A

TREATISE

OF THE

Pleas of the Crown.

By EDWARD HYDE EAST, Esq.
OF THE INNER TEMPLE.

Quid triſtes querimoniæ,
Si non ſupplicio culpa reciditur.
HORAT. Lib. 3. Ode 24.

VOL. I.

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1803.

TO

THE HONOURABLE

Sir SOULDEN LAWRENCE, Knight,

ONE OF THE JUSTICES

OF HIS MAJESTY's COURT OF KING's BENCH,

THIS TREATISE

IS,

WITH GREAT RESPECT AND ESTEEM,

DEDICATED

BY HIS MUCH OBLIGED,

AND VERY FAITHFUL HUMBLE SERVANT,

EDWARD HYDE EAST.

PREFACE.

I SHOULD have conſidered it an unbecoming preſumption, as well as an unneceſſary labour, had I ventured, without additional materials, on a new arrangement and diſcuſſion of the ſubject of theſe volumes, already ſo ably and authoritatively treated of by Lord C. J. Hale and Mr. Serjt. Hawkins. But it is now near ninety years * ſince the laſt of thoſe authors publiſhed his valuable work, and the accumulation of new matter, both by ſtatutes and adjudged caſes, is become ſo great, that a reviſion of this moſt intereſting branch of our law would, I thought, be an acceptable offering to the members of my profeſſion, however far the execution of it might fall ſhort in point of ability of thoſe models which they have been accuſtomed to contemplate.

It may be ſaid, that much has already been done towards the completion of what I have propoſed by the excellent diſcourſes of Mr. Juſtice Foſter, by the notes which have from time to time been added to the ſeveral editions of Serjt. Hawkins's work, and by a collection of caſes on the crown law publiſhed within a few years paſt by Mr. Leach.

With reſpect to the firſt of theſe, it is greatly to be lamented, from the ſpecimen which that learned judge has given of his talent in this ſpecies of writing, that he did not take a more general view of the criminal law, which he ſeems at one time to have meditated. Had he extended the ſame attention to other parts of

* The firſt edition was printed in 1716.

it as he has done to the ſubjects of High Treaſon and Homicide, this, or any other treatiſe of the like ſort, would have been much leſs wanted. His ſearching and well-poiſed mind would have cleared many of the difficulties which have impeded my progreſs, and the authority of his opinion would have ſettled many doubts which I have only ventured to ſuggeſt, or at moſt to hint a ſolution of.

With regard to the additions made to the ſubſequent editions of Hawkins, however ſerviceable as notes and references, yet from the very nature of ſuch materials they are for the moſt part little calculated to give that complete and ſatisfactory information, which is eſſentially requiſite to be obtained without delay in criminal caſes.

The publication of Mr. Leach's reports is of another deſcription. About a twelvemonth or more before that made its appearance, I had begun to make a collection of Crown MSS. with a view to a work of this kind at ſome diſtant period, and had been furniſhed with many of the caſes which are to be found in that book particularly by the late Mr. Juſtice Buller, who encouraged me to undertake the publication of them, provided I could obtain the conſent of the other judges, without which he did not feel himſelf at liberty to do more than to furniſh me with copies for my own information and amuſement. While I was deliberating upon his propoſal, Mr. Leach's book was firſt publiſhed, which removed part of the difficulty I had felt in making the deſired application to the judges; and ſoon afterwards in the courſe of July 1789, Lord Kenyon, by the conſent of the whole bench, gave me permiſſion to take a copy of that collection of caſes, of which as chief juſtice of the court of king's bench he was the depoſitary, and which will hereafter be mentioned in the liſt

liſt of MSS. referred to in the ſubſequent ſheets. From ſeveral of the other judges I alſo received the moſt liberal communications of their own MSS. and particularly from Mr. Juſtice Gould, whoſe venerable years and indefatigable profeſſional labours had given him more opportunity than any other of making a large collection of caſes within his own time. Theſe MSS, as coming from the moſt authentic ſources, carry with them the greateſt authority. If however my intention had been merely confined to publiſh a collection of crown caſes, it is probable that Mr. Leach's book would have made me refrain, from a conſideration, ſince juſtified by the event, that whatever inaccuracies firſt appeared in that volume, the principal at leaſt would be ſoon corrected in the ſubſequent editions. But as my intention went further, and I had originally propoſed to exhibit the modern deciſions in the ſhape of notes to Lord Hale's Summary, taking that as the ground work of the arrangement, on account as well of its authenticity, as its brevity, the printing of many of thoſe deciſions, together with the accumulation of additional matter, ſtimulated me to enlarge my plan, and to take a more general view of the criminal law, in which I was further encouraged by the friendly communication of other MSS., as ſoon as my deſign was known, from many gentlemen, whoſe names I ſhould be proud to connect with my own if I were at liberty ſo to do.

I was thus drawn on by degrees to engage in this very arduous undertaking before I was well aware of its magnitude. Let this be ſome alleviation of my preſumption with the public: and the members of my own profeſſion, who can alone juſtly eſtimate the extreme labour and difficulty as well as the painful anxiety accompanying an attempt of this nature, will, I truſt, judge of it with their habitual candour and indulgence. I make no apology for the length of

time the work has been preparing for, and in the preſs: I am more afraid that the importunity of friends has led me to haſten the publication of it ſooner than I ought in prudence to have done: but had I waited till I had ſatisfied myſelf with my own corrections of it, I know not when my mind would have been relieved from the burthen which has already broken in too much upon my private life.

Having been led to mention the name of my departed patron and friend, Mr. Juſtice Buller, to whoſe notice and regard I was recommended at my firſt outſet in the profeſſion of the Law by one whom we held in equal reverence and eſtimation, I truſt it will not be thought too great a deviation from the purpoſe of this introduction, if ſtrongly impreſſed by a ſenſe of the obligations I owe to him, I ſhortly trace, and add my humble endeavour to continue the memory of his many amiable and excellent qualities. At a very early period of his life, having been advanced to the rank of one of his majeſty's counſel, and being puiſne judge of Cheſter, he was in the thirty third year of his age, on the death of Sir Richard Aſton, which happened in the year 1778, placed upon the Engliſh bench at the inſtance of Lord Mansfield, who recommended him to that high ſtation, from having diſcovered in him thoſe talents and that knowledge, which pointed him out as the ableſt aſſiſtant he could ſelect from the bar of the court, in which he preſided. If any man were arrogant enough at the time to queſtion the judgment of Lord Mansfield upon that occaſion, the very active and able part which Mr. Juſtice Buller ſuſtained in the adminiſtration of juſtice for more than ſeventeen years during which time he ſat in the court of king's bench, as well as the ſhare which his declining health permitted him to take in public buſineſs during the ſix years he was a judge of the court of Common Pleas, would

moſt decidedly prove the diſcernment of that noble and enlightened magiſtrate, who left the public to regret as little as poſſible thoſe infirmities, which prevented the continued exertion of his own ſplendid talents, when to the abilities of the other judges of his court he added the induſtry, ſagacity, quickneſs, and intelligence, for which Mr. Juſtice Buller was moſt eminent. And perhaps the wiſdom of Lord Mansfield's recommendation cannot be more ſtrongly evinced, than by recollecting that the whole buſineſs of the ſittings in Weſtminiſter and London, during the two or three laſt years of his being chief juſtice, was conducted ſolely before Mr. Juſtice Buller; in the courſe of which many great and important queſtions, extenſively affecting the real and commercial intereſts of this country, were determined by him with a promptitude and juſtneſs of deciſion, which would alone place him very high in rank among thoſe judges, whom this country has been uſed to regard with admiration and reverence. That the opinion which Lord Mansfield formed of him when raiſed to the bench was not altered, when he himſelf retired from office, is certain; for it is known, that if he had had the nomination, he would have named Mr. Juſtice Buller as his ſucceſſor*. In regard to his adminiſtration of criminal law, it uſed to be ſaid of him by thoſe, who from their ſituation in life were moſt likely to form a true judgment of that part of his character, that no perſon if guilty would chuſe to be tried by him, but that every one if innocent would prefer him for his judge:

* In mentioning this anecdote, I truſt no one will ſuſpect me of intending the ſlighteſt diſreſpect to the late Lord Kenyon, of whom it has been juſtly obſerved, that he poſſeſſed more juridical knowledge than any other intermediate ſucceſſor of the learned Hale; my ſole object is to record the teſtimony, which, after many years experience, Lord Mansfield bore to the fitneſs of Mr. Juſtice Buller to fill the higheſt judicial ſituation in the Courts of common law.

judge: than which nothing ſurely can deſcribe more emphatically the general opinion of his great diſcernment and impartiality. In private life he united the moſt amiable temper with the moſt frank and conciliating manners, and, without regarding his own time or trouble, encouraged by the kindeſt attention and the moſt willing aſſiſtance the younger members of that profeſſion of which he was himſelf a diſtinguiſhed ornament.

I ſhall now proceed to make a few general remarks on the ſcope and conduct of the work, and then conclude with mentioning the ſeveral MSS. and publications which are referred to in it.

In drawing the outline of this treatiſe I have endeavoured as much as poſſible to claſs together kindred offences. This has led me to depart in ſome inſtances from the more uſual arrangement; but the convenience in practice from bringing together approximating offences into one view and in the ſame volume, will, I truſt, compenſate for ſuch deviation from the beaten path. For this purpoſe I have firſt claſſed together all offences againſt religion and the church eſtabliſhment. Next, ſuch as touch the perſon and majeſty of the king and the allegiance due to him as the ſupreme magiſtrate of the ſtate. This claſs of courſe includes ſeveral offences inferior to High Treaſon, though of the like tendency, which are noticed in the progreſs of the principal inquiry. Next are claſſed offences immediately againſt the *perſon*, amongſt which I have ranged ſuch as relate to forcible, clandeſtine, and illegal marriages for the reaſons hereafter ſuggeſted. Then follow offences immediately againſt *property*, beginning with thoſe the principal object of which is the gain of the offender, and which are ſaid to be done lucri cauſâ, and ending with thoſe inſtigated by mere malice, including ſuch as are of a mixed nature. Theſe conclude the two firſt volumes which are now

 publiſhed

publiſhed. A third volume, which is in conſiderable forwardneſs will include the offences of which I have not already treated, and conclude with a general view of the practical progreſs of criminal proceedings from the arreſt of the offender to the final conſummation of the law.

I wiſhed much to have brought this work into a narrower compaſs, which might have rendered it in ſome reſpects more convenient for common uſe, and would have ſaved me much time, labour, and expence; but theſe ends could not have been obtained without greatly leſſening the utility and value of the materials. It is well known to every lawyer that in criminal matters an abbreviation of an adjudged caſe is very ſeldom ſatisfactory, and that of a ſtatute is nearly uſeleſs, and can never be ultimately relied on. In many inſtances where the marginal abſtract of a caſe will, I truſt, be thought to give the full ſubſtance and effect of it, yet the caſe itſelf could not with any propriety have been omitted, without aſſuming to myſelf an authority which all might well diſpute, who wiſhed for more authentic information of the deciſion, and many would regret on account of loſing the preciſe and formal precedent, which has its uſe. The importance and neceſſity indeed of having the moſt correct information at hand is ſufficiently obvious to thoſe who practiſe at the crown bar, where it is moſt uſual, and always deſirable for the ends of juſtice and the influence of example, as far as certainty can be reaſonably obtained, that the trial which commences ſhould without intermiſſion be definitively concluded by judgment. Without loſing ſight of theſe moſt important objects, a faithful tranſcript of all the operative parts of the ſtatutes * in queſtion, and an authentic

* The ſtatutes when quoted verbatim are put within inverted commas; but thoſe are omitted in ſome inſtances where the purpoſe was of a ſecondary nature, and ſufficiently anſwered by ſetting forth the ſubſtance.

authentic ſtatement of the adjudged caſes, I have endeavoured to abbreviate all general matters which are of common notoriety, and are treated of in other well known books. Some heads which are grown almoſt obſolete I have very ſhortly touched upon, and having nothing new to add have contented myſelf with referring to other works where they are more fully diſcuſſed. And as the object of this treatiſe is confined to the deſcription of ſuch offences alone as are cognizable in the principal criminal courts of oyer and terminer and gaol delivery, I have only occaſionally noticed ſuch ſtatutes as refer to the juriſdiction of inferior magiſtrates upon ſummary proceedings, where I thought they might explain or illuſtrate the principal matter: it was indeed the leſs neceſſary to ſwell this work to a ſtill more inconvenient ſize by their introduction, as it is impoſſible to arrange thoſe laws in a more convenient and judicious manner than that in which they are already to be found in the admirable volumes of Dr. Burn.

EDWARD HYDE EAST.

Adelphi Terrace,
May 1803.

The following is an Account of the principal MSS. referred to in this Work.

1. A copy of a book, in which the crown caſes reſerved for the opinion of the Judges for many years back are entered. The original is in the cuſtody of the Lord Ch. J. for the time being of the Court of King's Bench. The determinations are entered ſhortly, ſometimes with the reaſons, but generally without. This deficiency I have been enabled to ſupply for the moſt part by the aſſiſtance of the private MS. next after mentioned. This book is cited as MS. Crown caſes reſerved; abbreviated, MS. Crown caſ. reſ.

2. Copies of the reſerved caſes above referred to, which were delivered to the ſeveral Judges before they met to conſider of them, with their memoranda or notes of the grounds of the determinations. I have been liberally favoured with communications of this kind from ſeveral of the Judges, which are quoted as MS. Jud. or MS. of the Judges. Part of theſe, I may now mention without breach of delicacy, as having been communicated to me by the late Mr. Juſtice Gould and Mr. Juſtice Buller, and which have the ſanction of their names.

3. Lord Hale's Summary, interleaved with MS. corrections and additions. This MS. compilation, though began before, (probably by Mr. Stow a gentleman at the bar) was put into its preſent form by Mr. Juſtice Yates, whoſe ſon is now in poſſeſſion of it. Copies of it were communicated to different Judges, who have contributed from time to time the fruits of their own experience. My own copy was taken from one in the poſſeſſion of the late Mr. Juſtice Buller. The work was bound up in three volumes, according to which I have cited it by the deſcription of 1. 2. and 3 MS. Sum. and I have added the page of the MS., becauſe copies of it are now in the hands of many gentlemen of the profeſſion. The greateſt part of the work is a compilation from printed books, chiefly from Mr. Juſtice Foſter's Treatiſe on the Crown Law, Lord Hale's and Hawkins' Pleas of the Crown.

4. One

4. One volume of MS. is cited by the name of MS. Tracy, by which Judge it was compiled as a comment on Lord Hale's Summary. A copy of this, which is occaſionally referred to in Mr. Juſtice Foſter's treatiſe, was communicated to me by Mr. Juſtice Lawrence.

5. A ſimilar compilation by Mr. Juſtice Burnet. The original is part of a moſt valuable collection of law MSS. made by Lord Chancellor Hardwicke: a copy of which was furniſhed to me by his deſcendant, my worthy friend, the Right Honorable Charles Yorke. This is cited as Burnet's MS. Summary, or, MS. Burnet.

6. Lord Holt's MS. from the laſt-mentioned collection.

7. A MS. volume of Crown caſes communicated by the late Lord Aſhburton to Mr. Juſtice Heath, by whom I was favoured with a copy. Theſe, which are cited as MS. Dunning, were taken by his Lordſhip when at the bar.

8. A MS. work of the late Mr. Serjeant Forſter, being a Treatiſe of the Crown Law, and probably intended by him for publication had he lived to have given it the finiſhing reviſal: Mr. Bolton, whoſe property in it was derived immediately from the author, very liberally confided the cuſtody of it to me, with liberty to make what extracts from it I pleaſed. But as I found that the author had been working upon materials ſimilar for the moſt part to my own, the uſe I have made of his treatiſe has been very ſparing, confined altogether to a few original caſes which had chiefly fallen under his own notice, and which I have marked with his name.

9. MSS. of Mr. Maſterman, ſometime ſince Secondary of the Crown Office, for the uſe of which I am indebted to Mr. Barlow, the preſent Secondary, to whom they belong.

10. Two volumes of MS. caſes, cited as Shapleigh's MS., the name of a gentleman formerly at the bar, who it was once ſuggeſted to me was probably the author. I have ſince however had reaſon to doubt the information. They were communicated to me by Charles Short, Eſq. the Clerk of the Rules on the plea ſide of the court of K. B. who received them from a relation of his at the bar long

long ſince deceaſed; but he knows not by whom they were taken. Mr. Juſtice Buller, who formerly inſpected them, gave them the praiſe of accuracy.

11. A few MS. caſes taken by myſelf, or communicated to me by friends, for whom I am gladly reſponſible. Theſe are ſimply marked MS.

Of printed books with varying editions, it may be uſeful to remark thoſe which I have uſed:

Crown Circuit Comp. 1738, in the firſt part of the work, and latterly the edition of 1799.

Dalton's Juſtice, fo. edit. 1727.

Leach's Crown Caſes, 2d edit. in the firſt part and latterly the edition of 1800, in two volumes.

State Trials, Hargrave's edit.

Statutes, Runnington's edit.

With the following liſt of Errata and Addenda will be found a few caſes which were not decided in time to be noticed in their proper places in the progreſs of the Work.

ERRATA ET ADDENDA.

Page

2. V 9. dele "*by perſons holding places at court,*" and add "*By barriſters, &c. form of oaths and tender.*" §. 19.
107. line 17. for "*confirmed*" read "*confined.*"
117. line 9. for "*is*" read "*was.*"
270. line 17. for "*were*" read "*was.*"
370. laſt line note, add "G. B. December 1775, *vi.* 1 Leach, 160. Captain Roche's caſe. A later inſtance was that of Governor Wall, tried and executed for the murder of Benjamin Armſtrong a ſoldier, at Goree in Africa, O. B January 1802."
383. add to Beaver's caſe in the margin "Hil. term 1785; and refer to Rex v. Pickerſgill and others, Cald. 297."
396. line 9. for "Lord C. J. *Pratt*" read "Lord C. J. *King.*"
416. line 3 and 5 from the bottom, for "*priſoner*" read "*proſecutor.*"
laſt line, for "*and*" read "*as*" (this is right in many copies).
427. at the end of title *aſſaults*, &c. add "ſtat. 33 Geo. 3. c. 67. aſſaults on ſeaman, keelman, caſter, or ſhip-carpenter, with intent to obſtruct them in their buſineſs; a miſdemeanor for the firſt offence, felony and tranſportation for the ſecond offence."
549. after line 31. add "6. Advertiſing reward, &c. for ſtolen goods, a forfeiture of 50*l.* by ſtat. 25 Geo. 2. c. 36. §. 155. *b.*"
579. S. 21. refer to "ſtat. 42 Geo. 3. c. 81. ſ. 1." paſſed ſince that part was printed.
582. Moore's caſe; refer to "ſtat. 42 Geo. 3. c. 81. ſ. 1." ſince paſſed.
589. ſtat. 13 Geo 3. c. 32. refer to "ſtat. 42 Geo. 3. c. 81. ſ. 4." ſince paſſed.
603. ſ. 38. refer to the ſame ſtatute.
605. refer from Thomas's caſe to "ſtat. 42 Geo. 3. c. 81. ſ. 3." ſince paſſed, which cures the difficulty.
609. as to *ſtealing deer*, refer to "ſtat. 42 Geo. 3. c. 107. ſince paſſed, which again makes the offence of *ſtealing deer* in *incloſed* grounds felony, and ſubjects to tranſportation for 7 years; in other grounds, to a penalty of 50*l.* for the firſt offence, and felony and 7 years' tranſportation for the ſecond."
658. line 6. in the margin dele "*at.*"
706. laſt line in the margin, for "Cro. Cir. *Comp.*" read "Crown Circ *Comp.*"
826. laſt line, add "13 Vin. Abr. 460."
845. add "xiii. Forging, &c. *contracts, aſſignments, certificates*, or *receipts*, reſpecting the redemption of the *land-tax*, a capital felony by ſtat. 42 Geo. 3. c. 116. ſ. 194." §. 31. *b.*
864. At the head of the ſecond note for (*a*) place (*b*).
872. in margin, for "8 Geo. 2." read "8 Geo. 1."

Addenda.

Benjamin Pooley was tried before Lawrence J. at the Old Bailey in 1801, and convicted on an indictment founded on the ſtat. 7 Geo. 3. c. 50. ſ. 2. charging him with ſtealing out of the poſt-office a letter ſent to be delivered by the poſt. It appeared in evidence that the priſoner was employed in the Penny Poſt department as a charge-taker and as a letter-carrier; and that as charge-taker the letters arriving by the General Poſt, which were to be delivered by the carriers of the Penny Poſt of the eaſtern diviſion, were delivered to him to be divided according to the different walks of the letter-carriers; and that he did not deliver the letter which was the ſubject of the indictment to the letter-carrier within whoſe walk the perſon lived to whom it was directed; but that he afterwards opened it, and took out of it a checque or draft for 200*l.* on the Stratford Place bank, drawn on unſtamped paper by a perſon living above 30 miles from Stratford Place. It was objected for the priſoner, that this draft being on unſtamped paper could not be received in evidence as a medium to ſhew that the priſoner had ſtolen the letter: but the court over-ruled the objection, being of opinion that the draft, though unſtamped, might be received in evidence for collateral purpoſes, though not for the purpoſe of recovering the money contained in it. But the Court entertained doubts whether the ſecond ſection of that act applied to *ſervants* of the poſt-office, againſt whoſe miſconduct the firſt ſection of the act was intended to guard; and from which it might be inferred that the Legiſlature did not conceive, that the embezzling a letter by thoſe ſervants was a larceny: and Strutt's caſe, Leach 100. was referred to, where Nares and Willes Juſtices, and Glynn Serjeant Recorder were of that opinion. On the 23d of June 1802 all the Judges agreed that the conviction was wrong, being of opinion that the 2d ſection of the ſtat. 7 Geo. 3. c. 50. did not extend to the ſervants of the poſt-office; which opinion was founded on comparing that ſection with the 1ſt and 3d ſections of the act. The priſoner was accordingly recommended for a pardon.

Pooley's caſe, MS. Jud. *The ſtat. 7 Geo. 3. c. 50. ſ. 2. does not extend to the ſervants of the poſt-office: and therefore a conviction of one of them for ſtealing out of the poſt-office a letter ſent to be delivered by the poſt, held wrong.* (Poſt. ch. 16. ſ. 38.)

Draft on unſtamped paper may be received in evidence for collateral purpoſes as to prove the offence of ſtealing, &c.

Harris's caſe, MS. Jud. *Conviction on the Black Act for firing at one who came to execute a writ of poſſeſſion with a warrant, in which the party's name was inſerted after the ſealing by the ſheriff, but before delivery out of the office by the under-ſheriff, held good.* (poſt. ch. 8. ſ. 6.)

John Harris was tried before Rooke J. at Salop, March 1801, for wilfully ſhooting at Thomas Banks; and being convicted, received ſentence; but execution was reſpited to take the opinion of the Judges on the following facts. Thomas Banks went with a warrant from the ſheriff of Salop to execute a writ of poſſeſſion on the priſoner's houſe. The warrant was addreſſed to three perſons, the ſheriff's bailiffs, and *after it was ſealed*, but *before it was ſent out of the office*, an interlineation was inſerted by the under-ſheriff in theſe words; "and to Jeremiah Powell and Thomas Banks, my "bailiffs on this occaſion only." Powell and Banks went to the priſoner's houſe to execute the writ of poſſeſſion, and deſired admittance. The priſoner looked out of the window, and they ſhewed him their warrant. The priſoner ſaid, that the firſt perſon who came in he would blow his brains out. Banks then went for more help, and returned with another man. They then burſt open the door of the houſe, and the priſoner fired a blunderbuſs at them, and wounded Banks very ſeverely in the knee. It was objected by the priſoner's counſel at the trial, firſt, that the warrant gave no authority to Banks or Powell, their names being interlined after the ſeal was affixed to it. Secondly, that the priſoner having ſhot at Banks in his own houſe, this was not within the meaning of the ſtatute. But the Judges held the conviction proper.

Vide Padfield v. Cannell and others, Willes' Rep. 411. which was referred to.

Martin's caſe, MS. Jud. *Indictment charging that the priſoner on the 14th of February, &c. uttered baſe coin to W. C. knowingly, &c. and that on the ſaid 14th of February, &c. he uttered to J. L. &c. is ſufficient to warrant the higher judgment required by ſtat. 15 G. 2. c. 28. ſ. 3. on ſuch as utter baſe coin twice on the ſame day: for the day as laid is material.* (*Vide* poſt. ch. 4. ſ. 29.)

Robert Martin was tried before Graham B. at the Derby aſſizes, March 1801, upon an indictment on the ſtat. 15 Geo. 2. c. 28.; the firſt count of which charged, that the priſoner on the 14th of *February*, in the 41ſt year of the King, one piece of falſe and counterfeit money made to the likeneſs of a ſhilling, as and for current money of the realm, did utter to one *William Coxen*, well knowing the ſame to be counterfeit; and that the ſaid Robert Martin on *the ſaid 14th of February* one other piece of counterfeit money made to the likeneſs of a ſhilling, as and for current money of the realm, did utter to one *John Longden*, well knowing the ſame to be counterfeit, againſt the form of the ſtatute. There was a ſecond count for a ſingle utterance to Wm. Coxen. The jury found a verdict on the firſt as well as ſecond count, on evidence of knowingly uttering bad ſhillings twice on the 14th of February. But it was moved in arreſt of judgment

judgment for the increaſed puniſhment, that the charge in the firſt count for the ſecond utterance was uncertain, being laid on *the ſaid 14th of February*, inſtead of following the words of the ſtatute and laying it "on the ſame day;" inaſmuch as evidence of an utterance at any time before the indictment found would (it was ſaid) ſupport the firſt part of the charge; and therefore that it did not neceſſarily appear on the face of the indictment that the utterings were both on the *ſame* day. The queſtion was thereupon reſerved for the Judges, Whether, as the caſe was proved, the charge of the ſecond utterance in the firſt count were well laid?

Vide Carliſle v. Treats, Comp. 671. Johnſon v. Pickett, E. 25 Geo. 3. Pope v. Foſter, 4 Term Rep. 590.

At a conference on the 5th of June 1801, to which time the caſe was adjourned, the Judges were of opinion that the indictment was good; for that on the face of it the utterings appeared to be on the ſame day: and though when the day was not material, the fact might be proved on a day different from the day laid; yet where it was not indifferent the preciſe time laid muſt be proved: and that in this caſe it muſt be taken that it was proved that the defendant uttered counterfeit coin at two different times of the ſame day.

Michael's caſe, O. B. Feb. 1802. MS. Jud. *An indictment charging that the defendant was before that time indicted for uttering baſe coin, knowing it to be falſe and counterfeit, and having about him at the time in his cuſtody and poſſeſſion other baſe coin, on which he was in due form of law* TRIED AND CONVICTED, *and adjudged by the Court there to be impriſoned for a year and find ſureties for two years more; and then averring that* HAVING BEEN SO CONVICTED AS A COMMON UTTERER OF FALSE MONEY

An indictment charged that heretofore, viz. at the general quarter ſeſſions of the peace, &c. holden at Guilford, &c. on, &c. viz. the 15th of July, 40 Geo. 3. before, &c. juſtices of our Lord the King aſſigned to keep the peace, &c., the defendant, by the name and deſcription of Michael Michael of, &c. was *in due form of law tried and convicted* by a certain jury of the county, duly taken and ſworn between our ſaid Lord the King and the ſaid M. M. in that behalf, on a certain indictment then depending againſt him the ſaid M. M.; for that the ſaid M. M., on the 10th of July, 40 Geo. 3., with force and arms at, &c. one piece of falſe and counterfeit money made and counterfeited to the likeneſs and ſimilitude of a piece of good, lawful, and current money and gold coin of this realm called an half guinea, as and for a piece of good, lawful, and current money and gold coin of this realm called an half guinea, unlawfully, unjuſtly, and deceitfully did *utter* to one Js. Senior; he the ſaid M. M. at the time when he ſo uttered the ſaid piece of falſe and counterfeit money then and there well knowing the ſame to be falſe and counterfeit: and that he the ſaid M. M. at the time when he ſo uttered the ſaid piece of falſe and

be afterwards knowingly uttered other baſe money, is good; without averring that the Court before whom he was tried and convicted for the firſt offence ADJUDGED HIM TO BE A COMMON UTTERER OF FALSE MONEY; *though the ſtat. 15 & 16 G. 2. c. 28. ſays, that ſuch a perſon as is deſcribed in the firſt indictment* SHALL BE DEEMED AND TAKEN TO BE A COMMON UTTERER, *&c.* (Poſt. ch. 4. ſ. 29.)

counterfeit money as aforeſaid, viz. on the ſaid 10th of July, 40 Geo. 3. at, &c. had about him the ſaid M. M., in the cuſtody and poſſeſſion of him the ſaid M. M., one other piece of falſe and counterfeit money, made and counterfeited to the likeneſs and ſimilitude of a piece of good, lawful, and current money and ſilver coin of this realm, called an half crown, he the ſaid M. M. then and there well knowing the ſaid laſt-mentioned piece of falſe and counterfeit money to be falſe and counterfeit; in contempt, &c. and againſt the form of the ſtatute, &c. and againſt the peace, &c.; and thereupon it was conſidered and adjudged by the ſaid court that the ſaid M. M., for the miſdemeanor and offence aforeſaid in the indictment above ſpecified, ſhould be impriſoned in the common gaol of the county aforeſaid for the ſpace of one year, and until he found ſureties for his good behaviour for two years, to commence from the expiration of the firſt year, himſelf to be bound in 40*l.* and two ſureties to be bound in 20*l.* each; as by the record thereof doth more fully appear. And further, &c. that the ſaid M. M. late of L., labourer, *having been ſo convicted as a common utterer of falſe money*, afterwards, viz. on, &c. with force and arms at, &c. one piece of falſe and counterfeit money, made and counterfeited to the likeneſs and ſimilitude of a piece of good, lawful, and current money and gold coin of this realm, called a ſeven ſhilling piece, as and for a piece of good, lawful, and current money and gold coin of this realm called a ſeven-ſhilling piece, unlawfully, unjuſtly, deceitfully, and feloniouſly did *utter* to one T. L., he the ſaid M. M. at the time when he ſo uttered the ſaid laſt-mentioned piece of falſe and counterfeit money, then and there well knowing the ſame to be falſe and counterfeit, in contempt, &c. and againſt the form of the ſtat. &c. and againſt the peace, &c. There was a ſecond count differing from the firſt, in charging the priſoner with *having been ſo convicted as aforeſaid*, inſtead of the words, "*having been convicted as a common utterer of falſe money.*"

The priſoner being convicted on this indictment before Mr. Common Serjeant (Silveſter), the following objection was taken in arreſt of judgment, which was reſerved for the opinion of the Judges. That in ſtating the original record and judgment of the court of quarter ſeſſions, it is not ſtated that

that the Court did *adjudge* the defendant *to be a common utterer;* but only that they conſidered and adjudged the priſoner to be impriſoned twelve months, and to find ſurety for his good behaviour for two years more.

On the 5th of May 1802, the Judges on a conference held the conviction right; and that it was not neceſſary that the Court ſhould *adjudge* the defendant *to be a common utterer;* though the ſtat. 15 & 16 Geo. 2. c. 28. ſays he ſhall be *deemed and taken to be a common utterer;* that being a concluſion of law: and it being ſufficient for the Court, before whom a defendant is convicted of an offence within the ſtatute, to adjudge him to ſuffer the puniſhment inflicted by law on the offence.

Vide Tandy's caſe, and Smith's caſe, poſt. ch. 4. ſ. 29.

John Jackſon, and William Shipley, together with one John Morris, were charged with robbing W. S. in the dwelling-houſe of S. Rowe, in the pariſh of Gidling, in the county of Nottingham. The proſecutor proved that while he was threſhing in his father's barn in the afternoon of the 8th of February, at Gidling, Shipley and Morris came and aſked if W. S. lived there; being told by the proſecutor that he was the man, they aſked him if he remembered being with two ſoldiers a-while back, and lying with them, and being anſwered in the affirmative, they told him that one of the ſoldiers named Jackſon had ſaid that he (the proſecutor) had *abuſed* him; that Jackſon had come over to Carlton, and that if the proſecutor did not come and make it up with Jackſon the latter would certainly follow the law; but that if he went there and made it up with him there would be no more of it. The proſecutor anſwered that he knew nothing of the ſort, but that he would go and hear what Jackſon had to ſay. Shipley and Morris then went away, and the proſecutor followed them to a public houſe kept by S. Rowe at Carlton, where he alſo found Jackſon and another ſoldier. They there had ſome converſation in a private room, in which Jackſon preferred the ſame charge againſt the proſecutor of his having unnaturally abuſed him, which the other poſitively denied; and at laſt Jackſon told the proſecutor that if he would pay him the expences there ſhould be no more of it. The proſecutor ſaid he was willing to pay any thing in reaſon; and Jackſon left it to Morris and Shipley to make up the account; when they ſet down in

Jackſon, and Shipley's caſe, Nottingham Spring aſſizes, 1802, cor. Graham B. MS. Jud. *To conſtitute robbery by taking money from another upon a threat to charge him with an unnatural crime, the money muſt be taken* immediately *upon the threat made, and not after the parties have ſeparated, and time for the proſecutor to deliberate and procure aſſiſtance, and eſpecially after he had conſulted a friend who was even preſent at the time when the money was paid: though the proſecutor parted with his money from fear of laſing his character.* (Poſt. ch. 16. ſ. 130.)

writing theſe articles, as mentioned by Jackſon. "Doctor 1l. 11s. 6d. For abuſing me 1l. 8s. Morris 10s. Shipley 5s. The other ſoldier 2s. 6d. (Caſt up and making together) 3l. 17s." They aſked however four guineas in all of the proſecutor, who ſaid he had no ſuch money, unleſs they would truſt him. Morris ſaid they muſt have the money with them. The proſecutor told them he had none unleſs he could get it of his parents, and he aſked one of them to go out with him, and Shipley accordingly went with him. The proſecutor ſwore that he was much frightened and hurried, and did not know what beſt to do. He with Shipley went to his mother's, where under pretence that a ſoldier had been hurt he obtained from her four guineas; and in their way back to the public houſe, the proſecutor ſtopped at the houſe of one W. Shelton, whom he defired and finally prevailed upon to go along with him. Shelton inquired what was the matter, and being informed by Shipley of the nature of the charge againſt the proſecutor, declared his diſbelief of it, and that if it were his caſe he would not pay the money. Shipley ſaid, that if the proſecutor did not pay it, it would coſt him 50l. or 100l., or perhaps his neck; that he himſelf was a conſtable and ſhould go for a warrant the next morning. This language frightened the proſecutor very much. He returned to the public houſe, together with Shipley and Shelton, where he found Jackſon, Morris, and the other ſoldier in the room where he left them. After ſeating himſelf a minute or two he laid the money, amounting to four guineas, on the table, and aſked who would take it; they all ſaid Jackſon, but Shipley took it up; and amongſt them they returned back ſix ſhillings to the proſecutor, half-a-crown of which was ſaid to be for his friend's expences (meaning Shelton). The proſecutor aſked for a receipt, but was told by Morris that his friend would do as well. Shelton inquired what doctor Jackſon had applied to, but only received evaſive anſwers. The proſecutor then ſwore to the falſehood of the charge; but ſaid that he was ſcared at it, and that was the reaſon why he parted with his money. It appeared on the croſs examination that Jackſon had firſt made the charge on the 4th of February, the morning after the night they had lain together; but he did not repeat it then, and they continued eating and drinking together for

for ſeveral hours after. That after this, the proſecutor had heard of his having repeated it in ſeveral companies, which had cauſed him much agitation of mind in the interval. Shelton confirmed the proſecutor's account as to what happened in his preſence; and ſwore further, that as they were going into the public houſe he called the proſecutor back, and adviſed him not to pay the money. He added, that the proſecutor was quite ſcared out of his wits.

From the whole of the evidence it ſeemed highly probable that the charge was falſe, and had been fabricated by Jackſon for the purpoſe of extorting money. Shipley's defence was, that he knew nothing of the matter but from Jackſon, who had perſuaded him of the truth of the charge. Graham B. in ſumming up the evidence obſerved, that the felonious and violent taking from the perſon money to any amount, by putting him in fear, conſtituted robbery; and that in law it amounted to ſuch a taking if the party delivered his money under the preſſure of great terror. And he pointed out to the jury the ſeveral circumſtances of the caſe, which ſhewed that the proſecutor was ſtrongly impreſſed not only with a fear of ſhame, but of a proſecution that might endanger his life.

After conviction, ſentence was paſſed on the priſoner; but execution was reſpited on a doubt conceived by the learned Judge whether this caſe did not go ſomewhat further than others of the kind which had been decided, and was ſtill further removed from the common acceptation of robbery; the principal circumſtance of difference being the preſence of the proſecutor's friend during the tranſaction.

In Eaſter term 1802 the Judges met to conſider this caſe, and a majority of them were of opinion that it was not robbery; though the money were taken in the preſence of the proſecutor, and the fear of loſing his character were upon him at the time. Moſt of the majority thought that in order to conſtitute robbery the money muſt be parted with from an *immediate* apprehenſion of preſent danger *upon the charge being made*, and not as in this caſe after the parties had *ſeparated*, and the proſecutor had time to deliberate upon it, and apply for aſſiſtance, and had applied to a friend, by whom he was adviſed not to pay it, and who was actually preſent

at the very time when it was paid: all which carried the appearance more of a compoſition of a proſecution than it did of a robbery; and ſeemed more like a calculation whether it were better to loſe his money or riſk his character. One of the Judges who agreed that it was not robbery went upon the ground that there was not a *continuing* fear, ſuch as could operate in conſtantem virum, from the time when the money was demanded till it was paid; for in the interval he could have procured aſſiſtance, and had taken advice. The minority, who held the caſe to be robbery, thought the queſtion concluded by the finding of the jury that the proſecutor had parted with his money through fear continuing at the time; which fell in with the definition of robbery long ago adopted and acted upon; and they ſaid that it would be difficult to draw any other line. That this ſort of fear ſo far differed from caſes of mere bodily fear, that it was not likely to be diſpelled as in thoſe caſes by having the opportunity of applying to magiſtrates or others for aſſiſtance; for the money was given to prevent the public diſcloſure of the charge.

Qu. if this deciſion do not in a great meaſure over-rule Hickman's caſe, poſt, 728.

Hobſon's caſe, Shrewſbury Lent Aſſizes, 1803, cor. Chambre J. MS. Jud.

Where a ſervant was intruſted by his maſter to receive money for him in the county of A., which he was to bring to him in the county of B. the ſame day, and after ſuch receipt, inſtead of proceeding with the money directly, he loitered on the road till the day following, and when he got home denied his having received the money; held that ſuch denial was evidence to ſhew that his original receipt in A. was with intent to ſecrete and embezzle,

John Hobſon was tried upon an indictment on the ſtat. 39 Geo. 3. c. 85. for receiving money, by virtue of his employment as ſervant to one Thomas Heighway, on account of the ſaid T. Heighway his maſter, and fraudulently ſecreting and embezzling, and ſo ſtealing it; the indictment ſtating the money to be the property of the maſter. After Chambre J. had ſummed up the evidence to the jury, the priſoner's counſel ſuggeſted an objection that there was no proof of any fact ariſing in the county of Salop ſufficient to give juriſdiction for trial of the offence in that county. The proof (ſo far as relates to the objection) was, that the reſidence of the maſter was at Litchfield in Staffordſhire, where the priſoner ſerved him in his trade. That on the morning of Saturday the 22d of January they were both at Shrewſbury; and the maſter, having authoriſed one W. Beaumont to collect ſome debts for him at that place, returned home the ſame morning, leaving the priſoner at Shrewſbury to receive the money from Beaumont, and bring it to his maſter at Litchfield that night. The priſoner engaged to do ſo, and about noon received the money from Beaumont, and alſo a letter for his maſter, which had been left

left at Beaumont's, and did not relate to the money tranſaction. The priſoner left Shrewſbury ſoon after, but did not go on to Litchfield that night, having ſlept at a public houſe on the road; and he did not go to his maſter till the following evening. He then delivered the letter; and being aſked about the money, he ſaid he had not received any. A few days after the maſter, in conſequence of information he had received by letter, charged the priſoner with having received the money, and another ſervant who had been at Shrewſbury on the Saturday, being preſent, told the priſoner that he had ſeen him receive money, but the priſoner perſiſted in denying that he had received any. Sometime afterwards the maſter having received further intelligence, bid the priſoner go to Shrewſbury to clear himſelf. On the Saturday following the priſoner went to Beaumont at his houſe in Shrewſbury, and deſired him to make a ſearch on the left-hand ſide of the room in which they had been: but no ſearch was made, Beaumont telling him it was of no uſe to ſearch, as the priſoner had received the money from him. The learned Judge, thinking the objection proper for the conſideration of the Judges, made no obſervations upon it to the jury; who found the priſoner guilty, and he received ſentence. The priſoner's receipt of the money at Shrewſbury, his going thither afterwards to clear himſelf, and on that occaſion deſiring a ſearch to be made for the money, as if he had left it there, being the only acts appearing to be done in Shropſhire, theſe queſtions were made; firſt, Whether, under this ſtatute, an indictment might not be found and tried in the county where the money or goods were received, although there were no evidence of any other fact locally ariſing within the ſame county? Secondly, Whether, if further local proof were neceſſary, the ſubſequent conduct of the priſoner at Shrewſbury were not ſufficient to obviate the objection, as being an act in furtherance of the purpoſe of ſecreting or embezzling. In Eaſter term following the Judges, having met to conſider this caſe, were of opinion that the trial was properly had at Shrewſbury. Moſt of them thought that as in the caſe of larceny at common law, ſo in this, where the ſtatute declared the offence to be of the ſame kind, the ſubſequent conduct of the priſoner

and ſo to ſteal the money, within the ſtat. 39 Geo. 3. c. 85., and conſequently that the trial might be had in A.

(*Vide* ch. 16. ſ. 18.)

ſoner, in not accounting to his maſter and denying the receipt of the money, was evidence to ſhew that the original taking was with intent to ſecrete and embezzle, and ſo to ſteal, within the meaning of the ſtatute; and the more ſo, as the act of ſecreting was a negative act. And ſome conſidered that the offence was triable in either county, as referable to the original taking in the one, and the not accounting, but denying the receipt when called upon, in the other.

The caſe of Eaſterby and M'Farlane, MS. Jud.

The Admiralty have no juriſdiction to try offenders on the ſtat. 11 *Geo.* 1. *c.* 29. *for procuring the deſtruction of a ſhip of which they were owners, there being no evidence of any act of procurement done upon the high ſeas within the Admiralty juriſdiction, but only on ſhore within the body of a county.*

(*Vide* ch. 17. ſ. 14.)

At an Admiralty Seſſion holden before Sir W. Scott, Lord Ellenborough C. J. and Thomſon B., at the Old Bailey on the 26th of October 1802, William Codling and John Reid mariners, and William Macfarlane and George Eaſterby of London, merchants, were indicted on the ſtat. 11 Geo. 1. c. 29. ſ. 6 & 7. The indictment ſtated that W. Codling and J. Reid on the 8th of Auguſt, 42 Geo. 3. upon the high ſeas within the juriſdiction of the admiralty of England, were on board a veſſel called the Adventure, whereof Codling was the maſter and belonging to the ſame, and Reid an officer belonging to the ſame; which veſſel was inſured for 700l. by R. S. and certain other underwriters by name, who had before that time ſeverally underwritten a policy of inſurance on ſuch veſſel; and that Codling and Reid with force and arms on the high ſea within the juriſdiction aforeſaid, &c. wilfully and feloniouſly made divers holes in and through certain parts of the veſſel, by means whereof the ſea entered, filled, and ſunk the ſaid veſſel: and that Codling and Reid, ſo reſpectively being ſuch maſter and officer belonging to the ſaid veſſel, thereby wilfully and feloniouſly deſtroyed the ſaid veſſel, to which they, Codling and Reid, ſo reſpectively belonged, with a wicked and diſhoneſt intent and deſign to prejudice the ſaid R. S. &c. who had ſo underwritten the ſaid policy of inſurance on the ſaid veſſel, and were ſeverally and reſpectively inſurers on the ſaid veſſel; againſt the form of the ſtat., &c. And that W. Macfarlane and G. Eaſterby on the ſaid 8th of Auguſt, *on the high ſea, within the juriſdiction aforeſaid*, were owners of, and each of them was an owner of the ſaid veſſel called the Adventure, and ſo being ſuch owners, and each of them being ſuch owner, with force and arms wilfully and feloniouſly procured the ſaid W. Codling and the ſaid J. Reid the felony aforeſaid, in manner and form aforeſaid, to

to do and commit; they the ſaid W. Macfarlane and G. Eaſterby at the time of the ſaid felony ſo done and committed by the ſaid W. Codling and J. Reid as aforeſaid being owners, and each of them being an owner of the ſaid veſſel; with a wicked and diſhoneſt intent and deſign to prejudice the ſaid R. S. &c. who had underwritten the ſaid policy of inſurance on the ſaid veſſel, and were ſeverally inſurers on the ſaid veſſel; againſt the form of the ſtatute, &c. There were other counts in ſubſtance the ſame as the firſt.

It appeared in evidence, that the veſſel called the Adventure, having taken in part of her cargo in the port of London, ſailed therewith to Yarmouth, where ſhe took in other part thereof, and from thence to Deal. That a few days after ſailing from Deal, and when ſhe was on the high ſeas within the juriſdiction of the Admiralty, at the diſtance of a few miles from Brighton on the coaſt of Suſſex, ſhe was ſunk by the means of boring ſeveral holes in the ſeveral parts of her bottom deſcribed in the indictment. Theſe were proved to have been done by the orders, and in the preſence, and with the aſſiſtance of the priſoner Codling, the maſter, for the purpoſe of thereby occaſioning the ſinking and deſtruction of the ſhip and her cargo. In reſpect to Eaſterby and Macfarlane it appeared that they were joint proprietors of the whole of the cargo which was ſhipped on board the Adventure; that they all along acted as, and declared and repreſented themſelves to be joint proprietors of the ſhip as well as of the cargo: that they particularly acted as ſuch in the hiring of perſons to ſerve on board the ſhip, in giving orders to, and treating with the captain as joint owners, both before and after the veſſel was deſtroyed; alſo in the giving orders for the effecting of an inſurance upon the ſhip on their joint account for 700l., and which was in fact underwritten by the ſeveral underwriters named in the indictment. That they alſo deſcribed themſelves in an inſtrument in writing ſigned by each of them, (and whereby Reid was appointed the ſuper-cargo), as "ſole proprietors and owners "of the brig Adventure." It appeared however by the production of the ſhip's regiſter from the cuſtom-houſe in London, that one A. Geddes was on the 12th of June 1802 the regiſtered owner of the ſhip Adventure deſcribed therein as of the port of London; and that the ſame ſhip was afterwards

wards on the 16th of June 1802 (by indorſement on the ſhip's regiſter) aſſigned by Geddes to the priſoner Macfarlane, from whom no ſubſequent aſſignment appeared to have been made. The cargo was on Tueſday the 10th of Auguſt 1802, being two days after the loſs, abandoned to the underwriters thereupon by a joint notice of abandonment ſigned by both the priſoners Eaſterby and Macfarlane, and the ſhip was on the ſame day, by a like notice ſigned by the priſoner Macfarlane alone, abandoned to the underwriters thereupon. It was under theſe circumſtances contended on the part of the priſoner Eaſterby, that he was not for want of a compliance with the requiſites ſpecified in the ſtatutes 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. an owner of the ſhip Adventure, ſo as to be liable in that character to the penalties of the ſtatute of the 11 Geo. 1. c. 29. ſ. 6. It appeared further by the evidence of one Storrow, who was originally retained by Eaſterby and Macfarlane to proceed as ſupercargo on board the ſhip, and who entered and continued on board till the ſhip arrived at Deal, that in a converſation between the witneſs and Eaſterby and Macfarlane at Eaſterby's houſe at Rotherhithe, about three weeks before the ſhip's ſailing, and after the witneſs Storrow had been applied to by Eaſterby to join the ſhip, Eaſterby threw out that many ſhips had been ſunk and might be ſo to take in the underwriters. That again afterwards, a few days before the ſhip ſailed, in another converſation between the witneſs, Eaſterby, Macfarlane, and Codling, at Rotherhithe, Eaſterby ſaid, "that they "wiſhed the ſhip to proceed from London to Yarmouth, "and from Yarmouth to Gibraltar, there to ſell the whole "of the cargo by contract at public vendue. That after "it was ſold they thought an opportunity might be taken "to ſink the ſhip, and that the people on board might take "the boat and get on ſhore; and that one half of the bills "for the amount of the cargo might be remitted in private "letters, and the other half in public letters, which latter "might be ſhewn as the whole of the proceeds, and that "the underwriters might be called on for the reſt, as if left "on board." To which Macfarlane and Codling aſſented. But though Eaſterby was afterwards ſeen at Deal, there was no evidence that either he or Macfarlane was ever perſonally preſent on board the ſhip Adventure on the high ſeas.

Vide Rolleſton v. Hibbert, 3 Term Rep. 406. and Hibbert v. Rolleſton, 3 Bro. Ch. Rep. 571. and Rolleſton v. Smith, 4 Term Rep. 161. Weſterdale v. Dale, 7 Term Rep. 306. and Camden v. Anderſon, 5 Term Rep 709.

ſeas. The intention of Eaſterby and Macfarlane that the ſhip ſhould be deſtroyed with ſuch cargo as ſhould be on board her at the time of her being ſunk was further proved by the circumſtance of their having cauſed to be effected inſurances upon the cargo to the amount in the whole of 10,250l., whereas the goods found on board after the ſhip with her cargo was weighed up and brought to land at Brighthelmſtone were proved to have been of the original value as between ſeller and buyer of 3231l. 1s. 6d. and no more; and by their having reſpectively withdrawn from the cargo, after the ſame had been originally ſhipped as part thereof, ſeveral articles, ſome being ſtores for the ſhip's uſe, a part of which were carried away by Eaſterby alone, and others put on board a ſhip called the William belonging to Eaſterby and Macfarlane, for the uſe of that ſhip; others being articles of conſiderable value packed up for exportation as merchandiſe, of which no leſs than 15 conſiderable packages were found in the houſe of Eaſterby; and other like goods which had been at Macfarlane's houſe were found at the houſe of a friend of Macfarlane, to which they had been removed for the purpoſe of concealment, upon Macfarlane's being taken into cuſtody. It was alſo proved that Eaſterby two days after the loſs of the veſſel came down to Brighton, near which place the ſhip had been caſt away, and that Eaſterby there in the preſence of Macfarlane and Codling aſked another witneſs (Cooper) where he had bored the hole, and what ſize it was, and whether it was about the ſize of the handle of a chiſſel which happened to be in the room where they were; and the witneſs having anſwered that it was thereabouts, Eaſterby bid him get the handle out of the chiſſel and ſharpen one end of it in order therewith to plug up the hole in caſe the veſſel ſhould drive on ſhore. That Eaſterby afterwards abuſed Codling for not having taken the veſſel to the coaſt of France, and there deſtroyed her. And that Macfarlane and Eaſterby then ordered Codling and Cooper to go to London together and ſecrete themſelves for their ſafety, which they accordingly did.

It was objected on the part of the priſoners Eaſterby and Macfarlane, that aſſuming them to be owners of the ſhip, and that the evidence ſtated proved them to have been guilty of feloniouſly procuring the ſhip in queſtion to be caſt away or deſtroyed within the 6th ſect. of the act 11 Geo. 1.

c. 29., yet that the ſame offence did not appear to have been committed by them *on the high ſeas*, ſo as to bring the ſame within the juriſdiction of the Court of Admiralty under the 7th ſection of the act. The Court reſerved this queſtion alſo as well as that which had been before made relative to the ownerſhip of Eaſterby in the ſhip for the conſideration of the twelve Judges. And ſubject to thoſe queſtions left the fact of the wilful deſtruction of the ſhip by Codling and Reid, and of the wilful procurement of ſuch deſtruction by Eaſterby and Macfarlane, with intent to prejudice the above underwriters, to the jury, who acquitted Reid (*a*), and found the other priſoners reſpectively guilty (*b*). The queſtions for the opinion of the Judges were, firſt, Whether Eaſterby was an owner of the ſhip Adventure, ſo as to be liable in that character to the penalties of the ſtat. 11 Geo. 1. c. 29. ſ. 6.? Secondly, Whether the procurement of the deſtruction of the ſhip by Eaſterby and Macfarlane were an offence committed by them on the high ſeas within the juriſdiction of the Court of Admiralty under the 7th ſection of that ſtatute?

Vide Kelw. p. 67. 20 H. 7. 28 H. 8. c. 15. 2 & 3 Ed. 6. c. 24. ſ. 4.

This caſe was argued before all the Judges in the Exchequer-chamber on the 13th of November 1802, and afterwards at an adjourned meeting at Serjeants' Inn on the 30th of the ſame month. And at a ſubſequent meeting of the Judges on the 2d of February 1803 they were all of opinion, that whether the act of 11 Geo. 1. c. 29. were conſidered as making the perſons who direct or procure the deſtroying of a ſhip principals or acceſſaries; yet inaſmuch as no act was done by the priſoners Eaſterby and Macfarlane within the juriſdiction of the Admiralty, they were not ſubject to that juriſdiction, and conſequently that the trial was improperly had. It therefore became unneceſſary to determine the other points raiſed in the argument of the caſe.

The priſoners afterwards received a free pardon.

(*a*) On this account the evidence which went to affect Reid is not ſtated.

(*b*) No queſtion was reſerved as to Codling, who afterwards ſuffered the puniſhment of the law.

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V. *Offences more peculiarly relating to the Church Eſtabliſhment and Diſcipline.*

I. *Of Blaſphemy, Contempt of the Eſtabliſhed Religion, Religious Impoſtors, and Immorality in general.*

§ 1. *Blaſphemy.* 1 Hawk. ch. 5. 3 Bac. Abr. 474. 4 Blac. Com. 59-62. *Vide* 9 & 10 W. 3. c 32. *infra, Religious Impoſtors.* 5 Eliz. c. 15. ſ. 2, 3.

ALL blaſphemies againſt God, or the Chriſtian Religion, or the Holy Scriptures, are indictable at common law, as well as upon the ſtat. 9 & 10 W. 3. c. 32. after mentioned. So are all impoſtors in religion; ſuch as falſely pretend to extraordinary miſſions from God, or terrify or abuſe the people with falſe denunciations of judgments. Theſe laſt, if the act be done with intent to make any public diſturbance, are by the ſtat. 5 Eliz. c. 15. puniſhable for the firſt offence by a fine of 10l. and one year's impriſonment; and for the ſecond, by impriſonment for life, and a forfeiture of all the offender's goods and chattels; one moiety to the crown, and the other to any perſon who ſhall ſue for the ſame. In like manner, all malicious revilings, in public derogation and contempt of the eſtabliſhed religion, are puniſhable by the common law, inaſmuch as they tend to a breach of the peace. Similar to theſe are all ſcandalous and open breaches of morality exhibited in the face of the people; ſuch as was the conduct of one who expoſed himſelf naked to the public view from a balcony in Covent-Garden.—Offences of this kind ſap public morals, the neceſſary foundation of good government; and are therefore properly cognizable by the temporal magiſtrates, who may puniſh the offenders by fine, impriſonment, and ſuch other corporal puniſhment as the circumſtances may require.

Contempt of the Eſtabliſhed Religion.

Open Immorality. Poph. 208. Sir Charles Sedley's caſe, 1 Sid. 168. 2 Str. 790.

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II. *Of Apoſtacy and Hereſy.*

§ 2.
1 Hawk. ch. 2.
1 Hale 387, 390. &c.
4 Blac. Com. 43—50.
3 Bac. Abr. 471.
5 Co. 58.
1 Eliz. c. 1. ſ. 36.
1 Ed. 6. c. 12. ſ. 3.
29 Car. 2. c. 9.
Vide 1 Hale 410.

Apoſtacy and Hereſy; the one an entire falling off from the Chriſtian Religion, the other, in its legal ſenſe, the adoption of any erroneous tenet not warranted by the eſtabliſhed church, are in their nature eccleſiaſtical offences, and properly inquirable and puniſhable by the ſpiritual court; the ſtat. 1 Eliz. c. 1. having repealed all former ſtatutes relating to hereſy, leaving it as at common law; and the ſtat. 29 Car. 2. c. 9. having taken away the writ de hæretico comburendo, by which the judgments of that court were ſometimes enforced, as well as all capital puniſhments in purſuance of eccleſiaſtical cenſures. But ſtill the common law courts will take cognizance incidentally whether or not a matter be hereſy, notwithſtanding the judgment of the eccleſiaſtical court; and will only give credence to their ſentence ſo far as it concerns eccleſiaſtical cenſures. And by the ſtat. 9 & 10 W. 3. c. 32. "If any perſon, having been educated in, or at any time having made profeſſion of, the Chriſtian religion within this realm, ſhall upon indictment or information be convicted by the oath of two or more credible witneſſes in any of the courts of Weſtminſter, or at the aſſizes, of denying, by writing, printing, teaching, or adviſed ſpeaking, any one of the perſons in the Holy Trinity to be God, or of aſſerting or maintaining that there are more Gods than one, or of denying the truth of the Chriſtian Religion, or the Divine authority of the Holy Scriptures, he ſhall for the firſt offence be adjudged incapable of any office or employment, eccleſiaſtical, civil, or military; and for the ſecond ſhall be diſabled to ſue any action, &c. or to be a guardian, executor, or adminiſtrator, or to take by any legacy or deed of gift, or to bear any office civil or military, or benefice eccleſiaſtical, for ever, within this realm; and ſhall alſo be impriſoned for three years from the time of ſuch conviction." But it is thereby provided (ſ. 3.), that a public recantation of the error in the ſame court where the party was convicted, within four months after the firſt conviction, ſhall diſcharge him for the firſt offence from all diſabilities. And by ſ 2. no perſon ſhall be proſecuted under the act for any words

1 Hale 400. 7, 8.
1 Hawk. ch. 2. ſ. 7.

9 & 10 W. 3. c. 32 and *vide* 3 Jac. 1. c. 21. *to reſtrain profaneneſs in players.*

Ch. I. § 2. *Apoſtacy, Hereſy.*

words ſpoken, unleſs information thereof ſhall be given on or within four days after to ſome juſtice of peace, and the offence be proſecuted within three months after ſuch information.

This ſtatute does not take away the common law proceeding againſt libellers of the Chriſtian Religion, which was the courſe lately adopted againſt a moſt impious writer of this ſort.

Rex v. T. Paine at Guildhall.

III. *Reviling the Sacrament of the Lord's Supper, or profaning the Lord's Day.*

§ 3.
1 Ed. 6. c. 1. ſ. 1. *repealed by* 1 Mar. c. 2. *and revived by* 1 Eliz. c. 1. ſ. 14. *Vide* 3 Bac. Abr. 477.

By the ſtat. 1 Ed. 6. c. 1. ſ. 1. "Whoever ſhall deprave, deſpiſe, or contemn the moſt bleſſed ſacrament of the Lord's Supper, in contempt thereof, by any contemptuous words, or words of depraving, deſpiſing, or reviling; or ſhall adviſedly in any otherwiſe contemn, deſpiſe, or revile the ſame, contrary to the effects and declaration abovеſaid, (i. e. as ſet forth in the preamble,) ſhall ſuffer impriſonment, and make fine and ranſom at the king's pleaſure," (i. e. in the diſcretion of the court). By the ſame ſection the offence is to be inquired of and indicted before juſtices of the peace (three at leaſt, and one of the quorum) in their quarter ſeſſions. By ſ. 5. the indictment muſt be preferred within three months after the offence committed.

(1 Hale 375.)

Profaning the Lord's-day.

Cr. Cir. Com. 155. 1 Hawk. ch. 6. ſ. 1. 2. 3.

The profanation of the Lord's-day or Sunday, is by a variety of ſtatutes puniſhable in particular inſtances by ſummary proceſs before magiſtrates; but it is alſo ſaid to be indictable at common law; and there is a precedent of ſuch an indictment againſt a butcher, in which he is charged to be a common Sabbath-breaker and profaner of the Lord's-day, and for having within certain times mentioned kept public and open ſhop, and expoſed meat to ſale to divers perſons unknown.

IV. *Pretending to Witchcraft.*

§ 4.
Vide 1 Hawk. ch. 3 & Blac. Com. 60.
9 Geo. 2. c. 5. *repealing the ſtat* 1 Jac. 1. c. 12.

The better ſenſe of modern times has properly transferred the puniſhment from the actual commiſſion of this ſuppoſed offence to the impoſtors who now make pretence to it. For the ſtat. 9 Geo. 2. c. 5. ſ. 3 & 4. enacts, that "No proſecution, ſuit, or proceeding ſhall be had againſt any

Ch. I. § 4. *Witchcraft.*

perſon for witchcraft, ſorcery, enchantment, or conjuration, or for charging another with any ſuch offence, in any court in Great Britain: and that if any perſon ſhall pretend to exerciſe or uſe any kind of witchcraft, &c. or ſhall undertake to tell fortunes, or pretend by their ſkill or knowledge in any occult or crafty ſcience, to diſcover where or in what manner any goods or chattels ſuppoſed to have been ſtolen or loſt may be found; every ſuch offender, being thereof lawfully convicted on indictment or information, ſhall be impriſoned for one year; and once in every quarter of the ſaid year, in ſome market town of the proper county, upon the market day there, ſhall ſtand openly on the pillory for one hour, and alſo ſhall (if the court think fit) give ſureties for good behaviour in ſuch ſum and for ſuch time as the court judge proper, and in ſuch caſe be further impriſoned until ſuch ſureties be given." Alſo by the vagrant act

17 Geo. 2. c. 5.

17 Geo. 2. c. 5. ſ. 2. all jugglers, fortune-tellers, and gypſies pretending to ſkill in phyſiognomy, palmiſtry, or the like crafty ſcience, or pretending to tell fortunes, &c. ſhall be deemed rogues and vagabonds, and ſuffer as the act directs.

V. *Offences more peculiarly relating to the Church Eſtabliſhment and Diſcipline.*

1. Conformity required by Law.

§ 5.

A multitude of ſtatutes have been paſſed from time to time for the protection of the eſtabliſhed church, and to promote conformity thereto; particularly in oppoſition to the popiſh religion and ſuperſtitions. It is uſeleſs at this day to inquire into the hiſtory of all theſe laws, many of which would only form a catalogue of human woes. Doubtleſs moſt of theſe proviſions were found neceſſary in times of fraud and violence, and while the church, as by law now eſtabliſhed, was in its infancy: they were paſſed, to uſe the words of Lord Bacon, upon the ſpur of the occaſion. But the ameliorated ſtate of the civilized world, and a juſter ſenſe of the true principles of chriſtian charity, as well as of ſound policy, have tended to ſoften their rigour; and, though ſtill retained on the ſtatute book, they are moſtly fallen into diſuſe. Thoſe reſpecting

Ch. I. § 5. *Offences againſt Church Eſtabliſhment.*

reſpecting proteſtant diſſenters are nearly in a ſtate of perpetual ſuſpenſion by the annual act of indemnity, which is paſſed for the protection of thoſe who may have incurred penalties by breach of the corporation and teſt acts. The particular examination of all theſe laws, creating offences cognizable by the ſuperior juriſdictions, would naturally fall within the ſcope of this treatiſe; yet, by reaſon of their diſuſe, and becauſe I have nothing new to add to what is already in print upon theſe ſubjects, I ſhall content myſelf with mentioning the principal heads, incidentally and briefly noticing ſome regulations of leſs general operation, and referring for the reſt to thoſe treatiſes where this whole code of laws is very perſpicuouſly detailed. And I am the more induced to adopt this method with reſpect to ſuch laws as are principally levelled at diſſenters from the eſtabliſhed church, whether proteſtants or papiſts, ſince their operation is very materially mitigated, and in ſome inſtances wholly done away, by the two principal acts of toleration undermentioned.

Vide 4 Blac Com. ch. 4. & 1 Hawk. ch. 6—16. nelusive, & ch. 18. ſ. 21. & ch. 19.

Exception by toleration acts.

Proteſtant Diſſenters.

