THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES

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EDITOR'S PREFACE

'Treason', wrote Maitland,[1] 'has a history all of its own.' Nevertheless that history has not previously received connected and comprehensive study in the literature of legal history, and it is therefore with the greatest pleasure that my first duty as general editor of this series of studies is to commend to all those interested Professor Bellamy's survey of the subject at large over the span of the thirteenth, fourteenth and fifteenth centuries.

The history of the law of treason has diverse origins and its story many turning points. One of the most critical occurred in the period with which this book is concerned, that is, the Statute of Treasons of 1352. As Plucknett[2] has remarked, 'the history of treason in the middle ages is as distinctive as the nature of the offence. It is one of the very few crimes which were defined by statute during this period; and it is one of the equally few crimes whose scope was extended by "construction". Unlike treason, the medieval felony was (generally speaking) neither statutory nor constructive'.

But the clear difference between treason and felony is the outcome of time and of refinement by lawgivers and lawyers. The further back in time we go, the less distinct do the lines of difference appear and indeed in the feudal dawn they vanish away. Originally the idea of felony included much of what later became separate categories of treason, for in origin felony denoted a breach of feudal faith or fidelity on account of which the vassal's fee or tenement escheated to his lord. As the notion of felony was extended to the more serious kinds of crime, so the incidence of escheat multiplied; or we may with equal plausibility regard the widening of the incidence of escheat as extending the scope of felony beyond its earliest feudal context. Indeed if as a matter of historical development the legal effect dictated the classification, it is possible to see the points of definition as so many attempts to reach grounds of compromise between the conflicting claims of feudal escheat and royal forfeiture. Thus if the statute of 1352 can be regarded as 'a rude compromise',[3] then it bears some

[1] Pollock and Maitland, *History of English Law*, II, 502.
[2] *Concise History of the Common Law*, p. 443.
[3] Such was Maitland's view. Pollock and Maitland, II, 508. But Professor Bellamy, pp. 21–2, sees less force in the economic considerations of forfeiture.

resemblance to the concession made by King John in his Great Charter[1] where he promised that he would not retain the lands of those 'qui convicti fuerint de felonia nisi per unum annum et unum diem, et tunc reddantur terre dominis feodorum'. Here then, as Maitland believed, was one peculiarly strong incentive to formulate a law of treason, 'for if there was any crime which would give the offender's land not to his lord but to the king, that crime could not be a mere *felonia*'. So treason was felony but more than felony, and long after the categories had become divided, the lawyers moved by unconscious instincts of the past wrote both words, treason and felony, into their indictments. As late as the eighteenth century Blackstone,[2] after noticing that the words of the statute of 1352 provide that parliament may declare of future dubious crimes 'whether they be treason or *other* felony', remarks that 'all treasons therefore, strictly speaking, are felonies, though all felonies are not treason'.

It is clear that the general idea of treason and the particular understanding of the 1352 Act must 'accommodate what came to be known as petty treason'.[3] The Act specified as 'another sort' of treason the killing of a husband by a wife, of a master by his servant, and the killing of a prelate by his subject, secular or religious. But there was no inclusion of the killing of a feudal lord by his vassal or tenant. The omission has often been remarked. 'Perhaps', suggests Professor Milsom,[4] 'the original sense of felony was too well remembered'. Certainly royal forfeiture never reached into the last enclaves of the feudal world, the unfree or customary lands within the lord's manor, and this sanctuary of feudal society remained untouched, for as Hale[5] wrote long after feudal principles had been shut into the closed community of each manor, 'an attainder of treason or felony of a copyholder gives the king no forfeiture, but regularly it belongs to the lord unless special custom be to the contrary'. And that was, it seems, a general rule applicable to all treasons, greater or lesser. Now the lesser treasons set out in the Act gave escheat to the lord, not forfeiture to the king,[6] and as Professor Bellamy[7] reminds us, 'the

