

30 *Octob. 5 E. 6.* Silver *Sterling* coin enhanced to five shillings the ounce, and so proportionably; and coins of fine gold, a whole sovereign was thirty shillings, an angel ten shillings, and base [203] money to pass as before.

2 *Eliz.* The base money was called in and brought to the mint and reduced to *Sterling* and new coined, and the drofs given to repair the highways.

16 *Novemb. 2 Jac.* By proclamation the new coins of gold and silver then made, together with their impressions, inscriptions, weight, and values were proclaimed; and 23 *Novemb. 9 Jac. per proclamation* the coins of gold are enhanced, viz. thirty shillings to thirty-three shillings, twenty shillings to twenty-two shillings, fifteen shillings to sixteen shillings, ten shillings to eleven shillings, five shillings to five shillings and six-pence.

Upon these variations these things are nevertheless observable, *First*, That the old *Sterling* gold is this, that one pound of *Sterling* gold contains twenty-three carats three grains and a half of fine gold, the rest to make it up twenty-four carats is of allay of copper. *Secondly*, That the old standard of *Sterling* silver is, that every pound weight of *Sterling* silver consist of eleven ounces two-penny weight of fine silver, and eighteen penny weight of allay of copper. *Thirdly*, That this rate of *Sterling* gold and silver hath most plainly continued to be the standard of *English* gold and silver coin, at least from the time of *Henry III.* until this day in *England* without any considerable alteration, saving that base money, which was stamp'd in the time of *Henry VIII.* and then reduced to a lower valuation by *Edward VI.* and after re-established by *Edward VI.* to its former value. *Fourthly*, That, as well in *England* as *Ireland*, there hath been imbasement of the species of money, as appears in these two instances in the time of *Henry VIII.* and *Edward VI.* which are yet the only instances that I find of that nature in *England.* *Fifthly*, That queen *Elizabeth* decreed by proclamation all that base money, which was in use in the time of her father and brother, and ever since that proclamation, viz. 2 *Eliz.* the true old *Sterling* standard both of gold and silver hath been the only standard of the *English* current money. *Sixthly*, That altho the standard of *Sterling* hath with great constancy obtained in *England.* yet the denomination or extrinsic or im- [204] posed value hath varied according to the pleasure of the king both as to gold and silver coin, as appears by what goes before; for in *Ed-*

*ward* I's time the ounce of *Sterling* silver was twenty pence, the pound twenty shillings or two hundred and forty pence; in *Edward* III's time the pound of *Sterling* was three hundred pence; in the time of *Henry* V. and so downward to *Edward* IV. three hundred and sixty pence, or, which is all one, thirty shillings; in the time of *Edward* IV. the pound of silver was thirty-seven shillings and sixpence; in 35 *H.* 8. the pound of *Sterling* silver was forty shillings; in 5 *E.* 6. and so down to this day the ounce of silver five shillings or sixty pence, and the pound of *Sterling* silver three pounds or seven hundred and twenty pence, which in *Edward* I's time was only two hundred and forty pence, which now is thrice as much as then it was. *Seventhly*, That I find rarely any proclamation for the setting of the rate of new coin, but only as before, when the denomination of what is in being is inhanfed, or abated, or recalled; so that the indenture of the mint and common reputation is that, which must try what is *English* money. *Eighthly*, That I never find either in the indentures of the mint or any proclamation the stamp, impression, or inscription described, unless in that of king *James*, because the stamps are agreed upon between the king and the master of the mint, and delivered to him by the king, or his warrant either of the great seal, privy seal, signet, or secretary of state.

## [205]

## C H A P. XVIII.

*Concerning the adulteration or impairing of coin, and the antient means used to remedy it.*

THE decays or impairment of coin is either in weight or allay, the former may happen by some abuse of the moniers or minters, or by the subtilty of clippers, washers and other impairers of coin; the latter, *viz.* impairment in allay, can only happen either by the dishonesty of the moniers or minters, or by the counterfeiting of coin.

Antiently all money was paid in number, namely so many pieces made a pound, and this was the common reservation and account of all farms, and the estimating of accounts, *vicecomes A. reddit compotum de 100l. numero*, or in the *sauro 100l. numero*.

But

But this did not answer all intentions, for the money that was paid in, might be clipt, or otherwise rendered light, or might be counterfeited, or of base alloy.

For remedy thereof there was practised these three methods of rectifications of payments at the exchequer, that the king might not be deceived, and these were successively used in the exchequer, which we may read *Gervaf. Tilb. Lib. I. supra quibus*.

1. *Solutio ad scalam*, which it seems was a dish or measure, whereby they measured their money, as well as told it, for that is the proper signification of *scala*: but in process of time this was turned into a measure of money, which was an addition of six-pence for every pound, to avoid the trouble of that probation, whereby an hundred pounds *numero* amounted to an hundred pounds and fifty shillings *ad scalam*; and so we have frequently in the old pipe rolls of *Henry II. Richard I. king John*, &c. *in thesauro 100 l. ad scalam*.

2. *Solutio ad pensum*, which was the answering of every pound of money by weight of a pound weight troy, for in [206] those times the *libra argenti* coin did or was to answer a pound weight troy, and therefore the payer was to make it good of that weight by answering the full weight; this gave the frequent title of the old pipe-rolls, also *in thesauro 100 l. ad pensum*.

But altho this *solutio ad scalam* or *ad pensum*, especially both together, did give some help against the defect of coin in weight, as by clipping, washing, or the like, yet it did not help as to adulterate money of baser alloy than the standard: Therefore,

3. There was found out in the time of *Henry II.* a third trial, namely trial by fire or combustion, and if it were of the just alloy it was allowed, if below the alloy the payer was to make it good, and hence he was said *dealbare firmam*; and hence grew quickly a difference between reservations and payments of so much money *numero*, and so much money *blanc*.

A reservation of so much money generally was intended of so much *numero*, as if a pound were reserved, it was in effect but twenty shillings *in pecuniis numeratis*; but if it were expressly said so much money *blanc*, then it was answered in *blanc* money, but yet with this difference, that if a farm were letten and so much rent generally reserved, it should be intended so much *numero*, *in pecuniis numeratis*; but if a franchise or liberty were granted, and so much rent generally reserved without saying *blanc* or *numero*, it was commonly intended

*blanc*, unless expressly said *reddendo* so much money *numero*, and therefore in such a case the former was bound *dealbare firmam*, that is, to answer so much as would make his payment to be so much good in fine silver, or very near it at least, *Gervaf. Tilb. Lib. II. cap. quid sit, quosdam fundos dari blanc, quosdam numero.*

And therefore upon all the antient accounts in the pipe, made by the sheriff, we shall find some of his accounts of rents to run *numero*, some of them to run *blanc*, viz. *firma comitatûs numero*, & *firma comitatûs blanc*, according to the variety of their reservations [207] or the things out of which they are reserved; now what the proportion was, between so much money *blanc* and so much money *numero* in those antient times, or what this *blanc* money was, is worth the inquiring.

I have formerly thought that *blanc* money was nothing else but *Sterling*, and that *dealbare firmam* was no more, than to reduce money to the true allay of *Sterling*; but upon consideration I think *blanc* money was truly so much fine silver without any allay, and that the true allay of *Sterling* silver or the antient standard was twelve penny weight only of copper to every pound weight of silver; and therefore he, that upon his reservation was to pay one hundred pounds of *blanc* money, was to answer to the king upon every pound of *Sterling* money one shilling to countervail the value of the allay of copper in every pound weight troy of silver.

And hence it is, that the farms of most corporations antiently let with liberties, if one hundred pounds *per annum* were reserved, usually answered one hundred and five pounds, the five pounds being to answer the allay of one of copper in the whole quantity.

21 H. 3. in compoto comitatûs North'ton summa totalis 102l. 13s. 7d. de quo 4l. 9s. 4d. *blanc*, quæ sunt extensæ ad 4l. 13s. 9d. subtrahuntur ad perficiendum corpus comitatûs, & remanet 97l. 13s. 10d. (a) de quibus respondet de proficuo in magno rotulo.

Claus. 19 H. 3. p. 1. m. 2. Sciatis quod pardonavimus dilectæ & fideli nostræ A. comitissæ Pembroch centum triginta & quinque libras *blanc*, quæ extensæ sunt ad 141l. 15s.

13 E. 3. in compoto Bedford & Bucks, Nicholaus Basslelew 18l. 4s. 4d. *numero pro* 17l. 7s. *blanc*.

That of 19 H. 3. exactly answers twelve pence *per* pound, which amounts to six pounds fifteen shillings, and added to one hundred

(a) This should be 97l. 9s. 10d.



thirty-five pounds make just one hundred forty-one pounds fifteen shillings.

And the other estimate is very near the same account, bating the difficulty of small fractions, four pounds nine shillings and four pence, with the adding of twelve pence for every pound to [208] make it *Sterling*, amounts to about four shillings and six pence, which added to four pounds nine shillings and four pence make four pounds thirteen shillings and ten pence; so the allay of *Sterling* at that time seems to be twelve pence of copper to every pound of silver.

The sum therefore is, 1. That *blanc ferme* or *blanc* money was the estimate of money in pure silver without allay, and accordingly it was to be answered, viz. one hundred pounds *blanc* was to answer one hundred and five pounds *numero*. 2. That a *ferme* or sum of money *numero* was so much *Sterling* money according to the standard of those times. 3. That the standard of *Sterling* money in those times was finer than it hath been since the time of *Edward I.* namely *Sterling* was then eleven ounces eight penny weight finer silver, and twelve penny weight of allay. 4. That when at the exchequer they burnt the money to make assay of it, in case twenty shillings *numero* were reserved, it sufficed if it held the allay of *Sterling*, viz. eleven ounces, eight penny weight of pure silver, and twelve penny weight of allay; but if it were reserved *blanc*, then the good *Sterling* was brought to the test, yet it went for less than *Sterling* by twelve penny weight in every pound, and therefore they were to add five pounds in the hundred to make it up *blanc*. 5. But when this probation grew troublesome, and *Sterling* money was well established, then they, that were to pay one hundred pounds *blanc*, paid one hundred and five pounds *Sterling*, as the common estimate of *blanc* money: it seems that in king *John's* time the standard of *Sterling* money was far lower and worse, than at any time before or after, especially towards the latter end of his reign.

The borough of *Wich* was antiently from the conquest till 17 *Johann.* held at the yearly rent of eighty pounds *per annum blanc*, which was answered by the sheriff in the times of *Henry II.* and *Richard I.*

7 *Johann.* the king granted the borough of *Wich* to the town at the farm rent of one hundred pounds *Sterling*: in the pipe-roll of 24 *H. 3.* *homines de Wico reddunt compotum de 100l.* [209] *numero, pro 80l. blanc*, which imports these sums to be equal, and afterwards 43 *H. 3.* *homines de Wico reddunt compotum de 80l. blanc*,

*quæ sunt extensæ ad 84l.* and in 17 *E. 3.* this eighty-four pounds was raised to eighty-nine pounds five shillings *numero* upon the extent, which *ferme* of eighty-nine pounds five shillings they have ever since answered; whereby it appears the standard of *Sterling* was but low in king *John's* time, for eighty pounds *blanc* was in his charter estimated at one hundred pounds *Sterling*: again it was high in 43 *H. 3.* *viz.* after the rate of twelve penny weight of allay in a pound of fine silver; for there, eighty-four pounds *Sterling* is rated to be eighty pounds *blanc*; and in *Edward III.* the standard was lower, than twelve penny weight of allay, *viz.* above twenty-four penny weight of allay in a pound weight of fine silver; but afterwards raised to eighteen penny weight of allay towards the latter end of his reign, which hath hitherto continued as the true standard of *Sterling* silver.

These curiosities, tho they be not much in use at this day, yet they are fit to be known for understanding the old rolls.

1 Hawk. P. C. 42.

[210]

## C H A P: XIX.

*Concerning the counterfeiting of the king's coin what it is, what the penalty thereof antiently, and what at this day.*

**H**AVING taken this compass I now descend to the offense itself, wherein I shall consider, 1. What is the coin or money of the king. 2. What a counterfeiting thereof. 3. What the punishment before this statute. 4. What the punishment since this statute.

1. What shall be said the king's money.

The money of a foreign kingdom is not the king's money within this act, and therefore at common law the counterfeiting thereof was only punishable as a cheat; and now by the statute of 14 *Eliz. cap. 3.* it is made misprision of treason to counterfeit any foreign coin of gold or silver, tho not made current here by proclamation.

The money of a foreign kingdom made current by proclamation, tho it be now, as to all civil respects, the proper money of this kingdom, yet, as to the crime of treason, it was not the king's money within this act.

And

And therefore a special statute was made, *viz.* 1 *Mar. cap.* 6. that if any person falsely forge or counterfeit any such kind of coin of gold or silver as is not the proper coin of this realm, and is or shall be current within this realm by the consent of the queen, her heirs or successors, then such offense shall be judged high treason.

This consent cannot be but under the great seal, *viz.* by proclamation and a writ under the great seal annexed thereunto, or some other sufficient notification under the great seal; and it must be of money of gold or silver, which I take to be a denomination *ex majori parte*, if it be such a foreign coin as is, for the most part, of gold or silver.

But even the counterfeiting in copper or brass gilt, or in tin or alchymy, if the exemplar itself be of gold or silver, is [211] within this act of 1 *Mar. cap.* 6.

If the coin of *Ireland* doth not substantially differ in the signature or impression from the coin of *England*, the counterfeiting of that money here in *England* seems to be a counterfeiting of the king's coin here in *England*; but if the stamp or impression bear no such resemblance, as is easily discernable, then it is considerable, whether it be a counterfeiting of the king's coin here, for *Ireland* is a distinct kingdom from *England*, tho part of the dominions of the crown of *England*.

Yet it seems that it is treason within the act of 25 *E.* 3. 1 Because the words of the statute are *sa monoye*, and not specially the money of *England*, and money coined by the king's authority in *Ireland* is *sa monoye*, tho it be not the current money of *England*. 2. Because by the express words of the statute of 25 *Eliz.* the clipping of coin of this realm, *or any the dominions thereof*, is enacted to be treason; it is not to be supposed that the parliament would make the clipping of *Irish* coin treason, unless the counterfeiting thereof were treason; and with this the resolution of the case of mixt monies in Sir *John Davys's* reports agrees, *viz.* that the imbased coin stampd for *Ireland* is lawful money for *England* within the condition of a bond for payment of money in *Ireland*.

What shall we say concerning the farthings and halfpence of copper newly minted in *England*, and proclaimed as before to be current money, is the counterfeiting thereof treason.

It is true, in antient proclamations for farthing-tokens it was not usual to be, that it should be current money, but only that it should be used as tokens, and the punishment of counterfeiters was either in the star-chamber, or by information or indictment, and fine and imprisonment in the king's bench.

And

And yet it seems to me, that this proclamation makes it not the king's money within this act of 25 E. 3. 1. Because it is so made only to a special purpose, namely in receipts and payments under fixpence, and not otherwise. 2. Because here is no dispensation or *non obstante* of the statute of 25 E. 3. Again, when by the statute of 25 E. 3. cap. 13. it is enacted, that the money of gold or silver which now runneth shall not be impaired in weight or allay, we can hardly think it ever intended that the copper money should be that money, which should be intended within the act made at the same parliament touching treason; but *quære tamen*.

If money be decried and varies signally from the stamp and impression in the coin that is commonly allowed, this is not money within this act, for it hath lost its denomination and legitimation by the king's proclamation (a).

The money of an usurper bearing his stamp and effigies and inscription, is the king's money in the time of the succeeding rightful king, till it be recalled by proclamation. If, upon the evidence against any counterfeiter of the king's coin, tho it be but of a late coinage or impression, it comes in question whether the coin that is counterfeited were the coin of this kingdom, it is not necessary to produce a proclamation to prove its legitimation for these reasons; 1. Because where there were proclamations of coin they are for the most part lost: if we should be put to prove a proclamation for the coins of queen Mary, queen Elizabeth, where should we find them? 2. Because in most kings times there are variations of the impressions without any proclamation, or so much as a new indenture between the king and the master of the mint. 3. Because there are very few proclamations, except that before-mentioned in king James's time, that express any more than the weight and allay, but the impression or effigies is rarely, if at all, expressed, and so such proclamation would import little to ascertain the effigies or stamps; and for the same reason the indenture of the mint is not absolutely necessary, tho in some cases it may be useful. 4. Because especially in ancient coins *ex diuturnitate temporis omnia præsumuntur ritè acta*, if proclamation or indenture be necessary, it shall be presumed in length of time, as a licence of appropriation shall be presumed by long continuance, tho not shewn.

(a) For this reason when the broad pieces were cried down, and the officers of the revenue charged to take them in payment for one year after, it was thought

necessary by a special act of parliament 6 Geo. II. cap. 26. to make the counterfeiting of them during that year treason.

The question therefore, whether the coin that is counterfeited be the coin of this kingdom, is a question of fact, which upon evidence of common usage, reputation, &c. may be found to be *English* coin, tho no proclamation of it extant.

But it may be of some use in case of newness of coin to produce the indentures, or the officers of the mint, or the stamps here used for the coin, and the like evidences of fact.

But as to foreign coin legitimated here, it seems necessary to shew the proclamation, together with the proclamation-writ, or a remembrance thereof; and this is expressly required by the statutes of 5 & 18 *Eliz.* for impairing or clipping foreign coin.

II. I come to the *second* consideration, what is a counterfeiting within this law.

And before I come to particulars it must be remembered, that the misfeasances concerning coin refer to two sorts of persons; *first*, to such as are authorized either by their office, or by charter, or by custom to coin money; *monetarii*, moneyers, minters; or *secondly*, those who do counterfeit, or take upon them the stamping of coin without such authority, counterfeiters, clippers, washers, &c.

Touching the former of these 3 *H. 7. 10.* (b) *Si ipse, qui facit monetam in Angliâ autoritate regiâ infra turrin London vel alibi in Anglia vel Calicia, illam facit minus in pondere per dimidium ordinati-onis antiqui ponderis, &c. vel falso metallo, est proditio, & tamen ipsi, qui illam monetam utterant ligeis domini regis infra Angliam non sunt proditores nec proditio, sed misprisio.*

But it is not every mistake in weight or allay, that chargeth the moneyers with so high a crime as treason, for the master is chargeable by his indentures to a fine and ransom for some mistakes of this nature; but it must be a wilful gross proditorious doing it, for the indictment runs *proditoricè*, and so it must be proved, for it is difficult for the best artist to make every piece of the precise weight.

Touching others that either counterfeit or imbase the coin. [214]

*First*. There must be an actual counterfeiting, for a compassing, conspiracy or attempt to counterfeit is not treason within this statute without an actual counterfeiting.

But if many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason



in all, and they may be all indicted for counterfeiting generally within this statute, for in such case in treason all are principals.

How far a receiver is a principal, *videbimus infra Co. Pla. Cor.* 138. *Dyer* 296.

If *A.* counterfeits, and by agreement before that counterfeiting *B.* is to take off and vent the counterfeit money, *B.* is an aider and abetter to such counterfeiting, and consequently a principal traitor within this law; but if *B.* knowing that *A.* hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be all one with a receiver of him, because he maintains him.