By the ſtat. 1 W. & M. c. 18. ſ. 2. emphatically called the Toleration Act, "all perſons diſſenting from the eſtabliſhed church (except papiſts and thoſe who ſhall in preaching or writing deny the doctrines of the Trinity) are exempted from all penal laws relating to religion, except the ſtat. 25 Car. 2. c. 2. (by which all officers of truſt are bound to receive the ſacrament according to the uſage of the church of England, and alſo to take the oaths of allegiance and ſupremacy, and the teſt,—or, being Quakers, make by 8 Geo. 1. c. 6. a ſimilar affirmation); and alſo, except the ſtat. 30 Car. 2. ſt. 2. c. 1. (amended and in part repealed by 2 Geo. 2. c. 31. by which the members of both houſes of parliament are bound to make a declaration againſt tranſubſtantiation, and the invocation of ſaints, and the ſacrifice of the maſs): provided ſuch diſſenters take the oath of allegiance and ſupremacy, and make the abovementioned declaration, and come to ſome congregation for religious worſhip, in ſome place regiſtered either in the biſhop's court, or at the county ſeſſions, the doors whereof ſhall not be locked, barred, or bolted."

1 W. & M. c. 18. ſ. 2. & *vide* 19 Geo. 3. c. 44. 4 Blac. Com. 53.

Toleration of Papiſts.

Alſo by the ſtat. 31 Geo. 3. c. 32. "Perſons profeſſing the popiſh religion, taking the oath of allegiance and abjuration, and making the declaration therein mentioned, ſhall be

31 Geo. 3. c. 32.

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relieved from the penalties and diſabilities of the ſeveral acts (*a*) againſt non-conformiſts, which are the ſubject-matter of moſt of the remainder of this chapter. This new oath and declaration may be taken in any of the courts of Weſtminſter, or at the general quarter ſeſſions of the place where the party ſhall reſide, and ſhall be ſubſcribed by him with his name at length, or his mark, the name, &c. in the latter caſe to be written by the officer of the court,) and his title, addition, and place of abode; and it ſhall remain in ſuch court of record. And the proper officer of the court ſhall give the party a certificate of ſuch declaration and oath having been duly made, &c. (for which 2 s. and no more ſhall be paid); and ſuch certificate, on proof of the certifier's hand, and that he acted as ſuch officer, ſhall be ſufficient evidence of the fact, unleſs falſified. With a proviſo (ſ. 9.) that all laws made for frequenting divine ſervice on Sundays ſhall be ſtill in force againſt offenders, unleſs ſuch perſons ſhall come to ſome congregation permitted by this act, or by the abovementioned act of the 1 W. & M. c. 18.

The above ſtatutes, founded on the beneficent, wiſe, and juſt principles of toleration, were intended for the protection

(*a*) The acts, or parts of acts, enumerated as conditionally repealed, are the 3 Eliz. c. 2.—23 Eliz. c. 1.—29 Eliz. c. 6.—35 Eliz. c. 2.—2 (vulgo 1) Jac. 1. c. 4.—3 Jac. 1. c. 4. & 5.—7 Jac. 1. c. 6. in reſpect of not reſorting to the pariſh church, or for keeping any ſervant or other perſon, being a papiſt, who ſhall not ſo reſort: alſo 23 Eliz. c. 1.—27 Eliz. c. 2.—35 Eliz. c. 2.—2 (vulgo 1) Jac. 1. c. 4.—3 Jac. 1. c. 5.—3 Car. 1. c. 2.—25 Car. 2. c. 2. in reſpect of being a papiſt or reputed papiſt, or profeſſing or being educated in the popiſh religion, or hearing or ſaying maſs, or being a prieſt or deacon, or entering or belonging to any eccleſiaſtical order or community of the church of Rome, or being preſent at or performing any rite, &c. of the popiſh religion, or maintaining or aſſiſting others therein, or teaching or inſtructing youth, not being in either univerſity, &c. or not taking the child of any proteſtant father, &c.: alſo the 1 W. & M. ſtat. 1. c. 9. as to removing papiſts from London and Weſtminſter; and 30 Car. 2. c. 5. as to papiſts adviſedly coming into the king's preſence, &c.

The acts, or parts of acts, abſolutely repealed, are the 1 Eliz. c. 1.—3 Jac. 1. c. 4.—1 W. & M. ſt. 1. c. 8.—1 Geo. 1. ſt. 2. c. 13. and 25 Car. 2. c. 2. touching the tender of the oath of ſupremacy and obedience therein referred to, and of the declaration againſt tranſubſtantiation, and the penalties thereby inflicted upon perſons refuſing or neglecting, upon ſuch tender, to take the oath, and make the ſaid declaration: alſo the acts of the 1 Geo. 1. ſt. 2. c. 55. requiring papiſts to regiſter their names and real eſtates; and 3 Geo. 1. c. 18. and other ſubſequent acts, diſabling them from taking by any deed or will, unleſs regiſtered within a certain time; and the 7 & 8 W. 3. c. 4. and 1 Geo. 1. ſt. 2. c. 13. diſabling them from being barriſters, attornies, &c. provided they take and ſubſcribe the new oath and declaration preſcribed by the ſtatute 31 Geo. 3. c. 32.

of

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of conſcientious perſons, who are bonâ fide members of the reſpective congregations ſo regiſtered. But neither will the mere act of regiſtry protect perſons reſorting to ſuch meeting houſes and chapels, unleſs they otherwiſe bring themſelves within the protection of one or other of theſe ſtatutes. Nor will a profeſſed churchman, who has occaſionally attended ſuch meetings, be excuſed on that account from the penalties of not attending his own church.

Rex v. the Juſtices of Derbyſhire, 1 Blac. Rep. 606. Britton v. Standiſh, 6 Mod. 190.

Toleration, however, like other good things, has its boundaries, and is not to be puſhed to the length of giving public encouragement to diſſent from the national eſtabliſhment. In the ſpirit of caution, therefore, the ſtat. 5 Geo. 1. c. 4. has enacted, "That if any mayor, bailiff, or other magiſtrate in England, Wales, Berwick-upon-Tweed, or the iſles of Jerſey or Guernſey, ſhall knowingly or wilfully reſort to or be preſent at any public meeting for religious worſhip, other than the church of England, in the gown or other peculiar habit, or attended with the enſigns belonging to his office, he ſhall be diſabled to hold ſuch office, and adjudged incapable to bear any public office or employment whatſoever within England, Wales," &c.

5 Geo. 1. c. 4. *Diſſenters not to attend meeting with public enſigns.*

2. Derogating from the Book of Common Prayer.

§ 6.

The book of Common Prayer was eſtabliſhed by the ſtat. 2 & 3 Ed. 6. c. 1. and 5 & 6 Ed. 6. c. 1. which being repealed by the ſtat. 1 M. c. 2. was again revived by ſtat. 1 Eliz. c. 2.; and by the latter ſtatute ſ. 4, 5, 6. "If any parſon, vicar, or other miniſter who ought to ſay the ſaid common prayer, &c. (this includes clergymen who have no cure as well as thoſe who have), ſhall refuſe to uſe it in ſuch church, &c. or other place where he ſhould uſe to miniſter the ſame, or wilfully or obſtinately ſtanding in the ſame uſe any other form, or ſpeak any thing in derogation of the ſaid book or any thing therein contained, he ſhall on conviction forfeit for the firſt offence one year's profit of all his ſpiritual promotions, and ſhall ſuffer ſix months impriſonment; and for the ſecond offence ſhall ſuffer one year's impriſonment, and be deprived, &c. and for the third offence be deprived, &c. and impriſoned for life." And by ſ. 7 & 8. if ſuch offender have no ſpiritual promotion, he ſhall for the firſt offence be impriſoned a year, and for the ſecond

1 Eliz. c. 2. *Vide* 1 Hale 328. &c. 1 Hawk. ch. 7. ſ. 3. 3 Bac. Abr. 478. *By miniſters.*

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1 Hawk. ch. 7. ſ. 4. *By perſons in general.*

ſecond be impriſoned for life. The juriſdiction of the eccleſiaſtical court being ſaved, and the ſtatute being only in the affirmative, it does not prevent that court from proceeding againſt ſuch offenders in its own way, even for the firſt offence.

By ſ. 9. &c. of the ſame ſtatute, "If any perſon ſhall in plays, ſongs, or other open words, ſpeak any thing in derogation, depraving, or deſpiſing of the ſaid book or any part thereof; or by open fact compel or otherwiſe procure or maintain any miniſter to ſay any common prayer openly, &c. in other form; or ſhall by any of the ſaid means unlawfully interrupt or let any miniſter to ſay the ſaid common prayer in manner and form required, he ſhall forfeit 100 marks for the firſt offence, and 400 for the ſecond, &c. (which if he pay not within ſix weeks after conviction, he ſhall ſuffer ſix months impriſonment for the firſt offence, and twelve months for the ſecond); and for the third offence ſhall forfeit all his goods and chattels, and ſhall ſuffer impriſonment for life."

3. Not attending Church and Sacrament.

§ 7. *Statutes.* 1 Eliz. c. 2. ſ. 14. *All perſons ſhall reſort to their pariſh church, &c.*

In treating of theſe offences I ſhall firſt refer to the ſeveral ſtatutes relative to the ſame. The ſtat. 1 Eliz. c. 2. ſ. 14. enacts, "That all perſons inhabiting within this realm, or any other the queen's dominions, ſhall diligently and faithfully, having no lawful or reaſonable excuſe to be abſent, endeavour themſelves to reſort to their pariſh church or chapel accuſtomed, or upon reaſonable let thereof to ſome uſual place where common prayer and ſuch ſervice of God ſhall be uſed in ſuch time of let, upon every Sunday and other days ordained and uſed to be kept as holidays, and then and there to abide orderly and ſoberly during the time of the common prayer, preaching, or other ſervice of God there to be uſed and miniſtered; upon pain of puniſhment by the cenſures of the church, and alſo upon pain that every perſon ſo offending ſhall forfeit for every ſuch offence 12d. to be levied by the churchwardens of the pariſh where ſuch offence ſhall be done, to the uſe of the poor of the ſame pariſh, of the goods, lands, and tenements of ſuch offender, by way of diſtreſs." S. 17. gives authority to juſtices of oyer and terminer or of aſſize to inquire, hear, and

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Limitation. 23 Eliz. c. 1. ſ. 5. *Vide* 1 Hawk. ch. 10. ſ. 33.

Forfeiture of 20l. per month, &c. *Recognizance with ſureties for good behaviour.*

Juriſdiction.

Impriſonment on failure of paying forfeiture.

Cauſes of diſcharge or acquittal.

and determine the offences: and by ſ. 20. offenders muſt be indicted at the next general ſeſſions holden before ſuch juſtices next after the offences committed. And by ſ. 24. Puniſhment by the ordinary for any ſuch offence is a bar to a proſecution before the juſtices for the ſame.

The ſtat. 23 Eliz. c. 1. ſ. 5. enacts, That every perſon above the age of 16 years, who ſhall not repair to ſome church, chapel, or uſual place of common prayer, but forbear the ſame, contrary to the former ſtatute of 1 Eliz. being thereof lawfully convicted, ſhall forfeit to the queen for every month he or ſhe ſhall ſo forbear 20l. (*a*); and that over and beſides the ſaid forfeitures, every perſon ſo forbearing for 12 months as aforeſaid ſhall, for their obſtinacy, after certificate thereof in writing made into B. R. by the ordinary of the dioceſe, a juſtice of aſſize and gaol delivery, or a juſtice of peace of the county where ſuch offender ſhall dwell or be, be bound with two ſufficient ſureties in 200l. at leaſt to the good behaviour, and ſo to continue bound until they conform themſelves and come to the church, according to the true meaning of the ſtatute 1 Eliz. c. 2.

By ſ. 8. Juſtices of the peace, as well as other juſtices named, may inquire of offences within this and the former ſtatute, within one year and a day after ſuch offences committed. And by ſ. 9. Juſtices of oyer and terminer, of aſſize, and of gaol delivery, have power to inquire, hear, and determine offences within this act.

By ſ. 11. Any perſon who ſhall forfeit any ſums of money by virtue of this act, and ſhall fail to pay the ſame within three months after judgment, ſhall be committed to priſon till he have paid the ſaid ſums, or ſhall conform himſelf, or go to church, and there do as is aforeſaid.

And by ſ. 10. Every perſon guilty of any offence againſt this ſtatute, who ſhall before he be thereof indicted, or at his arraignment or trial before judgment, ſubmit and conform

(*a*) By ſ. 11. One-third to the queen for her own uſe, one-third to the queen for the uſe of the poor (1) of the pariſh where the offence is committed, and one-third to whoever ſhall ſue for the ſame. (Vide 1 Hawk. ch. 10. ſ. 32. &c. as to the diviſion of theſe forfeitures.)

(1) The 29 Eliz. c. 6. ſ. 7. enables the lord treaſurer, &c. to make a further diſtribution of this third.

himſelf

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himſelf before the biſhop of the dioceſe where he ſhall be reſident, or before the juſtices where he ſhall be indicted, arraigned, or tried, (having not before made like ſubmiſſion at any his trial, being indicted for his firſt like offence,) ſhall upon his recognition of ſuch ſubmiſſion in open aſſizes or ſeſſions of the county where ſuch perſon ſhall be reſident, be diſcharged of all and every the ſaid offences againſt this act, and of all pains and forfeitures for the ſame: And ſ. 12. provides, that every perſon who uſually on the Sunday ſhall have in their houſe the divine ſervice eſtabliſhed by law, and be thereat uſually or moſt commonly preſent, and ſhall not obſtinately refuſe to come to church and there do as is aforeſaid, and ſhall alſo four times in the year at leaſt be preſent at divine ſervice in the church of the pariſh where they reſide, or in ſome other open common church or ſuch chapel of eaſe, ſhall not incur any pain or penalty limited by this act for not repairing to church.

Juriſdiction. 29 Eliz. c. 6. 3 Jac. 1. c. 4. ſ. 8. *to the like purpoſe.*

The 28 (vulgo 29) Eliz. c. 6. ſ. 2. enacts, That every conviction for any offence before mentioned, (i. e. contrary to the ſtatute of the 23 Eliz. c. 1.) ſhall be in B. R. or at the aſſizes or general gaol delivery, and not elſewhere. Sect. 4. enacts, That every ſuch offender in not repairing to divine ſervice, but forbearing the ſame, contrary to the ſaid ſtatute, being thereof once convicted, ſhall in ſuch of the terms of Eaſter or Michaelmas as ſhall be next after ſuch conviction pay into the Exchequer after the rate of 20 l. for every month which ſhall be contained in the indictment whereupon ſuch conviction ſhall be; and ſhall alſo for every month after ſuch conviction, without any other indictment or conviction, pay into the Exchequer at two times in the year, viz. in every Eaſter and Michaelmas term, as much as then ſhall remain unpaid, after the rate of 20 l. for every month after ſuch conviction; and in default of payment, proceſs to iſſue out of the Exchequer, &c. to take all the goods and two parts of the lands, tenements, hereditaments, leaſes, and farms of ſuch offender, towards ſatisfaction of the penalties. This payment for every month after the conviction, is by ſ. 6. to be till the party makes ſubmiſſion, and conforms according to the true meaning of the ſtatute 23 Eliz. c. 1. But by ſtat. 3 Jac. 1. c. 4. ſ. 11. the king has an option to wave the monthly forfeiture, and to take two-

Penalties.

Vide infra.

3 Jac. 1. c. 4. ſ. 11.

thirds

thirds of the offender's lands, till the ſaid party, being indicted for not coming to church contrary to former laws, ſhall conform himſelf and come to church, according to the meaning of the ſtatute in that behalf made.

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Indictment.

Sect. 5. for the more ſpeedy conviction of ſuch offender in not repairing to divine ſervice, but forbearing the ſame, contrary to the ſaid ſtatute, (23 Eliz. c. 1.) enacts, That the indictment mentioning the not coming of ſuch offender to the church of the pariſh where ſuch perſon at any time before ſuch indictment was, or did keep houſe or reſidence, nor to any other church, chapel, or uſual place of common prayer, ſhall be ſufficient in law; and that it ſhall not be needful to mention in every ſuch indictment, that the offender was or is inhabiting within England or other the queen's dominions. But if ſuch offender were then not within the realm, &c. he ſhall be relieved by plea in that behalf, and not otherwiſe. And that upon the indictment of ſuch offender, a proclamation ſhall be made at the ſame aſſizes or gaol delivery in which the indictment ſhall be taken, (if the ſame be taken at any aſſizes or gaol delivery,) by which it ſhall be commanded that the body of ſuch offender ſhall be rendered to the ſheriff before the next aſſizes or gaol delivery in the ſame county; and if at the ſaid next aſſizes or gaol delivery the ſame offender ſo proclaimed ſhall not make appearance of record (*a*), then upon ſuch default recorded the ſame ſhall be as ſufficient a conviction (*b*) in law of the ſaid offence whereof the party ſo ſtands indicted, as aforeſaid, as if upon the ſame indictment a trial by verdict thereupon had proceeded and been recorded.

Proclamation to ſurrender.

(*a*) *The party muſt enter his appearance on the record,* 1 Hawk. ch. 10. ſ. 25.

(*b*) *Such conviction, if inſufficient, ſhall be removed into the Exchequer, and there quaſhed; but no writ of error can be brought upon it, at upon a judgment.* 1 Hawk. ch. 10. ſ. 23.

Offender conforming.

Sect. 6. provides, That when ſuch offender ſhall make ſubmiſſion and become conformable, according to the ſtatute 23 Eliz. or ſhall die, then no forfeiture of 20 l. for any month, or ſeizure of lands from and after ſuch ſubmiſſion and conformity, or death, and full ſatisfaction of all arrearages of 20 l. monthly, before ſuch ſeizure due or payable, ſhall enſue or be continued againſt ſuch offender, ſo long as he ſhall continue in coming to divine ſervice according to the intent of the ſaid ſtatute.

Beſides

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Beſides the above proviſions, which are of a general nature, extending to all deſcriptions of perſons, there are alſo other ſtatutes, principally directed againſt popiſh recuſants, which incidentally notice the offence of not attending church, and make regulations in reſpect of the ſame: theſe I ſhall refer to as the ſubject hereafter requires. For the preſent I ſhall only advert to ſome clauſes which contain further general proviſions touching the offence in queſtion.

3 Jac. 1. c. 4. ſ. 7. *Juriſdiction.*

The ſtat. 3 Jac. 1. c. 4. ſ. 7. enacts, "That the juſtices of aſſize and gaol delivery at their aſſizes, and the juſtices of peace at any of their general or quarter ſeſſions, ſhall, by virtue of this act, inquire, hear, and determine of all recuſants and offences, as well for not receiving the ſacrament aforeſaid, *&c.* as for not repairing to church according to the meaning of former laws, in ſuch manner and form as the ſaid juſtices of aſſize and gaol delivery may now do by former laws in the caſe of recuſancy for not repairing to church; and alſo ſhall have power at their ſaid aſſizes and gaol delivery, and at the ſeſſions (in which any indictment againſt any perſon for not repairing to church according to former laws, &c. ſhall be taken) to make proclamation, by which it ſhall be commanded, that the body of every ſuch offender ſhall be rendered to the ſheriff of the ſame county, or bailiff, or other keeper of the gaol of the liberty, before the next aſſizes and general gaol delivery, or before the next general or quarter ſeſſions reſpectively to be holden for the ſaid ſhire, limit, diviſion, or liberty: and if at the ſaid next aſſizes, &c. the offender ſo proclaimed ſhall not make appearance of record, then, on ſuch default recorded, the ſame ſhall be as ſufficient a conviction in law of the ſaid offence whereof the party ſtands indicted as aforeſaid, as if upon the ſame indictment a trial by verdict thereupon had proceeded and been found againſt ſuch offender, and recorded."

Proclamation.

Sect. 8. enacts, "That every offender in not repairing to divine ſervice, but forbearing the ſame, contrary to the ſtatutes in that behalf made, who ſhall be thereof once convicted, ſhall, in ſuch of the terms of Eaſter and Michaelmas as ſhall be next after ſuch conviction, pay into the Exchequer after the rate of 20l. for every month which ſhall be contained in the indictment whereupon ſuch conviction ſhall be; and ſhall alſo, for every month after ſuch conviction,

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without any other indictment or conviction, forfeit 20l. and pay into the Exchequer at two times in the year, viz. in every Eaſter and Michaelmas term, as much as then ſhall remain unpaid, after the rate of 20l. for every month after ſuch conviction; except in ſuch caſes where the king ſhall and may, by force of this act, refuſe the ſame, and take two parts of the lands, tenements, hereditaments, leaſes, and farms of ſuch offender, till the ſaid party, being indicted for not coming to church, contrary to former laws, ſhall conform himſelf and come to church, according to the meaning of the ſtatute in this behalf made." And by ſ. 9. "Every conviction recorded for any offence before mentioned ſhall be certified into the court of Exchequer before the end of the term following ſuch conviction, which ſhall thereupon award proceſs for the ſeizure of the lands and goods of every ſuch offender, as the caſe ſhall require: and if default ſhall be made in any part of the payment aforeſaid, contrary to the form hereinbefore limited, then, and ſo often, the king ſhall and may, by proceſs out of the ſaid Exchequer, take, ſeize, and enjoy all the goods, and two parts as well of all the lands, tenements, and hereditaments, leaſes and farms of ſuch offender, as of all other the lands, tenements, and hereditaments liable to ſuch ſeizure, or to the penalties aforeſaid," &c.

Vide a ſimilar clauſe in 29 Eliz. c. 6. ſ. 4.

Indictment.

By ſ. 16. no indictment againſt any perſon for not repairing to ſome church or chapel, or uſual place of common prayer, but abſenting himſelf for one month, contrary to the laws and ſtatutes in that behalf provided, or for not receiving the ſaid ſacrament, contrary to this law, nor any proclamation, outlawry, or other proceeding thereupon, ſhall be avoided, diſcharged, or reverſed, for any default in form or other defect whatſoever, (other than by direct traverſe to the point of not coming to church or not receiving the ſaid ſacrament whereof ſuch perſon ſhall be indicted,) but the ſame indictment ſhall ſtand in force and be proceeded upon, any ſuch default of form, or other defect whatſoever, notwithſtanding.

Indictment reverſed by defend. ani's conforming.

Sect. 17. provides, That if any perſon ſo indicted ſhall ſubmit and conform himſelf, and become obedient to the laws of the church of England, and repair to the pariſh church of his moſt abiding, and if there be no ſuch, then to the church next adjoining his ſuch dwelling, and there hear divine

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ſervice according to the true meaning of the ſtatute in that behalf made, and there publicly receive the ſacrament according to law; then every ſuch perſon ſo indicted ſhall be admitted and allowed to avoid, diſcharge, and reverſe the ſaid indictment and all proceedings thereon, in ſuch manner as if this act had not been made, &c.

Summary proceeding before Juſtices.

Sect. 27. enacts, That if any ſubject ſhall not reſort every Sunday to ſome church, chapel, or other uſual place appointed for common prayer, and there hear divine ſervice according to the ſtat. 1 Eliz. c. 2. it ſhall and may be lawful for any juſtice of the peace of that diviſion, &c. wherein the ſaid party ſhall dwell, on proof of ſuch default by confeſſion, or oath of witneſs, to ſummon the ſaid party; and if he ſhall not make due proof of a ſufficient excuſe, it ſhall be lawful for the ſaid juſtice to give a warrant to the churchwarden of the pariſh where the party dwells, under his hand and ſeal, to levy 12 d. for every ſuch default, by diſtreſs and ſale of the offender's goods, or in default of ſuch diſtreſs to commit ſuch offender to priſon within the ſhire, &c., where he ſhall be inhabiting until payment of the ſum forfeited: the forfeiture to be for the uſe of the poor of the pariſh where the offender reſided at the time of the offence. Sect. 28. provides that nobody ſhall be impeached upon the above clauſe unleſs within one month after ſuch default made. And by ſ. 29. No man puniſhed upon this branch ſhall for the ſame offence be puniſhed by the forfeiture of 12 d. on the ſtat. 1 Eliz. c. 2.

Limitation.

25 Car. 2. c. 2. ſ. 2. *Sacrament.*

By ſtat. 25 Car. 2. c. 2. ſ. 2. All perſons admitted into any civil or military office, or receiving any pay, &c. by patent or grant from his majeſty, or having any command or place of truſt under him, ſhall take the ſacrament according to the uſage of the church of England, within three months after ſuch admittance, in ſome public church, on a Sunday; and by ſ. 3. ſhall obtain a certificate thereof, to be put on record in the court where he takes the oaths of allegiance and ſupremacy by the ſame act required. And by ſ. 4. Any perſon refuſing or neglecting to take ſuch ſacrament, at the place and within the time mentioned, ſhall ipſo facto be adjudged incapable and diſabled in law to have the ſaid office or employment, and the ſame is thereby adjudged void; and ſuch perſon being afterwards convicted of

Puniſhment.

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of executing the ſame, upon any information, preſentment, or indictment in any of the courts of Weſtminſter, or at the aſſizes, ſhall be diſabled to ſue; or to be guardian, or executor, or adminiſtrator; or to be capable of any legacy or deed of gift; or to bear any office in England, Wales, or Berwick-upon-Tweed; and ſhall alſo forfeit 500 l. to be recovered by any informer.

25 Car. 2. c. 2.

The following conſiderations are to be extracted from theſe acts:

As to the particular Offences deſcribed therein. § 8.

Offences deſcribed in the above ſtatutes.

The ſtat. 1 Eliz. c. 2. ſ. 14. requires all perſons having no lawful excuſe for abſenting themſelves, to repair to church, there to abide orderly during the ſervice. The ſtatutes 23 Eliz. c. 1. ſ. 5. 29 Eliz. c. 6. ſ. 2. and 3 Jac. 1. c. 4. ſ. 8. though not ſo fully worded as the ſtat. 1 Eliz. yet may reaſonably be taken to embrace the whole tenor of that ſtatute, to which they have general reference. One who miſbehaves himſelf at church, or goes away without reaſonable excuſe before the ſervice is ended, is as much within the law as one who wholly abſents himſelf. The laſt mentioned ſtatute, as well as the ſtat. 25 Car. 2. c. 2. further extends to perſons not receiving the ſacrament.

1 Hawk. ch. 10. ſ. 4.

As to the Juriſdictions before which theſe Offences are examinable. § 9.

Juriſdiction.

Offences within the ſtat. 1 Eliz. c. 2. are by ſ. 17. inquirable by juſtices of oyer and terminer, and of aſſize. The ſtat. 23 Eliz. c. 1. ſ. 8. extends the juriſdiction to juſtices of the peace to inquire of offences within that and the former act: and by ſ. 9. juſtices of oyer and terminer, of aſſize, and of gaol delivery, have power to hear and determine offences within that act. The ſtat. 29 Eliz. c. 6. ſ. 2. confined the cognizance of offences within the ſtat. 23 Eliz. c. 1. to B. R., or the aſſizes, or general gaol delivery. But the ſtat. 3 Jac. 1. c. 4. ſ. 7. again gives juriſdiction over all theſe offences, not only to the juſtices of aſſize and gaol delivery, but to juſtices of the peace or ſeſſions, in ſuch manner and form as juſtices of aſſize and gaol delivery might do by former laws. And by ſ. 2. of that ſtatute the penalty of 12 d. given by the ſtat. 1 Eliz.

1 Hawk. ch. 10. ſ. 21.

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may on conviction before one juſtice be levied by his warrant to the churchwardens of the pariſh where the party dwells, provided it be within one month after the offence: but there are no negative words to take away the remedy by indictment.

Vide 1 Hawk. ch. 10. ſ. 2. & ſ. 19.

§ 10. *The Limitation of Time for Proſecutions.*

Limitation.

By ſtat. 1 Eliz. c. 2. ſ. 20. offenders muſt be indicted at the next general ſeſſions of the juſtices, therein mentioned, after the offence committed; but by the ſtatute 23 Eliz. c. 1. the offences againſt that and the former ſtatutes of the 1ſt, 5th, and 13th years of the Queen are inquirable within a year and a day after they are committed: The ſtat. 29 Eliz. c. 6., which is in *pari materiâ*, will perhaps be governed by the ſame limitation; and the ſubſequent ſtatute 3 Jac. 1. c. 4. ſ. 7. giving juriſdiction to the juſtices therein named, refers to the mode of proceeding in former laws.

§ 11. *As to the Form of Indictment, or other Mode of convicting Offenders.*

Form of Indictment.
3 Bac. Abr. 479.
1 Hawk. ch. 10. ſ. 2. 24. &c.

The ſtat. 29 Eliz. c. 6. ſ. 5. gives a general and conciſe form of indictment, which is alſo ſufficient in an indictment on the ſtat. 1 Eliz.; and the indictment need not ſhew that the defendant had no reaſonable excuſe for his abſence; but he muſt ſhew that in his own defence. In default of the defendant's appearing, the ſame ſtat. and alſo the ſtat. 3 Jac. 1. c. 4. ſ. 7. give a ſummary mode of conviction, upon proclamation by the ſheriff for his appearing at the next aſſizes, &c., in caſe he ſhall not then appear, and ſuch his default be recorded; in which proceeding the ſtatutes muſt be ſtrictly purſued. The ſtat. 3 Jac. 1. c. 4. ſ. 16. provides, that no indictment for not repairing to church according to the laws in force, or for not receiving the ſacrament contrary to that law, nor any proclamation, outlawry, or other proceeding thereupon, ſhall be reverſed for any defect of form, other than by direct traverſe to the point of not coming to church, or not receiving the ſacrament. But the party is only reſtrained from taking advantage of defects in the record itſelf; for he may plead any collateral matter, ſuch as pardon, &c.; and judgment may be reverſed even for any defect in the record tending to prejudice the king,

1 Hawk. ch. 10. ſ. 28.

king, ſuch as the omiſſion of a capiatur, &c.; and ſo an outlawry may be reverſed for a common defect, on putting in bail, and traverſing the indictment as to the point of not coming to church. The offence need not be alleged in the county where the party was at the time, being a mere non-feazance, and, properly ſpeaking, not committed any where. But proof of abſence from the party's own pariſh church, it is ſaid, is ſufficient to throw the onus upon him of proving where he went to church. Yet this appears to be a ſtrong conſtruction to make on a penal ſtatute, unleſs he were alſo proved to be reſident within his pariſh at the time.

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1 Hawk. ch. 10. ſ. 9.
3 Bac. Abr. 479.
1 And. 139. (*Sed vide* Hob. 251.)
1 Hawk. ch. 10. ſ. 4. 5. *and the authorities there cited.*

What Bars or Excuſes may be alleged by Defendants. § 12.

Bars and Excuſes.

By ſ. 24. of the ſtat. 1 Eliz. c. 2. puniſhment by the ordinary is a bar to a proſecution before the juſtices for the ſame offence. The ſtat. 23 Eliz. c. 1. ſ. 5. attaches the offence only on thoſe above 16 years of age; and by ſ. 10. conformity before the biſhop or the juſtices, before judgment for the firſt offence, ſhall be a diſcharge from all pains and forfeitures incurred under that act. In like manner conformity after the ſummary conviction given by the ſtat. 29 Eliz. c. 6. ſhall by ſ. 6. do away ſubſequent forfeitures of 20 l. per month, or ſeizure of lands conſequent thereon, on payment of all arrearages, ſo long as ſuch conformity ſhall continue. So, an indictment for any offence within the ſtat. 3 Jac. 1. c. 4. may by ſ. 17. be avoided by the party's conformity, and receiving the ſacrament. And by the ſame ſtat. ſ. 27, 28, 29. a conviction by one juſtice of peace of offenders within the ſtat. 1 Eliz. c. 2., for not reſorting to church, ſhall operate in bar to the forfeiture given by the ſtat. 1 Eliz. c. 2. And by all theſe ſtatutes the defendant ſhall be diſcharged on ſhewing a reaſonable excuſe for not attending divine ſervice; ſuch as abſence out of the realm by ſtat. 29 Eliz. c. 6. ſ. 5. And ſ. 12. of the ſtat. 23 Eliz. c. 1. ſpecifies what degree of attendance at church within the year ſhall excuſe a party from the pains and penalties of that act. It is ſaid that ſickneſs for part of the time contained in an information ſhall be no excuſe, if it be proved that the defendant was a recuſant both before and after; becauſe it ſhall be preſumed that he obſtinately forbore during that time. This is another inſtance of a harſh conſtruction made

3 Bac. Abr. 479.

Cro Jac. 529.
1 Hawk. ch. 10. ſ. 10.

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on a penal law; more eſpecially as by ſtat. 1 Jac. 1. c. 4. ſ. 2. a recuſant conforming himſelf according to the meaning of the above mentioned ſtatutes of Eliz. ſhall during ſuch conformity be diſcharged of all penalties which he might otherwiſe incur by reaſon of his recuſancy. Such conformity may be pleaded after verdict in an action by a common informer, and even after judgment at the ſuit of the king, if before execution awarded. But after award of execution, or the king has actually taken the profits of the offender's lands, his only remedy is by petition to the king.

1 Jac. 1. c. 4. Okeden v. Keynel, T. Ray. 391. 465. 1 Hawk ch. 10. ſ. 53, 54.

By Toleration Act.

Alſo certain deſcriptions of perſons have been altogether taken out of the generality of theſe laws by two principal ſtatutes; namely, proteſtant diſſenters by the ſtat. 1 W. & M. c. 18., and papiſts by the ſtat. 31 G. 3. c. 32. before referred to, upon the conditions therein ſpecified.

Ante, p 7.

§ 13. *As to the Puniſhment; and where it is determinable by Conformity.*

Puniſhment. 1 Hawk. ch. 10. ſ. 7, 8. 11. 3 Bac Abr. 480. *Penalties.*

By the ſtat. 1 Eliz. c. 2. ſ. 14. a forfeiture of 12 d. is inflicted, after conviction and judgment, for each particular day's omiſſion in attending church. The ſtat. 23 Eliz. c. 1. ſ. 5. adds 20 l. per month (i. e. lunar month), which is accumulative to the forfeiture by the former ſtatute. Beſides which, by the ſtat. 23 Eliz. any ſuch offender not attending for 12 months, ſhall, after certificate thereof in writing made into B. R., either by the ordinary, or by a juſtice of aſſize, gaol delivery, or of the peace, of the county where the offender lives, be bound to good behaviour, with two ſufficient ſureties in 200 l. at leaſt, until conformity. By ſ. 11., on default of paying within three months after judgment the forfeitures incurred by this act, the offender ſhall be committed till payment or conformity. By ſtat. 29 Eliz. c. 6. ſ. 4. and 3 Jac. 1. c. 4. ſ. 8, 9. the forfeiture of 20 l. per month ſhall be for every month contained in the indictment, and alſo for every month after the conviction (i. e. till the party conforms), except when the king ſhall take the offender's goods and two thirds of his lands, in default of his paying the 20 l. per month, or where the king ſhall elect to take poſſeſſion of two parts of the offender's lands, in lieu of the ſaid penalty (i. e. upon inquiſition found of what lands the party was ſeiſed). And theſe penalties

For the recovery of theſe penalties by action, vide ſt. 35 Eliz. c. 1. ſ. 10.

1 Hawk. ch. 10. ſ. 43. 45.

are

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are to be paid into the Exchequer by the party convicted at ſtated periods. There is a ſimilar proviſion in the ſtat. 3 Jac. 1. c. 4. ſ. 8. whereby the party ſhall forfeit 20 l. for every month contained in the indictment on that ſtatute, and at the rate of 20 l. for every month after conviction; except when the king ſhall elect to take two parts of the offender's lands. And by ſ. 10 & 11. the ſame election is given to the crown in caſes of conviction on the ſtat. 23 Eliz. c. 1. ſ. 5. And by ſ. 9. of ſtat. 3 Jac. 1. c. 4. in default of payment before the end of the term after conviction recorded, proceſs ſhall iſſue from the Exchequer to ſeize the lands and goods of the offender in the manner therein ſpecified. By ſ. 5. of the ſame ſtatute, where the king takes the defendant's lands on default of his paying the 20 l. a month, the profits of them ſhall go towards the ſatisfaction of the penalty. Recuſants of a certain ſtanding are alſo liable to be bound to their good behaviour in the manner pointed out by the ſtat. 2 Eliz. c. 1. ſ. 5.

Recognizance.

It is further enacted by ſtat. 3 Jac. 1. c. 5. ſ. 8. that no recuſant convict ſhall practiſe the common or civil law, or phyſic, or uſe the trade of an apothecary, or be judge, miniſter, clerk, or ſteward in any court, or keep any court, or be regiſtrar or town clerk, or other miniſter or officer in any court, or ſhall bear any office or charge in camp, troop, or company of ſoldiers, or in any ſhip or fortreſs; but ſhall be utterly diſabled for the ſame, and forfeit for every ſuch offence 100 l., one moiety to the king, and the other to him who will ſue. And by ſ. 22. ſuch recuſants convicted at the death of any teſtator, or at the time of granting adminiſtration, ſhall be diſabled to be executors or adminiſtrators; and no ſuch perſon ſhall be guardian to any children.

3 Jac. 1. c. 5. ſ. 8. *Vide* 1 Hawk. ch. 12. ſ. 1. &c. *Diſabilities.*

In addition to the above, popiſh recuſants are put by ſeveral ſtatutes under theſe further diſabilities: 1. by ſtat. 3 James 1. c. 5. ſ. 11, 12. that of bringing actions, like perſons excommunicated; 2. that of preſenting to a church by ſtats. 1 W. & M. c. 26. ſ. 4. and 12 Ann. c. 2.; 3. that of bearing any public office or charge by ſtat. 3 James 1. c. 5. ſ. 9.; 4. by the ſame ſtat. ſ. 10. that of claiming any part of a huſband's perſonal eſtate; 5. by the ſame ſtat. ſ. 13. that of claiming an eſtate by curteſy or dower after a marriage againſt law. They are alſo put under theſe reſtraints by ſtats. 35 Eliz. c. 2. and 3 James 1. c. 5.

Vide 1 Hawk. c. 12. *per tot.*

Reſtraints.

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c. 5. ſ. 67. from going above five miles from home unleſs by licence, or by virtue of proceſs; 2. by ſtats. 3 Jac. 1. c. 5. ſ. 2. and 30 Car. 2. ſt. 2. ſ. 5 & 6. from going to court; 3. by ſtats. 3 Jac. 1. c. 5. ſ. 27, 28, 29. and 1 W. & M. c. 15. from keeping arms; 4. from going within 10 miles of London by ſtats. 3 Jac. 1. c. 5. ſ. 4, 5. and 1 W. & M. c. 9. They are alſo liable to theſe forfeitures: 1. by ſtat. 3 Jac. 1. c. 5. ſ. 10. that of two parts of a jointure or dower; 2. by ſtat. 3 Jac. 1. c. 4. ſ. 2, 3. that of 20 l. for not receiving the ſacrament yearly after conformity; 3. by ſtat. 3 Jac. 1. c. 5. ſ. 13. that of 100 l. for an unlawful marriage; 4. by the ſame ſtat. ſ. 14. that of an 100 l. for an omiſſion of lawful baptiſm; 5. by ſ. 15. that of 20 l. for an unlawful burial; laſtly, by ſtat. 3 Jac. 1. c. 5. ſ. 26. their houſes may be ſearched for relicks; and by ſ. 28. if they are married women they are liable to be committed after conviction, &c.

Forfeitures.

Commitment.

14. 4. The next Offence relating to the Church Eſtabliſhment is that of

Maintaining others who ſhall not repair to Church.

3 Jac. 1. c. 4. ſ. 32, 33, 34. *Keeping, &c. others who abſent themſelves from Church.*

The ſtat. 3 Jac. 1. c. 4. ſ. 32, 33, 34. enacts, "that whoſoever ſhall retain or keep in his ſervice, fee, or livery, or ſhall willingly maintain, retain, relieve, keep, or harbour in his houſe any ſervant, ſojourner, or ſtranger, (except a father or mother wanting, without fraud or covin, other habitation or ſufficient maintenance, and alſo except a ward or perſon committed to the cuſtody of another by authority,) who ſhall not go to ſome church or chapel or uſual place of common prayer, to hear divine ſervice, but ſhall forbear the ſame for the ſpace of one month, &c. ſhall for every month that he ſhall keep ſuch ſervant, &c. forfeit 10 l." This is repealed, as to diſſenting proteſtants, by ſuch as bring themſelves within the toleration act; and as to papiſts, by thoſe who bring themſelves within the ſtat. 31 G. 3. c. 32. ſ. 3. The above regulation is alſo enforced, with reſpect to teachers of youth, by the ſtatutes after mentioned.

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§ 15. *Non-conforming Teachers.*

5. Offences touching Non-conforming Teachers of Schools.

23 Eliz. c. 1. ſ. 6, 7. *Vide* 11 & 12 W. 3. c. 4. ſ. 3. *conditionally repealed by* 18 Geo. 3. c. 60.

By ſtat. 23 Eliz. c. 1. ſ. 6 & 7. "If any perſon or perſons, body politic or corporate, ſhall keep or maintain any ſchoolmaſter who ſhall not repair to church according to the form of the ſaid ſtatute, or be allowed by the biſhop or ordinary of the dioceſe (who ſhall not take any thing for the ſaid allowance), they ſhall forfeit for every month 10 l. And ſuch ſchoolmaſter preſuming to teach contrary to the ſaid act, and being thereof convicted, ſhall be diſabled to be a teacher of youth, and ſhall ſuffer impriſonment for one year."

The offence is by ſ. 8. inquirable before the ſame juſtices as are before mentioned. Ante, p. 17.

1 Jac. 1. c. 4. ſ. 9.

Alſo by the ſtat. 1 Jac. 1. c. 4. ſ. 9. "No perſon ſhall keep any ſchool or be a ſchoolmaſter, out of the univerſities or colleges of this realm, except it be in ſome public or free grammar ſchool, or in the houſe of one not a recuſant, or where ſuch ſchoolmaſter ſhall be ſpecially licenſed thereunto by the archbiſhop, biſhop, or guardian of the ſpiritualities of that dioceſe; upon pain, that as well the ſchoolmaſter, as alſo the party who ſhall retain or maintain him contrary to the meaning of the ſaid ſtatute, ſhall forfeit each of them, for every day ſo wittingly offending, 40 s., one moiety to the king, the other to him who will ſue for it."

3 Bac. Abr. 479. 1 Hawk. ch. 9. ſ. 3.

Theſe ſtatutes are ſtill in force as to perſons not within the toleration act (*a*); but, as to ſuch perſons as are within the latter act, they ſeem to be impliedly repealed by it. And the ſtat. 12 Ann. c. 7. which obliged ſchoolmaſters to ſubſcribe the declaration concerning the liturgy, and to have a licence from the biſhop, is repealed by ſtat. 5 G. 1. c. 4.

(*a*) 1 W. & M. c. 18. *enlarged by* 19 G. 3. c. 44.

31 Geo. 3. c. 32. ſ. 13.

Alſo by the ſtat. 31 G. 3. c. 32. ſ. 13. "No eccleſiaſtic or other perſon profeſſing the Roman Catholic religion, who ſhall take and ſubſcribe the oath of allegiance, abjuration, and declaration therein mentioned, ſhall be proſecuted in any court whatſoever for teaching and inſtructing youth as a tutor or ſchoolmaſter. Provided (ſ. 14.) that no perſon profeſſing the Roman Catholic religion ſhall obtain or hold the maſterſhip of any college or ſchool of royal foundation, or of any other endowed college or ſchool, or

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ſhall keep a ſchool in either of the univerſities of Oxford and Cambridge; or (ſ. 15.) ſhall receive into his ſchool for education the child of any proteſtant father. And provided (by ſ. 16.) that no ſuch perſon ſhall keep ſuch ſchool until his or her name or deſcription, as a Roman Catholic ſchoolmaſter or miſtreſs, ſhall have been recorded at the quarter or general ſeſſion of the peace for the county, &c. where ſuch ſchool ſhall be ſituated, by the clerk of the peace, who ſhall give a certificate thereof to ſuch perſon as ſhall at any time demand the ſame."

The ſtat. 11 & 12 W. 3. c. 4. ſ. 3. which ſubjected to perpetual impriſonment papiſts convicted of keeping ſchool, is repealed by ſtat. 18 G. 3. c. 60. as to perſons taking and ſubſcribing the oath therein recited before arreſt or proſecution. And alſo generally by ſtat. 31 G. 3. c. 32. ſ. 13. as to perſons making and ſubſcribing the oath or declaration thereby required.

§ 16. *6. By giving or receiving foreign Popiſh Education.*

Giving or receiving foreign Popiſh Education. 1 Jac. 1. c. 4. ſ. 6, 7.

By ſtat. 1 Jac. 1. c. 4. ſ. 6, 7. "If any perſon under the king's obedience ſhall go, or ſend, or cauſe to be ſent, any child or any other perſon under their or any of their government, beyond the ſeas, out of the king's obedience, to the intent to enter into, or reſide in, or repair to any college, ſeminary, or houſe of jeſuits, prieſts, or any other popiſh order, profeſſion or calling, to be inſtructed, perſuaded, or ſtrengthened in the popiſh religion, or in any ſort to profeſs the ſame, every ſuch perſon ſo ſending ſuch child, &c. ſhall forfeit 100 l., and the parties alſo incur certain diſabilities."

3 Jac. 1. c. 5. ſ. 16.

And by ſtat. 3 Jac. 1. c. 5. ſ. 16. "If the children of any ſubject within the realm, (the ſaid children not being ſoldiers, mariners, merchants, or their apprentices or factors,) ſhall be ſent or go beyond ſea, to prevent their good education in England, or for any other cauſe, without the licence therein required, the party ſending ſuch child &c. ſhall forfeit 100 l., and the child incurs certain diſabilities in the mean time."

3 Car. 1. c. 2.

Alſo by ſtat. 3 Car. 1. c. 2. "If any perſon under the king's obedience ſhall go, or ſhall convey or ſend, or cauſe to be ſent or conveyed, out of the king's dominions, any perſon into any parts beyond the ſeas, out of the king's obedience, to the intent

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intent to enter into, or be reſident, or trained up in any priory, abbey, nunnery, popiſh univerſity, college, or ſchool, or houſe of jeſuits, prieſts, or in a private popiſh family, and ſhall be there by any popiſh perſon inſtructed, perſuaded, or ſtrengthened in the popiſh religion in any ſort to profeſs the ſame, or ſhall convey or ſend, or cauſe to be conveyed or ſent, any thing towards the maintenance of any perſon ſo going or ſent, and trained and inſtructed as aforeſaid, or under colour of any charity towards the relief of any priory, &c. or religious houſe whatſoever, every perſon ſo ſending, &c. any ſuch perſon or thing, and every perſon paſſing or ſent, being thereof convicted, &c. ſhall forfeit all his goods and chattels, and alſo all his hereditaments offices and eſtates of freehold during his life;" beſides incurring certain other diſabilities. And the contributing to the maintenance of any jeſuit, ſeminary prieſt, &c. or of any popiſh ſeminary out of the realm, is made a præmunire by ſtat. 27 Eliz. c. 2. ſ. 6. And by ſ. 5. of the ſame ſtat. "If any ſubject, not being an eccleſiaſtic, and brought up in any popiſh ſeminary beyond ſeas, ſhall not, within ſix months after a proclamation to that purpoſe in London, under the Great Seal, return into this realm, and within two days after ſubmit, &c. and take the oath required, he ſhall be guilty of high treaſon whenever he ſhall otherwiſe return."

25 Car. 2. c. 2. ſ. 8.

By ſtat. 25 Car. 2. c. 2. ſ. 8. "If any perſons not bred by their parents from their infancy in the popiſh religion, and profeſſing themſelves to be popiſh recuſants, ſhall inſtruct or educate, or ſuffer to be inſtructed or educated, their children in the popiſh religion; every ſuch perſon on conviction ſhall be diſabled from bearing any office or place of truſt or profit in church or ſtate; and ſuch children ſhall alſo be thus diſabled until they conform, and take the oaths of ſupremacy and allegiance, and receive the ſacrament after the uſage of the church of England, and obtain a certificate thereof under the hands of two or more juſtices of the peace: and (by ſ. 9.) ſhall make and ſubſcribe the declaration againſt tranſubſtantiation."

Vide 1 Hawk. ch. 15. and 4 Blackſt. Com. ante, p. 21, 22.

Perſons profeſſing the popiſh religion are alſo laid under many diſabilities by various ſtatutes, moſt of which have been before alluded to, and which being fully explained in other treatiſes are not neceſſary to be here detailed; eſpecially as ſuch perſons are now protected by bringing themſelves within the act of the 31 Geo. 3. c. 32.

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§ 17. *Iſſuing Popiſh Books, &c.* 3 & 4 Ed. 6. c. 10.

7. Another Offence againſt the Eſtabliſhed Church, by encouraging the Popiſh Religion, is

The iſſuing of Popiſh Books, Relicks, and the like.

As to which, by ſtat. 3 & 4 Ed. 6. c. 10. all primers (and other popiſh books enumerated), or other books or writings whatſoever theretofore uſed for the ſervice of the church, other than ſuch as ſhall be ſet forth by the king, are aboliſhed and forbidden to be uſed or kept in this realm or elſewhere within any the king's dominions. And by ſ. 2. all perſons are forbidden to have ſuch books in their cuſtody; and every perſon ſhall, for every ſuch book willingly retained in his cuſtody within any of the king's dominions, forfeit on conviction for the firſt offence 20s., for the ſecond offence 4l., and for the third offence ſuffer impriſonment at the king's will. And by ſ. 4. juſtices of aſſize and of the peace have authority to hear and determine theſe offences. And by ſ. 3. half the forfeitures are to go to the crown, and half to whoever will ſue for the ſame.

13 Eliz. c. 2. ſ. 7.

By ſtat. 13 Eliz. c. 2. ſ. 7. "if any perſon ſhall bring into this realm or any the dominions of the ſame any thing called agnus Dei, or any croſſes, pictures, beads, or ſuch like ſuperſtitious things, from the biſhop or ſee of Rome, or from any perſon claiming authority from the ſame to conſecrate ſuch things; and if any perſon ſo bringing in ſuch things ſhall deliver, or cauſe, or offer the ſame to be delivered to any ſubject to be worn or uſed, as well the perſon doing as the perſon receiving the ſame, to the intent to uſe or wear the ſame, on conviction and attainder ſhall incur a præmunire. Any perſon to whom ſuch things are offered may, (by ſ. 8.) indemnify himſelf by apprehending the party offering the ſame, or within three days after the offer made diſcloſing his name and place of abode to a juſtice of peace, or delivering up the thing received within one day. And by (ſ. 10.) If any juſtice of peace to whom the ſaid offences ſhall be declared do not within fourteen days after ſignify the ſame to ſome privy counſellor, he ſhall incur a præmunire."

3 Jac. 1. c. 5. ſ. 25.

By ſtat. 3 Jac. 1. c. 5. ſ. 25. "no perſon ſhall bring from beyond the ſeas, nor ſhall print, buy, or ſell any popiſh primer, ladies' pſalters, manuals, roſaries, popiſh catechiſms, miſſals, breviaries, poſtals, legends, and lives of ſaints, containing ſuperſtitious

ſuperſtitious matter, printed or written in any language whatſoever, nor any other ſuperſtitious books printed or written in Engliſh, on pain of forfeiting 40s. for every ſuch book, one-third to the king, one to the informer, and one to the poor of the pariſh; and the books to be burnt."

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8. Another Offence of the ſame Deſcription is § 18.

The ſaying or hearing Maſs or other Popiſh Service.

Saying or hearing Popiſh ſervice. 23 Eliz. c. 1. ſ. 4.

By ſtat. 23 Eliz. c. 1. ſ. 4. "Every perſon who ſhall ſay or ſing maſs, being thereof lawfully convicted, ſhall forfeit 200 marks, and be committed to the next gaol for one year, and till payment: and every perſon who ſhall willingly hear maſs ſhall forfeit 100 marks, and ſuffer a year's impriſonment." But conformity will remit the puniſhment in the manner already deſcribed. Ante, p. 19.

3 Jac. 1. c. 5. ſ. 1. *Indemnity to Perſons diſcovering.*

And by ſtat. 3 Jac. 1. c. 5. ſ. 1. "Any perſon diſcovering to a juſtice of peace the ſaying of a maſs, and any of the perſons who were preſent at it, within three days afterwards, by reaſon whereof any offender is convicted or attainted, ſhall be indemnified, and have a third of the forfeiture, or 50l. if the forfeiture exceed 150l."

11 & 12 W. 3. c. 4. *Popiſh Prieſts convict.*

By ſtat. 11 & 12 W. 3. c. 4. ſ. 3. "Every popiſh biſhop, prieſt, or jeſuit proſecuted to conviction for exerciſing any part of his function, (except (ſ. 5.) he be a foreigner entered in the ſecretary of ſtate's office, and officiate only in the houſe of a foreign miniſter,) ſhall be adjudged to perpetual impriſonment in ſuch place as the king in council ſhall appoint." But this ſeverity is now in effect done away by the acts of the 18 Geo. 3. c. 60. and 31 Geo. 3. c. 32. ſ. 4., in reſpect to perſons of this perſuaſion taking the oaths, and ſubſcribing the declarations therein reſpectively contained.

9. Another and very principal Offence againſt the Church Eſtabliſhment, connected alſo with the State, is § 19.

The not taking the Oaths of Allegiance and Supremacy, and making the Declaration againſt Popery.

Not taking the Oaths, &c. 1 Eliz. c. 1. ſ. 12.

By the act of the 1 Eliz. c. 1. all ancient eccleſiaſtical juriſdictions were reſtored and united to the crown, and its ſupremacy in ſuch matters was finally aſſerted and eſtabliſhed; and an oath to that effect appointed to be taken by

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by all officers and miniſters eccleſiaſtical and civil, on pain, in caſe of refuſal, of the party forfeiting for life every promotion benefice and office, ſpiritual and temporal, which he had at the time of ſuch refuſal, and being diſabled from taking any ſuch preferment to which he was then promoted. This oath was abrogated by the ſtat. 1 W. & M. c. 8., and another appointed to be taken in lieu of it under the ſame penalties. By ſ. 37. of the ſaid ſtat. of Eliz. the offence muſt be proved by two witneſſes at leaſt.

ſ. 20, 21.

5 Eliz. c. 1. ſ. 5. Vide 1 Hawk. ch. 19. ſ. 28. &c.

All perſons required by the ſtat. 1 Eliz. c. 1. to take the ſaid oath, and all ſchoolmaſters and public and private teachers, barriſters, benchers, readers, ancients in any houſe of court, &c. attornies, ſheriffs, and officers belonging to the common or any other law, or to the crown, or to any court whatever, ſhall, by ſtat. 5 Eliz. c. 1. ſ. 5., take the ſaid oath in open court before they ſhall be admitted to any ſuch vocation or office, &c.; and if they belong not to any court, then they ſhall take the ſame before ſuch perſon as ſhall admit them to ſuch vocation, &c. or before commiſſioners appointed under the great ſeal, &c.

ſ. 6.

By ſ. 6. any biſhop may tender the ſaid oath to any ſpiritual perſon within his dioceſe, as well in places exempt as others; and by ſ. 7. commiſſioners may be appointed by the Lord Chancellor to tender the ſame to ſuch perſons as by their commiſſion they ſhall be authoriſed to do. And by ſ. 8. if any perſon compellable by either of the ſaid acts, or appointed by ſuch commiſſioners to take the ſaid oath, ſhall refuſe to take it on a tender thereof, he ſhall incur a præmunire. And by ſ. 9. ſuch refuſal ſhall be certified within 40 days if in term, or otherwiſe at the firſt day of the full term next following the 40 days, into B. R. by the perſons having authority to tender ſuch oath, under the penalty of 100 l.; and the ſheriff of the county where the court ſit may impanel a jury to inquire of ſuch refuſal, in ſuch manner as if it had happened in the ſame county; which jury may, upon ſuch certificate and other evidence, indict the offender in ſuch ſort as if the offence had been done in the ſame county. But though ſuch a jury may find the indictment, ſtill it is ſaid, that the *trial* muſt be by a jury of that county wherein the oaths were refuſed.

1 Hawk. ch. 19 ſ. 35. Dy. 234.

30 Car. 2 ſt. 2. c. 1. & 1 Geo. 1. ſt. 2. c. 1.

By ſtat. 30 Car. 2. ſtat. 2. c. 1. and 1 Geo. 1. ſtat. 2. c. 1. ſ. 16, 17. & 22. "No peer or member of the Houſe of Peers

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Peers ſhall vote, or make his proxy, or ſit there during any debate; and no member of the Houſe of Commons ſhall vote or ſit there during any debate, after the ſpeaker is choſen; until ſuch peer or member ſhall take the oaths of allegiance and ſupremacy, and make a declaration (therein ſpecified) of his belief that there is no tranſubſtantiation in the ſacrament of the Lord's Supper, and that the invocation or adoration of the Virgin Mary, or any other ſaint, and the ſacrifice of the maſs, as they are now uſed in the church of Rome, are ſuperſtitious and idolatrous, &c. on pain that every ſuch offender ſhall be adjudged a popiſh recuſant convict, and diſabled to hold or execute any office, &c. or from thenceforth to ſit or vote in either houſe of parliament, or to ſue in law or equity, or to be guardian, executor, or adminiſtrator, or capable of any legacy or deed of gift, and ſhall forfeit for every ſuch wilful offence 500 l."

By members of parliament.

Repealed as to ſuch papiſts who bring themſelves within the 31 G. 3. c. 32. ſ. 20.

The 9th, 12th, and 13th clauſes of the ſame ſtatute, which require that "Every ſworn ſervant to the king ſhall take the ſaid oaths, and make and ſubſcribe the ſaid declaration," are repealed by the ſtat. 2 Geo. 2. c. 31. ſ. 9.

By Perſons holding places at court.

By ſtat. 1 W. & M. c. 9. "Every juſtice of peace in London and Weſtminſter, and within ten miles thereof, ſhall cauſe to be arreſted and brought before him all reputed papiſts, (except foreigners, being merchants or menial ſervants to ſome ambaſſador or public agent, &c.) and ſhall tender the above-mentioned declaration to every ſuch perſon; and every ſuch perſon refuſing the ſame, and afterwards remaining within the above limits, or being certified by juſtices out of thoſe limits to B. R. or the quarter ſeſſions for ſuch refuſal, and neglecting to make the ſaid declaration in ſuch court, ſhall ſuffer as a popiſh recuſant convict." Suppoſed papiſts, required by two juſtices of peace to make the ſaid declaration, and neglecting ſo to do, are, by ſtat. 1 W. & M. c. 15., reſtricted in the privilege of keeping arms, ammunition, and horſes at their pleaſure; And by ſtat. 1 W. & M. c. 26. from preſenting to any benefice. And by the land-tax acts papiſts in general are liable to pay double land-tax if they do not conform. But now, by 31 Geo. 3. c. 32. ſ. 18., no papiſt making and ſubſcribing the oath and declaration therein contained ſhall be proſecuted on the former ſtatutes.

By perſons living within ten miles of London. 1 W. & M. c. 9.

31 G. 3. c. 32. ſ. 19. *proteſts thoſe who bring themſelves within that ſtat.*

Vide ſupra.

Alſo

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7 & 8 W. 3. c. 24. *By Barriſters, &c.*

Alſo by ſtat. 7 & 8 W. 3. c. 24. any ſerjeant or counſellor at law, barriſter, advocate, attorney, ſolicitor, proctor, clerk, or notary, practiſing as ſuch in any court whatſoever, not having before taken, in the court of Chancery, or King's Bench, or quarter ſeſſions of the county wherein he lives, the oaths required by the ſtat. 1 W. & M. c. 8., and made and ſubſcribed the declaration appointed by the ſtat. 25 Car. 2. c. 2. (to prevent danger from popiſh recuſants) ſhall incur a præmunire. This, ſo far as reſpects Roman Catholics, is repealed by ſtat. 31 Geo. 3. c. 32. ſ. 22., as to ſuch as bring themſelves within the ſame.

c. 27. *Tenure of Oaths.*

By ſtat. 7 & 8 W. 3. c. 27. any perſon refuſing to take the ſaid oaths of allegiance and ſupremacy when tendered, or refuſing or neglecting to appear, when lawfully ſummoned, in order to have the ſaid oaths tendered to him, ſhall, until he ſhall have taken the ſame, incur all the pains and penalties of popiſh recuſants convict: and the perſon ſo tendering the ſaid oaths ſhall, on every ſuch refuſal or default, record and enter in parchment the chriſtian and ſurname and place of abode of the party, together with the time of tender and refuſal or default, and ſhall certify the ſaid record or entry to the juſtices of aſſize, oyer and terminer or gaol delivery at their next ſeſſion, who ſhall eſtreat and certify the ſame into the court of Exchequer, who may award ſuch proceſs againſt the lands and goods of the party as in the caſe of a popiſh recuſant convict. By ſ. 12. quakers, who ſcruple to take an oath, may make a declaration of fidelity to the ſame effect.

1 Geo. 1. ſt. 2. c. 13. *Form of Oath of Allegiance and Abjuration.*

The ſtat. 1 Geo. 1. ſt. 2. c. 13. gives the form of the oaths of allegiance and abjuration required to be taken by all officers civil and military, and all eccleſiaſtical perſons, and members of colleges (being of the age of eighteen years), and by all teachers or readers in any univerſity or elſewhere, and by all ſchoolmaſters and uſhers, and all teachers and preachers of ſeparate congregations, all conſtables, ſerjeants at law, counſellors, barriſters, advocates, attornies, ſolicitors, proctors, clerks, or notaries, practiſing in any court; which oaths are to be taken within three (by 9 Geo. 2. c. 26. ſ. 4. *ſix*) months after they have been admitted into or entered upon any ſuch preferment, benefice, office, or place, or come into ſuch capacity, or taken upon themſelves ſuch employment,

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ſ. 7. ſ. 8.

ployment, practice, or buſineſs in one of the courts at Weſtminſter, or at the quarter ſeſſions of the county where they reſide, under pain of diſability to hold or exerciſe the ſaid offices, &c. upon neglect or refuſal to take the ſaid oaths. And perſons convicted in any of the courts at Weſtminſter, or at the aſſizes, of exerciſing ſuch offices or employments without taking the oaths within the time ſpecified, ſhall be diſabled to ſue, or to be guardian, or executor, or adminiſtrator, or capable of any legacy or deed of gift, or to be in any office within Great Britain, or to vote for members of parliament; and ſhall forfeit 500l., to be recovered by any informer. And by ſ. 10. two juſtices, or other perſons ſpecially commiſſioned, may tender the ſaid oaths to any perſon whom they ſuſpect to be dangerous or diſaffected to his majeſty or his government, and on their neglect or refuſal to take the ſaid oaths, may certify the ſame to the next quarter ſeſſions; which being there recorded, ſhall be from thence certified by the clerk of the peace into the courts of Chancery or King's Bench; and every perſon ſo neglecting or refuſing to take the ſaid oaths ſhall, from the time of his neglect or refuſal, be adjudged a popiſh recuſant convict, and as ſuch to forfeit and be proceeded againſt. The ſame puniſhment is denounced by ſ. 11. againſt ſuch as, being lawfully ſummoned to appear and take the oaths, neglect or refuſe to do ſo. Theſe proviſions, ſo far as they reſpect the ſummoning perſons to take the oaths of ſupremacy and make the declaration againſt tranſubſtantiation, required by the ſtat. 25 Car. 2. c. 2., are repealed by ſtat. 31 Geo. 3. c. 32. ſ. 18.

Tender of Oath to ſuſpected perſons.

Peers and members of parliament.

By ſ. 16 & 17 of the ſame ſtat. of Geo. 1. no peer of this realm, or member of the Houſe of Peers ſhall vote, or make his proxy, or ſit there during any debate, and no member of the Houſe of Commons ſhall vote or ſit there during any debate, after the ſpeaker is choſen, until ſuch peer or member ſhall have taken the abjuration oath thereby required, together with the oaths of allegiance and ſupremacy, and the declaration againſt tranſubſtantiation; on pain of being diſabled to ſue, or be a guardian, or executor, or adminiſtrator, or capable of any legacy, or deed, or gift, or to be in any office within Great Britain, or to vote at any election for members to ſerve in parliament, and of forfeiting 500l., to be recovered by any informer. By ſ. 20. this diſability

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diſability is not to extend to the offices of tithingman, headborough, overſeer of the poor, churchwarden, ſurveyor of the highways, or any like inferior civil office, or to any office of foreſter, or keeper of any park, or other inferior or private officers therein mentioned. By ſ. 22. perſons obliged by any law to receive the ſacrament, or make the declaration againſt tranſubſtantiation, ſhall continue bound to do ſo.

