

THE
THIRD PART
OF THE
INSTITUTES
OF THE
LAWS OF ENGLAND.

K. with H. 2

10. 15. 10.

THE
THIRD PART

OF THE

Institutes of the Laws of England:

CONCERNING

HIGH TREASON,
AND OTHER PLEAS OF THE CROWN.

AND

CRIMINAL CAUSES.

ECCLES. 8. II.

*Quia non profertur cito contra malos sententia, absque timore
ullo filii hominum perpetrant mala.*

Inertis est nescire quod sibi liceat.

Authore EDUARDO COKE, MILITE, J. C.

Hæc ego grandævus posui tibi, candide lector.

London:

Printed for E. and R. BROOKE, BELL-YARD, near TEMPLE-BAR.

M.DCC.XCVII.

H

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D E O,
P A T R I Æ,
T I B I.

A P R O E M E

T O T H E

THIRD PART *of the* INSTITUTES.

IN the Second Part of the Institutes we have spoken only of acts of parliament, (viz.) of Magna Carta, and many ancient and other acts of parliament, which we have explained, and therein observed which of them are declaratory of the ancient lawes of this realme, which are introductory of new, and which mixt: all of them (excepting a very few) concerning common pleas, and these two great pronouns, *meum* and *tuum*.

In this Third Part of the Institutes, we are to treat *de malo*, viz. of high treason, and other pleas of the crowne, and criminall causes, most of them by act of parliament, and some by the common law: in which cases the law of all other is most necessary to be knowne, because it concerneth the safety of his majestie, the quiet of the common-wealth, and the life, honour, fame, liberty, blood, wife, and posteritie of the party accused, besides the forfeiture of his lands, goods, and all that he hath: for it is truly said of these laws, *Reliquæ leges privatorum hominum commodis prospiciunt, hæ regię majestati, subditorum vitæ, ac publicæ tranquillitati consulunt*. And that in these cases the ancient maxime of the law principally holdeth, *Misera servitus est, ubi jus est vagum, aut incognitum*. And where some doth object
against

See the 1. part
of the Institutes
sect. 500.

*Malum non habet
efficientem, sed de-
ficientem causam.*
Evill hath not
an efficient, but
a deficient cause,
by reason of the
want of some
vertue or nota-
ble good.

Stamford.

A PROEME to the

against the lawes of England, that they are darke and hard to be understood, we have specially in these and other parts of the Institutes opened such windowes, and made them so lightsome, and easie to be understood, as he that hath but the light of nature, (which Solomon calleth the candle of Almighty God, Prov. 20. 27.) adding industrie and diligence thereunto, may easily discern the same. And that may be verified of these lawes, that *lex est lux*, Prov. 6. 23, the law it selfe is a light. See Rom. 2. 14. And when we consider how many acts of parliament (published in print) that have made new treasons and other capitall offences, are either repealed by generall or expresse words, or expired: how many indictments, attainders of treasons, felonies, and other crimes, which are not warrantable by law at this day: and how few book-cases there have been published of treasons, (though a subject of greatest importance) and those very slenderly reported: we in respect of the places which we have holden, and of our own observation, and by often conferences with the sages of the law in former times concerning criminall causes or pleas of the crowne, have thought good to publish this third part of the Institutes, wherein we follow that old and sure rule, *Quod judicandum est legibus, et non exemplis*. A worke arduous, and full of such difficultie, as none can either feele or beleeve, but he onely which maketh tryall of it. And albeit it did often terrifie me, yet could it not in the end make me desist from my purpose; (especially in this worke) so farre hath the love and honour of my country, to passe through all labours, doubts, and difficulties, prevailed with me.

This, as other parts of the Institutes, wee have set forth in our English tongue, not onely for the reasons in the preface to the first part of the Institutes alledged, which we presume may satisfie any indifferent and prudent reader: but specially this treatise of the pleas of the crowne, because, as it appeareth by that which hath been said, it concerneth all the subjects of the realme more neerly by many degrees, then any of the other.

Third Part of the Institutes.

man surnamed *Theologus magnus*, upon the second chapter of the book of Wisdome, in or about the 20. yeare of king E. 3. wrote to this effect. *Narrant historiæ quod cum Willielmus dux Normannorum regnum Angliæ conquississet, deliberavit quomodo linguam Saxoniam possit destruere, et Angliam, et Normanniam in idiomate accordari, et ideo ordinavit, quod nullus in curia regia placitaret nisi in Gallico, et iterum quod puer quilibet ponendus ad literas addisceret Gallicum, et per Gallicum Latinum, quæ duo usque hodie observantur. Hæc ille.* But the statute of 35 E. 3. cap. 15. made not long after Holcoth wrote, 35 E. 3. ca. 15. hath taken these edicts of a conqueror away, and given due honour to our English language, which is as copious and significant, and as able to expresse any thing in as few and apt words, as any other native language, that is spoken at this day. And (to speake what we think) we would derive from the Conqueror as little as we could.

When Henry the first died, all the issue male of the Conqueror, and of his sonnes were dead without issue male.

The wife of king H. 1. was Mawde daughter of Malcolme king of Scotland surnamed Canmor, and of Margaret his wife, who was the granchild of Edmond Ironside king of England, viz. the said king Edmond had issue Edward surnamed the Outlaw, because he lived a long time beyond sea with Salamon king of Hungary out of the extent of the lawes of this realme. Edward had issue the said Margaret his eldest daughter, famous for her piety and vertue; she had issue Mawde wife of king H. 1. who by her had issue Mawde, of whose English blood by Gefery Plantagenet earle of Anjou all the kings of England are lineally descended.

We have in this Third Part of the Institutes cited our ancient authors, and bookes of the law, viz. Bracton, Britton, the Mirror of Justices, Fleta, and many ancient records, never (that we know) before published, to this end, that seeing the pleas of the crown are for the most part grounded upon, or declared by
statute

A P R O E M E, &c.

statute lawes, the studious reader may be instructed what the common law was before the making of those statutes, whereby he shall know, whether the statutes were introductory of a new law, declaratory of the old, or mixt, and thereby perceive what was the reason and cause of the making of the same, which will greatly conduce to the true understanding thereof.

We shall first treat of the highest, and most hainous crime of high treason, *Crimen læsæ majestatis*; and of the rest in order, as they are greater and more odious then others.

C A P. I.

OF HIGH TREASON.

BY the statute of 25 E. 3. *de proditionibus*, is declared in 25 E. 3. cap. 2.
 certaine particular cases, what offences shall be taken to
 be treason, with this restriction, that if any other case sup-
 posed to be treason should happen before any justices, the justices
 should tarry without going to judgment of the treason, till the
 case be shewed before the king and his parliament, whether it
 ought to be adjudged treason or other felony: therefore we
 will lay our foundation upon, and begin with that act of par-
 liament, the letter whereof *in proprio idiomate* ensueth.

AVXINT pur ceo que divers opinions ount estre eins ceux
 heures qen case doit estre dit treason (1), et en quel case
 nemi, le roy a le request des seigniors et commons ad fait
 declarisment (2) que ensuist. Cest assavoir, quant home (3) fait
 compasser (4) ou imaginer (5) la mort (6) nostre seignior (7)
 le roy (8), madame sa compaigne (9), ou de leur fitzeigne et
 beire (10), ou si home violast la compaigne le roy (11), ou leigne
 file le roy nient marie (12), ou la compaigne leigne fitz (12)
 et beire le roy. Ou si home leve guerre enconter nostre seignior
 le roy (14) en son realme, ou soit aidant as enemies nostre dit
 seignior le roy en son realme, donnant a eux aid, ou confort en son
 roialme, ou per aylours (15), et de ceo provablement soit atteint
 de overt faet per gents de leur condition (16). Et si home coun-
 terface le grand (17), ou privie seale le roy, ou sa monye (18).
 Et si home apport faux money en cest roialme counterfait al
 mony danglitterre, sicome la mony appelle * Lusheburgh, ou auter
 sembleble a la dit mony danglitterre, jachant le money estre faux (19)
 pur merchander ou payment faire en discrite nostre dit seignior le
 roy et de son people. Et si home tuast chancellor, treasurer, ou
 iustices nostre seignior le roy del un banke ou del auter, iustices
in eire et daffises, et tous auters iustices assignes de oier et
 terminer †, esteaunts en leur places en fesants leur offices. Et soit
 a entendre que les cases suisnomes doit estre adjudge treason, que
 se extent a nostre seignior le roy et sa roiall majestie: Et de
 tiel manner de treason la forfeiture des escheates appertenont a
 nostre seignior le roy, cibien des terres et tenements tenus des auters,
 come de luy mesme (20).

Divers opinions.
Ad fait declarisment.

Nota, This is a
 law for the most
 part declaratory,
 but addeth also
 divers things to
 the ancient law.

* Lusheburghs,
 alias Lux n-
 burghs were a
 kinde of base
 coine to the
 likenesse of our
 English money,
 so called, be-
 cause they were
 coined in Lushe-
 burgh, which
 sometime was an
 earldome, and
 after a duke-
 dome. See Chau-
 cer in the Pro-
 logue to the
 Monk's Tale,
 the host speaking
 to a lusty monk,
 saith, God wot,
 as Lusheburghes
 pay ye, that is
 (upon the cohe-
 rence of the
 verbe) No pay-
 ment make ye
 that is not full
 and current.

† *Injuria illata
 judici seu locum te-
 nenti regis videtur
 ipse regi illata,
 maxime si fiat, in
 exercente officium.*

III. INST.

B

Item,

Item, **W**HEREAS divers opinions have been before this time, in what case treason shall be said, and in what not; the king at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth: that is to say, when a man doth compass or imagine the death of our lord the king, of my lady his queene, or of their eldest sonne and heire: or if a man doe violate the kings compaignion, or the kings eldest daughter unmarried, or the wife of the kings eldest sonne and heire: or if a man doe levie warre against our lord the king in his realme, or be adherent to the kings enemies in his realme, giving to them aide and comfort in the realme or elsewhere, and thereof be provably attainted of open deed by people of their condition. And if a man counterfeit the kings great or privie seale, or his money: and if a man bring false money into this realme counterfeit to the money of England, as the money called Lusheburgh, or other like to the said money of England, knowing the money to be false, to merchandize or make payment, in deceit of our said lord the king and of his people. And if a man slay the chancellor, treasurer, or the kings justices of the one bench or the other, justices in eire, or justices of assize, and all other justices assigned to heare and determine, being in their place doing their offices. And it is to be understood, that in the cases above rehearsed, it ought to be judged treason, which extend to our lord the king and his royall majestie; and of such treason the forfeiture of the escheates pertaineth to our lord the king, as well of the lands and tenements holden of others, as of himself.

And albeit nothing can concerne the king, his crowne, and dignity, more then *crimen læsæ majestatis*, high treason: yet at the request of his lords and commons, the blessed king by authority of parliament made the declaration, as is above-said: and therefore, and for other excellent lawes made at this parliament, this was called *benedictum parliamentum*, as it well deserved. For except it be Magna Charta, no other act of parliament hath had more honour given unto it by the king, lords spirituall and temporall, and the commons of the realme for the time being in full parliament, then this act concerning treason hath had. For by the statute of 1 H. 4. cap. 10. reciting that where at a parliament holden 21 R. 2. divers paynes of treason were ordained by statute, in as much as there was no man did know how to behave himselfe, to doe, speak, or say, for doubt of such paines: It is enacted by the king, the lords and commons, that in no time to come any treason be judged otherwise, then it was ordained by this statute of 25 E. 3. The like honour is given to it by the statute of 1 E. 6. cap. 12. and by the statute of 1 Ma. cap. 1. sess. 1. different times, but all agreeing in the magnifying and extolling of this blessed act of 25 E. 3. Of this act of 1 Maria, we shall speak more hereafter.

1 H. 4. cap. 10.

1 E. 6. cap. 12.

1 Ma. cap. 1.
Sess. 1.

hereafter. But to proceed to give a light touch how other acts of parliament have been called. The parliament holden at Oxford, *an.* 42. H. 3. was called *insanum parliamentum*. 12 E. 2. the parliament of whitebands, *albarum fibularum* or *metellarum*. 5 E. 3. *parliamentum bonum*. 10 R. 2. *parliamentum quod fecit mirabilia*, that wrought wonders. 21 R. 2. *magnū parliamentū*. 6 H. 4. *parliamentū indoctū*, lack-learning parliament. 4 H. 6. *parliamentū fustiū*, the parliament of bats. The session of parliament in *an.* 14. H. 8. called the black parliament. The act of 1 E. 6. was called *parliamentū pium*, the pious parliament. And the said act of 1 Mar. *parliamentū propitium*, the merciful parliament. The parliaments of queen Elizabeth stiled *pia, justa, et provida*. The parliament holden *anno* 21 of king James, called *foelix parliamentum*, the happy parliament. And the parliament holden in the third yeare of our soveraigne lord king Charles, *benedictum parliamentum*, the blessed parliament. The severall reasons of these former appellations appeare of record and in history, and the latter are yet fresh in memory. At the making of the statute of 25 E. 3. the high courts of justice were furnished with excellent men, *viz.* Sir William Shardshill knight (shortly written in bookes Shard) lord chiefe justice of the kings bench, and his companions justices of that court; Sir John Stonor knight, commonly written in books Stone, lord chief justice of the court of common pleas, and his companions justices of that court; and Gervasius de Wilford, lord chiefe baron of the exchequer, men famous in their profession, and excellent in the knowledge of the lawes. At the making of the statute of 1 H. 4. were Sir Walter Clopton knight, lord chiefe justice of the kings bench, and his companions justices of that court; and Sir William Thirning knight, lord chief justice of the court of common pleas, and his companions justices of that court; and Sir John Cassie knight, lord chiefe baron of the exchequer; men equall to any of their predecessors in the knowledge of the lawes. At the making of the statute of 1 E. 6. were Sir Richard Lister knight, lord chiefe justice of the kings bench, and his companions justices of that court; and Sir Edward Montague knight, lord chiefe justice of the court of common pleas, and his companions justices of that court; and Sir Roger Cholmeley knight, lord chiefe baron of the exchequer; men of that excellency, as they were worthy of the name of The worthies of the law. At the making of the statute of 1 Mar. were Sir Thomas Bromley knight, lord chiefe justice of the kings bench, and his companions justices of that court; and Sir Richard Morgan, knight, lord chiefe justice of the court of common pleas, and his companions justices of that court; and Sir D. Brook knight, lord chiefe baron of the exchequer, men renowned for their great knowledge and judgement in their profession. All these we have named in the honour of

them, and of their families and posterities, for that they in their severall times were great furtherers of these excellent lawes concerning treason. *In memoria æterna erit justus.* And all this was done in severall ages, that the faire lillies and roses of the crowne might flourish, and not be stained by severe and sanguinary statutes. But let us come to the act it selfe, and for the better understanding thereof, and of the book-cases, and other records grounded upon the same: let us divide this act concerning high treason into severall classes or heads, and then prosecute the same in order.

	By compassing or imagining the death of the	{ King, Queene, Prince, }	and declaring the same by some overt deed.
The first concerneth death,	By killing and murdering of the	Chancellor. Treasurer. Justices of the one Bench or other. Justices in eyre. Justices of assize. Justices of oier and terminer, &c.	In their places doing their offices.

The second concerneth, { the kings consort, or queene.
violation, that is, to vio- { the kings eldest daughter unmarried.
late or carnally to know { the princes wife.

The third is levying war against the king.

[4]

The fourth is adhering to the kings enemies within the realme, or without, and declaring the same by some overt act.

The fifth is counterfeiting of { the great seale.
the privie seale.
the king's coyne.

The sixth and last, by bringing into this realme counterfeit money to the likenesse of the kings coine, &c.

So as treason is *membrum divisum*, and these severall classes or heads are *membra dividenda*. And if the offence be not within one of these classes or heads, it is no treason.

(1) *Treason* is derived from [*trahere*] which is treacherously to betray. *Trahere*, betrayed, and *trahison*, per contractionem, treason, is the betraying it selfe.

*Detegit imbelles animos, nil fortiter audens
Proditio.*

*Inter leges Canoni, fo. 118. ca. 61. Proditiones (Царонб рrice)
numera-*

numerabantur inter scelera jure humano inexpiabilia. Treason is divided into two parts, *viz.* high treason, *alta proditio*, and into petit treason, *proditio parva*. The Latin word used in law is *proditio* (*à proderi*) and thereof cometh *proditoriè*, which of necessity must be used in every indictment of treason, and cannot be expressed by any other word, periphrasis, or circumlocution.

(2) *Ad fait declarifement.*] This law is for the most part declaratory of the ancient law, and therefore this word (*declarifement*) is used. But yet the studious reader shall observe, that in divers clauses it addeth to the former law, whereunto this word (*declarifement*) will sufficiently extend.

(3) *Quæ homo, &c.*] This extendeth to both sexes, *homo* including both man and woman. This act is generall, and therefore extendeth to some persons which claimed a priviledge to be exempted from secular jurisdiction. (For example,) ^a Adam de Orleton bishop of Hereford was indicted of high treason for aiding the Mortimers, &c. with men, and armour against king E. 2, &c. Whereupon he was arraigned, and alledged *se absque offensa Dei, et sanctæ ecclesiæ, et absque licentia domini summi pontificis non posse nec debere respondere in hac parte.* And thereupon the archbishop of Canterbury, York, and Dublin, and their suffragans came to the barre, claimed his priviledge, and took him away; and he was so far from punishment, as he was after translated to Worcester, and after to Winchester. But this statute (to cleare all doubts) extendeth to all persons, * as well ecclesiasticall as temporall, and so hath it ever since been put in execution, as hereafter in divers cases it appeareth. See hereafter cap. Murdre et Larceny.

A man that is *non compos mentis*, as shall be said more fully hereafter in the next section, or an infant within the age of discretion is not (*un homè*) within this statute; for the principall end of punishment is, that others by his example may feare to offend, *ut pœna ad paucos, metus ad omnes perveniat*: but such punishment can be no example to mad-men, or infants that are not of the age of discretion. And God forbid that in cases so penall, the law should not be certaine; and if it be certaine in case of murder and felony, *à fortiori*, it ought to be certaine in case of treason.

