

allegiance in the indictment mentioned. *Sed per Cur.* If an alien be indicted for treason *contra naturalem dominum suum*, or *naturalis ligeantie sue debitum*, the defendant may give in evidence that he is an alien; for the indictment is restrained to that species of allegiance which is not due; but a subject may be indicted so, or *contra ligeantie sue debitum*; for allegiance is the *genus*, which being set forth, all species are comprised under it.

The indictment was, that at such a time and place *proditorie tractaverunt proposuerunt & consultaverunt de viis & modis quomodo dominum Regem interficerent & consenserunt & agreverunt quod quadragint. homines equestres* should be provided, &c., for that end.

It was objected, that here are two distinct acts of high treason, and the latter is not laid to be done *proditorie*. *Sed non allocatur*; for, by Mr. Cowper, the *et* makes the whole but as one sentence; at least it conveys the force of the words in the former sentence to this, and makes it partake of them. *Et per Holt C.J.* Here is but one treason alleged, viz. compassing the death of the King, and that is said to be *proditorie*; therefore it need not be repeated again in setting forth the overt act; for the overt act is not the treason, but evidence of the treason. The treason itself lies in compassing, which is an act of the mind. Accordingly in the case of the regicides it was agreed, that the indictment should not be for killing the King, but for compassing and imagining his death, and that the killing should be alleged as the overt act; for by the statute the treason consists in the intention. But if a distinct treason, as that of levying war, had been alleged, where the treason consists in the act and not in the intention, the act must have been said to be done *proditorie*; for the act of levying is a treason, and not an overt act of treason or bare matter of evidence.

[634] 6. COOK'S CASE.

[8 Will. 3. At the Old-Bailey.]

Copy of indictment not granted after pleading.

In the indictment against Cook, after the Court was sat and the jury called but not sworn, Sir Bartholomew Shower of counsel for the prisoner made objections to the indictment, but it was held right enough; upon that he urged, that then he had not had a copy, and the prisoner could not be tried. *Et per Cur.* By the words of the Act he is to demand it, and he has it to enable him to plead, and till then he is not to plead. In this case he has pleaded; therefore this benefit is waived, and the prisoner has admitted he has a copy, or did not think it for his service to require it, but was able to plead without the help of it (*a*).

(*a*) By stat. 7 Ann. c. 21, the party indicted shall have a copy of the indictment, and a list of all the witnesses to be produced, and the jurors impanelled, delivered to him ten days before the trial.

7. VAUGHAN'S CASE.

Indictment for treason in levying war, or adhering to the King's enemies generally, without shewing particular instances, not good. *Vide* 1 Hawk. P. C. 37, 38, S. C. Holt 689. 5 S. T. 17. 6 S. T. Ap. 57.

The defendant was indicted for treason, in adhering to the King's enemies, *cum pluribus subditis Gallicis inimicis domini Regis*, and that they did navigate a certain vessel called "Clancarty," with a design to destroy the King's ships. And it was held by Holt, C.J. and the other justices at the trial, that an indictment for levying war, or adhering to the King's enemies generally, without shewing particular acts or instances, is not good; for the words of the statute are, *and thereof be provably attainted by some overt deed*, which comes after the particulars of compassing the King's death, levying war, and adhering to the King's enemies; and it would be violence to restrain them to the first article only without regard to the last, to which they are equally connected; if they are to be restrained to a single article, it ought rather to be referred to the article of adhering only.

And if it be not a good indictment without special acts, &c., the question is, whether those that are alleged ought not to be proved, and no others? *Et per Holt, C.J.* A distinct overt act cannot be given in evidence, unless it relate to that which is alleged, or conduces to the proof of it. But if it conduce to prove an overt act alleged, it is good evidence; as if consulting to kill the King be alleged, any actings or doings in pursuance of that consultation may be proved; for it proves their agreement and consent, and is a farther manifestation of the act alleged in the indictment.

It was also objected, that in evidence the seamen must appear to be Frenchmen born; for if they were Dutch, they are not *subditi Gallici*.

2dly, That though he was said to adhere to the King's [635] enemies, yet it was not said to be against the King.

3dly, That this was not a sufficient act of adhering, without fighting, or some act of hostility. *Et per Cur.*

1st, If the States be in alliance, and the French at war with us, and certain Dutchmen turn rebels to the States, and fight under command of the French King, they are *inimici* to us, and *Gallici subditi*: for the French subjection makes them French subjects in respect of all other nations but their own; and if such cruise at sea, and an Englishman assist them, he is a traitor, but not a pirate, for none are pirates that act under the command of a sovereign prince.

2dly, Adhering to the King's enemies must of necessity be against the King; and therefore if an Englishman assist the French, being at war with us, and fight against the King of Spain, who is an ally of the King of England, this is treason, as adhering to the King's enemies against the King; for the King's enemies are hereby strengthened and encouraged, and so is within the express words of 25 E. 3, of adhering to the King's enemies; and it is sufficient to allege the treason in the words of the statute.

3dly, Cruising is a sufficient overt act of adhering, comforting, and aiding; as if Englishmen would list themselves and march, this is sufficient without coming to battle, and there may be levying war without actual fighting. *Vide Vaughan's trial.*

See Raym. 367. That an indictment for high treason may be tried by Nisi Prius.

[636] TRESPASS.

1. INCLEDON *versus* BURGESS.

[Mich. 1 W. & M. B. R. Intr. Mich. 4 Jac. 2, Rot. 282.]

Contra pacem is substance. *Vide post*, 641. Cro. Jac. 527. 1 Hawk. 244. 2 Hawk. 243. 6 Mod. 128. 4 Mod. 145. 1 Salk. 67. Yelv. 66. *Vide* 1 Sid. 253. 2 Cro. 377. 2 Vent. 49. Show. 27. Comber. 166, S. C. Carth. 65, S. C. Holt 342. 4 & 5 Ann. c. 16, must be taken advantage of on special demurrer.

Trespass for breaking, entering, and depasturing, 36 Car. 2, *continuando* the depasturing till 4 Jac. 2, *contra pacem domini Regis nunc*, which was K. James the Second. This was held naught, for then there is no *contra pacem* to the trespass *tempore Caroli Secundi*, but it is omitted, and *contra pacem* is substance. *Vide* Cro. Car. 325. Cro. Jac. 426, 443, 537.

2. HORE *versus* CHAPMAN.

[— 1 Will. & M. B. R.]

Declaration in trespass, *quare vi & armis, &c.* ill. See 2 Lev. 206. 2 Jon. 197. 2 Show. Cas. 17, 180, 294. Con. 413. 1 Wilson 99. 2 Wilson 203, *contra*.

In trespass the plaintiff declared, *quare vi & armis clausum fregit*, and, after verdict for the plaintiff, judgment was arrested, for *quare* is not positive but interrogatory, and much worse than *quod cum*. *Vide* 1 Cro. 420. 2 Cro. 47. 2 Bulst. 214. Godb. 251. 2 Keb. 400. 1 Sid. 326. 3 Cro. 57. 1 Keb. 377.