If *A.* counterfeit money, and *B.* knowing the money to be counterfeit vent the same for his own benefit, *B.* is neither guilty of treason nor misprision of treason, but it is only a cheat and misdemeanor in him punishable by fine and imprisonment.

But if *B.* know that *A.* counterfeited it, and doth neither receive, maintain, or abet him, but conceals his knowledge, this is misprision of treason; and with this difference the book of 3 *H.* 7. above-cited is to be understood, and so it was ruled upon debate at the sessions at *Newgate Car.* 2. *ex libro Bridgman (c).*

*A.* fashions stamps for the counterfeiting of money, but he is discovered and apprehended before he hath actually counterfeited it; this is no treason within this statute (*d*), for tho he hath counterfeited the stamps, yet he hath not counterfeited the money of *England.*

[215] *A.* counterfeits the king's money, but never vents it; this is a counterfeiting, and treason within this statute, and so it hath been ruled *Co. P. C.* p. 16.

*A.* counterfeits the coin of this kingdom or any foreign coin of silver or gold of any foreign kingdom (*e*), and this counterfeiting is in another metal, as tin, lead, alchymy, copper gilt or silvered over, yet the former is treason within the statute of 25 *E.* 3. and the latter within the statute of 1 *Mar.* If there be a lawful coin of this kingdom, and *A.* doth counterfeit it in a considerable measure, but yet with some small variation in the inscription, effigies, or arms, to the intent thereby to evade the statute, yet this is a counterfeiting of the king's mo-

(c) *Aug.* 16 *Car.* 2: in the case of *Richard Oliver, Kel.* 33.

(d) 1 *Rich.* 3. 1. but it is treason by the statutes of 8 & 9 *W.* 3. cap. 25. and 7 *Ann.* cap. 25.

(e) This must be supposed to be foreign coin current within the realm; for to counterfeit other coin is only misprision by 14 *Eliz.* *preut patet supra.*

ney, and that intent doth unquestionably appear, if he vent it as true: *vide supra de privato signetto. 16 Jac. (f).*

The clipping, washing, or impairing, &c. of foreign coin made current by proclamation most certainly was not treason by the statute of 25 E. 3. but was made treason *de novo* by the statute of 5 & 18 Eliz.

But whether the clipping, washing, or impairing the proper coin of this realm for lucre or gain were treasons within this statute of 25 E. 3. or not, is a question that deserves consideration, which, tho it be now settled by those statutes to be treason, yet it is of moment to be known; if it were and continues treason by the act of 25 E. 3. then the judgment is only to be drawn and hanged; if it be a new made treason, then by my lord *Coke's* opinion the judgement must be to be hanged, beheaded, and quartered, as in treason for compassing the king's death. *Co. P. C. p. 17.*

I will therefore give the history of this business of washing, clipping, &c. *ab origine* from the time of the statute of 25 E. 3. for the history of former times at common law will be given in the next section.

It appears by the record of *M. 31 E. 3. coram rege rot. 18, 55. Bucks*, cited by *Co. P. C. p. 17.* within six years after the statute of 25 E. 3. that for counterfeiting and resection of the king's coin the abbot of *Mussenden* was adjudged to be drawn and <sup>[216]</sup> hanged, but not quartered.

By the statute of 3 H. 5. *cap. 6.* clipping, washing, and filing of the money of the land is declared to be treason, and the offenders to be traitors, and shall incur the pain of treason; this was made to settle the doubt, and not purely as a new law.

The petition, upon which this act was made, is more full than the act, as it is printed, *Rot. Parl. 3 H. 5. part 2. n. 40.* "Item pryont les commons, qe come devant ces heures grand doubt & awerestee ad este, le quelle le tonsure, loture, filinge, & autre fauxisme de vostre monoy duissent estre adjudge treason ou nient, a cause qe null mention ent est fait en le declaration des articles de treason faits en le parlement de vostre tresnoble besaiel lan de son raigne 25 Plese a vostre royal majestee de ordeiner, declarer, & determiner en cest present parlement par authority dicel, qe ceux, qe tondent, loient, filent, ou ascun autre fauxisme facent de vostre mony, soient adjuges traytors, & encurgent le pain de treason, si bien come ceux qe apportent faux money en Engleterre sachant la estre faux, & qe

“ cest declaration si bien soy extende al tiels tonsure, loture, & faux-  
 “ isme faits avant ces heures come a faire en temps avener. Ro.  
 “ Quant a le loture, tonsure & fileigne soit il declare pur treason.”

*Nota*, A retrospect desired, which was not usual, unless the law had held it treason before.

By the statute of 4 *H. 7. cap. 18.* counterfeiting or forging of foreign coin current here is enacted to be treason, which before was neither felony nor treason.

By the statute of 1 *E. 6. cap. 12.* it is enacted, that there be no other treason nor petty treason, but what was ordained by the statute of 25 *E. 3.* or by that act; and after certain new treasons enacted there is a *proviso*, that this act extends not to repeal any act of parliament concerning the counterfeiting, forging, clipping, washing or filing any coin of this realm, or any coin of other realms made current here, or the bringing into the realm any counterfeit coin.

[217] This proviso was absolutely necessary in relation to the treason in counterfeiting foreign coin contrary to the statute of 4 *H. 7. cap. 18.* because a new treason, but whether necessary in relation to clipping, or impairing the coin of *England* declared to be treason by the statute of 3 *H. 5.* may be doubtful upon what herein after follows, but certainly was very fit and convenient to avoid the question.

By the statute of 1 *Mar. cap. 1.* it is enacted, that no offense being by act of parliament or statute made treason, petit treason, or misprision of treason, by words, writing, or cyphering, deeds, or otherwise howsoever, shall be adjudged to be high treason, petit treason, or misprision of treason, but only such as be declared and expressed to be treason, petit treason, or misprision of treason in or by the act of parliament of the twenty-fifth year of king *Edward III.* concerning treason, nor any pains, penalty or forfeiture to ensue upon any offender in treason, petit treason, or misprision of treason, than such as are ordained by that statute; and all offenses made felony or *præmunire* since 1 *H. 8.* not being felony or within the statutes of *præmunire* before, and all articles, &c. concerning the same are repealed.

And yet it appears by the statute of 1 & 2 *Ph. & M. cap. 11.* that then, notwithstanding the statute of 1 *Mar. cap. 1.* they did take the impairing as well as forging or counterfeiting the king's coin to remain treason; for, by that statute of 1 & 2 *P. & M. cap. 11.* that makes the importation of foreign counterfeit coin to be high treason, it is provided, that any that shall be accused of the offenses contained

in

in the same statute, or any other offense concerning the impairing, counterfeiting or forging of any coin current within this kingdom, shall be indicted, arraigned, tried, convicted and attaint by such like evidence, and in such manner and form as hath been used in *England* at any time before the first year of the reign of king *Edward VI.*

So that it seems they took impairing of any coin current to be a treason in force, but on the other side it may be said, so they took also the forging of any foreign coin current to be treason, when as yet the statute of 4. *H. 7.* concerning forging of foreign coin made current stood repealed by 1 *E. 6.* but it is plain that no such consequence could be made, for by the statute of 1 *Mar.* [218] *sess. 2. cap. 6.* forging of foreign coin made current here is enacted to be treason; so that as to the point of foreign coin made current here, tho the statute of 4 *H. 7. cap. 18.* stood repealed, yet 1 *Mar. cap. 6.* stood in force at the time of the making of the statute of 1 & 2 *P. & M. cap. 11.*

Then ensues the statute of 5 *Eliz. cap. 11.* which reciting in express words, that the statute of 3 *H. 5.* concerning clipping, &c. is repealed by 1 *Mar. cap. 1.* and the mischief that happens thereby, enact, "That if, after the first day of May next, clipping, washing, rounding, or filing for wicked lucre or gain's sake any of the proper monies or coins of this realm or the dominions thereof, or the monies or coins of any other realm allowed and suffered to be current within this realm, or the dominions thereof, or that hereafter at any time shall be lawful monies or coins of this realm or of the dominions thereof, or of any other realm, and by proclamation allowed and suffered to be current here by the queen, her heirs or successors, shall be taken, deemed, and adjudged by virtue of this act to be treason, and the offenders, their counsellors, consenters and aiders shall from and after the first day of May be deemed traitors, and suffer pain of death and forfeit their goods, and forfeit all their lands during their lives only.

"That all, that by charter have lands or goods of traitors within their liberties, shall have these: a *proviso* that this act make no corruption of blood or loss of dower."

And the act of 18 *Eliz. cap. 1.* declaring that the falsifying, impairing, diminishing, scaling, or lightning of money was not within the act of 5 *Eliz.* which ought to be taken strictly according to the words thereof, and the like offenses not by any equity to receive the like

like punishments or pains, enacts those offenses to be treason almost *in totidem verbis* with that of 5 *Eliz.* with the like *proviso*; and note this clause in both statutes, *and the offenders being lawfully thereof convicted or attainted according to the due order and course of the laws of this realm shall suffer the pains of death.*

[219] These acts do, in effect, declare, that this was not treason within the statute of 25 *E. 3.* and that the statute of 1 *Mar. cap. 1.* repealed that declaration that was made in 3. *H. 5.* and gives the reason, because the law being penal ought to be taken and expounded strictly according to the words, and the like offenses not by any equity to receive the like punishment, and therefore lightning or scaling were not within the act of 5 *Eliz.* and neither within the act of 25 *E. 3.* against counterfeiting the coin.

And yet it is observable, that those very judges, which were present at the making of the statute of 5 *Eliz.* yet upon a solemn consideration in *Wright's case*, *T. 6 Eliz. Dyer 230.* did agree, that the judgment in treason *pro tonsurâ monetæ Angliæ* is no other but to be drawn and hanged, and accordingly judgment was given in that case; and upon search of the precedents at *Newgate* I find, that altho some judgments in case of clipping of money are *to be drawn, hanged, beheaded and quartered*; yet the greater number both of former and latter times have been only *to be drawn and hanged (g)* according to the judgment in 6 *Eliz.*

And therefore my lord *Coke, Pl. Cor. p. 17.* tho he agree, that the judgment for counterfeiting the coin of *England* is only to be hanged and drawn, as it was before the statute of 25 *E. 3.* seems nevertheless to be mistaken, when in the same page he saith, that if any be attainted for diminishing the king's money upon the statutes made in the time of queen *Mary* or Queen *Elizabeth*, because it is high treason newly made, the offender shall have judgment as in the case of high treason, *viz.* to be drawn, hanged, beheaded, dismembred, quartered, &c. for the greater number and better precedents run only to be drawn and hanged; and so it was lately ruled upon great consideration in a case in the king's bench (*h*), tho perchance it is not error, whether the one judgment or other be given.

Upon the whole matter therefore it seems to me, 1. That altho it should be admitted, that clipping of the coin of *England* continued treason notwithstanding the statute of 1 *Mar.* that yet

(g) *Morgan's case, Cro. Car. 383.*

(h) The case of *Bellw and Norman,* 1 *Ven. 254. 2 Lev. 98. Raym. 234.*



it is, at this day, treason merely by the statute of 5 *Eliz.* and therefore every indictment, at this day, for clipping or impairing, &c. must pursue the words of the statutes of 5 & 18 *Eliz.* and conclude *contra formam statuti*; and this, not only in the case of clipping of foreign coin, which certainly was no treason after 1 *Mar.* and before 5 *Eliz.* but also in relation to the coin of *England*; and the reason is, 1. Because this statute hath added a qualification to these treasons of clipping or lightning, *viz.* it must be *for lucre's sake*, which must be expressly laid in the indictment, but need not have been so laid by the statute of 3 *H.* 5, for tho, perchance, it was intended, yet it was not expressed in that statute, neither needed it then to have been in the indictment. 2. Because in express words the statutes of 5 & 18 *Eliz.* say, that it shall be treason by virtue of this statute, which is not a bare recital as in the beginning of the statute, that the statute of 3 *H.* 5. was repealed; but it is also an express enacting clause, which is in effect exclusive of any other law to make it treason, but this of 5 or 18 *Eliz.* for these words are in both the statutes. 3. Because it extremely alters the consequences of a judgment in treason, for here was no loss of dower, no loss of land but during life, no corruption of blood, so that these statutes did perfectly intend a total new establishment and qualification of this treason.

2. That altho this be a new law, yet inasmuch as neither at common law, nor after the statute of 25 *E.* 3. the treasons or offenses concerning money had any greater judgment than such as is given in case of petit treason, namely for the man to be drawn and hanged, the woman to be burnt, no higher or other judgment is to be given upon the statutes of the 5th or 18th *Eliz.* and hence it is, that in the statute of 25 *E.* 3. tho it rank counterfeiting money among high treasons, yet it alters not the judgment that was at common law; nay tho it be most certain, that the statute of 25 *E.* 3. as to some points of bringing in foreign money be introductive of a new law, yet inasmuch as it concerns money, wherein the highest judgment at the time of 25 *E.* 3 was only that of petit treason, it doth not enhance the judgment higher; and accordingly it was resolved upon great advice and consideration of precedents *Car.* 2. *Banco Regis* in the case (i) for clipping *English* coin. [221]

3. That upon any trial of counterfeiting, clipping, washing, &c. the coin of *England* or foreign coin made current, there is no necessity

(i) This I take to be the forecited case of *Bellew* and *Norman*, 1 *Ven.* 254.

either upon the trial or the indictment of two witnesses, required in other cases by the statutes of 1 E. 6. cap. 12. and 5 E. 6. cap. 11.

For as to the counterfeiting of money, or so much as was treason for impairing money, by 1 & 2 P. & M. cap. 11. it is expressly provided, that no other evidence shall be requisite either upon the indictment or trial than was before the statute of 1 E. 6. and as to clipping and washing, the very statutes of 5 and 18 Eliz. in express terms require only a conviction and attainder *according to the order and course of the law*; and therefore though the statute of 5 E. 6. cap. 11. enact, that two witnesses or lawful accusers shall be required upon proceeding for any treason, that now be or hereafter shall be, yet that act is thus far derogated by those two acts, that require only an indictment, a conviction and attainder according to the order and course of the law generally; for tho it be held, that the statute of 1 & 2 P. & M. cap. 10. that, enacts, that all trials of treason shall be according to the course of the common law, doth not take away the necessity of two witnesses upon the indictment, because that is a distinct thing from the trial. 14. Eliz. lord Lumley's case, Dy. 99. Co. P. C. p. 25. yet the words (*conviction and attainder after the order and course of the law*) mentioned in the statutes of 5 & 18 Eliz. include the indictment as well as the trial, and therefore even without the aid of the statute of 1 & 2 P. & M. cap. 11. restores the whole proceeding according to the order of the common law in case of clipping or washing, as the statute of 1 & 2. Ph. & Mar. doth in express words in case of counterfeiting.

And note, upon the statutes of 5 & 18 Eliz. tho Irish coin be not current in England, when of a baser alloy, yet it is the king's [222] coin, and clipping or washing in England the coin of Ireland is treason by those acts, for the words are *the coin of this realm, or dominions thereof*, which extends to Ireland.

4. The fourth thing observable upon these statutes is, that the act of 1 Mar. cap. 1. reducing all treasons to the standard of 25 E. 3. doth not only repeal treasons, that were newly enacted *de novo*, but such acts concerning treason as were only declarative, as this of 3 H. 5. among others.

IV. The fourth thing that I propounded to consider, is the history of the punishment of counterfeiters, &c. of coin before the statute of 25 E. 3. and how it hath stood since.

In this kingdom and indeed in all the kingdoms the counterfeiting of the

the king's money hath been in all ages *crimen læsæ majestatis* (*k*), tho in many of the old books (*l*) it comes under the general title of *crimen falsi*.

But the punishment in its kind and degree hath among us very much varied both in relation to the *monetarii* or moneyers, that were intrusted with the making of coin, and others, that took upon them to counterfeit the king's coin: among the laws of king *Athelstan*, l. 19. set down by *Brompton*, p. 843. *Una moneta sit in toto regni imperio, & nullus monetet extra portum, si monetarius reus fuerit, amputetur ei manus, & ponatur supra monetæ fabricam, accord Hoveden sub anno 1127. & M. Paris sub anno 1125 (m).*

In the time of *Henry I.* it is written by *Simon Dunelmensis*, p. 214: *Monetarii totius Angliæ principales deprehenſi adulterinos, ſcilicet non puros ex argento, feciſſe denarios, jūſſu regis ſimul Wintonæ congregati omnes unâ, die amputatis dextris evirantur; Et ibidem p. [223] 231. Qui falſos denarios fecerit, oculos et inferiores partes corporis perdet; and Knighton, p. 2377. H. 1. ſtatuit, ut fures ſuſpenderentur, falſarii oculos & genitalia amitterent, & ut denarii & oboli eſſent rotundi (n).*

*Knighton*, p. 2463. "*Edwardus primus tenuit parliamentum apud London, fecit mutari monetam regni, quæ illo tempore fuit viliſſe retonſa & abbreviata, unde populus regni graviter conquerebatur, & rex veritatem inquirens, & comperiens trecentos & plures de illo delicto & felonîâ publicè convictos, quorum quidam fuerunt ſuſpenſi, quidam diſtracti & ſuſpenſi ſecundum delicti quantitatem et qualitatem, & ordinavit, quòd deinde Sterlingus & quadrans deinceps eſſent rotundi:*" ſo that clipping was then held treason, or at leaſt felony.

After the ſtatute of 25 E. 3. the puniſhment hath been conſtantly to be drawn and hanged, becauſe that was the proper judgment of it, before the making of the ſtatute.

(k) By the old Roman law, *Qui nummos aureos, argenteos adulteraverit, loverit, conſlaverit, raverit, corruperit, vitiauerit, vulſitve principum ſignatam monetam, præter adulterinam, reprobaſſerit, boniflor in iſulam deportandus, humilior aut in metallum dammandus, aut in crucem tollendus; and whatever degree he was of, ejus bona ſiſſa vindicantur; ſee *Jul. Paſſi ſententias receptæ, Lib. V tit. 12. & 12. and Lib. V tit. 25, & 1.* Afterwards by a law of *Conſtantine*, *Cudendæ pecuniæ obnoxii majestatis crimen committunt, & quicunque ſolidorum adulter**

*poterit reperiri, flammatur exuſtionibus mancipetar, Lib. IX. Cod. tit. 24. l. 2, See alſo Wilkin's *Leges Anglo. Sax.* p. 59. in notis.*

(l) *Bracton, Lib. III. de corona, cap. 3. & 1. Glanvil. Lib. XIV. cap. 7, Flet. Lib. I. cap. 22.*

(m) *Leges Ethelſtani, l. 14. Wilk. Leg. Anglo-Sax. p. 59. See alſo *Leges Edgari, l. 8. Conſtitutiones Ethelredi in fine. Leges Cnuti, l. 8.**

(n) *Wilk. Leg. Hen. I. p. 304. ſub anno 1108. p. 308. ſub anno 1125.*

And altho the course hath been in treasons concerning the king's person not to allow the privilege of clergy, yet before 25 E. 3. *cap. 4. pro clero* it had been thought and practised in antient time to allow the privilege of clergy upon an indictment for counterfeiting money (o).

