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# The Tudor Law of Treason

John Bellamy

*Routledge Revivals*

# The Tudor Law of Treason

This title, first published in 1979, was ground-breaking in its exploration of the understudied area of the Tudor law of treason. Bellamy first examines the scope of that law, noting the inheritance from the Middle Ages, the effectiveness of the new statutes and interpretation of the law by the judiciary. Mining the archives for official, legal and literary accounts, the following parts consider how the government came to hear of traitors, the use of evidence and witnesses in trials and finally the fate of the traitor at the gallows and beyond. This is a full, useful and interesting title, which will be of great value to students researching Tudor and late medieval statute law, the Tudor concept of treason and the mores of Tudor society.

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# THE TUDOR LAW OF TREASON

An Introduction

John Bellamy

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# Introduction

The historians who in the last century and a half have addressed themselves to studying the complex Tudor law of treason and how it operated have been few in number although there has been a large amount of writing concerned with the political, religious and economic features of the many conspiracies, insurrections and traitorous expressions of dissent occurring in that period. Only with J.F. Stephen's 'History of the Criminal Law of England' published in 1883 was there a serious attempt to break away from reliance on the writings of Coke and Hale and to place the law of treason in a proper historical setting, albeit in a way which was extremely rudimentary. (1) In regard to the scope of the treason law the important issue for Stephen was why the act of 1352 was found insufficient in the years 1533-1603 and how it was supplemented. He divided the treason legislation of Henry VIII's reign into those acts aimed at securing this 'great religious and political revolution' by maintaining the king's position against the pope and the statutes that were intended to protect the king's plans for the succession. Rightly he fixed on the use made of the treason act of 1352 from the Henrician reformation to the death of Elizabeth, drawing attention to periods when he thought the statute was interpreted narrowly and others when it seemed a wider interpretation prevailed. The former he identified with the later years of Henry VIII, the latter with the reign of Elizabeth. Stephen was acute enough to notice how unsatisfactory were the comments of Coke and Hale on conspiracy to levy war. He pointed out that the act of 1352 omitted the offence, and argued that the defect could only be remedied by special legislation. He also drew attention to the medieval statute's failure to make treason out of forming an intent to depose or incapacitate the king. In his comments on the scope of

treason Stephen was in fact doing little more than reviewing critically the writings of famous law treatise writers of earlier centuries, relying for the most part on his professional knowledge as a judge. The same is largely true of his treatment of treason trials, although there he did utilize printed extracts of the arraignments of some of the more famous sixteenth-century traitors and Cobbett's 'State Trials'. (2) If the materials were thin, Stephen's comments were shrewd and indeed seminal. In only a few lines he got close to the heart of the Tudor treason trial, an achievement which, considering the lack of historical research to that time, was quite remarkable.

W.S. Holdsworth, in his 'History of English Law', followed Stephen in identifying three types of addition to the treason law by the Tudors. (3) He devoted a relatively large amount of space to the statutes which expanded the act of 1352 (and were thus 'of more permanent interest'), quoting and offering some sort of explanation of the terminology of each and showing that they 'clearly brought within the law of treason' the two great omissions of the medieval statute 'conspiracies to levy war which had for their object the deposition or coercion of the sovereign'. He was particularly eager to emphasize that in Elizabeth's reign, in contrast with those of her father, brother and sister, new statutes on treason ceased to be promulgated because of the judges' use of 'construction', that is to say the interpreting of an existing act (usually that of 1352) so that it covered a greater variety of treasons than had originally been supposed or intended. Constructive treason, he argued with some cogency, derived primarily from the clauses in the 1352 act which made it treason to compass or imagine the king's death or to levy war against him. (4) However, he did not notice, as did Miss Thornley a few years later, that examples of constructive treason could be found before the Tudor period. (5) Little of Holdsworth's contribution to the history of the Tudor law of treason was original. Where he did not follow Stephen he used Coke and Hale, other treatise writers like Fitzherbert, and the report of the trial of Roger Casement. He utilized almost no archival material and provided little historical background. Where Holdsworth did advance Tudor-treason scholarship was in attempting a comprehensive survey of treason legislation through considering, in addition to the acts dealing with central themes, such less important aspects as counterfeiting and forgery, the statutes making reference to witnesses and 'offences cognate to treason'. Yet, when all is considered, his comments on treason cannot be said to be among the better sections of his work.

In 1922 there appeared J.R. Tanner's 'Tudor Constitutional Documents A.D. 1485-1603 with an Historical Commentary'. In his introduction to the section devoted to the law of treason, Tanner gave some historical background to the statute of 1352 and endeavoured to show that constructive treason developed during the fifteenth century. In dealing with the Tudor treason statutes he adopted in essence the divisions proposed by Stephen and briefly commented on those acts he thought important. He demonstrated the alternating severity and moderation of the law in the middle years of the century. (6) He recognized that because of Miss Thornley's work it could no longer be held against Henry VIII that he or his minister was the inventor of treason by words. In his introduction to documents relating to treason trials, Tanner largely followed Stephen once more, but he was careful to list the sixteenth-century statutes which in some way affected the form of those trials by, for example, making stipulation as to witnesses or depriving the accused of benefit of clergy or of sanctuary. Tanner also had comment to make on two neglected, yet important, aspects of treason, namely acts of attainder and trial before the court of the lord high steward, although for both of these subjects he relied considerably on L.W. Vernon Harcourt's 'His Grace the Steward and Trial by Peers'. (7) Another useful part of Tanner's book, although again without claim to originality or depth, was a few remarks on the punishment of treason and the forfeiture of traitors' possessions. The book set the law of treason better in its historical, particularly its constitutional, setting than previously and it provided easier access to a number of relevant statutes, (8) yet it is clear that, apart from attempting to precis and clarify the work of the great commentators Coke and Hale and provide historical background, Tanner and the other modern writers on Tudor treason law had to this point achieved very little.