§ 20.

10. *Extolling or maintaining the Authority of the Pope or the See of Rome.*

Maintaining the Pope's authority. 5 Eliz. c. 1. ſ. 2. 10. Vide 1 Hawk. ch. 17. ſ. 72, 73, 74.

By ſtat. 5 Eliz. c. 1. if any perſon within the queen's dominions ſhall, by writing, cyphering, printing, preaching, or teaching, deed or act, adviſedly and wittingly hold or ſtand with, to extol, ſet forth, maintain, or defend the juriſdiction or power of the biſhop or ſee of Rome, heretofore claimed, uſed, or uſurped in this realm, or any dominion or country under the queen's obedience; or by any ſpeech, open deed or act, wittingly and adviſedly attribute any ſuch juriſdiction, authority, or pre-eminence to the ſaid ſee or biſhop of Rome within this realm, or in any of the queen's dominions, he, his abettors, procurers, aiders, aſſiſters, and comforters therein ſhall be guilty of a præmunire for the firſt offence, and of high treaſon for the ſecond; but without corruption of blood or loſs of dower. The firſt proſecution muſt be commenced within one year after the offence committed.

§ 21.

11. *Putting in Ure Popiſh Bulls, Proceſs, &c.*

Uſing Popiſh Bulls, &c. 13 Eliz. c. 2. ſ. 2, 3.

By ſtat. 13 Eliz. c. 2. ſ. 2, 3. "if any perſon ſhall put in ure, within this realm or any the queen's dominions, any bull or inſtrument of abſolution or reconciliation, obtained from the biſhop or ſee of Rome, or any perſon claiming authority therefrom, or ſhall take upon him, by colour of ſuch bull, &c. to abſolve or reconcile any perſon, or to grant or promiſe to any perſon within this realm, or other the queen's dominions, any abſolution or reconciliation, by any ſpeech, preaching, teaching, writing, or any other open deed, or ſhall willingly receive any ſuch abſolution or reconciliation, or ſhall obtain from the biſhop or ſee of Rome any bull or writing whatſoever, containing any thing, matter,

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ter, or cauſe whatſoever, or publiſh or any ways put the ſame in ure, he, his procurers, abettors, and counſellors to the fact ſhall be guilty of high treaſon." By ſ. 4. acceſſaries after the offence incur a præmunire; and by ſ. 5, 6. ſuch as do not, within ſix weeks, diſcloſe an offer of ſuch bulls, &c. to ſome privy counſellors, &c. are guilty of a miſpriſion of treaſon.

Vide 1 Hawk. ch. 19. ſ 12. &c.

There are many other obſolete laws againſt papal proviſions, inſtruments, and proceſſes, as applicable to particular caſes, which ſubject the offenders only to the penalties of a præmunire.

12. *Perverting others or being perverted to Popery.*

§ 22. *Converſion to Popery.* 23 Eliz. c. 1. 3 Jac. 1. c. 4. *Vide* 1 Hawk. ch. 17. ſ. 76, 77, 78. and poſt. tit. High Treaſon, § 33.

By ſtat. 23 Eliz. c. 1. ſ. 2. and 3 Jac. 1. c. 4. ſ. 22, 23. "If any one ſhall pretend to have power, or ſhall put in practice to abſolve, perſuade, or withdraw a ſubject from his natural obedience to the queen, or to withdraw him *for that intent* to the Romiſh religion, or to move him to promiſe any obedience to any pretended authority of the ſee of Rome or any other ſtate, &c. to be uſed within the dominions of the queen, or to do any overt act to that intent; and if any perſon ſhall, by any means, be willingly abſolved or withdrawn, or willingly be reconciled or promiſe ſuch obedience as aforeſaid, he, his procurers and counſellors, ſhall be guilty of high treaſon. By ſ. 3. acceſſaries after, not diſcloſing their principals within 20 days, ſhall be guilty of miſpriſion of treaſon. But by the latter ſtatute (ſ. 24.) if any perſon who is reconciled to the ſee of Rome, beyond the ſeas, return into the realm and ſubmit himſelf, &c. and take the oaths within ſix days after his return, he is excuſed.

13. *Natural born Subjects ordained or profeſſed by Popiſh Authority, being in the Realm, without ſubmitting themſelves.*

§ 23. *Popiſh Prieſts abiding here.* 27 Eliz. c. 2. *Vide* 1 Hawk. ch. 17. ſ. 82, 3.

By ſtat. 27 Eliz. c. 2. ſ. 3. "If any eccleſiaſtic, born in the queen's dominions, and made, ordained, or profeſſed by popiſh authority, ſhall come into, be, or remain in the queen's dominions, and not ſubmit to ſome biſhop or juſtice of the peace, within three days, and take the oaths, &c. he ſhall be guilty of high treaſon. By ſ. 13. if any ſubject

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ſhall know that any ſuch prieſt is within the realm, and not diſcover him to ſome juſtice of peace, &c. within 12 days, he ſhall be fined and impriſoned at the queen's will; and if any juſtice of peace, &c. to whom ſuch matters ſhall be diſcovered, ſhall not give information to ſome of the privy council, &c. within 28 days after, he ſhall forfeit 200 marks.

This ſtatute ſeems to be proviſionally repealed by the 4th ſect. of the ſtat. 31 Geo. 3. c. 32. in reſpect of ſuch as take the oath of allegiance, abjuration, and declaration therein mentioned.

14. *Relieving Popiſh Prieſts.*

§ 24. *Relieving Popiſh Prieſts.* 27 Eliz. c. 2. f. 4. *Vide* 1 Hal. 621.

By ſtat. 27 Eliz. c. 2. f. 4. "Whoever ſhall wittingly and willingly receive, relieve, comfort, aid, or maintain any jeſuit, ſeminary or other popiſh prieſt, &c. being at liberty or out of hold, knowing him to be a jeſuit, &c. ſhall be adjudged a felon, without benefit of clergy."

15. *Refuſing to elect or conſecrate the Perſon nominated by the King to a Biſhoprick.*

§ 25. *Refuſing the Nomination of the Crown to a Biſhopric.*

This offence, not likely to be now committed, againſt our church eſtabliſhment and diſcipline is one which grew out of the Reformation; before the ſupremacy of the crown in ſpiritual concerns had become as rooted in conſcience as in law.

25 H. 8. c. 20. f. 7.

By ſtat. 25 H. 8. c. 20. f. 7. "If any dean and chapter refuſe to elect the perſon named in the king's letter for a biſhoprick, and to ſignify ſuch election to the king within 20 days after the licence to elect ſhall come to their hands; or if any archbiſhop or biſhop, after ſuch election, or nomination by the king in default thereof, ſignified unto him by the king, ſhall refuſe, within 20 days, to confirm and conſecrate the perſon ſo ſignified to him, he ſhall incur a præmunire.

16. *Appointing Aliens to Church Preferment.*

§ 26. *Preferring Aliens in the Church.* 7 Ric. 2. c. 12.

The ſtat. 7 Ric. 2. c. 12. reciting, that by the ſtat. 27 Ed. 3. no perſon ſhall take or receive procuracy, letter of attorney, nor any other adminiſtration, by indenture or in any other manner, of any perſon, concerning any benefice of

Ch. I. § 26. *Offences againſt Church Eſtabliſhment.*

holy church within the realm, but only of the king's ſubjects of the ſame realm, without the king's licence, under the pains therein mentioned, confirms the ſame; and enacts, that if any alien ſhall purchaſe any benefice of holy church, dignity, or other thing, and take poſſeſſion of the ſame, whether for his own or another's uſe, without ſuch licence, he ſhall be compriſed in the ſaid ſtat., and alſo incur the pains and penalties of the ſtat. 25 Ed. 3. ſt. 5. c. 22.

17. *Exerciſing the Juriſdiction of Suffragan without due Appointment.*

§ 27. *Acting as Suffragan without Authority.* 26 H. 8. c. 14. f. 6.

By ſtat. 26 H. 8. c. 14. No ſuffragan ſhall uſe any juriſdiction, ordinary or epiſcopal power, otherwiſe nor for longer time than ſhall be limited by the commiſſion granted by the archbiſhop or biſhop of the dioceſe, under the authority of that act, under the penalty of a præmunire.

18. *Simony.*

§ 28. *Simony.* The Biſhop of St. David v. Lucy, 1 Ld. Raym. 449. Barret v. Glubb, 2 Blac R. 1054. Oldbury v. Gregory, Moor, 564. 6 Bac. Abr. 185. Mackaller v. Tadderick, Cro. Car. 361.

No offence under this title was known to the common law; and yet the corrupt preſentation to a benefice is ſaid to have been ſuch an offence, whereof the law would take notice even before the ſtat. 31 Eliz. c. 6.; and this is confirmed by what is ſaid in the ſtat. 1 W. & M. ſt. 1. c. 16. which provides, that no innocent incumbent or patron ſhall be prejudiced under pretence of lapſe by virtue of the ſimoniacal preſentation of the former incumbent, "unleſs the perſon ſimoniacally preſented, or his patron, were *convicted of ſuch offence at the common law*, or ſome eccleſiaſtical court, in the lifetime of the perſon ſimoniacally promoted." The ground of ſuch an offence at common law muſt be the abuſe of a great public truſt from corrupt motives.

31 Eliz. c. 6. f. 5.

The ſtat. 31 Eliz. c. 6. for avoiding ſimony and corruption in preſentations to benefices and other eccleſiaſtical promotions, enacts, f. 5. That if any perſon, bodies politic and corporate, ſhall, for any money, reward, gift, profit, or benefit, directly or indirectly, or by reaſon of any promiſe, agreement, bond, or other aſſurances for any money, &c. directly or indirectly, preſent or collate any perſon to any benefice with cure of ſouls, dignity, prebend, or living eccleſiaſtical, or give or beſtow the ſame for any ſuch corrupt cauſe or conſideration; then every ſuch preſentation, &c. thereupon

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ſhall be utterly void; and it ſhall be lawful for the crown to preſent, collate unto, or beſtow every ſuch benefice, &c. for that one turn only. And that every perſon, bodies politic and corporate, that ſhall give or take any ſuch ſum of money, reward, &c. directly or indirectly, or that ſhall make or take any ſuch promiſe, bond, &c. or other aſſurance, ſhall forfeit and loſe the double value of one year's profit of every ſuch benefice, &c.; and the perſon ſo corruptly taking, procuring, ſeeking, or accepting any ſuch benefice, &c. ſhall thereupon and from thenceforth be adjudged a diſabled perſon in law to have or enjoy the ſame benefice, dignity, prebend, or living eccleſiaſtical.

Cro. Jac. 533. In the caſe of Booth v. Potter it was holden, that the party ſo ſimoniacally promoted could never be preſented to the ſame benefice again.

Other proviſions are made and penalties given by the ſame act in furtherance of the like purpoſe.

12 Ann. c. 12. This proviſion has been followed up by the ſtat. 12 Ann. c. 12. ſ. 2. whereby, "if any perſon ſhall, for any money, reward, or advantage, &c. directly or indirectly, or by reaſon of any promiſe, agreement, bond, &c. or other aſſurance for any money, &c. directly or indirectly, in his own or any other perſon's name, take, procure, or accept the next avoidance of or preſentation to any benefice with cure of ſouls, dignity, prebend, or living eccleſiaſtical, and ſhall be preſented or collated thereupon, every ſuch preſentation or collation, &c. ſhall be void, and ſuch agreement be deemed a ſimoniacal contract, and the crown may preſent or collate for that turn; and the perſon ſo corruptly taking, procuring, or accepting any ſuch benefice, &c. ſhall thereupon and from thenceforth be adjudged a diſabled perſon in law to have the ſame benefice, &c."

By both ſtatutes the offenders ſhall alſo be liable to be puniſhed by the eccleſiaſtical laws.

CHAP. II.

OF HIGH TREASON;

AND OTHER INCIDENTAL OFFENCES

Immediately againſt the Allegiance due to the King.

VI. *Counterfeiting the Great or Privy Seal, by ſtat. 25 Ed. 3. ſt. 5. c. 2.; the Sign Manual, Privy Signet, or Privy Seal, by ſtat. 1 Mar. c. 6.* - - § 24.

Extended to Scotch Seals by 7 Ann. c. 21. § 24.

A Species of the crimen falſi; but now the ſame judgment as in other Treaſons. - § 24.

1. *What the Great Seal.* § 24. *The Privy Seal.* ib. *Privy Signet.* ib. *Sign Manual,* ib.

Counterfeiting other the King's Seals only a Miſdemeanor - - - § 24.

How the Seals deſtroyed. - - § 24.

2. *What a Counterfeiting.* - - § 25.

Not the bare Sculpture of the Seal, but the Application. - - - § 25.

Fixing true Seal to falſe Patent, or altering a true Patent, formerly doubted; but ſplitting true Seal and affixing it to falſe Patent certainly Treaſon. § 25. Small variations between the true and falſe Seal make no Difference. - § 25.

Accomplices, who within the Acts. - § 26.

VII. *Slaying the King's Juſtices, &c. doing their Offices.* - - - - § 27.

In England by ſtat. 25 Ed. 3.; in Scotland by ſtat. 7 Ann. c. 21. ſ. 8. - - § 27.

1. *What Officers within the Law.* - § 27.

Lord Chancellor, Treaſurer, the King's Juſtices of either Bench, Juſtices of Niſi Prius and Gaol delivery. - - - § 27.

Queſtions concerning the Lord Treaſurer. § 27. Barons of the Exchequer. *ib.* Lord Keeper. *ib.* and Lords Commiſſioners of the Great Seal. *ib.*

2. *Stat. of Ed. 3. confined to ſuch Officers in the Execution of their Offices.* - - - § 28.

3. *And to killing them.* § 29. *Not merely a wounding.* ib.

By ſtat. 3 H. 7. c. 14. compaſſing to kill any of the King's Houſehold by any of his ſworn Servants, Felony. Triable by a peculiar Juriſdiction. § 29.

By

By ſtat. 9 Ann. c. 16. aſſaulting a Privy Counſellor in the Execution of his Office Felony without Clergy. - - - § 29.

VIII. *High Treaſon in reſpect of the Coin.* § 30.

See more in Chapter of Offences relating to the Coin.

IX. *In reſpect of Papiſts.* - - § 31.

See more in the laſt Chapter, of Offences againſt Religion, &c.

X. *High Treaſon againſt the Proteſtant Succeſſion.* - - - - § 32.

By ſtat. 1 Ann. ſt. 2. c. 17. Endeavouring to hinder the Succeſſion by any Overt Act. - § 32.

By ſtat. 6 Ann. c. 7. Maliciouſly affirming the ſame by writing or printing. § 32. Or that Parliament cannot bind the Succeſſion to the Crown. *ib.* Præmunire to affirm the ſame by adviſed ſpeaking. § 32.

Correſponding with Pretender's ſons. - § 32.

Oaths of Allegiance and Supremacy to be taken. § 32.

XI. *Seducing or attempting to ſeduce others from their Allegiance and Obedience to the Crown.* - - - § 33.

If within a Compaſſing of the King's Death, Treaſon by ſtat. 25 Ed. 3. - - - § 33

Pretending to have Power, or practiſing to abſolve or withdraw a Subject from his Allegiance; or from the Proteſtant Religion, for that intent, to the Popiſh Religion; or to move him to promiſe Obedience to any foreign Power; or being ſo abſolved or withdrawn, &c. High Treaſon by ſtat. 23 Eliz. c. 1. § 33.

Aiders, Maintainers, or Concealers, guilty of miſpriſion of Treaſon. - - - § 33.

The bare Pretence of ſuch a Power, and the bare Endeavour to perſuade, are ſeveral Offences. § 33.

Endeavouring to ſeduce Soldiers or Sailors to mutinous or traiterous Practices, Felony without Clergy, by ſtat. 37 Geo. 3. c. 70. - - § 33.

Trial in any County. - - § 33.

Indictment laying Offence in the Words of the Act ſufficient. - - - § 33.

XII. *Deſer-*

Of Accomplices in Treaſon, and when they may be put on their Trials. - - § 35.

Of the Trial and Regulations thereon.

Of the Indictment and Evidence—Witneſſes and Confeſſion.

Judg-

Judgment.

Of High Treaſon, and other incidental Offences immediately againſt the Allegiance due to the King.

§ 1. *Definition.* 1 MS. Sum. 10. 4 Blac. Com. 75. 1 Hale, 86.

HIGH treaſon, which by the very term denotes treachery or breach of faith, is a violation of the allegiance which is due from the ſubject to the king, as ſovereign lord and ſupreme magiſtrate of the ſtate. It is, as Lord Hale ſays, the greateſt crime againſt faith, duty, and human ſociety, and brings with it the moſt fatal dangers to the government, peace, and happineſs of the nation. The life of the king, who is the head of the body politic, and the cement of the ſocial bond, cannot, in the ordinary courſe of things, be taken away by treaſonable practices without involving the whole nation in blood and confuſion; and conſequently every ſtroke levelled at his perſon is levelled at the public tranquillity. This offence, therefore, which includes felony, is the higheſt known to the law, and ſubjects offenders to the greateſt ignominy and puniſhment. It is diſtinguiſhable from ſedition, which is now underſtood in a more general ſenſe, and extends to other offences, not capital, of like tendency, but without any actual deſign againſt the king in contemplation; ſuch as contempts of the king and his government, riotous aſſemblies for political purpoſes, and the like: and therefore a charge of exciting ſedition, or doing any thing ſeditiouſly, does not amount to a charge of high treaſon. But all ſuch contempts, though not amounting

Foſt. 195.

Sum. 11. 3 Inſt. 15. *Diſtinguiſhable from Sedition.* 1 Hale, 77.

1 Hawk. ch. 23.

ing to high treaſon, as not being connected with any actual deſign on foot againſt the ſafety of the king, are yet highly criminal, and puniſhable with fine, impriſonment, and ſometimes with the pillory. Some of theſe offences I ſhall have occaſion to conſider in treating of libels, others will be mentioned incidentally in the courſe of the preſent inquiry. In general, it is ſufficient to obſerve, that all contemptuous, indecent, or malicious obſervations upon his perſon or government, whether by writing or ſpeaking, or by tokens, calculated to leſſen him in the eſteem of his ſubjects, or weaken his government, or to raiſe jealouſies of him amongſt the people, will fall under the notion of ſeditious acts, as well as all direct or indirect acts or threats calculated to overawe his meaſures or diſturb the courſe of his government, not amounting to overt acts of high treaſon, or otherwiſe puniſhable by particular ſtatutes. A ſecond offence of this ſort was, by a late temporary act, 36 Geo. 3. c. 7. ſ. 2., made puniſhable with tranſportation: but that is now ſpent.

Ch. II. § 1. *Definition.*

Vide chapter of Unlawful Aſſemblies, &c.

There are beſides ſome other offences which, though not amounting to high treaſon, yet being direct violations of the duty which the ſubject owes immediately to his ſovereign, have been made capital or ſimple felonies, or ſubjected to the penalties of a præmunire, according to their ſeveral degrees. Theſe I ſhall have occaſion to mention, as they occur in conſideration of the principal ſubject with which they are connected, and which ſeems properly diviſible into the four following heads of inquiry:

1. What is Allegiance.
2. From whom it is required.
3. To whom it is due.
4. What are the Breaches of it which amount to High Treaſon or other leſs Offence.

1. *What is Allegiance.*

§ 2. *Allegiance.* 1 Hale, 59. 67. Foſt. 184. 4 Blac. Com. 74.

Allegiance is that obedience and fidelity which every perſon, under the protection of the laws and government, owes, in return for that protection, to the perſon of the king, as the ſupreme head of the ſtate, and diſpenſer of thoſe laws

Ch. II. § 2. *What is Allegiance.*

and that government. It is the tie which binds every ſubject to be true and faithful to his ſovereign liege lord the king, and truth and faith to bear of life and limb and earthly honour; and not to know or hear of any ill intended him without defending him therefrom. This duty of allegiance alſo binds all perſons to ſerve the king faithfully and diligently in their ſeveral ſtations; to aſſiſt him with their advice when called upon; and to ſerve him in their perſons, if able, in defence of the realm againſt rebels and foreign invaders: and they are indictable as for a high miſdemeanor for the wilful neglect or refuſal of any of theſe their bounden duties. The ſame duty binds every ſubject beyond ſea to return upon the king's letters for that purpoſe, or to refrain from going abroad, upon the king's pleaſure ſo expreſſed either by the writ of ne exeat regnum, or under the great or privy ſeal or ſignet, or by proclamation; for the contempt of which he is indictable at common law, and his lands may be ſeized till his return. And inaſmuch as the duties and obligations of the king towards his ſubjects ariſe from the moment that he is inveſted with the regal character, and antecedent to his coronation oath, which is only a more ſolemn recognition of thoſe inherent obligations; ſo there is an original, implied, and virtual allegiance which the ſubject owes to the ſovereign antecedent to any expreſs oath or engagement to that effect; for the breach of which, at an age of diſcretion, he is amenable to juſtice.

See the Oath of Allegiance.

1 Hawk. ch. 22. ſ. 2. 4.

1 Hale, 61. 101. Fort. 189.

1 Hawk. ch. 17. ſ. 4.

Allegiance is diſtinguiſhed into *natural* and *local*, which leads to the ſecond head of inquiry.

2. *From whom Allegiance is required.*

§ 3.

From whom allegiance (natural) *is due.*

Fort. 182, 4.

1 MS. Sum. 10.

Natural allegiance is that which is due from every man who is born a member of the ſociety. His birth in the ſtate entitles him to peculiar privileges, which are, with great propriety, called his birth-right; and this being indefeaſible the allegiance ariſing out of it is equally unalienable: it is due from him at all times and in all places. Hence the maxim nemo poteſt exuere patriam. It is not in the power of any ſubject to ſhake off his allegiance, or transfer it to any foreign prince: nor can any foreign prince, by employing a Britiſh ſubject, diſſolve the bond of allegiance between that ſubject and the crown. Dr. Storie, an Engliſhman, having

Foſt. 60.

1 Hale, 68. 96.

3 Inſt. 11.

1 Hawk. ch. 17. ſ. 7.

Ch. II. § 3. *From whom Allegiance is due.*

having paſſed into Spain, and there ſworn allegiance to that crown, afterwards returned to England in the character of a public miniſter from the Spaniſh King; and entering into treaſonable practices againſt Queen Elizabeth, was condemned and executed for high treaſon. In Townley's caſe his counſel offered to ſhew that at the time of the rebellion, in which he bore a part, he was in the ſervice and pay of the French King; and ſo entitled, as they inſiſted, to the benefit of the cartel for the exchange of priſoners. But the court declared that ſuch proof was inadmiſſible. In truth it was, if poſſible, a great aggravation of his offence. They farther inſiſted on what was improperly called the Capitulation at the ſurrender of Carliſle to the king's forces. In this alſo the court over-ruled them; it being no ſort of defence in a court of law: though to prevent miſconſtruction it was proved that the rebels were expreſsly reſerved to be dealt with according to the king's pleaſure. The ſame doctrine prevailed in the caſe of Æneas Macdonald, who, though a native of Great Britain, had reſided and been educated in France from his early infancy, and acted in the rebellion of 1745, under a commiſſion from the French King. The hardſhip of his caſe was much preſſed; but the court ſaid, that it could not be doubted but that it amounted to high treaſon. Lord C. J. Lee, in directing the jury, told them, that as to the queſtion, Whether or not the priſoner were a native of Great Britain? the preſumption in all ſuch caſes was againſt the priſoner; and that where he put his defence on that iſſue, the proof of his birth out of the king's dominions lay upon him.

Dr. Storie's caſe, 1 Hale, 96. Dy. 298. a. pl. 29. 300. b. pl. 38. Townley's caſe, 1746. Foſt. 7.

Æneas M'Donald's caſe before the Special Commiſſioners in Surrey, 1747. Foſt. 59.

The rights of natural born ſubjects are extended by the ſtat. 4 Geo. 2. c. 21. to children born out of the king's allegiance of natural born fathers; and by the ſtat. 13 G. 3. c. 21. to the children of ſuch children.

Allegiance is due as well from the huſband of a queen regnant to her as from a queen conſort to the king.

3 Inſt. 8. 1 Hale, 100. Foſt. f. 5.

Oaths of Allegiance and Supremacy.

It is a high contempt at common law to refuſe taking the oath of allegiance, which all laymen above the age of 12 years are bound to take at the torn or court leet.

1 Hawk. ch. 24. ſ. 3.

By ſtat. 1 W. & M. c. 8. ſ. 3. Archbiſhops, biſhops, and all perſons of or above the degree of a baron, are required

1 W. & M. ſt. 1. c. 8.

Ch. II. § 3. *From whom Allegiance is due.*

to take the oaths of allegiance and ſupremacy, and make the declaration againſt tranſubſtantiation, at the times and places mentioned. And for omiſſion or refuſal thereof, theſe, and all perſons taking any office, eccleſiaſtical or civil, are ſubjected to the ſame penalties, forfeitures, and diſabilities, as they were before the act, (by ſtat. 1 Eliz. c. 1. and 3 Jac. 1. c. 4. amounting in ſome caſes to præmunire, in others to forfeiture of the office and diſability to hold any); and by ſ. 9. all other perſons, other than thoſe ſpecifically mentioned, refuſing the ſaid oaths of allegiance and ſupremacy, on tender to them by proper magiſtrates, ſhall be committed by ſuch magiſtrates for three months, unleſs they pay ſuch ſum, not exceeding 40s., as ſhall be required by the ſame: and if they refuſe again at the end of three months, they ſhall be impriſoned ſix months, or pay a ſum not above 10l. or under 5l., and alſo find ſureties for their good behaviour and appearance at the next aſſizes; where, if they refuſe the ſaid oath, they ſhall be incapable of any office, and continue bound to their good behaviour until they take the oaths. The oaths are alſo required to be taken by land and ſea officers, on pain of diſability to hold their employments.

30 Car. 2. ſt. 2. c. 1. *Oaths by Members of Parliament.*

By the ſtat. 30 Car. 2. ſt. 2. c. 1. No peer or member of the Houſe of Peers ſhall vote or make his proxy, or ſit there during any debate, and no member of the Houſe of Commons ſhall vote or ſit there during any debate, after the ſpeaker is choſen, until ſuch peer or member ſhall take the oaths of allegiance and ſupremacy, and make the declaration againſt popery in the manner before deſcribed, under the penalties there mentioned.

Ante, chap. 1. ſ. 19.

Vide ch. 1. ſ. 19.

And by various acts perſons entering upon certain offices or public truſts are required, under high pains and penalties, to take the ſaid oaths.

§ 4. *Local Allegiance; from whom due.*

1 MS. Sum. 10. Foſt. 183, 5. 1 Hale, 59, 60. 62. 92. 3 Inſt. 4. 7 Inſt. 58. 1 Hawk. ch. 17 ſ. 5.

Local allegiance is that which is due from a foreigner during his reſidence here; and is founded in the protection he enjoys for his own perſon, his family, and effects, during the time of that reſidence. This allegiance ceaſes whenever he withdraws with his family and effects; for his temporary protection being then at an end, the duty ariſing from it alſo determines. But if he only go abroad himſelf, leaving his family and effects here under the ſame protection, the duty

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Delamotte's caſe, O. B. July 1781. S. P.

duty ſtill continues; and if he commit treaſon, he may be puniſhed as a traitor: and this whether his own ſovereign be at enmity or at peace with ours. Therefore if he aid even his own countrymen in acts or purpoſes of hoſtility, while he is reſident here, he may be dealt with in the ſame manner. The above rule was laid down by all the judges aſſembled, at the queen's command, on the 12th January 1707. It has indeed been obſerved, that the judges, in that reſolution, laid conſiderable ſtreſs on the queen's declaration of war againſt France and Spain, in which ſhe expreſsly took under her protection the perſons and eſtates of the ſubjects of thoſe crowns reſiding here and demeaning themſelves dutifully, and not correſponding with the enemy: for by that declaration, ſay they, thoſe aliens were put upon the foot of aliens coming here by licence or ſafe conduct, and were enabled to acquire chattels, and maintain actions for the recovery and protection of their perſonal rights as fully as aliens amy. Yet I cannot think that this circumſtance eſſentially altered the caſe; for the mere fact of being domiciled here does in itſelf imply an allegiance and an engagement to be true and faithful to the government by which ſuch domicile is protected; and at any rate that the party ſhall not take advantage of this indulgence to prejudice the ſtate more eaſily and effectually. This latter I take to be the true ground upon which an alien enemy, domiciled in this country, may, in found reaſon and juſtice, be dealt with as a traitor for aiding or adviſing his own countrymen in acts of hoſtility. The caſe of an ambaſſador reſiding here is not meant to be included in the foregoing obſervations: the exception, if any, is grounded on principles of policy and not of juſtice. But an alien enemy, not domiciled here, taken in avowed hoſtilities againſt the king or his government is no traitor, though leagued with rebels; for he violates no truſt or allegiance.

Foſt. 185.

(Wells v. Williams, Salk. 46. 1 L. Raym. 282.)

See chap. of perſons capable of committing crimes.

Ld. Heriſe's caſe, 5 Inſt. 11. 1 Hale, 59. 94. 7 Co. 6. b. Dalis, 23. 1 Hawk. ch. 17. ſ. 6.

On the trial of ſeveral quakers for their third offence upon the ſtat. 16 Car. 2. an act for ſuppreſſing ſeditious conventicles, one of them pleaded that he was an alien born in France, and ſo not within the penalty of the act, which is levelled againſt every perſon, &c. "*being a ſubject of this realm;*" but this was over-ruled, becauſe as long as he lived here under the king's protection, he is a *ſubject* of the realm, and

Kel. 38.

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puniſhable for tranſgreſſing its laws: but it was admitted, that if the ſtatute had ſaid, being a *natural born* ſubject, &c. it would not have extended to him.

§ 5.

3. *To whom Allegiance is due.*

To whom allegiance is due.
Foſt 188.
1 Hale, 101, 6.
1 Hawk. ch. 17. ſ. 19, 20.
4 Blac. Com. 76.
Vide 1 Mar. ſt. 3. c. 1.
3 Inſt. 7, 8.
Ante, f. 3.

A prince or princeſs ſucceeding to the crown by deſcent or by the previous deſignation of parliament, is, from the moment their title accrues, a king to all intents and purpoſes within the ſtatute of treaſons (25 Ed. 3. ſt. 52. aftermentioned) antecedent to the coronation, which does not confer but pre-ſuppoſes a right. But a titular king, as the huſband of a queen regnant, is clearly not within that law, but does himſelf owe allegiance to the queen.

Foſt. 188. 379. 397, 398.
11 H. 7. c. 1.
1 Hale, 60. 101. 194. 272, &c.
Sum. 12.
1 Hawk. c. 17. ſ. 14. &c.

It is alſo agreed that a king de facto, in the full and ſole poſſeſſion of the crown, is a king within the ſame ſtatute of Edward 3.; and that any other perſon out of poſſeſſion is no ſuch king, be his pretenſions what they may. Mr. Juſtice Blackſtone, indeed, ſeems to inſinuate, that "the poſſeſſion of the crown" is a term of too looſe and indiſtinct a ſignification; but Hawkins refers it to the king in whoſe name the laws are adminiſtered, by virtue of which, liberty, life, property, and all other advantages of government are ſecured to the ſubject; which is, in truth, the legitimate and ſolid foundation of allegiance. A poſſeſſion of this ſort does at leaſt imply a general acquieſcence on the part of the nation, and not a mere forcible poſſeſſion of the external ſymbols of royalty, flagrante bello. But when Sir Henry Vane, to an indictment for levying war againſt King Ch. 2., juſtified that all that he had done was by authority of parliament, and that the king was then out of poſſeſſion of the kingdom, and the parliament the only power regnant; it was reſolved, that though King Charles 2d. was in fact kept from the exerciſe of his royal authority by rebels, yet he was king both de facto and de jure, and that all the acts done to keep him out were high treaſon. The latter part of this reſolution furniſhes the true ground of the judgment. Sir H. Vane was actively inſtrumental in preventing the king from aſſuming his authority. But it is a miſapplication of terms to ſay that that prince was king de facto before the period of the reſtoration. Shortly after the ſtat. 13 Car. 2. ſt. 2.

4 Blac. Com. 77.
1 Hawk. ch. 17. ſ. 11.

See 1 Hale, 273. the caſe of the Lady Jane Gray.

Sir H. Vane's Caſe, Kel. 14, 15.

ſt. 2. c. 1. was paſſed, declaring it a præmunire for any perſon to aſſert maliciouſly and adviſedly, by ſpeaking or writing, that both or either houſe of parliament have a legiſlative authority without the king. It is indeed happy for thoſe who live in the preſent times, under a known order of regal ſucceſſion, ſettled by the controlling authority of parliament, which has put all theſe queſtions out of countenance. By the ſtat. 1 W. & M. ſt. 2. c. 2. every perſon holding communion with the church of Rome, or profeſſing popery, or marrying a papiſt, is thereby diſabled from inheriting or poſſeſſing the crown of this realm: and in all ſuch caſes the ſubjects are abſolved from their allegiance. And by the act of ſettlement the crown is limited to the heirs of the body of the Princeſs Sophia, Electreſs and Ducheſs Dowager of Hanover, being proteſtants. Theſe acts have been followed by others tending to ſecure this ſucceſſion, which will be noticed in their place.

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1 W. & M. ſt. 2. c. 2. ſ. 9. *Papiſts diſabled from poſſeſſing the crown.*

12 & 13 W. 3. c. 2. *Act of ſettlement.*

Poſt. f. 32.

I now proceed to conſider

4. *What Acts in Breach of Allegiance amount to High Treaſon or other leſs Offence;*

§ 6.

which will lead me to the conſideration of the ſeveral acts of parliament declaratory or enactive of high treaſon, or other offences of the ſame nature.

What acts amount to a breach of allegiance.

The firſt and principal of theſe is the ſtat. 25 Ed. 3. ſt. 5. c. 2., emphatically called the Statute of Treaſons, becauſe it reduced and ſettled all treaſons which were before very indefinite, and often ſtretched by arbitrary conſtructions, to certain ſpecific heads therein declared. This ſtatute being the ſtandard of high treaſon, I will begin by ſetting it out at large:—It is thereby declared to be high treaſon,

Statute of Treaſons, 25 Ed. 3. ſt. 5. c. 2.
Vide 1 Hale, 82. 87, 9. 262.
4 Blac. Com. 76.

"When a man doth compaſs or imagine the death of our lord the king, or of our lady his queen, or of their eldeſt ſon and heir; or if a man do violate the king's companion, or the king's eldeſt daughter unmarried, or the wife of the king's eldeſt ſon and heir; or if a man do levy war againſt our lord the king in his realm; or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elſewhere; and thereof be proveably (*i. e.* upon ſufficient proof) attainted of open deed by the people of their condition; and if a man counterfeit the king's great or

25 Ed. 3. ſt. 5. c. 2.

(Foſt. 193.)

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privy ſeal, or his money; and if a man bring falſe money into this realm, counterfeit to the money of England, as the money called Luſhburgh, or other like to the ſaid money of England, knowing the money to be falſe, to merchandize or make payment, in deceit of our lord the king and his people; and if a man ſlay the chancellor, treaſurer, or the king's juſtices of the one bench or the other, juſtices in eyre, or juſtices of aſſize, and all other juſtices aſſigned to hear and determine, being in their places doing their offices."

The ſtatute afterwards proceeds to give this ſalutary caution, "That becauſe 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 juſtices, the juſtices ſhall tarry without any going to judgment of the treaſon till the cauſe be ſhewed and declared before the king and his parliament, whether it ought to be judged treaſon or other felony."

1 Hale, 308.
1 Hawk. ch. 17. ſ. 2.
4 Blac. Com. 86. 87.
1 Mar. ſt. 1. c. 1.
1 Ed. 6. c. 12. ſ. 2.

This ſtatute was re-enforced and again made the only ſtandard of treaſon by the ſtat. 1 Mar. ſt. 1. c. 1., which abrogated all intermediate acts creating new treaſons or miſpriſions of treaſon: ſince which time, however, other treaſons have been added by various ſtatutes; of theſe it is only neceſſary to ſet forth the laſt in this place, reſerving the reſt for incidental mention, as the ſubject matters of them occur.

36 Geo. 3. c. 7.

By ſtat. 36 Geo. 3. c. 7. "If any perſon, after the paſſing of this act, during the natural life of the king, and until the end of the next ſeſſion of parliament after a demiſe of the crown, ſhall, within the realm or without, compaſs, imagine, invent, deviſe, or intend death or deſtruction, or any bodily harm tending to death or deſtruction, maim or wounding, impriſonment or reſtraint, of the perſon of the king, his heirs or ſucceſſors, or to deprive or depoſe him or them from the ſtyle, honour, or kingly name of the imperial crown of this realm, or of any other of his majeſty's dominions or countries; or to levy war againſt his majeſty, his heirs or ſucceſſors within this realm, in order by force or conſtraint to compel him or them to change his or their meaſures or counſels, or in order to put any force or conſtraint upon, or to intimidate or overawe, both or either houſes of parliament;

parliament; or to move or ſtir any foreigner or ſtranger with force to invade this realm, or any other his majeſty's dominions, or countries, under the obeiſance of his majeſty, his heirs and ſucceſſors; and ſuch compaſſings, imaginations, inventions, devices, or intentions, or any of them, ſhall expreſs, utter, or declare, by publiſhing any printing or writing, or by any overt act or deed; being legally convicted thereof, upon the oaths of two lawful and credible witneſſes, upon trial, or otherwiſe convicted or attainted by due courſe of law, then every ſuch offender ſhall be deemed, declared, and adjudged to be a traitor." By ſ. 5. the benefit of the acts of the 7 W. 3. c. 3. and 7 Ann. c. 11. as to the trial is reſerved.

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Scotland. 7 Ann. c. 21.

By the act of union with Scotland, high treaſon or miſpriſion of treaſon in England, and none elſe, ſhall be high treaſon or miſpriſion of treaſon in Scotland. Such a proviſion was not neceſſary in the caſe of Ireland, which had the ſame general laws as Great Britain before its union with it; and therefore the 8th article of the union with Ireland only provides that all the laws in force, at the time of the union, in either country reſpectively ſhall remain, unleſs afterwards altered.

Ireland. 40 Geo. 3.

Keeping the leading ſtatute of the 25 Ed. 3. principally in view, that and the reſt furniſh altogether the following diſtinct heads of offence:

Diviſion of the Subject.

1. *The Compaſſing or imagining the Death of the King.*
2. *Compaſſing or imagining the Death of the Queen, or the eldeſt Son and Heir of the King and Queen.*
3. *Violating the King's Wife, or eldeſt Daughter unmarried, or the Wife of his eldeſt Son and Heir.*
4. *Levying War againſt the King in his Realm.*
5. *Adhering to the King's Enemies.*

   [*And herein of the inferior Offence of enliſting into foreign Service, done without any treaſonable Deſign.*]

6. *Counterfeiting the King's Seals.*
7. *Killing his Officers.*
8. *Concerning the Coin.*
9. *Concerning Papiſts and the King's Supremacy.*
10. *Concerning the Succeſſion to the Crown.*

Ch. II. § 7. *Compaſſing or imagining the King's Death.*

11. *Seducing or attempting to ſeduce others from their Allegiance.*

[*To theſe I ſhall add, as an Offence of an analogous Nature*]

12. *Deſertion from the King's Forces.*

I. The firſt kind of high treaſon declared by the ſt. 25 Ed. 3. is

§ 7. "*Where a Man doth compaſs or imagine the Death of our Lord the King.*"

2 MS. Sum. 23. Foſt. 193, 4, 5. Kel. 8. 1 Hale, 107, 8. 2 Hawk. ch. 17. ſ. 8. 4 Blac. Com. 79.

In this ſpecies of treaſon the old rule, which prevailed in all caſes of homicide, quod voluntas reputabatur pro facto, applies in its full extent. A mere imagination of the heart, if any open or overt act be done towards effectuating the deſign, (without which it cannot poſſibly fall under any judicial cognizance,) is deemed the ſame degree of guilt as if carried into actual execution. But ſtill *the compaſſing and imagining the death* is the ſubſtantive treaſon; and the indictment muſt charge in the ſtrict words of the ſtatute, that the defendant did traiterouſly *compaſs and imagine, &c.*, and then charge the ſeveral overt acts as the means and evidence by which the traiterous intention was manifeſted.

1 MS. Sum. 11.

Evidence of the Compaſſing, &c. Actual killing. Kel. 8. Foſt. 194. 1 Hawk. ch. 17. ſ. 8.

It remains then to be ſhewn what are ſufficient overt acts or legal evidence of ſuch an intention. The firſt ſet of acts is where the king's life is immediately aimed at. In the caſe of the regicides the beheading of King Charles I. was laid as an overt act of compaſſing his death; and the perſon ſuppoſed to have given the ſtroke was convicted on the ſame indictment. Though if a man ſhould, by mere miſchance or without any evil deſign, involuntarily hurt or even kill the king, it would not be treaſon: as when Walter Tyrrel, aiming at a deer, killed William Rufus by the glancing of the arrow from a tree.

1 Hale, 41. 107. 2 Hawk. ch. 17. ſ. 10.

Preparing means of death. 2 MS. Sum. 13. 1 Hale, 109. 119. 4 Blac. Com 79. Charnock's caſe, 2 St. Tr. 130. 4 St. Tr. 562.

So the providing weapons, ammunition, or any other means of accompliſhing or procuring his death, in order to effectuate that intent, or the ſending letters, or aſſembling for that purpoſe, is evidence of high treaſon under this branch of the ſtatute. Salk. 631.

Conſultation. 2 MS. Sum. 13. Foſt. 195.

A bare conſulting with others how to kill the king, though nothing elſe be done, and though the conſpirators do not then determine upon any ſcheme for that purpoſe, or do not agree in their reſolution, is an overt act of the ſame treaſon. If a perſon be preſent at only one ſuch conſultation and conceal it, having had a previous knowledge of the deſign of the meeting, it is evidence to be left to a jury of his aſſent to the deſign, though he neither did nor ſaid any thing at ſuch conſultation; but if he had no ſuch previous knowledge, as if he fell into the company by accident or upon ſome indifferent occaſion, a bare concealment without an expreſs aſſent is only miſpriſion of treaſon. But if he be preſent at more than one ſuch conſultation, and do not diſſent or make a diſcovery, it is ſtrong evidence of aſſent. And an aſſent to any overtures for that purpoſe is a plain overt act of compaſſing the king's death, in like manner as any advice, perſuaſion, or command, to incite, encourage, or procure others to make an attempt againſt his perſon.

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Waicot's caſe, Show. P. C. 128 4 Mod. 395. MS. Tracy, 14. Kel. 15. 17. 21. 4 Blac. Com. 79. 120. Rookwood's caſe, 4 St. Tr. 680. Somerville's caſe, 1 And. 106. 1 Hawk. ch. 20. ſ. 2, 3. Vide poſt. Miſpr. of Treaſon. Sir E. Digby's caſe, per Holt, C. J. in Rookwood's caſe, 4 St. Tr. 690, 2. MS. Tracy, 22. Kel. 12.

§ 8. *Depoſing or taking poſſeſſion of the king or government.* 1 MS. Sum. 13. Foſt 195. 1 Hawk. ch. 17. ſ. 9. 30. 3 Inſt. 12. 4 Blac. Com. 79. 1 Hale, 109, 110, 111. 121, 122. Lord Eſſex's caſe, Kel. 20, 21. Sum. 11. Parkins' caſe, 4 St. Tr. 651. Caſe of the Rebel Lords in 1715, 6 St. Tr. 1. &c. Harding's caſe, 2 Vent. 315.

The next head of overt acts of the ſame ſpecies of treaſon relates to depoſing or taking poſſeſſion of the king's perſon, which the common experience of all times and nations has ſhewn to be the moſt probable prelude to his death. And therefore it is laid down by our writers that the conſtruction of this ſpecies of treaſon extends to every wilful and deliberate act or attempt whereby the king's perſon may probably be endangered, or ſuch as cannot be executed without the apparent peril thereof. Accordingly, entering into meaſures for depoſing or impriſoning him, or for forcibly taking his perſon into the power of the conſpirators, or to compel him by force to yield to certain demands, or to remove evil counſellors, and all ſuch other like notorious acts done or conſpired to be done againſt his perſon or regal government, may be alleged as overt acts of compaſſing his death: they have a manifeſt tendency to that fatal iſſue.

Caſe of the Lords Eſſex and Southampton, Hil. 43 Eliz. 3 Inſt. 12. 1 Hale, 120. 138. Kel. 76. Moor, 622.

The Earl of Eſſex intending to go to the court, where the queen was, and take her into his power, and to remove ſome of her council, and having for that end aſſembled a multitude of people, it was deemed an overt act of compaſſing the queen's death; although, as the caſe is reported in Moor, he did not intend any corporal hurt to her. And this being rebellion in Eſſex, the adherence of the Earl of Southampton to him in that act was alſo adjudged treaſon; though the latter

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latter did not know of any other purpoſe than a private quarrel which Eſſex had with ſome of the queen's ſervants. So it is ſaid that thoſe alſo were traitors who went with Eſſex to London, whether or not they knew of his intent, and though they departed upon the proclamation.

Overawing and ſubverting parliament. Caſes of Hardy, Horne Tooke, and others, O. B. 1794, MS.

The indictment in the caſes of Hardy, Horne Tooke, and others, charged as overt acts of compaſſing the king's death; that the ſeveral priſoners, together with others, conſpired to procure a convention to be aſſembled, with intent that the perſons aſſembled thereat ſhould, without the authority of parliament, ſubvert and alter the legiſlature and government of the country, and depoſe the king. That the conſpirators wrote and publiſhed pamphlets, letters, reſolutions, and addreſſes, containing incitements to induce the king's ſubjects to ſend delegates to conſtitute ſuch convention. That they met and conſulted concerning the aſſembling of ſuch convention, and the means by which the king's ſubjects might be induced to ſend delegates to conſtitute the ſame. That they cauſed arms and other weapons to be provided for the purpoſe of arming the king's ſubjects, to the intent that they might oppoſe the king in the due exerciſe of his lawful power and authority in the execution of the laws, and might ſubvert and alter, without, and in defiance of the authority, and againſt the will of the parliament, the legiſlature and government, and depoſe and

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aſſiſt in depoſing the king. The Lord C. J. Eyre, in ſumming up to the jury on Tooke's trial, ſaid, that it could not be denied that he who meant to depoſe the king compaſſed and imagined his death. It was a preſumption of fact, ariſing from finding an intention to depoſe, ſo undeniable, that the law had adopted it and made it a preſumption of law. It had been ſo ſettled for centuries. That if the priſoner had been concerned in a plan to eſtabliſh a convention to uſurp the powers of government and depoſe the king, it did not ſignify to what extent the powers of government were to be uſurped. All the danger to the perſon of the king would follow, he being bound to ſupport the government and reſiſt the uſurpation at all hazards. That there was a great diſtinction between a reſiſtance to the execution of the laws and an aſſumption of the powers of government. The material conſideration,

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ation, therefore, for the jury was, for what purpoſe the convention was to be holden, in the deſign of calling which the priſoner had participated; and that was a matter of fact. That the avowed intention of it being to obtain a reform in the repreſentation of the commons' houſe of parliament, it lay upon the proſecutor to prove that that was not ſo; and the proſecutor had undertaken to prove that that was a mere pretext, and that the real object and tendency of it was that charged in the indictment, which was for the jury to determine.

S. C.

Several publications having been given in evidence on the trial, on the part of the crown, containing republican doctrines and opinions, which had been patroniſed, and the diſtribution of them promoted, by the priſoners, during the period aſſigned in the indictment for the exiſtence of the conſpiracy; and ſuch evidence having been relied on, to ſhew that the notion of a reform in parliament, which the priſoners were expected to ſet up in their defence, was a mere pretext to cover a revolution of the government and a depoſition of the king: to rebut ſuch concluſions on the part of the priſoner, Mr. Tooke, a book written by him, intitled a letter to Mr. Dunning (the late Lord Aſhburton,) on the ſubject of parliamentary reform, and expreſſive of his veneration for the king and conſtitution, was offered in evidence. To this the Attorney-general objected; contending that what the priſoner had written, ſaid, or publiſhed, at any time antecedent to the period of the conſpiracy with which he was charged, was not evidence. That the book had no relation to the particular tranſaction: and as well might any writer on the crown law give in evidence that he had written againſt robbery, if he were indicted for that crime: and that whatever the priſoner's opinions were then, he might have afterwards altered them. The counſel for the priſoner inſiſted on its being evidence to ſhew the mind of the priſoner, and that he could not have in view what was imputed to him by the indictment. That, as a book written by him in favour of a republic would be evidence againſt him, this muſt è converſo be evidence for him. That in caſe of murder it was competent to prove the defendant a man of humanity, and in crimes of another ſort to prove him a man of a chaſte and virtuous life. That in Lord Ruſſell's caſe, Dr. Tillotſon gave evidence of his moral and religious habits.

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habits. *Lord C. J. Eyre* ſaid, he doubted if the book could be received in evidence on the ground of general character; that it was a particular act; and it was not competent in giving evidence of character to prove particular inſtances, but only the general reſult of them; ſuch as had been given in evidence in Hardy's caſe, of loyalty and attachment to the king. That the queſtion was not whether this book had a reference to the conſpiracy charged, but whether it had not reference to the proof given in ſupport of the charge; and he thought it evidence to rebut the idea that the reform of parliament was a pretence made by the priſoner, and that his real object was to overturn the government. The book was accordingly received in evidence by the court. It was printed in 1782; and refuted the idea that every man was entitled to an equal ſhare in the government of the country; and was in commendation of the regal and ariſtocratic parts of the conſtitution.

36 Geo. 3. c. 7. *Compaſſing to levy war.*

Ante, p. 56.

By the ſtat. 36 G. 3. c. 7. before mentioned, the compaſſing to levy war againſt the king, in order to put any force or conſtraint upon, or to intimidate or overawe both or either houſe of parliament, is made a ſubſtantive treaſon during the king's life.

§ 9. *Levying and conſulting to levy war.*

1 MS. Sum. 13. Foſt. 196, 197. 211. 3 Inſt. 14. 1 Hawk. ch. 17. ſ. 31. MS. Burnet. 1 Hale, 120, 1, 2. 131. 144, 5. 148. Dr. Storie's caſe, Dy. 298. b. Harding's caſe, 2 Ventr. 315. Friend's caſe, 4 St. Tr. 599. Layer's caſe, 6 St. Tr. 328. Kel. 20, 1. Sum. 13.

An offence, though it fall under one branch of the ſtat. of Ed. 3. as a ſpecific treaſon, may alſo come within the conſtruction and be deemed an overt act of another; though Lord Coke thought otherwiſe. Thus the levying war againſt the king may be laid as an overt act of compaſſing his death; and ſo is a treaſonable correſpondence with the enemy; or raiſing troops for his ſervice; though ſuch acts more naturally fall within the clauſe of adhering to the king's enemies. But further, the bare conſulting or conſpiring to levy war, though not within the latter branch at all, is an overt act of compaſſing the king's death; for ſuch acts have a tendency, though not ſo immediate, to the ſame end. Lord Hale indeed in his ſummary, ſpeaking of this head of treaſon, ſays, "conſpiring to levy war is no overt act, unleſs levied, becauſe it relates to a diſtinct treaſon." This doctrine is true, if confined to a conſtructive levying of war, ſuch as to pull down incloſures, to lower the markets, or the like; but the reaſon aſſigned is a bad one; for the levying war againſt the king is not in all caſes a diſtinct treaſon. If a war be levied againſt his perſon, it will equally fall within this

1 MS. Sum. 13. Foſt. 197. 211. 213. poſt.

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this branch of treaſon as an overt act of compaſſing his death. And Lord Hale himſelf appears to have altered his opinion. The ſame diſtinction appears to have been taken by Lord Holt in Sir John Friend's caſe, which he ſaid had been holden to be law at all times; that, if the deſign be to kill, depoſe, or impriſon the king, and as the means to effect this the conſpirators agree to levy war, this is treaſon, though no war be levied; for the conſultation for any ſuch purpoſe is an overt act proving the compaſſing the king's death. But, under the act of the 36 Geo. 3., the mere compaſſing to levy war, in order to conſtrain the king, is a ſubſtantive treaſon. So the entering into meaſures, in concert with foreigners and others, for invading the kingdom, a treaſon of ſignal enormity; or going into a foreign country, or even purpoſing to go there to that end, and taking any ſteps in order thereto, will fall under the ſame conſtruction. And, indeed, unleſs the powers ſo incited happen then to be actually at war with us, the offence will not fall within any other branch of the ſtatute of treaſons than that of compaſſing the king's death; though this is alſo provided for by the ſtat. 36 Geo. 3. during the king's life. For by that act the compaſſing, &c. "to move or ſtir any foreigner or ſtranger with force to invade this realm, or any other his majeſty's dominions or countries under his obeiſance, is made a ſubſtantive treaſon." Lord Preſton, with ſome others, were indicted upon this branch of the ſtatute of Ed. 3., as well as on that of adhering to the king's enemies; and the compoſing, procuring, and ſecreting treaſonable papers; and taking boat, in order to go on board the veſſel which was to carry them to France; and carrying the papers with them, in order to be uſed there for the treaſonable purpoſes charged in the indictment, were proved as overt acts of both ſpecies of treaſon. The like courſe was taken in Stone's caſe upon a trial at bar.

1 Hale, 119. 122, 3. MS. Tracy, 14. Friend's caſe, 4 St. Tr. 625, 6.

Ante, p. 56.

Dr. Storie's caſe, ante, p. 51. Parkyn's caſe, 4 St. Tr. 651. Lord Preſton's caſe, infra. Foſt. 197. poſt. ſ. 20.

Ante, p. 56.

Lord Preſton's caſe, 4 St. Tr. 409, &c. 448.

Stone's caſe, poſt.

By conſtructive levying of War. 1 Hale, 123. poſt. ſ. 17.

Lord Hale, ſpeaking of a conſtructive levying of war, ſays, that ſuch may in proceſs of time riſe into a direct war againſt the king; as if the king ſend his forces to ſuppreſs them, and they fight the king's forces; and then it may be an overt act to prove the compaſſing of the king's death.

I do not know that this point, that a mere conſtructive levying of war is evidence of compaſſing the king's death, has ever come directly in judgment. It was not ſo conſidered

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dered by any of the judges in Cotton's caſe; and the point could not ariſe on the trials of Damaree and Purchaſe, who were ſeverally convicted upon a conſtructive charge of levying war only; there being no count for compaſſing the queen's death. It muſt, however, be admitted, that the object of a great riot or inſurrection, comparatively trivial in its origin, may ſo far vary by its ſucceſs, continuance, or other circumſtances, as to aſſume a decided tone of reſiſtance to the perſon of the king and his government, and ſo become an overt act of compaſſing his death. For it is a kind of natural or neceſſary conſequence, Lord Hale obſerves, that he who attempts to ſubdue the king cannot intend leſs than his death; and ſuch, he adds, has always been the miſerable conſequence of ſuch a conqueſt.

Cotton's caſe, Kel. 73. Caſe of Damaree and Purchaſe, 8 St. Tr 218. 268. 247. 285. 290. Foſt. 213. 1 Hale, 148.

§ 10.

II. It is further declared to be high treaſon by ſtat. 25 Ed. 3.

"*When a Man doth compaſs or imagine the Death of our Lady, his (the King's) Queen, or of their eldeſt Son and Heir.*"

Compaſſing the Death of the Queen or eldeſt Son and Heir. 25 Ed. 3. ſt. 5. c. 2. 1 Hale, 124. 3 Inſt. 8. 1 MS. Sum. 9. 12.

"The queen" means the queen conſort or wife of the king, and extends to a wife de facto during the coverture, and until a divorce. But after a divorce, though it be only a menſâ et thoro, ſhe is not within the ſtatute; although Lord Hale does not extend the excluſion further than a divorce a vinculo matrimonii. But certainly a queen dowager, namely, a queen after the death of her huſband, is not within the act.

1 Hale, 125, 6. 9. 3 Inſt. 8, 9. Sum. 12.

"Their eldeſt ſon and heir" extends to a ſecond born ſon, after the death of the elder, and the like of the reſt; and notwithſtanding the king ſhould have married a ſecond wife, and ſo the ſon ſhould not be *their* eldeſt ſon, but only the king's ſon. In like manner the eldeſt ſon of a queen regnant is within the act. Lord Hale alſo inclines to think that the deſcription may extend to a grandſon (being heir apparent after the death of his father), though he concludes that it is moſt fit to be firſt decided by parliament, according to the caution given in the ſtatute of the 25 Ed. 3. But a collateral heir apparent is certainly not within the act; nor an eldeſt daughter and heir apparent; becauſe a ſon may be born after; and temporary proviſions have been made by the legiſlature in ſuch caſes.

Ante, p. 56.

As

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As to what ſhall be ſaid to be an overt act of compaſſing their death; it muſt be ſuch as ſhews an unlawful intent againſt their *perſons*, and not merely againſt their *ſtate and dignity*. Therefore much of what has been already ſaid concerning overt acts of compaſſing the death of the king, which are ſpecifically appropriate to him and his ſovereign power and royal dignity, does not apply to the queen or prince. Thus a compaſſing to impriſon or otherwiſe puniſh them by due courſe of law is not within the ſtatute; but a compaſſing to wound them is.

What a Compaſſing. Burnet's MS. Sum. 12. 1 Hale, 127, 8.

§ 11.

III. The next treaſon declared by the ſtat. 25 Ed. 3. is,

"*If a Man do violate the King's Companion, or the King's eldeſt Daughter unmarried, or the Wife of the King's eldeſt Son and Heir.*"

Violating King's Wife, Daughter, &c. 25 Ed. 3. ſt. 5. c. 2. 4 Blac. Com. 81. 1 Hale, 124. 127, 8. 3 Inſt. 8. 1 Hawk. ch. 17. ſ. 22.

By the king's companion is meant his wife, that is, the queen conſort, during the marriage. And as the reaſon of the law was to guard the ſucceſſion of the crown from any ſuſpicion of baſtardy, when the reaſon ceaſes, the law ceaſes with it. Therefore to violate a queen dowager or princeſs dowager is no treaſon. On the ſame principle the law extends to a ſecond daughter, the eldeſt being dead during the father's life; and this whether there be any ſons or not. It ſeems, however, to be underſtood, that by the words of the ſtatute, "*nient marry*" (unmarried), is meant *before marriage*, and therefore not applicable to the eldeſt daughter afterwards, though a widow. And yet, for the reaſon before ſuggeſted, the law might with more propriety have been applied to the eldeſt daughter under coverture, when by law her iſſue might lay claim to the crown. Again, "the wife of the king's eldeſt ſon and heir" means the princeſs conſort during the coverture. And the eldeſt ſon and daughter of a queen regnant are equally within the meaning of the ſtatute. In either caſe mentioned by the ſtatute, by "violation" is intended carnal knowledge, as well without force as with it; and this is high treaſon in both parties, if both be conſenting.

4 Blac Com 81. 1 Hale, 128. 3 Inſt. 9.

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§ 12.

IV. The fourth treaſon declared by the ſtat. 25 Ed. 3. is,

"*If a Man do levy War againſt our Lord the King in his Realm.*"

25 Ed. 3. ſt. 5. c. 2. 1 Hale, 130. 148, 9. ante, ſ. 9. Kel. 20. poſt. ſ. 19.

Under this branch there muſt be an actual levying of war, and not barely a conſultation ſo to do; but the latter is made a diſtinct treaſon by the ſtat. 36 Geo. 3. c. 7. during the king's life. Such war muſt alſo be levied againſt the king; and it muſt be in his realm.

1 Hale, 152.

The levying war is either expreſs and direct, or conſtructive.

Evidence of the fact. 2 MS. Sum. 13, 14. 1 Hale, 122. 131. 146. 149. 152. Foſt. 210, 211. 1 Hawk. ch. 17. ſ. 23. 4 Blac. Com. 81. Ld. Eſſex's caſe, ante, ſ. 8.

1. Of the firſt ſort are all inſurrections againſt the perſon of the king, whether they be to dethrone, impriſon, or force him to alter his meaſures of government, or to remove evil counſellors from about him. In Eſſex's caſe, though the indictment was upon the clauſe of compaſſing the queen's death, yet, ſays Lord Hale, his riding armed into London, and ſoliciting the citizens to go with him to court to remove the queen's miniſters, and his fortifying his houſe againſt the queen's officers, were in truth overt acts of levying war. So the attacking the king's forces, in oppoſition to his authority, upon a march or in quarters, is levying war againſt the king. But if, upon a ſudden quarrel, from ſome affront given or taken, and not as a cover for any traiterous deſign, the neighbourhood ſhould riſe and drive the king's forces out of their quarters; though it would be a great miſdemeanor, and, if death enſued, might be felony in the aſſailants; yet it will not be a treaſon; there being no intention againſt the king's perſon or government. Thus it often happened formerly between the lords marchers, that upon private quarrels they collected their dependants in battle array, and levied war upon each other; but theſe acts were never holden to be treaſon, though doubtleſs deſerving of the moſt condign puniſhment. The intention in theſe caſes is of the eſſence of the offence. So the carrying off or deſtroying the king's ſtores, provided for the defence of the kingdom, if done in conjunction with or in aid of rebels or enemies, will amount to treaſon within this and the next branch; but otherwiſe, if done only for lucre, or ſome private malicious motive; and this being uſually the caſe, I ſhall refer the conſideration of ſuch offences to the more appropriate heads of larceny and malicious miſchief.

Foſt. 219. 2 Hale, 146.

1 Hale, 131. 135. 140. 260.

What an inception of levying war.

It muſt in general be difficult in the inception of inteſtine troubles to fix the period when oppoſition to the eſtabliſhed government

government ſhall be ſaid to wear the formidable appearance of inſurrection, and to conſtitute what in the terms of the act is called a levying of war againſt the king.

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1 Hale, 130, 1. 149. 1 MS. Sum. 13. Foſt. 218. 1 Hale, 131. 144. 152. Vaughan's caſe, 5 St. Tr. 37. Salk. 635. poſt. p. 80.

It is ſtrictly, therefore, a queſtion of fact to be tried by the jury under all the circumſtances. Any aſſembly of perſons, met for a treaſonable purpoſe, armed and arrayed in a warlike manner, is bellum levatum, though not percuſſum. Enliſting and marching are ſufficient overt acts, without coming to an actual engagement; in the ſame manner as cruiſing under an enemy's commiſſion, though no act of expreſs hoſtility be proved, is an adherence to the king's enemies.

§ 13. *Warlike Array.* Foſt. 208.

But though, in the caſe of levying war, the indictment generally charges, that the defendants were armed and arrayed in a warlike manner, and, where the caſe admits of it, with ſwords, guns, drums, colours, &c.; yet Mr. Juſtice Foſter obſerves, that in none of the caſes, not even in Benſtead's, did the queſtion turn ſingly on any of theſe circumſtances; but the true criterion has been, Quo animo did the parties aſſemble? Whether for a private and particular or for a public and general purpoſe? And he obſerves, that in the caſes of Damaree and Purchaſe, which turned on a conſtructive levying of war, no evidence was given of the uſual pageantry of war, nor of any regular conſultation previous to the riſing; and yet the objection weighed nothing with the court. Numbers will often ſupply the want of military weapons and diſcipline, as experience has often evinced; and ſuch was the opinion of five of the judges in the weavers' caſe in 1675. Lord Hale ſtates it as a queſtion worthy of conſideration; and goes no further than to obſerve, that the actual aſſembling of many rioters in great numbers, to do unlawful acts, if it be not modo guerrino or in ſpecie belli, as if they have no military arms, nor march or continue together in the poſture of war, though they make a great riot, yet does not *always* amount to a levying of war. It depends, as he ſtates before, upon many circumſtances difficult to enumerate or define, and is in truth a queſtion of fact; and how difficult a fact it is to define in terms, may be collected from an expreſſion made uſe of by the ſame author in another place, where he ſays, that the actual marching in a body modo guerrino *et modo inſurrectionis*, might be a levying of war. It ſeems to me, however, that Lord Hale did not mean to puſh the obſervations above

Poſt. p. 73.