But after that statute clergy was not allowable in case of counterfeiting money, 19 H. 6. 47 b. *Stamf Pla. Cor.* 114 b. yet whereas in cases of treason regularly he that stands mute shall be thereby convicted 15 E. 4. 33 a. *Stamf. Pla. Cor.* 150 a. because not within the statute of *Westmin.* 1. *cap.* 12. (p) yet we have some historical instances, that upon indictment of counterfeiting coin the prisoner standing mute was put to *pain fort & dure.* *Knighton tempore R.* 2.

[224] *sub anno* 1389. before *Belknap, Skipwith,* and others *apud* Lincoln *septem falsarii monetæ convicti, qui simul tracti fuerunt & suspensi, & quidam vicarius de Winttingham obmutescens adjudicatus est ad pœnam mutorum;* but at this day the law is taken otherwise, and that standing mute amounts to a conviction of the crime.

And in short at this day in all cases of treason for counterfeiting the coin of this kingdom, or of any the dominions thereof, or of foreign coin made current by proclamation, or for washing, clipping, scaling, impairing, or diminishing the same, tho most of these are made treason by new acts of parliament, as 1 Mar. *cap.* 6. 5 Eliz. *cap.* 11. 18 Eliz. *cap.* 1. yet the judgment is only for a man to be drawn and hanged, for a woman to be burned, and so (as I said) it was solemnly resolved.

And the reason is, because tho most of these be new treasons made by act of parliament, yet they are all in their matter concerning money, wherein the judgment at common law was, as in case of petit treason; and that judgment was not altered by 25 E. 3. in case of counterfeiting, which is the highest offense concerning money, and therefore is not to be exceeded by the intent of those statutes, which brought lesser offenses concerning money, as clipping, into the same

(o) For clergy was antiently denied only in such treasons, as were immediately against the king's person, and therefore Co. P. C. p. 16. clergy was allowed in the case of counterfeiting the great seal. See also the case of *Burdou*, (P. 18. E. 2. B. R. Rot. 25. Rex. South ton) who was admitted to his clergy on being convicted of felony and sedition in counterfeiting the great

seal; but in *Thorpe's case*, (T. 21 E. 3. Rot. 23. Rex.) who was convicted of sedition in levying war, it was adjudged, that he could not be admitted to his clergy: *nota la diversite*; but the 20<sup>th</sup> El. 8. *cap.* 13. takes away clergy in all cases of treason: *vide antea in notis*, p. 185 & 186.

(p) 2 Co. Inst. 377.

rank of offense with counterfeiting, for they are all offenses *in pari materia*; and so shall have a parity of judgment.

See the Stat. 12. Geo. 3. ch. 20. concerning standing mute and refusing to plead.  
4 Blackf. Com. ch. vi. page 89.

## C H A P. XX.

[225]

*Concerning treason in bringing in false money.*

THE next point of treason is, if any man bring in false money into this realm counterfeit to the money of *England*, as the money called *Lushborough*, or other like to the said money of *England*, knowing the money to be false, to merchandize or make payment in deceit of our lord the king and of his people.

Touching this point of treason these things are observable.

I. That the money in this case must be imported from a foreign nation, for here, it is not the counterfeiting, that is the treason, but the importing: and yet it seems by the general words of the statute of 35 H. 8. cap. 2. the counterfeiting itself, tho out of the kingdom, may be tried in the king's bench; or before special commissioners, as well as any other treason.

But at common law the counterfeiting beyond the sea seems not to have been such a treason as could be tried here, as treason in adhering to the king's enemies might have been, and therefore the importing was made treason by this act.

Altho *Ireland* be within the statute of 35 H. 8. cap. 2. for trial of treason in compassing the king's death or levying of war, as is before observed, and therefore as to that purpose out of the realm of *England*, yet it hath been held upon the obscure book of 3 H. 7. 10. that an importation of counterfeit coin from thence into *England* is not treason here within that statute, principally because the counterfeiting itself is punishable by the statute of 25 E. 3. which is of force in *Ireland*. Co. P. C. p. 18. And the like reason holds for the *Isle of Man*. Before this statute there was some difficulty [226] what this crime should be.

In the time of king *Edward I.* there were three great inconveniences touching coin imported from foreign parts, sometimes they imported true coin of *England*, but such as was clipped, sometimes



they imported counterfeit coin like to the coin of *England*, but of a base alloy; and most times they imported foreign coin, which yet passed between merchants, and filled the kingdom with bad money to the detriment of trade and the king's coinage.

And to remedy these inconveniences were those three ordinances made, called *Statutum de monetâ magnum*, *de monetâ parvum*, & *Articuli de monetâ*; by which, searches were ordained of all coin imported, that if any clipt money or any foreign money, other than of *England*, *Ireland*, or *Scotland*, were taken, it should be pierced and redelivered to the owner, if it were false it should be detained, and the bodies of such as had false or clipt money to be attached (*a*), and if suspicious, detained till he produce his warrant; that money be received by weight; and by the second, *viz.* *Statutum de monetâ parvum*, that if any merchant brought in clipt or counterfeit money, for the first offense he should lose the money, for the second he should lose his money and goods, and for the third *de corporibus suis & de omnibus bonis & cattallis suis nobis totalitèr incurratur*; that if they were not merchants, they should pierce the clipt and counterfeit money and send it to the exchange, otherwise in whose hands soever such money should be found, it should be forfeited to the king: and by *articuli de monetâ* the several faulty coins, foreign and others, that had obtained in the kingdom by common use are described and decried.

By the statute of 9 E. 3. cap. 2. Item, "That no false money or counterfeit *Sterling* be brought into this realm or elsewhere within "our power upon forfeiture of such money."

[227] By an act or rather an advice, *Rot. Parl.* 17 E. 3. n. 15. *ge nul soit si hardy de porter fausse & malveis monnoie en roialme sur peyn de forfeiture de vie & membre.*

*Rot. Parl.* 20 E. 3. n. 15. A complaint of importation of false money, especially the false money called *Lusheburnes*, praying *de punir ceux, que sont trovez culpablez d'apport, ou de le resceit de eux sachant le fauxisme, par judgment come faux monyers.*

*Ro.* Quant a cest point de ceux, qe apportent la faux mony deins le realme, & qe le usent per voy de merchander ent sachaiant, le roy voet, quils eient judgment de vie & de membre, come faux monyers, solonc les leys & customes de realme; but this was never drawn up into an act: yet *Rot. Parl.* 21 E. 3. n. 19. the commons desire the penalty may

(a) See an ordinance to this purpose in the reign of king *John*. *Wilk. Leg. Anglo-Sax.* p. 359.

stand according as was ordained in the last parliament, and that it extend as well to the time past as to come, *Et qe nul chartres de pardon soient grant de dit fauxime & treason* : they were answered, that the justices should be assigned to enquire of the time past and to come after this act, and to do right, and that pardons be not granted *cy legerment*.

By which it appears, that it was never settled to be treason till 20 E. 3. and even from that time there was but a faint proceeding upon that offense.

But this statute of 25 E. 3. was that, which made the final settlement in this point.

But this makes only the apporters themselves, their aiders, abettors, and assistants, traitors, not those, that receive it at the second hand ; and this stands with reason and is consonant to the statute of *moneta* before cited, which rendered the merchants offense punishable at the third time with death, but subjected others only to loss of the money, if not pierced and carried to the exchange.

II. That it be counterfeit after the similitude of the money of England, otherwise it is not treason : the bringing in of money counterfeit after the similitude of foreign coin made current here by proclamation is not treason within this act ; but by the statute of 1 & 2 Ph. & Mar. cap. 11. it is enacted, “ That if any person after

“ Jan. 20 next shall bring from the parts beyond the sea [228]  
 “ into this realm or into any of the dominions of the same  
 “ any false and counterfeit coin of money being current within this  
 “ realm as aforesaid, viz. by the sufferance and consent of the king  
 “ and queen,) (*which extends to the successors*) knowing the same coin  
 “ or money to be false and counterfeit, to the intent to utter or  
 “ make payment of the same, within this realm, or any of the do-  
 “ minions of the same, by merchandizing or otherwise, that every  
 “ such offender, their counsellors, procurers, aiders, and abettors  
 “ shall be deemed traitors, and forfeit as in case of high treason.”

And by the statute of 14 Eliz. cap. 3. forging of foreign coin not current by proclamation, as well without the realm as within, is made misprison of treason ; but that act extends only to the counterfeiting, whether within the realm or without, but not to the bare importing ; the instance that is here given is of *Lushboroughs*, which were a base counterfeit coin after the similitude of English coin.

Other monies both before and after this statute there were, some counterfeit, some clipt, some of baser metal, some foreign, which had their several courses and periods in this realm: *Pollards* and *Crokards*, that obtained some time in *Edward I.* but were after decied by proclamation 24 *E. 1. vide Dy. 81.* Other several base coins in the same king's time mentioned in the ordinance of *Articuli de monetâ*, *black money*, which had been formerly current here, recalled by the statute of 9 *E. 3. de monetâ, cap. 4. Sufkins, Dodkins,* and *Gally* half-pence recalled by the statute of 11 *H. 4. cap. 5. 3 H. 5. cap. 1. Scotch money* recalled by the statute of 3 *H. 5. cap. 1. Blankes* recalled by the statute of 2 *H. 6. cap. 9.* and several penalties, some general, some of felony applied to them; but these were for the most part out of this statute, and obtained here by connivance, till recalled.

III. The next qualification of this offense is, that the bringer in, must know it.

IV. The next qualification is, that he must bring it to merchandize or make payment thereof in deceit of the king and his people.

[229] Counterfeiting of the king's coin without uttering of it is treason; clipping, washing, &c. by the statutes of 5 and 18 *Eliz.* is treason, but it must be for gain or profit, and here the importing is not treason, unless it be to merchandize or utter it.

And hereupon my lord *Coke (a)* concludes, that he must merchandize therewith, or make payment thereof; it is a favourable exposition, but the statute is not, that if he import and merchandize, but *pur merchandizer & payment faire*, if it were to that intent, the statute makes it treason.

And by the statute of 1 & 2 *Ph. & Mar. cap. 11.* touching importation of coin counterfeit of foreign money, it must be to the intent to utter and make payment of the same; and tho' the best trial of an intention is by the act intended when it is done, yet the intent in this case may be tried and found by circumstances of fact, by words, letters, and a thousand evidences besides the bare doing of the fact.

As in case of those many acts, thar prohibit lading of ~~wool~~ gold, silver, &c. with an intent to transport the same, whereby some are made felony, &c. the intent shall be tried in those cases (being

joined with an act) by circumstances, that evidence the intent of that action, for the bare intentions cannot receive any trial, yet intentions joined with an overt-act, as here, importation, may be tried and discovered by circumstances.

So that it seems the very importing of counterfeit money *pur merchandizer*, &c. to the intent to merchandize or make payment therewith, tho no such merchandize or payment be actually made, is treason by this statute, if the party importing know it to be such, and that as well his intent as his knowledge lies in averment and proof.

And thus far concerning treasons relating to money.

## C H A P. XXI.

[230]

*Concerning high treason in killing the chancellor, &c.*

**I** COME shortly to treat of the last kind of high treason declared by this act.

*Si home tuast chancellor, treasurer, ou justice nostre seigneur le roy del un banck ou del autre, justice in eyre, ou de assises, & tous autre justices assignes de oyer & terminer, estant en leur place faisant leur office.*

I. This statute extends only to the actual killing of some of these officers, and therefore a conspiring to kill any of these without actual killing of any of them is not treason; but if many conspire to do the act, and one of the conspirators actually do it, this seems to be treason in them all, that are abettors or counsellors to do the act, as is before instanced in levying of war, and therefore there is a particular act made 3 H. 7. cap. 14. that makes the conspiring the death of a privy counsellor to be felony (a).

If a man only strike or wound one of these officers, tho in the execution of his office, this is a great misprision, for which in some cases

(a) But this act extends only to such offenders, as are the king's sworn servants, whose names are entered in the chequer-roll of the king's household, and who is under the state of a lord; and according to lord Coke's opinion the conspiracy must be plotted to be done within the king's household. Co. P. C. p. 35. by this statute the offender was not deprived of the benefit of the clergy; but by 9 Ann. cap. 16. on oc-

casion of Robert Harley, Esq; (afterwards earl of Oxford) being stabbed by Anthony Guiscard, who was then under examination before a committee of privy council, it was enacted, "That whoever should unlawfully attempt to kill, or should unlawfully assault, strike or wound a privy counsellor in the execution of his office, shall suffer death as a felon without benefit of clergy."

the offender shall lose his hand (*b*), as was once done in the case of my lord chief justice *Richardson* sitting as justice of oyer and terminer, but it is not treason within this act.

[231] II. This statute extends to no other officers but those above-named, and therefore not to the lord steward, constable, marshal, admiral, or lord of parliament, tho in the exercise of their offices; it may be murder, but not treason. *Co. P. C. p. 18.*

A justice of peace, tho there be in the end of his commission of the peace, *nec non ad diversa felonias, malefacta audiend' & terminand'*, is not a justice of oyer and terminer within this act, for the justices of oyer and terminer are intended such, as have their commission *ad audiend' & terminand'*, &c. as the principal designation of their office; and thus it is in divers statutes also, that speak generally of justices of oyer and terminer (*c*).

But a justice of peace may be also a justice of oyer and terminer by another commission, as many times they are, and then they are within this statute, when they are sitting by virtue of that commission.

The lord keeper, when there is a lord chancellor also, as there may be both at the same time, seems not to be within this law; but if there be no lord chancellor, then the lord keeper is within this act, for by the statute of 5 *Eliz. cap. 18.* their office is declared to be the same to all intents and purposes, as if the lord keeper were lord chancellor.

But the commissioners of the custody of the seal (*d*) or for the treasury are not lord chancellor or lord treasurer within this act, and therefore at such times as the treasury hath been in commission those commissioners have not the same power as the lord treasurer, as in cases of writs of error by the statute of 31 *E. 3. cap. 12. (e)* in the exchequer before the lord chancellor and treasurer, and so for the setting of the prices of wines by the statute of 7 *E. 6 (f)* neither do they fit as lord treasurer in the exchequer-chamber, as judges of equity.

[232] It extends not to the chancellor and under treasurer of the exchequer, nor to the chancellor of the county palatine of *Lancaster*, nor to the lord privy seal, for these are special officers and of a lower rank, than the lord chancellor or treasurer.

III. The *third* qualification of this treason is, that it must be *estants en leur places, faisant leur offices*; wherever the seal is open, whether

(*b*) 3 *Co. Inst.* 140.

(*c*) 9 *Co. 118. b. Cro. Eliz.* 87, 697.

(*d*) But it should seem, that now they are within the act, since by 1 *W. & M. sess. 1. cap. 21.* their office is declared to be the same, and they to have the same jurisdiction and privileges, as lord chancellor.

(*e*) See also 31 *Eliz. cap. 1.*

(*f*) This power is given by 37. *H. 8. cap. 23.* which statute was revived by the 5 & 6 *Ed. 6. cap. 17.* but there is nothing of it in the 7 *E. 6.*



in the court of chancery or in the chancellor's house, the chancellor or keeper there sealing writs is *seants en son place, fessant son office*.

And the same law seems to be, if he be hearing of causes in his chamber, for tho antiently the hearing of causes upon *English* bills was rare, yet use hath sufficiently obtained to give it the style of *fessant son office*.

*Quære*, touching the lord treasurer's dispatching business in his house, whether this be *seant in son place*, but sitting in the court of exchequer, or exchequer-chamber, or in the star-chamber, when it stood, had been *seant in son place, &c.*

The place for the justices of the several courts are the courts themselves, where they usually or by adjournment sit for the dispatch of the business of their courts.

And so much shall suffice for this treason also.

1 Hawk. P. C. 41. 4 Black, Com. c. vi. p. 84.

## CHAP. XXII.

[ 233 ]

*Concerning principals and accessaries in treason.*

**B**EFORE I leave the discourse concerning high treason it is necessary to consider, whether or how all are principals in high treason.

In cases of felony there are two sorts of principals, *viz.* principals in the first degree, that do the fact, be it in murder or any other felony, and principals in the second degree, that are present aiding and abetting the felony.

And regularly in felony there are two sorts of accessaries, 1. Accessaries before the fact, which are not present, but yet counselling, commanding, or abetting the felony, but in manslaughter no such accessaries can be before: and 2. Accessaries after, such as knowing a felony to be done by such a man do yet receive or maintain him, unless it be a wife receiving her husband (a); of this hereafter in its due place.

Now in treason thus far it is agreed of all hands, 1. That there are no accessaries *ex parte ante*, but all such as counsel, conspire, aid, or abet the committing of any treason, whether present or absent, are

(a) *Vide supra*, p. 47

all principals. 2. It is likewise agreed of all hands, than in all treasons, except that which concerns counterfeiting the great or privy seal, or money, whosoever knowingly receives, maintains, or comforts a traitor, is a principal in high treason. *Co. P. C.* 16, 138. and so it is there cited to be resolved in the case of *Abington*, who received *Garnet*, that was one of the conspirators in the powder treason: that which hath occasioned the doubt hath been the resolution in *Conyer's* case, *Dy.* 296. who was indicted, that *proditoriè receptasset, &c.* *Fairfax, sciens ipsum diversas pecias monetæ ad similitudinem monetæ*

[234] *Angliæ vocat shillings de falso metallo fabricasse*; upon this he and others were discharged, because it was misprision of treason only, and not treason; but this opinion is contradicted by my lord *Coke*, *Pla. Cor. p.* 138. and yet it is said by the same author, *Pasche* 9 *Jac.* 12 *Rep.* 81. the receiver of a counterfeiter of the seal or money is no traitor.

We will see therefore in what cases an act *ex post facto* will be, treason in relation to the aid of him, that committeth this or any other treason.

A man is imprisoned for treason, the gaoler voluntarily suffers him to escape, this is treason in the gaoler. *Stamf. Pl. Co.* 32.

If a person be arrested for treason, he that rescues him is guilty of treason.