The next study in chronological sequence of the Tudor treason law was that of S. Rezneck, who was by training a political scientist. (9) It was he who first saw in the large amount of sixteenth-century treason legislation proof of modernity, the solving of problems by means of parliamentary acts. He drew attention to several distinctive features of the operation of the laws against traitors which had not been emphasized hitherto. He pointed out that the chief Tudor contribution to treason legislation was through statutes dealing with traitorously written or spoken words. He noted the way in which the Tudor kings extended the concept of treason to embrace the powers, titles and dignities of the sovereign as well as

his person, and also to the opposition against existing or proposed treason legislation which manifested itself in 1547, 1571 and 1584. He sought to show in addition that the law could not make a valid distinction between religious and political obedience, since the two were so entangled. Did not parliament and the courts hold that popery and treason went automatically together? The end of the sixteenth century, so he argued, provided example of almost any attack on the state being construed as an attack on the sovereign and therefore treason which, if it was an oversimplification, rightly drew attention to the odd attitudes the crown lawyers took to rebellion at that time. In regard to trials for treason Rezneck advanced the important argument, drawn apparently from the report of Nicholas Throckmorton's trial, that during Mary and Elizabeth's reigns the crown took to prosecuting traitors under the act of 1352 once more because it offered procedural advantages, such as no time limit within which the prosecution should be begun, which assisted conviction. He suggested also, though with less foundation, that the Tudor judges discovered in the 'common law' a bottomless reservoir from which they might dredge vast numbers of ancient treasons and treason cases profitable to the government. Despite these advantages for the prosecution Rezneck thought he could detect 'a broad movement toward moderation' in the arraignment of Tudor traitors, and this regardless of his asseveration that the council performed tirelessly 'an inquisitorial function' for such trials. Where perhaps Rezneck made his greatest contribution to treason scholarship was in his brief analysis of the trials of traitors as a vehicle for governmental propaganda. He noted the open nature of these arraignments, the giving of evidence by the crown lawyers even when the accused had confessed the charge, the use of judges on circuit and preachers to give the official account of the traitor's misdeeds and his conviction, and the publishing of pamphlets for the same purpose. Thus Rezneck's account of the Tudor treason law was a valuable one, although because of its brevity, and perhaps because insufficient consideration was given to legal technicalities, it was of necessity superficial in many aspects. (10) Several of the more stimulating and provocative ideas which he drew from contemporary writers turn out on inspection to be exceptional in reflecting no general trend. At the present time it might occur to historians to criticize the study because it takes examples in each section from all parts of the Tudor period, yet it seems to me that as long as the examples are comparable and not different in kind, and particularly where the theme is the history of legal notions, it is no bad thing.

The most recent study of the Tudor law of treason of any size has been by Professor G.R. Elton and it is a most important one. (11) The contribution is in two parts namely the section devoted to treason in his 'The Tudor Constitution. Documents and Commentary' (1962) and the major part of his 'Policy and Police' (1972). The first covers the whole of the Tudor period, although only in the form of short introductions to various documents, the second only the years when Thomas Cromwell was Henry VIII's chief adviser (1532-40). Here the detail is exhaustive, but the 'enforcement of the reformation' is the main theme even if treason figures on most pages of the book. In 'The Tudor Constitution' Elton took up a position quite distinct from earlier writings on the law of treason. The Tudors, he argued, relied on statute to extend the scope of treason as set in 1352 rather than accept judicial construction, and thereby drew limits where there had been none previously. In the case of treason by words the Tudors through legislation merely codified common law precedents. There was, he avowed, no truth in the charge that the Tudors made treason out of any heinous crime. Elton was much closer to previous historians in his brief comments on procedure in treason trials. He found the advantages which the crown enjoyed were substantial: 'the court could be rigged against the accused and he was deprived of normal privilege in the conduct of his defence', though there was nothing improper in this. Furthermore in the course of the sixteenth century this 'unbalance' increased and therefore it was not surprising that 'very few men accused of treason ever escaped the net'. Even attainder became more severe, being used to dispose of persons who had not yet been tried, whereas 'originally, and nearly always, attainder was used to supplement a conviction in a court of law'. (12) This was written, I think it is fair to say, before Elton had embarked on any thorough investigation of the Tudor law of treason and related subjects, an investigation which was undertaken only later as a necessary part of his study of how the Reformation was enforced, and thus, although at least one major new interpretation was forthcoming, the factual basis was traditional.

In 'Policy and Police', on the other hand, the search for factual examples was very wide and almost every type of treason and restiveness against the regime in the 1530s was subjected to close scrutiny; so was the way in which these problems were handled by the government. The origins and political background of the treason legislation, actual and planned, of that period were examined in exemplary fashion and the earlier work of Miss Thornley super-

seded almost entirely. From the many separate cases reviewed a strong argument was made that traitorous and seditious talk and activity was reported spontaneously to the government (even if sometimes with malicious intent towards the accused), and that the ascendant minister did not need to operate a system of spies. All he needed, and he had it, was the co-operation of the gentry and the use of the traditional methods of prosecution. If there was a Tudor revolution in government, it did not extend as far as the police methods used to preserve public order. (13) In regard to trial procedure Elton moved somewhat from his earlier position so as to argue that the crown, or Cromwell at least, was intent on bringing virtually all legal proceedings against treason suspects under the rules of the common law, unless the offence was that of open insurrection, and that 'due process' nearly always prevailed. His examples tended to demonstrate that the investigation of suspected treason was usually directed from the centre, by king, minister, or the king's council, and that no cases were brought to trial unless the evidence against the suspect had been looked at thoroughly and accusations maliciously inspired weeded out. At the actual trials convictions were by no means automatic, the reason being that the petty jurors were sometimes 'overfriendly' to the accused. Even when a man was convicted of treason he had a good chance of excaping the penalty of death unless he had committed his crime 'in open rebellion or unquestioned conspiracy to rebel' or 'had got caught up in the high politics of a violent age'. A man denounced for 'words' 'stood approximately three times as good a chance of being dismissed without any consequences as of being brought to his death'. Overall the enforcement of the Reformation was a triumph for legalism. There was a 'rigid regard for the forms of trial and conviction at common law' and 'no intention to do more than punish real guilt as defined by law' save for a few exceptional cases where there was a 'savage lashing out' at opponents because of politics or personal feelings. (14) Even in such cases, Elton endeavoured to show, closer investigation could reveal that the crown kept to the law much better than had hitherto been supposed.

