1916
June 26, 27, 28, 29; *July* 17, 18.

[KING'S BENCH DIVISION AND COURT OF CRIMINAL APPEAL.]

THE KING *v.* CASEMENT.

Criminal Law—High Treason—Adhering to the King's Enemies—Adherence without the Realm—Aid and Comfort—Treason Act, 1351 (25 *Edw.* 3, *stat.* 5, *c.* 2).

By the Treason Act, 1351, it is declared that if a man do levy war against our Lord the King in his realm, or be adherent to the enemies of our Lord the King in the realm, giving to them aid or comfort in his realm or elsewhere, and thereof be probably attainted of open deed, that ought to be adjudged treason:—

Held by the Court of Criminal Appeal, affirming the King's Bench Division, that if a British subject be adherent to the King's enemies in his realm by giving to them aid or comfort in his realm, or if he be adherent to the King's enemies elsewhere by giving them aid or comfort elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies he commits treason as defined by the Act.

Held by the King's Bench Division, that if a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, or which weakens or tends to weaken the power of the King and of the country to resist or attack the enemies of the King and country, he gives aid and comfort to the King's enemies within the meaning of the Act.

Therefore, the United Kingdom being at war with the Empire of Germany, where a British subject went to Germany and there endeavoured to persuade other British subjects, who were prisoners of war in Germany, to join the armed forces of the enemy, and took part in an attempt to land arms and ammunition in Ireland for the use of the enemy:—

Held by the King's Bench Division and by the Court of Criminal Appeal, that he was guilty of high treason.

Held, also, that he could be tried in this country.

TRIAL at bar for high treason.

The indictment charged Sir Roger Casement with "high treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the Empire of Germany, contrary to the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2)." (1) It proceeded to allege that

(1) The Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2): "Auxint p[r]ceo q̃ di[v]ses opinions ount este einz ces heures qeu cas, q[a]nt il

"Sir Roger David Casement, otherwise known as Sir Roger Casement, Knight, on December 1, 1914, and on divers other days thereafter and between that day and April 21, 1916, being then, to wit, on the said several days, a British subject, and whilst on the said several days an open and public war was being prosecuted and carried on by the German Emperor and his subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects, did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without this realm of England, to wit, in the Empire of Germany."

Overt acts were alleged, namely, on December 31, 1914, and January 6 and February 19, 1915, of soliciting and inciting and endeavouring to persuade certain persons being British subjects

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avient doit estre dit treson, & en quel cas noun, le Roi a la requeste des Seign^rs & de la Cõe, ad fait declarissement q̃ ensuit, cest assavoir; q^ant hõme fait compasser ou ymaginer la mort nr̃e Seign^r le Roi, ma dame sa compaigne, ou de lour fitz primer & heir; . . . . & si hõme leve de guerre contre nr̃e dit Seign^r le Roi en son Roialme, ou soit ahordant as enemys nr̃e Seign^r le Roi en le Roialme, donant a eux eid ou confort en son Roialme ou p aillours, & de ceo p̃vablement soit atteint de ov̄t faite p gentz de lour condicion: . . . . et fait a entendre qen les cases suisnomez doit estre ajugge treson q̃ sestent a nr̃e Seign^r le Roi & a sa roial majeste; & de tiele man̄e de treson la forfait e des eschetes apptient a nr̃e Seign^r le Roi, si bien des t̄res & tenz tenuz des aut̄s, come de lui meismes . . . ."

TRANSLATION.

"Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth, that is to say; When a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen or of their 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 probably attainted of open deed by the people of their condition: . . . . And it is to be understood, that in the cases above rehearsed, that ought to be adjudged treason which extends to our Lord the King, and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our Sovereign Lord, as well of the lands and tenements holden of other, as of himself . . . ."

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and members of the military forces of the King and being prisoners of war then imprisoned at Limburg Lahn Camp, in the Empire of Germany, to wit, Michael O'Connor, John Richardson, John Cronin, John Robinson, William Egan, Daniel O'Brien, James Wilson, and others whose names were unknown, to forsake their duty and allegiance to the King and to join the armed forces of his enemies and to fight against the King and his subjects in the said war. Also in or about the months of January and February, 1915, at Limburg Lahn in the Empire of Germany circulating and distributing and causing and procuring to be circulated and distributed to and amongst certain persons being British subjects and members of the military forces of the King and being prisoners of war imprisoned at Limburg Lahn Camp aforesaid, to wit, Michael O'Connor, John Robinson, John Cronin, William Egan, Daniel O'Brien, James Wilson, and divers others whose names were unknown, a certain leaflet to the tenor and effect following, that is to say:

"IRISHMEN! Here is a chance for you to fight for Ireland! You have fought for England, your country's hereditary enemy. You have fought for Belgium in England's interest, though it was no more to you than the Fiji Islands! Are you willing to fight FOR YOUR OWN COUNTRY with a view to securing the national freedom of Ireland?

"With the moral and material assistance of the German Government an IRISH BRIGADE is being formed. The object of the Irish Brigade shall be to fight solely for THE CAUSE OF IRELAND and under NO CIRCUMSTANCES shall it be directed to any GERMAN end. The Irish Brigade shall be formed and shall fight under the Irish flag alone. The men shall wear a special distinctively Irish uniform, and have Irish officers. The Irish Brigade shall be clothed, fed, and efficiently equipped with arms and ammunition by the German Government. It will be stationed near Berlin and be treated as guests of the German Government. At the end of the war the German Government undertakes to send each member of the brigade who may so desire it to the United States of America with necessary means to land.

"The Irishmen in America are collecting money for the brigade.

"Those men who do not join the Irish Brigade will be removed

from Limburg and distributed among other camps. If interested, see your company commanders.

"Join the Irish Brigade and win Ireland's independence!

"Remember Bachelor's Walk!

"God save Ireland!"

with intent to solicit, incite, and persuade the said last-mentioned British subjects, being Irishmen, to forsake their duty and allegiance to the King and to aid and assist his enemies in the prosecution of the said war against the King and his subjects.

Other overt acts alleged were—

(i.) On or about December 31, 1914, and on divers days thereafter in the months of January and February, 1915, persuading and procuring certain persons, being members of the military forces of the King, to wit, Daniel Julian Bailey, one Quinless, one O'Callaghan, one Keogh, one Cavanagh, one Greer, and one Scanlan, and divers others, whose names were unknown, to the number of about fifty, the said persons being prisoners of war then imprisoned in Limburg Lahn Camp in the Empire of Germany, to forsake their allegiance to the King and to join the armed forces of his said enemies with a view to fight against the King and his subjects in the said war.

(ii.) On or about April 12, 1916, setting forth from the Empire of Germany as a member of a warlike and hostile expedition undertaken and equipped by the enemies of the King having for its object the introduction into and landing on the coast of Ireland of arms and ammunition intended for use in the prosecution of the war by the said enemies against the King and his subjects.

At the conclusion of the evidence for the prosecution,

A. M. Sullivan (Serjeant and King's Counsel of the Irish Bar) and *Artemus Jones*, for the prisoner, moved to quash the indictment. The indictment charges the prisoner with "adhering to the King's enemies elsewhere than in the King's realm, to wit," &c., "contrary to the Treason Act, 1351." No such offence is created by the words of that Act. The offence there specified is if a man "be adherent to the enemies of our Lord the King within the realm." The words "within the realm" are of vital importance. In the fourteenth century many of the English barons by holding lands in France were subjects of the French King as well

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as of the English King. If the two Kings were at war with each other these "amphibious barons" must fight for their liege lord and send a due contingent of knights to the opposite army. (1) If adhering to the King's enemies without the realm were treason, these barons by rendering service to the French King would be in danger of forfeiting their lands in England. It would be to their interest to exclude from punishment all cases of adhering to the King's enemies outside the realm and to confine treasonable adherence to cases of adhering within the realm. Their influence in Parliament would be used to protect their interests.

Still more cogent is the fact that no crime committed outside the body of a county was cognizable by the common law. "If a man be stricken upon the high sea, and dies of the same stroke upon the land; this cannot be inquired of by the common law, because no visne can come from the place where the stroke was given (tho' it were within the sea pertaining to the realm of England, and within the liegeance of the King) because it is not within any of the counties of the realm." (2) "If two of the King's subjects go over into a foreign realm, and fight there, and the one kills the other, this murder being done out of the realm, cannot be for want of trial heard and determined by the common law, but it may be heard and determined before the Constable and Marshal." (3) "So if A. gives B. a mortal wound in a foreign country, B. comes into England and dies; this cannot be tried by the common law, because the stroke was given there, where no visne can come . . . . " (4) And before the statute of 2 & 3 Edw. 6, c. 24, if one man struck another in one county and the injured man came into another county and died there, an indictment would not lie against the aggressor. (5) For "every indictment at common law must expressly show some place wherein the offence was committed, which must appear to have been within the jurisdiction of the Court, in which the indictment was taken; for if . . . . the stroke be alleged at A. and the

(1) Pollock and Maitland, Hist. Eng. Law, vol. 1, pp. 443, 444 (460, 2nd ed.), citing Bracton, fol. 427b.

(2) Vin. Abr. Trial (N. b. 4), pl. 1, p. 178.

(3) Vin. Abr. Trial (N. b. 5), pl. 2, p. 180, citing 3 Inst. 48.

(4) Vin. Abr. Trial (N. b. 5), pl. 2, note, p. 180.

(5) Vin. Abr. Trial (Y. a. 2), pl. 2, 3, p. 130.

death at B. and the indictment conclude that the defendant sic felonice murdravit the deceased at A. the indictment is void; so is it also if it lay not both a place of the stroke and death; or if any place so alleged be not such from whence a visne may come . . . ." (1) The limits of the common law jurisdiction in the time of Edward III. are matter of history. Offences committed outside the body of a county were not cognizable by the common law. The Admiral could try offences, including treason, committed on the high seas or below the bridges of the great rivers. Such a trial would be according to the civil law and not the common law. The Constable and Marshal could try treasons committed within the territory of a foreign prince. He tried such offences by appeal of treason and wager of battle. In the reign of Richard II. the Court of the Constable and Marshal was encroaching upon the jurisdiction of the King's Courts. To remedy this an Act was passed in the year 1389, 13 Ric. 2, stat. 1, c. 2, declaring that to the Constable it pertained to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm which could not be determined nor discussed by the common law, with other usages and customs to the same matters pertaining which other Constables theretofore had duly and reasonably used in their time; and it was enacted that if any should complain that any plea was commenced before the Constable and Marshal that might be tried by the common law of the land, the plaintiff should have a privy seal from the King directed to the Constable and Marshal to surcease in that plea until it was discussed by the King's Council if the matter ought of right to pertain to that Court, or otherwise to be tried by the common law of the realm of England. In the year 1399 it was enacted by the statute 1 Hen. 4, c. 14, that all appeals to be made of things done within the realm should be tried and determined by the good laws of the realm made and used in the time of the King's progenitors; and that all appeals to be made of things done out of the realm should be tried and determined before the Constable and Marshal. Consistently with this, when a statute of 1414, 2 Hen. 5, stat. 1, c. 6, created offences of treason by acts done outside the realm, it also provided a tribunal whereby to try them, consisting of a conservator

(1) Vin. Abr. Indictment (H. 8), pl. 5, pp. 376, 377.

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and two men learned in the law, who were to try these treasons according to the practice prevailing in trials before the Admirals of the Kings of England.