[1] Ch. 32.
[2] Comm. IV. 94–5.
[3] Milsom, *Historical Foundations of the Common Law*, p. 370.
[4] *Ibid.*
[5] *Pleas of the Crown*, I, 360.
[6] Other differences included the difference that petty treason was clergyable till 1497. High treason lost that privilege much earlier. Pollock and Maitland, I, 446: 'It is probable that already in the thirteenth century a clerk charged with

process of trial in cases of petty treason was like that for any other felony'. The difference lay in the mode of capital punishment. Thus in the account of a trial of a servant indicted for wounding and robbing his master as related in *Placita Corone*[1] at the end of the thirteenth century, the judge dwells on the treasonable nature of the offence, yet 'the prisoner is sentenced merely to be hanged, which he deserved for the theft alone, whereas had the case been regarded as one of completed petit treason, we should have expected some sort of additional punishment, such as drawing'. If the servant had killed his master, doubtless he would have suffered a traitor's death. But he did not; nevertheless the judge insists on his treason.

But these difficulties are of our own making. Treason later became a category of crime, or after the Act the lawyers came to think of two categories of treason, and there is a gap fixed between felonies and treasons. These categories however are the product of time and change. The idea of treason as a type of crime was only formed by degrees and the further one goes behind the Act so the entity fades and the list collected in the Act and in earlier texts becomes dispersed, and those parts which are attributable to feudal origins lose their identity in the original felony. The 'petty' traitor is guilty of aggravated felony. The homicides which are collected in the Act (apart from those striking at regal government) are merely those forms of aggravated or atrocious treachery to which the name of treason is attached for the sake of the severer

high treason, at all events with one of the worst forms of high treason, such as imagining the king's death or levying war against him, would in vain have relied on the liberties of the church'. In this connexion it is worth noticing that when Thomas Merks, bishop of Carlisle and courageous adherent of Richard II, claimed in 1401 (KB. Roll, no. 559, m.4, crown) that he was an anointed bishop and should not be arraigned before royal justices, the reply was: 'super quo dictum est ei per eosdem iusticiarios quod premissa in indictamento predicto contenta tangunt mortem domini regis et destruccionem totius regni Anglie et consequenter ecclesie anglicane, per quem se clamat privilegari, depressionem et subversionem manifestam, que omnia et singula alta et maxima proditio sunt et crimen lese majestatis, nec debet quisquam de iure legis auxilium petere nec habere qui in ea peccatum committit seu intendit committere . . .'. The justices may not have had in mind the phrase of D. 48.4.1.pr: 'Proximum sacrilegio crimen est quod majestatis dicitur', but the idea behind the concluding words has an interesting history in civilian and canonist literature. See (1969) 85 *Law Quarterly Review*, 472.

[7] Appendix II, p. 230.

[1] Selden Society, supplementary series, 4, 21–2, and Mr Kaye's comments at pp. xxxvi–xxxvii.

punishment, at the same time ensuring that they shall not be within the reach of royal forfeiture.

The Act of 1352 defined treasons and yet left open the limits of definition.[1] Into the statutory definitions went many different ingredients, both feudal and imperial. But the statutory definition was a legal and not a political definition. To borrow Professor Bellamy's words,[2] 'in England during the later middle ages there existed not one but two doctrines of treason side by side. One doctrine was the one which has been the concern of this volume, the law of treason as seen through the eyes of the king and his legal advisers. The other was the theory of treason of the barons and to a lesser extent of the people'. This other doctrine was founded on a notion of the unity of the nation, *rex* set against *regnum*, the king against the crown, and with this notion went the charges of accroaching royal power. But it was a doctrine only emerging in times of turmoil. '*Seditio regni*', to borrow the phrase in Glanvill,[3] is not in the Act of 1352, and the later lawyers repudiated with all their vigour 'the seditious doctrine of the Despencers' that 'homage and the oath of allegiance are more in respect of the crown than in respect of the king's person and are more closely related to the crown than the king's person; and this is evident because before the right to the crown has descended to the person, no allegiance is due to him'.[4] The lawyers who developed the doctrine of double capacities in the fifteenth century and further developed in the sixteenth century that doctrine with quasi-theological fervour[5] rejected its application to the law of treason.[6]

[1] The reserved power to declare new forms of treasons is one source of the parliamentary attainders of the fifteenth century, as Professor Bellamy demonstrates in Ch. 7. More generally, the reservation to parliament accounts largely for the later developments being legislative rather than judicial in character.