If a man commit treason or felony and confesseth the same, or be thereof otherwise convict, if afterward he become *de non sane memorie* (*qui patitur exilium mentis*) he shall not be called to answer; or if after judgement he become *de non sane memorie*, he shall not be executed, for it cannot be an example to others.

And all aliens that are within the realme of England, and whose soveraignes * are in amity with the king of England, are within the protection of the king, and doe owe a locall obedience to the king, (are *homes* within this act) and if they commit high treason against the king, they shall be punished as traytors, but otherwise it is of an enemy, whereof you may reade at large, lib. 7. Calvin's case, fol. 6, &c. and 17, &c.

(4) *Fait compasser.*] Let us see first what the compassing or imagining the death of a subject was before, and at the time of the making of this statute, ^a when *voluntas reputabatur pro facto*. And ^b Bracton saith, that *spectatur voluntas et non exitus, et nihil interest utrum quis occidat, aut causam mortis præbeat*. So as when the law was so holden, he must *causam mortis præbere*, that is, declare the

^a Rot. Romana. 17 E. 2. m. 6. Rot. Claus. 1 E. 3. part 1. memb. 13. Art. c. Cleri. 9 E. 3. cap. 15, & 16. Tr. 21 E. 3. coram rege Rot. 173.

Præscriptum seculare non competit sed. de j. q. 4. art. cum armis, &c. se. ordum leges e. d. fia.

25 E. 3. stat. 1. cap. 4 which was before this act.

Mich. 31 E. 2. coram rege Rot. 55. Buck. Abbot de Miffeny.

See in the Chap. of Clergy in what cases the priviledge of clergy is taken away.

* To persons ecclesiasticall and temporall.

Bract. lib. 3. 120, 121. 134, 135.

Britton, 5. 18.

Fleta, cap. 23. 30.

Mirror, cap. 1.

cap. 2. § 11. de

appeale de homicide, 3 E. 3.

cor. 383. 25 E. 3.

42. cor. 139. 26

aff. 27. 3 H. 7.

cap. 1. 3 H. 7.

1. 12. 21 H. 7.

31. 1. Mar. Dier.

104 Tr. 32 E. 1.

Coram rege. 15.

8 E. 2. Corone.

369. 395. Cus-

tum. de Norm.

cap. 79. 10. 94. 95.

33 H. 8. cap. 20.

1 & 2 Mar. c. 10.

To aliens.

* [5]

^a See hereafter,

cap. 73.

Where and how

voluntas reputa-

batur pro facto, by

the ancient law

and the change

thereof.

^b Bracton, fol

^c 15 E. 2. tit. Cor. 383.

^d Note this word [compassed]

* *Sed hæc voluntas non intellecta fuit de voluntate nudis verbis. aut scriptis proposita, sed mundo manifestata fuit per apertum factum, Id est, cum quis dederat operam, quantum in ipso fuit, ad occidendum, et sic de similibus.*

^e *Insidiator viarum.* See hereafter, cap. 5. De Heresie.

25 E. 3. 42. 27. aff. p. 38. 4 H. 4. ca. 2. 13 H. 4. 7. per Galcoign. But see 9 E. 4. fo. 26. *Insidiator viarum* without taking of somewhat, resolved to be no felony.

V. lib. 11. fo. 29 b. Al. Pouiter's case. Vid. postea cap. 16. Robbery, in fine.

Glanvil, lib. 14. cap. 14. lib. 1.

c. 2. Bract. lib. 3. f. 118. Britton, fol. 16 & 39 b.

Note the word *Compassé*.

Fleta, lib. 1. c. 21. Mirr cap. 1. § 5.

cap. 2 § 11.

Note this word *Compassé*.

Mirr, c. 2. § 11.

De lappeale de majestie.

Rot. pat. 25 E. 3. part 1. m. 16.

Vide Mic. 4 H. 4.

Coram rege.

Rot. 22.

See hereof more in the 57 cha. of Appelles.

Bracton, Britton, Fleta, &c.

same by some open deed tending to the execution of his intent, or which might be cause of death, as justice ^e Spigurnel reporteth a case adjudged; that a man's wife went away with her avowterer, and they ^d compassed the death of the husband, and as he was riding towards the sessions of oier and terminer and gaole-delivery, they assaulted him and stroke him with weapons, that he fell downe as dead, whereupon they fled; the husband recovered and made hue and cry, and came to the sessions and shewed all this matter to the justices, and upon the warrant of the justices, they were taken, indicted, and arraigned; and all this speciall matter was found by verdict; and it was adjudged that the man should be hanged, and the woman burnt. And Sir William Beresford, chiefe justice of the common pleas said, that before him and his companions justices of oier and terminer and gaole-delivery, a youth was arraigned, for that he would have stolne the goods of his master, and came to his masters bed, where he lay asleepe, and with a knife attempted with all his force to have cut his throat; and thinking that he had indeed cut it, he fled, whereupon the master cried out, and his neighbours apprehended the youth; and all this matter being found by special verdict, in the end he was adjudged to be hanged, &c. *Quia * voluntas reputabitur pro facto.* So as it was not a bare compassing or plotting of the death of a man, either by word, or writing, but such an overt deed, as is aforesaid, to manifest the same. So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing. ^e But if a man had imagined to murder, or rob another, and to that intent had become *insidiator viarum*, and assaulted him, though he killed him not, nor took any thing from him, yet was it felony, for there was an overt deed. But in those days, in the case of the king, if a man had compassed, or imagined the death of the king (who is the head of the commonwealth) and had declared his compassing, or imagination by words or writing, this had been high treason, and a sufficient overture by the ancient law. And herewith agree all our ancient books. Glanvil saith, *cum quis de morte regis, &c. infamatur, &c.*

Bracton in the title *de criminibus læsæ majestatis. Ipse accusatus præloquutus fuit mortem regis.* And Britton. fol. 16. *grand treason est a compasser nostre mort.* and fo. 39. b. *cyface lencusor son appeale &c. que il cya mesme cœi John pur parler tiel mort, ou tiel treason &c.* And Fleta saith in his title *de crimine læsæ majestatis, si quis mortem regis ausu temerario machinatus fuerit &c. quamvis voluntatem non perduxit ad effectum.* And the Mirror saith, *crime de majestie est un peche horrible fait al roy &c. p. ceux q. occirent le roy, ou compassant a faire.* And it will delight you (in respect of reverend antiquity) to heare a president of an appeale (which then and after was in use) of high treason, *en pleine pliam. &c. en temps roy Edmond en cestes parolx. Rocelyn icy dit vers W'aligrot illonq. q. a tiel iour tiel ane del raigne de tiel roy, en tiel lieu vint celui W'aligrot a cœi Rocelyn, et luy trova destre en compary. et en aide ensemblement ove Atheling, Thurkild, Ballard, et autres de faire prisonner, ou en tache pur occire nœ seignior le roy Edmond, ou en autre manner p. coupe feloniouslyment, et a ceo faire fuer' entreinres a ceo conseil celer, et a ceo felony issint fornit solonq. leur poier.* By all which it is manifest, that compassing, machinating, counselling, &c.

to

to kill the king, though it hath no other declaration thereof but by words, was high treason by the common law. And see hereafter, *verb. per overt fait, et de ceo provablement, &c.*

(5) *Fait compasser ou imaginer.*] So as there must be a compassing or imagination, for an act done *per infortunium*, without compassing, intent, or imagination, is not within this act, as it appeareth by the expresse words thereof. *Et actus non facit reum, nisi mens sit rea.* And if it be not within the words of this act, then by force of a clause hereafter, *viz. Et par ce que plusieurs autres, &c.* It cannot be adjudged treason, untill it be declared treason by parliament, which is the remedie in that case, which the makers of the law provided in that case. This compassing, intent, or imagination, though secret, is to be tryed by the peers, and to be discovered by circumstances precedent, concomitant, and subsequent, with all endeavour evermore for the safety of the king. This was the case of Sr. Walter Tirrel a French knight, who the first day of August *ann. 13 Willicl. 2. ann. dom. 1100* being a hunting with the king in the new forest, was commanded by the king to shoot at a hart, *exiit ergo telum volatile, et obstante arbore in obliquum reflexum faciens, per medium cordis regem sauciavit, qui subito mortuus corruit.*

It appeareth also by the Custumer of Normandy, treating of treason, and the exposition of the same, that this act was not treason. To calculate or seek to know by setting of a figure or witchcraft, how long the king shall raigne or live, is no treason, for it is no compassing, or imagination of the death of the king, within this statute of 25 E. 3. and this appeareth by the judgment of the parliament in 23 Eliz. whereby this offence was made felony during the life of queen Eliz. which before was punishable by fine and imprisonment.

The ancient law was, that if a mad man had killed or offered to kill the king, it was holden for treason; and so it appeareth by king Alfred's law before the conquest, and in lib. 4. in Beverlyes case. But now by this statute and by force of these words, *fait compasser ou imaginer la mort*, he that is *non compos mentis* and totally deprived of all compassings, and imaginations, cannot commit high treason by compassing or imagining the death of the king: for *furiosus solo furore punitur*: but it must be an absolute madnesse, and a totall deprivation of memorie. And this appeareth by the statute of 33 H. 8. for thereby it is provided, that if a man being *compos mentis* commit high treason, and after accusation, &c. fall to madnesse, that he might be tryed in his absence, &c. and suffer death, as if he were of perfect memory: for by this statute of 25 E. 3. a mad man could not commit high treason. It was further provided by the said act of 33 H. 8. that if a man attainted of treason became mad, that notwithstanding he should be executed; * which cruell and inhuman law lived not long, but was repealed, for in that point also it was against the common law, because by intendment of law the execution of the offender is for example, *ut poena ad paucos, metus ad omnes perveniat*, as before is said: but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others.

Reg. 2.

Mat. Par. pa. 51.
Holling. pa. 26. b.
Mat. Westm.
W. Malmesbury.

Custum. de Nor.
cap. 14.

Vide inter Indigamenta de 17 E. 4. de Th. Burdit. al. sed iudicandum est legibus, et non exemplis.

23 Eliz. cap. 2.

* Inter leges antiquas, cap. 4.

lib. 4. fo. 124.

Beverlyes case.

Ovid. Scilicet in superis etiam fortuna luenda est.

Nec veniam: l. so numine, casus habet.

33 H. 8. cap. 20.

* 1 & 2 Ph. and Mar. ca. 10.

* Bract. lib. 3. fo. 118.

Britton, cap. 8. a disheriter.

Glanv. lib. 1. cap. 2.

Fleta, lib. 1. cap. 21.

Mirror, ca. 1. § 5

Vers roy de la tre.

2 13 Eliz. cap. 1.
nota declared.
Brook, tit.
treason, 24.
b 1 H. 4. 1.
19 H. 6. 7.
13 H. 8. 12.
vide infra 16.
(16^e l'execut
Jait

3 Mar. Dier.
131. p. 7.

[7]

1 & 2 Phi. and
Mar. cap. 10.

Vide 11 H. 7. c 1.

4 E. 4. 1.
9 E. 4. 1. 2.

Hil. 1 Ja. in the
case of Watton
and Clark semi-
nary priests.
9 E. 4. 1. b.

See the pre-
amble. *Auxint
par ce que divers
opinions eunt estre
ens ceux heires,
que par cause doit
estre dit troyer, et
in quel cas nemi.*
Rot. puliam.
4 E. 3. num. 5.
* Eodem rot.
num. 3. and 4.

Plac. in parliam.
E. 1. anno regni
fat. 35 Nov. n.
Rot. 17. & 22.

(6) *Mort.*] * He that declareth by overt act to depose the king, is a sufficient overt act to prove, that he compasseth and imagineth the death of the king. And so it is to ^bimprison the king, or to take the king into his power, and manifest the same by some overt act, this is also a sufficient overt act for the intent aforesaid. But peruse advisedly the statutes of 13 Eliz. cap. 1. 2. & 14 Eliz. cap. 1.

(7) *Mre seignior le roy.*] These words extend to all his successors, as it hath been alwayes taken.

(8) *Le roy.*] Is to be understood of a king regnant, and not of one that hath but the name of a king, or a nominative king, as it was resolved in the case of king Phillip, who married queen Mary, and was but a nominative king, for queen Mary had the office and dignity of a king, so as she that wanted the name of a king, but had the office and dignity, was within this act of 25 E. 3. And hee that had the name, and not the office and dignity of the king was not within it. And therefore an act was made, that to compassse or imagine the death of king Phillip, &c. during his marriage with the queen, was treason. A queen regnant is within these words (*mre seignior le roy*) for she hath the office of a king.

This act is to be understood of a king in possession of the crowne, and kingdom: for if there be a king regnant in possession, although he be *rex de facto, et non de jure*, yet is he *seignior le roy* within the purview of this statute. And the other that hath right, and is out of possession, is not within this act. Nay if treason be committed against a king *de facto, et non de jure*, and after the king *de jure* cometh to the crowne, he shall punish the treason done to the king *de facto*: and a pardon granted by a king *de jure*, that is not also *de facto*, is voyde.

If the crown descend to the rightfull heire, he is *rex* before coronation: for by the law of England there is no *interregnum*: and coronation is but an ornament or solemnity of honour. And so it was resolved by all the Judges Hil. 1 Ja. in the case of Watton and Clarke seminary priests: for by the law there is alwayes a king, in whose name the lawes are to be maintained, and executed, otherwise justice should faile. Divers kings before the conquest voluntarily renounced their kingly office: and so did king H. 2. in the 16. yeare of his reigne, and Henry his sonne was created and crowned.

It appeareth by Britton, that to compassse the death of the father of the king, is treason, and so was the law holden long after that: for after king F. 2. had dismissed himselfe of his kingly office, and duty, and his sonne by the name of E. 3. was crowned, and king regnant, those cursed caitifs, Thomas Gourny, and William Ocle, and others were attainted of high treason for murdering the king's father, who had been king by the name of E. 2. and had judgement to be drawne, hanged, and quartered.

* The like judgement was given against Sir John Matrevers knight, and others, as being guilty of the death of the king's uncle, Edmund earl of Kent, which at that time (being so neer of the blood royall) was by some holden also treason. But now this act of 25 E. 3. hath restrained high treason in case of death (*al mre seignior le roy, sa consaigne, et al eigne fitz, et heire le roy.*

Nicholas de Segrave was charged in open parliament *in presentia dni. reg. comitum, baronum, et aliorum de consilio regis tunc ibi existent'*,
that

that the king in the warre of Scotland being amongst his enemies, Nicholas Segrave his liege man, and holding of the king by homage, and fealty, served him for his aid in that warre, did maliciously move contention and discord without cause, with John de Crombwell, charging him with many enormous crimes, and offered to prove it upon his body. To whom the said John answered, that he would answer him in the king's court, as the court should consider, &c. and thereupon gave him his faith. After Nich. withdrew himselfe from the king's host, and from the king's aid, leaving the king amongst his enemies, *in periculo hostium suorum*, and adjourned the said John to defend himselfe in the court of the king of France, and to give him a certaine day, *et sic quantum in eo fuit, fugiens, et subvertens dominium regis, et regni subjectioni dni. regis Francie, ad hoc sciendum, iter suum arripuit usque Doveriam, ad transitum, &c.* All which the said Nich. confessed, *et voluntate dni. regis de alto et basso inde se submisit. Et super hoc dns. rex volens habere consilium comitum, baronum, magnatum, et aliorum de consilio suo, conjunxit eisdem in homagio, fidelitate, et ligeantia quibus vivebantur, quod res sum fideliter consulerent, qualis pena pro tali facto sic cognito fieri iustitiam: qui omnes, habito super hoc diligenti tractatu, et consilio, et deliberatis, et intellectis omnibus in predicto facto contentis, &c. dicunt quod huiusmodi factum meretur amissionem vite et membrorum, &c.* So as this offence was then solemnely in parliament adjudged high treason. But this is taken away by this act of 25 E. 3. being not under any of the classes, or heads specified in this act.

[8]

So piracy by any of the king's subjects upon another, was taken to be treason before this act, for so is the book to be intended, because a pirat is *hostis humani generis*. But by this act it is not now to be judged treason. See hereafter in the chapter of Piracy.

40 Aff. 25.

One doth marie a queen regnant, if the husband compasse the death of the queene, and declare the same by overt act, he is guilty of treason, and punishable by this act, for to this and many other purposes she is a distinct person by the common law. And so if a queene wife of a king regnant, compasse the death of the king, and declare the same by overt act, she is guilty of treason, and punishable by this act. So as (that we may speak it once for all) by these and many others that might be cited, (some whereof shall hereafter be touched) the preamble of this act appeareth to be true, that divers opinions had been before the making of this act, what offences should be adjudged high treason, and what not.

Britton, cap. 8.
and other ancient
authors *ubi supra*.

This statute having restrained the compassing, &c. of death to the king, queen, and prince, it came to passe after the making of this act, that in 3 R. 2. two citizens of London, John Kerby, mercer, and John Algore, grocer conceiving malice against John Imperiall Janevoir of S. Mary in Genoa that came as ambassadour from the state of Genoa to the king (under the king's letters of safe conduct, for alliance to be had betweene the king and the duke and commonalty of Genoa aforesaid) for that the said John Imperiall had obtained a * monopolie to furnish this land (keeping his staple at Southampton) of all such wares as came from the Levant, so plentifully as was to be had in all the west parts of Christendome, the said John Imperiall was killed by them, as more at large appears by the record. And albeit the said John Imperiall was an ambassadour

Rot. parlia.
3 R. 2. num. 18.
See placita coram rege Hill.
an. 3 R. 2. (Cavendish) rot. 8.
London Holl.
cron. 3 R. 2.
pa. 422. 60. b.
&c.

* Monopoly.

nota his end.

fador

2 Regum, cap. 10.
4. 12. 31.

The killing of a
foreine ambaf-
fadour.

*Honor legati, ho-
nor mittentis est,
et proregis deus
reclundat in re-
gem.*

22 Aff. p. 49.

*Mort dun ambaf-
fad. le roy.*

fadour under the king's safe conduct, and the killing of him was *justi belli causa*, yet the killing of him was no treason, because it was not under any of the said classes or heads, until it was at that time declared by parliament in these words, *quel case examine et dispute inter les seigniors, et commons, et puis nre. al roy en pleine parliament, estoit illonques devant nre. seignior le roy declares, determinus et assentus, que tiel fait, et coupe est treason, et crime de royall majestie blemye, et quel case il ne doit allower a nulluy priviledge del chergie*, and accordingly the said Kerby and Algore were attainted of high treason in the king's bench, Hill. 3 Rich. 2. *ubi supra*: but this declaration is taken away by the statute of 1 Mariæ, as hereafter shall be said, and yet of this declaration we shall make much use hereafter.

