

**LIONS IN CONFLICT: ELLESMERE, BACON AND COKE**  
**TREASON AND UNITY**  
**SECOND ADDRESS TO THE ST THOMAS MORE SOCIETY**  
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When the seminary priest William Watson joined the long list of apprehensive Englishmen who travelled north to the Scottish court to inquire about King James' intentions if he became King of England, he received the same general blandishments of goodwill as other Catholic interlocutors. A leader of the Appellant faction that sought accommodation with the government of England, which actively encouraged the split in the Catholic community, Watson was one of the most vituperative critics of the Jesuits. Despite the fact that he had been imprisoned under Elizabeth five times – escaping three times – the Jesuits treated him as a collaborator.

Robert Persons, first commander of the Jesuit mission to England, who escaped when Edmund Campion was captured, returning to Rome, where he had great influence on the Vatican's policy towards England, deployed the same poisonous rhetoric as Watson in their debates. For example, referring to Watson's exaggerated squint, Persons wrote that he was "so wrong shapen and of so bad and blinking aspect that he looketh nine ways at once"<sup>1</sup>.

Supremely convinced of his own abilities, the arrogant Watson heard what he wanted to hear from the King of Scotland. James, he proclaimed on his return, would establish a new regime of religious tolerance. Many others were to suffer from such self-delusion. However James had firm, well-informed views about religion, developed over many years of study and of interaction with the fractious Scottish Kirk. He had set out his policy for Catholic priests in his secret correspondence with Robert Cecil, Elizabeth's key executive, before his accession:

"I [would not] wish to have their heads divided from their bodies, but ... I would be glad to have both their heads and bodies separate from this whole land, and safely transported beyond seas, where they may freely glut themselves upon their imagined gods".<sup>2</sup>

Of course he was telling Cecil what he wanted to hear too.

Elizabeth's religious legislation had imposed obligatory attendance at a Church of England parish and absence, known as recusancy, was punished by fines of, at first, a shilling but increased by later Acts to the crippling level of 20 pounds per month. James vacillated over enforcing the laws – i.e. defy Parliament – an assertion of executive power that would prove particularly controversial for the Stuart kings.

In 1608, when the religious confrontation had escalated, Rome would reveal that in 1599 James had written a letter to the Pope, signed in his own hand, indicating that conversion was a possibility. At that time James had feared that the Pope would excommunicate him in order to promote the claims of Isabella, the Infanta of Spain, to succeed Elizabeth. That plan, as James well knew, had been actively promoted by Jesuit leaders, notably Robert Persons, who wrote a book on Isabella's claim to the throne, a tract which, like other contemporary Jesuit tracts – including those found when the Jesuit seminary in Paris was raided after a deranged pupil had attempted to assassinate Henri IV of France – had the temerity to question the doctrine of the divine right of kings.

When revealed in 1608, James' 1599 letter was a great embarrassment. His Scottish secretary of 1599, by then enobled and living off the English purse like all the former members of the Scottish court, at first asserted that the letter had been sent on James' instructions but, eventually, accepted that it had been a frolic of his own. He had put the letter before James in a pile of correspondence which the King signed without reading. Suddenly, James recalled that precise occasion - he was anxious to go hunting - a feat of memory which James himself accurately characterised as a "miracle".<sup>3</sup>

James made his real opinions clear immediately after his accession was assured: "We'll not need the papists now", he proclaimed.<sup>4</sup>

In 1603 James had an ambitious agenda for which he would need the support of the anti-Catholic House of Commons. He was committed to making peace with Spain which, after detailed negotiations led by Cecil, was achieved in mid 1604. He was determined to resolve theological disputes between Anglicans and Puritans within the English church and presided over, indeed dominated and directed, the Hampton Court conference of January 1604 – "No bishop, no King" he twice told the Puritans, dismissively.<sup>5</sup> James, who had genuine intellectual interests, also instituted a new translation of the Bible, the most important cultural contribution ever made by a British monarch. He was also determined to formally unite the kingdoms of England and Scotland into a single polity under a single sovereign.

Perhaps most important of all, he needed the Commons to provide the finances for his spendthrift court, to the demands of which, in its hothouse, homosexually charged atmosphere, he almost invariably capitulated.