Elton's interpretation of the law of treason and its operation like the other parts of his study, although most enlightening and valuable, was essentially a political one. This was because the work was based largely on Cromwell's own correspondence, happily preserved by his attainder, which does not take very much notice of legal factors, often tending, as statesmen and their correspondents do, to simplify important criminal law matters and

reduce them to lay terms. Surviving court records relating to treason for this period, as Elton pointed out, are few. Thus, in his study the legal side was played down. There are few examples of, or comments upon, the actual indictments, few identifications of the acts under which they were drawn and little detail about the outcome of cases decided in the courts. The lack of attention to legal detail does not always matter very much but occasionally it can cause concern, as for example in the failure to make a distinction between disruptive talk, which came under three medieval statutes and was punishable by the authority of the council, (15) and talk actually traitorous. Two other comments are provoked by this study. Could not a government keep to the letter of the law but arrest, examine, and try treason suspects in a ruthless and tyrannical manner, seeing that some parts of the judicial process were unregulated by either statute or common law? There was nothing, for example, to limit the length or duress of a pre-trial sojourn in gaol, severe examination utilizing torture was not forbidden, and the crown might make out of the execution either a quick and relatively clean death or a lingering one. Second, is a government which has acted brutally and unfairly to be immune from criticism because it has done so under a brutal and unfair act of parliament? If the statute was without precedent and did not follow the norms of earlier legislation, and if its application seemed excessive to moderate men of the time, then surely not. Earlier practice must be the key in both cases.

The present book is intended only as an introduction to the complexities of the Tudor treason law. It covers all the Tudor period but there can be no suggestion that it does so exhaustively. It will be some years, I think, before that task can be put in hand. If there is one overriding theme it is the development of legal notions touching treason, and I have endeavoured wherever possible to demonstrate the medieval antecedents because they often tell us a great deal. For the chapters dealing with the scope of treason I have relied on that much under-studied source, the statute book; the vocabulary and its etymology alone is a major archive for the study of the history of English law. The other prime component is the indictments. I have made full use of the indictments in the file known as the *Baga de Secretis*, which although they sometimes concern important men and women are in no way legal freaks as has sometimes been implied. As Elton has remarked, there is a paucity of other court records of relevance. There are almost no treason indictments in the few quarter session files which survive from before

1550 and they are rare in those of the second half of the sixteenth century. This we might expect, since few types of treason could come before the quarter sessions. A more serious loss is the entire disappearance (save for Wales) of gaol delivery records before the late 1550s and of oyer and terminer ones (under which commission important cases were often handled) throughout the whole period. Where the records are fairly full, as for example in the case of the gaol delivery files for the south-eastern counties for the reign of Elizabeth, treason indictments are rare. There are, it is true, a number in the rolls of king's bench but a thorough search has yet to be conducted. With such great deficiencies in record material the value of any quantitative analysis of indictments, trial verdicts, and such would be of doubtful value.

For the chapters which deal with the fate of the accused from the time when he or she first aroused suspicion until acquittal or punishment, I have relied on a variety of sources, some official or legal, others literary, many casual. I have not hesitated to use accounts which are plainly partisan when incidentally or accidentally they illuminate legal procedure, and where the bias is not relevant or allowance can be properly made for it. There is, for example, quite a mine of detail about pre-trial procedure to be worked with care in descriptions by co-religionists of the lives of Jesuits, seminary priests and catholic traitors. In the second half of the book I have undoubtedly been guilty of abandoning a strictly chronological approach where I have thought the establishment of the theme would benefit by it. I can only say I have always tried to compare or connect like with like. As to the topics I have selected for consideration in these chapters, while a few have been touched on by earlier investigators concerned primarily with other matters, the majority have been almost entirely neglected, for despite the work of the historians mentioned above, and a good deal of writing on rebellions and traitorous conspiracies by others, the law of treason over the Tudor period as a whole has never been given close examination. It is surprising that there has been so very little written on, for example, martial law, attempts to extradite treason suspects, gaol conditions pre- and post-trial, the use of torture, the manner of punishment, and forfeiture. Perhaps the reason has been a fear that such topics might tend to emphasize too heavily the darker side of the Tudor criminal law.

# 1

## The Scope of Treason: 1

When Henry VII ascended the English throne, the crime of high treason rested largely for its definition on the statute of 1352, 25 Edw. III st. 5 c. 2. There it was clearly separated from petty treason, which was the slaying of a master by his servant, husband by his wife or prelate by a lesser cleric. High treason, although the adjective high did not appear regularly before the end of the fourteenth century, was to include only offences against the king's person and his regality. These were listed as: to compass or imagine the death of the king, his queen or the royal heir; to violate the king's consort, his eldest daughter or the wife of his eldest son; to levy war against the king in his realm or adhere to the king's enemies and be provably attaint of it by men of the offender's own condition; to counterfeit the great or privy seal or the king's coin, to introduce counterfeit money into England knowing it to be false; also to kill the chancellor, treasurer, or a justice of either bench, of eyre, of assize or of oyer and terminer while executing his office. Why the statute took the shape it did is to be discovered in the way treason had been defined in previous cases under the common law and also in the course of mid-fourteenth-century English politics. In enunciating the definition of 1352, Edward III was prompted chiefly by demand in recent parliaments that he should declare exactly what treason was, since royal justices had of late been holding as such crimes which had never been so interpreted in the past. These justices, and through them juries, so it seems, had been over zealous in their interpretations, calling felonies treasons and afforcing indictments by talk of accroachment of the royal power. Either they or King Edward may have been affected by new knowledge of continental law, but whatever the inspiration the purpose was clear enough. They hoped by extending

the category of treason, and thereby inflicting heavier and more certain punishment, to suppress local lawlessness; no doubt they also hoped to replenish their master's coffers by the forfeitures incurred. Another reason, though perhaps of less import, for the new act may have been supplication by the magnates that Edward should annul the convictions against a small group of men who had been condemned for treason over twenty years before. There is however no indication that the baronage brought any strong pressure to bear.

