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THE TREASON LEGISLATION OF HENRY VIII (1531-1534)

ALEXANDER PRIZE ESSAY, 1916

By Miss I. D. THORNLEY, B.A.

Read June 21, 1917.

ALL legislation is to some extent the product of circumstance, and none more so than the numerous Acts which have from time to time augmented or reduced the law governing high treason. The basis of that law has been since 1352 the famous Act of 25 Edward III, stat. 5, c. 2, and this Act itself was moulded by the circumstances under which it was passed. Edward III was at the height of his power and popularity, so that in defining treason it was only necessary to include offences likely to be committed against a popular king reigning by an undisputed title.¹ This accounts both for what the Act contains and what it omits, and is the reason for that sufficiency in quiet times which has preserved it for over five centuries. It accounts also for its inadequacy in crises and disturbances, and the need to supplement it under such kings as Richard II and Henry VIII. New treasons are thus emergency measures to enable the Government to cope with particular situations; when the troublous times are over, they and the offences with which they deal disappear naturally with the circumstances which provoked them, and the Act of 1352 once more reigns supreme. When considering the causes of its long life, it must be remembered that Treason Acts fall into two classes: those augmenting and those diminishing the scope of the offence. The Act of 1352 belongs to the latter class. It was passed to bridle the judges in the creation of constructive treasons—a process

¹ Stephen, *Hist. of Criminal Law*, ii. 250.

which had alarmed Parliament¹—and, unlike all other Acts of its class, it did not follow a revolution or period of crisis, as the Act of 1 Henry IV, c. 10, followed the reign of Richard II; 1 Edward VI, c. 12, that of Henry VIII; and 1 Mary, c. 1, that of Edward VI.

After 1529, Henry VIII had to deal with one of the greatest revolutions in English history. Revolutions, however popular, entail disturbance and danger, and the English Reformation was no exception to the rule. Henry's various divorces and re-marriages, and the consequent succession difficulties, further complicated the problem. Hence it was necessary from time to time to supplement the Law of Treason, usually by clauses in Acts the chief business of which was to limit papal jurisdiction, or to declare the queen of the moment Henry's lawful wife and to sweep aside her predecessors and their children. One Act, however, was passed which had the augmentation of the Law of Treason as its prime object—26 Henry VIII, c. 13. The year of its passing, 1534, was the beginning of that period of terror which lasted until the fall of Cromwell in 1540. Henry had just destroyed papal jurisdiction in England and realised to the full the almost unlimited possibilities of his own strength, and in the next ten years the Reformation was to be 'unalterably riveted upon the English people.'² The history of the years 1529 to 1534, and all that Henry had already planned to follow 1534, are responsible for this Act and its provisions.

As far back as January 1530-1 the advisability of passing a new Treason Act had come home to the Government, and a draft Bill had been prepared. The subject came up again at the session of January 1531-2, and then, as the Bill did not meet with the approval of Parliament, it was abandoned until the second session of 1534, when the Act was finally passed. The events of the four crowded years which intervened between the first suggestion of the

¹ Cf. their petition, *Rolls of Parliament*, ii. 239a.

² H. A. L. Fisher, Longman's *Political History*, v. 328.

Act and placing of it on the Statute Book profoundly affected it in substance, and since five¹ drafts remain, it is possible to trace its evolution and to see how it was modified by circumstances. Three of the drafts are of the Bill proposed in 1531 and 1532, the first two of which are calendared in the 'Letters and Papers of Henry VIII' as vol. v, No. 52 (1) and (2), and the third, which has been misplaced, as vol. vii, No. 1381 (5). The other two are of the Bill of 1534, calendared in the wrong order as 'Letters and Papers,' vol. vii, No. 1381 (4) and (3).² Each draft contains the date on which it is to come into force if passed: the first, March 6, 1530-1; the second and third, January 6, 1531-2; the first draft of the Bill of 1534, January 1, 1534-5; the second, February 1 of the same year.

These dates support the conclusion that the arrangement of the drafts in the Calendar is incorrect. Their chronological order is placed beyond doubt by an examination of the additions and corrections freely made in all of them. For instance, the first (A1) contains a clause offering pardon and reward to a conspirator who turns informer as a draft addition by the corrector on the back of a sheet; the second (A2) incorporates it as part of the text prepared by the copying clerk; it appears again in the third (A3), and is there struck out. At the end of the first draft of the 1534 Bill (B1) the correcting hand has added a draft clause making certain words misprision of treason, which is incorporated in the clerk's text of the second draft (B2), and struck out in correction. Further, save for one small word,³

¹ The earliest is made up of pieces of two pasted together, so at least six were prepared.

² The order of the drafts may be more clearly explained by a diagram.

Bill of 1531 and 1532 (A).

A1. *L. & P.*, vol. v, No. 52 (1).

A2. *L. & P.*, vol. v, No. 52 (2).

A3. *L. & P.*, vol. vii, No. 1381 (5).

(Copy of the corrected form of A2).

Bill of 1534 (B).

B1. *L. & P.*, vol. vii, No. 1381 (4).

B2. *L. & P.*, vol. vii, No. 1381 (3).

(Copy of the corrected form of B1.)

³ *Statutes of the Realm*, iii. 509, § iii. l. 8, reads: 'Everie inditement and presentment founden *and* made of any such treasons.' The draft has 'founden *or* made.'

this second draft, read with its corrections, is exactly like the Act as printed in the 'Statutes of the Realm,'¹ which is proof positive that it is the final form.

All five drafts are corrected in the same handwriting, and on this point also the 'Calendar of Letters and Papers' is at fault. The first is simply noted as 'corrected draft,' the second as 'corrected by Cromwell,' and the third, contemptuously thrown in, in the wrong place, as 'draft differing considerably from the Act as passed,' is not favoured with any remark. The first draft of 1534 is 'partly corrected by Lord Chancellor Audeley,' and the second is also 'corrected by Lord Audeley.' As a matter of fact, a comparison of the corrections with each other and with other documents proves beyond doubt that, except in a few minor instances in the final draft (B2),² the whole of the corrections were made by one hand, and that hand was Cromwell's.³

This fact sheds light on the amount of influence which Cromwell already possessed in 1531. Chapuys and the other foreign ambassadors did not realise till 1533 that he was all-powerful with the King, any more than did the people at large, from whom concealment of his influence on unpopular changes was necessary as a protection. But it seems agreed that his sudden rise into prominence in 1533 would have been impossible had he not previously earned that promotion by important services to his royal master.⁴ The fact that in the winter of 1530-1 he had already risen so high in the royal favour as to be correcting and adding to draft legislation which the Government was about to propose to Parliament shows how early and how strongly his influence was established, and how it affected the changes made before it was safe to reveal that any one but

¹ *Statutes of the Realm*, iii. 508-9.

² E.g. the alteration of a date overlooked by the chief corrector.

³ Mr. Brodie very kindly examined the drafts and confirmed my opinion on the points of arrangement and handwriting.

⁴ H. A. L. Fisher, *Longman's Political History*, v. 296. R. B. Merri-man, *Life and Letters of Thomas Cromwell*, i. 90-91.

the King was the author of them. His influence on legislation from 1533 to 1540 is undisputed;¹ from these drafts, and from the memoranda which bear on them, it appears to have been equally great from 1531 to 1533. Further, in 1531 and 1532 he was busy finding out and extirpating 'seditious opinions' in regard to Henry's policy for the control of the clergy and for the obtaining of his divorce and re-marriage, so it was natural that the preliminary steps towards new and oppressive treason legislation should be taken by him. It is said by his biographer that he began to create a system of espionage early in 1532—an organised method of reporting treason which in a short time rendered unsafe the most guarded expression of dissent in politics or religion.² That he had planned, or perhaps begun, this system at least a year earlier is proved by the fact that on the back of a sheet of the first draft (A1) he added a clause offering pardon and a reward of one quarter of the lands and goods to be forfeited by the offenders to any conspirator who would betray his fellows 'to the intent that treasons . . . may the sooner be discovered and brought to knowledge.' His influence both on the Bill of 1531-2 and the Bill of 1534 was very great; how much the final form owed to him will be discussed after it has been dealt with in more detail.

The Bill prepared for the Parliament which met in January 1530-1 runs as follows: It shall be treason if any person, being lawfully monished personally to appear before the King, contemptuously resort to any of the King's castles in England, Wales, Ireland, or the town and marches of Berwick, there keeping himself by force and refusing to come to the King's presence. Also if any person, being the King's natural subject, for malice engendered in his heart against the King contemptuously leaves the realm and binds himself by oath or otherwise to be subject to a foreign prince or noble person, thereby renouncing his due allegiance. Also if any person being the King's natural

¹ Merriman, *ut supra*.

