

Ireland, so resolved in 22 *Car.* 1. in *B. R.* in *Macguire's* case (*q*).
 4 The commission in this act mentioned may be signed by the king's sign manual, or the warrant to the chancellor to issue the commission may be signed by the king's sign manual, and either of them is warranted by this statute, so resolved *H. 36 Eliz.* cited *Co. Pl. Cor.* p. 11. in the case of *Patrick Ocullen*. 5. If an indictment be taken by virtue of this statute in the county of *Middlesex*, and then the bench is removed by adjournment into another county, if the prisoner pleads not guilty, it shall be tried by a jury of that county where the indictment is taken, because the words are *that it shall be inquired, heard and determined by good and lawful men of the same county, where the said bench shall sit.* *M. 35 & 36 Eliz. B. R.* in the case of *Francis Dacres* cited *Co. Pl. Cor.* p. 34. but otherwise upon an indictment upon the statute of 5 *Eliz.* cap. 1. for refusing the oath of supremacy. *Co. Pl. Cor. ibidem* (*r*).

III. As touching the *third* point of forfeitures by treason I shall say little more, than what is said before in the preceding chapter concerning the forfeiture of tenant in tail.

Only it seems, that the law was taken upon the statutes of 33 and 36 *H.* 8. before mentioned, that if an abbot or a bishop were attainted of treason, that by force of the general words of *forfeiting all their lands, tenements and hereditaments* they forfeit the lands of their church, tho they had them in *autre droit*.

1. Because in the savings of these statutes, yea and in all the new statutes of treason made in the time of *Henry VIII.* above-mentioned, the saving runs, *saving to all persons other than the offenders, their heirs and successors such right, &c.* and the [285] exception of *successors* makes it probable, that they intended, when a sole corporation was attainted of treason, he should forfeit the lands of his church.

2. Because in the act of attainder of the archbishop of *Canterbury* 1 *Mar.* cap. 16. there is a special proviso, that it should not extend to the lands which he had in right of his archbishoprick; but that these should be saved, as if he had not been attainted.

3. Because by the act of 31 *H.* 8. cap. 13. it appears plainly, that the possessions of Monasteries, where the abbots were attainted of treason, came thereby to the crown, tho they are

(*q*, *State Tr.* Vol. 1. p. 928. (*r*) The case of *Edmund Bonner*, Bishop of *London*.

not annexed to the court of augmentations of the king's revenues.

4. It is clearly admitted by the judges in the case of the Bishop of *Durham*, *Dy.* 289. that by force of the statute of 26 *H.* 8. the lands of abbeyes, &c. came to the crown by the attainder of treason of the abbots, &c. and possibly it was in design at the time of the making of that statute.

But it is true, that before that statute of 26 *H.* 8. 1. The lands, which a person had in right of his church, were not forfeited by attainder of treason. 2. That altho the lands of a sole corporation such as were an abbot, prior, bishop, might be forfeited by attainder by the special penning of 26 and 33 *H.* 8. yet the lands of an aggregate corporation, as dean and chapter, mayor and commonalty, were not forfeited by the treason of the dean, or mayor, by virtue of those statutes, for the right of the land was in the commonalty and chapter, as well as in the dean or mayor, and not in them alone. 3. That at this day the attainder of treason doth not forfeit the lands of a bishop, parson or other sole ecclesiastical corporation: 1. Because the statutes of 1 *Eliz.* (f), and 13 *Eliz.* cap. 10. (t), disabling bishops, masters of hospitals, &c. to alien their possessions, disable them to forfeit as well as alien, or otherwise the statute would be illusory. 2. By the special penning of the statutes of *E.* [286] 6. cap. 12. and 1 *Mar.* whereby it is enacted, that no penalties shall be inflicted for treason, other than such as be by 25 *E.* 3.

Concerning the forfeiture of lands in a county palatine by the attainder of treason out of a county palatine, or *e converso*.

By the statutes of 9 *H.* 5. cap. 2 18 *H.* 6. cap. 13. 20 *H.* 6. cap. 2. 31 *H.* 6. cap. 6. outlawries of treason, &c. in the county palatine of *Lancaster* were not to cause a disability of the person outlawed, nor induce any forfeiture of the lands or goods of the party outlawed lying out of that county; but by the statute of 33 *H.* 6 cap. 2. these acts are repealed, and it is ordained, that the indictors in a county palatine (where the indictment supposes any person to be inhabiting out of the county of *Lancaster* within some other county of the realm) have lands to the yearly value of five pounds in that county, and that upon indictment to be taken out of the county palatine

(f) This is not among the printed statutes.

(t) This statute made perpetual by 3 *Car.* 1. cap. 4.

of persons residing there, the indicters shall have a yearly freehold of five pounds, and that no process be made out upon any such indictments, till it has been examined by the king's justices, whether the indicters be so qualified.

But now by the statute of 27 *H. 8. cap. 24.* all powers in countys palatine for making of justices in eyre, of assise, of peace, of goal-delivery, are resumed, and such commissions are to pass under the great seal of *England*, only in *Lancaster* they are to be under the usual seal of *Lancaster*: all processes to be in the king's name under the *teste* of him, that hath the county palatine; all indictments, &c. are to conclude *contra pacem regis*, and all fines and amerciaments upon officers are resumed; so that now all process of outlawry, attainder, &c. in countys palatine are of the same effect and induce the same forfeitures, as if the offenses were committed, tried and determined in any other county of *England*.

But this alters not the title of the bishop of *Durham* or any other, that had royal forfeitures of treasons of lands within their liberty, or county palatine, for that is a distinct franchise, and not at all touched by the act of resumption, as appears by the case in *Dyer (u)* before cited, and by what is said in the precedent chapter touching forfeitures by treason: and thus far for acts touch- [287]
ing treason in the time of *Henry VIII.*

As touching treasons in the verge I shall particularly mention the same hereafter.

I come now to the time of king *Edward VI.*

1 *E. 6. cap. 12.* There are these several changes made by these several clauses.

1. It is enacted, that no act, deed or offense being by statute made treason or petit treason by words, writing, cyphering, deeds or otherwise whatsoever, shall be deemed or adjudged high treason or petit treasons but only such as be treasons or petit treasons in or by the statute of 25 *E. 3.* for declaring treason, and such offences, as hereafter by this act are expressed and declared to be treason or petit treason; and no other penalties to be inflicted upon the offenders in treason or petit treason, but what are ordained by that, or this statute.

2d clause repeals the statutes concerning heretics, *Lollards*, the six articles, selling of books of the scriptures, &c. ordained in the time of *R. 2. H. 5* and *H. 8.*

3d clause repeals all felonies made by act of parliament, since 23 April 1 H. 8. that were not felonies before, and all penalties touching the same.

4th clause repeals the act of 31 H. 8. touching obedience to the king's proclamations, and the statute of 34 H. 8. imposing penalties upon the disobedient.

5th clause enacts certain new offenses, viz. " If any shall by
 " preaching, express words or sayings affirm and set forth that the
 " king, his heirs or successors, kings of this realm, is not or ought
 " not to be supreme head on earth of the church of *England* and
 " *Ireland* immediately under God, or that the bishop of *Rome*, or
 " any besides the king for the time being, ought by the laws of
 " God to be supreme head of the same churches, or that the king,
 " his heirs or successors, kings of this realm, ought not to be king
 " of *England*, *France*, and *Ireland*, or any of them, or do compass
 " by open preaching, express words or sayings to depose or deprive
 " the king, his heirs or successors, kings of this realm, from his
 " [288] royal estate or titles to the same kingdoms, or do openly
 " publish, or say by express words or sayings, that any per-
 " son, other than the king, his heirs or successors kings of this realm,
 " of right ought to be king of the realms aforesaid, or any of them,
 " or to have or enjoy the same or any of them, the offenders, their
 " counsellors, aiders, abettors, procurers and comforters, for the
 " first offense shall lose his goods, and suffer imprisonment during the
 " king's pleasure; and if after such conviction he shall commit the
 " same offense again, other than such as be expressed in the statute
 " of 25 E. 3. he shall forfeit to the king the profits of his lands,
 " benefices, and ecclesiastical promotions during his life, and all his
 " goods, and suffer perpetual imprisonment; and for the third of-
 " fense after a second conviction, he shall be guilty of treason, and
 " suffer and forfeit as a traitor.

6th clause enacts that, " If any person shall by writing, printing,
 " overt-act or deed, affirm or set forth, that the king of this realm
 " for the time being, is not or ought not to be supreme head on earth
 " of the churches of *England* and *Ireland*, or any of them imme-
 " diately under God, or that the bishop of *Rome* or any person,
 " than the king of *England* for the time being, is or ought to be
 " supreme head on earth of the same churches or any of them, or
 " do compass or imagine by writing, printing, overt-deed or act to
 " depose

“ depose or deprive the king, his heirs or successors from the royal
 “ estate or titles of king of *England, France and Ireland*, or any of
 “ them, or by writing, printing, overt-act or deed, do affirm, that
 “ any person, other than the king, his heirs and successors, of right
 “ ought to be king of the realms of *England, France and Ireland*, or
 “ any of them, then every such offender shall be guilty of treason,
 “ and suffer and forfeit, as in case of high treason.

7th clause enacts, “ That this act shall not extend to repeal any
 “ statutes touching the counterfeiting, clipping, filing or washing
 “ the coin current of this kingdom, or importing counterfeit coin, or
 “ counterfeiting the king’s sign manual, privy seal, or privy signet,
 “ their abettors, &c.

8th clause enacts, “ That if the persons declared by the act of 35
 “ *H. 8.* to be inheritable to the crown do usurp one upon the
 “ other, or interrupt the king’s possession of the crown, they, [289]
 “ their abettors, &c. shall be traitors.

9th clause takes away clergy from persons found guilty by verdict,
 confession, or not directly answering or standing mute in cases of
 murder of malice prepense, of wilful poisoning, house-breaking, any
 person being in the house and put in fear, robbing in or near the
 highway, horse-stealing, sacrilege; but in all other cases of felony
 clergy allowed, and sanctuary the same as before the 24 April 1
H. 8.

10th clause provides, that all the statutes of *H. 8.* concerning chal-
 lenge, or concerning trial of foreign pleas, shall stand in force.

11th clause declares, that no person already arrested or imprisoned,
 indicted or convicted, or outlawed for treason, petty treason or mis-
 prison of treason, shall have any advantage of this act.

12th clause provides, that wilful killing by poison shall be deemed
 wilful murder, and the offenders, their aiders, abettors, counsellors
 or procurers shall suffer, as murderers.

13th clause enacts, that a lord of parliament in all cases within the
 benefit of clergy, tho he cannot read, yet shall be delivered as a clerk
 convicted without burning in the hand, or loss of lands, &c.

14th clause saves the trial by peers for any offenses within this
 statute.

15th clause enacts, that clergy be allowed, notwithstanding the
 offender have been married to a single woman or widow, or to two
 wives or more.

16th clause enacts, that notwithstanding attainder of treason, petit treason, misprision of treason, murder or felony, the wife shall have her dower, and saves to all and every person, other than to the offender attainted, convict or out-lawed, all such right, title, interest, entry, leases, possession, condition, profit, commodity, and hereditaments, as they had before or at the time of the attainder, conviction, or outlawry.

17th clause provides, that the statute of 27 H. 8. for felony in servants stealing the goods of their masters, shall stand in force.

[290] 18th clause provides, that no person be put to answer for any of the offences abovesaid concerning treason by preaching or words only, unless accused before one of the king's council, justice of assize or peace, &c. within thirty days after the offense committed.

19th clause, concealing and keeping secret any high treason shall be misprision of treason, and the offender shall forfeit as heretofore hath been used in case of misprision of treason.

20th clause, calling, writing or printing the *French* king king of *France* shall not be adjudged any offense within this act.

21st clause provides, that no person shall be indicted, arraigned, condemned or convicted for any offense of treason, petit treason, misprision of treason, or for any words before mentioned, whereby he shall suffer pains of death, loss of goods, imprisonment, &c. unless the offender be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same.

I have mentioned the clauses of this statute at large, and by their numbers, because there be many things observable thereupon.

By the first clause of this statute all those numerous treasons and petit treasons, that were enacted or declared at any time since 25 E. 3. are wholly taken away, except *that* of counterfeiting, clipping, washing, or filing of coin, &c. excepted in the 7th clause; but this doth not mention misprisions of treason, but only declares what misprision of treason is, for by taking away the treasons themselves, the misprisions of those treasons must needs cease, as a crime.

But this act did not extend to alter the trials in case of treason, and therefore notwithstanding this act the statute of 28 H. 8. cap. 15. for treasons at sea, 26 H. 8. cap. 6. for counterfeiting &c. in *Wales*, 32 H. 8. cap. 4. for treasons in *Wales*, 33 H. 8. cap. 23. for treasons to be tried out of their county, 35 H. 8. cap. 2. for trial of foreign treasons,

treasons, stood yet in their force, until the statute of 1 & 2 P. & M. cap. 10.

Again, notwithstanding that by some former statutes certain offences, which were felony before, as wilful burning of houses and poisoning, were made treason, yet the repeal of those [291] acts that made them treason leaves them nevertheless in the state, wherein they before were, namely felony.

Again, upon consideration and comparison of the 5th and 6th clauses these things are observable, namely, 1. The wisdom of the law-makers, that put the very same offenses in words spoken in a lower rank of punishment than the same things written or printed, making the former but a misdemeanor in the first offense, which in printing or writing was treason in the first offense. 2. it is observable upon that fifth clause, that there were some things within the fifth clause, that might be treason or an overt-act of treason, within the statute of 25 E. 3. (*other than such as be expressed in the statute of 25 E. 3.*) *vide quæ supra dicta sunt cap. 13.* touching the treason in compassing the king's death.

It is also observable upon the 11th clause, that when an offense is made treason or felony by an act of parliament, and then those acts are repealed, the offenses committed before such repeal, and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such repeal, unless a special clause in the act of repeal be made enabling such proceeding after the repeal, for offenses committed before the repeal, as there is in this case.

3 & 4 Ed. 6. cap. 5. Tho it primarily concerns riots, yet consequently it concerns treason also: thereby it is enacted,

1. "That if any persons to the number of twelve or more assembled together shall intend, go about, practise or put in ure with force of arms unlawfully, and of their own authority to kill, take or imprison any of the king's privy council, or unlawfully to alter or change any laws established by parliament for religion, or any other laws or statutes of this realm, and being commanded by the sheriff, justice of peace, mayor, &c. by proclamation in the king's name to repair to their houses, if they shall continue together by the space of one whole hour after such proclamation, or after that they shall willingly in forcible and riotous manner attempt to do or put in ure any of the things aforesaid; this shall be adjudged treason in all the offenders, their aiders, abettors and procurers." [292]
See before in chapter XIV. concerning levying of war, how much of this high treason is within the statute of 25 E. 3.

2. "That

2. "That if any persons to the number of twelve or more shall intend, go about, practise or put in ure in manner aforesaid to overthrow, cut, break or dig up pales, hedges, ditches or other inclosure of any park, inclosed grounds, banks of pools or fish-ponds, conduits, conduit-heads or pipes to the same, which may remain open, or unlawfully to have common or way in the said park or grounds, or to destroy the deer, warrens of conies, doves, houses, fish, or to pull down houses, mills, bays or barns, or to burn stacks of corn or grain, or to diminish the rents or yearly values of any manors, lands, &c. or the price of any victuals, corn or grain, or any other thing usual for the sustenance of man, and being required, as before, shall not depart, but continue an whole hour, or shall after that forcibly attempt to do or put in ure the things aforesaid they shall be adjudged felons without benefit of clergy."

Vide supra cap. 14. which of these offenses were a levying of war against the king.

3. "That if any person unlawfully and without authority by ringing of bells, founding of drums, trumpet, horn, or other instrument, by firing of beacons, by malicious uttering of words, casting of bills or writings, or by any act whatsoever raise or cause to be assembled any persons to the number of twelve, or above, to the intent that they shall do any of the acts aforesaid, who shall not dissolve their assembly upon such proclamation within an hour, or shall commit any of the said acts, then they, that raise such assemblies, shall suffer as felons."

4. If such assemblies to the number of forty, and above, shall continue together two hours, or shall bring weapons, meat, &c. to the persons so assembled, it shall be high treason.

5. If above the number of two and under twelve attempt such things, &c. as abovesaid, they are to suffer imprisonment for a year, and make fine and ransom, with treble damages to persons damaged.

[293] 6. In the cases of treason within this act tenant in tail is to forfeit to the king during life only, and tenant in fee simple to forfeit only as upon attainder of felony.

7. Power is given to the sheriffs, justices, mayor, &c. to raise power, and array them in manner of war against the rioters, to the intent to apprehend the rioters; and if the said rioters do not depart

upon

upon proclamation but continue together, it shall be lawful for the sheriff, &c. after such commands to kill the rioters; if after such commandment it fortune any of the rioters be killed upon such account, the sheriff, &c. or any assembled by him shall thereof be discharged: then follows the punishment of those, who refuse to assist the sheriff, or justice in the repression of riots.

Movers to such riots are guilty of felony without clergy, and persons solicited thereunto not revealing it to suffer three months imprisonment.

This act being made in a great measure for the support of the reformed religion under *Edward VI.* was as to all points of treason therein contained, repealed by 1 *Mar. cap. 1.* but in effect the very same offenses were enacted felonies within clergy by 1 *Mar. sess. 2. cap. 12.* which was to continue to the end of the next parliament, and after the death of queen *Mary* was re-enacted by 1 *Eliz. cap. 16.* to continue during her life, and till the end of the next session after her death, but then expired.

That which I would observe upon this act is this, how careful they were in this time not to be over-hasty in introducing constructive treasons, and to shew how the opinions of the parliaments of *Edward VI.* queen *Mary*, queen *Elizabeth* went, as to the point of constructive treason, and how careful they were not to go far in extending the statute of 25 *E. 3.* beyond the letter thereof.

