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UNIVERSITY OF ALBERTA

Attacking the State:

The Levying War Charge in Canadian Treason Law

by

Bob Beal ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Arts

Department of History

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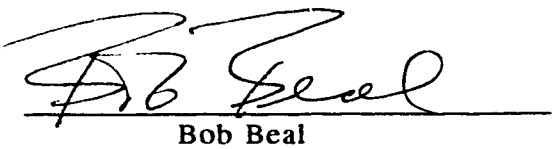

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Abstract

In the aftermath of the North-West Rebellion of 1885, a large number of people were convicted of treason, prominent personalities such as Louis Riel, Chief Poundmaker, and Chief Big Bear among them.

This study argues that historical investigation of the development of English and Canadian treason law, particularly investigation of the charge of levying war against the sovereign, shows that some of these people were wrongly convicted.

This study also argues that there can be seen, from Magna Carta to 1892, consistency in the application of the laws of treason and in the development of statute treason law, consistency that can be explained only by political circumstances.

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This study of the history of the laws of treason is the product of some of my previous work, but more so of the support and encouragement of friends and colleagues.

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In terms of the fine points of the analysis and presentation offered here, I owe the greatest debt to Professor Desmond H. Brown, of the University of Alberta, who became co-supervisor of this thesis. Des was severe in his criticism of my various drafts, employing not only his considerable knowledge of the development of English law but also perceptively commenting on (sometimes much to my embarrassment) my writing style and use of grammar.

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My son, Christopher, was a source of inspiration while I did this work. It is not merely coincidence that the initial final draft of this study was completed on his birthday.

Therefore, this work is dedicated to Cecilia and to Chris. They can take credit for what is right in this study; I am responsible for the mistakes.

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Chapter One

Introduction

Treason doth never prosper: what's the reason?
For if it prosper, none dare call it treason.[1]

Canada must have set the world record for treason prosecutions in the 19th century. If all the Canadian 19th-century treason trial reports were collected,[2] they would fill more volumes than do the British treason cases in that jurisdiction's State Trials.[3]

Even ignoring the treason prosecutions resulting from the War of 1812, which were on a specific charge outside the scope of this study, the extent of Canadian[4] treason prosecutions is extraordinary.

During the troubles of 1837-8, in Lower Canada more than one hundred people were tried for treason before courts martial, a perverse system of justice designed to secure the execution of traitorous enemies on the battlefield during a time when the level of rebellious activity meant that ordinary, civil courts could not function.[5] In 1866, about forty "Fenians" were put on trial in Toronto (and a number of others elsewhere in the Canadas) charged with "treason" under an act that bore little relation to the development of the British concept of treason.[6]

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[1] Harington, John, Epigrams, book 4, "Of Treason," 1613.

[2] This is being attempted by the Canadian State Trials Project at Carlton University.

[3] A full reference to Howell's State Trials is in the bibliography. In this study, full references are not given in footnotes but are found in the bibliography.

[4] The term "Canada" is used here to include all those territories and colonies that eventually became "Canada."

[5] See Chapter Seven of this study.

[6] ibid.

After the North-West Rebellion of 1885, about 70 people actually appeared for trial on treason charges. Quite a number of these people, this study argues, were wrongly convicted in law. They were convicted and sentenced to jail at least partly because the presiding judge simply did not understand the English laws of treason.[7]

Canadian historians have, of course, paid some attention to the 19th-century treason trials. The life of Louis Riel is supposed to have created, mainly around his trial, what has been called a "Riel industry." Any of the few who deal with the events of 1866 must mention the trials for treason, and so must those who attempt to analyze the events of 1837-8.

But while they have described events as they unfolded, few historians of 19th-century Canada have paid any attention to the application of the laws of treason — none has analyzed it thoroughly or even noticed the frequency of treason prosecutions. Beyond that, none has recognized the difference between the concept of English treason law and the way it was applied in 19th-century Canada.

According to the historians, people like Samuel Lount were executed for "treason" in 1838;[8] people like Chief Big Bear were jailed for "treason" in 1885.[9] Those are the bald facts, but Canadian historians have put very little effort into defining their terms, and "treason" is a particularly difficult term to define.

Judge Hugh Richardson in 1885 misdirected juries because he did not understand the legal definition of "treason." Richardson sent people to jail who were clearly not guilty in law of any offence. At least he did this because of what we may now consider an honest misunderstanding, or mis-education; subsequent historians have no such excuse.

What Judge Richardson in 1885 did not completely understand, and what historians since have avoided comprehending, is that English (hence Canadian) treason law has evolved along perfectly logical lines, but rooted in concepts that

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[7] See Chapter Eight of this study.

[8] See Chapter Seven of this study.

[9] See Chapter Eight of this study.

coalesced in the 14th century.

Treason is the first law of civilized society. It has to be, for, as James Fitzjames Stephen put it, "attacks upon the State itself when they succeed cease to be within the scope of the criminal law. They put an end if not to all existing law, at least to all the existing sanctions of law, and constitute a new point of departure for a fresh set of political institutions."[10]

Through the centuries in the English tradition, both prosecutors and defence lawyers consistently drove home to juries that treason was "the highest crime known to law." The prosecutors did that to show the horrific nature of the acts of the accused; the defence did it in hope that juries would think twice before convicting.

The greatest crime demanded the greatest punishment, in an age that saw death routinely applied to a wide variety of offenders. The official punishment awaiting the convicted traitor began with being drawn to the gallows. In the early period this meant simply being tied to a horse's tail and pulled over rough roads to the taunts and abuse of the crowds. Later, traitors were put on a mat for the ride, because too many had died on the way. At the gallows, traitors were hanged till near death, then cut down. They were disembowelled, watched their entrails burnt before their eyes, and then they were beheaded. Their bodies were cut into four pieces, one sent to each of the four corners of the kingdom to discourage other traitors.

Often, the official penalty, which was the usual sentence until the 19th century, was ameliorated somewhat. Sometimes, the penalty was made even more gruesome. Women and nobles escaped its full severity. Nobles were merely beheaded; women were simply burnt alive.

The treason penalty survived the grave. Traitors' property was forfeited; their heirs were disinherited.

In general, treason seems easy to define. A treasonous act must be one that

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[10] Stephen, History of the Criminal Law, 2:241-2.

strikes at the heart of at least the political institutions of a society if not at the basis of the social structure itself. Treason, as Stephen said, is at the root of all other law. It is the criminal charge that establishes the supremacy of the state, giving the state legitimacy to erect a system of law, giving life to all other criminal offences. But beyond what seems obvious, treason is a slippery concept. Within a single European nation, the idea of treason changed over time, as social and political conditions changed.

Like all other concepts in English law, treason is defined by a combination of statute (legislature-made) and common (judge-made) law. Judges interpret the statutes and shape the common law, but they do not make law arbitrarily. They rely on the text of legislative statutes, on previous judicial interpretation (precedents), and on the "custom of the country." In Britain, much more so than in Canada and in the United States,[11] the common law is considered the most important influence. In a sense, statute law is made when it seems that the common law has failed or has become insufficient. Britain still has neither a criminal code like Canada, which was the first nation in the British Empire to codify criminal law, nor a written constitution, of which the American example is the best-known. Statute law is fixed, at least until it is deliberately changed; common law tends to evolve.

In the English tradition, to a significant degree, laws regarding treason were among the first, or they were considered the most important, laws enacted by successive leglislative authorities or recognized by the judges and experts who described the common law. The writer known as Glanvill opened his famous 12th-century legal treatise with:

> Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of

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[11] Because the common law relies so heavily on precedents and authorities, a practioner needs ready access to large numbers of books and printed materials, where codified statute law diminishes that reliance. In the early days of European settlement of North America, this access was obviously limited and difficult. Therefore, it became more usual to rely on statute law, and this tendency appears to have become self-perpetuating. See, Brown, Genesis of the Criminal Code, c.3-4, pp. 38-91.

subject and peaceful peoples.[12]

The "great statute" of treason of Edward III is considered the first important statute in the modern tradition of British law.[13] The first legislature of the colony of Nova Scotia made a point of re-enacting all British treason law.[14] When the Thirteen Colonies first declared King George III their enemy, Congress did so in the course of establishing its first treason statute.[15] The first amendment to criminal law made by the legislature of Lower Canada concerned punishment for treason.[16]

Treason was also responsible, perhaps more than any other offence, for a great number of statutes and is responsible for much judicial attention in the interpretation of common law. The major authorities on English law tend to indicate that treason had more to do with changing and defining English common law and court procedure than did any other single offence. A modern expert on the development of English law wrote that treason was

> an offence with a peculiarly complicated conceptual basis. Treason was also unique in being subject to express standards of proof, on account of a succession of statutes that mostly required two witnesses.[17]

Treason is the only long-standing crime that might be considered to have a purely political basis. The relaxing or extending of statute treason law, and less obviously judicial interpretation of the law, depended on the strength of the state at the particular time and on to what extent those who controlled the state felt themselves politically threatened. Therefore, it is no surprise that Henry VIII was compelled to enact a variety of wide extensions to the treason law. It is no surprise

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[12] Glanvill, 1. This work is ususally attributed to Ranulph de Glanville, the justiciar of England, but there remains doubt about the authorship. See, Sosin, Aristocracy of the Long Robe, 11.

[13] 25 Edw. III, s.5, c.2.

[14] 32 Geo. II, c.13, s.1. (N.S.)

[15] Bradley Chapin, The American Law of Treason, 36-7.

[16] Brown, Genesis of the Canadian Criminal Code, 46.

[17] John H. Langbein, "The Criminal Trial Before Lawyers," 266.

that the major reforms of procedure in treason cases occurred after the upheavals of the Glorious Revolution. It is no surprise that the British made it direct treason to conspire to levy war in 1795, following the shock of the American and French revolutions. It is no surprise that the peculiar Canadian extension of treason law that became known as the Fenian Act was born when a very elitist government felt threatened by American republican incursions. It is no surprise that in the year of revolutions in western Europe, 1848, the British made intending to levy war a non-capital offence, thereby making treason conviction potentially easier.

Murder is always murder; robbery is always robbery. It is highly unlikely that a state would not prosecute a group of captured murderers or offer them a blanket pardon, except in the most extenuating circumstances. Not so with treason. The prosecution and conviction on treason charges often has much to do with distance in time from the treasonous events. During periods of upheaval, it is usual for the state to suspend civil rights and round up suspects on treason charges. As time elapses and the excitement dies down, many of those charged may be simply released, as the state loses interest in prosecuting and as it seems that juries become increasingly willing to acquit. If William Lyon Mackenzie had been captured in 1837, he likely would have shared the gallows with Samuel Lount and Peter Matthews — all three were equally guilty of treason. But Mackenzie escaped the government's net long enough to return home with impunity. In a similar case of political pragmatism, the British authorities in Nova Scotia during the American Revolution, while rounding up the usual suspects, were reluctant to bring alleged traitors to trial, or to impose the death penalty on those convicted, for fear of creating the problem they were trying to correct.

If the concept of 'treason' is itself complex and political, its legal component parts add complication. The treason charge that is the main concern of this study, 'levying war,' is often thought to be synonomous with 'rebellion,' but in its strict legal definition, it is not so simple, and it is particularly difficult to define it for ordinary citizens who compose juries. An experienced American prosecutor

who handled a high-profile 19th-century treason case told a jury:

> It is the business, no doubt, of the court to construe what is meant by the words 'levying war.' These words do not present to the mind a precise and distinct idea, like the words 'murdering a man,' or 'stealing a horse.' If the question, What is 'levying war?' were propounded distinctly and separately to every individual composing this assemblage, very few, even of the most intelligent among them, would have the temerity to answer without great hesitation and doubt.[18]

Much work has been done, primarily by judges and legal authorities, to explain and define the English laws of treason through history. From Bracton to Stephen, they have been concerned primarily with showing the consistency (and progress) of the English law. While they pay some attention to the social circumstances that would interest a modern historian, their very narrow concern was the law itself as defined by statute and interpreted at common law, often frustratingly non-chronologically. But even if they tended not to look at the development of the law quite as a modern historian would, their opinions and works are of prime importance.

Because English law operated so much in the common law tradition, the authorities and the judges who ruled in precedent cases actually set the law. The definitions in the Canadian Criminal Code are based directly on the work of one authority, James Fitzjames Stephen, whose aim was to raise the English law to a higher plane of organization and justice. Britain never adopted the principle of codifying criminal law, of creating statute law solely on the basis of what authorities said the common law was. Therefore, the modern Canadian treason law is quite different than that of Britain, and Canada has adopted in statute what in the British tradition has been only judicial interpretation. For these reasons, considerable attention is paid here to the authorities and precedents.

The historian must view the authorities and the old legal historians with considerable caution, putting them in their own historical environment. Most

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[18] Robertson, Trial of Aaron Burr, 1:499, speech of District Attorney George Hay.

authorities were judges themselves who not only knew the law but knew what they thought the law ought to be. Both the authorities and the legal historians have a disturbing tendancy to read into cases facts that appear questionable in the original records and to build construction upon construction.

The Great Statute of Edward III of 1352 is the basis of all subsequent statute and most common law of treason to the present day in what has become Canada. This study examines the development of those laws from the Edward III statute, focused in particular on the history of the treason charge of levying war against the sovereign contained in that statute.

Law has a fundamental historical basis. It may be argued that law is basically a shorthand for the history of relationships among individuals and of the relations between individuals and the state. Whether statute or common, all law has a political base, and is used politically. No law is as political as is treason law, and common law is by its nature more political than is statute law. One modern commentator on the development of early Upper Canadian law said that:

> It cannot be too strongly stressed, therefore, that especially where the law is unclear, judicial reasoning often boils down to making and justifying a political choice, and that even where the law is fairly plain, it is not unusual to find judges inventing new law, sometimes pretending for the sake of propriety that the innovation is merely a logical derivative of former decisions.[19]

Most often, the political choice involved in treason law, and the efforts to find propriety in previous decisions, involved interpreting the levying war charge in the Edward III statute. But it also should be noted that almost always judges were reluctant to make what appeared to be political decisions, and they had a strong tendancy, for the sake of their own positions, to stick to a close reading of the statutes and not to create too much new law.

There has never been a thorough survey of the history of British treason law. The major legal commentators, Edward Coke, Matthew Hale, James Fitzjames

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[19] Romney, "Re-Inventing Upper Canada," 90.

Stephen, et al., paid some attention to historical development, but their narrow concern was what the law meant for their own day. Even the major legal historians, Pollock and Maitland, Holdsworth, etc., gave surprisingly short shrift to the history that provided the background to the development of treason law. There are a few specific historical studies, of which John Bellamy's work on medieval and Tudor laws of treason is best-known, but none that attempt overall historical analysis to the modern period.

In a specific Canadian context, there has been no work on the laws of treason except as they have been applied in very specific instances. Here, historians and other commentators have often got the law badly wrong because of their lack of appreciation of its historical development, not to mention their lack of understanding of law and legal procedure.

Modern commentators deride the "old legal history" and propose a "new legal history" emphasizing the relationship between social conditions and the application of law.[20] But still, as John Bellamy noted, historians "have been far too happy to rely on the works of Coke or Hale and they have failed to put in sufficient spadework."[21]

The lack of work on the history of treason law is remarkable. More than any other crime, treason is historical, and of treason charges, levying war is the most historical. Treason statutes and judicial interpretation very often set the standard for the handling of procedure and evidence in other criminal law. Judges who tried treason cases almost invariably discoursed at length on history in their charges to grand and trial juries, much more so than they did in any other type of case. Because careless or unsuccessful treason prosecution could, for obvious reasons, itself promote treason, prosecutors usually tried to give juries the impression that their cases were solidly, soundly based in history, not simply based on the whim of

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[20] See, for instance, Susan Binnie, "Some Reflections on the 'New' Legal History in Relation to Weber's Sociology of Law."

[21] Bellamy, Law of Treason, 61.

a particular legislative act. Defending against treason charges, and especially the levying war charge, lawyers very often made heavy use of history, often arguing, in effect and technically improperly, that history showed people had a right to rebel against tyranny.

This study fills a significant gap in historical analysis of the most historical of criminal law, in tracing the development of the levying war treason charge from its inception to the late-19th century period in Canada.

Chapter Two

The Origin of English Treason Law

The importance and longevity of the Great Statute of Treason of 1352 is undoubted.[1] Through the centuries, judicial interpretation extended or narrowed the application of the three major categories of treason defined in the 1352 statute. From time to time, English and British statutes augmented the 1352 law. But, with one exception, none of the later treason statutes stood the test of time. British treason law today consists of the three main forms of treason the 1352 statute defined, with the addition of the 1795 act that made intending to commit treason a direct offence and which devolved into the treason-felony act of 1848.[2] American treason law is also essentially the 1352 statute, with the omission of the treason directly relevant to the sovereign and with the proviso that the treason law cannot be extended and must be construed very narrowly.[3]

Canadian practice differs significantly from both British and American. While the 1352 statute remains fundamental to some important aspects of Canadian treason law, since 1838 Canadians, with their passion for codifying offences, have extended in statute treasons that in Britain remain only treason by judicial interpretation and in one significant matter have created a new treason that has never been known to British law.[4]

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[1] By the British Short Titles Act of 1898, this is styled "Treason Act of 1351." But it became law in 1352, and historians almost invariably use that date.

[2] Archbold Pleading, 43rd edition (1988), c.21, ss.1-33.

[3] Constitution of the United States of America, article 3, s.3: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." The constitutional enshrinement of treason makes judicial extension virtually impossible.

[4] This is the so-called Fenian Act, first passed in Upper Canada in 1838, 1 Vic., c.3 (U.C.). It is discussed at length in Chapter Seven of this study.

The 1352 statute set out three categories of treason that form the basis of modern law: compassing (intending) or imagining[5] the death of the sovereign, levying war against the sovereign, and adhering to the sovereign's enemies.[6] Of these, the one that has been the subject of the greatest controversy, the most judicial construction (interpretation), and the most important additional statutes is clearly the levying war clause.

Both historians and legal experts recognize the importance of the 1352 statute. But the reasons for its enactment and its original purpose are not clear.

Some commentators see the statute as a result of the continuing struggle following the victory of the magnates over the king in 1215, that the Statute of Treason resulted from a compromise similar to the one that resulted in Magna Carta. Others see in the statute a deliberate attempt to rationalize English law, to make it more effective and more just. Neither of these explanations is sufficient.

Crown forfeitures, the seizure of property and the disinheriting of heirs, are key to much of the older analysis of the reasons for the 1352 statute. By Magna Carta, the king would hold estates seized from a criminal for only a year and a day, then they would go to the criminal's immediate overlord. But traitors' lands the king held in perpetuity.[7] Edward III, so the argument runs, needed money for his war in France and was construing a variety of crimes as treason in order to profit

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[5] In English treason law, the verb "to compass" strictly includes a combination of imagining and intending. This makes it an often confusing concept that has a complex relationship to the idea of "levying war" in treason law. It is no great leap in logic to conclude, as judges often did, that levying war against the sovereign amounted to an imagining of or intending (compassing) the sovereign's death. It was not a much greater leap to conclude that intending to levy war, which was not a treason offence in statute until 1795, amounted to the statute treason offence of compassing the sovereign's death because any war levied against the sovereign must almost necessarily carry with it the possibility (the compassing or imagining) of the sovereign's death. It was also possible, rarely, to be prosecuted for treason for simply "imagining" the death. Eleanor Cobham, duchess of Gloucester, was indicted for treason in 1441 specifically because she had, by astrology, predicted when the king would die, though there were deeper political motives in Eleanor's activities. Bellamy, Law of Treason, 126-7. And see, Alexander Luders' description of "compassing" in State Trials, 7:961.

[6] 25 Edward III, st.5, c.2. The statute is more thoroughly discussed later in this chapter, including the provisions other than the three main treason categories.

[7] Magna Carta, s.32.

from the forfeitures.[8] The magnates resented this, and forced on the king a very narrow interpretation of treason in return for their support of the war.

In a clear case of treason against the sovereign himself, the estate of the convicted person was forfeited to the sovereign. In a case of murder, the immediate lord would receive the estates. If the sovereign deemed what the magnates thought was a mere murder to be treason, the magnates' position was that the sovereign improperly received the benefit of the confiscated estates. An additional problem in this process was that the sovereign would remove land from magnate control to royal control. This was extraordinarily important as English society moved from feudal relations through centralized kingdom to modern state. Of the reasons for the 1352 statute, Pollock and Maitland wrote:

> The king wanted forfeitures; the lords wanted escheats [lands returning to the immediate overlord]. Some of the king's justices had been holding for treason mere murders and robberies — for example, the murder of a king's messenger — which should, so the magnates thought, bring lands to them instead of destroying their seignories. A rude compromise was established.[9]

May McKisack saw the forfeiture question in more narrowly legal terms. "The primary object of the statute was probably legal, rather than political, to establish a clear distinction between high and petty treason and so to settle the rules about forfeitures."[10]

But recent work tends to show that the feudal power struggle has been over-emphasized, that the magnates' quest for power was much more inconsistent and limited than was once believed and that the king's fundamental supremacy was only ineffectively challenged and remained intact even in times of upheaval.[11]

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[8] For an overview of the argument, see Bellamy, Law of Treason, 59-61.

[9] Pollock and Maitland, History of the English Law, 2:508.

[10] May McKisack, The Fourteenth Century, 257.

[11] See, for instance: the discussion of the relationship between chivalry and kingship in Kaeuper, War, Justice, and Public Order, 189-208; the chapter on "The Nobility" in Prestwich, The Three Edwards, 137-64; the chapter on "The Great Statute of Treasons" in Bellamy, The Law of Treason, 59-101.

The legalistic Whig approach to the 1352 statute is possible only by looking backwards. We know the statute was significant, that it represented a new departure for its day and set a new standard in English law. But this is because we can see that it became important. Its original creators probably had much narrower intents than we might perceive.

Far from being the "rude compromise" that Pollock and Maitland perceived,[12] the statute was an adept political exercise that gave all the parties to it some advantage. It was intended to address current concerns. Its long-term effects, though eventually substantial, were not well-recognized.

The early English concept of treason appears to come from Germanic and Roman sources, which sometimes conflict. The Germanic definition paralleled feudal ideas, a betrayal of trust of one's lord. The Roman idea was of a loss of majesty, an insult to public authority, in some sense a betrayal of the state.[13] Writing before Magna Carta, Glanvill, who was more concerned with civil than criminal law and more with procedure than definition, identified as treason only killing the king, betraying the realm, or betraying the army.[14]

About a century later, Henry de Bracton defined treason as:

> where something is done against the person of the king himself . . . where one rashly compasses the king's death, or does something or arranges for something to be done to the betrayal of the lord king or of his army, or gives aid and counsel or assent to those making such arrangements, even though what he has in mind is not carried into effect.[15]

Bracton wrote much more about treason than Glanvill did, but there appear to be some important differences between the two that may indicate a movement

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[12] Pollock and Maitland, History of English Law, 2:508.

[13] Bellamy, Law of Treason, c.1, "The Medieval Concept of Treason," 1-14.

[14] Glanvill, 171.

[15] Bracton, On the Laws and Customs, 334. Bracton is often seen as leaning, more than other treatise writers of the day, towards a Roman notion of law. See, Plucknett, "The Relations Between Roman Law and English Common Law"; Woodbine, "The Roman Element in Bracton"; Vinogradoff, "The Roman Element in Bracton's Treatise."

away from both the feudal and Roman concepts toward a view of the king as a complex combination of the only sovereign lord and the embodiment of the state.

Bracton quite deliberately focused treason as against the person of the king, betraying him or his army. Glanvill held treason to be betraying the realm or the army, and defined neither of these terms. The other apparent difference is that Glanvill said that it was treason to kill the king. In Bracton, the offence was not in the actual killing but in intending or imagining (compassing) the king's death. Bracton also added intending or conspiring to commit other acts of treachery against the king.

The author of the work known as Fleta, a major treatise of Edward I's day, followed Bracton very closely, but added Glanvill's betrayal of the realm.[16] The author of the treatise known as Britton, who claimed to be writing at the direction of Edward I, included compassing the king's death, not killing the king, and added compassing disinheriting the king. Britton said nothing about betraying the king or his army, but set out a general definition of treason that was wide even by feudal standards. "Treason consists of any mischief, which a man knowingly does, or procures to be done, to one to whom he pretends to be a friend."[17]

When Edward I came to the throne in 1272, the common law[18] of treason consisted of only one of the major charges under the modern law: compassing the sovereign's death. During his reign, the two other major charges, adhering to the sovereign's enemies and levying war against the sovereign, were added, to deal with Edward's Scottish and Welsh enemies. Under Edward I between 1282 and 1307, more than 20 people were executed as traitors, mainly Scots and most for levying

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[16] Fleta, 56, 57. Fleta and, below, Britton are often used as pseudonyms for the authors of these treatises, but there is considerable speculation about who actually wrote them.

[17] Britton, 40.

[18] The definition of common law and its difference from statute law is discussed in the introduction to this study.

war against the king.[19]

The levying war offence represents a significant movement away from the feudal philosophy of the sovereign as a kind of more-than-equal partner with his magnates towards a notion of sovereignty that saw the king as the single controlling and moderating force in society, as the personification of the society itself. While English society never completely accepted this latter, which is absolute monarchy, in treason law at least there is a distinct movement towards it.[20] In earlier times, a lord might fight against his king if he issued a formal denunciation of allegiance,[21] but this was no longer possible in a society that saw the sovereign not as the first among equals but as the primary legitimacy for the state.

Edward I developed two other aspects of treason law, both of which were seen as abuses of power and both of which have echoes to modern times: "accroaching the royal power" and prosecution by the "king's record."

By the use of the accroaching charge, almost anything that impinged however remotely on the king's authority could be construed as treason, and simple highway robbery sometimes was. One could "accroach" (usurp) the king's power by taking the king's law into one's own hands, by violating any of the king's laws, or by in any way hampering the king's ability to carry out his duties.[22]

The use of the king's record extended severe treason prosecution even farther. An accusation by the king himself (the "king's record," in other words, the king's recital of an accused person's "record") could not be defended against, for it was impossible for a subject to doubt the words that came out of the king's own mouth. It became a possibility that a traitor's death and forfeiture might be imposed only on the grounds that the king made an accusation that a crime vaguely had to

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[19] Bellamy, Law of Treason, 22-46. Bellamy made the point (p. 22) that while the treatise writers of the day did not refer to the levying war offence, the king "was busy construing the offence as treason."

[20] Discussed more fully below.

[21] Kaeuper, War, Justice, and Public Order, 229; Holdsworth, History of English Law, 3:461.

[22] Bellamy, Law of Treason, 62-74; Stephen, History of the Criminal Law, 2:246-7, 2:251-2.

do with accroaching on his power.[23]

The use of king's record paralleled an increase in the activity of itinerant royal courts, regarded in the countryside as an intrusion. The magnates favored feudal courts, which they would control. The gentry wanted a system of justices of the peace who would be more responsible to their local communities.[24]

In the reign of Edward's unpopular son, Edward II, the use of accroachment, king's record, and royal courts became more worrisome for his subjects. While Edward I had used the accroaching charge, John Bellamy maintains it was never used by itself but was always coupled with a sustainable count of levying war.[25] During Edward II's confused reign, a count of accroaching stood on its own.[26]

While in theory it might seem obvious that viewing accroaching the king's power as treason would enhance the sovereign's position, in practice accroaching was a treason charge more directed at a betrayal of the state, if the "state" (or the "crown") is viewed through feudal eyes as the bond between the sovereign and his magnates. In the early high-profile cases at least, accroaching as a treason charge was used more to prevent a weakening of the crown as a relationship between the sovereign and the magnates than it was directed at a betrayal of the king himself — that is, it was used to reinforce the magnates' position. It was especially useful in deposing royal favorites. During Edward II's reign, the nobles executed Piers Gaveston and the two Hugh Despensers on the ground that they accroached the royal power by placing themselves between the king and the nobles.[27] They

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[23] Bellamy, Law of Treason, 22-58; Prestwich, Three Edwards, 110; Plucknett, "The Origin of Impeachment," 56-66.

[24] Prestwich, Three Edwards, 232; Kaeuper, War, Justice, and Public Order, 176-81; Stephen, History of the Criminal Law, 1:85-116.

[25] Bellamy, Law of Treason, 36-7, 61-6.

