundation, and of small consideration in law.

The case of an amerciament in court-baron is nearest to the present case of any, though nothing like it, for such amerciaments are generally for private matters, as inclosing or overcharging of commons, or other private transgressions; but this offence, for which the penalty is laid here, is of a public nature, and concerns the administration of justice in the service of Sheriffs of London and Middlesex. And though this penalty be inflicted by an Act of the Court of Common Council, which is no Court of Record, yet it is a Court so vastly different from courts baron, or such other *petit* Courts, that in 4 Inst. 245, my Lord Coke does not stick to **[671]** compare it to the Court of Parliament, where the mayor and aldermen represent the Upper House, and the commonalty the House of Commons. And what immediately concerns the good government of London, does very nearly concern the whole kingdom; of which *vide* 8 Co. 187.

The King, as fountain of justice, has the nomination of sheriffs all over the kingdom; and since he, by his patent, has delegated that power for London and Middlesex to the City of London, as incident thereto, they must not only chuse sheriffs, but may also compel them to serve; for otherwise here would be a failure of justice; and the consequence of that in these two counties would be of extreme danger to the whole kingdom. The office is of very great concern, for he has the custody of the county: besides, it concerns the public revenue, part whereof he collects; and it is given for a reason in *Slade's case* (*a*), that a wager of law lies not in *quo minus*, because the King's revenue is remotely concerned, upon suggestion, that the plaintiff is indebted to the King, and less able to pay him by the defendant's detainer of his debt; *ergo à pari* in an action concerning the acceptance of an office relating to the King's revenue, he ought not to be received to his wager of law. Besides, here is a contempt in the defendant, which he ought not to be allowed to swear off. Also all the matters that charge him are facts notoriously known, in which there never are any precedents of wagers of law. Again, when the matter of the charge is pregnant with matter of law, there ought to be no wager of law, for that were to swear to the law; as in debt against husband for clothes taken up by the wife, the husband shall not wage his law, because it is a point of law, whether he be liable or no, viz. whether the clothes were for necessary apparel of the wife, without which he is not liable. Then the very custom of London excludes wager of law in some actions, as in debt for diet; 1 Edw. 4, 6; Bro. Examination, 18; the statute of 38 Edw. 3, c. 5, before which no wager of law could be against a Londoner; Br. Ley Gager, 94. Another reason against the waging law here is, that by custom of London the common council may make by-laws for the better ordering of the city; and that custom is confirmed by Magna Charta, and sundry other Acts of Parliament. So that this being a penalty so warranted is of too high a nature to be avoided by a wager of law. *Vide* 1 Vent. 196, 261.

[672] But another error assigned is, that this action is brought by the Mayor and Commonalty of London, in a Court holden before the mayor and aldermen; and the record says, that the Mayor and Commonalty of London came before that Court, that is, the mayor and commonalty came before the mayor and aldermen; so that the mayor is both Judge and party, a thing against natural justice. And this I hold to be error; for though the mayor be not sole plaintiff, nor sole Judge, yet he is essentially plaintiff and Judge; and the case of *The Bailiff of Norwich*, in 2 Ro. Ab. 93, differs from this: one brings an action before the bailiff and steward of the town, and pending the action the bailiff dies, and the plaintiff is made bailiff, and then judgment is given for him; that judgment is not erroneous, because it is given by the Court, and not by him alone; for there the action is originally well brought, and the plaintiff was not bailiff at the time of the action brought. But besides, I do not take the opinion there to be the resolution of the Court; *vide* 3 Cro. 320, that it is not error, except it be objected to and over-ruled; but surely that is a hard doctrine; for it might so happen, that he had not an opportunity of pleading it below; but my reason

(*a*) 4 Co. 92.

for that judgment is, that it did not appear on the record to be the same person. But here it does appear on the record to be the same person; and that being so, though the action were originally well commenced, yet I take it to be error. If one of the aldermen of London should bring an action before the mayor and aldermen, and recover, that may be a good judgment, because it may be a Court of Mayor and Aldermen without him, and the plaintiff would not be an essential part of the Court; *vide* 13 Hen. 8, 12. 14 Hen. 8, 2. Master and confrery of an hospital may present one of the brothers to a benefice, but they cannot present the master, or infeoff the master: for to that purpose the brother who is presented or infeoffed is severed from the body; and though the master have a double capacity, viz. a natural and a political one, yet in one capacity he cannot do an act to himself in the other capacity; but any single brother may take from the head and the remainder of the brothers, because the head and the rest of the brothers are a perfect corporation without him; *vide* 3 Hen. 6, 43, but the brothers are not a corporation without the master, who is the head. And he quoted Hob. 87, that an Act of Parliament against natural equity, as to make one a Judge in his own cause, would be merely void.

[673] As to the last point, he held it a plain discontinuance, and not amendable, for diminution is not to be alledged in such an Inferior Court as this of the mayor is; that judgment ought to be reversed, for the two last reasons.

