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THE LAW AND ECONOMICS OF HIGH TREASON IN ENGLAND FROM ITS FEUDAL ORIGIN TO THE EARLY SEVENTEENTH CENTURY

FRANK W. HARRIS*

Placed in the context of its historical setting between the Norman Conquest of the eleventh century and the advent of the modern age, what follows is a study of treason in England based on the relationship between law and economics. The treason dealt with is high treason, that which was directed against the king as sovereign. The adjective "high" generally will be deleted, but should remain understood. Except in passing, the other forms of treason (petit or petty treason and misprision of treason) will not be treated.¹

General conclusions are made as warranted by the evidence; conclusions which will be made more compelling or even be overcome as further research is made based on the extant public, local, and family records. Enquiry that looks solely into relevant case materials will not suffice if the interdependence between the law and economics of treason is to be more fully, if not completely, understood.

I. TREASON: THE CONTRACTUAL SETTING

The law of treason that developed in England grew out of the feudal relationship between the king as sovereign and lord paramount of the realm and the populace as vassals and subjects thereof. The origin of this relationship can be traced to a number of disparate sources which pre-date the

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1. See *infra* note 25.

While the non-specialist might recognize the names of Thomas More and Mary Queen of Scots, reference to less well known individuals has as its purpose the giving of personality and humanity to the otherwise stark and cold events by pointing out that it was truly real people who were involved. Reference to individuals such as Augustine Webster and William Freeman is thus intended by way of example.

Norman Conquest of 1066.²

The first of these was the Germanic *comitatus* which was based on the comradeship between warriors, the brotherhood of the battlefield, as centered upon the *comites* (companions) of the *princeps* (warrior chieftain).³ The obligation of the chief was to provide leadership, victory, and spoils. In return, he was to receive the chief's share and the rights and privileges of office. The band of companions ("comes" would become "count" in the medieval feudal hierarchy) gave loyal service in following the commands of the chief. The relationship, though largely tacit, retained a certain formality which provided for mutuality of obligation and satisfaction. Implied in the fulfillment of satisfaction was the requirement of obligation, for without the latter the former would not have been achieved.⁴

The second source was the Roman commendation of the later empire. Roman commendation was initially based on a relationship of clientage between a freeman who received economic assistance and protection and a wealthy patron who received personal service from the freeman in return. For the free client and the patron, the satisfaction of the former and the profit of the latter depended on their maximization of resources. Thus, for the patron to receive the freeman's service, the patron had first to see to the freeman's assistance and protection;⁵ for the freeman to receive economic assistance and protection, he was required to perform service for the patron. The value of the one was thereby directed to the marginal benefit of the other.

The interdependence of client and patron required a greater formality than did that of the *comites* and *princeps*, though even here some aspects of the relationship might remain implied.⁶ It has been found that, in the last

2. See generally J. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* ch. 1 (1970) [hereinafter BELLAMY, *TREASON IN ENGLAND*]; also the materials cited therein.

3. The terms were used by Tacitus in *GERMANIA*, and are thus Latin in origin, and therefore date to at least the late first century A.D. See also the relationship as depicted in such Anglo-Saxon epics as *BEOWULF* and *SONG OF MALDON* and the Continental *SONG OF ROLAND*.

For the difficulties presented by the "[un]settled and [un]stable scheme of technical terms" in use in England following the Norman Conquest, with words having English, Danish, Latin, or French origin, see F.W. MAITLAND, *DOMESDAY BOOK AND BEYOND* 8 (1897 & reprint 1966) [hereinafter MAITLAND, *DOMESDAY*].

4. Compare the analysis of a more recent time in Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975).

5. As the patron accumulated increasing numbers of clients, so too would he acquire by those numbers greater ability to perform their protection. The more clients commended themselves to a patron, the greater that patron's power; the greater his power, the more protection he could give; and thus more clients, seeking to be protected, would commend themselves to his care.

6. Compare, Anderson & Hill, *supra* note 4, at 163.

years before the fall of Rome, it was generally out of desperation that freeholders sought the protection of some powerful person. In light of the theorem developed by R.H. Coase,⁷ that the parties will bribe one another as a means of maximizing efficiency, it may be of some interest to note that villagers often bribed the provincial *dux* to place troops in their village to protect them from the imperial tax collector. Furthermore, if suit were brought, it was claimed by the ducal court which invariably found for the villagers.⁸

What began as an attempt by the client to obtain maximization of security through protection of life and economic well-being ended up as a contract through which that security and protection were obtained in exchange for a surrender to the patron of certain rights. In time, the relationship between the parties would give way to status so that a hierarchy was created in which the individual clients had placed themselves into vassalage, or even villeinage or serfdom, while the patrons had become the nobility or hereditary lords of European feudalism.⁹

When the Anglo-Saxons invaded England they brought with them their customs and practices, and thus the *comitatus*. When the Normans arrived, some six centuries later, they found the practice of commendation, whereby "smaller landowners had placed themselves in a relation of dependence on superior lords,"¹⁰ deeply entrenched in Anglo-Saxon society.¹¹ But while the roots of the relationship upon which treason was to be based can be traced to both the *comitatus* and commendation, it was brought to a higher level of development under Carolingian vassalage which, in its most essential form, was a contract or personal bond sworn to by the participants.

Successors to the Merovingian line of kings of the Franks and named after Charlemagne (768-814), the Carolingians perfected the contractual aspects of vassalage by emphasizing its personal character. In return for a

7. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), reprinted in *ECONOMIC FOUNDATIONS OF PROPERTY LAW* 17 (B. Ackerman ed. 1975).

8. 2 A.H.M. JONES, *THE LATER ROMAN EMPIRE 775-78* (1964). See also A. JONES, *THE DECLINE OF THE ANCIENT WORLD* 291-92 (1966).

9. See J.S. MILL, *UTILITARIANISM* ch. 5 (1863), reprinted in *THE GREAT LEGAL PHILOSOPHERS* 365, 375 (C. Morris ed. 1959).

For a proposed connection between "contractual thought" and "fundamental law," as well as between "fundamental law" and its development (at least in meaning) into "constitutional law," see Thompson, *The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution*, 91 AM. HIST. REV. 1103 (1986).

10. F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 148-50 (H. Fisher ed. 1965) [hereinafter MAITLAND, *CONSTITUTIONAL HISTORY*]. See also W. STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 71 (J. Conford ed. 1979).

11. MAITLAND, *DOMESDAY*, *supra* note 3, at 68-75. See also W. STUBBS, *supra* note 10, at 72.

fief,¹² a grant for the use of land (usufruct),¹³ the recipient-vassal was required to render homage and to take an oath of fealty to the donor-lord.¹⁴ The coupling of homage with the oath not only made God a witness to the exchange, it also required a promise of faithfulness by the recipient-vassal to the donor-lord.¹⁵ The obligation of faithfulness was not, however, completely one-sided, for there were reciprocal obligations imposed on the lord as well.¹⁶ When unfaithfulness occurred, the transgressor, whether lord or vassal, was called a felon.¹⁷ While it remained technically possible for a lord to act feloniously toward his vassal, in time it came to be limited to "the disloyal refusal of a vassal to perform his owed service."¹⁸ In such a

12. A *precarium* (pl. *precaria*) was originally "a grant of land to be held by some one during the pleasure of the donor," but it might also be called *beneficium*. Because these were "held on condition of military service" and because there was no word in Latin which distinguished that fact, the word "fief" was taken from German. C. STEPHENSON, *MEDIEVAL FEUDALISM* 7, 11-12 (1942); 1 F. POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 61, 67, 68 n.1 (the *precarium* was one of the germs of feudalism), 316 (1911) [hereinafter POLLOCK & MAITLAND]; 2 POLLOCK & MAITLAND, 111 (1911). See also Palmer, *The Origins of Property in England*, 3 *LAW & HIST. REV.* 1, 6-7 n.26 (1985).

13. C. STEPHENSON, *supra* note 12, at 23; 2 POLLOCK & MAITLAND, *supra* note 12, at 8, 114, 238. For contract between parties as involving a partial transfer of property rights, see Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 *J.L. & ECON.* 49, 50 (1970).

14. 4 E. CHEYNEY, *TRANSLATIONS AND REPRINTS FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY, NO. 3: DOCUMENTS ILLUSTRATIVE OF FEUDALISM 18-21* (1897) (*The Ceremony of Homage and Fealty*). For the commitment of the lord to his vassal once homage had been given, see Palmer, *supra* note 12, at 19. For homage and fealty, see 1 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 68a-b (London 1853) (commentary upon Littleton) [hereinafter COKE, *INSTITUTES*].

15. Oaths of fealty were considered so important that they would later be required to be enrolled in Parliament. See the Act of 21 Rich. 2, ch. 5 (1397).

16. E. CHEYNEY, *supra* note 14, at 5, 23-24. That "profound mutual obligations" were incumbent in the feudal relationship (emphasis added) has been pointed out by Palmer, *supra* note 12, at 4; see also Palmer, *supra* note 12, at 1-8. For the mutuality of faith, if not of obligation, see the relationship between Roland and Charlemagne in *SONG OF ROLAND*.

Compare Newman, *The Renaissance of Good Faith in Contracting in Anglo-American Law*, 54 *CORNELL L. REV.* 553 (1969).