[26] ibid., 64-6.

[27] State Trials, 1:21-3; State Trials, 1:23-38; Tuck, Crown and Nobility, 58-60, 91; Goodman, History of England, 160-2; Fryde, The Tyranny and Fall of Edward II, 47-9.

convicted Edward II of giving himself bad advice, an offence akin to accroaching.[28] After Edward III led the coup d'état in 1330, the new régime disposed of Roger Mortimer on accroaching charges.[29]

The overwhelming preoccupation for most of Edward III's reign was the war with France. The war provided the context for the king's domestic policy and was responsible for the new, balanced relationships among the king, the nobles, and the gentry.

After the financial and political crisis of 1340-41, Edward III effectively consolidated his regime and in the process created both a solid manpower and financial base for the war. Rather than the usual conscript or noble-raised army, Edward III used a volunteer, well-paid force. Direct taxation provided most of the money.[30]

During the late-1340s, the war was popular, especially after the major victory at Crécy in 1346. And, for many English, it was extraordinarily profitable. By 1352, Edward III had co-opted the nobles completely, by generously offering them much increased status and wealth resulting from the war. Even had he used wider treason laws to gain forfeitures, these would have made very little impact in waging an expensive war. In fact, Edward did virtually the opposite. He created new, profitable titles, provided land to go with them, and encouraged a form of land ownership that would avoid forfeiture.[31]

To make his taxation policies work, Edward had to rely on the gentry in the House of Commons. While this very much increased the Commons' power, and is

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[28] State Trials, 1:47-50.

[29] ibid., 1:51-4; Tuck, Crown and Nobility, 103; Goodman, History of England, 165.

[30] Tuck, Crown and Nobility, 139-47; Kaeuper, War, Justice, and Public Order, 15-77.

[31] Tuck, Crown and Nobility, 130-3, 139-47; Prestwich, Three Edwards, 200-13. On the creation of new titles: Prestwich, Three Edwards, 149-50; Tuck, Crown and Nobility, 152. The form of land ownership was the "use", a system by which trustees held the actual land ownership. See, Prestwich, Three Edwards, 154-5; Tuck, Crown and Nobility, 153. And see Brown, "Historical Perspective on the Statute of Uses." Prestwich wrote (p. 154) that "Edward III showed no reluctance to grant licences for enfeoffments to uses. He willingly co-operated with the magnates."

sometimes seen as the beginning of British parliamentary democracy, the relationship between the Commons and the king was a symbiotic one, in which Edward III very much retained the upper hand.

Much has been made of the use of Commons' petitions in this period to wrest concessions from Edward in return for Commons' support of increased taxation — the statute of treason resulted from one such petition. But the Commons never made support for new taxes conditional on the king granting their demands. Typically, the Commons granted taxes before the king responded to their petitions.[32]

By 1352, it appears that those who composed the Commons were pleased with the war, pleased with their new power, and pleased with their king. They did have one major concern that involved the use of the laws of treason. In the 1340s, a serious crime wave shook England, fueled partly by Robin Hood-style gangs. The Commons demanded that Edward guarantee law-and-order. In response, the king allowed his justices wide latitude while he was in France, which was most of the time. The royal justices tended to view almost anything that disturbed the peace while the king was abroad to be tantamount to levying war against him or at least to accroaching the royal power. It became again a distinct possibility that simple highway robbery would be construed as treason and conviction would occur merely on the king's record.[33]

To curb the royal justices and to limit the use of the accroaching charge with its wide possibilities for abuse, the Commons asked Edward to define treason precisely. The result was the famous statute of 1352.[34]

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[32] Prestwich, Three Edwards, 225-7; Tuck, Crown and Nobility, 149, 156-7; Goodman, A History of England, 170-1; Harriss, "The Commons' Petitions."

[33] Bellamy, Law of Treason, 100-101; Bellamy, "The Coterel Gang"; Stones, "The Folvilles of Ashby-Folville;" Keen, England in the Later Middle Ages, 154; Prestwich, Three Edwards, 233; Putnam, The Place in Legal History of Sir William Shareshull, 53. The best-known case of highway robbery construed as something close to treason was that of John Gerberge in 1348. See, Stephen, History of the Criminal Law, 2:246-7, and Bellamy, Law of Treason, 61-3.

[34] 25 Edw. III, st.5, c.2.

The 1352 statute essentially set out three classes of treasonous acts other than those directed specifically at the king's person. Some appear to have had been more directed at the state, such as compassing the deaths of or having sexual relations with some members of the king's family, killing the king's chancellor or treasurer or justices while they were working, and various counterfeiting offences. Killing one's master, one's husband, or one's prelate was treason in which forfeiture went to the immediate lord, not to the king (petty or petit treason). The statute also decreed that there might occur cases in which the acts committed were doubtful treasons, and these the judges should leave for Parliament's opinion.[35]

Those that appear to involve the person of the king, compassing his death, levying war against him in his realm, and adhering to his enemies, are the only charges of the 1352 statute that remain treasons to the present day.

The 1352 statute declared that that "ought to be judged Treason which extends to our Lord the King, and his Royal Majesty." The doctrine that the king's person and his office were inseparable was developing in the 14th century. But it is questionable whether the framers of the statute saw that the king and the state were one, that there could be no treason against the political state irrespective of the king. Legal historians debate this point, none thoroughly convincingly.[36] But in retrospect the statute represents a clear step along the road from feudalism to a more modern state dominated by the person of the sovereign and tempered by the growing strength of the gentry in the Commons.

The emphasis on the person of the king in the Edward III statute appears to

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[35] On Parliamentary declarations of treason, which are not discussed in this study, see Rezneck, "The Early History of the Parliamentary Declaration of Treason."

[36] See, for instance, Harris, "Law and Economics of High Treason." Harris argued that the 1352 statute defined treason "as activity aimed against the king or the majesty of government" (p. 107) which may be strictly true, though his use of the word "government" in this context raises questions. As noted above, the statute did appear to distinguish between offences against the sovereign's person and those against the majesty of the state, the old Roman notion. But only those against the person of the sovereign stood the test of time. Harris also argued (p. 108) that "treason as a concept began to change so that eventually ideology rather than economics comprised its principle characteristic."

demonstrate that those who drafted it did not conceive of treason against the political state, whether feudal or modern. But if so, they directly contradicted the feudal doctrine the magnates set out in 1320 that "homage and the oath of allegiance is more by reason of the crown than of the person of the king, and bound him [the subject] more to the crown than the person."[37] By "crown," the magnates did not mean the "state" in the modern sense, but in the sense of a compact between the monarch and his magnates. The "crown" was promoted as the "community," or the "commonality of the realm," and this is the way many historians describe it. But, in fact, the concept represents simply the idea that the king was the greatest magnate, not that he embodied the state. In the 13th century, "the corona was in fact the bond between the kingdom, in the sense of those barons who must be consulted (often called the community of the realm), and the king," John Bellamy wrote. "The crown was sovereign rather than the king."[38]

In any case, at least so far as the treason law was concerned, the philosophy that the state was embodied in the sovereign, that there was no "community of the realm," was firmly established by the end of the 15th century.[39] This is not to say that the English accepted a doctrine of absolute monarchy, that the state resided in the person of the sovereign. But the 1352 treason statute and its application clearly represented a movement away from feudal ideas towards a notion of sovereignty that saw the sovereign as key but whose power was tempered by the growth of the power of parliamentary institutions.[40] Certainly from the beginning of the 17th

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[37] This is from the indictment against the Hugh Despensers. State Trials, 1:25. It is noteworthy that killing the king was not treason. The offence was only compassing his death (of which the actual killing could be, and was, used as evidence), which seems to indicate a notion that the state and the king's person were inseparable.

[38] Bellamy, Law of Treason, 64.

[39] ibid., 98-100. Earlier, in 1399, the bishop of Carlisle allegedly used the argument that state authority resided only in the person of the king to oppose the deposition of Richard II. State Trials, 1:158-60.

[40] For an overview of the sovereign's place in English law, see Holdsworth, History of English Law, 3:458-69.

century onwards, judges were very careful to interpret consistently the three main charges of the 1352 statute as treasons against the sovereign's person. Levying war, for instance, was only treason if it was shown that the war was levied against the king himself, not in any way a private war or even one levied against the king's surrogates or representatives. Technically, it was not directly treason to wage war against the army of the English state, but it was treason to wage war against an army led by the English king. This may seem a very fine point, but it is a distinction judges consistently and clearly insisted upon, and it is most important in any discussion of the levying war count of the Edward III statute.[41]

Judges could, and often did, hold that some offences against the state and not directly against the sovereign's person were treason if by implication the offences, taken to their logical conclusions, would be offences against the sovereign's person. Therefore, for instance, waging war against the English army would be considered treason because, if the insurgents demonstrated some success, there was the possibility the king himself would appear to lead his army in the field. But these "constructive" (interpretive) treasons against the state rather than directly against the sovereign's person eventually demanded more careful prosecution and different standards of proof.[42]

The Edward III statute placed two important conditions on prosecuting treason. For conviction, accused must "be probably attainted[43] of open Deed by the People of their Condition." The open deeds of the statute came to be called "overt acts" (a direct translation of the original French) that demonstrated intent to commit treason. The intent could not be assumed, but had to be demonstrated by provable acts. The second condition, contained in the phrase at the end of the quotation, must

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[41] For the later philosophy of the sovereign's personal and political capacities, and how allegiance was due, see the discussion of Calvin's case in Chapter Three of this study.

[42] The important matter of constructive treason is discussed later in this chapter and in the following chapters.

[43] "Probably" in this context means "provably," which is clear in the original French. "Attainted" means convicted and subject to the forfeiture of property.

be assumed to guarantee that ordinary witnesses were required in treason prosecutions, that the king's record was not enough.[44] But shadows of the king's record would appear in the use of martial law against rebels taken in arms and in the use of parliamentary acts of attainder.[45]

The 1352 statute specifically excluded one class of crime from the law of treason. It was not treason if someone rode armed with others against another person for the purpose of killing, robbing, or kidnapping him. The statute thereby preempted the possibility of viewing highway robbery as treason, except by very imaginative constructions of the compassing or levying war charges.

What was left out of the 1352 statute was just as important as what was included. There was no mention, even by implication, of the charge of accroaching the king's power. Since this had been widely used in treason indictments, its exclusion must have been deliberate. But, though it could not be laid as a treason charge or provide evidence as an overt act, the philosophy of accroaching continued to have echoes to the modern period in the speeches of judges and prosecutors.[46]

As many commentators have pointed out, any statute definition of crime necessarily restricts the sovereign's power because it reduces his ability to make his own decisions case-by-case. There is no doubt that if there had been no pressing political necessity, Edward III would not have developed a statute of treason.

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[44] John Bellamy asserts that "a careful reading" of the statute shows that the phrase regarding being proved guilty of open deeds by ordinary witnesses applies not to the charge of compassing the king's death but only to levying war or adhering to enemies. Bellamy, Law of Treason, 122-3. But Bellamy's reading will not stand scrutiny, and judges always held that the overt acts provision applied to all three major treason offences. This is discussed in detail in Appendix I of this study.

[45] Parliamentary attainder was a method by which the sovereign could avoid treason trials and be virtually assured of successful prosecution. Bellamy, Law of Treason, 211-2. Rezneck, "The Early History of the Parliamentary Declaration of Treason," 498. Bellamy sees a direct relationship between the discredited prosecution by king's record and the summary execution of alleged traitors on the battlefield by martial law. Bellamy, Law of Treason, 177-205, 212; Elton, Policy and Police, 263, 270. And see, the appendix, "Martial Law," in Bellamy Tudor Law of Treason, 228-35.

[46] Accroachment did not entirely disappear from indictments until the mid-15th century and was the charge brought against the archbishop of York and others in 1388. Bellamy, Law of Treason, 95-6, 97; Tuck, Crown and Nobility, 189-95; State Trials, 1:89-124; Stephen, History of the Criminal Law, 2:251-2. Examples of accroachment language in later trials are cited below.

However, "passed at the height of Edward III's power and confidence," the 1352 statute "was a lean and lenient enactment."[47] While the Commons got what appeared to be a narrow definition of treason, the king agreed to a statute in which treason was defined mainly as acts against his own person, thereby distancing himself and his authority from the magnates.

While the statute of 1352 was designed to narrow the definition of treason, and did so particularly by excluding petty treason, accroachment, and, to some extent at least, highway robbery, the new law still provided the king and his justices much latitude. "Compassing the king's death" is obviously capable of wide construction, and judges did eventually interpret it very widely, and "levying war" was not defined, leading Bellamy to comment that "the king, however, had his own rules, which do not appear [in Edward III's day] to have ever been challenged. If the malefactors, who were ambushing travellers, had ridden in arms with banners displayed or shown some sign which had the same chivalric connotation, though not perhaps mere cote armure, then they could be taken as traitors and there would be no protest."[48]

The first clear use of the levying war charge of the 1352 statute was in the 1397 Parliamentary impeachment of the Duke of Gloucester and others.[49] The charge, coupled with accusations of accroachment, reads remarkably like a 19th-century indictment for levying war, but it is an exception. For at least the first two centuries of its existence, the Great Statute of 1352, especially the levying war charge, was remarkably little used in its strict sense.[50] The reason is simple.

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[47] Law Reform Commission of Canada, Crimes Against the State, 5. This is a partial paraphrase of Stephen, History of the Criminal Law, 2:250. The Law Reform Commission's paper contains a good overview of the development of treason law.

[48] Bellamy, Law of Treason, 95. Cote Armure was a particular kind of knight's tunic.

[49] State Trials, 1:125-36. For a discussion of the process of impeachment against peers, see Stephen, History of the Criminal Law, 1:145-65.

[50] The levying war charge was used, coupled with compassing and a variety of other charges, to deal with Cade's rebellion in 1450. Bellamy, Law of Treason, 107-8.

Though it is the foundation of all law and of the supremacy of the state, treason is such a political and difficult-to-define criminal offence that narrow definitions of it might be best not often employed. Acts that seem to threaten the security of the sovereign or government are often dubious as legal treason in themselves. It is only when they progress to their logical extreme that they become clearly treason. But it is in the interest of the state to prevent this progression, to nip potentially treasonous situations in the bud. Typically, in the early period this was done by avoiding the courts and relying on Parliamentary acts of attainder, by prosecution on construction of doubtful treasons that allegedly came from the old common law that survived the 1352 statute rather than by construction of the statute itself, or especially during the 15th century by developing wide definition of what constituted compassing the king's death under the statute.[51] It was also done by various attempts, particularly during the reigns of Henry VIII and Elizabeth I, to create new treasons in statute. These were most often variously clumsy attempts to make mere words overt acts of treason, or to secure the succession to the throne, or to deal with Henry VIII's marriage problems.[52] None of the statutes during this period, except those that attempted to regulate trial procedure, stood the test of time.

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[51] For a thorough survey of treason prosecutions from 1352 to 1485, see Bellamy, Law of Treason, c.5-6, 102-76. See also: C.J. Neville, "Law of Treason in the English Border Counties." In contrast, Bellamy says kings in this period "were happy to abide by the definition of treason embodied in the act of 1352" (p. 136), but most of the cases he cites contain quite imaginative constructions and include a variety of crimes that do not fall within even a wide meaning of the statute. Bellamy also makes the point (p. 141) that in the 15th century, "the crown was still able to do whatever was not definitely forbidden by statute or common law and there were no set rules on indictment at all." On attainder, see Bellamy, Law of Treason, c.7, 177-205.

[52] On words, see Thornley, "Treason by words;" Bellamy, Law of Treason, 116-23. On the statutes of Henry and Elizabeth, see Bellamy, Tudor Law of Treason, c.1-2, 9-82; Elton, Policy and Police, 276-81; Elton, Tudor Constitution, 59-86.

Chapter Three

The Edward III Statute in Practice

At times when those who held power felt the security of the state to be threatened, it was both difficult and unwise for the Crown to try to persuade judges to construct widely the statute of Edward III. It was in the short-term more practical to get Parliament to enact new treasons. But this did not work very well, either. It might serve to deal with a particular problem or rebellion, but publicly it was unpalatable. For instance, the government of Elizabeth I revoked treasons of earlier reigns only to find it had to re-enact them.[1]

In terms of the count of compassing the sovereign's death, W.S. Holdsworth remarked:

> The Tudor kings respected the law; and they were well aware that nothing could be more dangerous t › the security of their none too secure throne than any attempt to pervert it. It was for this reason that, during the first sixty or seventy years of the sixteenth century, many statutes were passed to extend the scope of treason, and very little is heard of any constructive extension of this clause of Edward III.'s [sic] statute.[2]

In terms of procedure, a statute of 1551-52 required two witnesses to prove treason.[3] These could be witnesses to different overt acts, but of the same charge of treason. Therefore, for instance, if someone were charged with treason for compassing the sovereign's death by conspiring to kill him and for levying war against the sovereign by shooting at the sovereign's soldiers and by attacking one of the sovereign's castles, a witness to the shooting and another one to the attacking would be prime facie (on the face of it) evidence of treason, for they were each

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[1] See 13 Eliz., c.1, which makes words treason.

[2] Holdsworth, History of English Law, 8:309; and see, Hale, Pleas of the Crown, 1:293.

[3] 5,6 Edw. VI, c.11.

testifying to overt acts of the same treason. But a witness to the conspiracy and another to the shooting would not by themselves satisfy the two-witness requirement because they were witness to two different treasons.

The two-witness rule may have been repealed in 1554.[4] There is considerable question about whether it was, with the authorities Coke and Hale disagreeing.[5] However, the Crown recognized early on the political dangers of convicting for treason on the testimony of only one witness, who might, it was feared, simply have a personal prejudice against the accused. While writing statutes to extend treason law to cover Henry VIII's various and unusual situations, Thomas Cromwell tried to adhere to the two-witness rule,[6] something that found a place in both the common and statute law of treason.

In the 1550s, attempts were made to define in statute the difference between riot and treason.[7] But these statutes did not last, and the matter was decided in a series of controversial judicial decisions on the levying war charge.

In the sixteenth century, there were two cases that judges and authorities since have held as declarative of the levying war count of the Edward III statute, though the history of the events that formed the background to the cases remains largely unexplored. Near the beginning of the century, an insurrection against wage-limiting legislation was held to be treason by levying war because, as Edward Coke later described it, "it was generally against the Kings [sic] Law, and the offenders took upon them the reformation thereof, which Subjects by gathering of power ought not to do."[8] This sounds very much like an accusation of accroaching royal power, especially because the action was aimed at one specific law.

The general rule that to be treason an action had to be aimed at what later

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[4] 1,2 Philip & Mary, c.10.

[5] Coke, Third Institute, 25-7; Hale, Pleas of the Crown, 1:298-300.

[6] Elton, Policy and Police, 308-9.

[7] 3,4 Edw. VI, c.5; 1 Mary sess. 2, c.12.

[8] Coke, Third Institute, 10.

commentators (from Coke to the present) called "a general public purpose" was set in 1597, when Richard Bradshaw and others were indicted for an attack on enclosures. There was no actual violence, but the accused were charged under a statute that made conspiring to levy war treason,[9] and the judges held that the crime was treason because the accused intended to pull down all enclosures. If the effort had been aimed only at a particular enclosure, or at a particular set of enclosures, it would have been riot.[10] This construction obviously provides a wide grey area. As James Fitzjames Stephen put it: "the difference between the commonest unlawful assembly and a civil war is one of degree, and no definite line can be drawn at which riot ends and war begins."[11]

The colorful and chequered career of the Earl of Essex came to an end in 1601.[12] Jealous of the success of his rivals at Elizabeth's court, and perhaps more than a bit unhinged, Essex led a foolish revolt in London in February of that year, proclaiming his loyalty to the queen and claiming that he was being persecuted. With about 200 followers, Essex fortified his house and began plotting his ascendancy and the downfall of his enemies. When several prominent members of the queen's council arrived to order him to desist, he arrested them. Then he marched on London, hoping the citizens would turn out to support him. Instead, the mayor organized forces against him, and Essex's uprising fizzled out. At his trial in the House of Lords, it was held that Essex's intent was not only to raise London in rebellion and seize the Tower of London, but also to get himself physically into the queen's presence to force her to grant his demands.[13]

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[9] 13 Eliz., c.1.

[10] Coke, Third Institute, 9, 10; Popham's reports, English Reports, 8:1227-8.

[11] Stephen, History of the Criminal Law, 2:268.

[12] Essex's career is covered in several books on the period. There is a short synopsis in Elton, England Under the Tudors, 469-73. The State Trials dates the case at 1600 and many histories repeat this mistake.

[13] State Trials, 1:1331-60; Moore reports, English Reports, 72:797-8. The two reports must be read together to get a full sense of what happened, especially to understand Southampton's involvement.

The synopsis of the indictment of Essex read at the trial makes it difficult to know with exactly which treasons Essex was charged. (Matthew Hale believed there was only one charge, that of compassing.[14]) The indictment refered mainly to "rebellion" as intending the death of the sovereign. Attorney-general and prosector Edward Coke said that Essex's attempt to get himself into the queen's actual presence amounted to a direct compassing of her death, that which "must needs be higher than the highest." Coke also appeared to say that levying war was constructive compassing the sovereign's death, or at least an overt act of compassing, and that Essex had actually levied war in order to seize London.[15]

Essex's guilt was not doubted. But for modern Canadian law, the more important case was that against his co-accused, the Earl of Southampton. The judges held that Southampton did not know that Essex's intent was a direct attack on the queen; he thought it was merely a private quarrel between Essex and his rivals. But because action was actually taken directly against the queen, he was equally guilty regardless of his own intent, that it "fuit auxi treason en luy [Southampton], quia ceo fuit rebellion en le Countee de Essex," the rebellion aimed at the queen in her own house, as it was reported.[16]

The obverse of this ruling must also hold: that if it had not been an action actually directed at the queen's person, but the logical outcome of which the judges construed as being directed at the queen, Southampton's intent would have had to have been proved. This is not as clear in the actual case as later commentators make out, but it is the beginning of the rule that in a constructive levying-of-war (rather than one directed at the sovereign's person) an accused's mere presence is not treason unless his intent is shown by an act of positive aiding and abetting, a rule that was most important in Canada in 1885.[17]

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[14] Hale, Pleas of the Crown, 1:138-9.

[15] State Trials, 1:336-8.

[16] Moore reports, English Reports, 72:798.

[17] See Chapter Eight of this study.

In the period 1608 to 1663, a number of important judicial interpretations were made that affected charges under the Edward III statute. Despite the great upheaval during this period, most of these cases had to do more with refining the understanding of the treason laws than with broadening them by wide construction.

The precedent of Calvin's case in 1608 set the law regarding natural and local allegiance and declared that the state was embodied in the king, that his private and public persons were not divisible.[18] Edward Coke, chief justice of the Court of Common Pleas, who wrote the best-known report of the case, recognized it as one of the most important precedents in English law and explicitly expected it to stand for all posterity.[19]

A subject owed natural allegiance, Coke wrote, simply by virtue of being born within the sovereign's realm. This allegiance was "absoluta, pura, et indefinita," that is it followed the subject wherever the subject travelled and could not be vitiated by subsequent acts of homage to a different sovereign. Local allegiance was "when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance."[20] (This did not apply to enemy aliens taken in war.[21])

The doctrine of local allegiance developed from the complex philosophy of sovereignty Coke set out in Calvin's case. Relying on precedents and authorities back to Glanvill, Coke revived a feudal notion of allegiance, that the sovereign was responsible to his subjects as they were responsible to him, contrary to the doctrine

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[18] Coke reports, English Reports, 77:377-411. Coke's report of the case is also included in the much more complete account in State Trials, 2:559-696, "Case of the Postnati." Robert Calvin's was a case testing whether a Scottish-born subject of James VI of Scotland could inherit English lands after his king became James I of England. The king himself instigated the suit after the English parliament rejected political union with Scotland. Bowen, Lion and the Throne, 300-1; Sosin, Aristocracy of the Long Robe, 62.

[19] The view of natural allegiance lasted until the naturalization acts of the late-19th century.

[20] Coke reports, English Reports, 77:383. Emphasis in original.

[21] ibid., 77:384.

of absolute monarchy. "Liegeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them."[22]

Coke added an important qualification that went to the heart of interpreting treason law. The sovereign had two capacities, Coke wrote, one a natural body subject to human frailties, the other a "politic body or capacity," which was "immortal, invisible, not subject to death, infirmity, infancy, nonage, &c." But allegiance was due to the sovereign's personal capacity and was "not due to the politic capacity only, that is, to his Crown or kingdom distinct from his natural capacity."[23] Therefore, under the Edward III statute, treason was against the sovereign's person; it was not against the state or the sovereign's government, except that the sovereign's political function was bound up in his natural life.

Three other cases from the period 1608 to 1663 illustrate two things: the fundamental necessity of proving actual overt acts illustrating treasonous intent and the difficulty of deciding whether mere words fell within the Edward III statute as overt acts. In 1615, a prelate was found guilty of treason for words written in a sermon that was neither delivered nor intended for delivery, with a strong dissent from some of the judges (including Edward Coke).[24] But in 1629, the judges held that spoken words were not treason unless they were relative to some other treasonous act,[25] and this opinion was reinforced in 1634 when it was held that a

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[22] ibid., 77:382. Though his Reports were relied upon as precedent for centuries, especially in terms of Calvin's case, Coke remains a very controversial figure in English legal history. In considering his judgements and reports, one has always to wonder whether Coke expressed what the law actually was or what Edward Coke thought it ought to have been. He is known to have distorted or falsified precedent to support his opinion. See c.4, "Coke and the Nature of Judicial Power," in Sosin, Aristocracy of the Long Robe, 53-74. For a more sympathetic view of Coke, see Bowen, Lion and the Throne. Also useful is Thorne, Sir Edward Coke.

[23] Coke reports, English Reports, 77:388-9.

[24] Peacham's case, Croke (Charles I) reports, English Reports, 79:711.

[25] Pine's case, Croke (Charles I) reports, English Reports, 79:703-4; State Trials, 3:359-68.

spoken threat to kill the king was an overt act of treason only if some other action were taken to effect the threat.[26] The case of the regicides in 1660 confirmed the obvious construction that killing the king was not treason under the 1352 statute, but it was evidence of an overt act of compassing his death.[27]

John Kelyng was one of the justices who presided in two cases in the 1660s that determined that intending to levy war was not treason within the meaning of the levying war charge of the Edward III statute, but it was an overt act of compassing the sovereign's death.[28] In one of these cases, the rule was also set regarding the difference between treason and "misprison of treason," the original meaning of which was concealing a treasonous plot but which later came to be a catch-all for various seditious offences. Kelyng wrote that

> where a person knowing of the design does meet with them, and hear them discourse of their traiterous designs, and say or act nothing; this is high-treason in that party, for it is more than a bare concealment, which is misprison, because it sheweth his liking, and approving of their design; but if a person not knowing of their design before, come into their company, and hear their discourses, and say nothing, and never meet with them again at their consultations, that concealment is only misprison of high-treason. But if he after meet with them again, and hear their consultations, and then conceal it, this is high-treason.[29]

While the cases just mentioned involve judicial interpretation (construction) of the 1352 statute, they also tend to indicate that even in the tumultuous times of civil war and restoration judges were concerned to provide strict and well-grounded interpretations of the treason law, not to apply it harshly without strong foundation. And after the restoration, the king and his ministers were very wary of the political consequences of using the law harshly against their defeated enemies, though they

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[26] Crohagan's case, Croke (Charles I) reports, English Reports, 79:891.

[27] State Trials, 5:947-1364; and see Vane's case, State Trials, 6:119-202.

[28] Kelyng reports, English Reports, 84:1061-3; Tonge's case, State Trials, 6:225-74; Vane's case, State Trials, 6:119-202.

[29] Tong's case, Kelyng reports, English Reports, 84:1061-2.

enacted strict new laws, particularly to protect the king and state from popery.[30]

Most of the treason and like cases of the 1660s involved kinds of conspiracy. But even when it came to acts of real violence, the judges found that though their concern was forestalling incipient rebellion, they had to apply the law with care.