Ward, Chief Baron. The errors assigned are three:

First, that the Act of Common Council mentioned is contrary to the law of England and right reason.

Secondly, that the defendant ought to have been admitted to wage his law.

Thirdly, the general error, viz. that judgment is given for the plaintiff, when it ought to be given for the defendant.

And all these three fall under five considerations:

First, whether the Act of Common Council be good to maintain this action?

Secondly, if it be, whether it be brought in the right Court?

Thirdly, whether wager of law lies?

Fourthly, if that does not lie, whether judgment ought to be final and peremptory, or only a *respondeas ouster*?

Fifthly, if all these points be against the plaintiff in error, whether there appear such error on the record for which the judgment ought to be reversed?

As to the first, the Act of Common Council is a good ground for this action, both in reason and in the legal consideration of it; and that has been so adjudged both in the Courts of Common Pleas and King's Bench. The subject-matter of this by-law is the power the City of London has for choosing sheriffs for London and Middlesex, which franchise is by Royal charter granted to London, whereby a trust is reposed in the city that sheriffs be accordingly chosen; and a failure therein would be such a breach of trust as would be a good cause of forfeiture of their franchise. And as this office is of great trust, so likewise is it an office of charge, which makes people unwilling to take it upon themselves; so that there is an absolute necessity there should be a compulsive power in the city to enforce some to exercise it, for the preservation of their franchise and discharge of their trust. And this by-law is in pursuance of this compulsive power, and made by the mayor and common council, and by consequence by all the freemen, whose consent is involved in that of the common council; and they that are intrusted to make laws for the better governing of the city are the best judges of the qualifications of persons fit to bear this office, and of the penalty they shall incur in case of refusal. And every corporation in England has a power to make a by-law for the better ordering and government of the corporation, as incident to their being: and he quoted the case of *Vanacre*, **[674]** in the King's Bench, and a judgment upon the return of a *hab. corp.* in this very case in the Common Pleas.

Second point, whether the action be well brought in the Mayor's Court? The penalty by the by-law is limited to the Mayor, Commonalty, and Citizens of London, and therefore none can sue for it but the mayor, commonalty, and citizens; then it is limited and restrained to be sued in any of the King's Courts of Record in London, and there are two considerable Courts of Record in London, viz. the Sheriff's Court and the Mayor's Court; and in either of these Courts, if the parties had been proper, this action might have been brought; and without doubt it might have been brought in the Sheriff's Court.

In the face of the record it does appear, that this action is brought by the mayor and commonalty; so it appears here is a complete body, and every corporation aggregate must sue by the name of the head and body, and the head is essentially necessary. Here the mayor is the head, and the corporation the commonalty or citizens of London. Then who are they that are the constituent parties of the Court? And we find they are the mayor and aldermen; so we find the same men sue before the same men, that is, the mayor and commonalty sue before the mayor and aldermen, viz. the mayor sues before himself; and that is it which makes the inconsistency, which is so much the greater, that it is without necessity, for they might bring this action in the Sheriff's Court.

And this objection does not arise from point of interest, but from point of inconsistency, for an objection from the point of interest would be of no force; for the mayor has no greater share of the penalty to be recovered than even the party defendant has.

Objection. Though the stile of the Court be before the mayor and aldermen, yet they never are there, but all is done before the recorder, who may or may not be free of the city. It is like a grant of conusance of pleas to a man, though he himself be party, which is bad if there be not a Judge appointed; but if another be appointed a Judge, the grant is good, for the King's patents cannot enable one to be Judge and party.

Answer. This were to take an averment against the record, whereby it appears that the Court is held before the mayor and aldermen.

Objection. The same thing was used to be in the King's Bench, when the King sat there upon pleas of the Crown, as they still may do; therefore this is no material objection.

Answer. By the constitution of England, though the King sat in that **[675]** Court, yet the judgment was given by the Judges, and not by the King, 4 Inst. 71, 73; and all judgments are to be *per Cur.* And if a criminal be to be punished by fine at the King's will, it shall be done by the Judges according to the law of England, and not by the King himself; and that is, because that such is the King's will; and he quoted the case of 14 Hen. 8, 2. Bro. Corporat. 34, before mentioned by Hatsell. If the Corporation of London give a letter of attorney to make livery, and before it is made the mayor dies, and after livery is made before another mayor chosen, it is ill. Bro. Corporat. 63, 64. But if the mayor had been made, and then a livery, it had been well, because at the time of the livery there had been a complete corporation to all purposes; and an obligation made by the commonalty to the mayor is not good. Bro. *ib.* 4 Inst. 213. 12 Co. 114. Ro. Judgm. 93, that the Chamberlain of Chester cannot determine a cause in which he himself is party; and here the Mayor of London is the chief plaintiff and the chief Judge.

