

C H A P. XIV.

Concerning levying of war against the king.

THE *jus gladii*, both military and civil, is one of the *jura majestatis*, and therefore no man can levy war within this kingdom without the king's commission. *Co. P. C. p. 9.* See the statute, or rather proclamation (a) *de defensione portandi arma*, wherein it is recited by the king, that the prelates, earls, ^{and} ~~and~~ commons, ^{and} ~~and~~ commonalty illoque *assembles en eviement sur cest besoyn ont dit, que a nous appent & de nous par nostre royal seigneur de fendre fortment des armes, & de tout autre force contre nostre pees, a tous les feitz, que nous plerra (b);* and hence it is in all declarations and indictments touchings things done against the peace, the conclusion goes *contra pacem domini regis*.

It is true, there have been great disputes in this kingdom touching the disposition of the *militia* of this kingdom, which are now all settled, and declared to be the right of the crown by the statutes of 13 *Car. 2. cap. 6.* and 13 & 14 *Car. 2. cap. 3.*

Now as to this clause of high treason, *Ou si home levy guerre contre nostre seigneur le roy en son realme.*

To make a treason within this clause of this statute there must be three things concurring.

- I. It must be a *levying of war*.
- II. It must be a *levying of war against the king*.
- III. It must be a *levying of war against the king in his realm*.

I. For the first of these, the act saith *levy guerre*; what shall be said a *levying of war*, is in truth a question of fact, and [131] requires many circumstances to give it that denomination, which may be difficult to enumerate or to define; and commonly is expressed by the words *more guerrino arraiati*.

As where people are assembled in great numbers armed with weapons offensive, or weapons of war, if they march thus armed in a body, if they have chosen commanders or officers, if they march *cum*

(a) In the seventh year of Edward I.

(b) This statute is only a proof of the king's power to issue his proclamation

against coming armed to the parliament. *Vide Rot. Parl. 25 H. 3. pars. 1. n. 58. dorse.*

cum vexillis explicatis or with drums or trumpets, and the like; whether the greatness of their numbers, and their continuance together doing these acts may not amount to *more guerrino arraiati*, may be considerable.

But a bare conspiracy or consultations of persons to levy a war, and to provide weapons for that purpose; this, tho it may in some cases amount to an overt-act of compassing the king's death, yet it is not a levying of war within this clause of this statute; and therefore there have been many temporary acts of parliament to make such a conspiracy to levy war treason during the life of the prince, as 13 *Eliz. cap. 1.* 3 *Car. 2. cap. 1.* and others. *Vide accordant Co. P. C. p. 10.*

Again, the actual assembling of many rioters in great numbers to do unlawful act, if it be not *modo guerrino* or *in specie belli*, as if they have no military arms, nor march, or continue together in the posture of war, may make a great riot, yet doth not always amount to a levying of war: *vide statute 3 & 4 E. 6. cap. 5. 1 Mar. cap. 12. (c).*

II. As to the second; the statute saith, (*against us*) to make it therefore treason, it must be a levying of war against the king: otherwise, tho it be *more guerrino*, and a levying of war, it is not treason. 1. Therefore if it be upon a private quarrel, as many times it happened between lords marchers, tho it be *vexillis explicatis*, it seems no levying of war against the king. 2. If it be only upon a private and particular design, as to pull down the inclosures of such a particular common, it is no levying of war against the king. *Co. P. C. p. 9.* 3. But a war levied against the king is of two sorts, 1. Expressly and directly, as raising war against the king or his general and forces, or to surprize or injure the king's person, or to imprison him, or to go to his presence to enforce him to [132] remove any of his ministers or counsellors, and the like. 2. Interpretatively and constructively, as when a war is levied to throw down inclosures generally, or to increase servants wages, or to alter religion established by law; and many instances of like nature might be given; this hath been resolved to be a war against the king, and treason within this clause; and the conspiring to levy such a war is treason, tho not within the act of 25 E. 3. yet by divers temporary acts of parliament, as 13 *Eliz.* during the queen's life, 13 *Car. 2.* during our king's life. *Co. P. C. p. 10.*

(c) See also 1 *Geo. 1. cap. 5.*

The first resolution, that I find of this interpretative levying of war, is a resolution cited by my lord *Coke*, *P. C.* p. 10. in the time of *Henry VIII.* for inhausing servants wages; and the next in time was that of *Burton*, 39 *Eliz. Co. P. C.* p. 10. (*d*) for raising an armed force to pull down inclosures generally: this is now settled by these instances, and some of the like kind hereafter mentioned; the proceeding against *Burton* and his companions was not upon the statute of 25 *E. 3.* which required, that in new cases the parliament should be first consulted; but upon the statute of 13 *Eliz.* for conspiring to levy war, which hath not that clause of consulting the parliament in new cases, and therefore seems to leave a latitude to this court to make construction greater, than that was left by the statute of 25 *E. 3.*

These resolutions being made and settled we must acquiesce in them; but in my opinion, if new cases happened for the future, that have not an express resolution in point, nor are expressly within the words of 25 *E. 3.* tho they may seem to have a parity of reason, it is the safest way, and most agreeable to the wisdom of the great act of 25 *E. 3.* first to consult the parliament and have their declaration, and to be very wary in multiplying constructive and interpretative treasons, for we know not where it will end.

But particular instances will best illustrate this whole learning, which I shall subjoin, tho somewhat promiscuously, as they occur to my memory.

[133] A conspiring or compassing to levy war is not a levying war within this act, unless the war be levied; this appears, *Co. P. C.* p. 9. and also by those many acts of parliament above-mentioned, which were but temporary and limited to continue during the life of the king or queen, whereby it is specially enacted, that such compassing to levy war shall be treason; which needed not have been, if it had been treason by the statute of 25 *E. 3.* *Vide* 1 & 2 *P. & M.* cap. 10. 1 *Eliz.* cap. 5. 13 *Eliz.* cap. 1. 13 *Car.* 2. cap. 1.

And therefore in the case of *Robert Burton* and others, that conspired to assemble themselves and pull down inclosures, and to gain arms at the lord *Norris's* house, and to arm themselves for that purpose, *Co. P. C.* 10. they were indicted and attainted purely upon the statute of 13 *Eliz.* cap. 1. whereby conspiring to levy war is made treason.

But if divers conspire to levy war, and some of them actually levy

it, this is high treason in all the conspirators, because in treason all are principals, and here is a war levied (e).

If divers persons levy a force of multitude of men to pull down a particular inclosure, this is not a levying of war within this statute, but a great riot; but if they levy war to pull down all inclosures, or to expulse strangers, or to remove counsellors, or against any statute, as namely the statute of *Labourers*, or for inhancing salaries and wages, this is a levying war against the king, because it is generally against the king's laws, and the offenders take upon them the reformation which subjects by gathering power ought not to do. *Co. P. C. p. 9. 16. Vide the act 3 & 4 E. 6. cap. 5.* "If any to the number of twelve shall intend, go about, practise, or put in ure by force to alter the religion established by law, or any other laws, and depart not within an hour after proclamation, or after that shall willfully in a forcible manner attempt to put in ure the things above specified, then it is high treason."

If men levy war to break prisons to deliver one or more particular persons out of prison, wherein they are lawfully imprisoned, unless such as are imprisoned for treason; this upon advice [134] of the judges upon a special verdict found at the *Old Bailey*, was ruled not to be high treason, but only a great riot 1668. but if it were to break prisons, or deliver persons generally out of prison, this is treason, *Co. P. C. p. 9.*

There was a special verdict found at the *Old Bailey*, anno 20 Car. II. (f), that *A. B. and C.* with divers persons to the number of an hundred assembled themselves *modo guerrino* to pull down bawdy-houses, and that they marched with a flag upon a staff, and weapons, and pulled down certain houses in prosecution of their conspiracy; this by all the judges assembled, except one (g), was ruled to be levying of war, and so high treason within this statute; and accordingly they were executed.

But the reason that made the doubt to him that doubted it, was 1. Because it seemed but an unruly company of apprentices, among whom that custom of pulling down bawdy-houses had long obtained, and therefore was usually repressed by officers, and not punished as traitors. 2. Because the finding to pull down bawdy-houses might reasonably be intended two or three particular bawdy-houses, and the

(e) *Co. P. C. p. 9 Kelyng, p. 19:*

(f) *Vide Kelyng, p. 70. &c.*

(g) This was our author himself. *Vide Kelyng, 76.*

indefinite expression should not *in materia odiosa* be construed either universally or generally. And 3. Because the statute of 1 *Mar. cap. 12.* though now discontinued, makes assemblies of above twelve persons and of as high a nature only felony, and that not without a continuance together an hour after proclamation made; as namely an assembly to pull down bawdy-houses, burn mills or bays, or to abate the rents of any manors, lands or tenements, or the price of victuals, corn or grain; or if any person shall ring a bell, beat a drum, or sound a trumpet, and thereby raise above the number of twelve for the purposes aforesaid, which are raised accordingly and do the fact, and dissolve not within an hour after proclamation, or that shall convey money, harness, artillery, it is enacted to be felony; and if any above the number of two, and under twelve, do practise with the force of arms unlawfully, and of their own authority to kill any of the queen's subjects, to dig up pales, throw down inclosures of
 [135] parks, pull down any house, mill, or burn any stack of corn, or abate rents of manors, lands or tenements, or price of corn or victual, and do not depart within an hour after proclamation, and continue to attempt to do or put in ure any of the things above-mentioned, they are to have a year's imprisonment.

And the statute of 3 & 4 *E. 6. cap. 5.* is to the same purpose, only if the number of forty, or above, come together to do such acts as before, or any other felonious, rebellious, or traitorous acts, and continue together two hours, it is made high treason (*h*).

But yet the greater opinion obtained, as it was fit; and these apprentices had judgment, and some of them were executed, as for high treason.

Yet this use may be made of those statutes: 1. That there may be several riots of a great and notorious nature, which yet amount not to high treason. 2. But again, those acts and attempts possibly might not be general, but might be directed only to some particular instances, as for the purpose, not to pull down all houses or mills, but some special ones, which they thought offensive to them; nor to abate the rents of all manors, but of some particular manor, whereof they were tenants; nor to make a general abatement of the prices of victuals or corn, but in some particular market, or within some precinct; and so crosseth not the general learning before given of constructive treason. 3. It seems by that act also, they did not take the bare assembly to

that intent to be a sufficient overt-act of levying of war; that was but an attempt and putting in ure, unless they had actually begun the execution of that intention, going about, practising or putting in ure; for this act puts a difference between the same and the doing thereof.

In the parliament of 20 E. 1. now printed in Mr. Ryley, p. 77. it appears there arose a private quarrel between the earls of Gloucester and Hereford, two great lords marchers; and hereupon divers of the earl of Gloucester's party with his consent *cum multitudine tam equitum quam peditum exierunt de terra ipsius comitis de Morgannon cu n° vexillo de armis ipsius comitis explicato versus terram comitis Heref' de Brecknock, & ingressi fuerunt terram illam per spatium duarum iucarum, & illam deprædati fuerunt, & bona illa deprædata usque in terram dicti comitis Glocestriæ adduxerunt*, and killed many, and burnt houses and committed divers outrages; and the like was done by the earl of Hereford and his party upon the earl of Gloucester: they endeavoured to excuse themselves by certain customs between the lords marchers; by the judgment of the lords in parliament their royal franchise, were seized as forfeited during their lives, and they committed to prison, till ransomed at the king's pleasure.

Altho here was really a war levied between these two earls, yet in as much as it was upon a private quarrel between them, it was only a great riot and contempt, and no levying of war against the king; and so neither at common law, nor within the statute of 25 E. 3. if it had been then made, was it high treason.

It appears by *Walsingham sub anno 1403.* a great rebellion was raised against Henry IV. by Henry Percy son of the earl of Northumberland and others: the earl gathered a great force, and actually took part with neither, but marched with his force, as some thought, towards his son, and, as others thought, towards the king *pro redintegrando pacis negotio*; he was hindered in his march by the earl of Westmoreland and returned to his house at *Werkworth*; the king had the victory; the earl petitioned the king; the whole fact was examined in parliament, *Rot. Parl. 5 H. 4. n. 12.* The king demanded the opinion of the judges and his counsel touching it: the lords protest the judgment belongs in this case to them; the lords by the king's command take the business into examination, and upon view of the statute of 25 E. 3. and the statute of Liveries "*Adjurerent, qe ceo, qe fuit fait par le counte, nest pas treason, ne felony, mes trespasss tantselement, pur quel trespasss le dit counte deust faire fine & ransom a volonte du roy;*" but Henry the son was attaint of treason.

It appears not what the reason of that judgment was, whether they thought it only a compassing to levy war, and no war actually levied by him, because not actually joined with his son; or whether they thought his intention was only to come to the king to mediate peace, and not to levy a war, nor to do him any bodily harm; that it was indeed an offense in him to raise an army without the king's commission, but not an offense of high treason, because it did not appear that he raised arms to oppose the king, but possibly to assist him; but whatever was the reason of it, it was a very mild and gentle judgment, for the earl was doubtful of a more severe judgment: *nota*, he returns thanks to the lords and commons *de leur bone & entye coers a lui monstre*, and thanks the king for his grace.

The clause in the statute of 25 E. 3. *If any man ride armed covertly or secretly with men of arms against any other to slay, rob, or take him, or to detain him, till he hath made fine or ransom, or have his deliverance, it is not in the mind of the king or his council, that in such case it shall be judged treason, but shall be judged felony or trespass according to the laws of the land of old times used, and according as the case requireth; and if in such case or other like (i) before this time any judges have judged treason, and for this cause the lands and tenements have come to the king's hands as forfeited, the chief lords of the fee shall have the escheat.*

This declares the law, that a riding armed with men of arms upon a private quarrel or design against a common person is not a levying of war against the king (*k*); and the especial reason of the express adding of this clause seems to be in respect of that judgment [138] of treason given against Sir John Gerberge, Trin. 21. E. 3. Rot. 23. Rex. and at large before mentioned, chap. 11. which judgment is in effect repealed by this act.

It appears by Sir F. Moore's Rep. n. 849. (*l*) the earl of Essex was arraigned and condemned for high treason before the lord high steward, whereupon it was resolved by the justices, 1. That when the queen sent the lord keeper of the great seal (*m*) to him, commanding

(i) *Vide simile* H. 26. E. 3. *coram rege*, Rot. 30. Rex. Hale.

This case was in the county of Essex, and was no more than this; Sir John Fitzwau-
ter and William Baltrip his steward, &c. were presented by juries of divers hundreds for taking men by force, and detaining them till they paid fines for their ransom, for exacting and extorting money from others, and for several great and enormous riots, misdemeanors and trespasses in the county of Essex, *attractando sibi rega-*

lem potestatem, upon which Sir John Fitzwau-
ter surrendered himself, and was committed to the Tower of London, and Baltrip was outlawed, who afterwards pleaded the king's pardon *pro felonis, conspiratione, manutenentia & transgressionibus prædictis, necnon pro utlagariis occasione præmissorum in ipsum promulgatis*, upon which he was discharged *sine die*.

(*k*) Co. P. C. p. 10.

(*l*) p. 620.

(*m*) And others of her council.

him

him to dismiss the armed persons in his house and to come to her, and he refused to come, and continued the arms and armed persons in his house, that was treason. 2. That when he went with a troop of captains and others from his house in the city of *London*, and there prayed aid of the citizens in defense of his life, and to go with him to the queen's court to bring him into the queen's presence with a strong hand, so that he might be powerful enough to remove certain of his enemies, that were attendant on the queen, this was high treason, because it tends to a force to be done upon the queen, and a restraint of her in her house; and the fact in *London* was actual rebellion, tho he intended no hurt to the person of the queen. 3. That the adherence of the earl of *Southampton* to the earl of *Essex* in *London*, tho he did not know of any other purpose than of a private quarrel, which the earl of *Essex* had against certain servants of the queen, was treason in him, because it was a rebellion in the earl of *Essex*. 4. That all they, that went with the earl of *Essex* from *Essex*-house to *London*, whether they knew of his intent or not, were traitors, whether they departed upon the proclamation or not; but those, that suddenly adhered to him in *London*, and departed upon the proclamation made, were within the proclamation to be pardoned: there were other points resolved touching the manner of his trial, whereof hereafter.

The whole history of *Essex* his treason and the proceeding thereupon is set forth at large by *Camden anno 44 Eliz. p. 604. & sequentibus*, wherein the charge of his indictment appears to be, that he and his accomplices had conspired to deprive the queen of her crown and life, having consulted to surprize the queen in the court; and that they had broken out into open rebellion by imprisoning the counsellors of the realm, by stirring up the *Londoners* to rebellion by tales and fictions, by assaulting the queen's faithful subjects in the city, and defending the house against the queen's forces; so that the great part of the indictment was compassing the queen's death, and the rest of the charge were the overt-acts, which was treason within the statute of 25 E. 3. with which my lord *Coke* agrees, *P. C. p. 12.*

If divers persons levy war against the king, and others bring them relief of victuals *pro timore mortis*, & *recesserunt quam citò potuerunt*, this was adjudged not to be a levying of war, because *pro timore mortis*; *quare*, if the same law be in case of marching with them in their company for fear of death. *Co. P. C. p. 10. vide sup. cap. 8. Mich. 21 E. 3. Rot. 101. Linc. coram rege. Illi, qui coacti fuerunt ad denarios recipiendos*

piendos & similiter coacti juraverunt, dimittuntur per curiam per manucaptionem, quia sic in personis ipsorum nihil mali reperitur, in case of a great riot, not unlike a levying of war, for which they were indicted of treason.

Rot. Par. 17 R. 2. n. 20. upon the complaint of the dukes of Aquitain and Gloucester, shewing that Thomas Talbot and others his adherents by confederacy between them *fauxment conspirerent pur tuer les dits ducs uncles le roy & autres persones grants de realme, & puss'accomplir le malice susdit le dit Thomas & les autres misrèrent tout loſr poyar, come notoirement est conus, & le dit Thomas ad en grand party confesse, en anientisment des estats & de loys de vostre réalme, & sur ceo firent divers gents lever armes, & arrayes a feire de guerre en assemblees & congregations a tres grant & horrible number en divers parties en les countie de Cestre,* and pray that it may be declared in this parliament the nature, pain and judgment of this offense: the conclusion whereof was thus:

“ *Est avys au roy & a les seigniors de cest parlement en droit de mesne la bille touchant Thomas Talbot, que la matter contenu en la dite bill est overt & haut treason, & touche la person du roy & tout son realme, & par treason le roy & tous les seigneurs susdits adjug-* [140] *gent & declarant;*” and thereupon writs of proclamation for

his appearance in the king's bench are ordered to issue for his appearance in one month, or otherwise to be attaint of treason (n): vide *Paf. 17 R. 2 B. R. Rot. 16. Rex.* Writs of proclamation issued accordingly to the sheriffs of Yorkshire and Derbyshire, and the sheriffs returned *non est inventus*; Talbot afterwards came and rendered himself, and was committed to the Tower, and afterwards a *Superfedeas* came for his enlargement (o).

But this declaration being only by the king and house of lords is not a conclusive or a sufficient declaration of treason according to the purview of this statute, but yet it was a real levying of war against the king, because done *more guerrino* and by people arrayed *de fet de guerre*, as in *Bensted's* case hereafter mentioned; but had it been a bare conspiracy, it had not been treason, as appears by the special statute of 3 H. 7. cap. 14. whereby a conspiracy to kill the king without an

(n) And all persons, that shall receive the said Sir Thomas Talbot within the realm of England, after the said month elapsed from the time of the said proclamation, are declared guilty of high treason upon conviction of such harbouring or receiving.