17. Treason arose out of, and is thus a branch of, the more general category of crime called felony. 3 COKE, *INSTITUTES* 15 (1797). "All treasons therefore, strictly speaking, are felonies; though all felones are not treason." 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 95 (1769 & reprint 1979) [hereinafter BLACKSTONE, *COMMENTARIES*]. Because of its obligations, the contractual aspects of the feudal relationship might be seen as a species of tort. See G. GILMORE, *THE DEATH OF CONTRACT* 14-16 (1974). Here might thus be found an early instance of the search for extraordinary penalties to enforce what otherwise might be seen as a contractual arrangement. See Leff, *Injury, Ignorance and Spite — The Dynamics of Coercive Collection*, 80 *YALE L.J.* 1 (1970), reprinted in *THE ECONOMICS OF CONTRACT LAW* 175 (A. Kronman & R. Posner eds. 1979).

18. C. STEPHENSON, *supra* note 12, at 23, 33-34, 76 (stating that "if either [lord or vassal] proved false, the other was justified in renouncing the original agreement." Furthermore, he states that "[s]o delicately balanced an obligation [as the feudal relationship was] could have slight permanence unless it was of real advantage to both parties." The concept of

case, the feudal incident of forfeiture would permit the lord to take back the fief, if he could, through military force.¹⁹

Thus, in the contractual setting created by the feudal relationship, sanctions would be imposed on the party who reneged on or otherwise failed to perform his feudal obligations. Should there have been no sanctions the incentive to perform would have been nil, and the motivation to enter into such relationships would have ceased to exist; why should a lord contract to grant a fief if he received no benefit, or why should a vassal receive such a grant if he were not obligated in return?²⁰ The reciprocal obligations resulting from the interdependence of the feudal relationship were thus the result of requirements of orderly medieval government (what, in a purely business setting, might be termed "business needs") and the necessity to plan for the future.²¹

The Carolingians institutionalized feudal tenure throughout the empire. Thus France, as one of its components, became a feudalized part of the empire and, under the Normans, Normandy became a feudalized part of France.²² In fact, by 1066 Normandy had become the epitome of a thoroughly feudalized state, and it was by way of Normandy that feudalism and feudal tenure passed into England, and after Normandy that the English feudal state was patterned.²³

mutuality of satisfaction thus becomes evident in the setting of this medieval form of contract.).

19. The "strength of the feudal relationship" has been said to be capable of being determined based on the lord's ability to take back his grant because of the vassal's disloyalty. Palmer, *supra* note 12, at 6. For the distinction between escheat and forfeiture, see A. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* 19-20 (1961), or any similarly reputable work.

20. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972), reprinted in *THE ECONOMICS OF CONTRACT LAW* 154 (A. Kronman & R. Posner eds. 1979). See also R. PALMER, *supra* note 12, at 6.

21. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978). G. KEETON, *THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE* 61 (2d ed. 1949) ("The basis of feudalism is a contract between a man and his lord. If the contract is arbitrarily broken, the relationship is at an end. If the lord breaks it, the man is absolved from his obligation. The relationship is regulated by law, which neither alone, but only both together, may change."). Keeton further states that Magna Carta was "itself a contractual reaffirmation of contractual rights." It is thus understandable why "The barons and their advisors were [at the time of Magna Carta (1215)] deeply concerned with the consequences of their feudal relationship with the king." Palmer, *The Economic and Cultural Impact of the Origins of Property: 1180-1220*, 3 LAW & HIST. REV. 375, 392 (1985).

Such reciprocal obligation and interdependence of relationship might be seen in terms of social contract. See *THE GREAT LEGAL PHILOSOPHERS* 564-65 (C. Morris ed. 1959) ("social contract").

22. C. HASKINS, *THE NORMANS IN EUROPEAN HISTORY* 67-69, 149-57 (1915).

23. C. STEPHENSON, *supra* note 12, at 84-86, who states at 85 that "[f]eudalism . . .

As a result of the Norman Conquest, a significant modification of feudalism was introduced into England. By right of conquest, all land was henceforth to be held by the king. As all land was held by someone, everyone in effect became a vassal, directly or indirectly, of the king who could require an oath of fealty from any landholder.²⁴ The result, in England, was the binding by sworn contract of all holders of property to the king, the breach of which would be treason against the Crown.²⁵

was unknown in England before the Norman Conquest." It might be argued, and possibly with great effect, that while feudal tenure was introduced into England after 1066, feudalism was not. This argument would be based on the proposition that feudalism required decentralized government. What England in fact got was a highly centralized state government. It might thus be concluded that while England received the incidents of feudalism (to include feudal tenure), England did not receive per se feudalism (but see Stephenson at 14 where he states that feudalism "properly refer[s] to the peculiar association of vassalage with fief-holding."). It must be noted, however, that centralized government or its opposite are not here the issue; feudal tenure is, and there should be no doubt that it existed in England after 1066. The various arguments dealing with the Norman Conquest, particularly the issue of English feudalism, are presented in *THE IMPACT OF THE NORMAN CONQUEST* (C. Hollister ed. 1969).

Compare the concept of feudalism in England with that of property rights in the American West as presented by *Anderson & Hill*, *supra* note 4, at 163.

24. C. STEPHENSON, *supra* note 12, at 86-87. On the Continent the oath was given by the vassal to the lord who granted the fief. Thus, while the king might grant a fief to *A* and receive an oath of fealty in return, if *A* "subinfeudated" and made *B* his vassal, there was no feudal — and thus no contractual — relationship formed between the king and *B*. This is not what happened in England where *B* would be required to swear fealty to the king. Stephenson explains "subinfeudation" at 28-29. I POLLOCK & MAITLAND, *supra* note 12, at 88, go even further by stating that the oath was required of every free man in England. See also the documents in C. STEPHENSON & F. MARCHAM, *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* § II (1937); as well as *supra* note 15.

25. Treason against the Crown was "high treason." Treasons that did not involve the Crown were "petit" or "petty treason," which included, among others, the treason of a vassal against his lord (when not the king), the treason of a servant against his master, and the treason of a wife against her husband. Petit treason was given statutory definition by the Treason Act of 1352, 25 Edw. 3, ch. 2, § 5, and was abolished as such by 9 Geo. 4, ch. 31 (1828) (second paragraph), when such acts became felony. Another form of treason was "misprision of treason." This consisted of knowledge of and concealment of treason. Where such knowledge and concealment involved high treason, the participants were generally charged as principals; high treason did not take such individuals into account as mere accessories because accessories to high treason were considered principals. This was undoubtedly because of the magnitude of the crime of high treason, an attack on the majesty of government. See *infra* note 98.

Because land could be held of the Crown but not owned separately or distinctly from it ("fee-holder," "freeholder"), "the greatest possible interest in a thing [such as land] which a mature system of law recognizes" would then have been possession rather than outright ownership. A. HONORÉ, *Ownership* in OXFORD ESSAYS IN JURISPRUDENCE 107, 108 (A. Guest ed. 1961) (italics deleted).

II. CONTRACTUAL AMBIGUITY AND THE NEED FOR DEFINITE TERMS

If treason against the crown was the breach of a contract with the king, what then constituted such a breach? Killing the king, seen as an attack on the majesty of government, would surely fulfill the requirements of a breach. On the other hand, distraining a traveler on a highway until a ransom was paid would seem in no way to involve the majesty of government or the contractual relation and surely would not be treason. In fact, cases on both points demonstrate the ambiguity of treason because results in both instances were opposite to what would otherwise be expected.²⁶

What was or was not to be included within the scope of treason was a question that required a clear answer. Because the result may have approached a contract of adhesion, of singular importance was the source from which the answer would come. If given by the king, as a means of protecting his interest and ensuring his satisfaction, treason would be prescribed in terms that were rather extensive; but if determined by those who might later be called to account under it, thus for much the same purpose as the king but with a different result caused by their interest and satisfaction being at times inconsonant with the king's, the scope of treason would be far more limited. In the end, somewhat by way of compromise, and thus overcoming the problems inherent in an adhesion contract, it would not be until nearly three hundred years after the Conquest that treason would formally be defined — and then by act of Parliament, the famous Treason Act of 1352.²⁷

The Act of 1352 laid down seven heads or categories of treason. These were:

1. to compass or imagine the death of the king, queen, or the king's eldest son;

26. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 76, 78-79; 1 M. HALE, PLEAS OF THE CROWN 80 (1736); 3 COKE, INSTITUTES, *supra* note 14, at 6; BELLAMY, TREASON IN ENGLAND, *supra* note 2, at 61-63.

On August 2, 1100, while hunting in the New Forest, William II was shot dead by an arrow discharged by one of the knights in the hunting party. The circumstances hinted at treason, though no such accusation was ever made, because Henry I was able to seize and hold the throne against William's named heir, Duke Robert of Normandy. In 1347 a Hertfordshire knight was charged with treason when he held "one of the king's subjects" for a ransom of £90.

27. 25 Edw. 3, ch. 2, § 5 (1352); given in 1 STATUTES OF THE REALM 319 (Record Commission ed. 1817 & reprint 1963) where previous misdating is noted, 1 STATUTES AT LARGE 261 (O. Ruffhead ed. 1763) under the date 1350, 5 HALSBURY'S STATUTES OF ENGLAND 452 (Sir Roland Burrows ed. 1948) under the date 1351. For the origin of this Act see BELLAMY, TREASON IN ENGLAND, *supra* note 2, chs. 1-4; see also T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 276 n.1 (C. Carmichael 3rd ed. 1886) [hereinafter TASWELL-LANGMEAD, 3rd ed.].