The death of the mayor causes a cessation of jurisdiction of the corporation till another mayor be chose. *Vide* Dyer, 220, where a recognizance entered into before Sir N. B. Keeper of the Great Seal, acknowledging such a sum due to him and to two more; and held void as to N. B. but good as to the rest; and a Judge cannot take a conusance of a fine to himself. Ro. Judgment, 93, 94. Hob. 85. Mo. 871. 2 Ro. Ab. 279, 280. 2 Ro. Ab. title Trial. Styl. 107, 130. And though many precedents be of such actions, yet they passed *sub silentio*, and therefore cannot maintain such an incongruity as here is. And the case of *The Bailiff of Newcastle*, Ro. 89, which is most like this, yet it differs from it in this, that there it does not appear on record that the same person was Judge, as here it does.

Thirdly, as to the wager of law, it lies not here; though, generally speaking, where the debt is not grounded upon any specialty, or matter savouring of the realty, it will lie. And he quoted the case in 1 Vent. 261, in point, and 2 Lev. 106, the same case; but it lies in debt upon assignment of commissioners of bankrupt, 2 Cro. *Bradshaw's case*, because the act of the commission out of Chancery, nor the deed of assignment, do not alter the nature of the original debt, but only transfer it as it is; and therefore if the debtor could have waged his law against the bankrupt, he shall still do it against the assignee. If a debt arises upon a by law authorized by letters patent, wager of law will not lie in debt for it. And the office of Sheriffs of **[676]** London and Middlesex is granted to the city by the charter of King John; and a

power of making by-laws to enforce the exercise of that office is necessarily and incidently granted by the same letters patent; so this by-law now in question is in some respect grounded upon letters patent. And my Lord Coke says, that wager of law is grounded upon the law of God, which says, that if one leaves an ox in the custody of another, and the ox dies, or is lost, that the bailor should take the bailee's oath of such death or loss to discharge him.

And per Ward, There is such a multifariousness of facts in the foundation of this action, that it were very unsafe for a man to wage his law in it, and very inconvenient to admit him to; and Judges are to use a sort of discretion in admitting people to wage law, *vide* 5 Hen. 4.

Fourthly, the judgment ought to be final, for it is an action of debt; and the plea is *nihil debet*, which is in bar, though the conclusion be impertinent.

Fifthly, it is a plain discontinuance, and no way to set it right; *ergo jud. reversetur.*

Holt, Chief Justice. There are several points in this case. And as to the first matter in it, which is the goodness of the by-law, I have given my opinion as to that point already in the King's Bench, in the case of *The City of London* v. *Vanacre* (*a*), and it had then the concurrence of all my brothers; and since the same point came in question in this very case in the Common Pleas upon a *hab. corp.* and that Court did likewise concur with us in the King's Bench; so I wonder it should not be left quiet now, it being so firmly established, that it cannot be otherwise shaken but by the Lords in Parliament.

Then as to the point, whether judgment final ought to be, or an answer over? surely it must be a judgment final, for since he pleads a *nil debet*, and instead of concluding to the country he concludes to wage his law; if he ought not to be admitted to that, without doubt he ought to have final judgment; and there is no colour for a *respondeas ouster*, for there never is a judgment to answer over but where there is a dilatory plea pleaded, or to the jurisdiction of the Court, or to abate the writ.

So in this case there are three things observable:

First, whether upon an action brought upon this Act of Common Council for a penalty incurred, or supposed to be incurred upon it, there ought to be a wager of law?

Secondly, whether upon this record, as certified to us, there does appear a **[677]** discontinuance?

Thirdly, whether, upon certificate that the record below is amended, we may amend the record before us by the record set right below?

Fourthly, whether this action be well brought by the Mayor, Commonalty, and Citizens of London, in the Court of the Mayor and Aldermen?

As to the defendant's attempt to wage his law, I hold his plea ill concluded, for he ought to conclude to the country, for these reasons: first, though it be a debt not founded upon a specialty, yet the foundation of the action is the wrong of the defendant; he is guilty of a wrong in refusing obedience to this Act of Common Council, for he has not done what the Act required him to do, that is, take an oath of his insufficiency, or pay down his fine, or assume the office according to the Act; so that his non-compliance with this law, by which he was bound, is the wrong which is the foundation of this action. And whenever a man is charged with a penalty for an injury or wrong done by him, or act of disobedience done by him, he cannot wage his law. And this is the reason of *Slade's case*, which was an action for money for goods sold and delivered; and this is the right difference, and not that which is made in the actions, viz. that it lies in one sort of action and not in another; but the true difference is when it is grounded on the defendant's wrong, &c. and when not; for if debt be brought, and that the foundation of the action is the wrong of the defendant, wager of law will not lie.