(o) The *Superfedeas* was not expressly for his enlargement, *Sed quod cuicumq; processui versus ipsum Thomam Talbot ex causis prædictis ulterius faciendo superfideant, quousque aliud a rege inde habuerint in mandatis.*

overt-act, (for then it were treason within the statute of 25 E. 3.) or a conspiracy to kill any of his privy council and certain great officers, tho the event followed not, is made felony.

See for instances of very great riots with multitudes of persons *modo guerrino arraiati*, which yet amounted not to high treason, because upon particular quarrels and differences between private persons. *Claus. 5 E. 2. M. 4. inter Griffinum de Pole & Johannem de Cherleton p^r castro de Pole. Pat. 8 E. 4. part 1. n. 7. dor^s.* between the citizens and bishop of Norwich (*p*). *Rot. Parl. 5 R. 2. n. 45.* between the town and university of Cambridge. *Rot. Parl. 11 H. 4. n. 37. & sequentibus*, between Hugh de Erdeswick and others touching the castle of *Bothall*. *Rot. Parl. 13 H. 4. n. 12.* between the lord *Rofs* Sir Robert Tyrhyt touching Turbary in *Wroughtly*. *Rot. Parl. 4 H. 5. n. 15.* between Robert Whittington and Philip Lingdon and others. *H. 26 E. 3. Rot. 30. Rex Fitzwauter's* [141] case (*q*).

All which, tho they were enormous riots, and done *more guerrino*, yet being private and particular quarrels, not much unlike that between the earls of Gloucester and Hereford, did not amount to high treason, but contempts, riots; or, if death ensued, felony, as the case required.

But going in a warlike manner with drums and arms to surprize the archbishop of Canterbury, who was a privy counsellor, it being with drums and a multitude (as the indictment was) to the number of three hundred persons, was ruled treason by all the judges of England, and the offenders had judgment accordingly; and at the same time by ten of the judges it was agreed, that the breaking of prison, where traitors were in durance, and causing them to escape was treason, altho the parties did not know that there were any traitors there, upon the case of 1 H. 6. 5. *b.* and so to break a prison where felons are, whereby they escape, is felony without knowing them to be imprisoned for such offense. *P. 16 Car. Crok. Thomas Bensted's case (r).*

The case of Sir John Oldcastle for levying of war against the king is entered *Rot. Parl. 5 H. 5. n. 11.*

(*p*) This is not to be found among the records.

(*q*) Nicholas Brundish and others to the number of one hundred were sent by Sir John Fitzwauter armed *platis, gladiis, bohelariis, arcibus & sagittis ad modum guerræ* to seize and take *boves, asinos, &c.* of Thomas Hubert in Herlawr upon the lands of the said Thomas, *quas tenuit de aliis dominis & nihil de ipso Johanne Fitzwauter;*

accordingly they did so, and carried them away to manors belonging to the said Sir John; but neither this riot, nor any other the facts, which he or his accomplices were indicted for, were conceived to amount to treason, since none of them were arraigned of more than felony; *vide supra in notis, p. 137.*

(*r*) *Cro. Car. 583. W. Jones 455.*

The

The twenty-fifth of *September anno domini* 1413, *Thomas* archbishop of *Canterbury* the pope's legate by his sentence definitive declared Sir *John Oldcastle* lord *Cobham* an heretic, especially in the point of the sacrament of the eucharist and penance, excommunicated him, *relinquentes ipsum ex nunc tanquam hæreticum judicio sæculari (f)*.

Hill. 1 *H.* 5. *Rot.* 7. *inter placita regis, Middlesex*, there is an indictment against him before certain commissioners of *oyer and [142] terminer of London and Middlesex*, returned into the king's bench to this effect (t):

“ *Quod Johannes Oldcastell de Coulyng in com' Kane' chivaler, &*
 “ *alii lollardi vulgariter nuncupati, qui contra fidem catholicam di-*
 “ *versas opiniones hæreticas & alios errores manifestos legi catholicæ*
 “ *repugnantes, a diu est, temerariè tenuerunt opiniones & errores*
 “ *prædictos manutenere, aut in facto minimè perimplere valentes,*
 “ *quam diu regia potestas & tam status regalis domini nostri regis,*
 “ *quàm status & officium prælatiæ dignitatis, infra regnum Angliæ*
 “ *in prosperitate perseverarent; falsò & proditoriè machinando tam*
 “ *statum regium quàm statum & officium prælatorum, nec non or-*
 “ *dines religiosorum infra dictum regnum Angliæ penitus adnullare*
 “ *ac dominum nostrum regem, fratres suos, prælatos & alios magna-*
 “ *tes, ejusdem regni interficere, nec non viros religiosos, relictis cul-*
 “ *tibus divinis & religiosis observantiis, ad occupationes mundanas*
 “ *provocare; & tam ecclesias cathedrales, quàm alias ecclesias & do-*
 “ *mos religiosas de reliquiis & aliis bonis ecclesiasticis totaliter spo-*
 “ *liare ac funditus ad terram prosternere, & dictum Johannem Old-*
 “ *castell regentem ejusdem regni constituere, & quamplura regimina*
 “ *secundum eorum voluntatem infra regnum prædictum, quasi gens*
 “ *sine capite, in finalem destructionem tam fidei catholicæ & cleri,*
 “ *quam statûs & majestatis dignitatis regalis, infra idem regnum or-*
 “ *dinare, falsò & proditoriè ordinaverunt & proposuerunt, quòd ipsi*
 “ *in simul cum quampluribus rebellibus domini regis ignotis ad nu-*
 “ *merum viginti millium hominum de diversis partibus regni Angliæ*
 “ *modo guerrino arraiatis privatim insurgerent, & die Mercurii proxi-*
 “ *mo post festum Epiphanie domini anno regni regis nunc primo*
 “ *apud Villam & parochiam sancti Egidii extra barram veteris Templi*

(f) See *State Tr.* Vol. I. p. 42.

(t) See *State Tr.* Vol. VI. Appendix p. 4. Fox in his acts and monuments, Vol. I. p. 655. brings several arguments to prove this indictment to be a forged one; but

whatever the indictment was, there is reason sufficient to believe the pretended conspiracy was so. See *Rapin's history* sub anno 1414.

“ London in quodam magno campo ibidem unanimiter convenirent
 “ & infimul obviarent pro nefando proposito suo in præmissis pe-
 “ rimplendo, quo quidem die Mercurii apud Villam & pa-
 “ rochiam prædictas prædicti Johannes Oldcastell & alii in [143]
 “ hujusmodi proposito proditorio perseverantes prædictum dominum
 “ nostrum regem, fratres suos, viz. Thomam ducem Clarencie, Jo-
 “ hannem de Lancastre, & Humfridum de Lancastre, nec non præ-
 “ latos & magnates prædictos interficere, nec non ipsum dominum
 “ nostrum regem & hæredes suos de regno suo prædicto exhæredare,
 “ & præmissa omnia & singula, nec non quamplura alia mala & in-
 “ tolerabilia facere & perimplere, falsò & proditoriè proposuerunt &
 “ imaginaverunt, & ibidem versus campum prædictum modo guerrino
 “ arraiati proditoriè modo insurrectionis contra ligeantias suas equi-
 “ taverunt ad debellandum dictum dominum nostrum regem, nisi
 “ per ipsum manu forti gratiosè impediti fuissent, quod quidem in-
 “ dictamentum dominus rex nunc certis de causis coram eo venire
 “ fecit terminandum——Per quod præceptum fuit vic’ quod non
 “ omitteret, &c. quin caperet præfatum Johannem Oldcastell, fi, &c.
 “ & salvo, &c.” upon this indictment removed into the king’s bench
 he was outlawed.

All this record and process at the request of the commons was re-
 moved into parliament, and in the presence of the *custos regni*, lords,
 and commons was read, and expounded in *English* to Sir John Old-
 castle, and it was demanded what he could say why execution should
 not be done upon him upon that utlary; and he saying nothing in his
 excuse “ *pur que agard est en mesme le parlement per les seigneurs avants*
 “ *dicts, de l’assent de le dit gardein, & a la pryer suisdit, qe le dit*
 “ *John, come traytour a dieu & heretique noitroirement approve & ad-*
 “ *jugge, come peirt per un instrument l’archevesque consue ala dors de*
 “ *cest roll, & come traytour a roy & a son roialme, soit amesne a la*
 “ *Tower de Londres, & d’illoques soit treins per my le city de Lon-*
 “ *dres, tanque as novel furches en le paroehe de St. Giles hors de la*
 “ *barre de viel Temple de Londres, & illoques soit pendus, & ars*
 “ *pendant (u).*

How this nobleman was pursued by the ecclesiastics, and [144]
 the whole story is set down by *Walsingham*.

(u) The author of the trial of Sir John
 Oldcastle says, that this sentence was in pur-
 suance of an act of parliament, which ap-

pointed that punishment in those cases.
 See *State Tr. Vol. I. p. 49.*

That which I observe in it is, 1. That the indictment is principally founded upon that article of this statute of compassing the king's death, and yet the overt-act is an assembly to levy war, and actual levying of war. 2. Altho this indictment is not expressly upon this clause of levying of war, for that is not the principal charge of the indictment, but compassing the king's death, yet the marching with a great army to St. *Giles's modo guerrino arraiati* was an express levying of war, tho there were no blow yet struck. But 3. it seems their first meeting to contrive their coming to St. *Giles's*, tho it might be an overt-act to compass the king's death, and so treason within the first clause of the statute, yet was not an actual levying of war, and so not treason within that clause of the statute; but their actual marching in a body *modo guerrino & modo insurrectionis* might be a levying of war within the statute. 4. That actual levying of war, tho it be a treason, upon which *Oldcastle* might have been indicted, yet it was also an overt-act to serve an indictment for compassing the king's death, as hath been shewed at large before.

If there be an actual rebellion or insurrection. it is a levying of war within this act; and by the name of levying of war it must be expressed in the indictment. *Co. P. C. p. 10.*

And in *Anderson's Rep. part 2 n. 2.* after *Trinity-term 37 Eliz.* (x) before the two chief justices, master of the rolls, baron *Clerk* and *Ewens*, the case was, that divers apprentices of *London* and *Southwark* were committed to prison for riots, and for making proclamation concerning the prices of victuals, some whereof were sentenced in the star-chamber to be set in the pillory and whipt; after which divers other apprentices and one *Grant* of *Uxbridge* conspire to take and deliver those apprentices out of ward, to kill the mayor of *London*, and to burn his house, and to break open two houses near the *Tower*, where there were divers weapons and arms for three hundred men, and there to furnish themselves with weapons; after which divers apprentices devised libels, moving others to take part with [145] them in their devices, and to assemble themselves at *Bun-hill* and *Tower-hill*; and accordingly divers assembled themselves at *Bun-hill*, and three hundred at the *Tower*, where they had a trumpet, and one that held a cloak upon a pole in lieu of a flag, and in going towards the lord mayor's house the sheriffs and sword-bearer with others offered to resist them, against whom the apprentices offered violence.

And it was agreed by the judges referees, that this was treason within the statute of 13 *Eliz.* for intending to levy war against the queen; for they held, that if any do intend to levy war for any thing, that the queen by her laws or justice ought or may do in government as queen, that shall be intended a levying of war against the queen; and it is not material, that they intended no ill to the person of the queen, but if intended against the office and authority of the queen, to levy war, this is within the words and intent of the statute, and hereupon *Grant* and divers others were indicted and executed.

And *eodem libro n. 49. (y)* the case of *Burton* mentioned by my lord *Coke, P. C. p. 10.* is reported, *viz.* in the county of *Oxford* divers persons conspire to assemble themselves, and move others to rise and pull down inclosures, and to effect it they determined to go to the lord *Norris's* house and others, to take their arms, horses, and other things, and to kill divers gentlemen, and thence to go to *London*, where they said many would take their parts; and this appeared by their confessions: and it was agreed, 1. That this was treason within the statute of 13 *Eliz.* for conspiring to levy war against the queen. 2. But not within the statute of 25 *E.* 3. because no war was levied, and that statute extended not to a conspiracy to levy war.

Nota; in both these cases there was a conspiring to arm themselves as well as to assemble, which had they effected and so assembled *more guerrino*, it had been a war levied, and by construction and interpretation a war levied against the queen.

If any with weapon invasive or defensive doth hold and defend a castle or fort against the king and his power, this is ^[146] a levying of war against the king within this act. *Co. P. C. p. 10. Vide* the statute of 13 *Eliz. cap. 1. & dicta ibid. postea.*

There is a great difference between an insurrection upon the account of a civil interest and a levying of war.

A. recovers possession against *B.* of a house, &c. in a real action, or in an *ejectione firmæ*, and a writ of seisin or possession goes to the sheriff, *B.* holds his house against the sheriff with force, and assembles persons with weapons for that purpose, who keep the house with a strong hand against the sheriff, tho assisted with the *posse comitatus*: this is no treason either in *B.* or his accomplices, but only a great riot and misdemeanor; the like is to be said touching a man that keeps possession against a restitution upon an indictment of forcible entry.

But if *B.* either fortifies his own house or the house of another with weapons defensive or invasive purposely to make head against the king and to secure himself against the king's regal army or forces, then that is a levying of war against the king.

But the bare detaining of the king's castles or ships seems no levying of war within this statute: *vide infra* 13 *Eliz. cap. 1. & dicta ibidem.*

If the king's lieutenant in a time of hostility or rebellion within the realm be assaulted upon their march or in their quarters as enemies, this is a levying of war; but if upon some sudden falling out or injury done by the soldiers, the countrymen rise upon them and drive them out, this may be a great riot, and if any be killed by the assailants it is felony in them; but this seems not a levying of war against the king, unless there be some traitorous design under the cover of it: and *claus. 26 E. 3. m. 24.* it appears, that an open resistance of the justices of oyer and terminer in the county of Surrey, *viz. resistendo justiciariis, & ipsos justiciarios, quo minus contenta in commissione nostrâ eis inde facta exequi & facere potuerunt, impediendo,* was felony, and the offenders were executed for the same as felons.

I shall conclude this matter with a consultation of the [*143] judges, where I was at present. All the judges except *J. Windham* and *J. Atkins* were assembled by my lord keeper, September 1675. to consider of this case, as it was stated in writing by the attorney general in manner following:

“ A great number of weavers in and about *London* being offended
 “ at the engine-loom, (which are instruments, that have been used
 “ above these sixty years,) because thereby one man can do as much
 “ in a day, as near twenty men without them, and by consequence
 “ can afford his ribbands at a much cheaper rate, after attempts in
 “ parliament and elsewhere to suppress them did agree among them-
 “ selves to rise and go from house to house to take and destroy the
 “ engine-looms; in pursuance of which they did on the 9th, 10th,
 “ and 11th of this instant *August* assemble themselves in great num-
 “ bers at some places to an hundred, at others to four hundred, and
 “ at others, particularly at *Stratford-Bow* to about fifteen hundred,
 “ They did in a most violent manner break open the houses of
 “ many of the king's subjects, in which such engine-looms were, or
 “ were by them suspected to be, they took away the engines, and
 “ making great fires burnt the same, and not only the looms, but in
 “ many

“ many places the ribbands made thereby, and several other goods of
 “ the persons whose houses they broke open; this they did not in
 “ one place only, but in several places and counties, viz. *Middlesex*,
 “ *London*, *Essex*, *Kent*, and *Surrey*, in the last of which, viz. at *South-*
 “ *wark* they stormed the house of one *Thomas Bybby*, and tho they
 “ were resisted and one of them killed and another wounded, yet at
 “ last they forced their way in, took away his looms and burnt them;
 “ the value of the damage they did, is computed to several thousand
 “ pounds.

“ This they did after several proclamations made and command
 “ given by the justices of peace and the sheriffs of *Middlesex* to de-
 “ part, but instead of obeying they resisted and affronted [*144]
 “ the magistrates and officers: It is true they had no war-
 “ like arms, but that was supplied by their number, and they had
 “ such weapons, as such a rabble could get, as staves, clubs, sledges,
 “ hammers, and other such instruments to force open doors.

“ There was this further evil attending this insurrection, that the
 “ soldiers and officers of the militia were so far from doing their duty
 “ in suppressing them, that some, tho in arms and drawn up in com-
 “ panies, stood still looking on while their neighbours houses were
 “ broken open and their goods destroyed, others encouraged them, and
 “ others, to whose custody some of the offenders, who were taken,
 “ were committed, suffered them to escape, so that during all the
 “ time of the tumult little or nothing was done to suppress them, un-
 “ til the lords of the council were constrained at a time extraordinary
 “ to assemble, by whose directions and orders as well to the civil ma-
 “ gistrates, as to the king's guards, they were at last quieted.”

Five of the judges seemed to be of opinion that this was treason
 within the act of 25 E. 3. upon the clause of levying war against
 the king, or at least upon the clause of the statute of 13 Car. 2.
cap. 1.

1. In respect of the manner of their assembling, who, tho they had
 no weapons or ensigns of war, yet their multitudes supplied that de-
 fect, being able to do that by their multitudes, which a lesser number
 of armed men might scarce be able to effect by their weapons; and
 besides, they had staves, and clubs, and some hammers or sledges to
 break open houses, and accordingly they acted by breaking open
 doors

doors and burning the engine-looms and many of the wares made by them.

2. In respect of the design itself, which was to burn and destroy not the single engine-looms of this or that particular person, but engine-looms in general, and that not in one county only, but [*145] in several counties, and so agreeable to *Burton's* case.

The other five judges were not satisfied, that this was treason within the clause of 25 *E. 3.* against levying of war, nor within the statute of 13 *Car. 2.* for conspiring to levy war.

1. It was agreed, that if men assemble together and consult to raise a force immediately or directly against the king's person, or to restrain or depose him, whether the number of the persons were more or less, or whether armed or unarmed, tho this were not a treason within this clause of the statute of 25 *E. 3.* yet it was treason within the first clause of compassing the king's death, and an overt-act sufficient to make good such an indictment, tho no war was actually levied; and with this accord the resolutions before cited, especially that of the insurrection in the north at *Farley* wood (*); but no such conspiracy or compassing appears in this case, and so that is not now in question, but we are only upon a point of constructive or interpretative levying of war.

2. Here is nothing in this case of any conspiring to do any thing, but what they really and fully effected; they agreed to rise in multitudes to burn the looms, and accordingly they did it, but nothing of conspiring against the safety of the king's person, or to arm themselves; therefore if what they did were not a levying of war against the king within the statute of 25 *E. 3.* here appears no conspiring to levy such war within the statute of 13 *Car. 2. cap. 1.* for, what appears, all was done, which they conspired to do.

3. It seemed very doubtful to them, whether in the manner of this assembling it was any levying of war, or whether it were more than a riot, for in all indictments of this kind for levying of war it is laid, [*146] that they were *more guerrino arraiati*, and upon the evidence, that they were assembled in a posture of war *armis offensivis*

(*) *Vide supra* p. 120.

et defensis, and sometimes particular circumstances also proved or found, as banners, trumpets, drums, &c. and where they were indicted for conspiring only to levy war, yet there was this circumstance accompanied it, *viz.* a confederacy to get arms and arm themselves, as in *Grant's* case, and *Burton's* case.

4. It seemed very doubtful to them, whether this design to burn engine-looms were such a design, as would make it a levying of war against the king (*), for it was not like the designs of altering religion, laws, pulling down inclosures generally, as in *Burton's* case, nor to destroy any trade, but only a particular quarrel and grievance between men of the same trade against a particular engine, that they thought a grievance to them, which, tho it was an enormous riot, yet it would be difficult to make it treason. *Vide statutes 8 H. 6. cap. 27. 9 H. 6. cap. 5. (†).*

Many of them therefore concluded, that if Mr. Attorney should think fit to proceed as for a treason, the matter might be specially found and so left to farther advice, or rather that according to the clause of the statute of 25 E. 3. the declarative judgment of the king and both houses of parliament might be had, because it was a new case and materially differed from other cases of like nature formerly resolved.