In 1668, while the Dutch war was going badly and in the aftermath of the political upheaval that saw the king's chief minister unsuccessfully prosecuted for treason,[31] Peter Messenger and several others were indicted on a treason charge of levying war by destroying brothels, letting prisoners out of jail, and fighting soldiers and constables.[32] Chief Justice John Kelyng instructed the jury to find on matters of fact only, simply whether the accused were involved in the events. "Because we ourselves have seen a rebellion raised by gathering people together upon fairer pretence than this was," Kelyng decided that whether what Messenger and others did was treason was too important a question to be left only to himself and the other judge then on the bench. Therefore, Kelyng took the question to the Court of Exchequer Chamber (an assembly of all judges whose responsibility it was to decide major questions of law) to decide if the actions amounted to treason within the 1352 statute.[33]

The judges (with Matthew Hale dissenting in a 10-1 opinion) held that this was treason largely because the attempt was to destroy all brothels, which were illegal. Messenger and the others tried to take the law into their own hands and, in Chief Justice Kelyng's words, their actions "doth betray the peace of the nation, for every subject is as much wronged [by the brothels] as the king."[34] This sounds

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[30] Jones, Country and Court, 134, 142-3.

[31] State Trials, 6:291-512, impeachment of Edward, Earl of Clarendon, 1663-1667.

[32] State Trials, 6:879-914; Kelyng reports, English Reports, 84:1087-90.

[33] Kelyng reports, English Reports, 84:1088, 1089.

[34] State Trials, 6:884. Kelyng said much the same thing to the jury and in his report of the judges' decision. Kelyng reports, English Reports, 84:1087, 1090.

very much like a revival of the accroachment charge to deal with a big riot that, by the standards of the day, could hardly be considered "rebellion." The case has significant differences from that of 1597 resulting from a plot to pull down all enclosures, which case Kelyng mentioned to the jury, for the enclosure case has overtones at least of opposing public policy, where the brothels were illegal. During the trial, Kelyng and the prosecution did make some attempt to show that Messenger and his compatriots operated with "banners flying" (a green apron), under a rudimentary military organization, and with a very vague threat to attack the sovereign's palace, sops to the standard of the Edward III law that induced even the dissenting judge, Matthew Hale, to support the decision as precedent.[35]

Kelyng told the Messenger jury that wide construction of the levying war charge was necessary because "we are but newly delivered from rebellion, and we know that that rebellion first began under the pretence of religion and the law, . . . therefore we have great reason to be very wary that we fall not again into the same error, but it should be carried on with a watchful eye."[36] The Messenger decision was based on much flimsier reasoning than that of most other decisions of the type, but it remained one of the standard precedents in defining the difference between levying war and rioting into the 20th century.[37] The authorities ignore the political environment in which Kelyng himself said the decision must be placed, and the law both ignores the authorities where they disagree with precedent and ignores the history upon which the law was founded.

But while they adopted a wide definition of levying war in the Messenger case, the judges also set out precise standards of proof that would become important

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[35] Hale made the point that Messenger and the others were "assembled more guerrino" (in the posture of war). Hale, Pleas of the Crown, 1:153. Hale's dissent had been based on his belief that the case properly fell under the riot act, 1 Mary, c.12. Kelyng reports, English Reports, 84:1089. And see, Luders, "Considerations," in State Trials, 15:525, in which the point is made that Hale seems to contradict himself.

[36] State Trials, 6:884.

[37] The case is mentioned in editions of Archbold's Pleading up to 1938, but it was dropped sometime before 1988. Archbold's Pleading, 1938 edition, 1087; Archbold Pleading, 1988 edition, 2206.

in Canada in 1885. The jury found William Green, Thomas Appletree, and others had been "abettors in the tumult." The jury found that Edward Bedle (often spelled Bedell), Richard Latimer, and others "were seen acting in that tumult."[38] Kelyng told the jury that though he wanted to reserve judgement for the Court of Exchequer Chamber, he had no doubt that the actions of Messenger and the other accused were treason by levying war.[39] Of Green, Kelyng told the jury: "he was with them shouting, and casting up his cap: now the act that any one does in such a tumult is the act of all, if they all join together."[40] Of Bedle, he only told them: "Bedle says, he was there, but he was drunk, which is no sufficient exuse."[41]

This was not good enough for the judges who composed the Court of Exchequer Chamber. They decided, as Kelyng later reported, looking as much at the actual evidence as at the jury decision quoted above, "where the jury find a person was there among them, and find no particular act of force done by him, but only his presence, there it is necessary that they find he was present aiding and abetting."[42] By six to four, the judges decided there was enough evidence of aiding and abetting to convict Appletree and Latimer. But in a unanimous decision, with Kelyng apparently changing his own mind, they acquitted Green and Bedle

> because the verdict only finds that they were present, and finds no particular act of force committed by them, and doth not find that they were aiding and assisting to the rest; and it is possible one may be present amongst such a rabble only out of curiosity to see.[43]

In the cases of Green and Bedle, there was not a complete lack of evidence of assisting in the events. Kelyng's reasonable synopsis of the evidence had it that "Green was among them, casting up his cap, and hollowing, with a staff in his

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[38] State Trials, 6:891.

[39] ibid., 6:884-5.

[40] ibid., 6:885.

[41] ibid., 6:886.

[42] ibid., 6:912.

[43] ibid., 6:913-4.

hand" and that "Bedle was there, and being pursued by one of the king's soldiers, called out to the rest of the company to face about, and not leave him." Against Appletree and Latimer, there was relatively stronger evidence, which indicated that Appletree hit a constable and pulled down part of a house and that Latimer helped in breaking into the jail.[44]

In coming to such precise distinctions in these cases, the judges established the rule that mere presence was not evidence of an overt act of constructively levying war, but that intent to levy war must be proved by overt acts of actually assisting in furthering the general intent. This is starkly different than the decision in the 1601 case of the Earl of Southampton, whose intent was inferred from his mere presence during treasonous events held to be aimed directly, not constructively, at the sovereign's person.

In his discussion of what happened, Kelyng said that Green and Bedle were discharged because the jury had not specifically found acts of aiding and abetting against them. Much as he disagreed with the jury on the facts, Kelyng held to the view, so entrenched in modern law, that only the jury could find facts and that judges were restricted to applying the law to the facts the jury found. Having determined that aiding and abetting, not mere presence, was necessary, the judges could not substitute their own view of the facts of the case but had to rely on what the jury had determined. So, the two accused were acquitted solely because in the facts the jury found, there was no instance of the aiding and abetting the judges determined the law demanded, Kelyng said.[45]

But this explanation will not wash and is simply an excuse for judges overturning a jury verdict.[46] It is true that the jury did not find specific acts

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[44] Kelyng reports, English Reports, 84:1088-9.

[45] ibid., 84:1090-1.

[46] Kelyng was well-known for being hard on juries and probably had few personal qualms about overturning a jury's finding of fact, but he had to appear to stick to the rules. See, Beattie, Crime and the Courts, 407.

against Green, as it had against Messenger and others, but it did not find specific acts against Appletree, either, and the judges, in a split decision, found him guilty. Similarly, with Bedle. The jury considered him and Latimer together, found no specific act against either, but the judges distinguished between the two, acquitting Bedle and convicting Latimer. The judges must have made their decisions in the four questionable cases on the evidence, which was stronger against Latimer than against Bedle and stronger against Appletree than against Green.

At least one later judge relied on Kelyng to propound the doctrine that even slight evidence of aiding and abetting was enough to show treason in a constructive levying-of-war for Green and Bedle had been acquitted, he said, "not because of a defect in the evidence, but the imperfection of the verdict. The jury did not in their vedict expressly find that they were aiding and assisting, and therefore the Court could not supply the defect in the finding of the jury." But he ignored the fact, which Kelyng glossed over, that the judges had "supplied the defect" in finding Appletree and Latimer guilty, thereby drawing a fine line as to what degree of aiding and assisting would prove treason.[47]

By 1675, there was less turmoil in English politics. Parliament was exerting its authority and attempting a number of liberal revisions of the law including making judges less dependent on the Crown.[48] That year occurred a case similar to Messenger's, but with much different judicial results.

London weavers organized an attack on engine-looms that spread in a few days across the country. The protesters forced their way into houses, removed and burnt the offending looms that were lowering the value of their labor.[49] The significant differences between the weavers' activities of 1675 and the anti-brothel movement of 1668 were: the weavers' activities were much more widespread and

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[47] The judge was Chief Justice Thomas Parker in the 1710 Dammaree case. State Trials, 15:566. See Chapter Four of this study.

[48] Jones, Country and Court, 184-5.

[49] Hale, Pleas of the Crown, 1:*143-4.

included many more people; the weavers were not militarily organized quite as much as Messenger and his compatriots were. Otherwise, the two events appear to be quite similar in law.

The panel of ten judges asked to comment on the case were equally divided about whether what the weavers did was riot or treason by levying war. Five of the judges held that there had been enough force and arms to constitute war and that, most importantly, the weavers' intent "was to burn and destroy not the single engine-looms of this or that particular person, but engine-looms in general, and that not in one county only, but in several counties." The other five judges (Matthew Hale among them) thought that there was not evidence that the weavers had organized sufficiently armed and arrayed to constitute "a posture of war" and that the intent was not general as in the attempt at "pulling down all inclosures generally" but was "only a particular quarrel and grievance between men of the same trade against a particular machine."[50] Consequently, the weavers were prosecuted for riot, not treason.

Some of the judges arguing for a narrow construction of levying war in this case must have also been those who ruled that Messenger was guilty of treason. They drew a very fine line between attacks on a particular kind of house, brothels, and a particular kind of machine.

The judges in the weavers case apparently did not notice a salient difference between the two cases on the matter of the old accroachment charge which keeps rearing its head in levying war prosecutions. The weavers would have been happy to see engine-looms made illegal. In their riot, they were trying to persuade the state to change the law. Messenger and the others attacked an institution that was illegal, thereby, as it was noted in their case, taking upon themselves the sovereign's

[50] ibid., 1:*144-6. The panel must have been the Court of Exchequer Chamber, but Hale does not say so explicitly.

prerogative of enforcing the law.[51]

In the political science known as English common law, the Messenger decision became an important precedent for distinguishing between riot and treason by levying war. The weavers' case forms no part of subsequent law,[52] nor do the more cavalier treason prosecutions and judgements arising from the 1678-9 Popish Plot[53] and the 1683 Rye House Plot.[54]

Abuse of the law is more consistently responsible for legal reform than is fair application of the law. Magna Carta resulted from not only abuse of authority but of law; the Statute of Treason of 1352 resulted from fears of arbitrary application of the laws of treason. And so it is that the infamous Judge George Jeffreys deserves credit for some of the most enduring safeguards in British, American, and Canadian laws of treason.

Jeffreys' sweep through the west of England in the aftermath of Monmouth's rebellion of 1685 dispatched more than 200 people to traitors' deaths and about 800 to transportation after trials that were perverse even for the time.[55] After the Glorious Revolution of 1688, the English state became much more careful in prosecuting treason, partly as a direct result of Jeffrey's activities.[56] The

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[51] The prosecution in the 1710 case of Daniel Dammaree and others made this point. State Trials, 15:595-6.

[52] Stephen merely mentioned it in the context of his criticism of the Messenger decision. Stephen, History of the Criminal Law, 2:270. Archbold's listed those things that were deemed to constitute levying war, pulling down all enclosures or all bawdy houses, etc., but said nothing about destroying all engine-looms not being treason. Archbold's Pleading, 1886 edition, 835.

[53] State Trials, 6:1402-1512.

[54] ibid., 9:358-1022.

[55] J.R. Jones refered to Jeffreys' "savage judicial repression." Jones, Country and Court, 227-9. Several other historians have debunked much of the myth and tried to rehabilitate Jeffreys. Muddiman, ed., The Bloody Assizes; Keeton, Lord Chancellor Jeffreys, c.11, 301-331; Helm, Jeffreys, c.7, 127-145. However, strictly on the application of the law and Jeffreys' conduct in the courtroom, the negative opinion of James Fitzjames Stephen, while admitting that many of Jeffreys' rulings were more proper than his detractors claimed, is probably the correct one. Stephen, History of the Criminal Law, 1:411-4; 2:234.

[56] Phifer, "The Reform of the Use of Political Crime," 8.

committee drafting the 1689 Bill of Rights originally intended to include a clause limiting constructions of the treason law and regulating treason trials.[57] This was not done, but the House of Lords passed a bill that year to very significanly safeguard the rights of those accused of treason. The bill stipulated that two witnesses would be required to prove overt acts of most treasons (except conterfeiting), that the accused would have an English copy of the indictment one week before arraignment, that full access to counsel would be allowed,[58] that defence witnesses would be allowed, that a writ of error[59] for appeal would be granted automatically, and that private informations would not be allowed in treason cases. The Commons dropped the bill out of fear that it would particularly protect magnates against charges of treason.[60]

Despite the bill's defeat, there were strong indications that as soon as the revolution of 1688 had established itself, the public sentiment was that a stable state existed and had no good reason to cast a wide treason net.

In 1690, a jury found that Patrick Harding had intended to depose William and Mary, had intended to restore James II, had enlisted men to wage war against the Crown, and had sent men to help the king of France, then an enemy of England. This sounds like clear treason on at least two counts of the Edward III statute, of compassing the death of the sovereign and of adhering to the sovereign's enemies. And yet, the jury refused to find Harding guilty of treason — they asked the judges to say whether these facts they found were treason. Not suprisingly, the judges convicted Harding. Seven of the nine-judge panel said it was treason, one thought it

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[57] ibid., 94.

[58] At this time, a person accused of treason was not allowed counsel as a matter of right but only as a favor of the court, and the lawyer was not allowed to present the accused's evidence to the court or to cross-examine witnesses. See Stephen, History of the Criminal Law, 1:398.

[59] On writs of error, see Holdsworth, History of English Law, 1:215-6; Stephen, History of the Criminal Law, 1:309-10. Writs of error are discussed briefly in Chapter Eight of this study in the context of Canadian practice in 1885.

[60] Phifer, "Reform of the Use of Political Crime," 97-100.

was not, and one was not sure.[61] As well, during the 1690s, defendants began to press in the courtroom for the safeguards of the abortive 1689 legislative efforts, with some success.[62]

Then, in 1694, those involved in the so-called Lancashire (Jacobin) Plot were prosecuted for treason. The jury registered acquittals without leaving the box, and parliament expressed outrage about the prosecution tactics in those trials. Historian James Ray Phifer made a convincing case that there were gross gaps in the conduct of the trials.[63]

As a result, parliament in 1696 passed a treason trials procedure statute, a slightly watered-down version of the earlier Lords' bill.[64] This provided that prosecution must take place within three years after the events, that accused were to have a copy of the indictment five days before arraignment, that there could be no evidence of overt acts not laid in the indictment, that accused would have a list of the jury panel at least two days before trial, that an accused's counsel could address both matters of fact and of law, that accused could subpeona witnesses, that defence witnesses as well as those for the Crown would be sworn, and that two witnesses were required to prove each treason alleged but that these could be witnesses to different overt acts.[65]

The 1696 statute "completed the transition from Tudor-style judicial

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[61] State Trials, 12:645-6; Ventris reports, English Reports, 86:461-2; Holt reports, English Reports, 90:1274. The judges were concerned about the statute provision that the treason be committed against the sovereign "in his realm." But with even a narrow construction of that phrase, Harding would still have been guilty.

[62] See, for instance, the 1691 case of Richard Grahme, State Trials, 12:645-747, which covered most of the procedural issues. James Ray Phifer saw the 1694 Lancashire prosecutions as the real key to the later reforms and did not mention these other trials.

[63] Phifer, "The Reform of the Use of Political Crime," c.4-5, 141-251. Phifer saw the events very much in the context of the Whig-Tory power struggle.

[64] 7,8 Will. 3, c.3.

[65] By 7 Anne, c.27, s.14, the jury panel list and a list of Crown witnesses were to be provided 10 days before trial. Procedure was later amended so that the accused would also receive a copy of the indictment 10 days before trial.

procedures to essentially modern ones" in treason trials, James Ray Phifer wrote.[66] His research also showed that the statute promoted a

> new attitude of caution and moderation for which the Act served as both an emblem and a source. It was this attitude that soon demanded — by pressing for both new laws and a new approach to trials — greater fairness even in judicial proceedings to which the Act did not apply. And, perhaps more important still, the new attitude permanently changed the political community's concept of the role of treason.[67]

During Elizabeth's reign and more so during the 17th century, judicial constructions of the levying war and compassing charges under the 1352 statute began to definitively set the law for the modern period. Indictments became much more standardized and, with the reforms of the 1690s, stricter and much fairer procedure became much more usual.

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[66] Phifer, 286. James Fitzjames Stephen disagreed that the 1696 statute had a major effect. Stephen, History of the Criminal Law, 1:416-7. But Phifer made the more persuasive case.

[67] Phifer, 287-8.

Chapter Four

Developing the Concept of Levying War

At the opening of the 18th century, the statute of Edward III remained the foundation of English treason law. Procedural rules had restricted its use, and judicial construction had extended its definitions of treason. But there remained wide grey areas in the statute's application, and with these 18th century judges and prosecutors grappled.

The distinction between riot and levying war was again tested in 1710, as was the issue of presence at a constructive levying-of-war. Daniel Dammaree, Francis Willis, and George Purchase were indicted for treason after riots aimed at destroying religious dissenters' meeting houses. These were the first major treason trials to resemble closely modern trials, with the active participation of lawyers in all aspects of the defendants' cases, following the procedural reforms of 1696. Although they had been retained only late the night before the first trial, the lawyers, John Darnell and Edward Whittaker, mounted a strong defence, citing in detail all the appropriate precedents.[1]

The defence urged that the riots did not amount to levying war. These cases differed significantly from the Messenger case in that the anti-dissenter rioters could hardly have been said to have organized in a military manner and a general intent against all dissenting meeting-houses was unclear — the rioters attacked only two of them. Chief Justice Thomas Parker quickly took a conservative view for a wide construction of the meaning of levying war.

Dammaree was charged with attacks on only two meeting-houses, Parker noted, but the accused had said that if it were up to him, all meeting-houses would

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[1] State Trials, 15:521-702.

be destroyed, and after attacking the first one, Dammaree encouraged the rioters to go to the second one. That was enough to prove a general intent, tinged with the old accroaching charge, because "it is taking on them the royal authority; nay, more, for the queen cannot pull them down till the law is altered."[2] Parker took a distinct thin-edge-of-the-wedge view of interpreting levying war. Of the Messenger brothel case, he said: "the general intention to pull them down all [sic] is the treason: for if those that were concerned for them would defend them, and the others would pull them down, there would be war immediately."[3]

The defence had not argued strongly against this construction of levying war, and when Parker's view became clear, they bowed to it, allowing the judge to direct the jury specifically that the anti-dissenter riots amounted to levying war within the meaning of the Edward III statute.[4] Later authorities, especially James Fitzjames Stephen, disagreed strongly with the court's view of levying war,[5] but they ignored the main line of defence, which was not on the definition of levying war but on the evidence of aiding and abetting.

In all three of these cases, the defence submitted strongly that an accused's mere presence at a constructive levying-of-war was not enough — an individual's intent had to be proved by overt acts of aiding and abetting. This was quite different than in a case of direct levying-of-war, that is where the actions fell squarely within the statute definition of war taken directly against the sovereign's person and judges held that an accused's intent to levy war could be inferred from his mere presence. A constructive levying-of-war was one in which judges construed that if the actions were taken to their logical conclusion they would result in war against the sovereign. This latter demanded additional proof of intent.

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[2] ibid., 15:609, 610.

[3] ibid., 15:607-8.

[4] ibid., 15:649, 664.

[5] Stephen said Parker's ruling was "the most severe ever decided upon this point." Stephen, History of the Criminal Law, 2:270.

While there was no doubt about the riots, the defence lawyers for Dammaree and the two others argued the evidence was not clear that their three clients had actually participated or assisted, therefore there was doubt about their intent to levy war.[6]

The defence lawyers again ran into the conservative view of Justice Parker, but they were undeterred. While applying the rules very strictly, Parker appeared to agree with the fundamental point. Parker refused to accept the Bedle and Green decisions in the Messenger case as precedent, following Justice Kelyng's view that the judges had found a defect in the verdict and not in the evidence in that case. Therefore the Messenger decision could not apply to weighing evidence as far as Dammaree, Willis, and Purchase were concerned. The judge used as precedent the Southampton decision in the Essex case, which involved a levying-of-war directly at the queen's person. But he did this to show that an accused need not be party to the original intention to levy war, not to say that mere presence was enough in a constructive levying-of-war. Though it was not necessary to show that the three accused had understood the original intent of the riots (which the defence had submitted was necessary) and although not accepting the Green and Bedle decision, Parker carefully instructed the Dammaree jury that acts of aiding and abetting had to be found.[7]

On the basis of the judge's instructions, the jury found Dammaree guilty of treason by constructively levying war.[8] Another jury found Willis not guilty, after the judge in his summation cast doubt both on Willis' active participation in the riots and even on his presence.[9] The case of George Purchase, who was undoubtedly present at the riots, gave the jury and the judges much more trouble.

Purchase had stumbled out of a bar, dead drunk, into the riots. Caught up in

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[6] State Trials, 15:564-8, 15:584-9, 15:638-9.

[7] ibid., 15:566, 605-10.

[8] ibid., 15:596-614.

[9] ibid., 15:646-52.

the excitement, he shouted his offer to lead the rioters, then pulled his sword and fought briefly and very inexpertly with a soldier on horseback. The jury found those facts, but said they were mystified as to whether those actions amounted to treason. Parker asked the panel of judges who formed the Court of Exchequer Chamber to make the decision. Three of the judges dissented, but the majority found that Purchase was guilty of treason, not because he was present but because there was sufficient evidence of his aiding a constructive levying-of-war. As might be expected, his being so drunk he had no idea what he was doing (which the defence emphasized) did not exculpate him because he had got drunk of his own free will. The judges appear to have put most emphasis on his positive acts of drawing his sword and attempting to fight one of the queen's soldiers. What the judges did in the Purchase case, as their predessors had done in the case of Messenger and his compatriots, was establish distinctly that mere presence did not prove treason in a constructive levying-of-war, though courts might rule that very slight evidence would prove aiding and abetting and convict a defendant of treason.[10]

During the decades after 1710, the English state found little necessity to resort to treason prosecution. With the exception of the continuing Jacobite problems and with parliamentary power well-entrenched, until near the end of the 18th century, England was a stable country. The government responded swiftly to unrest as the Hanovarian dynasty was established in 1714, suspending habeas corpus and sending troops to occupy Oxford.[11] But the treason laws were little used. Instead, parliament passed a new riot act.[12] For the first sixteen years of George II's reign, not a single treason prosecution is reported in the State Trials.[13] The leader of the Edinburgh riots of 1736 was prosecuted for "mobbing, murder, and

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[10] ibid., 15:651-702.

[11] Churchill, The Age of Revolution, 106-7.

[12] 1 Geo. 1, st.2, c.5. Treason was the charge in the parliamentary impeachments of 1716 and in the trial of Francis Francia the same year. State Trials, 15:761-994. There were several treason trials in 1746, companions to the M'Growther case, discussed below.

[13] State Trials, v.17.

facts alleged amounted to treason.[14]

With the 1714 riot act, James Fitzjames Stephen said that the difference between levying war and riot was settled once-and-for-all, that events such as the anti-dissenters' riots of 1710 could no longer be construed as treason.[15] Perhaps interpretations of levying war such as Justice Parker's in 1710, quoted above, which would make almost any criminal act treason if there were the possibility of public resistance to it, were limited by riot legislation. But there still remained obviously a very thin line between riot and treason. It was, and remains, a line that must be drawn neither at the whim of the prosecution nor by strict interpretation of the law. It is drawn by politics, by the apparent security of the state and those who control it at the moment it becomes necessary to draw the line.

A point that has always been overlooked is that in all the cases that supposedly set the difference between riot and levying war, the Messenger and Dammaree decisions and subsequent decisions, there was a more important and more argued issue. It was the question of whether mere presence constitutes an overt act of constructively levying war. The authorities and commentators have overlooked it presumably because the question is likely to affect few accused. It is much more important to distinguish between riot and treason because the rule set there will affect whole groups of accused. The fact is that, even in times of disorder, the state rarely tried for treason people who were merely present when the events occurred. Almost always, the Crown had at least some scrap of evidence to show that they acted according to the general design, even though it was accepted that in a charge of levying war directly against the sovereign a person's mere presence was evidence unless the accused proved he was innocent of the intent. Most often, it was the supposed leaders, not the rank-and-file, who were prosecuted.

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[14] ibid., 17:993-1004.

[15] Stephen, History of the Criminal Law, 2:271.

assumed in a direct levying-of-war unless the accused could show he was present only because of a fear of death. Mere compulsion or a fear of loss of property was no exuse in a direct levying-of-war. Alexander M'Growther's defence for joining Bonnie Prince Charlie's invasion of England was that a Jacobite leader had threatened to burn his property, then forced him to join the invading army. Justice Michael Foster reported that the court ruled M'Growther's duty was to escape as soon as possible, that he was guilty if he remained with the army under any condition except that of constant fear of death. But Foster also said, essentially, that M'Growther would have been guilty in a constructive levying-of-war because not only had he remained with the army but voluntarily accepted a commission in it, thereby assisting the Jacobite levying-of-war.[16]

By the 1760s, British laws of treason by compassing the sovereign's death and levying war against the sovereign were well-established. Though William Blackstone wrote in this period, the most-often cited authority, along with Matthew Hale, is Justice Michael Foster in his Discourses.[17] To distinguish between riot and treason, the main point, Foster wrote, was "Quo Animo did the Parties Assemble?"[18] He defined constructive levying war as:

> Insurrections in order to thrown down All inclosures, to alter the Established Law or change Religion, to inhance the Price of All Labour or to open All Prisons, all Risings in order to effect these Innovations of a Publick and General Concern by an Armed Force, are in Construction of Law High Treason, within the Clause of Levying War. For though they are not levelled at the Person of the King, they are against His Royal Majesty. And besides, they have a

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[16] ibid., 18:391-4; English Reports, 168:8. Foster discussed this case in his Discourses, 216-7. The precedent relied upon was the Oldcastle case. Hale, Pleas of the Crown, 1:50.

[17] Foster's Reports are in English Reports, 168:1-102. His Discourses, originally published with the Reports, have become extremely difficult to find, but the first and second editions of them are in the microfilm series The Eighteenth Century, R. 3471, no. 03; R. 3499, no. 04. Pagination is the same between the two editions, the only substantial difference in text being that the second edition omits much of the capitalization contained in the first.

[18] Foster, Discourses, 208. Emphasis in original.

> all Property and all Government too, by Numbers and an Armed Force. Insurrections likewise for redressing National Grievances, . . . or for the Reformation of Real or Imaginary Evils of a Publick Nature and in which the Insurgents have no Special Interest, Risings to effect these Ends by Force and Numbers, are by Construction of Law within the Clause of Levying War. For they are levelled at the King's Crown and Royal Dignity.[19]

The compassing treason charge included conspiring to imprison or depose the sovereign, Foster said, because "experience hath shewn that between the Prison and the Graves of Princes the distance is very small."[20] Levying war could be an overt act of compassing, and so could conspiring to levy war if war were actually levied directly against the sovereign. But a conspiracy to levy war constructively was not treason under either charge of the Edward III statute.[21] Writings could sometimes be laid as overt acts of treason. Published writings, being better capable of proof, would amount to overt acts, but Foster cautioned they should be used carefully. Unpublished writings could only be used if there were shown a direct relationship between them and a treasonous purpose.[22] Foster also cautioned as to the application of the two-witness rule, saying that the witnesses' evidence had to be to overt acts and not to collateral facts, and that while the evidence of the two witnesses might be to different overt acts they had to be to the same treason.[23] He also said that evidence could not be given of any overt act not laid in the indictment, but that evidence of what might be considered additonal overt acts might be led if it constituted direct proof of those acts upon which the accused was indicted.[24]

In 1781, the questions of the difference between levying war and rioting and

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[19] ibid., 211. Emphasis in original.

[20] ibid., 196.

[21] ibid., 197, 213.

[22] ibid., 198.

[23] ibid., 236-7, 240-2.

[24] ibid., 245.