The Statute of Richard the Second gives debt against a sheriff for escape of a prisoner in execution; and the words of the statute are, that the plaintiff shall have debt, and recover the whole sum in judgment; yet upon that statute wager of law was never attempted; and the only reason is, because the debt arises from the

(*a*) *Ante*, 270.

wrong of the defendant, who by suffering the escape, to the prejudice of the plaintiff, brought this penalty upon himself; and for that reason, it being merely grounded upon the defendant's wrong, if he dies the action dies with him, and will not lie against his executor, *vide* Dy. 322, pl. 25. So in debt upon the Statute of Edward the Sixth for Substraction of Tithes, wager of law will not lie; and in that case, too, debt will not lie against an executor, because it is a penalty arising from the wrong of the party, which dies with him. So if debt be brought against an executor upon a *devastavit*, no wager of law lies; and why so? Because it is an action brought upon the wrong of the executor in wasting, and for that reason it **[678]** is that it is brought in the *debet ac detinet;* and though that action lies not against an executor but after a judgment for the original debt, nor against the sheriff till after judgment and execution, yet it is not the record of the judgment, but the wrong of the executor in wasting in one case, and of the sheriff in suffering the escape in the other, is the foundation of the other.

So in this case it is plain he is guilty of a wrong in not obeying the Act of Common Council, for it is a law in London; and every by-law is a law, and as obligatory to all persons bound by it, that is, within its jurisdiction, as any Act of Parliament, only with this difference, that a by-law is liable to have its validity brought in question, but an Act of Parliament is not; but when a by-law is once adjudged to be a good and reasonable by-law, it is to all intents as binding to those that it extends to as an Act of Parliament can be. Secondly, wager of law does not lie here in respect of the defendant himself, upon two accounts. First, if he were admitted to discharge himself by wager of law of a debt arising thus from his own wrong, it would be a great temptation to corrupt perjury, and the law never leads men into temptation; and I am afraid the penalty of four hundred pounds would be too great a temptation to some people. Secondly, though generally wager of law be looked upon as a privilege the defendant has, but originally it was not only the privilege of the defendant to discharge himself, but one which the plaintiff had when he had no witness of his debt, to put the defendant under a necessity of giving him his oath to discharge him; so it was a kind of an equity in law, that the plaintiff might put him to take his oath that he owed nothing to him, or confess the debt, rather than the plaintiff should lose his debt in cases where he had no witnesses of it at all, or had some who were then dead. Magna Charta, c. 28, makes this very manifest; the words are, "*Nullus ballivus de cætero ponat aliquem ad legem manifestam, nec ad juramentum simplici loquela sua sine testibus fidelibus ad hoc inductis;*" where note the words "*de cætero,*" which shew that before that time the law was, that if a man had brought an action against another without any witness, he might put the defendant to his oath, whether he owed not the debt, and that was thought hard; and to prevent it this statute was made; but the witnesses mentioned by the statute are not to be produced after issue joined, or to be cross-examined, but only to give proof of a probable cause of action; that is, such proof as we now **[679]** require of a *modus decimandi*, when we grant a prohibition to stay a suit for tithes *in specie*. And upon bringing such convenient proof by credible witnesses, and averring the Statute of Magna Charta, a plaintiff may at this day compel a defendant to wage his law. In 33 H. 6, 8, in a *præcipe quod reddat*, the tenant made default, but appeared on the return of the great *capias*, and pleaded non-summons, and would conclude to the country, where the proper trial was, by wager of law of non-summons; and the question there was, if he could waive his plea of wager of law, and betake himself to plea concluding to the country? and the better opinion there is, that he could not put himself upon his country, and decline his wager of law. And that case is plainly out of the Statute of Magna Charta, because it is not debt, nor *simplex loquela*, but a process of non-summons from which he was to save himself; therefore since this action is grounded upon the defendant's tort, it would be hard to put the defendant to wage his law; for it were too great a temptation to save the penalty of four hundred pounds, and the law of England does abhor people's swearing, when they are charged with a crime or offence. Indeed when the Popish clergy did prevail, they did introduce an oath *ex officio* to make people swear when they were charged with a crime of ecclesiastical conusance; but that practice was always looked upon as an incroachment upon the right of the people. *Vide* 12 Co. 26, and other authorities mentioned there.

Another principal reason why a wager of law will not lie in this case is, because the Act of Common Council, by which this duty is created, is notorious and publick; it is the law of the City of London, of which every body within the city must take notice; and the secrecy of the contract which raises the debt, is the reason of the wager of law; but if the debt arise from a contract that is notorious, there shall be no wager of law; and so is the reason of the diversity between these two cases, of an action of account brought against a receiver; for if it be against him as receiver by the hands of the plaintiff, a wager of law will lie; but if he be charged for money received by the hands of a third person, no wager of law shall be allowed; because it appears from the nature of the action that a third person can prove the receipt; and the action in our case is brought upon the Act of Common Council, and other publick transactions, which are publickly known; *ergo à fortiori* wager of law is not receivable. **[680]** But if in *detinue* the bailment be by another hand than the plaintiff's, yet the defendant shall wage his law: and the reason of the diversity is, that in a declaration in *detinue* the bailment is no necessary ingredient, and the plaintiff by alledging an unnecessary thing shall not bar the defendant from the benefit of waging his law. For if in *detinue* the defendant should plead *nihil detinet*, and put himself upon the country, and upon the trial it appeared that the defendant found the goods, instead of having them by the bailment of a third person, yet the plaintiff shall recover; so the *gît* of the action is not the delivery of the goods, but the detainer is the only material part of the action; and the whole point is, whether he detained the goods; and that is a matter of secrecy.