2. to violate the queen, the king's eldest unmarried daughter, or the wife of the king's eldest son;
3. to levy war against the king in his realm;
4. to adhere to the king's enemies;
5. to counterfeit the Great Seal or the Privy Seal, or to counterfeit royal money;
6. knowingly to bring false money (that is, counterfeit) into the realm; and
7. to slay the chancellor, treasurer, or any of the judges while performing their duties.

The efficiency of the 1352 Act can perhaps best be appreciated in terms of the different perspectives of the sovereign and the governed. From that of the Crown, a tightly drawn statute which restricted the scope of treason to specifically enumerated categories would result in a loss of revenue from forfeiture. However, such limitation of scope would overcome the earlier abuses caused by vagueness and uncertainty and thus tend to the common good by removing possible grievances and causes for a traitorous rebellion against the king. Thus, while the Crown might lose some forfeitures and the wealth the abuses might have brought, statutory definition of treason would remove numerous sources of contention, caused by "treason's" lack of precision, which might have resulted in armed rebellion aimed at overthrowing the king. From the Crown's perspective, the balance must favor the efficiency of the Act.

From the perspective of the populace, there would seem little doubt that the Treason Act defined the offense with clarity sufficient for their needs by setting forth with particularity the precise conduct that constituted treason. Thus, for commoners and nobles, as well for the king, the Treason Act of 1352 was a striking example of clarification through statute and therefore, for that reason at least, was a working paradigm of statutory efficiency.²⁸

That the Treason Act was efficient — remarkably so — is perhaps best appreciated by the fact that the Act has stood for over six hundred years. There have, however, been statutory modifications of treason from time to time, often the result of changed circumstances of later times. Thus the

28. While efficient in the sense that the scope of treason had been refined and was generally capable of being known by the general population, the Treason Act was not without its shortcomings which produced some rather peculiar results. While apparently limited on its face to the seven heads of treason enumerated above, the Act was in some cases extended through interpretation to meet particular needs ("constructive treason"). Some of the more flagrant examples are mentioned in MAITLAND, *CONSTITUTIONAL HISTORY*, *supra* note 10, at 228.

scope of treason was at times expanded, but at others it was curtailed.²⁹ From 1352 to 1485, a period of one hundred and thirty-three years, less than ten treason statutes were enacted. Under the Tudors (1485-1603), a period of one hundred and eighteen years, sixty-eight treason laws were enacted. The latter, however, were largely a result of circumstances peculiar to the dynasty:

1. the problems of succession occasioned by Henry VIII having children by three different wives,
2. the break with Rome and the creation of an autonomous Christian church, and
3. the problem of dealing with seminarians and Jesuits who attempted to return England to Papal jurisdiction.

III. PENALTIES FOR TREASON: PUNISHMENT OF THE TRAITOR

A. Execution

Treason was considered a most heinous crime — “the highest civil crime, which . . . any man can possibly commit”³⁰ — the penalties for which called for “ferocious procedures” which intended that such behavior would never be undertaken “‘unadvisedly, lightly, or wantonly’.”³¹ This was “because it concerneth the safety of his majestie, [and] the quiet of the common-wealth.”³² The physical punishment inflicted upon the traitor was therefore “very solemn and terrible.”³³ It was to include each of the following in execution of the sentence of death:

1. the convicted traitor was to be drawn to the place of execution,³⁴
2. where he would be hanged but cut down while alive,³⁵

29. During the reign of Henry VIII, “the offence of high treason was vexatiously and wantonly extended far beyond the limits marked out by the ancient statute of Edward III.” TASWELL-LANGMEAD, 3rd ed., *supra* note 27, at 383 (at 260 in T. Plucknett 10th ed. 1946). The Act 1 Phil. & M., ch. 1, § 1 (1553), laid down that the scope of treason was to be confined to that of 1352, but this Act was quickly superseded in the next reign.

30. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 75.

31. A popular account of the reign of Richard III: G. St. Aubyn, *THE YEAR OF THREE KINGS*: 1483, at 233 (1983).

32. 3 COKE, INSTITUTES, *supra* note 12, at the first page of the Proeme.

33. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 92; G. ELTON, *POLICY AND POLICE* 294 (1972).

34. Drawing should not be overlooked as part of the punishment. It usually meant that the prisoner was dragged behind a horse, and it often resulted in the death or incapacitation of the prisoner. Before hurdles or other implements were authorized, so that the prisoner might arrive alive and conscious, furnishing something the traitor could be drawn upon was itself punishable by imprisonment. 3 J. REEVES, *HISTORY OF THE ENGLISH LAW* 117-18 (1787).

35. Women convicted of treason were to be burned. In the case of a noble the king

3. he would then be disembowelled, preferably while still alive, and his entrails burned,
4. his head would be struck off,
5. his body would be quartered, and
6. the parts placed "at the king's disposal."

This last usually meant that the body parts would be put up, most often at entrances to towns or along well-traveled roadways, as warnings to others of what the price of treason entailed.³⁶

By way of example, for refusing the oath of supremacy, John Houghton, Augustine Webster, Robert Lawrence, and Richard Reynolds were executed at Tyburn on Tuesday, 4 May 1535. After being hanged and cut down while still alive, their hearts were cut out and then burned. They were then beheaded and quartered, and their parts placed on long spears for public display.³⁷ The manner of execution for treason of Roger Bolingbroke in the preceding century has been recorded thus:

He was drawn through the city to Tiburn gallows. There he was hanged and taken down again, all alive. His bowels were cut out of his body and burned before him. Then his head was cut off and his body quartered. One quarter was sent to Oxford; a second was sent to Cambridge; and the third to Bristol; and the fourth [is not given]. His head was set upon London Bridge, and thus ended his life in this world.³⁸

Such punishment was, of course, a product of the age in which it was meted out: an age which saw the quality of the punishment as reflecting the

might permit decollation (beheading), but this was within the king's privilege and was afforded because of the traitor's class or rank. Sir Thomas More, for example, although not a peer, had been chancellor.

36. 1 M. HALE, *supra* note 26, at 382; 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 92; *See also* 4 COKE, INSTITUTES † 210; 2 M. HALE, *supra* note 26, at 399; 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 93.

There is a popular misconception of the order in which execution was to be carried out which states that traitors were hanged, drawn, and quartered (*see, e.g.*, G. St. Aubyn, *supra* note 31 at 56, 124). The correct formula would transpose "hanged" with "drawn." Popular modern writers should, perhaps, not be severely censured for such error. The same mistaken order is given in the early seventeenth century THE GUNPOWDER PLOT: THE NARRATIVE OF OSWALD TESIMOND, ALIAS GREENWAY at 225 (F. Edwards trans. ed. 1973). The formula is given properly and completely in G. ELTON, POLICY AND POLICE 294 (1972).

37. 8 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, HENRY VIII Nos. 661, 666 (J. Gairdner ed. 1885) [hereinafter, PAPERS OF HENRY VIII]; H. FISHER, THE HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF HENRY VIII (1485-1547) 348-49 (1906 & reprint 1969).

38. 2 THE BRUT 481 (F. Brie ed. 1908); B. WILKINSON, CONSTITUTIONAL HISTORY OF ENGLAND IN THE FIFTEENTH CENTURY (1399-1485) 59 (1964).

quality of the crime.³⁹ By accepting the standards of the time, one might better comprehend Coke's assessment that "his body . . . shall be torn, pulled assunder, and destroyed, that intended to tear, and destroy the majesty of government."⁴⁰

B. Forfeiture

Judgment of treason meant that all that the traitor possessed was to be taken from him. Not only did he lose his life, but "all his manors, lands, tenements, and hereditaments in fee-simple, or fee-tail of whomsoever they be holden," were lost as well.⁴¹ This loss was termed "forfeiture," and it belonged to the king by prerogative right⁴² and thus overrode the claim for escheat that might otherwise be made by the lord of whom the lands were directly held through subinfeudation.⁴³ This was because:

the offence [of treason] is committed against the sovereign lord the king, who is the light and the life of the common-wealth: and therefore the law doth give to the king in satisfaction of his offence, all the lands, &c. which the offender hath, and that no subject should be partaker of any part of the forfeiture for this offence.⁴⁴

Furthermore, forfeiture as a consequence of treason was founded upon the basic principle of a contractual relationship that had been breached. Even prior to 1352, this contractual relationship had come to be looked upon in terms of the fundamental precept that "allegiance . . . [was] due from every man who lives under the King's protection," and this "whether the oath [of allegiance] had been taken or not."⁴⁵ The harm claimed was to be found in the failure to perform, not necessarily in what the failure entailed.⁴⁶ Thus once the breach had occurred, no matter how small or though

39. For forms of punishment in other countries, chiefly those of Germany, see *CRIMINAL JUSTICE THROUGH THE AGES passim* (J. Fosberry trans. 1981).

40. 3 COKE, *INSTITUTES*, *supra* note 14, at ¶ 210.

41. *Id.*

42. 1 POLLOCK & MAITLAND, *supra* note 12, at 351-52; 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 70 (1966 reprint).

43. A direct result of this conflict of interest between king and nobility was the enactment of the statutory definition of treason that was the Treason Act of 25 Edw. 3, *see supra* note 27. *See* 2 W. HOLDSWORTH, *supra* note 42, at 449-50; 3 W. HOLDSWORTH, *supra* note 42 at 71. For forfeiture resulting from felony, *see* Magna Carta ch. 32. *See supra* note 19 for escheat and forfeiture.

44. 3 COKE, *INSTITUTES*, *supra* note 14, at 18.