² Merriman, *op cit.* p. 99.

subject living under the dominion of any foreign prince or community maliciously work, counsel, or procure the hindrance of the King or his ambassadors, messengers, or servants in any of the King's outward affairs, or otherwise cause any disturbance or trouble to such ambassador or servant whereby the King's affairs in those or any outward parts are stopped, hindered, or deferred. Also if any person bring into the realm, or publish or put in execution within the same,¹ any writing or commandment brought from abroad which shall be to the dishonour or slander of the King's person or to the damage or diminishing of his crown, majesty, or royal jurisdiction. The above treasons, if committed out of the realm or in any place where the King's writ does not run, shall be tried by verdict of twelve men in any shire of the realm like treason committed in that shire. A conspirator who shall betray his fellow-plotters to the King or any of the Council, so that they may be taken and convicted, shall be pardoned and receive one quarter of the forfeited inheritances and goods as reward.

The first clause is crossed out—no doubt for the reason that, as it stands, it makes no alteration in the law. Forcible detaining of the King's castles amounted to levying war, and was therefore already treason.² To leave the realm without licence, which the word 'contemptuously' seems to imply,³ was an offence of long standing, and many regulations had been made to guard against it.⁴ It is doubtful, however, whether such departure from the realm and swearing allegiance to a foreign prince amounted to the treason of adhering to the King's enemies, though it had always been a maxim of the Common Law that a man cannot divest himself of his allegiance or transfer it to a foreign

¹ A1 adds 'to the King's own person.' This does not appear in A2 and A3.

² Foster, *Discourse of High Treason*, p. 219.

³ A2 and A3 replace 'contemptuously' by 'without the King's licence.'

⁴ Coke, 3 *Inst.*, chap. 84, deals with the subject and gives references. See also Acts of 5 R. II. stat. 2, c. 1, and 13 R. II. stat. 1, c. 20.

prince; and it was held long afterwards that the latter cannot, by employing such a subject, dissolve the bond of allegiance between him and the sovereign to whom he was born a subject.¹

To hinder the King's ambassadors or prejudice his foreign affairs was an offence for which it would have been hardly necessary to provide before the expansion of England under the New Monarchy. It reflects the increasing complexity of diplomatic relations, and was especially necessary under such a king as Henry VIII, when opposition to the royal policy was strong, and half-friendly foreign courts were ready to welcome fugitives.

The clause making it treason to bring in, publish, or put in execution, writings to the dishonour of the King or his regality is a link in the long chain of enactments and decisions intended to curb papal interference in England. By Common Law a writ *Ad jura regia* lay against any person who by pretext of any foreign power impugned or attempted to frustrate the laws of the realm.² Under Edward I a subject who brought in a bull of excommunication against another subject, his opponent in a law-suit, and published it to the Lord Treasurer, was by Common Law adjudged guilty of treason against the King, his crown and dignity, and sentenced to be drawn and hanged.³ The sentence was commuted to abjuration of the realm at the intercession of the Chancellor and Treasurer, and there seem to be no more instances of so severe a punishment for such offences, which soon began to be dealt with in the manner later associated with praemunire.⁴ The year of Edward III's Treason Act saw also the Statute of Provisors,

¹ Case of Doctor Story, 13 Eliz., Dyer's *Reports*, ff. 298b and 300b. Case of Æneas Macdonald, 21 Geo. II., *State Trials*, xviii. 859.

² Coke, 3 *Inst.* p. 100.

³ Coke's *Reports*, v. 12a, 12b, in Caudrey's case: 'De jure regis ecclesiastico.' Coke specially notes that 'this was by the Common Law of England before any statute made.' Cf. Brooke's abridgment: Treason 14, Praemunire 10.

⁴ Coke's *Reports*, v. 12b, case of the Archbishop of York under Edw. I, *ibid.*, 15a, case under Edw. III; *ibid.*, 16b, case of the Abbot of Waltham.

based on Edward I's Statute *De asportatis religiosorum*, by which both those who obtained bulls of provision from Rome and those who executed them were declared to be out of the King's protection and might be treated as his enemies. Two years later came the Statute of Praemunire, and these two were the basis of all future law on the subject.¹ Henry VIII's object in raising the offence to the rank of treason was to protect himself against papal attacks on his matrimonial proceedings.

The clause providing for the trial of these treasons, if committed out of the realm, filled a gap in the Common Law, by which they were not triable.² The offer of pardon and reward to an informer was an addition of Cromwell's.

The circumstances which produced this Bill, and which make its provisions intelligible, were of the kind which usually prevail when laws creating new treasons are enacted. It was a time of crisis and political unrest. Henry's anti-papalism had from the first been popular,³ but not so the divorce which it was the object of that anti-papalism to obtain. Anne was hated, Catharine and Mary beloved; and the repudiation of papal jurisdiction, which seemed to be the only way to obtain what the King desired, might well bring war with the Emperor, taxation, and the stoppage of the wool trade with Flanders. This would alienate the commercial middle class—Henry's one strong and sure support—and rebellion and deposition were among the

¹ Cf. 1 Hawkins, *P.C.* chap. 19, *Of Praemunire*.

² So decided Trin. 2 & 3; P. & M. Dyer's *Reports*, ff. 131b-132. Coke, 3 *Inst.* p. 11, says: 'The offender shall be indicted and tried in this Realme where his land lyeth, and so it was adjudged in 2 Hen. IV.' In this case, however (Pasch. 2 Hen. IV, *Coram Rege*, Rex, rot. 18 Salop), it was decided that treason committed out of England, where English law does not extend, cannot be inquired of and tried in England. Coke has transposed the facts. Treason committed out of the realm could, however, be tried in England by process of appeal in the Court of the Constable and Marshall, which administered Civil Law. Cf. 1 Hen. IV. c. 14, *Statutes*. ii. 116. Vernon Harcourt, *His Grace the Steward and Trial of Peers*, gives cases which illustrate the point, e.g., on p. 383.

³ *L. & P.* iv. Introd. p. dv, and No. 5797, cited by A. F. Pollard. *Henry VIII*, p. 251. *L. & P.* v. 45.

possible consequences. It was the support of this dominant class, and their antagonism to those above and below them, which kept Henry on the throne and enabled him to ignore the discontent which was rife amongst other sections of his people. Against a united people, or a partial revolt which was well organised and really popular, Henry would have been powerless.¹ Since the opening of the Reformation Parliament in 1529 he had been able to take advantage of its strong anti-clerical and anti-papal tendencies in working towards his desired end ; still, no one, save perhaps he himself, could tell what might follow a definite breach with the Papacy ; and the fear of taxation and commercial loss might have disastrous effects on that dominant commercial class on whose support he chiefly leaned. It was well that the Government should have some safeguard against attempted rebellion and the stirring up of foreign enemies, while at the same time a blow might be struck against the papal prerogative and its English supporters. Hence possible rebels were provided for by the clause against those who seized and held castles and despised royal commands, and traitors endeavouring to embarrass Henry's policy abroad by those as to leaving the realm, swearing allegiance to a foreign prince, and hindering ambassadors.

The clause against writings or commandments to the dishonour of the King, or diminishing of his prerogative, also reflected recent events. In March 1530, papal bulls had prohibited Henry, under pain of the greater excommunication, from proceeding to his projected second marriage, and had forbidden all ecclesiastical judges, doctors, advocates and others to speak or write against the validity of the first.² Henry had already a weapon against such fulminations in the Law of Praemunire, and he was not slow to use it. In September 1530 a proclamation, based on that law, forbade the purchase from the Court of Rome or the publication of anything prejudicial to the realm or to the King's

¹ A. F. Pollard, *Henry VIII*, pp. 313-314.

² *L. & P.* iv. 6256, 6279.

intended purposes.¹ Despite this, an Anglo-French embassy in October found Clement resolved to continue his aggressions.² Evidently the Law of Praemunire was not a sufficient safeguard.³ Nor were the penalties of praemunire severe enough to satisfy Henry; to bring in or publish such attacks on his doings, and thus by implication to hold that the papal jurisdiction was superior to the royal prerogative, should be nothing less than high treason. In the autumn of 1530 it had already been considered that writing to the Pope to be reinstated in his possessions, and asking for sentence of excommunication against Henry if he did not banish Anne from Court and treat Catharine with due respect, was sufficient basis for a charge of treason against Wolsey.⁴ The information against the clergy for praemunire in having acknowledged the Cardinal's legatine authority filed by the Attorney-General in December 1530, simultaneously with the inception of the Bill creating new treasons, was another branch of the same general attack on papal jurisdiction in England.

The fate of this first Bill is uncertain. That it was troublesome to prepare is evident from the fact that parts of two separate drafts go to the making of the one existing, and from the alteration and correction to which it was subjected. No Journals of either House being extant, it is impossible to follow its progress; but it is more probable that it was left unfinished at the end of the session, or perhaps through some accident not introduced, than that it was rejected or committed to be reformed; for in that case the drafts prepared for the next session would have differed more from the first than the second and third in fact do.

The next move in the attempt to secure the new Treason

¹ *L. & P.* iv. 6615. Cf. *ibid.*, 6759.