And he quoted 1 Inst. 295, that wager of law lies in debt upon an award, if the submission be by parol; which was urged to be grounded upon a notorious transaction, and by the interposition of strangers. But *per luy*, the award is not the ground of the action there, but the submission, which may be in private; for an award without a submission would be void, and therefore the submission is the ground-work, and what raises the duty: but the principal case here is not like any case in our books, where a wager of law is allowed. As to the case of *The Corporation of Glaziers*, which is relied on as a parallel case, admit that case to be law, (as I shall demonstrate it is not by and by) it is nothing like this case: for the Company of Glaziers brought an action upon a by-law made by them, to which the defendant pleaded *nihil debet*, and put himself upon his law, and so had day given him to wage his law; so it never came before the Court judicially to determine: but if that were law, there would be a vast difference between that case and this; for a by-law by a whole city, or other town corporate, is what all people that live or come within such city or town are bound to take notice of, without any more a-do; but a law made by a particular fraternity, or company within a city or town, none but the members of the same are bound to take notice of. 1 Bulst. 11. And surely a by-law by the Company of Glaziers in London, which only binds their own members, and is only for the better government of that private society, is not to be compared to a by-law by the Common Council of London, or by any other corporation of a publick concern. In the eighteenth year of Charles the Second, upon the Act of Common Council for restraining the number of carts in the city, **[681]** and an action brought for the penalty for breach of that law, the great objection was, that the party had not notice of the law, he being no member of the corporation; yet it being a law of the city, it was ruled, that every one that came into the city was bound to take notice of it: and this case differs therefore from all the reasons and authorities quoted concerning wagers of law. Then as to the case of amerciament in a court-baron, where it is said, that in debt upon a judgment in such a Court, wager of law will lie; which my brother Hatsell allows to be law, and alledges for reason of it, that they are matters of small and private concern, but only for a trifling sum of forty shillings, and the amerciament is only for small things, for the benefit of the lord, and not worth giving the country trouble to come to try them. But I must own I am not satisfied, that a wager of law will lie in that case, for two reasons, one which concerns the plaintiff, and the other the defendant; for the plaintiff, now after the recovery, he has sufficient proof to make out his cause of action; and now it ceases to be a matter of secrecy, being grounded upon a judicial proceeding of a Court at law, and why then should he be put to lose his debt by a wager of law of the defendant; for now it is not matter of that secrecy that

requires a wager of law. And the defendant now has a judgment against him, suppose upon the oath of witnesses; and he might have waged his law in the original suit below, and that he omitted to do, but let judgment go by default, or otherwise; and shall he now by his oath be admitted to falsify that judgment of a Court that had jurisdiction? Surely he shall not, nor is there any reason for it.

In many cases, where there are no deeds or specialty, no wager of law will lie. In account upon receipt by the hands of a third person it will not lie; or if it be brought against the bailiff of a manor it shall not lie; because, says the book, that is in the realty; and what is that to say? It is, because it is notorious to the country; because the country takes notice of his looking after the manor, and they have thereby an opportunity of knowing that he has received his rents, &c. So in debt upon a contract for a sum in gross, wager of law will lie; but if debt be brought for rent due upon a parol lease, it will not lie; and the reason is, because it is in the realty, and arises from the taking the profits of the land, and occupation of it in the country; and so the notoriety of the thing excludes the defendant from waging his law; and it is ridiculous to say, **[682]** that wager of law will lie in debt upon a judgment in a court-baron, because the money might be paid in private; for that would be a reason to wage law in all the cases before put; but it is to be considered that it is not the privacy of the payment, or the possibility thereof, that is the occasion of a wager of law, but that the ground of the action is secret; as if debt be brought upon a bond, with condition for the payment of money, the money may be paid privately, and thereby the bond is discharged, if payment could be proved; and yet in debt upon such bond wager of law will not lie, because the contract was by specialty; though the bond may be discharged by payment, and that the payment might be private; so it is plain the possibility of private payment will not intitle one to a wager of law. And the reason is the same here, for the duty arises upon a solemn Act made by the city assembled in their legislative capacity, and that is very notorious; and what then can intitle him to wage his law, but the possibility of payment in private; yet if the foundation of the action be publick and notorious, that shall never do it. There was a case in the King's Bench, 29 Car. 2, Rot. 92, where it was held, that if debt be brought upon a recovery in a court-baron, the defendant may wage his law. And that is the only case of any such judgment or authority that I meet with in the books; except it be the opinion of 49 Ed. 3, 3, which I value very little; the case was debt upon account stated before auditors, upon which it appeared that money was due to the plaintiff; there it is said, that in case money be recovered in a court-baron, and debt be brought upon that judgment, the defendant may wage his law: but who says this? not the Court, but the counsel at the Bar; and if you consider all that the counsel said, you will no more take it to be law than to be gospel; for they say, that for debt upon a recovery in a court-baron, or in a franchise, a wager of law would lie; and what is meant by franchise is commonly a Court of Record; for if the King by letters patent grant a franchise to hold a Court within such a precinct, it will be intended a Court of Record; for the King cannot grant a franchise to hold a court-baron in gross. And in truth in that case the whole Court were under a great mistake; for it being debt upon account stated before auditors, wager of law is therein taken away by the Statute of Westminster the Second, c. 11, whereby auditors have power to fine and imprison, *which necessarily makes them a Court of Record;* and therefore no wager **[683]** of law can be in debt upon such judgment; and by consequence no stress to be laid upon the authority of that book. But 34 Hen. 6, 49. Br. Ley Gager, 11, is of great authority; if debt be recovered in a Court of antient demesne, and an action be brought upon that recovery, no wager of law will lie against it; yet a Court of antient demesne is no more a Court of Record than a court-baron is; and no difference in this respect can be made between the two Courts. And therefore if wager of law does not lie in one, as the authority of that case is full that it does not, none will lie in the other.