Poſt. p. 74.

1 Hale, 131. 144.

1 Hale, 144.

1 Hale, 149—152.

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mentioned further than concerned caſes of conſtructive levying of war, as one among other clues to diſtinguiſh between an inſurrection and a great riot. Becauſe, ſays he, when an aſſembly of perſons thus arm themſelves, (namely, in a military poſture,) it is a plain evidence that they mean to defend themſelves, and make good their attempts by a military force, and to reſiſt and ſubdue all power that ſhall be uſed to ſuppreſs them. In this view of the ſubject, any appearance of martialing or making military preparation ſeems to be a very ſtrong feature in the merits of the caſe. But every inſurrection, which in judgment of law is intended againſt the perſon of the king, as for the purpoſes firſt mentioned, amount to a levying of war within the ſtatute, whether or not attended with the pomp and circumſtances of open war; for they cannot be effected by numbers and open force without manifeſt danger to his perſon.

Vide 1 Hale, 153. Foſt. 210, 211. 1 Hale, 151. ante, p. 67.

§ 14. *Holding a Fort, &c. againſt the King.* Foſt. 219. 1 Hale, 146. 168. 296. 325, 6.

Holding a caſtle or fort againſt the king or his troops, if actual force be uſed in order to keep poſſeſſion, is levying war; but a bare detainer, as ſuppoſe by ſhutting the gates againſt the king or his troops, without any other force from within, Lord Hale *conceiveth*, (ſays Mr. Juſtice Foſter,) will not amount to treaſon. The laſt-mentioned judge has not told us what degree of approbation he gives to this inſtance of a detainer, which, as he ſays, Lord Hale *conceives* not to be within the ſtatute.

It may be fairly queſtioned, Whether there be not many inſtances of conſtructive levying of war far ſhort of the real guilt and conſequences of ſuch an act, and much leſs within the true meaning of the ſtat. 25 Ed. 3.? Lord Hale prefaces the paſſage in queſtion thus; "If *B.* either fortify his own houſe, or the houſe of another, with weapons defenſive or invaſive, purpoſely to make head againſt the king, and to ſecure himſelf againſt the king's regal army or forces, then that is a levying of war againſt the king." He then proceeds: "But the bare detaining of the king's caſtles or ſhips ſeems no levying of war within this ſtatute." And his lordſhip refers to a ſubſequent part of his work, where he grounds his reaſoning ſolely on the ſtat. 14 Eliz. c. 1. (*a*), having enacted the ſame thing during the queen's life. This, if it ſtood alone, would not be a concluſive argument, as might be proved by many paſſages, as well as by the expreſs declaration of the ſame author. Beſides which, that ſtatute was

1 Hale, 146.

1 Hale, 325. (by miſtake called 13) Eliz. c. 1.

(*a*) *Lord Hale (p.* 296.) *makes the ſame obſervation on the ſtat.* 5 & 6 *Ed.* 6. c. 11. *Vide* 1 Hale, 401. Foſt. 224. Foſt. 5. 56.

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was certainly creative of new treaſon; for it makes the wilful and malicious burning of the queen's ſhips treaſon, without any further qualification. But, moſt of all, I find it difficult to reconcile this opinion with the preceding part of the paſſage which I have referred to; for, ſuppoſing a treaſonable intent to exiſt, What ſolid diſtinction can there be between a man's fortifying his own or another's houſe, purpoſely to make head againſt the king, and to ſecure himſelf againſt the regal forces, (which is admitted to be an overt act of levying war,) and the caſe of one who detains the poſſeſſion of the king's own fortreſs againſt himſelf, with the ſame intent? for the manner of putting the firſt caſe ſuppoſes that no reſiſtance has been actually made. On the contrary, is not the latter caſe, put by Lord Hale, as much at leaſt within the reaſon and contemplation of the ſtat. 25 Ed. 3. as the former one? Is not the act of fortifying a private houſe, which may happen from caprice, of a more equivocal nature in itſelf than that of a governor of a fortreſs refuſing to deliver it up to the king upon his ſummons, and ſhutting the gates againſt him. Admitting that this latter is not concluſive evidence of a traiterous intent any more than the other; yet ſurely it ſeems ſufficient to leave to a jury. It is *holding a caſtle againſt the king*, which is as much an act of hoſtility, and a throwing off of the allegiance due to him, as any of the ordinary preparations of war are admitted to fall within the deſcription of levying war, though no act of force has been in fact exerted. In the caſe of the Earl of Eſſex, it is even ſaid, that keeping armed men againſt the king's command is a levying of war againſt him (*a*), which is a far leſs deciſive act of oppoſition than the other. And Lord Hale himſelf, ſpeaking in another place of the ſtat. 26 H. 8. c. 13. ſays, that that part of it whereby the rebellious detaining of the king's caſtles, after ſummons by proclamation, is made high treaſon, ſeems to be treaſon within the ſtat. 25 Ed. 3.; and both Lord Hale and Foſter, J. agree, that if the bare detainer be done in confederacy with enemies or rebels, that circumſtance will make it treaſon; in the one caſe under the clauſe of adhering to the king's enemies, in the other under that of levying war. The ſame rule applies to the delivery up of a caſtle to rebels or enemies, by trea-

Vide 1 Hale, 275.

1 Hawk. ch. 17. ſ. 24. 3 Inſt. 10.

Ante, ſ. 12

Ld. Eſſex's caſe, Moor, 621.

1 Hale, 275.

Supra, *at the beginning of this ſection.*

(*a*) But this muſt be underſtood, that the purpoſe for which they were armed was treaſonable.

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chery and in combination with them; but not if it happened through cowardice or imprudence.

§ 15. *Joining and continuing with rebels.*

Foſt. 216. *ante*, ſ. 8. Moor, 621. Kel. 76. Poſt. ſ. 17. 8 St. Tr. 247. 290. 1 Hawk. ch. 17. ſ. 26. Rex v. Green and Bedell, O. B. 20 Car. 2. Kel. 70. 79. *Vide* 2 Ld. Ray. 1585.

Joining and continuing with rebels, freely and voluntarily, in any act of rebellion, is levying war againſt the king; and this too though the party was not privy to their intent. This was holden in the caſe of the Earl of Southampton, and again in Purchaſe's caſe in 1710. But yet it ſeems neceſſary in this caſe, either that the party joining with rebels and ignorant of their intent at the time, ſhould do ſome deliberate act towards the execution of their deſign, or elſe ſhould be found to have aided and aſſiſted thoſe who did. Therefore, in the caſes of Green and Bedell, who with others were indicted for levying war and pulling down bawdy houſes and opening priſons, it being only found that they were preſent, and not finding any particular act of force committed by them, or that they were aiding or aſſiſting to the reſt, which is a fact that muſt be found by the jury, and cannot be implied, they were diſcharged. And if the act of thoſe who

Burnet's MS. 14. Moor, 621. 1 Hawk. ch. 17. ſ. 26.

ſuddenly join an inſurrection, being ignorant of their deſign, appear to be more inconſiderate than wilful or miſchievous, ſuch as throwing up their hats, or hallooing with the mob, this will fall under the ſame lenient conſideration.

Joining from fear. 1 MS. Sum. 14. Foſt. 216. 1 Hale, 49. 56, 57. 139. 1 Hawk. ch. 17. ſ. 24.

But if the joining with rebels be from fear of preſent death, and while the party is under actual force, ſuch fear and compulſion will excuſe him. It is incumbent, however, on the party ſetting up this defence to give ſatisfactory proof that the compulſion continued during all the time that he ſtaid with the rebels. It may perhaps be impoſſible to account for every day, week, or month; and therefore it may be ſufficient to excuſe him if he can prove an original force upon him, that he in earneſt attempted to eſcape and was prevented, or that he was ſo narrowly watched, or the paſſes ſo guarded, that an attempt to eſcape or to refuſe his aſſiſtance would have been attended with great difficulty and danger; and, if the circumſtance will admit of it, that he quitted the ſervice as ſoon as he could: ſo that upon the whole he may fairly be preſumed to have continued amongſt them againſt his will, though not conſtantly under an actual force or fear of immediate death. This is agreeable to the

1 Hale, 50.

rule in Oldcaſtle's caſe; where thoſe who were charged as his accomplices in rebellion were acquitted by the judgment of

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of the court, becauſe the acts were found to be done pro timore mortis, et quod receſſerunt quam cito potuerunt. In this reſpect there is no diſtinction between ſerving as an officer or private man, further than the accepting a command in a rebel army is a ſtronger evidence of willingneſs than the other. But an apprehenſion, though ever ſo well grounded, of having property waſted or deſtroyed, or of ſuffering any other miſchief, not endangering the perſon of the party, will be no excuſe for joining or continuing with rebels; otherwiſe it would be in the power of any leader of a rebellion to indemnify all his followers. It was ſo ruled in the caſe of M'Growther, and of many of the Scotch priſoners, on the ſpecial commiſſion, in Surry, in 1746. In M'Growther's caſe, beſides the threat of burning his property, it appeared that he and twelve other tenants of the Duke of Perth, being ſummoned to meet him, appeared on the third ſummons, on the 28th of Auguſt, when the Duke propoſed to them to take arms and follow him into the rebellion; that they all refuſed to go; whereupon they were told that they ſhould be forced, and cords were brought by the Duke's party (about 20) in order to bind them; and that then the priſoner and about ten more went off, ſurrounded by the Duke's party. Lord C. J. Lee obſerved to the jury, that the only force pretended to by the priſoner was on the 28th of Auguſt, and that he continued with the rebels, and bore a commiſſion in their army, till the 30th of December following. He was convicted, but not executed. In all the like caſes of the Scotch rebels, the matter of fact, whether force or no force, and how long that force continued, with every circumſtance tending to ſhew the practicability or impracticability of an eſcape, was left to the jury on the whole evidence.

Gordon's caſe, 23d Oct. 1746, at St. Margaret's Hill. cor. Lee, C. J. Wright, Reynolds, and Foſter, Juſtices, Serjeant Foſter's MS. 43. 1 MS. Sum. 14. Foſt. 13, 14.

Alex. M'Growther's caſe, Foſt. 13, 14. 9 St. Tr. 566.

Axtell, one of the regicides who commanded the guards at the king's trial and murder, juſtified that what he did was as a ſoldier, by command of his ſuperior officer, whom it was death not to obey; but this was ruled to be no defence. In truth there was no colour for imputing any compulſion on him to be in that ſituation.

Axtell's caſe, one of the regicides, Kel. 13.

Such compulſion or fear, however, is no excuſe for any other ſort of treaſon than that of joining with rebels or enemies.

1 MS. Sum. 14. *Vide* ch. of perſons capable of crimes, tit. *Compulſion.*

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§ 16. *Giving aſſiſtance or intelligence.* Foſt. 217. 1 MS. Sum. 14. 1 Hale, 51 56. 58. Sir J. Wedderburn's caſe, Nov. 4th, 1746, Foſt. 22.

So ſending money, arms, ammunition, or other neceſſaries to rebels, will primâ facie make a man a traitor, though they ſhould be intercepted. In Sir John Wedderburn's caſe it was proved as evidence of levying war, in order to depoſe the king and ſet the pretender on the throne, that the priſoner was appointed by the pretender's ſon collector of the exciſe, and that by virtue of that appointment he did actually collect the exciſe in ſeveral places where the rebel army lay, for their uſe. Yet paying contribution to rebels to prevent the plunder of the country, or making ſubmiſſion to them when reſiſtance would be dangerous and in all probability unavailing, is excuſable; for in times of open hoſtilities the jus belli is the only practicable law. But if it appear that the party wanted the will rather than the power to deny his aſſiſtance, and there appear any marks of conſciouſneſs that he might if he pleaſed have withheld it, he is inexcuſable if upon a pretence of fear or doubt of compulſion he gives ſuch aſſiſtance. It ſeems much more difficult to frame a caſe where the act of ſending intelligence to rebels can be palliated upon the plea of neceſſity. It partakes more purely of the will than almoſt any other act of this kind; and though it ſhould happen to fail of the effect intended, by not reaching the place of its deſtination, ſtill the treaſon is complete; for the party did all in his power.

Gregg's caſe, MS. Tracy, Dod, Price, and Denton, 10 St. Tr. App. 77. Dr. Henſey's caſe, B. R. Tr. 31 G. 2. 1 Burr. 644. 646.

§ 17. *Conſtructive levying of war.* Ante, f. 12. 1 MS. Sum. 13, 14. Foſt. 211. 213. 1 Hale, 132, 3. 146. 148. 3 Init. 9. 1 Hawk. ch. 17. ſ. 25. Burnet's MS. 14. Kel. 75, 76. Poph. 122. 2 And. 4, 5. 1 Ventr. 251. 2 Wilſ. 36c. Ld. George Gordon's caſe, Dougl. 550.

2. Conſtructive levying of war is in truth more directed againſt the government than the perſon of the king; though in legal conſtruction it is a levying of war againſt the king himſelf. This is when an inſurrection is raiſed to reform ſome national grievance, to alter the eſtabliſhed law or religion, to puniſh magiſtrates, to introduce innovation of a public concern, to obſtruct the execution of ſome general law by an armed force, or for any other purpoſe which uſurps the government in matters of a public and general nature. On the trial of Lord George Gordon the court of King's Bench declared their unanimous opinion that an attempt, by intimidation and violence to force the repeal of a law, was a levying war againſt the king. The ſtatute in queſtion was the 18 Geo. 3. c. 60. for relieving Roman catholics from certain penalties; and the treaſonable acts given in evidence againſt the priſoner was the aſſembling a great

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great multitude of people, and encouraging them to ſurround the two houſes of parliament and commit different acts of violence there and elſewhere, with a view to intimidate them to a repeal of the ſtatute. Inſurrections of this nature, though not levelled directly againſt the perſon of the king, are yet an attack upon his regal office, and tend to diſſolve all government, ſociety, and order. The king is bound in duty to enforce the acts of the legiſlature and uphold their authority: any reſiſtance, therefore, to theſe, muſt, in its conſequences, extend to the endangering of his perſon and government, by involving the ſtate in a general diſtraction; on which account this ſpecies of treaſon falls properly within the clauſe of levying war againſt the king. Upon this principle the Yorkſhire and Northumberland rioters, who oppoſed the militia laws, were convicted of high treaſon; and ſeveral of them were executed. But under this branch a bare conſpiracy to levy ſuch a war is not treaſon, unleſs the war be actually levied; in which caſe the conſpirators, as well as the actors, would be all equally guilty.

MS. Yates, J. cor. Loyd and Bathurſt, Juſtices. Ante, f. 9. Foſt. 211. Friend's caſe, 4 St. Tr. 599. Kel. 19.

Of the ſame nature is an aſſembling together for the purpoſe of deſtroying all meeting houſes or all bawdy houſes, under colour of reforming a public grievance; or an inſurrection to reduce by force the general price of victuals, to inhance the common rate of wages, to level all incloſures, to expel all foreigners, to releaſe all priſoners, or to reform by numbers or an armed force any real or imaginary grievance, of a public and general nature, in which the inſurgents have no peculiar intereſt. Againſt ſuch inſurrections magiſtrates, ſheriffs, and indeed all private perſons, may uſe force to ſuppreſs them without any ſpecial commiſſion, in the ſame manner as they may oppoſe foreign enemies coming hoſtilely into the kingdom.

1 MS. Sum. 14. Foſt. 211. 1 Hale, 132. 145, 146. 153. Kel. 70. 75, 6. Popp. 122. Cro. Car. 583. 2 And. 4, 5. 1 Ventr. 251. 2 Wilſ. 365. 1 Hawk. ch. 17. ſ. 25.

It was adjudged in Benſtead's caſe, that going in a warlike manner to Lambeth Houſe to ſurpriſe the Archbiſhop of Canterbury, who was a privy counſellor, it being with drums and a multitude of 300 perſons, was treaſon. The true ground of this reſolution Mr. Juſtice Foſter conſiders to have been, that the attempt was made on account of meaſures which the king had taken or was then purſuing, at the inſtigation, as the rabble imagined, of the archbiſhop; in conſequence of which they had deliberately, and upon a public invitation, attempted by numbers and open force to

Benſtead's caſe, 16 Car. 2 Cro. Car. 583. 1 Hale, 141. 152. Foſt. 211, 212.

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ſo revenge themſelves upon the privy counſellor for the acts of the ſovereign. Perhaps it would be ſtating it more correctly to ſay that it was an attack upon the king and his government in the perſon of his privy counſellor: but without the help of ſome ſuch ſuppoſition the ſame learned judge thought there was nothing in the caſe as reported which amounted to high treaſon.

Caſes of Damaree and Purchaſe. Foſt. 213. MS. Tracy, 16. 17. poſt. S. C. 8 St. Tr. 218. 247. 268. 285. 290.

Damaree and Purchaſe were indicted ſeverally, for that they, with a multitude of people, to the number of 500, armed and arrayed in a warlike manner, &c. did traiterouſly levy war, &c. It appeared, that during Dr. Sacheverell's trial in 1709 the rabble, who had attended him from Weſtminſter to his lodgings in the Temple, continued there together for a ſhort time, crying, among other cries of the day, "*down with the preſbyterians.*" At length a perſon unknown propoſed to pull down the meeting houſes; and thereupon the cry became general, "*down with the meeting houſes;*" and ſome thouſands immediately moved towards a meeting houſe of Mr. Burges, a proteſtant diſſenting miniſter; the defendant Damaree, a waterman, putting himſelf at the head of them, and crying, "*come on, boys; I'll lead you; down with the meeting houſes.*" They ſoon burnt Mr. Burges's; after which they agreed to proceed to *the reſt of the meeting houſes:* and hearing that the guards were coming to diſperſe them, they agreed for the greater diſpatch to divide into ſeveral bodies, and to attack different houſes at the ſame time; many of which were that night in part demoliſhed, and the materials burnt in the ſtreets. Damaree put himſelf at the head of one of theſe parties, and demoliſhed a meeting houſe in Drury Lane, ſtill crying that "*they would pull them all down that night.*" While the materials of this houſe were burning in the ſtreet, Purchaſe, who had not, for aught appeared, taken part in any prior outrage, came up to the fire very drunk, and with a drawn ſword in his hand encouraged the rabble, and incited them to reſiſt the guards, who juſt then came up to diſperſe them; he himſelf aſſaulting the commanding officer and others with his weapon; and calling to the rabble, "*come on boys, I'll loſe my life in the cauſe; I will fight the beſt of them.*" All the judges preſent agreed that Damaree was guilty of the treaſon charged; for there was a riſing

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with an avowed intention to demoliſh all meeting houſes in general, which was carried into execution as far as they were able. It was a declaration by the rabble againſt the act of toleration, and an attempt to render it ineffectual by numbers and open force. Damaree was accordingly convicted. In regard to the caſe of Purchaſe, there was ſome diverſity of opinion among the judges preſent at the trial; becauſe it did not appear that he had any concern in the original riſing, or was preſent at or active in any of the outrages of that night, except his behaviour at the bonfire in Drury Lane, whither he came by mere accident for aught appeared to the contrary. The jury therefore, by direction of the court, found a ſpecial verdict to the effect already mentioned. All the judges, on conſideration, agreed in the guilt of Damaree; and all but three held the ſame opinion in reſpect to Purchaſe; becauſe the rabble were traiterouſly aſſembled and in the very act of levying war when he joined them, and encouraged them to proceed, and aſſaulted the guards who were ſent to ſuppreſs them. All this being done in defence and ſupport of perſons engaged in the very act of rebellion involved him in the guilt of that treaſon in which the others were engaged. The ground of the opinion of the three diſſenting judges was, becauſe it was not directly found that he aided and aſſiſted the traitors; though they agreed that the mob were continuing their act of treaſon when Purchaſe joined them. But from what I have before ſtated this does not ſeem neceſſary, if the party be found to have done any act towards the execution of the traiterous deſign. For whoever joins deliberately in the execution of any unlawful act muſt abide the conſequences at his peril.

Trevor, C. J. Powell, J. and Price, B.

MS. Tracy, 17.

Ante, f. 13.

§ 18. *Inſurrections of a private or local nature.*

But where the object of the inſurrection is a matter of a private or local nature, affecting or ſuppoſed to affect only the parties aſſembled, or confined to particular perſons or diſtricts, it will not amount to high treaſon, although attended with the circumſtances of military parade uſually alleged in indictments on this branch of treaſon. As if the riſing be only againſt a particular market, or to deſtroy particular incloſures, to remove a local nuiſance, to releaſe a particular priſoner, unleſs impriſoned for high treaſon, or even to oppoſe the execution of an act of parliament, if it only

1 MS. Sum. 14. Foſt. 209, 210. Burnet's MS. 14. 1 Hale, 133, 4. 140. 9. 1 Hawk. ch. 17. ſ. 25. and other authorities under the former ſection.

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only affect the diſtrict of the inſurgents; as in the caſe of a turnpike act.

Foſt. 210. 1 Hale, 143—146.

Upon the ſame principle, and within the ſame equitable conſtruction of the ſtatute of treaſons, Mr. Juſtice Foſter ſays it was rightly holden by five of the judges, that a riſing of the weavers in and about London, to deſtroy all engine looms, machines which enabled thoſe of the trade who made uſe of them to underſell the reſt, did not amount to a levying war; though they aſſembled for ſeveral days together in conſiderable bodies, at different places, armed with clubs, and ſuch other weapons as they could get, and committed violent outrages; breaking into houſes and burning the looms, not only in London but in the adjacent counties, and reſiſting and affronting the magiſtrates and peace officers. For thoſe judges conſidered the whole affair merely as a private quarrel between men of the ſame trade about a particular engine, which thoſe concerned in the riſing thought detrimental to them in particular; and in which they had, in truth, a ſpecial intereſt: and though five other judges ſeemed to think it treaſon, yet finally the defendants were only proſecuted for a riot.

Riot Act, 1 Geo. 1. ſt. 2. c. 5. *Vide* Poph. 122.

I cannot take leave of this ſubject without noticing a modern act of parliament, I mean the riot act, which certainly cannot be deemed to have altered the law of treaſon in the reſpect above mentioned; but muſt be underſtood as confined to thoſe private and particular cauſes of riſings which do not fall within the clauſe of levying war, according to the conſtruction which has been given of that law. And this I conceive to be conſonant to the opinion delivered by eleven judges againſt Lord Hale, in Cotton's caſe, upon the application of a ſimilar act of the 1 *M. c.* 12. For though the preamble of the riot act notices that many *rebellious* riots and tumults had then of late taken place, yet, in the enacting part, it only attaches upon perſons *unlawfully, riotouſly, and tumultuouſly* aſſembled.

Cotton's caſe, Kel. 75.

§ 19. *Within the realm.* *Ante*, f. 12. 1 Hale, 154—158. *Vide* poſt. ch. 4. *Offences relating to the Coin.* f. 6. & Co. Litt. 261.

2. The clauſe of levying war is confined to the realm. The words of the ſtat. 25 Ed. 3. are "in his realm." So the act of the 36 Geo. 3. c. 7. is confined to a compaſſing to levy war "within this realm."

The realm of England comprehends the narrow ſeas; and, therefore, if a ſubject attack the king's ſhips upon thoſe ſeas,

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ſeas, it is a levying of war within his realm. It alſo extends to Wales. But Ireland (*a*) and the iſles of Man, Jerſey, Guernſey, Sark, and Alderney, though parcels of the dominions of the crown of England, are not within the realm. The ſame might be ſaid of Scotland, as to which proviſion is made by ſtat. 4 Jac. 1. c. 1. and 7 Jac. c. 1. for treaſons committed there.

(*a*) But ſee now the late act of union with Ireland, 40 Geo. 3. See alſo the acts of union with Scotland.

It was ruled in Harding's caſe, that enliſting men to ſend over ſea to aſſiſt the king's enemies, is not within this clauſe of the 25 Ed. 3. It would have fallen moſt properly within the clauſe of adhering, but was alſo admitted as an overt act to prove the compaſſing of the king's death.

Harding's caſe, 2 Ventr. 316. Poſt. p. 78.

Foſt. 197.

But to relieve a rebel out of the realm is no treaſon.

1 Hawk. ch. 17. ſ. 28. Sum. 15. 4 Blac. Com 83.

V. "*If a Man be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm or elſewhere,*"

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he is alſo declared guilty of high treaſon by the ſtat. 25 Ed. 3.

25 Ed. 3. ſt. 5. c. 2.

And it is further provided by ſtat. 2 & 3 Ann. c. 20. ſ. 34. that if any officer or ſoldier ſhall, out of England or upon the ſea, correſpond with any rebel or enemy, or give them advice or intelligence, by letters, meſſages, ſigns, tokens, or otherwiſe, or ſhall treat or enter into any condition with them, without authority ſo to do, he ſhall be guilty of high treaſon. And, by the general mutiny acts, for theſe and other like offences, the offender ſhall ſuffer death, or ſuch other puniſhment as a court martial ſhall award.

2 & 3 Ann, c. 20. *Soldiers correſponding with Enemies.*

I ſhall firſt enquire who is an enemy; next, what is an adherence; and then I ſhall conſider the analogous offence of ſerving foreign ſtates without licence from the crown.

1. By the term enemy is always to be underſtood a foreign power owing no allegiance to the crown, and in a ſtate of open hoſtility with us; though perhaps war may not have been regularly declared between the reſpective countries: and therefore, in an indictment on this clauſe, it is ſufficient to aver, that the prince or ſtate adhered to *was an enemy*. And the queſtion, Whether there be war or not between ſuch power and our king is purely a queſtion of fact, triable by the jury; and public notoriety is ſufficient evidence of it.

Who an Enemy. 4 Blac. Com. 83. 1 Hale, 159. 162, 163. 4. *ante*, f. 4. Foſt. 219, 220. 1 MS. Sum. 15. 24. 2 Ventr. 316.

(*Vide* Wells v. Williams, 1 Ld. Raym. 283.)

Alſo,

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Alſo, if the ſubject of a foreign ſtate in amity with us acts in a hoſtile manner againſt us, without commiſſion from his ſovereign, or under commiſſion from a ſtate at enmity with us, he is ſo far an enemy, that a ſubject of England adhering to him is a traitor. But inciting foreigners, not actually at war with us, to invade the kingdom, does not, for the reaſon given, fall within this branch of the ſtatute, but under that of compaſſing the king's death. Yet, perhaps, if it could be ſhewn that a war was commenced upon ſuch an incitement, it would fall as much within the true conſtruction of this clauſe, as one who counſels the levying of war is guilty of that offence, if the war be actually levied.

Foſt. 196.
1 Hale, 169.

Ante, f. 9.

§ 21. *What an adherence.*

2. In conſidering what ſhall be deemed an adherence to the king's enemies, much of what has been already ſaid under the head of levying war is equally applicable. Thus, every ſpecies of aid or comfort, in the words of the ſtatute, which, when given to a rebel within the realm, would make the ſubject guilty of levying war; if given to an enemy, whether within or without the realm, will make the party guilty of adhering to the king's enemies; though in the caſe of giving aid to enemies within the realm, a ſubject might in ſome inſtances be brought within both branches of the act. It is neceſſary in an indictment on this branch of the ſtatute to aver that the perſons adhered to were the king's enemies, as well as that the defendant adhered to them; but it is not neceſſary to allege expreſsly that ſuch adherence was againſt the king, that being apparent; nor is it more neceſſary under this, than under the former clauſe, that the parties ſhould come to an action; but the ſpecial manner of adhering muſt be ſet forth.

Ante, f. 16.
1 Hale, 56.
Vide 4 Blac. Com. 183.
Vaughan's caſe, 5 St. Tr. 37.
Foſt. 216, 217.
1 Hawk. ch. 17. ſ. 28.

1 Hawk. ch. 17. ſ. 28.
Vaughan's caſe, 5 St. Tr. 36.
Vide 2 Ventr. 316.
Ante, f. 12.
Foſt. 218.

Harding having raiſed men in England with intent to dethrone the king, and ſent them abroad to join the French, then at open war with us, for that purpoſe, was held guilty of adhering to the king's enemies, and of compaſſing his death. In Lord Preſton's caſe, the compoſing, procuring, and ſecreting treaſonable papers, and taking them with him in a boat, to go on board a veſſel bound to France, where they were to be uſed for treaſonable purpoſes, were laid as overt acts of both thoſe ſpecies of treaſon. Indeed all treaſonable correſpondence with an enemy falls within the clauſe of

Harding's caſe, 2 Ventr. 315.
Foſt. 197.
Ante, p. 77.

Lord Preſton's caſe, 4 St. Tr. 409, &c.
Foſt. 197.

Foſt. 217

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of adhering, as it has been ſhewn to do within the clauſe of compaſſing the king's death. At a meeting of the judges upon the caſe of Gregg, one of the clerks of Mr. Secretary Harley's office, who ſent intelligence by letters to Monſieur Chamillard, ſecretary of ſtate in France, which letters were intercepted at the poſt office here; the ſending ſuch letters was reſolved to be an overt act of both ſpecies of treaſon, as it was laid in the indictment, though the letters never came to the enemy's hands. And in Henſey's caſe, under the ſame circumſtances, the court cited that opinion with approbation, and adopted it.

Ante, f. 9.
12th Jan. 1707, Gregg's caſe, MS. Tracy, 16. MS. Price, Dod, and Denton.
1 MS. Sum. 14.
Foſt. 218.
10 St. Tr. App. 77.
Dr. Henſey's caſe, 1 Burr. 646.

In like manner in Stone's caſe, the indictment charged as an overt act of adhering and of compaſſing, that the priſoner conſpired with J. Harford Stone, W. Jackſon, and others unknown, to collect intelligence within England and Ireland of the diſpoſition of the king's ſubjects in caſe of an invaſion of either country, and to communicate ſuch intelligence to the enemy, for their aſſiſtance and direction in their conduct and proſecution of the war. Some part of the written intelligence applicable thereto, which was given in evidence, was found in the hands of Jackſon, one of the conſpirators. The tendency of parts of the papers was to adviſe the enemy againſt an invaſion of England, by repreſenting the improbability of its being attended with any ſucceſs, from the general diſpoſition of the people; and this was relied on by the priſoner's counſel, as ſhewing that they were ſent with a good intent, in order to avert the danger of ſo great a calamity. But all the court ſaid, that the jury were to judge from all the circumſtances, whether the intelligence had been ſent with that view. For however beneficial the effect of ſuch intelligence might be, yet, if it were ſent in order to aſſiſt an enemy in their counſels, and to enable them the better to ſhape their defence or attacks, it was undoubtedly high treaſon under both the clauſe of adhering and of compaſſing.

Rex v. Wm. Stone, at the bar of the Court in Hil. 36 Geo. 3. MS. & 6 Term Rep. 527. 529.
Vide poſt. S. C.

(*Vide* Rex v. Henſey, ſupra)

It is alſo an adherence to the king's enemies in a ſubject of England making war on the king's allies, engaged with him againſt the common enemy, though no act of hoſtility be committed againſt the king or his forces; for by this the enemy is ſtrengthened and the king weakened.

Vaughan's caſe, 5 St. Tr. 37.
Foſt. 220.

In

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Evans' caſe, M. 23 Geo. 3. MS. Gould, J. *Vide* S. C. chap. *Piracy.*

In Joſeph Evans' caſe it became a queſtion, How far the overt act laid under this branch of treaſon ſhewed a traiterous intent againſt the king, or was only a piratical attempt againſt the ſubject? He was convicted at an admiralty ſeſſions holden by virtue of 18 Geo. 2., whereby treaſons on the high ſeas, in time of war, by adhering to the king's enemies, are to be tried in like manner as piracies. The indictment, after ſetting forth that there was a war between the Engliſh and French, charged that the priſoner did adhere to the king's enemies, and in proſecution of ſuch adherence did, in a certain armed veſſel called the Eſcamatour, with certain perſons unknown, hoſtilely go a cruiſing, with intent in maritime places to ſeize and take the ſhips, &c. of our ſovereign lord the king and his ſubjects. Upon a conference among the judges, on ſome doubts in the caſe, a difficulty occurred at firſt, whether the overt act was ſufficiently charged; for it was ſaid that it ſtood in an equivocal light, whether the intent might not be to commit acts of piracy. But it being obſerved, that it was laid, that the priſoner went a cruiſing to take the ſhips of *the king* as well as of the ſubjects, it made it clear that it was an adherence to the enemy; in which opinion all concurred. In this reſpect it was compared to laying as an overt act of compaſſing the king's death, that they conſpired or agreed to ſeize his guards. But this and any other ſpecies of adherence on the high ſeas may, by the proviſions of the ſtat. 11 & 12 W. 3. c. 7. and 18 Geo. 2. c. 30., be tried as piracy under the admiralty commiſſion, holden by virtue of the ſtat. 28 H. 8. c. 15.

Vide title *Piracy.*

Ante, f. 15.

It may alſo be obſerved, that the ſame excuſes of compulſion and neceſſity, which may be made for one who has joined or given aid to rebels or enemies within the realm, will alſo apply in the caſes above alluded to.

§ 22. *Refuſal to ſerve againſt Enemies.* 1 Hawk. ch. 22. ſ. 2. 4 Blac. Com. 122.

But the mere act of refuſing perſonal aſſiſtance to the king, either againſt rebels or an invading enemy, amounts not to an adherence within the ſtatute, though undoubtedly it is a high miſdemeanor, and puniſhable by fine and impriſonment.

Refuſal to return home. 1 Hale, 165. 167.

So Engliſhmen living in a foreign country at the time of a rupture with us, and continuing there afterwards, are not on that account adherents to the king's enemies, unleſs they voluntarily

voluntarily ſwear fealty to them, or actually aſſiſt them in the war; or, at leaſt, unleſs they refuſe to return home upon privy ſeal or proclamation, and notice thereof, though ſuch a refuſal is only evidence of adhering. The caſe of foreigners reſiding here during a war between their country and ours has been before ſufficiently conſidered: They may undoubtedly be guilty of treaſon in adhering to their own country.

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Dy. 296. a.

Ante, f. 4.

§ 23.

There is another offence againſt the crown and ſtate, which, being analogous to thoſe I have been juſt deſcribing, I ſhall advert to in this place; although, being as well applicable to a ſtate of peace as of hoſtility, it does not fall under the notion of high treaſon, unleſs done in aid of rebels or enemies: Yet it is, properly ſpeaking, an offence againſt allegiance. This is,

Vide 4 Blac. Com. 101.

Serving or procuring others to ſerve Foreign States.

Serving Foreign States. 4 Blac. Com. 122. 1 Hawk. ch. 22. ſ. 2, 3.

Entering into the ſervice of any foreign ſtate without the conſent of the king, or contracting with it any other engagement which ſubjects the party to an influence or control inconſiſtent with the allegiance due to our own ſovereign, ſuch as receiving a penſion from a foreign prince without the leave of the king, is at common law a high miſdemeanor, and puniſhable accordingly. Such alſo is the diſobeying of the king's command to a ſubject abroad to return home; or his writ of ne exeat regno to a ſubject at home, commanding his ſtay.

Dy. 296. a.

3 Jac. 1. c. 4. ſ. 18.

Further, by ſtat. 3 Jac. 1. c. 4. it is enacted, "that every ſubject who ſhall go out of the realm of England to ſerve any foreign prince, ſtate, or potentate, or ſhall paſs over the ſeas, and there ſhall voluntarily ſerve ſuch prince, &c. not having before taken the oath of obedience (therein preſcribed), ſhall ſuffer as a felon." And (ſ. 19.) "if any gentleman or perſon of higher degree, or any perſon who has borne any office, place, or charge in camp or army, or company of ſoldiers, or conductor of ſoldiers, ſhall after go voluntarily out of the realm to ſerve any foreign prince, &c. or ſhall voluntarily ſerve any ſuch, before he be bound in a bond with two ſureties not to be reconciled to the ſee of Rome, nor to enter into any conſpiracy againſt the king, he ſhall be guilty of felony."

(The ſtat. 1 W. & M. ſt. 1. c. 8. gives a new oath.)

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3 Inſt. 60.

The offences are the going out of the realm with intent to ſerve a foreign ſtate, although there be no ſervice in fact, and the actual ſerving, after having gone out of the realm upon that or any other occaſion. And the trial is to be where the offence is committed, which is at the place where the party paſſed out of the kingdom.

9 Geo. 2. c. 30.

By ſtat. 9 Geo. 2. c. 30. "If any ſubject of Great Britain ſhall enliſt or enter himſelf, or if any perſon ſhall procure any ſubject to enliſt or enter himſelf, or hire or retain any ſubject with intent to cauſe him to enliſt or enter himſelf, or procure any ſubject to go beyond ſeas, or embark with intent and in order to be enliſted to ſerve any foreign prince, ſtate, or potentate, as a ſoldier, without his majeſty's licence under his ſign manual; every ſuch offender ſhall on conviction be guilty of felony without benefit of clergy." But if the perſon ſo enliſted or enticed to go beyond ſeas, in order to be enliſted as a non-commiſſioned officer or private ſoldier, ſhall diſcover upon oath to a magiſtrate his ſeducer, within 14 days after ſuch enliſting or agreement to go beyond ſeas, ſo that he may be apprehended and convicted, ſuch perſon ſhall be indemnified."

29 Geo. 2. c. 17.

And by ſtat. 29 Geo. 2. c. 17. If any ſubject ſhall take or accept of any military commiſſion, or otherwiſe enter into the military ſervice of the French king as a commiſſioned or non-commiſſioned officer, without ſuch licence under the king's ſign manual, he ſhall ſuffer death as a felon, without benefit of clergy.

S. 5. inflicts a forfeiture of 500 l. on any ſubject accepting a commiſſion in the Scotch brigade in the ſervice of the States General, unleſs within ſix months he take and ſubſcribe the oaths of allegiance and abjuration, and certify the ſame to the ſecretary at war, &c.

By ſ. 4. for removing doubts upon the ſtat. 9 Geo. 2. it is further provided "That if any ſubject has or ſhall engage, contract, or agree, within Great Britain or Ireland, to go beyond ſeas, or embark with intent or in order to enliſt or enter himſelf to ſerve as a ſoldier in any foreign ſervice, though no enliſting money be actually paid to or received by him; or if any perſon has or ſhall hire, retain, engage, or procure any ſubject, though no enliſting money has or ſhall actually be paid to or received by him, to agree to go beyond ſeas, or embark with intent to be enliſted to ſerve

ſerve any foreign prince, &c. as a ſoldier, without the king's licence firſt had; every ſuch offender ſhall be adjudged guilty of felony, without benefit of clergy."

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Trial.

Proviſion is alſo made by both of the above acts of Geo. 2., that offences againſt them committed out of the realm may be alleged to be committed and may be inquired of and tried in any county in England.

VI. *Counterfeiting the Seals.*

§ 24. *Counterfeiting the Seals.*

25 Ed. 3. ſt. 5. c. 2.

1 Hawk. ch. 17. ſ. 53.

1 Hale, 178. 184. 275.

1 Ma. ſt. 2. c. 6. re-enacting the 27 H. 8. c. 2. which had been repealed by 1 Mar. c. 1. though ſaved by 1 Ed. 6. c. 12. ſ. 8.

The next head of treaſon relates to the king's ſeals. By the ſtat. 25 Ed. 3. it is further declared to be treaſon "if a man counterfeit the king's great or privy ſeal;" and by ſtat. 1 Ma. c. 6. "If any perſon falſely forge or counterfeit the queen's ſign manual, privy ſignet, or privy ſeal, ſuch offence ſhall be deemed high treaſon, and the offenders therein, their counſellors, procurers, aiders, and abettors, being convicted according to law, ſhall be adjudged traitors."

7 Ann. c. 21. ſ. 9.

By ſtat. 7 Ann. c. 21. ſ. 9. To counterfeit the ſeals uſed and continued in Scotland, according to the 24th article of the union, is high treaſon.

Vide 1 Hale, 178, 179. 187. Bract. Lib. 3. c. 3. ſ. 2. Flet. lib. 1. c. 22. 4 Blac. Com. 89. Ryl. Plac. Parl. 542. Cro. Car. 383. 2 Ventr. 254.

This is a ſpecies of the crimen falſi, or forgery; and yet it differs conſiderably from the legal conſtruction of that offence, and therefore requires ſeparate notice. It was treaſon at common law, and the judgment was to be drawn and hanged: but now the judgment is the ſame as in all other treaſons I have before touched upon.

Two points are to be conſidered;

1. *What ſhall be ſaid to be the great or privy ſeal, &c.*
2. *What is a counterfeiting of the ſame?*

Great Seal. 1 Hale, 170.

1. The great ſeal of England is that by which the king diſpenſes the principal acts of his government, and the adminiſtration of juſtice. It conſiſts ordinarily, ſays Lord Hale, of two impreſſions, the principal one (properly called the great ſeal) with the king's effigies ſtamped on it; the other commonly called pes ſigilli, and formerly le targe, being the impreſſion of the king's arms in a target, which is uſed in matters of leſs moment. By the very delivery of this ſeal the office of keeper of the great ſeal is conſtituted,

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which in modern times has been to the lord chancellor, when any ſuch officer has been appointed, otherwiſe to certain commiſſioners, who exerciſe the functions of that office; and in ſome few inſtances to a ſingle perſon with the title only of lord keeper of the great ſeal.

40 Geo. 3. c. 67. ſ. 1.

By the firſt article of the union with Ireland the ſtile and title appertaining to the imperial crown of the united kingdom and its dependencies, and alſo the enſigns armorial flags and banners thereof ſhall be ſuch as his majeſty, by his royal proclamation under the great ſeal of the united kingdoms, ſhall appoint. And by ſ. 3. of the act it is enacted, that the great ſeal of Ireland may, if his majeſty think fit, after the union, be uſed in like manner as before, except where otherwiſe provided by the articles, within Ireland.

Privy Seal. 1 Hale, 171.

The privy ſeal is ordinarily a warrant for paſſing things under the great ſeal; ſometimes a warrant to iſſue money, and for other purpoſes. It is for the moſt part in the cuſtody of the lord keeper of the privy ſeal; but ſometimes has been holden by commiſſioners.

Privy Signet. 2 Inſt. 556. 2 Blac. Com. 347. *Vide* ſt. 27 H. 8. c. 11. 1 Hale, 171, 172.

The privy ſignet is one of the king's ſeals, uſed in ſealing his private letters and ſuch grants as paſs his majeſty's hand by bill ſigned with the ſign manual. It is in the cuſtody of the king's principal ſecretary, who has four clerks of the ſignet-office attending on him; and it is made uſe of ſometimes as a warrant to the privy ſeal, as this latter is to the great ſeal.

There are other ſeals of the king, ſuch as thoſe appertaining to the ſeveral courts; thoſe of the King's Bench and Common Pleas in the cuſtody of the reſpective chief juſtices; that of the Exchequer holden by the chancellor of the Exchequer; thoſe of the dutchy and county palatine of Lancaſter in the cuſtody of their reſpective chancellors; alſo the ſeals of the county palatine of Cheſter, and of the ſeveral juſtices of aſſize oyer and terminer and gaol delivery; though theſe latter ſometimes make their precepts under their own ſeals; alſo the king's ſeals of ſtatutes and recognizances, and the ſeal of the cocket. The counterfeiting of any of theſe was, before the 25 Ed. 3., ſuppoſed to be treaſon, and afterwards felony; but it is now ſettled only to be a high miſdemeanor, puniſhable by fine, impriſonment, and pillory.

1 Hale, 174.

1 Hale, 179—183.

Seals how deſtroyed. 1 Hale, 176, 7. *Vide* 6 Ann. c. 7. ſ. 8. for continuing officers, &c. for ſix months after the demiſe of the crown, unleſs ſooner diſplaced.

Upon the demiſe of the king, though the office of keeper of the great ſeal expires, yet the ſame great ſeal continues to

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to be the great ſeal of England till another be made and delivered. Formerly public proclamation was made in caſe of a change of the ſeal, though now a memorandum only is entered on the cloſe rolls. But even after the making and delivery of a new ſeal, and the breaking of the old one, yet the counterfeiting of the latter, and applying it to an inſtrument of the date wherein it was in uſe, or to an inſtrument without date, is high treaſon.

Burnet's MS. 18. 1 Hale, 177. Poſt.

§ 25. *What a counterfeiting.* Ante, p. 83. 1 Hale, 181. 183. 1 Hawk. ch. 17. ſ. 50.

2. As to what ſhall be ſaid to be a counterfeiting; although this is evidently a ſpecies of the crimen falſi or forgery, and might naturally have been ſuppoſed to be governed by the ſame rules, yet the difference is conſiderable; for though the ſculpture of the inſtrument, which is in truth the great ſeal, be exactly counterfeited, yet if it be not uſed or applied to ſeal any thing, though intended for that purpoſe, the offence is not complete: but it ſeems there muſt be an impreſſion made in wax, in teſtimony of ſome writing; otherwiſe it is no more than a mere intent or compaſſing to counterfeit the ſeal, and is only puniſhable as a high miſdemeanor.

1 MS. Sum. 22. 2 Hale, 183. 3 Inſt. 16. 4 Blac. Com. 83. 1 Hawk. ch. 17. ſ. 51, 52 Leak's caſe, Kel. 80.

Again, it is ſaid that the affixing the true great ſeal by the chancellor or any caſual poſſeſſor of it, without warrant, or the affixing it to a wrong patent knowingly, though a great miſpriſion, is no treaſon within the act of Ed. 3. (nor, by conſequence, within that of Mary); becauſe this is not a counterfeiting of the ſeal. For the ſame reaſon the raſing of one manor out of a patent and inſerting another, or any artificial removing of the true writing and adding new matter; or even, it is ſaid, the taking off the wax impreſſed with the great ſeal from a true patent, and affixing it to a writing importing to be a grant from the king, are none of them high treaſon, but only great miſpriſions. It was formerly queſtioned whether theſe inſtances did not amount to high treaſon, and many caſes are noticed by Lord Coke and Lord Hale upon this ſubject; but upon the whole, whatever the offence might have been before the ſtatute of the 25 Ed. 3., and however in ſound ſenſe and a juſt eſtimate of guilt there is no kind of difference between the offence of one who puts a true ſeal to a falſe patent, and of one who forges the ſeal itſelf; yet ſince that ſtatute which negatives all other treaſons than thoſe

Vide 1 Hale, 181, &c. 3 Inſt. 15, 16. and Leak's caſe, 12 Co. 16. Robinſon's caſe, 2 Rol. Rep. 51.

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therein enumerated, and the only treaſon therein deſcribed, touching this matter, is confined to the counterfeiting the ſeal itſelf; it ſeems to have been long ago agreed, and muſt be taken for law at this time, that none of the above-mentioned inſtances of miſuſer of the ſeals are within the meaning of that act. This ſeems to be one of thoſe caſes where, according to the caution given in the ſtatute of treaſons, recourſe ſhould be had to the advice of parliament.

And herein conſiſts the difference between this offence and forgery, properly ſo called; that in the latter the crime conſiſts in the falſification of the *inſtrument*, and therefore if any part of it be falſe it is not the ſame inſtrument which it purports to be: but here the crime conſiſts wholly in the falſification of part of the inſtrument, namely the ſeal; and therefore if that be genuine, however falſe the inſtrument to which it may be applied, at leaſt the party cannot be ſaid to have counterfeited the ſeal, in the words of the act of Edward 3. Hence it is that in moſt, if not in all, of the acts which have paſſed to protect the property of public companies, proviſion has been made not only againſt counterfeiting their common ſeals but all thoſe inſtruments under their common ſeals, which were intended to be protected.

2 MS. Sum. 22. 1 Hale, 178. 184.

It has been determined, however, that ſplitting the ſeal and cloſing it again to a falſe patent is a counterfeiting, and this upon the principle above adverted to; becauſe this is an alteration of the ſeal itſelf. And where the ſeal is ſubſtantially counterfeited, the adding or omitting of a crown, the leaving out words in the ſtile or adding others, or making any other minute variations in the counterfeit, which is often done purpoſely, and by way of eluding the law, will not alter the caſe; as was ruled in Robinſon's caſe, upon an indictment under the ſtatute of Mary for counterfeiting the privy ſignet. The diſparity, however, may be ſo great between the true and falſe ſeal that it would not amount to a counterfeiting within the ſtatute, as if it be evident to the view of every man's eye. Neither would it if a man were to counterfeit the ſeal of one prince to a patent ſuppoſed to be granted in the time of another; or to a ſuppoſed patent of the ſame prince after a new ſeal had been made and delivered; if, ſays Lord Hale, the difference appear very legible and conſpicuous; for at the time whereunto it relates there was no ſuch great ſeal in being. In regard to the

Robinſon's caſe, 2 Rol. Rep. 50.

Vide 1 Hale, 211. 215.

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the queſtion of variance the ſame rule muſt govern as in caſe of coining, where it was ruled in Welſh's caſe, by all the judges, to be a queſtion of fact for the jury to determine, Whether or not the counterfeit were made to reſemble the real coin?

R. v. Welſh, Hertford Lent Aſſizes, 1785, and in Eaſter term following; MS. Jud. Gould & Buller, Js. and *vide* R. v. Jones, tit. Forgery.

§ 26. *Accomplices.*

All aiders and conſenters to the counterfeiting of the great or privy ſeal are within the act of Edward 3.; and that of Mary extends to ſuch in terms. But receivers or aiders after the fact are not within the words of either: and it was always doubtful how far the ſtat. of Ed. 3. extended to them by implication; which doubt is rather ſtrengthened by the ſtat. of Mary, which expreſsly mentions ſuch as are in ſubſtance acceſſaries before, and does not mention receivers.

1 MS. Sum. 22. 1 Hawk. ch. 17. ſ. 49. 1 Ma. ſt. 2. c. 6. Ante, ſ. 24. 12 Co. 81, 2. (3 Inſt. 16. *ſed. vide* Ibid. 138.) Poſt. ſ. 35.

VII. *High Treaſon againſt the King's Officers.*

§ 27. *High Treaſon againſt the King's Officers.*

By the 25 Ed. 3. "If a man ſlay the chancellor, treaſurer, or the king's juſtices of one bench or the other, juſtices in eyre, or juſtices of aſſize, and all other juſtices aſſigned to hear and determine, being in their places, doing their offices," it is declared high treaſon.

25 Ed. 3. ſt. 5. c. 2.

By the 7 Ann. c. 21. ſ. 8. to ſlay any of the lords of ſeſſions, or juſticiary of Scotland, in the exerciſe of their office, is high treaſon.

7 Ann. c. 21. ſ. 8.

To whom it extends.

1ſt. The ſtatute of Edward 3. extends to no other officers of ſtate but thoſe who are expreſsly mentioned; and therefore the lord ſteward, conſtable, or marſhal are not included.

3 Inſt. 18. 1 Hale, 237. 1 Hawk. ch. 17. ſ. 47.

It may ſeem extraordinary that the lord treaſurer ſhould be the only officer of ſtate named among the other high legal officers, who ſeem to have been the principal at leaſt, if not (as I think they were) the ſole objects of regard. But the lord treaſurer ſeems to have been named on account of the judicial part of his office mixing with that of the other judges, which was not inconſiderable, as appears by ſeveral ſtatutes. The exchequer too was the great repoſitory of records, which were brought and laid up in the treaſury there, of which he had the ſuperintendance, from the other courts at Weſtminſter. Lord Hale doubts whether diſpatching buſineſs in the treaſurer's houſe be *in his place*; and both he and Lord Coke ſeems to confine it to ſitting in courts, as he does in the

20 Ed. 3. c. 6. 31 Ed. 3. ſt. 1. c. 12. 21 H. 8. c. 20. 31 Eliz. c. 1. 1 Hale, 232. 3 Inſt. 18. *Vide* poſt.

Ch. II. § 27. *Slaying of the King's Officers.*

court of exchequer, or exchequer chamber, or as he did in the ſtar chamber while that court ſtood. The ſtatute has alſo been ſaid to extend to juſtices of niſi prius, and gaol delivery, but not to juſtices of the peace.

Burnet's MS. 17. Holborn's Reading, 48. 1 Hale, 231.

1 MS. Sum. 22. MS. Burnet, 17. *Vide* Holborn's Reading, 48. 4 Blac. Com. 84. And *vide* Barrington on the Statutes, 137. 249. *Ut ſupra.*

It is ſaid by good authority, that among the judges the barons of the exchequer are included, becauſe in the ſame predicament with the other judges. Mr. Juſtice Blackſtone has indeed delivered a different opinion, and cited Lord Hale in ſupport of it; but the latter takes no particular notice of this caſe, but merely ſtates generally, that the ſtatute extends to no other officers than thoſe named, referring to the officers of ſtate above mentioned.

5 Eliz. c. 18. 1 Hale, 231. 4 Blac. Com 84. 4 Inſt. 84. 88.

1 MS. Sum. 22. 1 W. & M. ſt. 1. c. 21.

1 Hale, 231.

Poſt. f. 30.

The ſtat. 5 of Eliz. c. 18. having declared the office of lord keeper to be the ſame to all intents as if he were lord chancellor, it ſeems that the lord keeper, at leaſt when there is no lord chancellor, is within the act. And as the office of commiſſioners of the great ſeal, when it happens to be in commiſſion, is by ſtatute declared to be the ſame, and the commiſſioners to have the ſame juriſdiction and privileges as the lord chancellor, they alſo ſeem to be within the act. But not the commiſſioners of the treaſury, for they have not the ſame power as the lord treaſurer, and therefore their office is not the ſame. But ſome other officers are included in other ſtatutes, which will be preſently mentioned.

§ 28. *At what Time.* 1 MS Sum. 22. 3 Inſt. 18. 3 Hale, 252.

2. The protection of the act is only during the times that the ſeveral officers above named are in the actual execution of their reſpective offices; that is, ſitting judicially in their places in the king's courts, where they uſually or by adjournment ſit in the adminiſtration of juſtice; for there they repreſent the king's perſon. And Lord Hale extends it to the Lord chancellor's houſe, when the ſeal is open there, and to the hearing of cauſes in his chamber, where he ſays uſe has ſufficiently obtained to give it the ſtile of *feſant ſon office.*

§ 29. *Killing.* 1 Hale, 230. 1 Hawk. ch. 17, ſ. 47. 3 Inſt. 140.

3. The ſtat of Ed. 3. is alſo confined to the caſe of *killing* ſuch officers, and extends not to a wounding or attempt to kill, unleſs death afterwards enſue from it. Yet the mere ſtriking or aſſaulting them in the execution of their office is a great miſpriſion, for which in ſome caſes of aggravation the

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the offender may loſe his hand. But if many conſpire to kill any ſuch officer, and one actually accompliſh it, it ſeems treaſon in all.

3 H. 7. c. 14. *Compaſſing to kill.* 3 Inſt. 37. 1 Hale, 661.

By the act of 3 H. 7. c. 14. the mere "compaſſing by any of the king's ſworn ſervants named in the cheque-roll of his houſehold, under the ſtate of a lord, with any perſon, to kill the king, or any lord of the realm, or other perſon ſworn to the king's council, or the ſteward, treaſurer, or comptroller of the king's houſehold," is made felony, but within clergy. According to Lord Coke, the conſpiracy muſt be plotted to be done within the king's houſehold. But the trial of offenders under this act being before a peculiar juriſdiction compoſed of officers of the houſehold, there is leſs occaſion to ſay more of it, being extraneous to the object of this treatiſe.

9 Ann. c. 16. *Aſſaulting a Privy Councillor.*

By ſtat. 9 Ann. c. 16. (which was made on occaſion of Mr. Secretary Harley being ſtabbed by Anthony Guiſcard, who was then under examination before the privy council,) it is enacted, "that if any perſon ſhall unlawfully attempt to kill, or ſhall unlawfully aſſault, ſtrike, or wound any privy counſellor in the execution of his office, in council, or in any committee of council, he ſhall on conviction be declared a felon, and ſuffer death without benefit of clergy."

VIII. *High Treaſon in reſpect of the Coin.*

§ 30. *Coin.*

As to offences againſt the coin, ſome of which amount to high treaſon, I ſhall treat of them altogether in another place; contenting myſelf here with enumerating the ſeveral ſtatutes by which offences of this deſcription are made high treaſon; which are 25 Ed. 3. ſt. 5. c. 2. 1 M. ſt. 2. c. 6. 1 & 2 Ph. & M. c. 11. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. 3. c. 26. 7 Ann. c. 25. 15 Geo. 2. c. 28, &c.

Poſt. ch. 4.

Vide 1 Hale, 340. 4 Blac. Com. 88, &c.

IX. *In reſpect of Papiſts.*

§ 31. *Papiſts.* *Vide* 1 Hale, 287. 329, &c. 4 Blac. Com. 87. 103. 112. 115. 1 Hawk. ch. 17. ſ. 71, &c. *Vide* poſt. ſ. 24.

The ninth claſs of offences againſt the allegiance and duty of the ſubject to the crown relates to papiſts. Theſe, ſo far as they relate to religious matters, being in a manner grown obſolete, I ſhall barely refer to the mention which has already been made of them in the preceding chapter. They depend upon ſtatutes paſſed in the reigns of Elizabeth and James the firſt, and were conſequent upon the then recent ſeparation of the church of England from the ſee of Rome.

Theſe

Ch. II. § 31. *Papiſts.*

These animoſities are now happily buried in oblivion in a more enlightened age, and under better auſpices.

X. *High Treaſon, &c. againſt the Proteſtant Succeſſion.*

§ 32. *Proteſtant Succeſſion.* 12 & 13 W. 3 c 2. *Vide* 4 Blac. Com. 91. ante, ſ. 5. 1 Hawk. ch. 17. ſ. 85, &c. 1 Ann. ſt. 2. c. 17. ſ. 3. (1 W. & M. ſt. 2. c. 2. & 12. and 13 W. 3. c. 2.)

Another principal branch of this offence is that which concerns the preſent proteſtant ſucceſſion to the crown, as modelled by the act of ſettlement, to which I have before adverted. To ſecure which it is enacted by the ſtatute 1 Ann. ſt. 2. c. 17. ſ. 3. that if any perſon ſhall endeavour to deprive or hinder any perſon, being next in ſucceſſion to the crown for the time being, according to the limitations of the acts of ſettlement, from ſucceeding to the crown, and ſhall maliciouſly, adviſedly, and directly attempt the ſame by any overt act or deed; ſuch offence ſhall be adjudged high treaſon; and the offenders therein, their abettors, procurers, and comforters, knowing the ſaid offence to be done, on conviction or attainder ſhall be adjudged traitors.

6 Ann. c. 7. ſ. 1 & 2.

By ſtat. 6 Ann. c. 7. If any perſon ſhall maliciouſly, adviſedly, and directly, by writing or printing, maintain and affirm that any other perſon hath any right or title to the crown of this realm, otherwiſe than according to the acts of ſettlement, or that the kings of this realm, with the authority of parliament, are not able to make laws and ſtatutes to bind the crown and the deſcent thereof, ſuch perſon ſhall be guilty of high treaſon; and thoſe who maliciouſly and directly affirm the ſame, by preaching, teaching, or adviſed ſpeaking, ſhall be guilty of a præmunire. The ſt. 13 Eliz. c. 1. had before made a ſimilar proviſion.

17 Geo. 2. c. 39. *Correſponding with the Pretender, &c.*

By ſt. 17 Geo. 2. c. 39. If any ſubject of the crown ſhall hold any correſpondence with the ſons of the pretender, or knowingly with any perſon employed by them, or ſhall remit or pay any money for their uſe or ſervice, he ſhall be guilty of high treaſon. And any of the pretender's ſons attempting to land in Great Britain or Ireland ſhall ſtand and be adjudged attainted of high treaſon.

As a further ſecurity for the bleſſings of the proteſtant government and ſucceſſion, a variety of ſtatutes have from time to time been paſſed, requiring the oaths of allegiance and ſupremacy to be adminiſtered, ſometimes in the caſes of ſuſpected perſons, but principally in the inſtance of perſons taking public offices or truſts. Moſt of theſe have been already noticed in the preceding chapter; and further mention of them will occur when I treat of offences relating to ſuch offices.

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XI. *Seducing, or attempting to ſeduce others from their Allegiance and Obedience to the Crown.*

§ 33. *Withdrawing or attempting to ſeduce others from their Allegiance and lawful Obedience.*

Another and not leſs important claſs of offences than many of the foregoing is that of withdrawing or attempting to withdraw others from their allegiance to the crown, and their obedience to the king's lawful commands in their ſeveral ſtations. In all caſes falling within the legal notion of compaſſing the king's death, any attempt of this ſort, though no act be done in conſequence thereof, will amount, as was before ſhewn, to high treaſon, within the ſtat. 25 Ed. 3. But there are ſome other ſtatutes relative to this matter well worthy of particular notice. By the ſtat. 23 Eliz. c. 1. "If any one ſhall have or pretend to have power, or ſhall by any ways or means put in practice, to abſolve, perſuade, or withdraw a ſubject from his natural obedience to the crown, or to withdraw him, *for that intent*, from the religion eſtabliſhed by the queen's authority within her dominions to the Romiſh religion, or to move him to promiſe any obedience to any pretended authority of the ſee of Rome, or of any other prince, ſtate, or potentate, to be had or uſed within the queen's dominions, or ſhall do any overt act to that intent or purpoſe; or, if any perſon ſhall by any means be willingly abſolved or withdrawn as aforeſaid, or willingly be reconciled, or ſhall promiſe obedience as aforeſaid; every ſuch perſon, his procurers, and counſellors thereunto, being thereof lawfully convicted, ſhall ſuffer and forfeit as in caſes of high treaſon."

23 Eliz. c. 1. ſ. 2. Cro. Cir. Comp. 353.

It ſeems the bare pretending to ſuch a power, without any further endeavour to perſuade perſons from their allegiance, or the bare endeavour ſo to perſuade without pretending to ſuch power, is within the act.

1 Hawk. ch. 17. ſ. 78. Campion's caſe, Sav. 3.

By ſ. 3. of the ſame act, aiding or maintaining of ſuch offenders, knowing the ſame, or concealing any ſuch offence for 20 days after knowledge thereof, without diſcloſing the ſame to ſome juſtice of peace or other high officer, is made miſpriſion of treaſon.

Endeavouring to ſeduce Soldiers or Sailors.

In later times the ſame ſpecies of offence has taken another and not a leſs perilous ſhape; and it has been found neceſſary to

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37 Geo. 3. c. 70. Continued by ſeveral acts (laſtly by the ſtat. 40 G. 3. c. 16.) to ſix weeks after the commencement of the then next ſeſſions.

to paſs an act for the better prevention and puniſhment of attempts to ſeduce the army and navy from their duty and allegiance to his majeſty. For which purpoſe the ſtat. 37 G. 3. c. 70. has enacted, "That any perſon who ſhall maliciouſly and adviſedly endeavour to ſeduce any perſon ſerving in the king's forces, by ſea or land, from his duty and allegiance to his majeſty, or to incite or ſtir up any ſuch perſon to commit any act of mutiny, or to make or endeavour to make any mutinous aſſembly, or to commit any traiterous or mutinous practice whatſoever, ſhall, on conviction of ſuch offence, be adjudged guilty of felony without benefit of clergy." And, by ſ. 2. any ſuch offence, whether committed in England or on the high ſeas, may be tried before any court of oyer and terminer or gaol delivery for any county in England, as if the offence had been therein committed. Provided (ſ. 3.) that no perſon tried and acquitted, or convicted under this act, ſhall be liable to be tried again for the ſame offence or fact, as high treaſon or miſpriſion of treaſon, nor ſhall this act prevent the trial of any perſon as for high treaſon or miſpriſion of treaſon, who has not been tried for the ſame fact under this act.

Trial in any county.

Fuller's caſe, O. B. July, 1797, cor. Buller, J. MS. Jud.