[2] Pp. 209–10.

[3] I. 2, also XIV. 1: 'Crimen quod in legibus dicitur lese maiestas, ut de nece vel seditione persone domini regis vel regni vel exercitus.'

[4] The opening words of the 'alleged' articles against Gavaston in 1308. The text is now set out in Richardson and Sayles, *The Governance of Medieval England*, Appendix VII, at pp. 467 and 469. For the authors' view on the authenticity of the text, *ibid.* p. 15. But whatever its authenticity, there can be no doubt as to its later influence and importance.

[5] E. H. Kantorowicz, *The King's Two Bodies, a Study in Medieval Political Theology*, explores the medieval background. A further study is in Richardson and Sayles, *The Medieval Governance of England*, Ch. VII, 'The Undying King'.

[6] The extremes to which such 'seditious doctrine' could lead can be seen in

The metaphysical reasoning of Coke in *Calvin's case*[1] that treason, being to 'intend or compass *mortem et destruccionem domini regis*, (which must needs be understood of his natural body, for his politic body is immortal, and not subject to death)' reflects in figurative language[2] the much more down to earth attitude of the medieval lawyers. As Maitland[3] wrote, 'the medieval king was every inch a king, but just for that reason he was every inch a man and you did not talk nonsense about him. You did not ascribe to him immortality or ubiquity or such powers as no mortal can wield. If you said that he was Christ's vicar, you meant what you said, and you might add that he would become the servant of the devil if he declined towards tyranny. And there was little cause for ascribing to him more than one capacity.' The medieval lawyers found some causes for contrasting the office of king and the office-holder, but practically none in the field of treason.[4] Still less did they indulge in artificial jurisprudence to the degree of raising the crown to the status of a corporation sole, though the king might be a part, the head, of a truly collective

the parliamentary justification for waging war against Charles I and indeed the theory upon which the king was accused of treason in 1649.

[1] 7 Co. Rep. at p. 10 b. And Coke adds, since the indictment concludes *contra ligeantiae suae debitum*, therefore 'the ligeance is due to the natural body'.

[2] The Elizabethan judges used metaphorical language of some extravagance. *Willion v. Berkley* (1561) Plowden 238, and the *Case of the Duchy of Lancaster* (1561) Plowden 212 reveal most clearly what Kantorowicz calls the 'monophysitic' leanings of the Elizabethan judiciary.

[3] *The Crown as Corporation*, Collected Papers, III at p. 246.

[4] Stephen, *History of the Criminal Law of England*, II, 254, n.2, says of the statute 11 Hen. 7, c. 1 that 'this statute may perhaps be regarded as the earliest recognition to be found in English law of a possible difference between the person and the office of the king, though nothing can be more vague and indirect than the way in which the distinction is hinted at by the words "king and sovereign lord of this land for the time being".' For a thorough review and reinterpretation of the purpose of this statute, see A. M. Honoré, 'Allegiance and the usurper', (1967) *Cambridge Law Journal*, p. 214. The author is surely correct in believing that the statute's phrase "king for the time being" does not mean a king *de facto*, but simply means the person who is king at any given time. But the author's view that Henry and his parliament contemplated within that description a future king whose title (on Henry's view) would be illegitimate, and who would therefore be a usurper, is very hard to accept. For reasons which cannot here be developed it seems more likely that the statute was thoroughly 'lancastrian' in intention and purpose, and that Henry meant by "king for the time being" himself and his successors whose titles were (from his own dynastic standpoint) legitimate. Coke and other lawyers reading the text in later ages interpreted it in a manner which turned allegiance in this context into 'a shifting sand'.