45. TASWELL-LANGMEAD, 3rd ed., *supra* note 27, at 392 n.1.

46. Failure to perform military service in time of war or rebellion could be catastrophic as it was for Richard III at the Battle of Bosworth (1485) when certain of his captains awaited the outcome on the periphery of the battlefield. It would be of no significance to a charge of treason if the feudal levy were merely on maneuvers, but it is to be doubted that failure at that

it might be forgiven, treason had been committed and there was no going back. Even when forgiven, forfeiture followed unless the king directed that it would not. From the contractual standpoint, because the failure to perform had over time come to be placed solely on the part of the vassal holding the fief, it would seem a natural consequence that the fief would be taken back to its grantor. When the fief was held through subinfeudation, the lord who stood in between the king and the vassal was simply bypassed.⁴⁷

That forfeiture would take place as part of the punishment for treason was never attacked as a prerogative right, though it was questioned in particular instances of application. This may seem peculiar when it is realized that forfeiture did not feature as a formal part of the contract — that it was not pointed to with particularity as a consequence which was to follow a breach. It might thus be concluded that forfeiture was to be implied or inferred from the contractual setting. It was the setting, the fact that the king was a party to the contract, that allows the implication or inference to be drawn. This was because forfeiture as a consequence of treason was explained by the consideration:

that he who has thus violated the fundamental principles of government, and broken his part of the original contract between the king and people, hath abandoned his connexions with society; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community. . . .⁴⁸

Forfeiture was a form of repossession, and there was always the possibility that valuable property might be sought where no treason had occurred. For such to occur (that is, an abuse of power), it may well have been as a result of an inequality within the framework of the contractual relationship. In the present context, the question is whether the king might abuse his power and seek the penalties for treason when no treason had taken place, or when treason had not been proved, but the penalties were desirable or advantageous, such as the forfeiture of valuable lands or the execution of a possible rival to the throne.⁴⁹

Following the flight of the earls of Tyrone and Tyrconnell from Ireland to the Continent in 1607, the Privy Council, while directing that “a due

time would result in a charge of treason. If it did (no reference to such having been found) it might result in a rare instance of a duty to mitigate on the part of the king; but “duty” may be too strong a word.

47. The mesne lord might be looked to to watch over his personal vassals, but he was neither guarantor nor surety for their behavior.

48. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 375.

49. LEFF, *supra* note 17, at 177-78.

form [of law] must be pursued for proving the guilt of the fugitives [that] their forfeitures [might be obtained]," stated without equivocation that they liked "the room of the fugitives [that is, their lands] . . . better than their company."⁵⁰ The result was that the earls' "room" became the means through which the province in which they lived, the only part of Ireland then still largely outside the control of the king's government, was brought to subjugation through the Ulster Plantation. Voices in England were raised in criticism of a statute which made it treason for Jesuits and other priests to remain in England because it was "full of blood, danger, despair and terrour or dread to the English Subjects of this Realm, our Brethren, Uncles and Kinsfolk" as well "also full of Confiscation."⁵¹ Margaret Pole, countess of Salisbury, was very likely executed in 1539 for no reason other than that she was the mother of Reginald Cardinal Pole (a hated enemy of Henry VIII) and that her family had a legitimate claim to the throne.⁵²

The development of use and of equitable trusts, as new interests in land not previously conceived of within the structure of feudal tenure, presented certain problems for forfeiture because the rights attached to the legal estate only (the estate of the feoffee to use or holder of legal title) and not to that of the *cestui que use* (who had use and benefit of the lands but not legal title). This was ultimately solved by the Statute of Uses, 27 Hen. 8, ch. 10 (1536), which transferred to the *cestui que use* the legal estate of the feoffee to use.⁵³ Subsequently, the statutes 33 Hen. 8, ch. 20 (1541), and

50. 2 CALENDAR OF STATE PAPERS, IRELAND, JAMES I 287 (C. Russell & J. Prendergast eds. 1874) (for the years 1606-1608).

51. 27 Eliz., ch. 2 (1585); S. D'EWES, THE JOURNALS OF ALL THE PARLIAMENTS DURING THE REIGN OF ELIZABETH 340 (1682).

52. 6 CALENDAR OF STATE PAPERS, DOMESTIC, ELIZABETH 407-09 (E. Green ed. 1870) (for 1601-1603, with addenda for 1547-1565). A contemporary account reported that the countess went to her death "not knowing her crime." 16 PAPERS OF HENRY VIII, *supra* note 37, at No. 897; 6 LETTERS, DESPATCHES, AND STATE PAPERS, ENGLAND AND SPAIN pt. 1, No. 166 (P. de Gayangos ed. 1890).

53. The text is in K. DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY WITH ORIGINAL AUTHORITIES 347-54 (5th ed. 1897); 3 W. HOLDSWORTH, *supra* note 42 at 71; 4 W. HOLDSWORTH, *supra* note 42, at 449-65; 1 COKE, INSTITUTES, *supra* note 14, at 13a n.7 (Coke on Littleton). See also T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 575-87 (5th ed. 1956); G. ELTON, *supra* note 33, at 269-70. In addition to the Statute, see also LORD DACRE'S CASE, Y.B. 27 Hen. 8 fo. 7, pl. 22 (1535), and 1 THE REPORTS OF SIR JOHN SPELMAN, reprinted in 93 THE PUBLICATIONS OF THE SELDEN SOC'Y 228 (J. Baker ed. 1977).

"Use" described a situation in which "the owner of the fee simple title to real property granted the fee to — enfeoffed — others, who were to do with the property what the grantor — feoffor — specified." Such was thus not illegal, but rather beyond the scope of the law, because it by-passed and did not violate the rules as they then existed. DeVine, *Ecclesiastical Antecedents to Secular Jurisdiction Over the Feoffment to the Uses to be Declared in Testamentary Instructions*, 30 AM. J. LEGAL HIST. 295, 295 & n.1, 317-19 (1986).

For the early development of "use" (or "feoffment to uses"), see J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 210-219 (2d ed. 1979).

5 & 6 Edw. 6, ch. 11 (1552), mandated forfeiture of those lands held to the use of a traitor. These Acts were quickly extended to apply to equitable trusts as well.⁵⁴ The problem of obtaining forfeiture for the Crown where either use or equitable trusts were utilized was thus solved, and henceforth neither could be used to escape the penalty of forfeiture.

Forfeiture for treason (as well as escheat for felony) was not abolished until 33 & 34 Vict., ch. 23, § 1 (1870), yet it continued as a consequence of outlawry following indictment for treason. This was because outlawry was essentially a means of inflicting punishment on a fugitive; his flight was accepted as an admission of guilt. Thus outlawry was roughly the equivalent of conviction, though accomplished with the accused not present—and thus without benefit of trial, following which execution of justice would follow.⁵⁵

Not only were all real properties forfeited to the Crown, but all chattels or personal possessions were forfeited as well.⁵⁶ However, there is a difference between forfeiture of real and of chattel property, and it is a considerable one because it points to the moment when forfeiture might be accomplished. Forfeiture of lands took place upon attainder, the moment at which sentence of death was pronounced at trial or declaration of outlawry was made. Forfeiture of personalties occurred upon conviction. Thus the traitor convicted but not sentenced because the king let it be known that sentence was not to be passed or that he had pardoned the traitor would forfeit his chattels but not his real property.⁵⁷ Furthermore, the forfeiture

54. 1 M. HALE, *supra* note 26, at 240-44, 248-49; 3 COKE, INSTITUTES, *supra* note 14, at 18-19.

"Trust" originally had the same meaning as "use", but over time came to be used to designate the equitable estates which the Statute of Uses did not execute. See Barton, *The Statute of Uses and the Trust of Freeholds*, 82 LAW Q. REV. 215 (1966). That the expansion of Chancery's jurisdiction was the result of uses has been proposed by Avery, *The History of the Equitable Jurisdiction of the Chancery before 1460*, 42 BULL. INST. HIST. RES. 129 (1969).

55. Richards, *Is Outlawry Obsolete?*, 18 LAW Q. REV. 297, 298-300 (1902); 2 M. HALE, *supra* note 26, at 205, 209; 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 314-15.

In England death in rebellion did not result in further punishment unless the process of outlawry had previously been accomplished. 34 Edw. 3, ch. 12 (1360) (which established that there would be no forfeiture following death in rebellion unless there had first been an attainder); 3 COKE, INSTITUTES, *supra* note 14, at 12. Such was not the case in Ireland where death in rebellion was an attainder in law resulting in forfeiture. See *infra* through note 83 and accompanying text.

56. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 374.

For the disposition of Sir Walter Raleigh's forfeited goods by a grant dated February 14, 1604 and those of the earl of Somerset by a grant dated June 24, 1619 see T. RYMER, FOEDERA tome 7, pt. 2, at 108, pt. 3, at 110 (G. Holmes 3rd ed. 1742).