Lord George Gordon led at least 20,000 people to Parliament in support of their petition for the repeal of a law relaxing restrictions on Roman Catholics. Gordon's petitioners became a mob that rioted for a number of days and, as James Fitzjames Stephen put it, attempted to burn down London. There is no doubt that Gordon organized the petitioners for their assault on Parliament and that he was present when the rioting began.[25]

Thomas Erskine, Gordon's lawyer, argued strongly that the petitioners' actions in which Gordon was involved did not amount to levying war because their original intent was to demonstrate their opposition to the particular law, not to compel its repeal by armed force. He also argued that Gordon bore no personal hostility towards Parliament but that he attended the riots to try to calm his followers, to get them to voice their opinions peaceably.[26]

Chief Justice Lord Mansfield, following Michael Foster closely, ruled that an attempt by force to compel the repeal of a law was a constructive levying-of-war under the Edward III statute. He then carefully instructed the jury that they should first consider whether the rioters had that aim.[27] If they did, the jury had to decide whether Gordon

> incited, encouraged, promoted, or assisted in raising this insurrection, and the terror they carried with them, with the intent of forcing a repeal of this law?
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> . . . For if either the multitude had no such intent, or supposing they had, if the prisoner was no cause, did not excite, and took no part in conducting, counselling, or fomenting the

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[25] State Trials, 21:485-652. Stephen, History of the Criminal Law, 2:272-4.

[26] State Trials, 21:587-621. James Fitzjames Stephen was wrong in saying that this second point was the only one Erskine used. Stephen, History of the Criminal Law, 2:273-4. While, as Stephen said, Erskine did not try to shake the doctrine of constructive levying-of-war as set out in the Dammaree case, and while he seemed to agree that subsequent actions of the rioters would fit that definition, his point was that the original actions of the rioters, the only actions that formed the basis of the charge against Gordon, did not fit the definition.

[27] State Trials, 21:644-7.

insurrection, the prisoner ought to be acquitted.

Following Erskine's vigorous defence and Mansfield's careful instructions, the jury acquitted Gordon.

The American and French revolutions raised the spectre of republicanism in Britain, and this exposed the major deficiency of the Edward III statute: the difficulty of prosecuting as treason conspiracies to levy war. In Foster's view, this could be done only if war were actually levied (which would usually make conspiracy charges redundant) or if a direct attack on the sovereign's person was what was contemplated. Any other conspiracy to levy war had to be prosecuted as constructively compassing the sovereign's death.

The issue was dealt with in 1794 at Edinburgh in the cases of Robert Watt and David Downie[29] and then at much greater length in the trials of Thomas Hardy and John Horne Tooke at London.[30] The prosecutions resulted from the activities of the Constitutional Society and the London Corresponding Society, which were agitating for universal suffrage and annual parliaments. The prosecution argued that the societies' political activities were a cover for a plot to depose the king and establish a republic.

Downie's lawyer, Robert Cullen, argued very carefully for a narrow application of the Edward III statute. "With respect to constructive treason in general, I must beg leave to remark, that in its very nature, it is of a dangerous tendancy, and such as ought never to be listened to, nor admitted, without at least the utmost caution and circumspection."[31] He followed Foster closely in submitting that conspiring to levy war constructively was not treason. The prosecution countered that intending to depose the sovereign did come within the meaning of

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[28] ibid., 21:647.

[29] ibid., 23:1167-1414, 24:1-200.

[30] ibid., 24:199-1408, 25:1-748.

[31] ibid., 24:125.

In all the 1794 trials, the real difference between the prosecution and defence was much more on the evidence than specifically on the law, something that is difficult to see without close examination. The prosecution tried to make out a case that the accused intended to depose the sovereign, or at least their actions constructively would lead to that conclusion, putting the crime within the statute. The defence tried to say that the best the prosecution could do was show a conspiracy to levy war constructively, which was not treason. James Fitzjames Stephen later commented: "that there was a failure on the part of the prosecution to prove any such intent [as deposition] on the part of the prisoners is well known."[32] And so, while the defence argued for a very narrow interpretation of the Edward III statute, the Crown proposed a wide one, sometimes presenting an avowedly "common sense" view of the law rather than a legal one,[33] damning the defence for relying on legal definition. One prosecutor told a jury:

> Will you then, gentlemen, permit this man and others engaged in such a detestable and dangerous conspiracy, to be excused under the idea of an idle and absurd rhodomontade? Will you permit them to go free under the more specious but false pretext of general reform of national grievances?[34]

To the Edinburgh grand jury, Justice Ilay Campbell gave a short, very correct, dispassionate, and pointed synopsis of the treason charges of compassing the sovereign's death and of levying war. But after hearing the evidence and the argument between the prosecution and defence, in his summations to the Watt and Downie trial juries, Campbell abandoned the law, or at least distorted it, and relied largely on politics. He told the juries:

Of late, great pains have been taken to introduce among us the

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[32] Stephen, History of the Criminal Law, 2:275. His comment was directed specifically at the Hardy and Tooke prosecutions, but the Edinburgh cases were tried on much the same facts.

[33] State Trials, 23:1362.

[34] ibid., 23:1366. 'Rhodomontade' means 'extravagant boast,' in this context that the accused were full of big ideas but never intended the consequences of putting them into practice.

> odious terms and distinctions of aristocrate and democrate. But, gentlemen, no good subject of this country is either an aristocrate or a democrate; he is both the one and the other, and a royalist too. . . .
>
> Gentlemen, what a wretched delusion is it that has taken possession of the minds of many men in this country, who say that they want liberty, when their own proceedings are proof of the reverse, and who think their condition is to be somehow made better, and their situation be amended; by what? By the destruction of government, by the introduction of democracy, and establishing a French convention into this country, which would be the infallible consequence of their measures, were they to take effect.[35]

Justice Campbell did carefully instruct the juries that positive overt acts had to be found as evidence of intent, but Downie and Watt were both convicted. When it came to the trials of Hardy and Horne Tooke, the legal issue was the same, but it developed differently and had a different outcome.

For the London grand jury, Chief Justice James Eyre began with a commonsense notion of the difference between direct and constructive treason that probably was educational and at least implicitly well-grounded, but then he waxed philosophically to the outer edges of the doctrine of constructive treason, setting up a hypothetical case that prejudiced the position of the accused and presumed what evidence might be adduced at their trials.[36] Eyre's grand jury charge infuriated the lawyers for the defence of Hardy and Tooke. After the grand jury indictment and before trial, one of the lawyers, Felix Vaughan, published a pamphlet attacking the chief justice and his views.

Behind the cloak of anonymity and at greater length than the chief justice employed in his grand jury charge, Vaughan vituperatively denounced Eyre for creating "many new and extraordinary doctrines upon the subject of treason."[37] Of the grand jury charge, Vaughan found pleasure, and probably not a little political necessity, in being able to "animadvert upon its enormities," arguing against "the

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[35] State Trials, 23:1387. The ellipsis here covers more than a full paragraph.

[36] ibid., 24:202-6.

[37] Vaughan, Cursory Strictures, reprinted in State Trials, 24:210.

illegal and destructive doctrines that now appear to pollute it."[38]

Eyre had espoused a doctrine of constructive treason that was at least unique, if not slightly bizarre. In his view, almost any action could lead eventually to subverting the monarchy, and if that were even a remote possibility, it was treason. Even actions that had absolutely innocent intent could evolve into treason despite themselves. He directly told the jury that his "just theory" was so extraordinary that "no lawgiver in this country hath ever ventured to contemplate it in its whole extent." He also told the jury that "the statute of Edward 3rd, by which we are governed, hath not declared this (which in all just theory of treason is the greatest of all treasons) to be high treason." Eyre did not think himself governed too closely by the statute.[39]

Vaughan responded that there was no such treason as "conspiring to subvert the monarchy," and that Hardy and Tooke were engaged merely in perfectly legal associations for parliamentary reform.[40] In his submissions to the jury at Hardy's trial, defence lawyer Thomas Erskine drew a sharp line between actions directed at the sovereign's person and those directed at him in his regal capacity. He said that the compassing offence in the Edward III statute

> was intended to guard by a higher sanction than felony, the NATURAL LIVES of the King, Queen, and Prince; and that no act, therefore (either inchoate or consummate), of resistance to, or rebellion against, the King's regal capacity, amounts to high treason of compassing his death, unless where they can be charged upon the indictment, and proved to the satisfaction of the Jury at the trial, as overt acts, committed by the prisoner, in fulfilment of a traitorous intention to destroy the King's NATURAL LIFE.
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> . . . and that no conspiracy to levy war against the King, nor any conspiracy against his regal character or capacity, is a good overt act of compassing his death, unless some force be exerted, or in

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[38] ibid., in State Trials, 24:211.

[39] State Trials, 24:203-4. Despite his strong criticism of the treason law constructions of Hale and Foster, James Fitzjames Stephen took a very dispassionate view of Eyre's behavior. Stephen, History of the Criminal Law, 2:277.

[40] Vaughan, Cursory Strictures, in State Trials, 24:215-23.

contemplation against THE KING'S PERSON.[41]

In reply, Solicitor-General John Mitford said that it was not necessary to prove an original intent to take the sovereign's life but only to show "forming a design to take any measure by which, if pursued, the king's life may be in danger."[42] Unlike Erskine, Mitford combined the sovereign's personal and regal life, showing treason as that which tended to subvert the state. He drew a distinction between acts that tended to limit the state's power and those that tended to threaten the state's existence.[43] He threw back at Erskine part of Erskine's own speech in defence of Lord George Gordon which tended to support the view of the sovereign and the state as indivisible, so that "a conspiracy against the life of the prince is a conspiracy against the constitution of the state, and a conspiracy against the constitution of the state is a conspiracy against the life of the prince."[44]

Justice Eyre summed up the evidence at length for the jury, but he almost entirely avoided discussing the law because "many, many hours were spent at the bar, in this discussion." He did say the defence had not shown that consipiring to depose the sovereign was not compassing his death, which had not been Erskine's point.[45] He ended his charge to the jury with an obvious and bitter reference to Vaughan's pamphlet, putting the defence team in the same conspiracy as the accused.

> I am very sorry to have occasion to remark, that during the course of this trial the dignity of a court of justice has but too often been violated by improper behaviour both within and without doors; what is it men can mean by such conduct who do not wish at once to dissolve all government and the bonds of all society, I cannot imagine.[46]

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[41] State Trials, 24:881. Emphasis in original.

[42] ibid., 24:1180.

[43] ibid., 24:1181.

[44] ibid., 24:1182-3.

[45] ibid., 24:1361-2.

[46] ibid., 24:1383.

From Eyre's own comments, it appears that other judges criticized his lack of instruction on the law in Hardy's case, but he expanded his view only very slightly in the subsequent Tooke trial.[47] The jury took three hours to acquit Hardy but only eight minutes to acquit Tooke. The Crown declined to proceed against six others charged with the same offences.[48]

After the failure of the Hardy and Tooke prosecutions, the government moved quickly to change the treason law. In 1795, a new statute, passed because of "the continued Attempts of wicked and evil-disposed Persons to disturb the Tranquility of this your Majesty's Kingdom, particularly by the Multitude of seditious Pamphlets and Speeches daily printed . . . in Contempt of your Majesty's Royal Person and Dignity, and tending to the Overthrow of the Laws, Government, and happy Constitution of these Realms."[49] Part of the emphasis was on, as it had been for centuries, the problem of seemingly seditious speech, but the object of the new law was conspiracy. The 1795 statute made it treason to:

> compass, imagine, invent, devise, or intend Death, or Destruction, or any bodily Harm tending to Death or Destruction, Maim or Wounding, Imprisonment or Restraint, of the Person of the same our Sovereign Lord the King, his Heirs and Successors, or to deprive or depose him or them from the Style, Honour, or Kingly Name of the Imperial Crown of this Realm . . . ; or to levy War against his Majesty, his Heirs and Successors, within this Realm, in order, by Force or Constraint, to compel him or them to change his or their Measures or Counsels, or in order to put any Force or Constraint upon, or to intimidate, or overawe, both Houses, or either House of Parliament; or to move or stir any Foreigner or Stranger with Force to invade this Realm, or any of his Majesty's Dominions or Countries.[50]

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[47] ibid., 25:725-6.

[48] ibid., 25:745-8.

[49] Preamble to 36 Geo. III, c.7.

[50] 36 Geo. III, c.7. The statute was originally limited to George III's life, but it was made perpetual by 57 Geo. III, c.6. Despite the punctuation, the words "compass ... intend" applied to all three categories of treasonous activities. When James Fitzjames Stephen printed it, he used commas instead of semi-colons. Stephen, History of the Criminal Law, 2:279.

With this statute, for the first time the government, not just the sovereign, found a place in British treason legislation. This reflects the idea of the modern state in which the sovereign acts with and within a parliamentary system of government and reflects a construction of the treason law that prosecutors, and some judges, had been urging.

However, the 1795 statute did not create a new treason against the government. The offence was still levying war against the sovereign, with one possible specific intent as attempting compulsion against the government. The difference between direct (statute) levying war as against the sovereign's person and constructive (judge-interpreted) levying war as against the sovereign's functions remained unchanged. As E.H. East described it in 1803:

> Constructive levying of war is in truth more directed against the government than the person of the king; though in legal construction it is a levying of war against the king himself. This is when an insurrection is raised to reform some national grievance, to alter the established law or religion, to punish magistrates, to introduce innovation of a public concern, to obstruct the execution of some general law by an armed force, or for any other purpose which usurps the government in matters of a public and general nature.[51]

But with the 1795 statute, governmental language found a permanent place in treason indictments.

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[51] East, Pleas of the Crown, 1:72.

Chapter Five

Early North American Treason Law

When the British established themselves in North America, the settlers brought with them English law. When they organized legislatures, they erected their new statute law on top of or instead of English criminal law as it existed at whatever point it was deemed to have been received in the colonies.[1] For instance, in what became Canada, the New Brunswick legislature enacted nothing regarding treason, and people in that colony were therefore bound by what the English law had been probably in 1660.[2] However, the first Nova Scotia legislature, in 1758, re-enacted the Edward III statute and all other English treason statutes then in force, including those with regard to procedure.[3]

The first treason prosecutions in what became Canada occurred in Nova Scotia as a result of the American Revolution, under the colony's re-enactment of the Edward III statute. About 37 people were accused of treason, and an additional number were accused of "rebellious practices," resulting from the siege of Fort Cumberland in 1776 and the occupation of the Saint John Valley the next year. Given the apparent sympathy among colonists in the British Maritimes for the efforts of their New England neighbors, grand juries refused to indict most of those accused of treason. The only two who came to trial for treason, by levying war

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[1] On the transfer of English common and criminal law, see Brown, Genesis, c.3, 38-69; Slattery, "The Land Rights of Indigenous Canadian Peoples," c.1, 10-44; Eddie Mabo and Ors v. The State of Queensland, High Court of Australia (June 3, 1992, F.C. 92/014), Justice Sir Gerard Brennan for the majority, 21-6; Blackstone, Commentaries, 1:106-8.

[2] Brown, Genesis, 50-1. The date of the reception of English law in New Brunswick has been a matter of some controversy, and Brown doubted "that the last word has been said." However, he believed that D.G. Bell's date of 1660, the English Restoration, was the best candidate. See, Bell, "A Note on the Reception of English Statutes in New Brunswick."

[3] 32 Geo. II, c.13, s.1. (N.S.).

against the sovereign, Parker Clarke and Thomas Falconer, though convicted, had their sentences postponed until they came under a general amnesty. A future, famous attorney-general of Nova Scotia, Richard Uniacke, escaped treason prosecution by turning king's evidence.[4]

The Nova Scotia cases went almost entirely unnoticed, and it was thought until recently that the trial of David Maclane at Quebec in 1797 was the first treason trial in what became Canada.[5] Maclane, a Rhode Island merchant, was charged as the result of a far-fetched plot between him and Pierre Auguste Adet, the French Minister to the United States, to invade Canada with French troops and organize a popular rebellion to support them. The indictment against Maclane charged him under the Edward III statute with the counts of compassing the sovereign's death and adhering to the sovereign's enemies. He was not charged under the 1795 statute with conspiring to levy war, though conspiring to levy war was alleged as an overt act of compassing the sovereign's death.[6] The alleged overt acts supporting both counts were a complicated mixture of allegations of conspiring to levy war and aiding or conspiring to aid the enemy.[7]

The prosecution of Maclane had most to do with politics, with the fears of the governing elite during a time of political uncertainty, and much less to do with law. The Crown bribed witnesses, one of whom then perjured himself, rigged the

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[4] The indictments in these cases are contained in PANS RG 39, J. PANS also holds the notebooks of Judge Isaac Deschamps. Some of the trial documents are reprinted in Nova Scotia Historial Society, 1:110-8. The siege is discussed in Ernest A. Clarke "Cumberland Planters and the Aftermath of the Attack on Fort Cumberland." I am indebted to Halifax historian Ernest Clarke for bringing these cases to my attention and whose book Canada and the American Revolution is forthcoming.

[5] State Trials, 26:721-828. Maclane is variously spelled. The transcript was printed originally at Quebec in 1797. See also, William R. Riddell, "Canadian State Trials; The King v. David McLane." At Maclane's trial, Attorney-General Jonathan Sewell said that that certainly was the first Canadian treason trial, meaning that it was the first in the "Canada" of his day, but Riddell and others believed it to be the first treason trial in what became Canada. But Sewell had also forgotten about the Nova Scotian trials, for he said that the Maclane trial was the first treason trial "perhaps in America." State Trials, 26:815.

[6] State Trials, 26:732-47.

[7] See the prosecution's summary of them, State Trials, 26:748-9.

jury panel, and arranged for inexperienced defence lawyers who were indebted to the Crown.[8]

Chief Justice William Osgoode, who presided at Maclane's trial, actively participated in preparing the prosecution. Murray Greenwood, who researched the Maclane case, criticized Osgoode's role and made the point that Canadian colonial justices tended to adopt a "Baconian" view of their position. They thought that the duty of a justice was to advise and support the Crown.[9] In his relationship with government, and in his behavior on the bench, Osgoode compares well with Chief Justice John Beverley Robinson of Upper Canada in 1837-8.[10]

Greenwood failed to distinguish between Osgoode's role in the prosecution and his behavior on the bench. Greenwood wrote that "Osgoode — worried that the jury might find the 'compassing' count artificial — went out of his way to give 'adhering' the most capacious definition possible."[11] Greenwood cited Michael Foster to say that adhering must reach a "penultimate stage." But adhering-to-enemies always was capaciously defined, and Greenwood simply misread Foster.[12]

In fact, though he began his speech to the Maclane grand jury with a conservative discourse on current politics, Osgoode's speeches to both the grand

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[8] Greenwood, "The Treason Trial and Execution of David McLane." Though the defence lawyers were inexperienced and though Greenwood made a convincing case that they might be supposed to favor the Crown, it must be noted that they were not wholly incompetent and that one of them referred to "the base work of the whole proceedings" against Maclane. State Trials, 25:815.

[9] Greenwood, "The Treason Trial and Execution of David McLane," 11-13. Francis Bacon was of the view that judges were "lions under the throne, being circumspect that they do not check or oppose any points of sovereignty." Edward Coke held a much different view of the relationship between the sovereign and the justices than did his rival, Bacon, a view that triumphed in England after the Glorious Revolution of 1688. See, Bowen, The Lion and the Throne. The insight that the colonial Canadian bench adopted a "Baconian" philosophy is outside the scope of this study, but it deserves further investigation.

[10] See Chapter Seven of this study.

[11] Greenwood, "The Treason Trial and Execution of David McLane," 9.

[12] ibid. Foster, Discourses, 217. Greenwood wrote that, for instance, evidence had to be led of "intelligence letters actually sent but intercepted." What Foster wrote was that intelligence letters were evidence even though they had been intercepted, not reached their destination, because they showed the adhering-to-enemies to be complete on the sender's part and demonstrated his intent.

of treason that stand very well compared to the speeches of other judges in treason cases. He did, however, tell the trial jury strongly that in his view the evidence proved several of the overt acts alleged against Maclane. Though the chief justice did not unreasonably slant the law, it would have been astonishing if the jury had acquitted Maclane in the face of Osgoode's direction on the evidence. As this study shows elsewhere, judges sometimes felt inclined to distort treason law, widening its provisions, when they believed evidence of treason to be weak. Osgoode thought the evidence against Maclane was very strong, and he virtually directed a verdict on the evidence; he had no need to interpret the law capaciously.[13]

The only substantial point of law made at the Maclane trial was the defence contention that the Edward III statute did not apply to Lower Canada because the local legislature had not enacted it, and the statute required that any alleged conspiracy to levy war had to involve war against the sovereign "in his realm." This was dismissed after a detailed argument.[14] Murray Greenwood also criticized Osgoode's performance in this regard, writing that there "was no judicial or juristic authority" for this ruling.[15] But Osgoode's ruling was certainly a reasonable one, that although an accused almost five thousand kilometres away from the sovereign's home perhaps could not commit direct treason by compassing his death, judicial construction easily could determine that Lower Canada was "in his realm."[16]

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[13] State Trials, 26:722-31; 26:793-811.

[14] State Trials, 26:812-24.

[15] Greenwood, "The Treason Trial and Execution of David McLane," 9.

[16] Greenwood's archival research appears to show that the prosecution of Maclane was heavily weighted in favor of the Crown. But Greenwood's legal analysis is weak. The debate about compassing during the Maclane trial was much more complex than Greenwood indicated. And, in addition to the points noted in the text here, Greenwood suggested that Maclane's lawyers missed an obvious and most important line of defence, that Maclane's position as a spy for an enemy state put him outside the scope of treason law. Greenwood, "The Treason Trial and Execution of David McLane," 10-11. This simply was not an available defence. Though he was a citizen of the United States, Maclane was also undoubtedly (though this was not brought out in evidence) a natural-born British subject; he was not an alien. As a natural subject, his allegiance to the British sovereign was absolute. His acting as a spy for an enemy could, in itself, be held to be a violation of that allegiance. On natural allegiance, see the

necessitated the use of the levying war charge of the treason laws in what became Canada. During the War of 1812, though, there was use for the adhering-to-enemies treason charge.[17]

As the society of Upper Canada developed and as those who became known as the "family compact" established their control, efforts increased to draw a clear distinction between "loyal" British subjects and those who might harbor republican sympathies dangerous to the elite. Most of these latter were among the so-called "late-Loyalists," and the attitude towards them evolved partly out of the experiences of the War of 1812. What was most illustrative of the attitude of the elite and their attempt to retain control was the effort in the 1820s to keep the late-Loyalist Bidwells out of the Legislative Assembly. One of the leaders of the anti-Bidwell forces was Attorney-General John Beverley Robinson, the "Bone and Sinew of the Compact," who would soon rework Canadian treason law on what he saw as the necessity of distinguishing between monarchists and republicans.[18]

In 1833, the Upper Canada legislature re-enacted the provisions of the statute of Edward III, with one important change. In order to forestall the objection that had been raised by Maclane's lawyers in 1797, that the Edward III statute did not apply to Canada because it specified that levying war had to occur against the sovereign "in his realm," the 1833 Upper Canadian statute made it treason to levy

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discussion of Calvin's case in Chapter Three of this study. Maclane's lawyers objected that the indictment did not describe Maclane as a British subject, but the Attorney-General replied, correctly, that if he were not proved to be an alien, he had to be assumed to be a subject. State Trials, 26:812-24.

[17] Cruikshank, "John Beverly Robinson and the Trials for Treason in 1814;" Riddell, "The Ancaster 'Bloody Assize' of 1814."

[18] Romney, "Re-inventing Upper Canada." In 1822, the Upper Canadian House of Assembly ousted member Barnabas Bidwell, a former attorney-general of Massachusetts, technically on the ground of moral turpitude but, Romney argued, more because he was considered a republican alien, even though he was a British-born subject. Barnabas' son, Marshall Spring Bidwell, against whom there were no moral accusations, was then nominated to fill the vacant seat. The returning officer rejected Marshall Spring's nomination on the ground that he was an alien, and the Assembly spent a year debating the question before deciding that the younger Bidwell was eligible. Robinson's biographer, Patrick Brode, puts a different color on the events. Brode, Sir John Beverley Robinson, 96-7.

unnecessary given Justice Osgoode's definitive ruling in the Maclane case, but it was legally prudent. (The 1833 Upper Canadian legislature also modified, twice, the punishment for treason to include only drawing and hanging until death, then the body to be "dissected and anatomized."[20])

When rebellion broke out in late-1837, the governments of Upper and Lower Canada had essentially only the provisions of the Edward III statute to deal with the situation, the 1795 treason statute having been not adopted by either legislature. While the rebellions were against the governments of the two colonies, not the sovereign personally or directly, they would certainly have been considered constructive levying-of-war against the sovereign. The levying war charge under the Edward III statute should have been quite adequate to deal with the events of 1837-38, as it had been adequate in similar English situations. The governments also had available to them court martial procedure, which had a long history in treason law, which was akin to conviction on the king's record of Edward I's day and which was usually used as an excuse for the summary execution of alleged traitors on the battlefield. In Upper Canada, the law would soon change.

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[19] UCCS 1859, c. 97, s.1. The Consolidated Statutes say this law is 3 Will. IV, c.3, and Chief Justice Robinson said at the 1838 trials that the Upper Canadian treason law was passed in 1833. Patriot, Mar. 13, 3. But it does not appear in the extant version of the Upper Canadian statute book of 1833, 3 Will. IV.

[20] 3 Will. IV, c.4; and according to UCCS 1859, c. 97, by 3 Will. IV, c.3.

Chapter Six

Conspiring to Levy War

The 1795 British treason statute was designed to nip sedition in the bud, to deal with the threat of republicanism in the form of conspiracies to raise rebellion. Judicial interpretation had detemined that it was not possible to prosecute those conspiracies under the levying war charge of the Edward III statute — only actual fighting came within that law's purview.[1]

In the decades following the passing of the new law, the few serious internal situations the British state had to deal with involved real shooting war, the first of which was the 1798 Irish rebellion.[2] But when the 1795 treason-conspiracy statute was used, it served the state well.

In 1820, Arthur Thistlewood and 10 others were charged with treason under both the 1795 and the Edward III statutes as a result of a plot to assassinate the British cabinet, allegedly the first move in establishing a provisional government to oversee revolution.[3] In his charge to the grand jury, Chief Justice Charles Abbott presented a very detailed and very careful explanation of the applicable laws and of the kind of evidence that might be adduced.[4] Abbott's charge stands in very marked contrast to that of Eyre in the Hardy and Tooke prosecutions.

The grand jury returned indictments that charged Thistlewood and the others with treason by levying war in every possible way, with conspiring to levy war under the Edward III statute (which strictly was not a proper charge), with actually

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[1] It was possible to use evidence of conspiracies to levy war to support a treason charge of compassing the sovereign's death. But that was, in a sense, building construction upon construction, a clumsy and uncertain argument.

[2] See, Robert Kee, The Most Distressful Country, c.10-11, 108-31. State Trials, 27:255-626.

[3] State Trials, 33:681-956.

[4] ibid., 33:683-95.

levying war, and with conspiring to levy war under the 1795 statute. They were also charged under the Edward III statute with compassing the sovereign's death. The overt acts alleged covered all possible situations.[5]

The trial juries consistently found the accused guilty of the charge under the 1795 statute. (In two of the three trials, the juries found the accused guilty of one of the Edward III charges.[6]) During these trials, there was remarkably little discussion of the law — the submissions were almost entirely on the evidence. In the Thistlewood trial, the defence argued briefly that the evidence might show a plot to assassinate people who were ministers of the Crown but did not extend farther than conspiracy to murder.[7]

Also in 1820, Andrew Hardie was charged with compassing the sovereign's death by levying war under the Edward III statute, with conspiring to levy war under the 1795 statute, and with conspiring to depose the sovereign under the 1795 statute.[8] Hardie and others had allegedly organized to establish a provisional government, organized arms in its support, and fought briefly with the cavalry.[9] To the grand jury, Justice Charles Hope delivered a very thorough and dispassionate synopsis of the laws of treason.[10]

As had happened at the trials of Thistlewood and others, Hardie's defence was mainly on the evidence, not the law. His lawyer, Francis Jeffrey, did pointedly tell the jury that at most points it was <u>constructive</u> treason that was being alleged

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[5] <u>ibid.</u>, 33:697-709.

[6] <u>State Trials</u>, 33:956, Thistlewood; 33:1176, Ings; 33:1542, Davidson and Tidd. After these verdicts, the other accused changed their pleas to guilty.