Upon the conclusion of this debate we all departed, and Mr. Attorney upon consideration of the whole matter, it seems, thought fit to proceed for a riot, and caused many of them to be indicted for riots, for which they were convicted and had great fines set upon them, and were committed in execution and adjudged to stand upon the pillory.

Touching the laws of treason in *Ireland*, by the statute of 18 H. 6. cap. 3. levying horse or foot upon the king's sub- [147.] jects against their will shall be treason; this they call cessing of soldiers upon men, and hath been often done by the lieutenants or deputies of *Ireland* by consent of the council in some cases.

Among many cumulative treasons charged upon the late earl of *Strafford* the king's deputy in *Ireland*, this one thing of cessing of

(*) By 12 Geo. 1. cap. 34. " If any person shall wilfully break any tools used in the woollen manufacture, not having the consent of the owner, or shall break or enter by force into any house or shop by night or by day for such purpose, he

" shall be adjudged guilty of felony with out benefit of clergy.

(†) Concerning the riots committed by the *Welsh* upon the drapmen of *Severn*, *vide infra*, p. 151.

soldiers upon the king's subjects in *Ireland* was the chief particular treason charged upon him.

It was insisted upon for the earl's defence, that by the statute of 10 H. 7. in *Ireland*, cap. 22. called *Poyning's law*, all the statutes of *England* are at once enacted to be observed in *Ireland*; and therefore the statute of 25 E. 3. declaring treasons, and the statute of 1 H. 4. cap. 10. enacting, that nothing shall be treason but what was within that statute, the treasons enacted in *Ireland* in the time of H. 6. and and afterwards before 10 H. 7. were repealed, and consequently this statute of 18 H. 6. cap. 3.

But that seems not to be so, for the general introduction of the statutes of *England* being an affirmative law could not be intended to take away those particular statutes, that were made in *Ireland* for the declaring of treason, as this and that also of the same year, cap. 2. for taking *Comericke* (x).

But surely this was no levying of war within this statute (a), either in respect of the matter itself or of the person that did it, he being the king's lieutenant, neither could an act by the lord deputy and council of this nature be construed to be within the penalty of this act, if it were in force; yet for this and other cumulative treasons he was attainted by act of parliament, but that attainder was very justly repealed by the statute of 14 Car. 2.

[148] Now I shall draw out some observations and conclusions from the precedents and instances before given touching this obscure clause of levying war against the king.

1. A conspiracy or confederacy to levy war against the king is not a levying of war within this clause of the statute of 25 E. 3. for this clause requires a war actually levied. *Co. P. C. p. 10.*

And this appears *first* by those temporary laws, that were made to continue during the king's or queen's life, which made conspiring to levy war with an overt-act evidencing such conspiracy to be treason, as the statutes of 1 & 2 Ph. & M. cap. 10. 13 Eliz. cap. 1. and 13 Car. 2. cap. 1. and *secondly* by the resolution of the judges in the case of *Burton* 39 Eliz. cited by my lord *Coke*, *P. C. p. 9, 10.*

2. That yet such a conspiracy or compassing to levy war against the king directly or against his forces, and meeting and consulting for

(x) That is, for taking thieves, robbers, or rebels into safe guard.

(a) Tho this were not levying of war, yet being cessing of soldiers upon the subject, it was treason within the express

words of that statute; nor does our author assign any reason, why an act of lord deputy and council is not within the penalty of that law. See *Camd. Eliz. p. 219.*

the effecting of it, whether the number of the conspirators be more or less, or disguised under any other pretence whatsoever, as of reformation of abuses, casting down inclosures particular or generally, nay of wrestling, football-playing, cock-fighting; yet if it can appear, that they consulted or resolved to raise a power immediately against the king, or the liberty or safety of his person, this congregating of people for this intent, tho no war be actually levied, is an overt-act to maintain an indictment, for compassing the king's death within the first clause of the statute of 25 E. 3. for it is a kind of natural or necessary consequence, that he, that attempts to subdue and conquer the king, cannot intend less than the taking away his life; and indeed it hath been always the miserable consequence of such a conquest, as is witnessed by the miserable tragedies of E. 2. and R. 2. and this was the case of *Oldcastle* and *Essex*.

3. That yet conspiring to levy war, (*viz.* to do such an act, which if it were accomplished and attained its end would be an actual levying of war) and being accompanied with an overt-act evidencing it, (tho it be not treason within this clause of the act of 25 E. 3.) yet was treason during the queen's life by the statute of 13 Eliz. cap. 1. and is treason at this day by the statute of 13 Car. 2. [149] cap. 1. during the life of our now sovereign.

But then the overt-act (be it speaking, writing, or acting) required by these statutes to evidence the same must be specially laid in the indictment, and proved upon the evidence; thus in *Grant's* case and *Burton's* case the conspiring to fetch arms at the houses therein mentioned was an overt-act proving this conspiracy to levy war.

4. That a levying of war with all the circumstances imaginable to give it that denomination, as *cum vexillis explicatis, cum multitudine gentium armatorum & modo guerrino arraiat*, yet if it be upon a mere private quarrel between private, tho great persons, or to throw down the inclosures of such a manor or park, where the party tho without title claims a common, or upon dispute concerning the propriety of liberties or franchises, this, tho it be in the manner of it a levying of war, yet it is not a levying of war against the king, tho bloodshed or bunting of houses ensue in that attempt, but is a great riot, for which the offenders ought to be fined and imprisoned; and if any be killed by the rioters in the riot, it may be murder in the assailant.

This was the case of the earls of *Gloucester* and *Hereford*, anno 20 E. 1. tho before the statute of 25 E. 3. and the several great riots

above-mentioned, to which we may add *Rot. Parl.* 50 E. 3. n. 140, 164. 11 H. 4. n. 36, 57. 13 H. 4. n. 14. 18 H. 6. n. 30.

5. An actual levying of war therefore against the king to make a treason, for which the offender may be indicted upon this clause of the statute for levying of war against the king, consists of two principal parts or ingredients, *viz.* 1. It must be a levying of war. 2. It must be a levying of war against the king.

6. What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, tho *de facto* they commit the act they intend, that makes a levying of war, for then every riot would be treason, and all the acts against riotous and unlawful assemblies, as 13 H. 4. cap. 7. 2 H. 5. cap. 8. 8 H. 6. cap. 14. and many more (b) had been vain and needless; but it must be such an assembly as carries with it *speciem belli*, as if they ride or march *vexillis explicatis*, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of war, which circumstances are so various, that it is hard to define them all particularly.

Only the general expressions in all the indictments of this nature, that I have seen, are *more guerrino arraiati*, and sometimes other particulars added as the fact will bear, as *cum vexillis explicatis, cum armis defensivis & offensivis, cum tympanis & tubis*: but altho it be a question of fact, whether war be levied or conspired to be levied, which depends upon evidence, yet some overt-act must be shewn in the indictment, upon which the court may judge; and this is usually *modo guerrino arraiati*, or *armati*, or conspiring to get arms to arm themselves.

And therefore in the cases of *Burton* and *Grant* before-mentioned, who were indicted and convicted upon the statute of 13 Eliz. cap. 1. for conspiring to levy war for pulling down inclosures, &c. there is not only the conspiracy to do the thing, but also to gain arms and weapons at the lord *Norris's* house, and elsewhere to arm themselves for that attempt.

And the reason hereof seems to be, because, when an assembly of people thus arm themselves, it is a plain evidence, that they mean to defend themselves, and make good their attempts by a military force, and to resist and subdue all power, that shall be used to suppress them;

(b) See 3 & 4 Edw. VI. cap. 5. 1 Mar. cap. 12. 1 Geo. I. cap. 5.

and besides, the very use of weapons by such an assembly without the king's licence, unless in some lawful and special cases, carries a terror with it, and a presumption of warlike force, and therefore under a distinct and special restraint by the statute of *Westminst* 2.

(c) and the statute (d) of 7 E. 1. *de defensione portandi arma*. [151]

Whether the bare assembling of an enormous multitude for doing of these unlawful acts without any weapons, or being *more guerino arraiati*, especially in case of interpretative or constructive levying of war, be a sufficient overt-act to make a levying of war within this act, especially if they commit some of these acts themselves, is very considerable and seems to be doubtful, 1. Because I have not known any such case ruled. 2. Because the acts of 3 & 4 Ed. 6. cap. 5. and 1 Mar. cap. 12. (which must be intended of such unarmed assemblies) makes it in some cases felony, in some cases only misdemeanor. 3. Because it is very difficult to determine what that number must be, that must make treason, and less than which must be only a riot; this therefore should be well considered, and the direction of the statute of 25 E. 3. to expect the declaration of parliament in like cases is a safe direction, and so much the rather, because the statutes of E. 3. and queen Mary seem to look the other way (e), to which may be added the great riots committed by the foresters and *Welsh* upon the dragmen of *Severn*, hewing all their boats to pieces, and drowning the barge-men in a warlike posture. *Rot. Parl.* 8 H. 6. n. 30, 45. 9 H. 6. n. 37. upon which the statute of 9 H. 6. cap. 5. was made: I forbear therefore any opinion herein.

8. But whether the assembly were greater or less, or armed or not armed, yet if the design were directly against the king, as to do him bodily harm, to imprison, to restrain him, or to offer any force or violence to him, it will be treason within the first clause of compassing the king's death, and this assembling and consulting or practising together to this purpose, tho of but two or three, will be an overt-act to prove it; therefore all the question will be only touching interpretative or constructive levying of war, whereof here- [152]

(c) I don't find any thing to this purpose in the statute of *Westminst* 2. so suppose the statute here meant is the statute of *Northampton* 2 E. 3. cap. 3. whereby it is prohibited that anyone bring force in affray of the people, or go armed by night or by

day. See *Co. P. C.* p. 158 & 160. *F. N. B.* p. 552.

(d) Or rather proclamation: see the beginning of this chapter.

(e) As does also 1 Geo. I. cap. 5.

9. If there be war levied as is above declared, viz. an assembly *more guerrino arraiati*, and so in the posture of war for any treasonable attempt; this is *bellum levatum*, tho not *bellum percussum*: and thus far touching the levying of war, as in relation to the manner of it.

10. But besides the circumstances requisite to denominate a levying of war in respect of the manner of it, there is also requisite to make a treason within this clause, that it be a levying of war *against the king*, which is the scope, end and termination thereof, ~~for~~ as hath been said, there may be a levying of war between private persons upon private quarrels, which is not a levying of war against the king, and so not treason within this clause of this act.

11. A levying of war against the king therefore is of two kinds, either expressly and directly, or by way of interpretation, construction or exposition of this act: the former is, when a war is levied against the person of the king, or against his general, or army by him appointed, or to do the king any bodily harm, or to imprison him, or to restrain him of his liberty, or to get him into their power, or to enforce him to put away his ministers, or to depose him; many instances of this kind may be given, such as was in truth the riding of the earl of *Essex* into *London* armed with swords and pistols, his soliciting of the citizens to go with him to court to remove from the queen her ministers and counsellors, his fortifying of his house against the queen's officers, which were in truth a levying of war, tho his indictment was upon the first clause of compassing the queen's death, which was more clearly included within these actions.

12. Constructive or interpretative levying of war is not so much against the king's person, as against his government: if men assemble together *more guerrino* to kill one of his majesty's privy council, this hath been ruled to be levying of war against the king. *P. 16 Car. 1. Cro. 583. Bensted's case* before cited, and accordingly was the resolution of the house of lords 17 *R. 2. Talbot's case* above-mentioned.

[153] So in the case mentioned by my lord *Coke* in the time of *H. 8. Co. P. C. p. 10.* levying war against the statute of *Lambourers* and to inhanse servants wages was a levying of war against the king; and altho levying of war to demolish some particular inclosures is not a levying of war against the king, *Co. P. C. p. 9.* yet if it be to alter religion established by law, or to go from town to town generally to cast down inclosures, or to deliver generally out of prison persons lawfully imprisoned, this hath been held to be levying of war against

against the king within this act, and the conspiring to levy war for those purposes treason within that clause of the act of 13 *Eliz. cap. 1.* as was resolved in *Burton's* case and *Grant's* case above-mentioned; and the like resolution was in the case of the apprentices that assembled *more guerrino* to pull down bawdy-houses.

It is considerable how these resolutions stand with the judgment of parliament in 3 & 4 *Ed. 6. cap. 12.* which makes special provisions to make assemblies above twelve to alter the laws and statutes of the kingdom, or the religion established by law, or if above forty assemble for pulling down inclosures, burning of houses, or stacks of corn, treason, if they departed not to their homes within an hour after proclamation, or after proclamation put any of these designs in practice, which is nevertheless reduced to felony within clergy by the statute of 1 *Mar. sess. 2. cap. 12.* These offenses being the same with those adjudged treason in *Burton's* case and some others before cited, why was it thought necessary for an act of parliament 3 & 4 *Ed. 6.* to make it treason under certain qualifications, and why reduced to felony within clergy by the statute of 1 *Mar. cap. 12.* and the statute of 3 & 4 *E. 6.* repealed? It seems that altho the unlawful ends of these assemblies thus punished by 3 & 4 *Ed. 6.* and 1 *Mar.* were much the same with those of *Burton* and *Grant* and others, that were adjudged treason, yet the difference between the cases stood not in that, but in the manner of their assembly; those that were adjudged treasons in *Burton's* and *Grant's* case were, because it was a conspiracy to arm themselves and levy a war *more guerrino*.

But those, that were thus heightened to treason by 3 & 4 *E. 6.* and reduced to felony by 1 *Mar.* were not intended of [154] such, as were *more guerrino arraiati*, nor a levying of war, tho their multitudes were often great, and tho they did put in ure the things they conspired to effect, and so were but great riots and not levying war within this clause of 25 *E. 3.* and therefore those acts inflicted a new and farther punishment to them.

III. *En son realme*: hitherto it hath been said what is a levying of war; we are now to consider the place, *En son realme*.

The realm of *England* comprehends the narrow seas, and therefore if a war be levied upon those seas, as if any of the king's subjects hostily invade any of the king's ships, (which are so many royal castles) this is a levying of war within his realm, for the narrow seas are of the ligeance of the crown of *England*: *vide Selden's Mare clausum.*

And this may be tried in the county next adjacent to the coast by an indictment taken by the jurors for that county before special commissioners of *oyer and terminer*, *de quo vide infra*, and in the chapter of piracy: *vide* 5 R. 2. Trial 54.

It is true, before the statute of 28 H. 8. cap. 15. those treasons were usually inquired and tried by special commission, wherein the admiral and his lieutenant were named, as likewise other felonies committed upon the sea.

But divers instances were in the time of E. 3. whereby such offenses upon the sea were punished as treason or felony in the king's bench. 40 Ass. 25. A Norman captain of a ship robs the king's subjects upon the sea, he being taken was hanged as a felon, but the *English* that assisted him were drawn and hanged as traitors; and by the statute of 28 H. 8. cap. 15. there is a direction of a special commission to try them in such counties or places as shall be assigned by such commission according to the method of trials of such offenses at the common law, but before that statute they might be tried by special commission at the common law, and according to the course of the common law; but of this *alibi* in *tractatu de Admiralitate*.

[155] For treasons and other capital offenses in *Scotland* there is a provision made by the statute of 4 Jac. cap. 1. and 7 Jac. cap. 1.

Ireland, tho part of the dominions of the crown of *England*, yet is no part of the realm of *England*, nor *infra quatuor maria*, as hath been ruled *temp. E. 1. Morrice Howard's case*: the like is to be said for *Scotland* even while it was under the power of the crown of *England*, as it was in sometimes of E. 1. and some part of the time of E. 3. 8 Rich. 2. Continual claim 13.

For *Ireland* hath the same laws for treason that *England*, tho it hath some more; yet for a levying war, or other treason in *Ireland* the offender may be tried here in *England* by the statute of 35 H. 8. cap. 2. for treasons done out of the realm, as was resolved in the case of *O-Rork*, H. 33. Eliz. (*) and after that in Sir *John Perrot's case* (f), Co. P. C. p. 11. 7 Co. Rep. *Calvin's case*, 23. a.

In the case of the lord *Macguire* (g) an *Irish* peer, who was indicted in *Middlesex* for high treason for levying war again the king in *Ireland*, he pleaded to the indictment, that he was one of the peers and

(*) *Camd. Eliz. p. 458.*

(f) See his trial in *State Tr. Vol. I. p. 181.*

(g) *State Tr. Vol. I. p. 928.*

lords of parliament in *Ireland*, and demanded judgment, if he should be arraigned in *England* for a treason committed in *Ireland*, whereby he should lose the benefit of trial by his peers; but it was resolved, 1. That for a treason in *Ireland* a man may be tried here in *England* by the statute of 35 *H.* 8. for it is a treason committed out of the realm. 2. That altho' *Macguire*, if tried in *Ireland* for his treason, should have had his trial by his peers, as one of the lords in parliament, which he cannot have here, but must be tried by a common jury, yet that altered not the case; he was therefore put upon his trial by a *Middlesex* jury, and was convicted and had judgment, and was executed. *H.* 20 *Car.* 1. *B. R.* so that the opinion 20 *Eliz.* *Dy.* 360. *b.* was ruled no law: *vide Co. Litt.* 261.

And the same that is said of *Ireland* may be said in all particulars of the isle of *Man*, *Jersey*, *Guernsey*, *Sark*, and *Al-derney*, which are parcel of the dominions of the crown of *England*, but not within the realm of *England* as to this purpose concerning treason; yet they have special laws of their own applicable to criminals and jurisdiction for their trials: as touching treason committed in *Wales* before the statute of 26 *H.* 8. *cap.* 6. no treason, murder, or felony committed in *Wales* was inquirable or triable before commissioners of *oyer and terminer*, or in the king's bench in *England*, but before justices or commissioners assigned by the king in those counties of *Wales* where the fact was committed. *P.* 2 *H.* 4. *Rot.* 18. *Salop'*:
 “ *Johannes Kynaston indictatus fuit quod ipse consentiens fuit ad falsam*
 “ *& proditiōsam insurrectionem Oweyn Glyndour & aliorum Wallico-*
 “ *rum, & sciens de toto proposito eorundem, qui proditiōse combusserunt*
 “ *villas de Glyndour Dynby, &c. & quod proditiōse misit Johannem*
 “ *filium suum bene armatum & arraiatum pro guerrā & Willielmum*
 “ *Hunte sagittarium ad prædictum Oweyn & exercitum Wallicorum,*
 “ *&c. dicit quod prædictæ villæ, in quibus supponitur proditiōes præ-*
 “ *dictas factas fuisse, sunt infra terram Walliæ & extra corpus com-*
 “ *Salop' & legem terræ Angliæ, unde non intendit quod dominus rex de*
 “ *proditiōibus prædictis in hoc casu ipsum impetire velit, seu ipsum po-*
 “ *neri velit inde responsurum, & quia plenariè & certitudinaliter testifi-*
 “ *catum est, quod prædictæ villæ sunt infra terram Walliæ & extra*
 “ *corpus comitatus Salop' & legem terræ Angliæ, & Thomas Covele*
 “ *attornatus ipsius regis coram ipso rege inde examinatus hoc non dedit,*
 “ *& sic justiciarii ad inquirendum de proditiōibus prædictis infra Wal-*
 “ *liam factis virtute commissionis prædictæ inquirere minimè potuerunt*
 “ *nec*

“*nec proditionis prædictæ sic in terrâ Walliæ factæ per legem terræ Angliæ triari nec terminari possunt, consideratum est, quod quoties prædictas proditiones prædictus Johannes Kynafton rat inde quitus, &c.*” But it is true by the statute of 26 H. 8. cap. 6. counte-feiting of coin, washing, clipping or minishing the same, felonies, murders, wilful burnings of houses, manslaughters, robberies, burglaries, rapes, and accessaries of the same and other offenses feloniously done in *Wales* (h), or any lordship marcher may be inquired of, heard and determined before the justices of goal-delivery and of the peace and every of them in the next adjacent county: this act is confirmed by the great statute of *Wales* 34 & 35 H. 8. cap. 26. which settles the grand sessions and justices thereof, and gives the justices of the grand sessions power to hold all manner of pleas of the crown, and to hear and determine all treasons, felonies, &c. within the precinct of their commissions, as fully as the court of king’s bench may do in their places within the realm of *England*; so that as to those offenses enumerated in the statute of 26 H. 8. the justices of gaol-delivery in the adjacent counties, viz. *Gloucester, Hereford, Salop and Wigorn*’, had thereby a concurrent jurisdiction with the justices of the grand session (i).