In the 22 yeare of E. 3. which was about 3 yeares before the making of this act, one John at Hill had murdered A. de Walton the king's ambassadour, *nuncium dni. regis miss. ad mandatum regis exequendum*: this was adjudged high treason, for which he was drawne, hanged, and beheaded, &c. For true it is, *quod legatus ejus vice fungitur, a quo destinatur, et honorandus est sicut ille cujus vicem gerit, et legatos violare contra jus gentium est*. But by this act of 25 E. 3. it is restrained to the death *de nre. seignior le roy*, and therefore *prorex* is not within this statute.

(9) *Sa compaigne.*] This word *compaigne*, (which is all one with consort or wife) was used, that compassing, &c. must be during the marriage with the king, for after the king's death she is not *sa compaigne*, and therefore it extendeth not to a queene dowager, and for this cause this word *compaigne* was used in this act.

(10) *Le fitz eigne et heire le roy.*] The eldest sonne and heire of a queen regnant is within this law. Before this statute some did hold, that to compass the death of any of the king's children, was treason. But by this act it is restrained to the prince, the king's sonne, being heire apparant to the crowne for the time being: and he need not be the first begotten sonne, for the second after the decease of the first begotten without issue, is *fitz eigne* within this statute, *et sic de cæteris*. If the heire apparant to the crowne be a collateral heire apparant, he is not within this statute, untill it be declared by parliament, as it was in the duke of York's case.

Roger Mortimer, earle of March, was in *anno domini* 1487 (11 R. 2.) proclaimed heire apparant. *Anno* 39 H. 6. Richard duke of York was likewise proclaimed heire apparant. And so was John de la Poole earle of Lincolne, by R. 3. And Henry marquise of Exeter, by king Henry the eighth. But none of these or of the like, are within the purview of this statute. And now that we have handled compassings and imaginations, let us proceed to the residue which concerne acts and deeds.

Heire is here taken for heire apparant, for he cannot be heire in the life of the father.

(11) *Si home violaft la compaigne le roy.*] The Mirror saith, *Crime de majestie vers le roy p. ceux avortors q. spergissent la feme le roy*. Whereby it appeareth that this was high treason by the common law.

Violare is here taken for *carnaliter cognoscere*; and it is no treason, unlesse it be done during the marriage with the king, and extendeth not to a queen dowager, as hath been said. And if the wife

of.

Britton *ubi supra*.

[9]

Mirror, ca. 1. § 5.
Brit. c. 23.
fo. 43. a.

33 H. S. cap. 21.

of the king doth yeeld and consent to him that committeth this treason, it is treason in her.

(12) *Ou la compaigne de leur fitz et heire.*] This also extendeth to the wife of the prince during the coverture betweene them, and not to a dowager, and if the wife yeeld and consent to him that commits this treason, it is treason in her.

Heire] Here is taken *ut supra*, for heire apparant.

(13) *Ou leigne file nient marie.*] (That is,) eldest daughter not married at the time of the violation, albeit there had been an elder daughter then she, who is dead without issue. * The Mirror. *Avowteurs q. spergissent la file le roy cignes legitime, avant ceo q. el soit marie.*

And the reason that the eldest only is here mentioned, is, for that for default of issue male, she only is inheritable to the crowne.

(14) *Ou si home leva guerre enconter nostre seignior le roy.*] ^a This was high treason by the common law, for no subject can levie warre within the realme without authority from the king, for to him it only belongeth, See F. N. B. 113. a. *Le roy de droit doit savor et defender son realme vers enemies, &c.*

^b A compassing or conspiracy to levie war, is no treason, for there must be a levying of war *in facto*. But if many conspire to levie war, and some of them do levie the same according to the conspiracy, this is high treason in all, for in treason all be principals, and war is levied.

If any levie war to expulse strangers, to deliver men out of prisons, to remove counsellors, or against any statute, or to any other end, pretending reformation of their own heads, without warrant; this is levying of war against the king: because they take upon them royall authority, which is against the king. There is a diversity betweene levying of war and committing of a great riot, a rout, or an unlawfull assembly. ^c For example, as if three, or foure, or more, doe rise to burne, or put down an inclosure in Dale, which the lord of the manor of Dale hath made there in that particular place; this or the like is a riot, a rout, or an unlawfull assembly, and no treason. But if they had risen of purpose to alter religion established within the realme, or laws, or to go from town to town generally, and to cast downe inclosures, this is a levying of war (though there be no great number of the conspirators) within the purvien of this statute, because the pretence is publick and generall, and not private in particular. And so it was resolved in the case of Richard Bradshaw, miller, Robert Burton, mason, and others of Oxfordshire, whose case was, that they conspired and agreed to assemble themselves with so many as they could procure at Entlowe-hill in the said county, and there to rise, and from thence to go from gentlemans house to gentlemans house, and to cast downe inclosures, as well for enlargement of high-ways as of errable lands. And they agreed to get armour and artillery at the lord Norrys his house, and to weare them in going from gentlemans house to gentlemans house for the purpose aforesaid, and to that purpose they perswaded divers others: and all this was confessed by the offenders. And it was resolved, that this was a compassing and intention to levie war against the queen, because the pretence was publick within the statute of 13 Eliz.

cap.

Pasch. 23 H. 8. in Spilman's Reports in case of Queen Anne. 33 H. 8. ubi supra, in case of Queen Katherine.

* Mirror, ca. 1. § 5.

See Brit. cap. 23. fo. 43, 44. and cap. 29. fol. 71. 1 Mar. Parl. 2. c. 1.

^a Glanvil, lib. 1. cap. 2. l. 14. c. 1. Bracton, lib. 3. fol. 118.

Britton, f. 16, &c. Fleta, li. 1. ca. 21.

Mir. ca. 1. § 5. ^b 1 Mar. 98. b.

Dier. in Sir N. Throgmorton's case.

See 21 E. 3. 23. 21 R. 2. cap. Repeale.

1 H. 4. cap. 3. 8 E. 3. 20.

See hereafter, cap. 73. against going or riding armed.

^c See Rot. Parl. in Cro. Epiphani. 20 E. 1. Rot. 23. Humfrey de Bohun's case. 4 Eliz. 210. b. Dier.

See the statute of 1 Mar. ca. 2. By which, grand riots in some cases be made felony.

[10]

Pasch. 39 Eliz. by all the judges of England, I being attorney-general, and present.

cap. 1. (the letter whereof herein shortly followeth,) and the offenders were attainted and executed at Enslowe-hill.

And this diversity is proved by a latter branch of this act.

Et si per case ascun home de cest realme chimancha arme discovert secretment ove geuts armes, contre ascun autre, pur luy tuer, ou disrober, ou pur luy prender, ou retayner tanq. il face fine, ou ransome pur sa delivrance, nest l'entention le roy et de son conseil', q. en tiel case soit adjudge treason, mes soit adjudge felony, ou trespassse, selonq. le ley del tre. auncientment use. Whereby it appeareth, that bearing of armes in warlike manner, for a private revenge or end, is no levying of war against the king within this statute. So that every gathering of force is not high treason. And so it was resolved in parliament, in 5 H. 4. rot. parliam. nu 11. & 12. the earle of Northumberland's case.

Rot. Parl. 5 H. 4. nu. 11, 12.

13 Eliz. cap. 1. b. The indictments and attainders of treason by force of this statute are not more to be followed, because the statute which made them good, is expired. Dier, 3 & 4 Ph. and Mar. 144. 10 E. 4. 6. 1 Mar. Treason, B. 24. Ter. Mic. 8 H. 8. Mich. 7 H. 5. Coram rege. Heref. Rot. 20.

By the said statute of 13 Eliz. cap. 1. it is enacted, declared, and established, that during the naturall life of queene Elizabeth, if any within the realme or without, should compass, imagine, invent, devise, or intend to levie war against her majesty, within this realme, or without, and the same declare by writing, or word, &c. that it should be high treason: so during the life of the queen, a conspiracy to levie war was high treason, though no war were levied; and upon that law, Bradshaw, Burton, and others, were attainted of high treason, for conspiracy only to levie war. But it was resolved by all the justices, that it was no treason within the statute of 25 E. 3. as hath been said. The words in this law are [*levie guerre*] an actuall rebellion or insurrection is a levying of war within this act, and by the name of levying war is to be expressed in the indictment. If any with strength and weapons invasive, and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king within this statute of 25 E. 3.

It was resolved by all the judges of England in the reigne of king H. 8. that an insurrection against the statute of labourers, for the inhaning of salaries and wages, was a levying of war against the king, because it was generally against the kings law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do. It was specially found, that divers of the kings subjects did minister and yeeld victuals to Sir John Oldcastle, knight, and others, being in open war against the king, and that they were in company with them in open war; but all this was found to be *pro timore mortis, et quod reciperunt, quam cito potuerunt*: and it was adjudged to be no treason, because it was for feare of death. *Et actus non facit reum, nisi mens sit rea.* And therefore this in them was no levying of war against the king within this act.

(15) *Ou soit adherent as enemies nostre seignour le roy, a eux donant aide et confort en son roialme et ay'ors.*]

Adherent.] ^a This is here explained, viz. in giving aide and comfort to the king's enemies within the realme or without: delivery or surrender of the king's castles or forts by the kings captain thereof to the kings enemy within the realme or without for reward, &c. is an adhering to the kings enemy, and consequently treason declared by this act. ^b A. is out of the realme at the time of a rebellion within England, and one of the rebels flye out of the

^a Rot. Parl. 20 E. 1. nu. 2. John de Brittain's case. Rot. Parl. 33 E. 1. Rot. 6. R. b. de Ros de Werke's case. 8 E. 5. 20. 38 E. 3. 31. a. Parl. 4 R. 2. nu. 17, 18, &c. 5 R. 2. Triali 54. Hil. 18 E. 3. coram rege. Rot. 145. Eborum, 43. Ass. 28. 42. Ass. 29. Gilbert de M. was a Scot. Rot. Parl. 7 R. 2. nu. 15. 17. 24. 7 H. 4. 47. Cust. de Norm. ca. 73. ^b Vid. 13 Eliz. Dier. 298.

the realme, whom A. knowing his treason doth aide or succour, this is no treason in A. by this branch of 25 E. 3. because the traytor is no enemy, as hereafter shall be said; and this statute is taken strictly.

As enemies.] *Inimicus* in legall understanding is *hostis*, for the subjects of the king, though they be in open war or rebellion against the king, yet are they not the king's enemies, but traytors; for enemies be those that be out of the allegiance of the king. If a subject joine with a foraine enemy, and come into England with him, he shall not be taken prisoner here and ransomed, or proceeded with as an enemy shall, but he shall be taken as a traytor to the king.

^d An enemy coming in open hostility into England, and taken, shall be either executed by marshall-law, or ransomed; for he cannot be indicted of treason, for that he never was within the protection or ligeance of the king, and the indictment of treason saith, *contra ligeantiam suam debitam*.

^e David prince of Wales levied war against E. 1. this was treason, for that he was within the homage and ligeance of the king, and had judgement given against him as a traytor, and not as an enemy. And albeit in many precedents of indictments, subjects that be rebels, and traytors, &c. be called *proditores et inimici*; yet within this statute they are not *inimici*.

^f In the duke of Norfolk's case the question was, a league being between the queene of England and the king of Scots, whether the lord Herise and other Scots *in aperto praelio* burning and wasting divers townes in England without the assent of the king, were enemies in law within this statute, and resolved that they were. ^g See more hereafter in this third part of the Institutes. cap. 49. of Piracy, &c. upon the statute of 28 H. 8. cap. 15.

On per aйлors.] That is to say, out of the realme of England. But then it may be demanded, how should at this time this forraigne treason be tried? And some ^h of our books doe answer, that the offender shall be indicted and tried in this realme where his land lyeth, and so it was adjudged in 2 H. 4. But now by the statute of 35 H. 8. cap. 2. (which yet remains in force) all offences made or declared, or hereafter made or declared treasons, misprisions of treason, and concealments of treason, committed out of the realme of England, shall be inquired of, heard, and determined, either in the king's bench or before commissioners in such shire as shall be assigned by the king. If it be before commissioners, it hath been commonly used, that the king doth write his name in the upper part of the commission. But in the case of Patrick o'Cullen an Irishman, the queene did put her signature to the warrant to the lord keeper, and not to the commission: ^{*} and it was holden by the justices that the one way and the other was a sufficient assignement by the king within the statute of 35 H. 8.

ⁱ It was resolved by all the judges of England, that for a treason done in Ireland the offender may be tryed by the statute of 35 H. 8. in England, because the words of the statute be, all treasons committed out of the realme of England, and Ireland is out of the realme of England. And so it was resolved in Sir John Parrot's case. And our word here [*per aйлors*] is as much as out of the realme

See hereafter,
35 H. 8. cap. 2.

^c 43 Aff. 28, 29
33 H. 6. 1.
19 E. 4. 6. a.
and b. 4 Mar.
Treaton. Br. 32.
1 Mar. ibid. 27.
21 E. 3. 23.
22 Aff. p. 49.
13 El. Dyer, 298.
Ex libro de Griffin
de Perkin
Werbeck.

^d Dier, 4. Mar.
fo. 145. a.
Lib. 7. fo. 6. b.
Calvin's case.

^e Fleta, lib. 1.
c. 16.

^f Mich. 13. & 14.
Eli. per Justice.
19 E. 4. 6. b.
18 H. 6. ca. 4.
20 H. 6. cap. 1.

^g 27 E. 3. cap. 13.
31 H. 6. cap. 4.
7 E. 4. 14.
13 E. 4. 9.
21 E. 3. 16, 17.
Regist. 129. Fit.
N. B. 114.

^h 4 Aff. p. 15.
5 R. 2. *ubi supra*.
19 E. 4. 6. b.
Dier. 3. Mar. 132.
Pasch. 2 H. 4.
coram rege.
Rot. 8. Wallia.
35 H. 8. cap. 2.
3 Mar. *ubi supra*.
13 Eliz. Dier.
298. Stanford
Pl. Cor. fo. 90. a.
and b. See the
first part of the
Institutes, 440.

^{*} Hil. 36 Eliz. in
the case of Pa-
trick o'Cullen,
for a treason at
Brussels *in parti-*
bus marinis.

ⁱ 33 El. in Or-
nick's case. lib. 7.
f. 23. Calvin's
case. *Vid.* Dier.
Mich. 19 & 20
Eliz. fo. 360.
lib. 11. fo. 63. in
Doct. Foster's
case.

28 H. 8. ca. 15.
This act concerning treasons is not taken away by the statute of 35 H. 8. cap. 2. *Vide infra* cap. 49. fo. 181. of Piracy, &c. Vid. 5 Eliz. c. 5.

[12]

See 1 E. 6. ca. 12. the last clause. 5 E. 6. ca. 11. 1 & 2 Ph. & Mar. ca. 10. and 11. 1 Eliz. cap. 6. 13 Eliz. cap. 1. Stanf. pl. Cor. 89. and 164. Br. coron. 4 Mar. 220. Dier. 2 Mar. fo. 99.

Rot. parl. an. 33 E. 1. Rot. 6. Jo. Salvyn's case. ^h 43. Aff. 28. 8 E. 3. 20. 7 H. 4. 27. 34 E. 3. cap. 12. Lib. 4. fo. 57. the Sadler's case.

* 29 H. 6. cap. 1.

Vide supra verbo ¶ Mort. fo. 6. *Vide* 21 R. 2. cap. 3. but it is repealed by 1 H. 4. ca. 3. * Hill, 36 Eliz. Doctor Lopes case, 13 Eliz. c. 1. Brooke, Treason, 24.

Hill. 1 Ja. R. Lo. Cobham's case.

realme of England. See Pasch. 2 H. 4. *coram rege rot.* 8. Salop. Treason in Wales.

^k All treasons done upon the sea shall be inquired, heard, and determined in such shires and places of the realme as shall be limited by the king's commission, in like forme and condition, as if the same had been done upon the land, &c. after the common course of the lawes of this land. And by the preamble it appeareth, that it could not be tryed by the common law, but by the civill law before the lord admiral. See hereafter in the exposition of the statute of 28 H. 8. cap. 15. *et infra*, cap. 40.

(16) *Et de ceo provablement soit attainé ou overt fait per gentes de leur condition.*] In this branch four things are to be observed, & first this word [*provablement*] provably, that is, upon direct and manifest proof, not upon conjectural presumptions, or inferences, or straines of wit; but upon good and sufficient proofe. And herein the adverb [*provablement*] provably, hath a great force, and signifieth a direct and plain proof, which word the king, the lords, and commons in parliament did use, for that the offence was so heinous, and was so heavily, and severely punished, as none other the like, and therefore the offender must provably be attained, which words are as forcible, as upon direct and manifest proof. Note, the word is not (probably) for then *commune argumentum* might have served, but the word is [*provably*,] be attained.

2. This word (*attainé*) necessarily implyeth that he be proceeded with, and attained according to the due course, and proceedings of law, and not by absolute power, or by other meanes, * as in former times had been used. ^h And therefore if a man doth adhere to the enemies of the king, or be slaine in open warre against the king, or otherwise die before the attainder of treason, he forfeiteth nothing, because (as this act saith) he is not attained: wherein this act hath altered that, which before this act, in case of treason, was taken for law. And the statute of 34 E. 3. cap. 12. saves nothing to the king, but that which was in *esse*, and pertaining to the king at the making of that act. And this appeareth by a judgement in parliament in *anno* 29 H. 6. cap. 1. that * Jack Cade being slaine in open rebellion could no way be punished, or forfeit any thing, and therefore was attained by that act of high treason.