[7] <u>State Trials</u>, 33:830-40, 33:850-894, defence submissions, Thistlewood trial; 33:919-953, judge's charge, Thistlewood trial.

[8] <u>State Trials, New Series</u>, 1:632-48. There were four counts in the indictment, but it appears to contain only these three substantive charges. The summary of the Hardie charge, <u>State Trials, New Series</u>, 1:609-10, is incorrect in that he was not charged under the levying war charge of the Edward III statute, but levying war was alleged to be an overt act under the compassing charge.

[9] <u>State Trials, New Series</u>, 1:609-784.

[10] <u>ibid.</u>, 1:613-29.

and that therefore they ought to view the evidence carefully. But he also said he had no disagreement with the idea of constructive treason. Jeffrey did urge strongly that the evidence did not connect Hardie with a treasonous intent.[11] In his short reply, Solicitor-General James Wedderburn dealt with the questions of defining "levying war" and "treasonous intent."[12] The defence correctly summarized the treason laws, exaggerated a bit to support its position; the prosecution did exactly the same thing.

The presiding justice, who had done so well in his speech to the grand jury in explaining the law, then delivered a very curious charge to the trial jury.[13] Justice Hope specifically directed the jury to ignore the defence explanations of the law and to accept those of the Crown, only on the ground that Wedderburn had quoted authorities (Hale and Foster) in his presentation and Jeffrey had not quoted authorities. He followed with his own view of the law, which was significantly different than the one he had presented to the grand jury. Hope said that the 1795 statute merely explained the Edward III statute but did not extend it.[14] But in his grand jury charge, Hope had said that the 1795 statute "considerably extended" the levying war count of the Edward III statute, which it in fact did.[15] There is no explanation for Hope's speech other than it may have become clear as the evidence unfolded that the jury might be unwilling to convict. Hope did not deal with the question of treasonous intent, as had both the defence and prosecution, but told the jury to ignore the charges under the Edward III statute and concentrate on the conspiracy provisions of the 1795 statute. The jury followed the judge's advice and found Hardie guilty on the conspiracy charges.[16]

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[11] ibid., 1:732-57.

[12] ibid., 1:757-61.

[13] ibid., 1:761-74.

[14] ibid., 1:763.

[15] ibid., 1:621.

[16] ibid., 1:774.

The prosecutions of John Frost and others in 1839-40 followed much the same pattern as those of Thistlewood and Hardie.[17] In 1839, Frost and others assembled 10,000 men and marched on Newport. This action was supposed to be the beginning of a rebellion to establish Chartist law. In a battle with soldiers and police, about 20 were killed. The two treason statutes were combined in the indictment against Frost and the others, charging levying war under Edward III and compassing to depose the sovereign and compassing to levy war under the 1795 statute.[18] Again, legal points the defence raised concerned the necessity of proving the accused's intent under the treason statutes.[19] Chief Justice Nicholas Tindal was extraordinarily careful to explain to the jury the laws regarding treasonous intent,[20] but the jury quickly found Frost guilty.[21]

The year of revolutions in Europe, 1848, recalled the environment in which the 1795 treason statute had been passed. This time, the threat was not only republicanism but, worse, socialism. To deal with the present and increasing danger of rebellious conspiracies, the British government put prosecutorial teeth into the 1795 statute.

The result was the creation of a new criminal offence, that which came to be known as "treason-felony."[22] The 1848 statute repealed the 1795 statute except for the clause regarding compassing the sovereign's death or harming the sovereign's person, then it re-enacted in a new form its other provisions, those having to do with compassing to depose the sovereign and with compassing to levy war against

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[17] ibid., 4:85-480; Moody reports, English Reports, 169:56-70; Car. & P. reports, English Reports, 173:771-96.

[18] State Trials, New Series, 4:98-105.

[19] ibid., 4:388-414.

[20] ibid., 4:439-52. Tindal was known as a lousy courtroom lawyer, but one who was expert in "obsolete law." As a judge, he was known "for his grasp of principle, accuracy of statement, skill in analysis, and vast stores of case law." Dictionary of National Biography, 56:406-8.

[21] State Trials, New Series, 4:452.

[22] 11,12 Vict., c.12.

the sovereign. On these latter two clauses, the major practical difference was in punishment. People convicted of treason-felony were not subject to the death penalty, let alone to the horrible execution prescribed for traitors, nor were they subject to forfeiture. This was done deliberately to make convictions easier to obtain. Juries might balk at convicting conspirators if the only available punishment was death and forfeiture. Treason-felony was to be punished by transportation for not less than seven years or imprisonment for not more than two years. This punishment provision compounded the statute's flexibility and increased chances of conviction. Juries could convict secure in the hope that the judge would deem the non-capital offence either a very serious treason-felony or a very minor one.

The 1848 statute gave prosecutors wide latitude in their courtroom strategy. If they thought juries might be receptive, they could claim that what they were prosecuting under the treason-felony statute was treason, the highest offence known to law; if not, they could claim it was "mere felony," a lesser offence, something like riot. Under this statute, treason sometimes became a matter of prosecutorial whim in the courtroom. The statute also made matters easier for prosecutors because the procedural rules for treason, such as delivering the indictment and witness list to defendants in advance, did not apply.[23]

The treason-felony statute was also a legal anomaly for its day in that it specified that an accused could be prosecuted under it for conspiracy even if the facts alleged or proved "shall amount in Law to Treason," provided that an accused could not be tried subsequently on the same facts for treason. Before the modern doctrine of included offences developed, this was a very curious system of dual

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[23] See, for instance, the charge to the jury by Chief Justice Lord Coleridge in the 1883 case of Thomas Gallager and others. Coleridge cited both the decreased severity of punishment and relaxation of procedural rules as reasons for prosecuting under the treason-felony statute. Cox's Criminal Cases, 15:316. In Canada, the lack of procedural requirements and the greater likelihood of jury convictions was the stated reason the Crown abandoned High Treason prosecutions against most 1885 defendants and used instead the Canadian treason-felony statute. See Chapter Eight of this study.

offences.[24] A person could be tried for treason or felony on an accusation of actual levying war on exactly the same facts, the same intent, ultimately exactly the same offence. This is quite different than the modern doctrine of included offences, which began its development in the 19th century. A modern jury may well, and often does, find a person accused of murder guilty only of manslaughter. Murder and manslaughter carry different penalties, but the important distinction is that they are different offences, with different intents, proveable by different facts. But under the treason-felony statute, the facts in a case of actual levying war did not matter in the determination of the offence. There was no difference except in the matter of punishment, and the jury did not itself have the option of choosing which offence the facts fit. The difference between treason and treason-felony in an actual levying war was a purely political, not a legal, one.

There was one other important provision of the treason-felony statute on a matter that had been partly responsible for the statute's enactment. The statute of 1795 had not been extended to Ireland, but the treason-felony statute was. The first use of the new law was in dealing 1849 with Irish rebellion and conspiracy.

Unlike the close relationship between the 1795 statute and that of Edward III, indictments usually charged treason-felony by itself, rather than coupled with treason charges under the Edward III statute. An exception was the prosecution of Smith O'Brien, M.P., and other Irish leaders, charged in 1848 both with the Edward III treason of levying war and with intending to levy war under the treason-felony statute,[25] but most of the 1848-9 prosecutions were under the treason-felony statute alone, often involving evidence of treasonous publications.[26] These trials were

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[24] See Kenny, Outlines of Criminal Law, 274. Kenny called this provision of the treason-felony act "a singular judicial anomaly."

[25] State Trials, New Series, 7:1-380, O'Brien; 7:1087-91, McManus; 7:1091-2, O'Donohue; 7:1092-1104, Meagher.

[26] State Trials, New Series, 6:599-698, Mitchel; 6:831-924, O'Doherty; 6:925-1100, Martin; 7:381-466, Dowling and others; 7:467-84, Cuffy and others; 7:485- 506, Cumming; 7:795-960, Duffy; 7:1110-6, Mullins; 7:1127-9, Constantine and others. The Mitchell case is also reported in Cox's Criminal Cases, 3:1-36.

among the most political of all British treason trials. Smith O'Brien's lawyers argued at great length, and using every procedural fiddle they could find, that there was no such thing as any constructive treason.[27] Robert Holmes,[28] one of John Mitchel's lawyers, defiantly declared "Ireland is an enslaved country, and I will prove it," to the delight of the spectators and resulting in an admonition from the judges to avoid treason himself.[29]

Judges very quickly and distinctly determined that the new treason-felony statute did not alter in any way the definition of "levying war" as it had developed under the treason statutes.[30] Direct levying-of-war remained that directed at the sovereign's person, and, as E.H. East said after the passing of the 1795 statute, constructive levying-of-war was directed more at the sovereign's government.[31] W.S. Holdsworth remarked that:

> At the time when the statute of Edward III. [sic] was passed treason was regarded rather as an offence against the person of the king than an offence against the state. It has never ceased to be an offence against the person of the king. In fact, since the Act of 1848, it is only offences against the state which take the form of attempts against the person of the king, which must be treated as treason. But it is obvious that, as the conception of the state was more distinctly realized, and as the king came to be conceived as the head and representative of the state, treason must come to be regarded as essentially an offence, and the most heinous offence, against the state.[32]

After the upheavals of the late-1840s, the treason-felony statute was little used in Britain. It was employed to deal with the Fenian "dynamiters" in 1883 who

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[27] State Trials, New Series, 7:1-380.

[28] Holmes reputedly had the largest practice in Ireland and was well-known for his support of Irish nationalism. He "was listened to with the greatest attention by the judges although he was not always very civil to them." Dictionary of National Biography, 27:198.

[29] State Trials, New Series, 6:660-2.

[30] See, in particular, Baron Alderson's charge to the Liverpool grand jury, State Trials, New Series, 6:1129-34, December, 1848.

[31] East, Pleas of the Crown, 1:72.

[32] Holdsworth, History of English Law, 8:322.

had conspired to blow up public buildings and who were charged under the treason-felony statute with conspiring to depose the sovereign and compassing to levy war against her.[33] For the defence in the case of dynamiter Thomas Gallagher and others, Edward Clarke argued that the various acts of contemplated violence did not add up to levying war under the statute, as a concerted plan to raise general rebellion. After Clarke and the judges traded authorities and hypothetical situations, the chief justice ruled that "there was nothing in the point which had been very ingeniously argued before them by Mr. Clarke." Planning to dynamite several different public buildings, coupled with evidence of associations for the independance of Ireland, could amount to a treasonous conspiracy to levy war, in concord with the 1848 statute.[34]

In another of the "dynamiters" cases, that of Denis Deasy and others,[35] Justice James Fitzjames Stephen, who so prided himself on his opposition to constructive treasons, supported a wide interpretation of intent in a constructive levying-of-war under the treason-felony statute. "There was a point in all these cases at which the burden of proof shifts, and if the prosecution proved the prisoners to have been in such circumstances as, without explanation, left them open to the reasonable inference of the existence of such as conspiracy as they wished to establish, then it might be for the defence to say what they were doing."[36]

Stephen's "reasonable inference" rule came close to establishing that mere presence could be an overt act of constructive levying-of-war, something that, in the few cases in which it had been tested, had been rejected.

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[33] Cox's Criminal Cases, 15:291-319; 15:334-43.

[34] ibid., 15:312-5, 15:316-8.

[35] ibid., 15:334-43.

[36] ibid., 15:342.

Chapter Seven

Canadian Variations of Levying War

The events of 1837-38, in terms of their effect on judicial proceedings, fall into two neat chronological periods: those that took place from the fall of 1837 through the summer of 1838 and those that took place after the summer of 1838. Legally, the governments of Upper and Lower Canada reacted entirely differently during the first period, based entirely on political considerations.

In Lower Canada, it was determined that the civilian courts were inoperative, especially in cases of treason. The enormous gulf between English and French determined that any treason jury would be hung; there was little possibility of any conviction. Therefore, Lower Canada remained under martial law during the rebellion. However, in the first period of rebellion, military law by courts martial was not employed against alleged traitors, either; that was about as, and perhaps more, politically dangerous as leaving the cases to ordinary juries. The accused were dealt with in a complicated, disorganized, and often ill-advised system of clemancy. Confessions were extracted from the leaders in jail, and amnesty declared for the rest. Governor-General Lord Durham sentenced the confessed to transportation to Bermuda, well outside his jurisdiction, causing an uproar in the British House of Lords.[1]

In Upper Canada, the response was a flurry of legislative activity, resulting in early 1838 in a set of new treason statutes, sometimes quite severe in their provisions and necessary, the government said of the one that denied bail to accused traitors, because "in every country when treason exists against the government, whether widely diffused or even in a limited degree, it is common to resort to a

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[1] Schull, Rebellion, 140-4.

measure like the present — that the government may have power to arrest and keep in custody all those who encourage it."[2]

Unlike Lower Canada, the civilian courts of Upper Canada in 1838 could be relied upon to secure the state from attack, and the Family Compact in its position. There was not the problem of a French-English political split, and juries were likely to register convictions. The government wanted the power to round up suspects and keep them out of trouble without having to satisfy the niceties of British criminal procedure. Chief Justice John Beverly Robinson, who was responsible for drafting the statutes, also thought he had to modify the law so that the usual constructions of English treason law would not work to the advantage of the accused, at least not to the advantage of those who might be viewed as having republican sympathies; loyal British subjects still needed the protection of the law. In the legislature, there was vocal opposition to these measures on civil rights grounds, but the Tory majority passed them easily.[3]

The most important Upper Canadian statute of early 1838 was one that amended treason law in a way not thought of before or since in the English tradition. It was passed as William Lyon Mackenzie was organizing Canadian and American republicans on Navy Island for an invasion. Entitled "an Act to protect the Inhabitants of this Province against Lawless Aggressions from Subjects of Foreign Countries, at Peace with Her Majesty,"[4] Robinson designed the legislation to do two things: make it easy to prosecute Americans under quasi-treason laws and draw a clear distinction between American republicans and Canadian monarchists.

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[2] The Patriot, Jan. 5, 1838, 2. The statutes, except the one discussed at length below, were: 1 Vic., c.1, denying bail to accused traitors; c.2, given the disingenuous title of "an Act to provide for the more effectual and impartial Trial of Persons charged with Treason and Treasonable Practices," extending the range of courts entitled to hear treason cases, limiting challenges to prosective jurors, and extending the penalty of forfeiture to "treasonable practices"; c.9, providing for conviction in absentia; c.10, providing the possibility of pardon on the government's terms; c.12, indemnifying individuals who helped capture or detain suspected traitors against prosecution even though some of their actions "may not have been strictly legal."

[3] The votes were 20-odd to eight or nine. See Patriot, Jan. 5, 1838, 4; Patriot, Jan. 12, 1838, 4.

[4] 1 Vic., c.3. (U.C.).

The statute was directed against:

> any person, being a Citizen or Subject of any Foreign State or Country at peace with the United Kingdom of Great Britain and Ireland, having joined himself before or after the passing of this Act, to any Subjects of our Sovereign Lady the Queen, Her Heirs or Successors, who, or hereafter may be, traitorously in arms against Her Majesty, Her Heirs or Successors, shall after the passing of this Act be or continue in arms against Her Majesty, Her Heirs or Successors, within this Province, or commit any act of hostility therein.[5]

The other offenders under the statute were British subjects who levied war against the sovereign in the company of foreigners who fell within the provisions of the statute. Both classes of offender could be tried by courts martial and would be subject to death or any other punishment that the court saw fit to impose. Foreigners, but not subjects in the strict wording of the statute, could also be tried by civilian courts. But if foreigners were convicted in civilian courts, the only punishment was death.

This statute was of doubtful necessity, questionable legality, and, in one important case, difficult to make work in the courtroom. It is an interesting piece of legal draftsmanship, and its foundations are complex.

John Beverly Robinson sincerely believed, or at least said he believed, that the existing laws did not cover the possibility of citizens of a state at peace with Britain invading to levy war against the sovereign. Some of the Americans involved in the 1837-38 events were, in Robinson's view, neither enemies nor traitors — there was no way for British or Canadian law to prosecute them. He told a grand jury that "the mere subjects or citizens of a foreign country in amity with G. [sic] Britain, making war upon us without a commission from their government can not be treated as traitors, because having received no protection, they owe no allegiance."[6] In this, he was quite wrong, as the British government's legal advisors

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[5] 1 Vic., c.3, s.1 (U.C.).

[6] The Patriot, Mar. 13, 1838, 2.

international law, the moment a person crossed a border, he accepted the protection of the state he entered. He owed local allegiance, unless he crossed the border as a member of an invading army sanctioned by an enemy state.[8]

In 1838, Americans invaded Canada as members of an army but not one that was an extension of an enemy state. They clearly owed local allegiance and were subject to the laws of treason. It is difficult to believe that Robinson did not understand this. Robinson was clearly expert in British law, and, although the evidence is unclear, the impression must linger that he devised the statute from purely political motives rather than the stated legal ones.

Under the 1838 statute, Americans were culpable if they joined with British subjects traitorously in arms and then continued in arms. British subjects were liable if they levied war in the company of Americans who were offenders under the act. In essence, this creates a wide gulf between American and British accused. The phrases "in arms" and "levy war" must be interpreted as they had been in the context of the treason laws, as judges had done with respect to the 1795 treason statute or would do with respect to the 1848 treason-felony statute. To be "in arms" required in treason law not necessarily carrying arms oneself but only being associated with those who did. The 1838 statute, therefore, in effect made it an offence for Americans to be merely present during a constructive levying-of-war,[9] without necessarily aiding and abetting, which had been a requirement of English

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[7] State Trials, New Series, 3:1355-62. Brode, Sir John Beverly Robinson, 196-7. Brode accepts Robinson's view.

[8] See Kenny, Outlines of Criminal Law, 270-1. But Robinson might have found some support for his view in Calvin's case, which is imprecise about whether an alien enemy, who never accepted the sovereign's protection and was not subject to treason laws, must be defined as a subject of an enemy state or simply an individual who came into the kingdom "with malice and enmity." Coke reports, English Reports, 77:384.

[9] The rebellions of 1837-38 were clearly constructive levyings-of-war, for they were directed at the overthrow of governments and not directed specifically at the sovereign's person. Though extremely serious treasonous events, accused were entitled to the benefits of a greater burden of proof than in a situation where the sovereign's own person was threatened directly.

traitorously levying war. As well, under this statute, prosecution against British subjects became more difficult than under other available treason laws. They had to be found not only levying war but doing so in the company of foreigners who had previously been held to be offending against the statute.[10]

It was the 1838 statute's provision for court martial trial that caused most concern in London. It was the strong view of the Crown law officers (including the Attorney-General and Solicitor-General) that martial law was simply "a cessation of all law."[11] While legally the Upper Canadian legislature could change the mode of trial for any criminal offence, it was at least unusual for courts martial to be employed when civilian courts were operative, and it was also unusual for court martial procedure to be included in statutes that specified civil offences. The law officers said that "martial law can never be enforced for the ordinary purposes of civil or even criminal justice, except, in the latter, so far as the necessity arising from actual resistance compels its adoption."[12]

However, the law officers were unwilling to question "the scruples of the legal authorities of Upper Canada" and concluded that the statute was valid.[13] Despite this, the British government seriously considered disallowing Robinson's new law.[14] One provision of the statute that may have made London slightly more

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[10] This last point was never tested in the courtroom, but it appears to have been a standard rule of English treason law, for instance, that one could not be convicted of misprison of treason unless the principals upon whose case the misprison hinged had been previously convicted. Michael Foster and Matthew Hale both thought this was the law, though James Fitzjames Stephen was not so sure. Foster, Discourses, 346; Hale, Pleas of the Crown, 1:238; Stephen, History of the Criminal Law, 1:413. See also, Pollock and Maitland, History of English Law, 2:509.

[11] State Trials, New Series, 3:1364. This comment was made in reference to the Lower Canadian situation, but it equally applies to Upper Canada.

[12] State Trials, New Series, 3:1355. Again, this statement was made with reference to Lower Canada.

[13] State Trials, New Series, 3:1362.

[14] AO, Robinson Papers, F 44, Lord Glenelg to Sir George Arthur, June 23, 1838; Sir George Arthur to J.B. Robinson, August 3, 1838.

saw fit, allowing for political judgement in an already distinctly extra-judicial, political forum. The civilian courts were allowed, under the statute, only the death penalty. However much London disliked the Upper Canadian court martial procedure, it gave the accused, if convicted, a better chance of remaining alive.

Despite its obvious utility, the Upper Canadian 1838 statute was little used during the first part of 1838. Defendants such as Samuel Lount, Peter Matthews, and John Montgomery (owner of the famous tavern) were all tried under the levying war count of the Edward III statute in its Upper Canadian incarnation. (Lount and Matthews pleaded guilty.) While the prosecution was done strictly under Edward III terms, the wording of the indictments varied. Montgomery, for instance, was charged with compassing to levy war and with actually levying war "for the purpose of overthrowing the Constitution and Government."[15] The first of these charges did not exist in Upper Canadian law except as wide construction of the compassing the sovereign's death charge under the Edward III statute. The wording of the second charge contained language that was not strictly correct but that the 1795 statute and judicial acceptance had made respectable.

At the Montgomery trial, defence lawyer Robert Baldwin raised the issue that had been a feature of trials on charges of levying war for centuries, that of intent. The jury, Baldwin said, must be perfectly satisfied that in any part which he had taken, Montgomery had acted voluntarily, "for the intention of the mind was necessary to constitute treason."[16] The defence contention was that Montgomery had been at his tavern to protect his own property, that he was merely present among rebels and had not assisted them. But on the evidence, the jury found Montgomery guilty.

The prosecutors did not always have an easy time. They found they could

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[15] The Patriot, Apr. 13, 1838, 1.

[16] ibid.

march down Yonge Street. They relied instead on Morrison's participation at an allegedly treasonous meeting in July, 1837, and on a declaration he published after it. But the best they could do was show he had been present when treasonous intent had been uttered and then did not do his duty by immediately informing authorities. To that, the defence replied that everyone, including Lieutenant-Governor Francis Bond Head, knew of the apparently treasonous conspiracies to which Morrison was witness, and if the crime was not informing authorities or otherwise doing anything about it, then "Sir Francis was the greatest traitor in Upper Canada." Morrison was acquitted, to the spectators' cheers.[17]

During the several assizes in the early part of 1838 dealing with many alleged traitors under the Upper Canadian version of the Edward III statute, the judges almost always provided juries with accurate, dispassionate explanations of the laws of treason. In particular, Chief Justice John Beverly Robinson delivered a very clearly worded charge to the Toronto grand jury on March 8.[18] Justice James Macaulay at Hamilton was exceptionally careful to explain precisely the meaning of the treason laws.[19] The one exception was Justice Archibald McLean at Kingston. He told the grand jury that "it appears, under these circumstances, almost inconceivable, what evil influence, what fatal delusion could have led so many persons to embark in the horrible excesses of the highest crime which is known to the Law."[20] Of the about 100 people arrested for marching from Hastings to join the rebellion at Kingston, most were simply released, and of the rest, the grand jury indicted only eight, of which the Crown declined to proceed against two.[21] The six

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[17] British Whig, May 11, 1838, 1-2. The Whig was vocally anti-Compact and relished reporting this trial. See also, Trial of Dr. Morrison, M.P.P., and Riddell, "A Trial for High Treason in 1838."

[18] The Patriot, Mar. 13, 1838, 2-3; Christian Guardian, Mar. 14, 1838, 2-3; British Colonist, Mar. 15, 1838, 2-3. The last cited is much the easiest to read on microfilm.

[19] British Colonist, Mar. 29, 1838, 1.

[20] Chronicle and Gazette, May 2, 1838, 2.

[21] British Whig, July 13, 1838, 2.

who were eventually brought to trial raised on their defence the [illegible] connecting them with a treasonous intent to levy war.[22] They were all acquitted, much to the delight of their lawyer, future prime minister John A. Macdonald.[23]

The Upper Canadian government's new levying war statute did not work as well as was intended. It was used against Thomas Jefferson Sutherland ("brigadier-general" or "pirate," depending on who was describing him), an American citizen of Scottish extraction who was a leader among Mackenzie's military on Navy Island. Sutherland was tried by court martial under the new statute in Toronto on March 19, 1838. Sutherland had been captured "in arms," that is wearing a sword, on the ice near Gosfield, Ontario, apparently on the Canadian side of the border though there was some doubt.[24]

The legal problem was that he was captured with one companion, who was an American, and the law required that the accused be in arms having joined British subjects who were traitorously in arms. Sutherland conducted a very able defence in his own behalf during which he complained that the charge did not say he was in arms having joined traitors and that the evidence did not show that, either.[25] The charge against Sutherland read that he had joined traitors at Navy Island and was in arms when captured, but the direct connection was not made. One newspaper said that it was in the prosecution's mind to rely on evidence of Sutherland's presence among Americans and traitorous British subjects during the fight at Pelee Island earlier in March and to present the event of his capture as a continuation of his adhering to traitors.[26] The summary justice of the court martial virtually

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[22] Chronicle and Gazette, July 11, 1838, 2.

[23] NAC, Alexander Campbell Papers, MG 27 I C2, Macdonald to Campbell, May 19, 1885. For Macdonald's involvement in these and other 1838 cases see, Donald Creighton, John A. Macdonald: The Young Politician, 62-8.

[24] The reports of Sutherland's trial are sketchy on the legal points. A partial transcript was published in 1838, The Trial of General Th. J. Sutherland. Newspaper accounts of the trial include British Colonist, Mar. 22, 1838, 2; The Patriot, Apr. 20, 1838, 3.

[25] Trial of General Th. J. Sutherland, 35, 52.

[26] Niagara Reporter, quoted in British Whig, Mar. 31, 2.

commented of Sutherland that "it cannot be said that he had a fair trial."[27] But the process against Sutherland was not significantly different than that in other court martial cases. The Sutherland prosecution did, though, expose a problem with the new statute.

In the fall of 1838, the activities of the Hunters' Lodges caused charges to be brought before courts martial in both Upper and Lower Canada, but the two colonies handled them differently.

Lower Canada continued under martial law through 1838 because the civilian courts "have virtually ceased to exist."[28] A total of 108 people were tried under this procedure at Montreal. Of these, 12 were executed, 58 transported, nine acquitted, 26 freed on bail, two freed on condition of leaving the colony, and one freed on condition of not leaving the colony.[29]

The Lower Canadian accused were charged with offenses that purported to be treason but were actually a sloppy hodge-podge gleaned from a variety of treason indictments. Some of them were charged in the words of the 1795 statute with compassing to depose the sovereign[30] or conspiring to subvert or destroy the government.[31] Some were charged with actually levying war[32] and some were charged with much vaguer offences. Many of the accused objected to the court martial procedure in treason cases. They were denied the usual advantages of receiving the indictments and lists of Crown witnesses in advance and of having lawyers plead their cases directly. Lawyers were allowed only to read statements

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[27] Riddell, "A Patriot General," 34.

[28] Sir John Colbourne proclamation, Nov. 4, 1838.

[29] Report of the State Trials Before a General Court Martial held at Montreal, 1:529.

[30] ibid., 1:20, 1:228.

[31] ibid., 1:19, 1:228.

[32] ibid., 1:20, 1:229, 2:6-7.

from the accused and to advise them. Neither did the two-witness rule apply. The lack of attention to the usual legal requirements in treason cases was demonstrated when Charles Bonc and a number of others came to trial. Bonc's lawyer attempted "a concise exposition of the law constituting the crime and punishment of levying public war actually against the Government, and constructively against the queen." He made a number of very precise points about the law, but the court deigned not to reply to any of them.[34]

At Kingston, 140 people involved in the Battle of the Windmill were tried by courts martial in December, 1838, and January, 1839. Most of the accused were American, some were European, and some were British subjects. John A. Macdonald was their legal advisor.[35]

The windmill accused were all charged under the 1838 statute, the Americans and Europeans with "having joined themselves to divers subjects of our said Lady the Queen, who were then and there unlawfully and traitorously in arms against our said Lady the Queen . . . did then and there levy and make war on our said Lady the Queen." The charge also noted that they had been "taken in arms."[36] At least ten were executed, including their leader, Nils Von Schoultz; the rest received various lesser sentences.

At the Kingston courts martial, Solicitor-General W.H. Draper connected the 1838 statute directly to treason in its application to foreigners.