57. For the pardons for treason granted to the countess of Oxford on December 5, 1404, the duke of Norfolk on August 29, 1553, and the marquess of Northampton on January 3, 1554 see T. RYMER, *supra* note 56, at tome 4, pt. 1, at 74, tome 6, pt. 4, at 4, 13. Robert

of real property related back to the treason committed, so that all later sales or encumbrances were void. The forfeiture of personalties did not relate back, and thus only that which was held at the time of conviction was forfeited.⁵⁸ The distinction may seem slight, but it could prove significant because it would permit bona fide sale of possessions and allow "for the sustenance of himself [that is, the one charged with treason] and family between the fact [of the treason committed] and conviction."⁵⁹ Of course, the sale must be bona fide and not done through collusion intended to defraud the Crown. In the latter instance the possessions would remain subject to forfeiture, "for they are all the while truly and substantially the goods of the offender: and as he, if acquitted, might recover them himself, as not parted with for good consideration; so, in case he happens to be convicted, the law will recover them for the king."⁶⁰

IV. PENALTIES FOR TREASON: PUNISHMENT OF THE SPOUSE

Except for a brief time in the reign of Edward VI and under specific offenses legislated as treason under Elizabeth, the wife of a traitor lost her claim to dower — "His wife, that is a part of himself, (*et erunt animae duae in carne unâ*) shall lose her dower."⁶¹ This was because a wife had no right in dower until her husband's death, and thus the right must follow the treason which would overcome a claim for dower. However, a wife would not lose her jointure when the treason occurred after marriage because forfeiture related back to the moment of the treason and her jointure had been settled upon her at an earlier date.⁶² This would mean that treason committed before marriage would defeat a wife's jointure if conferred, say, by way

Rudstowe, Leonard Digges, Johan Goldewell, and Thomas Fane, attainted of high treason for rebellion, were granted a stay of execution on March 18, 1554 for the interesting reason of "Pitie and Compassion." T. RYMER, *supra* note 56, at tome 67, pt. 4, at 19.

Because they were often obtained through payment of fines and because they could be used as tools of state to secure peace, pardons which resulted in loss of forfeiture to the Crown were not necessarily an economic deprivation.

For pardons under the Tudors, see J. BELLAMY, *THE TUDOR LAW OF TREASON, AN INTRODUCTION* (1979) (particularly 218-25) [hereinafter, BELLAMY, *TUDOR LAW*].

58. 3 COKE, *INSTITUTES*, *supra* note 14, at 212; 4 BLACKSTONE, *COMMENTARIES*, *supra* note 17, at 373, 380.

59. 4 BLACKSTONE, *COMMENTARIES*, *supra* note 17, at 380; 2 W. HAWKINS, *PLEAS OF THE CROWN* 454 (1721); 3 COKE, *INSTITUTES*, *supra* note 14, at 211.

60. 4 BLACKSTONE, *COMMENTARIES*, *supra* note 17, at 381.

61. 1 COKE, *INSTITUTES*, *supra* note 14, at 37a, 41a to include note 4 (Coke on Littleton). 1 Edw. 6, ch. 12 (1547), permitted the wife to retain her dower, but 5 & 6 Edw. 6, ch. 11 (1551-52), took it away. 5 Eliz., ch. 1 (1563), dealt with refusing the oath of supremacy a second time; 5 Eliz., ch. 11 (1563), and 18 Eliz., ch. 1 (1576), both dealt with offenses regarding coinage.

For a brief introduction to dower see T. PLUCKNETT, *supra* note 53, at 566-68.

62. 4 BLACKSTONE, *COMMENTARIES*, *supra* note 17, at 375.

of a wedding gift. The husband of a female traitor was not covered by statute and so was able to retain curtesy of his wife's lands.⁶³

While in no way taking into account the contract concept of duty to mitigate,⁶⁴ the Crown was not without sympathy where wives of traitors were concerned and would, on occasion, allow them some form of compensation.⁶⁵ This usually meant that the wife would be granted something out of the husband's chattels.⁶⁶ More noteworthy, because of its rarity, was the retention by a wife of lands she possessed in her own right, separate from dower and distinct from jointure, or lands jointly held with a convicted husband. Such a concession would seem to have required specific mention by Act of Parliament.⁶⁷

If the Crown were to proceed to forfeiture by expending the time and efforts of its officials, coupled with the costs of maintaining the prisoner (the expense, however, was often his own) and of the trial, it would hardly have been economically rational for a standard policy to dictate that it would all be wasted and thrown away by a practice that would always make provision for the wife. Such practice would in fact militate against policy, but the king's interest in a particular case might overcome policy simply because he desired it to be overcome. Then too, the king might be persuaded to a wife's cause through the intervention of an important minister of state.⁶⁸ When the wife of a traitor was provided for, whether for

63. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 375; 1 M. HALE, *supra* note 26, at 359.

64. There was no duty to mitigate punishment for treason. As a modern concept, it would not have been thought of, much less would it have been used in treason.

65. BELLAMY, TUDOR LAW, *supra* note 57, at 216.

66. IVES, *Court and County Palatine in the Reign of Henry VIII: The Career of William Brereton of Malpas*, HISTORIC SOCIETY OF LANCASHIRE AND CHESHIRE 34 (1972) (for such a grant to Brereton's wife); *see also* THE LETTERS AND ACCOUNTS OF WILLIAM BRERETON OF MALPAS (E. Ives ed. 1976). Grants were occasionally made for the care of a traitor's wife, a number of which are noted in Lander, *Attainder and Forfeiture, 1453-1509*, 4 HIST. J. 141 (1961) (to include note 95). *See also* D. LOADES, TWO TUDOR CONSPIRACIES 122 (1965); Ross, *Forfeiture for Treason in the Reign of Richard II*, 71 ENG. HIST. REV. 560, 574 n.5 (1956) (maintenance allowances for the wives of the earl of Warwick and Sir Thomas Mortimer).

67. Examples are to be found in 7 Hen. 7, ch. 23 (1491), which excepted certain lands of the wives of Sir Robert Chamberlain and Richard White; 14 & 15 Hen. 8, ch. 22 (1523-1524), did much the same for the duchess of Buckingham (Eleanor Stafford); and 23 Hen. 8, ch. 34 (1532), which excepted the wife of Rhys ap Griffiths. Livery of dower was permitted to Philippa Mortimer and livery of a moiety of the Bohun estates was promised to Eleanor de Bohun. Ross, *supra* note 66 at 574 n.5.

68. BELLAMY, TUDOR LAW, *supra* note 57, at 217. Bellamy credits Thomas Cromwell, seemingly out of character, as proposing mercy through assistance to both wives and children of convicted traitors. The popular notion of Cromwell as the dutiful servant of Henry VIII may be in need of modification, if not revision. Note that this is mercy and not a duty to mitigate.

reasons of state or through the intercession of some highly placed person or for purely personal reasons of the king, it was merely an instance of royal mercy, and not an application of a duty to mitigate.

V. PENALTIES FOR TREASON: PUNISHMENT OF THE CHILDREN AND POSTERITY

Terrible though it may have been, that a traitor would face loss of both life and possessions was a punishment hardly outstanding in terms of severity. That the wife of a traitor would also be called to account for her spouse's activities was well within the framework of the law as it then stood. But while it may have been less physically shocking, it was certainly a most drastic expedient to punish one whose only connection to the treason was that she was wedded to the traitor. However, from an economic perspective, the most devastating punishment was that visited upon the offspring and posterity of the traitor, for they would be required to expiate the crime of their progenitor long after it had faded from living memory and into the pages of history.

The punishment extended to those descended from a traitor was that the traitor, as a result of his treason, "shall lose his children (for they become base and ignoble)" and he shall also "lose his posterity, for his blood is stained and corrupted, and they cannot inherit."⁶⁹ Specifically, as Coke explained it, "If a man be attainted of treason . . . , although he be borne within wedlocke, he can be heire to no man, nor any man heire to him, . . . for that by his attainder his blood is corrupted."⁷⁰ Corruption of blood was demonstrated during the execution by castration of the traitor as part of the disembowelling.⁷¹ The disinheriting of future generations was to extend forever.⁷²

Corruption of blood, present punishment extended into the future, was intended as a recourse to rationality and thus a deterrent that would overcome what otherwise might prove a precipitate course of action. This was

69. 3 COKE, INSTITUTES, *supra* note 14, at 210; 2 BLACKSTONE, COMMENTARIES, *supra* note 17, at 251.

70. 1 COKE, INSTITUTES, *supra* note 14, at 8a (Coke on Littleton).

71. BELLAMY, TUDOR LAW, *supra* note 57, at 204; G. ELTON, *supra* note 33, at 294.

72. RANULPH DE GLANVILL, TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIAE QUI GLANVILLA VOCATUR 173 (G. Hall ed. 1965). Blackstone speaks "of future incapacities even to the twentieth generation." 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 381. Whether forever or merely twenty generations, the meaning, if not the result, is much the same. In 1977 the descendants of the Gunpowder Plot conspirators of 1605 were recommended to be permitted to inherit, as were others caught up in fifty-one other acts of attainder passed between 1491 and 1783. THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, STATUTE LAW REVISION, EIGHTH REPORT (1977); Parkin, *Guy Law Reduced to Ashes*, The Guardian, Jan. 28, 1977, at 4.

because, for English society of the feudal and early modern epoch, wealth, power, and station were predicated upon the accumulation and possession of property, and that property was to be passed on to one's offspring, so far as the law would permit, as the means of perpetuating the wealth, power, and station of the family. Specifically, therefore, corruption of blood would force a potential traitor to restraint and moderation by making him aware that, in addition to himself and his wife, the rigor of the law would be brought to bear against his offspring and succeeding generations. The innate or natural desire to secure for one's children and posterity what would otherwise be expected to be their patrimony or birthright through inheritance was thus intended to counteract or curb a rashness that might take little account of one's own safety or even the well-being of a spouse. Thus, if treason were contemplated, the individual, in considering the totality of the consequences, might be recalled to reason and rationality, "not only by the sense of his duty [to the Crown], and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending."⁷³

While he was examining neither the general historical setting currently under review nor the specific issues presented by the law of treason, the purpose, if not the effect, of corruption of blood as a potential punishment might be seen to greater advantage in terms of law and economics by reference to what Richard Posner has written regarding the law of contract.⁷⁴ One engages in contract (the feudal relationship between the king as sovereign lord and the subjects as vassals)⁷⁵ to maximize value — the continuation of peace and tranquility throughout the realm. But the further into the future the contract is extended, as it automatically would be by the natural succession of kings and heirs by right of inheritance, the more difficult it becomes to maximize values at the time the contract is formed. Therefore, present liability is imposed into the future as a means of achieving continued maximization of wealth or value — thus the penalties for treason were to be extended into the future to ensure the maximization of peace and tranquility.