And so if a man be imprisoned for treason, and another prisoner or any other person breaks the prison, and lets out the party imprisoned for treason, this is treason in the party that breaks the prison. 1 *H.* 6. 5. *Stamf. Pl. Cor.* 32. nay, if a stranger breaks the prison and lets out one there imprisoned for treason; this is held treason, tho he that breaks the prison knew not that any there was imprisoned for treason; so resolved by ten judges, *P.* 16. *Car.* *Croke* 583. *Bensted's* case; but my lord *Coke* holds that he must be knowing it. *Co. Mag. Cart. super statutum de frangentibus prisonam (b).*

*Rot. Parl.* 2 *H.* 6. n. 18. in *schedula.* *Mortimer* was committed to the *Tower of London* for suspicion of treason; and 23 *Feb.* 2 *H.* 6. was indicted, *quod per covinam, confederationem & assensum Willielmi King, &c. pro diversis denariorum summis eidem Willielmo King per præfatum Johannem Mortimer promissis, idem Johannes turrin prædicti falso & proditoriè fregit*: the indictment was removed into parliament, and *John Mortimer* likewise brought into the par-

(b) 2 *Co. Inst.* 590.

liament: the commons desired the duke of Gloucester (then commissioned to hold the parliament) that the indictment might be affirmed, and that *John Mortimer de prædictis proditionibus & felonis convincatur*: thereupon the duke and lords at the request of the commons affirm the indictment by act of parliament, *& quod prædictus Johannes Mortimer de proditionibus & felonis prædictis* [235] *convincatur, & quod trahatur per medium civitatis, & super furcas de Tyburne suspendatur, & ad terram projiciatur, & caput ejus ampuetur, & interiora sua comburantur, & corpus ejus in quatuor partes dividatur, & caput ejus ponatur super portam pontis London, &c. & quod bona & cātalla, terras & tenementa sua, tam in dominico, quàm in reversione, domino regi forisfaciat.*

So that it seems, tho the statute of 25 E. 3. speaks not of these offenses, yet they are in a manner incidents, and virtually included within the original offense, and therefore these cases of voluntary permission to escape, rescue, breach of prison, translate the original offense upon him, that commits it by the common law; and these would be treasons as well in the case of counterfeiting of coin, as other treasons.

But herein these things are observable, 1. This judgment in *Mortimer's* case is not at all now in force, nor binding, for the statute of 1 *Mariæ* repeals not only enacted treasons, but declared treasons, that were not within 25 E. 3. and 2. That therefore at this day, if one be committed for suspicion of treason, and another break goal to let him out, yet unless the party imprisoned were really a traitor, this is no treason at this day. 3. But if he were really a traitor, then breaking of the prison to enlarge him is treason, and a treason of a greater guilt, than a knowing receiver, and then it is treason by virtue of the common law, for it is a kind of incident; the like of a receiver of a traitor, or a goaler that suffers him voluntarily to escape, those are incident treasons by the common law, and virtually included in the statute of 25 E. 3. as well as a receiver of a traitor knowingly.

The differences therefore seem to be these, which state and reconcile the whole matter.

*First* as for new treasons. If an act of parliament enact a new treason, and that the offender, his counsellors, abettors, and aiders thereunto shall suffer as traitors, this doth not make receivers or comforters after the fact guilty of treason, for *expressum facit cessare tacitum*;

[236] *tum*; such a clause we shall find in the statute 23 *Eliz. cap.* 2. for a new felony (*c*), 5 *Eliz. cap.* 1. in a case of a *præmunire* (*d*).

If an offense be made treason in the offender, his procurers, counsellors, abettors, consenters, (without the word *thereunto*) yet it seems to me for the same reason it doth not make the knowing receivers traitors, unless the words *receivers* or *comforters* be also inserted: for the former words import an offense preceding or concomitant to the act of treason, but the latter words *receivers* and *comforters* are after the offense, and so of another nature: and this difference appears expressly by the statute of 13 *Eliz. cap.* 2. where *abettors*, *procurers*, and *counsellors* are made guilty of high treason; but *receivers* and *comforters* (*e*) after the fact are only within the statute of *præmunire*; the like in 27 *Eliz. cap.* 2. where the coming of a priest, &c. is *treason*, but his receiver, aider, or comforter is *felony*: so 5 & 6 *E. 6. cap.* 11. and 1 *Eliz. cap.* 5. *the offenders, their counsellors, abettors and procurers, and all and every their aiders and comforters knowing the same* extend to knowing receivers.

The word (*aid*) is of somewhat a more doubtful extent, yet we shall find in those statutes and some others the word *aid* to be applied to an aiding after the offense, and not in it or to it; but it seems to me, that when it is joined only with those that import a consent to the offense, (as *procurers*, *counsellors*, *aiders*, *abettors*, or *counsellors*, *consenters* and *aiders*) as in the statute of 5 *Eliz. cap.* 11. for clipping, 18 *Eliz. cap.* 1. for impairing 1 *Mar. sess.* 2. *cap.* 6. for counterfeiting foreign coin, it must be construed of those that are *aiders* in the offense, and not bare receivers of the person.

But in all new treasons, those that rescue him from prison, or suffer him voluntarily to escape being lawfully committed to his custody, tho these are not expressly contained in that new act of treason, yet they are traitors by a necessary construction of law upon the act itself; but if the act, be general, making a man a traitor for [237] such an act without mentioning in what degree his aiders, or abettors, comforters, or receivers shall be, it seems probable, that the receiver, knowing it, is thereby virtually made also a traitor;

(c) The words of this statute are, *aiders, procurers, and abettors.*

(d) The words of this statute are more extensive, *wiz. abettors, procurers, counsel-*

*lors, aiders, assistants, and comforters.*

(e) The words in this place of the statute are, *aiders, comforters, or maintainers.*

this, I say, seems probable, but most certainly procurers, consenters, and aiders to the fact are thereby traitors, tho not specially so enacted; this is agreed in *Conyer's case*, *Dy. 296. Co. P. C. 16 & 138.*

*Secondly*, As touching treasons within the act of 25 E. 3.

The procuring, counselling, consenting, or abetting such treasons, tho not specially expressed in that statute, is treason within that statute. *Co. P. C. cap. 64. p. 138.* and so is the receiving of a traitor, or a gaoler's voluntary permitting him to escape, if he were in truth a traitor.

In case of the knowingly receiving of a person guilty of counterfeiting of coin, or of the great seal, there is diversity of opinion, *M. 12 & 13 Eliz. Dy. 296.* and my lord *Coke* himself in his 12 *Rep. p. 81. 9 Jac.* says, that it is not treason, and yet *Pla. Cor. cap. 64. p. 138.* he holds it treason, tho this latter opinion is the more probable, the former is more merciful.

But in all other treasons against the king within the statute of 25 E. 3. the receiver of a traitor knowingly makes the receiver a traitor: this was *Abington's case* for receiving *Garret* guilty of the powder treason, *Co. P. C. p. 138.*

Only this difference is to be observed, he, that being committed for treason breaks prison, may be indicted for breaking of prison before he be convicted of the principal offense, for which he was committed, but not of treason, but it will be only felony by the statute *de frangentibus prisonam*, for this statute *de frangentibus prisonam* makes it not treason; and if it did, yet the statute of 25 E. 3. makes it no treason, because not within the same statute, and consequently 1 *Mar. cap. 1.* exempts it from being treason; but he, that rescueth a person imprisoned for treason, or suffers him voluntarily to escape, shall not be arraigned for that offense, till the principal offender be convicted of that offense: for if he be acquitted of the principal offense, the gaoler, that suffered the escape, and he that made the rescue shall be discharged; and the like in felony. *Coke Mag.* [238] *Câr. super stat. de frangentibus prisonam, p. 592.* and the reason, is because tho rescuing a person charged with treason, or suffering him wilfully to escape be a great misdemeanor, yet it is not treason, unless in truth and reality he were a traitor, for a man may be arrested or imprisoned under a charge of treason, and yet be no traitor.



And tho the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessary, yet thus much he partakes of an accessary, 1. That his indictment must be special of the receipt, and not generally, that he did the thing, which may be otherwise in case of one, that is a procurer, counsellor, or consenter; thus it was done in *Conyer's case*, *Dy.* 296. 2. That if he be indicted by a several indictment, he shall not be tried till the principal be convicted (*f*), upon the reason of the goaler and rescuer before given, for the principal may be acquitted, and then he is discharged of the crime of receipt of him. 3. If he be indicted specially of the receipt in the same indictment with the principal offender, as he may be, yet the jury must first be charged to inquire of the principal offender; and if they find him guilty, then to inquire of the receipt, and if the principal be not guilty, then to acquit both; and accordingly it was ruled in *Arden's case* (*g*).

For tho, in law, they be both principals in treason, and possibly process of utlary may go against him, that receives, at the same time as against him, that did the fact; and tho the principal appear, process may go on against the other (otherwise in the case of an accessary in felony, *Stamf. Pla. Cor.* 47.) yet in truth he is thus far an accessary, that he cannot be guilty, if the principal be innocent.

How far *Mortimer's case* agrees with law at this day, *videbimus infra*, & *vide supra*.

[239] That, which will not make an accessary to felony after the fact, will not make a man principal in treason; therefore sending of a letter for his deliverance, or speaking a good word for him, &c. will not be treason. *Stamf. Pl. Cor.* 41. *b.* how far charitable relief will do it, *vide infra super statutum* 13 *Eliz. cap.* 1.

Foster 213. 341. 347. 1. Hawk. P. C. ch. xvii. §. 39. & ch. xx. §. 4. Fost. 341.

(*f*) See *postea* Book II. *cap.* 28. And therefore the conviction of lady *Alice Lisle*, 1 *Jac.* II. was contrary both to law and reason, for that *Hicks* the principal (for harbouring whom she was convicted of

treason) was not at that time convicted, nor indeed was there any proof that she at that time knew he had been in the rebellion: *State Tr. Vol.* IV. *p.* 105.

(*g*) 1 *And. n.* 154. *p.* 109.

## CHAP. XXIII.

*Concerning forfeitures by treason*

HAVING gone thro the several treasons declared by this statute, I shall now proceed to what follows in this statute, which is, 1. Touching forfeitures of high treason. 2. Touching declaring of treason by parliament, and under this head shall consider those several declarations and new enacted treasons since the statute of 25 E. 3. and how they stand at this day.

The forfeitures for treason are either goods or lands.

As to goods: the king's prerogative as to goods forfeit for treason is the same as to forfeitures for felony, only there seems to be some difference in relation to grants thereof. 22 Aff. 49. The king grants to the master of St. Leonard's *Omnia bona & catalla tenentium suorum fugitivorum, & felonum qualitercunque damnatorum*. A tenant of the master's was convicted and attaind for killing of the king's messenger, which at that time was held high treason; it was ruled, that the master shall not have the goods of this person by force of this general grant.

As to lands this statute of 25 E. 3. goes farther, *Et soit a entendus, qe les cases fuisnosmes doit estre adjudge treason, qe se extend a nostre seigneur le roy & sa royal majesty, & de tuel maners de treasons le forfeiture des eschetes appertenant a nostre seigneur le roy, ci bien de terres & tenements tenus des autres, come de lui mesme*.

I shall here examine, 1. Of what lands the king shall have the eschete upon attainder of treason, and 2. In what manner [240] or degree he shall have those eschetes. 3. Where a subject in point of privilege or franchise shall have these royal eschetes.

I. As to the first of these, what lands are forfeit to the king by attainder of treason, my lord Coke, *Pl. Cor. p. 19.* gives a full account of them, which I shall repeat with some additional observations: 1. At common law the lands entailed were forfeited for treason, because it was a fee-simple conditional; but by the statute *W. 2. de donis conditionalibus* the forfeiture of lands entailed, even in case of treason, was taken away, and the general words of this statute of 25 E. 3. doth not repeal the statute of *Westm. 2.*

But

But some later statutes have given to the king the forfeiture for treason of lands entailed : the statute of 21 R. 2. *cap.* 3. did give the forfeiture of lands entailed to the king for the treasons therein mentioned ; but that statute with the whole parliament of 21 R. 2. was repealed by the statute of 1 H. 4. *cap.* 3.

By the statute of 26 H. 8. *cap.* 13. *in fine* lands entailed are forfeited by attainder of treason, *viz.* “ All such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance in use or possession, by any right, title, or means, within any of the king’s dominions at the time of any such treason committed, or at any time after, saving to all persons, other than the offenders, their heirs and successors, and such persons as claim to any of their uses, all such right, title, interest, possession, &c. as they might have had if this act had not been made.”

And by the statute of 33 H. 8. *cap.* 20. (a) “ That if any person be attaint of high treason by the course of the common law such attainder shall be of as good force, as if it had been by parliament ; and the king, his heirs and successors shall have as much benefit by such attainder, as well of uses, rights, entries, conditions, as possessions, reversions, remainders and all other things, and shall  
[241] “ be deemed in the actual and real possession of the lands, tenements, hereditaments, uses, goods, chattles, and all other things of the offender, which his highness ought to have, if the attainder had been by authority of parliament, without any office or inquisition to be found for the same, saving to all persons, (other than the offenders and their heirs and assigns, and other persons claiming by, from or under them or to their uses after the treason committed) all such right, title, use, possession, entry, reversion, remainder, interest, condition, fees, offices, rents, annuities, commons, leases, and all other commodities, and hereditaments whatsoever, which they should, might, or ought to have, if this act had not been made.”

And the statute of 5 & 6 Ed. 6. *cap.* 11. is to the same effect.

These statutes as to the forfeiture of lands entailed remain in force, and are not repealed by the statute of 1 Mar. and so it hath

(a) See the cause of making this act, 3. Co. Rep. 10. b.

been often ruled, and particularly by all the judges in the lord *Sheffield's* case 21 *Jac de quo possea*.

And the reason is, because the statute of 1 *Mar. cap. 1.* enacting, that no treason shall be, but what was enacted by 25 *E. 3.* and that no pains of death, penalties or forfeitures shall ensue for doing any treason, other than be in the statute of 25 *E. 3.* these words *other than be mentioned in the statute of 25 E. 3.* refer to treasons, not to forfeitures or penalties; and therefore tho by the statutes of 26 and 33 *H. 8.* new penalties, *viz.* forfeitures of lands intailed, are introduced, this forfeiture is not repealed, but only new treasons not mentioned in 25 *E. 3.* so that at this day, if tenant in tail be attainted of treason, the estate-tail is forfeited, and yet this attainder works no corruption of blood as in relation to the heir in tail: *vide* the lord *Lumley's* case cited in *Dowry's* case, 3 *Co. Rep. 10. b.* Grandfather tenant in tail, father, and son, the father is attainted of treason and dies, the grandfather dies, the land shall descend to the grandchild, for the father could forfeit nothing, for he had nothing to forfeit; and the statute of 26 *H. 8.* that gives the forfeiture of tenant in tail, yet corrupts not the blood by the attainder of the father.

And therefore it is agreed in the principal case, that if after 26 *H. 8.* and before 33 *H. 8.* which vests all in the [242] king without office, if tenant in tail had been attainted of treason, and died in that interval, the land would have descended to his son till office found; but otherwise in case of tenant in fee-simple attainted and dying before office, the freehold is cast upon the king without office, because none could take it else.

2. The king at common law and by virtue of this statute was entitled to a right of entry, where the party was *in* merely by disseisin or abatement, but not to a right of entry, where the possessor was *in* by title; but at this day by virtue of the statute of 33 *H. 8.* above-mentioned the king is entitled to a right of entry in both cases, and that without office, but then there must be an inquisition or seizure to bring the king into the actual possession; and if he grant it over before such seizure, the grant must be special, not of the land simply, but of the right to the land otherwise neither land nor the right of entry passeth; it is so adjudged in *Dowry's* case, 3 *Co. Rep. 10. b.*

3. If a person committing treason hath at the time of the treason committed a bare right of action touching any lands, or a right to reverse a judgment given against him by writ of error, or a right to bring a formedon, or writ of entry, but hath no right of entry without such recovery in such action; this right neither at common law nor by the statute of 33 *H. 8.* is given to the king by the attainder of treason, 3 *Co. Rep.* 3. *a.* marquis of *Winchester's* case, 3. *Co. Rep.* 10. *b.* *Dowty's* case so adjudged; but yet there have been two great cases resolved, that tread hard upon the heels of this judgment.

*H. 15 Eliz. Pl. Com.* 552. *b.* *Walsingham's* case: *Wyat* tenant in tail of the gift of king *Henry VII.* the reversion in the crown, made a feoffment in fee, and then was attaind of treason, and died leaving issue, tho the feoffor, against his own feoffment, could not claim any right at the time of the treason; yet it was adjudged, 1. That there remained in him such a right of the entail, as was forfeited to the king. 2. And that the king was *in* as of his [243] reversion, and should not be subject to leases duly made by *Wyat* before his attainder.

21 *Jac. in Camera Scaccarii* *Stone* and *Newman's* case, it was adjudged in *B. R.* and affirmed in *Camera Scaccarii* by the greater number of justices. *Bigott* tenant in tail general makes a feoffment to the use of himself and his heirs; and before the statute of 26 or 27 *H. 8.* commits treason, and is attaind of treason, and dies leaving issue inheritable to the entail, then a special statute is made 31 *H. 8.* whereby he was to forfeit all estates and rights; yet it was adjudged, 1. That against his own feoffment the tenant in tail could have no right, and therefore if the case had stood barely so, the right of the entail could not have been forfeited by the attainder. 2. But when an estate returns to him, that is forfeited by the attainder, the king shall hold this estate discharged of the right of the old entail, and that right shall never revive to the issue. 3. That the retrospect of the king's title by the attainder shall over-reach and avoid the remitter, which was wrought in the issue before the king's actual seisin by the attainder or office thereupon.

But it is to be noted, that if the king makes a gift in tail, saving the reversion to himself, the attainder of treason of such tenant in tail shall not bar his issue, because the statute of 34 *H. 8. cap.* 20. enacts,



enacts, "That the heir in tail in such case shall have the lands, any recovery, or any other thing or things hereafter to be had, done, or suffered by or against such tenant in tail to the contrary notwithstanding;" which act coming after 26 H. 8. and 33 H. 8. that gave the forfeiture of lands entailed, is a repeal of those statutes as to this case, and a restitution of the statute *de donis conditionalibus* in this special case: and therefore, where in *Plowden's Commentaries* (*Walsingham's case*) *Wyat*, who was tenant in tail of the gift of the crown, the reversion in the crown, was attaind of treason 1 Mar. he had not forfeited his land by virtue of the statutes of 26 or 33 H. 8. if there had been no more in the case; but in that case he lost it, because by a special act of 1 & 2 Ph. & Mar. that attainder was confirmed, and farther it was enacted, "That he should forfeit all the lands, tenements, and hereditaments, whereof he or any to his use was seized the day of the treason [244] committed, saving the right of all persons other than the person attainted and his heirs, and all claiming under them after the treason committed;" and this act coming after 34 H. 8. cap. 20. repealed that act as to this case, as the act of 34 H. 8. repealed the acts of 26 and 33 H. 8. as to entails of the gift of the crown, where the reversion continues in the crown.

But since all these statutes it is enacted by the statute of 5 & 6 Ed. 6. cap. 11. "That every offender being lawfully convicted of any manner of high treason according to the course and custom of the common law shall lose and forfeit to the king's highness, his heirs and successors, all such lands, tenements, and hereditaments, which any such offender or offenders shall have of any estate of inheritance, in his own right, in use, or possession, within this realm of *England*, or elsewhere within the king's dominions at the time of such treason committed, or at any time after:" this act coming after 34 H. 8. makes lands of the gift of the king in tail subject to forfeiture for treasons, as well as other lands entail. 16 *Eng. Dy.* 332. b.

4. At common law the king was not entitled to a condition, that was in the party attainted; but now by the express words of the statute of 33 H. 8. the king is in some cases entitled to a condition of re-entry belonging to the party attainted, viz. not to the land itself but to the benefit of that condition, which might reduce the land into the possession of the party attainted, if he had not been attainted,

and now to the benefit of the king : but herein this difference is to be observed.