As to the point of indemnifying those, that killed the rioters in assistance of the sheriff, it is true, that the killing of rioters barely for continuing together after proclamation required a new law to indemnify it, as in the statute is provided; but if rioters resist the sheriff in his endeavour to apprehend them, or make head against him, or continue to put in ure their riotous acting, as pulling down houses, inclosures, &c. if the sheriff, or those that come in aid of him, kill any of them, the law and the statute of 2 *H. 5. cap. 8.* do indemnify them, as shall be hereafter more fully declared. [294]

By 5 & 6 *E. 6. cap. 11.* "If any person by open preaching, express words or sayings do expressly, directly and advisedly set forth and affirm, that the king, that now is, is an heretic, schismatic, tyrant, infidel, or usurper of the crown, or that any his heirs or successors, to whom the crown is to come by the statute of 35 *H. 8.* being in lawful possession of the crown, is an heretic, schismatic, tyrant,

“ tyrant, infidel, or usurper of the crown then such person, his aiders,
 “ abettors, procurers, counsellors, and comforters knowing the same,
 “ shall for the first offense lose their goods and be imprisoned at the
 “ king’s will, for the second offense, after conviction for the first,
 “ lose the profits of their lands and ecclesiastical benefices during their
 “ lives, and be perpetually imprisoned, and for the third offense, after
 “ the second conviction, be adjudged traitors, and lose their lives, and
 “ forfeit as in case of high treason.

“ If any person shall by writing, printing, painting, carving or
 “ graving, directly, expressly and advisedly publish, set forth and affirm,
 “ that the king, or any his heirs or successors, &c. is an heretic,
 “ schismatic, tyrant, infidel, or usurper, it shall be high treason, and
 “ he shall forfeit as in case of high treason.

“ If any person or persons rebelliously detain the king’s castles, or
 “ fortresses, ships, ordinance, artillery or fortifications, and do not
 “ render them up to the king, his heirs or successors within six days
 “ after proclamation under the great seal, it shall be treason, and the
 “ offender, his aiders, &c. knowing of the said offenses shall suffer
 “ and forfeit as in case of high treason.

“ If any the king’s subjects commit treason contrary to this act or
 “ any other act in force out of the realm, it shall be inquired and
 “ presented by twelve men of any county, which the king by com-
 “ mission shall assign, as if committed within the realm, and the like
 [295] “ process thereupon, as if done within the realm, and the
 “ outlawry against an offender inhabiting out of the realm
 “ shall be as effectual as if he had been resident within the realm.

“ But if he render himself upon the outlawry within a year, he
 “ shall be received to traverse the indictment (x).

“ Persons attainted of any treason shall forfeit to the king all their
 “ lands of any estate of inheritance in their own right at the time of
 “ the treason committed, or at any time after.

“ No proceeding shall be on any the offenses aforesaid committed
 “ only by preaching or words, unless the offender be accused thereof
 “ within three months before one of the king’s council, justice of

(x) This clause remains, as our author observes below, unrepealed to this day, so that it was great injustice to deny the benefit of a trial within the year to Sir Thomas Armstrong, who was out-lawed, while he was beyond sea, 36 Car. 2. and of this opinion was the house of commons by their vote Nov. 19, 1689. when it was re-

solved, that Sir Thomas Armstrong’s plea ought to have been admitted according to the statute of 5 & 6 E. 6. see *State Tr.* Vol. III. p. 896. and accordingly the like plea was allowed to Johnson, who was indicted for counterfeiting the coin, Mich. 2 Geo. 2. B. R. altho he had broke prison, and was retaken in England.

“ of affise, justice of peace being of the *quorum*, or two justices of
 “ peace in the shire, where the offense is committed: concealment
 “ of any high treason shall be adjudged only misprision of treason,
 “ and the offender to forfeit as in misprision of treason.

“ Provided that no person shall be indicted, arraigned, condemned,
 “ convicted or attainted for any of the treasons or offenses aforesaid,
 “ or for any other treasons, that now be, or hereafter shall be, which
 “ shall be hereafter perpetrated, committed, or done, unless the same
 “ offender or offenders be thereof accused by two lawful accusers,
 “ which said accusers at the time of the arraignment of the party ac-
 “ cused, if they be living, shall be brought in person before the party
 “ so accused, and avow and maintain that which they have to say
 “ against the said party to prove him guilty of the treasons or offenses
 “ contained in the bill of indictment laid against the party arraigned,
 “ unless the party arraigned shall willingly without violence confess
 “ the same: a saving of the right of all, other than the offenders
 “ and their heirs, or such as claim to their or any of their use: the
 “ wife of the party attainted of these or any other treasons
 “ shall be barred of dower of the lands of the party attainted, [296]
 “ so long as the attainder stand in force.”

Upon this statute many things are observable, 1. That it should seem, that neither the writing of these scandalous words, nor the bare detaining of the king's forts or ships were treason within the statute of 25 E. 3. for if they had been such, this act would not have been made. 2. The *second* thing observable is the great discrimination, which in this act is made between words and writing, the latter being made treason, the former only misdemeanor in the two first offenses, altho the words be the same in both. 3. That so much of this act, as is introductive of new treason, is repealed by the statute of 1 Mar. cap. 1. but whether those two penalties previous to treason in case of words, *viz.* for the first and second offense, be repealed by any statute, seems doubtful, for those are not treason. 4. But those clauses in this statute, that concern trial of foreign treasons, concerning outlawry of persons beyond the sea, forfeiture of lands of inheritance of the party attainted, loss of dower by the wife of the party attainted, stand unrepealed to this day; and so it is held by many, that the clause concerning two accusers stands still on foot; *de quo vide postea*.

Touching the clause for the forfeiture of the lands of the party attainted there are these things considerable.

1. That by this clause tenant in tail of the gift of the king doth by his attainder forfeit his estate-tail, notwithstanding the statute of 34 *H. 8. cap. 20.* for as that statute coming after 26 & 33 *H. 8.* did, as to that case, repeal so much of those acts; so this statute of 5 & 6 *E. 6.* coming after 34 *H. 8.* doth repeal that statute, as to the case of attainder of treason of such donee in tail.

2. That this act varies much from the penning of the acts of 26 and 33 *H. 8.* for they seemed, as hath been observed, to fasten upon lands in right of a corporation sole, as bishop, abbot, &c. but this limits it only to lands in their own right, which possibly, tho an affirmative clause, may correct the extent of the statutes of 26 and 33 *H. 8.* and bind up the forfeiture to lands only in their own right.

[297] As to the point concerning the two lawful accusers these things will be considerable, 1. Whether it extends in law to new treasons made after this act. 2. Whether by any statute this be repealed. 3. Admitting it be not, what shall be said two lawful accusers. 4. What a confession.

I. The statute of 5 & 6 *E. 6.* above-mentioned appoints two lawful accusers in case of all treason enacted or to be enacted; therefore if a new treason were made by a subsequent act of parliament without any clause that directs the indictment or trial in any other manner than is appointed by 5 & 6 *E. 6.* by the words of this act there must be two lawful accusers, both upon the trial and indictment.

But there have been great opinions, that tho the words of 5 & 6 *E. 6.* extend to treasons that shall be hereafter enacted, yet this clause doth not extend in law to such new treasons, unless special provision be made for the same in the act making such new treason: others have been of a contrary opinion, because it only concerns the manner of proceeding, which may be directed by a precedent act, as upon the statute of 18 *Eliz. cap. 5.* 21 *Jac. cap. 4.*

II. But certainly, if there be, by a subsequent statute, any derogatory clause from this statute, then there need not be two lawful accusers.

Therefore upon the statutes of 1 & 2 *P. & M. cap. 11.* in treason for counterfeiting the coin current here, or for clipping and impairing of coin (which was then conceived a treason not repealed by 1 *Mar. cap. 1.*) the evidence and course of proceeding at common law both upon the indictment and trial are restored, and so no necessity of two witnesses; this is agreed on all hands. *Co. Pl. Cor. p. 25.*

Again,

Again, tho the treason for clipping or washing of coin declared by 3 H. 5. cap. 6. were repealed by the statute of 1 Mar. cap. 1. as is declared by the preamble of the statutes of 5 Eliz. cap. 11. and 18 Eliz. cap. 1. and that the same is newly made treason by the statutes of 5 and 18 Eliz. and consequently, were there no more in the case, two witnesses might be requisite by the words of the act of 5 & 6 Ed. 6. because those are newly made treasons, yet by the penning of those statutes of 5 and 18 Eliz. it is not necessary, be-
 · cause the words in both statutes are *being lawfully convicted* [298]
or attainted according to the order and course of the law, which takes in the whole proceeding, as well indictment as trial; for the course of law therein mentioned seems to be intended the common law, and at common law there was no necessity of two witnesses in any case of treason.

And altho the statute of 1 & 2 P. & M. cap. 11. did take clipping and washing to be continuing treasons, and therein might mistake, yet there being an exprefs clause in that statute, that in those cases the evidences at common law should be restored; this direction might take off the statutes of 1 & 5 E. 6. as to the two witnesses in those cases, and so have an influence upon the statutes of 5 & 18 Eliz. or at least may go far in expounding them to restore the evidence required at common law in those cases.

But whether, as to all other treasons, the general clause in the statute of 1 & 2 P. & M. cap. 10. *that all trials hereafter to be awarded or made for any treason shall be had and used only according to the due order and course of the common laws of this realm and not otherwise*, have taken away the necessity of two witnesses upon the indictment, hath been controverted (y), for on all hands it is agreed, that it takes away the necessity of two witnesses upon the trial, if there were no more in the case.

My lord Coke in *Pla. Cor. p. 25, 26.* delivers his opinion, that two witnesses are necessary upon the indictment in case of all treasons, other than those, that are for counterfeiting, clipping, or impairing the coin, and gives many weighty treasons for it, and cites a resolution in 14 Eliz. lord Lumley's case, and 4 Mar. Bro. Corone, 219. for according to him the indictment is a distinct thing from the trial; therefore the statute of 1 & 2 P. & M. cap. 10. extending only to the trial doth not take away the necessity of two witnesses

(y) See *Kel. 9, 18, 49.*

upon the indictment, and accordingly the general opinion hath run thus since (x).

[299] But yet much is to be alledged, that the statute of 1 & 2 P. & M. cap. 10. extends as well to reduce the indictment, as the trial, to the course of the common law.

1. Because it seems to be the intent of the statute to involve the indictment under the general appellation of the trial, according to 2 & 3 P. & M. Dy. 132. a. and tho it is true, that 1 P. & M. Dy. 99, 100. in *Thomas's* case there were two accusers required, yet that was before the statute of 1 & 2 P. & M. cap. 10.

2. Because this statute of 1 & 2 P. & M. cap. 10. in other cases extends as well to the indictment, as the trial; it is agreed, that the statute of 33 H. 8. cap. 23. concerning trial of treason in a foreign county, is wholly repealed by 1 & 2 P. & M. cap. 10. *quod vide* Co. P. C. p. 27. Dy. 132. whereas, if it should only refer to the trial, the indictment might still be in a foreign county, and so he might be indicted in a foreign county, and yet must be tried in the proper county: *vide* accordingly resolved H. 12 Eliz. Dy. 286. b. touching the rebels in the North, where *Stamford's* opinion, Lib. III. cap. 26. (a) is denied by all the judges of both benches; again, the statute of 33 H. 8. cap. 20. touching the indictment and trial of lunatics in any county the king shall appoint, is repealed by this act of 1 & 2 P. & M. cap. 10. as well to the indictment as the trial: *vide* *Andersf. Rep. n.* 154. *Arden's* case (b).

3. The indictment is in common speech a part of the trial, or at least a necessary incident to it; and if it should be necessary to have two witnesses to the indictment, it would consequently be necessary to have them upon the trial also; for by the statute of 5 & 6 E. 6. cap. 11. the two witnesses, that are upon the indictment, must avow their testimony in the presence of the party upon his arraignment: and it seems incongruous, that a greater evidence should be required to the indictment, which is only an accusation, than to the trial (c), where the party is to be convicted; therefore, if the statute of 1 & 2 P. & M. intended to take it away upon the trial, it cannot [300] be supposed to continue the necessity of two witnesses upon the indictment.

(x) *State Tr. Vol. III. p. 56.* the case of lord *Castlemain*, *Ibid. p. 415.* earl of *Shafisbury's* case; p. 645. lord *Ruffel's* case, p. 733. colonel *Sidney's* case,

(a) *S. P. C. p. 90.*

(b) 1 *And. 105.*

(c) Lord *Coke P. C. p. 25.* says the greatest proof is most of all necessary at the time of the indictment, because that is the foundation of all the rest, and is commonly found in the absence of the party accused.

4. There is also a great authority for this opinion: *vide* the resolution and reason of the judges in *Arden's case*, *Anderf. Rep. n. 154. (d)*, where they resolved, that they could not be indicted in a foreign county upon the statute of 33 *H. 8. cap. 23.* because the statute of 1 *Ed. 2 P. & M. cap. 10.* restoreth the common law as well in relation to the indictment as the trial, and the trial includes the indictment; and this was by all the justices and barons so resolved, which case is also reported by justice *Clench. n. 17.* to be 19 *Novem. 26 Eliz.* Again *ibidem n. 28.* “ Fuit tenus per les justices, “ que ou le statute de *E. 6.* est, que inditement de treson sera per 2 “ testes, & le statute de reine *Mary* est, que tresons sey try solonc le “ common ley, que ore inditements sey solonc le common ley; car “ inditement est parcel de tryal, car nul tryal poet estre sans indite- “ ment, and sic fuit in *Somerville's & Arden's case.*

5. It hath been the care of the parliaments since in their acts to make provision for two witnesses in cases of treasons newly made, *vide* statutes 13 *Eliz. cap. 1.* 13 *Car. 2. cap. 1.* so that it was thought that the statute of 5 *Ed. 6. E. 6. 6.* was not of force as to the two witnesses, at least as to treasons newly enacted, otherwise in cases of new treasons they needed not these provisions (*e*).

And thus the reasons stand on both sides, and tho these seem to be stronger, than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger; *quod dubitas, ne feceris*, especially in cases of life (*f*); but upon misprision of treason two witnesses are requisite both upon the indictment and trial. *Co. Pla. Cor. p. 24.*

III. The third thing considerable in this clause is, [301] what shall be said two lawful accusers within this statute, if it be of force.

As to the accusers mentioned in the statute of 5 *Ed. 6. E. 6. cap. 11.* they are no other than the two lawful and sufficient witnesses mentioned in the statute of 1 *E. 6. cap. 12. in fine*; this is agreed by my lord *Coke, Pl. Cor. p. 25.*

(*d*) 1 *And. 107.*

(*e*) If it were only questionable, that was reason sufficient for making such provision. *Vide supra p. 261.*

(*f*) However since our author wrote this matter is in great measure settled by 7 *W. 3. cap. 3.* whereby it is enacted, “ That “ in all cases of high treason, whereby any

“ corruption of blood, &c. no person “ shall be indicted, tried or attainted, “ but upon the oaths of two lawful wit- “ nesses to the same treason; but out of “ this act are excepted all proceedings in “ parliament, or proceedings for counter- “ feiting the king's coin, great seal, privy “ seal, or signet or sign manual.

Now what are lawful witnesses in this case is considerable; the lawfulness of witnesses must respect either, 1. The persons, or else, 2. The testimony of the witnesses.

1. As in relation to the persons of witnesses, those are said lawful witnesses, which by the laws of *England* are allowed to be witnesses.

A *feme covert* is not a lawful witness against her husband (*g*) in case of treason, yet in lord *Castlehaven's* case (*h*) upon an indictment for a rape upon his lady by another by her husband's present force, she was received as a witness by the advice of the judges, that assisted at that trial, and upon her evidence he was convicted and executed.

But a woman is not bound to be sworn or to give evidence against another in case of theft, &c. if her husband, be concerned, tho it be material against another, and not directly against her husband. *Dalt. cap. 111 (i)*.

Upon an indictment upon the statute of 3 *H. 7. cap. 2.* for taking away forceably and marrying a woman, the woman so married may be sworn against her husband, that so marries her, if the force were continuing upon her till the marriage; and thus it was done in the case of the lady *Fulwood, M. 13 Car. 1. B. R. Croke (k)* and accordingly *seriatim* resolved by all the judges of the king's bench lately in the case of *Brown, Trin. 25 Car. 2. (l)* for these reasons: 1. Because otherwise the statute would be vain and useless, for possibly all that were present were of the offender's confederacy. 2. The marriage, tho a marriage *de facto*, yet, if it were effected by a continued act of force, was not a marriage *de jure*, [302] for it was dissolvable by divorce, unless ratified by a subsequent free cohabitation or consent. But 3dly and principally, because it was *flagrante crimine*, for the child was taken away upon the *Thursday*, married the *Friday*, and seized by the guardian the next day, before they had lain together, and the force was all that while continuing upon her. 4. There were other witnesses, that proved the first taking away by force against the child's will, tho

(*g*) *Co. Lit. 6. b.*

(*h*) *Hut. 115. Russ. Collect. Vol. II. p. 93--101. State Tr. Vol. I. p. 366.*

(*i*) *N. Edit. cap. 164. p. 540.*

(*k*) *Cro. Car. 482, 484, 488, 492. the*

like was done in the case of *Haagen Swendsen, Mich. 1 Ann. B. R. State Tr. Vol. V. p. 453.*

(*l*) 1 *Ven. 243. 3 Keb. 193.*

there were no witnesses to prove the marriage forceable but herself, who expressly swore, that she was married against her will; upon all which circumstances it was ruled, that she should be examined in evidence, and the credibility of her testimony left to the jury; but most were of opinion, that had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband; he was convicted and had judgment of death, and was executed.

Regularly an infant under fourteen years is not to be examined upon his oath as a witness; but yet the condition of his person, as if he be intelligent, or the nature of the fact may allow an examination of one under that age (*m*), as in case of witchcraft an infant of nine years old has been allowed a witness against his own mother. *Dalton* (*n*).