3. *Per overt fait,*] *per apertum factum.* This doth also strengthen the former exposition of the word (*provablement*,) that it must be provably, by an open act, which must be manifestly proved. As if divers doe conspire the death of the king, and the manner how, and thereupon provide weapons, powder, * poison, assay harness, send letters, &c. or the like, for execution of the conspiracy. Also preparation by some overt act, to depose the king, or take the king by force, and strong hand, and to imprison him untill he hath yeilded to certaine demands, this is a sufficient overt act to prove the compassing, and imagination of the death of the king: for this upon the matter is to make the king a subject, and to dispoyle him of his kingly office of royall government. And so it was resolved by all the judges of England. Hill. 1 Jac. *regis*, in the case of the lo. Cobham, lord Gray, and Watson and Clarke seminary priests: and so had it been resolved by the justices, Hill. 43. Eliz. in the case of the earles of E. and of S. who intended to goe to the court

court where the queen was, and to have taken her into their power, and to have removed divers of her counsell, and for that end did assemble a multitude of people; this being raised to the end aforesaid was a sufficient overt act for compassing the death of the queen. And so by woful experience in former times it hath fallen out, in the cases of king E. 2. R. 2. H. 6. and E. 5. that were taken, and imprisoned by their subjects. And this is made more plain by the legall forme of an inditement of treason: for first it is alledged according to this act, *quod * proditorie compassavit, et imaginatus fuit mortem et destructionem dni. regis, et ipsum dom. regem interficere, &c.* in the second part of the inditement is alledged the overt act, *et ad illam nefandam, et proditoriam compassationem, imaginationem, et propositum suum perficiend' et perimplend'* and then certainly to set downe the overt fact for preparation to take, and imprison the king, or any other sufficient overt act, which of necessity must be set downe in the inditement. Hereby it appeareth how insufficient many inditements were of high treason, wherein it was generally alledged, that *per apertum factum compassavit et imaginatus fuit mortem dom. regis, &c.* * For example *termo. Mic. anno 5 E. 6.* Edward duke of Somerset was indited before commissioners of oyer and terminer in London, *quod ipse dum præ oculis suis non habens, sed instigatione diabolica seductus, apud Holborne in parochia Sancti Andreæ infra civitatem London, viz. 20 die Aprilis anno regni domini regis Edw. sexti quinto, et diversis diebus et vicibus antea et postea false, maliciose, et proditorie * per apertum factum circumivit, compassavit, et imaginavit cum diversis aliis personis prædictum dominum regem de statu suo regali deponere et deprivare, &c.* Which indictment, and all others of like forme were against law, as hath been said, and of the matter of this indictment that noble duke was by his peers found not guilty. But then it may be demanded, for what offence he had judgement of death, and 2. what law made it an offence. The offence appeareth in his indictment, for the former part thereof contained high treason, whereof he was acquitted, and the latter part contained one only offence of felony (whereof he was found guilty) in these words, *et ulterius juratores præd. præsentant, quod præfatus Edwardus dux Somerset deũ præ oculis suis non habens, sed instigatione diabolica seductus 20 Maii an. regni dicti dom. regis Edwardi sexti quinto suprascripto, ac diversis aliis diebus et vicibus antea et postea apud Holborn in præd. paroch. Sancti Andreæ in civitate London, et apud diversa alia loca infra civitatem London præd. felonice ut felo dicti dom. regis per aperta verba et facta procuravit, movit, et instigavit complurimos subditos ipsius domini regis ad insurgendum, et apertum rebellionem et insurrectionem infra hoc regnum Angliæ movend' contra ipsum dominum regem, et ad tunc et ibid. felonice ad capiendum et imprisonandum prænobilem Johannem comitem Warwick de privato consilio domini regis ad tunc existen', contra pacem dicti domini regis coronam et dignitatem suam, et contra formam statuti in hujusmodi casu editi et provisi.* The statute whereupon this indictment was intended to be grounded, was the branch of the statute of 3 and 4 E. 6. by which it is provided, "That if any person or persons by ringing of any bel, &c. or by malicious speaking or uttering of any words, or making any outcry, &c. or by any other deed or act shall raise or cause to be raised or assembled any persons to the number of 12 or above, to the intent that the same persons should

* In ancient time traditiosè, et felonice. parl. 33 E. 1. rot. 6. Robert de Ros his case, but now proditorie is necessarily required.

Vide Britton, fo. 16. et 19.

1 Mar.

Br. treason. 24.

* Ter. Mic. 5 E. 6.

Lib. Intr. Coke, fo. 482.

Sanguinis O maledicta suis, &c.

‡ [13]

* Per apertum factum.

Vid. hereafter ca. 5. de Heresie, generall indictments against Lollards, &c.

The residue of the indictment of the duke of Somerset.

To take and imprison one of the privie councill. Contra formam statuti. 3 & 4 E. 6. cap. 5.

should do, commit, or put in ure any of the acts and things above mentioned (whereof to take and imprison any of the kings most honourable privie counsell was one) and the persons to the number of 12 or above so raised and assembled after request and commandement (in such sort as in that act is prescribe) shall make their abode and continue together, as is aforesaid, (in the act) or unlawfully perpetrate, doe, commit, or put in ure any of the acts or things aforesaid, that then all and singular persons by whose speaking, deed, act, or any other the meanes above specified any persons to the number of 12 or above, shall be raised or assembled for the doing, committing, or putting in ure any of the acts or things above mentioned, shall be adjudged for his so speaking or doing a felon, and suffer execution of death as in case of felony, and shall lose his benefit of sanctuary and clergy." Hereby it doth manifestly appeare, that the truth concerning this nobleman's attainder, and execution in divers things, is contrary to the vulgar opinion, and some of our chronicles, and in some points contrary to law. First, that for the felony made by the said branch of the said act he could not have had his clergie, for clergie in that case is expressly ousted by the said act. 2. That he was not indicted for going about, &c. the death of the earle of Warwick then of the kings privie counsell, but only for his taking or imprisonment, and therefore could not be indicted upon the statute of 3 H. 7 as some have imagined. 3. That the indictment is altogether insufficient, for it pursueth not the words or matter of the said branch of the said act, as by comparing of them it manifestly appeareth; which (we being desirous that truth may appeare in all things) we have thought good upon this occasion to adde for advancement of truth. 4. That being but attainted of felony, he could not by law be beheaded, as elsewhere we have shewed. And this act that created the felony saith, that such a felon shall suffer execution of death, as in case of felony. 5. Lastly, this whole act was justly holden to be a doubtful and dangerous statute, and therefore was deservedly repealed. And after the fall of this duke, see the preamble of the statute of subodie of 7 E. 6.

And now to returne to cases of high treason. If a man be arraigned upon an indictment of high treason, and stand mute, he shall have such judgement, and incurre such forfeiture, as if he had been convicted by verdict, or if he had confessed it. For this standeth well with this word *prohabiment*, for *fatetur facinus, qui iudicium fugit*: but otherwise it is in case of petit treason, murder, or other felony.

If a subject conspire with a foraine prince beyond the seas to invade the realme by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the king, for by this act of parliament in that case there must be an overt act. * *Qui capiti, aut saluti regis perfidiose sive solus, sive servis aut scariis mercede conductis stipatus infidiabitur, vita et fortunis ejus omnibus privator.* So as thereby an overt act was required.

The composition and connexion of the words are to be observed, viz. [thereof be attainted by overt deed.] † This relateth to the severall and distinct treasons before expressed), and specially to the compassing and imagination of the death of the king, &c. for that it is secret in the heart) and therefore one of them cannot

3 H. 7. ca. 14.

Lib. 9. fo. 114.
in feignior Sanchez's case.

1 Mar. cap. 12.
1 Eliz. 1. 16.
7 E. 6. ca. 12.

[14]

13 Eliz Dier, 298.
13 E. 2. cap. 1.
Nota bene. Vide supra verbo Mort.

* Inter leges Alveledi, cap. 4.

† So resolved by the justices Pasc. 35 Eliz. which we heard and observed.

be an overt act for another. As for example: a conspiracy is had to levie warre, this (as hath been said and so resolved) is no treason by this act untill it be levied, therefore it is no overt act or manifest proove of the compassing of the death of the king within this act: for the words be (*de ceo, &c.*) that is, of the compassing of the death. For this were to confound the severall classes, or *membra dividenda, et sic de cæteris, &c.*

^a Divers latter acts of parliament have ordained, that compassing by bare words or sayings should be high treason; but all they are either repealed or expired. And it is commonly said, that bare words may make an heretick, but not a traytor without an overt act. And the wisdom of the makers of this law would not make words only to be treason, seeing such variety amongst the witnesses are about the same, as few of them agree together. But if the same be set downe in writing by the delinquent himselfe, this is a sufficient overt act within this statute.

^b Cardinall Poole, albeit he was a subject to H. 8. and of the kings blood, (being descended from George duke of Clarence, brother to king E. 4.) yet he in his booke of the supremacy of the pope, written about 27 H. 8. incited Charles the emperour, then preparing against the Turke, to bend his force against his naturall soveraigne lord and countrey; the writing of which booke was a sufficient overt act within this statute: and to move the emperour the rather in that book, he made H. 8. almost as ill as the Turk, in these words, *in Anglia sparsum nunc est hec semen, ut vix à Turcico interrosi queat, idque autoritate unius coaluit.*

^c In the preamble of the statute of 1 Mar. concerning the repeale of certaine treasons, &c. It is agreed by the whole parliament, that lawes justly made for the preservation of the common-wealth without extreame punishment, are more often obeyed and kept, then lawes and statutes made with great and extreame punishments: and in speciall, such lawes and statutes so made: whereby not only the ignorant and rude unlearned people, but also learned and expert people minding honesty, are oftentimes trapped and snared, yea, many times * for words only, without other fact or deed done or perpetrated: therefore this act of 25 E. 3. doth provide, that there must be an overt deed. But words without an overt deed ^d are to be punished in another degree, as an high misprision.

Per gentes de leur condition.] That is, *per pares*, or their equals, whercof we have spoken before in the exposition of the ^e 29 chapter of Magna Carta. verb. *per judicium parium suorum*, and more shall be said hereafter. This branch (*per gentes de leur condition*) extendeth only to a conviction by verdict, whereof the statute particularly speaketh; but yet where the party indicted confesseth the offence or standeth mute, he shall have judgement as in case of high treason. For this branch being affirmative, is taken *cumulatively* and not *trinitivè*. And therefore seeing upon confession, or standing mute, the judgment in case of high treason was given at the common law, this act being, as it hath been said, affirmative, taketh not away the same: and (to say once for al) the clause hereafter of restraint of like cases, &c. extends onely to offences, and not to tryalls, judgements, or executions.

^a 26 H. 8. cap. 13.
1 E. 6. cap. 13.
1 & 2 Ph. and
Mar. cap. 9, 10.
1 Eliz. cap. 6.
13 Eliz. ca. 1, &c.
14 Eliz. cap. 1.

^b See the fourth part of the Institutes, c. 26. Brook, treason 24 writing of letters.

^c 1 Mar. cess. 1. c. 1. See the statute of 3 H. 7. hereafter, cap. 4. directly in the point by the judgement of the parliament. *Nota*, this act of 25 E. 3. saith, *per overt fact, per apertum factum*, and not *per apertum dictum*, by word or confession.

See 25 H. 8. c. 12. Eliz. Barton, Edw. Locking, and others attainted by parliament for divers words and conspiracies which being not within this act without an overt act they could not be attainted by the common law.

* *Nota.*

^d See in the chapter of Misprision.

[15]

^e Mag. Cas. ca. 29.

Bracl. l. 3.
fo. 138.
Brit. fo. 10, &c.
Bracl. l. 5.
fo. 414.
Fleta, l. 1. ca. 27.
Minor, ca. 1. § 6.
de tauloner e.
29 Aff. pa. 49.
* 1 E. 3. tit. Chre.
F. 13. 22 Aff.
Pl. 49.

2 R. 3. 9.

3 H. 7. 10. 2.

40 Aff. p. 33.

Rot. Claus.
42 E. 3. nu. 8.
in coro.

2 H. 4. fo. 25.

*Errores ad sua
principia referre,
est resillere*
To bring errors
to their begin-
ning, is to see
their last.

(17) *Si homo counterface le grand seale.*] All our ancient authors agree that this was high treason by the common law, and for this offence his judgement was to be drawn, hanged, and quartered, at the common law, as in other cases of high treason, (the counterfeiting of the kings mony excepted.) See the second part of the Institutes. W. 1. cap. 5.

* In ancient time every treason was comprehended under the name of felony, but not *à contra*: and therefore a pardon of all felonies was sometime allowed in case of high treason. But the law is, and of long time hath been otherwise holden: and if the inditement were *felonice*, and not *proditione*, (for the king may lessen the offence, if it please him) then the pardon of felonies is good at this day, for no inditement can be of high treason without this word (*proditione*;) and *in quilibet proditione implicatur felonia, quia in quilibet brevi de exigendo super quolibet indictamento le proditione proclamator facit sic*, I. B. an exigent on thy head of treason and felony.

A compassing, intent, or going about to counterfeit the great seale is no treason, but there must be an actuall counterfeiting, also it must be to the likeness of the kings great seale, the words be, *counterface le grand seale le r y.*

Now it is to be seen what shall be said a forging, or counterfeiting of the great seale. If the lord chancellor, or lord keeper put the great seale to a charter &c. without warrant, this is no treason, because the great seale is not counterfeited. But it seemeth by Briton fo. 10. b. that it was treason at the common law, and of that opinion is Fleta fo. 29. a. but it is no treason now (without question) by the negative clause of this act.

If a man take wax lawfully imprinted with the great seale from one patent, and fix it to a writing purporting a grant from the king, there have been divers opinions in this case what the offence is, which we will rehearse.

In 40 Aff. which was about 15 years after the making of this act, it was not holden high treason, but a great misprision, for that it is no counterfeiting of a new, but an abuse of the true great seale.

In 42 E. 3. the abbot of Buer caused Rob. Rigge his com-moigne to rase a charter of R. 1. and put out the manner of Fistruda, and in place thereof put in Etleghe. And this offence was heard, and sentenced before the king and his counsell in the star-chamber, as a great offence and misprision: for if it had been high treason, it should have had another tryall, and yet this was a great abuse of the great seal.

2 H. 4. The taking of the great seale from one patent and fixing it to a commission to gather mony, &c. was adjudged to be such an offence, as the offender had judgement to be drawne, and hanged. The record of which case we have perused, and the effect thereof is this. The partie is indited generally for counterfeiting of the great seal, whereunto he pleaded not guilty, and the jury found him not guilty of the counterfeiting of the great seale, as was supposed by the inditement, and found further specially, that he tooke the great seale from one patent, and put it to the commission, and that the party put the same in execution, and there judgement was given, that he should be drawne and hanged: which (whatsoever the offence was) ought not to have been given upon
this

this verdict, the jury finding him not guilty of the offence alledged in the inditement: and besides the judgement is such, as is given in case of petit treason, and not of high treason. Hereby it appeareth how dangerous it is for any to report a case by the ear, specially concerning treason, unlesse he had advisedly read the record: for (as I take it) the misreport of this case hath hatched errors, and he mistooke the judgment, if it had been high treason, for then it should have been drawne, hanged, and quartered.

37 H. 8. Br. tit. Treason. A chaplain had fixed such a great seale to a patent of dispensation with non-residence, and this was holden a misprision, and not high treason, for it was an abuse of the great seale, and no counterfeiting of it. Stanford saith that it was adjudged in his time according to the book of 2 H. 4. *et sic ex errore sequitur error.*

G. Leak a clerk of the chancery joyned two cleane parchments fit for letters patents so close together with mouth gliew, as they were taken for one, the uppermost being very thinne, and did put one labell through them both, then upon the uttermost he writ a true patent, and got the great seale put to the labell, so the labell and the seale were annexed to both the parchments, the own written, and the other blank: he cut off the glewed skirts round about, and tooke off the uppermost thinne parchment (which was written, and was a true and perfect patent) from the labell, which with the great seale did still hang to the parchment, then he wrote another patent on the blancke parchment, and did publish it as a good patent. Hereupon two questions were moved. 1. Whether this offence be high treason or no. 2. If it be high treason, then whether he may be indited generally for the counterfeiting of the great seale, or els the speciall fact must be expressed. And upon conference had between the judges, upon great advisement and consideration it was in the end, concerning the first point, resolved by the justices (saying a very few) upon the authorities aforesaid, and for that it was no counterfeiting of the great seale within this statute, that this offence was neither high treason, nor petit treason, because it is not within either of the branches of this statute, but it is a very great misprision, and the party delinquent liveth at this day. As to the 2. point it was resolved, that if the speciall matter had amounted to counterfeiting of the great seale in law within this act, then he might have been generally indited of high treason for counterfeiting the great seale. As if a man in an affray kill a constable that comes to keep the kings peace without any expresse malice prepenfed, this is murder in law, and yet the delinquent may bee generally indited of murder by malice prepenfed.

And ^a Fleta who wrote before this act telleth us, that *crimen falsi dicitur, cū quis illicitus (cui non fuerit ad hoc data auctoritas) de sigillo regis repto vel invento, et brevia cartasque consignaverit.* But whatsoever offence it was before the making of this statute, it is after this statute no high treason, because it is no counterfeiture of the great seale, but a misusur thereof.

Qui ^b convictus fuerit pro falsatione sigilli dom. regis, quod tradatur episcopo Sarum, qui eum petiit ut clericum suum sub pœna et in forma qua decet, quia videtur concilio quod in tali casu non admittenda est purgatio, &c. Hereby it should appeare that in those dayes a man might have had his clergie for this offence, and therefore as some hold, it

[16]

37 H. 8. Br.
Treason.Stanf. Pl. Coron.
fo. 3. c.Bract. 3. agreeth
with *Ubi supra.*
Leak's case. Hil
4 Ja. R.40 Aff. 33
42 E. 3 Rot. Ch
Ubi supra.
37 H. 8. Br. dev.^a Fleta, l. 1. c. 22.
Britton, fo. 10. b.
See before, fo. 15.^b Rot. Parl. Hil.
18 E. 1. fo. 92.
nu. 125.

^c 1 Mar. cap. 6.
1 & 2 Ph. and
Mar. ca. 11.

* 19 H. 6. 47.
3 H. 7. 10. Stanf.
Pl. Coron. 3. vide
postea, cap. 64.
*principall and ac-
cess.* See Mich.
13 & 14 Eliz.
Dier, 296.
Conier's case.

^d See Mat. Par.
anno 34 H. 3.
pag. 753 *de pe-
cunia as probata
et reprobata.*
Et Walsingham,
28 E. 1. anno
Dom. 1300. stat.
31 E. 1. *de weightis
et measures.*
Rall. 7.