In the reign of Henry VIII. for dynastic and other purposes a great accession was made by statute to the number of treasons. The statute 25 Hen. 8, c. 22, is an example of this legislation; 26 Hen. 8, c. 13, is another. A number of these newly-made treasons consisted of acts which might be committed abroad. The last mentioned Act, 26 Hen. 8, c. 13, dealt with them. It provided that those treasons committed abroad should be triable here as treason committed within the realm were triable. It enacted that "If any of the Kinges subjecte, denisens or other, do commytte or practyse, oute of the lymette of this realme yn any oute warde ptyes, any suche offences whiche by this Acte are made or heretofore have be made treasonne, that then suche treasons, what so ever they be or where so ever they shall happen so to be donne or commytted, shalbe inquyred and presentyd, by the othes of twelve goode and laufulle men upon good and probable evydence and wytnesse, yn suche shyre and countie of this realme and before such psonnes as hit shall please the Kynges Highnes to appoynte by cōmyssion under his greate seale, yn lyke maner and fourme as treasons commytted within this realme have byn used to be inquyred of and presentyd; and that uppon everie ynditement and presentment founden and made of any suche treasons, and certyfied ynto the Kynges Bench, lyke ꝓcese and other circumstānce shalbe there had and made ayenst the offendours as yf the same treasons so presentyd had be laufully founde to be donne and commytted within the lymytes of this realme; . . . ." That statute, which is repeated in 5 & 6 Edw. 6, c. 11, s. 4, in force at the present day, is the foundation of the law of foreign treasons. It does not include adhering to the King's enemies without the realm, for that was not by that Act or theretofore made treason.

It is stated by Sir Matthew Hale (1) that before the statute of 26 Hen. 8, c. 6, no treason, murder, or felony committed in Wales was inquirable or triable before commissioners of oyer and terminer, or in the King's Bench in England, but before justices or commissioners assigned by the King in those counties of Wales where the

(1) 1 Hale, P. C. 156.

fact was committed. He cites the case of *John Kynaston* (1), who was charged with certain felonies committed in Shropshire and also as an accessory to the treason of compassing the King's death in Wales in having sent his son fully armed to assist Owen Glendower at Oswestry in his rebellion. He was indicted in Shropshire and the indictment was returned into the Court of King's Bench at Westminster. But, inasmuch as treasons in Wales were not triable by the laws of England, he was tried only for the felonies alleged to have been committed in Shropshire. Of these charges he was acquitted. This is one of many instances which show that treasons committed without the realm could only be tried by a special statutory provision.

The next statute to be noticed is 28 Hen. 8, c. 15. It treats of treasons, piracies, and other offences committed upon the high seas. It recites that whereas traitors, pirates, thieves, robbers, murderers, and confederators upon the sea many times escaped unpunished "because the triall of their offences hath heretofore ben ordered judged and determyned before the Admyrall or his lyeutenante or cõmissary, after the course of the civile lawes, the nature wherof is that before any judgement of death canne be yeven ayenst the offendours, either they must playnly confesse their offences (which they will never doo without torture or paynes) or els their offences be so playnly and directly pved by witnes indifferente, suche as sawe their offences cõmytted, which cannot be gotten but by chaunce at fewe tymes by cause such offendours cõmytt their offences uppon the see, and at many tymes murder and kill suche psons being in the shipp or bote where they cõmytt their offences which shulde wytnes ayenst them in that behalfe"; and proceeds to enact: "For reformacion wherof be it enacted," &c., "that all treasons . . . . herafter to be cõmytted in or uppon the see, or in any other haven ryve creke or place where the Admyrall or Admyralls have or ptende to have power auctoritie or jurisdiction, shall be enquired tried harde determyned and judged in such shires and places in the realme as shall be lymytted by the Kynges cõmission or cõmissions to be directed for the same, in like fourme and condicion as if any such offence or offences hadd ben cõmytted or done

(1) (1401) Coram Rege Roll Pasch. 2 Hen. 4 Rex, memb. 18, in the Public Record Office.

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in or uppon the lande; And such cõmissions shall be hadd under the Kinges greate seale directed to the Admyrall or Admyrals, or to his or their lieutenaunt deputie or deputies, and to three or four such other substanciall psons as shall be named or appoynted by the Lorde Chauncellour of Englande for the tyme being from tyme to tyme and as often as nede shall require, to here and determyne suche offences after the cõmon course of the lawes of this lande, used for tresons . . . . done and cõmytted upon the lande within this realme." Coke treating of Piracy (1) says: "Note, treason done out of the realm is declared to be treason by the statute 25 Edw. 3, and yet at the making of this Act of 28 Hen. 8 it wanted trial (as by the preamble of this statute it is rehearsed) at the common law."

Now the Act of 26 Hen. 8, c. 13, had provided for the inquisition and presentment of foreign treasons under the King's commission, not by the common process of the realm. This was considered objectionable, and accordingly the Act of 35 Hen. 8, c. 2, was passed. This Act recites: "Forasmuche as some doubtes and questions have bene moved, that dyuers kindes of treasons mysprisiõns and concealmentes of treasons, done ppetrated or cõmytted out of the Kinges Majesties realme of Englande and other his Graces Dnions, cannot ne maye by the cõmon lawes of this realme be enquired of herd & determyned within this his saide realme of Englande; for a playne remedye ordre and declarcõn therein to be had and made, be it enacted by auctoritie of this psent parliament, that all manner of offences being alredye made or declared, or hereafter to be made or declared by any the lawes and statutes of this realm, to be treasons mysprisions of treasons or concealmentes of treasons, and done ppetrated or cõmytted or hereafter to be done ppetrate or cõmitted by anye pson or psons out of this realme of Englande, shalbe from hensforth inquired of herd and determyned before the Kinges justices of his Benche for plees to be holden before himselfe, by good and laufull men of the same shire where the saide Benche shall sytt and be kepte, or els before suche cõmissioners and in suche shire of the realme as shalbe assigned by the Kinges Majesties cõmission, and by good and laufull men of the same shire; in like manner and forme to all ententes and purposes as if suche treasons mysprisions of treasons or concealmentes of

(1) 3 Inst. 113.

treasons had bene done ppetrated and cõmytted within the same shire where they shalbe so inquired of harde & determyned as is aforesaid." Again, adhering to the King's enemies without the realm is not included in this statute, since such adherence was not already or afterwards made or declared to be treason.

All those treasons newly created in the reign of Henry VIII. were swept away by an Act of 1553, 1 Mar., sess. 1, c. 1, which provided that no act, deed, or offence being by Act of Parliament made treason by words, writing, cyphering, deeds, or otherwise should be taken or adjudged to be high treason, but only such as were declared and expressed to be treason by the Act of 25 Edw. 3, and none other. (1) And by an Act in the next year, 1 & 2 Ph. & Mar. c. 10, s. 6, it was enacted that all trials to be had, awarded, or made for any treason should be had and used only according to the due order and course of the common laws of this realm and not otherwise. This statute raised a doubt in the minds of the judges in the year 1555 "because no offence of treason committed out of the realm was triable here by the course of the common law." The judges (2) decided that the course of the common law included the procedure indicated by the Act of 35 Hen. 8, c. 2, but not that authorized by an Act of 33 Hen. 8, c. 23, whereby a treason committed in one county could be tried in another.

After 1 & 2 Ph. & Mar. c. 10 there were passed various statutes making treasons committed abroad triable in England. Among them were 13 Car. 2, stat. 1, c. 1; 9 Will. 3, c. 1; 13 & 14 Will. 3, c. 3; 1 Ann. stat. 2, c. 21 (c. 17 in the common printed editions); 3 & 4 Ann. c. 13 (c. 14 in other editions). (3) All these statutes prescribe the mode of trial. The inference is that without a special enactment in that behalf treason committed abroad was not triable at all, and therefore was not a crime.

To come now to the authorities: Lord Coke, dealing with the

(1) This had been done once before by an Act of 1 Hen. 4, c. 10, which recited that in 21 Ric. 2 "divers pains of treason were ordained by statute, in as much that there was no man which did know how he ought to behave himself, to do, speak, or say, for doubt of such pains."

(2) See Dyer, 131b, 286b.

(3) Other statutes are 13 Eliz. c. 1 and 17 Geo. 2, c. 39, but *semble* these treasons were all triable in England by 35 Hen. 8, c. 2.

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several classes or heads of high treason, says (1): "The fourth is adhering to the King's enemies within the realme, or without, and declaring the same by some overt act"; and again, explaining the word "adherent," he says (2): "This is here explained, viz. in giving aide and comfort to the King's enemies within the realme or without: delivery or surrender of the King's castles or forts by the King's captaine thereof to the King's enemie within the realme or without for reward, &c., is an adhering to the King's enemy, and consequently treason declared by this Act." In support of this statement he cites numerous authorities in the margin. (3) None of them supports the view that adherence without the kingdom is treason within the meaning of the Act. Some of them were petitions in Parliament to be restored to the possession of lands forfeited by the treason of the petitioner's predecessor; others were impeachments in Parliament of military officers for surrendering castles and cities in France or Flanders. Of the cases cited from the Year Books, one, namely, 8 Edw. 3, 20, is in favour of the prisoner, in so far as a case before the Act can be an authority. The others are equivocal. On the words "ou par ailors" he says (4): "That is to say, out of the realme of England. But then it may be demanded, how should at this time this foraigne treason be tried? And some of our books doe answer, that the offender shall be indicted and tried in this realme where his land lyeth, and so it was adjudged in 2 Hen. 4." There is a reference in the margin to the Coram Rege Roll Pasch. 2 Hen. 4, Rot. 8, Wallia. This seems to be *John Kynaston's Case*, cited above, and if so it is no authority for the position in support of which it is cited. The same may be said of the other authorities cited. The nearest approach to an authority among them is 5 Ric. 2, Trial 54 (5), but that is merely the argument of Bealknap, who was the King's Attorney. (6)

Sir Matthew Hale says (7): "If an Englishman during war

(1) 3 Inst. 4.

(2) Ibid. 10.

(3) See note on these authorities, post, p. 144.

(4) 3 Inst. 11.

(5) This seems to be a reference to Fitzh. Abr. Trial 54.

(6) *Quaere de hoc.* According to Foss's Lives of the Judges, and the Dictionary of National Biography, Sir R. Bealknap was appointed Chief Justice of the Common Pleas in 1374 and still held that office in 5 Ric. 2 (1382).

(7) 1 Hale, P. C. 167.

between the King of England and France be taken by the French and there swear fealty to the King of France, if it be done voluntarily, it is an adhering to the King's enemies; but if it be done for fear of his life, and that he returns, as soon as he might, to the allegiance of the Crown of England, this is not adherence to the King's enemies within this Act." In support of this the author cites the Close Roll 7 Edw. 3. (1) He continues: "Tho' this was before 25 Edw. 3, yet the instance is useful, because adhering to the King's enemies was then treason." The instance may be useful, but the Close Roll of 7 Edw. 3 can be no authority for the construction of a statute of 25 Edw. 3. He proceeds (2): "If a captain or other officer, that hath the custody of any of the King's castles or garrisons, shall treacherously by combination with the King's enemies, or by bribery or for reward deliver them up, this is adherence to the King's enemies." As authority for this is cited "the case of William Weston for delivering up the castle of Oughtrewicke, and John de Gomeneys for delivering up the castle of Ardes in France, both which were impeached by the Commons, and had judgment of the Lords in Parliament . . . ." (3)—namely, William Weston to be drawn and hanged, but execution was respited; and execution was respited in the second case. The passage continues: "And note, though the charge were treason, and possibly the proofs might probably amount to it, and Walsingham sub anno 1 Ric. 2 tells us it was done by treason; yet the reason expressed in the judgment against Weston is only que surrendists le dit castle de Oughtrewicke al enemies nostre Seigneur le Roy avant dits sans nul duresse ou defalt de victualls contre vous ligeance & emprise: and the like reason is exprest in the judgment against Gomeneys . . . ." The author continues (4): "The truth is, if it were delivered up by bribery or treachery, it might be treason, but if delivered up upon

(1) The case of *John de Culewen* (1333), Close Roll 7 Edw. 3, memb. 15, May 13, Fenham, whose lands had been seized into the hand of the King on the ground that he had joined the Scots. Afterwards it was found that he had been taken prisoner of war by the Scots and detained in prison in Scotland, and that to save his life he remained in the faith of the Scots for half a year and then returned to England and had been in the King's faith ever since. The King's hand was amoved from the lands.

(2) 1 Hale, P. C. 168.

(3) (1377) Rot. Parl. 1 Ric. 2, numb. 40.

(4) 1 Hale, P. C. 169.