And the like may be in a rape of one under ten years upon the statute of 18 *Eliz. cap. 6.* and the like hath been done in case of buggery upon a boy upon the statute of 25 *H. 8. cap. 6.*

And surely in some cases, one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in case of treason: *vide quæ supra dixi p. 26.*

A man concerned in point of interest is not a lawful accuser or witness in many cases, the party to an usurious contract, cannot be a witness to prove an usurious contract, upon an information, if the money be not paid, for he swears to avoid his own debt or security (*o*); but if the money be paid he may be a witness to prove it, where another informs, for he is [303] to gain nothing.

And therefore if any man hath the promise of the goods or lands of the party attainted, he is no lawful witness to prove the treason.

A person outlawed in trespass is nevertheless a lawful witness, but no lawful jurymen or indicters in case of felony or treason, Sir *William Withipol's* case (*p*).

A father or son or adversary in a suit is a witness for or against a person accused of any crime, yet not always a competent jurymen.

(*m*) By the laws of *Ina* a child ten years old was allowed to be a witness in theft. *Vide L. L. Inæ. l. 7.*

(*n*) *Dalt. Just. N. Edit. p. 541.*

(*o*) *Co. Lit. 6. b.*

(*p*) *Cro. Car. 134. 147. W. Jones 198.*

A *particeps criminis* is in some cases a lawful accuser within this statute, in some cases not.

An approver shall be sworn to his appeal, *Stamf. Pla. Cor. (q)*; but it seems, that he shall not be a witness upon the trial, if the party accused put himself upon his country, because, if he fail in proving the party guilty, he shall be hanged.

In Sir *Percy Cresby's* case, *P. 19 Jac. Noye's Rep. p. 154. placito 676. in Camera Stellatâ*, if two defendants be charged for a crime, one shall not be examined against the other to convict him of an offense, unless the party examined confess himself guilty, and then he shall be admitted.

9 Dec. 15 Car. 2. at Newgate, *Henry Trew* was indicted of burglary, and by advice of *Keeling* chief justice, *Brown* justice, and *Wilde* recorder, *Perrin* that was in goal for two other robberies, and confessed himself to be in this burglary, was sworn as a witness against *Trew*, but he was not indicted of the burglaries or robberies. *Ex libro Bridgman.*

10 Dec. 1662. *Tonge, Philips*, and others (*r*) were indicted for treason for compassing the king's death, the question was, whether those, that were parties in the compassing, which were not yet pardoned, nor indicted, might be produced as witnesses, namely *Riggs* and others; and upon conference with all the judges these points were resolved.

[304] 1. That the party to the treason, that confessed it, may be one of the two accusers or witnesses in case of treason, for the statute intended two such witnesses, that were allowable witnesses at common law, and so may a *particeps criminis* be admitted as a witness, and was admitted to give evidence to the jury; but the jury may, as in other cases, consider of the evidence and credit of the witnesses, but he is sufficient to satisfy the statute.

2. That the confession before one of the privy council or a justice of the peace being voluntary made without torture is sufficient as to the indictment or trial to satisfy the statute, and it is not necessary, that it be a confession in court; but the confession is sufficient, if made before him that hath power to take an examination.

3. The king having promised a pardon to *Riggs*, if he would discover the plot, he performed that part by his discovery; and this was

(q) *Lib. II. cap. 56. p. 145. a.*

(r) *Keel. 17. State Trials, Vol. II. p. 48.*

held by all no impediment to his testimony, for the promise was not applied to witnessing against any other; but two justices (*f*) held, that if the king promised a pardon upon condition, that he would witness against any others, and that being acknowledged by *Riggs* when he took upon him to give evidence, &c. that will make him incapable to give evidence, because he swears for himself (*t*); but in this point the greater number were of a contrary opinion (*u*), *ex libro Bridgman verbatim*, and I remember the consultation and resolution accordingly.

And accordingly at the sessions of *Newgate* 1672. *Mary Price* was convicted of treason in clipping the current money of *Englana* by the testimony of those, that were *participes criminis* (*x*), namely *Throgmorton* and others, who brought her broad money upon allowance of 10 *l. per Cent.* and carried off the clipt money into their master's cash.

The like conviction was in the same year of *Hyde* and others of robbery upon the highway by one that was a party [305] in the robbery, but not indicted.

But in these and the like cases 1. The party that is the witness, is never indicted, because that doth much weaken and disparage his testimony, but possibly not wholly take away his testimony. 2. And yet, tho such a party be admissible, as a witness in law, yet the credibility of his testimony is to be left to the jury, and truly it would be hard to take away the life of any person upon such a witness, that swears to save his own, and yet confesseth himself guilty of so great a crime, unless there be also very considerable circumstances, which may give the greater credit to what he swears.

If *A. B.* and *C.* be indicted of perjury on three several indictments concerning the same matter, *A.* pleads not guilty, *B.* and *C.* may be examined as witnesses for *A.* for yet they stand unconvicted, altho they are indicted, 19 *Car.* 1. *B. R. Bilmore's case.*

By the statute of 1 & 2 *P. & M. cap.* 14. justices of peace ought to examine the party and take informations touching offenses brought before them, and certify them at the next goal-delivery.

(*f*) These were our author and *Ji Brown.*

(*t*) *Vide posse part. 2. cap.* 27.

(*u*) Of this contrary opinion was the court in the case of *Christopher Layer*, *Mich. 9 Geo. I. B. R. State Tr. Vol. VI. p.* 259.

(*x*) But it does not appear in this case, whether they were promised a pardon or not: the like resolution was in the case of *Joseph Clark* for coining 16 *Car.* 2. see *Kel.* 33. but in that case the witness had actually obtained a pardon.

The justices of peace cannot hear and determine treason by virtue of their commission of the peace, no nor take an indictment of it, yet they may take examinations and informations touching such offense of the party brought before them, and certify them according to that statute; and those informations taken upon oath, as they ought to be, and sworn to, by the justice or his clerk, that took them, to be truly taken, may be read in evidence against the prisoner, if the informant be dead, or not able to travel, and sworn so to be; yea by some opinion, if he were bound over and appear not, they may be read, which seems to be questionable. *

And in such case information upon oath taken before justices of the peace of one county may be transmitted before justices of goal-delivery of that county, where the offense was committed, *viz.* if the offender [306] were brought before that justice; *quære tamen*, because the offense was out of his jurisdiction; yet *vide Dalt. cap. 111. p. 299. accordant (y).*

He, that hath a remainder expectant upon an estate tail, shall not be allowed as a witness, and so ruled, but a disseisor may be a witness to a deed made to the tenant. 12 *Aff.* 12.

Mich. 1652. A commission issued to examine the validity of a marriage supposed to be done by force, and upon *that* a divorce was had: an indictment was against *Welsh*, that married the woman, the depositions in the cause of divorce were offered to prove the force, but rejected, because in a suit of another nature and jurisdiction, *Welsh's* case.

A man convict of conspiracy, perjury, or forgery is not a lawful witness. *Crompt. de pace regis* 127. *b.* *Dalt. cap. 111. (z)* but if he be pardoned, it seems he may be a witness.

And thus far concerning the capacity or incapacity of the witnesses.

2. In relation to the manner of their testimony, the opinion in *Dyer* of a witness by hearsay 1 *Mar. Dy.* 99. *b.* was rejected by all the judges in the lord *Lunly's* case, *H. 14 Eliz. Co. Pla. Cor.* 25. but if it be a hearsay from the offender himself confessing the fact, such a testimony upon hearsay makes a good witness within the statute.

The information upon oath taken before a justice of peace may make a good testimony to be read against the offender in case of

felony, where the witness is not able to travel, yet in case of treason, where two witnesses are required, such an examination is not allowable, for the statute requires, that they be produced upon the arraignment in the presence of the prisoner to the end that he may cross examine them.

And thus much concerning the statutes in the time of *Edward VI.* and evidence upon indictments, I shall only add this.

In civil actions, as trespass against *A. B.* and *C.* if no evidence be given against any one to prove him guilty, he may be examined on the part of the defendant, and stands as a competent witness; and I see no reason, why if two or three persons be [307] indicted, and no evidence given against one or more of them, but that he may be a witness for the other; but otherwise it is, if there be but a colourable evidence against him (+).

(+) Our author should here have proceeded to his fourth general head, and have shown, what would be a confession within this statute of 5 & 6 *Ed. 6. cap. 11.* but

probably he thought that sufficiently done by the second resolution in *Tonge's case* mentioned by him, *p. 304.*

CHAP. XXV.

Concerning treasons declared and enacted from 1 Mar. till this day, viz. 13 Car. 2.

I COME to the statutes concerning treason in the times of queen *Mary*, queen *Elizabeth*, and so downwards.

The first statute in this period is 1 *Mar. cap. 1.* consisting of three clauses.

1. "That no act, deed or offense being by act of parliament made
" treason, petit treason, or misprision of treason, by words, writing,
" cyphering, deeds, or otherwise whatsoever, shall be taken, had,
" deemed, or 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 25 *E. 3.* touching treason or the declaration of treasons, and none
" other, nor that any pains of death, penalties, or forfeitures in any
" wise ensue or be to any offender or offenders for doing or committing
" any treason, petit treason, or misprision of treason, other than
" such

“ such as be in the said act ordained and provided, any statute made
 “ before or after the said 25th year of *Edward III.* or any declaration
 “ or matter to the contrary notwithstanding.

2. “ That no advantage be given by this act to any person arrested
 “ or imprisoned for treason, petit treason, or misprision of treason the
 “ last day of *September* last past, or heretofore indicted or outlawed,
 “ or attainted of treason, &c. or excepted out of the queen’s pardon.

3. “ That all offenses made felony, or appointed to be within the
 “ case of *præmunire* by any statute since the first day of the first year
 “ of king *Henry VIII.* (not being felony or within the case of *præ-*
 “ *munire* before) and all and every branch, article, clause mentioned
 “ or declared in the same statutes concerning making of any offense
 “ felony, or within the case of *præmunire*, and all pains and forfeitures
 “ concerning the same, or any of them, shall be from henceforth
 “ void and repealed.”

This excellent law at one blow laid flat all those numerous treasons, misprisions, &c. at any time enacted since 25 *E. 3.* and all felonies and *præmunires* enacted in or after 1 *H. 8.*

As touching the first of these.

1. Hereby all those numerous treasons newly enacted in any former king’s time since 25 *E. 3.* a catalogue of most of which is before given, are wholly taken away.

2. Hereby all those treasons, that were declared treasons, so far forth as those treasons had their strength from such declarations, and were not really within the statute of 25 *E. 3.* are wholly taken away, and left purely to be determined according to the statute of 25 *E. 3.* and so far forth and no farther, than that statute warranteth.

And therefore the declaration of 3 *R. 2.* touching the killing of an ambassador, namely *John Imperiall*, the declaration of 3 *H. 5.* concerning clipping and impairing of coin, the declaration of *Mortimer’s* treason in breaking prison 2 *H. 6.* and all others of that kind are now wholly put out by this statute, *Coke* upon the statute *de fran-*

[309] *gentibus prisonam (a)*, tho it is true, that it appears by 1 & 2 *P. & M. cap. 11.* they thought that clipping and impairing of money had remained treason by the declarative law of 3 *H. 5.* but the statute of 5 *Eliz. cap. 11.* hath declared the contrary, and put that out of question.

3. But it repeald not the forfeitures for old treasons, tho those forfeitures were enacted by statutes made after 25 *E. 3.* and therefore the forfeiture of estates-tail for treason given by 26 *H. 8.* continues notwithstanding this statute, *Co. P. C. p. 19.* and so it was resolved by all the judges of *England* in the lord *Sheffield's* case (*), *Stamf. 187. b. 12 Eliz. Dy. 289.* the reason is before given, *cap. 23. p. 241.* for the relation of the repealing clause is only to *treasons* not contained in 25 *E. 3.* not to *forfeitures* not contained in 25 *E. 3.* for indeed 25 *E. 3.* creates no forfeitures, but only declares what the common law was, and enacts no farther touching forfeitures.

4. But this act did not meddle with those new laws, that directed special proceedings, trials, &c. or other matters of that nature relating to treason, but that was done after by 1 & 2 *P. & M. cap. 10. de quo postea.*

5. The preamble is very considerable, which takes notice of the severity of former statutes, that made words only without other fact, or deed, to be high treason, which was one of the causes of this general repeal.

Touching the second clause, as is before observed in the precedent chapter, the repeal by 1 *Mar.* had discharged all offenses committed before that repeal against the statutes repeald, if it had not been specially provided to the contrary by the proviso of this act touching persons formerly indicted.

Now as to the third clause, it also took away all new felonies made since the first day of the reign of *Henry VIII.* but whether either of these clauses of repeal did take away those previous punishments, which for the first offense was made forfeiture of goods, and the second or third offense made treason, whether, I say, this statute took away those penalties, which were less than felony or treason in the first or second offense, or only those punishments which were made treason or felony, may be a question; as for instance, that of 1 *E. 6. cap. 12.* the 5th clause, which makes certain of- [310] fenses by words punishable with forfeiture of goods for first offense, loss of profits of lands for second offense, and treason for the third offense; whether this statute extends to successors, and (tho the penalty of treason for the third offense be repeald by this act) whether the penalties for the first and second offenses be repeald, seems to me doubtful; I rather think they are not.

(*) *Paim. 351. W. Jones 69.*

And now this act having laid all former new treasons, felonies, and misprisions flat, and reduced all to the standard of 25 E. 3. the necessity of state and public peace puts the queen and her parliament nevertheless to begin new provisions.

1 *Mar. sess. 2. cap. 6.* "If any person shall 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, or if any person do falsely forge or counterfeit the queen's sign manual, or privy signet, or privy seal, then every such offense shall be adjudged high treason, and the offenders, their counsellors, procurers, aiders and abettors judged traitors against the queen, her heirs and successors, and suffer and forfeit as in high treason."

Concerning this statute much hath been said before.

1. It is a perpetual act, and not personal only to the queen, for as the word *king* may include a successor, so the word *queen* may include a succeeding king or queen, and that it was so intended here is apparent by the words in the conclusion *shall be adjudged traitors against the queen, her heirs and successors*; and accordingly it hath been often resolved.

2. That the foreign coin (the counterfeiting whereof is made treason by this act) must be such, as is so made current by proclamation, for by the statute of 17 R. 2. *cap. 1.* foreign coin is not to run in payment in *England*, and therefore there must be an act under the great seal, as all proclamations ought to be, before it can be current within this statute: *vide accordant statut. 5 Eliz. cap. 11. and 18 Eliz. cap. 1.*

[311] 3. It must be a counterfeiting of that foreign coin, which is stamped in *gold or silver, viz.* the greatest part gold, or the greatest part silver, for *denominatio fit a majore parte*; therefore if there be a foreign coin of copper, or brass and copper, it is not within this statute, but it is not necessary, that the counterfeit of it must be gold or silver, for if that be copper gilt, or alchymy after the similitude of foreign coin of gold or silver, it is within this act, because the prototype is a coin of gold or silver.

1 *Mar. sess. 2. cap. 12.* The act against riotous assemblies is the very same in substance with that of 3 & 4 E. 6. *cap. 5.* only changing treason into felony within clergy, and *nota bene* the power given to suppress such assemblies by force, and indemnifying the suppressors, tho

tho some of the rioters be killed: this act was continued by 1 *Eliz.* cap. 16. during that queen's life and till the next session after, and then expired (*b*).

1 & 2 *P. & M. cap.* 3. "If any person shall maliciously and of his own imagination speak any false, seditious and slanderous news, rumors, sayings, or tales, of the king or queen, then the person being convicted and attainted, as in the act is expressed, shall be set upon the pillory and have both his ears cut off, unless he pay one hundred pounds, and suffer three months imprisonment; and if it be of the reporting of any other, then to stand on the pillory and lose one of his ears, unless he pay one hundred marks within one month after judgment, and suffer one month's imprisonment.

"And if any shall maliciously devise, write, print, or set forth any writing containing any false matter of slander, reproach, or dishonour to the king or queen, or to the encouraging, stirring or moving of any insurrection or rebellion within this realm or the dominions thereof, or shall procure the same to be written, printed, or set forth (the said offense not being punishable as treason within the statute of 25 *E.* 3.) the offender shall for the first offense have his right hand stricken off.

"The second of any of these offenses after a former conviction is made punishable with loss of goods and perpetual [312] imprisonment: justices of assize, &c. shall have power to hear and determine offenses, &c. and to commit persons suspected without bail; no person impeachable for words, unless convicted within three months after the offense: peers to be tried by their peers."

Upon this act these things are observable: 1. That the law-makers did not take seditious words to be within the statute of 25 *E.* 3. for then they would have added the same clause as in the other case, *viz.* (*not being treason within the statute of 25 E. 3.*) Again, 2. That they did take it, that some seditious writings might be treason within the statute of 25 *E.* 3. for it is an overt-act, as hath been formerly observed (+). 3. That as some writings exciting insurrection *might* be treason within the statute of 25 *E.* 3. so some writings, that might possibly by construction have the same effect, *might not be* within that statute, for the law-makers cannot be supposed to intend to make any thing, that was treason within the statute of 25 *E.* 3. to be less than

(*b*) But a new act to much the same purpose was made 1 *Geo.* 1. cap. 5. which is perpetual.

(+) *p.* 112.

treason; and by consequence and consequential illation many things might by a witty advocate be construed and heightened to be to move insurrection and rebellion, which immediately, and in their own nature, nor in the intention of the writer, were never so intended; this statute died with the queen, but was revived 1 *Eliz. cap. 6.* during that queen's life.

1 & 2 *P. & M. cap. 9.* " If any by exprefs words or sayings
 " have prayed, or shall pray, that God would shorten the queen's
 " life, or take her out of the way, or any such like malicious prayer
 " amounting to the same effect, they, their procurers and abettors
 " shall be adjudged traitors.

" But as to any the offenses aforesaid perpetrated during that session
 " of parliament, if the offenders shall shew themselves penitent
 " upon their arraignment, no judgment of treason shall be given
 " against them, but a lesser punishment may be inflicted.