There are two cases mentioned in *Pincheon's case* (*a*), concerning wagers of law, and the reason thereof. First, if one retain a painter, or other workman to serve him, who after brings debt for his wages, the master shall wage his law; but if it be a

(*a*) 9 Co. 88.

retainer upon the Statute of Labourers, he shall not wage his law; and the reason given by the book is, because in the case of the statute he is compellable to serve: but surely that can be no reason, for though he be bound to serve, the other is not bound to take him; but the reason is, because it is hard the master should be put to wage his law, but rather that the plaintiff should be put to prove his retainer by the statute. Another case is 28 H. 6, 4 b. One was a prisoner in the Tower for high treason, and the lieutenant finds him meat and drink, and for this brings debt, and the defendant was denied his law; and Co. in his 9 Rep. *ubi supra*, gives for reason, that the lieutenant was bound to find his prisoner with meat and drink; but that is not law, for the gaoler is not bound so to do; *vide* Pl. 68 a. And it is for the benefit of the prisoner that he shall not be put upon it, for the other must make out his charge, and not put the defendant to his oath. And another reason why he shall not wage his law is, because, while the prisoner is in his charge, the gaoler cannot take any security for his victuals from himself; for a bond from him in that case would be *ipso facto* void; and *ergo*, since he is disabled from taking a security from the prisoner, but barely his promise, it were hard to allow the prisoner to clear himself by his oath. Another reason why wager of law should not be allowed here is, that every by-law is grounded upon charter or prescription; if it be matter of record, it leaves no room for a wager of law; and if it be by prescription, it is time out of mind, and no man living can swear that off, or deny a prescription upon oath. It is true, a prescription is capable of proof, by shewing a usage of such a thing by **[684]** antient witnesses, which is an evidence only of a prescription. 1 Vent. 261. Wager of law was denied in debt for scavage arising by prescription. And lastly, a wager of law will not lie here, because this Act of Common Council does not affect the defendant only, but all the whole body of the city; and there is no case, where there is a penalty, to which all the men within such a jurisdiction, precinct, or city, are obnoxious, that a wager of law was allowed; and this answers all your cases of recoveries and amerciaments in Courts; for there none is affected but one; but this law is made to extend to the whole community of the city for all generations to come, and for aught I know to the day of judgment. Now as to the case of *The Company of Glaziers* before put, it is true, so far as it was a debt for the recovery of a penalty inflicted by a by-law, it is like this case, and a precedent for it: but how happened that matter? First, it was allowed by counsel on both sides, and the Court never heard of it but once upon a motion, and admission of the counsel of both sides; so it was a gudgeon swallowed, and so it passed without observation. And the case in Co. Ent. 118 is very like this: debt was brought for a fine set upon the defendant by the homage at the court-baron, grounded upon a custom to make laws for regulating their common, and inflicting a penalty on such as did inclose at inconvenient times; and a wager of law was offered there, and judgment is there for the defendant; for of common right the homage has no right to impose a penalty for such private offences, but it is only by custom that they can do it; *vide* 5 Co. *Chamberlain of London's case*. Mo. 276. 1 Leon. 203. The case indeed is not well reported, but upon comparing both the books together, it appears the wager of law was not admitted in that case.

