

Tempest to the Ground, yet might he without Danger rise of himself again: So he that hath the Administration of Justice, and in all his Occasions is guided and directed by the Rule of the Law, neither abusing his Authority, nor exceeding his Commission, standeth on a sure Ground which will bear him up at all Seasons: Sapiens est cogitare (saith Cicero) tantum sibi esse permillum, quantum sit commissum & creditum. And good was the Counsel (as those that follow it find) whosoever gave it, (viz.) Exceed not thy Commission: And albeit it is truly said, That Judicium est legibus & non exemplis; and as the Logician saith, Exempla demonstrant, non probant; yet undoubtedly it is a great Contentment and Satisfaction to an honest Mind and a good Conscience, especially in Cases that concern the Life and Liberty of a Man, to follow the Precedent and Example of grave and reverend Men: Howbeit so much as all good Laws are instituted, and made for the repelling of those Evils that most commonly happen, (For ad ea quæ frequentius accidunt jura adaptantur) and principally do respect the general Peace and Profit of the People: And therefore we use to say, That a Mischief is rather to be suffered than an Inconvenience; that is to say, that a private Person should be punished or damaged by the Rigour of the Law, than a general Rule of the Law should be broken, to the general Trouble and Prejudice of many; it is therefore very necessary, that the Law and Discretion should be concomitant; and the one to be an Accident inseparable to the other, so as neither Law without Discretion, lest it should incline to Rigour; nor Discretion without Law, lest Confusion should follow, should be put in Use: My Meaning hereby is not to allow of every Man's Discretion that sitteth on the Seat of Justice: (for that would bring forth a monstrous Confusion) But I mean that Discretion that ariseth upon the right Discerning, and due Consideration of the Time and necessary Circumstances of the Matter; and as we commonly use to say, That Common Law is nothing else but common Reason; and yet we mean thereby nothing less, than that common Reason wherewith a Man is naturally endued, but that Perfection of Reason which is gotten by long and continual Study: So in associating Discretion so near to Law, it is not meant to prefer to that Society each Man's Discretion, which commonly rather deserveth the Name of Affestation and Self-will, than of Discretion indeed: But that Discretion only we allow of in this Place, that either grave and reverend Men have used in such Cases before, or rises of the Circumstances of the Matter (as is aforesaid): As for Example, being not also impertinent to the Matter of our Treatise, if it were a Question, Whether in an Appeal of Mayhem, the Defendant were to be let to Bail or Mainprize, or no? It is necessary to be examined, whether the Manner of the Mayhem were horrible or heinous; for the Defendant may be denied Bail and Mainprize, whether the same were done upon a sudden Affray, or of the Plaintiff's Assault, or against the Intent of the Defendant, &c. For the Defendant may be let to Bail: And this I take to be a lawful Discretion; for to that End is the Book, and Reason of the Book in 6 H. 7. fol. 2. where in an Appeal of Mayhem, the Justices of the King's Bench denied the Defendant to be bailed; for that upon the Examination of the Matter it appeared to be most cruel and horrible, and therefore in Respect of the abominable Heinousness of the same, the Justices would not suffer the Defendant to be bailed. And with this agreeth the Opinion of Bracton, in the second Treatise of his third Book; ca. 8. Appellati vero de morte hominis, & de pace & Plagis periculosus saltem capiantur, & in Prisonam detruantur, & ibi custodiantur, donec per Dominum Regem per Pleg' dimittantur, vel per Judicem deliberentur, &c. Whereby I Note that he saith, Plag' periculosus, insinuating a Difference inter plagas periculosas & minus periculosas, in that he saith, Donec per Dominum Regem per pleg' dimittantur, it is to be understood, until by that Court where the Offence is to be determined and judged they be let to Bail; and this Particular may suffice to the Resolution of the General.

To conclude, The Author of all Wisdom and true Knowledge, thought it requisite, that those that were Judges of the Earth, should be both wise and learned, whom I beseech God to bless with his true Knowledge and Wisdom.