But whether the statute of 26 H. 8. extended to treason for compassing the king’s death or levying of war (k), or whether the same remained only triable by the justices of the grand sessions, seems doubtful, and the rather, because that statute is not construed by equity, and therefore it extends not to an appeal of murder in an adjacent county, and so it was adjudged *Hil. 7 Car. B. R. Sently and Price* (l); but at this day 26 H. 8. cap. 6. stands repealed by 1 & 2 Ph. & M. cap. 10. as to the trials of treason (m).

It is true, that in other criminal causes, that are not capital, as in cases of indictments of riots, they may be removed by *certiorari* into the king’s bench, and when issue is joined they may be tried in the next *English* county, *T. 16 Jac.* Sir *John Carew’s* case (n) and *dyers*

(b) For this act extends to all the antient counties of *Wales*, as well as the lordships marchers; and so it was resolved in *Stoboe’s* case for a murder in *Pembrokeshire*. *T. 9 Geo. I. B. R.*

(i) 1 *Mod.* 64, 68.

(k) It should seem that it did not, and that was one reason of making the statute of 32 H. 8. cap. 4. whereby all treasons or misprisions of treasons committed in *Wales* may be presented and tried in such

shires and before such commissioners as the king shall appoint, in like manner as if the facts had been committed in such shires.

(l) *Cro. Car.* 247. *W. Jones* 255.

(m) The 1 & 2 Ph. & M. reducing all trials for treason to the order and course of the common law is a virtual repeal of 26 H. 8. and by the same reason of 32 H. 8. also as to treason.

(n) *Cro. Jac.* 474. 2 *Rol.* 28. 1 *Rel. Abr.* 394.

others, as well as in a *quo minus*, which is at the king's suit: but whether a *certiorari* lies into *Wales* upon an indictment of treason or felony hath been doubted *M. 9 Car. B. R. Chedley's case (p)*: it seems a *certiorari* may issue for a special purpose, as to quash the indictment for insufficiency or to plead his pardon, but not as to trial of the fact (*p*), but it shall be sent down by *mittimus* according to the statute of 6 *H. 8. cap. 6.* because it is in a manner essential for felony or treason to be tried in the proper county, unless where a statute particularly enables it, which it did in the case of 26 *H. 8.* only whilst it was in force, where the indictment as well as the trial is in the adjacent county.

But certainly *Wales* is within the kingdom of *England (q)*, and therefore not within the statute of 35 *H. 8. cap. 2.* for trial of foreign treasons.

If a felony or treason be committed in *Durham*, a *certiorari* lies to remove it into the king's bench out of *Durham* directed to the justices of peace, *oyer and terminer*, or gaol-delivery there; for since the statute of 27 *H. 8. cap. 24.* they are all made by the king's commission, and so the proceedings before them are his own suit, and thus it was done in *Ruttaby's case (r)* upon debate; but if the party plead not guilty it shall be sent down thither to be tried, as was done in that case. *T. 1653.* They of *Durham* claim a privilege not to be sworn out of the precinct of the county palatine. *Vide* the statute of 2 *H. 5. cap. 5. 9 H. 5. cap. 7. 11 H. 7. cap. 9.* for treasons and felonies in *Tindal* and *Hexamshire*.

And thus far concerning treason in levying of war against the king.

See Foster's discourse of High Treason per totum. and 1 Hawk. P. C. ch. 17. of High Treason, and Kelyng's Rep 7. &c. High Treason, 2 Bur. 642 to 652. Kelyng, 75. 2 Black. Com. ch. vi. p. 82. 2. Wilton, 365.

(o) *Cro. Car.* 331.

(p) But yet it has been done in felony as to the trial of the fact, as in the case of *Morris*. 1 *Ven.* 93, 146. *Herbert's case*,

Latch. 12.

(q) 2 *Roll.* 28.

(r) *Vide infra*, p. 467. and Part II. p. 212.

CHAP. XV.

Concerning treason in adhering to the king's enemies within the land or without.

THE words of the statute of 25 E. 3. go on, *viz.* *—Ou soit aidant al enemies nostre dit seigneur le roy en son royaume donant a eux ayd ou comfort en son royaume ou per ailliors.*

I. Therefore we shall inquire what shall be said *enemies of the king*: those that raise war against the king may be of two kinds, subjects or foreigners: the former are not properly enemies but rebels or traitors, the latter are those, that come properly under the name of enemies.

This gives us occasion to consider somewhat of the nature of war and peace.

The power of making war or peace is *inter jura summi imperii*, and in *England* is lodged singly in the king, tho it ever succeeds best when done by parliamentary advice.

Peace is of two kinds, *viz.* 1. Positive and contracted. 2. Such a peace, as is only a negation or absence of war: that peace, which I call positive, is such as ariseth by contracts, capitulations, leagues, or truces between princes or states, that have *jura summi imperii*, and is of two kinds: 1. Temporary, which is properly a truce, which is a cessation from war already begun, and then the term being elapsed the princes or states are *ipso facto* in the former state of war, unless it be protracted by new capitulations, or be otherwise provided in the instrument or contract of the truce. 2. Perpetual, *sine termino* or indefinite, which regularly continues according to the tenor or conditions of the agreement, until some new war be raised between the princes or states upon some emergent injury supposed to be done by the one party or the other; and this is properly called a league *fœdus*, and makes the princes and states *confœderati*, and tho this may be variously diversified according to the capitulations, conditions and [160] qualifications of such leagues, yet they are ordinarily of these kinds: 1. Leagues offensive and defensive, which oblige the princes not only to mutual defense, but also to be assisting to each other in their military aggresses upon others, and makes the enemies of one in effect the common enemies of both. 2. Defensive, but not offensive, obliging

obliging each to succour and defend the other in cases of invasion or war by other princes. 3. Leagues of simple amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes also liberty of mutual commerce and trade, and safeguard of merchants and traders in either's dominions, tho this may be diversified according to such contracts as are made in such leagues; and therefore in the league between king *James* of *England* and the king of *Spain*, there was a tacit exception on the part of the *Spaniard* by the wary penning of the articles, whereby the freedom of our trade into the western plantations of the king of *Spain* hath been supposed by the *Spaniard* to be restrained.

2. A peace, which is only a negation or absence of war, is that which I call a negative peace, because it is only an absence or negation of war, there intervening no league nor articles of peace, nor yet any denunciation of war, for it is regularly true, *ubi bellum non est, pax est*, tho neither prince is under any capitulation or contract; for there are divers princes in the world, that never capitulated one with another, and yet there is no state of war between them; and therefore the war by the *Spaniards* upon the *Indians*, tho under pretense of religion, without any just provocation hath been held injurious and an unjust aggression, tho there intervened no former articles of peace between them.

War was antiently of two kinds, *bellum solemne vel non solemne*: a solemn war among the *Romans* had many circumstances attending it (a), and was not presently undertaken upon an injury received without these solemn circumstances. 1. *Clarigatio* (b) or demanding [161] reparation for the injuries received. 2. That being not done there followed indiction or denunciation of war. 3. Dilation or a space of thirty-three days before actual hostility was used; but most times necessity and politic considerations both among them and other nations did dispense with these solemnities, which were found oftentimes too cumbersome and inconvenient, especially where the delays might occasion surprizal or irreparable damage to the commonwealth, as where the adverse party made preparations, which, if not suddenly repressed, might prove more dangerous and irresistible.

But these solemn denunciations of war had place only in offensive or invasive wars, and even then had many exceptions.

(a) See the manner of it described by *Dionys. Hal. Lib. II. Agel. Lib. XVI. cap. 4.* and *Liv. Lib. I. §. 32.* whereby it appears, that the thirty-three days of dilation

intervened between the demanding reparation and the indiction.

(b) See *Plin. Lib. XXII. cap. 2.*

1. If a war be actually between two princes or states, and a temporary truce be made as for a year or two, that term being elapsed they are in a state of war without any denunciation, for they are in the former condition, wherein they were before the truce made.

2. In case a foreign prince in peace violate that peace and becomes the aggressor, or invades the other, tho without any denunciation, the prince that is upon his defense was not bound, neither was it necessary for him to make a solemn denunciation or proclamation of war, for this solemnity of denunciation was thought only requisite on the part of the aggressor.

3. If after reparation of injuries sought, instead of reparation of the former, new are committed by the adverse prince, as killing of an ambassador, contemptuous rejection of all reparation or mediation touching it, great provisions of hostility, or the like, there, this denunciation or dilation was not requisite in the aggressor; but when all is done, supreme princes or states take themselves to be judges of public injuries, and of the manner, means and seasons for their reparations, and what they judge safest and most for their advantage is most commonly done in these cases, and they seldom want fair declarations to justify themselves therein.

[162] And therefore whether these handsome methods be observed or not, yet if *de facto* there be a war between princes, they and their subjects are in a state of hostility, and they are in the condition of enemies (*hostes*) to each other; but now for the most part these antient solemnities are antiquated, I come therefore to the practice of our own country and modern arms, and what we may observe from our own books, history, and monuments.

We may observe in the wars we have had with foreign countries, that they have been of two kinds, *viz.* special and general: special kinds of war are that, which we usually call *marque* or reprisal, and these again of two kinds, 1. Particular, granted to some particular persons upon particular occasions to right themselves, for which *vide* statute 4 *H. 5. cap. 7.* but this is not the proper place to treat touching it. 2. General *marque* or reprisal, which tho it hath the effect of a war, yet it is not a regular war, and it differs in these two instances: 1. Regularly it is not lawful for any person by aggression to take the ship or goods of the adverse party, unless he hath a commission from the king, the admiral, or those that are specially appointed thereunto. 2. It doth not make the two nations in a perfect state of hostility

hostility between them, tho they mutually take one from another, as enemies, and many times in process of time these general reprisals grow into a very formed war: and this was the condition of the war between us and the *Dutch* 22 February anno 1664. the first beginning whereof was by that act of council, which instituted only a kind of universal reprisal, and there were particular reasons of state for it; but in process of time it grew into a very war, and that without any war solemnly denounced; and therefore by the statute of 17 Car. 2. cap. 5. *Doleman* and others, that were in *Holland*, were declared to have traitorously adhered to the king's enemies, and were attainted of treason, unless they rendered themselves by a day certain, and all others, that served the states of the united provinces during the continuance of the war, soldiers or seamen, by sea or land, and not returning by a time certain, were attainted of treason; and this had all the effects of war and hostility: the goods of the *English* taken by the *Dutch* and brought *intra præsidia* the property was wholly changed, and [163] tho retaken again, should not be restored again to the first owner, according as in captures by enemies, 7 E. 4. 14. 22 E. 3. 16. and so it was practised during that war.

A general war is of two kinds: 1. *Bellum solemniter denuntiatur*, or *bellum non solemniter denuntiatur*; the former sort of war is, when war is solemnly declared or proclaimed by our king against another prince or state; thus after the pacification between the king and the *Dutch* at *Breda*, upon new injuries done to us by the *Dutch* the king by his printed declaration 1671. declared war against them; and this is the most formal solemnity of a war, that is now in use.

A war that is *non solemniter denuntiatur* is, when two nations slip suddenly into a war without any solemnity, and this ordinarily happeneth among us; the first *Dutch* war was a real war, and yet it began barely upon general letters of *marque*: again, if a foreign prince invades our coasts, or sets upon the king's navy at sea, hereupon a real, tho not solemn war may and hath formerly arisen, and therefore to prove a nation to be in enmity to *England*, or to prove a person to be an *alien enemy*, there is no necessity of showing any war proclaimed, but it may be averred, and so put upon trial by the country, whether there was a war or not; and therefore *P. 31 Eliz.* in justice Owen's reports (c), in an action of debt the defendant pleaded, that the plaintiff was an *alien* born in *Gaunt* under the obedience of the king of

Spain, enemy of the queen, the plea was ruled good, tho he shewed not, that any war was proclaimed between the two realms; and according is the pleading 7 E. 4. 13. *Rastel's Entries, Trespass per alien (d)*.

And in very deed there was a state of war between the crowns of *England* and *Spain*, and the *Spaniards* were actual enemies, especially after the attempt of invasion in 88. by the *Spanish Armada*, and yet there was no war declared or proclaimed between the two crowns, as [164] appears by *Camden sub anno 31. (e) ibidem p. 404. & ibidem p. 466. (f)* so that a state of war may be between two kingdoms without any proclamation or indiction thereof or other matter of record to prove it.

And therefore in the case in question touching treason it shall upon the trial be inquired by the jury, whether the person, to whom the party indicted adhered, were an enemy or not, and in order to that, whether there were a war between the king of *England* and that other prince, whereunto the party adheres, this is purely a question of fact and triable by the jury, and accordingly is the book 19 E. 4. 6. and the reason is plain, because it may fall out, that tho there were a league between the king of *England* and a foreign prince, yet the war may be begun by the foreign prince: again, suppose we, that the king of *England* and the king of *France* be in league, and no breach thereof between the two kings, yet if a subject born of the king of *France* makes war upon the king of *England*, a subject of the king of *England* adhering to him is a traitor within this law, and yet the *Frenchman*, that made the war, is not a traitor but an enemy, and shall be dealt with as an enemy by martial law, if taken: this was the case of the duke of *Norfolk* adhering to the lord *Herise* a subject of the king of *Scots* in amity with queen *Elizabeth*, that made an actual invasion upon *England* without the king's commission. *M. 13 & 14 Eliz. Co. P. C. p. 11. Camd. Eliz. sub anno 1571 (g), 14 Eliz. p. 175.* and the case of *Perkin Warbeck* a *Frenchman*, 7 Co. Rep. *Calvin's case (h). 6 Dy. 145. a Sherly's case (i)*; so that an enemy extends farther than a king or state in enmity, namely an alien coming into *England* in hostility.

II. In the next place I shall consider what shall be said a person adhering, and also what shall be adhering.

(d) *Rast. Entr. p. 605, d. 152. b.*

(e) *viz. 1588.*

(f) *sub anno 1592.*

(g) And also *sub anno 1572. in principio.*

(h) 7 Co. 6. b.

(i) 7 Co. *Calvin's case* 6. a.

If a foreign prince be in actual war against the king of *England*, any subject of that prince under his protection is presumed to be adhering to him, but he is not a person within this act, for if he be taken, he shall be dealt with as an enemy, *viz.* he shall be [165] ransomed, and his goods within this realm seized to the use of the king. When king *John* was deposed of the duchy of *Normandy* by the king of *France*, and thereupon the *Normans* forsook the allegiance of the king of *England*, which was due to him, as duke of *Normandy*, all the lands of the *Normans* in *England* were seized into the king's hands, and thence grew first the escheat *de terris Normannorum* mentioned *prærogativa regis* (k) cap. 12. and the style of such forfeiture was usually, *quia recessit à servitio nostro & adhæsit inimicis nostris in Normannia*, Claus. 6 *John. m.* 19. *pro Eustachia uxore Lurce fil' Johannis*, Claus. 8 *John. m.* 5. *pro Abbate Cluniacensi*: see the reason thereof before cap. 10. they were *ad fidem utriusque regis*.

If there be war between the king of *England* and the king of *France*, those *Englishmen*, that live in *France* before the war, and continue there after, are not simply upon that account adherents to the king's enemies, unless they actually assist him in his wars, or at least refuse to return upon privy seal, or upon proclamation and notice thereof into *England*; and this refusal, tho it is an evidence of adherence, seems not to be simply in itself an adherence: this appears plainly by the statute of *Magna Charta*, cap. 30.

If a subject of a foreign prince hath lived here in *England* under the protection of the king of *England*, and so continues after a war proclaimed, and partakes of all the benefits of a subject, and yet secretly practiseth with the king of *France*, and assists him before he hath left this kingdom, or openly renounced his subjection to the crown of *England*, this man seems to be an adherent within this act, and commits treason thereby: *tamen quære, vide Dy.* 144. a *Sherley's* case; and the like law seems to be of an enemy coming hither and staying here under the king's letters of safeconduct: *quære, vide statute* 18 *H.* 6. cap. 4. 20 *H.* 6. cap. 1.

If there be a war between the king of *England* and *France*, and then a temporary truce is made, and within the time of that truce an *Englishman* goes into *France*, and stays there and returns before the truce is expired, this is not an adherence to an [166] enemy within this statute, Claus. 7 *E.* 3. part 1. m. 9. *pro Johanne*

(k) 17 E. 2.

Poynter, who had an *amoveas manus cum exitibus*, his lands having been seised for that cause: but this record implies, that if during his stay (it was in Scotland) he had confederated or conspired with the enemy or assisted them in order to their further hostility, this might have been an adherence: *nota*, the reason, "*Quia prædictus Johannes tempore treugarum inter patrem nostrum & Robertum de Bruys ivit in Scotiam per præceptum Andree de Harcla ad pictandum quandam imaginem, quo tempore bene licuit unicuique de Angliâ intrare in Scotiam per licentiam & literas de conductu custodis Marchiæ, & quod idem Johannes habuit tales literas Andree de Harcla, & ibidem taliter moram fecit per unum annum absque eo, quod aliquo tempore Scotis prædictis fuit adhærens, & quod idem Johannes rediit in Angliam durantibus trengis prædictis, & semper hæclemis fuit ad pacem nostram & patris nostri.*" *Nota*, this Andrew Harcla having been created earl of Carlisle was by an extrajudicial military sentence first degraded, and then had judgment of high treason given against him. H. 18 E. 2. Rot. 34 in dorso rex (1).