Richard Fuller was indicted on the above act; and the indictment ſtated that the defendant, after the paſſing of the act, and whilſt it was in force, to wit, on, &c. with force and arms, at, &c. "feloniouſly did maliciouſly and adviſedly endeavour to ſeduce one Mathew Lowe, he the ſaid M. L. then and there being a perſon ſerving in his majeſty's forces by land, from his duty and allegiance to his ſaid majeſty; againſt the form of the ſtatute," &c. The ſecond count was, for that the defendant "feloniouſly did maliciouſly and adviſedly endeavour to incite and ſtir up the ſaid M. L., he the ſaid M. L. then and there being a perſon ſerving, &c. to commit an act of mutiny, and to commit traiterous and mutinous practices, againſt the form of the ſtatute," &c. After conviction a queſtion was reſerved for the opinion of the judges, Whether the indictment were good in this general form? or, Whether it ought not to have ſtated how and by what acts the priſoner endeavoured to ſeduce the ſoldier? The caſe involving ſome difficulty, it was afterwards argued in the exchequer chamber before all the judges (except Buller, J. who was indiſpoſed), and all thoſe who were aſſembled held the indictment to be ſufficient. This opinion was grounded upon conſideration of many precedents in Tremain

Vide the ſame caſe at large in the chapter on Form of Indictments.

Tremain of the like general import, and on the nature of the offence itſelf, created by the act of parliament in the terms laid in the indictment.

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XII. *Deſertion from the King's Forces.* § 34.

Deſertion.
3 Inſt. 86.
4 Blac. Com. 102.
1 Hale, 674, &c.
1 Hawk. ch. 48. ſ. 8, 9.
18 H. 6. c. 19.
2 & 3 Ed. 6. c. 2.
5 Eliz. c. 5.
7 H. 7. c. 1.
3 H. 8. c. 5.

The laſt offence more immediately againſt the allegiance due to the crown, though not amounting to high treaſon, is deſertion from the king's armies. This, whether by land or ſea, in England or abroad, is by ſeveral ancient ſtatutes, and particularly by the ſtats. 18 H. 6. c. 19. 7 H. 7. c. 1. 3 H. 8. c. 5. and 5 Eliz. c. 5. made felony, and, under certain circumſtances, without benefit of clergy; and the ſtat. 2 & 3 Ed. 6. c. 2. renewed by ſtat. 4 & 5 W. & M. c. 23. takes away clergy generally from deſerters in time of war. And the offence is made triable by the juſtices of every ſhire. Theſe ſtatutes are alſo levelled againſt ſome other inferior military offences, which are puniſhable as miſdemeanors; but they are altogether fallen into diſuſe, as well on account of the manner of retaining ſoldiers therein referred to being no longer adopted, as becauſe, ſince the annual acts for puniſhing mutiny and deſertion, a more compendious and convenient ſyſtem of military coercion has obtained.

1 Geo. 1. c. 47.

By the ſtat. 1 Geo. 1. c. 47. If any perſon (other than inliſted ſoldiere, who are already puniſhable by law for ſuch offence) ſhall, in Great Britain, Ireland, Guernſey, or Jerſey, perſuade or procure any ſoldier to deſert, he ſhall forfeit 40 l., to be recovered by any informer; and, if he has not property to that amount, or from the heinous circumſtances of the crime it ſhall be thought proper, the court before whom he is convicted ſhall impriſon him not exceeding ſix months, and alſo adjudge him to ſtand in the pillory for one hour in ſome market town next adjoining to the place where the offence was committed, in open market there, or in the market town itſelf where the offence was committed. By ſ. 2. the proſecution muſt be commenced within ſix months after the offence.

Of Accomplices, and when they may be put on their Trial. § 35.

All Principals.
1 MS. Sum. 100.
1 Hawk. ch. 17. ſ. 39. ch. 20.
2 Hawk. ch. 29. ſ. 3. 14.

I. It is generally ſaid, that in high treaſon, whether at common law or by ſtatute, there are no acceſſaries, but all are principals; and that whatever will make a man acceſſary before

Foſt. 341, 346. 1 Hale, 214. 239. 323 328. 613. 3 Inſt. 16. 138. Staunf. 40. Ke. 33.

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before or after in felony, will make him a principal in treaſon, and that nothing leſs will. And this is true, both with reſpect to new as well as old treaſons, if it be taken with reſpect to the offence itſelf, or the offender after conviction; but with two exceptions:

1ſt Exception as to certain Receivers.

1ſt, With reſpect to receivers of ſuch as counterfeit the ſeals or money; concerning whom there is a difference of opinion, whether they are guilty of more than miſpriſion of treaſon. Though in all other treaſons againſt the king within the ſtat. 25 Ed. 3. the offence of receiving a traitor knowingly makes the receiver alſo a traitor. I do not find the grounds of this diſtinction any where plainly ſtated. But what ſeems to have led to it is the opinion hinted at by Lord Coke, as entertained by ſome, that the offences of counterfeiting the ſeals and the coin were only felonies at common law; or if, according to the better opinion, they were treaſons, yet they were admitted to clergy, which Lord Hale ſays was formerly allowed in ſome caſes of treaſon; and certainly it was allowed in theſe. The laſt-mentioned author in another place, ſpeaking of counterfeiting the ſeals, ſays that at common law the offence was treaſon or felony, according to the king's pleaſure to indict for either. But even if the indictment were laid proditorie, it was treaſon of an inferior kind, a kind of petty treaſon, as he ſays, in compariſon to thoſe of compaſſing the king's death, levying war, or adhering to his enemies; which opinion is adopted by Mr. Juſtice Blackſtone. That there was a manifeſt diſtinction between them appears from the difference of the judgment at common law between the treaſons for counterfeiting the coin and ſeals, and thoſe of a ſuperior kind. It ſeems doubtful whether the ſtat. 25 Ed. 3. was not in one reſpect introductive of a new treaſon, which was not ſuch at common law, namely, as to the bringing of foreign money into the realm; but this is conſidered as ſubject only to the ſame judgment as other treaſons relating to the coin: and, at leaſt, in other reſpects, it muſt be conſidered that the ſtatute was not intended to enhance the crime or puniſhment of treaſon; for the judgment in the caſe of the coin remains as it did before at common law. If then the offences of counterfeiting the coin and ſeals, admitting them to be treaſons at common law, were clergyable; and that ſtatute was in general

Vide 1 Hale, 237. Sum. 20. 127. 1 Hawk. ch. 17. ſ. 55. 12 Co. 81, 2. Conier's caſe, Dy. 296. a.

3 Inſt. 16.

1 Hale, 181. 223, 4. And *vide* Barrington on the Statutes, 273. 1 Hale, 185. & 223. n.

4 Blac. Com. 89.

1 Hale, 223. 351.

Vide 1 Hale, 220, 227.

1 Hale, 224.

Ibid. 220, 1.

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general a reſtraining ſtatute, and not deemed to enhance the crime of treaſon beyond the letter of it; and as receivers cannot be indicted for the act of counterfeiting, &c. within the words of that ſtatute, by force of which they would be ouſted of clergy, as all other kind of aiders to treaſon may, but muſt be indicted ſpecifically for the receipt; ſo it may be argued that by force of that, which was a reſtraining ſtatute, receivers, who do not come expreſsly within the words or neceſſary implication of it, ſhall not thereby be ſubjected to greater penalties than they were liable to before the paſſing of it. And, as there is no ſuch thing at this day as clergyable treaſon, therefore, as Lord Hale ſays, though the more probable opinion may be that ſuch receivers are traitors (and ſo he ſtates them to be in one part of the Summary), yet the more merciful opinion is againſt ſuch a conſtruction. According to the latter opinion, the caſe of John Conier, who was convicted upon an indictment for traiterouſly receiving and comforting J. F., knowing him to have traiterouſly counterfeited the coin, &c. was conſidered to be only miſpriſion of treaſon; and he was at length pardoned. It is evident, however, from the ſtatement of the reporter, that the caſe did not paſs without doubt. And it muſt be admitted, that the beſt modern authorities have adopted the ſtricter conſtruction of the two; conſidering it as a neceſſary one reſulting from the general rule of law, that whatever will make a man acceſſary before or after in felony will make him a principal in treaſon; and that the ſt. 25 Ed. 3. having declared theſe offences to be high treaſon, the conſequence follows of courſe. It ſeems alſo to be greatly ſtrengthened by this conſideration, that otherwiſe the receipt of a common felon would be a higher offence than the receipt of a traitor of this kind, which appears to be incongruous. I have contented myſelf with ſtating how this queſtion ſtands, and ſhall forbear to advance any direct opinion of my own.

1 Hale, 238. Poſt.

Ibid. 237.

Vide infra. Conier's caſe, Dy. 296. a.

3 MS. Sum. 189. Burnet's MS. 20, 1. Sum. 127. *Sed vide* ib. 20. *contra.*

Vide 2 Hawk. ch. 29. ſ. 3.

As to what ſhall make a man a receiver or maintainer in treaſon, this follows the general rule in caſes of felony, to which I refer. Thus much, however, may be obſerved in reſpect of counterfeiters of the coin, that the bare uttering of falſe money, knowing it to be ſo, is not ſuch a maintaining of the counterfeiter as will amount to treaſon, but merely a miſpriſion: yet, if this were done with knowledge of the coiner, or in concert with him, it

Oliver's caſe, Kel. 33. Foſt. 342. 1 MS. Sum. 96. 1 Hale, 214. 1 Hawk. ch. 17. ſ. 56.

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was ruled in Oliver's caſe to amount to treaſon. If it were done in conſequence of an agreement with the counterfeiter before the counterfeiting, it makes the utterer an aider and abettor; if done after, he is a receiver and maintainer.

16 Geo. 2. c. 31. *Vide* ch. Offences againſt lawful Cuſtody.

The ſtat. 16 Geo. 2. c. 31. has further provided, that the mere aiding or aſſiſting any priſoner, convicted, attainted, or committed for high treaſon, to make his eſcape, though no eſcape be actually made, ſhall be liable to tranſportation for ſeven years.

§ 36. Ante, p. 94. *2d Exception on Wording of new Laws.* Foſt. 341. 1 Hale, 235, 6. 323. 328. 376.

2. The ſecond exception to thegeneral rule, *that all are principals in treaſon*, is where the ſpecial penning of any act, creating a new treaſon, leads to a different conſtruction; whereon it is to be obſerved that the conſtruction has in general been very favourable in excluding mere receivers or comforters after the fact, not named in ſuch act, from the penalties of high treaſon, if others who may be conſidered as acceſſaries before or at the fact are expreſsly named. This is founded upon the principle that expreſſum facit ceſſare tacitum. And it has been applied to ſtatutes where even the word *aiders* was uſed, when joined with ſuch words only as imported a conſent to the offence. But even in the caſe of new-created treaſon, he who reſcues the traitor from priſon, or ſuffers him voluntarily to eſcape from his lawful cuſtody, though not expreſsly named in the ſtatute, is yet a traitor by a neceſſary conſtruction of law upon the act itſelf; in the ſame manner as offenders of the like ſort were puniſhable at common law as traitors, and ſtill continue ſo though not named in the ſtat. 25 Ed. 3.

II. Next, *as to the evidence affecting accomplices.*

§ 37. *Evidence of acting in concert.*

As it happens more frequently in trials for this than for any other offence, that the acts of ſome of the conſpirators, in the abſence of the others, are given in evidence againſt them, it may be worth a more particular enquiry in what manner the rule is applied.

In this, as in other caſes founded in conſpiracy, the conſpiracy or agreement among ſeveral to act in concert together for a particular end muſt be eſtabliſhed by proof, before any evidence can be given of the acts of any perſon not in the preſence of the priſoner. And this muſt, gene-

rally ſpeaking, be done by evidence of the party's own acts, and cannot be collected from the acts of others, independent of his own; as by expreſs evidence of the fact of a previous conſpiracy together, or of a concurrent knowledge and approbation of each other's acts. But it may alſo be done by evidence of the acts of the priſoner, and of any other with whom he is attempted to be ſo connected, concurring together at the ſame time and to the ſame purpoſe or particular object. And here the evidence of a conſpiracy is more or leſs ſtrong, according to the publicity or privacy of the object of ſuch concurrence, and the greater or leſs degree of ſimilarity in the means employed to effect it. The more ſecret the one, and the greater the coincidence in the other, the ſtronger is the evidence of a conſpiracy. Where it appeared that there was a conſpiracy to levy war in the North-Riding of Yorkſhire, and that there was at the ſame time a ſimilar conſpiracy in the Weſt-Riding, in which latter only it took place; and it did not appear that thoſe in the North Riding agreed to the inſurrection in the Weſt, or that they knew any thing of it: it was agreed that the former could not be implicated in the acts of the latter. And yet the acts of both concurred at the ſame time to the ſame general object; namely, an inſurrection againſt the government. In the caſe of the Earl of Southampton, in that of Purchaſe, and ſome others which have occurred, there was an actual preſence and particular co-operation and aiding in the very acts of rebellion; and therefore they fell under a different conſideration.

Ch. II. § 37. *Accomplices. Evidence.*

Kel 19. 15 Car. 2.

Vide ante, p. 59. Foſt. 216.

§ 38. *Acts of one Conſpirator Evidence againſt all.*

But when the connection between the parties, by one or other of the means above mentioned, is once eſtabliſhed; of which the court muſt in the firſt inſtance judge, previous to the admiſſion of any conſequential evidence to affect the priſoner by the acts of others, to which he was not a party or privy; then whatever is done in purſuance of that conſpiracy by one of the conſpirators, though unknown perhaps to the reſt at the time, is to be conſidered as the act of all. This muſt, however, be underſtood with thoſe diſtinctions which obtain between principal and acceſſary in felony, in reſpect to the extent of their liability for each other's acts; ſo far as thoſe diſtinctions are applicable to treaſon and miſdemeanor, where all who take part are principals. If ſeveral

Kel. 19. 3 Inſt. 9.

Ch. II. § 38. *Accomplices. Evidence.*

perſons agree to levy war, ſome in one place, and ſome in another, and one party do actually appear in arms, this is a levying of war by all, as well thoſe who were not in arms as thoſe who were, if it were done in purſuance of the original concert: for thoſe who made the attempt were emboldened by the confidence inſpired by the general concert, and therefore their particular acts are in juſtice imputable to all the reſt. But ſuppoſe a conſpiracy to levy war and a plan of operations ſettled, and thoſe to whom the execution of them is committed afterwards ſee occaſion to vary in certain particulars from the original plan, which is accordingly done unknown to ſome of the conſpirators: yet I conceive that if the new meaſures were conducive to the ſame end, and that in ſubſtance the original conſpiracy were purſued, they all remain reſponſible for each other's acts.

Rex v. Horne Tooke, O. B. Nov. 1794. MS.

Upon the trial of John Horne Tooke for high treaſon, much of the ſort of evidence to which I have alluded was given. The indictment was for compaſſing the king's death; and the overt acts charged were in ſubſtance, that the priſoner with ſeveral others named conſpired to procure a convention to be called to uſurp the powers of government, depoſe the king, and ſubvert the conſtitution. In ſupport of which the counſel for the crown read the minutes, (being firſt verified to be true minutes of their proceedings,) of two ſocieties or voluntary aſſociations of perſons calling themſelves the ſociety for conſtitutional information, and the London correſponding ſociety, of the former of which the priſoner was a member: and alſo various letters addreſſed from ſimilar ſocieties in different parts of the country to the ſecretaries of theſe ſocieties, found in their poſſeſſion or in that of the members of the other ſocieties who correſponded with them. To the reception of this body of evidence there was ſome oppoſition by the counſel for the priſoner. But the court ruled that all theſe papers, and the acts of perſons engaged in the ſame deſign, were proper to be received as evidence of the general conſpiracy. Alſo the minutes of the proceedings of a number of other perſons who met at Edinburgh, and called themſelves a Britiſh convention for the reform of parliament, to which the ſociety for conſtitutional information had ſent a delegate, whoſe conduct they approved of, were read; thoſe minutes having been found on one Skirving who acted as ſecretary to that convention. Evidence was alſo given

Ch. II. § 38. *Accomplices. Evidence.*

given of a book called the ſecond part of the Rights of Man, by Thomas Paine, which the ſociety for conſtitutional information had made the ſubject of their thanks to the author, and of which they had promoted the diſtribution. The book was proved by one Jordan a bookſeller, who looking at it ſaid that he had publiſhed a book like it, and of the ſame type. This mode of proof was objected to; but the court overruled the objection, there being nothing of ſtrict identity in the inquiry. Evidence of the like ſort was given upon the other trials which took place about the ſame period.

Rex v. Hardy and Thelwal, O. B. Oct. Nov. and Dec. 1794. MS.

In William Stone's caſe before mentioned, evidence having been given to connect the priſoner with John H. Stone and Jackſon, and to ſhew that they were engaged in a conſpiracy to tranſmit to the French enemy an account of the diſpoſition of the people of England in caſe of an invaſion, the ſecretary of ſtate was called to prove that a letter of Jackſon's, containing treaſonable information of the ſtate of this country, had been tranſmitted to him from abroad, but in a confidential way, which made it improper for him to ſay by whom it was communicated. This evidence was objected to on the part of the priſoner, as the letter was not proved to have come to his hands, and he ought not to be affected by any but his own acts. But the court admitted the evidence; and Lawrence, J. obſerved, that in Tooke's caſe (above referred to) he had alluded to the caſes of Lord Stafford and Lord Lovatt, to ſhew that in order to prove a conſpiracy the acts of the different conſpirators were admiſſible, though acts to which the priſoner was no party: and that in this caſe evidence having been given from the acts of the priſoner himſelf, ſufficient for the jury to conſider whether he were not one of a treaſonable conſpiracy with Jackſon; if they ſhould be of that opinion, Jackſon's acts done in purſuance of that conſpiracy were in contemplation of law the acts of the priſoner. And Lord Kenyon, who had on the firſt day of the trial when the evidence was received relied altogether on the authority of the precedents in Hardy's caſe and Horne Tooke's caſe, on the next day declared himſelf perfectly ſatisfied on principle with the deciſion of the court: of which alſo the priſoner's counſel then ſignified their approbation. A paper was alſo read on the ſame trial found in the poſſeſſion of Jackſon, in the hand-writing of one Galliers a clerk

Rex v. W. Stone, at the Bar of the Court of B. R. Hil. 36 Geo. 3. MS. and 6 Term Rep. 527. Ante, p. 79. *Vide* poſt. S. C.

Ch. II. § 38. *Accompliceſ. Evidence.*

of the defendant, the reading of which was at firſt oppoſed; but afterwards the paper was agreed by the defendant's counſel to be evidence, when they found it contained parts of ſome other papers which the defendant had before obtained from other perſons. Another paper ſo found, which was alſo in the hand-writing of Galliers, was not allowed to be read, merely on that account, as evidence of its having been ſent to Jackſon by the priſoner, which was the ground on which it was offered by the counſel for the crown; becauſe it was properly obſerved it did not follow becauſe the defendant had employed Galliers to write one paper, therefore he had employed him to write this. What were the contents or nature of the paper did not appear, and there was no reſolution of the court on that ground. But if the paper had appeared to have related to the conſpiracy in queſtion, it muſt I conceive in that ſtage of the trial have undergone a different conſideration.

§ 39. *How far the general rule applicable with reſpect to trial.* 1 MS. Sum. 100, 1, 4. Foſt 312, 346. 2 Hale, 613.

But further, with reſpect to the trial, the general rule, *that all are principals in treaſon*, muſt be underſtood with more limitation. In regard to all acts of approbation, incitement, advice, or procuring towards that ſpecies of treaſon, which in judgment of law falls within the clauſe of compaſſing the king's death, or that of the queen or prince, there is no doubt but that the party may be tried before the perſon who acted upon ſuch incitement; becauſe the bare adviſing or encouraging to ſuch actions is in itſelf a complete overt act of compaſſing; and it is totally immaterial whether the attempt were ever made or not. The caſe of Somerville proves no more than this; though the rule is there laid down in general terms, that a perſon aiding or procuring a treaſon may be tried before the actor. But with regard to all other treaſons within the ſtat. 25 Ed. 3. if one adviſe or encourage another to commit them, or furniſh him means for that purpoſe, in conſequence whereof the fact is committed, the adviſer will indeed be a principal; for ſuch advice or aſſiſtance would have made him an acceſſary before the fact in felony: but if the other forbore to commit the act thus adviſed, the adviſer could not be a traitor merely on account of his ineffectual advice and encouragement; though his conduct would be highly criminal: for it cannot be ſaid that a perſon procured an offence which in truth was never committed.

(Somerville's caſe, 1 And. 109.) *Vide* 1 Hale, 223.

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Ch. II. § 39. *Accompliceſ. Trial.*

In theſe caſes therefore the treaſon is of a derivative nature, and depends entirely upon the queſtion, Whether the agent have or have not been guilty of ſuch treaſon? the proof of which can only be legally eſtabliſhed by his conviction, if he continue ameſnable to juſtice, or his attainder by outlawry, if he abſcond; unleſs the acceſſary chooſe to waive the benefit of the law, and ſubmit to a trial. [1 Hale, 623. 2 Hale, 224.]

The ſame rule holds in caſe of aſſiſtance or protection to a traitor after the fact in all caſes, or of permitting or procuring his eſcape from cuſtody. The party knowingly affording ſuch protection or contributing to ſuch eſcape, if the treaſon have been in fact committed, will be a principal traitor; but the fact of the principal's guilt muſt firſt be eſtabliſhed, and notice of it muſt alſo appear to have been received by him who may be called the acceſſary after. For it cannot be ſaid that a perſon received or ſuccoured a traitor knowingly, that is, with a knowledge of the treaſon's having been committed, when in truth either no ſuch treaſon was committed by him, or the receiver was altogether ignorant of it. But it would be ſufficient if a reſcuer knew that the party was committed for high treaſon, if in fact he were guilty of it: and though he were not guilty of it, yet it would be a great miſdemeanor to reſcue one under ſuch a charge, or ſuffer him to eſcape. And though the party himſelf, committed for treaſon and breaking his priſon, may be tried for that offence before he is convicted of the treaſon, yet it can only be for felony, upon the ſtatute de frangentibus priſonam. So if both be indicted together, the jury muſt be firſt charged to inquire of the guilt of the principal. 1 MS. Sum. 107, 102. Foſt. 342—346. 1 Hale, 235, 7, 8. 598. 2 Inſt. 590. Bro. Treaſon, 11. *Vide* Offences againſt lawful cuſtody, poſt. 1 Ed. 2. ſt. 2. 1 Hale, 238. 2 Hale, 223.

By a temporary act of the 14 Eliz. c. 2. the conſpiring, imagining, or going about unlawfully and maliciouſly to ſet at liberty any perſon committed for high treaſon or ſuſpicion thereof before indictment, and ſetting forth the ſame, or declaring it by expreſs words, writing, or other matter, was made miſpriſion of treaſon; but after indictment of the principal it was made felony ſo to conſpire, and declare ſuch conſpiracy; and after his conviction or attainder, it was made high treaſon ſo to do. On this Lord Hale obſerves, that under the ſtat. 25 Ed. 3. if there were only a commitment of the principal for treaſon, but no treaſon in fact committed by him, the ſetting him at liberty was no treaſon. And that the mere conſpiring to do ſo, though manifeſted by open 1 Hale, 326.

Ch. II. § 38. *Accompliceſ. Evidence.*

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Ch. II. § 19. *Accomplices. Trial.*

act, neither was nor is treaſon, though the party impriſoned were indicted or even attainted, but only a bare miſdemeanor puniſhable by fine and impriſonment; that is, provided the conſpiracy were not effected.

It is not equally clear how the rule, with reſpect to the courſe of trial, would be in the caſe of a *conſtructive* levying of war, namely, in regard to ſuch perſons as accidentally join others in the commiſſion of unlawful and traiterous acts, but without any knowledge of their previous traiterous deſign, which previous deſign alone conſtitutes ſuch acts to be high treaſon. That ſuch an aiding and ſupporting in the very act of rebellion does make the parties guilty of high treaſon, notwithſtanding their ignorance of the treaſonable intent, is clear. This was expreſsly determined in the caſe of Purchaſe before mentioned. The three diſſenting judges in that caſe grounded their opinion on the conſideration that it was not directly found that he aided and aſſiſted the ſaid traitors, though they agreed that the mob were continuing their act of treaſon when he joined them. The ſame doctrine was holden in the caſe of the Earl of Southampton, and thoſe who lent their aſſiſtance to Eſſex's rebellion; and alſo by a majority of the judges in the caſes of Appletree and Latimer, in the 20 Car. 2. But in each of theſe caſes thoſe who were actually privy to the deſign, and took a principal part in the very acts of treaſon, were indicted and convicted at the ſame time. Yet it muſt be conſidered that in this as in all other caſes grounded in conſpiracy, where ſeveral perſons take the ſame or different parts all tending to the ſame end, that of itſelf is primâ facie evidence that they all acted with the ſame deſign.

Purchaſe's caſe, ante, p. 74. and 8 St. Tr. 285. Trevor, C. J. Powell, J. and Price, B. MS. Tracy, 17.

Ante, p. 59.

20 Car. 2. Kel. 79. 78.

I ſhall next conſider where the trial is to be had, and the manner in which it is regulated.

Of the Trial.

§ 40. *Trial in what Place.*

1 & 2 Ph. & M. c. 10. ſ. 7. Dy. 132. a. 1 And. 105.

The ſtat. 1 & 2 Ph. & Mary, c. 10. enacts, "that all trials hereafter to be had, awarded, or made for any treaſon, ſhall be had and uſed only according to the due order and courſe of the common laws of this realm, and not otherwiſe. This offence is triable therefore, like all others, in the county where the offence is committed, that is, where the overt acts charged

charged in the indictment were done; but as I ſhall hereafter ſhew, it is enough if one overt act be proved in that county. The above act of Philip and Mary is a virtual repeal of the ſtatutes of the 26 and the 32 Hen. 8. c. 4. as to the trials of treaſons committed in Wales; for though the indictment is not properly the trial, yet it is ſo connected therewith that they cannot be ſeparated in this reſpect without ſpecial proviſion for that purpoſe; and it is alſo a repeal of the ſtat. 33 Hen. 8. c. 23. as to treaſons in general.

Ch. II. § 40. *Trial. Place.*

Poſt, ſ. 61. 1 Hale, 157. 282. *Wales.* Poſt. 238.

Treaſons committed on the high ſeas are triable before the admiral, by commiſſion under the great ſeal, by virtue of the ſtat. 28 Hen. 8. c. 15. which in this reſpect ſtands unrepealed by the ſtat. 1 Mar. ſtat. 1. c. 1.

Treaſons on High Seas. 28 H. 8. c. 15. *Vide* tit. Piracy. 1 Hale, 282.

As to other treaſons committed out of the realm, proviſion is made by the ſtat. 35 Hen. 8. c. 2. which enacts, "that all manner of offences being then already made or declared, or after to be made or declared by any law of this realm to be treaſons, miſpriſions of treaſons, or concealment of treaſons, and committed by any perſon out of this realm of England, ſhall be from thenceforth inquired of, heard, and determined before B. R. by jurors of the ſame ſhire where the ſaid bench ſhall ſit, or elſe before ſuch commiſſioners and in ſuch ſhire of the realm as ſhall be aſſigned by the king's commiſſion (*a*), and by lawful men of the ſame ſhire; in like manner and form to all intents and purpoſes as if ſuch treaſons, &c. had been committed within the ſame ſhire where they ſhall be ſo inquired of," &c. By ſ. 2. the privilege of peerage is ſaved.

Foreign Treaſons. 35 H. 8. c. 2. *Vide* 1 Hale, 284. The ſtat. 5 & 6 Ed. 6. c. 11. ſ. 6. is to the ſame effect. *Vide* 1 Hale, 294, 5, 6.

(*a*) Which commiſſion may be ſigned by the king's ſign manual, or iſſued by the chancellor by virtue of a warrant ſo ſigned. 1 Hale, 284.

A like proviſion is made with reſpect to Scotchmen by the ſtat. 7 Ann. c. 21. ſ. 5., who are triable before commiſſioners in any ſhire, ſtewarty, or county of Great Britain, as ſhall be aſſigned by the crown for all treaſons and miſpriſions of treaſons committed out of the realm of Great Britain.

7 Ann. c. 21. ſ. 5.

Neither the ſtat. 35 H. 8. c. 2. nor the 28 H. 8. c. 15., concerning the trial of treaſons on the high ſeas, are repealed by the ſtat. 1 & 2 Ph. & Mary, c. 10.; for that was only meant to reſtore the common law trial of treaſons within the realm, in which great innovations had been made in the reigns of *Henry* 8. and *Edward* 6. But there was no way regularly appointed at common law for the trial of

2 Hawk. ch. 25. ſ. 53. 1 Hale, 284. 316. Poſt. 238. Vaughan's caſe, 5 St. Tr. 38. 1 MS. Sum. 25. 3 Inſt. 24. poſt, p. 105.

Ch. II. § 40. *Trial. Place.*

treaſons committed out of the realm, as may be collected from the preamble to the ſtat. 35 H. 8. c. 2. Yet, if the court remove into a different county from that wherein the indictment was found, the trial muſt ſtill be by jurors returned from the firſt county, agreeable to the rules of the common law.

2 Hawk. ch. 25. ſ. 50.
1 Hale, 284.
1 And. 105.

One ſpecies of treaſon, namely, that of committing hoſtilities at ſea, under colour of a foreign commiſſion, or any other ſpecies of adherence to the king's enemies there, may be indicted and tried as piracy by virtue of the ſtats. 28 H. 8. c. 15. 11 & 12 W. 3. c. 7. and 18 Geo. 2. c. 30.

Vide tit. Piracy.

§ 41. *Foreign Dependencies.*

There are inſtances in the books of trials in England for high treaſon, committed by Iriſhmen in Ireland before the union; one of them in the caſe of an Iriſh peer, who objected without avail to the defect of trial by his peers. This has not paſſed without queſtion: but, ſince the legiſlative incorporation of the two countries, theſe caſes cannot be brought into precedent again. And very ſhortly before the union an act paſſed directly repugnant in ſpirit to thoſe authorities. This was the temporary act of the 39 Geo. 3. c. 44. ſ. 7, 8., by which it was provided, "that perſons ſent from Ireland to this country for ſafe cuſtody, charged with treaſon, ſuſpicion of treaſon, or treaſonable practices there, and perſons taken up in this country, on a charge of the ſame offences committed in Ireland, may be detained here in ſuch places as his majeſty may think fit: but that ſuch perſons, when entitled by the law of Ireland (if they had been in cuſtody there) to be tried or diſcharged, may apply to the court of B. R. or any judge thereof, who ſhall order them to be diſcharged, or ſent to Ireland to be dealt with according to law."

O'Rorke's caſe, 1 Hale, 155. 284.
Sir John Perrott's caſe, 1 St. Tr. 189.
Lord M'Guire's caſe, 1 St. Tr. 949.
Dy. 360. b. contra.
Vide 2 Hawk. ch. 25. ſ. 52.

It ſeems to me that the true queſtion in ſuch caſes is, whether by force of the relation between a foreign dependency and the parent ſtate, the legiſlative acts of the latter be or be not binding proprio vigore upon the inhabitants of the former. But with reſpect to all thoſe colonies and dependencies of the crown of England, which remain under its legiſlative control, all treaſons committed therein are undoubtedly triable here by force of the ſtat. 35 H. 8. c. 2. although they may have ſome ſpecial laws of their own applicable to criminals, and juriſdiction for their trials. This ſeems to ariſe

1 Hale, 156. 8. Colepepper's caſe, 1 Contr. 349.
Vide 4 Mod. 225
1 MS. Sum. 27.
2 MS. Sum. 445.
Vide Platt's caſe, O. B. 1777. Leach, 141.

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ariſe of neceſſity from the very nature of the tie of allegiance by which they are knit to the crown of England, unleſs there be any expreſs convention or ſtipulation that the ſubjects thereof ſhall only be judged by their own particular laws and tribunals. In Platt's caſe above referred to, it was ſaid by the court, that the ancient opinion was, that adherence to the king's enemies within the meaning of the ſtat. 25 Ed. 3. c. 2. might even before the ſtat. 35 H. 8. have been tried by the rules of the common law within the kingdom, though the aid and comfort were afforded out of it; but that every other ſpecies of treaſon committed without the realm could only be tried here under the proviſions of that act.

The ſtat. 35 H. 8. however, does not include Wales, which (c. 2.) is within the realm of England; nor Scotland, which is incorporated therewith by the act of union. During the rebellion, which began in Scotland in the year 1745, an (19 G. 2. c. 9.) act paſſed empowering the king to iſſue commiſſions for Foſt. 1. trying the rebels in any county of the kingdom, in the ſame manner as if the treaſons had been committed in that county. Alexander and Charles Kinloch, two of the rebels, The caſe of the Kinlochs, in who were Scotchmen born, and indicted for overt acts of 1746. Foſt. 15. high treaſon committed in Scotland, inſiſted upon the benefit 16. 23. of the act of union in a plea to the juriſdiction of the ſpecial commiſſioners in Surry; which was over-ruled upon the authority of the ſtatute under which the court ſat. Upon that occaſion Mr. Juſtice Foſter was of opinion, that the objection, if any, was available upon the plea of not guilty; for, unleſs the caſe of the priſoners was brought within the act, they would have been entitled to an acquittal for want of proving an overt act in the county where the commiſſion ſat, and from whence the jury came: or, as the merits of the objection appeared on the face of the indictment, which ſet forth the act of parliament, and laid the overt acts in Scotland according to the fact, it was alſo open to them to move in arreſt of judgment on the ſame ground.

This and other acts of the like kind were neceſſary, be- Burnet's MS. cauſe Scotland being by the act of union within the realm, Sum. 15. *Vide* Calvin's the Scotch rebels could not have been tried in England for caſe, 7 Co. 3. 15. acts of rebellion committed in a ſhire of Scotland without a ſpecial authority for that purpoſe.

As

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§ 42. *Mode of Trial.*

As to the Mode in which Trials for this Offence ſhall be regulated.

Regulations of Trial by ſtat. 7 W. 3. c. 3.

The legiſlature, for the ſafeguard of the ſubject under the weight of a ſtate proſecution, and the popular odium of ſo deteſtable a charge, have deemed it neceſſary to make ſpecial proviſion by ſeveral acts of parliament, particularly by the ſtat. 7 W. 3. c. 3. Theſe may be conſidered under the following heads of inquiry:

1. *To what Treaſons theſe Regulations extend.*
2. *Before what Tribunals.*
3. *Within what Time Proſecutions muſt be commenced.*
4. *When and what Objections may be taken to Want of Form in the Indictment.*
5. *By what Witneſſes and Evidence the Indictment muſt be ſupported.*
6. *To what Privileges the Defendant is entitled in preparing for and making his Defence.*

§ 43. *To what Treaſons extending.* 7 W. 3. c. 3. Foſt. 222. 224, 6, 7. 1 MS. Sum. 52. 83, 84. 2 MS. Sum. 477. Poſt. *Vide* ſt. 20 G. 2. c. 30. enabling perſons impeached of high treaſon, &c. *whereby any corruption of blood may be made*, to defend themſelves by counſel.

1. The act of the 7 W. 3. c. 3. for regulating trials in caſes of high treaſon and miſpriſion of treaſon, is confined to high treaſons (except in the particulars after noticed,) whereby any corruption of blood may or ſhall be made to the offender or his heirs, and to the miſpriſions of ſuch treaſons. The 1ſt and 2d ſections are expreſsly limited to ſuch treaſons, and all the ſubſequent clauſes, except the 10th and 11th, uſe words of reference. This muſt be intended of all ſuch treaſons, as well thoſe created by ſtatutes ſubſequent as before, where the corruption of blood is not ſaved by the ſtatute. And therefore, if high treaſon be committed on the high ſeas, the defendant in a proſecution under the ſtat. 28 H. 8. c. 15. will be entitled to the benefit of the act, notwithſtanding the doubt (though as Mr. Juſtice Foſter conceives, without juſt ground), whether a corruption of blood be wrought in that proceeding (*a*). But the caſes of

(*a*) It is probable that Mr. Juſtice Foſter had in view a caſe at an Admiralty Seſſions in July 1705, where Powell, J. ſaid, and which was agreed by the civilians, that it had been ruled by all the judges that the ſtat. 7 W. 3. extends to treaſons on the ſea, though they do not make a corruption of blood, and the purview of the ſtatute confines it to treaſons whereby any corruption of blood ſhall be made: for, ſaid Powell, J. thoſe words were expounded to relate to the treaſons of counterfeiting the coin, &c. which are there excepted. MS. Tracy, 254 & 258. *Vide* Vaughan's caſe, 5 St. Tr 37.

petty

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petty treaſon, of treaſons created by acts ſaving the corruption of blood, and of the treaſons expreſsly excluded by the 13th ſection of the act, of counterfeiting the king's coin (*a*), the great ſeal, privy ſeal, ſign manual, and privy ſignet, all ſtand upon the ſame foot as they did before the making of this act. By the ſtat. 6 *Geo.* 3. *c.* 53. the ſame caſes are excepted out of the ſtat. 7 *Ann. c.* 21. *ſ.* 11. after mentioned, which is auxiliary to that of W. 3.; and the ſame ſtatute of Geo. 3. alſo provides, that nothing in the ſaid ſtatute of Ann. ſhall extend to any indictment for high treaſon, or to any proceedings thereupon againſt any offender, who by any act or acts now in force is to be indicted, arraigned, tried, and convicted by ſuch like evidence, and in ſuch manner as is uſed and allowed againſt offenders for counterfeiting the king's coin.

Foſt. 227.

Vide poſt, f. 48.

The operation of the ſtatute of King William has been ſtill further confirmed by a late act, which took its riſe from the attempt of a wretched maniac of the name of Hadfield to aſſaſſinate his majeſty, by firing a piſtol at him as he entered the theatre at Drury-lane. The reaſon of the ſtatute, which is very ſhortly hinted at in the preamble, is obvious: it was thought incongruous that greater privileges and indulgence ſhould be allowed to a priſoner upon his trial under a charge for aſſaſſinating or attempting the life of his ſovereign, than if he had made the ſame attempt upon the life of any of his majeſty's ſubjects. Upon this occaſion the priſoner had the benefit of the ſtat. of King *William*, and ſoon after the legiſlature paſſed the following law:

By ſtat. 40 Geo. 3. c. 93. reciting "that it is expedient that in caſes of high treaſon in compaſſing or imagining the death of the king, and of miſpriſion of ſuch treaſon, where the overt act or acts of ſuch treaſon alleged in the indictment

40 *G.* 3. *c.* 93. *Exception in caſes of attempts on the king's perſon.*

(*a*) A doubt has been thrown out, Whether other treaſons relating to coin, not the king's coin, are within this exception; namely, the importing coin counterfeited to the ſimilitude of Engliſh coin, and the counterfeiting foreign coin made current here by proclamation; in both of which a corruption of blood is worked? Undoubtedly theſe ſtand *in pari ratione* with the exception as to the counterfeiting of the king's coin ſtrictly ſo called; and to avoid a palpable incongruity, which cannot be imputed to the legiſlature, ought to receive the ſame conſtruction. Beſides, in the latter caſe any coin which is current here by the king's authority may juſtly be deemed the king's coin, unleſs the apparent ſenſe of a ſtatute lead to a different conſtruction; the contrary of which is the caſe here. *Vide* Foſt. 226.

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ſhall be the aſſaſſination or killing of the king, or any direct attempt againſt his life, or any direct attempt againſt his perſon, whereby his life may be endangered, or his perſon may ſuffer bodily harm, the trial for ſuch offence ſhould not be different from trials for murder or wilful and malicious ſhooting; enacts, that in all caſes of high treaſon in compaſſing or imagining the death of the king, and of miſpriſion of ſuch treaſon, where the overt act or acts of ſuch treaſon which ſhall be alleged in the indictment ſhall be aſſaſſination or killing of the king, or any direct attempt againſt his life, or any direct attempt againſt his perſon, whereby his life may be endangered or his perſon may ſuffer bodily harm, the perſon or perſons charged with ſuch offence ſhall and may be indicted, arraigned, tried, and attainted in the ſame manner, and according to the ſame courſe and order of trial, in every reſpect, and upon the like evidence, as if ſuch perſon or perſons ſtood charged with murder: and none of the proviſions contained in the ſeveral acts of the 7 W. 3. and 7 Ann. reſpectively, touching trials in caſes of treaſon and miſpriſion of treaſon reſpectively, ſhall extend to any indictment for high treaſon in compaſſing and imagining the death of the king, or for miſpriſion of ſuch treaſon, where the overt act or acts of ſuch treaſon alleged in the indictment ſhall be ſuch as aforeſaid: but upon conviction on ſuch indictment, judgment ſhall be nevertheleſs given, and execution done, as in other caſes of high treaſon."

2. *Before what Tribunals.*

§ 44. *Before what Tribunals.* 7 W. 3. c. 3. ſ. 10, 11, 22. Foſt. 246. 1 Inſt. 156. b. Moor, 622. 4 Blac. Com. 262.

The ſtat. of W. 3. is not only applicable to examinations of ſuch treaſons before the ordinary courts of juſtice, but ſpecial proviſion is alſo made therein for a more equal and indifferent trial of peers in the like caſes. Before this time, upon the trial of a peer in the court of the high ſteward, the peers triers were a ſelect number returned at the nomination of the high ſteward. This was the real miſchief, though not that which is ſpecified in the act; and for remedy thereof it is enacted, "That upon the trial of any peer or peereſs for high treaſon or miſpriſion, all the peers who have a right to ſit and vote in parliament ſhall be duly ſummoned, twenty days at leaſt before the trial, to appear at ſuch

ſuch trial; and that every peer ſo ſummoned and appearing ſhall vote in the trial of ſuch peer or peereſs, having firſt taken the oaths appointed by the act." This clauſe refers to trials for treaſons generally, and is not confined to ſuch treaſons only as corrupt the blood. It is followed by a proviſo, that nothing in the act contained ſhall extend "to any impeachment or other proceedings in parliament in any kind whatſoever." But notwithſtanding the generality of theſe latter words it was clearly ſettled in the caſes of the Earls of Kilmarnock and Cromartie, and of the Lord Balmerino, that they do not extend to exclude the trial of peers in full parliament in the ordinary courſe of juſtice; but that they are entitled to all the benefit of the act. And, accordingly, upon the trial of thoſe peers for high treaſon, all the lords were ſummoned, and ſuch as appeared took the oaths appointed by the act.

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Vide Foſt. 222. 247. ſt. 7 W. 3. c. 3. ſ. 12. not extending to impeachment or other proceedings in parliament. *Vide* ſt. 20 G. 2. c. 30. ante, p. 106. Foſt. 247. 1 MS. Sum. 80. Caſes of the Lords Kilmarnock, Cromartie, and Balmerino.

3. *Within what Time Proſecutions muſt be commenced.*

§ 45. *Limitation of Time.* 7 W. 3. c. 3. ſ. 5. Foſt. 249.

By the ſame act of William no proſecution ſhall be for any of the treaſons or miſpriſions within the act, committed in England, Wales, or Berwick upon Tweed, "unleſs the indictment be found by a grand jury within three years after the offence committed;" "except (by ſ. 6.) where any perſon ſhall be guilty of deſigning, endeavouring, or attempting any aſſaſſination on the body of the king, by poiſon or otherwiſe," in which caſe the proſecution may be at any time.

The above limitation is, by the tenor of the ſtat. 7 Ann. c. 21., extended to treaſons of the like kind committed in Scotland. It was ſo underſtood at the time of the rebellion in 1715; and, therefore, after all the proceedings upon the ſpecial commiſſions in England were at an end, another ſpecial commiſſion went into Scotland, merely for the finding bills of indictment in the proper counties and ſtewarties, in order to prevent the limitation taking place.

4. *When and what Objections may be taken to the Form of the Indictment.*

§ 46. *Objections to form of Indictment.* 7 W. 3. c. 3. ſ. 9.

"No indictment for any of the offences aforeſaid, nor any proceſs or return thereupon, ſhall be quaſhed for miſ-writing, miſ-ſpelling, falſe or improper Latin, unleſs the exception be taken in court by the priſoner, or his counſel aſſigned,

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aſſigned, before any evidence be given in open court upon ſuch indictment; and no ſuch miſ-writing, miſ-ſpelling, falſe or improper Latin, after conviction on ſuch indictment, ſhall be cauſe to ſtay or arreſt judgment; but ſuch judgment may, nevertheleſs, be reverſed upon writ of error, as before the making of this act."

1 MS. Sum. 75. Foſt. 231. Rookwood's caſe, 4 St. Tr. 668. 674. Cranburne's caſe, ib 698.

It has not at any time been uſual to quaſh indictments for high treaſon, though it may be done. And though the act ſtates that exceptions, grounded on thoſe miſtakes, muſt be taken before evidence be given, it does not therefore follow that the defendant may take ſuch exceptions at any time before. The practice remains as it was at common law; and the conſtruction upon this act has been conformable thereto, that they muſt be taken before plea pleaded; and accordingly in the ſeveral caſes of Vaughan, Sullivan, and Layer, the court refuſed to hear ſuch exceptions after plea: though it is ſtill open to the priſoner afterwards to move in arreſt of judgment.

Vaughan's caſe, 5 St. Tr. 17. Sullivan's caſe, O. B. 1715. Layer's caſe, 6 St. Tr. 229. Poſt. f. 50.

1 MS. Sum. 75, 76.

Poſt. f. 60.

But though ſome words in the indictment are inſignificant or improper, yet if others, which are proper, are alſo uſed, the court will not quaſh the indictment, but will reject the former as ſurpluſage. Thus, in Layer's caſe, where the words were "ad ſeiſiend. capiend. et impriſonand." the words "*ad ſeiſiend.*" were rejected, as the ſubſequent words "*ad impriſonand.*" were ſufficient and proper. And it may be obſerved generally, that where ſeveral words are uſed in ſetting out an overt act of treaſon, one of which is improper; or if ſeveral overt acts are charged, and one of them defectively ſet out; the court will not quaſh the indictment, provided there be proper words ſufficient to ſupport it in the one caſe, or if any of the overt acts be well ſet out in the other: for otherwiſe the crown would be deprived of an opportunity of proving that which is well ſet out; and if any one overt act be well laid and proved, it is ſufficient.

Layer's caſe, 6 St. Tr. 237. *Vide* Lovick's caſe, 4 St. Tr. 717.

Poſt.

§ 47. *Witneſſes and Evidence.*

5. With reſpect to the fifth branch of inquiry propoſed, namely,

By what Witneſſes and Evidence the Indictment muſt be ſupported,

Poſt. 5. 53, &c.

I ſhall have an opportunity of conſidering it better in the next diviſion of this chapter.

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6. *As to what Privileges the Defendant is entitled in preparing for and making his Defence.*

§ 48. *Privileges of Defendant in his Defence.* 7 W. 3. c. 3. f. 2. *Counſel.* *Vide* Foſt. 228.

By the ſtat. 7 W. c. 3. f. 1. "All and every perſon and perſons indicted for high treaſon, whereby any corruption of blood may be made to ſuch offenders or their heirs, or for miſpriſions of ſuch treaſons, ſhall be admitted to make their full defence by counſel; and the court before whom ſuch perſon or perſons ſhall be tried, or ſome judge thereof, is required, immediately upon his or their requeſt, to aſſign to ſuch perſon or perſons ſuch and ſo many counſel (not exceeding two) as he or they ſhall deſire: to whom ſuch counſel ſhall have free acceſs at all ſeaſonable hours." And by ſtat. 20 Geo. 2. this privilege is extended to impeachments for treaſon corrupting the blood, which had before been excepted generally from the benefit of the act of William.

20 G. 2. c. 30.

7 W. 3. c. 3. f. 1.

Each priſoner is entitled, under the ſtat. of William, to have two counſel aſſigned him, although indicted jointly with others for the ſame treaſon. This was ſo ordered in the caſes of Rookwood and Lovick, who were indicted together for the Aſſaſſination Plot; and on the trials of Hardy and others at the Old Bailey, in 1794.

4 St. Tr. 663. 718.

MS.

Copy of Indictment. 7 W. 3. c. 3. f. 1. *To adviſe with Counſel.* Poſt.

The ſame act of William requires, that the perſon or perſons ſo indicted "ſhall have a true copy of the whole indictment (but not the names of the witneſſes) five days at leaſt before trial, to adviſe with counſel thereupon to plead and make their defence, his or their attorney or agent requiring the ſame, and paying the officer his reaſonable fees for writing thereof, not exceeding 5 s. for the copy of every ſuch indictment.

f. 7. *Copy of Panel.*

And by ſ. 7. of the ſame act, every ſuch perſon ſhall have a copy of the panel of the jurors who are to try him, duly returned by the ſheriff, and delivered unto him two days at leaſt before he ſhall be tried.

7 Ann. c. 21. ſ. 11.

But alteration has been made in ſome of theſe reſpects by the ſtat. 7 Ann. c. 21. which enacts, that after the deceaſe of the pretender, "when any perſon is indicted for high treaſon, or miſpriſion of treaſon, a liſt of the witneſſes who ſhall be produced on the trial for proving the ſaid indictment, and of the jury, mentioning the names, profeſſions, and place of abode of the ſaid witneſſes and jurors, ſhall be alſo

Liſt of Witneſſes, and Liſt of Jury, with their Profeſſions and Places of abode.

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alſo given at the ſame time that the copy of the indictment is delivered to the party indicted. And that copies of all indictments for the offences aforeſaid, with ſuch liſts, ſhall be delivered to the party indicted *ten* days before the trial, and in the preſence of two or more credible witneſſes."

Dougl. 591.

Theſe additional privileges were exerciſed for the firſt time on Lord George Gordon's trial.

2 Hawk. ch. 39. per tot. Foſt. 228. 231, &c. 1 MS. Sum. 59. 63. Charnock's caſe, 4 St. Tr. 563. Parkyn's caſe, 4 St. Tr. 630, 1.

None of theſe privileges of having counſel aſſigned to make a full defence, or of having a copy of the indictment, or of the panel, or a liſt of the witneſſes, were demandable of common right; though upon the trial of collateral iſſues, whether in caſes of treaſon or felony, as alſo upon a doubtful queſtion at law, counſel have always been aſſigned, upon the prayer of the priſoner, to addreſs the jury in the one caſe, and in the other to argue the point on his behalf. In Ratcliffe's caſe, who, having eſcaped after attainder, and been re-taken, was tried upon a collateral iſſue, whether he was the ſame perſon who had been before attainted; he was denied a copy of the record, but had the aſſiſtance of counſel, who obſerved fully on the evidence to the jury. The ſame courſe was taken in Johnſon's caſe. In the former the venire was awarded and returnable inſtanter.

Ratcliffe's caſe, M. 20 G. 2. B. R. Foſt. 40.

Johnſon's caſe, M. 2 G. 2. B. R. Foſt. 46.

§ 49. *How the Time computed.*

By neceſſary conſtruction the *ten days* mentioned in the ſtat. 7 Ann. muſt be reckoned after the bill is found, and before the arraignment of the priſoner; for till the finding of the bill there is no indictment, and upon the arraignment the priſoner muſt plead inſtanter. The ten days muſt in the inſtance of the copy of the indictment be reckoned excluſive of the day of delivery, and the day of arraignment; and, with regard to the copy of the panel, excluſive of the days of delivery, and of trial. By general practice too the time, at leaſt with reſpect to the copy of the indictment, has alſo been reckoned excluſive of Sunday, that not being a day on which the priſoner may be preſumed to be preparing for his defence; though the ſtatute does not require this caution, nor is it of abſolute neceſſity.

Time for giving Copies. Caſes of Rookwood, Lowick, and Cranburne, 4 St. Tr. 667. Ld. George Gordon's caſe, Dougl. 591. 1 MS. Sum. 59. MS. Tracy. Greg's caſe, poſt., and in the caſe of May, alias Smith and others, April 1708. MS. Tracy. Foſt. 2. 230. 250.

Though

Though theſe acts mention only "*the whole indictment*," yet the priſoner ought to have a copy of the caption delivered to him with the indictment; and it was ſo ordered at a meeting of all the judges upon the intended trial of Greg, for holding treaſonable correſpondence with France: for this is in many caſes as neceſſary to enable him to conduct himſelf in pleading as the other; and ſuch is now the conſtant practice. But after pleading it is too late to object either to the want of a copy or to any inſufficiency in it; for that admits it to be ſufficient.

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§ 50. *What are ſufficient Copies of Indictment.*

Foſt. 229, 30. Rookwood's caſe, 4 St. Tr. 668. 1 MS. Sum. 59. Greg's caſe, ante, f. 46.

12th Jan. 1707. MS. Tracy. Cooke's caſe, Salk. 634.

On the other hand, though the words of the ſtatute of William are, that the priſoner ſhall have a copy of the panel "duly returned by the ſheriff;" yet if the copy be delivered before the return of the precept it will be ſufficient, within the words and intent of the act, if the priſoner have the advantage of it in the time allowed by law before his trial, the intent of which was to give him an opportunity of preparing his challenges. This was ſo ruled in Rookwood's caſe, and alſo at a meeting of the judges on Greg's caſe.

Of Panel. Foſt. 230. 2 Hawk. ch. 41. ſ. 23. 1 MS. Sum. 60. MS. Tracy. Rookwood's caſe, 4 St. Tr 667. Greg's caſe, ſup.

In the caſe of Lord George Gordon the attorney-general moved the court of K. B. for a rule upon the ſheriff to deliver to the proſecutor a liſt of the jurors whom he intended to return on the panel, in order that the proſecutor might be enabled to deliver ſuch liſt to the priſoner; and the rule was made accordingly.

Ld George Gordon's caſe, H. 21 G. 3. Dougl. 591.

Where ſo many of the jurors were challenged that there were not left a ſufficient number, the court, which ſat under the commiſſion of gaol delivery at St. Margaret's Hill for the trial of the rebels in 1746, awarded ore tenus a new panel, and adjourned to another day, to give time for the priſoners to have copies of the panels purſuant to the ſtatute of William.

Foſt. 63, 4.

Previous to the trials of the late ſtate priſoners for high treaſon, it was found that the panel of the jurors, returned both to the court of gaol delivery and of oyer and terminer, was incorrect in not ſtating the profeſſions of the ſeveral jurors, and in other reſpects. Whereupon a motion was made on the part of the crown in the court of gaol delivery, which was then ſitting, that the ſheriff might have liberty to amend the panel, by correcting miſtakes and adding the profeſſions of the jurors returned; which was thereupon directed

Rex v. Thomas Hardy & others, O. B. Oct. 1794. MS. *Vide* tit. Jury, Tales.

I to

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to be done, upon advice among the judges who preſided; and copies of the panels ſo amended were delivered to the priſoners, purſuant to the directions of the ſtatute.

Layer's caſe, 6 St. Tr. 246.

In Layer's caſe, the name of a juryman was by miſtake written Longbotham inſtead of Longbothom, both in the original panel and in the priſoner's copy; but the ſound being the ſame, and written both ways, it was ruled to be ſufficient.

Stone's caſe, B. R. H. 36 G. 3. 6 Term Rep. 531.

In Stone's caſe, who was tried at bar for high treaſon, his counſel objected to one of the jurymen as being ill deſcribed; his place of abode being ſtated to be Grafton-ſtreet; and as it was ſaid, there being ſeveral ſtreets of that name, that there ſhould have been ſomething added to diſtinguiſh which Grafton-ſtreet was meant: but the objection was over-ruled.

Layer's caſe, 6 St. Tr. 323.

In Layer's caſe the court refuſed to order the venire to be read to the priſoner after his conviction.

§ 51. *Courſe of Proceedings after Bill found and before Trial.* Foſt. 1.

In the courſe of the proceedings under the ſpecial commiſſion in 1746, for the trial of the rebels, after the bills of indictment had been found againſt them, the priſoners were brought to the bar and informed that bills had been found againſt them, of which they ſhould ſoon have copies; which were accordingly delivered to them after the riſing of the court on the ſame day. A different courſe was purſued upon the late proceedings againſt Hardy and others for high treaſon. On the grand jury's returning the bill "found," Lord C. J. Eyre, who was the only judge in court, deſired to know whether there were any perſons preſent who were concerned as attornies or agents for the priſoners: if there were, he wiſhed it to be underſtood, that on application made either to the court of oyer and terminer or of gaol delivery at the Old Bailey, or to either of the judges in thoſe commiſſions, counſel would be aſſigned to the priſoners; and that ſuch counſel and the agents of the priſoners ſhould have proper acceſs to them. That his reaſon for mentioning this was, that the priſoners might not be haraſſed by being brought up to be informed that bills were found againſt them, and then be remanded. This was done in conſequence of a previous meeting at the Chief Juſtice's chambers, when the former precedent was conſidered, and the preſent mode agreed to be adopted as the more convenient. In truth, as far as reſpects notice of the indictment, all that the ſtatute either of William or of Anne requires is, that the priſoner ſhould have a copy of

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of it, which ſeems in itſelf to be an adequate notice, and ſufficient for all the purpoſes of the act. And ſo it was conſidered by one of the judges upon that occaſion. But the propriety of this kind of communication, where the priſoners are not brought to the bar, as they were in 1746, ſeems evident on another account, namely, to enable them if they pleaſe in the firſt inſtance to apply for counſel to be aſſigned to them, whom they may conſult as ſoon as they are ſerved with copies of the indictment. For the ſt. 7 W. 3. requiring ſuch copies to be delivered, aſſigns as a reaſon for it, to enable the priſoner "*to adviſe with counſel thereupon to plead and make his defence.*" Therefore, by fair conſtruction of the whole law upon this ſubject, ſuch opportunity ought to be afforded to the priſoner, as that he may, if he pleaſe, have counſel aſſigned to him ſo long before his trial as the law expreſsly requires that he ſhall be furniſhed with a copy of the indictment, namely, 10 days.

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§ 52. *Proceſs for witneſſes and examination on oath.* 7 W. 3. c. 3. ſ. 7.

Alſo by the act of King William the priſoner "ſhall have the like proceſs of the court where he ſhall be tried, to compel his witneſſes to appear at the trial, as is uſually granted to compel witneſſes to appear againſt priſoners in the like caſe;" and his witneſſes are to be heard upon oath. Though now by the ſtat. 1 Ann. c. 9. the priſoner's witneſſes in all caſes of felony as well as treaſon are to be heard upon oath.

1 Ann. ſt. 2. c. 9. ſ. 3.

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§ 53. *General words.* 3 Inſt. 4. 15. 1 MS. Sum. 76. 88. Foſt. 186. Cranburn's caſe, 4 St. Tr. 700. Salk. 633. Tucker's caſe, 4 Mod. 163—6. 1 Hale, 59. 77. 92. Dy. 145. a. Calvin's caſe, 7 Co. 6. b. 1 Hawk. ch. 17. ſ. 5. *Vide* poſt. ſ. 59.

Every indictment for high treaſon muſt lay the offence to have been committed *traiterouſly*, and ſhould conclude *againſt the duty* of the defendant's *allegiance*. A charge of doing any thing *ſeditiouſly* does not amount to a charge of treaſon. Where the traitor is a natural-born ſubject, it is uſual to lay the offence to have been done againſt his *natural* allegiance; but that is not neceſſary; for in the general word *allegiance* is compriſed every ſpecies of it; and the addition of the word *natural* is even faulty where the defendant is a foreigner. Yet if that fact appeared upon the face of the indictment, I conceive that the word *natural* might be rejected as repugnant and ſurpluſage.

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It is ſufficient if the ſpecies of treaſon, ſuch as compaſſing the king's death, be laid to be done traitorouſly: there is no neceſſity to charge every ſeparate overt act relating thereto to be ſo done. And it is ſufficient in ſtating ſuch ſeveral overt acts to couple them together by an *and*, without repeating *that the jury further preſent, &c.* or the like; but that form is the proper one in laying diſtinct ſpecies of treaſon.

1 MS. Sum. 5. 76, 77. Cranburn's caſe, 4 St. Tr. 701. Salk. 633.

In what manner an indictment may be quaſhed for inſufficiency I have already obſerved.

Ante, f. 46.

§ 54. *Particular treaſon muſt be laid, and overt acts.*

In every indictment for high treaſon upon the ſt. 25 Ed. 3. for compaſſing the death of the king, or of ſuch of his family as are therein named, or for levying war, or adhering to his enemies, the particular ſpecies of treaſon muſt be charged in the very terms of the ſtatute, being a declaratory law, as the ſubſtantial offence, and then ſome overt act muſt be laid as the means made uſe of to effectuate the traiterous purpoſe. For though the words of the ſtatute, "and thereof be proveably (i.e. on ſufficient proof) attainted by open deed," &c. come immediately after the clauſe of adhering to the king's enemies, yet they refer to all the treaſons before mentioned. The overt acts ſo laid are in truth the charge to which the priſoner muſt apply his defence. And therefore it is in no caſe ſufficient to allege that the priſoner compaſſed the king's death, or that he levied war againſt him, or adhered to his enemies; for upon a charge ſo general and indefinite, he cannot know what acts he is to defend. The particular acts of compaſſing and adherence muſt be ſet forth: and in the other inſtance it muſt be alleged that he aſſembled with a multitude armed and arrayed in a warlike manner, and levied war. The indictment againſt Purchaſe and Damaree for pulling down meeting-houſes, charged that they, with a multitude to the number of 500, to the jury unknown, armed and arrayed in a warlike manner with clubs and ſtaves, and other arms offenſive and defenſive, levied war againſt the queen. No exception was taken to the indictment by Damaree's counſel: but on behalf of Purchaſe it was objected, that there ought to have been an overt act laid of the treaſon; becauſe there being ſuch a variety of facts which amount to levying war, if the particular facts intended to be brought forward againſt the priſoner were not alleged, he could not know how to make his defence. But it was

1 Hale, 108. 121. 131 144. 149. Vaughan's caſe, 5 St. Tr. 18. 21, 2. Salk. 634. 3 Hawk. ch. 17. ſ. 29. Burnet's MS. 15. Ante, f. 6.

3 Hale, 150.

Caſe of Purchaſe and Damaree, O. B. Seſſ. before Eaſt. term, 3 Ann. MS. Tracy. *Vide* 8 St. Tr. 219. 267. Poſt. 213. S. C. ante, f. 17.

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was reſolved by all the judges, upon conference, that the indictment was good, and that levying war being an overt act of itſelf, no other overt act need be alleged. They agreed, however, that it ought to appear ſufficiently upon the indictment that a war was levied, and that they appeared in ſuch warlike manner; and that an indictment generally that A. levied war is not good. The indictments in Benſtead's caſe, and in the caſe of the apprentices for pulling down bawdy-houſes, were framed as this is. And they all reſolved that the ſtat. 7 W. 3. did not make the laying an overt act neceſſary where it was not ſo before.

5 St. Tr. 20, 1.

Vide 1 Hawk. ch. 17. f. 29. 3 MS. Sum. 64. Benſtead's caſe, Cro. Car. 583. Kel. 70. Vaughan's caſe, 5 St. Tr. 21.

As to what may be laid as overt acts of each reſpective treaſon, of compaſſing the king's death, levying war, and adhering to his enemies, I have before had occaſion to conſider at length, in treating of thoſe treaſons. And as to the other treaſons mentioned in the ſtatute, they ſeem to be overt acts of themſelves; and therefore require nothing more to be alleged than the facts themſelves conſtituting the treaſon.

Ante, f. 7, 8, 9, 12—22.

I have alſo had occaſion to notice, that one ſpecies of treaſon may be laid and proved as an overt act of another. The inſtances are unneceſſary to be repeated here. Yet it ſeems that no overt act can be given in evidence under any branch of treaſon, unleſs it be expreſsly laid as an overt act of ſuch treaſon; although it be laid as an overt act of ſome other treaſon in the ſame indictment.

Ante, f. 9. Poſt 197. 211. 2 Hale, 121, 2. 144.

§ 55. *Overt acts. Words.*

There are however ſome other overt acts to be examined, which being of a general nature, and requiring peculiar conſideration, I have reſerved to this place: theſe are words and writings.

Whatever doubts may have been formerly entertained, or however the law may have been ſtretched in arbitrary times to reach particular men, it is now ſettled that bare words not relative to any act or deſign, however wicked, indecent, or reprehenſible they may be, are not in themſelves overt acts of high treaſon, but only a miſpriſion, puniſhable at common law by fine and impriſonment, or other corporal puniſhment (*a*). They are frequently ſpoken in heat without any

Poſt. 200. 202. 204. 7. 346. 4 Blac. Com. 80. 123. Cro. Car. 117. 125. 332. 3 Inſt. 14. 140. 1 Hale, 111. 114—117. 315. 322, 3. 1 Hawk. ch. 17. ſ. 33, &c. 37. 39. Charnock's caſe, 1 Salk. 631. 4 St. Tr. 593. 1 MS. Sum 13, 14. Kel. 13. in margin. T. Ray. 408. Burnet's MS. 13.