[313] So that they took not this to be a treason within the
 statute of 25 *E. 3.* neither is it thought to be a very great
 offense, for it is an appeal to God, who we are sure is not
 moved by such wishes and prayers contrary to his own command,
Thou shalt not curse the ruler of thy people, *Exod. xxii. 28.*

1 & 2 *P. & M. cap. 10.* consisteth of several remarkable clauses.

1. " If any during the marriage between the king and queen
 " shall imagine to deprive the king from having jointly with the
 " queen the style, honor, and kingly name of the realms and do-
 " minions belonging to the queen, or to destroy the king during the
 " matrimony, or to destroy the queen, or the heirs of her body,
 " being kings or queens of this realm, or to levy war within the
 " realm or marches of the same against the king during the mar-
 " riage, or against the queen or any of her said heirs, kings or
 " queens of this realm, or to depose the queen or the heirs of her
 " body kings or queens of this realm from the imperial crown of
 " this realm, and the said compassings maliciously, advisedly and
 " directly shall utter by open preaching, exprefs words or sayings,
 " or if any person by exprefs words shall maliciously, advisedly, and
 " directly declare or publish, that the king during the marriage ought
 " not to have jointly with the queen the style, honor and kingly name
 " of this realm, or that any person, being neither the now king or
 " queen, during the marriage between them ought to have the style,
 " honor and kingly name of this realm, or that the now queen is

" not

“ not, or of right ought not to be queen of this realm, or after her death the heirs of her body, being kings or queens of this realm, ought not so to be or to enjoy the same, or that any person, other than the queen during her life, or after death, other than the heirs of her body, as long as one of the heirs of her body, shall be in life, ought to be queen or king of this realm, then every such offender shall lose to the queen all his goods and chattels, and forfeit the issues of his lands during his life, and have perpetual imprisonment; the second offense after a former conviction shall be treason.

2. “ And if any by writing, printing, overt-act, or deed shall maliciously, advisedly and directly utter the things [314] aforesaid, then they, their abettors, procurers, counsellors, aiders, and comforters knowing the said offense to be done, and being thereof convicted and attainted by the laws and statutes of this realm, shall be adjudged high traitors, and forfeit their goods, lands and tenements to the queen, her heirs and successors, as in case of high treason.

3. “ Provision for the government of the queen’s children.

4. “ If any person, during the time that the king shall have the ordering of the queen’s children, shall compass to destroy the king, or to remove him from the government of the said children, it shall be treason.

5. “ That all trials hereafter to be had, awarded or made for any treason, shall be had and used only according to the due order and course of the common laws of this realm, and not otherwise, saving to all persons, (other than the offenders and their heirs, and such persons as claim to any of their uses,) all such rights, titles, interests, possession, leases, &c. which they had at the day of the committing of such treasons, or at any time before, as if this act had never been made.

6. “ Concealment of any high treason shall be adjudged only misprision of treason, and to forfeit and suffer as in case of misprision notwithstanding this act.

7. “ Trial by peers is saved in treason or misprision of treason.

8. “ None to be impeached for words, unless indicted within six months after the offense.

9. “ Witnesses examined to or deposing any treasons in this act, or at least two of them shall be brought forth before the party

“arraigned, if he require the same, and say openly in his hearing
 “what they can say against him concerning the treasons in the in-
 “dictment, unless the party arraigned shall willingly confess the same
 “upon his arraignment.

[315] 10. “In all cases of high treason concerning coin current
 “within this realm, or counterfeiting the king’s or queen’s
 “signet, privy seal, great seal, or sign manual, such manner of trial,
 “and no other, shall be observed and kept, as heretofore hath been
 “used by the common laws of this realm, any law, statute or other
 “thing to the contrary notwithstanding.

“The counsellors, procurers, comforters, and abettors for the first
 “offense to suffer as the principal in the first offense, and procurers,
 “comforters and abettors for the second offense to forfeit as the
 “principal in the second offense.”

This statute for so much as concerns the forfeiture or punishment inflicted for words, &c. and likewise the treasons newly enacted was but temporary, and died when the queen died without issue.

But there is still observable,

1. The great distinction, that was used between words and writing; those very things, which written were made in the first offense *treason*, being only spoken were in the first offense *but misdemeanor*, altho many of the words there mentioned founded high, as namely that the queen is not or ought not to be queen, but some person else, whereby we may gather the opinion of parliaments in those times, that regularly words, tho of a high nature, were not treason, nor an overt-act of compassing the king’s death.

The second thing observable is, that here are some treasons newly enacted, which yet were treasons within 25 E. 3. as compassing to destroy and depose the queen, and declaring the same by writing or overt act; and therefore this clause was omitted in the statute of 1 Eliz. cap. 6. and left to the statute of 25 E. 3.

The 3d thing observable herein is, that the queen’s husband is not within the act of 25 E. 3. therefore it was necessary to have an act of parliament for the securing of him, who was only the queen’s husband.

4. That tho there was a communication of the regal title to the queen’s husband, yet even that could not have been but by act of
 parliament,

parliament, and yet no more is communicated, but the title and name, not the authority and rule of a king of *England*.

The fifth clause concerning restoring of trial of treason according to the course of the common law is of great consequence and use, and is perpetual.

1. By this clause of the statute as to the case of high treason, the statutes of 27 *E. 3. cap. 8.* 28 *E. 3. cap. 13.* 8 *H. 6. cap. 29.* for trial of an alien *per medietatem linguæ* are wholly repealed, and the trial shall be by *Englismen*, 1 *Mar. Dy.* 144. *Shirly's case*, *H. 36 Sliz.* Dr. *Lopez's case* ruled *per omnes justiciarios. Co. P. C. p. 27.*

2. The trial of a lunatic without issue joined by 33 *H. 8. cap. 20.* and in a foreign county by 33 *H. 8. cap. 23.* and for treasons in *Wales* 26 *H. 8. cap. 6.* 32 *H. 8. cap. 4.* are all repealed by this statute. *Co. P. C. p. 24, 27. •*

3. But whether the statute of 1 *E. 6.* and 5 & 6 *E. 6.* concerning two witnesses be hereby repealed *vide supra p. 298.* only the 9th and 10th clauses of this statute seem strongly to imply, that this statute intended the repeal of it, for otherwise why should that special provision be added in this statute, for at least two of the witnesses formerly examined to repeat their testimony to the prisoner, if he desires it, when the statute of 5 & 6 *E. 6.* had more effectually provided for the same thing.

4. But the statute of 28 *H. 8 cap. 15.* concerning the trial of treason committed upon the high sea is not repealed, nor the statute of 35 *H. 8. cap. 2.* for trials of treasons out of the realm, because there was no way regularly appointed at common law for the trial of those treasons being done out of the bodies of counties; but it seems the trial of treasons committed in any place in rivers, or parts within the bodies of counties, tho the admiral claimed jurisdiction there, is restored to the common law, where it was originally triable.

Neither doth the act extend to petit treason, for treason generally spoken is intended of high treason; therefore the trial, as to that, stands in the same manner, as it was before the making of that act.

5. Peremptory challenge in case of high treason is restored by this act, and the statute of 33 *H. 8. cap. 23.* as to that point repealed, *vide accordant Co. P. C. p. 27. & libros ibi;* so that

[317]

at this day he may challenge thirty-five, viz. under three juries peremptorily. *Co. P. C. ibidem.*

1 & 2 P. & M. cap. 11. "Whosoever shall bring from the parts beyond sea into this realm, or into any of the dominions of the same, any false and counterfeit money, being current within this realm by the sufferance and consent of the queen, knowing the same coin to be false and counterfeit, to the intent to utter or make payment with the same within this realm, or any of the dominions of the same, by merchandizing or otherwise, the offenders, their counsellors, procurers, aiders and abettors in that behalf, shall be adjudged offenders in high treason, and after lawful conviction shall suffer and forfeit, as in cases of high treason.

"If any be accused or impeached of any offense within this statute, or of any other offense concerning the impairing, forging, or counterfeiting any coin current within this kingdom, he shall be indicted, arraigned, tried, convicted, or attainted by such like evidence, and in such manner and form, as hath been used and accustomed within this realm before the first year of the reign of Edward VI. any law, statute &c. to the contrary notwithstanding."

Upon this statute several things are observable:

1. That the foreign coin in this case must be such, as is made current in this realm by the consent of the queen, which cannot be without proclamation by writ under the great seal, as hath been before said p. 213 & 310.

2. That the party, that brings it in, must know it to be counterfeit.

3. That it must be brought into the king's dominions from some place, that is out of the king's dominions, and therefore the importation out of Ireland is held not to be an importation within this statute, for that is within the dominions of this realm, tho not within the realm. 3 H. 7. 10. & vide supra cap. 20 p. 225. *Co. P. C.* p. 18.

[318] 4. It must be brought with an intent to merchandize or make payment within this realm, and this intent may be tried by circumstances, tho the offender hath not yet actually made payment or merchandize with it: vide antea p. 229.

5. This is a new law, for the statute of 4 H. 7. cap. 18. whereby it was formerly enacted, is repealed by 1 Mar. cap. 1.

6. It is a law perpetual, tho it speaks only of coin made current by the consent of the king and queen our sovereign lord and lady, and so it hath been still taken.

7. That

7. That at this time it was taken, that impairing of the coin current within this realm was treason as to the proper coin of this realm by force of the declarative law of 3 *H. 5. cap. 6.* and that this was not repealed by 1 *Mar. cap. 1.* for there was no other law in force newly enacted for making impairing of the coin treason between 1 *Mar. cap. 1.* and 1 & 2 *P. & M. cap. 11.* but this error is reformed by the declaration of 5 *Eliz. cap. 11.*

8. That without any difficulty in the case of counterfeiting coin current in this kingdom there is no necessity of two witnesses, neither upon the trial nor upon the indictment, so that questionless, as to this treason, the clause of the statutes of 1 and 5 *E. 6.* concerning two witnesses is wholly repealed, for the statute saith, he shall be *indicted, &c.* the omission of which word in the general clause of 1 & 2 *P. & M. cap. 10.* which concerns treasons in general, is that which gave the great countenance to that opinion of my lord *Coke*, that in other treasons there must be two witnesses upon the indictment, tho that statute, as to the trial, remitted the course of the common law.

I come now to the time of queen *Elizabeth*.

The statutes, that concern treason, I shall range in three ranks: 1. Such as more immediately concern the safety of the queen's person. 2. Such as concern the money of the kingdom. 3. Such as concern the safety of the queen's government in relation to papal usurpations and matter of religion.

I. I begin with the first rank, such as concern more immediately the safety of the queen's person.

1 *Eliz. cap. 5.* The statute of 1 & 2 *P. & M. cap. 10.* is recited, and that *that* statute extended only to queen *Mary* [319] and the heirs of her body, the very same statute in effect is enacted over again, only with an application thereof to queen *Elizabeth*, and the heirs of her body, and almost all the same clauses are over again, except *that* which concerns the trial of treason according to the common law, and the clause of compassing to destroy the queen, and manifesting the same by writing or overt-act; two witnesses are required to the indictment and arraignment of the prisoner: this act expired upon the queen's death without issue.

1 *Eliz. cap. 6.* The statute of 1 *Mar. sess. 2. cap. 3.* concerning seditious and false rumours is revived, as in relation to queen *Elizabeth*, under the same pains and penalties, as are therein contained, as

tho the same act had extended to the heirs and successors of queen *Mary*, any doubt to the contrary notwithstanding ; but this was personal to the queen and the heirs of her body, and was repealed by 23 *Eliz. cap. 2.*

13 *Eliz. cap. 1.* “ If any person during the natural life of the
 “ queen shall, within the realm or without, compass or imagine the
 “ death or destruction, or bodily harm tending to death or destruction,
 “ maiming or wounding of her person, or to deprive or depose her
 “ from the style, honour, or kingly name of the crown of this realm,
 “ or of any other realm or dominion belonging to her majesty, or to
 “ levy war against her majesty within the realm or without, or to
 “ move or stir any foreigners with force to invade this realm, or any
 “ other her majesty’s dominions being under her obedience, and such
 “ compasses, imaginations, devices, or intentions, or any of them
 “ shall maliciously, advisedly, and directly publish, hold opinion,
 “ affirm or say by any speech, express words or sayings, that the
 “ queen during her life is not, or ought not to be queen of this
 “ realm of *England*, and also of *France* and *Ireland*, or of any other
 “ her majesty’s dominions being under her obedience during her life,
 “ or shall by writing, printing, preaching, speech, express words or
 [320] “ sayings, maliciously, advisedly, and directly publish and
 “ affirm, that the queen is an heretic, schismatic, tyrant,
 “ infidel, or usurper of the crown, every such offense shall be taken,
 “ deemed, and declared by authority of this parliament to be high
 “ treason; and the offenders, their abettors, counsellors and procu-
 “ rers, and the aiders and comforters of the same offenders, knowing
 “ the same, being indicted, convicted, and attaint according to the
 “ usual order and course of the common law, or according to the act
 “ of 35 *H. 8.* for trial of treasons out of the realm, shall be deemed
 “ traitors, and suffer and forfeit as traitors.

2. “ If any person of any condition, place, or nation during the
 “ queen’s life pretend, utter, or publish themselves, or any of them,
 “ or any other, than the now queen, to have right to enjoy the
 “ crown of *England* during the now queen’s life, or shall during the
 “ queen’s life usurp the crown, or the royal title, style or dignity of
 “ the crown of *England*, or shall during the queen’s life, hold, or
 “ affirm, that the now queen hath not right to hold the said crown,
 “ realm, style, title, or dignity, or shall not, after demand made on
 “ the behalf of the queen, acknowledge effectually, that the now
 “ queen

“ queen is true and rightful queen of this realm, they shall be disabled
 “ during their natural lives only to enjoy the crown by succession
 “ after the queen’s death, as if such person were naturally dead.

3. “ If any person shall during the queen’s life hold or affirm a
 “ right, interest or succession to the crown to be in any such claimer,
 “ usurper, or pretender, or not acknowledger after notification by
 “ proclamation of such claim, usurpation or pretense, such person
 “ shall suffer as a traitor.

4. “ If any shall maintain, that the common laws, not altered by
 “ parliament, ought not to direct the right of the crown of *England*,
 “ or that the queen [*Elizabeth*] with and by the authority of par-
 “ liament is not able to make laws of sufficient force to limit and
 “ bind the crown of *England*, and the descent, limitation, inherit-
 “ ance, and government thereof, or that this statute, or any statute
 “ to be made by authority of parliament with the queen’s royal assent
 “ for the limiting of the crown to be justly in the queen’s
 “ person is not, or ought not to be of sufficient force to bind, [321]
 “ limit, restrain, and govern all persons, their rights and titles, that
 “ in any way might claim an interest, or possibility in or to the crown
 “ of *England* in possession, remainder, inheritance, succession, or
 “ otherwise, every such person so holding, affirming or maintaining
 “ during the queen’s life shall be judged a high traitor, and every
 “ person so holding after the queen’s death shall forfeit all his goods
 “ and chattles.

5. “ If any by writing or printing declare, before the same be de-
 “ clared and established by act of parliament, that any particular
 “ person ought to be right heir to the queen (except the natural issue of
 “ her body) or that shall print, set up, or sell such book, for the first
 “ offense he shall suffer one year’s imprisonment, and forfeit half his
 “ goods, and for the second offense it shall be a *præmunire*.

6. “ Trial of a peer by his peers is saved.

7 “ Saves the right of all, other than the offenders and their heirs,
 “ claiming only as heir to the offender.

8 “ Offender within the queen’s dominions shall be indicted with-
 “ in six months, and out of the dominions within twelve months.

9. “ No person to be arraigned for any offense within this act,
 “ unless it be proved by the testimony, deposition, or oath of two
 “ lawful and sufficient witnesses, who shall at the time of the arraign-
 “ ment of such person be brought before the party offending face to

“face, and there declare all they can say against the party arraigned, unless the party arraigned shall without violence confess the same.

10. “The aider or comforter of such, as shall affirm the queen a schismatic, heretic, tyrant, infidel, or usurper, shall for his first offense, knowing the same to be committed, incur a *præmunire*, and for his second offense, after conviction of the former, shall be a traitor.

11. “Provided, that giving charitable alms in money, meat, drink, apparel or bedding for sustentation of the body, or health of
[322] “any offender in any offense, made treason or *præmunire*, “during the time of his imprisonment, shall not be taken to “be any offense.”

Tho this act be antiquated by the death of queen *Elizabeth*, yet there are (as in other acts of this nature that are expired) divers matters that are observable for the true understanding of the common law, and therefore I have repeated many acts of this nature at large.

1. This act doth contain and enact some treasons as new treasons, which certainly were treasons by the statute of 25 *E. 3.* as compassing to destroy or depose the queen, and manifesting the same by writing, printing, or overtact; but it was thought or at least doubted, that manifesting the same barely by words were not within 25 *E. 3.* and it appears by the preamble, that this act was made to take away some doubts, as well as to provide new remedies.

2. It partly appears by this act, that the bare conspiracy to levy war was not treason by the statute of 25 *E. 3.* without a war levied, and accordingly it was resolved *P. 39 Eliz. Burton's case, Co. P. C. p. 10.* and therefore we are to be careful not to apply all convictions of treason in the queens time, as judgments declarative of the statute of 25 *E. 3. de proditionibus*, because they were oftentimes indicted upon this statute in the queen's time, and the general conclusion of the indictment *contra formam statuti*, and sometimes generally *contra formam statuti*. with an abbreviation was applicable to any statute then in force, which was most effectual to this purpose.

In *Anderson's reports, part. 2. n. 2. (c)*, it appears that in 37 *Eliz.* divers apprentices were committed for great riots, divers other apprentices conspired to deliver them out of prison, to kill the lord mayor of London, to burn his house, to break open two houses near the Tower, where there were arms for three hundred men, and to furnish them-

selves ; after which divers apprentices threw about libels moving others to join with them and to assemble at *Bunhill*, where divers to the number of three hundred assembled, where they had a trumpet and a cloke upon a pole instead of a flag, and as they were going towards the mayor's house, they were met by the [323] sheriffs and swordbearer, against whom the apprentices offered resistance.