> Levying war on Her Majesty is of course committing an act of hostility within the spirit and meaning of this Act, and I respectfully submit that whatever acts will amount to levying war, so as to render a British subject amenable to a charge of High Treason, will equally amount to a levying of war, so as to render foreigners amenable to a

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[33] ibid., 1:99.

[34] ibid., 2:418-45.

[35] Full reports of the courts martial are in NAC, RG 5, B41. The Chronicle and Gazette covered the trials in some detail. Those involved in the Duncombe revolt of late-1838 were tried at London. See, Read, The Rising in Western Upper Canada, c.5, 107-63, and appendix 1, 220-32.

[36] NAC, RG 5, B41, v. 1, file 4, the charge against Christopher Bulkley and others.

charge of committing acts of hostility within the provision of this particular Statute.[37]

For the defence, Macdonald accepted that the 1838 statute established "a crime of the same description" as treason by levying war.[38] He argued, unsuccessfully, that the usual rules of treason trial procedure should apply. He also argued, again unsuccessfully, that the prosecution could not connect many of the accused with what amounted to a treasonous intent, the same argument with which he had won acquittals during civilian trials.

One newspaper commented that "it appears to us that to execute all the prisoners found guilty by the Court, would not add to the dignity of the Empire."[39] But there appears to have been little public comment about the propriety of the court martial procedure. In any case, while the 1838 statute would come in handy in a revised form, courts martial would never again be used.

In 1840, the Upper Canadian legislature amended the 1838 statute to avoid the problems the prosecution had during the trial of Thomas Jefferson Sutherland. In the process, prosecution of foreigners was made easier, and the crime was brought closer to treason.

The amended statute made it an offence for foreigners to be merely "in arms" in Upper Canada, not necessarily in the company of traitorous subjects.[40] It was also an offence for foreigners to commit any act of hostility in Upper Canada, enter Upper Canada intending to levy war, or enter the colony intending to commit a capital felony. What this did, in effect, was to make mere presence an act of constructively levying war, at least as far as foreigners were concerned.

The amended statute also changed the provisions against subjects slightly. It was an offence for them to levy war in the company of foreigners, to enter Upper

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[37] Chronicle and Gazette, Dec. 15, 1838, 1, in the trial of Daniel George.

[38] ibid.

[39] Chronicle and Gazette, Dec. 29, 1838, 2.

[40] 3 Vic., c.12 (U.C.).

Canada in the company of either subjects or foreigners intending to levy war or commit a capital felony, or to join with either subjects or foreigners who entered the colony intending to levy war or commit a capital felony.

The provisions regarding court martial, civil procedure, and punishment were unchanged. The statute was re-enacted in 1859 as part of the consolidated statutes of Upper Canada, with only minor changes in wording.[41]

From 1838 in Upper Canada, levying war took on a kind of legal life of its own, in some sense distinct from treason but still closely allied to, and defined by, judicial construction of the Edward III statute. In 1848 in Britain and in 1868 in Canada with the so-called treason-felony acts, levying war increased its independence in statute law, becoming a peculiar kind of double offence, but one still dependent on construction of the Edward III statute.[42]

In what became Canada, levying war statutes were not used again until the Fenian raids of 1866. Then, the amended Upper Canadian 1838 statute was so heavily used, the topic of considerable judicial definition, that it acquired its nickname, "the Fenian Act."

Most Fenian prisoners were tried in civilian court at Toronto.[43] They were both American and Upper Canadian residents, all charged as either foreigners or subjects or both under the amended 1838 statute.[44] Of the 41 tried at Toronto, 22 were sentenced to death; only a few won acquittal.[45]

The reporters who compiled the trial reports regarded charges under the British subject section of the 1838 law as charges of High Treason, but the trial

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[41] CSUC, 22 Vic., c.98.

[42] 31 Vic., c.69 (Can.).

[43] There were also 16 tried at Sweetsburg, Canada East.

[44] In 1866, the statute was amended again to provide for civilian trials of both subjects and foreigners. Previously, only foreigners could be tried in civil court under the statute. 29,30 Vic., c.4 (U.C.). Those charged under both Fenian Act sections were either British-born American citizens (and therefore natural British subjects) or those of whom the prosecution was uncertain with regard to national status or how of how to proceed against them.

[45] The death sentences were all commuted.

judge and the appeal court justices made clear distinctions not only between the two sections but also between the British subject section and the more traditional treason count of levying war.[46]

Against the Americans, strictly under the statute it would have been necessary only to allege that they had been "in arms" against the sovereign. The prosecution would then not have to show acts of aiding and abetting to prove intent, but it would have been up to the defence to show that the accused had been innocent of criminal intent. But the indictments read that the Americans had, among other things, been "in arms . . . with intent to levy war" against the sovereign. This put the onus on the prosecution to prove intent, to show aiding and abetting. The Americans were charged with entering Upper Canada in the company of others intending to levy war, with continuing in arms in Upper Canada intending to levy war, and with committing acts of hostility in Canada in the company of others intending to levy war.[47]

Judge John Wilson delivered a very short charge to the grand jury, instructing them that if the accused were charged as Americans, citizenship had to be proved, but that British subject status could be assumed in the absence of evidence to the contrary. He was also very careful to tell the jurors not to let their feelings about the raid interfere with their consideration of the Crown's evidence.[48] That advice might have been difficult for the jurors to take. Chief Justice W.H. Draper had been quoted in the press as saying that the Fenian prisoners "should simply be dealt with as a party of robbers, whose fate ought to be the gallows."[49]

To escape the easier prosecution the American citizen section of the statute afforded, some of the American accused argued that they were British-born and

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[46] The trial reports are in Gregg, Trials of the Fenian Prisoners. The appeal reports are cited below.

[47] Gregg, Trials of the Fenian Prisoners,, 10-11.

[48] ibid., 8-9.

[49] Irish Canadian, July 6, 1866. Quoted in Neidhardt, "The Fenean [sic] Trials."

should be charged as natural British subjects. The trial judged ruled, and was upheld on appeal, that while the accused might be prosecuted on the basis of their natural allegiance, by 1866 judicial practice was to recognize acts of formally becoming citizens of another country.[50] But there had to be evidence of foreign citizenship. Judge Wilson directed that one man be acquitted because he was indicted only as an American, a fact the prosecution could not prove. After the acquittal, he was simply re-indicted and found guilty under the British subject section.[51] Some of the accused were indicted under both the American and British subject sections, with citizenship left as a fact for the jury to find.[52] At one of the appeals on the question of dual indictment, Chief Justice Draper ruled "that though his duty as a subject remained, he might become liable as a citizen of the United States by being naturalized."[53] The citizenship question would be settled by new naturalization acts, in Britain in 1870 and in Canada in 1881, that specified that a person who took out foreign citizenship would no longer be deemed in law a British subject.[54]

Some of the Americans demanded, and received, juries of their peers that reflected the dual nature of the so-called Fenian Act, six Americans and six British subjects.[55] This was an extension of the old right to a "half-tongue jury," used in the dim past for foreigners tried in England to ensure that some jury members spoke the accused's language.[56]

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[50] See the McMahon case, Gregg, Trials of the Fenian Prisoners, 84; UCQB, Michaelmas Term, 30 Vic., 198-201.

[51] McGrath case, Gregg, Trials of the Fenian Prisoners, 218, 188, 194-5; UCQB, Hilary Term, 30 Vic., 385-91.

[52] See, for instance, O'Neil case, Gregg, Trials of the Fenian Prisoners, 194.

[53] UCQB, Michaelmas Term, 30 Vic., 195, 198-201.

[54] 33 Vic., c.14 (G.B.); 44 Vic., c.13 (Can.).

[55] Gregg, Trials of the Fenian Prisoners, 197-9.

[56] Before the British Naturalization Act of 1870, an alien was entitled to a jury de medietate linguae in felony and misdemeanor cases but not in high treason. See Archbold's Pleading, 1875 edition, 156.

In a series of appeal judgements in the 1866 Fenian cases, the Upper Canadian Court of Queen's Bench clearly defined the statute and distinguished between the sections referring to British subjects and to Americans.

Thomas School was charged with six counts of levying war under the Fenian Act, three as an American and three as a British subject. He was found guilty only on two counts, both alleging he was a British subject. In the appeal court ruling, Justice Morrison ruled that there was enough evidence of School's crossing the border to go to the jury. And he ruled that the people he joined himself with on reaching Canada might reasonably be assumed to have been Americans.[57] Morrison's emphasis on these two points indicates that the wording of the Fenian Act demanded different offences being charged against British subjects than charged against aliens.

Against subjects, evidence of some element of crossing the border was necessary, either that they had themselves crossed the border with criminal intent or that they had levied war in the company of people who had crossed the border. Charges against British subjects could not include the offence of simply being in arms that could be charged against an accused foreigner.

In another of the Fenian cases, the question was highlighted as to the different offences under the Fenian Act sections dealing with aliens and subjects. William Slavin had been charged as an American and one of the grounds for his appeal was that that fact had not been proved. In writing the judgement for the appeal court, Justice Adam Wilson said that there was sufficient evidence that Slavin was American for the jury to consider. While he found the indictment preferred against Slavin somewhat imprecise, there was no doubt in his mind that the offences that could be charged against a foreigner and against a subject were substantially different, and that prosecution against a subject was more difficult. But if Slavin were an American, it was sufficient for the Crown to show only that

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[57] UCQB, Michaelmas Term, 30 Vic., 212-6.

he had been "in arms" against the Queen.[58]

In a unanimous decision of the Upper Canadian Court of Queen's Bench in another Fenian case, Chief Justice Draper was much more specific and considerably narrowed the grounds of prosecution.

Thomas Magrath had been charged under the Fenian Act as a citizen of the United States. It was shown at his trial that he was a British subject, and he was therefore acquitted. He was then indicted under the same act as a British subject. On Magrath's appeal, Draper held that the British subject section describes

> a felony not simply consisting of levying war in Upper Canada against the Queen, or of entering into Upper Canada with intent to levy war, or to commit any felony therein punishable by death; but the doing [sic] these or some other acts in company with foreigners, with the intents mentioned, or either of them; and this enactment is confined to British subjects.[59]

But the foreign citizen section of the statute was much different, Draper said, requiring different proofs.

> The first section points at the subjects of foreign states at peace with Her Majesty. . . . Under it foreigners may be tried and convicted, though none but foreigners have offended. British subjects do not commit the statutable felony unless by reason of their association with foreigners.
>
> The offence against the acts [sic] committed by a British subject, requires proof not only of the status as such subject, but also of the joining with foreigners in the commission of it. The same evidence, irrespective of national status which would convict the foreigner, would not convict the subject.[60]

The result of these rulings was that the prosecution need only show that foreigners were "in arms" against the sovereign in Upper Canada, akin to being merely present during a constructive levying-of-war, an offence much easier to prove than what was required under the Edward III statute. Against British subjects, levying war had to be shown, but the levying war had to be done in the company of

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[58] UCCP, Michaelmas Term, 30 Vic., 208-9.

[59] UCQB, Hilary Term, 30 Vic., 389.

[60] ibid. Emphasis in original.

foreigners and containing some element, either on the part of the accused or on the part of those with whom he joined, of crossing the border, much greater proof than required under the Edward III statute.

Against British subjects, it remained necessary to show that they aided the levying-of-war, not simply that they were present during it, as it had been necessary under other treason statutes. The 1866 decisions on this important point are a bit confusing and must be read closely and in context. The judge during the 1885 North-West Rebellion trials did not understand these rulings and applied them to mean the opposite of what was intended.[61]

In the Upper Canadian Fenian cases, Robert Lynch claimed on his defence that he was a newspaper reporter, merely doing his job unconnected with any intent to levy war. John McMahon claimed that he was a priest who had been forced to accompany the Fenians and who had acted as a doctor for them. Both Lynch and McMahon were charged and convicted as Americans, not just with being in arms but being so intending to levy war. So, aiding and abetting, under the long-standing construction of the levying war count of the treason laws, had to be shown against them, the same as against British subjects under the Fenian Act.

In Lynch's appeal, Justice Hagerty, taking both that and the previously settled McMahon case together, said:

> The prisoner, we think, wholly mistakes the nature of the charge against him, when he urges his character as a newspaper reporter to establish an immunity from the consequences of being present in apparent co-operation with the invaders. If a number of men band themselves together for an unlawful purpose, and in pursuit of their object commit murder, it is right that the Court should pointedly refuse to accept the proposition that a full share of responsibility for their acts does not extend to the surgeon who accompanies them to dress their wounds, to the clergyman who attends to offer spiritual consolation, or to the reporter who volunteers to witness and record their achievements. The presence of any one, in any character, aiding and abetting or encouraging the prosecution of the unlawful design,

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[61] See Chapter Eight of this study.

must involve a share in the common guilt.[62]

He was drawing a very fine line, but Hagerty was not saying that mere presence was evidence of guilt in a constructive levying-of-war, which is what Judge Hugh Richardson would take him to mean in 1885. His emphasis was distinctly on "apparent co-operation" and "aiding and abetting or encouraging." Most pointedly, the reporter he described was one who "volunteers to witness and record their achievements." Chief Justice Draper made a similar point in the McMahon appeal, saying that there had to be "evidence to connect the prisoner with the acts of hostility and the intent to levy war," that is aiding and abetting.[63]

One of the grounds for McMahon's appeal was that Judge Wilson misdirected the jury by saying that McMahon would be guilty if he was present with no intent other than to "minister the consolations of religion."[64] But what Wilson had told the jury on that point was:

> If he was there to aid and comfort them in any way whatever — as a spiritual advisor even, or as a medical man, or in any capacity which would give them encouragement and assistance even although he did not bear arms — the law makes no distinction between him or any other who merely assisted about the camp, and those who actually bore arms and committed acts of hostility.[65]

As Chief Justice Draper put it, the question was not whether McMahon was there in his alleged professional capacity, but whether he "was there to sanction by his presence as a clergyman what the rest were doing, . . . supporting and counselling them."[66] While Lynch and McMahon may have actually been with the Fenians in professional capacities unrelated to an intent to levy war, there was evidence in both cases that they were acting as Fenians themselves, and perhaps

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[62] UCQB, Michaelmas Term, 30 Vic., 210-11.

[63] UCQB, Michaelmas Term, 30 Vic., 205.

[64] ibid.

[65] Gregg, Trials of the Fenian Prisoners, 76. Emphasis added. To the appeal court, Wilson directly denied the contention contained in the appeal. UCQB, Michaelmas Term, 30 Vic., 197, 204-5.

[66] UCQB, Michaelmas Term, 30 Vic., 206.

they were in leadership positions. What Wilson, Hagerty, and Draper all ruled was that there was enough evidence of their assisting in the levying-of-war to go to the jurics for findings of fact.

The 1866 justices made another point important in the conduct of treason trials. Often, both in what became Canada and in Britain, treason indictments were written and prosecution commenced without much regard for the strict words of the statutes and without applying the usual standards of proof to all facts alleged. After the 1795 treason-conspiracy statute was passed, many indictments contained charges that were an amalgam of the wording of that statute, the Edward III statute, and wide construction of those two statutes. For instance, the words "rebellion" and "subverting the government" increasingly appeared in indictments, though not strictly proper. When it came to the courtroom, prosecutors often made little effort even to define their terms, let alone to present evidence proving them, often relying on public knowledge or public notoriety. Defence lawyers very rarely complained about this imprecision, except in their submissions on the definition of intent to levy war, but Chief Justice Draper pointedly noted that the term "Fenians" had been neither explained nor proved.

> We cannot refrain from saying that we think it is to be regretted some evidence was not given to explain and establish what the word 'Fenians' imported. It seems rather to have been assumed that every body, the Court and jury included, understood it. Almost every witness used it as a familiar expression, and it is very probably that the sense in which they used it was the sense in which bystanders understood it. But it was a matter requiring proof, if that term explained the acts of the accused or of those among whom he was as an associate. Such proof might have prevented the possibility of question whether the acts proved amounted to levying war against the Queen.[67]

After 1866, the Fenian Act was never again used in a case of levying war. But it remained Canadian law into the 20th century and was considered for use in one famous treason case, that of Louis Riel in 1885.

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[67] UCQB. Michaelmas Term, 30 Vic., 264.

Chapter Eight

Levying War in 1885

The Edward III treason statute was considered to be the law of the new country of Canada in 1867.[1] In the wake of Confederation, the continuing Fenian threat, and the aftermath of the American Civil War, the Canadian Parliament quickly enacted more treason law. At the end of 1867, the Upper Canadian Fenian Act was adopted as Canadian law.[2] A few months later, parliament passed a virtual copy of the British treason-felony act of 1848. The only significant difference was in the punishment section, with the Canadian version giving judges latitude to prescribe any term of imprisonment, perhaps making conviction a bit easier than the British version that prescribed imprisonment for less than two years or transportation for more than seven years.[3]

When rebellion was crushed in the North-West Territories in 1885, the Canadian government had three statutes available to prosecute those who had taken up arms: the Edward III statute, the treason-felony act, and the Fenian Act. There was considerable debate about which was most appropriate.

To deal with rebellion leader Louis Riel, Prime Minister John A. Macdonald instructed Justice Minister Alexander Campbell to

> look carefully at the Treason-felony act. I think there may be some difficulty in applying the Statute to Riel's case. I hope we shall not be obliged to have recourse to the Statute of Edward. The proceedings are complicated & perhaps can not be applied in the

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[1] See Burbidge, Digest of the Criminal Law, 55-6, fn. 4.

[2] 31 Vic., c.14 (Can.); transferred to the North-West Territories by 36 Vic., c.34 (1873).

[3] 31 Vic., c.69 (Can.); transferred to the North-West Territories by 36 Vic., c.34 (1873). This was slightly amended by 32-33 Vic., c.17, to remove the words "or without" in the phrase "within Canada or without" in the clauses regarding compassing the sovereign's death and intending to levy war.

N.W.[4]

The problems in applying the Edward III statute in the North-West Territories included the fact that the North-West Territories Act appeared to allow for trial of capital cases without grand jury indictment and before only a stipendiary magistrate and a jury of six.[5] This was a major issue at the Riel trial and was the principal ground of appeal.[6] As well, the requirement that the Crown provide in advance a copy of the indictment and lists of the jury panel and prosecution witnesses to the defence applied to the Edward III but not to the other statutes. Another complication was that the Canadian government had not transferred the Edward III statute to the North-West Territories. It existed in the territories as it had in England in 1670 when the Hudson's Bay Company was chartered.[7] This was a somewhat troublesome but not insurmountable legal hurdle. It was politically embarrassing, leading to charges that the government dredged up an "ancient" English law in order to hang Riel. Sensitive to this opinion, Judge Hugh Richardson made a point in some of the subsequent 1885 trials of telling the juries that the treason-felony statute was a "modern" law.[8]

It is difficult to know what difficulty Macdonald saw with regard to the treason-felony statute, unless it was the major political problem that that statute was a non-capital one. Ontario voters were clamouring for revenge for the killing of Thomas Scott in 1870, and badly frightened western settlers were also demanding

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[4] AO, M20-26, and NAC, MG-27 I C2, Alexander Campbell Papers, Macdonald to Campbell, May 19, 1885.

[5] 43 Vic., c.25 (Can.).

[6] CSP 1886, 43c; Territories Law Reports, 1:23-66; Canadian Reports, Appeal Cases, 9:214-8.

[7] The laws of England were received in Rupert's Land, which became the North-West Territories, with the HBC Charter of 1670 and the arrival of company personnel. By the North-West Territories Act of 1873, neither the whole of English nor Canadian law was transferred but just those specific statutes set out in that statute. English law, including the Edward III treason statute, as it existed in Canada at Confederation was specifically not transferred to the North-West Territories. So, the Edward III treason statute was in force in the North-West Territories in 1885 as it had been defined in England in 1670. 36 Vic., c.34 (Can.).

[8] CSP 1886, 52:169-70.

that Riel be hanged.[9]

In his instructions to Campbell, Macdonald did not mention the Fenian Act, even though he had personal experience with that statute in 1838. The Fenian Act posed none of the complications of the other two statutes, but it did present a different problem.

The public perception was that charges against Riel under the Edward III statute were unlikely. Between the time of Riel's surrender on May 16, 1885, and the trial that began on July 20, almost no commentators thought he would be or ought to be tried under the Edward III statute.[10] Quite a number thought prosecution under the treason-felony statute would be appropriate.[11] About an equal number thought Fenian Act charges were proper, partly because that law appeared to take care of Riel both as a British subject by birth and as a naturalized American, which he was. These included the journal of the Law Society of Upper Canada.[12]

The government's prosecutors initially favored Fenian Act charges against Riel. If they charged him as an American, they could accuse him simply of being "in arms against Her Majesty" or committing "any act of hostility" in Canada. In 1866, the American Fenian accused had been charged with being in arms intending to levy war. Proving the intent necessitated more work on the part of the Crown and was not strictly necessary. It was sufficient to charge a foreigner with being "in arms," without specifying any intent.[13]

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[9] See, Beal and Macleod, Prairie Fire, 295-6; Canada Law Journal editorial, v.21, n.11, June 1, 1885.

[10] See, for instance, Toronto Daily Mail, May 25, 1885; Regina Leader, June 2, 1885. These two newspapers were among the very few that thought the Edward III statute would be used, but they also mentioned the possibility of Fenian Act charges.

[11] See, for instance, Winnipeg Daily Times, May 18, 1885, and June 19, 1885.

[12] Canada Law Journal, v.21, n.11, June 1, 1885. The editorial was curiously titled "Treason-felony in the North-West," but it made no mention of the treason-felony statute.

[13] George Burbidge, deputy minister of justice in 1885 and the leader of the prosecution team for the Riel trial, supported this reading of the statute in his Digest of the Criminal Law, 56-7.

Near the end of June, 1885, the prosecutors prepared an information against Riel entitled "Draft Charge under 31 Vic Cap 14 [the Fenian Act] & for Murder." The information contained a total of five counts, the first four worded in the language of the Fenian Act and charging Riel as an American citizen. (The fifth count charged him with murder, the date, place and victim left blank.)[14] The information was very carefully worded to cover all the major events in which Riel participated, but not worded so as to make prosecution easiest. The first count charged him with joining with others and being in arms intending to levy war at the battle of Duck Lake on March 26. There were no overt acts specified. The next three counts charged him with joining with others who were in arms (feloniously, not traitorously) at the battles of Duck Lake, Fish Creek, and Batoche and with committing acts of hostility there. Unlike the first count, the subsequent three alleged an overt act of hostility, essentially of fighting the sovereign's soldiers and police, done with an intent to levy war.

The difference between the charge contained in the first count of the information and those in the following three counts is substantial. It is difficult to say, given the documentation that remains, exactly what the prosecutors intended. Taking the counts together, the prosecutors may have thought they were charging Riel with being in arms intending to levy war (the first count) and with committing hostile acts without necessarily intending to levy war (the next three counts). Or, they may have thought they were charging him with being in arms and committing hostile acts, without necessarily intenting to levy war. The difference is that if the prosecutors tied language about intent directly to the substantive charge, they would have to prove the intent, something that was both difficult and strictly not necessary under the Fenian Act.

Under the Edward III statute, it was necessary to prove an intent to levy

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[14] NAC, RG 13 B2, pp. 2644-50. The date the draft was prepared is not specified but it is written to be sworn on a day (left blank) in July, which indicates it must have been written towards the end of June. Informations, not indictments, were prepared in 1885 because the North-West Territories Act did not contain provisions for grand juries.

war, though that intent could be assumed in a direct levying-of-war. Under the Fenian Act, proving intent was not necessary against foreigners, unless the intent was alleged in the indictment or information.[15]

The language about "intent to levy war" occurs in the Riel draft information after the inclusion of each overt act in counts two to four. Intent could, therefore, in the prosecutors' minds have been directly connected to the overt act specified, not to the actual charge. It is the kind of complexity appeal court judges wrestle with, but essentially if an intent to levy war were merely part of the evidence of overt acts, the prosecutors might have been left with an easier stated offence to prove.

But because a marginal note in the draft Fenian Act charge against Riel refers to the 1866 case of McMahon, it is more likely that the prosecutors of Riel thought that the substantive crime included intent to levy war, as the 1866 prosecutors had charged McMahon.[16] The difference was that the 1866 prosecutors had not inserted allegations of overt acts between the substantive charge and the language of intending to levy war, but the 1885 prosecutors did. This might have changed had the Fenian Act charge against Riel gone beyond the "draft" stage, and it is impossible to tell now whether the prosecutors thought of charging Riel as an American with simply being "in arms" under the Fenian Act, the easiest-to-prove quasi-treason charge ever devised under the British system, or if they were considering charging him as an American with being "in arms with intent to levy war" under the Fenian Act, a more difficult charge to prove but still easier than sustaining a prosecution under the Fenian Act against a British subject.

The major problem with the strategy of charging Riel under the Fenian Act was that the prosecutors were not sure they could prove that Riel was an American citizen, a burden-of-proof that would fall on them. He had taken out citizenship, but

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[15] It is a long-standing requirement of British law that to secure conviction, prosecutors must prove each fundamental element of the stated charges.

[16] Gregg, Trials of the Fenian Prisoners, 10-11. This is the indictment of Robert Lynch, but the McMahon indictment was not printed, and the reporters said it was the same as that against Lynch.

the prosecution could not find a copy of his naturalization certificate.[17] If they could not prove he was an alien,[18] Riel would be assumed to be a British subject, as he was by birth.

The prosecution certainly did not want to charge Riel under the British subject section of the Fenian Act. They would have had to show that Riel had levied war in the company of aliens, that he entered Canada with aliens intending to levy war, or that he, intending to aid and assist, joined with either subjects or aliens who had entered Canada intending to levy war. Connecting him directly with Americans in his rebellious efforts was virtually impossible. The only way of getting at Riel as a British subject under the Fenian Act would have been to allege that those with whom he entered Canada in the summer of 1884 had harbored intent to levy war.[19] This would not have been impossible, but it would have been very difficult. Without having certain proof of Riel's citizenship, the prosecution could not risk being forced to try him as a British subject, so they dropped the Fenian Act strategy.

The information eventually preferred against Riel charged him with six counts, all levying war charges in the words of the Edward III statute, the first three as violating his natural allegiance as a British subject, the second three as violating his local allegiance.[20] The information was worded almost exactly as the standard

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[17] CSP 1886, 43c, Riel transcript, in Epitome, 43, 50; NAC, RG-13, B2, letterbook, p. 204, Burbidge to Fitzpatrick, July 27, 1885.

[18] Until 1881 in Canada, the dual nature of the Fenian Act described the difference between British subjects and citizens of a foreign state. "Foreigners" could be British-born, therefore owing natural allegiance to the British sovereign, or they could be deemed to be foreign citizens owning local allegiance when they were within the British state. "Aliens" were not natural-born British subjects, but they would owe local allegiance when within the British state. The Naturalization Act of 1881, 44 Vic., c.13, decreed that those British-born subjects who took out citizenship in a foreign country would not be deemed natural British subjects for the purposes of Canadian law, but they would be considered "aliens."

[19] On Riel's return to Canada in 1884, see Beal and Macleod, Prairie Fire, 103-9.

[20] CSP 1886, 43c, in Epitome, 14-16. There is a major error in the transcript as printed in that the words of the substantive offence, "did levy and make war," etc., were left out in the first count. This did not much matter, because the proper wording is included in the other counts.

authority, Archbold's Pleading, suggested a levying war charge should be worded,[21] but levying war was a charge that could be brought under the Edward III statute, the treason-felony statute, or the Fenian Act.

The Crown, then, charged Riel with the levying war offence of the Edward III statute, and the prosecutors were not obliged under the 1885 rules to tell Riel or his lawyers what statute was being used. Riel's lawyers thought Edward III charges were unlikely, and when they came to court on July 20, they recognized the charge against their client as one of levying war but thought it was under the Fenian Act. They believed Riel was charged under both relevant sections of the Fenian Act, with levying war as a British subject and with being in arms as an American. They knew he could not be found guilty both as British and as American. Their strategy was to try to force the Crown to proceed against Riel solely as a British subject, which made the defence easiest. If that failed and he were tried as an American, they could still rely on an insanity defence. They may have believed they would be defending either an insane American or a sane British subject.