The extension of liability into future generations was explained by the fact that treason was a violation of "the fundamental principles of government" which resulted in the traitor's breach "of the original contract" con-

73. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 375. However, this does not take into account the first head of the Treason Act of 1352, for even to have imagined treason was to have committed it. No overt act was required under this head for treason to have been done; the thought alone constituted treason.

74. Posner, *Gratuitous Promises in Economic Law*, 6 J. LEGAL STUD. 411 (1977), reprinted in THE ECONOMICS OF CONTRACT LAW 47 (A. Kronman & R. Posner eds. 1979).

75. That the feudal relationship instituted by William I following the Conquest included "a set of determinate contracts" between himself and his tenants-in-chief has been pointed out by 1 POLLOCK & MAITLAND, *supra* note 12, at 92.

cluded between sovereign and subjects as a means of obtaining orderly government for and peace within the realm.⁷⁶ The traitor, by his treason, had severed himself from society and thereby could no longer partake of those requisites and advantages that were, by right of membership, to belong to each individual person who comprised the community. By placing himself outside the commonality or general body, all social advantages were lost and there could be no question of a traitor's passing on to his progeny that cornerstone of the medieval and early modern commonwealth that property most assuredly was.

VI. PARLIAMENTARY ATTAINDER⁷⁷

When no trial at common law had taken or could take place (for example, when death in rebellion had occurred) or when forfeiture was desired but the common law proved deficient for that purpose (for example, "the forfeiture of equitable and entailed estates . . . often escaped at common law"⁷⁸), recourse might be had to attainder by Act of Parliament. In cases where the treason involved violation of the new treason statutes of the sixteenth century,⁷⁹ it is to be noted that Parliament was at times inclined "to give way to [an] equitable . . . provision" whereby "corruption of blood shall be saved."⁸⁰ One Act that defined the scope of treason with regard to the alienation of obedience from the sovereign to the pope, thus not itself an Act of Attainder, contained a provision which specifically excluded both corruption of blood and the disinheriting of any heir, as well as loss of dower, from punishment for conviction.⁸¹

The principal purpose of the Act of Attainder, however, was not to alleviate punishment, but rather a means to secure it. Such Acts proved helpful in affirming common law indictments, as well as for affirming outlawry, and in providing a means for disposing of the lands and property of

76. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 375; *see also* POLLOCK & MAITLAND, *supra* note 12, at 92.

77. For the origin and early history of attainder *see* T. PLUCKNETT, *Impeachment and Attainder*, 3 TRANS. ROYAL HIST. SOCIETY 145 (5th series 1953). *See also* BELLAMY, TREASON IN ENGLAND, *supra* note 2, at ch. 7; Lander, *Attainder and Forfeiture 1453-1509*, 4 HIST. J. 119, *reprinted in* 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 92 (E. Fryde & E. Miller eds. 1970); Lehmborg, *Parliamentary Attainder in the Reign of Henry VIII*, 18 HIST. J. 675 (1975); G. ELTON, *supra* note 33, at 270 n.1, 275 n.3 (1972).

78. T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 262 n.s. (T. Plucknett 10th ed. 1946) [hereinafter TASWELL-LANGMEAD, 10th ed.].

79. For example, the offense of acknowledging papal supremacy and certain coinage offenses. Particular Acts included 5 Eliz., chs. 1, 11 (1563); 18 Eliz., ch. 1 (1576). Among later Acts were 8 & 9 Will. 3, ch. 26 (1696-97), and 15 & 16 Geo. 2, ch. 28 (1742).

80. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 382.

81. 13 Eliz., ch. 2 (1571).

dead traitors by giving to the Crown "sound title."⁸² Acts of Attainder could thus be used to overcome the limitations of 34 Edw. 3, ch. 12 (1360), which specified that there would be no forfeiture without attainder of anyone killed in rebellion. Odd as it might seem, this limitation on forfeiture did not exist as part of transplanted English law in Ireland where the matter was more expeditiously capable of resolution because death in rebellion was itself an attainder in law in Ireland. All that was required there was a commission to enquire *super visum corporis* of the dead rebel, a declaration by the commission that rebellion had occurred, a finding by it that death took place while in rebellion, and a determination that it was indeed the rebel whose body had been found. There was therefore no need in Ireland to make use of either protracted legal procedures or to await the sitting of Parliament to obtain the forfeiture of a dead rebel.⁸³

The efficiency of Parliamentary attainder was noted in the reign of Henry VIII when Cromwell brought it to its highest level of perfection by using such Acts against individuals who could have been lawfully tried at common law.⁸⁴ Trial at law would have been foreborne where the evidence seemed insufficient for conviction, or where an unwanted public disclosure would be made through presentation of witnesses or other evidence, or where the existing law did not cover the offense.⁸⁵ Statutory attainder could easily overcome such problems. For instance, while defense might on occasion be permitted, it had "always been clear that a bill of attainder may be lawfully passed without any opportunity for defence being given."⁸⁶ Thus, because it was a legislative act rather than a trial, attainder could obviate an accused's exculpatory reply to the charges and any disclosure that might prove harmful or unpleasant to the Crown.⁸⁷ When Cromwell, acting at the king's command, enquired of the judges whether an Act of Attainder that condemned an accused traitor to death without benefit of hearing him in defense could ever be overturned at law, they replied that it could not.

The answer given by the judges, that Parliament could indeed condemn to death a man available for trial at common law and do so without hearing his defense and without fear that the Act might later be defeated in court, is instructive both as to the state of the law and the level of timidity of its judges. While acknowledging that the use of attainder in such an instance "would form a dangerous precedent" because it would allow an

82. BELLAMY, TREASON IN ENGLAND, *supra* note 2, at 137, 184, 195, 203.

83. F. Harris, *The Rebellion of Sir Cahir O'Doherty and its Legal Aftermath*, 15 THE IRISH JURIST 298, 306 (1980).

84. T. PLUCKNETT, *supra* note 53, at 205 n.3; 4 COKE, INSTITUTES, *supra* note 14, at 37; J. TANNER, TUDOR CONSTITUTIONAL DOCUMENTS, 1485-1603, 423 (1922).

85. BELLAMY, TUDOR LAW, *supra* note 57, at 211.

86. T. PLUCKNETT, *supra* note 53, at 205; 4 COKE, INSTITUTES, *supra* note 14, at 37.

87. TASWELL-LANGMEAD, 3rd ed., *supra* note 27, at 384-85; TASWELL-LANGMEAD, 10th ed., *supra* note 78, at 262.

accused, who could otherwise speak for himself, to be condemned without being heard in his defense and "that Parliament should rather set an example to inferior courts by proceeding according to justice," Parliamentary attainder "could never, under any circumstances, be subsequently questioned in a court of law" because the court of Parliament was supreme.⁸⁸

A striking example of Cromwell's approach to and use of attainder can be found in the case of Elizabeth Barton, known as "the Holy Maid" or "the Nun of Kent," who, with a number of accomplices, was charged before Parliament in 1534 after an attempt to do so through judicial means had failed. Parliament accepted no evidence and heard no defense; only a confession of questionable quality and the results of a Privy Council enquiry were admitted. Barton and her fellows were executed at Tyburn on the 20th of April.⁸⁹

So long as king and Parliament were not in opposition, or so long as the latter was subservient to the interests of the former, then attainder by statute was an efficient method of moving against actual and suspected traitors, whether dead or alive, as well as for securing their forfeitures. This was particularly so when the affairs of the king were managed by one such as Cromwell. The efficiency of Parliamentary attainder cannot, therefore, be minimized. There were, after all, no court costs, and Parliament would have been sitting for other purposes. The economics of working through Parliament would have been extremely worthwhile, particularly as an accused's defense need not be heard, witnesses and evidence need not be produced, and Crown secrets could be maintained and embarrassment foreclosed.

VII. PENALTIES FOR TREASON: DETERRENCE

It has been said that "the rule of law, whatever the intention of its originator, does tend to produce an attitude of obedience in the subject."⁹⁰ What is not addressed therein is the cause or motivation which tends to bring about the attitude to obey. Two possible explanations seem immediately apparent. On the one hand, obedience may result from nothing more

88. TASWELL-LANGMEAD, 3rd ed., *supra* note 27, at 385; TASWELL-LANGMEAD, 10th ed., *supra* note 78, at 262; 4 COKE, INSTITUTES, *supra* note 14, at 37; J. TANNER, *supra* note 84, at 423. An Act of Attainder was, after all, a legislative function which obligated the judges to obedience.

89. 25 Hen. 8, ch. 12 (1534); 3 STATUTES OF THE REALM 446; 1 R. MERRIMAN, LIFE AND LETTERS OF THOMAS CROMWELL 119 (1902); H. FISHER, *supra* note 37, at 334; BEL-LAMY, TUDOR LAW, *supra* note 57, at 23, 28; G. ELTON, *supra* note 33, at 274-75.