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cowardice or imprudence without any treachery, though it were an offense against the laws of war, and the party subject to a sentence of death by martial law, as it once happened in a case of the like nature in the late times of trouble, yet it is not treason by the common law, unless it was done by treachery; but tho' this sentence was given in terrorem, yet it was not executed: it seems to be a kind of military sentence, though given in Parliament." This passage stands self-condemned as an authority on the construction of the statute in question. Further on there is this: "Touching the trial of foreign treason, viz., adhering to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statutes of 35 Hen. 8, c. 2, hath sufficiently provided for it" (1); "but at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." In support of that the author cites 5 Ric. 2, Trial 54 (2), where there is indeed the statement of counsel to that effect but no decision by the Court. (3)

Then there is a passage in Hawkins' Pleas of the Crown (4): "It seems to have been a great doubt (5) before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried. For some seem to have holden, that it was triable only upon an appeal before the Constable and Marshal; others, that it might be tried upon an indictment, laying the offence in any county where the King pleased (6); and others, that it was triable by way of indictment in that county only wherein the offender had lands (7): but surely

(1) Citing Dyer, 298, 300.

(2) Fitzh. Abr. Trial 54.

(3) *Quaere.* See note (6), ante, p. 108.

(4) Hawkins, P. C., bk. 2, ch. 25, s. 48, vol. 4, p. 22 (Leach); vol. 2, p. 306 (Curwood).

(5) Citing Y. B. Hil. 19 Edw. 4, fol. 6, pl. 6, where per Neele J: "If a man who is a liege of the King be adherent to or aiding the great enemy of our Lord the King beyond the sea, how shall that matter be tried? It seems to me that it shall be tried by the country."

(6) Citing Co. Litt. 261b.

(7) Citing Hale, Pleas of the Crown, or a Methodical Summary of the Principal Matters relating to that subject (London, 1707), p. 204: "A treason done out of the land, it hath been held that it may be enquired of and tried where the offender had lands; but to avoid the question by statute 35 Hen. 8, c. 2, all treasons and misprisions, or concealments

it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3 should be wholly dispunishable, as it must have been, if it were no way triable." The words "high treason done out of the realm" cannot include the offence of adherence without the realm. But even if intended to do so the passage is merely speculative and not authoritative. It establishes one point only, namely, that no one knew how such a treason was to be tried.

Next it is stated in *Reg.* v. *Platt* (1) that "it was the ancient opinion, that the species of treason which consists, by 25 Edw. 3, c. 2, in adhering to the King's enemies, might be tried, before the statute 35 Hen. 8, c. 2, within the kingdom, by the rules of the common law, though the aid and comfort was afforded without the realm." The prisoner in that case was charged with "high treason at Savannah in the Colony of Georgia in North America." It does not appear in what the treason consisted. The prisoner applied for his discharge under the Habeas Corpus Act. The passage cited is merely obiter.

In *Mulcahy* v. *Reg.* (2) Willes J., in delivering before the House of Lords the opinion of the judges on the question whether a conspiracy was a sufficient overt act to support a charge of compassing to depose the Sovereign, is reported to have said that the Treason Act, 1351, made it treason to be "adherent to the King's enemies, in his realm or elsewhere." The words are printed with inverted commas as though they were a quotation from the Act. They are in truth a misquotation. But in any view the passage is no authority on the meaning of the Act: its only purport is as matter of inducement; the meaning of the statute was irrelevant to the appeal before the House.

The only decision against the prisoner is *Rex* v. *Lynch*. (3) In that case the prisoner was charged with adhering to, aiding, and comforting the Government of the South African Republic while at war with this country at Pretoria. Lord Alverstone C.J., Wills

of treasons done out of England may be enquired heard and determined," &c.

(1) (1777) 1 Leach, 157, 168.

(2) (1868) L. R. 3 H. L. 306, 318.

(3) [1903] 1 K. B. 444; 19 Times L. R. 163.

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and Channell JJ., on the authority of *Rex* v. *Vaughan* (1), held that this was treason within the Treason Act, 1351. (2) Yet it can be demonstrated that *Rex* v. *Vaughan* (1) was a case of adhering within the realm. "If a man be upon the sea of England, he is within the kingdom or realme of England, and within the ligeance of the King of England, as of his Crowne of England. And yet altum mare is out of the jurisdiction of the common law, and within the jurisdiction of the Lord Admirall." (3) "Intra regnum, within the realm, is by the same law taken, and that in the usual phrase for that which is intra (or as it is wont to bee barbarously rendered infra) quatuor maria, within the four seas, to wit, the southern, western, eastern, and that northern sea which washeth both the sides of that neck of land, whereby Scotland is united to England." (4) "Within the four seas and within the realm signified one and the same thing." (5) "The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of any county or not. This is abundantly proved by that learned treatise of Master Selden called Mare Clausum." (6) See also *Reg.* v. *Keyn.* (7) Treason without the realm was triable, if at all, under the Act of 35 Hen. 8, c. 2, in the King's Bench or before the King's commissioners. Treasons on the high seas were triable under 28 Hen. 8, c. 15, before a Court consisting of the judge of the Admiralty and divers other weighty persons (words which were construed to mean His Majesty's judges). The judges in *Rex* v. *Vaughan* (1) were Sir Charles Hedges, judge of the High Court of Admiralty, Holt C.J., Treby C.J., Ward C.B., Turton J., and others of His Majesty's commissioners. The prisoner was indicted for that he, "being then on the high seas within the jurisdiction of the Admiralty of England about fourteen leagues from Deal, did then and there by force of arms falsely, maliciously, and traitorously aid and help and assist the enemies of our said Lord the King." The second count charged that the prisoner as a false traitor against our said

(1) (1696) 13 How. St. Tr. 485; 2 Salk. 634.
(2) See 19 Times L. R. 173.
(3) Co. Litt. p. 260a, s. 439.
(4) Selden, Mare Clausum, translated by Nedham (ed. 1652), bk. 2, ch. 24, p. 387.
(5) Ibid. 389.
(6) Hale, De Jur. Mar., ch. 4.
(7) (1876) 2 Ex. D. 63.

Lord the King further designing war and rebellion against the said King upon the high seas within the jurisdiction of the Admiralty of England to move, stir up, and procure upon the high seas about fourteen leagues from Deal and within the dominion of the Crown of England and within the jurisdiction of the Admiralty of England aforesaid with other traitors war against the King levied and waged. It is plain, therefore, that *Rex* v. *Vaughan* (1) was a case of treason upon the high seas and therefore within the realm. Yet in *Rex* v. *Lynch* (2) Lord Alverstone C.J. treats this case as an authority that there may be treason by adherence without the realm. (3) For that proposition it is no authority at all. In short, *Rex* v. *Lynch* (2) rests upon no authority. Apart from that case there is no reliable authority for saying that adherence to the King's enemies outside the realm, much less that adherence outside the dominions, is treason. If the accused is within the realm his adherence may be proved by acts outside the realm, because it is his treachery that is the gist of his offence. A typical instance of treasonable adherence is the case of *Nicholas de Wautham* (4), who against his allegiance treacherously conspired with Guy de Montfort and Emericus his brother and Llewelyn, formerly Prince of Wales, an enemy of the King, and came to the King's Court and sojourned there as a private guest while he lay in wait and pried out the secrets of the King, and all that he could discover he betrayed to the King's enemies to whom he gave his adherence. He was properly speaking "adherent to the enemies of our Lord the King in the realm" within the words of the Act. Being within the realm the law had seisin of him. But a man who outside the dominions adheres to the enemy is outside the common law and outside the Act of Edward III. which declared it. The meaning of that statute, as of all statutes, is to be derived from the words read in their natural sense unelucidated or unobscured by the counsel of commentators however eminent. The words are "be adherent . . . . within the realm." No authority short of a judgment can compel this

(1) 13 How. St. Tr. 485; 2 Salk. 634.

(2) [1903] 1 K. B. 444; 19 Times L. R. 163.

(3) See 19 Times L. R. 173.

(4) (1285) Oxford City Documents, p. 204, cited in Pollock and Maitland, Hist. Eng. Law, vol. 2, p. 506, note 2. For other instances see 1 Hale, P. C. 78 et seq.

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Court to say that those words mean "be adherent . . . . without the realm."

J. H. Morgan, having been retained by the prisoner, but not having been assigned as one of his counsel, was heard as amicus curiae. In the case of *Rex* v. *Weldon* (1) the prisoner was charged under the Treason Act, 1351, with adhering to the King's enemies in the county of the city of Dublin and found guilty. Finucane J., in giving judgment on a motion in arrest of judgment, said (2): "At the time this statute was passed, no treason could be tried but treason within the realm, and that is the treason specified, 'giving them aid within the realm'—then are added the words 'or without' . . . . The locality is annexed to the person adhering, not to the enemy to whom he adhered."

Sir Frederick Smith, A.-G., Sir George Cave, S.-G., Bodkin, Travers Humphreys, and *Branson*, for the Crown. Not of caprice but of necessity have counsel for the defence made light of such authorities as Coke, Hale, and Hawkins. But the opinions of such lawyers are not to be brushed aside so carelessly, because, first, they are agreeable to reason, and, secondly, they are supported by authority.

It is truly said that treason consists of a breach of the duty of allegiance which the subject owes to the Sovereign and which binds him at all times and in all places. Is it probable that the law of an island realm would regard those traitors, if any, who aid and comfort the King's enemies abroad by remaining at home, and ignore that larger number who would give greater aid and comfort by joining the enemy abroad? If it were so, adherence to the King's enemies would be punishable only when the realm was invaded by a foreign Power; for the number of traitors found at home adhering to the King's enemies abroad would be negligible compared with those who would transfer themselves and their allegiance to the enemy abroad.

The argument for the defence rests on the assumption that there is only one reasonable construction of the Treason Act, 1351, namely, that the words "or elsewhere" are in opposition to the words "giving them aid or comfort within his realm." This is a false assumption. The words "or elsewhere" may with at least

(1) (1795) 26 How. St. Tr. 226. (2) Ibid. 292.

equal reason be read as in opposition to the words "be adherent to the King's enemies in the realm." In that case the words "giving them air or comfort within his realm" are explanatory of the words "be adherent to the enemies of our Lord the King in the realm," and the passage, omitting the explanatory words, would then read "be adherent to the enemies of our Lord the King in the realm . . . . or elsewhere." This is not only a possible construction, but is in truth the only reasonable construction when it is remembered that the enemies of our Lord the King will mostly be found outside the realm. Modern rules of construction strictly applied may lead to a false interpretation of a statute of Edward III. Another reasonable construction would be to read the words "or elsewhere" as alternative both to the words "be adherent to the enemies of our Lord the King in the realm" and also to the words "giving to them aid or comfort in his realm." Indeed the words may equally apply to the levying of war against the King in his realm. Now when there are two reasonable constructions of a statute of such antiquity the opinion of Hawkins alone is conclusive; and he says in the passage that has been quoted (1) that high treason done without the realm is "expressly within the purview of 25 Edw. 3." If he did not expressly exclude from this statement the case of adhering to the King's enemies it is to be inferred that he intended to include it. This passage begins by stating that there was great doubt before the statute 35 Hen. 8, c. 2, how and where high treason done out of the realm was to be tried. No doubt was ever expressed either by Hawkins or by any one else but that it was triable some way or other. The only doubts which had existed, namely, those as to the venue and mode of trial, were set at rest by the Act of 35 Hen. 8, c. 2.

As great reliance was placed upon the case in Dyer (2) it is necessary to explain that case. An Act of 1 & 2 Ph. & Mar. c. 10 had enacted that all trials thereafter to be had, awarded, or made, for any treasons, should be had and used "only according to the due order and course of the common laws of this realm and not otherwise." The judges were pressed by the doubt to which Hawkins refers, the doubt as to the venue and mode of trial of high treason

(1) Hawk. P. C., bk. 2, ch. 25, s. 48, vol. 2, p. 306 (Curwood); vol. 4, p. 22 (Leach).

(2) Dyer, 131b.