If

(1) This sentence of degradation, as well as the judgment for high treason, were pronounced at Carlisle, before Sir Ralph Basset, Sir John Pecche, Sir John de Wissham and Geoffrey le Scrop, who, together with the earl of Kent the king's brother and John de Hastings, were specially constituted by letters patents, *Iusticiarii ad degradandum Andream de Harcla comitem Carlioli, inimicum & proditorem regis & regni sui, quem nuper in comitem gladio cinxerat, & ad iudicium de ipso super degradatione, inimicitia & seditione prædictis pronunciandum & reddendum*; and the form of the said judgment to be pronounced was at the same time sent to the said justices in a certain schedule, *sub pede sigilli regis*, the which judgment was accordingly pronounced in the following words: "Pur ceo qe nostre seignor le roi pur le griaunt bien valu & loialte, qu'il entendit davour trove en vous Andree de Harcla pur aider & meyntener ses dreytours & les droitz de la coroune & de soun people, couhure ses enemys de tous partz, & nomement countre Robert de Brus & ses autres enemys d'Escoce, vous fist counte de Carleil, & de la meyn vous seynt [ecyng] d'Espee, & vous dona fee de la counte, chasteux, villes, terres & tenementz, pur vostre estat meyntener, come counte; & apres ceo qe vous avietz tiel honour, & bien fait receu de nostre dit seignour, si estes alez [allice] au dit Robert de Brus, treitrousement, fausement & malveusement, par escrit & par serement,

pur meyntener le dit Robert d'estre roi d'Escoce, proprement en la reverie de la entencion le roi, pur quele il vous fit counte; par quei agarde ceste court, qe vous soietz degradee, & qe vous perdetz noun de counte pur vous & pur vos heires a toutz jours, & qe vous soietz deceynt del espeye & qe vos esporuns d'orrez soient coupes de talouns; & pur ceo qe vous Andree, homme lige nostre seignour le roi, countre vostre homage, soi & ligeance, en countre vostre seignour lige, estes aliez, treitrousement, fausement & malveusement, a Robert de Brus, enemy mortel a nostre seignour le roi & de soun realme & a soun people, par serement & par escrit, por meyntener au dit Robert & a ses heires le roialme d'Escoce entement, a tut vostre force & power, countre toutes gentz, & qe vous nomeretz sis hommes, & le dit Robert autre sis, les queux duze ordenerent, de toutes les grosses besoignes de roialme d'Engleterre & d'Escoce, & qe leur ordinement se tendroit en touz poynz, & si nul, de quel estat ou condicion qu'il fust, vouist countredire le dit ordinement en nul poyn, qe vous ove toute vostre force & power, [sui] curriez seur, & en taunte enpreistes, treitrousement, fausement & malveusement d'enprendre roial power, countre vostre seignour lige, les piets & les people du roialme, pur eux mettre en subjection, & al ordinaunce de vous, & du dit Robert, qi est comun enemy au roy & au roialme,

If the king of *England* and the king of *France* be in amity, yet if a subject of the king of *England* solicits by letters the king of *France* to invade this realm, this is high treason: it was the case of cardinal *Poole*, who wrote a book to that purpose to *Charles* the emperor. *Co. P. C. p. 14.* It is certainly an overt-act to prove treason in compassing the king's death, but it seems not an overt act to convict him of adhering to the king's enemies, for at the time of this act done the emperor was not an enemy. *Co. P. C. p. 14.*

If an *Englishman* during war between the king of *England* and *France* be taken by the *French*, and there swear fealty to the king of *France*, if it be done voluntarily, it is an adhering to the king's enemies; but if it be done for fear of his life, and that he returns, as soon as he might, to the alligance of the crown of *England*, this is not an adherence to the king's enemies within this act. *Claus. [168]*

7 E. 3. part 1. m. 15. *John Culwin's* land being seized upon this account there was ouster le main cum exitibus, "*Quia compertum est per inquisitionem, &c. quod Johannes ad fidem & pacem nostram extitit, quodque idem Johannes captus fuit de guerrâ per Scotos inimicos nostros, & in prisonâ in Scotiâ per dictos inimicos nostros, & pro vitâ suâ salvandâ ad fidem dictorum Scotorum per dimidium annum extitit, quodque idem Johannes postea in Angliam rediit, & ad fidem & pacem nostram a tempore prædicto hætenus extitit;*" tho this was before 25 E. 3. yet the instance is useful, because adhering to the king's enemies was then treason.

If a captain or other officer, that hath the custody of any of the king's castles or garrisons, shall treacherously by combination with the king's enemies, or by bribery or for reward deliver them up, this

" roialme, & a cest trefoun, faufme, mal-
" veille & treitrouse aliaunce meyntenir,
" feistes le poeple nostre seignour le roi
" jurer, en ettreuant le dit poeple a vous,
" tant come en vous feust, pour meyn-
" nir la dite trefoun, faufme, malveille &
" treitrouse aliaunce susdites, les queux
" sont notories & conuz en le roi-
" alme, & nostre seignour le roi le re-
" corde; par quei agarde ceste court, qe
" por le dite trefoun soietz treynez &
" pendutz & decole, & qe vostre quer,
" bouels & entrayles, dount les treitrouses
" pensez vindrent, soient araceez, ars en
" poudre, & le poudre ventee, & qe vostre
" corps soit coupee en quatre quarters,
" d'ount l'un quarter sont [foit] pendu
" amount de latour de *Cardoill*, un autre
" quarter amount de la tour de *Novel*
" *Chafel*, le terce seur le pount de *Waver-*

" *wyke* & le quartre a *Salopp* & vostre teste
" seur le pount de *Loundres*, por ensemble
" qe autres n'enpreignent a faire tieux
" treasons a lour seigneur lige, & dictum
" est vicecomiti *Cumbrie* quod faciat inde
" executionem."

This whole proceeding was returned into chancery upon a *certiorari*, and from thence sent by *mittimus* into the king's bench there to be inrolled *ad perpetuum rei memoriam*; by this it appears, that it was not a military but designed as a judicial sentence, altho it scarce deserves that name, being throughout irregular and illegal, for that the party was not admitted to a trial, nor indeed had the commissioners power to try, their commission being (not *ad audiendum & terminandum* but) only *ad degradandum & ad judicium reddendum & pronunciamdum*.

is adherence to the king's enemies. This was the case of *William Weston* for delivering up the castle of *Oughtrewicke*, and *John de Gomeney*s for deliveriing up the castle of *Ardes* in *France*, both which were impeached by the commons, and had judgment of the lords in parliament, *Rot. Par. 1 R. 2. n. 40.* namely *William Weston* to be drawn and hanged, but execution was respited, *que le roy n'est uncore enforme del manner de cest judgement*: *Gomeney's* judgment was thus, *Les seigneurs in plein parlement vous adjudgent a la mort, & pur ceo qu'estes gentlehome & banneret & aves serve la aiel le roy en ses guerres, & n'estes lige home nostre seigneur le roy, vous seres decolle sans autre justyce auer*, but execution was respited (*m*).

And note, tho the charge were treason, and possibly the proofs might probably amount to it, and *Walsingham* sub anno 1 R. 2. tells us it was done by treason; yet the reason expressed in the judgment against *Weston* is only, *que surrendists le dit castle de Oughtrewicke al enemies nostre seigneur le roy avant dits sans nul duresse ou defalt de victualls contre vous ligeance & emprise*: and the like reason is exprest in the judgment against *Gomeney*s, *Vous emprists a sauement garder* [169] *sans les surrendy a nully, &c. & ore vous Johan sans nul duresse ou defalt de victualls ou de artillery ou autres choses necessaries pur le defence de dits ville & castle de Arde sans commandment nostre seigneur le roy malement l'auets delivers & surrendres al enemies nostre seigneur le roy per vostre defalt demesne contre tout plain de droit & reason, & encountre vestre emprises suisdits, &c.*

The truth is, if it were delivered up by bribery or treachery, it might be treason, but if delivered up upon cowardice or imprudence without any treachery, tho it were an offense against the laws of war, and the party subject to a sentence of death by martial law, as it once happened in a case of the like nature in the late times of trouble (*n*), yet it is not treason by the common law, unless it was done by treachery; but tho this sentence was given in *terrorem*, yet it was not executed: it seems to be a kind of military sentence, tho given in parliament, like unto that of the baron *Graystock* governor of *Berwick* (*o*), who travelled into *France* without the king's commandment, and left the care of the garrison to *Robert de Ogle* a valiant knight, who used all imaginable courage in defense thereof, but it was lost in the ab-

(*m*) See these cases *State Tr. Vol. I. p. 795.*

(*n*) This was the case of Col. *Fiennes*, parliament governor of *Bristol* for coward-

ly surrendering the same to the king's forces. See *State Tr. Vol. I. p. 745.*

(*o*) See this case *State Tr. Vol. I. p. 797.*

fence of the baron of *Grayflock*, who was thereupon sentenced to death, because he had undertaken that charge, and yet went from it without the king's command, and in his absence it was lost: this also seems rather a sentence of council of war, than a judgment of high treason; and thus far touching the treason of adhering to the king's enemies within the land and without.

Touching the trial of foreign treason, viz. adhering to the king's enemies, as also for compassing the king's death without the kingdom at this day, the statutes of 35 *H. 8. cap. 2.* hath sufficiently provided for it (*p.*) *P. 13 Eliz. Dyer*, 298, 300. *Storie's case*; but at common law he might have been indicted in any county of ^[170] *England*, and especially where the offender's lands lie, if he have any. 5 *R. 2. Trial* 54.

And it seems, if the adhering to the king's enemies were upon the narrow seas, this is an adherence to the king's enemies within the realm, and tho it be triable by a special commission at this day grounded upon the statute of 28 *H. 8.* yet at common law it might have been indicted and tried in any adjacent county by a special commission of *oyer and terminer*, for the narrow seas are within the king's allegiance, and part of the realm of *England*. 6 *R. 3. Protection* 46. *Co. Lit.* 260.

Fest. 197. 217. 218. 219. 220. and see his *Disc. I. ch. ii. per tot.* 4 *Black. Com. ch. vi.* 82. 83. 1 *Black. Com. ch. vii. p. 257.*

(*p.*) This statute gives power to try such treasons in the king's bench or by commissioners in any county appointed by the commission, and continues in force notwithstanding 1 & 2 *Pb. & Mar. cap. 10.* which reduces the methods of trial for

treason to the course of the common law, because it is not introductive of a new law, but only settles a point, that was before doubtful at common law; and it was accordingly so resolved in *Storie's case*, *Dyer* 298. *b. Co. P. C. p. 24.*

CH A P. XVI.

Concerning treason in counterfeiting the great seal or privy seal.

FIRST, I shall upon this article consider how the common law stood before this statute, and what kind of offense this was anciently, and how punished. Secondly, I shall consider how the law hath been taken touching this offense since the statute, and how punished.

I. The *great seal of England* is the great instrument, whereby the king dispenseth the great acts of his government, and the administration of justice; under this seal the great commissions to his justices and others are passed; original writs and mandates, and those processes that issue out of chancery, all the king's grants and charters of lands, liberties, franchises, honours, pardons are passed under this seal.

[171] There is or should be always a *memorandum* made upon the close rolls of the breaking of the old seal and making and delivering of the new; and by the very delivery of this seal the office of keeper of the great seal is constituted, and most ordinarily is to the same person, that is lord chancellor: sometimes the custody of the great seal is in one person, and the office of lord chancellor in another; but always a *memorandum* of the delivery thereof entered upon the close rolls. The great seal consists ordinarily of two impressions, the one the very great seal itself with the king's effigies instamped on it, the other is commonly called *pes sigilli*, and sometimes in our old books called *le targe*, which is the impression of the king's arms in the figure of a target, which is used in matters of smaller moment as certificates, which are usually pleaded *sub pede sigilli*.

Antiently, when the king travelled into *Normandy, France*, or other foreign kingdoms upon occasion of war or the like, there were two great seals, one went along with the king, the other was left with the *custos regni*, or sometimes with the chancellor, if he went not along with the king, for the dispatch of the affairs of the kingdom, and then the king upon his return sometimes redelivered the old seal and took in the new, *Clausf. 20 E. 3. part 2. m. 26. dorf. Clausf. 19 E. 3. part 2. m. 23 & 10. dorf. Clausf. 20 E. 3. part 2. m. 18. dorf. & frequentissimè alibi in dorso clausorum.*

The *privy seal* is ordinarily a warrant for the passing of things under the great seal, sometimes a warrant to issue treasure, to make allowances, &c. *vide 11 Co. Rep. 92. the earl of Devonshire's case*; and this seal is ordinarily in the custody of the lord keeper of the privy seal or commissioners thereunto appointed.

Besides these seals of greater moment there are other seals of the king, as the *privy signet*, the particular seals of the several courts, that of the *king's bench* and *common pleas* in custody of the chief justices of either court, or their clerks appointed for that purpose, the seal of the *exchequer* in the custody of the chancellor of the exchequer, the seal of the duchy of *Lancaster* in the custody of the chancellor

cellor of the duchy, the seal of the county palatine of *Lancaster* in the custody of the chancellor of the county palatine, which are sometimes in the same person, the seals of county palatine of *Chester*, of the several justices of assize, *oyer* and *terminer* and gaol-delivery, the king's seal of statutes and recognizances, the seal of the cocket; and for the most part these seals are delivered by the king's order signified sometimes by his privy signet, sometimes by his secretaries, but antiently the most of them were delivered by the king in person to the several persons, that had the custody thereof, and a memorandum made thereof upon the back of the close roll. *Claus. 43 E. 3. m. 18. dorf.*

The antient manner of delivery of the seal for statutes merchant, and probably for other seals of like nature was by the king in person as before, or by a close writ and memorandum under the great seal. *T. 19 E. 1.* it is commanded, that for the future it should be delivered under the seal of the chancellor of the *exchequer*.

The manner antiently of delivering the judicial seals of the king's bench and common pleas was by the king or chancellor to the chief justices respectively, and in like manner the judicial seal of the *exchequer* to the chancellor of the *exchequer*; these were ordinarily in two pieces, *Claus. 43 E. 3. m. 18. dorf.* The profits of the seals belonged to the king, except the seventh penny, which is the fee of either chief justice (*a*); and when the king farmed out the profits of the seal of either court, sometimes one piece remained with the chief justice or his deputy, the other piece remained with [173] the farmer or his deputy: these profits of the seals of the courts of the king's bench and common pleas were let for 1000*l.* per annum (*b*) by

L. 4

the

(*a*) The antient fee to the chief justice was one penny for every writ, as appears from two of the records here quoted by our author, viz. 20 *E. 3. Rot. 87. 22 E. 3. Rot. 115.* the first of these is a grant to *Walter* of *Yarmouth* of the profits of the seals for ten years, in consideration that the said *Walter* should pay to the clerk of the hanaper for the king's use 250 marks every year, and should likewise discharge a debt of the king's of 2000*l.* by the yearly payment of 200*l.* the said *Walter* to be allowed every year cent solds for his expenses in sealing writs; all writs *ad scētā regis*, &c. to pay no fees, *Et que les justices preignent vn denier du brief per leur seale en manere come ad este use en temps passe.*

The latter is a grant of the king (upon his having resumed the seals on account of some misdemeanor committed by *Walter*

of *Yarmouth*) to *John de Padebury* and *Henry de Sulibull*, reddendo inde regi de claro per annum ducentas & quater viginti marcas per manus clerici hanaperii, writs *ad scētā regis*, &c. to pay no fees, & quod iustitiarum nostri in placis illis percipiant unum denarium de brevi pro sigillis suis, prout ibidem *baften's est statutum*: it should seem therefore, as if the person employed by our author to consult the record mistook the word *vn* in the first grant for a numeral *vii*, and that this was the occasion of his making the seventh penny to be the fee of the chief justice.

(*b*) These profits were not let for above three or four hundred pounds per annum, as appears not only from the above-mentioned cases, (the highest of which is 200*l.* and 250 marks per annum, which is on more than 366*l.* 13*s.* 4*d.*) but also from the

the king. *M. 18 E. 3. Rot. 35. Rex. P. 20 E. 3. Rot. 87. T. 22 E. 3. Rot. 115. M. 23 E. 3. Rot. 31. coram rege (c).*

Many times the justices issued process under their own seals unto the sheriffs: this was complained of *inter petitiones parliamenti* [174] 12 E. 3. n. 6. by the chancellor of the exchequer and clerk of the hanaper, as a derogation to the king's profit, and contrary to the duty of the sheriff, who, by his oath, is bound to receive no writs, but under the king's seal; the answer is, *Soit briefe mar.' a justie' de common banc contenant l'effect de petition, & quils pur leur advisement facent tiel remedy en leur place, come ils verront, qe soit a faire a profit du roy.*

And it seems most usual, that since that time judicial process not only in those greater courts, but in most other courts issued under the king's seals thereunto deputed, yet justices of assise and gaol-delivery sometimes make their precepts under their own seals: *vide Judicial Register, 34, 35, 41, 43, 73, 84. vide pur ceo Rot. Parl. 25 E. 3. n. 25.* a petition that judicial process out of the king's bench and com-

18 E. 3. Rot. 35. where the king signifies by writ 20 Octob. to his justices, that he had granted to Matthew Canaceon and his assigns totam proficuum ad se de sigillis omnium brevium judicialium de banco suo & banco communi executionum pertinentem, usque ad terminum decem annorum, in valore trescentarum librarum per annum, de quibus ipsi solvent ad opus regis custodi hanaperii cancellarie quolibet dictorum decem annorum centum libras de exitibus brevium prædictorum, & reserabunt penes se totum proficuum residuum de brevibus prædictis durante dicto termino in recompensationem decem [duo] millium librarum sterlingorum, de quibus prædictus Mattheus in debitis, in quibus rex certis personis in ducatu Aquitanie tenebatur, assumpsit regem acquiescere & exonerare; ita semper quod brevia ad secliam & pro commodo regis per visum & testimonium illorum, qui pro rege prosequuntur ac brevia pro hominibus de curia regis, & pauperibus hominibus facta & facienda absque aliquo inde solvendo deliberentur, prout hactenus in cancellaria fieri consuevit. Et sciendum quod eodem 20 die Octob. Robertus de Sadynghon Cancellar' domini regis liberavit Willhelmo Scot [capitali iustitiario] apud Westm' quoddam sigillum domini regis pro brevibus prædictis in banco domini regis sigillandis, cujus unam partem idem Willhelmus Scot liberavit cuidam Rogero de Merlawe, deputato dicti Matthei Canaceon jurato, aliam vero partem ejusdem sigilli penes se ipsum retinendo; Et dictum est fideliter Rogero, quod officio prædicto bene & fideliter intendat; secun-

dum formam & conditionem in brevi prædicto contentas periculo quod incumbit, &c.

Altho the consideration is here said to be the discharging of a debt of ten thousand pounds, (which probably led our author to think the profits were let at 1000*l.* per annum, so that in ten years time that debt might be discharged) yet the annual produce of the seals being no more than 300*l.* one hundred whereof was to be paid yearly for the king's use, it seems to me pretty plain, that the king's debt, which he undertook to pay, could be only two and not ten thousand pounds; what strengthens this observation is, that the indentures of agreement being in French, it was very easy to mistake *deux* for *dix*.

(c) This was a grant of the seals of the king's bench and common pleas to Anthony Bache for seven years in recompensationem septingentarum marcarum (due to him on an annuity formerly granted) at the rate of 200*l.* per annum for the two first years of the said term, and 200 marks per annum for the five remaining years, the said Anthony to pay to the clerk of the hanaper for the king's use one [two] hundred marks per annum for the two first years, and one hundred marks per annum for the five remaining years; and the king thereupon sends his writ de admitting prædictum Antonium vel ejus attorn' ad officium prædictum modo debite faciendum; and he was admitted accordingly.

mon pleas might issue under the seal of the chief justices, as is used in *eyere, affises, & oyer & terminer*, but denied.

But to return to the business of the great and privy seal.

The great seal which *Matthew Paris* (*d*) *sub anno* 1250. well calls (*clavis regni*) hath been with great care and solemnity kept and used, and therefore antiently, when there was any change made of the great seal, there was not only a *memorandum* made thereof in *dorso clausorum cancellariæ*, and a public notification thereof in the court of chancery, but public proclamation was made thereof. *Claus.* 1 *E.* 3. *part* 2 *m.* 11. *dorso*.

Yet in cases of speed and necessity, and sometimes for distinction's sake the king used a private seal for such occasions, which were to be passed under the great seal.