The second point considerable is, whether here be a discontinuance? And surely it is, for it appears that the defendant came into Court, and appeared to a plaint levied against him the 15th of November, and his bail was given to appear at the next Court, which was held the day following, viz. the sixteenth, but there is no day given to him on record, or to the plaintiff, to appear on the sixteenth; but presently after bail taken, there is day given to the 20th of June, and every case ought to be continued from Court to Court, as in Westminster Hall from term to term, if it be not a real action, where long process is allowed. *Vide* 21 Hen. 7, 16, discontinuance is error by the common law; but by the 32 Hen. 8, c. —, it would be cured, if it **[685]** were after verdict; but this is upon demurrer. So the next thing considerable is, whether this be amendable? And surely it is not; for it is such a misprision as is not amendable by 14 Ed. 3, c. 6, or 8 H. 6, c. 12, for these statutes do not extend to amend any record but in errors, which are the misprision of clerks in making their entries on record; but a discontinuance is a fault of the Court, and that never was amended by any of these statutes; and many judgments have been reversed for it, as in 2 Cro. 211. If a Court once give a judgment they cannot after amend,

3 Cro. 412. *Ireland's case*, Yel. 169. 2 Cro. 260. 3 Cro. 619. And if a discontinuance were amendable by any of these statutes, there had been no need of the statute of 32 Hen. 8, —, that supplies the want of continuance after verdict. But if the record below be well, why may not we amend by that? And though the Court below be not of as high a nature as the Courts of Westminster-Hall, the Grand Sessions of Wales, or the County Palatine, yet if the record below had been originally well, and this fault had been only a slip in the clerk in transcribing, we ought to amend it, by the statute of 8 Hen. 6, for the record being well below, the omission was in the clerk; and though the very record be that which we have here, yet if it had appeared to us to have been well below, we ought to have amended by it. In the King's Bench, in error of a judgment of an Inferior Court upon the record certified it appeared there were but eleven jurors, which was the fatal error; but the book of the Inferior Court, where the names of the jurors were entered, was produced, and oath being made that the twelve there entered were sworn of the jury, the record was amended by that book; but here we find that the record was originally bad below, and amended below as soon as the exception was taken here. And in every day's practice, if the record entered on the roll be ill, yet if the paper-book in the office be well, we give them leave to amend by the book in the office; but if the paper-book be originally ill, and clandestinely amended, there we never let them amend their record by it.

Objection. You will give credit to our record, as if it were in Westminster-Hall, if the roll be amended by the Court of Common Pleas or King's Bench, when error is in the Chequer Chamber. *Answer.* Those Courts will amend nothing but what is amendable by law, at least it must be presumed they will not do it; besides, when in those Courts they amend the matter below, they come into the King's **[686]** Bench and alledge diminution, and thereupon the record is certified up, and then the Court above can never tell whether they have amended or not; if they certify it up upon diminution alledged, it will do well enough, and we shall not suppose they have done amiss. But no *certiorari* lies to this Court of the mayor, and that is the case of *Green* v. *Cole* in 2 Saund. 252. 1 Lev. 310.

The third great point is the manner of bringing of this action, to which there were two exceptions taken: the first is to the by-law, that it inflicts a penalty for the benefit of those that make the law. But that point has been already settled, and the by-law notwithstanding adjudged good; and the truth is, that objection has not weight enough to require an elaborate answer; for we must consider the City of London, as all other great towns are to be considered, a great community that have a legislative power intrusted to them for their better government, and can make laws to bind the property of those that live within that city or precinct, and also of all strangers whatsoever that come within the limits of their jurisdiction; and it was necessary and convenient they should have such power for the support of their Government; and it is so in all countries and forms of government whatever, whether monarchy, aristocracy, or democracy, or whatever order of government it be; for the supreme jurisdiction cannot have leisure to inspect into the small matters that concern the whole order and regulation of matters within that society or community, as they that are members of it shall. *Vide* Beaulieu de Rep. c. 2. Hob. 221, says that all corporations, as such, have power to make laws and ordinances, and need not special words in their patents to enable them thereunto. And if they have power to make laws, of necessary consequence they must have a power to inflict a penalty for the inforcing of that law; and here in England it must be a pecuniary one, for a corporal one it cannot be by the law of England, it being against Magna Charta, without a special custom. And this pecuniary penalty must be levied by distress, or action of debt; for there can be no other remedy. And surely it can be no exception, that this penalty goes to the use of the body politick, for it is most reasonable it should be so; for it is in the nature of damage for an injury done, and that injury is done to the body politick, whose laws are broke and despised, and therefore it is fit they should have the penalty; and to say that one who is free of the corporation should not be Judge, because **[687]** he is to have share of the penalty, is as ridiculous as groundless: and since this objection has had so little regard with us in the King's Bench, I wonder it should be so much insisted on now, especially since it has been

also rejected in the Common Pleas. I agree, where the City of London claims any freedom or franchise to itself, there none of London shall be judge or jury, for there they claim an interest to themselves against the rest of mankind; but here is only an act of government to exercise a power which they have by law. And it is not to be imagined that the aldermen of the city, in kindness to the body politick, would oppress the rest; and the freemen, who should try the fact, would be themselves obnoxious to the like penalty in time, and in their turns; and if there were any room for a presumption, it would be that they would favour private persons against the body politick, in regard of their own private interests, which would be concerned next time.