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done out of the realm, "because"—however else it was triable—"no offence of treason committed out of the realm was triable here by the course of the common law"—at any rate before the statute of 35 Hen. 8, c. 2. The question was as to the meaning of the words "according to the course of the common law"; did they refer to the common law before 35 Hen. 8 or the common law as modified by that statute? In other words, did the statute of 1 & 2 Ph. & Mar. c. 10 repeal or modify the Act of Henry VIII.? "And for the cause above the judges, Sir John Baker and Hare M.R. were assembled." They thought that the statute of Henry VIII. enlarged the power and authority of the trials of the realm in this point, and that "by the words above, that is to say 'according to the order and course of the common law,' it shall be intended that the trial shall be in the county where the indictment is." This was not a decision in a case, but the resolution as of a rule committee. It casts no doubt on the opinion that high treason committed abroad was triable some way or other.

To come now to the decided cases. In the case of *William de Weston* (1) it was found by Parliament that he having undertaken to keep safely the castle of Outkrewyk in Flanders wickedly delivered and surrendered it to the King's enemies without any duress or lack of victuals by his own default alone against all right and reason and against his allegiance and undertaking. By resolution of Parliament he was sentenced to be drawn and hanged. In the case of *Sir John de Gomeneys* (2), who was impeached for delivering up the castle of Ardes in France, sentence was also passed. That was treason by adhering to the King's enemies. Sir Matthew Hale mentions both these cases in the passage cited in the argument for the defence. (3) That passage is a strong authority in favour of the Crown.

The next is *Lord Wentworth's Case*. (4) Lord Wentworth, deputy of the town of Calais, Edward Grymston, controller of that town, and Ralph Chamberleyn, lieutenant of the castle of Calais, were

(1) (1377) Rot. Parl. 1 Ric. 2, nums. 38—40. See also 4 Cobb. St. Tr. 299.

(2) Rot. Parl. 1 Ric. 2, nums. 38—40; 4 Cobb. St. Tr. 303.

(3) 1 Hale, P. C. 168.

(4) (1559) Unreported: Baga de Secretis, K. B. 1 Eliz., Pouch 38, in the Public Record Office.

indicted jointly with others for that occupying and exercising various offices respectively at Calais in parts beyond the seas they were on December 20, 1558, adhering to, aiding, and comforting Henry King of the French, the public enemy of the King and Queen of this realm of England, and finding means falsely and traitorously to deprive the said King and Queen of their possession of the town of Calais and the castle of the same and deliver the same into the hands and possession of the said Henry King of the French. For the fulfilling of which false and treasonable purposes the said Henry, by their treasonable procurement, covin, and assent, sent the Duke of Guise with an army of 15,000 Frenchmen to the town of Calais to receive it, upon whose approach Chamberleyn withdrew from the castle so that the French took it, and Lord Wentworth, Grymston, and Chamberleyn offered to surrender the town and permitted the Duke of Guise to enter and take it. The indictment against Lord Wentworth was removed into the House of Lords, where he was found not guilty. (1) Grymston was tried before commissioners and found not guilty. (2) Chamberleyn was tried before the same commission, found guilty, and executed. (3) That was a case of adhering to the enemies of the King without the realm.

In *O'Rurke's Case* (4) the indictment charged that Brian O'Rurke as a false traitor against the Lady Elizabeth, Queen of England, France, and Ireland, at Dromahere in the realm of the said Lady the Queen of Ireland in parts beyond the sea, traitorously conspired and compassed to deprive, overthrow, and disinherit and put to death the Queen. It set out among other overt acts that at Dromahere and in divers other places in the realm of Ireland in parts beyond the sea he moved and procured Alexander MacConnell and Donagh MacConnell, enemies of the Queen, to levy an army to invade the realm of Ireland, and that he received, comforted, and aided the same enemies at Bradlewe in the realm of Ireland in parts beyond the seas. Further it charged that Sixtus V., late Bishop of Rome, and Philip King of Spain had prepared a great army hostilely to

(1) (1643) 4 Cobb. St. Tr. 314.

(2) Baga de Secretis, 2 Eliz. K. B., Pouch 39, file 1, in the Public Record Office.

(3) Baga de Secretis, K. B. 2 Eliz., Pouch 39, file 2, in the Public Record Office.

(4) (1591) Coram Reg. Mich. 33 & 34 Eliz., Regina Roll 15, in the Public Record Office.

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invade the realm of England, and that O'Rurke traitorously received, fed, and comforted and aided very many Spaniards, enemies of our said Lady the Queen, arriving in certain ships in the said realm of Ireland. In the fourth count it charged that O'Rurke in the realm of Ireland in parts beyond the seas traitorously aided and comforted certain rebels and traitors of the realm of Ireland. He was sentenced to death. That was a charge of adhering within the realm of Ireland outside the realm of England. *Perrot's Case* (1) is similar. The indictment charged that Perrot, late deputy of the Lady the Queen, in her realm of Ireland in parts beyond the sea as a false traitor against the Queen at Dublin in the said realm of the said Lady the Queen of Ireland compassed the Queen's death and to bring about the overthrow of the Commonwealth of the realms of England and Ireland, and that the Pope Gregory XIII. and the King of Spain had prepared an army to invade the realm of England, and that Perrot in the realm of Ireland wrote traitorous letters inciting the King of Spain to perform his malicious purpose. The prisoner was convicted and sentenced. He died in the Tower before execution. It is true that in each of the two cases last mentioned the adherence was within the realm of Ireland; but it was without the realm of England, and yet the trial in each case was in Middlesex. However, the matter does not rest there.

In the case of *Lords Middleton and Castlemaine, John Stafford and Others* (2) the indictment charged that, there being open war between King William III. and Lewis King of France, the defendants as false traitors without this realm of England in the kingdom of France in parts beyond the sea traitorously adhered to the King's enemies in the same war and traitorously joined and united themselves with the said adversaries and enemies and then and there treasonably comforted, aided, helped, supported, and assisted the same adversaries and enemies, contrary to their allegiance and against the peace of the King, his Crown and dignity, and contrary to the form of the statutes in such case made and provided. Most of the persons indicted were outlawed, including Stafford. He

(1) (1592) Baga de Secretis, 34 Eliz. K. B., Regina Pouch 50; 1 Cobb. St. Tr. 1316; 4 Cobb. St. Tr. 708.

(2) (1713) Unreported: Coram Rege Roll, K. B. Regina, Mich. 12 Ann., Roll 8, in the Public Record Office.

subsequently surrendered, pleaded in bar on a technical point, and produced letters of pardon.

In the *Duke of Wharton's Case* (1) the indictment charged that a war was being carried on between Philip King of Spain and His then late Majesty King George I., and that Philip Duke of Wharton, late of Westminster in the county of Middlesex, being a subject of the said Lord the late King, well knowing the premises, &c., as a false traitor against the said Lord the late King his Sovereign, true, natural, and undoubted Lord, on May 1 in the thirteenth year of the reign of the said Lord the late King and on divers other days and occasions, as well before as afterwards, in parts foreign and beyond the seas without his realm of Great Britain, to wit in the realm of Spain, by force of arms, &c., falsely, maliciously, knowingly, devilishly, and treasonably was adherent, aiding, and assistant to the same Philip King of Spain. It went on to allege that in performance and execution of his treason and adherence he without this realm, to wit in the kingdom of Spain in parts beyond the seas, joined and united himself to the army of Philip King of Spain, prosecuting the war against King George I. and attacking Gibraltar, and with his counsel and aid comforted them and adhered to them against his allegiance and against the peace of the late King, his Crown and dignity, and also against the form of the statute in such case made and provided. The Duke of Wharton did not appear, and he was outlawed.

William Cundell's Case (2) is very important. "In 1808 a number of British sailors and mariners were confined, as prisoners of war, in the Isle of France. The prison, being much crowded, was greatly incommoded with dirt and vermin, and, there being no way of escaping from such inconvenience but that of desertion, every art was practised by their keepers to induce the unhappy prisoners to enter the French service. Fifty men, among whom were Cundell and Smith, had not virtue enough to resist the temptations on the one hand, and the hope of escaping from distress and filth on the other. They forgot their country and allegiance, and put on the enemy's uniform, acting as sentinels over those who were so recently

(1) (1729) Unreported: Baga de Secretis, Trin. 2 Geo. 2, K. B. 8/67 in the Public Record Office.

(2) (1812) 4 Newgate Calendar, 62.

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their companions in captivity. These traitors continued to do duty with the French until the surrender of the island to the British forces, when Cundell and Smith, with ten others, positively refused to accompany the enemy, and threw themselves upon the mercy of their country, having immediately surrendered to the English, while thirty-eight others marched off to old France. These culprits were now transmitted to England, and a special commission was issued for their trial, which took place at the Surrey Court-house, February 6, 1812. Cundell, Smith, and five others were found guilty of adhering to His Majesty's enemies, when the Attorney-General stated that he thought the ends of justice obtained, and that he would not press the conviction of the remaining five, who were discharged, not for any want of proof of their guilt, but through the clemency of the Government. . . . . " Cundell, Smith, and the others, being sentenced to death, were then reconducted to their cells. " On Monday morning, March 16, 1812, William Cundell and John Smith, pursuant to their sentence, were hung," &c. In that case the adherence was without the realm in the Isle of France in the French colony of Mauritius. It must be added that if the view of the defence is right the defendant in *Rex* v. *Lynch* (1) ought to have been acquitted instead of being, as he was, convicted.

This weight of authority seems to justify Lord Coke in saying (2) that " The fourth "—i.e., the fourth kind of treason—" is adhering to the King's enemies within the realme or without and declaring the same by some overt act " ; to justify the King's Attorney in saying (3) " If a man be adherent to the King's enemies in France his land is forfeitable and his adherence shall be tried where his land is as has been often times done in respect of the adherents to the King's enemies in Scotland " ; Sir Matthew Hale in saying (4) " If an Englishman during war between the King of England and France be taken by the French, and there swear fealty to the King of France, if it be done voluntarily, it is an adhering to the King's enemies " ; East in saying (5) " 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

(1) [1903] 1 K. B. 444.
(2) 3 Inst. 4.
(3) Fitzh. Abr. Trial, fol. 219, pl. 54. See note (6), ante, p. 108.
(4) 1 Hale, P. C. 167.
(5) 1 East, P. C. 78.

to an enemy, whether within or without the realm, will make the party guilty of adhering to the King's enemies " ; and further on (1) " 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 swear fealty to them, or actually assist them in the war ; or, at least, unless they refuse to return home " ; and Willes J. in saying, when he delivered before the House of Lords in *Mulcahy* v. *Reg.* (2) the opinion of all the judges, that by the Treason Act, 1351, " it was declared to be treason ' when a man doth compass or imagine the death of our Lord the King,' &c., ' 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 or elsewhere, and thereof be probably attainted of open deed.' "

In view of these opinions of well-known writers on the law and of the judges who have been called upon to pronounce it from the earliest times down to the year 1868 and even to the year 1903, it is impossible to resist the conclusion that adherence to the King's enemies without the realm is treason and is justiciable in the Courts of this country.

Artemus Jones replied.

LORD READING C.J. A submission has been made to the Court by the defence that this indictment should be quashed on the ground that it discloses no offence known to the English law. Another way of putting the same proposition is that the Court should rule, according to the contention of the defence, that the Crown has failed to prove an offence in law. The prisoner is charged with that species of treason which is known as adhering to the King's enemies. The charge in the indictment is the offence of " high treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the Empire of Germany, contrary to the Treason Act, 1351." The argument advanced and supported by careful, well-reasoned, and able arguments of Mr. Sullivan and those who supported his contention is to the effect that adherence to the King's enemies without the realm is not an offence against the statute of Edward III., that is to say, the statute of 1351. We have had

(1) 1 East, P. C. 80. (2) L. R. 3 H. L. 306, 318.

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the advantage of elaborate arguments, by no means too elaborate, on behalf of the defence, and also on behalf of the Crown by the Attorney-General; and although this point has been discussed many times in the books and decided, according to our view, in the most recent case of treason, *Rex* v. *Lynch* (1), yet it merits careful examination by this Court.