King *John* died, his son king *Henry III.* being but about ten years old, from the beginning of his reign, until 3 *H.* 3. all grants passed under the seal of the earl marshal, that was his protector or guardian, but in the king's name, *viz.* *In cujus rei testimonium has literas nostras sigillo comitis mariscalli rectoris nostri & regni nostri sigillatas, quia nondum sigillum habuimus, vobis mittimus, teste Willielmo comite mariscallo.* This seal he continued till the third year of his reign, *Claus.* 3 *H.* 3. *m.* 14. *hic incepit sigillum regis currere:* and in the same third year, *viz.* *Pat.* 3 *H.* 3. *m.* 6. there was a provi- [175]
sion made in parliament for the discrimination of those charters, that passed during his minority and after his full age, in these words: "*Henricus dei gratiâ, &c.* Sciatis quod provisum est per commune consilium regni nostri, quod nullæ cartæ, nullæ literæ patentes de confirmatione, alienatione, venditione vel donatione, seu de aliqua re, quæ cedere possit in perpetuitatem, sigillentur magno sigillo nostro usque ad ætatem nostram completam, *Teste, &c.*" and after the setting down of divers witnesses are these words, "Provisum est etiam per commune consilium regni nostri & coram omnibus prædictis, quod si aliquæ cartæ vel aliquæ literæ patentes factæ secundum aliquam prædictarum formarum sigillatæ inveniuntur prædicto sigillo, irritæ habeantur & inanes, testibus prædictis."

It appears *Claus.* 20 *E.* 2. *m.* 3. *dors.* in the beginning of that miserable tragedy, that the 26th of *October* 20 *E.* 3. the king flying from his wife and son, who was afterwards king, a great number of lords and others chose *Edward* the king's eldest son to be *custos regni*,

supposing the king to be out of the kingdom ; at that time the chancellor, together with the great seal were with the king, and the new *custos regni ea, quæ juris fuerunt, sub sigillo suo privato in custodia domini Roberti de Wyvill clerici sui existent*, eo quòd aliud sigillum pro dicto regimine ad tunc non habuit, exercere incepit, postmodum vero 20 die Novemb. proximè sequent', captis inimicis prædictis & dicto rege in regnum revertente, upon a messuage sent to the king for the seal the king thereupon sent the great seal to his wife and son, *ut non solum ea, quæ pro jure & pace essent faciendæ, sed etiam quæ gratiæ forent, fieri facerent* ; the seal was brought to them 26 Novemb. and the morrow being the feast of St. Andrew it was opened by the queen and her son, and delivered to the bishop of Norwich : and it is to be observed, that a parliament was summoned between the 26th of October and the 26th of November in the name of the king, but to be held before the queen and the *custos regni in quindena sancti Andree*, which summons must [176] needs be under his own private seal ; but the 3d of December the great seal being then in their power it was prorogued unto the morrow of Epiphany : the first summons is recited in the writ of *prorogation*, but it is not entered of record, for it was a hasty confused business, neither had they the rolls of the chancery in their hands to make any entry of it ; and if they had had them, yet it would have been irregular, and not have amended the matter : all that I shall farther add concerning these two instances is, that neither the seal of William earl Marshal used by Henry III. nor the private seal of prince Edward were great seals within this statute, whereof the counterfeit-ing might be high treason.

When the king dies, tho the office of keeper of the great seal expires, as well as all commissions to sheriffs and justices, yet the great seal of the last king continues the great seal of England, till another be made and delivered.

King Edward III. began his reign the 25th of January, he made the bishop of Ely his chancellor the 28th of January, it was not possible a new seal could be made in that time, and besides the seal was not altered till the 3d of October *eodem anno*, as appears by the proclamation thereof, *Claus. 1. E. 3. part 2. m. 11. dorf.* so that all that while the old seal with the old inscription stood ; the method of which alteration was thus : The king by his proclamation bearing, *teste 3 Octob. anno 1.* directed to all the chief sheriffs of England, signifying, that he had made a new great seal, and that it was to take place from the

the fourth day of that month of *October*, sends them the impression of the new seal in wax, commands them to publish it, and that after the fourth day of *October* they should give faith to it, and receive no writs but under the new seal after that day.

The fourth day of *October* being *Sunday* the bishop of *Ely* chancellor produceth the new seal, declares the king's pleasure, that it should be from thenceforth used; the *Monday* after the old seal is broke *præcipiente rege*, and the pieces delivered to the Spigurnel (*e*).

Again, king *Henry V.* died 30 *Augusti anno sui decimo*, a parliament was summoned by writ bearing *teste 29 Septemb.* [177] *anno primo H. 6.* to be held *die lunæ ante festum Martini*, a commission issued to the duke of *Gloucester* bearing *teste 6 Novemb. 1 H. ad inchoandum parlamentum, &c.* and the bishop of *Durham* chancellor to *Henry V.* delivered up the seal to the king 28 *Septemb.* The new seal with the new inscription was in that parliament ordered to be made, the bishop of *Durham* was made chancellor by commission under the great seal dated 16 *Novemb.* the new seal was not made till some time after, therefore the old seal of *Henry V.* was used in the summons of the parliament and all the transactions till the new seal was delivered: indeed when *Edward IV.* assumed the crown, the seal of *Henry VI.* was not used, for it could not be had, and if it could, yet *Henry VI.* being declared an usurper, there was no reason for *Edward IV.* to give any countenance to that usurpation by using of his seal, who was declared an usurper and attainted of treason.

So that (except the last case of an usurper) till a new great seal be made, the old seal, being delivered to the keeper and used and employed as the great seal, is the great seal of *England* within this statute, notwithstanding the variance in the inscription, *portraiture*, and other substantials from the state of the present governor.

But then, what shall we say of the old seal, when the new seal is made and delivered of record to the keeper, and the old seal broken? To this I say, 1. It was once the great seal of *England*, and therefore the counterfeiting of that seal and applying it to an instrument of that date, wherein the old seal stood, or to an instrument without date, is high treason; nay, if in the time of *Edward IV.* a man should counterfeit the great seal of *Henry VI.* and apply it to a patent or other instrument of his time, it had been high treason, tho

(*e*) The *Spigurnel* was an officer, whose place was to seal the king's writs. *Cambd. Remains*, p. 126.

Henry VI. were an usurper, and his seal in the time of *Edward IV.* of no value. 9 E. 4. (f).

[178] But what if in the case before instanced in, after the 4th of *October 1 E. 3.* a man had forged a grant by king *Edward III.* (g), bearing *teste 2 E. 3.* when the old seal was out of date, or in the time of *Edward IV.* had forged a grant by *Edward IV.* and counterfeited the seal of *Henry VI.* thereunto; this seems not to be a counterfeiting of the great seal of *England*, if the difference appear very legible and conspicuous, for at the time, whereunto it relates, there was no such great seal in being; but if the difference between the seals be such as be not evident to the view of every man's eye, it may be more doubtful; *sed vide de hoc infra.*

This statute speaks only of the great seal, and privy seal, and therefore no other seals were within this statute.

But by the statute of 1 *Mar. sess. 2. cap. 6.* "If any do falsely forge or counterfeit the queen's sign manual, privy signet or privy seal, every such offense shall be high treason, and the offenders herein, their counsellors, procurers, aiders and abettors being convicted according to the course of law shall be adjudged traitors against the queen, her heirs and successors." But now what shall be said concerning these other seals above-mentioned, as the seals for the writs of the courts of king's bench, common pleas, and exchequer, the seal for statute-merchant, &c.

By the old law, it seems that counterfeiting any of the king's seals, wherewith writs were sealed, was petit treason, tho it came under the name of *crimen falsi*. *Glanvil*, that wrote in *Henry II.*'s time, *Lib. XIV. cap. 7.* "Distinguendum est, utrum fuit carta regia an privata, quia si carta regia, tunc is, qui super hoc convincatur (scilicet de falsificatione) condemnandus est tanquam de crimine læsæ majestatis; si vero fuerit carta privata, tunc cum convicto mitius agendum est, sicut in cæteris minoribus criminibus falsi, in quorum judiciis consistit eorum condemnatio in membrorum solummodo amissione, pro regia tamen voluntate." *Bracton*, that wrote in the time of *Henry III.* *Lib. III. cap. 3. de crimine læsæ majestatis, §. 2.*

[179] "Est & aliud genus criminis læsæ majestatis, quod inter graviora numeratur, quia ultimum inducit supplicium & mor-

(f) This is *Begor's* case, 9 E. 4. 1 b. where it is said by the counsel, "That a man shall be arraigned in the time of E. 4. for treason done against H. 6. in

"compassing his death, &c."

(g) This must be understood under the old seal.

“tis occasionem, scilicet crimen falsi in quâdam sui specie & quod
 “tangit coronam ipsius regis, ut si aliquis accusatus fuerit vel con-
 “victus, quod sigillum domini regis falsaverit consignando inde cartas
 “vel breviam, vel si cartas confecerit & breviam & signa apposuerit adul-
 “terina, quo casu si quis inde inveniatur culpabilis vel seiscitus, si war-
 “rantum non habuerit, pro voluntate regis iudicium sustinebit, &c, si
 “warrantum habuerit & warrantizaverit, liberabitur & tenebitur war-
 “rantus:” *Fleta*, that wrote in the time of *E. 1. Lib. I. cap. 22. de crimine falsi*, tells us, “Crimen falsi dicitur, cum quis accusatus fuerit,
 “quod sigillum regis, vell appellatus, quod sigillum domini sui, de
 “cujus familiâ fuerit, falsaverit & breviam inde consignaverit, vel
 “cartam aliquam vel literam ad exhæredationem domini vel alterius
 “damnum sic sagillaverit, in quibus casibus si quis inde convictus fu-
 “erit, detractari meruit & suspendi §. 3. Item crimen falsi dicitur,
 “cum quis illicitus, cui non fuerit ad hoc data autoritas, de sigillo
 “regis rapto vel invento breviam cartasve consignaverit:” *Britton*, that
 wrote in the time also of *E. 1. cap. 4.* “Soit inquire de tous ceux,
 “qui ascun fausin averont fait a nostre seale, come de ceux qui per
 “engin ont nostre seale pendu a ascun charter sauns conge, ou que
 “nostre seale ount emble ou robbe, ou autrement troue eient ensele
 “brefs sauns autre auctorite, and cap. 8. Graund trefon est a fauser
 “nostre seal, &c.”

Upon these old books there is no difference made touching the king's seals, but generally the crime of treason was supposed in counterfeiting any of them, but most certainly the statute of 25 *E. 3.* extends only to the great and privy seal, as to the point of treason; but then whether that, which was a treason before, remain not still a felony at the common law (for all treasons include felony. 3 *H. 7. 10. Co. P. C. p. 15.*) is considerable.

M. 2 H. 4. B. R. Rot. 2. as I take it, *Visum est curiæ, quod contrafactio sigilli regis pro recognitionibus non est nisi feloniam (h)*: but tho they held it not treason, they do not positively affirm it felony since the statute of 25 *E. 3.* but only *non est nisi feloniam, viz.* that at most it can be only felony. [180]

P. 6 E. 2. B. Rot. 2. Essex. *Johannes de Bosco per cur' est culpabilis pro falsitate, eo, quod cepit cultellum suum & calefaciebat eum apud*

(b) There is no such entry to be found either on the second or seventh roll of the plea or crown-roll of that term, but the words cited by our author are in the abstract of the rolls of the king's bench of

Mich. 2 H. 4. Rot. 7. but upon what authority is uncertain, being in a different and more modern hand than that of Mr. *Agard*, who in the reign of *James I.* abbreviated the king's bench rolls.

ignem & aperuit breve regis & imposuit aliud fictum, dicit quòd est clericus, & traditur ordinario Westm' (i). Simile P. 18 E. 2. B. R. Rot. 25 Rex (k).

[181] It appears not, whether it were a writ under the great seal or a judicial writ of some court, but whether it were the one or the other, it seems to be capital, for he had the benefit of clergy, which in those times was allowable in some cases of treason; so that it seems a counterfeiting of any of the king's seals was felony at common law, but whether it so continues, notwithstanding the statute of 25 E. 3. hath degraded it from treason, unless it be the great or privy seal, shall be farther examined.

II. Having thus considered the seals, it remains to consider what shall be said a counterfeiting of the great or privy seal.

A conspiracy or compassing to counterfeit the great or privy seal is not a counterfeiting nor treason within this act, for it must be an actual counterfeiting. Co. P. C. p. 15.

(i) The record of this case is thus, "John de Bosco was arraigned pro falsitate sigilli & brevis domini regis, eo quod ivit cum brevi [de cancellaria] ad ignem & calefaciebat cultellum, & cum illo cultello ceram dicti brevis fudebat, and amoto illo brevi imposuit aliud breve [this was a Superfedeas to the sheriff of Essex] & illud in eadem cera incluit & tradidit fervienti suo illud breve vicecomiti Essex defendendum, qui quidem serviens in præsentia prædicti Johannis de Bosco liberavit eidem vicecomiti falsum breve prædictum: Dicit quod clericus est:" upon which he was claimed by the abbot of Westminster his ordin.ry; "Sed ut sciatur pro quali eadem ordinario liberari debeat," a jury ex officio pass upon him, who find him guilty "de prædicta falsitate, findendo cum cultello suo prædicto ceram prædictam & imponendo falsum breve prædictum, sicut ei superius imponitur: Ideo inde ad judicium, &c. & interim committitur marechal', &c." There is no judgment entered upon the roll; so that from this record, which is not in usual form, it is doubtful whether he had his clergy or not, tho from a jury passing upon him ex officio it is most probable he had; but yet it should seem from the case of Geoffrey de Huntinton & Richard de Chynton, which was but six years afterwards, as if this offense was not so much as felony; they were charged "pro contrafectione sigilli regis & carte sub sigillo regis sic contrafacto," which was found in their custody; afterwards they plead the king's pardon "pro omnibus felonis & transgressionibus, &

"quia inspecta carta prædicta, quæ dicitur esse contrafacta, compertum est quod carta non est de forma in cancellaria regis usitata, inspecta etiam cera ejusdem carte suspectæ compertum est, quod cera illa impressa est sigillo regis cancellar', sed prius apposita fuit cuidam alteri literæ regis patenti, quod citius dici potest transgressio, quam contrafactio. Et dominus rex perdonavit eis sectam pacis suæ, quæ ad ipsum pertinet, de omnimodis felonis & transgressionibus, &c.—jam per tres annos in prisione regis steterint occasione prædicta & non alia causa, dictum est—quod deliberet eos, &c. & ipsi eant inde quieti, &c. Et carta illa cancellatur in cur." Mich. 11 E. 2. B. R. Rot. 156. Heref: from hence it appears that the judgment afterwards in Leake's case 4 Jac. 1. was agreeable to the ancient resolutions.

(k) This is the case of Philip Burden, but is by no means similar to that of John de Bosco, for this was a direct actual counterfeiting of the great seal: vide infra in notis. See also another case to this purpose for counterfeiting the privy seal. Rot. part. 6 E. 2. part. 2. m. 18. "John de Redynges was arraigned and tried coram senescallo & marecallo hospitii domini regis pro contrafectione privati sigilli domini regis, & pro quibudam litteris prædicto sigillo contrafactis [contrafactis] consignatis cum eo inventis," and being found guilty had judgment, "Quod pro prædicta seductione [seditione] sit detractus, & pro manuoperè cum sigillo prædicto postea suspensus." Vide Ryley's Placita Parliamentaria, p. 542—545.

A taking

A taking the great seal off from a true patent and clapping it on a forged patent in former times hath been held high treason; in 40 *Ass.* 33. it is plainly held to be high treason, (tho my lord *Coke* (1) saith otherwise) for the woman, that did it, could not be let to mainprife, which if it had been only a great misprison, she had been bailable upon that indictment (m).

2 *H.* 25. which is entered *H.* 2. *H.* 4. *B. R.* *Rot.* 16. *Midd. Clement Petition's* case, the taking off the true seal from one patent and fixing it to a forged patent is adjudged high treason; yet the judgment is only *quod distrahatur & suspendatur*, which is the judgment in petit treason.

This case and the reporting of it is disliked by my lord *Coke P. C.* p. 15. (n); but *Stamf. Pl. C.* p. 3. seems to agree with this resolution.

But the later authorities are against it, and that it is only a great misprison and offense, but not high treason, no nor yet [182] felony, as it seems by the book hereafter cited.

37 *H.* 8. *B. Treason* 3. A chaplain taking a good seal off from an old patent, and fixing it to a forged dispensation of non-residence no treason, but only a great misprison punishable by fine and imprisonment.

(1) *Co. P. C.* p. 115.

(m) This argument of our author is very far from being conclusive, for by the statute of *Westm.* 1. cap. 15. where the offense is *open and manifest* (which for what appears was the case here) the offender is not bailable, altho it were only a misprison. 2 *Co. Inst.* 188, 189.

(n) And well it might be, for that case appears by the record to have been thus: "*Clemens Peytenyn* was indicted, quod contrafecit magnum sigillum domini regis falso & malitiose & proditorie, & cum dicto sigillo sic contrafacto quasdam literas, quæ præsent' prædict' sunt contrafuit, sigill': he pleads not guilty, the jury find, quod quoad contrafactionem sigilli prædicti idem *Clemens* in nullo est culpabilis, sed dicunt, quod idem *Clemens* falso & deceptorie & in deceptionem populi de assensu aliorum de cova sua scribi fecit, & fluxit literas illas pendit fecit sigillum magnum domini regis, quod antea pendeat super aliam magnam patentam domini regis, & sigillum domini regis prædictum subtiliter & private confusi fecit super literas falsas prædictas, & illas falsas literas una cum sigillo domini regis prædicto in diversis partibus regni *Angliæ* tanquam veras li-

teras patentes, prout eadem literæ faciunt mentionem, usus est & exercebat in deceptionem domini regis & populi sui; propter quod pro eo, quod curia non auferatur, quale iudicium prædictum *Clemens* in hac parte subire debeat, remittitur prisonæ maresch': Afterwards in the *Easter* term next following, visum indictionem necnon veredictum prædictis videtur curiæ hic, quod falsæ literæ prædictæ sic in deceptionem domini regis & populi sui factæ & sigillatæ, una cum usu & exercitio earundem, alta proditiis sunt, consideratum est, quod prædictus *Clemens Peytenyn* distrahatur & suspendatur." This must be owned to be a very extraordinary case, for as lord *Coke* justly observes, whatever offense this were, yet this judgment ought not to have been given upon this verdict, for the jury had expressly acquitted him of the offense charged in the indictment; not to mention, that it is directly contrary to the case above-mentioned of *Geoffrey de Huntynton*; there is likewise another irregularity in this case, that tho the offense was committed after the 25 *E.* 3. and is laid to be done *proditorie*, yet it is not laid to be *contra formam statuti*, as since that statute all treasons ought to be.

H. 4 Jac. cited by lord *Coke*, *P. C. p. 16.* *Leake's* case, who joined two parchments together with glew so close, that it could not be discerned, and put a label through both, and on the one a true patent granted, which passed the seal, and then afterwards upon the other parchment wrote a forged patent, then he cut off the true patent and published the other as a true patent; this was ruled by the advice of all the judges, 1. That this was no counterfeiting of the great seal, nor treason within this act. 2. But if it had been a counterfeiting of the seal, he might have been generally indicted of treason for counterfeiting the great seal, but it was ruled to be a great misprision or offense, but not high treason; and with this opinion agrees my lord *Coke*, and it is the safer and later opinion and fit to be followed.