² Cf. Fisher, *Polit. Hist.* v. 304.

³ Attempts, which do not seem to have had much effect, had been made in January 1530-1 to impress Chapuys and the papal Nuncio with the heinous nature of the crime of importing bulls without the King's consent (*L. & P.* v. 45).

⁴ Cf. Fisher, *Polit. Hist.* v. 305-6.

Act was made in the autumn of 1531, when a paper of royal instructions to Cromwell 'to be declared to the Council and undelayedly put in execution this Michaelmas term, 23 Henry VIII,' includes the command: 'The Bill of Augmentation of Treasons to be ready against Parliament.'¹ The circumstances did not differ widely from those under which the first Bill was prepared. The bonds of Rome were not yet broken, though the clergy had made a qualified recognition of the royal supremacy, and the divorce loomed nearer and more distinct. Safeguards against rebellion were more than ever necessary; for the second marriage, which it was now clear that the King was determined to carry through, was no more popular than before. A riot had followed the demand for Convocation's subsidy from the London clergy, and Henry, watchful as he always was of the temper of the nation, must have noted the danger-signs.² So in the Treason Bill prepared for Parliament the clauses against those who seize the King's castles, who leave the realm and become subject to a foreign prince, or who embarrass foreign affairs, reappear, sometimes with slight additions which make them more stringent. The clause against papal bulls was no less necessary; in December 1530 it had been decided at Rome that briefs should be granted prohibiting the Archbishop of Canterbury from taking cognisance of the divorce, forbidding Henry to have any other wife than Catharine, and Anne, or any other woman, to marry him while the case was pending.³ The news of this would not arrive in time to influence the draft prepared for the session of January 1530-1, but it further emphasised the need for some provision against such papal attacks. In the same January

¹ *L. & P.* v. 394. Cf. *State Papers*, i. 380, where it appears that the body referred to was the King's Counsel learned in the law. For the share of the judges and law officers in the drafting of legislation, see thesis in the University Library at South Kensington by J. J. McGinley, *The Judiciary in Relation to Legislation under Henry VII and Henry VIII*.

² Cf. A. F. Pollard, *Henry VIII*, pp. 304-6, and references.

³ *L. & P.* iv. 6772. The date of this secret Consistory was December 23.

the Pope again forbade Henry to remarry until the decision of the case, and prohibited laity, clergy, universities, parliaments, and courts of law in England from coming to any decision on the divorce.¹ Every fresh step that the King took might be followed by further ecclesiastical thunders. So the new Treason Bill was very similar to the one prepared twelve months earlier, but more stringent. A clause widening the scope of forfeiture for treason was added, no doubt as a further deterrent to attempted rebellion, and the later of the two drafts includes as treason the making of agreements with any foreign prince or consenting to pay him any sums of money. This second draft is also prefaced by a long preamble,² setting forth that in the twenty-fifth year of Edward III, Parliament, in passing the Act of Treasons, had by a special clause made provision for the further extension of the Law of Treason when necessary :

‘ According to which declaration and ordinance so most prudently foreseen and made . . . it is now therefore thought by the noble men of this realm and the Commons in this present Parliament assembled much necessary and convenient to declare by authority of this present Parliament some kinds and offences . . . to be high treason.’

It is interesting to find this clause of the Act of 1352 thus quoted as the authority for a Bill augmenting the Law of Treason, because there has been some controversy as to whether it referred to the legislative or judicial powers of Parliament. Several judicial decisions in Parliament were given under it,³ and an attempt was made to use it at the

¹ *L. & P.* v. 27. It is noteworthy that the fixing of this document on the church doors of Flemish towns is to be sufficient promulgation, as Henry had refused to receive a former citation.

² This preamble is only found in A3, but a reference in A2 shows that it was at least planned when that draft was prepared. It is probably the preamble which misled Dr. Gairdner when he calendared A3 in the wrong place.

³ *E.g.*, the case of John Imperial in 1380. *Cf.* Coke, 3 *Inst.* p. 8; 1 Hale, *P.C.*, pp. 83, 263. That of Mortimer in 1423 (1 Hale, *P.C.*, p. 268) appears to be the last.

time of Strafford's impeachment.¹ His counsel argued that it was repealed by 1 Henry IV, c. 10, and 1 Mary, c. 1, which enact that no offence shall be treason except those specified by the Act of 1352; and the fact that the impeachment was abandoned seems to lend colour to his point of view. But whether it refers to legislative or judicial functions, the provision gave to Parliament no power which it did not already possess. As to legislation, it could not increase the right of Parliament to pass a Bill either augmenting the Law of Treason generally, or dealing with some particular case. Judicially, Parliament was the highest court in the land. The provision merely states the power of giving a decision which Parliament already had²; and if it be taken to refer to the judicial power, it points out to the judges the occasions and the ways in which they are to ask for its exercise. Hence, since it gave no power, none was taken away by its repeal—if 1 Henry IV, c. 10, be considered to repeal it. It is used as the excuse for Henry VIII's projected Treason Act, but in any case the new treasons are to be declared 'by authority of *this present* Parliament.'

Parliament, when it met, reflected the disturbed and restive temper of the great majority of the nation; the royal proceedings were criticised, and Government Bills had a hostile reception. There had in the previous session been loud complaints of the King's financial exactions;³ now Henry's request for supplies was met only by the grant of a single fifteenth, which he did not consider worth acceptance.⁴ Two members moved that he be asked to take back Catharine as his wife, and their words were reported to have been well received by the House.⁵ The Bills of Uses and Wills, his dearest projects, were twice rejected,⁶ and it required all his and Cromwell's parliamentary skill to

¹ Stephen, *Hist. of Criminal Law*, ii. 252. Holdsworth, *Hist. of English Law*, ii. 372.

² Parliament had decided cases before the Act of 1532—e.g., those of Segrave, the Despencers, Roger Mortimer, and Maltravers.

³ *L. & P.* v. 171.

⁴ *Ibid.*, 1046.

⁵ *Ibid.*, 989.

⁶ *Ibid.*, 805, 989.

secure the passing of the Act of Annates ; in the House of Commons recourse was had to the rare expedient of a division,¹ and in both Houses the votes were taken in the King's presence. In such circumstances the failure of a Government measure, intended to create new treasons and guard against plottings abroad and discontent at home, was only to be expected. No Journals of the session have been preserved, but the existence of two drafts and the amount of correction to which they were subjected argues that the Bill was not rejected without due consideration. Between the lines of the preamble there seems to be a suggestion that an easy passage was not expected ; it sets out that the most detestable sin of high treason has always been abhorred both by Christians and infidels, and that in the statute of the twenty-fifth year of King Edward III, by which the offence is defined, provision is made for including other offences in the Law of Treason when necessary. Now, therefore, the nobles and commons of the realm think it necessary and convenient to raise various offences, ' which have been newly by experience practised,' to the rank of high treason, even as the Parliament of Edward III ' discreetly assented and enacted ' for the safety of the King and his heirs,

' to the intent that the people of this realm may well consider, know, and perceive that the said noblemen and commons in this present Parliament assembled be as fervently disposed and as greatly affectionate as ever their said predecessors were or their successors have been or shall be to ordain and provide for the surety of their sovereign lord.'

It reads like an appeal to the loyalty of the House of Commons and the class they represented : a defiant manifesto to enemies abroad and malcontents at home that the majority of the nation were still the King's firm supporters. But if such were its objects, it failed. Parliament refused Henry the vote of confidence he desired. Such was the fate of his (or Cromwell's) first Treason Bill.

¹ *L. & P.*, v. 898.

The successful attempt to obtain the Treason Act was not made until the second session of 1534. Meanwhile, matters had reached a crisis. In January 1532-3, despite papal threats in the previous November,¹ Henry and Anne were secretly married, and in the session of Parliament which opened in the following month, Henry must sever the connexion with Rome in order that he might obtain a legal form of divorce in England. The thunderbolt of excommunication might be launched at any moment. London was disquieted by rumours that the new Archbishop-designate was a Lutheran, and that the King was consulting with Melancthon. The Commons had been troublesome in the previous year, and were sure to be apprehensive of injury to the Flemish trade. So in order to smooth the passage of the essential measure, no other demands were made upon Parliament; no grants were required, and no extensions of the royal prerogative proposed; the Treason Bills of the two previous sessions were therefore not revived.

The Act of Appeals was followed by the opening of Cranmer's court at Dunstable, the sentence of divorce, Anne's coronation, and, in September 1533, the birth of Elizabeth. In the same month bulls of excommunication were issued against Henry and Anne,² and the King's reply was a vigorous campaign against papal authority. Preaching was forbidden, the Act of Appeals was placarded on the church doors, ambassadors were sent to make leagues with Poland, Hungary, the Hanse towns and the princes of Germany, fortifications were strengthened and munitions of war prepared. Indeed, Henry's position was dangerous, and Chapuys' despatches are full of assurances that an Imperial invasion would be widely supported in England. Whether or not there was as much disaffection as he believed, there was much murmuring, and many indications

¹ *L. & P.* v. 1545, where are also noted briefs of March 7, 1529-30, and January 5, 1530-1.