1. If the condition be such, as that the substance of the performance thereof is not bound up strictly to the person attaint, then such a condition is given to the crown, and he may perform it, as the party himself might have done in case the condition hath a continuance.

7 *Co. Rep.* 11. *b.* *Englefield's case* : Sir *Francis Englefield* conveyed [245] his lands to the use of himself for life, the remainder to his nephew and the heirs male of his body, &c. with a proviso, that in as much as he might turn prodigal, and therefore for a bridle to him, if Sir *Francis* by himself, or any other during his life, should deliver or offer to his nephew a ring of gold to the intent to make void the uses, then the uses should cease—Sir *Francis* is attaint of treason ; it was ruled, that the queen in the life-time of Sir *Francis* may by commission, &c. tender the ring and make void the uses, for it was not personally annexed to him, but might be performed by the queen.

This case was judged *M.* 33 & 34 *Eliz.* but it was not thought safe to rely upon this judgment ; but 35 *Eliz. cap.* 5. there was a special act of parliament reciting the attainder and the conveyance with the proviso : “ And it is declared and enacted, that the attainder be confirmed, and that the queen was lawfully entitled to “ take benefit and advantage of that proviso in the same form, as “ Sir *Francis Englefield* might have done, and that the said proviso “ or condition was well performed by the queen’s commission :” But suppose Sir *Francis* had died before the queen had made the tender, then the condition, which was only limited to him during his life, had been determined, and the queen could not have tendered, for the attainder could not lengthen the condition longer than the first limitation ; but on the other side, if the condition be appropriated and applied to the person of the party attaint, then such condition is not given to the crown.

The duke of *Norfolk's* case 11 *Eliz. (b)* cited in *Englefield's* case to be adjudged and then agreed by the court : the duke conveyed land to uses, provided that if he shall be minded to revoke, and shall signify his mind in writing under his proper hand and seal sub-

scribed by three witnesses, that then the uses should be revoked; it was ruled, that this condition was not given to the crown by his attainder.

2. *Car. 1. B. R.* Sir *William Shelly (c)* made a feoffment to the use of himself for life, the remainder to his first, second, third, and other sons in tail, provided, that if Sir *William Shelly at* [246] any time during his life give or deliver, or lawfully tender to the feoffees or any of them, their heirs or assigns, a gold ring, or a pair of gloves of the price of twelve-pence *ipso Willielmo tunc declarante & expressante*, that the tender was to the intent to avoid the deed, that then it should be void, and the feoffees should stand seised to the use of Sir *William* and his heirs; and it was adjudged in the common pleas, that this condition was so personal, that it was not given to the king, but upon a writ of error in *B. R.* the court was divided; *Whitlock* and *Jones*, that it was given, *Croke* and *Doderidge*, that it was not given to the king, *& sic fletit*.

In the case of *Wheeler* and *Smith (d)*, *Simon Mayne* being possessed of the rectory of *Haddenham* for sixty years, in 1643. assigned it over to trustees in trust for himself for life, and afterwards to divers other trusts for payment of debts and other things, provided nevertheless and upon condition, that if the said *Simon Mayne* shall at the time of his decease have issue of his body, that then and from thenceforth the trustees shall stand possessed for such person and persons, and such estate and estates, as *Simon Mayne* by his last will and testament shall limit and appoint, and for want of such limitation and appointment, in trust for such after-born child; provided also, that if the said *Simon Mayne* shall hereafter during his life be minded to make void these present indentures, or any use or trust therein, or to limit new uses, and the same his mind shall declare or signify *under his hand and seal* in the presence of two witnesses, then the uses shall cease, and then the trustees shall stand possessed to such uses, as he by such deed or writing, or by his last will and testament in writing shall limit and appoint. *Simon Mayne* was guilty of the execrable murder of the king, had issue a son, was attainted, and died without making any such will or revocation or declaration; and by act of parliament all the estates, which he had

(c) See this case by the name of *Warner* and *Hardwin* in *Latch* 25, 69, 102. *W. Jones* 134.

(d) See this case reported 2 *Keb.* 564, 608, 670, 772. 1 *Mod.* 16, 38.

or any in trust for him, and all rights, conditions, &c. were vested in the crown, who granted this rectory to the duke of *York*, and by

[247] him the same was granted to Sir *William Smyth*: it was adjudged in the common pleas, and upon a writ of error affirmed in the king's bench, *P. 23 Car. 2.* that Sir *William Smyth* had no title to this rectory: 1. That this was a personal condition and not given to the king, *under his hand and under his proper hand*, being all one in sense and appropriate to his person. 2. That, if it were given, yet the same expiring by the death of *Mayne* could not be performed after his death by the king. 3. Admitting it might, yet nothing but the condition was in the king, and not the rectory itself, till the condition performed. 4. That consequently the rectory passed not to the duke of *York*, because the condition was not performed. 5. Neither the performance of the condition nor the benefit thereof passed to the duke by the general grant of the rectory, but it must have been specially granted, or otherwise nothing passed. 6. That here was no estate in trust for *Simon Mayne* longer than during his life, because the whole residue of the trust was out of him, and was not reducible back to him, but by a strict performance of the condition or power, which was strictly tied to the person of *Simon Mayne*, and determined by his death, and therefore not given to the crown; but if it had been given to the crown, and might by the crown be transferred to the patentee, yet it seems the patentee could not transfer or assign that condition over to another; but this last question was not moved, as I remember, for the resolution of the former points made an end of the case.

5. At common law the king by attainder of treason was not entitled to uses or trusts belonging to the party attaint: thus it is recited to be the law by the statute of *27 H. 8. cap. 10.* and was one of the reasons of the making of that statute for transferring of uses into possession; and hence it was, that in some general acts touching treason, as that of *21 R. 2. cap. 3.* and in most particular acts of attainder, that were made after that time, there was special provision made, that the parties attaint should forfeit all the lands, whereof they or any other to their use were seized, and in most of these acts provision was also made to save from forfeiture such lands, whereof the persons attaint were seized to the use of any other,

[248] may be seen in the acts of attainder: *vide Rot. Parl. 1 E. 4. n. 18. 3 E. 4. n. 28, &c.*

And

And yet, altho the statute of 27 *H. 8. cap. 10.* had executed uses into possession, so that after that statute all uses were drowned in the land, yet there have succeeded certain equitable interests called trusts, which differ not in substance from uses; nay, by the very statute of 27 *H. 8. cap. 10.* they come under the same name, *viz. uses or trusts.*

And by the statute of 33 *H. 8. cap. 20.* there is a special clause, that the person attainted shall forfeit all uses, &c. and the saving is to all persons other than the person attainted, and his heirs, and all persons claiming to the use of them or any of them.

And what other uses there could be at the making of the statute of 33 *H. 8.* but only trusts, such as are now in practice and retained in chancery, I know not, and yet such hath been the opinion of men, or rather their necessity in respect of frequent emergencies in estates and their disposition thereof, that these trusts since the statute have not only been kept from being executed by the statute of 27 *H. 8.* but have been held and used quite as other things different from uses, and from all those burdens, with which uses were incumbered by several acts of parliament made before 27 *H. 8.*

And therefore *H. 55 Eliz. Croke, n. 2. B. R. Ridler and Punter (e)*, such a trust not withing the statute of 3 *H. 7. cap. 4.* or any other statute of that nature.

*M. 16 Jac. B. R. Croke, n. 23. (f)* the king made a lease for years to Sir John Duncombe of the provision of wines for the king, but in trust for the earl of Somersset, who was afterwards attainted of felony; by the opinion of all the judges the king shall have this trust, and so if a person outlawed have a bond made to another in trust for him, it shall be executed by an information in the exchequer-chamber or chancery; but it was agreed by them all, and so resolved in *Abington's case*, that a trust, if a freehold, was not forfeited by attainder of treason.

But how this resolution in *Abington's case* can stand with the statute of 33 *H. 8.* I see not, for certainly the uses [249] there mentioned could then be no other than trusts, and therefore the equity or the trust itself in cases of attainder of treason seems forfeited by the statute of 33 *H. 8.* upon an attainder of *cessy qe trust* of an inheritance, who possibly the land itself be not in the king.

(e) *Cro. Eliz. 291.*

(f) *Cro. Jac. 512. Hob. 214.*



But indeed, where the king or a common person is entitled to an eschete by an attainder of felony, there, by the attainder of *cessly qe trust in fee-simple* the land nor trust doth not come to the king or lord by eschete, for the eschete is only *ob defectum tenentis*, and in this case the king or lord hath his tenant, as before, namely the feoffee in trust, who is to be attendant for the services to the king or lord, and by the attainder of felony of the feoffee, the lord shall have his eschete of the lands discharged of the trust; and besides, an attainder of felony is not within the statute of 33 H. 8. cap. 20. and so it was resolved by all the court in the exchequer, *M. 21 Car. 2.* wherein the case was thus (*h*).

10 Martii 1 Car. 1. a long lease of the manor of *Bony Tracy* came to Sir *Ralph Freeman*.

4 Car. 1. The fee-simple thereof was conveyed to Sir *George Sands* and his heirs in trust for Sir *Ralph Freeman*.

July 1633, Sir *George* having issue two sons, *Freeman Sands* and *George Sands*, Sir *Ralph Freeman* devised part of the manor to *Freeman Sands* and his heirs, and other part thereof to *George* the son and his heirs, and devised all the rest of the manor to *Freeman Sands* and *George* his brother, and all such other sons as Sir *George* should have by *Jane* his wife, and their heirs, and made Sir *George Sands* and *Ralph Freeman* executors, and appointed them to convey the term according to these trusts.

*Ralph Freeman* the executor refused, Sir *George* took administration alone to him and his wife *cum testamento annexo*.

1635. *Freeman Sands* died without issue, *George* being his brother and heir.

[250] Afterwards Sir *George* by *Jane* his wife had issue another *Freeman Sands*, but no conveyance was executed of the term or inheritance.

1655. *Freeman Sands* murdered his brother *George*, who dying without issue all that right or trust, that was in *George* the brother, descended and survived to *Freeman*.

7 Aug. 1655. *Freeman* the son was attainted of felony.

23 Nov. 1655. Sir *George* takes administration to his son *George*.

The land being held of the king, as of the manor of *East-Greenwich*, the king's attorney preferred an information against Sir *George*

*Sands* in the exchequer-chamber to have a conveyance both of the term and inheritance to be executed by Sir *George Sands* unto the king, being the lord of whom the land was held; but it was *unâ voce* resolved, 1. That as to the inheritance, tho there were a trust for *George* the son, and that trust descended unto *Freeman* the murderer, as his brother and heir, and was in him at the time of the death of his brother and at his attainder, as to the greatest part of the lands, and as to the residue of the lands the trust was originally for *Freeman Sands*, yet in as much as Sir *George Sands* continued seized of the fee-simple, and so was tenant to the king, tho subject to a trust; yet the trust escheted not to the crown, but Sir *George* held it discharged of the trust. 2. That the term for years was not extinguished in law by the accession thereof to Sir *George*, as executor or administrator, tho Sir *George* had the fee-simple, because it was *en autre droit*, that he had the term. 3. That if the term for years had been a term in gross in trust for the party attainted, then by the attainder of felony the king had been entitled thereunto, not in point of eschete, but by his prerogative, having *bona & catalla felonum*. 4. But this term being to attend the inheritance the trust thereof was not like the trust of a chattle in gross, but was to wait upon the inheritance (and otherwise it had been impossible for the greatest part to have descended from *George Sands* to his brother *Freeman Sands*, unless it waited upon the trust of the inheritance) therefore the inheritance remaining in Sir *George* now discharged of the trust by the attainder of *Freeman Sands* the trust of the term shall also remain in him, for it is a <sup>[251]</sup> kind of incident or appurtenant to the inheritance.

And in this case the case of Sir *Walter Raleigh* was cited, which was *Mich. 7 Jac. in Camera Scaccarii*. Sir *Walter Raleigh* being possessed of a long term for years of the manor of *Sherburn*, intending to obtain the inheritance assigned this term to his son an infant upon pretense for a trust for his son, but really in trust for himself.

Sir *Walter Raleigh* then purchased the inheritance and made a settlement upon his son, but the same was defective, whereby the fee-simple remained in Sir *Walter*.

1 *Jac.* Sir *Walter* was attainted of treason, and afterwards the king granted all the goods and chattles real and personal of Sir *Walter* to *Shelbury* and *Smith* in trust for Sir *Walter's* wife and children,

Sir *Walter Raleigh* was executed, and upon an information in the exchequer, *M. 7 Jac.* it is declared and decreed, that the lease was in trust for Sir *Walter*, and therefore forfeited by his attainder, as well as if it had continued in him, and that it should be cancelled, and not incumber the reversion in fee-simple.

So that according to this resolution this trust for Sir *Walter* was not a chattle, for then it had passed to *Shelbury* and *Smith*; but it was a kind of appurtenant to the inheritance, and together with it was forfeited by the attainder, the conveyance of the inheritance being defective, and accordingly at this day it is held by those that derived under the patent of king *James*.

6. At common law the king by attainder of treason was not entitled to any chattles, that the party had *en autre droit*, as executor, or administrator, or in right of a corporation aggregate.

But the husband possessed of a term in right of his wife forfeits it by attainder of treason, felony, or out-lawry; but as to lands of inheritance, if the husband be seized in right of his wife, and is attainted of treason, the king hath the freehold during the coverture; and so if tenant for life be attainted of treason, the king hath [252] the freehold during the life of the party attainted; and so he had before the statute of 26 *H. 8.* by the attainder of tenant in tail.

Touching forfeitures for treason by a corporation sole, or aggregate, somewhat is observable.

At common law and still to this day in the case of a corporation aggregate, as dean and chapter, mayor and commonalty, where the possessions are in common in the aggregate corporation, nothing was or is forfeited by the attainder of the head of the corporation, as the dean, mayor, &c.

At common law a sole corporation, as an abbot, bishop, dean, prebendary, parson, vicar, by attainder of treason forfeited to the king the profits of their abbey, bishoprick, prebend, during their incumbency; but their successors were not bound by that forfeiture, for tho the profits as they arose belonged to their persons, yet the inheritance was in right of their church, and so not forfeited.

But by the general words of the statutes of 26 and 33 *H. 8.* and by the exclusive saving of the rights of others, *other than the successors of the persons attain*, these sole corporations forfeited the inheritance, and their successors were bound by such attainder; for it is apparent that *H. 8.* had not only in prospect the dissolution of monasteries, but

but had a resolution to curb the clergy, who were too obsequious to the pope and his power.

And therefore there were several attainders of abbots of high treason, whereupon the king seized their possessions, as dissolved thereby, as appears by the statutes of 27 *H. 8. cap. 28.* and 31 *H. 8. cap. 13.* touching monasteries, tho the king rested not barely upon such attainders; but by the statutes of 27 and 31 *H. 8.* their possessions are settled in the crown by those acts, and with this agrees the book of *Dy. 289.*

And therefore we may observe in the statute of 1 *Mar. sess. 2 cap. 16.* for the attainder of the archbishop of *Canterbury* a cautious proviso was added, that it should not prejudice his successors touching the possessions of his see; this was to avoid the question, that otherwise might have arisen upon the general words of the forfeitures thereby enacted.

But now by the act of 5 & 6 *Ed. 6. cap. 11.* this matter seems to be settled, for whereas by the statute of 26 *H. 8. [253] cap. 12.* a person attaint of treason is to forfeit all the lands, which he had by any right, title or means, saving the right of others, other than the heirs and successors of the person attaint, which confiscated the inheritance of sole corporations attaint of treason, the statute of 5 & 6 *E. 6. cap. 11.* enacts specially, that persons attaint of treason shall forfeit the lands, which they have of any state of inheritance in their own right, and saves the right of all persons, other than the persons attaint and *their heirs*, which restores and preserves the right of *successors*, as it was at common law.

7. By the common law all hereditaments, whether lying in tenure or not, as rents, advowsons, commons, corodies certain, are forfeited to the king by attainder of treason; but such inheritances, as lie purely in privity, appropriate to the person, are not forfeited neither at common law, nor by any special statute, as a foundership, or corody uncertain.

8. At the common law by attainder of felony or treason of the husband the wife lost her dower: by the statute of 1 *E. 6. cap. 12.* no attainder of treason or felony excludes her dower; but by the statute of 5 & 6 *E. 6. c. 11.* the husband attaint of treason the wife shall lose her dower, and so it stands at this day, except in treasons enacted by particular statutes, where dower is saved to the wife, notwithstanding the attainder of her husband of treason, as upon the statute

statute of 5 *Eliz. cap. 11.* for clipping money, 18. *Eliz. cap. 1.* for impairing money, 5 *Eliz. cap. 1.* refusing the oath of supremacy the second time, and some others.

And thus far concerning the things forfeited by attainder of treason, now,

II. I shall consider in what kind or degree the king hath these forfeitures of lands.

1. Altho these be called royal eschetes, yet the king is not *in*, purely, as by an eschete, for he hath those forfeitures *in jure coronæ* of whomsoever the lands be immediately held; yea, tho they are held immediately of the king, he hath them not in point of eschete, but *jure coronæ* or *prerogativæ regalis*.

[254] 47 *E. 3. 21 b.* A manor is held of the king as of his honor of *D.* and the manor eschetes for the felony of the tenant, it is now parcel of the manor, and therefore by the book if the king grant it out again generally, it shall be held of the honor, but if it eschete for treason, it is no parcel of the honor, and if it be granted out generally it shall be held *in capite*, 6 *E. 3. 32. a. accordant adjudge: vide* the case of *Saffron Walden*, *More's Rep. n. 301. (i) & ibidem n. 405.* the case of the borough of *Southwark (k).*

2. Where land comes to the crown by attainder of treason all mesne tenures of common persons are extinct; but if the king grants it out, he is *de jure* to revive the former tenure, for which a petition of right lies. 46. *E. 3. 19. (l)*

3. If tenant in tail of the gift of the king, the reversion in the king, makes a lease for years, and then is attainted of treason, the king shall avoid that lease, for the king is *in* of his reversion, tho the tenant in tail have issue living: this hard case is so adjudged in Commentaries *Austin's case (m) in fine*, and yet if such tenant in tail had, after such lease, bargained and sold, or levied a fine to the king, he should be bound by such lease as long as there is issue. *H. 22 Jac. B. R. Croker and Kelsey (n). 1 Rep. Alton Woods case (o).*

III. The third thing I propounded was the consideration of the eschetes in case of treason to such as have royal franchises, or counties palatine, as *Durham, &c.*

(i) *Mo. 159.*

(k) *Mo. 257.*

(l) I take it, this should be *H. 46 E. 3.*

*Petition 19.*

(m) *Plotod. 58.*

(n) *Cro. Jac. 688. 1 R. A. 843.*

(o) *1 Co. 40. b.*



1. At common law divers lords had by special grant or in right of their counties palatine royal eschetes of the lands held within their franchises of persons attaint of treason against the king.