Near the end of the first day of Louis Riel's trial, after the long argument about the court's jurisdiction in capital cases, one of Riel's lawyers, T.C. Johnstone, began an argument that had to do with the wording of the information and with his client's nationality. Johnstone argued that the second set of three counts of the information should specify he was a citizen of a foreign state at peace with Britain, the wording of the Fenian Act, not just that he was living in Canada. If the second set of counts did not specify that, Johnstone argued, Riel should be presumed to be a British subject, and therefore the information should be held as defective because it was double, that is the second set of counts exactly duplicated the first set.[22]

When he cited 1866 precedents, Johnstone found himself in trouble. Judge

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[21] Archbold's Pleading, 1886, 834.

[22] CSP 1886, 43c, in Epitome, 35-6.

Hugh Richardson was familiar with the Fenian cases,[23] and he found Johnstone's line of argument confusing. Of the Thomas School case, he asked Johnstone: "Was that a prosecution under Edward III Act? Wasn't it under the 31 Victoria [chapter 14]?" Johnstone replied that the School prosecution was under the Fenian Act but "the clauses are the same." What he meant was that the clauses concerning citizenship in the old Upper Canadian Fenian Act were the same as the clauses in the Canadian version. At that point, prosecutor B.B. Osler interjected to say that the clauses were "totally different on that point," meaning that the description of citizenship was not at all the same in the Fenian Act as were the requirements of the Edward III statute and charges brought under either of those statutes had to be worded differently. Then Johnstone said to Osler: "As I understand it, you are proceeding under 31 Victoria" (the Fenian Act). Osler replied: "You are misunderstanding us then. 25 Edward III is the one."[24]

It was an extraordinary mistake for the defence team to make, to believe the charge against their client was under a quite different statute than it actually was. Experienced lawyers, as Riel's were, should have recognized the charges contained in the information as Edward III charges, certainly not as Fenian Act ones. This would have been reinforced when the Crown's list of witnesses and the prospective jury panel were served on Riel, requirements of Edward III prosecution but not for a charge taken under the Fenian Act. It might be suggested that at the end of a long day, T.C. Johnstone, the junior member of the Riel defence team, was allowed to "take a whack at trying to get the Crown to elect or concede that it was proceeding under the Fenian Act," that Johnstone was "assigned the least arguable submission," and that Johnstone's stated surprise when corrected by B.B. Osler as to the actual

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[23] Richardson was the militia lieutenant-colonel at Sarnia during the Fenian raids and apprenticed as a lawyer under the 1866 trial judge, John Wilson. Morgan, Canadian Men and Women, 856.

[24] CSP 1886, 43c, in Epitome, 35-6.

charge was simply playing to the gallery, or perhaps to an appeal court.[25]

But, while the extant evidence is unclear, it does seem as if the Riel team made a substantial mistake.[26] The exchange between Johnstone and Osler occurred after the argument about the jurisdiction of North-West Territories courts in captial cases. This jurisdictional argument in the Riel case has riveted historians' attention. What the historians have not noticed is that the jurisdictional question had in fact been thorougly and very capably argued shortly before the Riel trial began in the murder case of John Connor (and lost as far as Riel was concerned). This argument would be settled, the jurisiction of the North-West Territories court upheld, by the Manitoba Court of Appeal on June 29, 1885, pending an appeal to the British Privy Council. It had been argued by T.C. Johnstone (and J.S. Ewart) against Riel prosecutor B.B. Osler.[27]

On July 20, 1885, the Riel defence team spent most of its effort arguing jurisdiction, something that if successful would have sunk the whole Riel process at trial or on appeal but that had already been decided at trial and was wending its way through appeal in the Connor case. It may well be that the Riel defence team thought that their best procedural tack was to force the Crown to proceed against Riel as a British subject assuming he had been charged under the Fenian Act, an argument they left until after the fundamental jurisictional one and left to the "junior" T.C. Johnstone who had already handled the jurisdictional question. It may well be that the insantity defence they launched was a "back-pocket" defence and that the Riel defence team originally hoped to mount a defence against charges under the Fenian Act, which would have put them in a much different position than

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[25] Private letter, McClung to Beal, Nov. 20, 1990. These suggestions, and many other valuable ones, were made by Justice John McClung of the Alberta Court of Appeal during correspondence with me on various legal points in the Riel trial.

[26] Nicholas Flood Davin, publisher of the Regina Leader and himself a lawyer, who knew Johnstone personally, believed the defence had made a mistake. Davin wrote that "though all the proceedings must or should have suggested the fact to him, he [Johnstone] did not know that the prosecution was under the statute of Edward iii [sic]." Regina Leader, July 21, 1885.

[27] Manitoba Law Reports, 1885, 235-48.

defending against charges under the Edward III statute.

After discovering that the prosecution was under the Edward III statute, Riel's defence team thought their only chance of saving their client from the gallows was by the insantity defence. They may have been planning to use insanity as a defence even thinking the prosecution was under the Fenian Act, especially if Riel had been proved to be an American. But this may have been the first case in which insanity was the defence against a treason charge in a constructive levying-of-war.

Riel's was only one of many treason trials following the 1885 rebellion. Justice Minister Alexander Campbell instructed the prosecutors to charge all leading participants in the 1885 affair under the Edward III statute. After a series of convictions, Campbell expected the accused to begin to plead guilty. Then, the government would consider dropping or revising the remaining charges, but it was necessary to secure 30 or 40 convictions, Campbell said.[28]

Of the people the government rounded up after the rebellion, about 70 eventually appeared for trial, not including those charged with murder. Some of those were at Batoche with Riel as members of the Métis provisional government council, four were chiefs of Cree and Dakota bands that apparently rose in rebellion, one was a leader of an English half-breed group, one was Riel's secretary, and the rest tended to be more-or-less ordinary participants.[29]

The prosecutors found Campbell's advice to bring charges under the Edward III statute not easy to take. They told the minister that they decided to proceed under the treason-felony statute because of the procedural hurdles of the Edward III statute and because they would have trouble persuading juries to bring in hanging

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[28] Campbell to Robinson and others, June 20, 1885, in Epitome, 12.

[29] Complete lists of those the government charged or was considering charging appear in NAC, RG-13, B2, "Records Relating to Louis Riel and the North-West Rebellion, 1873-1886." A fairly reliable list of those charged is in Sandra Bingaman, "The North-West Rebellion Trials," 204-10. Bingaman's is the only full scholarly study of the 1885 treason-felony trials, but it does not demonstrate significant understanding of the legal issues and is wrong on some important points of courtroom procedure.

verdicts against many of the accused other than Riel.[30]

As they had for the Riel case, the prosecutors appear to have relied on Archbold's Pleading for the wording of the treason-felony informations. Initially, they did not read Archbold's very carefully. In the first information they wrote, the prosecutors charged William Henry Jackson, Riel's secretary, with intending to depose the Queen, as evidenced by an overt act of conspiring to levy war.[31] This was a perfectly proper charge under the treason-felony statute, but it was not nearly as appropriate to the 1885 cases as was a charge for intending to levy war As it was laid against Jackson, the intention to depose the Queen was related constructively to an intention to levy war, which was itself in 1885 a constructive levying-of-war.

What the 1885 prosecutors appear to have done was take without question the only count Archbold's fully used as an example of a treason-felony indictment. After the example of an indictment for intending to depose the queen, Archbold's said, in italics: "Add counts charging a compassing to levy war, in order to compel the Queen to change her measures and counsels, or otherwise according to the facts."[32] Jackson's case was peculiar on any grounds, and he was found not guilty by reason of insanity.[33]

The next informations the prosecution team wrote were against some of the Métis councillors, charging them with intending to levy war to compel the queen "to change her measures and counsels," as evidenced by an overt act of actually levying war at the fight at Duck Lake on March 26.[34] The prosecutors did not tell the councillors or their lawyers that they had already decided to use the treason-felony

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[30] NAC, RG-13, B2, letterbook, p. 142, Burbidge to Campbell, July 18, 1885.

[31] CSP 1886, 52:340.

[32] Archbold's Pleading, 1886, 841.

[33] CSP 1886, 52:340-4. Jackson's colorful career is covered in several articles. There is a short synopsis in Beal and Macleod, Prairie Fire, 128-35, 306-8, 339-40.

[34] CSP 1886, 52:368-9, case of Pierre Parenteau and others.

statute against all but Riel. They threatened to charge them all with the capital treason offence under the Edward III statute unless the councillors pleaded guilty to the non-capital treason-felony, which they did.[35]

The prosecutors realized early on that they would have trouble making strong cases against many of the accused. In a private letter written before the Riel trial began, B.B. Osler said that

> our great trouble & tedious work will be not so much in the Riel trial, but in bringing crime home to the others. Poundmaker's case is a difficult one to deal with & so are the cases against the rank & file.[36]

But they had little difficulty in prosecuting the rest on the same treason-felony charge as they used against the Métis councillors, intending to levy war as evidenced by overt acts of actually levying war and, in some of the cases, of writing treasonous letters.

The 1885 treason-felony trials were handled badly in the courtroom. In none of the cases did the prosecution lead very strong evidence that a levying-of-war had taken place, which was a matter of fact that should have been placed before the juries. The difference between treason and riot that had been a feature of treason trials for centuries elicited no argument.

During the 1885 treason-felony cases, the trial of Chief One Arrow was typical in its treatment of levying war as defined by treason law. One Crown witnesses testified he thought there had been an uprising "against the Government, the Hudson [sic] Bay Company and the police."[37] The uprising was "supposed to be for the French half-breeds' claims," he testified, and the insurgents were "opposing for their rights; that is what it was supposed to be, against the police and

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[35] Beal and Macleod, Prairie Fire, 308.

[36] AO, Osler Papers, MU 2302, Osler to [?], July 12, 1885. Actually, Poundmaker's was a comparatively easy case to prosecute because of the letter demonstrating treasonous intent that was the Crown's main piece of evidence. CSP 1886, 52:261-337.

[37] CSP 1886, 52:16.

volunteers."[38] Two other Crown witnesses testified in the same vein, but less specifically.[39] In the One Arrow case, the vague Crown evidence hardly began to satisfy the quo animo test that distinguished between treason and riot, and in some other 1885 cases, the evidence was only slightly stronger.[40] It appears that public notoriety was enough definition of levying war to satisfy Judge Hugh Richardson, who instructed one jury to refer to "common report carrying down what [was] that state of open and armed rebellion."[41] The defence rarely objected to this — it probably did not matter much because the evidence certainly was available if the Crown had been pressed, and such evidence probably would have made conviction more certain regardless of the activities of the various accused.

In the 1885 cases, the clearest evidence that had to do with defining "levying war" in treason prosecutions was produced by a petulant and frustrated defence lawyer.[42] During the trial of Dakota Chief White Cap, Beverly Robertson led Crown witness Philippe Garnot, secretary of the Métis provisional government council, to say several times that he understood the Métis to be in arms to force the government to grant them rights to land.[43] In law, this might amount not to treason by constructively levying war, but to riot for redress of local grievances, which Robertson was obviously thinking but did not use in his closing argument because he had bigger and better points to make in that case.[44]

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[38] ibid., 52:17, 18.

[39] ibid., 52:22-3, 24.

[40] See, for instance, the Poundmaker case, CSP 1886, 52:261-337, and the case against The Hole (Okadota) and others, CSP 1886, 52:1-13.

[41] CSP 1886, 52:172.

[42] That defence lawyer Robertson was "petulant and frustrated" by the time of the White Cap trial and, below, "angry" at the time of the Big Bear trial seems obvious from reading the trial transcripts in the order in which the trials occurred. As the series progressed, Robertson attempted a variety of defence tactics, clearly, at times, "grasping at straws." The judge's view of the main legal point was so different from that which Robertson so firmly held that one marvels that he kept his temper. His speech to the White Cap jury was as severe as any in its treatment of both judge and jury.

[43] ibid., 52:43-4.

[44] ibid., 52:33-60.

Hugh Richardson, the judge who presided at the Riel trial and at the trials of most of the treason-felony accused, had very slight understanding of the laws of treason. His behavior on the bench during these trials cannot be compared to that of any other British or Canadian judge who ever heard a treason case. It can not be said that Richardson harbored ill-will towards the defendants or their race. In fact, he made clumsy attempts to bend the rules of evidence in the defendants' favor. But when it came to applying the law as it existed in 1885, Richardson was simply not competent.[45]

Richardson's charges to the juries were certainly not adept. Even in the Riel case, the highest-profile one, he spent more time discussing matters that were none of the jury's concern (the jurisdictional argument) than he did explaining treason laws.[46] His charge to the jury trying Thomas Scott[47] was peculiar, to put it generously.[48] In his direction, he ignored entirely the substantial defence evidence in the trial of Cree Chief Big Bear.[49] Much more importantly, he sincerely believed that mere presence was evidence in a constructive levying-of-war. That was contrary to all precedent, as defence lawyer Robertson repeatedly tried to point out. The directions to the juries resulting from this misunderstanding were probably responsible for imprisoning some people who were distinctly not guilty in law. This worked most to the disadvantage of those who were clearly simply members of the rank-and-file, who were not leaders.

Nine Cree associated with Chief Big Bear's band were tried (and convicted) together as a result of activities during murders at Frog Lake on April 2, the

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[45] Wilbur Bowker showed Richardson as a mediocre judge and one who was not above using his judicial position to solve personal problems. Bowker, A Consolidation of Fifty Years of Legal Writing, 707-14.

[46] ibid., 43c, in Epitome, 210-13.

[47] Thomas Scott was a community leader among English half-breeds in the Batoche area. He was no relation to the Thomas Scott of Red River Resistance fame.

[48] ibid., 52:168-72. His best charge was that to the jury trying Chief Poundmaker, CSP 1886, 52:333-6.

[49] ibid., 52:230-3.

burning of Fort Pitt on April 17, and the battle near Frenchman Butte on May 28. In this trial, the strongest evidence was probably that against Oskatatask. He bought tea at Frog Lake on April 2, attended a religious ceremony at Frenchman Butte a day or two before the battle, was seen armed at Frenchman Butte the day before the battle, and was at Fort Pitt on April 17 but apparently did nothing. The weakest evidence was that against Napasis, the sum of the testimony showing that he attended the religious ceremony and was seen armed at Frenchman Butte on May 27 but doing nothing else.[50] The lawyer for the Cree, Beverley Robertson, did not even see much point in having the evidence interpreted for his clients because "I can find nothing against them except that they are members of the band."[51]

The case against a group of Cree and Dakota relating to the fight at Duck Lake and the Battle of Batoche in mid-May was similar. One Crown witness testified that the five accused had been armed during the Batoche battle but apparently doing nothing except standing around with groups of Indians. The only other Crown witness saw only three of the accused armed during the battle, one apparently unarmed during the battle, and another at Batoche earlier in the month. The evidence did not show that any of the accused had been in the least aggressive. Judge Richardson gave the jury no instructions at all about what evidence might prove the charges, and the five accused were found guilty.[52]

While weak evidence and lame instructions to the juries were most obvious in the cases of the rank-and-file, the best illustration of Judge Hugh Richardson's misunderstanding of the law was in the case of Cree Chief Big Bear.[53] There was no doubt that Big Bear was present during the activities that were charged against

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[50] ibid., 52:233-60.

[51] ibid., 52:249.

[52] ibid., 52:1-13.

[53] ibid., 52:172-233.

him as overt acts of constructively levying war.[54] There could also be no doubt that he was present not aiding and abetting but trying to prevent bloodshed. Several defence witnesses testified very strongly to this, and so did some of the Crown witnesses. Only one witness testified that Big Bear had a hand in promoting treasonous intent, and that witness was thoroughly discredited.[55] Chief Big Bear was, in effect, in substantially the same position as Lord George Gordon had been in 1781,[56] as a leader of a group who were subsequently involved in riot or rebellion but as one who had tried to stop the violence, except that the evidence was more in Big Bear's favor than it had been in Gordon's.

But Judge Richardson directed the jury that Big Bear's continued presence among rebels was proof of treason, unless the defence showed that he was there under fear of death. He first told the jury that if they believed the evidence,

> a state of rebellion existed prior to the 2nd of April, and the prisoner knew it. Now, if he knew it, what was his duty? What was his first duty, and in what way could he relieve himself of that duty? His first duty was the same as yours and mine would be, not to be found in the rebel camp, but to be found where law and order prevailed. That was his first duty, and if that was his first and main duty, what excuse could there be, what excuse is there why he was not?
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> Well, the only excuse which the law recognizes is this — taking the words themselves of the authorities 'the fear of present death is the only excuse. Suffering, or any other mischief not endangering his person, or the apprehension of personal injury less than would deprive of life, is not a justification of a traitorous act.'[57]

It is difficult to know what authority Richardson was quoting. The passage does not appear in Foster or Hale. But Archbold's Pleading, upon which all 1885

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[54] One of the overt acts charged against Big Bear was that of writing a letter seeking support for rebellion. But the Crown could not produce the letter, and Judge Richardson stopped exploration of that topic. CSP 1886, 52:178-80.

[55] The witness was HBC clerk Stanley Simpson, who testified about what he overheard Big Bear say but whose understanding of the Cree language was shown to be virtually non-existent. CSP 1886, 52:195-202.

[56] See Chapter Four of this study.

[57] CSP 1886, 52:231.

trial participants heavily relied, immediately followed its discussion of the pro tempore mortis rule with a caution: "In the case of a constructive levying of war, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason, are traitors, the rest are merely rioters."[58]

After Richardson's charge, an angry Beverly Robertson demanded the jury be brought back for further direction, so they could be instructed that Big Bear's presence in itself was not a treasonous act, but that he had to be shown to have been aiding and abetting, "that, although he was there, he was not acting with them, but the contrary, his being there was not enough upon which to convict him."[59]

Judge Richardson's confusion is evident during the argument with Robertson about whether to bring back the jury. He said that he had directed the jury on the aiding and abetting rule, which he had not, and he denied saying that the fear of death would be Big Bear's only excuse, which he had said.[60] Then, Judge Richardson re-directed the jury incorrectly. He first laid emphasis on whether evidence of Big Bear's peaceable intent could exculpate him from a charge of treason, shifting the burden-of-proof to the defence incorrectly in a constructive levying-of-war. He then, and much more damagingly, wrenched the 1866 precedents out-of-context, quoting Justice Hagerty's discussion of the reporter and clergyman-doctor to give the impression that mere presence was evidence of treason.[61] He told the jury that:

> If a number of men band themselves together for an unlawful purpose, and in pursuit of their object commit murder, it is right that the court should pointedly refuse to accept the proposition that a full share of responsibility for their acts does not extend to the surgeon who accompanied them to dress their wounds, to the clergyman who

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[58] Archbold's Pleading 1886, 836. Richardson's misunderstanding on this point was evident in many of the cases he tried. See, for instance, his charge to the jury at the trial of Chief Poundmaker, CSP 1886, 52:336.

[59] CSP 1886, 52:233.

[60] ibid.

[61] ibid., 52:232-3.

> attends to offer spiritual consolation, or to the reporter who volunteers to record their achievements; the presence of anyone in any character aiding and abetting or encouraging the prosecution of those unlawful designs must involve a share of the common guilt.[62]

Now, Richardson did mention aiding and abetting, but the impression he must have left with the jury is that mere presence would constitute assistance. Richardson's was an accurate paraphrase of what Justice Hagerty had said in 1866. But it lacked context. Hagerty, and other 1866 judges, did not mean to say that mere presence in a professional capacity unrelated to a levying-of-war was sufficient proof of treason. They said that using one's professional position to further levying-of-war was treason, and that if evidence showed that the accused had aided and abetted treason, he could not at trial hide behind his profession. The 1866 judgements are complex and confusing, but they simply do not apply to Chief Big Bear's case, or to other 1885 cases during which the judge mentioned them, and Richardson, who apprenticed under the 1866 trial judge, should have known that.[63] After Judge Richardson's direction, it is no wonder the jury found Chief Big Bear guilty.

Richardson's incorrect direction on the issue of presence during a constructive levying-of-war is more obvious when compared to the views of another 1885 judge who heard two treason-felony cases. Judge Charles Rouleau of Battleford was known as a man who disliked Indians.[64] But during one of the trials, he pointedly told the prosecutor he had to show assisting, not mere presence. Mussinass and Oopinouwayinwin were charged with treason-felony as a result of the pillaging of Battleford at the end of March, 1885, and in their co-operating in writing an allegedly treasonous letter to Louis Riel at the end of April. Unlike those

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[62] ibid., 52:233.

[63] For the 1866 judgements, see Chapter Seven of this study.

[64] See Fr. Alexis André's comparison of Richardson with Rouleau, whom he calls "a vindictive man and a servile instrument in the hands of the government." SAB, Taché Papers, André to Taché, Aug. 20, 1885, this author's translation.

Indians tried at Regina before Judge Richardson, the goverment did not provide those tried at Battleford, even for murder, the assistance of a defence lawyer. Judge Rouleau interrupted prosecutor D.L. Scott's case to say:

> There is no evidence about these men raiding the houses [at Battleford]. They were no doubt there with the other Indians but that does not prove they were assisting, and evidence does not seem to be strong enough to show that these men were actively writing treason.[65]

Even so, Rouleau found the two accused guilty, and though either his reasons or the reports of them were imprecise, it appears he made his determination, in a trial without a jury, on a narrow but correct interpretation of treason law. He appears to have decided that the mere presence of the two accused during the pillaging of Battleford did not matter. But they were not merely present during the composition of the treasonous letter — they gave their support to it by not objecting to it and by remaining in the tent while it was composed.

Again without a jury, Judge Rouleau tried Wahpiah. Though this trial, without a defence lawyer, could hardly be considered fair in the circumstances, Rouleau was quite explicit about where the law stood. The evidence showed that Wahpiah had moved from his own band, one much different geographically and politically from Big Bear's, to become a leading militant among Chief Big Bear's band. But Rouleau did not, in his judgement, lay stress on Waphiah's militancy. He told Wahpiah, in essence, that the crime of treason was his leaving his own band to join one apparently in rebellion. "If you had been a man of Big Bear's band I would have done nothing to you but you left your band and went there."[66]

An appeal court almost certainly would have ordered new trials in many of Judge Richardson's treason-felony cases on the ground of misdirection or of non-direction. But in the North-West Territories in 1885, unlike other parts of Canada,

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[65] Saskatchewan Herald, Oct. 19, 1885. In the government's 'official' transcripts of Rouleau's trials, in CSP 1886, 52a and 52b, many of the judge's comments do not appear.

[66] Saskatchewan Herald, Oct. 26, 1885.

modern appeal procedure was not at all in place. Appeals could only be taken by the clumsy "writ of error" route. This kind of appeal could be taken only if it could be alleged that something was wrong in the record of the trial. Before modern procedure, the record consisted of such things as the indictment (or information), the verdict, and the judge's legal rulings during the trial. The judge's directions were not considered part of the record, and so it was extremely difficult to allege error in them.[67]

A further complication was the position of 1885 juries. There are few close studies to support the conclusion, but it is a commonplace among lawyers, judges, and newspaper reporters who regularly cover jury trials that jury members give inordinate weight to what the judge tells them in his charge. An expert on English trials in the century following 1650 wrote: "the jury seem to have been eager for the judge's guidance, and the judge could often content himself with uttering a broad hint of his view of the merits [of a case]."[68] This appears to be true still in the modern era.

In 1885, there was an additional compelling reason for juries to listen to their judge: he himself had picked the panel. The North-West Territories Act directed magistrates to seek juries "from among such male persons as he may think suitable in that behalf."[69] For the 1885 trials, Judge Richardson said:

> I selected the jury, gentlemen who were summoned to serve as a jury in this case and in all other cases — I select them from a respectability standpoint, respectability as men in the Dominion of Canada. . . . I look not at politics, not at religion, not at any branches how one may feel, I simply say, is that a respectable man? Does he bear a character so far as I know in the community? If he does, he is fit to sit on a jury, and having a list of whose whom I know and whose characters I have been able to form an opinion upon, a ballot takes place.[70]

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[67] See, Stephen, History of the Criminal Law, 1:95, 1:308-10.

[68] Langbein, "The Criminal Law Before Lawyers," 263.

[69] 43 Vic., c.25, s.75, ss.9.

[70] CSP 1886, 52:169.

The judge either knew each juror personally, and presumably was friendly with him, or knew enough of him by reputation to deem him "respectable." It would be extremely difficult to prove, but it is highly likely that almost all the 1885 jurors closely shared their judges' view of events. It would be surprising to find many Liberals among the jurors, and probably all of them were reasonably well-to-do. It is very likely that most jurors in the North-West Territories in 1885 paid special attention to their judges' advice.

It is interesting that the only victory for the lawyer who defended most of the Indians charged with treason-felony came when he, after trying a number of different tactics, took a strongly offensive, and offending, tack. In his speech to the jury trying Chief White Cap, the last treason-felony trial he handled, Beverly Robertson took direct aim at the jury for their apparent racism and at the judge for his apparent misunderstanding of the law.

Robertson began by complaining that "since the conviction of the [sic] Big Bear, I have felt that it is almost a hopeless task to attempt to obtain from a jury in Regina a fair consideration of the case of an Indian." He ended his address to the White Cap jury by disagreeing with Judge Richardson's view that mere presence among rebels was evidence of treason.[71]

> His Honor has told juries before in these cases that the mere presence of the prisoner in the camp was sufficient to convict him, unless it was conclusively proved to you that he was prevented from leaving it by the instant fear of death and nothing short of that would excuse it. . . . I am bound to dissent from that ruling and to protest against it, and I do so. I say that is not the law. I say that in a case of this kind, . . . the question is not whether he was there, but the question is whether he was aiding and abetting and encouraging them, and the jury is not bound to infer at all that because he was there, he was aiding them. His being there is not a crime.[72]

It is difficult to know whether the government's prosecution team recognized

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[71] ibid., 52:51-7. The other major defence victory was in the case of Thomas Scott, defended by H.J. Clarke, CSP 1886, 52:60-172.

[72] ibid., 52:55-6.

the mis-application of the law in the 1885 treason-felony cases. In the first trial of the treason-felony series, B.B. Osler argued with Beverly Robertson about constructive treason and constructive levying war, in the process demonstrating some misunderstanding himself and apparently eventually bowing to Robertson's interpretation.[73] After that, the prosecution never again engaged in debate on the issue.

But as after every other upheaval in which one brand of treason law or another was used heavily in England or in Canada, changes in statute treason law followed the 1885 rebellion.

The Revised Statutes of Canada of 1886 changed Canadian treason law significantly. The RSC made it treason punishable by death to compass the death of the sovereign. This was the only one of the charges of the Edward III statute specified, but the statute itself was included as being the law of Canada. Among other provisions, intending to levy war, in the words of the treason-felony statute, was an offence punishable by life imprisonment, removing the latitude that had previously been given to judges to impose any term of imprisonment. The provisions of the Fenian Act against aliens and subjects were re-enacted verbatim. The RSC also created a novel treasonous practice, that of conspiring to by violence intimidate or put force or constraint on a provincial legislature, punishable by fourteen years in prison.[74]

George Burbidge, the deputy minister of justice and the government's representative at the Riel trial and during the organizing of the treason-felony cases of 1885, began his efforts to write a Canadian criminal code in the late-1880s. When he published what he thought ought to be the criminal code in 1890, he included the main Edward III treason charges. He also included the charges under the treason-felony and Fenian statutes and the clause about provincial legislatures,

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[73] ibid., 52:25-7.

[74] RSC 1886, c.146.

all as were contained in the 1886 RSC.[75]

When the Canadian parliament enacted its first criminal code in 1892, it followed almost exactly Burbidge's Digest with regard to treason and like offences, except that conspiring to levy war became a truly dual offence, punishable under the main treason section by death and punishable under what was in effect the treason-felony section by life imprisonment. The first criminal code also re-enacted the old Fenian Act, but it changed the wording of the Edward III adhering-to-enemies treason count to read "assisting any public enemy at war with Her Majesty." This may have meant that those enemies who were citizens of countries at peace with Canada would have been liable under this section, but it was never tested.[76]

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[75] Burbidge, Digest, articles 54-66, pp. 54-61.

[76] CC 1892, s.65-70.

Chapter Nine

Conclusion

Loyalty is a sentiment, not a law. It rests on love, not on restraint. The Government of Ireland by England rests on restraint and not on law; and since it demands no love it can evoke no loyalty.