² See A. F. Pollard, *Henry VIII*, p. 302 note, on the various bulls of excommunication.

of the feeling which the divorce had roused against the King. Probably Henry alone knew the extent of his safety. A Catholic Europe which could not combine against the Turk would never do so against one who, whatever else he might be, was still rigidly orthodox in faith. The Flemish wool trade was more important to Charles V's subjects than to the English, and so long as it was safe Henry need not fear a serious rebellion. The commercial classes were dominant ; they wanted peace and prosperity, and the only alternative to Henry VIII was anarchy. The repudiation of papal authority was popular, the Church was not loved as an institution, and so long as the divorce did not bring consequences which materially affected Henry's subjects, they would not stir against him. Henry understood all this, and acted accordingly. Further, in the autumn, the exposure of the Nun of Kent and her accomplices did much to cow disaffection.

Parliament reassembled on January 15, 1534, to complete the separation from Rome. The worst of the crisis was now over. It was fairly evident that the Emperor neither could nor would attack England, and now that the divorce and re-marriage were accomplished facts it was probably felt that grumbling was useless, and the objections would assuredly go no farther than that.¹ The discredited Nun and her accomplices were attainted, and the apprehension thus created helped the passage of the Act declaring Henry's first marriage invalid—a proposition from which the majority of the nation would certainly have dissented. But Parliament was prepared to recognise accomplished facts, and it passed the Act for the King's marriage and succession apparently without much unwillingness.

This Act is another step in the progress of the Law of Treason. It provided that it shall be treason to do, or procure to be done, anything to the peril of the King's

¹ I have neglected the alleged attempts to render this Parliament subservient by packing it. Cf. A. F. Pollard, *Henry VIII*, p. 317, and thesis by W. S. Dann, in the University Library at South Kensington

person or whereby he may be disturbed or interrupted of the Crown, or to the prejudice, slander, or derogation of his marriage or the peril, slander, or disherison of his heirs as limited by the Act, by which they might be destroyed, disturbed, or interrupted in body or title of inheritance. These offences were to be high treason if committed by deed or writing, and misprision of treason if by words only. To refuse to swear to the contents of the Act was also to amount to no more than misprision.

No drafts of this Act have been found, so that it is impossible to tell what the original proposal of the Government was; probably, however, it was more severe than the Act, and was modified by Parliament in the direction of greater leniency. Cromwell reported to the King that Parliament was content that deeds and writing should be treason and words misprision, with a declaration of what the misprisors shall do.¹ These, and the directions as to what should be omitted from the Act, were carried out to the letter—a striking instance of the prevailing of the will of Parliament and of its ability to alter a Government Bill. Obviously, then, it approved of these extensions of the Law of Treason.

By the autumn of 1534 the crisis, which had reached its height in 1533, was practically over, and Henry was safe. He had little difficulty in securing a general and formal repudiation of papal authority and acknowledgment of his second marriage. Everywhere the oath to the contents of the Act of Succession was readily taken,² and

¹ *L. & P.* vii. 51. Remembrances in Cromwell's hand. Professor Pollard (*Henry VIII*, p. 263 note) has taken this remembrance as referring to 26 Hen. VIII, c. 13, basing his theory on the fact that 'there is in the Record Office a draft . . . differing considerably from the Act as passed.' This is incorrect, as the examination of this draft (A3) has shown. All the conditions mentioned in *L. & P.* vii. 51 are fulfilled by 25 Hen. VIII, c. 22; none of them by 26 Hen. VIII, c. 13. The mention of the King of Scots, and of the disobedience of an heir to the Act, show that the remembrance can only refer to some Act regulating the succession, such as 25 Hen. VIII, c. 22, or 28 Hen. VIII, c. 7, in which the latter provision appears.

² *L. & P.* vii. *passim*—e.g., 610, App. 23, 24, 26, 27, 29.

the declarations required of them were made by the Convocations, the two Universities, and the capitular bodies. On November 3, 1534, Parliament reassembled, and the first measures that it passed were a short declaratory Act for the royal supremacy, and another laying down in precise terms the oath to the succession. Evidently it had decided to acquiesce whole-heartedly, not only in the King's popular anti-papal policy, but also in his unpopular but accomplished marriage. It was plain that Charles V neither could nor would interfere.¹ Hence it is not surprising to find that in this session it at last strengthened the hands of the Government by a new Act of Treasons, dealing with three classes of offences :

1. To wish or attempt any bodily harm to the King, the Queen, or their heirs apparent, or to deprive them of their titles, and to express it by words, writing, or deed.

2. By writing or words to call the King a heretic, schismatic, tyrant, infidel, or usurper of the Crown.

3. To detain any royal castles, ships, ordnance, or munitions of war, and to refuse to give them up after proclamation.

4. All traitors are deprived of the privilege of sanctuary.

5. These, or any other treasons, if committed out of the realm, shall be enquired of and presented by the oaths of twelve men upon good evidence, in such shire and before such persons as the King shall appoint by commission under the Great Seal. The indictment shall be certified into the King's Bench, and process there made as if the treason had been committed in the realm. Process of outlawry against offenders living out of the King's dominions shall be as good and effectual as if they were living in the realm.

6. A convicted traitor shall forfeit all his lands, tenements, and hereditaments of any estate of inheritance, in use or possession ; the rights of all persons are saved except the offenders, their heirs and successors, and any persons claiming to their use.

¹ *L. & P.* vii. 229. Cf. Pollard, *Henry VIII*, pp. 310-1.

The changes which this Act made in the law were considerable, but they were neither unreasonable nor unprecedented, and certainly do not deserve the violent condemnation which has usually been their lot. To compass the bodily harm of the King was treason under the Act of 1352,¹ for a conspirator who plotted to harm him would be unlikely to leave him alive to take vengeance.² The first appearance of this provision in an Act is in the Act of Succession, 25 Henry VIII, c. 22. The inclusion of the Queen and the heir apparent was natural in the circumstances of the time. The clause as to depriving the King of any of his titles was levelled at those who denied Henry's ecclesiastical supremacy, and its insertion in the Act was due to the events of the years 1531 to 1534. Henry's title of supreme head on earth of the Church of England, first granted to him by Convocation in January 1530-1, had just been confirmed by Parliament in the Act of Supremacy, but that Act contains no penal clauses. This clause is the first enactment under which those who denied Henry's supremacy could be put to death, and it was under it—not under the Acts of Succession and Supremacy, as is generally believed—that the Catholic martyrs suffered. The penalties imposed by the Act of Succession on those who refused to swear to its contents were those of misprision only.³

¹ 1 Hale, *P.C.* p. 275. Stephen, *Hist. of Criminal Law*, ii. 256.

² In Essex's case, in 1600, the judges gave the opinion that 'in every rebellion the law intendeth as a consequent the compassing the death and deprivation of the king,' for the reason given above (*State Trials*, i. 1353; Foster, *Discourse*, p. 195).

³ It was therefore for misprision of treason that Fisher and More were attainted by Acts of this Parliament, 26 Hen. VIII, cc. 22 & 23. Their refusal of the oath was due to the implied denial in the Act of the Papal Supremacy; hence, since they upheld this, they denied Henry's supremacy. They could not, however, be condemned to death as traitors until after the passing of 26 Hen. VIII, c. 13. Cf. Pollard, *Henry VIII*, p. 331 note. That they and the Carthusians suffered under this Act is clear from the records of the trials in the *Baga de Secretis*, Deputy Keeper's 3rd Report, App. ii. pp. 237, 239, 240. On p. 238 (M. 8) it is made plain that this clause in 26 Hen. VIII, c. 13, was intended to enforce the Act of Supremacy. Cf. the other trials.

To make it treason to deprive the Queen of her title would have been meaningless, and indeed in direct opposition to what Henry wished his subjects to believe, until Cranmer's sentence of divorce between Henry and Catharine, and Anne's coronation. That both this and the guarding of the title of the heirs of Henry and Anne were necessary there is no question. In July 1533, Chapuys had reported¹ that the people, though forbidden on pain of death to call Catharine queen, shouted it aloud, and it is said that none cried 'God save the Queen!' as Anne's coronation procession passed through London.² Certainly the majority of the nation regarded Mary as the true princess and deeply resented her supersession by Elizabeth. That the opprobrious epithets to be treason in future were in common use is evident from the many fragments of seditious talk preserved among the 'Letters and Papers,' and they were dangerous to Henry in the mouths of his subjects, for the people who spoke them were those most likely to plot or attempt rebellion. Those who could call Henry a heretic, schismatic, or infidel, evidently disagreed with his ecclesiastical policy; and to call him a usurper argued a dangerous degree of adherence to those families of White Rose descent which it was always the object of Henry VII and Henry VIII if possible to destroy. The clause as to detaining royal castles or munitions of war was useful as a check on attempted rebellion, and it made the law more stringent than it had previously been by making a bare detainer treason; previously, forcible resistance had been necessary to constitute the offence.³

The Act also introduced what legal and constitutional historians regard as a violent breach of the constitution—an invasion of the most elementary and fundamental liberties of the subject—treason by words. Unfortunately

¹ *L. & P.* vi. 918. Cf. *Camden Miscellany*, xii. 8. 24 Hen. VIII, two women were cruelly punished for saying that Catharine, not Anne, was the true Queen of England.