Such was the royal franchise of the manor of *Wreck* in *John Darcy's* case, 6 E. 3. 31. b.

It appears in the parliament-roll 9 E. 2. m. 8. that the bishop of *Durham* claimed among divers franchises between the waters of *Tyne* and *Tese*, and *Norhamshire* and *Bedlingtonshire* in the county of *Northumberland*, the forfeitures of war, namely the lands of those, who held lands within that precinct, who adhered to the enemies of the king. [255]

And after many debates in parliament 2 E. 3. that liberty was allowed him by the judgment of the king and his council in parliament.

*Claus.* 1 E. 3. part 1. m. 10. and p. 2. m. 20. the precedents of the allowance of that liberty being produced, viz. that *Anthony* bishop of *Durham* had the forfeiture of *Castrum Bernardi* by the forfeiture of *John de Baliol*, the manors of *Hert* and *Hertness* by the forfeiture of *Robert Bruce*, the manor of *Gretham*, that was *Peter of Montfort's*; and, upon the consideration of the several pleadings in those cases, concordatum est per nos & totum concilium nostrum in ultimo parlamento, quod episcopus habeat suam libertatem de hujusmodi forisfacturis juxta tenorem & effectum cartæ proavi nostri, ideo vobis mandamus, (viz. the custos of these lands) quod de terris & tenementis infra libertatem episcopatus prædicti, & in prædictis locis de *Norhamshire* & *Bedlingtonshire* in manu nostrâ & in custodiâ nostrâ per forisfacturam guerræ existentibus manum nostram amoventes vos ulterius de eisdem non intromittatis, and the like particularly after *Claus.* 1 E. 3. part 2. m. 20 an amoveas manus for all the lands of *Guido de Bello Campo Comes Warwick*, qui de rege tenuit in capite infra libertatem episcopatus *Dunelmensis*, and likewise for the manors of *Gainsford*, *Hert*, and *Hertness* in the hands of *Roger de Clifford* seised for the forfeiture of war of *John de Baliol* and *Robert Bruce*; only the patentees not to be put out without an answer.

So that it is apparent, that at common law the bishop of *Durham* had the royal forfeitures of war (which was treason) for such lands as were within his liberty, tho they were formerly held of the king immediately in capite, if they lay within the precinct of his county palatine; and tho by the statute of 7 E. 6. the said bishoprick was dissolved,

dissolved, yet by the statute of 1 *Mar. Parl. 2. cap. 3.* that act is repealed and the bishoprick with its franchises revived.

2. Yet farther, tho this act of 25 *E. 3.* declares, that all such forfeitures belong to the king, yet this act did not derogate from the franchise of the bishop of *Durham* or others, that had that royal [256] liberty of forfeitures for treason, because it was in effect but a declaration of the common law, or at least an ascertaining of it without prejudice to those, that had these franchises of royal forfeitures, either by charter, or by reason of their county palatine by prescription; and this is agreed by all the judges in the case of the bishop of *Durham* *P. 12 Eliz. Dy. 288.* and accordingly *Rot. Parl. 1 E. 4. n. 20. & sequentibus*, where by act of parliament a great many noblemen, that were of the party of *H. 6.* were upon the coming of *E. 4.* to the crown attainted and their lands forfeited to the king; and such as were within the county palatine of *Lancaster* annexed to the duchy of *Lancaster*, and the rest lodged in the crown; yet there is a special provision and exception of the lands within the bishoprick of *Durham*, viz. between the waters of *Tyne* and *Tese*, and in the places called *Norhamshire* and *Bedlingtonshire* within the county of *Northumberland*, in which liberty and place the bishop of *Durham* and his predecessors of time, whereof there is no memory, have had royal right and forfeiture of war in the right of the cathedral church of *St. Cuthbert* of *Durham*, as by concord in parliament in the time of the progenitors of our lord the king *Edward IV.* it hath been assented.

3. Altho by the statute of 26 *H. 8.* and 33 *H. 8.* before-mentioned it is enacted, that the king shall have the forfeiture of all lands, &c. of the persons attainted of treason, yet in as much as in those acts there is a saving of the rights of others, the forfeitures for all treasons, that were within the statute 25 *E. 3.* and consequently were treasons at common law, by tenant in fee-simple, are saved to the bishop of *Durham*, and those that have such royal franchises of forfeiture of treasons; for these stand as they did before, by the opinion of five judges against four. *P. 12 Eliz. Dy. 289.* in the bishop of *Durham's* case.

4. But as to the forfeiture for new treasons enacted by any of those statutes the lords of franchises shall not have their franchise; this was agreed by all: but those new treasons that were enacted in the time of *H. 8.* or before, are all repealed by the statute of 1 *Mar. cap. 1.*

5. But

5. But as to treasons, that stood by the statute of 25 *E.* 3. and therefore not repealed by 1 *Mar. cap.* 1. yet as to the forfeitures of tenants in tail, or of lands in the right of churches or monasteries, the person that hath *jura regalia* shall not have them, because the king before the act of 26 *H.* 8. was not entitled to the forfeitures of those estates; and the statute of 26 *H.* 8. stands unrepealed as to the forfeitures for treasons within the statute of 25 *E.* 3. these are the points resolved in that case of 12 *Eliz.*

And therefore it is observable, that in the statutes of 5 *Eliz. c.* 11. whereby clipping is made treason, tho the forfeiture of lands is only during the offender's life, and no corruption of blood, nor loss of dower, yet there are special proviso's, that all persons, which have any lawful grant to hold and enjoy the forfeitures of lands, tenements, goods, or chattles of offenders, and men attaint of high treason within any manor, lordship, town, parish, hundred, or other precinct within the realm of *England* and *Wales* shall and may at all times have like liberty to take, seize, and enjoy all such forfeitures of lands, tenements, goods, and chattles, as shall come or grow within their liberties by force of the attainder of any person upon any offense made treason by this act, as they might have done by virtue of any grant to them heretofore made.

I do not find the like clause to my remembrance in any other acts of new treason either in that of 1 *Mar. sess.* 2. *cap.* 6. for counterfeiting the privy signet or sign manual, or in that of 1 & 2 *Ph. & Mar. cap.* 11. for importing foreign counterfeit coin made current by proclamation, or in that of 18 *Eliz. cap.* 1. concerning washing of coin, nor in any of those temporary acts made for the safeguard of the queen's person, &c. so that upon the reason of the resolution of 12 *Eliz.* the patentees of goods or lands of traitors by patents granted before those acts, and particularly the bishop of *Durham*, whose claim is by prescription, cannot have the goods or lands of persons attainted for those new treasons: *vide* 13 *Eliz. cap.* 16. a special provision in the act of attainder of the earl of *Westmoreland* and others for the rebellion in the *North*, that the queen shall have and hold against the bishop of *Durham* and his successors the [258] lands, tenements, goods and chattles of the persons attainted within the county palatine and franchise of the said bishop.

Nay, I cannot see how the bishop of *Durham* can either by his ancient charters or prescription claim the goods or lands of persons attaint

attaint for bringing in counterfeit coin contrary to the statute of 25 E. 3. for it seems that *that* was not treason at common law, as may reasonably appear by what has been before said touching that subject.

2 Hawk. P. C. ch. xlix. § 2.

See a learned treatise, intituled, *Considerations on the Law of Forfeitures for High Treason*; (supposed to be) written by the Hon. Cha. Yorke, sometime Attorney

General to King George III. and afterwards Lord High Chancellor of Great Britain, *per totum*. WILSON.

## CHAP. XXIV.

*Concerning declaring of treasons by parliament, and those treasons that were enacted or declared by parliament between the 25 of E. 3. and the 1 Mar.*

ALTHO the order of the statute leads us to consider of *petit treason* in the next place, yet because I intend to absolve the whole discourse of high treason and misprision of treason, before I descend to crimes of an inferior nature, I shall proceed to a full consideration of the whole matter specially relating to high treason, and so far as the same is not common to other capital offenses: the statute therefore proceeds, "And because many otherlike cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case supposed treason, which is not above specified, doth happen before any justice, the justice shall tarry without going to judgment of the treason, till the cause be shewed and declared before the king and his [259] parliament, whether it ought to be judged treason or other felony; and if *per case* any man of this realm ride armed covertly or secretly with men of arms against any other to slay him or rob him, or take him or detain him, till he hath made fine or ransom to have his deliverance, it is not 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 law of the land of old time used, and according as the case requireth, &c."

This clause consists of two parts, the former, how treasons not specially declared by this statute shall for the future be settled. 2. It declareth, that a particular offense therein mentioned, that was in truth formerly held to be treason, shall not for the future be taken to be so.

As to the former of these clauses touching the declaring of treasons not declared by this act, I shall pursue the history thereof at large in what follows, only at present I shall subjoin these few observations.

1. The great wisdom and care of the parliament to keep judges within the bounds and express limits of this act, and not to suffer them to run out upon their own opinions into constructive treasons, tho in cases, that seem to have a parity of reason (*like cases of treason*) but reserves them to the decision of parliament: this is a great security, as well as direction, to judges, and a great safeguard even to this sacred act itself.

And therefore, as before I observed in the chapter of levying of war, this clause of the statute leaves a weighty *memento* for judges to be careful, that they be not over hasty in letting in constructive or interpretative treasons, not within the letter of the law, at least in such new cases, as have not been formerly expressly resolved and settled by more than one precedent.

2. That the authoritative decision of these *casus omitti* is reserved to the king and his parliament, *viz.* the king and both his houses of parliament, and the most regular and ordinary way is to do it by a bill declaratively; and therefore altho we meet with some declarations by the lords house alone in some particular cases, [260] as in that of the earl of Northumberland, anno 5 H. 4. and that of Talbot 17 R. 2. tho they be decisions and judgments of great weight, yet they are not authoritative declarations to serve this act of 25 E. 3. but it must be by the king and both houses of parliament.

As to the latter of these, it has been formerly discussed in the second chapter.

This, at common law, was held treason, and the particular reason of the adding thereof in this place was, in effect, to reverse the judgment given in B. R. P. 21 E. 3. Rot. 23. in Sir John Gorbege's case (a); and touching this whole matter of riding armed, &c. *vide quæ dicta sunt supra, cap. 14. p. 135. & seq.*

Only the printed statute varies from the parliament-roll of 25 E. 3. p. 2. n. 17. for whereas it is printed in the late statutes (*covertly or secretly*) the parliament roll is *chivach arme descouvert ou secretment*, and accordingly the old written manuscript statutes are written thus, *chivach arme descouvert ou en privy en le realm, &c.* which misprinting possibly hath made some mistakes in judgments given of high treason,

(a) *Vide antea p. 80. & 183.*



as if to ride privily and covertly upon such a private attempt were not treason; but to ride discover, openly, were treason, when in truth neither in one case or the other it is treason, neither at this day nor at common law, if it be only upon a particular or private quarrel, as in the case of 20 E. 1. between the earls of Gloucester and Hereford (b); and this of Gerbege, tho it were *more guerrino & vexillis explicatis*.

But now to resume what is before promised, viz. touching the first matter, namely treasons not declared by the statute of 25 E. 3. we shall find, that between that statute and 1 Mar. there were treasons enacted or declared of these kinds:

1. Such as were simply declarative treasons, or so many expositions of the statute of 25 E. 3.

2. There were new treasons, that were simply enacted, and not declared only that were perpetual in their institution, but repealed by the statute of 1 Maria.

[261] 3. There were new treasons, that seem only temporary or fitted to the reigns of those kings, in whose time they were made.

4. There were some treasons, that were perpetual, but more explicate declarations or rather expositions of the statute of 25 E. 3. which yet stand repealed by the statute of 1 Mar.

And here I must advise the reader to take notice of these cautions.

1. Because the hereafter mentioned statutes are many, and consisting of divers clauses, that he rely not barely upon the abstracts thereof here given, because possibly there may be mistakes or omissions in those abstracts, but peruse the statutes themselves in the books at large.

2. That tho generally it be a fair topical argument, that when offenses are made treasons by new and temporary acts, they were not treasons within the statute of 25 E. 3. for if they were, they needed not to have been enacted to be treason by new statutes, as introductive of new laws in such cases; yet that doth not hold universally true, for some things are enacted to be treason by new, yea and temporary laws, which yet were treason by the statute of 25 E. 3. as will appear in the sequel.

And therefore the statutes of 1 & 2 Ph. & M. cap. 3. 1 E. 6. cap. 12. 23 Eliz. cap. 2. making several offenses felony have this

wary clause, *the same not being treason within the statute of 25 E. 3.*

And hence it was, that whereas by the statute of 13 *Eliz. cap. 1.* compassing the queen's death and declaring the same by writing or printing is enacted to be treason during the queen's life, but the delinquent is by that statute to be charged therewith within six months, and *Throckmorton* was generally indicted for compassing the queen's death, and the overt-act was by making a writing declaring convenient landing places for the *Spanish* forces, and the naming of divers popish gentlemen in writing, who would be assistant to that design, and communicating it to the *Spanish* embassador, and *Throckmorton* excepted to the proceeding, because not within six months according to the statute of 13 *Eliz.* that exception was over-ruled, because it was a charge of treason and an overt-act [262]

within the statute of 25 *E. 3.* which hath no such restriction, and thereupon he was convicted and executed. *Camd. Annals sub anno 1584. p. 293.* and the like was done upon the like exception in the case of the earl of *Arundel*; *quod vide Camd. Annals sub anno 1589. p. 426.*

3. But where an act of parliament made for the safety of the king or queen's person or government enacts any offense to be felony only, or a misdemeanor only punishable by fine and imprisonment, without that wary clause above-mentioned, it is a great evidence and presumption, that the same was not treason before, and a judgment of parliament in point, for it can never be thought, that the parliament would in such cases abate the extent of 25 *E. 3.* or make that less than treason, which was treason by that act.

I shall as near as I can pursue the order above-mentioned, but some intermixtures there will necessarily be of the many particular treasons enacted by some statutes, some of which were within the statute of 25 *E. 3.* and I shall follow those in every succeeding king's reign.

In the time of king *Edward III.* I find no declarations of treason after the statute of 25 *E. 3.*

Only I find somewhat like it in the attainder of *Thorp* chief justice of the king's bench for bribery (*c*) and other offenses, who was

(*c*) He was justice of assize in com' *Lincoln*, and took brides of several to stay an exigent upon an indictment for felony, that should have issued against them.

thereupon sentenced to death, before special commissioners (*d*) assigned *ad judicandum secundum voluntatem regis*, in respect of the oath he had made to the king and broken, whereby he had bound himself to that forfeiture, *si ale encountre son serement*: it is true he had judgment, but there was no execution; this judgment and the whole proceeding is entered in patent-roll of 24 *E. 3. part 3. m. 3. dorf.* and was afterwards removed into the lords house in the parliament held in *oſtabis purificationis 25 E. 3.* which was a year before the parliament held *Wednesday* in the feast of *St. Hillary 25 E. 3.* wherein

[263] the declaration of treason was made; and in that parliament of *oſtabis purificationis, n. 10.* the judgment was affirmed good, *de puis qe se obligea mesme par son serement a tiel pennance, sil fait al encountre, & connusseit, quil avoit receive douns countre, son dit serement*: but with this caution for the future to prevent such an arbitrary course of proceeding, *& sur ceo y fuit accord par les grants de mesme le parlement, qe si nul tiel case auaigne desore an evant de nul tiel, que nostre seigneur le roy prigne devers lui des grants, qe lui plerra, & par lour bone avyse face outre ce qe plese a sa royal seignory (e)*; but this comes not to our purpose concerning treason.

As to the time of *R. 2.* it was a fruitful time for declaring and enhancing of treason in parliament. *Rot. Parl. 3 R. 2. n. 18. pars 1.* the case of *Jean Imperiall (f)* who was sent as agent from the duke and commonalty of *Genoa*, and coming hither by the king's safe-conduct was murdered: the inquisition before the coroner was brought into parliament, and in pursuance of this clause of 25 *E. 3.* it was declared by the king, lords, and commons, to be treason.

This declaration being by the king and both houses of parliament was a good declaration pursuant to the act of 25 *E. 3.* but is not of force at this day, 1. Because it was but a particular case, and extended not to any other case, as a binding law but only as a great authority. 2. Because it being not within the express provision of the statute of 25 *E. 3.* it stands wholly repealed as treason by the statutes of 1 *E. 6.* and 1 *Mariae*.

(*d*) The earls of *Arundel, Warwick, &c*

(*e*) There is likewise a proviso added, that this should not be drawn into precedent; *sed solummodo versus eos, qui prædic-*

*tum sacramentum fecerunt & fregerunt, & habent leges Angliæ regales ac custodiendum.*

(*f*) *Co. P. C. p. 8. vide supra p. 83.*

*Rot. Parl.* 1 *R.* 2. *n.* 38. the judgment against *Gomenays* and *Weston* for betraying the king's castles in *France* mentioned before *cap.* 15. *p.* 168. where *Weston* had judgment to be drawn and hanged; this judgment was given by the lords at the petition of the commons in parliament, but makes not much in the point of declaration of treason, because, 1. If done, as is supposed, by treachery and bribery, it was an adherence to the king's enemies. 2. Being a declaration or judgment only by the lords, and not formally by the king, lords and commons, it is not such a declaration of treason, as the act of 25 *E.* 3. requires in cases of treason not thereby [264] declared.

*Rot. Parl.* 11 *R.* 2. *pars* 2. *per totum*, the great appeal in parliament by the duke of *Gloucester* and others against the archbishop of *York*, duke of *Ireland*, *Trefilian*, *Uske*, *Blake*, *Holt*, and others containing divers articles, which surely were not treason within the statute of 25 *E.* 3. yet had judgment of high treason given against them by the lords in parliament (*g*).

Upon the impeachment of the commons against *Simon Burle*, *Beauchamp*, and others, many of them had likewise judgment of high treason given against them by the lords in parliament (\*).

Altho the king did in some kind outwardly agree to these judgments, and the commons were active in it, and *Rot. Parl.* 11 *R.* 2. *pars* 1. *n.* 50. public thanks were given to the king by the lords and commons in full parliament, *de eo, qd loy avoit fait cy plein justice*, yet this was no declaration of parliament of treason pursuant to the statute of 25 *E.* 3. because the king and commons did not consent *per modum legis declarativæ*, for the judgment was only the lords. 2. Because it was but a particular judgment in a particular case, which was not conclusive, when the like cases came before judges.

This parliament of 11 *R.* 2. was repealed by the parliament of 21 *R.* 2. and that of 21 *R.* 2. also repealed, and the parliament of 11 *R.* 2. enacted to be holden according to the purport and effect of the same by the statutes of 1 *H.* 4. *cap.* 3 & 4. but this did not alter the statute of 11 *R.* 2. and make those judgments, which were given by the lords in 11 *R.* 2. of any other value than they were and consequently amounted not to any declaration by parliament, that these which the lords adjudged treasons in 11 *R.* 2. were or

(*g*) See *StateTr.* Vol. 1. *p.* 1.