[17]

^e Vet. Magna
Chart. ca. Itin.
fo. 151. a.
22 Aff. p. 49.
3 H. 7. 10.
25 E. 3. 42. b.
Coro. 130.

^f 6 H. 7. 13.
1 R. 3. 1.

^g Walf. Hyp.
Neustrie, pa. 69.
1278. 6 E. 1.

^h 3 H. 7. 10. a. b.

ⁱ See inter leges
Adelstani,
ca. 14.

Canuti, cap. 61.
Britton, cap. 5.
fo. 10. b.

See the Mirror,
ca. 1. § 6. De la
money falsifie acc'
with 3 H. 7. and
ca. 5. § 1. and
Vicia, ca. 22. acc.

^b Mirr. ca. 1. § 3.
inter Artic. per-
viels royes or-
deinus.

Rot. Par. 17 E. 1.
nu. 15. Vide hic
postea, cap. 31.
45 E. 3. ca. 13.
a H. 5. cap. 11.
Stat. 1.

See the second part of the Institutes, ca. 20. Artic. super Cart. and the exposition upon the same.

^c 3 H. 5. ca. 6. 1 E. 6. cap. 12. 5 Eliz. cap. 11.

gain. ^e 18 Eliz. cap. 1.

^f 11 Eliz. cap. 3.

^d Nota, for wicked lucre and
^g See hereafter, cap. Principall

and Accessary.

was not then holden to be high treason, and herein also is the pre-
amble of this act, concerning divers opinions in case of treason,
verified.

This statute naming the great seale and privie seale, the forging
and the counterfeiting of the privie signet, or of the signe manuall
was not within this statute. But by the ^e statute of 1 Mar. it is
made high treason in both cases. Albeit that in this act there is
no mention made of ^a ayders and consenters to this counterfeiting,
yet they are within the purview of this statute, for there be no ac-
cessaries in high treason.

(18) *Ou sa^d monye.* ^e This was treason by the common law,
as it appeareth by all the said ancient authors, *ubi supra (verbo, si
homo c. interface le grand seale.)* and therefore the opinion in 3 H. 7.
is holden for no law, that it was but felony before this act. ^f The
forging of the kings coine, is high treason, without utterance of it,
for by this act the counterfeiting is made high treason. See the
second part of the Institutes. W. 1. cap. 15. ^g See Thom. Walsing-
ham. *Hypodigme Neustrie. an. dom. 1278. jud. i pro tonsura monetæ in
magna multitudine ubique per Angliam suspenduntur, &c.*

^h *Si ipse qui facit monetam auctoritate regis, &c. illam facit minus
in pendere vel allaiata, viz. alumino vel alio falso metallo contra ordina-
tionem, &c.* This is there holden to be high treason, and by that
book taken for a counterfeiter of the kings money within the pur-
view of this statute. ^a And herewith agreeth Britton, who saith,
*des fauceres q. ont nostre monye counterfet ou plus de allaye mise in nostre
monye, q. nest. r. ne serroit sol. n. 7. le forme et usage de nostre realme.*

^b *Orde. ne fuit q. nul roy de cest realme ne puit changer sa money, ne
impairer, ne amender, ne auer monye faire q. de ore et argent, sans lassent
de tous les counties.* It was ordained, that no king of this realme
might not change his money, nor impaire, nor amend the same,
nor other money make then of gold or silver, without assent of
parliament.

^c Clipping, washing, and filing of the money of this realme,
was no counterfeiting of it within this act. And therefore being
a like case, it was declared by parliament in anno 3 H. 5. cap. 6.
to be high treason: but that act being repealed by 1 *Marie* the
statute of 5 Eliz. cap. 11. hath ^d declared, that clipping, washing,
rounding, or filing, for wicked lucre and gaine, &c. to be high
treason. And by the statute of ^e 18 Eliz. it is declared, that if
any person for wicked lucre or gaines-sake, shall by any art,
wayes, or meanes whatsoever, impaire, diminish, falsifie, scale, or
lighten the kings money, &c. it is high treason, for being a like
case, it was to be declared by parliament.

Forging ^f or counterfeiting of foraine money, which is not cur-
rant within the realme, is misprision of treason, and the offender
shall forfeit, as for concealment of high treason.

Sa money ^g This extendeth only to the kings money coyned
within this realme; and therefore after this statute, if a man had
counterfeited the money of another kingdome, though it were
currant within this realme, it was no treason, untill it was so de-

clared

clared by parliament ^h in an. 1 Mar. and in an. 1 & 2 Ph. and M. and the said acts of 5 Eliz. & 18 El. do extend to forrain coyne currant within this realme. And it is holden, that at the making of this statute of 25 E. 3. there was no money currant within this realme, but the kings own coyne. ⁱ See the statute called *statutum de moneta magnum, et statutum de moneta parvum*. And it is to be knowne, that if any doe counterfeit the kings coyne contrary to this statute of 25 E. 3. ^k he shall have the punishment of his body, but as in case of petit treason, that is, to be drawne and hanged till he be dead, but the forfeiture of his lands is as in other cases of high treason, for this statute is but a declaration of the common law, and the reason of his corporall punishment is, for that in this case he was only drawne and hanged at the common law, but a woman in that case was to be burnt.

^l The abbot of Millenden in the county of Buckingham for counterfeiting and refectiō of the kings money, was adjudged to be drawne and hanged, and not quartered. The want of obseruation of the said distinction hath made some to erre in their judgement. Nota. This act of 25 E. 3. maketh no expression of the judgement, therefore such judgement as was at the common law either in case of high treason or petit treason must be given.

But if one be attainted for diminishing of the kings mony upon any of the statutes made in queen Maries time, or in the time of queen Elizabeth, because it is high treason newly made, the offender shall have judgement as in case of high treason, which judgement you may see in the first part of the Institutes. Sect. 747.

^m And when a woman commits high treason and is quick with childe, she cannot upon her arraignment plead it, but she must either pleade not guilty, or confesse it: and if upon her plea she be found guilty, or confesse it, she cannot alleage it in arrest of judgement, but judgement shall be given against her: and if it be found by an inquest of matrons that she is quick with childe, (for *priviument ensent* will not serve) it shall arrest, and respite execution till she be delivered, but she shall have the benefit of that but once, though she be againe quick with childe: so as this respite of execution for this cause is not to be granted, only in case of felony, whereof justice Stanford speaketh, but in case of high treason, and petit treason also.

(19) *Si homo port faux money en cest roialme, counterfeit au money dangleterre, et sachant le money estre faux, &c.*] By this branch six things are to be observed. First, that the bringing in of counterfeit money, and not the counterfeiting is expressed in this word [*apport.*] Secondly, that it must be brought from a foraine nation, and not from Ireland, or other place belonging to, or being a member of the crowne of England, and so it hath been resolved, so wary are judges to expound this statute concerning treason, and that in most benigne sense: for albeit Ireland be a distinct kingdome, and out of the realme of England to some purposes, as to protections and fines levied, &c. as hath been said: yet to some intent it is accounted as a member of or belonging to the crowne of this realme. And therefore a writ of error is maintainable here in the kings bench of a judgement given in the kings bench in Ireland, so as the judges did construe this statute not to extend to false money brought out of Ireland, Thirdly, it must be to the similitude of

^h 1 Mar. cap. 6. 1 & 2 Ph. and Mar. cap. 11.

ⁱ Vet. Mag. Car. 13, part 2. fol. 38, 39, 40.

^k Fleta, lib. 1. c. 22. who wrote before this statute, which is but a law declaratory, as it appeareth before.

23 Ass. p. 2. Dier, 6 Eliz. Term. Tr. MS. *protonfura monete trabe et perit.* Tr. 24 H. 8. in Justice Spilmans Reports accord.

^l Mich. 31 E. 3. coram rege. Rot. 55. Buck. within six yeares after making of our statute.

^m 25 E. 3. 42. b. Cor. 130 23 Ass. p. 2 22 Ass. p. 71. 22 E. 3. Cor. 253. 12 Ass. p. 11. 8 E. 2. Cor. 410.

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Stanford, f. ult. b.

Vid. hereafter, cap. 30. Rot. Parl. 17 E. 3. nu. 15.

7 H. 7. 10.

Lib. 7. Calvin's case, *ubi supra.*

3 H. 7. 10.

the money of England. Fourthly, that the bringer of it into this realme, must know it to be counterfeit. Fifthly, uttering of false money in England, though he know it to be false and counterfeit to the likenesse of the coyne of England, is no treason within this statute, unless he brought it from a foraine nation, for the words be, *si homo a port faux money en cest realme*. But if money false or clipped be found in the hands of any that is suspicious, he may be imprisoned untill he hath found his warrant, *per statutum de moneta magn' vet. Mag. Cart. fo. 38. 2 part.* Lastly, he must merchandize therewith, or make payment thereof, expressed in these words, *pur merchandizer, ou paiement faire in deceit nostre seignior le roy et son peop e*. See more, *de moneta regis*, and of the derivation thereof in the second part of the Institutes, *in artic' super cartas*, cap. 20.

Si home tuast chancelour, tresurer, ou justice nostre seignior le roy del un barke ou del autre, justice in cite, ou daill' s et tous autres justices assignes doier et terminer esteant en leur place feasant leur office.

In this case albeit one intend to kill any of these here named in the place, and doing their office, and thereupon strike or wound any of them, this is no treason: for our statute saith, *si home tuast chancelor, &c.* If a man kill the chancelour, &c. For if it be treason, death must ensue. And the reason wherefore it is treason in these cases is, because sitting judicially in their places, (that is, in the kings court) and doing their office in administration of justice, they represent the kings person, who by his oath is bound that the same be done. And this act extends only to the persons here particularly named, and to no other: and therefore extendeth not to the court of the lord steward, or of the constable and marshall, nor to the court of the admiralty, or any other, nor to any ecclesiasticall court. Nay, it extends not to the high court of parliament, if any member of the lords house, or house of commons be slaine in his place, and doing his office, because it is *casus omissus*, and not mentioned in this act. But in all those cases it is wilfull murder, for the law implyeth malice.

^a Rot. Parliam. 20 E. 1. nu. 2. John de Britain's case. 3 Reg. 21. 15. See inter leges Alveredi, cap. 4. ubi supra. Vita et fortunis omnibus privator. Cult. de Norm. ca. 14. 22 lib. Aff. pl. 49.

Et soit assavoir q. in les cases jusnomes doit ce adjudge treason q. se extenda a nostre seignior le roy et sa royall majestie: et de tiel treason le forfeiture des escheates appartient a nostre seignior le roy cibien des tres. et tenements tenus des autres, come de luy mesme.

(20) ^a Des tres. et tenements tenus des autres come de luy mesme.] This is an affirmance of the common law, and the reason thereof is, for that the offence is committed against the soveraigne lord the king, who is the light and the life of the common-wealth: and therefore the law doth give to the king in satisfaction of his offence, all the lands, &c. which the offender hath, and that no subject should be partaker of any part of the forfeiture for this offence.

[19]

^c Brook, Etch. 9. See hereafter. Verbo Et de tul manner de treason, &c.

Otherwise it is in case of petit treason and felony

^b 7 H. 4. 27. See hereafter in the title of Premunire. Verb. (des tres, &c.) Vid. 26 H. 8. cap. 13.

And where the words be [lands and tenements holden, &c.] yet the forfeiture extends to ^{*}rents charges, rents seck, commons, corrodies, and other hereditaments which are not holden, for in case of high treason the tenure is not materiall.

This clause hath 7. limitations. First, this act extends not ^b to lands in taylor, (saving only for the life of tenant in taylor) but the forfeiture of escheats is to be understood of such lands and tenements, as he might lawfully forfeit. And these generall words take not away the

the statute of *donis conditional* ^c but latter statutes give the forfeiture of estates in tail. 2. Nor doth this act extend to uses, but * latter statutes doe name uses. 3. ^d Nor to rights of actions, where the entrie is taken away, and so is the law cleerly holden at this day. 4. Nor to any conditions, but by a ^e latter statute conditions, unlesse they be inseparably knit to the person, be given to the king. 5. Nor to rights of entry, where any was in the lands ^f by title before the treason committed, but such a right of entry is since given by latter statutes. 6. Nor to lands or tenements, or rights ^g *in auter droit*, as in the right of the church, nor to lands in the right of a wife, but only during the coverture, and it extendeth to land which the offender hath ^h for life, for the forfeiture of the profits during his life. 7. It extendeth not to * a foundership of an house of religion *in free almoign*, for that is annexed to the bloud of the founder. Here goods and chattels be not named, but the forfeiture of them is implied in the judgement.

ⁱ *Nota lector*, the said acts of 26 H. 8. 33 H. 8. 5. and 6 E. 6. doe yet remain in force, notwithstanding the said statute of 1 Mar. as it hath been often adjudged and resolved, and namely Mich. 21. Ja in the exchequer chamber, in a writ of error, upon a judgement given in the exchequer, between Ratcliffe, and the lord Sheffield, by all the judges of England, and is agreeable to common experience.

See more of high treason in the next chapter following, cap. 2. *verbo, Et pur ceo que plusors auters cases, &c.*

^c 26 H. 8. ca. 13. in fine. 33 H. 8. ca. 20. 5 & 6 E. 6. cap. 11. lib. 7. fo. 12, 13.
^e 23 H. 8. ca. 20. 5 E. 6. ca. 11.
^d Lib. 3. fo. 210. 7 H. 4. 6, &c.
^e 33 H. 8. c. 20. lib. 7. fo. 11. Englefield's case.
^f Englefield's case. *Ubi supra.*
^g 5 E. 6. *ubi supra.* 1 Mar. Dier, 123. Dier, 12 El. 289. Temps. H. 8. Br. Coron. 5.
^h 1 Mar. Dier, 108
^{*} 24 E. 3. 33. 72. Corody, Br. 5. Temps H. 8. Etcheat, 239.
ⁱ 12 El. Dier, 289. Lib. 3. fo. 10. 35. Lib. 7. fo. 33. 34. lib. 8. 72. 166. lib. 9. fo. 140. Stant. Pl. Corone, 187. 1.

C A P. II.

OF PETIT TREASON.

ET ovesque ceo ! y ad un auter manner de treason, cest assavoir, quant un servant tua son maister (1) ou un femme tua son baron (2), ou quant home seculer ou de religion tua son prelate a que il doit foye et obedience (3). Et de tiel manner de treason la forfeiture des escheats appertenant a chescun seignior de son fee proper, &c.

Britton, ca. 8. and cap. 22.

And moreover there is another manner of treason, that is to say, when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate to whom he oweth faith and obedience. And of such treason the escheats ought to pertain to every lord of his own fee, &c.

[20]

It was called high or grand treason in respect of the royall majesty against whom it is committed, and comparatively it is called petit treason (whereof now this statute speaketh) in respect it is

committed against subjects and inferiour persons, whercof this act doth enumerate three kinds.

(1) *Quant un servant tua son maister.*] This was petit treason by the common law, for so it appeareth by the ^a book of 12 Aff. that a woman servant killed her mistress, wherefore she had judgement to be burnt, which is the judgement at this day of a woman for petit treason. And herewith agreeth 21 E. 3. where the reader must know, that in stead of *mere* in that case you must read maister.

^b And upon this act, if the servant kill the wife of his master, it is petit treason, for he is servant both to the husband and wife.

^c If the child commit parricide in killing of his father or mother (which the law-makers never imagined any childe would doe) this case is out of this statute, unlesse the childe served the father or mother for wages, or meat, drink or apparell, for that it is none of these three kinds specified in this law. And yet the offence is far more hainous and impious in a child then in a servant, for *peccata contra naturam sunt gravissima*: but the judges are restrained by this act, to interpret this act, *à simili*, or *à minore ad majus*, as hereafter shall be said. And * some say that parricide was petit treason by the common law.

^d A servant of malice intended to kill his master, and lay in wait to doe it whilest he was his servant, but did it not till a year after he was out of service, and it was adjudged petit treason within this act.

(2) *Un feme tua s^r baron.*] ^e This was petit treason by the common law, as it appeareth in our books. If the wife procure one to murder her husband, and he doth it accordingly, in this case the wife being absent is but accessory, and shall be hanged and not burnt, because the accessory cannot be guilty of petit treason, where the principall is not guilty but of murder: and the * accessory must follow the nature of the principall: but if he that did the murder had been a servant of the husband, it had been treason in them both, and the wife should have been burnt. And so it is in the case before of a servant, and in the case hereafter of a clerk.

If the wife and a stranger kill the husband, it is petit treason in the wife, and murder in the stranger, and so it is in the case of the servant next before, and of the clerk next after.

Before this statute it was petit treason, *si quis falsaverit sigillum domini sui de cujus familia fuit*. Britton agreeth herewith. But these are taken away by this act, and all other saving these, that are here expressed.

(3) *Quant home secular ou de religion tua son prelate a que il doit fey et obedience.*] This clause is understood only of an ecclesiasticall person, be he secular, or regular, if he kill his prelate, or superiour, to whom he oweth faith, and obedience, it is petit treason: and so it was at the common law. And petit treason doth presuppose a trust, and obedience in the offender, either civill, as in the wife and servant, or ecclesiasticall, as in the ecclesiasticall person.

Aidors, abettors, and procurers of any of these petit treasons, are within this law.

If the servant kill his mistress, viz. his masters wife, this is treason (as hath been said) not by equity, for that is denied as well in

petit

^a 12 Aff. p. 30.
21 E. 3. 17.
F. coron. 447.
Statham, tit. cor.
21 E. 3. 22 Aff.
p. 49.

^b 19 H. 6. 47.
Pl. Com. 86. b.
Dier, 3 Mar. 128.
7 El. 235.

^c Exodus, c. 21.
v. 15. 17.

Lev. 20. v. 9.

1 Mar. per Brom-
ley and Portman
of the report of
Justice Dalison.
vid. 1 R. 3. 4.

*In culis paricidæ
cum simia, cane,
gallo, et serpente
inciusti mari olim
murgebantur: sed
nos non habemus
talem consuetudi-
nem.*

* 22 E. 1.
Math. Par. 874.

^d 33 Aff. p. 7.
Li. 1. f. 99.
Shelly's case.
10 H. 6. 47.
pl. com. 260.

