Whether the Court of C. B. may grant a *habeas corpus* for persons not within the privilege of the Court. 1 Mod. 119, 284. 3 Keb. 358, 322. 2 Mod. 218. Vaugh. 135. State Trials, vol.

The case was, that Bushel and other jurors in London (for the trial of a traverse on an indictment against several persons for conventicling against the form of the statute lately made) were fin'd and imprison'd at the sessions in the Old Baily, because they gave their verdict *against full evidence and the direction of the Court in matter of law*, and so acquitted the prisoners. In this case it was first debated at the Bar, and on the Bench, whether the Common Pleas could award an *habeas corpus* in this case. Wild, Archer and Tyrel Justices. This Court may well award it, and for this cited Anderson part 1, 297, 298. 2 Inst. 615. Moor Rep. 839, 1132. Brownl. part 1, 33. Vaughan Chief Justice on the contrary, and he said, that some *habeas corpora's* are granted of course, others not without motion, and for this reason on motion, because it is not of necessity to be done of course, therefore there is no necessity for the granting it; for the Court ought to be satisfied that the party hath probable cause to be delivered. This Court has not power to grant it in general, but only in case of privilege, or excess of jurisdiction of an Inferior Court, in which case every one has the privilege of being discharged by the Courts of Westminster. This Court does not grant, because they have cognizance of the cause, but because it is a probable suggestion that this Court can deliver the party. If on the retorn the cause be expresly just, the party ought to be remanded, if expresly unjust, dis-**[14]**-charged, if doubtful, bailed. The writ is *ad subjiciend' & recipiend' qd' Cur' consideraverit & ut Cur' nostr. visa causa illa;* or *qd' de jure & consuetudine regni nostr' fuerit faciend' &c.* But this Court in criminal causes cannot do this. He urged that the want of precedents in this Court is a great argument that such writs are not grantable here. The writ moreover requires that the body *una cum die caption' habeat'*, by which the Court ought to be certified how long the party has been in custody; for if for a long a time and no proceedure against him, the Court ought to bail the prisoner though committed for felony or treason, which is improper for this Court that has no cognizance of *crimes;* for this Court is for Common Pleas, between subject and subject, but in a criminal case the plea is between the King and his prisoner. He cited in this case, 2 Inst. 53, *in margine* & 55 Westm. 1, cap. 15, and as to the authorities cited on the other side out of Anderson, he said that all the four causes there mention'd are of persons under

the protection and of this Court, and concluded that this Court ought not to grant the writ in this case. But on the opinion of the other 3 Judges the writ was granted And on another day the Sheriff of London, to whom the writ was directed, return'd it with the cause as above. And Maynard Serjeant argued that the cause was sufficient, or at least that the prisoner ought to be remanded; for he said that the imposition of the fine was a judgment in a Court of Record, which ought to be defeated by writ of error only, and not otherwise. As to the power of fining jurors, he cited 8 Ass. p. 35, where eleven jurors were fined, Yelv. p. 23, *Wharton's case*, Leonard part 2, 132, 135, and *Wagstaff's case*, 17 Car. 1, B. R. He denied that an attaint lies for the King on a false verdict in assise, but that it lies on a false verdict in an information for the King only, and not for the King and the informer, 3 Cro. 309, and thereupon he pray'd that the prisoner might be remanded. Ellis Serjeant for the prisoner. Good cause ought to appear to the Court, or the prisoner shall be discharg'd; general cause is not sufficient; as in the petition of right. Here is no certainty on the body of the return, which ought to be as certain as pleading, 22 E. 4, f. 40. It does not appear here what matter of law there was in the case. *Generale perit in incertitudine. Ex facto jus oritur.* This fact, whereon the law seems to arise, perhaps was not found by the jury. Neither is the time of the offence returned as it ought, for it may be be-**[15]**-fore the Act of Oblivion. As to the matter in law, he said that a juror cannot be fined for a verdict given according to his conscience. No fine on Judges for error; therefore none on the jury, which hath *divisum imperium;* and this pretended power of fining will confound the course of trials, 7 H. 4, f. 40. Pl. Com. 83, *Partridge's case*, *Rawlins's case*, in 4 Co. He said also that an attaint lies in this case, F. Attaint 60, 64. F. N. B. 107 b. And if an attaint lies, and a fine may also be imposed, the jury would be twice punished for the same offence, 42 E. 3, f. ult. In capital cases an attaint lies not for the King *in favorem vitæ*, otherwise in criminal. He denied *Wagstaff's case* to be law, and said that in Mich. 4 Car. 1 it was adjudg'd in the Exchequer against this case of *Wagstaff*, on a fine imposed by justices of peace, and pray'd that the prisoner might be delivered. On another day Vaughan Chief Justice delivered the opinion of the Court, and as to the first point, whether the cause returned be sufficient? In all returns *bonæ fidei* the cause ought to appear as certainly to the Judges, as to the persons who committed. In the present return, 1. That the jurors acquitted the prisoners *contra plenam evidentiam;* the Court here has no light to judge whether the evidence was full or sufficient, because the evidence it self is not exprest or exposed to the judgment of the Courts; for tho' the return of all evidence would be prolix, yet it ought to be returned; otherwise the remedy given by the judgment in *habeas corpus* will be taken away and defeated. *Non sunt longa quibus nihil est quod demere possis.* He confessed that all the evidence is not necessary, but some sufficient particular matter ought to be returned, by which it may appear *quod minus juste & contra sacramentum dederunt veredictum.* The stamp of authority given by the King ought to silence any inquiry into the discretion of a Judge; the King alone is the proper judge of the ability of his ministers, and the Ch. Justices are within the Statute of Scandal. Magnat. But this does not place the Judges out of a possibility of error; and for dishonest judgment Judges may be punished. Mirror of Justices reports that 44 were hanged for this cause, 2. Reason, it does not appear by this retorn that the jurors acquitted the prisoners corruptly, or that the evidence against them was manifest to the jurors, Bract. 288. Flet. b. 336, n. 9. It is the duty of a Judge to examine the jury, and of a juror to answer, and if he will not answer, or shall give a ver-**[16]**-dict contrary to their answer, in either case he is finable, Bract. 289, and he said that in this all the Judges except one were unanimous. He put this difference between the oath of a witness and that of a juror. The witness swears more generally on his senses, the juror by collection and inference, by the act and force of his understanding. He agreed *The Earl of Northumberland's case*, 5 H. 4, whereof mention is made in Coke, Jurisdict. cap. Parl. p. 23, that a retorn in general that he was committed for treason was admitted, on this reason, that in causes capital, the prisoner may demand his trial, which ought not to be denied, and then the particular fact ought to be put in the indictment; otherwise it is where the party is only to be remanded. As to the second part of the retorn, *quia dederunt veredictum contra direct' Cur' in materia legis*, he said that this is wholly insensible, for no jury can be charged in matter of