If the patentee of the king, of lands under the great seal, raze the name of one of the manors and make it another name, this is not counterfeiting of the seal nor treason within this statute, but [183] a great offense or misprision, for which the abbot of *Bruer* was sentenced before the king and his council, and the abbot delivered up the charter to be cancelled. *Claus. 42 E. 3. m. 8. dorf. Co. P. C. p. 16.*

If the chancellor or keeper affix the great seal to a charter without warrant, tho this be a misdemeanor in him, it is not treason within this statute, tho *Britton* and *Fleta ubi supra* make it treason at common law; and altho it should be supposed treason at common law, but not comprised within the statute, yet it is not now felony; therefore the rule taken 3 *H. 7. 10.* that those treasons at common law, which are not within the declaration of 25 *E. 3.* yet remain felony, is not true, as might be made appear by many instances.

And upon the same account it seems, that altho, by *Fleta* and *Britton*, if a man find casually the great seal, and seal a forged charter, this was treason at common law; yet it is neither felony nor treason at this day, for here is no counterfeiting of the great seal, it is therefore only a great misdemeanor, *Co. P. C. p. 16.*

And altho it seems, by the old books above cited, that counterfeiting of the judicial seal of the king used for writs was then treason, yet very lately in the king's bench it was ruled to be no felony at this day, but only a great misdemeanor punishable by fine and imprisonment, or by standing in the pillory, or both, so that the book of 3 *H. 7.* is not in all points agreeable to law, for many things were treason before 25 *E. 3.* which are thereby declared not to be treason, and yet remain

not felony at this day; and the like for counterfeiting the seal of a statute merchant.

If a man grave the sculpture of the great seal without warrant from the king, but never use it or apply it to seal any thing, this seems to be no counterfeiting of the great seal, tho it be with design and preparatory to such an attempt; for tho in truth the instrument itself be the seal, as appears by the usual expression *figillo meo figillat'*, and by the frequent proclamations *de figillo amisso*, when either the king or a subject lost his seal casually, yet it seems not a seal within this statute till an impression made in wax in testimony of some writing, [184] no more than the forging of a stamp for money is a counterfeiting of money, unless it be used, tho in both cases it is a great misdemeanor and a great evidence to prove the offense committed, if any other circumstances concur to prove it done.

M. 16 Jac. B. R. One counterfeited the draught of a patent to himself and others to compound with alehouse-keepers and usurers touching their offenses, and counterfeited the privy signet to warrant the passing of the other commission so by him drawn, and collected divers sums of money thereby, and for counterfeiting the privy signet he was indicted of high treason upon the statute of 1 *Mar.* It was resolved, 1. That the counterfeiting of the great seal, privy seal, sign manual, or privy signet is at this day high treason. 2. That the adding of the crown in the counterfeit signet, which was not in the true, and the omission of some words in the inscription, which were in the true signet, and the inserting other words, which were not in the true, (which was done purposely, that there might be a difference between the true signet and the counterfeit) alters not the case, but it is high treason, for the fixing of the counterfeit signet, and thereby obtaining the great seal to his feigned patent, and thereby publishing it to be true, and collecting sums of money by it make it treason; the offender had judgment to be drawn, hanged and quartered (*o*).

So that it should seem, that tho there might be so great a disparity between the true and counterfeit signet, that the bare affixing of such a seal might not be a counterfeiting within the statute; yet if it were so like, that it deceived the officers of the great seal, and was used to that purpose, and attained its effect, *viz.* the affixing of the great seal to the forged commission, it was a sufficient counterfeiting to bring him within this law of 1 *Mar.*

(*e*) This case is reported in a *Rel. Rep.* so, by the name of *Robinson's case*.

The like *mutatis mutandis* may be applied to the great or privy seal.

[185] If a man counterfeit the stamp of the great seal, and deliver it to *B.* to use, *B.* being ignorant that it is a counterfeit stamp, but thinking it true, seals a writ or commission, this seems not to be treason in *B.* because he did it not *proditorie*, but it seems to be treason in the deliverer, if he delivered it to that purpose, for he did it *proditorie*, but the other not.

III. I come in the last place to consider the judgment in the case of counterfeiting of the seal, whether it be only to be drawn and hanged, as in the case of counterfeiting money, or to be drawn, hanged, beheaded, &c. as in the case of compassing the king's death, levying of war, or adhering to the king's enemies.

It seems that at the common law this offense was felony or treason at the king's election; if the indictment ran only *felonice* it was only felony, if *proditorie* it was treason (*p*).

But altho it were *proditorie* and so applied to treason, it was not a treason of so deep a die, as that of compassing the king's death, adhering to the king's enemies, or levying war, which strikes at the head, and therefore in comparison thereof it was a kind of petit treason.

Claus. 6 Johan. M. 12. dorf. "Scias quòd dedimus *Adæ de Essex* clerico nostro pro servito suo omnia terras, tenementa & jura, quæ fuerunt *Willielmi de Strubby*, cujus terræ & tenementa sunt eschaeta nostra per feloniam, quam fecit de falsificatione sigilli nostri." *Et nota* the king had the escheat, yet the offense was styled felony.

At the parliament 18 E. 1. Co. P. C. p. 16. Clergy was allowed to a man convict *pro falsificatione sigilli regis, deliberatur ordinario* (*q*), but in *tali casu non admittenda est purgatio*; and yet in these [186] greater cases of treason of levying war or compassing the king's death clergy was not allowed at common law. T. 21 E. 3. B. R. Rot. 23. Rex (*r*).

M. 1

(*p*) Co. P. C. p. 15.

(*q*) This is confirmed by Philip Burton's case, (P. 18 E. 2. B. R. Rot. 25. Rex South') who together with Richard de Bourne was indicted *Quod nequiter & seditiose contraxerunt sigillum de metallo ad modum magni sigilli regis, de quo quidem sigillo contraxerunt diversa brevicia quamplurima consignaverunt*; he pleads *quod clericus est*, the jury find him guilty of felony & seditione prædictis ei impositis, and he was thereupon delivered

to his ordinary, *tanquam clericus convictus*, from hence it appears that at common law clergy was allowed in cases of treason, where it was not immediately against the king's person.

(*r*) That case was thus, Peter de Thorpe son of John de Thorpe was indicted, and afterwards outlawed anno 18 E. 3. *pro diversis felonis & seditioibus, viz. going to little Tarmouth and Gorleston cum tribus vexillis extensis in modum guerræ, breaking open* houses

M. 1 E. 3. Charter de Pardon 13 (f). A man arraigned for counterfeiting the king's seal pleaded a charter of pardon of all felonies, and it was allowed; yet there it is agreed, that the judgment for such an offense is, that he shall be drawn and hanged, but such a pardon will not serve in such a case since the statute of 25 E. 3.

Trin. 10 E. 2 Rot. 192. B. R. Bucks. "*Robertus Legat & Johannes Salecok* per ballivos coram rege ducti ad respondendum domino regi de hoc, quod ipsi cum aliis ignotis in pleno mercato villæ de *Olneye*, cum quadam falsa commissione & ficta cum quodam sigillo regis controfacto signata, quam ballivi in curia regis hic porrexerunt, afferentes, illam super eos inveniri die, quo attachiati fuerunt, & dicentes, quod virtute illius commissionis prisas fecerunt ad opus domini regis, usque ad summam sexaginta bestiarum, de quibus quatuor bestię inventę fuerunt in eorum possessione & cum eis hic ductę; they both plead not guilty; the jury find *John Salecok* guilty de falsitatibus & felonis prędictis, judgment given against him pro falsitate sigilli regis & commissione prędictis quod detrahatur & pro furtiva abductione prędictarum bestiarum suspendatur."

Nota, an arraignment of treason without indictment upon the mainouer (*t*) found upon them: vide *P. 21 E. 3. B. R.* [187] *Rot. 46. Midd' Rex.*

According to the old books above-mentioned, *Fleta*, &c. ubi supra, *distrahi debet & suspendi*; and so it was practised in the case of 2 *H.* 4. above-mentioned, where the judgment is only *distrahi & suspendi*.

And it may be reasonably argued, that as in the case of counterfeiting the king's coin, which was a treason at common law, tho it be so declared by the statute of 25 E. 3. yet the judgment, that was at common law, which was only to be drawn and hanged, is not altered by that statute. *M. 10 Car. B. R. Morgan's case (u)*: so in case of counterfeiting the seal; but at this day the law is generally held, that

houses there, feloniously taking away goods there, &c. and also five ships, "Quę preparatę erant de victualibus & aliis necessariis eundi cum domino rege in guerra sua, &c. Afterwards coram rege quęsitum est a pręfato *Petro*, si quid pro se habeat vel dicere sciat, quare ad executionem judicii de eo super utlagaria prędicta procedi non debeat, &c. Qui dicit, quod clericus est & membrum sacrę ecclesię, &c. Et quęsitum est fępius ab eo, si quid aliud velit dicere pro responsione in retardationem judicii, &c. Qui dicit, ut prius, & nihil aliud re-

spondet, &c. Et inspectis indictmentis prędictis, & etiam recordo & processu utlagar' prędictę manifestę compertum est in eisdem, quod utlagar' prędicta super articulo *seditionis* promulgatur, in quo casu prędictus *Petrus* privilegio clericali gaudere non potest secundum legem & consuetudinem regni, &c. Ideo idem *Petrus* distrahatur & suspendatur, &c."

(*f*) 1 E. 3. 23. b.

(*t*) See for this kind of arraignment, 2 *H. 4. 43. b. S. P. C. 148. c. 2 Co. Inst.* 188.

(*u*) *Cro. Car.* 383.

for counterfeiting of the great or privy seal, or of the privy signet or sign manual, the judgment is to be hanged, beheaded and quartered, as in other high treasons, and so was the judgment in the case of 16 *Jac.* above-mentioned; and it is safest to follow the modern practice in judgments of high treason, tho I think it no error, if the judgment be only *quod distringatur & suspendatur*, according to the antient precedents, because the judgment is still capital, and tho it be less, than the highest judgment in treason, yet it is still included in it.

1 Hawk. P. C. 41. 4 Black. Com. c. vi. p. 83. Kelyng 80. Coke's Entries, 360. b. See a precedent there.

[188]

CHAP. XVII.

Concerning high treason in counterfeiting the king's coin, and in the first place touching the history of the coin and coinage of England.

THE legitimization of money and the giving it its denominated value is justly reckoned *inter jura majestatis*, and in *England* it is one special part of the king's prerogative.

Before I enter into the particulars concerning money I will give a history or narrative of the various states and conditions and changes of money in the several ages of this kingdom, and then shall descend to some more particular observations, which will be useful in this business.

Money is the common measure of all commerce almost through the world; it consists principally of three parts; 1. The material, whereof it is made. 2. The denomination or extrinsic value. 3. The impression or stamp.

1. The material in *England* is either pure silver, or pure gold, whereof possibly some money was antiently made here in *England*, or else silver or gold mixed with an allay, which was usually and is hitherto a small proportion of copper.

The standard of the money of *England*, that hath for many ages obtained, is that, which is commonly called *Sterling* (a) gold or *Ster-*

(a) Some imagine this word to come from the town of *Sterling* in *Scotland*, where they pretend the purest money was formerly made; others that it is derived from the Saxon word *Stear*, which signifies rule or standard; others that it was taken from

some *Flemish* workmen, who in the reign of King *John* were invited over to reduce the money to its proper fineness; the people of that country being generally called *Esseflings*.

ling silver, for tho the denomination of *Sterling* was at first applied to the coin of silver and to that coin, which was the penny commonly called *Sterlingus*, yet use hath made it applicable not [189] only to all kind of *English* coin of silver, but also to coin of gold, and this is called the standard of coin.

But before this can be well understood, we must make some digression touching the measures applicable to these materials.

In silver the measure or weights applicable thereunto are principally these:

1. The pound, which being not *averdupois*, but *troy* weight consists of twelve ounces.

2. The ounce consisting of twenty penny weight.

3. The penny or *Sterling* consisting of thirty-two grains of wheat taken out of the middle of the ear.

This is the old *compositio mensurarum* settled in the time of E. 1. (*b*) viz. quod denarius Angliæ, qui denominatur *Sterlingus rotundus*, sine tonsura ponderabit triginta duo grana frumenti medio spicæ, & viginti denarii faciunt unciam, & duodecim uncie faciunt libram, & octo libræ faciunt gallonem, & octo gallones busselum (*c*).

And it is to be remembered, that at that time a penny did really weigh the twentieth part of an ounce of silver, and twenty pennies did really weigh an ounce of silver, and two hundred and forty pence did really amount to a pound weight troy, and to twenty shillings, which made a pound of silver coin.

And altho at this time the coin is raised, and therefore varies from what it was at that time, yet to this day twenty shillings in silver is called a pound, and the measure of an ounce is by twenty penny weights according to the old proportion; but indeed the grain is changed (*), for whereas thirty [two] grains of corn then made an ounce [a penny weight], yet because the weight of corn is not always uniform, and the number of thirty [two] was not so ready and easy for computation; the penny weight is now divided [190] into twenty-four equal parts, which are commonly in the business of the mint called grains.

(*b*) An old leiger book of the abbey of St. Edmundsbury says the affair was thus settled in 3 E. 1. by George Rochley then mayor of London and master of the mint; and in the 28 E. 1. an indented trial-piece of the goodness of old *Sterling* was lodged in the exchequer, and every pound weight troy of such silver was to be shorn at twenty

shillings and three pence. See Tindal's note on Rapin's history *sub fine Ed. 1.*

(*c*) Vide statute 31 E. 1. 2 Co. Inst. 577.

(*) There being, as I apprehend, two or three mistakes in this paragraph, I was not willing to vary from the original MS. but have inserted in brackets what I think was intended.

But touching the measure of gold, there is some difference in relation to coin from that of silver, for we are told by the *liber ruber scaccarii* in that large tract concerning money, that the pound of gold consists of twenty-four carets, every caret weighing half an ounce of silver, and every caret consisting of four grains; and consequently every grain of gold would weigh sixty of those grains, which we call grains of silver, *viz.* the artificial grains, whereof twenty-four make the penny weight (*d*).

Now the *Sterling* standard was antiently, as it seems, somewhat different from the standard as it is at this day, and for some hundred of years before; for from the 46th year of *Edward III.* and for some time before until this day the standard of *Sterling* silver hath been and is this, *viz.* every pound of *Sterling* silver hath eleven ounces two-penny weight of fine silver, and eighteen penny weight of copper, which makes the alloy of *Sterling*; but because there cannot be so exact an observation of the proportion, a half-penny weight of copper over or under is allowed for the remedy, which is the cause that *Sir John Davis* in the case of mixt monies, *fol. 24. b.* saith, that eighteen shillings and five pence halfpenny *argenti purissimi continentur in quolibet librâ, & quolibet libra de Sterling money avoit 18 d. ob. de alloy de koper, & nient pluïs.*

But before that time it appears by the red book in the exchequer, (which was written before 46 *E. 3.* and after 23 *E. 3.*) the standard of *Sterling* silver consisted of eleven ounces four penny weight of fine silver, and sixteen penny weight of copper, so that then the standard was purer; and possibly by what follows it may appear, that in the time of *Henry II.* the standard was purer than that, for then there was allowed only twelve-pence upon the pound of silver *dealbare firmam* (*e*), which possibly might be to reduce it to fine silver, but this is obscure; *de hoc postea.*

[191] The standard of *Sterling* gold in the latter end of *E. 3.* (*f*) was, that a pound of *Sterling* gold consisted of twenty-three carets, three grains and a half of pure gold, and a half grain of alloy of copper, and thus I think it continues to this day; and by this we may understand the statute of 17 *E. 4. cap. 1.* and 4 *H 7. cap. 2.* by the former it is provided, that no goldsmith sell any gold under the

(*d*) If 1 caret=4 grains= $\frac{1}{2}$ ounce=10 penny weight, then $\frac{1}{2}$ caret=1 grain= $\frac{1}{20}$ penny weight=60 grains of silver.

(*e*) *Mat. Paris* 747.

(*f*) See *Tindall's* note on *Rapin's* history *sub fine Ed. 3.*

fineness of eighteen carets, nor silver under the allay of *Sterling*; by the latter, that all silver, that shall be fined or parted, be made so fine, that it may bear twelve penny weight of allay in a pound weight, and yet be so good or better than *Sterling*.

And this is the dignity of the coin of *England*, that it hath been generally of the allay of *Sterling*, (except some small interruptions, whereof hereafter) and according to this it was enacted 25 E. 3. cap. 13. that the money of gold or silver, which now runneth, shall not be impaired in weight or allay, but as soon as a good way may be found, the same be put into the antient state, as in the *Sterling* made upon the petition of the commons. *Rot. Par.* 25 E. 3. n. 32.

II. As to the second essential of coin it is the denominated or extrinsic value, which is and of right ought to be given by the king, as his unquestionable prerogative (*g*), and that is seen in these particulars.

1. In the first institution of any coin within this kingdom he, and he alone sets the weight, the allay, the denominated value of all coin; this is done commonly by indenture between the king and the master of the mint; *de quo postea*.

And tho by special charter or usage divers prelates and monasteries in *England* had a certain number of stamps for the coinage of money, as the abbot of *St. Edmundsbury*, *Claus.* 32 H. 3. m. 15. *ders.* the archbishop of *York*, *Claus.* 5. E. 3. part. 1. m. 19. and likewise the archbishop of *Canterbury*, the bishop of *Durham*, the bishop of *Chichester*, &c. *de quibus vide.* statute 14 & 15 H. 8. cap. 12. yet they had only the profit of the coinage, and the residence of some coiners at their cities, but they had not the power of instituting either the allay, the denomination, or the stamp; the stamps were usually sent them by the treasurer and barons of the exchequer by the king's command under his great seal, and the masters or chief officers employed therein were sworn to the king for the just execution of their places. *Claus.* 5 E. 3. part. 1. m. 10. & 19. [192]

But those mints have been long disused, tho it should seem by the statute of 14 H. 8. cap. 12. above-mentioned, that the several statutes made against exchange of money, other than at the king's exchanges, were not intended to prejudice these particular franchises of coinage.

2. He may by his proclamation legitimate foreign coin, and make it current money of this kingdom according to the value imposed by such proclamation; but the counterfeiting of such money was not

treason, till the statute of 1 *Mar. cap. 6.* made it so, nor the clipping, washing, impairing thereof was not treason till 5 *Eliz. cap. 11.* and 18 *Eliz. cap. 1.* but all these statutes allow the power of legitimation thereof to the king by proclamation (*h*).

3. He may inhanse the external denomination of any coin already established by his proclamation, and thus it hath been gradually done almost in all ages, as will appear by what follows in this chapter; this is sometimes called imbasing of coin^a and sometimes inhaning it; and it is both, it is an inhaning of coin in respect of the intrinsic value or denomination, but an imbasing in regard of the extrinsic value; as for instance, when in the time of *E. 4.* a noble was raised to a higher rate by twenty pence; *vide 9 E. 4. 49.*

4. He may by his prerogative imbase the species or material of the coin, and yet keep it up in the same denominated or extrinsic value as before, namely to mix the species of money with an alloy below the standard of *Sterling*; this is the case of mixt monies in Sir *John Davis's* reports, where the case was this.