The headstrong Watson, who had widely disseminated his own misinterpretation of James's intentions, chose to express his frustration and humiliation by organising a ludicrous, bordering on the imbecilic, conspiracy to kidnap the new King and imprison him until he declared toleration of Catholic religious practice. Tipped off by the Jesuit John Gerard and by George Blackwell, the Jesuit-aligned Archpriest – a unique office created, in the absence of a bishop, as the nominal head of the underground English Catholic church – the authorities quickly arrested the group of amateurish malcontents, including George Brooke, younger brother of Lord Cobham, one of the richest men in England.

This family link would prove disastrous, not only for Cobham, but also for his acquaintance, the now eclipsed Elizabethan favourite Sir Walter Raleigh. The spinmeisters of the day would label the Watson led conspiracy with the dismissive title: “the Bye Plot”. The almost certainly concocted, treasonous conspiracy involving Raleigh was labelled: “the Main Plot”.

## **RALEIGH**

James had good reason to dislike Raleigh. For a start he hated tobacco, which Raleigh had introduced to England. James had denounced it in a scathing, prescient attack entitled *A Counter-Blaste to Tobacco*. He concluded: “Smoking was a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs and in the black stinking fume thereof, nearest resembling the horrible Stygian smoke of the pit that is bottomless”.<sup>6</sup>

James expressed no such sentiments about Raleigh's other introduction, the potato, perhaps because the potato was then prized as an aphrodisiac, for reasons that, mercifully, have been lost. Further, Raleigh had been a leader of the war-with-Spain faction, indeed one of its most brutal and successful practitioners. James intended to be, and became, a peacemaker, even at the expense of piracy, one of England's most profitable industries.

Raleigh was an upstart parvenu, the son of a poor tenant farmer, whose swagger was as infuriating as his intelligence. His flamboyance and his arrogance were treated with scorn by his rivals and contempt by his social superiors. Some of them even expressed jealousy about Raleigh's beard, which was naturally curly, while they had to apply hot irons to conform to the contemporary fashion.

The accomplished courtier, adventurer, soldier, poet, scientist, historian, seafarer, explorer and coloniser had made many enemies over his years of patent, bordering on the neurotic, ambition and accomplishment, accentuated by the poisonous jealousy of court politics during his periods as Elizabeth's favourite. (I should note there is no historical record of the folktale about him casting his cloak over a puddle for her). An astute observer would call him "fortune's tennis ball".<sup>7</sup> So it would prove.

James was convinced, with reason, that Raleigh and Cobham, longstanding political allies, were amongst those members of the English political elite who had not regarded his succession as obvious. They had also actively opposed the faction of the Earl of Essex, who was regarded by James as a martyr for his own cause.

James' mind had been poisoned against them in his secret, pre-accession correspondence by Cecil, now the Earl of Salisbury, who had often been in conflict with Raleigh as a rival at Elizabeth's court, and by their intermediary, Henry Howard, later the Earl of Northampton, head of one of the leading Catholic-inclined families of England.

Cecil wrote to James that "the two hedgehogs", Raleigh and Cobham " would never live under one apple tree with him".<sup>8</sup> Howard wrote to James denouncing them as two members of a "diabolical triplicity"<sup>9</sup> – the third being the Catholic Duke of Northumberland – who were plotting against James. When they finally met, James treated Raleigh to a bad pun on his name: "I have heard rawly of you",<sup>10</sup> he said, truthfully.

Raleigh was Elizabeth's Captain of the Guard, a praetorian force which, as Raleigh had shown during the Essex rebellion, was a critical post for protection of the monarch and, accordingly, had to be held by a soldier of absolute and unquestioned personal loyalty. His removal from that post was no surprise. However, James also stripped him of his major source of income as the owner of monopolies over certain wines and tin, conferred by the late Queen. He had to resign as Governor of Jersey, a post with strategic implications as a possible stepping-stone for an invasion. Cobham was also regarded with suspicion in this respect, having succeeded his father as Lord Warden of the Cinque Ports.