² *L. & P.* vi. 585.

³ Foster, *Discourse*, p. 219.

for those who take this orthodox view, a study of the working of the Treason Law in the fifteenth century seems to place it beyond doubt that treason by words was then a recognised principle of the law of the land. The Act of 1352, which cuts down and defines treason, insists on the necessity for an overt act, from which it may be concluded that proof of such an overt act had not previously been essential to secure conviction. An Act of 1397,¹ passed when storm-clouds were gathering thickly over Richard II's head, makes it treason to compass the death or deposition of the King without mentioning the necessity for an overt act; evidently the intention was to enable the King to deal with treasonable words, which, at such a time, were a danger-signal. The Act was swept away as too vague and elastic by the first Parliament of Henry IV;² nevertheless, in the third year of his reign, we find men being executed as traitors for saying that King Richard was alive and would come to regain his realm,³ despite the fact that the Act of 1352 had been reinstated as the sole standard of treason. No protest appears to have been made against these proceedings; and during the fifteenth century a long succession of cases⁴ testifies to the fact that words alone

¹ 21 Rich. II. c. 3.

² 1 Hen. IV, c. 10, *Stats. of the Realm*, ii. 114. The preamble says that on account of Richard II's Act of Treasons 'there was no man who did know how he ought to behave himself, to do, speak, or say, for doubt of such pains.' Therefore 'in no time to come [shall] any treason be judged otherwise than it was ordained by statute in the time of . . . King Edward III.'

³ Case of John Sperhauke, *Coram Rege*, 3 Hen. IV, *Pasch. Rex.*, rot. 12. Case of Friar Henry Forster, 3 Hen. IV, *Trin. Rex.*, rot. 3. Case of William Balsshalf, appealed by John Bernard, *ibid.*, rot. 4. Case of Nicholas Louth, chaplain, *ibid.*, back of rot. 4. Case of Friar Walter Walton, *ibid.*, back of rot. 5. In all these cases the prisoner was condemned and executed as a traitor. The first, fourth, and fifth are referred to in a note on p. 115 of vol. i. of the 1778 edition of Hale's *Pleas of the Crown*. The cases of Sperhauke and Walton are printed in the *Engl. Hist. Review*, Oct. 1917.

⁴ They are collected in Croke's *Reports* for the reign of Charles I, pp. 117-126, in Pyne's case, and occur under Henry VI, Edward IV, Richard III, and Henry VII. See also Flenley, *Town Chronicles*, pp. 128 129

could and did constitute treason, and that to punish them as such was strictly conformable with law and the constitution. The New Monarchy brought new constitutional theories, and the 'liberty of the subject,' as it was understood at the time of the Great Rebellion, began to develop. Freedom of speech would before long be an article in the Englishman's political creed.¹ In 1512 Strode's case established the right to free speech in Parliament, and in 1515 Convocation petitioned for the same liberty of speech as was enjoyed in Parliament, where members might even attack the law of the land without being called in question.² There are many instances of the exercise and allowance of this parliamentary right. In 1529 a member named Petit opposed the Bill wiping out the King's debts; the only result was that Henry used to inquire jokingly 'if Petit were on his side.'³ In 1531 the House of Commons complained loudly of the King's exactions, reminded him that his strength lay in the affections of his people, and quoted many instances 'of the inconveniences which had happened to princes through the ill treatment of their subjects.'⁴ At the same time the divorce was being attacked in the House of Lords.⁵ In 1532 Henry asked for money in order to strengthen the Scottish border, whereupon two members said that fortifications were unnecessary, since the Scots could do no harm without foreign aid; the best fortification was to maintain justice at home and friendship with the Emperor abroad, and to the latter end Henry ought to take back his wife and treat her well.⁶

¹ Perhaps the first trace of this may be found in the story that in the reign of Edward IV, Chief Justice Markham left the Bench rather than agree to the judgment in Sir Thomas Burdett's case. Cf. 1 Hale, *P.C.* p. 115. This case was not, however, as most of those who report it believed, one of treason by words only. In 1537, when the leaders of the Pilgrimage of Grace were examined, they were asked against what particular Acts of Parliament the people grudged. *L. & P.* xii. 900 (19). Aske answered that, among others, 'they grudged at the Act that words should be treason' (*Ibid.*, 901 (p. 404)).

² *L. & P.* ii. 1314.

³ Quoted by Professor Pollard, *Henry VIII*, p. 260. He discusses the subject fully, pp. 259-60 and 288-9.

⁴ *L. & P.* v. 171

⁵ *Ibid.*

⁶ *Ibid.*, 989.

Nothing could have been more displeasing to the King; but all that he did was to argue the point of his divorce with a deputation from the Commons.¹ In 1541 the Speaker, for the first time, included freedom of speech among the ancient and undoubted privileges which the Commons claimed of the King,² and in 1547 Gardiner refers to it in a manner which shows that it was customary and undisputed.³ It is mentioned in the same way in a book written by Edward VI's Clerk of the Council.⁴ Is it unreasonable to suppose that a principle which had firmly established itself in Parliament was also growing up out of Parliament? It was only to be expected that a right which the subject possessed in one place he would soon also claim in another.

In 1533-4 the project for the trial of the Nun of Kent seems to have broken down because her offence had been committed by words only, and she had instead to be disposed of by an Act of Attainder.⁵ In the autumn of 1534, treason by words was for the first time specifically included in an Act of Parliament—a fact which seems to suggest that the Government had their failure of a few months before in mind. It continued to be included in a long succession of Tudor acts.⁶ The old constitutional principle, that the Government may do everything not definitely forbidden

¹ *L. & P.*, v. 989.

² Maitland, *Constitutional History*, p. 242.

³ Quoted by Prof. Pollard, p. 259.

⁴ *The Pilgrim* (by W. Thomas, ed. J. A. Froude), p. 30.

⁵ This is one of the very few cases under Henry VIII in which an Act of Attainder was not preceded by a regular trial and condemnation. The only other two appear to be those of the Countess of Salisbury and Cromwell. There are no records of the trial of the Nun in the *Baga de Secretis*, Deputy Keeper's 3rd Report, App. ii. pp. 210 *et seq.* Cf. *L. & P.* vi. 1382, 1445; and Fisher, *Polit. Hist.*, v. 334. Coke, 3 *Inst.* p. 14, marginal note, says that she and her accomplices could not be attainted by the Common Law.

28 Hen. VIII, c. 7.

1 Eliz. cc. 1 & 5.

35 Hen. VIII, c. 1.

5 Eliz. c. 1.

1 Edw. VI, c. 12.

13 Eliz. cc. 1 & 2.

5 & 6 Edw. VI, c. 11.

14 Eliz. c. 1.

1 & 2 P. & M. cc. 9 & 10.

23 Eliz. c. 1.

They were not, however, always treason at the first offence, and had usually to be prosecuted within a certain time.

to it by law, was giving way in the sixteenth century to the new one that the Government has only the powers allowed to it by law, and that it is the subject who may do everything which definite law does not forbid. When Coke wrote, all the Tudor Acts making words treason had expired or been repealed, and the new constitutional theories as to the liberty of the subject and his right to freedom of speech were firmly established. Hence it was natural that he and his contemporaries should regard treason by words as alien to the law and the constitution. Like all lawyers, they could only read the past by the light of the present; what the constitution was in their own day, such it must always have been. Hence, since words did not then constitute treason, they could not have done so in the past; cases which seemed to point in the opposite direction were the exceptions which proved the rule, and were due to the tyranny of particular sovereigns. They had not yet arrived at the modern view which can recognise constitutional development and change. The only way they knew of getting rid of out-worn principles and institutions was by declaring that they never had been legal or constitutional; everything must show statutory authority for its existence.¹ Under Henry VIII it had become necessary to strengthen by Act of Parliament a principle which could no longer maintain itself by custom and practice, and this policy of making words treason by Act of Parliament had been continued throughout the Tudor period.

In 1628, in Pyne's case,² the judges decided that words, save by some particular statute, did not amount to treason, since there was then no treason save by the Act of 1352. Legally they were probably right in holding that in 1628 words were not treason. Constitutional development swept away the Common Law practice of the fifteenth century, and these Acts became the sole basis of treason by words. Hence

¹ Cf. the excuses for the abolition of the Court of Star Chamber in 1641, and of papal jurisdiction in the sixteenth century.