(\*) *Ibid.* *p.* 15.

ought to be so held; and if any such construction might be made upon the confirmation of 1 *H. 4. cap. 4.* yet the same was repealed by the statute of 1 *H. 4. cap. 10.* in the same parliament; and if not, yet certainly 1 *E. 6.* and 1 *Mar.* have wholly taken away the force of those declarations, as shall be shewed.

[265] *Rot. Parl. 17 R. 2. n. 20.* Talbot's case, in conspiring the destruction of the dukes of *Aquitain* and *Gloucester* the king's uncles, and other great men, *Et sur ce firent divers gens lever armies & arrayes a faire guerre en assemblees & congregations in tres grand & horrible nombre*: this was declared treason by the lords in parliament, and a proclamation issued to render himself, or otherwise to be attainted of treason: how far this was treason or not within the statute of 25 *E. 3.* hath been before considered, but certainly, if it were no treason declared by the particular purviews of 25 *E. 3.* it is no such authoritative declaration of treason in parliament, as this act requires in treasons not declared; and if it were such an authoritative declaration, it binds not now as such, because all treasons are reduced to those expressed in the statute of 25 *E. 3.* by the statutes of 1 *H. 4. cap. 10.* 1 *E. 6. cap. 12.* 1 *Mar. cap. 1.* and treasons declared, as well as new treasons enacted, are by these statutes set aside, farther than the very declaration of 25 *E. 3.* extends.

*Rot. Parl. 21 R. 2. quod vide inter statuta 21 R. 2. cap. 2, 3, 4,* 12. some new statutes of treason were enacted, others were declared; by *cap. 2.* it is enacted, that the procurers of any new commission like that, (for the obtaining of which the archbishop of *Canterbury*, &c. were in that parliament attainted) being convict in parliament should be guilty of high treason: again, *cap. 3.* If any be convict in parliament of the compassing of the king's death, or to depose him, or to render up his homage to him, or of raising war against the king; and *cap. 4.* The procurers or counsellors to repeal the judgments given in that parliament, if convict in parliament, are guilty of high treason: other treasons were declared, as namely those nine rank answers to the king's questions, which are all recited and affirmed, and adjudged good and sufficient by the 12th chapter of that parliament; other points were judged, as namely, that the procuring of the commission for regulating the miscarriages in government *anno 7 R. 2.* and the execution thereof by the archbishop of *Canterbury* and others was high treason.

And



And tho it is true, that some of the points enacted to be treason by the 3d chapter were in truth treasons by the statute of 25 E. 3. if here were an overt-act, namely compassing the death or deposing the king, or levying war, yet these statutes and these declarations by the parliament of 21 R. 2. are wholly set aside; and the statute of 25 E. 3 governs the whole matter of high treason, notwithstanding any of the extensions, enactings, or declarations of the parliament of 21 R. 2. or any of the judges therein-mentioned, viz. *Belknap, Tresilian, Holt, Fulthorp, Burgly, Thirlinge, Birkhill, and Clopton*, for the parliament of 21 R. 2. is wholly repealed by 1. H. 4. cap. 3 & 4. and the parliament of 11 R. 2. wherein *Belknap* and *Tresilian* were judged traitors for delivering those extravagant opinions (*h*) is revived and affirmed; and also by the statutes of 1 E. 6. and 1 Mar. the treasons enacted or newly declared by the parliaments of 11 & 21 R. 2. are repealed.

And tho those opinions of the judges *Tresilian, Thirlinge* and the rest had the countenance of the parliament of 21 R. 2. yet they had the discountenance of the parliament of 11 R. 2. and 1 H. 4. which repealed the parliament of 21 R. 2. and stand at this day unrepealed in their full strength, excepting only such treasons as were newly made, or newly declared by those parliaments: tho the statutes of 1 E. 6. and 1 Mar. have taken away those treasons, which either the statute of 11 R. 2. or 1 H. 4. had introduced more than were in the statute of 25 E. 3. yet it hath not taken away the efficacy of the parliaments of 11 R. 2. and 3 H. 4. as to their declarations, that the extrajudicial opinions of those judges were false and erroneous; but in that respect the parliaments of 1 H. 4. and 11 R. 2. are of force, as to the damning of those extravagant and unwarrantable opinions and declarations.

I come now to the time of *Henry IV.* wherein I find little: in *anno primo* in parliament *inter Placita Coronæ*, *John Hall* was convicted before the lords in parliament of the murder of the duke of *Gloucester*, and judgment given by the lords *per assent du roy*, that altho it were only murder, yet the offender should have the judgment of high treason, viz. to be drawn, hanged, embowelled, his bowels burnt, his head cut off, and quartered, and his [267] head sent to *Calice*, where the murder was committed, which was

executed by the marshal accordingly: this was no declaration of treason, but a transcendent punishment of the murder of so eminent a person.

1 *H. 4. cap. 10.* "It is accorded, that in no time to come any treason be judged otherwise than it was ordained by the statute of king *Edward III.*" This at once swept away all the extravagant treasons introduced in the time of *R. 2.* either in over much favour of popularity, or over much flattery to prerogative, for they were of both sorts.

*Rot. Parl. 5 H. 4. n. 12.* There is a declaration of an acquittal of the earl of *Northumberland* from treason; *quod vide antea cap. 14. p. 136.* but I find no declaration nor act of new treason, in the time of *H. 4.* he was as good as his promise by the act of 1 *H. 4. cap. 10.* for he contented himself with the declaration made by 25 *E. 3.*

In the time of *H. 5.*

By the statute of 2 *H. 5. cap. 6.* It is ordained and declared that "manslaughter, robbery, spoiling, breaking of truce, and safe-conducts, and voluntary receipt, abetment, procurement, concealing, hiring, sustaining, and maintaining of such persons to be done in time to come by any of the king's subjects within *England, Ireland, or Wales, or upon the main sea* shall be judged and determined treason done against the king's crown and dignity; and the conservator of the truce to have power by the king's commission and by the commission of the admiral to inquire thereof." But this statute as to treason is particularly repealed by the statute of 20 *H. 6. cap. 11.* but whether the general statutes of 1 *E. 6. cap. 12.* 1 *Mar. cap. 1.* had repealed it as to treasons done upon the sea may be a question, because it hath been ruled, that those statutes extend not as to trials of treason done upon the sea by the statute of 28 *H. 8. cap. 15. de quo infra.*

The statute of 3 *H. 5. cap. 6 & 7.* it is true, is a declarative law, that clipping, washing and filing the king's coin is treason within the statute of 25 *E. 3.* and judges of assize and justices of [268] peace have cognisance thereof; but even this declarative law is repealed by the statute of 1 *Mar.* as it is declared in the statute of 5 *Eliz. de quo antea.*

As to the judgment of treason given in Sir *John Oldcastle's* case *Rot. Parl. 5 H. 5. par. 1. n. 11.* tho the judgment be given in parliament, yet it is barely upon the account of compassing the king's death,

death, and of levying of war, which was expressly within the statute of 25. E. 3. as appears before, *cap. 14. p. 142.*

Touching the times of H. 6.

*Rot. Parl. 2 H. 6. n. 18.* It appears, that *John Mortimer* was committed for suspicion of treason against H. 5. and 23 Feb. 2 H. 6. brake prison, and escaped, for which he was indicted 25 Feb. 2 H. 6. at *Guildhall, London*, before commissioners of *oyer and terminer* setting forth the matter, and that *prisonam prædictam falsò & voluntariè fregit*; the record by the king's command was sent into parliament, and by the king's commissioner *ad tenendum parliamentum*, and the lords at the request of the commons, it was affirmed a good indictment, and *Mortimer* had judgment to be drawn, hanged, and quartered, and his lands and goods forfeited to the king by the judgment of the lieutenant, lords, and commons, by an act made then for that purpose.

This it is true was an authoritative declaration of treason in this particular case pursuant to the clause of the statute of 25 E. 3.

But it rested not here, for in the same parliament, n. 60. a general statute passed, “ Que si aucun person soit indite, appelle ou prise  
“ par suspicion de grand treason and pur cest cause soit commise  
“ & detenus in prison & escape voluntierement hors du dit prison,  
“ que tiel escape soit adjudge & declare treason, si tiel person ent  
“ soit duement atteint selon la ley de terre. Et eient les seigneurs de  
“ fee en tiel cas les eschetes & forfeitures de terres & tenements de  
“ eux tenus par tiel persons issint atteints, come de ceux, que sont  
“ atteints de petit treason; Et teigne cest estatute lieu & effect del  
“ 20<sup>e</sup> jour de *Octobre* darrein, passe tanque al prochein parliament.

“ Ro'. Soit fait, come est desyre par la petition.

This parliament began 20 Oct. 2. H. 6.

The things observable hereupon are these, 1. That to [269]  
rescue a person, that is a traitor, out of prison was treason at common law, and so continues at this day within the statute of 25 E. 3. 2 *Co. Instit. p. 589.* and 1 H. 6. 5. b. 2. But if a man committed for treason breaks prison and escapes, this is not treason at common law. 3. Tho it be felony by the statute *de frangentibus prisonam*, yet it is not made treason by that statute. 4. But if it were treason by that statute, yet it is corrected and made not treason by the statute of 25 E. 3. and 1 H. 4. and therefore in this case it was made treason merely by the judgment of parliament, and statute of 2 H. 6. was but temporary and expired by the next parliament.

parliament. 5. That the judgment itself in *Mortimer's case*, tho an authoritative declaration, was not at all binding in other cases for two reasons, 1. Because it is checked and controled as to any such effect by the general act of parliament of 2 *H. 6.* which was to continue only to the next parliament; and 2. Because it was but a particular judgment of parliament in that particular case, to which it was particularly applied.

But howsoever, that question is now put out of question by the general act of 1 *Mar. cap. 1.* which enervates the force of this judgment and declaration; for 1 *Mar.* repeals declarative laws of treasons as well as enacting laws, and leaves the judges to judge strictly according to the statute of 25 *E. 3.* as if no such judgment had been given in parliament. 2 *Co. Instit. p. 589.* and therefore it seems strange to me, that the judges took any notice of 2 *H. 6.* in *Bensted's case* to ground any opinion on (*i*).

And therefore, altho in the last act of attainder of the earl of *Strafford*, there was a proviso added, that it should not be construed, that the treasons therein charged should be a rule for judges to proceed by, in other cases, it seems a cautious but needless proviso, [270] because it was a particular judgment, that did not *egredi personam*, and no general declarative law to serve the statute of 25 *E. 3.* For there may be collateral reasons not only in policy, but in justice sometimes for a parliament to vary the punishment of crimes, in substance the same, when differenced by circumstances, in several persons.

8 *H. 6. cap. 6.* Burning of houses maliciously or wickedly to extort sums of money from those, whom the malefactors spare, is made high treason with a retrospect to the first year of the king's reign, saving to the lords their liberties, as in case of felony.

Two things are observable upon this act, 1. That had it not been specially provided against, the lords had lost their eschetes by making it treason. 2. That this act, tho perpetual in its constitution, yet was repealed by 1 *Mar. cap. 1.* and after that repeal it remained felony, as it was before, and so continues to this day.

(*i*) *Cro. Car. 583. Jones 455.* It was the case in 1 *H. 6. 5. b.* and not the statute of 2 *H. 6.* on which the judges grounded their opinion, altho as that opinion is express in *Cro. Car. 583.* and *Kel. 77. viz.* that the breaking of a prison, wherein traitors be,

is high treason, tho the parties did not know, that there were traitors there, is not warranted by that case, which is of one, who brake prison, knowing certain persons to be prisoners in the said prison for treason.

*Rot. Parl.* 11 *H.* 6. *n.* 43. A petition that *John Carpenter*, who had committed a barbarous murder upon his wife, for which he was outlawed and in prison in the king's bench, might for example's sake by authority of parliament be judged a traitor, and that the judges might give judgment against him to be drawn and hanged, saving to the lords their eschetes. *Ro'. Pur ceo, quil semble encountre le liberty de seint esglis le roy se aviserà.*

20 *H.* 6. *cap.* 3. The coming of people out of *Wales* or the marches of the same into the counties adjacent, and taking and driving away cattle, and their abettors and receivers knowing thereof, is made treason against the king, saving to the lords marchers, of whom the offenders, receivers, or abettors held their lands, the forfeiture thereof and of their goods and chattles, when attainted; this act was to continue for six years: *nota*, the lords had lost their eschetes and forfeiture of the offenders goods, if it had not been specially provided for, because ~~made~~ treason and a new treason, which was not before, for the lords marchers had not only forfeiture of goods of felons, but royal eschetes and forfeiture of traitors goods for the most part; but that franchise, which was by prescription, could not extend to new treasons. [271]

I find nothing more relating to this matter in the time of *Henry VI.*

The impeachment of the duke of *Suffolk* by the commons for treasons and misdemeanors contained many articles of high treason within the statute of 25 *E.* 3. namely, *adhering to the king's enemies*; but the whole matter being at last left to the king, he was declared by the king clear of the treasons, and for the rest the king by a kind of composition ordered him to be banished for five years. *Rot. Parl.* 28 *H.* 6 *n.* 18, 19, 20, &c.

As to the reigns of *Edward IV.* and *Richard III.* tho in those great revolutions, that happened in the latter end of *Henry VI.* the beginning of *Edward IV.* the time of *Richard III.* there are many acts of attainder of treason of particular persons, that adhered to either party then contending for the crown, according as the success of war fell to one side or the other, as namely *Rot. Parl.* 38 *H.* 6. *n.* 1.—36, &c. many of the duke of *York's* party were attainted of treason by act of parliament. *Rot. Parl.* 1 *E.* 4. *n.* 6.—15, &c. the numerous companies of the party of *Henry VI.* were attainted by parliament; the like was done in the short regrefs of *H.* 6. 11 *E.* 4. in a parliament held



held in that short resumption of the crown by *Henry VI.* Again, the like was done in the parliament of 12 *E. 4.* upon the regrefs and re-expulsion of *Henry VI.* Again, *Rot. Parl.* 1 *R. 3.* divers persons of great quality, that opposed the pretensions of *Richard III.* were attainted by act of parliament; and the like was again done in the parliament of 1 *H. 7.* against the assistants of *Richard III.* Every new revolution occasioned the attainder by parliament of the most considerable of the adverse party; yet in all this time I find no general declaration or general enacting of new treasons by parliament.

I come to the time of *Henry VII.*

In this time I find but one new treason, namely the statute of 4 *H. 7. cap. 18.* whereby the counterfeiting of foreign coin made current in this realm is made high treason.

But this act was repealed by the statute of 1 *E. 6. cap. 12.* [272] and 1 *Mar. cap. 1.* and another act made to the same purpose in 1 *Mar. sess. 2. cap. 6.*

This wise prince duly considering the various revolutions, that had formerly happened in this kingdom touching the crown especially to the houses of *York* and *Lancaster*, and that every success of any party presently subjected all that opposed the conqueror, to the penalties of treason; and weighing that, altho by his marriage with the heir of the house of *York*, he had reasonably well secured his possession of the crown, yet otherwise his title, as in his own right, was not without some difficulties; he therefore made a law, not to enact treason, but to give some security against it, *viz.* 11 *H. 7. cap. 1.* “ That all  
“ persons, that attend upon the king and sovereign lord of this land  
“ for the time being in his person, and do him true and faithful service of allegiance in the same, or be in other places by his commandment in the wars within this land or without, that for the  
“ said deed and true duty of allegiance he or they shall be in no wise  
“ convicted or attainted of high treason, nor of other offenses for that  
“ cause by act of parliament, or otherwise by any process of law,  
“ whereby he or any of them shall now forfeit life, lands, tenements, rents, possessions, hereditaments, goods, chattles, or any  
“ other thing, but be for that service utterly discharged of any vexation, trouble, or loss; and if any act or acts, or other process of law hereafter thereupon for the same happen to be made contrary  
“ to this ordinance, that then that act or acts or other process of law  
“ whatsoever they be, stand and be utterly void; provided always,  
“ that

“ that no person or persons shall take any benefit or advantage by  
 “ this act, which shall hereafter decline from his or their said allige-  
 “ ance.” Upon this act these things are observable.

1. That this act was not temporary or for the life of king *Henry VII.* but was perpetual, and extended to all succeeding kings and queens of this realm, for it is for attendants upon the king or sovereign lord of this land *for the time being.*

2. It is observable, that this act extendeth to a king *de facto*, tho not *de jure*, for in truth such was *Henry VII.* for <sup>[273]</sup> his wife was the right heir to the crown, and his regal power was principally by an act of parliament made 1 *H. 7.* before his intermarriage with his queen, tho both titles were derived to his descendants, *viz. Henry VIII.* and in default of issue, to his sister, from whom our present sovereign is descended: and this act, tho extended to his successors, which were kings *de jure*, as well as *de facto*, yet was made for the security of himself and his servants in the first place, which appeareth more fully also by the preamble.

3. That tho this act might secure the attendants on the king in his wars against impeachments in an ordinary course of law, and might, as to this purpose, exempt them from the danger of any treason by the statute of 25 *E. 3.* as adherers to the king's enemies, yet it was a vain provision against future acts of parliament, whose hands could not be bound by a former act from repealing it, or taking away the effect thereof in part or in all.

It is true, since that time this kingdom hath had no great experience of changes of this nature, nor need to make use of the advantage of this statute: it is true queen *Mary* began her reign 6 *July* 1553. she was crowned 6 *Octob.* following, her first session of parliament began 5 *Octob.* 1553. which was the day before her coronation, and the second session thereof was held by prorogation 24 *Octob.* 1. *Mar.*

Upon that 6th of *July*, which was the day of king *Edward's* death, and before queen *Mary* was actually settled, the lady *Jane Gray* set up a title for herself, and continued in some kind of regal power, until the 1st of *August* following, and during those twenty-four days the styles of deeds, statutes and other things (and possibly also processes) were made in her name, and a special act was made 1 *Mar. sess. 2. cap. 4.* to make them effectual, and to be pleadable in the style, name, and year of queen *Mary*; so that the lady *Jane* seemed an intruder for about twenty-four days; but the truth is, she was not so much

much as an usurper, or a queen *de facto* : and these her assistants in that business, viz. the archbishop of *Canterbury*, the duke of [274] *Northumberland*, the said lady *Jane* and divers others were attainted before commissioners of *oyer and terminer*; and those attainders confirmed by parliament 1 *Mar. sess. 2. cap. 16.* and note in that act of attainder a special proviso, that the possessions of the archbishoprick of *Canterbury* should not be forfeited by that attainder or act of parliament; possibly they thought that the general words of that act, or at least the statutes of 26 *H. 8.* and 33 *H. 8.* which gave forfeitures for treason against successors, and were not repealed by 1 *Mar.* might otherwise have forfeited the lands of the archbishoprick by the attainder of the archbishop; but of this *supra cap. 23. p. 252.*

4. But what was the meaning of the proviso in that act of 11 *H. 7.* "That no persons shall have the benefit of this act, who shall decline from his allegiance," is dark and dubious.