James also forced Raleigh, on two weeks notice, to surrender Durham House on The Strand, his home of twenty years on which he had spent thousands of pounds for renovations, to his formerly nominal landlord, the Bishop of Durham, who had delivered the first of many sycophantic sermons to the new King immediately after he crossed the border to commence his triumphal journey south from Scotland. Raleigh wrote complaining to

Lord Chancellor Ellesmere, Chief Justice Sir John Popham and Sir Edward Coke – “The poorest artificer in London hath a quarter’s warning given him by his landlord”<sup>11</sup> – to no avail.

When Cobham’s brother showed up as a member of the hapless conspiracy organised by William Watson, Raleigh’s enemies, particularly Cecil and Howard but also James himself, seized the opportunity to destroy him. The principal weapon in the attack would be Attorney General Coke.

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Coke was newly knighted. Shortly after James’ accession he wrote to Cecil on 4 May 1603 seeking his support for such an honour. Citing a surplusage of historical precedent, as was his tedious habit, of the elevation of former attorneys back to Edward II, he told Cecil, disingenuously: “I thank God I am not ambitious,” and added, truthfully: “but as all my good fortunes have come either by your honourable father or by you, so I would account it the greater if it came by your honourable hand.”<sup>12</sup>

Within a few weeks Coke was knighted in a select band of six at the royal palace at Greenwich. Ellesmere was enobled and retitled Lord Chancellor in a personal ceremony. Francis Bacon became a knight too, not for anything he had done but in recognition of his late brother’s role as an intermediary between Essex and James, probably also as a spy for James and, no doubt, for his brother’s effeminate beauty – a quality which always attracted James. Bacon’s recognition occurred in the gardens of Whitehall in a mass investiture of 300 men to mark the King’s coronation, including sons of pedlars and the like. As Bacon recorded, this farce “almost prostituted [the] title of knighthood.”<sup>13</sup>

In his first year James created over a thousand knights, trebling the order,<sup>14</sup> more knights than the stingy Elizabeth had invested in her 44 and a half years reign.<sup>15</sup> The corruption involved was notorious, as the horde of comparatively impoverished Scottish nobles descended on England, selling their access to the King’s ear to anyone who could afford it. James and the Scottish courtiers were determined to enjoy England’s wealth. As a contemporary English ditty put it:

“Hark! Hark!  
The dogs do bark,  
The beggars have come to town”.<sup>16</sup>

James' total annual expenditure as King of Scotland had been some 50,000 pounds. In 1604, as King of England, he was able to spend about the same amount just on jewellery<sup>17</sup> and this by a man who abhorred earrings.

The debasement of the coin of knighthood was so pronounced that a few years later James would create a new category of baronets, to recognise the special place of those who came from families that had a family history of note, such as having knights for three generations, and could afford to buy the new title, which brought in some 90,000 pounds for the King in the first three years.<sup>18</sup> A new cottage industry of fake family histories, replete with forged documents, emerged. Everyone seemed to be able to trace his roots to the Norman Conquest. No doubt their descendants still believe it.

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In November 1603, London was beset by plague and the court moved to Winchester. It was there, in the great hall of Winchester Castle beneath the wall adorned, as it still is, with what was said to be King Arthur's Round Table, that the trial of Raleigh occurred. Sir John Popham, Chief Justice of the King's Bench presided over a board of eleven commissioners, including Raleigh's enemy Lord Henry Howard, with a jury of twelve knights and gentlemen.

The purpose of the commission was to provide public confirmation of Raleigh's guilt. It cannot really be called a trial: there was no presumption of innocence, the accused was given no notice of the case against him or of the evidence and the bench, including Popham, had been closely involved in the course of the investigation. The judges and the jury knew that the King wanted a conviction. The public was convinced of his guilt, not least because of the role Raleigh had played in the downfall of the dashing, deeply flawed Earl of Essex, still a popular favourite, as he had been of James.