At one time a small tributary of the River Thames, Tyburn was the site of a permanent gallows from the Middle Ages until 1783. The gallows was near the modern tourist attraction of Speaker's Corner at Marble Arch in Hyde Park.

90. Williams, *Language and the Law* — V, 62 LAW Q. REV. 387, 398 (1946).

than that the law is there, and by its existence it is to be obeyed. Such obedience might be the consequence of habit. In the context of the law of treason, obedience would thus be the product of ancient loyalties, buttressed perhaps by the chivalric code of honor, which loyalties would not be broken without extreme cause. Alternatively, fear of punishment for transgression could well dictate obedience even when the motivation to do otherwise may have been extreme.⁹¹

What brought a traitor to his treason may be determined from the facts of history, at least insofar as extant records will permit. Chief among the causes would seem to have been tyranny: abuse of ancient custom, unwarranted taxation, and, after the Reformation, the assertion of heresy in the sovereign. When a treason was abandoned, the reasons for its being given up are more difficult, if not impossible, to discern. This is because where treason was abandoned, it is highly unlikely that evidence of the design would be left to posterity; it would have been too easy for it to have fallen into the wrong hands during the lifetime of one who had plotted treason.

So ingrained that it could not be overcome no matter what the justification, loyalty to the ancient line of kings may have forestalled treason against a tyrant by members of a class bound by honor, duty, and past association. Those less bound by the strictures of such a code of behavior may have had more pragmatic reasons for putting aside plans for treason. Discovery of a plot would mean capture, torture,⁹² conviction, and execution of sentence with all that the terrible punishment of treason entailed. The effectiveness of fear of such punishment as the cause for obedience can only

91. Coke believed punishment was intended to deter. 1 COKE, INSTITUTES, *supra* note 14, at 41a (Coke on Littleton). It is to be noted that other reasons for obedience may exist, and that they may be more instrumental.

92. There should be no doubt that Coke, Blackstone, and others notwithstanding, torture of prisoners in legal custody was used. 2 COKE, INSTITUTES, *supra* note 14, at 48; 3 COKE, INSTITUTES, *supra* note 14, at 34-35; 1 BLACKSTONE, COMMENTARIES, *supra* note 17, at 129; 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 320-21. Blackstone attempted to distinguish the use of the rack by stating that "it was occasionally used as an engine of state, not of law" during Elizabeth's reign. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 321. Such rationalization would hardly have mattered to an accused; its use by the "state" was in its police capacity, and thus adjunct to the "law." Such a distinction as Blackstone's would seem to have been too finely drawn, pointing out what in fact did not make a difference. Numerous instances of the use of torture can be found among the State Papers, both English and Irish, and other records. As one example, Francis Throckmorton was racked at the Tower of London on at least two occasions in 1583. Throckmorton, *A discoverie of the treasons practiced and attempted against the Queenes Maestie and the Realme*, (1584), reprinted in ELIZABETHAN BACKGROUNDS 144, 148 (A. Kinney ed. 1975).

See Magna Carta ch. 39; 5 Edw. 3, ch. 9 (1331). See also J. LANGBEIN, TORTURE AND THE LAW OF PROOF, ENGLAND AND EUROPE IN THE ANCIENT RÉGIME (1977); J. HEALTH, TORTURE AND ENGLISH LAW, AN ADMINISTRATIVE AND LEGAL HISTORY FROM THE PLANTAGENETS TO THE STUARTS (1982).

be surmised. Perhaps only on the scaffold, with execution imminent, might its effect on the traitor be seen. Yet, a recent study of treason in the sixteenth century has discovered "virtually no reference to any displaying fear" on the way to or at the place of execution.⁹³

The following might suffice as examples of behavior just prior to execution. In 1554 the duke of Suffolk thought more of the unwanted presence of a chaplain on the scaffold than he did of his impending execution, and went so far as to fight to remove him. Robert Southwell debated the decrees of the Council of Trent as he stood on the scaffold late in Elizabeth's reign. William Freeman debated points of religion with the chaplain present at his execution in 1595; each asked and received the other's forgiveness before Freeman died. In 1585 John Hewett would seem to have become engaged in a disputation on matters of faith right up to the moment of his execution. Mary Queen of Scots, Anthony Babington, and Southwell asked that their friends pray for them, and these were almost the last words of each.⁹⁴ Many steadfastly denied their guilt, even to the moment of execution. Some admitted a degree of guilt, but it was rare to find a scaffold admission which specified treason. Those who admitted guilt generally spoke of their having committed an offense against law or king, thereby indicating that while the condemned had no complaint about his trial, he felt that the charge of treason was more than his action warranted.⁹⁵

Thomas Wintour, one of the principal organizers of the Gunpowder Plot (1605), took time to exculpate a number of Jesuits believed to have been accomplices to the plot. His brother, Robert Wintour, "remained rather withdrawn into himself, and obviously praying" right up to the moment when he died. John Grant, when asked if he was sorry for what he had done, answered that "it was not the time or place to discuss cases of conscience;" rather, his purpose at that time and place was "to die, not to dispute matter of that kind." Ambrose Rookwood "begged the king to show favour to his wife and sons."⁹⁶ Anthony Babington had done much the same

93. BELLAMY, *TUDOR LAW*, *supra* note 57, at 209 (pointing to John Felton as the "one exception concerning the displaying of trepidation" at 282 n.107); see 1 W. COBBETT & T. HOWELL, *A COMPLETE COLLECTION OF STATE TRIALS* 1087 (1809).

94. BELLAMY, *TUDOR LAW*, *supra* note 57, at 192-93, 278 n.42.

It is realized that these are examples of individuals who died largely as a result of the religious treason laws; this species of treason may have imbued the traitors with a conviction that fully justified in their own mind the treason committed. Further research may turn up different results where the treason was political, or at least not religious.

95. BELLAMY, *TUDOR LAW*, *supra* note 57, at 195-98. Among those who denied guilt were the countess of Salisbury (1539), Appleyard (1551), four of the men of the duke of Somerset (1552), Edmund Campion (1581), Thomas Ford (1582), William Parry (1584), Edward Abington (1588), Brian O'Rourke (1591), William Freeman (1595), as well as most of the priests and Jesuits executed under the religious treason laws of Elizabeth.

96. H. WILLIAMSON, *THE GUNPOWDER PLOT* 227-29 (1952).

in 1586, though from what he said it cannot be determined whether his request was directed to the queen, his friends, or others.⁹⁷

From examination of words and demeanor on the scaffold, it would appear that the fate of traitors may have weighed heavily on the minds of those who contemplated treason but that they were willing to make the sacrifice in the hope that the treason would prove successful or remain undetected. How many treasons never got off the ground because the consequences of failure were too great cannot be known. Those who continued with their designs, though they fully realized that a grizzly execution for them and economic ruin for their family awaited failure or discovery, would for the most part appear not to have thrown caution to the wind to risk all in a desperate gamble. Rather, having considered the penalties and the likelihood of success, or of failure, they were determined in their course of action in spite of, and not deterred because of, the consequences. Because the odds were heavily against such a venture, the apparatus of the State being in position both to learn of a treason when it remained premature for success and to suppress it by force when necessary, such may have been politically irrational at the least and certainly economically irrational.

Monitoring costs by the government were generally negligible. To know of a treason and not report it was also a form of treason,⁹⁸ so one who learned of a plot was likely to turn government informer as a means of saving himself. Under Cromwell, information concerning treason was often received without any attempt having been made to obtain it, and the source of this information often proved to be ordinary folk rather than government spies or professional informers.⁹⁹ Spies and other professional agents were used, as was the promise of reward to induce information, but these professionals were generally paid only for information received, and the costs incurred in such operations might be recouped through forfeiture.¹⁰⁰

97. BELLAMY, *TUDOR LAW*, *supra* note 57, at 199.

98. Knowledge of treason was to be brought immediately to the king's attention; it was, after all, a citizen's duty. To know of a treason and not report it was misprision of treason, but one who knew of a plot against the Crown might be charged as an accomplice, and accomplices to high treason were principals. 2 H. BRACON, *HENRICI DE BRACON DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 335 (G. Woodbine ed. 1915-42); BELLAMY, *TREASON IN ENGLAND*, *supra* note 2, at 8, 17, 240; BELLAMY, *TUDOR LAW*, *supra* note 57, at 83; G. ELTON, *supra* note 33, at 345-50.