It was resolved, that this was treason within the statute of 13 *Eliz.* for it was an intention to levy war, and altho they intended no harm to the person of the queen, yet because it concerned her in her office and authority, and was for such things, which the queen by law and justice ought to do, it was a levying war against the queen, and they were condemned and executed.

This proceeding was upon this statute, and yet perchance, the circumstances of the case wholly laid together, this might have been an actual levying of war within the 25 *E. 3.* but they thought it safer to proceed upon this statute.

3. That, tho regularly words alone make not an overt-act of compassing of the queen's death, yet printing or writing may do it, *Co. P. C. p. 12, 14.* and therefore an act of parliament was requisite to make it an overt-act ; yet observe how cautiously it is penned, *maliciously, advisedly, and directly, &c.* leaving as little, as possibly may be, to construction.

4. That defamatory words, tho of a very high nature, do not always make treason ; there cannot be more venomous words ordinarily thought of, than to say, the queen was an *heretic, schismatic, tyrant, usurper*, yet an act of parliament was necessary to make it treason.

5. That to make a man a principal in treason by comfort or aid after the offense committed it must be *knowingly*, and therefore I never thought that opinion of *Stamford, fol. 41. b.* to be law, that a receipt of a felon after attainder in the same county made a person accessory without notice, because he is bound at his peril to take notice, that he was attainted, for it oftentimes lies as little in the knowledge of many persons, who are convict or attainted of felony or treason, as whether a man be guilty of it : *vide tamen Dyer 355.*

6. That regularly in a new treason the aiding and comforting of the traitors, knowing them to be such, makes a man guilty of treason,

son, and therefore here is care by exprefs provision to make the first offense a *præmunire*.

[324] 7. Here is great care to disable the heir to the crown from succeeding, if he usurp during the queen's life; but tho' all the care imaginable was there used, yet it hath been held, that by the accession of the crown to the person so disabled, all these disabilities have vanished, *vide* 1 H. 7. 4. (d): see Mr. Plowden's learned tract touching the right of succession of Mary queen of Scotland.

8. Nota concerning the power of the king to limit the crown by consent of parliament.

9. That they took the statutes of 1 and of 5 & 6 E. 6. concerning two witnesses to be determined, or at least not to extend to treasons afterwards enacted, for otherwise there needed not this special care and provision *de novo* for two witnesses.

10. That as the aiding or comforting of one, that speaks seditious words, made treason on the second conviction, must be for the second offense, after a conviction of the former, so the second offense, tho' committed after a former, is not treason, unless it be also committed after a former conviction: the like method is in forgery upon the statute of 5 Eliz. cap. 14. and generally that exposition holds in most cases, where the second offense is subjected to a severer punishment than the former, for it is intended of such offense committed after the conviction of a former, *Co. P. C.* 172.

11. It is provided that charitable relief shall not make a party guilty of treason or *præmunire*, as an aider or abetter: this was a necessary provision to avoid question.

Regularly relief by victuals or clothes of a felon or of a traitor, after he is in custody or under bail, makes not a man an accessory in felony, nor a principal in treason; but if he help him to [325] escape, that makes him an accessory in one case and a principle in the other, *Dalt. cap.* 108. p. 286. (e), and with this

(d) The words of that book, are, *That the king was a person able and discharged from any attainder eo facto, that he took upon him the government and the being king*; so that it was not the bare accession or descent of the crown, but the being in actual possession of the regal government, which was construed to remove all disabilities; this case therefore is no argument that the statute of 15 Eliz. could not bar the right of the

successor, and hinder him from succeeding, but only that if notwithstanding he should get possession of the government, that possession would purge all disabilities, which is just as much as to say, that he, who can get the power into his hands notwithstanding an attainder or act of parliament to the contrary, will not think himself bound by such attainder or act of parliament.

(e) *N. Edit. cap.* 161. p. 531.

agrees this proviso in the case of high treason; but *nota* it extends no farther than during the time of his imprisonment, yet the law is all one, if he be under bail, for he is *in custodia* still, for the bail are in law his keepers, and he, that is delivered to bail in the king's bench, is nevertheless said to be *in custodia marescalli*.

14 *Eliz. cap. 1.* " If any person do within this realm, or elsewhere unlawfully, and of his own authority compass, imagine, conspire, practise, or devise by any ways or means with force, or by craft maliciously and rebelliously to take, detain or keep from the queen any of her towers, castles, fortresses or holds, or maliciously and rebelliously take, burn or destroy them, having any of the queen's munition in them, or being appointed to be guarded with soldiers within the queen's dominions, and the same compassing do advisedly by express words or deeds utter and declare for any the malicious or rebellious intents aforesaid, it shall be adjudged felony in the offenders, their aiders, comforters, counsellors and abettors without clergy.

" If any shall with force maliciously or rebelliously detain from the queen any of her majesty's castles, towns, fortresses or holds within any of her dominions, or any of her ships, ordinance or artillery, or munition of war, and not render the same within six days after proclamation, or wilfully or maliciously burn or destroy any of her ships, or bar any of her havens, this shall be treason."

This act to continue during the queen's life.

We may see by this act, that the opinion of the parliament in that time was, that this conspiring to take forts or ships by force or deceit was not treason; but indeed the actual taking them by force was levying of war against the king by the statute of 25 *E. 3.*

But if a man detains the king's town, or castle, or ships, and when any commissioned by the king demands the same, and it is refused to be delivered, and thereupon the king's commissioner raiseth a power, makes an assault, and they within stand upon their [326] guard, and repel force with force, this had been treason within the statute of 25 *E. 3.* for it is a levying war, and so not a bare detaining; *quod vide Co. P. C. p. 10. bis in eadem pagina.*

Again, if this detaining the king's castle or fort, or the castle of any other be barely such and without assault, yet if it be in compliance with a foreign enemy, or in confederacy with him, this is treason within

within the act of 25 E. 3. and an overt-act of adhering to the king's enemies; that therefore, which this act makes treason in detaining after proclamation, is a simple detaining without the concurrence of the circumstances above-mentioned, which was not treason before the making of this act.

14 *Eliz. cap. 2.* " If any person shall conspire, imagine, or go about unlawfully and maliciously to set at liberty any person committed by the queen's special command for any treason or suspicion of Treason concerning the person of the queen before indictment of the person imprisoned, and such imagination or conspiracy shall set forth, utter or declare by express words, writing, or other matter, it shall be misprision of treasons; but if the party imprisoned be indicted of any treason concerning the person of the queen, it shall be felony so to conspire and declare such conspiracy, *ut supra.*

" If it be after attainder or conviction, then such conspiracy so declared as aforesaid shall be high treason:" this act to last during the queen's life.

These things are observable upon this act, 1. Here is no provision against the actual discharge or setting at liberty, neither needed it, for if the party committed had really committed treason, this was treason even within the statute of 25 E. 3. but if it were only a commitment for treason, but no treason committed by the person in custody, such delivery was not treason, as appears before *cap. 22.* But 2. The conspiracy to do this, tho manifested by open act, was neither treason, misprision of treason, nor felony; neither is it at this day, but only a bare misdemeanor punishable by fine and imprisonment, tho the party imprisoned were indicted, yea attainted. And 3. This act extends only to such treasons as concerned immediately the queen's person, not to treasons touching her seal or coin.

And these are all the acts, that were made in the queen's time touching treasons, which more especially related to the safety of her person, all which expired at her death.

II. I come to those treasons, which were enacted in the queen's time concerning coin, and they are three.

5 *Eliz. cap. 11.* " Makes the filing, washing, rounding, and clipping of the coin of this realm, or foreign coin made current by proclamation,

“ proclamation, for lucre or gain, and their counsellors, consenters, and aiders to be high treason by virtue of this act.”

14 *Eliz. cap. 3.* “ Makes the counterfeiting of foreign coin of gold or silver, not current within this realm, misprision of treason in the offenders, their procurers, aiders and abettors.”

18 *Eliz. cap. 1.* “ Makes the impairing, diminishing, falsifying, scaling or lightning of the coin of this kingdom or foreign coin made current by proclamation for lucre-fake to be high treason in the offenders, their counsellors, consenters and aiders.”

But of these sufficient hath been said before in the business of money, forfeiture and upon the statutes of 1 and 5 & 6 *E. 6.* The sum of which is this :

1. That the treasons made by the acts of 5 and 18 *Eliz.* are new treasons, newly made by virtue of this act, and every body is estopped to say the contrary by reason of the special recital and penning of this act, *viz. shall be adjudged treason by virtue of this act.*

2. That the foreign coin, the clipping and impairing whereof is made treason by this act, must be such as is made current by proclamation, for it cannot be otherwise current by reason of the prohibition of the statute of 17 *R. 2. cap. 1.* and also, the word *proclamation* in those acts refer to foreign coin so legitimated by proclamation, not to the proper coin of this kingdom, which needs not a proclamation to legitimate it.

3. The trial and whole proceeding is to be according to the course of the law by the express words of these acts and of 1 & 2 *P. & M. cap. 11.* and therefore there need not two witnesses required by the acts of 1 and the 5 & 6 *E. 6.* [328]

4. Not only the offenders themselves, but the counsellors, consenters and aiders are within those acts; but altho regularly in case of any old or new treason made, the comforters and receivers of the offender are impliedly guilty of treason by a kind of necessary concomitance, yet it seems to me by the special penning of this act, it extends only to counsellors, aiders and consenters (according to the resolution in *Conyer's case*, *Dy. 296.*) as to the offences made treason by those acts, tho possibly it may be treason, as to the receiver of a counterfeiter within the statute of 25 *E. 3.* according to my lord *Coke's* opinion, *Co. P. C. cap. 64. p. 138.* for that is an old treason, and no such restriction by express words to counsellors, aiders and assenters.

5. The

5. The clipping and impairing, that makes treason within these acts, must by the express words of the act be *for gain or lucre*, and so laid in the indictment.

6. Counterfeiting of coin not current to bring it within a *præmunire* by the statute of 14 *Eliz. cap. 3.* must be a counterfeiting of such foreign coin, as is of gold or silver, or consists thereof for the greatest part, and extends not to the foreign copper, or leather coin.

7. No corruption of blood or loss of dower are to be by attainders of these treasons.

III. Therefore I come to the third sort of statutes made in this queen's time, which relate to the queen's government, and especially in relation to papal usurpation.

1 *Eliz. cap. 3.* is an act of recognition of the queen to be rightful sovereign of this realm, and all acts repugnant thereunto are repealed; and *cap. 1.* the oath of supremacy is enacted to be taken by the persons therein described: the tenor of which oath followeth in these words, *viz.*

“ I *A. B.* do utterly testify and declare in my conscience, that the
 [329] “ queen's highness is the only supreme governor of this
 “ realm, and of all other her highness's dominions and coun-
 “ tries, as well in all spiritual or ecclesiastical things or causes, as
 “ temporal, and that no foreign prince, person, prelate, state, or
 “ potentate hath or ought to have any jurisdiction, power, superiority,
 “ preeminence or authority, ecclesiastical or spiritual within this
 “ realm, and therefore I do utterly renounce and forsake all foreign
 “ jurisdictions, powers, superiorities and authorities, and do promise,
 “ that from henceforth I shall bear faith and true allegiance to the
 “ queen's highness, her heirs and lawful successors, and to my
 “ power shall assist and defend all jurisdictions, privileges, preemi-
 “ nences and authorities granted or belonging to the queen's highness,
 “ her heirs and successors, or united and annexed to the imperial
 “ crown of this realm.” So help me God and by the contents of
 this book. (*f*)

Every person appointed to take the oath, and refusing, shall lose his offices and benefices, and be disabled to take any office or benefice, &c. and then proceeds to other penalties upon refusers.

(*f*) This oath, and this statute so far as relates to the said oath, are abrogated by 1 *W. & M. cap. 8.*

And

And by that act it is enacted, "That if any person inhabiting within the queen's dominions shall by writing, printing, teaching, preaching, exprefs words, deed or act advisedly, maliciously, and directly affirm, hold, stand with, set forth, maintain, or defend the authority, preeminence, power or jurisdiction spiritual or ecclesiastical of any foreign prince, prelate, person, state or potentate whatsoever, heretofore claimed, used or usurped within this realm, or any dominion or country under the queen's obedience, or shall advisedly, maliciously, and directly put in ure, or execute any thing for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, preeminence or authority, or any part thereof, every person so offending, his abettors, aiders, procurers and counsellors, being convicted according to the course of the common law, shall for the first offense forfeit his goods and chattles, and, if not worth twenty pounds, shall also suffer a year's im. [330] prisonment, and all his ecclesiastical benefices and dignities shall be void, and for a second offense committed after attainder of the first shall be within penalty of *præmunire*, and for the third offense committed after his second conviction, it shall be adjudged high treason."

None to be impeached for words only, unless indicted within a year after the offense committed; and if imprisoned, to be set at liberty, unless indicted within half a year after the the offense: trial of a peer by peers.

None to be indicted, &c. without two witnesses, which if living shall be brought face to face before the prisoner upon his arraignment, and testify what they can say, if the prisoner require it.

Giving of relief, aid or comfort to offenders shall not be punishable, unless proved by two witnesses, that he had notice of the offence at the time of such relief given.

5 *Eliz. cap. 1.* "If any person dwelling, inhabiting, or residing within the queen's dominions or under her obedience, shall by writing, cyphering, printing, preaching, deed or act, advisedly and wittingly hold, or stand with, to extol, set forth, maintain or defend the authority, jurisdiction, or power of the bishop of Rome, or his see, heretofore claimed, used, or usurped within this realm or any dominion or country under the queen's obedience, or by speech, open act or deed advisedly and wittingly attribute any such manner

“ manner of jurisdiction, authority, or preeminence to the said see
 “ or bishop of *Rome* for the time being within this realm or any
 “ the queen’s dominions, then every such person, their procurers,
 “ abettors and counsellors, and also their aiders, comforters and as-
 “ sistants upon the purpose aforesaid, to extol the authority of the
 “ bishop of *Rome*, being lawfully convicted within one year shall
 “ incur a *præmunire*.

It directs who shall take, and give the oath of supremacy.

Any person appointed to take this oath by this statute or the
 statute of 1 *Eliz.* who shall refuse to take the same, being
 [33¹] thereof lawfully indicted within one year, and convict or
 attaint at any time after, shall incur a *præmunire*, 16 *R.* 2.

Certificate of refusal to be made into the king’s bench within
 forty days after refusal ; the king’s bench may proceed to indict the
 party refusing within a year by a jury of the same county, where the
 court sits.

If any person convict of the offenses within the first clause of the
 statute shall after conviction thereof do the said offenses or any of
 them, or if any person appointed to take the oath, do after three
 months after the first tender refuse to take the same being tendred
 a second time, the offender shall suffer as in case of high treason.

Attainder of treason upon this act shall not make corruption of
 blood, disherit the heir, or forfeit dower.

Members of the house of commons shall take the said oath, other-
 wise shall be disabled to sit.

Temporal lords of parliament shall not be bound to take the oath,
 nor subject to the penalties for refusing the same.

The charitable giving of reasonable alms to an offender without
 fraud or covin shall not be construed an abetting, counselling, aid-
 ing, assisting, procuring or comforting of an offender within this
 act : peers indicted shall be tried by peers, as in other cases of treason.

No person compellible to take the oath upon second tender, but
 such as have ecclesiastical preferments, or such as have offices in
 ecclesiastical courts, or such as refuse wilfully to observe the orders
 established for divine service, or such as shall deprave the rites and
 ceremonies of the church of *England*, or that shall say or hear pri-
 vate mass,

Not lawful to kill person attaint in *præmunire*.

No person to be indicted for aiding, assisting, comforting, abetting any person for extolling the power of the bishop of *Rome*, unless accused by such lawful proof, as shall be thought by the jury sufficient to prove him guilty of the offence.

The things observable upon this act,

1. Tho the indictment for the refusal of the oath upon the first tender may be in the county, where the king's bench sits, yet the trial must be by a jury of the county where the refusal is, 6 & 7 *Eliz. Dy.* 234. *a Bonner's case.* [332]

2. If books extolling the pope's jurisdiction be written beyond sea and brought in hither, it was ruled by the advice of all the judges, 1. The importer, that delivers them out to extol the pope's authority. 2. He that reads them, and in conference with others allows them to be good, 3. He that hears the contents, and in open speech with others commend and affirm them to be good. 4. He that hath such books in his custody, and secretly conveys them to his friends to the intent to perswade them to be of that opinion. 5. He that prints such books in this realm, and utters them, are within the first clause of this statute against extolling of papal authority; but those that receive and read them without allowing them in conference, are not within this act.

3. An indictment against an aider, &c. must be, *knowing* the principal to be a maintainer of the jurisdiction of the pope, and *contra formam statuti* only, is not sufficient. *Dy.* 363. *a.*

4. *Nota* this special clause of giving alms not to make an aider or comforter, if the alms be reasonable, and without covin, tho the offender not imprisoned, nor under bail, seems to be but agreeable to the common law; *vide quæ supra dicta sunt super statutum 13 Eliz. cap. 1.* and therefore it seems, even by the common law, if a physician or chirurgion minister help to an offender sick or wounded tho he know him to be an offender, even in treason, this makes him not a traitor, for 'tis done upon the account of common humanity, not *intuitu criminis vel criminosi*; but it will be misprision of treason, if he know it, and do not discover him.

23 *Eliz. cap. 1.* "All persons whatsoever, who have or shall have
"or pretend to have power, or shall any way put in practice to
"absolve, perswade, or withdraw any of the queen's subjects, or
"any within her dominions from their natural obedience to her
"majesty, or to withdraw them for that intent from the religion

“ now by her highness’s authority established within her highness’s dominions to the *Romish* religion, or to move them or any
 [333] “ of them to promise any obedience to any pretended authority of the see of *Rome*, or of any other prince, state or potentate, to be had or used within her dominions, or shall do any overt-act to that intent or purpose, they shall be adjudged traitors; and the persons who shall be willingly absolved, or withdrawn as aforesaid, or willingly reconciled, or shall promise obedience to any such pretended authority, prince, state, or potentate as aforesaid, they, their procurers and counsellors thereunto shall suffer as in case of high treason.