² *Cro. Car.* p. 125. *State Trials*, iii. 359.

the offence disappeared with them, and the judges were right in deciding, in face of a long list of fifteenth-century precedents, that in 1628 words were not treason save by a particular statute. They did not say this had never been the case; but if they understood how the change from fifteenth- to seventeenth-century practice had come about, they did not explain it, and it was soon forgotten. It became a maxim of historians and legal writers that treason by words was an invention of Tudor despotism; and this view, coloured—like so much of constitutional history—by the narrow unhistorical ideas of the seventeenth-century lawyers, has prevailed down to the present day.¹

Similarly it was no new principle that writings might constitute treason. Cases in the fifteenth century prove that they were held to do so.² The Act of Succession, 25 Henry VIII, c. 22, is the first which specifically includes them, and they were included in the new Treason Act a few months later. They may, however, be held to come within the provisions of the Act of 1352, for writing argues a deliberate intention—a principle which was still held in the seventeenth century after the disappearance of all the Tudor Acts on the subject.³ Here, then, the Act simply reinforces what was already the practice of the courts.

¹ With Tudor officials, treason by words was considered useful and necessary. Sir John Mason, who is typical of his class, wrote to Edward VI's council: 'The worst act that ever was done in our time was the general abolishing of the Act of Words by the Duke of Somerset' (Quoted, Pollard, *England under Protector Somerset*, p. 58). Yet this very Repealing Act (1 Edw. VI, c. 12) reimposed the penalties of treason for a third offence by words; evidently even Somerset would not include it in his general repeal of Henry VIII's repressive legislation.

² Some of the precedents cited in Pyne's case (*Cro. Car.*, pp. 117-125) are cases of treason by writings: e.g., cases of William Ashton, 31 Hen. VI; William Belmyne, 9 Edw. IV; Thomas Bagnall, 9 Hen. VII. The well-known case of Haxey in 1397 (*cf.* Maitland, *Const. Hist.* p. 241) belongs to this category of treason.

³ In Williams's case in 1619 (*State Trials*, ii. 1088), the judges decided *scribere est agere*. *Cf.* the cases of Peacham and Algernon Sidney. The writing of Cardinal Pole's book on the papal supremacy was a sufficient overt act. See Coke, 3 *Inst.* p. 14, and *Treatise on the Law and Proceedings in Case of High Treason*, 1793, p. 31.

The provision that traitors shall lose all privilege of sanctuary forms part of a long campaign against what had become a serious abuse. The privilege of sanctuary was very ancient,¹ and during the Middle Ages had been useful and necessary as a palliative to the harshness of the law. But by the fifteenth century the extravagant claims of the Church had raised it into an instrument for the defeat of justice,² and, as the rule of law gradually became more defined and superseded the rule of force, sanctuary lost its *raison d'être*. During the fifteenth century the judges began to reduce it to more reasonable proportions and to define by whom and under what conditions it might be claimed.³ Its gradual destruction was due to that rise of anti-clerical feeling which culminated in the Reformation, and also to the change from medieval to modern England. The former cause is already apparent in the significant advice given to the Abbot of Westminster in the first Parliament of Henry VII. Some case had evidently arisen, and the Abbot alleged the privileges of Westminster; he was told by the Lords Spiritual and the judges that he had acted unwisely in making his franchises the subject of argument, and that the best way to preserve them was to see that they were well and duly kept, and that wrongdoers were not by them allowed to escape from justice.⁴

¹ Cf. Stanford, *Les Plees del Coron*, bk. ii. chap. 38. Reeves, *Hist. of Eng. Law*, ed. Finlason, i. 32. There are many references to sanctuary in Thorp, *Ancient Laws and Institutes of England*.

² Originally, it seems only to have protected an offender for seven or nine days (Thorp, *op. cit.*, pp. 29 and 141), on condition that he made amends for his crime to God and man (*ibid.*, pp. 46, 142, 145). Reeves, *loc. cit.*, has apparently not noticed the time limit.

³ Keilway's *Reports*, f. 189b, case in 1429. Case in 1462, Y.B. 2 Edw. IV, Mich. ff. 22-23. Cases under Henry VII, Y.B. (Tottel), Hil., 1 Hen. VII, f. 6, 9 Hen. VII, f. 20. Cases in the early years of Henry VIII, Keilway's *Reports*, ff. 188-189.

⁴ Y.B. Hil., 1 Hen. VII, f. 10b. From what follows it seems that the case was one of a fraudulent debtor, who, under the Acts of 50 Edw. III, c. 6, and 5 Rich. II, stat. 2, c. 3, had no right to sanctuary for his goods.

The first case affecting sanctuary for treason¹ is that of Humphrey Stafford in 1486, and by it the conditions necessary if the privilege was to cover a traitor were clearly defined.² In 1487, 1493,³ and 1504,⁴ papal bulls, professing to be issued at the King's request, deprived felons in sanctuary of the privilege if they committed a second offence, and ordered that convicted or suspected traitors taking sanctuary should be guarded by royal officers to prevent their escape in order to offend again. These bulls indicate what was the existing practice in such cases.⁵ Their object was not to alter the law or to limit the privilege of sanctuary. It had been clearly laid down that the pope had no power to grant such a privilege, which was a matter of royal gift

¹ Brooke, *Abridgement*, Sanctuary 2, and Treason 6, quotes a case (*Y.B.* 21 Edw. III, 17 b) of a man who was drawn and hanged for matricide, 'et sic videtur que cest treason, et que pur treason il navera privilegede desglise.' These deductions are Brooke's own; there is nothing in the *Year Book* to warrant them. All that is there laid down is that a man may not fall back upon a plea of sanctuary after he has been non-suited in an appeal. The offence may perhaps have been petty treason. (For the later theory on this point see Coke, 3 *Inst.* p. 20.) Brooke seems to have classed it as treason because it received the punishment which in his own day was inseparably associated with the offence; and the remark that there is no sanctuary for treason was probably influenced by contemporary practice, based on this Act of 26 Hen. VIII, c. 13. Hale's annotator (1778, 1 *P.C.* p. 81) calls this Thorpe's case. Thorpe was the name of the judge, not of the prisoner.

² It was decided that sanctuary for treason cannot be claimed by prescription, nor deduced from a charter in general words, but must be expressly granted by the King. Also there must have been allowance of the privilege before justices in Eyre, within the time of legal memory (*Y.B.*, 1 Hen. VII, ff. 22b-26b).

³ Rymer, xii. p. 541. It is a confirmation of the bull of 1487.

⁴ *Ibid.*, xiii. p. 104. Professor Pollard, *Documents illustrative of the Reign of Henry VII*, iii. 184, says that this bull excepts traitors from the privilege of sanctuary. It seems to be merely a confirmation of the previous ones by the new pope.

⁵ For the guarding of fugitives while in sanctuary, see *Ancient Indictments*, Bundle 178, No. 10, and Bundle 186, No. 44, 3 Hen. IV. Mazzinghi, *Sanctuaries*, p. 37, and Réville, 'L'Abjuratio Regni,' *Révue Hist.*, September 1892, pp. 25, 28, cite cases. See also Prof. Pollard's *Documents Illustrative of the Reign of Henry VII*, i. 176-7.

alone;¹ hence neither could the pope restrict or annul it.² Clearly, the object of the bulls was to protect the King's officers in the execution of their duty against excommunication by Churchmen over-zealous for what they considered their rights.

The attack on the privilege went on steadily under Henry VIII. A temporary Act of 1512³ reduced it, but, owing to bitter clerical opposition, it was allowed to lapse.⁴ In 1516 a case revived the controversy, and its result was a great conference in 1519, which brought out clearly the extent of the abuse and the powerlessness of the Church to restrain it.⁵ The King, who was present, took the side of the lawyers, and announced his intention to reform encroachments and abuses and make the privilege conform to the intentions of its first grantors for the good of the realm. The assault, however, was delayed another ten years, for, save for the short and stormy session of 1523, Parliament did not meet between this eventful conference

¹ *Y.B.*, 1 Hen. VII, f. 25b. Keilway, *Reports*, ff. 189b, 190. All that the pope could grant was the name 'sanctuary.' The privilege, since it operated against the King, could only originate in a royal grant.

² The fact that the bulls did not alter the law is evident from the fact that in the controversies over sanctuary under Henry VIII they are never mentioned, and the abuses at which they aimed were complained of down to 1534 (*Lords' Journals*, i. 59b). Further, neither they nor the judgment in Stafford's case destroyed the privilege of sanctuary for treason. (Reeves, *H.E.L.*, ed. Finlason, iii. 190 note, on Stafford's case.) That sanctuary could be claimed for treason on the eve of the passing of 26 Hen. VIII, c. 13, is evident from the final saving clause of 22 Hen. VIII, c. 14, which reserves to persons guilty of offences of a higher nature in law than those mentioned in the Act all rights of sanctuary which they had before the making of the Act. The offences mentioned are petty treason, murder, and felony, so 'offences of higher nature in the law' can only refer to high treason.