The argument is that this Court must construe the words of the statute of 1351 and must pay no regard to any commentary that may have been made by learned authors, however distinguished, when arriving at the meaning of the words. That we must interpret the words of the statute is beyond question. That we should not be entitled to do violence to the words of the statute may, I think, also be assumed. But if the words of the statute are not clear, and if it be possible to construe the statute in two different ways, then the comments of great lawyers, masters of the common law, during the last three or four centuries cannot be allowed by this Court to pass without the greatest regard and consideration.

The words in question in the statute 25 Edw. 3 are these, paraphrasing them: "It shall be treason 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." The contention is that those words "or elsewhere" govern only the words "aid and comfort in the realm" and have no application to the words "be adherent to the King's enemies in his realm." As the offence is that of adhering to the King's enemies, if the words "or elsewhere" do not apply to the adhering, then the contention of the defence would be right. If, on the other hand, the Crown's contention is correct that those words "or elsewhere" do govern the adhering to the King's enemies, then it is plainly an offence to adhere to the King's enemies by an act committed without the realm. In order to avoid ambiguity I would add that to constitute the offence for this purpose it is not sufficient to show that the aid and comfort have been given to enemies without the realm. The act of adherence which constitutes the charge must also have been committed without the realm for this purpose, because the whole of this indictment is based upon the offence of adhering to the King's enemies without the realm.

(1) [1903] 1 K. B. 444.

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Now I repeat what I said during the argument, that we must construe these words of this statute, now some 560 years old, without reference to commas or brackets, but merely looking to the language. The history of the law of treason in this country is certainly of importance in considering the statute of 1351. It is unnecessary at this time, and having regard to the authorities to which I shall call attention in a moment, to refer in great detail to the early law. But I have no hesitation myself in stating that if a man adhere to the King's enemies without the realm he is committing the offence of treason; and that he is committing the offence of treason at common law, notwithstanding that the offence is committed without the realm. We have heard considerable argument to establish that the common law of England never knew a crime which was not committed within the territory of England, that is to say, in ancient times of course; and it is said the common law of England still obtains except in so far as it has been altered by statute. There is authority for the proposition which I have stated. Sir Matthew Hale in his Pleas of the Crown (1) says: "Touching the trial of foreign treason, viz., adhering to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statutes [*sic*] of 35 Hen. 8, c. 2, hath sufficiently provided for it"; then follows a passage upon which I lay special stress: "But at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." In support of that reference is made to a case in the fifth year of the reign of Richard II. which is to be found in Fitzherbert's Abridgment. (2) The substance of it—I am not quoting the exact words—is that the then King's Attorney (3) stated to the Court, and apparently, so far as one can judge from the report, without any contradiction by the Court, and so far as I know without any contradiction to be found in any book up to this very day, that that was the law, and it was adopted as the law by Sir Matthew Hale in the passage which I have read. I am prepared to concede that if the statute were unambiguous in its terms we ought to construe its language without reference to the fact that it happens to be declaratory of the common law; but it is a matter not lightly to be

(1) Vol. 1, p. 169. (2) Fitzh. Abr. Trial, s. 54.
(3) See note (6) on p. 108, ante.

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passed by that the common law before this statute was, in my opinion, as I have stated it. It has been said more than once (1) that this statute of 1351 was declaratory of the common law. There is no doubt that at that time there was great agitation amongst the subjects of the King because of the fear of the consequence of being charged with treason, which was a crime at that time so vague, or thought to be so vague, that those who might be charged with it were apprehensive of the consequences; and the result was that on petition to Parliament the statute then became law and received the assent of the King in the words to which I have referred.

Now from the year 1351 until the thirty-fifth year of the reign of Henry VIII. there is little to assist us; but in the reign of Henry VIII. a statute was passed which in my view is of importance in this connection. The statute is entitled "An Acte concerninge the triall of treasons cõmytted out of the Kinge Majesties domynions." It recites—again I am paraphrasing the language—that doubts and questions had arisen as to the trial of treasons and misprisions of treasons committed abroad. It is worth noting that the doubts had not arisen as to whether the act, if committed abroad, would amount to treason, but only as to the trial. Then the statute proceeds: "Be it enacted," &c., "that all manner of offences being alredye made or declared, or hereafter to be made or declared by any the lawes and statute of this Realme, to be treasons . . . . and done ꝑpetrated or cõmytted or hereafter to be done ꝑpetrate or cõmitted by anye ꝑson or ꝑsons out of this Realme of Englande, shalbe from hensforth inquired of herd and determyned before the Kinge Justice of his Benche for plees to be holden before himselfe," that is the King's Bench, and also as an alternative by commissioners where a commission is appointed. Now that statute assumes that the offence of treason can be committed without the realm; and it prescribes in respect of all such offences as have already been declared the mode of procedure, or rather the venue of the trial. The statute shows plainly that the offence existed. From that time the statute has regulated the trial of offences without the realm. It is by virtue of that statute and subsequent statutes,

(1) 3 Inst. 1, note; *Sindercome's Case* (1657) 5 Cobb. St. Tr. 848; *Bellew's Case* (1672) 1 Vent. 254, note; *Reg.* v. *Smith O'Brien* (1849) 7 St. Tr. (N.S.) 349, per Blackburne C.J. of Ireland.

which have really done nothing more than provide that the counties of London and Middlesex shall be one county for this purpose, that the jurisdiction of this Court is derived. It is because we are sitting as judges of the King's Bench that we become the judges to try this case, for the reason that, if it is a treason committed without the realm, the venue is prescribed by this statute of Henry VIII. as of the King's justices "where the saide Benche shall sytt and be kepte." That statute of Henry VIII. at least shows clearly what the law was at the time it was passed, and is, to my mind, authority for this proposition, that there was the offence of treason without the realm; and further, quite consistently with the reading which the Crown wishes to give to the statute of 1351, it would apply to the offence of adhering to the King's enemies without the realm. The doubts that have arisen from beginning to end, so far as we have been able to trace in looking through the various books to which we have had access and to which our attention has been called, are never as to the offence, but only as to the venue. This was the whole difficulty which arose, as was pointed out by learned authors, and more especially in Hawkins's Pleas of the Crown (1), where this matter is dealt with in passages that have been read and of which I will only read one short passage now. There the learned author says "It seems to have been a great doubt before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried." There is not the faintest suggestion that the offence did not exist, but only a doubt as to the manner and place of trial. "For some seem to have holden that it was triable only upon an appeal before the Constable and Marshal; others, that it might be tried upon an indictment, laying the offence in any county where the King pleased; and others, that it was triable by way of indictment in that county only wherein the offender had lands; but surely it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3, should be wholly dispunishable, as it must have been, if it were no way triable." I am content to adopt every word of that language

(1) Hawk. P. C., bk. 2, ch. 25, s. 48, vol. 4, p. 22 (Leach); vol. 2, p. 306 (Curwood).

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of that great master of the law and also of Sir Matthew Hale, whom I have just quoted. The only observation I wish to make upon it is that the defence would say, as Mr. Sullivan pointed out, and, I think, rightly, that it does not follow that this meaning must be given to the words now under discussion because, it is said, there were other offences of treason without the realm. But equally it must be observed that the learned author suggests no exception to the general statement, and there is nothing which would support an exception being made save the interpretation of the statute contended for by the defence. I can find no justification for doubting that these learned authors meant their language to apply equally to a case of adhering to the King's enemies without the realm as to any other kind of offence of treason without the realm.

Now I will not read again the passages in Coke's Institutes, but they contain (1) a statement of the law which is plain in its terms and which Mr. Sullivan quite frankly stated was an authority against him, if the Court accepted it as an authority.

Then coming to later days there are passages in *Mulcahy* v. *Reg.* (2) in which Willes J., in giving to the House of Lords not only his opinion but the opinion of all the judges on the law relating to treason, adopted the construction of the words of the statute of 1351 that the offence is committed if a person be adherent to the King's enemies in his realm or elsewhere. He leaves out the words which have given rise to this discussion, i.e., "giving them aid and comfort." These views were adopted by the House of Lords. It is right here again to say that Mr. Sullivan pointed out, and again I say in my judgment accurately, that these observations of Willes J. were by the way; but nevertheless they were the considered opinion of the judges given to the House of Lords, and the House of Lords did not dissent from any one of the views expressed.

Then at last we come to the decision in *Rex* v. *Lynch*. (3) There the same argument was advanced by the defence that has been put forward before us, and it was persisted in and elaborately argued. The Court there came to the conclusion that the defendant's contention was wrong, and, although it gave no judgment, the then

(1) 3 Inst. 10, 11. (2) L. R. 3 H. L. 306, 318.
(3) [1903] 1 K. B. 444.

Lord Chief Justice proceeded to sum up and directed the jury as if the offence had been committed. Lynch was convicted by the jury. If the argument of the defence in the present case is right, Lynch never should have been convicted, and the Court ought to have ruled that no offence had been disclosed either by the evidence or in the indictment. The Court did not so rule, but on the contrary directed the jury upon the assumption that the offence was disclosed if the jury took a particular view of the facts.

That is a strong current of authority. I will not pass over the case in Dyer (1) to which our attention was called and upon which Mr. Sullivan placed much reliance. His argument was that on examination that case shows that there was no such offence cognizable by the common law as treason committed out of the realm; indeed he went further and argued that no such offence was known to the law at all, because no means had been found of trying the offence until the statute 35 Hen. 8, c. 2. But a consideration of the case in Dyer (1) shows that it is not a judgment at all; it is a memorandum of the judges and the King's serjeants, some doubt having arisen as to whether a statute of 1 & 2 Ph. & Mar. had repealed the statute of 35 Hen. 8, c. 2, in so far as that statute declared that treasons without the realm should be tried by the judges of the King's Bench. In the result they came to the conclusion that the statute of Henry VIII. was not repealed. Reliance was placed before us upon the words "because no offence of treason committed out of the realm was triable here by the course of common law." The obvious comment is that the words assumed that there was an offence of treason committed out of the realm. The difficulty was that it was not known how it was triable by the course of the common law. All that was done by the judges and the Master of the Rolls there assembled was to declare the effect of this statute 1 & 2 Ph. & Mar. The question which has been argued before us was not raised. On the contrary it was assumed that there was such an offence as treason without the realm. The difficulty, which one finds running through centuries of our law, is as to the procedure when there was treason without the realm—that is, as to the venue of the trial.

Our attention was called by the learned Attorney-General to

(1) Dyer, 131b.

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a series of cases of which I only propose to refer to three and to rely only upon one. First there was the case of *Lord Wentworth, Grymston, and Chamberleyn.* (1) The indictment there, we are told by the Attorney-General, was for an offence committed in Calais. Lord Wentworth apparently was sent to the House of Lords to be tried; Grymston was acquitted; Chamberleyn was convicted. I find it difficult to take that case as an authority. Indeed I do not think we can regard it as one because it was tried in the year 1558, and according to the indictment it seems clear that the offence was laid treating Calais as within the King's dominions. Consequently in my judgment that case does not help us. The next case he cited was the *Duke of Wharton's Case* (2), which was tried in the year 1729. There, according to the statement made from investigation of the indictment and the record, the offence was of adhering to the King's enemies in Spain. The overt acts show the offence of adhering committed in Spain and the aid and comfort given in Spain; so that the complete offence of treason without the realm was there charged. The Duke of Wharton did not appear and was outlawed. That case assumes that by the law of England he had committed the offence. It is to be observed that the defendant did not appear and did not put his case before the Court, and therefore the case has not the full authority which would be given to a case in which the defence raised the point under discussion. The third case was that of *William Cundell,* tried in the year 1812, of which the record is extant, but of which there is no report except in the Newgate Calendar. (3) It was a case of adhering without the realm to the King's enemies and giving them aid and comfort there. The case was tried. The persons were within the jurisdiction of this Court and sentence was pronounced. Therefore in the year 1812 there is distinct authority for saying that it is an offence to adhere without the realm to the King's enemies. It was the case of persons who were confined in the Isle of France and who had there forsaken their allegiance to the King and transferred it to the French. In

(1) Unreported: Baga de Secretis, K. B. 1 Eliz., Pouch 38, in the Public Record Office.