“ Aiders and maintainers of the persons offending, knowing the same, or who shall conceal such offense, and not within twenty days disclose the same to some justice of peace, &c. shall forfeit as in misprision of treason: justices of peace to have cognisance of offenses, except treason and misprision of treason.

Nota the words (*for that intent*) run through the whole clause of dissuading from the religion of the church of *England*: *vide postea* statute 3 *Jac.* cap. 4.

The religion established within the meaning of this act seems to be that book of articles mentioned and enjoined to be assented to by all men taking orders by the statute of 13 *Eliz.* cap. 12.

23 *Eliz.* cap. 2. “ Advised and malicious speakers of seditious or scandalous tale of the queen of their own imagination shall for the first offense be set upon the pillory, lose both ears (or at the offender’s election pay two hundred pounds) and suffer six months imprisonment.

“ If any shall advisedly and with malicious intent report false, seditious and slanderous news or tales of the queen of the reporting of another, then to be set on the pillory and lose one of his ears (unless he pay two hundred marks) and suffer imprisonment three months: second offense after a first conviction shall be felony without clergy.

“ If any shall within or without the queen’s dominions advisedly and with a malicious intent against the queen devise and write,
 [334] “ print, or set forth any book or writing, containing any false, seditious or scandalous matter against the queen, or to the encouraging, stirring, or moving any insurrection or rebellion within the realm or dominions thereof; or if any per-
 “ for

“ son within or without the realm shall advicedly, and with a
 “ malicious intent against the queen procure or cause any such
 “ book or writing to be written, printed, published or set forth,
 “ (the said offense not being punishable by the statute of 25 E. 3.
 “ concerning treason, or by any other statute, whereby an offense
 “ is made or declared treason) every such offense shall be judged
 “ felony without the benefit of clergy.

“ If any person either within or without the queen’s dominions
 “ shall by erecting a figure, casting nativities, prophesying, witch-
 “ craft, conjurations, or other like unlawful means seek to know,
 “ and shall set forth by exprefs words, deeds, or writings, how
 “ long the queen shall live, or who shall reign after her, or ma-
 “ liciously utter any direct prophecies to that purpose, or shall
 “ maliciously by words, writings or printing with, will or desire
 “ the death or deprivation of the queen, or any thing directly to
 “ the same effect, the offender, their aiders, procurers and abettors
 “ in or to the said offenses shall suffer as felons without the benefit
 “ of clergy.

Offenses made felony by this act committed by persons out of the realm shall be inquired, heard and determined in the county where the king’s bench sits; and limits the proof and manner of proceeding; no corruption of blood, loss of dower, or forfeiture of lands longer than during life.

Two witnesses required to prove words.

The act of 1 & 2 P. & M. and 1 Eliz. concerning scandalous words are repealed: this act to continue only during the queen’s life.

These things are observable upon this act,

1. There may be some words or writings, that consequentially may be construed to stir up insurrection, and yet are not within the statute of 25 E. 3. for this statute supposes some may be within it, and some may not.

2. That casting the king’s nativity, how long he shall live, who shall succeed him, or using prophecies to that effect, tho done maliciously, or wishing the king’s death, was not treason [335] within the act of 25 E. 3. or of any statute then in force, tho they are great offenses; for had they been treason, this statute would never have made it only felony, and tha only during the queen’s life.

27 *Eliz. cap. 1.* "If any open invasion or rebellion shall be made within her majesty's dominions, or any act attempted tending to the hurt of her majesty's person by or for any person, that shall or may pretend title to the crown after the queen's death, or if any thing shall be compassed or imagined tending to the hurt of the queen's person by any person or with the privity of any person, that shall or may pretend title to the crown of this realm, then by her majesty's commission twenty-four privy counsellors and lords of parliament at least, with the assistance of such judges of the courts of *Westminster*, as the queen shall appoint, or the greater number of them, shall by virtue of this act have authority to examine all and every the offenses aforesaid, and all circumstances thereof, and thereupon to give sentence or judgment, as upon good proof the matter shall appear unto them; and after such sentence or judgment given, and declaration thereof by her majesty's proclamation under the great seal, all such persons, against whom such judgment or sentence shall be given or published, shall be excluded and disabled to claim or pretend to have any title to the crown of *England*.

"And all the queen's subjects may by virtue of this act and her majesty's direction by all possible means pursue to death every such wicked person, by whom such invasion or wicked act shall be attempted, or other thing compassed or imagined against her majesty's person, and all their aiders, comforters and abettors.

Provision is made in case the queen should be killed by such attempt for prosecution of the offender, and exclusion of the person offending from succession to the crown, &c.

Nota, this extraordinary commission was issued thus by authority of parliament in relation to the queen of *Scots*, who was by virtue thereof sentenced to death and executed.

[336] This was but a temporary act, but the precedent of this commission to sentence and give judgment without a trial by jury, was the first of that nature that I remember to have been issued by parliament.

27 *Eliz. cap. 2.* "It shall not be lawful for any jesuit, seminary priest, or other such priest, deacon, or religious or ecclesiastical person whatsoever being born within this realm or other her highness's dominions, and made, ordained or professed, or to be made, ordained or professed by any authority or jurisdiction derived, challenged or pretended from the see of *Rome* by or of what name, title
"or

“ or degree soever the same shall be called or known, to come into,
 “ be or remain in any part of this realm, or any of her highness’s
 “ dominions after the end of forty days, other than in such special
 “ cases, and upon such special occasions only, and for such time
 “ only, as is expressed in this act; and if he do, then every such of-
 “ fense shall be high treason, and every such person as shall wittingly
 “ and willingly receive, relieve, comfort, aid, or maintain any such
 “ priest, &c. being at liberty and out of hold, knowing him to be
 “ such, shall be guilty of felony without clergy.

“ If any of the queen’s subjects (not being a jesuit, seminary priest,
 “ deacon, or religious or ecclesiastical person) be brought up in any
 “ college or seminary beyond sea, shall not return within six months
 “ after proclamation in *London*, and within two days after his return
 “ before the bishop of the diocese, or two justices of the peace sub-
 “ mit to her majesty’s laws, and take the oath of supremacy, then
 “ such person, who shall otherwise return into this realm or other
 “ the queen’s dominions, shall be adjudged a traitor.

“ Sending relief to any jesuit, seminary priest, or college of priests
 “ or jesuits beyond the seas, or to one not returning out of such col-
 “ lege into *England*, shall incur a *præmunire*.

“ Every offense against this act shall be tried in the king’s bench in
 “ the county where it fits, or in any other county, where the offense
 “ was committed, or offender apprehended.

“ If a jesuit, seminary priest, &c. within three days after his arri-
 “ val in the queen’s dominions submit to some archbishop,
 “ bishop, or justice of peace, and take the oath of supre- [337]
 “ macy, and by writing under his hand profess to continue obedient
 “ to the laws, then he shall not be subject to any penalty.

“ Trial of peers in the case of treason, felony, or *præmunire* to be
 “ by peers.

“ Any person knowing such priest to be within the realm contrary
 “ to this act, and not discovering it to a justice of peace, &c. within
 “ twelve days, shall be fined and imprisoned during the queen’s plea-
 “ sure, and a justice of peace to whom such discovery is made, not
 “ informing one of the privy council, &c. shall forfeit two hundred
 “ marks.

29 *Eliz. cap. 2.* “ No attainder of treason that now is, where the
 “ party is executed, shall be reversed for error.

25 *Eliz. cap. 2.* "A suspected jesuit or priest refusing to answer directly upon his examination shall be imprisoned for his contempt, until he shall make direct answer.

And these are all the acts concerning treason in the queen's time, that I remember, except particular acts of attainder, whereof some are temporal, some perpetual.

In the time of king *James*, besides the particular acts touching the treason of the conspirators of the powder-plot, and the treasons of the lords *Cobham* and *Gray*, there are some general clauses touching treason in the statutes of 3 *Jac. cap. 4. (g)*, and 5. and among them this special clause which enlarged the statute of 23 *Eliz. cap. 1. viz.*

"If any person shall upon or beyond the seas, or in any other place within the dominions of the king, his heirs or successors, put in practice to absolve, persuade or withdraw any of the king's subjects from their natural obedience to his majesty, his heirs or successors, or to reconcile them to the pope or see of *Rome*, or to move any of them to promise obedience to any pretended authority of the see of *Rome*, or any other prince, state or potentate, then such persons, their procurers, counsellors and aiders, and maintainers [338] "knowing the same shall be adjudged traitors, and likewise "the persons willingly absolved or withdrawn, &c. their aiders, abettors, maintainers, &c. knowing the same shall be adjudged traitors, to be indicted and proceeded against in any county where taken, as if the offense were committed in that county.

This act is much more strictly pen'd against such offenders, than the statute of 23 *Eliz. cap. 1.* 1. It extends larger as to the place of such offense. 2. The words (*to that intent*) which bound up the statute of 23 *Eliz.* more strictly, are here omitted. 3. The disjunctive clauses in this statute have a greater latitude. 4. It extends to maintainers of the offenders knowing the same.

Neither do I find any special new act generally touching treason from this time till the 13th year of king *Charles II.*

13 *Car. 2. cap. 1.*

1. "If any person after 24 *June* 1661. during the king's life shall "within the realm, or without, compass, imagine, invent, devise, "or intend death or destruction, or any bodily harm tending to death "or destruction, maim, wounding, imprisonment, or restraint of

(*g*) The oath of allegiance appointed hereby, and this statute in far as relates to the said oath, are abrogated by 1 *W. & M. cap. 8.* *

"the

“ the person of the king, or to deprive or depose him from the style,
 “ honour, or kingly name of the imperial crown of this realm, or of
 “ any other his majesty’s dominions or countries, or to levy war
 “ against his majesty within the realm, or without, or to move or stir
 “ up any foreigner to invade this realm, or any other his majesty’s
 “ dominions being under his majesty’s obedience, and such compas-
 “ sions, imaginations, inventions, devices, or intentions, or any of
 “ them shall express, utter, or declare by any printing, writing,
 “ preaching, or malicious and advised speaking, being legally con-
 “ victed thereof upon the oath of two lawful and credible witnesses
 “ upon trial, or otherwise convicted or attainted by due course of
 “ law, then every such person shall be deemed a traitor, and suffer
 “ and forfeit as in cases of high treason.

“ 2. If any after 24 June 1661. during his majesty’s life shall ma-
 “ liciously and advisedly publish or affirm, that the king is an heretic
 “ or papist, or endeavours to introduce popery, or maliciously and
 “ advisedly by writing or speaking shall express, publish,
 “ utter or declare any words or things to incite the people to [339]
 “ hatred or dislike of his majesty or the established government, shall
 “ be disabled to enjoy any office or promotion ecclesiastical, civil, or
 “ military, or other employment, than that of peerage, and suffer
 “ such farther punishment as may be by law inflicted.

3. “ Any that shall maliciously and advisedly affirm the parliament
 “ of 3 Nov. 1640. is yet in being, or that there lies obligation upon
 “ any by any oath, engagement or covenant to endeavour a change
 “ of government in church or state, or that both or either house of
 “ parliament have a legislative power without the king, shall incur the
 “ penalty of a *præmunire* 16 R. 2. *

4. “ No person to be prosecuted for any of the said offenses, ex-
 “ cept treason, but by order of the king under his sign manual, or of
 “ the council, nor unless prosecuted within six months after the of-
 “ fense, and indicted within three months after prosecution.

5. “ None to be indicted, arraigned, convicted, or condemned of
 “ any of the said offenses, unless the offender be accused by two law-
 “ ful and credible witnesses upon oath, which witnesses upon his ar-
 “ raignment shall be brought in person before the offender face to face
 “ and maintain upon oath what they have to say against him, unless
 “ the party arraigned shall willingly without violence confess the same

6. “ This shall not deprive members of parliament of their free
 “ debates.

" Trial by peers: peer convicted disabled to sit in parliament till his
" majesty pardon him (*h*).

(*h*) The acts relating to treason and offences of that nature, which have passed since our author wrote, may be reduced to these three heads: 1. Such as more immediately relate to the king and his government. 2. Such as relate to the coin. 3. Such as relate to the manner of trials and other proceedings.

I. As to the first, such as relate to the king and his government.

By 9 *W. 3. cap. 1.* " If any of the king's subjects, who have voluntarily gone into *France*, or any the *French* king's dominions in *Europe* before 11 Dec. 1663, without licence from the king or queen, or who have at any time during the late war with *France* born arms in the service of the *French* king, or who have since the 13th February 1688, been in arms under the command or in the service of the late king *James* in *Europe*, shall return into this kingdom of *England*, or any other the king's dominions without licence from the king under the privy seal, such person shall be adjudged guilty of high treason. Where the offense shall be committed out of the realm, it may be tried in any county."

[340] Upon this act these things are observable.

1. That this act doth enact some treasons, which certainly were so by 25 *E. 3.* as bearing arms in the service of the *French* king during the war with *France*, which is plainly an adhering to the king's enemies; and tho' 25 *E. 3.* says adhering to the king's enemies in the realm, yet it immediately adds giving them aid and comfort in his realm or elsewhere, Co. P. C. p. 11. *Koughton's* case, 2 *Salk.* 635, indeed all the treasons by this act are compounded of this old treason, altho' they be now in form for the sake of facilitating the proof in some instances, *Hill. 2 Ann. Boucher's* case, *State Tr. Vol. V. p. 511.*

2. That a pardon under the great seal (after having been in the service of the *French* king and before returning) of all treasons, &c. will not amount to a licence to return, because it is the returning, which is the treason punishable by this act. 3 *Ann. Lindsey's* case, *State Tr. Vol. V. p. 528.*

3. That a Scotchman going out of *Scotland* into *France* (especially if formerly resident in *England*) after the time mentioned in the act, and returning into *England* is within the words and meaning of the act, even tho' he had a licence to return into *Scotland.* *Ibid.*

4. That a person offending against this act by returning into *England* may be indicted in any county where he is taken,

altho' it be not the first *Eng'ish* county into which he came. *Ibid.*

5. That this act is perpetual and extends to the king's successors, altho' the act speak only of the king generally and not of his successors, according to the resolution 12 Co. Rep. 109. *vide supra p. 100.*

By 13 & 14 *W. 3. cap. 3.* " The pretended prince of *Wales* is attainted of high treason, and it is made high treason for any of the king's subjects by letters, messages or otherwise to hold correspondence with him or any person employed by him, or to remit any money for his use knowing the same. And by the 17 *Geo. 2.* this is extended to the pretender's son. Provides that offences against this act committed out of the realm may be tried in any county.

By 1 *Ann. cap. 17.* " It is made high treason to attempt by overtact or deed to deprive or hinder any person next in succession to the crown (according to the limitation of the crown by 1 *W. & M. sess. 2. cap. 2.* and 12 *W. 3. cap. 2.*) from succeeding after the decease of the queen; but this succession has now happily taken place, and thereby put an end to this statute.

By 3 & 4 *Ann. cap. 14.* " If any subject, who has voluntarily gone into *France* since 4 May 1702, or into any the *French* king's dominions in *Europe* without licence from the queen, or has since the said 4 May born arms in the service of the *French* king, shall return into *England* without licence from the queen under her privy seal, he shall be adjudged guilty of high treason.

By 4 *Ann. cap. 8.* " It is made high treason for any one maliciously to affirm by writing or printing, that the pretended prince of *Wales*, or any other person hath any right to the crown of these realms, other than according to 1 *W. & M.* and 12 *W. 3.* or that the kings of *England* are not able by authority of parliament to make laws to bind the descent, limitation, inheritance and government of the crown. To declare the same things by preaching, teaching or advised speaking is made a *premunire*.

This act (which is in the main transcribed from 13 *Eliz. cap. 1.*) was re-enacted upon occasion of the union 6 *Ann. cap. 7.* Upon this statute *Matthews* the printer was convicted and executed for printing a pamphlet intituled. *Vex. Populi Van Dei, Oseob.* 30. 1719, at the *Old Bailey*.

By 7 *Ann. cap. 4.* " It is high treason for any officer of the army or soldier by land or sea to hold correspondence with
" any

“ any rebel or enemy to her majesty, or to
 “ treat with such rebel or enemy without
 “ her majesty’s licence,

By 7 *Ann. cap. 21.* “ Whatever is high
 “ treason or misprision of treason in *Eng-*
 “ *land*, (and none else) shall be high
 “ treason or misprision of treason in *Scot-*
 “ *land*.

11. Such as relate to the coin.

By 8 & 9 *W. cap. 25.* “ Whoever shall
 “ knowingly make or mend, or assist in
 “ making or mending, or shall buy or sell,
 “ or have in his possession any instruments
 “ proper for the coinage of money, or
 “ convey such instruments out of the
 “ king’s mint, or shall mark on the edges
 “ any coin current or diminished coin of
 “ the kingdom, or any counterfeit coin

[341] “ resembling the coin of the
 “ kingdom with letters or
 “ other marks like to those on the edges,
 “ of money coined in the king’s mint, or
 “ shall colour, gild or case over any coin
 “ resembling the current coin of the king-
 “ dom, or any round blanks of base me-
 “ tal, &c. shall be guilty of high treason.
 “ No attainder by this act shall work cor-
 “ ruption of blood or loss of dower,
 “ or prosecution be for any offence against
 “ the same, unless commenced within three
 “ months after the offence committed;”
 this act was but temporary.

But by 7 *Ann. cap. 25.* it is made perpe-
 tual, and the time of prosecution enlarged
 from three months to six months after the
 offence committed.

Other statutes relating to the coin enacted
 since the edition of this book in 1736, are
 the 15. 16. *Geo. 2. ch. 28.* concerning gild-
 ing, washing, colouring, &c. coin; and
 rewards for convicting offenders; and pardon
 to accomplices informing.—The 11 *Geo. 3.*
ch. 40. concerning counterfeiting
 halfpence and farthings.—The 13 *Geo. 3.*
ch. 71. concerning what is to be done
 with false money.—The 14 *Geo. 3. ch. 92.*
 concerning weights for coin.