(*a*) By a late temporary act of 36 Geo. 3. c. 7. ſ. 2. the operation of which ſo far as concerns this matter is now ſpent, ſeditious words or writings in hatred or contempt of the king or government were made puniſhable for the firſt time as other high miſdemeanors, and for the ſecond time by tranſportation for ſeven years.

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intention to act accordingly; they are ſtill more frequently miſtaken or miſ-remembered; and ſometimes it is to be feared the ſenſe of them knowingly perverted. It is one of the cauſes mentioned in the preamble of the ſtatute 1 Mar. ſt. 1. c. 1. for repealing all intermediate treaſons created ſince the ſtat. 25 Ed. 3. on account of the ſeverity of thoſe laws that made words only, without other fact or deed, to be high treaſon.

Hale, 309.

Crohagan's caſe, Cro. Car. 332.

But words may expound an overt act, and ſhew with what intent it was done. As in Crohagan's caſe, who when at Liſbon ſaid, that he would kill the king if he could come to him; and afterwards coming to England, the overt act of coming here was explained by thoſe words, and ſhewn to have been with intent to carry his purpoſe into execution; which ſeems to be the proper explanation of that caſe; though the ſpeaking the words, as well as the act of coming to England, in order to kill the king, were laid as diſtinct overt acts. On the other hand, words of advice or encouragement to deſtroy the king, and above all, conſultations for that purpoſe, are entitled to far different conſideration: they expreſsly relate to ſuch an act or deſign in contemplation; and come directly and properly under the notion of means made uſe of for that end. But the conſultation or incitement is the overt act, and the words are properly evidence of it. One charge againſt Coke, one of the regicides, was the ſpeaking as counſel againſt the king on his trial.

Foſt. 202.

Foſt. 204. 1 Hawk. ch. 17. ſ. 39.

Coke's caſe, Kel. 12. 23.

By the ſtat. 4 Ann. c. 8., re-enacted by ſtat. 6 Ann. c. 7., to affirm maliciouſly and directly, in preaching, teaching, or adviſedly ſpeaking, that there is any right or title to the crown, other than according to the act of ſettlement; or that the king and parliament have not a right to limit the ſucceſſion, is a præmunire. By ſ. 3. of the latter ſtatute it is provided, that no perſon ſhall be proſecuted, by virtue of the act, for any words ſpoken, unleſs information thereof be given upon oath to a juſtice of peace within three days after ſuch words ſpoken, and the proſecution be within three months after ſuch information: and that no perſon ſhall be convicted, by virtue of the act, for ſuch words, but by the oaths of two credible witneſſes.

4 Ann. c. 8. 6 Ann. c. 7. ſ. 2. *Vide* poſt. the next ſection.

13 Car. 2. c. 1.

The ſtat. 13 Car. 2. had before declared it a præmunire to aſſert, maliciouſly or adviſedly, by ſpeaking or writing, that both or either houſe of parliament have a legiſlative authority

thority without the king. And, generally ſpeaking, any words, acts, or writing, tending to vilify or diſgrace the king, or to leſſen him in the eſteem of his ſubjects, or any denial of his right to the crown, even in common and unadviſed diſcourſe, amount at common law to a miſpriſion, puniſhable by fine and corporal puniſhment.

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4 Blac. Com. 123.

§ 56. *Writings.*

Writings of this nature, inaſmuch as the very act betokens greater deliberation and malignity, may, I think, with ſtrict propriety, be urged more ſtrongly againſt the writer, as evidence of a treaſonable intent. But this muſt be taken with ſome reſerve. Writings plainly applicable to ſome treaſonable deſign in contemplation are clear and ſatisfactory evidence of ſuch deſign, although not publiſhed. If, ſay Mr. Juſtice Foſter and Mr. Juſtice Blackſtone, the papers found in Sidney's cloſet had been plainly relative to the other treaſonable practices charged in the indictment, they might have been read in evidence againſt him. The papers found in Lord Preſton's cuſtody, thoſe found, where Mr. Layer had depoſited them, and the intercepted letters of Dr. Henſey, were all read in evidence as overt acts of the treaſons reſpectively charged on them; for they were all written in proſecution of certain determinate purpoſes which were treaſonable, and then in the contemplation of the offenders: and ſuch papers being found in the cuſtody of the priſoners are admiſſible in evidence, without any proof of the hand-writing being theirs. Evidence of the ſame nature was received in the caſe of Tooke and others at the Old Bailey, in 1794; as alſo in Stone's caſe, who was tried at the bar of the court in Hilary 36 Geo. 3. And not only was evidence received of ſuch papers as were found in their own poſſeſſion, but alſo of ſuch as were found in the poſſeſſion of their accomplices; the connection between them being firſt proved. But writings which have no connection with any actual purpoſe of a treaſonable nature, while they remain unpubliſhed, will not amount to an overt act of treaſon; but the fact of publiſhing them is an overt act, and may be evidence of the treaſonable purpoſe which they import. And this I think upon the ſame principle as words of incitement to treaſon are evidence of ſuch incitement. Thoſe are addreſſed to ſome one or more individuals; theſe to the

Foſt. 198. 4 Blac. Com. 80.

Vide Gregg's caſe, 10 St. Tr. App. 7.

Layer's caſe, 6 St. Tr. 279.

Dr. Henſey's caſe, 1 Burr. 644.

Layer's caſe, 6 St. Tr. 279.

Tooke's caſe, MS. Stone's caſe, MS. and 6 Term Rep. 527.

Foſt. 198. 1 Hale, 112. 118. 1 Hawk. ch. 17. ſ. 31, 32. 3 Inſt. 14. Burnet's MS. 13. Twyn's caſe, Kel. 22, 23. 1 MS. Sum. 15. Sed *vide* 2 Roll. Rep. 89, 90.

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whole body of the people. But in both caſes it ſeems that the intent to incite ſhould appear to the ſatisfaction of the jury. So in all writings of a treaſonable nature it appears to me that not only they ſhould, in the judgment of the court and jury, import the treaſonable purpoſe in proof of which they are adduced in evidence, but that the jury ſhould be ſatisfied that the publication was made in furtherance of ſuch purpoſe. Though if the immediate tendency of ſuch writings be to cauſe the dethronement of the king, that would be proof of compaſſing his death; becauſe the law has adopted it as ſuch. In Twyn's caſe, a publication printed and diſtributed by him, exhorting the people to throw off their allegiance and put the king to death, was laid as the overt act of compaſſing the king's death; and the priſoner was convicted and executed. But by the ſtat. 4 Ann. c. 8. and 6 Ann. c. 7. it is made a ſubſtantive treaſon maliciouſly, adviſedly, and directly to affirm, in print or writing, that there is any right or title to the ſucceſſion of the crown, other than according to the act of ſettlement; or that the parliament has not a right to limit and bind the ſucceſſion. On this ſtatute Mr. Juſtice Foſter remarks, that no man is to be argued into the penalties of it by inferences and concluſions; but the criminal poſition muſt be *directly* as well as maliciouſly and adviſedly maintained in order to bring him within it.

Twyn's caſe, Kel. 22.

4 Ann. c. 8. 6 Ann. c. 7.

Foſt. 201.

Vide 26 H. 8. c. 13. 1 & 2 P. & M. c. 10. 1 Eliz. c. 5. 13 Eliz. c. 1. 13 Car. 2. c. 1. *Vide* 1 Hale, 261, 2.

Upon no other principle than what I have before advanced can the various temporary ſtatutes be accounted for, which have, from time to time, been paſſed, making the publiſhing by writing of diſloyal or ſeditious poſitions high treaſon. They were meant to repreſs and puniſh the very act of publiſhing ſuch writings; although the publiſher had no other deſign in ſo doing than to vent his ſpleen againſt the government, without any intention of ſtimulating others to any treaſonable act. For though it muſt be admitted that the argument is not ſo ſtrong in thoſe inſtances as in the caſe where bare words of the like import have by ſeveral temporary ſtatutes been made felony and miſdemeanor; yet the frequent recurrence of ſtatutes of the former kind upon ſo many occaſions and at different periods, do at leaſt imply great doubts in the legiſlature whether the publication of ſuch ſeditious writings did of itſelf, without any intention of the publiſher

Vide Foſt. 201. *Vide* ſt. 5 Eliz. c. 15. againſt fond and fantaſtical prophecies with intent to make inſurrection, diſturbance, &c.

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publiſher thereby to promote ſome treaſonable purpoſe in contemplation, amount to high treaſon.

§ 57. *Evidence of overt acts not neceſſary to be laid.*

But though ſome overt acts muſt be laid and proved in the inſtances before mentioned, yet it is not neceſſary that the whole detail of the evidence ſhould be ſet forth. The common law never required this exactneſs; and the ſtatute of William does not make it neceſſary to charge particular facts where it was not neceſſary before. It is ſufficient that the charge be ſtated with reaſonable certainty, ſo that the priſoner may be appriſed of the nature of it. Thus the laying, that A. and B. met and propoſed the means how to effect the king's death is ſufficient, without alleging the particular means upon which they agreed, which is matter of evidence.

1 MS. Sum. 13, 83, 87. Foſt. 194. 220. 1 Hale, 122. Lowick's caſe, 4 St. Tr. 722. Rookwood's caſe, 4 St. Tr. 696, 7.

The ſtatute of William directs, that "no evidence ſhall be admitted or given of any overt act that is not expreſsly laid in the indictment againſt any perſon or perſons whatſoever." This rule, though expreſsly preſcribed by the ſtatute, in order to ſuppreſs ſome abuſes that had appeared in the heat of proſecutions for treaſon, is in truth no more than the common law itſelf directs generally. For in no caſe is a priſoner bound to anſwer unprepared for every action of his life, but only to that which is the ſubject of the indictment againſt him: and therefore no evidence ought to be admitted in any proſecution but what immediately relates to the crime imputed. This I think was always the law as well as the juſt rule in this particular caſe; though it muſt be owned that ſome high authorities did ſeem to countenance a contrary doctrine; which juſtifies the caution and wiſdom of parliament in ſecuring the obſervance of the rule by a legiſlative proviſion. But the meaning of the ſtatute has often been attempted to be ſtrained the other way; and ſuch a conſtruction has been argued for as would, if it had prevailed, have made it neceſſary to ſet forth ſpecifically every fact intended to be proved at the trial. The true ſenſe of the clauſe is, that no overt act amounting to a diſtinct independent charge, though falling under the ſame head of treaſon, ſhall be admitted in evidence, unleſs it be expreſsly laid in the indictment: but an overt act may be given in evidence, though it be not expreſsly laid, or not well laid in the indictment, if it amount to direct proof of any overt act which is well laid. Thus in the caſe of Rookwood, who was

7 W. 3. c. 3 ſ. 8.

1 MS. Sum 73. Foſt. 246. 1 Hale, 121. *Vide* Kel. 8. the 5th reſolution on the trial of the regicides.

Vide Foſt. 246. Kel. 8. Hale, 121, 122.

Foſt. 245. 1 MS. Sum. 71. Vaughan's caſe, 5 St. Tr. 20, 1, 2. MS. Tracy, 23.

MS. Burnet, 16.

Rookwood's caſe, 4 St. Tr. 687. 690. 695, 696, 7.

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was indicted for compaſſing King William's death, two of the overt acts charged were, that he and others met and conſulted upon the proper means for way-laying the king, and attacking him in his coach; and alſo, that they agreed to provide 40 men for that purpoſe. Upon this indictment the counſel for the crown were allowed to give in evidence a liſt of the names of a ſmall party who were to join in the attempt, of which the priſoner was to have the command, with his own name at the head of the liſt as their commander: for though this circumſtance was not charged in the indictment, yet it amounted to a direct proof of the overt acts laid, viz. the meeting and conſulting together how to kill the king, and their agreeing to provide 40 men for that purpoſe. And as this fell under the ſame ſpecies of treaſon, it was very proper evidence. In Major Lowick's caſe, upon the ſame charge, the court declared, that even if the circumſtance of providing 40 men had not been laid in that indictment, the evidence would ſtill have been admiſſible; for it was a direct proof of the firſt overt act laid, the meeting and conſulting on the means of killing the king. So in the caſe of Layer, his correſponding with the pretender, though not laid in the indictment, and though made a ſubſtantive treaſon by the ſt. 12 & 13 W. 3. was admitted in evidence; becauſe it tended directly to prove one of the overt acts laid, namely, his conſpiring to depoſe the king, and to place the pretender on the throne. The like rule was obſerved in the caſes of Deacon and Sir John Wedderburne, upon the ſpecial commiſſion in Surry in 1746. In the former, his counſel objected to the receiving the evidence of one Craig a printer, touching the priſoner's obliging him to print the pretender's manifeſto at Mancheſter, and his publiſhing it there while the rebel army was in the town; and alſo to the reading of the manifeſto itſelf, becauſe it was an overt act not laid in the indictment: but it was anſwered by the court, that an overt act not laid may be given in evidence, if it be a direct proof of any which is laid. That one of the overt acts laid being the aſſembling and marching modo guerino in order to depoſe the king, and ſet the pretender on the throne; and it being proved that the priſoner was with the reſt of the rebel army at Mancheſter, and appeared in a hoſtile manner there; the fact of his cauſing to be printed and publiſhed the pretender's manifeſto there was ſtrong and direct proof

Major Lowick's caſe, 4 St. Tr. 722.

Layer's caſe, 6 St. Tr. 286, 7.

Caſes of Deacon and Sir John Wedderburne, Foſt. 9. 22.

(Ld. C. J. Willes, Abney and Foſter, Juſtices.)

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proof of his having joined the army for the purpoſe mentioned in the indictment. In Sir John Wedderburne's caſe the proof offered was, that he was appointed by the pretender's ſon collector of the exciſe, and that he did actually collect it in ſeveral places where the rebel army lay, by virtue of that appointment, for the uſe of the rebel army, with whom he was proved to have been preſent at divers places. The ſame objection was urged, and the ſtat. 7 W. 3. particularly relied on, but the court over-ruled it for the ſame reaſon given in Deacon's caſe.

On the other hand, if the overt act offered in evidence and not laid in the indictment be no direct proof of any of the overt acts charged, but merely go to ſtrengthen the evidence or ſuſpicion of ſome of thoſe overt acts by a collateral circumſtance, ſuch evidence cannot be admitted, notwithſtanding the opinion of Lord Hale to the contrary. As in the caſe of Captain Vaughan, who was indicted for adhering to the king's enemies on the high ſeas: The overt act laid was his cruiſing upon the king's ſubjects in a veſſel called the Loyal Clencarty; and the counſel for the crown offered to give in evidence, that he had ſome time before cut away the Cuſtom-houſe barge, and had gone cruiſing in that veſſel; but as that was no proof of his cruiſing in the Loyal Clencarty, the court rejected the evidence.

Foſt. 226. 1 MS. Sum. 72.

1 Hale, 121, 2. Vaughan's caſe, 5 St. Tr. 22.

§ 58. *What certainty ſufficient in laying and proving words and writings.* 1 MS. Sum. 86.

The rule abovementioned applies alſo as to the manner in which words or writings are to be laid in the indictment, and proved in evidence. Upon an indictment for compaſſing the king's death, in which a treaſonable declaration of the priſoner was alleged as an overt act, but was only ſet forth in ſubſtance, it was objected in arreſt of judgment, that the words of the declaration were not ſpecified; but the court unanimouſly held the indictment ſufficient. It was laid, that the declaration contained incitement, perſuaſions, and promiſes of reward to induce the people to join in rebellion, which was an overt act of the treaſon charged, namely, the compaſſing the king's death; and this being the ſubſtantial charge, it was ſufficiently ſet forth. In the caſes of Coleman and Lord Preſton, the ſubſtance only and purport of the letters found upon him were ſet forth. In Staley's caſe, the words were ſpoken in French, and the import of them ſtated in Latin. In Francia's caſe, the like rule was laid

Coleman's caſe, 2 St. Tr. 661. Lord Preſton's caſe, 4 St. Tr. 411. Staley's caſe, 2 St. Tr. 655. Francia's caſe, 6 St. Tr. 73—7. So Layer's caſe, 6 St. Tr. 330.

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laid down, that it is not neceſſary to ſet forth the letters themſelves of a treaſonable correſpondence; it is ſufficient to ſtate the ſubſtance and intent of them; for they are evidence of the ſecret compaſſing and imagination of the heart. In Dr. Drake's caſe it was ſaid by Lord Holt, that either the very words of a libel might be charged; but then the ſmalleſt variation which changed the word was fatal (*a*); or the ſubſtance and effect of them may be ſtated; and in that caſe if the ſenſe be rightly ſtated, it is ſufficient. And at the Cornwall Summer aſſizes in 1735, Lord Hardwicke ſaid that this was law; though it was ſafer to lay the indictment both ways, viz. in one count the very words, in another the ſubſtance and ſenſe of them only.

Dr. Drake's caſe, Salk. 660.

(*a*) The variance was *nor for not.*

Chapple's notes.

In the inſtances of Gregg and of Dr. Henſey, the letters reſpectively ſent by them with intent to convey intelligence to the enemy were ſtopped at the poſt-office. In the caſe of the former, who pleaded guilty, the indictment charged, that the letters were ſent from the place where the venue was laid into parts beyond the ſeas, to be delivered to the enemy. The indictment in Dr. Henſey's caſe with more propriety ſtated, that the letters were ſent from the place where the venue was laid, to be delivered in parts beyond the ſeas to the enemy.

Foſt. 218. Gregg's caſe, 20 St. Tr. App. 77. Dr. Henſey's caſe, 1 Burr. 642.

In the caſe of De la Motte, on ſuſpicion of the traiterous correſpondence which he was carrying on with the French government, then at war with this country, the packets were ſecretly opened, copies taken of their contents, and they were afterwards ſealed again and forwarded to their place of deſtination. Perſons who knew the priſoner's hand writing proved that the original letters were written by him; and the copies being proved to have been examined were admitted in evidence.

De la Motte's caſe, O. B. July 1781, cor. Buller and Heath, Js. MS. Gould, J.

§ 59. *Surpluſage need not be proved.*

If but one of ſeveral overt acts be well laid and proved, that is ſufficient. And if it be laid with circumſtances not neceſſary to conſtitute the act high treaſon they need not be proved, but may be rejected as ſurpluſage. As in the caſe of treaſon in levying war; if the overt act be an arraying in an hoſtile manner, and thereby killing divers of the king's ſubjects; if the arraying in an hoſtile manner be proved, that is ſufficient, without proof of the reſt. Or if it be, as in Lowick's caſe, that A. and B. met and propoſed the king's death,

1 MS. Sum. 13. Foſt. 194. 1 Hale, 122. Lowick's caſe, 4 St. Tr. 722. Layer's caſe, 6 St. Tr. 329, 330. Burnet's MS. 16. Vaughan's caſe, 5 St. Tr. 25, 6. Ante, f. 46.

death, and the particular meaſure by which they purpoſed to effect it be not well laid, this latter will not vitiate the reſt.

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§ 60. *Time and place.*

Neither is the time or place laid in an overt act charged in the indictment more neceſſary to be ſtrictly proved in this than in any other caſe, provided a time be laid before the finding of the bill, and a place be laid within the county. In Mr. Townly's caſe it was ſtrongly preſſed as an objection under the clauſe in the ſtat. of William, above referred to, that all the overt acts proved were ſubſequent to the time laid in the record. But all the court were clearly ſatisfied that ſuch ſtrictneſs was not neceſſary, but that it was ſufficient, as at common law, to prove the overt acts on any day before the finding of the bill. The ſame was ruled on Lord Balmerino's trial in the Houſe of Lords, by the advice of all the Judges.

Charnock's caſe, 4 St. Tr. 570. Townley's caſe, Foſt. 2, 9. Ante, f. 57. *Vide* 3 Inſt. 230. 1 Hale, 361. 2 Hale, 179. 292. Kel. 16. Ld. Balmerino's caſe, Dom. Proc. 9 St. Tr. 607.

§ 61. *Proof of overt act in the county where trial had.*

I have before had occaſion to treat of the place where treaſons, committed both abroad and at home, ſhall be tried, and how the law ſtands in that reſpect. But in all caſes of treaſon within the realm, ſome overt act muſt be proved in the county where the indictment is laid and the trial had, according to the courſe of the common law. But, as in the caſe of compaſſing the king's death, any act done towards the accompliſhment of that object within the county is ſufficient. Lord Preſton and two other gentlemen had procured a veſſel to tranſport them to France, but were ſtopped before they got out of the river; and their papers were ſeized. Amongſt thoſe papers was found a ſcheme, intended to be laid before the French government, for invading the kingdom. Lord Preſton inſiſted that no overt act was proved upon him in Middleſex, where all the overt acts were laid; for he was taken with the papers in the county of Kent. But the court told the jury, that if they believed that he had an intention of going to France with thoſe papers, for the purpoſe charged in the indictment, his taking boat in Middleſex, in order to go on board the veſſel, was a ſufficient overt act in that county. But after proof of an overt act in the county in which the treaſon is laid, evidence may be given of any other overt acts of the ſame ſpecies of treaſon in other counties. In this ſenſe the paſſage in Kelyng

1 & 2 Ph. & M. c. 10. f. 7. 2 MS. Sum. 186.

Ld. Preſton's caſe, 4 St. Tr. 447, 8. *Vide* Foſt. 196. Ante, f. 9.

2 MS. Sum. 485. Sir H. Vane's caſe, Kel. 14, 15. Parkin's caſe, 4 St. Tr. 639, 640 per Holt, C. J. Layer's caſe, 6 St. Tr. 260, 314, 319. Foſt. f. 65.

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muſt be underſtood, where it is ſaid to have been reſolved in Sir H. Vane's caſe, that the treaſon laid in the indictment being the compaſſing the king's death, which was in the county of Middleſex, and the levying war being laid only as *one of the overt acts*; though it were laid to be in Middleſex, yet a war levied by the priſoner in Surry might be given in evidence; for not being laid as the treaſon, it is a tranſitory thing which may be proved in another county: otherwiſe, if the indictment had been for levying war as a ſubſtantive treaſon.

Vide poſt. f. 65.

2 MS. Sum. 485.

But further, it is obſervable that Kelyng appears to confine the rule for admitting in evidence other overt acts of the ſame treaſon in other counties (after proof of an overt act in the county where the offence is laid) to the caſe of compaſſing the king's death; and it is ſaid that treaſon in levying war is local. But quære whether this diſtinction can be right. The caſe in *Kel.* 15. and the caſe of the Earl of Eſſex were indictments for compaſſing the king's death, and the levying war was laid as an overt act. And where is the difference, in point of reaſon or principle, whether the levying war be charged as the treaſon indicted, with overt acts laid of that fact, or whether the ſame facts be charged as overt acts of another branch of treaſon? In the caſe of Damaree, Purchaſe, and Willes, for high treaſon in conſtructive levying of war, evidence was given of houſes pulled down in London as well as in Middleſex, where the priſoners were indicted. In the proſecutions for the rebellions in 1745 and 1746 evidence was given of the march of the rebels, and of the part the priſoners bore in the rebellion in every county through which they paſſed; and yet theſe were caſes of indictments for levying war; but then ſome overt acts were proved in the county laid in the indictment. In Deacon's caſe in particular, evidence was permitted to be given of overt acts done in other counties, though all the overt acts were laid to be done in Cumberland; an overt act being firſt proved in that county.

Vide 8 St. Tr. 218, &c.

Deacon's caſe, 1746. Foſt. 8.

§ 62. *How Accomplices and Receivers are to be charged.*

As all accomplices in treaſon are principals, as much as thoſe who do the act, there is nothing to remark of difference between them in reſpect of the indictment: and I have before conſidered what evidence is neceſſary or ſufficient to connect

Ante, f. 35. 37.

connect them altogether, ſo as to let in proof of their reſpective acts againſt each other.

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But an indictment againſt a receiver of a traitor, after the fact, muſt charge him ſpecially with the receipt, and not generally, that he did the thing; which is otherwiſe in caſe of one who is a procurer, counſellor, or aſſenter.

1 Hale, 214. 238. Conier's caſe, Dy. 296. Foſt. 345. Ante, f. 35.

Witneſſes.

§ 63. *Witneſſes neceſſary to ſupport the Indictment.*

It is an eſſential requiſite on the trial of this offence, that the treaſon charged in the indictment ſhould be proved by two witneſſes. This ſtands on ſeveral acts of parliament, which I will firſt ſet forth, and then notice the conſtruction which has been made upon them.

The ſtat. 1 Ed. 6. c. 12. f. 22. enacts, "that no perſon ſhall be indicted, arraigned, condemned, or convicted for any treaſon, petty treaſon, or miſpriſion of treaſon, unleſs he be accuſed by two ſufficient and lawful witneſſes, or ſhall willingly without violence confeſs the ſame."

1 Ed. 6. c. 12. f. 22.

The ſtat. 5 & 6 Ed. 6. c. 11. f. 12. enacts, "that no perſon ſhall be indicted, arraigned, condemned, convicted, or attainted for any treaſons that then were or after ſhould be, unleſs thereof accuſed by two lawful accuſers (i. e. witneſſes); 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 accuſed to prove him guilty of the treaſons or offences contained in the indictment, unleſs the ſaid party arraigned ſhall willingly without violence confeſs the ſame."

5 & 6 Ed. 6. c. 11. *Vide* 1 Hale, 295. 7.

Then by the ſtat. 1 & 2 Ph. & Mary, c. 10. it is enacted, "that all trials for any treaſon ſhall be had and uſed only according to the due order and courſe of the common law." And by another ſtatute of the ſame ſeſſion it is enacted, "that every perſon who ſhall be accuſed or impeached of any of the offences contained therein (*a*), or of any other offence concerning the impairing, counterfeiting, or forging of any coin current within this realm, ſhall and may be indicted, arraigned, tried, convicted, or attainted by ſuch like evidence, and in ſuch manner and form, as hath been uſed and accuſtomed within the realm before the 1 Ed. 6."

1 & 2 Ph. & M. c. 10.

c. 11. f. 3.

(*a*) *i. e.* offences relating to the coin.

Laſtly, the 7 W. 3. c. 3. enacts, "that no perſon whatſoever ſhall be indicted, tried, or attainted of high treaſon,

7 W. 3. c. 3. f. 2. 4.

(ſuch

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(ſuch as have already been ſtated,) or of miſpriſion of ſuch treaſon, but by and upon the oaths and teſtimony of two lawful witneſſes, either both of them to the ſame overt act, or one of them to one, and the other of them to another overt act of the ſame treaſon; unleſs the party indicted and arraigned or tried ſhall willingly without violence in open court confeſs the ſame; or ſhall ſtand mute, or refuſe to plead; or in caſes of high treaſon ſhall peremptorily challenge above 35." And it further enacts and declares, "that if two or more diſtinct treaſons of divers heads or kinds ſhall be alleged in one bill of indictment, one witneſs produced to prove one of the ſaid treaſons, and another witneſs to another of the ſaid treaſons, ſhall not be deemed to be two witneſſes to the ſame treaſon within the meaning of the act."

Ante, f. 43.

f. 3. *Vide* poſt, f. 69.

There is alſo a proviſo, "that any perſon being indicted as aforeſaid for any of the ſaid treaſons or miſpriſions may be outlawed, and thereby attainted; and in caſes of the high treaſons aforeſaid, where by the law after ſuch outlawry the party outlawed may come in and be tried, he ſhall upon ſuch trial have the benefit of this act."

§ 64. *Two witneſſes to what treaſons, and before whom. Vide* 3 Inſt. 25. & 1 Hale, 298—300. Foſt. 232.

The firſt point to be noted upon theſe acts is the neceſſity of two witneſſes to prove the treaſon; which extends as well to the finding of the bill of indictment by the grand jury as to the trial itſelf in open court; not only as in law and reaſon they ſtand on the ſame footing, but by the very words of all the acts, that no perſon ſhall be *indicted*, &c.

Foſt 233, &c. 1 MS. Sum. 64, 5. K. l. 18. 49. 1 Hale, 298. 316. Sum. 262. *Sed vide* 3 Inſt. 26.

At common law, one witneſs was ſufficient in caſe of treaſon as well as on any other capital charge. The ſtat. 1 Ed. 6. c. 12. firſt required that in caſes of treaſon there ſhould be two witneſſes. This was followed by the ſtat. 5 & 6 Ed. 6. c. 11. to the ſame purpoſe. Little regard however was had to theſe ſtatutes in the times next ſucceeding the paſſing of them, upon an idea entertained and acted upon by ſome, that they were repealed by the ſtat. 1 & 2 Ph. & M. c. 10. which reſtored the common law trial to all treaſons. But it has been long ſettled, that the true object and operation of this laſt act, which was intended for the benefit of the ſubject, and not to deprive him of any advantage which he then enjoyed, was not to repeal the above ſtatutes of Ed. 6., but to reſtore the common law right of trial in the proper county, and the peremptory challenge of 35, which had been intrenched

(*Vide* 3 St. Tr. 56. 415. 645. 733.)

trenched upon by ſeveral acts in the reign of Henry the 8th. In this reſpect therefore the act of 7 W. 3. is only confirmatory of the law as it ſtood before.

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[32 H. 8. c. 4. 33 H. 8. c. 20. & c. 23.]

The ſtatutes of Ed. 6. I have already obſerved extended to all treaſons; but the ſtat. 1 & 2 Ph. & M. c. 11. by an expreſs proviſion excepts perſons accuſed of any of the offences contained therein, or of any other offence concerning "the impairing, counterfeiting, or forging of any coin current within the realm." It was agreed by all the Judges, that this act extends to all offences touching the impairing the coin, which ſhall be made treaſon afterwards; and therefore it was agreed, that one witneſs was ſufficient in clipping as well as counterfeiting the coin; though it appears that the opinion and practice had once been otherwiſe in the caſe of clipping. The ſtat. 7 W. 3., which only extends to treaſons working corruption of blood, does alſo expreſsly exclude the counterfeiting of the king's coin, great ſeal, privy ſeal, ſign manual, and privy ſignet: all theſe may be indicted and tried in ſuch manner, and by ſuch evidence, as before theſe ſeveral acts were made. The ſame proviſion is continued by the ſtat. 8 & 9 W. 3. c. 26. ſ. 7. and 6 Geo. 3. c. 53. ſ. 3.

T. Jones, 233. *Vide* 1 Hale, 221. ex Relatione Holt C. J. MS. Tracy, 262. *Vide* poſt, offences relating to the coin, tit. Witneſſes.

Ante, p. 106, 7. Gahagan's caſe, O. B. 1748, Leach, 39. Hale, 221.

Vide poſt.

It alſo appears to be the intent of the ſtat. 40 Geo. 3. c. 93. that where the overt act of treaſon alleged ſhall be the aſſaſſination or killing of the king, or any direct attempt againſt his life, or againſt his perſon whereby his life may be endangered, or his perſon may ſuffer bodily harm, proof by one witneſs ſhall be ſufficient; becauſe it enacts, that the party may be "indicted and tried in every reſpect and upon the like evidence, as if he ſtood charged with murder." And yet the ſtatute proceeds to negative ſpecially, that any of the proviſions in the acts of the 7 W. 3. and 7 Ann., touching the trial of treaſons, ſhould extend to the caſes above mentioned; whereas it appears that the neceſſity of two witneſſes in caſes of treaſon ſtands upon other acts beſides the two ſpecifically referred to.

40 Geo. 3 c. 93. *Vide* ante, f. 43.

§ 65. *Two witneſſes to what facts.*

It was fully eſtabliſhed by the opinion of all the Judges on the trial of Lord Stafford, as it ſeems to have been before underſtood in the caſe of the regicides, that one witneſs to one overt act, and another to another overt act of the ſame ſpecies of treaſon, were two ſufficient witneſſes within the ſtatutes of Edward 6. From that time the rule has prevailed. The ſtat. 7 W. 3. does not require that each overt act ſhall

Caſe of the Regicides, Kel. 9. Lord Stafford's caſe, 3 St. Tr. 204, 5. T. Raym. 407. Foſt. 235. 237. 1 MS. Sum. 66. Burnet's MS. 13. Parkyn's caſe, 4 St. Tr. 648. Ante, f. 57.

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be proved by two witneſſes, but only that the treaſon ſhall be ſo proved. And, by the expreſs direction of that ſtatute, either two witneſſes to the ſame overt act, or one witneſs to one and another witneſs to another overt act of the ſame treaſon, that is of the ſame ſpecies of treaſon, are ſufficient. But, if ſeveral overt acts be proved by different witneſſes ſingly, ſuch overt acts muſt relate to the ſame kind of treaſon, otherwiſe it is inſufficient by the expreſs proviſion of the ſtatute 7 W. 3. c. 3. which in this reſpect is only declaratory of what was the known rule of law before.

Ante, f. 64.

Overt acts in different counties. Ante, f. 61. 2 MS. Sum. 485. Deacon's caſe, Foſt. 9, 10. *Vide* Parkyn's caſe, 4 St. Tr. 639, 640.

In Deacon's caſe in 1746, it was expreſsly ruled by Abney and Foſter Juſtices, that after proof of ſome overt act charged within the county in which the indictment is laid, evidence may be given of other acts of treaſon tending to prove the overt acts laid, though done in a foreign county. And evidence of that ſort was given in almoſt all the trials for high treaſon at the ſame period. The like was done in moſt of the trials after the rebellion in 1715. But further, if one overt act be proved by one witneſs in the county in which the trial is had, which gives the grand jury juriſdiction to inquire, another overt act of the ſame ſpecies of treaſon proved by another witneſs in a different county will make two witneſſes within the ſtat. 7 W. 3. This was expreſsly ruled in the caſe of Layer: and was ſo adjudged at York by Ld. C. B. Parker and the Judges Burnet, Clarke, and Denniſon in the caſe of Jellias in 1746. Ld. C. J. North laid down the ſame doctrine in Gavan's caſe before the ſtat. of King William.

Layer's caſe, 6 St. Tr. 314. 319. 322. 2 MS. Sum. 485.

Rex v. Jellias, Oct. 1746, MS. Burnet, 13, 14.

Gavan's caſe, 2 St. Tr. 873.

Collateral facts. Foſt. 240, 2. 2 MS. Sum. 66. Vaughan's caſe, 5 St. Tr. 38. & Salk. 634.

But though the treaſon itſelf muſt be proved by two witneſſes in the manner above ſpecified; yet a collateral fact, not tending to the proof of the overt acts, may be proved by one witneſs only. As in the caſe of Captain Vaughan, where the priſoner having called witneſſes to prove that he was born in France, the counſel for the crown produced witneſſes to prove that he was born in Ireland; and the priſoner inſiſting that there was but one credible witneſs to that fact, Lord Holt ſaid that one witneſs was ſufficient; for the ſtatute of William relates only to the proof of the treaſon, and the overt acts of that treaſon; and the ſtatutes of Edward 6. are confined to the evidence for proving the priſoner guilty of the offence; which muſt alſo be underſtood of the overt acts. The ſame doctrine was holden in the caſe of Smith, upon an indictment for adhering to the queen's enemies on the high ſeas. He made alienage his

Rex v. Smith, alias May, Admiralty Seſſions, June, 7 Ann. Foſt 242.

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defence; and his confeſſion, that he was an Engliſhman born, was holden admiſſible by the judges Trevor, Powell, Powis, Tracy, and Bury; though his counſel inſiſted on the act of the 7 W. 3., which the court ſaid was intended to prevent a confeſſion being concluſive evidence of the very overt act, but not to take away that ſort of evidence of collateral matters.

Confeſſion.

§ 66. *Confeſſion.* 1 MS. Sum. 66. Foſt. 240, &c.

The ſtat. 7 W. 3. requiring two witneſſes to prove the treaſon has this exception, "unleſs the priſoner ſhall willingly and without violence, in open court, confeſs the ſame." The ſtatutes of Edward 6. make the ſame ſort of exception, but with this difference, that the words "in open court," are in thoſe ſtatutes omitted; as well as ſome further variation in the wording of the latter act of Edward 6., which I ſhall preſently have occaſion to remark. It appears that till the caſe of Francia in 1716, the conſtruction upon the ſtatutes of Edward 6. had been, that to warrant a conviction it was not neceſſary that the confeſſion ſhould be made in court, but it was ſufficient if it were made before any magiſtrate or perſon having authority, as a privy counſellor, to take ſuch examination; and were afterwards proved at the trial by two witneſſes, without any further proof of the overt acts. Lord Coke indeed ſeems to conſider that the exception is confined to an examination out of court, upon the conſtruction of the words "*without violence*," as meaning without any torture; and therefore, ſays he, by "confeſſion without violence" is not meant of a confeſſion before the judge; for he is never preſent at any torture; neither upon the priſoner's arraignment was ever any torture offered. This appears to be a very extraordinary conſtruction; more eſpecially as it is directly repugnant to the expreſs words of the auxiliary ſtat. of 5 & 6 Ed. 6. which are, that the two witneſſes ſhall, "at the time of the arraignment of the party accuſed," be brought before him to prove the treaſon, "unleſs *the ſaid party arraigned* ſhall willingly without violence confeſs the ſame." If indeed no other violence than the rack (the uſe of which was very unfrequent and always illegal) had ever been made uſe of to draw confeſſions from priſoners, there might be leſs reaſon for doubting this conſtruc-

Vide the caſe of Tong and others, 1662. 1 Hale, 304. Kel. 18, 19. 2 And. 67.

3 Inſt. 25. *Vide* Foſt. 241.

Vide Foſt. 244. n.

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Tong's caſe, Kel. 17, 18.

tion of the act, though the latter words would ſtill be repugnant to ſuch a conſtruction: but when we find ſo late as in 14 Car. 2. the advice of all the judges, which I preſume was found neceſſary to be given, that *no promiſe* ſhould be made, or *any threatnings* uſed, to the *witneſſes*, in caſe they did not give *full evidence* againſt the priſoners, we need not be ſurprized at the care of the legiſlature at all times both before and ſince to hinder any undue advantage being taken of the ſituation of a priſoner to wring a confeſſion from him; of which I fear the hiſtory of former times can furniſh but too many examples. The ſame words are to be found in the ſtatute of William, where it cannot be ſuppoſed that the legiſlature could allude to the torture. If the matter had undergone no further diſcuſſion, I ſhould have had but little heſitation in collecting the ſenſe of the legiſlature in theſe ſeveral acts of parliament. The words of the ſtat. 1 Ed. 6. might beget ſome doubt from their generality, in what manner the confeſſion intended to be excepted was to be made, and by what proof it was to be ſuſtained. This was meant to be cleared up by the ſtat. 5 & 6 Ed. 6. which followed ſo cloſe upon it, and which ſeems to me to have defined what confeſſion was intended to be excepted; namely, a confeſſion *at the time of the arraignment by the ſaid party arraigned* (*a*). Was it then intended to exclude evidence of any other confeſſion? In my apprehenſion, neither the words nor the obvious meaning of theſe acts have any ſuch tendency. For the rule, out of which the exception is taken, is the neceſſity of proving the treaſon by two witneſſes: the thing excepted is a confeſſion; which confeſſion therefore was not required to be proved by two witneſſes. No ſort of confeſſion could, conſiſtently with the principle of thoſe acts, be ſo intended to be excepted, but a confeſſion, as the ſtature of William in plain terms expreſſes it, a confeſſion *in open court*, ſuch as required no proof by witneſſes; which I conceive was expreſſed as plainly before by the ſtat. of the 5 & 6 Ed. 6. All other proof then of the treaſon was required to be confirmed by two witneſſes, except a proof in open court by the confeſſion

Vide 1 Hale, 514.

(*a*) So the ſtat. 1 & 2 Ph. & M. c. 10. ſ. 9. required that at leaſt two witneſſes examined to any treaſons in that act ſhall be brought forth before the party *arraigned*, if he require the ſame, and ſay openly in his hearing what they can ſay againſt him concerning the treaſons in the indictment, unleſs the party *arraigned* ſhall *willingly confeſs* the ſame *upon his arraignment*.

of

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Vide Kel. 18.

of the party; which of itſelf was ſufficient to warrant his conviction and attainder. There are no negative words in any of the ſtatutes, declaring that no evidence of any other confeſſion ſhall be received; but all other proof of the treaſon, including a confeſſion out of open court, muſt be made by two witneſſes. The queſtion then is ſimply this, Whether evidence of the confeſſion of the priſoner of any fact be or be not legal proof of the truth and exiſtence of ſuch fact? which I preſume cannot be denied. I am aware that the above reaſoning carries the admiſſion of this ſort of evidence beyond the rule which I before alluded to; and that it lets in as well evidence of confeſſion at any time, or upon any occaſion, as confeſſion upon an examination before a magiſtrate or other perſon having authority to take ſuch examination. I ſtop not to inquire what degree of weight is due to bare evidence of a confeſſion out of court, unſupported by any other proof of the fact; for that is foreign to the preſent inquiry: but I ſee nothing upon the face of theſe acts of parliament to warrant the diſtinction aimed at. I ſubmit the above reaſons with great deference to better judgments. But the concluſion which I have drawn has higher authority to ſupport it: for at a conference of the judges, preparatory to the trial of Francis Francia in 1716, it was agreed that the confeſſion, which the ſtatutes of Edward 6. intended to except, was only a confeſſion upon the arraignment of the party, which amounts to a conviction: and that the deſign of thoſe acts was merely to prevent any other confeſſion from operating as a concluſive and abſolute conviction: but that in all caſes the confeſſion of a criminal may be given in evidence againſt him; and that in caſes of treaſon, if ſuch confeſſion be proved by two witneſſes, it is proper evidence to be left to

Ante, p. 131.

Francia's caſe, 1 MS. Sum. 67. Foſt. 11 Burnet's MS. accord. This caſe is alſo alluded to in Foſt 241 but the reſolution there is not ſo fully reported as in the MS. (*a*).

(*a*) The report of this caſe in the MS. of Mr. Juſtice Burnet is in theſe words: "It was reſolved by the judges that though a confeſſion before a magiſtrate does "not take away the neceſſity of two witneſſes, as it did by the 5 & 6 of Ed. 6. "c. 11.; yet the ſtat. of 7 W. 3. c. 3. which requires two witneſſes [unleſs "there be a confeſſion, which amounts to a conviction, as a confeſſion in open "court does] has not altered the nature of evidence. That therefore a witneſs "to a confeſſion before a magiſtrate, or a witneſs to a confeſſion in converſation, "is a witneſs within both theſe acts. And if two ſuch witneſſes are produced, "and the grand and petty jury believe them, they are two ſufficient witneſſes to "indict and convict the party of the overt acts confeſſed to two ſuch witneſſes." Francia's caſe, 1719, MS. Report. "To this he adds that the caſe of Rex "v. Berwick, at the court of St. Margaret's, Southwark, Auguſt 1746, was "ſo ruled by the judges."

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a jury (*a*). By this conſtruction the ſtatute of William has not added any new reſtriction with reſpect to confeſſions, than was before implied in the ſtatutes of Edward 6.; and conſequently if confeſſions out of court might under thoſe ſtatutes be given in evidence, if proved by two witneſſes, the ſame kind of evidence is admiſſible now. But from Mr. Juſtice Foſter's manner of ſtating the opinion of the judges above referred to, and obſerving upon it, we may collect that he was not well ſatisfied with it. He ſays, that no regard was paid to the former authorities: and he alſo adverts to the caſe of Smith before mentioned; and to that of Willis, where it was admitted on the part of the proſecution, that a confeſſion out of court, though admiſſible in evidence, was not of itſelf ſufficient to ground a conviction: and where Ward, C. B. afterwards ſaid, that there muſt be two witneſſes to the treaſon notwithſtanding a confeſſion. Upon the whole it ſeems to have been the inclination of Mr. Juſtice Foſter's own opinion, that a confeſſion out of court would not warrant a conviction ſince the ſtatute of W. 3.; that that ſtatute, by the inſertion of the words "*in open court*," was intended to carry the neceſſity of two witneſſes to the overt acts a ſtep further than the ſtatutes of Edward 6. were at firſt conſtrued to have carried it; and that the intention of the legiſlature was to require two witneſſes to the overt acts themſelves in all caſes, except where the priſoner confeſſed the treaſon upon his arraignment in open court; and therefore that by that ſtatute no other confeſſion, though proved by two witneſſes, was ſufficient to convict the priſoner: the exception extending to a virtual excluſion of all other evidence of confeſſion, as a ſufficient ground at leaſt for conviction in itſelf. But the rule was certainly laid down otherwiſe in Francia's caſe before mentioned. And at a meeting of the judges upon Greg's caſe, which is cited in that of Francia, Holt, C. J. and the judges Powell, Powis, Smith, Dormer, and Bury were clearly of opinion, that the priſoner's confeſſion, though not made in court, might be given in evidence within the ſtat. 7 W. 3. Trevor was of a contrary opinion; Tracy doubted; and the Chief Baron, Blencowe, and Gould, Js. were abſent. On the trial of the rebels in the North in the

1 MS. Sum. 67—70.

Ante, f. 65. Willis's caſe, 8 St. Tr. 254, 5. 262, 3.

Ante, p. 113. Greg's caſe, 1 MS. Supra, 69. MS. Tracy, 262.

Q. of Price, B.

Caſe of Rebels in 1746, MS. ſupra.

(*a*) The ſame appears to have been the opinion of Lord Hale, 1 Hale, 306. and *vide* Kel. 18. in the caſe of the Regicides.

ſummer

ſummer of 1746, the judges in that commiſſion admitted the confeſſion of the priſoners to be given in evidence againſt them upon proof by two witneſſes. And in the caſe of John Berwick, at St. Margaret's Hill in the ſame year, Lord C. J. Willes and Sir Thomas Abney purſued the ſame doctrine, and over-ruled Mr. J. Foſter. In that caſe, however, other circumſtances were proved againſt the priſoner; ſuch as his appearing in the priſon where the rebel officers were confined apart from the common men after the ſurrender of Carliſle, and giving in his name as ſuch an officer to the perſons appointed to take the account; which facts were conſidered by the learned judges not merely as a bare confeſſion after the fact, but as evidence ariſing from the very ſcene of action. Finally, Mr. Juſtice Foſter himſelf ſays, that perhaps it may now be too late to controvert the authority of the opinion in 1716, warranted as it has been by later precedents; but he inſiſts that this evidence of confeſſion ſhould never be carried further than to a confeſſion made with ſolemnity and deliberation, before a perſon who has a proper authority to take it; which was an ingredient in the caſes of Francia and Greg. I have before ſubmitted ſome reaſons why I think ſuch a diſtinction cannot be ſupported. Thoſe advanced by Mr. Juſtice Foſter in ſupport of it, however well worthy of attention in point of the weight which ought to be given to this ſpecies of evidence, are yet general in their nature, and equally applicable to confeſſions in all other criminal caſes as in this of high treaſon. The reſolution of the judges in Francia's caſe is not confined to examinations before magiſtrates, but comprehends in the very terms of it confeſſions of every kind. The opinion of the two judges in Berwick's caſe, is, as far as it goes, againſt the diſtinction; not to mention the caſes of the rebels on the trials in the North in 1746, which from the nature of thoſe caſes were as little likely to be governed by it.

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Berwick's caſe, 1746, MS. ſupra, & Foſt. 10. 241.

Foſt. 243.

Standing Mute.

§ 67. *Mute.*

In all caſes of high treaſon ſtanding mute amounts to a conviction: and this is now extended to all caſes of felony and piracy by ſtat. 12 Geo. 3. c. 20.: and perſons ſtanding mute are excepted out of the benefits of trial conferred by the 7 W. 3. c. 3.

1 Hale, 228. 2 Hale, 317. 7 W. 3. c. 3. § 2.

Ch. II. § 68.

Clergy.

§ 68. *Clergy.* 2 Ed. 3. ſt. 3. c. 4. Foſt. 190, 1.

Concerning the puniſhment of traitors, the ſtatute de clero provides, that "clerks convicted for any treaſons or felonies, touching other perſons than the king himſelf or his royal majeſty, ſhall have the privilege of holy church." By force of this reſervation all new created treaſons, which in judgment of law are levelled at the perſon or royal majeſty of the king, are excluded, without ſpecial words for that purpoſe. Of this kind are the treaſons created by ſtatutes made for eſtabliſhing the regal ſupremacy, for avoiding doubts touching the ſucceſſion of the crown, and for eſtabliſhing ſuch ſucceſſion; for the puniſhing ſeditious and defamatory libels tending to raiſe ſuſpicions touching the king's title or government, or the royal iſſue. For all theſe have a direct tendency to diſturb the peace of the kingdom, and endanger the ſtability of the government; and, therefore, by a juſt, reaſonable, and neceſſary conſtruction, come within the above deſcription. But with reſpect to treaſons of a lower kind, ſuch as petty treaſon, or any other terminating in injuries to particular perſons, the rule is otherwiſe; and clergy can only be taken away by expreſs words.

Outlawry.

§ 69. *Outlawry.* 5 & 6 Ed. 6. c. 11. ſ. 7.

By ſtat. 5 & 6 Ed. 6. c. 11. ſ. 7. "All proceſs of outlawry againſt any offenders in treaſon, being refiant or inhabitant out of this realm, or in parts beyond the ſea, at the time of the outlawry pronounced againſt them, ſhall be as effectual in law to all intents and purpoſes, as if ſuch offenders had been reſident and dwelling within this realm at the time of ſuch proceſs awarded and outlawry pronounced. Provided (ſ. 8.) that if the party outlawed ſhall, within one year next after the ſaid outlawry pronounced or judgment given thereon, yield himſelf to the chief juſtice of England, and offer to traverſe the indictment or appeal whereon the ſaid outlawry ſhall be pronounced, then he ſhall be received to the ſaid traverſe; and being thereupon found not guilty by verdict, ſhall be acquitted and diſcharged of the ſaid outlawry, as though it had not been made." One outlawed, and retaken in England, was, notwithſtanding his being in cuſtody, allowed to be within the benefit of

Johnſon's caſe, M. 2 Geo. 2. B. R. *vide* 6 St. Tr. 583. n.

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of this proviſo; and, upon proving himſelf to have been beyond ſea at the time of the outlawry, it was reverſed, and he was admitted to a trial, and acquitted; and Armſtrong's caſe, which had been otherwiſe ruled by the odious advice of Lord C. J. Jefferies, was declared an unfit precedent to be followed.

Armſtrong's caſe, 3 St. Tr. 583. 3 Mod. 47

The ſtat. 7 W. 3. c. 3. ſ. 3. ſaves the benefit of the regulations thereby enacted on trials for treaſon to ſuch as, having been outlawed, do afterwards entitle themſelves to a trial on the merits.

Judgment.

§ 70. *Judgment.* 1 MS. Sum. 89. 2 MS. Sum. 586. 590. MS. Tracy, 281. 1 Hale, 187. 350, 1. 2 Hale, 396. 3 Inſt. 210. Sum. 268.

The judgment in high treaſon for a man in all caſes, except counterfeiting the coin, is to be drawn upon a hurdle to the place of execution, there to be hanged by the neck; to be cut down while he is alive, and his entrails taken out and burnt before his face; and his head to be cut off, and body quartered; and the head and quarters to be at the king's diſpoſal.

Foſt. 336. 2 Hawk. ch. 48. ſ. 3. 4 Blac. Com 92. Walcott's caſe, 4 Mod. 395.

In the entry of the judgment in treaſon it is only ſaid, that he ſhall be drawn to the place of execution, without adding "upon a hurdle," though it ought to be ſo pronounced: and thus it was pronounced by Holt, C. J. in the caſe of James Boucher, 27th February, 2. Ann. In the ſame caſe he alſo pronounced the judgment, that his privy members ſhould be cut off: this ought alſo to be omitted in the entry of the judgment: and both theſe things were omitted in the entry of the judgment againſt Boucher, by the opinion of all the judges of England. And Holt, C. J. there produced the records of the judgments againſt Somerville and Arden in the time of Queen Elizabeth, and againſt Sir Walter Raleigh, which accorded therewith. And he ſaid, that thoſe words, that the privy members ſhould be cut off, were not in any records that he had ſeen but thoſe in the caſe of the regicides. Nor indeed are they uſually pronounced.

Boucher's caſe, MS. Tracy, 295. See Tucker's caſe, 4 Mod. 162. Show. C. P. 186.

(1 And. 106.)

Vide the judgment in the caſe of Ld. Derwentwater and others, 6 St. Tr. 16.

For women the judgment was always the ſame in all caſes of treaſon, whether high or petty treaſon, namely, to be drawn to the place of execution and there burnt alive: but that is now

Women. Authorities ut ſupra.

Ch. II. § 70. *Women.*

30 Geo. 3. c. 48.

Vide tit. Homicide (Judgment.)

Coin.
1 MS. Sum. 45.
2 MS. Sum. 589.
MS. Burnet, 19.
1 Hale, 219, 220. 224. 351.
2 Hale, 397.
Sum. 45.
2 Hawk. ch. 48. ſ. 4, 5, 6.

Ante, ſ. 24.

now altered to being drawn and hanged, by the ſtatute 30 Geo. 3. c. 48. ſ. 1.; and by ſ. 4. the like forfeitures and corruption of blood ſhall enſue as before the act. And by ſ. 2. women convicted as principals or acceſſaries before in petty treaſon ſhall be liable to the further puniſhment inflicted by the ſtat. 25 Geo. 2. c. 37. on perſons convicted of murder.

In all caſes of treaſon reſpecting the coin, whether newly created ſuch or not, and ſo in petty treaſon, the judgment is only to be drawn on a hurdle and hanged; for that was the judgment before the ſtatute 25 Ed. 3. ſt. 5. c. 2., and was not intended to be altered thereby: and theſe being all offences in pari materiâ, and auxiliary to the original law, have the ſame judgment. And ſuch it ſeems was formerly the judgment for counterfeiting the great or privy ſeal; but now that is the ſame as in other treaſons.

1 Hale, 239. 354. 359, &c. 4 Blac. Com. 380, &c.

The conſequences of a judgment and the attainder conſequent thereon in treaſon, are, 1. Corruption of blood to the party attaint; by which he can neither inherit nor tranſmit lands by deſcent to his heirs. 2. Loſs of dower to his wife. 3. Forfeiture (*a*) to the king of all his lands, goods, and chattels: and this relates back to the time of the treaſon committed. 4. Execution. Without attainder, there is no forfeiture of lands, unleſs, ſays Lord Hale, where the Chief Juſtice of B. R. as ſupreme coroner, in perſon upon the view of the body of one killed in open rebellion records it, and returns the record into his own court; when both lands and goods are forfeited.

1 Hale, 342.

By the ſtat. 7 Ann. c. 21. it was provided, that after the deceaſe of the then pretender no attainder for treaſon ſhould extend to the diſheriſon of any heir, nor to the prejudice of any other perſon than the traitor himſelf for his life. The operation of that proviſion was by ſtat. 17 Geo. 2. c. 39. ſ. 3. further ſuſpended till the death of the pretender's ſons. But the proviſion never took effect, and is now wholly repealed by the act of the 39 Geo. 3. c. 93.

(*a*) *Vide* Chapter of Crimes (Felony, Forfeiture) for the general deſcription of property liable to forfeiture.

CHAP. III.

MISPRISION OF TREASON.

Definition.

§ 1. *Definition.*
1 Hale, 214. 371, 3. Sum. 127. 3 MS. Sum. 188. 3 Inſt. 24. Kel. 17. 21, 22. 4 Blac. Com. 120. 1 Hawk. ch. 20. 1 & 2 Ph. & M. c. 10. ſ. 8. *Vide* 1 Ed. 6. c. 12. ſ. 19. 1 & 2 Ph. & M. c. 10. ſ. 8. 1 Ed. 6. c. 12. ſ. 20. 5 & 6 Ed. 6. c. 11. ſ. 11. Ante, ſ. 7.

MISPRISION of treaſon is where a perſon knowing of a treaſon, but no party or conſenter to it, does not reveal it by a fair and full diſcloſure in convenient time to the king, or his privy council, or to ſome magiſtrate or perſon having authority to take the examination. And it is doubtful whether a declaration to any other than theſe is ſufficient. Such a concealment or keeping ſecret of any high treaſon ſhall, by the ſtat. 1 & 2 Ph. & M. c. 10. ſ. 8. and other prior ſtatutes, be now taken to be only a miſpriſion, though formerly it was deemed evidence of an aiding and abetting to the treaſon itſelf. But ſtill, under particular circumſtances, ſuch as I have before noticed, concealment may amount to evidence of aſſent to the treaſon, and ſo make the party a principal traitor.

Knowledge, to what Extent.
3 MS. Sum. 188. 1 Hale, 372. Kel. 21. MS. Tracy, 127.

The knowledge muſt be of the perſon of the offender as well as of the deſign or offence: for a man cannot be ſaid to conceal that which he does not know. Therefore if one ſay to *J. S.* that there will be a riſing, but do not acquaint him with the perſons or the nature of the plot, the concealing of this

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Ch. III. § 1. *Definition.*

is not miſpriſion. On the other hand, if the party have an explicit knowledge of an intended riſing, his merely telling another in a general way that there will be a riſing will not acquit him of miſpriſion.

Vide authorities at the beginning.

By neceſſary conſtruction of the ſtat. 25 Ed. 3. ſt. 5. c. 2. there can be no miſpriſion of any other treaſon than what is declared and enacted therein, (which includes petty treaſon,) unleſs created by ſome ſubſequent ſtatute in force. But if a new ſtatute create a new treaſon, it virtually and conſequentially makes the concealing thereof miſpriſion of treaſon. There are however ſome offences, made poſitive miſpriſions of treaſon by particular ſtatutes, which are noted in their proper places.

§ 2. *Trial and Puniſhment.*
Staunf. 37.
1 Hale, 374.
4 Blac. Com. 119.
1 Hawk. ch. 20.
Poſt. tit. Crimes, (Merger.)
3 Inſt. 14.
1 Hale, 300.
Ante, c. 2. ſ. 64.
2 Inſt. 49.
1 Hale, 374.

All treaſon, it is ſaid, includes miſpriſion of treaſon and more; and therefore that the king may indict a traitor for the miſpriſion only. And the trial, ſays Lord Hale, may be in a foreign county, under the circumſtances ſpecially provided for by the ſtat. 33 H. 8. c. 23., which in that reſpect is not repealed by the ſtat. 1 & 2 Ph. & M. c. 10. Two witneſſes however are neceſſary by the ſtatutes 1 Ed. 6. c. 12. ſ. 22. and 7 W. 3. c. 3. before referred to, both upon the indictment and trial of miſpriſion of treaſon, except in the caſes I have there noticed. For this offence a peer ſhall be tried by his peers, upon indictment found by a grand jury.

Puniſhment.
1 Hale, 374, 5.
4 Blac. Com. 120.
Sum. 128.

The puniſhment for miſpriſion of high treaſon is the loſs of the profits of lands during life, forfeiture of goods, and impriſonment during life: but miſpriſion of petty treaſon is only puniſhable by fine and impriſonment, as in caſe of miſpriſion of felony.

CHAP. IV.

OF OFFENCES RELATING TO THE COIN AND TO BULLION.

must be of Money current within the Realm. Felony if not current. - - § 6.

Diviſion of Offences relating to the Coin. § 7.

I. *Counterfeiting the Coin.* - § 8.

1. *What Coin.* - - § 8.

Deſcription of the ſeveral Species of Coin, the counterfeiting whereof is puniſhable, and in what Degree. *ib.*

i. *Gold and Silver Coin of the King.*

Counterfeiting thereof Treaſon by ſtat. 25 Ed. 3. ſt. 5. c. 2. 8 & 9 W. 3. c. 26. and 15 Geo. 2. c. 28. *ib.* Pardon on diſcovering others. *ib.* Trial and Evidence. *ib.* Limitation of Proſecution. *ib.* Seizure of baſe Coin. *ib.*

The Statutes confined to ſuch Coin. - § 9.

ii. *Gold and Silver foreign Coin.* - § 10.

Counterfeiting thereof, when current, Treaſon by 1 Mar. ſt. 2. c. 6. When not current, Miſpriſion of Treaſon by 14 Eliz. c. 3. and Felony by 37 Geo. 3. c. 126. ſ. 2. *ib.* Miſdemeanor at Common Law. *ib.* Procurers within the 1 Mar. ſt. 2. c. 6. and 14 Eliz. c. 3. but not mentioned in 37 Geo. 3. c. 126. *ib.*

iii. *Copper Coin of the Realm.* - § 11.

Counterfeiting thereof formerly a Miſdemeanor by 15 Geo. 2. c. 28. Now Felony by 11 Geo. 3. c. 40. as to Halfpence and Farthings; and by 37 Geo 3. c. 126. ſ. 1. extended to other Copper Money current by Proclamation. *ib.* Extend to Counſellors, Aiders, and Procurers. *ib.* Power to ſeize the Counterfeits. *ib.* Quære, as to Proſecutions on 37 Geo. 3. c. 126. whether optional for Felony or Miſdemeanor? *ib.*

2. *How the Offence of counterfeiting may be committed.* § 12.

i. By an actual Imitation of the real Coin; not merely an Attempt to do ſo: except by particular Statutes. *ib.* (and poſt, f. 13.)

ii. Under

ii. Under particular ſtatutes. Under 8 & 9 W. 3. c. 26. By marking the Edges of Coin with Letters, &c. By gilding, ſilvering, or caſing over with any waſh, &c. baſe Coin, or round Blanks, &c.; or gilding Silver Blanks to reſemble Gold Coin. Under 15 Geo. 2. c. 28. by making Shillings or Sixpences reſemble Guineas or Half Guineas, or making Halfpence or Farthings reſemble Shillings or Sixpences. - - - § 12.

The Similitude of the counterfeit to the real Coin a Queſtion of Fact; it need not be perfect: ſufficient if it be ſuch againſt which common Prudence cannot guard. - § 13.

What *a Colouring* within the Statutes. § 14.

Preparing Blanks with ſuch Materials as when rubbed will reſemble the real Coin. *ib.* Bringing to the Surface the latent Silver in a Blank of mixed Metal, by means of Aqua Fortis. *ib.*

3. *By whom the Offences may be committed.* § 15.

By Officers of the Mint as well as others. *ib.* Indictment on 8 & 9 W. 3. c. 26. muſt negative that Defendant was employed in the Mint, ſuch Perſons being excepted in enacting Clauſe. *ib.*

II. *Making, mending, or having any Inſtrument, &c. applicable to counterfeiting the Coin.* - - - § 16.

Offences of this Sort made High Treaſon by Stat. 8 & 9 W. 3. c. 26. ſ. 1. *ib.* So by ſ. 2. conveying ſuch Tools, &c. out of the Mint. Extends to Aiders and Abettors, and to Receivers and Concealers of ſuch Tools, &c. *ib.* Tools, &c. to be ſeized and produced in Evidence. *ib.* Proſecution within ſix Months, by 7 Ann. c. 25. ſ. 2. *ib.*

A Preſs or Mould for coining is a Tool or Inſtrument within the Statute of William. § 17.

How to be deſcribed in the Indictment. *ib.* & § 18.

What a ſufficient Excuſe for having ſuch in Poſſeſſion. - - § 17.

Reſemblance to a common Purpoſe of the Inſtrument to the Coin ſufficient. - § 18.

Of Offences relating to the Coin, and to Bullion.

§ 1. *Introduction. As to the coin.*

BEFORE I proceed to conſider of offences relating to the coin, I ſhall give a ſhort introductory account of the coin itſelf, ſo far as it may be uſeful to the preſent purpoſe.

Lord Hale has written ſeveral chapters upon this ſubject, wherein he has traced the hiſtory of the coin with ſufficient certainty at leaſt as far back as the time of Edw. 1ſt. From thence it appears, that the coin or money of this kingdom conſiſts properly of gold or ſilver only, with a certain alloy, conſtituting what is called *ſterling*, coined by the king's authority: and to ſuch money only does the ſtat. 25 Ed. 3. ſt. 5. c. 2. refer, which mentions "*the king's money*" generally. And therefore it ſeems, that where any ſtatute names *money* generally, it muſt be taken to have the ſame meaning. The copper coin, concerning which Lord Hale doubted, has ſince his time been protected from being counterfeited or impaired by ſpecial enactment. According to the above-mentioned ſtandard of ſterling, which had continued with little alteration at leaſt from the time of Hen. 3. to the period in which Lord Hale wrote, one pound of ſterling gold contained 23 carats 3 grains and a half of fine gold and half a grain

1 Hale, chap. 17, 18, 19, & 20. *Vide* poſt. ſ. 27. Cirwan's caſe. Co. Litt. 207. 1 Blac. Com. 278. 4 Blac. Com. 84. 88. 1 Hale, 189. 210, 211. 1 Hawk. ch. 17. ſ. 57. 1 MS. Sum. 91. 2 Inſt. 577. 3 Inſt. 17. 1 Hale, 212.