³ 4 Hen. VIII, c. 2.

⁴ Keilway, *Reports*, ff. 180b-185b. It was revived by 22 Hen. VIII, c. 14.

⁵ Keilway, *Reports*, ff. 190b-192b. Wolsey and the Abbot of Westminster had drawn up an oath, to be taken by every one who fled into sanctuary, that he would not go out and commit any treason or felony *sub spe redeundi*. This had proved useless, since the only penalties for those who broke it were such as the ecclesiastical courts could inflict for perjury.

and 1529. Then at last anti-clericalism had its way. Acts reducing the privilege of sanctuary were passed in 1529,¹ 1530-1,² and 1531-2.³ In the first session of 1534 the Lords complained of the abuse of sanctuary, and ordered the judges to prepare a Bill on the subject,⁴ and those committing the treasons or misprisions enacted by the Act of Succession were deprived of the privilege. It was but a short step for the next session to extend this deprivation to all traitors.⁵ The persistent attacks on sanctuary throughout the reign are clear proof that its reduction was really desired by Parliament and was not simply imposed by the Crown. Here is no forcing of royal measures on a reluctant House.

Another clause provides for the trial of treason committed out of the realm.⁶ It is a mark of national development and expansion. Englishmen were less than formerly confined to England, and it was comparatively easy for them to go abroad and commit treason at the papal and Imperial courts, or to speak hard words of the King and his doings as they bargained and sold in the marts of Flanders. Further, the provision is part of a well-defined

¹ 21 Hen. VIII, c. 2.

² 22 Hen. VIII, c. 14.

³ 23 Hen. VIII, c. 11.

⁴ No Bill was prepared, doubtless because the case could be fully met by reviving 22 Hen. VIII, c. 14—a course which was taken by 28 Hen. VIII, c. 1.

⁵ *L. & P.* vii. 1388, is apparently a clerical attempt to arrive at a compromise.

⁶ This applies to all treasons, not only to those created by the Act. The standard of later law on the subject, however, was 35 Hen. VIII, c. 2; and Coke (3 *Inst.* p. 11) and Hale (1 *P.C.* p. 169) appear to forget that it was anticipated by 26 Hen. VIII, c. 13. (*Cf. State Trials*, i. 440, Hargrave's note.) It was not repealed by 1 & 2 P. & M. c. 10, which reduces all treason trials to the course of Common Law, because treason committed out of the realm was not triable by Common Law. *Cf. Dyer's Reports*, f. 131b-132, and Story's case, 298b and 300b. Coke (3 *Inst.* p. 11) says that treason committed out of the realm *can* be tried in the realm, and cites a case, *Coram Rege*, 2 Hen. IV, Pasch. Rex rot. 18 (not 8, as he gives it). This case, however, proves exactly the opposite—*i.e.* that treason committed out of the realm cannot be tried in the realm. *Cf. supra*, p. 94, n. 2.

movement in the direction of straightening out the crooked line of the law and filling its gaps. Doubtless the scarcity of cases and the small chance of capturing such a traitor¹ accounts for the earlier lack of Common Law on this subject. Now the meshes of the law were to be made fine enough to catch all traitors. Treason in Wales, and places where the King's writ did not run,² treason in Ireland,³ and at sea,⁴ were all provided for; even traitors who became lunatic were not allowed to escape.⁵

Finally, the Act amends the law of forfeiture in the direction of greater stringency. The statute of Westminster II had made entailed estates inalienable;⁶ hence, under the notion that a man ought not to forfeit what he is unable to dispose of in other ways,⁷ they were, in cases of treason or felony, forfeited only during the offender's life, and were then restored to his family. Such a statute was naturally popular with the land-holding classes,⁸ who took care that it was not repealed, though estates-tail soon came to be looked on as a grievance and the judges invented a method of cutting of the entail by a common recovery. Hence the excuse for their privilege from forfeiture was destroyed; but the privilege itself remained down to 1534, save for two years at the end of the reign of Richard II. The Act of 1397 definitely declared estates-tail to be forfeited by attainder of treason, but it disappeared in 1399, and no further attempts were made to alter the law in this direction until that New Monarchy of which Richard II was

¹ This was still a difficult task, as Henry VIII found in the case of Brancetour. *L. & P.* xv. Introd. pp. v-viii. For the international law on the subject, see Coke, 3 *Inst.* p. 180.

² 32 Hen. VIII, c. 4.

³ 35 Hen. VIII, c. 2, as resolved in O'Rurke's case, 33 Eliz., Coke's *Reports*, pt. vii. f. 23. See *State Trials*, i. 439, trial of Lord Leonard Grey under 26 Hen. VIII, c. 13.

⁴ 28 Hen. VIII, c. 15.

⁵ 33 Hen. VIII, c. 20.

⁶ Coke, 2 *Inst.* p. 335. 1 Hale, *P.C.* p. 240.

⁷ *Some Considerations on the Law of Forfeiture for High Treason*, by the Hon. C. Yorke, 1745, p. 48.

⁸ Coke on Littleton, f. 392b. Stephen, *Commentaries*, ed. 1914, i. 155.

of an ill-starred forerunner. In the spring of 1534 the Act Succession, and in the autumn the Act of Treasons, declare that all lands of any estate of inheritance shall be forfeited, thus covertly including estates-tail;¹ and in doing so they seem rather to legalise and extend existing practice than to make an innovation. Acts of Attainder had usually contained a special clause of forfeiture including estates-tail; now the system in use for attainders by Parliament was to be extended also to attainders by Common Law.²

Another gap in the Law of Forfeiture was filled by the inclusion of lands held to the use of the person attainted.³ These, like estates-tail, had been included in Richard II's Act, and afterwards received special mention in Acts of Attainder. They were not forfeited by Common Law,⁴ which refused to recognise them; indeed, this point was one of the reasons alleged for the making of the Act of 1536, 27 Henry VIII, c. 10, for transferring uses into possession.⁵ The wording of the clause—'in use or possession'—is less explicit than are some of the earlier drafts,⁶ but persons claiming lands to the use of the traitor are expressly excluded from the benefits of the saving clause.⁷

A third point is the forfeiture of lands belonging to corporations. At Common Law the possessions of a corporation sole, as for example a bishop, were forfeited only during the life of the attainted incumbent, and were restored to his

¹ Cf. the projected attack on entails in 1539, *L. & P.* XIV. i. 1030. Fisher, *Polit. Hist.* v. 291, says the Reformation Parliament discussed the abolition of entails.

² This was to apply to attainder by presentment, confession, verdict, or outlawry. 33 Hen. VIII, c. 20, applied these forfeitures to all attainders, so that there was henceforth no need for a forfeiture clause in an Act of Attainder.

³ Also included in 25 Hen. VIII, c. 22, for the treasons it created.

⁴ See 11 Hen. VII, cc. 63 and 64.

⁵ See the preamble of the Act, *Statutes of the Realm*, iii. 539. 'Persons attainted' would there refer to attainders of felony, attainders of treason having been already provided for by 26 Hen. VIII, c. 13.

⁶ A2 and A3.

⁷ 33 Hen. VIII, c. 20, declares the forfeiture of uses more plainly.

successors, since the profits only, and not the inheritance, were his.¹ Similarly the lands belonging to a monastery were not permanently forfeited by the attainder of the abbot, the head of the corporation. Now a clause added by Cromwell to the last draft of the Bill brought them within the law. It is a piece of historical irony that this new destruction should appear in the guise of a saving clause: 'Saving to every person and persons, their heirs and successors, other than the offenders in any treasons, their heirs and successors . . . all such rights . . . which they shall have. . . .'² The exclusion from the saving of the traitor's successors barred the successor of an attainted bishop or abbot.³ Truly, a wolf in sheep's clothing. That it was done deliberately is proved by a note amongst Cromwell's papers;⁴ 'Any bishop, dean, abbot, &c. convicted of high treason to forfeit the lands held in right of their corporations.' As to the deep-laid plans hinted at by this new departure, Hale⁵ says:

'It is apparent that Henry VIII had not only in prospect the dissolution of monasteries, but had a resolution to curb the clergy, who were too obsequious to the Pope and his power. And therefore there were several attainders of abbots of high treason, whereupon the king seized their possessions, as dissolved thereby, as appears by the statutes of 27 Henry VIII, c. 28, and 31 Henry VIII, c. 13, touching monasteries.'

By the latter Act it appears plainly that the possessions of monasteries whose abbots were attainted of treason came thereby to the Crown, though special forfeiture clauses were inserted to make assurance doubly sure.

This forfeiture disappeared as quietly and unostentatiously as it appeared. The Act of 5 and 6 Edward VI,

¹ 1 Hale, *P.C.*, p. 252.

² The usual saving clause excepts only the traitor, his heirs, and those claiming to his or their use.

³ Continued by 28 Hen. VIII, c. 7, 33 Hen. VIII, c. 20, and 35 Hen. VIII, c. 3.