^e 15 E. 2. Coron.
383. 19 H. 6. 47.
See c. Pr. & Acc.
Dier, 34 H. 8. 50.
Dier, 16 El. 332.
Saunders' case.
Pasch. 32 E. 3.
Rot. 62. coram
rege. Ph. Clif-
ton's case.

* 40 Aff. p. 15.
Fleta, li. 1. ca. 22.
Britton, 10. 16.

19 H. 6. 47.

40 Aff. ubi supra.
et 16 El. ubi sup.

19 H. 6. 47. by
all the judges.

petit treason, as high treason, but it is within the letter of this statute, for she is a master.

In high treason there is no accessories, but all be principalls, and therefore whatsoever act or consent will make a man accessory to a felony, before the act done, the same will make him a principall in case of high treason. But in case of petit treason, there may be accessories, either before, or after the act done, as in case of murder or homicide.

Here it appeareth that acts of parliament may bind men of the church, secular, or regular, and no benefit of clergy allowed unto them in case of treason: but ^a hereof you shall read at large in the exposition of the 15. chapter of *Articuli cleri*.

(3) *Et de tiel manner de treason forfeiture des escheats apperteinont a chescun seignior de son fee proper.*] See hereof hereafter in the chapter of forfeiture. ^b If a man seised in fee of a fair, market, common, rent charge, rent seck, warren, corrody, or any other inheritance, that is not holden, and is attainted of felony, the king shall have the profits of them during his life: but after his decease, seeing the blood is corrupted, they cannot descend to the heir, * nor can they escheat because they be not holden, they perish and are extinct by act in law: for in escheats for petit treason or felony, a tenure is requisite, as well in the case of the king, as of the subject.

An approver in case of felony, refusing the combate with the appellee, shall have like judgment that is for petit treason, *pribator recusans duellum adjudicatur suspendi, et trahi in odium falsæ accusationis*: but yet it is not petit treason, because it is none of the three specified in this act.

The case which Shard reciteth in 40 Ass. that a Norman being leader of an English ship, who had English men with him, and robbed divers upon the sea, and were taken and found guilty: and as to the Norman it was but felony (because Normandy was lost by king John, and was out of the ligeance of E. 3.) and as to the English it was adjudged treason, and the offenders drawn and hanged, which was the judgement of petit treason: but this case must be intended to fall out before this statute of 25 E. 3. for it is none of the petit treasons mentioned in this act.

Et pur ceo que plusors auters cases de semblables treason (1) purront escheer en temps avener, queux home ne purra penser ne declarer en present: assentu est, que si autre case suppose (2) treason (3), que nest especifie paramount (4), aviegne de novel devant ascun justice, demerge le justice sans aler a judgment de treason, tanque per devant nostre seignior le roy en son parliament (5) soit le case mre. et declare (6), le que le ceo doit estre adjudge treason, ou auter felony.

And because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time: it is accorded, that if any other case supposed treason, which is not above specified, doth happen before any justice, the justice shall tarry without going to judgement of the treason, till the cause be shewed and declared before

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^aSee the 2. pt of the Institutes. Artic. cleri. ca. 15. Hil. 3. R. 2. coram rege Rot. 8. London. Jo. Imperial's case.

For escheats see the 1. part of the Institut. sect. 1. fo. 13. a.

^b See before, cap. 1. verbo, des terres et tenements, &c.

* See 1 pt. of the Institutes, fo. 13. verb. Avera la terre per escheat. Mic. 4 H. 4. coram rege. Rot. 22. Anglia.

40 Ass. 25. Vide 2 H. 5. cap. 6.

Rerum progressus ostendunt multa, quæ initio prævideri non possunt.

before the king and his parliament, whether it ought to be judged treason or other felony.

(1) *Semblable treason.*] In this case, the judges shall not judge *à simili*, or by equity, argument, or inference of any treason, high or petit, for no like case shall be adjudged treason, &c. And note this branch extendeth (as hath been said) to the offence, viz. treason, and not to tryall, judgement, or execution.

(2) *Si auter case suppose treason.*] No other case, though of as high or higher nature, &c. shall be adjudged treason high or petit, as before it appeareth in the case of parricide, *anno 1 Mar. ubi supra.*

(3) *Treason.*] Either high treason, or petit treason, so as this branch extendeth as hath been said to the offence of treason only.

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See the exposition upon the statute, *de frang. prisonam.*

1 H. 6. 5.
9 E. 4. 26, &c.
See 1 Mar. of Justice Dalison's report, *ubi supra.*

1 Mar. cap. 1.

(4) *Que nest specifie paramount.*] This word [*specifie*] is to be specially observed, for it is as much to say, as particularized, or set downe particularly: so as nothing is left to the construction of the judge, if it be not specified and particularized before by this act. A happy sanctuary or place of refuge for judges to flye unto, that no mans blood and ruine of his family do lie upon their consciences against law. And if that the construction by arguments *à simili*, or *à minori ad majus* had been left to judges, the mischief before this statute would have remained, viz. diversity of opinions, what ought to be adjudged treason, which this statute hath taken away by expresse words: and the statute of 1 Mar. doth repeale all treasons, &c. but only such as be declared and expressed in this act of 25 E. 3. wherein this word [*expressed*] is to be observed.

Rot. Parl. 5 H. 4. nu. 11, 12. See nu 15. *Ibid.*

In the parliament holden *anno 5 H. 4.* the earle of Northumberland came before the king and lords in parliament, and by his petition to the king, acknowledged to have done against his allegiance: and namely, for gathering of power and giving of liveries, whereof he prayeth pardon: and the rather, that upon the kings letters he yielded himselfe, and came to the king unto Yorke, where he might have kept himselfe away. The which petition the king delivered to the justices by them to be considered. Whereupon the lords made protestation, that the order thereof belonged to them, as peers of the parliament, to whom such judgement belonged in weighing of this statute of 25 E. 3. &c. and they judged the same to be no treason, nor felony, but only trespassse finable at the kings will. And the opinion in 27 Ass. is denied, that if one of the indicters discover the counsell of the king, that it should be treason; because it is not specified before in this act, and therefore neither high treason, nor petit treason.

27 Ass. p. 63

(5) *Tanque per decant le roy et son parlement.*] By this it is apparent, that any like or other case ought to be declared by the whole parliament, (and not by the king and lords of the upper house only, or by the king and the commons, or by the lords and commons.) And so was it done by the whole court of parliament in 3 R. 2. *ubi supra.* 5 Eliz. 18 Eliz. *ubi supra.* and many other acts of parliament.

Rot. Par.
17 R. 2. nu. 20.

John duke of Gwyen and of Lancaster, steward of England, and Thomas duke of Gloucester, constable of England, the kings uncles,

uncles, complained to the king, that Thomas Talbot knight, with other his adherents, conspired the death of the said dukes in divers parts of Cheshire, as the same was confessed and well knowne, and prayed that the parliament might judge of the fault (which petition was just, and according to this branch of the statute of 25 E. 3.) but the record saith further: whereupon the king and lords in the parliament adjudged the same fact to be open and high treason: which judgement wanting the assent of the commons, was no declaration within this act of 25 E. 3. because it was not by the king and his parliament according to this act, but by the king and lords only.

(6) *Soit le case monstre et declare, &c.*] This declaration may be absolute, or *sub modo*, for a time.

By this which hath been said it manifestly appeareth, what damnable and damned opinions those were concerning high treason, of Tresilian chiefe justice of the kings bench, Sir Robert Belknap chiefe justice of the common bench, Sir John Holt, Sir Roger Fulthorp, and Sir William Burghe, knights, fellowes of the said Sir Robert Belknap, and of John Lockton one of the kings serjeants, that were given to king R. the 2. at Nottingham, in the eleventh yeare of his reigne. But more detestable were the opinions of the justices in 21 R. 2. and of Hauckford and Brinchley the kings serjeants, (and the rather, because they took no example by the punishment of the former) which affirmed the said opinions to be good and lawfull, saving Sir William Thirning chiefe justice of the common bench gave this answer: That declaration of treason not declared belongeth to the parliament; but to please, he said, that if he had been a lord or a peer of parliament, if it had been demanded of him, he would have made the like answers. These justices and serjeants being called in question in the parliament holden *anno* 1. H. 4. for their said opinions, answered as divers lords spirituall and temporall did) that they durst no otherwise do, for feare of death. It was thereupon enacted, that the lords spirituall and temporall, or justices, be not from thenceforth received to say, that they durst not for feare of death to say the truth. Which opinions being so manifestly against our said act of 25 E. 3. afterwards in the parliament holden 1 H. 4. it is affirmed by authority of parliament, that in the said parliament of 21 R. 2. divers statutes, judgements, ordinances, and stablishments were made, ordained, and given, erroneously and dolefully in great disherison and finall destruction and undoing of many honourable lords, and other liege people of this realme, and of their heires for ever. And therefore not only that parliament of 21 R. 2. and the circumstances and dependances thereupon, are wholly reversed, revoked, voided, undone, repealed, and annulled for ever, but also the parliament holden in 11 R. 2. by authority of which parliament, Tresilian, Belknap, and the rest of those false justices and serjeants aforesaid were attainted, is confirmed, for that it was (as there the parliament affirmeth) for the great honour and common profit of the realme.

Et si per case ascun home de cest roialme chivache armee, &c.] And if percase any man of this realme ride armed, &c. For exposition hereof, see the chapter hereafter against riding or going armed.

13 El. cap. 1, 2.
14 El. ca. 1, 2. &c.

Anno 21 R. 2,
in Latin.

11 R. 2. ca. 1.
and 4.

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Rot. Parl. 1 H. 4.
no. 97.
*Melius est omnia
mala pati quam
malo consentire.*

1 H. 4. ca. 3.

See the consequence of erroneous opinions in case of high treason.

1 H. 4. cap. 4.

For

1 Mar. cap. 1.
Sessio prima.
 The like statute
 was made, anno
 1 E. 6. ca. 12.
 See the statute of
 1 H. 4. cap. 10. to
 the like effect.

Inter leges Can-
 nuti, cap. 1. *In-*
primis justæ leges
ut efferrantur in-
justæ depriman-
tur.
 Aliter in antiquo
 MS.
Inprimis ut justæ
leges erigantur,
injustæ subver-
tantur.

For the better instruction of the reader to discern what offences be high treason or petit treason at this day, it shall be necessary to adde hereunto the statute of 1 Mar. whereby it is enacted, [That no act, deed, or offence, being by act of parliament or statute made treason, petit treason, or misprision of treason, by words, writing, ciphering, 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 or statute made in the 25 yeare of the raigne of the most noble king of famous memory, king Edward the third, touching or concerning treason, or the declaration of treason, and none other, &c. any act or acts of parliament, statute, or statutes, had or made at any time heretofore or after the said 25 year of king E. 3. or any other declaration or matter to the contrary in any wise notwithstanding.]

Before this act so many treasons had been made and declared by act of parliament since this act of 25 E. 3. some in particular, and some in generall, and in such sort penned, as not only the ignorant and unlearned people, but also learned and expert men were many times trapped and snared: and sometimes treasons made or declared in one kings time, were abrogated in another kings time, either by speciall or generall words: so as the mischief before 25 E. 3. of the uncertainty what was treason, and what not, became to be so frequent and dangerous, as the safest and surest remedy was, by this excellent act of 1 Mar. to abrogate and repeale all, but only such as are specified and expressed in this statute of 25 E. 3. By which law, the safety both of the king and of the subject, and the preservation of the common-weale is wisely and sufficiently provided for, in such certainty, as *nihil relictum est arbitrio judicis*. And certainly the two rules recited in the preamble of the said act of 1 Mariae, are assuredly true. The first, [that the state of a king standeth and consisteth more assured by the love and favour of the subject toward their soveraigne, then in the dread and fear of lawes made with rigorous pains and extreme punishment for not obeying their soveraigne.] And the other, [that lawes justly made for the preservation of the common-weale without extreme punishment or penalty, are more often, and for the most part better obeyed and kept, then lawes and statutes made with great and extreme punishment.] *Mitiùs imperanti melius paretur.*

In which act five notable things are to be observed. First, it extendeth (without exception) to all high treasons made by any act of parliament since the said act of 25 E. 3. Secondly, to all declarations of high treasons by any act of parliament since the said act of 25 E. 3. (as of the said declaration in 3 R. 2. of killing an ambassadour and the like.) Thirdly, to all petit treasons made or declared by any act of parliament since the said act of 25 E. 3. Fourthly, albeit misprision of treason is not mentioned in the act of 25 E. 3. yet every misprision of any treason made or declared since that act by any act of parliament, is abrogated. Fifthly, no offence to be treason, petit treason, or misprision of treason, but only such as be declared and expressed to be treason, petit treason, or misprision of treason by the said act of 25 E. 3. Here three things are to be observed: first, that this word [expressed] excludeth all implications

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Seneca.

implications or inferences whatsoever. Secondly, here misprison of treason is taken for concealment of high treason or petit treason, and only of high treason or petit treason specified and expressed in the act of 25 E. 3. Thirdly, that no former judgement, attainder, president, resolution, or opinion of judges or justices of high treason, petit treason, or misprison of treason, other then such as are specified and expressed in the said act of 25 E. 3. are to be followed or drawne to example: for the words be direct and plaine, [that from henceforth, no act, deed, or offence, &c. shall be taken, had, deemed, or adjudged to be treason, petit treason, or ^a misprison of treason, but only such as be declared and expressed in the said act of 25 E. 3. &c. any act of parliament or statute after 25 E. 3. or any other declaration or matter to the contrary notwithstanding.] So as there is no high treason, petit treason, or misprison of any treason made or declared by any act of parliament or otherwise since the act of 25 E. 3. but only such as have been made since the said act of 1 Mariæ, and of those only such as were made ^b perpetuall, and not during the life of queen Mary or of queen Elizabeth, whereof there be divers which now are expired, which you may reade being all in print. But there wanted nothing to the perfection of the statute of 25 E. 3. but a limitation of some certaine time wherein the offender should be accused.

^c *Post intervallum temporis accusator non est audiendus, nisi docere potest se fuisse justis rationibus impeditum.*

Or the declaration of treason, &c. ^d Declarations made during the naturall life of queen Elizabeth ceased by her death: for declarations may have limitations as well as statutes introductory of new lawes.

There is another excellent branch of a statute made ^e in 1 & 2 Ph. & Mar. in these words. [And be it further enacted by the authority aforesaid, 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 law.]

All trials. ^f Upon these words many things have been observed by others. First, that the letter of this act extendeth only to triall of high treasons, or petit treasons, and not to misprison. Secondly, foraine treasons are to be tried by the statute ^g of 35 H. 8. cap. 2. and so it was resolved by all the justices of England in Orurks case, and had been so resolved before. But for trials of treasons to be had in Wales, or where the kings writ runneth not, in such shires as the king shall assigne by his commission by the ^{*} statute of 32 H. 8. ca. 4. are abrogated by this act, because they are triable by the law.

^h It hath been holden, that upon the triall of misprison of treason there must be two lawfull witnesses, as well upon the triall, as upon the indictment, as it was resolved by the justices in the lord Lumleyes case, Hil. 14. Eliz. reported by the lord Dier, under his own hand, which we have seen, but left out of the print, which for other purposes is cited hereafter. Thirdly, it hath beene holden, that this act extendeth not to the indictment of any treason, but to the triall by peers, if the offender be noble: or by freeholders, if the offender be under the degree of nobility: and therefore upon the indictment which is in manner of an accusation, by the statutes of 1 E. 6. and 5 E. 6. two lawfull witnesses are requisite:

^a That is, of such treason, high or petit, as is expressed in the act of 25 E. 3. and of no other treason.

^b 1 Mar. cap. 6. 1 & 2 Ph. and Mar. cap. 11. 5 Eliz. ca. 1. and 11.

18 Eliz. cap. 1. 13 Eliz. cap. 2. 23 Eliz. cap. 1. 27 Eliz. cap. 2. 3 Jac. cap. 4.

^c Bracton, lib. 3. fol. 118. b.

^d 13 Eliz. cap. 1. 14 Eliz. cap. 1. and cap. 2.

^e 1 & 2 Ph. and M. cap. 10.

^f See the second part of the Institutes, Mag. Carta, cap. 29. Verbo (per judicium parium.)

^g 35 H. 8. cap. 2. 3 Mar. Dier, 132. lib. 7. fol. 23. in Calvin's case. Patch. 33 Eliz. Orurk's case.

^{*} 32 H. 8. cap. 4.

^h 1 E. 6. cap. 12. 5 E. 6. cap. 11. Both which are mentioned in the next section. Hill. 14 Eliz. Dier, MS.

Notz. This is the last resolution of the judges in this point.

At this time Catlin and Dier were chief justices, and Sanders chiefe bason, &c.

1 E. 6. cap. 12.
 5 E. 6. cap. 11.
 See 13 El. cap. 1.
 See before verb.
 [Deceivable-
 ment jolt attainr.]

quisite: the words of the statute of 1 E. 6. in the last branch be, [that none shall be indicted, arraigned, condemned, or convicted for any treason, petit treason, misprision of treason, or for any words before specified to be spoken, after the said first day of February, for which the same offender or speaker shall in any wise suffer pains of death, imprisonment, losse or forfeiture of his goods, chatels, lands, or tenements, unlesse he be accused by two sufficient and lawfull witnesses, or shall willingly without violence confesse the same

Nota that [before specified] doe refer to the words mentioned before in the act. 1. It is manifest by the connexion of the words, viz. [for any words before specified to be spoken, &c.] 2. The treasons in 25 E. 3. were mentioned before. 3. The first words be [for any treason, petit treason, misprision of treason, &c.]

See 1 El. cap. 6.
 Stanf. Pl. Coron.
 89. and 164.
 4 Mar. Coron.
 Br. 220. Dier,
 2 Mar. 99. and
 3 Mar. 132.

* *Nota* the generality of these words.

Regula. verba generalia generaliter sunt intelligenda.

See hereafter
 c. 49. of Piracy,
 &c.

Hil. 14 El. Lo.
 Lumley's case.
 Ubi supra.
 2 Mar. Dier, 99,
 100. Thomas' case.

4 Mich. 13 &
 14 El. Rolston's case.

^b 1 & 2 Ph. and
 Mar. c. 11. supra.