body, a corporation in aggregate. As Fineux C. J. said in 1522,[1] 'the parliament of the king and the lords and the commons are a corporation'. As was a lord or a commoner, so also was the feudal king a man, and while 'the practical application of the feudal theory of kingship in England . . . accounted for the development of representation', so on a more theoretical level, ideas of royal theocracy were kept in check as long as the king remained in any real sense a feudal overlord. 'The feudal side of the king made him, as it were, human. . . .'[2]

But if the feudal idea of kingship left indelible marks on the medieval law of treason, it cannot satisfactorily and fully account for the nature of treason as a crime. Feudal allegiance was essentially conditional and might be withdrawn by renunciation. And similarly a seizure by a feudal lord might be conditional upon a return to allegiance. When after the loss of Normandy King John seized the English lands of his Norman nobles who had adhered to the king of France, those seizures were conditional sequestrations, 'donec terrae fuerint communes', until the Normans shall have returned to their allegiance. It was only after long lapse of time and the loss grew permanent, that they hardened into full and irretrievable forfeitures.[3] Yet from the earliest times the Norman kings had endeavoured to impose allegiance without restriction to the feudal relationships of tenure. Homage or the act of commendation was not allowed to stand in the way, and even before liege homage had become owed to the king alone, the oaths of fidelity or allegiance had been exacted from all men.[4] The idea of ligeancy was at the core of the matter, as the lawyers recognized when every indictment for treason charged a breach of the duty of allegiance, *contra ligeantiae suae debitum*. So as a matter of public law and duty, homage became something of an irrelevance. 'Homage did not bind men closer to their lord or

[1] YB. Mich. 14 H. VIII, f. 3, pl. 2.

[2] W. Ullmann, *A History of Political Thought in the Middle Ages*, Ch. 5 (III), 'Kingship in England and Constitutionalism', pp. 145–58.

[3] The apocryphal statute *De Prerogativa Regis* c. 14, speaks of forfeiture. For this change and its significance, see Pollock and Maitland, I, 461–4, II, 501–2.

[4] Ganshof, *Feudalism*, pp. 165–6, writes that 'the idea behind these oaths was subsequently influenced by the idea of ligeancy, and one came to term all those who had taken them the liegemen of the king. In the reign of Henry I the crown insisted that a reservation of fealty should form part of the ordinary oath of vassalage'.

introduce a new concept of fidelity. Men followed their lord to the death—or betrayed him—after the Conquest as they had done before. Liege homage to the king stands apart; but with or without the ceremony of homage the duty of the subject would remain.'[1] The relationship of king and subject prevailed over that of lord and man, and the growth of the duty of allegiance both instilled and distilled the nascent ideas of nationality and alienage.

Professor Bellamy in summing up the sources of the medieval concept of treason concludes[2] that 'the English law of treason of the later middle ages was founded on a Germanic base but contained also much that was derived either from the law of classical Rome or from contemporary European practice'. The idea of treachery and betrayal was certainly at the centre, or at one of the centres,[3] but the further question arises, who or what is betrayed or is the object of treason. The answer of the medieval lawyers was, the king or regal government, but as this book truly shows, the answer however it was formulated in law reflected a political position, not merely a theory of kingship nor always the policies of particular kings, but the constant practical need to produce public order. The law of treason in the later middle ages was necessarily created as the feudal organization of society decayed and as the feudal state was replaced by sovereignty.

D. E. C. YALE

[1] Richardson and Sayles, *The Governance of Medieval England*, p. 112.
[2] P. 14.
[3] Maitland's geometrical figure which Professor Bellamy chooses as his opening words.