In parliament the act was passed subsequent to a request by the commons simply for remedial legislation: no detail was given as to what the new law should say. There was no suggestion of a political confrontation between Edward and a bitter baronage, and for this reason the 1352 act of treason was more likely to be long-lasting, since Edward had no humiliation to revenge. The new law when passed gave a decidedly narrow interpretation to treason. Seriously diminished were the king's chances of obtaining forfeitures, and on the face of it royal power suffered a decline. Perhaps the king and his advisers accepted the fact that the nebulous periphery of treason often used to their advantage in the past was an unavoidable casualty in an age of increasing legal definition and, viewed politically, at a point when popular support was very necessary for the war with France. Whatever his feelings, Edward himself made no subsequent effort to restore the royal position and this, together with the lack of internal dissension until the last years of his reign, seems to have allowed the 1352 statute to become hallowed by time.

There is no doubt that at heart Edward III's treason act was founded on the crimes which were customarily held as treason under the common law. True, kings had not been absolutely consistent in what hitherto they had called treason but thirteenth- and early-fourteenth-century precedents can be found for nearly every category of traitorous offence which was included in the act. This close correlation may have been the reason why lawyers of the later fourteenth and the fifteenth centuries did not refer like their Tudor counterparts to 'common law' treasons, although it was accepted that unless a statute contravened the common law that law remained standing. For them there was no need to look for treason categories beyond the 1352 act. (1)

The most important development in the interpretation of the law of treason between 1352 and 1485 concerned the clause in the Edwardian act about imagining and compassing the king's death. Apart from those based on the offence

of levying war against the king, a fairly frequent offence in the political upheavals from Richard II's reign onward, indictments concerned with 'imagining' were dominant. The reason for this was the discovery by kings and their judges that the category could be extended to embrace a wide variety of offences. Words and writings which commented on the king and his behaviour in what was regarded as a malicious manner were often the basis of these indictments. If the words did not suggest a direct intent to bring about the king's demise then they were held to do so indirectly and the accused found guilty of treason just the same. Commenting on some words from a sermon with approval led to one accusation of treason, repeating gossip, crying out in the street damaging comments about the king's personal characteristics and using the magic arts to make predictions about his future, led to others. This wide interpretation of the treason law was being justified by the king's lawyers in the second half of the fifteenth century on the grounds that these deeds were intended to destroy the cordial love which his people had for the king and thereby shorten his life by sadness.

The crown seems to have used this wide interpretation of 'imagining and compassing the king's death' which has often gone under the name 'constructive treason' in preference to a procedural device which the 1352 statute thoughtfully provided. This was that when 'doubtful' cases of treason arose the justices were to delay giving judgment until the issue was brought before the king in parliament and it was declared whether it should be held treason or felony. It was the judges and the king who decided if in fact the case was a doubtful one. If the situation was novel but they had no doubts about what to do then they 'constructed', and they do not seem to have been brought to task for their interpretations. Parliamentary declaration of treason, despite its unpopularity with the king, may have survived into the fifteenth century, but only as an element in the act of attainder. Such acts were intended to affirm and supplement convictions made outside parliament, to serve sometimes as a form of exaction and outlawry and to set penalties which were beyond the power of the common law courts to inflict. In the matter of the definition of treason for all their extra-legal appearance they played only a small role, nearly always following the act of 1352.

The Edwardian statute was not the only treason act of the later Middle Ages; there were others in the fifteenth century although much less important. A statute of 1414, which owed much to contemporary continental conventions, decreed that those who ignored truces the king had made

with his enemies and the safe conducts he had granted should be judged for high treason. (2) An act of 1416, in dealing with the clipping, washing and filing of coins, consciously supplemented the 1352 statute, as did the statute made in the parliament of 1423-4 concerning escape from gaol by those committed on suspicion of high treason. (3) Other legislation extended treason to include extortion by threat of arson (1429-30), the seizure of goods in three English border counties by Welshmen (1442) and compassing the death of Richard, duke of York (1460). (4) In addition to new laws there were in the fifteenth century a number of occasions when the penalties for treason were awarded by parliament in suspension, so to speak, so as to force particular miscreants to appear before a court. (5) Here again we have the phenomenon of certain crimes being classified as treason so as better to maintain public order. Since parliament legislated these devices they cannot be viewed as illegal, although the departure from general principle in order to benefit a single suppliant must be decried. Yet speaking in general terms it seems that even when the quality of government was poor, as for example in the middle of the fifteenth century, there were very few occasions when a charge of treason was legally unwarranted. The English kings of the period, with perhaps one exception, seem to have been happy to abide by the law, feeling no doubt that the use of judicial construction made it quite favourable to their interests.