(2) Unreported: Baga de Secretis, Trin. 2 Geo. 2, K. B. 8/67, in the Public Record Office.

(3) Vol. 4, p. 62.

view of that judgment it cannot be said that there is no authority to be found in our books for the proposition advanced by the Crown until the authority of *Rex* v. *Lynch*. (1)

I do not propose to go further through the various authorities. I have called attention to the most important of them. I come to the conclusion that the offence, if proved in fact, has been committed in law. We are merely considering now the case upon the assumption that the facts prove it. The argument of the defence is put forward on the basis that no offence is made out in law. The result of the argument upon this motion is that in my judgment the words "giving to them aid and comfort" may be read as a parenthesis; yet I do not confine the application of the words "or elsewhere" to that parenthesis; I think they apply just as much to the parenthesis as to the words which precede it. My view is, although it is not necessary to state it for the purposes of this case, that the words "or elsewhere" govern both limbs of the sentence—both the adhering to the King's enemies and the aid and comfort to the King's enemies—and that it is an offence to adhere within the realm or without the realm to the King's enemies, and it is equally an offence to adhere within the realm to the King's enemies by giving them aid and comfort without the realm.

For these reasons I am of opinion, notwithstanding the learned and able arguments that have been addressed to us, that the point fails and that the motion to quash the indictment must be refused.

AVORY J. I agree that this objection fails whether it be regarded as an objection to the indictment that it discloses no offence upon the face of it, or whether it be regarded as an objection that there is no evidence to go to the jury of an offence committed within the meaning of the statute of Edward III.

It would, in my opinion, be sufficient in this Court to say that the point which has been argued before us so strenuously and with so much learning has been already decided by this Court in *Rex* v. *Lynch* (1), but, having regard to the criticisms which have been passed upon that case, I think it right to add my own reasons for coming to the same conclusion as that which has been expressed by my Lord Chief Justice.

(1) [1903] 1 K. B. 444.

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First of all, it is not right to say that the point was not in fact decided in *Rex* v. *Lynch*. (1) While it is true that no formal judgment was pronounced on the objection, it will be found by reference to the report of the case in *The Times* Law Reports (2) that the Lord Chief Justice stopped the Attorney-General in his reply to the argument and said that the Court was satisfied upon the point and that unless he desired to cite any further authorities they did not wish to hear him further. That was in fact a decision that the point taken was a bad one. But further, and beyond the fact, to which allusion has been made, that the prisoner in that case could not have been convicted unless the point was decided against him, it will also be found in the same report (3) that towards the close of his summing-up the learned Lord Chief Justice said "that the charge against the prisoner was that of aiding the King's enemies; and he had already told them that the facts which had been laid before them amounted to aiding the King's enemies, and that, wherever it was done, this was an offence in respect of which, if proved, the prisoner ought to be found guilty under the indictment." So that there was an express direction in terms in that case to the jury that wherever the acts were done of adherence to the King's enemies, that was an offence within the meaning of the statute.

It is also clear that the Court must interpret this statute of Edward III. in the light of the fact that it has been decided to be an Act declaratory of the common law. I cannot doubt that before the statute it was treason in a British subject to join the forces of an enemy abroad, and that if a British subject had joined the forces of an enemy abroad at war with this country, and he afterwards returned or was brought back to this country, he could be tried here for that offence. When one has regard to the nature of this offence of high treason I think it is obvious it must have been so. Foster in his Crown Law thus describes the offence of high treason (4): "High treason being an offence committed against the duty of allegiance, it may be proper . . . . to consider from whom, and to whom allegiance is due. With regard to natural born subjects there can be no doubt. They owe allegiance to the Crown at all times and in all places.

(1) [1903] 1 K. B. 444.
(2) 19 Times L. R. 163, 173.
(3) Ibid. 178, 179.
(4) Fost. C. L. 183.

This is what we call natural allegiance, in contradistinction to that which is local. . . . . Natural allegiance is founded in the relation every man standeth in to the Crown, considered as the head of that society whereof he is born a member; and on the peculiar privileges he deriveth from that relation, which are, with great propriety, called his birthright; this birthright nothing but his own demerit can deprive him of; it is indefeasible and perpetual; and consequently the duty of allegiance, which ariseth out of it, and is inseparably connected with it, is in consideration of law likewise unalienable and perpetual." In view of that definition of the offence of high treason I think it cannot be doubted, as I have said, that such an offence committed by a British subject abroad was triable, justiciable, in this country; and the only doubts which had arisen before the statute of Henry VIII. were, as expressed by Hawkins in his Pleas of the Crown, in the passage which my Lord has already read—not a doubt whether it was triable here, not a doubt whether it was an offence committed by a British subject, but a doubt only as to the proper place and the proper manner in which it should be tried. He points out that some have held that it should be tried in one county; others that it should be tried in another county; others that it should be tried upon an indictment laying the offence in any county where the King pleased. That, no doubt, had reference to a special commission issued by the King for the trial of a particular treason, which commission would, in my opinion, get rid of all difficulty about local venue.

That being so, if this was an offence triable in this country before the statute of Edward III. —that is to say, if the offence of treason committed abroad was triable in this country before the statute of Edward III. and that statute is declaratory only of the common law—it would be a strange conclusion that the statute has limited the offence to treasons or to overt acts committed within the realm. As the Attorney-General has pointed out, the offence of adhering to the King's enemies, giving aid and comfort to them, is an offence which is more likely, prima facie at all events, to be committed out of the realm than within it, and it would be a strange enactment to provide, if the common law was as I have said, that after this date the offence could only be committed by a person who was within the realm at the time when he committed it.

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With reference to the construction of the actual words, again it would be sufficient, as my Lord has pointed out, to say that the great authorities have uniformly put upon these words the construction which the Crown invite us to give them, namely, that the statute does not limit this kind of treason to treason committed by a subject within the realm. But there appear to be two constructions of it which have been adopted, either of which will satisfy and answer this objection. It may be that the words "or elsewhere" are to be read as applying to the words "be adherent to the King's enemies"—that is to say, if he be adherent to the King's enemies in his realm or elsewhere; or it may be, as Serjeant Hawkins seemed to think when he said (1), "As to the second point, viz., what shall be said to be an adherence to the King's enemies, &c., this is explained by the words subsequent, 'giving aid and comfort to them,'" that the proper construction of this section is that the words "giving aid and comfort to them in the realm or elsewhere" are an explanation or an exposition of the kind of adherence to the King's enemies which is aimed at by the statute. Nobody questions that the words "or elsewhere" apply to the giving of aid and comfort to the enemy, and it may be, therefore, that the proper construction is that if a person gives aid and comfort to the King's enemies either in the realm or elsewhere he is committing the offence of adhering to the King's enemies within the meaning of this statute. Whichever view be taken, it is sufficient to say that all the authorities agree that it is not limited in the manner in which the learned counsel for the prisoner have invited us to confine it.

It only remains to consider in one word the statute of Henry VIII. which provides for the trial in this country of treasons committed abroad. In my view there is nothing in that statute which assists the argument for the prisoner. The recital of it is "Forasmuche as some doubtes and questions have bene moved that ẽten kindes of treasons, mysprisions and concealmentꝭ of treasons, done ppetrated or cõmytted out of the Kingꝭ Majesties realme of Englande and other his Graces Dnions cannot ne maye by the cõmon lawes of this realme be enquired of . . . ." In my opinion that recital or

(1) Hawk. P. C., bk. 1, ch. 17, s. 28, vol. 1, p. 91 (Leach); ch. 2, s. 28, vol. 1, p. 12 (Curwood).

preamble of the statute rather assumes that there are already certain kinds of treason committed out of the realm which may be tried within the realm, and the probability is that the statute was only for removing doubts as to the other kinds of treason many of which had been enacted either in the reign of Henry VIII. or shortly before. At all events it makes it clear that after that date any treason committed out of the realm may be tried, as this one is being tried, by His Majesty's judges in the King's Bench.

For these reasons I agree that this objection must be overruled.

HORRIDGE J. After the very careful consideration by the Lord Chief Justice of the law before the statute of Edward III., of that statute itself, of the cases in which the decision involved the construction of the statute, and of the writings of learned authors, I do not think I should usefully occupy the time of the Court by again reviewing those matters. All I wish to say is this: My view is that the true construction of the statute is to be found in the opinion of the judges in the case of *Mulcahy* v. *Reg.* (1) in the words of Willes J., "if a man . . . . be adherent to the King's enemies, in his realm or elsewhere," and that there ought only to be added to that the direction as to the use of the words "or elsewhere" contained in the judgment of the Lord Chief Justice. I agree with every word of that judgment, and I also agree that this objection fails.

Counsel for the prisoner and for the Crown respectively having addressed the jury upon the evidence, the Lord Chief Justice summed up the case. As to the meaning of the words "giving to them aid or comfort" he directed the jury as follows:—"If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort to the King's enemies. Again, if a British subject commits an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country, that is in law the giving of aid and comfort to the King's enemies."

(1) L. R. 3 H. L. 306, 318,

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The prisoner was found guilty. The Lord Chief Justice pronounced sentence of death.

The prisoner appealed.

July 17. *A. M. Sullivan* (*Artemus Jones* and *J. H. Morgan* with him), for the appellant, again argued as above.

Sir Frederick Smith, A.-G., Sir George Cave, S.-G., Bodkin, Travers Humphreys, and *Branson,* for the Crown, were not called upon.

The opinion of the COURT (Darling, Bray, Lawrence, Scrutton, and Atkin JJ.) was delivered by

DARLING J. In this case the appellant was indicted for high treason in adhering to the King's enemies elsewhere than in the King's realm, that is to say, within the Empire of Germany, and his act was said to be contrary to the Treason Act, 1351, the statute of 25 Edw. 3, stat. 5, c. 2. That statute says: "Whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth,"—which is the statute of Edward III., and various treasons are defined; and after the treason of levying war against the King in his kingdom there is defined (because it is only, as has often been said, declaring the common law) this particular treason. I will read it first in the words in which it is written in the Parliament Roll and in the Statute Roll, now in the Record Office, in Norman French, and then I will read it in the translation which has been published long ago under the authority of the King's printers. The words are these: may commit treason by levying war against the King, and so on, "Ou soit aherdant as enemys nře Seignr le Roi en le Roialme donant a eux eid ou confort en son Roialme ou par aillours," and that has been translated "or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere." The construction of those few words has given rise to all the argument which has been addressed to the Court before whom the appellant was tried and to this Court.

Now we desire to say—every member of this Court desires to say—that we are greatly indebted to Serjeant Sullivan, who has appeared

for the appellant in this case. We desire to say that in our judgment his argument was in every way worthy of the greatest traditions of the King's Courts, in one of which it was delivered. Having said that, it is from no want of respect to his argument that we did not call upon the Attorney-General, but the Court, having considered fully and attentively every argument used by Serjeant Sullivan and the authorities he advanced for it, have come to the conclusion that there was no need to call for any refutation of it from the Attorney-General. The authorities have been fully cited; there is no consideration which is not before the Court, because the answer, so far as it was an answer, to Serjeant Sullivan's argument had been made by the Crown at the trial, and Serjeant Sullivan himself was thoroughly aware of what might be the answer to any proposition which he put before us. We have considered, therefore, with the advantage of having known to us all that passed at the trial, the argument which he has so well—so excellently, I may say—addressed to us.