law; and if this retorn should be good, there will be no use of a jury. The direction of the Judge in civil pleas ought to be hypothetick, if the fact be found such, then for the plaintiff or defendant, but never positive or coercive, nor is the jury finable; for perhaps in attaint the first verdict shall be affirmed; and he said that all the Judges agreed, that in all the cases where an attaint lies, no fine ought to be imposed. But he held that an attaint does not lie in this case, tho' only criminal and not capital, and that there is no case at common law where an attaint has been brought against any particular person, Co. 2 Inst. W. 1, cap. 38, and he also said that no attaint was at common law, only in assise, Bract. 288, and no Statute of Attaint ought to be taken by equity, Regist. 122 a. which book he affirmed to be of the greatest authority in the law. No attaint on indictment, or appeal, which in former times was more frequent in capital cases than indictment. In his opinion a jury was not finable at common law, for thereof is *nec vela nec vestigium* in the old books, before the Statutes of Attaint; and if the Judge can fine by the common law, the power is not lost, for no statute has taken it away. Plato says *omnis scientia est quædam reminiscentia.* Therefore 1. Without a known fact, it is impossible to know the law on that fact. 2. The Judge cannot know the fact but by the evidence which the jury hath, and all their evidence he cannot know, for they may have other evidence than is deposed in open Court; for they may **[17]** have evidence of their personal knowledge, which may be directly contrary to the evidence deposed; they may also know the witnesses to be infamous; also evidence may arise on their view; in all these cases the jury cannot be coercively directed by the Court. 3. A fine imposed by the Judge does not take away an attaint, which perhaps may affirm the verdict, Dyer 201. 4. The jury is perjured if the verdict be against their own judgment, tho' by direction of the Court, for their oath obliges them to their own judgment, Hob. 227. Cro. Eliz. 416. 26 H. 8, c. 4. As to the objection out of 8 Ass. the fine there was for a misdemeanor of a jury, not for their verdict which is a judicial act, Br. Juror 46, and as to 41 Ass. 11, he denied it to be law, Fitz. Coron. 108. Hob. 114. In the case of *Watts and Braynes*, Cro. Eliz. the jury was fined for a manifest combination. But he denied the case of *Wharton*, Yelv. 23, & *Lannois*, Moor 730 to be law. As to the second point, whether this Court could discharge the prisoners, he cited the case of *Sir Anthony Roper*, Co. 12 Rep. as without any cause of privilege, and said though perhaps we may deny an *habeas corpus*, yet when it is granted, we ought to deliver the prisoner, if the cause returned be not sufficient, or perhaps the prisoner never will be discharged, for it may be that other insufficient causes will be still returned, 21 H. 6, 20. 34 H. 6, 15. 9 H. 6, 58. 9 E. 4, 47. And he held there was no necessity to quash the order on which the commitment was made. For this Court can deliver without quashing it, Co. Mag. Chart. 55. And thereupon the prisoner was discharged by judgment of the Court.