1 Hale, 189. 190, 1. 203. 209.

Ch. IV. § 1. *Introduction. As to the coin.*

a grain of alloy of copper, making together 24 carats of Troy weight. But for many years paſt the ſtandard has been fixed at 22 carats of fine gold and two carats of copper (*a*). And by the ſame ſtandard, every pound weight of ſterling ſilver muſt contain 11 ounces 2 penny-weights of fine ſilver and 18 penny-weights of copper alloy, making together 12 ounces. By an old ſtatute of the 17 Rich. 2. c. 1. no foreign coins of gold or ſilver are to run in any manner of payment within this realm, but are to be brought as bullion to the mint to be turned into Engliſh coin. The introduction of copper money into general currency is of comparative late date. Lord Hale refers to a proclamation juſt iſſued at the time he wrote, in 1672, whereby copper halfpence and farthings, ſuch as are now in circulation, were made current in certain caſes. Though indeed he makes mention of proclamation for farthing tokens before that time; which however he ſays were not uſed for current money but merely for tokens. But thoſe who counterfeited them or made inſtruments for that purpoſe were puniſhed in the Star-Chamber.

Vide 12 Geo. 2. ch. 26. poſt. f. 32.
& 14 G. 3. c. 42. ſ. 2.
17 Ric. 2. c. 1.
Vide poſt. p. 160.
1 Hale, 197.
1 Hale, 195.
1 Hale, 211.
2 Ruſhw. 202.

§ 2. *Legitimation and current value of coin.*

The coining and legitimation of money, and the giving it its current value, are the unqueſtionable prerogatives of the crown; though great doubt has been entertained whether by force of the ſtat. 25 Ed. 3. c. 13., the 9 H. 5. ſt. 2. c. 6., and other acts ſettling the ſtandard of ſterling, the king is not now reſtrained from altering it by increaſing the alloy. But at this day it is the leſs neceſſary to conſider the point, becauſe the impolicy of the act is alone ſufficient to prevent the attempt from being made; unleſs the marketable and relative value of gold and ſilver ſhould ſenſibly alter (*b*). Lord Hale, though he upholds the prerogative in this reſpect, ſays however, that it would be a diſhonour to the nation to put it in practice, and not ſafe to be attempted without parliamentary advice. But any coin once legally made and iſſued by the king's authority continues to be the current coin of the kingdom until recalled, notwithſtanding any change in the authority which conſtituted it. This recall may be by

1 Hale, 188. 191, 2, 3. 2 Inſt. 577. 3 Inſt. 17. 93. 1 Blac. Com. 278. 4 Blac. Com. 88.
1 Hale, 122.

(*a*) A pound weight of gold is coined at the Mint into 44 guineas and a half; an ounce therefore is worth 3*l.* 17*s.* 10½*d.* in ſilver. A pound weight of ſtandard ſilver is coined into 62 ſhillings, which is 5*s.* 2*d.* an ounce.—Smith's Wealth of Nations, 1 vol. 62, 3.

(*b*) About the years 1796 and 1797 the marketable value of gold and ſilver fluctuated in a manner unprecedented at leaſt in modern times.

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Ch. IV. § 2. *Introduction. As to the coin.*

proclamation; and long diſuſe may, I conceive, be evidence of it. But it has alſo been effected by act of parliament (*a*).

§ 3. *Evidence of legitimate current coin.*

The weight, alloy, impreſſion, and denomination of money made in this kingdom, are regularly ſettled by indenture between the king and the maſter of the mint; which has ſometimes been followed by a proclamation, as a more ſolemn manner of giving it currency. But this in general caſes is certainly not neceſſary; and in proſecutions for coining need not be proved. Neither is it neceſſary in the ſame caſe to produce the indentures, though it may be of uſe in caſe of any new coin, with a new impreſſion, not yet familiar to the people, to produce either the indentures, or one of the officers of the mint cognizant of the fact, or the ſtamps uſed, or the like evidence. By the act of the 37 Geo. 3. c. 126. ſ. 1. relative to the new copper coinage, the king's proclamation is made neceſſary; and therefore ſeems to be required in proof of any indictment upon that ſtatute. But in general, whether the coin, upon a queſtion of counterfeiting or impairing it, be the king's money, or not, is a mere queſtion of fact, which may be found upon evidence of common uſage or notoriety. But proclamation by the writ of proclamation under the great ſeal, or a remembrance thereof, is neceſſary to prove a coin current in the following inſtances: 1. In the caſe of foreign coin, which is otherwiſe to be conſidered as no more than bullion. None ſuch is now current in this kingdom. Mr. Juſtice Blackſtone intimates an opinion, which remains however to be judicially confirmed, that the currency mentioned and intended by the ſtatutes muſt be ſuch as is general, and extending to all payments. It may however be worthy of conſideration, when that caſe comes in judgment, that if the ſubject be in any caſe compellable by law to accept certain coin in payment upon a legal tender, his caſe is juſt as much within the reaſon of the law againſt counterfeiters, and he is as much entitled to the protection of it, as if the currency of that particular coin extended to all other caſes: Such a practice is equally "in deceit of our lord the king and of his people." And by a parity of reaſon I conceive, that an importation of foreign counterfeit money into this realm, with intent to utter it within the ſame or any of the dominions thereof, would fall within the ſtat. 1 & 2 Ph. & M. c. 11. although it were only

1 Hale, 192. 197. 213. 1 MS. Sum. 46.
Vide 17 Ric. 2. c. 1. ante, p. 148.
4 Blac. Com. 89.
25 Ed. 3. ſt. 5. c. 2.

(*a*) *Vide* Stat. 9 W. 3. c. 2. and 6 Geo. 2. c. 26.

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current in ſome part of the dominions and not throughout the realm at large. 2dly, A proclamation under the great ſeal is required to legitimate baſe or mixed coin below the ſtandard of ſterling. 3dly, To enhance the denomination or extrinſic value of a coin already current: as was done upon the enhancing of 20s. and 10s. pieces by K. James I. 4thly, To decry any coin before current: as was done not long ſince in the inſtance of the broad pieces of 25 and 23 ſhillings. The ſtat. 6 Geo. 2. c. 26., which made them payable at the mint and offices of revenue for one year after they were ſo decried, ſpecially provided that the counterfeiting of them during that year ſhould be high treaſon. 5thly, By the late act of the 37 Geo. 3. c. 126. f. 1., relative to the new copper coinage, the king's proclamation is made neceſſary, and therefore evidence of it ſeems to be required in proof of any indictment upon that ſtatute. But proclamation, where neceſſary, may be preſumed in length of time; eſpecially when ſupported by continual and approved uſage, which in itſelf affords a preſumption of a legal commencement.

Touching the Coin of Ireland and other foreign Members of the Crown.

§ 4. *Iriſh coin, &c.*

Before I quit this part of the ſubject, I muſt notice another queſtion of great importance and difficulty made in the books, reſpecting the money of Ireland, or any other independent member of the crown of England. I ſhall collect together in this place all that I find, or that occurs to me on the ſubject. It has been conſidered upon high authority that the counterfeiting of Iriſh money is high treaſon, within that branch of the ſtat. 25 Ed. 3. ſt. 5. c. 2. againſt counterfeiting *the king's money*; firſt, becauſe it comes expreſsly within the words of the act, which are of large ſignification. The coining of money is the excluſive prerogative of the crown: the king alone is entitled to the profit of it: it is part of his revenue: and all money coined and iſſued by his authority is *his money*. He may coin money here and iſſue it in Ireland, or coin it in Ireland and iſſue it here; and he is equally defrauded and injured whether his money iſſued there or here be counterfeited. All money coined and iſſued by the king's authority is neceſſarily and legally current throughout

1 Hale, 211. 221. 225. 317. 1 MS. Sum. 46. 91.

Ch IV. § 4. *Introduction. Coin of Ireland, &c.*

out all the dominions of the crown; unleſs the king ſhall by his proclamation ſpecially direct otherwiſe. And this it may be ſaid is not like a local law, affecting merely the intereſts of the ſubjects of this particular kingdom, which might perhaps require a narrower interpretation adapted to the nature of the ſubject matter, but a matter of general concernment pervading every part of the dominions of the crown of England. But, 2dly, There is another, and in my mind a ſtill ſtronger reaſon for this conſtruction; for it appears that the legiſlature themſelves muſt have ſo conſidered it. By the ſtat. 5 Eliz. c. 11. and 18 Eliz. c. 1. the clipping or impairing of any of the proper monies or coins of *this realm*, or *any the dominions thereof*, is made treaſon. Upon theſe ſtatutes, ſays Lord Hale, though Iriſh coin be not current in England, when of a baſer alloy, yet it is the king's coin; and clipping it in England is treaſon by thoſe acts. And it is not to be ſuppoſed that the parliament would make the clipping of Iriſh coin treaſon, unleſs the counterfeiting thereof were ſuch. This argument it muſt be owned has great weight: and upon another occaſion, which I have elſewhere adverted to, has been carried ſtill further. The force of it is alſo conſiderably ſtrengthened by the proviſions of the ſtat. 1 & 2 Ph. & M. c. 11., to which I ſhall preſently have occaſion to refer more particularly. It is further confirmed by the judgment in the caſe of mixed monies; where money which was coined by the queen for Ireland, and made current there by her proclamation in that country, but which was not current in England, was yet holden to be lawful money of England; and that payment of 100l. ſuch money, made payable in Ireland, was a good diſcharge of a bond conditioned for the payment of 100l. ſterling current and lawful money of England.

5 Eliz. c. 11. f. 2. 18 Eliz. c. 1.

1 Hale, 211. 221. 317.

Vide Poſt. 530, &c.

Poſt. p. 154-156.

Caſe of mixed monies, Davis' Rep. 18.

1 Hale, 195. 211.

Yet ſtill there appears this difficulty: if money be coined for the excluſive uſe of Ireland, and only circulated there, and it be different from the coin of England and not current here: or if the king iſſue a proclamation in Ireland legalizing ſome foreign coin there, which is not legalized nor current here, how is a ſubject of England reſident here to take cognizance of theſe acts, ſo as to be legally warned not to counterfeit or clip ſuch coin, unleſs ſuch currency be notified here by a proclamation under the great ſeal of England? In the caſe of money coined and iſſued here by the king's authority, it is true that it is not ſtrictly requiſite in proſecutions

Ante, f. 3.

1 Hale, 198. 327.

tions of this ſort to prove a proclamation giving it currency: yet that is the more regular way; eſpecially in the caſe of new coin iſſued with a new impreſſion, as was lately done in the new copper coinage of pennies, and which was made neceſſary by the expreſs words of the ſtat. 37 Geo. 3. c. 126. ſ. 1. "For how," ſays Lord Hale, "can men reaſonably know at firſt, whether this be the king's coin, without ſome ſuch public notification, where long uſe and cuſtom hath not made it familiarly known to them?" But with reſpect to coin heretofore iſſued and current in England, the ſubject has that kind of evidence which ſupplies the more regular notification by a proclamation, namely, the notoriety of the fact: but no ſuch notoriety exiſts in the inſtances I have put. With reſpect however to the clipping of foreign coin current here, I take it that by the very words of the ſtatutes of Elizabeth there muſt have been a proclamation in this country, legalizing the currency, in order to make the offence high treaſon in a ſubject of England. The ſtat. 5 Eliz. c. 11. makes it high treaſon to clip, &c. "the monies or coins of any other realm allowed and ſuffered to be current within this realm or the dominions thereof, at this preſent, or that hereafter at any time ſhall be the lawful monies or coins of this realm, or of the dominions thereof, or of any other realm, *and by proclamation allowed and ſuffered to be current here.*" The ſtat. 18 Eliz. c. 1., which was made to ſupply ſome omiſſions in the former act, is confined in like manner to "the monies or coins of any other realms *allowed and ſuffered to be current*, at the time of the offence committed, within this realm of England, or any the dominions of the ſame, *by the proclamation of the queen's majeſty*," &c. This I apprehend muſt mean ſuch a proclamation, whereof the ſubjects of either kingdom reſpectively are bound to take cognizance; namely, in this country by a proclamation under the great ſeal of England. But with reſpect to money coined by authority of the crown in Ireland, or elſewhere within the dominions of the crown, perhaps in ſtrictneſs the ſubject may be bound at his peril to take notice of its being the king's money; the very act of counterfeiting implying ſome knowledge of the coin which is counterfeited, more eſpecially if it bear any ſtamp or device, denoting the authority from whence it iſſued. It is clear, that in the caſe of counterfeiting or clipping the king's coin, made and iſſued here,

Ante, ſ. 3.
Poſt. ſ. 11.

5 Eliz. c. 11.

18 Eliz. c. 1.

here, the very act itſelf conſtitutes the treaſon; and there is no neceſſity to prove any particular knowledge in the party, that it was the king's coin; but only to ſatisfy the jury of the fact of its being ſo: of which notoriety indeed is one and the moſt general medium of proof; but it may alſo be proved by the officers of the mint or any other who has a knowledge of the fact. And indeed in the caſe of old coin, which has gradually fallen into diſuſe, though ſtill the legal coin of the king, there can be no general notoriety of the fact. There is leſs ground for complaining of hardſhip from want of notice at the preſent day; becauſe the counterfeiting of any gold or ſilver coin, whether of this or any other realm, or whether current or not, is highly illegal; being in no inſtance leſs than miſpriſion of treaſon by the ſtat. 14 Eliz. c. 3., or felony by the ſtat. 37 Geo. 3. c. 126.

§ 5. *Importing counterfeit Iriſh coin into the realm.*

The ſame ſort of queſtions occur upon the other branch of the ſtat. of Ed. 3. concerning the bringing of falſe money into the realm counterfeit to the money of England. Firſt, What is meant by *the money of England?* Is it ſomething different from *the king's money*, or the ſame? It certainly muſt appear ſtrange, if for the reaſons before adverted to the legiſlature intended to make the counterfeiting of any coin, made and iſſued by the king in any of the dominions of the crown, high treaſon, though not the proper coin of England, nor current here, that they ſhould have altered their phraſe in this branch of the ſtatute, concerning the importation, from "the king's money" to "money counterfeit to the money of England:" and from thence it might be argued, that theſe latter words explain the former ones, and ſhew that the money meant by *the king's money*, was *the money of England*; ſuch as in the words of the ſtatute was calculated *to merchandize or make payment with*: in other words, ſuch as was *current* in England, and of which the ſubjects of this country muſt be taken to be cognizant. This conſideration might deſerve ſome weight if the queſtion were new. It is indeed ſaid in general terms in the books, that the importation under the ſtatute of Ed. 3. muſt be of money counterfeit to the ſimilitude of the money of England: but theſe are merely the words of the ſtatute, and not given as an interpretation of them. The queſtion ſtill remains, What is meant *by the money*

Staunf. 3.
3 Inſt. 18.
1 Hale, 227.
1 Hawk. ch. 17. ſ. 65.

Ch. IV. § 5. *Introduction. Coin of Ireland, &c.*

money of England? and whether any thing more was meant than to diſtinguiſh ſuch money from the money of foreign realms? In order to make the law conſiſtent, the conſtruction of the ſtatute of Ed. 3. ought to be, that it is high treaſon to bring into the realm the ſame falſe money, the counterfeiting of which within the realm was before declared to be ſo. In that caſe *by the money of England* muſt be underſtood all ſuch money as is coined and iſſued by the authority of the crown of England; and muſt conſequently include money coined and iſſued by the king in Ireland: and ſuch was the opinion that prevailed in the caſe of mixed monies. If this be not the true conſtruction, for aught I can obſerve, the importing into England ſuch falſe Iriſh coin from any foreign kingdom is only puniſhable as a miſdemeanor at common law, or at moſt as a miſpriſion of treaſon, within the ſtat. 14 Eliz. c. 3.; although by the ſtat. 1 & 2 Ph. & M. c. 11. the importation of counterfeit foreign coin, current within the realm, into the realm or any of the dominions of the ſame, with intent to utter it in either, is made high treaſon. In truth I conceive, that neither the abovementioned act of the 14 Eliz. nor that of Ph. & Mary, nor any other which treats of money "not the proper coin of this realm," or to that effect, can be underſtood of any other coins than thoſe of foreign powers independent of the crown of England; and which I think are emphatically deſignated by the late act of the 37 Geo. 3. c. 126. ſ. 2.; in which caſe unleſs the money of Ireland come within the deſcription of *the king's money*, and *the money of England*, I know of no ſtatute which will reach even the caſe of counterfeiting ſuch Iriſh money in this country.

Ante, f. 4.

Poſt. f. 23.

§ 6. *Importing falſe money from one part of the king's dominions into another.* Poſt. f. 20.

Laſtly it has been conſidered, whether the bringing in of falſe money, counterfeit to the money of England, from Ireland, or other tranſmarine member of the crown of England, into England or other the dominions thereof, be within the prohibition of the ſtat. 25 Ed. 3. ſt. 5. c. 2. againſt bringing falſe money *into this realm*. The only direct reſolution I can find upon the ſubject is that in the year-book 3 H. 7. 10., where it was reſolved, that counterfeit money imported into England out of Ireland was not within the ſtatute, becauſe Ireland was a member of England, governed by its laws, and money

3 H. 7. 10. Bro. Abr. Treaſon, pl. 29.

Ch. IV. § 6. *Introduction. Importing falſe Money, &c.*

money was coined there by the authority of the king. The queſtion ſimply was, Whether Ireland at that day was within "this realm?" As to which Lord Hale, ſpeaking in another place of the ſtat. 1 & 2 Ph. & M. c. 11., ſays, that an importation out of Ireland into England is not within the act, becauſe Ireland is within *the dominions of this realm*, though not within *the realm*; evidently conſidering them as the ſame in effect for this purpoſe. And Staunford and Lord Coke, grounding themſelves on the above reſolution in the time of H. 7., expreſsly ſay, that if a man bring counterfeit money from Ireland, it is not within the ſtatute of Edward 3., but that it muſt be money made in a foreign nation, and brought from thence into this realm. Lord Hale however ſpeaks with more doubt upon this part of the ſtat. of Ed. 3.; for, ſays he, although Ireland be within the ſt. 35 H. 8. c. 2. for the trial of treaſons out of the realm; yet it has been holden *upon the obſcure book* of 3 H. 7. 10. that an importation of counterfeit coin from Ireland into England is not treaſon here within the ſtatute; principally becauſe the counterfeiting itſelf is puniſhable by the ſtat. 25 Ed. 3., which is of force in Ireland. The ſame reaſon is adopted by Hawkins. It certainly is not concluſive; becauſe it depended with reſpect to Ireland in later times on the will of a different legiſlature to give it efficacy. And the conſtruction does in truth let in much of the miſchief with reſpect to the ſubjects of this country, which the act was intended to guard againſt. But if we attend to the ſubject matter, and conſider that the intereſt of the crown was principally in view, then moſt, if not all, of the reaſons which were firſt urged to ſhew, that *the king's money* mentioned in the firſt branch of the ſtat. 25 Ed. 3. extended to the money coined and iſſued by his authority in Ireland, will alſo apply to ſhew that the bringing of counterfeit money into Ireland or other part of the dominions of the crown is juſt as much within the reaſon of the law againſt bringing it into the realm: for the prerogative of the crown of England, of which Ireland is a member, is as much invaded, and the revenue of the king as much defrauded, whether the counterfeit money be firſt brought into one part of his dominions or into another; into Ireland, or into England. The conſtruction therefore which has prevailed is certainly in uniſon with the reaſon of the law; though

1 Hale, 155. 225. 317. ante, ch. 2. f. 19.

Staunf. 3. 3 Inſt. 18.

1 Hale, 225. & *vide* ib. 317.

1 Hawk. ch. 17. f. 67.

Ch. IV. § 6. *Introduction. Importing falſe money, &c.*

though perhaps the words do not obviouſly lead to it. But however doubtful this interpretation might have been at firſt, it ſeems to have been greatly confirmed by other acts of the legiſlature. For by the ſtat. 1 Mar. ſt. 2. c. 6. the counterfeiting of any gold or ſilver coin, not the proper coin of, but current within, the realm by the conſent of the crown, (which conſent muſt be ſignified by proclamation and writ under the great ſeal,) is made high treaſon; and the ſtatute 1 & 2 Ph. & M. c. 11. made in aid thereof, provides, that whoever ſhall bring from parts beyond ſea *into this realm*, or *into any of the dominions of the ſame*, any counterfeit money, *current within this realm* by the conſent of the crown, ſhall be guilty of high treaſon. The ſame argument then which Lord Hale drew from the ſtatutes of Elizabeth in aid of the conſtruction of the firſt branch of the ſtat. 25 Ed. 3. relative to counterfeiting the king's money, may be alſo derived from the ſtat. of Ph. & M. in confirmation of the conſtruction put on the ſecond branch of the ſtat. 25 Ed. 3. relative to the importation of falſe money. For it cannot be ſuppoſed that the legiſlature would have made the bringing of *foreign* counterfeit current money into any of *the dominions of the realm* high treaſon, unleſs the bringing of money into ſuch dominions, counterfeited to the likeneſs of our own coin, had been deemed to have been as high an offence before; this being by far the greater miſchief of the two. And conſonant to the conſtruction put on the ſtat. 25 Ed. 3. the bringing of ſuch counterfeit money out of Ireland into this country is not within the ſtatute. But under both the ſtatutes of Ed. 3. and Ph. & M. the money muſt be brought from ſome foreign place out of the king's dominions. If this conſtruction be admitted, it muſt in reaſon be taken to extend to all the plantations and dominions of England, where the ſame laws are in force, by which the counterfeiter himſelf is puniſhable; which is not the caſe of a counterfeiter of our coin in the dominions of another ſovereign; againſt whom it muſt be admitted that this proviſion was principally levelled. Therefore it ſeems, that if the counterfeiting be within the king's dominions, the importer from thence into England, as ſuch, is only puniſhable as an utterer of counterfeit coin. But further, in order to bring a caſe within the ſtatute of the 1 & 2 Ph. & M., it ſeems by the very words of the act that the importation, whether into England or into any of the dominions

1 Mar. ſt. 2. c. 6.

[1 Hale, 210.] 1 & 2 Ph. & M. c. 11. Poſt. f. 20.

Vide 1 Hale, 211. 352, 3. ante, p. 151.

1 Hale, 317. ante, p. 154.

1 Hale, 225. 317. 1 Hawk. ch. 17. ſ. 67 1 MS. Sum. 94. Burnet's MS. 21.

Vide 1 Hale, 225. *Et qu.* in caſe of a ſubject ſo counterfeiting.

3 Inſt. 18. ante, f. 6.

dominions parcels of the crown of England, muſt be of ſuch counterfeit money as is *current within this realm*, i. e. of England, *by the conſent of the crown*; which conſent, as we have ſeen, muſt be ſignified by proclamation under the great ſeal of England: for the legiſlature ſpeaking of the currency alter their phraſe, and do not as in the preceding part extend the deſcription to *the dominions of the realm*. And beſides, in the caſe of foreign coin, how elſe can a ſubject of England take cognizance of its legal currency, ſo as to take warning not to import it under the penalty of the law? Alſo by the ſtat. 14 Eliz. c. 3. even the forging of any foreign coin, not current within this realm, was only miſpriſion of treaſon; a fortiori therefore the importation of ſuch forged coin could not have been conſidered as treaſon itſelf. But now by the ſtat. 37 Geo. 3. c. 126. ſ. 2. as well the counterfeiting as the bringing into the realm foreign coin not current is made felony.

Ch. IV. § 6. *Introduction. Importing falſe money, &c.*

Ante, p. 156. 1 Hale, 210.

14 Eliz. c. 3.

Poſt. f. 23.

Some verbal difference is obſervable in the wording of ſome of the ſtatutes on the ſubject of the coin ſince the Revolution. The ſtat. 8 & 9 W. 3. c. 26. ſpeaks of the gold and ſilver coin "of this kingdom," or "current within this kingdom." The ſtat. 15 Geo. 2. c. 28. in one part expreſſes by name, "guineas and half guineas," "ſhillings and ſixpences," and is conſequently confined to thoſe identical coins. In another part it ſpeaks of counterfeit money generally, the explanation of which has been before given. The ſtat. 11 Geo. 3. c. 40. as to the copper coin, and in the ſtat. 37 Geo. 3. c. 126. ſ. 2. as to gold and ſilver coin, deſcribe each as the coin of "this realm," following the words of the more ancient ſtatutes. No ſtreſs can be laid upon ſuch verbal differences between ſtatutes paſſed in pari materiâ, further than that the conſtruction which the reaſon of the thing points out muſt be ſuch as the words are capable of receiving without violence to their proper or accepted legal ſignification.

Ante, ſ. 1.

To proceed now to the conſideration of

§ 7. *Diviſion of offences relating to the coin.*

Offences relating to the Coin.

Theſe may be conſidered under ſeveral different heads.

1. *As to the Offence of counterfeiting the Coin; with a Deſcription of the ſeveral Species of Coin, the counterfeiting whereof is puniſhable, and in what Degree.*

2. *The*

Ch. IV. § 7. *Diviſion of offences relating to the coin.*

2. *The making, mending, or having any Inſtrument applicable to counterfeiting the ſame.*
3. *Impairing the Coin.*
4. *Importing counterfeit or light Coin into the Realm.*
5. *Exporting the ſame.*
6. *Receiving, uttering, or tendering counterfeit Coin.*
7. *General Matters relating to the Coin.*

I. *Counterfeiting the Coin.*

§ 8. *Counterfeiting what coins.* 1 Hale, 77. 222. 4 Blac. Com. 82, 9.

The counterfeiting of the current coin of the realm is in truth a ſpecies of the crimen falſi or forgery, though ranked by the law of England in the higheſt claſs of offences by reaſon of its affecting the royal majeſty of the crown in a great prerogative of government. The legiſlature have reſpectively made proviſion againſt the counterfeiting of the gold or ſilver coin of this realm, and of any foreign realm, and of our copper coin; upon each of which I ſhall have occaſion to obſerve in its turn.

Statutes. 25 Ed. 3. ſt. 5. c. 2. ante, f. 1. ante, ch. 2. f. 6. *Gold and ſilver coin of the realm.* 8 & 9 W. 3. c. 26. f. 3. made perpetual by 7 Ann. c. 25. f. 3.

1ſt, The ſtat. 25 Ed. 3. ſt. 5. c. 2. declares it to be high treaſon "if a man counterfeit the king's money."

By ſtat. 8 & 9 W. 3. c. 26. f. 3. made perpetual by ſtat. 7 Ann. c. 25. "If any perſon, (other than the perſons employed in his majeſty's mint or mints, or ſuch as ſhall have authority from the Lords Commiſſioners of the Treaſury or Lord High Treaſurer of England for the time being,) ſhall after the 15th of *May* 1697 mark on the edges of any the current coin of this kingdom; or if any perſon whatſoever ſhall mark on the edges of any the diminiſhed coin of this kingdom, or any counterfeit coin reſembling the coin of this kingdom, with letters, or grainings, or other marks or figures like unto thoſe on the edges of money coined in his majeſty's mint; every ſuch offence ſhall be adjudged high treaſon; and the offenders therein, their counſellors, procurers, aiders, and abettors, being thereof convicted or attainted, ſhall ſuffer death," &c. The proſecution to be commenced in ſix months after the offence, by ſtat. 7 Ann. c. 25. f. 2.

Colouring or gilding, &c. baſe coin.

By f. 4. of the ſame ſtatute of William, "if any perſon whatſoever after the 15th of May 1697 ſhall colour (*a*), gild, or caſe over with gold or ſilver, or with any waſh or materials producing the colour of gold or ſilver, any coin reſembling any the current coin of this kingdom, or any round blanks

(*a*) *Vide* poſt. f. 14. what is a colouring.

Ch. IV. § 8. *Counterfeiting the coin.*

blanks of baſe metal, or of coarſe gold or coarſe ſilver, of a fit ſize or figure to be coined into counterfeit milled money, reſembling any the gold or ſilver coin of this kingdom; or ſhall gild over any ſilver blanks of a fit ſize and figure to be coined into pieces reſembling the current gold coin of this kingdom; all ſuch offenders, their counſellors, procurers, aiders, and abettors ſhall be guilty of high treaſon, and being convicted or attainted thereof, ſhall ſuffer death," &c. But without corruption of blood. Proſecutions to be commenced within three months after the offence committed, by f. 9.

15 G. 2. c. 28.

By ſtat. 15 Geo. 2. c. 28. f. 1. "If any perſon ſhall after the 29th September 1742 waſh, gild, or colour any of the lawful ſilver coin called a ſhilling, or a ſixpence, or any counterfeit or falſe ſhilling or ſixpence, or add to or alter the impreſſion or any part of the impreſſion of either ſide of ſuch lawful or counterfeit ſhilling or ſixpence, with intent to make ſuch ſhilling or ſixpence reſemble, or look like, or paſs for, a piece of lawful gold coin, called a guinea, or a half guinea reſpectively; or ſhall file or any wiſe alter, waſh, or colour any of the braſs monies called halfpennies or farthings, or add to or alter the impreſſion, or any part of the impreſſion, of either ſide of a halfpenny or farthing, with intent to make ſuch halfpenny or farthing reſemble or look like or paſs for a lawful ſhilling or ſixpence reſpectively; ſuch offenders, their counſellors, aiders, abettors, and procurers ſhall be guilty of high treaſon." But by f. 4. the blood ſhall not be corrupted. *No corruption of blood.* And by f. 8. the offender ſhall be pardoned in caſe [being out of priſon] he diſcovers two or more offenders of the ſame kind mentioned in the act, ſo as they ſhall be thereof convicted. *Pardon on diſcovering others.* By f. 5. offenders ſhall be indicted, arraigned, tried, and convicted by ſuch like evidence and in ſuch manner as other offenders for counterfeiting the coin; with a proviſo that the proſecution be commenced within ſix months after the offence committed. *Trial and evidence.* *Limitation of time.*

8 & 9 W. 3. c. 26. f. 5.

And by the 5th ſection of the laſt-mentioned act of William, ſpurious money produced on the trial in a court of juſtice ſhall be cut in pieces in open court.

§ 9. *Confined to gold and ſilver coin of the king.* Ante, f. 1. 1 Hawk. ch. 17. f. 57. 1 MS. Sum. 91. Ante, f. 1. *Vide* Cirwan's caſe, poſt.

All the abovementioned ſtatutes relate only to the gold and ſilver coin made and iſſued by the king's authority, in the ſenſe I have before ſhewn; the counterfeiting of which by

Ch. IV. § 9. *Counterfeiting the coin.*

by all of them amounts to high treaſon. The ſtatute of 25 Ed. 3. has always been ſo conſidered; the proviſions of the 8 & 9 W. 3. are only referable to ſuch coinage, and in ſome parts mention gold and ſilver coin by name; and the ſame appears in terms by the ſtat. 15 Geo. 2.

§ 10. *Counterfeiting gold or ſilver foreign coin.*

Ante, f. 4, 5, 6. *Vide* 1 Hale, 210. 215, 216.

2. With regard to foreign coin of gold or ſilver, ſome obſervations upon which I have before made, the counterfeiting of ſuch as is current here was not within the ſtat. 25 Ed. 3., but was made treaſon for the firſt time by the ſtat. 4 H. 7. c. 18. But that being repealed by the ſtat. 1 Mar. c. 1. the ſame proviſion was revived by ſtat. 1 Mar. ſt. 2. c. 6., which

1 Mar. ſt. 2. c. 6. *Gold and ſilver foreign coin current.*

enacts, that "if any perſon or perſons falſely forge or counterfeit any ſuch kind of coin of gold or ſilver as is not the proper coin of this realm, and is or ſhall be current within this realm by the conſent of the crown, they and their counſellors, procurers, aiders, and abettors, ſhall on conviction be

1 Hale, 210. 310.

adjudged guilty of high treaſon." This conſent muſt be notified under the great ſeal by proclamation, and a writ annexed thereto: for by the ſtat. 17 Rich. 2. c. 1. foreign coin is not to run in payment in England.

14 Eliz. c. 3. *Gold and ſilver foreign coin not current.*

By the ſtat. 14 Eliz. c. 3. "If any perſon falſely forge or counterfeit any kind of coin of gold or ſilver of other realms as is not the proper coin of this realm, nor permitted to be current within this realm; ſuch offence ſhall be adjudged miſpriſion of high treaſon; and the offenders, their procurers, aiders, and abettors, being convict, ſhall be impriſoned, and forfeit ſuch lands, goods, and chattels, as in

1 Hale, 376.

caſe of miſpriſion of treaſon." By "aiders" is meant ſuch as aid in the fact, and not aiders of the offender after the fact. At common law this offence was only puniſhable as a miſdemeanor.

1 Hale, 210. 311. 328.

Both the ſtatute of Mary and that of Eliz. are to be underſtood of the counterfeiting of ſuch foreign coin as is for the moſt part of gold or ſilver. But the ſtat. 37 Geo. 3. c. 126. has now provided another puniſhment for the offence of counterfeiting foreign gold or ſilver coin not current here: that ſtatute reciting, that "whereas the practice of counter-

37 G. 3. c. 126. f. 2.

feiting foreign gold and ſilver coin, and the bringing into this realm and uttering within the ſame falſe and counterfeit foreign gold and ſilver coin, and particularly pieces of gold coin commonly called louis d'or, and pieces of ſilver coin commonly

Ch. IV. § 10. *Counterfeiting the coin.*

commonly called dollars, has of late greatly increaſed, and it is expedient that proviſion ſhould be made more effectually to prevent the ſame;" enacts, "that if any perſon or perſons ſhall hereafter make, coin, or counterfeit any kind of coin, not the proper coin of this realm, *nor permitted to be current within the ſame*, but reſembling, or made with intent to reſemble or look like, any gold or ſilver coin of any foreign ſtate, &c. or to paſs as ſuch foreign coin; ſuch perſon or perſons offending therein ſhall be deemed guilty of felony, and may be tranſported for any term of years not exceeding ſeven." By the words, "not permitted to be current within the realm," muſt be underſtood not permitted to be current by proclamation under the great ſeal.

Vide ante, f. 3. 6.

Procurers, who are named in the ſtatutes 1 Mar. ſt. 2. c. 6. and 14 Eliz. c. 3. are not mentioned in this law; but the offence being made felony attaches to it all the incidents of felony at common law, and conſequently may have acceſſaries. But quære, if they are liable to tranſportation, or to any other puniſhment than is authoriſed by the general act of the 18 Eliz. c. 7. ſ. 2. after mentioned?

Poſt. p. 162.

§ 11. *Copper coin.* 15 G. 2. c. 28.

3. Laſtly, As to the copper coin of this realm, the counterfeiting of which was by the ſtat. 15 Geo. 2. c. 28. ſ. 6. puniſhable as a miſdemeanor by two years' impriſonment, and finding ſureties for two years more; it is now enacted

11 G. 3. c. 40.

by the ſtat. 11 Geo. 3. c. 40. that "if any perſon after the 24th of June 1771 ſhall make, coin, or counterfeit any of the copper monies of this realm, commonly called an halfpenny or a farthing, ſuch offender, his counſellors, aiders, abettors, and procurers, ſhall be adjudged guilty of felony." But clergy is not taken away. Sect. 3. enables any juſtice of peace, on the oath of one witneſs, that there is juſt cauſe to ſuſpect that one or more perſons have been concerned in ſuch coining, by warrant under his hand to cauſe their dwelling-houſes, outhouſes, &c. or other place belonging to them to be ſearched for tools and implements for ſuch coining; and if they ſhall be found concealed there, or in the cuſtody or poſſeſſion of any perſon whatſoever not employed in his majeſty's mint, or having the ſame by ſome lawful authority, to ſeize ſuch tools and carry them before a juſtice of peace of the place, &c. where ſeized, who ſhall cauſe the ſame to be ſecured and produced in evidence on the trial of

Ch. IV. § 11. *Counterfeiting the coin.*

the offenders, and afterwards deſtroyed by order of the court, or of ſuch or ſome other juſtice of peace in caſe there be no trial.

37 Geo. 3. c. 126. ſ. 1.

By ſtat. 37 Geo. 3. c. 126. "The proviſions of the two laſt-mentioned ſtatutes, (by name,) and all other acts concerning the copper monies of this realm, called an half-penny and a farthing, or any other copper money of this realm, ſhall extend to all ſuch pieces of copper money as ſhall be coined and iſſued by order of his majeſty, &c. and as ſhall by royal proclamation be ordered to be deemed and taken as current money of this realm, as if ſuch pieces had been particularly mentioned in ſuch acts reſpectively."

It may now be a queſtion, Whether under this latter ſtatute it is not optional to proſecute either for a miſdemeanor, as the offence is made by the ſtat. 15 Geo. 2.; or for a felony, as it is made by that of the 11 Geo. 3., ſince the proviſions of both ſtatutes are extended to the new copper coinage? And yet ſuch an option without varying circumſtances is unuſual, and incongruous with the general rule of law, that the miſdemeanor is merged in the felony.

Rex v. Weſt and others, O. B. Sept. 1780. 1 MS. Sum. 91.

The puniſhment, however, under the act of the 11 Geo. 3. is only a year's impriſonment; which is founded on the general ſtat. of the 18 Eliz. c. 7. ſ. 3.

§ 12. *What a counterfeiting.* 1 Hale, 214. Kel. 33.

1. It is firſt to be ſeen what is a counterfeiting within theſe ſtatutes. There muſt be an actual counterfeiting either by the party himſelf or by thoſe with whom he conſpires: a mere attempt to counterfeit, ſuch as preparing the materials or faſhioning the metal, is not ſufficient, except in thoſe particular inſtances which have been ſo declared by ſtatute.

Ante, ſ. 8.

From the ſeveral ſtatutes before ſet forth it is to be collected, that the offence of high treaſon in counterfeiting our own gold or ſilver coin attaches in the ſeveral inſtances following;

Complete counterfeiting. 25 Ed. 3. ſt. 5. c. 2. poſt. ſ. 13.

1. In a complete counterfeiting of any gold or ſilver coin of the realm; at leaſt to the degree of reſemblance after mentioned.

Marking the edges of coin. 8 & 9 W. 3. c. 26.

2. By marking on the edges of any the current or diminiſhed coin of this kingdom, or counterfeit coin reſembling the coin of this kingdom, with letters or grainings, or other marks or figures, like thoſe on the edges of money coined in his majeſty's mint.

3. By

Ch. IV. § 12. *What a counterfeiting.*

3. By colouring, gilding, or caſing over with gold or ſilver, or with any waſh or materials producing the colour of gold or ſilver, any coin reſembling the current coin of this kingdom: or,

Gilding or ſilvering coin.

Gilding or ſilvering blanks. 8 & 9 W. 3. c. 26.

4. Any round blanks of baſe metal, or of coarſe gold, or coarſe ſilver, of a fit ſize or figure to be coined into counterfeit milled money, reſembling the gold or ſilver coin of this kingdom.

Gilding ſilver blanks to be made into gold coin. 8 & 9 W. 3. c. 26.

5. By gilding over any ſilver blanks of a fit ſize and figure to be coined into pieces reſembling the current gold coin of this kingdom.

Making ſhillings or ſixpences to reſemble guineas or half guineas. 15 G. 2. c. 28.

6. By waſhing, gilding, or colouring any lawful or counterfeit ſhilling or ſixpence, or adding to or altering the impreſſion on either ſide, to make it reſemble a guinea or half guinea reſpectively.

Making halfpence or farthings reſemble ſhillings or ſixpences. 15 G. 2. c. 28.

7. By filing, or any wiſe altering, waſhing, or colouring any halfpence or farthings, or adding to or altering the impreſſion on either ſide, with intent to make them reſemble reſpectively a ſhilling or ſixpence.

Several of theſe proviſions were in truth ſuperfluous; for they amount after all to a counterfeiting of the coin attempted to be imitated. For example; one who alters a lawful ſhilling, ſo as to make it reſemble a guinea, may with as much truth and propriety be ſaid to have counterfeited a guinea, as if he had actually fabricated the whole piece from the original ſtate of the metal. In like manner, as one who alters the principal ſum of a bond is as much a forger of the bond ſo altered, as if he had written the whole. Theſe are kindred offences. The 3d, 4th, and 5th deſcriptions only ſeem to carry the offence further than the ſtat. 25 Ed. 3. had done: becauſe they conſtitute acts to be high treaſon which are only preparatory to, and in the progreſs of actually counterfeiting the coin.

§ 13. *The ſimilitude a queſtion of fact.*

Whether there be a counterfeiting, or, in the words of ſome of the ſtatutes, a reſembling of the real coin, is a matter of fact of which the jury are to judge upon the evidence before them: in which reſpect there can be no diſtinction between our own and foreign coin. There muſt be a reſemblance, ſuch as may in circulation ordinarily impoſe upon

It need not be perfect. 1 Hale, 178. 184. 211. 215.

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the world; but it is clear, that in order to warrant a conviction the reſemblance need not be perfect. Thus a counterfeiting, with ſome ſmall variation in the inſcription, effigies, or arms, done probably with intent to evade the law, is yet within it; and ſo is the counterfeiting in a different metal, if in appearance it be made to reſemble the true coin.

1 MS. Sum. 50. Ridgeley's caſe, poſt. f. 18.

Rex v. Welſh and another, Hertford Lent Aſſizes 1785, cor. Perryn, B. MS. Gould, J. *It is not neceſſary that there ſhould be an impreſſion on the counterfeit, if it reſemble the common worn coin.* Leach, 293. S. C.

Patrick and John Welſh were indicted for counterfeiting a piece of falſe and counterfeit money and coin, *of the likeneſs and ſimilitude of the good, legal, and current coin, money, and ſilver coin of this realm* called a ſhilling, againſt the form of the ſtatute. A ſecond count charged a ſimilar offence in counterfeiting a ſixpence. It appeared that all things neceſſary for coining, with a mould for ſhillings and ſixpences, were found in P. Welſh's houſe, where the other priſoner was at work in coining when he was apprehended: and ſeveral ſhillings and ſixpences which they had coined were found in the room or upon them in a perfect ſtate for circulation, and many had been circulated and paſſed off. The objection made was, that there was no impreſſion on any of theſe coins, and that the offence was not complete till the ſtamp was put upon them, till when they could not be ſaid to reſemble the current coin. But it was over-ruled at the trial, and the caſe went to the jury, who found the priſoner guilty. Judgment was however reſpited to take the opinion of the judges, all of whom thought that the conviction was proper. They ſaid, it was a queſtion of fact, Whether the counterfeit were *of the likeneſs and ſimilitude of the lawful current ſilver coin* called a ſhilling? and the jury having ſo found it, the want of an impreſſion was immaterial; becauſe from the impreſſion being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected. The counterfeit was perfect therefore for circulation, and poſſibly might deceive the more readily from having no appearance of an impreſſion; and in the deception the offence conſiſts. But in Varley's caſe, where the impreſſion of money was forged on an irregular piece of metal, not rounded, without finiſhing it, ſo as not to be in a ſtate to paſs current, the offence was holden to be incomplete, although he had actually attempted to paſs it in that condition.

Eaſter term 1785.

Varley's caſe, 1771, 2 Blac. Rep. 632. 2 MS. Sum. 46. Leach, 71. S. C. & 253. *Vide* Rex v. Harris and Milſon, Leach, 126.

But

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But if there be a counterfeiting, ſuch as I have before deſcribed, in fraud of the king, the offence within the reſpective ſtatutes is complete before any uttering or attempt to utter. The uttering is puniſhable in another manner, as will be ſhewn.

3 Inſt. 16. 1 Hale, 215. 228. 1 Hawk. ch. 17. f. 55. 4 Blac. Com. 84. 1 MS. Sum. 91. Poſt. f. 26, 27, 28.

§ 14. *What a colouring, &c. within the ſtatute.* Ante, f. 12.

But beſides the offence of counterfeiting, which requires a ſimilitude to a common intent to the exemplar, the abovementioned ſtatutes, as I before obſerved, go further in ſome inſtances; and in particular it has been made a queſtion, What is *a colouring*, &c. within the ſtat. 8 & 9 W. 3. c. 26.? Ante, f. 8.

Rex v. Wm. Caſe, Lancaſter Spring aſſizes 1795, cor. Heath, J. MS. Buller, J. and MS. Jud. *Preparing blanks with ſuch materials as when rubbed will make them reſemble the real coin, is a colouring within the ſtatute, before the reſemblance has been produced by ſuch friction.*

William Caſe was found guilty on an indictment for traiterouſly colouring with materials producing the colour of ſilver a piece of baſe coin reſembling a ſhilling, againſt the ſtatute. The priſoner was taken in the very act of making counterfeit ſhillings in the ordinary way, by ſteeping round blanks compoſed of braſs and ſilver in aqua fortis. None of them were found in a finiſhed ſtate; but many were taken out of the liquor by thoſe who apprehended the priſoner; and others had been before taken out by himſelf and were dry. Theſe exhibited the appearance of lead, and ſome of them had the impreſſion of a ſhilling, and by rubbing them a little they would perfectly reſemble ſilver coin, and would readily paſs current; but in their then ſtate the jury found, that none would paſs current. The queſtion therefore was, Whether this offence were complete, inaſmuch as the colour of ſilver had not been produced in any of the blanks? The counſel for the crown argued, that if the colour of ſilver had been produced, it would have been high treaſon within the ſtat. 25 Ed. 3.; and that the ſtat. 8 & 9 W. 3. was made to puniſh the inchoate offence, which before was not puniſhable; and that offence was complete by dipping the round blanks in the aqua fortis, by which ſome change of colour had been produced; for that the words, "producing the colour of ſilver," were to be reſtrained to the next antecedent words, "materials," &c. and not to the preceding words "colour," &c. This matter being referred to the judges, there was ſome difference of opinion amongſt them. One judge ſaid, he underſtood the words "colour," &c. to mean producing on the piece of metal the colour of ſilver,

Eaſter term 1795, (abſent Perryn, B. and Buller, J.)

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which was not done here; for, without rubbing, the money coined would not paſs: and another obſerved, that the word in the ſtatute was "*producing*," in the preſent tenſe, and not materials *which would produce*. But all the other judges thought the conviction right. They conſidered, that the offence was complete when the piece was coloured; for it was then coloured with materials which produce the colour of ſilver; and that it was not neceſſary that the piece ſo coloured ſhould be current, for the colouring of blanks was an offence within the clauſe. And it was obſerved, that a contrary conſtruction would prevent any conviction until a waſh was diſcovered which would in the firſt inſtance produce a perfect bright ſhilling or ſixpence.

Rex v. Lavey, and Parker, O. B. Dec. 1776. MS. Gould, J. and MS. Crown Caſ. Ref. *Bringing to the ſurface the latent ſilver in a blank of mixed metal by means of dipping it in aqua fortis, which corrodes the baſe metal, is a colouring within the ſtatute.* Leach, 140. S.C.

A caſe under the like circumſtances had been before expreſsly decided by the unanimous opinion of the judges to come within the ſtatute. But there the doubt was not, as in the laſt inſtance, upon the neceſſity of rubbing the blank after it was taken out of the waſh, in order to give it the appearance of ſilver; but whether the legiſlature did not intend ſuch a colouring only as is altogether produced by ſome outward application. But they all thought that this proceſs of extracting the latent ſilver by the power of the waſh, from the body to the ſurface of the blank, was a colouring within the words of the act. They thought beſides, that it might be charged as a colouring with ſilver; for the effect of the aqua fortis is to corrode the baſe metal, and leave the ſilver only on the ſuperficies, and ſo the copper is coloured or caſed with ſilver.

§ 15. *Counterfeiting by officers of the Mint.* 1 Hale, 213. 1 Hawk. ch. 17. ſ. 55. 3 Inſt. 16, 17. 4 Blac. Com. 84. 1 MS. Sum. 91. Ante, f. 3.

Not only all ſuch as counterfeit the king's coin without his authority, but even ſuch as are employed by him in the mint, come within theſe ſtatutes, if for their own lucre they make the money of baſer alloy, or lighter than by their indentures they are authoriſed and bound to do: for they can only juſtify their coining at all under ſuch an authority; and if they have not purſued that authority, it is the ſame as if they had none. But it is not any miſtake in weight or alloy that will make them guilty of high treaſon; the act muſt be wilful, corrupt, and fraudulent; for it muſt be laid and proved to be done traiterouſly. The ſtat. 8 & 9 W. 3. does indeed make a ſpecial exception of perſons employed in his majeſty's mint; which ſeems unneceſſary, and would have been implied

plied by law, when they were employed by his majeſty's authority in the ſenſe before deſcribed. Nevertheleſs it was holden about Hilary term 13 W. 3. by all the judges, that in an indictment on that act it ought to be averred that the party was not employed in the mint, or authoriſed by the treaſurer, &c.; becauſe the exception of ſuch perſons is within the enacting clauſe; and the want of ſuch an authority is part of the deſcription of the offence itſelf. This queſtion was moved by Mr. Juſtice Turton, who had convicted one upon this ſtatute at York, upon an indictment which had not ſuch an averment; and for this reaſon it was holden bad, and that the priſoner ought to be tried again, which was done at the Lent aſſizes 1702, before Powis, J., when the priſoner was attainted and executed.

Ch. IV. § 15. *Who are offenders.*

MS. Tracy, 19. *Vide* Cro. Cir. Comp. 361. 1ſt edit. *Vide* Bell's caſe, Foſt. 430. 3d ed. & 1 Burr. 154. poſt. f. 27. 1 MS. Sum. 92.

II. *The making, mending, or having any Inſtrument applicable to counterfeiting the Coin.*

§ 16. *Making, mending, or having inſtruments for coining.* 8 & 9 W. 3. c. 26. made perpetual by 7 Ann. c. 25.

By ſtat. 8 & 9 W. 3. c. 26. ſ. 1. "after the 15th of May 1697, no ſmith, &c. or other perſon whatſoever, (other than the perſons employed in his majeſty's mints in the tower of London or elſewhere, and for the uſe and ſervice of the ſaid mints only, or perſons lawfully authoriſed by the lords commiſſioners of the Treaſury or lord high treaſurer of England for the time being,) ſhall knowingly make or mend, or begin or proceed to make or mend, or aſſiſt in the making or mending of any puncheon, counter-puncheon, matrix, ſtamp, dye, pattern, or mould, of ſteel, iron, ſilver, or other metal or metals, or of ſpaud, or fine founder's earth or ſand, or of any other materials whatſoever, in or upon which there ſhall be or be made or impreſſed, or which will make or impreſs, the figure, ſtamp, reſemblance, or ſimilitude of both or either of the ſides or flats of any gold or ſilver coin, current within this kingdom; nor ſhall knowingly make or mend, or begin or proceed to make or mend, or aſſiſt in the making or mending of any edger, or edging tool, inſtrument, or engine, not of common uſe in any trade, but contrived for making (*a*) of money round the edges with letters, grainings, or other marks or figures reſembling thoſe on the edges of money coined in his majeſty's mint; nor any preſs for coinage, nor any cutting engine, for cutting round blanks, by force of a ſcrew, out of flatted bars of gold, ſilver, or other metal; nor ſhall knowingly buy or ſell, hide or conceal, or without lawful authority or ſufficient

(*a*) *Quære*, a miſprint in the printed ſtatute for marking.

Ch. IV. § 16. *Making, &c. or having inſtruments for coining.*

ſufficient excuſe for that purpoſe, knowingly have in his or their houſes, cuſtody or poſſeſſion, any ſuch puncheon, counter-puncheon, matrix, ſtamp, dye, edger, cutting-engine, or other tool or inſtrument before mentioned. And every ſuch offender and offenders, their counſellors, procurers, aiders, and abettors ſhall be guilty of high treaſon, and being thereof convicted or attainted, ſhall ſuffer death," &c.

Conveying out of the mint, or concealing ſuch inſtruments.

By ſ. 2. " If any perſon or perſons whatſoever after the 15th of May 1697, ſhall, without lawful authority for that purpoſe, wittingly or knowingly convey or aſſiſt in conveying out of any of his majeſty's mints any puncheon, counter-puncheon, matrix, dye, ſtamp, edger, cutting-engine, preſs, or other tool, engine, or inſtrument uſed for or about the coining of monies there, or any uſeful part of ſuch tools or inſtruments; ſuch offenders, their counſellors, procurers, aiders, or abettors, as alſo all and every perſon and perſons knowingly receiving, hiding, or concealing the ſame, ſhall be adjudged guilty of high treaſon, and being convicted or attainted thereof ſhall ſuffer death," &c.

7 Ann. c. 25. ſ. 2. *Proſecution within ſix months.*

By 7 Ann. c. 25. ſ. 2. the proſecution of ſuch as offend againſt the above act, " by making, or mending, or beginning or proceeding to make or mend, any coining tool or inſtrument therein prohibited, may be commenced within ſix months after ſuch offence committed."

2 & 9 W. 3. c. 26. ſ. 5. *Coining tools, &c. to be ſeized to be produced as evidence.* Poſt.

Alſo by ſ. 5. of the ſame ſtatute of King William, " If any puncheon, dye, ſtamp, edger, cutting engine, preſs, flaſk, or other tool, inſtrument, or engine uſed or deſigned for coining or counterfeiting gold or ſilver money, or any part of ſuch tool or engine, ſhall be hid or concealed in any place, or found in the houſe, cuſtody, or poſſeſſion of any perſon, not then employed in the coining of money in ſome of his majeſty's mints, nor having the ſame by ſome lawful authority, then any perſon diſcovering the ſame may ſeize and carry them forthwith to ſome juſtice of peace of the county or place, to be produced in evidence at the trial of the offender; and they ſhall be afterwards defaced and deſtroyed by order of the court," &c. By ſ. 7. no attainder by this act ſhall corrupt the blood.

§ 17. *Conſtruction of the ſtatute of William.* Ante, ſ. 15.

As to the manner of drawing the indictment on the ſtatute of William, I have before ſpoken of it.

John

Ch. IV. § 17. *Having, &c. inſtruments for coining.*

John Bell was indicted on the ſtatute, for that he not being a perſon employed in or for the mint, &c. knowingly, feloniouſly, and traiterouſly had in his cuſtody a preſs for coinage, without any lawful authority, or ſufficient excuſe for that purpoſe, againſt the duty of his allegiance, &c. It was proved, that the defendant knowingly had a preſs in his houſe and cuſtody, of the ſame ſort as thoſe uſed in the mint for coinage, and proper to be made uſe of for coining guineas, ſhillings, and louis d'ors, or any other ſmaller pieces, and alſo proper for making certain manufactures. It did not appear that it was ever made uſe of or intended to be made uſe of by the defendant for ſuch manufactures, or for coining any of the current coin of this kingdom: but it was proved, that he intended to uſe it for coining louis d'ors and other foreign pieces, not the current coin of this kingdom. And no proof was given by him of his being employed in the mint, &c.; or that he had any lawful authority, or any excuſe but as aforeſaid, for having the ſaid preſs in his cuſtody or poſſeſſion. The defendant was found guilty: but two points were reſerved for the conſideration of the judges; 1. Whether a preſs for coinage be one of the tools or inſtruments within that clauſe of the act on which the indictment is founded? And if it were, 2. Whether the facts ſtated amounted to a ſufficient excuſe, to ſave the defendant from the penalties of the act. A majority of the judges anſwered both queſtions in the affirmative; conſidering on the ſecond queſtion, that this act was only intended to prevent the counterfeiting the current coin of this kingdom, and not foreign coin. Lord C. J. Ryder and Foſter, J. diſſented from the laſt reſolution; conſidering that the act, though principally levelled againſt counterfeiters of the current coin of the kingdom, was not confined ſolely to that object. That the intention of the legiſlature was to keep out of private hands, as far as poſſible, all means of counterfeiting the coin; and therefore makes it high treaſon to be knowingly poſſeſſed of ſuch inſtruments, in fact, without lawful authority or ſufficient excuſe. That it was therefore incumbent on the defendant to ſhew ſuch lawful authority or ſufficient excuſe. But that, ſuppoſing his mere intention to be an ingredient in the caſe, the intention found of uſing the preſs for the purpoſe ſtated did not amount to a ſufficient excuſe; and upon the fulleſt conſideration afterwards Mr. Juſtice Foſter was of

Bell's caſe, O. B. 1753. Foſt. 430. *A preſs for coinage is a tool or inſtrument within that branch of the ſtat.* 8 & 9 *W.* 3. *c.* 26. *which makes it treaſon to have the ſame knowingly in the party's cuſtody. Having ſuch in poſſeſſion for the purpoſe of coining foreign gold coin not current here, ruled to be a ſufficient excuſe to take the caſe out of the act. Sed dubitatur, et quære.*

On a conference at Serjeant's Inn, 30th June 1755.

Vide the Preface to the 3d edit. of Foſt. C. L. p. 8.

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of opinion that the caſe did fall within the act; in which opinion it appears that Lord Hardwicke fully concurred.

Lennard's caſe, Taunton Lent aſſizes 1772, MS. Cro. Caſ. Reſ. 1 MS. Sum. 93. 2 Blac. 807. & Leach, 85. S. C. *A mould for coining is a tool or inſtrument within the ſtatute* 8 & 9 *W.* 3. *c.* 26. *the unlawful cuſtody of which is treaſon.* Eaſter term 1772, (abſent De Grey, C. J.)

Hugh Lennard was indicted for high treaſon on the ſtat. 8 & 9 W. 3., for having in his cuſtody and poſſeſſion, without any lawful or ſufficient excuſe, one mould made of lead, on which was made and impreſſed the figure, ſtamp, reſemblance, and ſimilitude of one of the ſides or flats of a ſhilling, viz. the head ſide, &c. The priſoner being convicted, it was ſubmitted to the judges, 1ſt, Whether the mould found in the priſoner's cuſtody be compriſed under the general words, "*other tool or inſtrument before mentioned*," ſo as to make the unlawful cuſtody of it high treaſon: it being obſervable that the words, "*pattern or mould*," which are mentioned in the firſt part of the act, are omitted in the latter. 2dly, If it be ſo compriſed, Whether it ſhould not have been laid in the indictment to be *a tool or inſtrument*, in the words of the act? The judges were unanimouſly of opinion, that the mould was a tool or inſtrument, mentioned in the former part of the ſtatute, and therefore included under the general words in the latter part; and that having been before expreſsly mentioned by name, it need not be averred in the indictment to be ſuch tool or inſtrument. Another doubt afterwards aroſe, Whether the indictment properly laid it to be a mould, *on which was made and impreſſed the figure, &c. of a ſhilling?* the evidence being of a mould on which the reſemblance of a ſhilling was inverted, and therefore more properly an inſtrument to make or ſtamp the reſemblance of a ſhilling, than an inſtrument on which the reſemblance was made. Yet the evidence was holden by moſt of the judges to ſupport the indictment; for the ſtamp of the coin was impreſſed on it. But they, as well as the reſt who doubted, agreed that the indictment would have been more accurate if it had ſtated that the priſoner had in his cuſtody a mould that *would make* the figure of one of the ſides of a ſhilling.

A mould on which is impreſſed the reſemblance of a ſhilling inverted is ſufficiently deſcribed in the indictment as "a mould *on* "*which was* "*impreſſed* the "figure of a "ſhilling;" though it might be more properly deſcribed as a mould *which would make* ſuch figure.

§ 18. *Reſemblance to a common purpoſe of the inſtrument to the coin is ſufficient.* Ante, f. 13.

The degree of ſimilitude to the real coin which the tools or inſtruments muſt be capable of impreſſing, in order to bring the caſe within the ſtatute of King William, ſeems to be governed by the ſame conſiderations as were before noticed in regard to the counterfeit coin itſelf. The jury are to judge whether the inſtrument in queſtion be calculated to impreſs the

Ch. IV. § 18. *Having, &c. inſtruments for coining.*

the figure, ſtamp, reſemblance, or ſimilitude of the coin current. Theſe latter words extend the offence beyond an exact imitation of the original and proper effigies of the coin: and the intention of the legiſlature would be entirely defeated by a different conſtruction.

Ridgeley's caſe, O. B. Dec. 1778, MS. Gould and Buller, Js. Leach, 172. S. C. *Having knowingly in poſſeſſion a puncheon for the purpoſe of coining is within the ſtat.* 8 & 9 *W.* 3. *though that alone, without the counter-puncheon, will not make the figure, &c. And though ſuch puncheon had not the letters, yet held ſufficiently deſcribed in the indictment as a puncheon which would impreſs the reſemblance, &c. of the head ſide of a ſhilling.*

Rowland Ridgeley was indicted, for that he, not being employed by the mint, &c. knowingly, feloniouſly, and traiterouſly had in his cuſtody and poſſeſſion one puncheon made of iron and ſteel, in and upon which was impreſſed and made the figure, reſemblance, and ſimilitude of the head ſide of a ſhilling without lawful authority, &c. He was charged in another count with having ſuch a puncheon, which would make and impreſs the figure, &c. The puncheon was found in the priſoner's lodging, with a quantity of bad money: and the jury were ſatisfied that he had it knowingly, and for the purpoſe of coining, but would have found a verdict only that the puncheon was knowingly in his cuſtody; ſubmitting to the court whether the proof of ſuch puncheon being found ſatisfied the words of the act. The verdict however was taken generally; and as the officers of the mint remembered no proſecution under this branch of the act, the court wiſhed to have the opinion of the judges thereon. It appeared by the evidence of the engraver of the mint, that the puncheon was complete and ready for uſe; and that the manner of making it is this: a ſhilling is cut away to the outline of the head; that outline is fixed upon a piece of ſteel, which is filed or cut cloſe to the outline, which makes the puncheon; the puncheon makes the dye, which is the counter-puncheon. That a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never ſo made at the mint; but after the dye is ſtruck the letters are engraved upon it. That a puncheon alone without the counter-puncheon will not make the figure. That to make an old ſhilling current, nothing elſe was neceſſary but ſuch a puncheon. That the puncheon was hardened and ready for uſe; but it was impoſſible to ſay that the ſhillings found on the priſoner were made with it, the impreſſion was ſo faint, though they had all the appearance of it. The judges were all of opinion that the priſoner's caſe came within the words of the ſtat. 8 & 9 W. 3. The word *puncheon* is expreſsly mentioned in the act; and it will

At Serjeants' Inn, 23 Jan. 1779. (abſent De Grey, C. J.)

Ch. IV. § 18. *Having, &c. inſtruments for coining.*

will by the means of the counter-puncheon or matrix impreſs, &c. to the ſimilitude of the current coin. The words "figure, ſtamp, reſemblance, or ſimilitude," in the act, do not mean an exact figure, &c.; but if the inſtrument impreſs a reſemblance in point of fact, ſuch as will impoſe on the world, it is ſufficient, whether the letters are apparent on the puncheon or not; otherwiſe the act would be quite evaded; for the letters would be omitted on purpoſe. The puncheon in queſtion was one to impreſs the head of King William; and the ſhillings of his reign, though the letters were worn out, are current coin of this kingdom. The puncheon made an impreſſion like them, and the coin ſtamped with it would reſemble them on the head ſide, though there were no letters. This was compared to the caſe of counterfeiting the great ſeal mentioned in 1 Hale 184., where he ſays, that the omiſſion or addition of words in the inſcription of the true ſeal, for the purpoſe of evading the law, would not alter the caſe. And the judges all agreed, that it was not neceſſary to prove that money was actually made with the inſtrument in queſtion.

Ante, ch. 2. ſ. 25.

Not neceſſary to prove money made with the inſtrument, &c.