In contrast to the later medieval period the Tudor era is remarkable in the history of treason for the large amount of legislation which concerned itself with that subject. Between 1485 and 1603, according to one calculation, there were no fewer than sixty-eight treason statutes enacted, though there had been less than ten in the period 1352-1485. (6) This proliferation is explained by the fact that many Tudor acts were the by-product of royal concern over the succession to the crown and the king's ecclesiastical supremacy, problems previous kings did not face in the same form, and also by the reluctance of the Tudor monarchs to put their trust in judicial construction based on existing statutes. The large number of acts should not be taken automatically as an indication of the king's success in expanding the scope of the treason laws. The history of treason in the fifteenth century demonstrates that how the law was interpreted was sometimes more important than the bald statute, and indeed the later Middle Ages as a whole suggest that to define treason more exactly was in general to the king's disadvantage, serving to reduce his ancient prerogative powers. This issue of

how wide the scope of treason extended is the central one in this chapter, but it cannot be studied simply through examination of the statutes alone, important as they are. Indictments and how they were drawn tell us much, and so do the comments about treason made formally or informally by judges, justices, ministers and even the monarch himself.

Together with the width of the treason law must be considered the general fairness of that law. Did the Tudors adhere to the principles which had guided past legislators and were the rules made in harmony with the tenor of the English common law? Most of the comments of those historians who have dealt with the matter directly have been unfavourable. Tanner said of Henry VIII's treason legislation that it 'abandons any logical principle and converts treason into a crime which has no character except heinousness'. (7) Pickthorn drew attention to the device utilized by the king and his ministers in 1531 'of denouncing and punishing as high treason whatever was especially disagreeable to the government' and reflected it was 'an expedient several times repeated in the course of the reign'. (8) Rezneck, concurring with Tanner, referred to the 'amazingly novel character' of the addition to the treason law by Henry VIII and regarded the general trend of Elizabethan legislation on the subject as being towards increased severity 'even exceeding Henry VIII's harshness'. A.F. Pollard remarked on the 'ferociousness' of Henry VIII's treason laws and thought one promulgated in Queen Mary's reign (1 & 2 Ph. & M. c. 9) even worse. (9) The only categorical denial of these opinions has come from G.R. Elton, who has sought to refute the argument that the Tudors 'fudged the whole meaning of treason by turning the supreme political offence into an emotional term for any heinous crime' by proposing instead that 'typically Tudor legislation extended treason to cover new aspects of the fundamental offence against king and realm'. (10) Lawyers have been less willing to damn than historians, although they have been loth to defend. Holdsworth, quite remarkably, seems to have avoided any comment at all. Stephen, clearly on the defensive, wrote that he thought the impression which Henry VIII's treason laws 'have created of tyranny is somewhat exaggerated though it is not unnatural'. He argued that they were a necessary outcome of the war between Henry and the pope and that they were not intended to last for an indefinite time or to apply to a normal state of society: to believe otherwise 'is to misunderstand them pedantically'. Less restrained was the earlier legal historian Reeves, who was prompted by the Henrician laws to write that this repres-

sive legislation ordained for law 'the strangest inventions that ever were thought worthy to become the objects of penal jurisdiction'. (11)

Alongside the generally derogatory remarks of historians and lawyers of a later period may be cited the comments of contemporaries. Here we find some occasional and scattered complaint but no loud or general outcry about the scope of the treason laws. One grievance was the accounting as treason of seditious words used in everyday speech. Bishop Fisher's brother Robert is reputed to have said in February 1535 that 'speaking is made high treason which was never heard of before'. (12) In 1540, at the time of Thomas Cromwell's fall, there was a complaint that by sanguinary laws he had made into treason inadvertent words spoken in good intent. (13) Yet in fact among the large number of seditious speeches which came to the government's attention between 1532 and 1540, the time when the offence was probably most common, very few indeed criticized the law defining treason even indirectly. (14) Later in the century there were one or two occasions when protest was made in parliament against the extension of the scope of the treason law. When in 1571 the commons were discussing a proposed new treason act one member, Snagg, showed his opposition by arguing that he thought the statute of 1352 was itself sufficient. In the parliamentary session of 1585 Dr Parry was sequestered for saying that the treason bill against Jesuits, seminary priests and 'such like disobedient subjects' was 'full of blood, danger, despair and terror' to the people of the realm and further that it was 'full of confiscations'. (15) One obvious target of criticism, at least from the wealthier classes, were the rules about forfeiture yet surprisingly the only contemporary complaint seems to have come from a governmental source. Reginald Pole in Starkey's 'Dialogue between Reginald Pole and Thomas Lupset' is made to say that the law was 'overstrait' because the innocent heir and the stock of the convicted traitor could not inherit his lands and creditors were deprived thereby of their chance of payment. (16) To these few criticisms about the content of the treason statutes should perhaps be added complaints concerning how the crown interpreted them. Robert Fisher is supposed to have said that the government was going to expound the treason act of 1534 according to its pleasure, regardless of the inclusion of the word 'maliciously'. (17) In 1554 Sir Nicholas Throckmorton, when on trial for his life, saw fit to criticize the way judges were able to construe the laws of treason to the king's advantage. (18) The Yorkshire insurgents of 1536, when

referring to the malpractices of two of Cromwell's minions, claimed that 'what so ever thay will have doyne must be lawfull and who contrarys theym shall be accusyd off tresun'. (19)

This criticism of the scope of treason stemmed largely from individuals who were aggrieved at one particular proviso of the treason acts. A general and substantial complaint about the scope of treason only showed itself on Henry VIII's death, when there was a widespread though temporary desire to make the law more narrow. Even then there were outspoken critics of the change. The return to the statute of 1352 was called the worst deed done in that generation and the western rebels of 1549 sought a return to 'the statute that made words treason'. (20) The Tudor monarchs benefited greatly from the fact that the opposition to their policies, political or religious, rarely came from the same quarter for more than a few years at a time. There was no constant source of opposition until well on in Elizabeth's reign. Thus there was no contrary philosophy about the scope of treason as for example the baronage of the early fourteenth century had. Even the transmarine English catholics of the 1580s and 1590s, who had plenty of time to philosophize, showed neither the ability nor the inclination to expose the legal weaknesses in the laws deciding the scope of treason. The Tudor kings and queens had it virtually all their own way.