[193] *April, 43 Eliz. Brett* bought wares of one *Gilbert* a merchant in *London*, and became bound to him in 200*l.* conditioned for the payment of one hundred pound *Sterling* current and lawful money of *England* in *September* following at *Dublin* in *Ireland*: 24 *May, 43 Eliz.* the queen sent into *Ireland* certain mixt money from the tower of *London* with the usual stamp and inscription, and declared by her proclamation, that it should be lawful and current money of *Ireland, viz.* a shilling for a shilling, and six-pence for six-pence, and that accordingly it should pass in payment, and none to refuse, and declared that from the 10th of *July* next all other money should be decried and esteemed only as bullion and not current money. Upon the day of payment *Brett* tendered the 100*l.* in this mixt money, and resolved upon great consideration, that this tender was good, the place of payment being in *Ireland*, and the day of payment happening after the proclamation made; that altho this were not in truth *Sterling*, but of a baser alloy, nor a money current in *England* by the proclamation, yet the payment being to be made in *Ireland*, it was, as to that purpose, current money of *England*; but if the day had been passed be-

(*b*) See also 8 & 9 *W. 3. cap. 25.* and 7 *Ann. cap. 25.* whereby it is high treason knowingly to make, mend, buy, sell, or have in possession any mould or press for coining, or to convey such instruments out

of the king's mint, or mark on the edges any coin current, or to counterfeit, or colour or gild any coin resembling the current coin of the kingdom. And see 15 *Geo. 2. ch. 28.*

fore the proclamation, then he must have answered the value, as it was when payment was to have been made. Sir *John Davis's* reports, *case de mixt moneys* (i).

It is true, that the imbasing of money in point of allay hath not been very usually practised in *England*, and it would be a dishonour to the nation, if it should, neither is it safe to be attempted without parliamentary advice; but surely if we respect the right of the thing, it is within the king's power to do it; for tho the statute of 25 E. 3. cap. 13. above-mentioned be against it, yet the statute doth not absolutely forbid it; and altho by *Poyning's* law 10 H. 7. all the precedent statutes in *England* are of force in *Ireland*, yet that resolution was given as above.

My lord *Coke* in his comment of *Articuli super cartas*, cap. 20. seems to imply, that the alteration of money in weight or allay may not be, without act of parliament, and for that purpose cites the *Mirror of Justices* (k), *Ordein fuit, qe nul roy de ce realme ne poit changer sa money ne impayre, ne amender, ne autre money faire, qe de ore ou de argent sans assent de tous ses counties*; and the act of 25 E. 3. cap. 13. the statute of 9 H. 5. sess. 2. cap. 6. that all money of gold and silver shall be as good weight and allay as is now made at the *Tower*: the parliament-roll of 17 E. 3. n. 15. (l) which was an accord in parliament for the present amendment and increase of coin *de faire une mony des bones Esterlinges en Engleterre du poys & allay del auntient Esterlinges, qe avera son course in Engleterre enter les graunts & commons de la terre*, which should not be exported; and if those of *Flanders* would make money of as good an allay as *Esterlinges*, that it should be current between merchant and merchant here and others that would receive it, which was a temporary provision for the increase of money.

All that a man can conclude upon these is, that it is neither safe nor honourable for the king to imbase his coin below *Sterling*: if it be at any time done, it is fit to be done by assent of parliament, but certainly all that it concludes is, that *fieri non debuit*, but *factum valet*, and this appears,

1. By that resolution in the case of mixt monies, which, tho it were but by way of advice and in *Ireland*, is of great weight, especially if we consider the consonancy thereof to the practice in *Ireland*,

(i) *Davis Rep.* 18.

(k) cap. 1. §. 3.

(l) See *Co. P. C.* p. 93.

which tho it hath the same law of 25 E. 3. in force there, yet generally their coin current there was of a baser allay than *Sterling*, even before the proclamation of 43 *Eliz.*

2. By the usual inhanfing of the coin in point of value and denomination here, which tho it be not absolutely an imbasement of the coin in the species, yet it hath very near the same effect.

3. By the attempts that have been made to restrain the change of coin without consent of parliament. Among those many provisions by the lords ordeiners, 5 E. 2. n. 30. that much abridged the king's power, this was one, *pur ceo qe a tous les foyz qe le change de mony se fait en royaume, tout le people est grandment grievex in molts des manners, nous ordeinams, qe quant mestier serra & le roye voile exchange faire, qil la face par common counsell de son baronage & ceo en parlement.*
[195]

But these ordinances, and this among the rest was repealed in parliament E. 2. and never revived again.

Rot. Par. 20 E. 3. n. 17. “Item qe les receivers des payments nostre seigneur le roy recēvent de people en chescun place auxi bien or come argent al prise assise desicom le people est arte de cel recevoir pur payment, & qe la change de mony de or ne dargent ne se face sans assen de parlement. Ro’. Quant aprimer point de c’article soynt tenus; quant a les changes fair soit l’article monstre a nostre seigneur le roy, & as graunts qe sont perdervers lui, qils ent ordeignent & dient lour volunte.”

King *Henry VIII.* imbased the coin of this kingdom in point of allay, and so it continued during the residue of his reign, and during the reigns of *Edward VI.* and queen *Mary*, in so much that the penny had not above a half-penny of intrinsic value; but queen *Elizabeth* among the rest of her excellent methods of government did by little and little rectify this detestable imbasement of coin, 1. By prohibiting exportation, and melting down of good silver. 2. By reducing the brass money to its intrinsic value. 3. By making a good allowance (to her own loss) of the base money brought into the mint. 4. By stamping of new money of just allay of *Sterling*: *Camd. Eliz. sub anno 1560. p. 48.*

While I wrote this a proclamation hath issued dated 16 Aug. 1672, whereby copper coin of half-pence and farthings near the intrinsic value is proclaimed in these words: “We do by this our royal proclamation declare, publish and authorize the said half-pence and farthings of copper so coined, and to be coined, to be current money,
“ and

“ and that the same from and after the 16th of *Aug.* shall pass and be
 “ received in all payments, bargains and exchanges to be made be-
 “ tween our subjects, which shall be under the value of six-pence,
 “ and not otherwise nor in any other manner ;” how far this makes
 it current money, *videbimus infra.*

And thus far touching the power of denomination, or set-
 ting the extrinsic value upon coin ; the manner how this is [196]
 done will be shewn hereafter.

III. The *third* essential in coin is the stamp or impression, for tho
 it may be possible, as Mr. *Stowe* says, that in antient time money
 passed in *England* without a stamp or impression, yet I never read any
 such thing since the conquest, for that, which is frequently called
 blank money, was not money without impression, but white money or
 pure silver, or at least *Sterling* silver coined, for otherwise it had not
 been an apt measure for commerce ? the stamps or impressions of cur-
 rent money were heretofore delivered to the master of the mint from
 the exchequer, but of later times they are delivered by the secretary
 sometimes with, sometimes without the indenture of coinage : now
 touching the manner of the legitimation of coin in *England*, it is
 sometimes by proclamation, but always by indenture between the king
 and the master of the mint.

And therefore where Sir *John Davis* in the case *ubi supra* (*m*) makes
 these six things as essentials to the legitimation of coin, 1. Weight.
 2. Fineness. 3. Impression. 4. Denomination. 5. Authority of the
 prince. 6. Proclamation. The last is not always necessary to the le-
 gitimation of coin, for there is scarce any king's reign, but that there
 are various stamps or impressions of money, which were never pro-
 claimed, and therefore if upon an indictment of clipping or counter-
 feiting the king's coin it be questioned, whether it be the king's coin
 or no upon the evidence, there is not a necessity of proof thereof by
 a proclamation, but it is a meer question of fact, which must be left
 upon the jury by circumstances of fact to find, whether it be the king's
 money ; for tho there might be possibly proclamation of some new
 coins in the beginning of king's reigns, yet it would be impossible
 to prove them in the antient coins of *Edward VI.* queen *Mary*, queen
Elizabeth, &c. but if necessary to be supposed, they may be presumed,
ex diuturnitate temporis ; the most therefore that can be expected is to
 produce the officers of the mint or their indenture to prove a
 coin current, if it be not otherwise commonly known. [197]

But proclamation is necessary in these cases following.

1. A proclamation with proclamation-writ under the great seal is necessary to legitimate and make current foreign coin, and without the proclamation it is neither current coin of this kingdom, nor is the counterfeiting, clipping or diminishing thereof treason within the statute of 1 Mar. or 5 or 18 Eliz. for the words in these statutes (*and by proclamation allowed and suffered to be current here*) refers only to foreign coin, not to the coin of this kingdom; but tho it be not proclaimed, it is misprision of treason to counterfeit it by the statute of 14 Eliz. cap. 1.

The reason is especially because by the statute of 17 R. 2. cap. 1. no foreign coin of gold or silver are to run in any manner of payment within this realm, but are to be brought as bullion to the mint to be turned into *English* coin.

2. A proclamation under the great seal is necessary to legitimate base coin or mixt below the standard of *Sterling*, and for the dispensing within the statute of 25 E. 3. cap. 13. and 4 H. 5. cap. 6. and with application to that case the opinion of Sir *John Davis's* report touching the necessity of a proclamation seems to be good in law.

3. A proclamation under the great seal is necessary, when any coin already in being is inhanfed to a higher denomination or extrinsic value; as when the twenty shillings piece of gold was raised to twenty-two shillings, because it was once current money under another denomination; thus it was done upon the inhanfing of twenty shillings and ten shillings pieces by king *James*.

4. A proclamation is necessary when any money, that is current in usage or payment, is decried; thus it was done in the case of 43 Eliz. for the *Sterling* money in *Ireland* before mentioned; and thus it was done by the *Pollards* and *Crocards* tempore E. 1. (n) Dy. 82. and by the several base monies mentioned in *Articuli de moneta*, namely [198] by the money with the mitre and with the lyons, which it seems were minted in *England*, besides the other foreign money therein mentioned (o).

5. Altho in the case of money newly coined by the king's authority in *England* a proclamation is not absolutely necessary to the legitimation thereof or making it current, yet to induce a contempt upon such as refuse to take it in payment such proclamations have not

(n) *Davis* 21. l. See the note in *Rapin's* hist. sub fine Ed. 1.

(o) And thus it was lately done in the

case of the broad pieces of twenty-five shillings and twenty-three shillings.

been altogether unusual, and by the red book of the exchequer seems necessary for that purpose; for how can men reasonably know at first, whether this be the king's coin without some such public notification, where long use and custom hath not made the stamp or coin familiarly known to those, that are to receive it: *vide* proclamations for money newly made principally upon this account, *Claus.* 18 *E.* 3. *part* 1. *m.* 28 & 12. *dors.* *Claus.* 18 *E.* 3. *part* 2. *m.* 14. *dors.* *Claus.* 19 *E.* 3. *part* 1. *m.* 23 & *part* 2. *m.* 15. *dors.* *Claus.* 20 *E.* 3. *part* 2. *m.* 20. *dors.* and 25 *E.* 3. *m.* 14. *dors.* But yet the money is the lawful money of *England*, and he that counterfeits it is within the law of 25 *E.* 3. for treason, tho there be no such proclamation: *vide* *Libr. Rubr. Scaccarii*, fol. 259. "Imprimis oportet ut omnem monetam
 "præcedat constructio allai, viz. ponderisque & numeri ipsius monetæ distinctè & aptè continens moderamen, deinde inchoanda est
 " & perficienda ex edicto aut licentiâ principis speciali, & publicandâ
 "per proclamationem præconis ipsius principis publicè, ut mos exigit faciendum, & tunc usui apta erit: ita ut ex tunc non sit impunè a quoquam de populo recusanda. Quicumque autem clam
 "vel apertè vel palàm absque licentiâ principis cujuscunque monetæ
 "contrafactionem attemptiâsse convictus fuerit, corporaliter plecti
 "solet."

And now I shall give a brief history of the variation of the coin of *England*.

It appears by all the antient monuments, that I have seen, that the use of coin or money was antient and long before the conquest (*p*).

It is true that *Gervasius Tilburienfis*, who wrote the black book of the exchequer in the time of *Henry II.* commonly [199] called *magister & discipulus*, *Lib. I. cap. à quibus & ad quid instituta fuit argenti purgatio*, says, that in the times of king *William I.* *William II.* and *Henry I.* the antient farms of the king's demesnes were answered in cattle, corn, and other provisions in specie, because it saved the king the trouble of purveyors, and money was scarce among the people, and yet the reservations of their rents were in money, viz. so many pounds *numero*, or so many pounds *blanc*; *de quibus infra*.

And to make an equation between the provisions, that were answered in kind, and the rents that were reserved, there were certain rates or prices agreed upon almost all such provisions, as for wheat

(*p*) That money was coined here in the time of the Saxons is sufficiently plain, but it is very doubtful whether the Britons ever

coined any; in *Cæsar's* time they used only iron-rings, or pieces of brass; *Cæsar. Com. de B. G. lib. 5. n. 12.*

for one hundred men *per diem* twelve pence, for a fat ox twelve pence, &c. which it seems were delivered to the sheriff, and by him answered to the king in money or kind, as it was agreed.

But those farm rents, that were reserved out of the cities, boroughs, franchises, &c. because they had not provisions in kind were answered in money according to their reservations.

In the time of *Henry I.* this answering of farms by provisions ceased, and the tenants paid their money according to the letter of their reservations; the king was weary of receiving, and the farmers weary of paying their rents in victuals and provisions, but money still was in use as the common instrument of commerce and valuation.

In the troublesome time of king *Stephen* we are told by *Roger Hoveden* sub anno 1149. *Omnes potentes tam episcopi, quam comites & barones suam faciebant monetam*, which occasioned a great confusion and corruption in money and commerce (q): *Henry II.* coming to the crown reformed this usurpation and abuse, *novam fecit monetam, quæ sola accepta erat & recepta in regno* (r); and thus it hath hitherto

[200] obtained, only some particular corporations ecclesiastical, as bishops and abbots had special privileges granted to them to have mints (f), some one stamp, some two, some more, which yet were sent to them from the king's exchequer, and their officers sworn to the king to deal faithfully in their offices.

Yet after this king's time, especially in the beginning of king *John's* time, there was a great uncertainty and disorder both in the weight and alloy of coin; for *Claus. 7 Johann. m. 24. Sciatis quodd recipimus per manum Petri de Ely, &c. trecentas libras numero, quæ ponderabant quingentas libras 47 s. 8 d.* and in the same roll, *m. 25. recipimus de Thesauo per manus Petri de Ely, 1725 l. & 11 s. 6 d. numero, quæ ponderabant 1556 l. 17 s. 6 d.* which holds no proportion with the former.

Henry III. had a troublesome reign, and malefactors abounded, especially in relation to the clipping of money; in his thirty-second year he made new money, and ordained *ne quis denarius, nisi legitimi*

(q) *William of Newbury* writes thus under the reign of king *Stephen*, *Erant in Anglia quodammodo tot reges vel potius tyanni quot domini castellorum, habentes singuli per-cussuram proprii numismatis.*

(r) See *Wilk. Lg. Henry II. p. 320.* where these words are also added, *abdicata jam procerum illa*; the truth is, this reformation of the money began to be made to-

wards the latter end of *Stephen's* reign, for among the articles of peace between *Stephen* and *Henry* this was one, that the silver coin should be one and the same throughout the kingdom. *Ibid. p. 315. Mat. Paris, p. 139.*

(f) See a charter of king *John* allowing this privilege to *Hubert* archbishop of *Canterbury*, *Wilk. Leg. Johannis, p. 355.*

ponderis & circularis formæ uteretur, clipt money not to be received but perforated, and divers offenders were hanged. *Mat. Paris sub anno 1248. (t)* but we have not the just standard or weight of his money.

In the time of *Edward I.* we know what the weight and allay of his current money was, namely the allay was *Sterling*, twenty shillings made a pound weight troy, and twenty pence an ounce, so that the pound of *Sterling* silver made two hundred forty *Sterling* pence.

There were other base monies in his time, as namely, those that were decreed by the *Articuli de monetâ*, and *Pollards* and *Crocards*; what the value of the latter was I know not, but it appears by *Claus. 28 E. 1. m. 6. quod pro qualibet libra pollardorum una marca Sterlingorum solvitur ad Scaccarium*: they were both decreed in the 28 E. 1. (u) *Vide Dy. 81.* This rate of *Sterling* continued during some time of *Edward II.*

I have not seen any indentures of the mint between the time of *Edward II.* and the 46 *Edward III.* (x) and then by [201] the indenture of the mint *Claus. 46 E. 3. m. 18.* a pound of gold made forty-five nobles, each noble six shillings and eight pence, and was to consist of twenty-three carets, three grains and an half of fine gold, the rest allay; the coinage to be four shillings for each pound for the master of the mint, and twelve pence for the king; the pound valued at fifteen pounds, and the merchant upon the return to have out of the *Tower* fourteen pounds fifteen shillings.

A pound of silver was to make three hundred pence, and so in that proportion groats, half-pence, and farthings, which was to be of the allay *du viel Esterling*, viz. eleven ounces two-penny weight of fine silver, and eighteen penny weight of allay; eight pence to be allowed for coinage.

The next Indenture I find is 3 *H. 4. p. 2. m. 9. dorf.* whereby a farther alteration was made.

The pound of gold made the same quantity of nobles, and was of the same allay as before, only upon every pound was allowed three

(t) p. 747.

(u) As appears by the proclamation, *Quod Pollardi & Crocardi non currant in regno Angliæ. Claus. 28 E. 1. m. 12. dorf.* by which record it also appears, that two *Pollards* and one *Sterling* were much about the same value; for the words are *Licet nup. r pro communi utilitate regni nostri de concilio nostro ordinavimus, quod duo Pollardi, vel duo Crocardi surreant in eod. m. regno pro uno Sterlingo.*

(x) But among the records in the *Tower* there are several indentures to be found within that time, viz.

Claus. 18 E. 3. p. 2. m. 19. d.

Pat. 18 E. 3. p. 1. m. 27.

Claus. 23 E. 3. p. 1. m. 21. d.

Claus. 25 E. 3. m. 15. d.

Claus. 29 E. 3. m. 6. d.

Claus. 35 E. 3. m. 10. d.

shillings and six pence to the master, and one shilling and six pence to the king for coinage.

The silver coin of the same fineness, weight and allay, as by the indenture of 46 E. 3. the coinage eight pence, whereof seven pence to the master, and one penny to the king upon every pound weight.

Claus. 1 H. 5. m. 35. *dorf.* the allay of gold and silver still the same as before, but some other variance there was.

The pound of gold was now to make fifty nobles, the value of the whole pound to be sixteen pounds thirteen shillings and four pence, the coinage five shillings.

[202] The pound of silver was to make three hundred and sixty pence, the coinage was nine pence to the master, and three-pence to the king; so that now the pound of silver made thirty shillings *Sterling*, which began in *Rot. Parl.* 13 H. 4. n. 28. by ordinance of parliament.

Claus. 9 H. 5. m. 2. *dorf.* the same weight and allay of gold, *viz.* every pound of gold to make fifty nobles, the coinage to the king three shillings and six pence, to the master eighteen pence.

The like as to silver in all points as by the indenture of 1 H. 5. only the master to have nine pence, the king three pence for coinage.

Claus. 1 H. 6. m. 13 & 15. The indenture agrees in all things with that of 9 H. 5.

Claus. 4 E. 4. m. 20. The king by proclamation inhanfeth the value of coin, so that the noble of gold, which before was six shillings and eight pence, is now raised to eight shillings and four pence, three groats make a shilling, and so do twelve pence, and twenty shillings make a pound.

And afterwards he made new coins according to the standard of gold aforesaid, *viz.* the noble of gold eight shillings and four pence, and the pound of silver raised to thirty-seven shillings and six pence; and now I shall follow *John Stowe* in his *Survey of London*, p. 47.

H. 7. raised the rate of *Sterling* silver coin to forty pence the ounce.

18 H. 8. the pound of silver coin was raised to forty shillings.

35 H. 8. the coin of gold was raised to forty shillings the ounce, the coin of silver to four shillings the ounce, and coins of base money of allay below *Sterling* were coined, *viz.* shillings, six-pences, four-pences, two-pences, pennies: these were decreed in 5 E. 6. and the shilling reduced to nine-pence, and after to six pence (y).