§ 19. Sutton's caſe, Eaſt. 10 G. 2. Rep. temp. Hardw. 370. *Indictment for miſdemeanor at common law for having tools for coining in poſſeſſion, with intent to uſe them.*

In Sutton's caſe, the indictment, which was framed as for a miſdemeanor at common law, charged that the defendant, without any lawful authority, had in his cuſtody and poſſeſſion two iron ſtamps, each of which would make and impreſs the figure, reſemblance, and ſimilitude of one of the ſceptres impreſſed upon the current gold coin of this kingdom, called half guineas, with intent to make the impreſſion of ſceptres on divers pieces of ſilver coin of this realm, called ſixpences, and to colour ſuch pieces of the colour of gold; and fraudulently to utter them to his majeſty's ſubjects as lawful half guineas; againſt the peace, &c. Page, Probyn, and Lee, Juſtices, held, that the bare having ſuch inſtruments in poſſeſſion, with the intent charged, was a miſdemeanor: but Lord Hardwicke thought that the bare poſſeſſion was not unlawful, unleſs made uſe of, or unleſs made criminal by ſtatute, as in the inſtance of the ſtat. 8 & 9 W. 3.

Ch. IV. § 20. *Impairing.*

III. *Impairing the Coin.*

§ 20.

This offence ſtands at this day on the following ſtatutes:

Vide 2 Inſt. 577. 17 Ed. 4. c. 1.

By ſtat. 17 Ed. 4. c. 1. No perſon ſhall melt down any money of gold or ſilver ſufficient to run in payment, upon pain of forfeiture of the value: and by ſtat. 13 & 14 Car. 2. c. 31. melting down any current ſilver money of the realm" ſhall be puniſhed with forfeiture of the ſame, and double the value; and if done by a freeman of a town, with diſfranchiſement; if by any other perſon, with ſix months' impriſonment.

13 & 14 Car. 2. c. 31. poſt. ſ. 32, &c.

5 Eliz. c. 11. *Vide* 1 Hale, 216. 220. 267. 318.

The ſtat. 5 Eliz. c. 11. reciting that the ſtat. 3 Hen. 5. c. 6. concerning clipping, &c. is repealed by ſtat. 1 Mar. ſt. 1. c. 1., and the miſchief that happens thereby; enacts (ſ. 2.) "that clipping, waſhing, rounding, or filing, for wicked lucre or gain's ſake, any of the proper monies or coins of this realm, or the dominions thereof, or of the monies and coins of any other realm, allowed and ſuffered to be current within this realm, or the dominions thereof, or that hereafter at any time ſhall be lawful monies or coins of this realm, or of the dominions thereof, or of any other realm, and by proclamation allowed to be current here, ſhall be adjudged high treaſon; and the offenders, their counſellors, conſenters, and aiders, traitors, being thereof lawfully convicted or attainted." By ſ. 4. there ſhall be no corruption of blood or loſs of dower.

(1 Hale, 327.)

18 Eliz. c. 1.

The auxiliary ſtatute of 18 Eliz. c. 1. declaring that the falſifying, impairing, diminiſhing, or lightning of ſuch laſt mentioned money was not within the ſtat. 5 Eliz. which ought to be taken ſtrictly according to the words thereof, &c. enacts "that if any perſon or perſons ſhall, for wicked lucre or gain's ſake, by any art, ways, or means whatſoever, impair, diminiſh, falſify, ſcale, or lighten the proper monies or coins of this realm, or any the dominions thereof, or the monies or coins of any other realm, allowed to be current at the time of the offence committed within England or any the dominions of the ſame by proclamation, &c.; the offenders, their counſellors, conſenters, and aiders, being lawfully thereof convicted or attainted according to the due order and courſe of the laws, ſhall be adjudged guilty of high

Ch. IV. § 20. *Impairing.*

high treaſon." By ſ. 2. no corruption of blood or loſs of dower ſhall enſue.

1 Hale, 221, 2. MS. Burnet, 19. *Vide* ante, ſ. 4. &c. as to Iriſh coin.

It is clear that the impairing of Iriſh coin, though not current in England, is within the expreſs words of theſe ſtatutes.

1 Hale, 220. 228.

The clipping, &c. muſt be for gain or lucre under theſe ſtatutes, and muſt be ſo laid in the indictment; which muſt alſo purſue the words of the ſtatutes in deſcribing the offence; and conclude againſt the form of the ſtatute, becauſe they were in ſome reſpects introductive of a new law.

6 & 7 W. 3. c. 17.

By the ſtat. 6 & 7 W. 3. c. 17. ſ. 4. "for the better preventing the clipping, diminiſhing, or impairing the current coin of this kingdom, if any perſon ſhall buy or ſell, and (*a*) knowingly have in his cuſtody or poſſeſſion, any clippings or filings of the current coin of this kingdom, he ſhall forfeit the ſame, and alſo 500 l. half to the king and half to the informer; and ſhall alſo be branded in the right cheek with a hot iron with the letter *R*, and be impriſoned till payment of the 500 l. By ſ. 8. of the ſame act, the very poſſeſſion of bullion, under certain circumſtances of ſuſpicion, throws the onus upon the party indicted of proving that it was neither coin nor clippings melted, under pain of impriſonment for ſix months.

(*a*) Qu. *and* for *or* in the printed ſtatute.

3 Inſt. 18.

By the ſtat. De Monetâ, &c. if money falſe or clipped be found in the hands of any that is ſuſpicious, he may be impriſoned until he have found his warrant.

IV. *Importing counterfeit or light Money into the Kingdom.*

§ 21.

25 Ed. 3. ſt. 5. c. 2. *Vide* 1 Hale, 216.

Firſt of counterfeit money. By the ſtat. 25 Ed. 3. ſt. 5. c. 2. "If a man bring falſe money into this realm, counterfeit to the money of England, as the money called Luſhburg, 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 his people," it is high treaſon.

1 & 2 Ph. & M. c. 11. *Vide* 1 Hale, 317. ante, ſ. 6.

By ſtat. 1 & 2 Ph. & M. c. 11. it is enacted, "that if any perſon ſhall bring from parts beyond the ſea into this realm, or into any of the dominions of the ſame, any falſe or counterfeit coin or money, being current within this realm as aforeſaid, (viz. gold and ſilver coin of foreign realms current

Ch. IV. § 21. *Importing counterfeit money.*

rent here by the ſufferance and conſent of the crown, which muſt be by proclamation or by writ under the great ſeal,) knowing the ſame coin or money to be falſe and counterfeit, to the intent to utter or make payment with the ſame within this realm or any the dominions of the ſame, by merchandizing or otherwiſe; ſuch offenders, their counſellors, procurers, aiders, and abettors ſhall on conviction or attainder be deemed traitors."

Vide 1 Hale, 228.

1 Hale, 225.

It is ſaid by Lord Hale, that at common law the counterfeiting (meaning of our own coin) beyond ſea ſeems not to have been ſuch a treaſon as could be tried here, in like manner as adhering to the king's enemies might be; and that therefore the importing was made treaſon by the act of Edward 3. He cites no authority for this poſition, the grounds of which I can find no where ſuggeſted. Certainly however the neceſſity of this branch of the law was no leſs apparent, whether a ſubject of England counterfeiting the king's coin abroad were or were not ameſnable to juſtice; for ſuch counterfeiting might be by a foreigner owing no allegiance to the crown of this realm; and therefore the making this proviſion is of itſelf no argument in ſupport of ſuch an opinion.

§ 22. *Conſtruction of the ſtatutes.* Ante, ſ. 1. 4, 5. 9. & ante, ſ. 13. 18. Ante, ſ. 6. *The counterfeit muſt be brought from foreign parts.* 1 Hale, 227, 8, 9. 317. 3 Inſt. 18. Sum. 21. 1 Hawk. ch. 17. ſ. 66. 68. *Vide* poſt. ſ. 26. *Confined to the original importer.*

It has been ſhewn before what kind of money it is, the bringing in of which is prohibited by theſe ſtatutes; and what ſhall be ſaid to be a ſufficient reſemblance of the counterfeit to the true coin. It has been alſo ſhewn that the money ſo prohibited muſt be brought from ſome foreign place out of the king's dominions into ſome place within the ſame. But further, the acts are confined to the importer, and do not extend to a receiver at ſecond hand; though by force of an ancient ſtatute de monetâ, if falſe money be found upon a ſuſpicious perſon, he may be arreſted till he have found his warrant. And ſuch importer muſt alſo be averred and proved to have known that the money was counterfeit.

3 Inſt. 18. 1 Hale, 229. 318. 1 MS. Sum. 50. 94. 1 Hawk. ch. 17. ſ. 69.

It is ſaid by Lord Coke, that the importer muſt alſo merchandize therewith, or make payment thereof: but if he import it with intent ſo to do, it is within the words, and, according to the better opinion, within the intent and true conſtruction of the ſtatutes of Ed. 3. and Philip & Mary; to which purpoſe the latter ſtatute is explanatory of the former.

For

Ch. IV. § 22. *Importing counterfeit money.*

For though the beſt trial and proof of an intent be by the act done, yet it may alſo be evinced by a variety of circumſtances, of which the jury are to judge. At any rate, ſuch intent muſt be averred in the indictment.

§ 23. *Importing counterfeit gold or ſilver foreign coin, not current.* 37 G. 3. c. 126. ſ. 3. *Vide* the preamble, ante, ſ. 10.

The above conſtruction is confirmed, and a new offence alſo created by the ſtat. 37 Geo. 3. c. 126.; the 3d ſection of which enacts, "that if any perſon or perſons ſhall bring into this realm any ſuch falſe or counterfeit coin as aforeſaid, (i. e. by ſect. 2. "any kind of coin, not the proper coin of this realm, nor permitted to be current within the ſame,") reſembling or made with intent to reſemble or look like any gold or ſilver coin of any foreign prince, ſtate, or country, or to paſs as ſuch foreign coin, knowing the ſame to be falſe or counterfeit, to the intent to utter the ſame within this realm, or within any dominions of the ſame; every ſuch perſon ſhall be deemed guilty of felony, and may be tranſported for any term of years not exceeding ſeven."

Several matters are to be remarked in this ſtatute: 1ſt, It embraces the importers of known counterfeit gold or ſilver foreign coin, though *not current* within the realm, who were not included in the ſtat. 1 & 2 Ph. & M. c. 11. 2dly, Acceſſaries before are not mentioned; but theſe are incident to every felony. Yet quære, If they are liable to the puniſhment of tranſportation? 3dly, An importation *with intent to utter* is ſufficient, without any actual uttering; which intent muſt be collected from circumſtances. But though an actual uttering may be the beſt evidence of ſuch intent, yet it ſeems ſafeſt that the indictment ſhould follow the words of the ſtatute. 4thly, The offence created is the bringing ſuch counterfeit money into *this realm*, with intent to utter the ſame *within this realm, or within any dominions of the ſame:* in which reſpect the wording is very different from that of the ſtat. 1 & 2 Ph. & M. c. 11. which prohibits the *bringing into this realm* or *into any of the dominions of the ſame* any counterfeit coin being current *within this realm.* I remark this the rather, becauſe by a ſubſequent ſtatute, viz. 38 Geo. 3. c. 67. the exporting or ſhipping for that purpoſe any ſort of counterfeit coin, whether reſembling our own or any foreign coin, in order to its being ſent to any of our colonies in the Weſt Indies or America, only ſubjects the party to a forfeiture;

Vide ante, p. 161, 162.

Poſt. ſ. 25.

ture; and yet the very fact of ſuch exportation may afford pregnant evidence that it was with intent to utter ſuch baſe money within thoſe *dominions of this realm.* Nor can it in reaſon affect the merits of an offender, whether he has collected ſuch baſe money from the venders of it in this country, or whether he has himſelf imported it hither, which is neceſſary to bring him within this clauſe; his object in exporting it from hence into the Britiſh Weſt Indies or America being the ſame in both inſtances. But the former caſe does not ſeem to be provided for by the ſtat. 37 Geo. 3.

Ch. IV. § 23. *Importing counterfeit, &c. coin not current.*

§ 24. 14 G. 3. c. 42. made perpetual by 39 G. 3. c. 75.

Another offence is created by the ſtat. 14 G. 3. c. 42. intitled, an act to prohibit the importation of light ſilver coin from foreign countries into Great Britain and Ireland. The act recites, that whereas conſiderable quantities of old ſilver coin of this realm, or coin purporting to be ſuch, greatly below the ſtandard of the mint in weight, have been lately imported into this kingdom; and that it is expedient to prevent a practice which may be carried on at this time, to the great detriment of the public; enacts, that from the 1ſt June 1774 all ſilver coin of this realm, or any money purporting to be ſuch, which is not of the eſtabliſhed ſtandard of the mint in weight and fineneſs, ſhall be prohibited to be imported or brought into the kingdoms of Great Britain or Ireland from foreign countries; and if any ſilver coin being, or purporting to be the coin of this realm, exceeding in amount the ſum of five pounds, ſhall be found by any officer of his majeſty's cuſtoms on board any ſhip or veſſel, in any port, &c. or in any boat or other veſſel upon the water within the ſaid kingdoms, or in the cuſtody of any perſon coming directly from the water ſide, or from the information of one or more perſons in any houſe or other place, on ſearch there made in the manner directed by the ſtat. 14 Car. 2. &c., the officer may ſeize the ſame; and if upon examination it ſhall appear to be of the ſtandard weight, it ſhall be reſtored, otherwiſe it ſhall be ſeiſed and confiſcated in the manner therein mentioned, and after condemnation melted down.

Ch. IV. § 25. *Exporting counterfeit money.*

§ 25.

V. *Sending counterfeit Coin, &c. out of the Kingdom, for the purpoſe of its being imported into the Britiſh Colonies in America or the Weſt Indies.*

38 G. 3. c. 67.

By ſtat. 38 Geo. 3. c. 67. ſ. 1. "All copper coin whatſoever, not being the legal copper coin of this kingdom, and all counterfeit gold or ſilver coin, made to the ſimilitude or reſemblance, or intended to reſemble, any gold or ſilver coin either of this kingdom or of any other country (*a*), which ſhall under any pretence, name, or deſcription whatſoever be exported or ſhipped, or laden or put on board any ſhip, veſſel, or boat, for the purpoſe of being exported from this kingdom to the iſland of Martinique, in the Weſt Indies, or any of his majeſty's iſlands or colonies in the Weſt Indies or America, ſhall be forfeited," &c. And by ſ. 2. "Every perſon who ſhall ſo export, or ſhip, lay or put on board any ſhip, veſſel, or boat, in order to be ſo exported, or cauſe to be ſo ſhipped, &c., or ſhall have in their cuſtody, in order to be ſo exported, any ſuch coin as aforeſaid, ſhall forfeit 200 l. and double the value of ſuch coin, to be recovered by bill, ſuit, action, or information in any court of record at Weſtminſter." But genuine gold or ſilver coin may be exported from hence to Ireland ſince the repeal of the ſtat. 19 H. 7. c. 5. by the ſtat. 20 Geo. 3. c. 18.

Vide 37 G. 3. c. 126. ſ. 6. Ante, f. 23.

Exporting genuine money to Ireland. 20 G. 3. c. 18.

VI. *Receiving, uttering, or tendering of counterfeit coin.*

§ 26. *Receiving, uttering, or tendering baſe coin.*

Treaſon. 1 Hale, 214. Foſt. 343.

Felony. MS. Burnet, 40.

Theſe may amount to different degrees of offence according to the circumſtances. If A. counterfeit the gold or ſilver coin current, and by agreement before ſuch counterfeiting B. is to receive and vend the money, he is an aider and abettor to the act itſelf of counterfeiting; and conſequently a principal traitor within the law. In the caſe of the copper coin, he would be an acceſſary before the fact to the felony within the ſtat. 11 Geo. 3. c. 40. And if B. had

(*a*) The genera lcurrent money of the Britiſh Weſt Indies is Spaniſh; which accounts for this branch of the law.

done

done this afterwards for A.'s benefit, without any ſuch agreement precedent to the counterfeiting, but yet knowing the fact; this ſeems to be the ſame as a receiving of the principal, becauſe he maintains him. But if he had merely vented the money for his own benefit, knowing it to be falſe, in fraud of any perſon, he was only liable to be puniſhed as for a cheat and miſdemeanor before the ſtat. 15 Geo. 2. hereafter mentioned. Yet if he then knew by whom it was counterfeited, it might be evidence of his concealment of the treaſon, and therefore a miſpriſion of the ſame. In like manner I have before ſhewn, that the ſtatutes againſt the importation of falſe money do not extend to the receivers, not having taken any part in the bringing in of ſuch money.

Ch. IV. § 26. *Receiving, uttering, or tendering baſe coin.*

Miſdemeanor. 1 Hale, 214. 372. 1 MS. Sum. 96. MS. Burnet, 20. Kel. 33 poſt. ſ. 28. 1 Hawk. ch. 17. ſ. 56. & *vide* Foſt. 342.

Miſpriſion of treaſon. Ante, f. 22.

§ 27. *Receiving, paying, or putting off, &c. felony.*

8 & 9 W. 3. c. 26. made perpetual by 7 Ann. c. 25. ſ. 3.

By ſtat. 8 & 9 W. 3. c. 26. ſ. 6. "Whoever ſhall take, receive, pay, or put off any counterfeit milled money, or any milled money whatſoever, unlawfully diminiſhed and not cut in pieces, at or for a lower rate or value than the ſame by its denomination doth or ſhall import or was coined or counterfeited for, ſhall be guilty of felony." By ſ. 7. the corruption of blood is ſaved; and by ſ. 9. the proſecution muſt be commenced within three months after the offence committed.

This ſtatute mentioning "counterfeit *money*," generally, muſt it ſeems be confined to gold or ſilver coin, in the manner before deſcribed. But by ſtat. 11 Geo. 3. c. 40. ſ. 2. "If any perſon after the 24th of June 1771, ſhall buy, ſell, take, receive, pay, or put off any counterfeit copper coin, not melted down or cut in pieces, at or for a lower rate or value than the ſame by its denomination imports, or was counterfeited for, he ſhall be adjudged guilty of felony."

Ante, f. 1. 9. poſt. Cirwan's caſe, p. 182. 11 G. 3. c. 40. *Vide* ante, f. 11.

What a putting off.

The putting off under theſe ſtatutes means an actual paſſing or getting rid of the money, and not merely an attempt to do ſo; as by tendering it to another who returns it again, refuſing to accept it; which is a diſtinct offence provided for by the ſtat. 15 Geo. 2. after-mentioned. In the caſe of Wooldridge, who was indicted on the ſtat. 8 & 9 W. 3. c. 26. ſ. 6. for putting off counterfeit money to a Mrs. Levey, it appeared that he had carried a large quantity of ſuch money to her houſe, which he had agreed to put off to her, and ſhe to receive from him, at the rate of 29s. for every guinea; and having laid the ſhillings down on a table, ſhe

Wooldridge's caſe, Leach, 211. O. B. Feb. 1783, cor. Perryn, B. and Gould, J. Seſſ. Pap. p. 450. S. C.

Ch. IV. § 27. *Receiving, uttering, or tendering baſe coin.*

ſhe was proceeding to count them out at that rate, and had counted out part of the heap when the officers entered the room, and apprehended them, before ſhe could pay the priſoner for thoſe ſhe had ſelected. This was ruled not to be a completion of the offence charged, and the priſoner was acquitted.

It muſt be vented at a lower rate, &c.

The mere venting of the money does not come within theſe acts, unleſs it be done at a lower value than the coin imports; and it ſhould be ſo ſtated in the indictment.

Nor is it felony within the ſtat. 8 & 9 W. 3. to put off *diminiſhed money*, by which I underſtand genuine money diminiſhed, if it be not ſtated to be *unlawfully* diminiſhed.

Muſt be charged to be unlawfully *diminiſhed.* Tooke v. Hollingſworth, 5 Term Rep. 217.

Should ſtate to whom put off, &c. MS. Tracy.

At the ſeſſions at the Old Bailey before Michaelmas term 1702, a woman was indicted for putting off ten pieces of counterfeit gilt money like guineas to divers perſons unknown. Holt, C. J. ſaid, that the names of the perſons ought to be mentioned and be laid ſeverally; yet he tried the priſoner and ſhe was convicted. This muſt be governed by the ſame rule as prevails in the caſe of ſtealing the property of perſons unknown.

Vide tit Larceny.

What is milled money, &c. Rex v. Bunning, alias Pendegraſt, O B. Sept. 1794. MS. Jud.

As to what ſhall be conſidered as milled money within the ſtatute of William; James Bunning was indicted for putting off to J. P. nine pieces of falſe and counterfeit *milled* money and coin, each counterfeited to the likeneſs of a piece of legal and current *milled* money and ſilver coin of the realm, called a ſhilling, at a lower rate and value than the ſame did by the denomination import and were counterfeited for; i. e. at ſo much, &c. The fact of knowingly putting off counterfeit ſhillings at a lower value than according to their denomination was fully proved; but it could not be proved that the money had any marks of *milling* upon it. The priſoner being convicted, the objection was referred to the judges, who all held the conviction right. Milled money is ſo called to diſtinguiſh it from hammered money(*a*); and all the money now current is milled, i. e. paſſed through a mill or preſs to make the plate out of which it is cut of a proper thickneſs; though by a vulgar error it is frequently ſuppoſed to mean

To ſupport an indictment for putting off counterfeit MILLED MONEY, *it is not neceſſary to prove that the counterfeit was* MILLED.

Hil. Term 1795.

(*a*) I am informed there has been no hammered money ſince the time of Car. 2. and by ſtat. 9 W. 3. c. 2. the currency of all hammered ſilver coin after January 1697 was prohibited.

the

Ch. IV. § 27. *Receiving, uttering, or tendering baſe coin.*

the marking on the edges, which is properly termed *graining*. The judges therefore thought it unneceſſary that the counterfeit money ſhould appear to have been milled: for conſidering *milled-money* as one word, (as if written with a hyphen,) and deſcriptive of the money now current, if the counterfeit reſemble the money which if genuine would have been milled, it is enough.

Vide 8 & 9 W. 3 c. 26. ſ. 3.

Hannah Dorrington's caſe. Caſe of Jacobs and Lazarus, O. B. January 1795, MS. Jud.

The like reſolution was made in the caſe of Hannah Dorrington; and alſo in the caſe of Jacobs and Lazarus; which were conſidered by the judges at the ſame time.

Puniſhment. Rex v. Weſt & others, O. B. Sept. 1780. 1 MS. Sum. 91.

The puniſhment under the abovementioned ſtatutes of W. 3. and Geo. 3. is burning in the hand, and impriſonment not exceeding a year; and that under the ſtat. 18 Eliz. c. 7. ſ. 3.

Ante, ſ. 26.

I have before remarked in what views the uttering of baſe money knowingly may be conſidered, according to the circumſtances under which the act is done, and particularly in caſes where it is uttered in concert with the coiner: but as ſuch concert muſt always be difficult of proof, the legiſlature have provided againſt the fact of uttering it knowingly.

§ 28. *Uttering or tendering in payment.* 15 G. 2. c. 28.

By ſtat. 15 Geo. 2. c. 28. ſ. 2. "If any perſon ſhall after the 29th of September 1742 utter, or tender in payment any falſe or counterfeit money, knowing the ſame to be ſo, to any perſon or perſons, and ſhall be thereof convicted, he ſhall ſuffer ſix months' impriſonment, and find ſureties for good behaviour for ſix months further; and on conviction for a ſecond offence ſhall ſuffer two years impriſonment, and find ſureties for two years more; and on conviction for a third offence ſhall be adjudged guilty of felony without benefit of clergy."

Further puniſhment if the utterer have other baſe money in poſſeſſion at the time of uttering, or ſhall within 10 days after utter more.

By ſ. 3. "If any perſon ſhall after the ſaid 29th September utter or tender in payment any falſe or counterfeit money, knowing the ſame to be ſo, to any perſon or perſons; and ſhall either the ſame day or within ten days then next utter or tender in payment any more or other falſe or counterfeit money, knowing the ſame to be ſo, to the ſame or any other perſon or perſons; or ſhall at the time of ſuch uttering or tendering have about him in his cuſtody one or more pieces of counterfeit money, beſides what was ſo uttered or tender-

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ed; he ſhall be deemed and taken to be a common utterer of falſe money; and being thereof convicted ſhall ſuffer a year's impriſonment, and find ſureties for his good behaviour for two years more: and for a ſecond offence he ſhall be adjudged guilty of felony without benefit of clergy."

2d enhanced offence, felony without clergy.

Pardon on diſcovery.

By ſ. 4. the corruption of blood is ſaved; and by ſ. 8. any offender out of priſon diſcovering two or more perſons guilty of any of the ſaid offences, ſo as they be thereof convicted, ſhall be pardoned. By ſ. 5. offenders ſhall be indicted, arraigned, tried, and convicted by ſuch like evidence and in ſuch manner as counterfeiters of the coin; with a proviſo that the proſecution be commenced within ſix months next after the offence committed.

Trial and evidence.

Limitation of time.

Certificate of former conviction.

By ſ. 9. "If any perſon be convicted of uttering or tendering any falſe or counterfeit money as aforeſaid, and ſhall afterwards be guilty of the like offence in any other county or city, the clerk of the aſſize or clerk of the peace of the county or city where ſuch conviction was had, ſhall, at the requeſt of the proſecutor or any other on his majeſty's behalf, certify the ſame by a tranſcript in a few words, containing the effect and tenor of ſuch conviction, for which certificate 2 s. 6 d. and no more ſhall be paid; and ſuch certificate being produced in court ſhall be ſufficient proof of ſuch former conviction."

An'e, ſ. 1. 9. 27. 1 Hale, 211.

This ſtatute alſo mentioning counterfeit money generally, muſt, as was before obſerved, be confined to the gold and ſilver coin of the realm.

Cirwan's caſe, Oxford Sum. Aſſ. 1794. MS. Jud.

Francis Cirwan was indicted for "unlawfully uttering and tendering in payment to J. H. ten counterfeit halfpence, knowing them to be counterfeit;" and this was laid in the one count againſt the form of the ſtatute, and in another generally. The defendant was convicted on the general count, it being admitted at the trial that there was no ſtatute applicable to the fact. But upon reference to all the judges, they held the conviction wrong, it not being an indictable offence.

Hil. Term 1795.

§ 29. Conſtruction on ſ. 3. of ſtat. 15 G. 2. c. 28.

An indictment againſt Elizabeth Tandy on the act of the 15 Geo. 2. charged her in the firſt count with having on the

Eliz. Tandy's caſe, O. B. Jan. 1799. MS. Jud.

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the 15th December, 39 Geo. 3. uttered to one George Swinburn a counterfeit half-crown, knowing it to be ſo; and a ſecond count charged her with having on the ſaid 15th December, &c. uttered another counterfeit half crown to the ſame perſon. The priſoner having been convicted on both counts, it was referred by Mr. Juſtice Heath to the judges to conſider what judgment was proper to be paſſed on this record; whether the uttering the counterfeit money twice on the ſame day, being ſtated in two counts, would enable the court to pronounce the greater puniſhment inflicted by the 3d ſection, or whether it were to be reſtrained to the leſſer puniſhment inflicted by the 2d ſection (*a*). In Hilary term 1799 the judges (abſent Eyre, C. J., Buller and Heath, Js.) held, that this indictment was not ſufficient to ſubject the priſoner to the larger penalty, as for uttering two pieces of counterfeit coin on the ſame day; there being no diſtinct averment of that fact. And upon the whole they thought it more adviſeable only to give judgment of impriſonment for ſix months ſingly, and not on each of the counts.

Charging two utterings on the ſame day, each in a different count, will not warrant a judgment on the 3d ſection of the ſtat. 15 G. 2. c. 28. as for two diſtinct utterings on the ſame day, there being no preciſe averment of that fact.

Some doubt was at the ſame time entertained, whether a count charging two ſuch utterings on the ſame day, to bring an offender within the third clauſe, ſhould not conclude with an averment that the offender was a *common utterer of falſe money*, as that clauſe declares him to be. But this doubt was ſhortly after ſolved in the following caſe:

Smith's caſe, coram Buller, J. at Maidſtone Sum. Aſſ. 1799. MS. Buller, J. et alia MS. Jud.

James Smith was indicted on the above ſtatute, (15 & 16 G. 2. c. 28.) for that he on, &c. one piece of falſe and counterfeit money, made and counterfeited to the likeneſs and ſimilitude of a piece of good, lawful, and current money and ſilver coin of this realm, called a half-crown, then and there unlawfully and deceitfully did utter to one J. F., he the ſaid defendant, at the time when he ſo uttered the ſaid piece of falſe and counterfeit money, then and there well knowing the ſame to be falſe and counterfeit. And alſo that he the ſaid defendant at the time when he ſo uttered the ſaid piece, &c. as aforeſaid, to wit, on the ſaid day, &c. had about him in his cuſtody and poſſeſſion one other piece of falſe and counterfeit money, made and counterfeited to the

On an indictment on the ſtatute 15 G. 2. c. 28. for uttering falſe money knowingly, and having about him at the time of ſuch uttering other falſe money, the defendant may be adjudged to ſuffer the greater puniſhment of one year's impriſonment, and ureties for two years more, impoſed by ſection 3.; although there be no averment in the indictment that the defendant was a common utterer of falſe money; for that is a concluſion of law from the facts ſo ſtated.

(*a*) It was obſerved that this form of indictment had prevailed at the O. B. and on the circuits.

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likeneſs, &c. of an half-crown; he the defendant then and there well knowing the ſaid laſt-mentioned piece of falſe and counterfeit money to be falſe and counterfeit, againſt the form of the ſtatute, &c. and againſt the peace, &c. After conviction judgment was reſpited to take the opinion of the judges, whether on this form of indictment the defendant were liable to ſuffer the greater puniſhment inflicted by the 3d ſection of the act, or only the leſſer one provided by the 2d ſection; in other words, whether to bring the caſes within the 3d ſection the indictment ſhould not have concluded with a diſtinct averment, that the defendant was a common utterer of falſe money; or whether that were not the neceſſary concluſion of law from the facts ſtated. In Hilary term 1800 the judges, upon ſearch of precedents for many years back, finding that judgment had been given for the greater puniſhment upon indictments drawn in this form, although ſome were to be found containing the averment in queſtion, held ſuch averment, though it would not hurt, was not neceſſary in order to warrant the greater puniſhment.

Rex v. Levi.

There was at the ſame time another caſe reſerved of a ſimilar conviction againſt Benjamin Levi, on which the ſame judgment was given.

§ 30. *Uttering or tendering foreign baſe coin.*

37 G. 3. c. 126. ſ. 4.

Proviſions of a nature ſimilar to thoſe contained in the ſtat. 15 Geo. 2. c. 28. are now extended to foreign coin by ſtat. 37 Geo. 3. c. 126. ſ. 4. which enacts, "that if any perſon or perſons ſhall after the paſſing of this act utter or tender in payment, or give in exchange, or pay, or put off to any perſon or perſons any ſuch falſe or counterfeit coin as aforeſaid, (i. e. by ſ. 2 & 3. not the proper coin of this kingdom, nor permitted to be current within the ſame,) reſembling, or made with intent to reſemble or look like any gold or ſilver coin of any foreign prince, ſtate, or country, or to paſs as ſuch foreign coin, knowing the ſame to be falſe or counterfeit, and ſhall be thereof convicted, every ſuch offender ſhall ſuffer ſix months' impriſonment, and find ſureties for his good behaviour for ſix months more: and if the ſame perſon ſhall afterwards be convicted a ſecond time for the like offence, he ſhall ſuffer two years' impriſonment, and find ſureties for good behaviour for two years more: and if the ſame perſon ſhall afterwards offend a third time, and ſhall

Vide ante, in margine.

1ſt *offence.*

2d *offence.*

3d *offence*

ſhall be convicted of ſuch third offence, he ſhall be adjudged guilty of felony without benefit of clergy."

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Certificate of former conviction.

By ſ. 5. "If any perſon ſhall be convicted of uttering or tendering any ſuch falſe or counterfeit coin as aforeſaid, and ſhall afterwards be guilty of the like offence in any other county, city, or place, the clerk of aſſize or clerk of the peace for the county, &c. where ſuch former conviction ſhall have been had, ſhall at the requeſt of the proſecutor, or any other on his majeſty's behalf, certify the ſame by a tranſcript in few words, containing the effect and tenor of ſuch conviction, [for which 2s. 6d. and no more ſhall be paid]; and ſuch certificate ſhall be ſufficient proof of ſuch former conviction."

Having in poſſeſſion foreign counterfeit coin.

By ſ. 6. of the ſame act, "If any perſon or perſons ſhall have in their cuſtody, without lawful excuſe, any greater number than five pieces of falſe or counterfeit coin, of any kind or kinds, reſembling, or made with intent to reſemble or look like, any gold or ſilver coin or coins of any foreign prince, ſtate, or country, or to paſs as ſuch foreign coin; every ſuch perſon, being thereof convicted upon oath before one juſtice of the peace, ſhall forfeit all ſuch falſe and counterfeit coin, which ſhall be cut in pieces by order of ſuch juſtice; and ſhall for every ſuch offence forfeit a ſum not exceeding 5 l. nor leſs than 40 s. for every ſuch piece of falſe or counterfeit coin which ſhall be found in the cuſtody of ſuch perſon; one moiety to the informer, the other to the poor of the pariſh where the offence was committed; and in default of payment forthwith ſhall be committed to the common gaol or houſe of correction, there to be kept to hard labour for three calendar months, or until ſuch penalty be paid."

This laſt ſection includes all counterfeit foreign coin therein deſcribed, whether current here or not.

By ſ. 7. juſtices of peace may grant warrants to ſearch ſuſpected places for foreign counterfeit coin; and ſuch coin, and any implements for making it, when found, may be taken before ſuch juſtices, who ſhall order the ſame to be ſecured for evidence, and to be afterwards deſtroyed.

VII. *As to general Matters relating to the Coin.*

§ 31. *Principal and accessaries.* Ante, c. 2. f. 35. 1 MS. Sum 99. 1 Hale, 214. Ante, f. 26.

I have before ſhewn in what light accomplices or receivers, in all offences concerning the coin amounting to high treaſon, are conſidered. In thoſe amounting only to felony, they follow the general rule applicable to felony. A few general inſtances will ſuffice. Two agree to counterfeit, and one does it in conſequence of that agreement; they are both guilty. One counterfeits, and another by agreement beforehand afterwards puts it off; the latter is a principal: ſo if he put it off afterwards, knowing that the other coined it; for that makes him an aider; ſo if he furniſhed the coiner with tools or materials for coining.

Indictment and evidence.

Judgment. Ante, c. 2. f. 53. 70.

In like manner it will be ſufficient to refer to what has been before ſaid touching the form of the indictment and evidence applicable thereto, under the general head of high treaſon; and alſo touching the judgment, and puniſhment peculiar to offenders of this ſort. The variations in any of theſe particulars by ſtatute were ſhewn at the ſame time that the ſtatutes themſelves were ſet forth.

Commencement of proſecution within time limited.

Proſecutions under ſome of the acts referred to are limited to take place within a certain time. Amongſt others, the ſtat. 8 & 9 W. 3. c. 26. f. 9. provides that no proſecution ſhall be made for any offence againſt that act, unleſs ſuch *proſecution be commenced* within three months next after ſuch offence committed. In Willace's caſe, who was indicted for high treaſon in colouring a piece of baſe coin reſembling a ſhilling with materials producing the colour of ſilver, the evidence was, that on the 5th May 1797 ſearch was made in the priſoner's lodgings in conſequence of information; and upon the party's entering the room the priſoner immediately ran away. There was found in his room a quantity of baſe money ſuch as deſcribed in the indictment, ſome in earlier ſome in more advanced ſtages of the proceſs. The priſoner was apprehended the ſame evening and lodged in Durham gaol. He was afterwards carried before a magiſtrate, and by warrant dated 8th May was committed to gaol, charged on oath "with ſuſpicion of high treaſon in *counterfeiting* the current money of this kingdom, viz. ſhillings," &c. The aſſizes at Durham were holden on the 8th of Auguſt; ſo that more than three months had elapſed between the commiſſion

Rex v. James Willace, Durham Sum. Aſſ. 1797, afterwards before all the judges. MS. Jud. *Information and proceeding before a magiſtrate held the commencement of proſecution, and not the preferring the indictment.*

of the offence and the preferring of the indictment. But the judges, at a conference, unanimouſly held that the information and proceeding before the magiſtrate was the commencement of the proſecution within the meaning of the act; and that the variance between the manner of laying the offence in the indictment and charging it in the commitment made no difference.

Michaelmas 1797.

Witneſſes. Ante, c. 2. f. 64. 1 Hale, 221. 1 MS. Sum. 50. 93. Foſt. 239. 1 & 2 Ph. & M. c. 11.

Further it has appeared, that in reſpect to traitors of this kind there is not the ſame neceſſity for two witneſſes to prove the treaſon as in the higher ſpecies of that offence; but they may be indicted, tried, convicted, or attainted by ſuch like evidence, and in ſuch manner and form, as felons in general; except that they are entitled to a peremptory challenge of thirty-five.

Reward. See tit. Rewards, more at large.

Rewards are given by the ſtatutes 6 & 7 W. 3, c. 17. and 15 Geo. 2. c. 28. on the apprehenſion and conviction of coiners.

See tit. Pardon, at large.

And by the ſame act of King William, ſ. 12. coiners, clippers, &c. are entitled to a pardon on diſcovery and conviction of two other offenders of the ſame deſcription.

Seizure of baſe coin and tools for coining; and production of them in evidence. 9 & 10 W. 3. c. 21. 13 G. 3. c. 71.

It remains only to add, that the legiſlature have made ſpecial proviſion for the ſuppreſſion of baſe coin, and for the production of it in evidence againſt offenders of this deſcription. By ſtat. 9 & 10 W. 3. c. 21. ſ. 1. any perſon to whom any ſilver money; and by ſtat. 13 Geo. 3. c. 71. ſ. 1. any perſon to whom any gold money ſhall be tendered, which ſhall be diminiſhed otherwiſe than by reaſonable wearing, or which from the appearance of it he ſhall ſuſpect to be counterfeited, may cut, break, or deface the ſame: but if the ſame ſhall afterwards appear to have been lawful money, the perſon who cut, &c. ſhall take the ſame at the rate it was coined for: and every queſtion reſpecting the validity of ſuch coin ſhall be finally determined by the chief magiſtrate of the place.

8 & 9 W. 3. c. 26. ſ. 5. 11 G. 3. c. 40. 37 G. 3. c. 126. *Coining tools, &c. to be ſeized.* Ante, ſ. 11. 16. & 30.

By ſtat. 8 & 9 W. 3. c. 26. and the 11 Geo. 3. c. 40. and the 37 Geo. 3. c. 126. ſ. 7. before mentioned, houſes and other places may be ſearched for tools, which when found, together with all falſe coin, ſhall be ſeized, and produced in evidence againſt the offenders, and afterwards deſtroyed.

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Regulations and Offences concerning Bullion.

§ 32. *Bullion.* *Vide* 2 Inſt. 577. Plowd. 336.

With regard to bullion, which ſignifies properly either gold or ſilver in the maſs, and is here intended to denote thoſe metals in any ſtate other than that of authenticated coin, the legiſlature for the prevention of frauds both with reſpect to the coin and to plate have made ſeveral proviſions.

28 Ed. 1. ſt. 3. c. 20.

By the ſtat. 28 Ed. 1. ſt. 3. c. 20. no goldſmith ſhall make any veſſel, jewel, or any other thing of gold or ſilver, except it be of good and true allay, viz. gold not worſe than the touch of Paris, and ſilver of ſterling allay or better: and that the latter ſhould be aſſayed by the wardens of the goldſmiths' company, and marked with the leopard's head; and any ſuch made otherwiſe may be ſeized; and if he be attainted of the fact, he ſhall be puniſhed by impriſonment, and ranſom at the king's pleaſure.

Ante, f. 1. 17 Ed. 4. c. 1. 1 Hale, 191.

What the ſtandard of ſterling gold or ſilver coin is has been before ſhewn; and by the ſtat. 17 Ed. 4. c. 1. it is provided, that no goldſmith ſhall ſell any gold under the fineneſs of 18 carrats, nor ſilver under the allay of ſterling.

4 H. 7. c. 2. *Vide* 5 H. 4. c. 4. 1 Hale, 644.

By ſtat. 4 H. 7. c. 2. all ſilver fined or parted ſhall be made ſo fine that it may bear 12 penny-weight of allay in a pound weight, and yet be as good or better than ſterling.

18 Eliz. c. 15. *Gold wares 22 carrats; ſilver 11 oz. 2 dwt.* 8 W. 3. c. 8. *Standard for ſilver wares 11 oz. 10 dwt.*

By ſtat. 18 Eliz. c. 15. goldſmiths' wares are required to be not leſs in fineneſs than 22 carrats of gold, nor of ſilver leſs than 11 ounces 2 penny-weights. By ſtat. 8 W. 3. c. 8. after the 25th of March 1697, no perſon ſhall work or make any manufacture of ſilver, leſs in fineneſs than 11 ounces and 10 penny-weights of fine ſilver in every pound troy; nor put to ſale, exchange, or ſell any ſuch made after that time, (unleſs it be ſilver wire or ſuch ſmall things as are not capable of receiving a mark,) until ſuch time as the ſame ſhall be marked as therein deſcribed. And if the wardens and maſters of the ſaid myſtery mark any plate for good contrary to the act, they ſhall alſo forfeit the value of the plate ſo deceitfully marked, to be recovered in like manner.

Wardens, &c. fraudulently marking, &c.

6 G. 1. c. 11. ſ. 41. *Allowing two different ſtandards for ſilver wares with reſpective marks, 11 oz. 10 dwt. and 11 oz. 2 dwt.*

By ſtat. 6 Geo. 1. c. 11. ſ. 41. reciting, that it may be requiſite for encouraging the ſeveral manufactures of wrought plate to continue both the ſtandard of plate of 11 ounces 10 penny-weights, and alſo the ſtandard of 11 ounces

Ch. IV. § 32. *Standard.*

11 ounces 2 penny-weights (*a*) to the pound troy, enacts, that from the 1ſt of June 1720 all ſilver veſſels of plate or manufactured of ſilver ſhall not be leſs in fineneſs than thoſe reſpective ſtandards, each to be marked with diſtinguiſhing marks; the greater ſtandard with the workman's mark, the mark of the wardens of the goldſmiths' company, and with the figure of a lion's head eraſed, and the figure of the Britannia; and the leſſer ſtandard with the workman's mark, that of the wardens of the goldſmiths' company, and with the figure of a lion paſſant, and the figure of a leopard's head; and that it ſhall not be lawful to make any manufactures of ſilver of a coarſer allay than above ſpecified, under the penalties and forfeitures preſcribed *by any laws then in force concerning wrought plate.*

12 G. 2. c. 26. *regulating ſtandards of gold and ſilver wares.*

The ſtat. 12 Geo. 2. c. 26. reciting ſeveral prior ſtatutes for regulating the ſtandards of gold and ſilver plate, enacts, "that after the 28th of May 1739 no goldſmith, ſilverſmith, or other perſon making, trading, or dealing in gold or ſilver wares, within England, ſhall work, or make, or cauſe, &c. any gold veſſel, plate, or manufacture of gold whatſoever leſs in fineneſs than 22 carrats of fine gold in every pound weight troy; or any ſilver veſſel, &c. leſs in fineneſs than 11 ounces 2 penny-weights of fine ſilver in every pound troy; nor ſell, exchange, or expoſe to ſale, or export out of this kingdom any gold or ſilver manufacture, &c. leſs in fineneſs than ſuch reſpective ſtandards, on forfeiture of 10 l. for every ſuch offence, one moiety to the king, the other to any informer who will ſue; and in default of payment the defendant ſhall be committed by the court in which judgment ſhall be given thereon to the houſe of correction for the county, &c. where convicted, there to be kept to hard labour not exceeding ſix months, or until payment." The act contains exceptions of certain ſmall wares particularly deſcribed. By ſ. 3. "Perſons (other than the makers or workers thereof) dealing, &c. in gold or ſilver wares, exporting, ſelling, or expoſing to ſale the ſame worſe than the reſpective ſtandards, who ſhall within fourteen days after notice of the coarſeneſs thereof diſcover to the party grieved, or to the maſter, wardens, or clerk of any of the companies of goldſmiths of the place where ſuch dealer reſides, the name and place of abode of the maker or worker thereof, or of the

Dealers, &c. exempt from proſecution on diſcovery of the maker.

(*a*) For this laſt ſtandard *vide* ſtat. 18 Eliz. c. 15.

perſon

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perſon of whom ſuch dealer really bought the ſame, and ſhall produce him if living, ſo that he may be proſecuted; and if ſuch dealer ſhall give material evidence againſt ſuch perſon, and the judge before whom the trial is had ſhall under his hand on the record certify the ſame, and alſo that there did not appear any ground to believe that ſuch dealer, &c. was privy to the fraud; or if ſuch dealer ſhall, on the trial of any ſuit or proſecution againſt himſelf, concerning the premiſes, prove that he delivered to ſuch maker or worker a ſufficient quantity of ſtandard gold or ſilver to make the ſaid wares, and paid a reaſonable price for the faſhion thereof, or paid the maker or worker or other perſon a market price for ſtandard gold or ſilver of that weight, beſides a reaſonable price for the faſhion thereof; then ſuch dealer, &c. ſhall be diſcharged from any penalty or forfeiture to be incurred by this act for exporting, ſelling, or expoſing to ſale ſuch coarſe gold or ſilver wares, and from any action, ſuit, or proſecution for the ſame." Provided (ſ. 4.) "that ſuch dealer, &c. need not give material evidence, or produce ſuch certificate as aforeſaid, in order to indemnify himſelf from any penalty or forfeiture under this act, unleſs ſuch trial againſt ſuch maker, worker, or other perſon of whom the ſaid wares were bought, ſhall be had within four terms after ſuch diſcovery made, nor unleſs reaſonable notice ſhall be given to ſuch dealer, &c. of the time of ſuch trial."

Limitation of proſecution.

Marks. Selling, &c. or exporting gold or ſilver wares without ſuch marks.

By ſ. 5. "after the 28th of May 1739 no goldſmith, ſilverſmith, or other perſon whatſoever making or ſelling, trading or dealing in gold or ſilver wares, ſhall ſell, exchange, or expoſe to ſale, within England, any gold or ſilver manufacture whatſoever, made after that time, or export the ſame out of this kingdom, until ſuch manufacture of gold (being of the ſtandard of 22 carrats of fine gold per pound troy) and ſuch manufacture of ſilver (being of the ſtandard of 11 ounces 2 penny-weights of fine ſilver per pound troy) ſhall be marked with *the mark of the worker or maker*, which ſhall be *the firſt letters of his chriſtian and ſurname*, and with theſe marks of the goldſmiths' company in London, viz. *the leopard's head, the lion paſſant, and a diſtinct variable mark or letter* to denote the year in which ſuch plate ſhall be made; or with *the mark of the worker or maker*, and with *the marks of the aſſayers at York, Exeter, Briſtol, Cheſter, Norwich, or Newcaſtle-upon-Tyne*; or plate (being of the ſtandard of 11 ounces 10 penny-

10 penny-weights of fine ſilver per pound troy) with *the worker or maker's mark as aforeſaid*, and with theſe marks of the ſaid company, viz. *the lion's head eraſed, the figure of a Britannia*, and the *ſaid mark or letter* to denote the year as aforeſaid; or with *the worker or maker's mark*, and *the marks of one of the ſaid cities or towns*; upon pain of forfeiting 10l., half to the crown, and half to any informer who will ſue; and for default of payment the offender ſhall be committed by the court in which judgment ſhall be given thereon to the houſe of correction for the county, &c. where convicted, there to be kept to hard labour not exceeding ſix months, or until payment be made of the ſaid forfeiture."

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By ſ. 6. certain wares by reaſon of their ſmallneſs or thinneſs are excepted from being marked.

By ſtat. 24 Geo. 3. c. 53. ſ. 5. (to denote the payment of a certain duty) over and beſides the other legal marks, there is required on the ſame manufactures, when ſent to be aſſayed and marked, the mark of *the king's head*; on pain of forfeiting (by ſ. 8.) under the like circumſtances as are before mentioned in the former act, 50l., to be recovered and diſpoſed of as aforeſaid, or in default of payment to be committed in like manner to the houſe of correction, not exceeding one year, or leſs than ſix months, or until payment, and alſo on pain of forfeiting the gold or ſilver manufacture ſo ſold, exchanged, or expoſed to ſale without ſuch mark, one moiety to the crown, the other to any perſon who will ſue, with the like exceptions as in the former ſtatute.

24 G. 3. c. 53. ſ. 5. *The duty mark.*

The ſtat. 30 Geo. 3. c. 31. repeals the exceptions in the two laſt-mentioned acts, as to ſilver wares, and enacts others in lieu thereof.

30 G. 3. c. 31. ſ. 1. *Repealing exceptions of former acts, and making new exceptions.*

Laſtly, By the ſtat. 38 Geo. 3. c. 69. ſ. 1. it is enacted, "that from and after the 1ſt of October 1798, it ſhall be lawful for any goldſmith or other perſon making, trading, or dealing in gold wares in Great Britain, to work or make any gold veſſel, plate, or manufacture of gold whatſoever of the ſtandard of 18 carrats of fine gold in every pound weight troy, and to ſell, exchange, or expoſe to ſale, or export the ſame out of the kingdom." By ſ. 2. "After the ſaid 1ſt of October 1798, no perſon ſhall ſell, exchange, or expoſe to ſale, or export out of the kingdom, any ſuch manufacture of gold made after that time, until marked with a crown

38 G. 3. c. 69. *Giving a lower ſtandard for gold manufactures.*

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crown and the figures 18, inſtead of the mark of the lion paſſant, on forfeiture of 10 l.; which mark is (by ſ. 3.) to be affixed by the reſpective companies of goldſmiths in London, Edinburgh, Birmingham, and Sheffield, and by the wardens and aſſayers of gold at York, Exeter, Briſtol, Cheſter, Norwich, and Newcaſtle-upon-Tyne." By ſ. 4 & 5. this is not to prevent the making, ſelling, &c. manufactures of gold of the ſtandard of 22 carrats directed by former laws; but not to authorize the aſſaying or marking with the mark uſed before the act any gold manufactures of lower ſtandard than 22 carrats per pound troy. But by ſ. 6. the making or ſelling of any manufacture of gold after the ſaid firſt of October, not duly marked with one of the marks required by law to denote the reſpective ſtandards, is ſubjected to a forfeiture of 50 l. By ſ. 7. the counterfeiting of any of the aſſay marks, and removing them from one piece of manufacture to another, or ſelling, &c. the article with ſuch forged or removed mark, knowingly, is made felony, puniſhable with tranſportation for ſeven years. By ſ. 8. all the powers, regulations, forfeitures, methods, &c. preſcribed by the act of the 12 Geo. 2. c. 26. or by any other act therein referred to, or ſtill in force, are made applicable with reſpect to manufactured gold of the ſtandard of 18 carrats thereby allowed, except where otherwiſe provided for expreſsly by this act.

See tit. Forgery more at large.

§ 33. *Reſult of the ſtatutes.* Ante, f. 1. 28 Ed. 1. ſt. 3. c. 20. 17 Ed. 4. c. 1. *Vide* 1 Hale, 191.

Hence it appears, that by the ſtat. 28 Ed. 1. ſt. 3. c. 20. all gold manufactures were required to be made of good and true alloy, that is, not worſe than the touch of Paris. By ſtat. 17 Ed. 4. c. 1. gold was not to be manufactured under the fineneſs of 18 carrats in the pound troy, which was increaſed to 22 carrats by ſtat. 18 Eliz. c. 15. and ſo continued by the ſtat. 12 Geo. 2. c. 26. ſ. 1. in reſpect of all goods manufactured after the 28th of May 1739. But by the ſtat. 38 Geo. 3. c. 69. ſ. 1. it was again permitted to be manufactured at the lower ſtandard of 18 carrats after the 1ſt of October 1798.

Marks for gold manufactures of 22 carrats.

By ſtat. 12 Geo. 2. c. 26. ſ. 5. manufactured gold of the ſtandard of 22 carrats ſhall have, 1. the worker or maker's mark, viz. the firſt letters of his chriſtian and ſurname; 2. the marks of the goldſmiths' company in London, viz. the

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the leopard's head, the lion paſſant, and a diſtinct variable mark or letter to denote the year in which it was made: or elſe it ſhall have, 1. the worker or maker's mark, together with, 2. the marks of the aſſayers at York, and other places named, (i. e. reſpectively, according to the party's place of reſidence). By the ſtat. 38 Geo. 3. c. 69. ſ. 1. manufactured gold of the ſtandard of 18 carrats ſhall be marked with a crown and the figures 18 inſtead of the lion paſſant, to be affixed by the reſpective companies of goldſmiths in London, Edinburgh, Birmingham, and Sheffield, and by the wardens and aſſayers, &c. at York, Exeter, &c.

Of 18 carrats.

Vide poſt.

Silver ſtandard ſterling.

By ſtatutes 28 Ed. 1. ſt. 3. c. 20. and 17 Ed. 4. c. 1. ſilver manufactures were to be of true ſterling allay or better, the value of which has been noticed before. By ſtat. 4 H. 7. c. 2. the ſilver was to be made fine enough to bear 12 penny-weights of allay per pound weight. By the ſtat. 18 Eliz. c. 15. the ſtandard was ſettled at 11 ounces 2 penny-weights to the pound troy. This by ſtat. 8 W. 3. c. 8. was raiſed to 11 ounces 10 penny-weights in reſpect of goods manufactured after the 25th of March 1697. But the ſtat. 6 Geo. 1. c. 11. ſ. 41. confirmed by the ſtat. 12 Geo. 2. c. 26. ſ. 5. ratified both the ſtandards again under diſtinguiſhing marks, the one from the 1ſt of June 1720, the other from the 1ſt of October 1798, as after-mentioned. Silver manufactures of ſterling allay were by the ſtat. 28 Ed. 1. ſt. 3. c. 20. to be aſſayed by the wardens of the goldſmiths' company, and marked with the leopard's head. The marks were afterwards varied on the change of the ſtandard by the ſtat. 8 W. 3. c. 8., and diſtinguiſhing marks given by the ſtat. 6 Geo. 1. c. 11. ſ. 41. upon eſtabliſhing the two different ſtandards before mentioned. The marks in uſe ſince the 28th of May 1739 are fixed by the ſtat. 12 Geo. 2. c. 26. to be, for manufactured ſilver of the ſtandard of 11 oz. 2 dwt. per pound troy, the ſame marks as are before ſet by the ſame ſtatute for manufactured gold of 22 carrats. And for manufactured ſilver of the ſtandard of 11 oz. 10 dwt. the worker or maker's mark as aforeſaid, and theſe marks of the goldſmiths' company in London, viz. the lion's head eraſed, the figure of Britannia, and a diſtinct variable mark or letter to denote the year in which it was made; or elſe with the worker or maker's mark, and the marks of the aſſayers at York, Exeter, &c.

Ante, f. 1. *Vide* 5 H. 4. c. 4. & 14 G. 2. c. 42. 1 Hale, 644.

11 oz. 1 dwt. *per pound troy.*

11 oz. 10 *dwt.*

Marks. Sterling.

11 oz. 2 *dwt.* *ſupra.*

11 oz. 10 *dwt.*

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In addition to the marks above mentioned, there is another mark common both to gold and silver manufactures of whatever standard, namely, the mark of the king's head; which by stat. 24 Geo. 3. c. 53. is required in all instances where other marks are necessary, to denote the payment of a certain duty.

Gold and silver additional mark. 23 G. 3. c. 53 s. 5.

§ 34. *Offences and punishments.*

The principal offences created by these statutes are the making, working, putting to sale, exchanging, selling, or exporting any gold or silver manufactures of less fineness than the standards respectively fixed at the time by the several acts. Besides the particular penalties and forfeitures inflicted on the delinquents, or in default of payment the commitment to the house of correction, it is to be remembered that the stat. 28 Ed. 1. st. 3. c. 20. is still in force, which subjects them to a discretionary fine and imprisonment: and though the description of the offence therein is not so large as in the subsequent statutes, yet the penalty of it seems virtually to be adopted in the latter by general words of reference to former laws. Besides which, I conceive that offenders of this description fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat.

Rex v. Jackson, Cowp. 297.

Vide tit. Cheats.

Fabian's case, O. B. 1664, Kel. 39.

Joseph Fabian a working goldsmith was indicted for falsifying plate, by putting in too much allay, and then corrupting one of the assay master's servants to help him to the proper marks, with which he stamped his plate; and being convicted was fined 100 l. and adjudged to stand three times in the pillory; and was also forejudged of his trade that he should not use that trade again as a master workman. Such a judgment must have been at common law.

Vide tit. Forgery, Stamps.

I have in another place mentioned the offence of forging the marks on bullion or wrought plate.

2. *Counterfeiting Bullion.*

§ 35. *Counterfeit Bullion.*

The counterfeiting of bullion in the mass is also provided against, with a view to discourage false coining as well as private impositions.

8 & 9 W. 3. c. 26. made perpetual by 7 Ann. c. 25. s. 3. *Blanching copper for sale, or mixing it with silver, or*

By stat. 8 & 9 W. 3. c. 26. "If any person whatsoever after the 15th of May 1697 shall blanch copper for sale, or mix blanched copper with silver, or knowingly buy or sell or offer to sale blanched copper alone, or mixed with silver; or shall

shall knowingly and fraudulently buy or sell or offer to sale any malleable composition, or mixture of metals or minerals, which shall be heavier than silver, and look and touch and wear like standard gold, but be manifestly worse than standard; every such person shall be guilty of felony, and being thereof convicted or attainted shall suffer death." By s. 7. the corruption of blood is saved; and by s. 9. the prosecution must be commenced within three months after the offence committed.

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buying, selling, or offering to sale such or the like; or any composition like gold.

3. *Exportation of Bullion.*

§ 36.

At former periods the exportation of bullion has been prohibited by various statutes; but these having been found greatly inconvenient to commerce, the stat. 15 Car. 2. c. 7. s. 12. provides, that any person may export any foreign coin or bullion duty free, first making an entry thereof in the custom-house. But it having been found that, under colour of this regulation, English money or wrought plate had been melted down into the form of foreign coin, or bullion, for the purpose of exportation, the stat. 6 & 7 W. 3. c. 17. s. 3. enacts, that none shall cast or make ingots, or bars of silver, in imitation of Spanish bars or ingots of silver, nor stamp any mark or impression upon any ingot or bar in likeness of the Spanish marks or impression, on pain for each offence of forfeiting the silver so cast, and 500 l., half to the king, and half to the informer. And by s. 5. "No person shall transport or cause to be transported out of England into parts beyond the seas any molten silver, but only such as shall be marked or stamped at goldsmiths' hall, &c. nor without a certificate under the hands of one of the wardens of the goldsmiths' company, that oath has been made by the owner or owners thereof, and likewise by one credible witness, that the same is lawful silver; and that no part thereof was (before the same was molten) the current coin of this realm, nor clippings thereof, nor plate wrought within this kingdom," &c. And by s. 6. "Any custom-house officer may seize any molten silver put on board any vessel without such mark or stamp and certificate." By s. 13. of the same act, "in case of any seizure of any bullion shipped to be exported, if any doubts shall arise whether the same be English or foreign, the proof shall lie upon the owner, claimer, or exporter, that the same is foreign bullion, and has not been melted down

Exportation of Bullion. 1 Hawk. ch. 18. s. 6. 1 Hale, 654. 15 Car. 2. c. 7.

6 & 7 W. 3. c. 17. s. 3. *Ingots or bars made in imitation of Spanish prohibited.*

Bullion exported must be stamped.

If doubt arise proof lies on the owner.

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in England," &c. And by ſ. 14. "if any perſon ſhall enter or ſhip any bullion allowed by the act to be exported, other than in the name of the true owner, proprietor, or importer, the exporter ſhall forfeit the ſame or the full value thereof, half to the king, and half to the perſon ſeizing or diſcovering." Alſo by ſtat. 7 & 8 W. 3. c. 19. ſ. 6. "no perſon ſhall ſhip or cauſe to be ſhipped any molten ſilver or bullion whatſoever, in any form, unleſs a certificate be firſt obtained from the court of the lord mayor and aldermen of London; oath having been made before the court by the owners and two witneſſes, that the ſame was and is foreign bullion, and that no part thereof was the coin of this realm, or the clippings thereof, nor plate wrought within this kingdom," &c.; "which oath the ſaid court ſhall circumſtantially certify to the commiſſioners of the cuſtoms before any cocket ſhall be granted for ſhipping the ſame, on pain to the owner of loſs of the goods and forfeiting double the value; to the captain the forfeiture of 200 l., and if in the king's ſervice, the loſs of command; to the cocket officer 200 l., and incapacity to hold any office."

7 & 8 W. 3. c. 19. ſ. 6. *Certificate from the lord mayor and aldermen.*

§ 37. *Sale of bullion.* 6 & 7 W. 3. c. 17. ſ. 7. *Brokers prohibited from buying or ſelling bullion.*

4. *Sale of Bullion.*

The exportation of gold or ſilver manufactures under the ſtandard allay allowed by law, has been juſt noticed.

By ſ. 7. of it. 6 & 7 W. 3. c. 17. "If any broker, not being a trading goldſmith or refiner of ſilver, ſhall buy or ſell any bullion or molten ſilver, he ſhall ſuffer impriſonment for ſix months without bail." This regulation was probably intended to prevent gambling ſpeculations which might enhance the price of the precious metals.

§ 39. 6 & 7 W. 3. c. 17. ſ. 8. *Perſons having ſilver bullion found in their poſſeſſion under certain circumſtances of ſuſpicion, ſhall upon indictment be bound to prove it to be lawful bullion, on pain of ſix months' imprisonment.*

5. *As to the Poſſeſſion of Bullion unaccounted for.*

The ſtat. 6 & 7 W. 3. c. 17. ſ. 8. for "preventing the counterfeiting and clipping the coin of this kingdom," after impoſing certain penalties and other puniſhment on perſons ſelling or paying broad ſilver money, or money unclipped, for more than it is coined for; or caſting bars of ſilver in imitation of the Spaniſh; or for buying, ſelling, or having clippings or filings; and after prohibiting the exportation of bullion except it be properly ſtamped, and ſubjecting it to ſeizure if ſhipped, and inflicting impriſonment on brokers trading in bullion; enacts by ſ. 8. that for the better diſcovery of

of offenders in the premiſes, that one or more of the wardens of the goldſmiths' company, with any two or more of the court of aſſiſtants of the ſaid company within the bills of mortality, or any two juſtices of the peace within any county, city, or town corporate, out of the bills of mortality, may enter into the houſe, room, or workſhop of any perſon ſuſpected of buying or ſelling unlawful bullion, and ſearch for the ſame; and in caſe the occupier of ſuch houſe, &c. ſhall refuſe to permit the ſaid warden and aſſiſtants, or juſtices, to make ſuch ſearch as aforeſaid, they may, with the aſſiſtance of a conſtable, break open any door, box, &c. in order to ſearch for ſuch bullion; and in caſe of finding any ſuch, ſhall ſeize as well the ſame as the perſon and perſons in whoſe poſſeſſion it ſhall be found; and the ſaid wardens, aſſiſtants, and conſtables ſhall bring the parties before the next juſtice of the peace, who ſhall, upon oath made of ſuch finding (which juſtice within the bills of mortality, and the ſaid two juſtices without the ſaid bills of mortality, ſhall and may) examine the perſon ſo brought before him, or found by them reſpectively, upon oath, whether the bullion ſo found be lawful ſilver, and whether the ſame were not (before the melting thereof) the current coin of this kingdom, or clippings thereof; and in caſe the perſon ſo examined ſhall not prove by their oath, or by the oath of one credible witneſs, before the ſaid juſtice and juſtices reſpectively, that the bullion ſo found is lawful ſilver, and that the ſame was not, before the melting thereof, the current coin of this realm, nor clippings thereof, then the ſaid juſtice or juſtices reſpectively ſhall commit the perſon ſo examined to priſon, and ſhall ſecure the bullion ſo found, and ſhall likewiſe oblige the perſons that can give any evidence concerning the ſame to enter into recognizance to proſecute the ſaid offender and offenders; and in caſe ſuch offender and offenders, in whoſe poſſeſſion ſuch unlawful bullion ſhall be found, ſhall not, upon their trials on an indictment for melting the current ſilver coin of this realm, prove by the oath of one credible witneſs at the leaſt, the bullion ſo found to be lawful ſilver, and that the ſame was not the current coin of this realm, nor clippings thereof, then, and for want of ſuch proof, ſuch offender ſhall be found guilty of the offence contained in ſuch indictment, and ſhall ſuffer impriſonment for the ſpace of ſix months, without bail or mainprize."

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