Any study of the scope of the Tudor treason laws is best divided around 1530, four years before the most important of the relevant statutes was enacted. Until that year the pre-eminence of the act of 1352 was unchallenged, yet the twenty-four years of Henry VII's reign and the first twenty-five of his son's were by no means devoid of events significant to the law of treason. There was legislation on treason in 1487-8 and 1495, important declarations by the judges in 1485, 1517 and 1525, new trends in the formulation of indictments and two remarkable constructions of treason by Henry VIII and his advisers. In Henry VII's second parliament it was enacted that if any servant in the royal household should compass to destroy or murder the king or a lord of the realm or other counsellors of the king or the steward, treasurer or comptroller of the household, it was to be held felony. Hitherto conspiring, as distinct from achieving, the death of anyone other than the king was not a crime at all. To imagine the king's death, on the other hand, was high treason. The aspect of the act which attracts our attention most is its actual diminution of the scope of treason in one area. The principle, we must admit, was reasonable

enough, for the 1352 act stated that any servant who imagined his master's death was to be held guilty of petty treason, and for that crime the penalty was the same as for felony. Very likely the reason for the act was no delight in legistic principles but lay, as one usually discovers when changes occurred in definitions of crimes, in actual offences committed or attempted in the recent past. In this case it was apparently the behaviour of one John Spynell, a yeoman of the crown, and some eighty disorderly followers, who on 15 December 1487, while parliament was sitting, assembled together for the purpose of murdering several of the king's chief officers and members of his council. (21)

The so-called 'de facto' act of 1495 (11 Hen. VII c. 1) should also be read with recent circumstances very much in mind. Late in 1494 or early in 1495 it was revealed by Sir Robert Clifford, who was either a defector from Warbeck's cause or a royal spy, that the chamberlain of the royal household, Sir William Stanley, brother of the earl of Derby who had played such a vital role at Bosworth, was a traitor. According to Polydore Vergil, Stanley's treason amounted to nothing more than saying that if Warbeck was indeed the son of Edward IV as claimed he would not fight against him. (22) Stanley and other suspects, who included Lord Fitzwalter, Sir Simon Mountford, several ecclesiastics and men of lower rank, were arrested and put on trial. Stanley was indicted of imagining the king's death through an intent to levy war against him, and through communication with Warbeck, and of adhering to the king's enemies. Clifford was similarly indicted but whereas Stanley was tried, convicted and later executed, Clifford failed to appear even to plead a pardon known to have been granted to him. (23)

That Henry was much disturbed by the revelations is obvious. Oyer and terminer commissions of great size were appointed to investigate offences south of the Trent, from the Welsh border to the North Sea, and the king made a progress in the summer with what has been described as 'the obvious object of awing Stanley's tenants and retainers'. (24) A contingent of Warbeck's forces landed at Deal in July 1495 and, though they were all killed or captured, the king must have felt his throne was most insecure. The parliament which he summoned to meet in October was used to legislate an attainder act which provided for the forfeiture of lands held to the use of Stanley, Mountford, and two outlawed traitors in sanctuary. (25) These measures of repression were accompanied by one of inducement. To retain the loyalty and ease the fears of men who had been Yorkist partisans and sympathizers in the

past Henry saw to it there was promulgated a statute which promised that 'no manner of person ... that attend upon the king and sovereign lord of this land for the time being in his person and do him true and faithful service of allegiance' within the realm or without, was to be convicted by act of parliament or process of law to the loss of his life or the forfeiture of his possessions. This meant, as Pollard said, that there would be no future proceedings against Yorkists who had so far escaped attainder and forfeiture on the grounds of what they had done before Henry came to the throne. (26) Suspending the legal principle *nullum tempus occurrit regi* in this way was not new: in an earlier and very important example Edward III had done the same thing in 1361 with regard to those who, living in the northern shires, had been guilty years before of adhering to the king's Scottish enemy. (27)

There is no suggestion in the act that Henry was anything less than king de jure or that the question of the succession was other than closed. Henry and his parliament were merely recognizing facts: that there had been kings with, as they saw it, no proper claim to the throne, but they were ruling monarchs and loyal service to them should not be punished, not at least at that distance from Bosworth, unless they committed another offence. The kings who had ruled from 1461 to 1485 had not questioned the validity of laws enacted by those they supplanted, and there is even to be found example of treason against Henry VI being tried in the courts of the king who usurped him, Edward IV. (28) In 1495 Henry VII was extending this acceptance from legislation and judicial decision to political circumstance, that is to service to the de facto king in war. The act set down no new principle for the future, it merely made a rule about behaviour at a time in the past. Nor should anything novel be seen in the use of the phrase 'prince ... for the time being'. Those lawyers who pleaded in the courts of common law had used the de facto concept from at least 1470, (29) and if we take into account the parallel political idea of a separation between the king's person and his office then the origins are to be found in the earlier fourteenth rather than the fifteenth century. In the reign of Edward II the notion was popular among the baronial opposition. (30) After 1495 the phrase disappeared for more than forty years, reappearing only in the proclamation act of 1539 (31 Hen. VIII c. 8). The section of the act of 1495 which made void any subsequent act or process of law which contradicted it was largely propaganda to make the offer doubly attractive to erstwhile Yorkists by seeming to, although of course it could not, provide continuous protec-

tion in an age of sudden turnabout in political fortune. Again the device was not entirely novel. Richard II's treason statute of 1397-8 provided the penalties of treason against those who later sought and were convicted of annulling any of the proceedings of the present parliament. (31) The act of 1495 was not referred to at all during the subsequent century. It was a temporary expedient and in the history of the scope of treason has only a minor place despite the many comments made about it by historians.