— Roger Casement[1]

When Irish nationalist Roger Casement came to trial in 1916 on a treason charge of adhering to the sovereign's enemies, the British government had in its hands Casement's "Black Diaries." The diaries indicated "a compulsive and obsessional homosexual activity of a promiscuous nature, crudely described."[2] They would have been good backing for a plea of "not guilty by reason of insanity" by Casement. The British government offered them to the defence lawyers for that purpose, but the lawyers adamantly refused them.[3]

Casement's lawyers constructed a defence based on the strict wording of the Edward III statute, directly against precedent.[4] It was a long-shot but well-argued defence, not likely to succeed but holding out the possibility of a reprieve of the death penalty after conviction.[5] Casement opposed his lawyers' strategy. He wanted

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[1] Casement's speech at his trial. Quoted in Inglis, Roger Casement, 404. The word "law" in the third sentence obviously should be "love." This indicates a fascinating Freudian slip on the part of either Casement or those who reported his speech.

[2] Kee, Ourselves Alone, 13-4.

[3] For a decidedly conspiratorial view of the rejection of the offer of the diaries, see, Inglis, Roger Casement, 332-4. The use of the diaries, and even their existence, has been a matter of considerable controversy and is included in any work on Casement.

[4] The defence fought the charge on the ground that the offence had not been committed against the sovereign "in his realm." K.B. 1(1917):98-147. The precedent that bore directly on this case was that of Lynch in 1903. K.B. 1(1903):444-60.

[5] Reid, The Lives of Roger Casement, 388-9.

to mount a purely political defence, that it was right for an Irishman to fight British tyranny, a defence that was not only improper in treason law but that would have virtually guaranteed him the gallows.[6]

When Louis Riel came to trial in 1885, the Canadian government probably had in its possession his diaries, which had been seized with his other papers after the Battle of Batoche. These diaries, not lurid in any measure as Casement's were, detailed highly religious musings that would have seemed more than passing strange to an 1885 jury. Later commentators claimed that the diaries might demonstrate Riel's mental instability. The Canadian government did not offer the Riel diaries to anyone. In fact, sometime before the Riel trial began, the diaries were conveniently lost and did not re-surface until the 1960s.[7]

Riel's lawyers entered a plea of insanity, the only strategy they thought offered hope of keeping their client alive. This angered Riel. He, like Casement and like many other "traitors," wanted a political defence, a certain loser but one that would leave him with his dignity intact.[8]

Between the British government of 1916 and the Canadian government of 1885, there was one similarity in the way they found they had to treat their high-profile traitors. Despite strong protests, both domestic and international, neither government felt it could risk the political fallout of reprieving the death sentences passed on Riel or Casement.

Politics also accounts for the differences in the way the two governments dealt with possible insanity in their traitors. The British in 1916 were faced with a growing Irish insurgency, one that would soon succeed, at the same time as they were fighting the "war to end all wars." It would have suited that government to portray the captured nationalist as a madman, to minimize the seriousness of the Irish rebellion and to avoid creating a martyr to fuel the inferno. In 1885, the

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[6] ibid., 387-8.

[7] Flanagan, ed., The Dairies of Louis Riel. And see, Flanagan, "Louis Riel: Was He Really Crazy?"

[8] See, Riel's speech to the court, CSP 1886, 43c, in Epitome, 191-9.

Canadian government had crushed rebellion. At the risk of creating a martyr, it would have suited that government to seal its victory with the treason conviction of the rebellion leader, to firmly demonstrate to the world that its law and order prevailed in its western territories.

The point that Roger Casement made at his trial, quoted above, goes to the heart of the concept of treason and illustrates what makes treason law different from any another kind of law. Murder, theft, and other offences clearly disturb the workings of normal society — they are easy to understand as crimes. But treason is a crime against allegiance, against loyalty. Allegiance to whom? To whomever demands it? To one's own concept of group? To one's own ideas? Riel was a Métis patriot; Casement was an Irish patriot. If others considered them traitors, they were proud of their treason.

During the 1885 trials, defence lawyer Henry J. Clarke told a jury:

> From the first moment of the dawn of history, the struggles of the people against their oppressors filled every page, and the achievements of the suffering people rising in their might and crushing their tyrants are the brightest pages with which history is gilded and handed down as an example of what our forefathers have done, that we in time should do, should tyranny ever dare to lift its ugly head in our midst.[9]

Clarke's view that subjects had a right to rebel against tyrannical leaders had been echoed by many other defence lawyers in treason cases. It harkened back to a medieval concept of treason, when, in the "community of the realm," the king was the first among equals. Lesser magnates and ordinary subjects owed the king allegiance. But the king owed his subjects protection and good government. If the king did not perform his functions well, subjects had a right of rebellion. The king treated defeated rebels as enemies, not as traitors.

This began to change in the reign of Edward I, and the changes were set in statute in 1352. With the Edward III statute, treason became not a breaking of the

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[9] Speech in defence of Thomas Scott. CSP 1886, 52:104.

bonds of allegiance to the "community of the realm," or to a Roman notion of the state, or to a modern version of the state, or even to the human person of the sovereign. The Edward III statute expressed it as against the person of the sovereign, but treason could actually be the breaking of allegiance owed to a complex combination of the sovereign's human and politic personas, as Edward Coke expressed in Calvin's case.

The greatest consistency in the way in which British treason laws have been applied since 1352 is that the narrow specific treason contained in the three major charges of the Edward III statute have been seen as that directed specifically at the sovereign's person. Actions against the state, or the government, were only treason if they could be interpreted as carrying with them the possibility of action against the sovereign's person. In those cases where the sovereign's politic persona was combined with the sovereign's person, greater safeguards had to be satisfied. This was true at least until the late-19th century when the Canadian government, codifying its law and expressing its independence from Britain, created a direct treason against the government.

The development of statute treason law since 1352 has also followed a consistent pattern. After every political uprising or threat of rebellion, treason law expanded. In every case but one, the new statutes widened the possibilities for treason prosecution. Intending to levy war became a direct treason offence after the American and French revolutions. Britain passed its treason-felony statute during the 1848 revolutions. Canada passed its treason-felony statute after the Fenian raids. The one exception in which the possibilities for treason prosecution were narrowed was the procedural reforms of the 1690s. But those reforms followed successful rebellion.

The pattern of judges' behavior in treason trials is harder to see, but there is consistency.

Almost always, despite some outstanding exceptions and despite the protests of defence lawyers, judges were careful to interpret the law narrowly. Even in times

of turmoil, they usually did not try to persuade juries to use political, rather than legal, judgement. For example, Lord Mansfield, whose own house was burned down during the Gordon riots of 1781, very thoroughly and dispassionately instructed the jury on the law. John Beverly Robinson, who was responsible for extending treason law in statute and who was intimately involved in the troubles of 1837-38, stuck closely to the law in his jury direction. Even John Kelyng, who made plain his views of the actions of the brothel-destroyers Peter Messenger led, prudently reserved the major legal questions for the Court of Exchequer Chamber.

Sometimes, but not often, judges found themselves caught up in the political excitement, as Archibald McLean was at Kingston in 1838. In 1794, Chief Justice James Eyre went far beyond what the law specified in his grand jury direction, and in cases arising from the same series of events, Justice Ilay Campbell abandoned the law he expressed to the grand jury for politics in his speech to the trial jury, after he saw that the evidence might be too weak to guarantee conviction.

Hugh Richardson in 1885 was a major exception to the trends. Not only did he rely on public notoriety to define "levying war," but he fundamentally misunderstood treason law. He was also probably the only junior judge ever to hear a treason case. Typically, in England it was the chief justice who heard treason cases and the attorney-general who prosecuted them. Richardson was a mere stipendiary magistrate, though he would soon become chief justice of the North-West Territories.

The Upper Canadian "Fenian Act" was also an anomoly. The English had, from time to time, passed statutes that widened the scope of treason law. With one exception, the 1795 statute that devolved into the treason-felony act, all these were very temporary measures. The "Fenian Act," which very significantly extended treason law, was re-enacted in the aftermath of the Fenian raids of 1866 and remained Canadian law until Canadian statutes were revised in the early 1950s.

The authorities and commentators on the law of treason by levying war have also been fairly consistent. They have universally promoted a strict, narrow, and

essentially liberal approach to the Edward III statute. Authorities such as John Kelyng and James Fitzjames Stephen wrote that levying war ought to be defined very carefully, in contrast to some of the judgements they gave from the bench. They wrote after they had had time to reflect and were no longer bound up in the events of the trials at which they presided. Matthew Hale provides a contrast. He was in the minority in at least two cases that defined levying war, yet he was careful in his writing to avoid the temptation to present his own view and instead defined levying war as judges had decided it.

Treason is a fundamentally difficult "crime" to comprehend. Despite that, there has been surprising consistency in the ways the English treason laws have been enacted, interpreted, and applied since 1352.

Politics, the protection of the elite, accounts for the consistency in the application of the most political of crimes.

Appendix I

Overt Acts and the Edward III Statute

In his book Law of Treason, John Bellamy suggested that a close reading of the punctuation and wording of Edward III's statute of treason is necessary to understand its real meaning with regard to the provision for proof of overt acts by ordinary witnesses. In his text, Bellamy said that "the drafters" of the 1352 statute "intended the phrase 'overt acts' to refer not to imagining or compassing the king's death but to adhering to his enemies in the realm or giving them aid or comfort within the kingdom or outside it." In a footnote following this text, Bellamy said that the overt acts provision referred "quite specifically to giving aid to the king's enemies and possibly to the levying of war in the kingdom and adhering to his enemies. They do not refer to any other listed crime.[1]

There are several problems with this analysis, aside from the fact of Bellamy's own confusion about whether "adhering to enemies" was definitely or merely possibly coupled with the overt acts provision. The main problem is that Bellamy used a 19th-century printed version of the statute to try to determine what the drafters of it had in mind in 1352.

In support of his argument, Bellamy quoted the law-French version of the statute contained in the Statutes of the Realm printed between 1810 and 1828.[2] That publication printed both the law-French and English versions of the statute; presumably Bellamy quoted the law-French because it was "more original."[3] In terms of conjunctions and punctuation (which are printed in boldface here, as in the

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[1] Bellamy, Law of Treason, 122-3.

[2] Earlier printed versions of the English statutes were called Statutes at Large.

[3] The relevant excerpt from the 1810-28 printed statutes printed in full in Appendix II of this study, following the full statute from an earlier Statutes at Large.

additional examples of forms that follow this one), this law-French version follows the paraphrased formula that it is treason to:

> compass the death of the sovereign; **or** have illicit sexual relations; **and** levy war against the sovereign, **or** adhere to the sovereign's enemies, giving them aid or comfort, **and** be proved guilty by overt deed.

In this version, which Bellamy used, technically and grammatically the overt acts provision applies only to levying war and adhering to enemies; it does not apply either to compassing the sovereign's death or to illicit sexual relations. It was wrong of Bellamy to suggest in his footnote that in this version the overt acts provision applied only to giving aid to enemies. The grammatical structure quite clearly makes overt acts also apply to levying war and adhering to enemies.

If we are to find meaning in the technical wording of Edward III's statute as it has been handed down, Bellamy did not look far enough. In the printed version of the statute he used, as between the law-French and English-language versions, the punctuation in the English-language version is exactly the same as in the law-French version, but the conjunctions are different, following this paraphrased formula:

> compass the death of the sovereign; **or** have illicit sexual relations; **or** levy war against the sovereign, **or** adhere to enemies, giving them aid and comfort, **and** be proved guilty by overt deed.

This version would seem to make Bellamy's argument stronger. But it is only one among many printed versions of the statute.

A compendium of the statutes of the mid-16th century, done in subject-order rather than in statute-order, gave only the law-French version of Edward III's statute of treason.[4] It set out the crimes following this formula:

> compass the death of the sovereign, **or** have illicit sexual relations, **or** levy war against the sovereign, **or** adhere to enemies, giving them aid and comfort, **and** be proved guilty by overt deed.

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[4] Rastel, Collection of all the statutes, 443. The relevant excerpt is printed here in Appendix II.

This early version reads more clearly than do some later versions, and grammatically it would seem clearly to make all offences under this section of the law subject to the overt acts provision, by connecting them all with the conjunction "or" and then, apparently deliberately, by subjecting them all to the "and" clause at the end.

From 1587 to 1676, the Statutes at Large printed only the English-language version of the Edward III statute of treason.[5] The Statutes at Large of 1587, 1618, and 1676 agree on this formula for punctuation and conjunctions:

> compass the death of the sovereign: or have illicit sexual relations: or levy war against the sovereign, or adhere to enemies, giving them aid and comfort, and be proved guilty by overt deed.

These versions are more clearly worded than the one Bellamy used, but they support the reading that the overt acts provision applied only to levying war and adhering to enemies, not to compassing the death or having illicit sexual relations.

By 1681, the Statutes at Large changed significantly its reporting of the Edward III statute of treason. In 1681 and 1684, the Statutes at Large, which still printed only the English-language version, numbered the clauses, resulting in the formula:

> (2) . . . compass the death of the sovereign: (3) or have illicit sexual relations: (4) or levy war against the sovereign, or adhere to the sovereign's enemies, giving them aid and comfort, and be proved guilty by overt deed.

Except for the numbering, this formula is essentially the same as that used in the earlier Statutes at Large and restricts the overt acts provision to levying war and adhering to enemies.

By 1762, the Statutes at Large printed both the law-French and English-language versions of the Edward III statute. There was no change in the English-language version from that of the 1684 Statutes at Large except that semi-colons

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[5] The relevant excerpt is printed in Appendix II of this study.

appeared in the place of the earlier colons.[6]

But the law-French version of 1762 and 1763 was significantly different. It used virtually no punctuation at all, nor did it number the clauses, and it replaced the earlier "or" with "and" before the offence of levying war, following this formula:

> compass the death of the sovereign **or** have illicit sexual relations **and** levy war against the sovereign **or** adhere to enemies giving them aid and comfort **and** be proved guilty by overt deed.

This would seem, grammatically at least, to make all the provisions subject to the overt acts provision.

By 1786, the Statutes at Large had changed its style again.[7] The law-French duplicated that of 1763. But the 1786 English-language version, while duplicating the conjunctions and punctuation of 1763, added italics, following this formula:

> compass the death of the sovereign; **or** have illicit sexual relations; ***or levy war against the sovereign,*** **or** adhere to enemies, giving them aid and comfort, ***and be proved guilty by overt deed.***[8]

The 1810-28 Statutes of the Realm, which Bellamy used, followed exactly the same pattern of conjunctions in its English-language version as did the 1786 Statutes at Large but dropped the italics. But the law-French version of 1810-28, which still followed the pattern of conjunctions of 1763, contained punctuation, following exactly the punctuation of the English-language version of the same edition. It appears possible that the editors of the 1810-28 Statutes of the Realm simply imposed the English-version punctuation on the law-French, where previously, at least in the Statutes at Large from 1762 to 1786, there had been virtually no punctuation at all.

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[6] The relevant excerpt is printed in Appendix II of this study.

[7] This version is printed in full in Appendix II of this study.

[8] The full 1786 version is printed in Appendix II of this study.

The State Trials printed an effort by Alexander Luders of a "new translation" of the Edward III statute.[9] In terms of the application of the overt acts provision, Luders' version followed what he cited as the "old translation," but made it clearer, obviously restricting the overt acts provision to levying war and adhering to enemies. Luders followed this formula:

> compass the death of the sovereign; **or** have illicit sexual relations. **And** levy war against the sovereign, **or** adhere to enemies, giving them aid and comfort; **and** be proved guilty by overt deed.

Reference to the authorities is not much help in solving the problem of wording. Edward Coke used a version of the statute similar to the one Bellamy used.[10] Matthew Hale used a different version, one that appeared to restrict the overt acts provision only to the charge of adhering to enemies.[11] E.H. East used a version that made the overt acts provision apply to all the treason charges.[12] The 1886 edition of Archbold's Pleading and James Fitzjames Stephen used slightly different versions, but with an effect that supports Bellamy's reading.[13]

The whole matter of wording is probably academic. Though they used versions of the statute that restricted the application of the overt acts provision, both Coke and Hale thought it applied to all the main charges under the Edward III statute. Coke discussed overt acts in the context of each treason charge.[14] Hale said explicitly:

> Tho the words in the statute of 25 E. 3. *and be provably thereof attaint* [sic] *by open deed, &c.* come after the clause of levying of war, yet it refers to all the treasons before-mentioned, *viz.*

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[9] State Trials, 5:975. The relevant excerpt is printed in Appendix II of this study. Luders' translation also appears in his "Considerations" in State Trials, 15:522-45.

[10] Coke, Third Institute, 1-2.

[11] Hale, Pleas of the Crown, 1:87-8.

[12] East, Pleas of the Crown, 1:55.

[13] Archbold's Pleading, 1886, 828; Stephen History of the Criminal Law, 2:248.

[14] Coke, Third Institute, 12-14.

compassing the death of the king, queen, or prince.[15]

A law dictionary of the late-18th century specifically referred to the wording problem and confirmed what the authorities and judges consistently said.

> It has been doubted, whether an overt act is required for any other species, except that of compassing or imagining the King's death; but since the words of *stat. 25 Edw. 3.* "and thereof be provably [sic] attainted by overt act," relate to all the Treasons, an overt act is required for each.[16]

Until the late-19th century, there was much seeming capriciousness in matters of punctuation, spelling, grammar, and capitalization in the English language. We make a mistake if we attempt to impose modern language precision on the past — in fact, if we try too much "close reading," we risk obscuring rather than illuminating.

It is probably impossible to say for certain how the drafters of the Edward III statute conceived that the overt acts provision was to be restricted, even if there was found their own, original written version of the statute. What we can say for sure is that though there has been some minor argument, judges have always ruled that the overt acts provision applied to all three major categories of treason.

This illustrates a point that is made elsewhere in this study: it is often not the law that matters, but the application of the law.

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[15] Hale, Pleas of the Crown, 1:108.

[16] Tomlins, The Law Dictionary, Treason IV, v.1. One of the precedents Tomlins relied upon was Vaughan's case, English Reports, 91:535-6. This author has not been able to find the other precedent case Tomlins cited.

Appendix II

The Great Statute of Edward III

(Full text, from the 1786 Statutes at Large)

'Item, Whereas divers Opinions have been before this Time *in what Case Treason shall be said, and in what not*;' the King, at the Request of the Lords and of the Commons, hath made a Declaration in the Manner as hereafter followeth; that is to say, When a Man doth compass or imagine the Death of our Lord the King, or of our Lady his Queen, or of their eldest Son and Heir; or if a Man do violate the King's Companion, or the King's eldest Daughter unmarried, or the Wife of the King's eldest Son and Heir; *or if a Man do levy War against our Lord the King in his Realm*, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort, in the Realm, or elsewhere, *and thereof be probably attainted of open Deed by the People of their Condition*. And if a Man counterfeit the King's Great or Privy Seal, or his Money; and if a Man bring false Money into this Realm, counterfeit to the Money of *England*, as the Money called *Lushburgh*, or other like to the said Money of *England*, knowing the Money to be false, to merchandize or make Payment, in Deceit of our said Lord the King and of his People; and if a Man slea the Chancellor, Treasurer, or the King's Justices of the one Bench or the other, Justices in Eyre, or Justices of Assise, and all other Justices assigned to hear and determine, being in their Places, doing their Offices. And it is to be understood, that in the Cases above rehearsed, that ought to be judged Treason which extends to our Lord the King, and his Royal Majesty: And of such Treason the Forfeiture of the Escheats pertaineth to our Sovereign Lord, as well of the Lands and

Auxint pur ceo qe diverses opinions ount este einz ces heures qen cas quant il avient doit estre dit treson & en quel cas noun le Roi a la requeste des Seignurs & de la Communalte ad fait declarissement qe ensuit cest assavoir Quant homme fait compasser ou imaginer la mort nostre Seignur le Roi madame sa compaigne ou de lour fitz primer & heir ou si homme violast la compaigne le Roi ou leisnesce fill le Roi nient marie ou la compaigne leisne fitz & heir du Roi & si homme leve de guerre contre nostre dit Seignur le Roi en son Roialme ou soit aherdant as enemys nostre Seignur le Roi en le Roialme donant a eux eid ou confort en son Roialme ou par aillours & de ceo provablement soit atteint de overt faite par gentz de lour condition. Et si homme contreface les grant ou prive sealx le Roi ou sa monoie & si homme apport faus monoie en ceste Roialme contrefaite a la monoie dEngleterre sicome la monoie appelle Lucynburgh au autre semblable a la dite monoie dEngleterre sachant la monoie estre faus pur marchander ou paiement faire en deceit nostre dit Seignur le Roi & son poeple & si homme tuast Chanceller Tresorer ou Justice nostre Seignur le Roi del un Baunk ou del autre Justice en Eir & des assises & toutes autres Justices assignez a oier & terminer esteiantz en lours places en fesantz lours offices. Et fait a entendre qen les cases suisnomes doit estre ajugge treson qe sestent a nostre Seignur le Roi & a sa roial majeste & de tiele manere de treson la forfeiture des eschetes appartient a nostre Seignur le Roi sibien des terres & tenemenz tenuz des autres come de lui meismes. Et ovesqe ceo il y

Tenements holden of other, as of himself. And moreover there is another Manner of Treason, that is to say, when a Servant slayeth his Master, or a Wife her Husband, of when a Man Secular or Religious slayeth his Prelate, to whom he oweth Faith and Obedience; and of such Treason the Escheats ought to pertain to every Lord of his own Fee. *And because that many other like Cases of Treason may happen in Time to come, which a Man cannot think or declare at this present Time; it is accorded, That if any other Case, supposed Treason, which is not above specified, doth happen before any Justices, the Justices shall tarry without any going to Judgement of the Treason till the Cause be shewed and declared before the King and his Parliament, whether it ought to be judged Treason or other Felony.* And, if percase any Man of this Realm, ride armed covertly or secretly, with Men of Arms against any other, to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance, it is not the Mind of the King nor his Council, that in such Case it shall be judged Treason, but shall be judged Felony or Trespass, according to the Laws of the Land of old Time used, and according as the Case requireth. And if in such Case, or other like, before this Time any Justices have judged Treason, and for this Cause the Lands and Tenements have come into the King's Hands as Forfeit, the chief Lords of the Fee shall have the Escheats of the Tenements holden of them, whether that the same Tenements be in the King's Hands, or in others, by Gift or in other Manner; saving always to our Lord the King the Year, and the Waste, and the Forfeitures of Chattles, which pertain to him in the Cases above named; and that the Writs of *Scire facias* be granted in such Case against the Land-Tenants without other Original, and without allowing the Protection of our Lord the King, in the said Suit; and that of the Lands which be in the King's Hands, Writs be granted to the Sheriff of the Counties where the Lands be, to deliver them out of the King's Hands without Delay.

ad autre manere de treson cest assavoir quant un servant tue son meistre une femme qe tue son baron quaunt homme seculer ou de religion tue son Prelat a qi il doit foi & obedience & tiele manere de treson donn forfaiture des eschetes a chescun Seignur de son fee propre. Et pur ceo plusurs autres cases de semblable treson purront escheer en temps a venir queux homme ne purra penser ne declarer en present Assentu est qe si autre cas supposee treson qe nest especifie paramount aviegne de novel devant ascunes Justices demoerge la Justices saunz aler au juggement de treson tanqe par devant nostre Seignur le Roi en son parlement soit le case monstree & declarre le que ceo doit estre ajugge treson ou autre felonie. Et si par cas ascun homme de cest roialme chivache arme descovert ou secrement od gentz armees contre ascun autre pur lui tuer ou derober ou pur lui prendre & retenir tanqil face fyn ou raunceon pur sa deliverance avoir nest pas lentent du Roi & de son conseil qe en tiel cas soit ajugge treson einz soit ajugge felonie ou trespass solonc la lei de la terre auncienement usee & solonc ceo qe le cas demand. Et si en tieu cas ou autre semblable devant cas heures ascune Justice eit ajugge treson & par celle cause les terres & tenemenz soient devenuz en la main nostre Seignur le Roi come forfaitz eient les chiefs Seignurs de fee lours eschetes des tenemenz de eux tenuz le quel qe les tenemenz soient en la main nostre Seignur le Roi ou en la main des autres par donn ou en autre manere Sauvant totefoitz a nostre Seignur le Roi lan & le wast & autres forfaitures des chateux qe a liu attenent en les cases siusnomes & qe briefs de Scire facias vers les terres tenantz soient grantez en tieu cas saunz autre originale & saunz allower la protection nostre Seignur le Roi en la dite seute & qe de les terres qe sont en la main le Roi soit grante brief as viscontes des countees la ou les terres serront de ostier la main le Roi saunz outre delaie.

(Excerpt, Rastel, Collection of all the statutes, 1557)

quant home face cópasser ou imaginer la mort nostre seignour le roy, madame sa cópaign̄ ou de lour fitz eisne & heire, ou si hóe violat la compaigne le roy, ou leisne file le roy nient marie, ou compaign̄ leisne fitz et heire le roy, ou si home leue guerre encountre nostre seignour le roy en son roialme, ou soit eidant as enemies nostre dit seignour le roy en son roialme, as cur donant eide & comfort en son roialme ou per aillours, & de ceo prouablement soit atteint de ouert fait þ gētz de lour códictó.

(Excerpt, 1618 Statutes at Large)

When a man doeth compasse or imagine the death of our Soueraigne Lord the King, or of my Lady the Queene, or of their eldest sonne and heire: or if a man doeth violate the Kings companion, or the Kings eldest daughter unmarried, or the wife of the Kings eldest sonne and heire: or if a man doe leuie warre against our Soueraigne Lord the King in his Realme, or bee adherent to the Kings enemies in his Realme, giving to them aide and comfort in the Realme or elsewhere, and thereof be probably attainted of open deed by people of their condition.

(Excerpt, 1762 Statutes at Large)

(2) . . . When a man doth compass or imagine the death of our lord the King, or of our Lady his Queen, or of their eldest son and heir; (3) or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife [sic] the King's eldest son and heir; (4) or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be provably attainted of open deed by the people of their condition.

quant homme fait compasser ou imaginer la mort nostre seignur le Roi ma dame sa compaigne ou de lour fitz primer & heir ou si homme volast la compaigne le Roi ou leisnesce fill le Roi nient marie ou la compaigne leisne fitz & heir du Roi & si homme leve de guerre contre nostre dit seignur le Roi en son roialme ou soit aherdant as enemys nostre seignur le Roi en le roialme donant a eux eid ou confort en son roialme ou par aillours & de ceo provablement soit atteint de overt faite par gentz de lour condition.

(Excerpt, Alexander Luders' translation)

In case where a man doth compass or imagine the death of our Lord the King, the Lady his Consort, or of their eldest son and heir; or if a man violate the King's Consort, or the King's eldest daughter being unmarried, or the consort of the King's eldest son and heir. And if a man levy war against our said Lord the King in his realm, or be adherent to the enemies of our Lord the King in the realm, giving to them aid and support in his realm or elsewhere; and thereof be attainted upon due proof of open deed by people of their condition.

(Excerpt, 1810-28 Statutes of the Realm)

When a Man doth compass or imagine the Death of our Lord the King, or of our Lady his Queen [Wife] or of their eldest Son and Heir; or if a Man do violate the King's Companion [Wife] or the King's eldest Daughter unmarried, or the Wife (of) the King's eldest Son and Heir; or if a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere, and thereof be probably [proveably] attainted of open Deed by [the] People of their Condition:

q'nt hõme fait compasser ou ymaginer la mort nře Seign^{r} le Roi, ma dame sa compaigne, ou de lour fitz primer & heir; ou si hõme violast la compaigne le Roi, ou leisnesce fill le Roi nient marie, ou la compaigne leisne fitz & & heir du Roi; & si hõme leve de guerre contre nře dit Seign^{r} le Roi en son Roialme, ou soit aherdant as enemys nře Seign^{r} le Roi en le Roialme, donant a eux eid ou confort en son Roialme ou þ aillours, & de ceo þvablement soit atteint de ov't faite þ gentz de lour condicion:

Abbreviations

AO — Archives of Ontario.

CSP — Canada. House of Commons Sessional Papers.

CSUC — Consolidated Statutes of Upper Canada.

NAC — National Archives of Canada.

PANS — Public Archives of Nova Scotia.

SAB — Saskatchewan Archives Board.

State Trials — See, A Complete Collection of State Trials, etc.

State Trials, New Series — See, Reports of the State Trials, New Series.

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