PREFACE

My interest in the history of medieval treason dates back ten years or more and sprang, I believe, from my early postgraduate training under Professor J. S. Roskell. I began serious investigation in 1961 and continued thereafter whenever the exigencies of teaching and academic administration allowed. Much of the present book was offered as a thesis for the degree of Ph.D. of the University of Nottingham. This work was supervised by Dr R. L. Storey, who gladly undertook the task of guidance in a field that was at first unfamiliar to him and did so in a manner which was encouraging, stimulating and most effective. His deep knowledge of the Public Records was an immense boon and his criticism, ever friendly, not less so.

My gratitude is also extended to Professor S. F. C. Milsom, whose valuable advice has saved me from more than one serious error, to the General Editor of this Series, Mr D. E. C. Yale, who pointed out certain omissions, and to my wife, for her continuous encouragement.

Although I have felt it necessary to go back as far as the laws of classical Rome by way of introduction, this book is concerned in essence with the period from the middle of the thirteenth century to the end of the fifteenth, the prelude to the great treason statute of 1352 and the aftermath. I feel no obligation to justify the importance of the theme. No one studying the constitutional, the legal, or the political history of later medieval England can fail to be impressed by the vital role of treason in the development of concepts and institutions in this period. Whether I have been able to do the subject justice is another matter.

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Carleton University, Ottawa J. G. B.
June 1969

ABBREVIATIONS

Bracton	*Henrici de Bracton de Legibus et Consuetudinibus Angliae*. References are to the edition of G. E. Woodbine (New Haven, 1915–42), unless stated otherwise.
Britton	*Britton*. Ed. F. M. Nichols (Oxford, 1865).
Cal. Chanc. Rolls	*Calendar of . . . Various Chancery Rolls*.
Cal. Close Rolls	*Calendar of . . . Close Rolls*.
Cal. Docs. Scot.	*Calendar of Documents relating to Scotland*. Ed. J. Bain (Edinburgh, 1881–4).
Cal. Pat. Rolls	*Calendar of . . . Patent Rolls*.
Camden Soc.	Camden Society.
Coke	E. Coke, *The Third Part of the Institutes of the Laws of England* (London, 1797).
Eng. Hist. Rev.	*English Historical Review*.
Fleta	*Fleta, II, Prologue, Bk. I, Bk. II*. Ed. H. G. Richardson and G. O. Sayles (Seld. Soc., 1953).
Hale	M. Hale, *Historia Placitorum Coronae: the History of the Pleas of the Crown*. Ed. Sollom Emlyn (London). The edition of 1778 has been used unless stated otherwise.
K.B. 9	King's Bench, Ancient Indictments (in the P.R.O.).
K.B. 27	King's Bench, Coram Rege Rolls (in the P.R.O.).
Mirror	*The Mirror of Justices*. Ed. W. J. Whittaker (Seld. Soc., 1895).
Pollock and Maitland	F. Pollock and F. W. Maitland, *The History of English Law before the time of Edward I* (Cambridge, 1895).
P.R.O.	Public Record Office, London.
Procs. and Ords.	*Proceedings and Ordinances of the Privy Council*. Ed. N. H. Nicolas (Rec. Comm., 1834–7).
Rec. Comm.	Record Commission.
Rot. Parl.	*Rotuli Parliamentorum*. Ed. J. Strachey and others (London, 1767).
R.S.	Rolls Series.
Seld. Soc.	Selden Society.
Stat. Realm	*Statutes of the Realm* (Rec. Comm., 1810–28).
Stow	J. Stow, *Annales or a Generall Chronicle of England*. Ed. E. Howes (London, 1631).

Trans. Roy. Hist. Soc.	*Transactions of the Royal Historical Society.*
Year Books	*Les Reports del Cases en Ley.* References are to the edition of Sawbridge, Rawlins and Roycroft (London, 1678–9), unless stated otherwise.
Year Books, Liver des Assises	*Le Liver des assises et plees del Corone* within the same edition of *Les Reports del Cases en Ley.*