III. Such as relate to the manner of trials
 and other proceedings.

By 7 *W. 3. cap. 5.* “ Every person in-
 “ dicted for high treason, whereby cor-
 “ ruption of blood may be made, shall
 “ have a true copy of the whole indictment,
 “ but not the names of the witnesses, de-
 “ livered to him five days before his trial,
 “ paying for it not exceeding five shil-
 “ lings, and shall be admitted to make
 “ his defence by counsel, and witnesses on
 “ oath, the said counsel not to exceed
 “ two, and to be assigned by the court,
 “ and to have access to the prisoner at all
 “ seasonable times.

“ No person shall be indicted, tried,
 “ or attainted but on the oaths of two

“ lawful witnesses, which two witnesses
 “ must be to the same treason,” altho’
 it be not necessary they should both be
 to the same overt-act.

“ No prosecution to be for any such
 “ treason unless the party be indicted
 “ within three years after the offence com-
 “ mitted, unless it be for a design or
 “ attempt to assassinate the king by poison
 “ or otherwise.

“ The prisoner shall have a copy of the
 “ panel of the jurors two days before
 “ his trial, and shall have like process to
 “ compel the appearance of witnesses for
 “ him, as is usually granted for witnesses
 “ against him.

“ No evidence shall be given of any
 “ overt-act not expressly laid in the indict-
 “ ment.

“ No indictment, process, &c. shall be
 “ quashed for mis-writing mis-spelling,
 “ false or improper *Latin*, unless excep-
 “ tion be taken in court before any evi-
 “ dence given upon such indictment, nor
 “ shall any such mis-writing, &c. be
 “ cause to stay judgment after conviction,
 “ but such judgment may nevertheless be
 “ reversed upon writ of error, as before
 “ the making this act.

“ In the trial of a peer or peeress all
 “ peers intitled to vote in parliament
 “ shall be summoned twenty days before
 “ the trial, and every one so summoned
 “ and appearing shall vote at such trial
 “ first taking the oaths to the government,
 “ &c.

“ Provided that this act shall not ex-
 “ tend to impeachments or other proceed-
 “ ings in parliament, nor to indictments
 “ of high treason, nor any proceedings
 “ thereupon for counterfeiting his ma-
 “ jesty’s coin, great seal, privy seal, sign
 “ manual, or privy signet.

By 1 *Ann. cap. 9.* “ In any trial for trea-
 “ son or felony the witnesses for the pri-
 “ soner shall be upon oath.

By 7 *Ann. cap. 21.* “ After the decease
 “ of the present pretender no attainder of
 “ treason shall work a disinheritance of the
 “ heir, nor affect any other right, save
 “ that of the offender for his natural life
 “ only, and every person indicted for
 “ high treason or misprision of treason
 “ shall have a list of the witnesses to be
 “ produced against him on his trial, and
 “ of the jury, mentioning the places of
 “ their abode, &c. given to him together
 “ with the copy of the indictment ten days
 “ before his trial, in the presence of two
 “ credible witnesses,

C H A P. XXVI.

Concerning the judgments in high treason and the particulars relating thereunto, and to attainders.

THIS Chapter divides itself into these particulars: 1. Touching the person against whom the judgment is to be given. 2. By whom it is to be given. 3. What the form of the judgment is. 4. What the consequents thereof are.

I. Touching the person, against whom a judgment in treason is to be given.

In antient time, if a man had been slain in open war against the king either in rebellion, or adhering to the king's enemies, the king did *de facto* take a forfeiture, sometimes by presentment in *Eyre*, sometimes by presentment in the king's bench, and sometimes by inquisition by the escheator: for this see the whole pleading in the chancery, *Claus.* 29 E. 3. M. 2. & 4. for the coheirs of *Robert de Rofs* for the manor of *Werk*.

But in all other cases, whether of felony or treason, if the party had died before attainer, tho he were killed in the pursuit, *Claus.* 26 E. 3. m. 29. *pro Ricardo filio Ade Peshall*; and H. 16 E. 1. Ret. 27. *coram rege. Suffex, pro Stephano Northup* (a) M. 20 & 21 E. 1. Ret. 4. *in dorf. coram rege pro Johanne de Bekingham* (b), or tho

(a) That case was thus: *Richard de Northup de Estdene* killed *Endo de Shelf-haigre* in the reign of Henry III. for which murder he was indicted and outlawed upon an exigent awarded against him by the justices itinerant in *Suffex* anno 55 H. 3. whereupon his lands were seized, afterwards, viz. H. 16. E. 1. *Stephen*. brother and heir of the said *Richard Northup*, impleaded the chief lord of the fee *coram rege* for his said brother's lands, and alleged, *quod prædictus Ricardus obiit ante iter prædictorum justiciariorum, & quod post mortem suam possit fuit in exigendu*; upon which point the parties joined issue, and in the following Easter-term anno 16 Edw. 1. *venerunt juratores, qui dicunt super sacramentum suum, quod prædictus Ricardus Northup de Estdene obiit apud Rotherfield in comitatu prædicto ante prædictum iter prædictorum justiciariorum: Et ideo recuperatum est, quod prædictus Stephanus recuperet seisinam suam de prædictis terris, &c.*

(b) This was in the county of *Nottingham*; *Alan de Bekingham* was appeal'd by *Eve* the wife of *Peter de Dynyngton de morte prædicti viri sui* before special commissioners of *oyer and terminer*, upon which the said *Alan* was brought before them, and pleaded *se clericum esse, & non alibi quam in foro ecclesiastico inde posse aut debere respondere*; and thereupon the said justices proceeded *ex officio de morte prædictæ inquisitionem capere, & ipsum Alanum per inquisitionem illam culpabilem inde invenerunt, & talem ipsum prisonæ regis de Nottingham occasione mortis prædictæ repeni præceperunt*: *Alan* died in prison, and after his death the sheriff and coroners seized all his lands and tenements into the king's hands, *ac si idem Alanus de morte prædictæ convictus fuisset & judicium propter hoc subisset*; but upon a *monstravit* of *John*, son and heir of the said *Alan*, the matter came to be heard *coram rege*, and thereupon in *Trinity-term* following, anno 21 Ed. 1. "Rex ex gratia sua concedit, quod

tho he died after conviction and before judgment, 7 *H.* 4. 27. *a.* there ensued neither attainder nor forfeiture of lands.

But the law was practised antiently, and it seems continuing to this day, if a traitor or a felon rescue himself, or will not submit to be arrested and on resistance is slain, upon presentment thereof he shall forfeit his goods and chattles, 3 *E.* 3. *Corone* 290, 312. *Co. P. C.* p. 227. for if a person be arraigned for felony or treason, tho he be acquitted, yet if it be found he fled, he forfeits his goods, and this is but in nature of a presentment of *fugam fecit*.

But whether that presentment be traversable, *vide Stamf. P. C. Lib. III. cap. 21. (c)*

Yet the former practice by degrees grew out of use, for in 8 *E.* 3. 20. *a.* the judges would not allow an averment, that a party died in rebellion or adhering to the king's enemies, without a record of his conviction, for it is possible he might be there against his will.

But now by the statute of 25 *E.* 3. *de prodicionibus*, which requires an attainder by conviction and attainder *per gentes de leur condition* that attainder after death for adhering to the king's enemies is ousted.

And because it might be said, that an inquest before the escheator might satisfy those words, the statute of 34 *E.* 3. *cap.* 12. hath in express terms for the future ousted such attainders or convictions after the parties death, at least in other cases than of forfeitures of war, and except forfeitures of old times judged after the parties death by presentment in *Eyre*, or in the king's bench, as of felons of themselves; and therefore *Jack Cade*, who was slain in open rebellion, could not be attainted but by act of parliament, and so it is recited in the act of his attainder 29 *H.* 6. *cap.* 1.

Yet after the statute of 34 *E.* 3. the earl of *Salisbury* and others, who conspired against *Henry IV.* and levied war against him, and in their flight were taken, had their heads stricken off by those that apprehended them, without any judgment given against them, and after their death judgment of treason was given against them by the king and lords in parliament, *Rot. Par.* 2 *H.* 4. n. 30. upon which the heir of the earl of *Salisbury* brought a petition of error, *Rot. Par.* 2 *H.* 5. *part.* 1. *m.* 13. and assigned for error among other

“ quod prædictus *Johannes* filius *Alani* de
“ *Bekingham* habeat seisinam de tenementis
“ in manu domini regis existentibus, salvo
“ jure suo & hæredum suorum & aliorum,
“ cum inde loqui voluerint, &c. Et ideo

“ præceptum est vicecomiti, quod habere
“ faciat prædicto *Johanni* seisinam de præ-
“ dictis tenementis in forma prædicta cum
“ pertinentiis, &c.
“ (c) fol. 183. b.

errors, that his ancestor was dead at the time of the judgment given in parliament, but yet the judgment was affirmed; yet afterwards *Rot. Par. 9 H. 5. n. 19.* to avoid all questions he was restored by act of parliament.

Again, no man ought to be attainted of treason without being called to make his defense and put to answer, which is called *arrenatio* or *ad rationem positus*.

Claus. 1 E. 3. part. 1. m. 21. dorf. Thomas earl of Lancaster was condemned to death, as a traitor by Edward II. at Pontefract, Henry his brother brought a petition of error in the parliament of 1 E. 3. upon that judgment, the record was removed in these words.

“ Placita coronæ coram domino Edwardo rege filio domini regis Edwardi tenta in præsentia ipsius domini regis apud Pontem-fraetum die lunæ proximæ ante festum annunciationis beatæ Mariæ virginis anno regni sui quintodecimo.

“ Cum Thomas comes Lancastriæ captus pro proditionibus, homicidiis, incendiis, depredationibus, & aliis diversis felonis ductus esset coram ipso domino rege, præsentibus Edmundo comite Kant’, Johanne comite Richemund’, Adomaro de Valenciâ comite Pembrech’, Johanne de Warennâ com’ Surr’, Edmundo com’ Arundoll’,

[345] “ David com’ Athol, Roberto comite de Auegos, baronibus & aliis magnatibus regni, dominus rex recordatur, quod idem Thomas homo ligeus ipsius domini regis venit apud Burton super Trentam simul cum Humfr’o de Bohun nuper com’ Heref’, proditore regis & regni invento cum vexillis explicatis apud Pontem Burgi in bello contra dominum regem, & ibidem interfecto, & Rogerio Damory proditore adjudicato, & quibusdam aliis proditoribus & inimicis regis & regni cum vexillis explicatis, & ut de guerrâ hostiliter resistebat & impedivit ipsum dominum regem & homines & familiares suos per tres dies continuos, quo minus pontem dictæ villæ de Burton transire potuerunt, &c.—Et unde dominus rex, habito respectu ad tanta dicti Thomæ comitis facinora, & iniquitates ejus, & ejus maximam ingratitudinem, nullam habuit causam ad aliquam gratiam eidem Thomæ comiti de pœnis prædictis super ipsum adjudicatis pardonand’ in præmissis faciend’, quia tamen idem Thomas comes de parentelâ excellenti & nobilissimâ procreatus est, dominus rex ob reverentiam dictæ parentelæ remittit de gratiâ suâ speciali prædicto Thomæ comiti executionem duarum pœnarum ad judicatarum, sicut prædictum est, scilicet quod idem Thomas comes

“ non

“ non trahatur, neque suspendatur, sed quod executio tantummodo
 “ fiat super ipsum *Thomam* comitem, quod decapitetur.

“ Thereupon the record being read in præsentia domini regis, pro-
 “ cerum & magnatum regni & aliorum in hoc parlamento, he assign-
 “ ed these errors: 1. Quod erratum est in hoc, quod cum quicun-
 “ que homo ligeus domini regis pro seditionibus, homicidiis, robberiis,
 “ incendiis & aliis felonis tempore pacis captus, & in quacunque
 “ curia regis ductus fuerit, de huiusmodi seditionibus & aliis felonis
 “ sibi impositis, per legem & consuetudinem regni arrenari debet, &
 “ ad responsionem poni, & inde per legem &c. convinci, antequam
 “ fuerit morti adjudicatus; licet prædictus *Thomas* comes, homo
 “ ligeus prædicti domini regis patris, &c. tempore pacis captus, &
 “ coram ipso rege ductus fuit, dictus dominus rex pater, &c. record-
 “ abatur ipsum *Thomam* esse culpabilem de seditionibus & felonis in
 “ prædictis recordo & processu contentis, absque hoc, quod [346]
 “ ipsum inde arrenavit seu ad responsionem posuit, prout
 “ moris est secundum legem, &c. & sic absque arrenamento & res-
 “ ponsione idem *Thomas* erroneè, & contra legem terræ tempore pacis
 “ morti extitit adjudicatus, unde cum notorium sit & manifestum,
 “ quod totum tempus, quo impositum fuit eidem comiti prædicta mala
 “ & facinora in prædictis recordo & processu contenta fecisse, &
 “ etiam tempus, quo captus fuit, & quo dictus dominus rex pater
 “ recordabatur ipsum esse culpabilem, &c. & quo morti extitit adju-
 “ dicatus, fuit tempus pacis, maximè cum per totum tempus prædic-
 “ tum cancellaria & aliæ placeæ curiæ domini regis apertæ fuerunt, &
 “ in quibus lex cuicunque fiebat, prout fieri consuevit, nec idem do-
 “ minus rex unquam in tempore illo cum vexillis explicatis equitabat,
 “ prædictus dominus rex pater, &c. in huiusmodi tempore pacis con-
 “ tra ipsum comitem sic recordari non debuit, nec ipsum sine arrena-
 “ mento & responsione morti adjudicasse. Dicit etiam, 2. Quod er-
 “ ratum est in hoc, quod cum prædictus *Thomas* comes fuisset unus
 “ parium & magnatum regni, & in Magnâ Cartâ de libertatibus
 “ *Angliæ* contineatur, quod nullus liber homo capiatur, imprisonetur,
 “ aut disseisietur de libero tenemento suo, vel libertatibus, seu liberis con-
 “ suetudinibus suis, aut utlagetur, aut exulet, nec aliquo modo destru-
 “ atur, nec dominus rex super eum ibit, nec super eum mittet, nisi per
 “ legale iudicium parium suorum, vel per legem terræ, prædictus *Thomas*
 “ comes per recordum regis, ut prædictum est, tempore pacis erro-
 “ nicè morti fuit adjudicatus absque arrenamento seu responsione, seu
 “ legali

“ legali iudicio parium suorum, contra legem, &c. & contra tenorem
 “ Magnæ Cartæ prædictæ: and therefore, as brother and heir of
 “ *Thomas*, prays that the judgment be annulled, and he restored to
 “ his inheritance, & quia inspectis & plenius intellectis recordo &
 “ processu prædictis, &c. ob errores prædictos & alios in eisdem re-
 “ cordo & processu compertos consideratum est per ipsum dominum
 “ regem, procures, magnates & totam communitatem regni in eodem
 “ parlamento, quod prædictum iudicium contra prædictum *Thomam*
 “ comitem redditum tanquam erroneum, revocetur & adnul-
 [347] “ letur, & quod prædictus *Henricus*, ut frater & hæres ejus-
 “ dem *Thomæ* comitis, ad hæreditatem suam petendam & habend’ de-
 “ bito processu inde faciend’, prout moris est, admittatur, & habeat
 “ brevia cancellariæ, & quod justic’, in quorum placeis dicta recordum
 “ & processus irrotulantur, eadem recordum & processus irritari fa-
 “ ciunt & adnullari, &c. *P. 15 E. 2. B. R. Rot. 69. & Pasch. 39*
E. 3. Rot. 49. coram Rege.

This notable record, even before the statute of 25 *E. 3.* gives us an account of these things: 1. That in time of peace no man ought to be adjudged to death for treason, or any other offense without being arraigned and put to answer. 2. That regularly, when the king’s courts are open, it is a time of peace in judgment of law. 3. That no man ought to be sentenced to death by the record of the king without his legal trial *per pares*. 4. That in this particular case the commons, as well as the king and lords, gave judgment of the reversal.

John Matravers was attainted of treason in the parliament of 4 *E. 3. n. 3.* for the death of the earl of *Kent*, as hath been before shewn, *cap. 11. p. 82.* in his absence, *Rot. Par. 21 E. 3. n. 65. dorf.* the same *John Matravers* sued in parliament to reverse that judgment, and assigned for error, *qil est adjudge a mort in un parlement tenuis a Westminster en l’ absence de lui, nient indite, nient arrayne, ne appell a respons, countre le ley de realm & les usages approuves*; he did not prevail in that parliament but *Rot. Par. 25 E. 3. n. 54 & 55.* he had a restitution by the king confirmed in parliament.

Roger Mortimer earl of *March* was condemned for treason for the death of king *Edward II.* *Rot. Par. 4 E. 3. n. 1.* his cousin and heir *Roger Mortimer*, *Rot. Par. 28 E. 3. n. 9 & 10.* brought a petition of error upon that judgment, whereupon the record of his attainder

was

was removed into parliament, and there entred of record, and errors assigned; the judgment of reversal is thereupon given in this form.

“ Les queux record & judgment lues & examine in plein parlem^{en}t
 “ le dit *Roger* cosin & heyre de dit counte dit & alledge, qe les record
 “ & judgment fufdit font erroynes & defective in tous points,
 “ & nosment en tant come le dit counte estoit myse a mort & [348]
 “ disherite sans nul accusement & sans estre mesme en judgment, ou
 “ en respons, dont il prie, qe les record & judgment avant dits soient
 “ revers & adnulls, A sur ceo ove bone deliberation ed avise ed grand
 “ leisure per nostre dit seigneur le roy, prelates, princee, & ducs,
 “ countes, & barons avant dit, il peirt clerement, qe mesmes les judg-
 “ ment & records font erroynes & defectives en tous points, par quoi
 “ nostre dit seigneur le roy & les dits prelates, prince, ducs, countes,
 “ & barons par accord des chivalers des countes & des commons repel-
 “ lent, & anyentissent, & pur erroyn & irrit adjuggent les records &
 “ judgment fufdits,” and restore *Roger* the petitioner to the title of
 earl of *March*, and to the lands, &c. of his grandfather.