But these questions never failed to be soon decided on the victor's part by their parliaments, which were always obsequious enough in these matters to the victor, and ready to pass acts of attainders for his safety and their own, against which no security was, nor could be given by this act of 11 *H. 7.*

I come now to the reign of *Henry VIII.* which was a reign, wherein acts concerning treason were exceedingly multiplied, and they are of three kinds: 1. Such acts, as constituted or declared treason. 2. Such acts, as concerned the trial of treason. 3. Such as concerned the punishment or forfeiture of treason.

By the statute of 22 *H. 8. cap. 9. Richard Rose* for wilful poisoning of divers persons is by authority of parliament attainted of high treason, and that he be boiled to death : and by authority of parliament murder by wilful poisoning is made treason for the future, and the offender to be boiled to death, and not to have benefit of the clergy : justices of peace to have power to inquire of this offense, and also of counterfeiting coin of any foreign kingdom, suffered to be current here, the title of lords to eschete of the lands of offenders in poisoning is saved to them (*k*).

[275] This treason is repealed by 1 *Mar. cap. 1.* and the same remains felony as before.

By 26 *H. 8. cap. 13.* “Maliciouſly to wiſh, will, or deſire by  
 “ words or writing, or by craft to imagine, invent, praſtiſe, or at-  
 “ tempt any bodily harm to the king, queen, or their heirs apparent,  
 “ to deprive them, or any of them of their dignity, title, or name  
 “ or ſlanderouſly, or maliciouſly to publiſh by expreſs writing, or  
 “ words, that the king, our ſovereign lord is an *heretic, ſchiſmatic,*  
 “ *tyrant, infidel,* or *uſurper*, or rebelliouſly to detain any of his  
 “ caſtles, &c. in this realm, or other his dominions, or rebelliouſly  
 “ to detain or keep any of his ſhips, ammunition, or artillery, and  
 “ do not humbly render the ſaid caſtles, fortrefſes, ſhips, or artillery,  
 “ to our ſovereign lord, his heirs or ſucceſſors, or ſuch as ſhall be  
 “ deputed by them, within fix days after they be commanded there-  
 “ unto by proclamation under the great ſeal, is enacted to be treaſon  
 “ in the offenders, their aiders, counſellors, conſenters and abettors:  
 “ foreign treaſon to be tried in any county, where the king ſhall ap-  
 “ point by commiſſion.”

1. It ſhould ſeem, that this act was intended to be perpetual, for  
 in it and the ſubſequent claule of forfeitures it mentions the king, *his*  
*heirs and ſucceſſors.* 2. Part of this ſeems to be treaſon by the ſtatute  
 of 25 *E. 3. viz.* the praſtiſing any bodily harm, if there be an overt-  
 act, and alſo the rebellious detaining of the king’s caſtles after ſum-  
 mons by proclamation; the reſt are purely new treaſons. 3. But  
 whether it was temporary or perpetual, all treaſon reſting ſingly, as  
 enacted by authority of this act, is repealed by 1 *E. 6.* and 1 *Mar.*  
 and yet the latter claule (1) concerning forfeiture in relation to all  
 treaſons within 25. *E. 3.* ſtands unrepealed; *de quo vide ſupra &*  
*infra.*

By 27 *H. 8. cap. 2.* counterfeiting privy ſeal, privy ſignet, or ſign  
 manual is made treaſon, and the offenders, their counſellors, aiders,  
 and abettors to ſuffer and forfeit, as in caſe of treaſon; this is repea-  
 led by 1 *Mar. cap. 1.* and then re-enacted by 1 *Mar. cap. 6.*

By 25. *H. 8. cap. 22.* the divorce between the king and  
 queen *Catharine* is affirmed by parliament, and alſo the [276]  
 marriage between him and *Anne Bullen*, and the crown with all dig-  
 nities, honours, pre-eminences, prerogatives, authorities, and juriſ-  
 dictions to the ſame annex or belonging, is entailed after the king’s

(1) By this latter claule the offender,  
 &c. ſhall forfeit to the king, his heirs and  
 ſucceſſors all lands, tenements and here-

ditaments of any eſtate of inheritance in  
 uſe or poſſeſſion, by any right, title, or  
 means.

death to the heirs of his body lawfully begotten, *viz.* to the first, second, and other sons of the king and of the said queen *Anne*, and to the heirs of their bodies successively; and for want of such issue male, to the heirs male of the king, and the heirs of their several bodies; and for want of such issue, to the lady *Elizabeth*, their daughter and the heirs of her body, and so to their second, third, and other daughters; and for want of such issue, to the king's right heirs.

“ If any by writing, printing, or exterior act maliciously do or procure any thing to the peril of the king's person, or to the disturbance of the king's enjoyment of the crown, or to the prejudice or derogation of the marriage between him and queen *Anne*, or to the peril, slander, or disherison of any of the issues or heirs made by this act inheritable to the crown, it shall be high treason.

“ If any by words without writing, &c. maliciously publish any thing to the slander of the said marriage between the king and queen *Anne*, or to the slander or disherison of the issues of the king's body begotten on the said queen *Anne*, or other heirs inheritable to the crown, by virtue of this act, it shall be misprision of treason:” an oath is appointed to be taken in pursuance hereof, and the refusers are guilty of misprision of treason; provision is made for the custody of the heir of the crown during minority.

28 *H. 8. cap. 7.* the last act is repealed, and all intermediate offenses against that act in relation to queen *Anne* or the lady *Elizabeth* pardoned; queen *Anne* and others attainted of treason; the marriage between the king and queen *Catharine*, annulled and judged void, and the issues between them to be illegitimate; the marriage between the king and queen *Anne* judged void by sentence of divorce of the archbishop; the same sentence confirmed, and the marriage with queen *Anne* judged and declared null and void, and the issues between them declared illegitimate and excluded from inheriting the crown:

[277] *Levitical* degrees settled. Children between the king and queen *Jane* shall be adjudged the king's lawful children, and inheritable to the crown; the crown entailed to king *Henry VIII.* and the heirs of his body lawfully begotten, that is to say, to the first, second, and other sons of the king on the body of queen *Jane* begotten, and the heirs of their bodies severally; and in default of such issue male, then to the first son and heir male of his body, and so to the second and other sons in tail; and for the want thereof, to the first and other issue female between the king and queen *Jane* in tail; and



and for want of such issue, to the king's first and other issue female in tail; and for lack of issue of the king's body, to such person, and in such manner as he shall appoint by his last will or letters patent; provision against disturbances of the heir of his body so nominated under pain of treason; "And if any shall by words, writing, printing, or other exterior act directly or indirectly do or procure maliciously any thing to the peril of the person of the king, his heirs or successors having the royal estate of the crown, or maliciously or willingly by words, &c. give occasion, whereby the king, his heirs or successors might be interrupted of the crown, or for the interruption, repeal or adnullation of this act, or the king's disposal of the crown according to it, or to the slander, disturbance, or derogation of the marriage between the king and queen *Jane*, or any other lawful wife, which he shall hereafter marry, or to the peril, slander, or disherison of any of the issues and heirs of the king limited to be inheritable to the crown, or to whom the king shall by authority of this act dispose it, or that affirm, &c. the marriage between the king and queen *Catharine*, or between the king and queen *Anne* to be good, or slander the sentences of divorce above said, or publish their issues to be the king's lawful children, or shall attempt to deprive the king, the queen, or any made inheritable to the crown by this act, or to whom the king by authority of this act shall dispose thereof, of their titles, styles, names, degrees, or royal estate or regal power, or refuse to take an oath to answer such questions, as shall be objected to them [278] upon any clause of this act, or after taking the oath do contemptuously refuse to answer such interrogatories, as shall be objected concerning the same, or shall refuse to take the oath enjoined by this act, they, their aiders, counsellors, maintainers and abettors shall be guilty of treason, and forfeit all their lands, &c. and all sanctuary excluded."

The form of the oath is set down in the act, and power is given to the king by will to dispose of the custody of the king's issue within age.

It is made treason to disturb such disposal, and also power is given to the king to dispose or give by will, &c. to any of his blood any title, style, name, honors, tenements, or hereditaments.

*Nota*, This act doubted whether the attempting any thing in parliament against the marriage of queen *Anne* might not bring them in

danger of the act of 25 *H. 8.* and therefore took care both to repeal the act, and to discharge and pardon what had been attempted against it.

The clause enabling the king to dispose of any honours or lands to those of his blood by will was necessary, for without such an enabling act of parliament the king could not dispose thereof by will, but only by *letters patent* under the great seal, or for lands parcel of the duchy of *Lancaster* under the seal of the duchy.

But it seems, that as to the disposal of lands belonging to the crown or duchy by letters patent under these respective seals, the king had power without this act, or the 35 *H. 8. cap. 1.* to dispose thereof, and to bind his successors.

And this by reason of the special penning of those acts, which, as I think, did not entail the lands, that the king had *in jure coronæ* or *in jure ducatus Lancastriæ*, but only limits the succession of the crown and of the dignities, honors, prerogatives, pre-eminences, authorities, or jurisdictions to the same annex or belonging, which are but so many expressions of the parts or incidents of the regal dignity, and not of the lands or possessions of the crown, but those rested in the crown in fee-simple, as they were before those acts made.

[279] And hence it is, that in the several acts of 34 *H. 8. cap. 21.* 1 *E. 6. cap. 8.* 18 *Eliz. cap. 2.* 35 *Eliz. cap. 3.* 43 *Eliz. cap. 1.* for confirmation of letters patent, there is no clause to make them good, notwithstanding the entail of the crown, for it was not needful; but the lands granted by king *Henry VIII. Edward VI. queen Mary, queen Elizabeth*, stand effectual without any such confirmation, and yet the entail of the crown by these acts continued till the death of queen *Elizabeth*, at which time it was spent, and king *James* succeeded to the crown as the true heir thereof, without the help of any entail or nomination by *Henry VIII.*

And yet after all this the whole scheme was altered by the statute of 35 *H. 8. cap. 1.* for thereby after recital of the statute of 28 *H. 8.* and that the king had issue by queen *Jane* prince *Edward*, and the king had since married the lady *Catharine*; It is enacted, "That if  
 " the king and prince *Edward* die without heirs of either of their  
 " bodies, the crown shall remain to the lady *Mary* and the heirs of  
 " her body under such conditions, as shall be limited by the king by  
 " his letters patent, or his last will; and for want of such issue, or  
 " upon breach of such conditions, to the lady *Elizabeth* and the heirs  
 " of her body under such conditions, as shall be limited by the king  
 " by

“ by his last will or letters patent; and in default of such issue, or  
 “ upon breach of such conditions, to such persons and for such estates,  
 “ as the king shall limit by his will or letters patent.

This act repeals the former oath of 28 *H.* 8. and directs the form of a new oath to be taken for the extirpation of the pope's pretended supremacy, and limits it to be taken by all that sue livery, have any office of the king's gift, receive orders, take degrees, and by all persons whom the king, &c. shall appoint, and that it shall be treason in such, who obstinately refuse to take the oath.

It is also enacted, “ That if any person by words, writing, printing  
 “ or exterior act maliciously or willingly do or procure any thing  
 “ directly or indirectly for the repeal, annulation or interruption of  
 “ this act, or any thing therein contained, or of any thing  
 “ that shall be done by the king in the limitation of the [280]  
 “ crown to be made as aforesaid, or to the peril, disherison or slander  
 “ of any of the issues and heirs of the king being limited by this act  
 “ to inherit and to be inheritable to the crown, or to the disherison or  
 “ interruption of any person, to whom the crown is by this act, or  
 “ shall be limited by the king as aforesaid, whereby they may be de-  
 “ stroyed or interrupted in body or title of the inheritance of the  
 “ crown, the same shall be high treason in the offenders, their main-  
 “ tainers, aiders, counsellors, and abettors, saving to all persons, other  
 “ than the parties attainted, their heirs and successors, all rights, &c.  
 “ in the lands of the persons attaint.”

And note, that notwithstanding the caution used in the act of 28 *H.* 8. for the pardon of the attempting to repeal the act of 25 *H.* 8. no such care was thought necessary here for the attempt or procurement to alter the law by act of parliament; for as it could not be restrained by a precedent act, so neither was it concerned within the penalty.

And thus much for those treasons, that related to the succession of the crown, which I have put together, notwithstanding many of them come after those other acts, which I shall hereafter mention.

By the 28 *H.* 8. *cap.* 10. which was the great concluding act against the papal authority, the asserting or maintaining of the papal authority is brought within the statute of *præmunire*, and he that obstinately refuseth the taking of the oath of abjuration thereby enacted, is subjected to the penalty of high treason.

By 28 *H. 8. cap. 18.* marrying any of the king's children or reputed children, or his sisters, or aunts of the father's part, or the children of the king's brethren, or sisters, without the king's licence under his great seal, or deflowering of any of them, is enacted to be treason.

By 31 *H. 8. cap. 8.* the king and council's proclamation concerning religion or other matters are to be obeyed under such penalties, as they shall think requisite; they, that disobey them and then go beyond sea contemptuously to avoid answering such offense, [281] shall be guilty of treason, &c. saving to every person, other than the offenders, their heirs and successors, all right, &c.

By 32 *H. 8. cap. 25.* the marriage between the king and lady *Anne Cleve*, which had been dissolved by the sentence of convocation, was confirmed by parliament, with liberty for each party to marry elsewhere: if any by writing, printing, or exterior act, word or deed, accept, take, judge, or believe the said marriage to be good, or attempt any thing for the repeal or adnullation of this act, it shall be high treason in them, their aiders, counsellors, abettors, or maintainers, saving the rights of all, other than the offenders, their heirs and successors; and all persons that have acted against the said marriage are pardoned.

By 33 *H. 8. cap. 21.* Queen *Catharine Howard* was attainted of high treason, and all persons that had acted against her were pardoned: any woman, whom the king or his successors shall intend to take to wife, thinking her a pure and clean maid, if she be not so, and shall willingly couple herself in marriage to the king notwithstanding, without discovering it to the king before marriage, shall be guilty of high treason; and if any other know it and reveal it not, it shall be misprision of treason: the queen or prince's wife soliciting any person to have carnal knowledge of her, or any person soliciting the queen or prince's wife to have carnal knowledge of her, is treason in them respectively, their counsellors, aiders and abettors.

By 35 *H. 8. cap. 3.* The king's style (*Henricus octavus Dei gratiâ Angliæ, Franciæ & Hiberniæ rex, fidei defensor, & in terrâ ecclesiæ Anglicanæ & Hiberniæ supremum caput*) is united and annexed to the imperial crown of *England*; and if any shall imagine to deprive the king, queen, prince, or the heirs of the king's body, or any to whom the crown is or shall be limited, of any of their titles, styles, names, degrees, royal estate, or regal power annexed to the crown of *England*, it shall be high treason, saving the right of all other than the offenders, their heirs and successors.

And thus far concerning the several treasons enacted in this king's time, all which are nevertheless now abrogated and repealed by 1 *E. 6.* and 1 *Mar.* as shall be shewn.

II. There are several acts of parliament in this king's time, which concern trials of treason, some of which are in force at this day, and not repealed by any statute.

By 26 *H. 8. cap. 6.* The treason concerning counterfeiting, washing, clipping and minishing of money current within this realm, as likewise other felonies committed in *Wales* or the marches thereof, may be heard and determined before justices of goal-delivery in the next *English* county; but note, this extends not to other treasons, nor, at this day, to clipping or minishing the coin; for the acts, that made them treason at that time, *viz.* 3 *H. 5.* and 4 *H. 7.* stand now repealed, and the statutes of 5 *Eliz. cap. 11.* for clipping, and 18 *Eliz. cap. 1.* for minishing the coin, direct it to be tried by the course and order of the law; and so it is also for counterfeiting of foreign coin by the statute of 1 *Mar.* yea, and as to counterfeiting the coin of this kingdom, or any other offense touching coin, by the statute of 1 & 2 *P. & M. cap. 11.* the indictment and trial is directed to be according to the course of the common law; so that as to coin also the statute of 26 *H. 8.* is now out of doors.

28 *H. 8. cap. 15.* For trial of treason committed upon the high sea before the admiral, &c. by commission under the great seal; this statute as to trial of treason upon the sea stands unrepealed by 1 *Mar.* and whether as to treasons committed in any rivers, or ports, or creeks within the bodies of counties, it be not repealed by 1 & 2 *P. & M. cap. 10.* or by the statute of 35 *H. 8. cap. 2.* for trial of foreign treasons, is considerable.

By 32 *H. 8. cap. 4.* Treasons and misprisions of treason committed in *Wales*, or in other places where the king's writ doth not run, shall be tried before such commissioners of *oyer* and *terminer*, as the king shall appoint, as if committed in the same counties into which the commission is directed.

This is repealed by the statute of 1 & 2 *P. & M. cap. 10.* cited to be so adjudged in *H. 14 Eliz. (m) Co. P. C. p. 24.* because it is done within this realm, and so may be tried in *Wales*. [283]

(m) Lord Lumley's Case.



33 *H. 8. cap. 20.* Concerning the proceeding touching the enquiry and trial of treason committed by persons, that become lunatic after the treason committed, without putting them to answer, and touching the execution of persons attainted of treason, and afterwards becoming lunatic, is repealed by the statute of 1 & 2 *P. & M. cap. 10. vide Co. P. C. p. 4 & 6.* both as to the indictment and as to the trial; but the forfeiture of persons attainted of treason, as to old treasons, stands in force.

33 *H. 8. cap. 23.* Treason or misprision of treason or murder committed by a person examined before three of the council, and found by them guilty, or suspected, may be enquired of, heard and determined before commissioners of *oyer and terminer* in any county of *England* to be named by the king, by jurors of the county in such commission: challenge for lack of forty shillings freehold allowed, peremptory challenge is ousted in treason or misprision of treason: trial by peers is saved.

This statute as to the indictment and trial of treason in any foreign county stands repealed by 1 & 2 *P. & M. cap. 10.* as was ruled by all the judges of *England* in *Somerville's case*, *M. 26 Eliz.* reported by justice *Clench*, *n. 17. (n)* against the opinion of *Stamford*, *Pl. Cor. Lib. II. cap. 26.* both as to the indictment and also as to the trial, for *Somerville* was indicted in the county where the offense was, and by a commission in *Middlesex* was tried by a jury of the county, where the offense was committed; but as to murder, it seems to stand unrepealed, and accordingly put in ure; *Crompton's justice (o).*

35 *H. 8. cap. 2.* Treasons, misprisions and concealments of treasons committed out of the realm shall be heard and determined by the court of king's bench, and tried by a jury of that county, where the court sits, or before commissioners and in such shire, where the king shall appoint by his commission, by good and lawful men of the same shire, as if committed in the same shire: trial of a nobleman [284] by his peers is saved.

Upon this statute these points have been resolved: 1. That this act is not repealed by 1 *E. 6.* or 1 & 2 *P. & M. cap. 10.* thus it was resolved in *Orurk's case*, *Co. P. C. p. 24.* 2. It extends to a treason committed in *Ireland*, resolved in *Sir John Perrot's case (p)*, *Co. P. C. p. 11.* 3. It extends to a treason committed in *Ireland* by a peer of

(n) This is reported 1. *And p. 104.*  
(o) *p. 22.* lord *Grevil's case.*

(p) *State Tr. Vol. I. p. 181.*