As well as by new act, the scope of treason was affected by judicial interpretation of treason laws already on the statute roll. Sometimes this construction, as it is often called, was the result of formal consultation among the legal advisers of the king. At other times there is no reference to any confering together: there simply appeared a new type of indictment. There were at least two important judicial conferences concerned with the definition of treason in the period 1485-1530, the first in Henry VII's first year as king. The judges of the two benches, when asked about the attainder of treason which the new monarch had incurred whilst in exile during the previous reign, affirmed there was no legal problem. There was no need for an act to annul the earlier act, was the general opinion, since by becoming king Henry had automatically discharged himself of his attainder. (32) One judge pointed out that at the time of his re-adeption Henry VI, who likewise had been attainted by an earlier act, did not have that act reversed. The other judges said the present king was not under attainder at all but merely disabled and when he seized the crown was enabled automatically. The judges, we may suspect, were really playing with words so they would not have to make a judgment about the king's right to the throne. They were also evading having to admit openly that a de facto king was king de jure the moment he seized the crown and that the acts governing the succession counted for little.

The other notable judicial conference which concerned treason was in 1517. The occasion was the riots in London directed against foreigners on the eve of 'evil May day'. When order had been restored 'the justices with all the king's councell learned in the lawes' assembled at the house of the chief justice of the king's bench, Sir John Fineux. The intent was to decide how the riots should be treated in law. Having told us this, Holinshed adds enigmatically 'and first there was read the statute of the third yeare of Henry the fift'. This act dealt in fact not with riotous behaviour but with treason. It decreed that those of the king's subjects who ignored safe

conducts issued by the crown and its truces made with enemies and those who killed and robbed men travelling under such protection were committing high treason. The statute was thought to be applicable in 1517 because at that time Henry VIII had truces with France, Burgundy and Spain 'all the which truces were violated by the said insurrection', that is to say the nationals of those countries suffered in the rioting. Then it was decided 'by the whole councell there assembled that the king's sergeants and attournies should go to the chancellor to have a sight of all the said leagues and charters of truces to the intent they might frame their indictments according to the matter'. (33) Chief Justice Fineux told the gathering that all the trouble-makers were guilty of high treason whether they had robbed or not 'bicause that the insurrection in it selfe was high treason as a thing practised against the regall honour of our sovereigne lord the king'. This interpretation Fineux supported with the statement that 'the same law holdeth of an insurrection made against the statute of labourers', saying it had been applied against those who had once risen in Kent against that statute.

At first sight these tactics for the prosecution of the king's case seem to be bad law based on worse history. It is remarkable that the judges should have held the London riots as treason. We must assume that it was King Henry or Wolsey or some other minister on their command who told the judges that treason was to be the charge. Whoever had the idea of using the statute of 1414 was certainly not well informed historically. The act had been used against piratical seamen, that is against infractions of truces at sea, but probably not since the mid-fifteenth century in any case. There had, it is true, been a case where the murder in London of a Genoese ambassador travelling under safe conduct was declared treason, but that was thirty-five years before the 1414 act. (34) Fineux may have known the weakness of the crown's case. This is suggested by his reference to an insurrection in Kent 'made against the statute of labourers'. He may have been thinking of the act of 1381 (5 Ric. II st. 1 c. 6) which made it treason to recommence *the* riot, that is to say the peasants' revolt of the previous June. This law had been referred to at the time of John of Northampton's rising in London in 1384 and again in 1394, but does not seem to have been used as a basis for indictments beyond the end of the fourteenth century. (35) More likely he was thinking of the misdeeds of June 1381 when the rebels broke into London and turned to destruction and pillage. On that occasion, when the king's authority was restored

and trials began, the misdoers were indicted in a way which demonstrated that the crown at that time lacked both a clear judicial policy on popular insurrection as well as control over the indicting juries. There was no consistency in the presentments. The same offence might be treason to one jury and felony to another. Juries called as treason what seemed to them to be treason, not what actually was. The list included the murder of men loyal to the king, destroying loyal men's houses, royal records and buildings and giving the rebels something more than modest assistance. (36)

In the fifteenth century disturbances of the type which occurred in 1517 would probably have been dealt with as riot (which was trespass), or if the miscreants had been well armed and armoured and displayed some form of military discipline then as the treason of levying war against the king. Less likely, but a possibility none the less, was that the riot would be construed as in some way compassing or imagining the king's death. That there was some consideration of this form of indictment in 1517 is suggested by Grafton, who says that 'upon examination it could never be proved of any meetyng, gatheryng, talkyng or conventicle at any day or tyme before that day but that the chaunce so happened without any matter prepensed of any creature savyng Lincoln'. (37) This, if true, meant the crown was seeking evidence of men conspiring together, which in turn indicates a charge of imagining the king's death was in mind. The judges' discussions were not merely academic: thirteen rioters were later found guilty and sentenced to the normal penalty for treason, to be drawn to the gallows, hanged, disembowelled and their bodies quartered.

The lack of clear legal provision for riots that were not merely part of a private feud as were usually those involving the magnates and the gentry, but directed against a general grievance, was demonstrated again in 1525 when the cloth workers of Suffolk assembled in harness to resist collection of the 'amicable' grant. The dukes of Norfolk and Suffolk persuaded them to disperse. Later the rebels, in token of repentance, went to Bury St Edmunds in their shirts with halters about their necks in order to seek pardon. (38) There was then some debate between the two dukes and Cardinal Wolsey as to what offence should be charged against the ringleaders. Norfolk and Suffolk told Wolsey how in the rebels' presence they had rather unwillingly 'aggravated' the offence, declaring it to be high treason 'and never made it less'. Wolsey may have pressed for the bringing of charges of treason but the king's 'temporal counsel' and the judges seem to

have reached the conclusion that the crime was only riot and unlawful assembly. (39) Eventually a few of the leading dissidents appeared in the star chamber, which shows it was the law officers' recommendations that were accepted by the king. At the end of the century popular insurrection of a similar nature was to cause more concern and produce interpretations of the law as strange as in 1517.