Now the main point raised in the argument of Serjeant Sullivan was that this statute had neither created nor declared that it was an offence to be adherent to the King's enemies beyond the realm of the King, and that the words meant that the giving of aid and comfort *par aillours*—that is outside the realm—did not constitute a treason which could be tried in this country unless the person who gave the aid and comfort outside the realm—in this case within the Empire of Germany—was himself within the realm at the time he gave the aid and comfort. This argument was founded upon the difficulties which must arise owing to the doctrine of venue, that people were only triable within certain districts where the venue could be laid; that if a man committed a crime in a county he must be indicted and tried for it in that county; that if he committed a crime against the King he must be tried within the realm; and that if the aid and comfort were given outside the realm by a person then being outside the realm he could not be tried there—that follows, because it was not within the King's realm; and that as he could not be tried by the King's Courts in the Empire of Germany he could not be tried here; he could not be tried in the King's Courts at all for what he had done in Germany, unless when he gave the aid and comfort in Germany he was himself actually resident

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within the realm of the King. It was said this must be so or one could find a case where a man had altogether outside the realm given aid and comfort to the King's enemies and had been indicted within the realm and tried for it. Such a case would be difficult to find in the course of years, because it cannot be a very common offence. First of all, if a man did those things pure and simple it is highly improbable that he would then put himself in peril by coming within the realm, where what he had done might be investigated and where he might be punished for it. One would expect that very few people would put themselves in a position where they could possibly be charged; but if any of them did, it is so highly probable that, besides the giving of aid and comfort outside the realm, they would have done something inside the realm; and that if they came back they would have done so with some evil intention, such as levying war, compassing the King's death, or doing something of that sort, that they would very probably be arrested on their arrival in this country and not charged with being adherent to the King's enemies outside the realm, but charged with some such offence as anybody being within the King's realm could commit there; it would be much more easily proved; and, if the two offences had been committed, as would be extremely probable, in the one case, any one having the direction of a criminal prosecution would be certain to charge him for the offence which could be the more easily proved. Therefore we are not very much impressed by the fact that there is very little precedent for such a prosecution as this.

But there is a large amount of authority for the proposition that what the jury have found was done by this appellant, and what it is not contested was done, because there is here no appeal upon the facts, is an offence triable, as this offence was tried, in the King's Bench. Taking the words of the statute themselves, it appears to us that the construction for which Serjeant Sullivan contends is not the true one. He would have it that "be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," means that the adherence, because it is the adherence which is the offence, must be by a person who, being in this country, gives the aid and comfort, it may be in this country, it may be outside of it. We agree that if a person being within

this country gives aid and comfort to the King's enemies in this country he is adherent to the King's enemies; we agree (and Serjeant Sullivan admits this) that if he is in this country and he gives aid and comfort to the King's enemies outside this country he is adherent to the King's enemies. But we think there is another offence, and that these words must mean something more than that. We think that the meaning of these words is this: "giving aid and comfort to the King's enemies" are words in apposition; they are words to explain what is meant by being adherent to, and we think that if a man be adherent to the King's enemies in his realm by giving to them aid or comfort in his realm, or if he be adherent to the King's enemies elsewhere, that is by giving them aid or comfort elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies, then he commits the treason which the statute of Edward III. defines. Reasons may be given for that, but we think a very good reason is to be found in this, that the subjects of the King owe him allegiance, and the allegiance follows the person of the subject. He is the King's liege wherever he may be, and he may violate his allegiance in a foreign country just as well as he may violate it in this country. If authority were wanted for that it is to be found in *Rex* v. *Cundell.* (1) I put out of the question Serjeant Sullivan's argument as to where the person could be tried, whether he could be tried by commissioners, or by commission of oyer and terminer, or in the King's Bench; but a really shocking example of what allegiance may mean is to be found in *Cundell's Case* (1), where prisoners of war, being then in the Isle of France, which we now call by its older name Mauritius, were seduced from their allegiance; they had adhered to the King's enemies; being recaptured, they were actually tried here in England, and one of them, Cundell, was executed for high treason; the others were pardoned. That was because he had violated his allegiance which followed him, which remained with him wherever he might be outside the King's dominions, and by which he was bound even when he was a prisoner of war. Of course I do not cite that case to commend it for its humanity, but merely to say that as a matter of strict law it is perfectly good law, and the only reason why it is not decisive of this case is that it does not dispose of the question as

(1) 4 Newgate Calendar, 62.

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to where the person who has committed the particular treason can be tried or how he can be tried.

Now I have said that it is the opinion of the Court that there is a great deal of authority for this proposition, that adherence to the King's enemies outside the King's dominions by a person who is himself outside them constitutes the commission of this treason by the person who is elsewhere than within the King's realm. It is worth while to notice that this question must have been discussed; people may have doubted how a person could be tried, but it must have been discussed among lawyers as to how he could be tried. There is a long and ancient opinion, as I will show when I read the cases presently, for the proposition that it is treason to do what the appellant has been convicted of doing in this case.

A statute was passed which has been often cited here, a statute of 35 Hen. 8, and what it says is this: "An Acte concerninge the triall of treasons cõmytted out of the Kinge Majesties domynions." There is a distinct statement that you can commit treason out of the King's dominions; it is only a question of how the person is to be tried; and it says: [The learned judge read the section of the statute set out above to the words "to be holden before himselfe," and proceeded.] Therefore this trial was rightly had in the King's Bench provided what was done by the appellant amounted to treason by virtue of the statute of Edward III. If it was such a treason it was rightly tried. Whether it was or not depends upon the construction which we ourselves, reading this statute, put upon it. Serjeant Sullivan has asked us simply to take the statute and read it as though we had seen it for the first time, and he says that is the best way to construe any statute. Well, it is a little difficult for anybody who is a judge of the King's Bench to say that he reads for the first time the statute of Edward III. concerning treasons. We must all have read it before. But I do not know that the rule which Serjeant Sullivan lays down is altogether an acceptable one. In Maxwell on the Interpretation of Statutes (1) there is this passage: "It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. Optima est legum interpres consuetudo"—and then another maxim is stated. "Where this has

(1) 5th ed. (1912), ch. xi., p. 489.

been given by enactment or judicial decision, it is of course to be accepted as conclusive. But further, the meaning publicly given by contemporary, or long professional, usage, is presumed to be the true one, even when the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed; and those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions; moreover, the long acquiescence of the Legislature in the interpretation put upon its enactment by notorious practice, may, perhaps, be regarded as some sanction and approval of it."

Now this statute has been understood long before to-day, has been understood by lawyers of great learning and lawyers of very exceptional erudition who have been members of the King's Bench, and understood in the sense in which we have to-day said we understand it. Serjeant Sullivan has attacked their authority; he has, quite properly, assailed the authority of Lord Coke; he has questioned the reasons, if there be any, for the statements which Lord Coke has made concerning the law; and if we were to accede to the argument of Serjeant Sullivan we should have absolutely to disregard the opinion of Lord Coke, the opinion of Mr. Serjeant Hawkins, and the opinion of Sir Matthew Hale, all great names in the law, and persons whose opinions have long been followed in many questions of extreme difficulty which have puzzled lawyers for many generations. Let us see what Hale says. Sir Matthew Hale in his Pleas of the Crown says this (1): "Touching the trial of foreign treason, viz. adhering to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statute of 35 Hen. 8, c. 2, hath sufficiently provided for it"; he cites *Story's Case* (2) and continues: "but at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." That is a very definite statement, and if we were to allow this appeal we should be bound to say that it did not state the law. Are we entitled to throw over the opinion of Sir Matthew Hale as cavalierly as we

(1) 1 Hale, P. C., ch. 15, p. 169. (2) Dyer, 298, 300.

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are invited to do? Looking at this book, The History of the Pleas of the Crown, how comes it to be in our hands? I read at the very beginning of it: "Extract from the Journal of the House of Commons Lunae 29° die Novemb. 1680. Ordered, that the executors of Sir Matthew Hale, late Lord Chief Justice of the Court of King's Bench, be desired to print the MSS. relating to the Crown law; and that a committee be appointed to take care in printing thereof, and it is referred to Sir William Jones, Serj. Maynard,"—a name to be reverenced in legal history—"Sir Fra. Winnington, Mr. Sacheverel, Mr. Geo. Pelham and Mr. Paul Foley"; and it is because of their care and by order of Parliament that we have this book in our hands at all.

Then there is Mr. Serjeant Hawkins, who says (1) this: "It seems to have been a great doubt before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried. For some seem to have holden, that it was triable only upon an appeal before the Constable and Marshal; others, that it might be tried upon an indictment, laying the offence in any county where the King pleased; and others, that it was triable by way of indictment in that county only wherein the offender had lands: but surely it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3, should be wholly dispunishable, as it must have been, if it were no way triable." Serjeant Sullivan's argument is that it was dispunishable because you could not try it, if the kind of treason alleged were what is alleged in this case.

I mentioned yesterday—and I think it is worth mentioning again, because we are confessedly relying upon the authority of Sir Matthew Hale and of Serjeant Hawkins in the judgment that we are giving, and also upon the opinion expressed by Lord Coke to which I will come presently—that there is a passage in the case of *Butt* v. *Conant*. (2) Dallas C.J., himself no mean authority, says this: "We are told that we must look to the authorities, and find what we can in the books upon the subject. Now if the authority of Lord

(1) Hawk. P. C., bk. 2, ch. 25, s. 48; vol. 4, p. 22 (Leach); vol. 2, p. 306 (Curwood).

(2) (1820) 1 Brod. & B. 548, 570.

Hale, and that of Mr. Serjeant Hawkins, are to be treated lightly, we may be without any authority whatever." (Here we are asked to treat them more than lightly, we are asked to reject them altogether.) "With respect to Lord Hale, it is needless to remind those whom I am now addressing"—this was in 1820—"of the general character for learning and legal knowledge of that person, of whom it was said, that what was not known by him, was not known by any other person who preceded or followed him; and, that what he knew, he knew better than any other person who preceded or followed him. With respect to Mr. Serjeant Hawkins, we know his authority. These are books which are in the hand and head of every lawyer, and constantly referred to on every occasion of this sort. I must, therefore, look to these books; and I shall proceed to examine the exposition given by text writers of the words of those statutes, and the commission of the peace."

Now with regard to Lord Coke, his opinion is precisely the same as that which is given by Sir Matthew Hale and Mr. Serjeant Hawkins, and it has been said to us that we should not follow Lord Coke because Stephen in his Commentaries and other writers elsewhere have spoken lightly of the authority and learning of Lord Coke. (1) It may be they have done so. Of course they have all the advantage. They are his successors. If Lord Coke were in a position to answer them, it may be they would regret that they had entered into argument with him; but, although Stephen and others have perhaps flouted the opinion of Lord Coke, he has been recognized as a great authority in these Courts for centuries, and nowhere more than perhaps in the passage I am now about to read, which I owe to my brother Atkin, in the case of *Garland* v. *Jekyll* (2): "I know it has been said, that Lord Coke in this case must be mistaken, for in the margin is a reference to Lord Coke's Reports, and upon referring to the page you find nothing to warrant his opinion. I have looked into the report, and the observation is correct, but it will be found that the same observation will apply to cases that are relied on on the other side; it appears to me that

(1) [Coke's authority as a witness to what the law was understood to be in his own time is to be carefully distinguished from his opinions in historical and antiquarian matters.—F. P.]

(2) (1824) 2 Bing. 296.

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the reference was not made by Lord Coke, but that it has been introduced by some ignorant editor who fancied something confirmatory of the opinion in 4 Coke. The fact is, Lord Coke had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any Court of justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense." Those are the words of Best C.J.

If one wanted an opinion of a person who was not a lawyer, it is where this same Lord Coke is alluded to by John Milton as one who—

> "On the royal Bench
> Of British Themis, with no mean applause,
> Pronounced, and in his volumes taught our laws,
> Which others at their Bar too often wrench." (1)

There are other authorities who understood this matter in precisely the same way, not authorities as great as Lord Coke, but it is worth while, I think, to show what was the volume of opinion during ages when lawyers were considering this particular matter. There is a treatise perhaps not very commonly known—I referred to it yesterday—by Mr. Ferdinando Pulton, a barrister of Lincoln's Inn, and the particular copy I am reading from was published in 1609. He says that his views are "collected out of the reports of the common lawes of this realme, and of the statutes in force, and out of the painfull workes of the reverend judges," mentioning them; and there is this passage (2): "And because by the said statute of 25 Edw. 3 it is declared to be high treason to levie warre against the King in his realme, or to be adherent to his enemies, aiding them in his realme or elsewhere; therefore if a subject borne of this realme being beyond the seas, doth practice with a prince or governor of another countrey to invade this realme with great power, and doe declare, where, how, and by what meanes the invasion may best be made, it is high treason; for an invasion with great power cannot be, but of likelihood it will tend to the destruction or great perill of the K. and hurt to the realme; and moreover the said offendor

(1) Sonnet to Cyriack Skinner. (2) De Pace Regis, fol. 110a, pl. 4.

hath manifested himselfe to be adherent to the K. enemy and to aid him with his counsel, though not in the realme, yet elsewhere. And this offence shall be tried in the K. Bench, or elsewhere, before such commissioners, and in such countie, as the King by commission shal appoint, according to the stat. of 35 Hen. 8. 2."