99. BELLAMY, *TUDOR LAW*, *supra* note 57, at 83; G. ELTON, *supra* note 33, at 339, 345, 382.

100. 1 *TUDOR ROYAL PROCLAMATIONS*, No. 358 (P. Hughes & J. Larkin eds. 1964); 2 *TUDOR ROYAL PROCLAMATIONS* Nos. 577, 672 (P. Hughes & J. Larkin eds. 1969); BELLAMY, *TUDOR LAW*, *supra* note 57, at 83-85. An example of Cromwell's use of spies is to be found in 1 R. MERRIMAN, *supra* note 89, at 360, but Elton argues convincingly that there was no organized spy system under Cromwell. G. ELTON, *supra* note 33, at 327-29, 331-33. Drafted in 1531, but not included in the Treason Act of 1534, 26 Hen. 8, ch. 13, was a proposal to give as reward a pardon and part of the lands and chattels forfeited by a convicted traitor to any-

The most cost-effective source of information regarding treason, as well as other criminal or non-criminal matters and much more besides, undoubtedly was the local justices of the peace.¹⁰¹ Because they were of the gentry, the same social class that supplied members to Parliament, justices of the peace were generally "conservative and careful." Because they were appointed by the Crown, local justices looked out for and guarded the royal interest and were thus "a very suitable medium for the enforcement of the policy of the central government on the countryside." Furthermore, because their ultimate responsibility was to the king through the Privy Council, justices of the peace could be expected to report any instances of treason, real or suspected, immediately to the king's ministers.¹⁰²

While their power to try indictable offenses did not extend to cases of treason unless empowered to do so under a separate commission of oyer and terminer (but important treason cases would be excepted from their care), justices of the peace were in a position to obtain information concerning suspected treason, and it was their duty to pass this information on to the Privy Council. While they might not bring to trial a particular treason case, justices of the peace could make enquiry and receive indictments, and the Privy Council might direct that further investigation be done. Justices of the peace could therefore search for suspected traitors, obtain physical evidence, and make enquiry of informers and witnesses so that the information passed on was based on something more than rumor or speculation.¹⁰³

In light of the fact that the justices of the peace were the king's eyes and ears in the countryside, and thus of singular importance in troubled times, it would seem that they would be particularly well paid for their

one involved in a treason plot who turned in the fellow conspirators. BELLAMY, *TUDOR LAW*, *supra* note 57, at 84; G. ELTON, *supra* note 33, at 267-69, 271-72. Elton states at 345 that it was expected that information concerning treason would come from individuals close to the offender; the government, in fact, "made no attempt to stimulate informing either by offering rewards or by organizing a spy system."

While there may have been a few salaried professional spies and agents, likely more so under the Tudors, it would seem that most were paid for particular services rendered. It would be interesting, for instance, to know whether Richard Topcliffe, the priest catcher, was paid per head or if he was in fact a salaried employee of Elizabeth's government.

101. See the entries listed under *Local Government: Justices of the Peace* in BIBLIOGRAPHY OF BRITISH HISTORY: TUDOR PERIOD, 1485-1603, 109 (C. Read 2d ed. 1959) and BIBLIOGRAPHY OF BRITISH HISTORY: STUART PERIOD, 1603-1714, 135 (M. Keeler 2d ed. 1970).

102. G. SMITH, *A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND* 298, 299 (1955); MAITLAND, *CONSTITUTIONAL HISTORY*, *supra* note 10, at 207; LORD CROSS OF CHELSEA & G. HAND, RADCLIFFE AND CROSS, *THE ENGLISH LEGAL SYSTEM* 109 (5th ed. 1971).

103. 7 PAPERS OF HENRY VIII, *supra* note 37, at Nos. 779, 902; 13 PAPERS OF HENRY VIII, part 1, No. 801; MAITLAND, *CONSTITUTIONAL HISTORY*, *supra* note 10, at 207; BELLAMY, *TREASON IN ENGLAND*, *supra* note 2, at 138, 147-48; BELLAMY, *TUDOR LAW*, *supra* note 57, at 45-46, 84, 85-86, 121, 122, 252 n.4 (regarding coinage treasons); G. ELTON, *supra* note 33, at 295, 298, 331-32, 344.

services. In fact, their remuneration seems hardly worth the effort their position would have required. Justices of the peace actually "held their offices for the importance and precedence [that office] gave and the leadership and influence which accrued" from it in the place where they lived and not for the paltry sum they received for each day they were in session.¹⁰⁴

VIII. DEFENSE COUNSEL

Those accused of treason were denied benefit of defense counsel and were thus without legal advice or assistance. The only exception was on matters of procedure or points of law,¹⁰⁵ but these had first to be raised by the accused. The judge was expected to be mindful of the needs of the accused by seeing to it that "the proceedings against him [were] legal and strictly regular."¹⁰⁶ It was thus for the court to ensure that conviction was based on "evidence . . . so manifest, as it could not be contradicted."¹⁰⁷ Consequently, it was believed "too dangerous an experiment, to let an advocate try, whether [the evidence] could be contradicted or no[t]."¹⁰⁸

Because treason often involved peers, gentry, or the middle class, the strata of society most capable of paying for their defense as well the strata most capable of bringing about a change in trial procedure, it would seem that the legal profession would surely have found a way to practice as counsel for a treason defendant. Such, however, did not occur until the end of the seventeenth century when it was permitted by Act of Parliament.¹⁰⁹ Previously, lawyers had looked "to preserve their good name and reputation," and defending one accused of treason apparently would have stained both.¹¹⁰ This was because the "Law abhor[red] the defence and maintenance of bad Causes." If that was the posture of the law, then "a good lawyer [could not] honestly undertake the defence of a foul and desperate

104. B. WILKINSON, *supra* note 38 at 326; *See also* MAITLAND, CONSTITUTIONAL HISTORY, *supra* note 10, at 207, where Maitland states their wages as four shillings for each day while in session.

Research into the effectiveness and usefulness of justices of the peace in detecting treasons and ferreting out traitors would seem particularly worthwhile.

105. 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 400 (1724); 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 349. For trial procedure see BELLAMY, TREASON IN ENGLAND, *supra* note 2, at 265 (index); BELLAMY, TUDOR LAW, *supra* note 57, at ch. 4; G. ELTON, *supra* note 33, at ch. 7; Marcus, *The Tudor Treason Trials: Some Observations on the Emergence of Forensic Themes*, 1984 U. ILL. L. REV. 675.

106. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 349.

107. 3 COKE, INSTITUTES, *supra* note 14, at 137.

108. 4 BLACKSTONE, COMMENTARIES, *supra* note 17, at 349.

109. THE TREASON ACT, 1695, 7 & 8 Will. 3, ch. 3.

110. SIR JOHN DAVIES, LE PRIMER DISCOURS DES CASES ET MATTERS IN LEY RESOLVES ET ADJUDGES EN LES COURTS DEL ROY EN CEST REALME 19-20 (law French 1615), *reprinted in* 80 ENG. REP. 491-583 (9 K.B.) (trans. 1762) (preface to translation).

Cause." Consequently, in this regard, it was because the profession accepted that it was to give "honour unto our Law," and not "to dishonour themselves . . . by defending such Offendours," that those accused of treason had to go it alone and meet the test by their own wits.

The method of proceedings at a trial for treason was clearly intended to make counsel for the accused superfluous. The evidence was to be so clear and convincing that it was impossible to overcome, and the court was to ensure the legal sufficiency of the proceedings.¹¹¹ Such, at least, was the theory, but the practice may have been another matter. At her execution in 1685, Alice Lisle said that what she received from the court was evidence rather than advice.¹¹² It was likely to have been much the same throughout the earlier period.¹¹³

The absence of defense counsel would be most noticeable at the indictment of a fugitive accused of treason, for with the accused absent, no voice whatsoever would have been raised in his defense. With only Crown evidence, testimony, and argument presented, the likelihood of a *vera billa*, and thus of a declaration of outlawry, was a near certainty.¹¹⁴

IX. CONCLUSION

By the end of the medieval period, treason had become a unilateral breach by the vassal or citizen of his relationship with his king as sovereign. That treason was no longer based on a bilateral relationship involving reciprocal privileges and responsibilities can be found in the seven heads of treason memorialized in the Treason Act of 1352, for in every instance treason is defined as activity aimed against the king or the majesty of government.¹¹⁵ Later statutes, though they altered the scope of treason, confirmed the essential definition. Only when successful would such a breach not be

111. 3 COKE, INSTITUTES, *supra* note 14, at 137.

112. THE DYING SPEECHES OF SEVERALL EXCELLENT PERSONS WHO SUFFERED FOR THEIR ZEALE AGAINST POPERY AND ARBITRARY GOVERNMENT 26 (1689), cited in Bodet, *Sir Edward Coke's Third Institutes: A Primer for Treason Defendants*, 20 U. TORONTO L.J. 469, 476 (1970).

113. Bodet, *supra* note 112, at 471: "In the seventeenth century prosecuting attorneys customarily baited the defendant . . . and were more often joined than restrained by the presiding judge." See also the materials for trial procedure, *supra* note 105.

114. See, e.g., the true bill of indictment of Tyrone, Tyrconnell, and their fellow fugitives (1607) in Public Record Office, London, State Papers 63/223/2,1, and 2 CALENDAR OF STATE PAPERS, IRELAND, JAMES I 555. See F. Harris, *Matters Relating to the Indictments of 'the Fugitive Earls and their Principal Adherents'*, 18 THE IRISH JURIST (n.s.) 344 (1983); also, a further paper by the present writer is currently being prepared on the topic of this indictment.

115. I do not for a moment propose that the Act of 1352 was not the direct consequence of a reaction against the vagueness of and lack of precision in the law of treason as it existed prior to passage of the Act.

treason, because, if successful, the king had to accept the breach (John and the Magna Carta in 1215) or the breach resulted in the king's overthrow (Richard II by Bolingbroke, Henry IV, in 1399) or his own execution (Charles I by Parliament in 1649).

In the period under review, treason began in the economic setting of feudalism, it developed within the framework of the economics of contract, and its punishment was intended as payment by way of retribution for breach. As the feudal and early modern state was tied to the economics of feudalism, so too was the economics of feudalism tied to the law of treason. In time, as the economics of the old medieval world faced the reality of new and different circumstances, feudalism collapsed as the Middle Ages gave way to the modern. The ruin of what remained of the feudal land law was largely accomplished by the Restoration's Convention Parliament which abolished the incidents of tenure in chivalry in 1660.¹¹⁶ With the alterations of politics and society that came with the new age, treason as a concept began to change so that eventually ideology rather than economics comprised its principle characteristic.

116. THE TENURES ABOLITION ACT, 1660, 12 Car. 2, ch. 24.