But the true great point is, that the Court is held before the mayor and aldermen, and the action brought in the names of the mayor and commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to sue, is the very person before whom the action is brought; and this cannot be by the rules of any law whatever, for it is against all laws that the same person should be party and Judge in the same cause, for it is manifest contradiction; for the party is he that is to complain to the Judge, and the Judge is to hear the party; the party endeavours to have his will, the Judge determines against the will of the party, and has authority to enforce him to obey his sentence: and can any man act against his own will, or enforce himself to obey? The Judge is agent, the party is patient, and the same person cannot be both agent and patient in the same thing; but it is the same thing to say that the same man may be patient and agent in the same thing, as to say that he may be Judge and party; and it is manifest contradiction. And what my Lord Coke says in *Dr. Bonham's case* in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, though it may do **[688]** several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party. An Act of Parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B. but it may make the wife of A. to be the wife of B. and dissolve her marriage with A.

Objection. My Lord Mayor, as he is head of the corporation, acts in his politick capacity, and judges in his natural capacity. It is true he acts in different capacities, yet the person is the same, and the difference of the capacities in which he acts does not make a difference; as the Bishop of London has two capacities, one as bishop, the other as I. S. but he cannot do an act in one capacity to inure to him in another capacity; as he cannot make a lease for years as he is bishop, to himself as he is I. S. nor *vice versa.*

Objection. It is an invisible body politick. It is true, but the head is visible as the bishop is, and he is the most conspicuous part of the corporation, and that without which there would not be a corporation existing; and it is impossible to get over the two judgments in Henry the Eighth's time, before cited by my brothers: the master and confrery of the hospital had the presentation to a rectory; they under their common seal present their master, without taking notice that he was their master, and it was held to be a void presentation, and that judgment was after affirmed upon writ of error; and in that case the difference is taken between presenting one of the members, and presenting the master; for if they had presented one of the members, it had been well; for if that member were set aside, yet still it would be a corporation. And when they present a member, it is a setting aside, or an exclusion of him for that purpose from the corporation; but if the master, who is the head, be set aside, then it ceases to be a corporation, and by consequence cannot do any corporate act, and then their presentation is void; so if this Court could be before the aldermen without the mayor, then this action might be well brought; but as, if the Chief Justice of Common Pleas bring an action in the Common Pleas, as it is his privilege to do, yet there he must not be named in the whole proceedings but

as plaintiff, and not so much as the *placita* shall be said to be before him, for then it would be error; and the *placita* shall be *coram Ed. Nevill, Joanne Powel, & Joanne Blincowe;* and if he take out the writ, it must be not **[689]** so much as tested in his own name, but in the name of the next senior Judge: so here, since the Court cannot be held without a mayor, this action which is brought in his name cannot be brought in that Court, and the lord mayor is a necessary constituent part of the city; *vide* 21 Edw. 4, 15, 151. 17 Edw. 3, 48. A burgess of a corporation had laid out money for the use of the corporation, and after being mayor, took the bond of the corporation for it to him in his natural capacity, and held void. And he allowed the case in 2 Ro. Ab. —, before cited, to be good law, but utterly exploded the reason given there: the case was, a member of a corporation brings an action in the Mayor's Court, and after the plaintiff was chosen mayor, and then judgment for him, and a writ of error brought, and the judgment affirmed; because, says the book, the judgment was not given by him alone, but by the Court; but if he be in the stile of the Court, he is a Judge of the Court, and it cannot be a Court without him. And though my Lord Roll was a very learned man, and that his Abridgment was published by my Lord Hale, perhaps the greatest man of the law that ever was, yet this reason might be overlooked by him; however, it is plain this reason is a senseless one, but the true reason is to be seen in 2 Hen. 4, 40. If A. sue in the Court of Mayor and Bailiffs, A. is made mayor, and it is not said in the record that he was made mayor, or it do not appear in the record that he was made mayor, there if the defendant do not come to the Court below, and plead this error in fact, he shall never after assign it for error; but if he had pleaded this error in fact, and had been overruled in it, he might have a writ of error; for one shall never take advantage of an error in fact, where he had an opportunity of pleading it; that is, if it be such an error in fact as does abate the writ; and if it be such an error in fact as does happen after the time of pleading is out, then the way is to bring an *audita querela;* as if after verdict between the day of Nisi Prius the plaintiff release to the defendant, he cannot plead it in Bank, but must have recourse to an *audita querela;* and if this exception had been taken upon the *habeas corpus* in Westminster-Hall, it would not have hindered a *procedendo,* because it was an error in the proceedings. And the *habeas corpus* is only to know the cause of detainer of the party in custody, and what is then to be judged of is only the return of the by-law; and if that **[690]** be good, we must remand, for to enter into an examination of the proceedings would be to preclude the plaintiff before his time.

Objection. Though the mayor be named in the plea, yet the recorder is Judge, and that we must take notice of as Judges by commission here in the city; where we are as much bound to take notice of the customs of the city and its Courts, as we should take of the customs of the Courts of Westminster-Hall when we sit there. *Answer.* The *placita* are virtually held before the mayor and aldermen, though in fact the recorder acts, and is as a deputy; and the steward of a Court who has a deputy cannot sue in the Court before his deputy; and a deputy acts, and of right ought to act, in the name of his principal.

Et per omnes Jud. reversetur.