A much more modern writer was of the same opinion, Sir James Fitzjames Stephen. In his Digest of the Criminal Law he says (1): "Every one commits high treason who, either in the realm or without it, actively assists a public enemy at war with the Queen."

A valuable opinion to the same effect was given in the year 1775, and it is referred to and can be found in Archbold's Criminal Pleading, where this is said (2): "In 1775 the law officers (Thurlow A.-G. and Wedderburn S.-G.) had been informed—(1.) that in 13 Ann. an Act against high treason had been passed in the province of New Hampshire;"—which was in the King's dominions in America—"(2.) that the said Act was disallowed by Order in Council in 1718; (3.) that it was conceived that there was no law of that province at present existing for the trial and punishment of that offence. They were asked in what manner it was proper to proceed against persons for high treason committed in New Hampshire. They replied: 'We are humbly of opinion that it requires no Act of a provincial Legislature to constitute the offence of high treason in any of His Majesty's plantations. The crime may be prosecuted in the Superior Court of New Hampshire (which by 11 Wm. 3 hath the full criminal jurisdiction within that government which His Majesty's Court of King's Bench exercises here), or in this country under the statutes of 35 Hen. 8 as the occasion may require.'" That was exactly this case. The treason was not committed within the King's realm; it was committed elsewhere. There is no pretence that the person who committed it by being adherent, or whatever form the treason took, was within the King's realm. That is a distinct statement which covers this case exactly, and that is the opinion of two such law officers as Lord Thurlow and Lord Loughborough, absolutely consonant with the opinion which this Court is expressing to-day.

I do not know that it is worth while to allude to the paragraph

(1) 5th ed. (1894), art. 55, p. 44. (2) 24th ed. (1910), p. 1033, note (*a*).

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to which Serjeant Sullivan called our attention in *Platt's Case* (1), but it is to be noticed that no stress whatever is laid by the Court there upon the words which Serjeant Sullivan insists govern the whole of this particular definition of treason, that is the words "in his realm," because what is said is: "It was the ancient opinion, that the species of treason, which consists, by 25 Edw. 3, c. 2, in adhering to the King's enemies, might be tried, before the statute 35 Hen. 8, c. 2, within the kingdom, by the rules of the common law, though the aid and comfort was afforded without the realm."

We do not think it necessary to give further reasons for the conclusion to which we have come. We purposely do not rely upon a recent case which has been questioned by Serjeant Sullivan, simply for the reason that we are of opinion that the conclusion to which the Court indubitably came in that case is supported by ample authority to be found in the decisions and in the opinions of great lawyers to which I have referred in giving the judgment of this Court.

It only remains to say that the appeal is dismissed.

Appeal dismissed.

Solicitor for appellant: *G. Gavan Duffy.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

NOTE on the authorities cited in 3 Inst., p. 10, in support of Lord Coke's explanation of the word "adherent":—

Rot. Parl. 20 *Edw.* 1, *nu.* 2 (1292), *John de Brittaine's Case.*—This was a petition in Parliament for the restoration of a certain manor which had escheated to the Crown because a former owner "adhaesit parti Regis Francie contra fidem et partem praedicti Henrici Regis Anglie." The petition was not granted.

Rot. Parl. 33 *Edw.* 1, *Rot.* 6 (1305), *Robert de Ros de Werke's Case,* Placita coram Rege, Octab. Nativ. B. Mar., membr. 1.—This was a petition by the heiresses of Robert de Ros and by John Salveyn, the husband of one of them, for restoration of lands formerly held by their ancestor in England and Scotland which had been forfeited because he had adhered to the Scots. The petition was refused because it was recorded that "dictus Robertus de Ros . . . . contra homagium, fidelitatem, et ligientiam suam, de ipso Domino Rege tradiciose et felonice se elongavit, et inimicus ipsius Domini Regis manifeste devenit, parti

(1) 1 Leach, 168.

Scottorum adherendo . . . . nec unquam postea in vita sua ad pacem ipsius Domini Regis rediit, set inimicus suus obiit."

Year Book, Pasch. 8 *Edw.* 3, *fol.* 20, *pl.* 6 (1334).—In this case one Alice claimed dower of the lands of William her husband. The defendant pleaded that William went to Scotland and adhered to the enemies of the King and there remained and died an enemy in their allegiance. After some discussion upon this plea Herle C.J. asked, "How do you propose to prove the felony?" Elmer, counsel for the defendant, answered, "Sir, by the country." Herle C.J.: "Felony ought to be proved by record. Suppose he did remain with the King's enemies, it does not follow that he is a felon; he might have remained against his will." The defendant's counsel then said he was ready to prove that William went to Scotland and there joined the King's enemies in a raid upon Northumberland, "a matter which may well lie in the cognizance of the country."

Year Book, Mich. 38 *Edw.* 3, *fol.* 31*a.* (1364).—This was a quare impedit in which the King claimed a manor and advowson of which one R. was seised until he adhered to the King's enemies and was outlawed. In this case it does not appear whether the adherence was within or without the realm.

Rot. Parl. 4 *Ric.* 2, *nu.* 17 *et seq.* (1380).—Sir Rauf de Ferriers was arrested in the Scottish Marches and brought before Parliament to answer on suspicion of adhering to the French enemies of the King and especially concerning certain letters found in the fields near London, some under the seal of Sir Rauf directed to enemies in the kingdom of France and others to Sir Rauf from those persons. The letters were found to be forgeries and Sir Rauf was allowed to go at large.

5 *Ric.* 2, *Trial* 54 (1382).—This seems to be a reference to Fitzherbert's Abridgment, Trial 54.—"Quare impedit by the King against one P., clerk of a church in the bishopric of Durham. The count stated that the bishop, who was dead, presented one as his clerk; that the clerk died and the chapel was collated upon a cardinal, naming his name; that because of miscreancy and schism the church became void; the taking of the temporalities into the hand of the King, and the right of the King to present.

Burgh: "He has alleged that the church is void for miscreancy of a cardinal at the Church of Rome, which is not triable here, wherefore (we pray) judgment whether the Court will take cognizance of it."

Bealknap C.J.: "I say for certain that the Court has cognizance of this plea, and that I prove by reason that the whole Court Christian is one Court, and if a man in the Arches here in this country is arraigned of a crime for which he is liable to deprivation and then appeals to the Court at Rome and is deprived, that deprivation is triable in the Court of the King just as if he had been deprived in the Arches, since it is all one Court; and if a man be adherent to the enemies of the King in France his land may be forfeited, his adherence shall be tried where his land is, as has been often done of adherents to the enemies of the King in Scotland. And, Sir, by my faith if a man be miscreant his land is

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forfeitable and the lord shall have it by way of escheat, and reason demands this, for if a man who forsakes the allegiance of his liege Lord the King forfeits his land a multo fortiori where he forsakes the allegiance of God." And that Bealknap swore to be law; wherefore Burgh made answer.

Burgh: "Sir, the church became void in the time of the bishop who is dead, and we were the parson impersonee in the time of the same bishop of the provision of the Pope &c., without this that the church became void by the miscreancy of the cardinal &c., the temporalities being in the hands of the King [and this we are] ready to prove &c."

And the others plead to the contrary for the King. And a venire facias was awarded to the sheriff of the county where the church was, and not to the Bishop of Durham, nor to his seneschal nor bailiff; and it was said that the miscreancy should be tried where the church was and the same of the deprivation decreed by the Court of Rome, and this appears by this plea here by the judgment &c.: *quod nota.*

Hil. 18 *Edw.* 3, *Coram Rege, Rot.* 145: *Eboracsira.*—This appears to be a false reference. A careful search has failed to discover the case which the annotator had in mind.

Ass. 43 *Edw.* 3, *pl.* 28, 29 (1369).—In this case it was found by an inquest of office in the Chancery that one W. de Herlington, who was seised of certain lands in the county of York, was aiding Gilbert de M., who was an enemy of the King, wherefore the lands were seized into the hands of the King. The rest of this case seems immaterial. In the end restitution was granted to W. Lord Coke states that Gilbert de M. was a Scot.

Further proceedings appear in placitum 29 (the reference to 42 Ass. seems to be a mistake), where it is stated that by another office it was found that H. de Herlington, the father of W., was aiding, &c., wherefore the lands were seized back and then granted by patent to another. W. presented a petition in Parliament and restitution was granted to him. The rest of this case seems immaterial.

Rot. Parl. 7 *Ric.* 2, *nu.* 15 *et seq.* (1383).—The Bishop of Norwich, commander of the King's forces in Flanders, was called to account for surrendering the town of Graveling to the enemy and accepting bribes from them. Sects. 18—23 set out the proceedings. In the end the bishop was put to a fine and ransom for his misdoing and the temporalities of his bishopric were seized to compel payment. See also 4 Cobb. St. Tr. 282, 307.

Rot. Parl. 7 *Ric.* 2, *nu.* 17 (1383).—Peter de Cressyngham and John de Spykesworth were arrested and arraigned in Parliament for taking a bribe and surrendering the castle of Drinkham in Flanders to the enemy. Spykesworth was set at liberty. Cressyngham was committed to prison during the King's pleasure. See also 4 Cobb. St. Tr. 281, 306.

Rot. Parl. 7 *Ric.* 2, *nu.* 24 (1383).—This was a similar case, in which Sir William de Elmham and others were accused in Parliament of taking a bribe and surrendering the castle of Burburgh in Flanders. Some of the persons impeached were ordered to pay to the King what they had received, some were committed to prison to be ransomed at the will

of the King, and one William de Farndon was to be in mercy of the King, body and goods, to do with them what he pleased. See also 4 Cobb. St. Tr. 284, 311.

Year Book, Trin. 7 Hen. 4, fol. 46 (47 seems to be a mistake), pl. 5, 6.—In this case Michael de la Pole, Earl of Suffolk, sued a scire facias against Constance, Countess Marshal, and rehearsed that by suit made to the King by petition in his Parliament at Westminster in the first year of his reign, notwithstanding certain judgments given against his father in the time of King Richard by the assent of the said Parliament, he was made a person able to bear the name of Earl of Suffolk and to inherit and enjoy all the lands which were his said father's in his lifetime; and that by virtue of that ordinance he was seised of certain lands which were (limited) to his father and his heirs during the life of the Countess of Suffolk which were given to his father by the King's letters, &c.; then that he was ousted by colour of an inquest of office taken before the escheator of the county of Norfolk, by which it was found that Thomas (Mowbray), Earl Marshal, who lately committed treason against the King, died seised of the said lands as joint feoffee with the said Countess, then his wife, in fee tail. The Earl of Suffolk claimed that the Countess Marshal should show cause why he, the Earl, should not be restored to possession together with the issues at the same time.

After considerable discussion as to whether the proper remedy was by an assize:

Markham J.: When a man commits high treason all his land in fee simple or fee tail is seizable, and by this seisin the King has the fee and inheritance. If a man has a right he may make it good by petition, &c.

Gascoigne C.J.: The lands of no man shall be seized before he is attainted; that has always been the law.

Markham J.: If a man levying war against the King is killed in battle, his lands may be seized; and similarly if a man after committing treason flies beyond the sea his land may be seized.

Gascoigne C.J.: What you say is not law, for in such a case process shall be put in suit against him until he be attainted as an outlaw and then shall the land be seized.

Le Grand Coustumier de Normandie, ch. 73.—Of treason to the Duke of Normandy suit shall be made in this manner: I, to whom the Duke of Normandy had delivered his castle to guard, make complaint of P. that he was with me in the garrison; that treasonably and feloniously he went by night out of the castle and introduced the enemies of the Duke, from whom I was hard set to escape, &c.

W. H. G.