⁴ *L. & P.* vi. 1381, among 'acts necessary to be made in this Parliament,' *i.e.* a projected session at the end of 1533. ⁵ 1 *P.C.* p. 252.

c. 11, saves the rights of all persons other than attainted traitors and their heirs, 'which restores and preserves the right of successors as it was at the Common Law.'¹ Still, it was doubtless owing to the remembrance of this forfeiture that a provision was inserted in Mary's Act for the attainder of Cranmer,² that this should not prejudice his successors in regard to the possessions of the see.

Was the full force of this saving clause grasped by Parliament? Perhaps not. But in view of the prevalent anti-clericalism and the strong feeling in favour of disendowment, it would in any case hardly have been unpopular. Sweeping Acts of dissolution and disendowment were passed a few years later, and the classes from which the members of both Houses were drawn were the classes which ultimately benefited most by them. In the storm of Mary's reign the determination of Parliament not to restore the abbey lands was the mainstay of the Henrician Reformation.

The first Act of the session which produced this Act of Treasons had declared the King supreme head of the Church. On January 15, 1534-5, the title was by Letters Patent incorporated in the royal style.³ On February 1, the Act making it treason by word, writing, or deed to attempt to deprive the King of it came into force. It was on the back of a copy of the Act⁴ that notes were made in April of the denial of the King's supremacy by Houghton, Prior of the London Charterhouse, and others, and it was for this offence, and under this Act, that on April 29 they were tried and condemned as traitors. Fisher followed them to the scaffold in June; More in July. The long succession of martyrdoms for Catholicism had begun.

Where is the responsibility for this Act to rest? The Crown was still the dominant factor in the composite entity

¹ 1 Hale, *P.C.* p. 253. In the Bishop of Durham's case in 12 Eliz. Dyer, *Reports*, f. 288b-289), the judges admitted that under 26 Hen. VIII, while it was in force, attainder of treason forfeited the lands of a corporation sole to the Crown.

² 1 Mary, sess. 2, c. 16.

³ *L. & P.* viii. 52. Rymer, xiv. 549.

⁴ *L. & P.* viii. 566.

of Parliament, and the bulk of legislation, then as now, was initiated by the Government. That Henry was interested in obtaining this Act is evident from the fact that he ordered the preparation of the Bill of 1532,¹ and endorsed the paper of instructions with his own hand. Probably the final form of the Act owes much to his influence, for he, better than any one else, knew his own plans for the future; hence, perhaps, the provision for the forfeiture of abbey lands, when an abbot should be attainted of treason. Further, the Act seems to reflect two checks which he had experienced. He seems to have pressed for and failed to obtain a judicial decision that it was high treason not to report the political ravings of the Nun of Kent,² and he was obliged to retire from the contest with Parliament over the attainder of More and Fisher for supporting her. He was told that unless More's name was omitted from the Bill it would certainly fail to pass the House of Lords; according to Roper, he replied that he would go down in person and see that it did pass. Eventually, however, he was obliged to yield in order to avoid a parliamentary defeat. More's name was taken out of the Bill, and Fisher was attainted of misprision only; Parliament had carried its point. More, however, knew that though for the present he was saved, the King's anger was relentless. 'In faith, Meg,' he said to his daughter, 'quod differtur non aufertur'; and his conversation with Norfolk, over the phrase 'Indignatio principis mors est,' further showed that he knew what was before him.³ It may be that it was partly owing to Henry's determination to secure More's death that it was made treason to deny the royal supremacy by words—a provision which a subservient tribunal could if necessary twist to include silence.⁴ Before this Act the worst penalties that More and Fisher could incur were those of misprision;

¹ *L. & P.* v. 394. *State Papers*, i. 380. He ordered it to be prepared and engrossed, so he evidently did not expect its rejection.

² Fisher, *Polit. Hist.* v. 334. *L. & P.* vi. 1445.

³ Quoted by Fisher, *Polit. Hist.* v. 338.

⁴ *State Trials*, i. 389.

death alone would satisfy the King, and unless the law were altered their execution was impossible.

The form of the Bill must chiefly be due to Cromwell. Every draft is corrected by him, and about 1533 three copies of a Bill for Treasons were among his papers.¹ The clause making it treason to call the King a heretic, schismatic, tyrant, infidel, or usurper is in accordance with his system of seeking out and punishing those who spoke such words.² The form of the saving clause was certainly his invention, and bears the stamp of his sinister legal genius. That his contemporaries believed him to be responsible for the statutory making of words treason is evident from the scene which is reported to have taken place in the Council Chamber on his arrest in 1540. 'Some said he was a traitor; others that he should be judged according to the laws he had made, which were so sanguinary that often words spoken inadvertently with good intention had been constituted high treason.'³ Perhaps, however, his offence lay rather in the harsh execution of the law than in its making.

Finally, what was the share of Parliament in this Act? Much has been written on the servility of Henry VIII's Parliaments, and especially of the one which could pass such an Act as this. But Parliament was in fact less subservient than the older school of constitutional historians chose to believe. In 1529 it rejected the Bill for Wolsey's attainder, and only passed the Bill releasing Henry from his debts on various conditions.⁴ The Acts of Uses and Wills, which Henry was particularly anxious to secure,

¹ *L. & P.* vi. 299, pp. 138, 139. One of them is on parchment, so it was not one of the drafts now existing, all of which are on paper. Perhaps it was the engrossed copy prepared for, and rejected in, the session of 1532.

² Merriman, *Life and Letters*, i. 116-118.

³ *L. & P.* xv. 804. Quoted by Froude in his appendix to the *Pilgrim*. The account points to the growth of a definite public opinion against treason by words among the upper classes. Cf. Aske's examination, *L. & P.* xii. 901, quoted *supra*, for the opinion of the common people.

⁴ Pollard, *Henry VIII*, pp. 278-9. It was really to their advantage to pass the Bill, as they would thus escape new and more general taxes.

were several times rejected, while individual members made speeches directly hostile to the King and to what was known to be his policy. In 1532, when Henry's position was far less secure than it was in 1534, and therefore his need of a new Treason Act greater, a Bill much less destructive of the ordinary liberties of the subject was rejected. In the spring of 1534 Parliament modified at its pleasure the Act for the King's Marriage and Succession, and defeated Henry over the question of More's attainder. As Professor Pollard has expressed it :

'The mere coincidence between the wishes of Henry and those of Parliament is no proof of servility. That accusation can only be substantiated by showing that Parliament did, not what it wanted, but what it did not want, out of deference to Henry. And that has never been proved. . . . The fact that Parliament rejected some of Henry's measures is strong presumption that it could have rejected more, had it been so minded.' ¹

Mr. Fisher, speaking of this Act,² says :

'The House of Commons had made many base surrenders, but the Treason Act, which imperilled the most elementary liberties of the subject, did not pass without hot questionings. "There was never more sticking at the passing of any Act than at the passing of the same," says a contemporary. It was a new principle that words should be high treason, and the House of Commons insisted that if the principle was to be accepted, the words should at least be spoken "maliciously." The adverb was forced into the Bill,³ and was as nugatory in its effects as an adverb in a Bill can be.'

That the Act was not passed without opposition is evident from the fact that the two drafts which remain underwent much correction. But the same fact proves that Parliament could and did alter them to suit its wishes. To the first 1534 draft (B1) Cromwell added a clause making

¹ *Henry VIII*, pp. 261-2.

² *Polit. Hist.* v. 346.

³ The authority for this statement seems to be the *Life of Bishop Fisher*, commonly attributed to Thomas Bayly, and written about 1604.

it misprision of treason to speak slanderously or maliciously any words, not declared by the Act to be treason, which tended to the dishonour or danger of the King, the Queen, or their heirs, or the division of the realm. This clause was struck out in the second draft (B2), probably at the wish of the House of Commons, as being too vague and elastic. The deletion of 'extortioner' from the list of epithets which it was to be treason to apply to the King may well have been due to a fear amongst members that they themselves might only too easily be guilty of the offence. A few months earlier, Parliament had refused to make bare words amount to treason; it could have refused again if it had wished to do so, or it could have rejected the Act entirely as it had done in 1532. Nor is there any sign that the Commons forced the word 'maliciously' into the Bill; it forms part of the clerk's text in both drafts.

Further, there is a very interesting point which was unknown to those who have considered the passing of this Act by Parliament to be evidence of servility; the last draft (B2), after correction, agrees with the Act as finally passed and printed. The draft is on paper; evidently, then, the House of Commons made what alterations they wished, and, when they had finally hammered the Bill into a shape which pleased them, ordered it to be engrossed, and passed it through its final stages untouched. They had their way with it, and it represents their wishes. Hence the Act cannot be classed as a piece of tyranny due solely to the King and his all-powerful minister. It was always Henry's policy to make Parliament his accomplice. The Act expressed the wishes of Parliament; it bore the hall-mark of parliamentary approval, and the Parliament which freely chose to pass it must bear the responsibility for its deeds.