And by 5 E. 6. ca. 11. it is provided by the last clause save one, [that none shall be indicted, arraigned, condemned, convicted, or attainted for any of the treasons or offences aforesaid, or for any * other treasons that now be, or hereafter shall be, which shall hereafter be perpetrated, committed, or done, unlesse the same offender be thereof accused by two lawfull accusers, &c. unlesse the said party arraigned shall willingly, without violence confesse the same.] Here two things are to be observed. 1. The particular penning of both these acts, viz. indicted, arraigned, convicted, &c. and the words of 1 & 2 of Ph. & Mar. extend to tryalls only, and not to the indictment. 2. Two lawfull accusers in the act of 5 E. 6. are taken for two lawfull witnesses, for by two lawfull accusers, and accused by two lawfull witnesses (as it is said 1 E. 6.) is all one: which word (accusers) was used, because two witnesses ought directly to accuse, that is, charge the prisoner, for other accusers have we none in the common law, and therefore lawfull accusers must be such accusers as law allow. And so was it resolved in the Lo. Lumleys case by the justices: for if accusers should not be so taken, then there must be two accusers, by 5 E. 6. and two witnesses by 1 E. 6. And the strange conceit in 2 Mar. that one may be an accuser by hearsay, was utterly denied by the justices in the Lo. Lumleys case. And this word (awarded) in the statute of 1 & 2 Ph. and Mar. extendeth to the tryall upon the arraignment, and not to the indictment, for that is not said to be awarded.

And it was resolved by all the justices in ^a Rolston's case upon the rebellion in the north, that these words [shall willingly without violence confesse the same] are to be understood where the party accused upon his examination before his arraignment, willingly confessed the same without violence, that is, willingly without any torture: and is not meant of a confession before the judge, for he is never present at any torture, neither upon his arraignment was ever any torture offered. And here commeth another ^b statute made in 1 & 2 Mar. to be considered, by which it is provided, that treason for the counterfeiting and impairing of the coin currant in this realm, &c. the offender therein, &c. 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, at any time before the first year of king E. 6. &c.

Wherein

Wherein the special penning of this act is to be observed; which in case of treason concerning the counterfeiting or impairing of coin, &c. hath by particular words restored the evidence requisite by the common law, before the statute of 1 E. 6. as well upon the indictment as the triall. But the act of 1 & 2 Ph. and Mar. cap. 10. extends to trialls only in other cases of high treason, and therefore that act extendeth not to the indictment of other high treasons. Also it is most necessary (as many doe hold) that there should be two lawfull accusers, that is, two lawfull witnesses at the time of the indictment, for that it is commonly found in the absence of the party accused, and it may be when the party suspected is beyond sea or in remote parts, and may be outlawed thereupon; and therefore seeing the indictment is the foundation of all, it is most necessary to have substantial proof in a cause so criminall, where *probationes oportent esse luce clariores*. Lastly, * if the indictment were part of the tryall, then ought he that is noble, and a lord of parliament to be indicted of high treason, &c. by his peers: for the tryall of him (without question) must be by his peers: but the indictment of peers of the realm is always by free-holders, and not by their peers, as hereafter shall appear. We have been the longer herein in respect of some variety of opinion (for want of due and intire consideration had of all and every part of that which hath been said) upon serious study touching this point, without respect of a common wandring opinion.

And it seemeth that by the ancient common law one accuser, or witness was not sufficient to convict any person of high treason: ^a for in that case, where is but one accuser, it shall be tried before the constable and marshall by combat, as by many records appeareth. ^b But the constable and marshall have no jurisdiction to hold plea of any thing, which may be determined or discussed by the common law. And that two witnesses be required, appeareth by our ^c books, and I remember no authority in our books to the contrary: and the common law herein is grounded upon the law of God expressed both in the old and new Testament: ^d *in ore duorum aut trium testium peribit qui interficietur: nemo occidatur uno contra se dicente testimonium*.

And this seemeth to be the more clear in the triall by the peers, or nobles of the realm, because they come not *de aliquo vicineto*, whereby they might take notice of the fact in respect of *vicinitie*, as other jurors may doe.

Having now rehearsed what others have said and holden, we upon due consideration had of the whole matter will set down our own opinion, and reasons, in these four points following. First, that the statute of ^e 5 E. 6. cap. 11. is a generall law, and extends to all high treasons, as well by the common law declared by the statute of 25 E. 3. as to any other statute made or to be made, the negative words of which statute be: [no person shall be ^f indicted, arraigned, convicted, condemned, or attainted for any treason, that now is, or hereafter shall be, &c.] Which words without all question are generall, and so to be taken. The words of that statute be further, [unlesse the same offender be accused by two lawful accusers,] these two lawful accusers are in judgement of law taken for two lawful witnesses, and that for two causes: first, they must be lawful, that is, allowed by the laws of the realm: and by the law,

1 & 2 Ph. and Mar. cap. 10.

* [26] .

See Magna Cart. c. 29. and the exposition thereupon.

^a Pat. 25 E. 3. part 1. nu. 16. Rot. Parl. 21 R. 2. nu. 10. 21. the D. of North. case. Rot. Pat. 3 H. 4. Balthard's case. Rot. Vafcon. 9 H. 4. nu. 14. John Bolemer's case. Rot. Parl. 2 H. 6. nu. 9. the earl of Ormond's case.

Rot. Pat. 8 H. 6. pt. 2. m. 7. between Upton and Dowy.

Vide the 3. part of the Institutes. cap. the Court of Chivalry, &c. See Braët. lib. 3. fo. 119. a.

^b 13 R. 2. cap. 7.

^c Mirror, ca. 3. ^d ordonnance de attain. Braët. l. 5. f. 354. 48 E. 3. 30. 35 H. 6. 46. Fort. c. 32. 15 E. 4. f. 1. Pl. Com. fo. 8.

^d Deu. 17. 6. 19. 15 Mat. 18. 16. John 18. 23. 2 Cor. 13. 1. Heb. 10. 28.

^e And so I hold the statute of 1 E. 6. c. 12. to be a generall law, and to extend to all high treasons, &c.

^f Nota as well upon the indictment as the arraignment of treason there ought to be two accusers. See Dier, 2 & 3 Ph. and Mar. 132.

upon the arraignment of the prisoner upon the indictment of treason, no other accuser can be heard, but witnesses only. Secondly, the words of the statute are [which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow, and maintain that which they have to say to prove him guilty of the treason, unlesse the party arraigned shall willingly without violence confesse the same,] as by that act it appeareth. Now to avow and maintain that which they have to say to prove him guilty of the treason, is the proper office and duty of witnesses, and so it is said in the statute of 1 E. 6. c. 12, in the last clause (by two lawful witnesses.) See the statute of 5 El. c. 1. where it is said [accused by good and sufficient testimony:] and to the same intent, the statute of 1 & 2 Ph. and Mariæ, cap. 11. for the word [accused.]

1. *Puniantur accusatores penes dominum regem, quòd amodò rex eis de facili non credat: et talis pœna fiat eis, qualis debeat fieri illis, qui injuste fideles dni. regis exheredari et destrui fecerunt, &c.*

2. That this act of 5 E. 6. extend as well to petit treason, as high treason, for the words be [any treason] and so doth the statute of 1 E. 6. cap. 12.

3. That the statute of 1 & 2 Ph. and Mar. cap. 10. doth not abrogate the said act of 1 E. 6. or of 5 E. 6. For that act of 1 & 2 Ph. and Mar. extends only to trialls by the verdict of twelve men *de vicincto*. of the place where the offence is alleadged, and ^k the indictment is no part of the triall, but an information or declaration for the king, and the evidence of witnesses to the jury is no part of the triall, for by law the tryall in that case is not by witnesses, but by the verdict * of twelve men, and so a manifest diversity between the evidence to a jury, and a tryall by jury. And the word [awarded] in that statute doth prove that that act extended only to the *venire facias* for trial, for neither the indictment nor the evidence can be said to be awarded: *veritas quæ minime defensatur, opprimitur, et qui non improbat, approbat. Et sic liberè animam meam liberavi.*

^a The tryall against an aliennee, that lived here under the protection of the king, and amity being between both kings, for high treason, shall by force of this act of 1 & 2 Ph. & Mar. be tried according to the due course of the common law, and therefore in that case he shall not be tried *per medietatem lingue*, as he shall be in case of petit treason, murder, and felony, if he prayeth it.

4. ^b That a tryall in a forein county upon examination before three of the councell, &c. by the statute of 33 H. 8. cap. 23. is abrogated by this act of 1 & 2 Ph. and Mar. being a tryall contrary to the due course of the common law, which is to have it tryed by jurors of the proper county, ^c but the indictment being found in the proper county, it may be by speciall commission heard and determined before commissioners in any forein county, but the tryall must be by jurors of the proper county; and this is warranted by the course of the common law. And albeit when the term begins, all commissions of oier and terminer in the county where the kings bench sit, be suspended during the term, yet if an indictment be found before such commissioners before the term, there may be a speciall commission made to commissioners in the same county, sitting the kings bench in that county,

to

^g 1 E. 6. cap. 12. the last clause.

⁵ El. cap. 1.
¹ & 2 Ph. and Mar. cap. 11.
Bract. li. 3. f. 118.
Qui accusat integre sumæ sit, et non criminosis.

¹ Stat. de Kenelw. secunda parte, Vet. Mag. Cart. cap. 16.

^k See the first part of the Institutes. sect. 194. See Fortescue, cap. 26, 27.

Juries ought to be informed by evidences, and witnesses.

* [27]

² 27 E. 3. cap. 8.
²⁸ E. 3. cap. 18.
⁸ H. 6. cap. 29.
¹ Mar. fo. 147.
Shirley's case, and so it was resolved by all the judges, Hil. 36 El. in the case of doctor Lopez, Emanuel Loyse, and Stephen Ferreira de Gama.

^b 33 H. 8. c. 23.
³ Mar. Dier. 132.
Dier. 12 El. 286. b. li. 11. fo. 63. a. in doctor Foster's case.

^c 27 Aff. p. 1.
²¹ Aff. p. 12.
W. 1. c. 3. &c.
Mic. 25 & 26 El. per les justices in Somerville's and Arden's case.
Dier. 12 El. 286. b. All this was resolved, Mic. 1 Ja. in Sir Walter Raleigh's case. Pl. Com. 388. Court de Leicester's case.

to hear and determine the same during the term: for the kings bench hath no power to proceed thereupon, till the indictment be before them. And it is the better, if the speciall commission bear teste after the beginning of the term. Note a diversity between generall commissions of oier and terminer, and such a speciall commission; and the court of kings bench may be adjourned, and in the mean time the commissioners may sit there.

^d And where it is provided by the statute of 33 H. 8. cap. 23. that peremptory challenge should not from thenceforth be admitted or allowed in cases of high treason, or misprision of treason: ^e this branch is abrogated by the said act of 1 Mar. For the end of challenge is to have an indifferent tryall, and which is required by law; and to bar the party indicted of his lawfull challenge, is to bar him of a principall matter concerning his tryall: and all acts of parliament concerning incidents to tryalls contrary to the course of the common law, are abrogated by the said words, [and that all trialls hereafter, &c.] but all this is to be understood of persons under the degree of nobility; for in case of a triall of a noble man, lord of parliament, he cannot challenge at all any of his peers.

^f Henry Garnet superiour of the jesuites in England upon his arraignment for the powder treason, did challenge Burrel a citizen of London peremptorily, and it was allowed unto him by the resolution of all the judges; ^g so as in case of high treason, or misprision of high treason, a man may challenge 35. peremptorily, which is under three juries, but more he cannot.

Lastly, all statutes made before the said act of 1 & 2 Ph. & Mar. for tryall of high treason, petit treason, or misprision of treason, contrary to the due course of the common law, are abrogated by the said act of 1 & 2 Ph. & Mar. and tryalls by the due course of the common law, with challenges incidents in those cases are restored.

^h If a man be indicted of high treason, he may at this day plead a forein plea, as he might doe by the common law, and shall be tryed in the forein county; but otherwise it is in cases of petit treason, murder, or felony, for there it shall be tryed in the county where the indictment is taken.

And forasmuch as the proceeding against a noble peer of the realm, being a lord of parliament in some points agrees, and in other points differeth from the proceeding against a subject under the degree of nobility: it shall be necessary to shew wherein they agree, and wherein they differ.

1. The noble peer of the realme must be indicted before commissioners of oier and terminer, or in the kings bench, if the treason, misprision of treason, felony, or misprision thereof be committed in that county where the kings bench sit, as it was resolved in the case of Tho. d. of N. in an. 13. Eliz. And this is common to both degrees to be indicted by jurors of that county where the offence was committed.

2. When he is indicted, then the king by his commission under the great seale constitutes some peer of the realme, to be *hac vice*, steward of England: for his stile in the commission, is, (*seneschallus Angliæ*) who is judge in this case of the treason or felony, or of the misprision of the same committed by any peer of the realm.

III. INST.

D

This

^d 33 H. 8. c. 23.

^e And so it was resolved. an. 1 Ja. in Sir Walter Raleighs case, by all the judges and had been resolved so before. Stan. pl. cor. 157.

^f 3. Ja. R. in Garnets case. And so it was resolved, M 25 & 26 El. in Somerviles and Ardens case.

^g Br. tit. Challenge, 217.

^h 22 H. 8. c. 14. 32 H. 8. c. 3. See 4 H. 8. c. 2. and 22 H. 8. c. 2. pleading, &c. for being taken out of sanctuary in a forain county in case of murder or felony. See hereafter, cap. Sanctuary, all sanctuaries taken away: and note that the stat. of 22 H. 8. &c. extend only to indictments and not to appeals.

[28]

1 H. 4. 1.

1 H. 4. 1.
10 E. 4. 6. b.
13 H. 8. 12.

This commission reciteth the indictment generally as it is found: and power given to the lord steward to receive the indictment, &c. and to proceed, *secundum legem et consuetudinem Angliæ*. And a commandement is given thereby to the peers of the realme, to be attendant and obedient to him: and a commandement to the lieutenant of the Tower to bring the prisoner before him.

3. A *certiorari* is awarded out of the chancery to remove the indictment it selfe before the steward of England *indilatè*, which may either beare date the same day of the stewards commission, or any day after.

4. The steward directs his precept under his seale to the commissioners, &c. to certifie the indictment such a day and place.

5. Another writ goeth out of the chancery directed to the lieutenant of the Tower, to bring the body of the prisoner before the steward at such day and place as he shall appoint.

6. The lord steward maketh a precept under his seale to the lieutenant of the Tower, &c. and therein expresseth a day and place when he shall bring the prisoner before him.

7. The steward maketh another precept under his seale to a serjeant at armes, to summon *tot et tales dominos, magnates, et proceres hujus regni Angliæ prædicti R. comitis E. pares, per quos rei veritas melius sciri poterit, quòd i: si personaliter compareant coram prædicto seneschallo apud Westm. tali die et hora, ad faciend. ea quæ ex parte domini regis forent faciend.* &c. Wherein four things are to be observed. First, that all these precepts most commonly beare date all in one day. Secondly, that no number of peers are named in the precept, and yet there must be twelve or above. Thirdly, that the precept is awarded for the returne of the peers before any arraignment or plea pleaded by the prisoner. Fourthly, that in this case the lords are not *de vicinito*, and therefore the sitting and triall may be in any county of England. And herein are great differences between the case of a peer of the realme, and of one under the degree of nobility.

1 H. 4. 1.

1 H. 4. 1.

8. At the day, the steward with six serjeants at armes before him takes his place under a cloth of estate, and then the clerk of the crown delivereth unto him his commission, who redelivereth the same unto him. And the clerk of the crown causeth a serjeant at armes to make three oyes, and commandement given in the name of the lord high steward of England to keep silence: and then is the commission read. And then the usher delivereth to the steward a white rod, who re-delivereth the same to him againe, who holdeth it before the steward. Then another oyes is made, and commandement given in the name of the high steward of England, to all justices and commissioners to certifie all indictments and records, &c. Which being delivered into court, the clerk of the crown readeth the returne. Another oyes is made, that the lieutenant of the Tower, &c. returne his writ and precept, and to bring the prisoner to the bar: which being done, the clerk reads the returne. Another oyes is made, that the serjeant at armes returne his precept with names of the barons and peers by him summoned, and the returne of that is also read. Another oyes is made, that all earles, barons and peers (which by the commandement of the high steward be summoned) answer to their names, and then they take their places and sit down, and their names are recorded; and the entry of the record is, that they

they appear, *ad faciendum ea quæ ex parte domini regis eis injungentur*. And when they be all in their places, and the prisoner at the bar, the high steward declares to the prisoner the cause of their assembly, and perswades him to answer without feare, that he shall be heard with patience, and that justice shall be done. Then the clerk of the crown reads the indictment, and proceeds to the arraignment of the prisoner, and if he plead not guilty, the entry is, *et de hoc de bono et malo ponit se super pares suos, &c.* Then the high steward giveth a charge to the peers, exhorting them to try the prisoner indifferently according to their evidence.

1 H. 4. 1.

9 The peers are not sworn, but are charged, *super fidelitatis, et ligeantibus domino regi debitibus*: for so the record speaketh.

10. Then the kings learned councill give evidence, and produce their proofes for the king against the prisoner.

11. But the prisoner, when he pleadeth not guilty, whereby he denieth the fact, he needs have no advice of councill to that plea. But if he hath any matter of law to plead, as Humfrey Stafford in 1 H. 7. had, viz. The priviledge of sanctuary, he shall have councill assigned to him to plead the same, or any other matter in law: as to plead the generall pardon, or a particular pardon, or the like. And after the plea of not guilty, the prisoner can have no councill learned assigned to him to answer the king's councill learned, nor to defend him. And the reason thereof is, not because it concerneth matter of fact, for *ex facto jus oritur*: but the true reasons of the law in this case are: First, that the testimonies and the proofs of the offence ought to be so clear and manifest, as there can be no defence of it. * Secondly, the court ought to be instead of councill for the prisoner, to see that nothing be urged against him contrary to law and right; nay, any learned man that is present may inform the court for the benefit of the prisoner, of any thing that may make the proceedings erroneous. And herein there is no diversity between the peer and another subject. And to the end that the triall may be the more indifferent, seeing that the safety of the prisoner consisteth in the indifferency of the court, the judges ought not to deliver their opinions before-hand of any criminall case, that may come before them judicially. And we reade, that in the case of Humfrey Stafford that arch-traytor, Hufsey chief justice, besought king Henry the seventh, that he would not desire to know their opinions before-hand for Humfrey Stafford, for they thought it should come before them in the kings bench judicially, and then they would do that which of right they ought: and the king accepted of it. And therefore the judges ought not to deliver their opinions before-hand upon a case put, and proofs urged of one side in absence of the party accused: especially in cases of high nature, and which deserve so fatall and extreme punishment. For how can they be indifferent, who have delivered their opinions before-hand without hearing of the party, when a small addition, or subtraction may alter the case: And how doth it stand with their oath, who are sworn, That they should well and lawfully serve our lord the king and his people in the office of a justice? and they should do equall law, and execution of right to all his subjects, &c. See more of this matter in the 13 section here following.