But if the party accused declined his appearance, it is true then, that the law of the land is, that he should be proceeded against to an outlawry, and may thereby be attainted by process of outlawry without answer, for he declines it by his own default.

And sometimes there was a more compendious way, namely, the issuing of a proclamation-writ to appear in a month, two, or three in the court of king's-bench, or that in default thereof the party should be attainted of treason or such other offense, wherewith he was charged; and this was frequently done by act of parliament in particular cases, not unlike the process enacted in case of an assault upon a member of parliament by the statute of 5 *H. 4. cap. 6.* and 11 *H. 6. cap. 11.*

Sometimes the lords house did make such a direction, as in the case of *Talbot*, *Rot. Par. 17 R. 2.* mention'd before, *p. 265.* but it could not be effectual to attain the party upon his default of appearance upon the return of proclamation without act of parliament, or process of outlawry.

Again, as a man could not be attainted of treason without arraignment, if present, or process of outlawry, if absent, so neither could he be arraigned without an accusation; and this accusation was of three kinds: 1. If he were taken with the *mainour*. 2. By way of appeal. 3. By way of indictment.

1. In antient time, sometimes as well in case of treason, as in case of felony a man, that was taken *cum manu opere*, was thereupon arraigned, an instance we have thereof, *T. 10 E. 2. Rot. 132. Bucks* cited before *p. 186.*

But this is wholly disused and ousted by the statutes of 5 *E. 3. cap. 9.* and 25 *E. 3. cap. 4.* by which statutes none shall be put to answer without indictment or presentment of good and lawful men of the neighbourhood.

2. By appeal, and this was usual at common law, as appears by *Britton, cap. 22.* but this kind of proceeding by appeal in the king's ordinary courts in cases of treason hath been long disused, and it seems is wholly taken away by the statutes of 5 and 25 *E. 3.* above-mentioned.

But yet notwithstanding that course of appeal continued still in parliament, as appears by several instances, especially in the great appeal of treason by the lords appellants in 11 and 21 *R. 2. (d)*, but by the statute of 1 *H. 4. cap. 14.* all appeals in parliament are wholly taken away, and accordingly upon reference to the judges upon the impeachment made in the lord's house by the earl of *Brissol* against the earl of *Clarendon* in the present parliament, it was resolved and reported by all the judges. *(e)*

But yet that statute hath not taken away impeachments by the house of commons in cases of treason or other misdemeanors, and therefore tho' since 1 *H. 4. cap. 14.* all appeals of treason by particular persons are taken away, and have been wholly disused, yet impeachments by the commons have been ever since very frequently used, because they are rather in the nature of grand indictments, than appeals.

3. By way of indictment, this is the regular and legal way of proceeding in case of treason.

And thus far for the persons against whom judgment of treason may be given, and the manner of deducing them unto judgment.

II. As touching the persons, by whom judgment of treason may be given; this concerns more especially the jurisdiction of courts: a word touching it.

[350] 1. Justices of peace cannot regularly arraign, try or give judgment in case of treason, unless in such cases, as are by special act of parliament committed to their cognizance, as 26 *H. 8.*

(d) State Tr. Vol. I. p. 4.

(e) State Tr. Vol. II. p. 552.

cap. 6. 5 *Eliz. cap. 1.* 13 *Eliz. cap. 2.* 23 *Eliz. cap. 1.* and some others, because their commission extends not to it, yet they may take examinations touching treason in order to the discovery thereof and preservation of the peace.

2. Justices of *oyer and terminer* may give judgment in case of high treason, for it is expressly within their commission.

3. Justices of goal-delivery may give judgment in case of treason on any person in prison before them, and that is proved by the statute of 1 *E. 6. cap. 7.* and by the constant practice.

4. Justices of *Nisi prius* may give judgment in case of treason by the statute of 14 *H. 6. cap. 1.* but *quare*, whether it be barely by force of that commission, or whether it must be by virtue of some other commission.

5. Justices of the king's bench in the court of king's bench may give judgment in case of treason, for it is the highest court of ordinary justice, especially in criminals.

6. If a peer be indicted and plead not guilty to his indictment, and is tried by his peers and found guilty, the lord steward commissioned by the king for that office gives the judgment, and orders execution.

7. If a peer be tried in parliament by the lords, they usually elect a person to be lord steward to gather up their votes and pronounce the judgment, but for the most part that steward so elected, tho in parliament, is commissioned by the king under his great seal; but of this more hereafter.

III. I come to the form of the judgment.

The judgments in case of treason are of two kinds, *viz.* the solemn and severe judgment, and the less.

The solemn or severe judgment against a man convicted of high treason is set down, *Co. P. C. p. 210. Stamf. Lib. III. cap. 19. (f), 1 H. 7. 24. a Stafford's case & alibi*, "Et super hoc visis & per curiam
"hic intellectis omnibus & singulis præmissis consideratum est,
"1. Quod prædictus *R.* usque furcas *T.* trahatur. 2. Ibi
"dem suspendatur per collum, & vivus ad terram prostratus [351]
"tur. 3. Interiora sua extra ventrem suum capiantur. 4. Ipsoque
"vivente (*g*) comburantur, & 5. Caput suum amputetur. 6. Quod-
"que corpus suum in quatuor partes dividatur. 7. Et quod caput &
"quarteria illa ponantur, ubi dominus rex ea assignare voluerit.

(*f*) p. 182. a.

(*g*) These words are so material, that the judgment was reversed for want of

them in the case of *Walcot*, 35 *Cor. 2. Show. Ca. Parl.* 127. 1 *Salk.* 632.

The king may and often doth discharge or pardon all the punishment, except beheading, and in as much as that is part of this judgment, it may be executed by the king's special command, tho the rest be omitted.

In the case of a woman her judgment is to be drawn and burnt, as well in high treason, as petit treason, and she is neither hanged nor beheaded.

The less solemn judgment is only *to be drawn and hanged*, and this is regularly the judgment in case of counterfeiting the coin of this kingdom, for that was the judgment in that case at common law, which was not altered by the statute of 25 E. 3. viz. "Super quo visis, &c. consideratum est, quod B. usque furcas de T. trahatur, & ibidem suspendatur per collum, quousque mortuus fuerit."

But the judgment in that case also for a woman is to be drawn and burnt, 25 E. 3. 85. b.

And it seems the same judgment was also for importing counterfeit coin, and yet that was not treason at common law.

And the same judgment was for counterfeiting the great or privy seal at common law, as may be easily gathered out of *Brañon, Lib. III. de Corona, cap. 3.* but expressly by *Fleta, Lib. I. cap. 22. Crimen falsi dicitur, cum quis accusatus fuerit quod sigillum regis, vel appellatus, quod sigillum domini sui de cujus familiâ fuerit, falsaverit, & brevia inde consignaverit, vel cartam aliquam vel litteram ad exheredationem domini vel alterius damnûm sic sigillaverit, & quibus casibus, si quis inde convictus fuerit, detractari meruit & suspendi.*

And accordingly the like judgment hath been given, as in case of petit treason, for counterfeiting the great seal after the statute [352] of 25 E. 3. as appears by 2 H. 4. 25. and the record is accordingly (*h*); and tho it is true my lord *Coke* saith, it is a mistake *Co. P. C. p. 15.* yet I rather think it was a mistake in my lord *Coke*, and that the judgment may be given either way, viz. *distrahatur & suspendatur*, or *distrahatur, suspendatur & decapitetur.*

In the case (*i*) 16 Jac. for counterfeiting the privy signet, which was made treason by the statute of 1 Mar. cap. 6. the judgment was the great and solemn judgment of drawing, hanging and quartering.

But suppose the judgment were so in case of counterfeiting the seal, great or privy, yet the question is whether the same judgment must be in those new treasons enacted by 1 & 2 P. & M. cap. 11. for

(b) Vide supra in notis p. 181.

(i) *Robinson's case*, 2 *Rel. Rep.* 50.
counterfeiting

counterfeiting foreign coin made current by proclamation, and also upon the statutes of 5. *Eliz.* and 18. *Eliz.* for clipping and washing, whether must they have the solemn judgment to be hanged and quartered, or only the judgment of petit treason to be drawn and hanged.

And herein by *Stamf. Lib. III. cap. 19. (k)*, and *Co. P. C. p. 17.* the judgment is to be the solemn judgment, and not the judgment to be drawn and hanged, because it is a new treason made by act of parliament, and therefore must have the solemnity of the great judgment in case of high treason.

And surely this is regularly true, and therefore in the case of popish priests, and those other acts of treason newly enacted in the queen's time, the judgment is to be drawn, hanged and quartered; but it seems to me, that the law is otherwise in relation to those new treasons enacted in the time of queen *Mary* and queen *Elizabeth* relating to coin, and that in all those cases the judgment at least may be only to be drawn and hanged; and my reasons are, 1. Because they are in cognata materia falsificationis monetæ, and therefore tho they are made treason, yet they are within the verge of the crime of falsification of money, and are to be under the same punishment. 2. It were unreasonable to think, that the parliament should make the counterfeiting of foreign coin to have a greater kind of punishment, than the counterfeiting of the coin of this kingdom, or that clipping *English* or foreign coin should have a greater punishment, than counterfeiting of the coin of this kingdom. [353] 3. As the statute of 25 *E.* 3. tho it declares as well counterfeiting of money as levying of war to be high treason, yet leaves them under the several degrees of punishments proportionable to their nature, and what they had before, so tho these statutes make those to be new treasons, that were not before, yet in as much as the punishments of treasons were not equal, but that concerning coin was a punishment of a lower allay, therefore the subject matter of those acts shall govern the degree of their punishment according to that punishment of treason, that relates to coin. 4. And accordingly in the book of *T. 6 Eliz. Dy. 230. b.* it is agreed by the justices, that the punishment *pro tonsurâ monetæ* is only to be drawn and hanged, and upon a strict search into the precedents of *Newgate* from 5 *Eliz.* downwards, tho some judgments for clipping be the solemn judgments, yet the most and latest are only to be drawn and hanged, and accordingly it was re-

resolved and done upon great deliberation lately in the king's bench upon the conviction of two *Frenchmen* for clipping of the king's coin (1).

But however it seems, that the judgment either of one kind or the other seems not to be erroneous, for hanging and drawing is part of the solemn judgment, and tho either may be perchance warrantable enough, yet certainly the judgment of petit treason in all treasons touching coin is the most warrantable and safe.

IV. I come to consider of the consequents of a judgment in treason.

If the judgment be given by him, that hath authority, and it be erroneous, it was at common law reverfible by writ of error; only the statute of 29 *Elix. cap. 2.* secures all former attainders, where the party is executed, from reversal by writ of error, but meddles not with other attainders, neither doth the statute of 33 *H. 8. cap. 20.* take away writs of error upon attainder of treason, as hath been resolved against the opinion of *Stamf. P. C. Lib. III. cap. 19. (m)*, *Co. P. C. p. 31.*

[354] But it is true, that the statutes of 26 *H. 8. cap. 13.* and 5 & 6 *E. 6. cap. 11.* take away from a person outlawed in treason the advantage of reversal of an outlawry, *because the party outlawed was out of the realm*, but extends not to other offenses.

The consequents of a judgment in treason are, 1. Corruption of blood of the party attaind. 2. Loss of dower to his wife. 3. Forfeiture to the king of all his lands, goods and chattles. 4. Execution, whereof in the next chapter.

See 4. Blackf. Com. ch. xxix. page 375, &c. ch. 23. page 314.

C H A P. XXVII.

Touching corruption of blood and restitutions thereof, loss of dower, forfeiture of goods, and execution.

THE Consequence of the judgment in high treason, petit treason, or felony, is corruption of blood of the party attaind; unless it be in such special treasons or felonies enacted by parlia-

(1) The case of *Bellew and Norman*, *Raym. 234. 1 Vent. 254. (m) p. 182. &*

ment, wherein it is especially provided, that the attainer thereof shall make no corruption of blood, as upon the statutes of 5 and 18 *Eliz.* in treason for clipping and washing of coin; and upon the statutes of 21 *Jac. cap. 26.* for acknowledging a recognizance, &c. in another's name, 1 *Jac. cap. 11.* for bigamy, and many others.

If a man be attaint of piracy before commissioners of *oyer and terminer* grounded upon the statute 28 *H. 8. cap. 15.* by indictment and verdict of twelve men according to the course of the common law, he forfeits his lands and goods by the statute of 28 *H. 8. cap. 15.* but this works no corruption of blood, because it is an offense, whereof the common law takes no notice, and tho it be enacted, they shall suffer and forfeit as in case of felony, yet it alters not [355] the offense, *Co. P. C. cap. 49. p. 112. vide tamen contra Co. Litt. §. 745. p. 391.*

If a man be attainted before the admiral of treason or felony committed upon the sea, or before the constable and marshal for treason or murder committed beyond the sea, according to the course of the civil law, it works no corruption of blood, for tho these offenses within the cognizance of the common law are felonies or treasons, yet the manner of the trial being according to the course of the civil law, the judgment thereupon, tho capital, corrupts not the blood.

If there be an attainder of treason or felony done upon the sea upon this statute of 28 *H. 8.* by jury, according to the course of the common law, it seems that the judgment thereupon works a corruption of blood, because the commission itself is under the great seal warranted by act of parliament, and the trial is according to the course of the common law, and therefore the proceeding and judgment thereupon is of the same effect, as an attainder of foreign treason by commission upon the statute of 35 *H. 8. cap. 2.* or any other attainder by course of the common law, and with this agrees *Co. Litt. §. 745. p. 391.* nay, I think farther, that if the indictment of piracy before such commissioners upon the statute of 28 *H. 8.* be formed as an indictment of robbery at common law, *viz. vi & armis & felonice, &c.* that he might be thereupon attainted, and the blood corrupted; for whatever any say to the contrary, it is out of question, that piracy upon the statute is robbery, and the offenders have been indicted, convicted, and executed for it in the king's bench, as for a robbery, as I have elsewhere made it evident,

But indeed, if the indictment before these commissioners run only

according to the style of the civil law, *viz.* *piraticè deprædavit*, then the attainder thereupon upon the statute of 28 H. 8. though it gives the forfeiture of lands and goods, corrupts not the blood, and so are those two books of the same author, *Co. P. C. cap.* 49. and *Co. Litt.* §. 745. to be reconciled, which without this diversity would be contradictory: *vide H. 13 Car. B. R. Hilliar & Moore.*

[356] By the statute of *Westminster 2. de donis conditionalibus*, if tenant in tail be attaint of felony or treason, there is no corruption of blood wrought as to the issue in tail, because the very blood as well as the land, is entailed, and yet for the advantage of the issue there is a corruption of blood, as if the tenant in tail alien with warranty and affets, and then is attainted, the lien of the warranty is gone, for that lien was not entailed. *Litt.* §. 747. but if the warranty were annexed to the gift in tail, the attainder of the donee doth not destroy the warranty to the issue, for the warranty is entailed.

The statutes of 26 and 33 H. 8. subject estates-tail to forfeiture by attainder of treason, and so the law stands at this day, notwithstanding the statutes of 1 E. 6. and 1 Mar. whereof before.

But yet these acts are not absolutely a repeal of the statute of *donis conditionalibus*, for notwithstanding the forfeiture of the lands entailed by the attainder, yet the blood is not corrupted as to the issue in tail.

And therefore if the son of the donee in tail be attainted of treason in the life of the father, and dies having issue, and then the father dies, the estate shall descend to the grandchild, notwithstanding the father's attainder; but otherwise it would have been in case of a fee-simple. 3 Co. Rep. *Dowrie's case*, 10. b.

In all cases (but only in cases of entails as before) attainder of treason or felony corrupts the blood upward and downward, so that no person that must make his derivation of descent to, or through the parties attaint, can inherit, as if there be grandfather, father, and son, the father is attainted, and dies in the life of the grandfather, the son cannot inherit the grandfather (a).

In cases of collateral descents of lands in fee simple, if there be father and two sons, and the eldest is attainted in the life of the father, and dies without issue in the life of the father, the younger son shall inherit the father, for he needs not mention his elder brother in the

conveying of his title; but if the elder son attaint survive the father but a day, and die without issue, the second son cannot inherit, but the land shall eschete *pro defectu hæredis*, for the [357] corruption of blood in the elder son surviving the father impedes the descent. 31 E. 1. Barr, 315.

But otherwise it is in case the eldest son had been an *alien nec*, for then notwithstanding such son alien were living, the land will descend from the father to the youngest son born a denizen.

If a man hath two sons and then is attaint of treason or felony, the elder son purchaseth land and dies without issue, either in the lifetime or after the death of the father, the attainder of the father is no impediment of the descent from the brother to the brother. Sir Philip Hobbys case, Co. Litt. 8.

And the same law is in case the father were first attaint, and then had issue two sons, the elder purchases lands in fee simple and dies without issue, the younger shall inherit, for though both derive their blood from the father, yet the descent from the brother to the brother is immediate, and is not impeached by the attainder of the father, this tho made a doubt, Co. Litt. p. 8. yet was agreed generally by the judges in the exchequer-chamber in the case of the earl of *Holderness (b)*.

But if there be two brothers, the elder is attaint and have issue, and dies in the life of the younger, and then the younger die without issue, the lands in fee-simple of the younger shall not descend to the nephew, for the attainder of his father is an impediment to the derivation of his descent.

And accordingly it is, if the son of the person attaint purchases lands and dies without issue, it shall not descend to his uncle, for the attainder of his father corrupted his blood, whereby the bridge is broken between the nephew and uncle, and the one cannot inherit the other, but the land shall eschete *pro defectu hæredis*: vide accordant ruled in *Courtney's case infra Co. P. C. p. 241*.

Thus far for corruption of blood.

Touching restitutions in blood they are of two kinds, by [358] pardon, and by act of parliament.

The king's pardon, tho it doth not restore the blood, yet as to issues born after it hath the effect of a restitution.

(b) P. 16 Car. 2. reported by the name of *Collingwood* and *Pace*, 2 Sid. 193. 1 Ven. 413.