Nowhere is the scope of the treason laws better revealed than in actual indictments. Acts may have been passed, and judges have made declaration, but only by looking at the form of bills of indictment and how grand juries framed the charges can we be certain of what was eventually laid against the suspect in court. Examination of treason cases in the legal records of the period reveals in general some interesting changes in the phraseology of indictments and more particularly evidence in two cases of definite sharp practice. The cases were those of Sir Richard Empson and Edmund Dudley and occurred soon after the accession of Henry VIII. Both men were accused of planning to govern the new king, and thereby the realm, against his wishes, using force to do so. (40) Though reprehensible, this was not treason. In the fourteenth century it would probably have been called 'accroaching the royal power' but the kings and magnates of that time had been unable to gain the admission of the offence into the law of treason or even make it felony. An accepted charge of treason was mentioned in both indictments: it was that the accused intended to destroy the king, or rather the king's heir, for the plotting took place when Henry VII was on his death bed. What made the indictments so different from previous ones was that the accusations were conditional: Empson and Dudley intended the king should be destroyed *if* he and his council should refuse to be ruled and governed by them. Sir William Stanley, according to Polydore Vergil, was guilty of saying that he would never bear arms against Perkin Warbeck *if* he were sure Warbeck was the son of Edward IV. This may possibly be true, but when Stanley was put on trial the indictment, as we have seen already, contained the quite proper charges of imagining the king's death and adhering to the king's enemies. Francis Bacon, whether he had seen the plea roll or not, was much impressed by what he took to be the weakness of the charge against Stanley. He explained the circumstances thus: 'it seems the judges of that time (who were learned men and the chief of them of the privy council) thought it was a dangerous thing to admit ifs and ands to qualifie words of treason; whereby every man might express his malice and

blanch his danger'. (41) If Bacon was correct, if the charge of imagining the king's death was founded on Stanley's words about Warbeck, the construing of conditional statements as treason had started before 1509: if not the novel nature of the accusations against Empson and Dudley were probably inspired by Henry VIII. Someone must have been aware of the unsatisfactory nature of the indictments of 1509, since their conditional form never appeared again in the Tudor era. Like the question of popular disturbances, the issue of whether seeking to govern or control the prince was treason arose again at the end of the century, when despite the welter of legislation on treason in the interim it still seems to have been without statutory sanction.

These then were the more important acts, declarations and cases which affected the scope of the treason law in the period 1485-1530. There was also a treason act passed in the parliament of 1488-9, which made treason the forging of foreign coins current in payment at that time in the realm, as well as several things of interest on the procedural side, like judicial declaration on sanctuaries and the last obvious case of that chivalric anomaly, trial under the law of arms, but these are better dealt with in later chapters. (42) That it was for the history of treason not a critical period is obvious, yet there was portent of change to come. This lay in the harsh fashion in which the misdeeds of Empson and Dudley were construed and the decision to make treason out of popular disturbances in London in 1517.

In the history of the scope of treason, as in the history of the sixteenth century as a whole, the years 1530-6, that is to say roughly the period of the Reformation Parliament, can be considered the most crucial. As well as the act designed solely to deal with treason of 1534 (26 Hen. VIII c. 13), the first and second acts of succession (25 Hen. VIII c. 22 and 28 Hen. VIII c. 7) and the act which extinguished the authority of the pope (28 Hen. VIII c. 10) considerably affected the official definition of treason. These acts were intended to defend King Henry's anti-papal policy, his attack on the liberties of the church and his matrimonial arrangements. This revolution, for it was hardly less, having no real parallel in English medieval history, was bound to create opposition, and since the question of obedience and to whom it was owed was at the heart of the king's policies, new categories of treason might be expected. This did not of necessity mean new laws, although since there had been statutes made in the fifteenth century which consciously supplemented the act of 1352 there was nothing to prohibit

it. Many attacks on the changes which the government was accomplishing could perhaps have been dealt with by judicial declaration, as had happened periodically since 1352, that they were in fact treasonable. The reason given might have been that they grieved the king and therefore were likely to cause his illness and death. (43) By this interpretation the offences would have come under the clause of the 1352 act concerning imagining or compassing the king's death. Since judicial interpretation had played a crucial role in 1509 and 1517, why the king and his ministers in the 1530s resorted to statutes to redefine the scope of treason is thus an important matter.

From the king's point of view declaration of treason by the judges had a serious flaw in it. The judges could not always be counted on to see the crime in exactly the same light as the king and his legal advisers. On occasion they might show a most independent spirit and Henry VIII may well have had his attention drawn to the example of Chief Justice Markham, who is said in 1468 to have found what Edward IV thought was treason to be misprision only. (44) The king therefore had probably begun to take precautions. It is very likely that in Tudor times conferences among the judges about points of treason were prompted by the crown, and that furthermore the judges were under some pressure to find the offence at issue traitorous. (45) Significantly, judicial declaration operated against the king, perhaps for the first time under the Tudors, in November 1533. Henry wished the crimes of Elizabeth Barton, the Kent prophetess, and her associates to be declared as high treason, and for that purpose assembled not merely judges and lawyers but bishops and nobles as well, intending perhaps that they should overawe any opposition on the part of the legal experts. Henry seems to have argued that Elizabeth had failed to reveal traitorous dreams and a knowledge of traitorous plans,which of course was treason. The judges, however, pointed out that a year earlier she had revealed all when she prophesied before the king in person and they would not concur. (46) As a result Elizabeth and her accomplices were proceeded against by bill of attainder in parliament and not by indictment in a court of common law.

The lack of compliance by the judges in a case which was of particular political importance helps to explain why comprehensive legislation on treason could not thereafter be long delayed, but it does not suggest why the king and his ministers had been toying with drafts of a new treason act since 1530. That a new statute took so long to materialize implies a reluctance to legislate until positively obliged to do so. Arguments that the