In Scotland in all criminall cases, yea in cases of high treason, *pari rea* may have councill learned.

Vide hereafter upon the statute of 31 Eliz. concerning witnesses.

* See more hereof cap. 63. Councill learned in Pleas of the Crown.

1 H. 7. fo. 26.

18 E. 3.

12. There be alwayes either all, or some of the judges ever attendant

dant upon the high steward, and sit at the feet of the peers, or about a table in the midst, or in some other convenient place.

13. After all the evidence given for the king, and the prisoners answers, and proofs at large, and with patience heard: then is the prisoner withdrawn from the bar to some private place under the custody of the lieutenant, &c. And after that he is withdrawn, the lords that are tryers of the prisoner go to some place to consider of their evidence: and if upon debate thereof, they should doubt of any matter, and thereupon send to the high steward, to have conference with the judges, or with the high steward, they ought to have no conference, either with the judges or the high steward, but openly in court, and in the presence, and hearing of the prisoner; as it was resolved by all the justices of England in the reign of king H. 8. in the case of the lord Dacres of the North. And this was a just resolution; for when the lords should put a case, and ask advice thereupon, the prisoner ought by law to be present, to see that the case or question be rightly put: and therefore that nothing be done in his absence, untill they be agreed on their verdict. Hereupon it followeth, that if the peers of the realm, who are intended to be indifferent, can have no conference with the judges, or with the high steward in open court in the absence of the prisoner: *à fortiori*, the king's learned counsell should not in the absence of the party accused, upon any case put, or matter shewed by them, privately preoccupate the opinion of the judges: and upon so just a resolution the case succeeded well, for the peers found the lord Dacres not guilty.

14. A noble man cannot waive his triall by his peers, and put himselfe upon the triall of the country, that is, of twelve freeholders: for the statute of Magna Carta is, that he must be tried *per pares*. And so it was resolved in the lord Dacres case, *ubi supra*.

15. * The peers ought to continue together (as juries in case of other subjects ought to do) until they be agreed of their verdict: and when they are agreed, they all come again into the court, and take their places, and then the lord high steward publicly in open court, beginning with the puisne lord, (who in the case of the lord Dacre was the lord Mordant,) said unto him: My lord Mordant, is William lord Dacre guilty of the treasons, whereof he hath been indicted or arraigned, or of any of them? And the lord standing up said, Not guilty: and so upward of all the other lords *fortiori*: who all give the same verdict: In which case the entry is, *super quo W. Comes E. & ceteri antedicti pares instanter super fidelitatis & legerantibus dicto domino regi debitis, per prefatum senescallum ab inferiori parte usq; ad supremum separatim publice examinati dicunt quod W. dominus Dacre non est culp.* &c.

16. The peers give their verdict in the absence of the prisoner, and then is the prisoner brought to the bar again: and then doth the lord steward acquaint the prisoner with the verdict of his peers, and give judgement accordingly; either of condemnation or acquittal. But it is not so in the case of another subject: for there the verdict is given in his presence.

17. Every lord of parliament, and that hath voice in parliament, and called thereunto by the king's writ, shall not be tried by his peers, but only such as fit there *ratione nobilitatis*, as dukes, marquisses,

[30]

Pasch. 26 H. 8.
in the case of the
lord Dacres of
the North, re-
ported by justice
Spelman, which
we have seen.

Mag. Cart.
cap. 29

* Resolved by
all the justices.
Mich. 13 & 14
Ed. in the case of
the duke of
Northfolk.
1 R. 4. f. 1.
1 R. 4. b. 6.
13 H. 8. fo. 12.
15 H. 8. U. S.
Spelman's re-
port

Rot. Roman.
17 E. 2. m. 6.
Adam Orleton
B. of Hereford.

marquiffes, countes, viscounts or barons, and not fuch as are lords of parliament, *ratione baroniarum, quas tenent in jure ecclesiæ*, by reason of their baronies which they hold in the right of the church, as arch-bishops, and bishops, and in time past some abbots and priors, but they shall be tried by the countrey, that is, by freeholders, for that they are not of the degree of nobility.

2 H. 4. Marks. B. of Carlisle. Stanf. Pl. Coron. li. 3. ca. 62. 10. 153. in Temps H. 8.

18. ^a No noble man shall be tried by his peers, but only at the suit of the king upon an indictment of high treason, or misprision of the same, petit treason, murder, or other felony, or misprision of the same. But in case of a premunire or the like, though it be at the suit of the king, he shall not be tried by his peers, but by freeholders. And so in an appeale at the suit of the party for petit treason, murder, robbery, or other felony, he shall be tryed by freeholders. See more hereof in the second part of the Institutes, Magna Carta, cap. 29.

^a 10 E. 4. 6. b. Mag. Cart. c. 29.

19. ^b And albeit a man be noble, and yet no lord of the parliament of this realm, (as if he be a nobleman of Scotland, or of Ireland, of France, &c.) he shall be tried by knights, esquires, or others of the commons. And so it is of the sonne of a duke, marquiffè, earle, &c. he is noble, and called lord: and yet because he is no lord of parliament, he shall be tried as one under the degree of a peer, and lord of parliament.

^b 11 E. 3. bre. 473. 8 R. 2. proces. pl. ultimo. 20 E. 4. 6. 20 El. Diet. 360. 38 H. 8. Bre. treason. Seigneur Sanctus case. Lib. 9. fo. 117.

20. No peer of the realm, or any other subject shall be convicted by verdict, but the said offences must be found by above four and twenty, viz. by twelve, or above, at his indictment, or by twelve peers, or above, if he be noble, and by twelve, and not above, if he be under the degree of nobility.

21. A peer of the realme being indicted of treason, or felony, or of misprision, as is aforesaid, and duly transmitted to the lords, may be arraigned thereof in the upper house of parliament, as frequently in parliament rolls it doth appeare: but then there must be appointed a steward of England, who shall put him to answer: and if he plead not guilty, he shall be tried *per pares suos*, and then the lords spiritual must withdraw, and make their proxies: but no appeal of treason can be in parliament, ^a but is ousted by the statute of 1. H. 4. cap. 14.

10 E. 4. 6. Rot. par. 21. R. 2. Countee de Arundel. c. 12. Rot. Parlat. 5 H. 4. nu. 11, 12. 31 H. 6. nu. 49. Countee de Devons case. 28 H. 6. nu. 19. Duke of Suff.

22. ^b And as the beginning (viz. the finding of the indictment by freeholders) is equall to them both: so the most extreme and heavy judgement, if they be found guilty, is equal to both, &c. which you may reade in the first part of the Institutes, Sect. 147.

^a 1 H. 4. cap. 14. ^b 1 H. 4. 7. Stanf. Pl. Coron. 182. E. K. See hereafter. cap. Judgement and Execution.

23. ^c And though the commission of the lord steward be only in these latter times *hac vice*, yet may the same be adjourned, as other commissioners *hac vice* may. And so it was holden in the lord Dacres case. And so it was done by the steward of England in the case of R. earle of S. and of F. his wite, who adjourned his commission until the next day.

^c Patch. 26 H. 8. ubi supra. L. 5 E. 4. 33. 12 H. 4. 20.

24. If execution be not done according to the judgement, then the high steward in the case of a peer of the realm, or the court or commissioners in case of another subject, may by their precepts under their seales command execution to be done according to the judgement: but in case of high treason, if all the rest of the judgement (saving the beheading, which is part of the judgement) be pardoned, this ought to be under the great seale of England.

25. And when the service is performed, then is an eyes made for the dissolving of the commission; and then is the white rod, which hath been borne and holden before the steward, by him taken in both his hands, and broken over his head.

Lastly, the indictments together with the record of the arraignment, triall, and judgement, shall be delivered into the king's bench, there to be kept and inrolled.

Hitherto we have spoken when a noble man doth appear, and plead not guilty, and put himself upon his peers: Now let us see what shall be had against him when he is indicted and appears not, and cannot be taken: and generally he shall be outlawed, *per judicium coronatorum*. But how doth that stand with Magna Charta, *nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum*? That is to be intended, when he appears and pleads not guilty, and puts himself upon his peers: but when he absents himself, and will not yeild himself to the due tryall of his peers, then he shall be outlawed *per judicium coronatorum*, or else he should take advantage of his own contumacy, and flying from judgement. ^d For proces to be awarded upon the indictment or appeal of treason, felony, or trespass, either against a nobleman or any other, see the statute of 6 H. 6. and 8 H. 6. and if the proces and order prescribed by those statutes be not pursued, the outlawry may be reversed by writ of error, which writ ought to be granted to him *ex merito justitie*, as it was adjudged in Ninian Menvils case: and those statutes doe extend as well to the kings bench, as to other courts having by commission power to hear and determine the same, and very few outlawries of treason or felony, are of force and validity in law, for that these acts are not pursued.

And these acts are well expounded by our * books, and therefore they shall not need to be recited at large. This is necessary to be added, that the opinion of Stanf. Pl. Cor. 182. l. upon the statute of 33 H. 8. c. 20. is, where the attainder is not erroneous, but lawfull by the course of the law: and so it was resolved, Tr. 28 Eliz. and thereupon ^e the statute of 28 Eliz. ca. 2. was made, that no attainder that then was for any high treason should be reversed for error where the party was executed. But that act extendeth only to attainders before that act, and where the party attainted suffered pains of death, as hath been said.

But admitting the proces be awarded according to these statutes, and the truth is, that the party indicted of high treason (be he noble or other) at the time of the outlawry pronounced, is out of the realm, &c. whether may he avoid the same by writ of error? The answer is, that he might have avoided the same by writ of error at the common law: but now in case of high treason he is barred of his writ of error by the statutes of 26 H. 8. and 5 E. 6. which statutes are expounded to extend generally to all treasons, but those statutes extend not to any other offence than high treason only, and therefore all other offences remain as they did at the common law for that point.

Now for that all indictments for any offence whatsoever, as well of noblemen, as of any under the degree of nobility, ought by the common law of the realm to be by persons duly returned, and by * lawfull liege people, indifferent as they stand unsworn, and without any denomination of any: a good and profitable law

was

Mag. Cart.

ca. 29.

^d See hereafter in the chapter of Judgement and Execution concerning reversing of outlawries. 6 H. 6. c. 1. 8 H. 6. ca. 10. Mich. 26 and 27 Eliz. in bre. de error coram Rege in Ninian Menvils case.

Utlary de haut treason reverse in bank 1. 10y.

* 19 H. 6. fo.

1. 2. 11 H. 6.

51. 7 E. 4. 1.

3 H. 6. proces.

192. 31 H. 6.

11. Vide F. N.

B. 115. l.

Li. Intr. R. 7.

122. Stanf. Pl.

cor. 69, 69.

182. l.

^e 28 El. ca. 2.

[32]

See the first part of the Inst. lect. 26 H. 8. cap. 13. 5 E. 6. cap. 11. 12 El. Dier 287.

* Artic. sup.

cart. cap. 6. 28

E. 1. 20 E. 3.

cap. 6. 34 E. 3.

c. 4. 42 E. 3. c.

11. Regit. 1. S.

Ralf. pl. 117.

• was made in that behalf at the parliament holden 11 H. 4. in these words. *Item* because that now of late ^a inquests were taken at Westm' of persons named to the ^b justices, without due return of the sheriff, of which persons some were ^c outlawed before the said justices of record, and some fled to sanctuary for treason, and some for felony, there to have refuge; by whom as well many offenders were indicted, as other lawful liege people of our lord the king, not guilty by conspiracy, abatement, and false imagination of other persons for their special advantage and singular lucre, against the course of the common law used and accustomed before this time. Our said lord the king for the greater ease and quietness of his people, will and granteth, that the same indictment so made, with all the dependance thereof be ^d revoked, annulled, void, and holden for none for ever. And that from henceforth no indictment be made by any such persons, but by enquest of the king's lawful ^e liege people, in the manner, as was used in the time of his noble progenitors, returned by the sherifs, or baylifs of franchises, without any ^f denomination to the sherifs, or baylifs of franchises before made by any person of the names, which by him should be impanelled, except it be by the officers of the said sherifs or baylifs of franchises sworn and known to make the same, ^g and other officers to whom it pertaineth to make the same according to the law of England. And if any indictment be made hereafter in any point to the contrary, that the same indictment be also void, revoked, and for ever holden for none.

The body of this act consisteth upon two distinct purviens or branches, the one to remedy a mischief past, the other to provide for the time to come. The first branch consisteth of a preamble, and a purvien: and the preamble containeth these eight parts. First, it sheweth divers inquests had been taken at Westminster by persons named to the justices. Secondly, without due return of the sheriff. Thirdly, of which some were outlawed before the said justices of record. Fourthly, some fled to sanctuary for treason, and some for felony. Fifthly, by whom many offenders were indicted. Sixthly, some not guilty. Seventhly, by conspiracy, &c. Eighthly, that all this was against the course of the common law. By the body of the act, it is enacted that the same indictment, with all the dependance thereof, be revoked, and made void. Then followeth the second branch or purvien for the time to come, and this purvien consisteth of divers parts: First, in describing by what persons indictments ought to be found, and therein 1. *privative*, that is, not by any such persons, having reference to the preamble, which persons we have before particularly distinguished. 2. *Positive*, that all indictments must be found by persons of these qualities. 1. They must be the kings lawfull liege people. 2. Returned by sherifs, or baylifs, of franchises, and other officers to whom it pertaineth. 3. Without any denomination to the sherifs, baylifs, or other officers: and this purvien is in affirmance, and declaratory of the common law.

The second part of the purvien is introductory of a new law, viz. that if any indictment be made hereafter in any point to the contrary, that the same indictment be void, revoked, and holden for none. Wherein these two things are to be observed: 1. That this is a general law, and extendeth to all indictments for any crime, de-

^a 11 H. 4. c. 9.
^b Stat. p. cor. 87. c.
^c Ret. Parl. 11. H. 4. no. 15. in the Kings bench.
^d Vid. 11 H. 4. c. 4.
^e 21 H. 6. c. 10.
^f 9 H. 4. c. 10.
^g 2 H. 6. c. 55.
 . 6 Ad. 28.
^h 11 H. 4. c. 41.
ⁱ 11 H. 4. c. 19.
^j 1 E. 3. c. 5.
^k 15 E. 3. c. 10.
^l 113. 2. Ad. pa. 65. 23. Ad. 24.
^m 22. 49. E. 3. c. 1.
ⁿ 49. Ad. 1. c. 28.
^o 23. E. 3. c. 10.
^p 94. 6 R. 2. c. 11.
^q 102. 7 H. 4. c. 10.
^r 21 E. 4. c. 74.
^s 19 H. 6. c. 9.
^t 21 H. 6. c. 22.
^u 14 H. 7. c. 1.
^v Nota.

fault, or offence whatsoever: for the words be [if any indictment] generally without naming of any court, or before whom. 2. If the indictment be found by any persons that are outlawed, or not the kings lawfull liege people, or not lawfully returned, or denominated by any, viz. by all or any of these, that then the indictment is void, for the words be, [if any indictment be made hereafter in any point to the contrary, &c.] Upon this statute in the case of Robert Scarlet before the justices of assize at Bury in the county of Suffolk, in sommer vacation, 10 Ja. R. these points were resolved and adjudged: First, where at the sessions of the peace holden at Woodbridge in the said county of Suffolk, Robert Scarlet by confederacy between him and the clerk, that was to read the pannell of the grand jury returned by the sherif, (whereof he was none, albeit he laboured the sherif to have returned him) that the clerk should read him as one of the pannell, which was done accordingly, and he sworn. It was resolved and adjudged that this case was within the statute, for that he was not returned by the sherif. Secondly, that where the rest of the great inquest giving faith to him indicted seventeen honest and good men upon divers penall statutes, which was done by the said Robert Scarlet maliciously. It was resolved and adjudged, that albeit he * alone was sworn without the return of the sherif, and all the rest duly returned, yet this case was within this statute, and all the indictments found by him and the rest were void by this statute: for hereby it appeared what mischief such a one might doe. Thirdly, that Robert Scarlet upon this case had offended against the said act, and might be indicted thereupon: and accordingly he was upon sufficient proof of the fact, as aforesaid, indicted upon the said act, and pleaded not guilty, and was found guilty. Fourthly, that this act extended not only to indictments of treason and felony, but of all other offences and defaults whatsoever, according to the generality of the words. Fifthly, consideration was had of the act of 3 H. 8. cap. 12. and resolved clearly that this statute had not altered the act of 11 H. 4. in any thing concerning the offence of Scarlet, as upon that, which shall be said of the act of 3 H. 8. shall appear. And upon hearing of councell learned what they could say in arrest of judgement, at last judgement was given, that he should be fined and imprisoned, and ordered by the court that no proces should goe out upon the said indictments found by the said great inquest, whereof Scarlet was one.

But notwithstanding this good law, through the subtilty, and untrue demeanor of sherifs, and their ministers, great extortions and oppressions be and have been committed and done to many of the kings subjects by means of returning at sessions holden within counties and shires for the body of the shire, the names of such persons as for the singular advantage, &c. of the said sherifs and their ministers, will be wilfully forsworn and perjured by the sinister labour of the said sherifs and their ministers, by reason whereof many substantial persons, the king's true subjects have been wrongfully indicted of murders, felonies, and misdemeanours: and sometime by labour of the said sherifs and their ministers, divers great felonies and murders have been concealed, &c. For remedy of which mischiefs it is enacted by the said statute of 3 H. 8. cap. 12. That the justices of great delivery, or justices of peace, whereof

47 E. 3. 1.
7 H. 4. 10.
21 E. 4. 74.

3 H. 8. ca. 12.