Coke, determined to ingratiate himself with the new monarch, had decided that violent rhetoric, crass insults and unrestrained combativeness was what the prosecution required – what Macaulay would later call his habitual "rancorous insolence".<sup>19</sup>

Never was Coke's vanity – short of sight, he refused to wear glasses – nor his self-absorbed advocacy on more unfortunate display. Even by the undemanding procedural fairness standards of the day, his conduct was a disgrace. In this trial – a precedent which Coke would pointedly ignore when he came to write about the

law of treason in his *Third Institutes* – Coke's performance was worthy of Andrey Vyshinsky, the brutal prosecutor of Stalin's show trials

Raleigh was charged with inciting Lord Cobham to approach Spain for funds to finance a rebellion to place James' cousin, Arbella Stuart, who not only could claim Tudor ancestry but was English, on the throne and secure toleration for Catholicism. Innocent of any plotting herself, she was to remain the focus of the plots of others. Eventually James felt constrained to have her imprisoned and she died in the Tower. There was no suggestion that she knew of the alleged Raleigh plot.

Coke's address for the prosecution asserted that Raleigh was involved in a plan to kill the king and his children – based on a statement by one of the so-called Bye plotters, who had been convicted at Winchester two days before. Coke had no evidence connecting Raleigh to any of them.

As Raleigh replied to Coke's opening in calm, measured, dignified terms, Coke indulged in unadorned vitriol: "Thou art a monster! Thou hast an English face and a Spanish heart." And "Thou viper ... the rankest traitor in all England".<sup>20</sup> And "There has never lived a viler viper on the face of the earth".<sup>21</sup>

At one stage he was rebuked from the bench for his cantankerous conduct and Coke, asserting that his ability to do his duty to prosecute traitors was being undermined, sat down in a huff and had to be cajoled to continue. This was not the only time he displayed such arrogant petulance. In May 1605, when Ellesmere ruled against the admissibility of his evidence in a civil case, Coke refused to participate any further and sat there silent throughout the day.<sup>22</sup>

The sole live witness called by the prosecution was a sailor who swore that on a visit to Lisbon he had overheard an unidentified Portuguese man say that Raleigh and Cobham were plotting against James.<sup>23</sup> The so-called evidence didn't get much better than that.

There were a few bits of circumstantial evidence and Raleigh accepted that Cobham had offered him a Spanish bribe – hardly incriminating when the proclivity of English political figures of the era to accept bribes was notorious throughout Europe. Indeed, within a few years Cecil himself would accept a Spanish pension.

Raleigh had sent Cobham a letter, which was said to suggest a guilty mind, based on evidence about its content by the messenger who, Raleigh said, had been threatened with the rack. Sir William Waad, the Clerk of

the Privy Council and well known to be a torturer, who was a member of the bench trying Raleigh, spoke up to deny it: "We told him he deserved the rack, but did not threaten him with it."<sup>24</sup> That cleared that up.

The only evidence against Raleigh was a confession by Cobham – whom everyone knew to be a fool – implicating Raleigh in a plot. His statement was given weight because it incriminated himself, although his brother's evidence was enough to condemn him. At first Cobham had denied everything which might involve Raleigh. He was then told that Raleigh had implicated him with Spanish agents. Cobham confessed in fury, saying it was all instigated by Raleigh.

His first two statements, denying involvement, are filed in the State papers. Somehow his confession is not. The only record of it is Coke's paraphrase in the partial transcripts of the trial that have survived.<sup>25</sup> It is quite clear from those transcripts that Coke proceeded to read selectively from various statements when presenting the prosecution case. The records are such that it is possible in many cases to know what he omitted, but not with this critical document.

Although everyone who has reviewed the conduct of the prosecution over the centuries had denounced it as a travesty, it was not until 1995, when a researcher came across a summary of the prosecution brief prepared for Lord Ellesmere, that it became known that, after Cobham had made the statement implicating Raleigh, he had retracted all of it before the investigators.<sup>26</sup> This retraction was never mentioned at the trial, although Coke and Popham, who conducted many of the investigations, must have been aware of it.

Despite Raleigh's repeated pleas and legal argument – rejected by Popham – Cobham, who was in the castle, was not called to give evidence orally. Cobham had sent Raleigh a letter withdrawing his incriminating statement and Raleigh tendered it. However, Cobham also gave Coke a further statement retracting the retraction, which Coke then tendered. But there was no reference to the first retraction, originally given to the investigators.

In the retraction given to Raleigh, Cobham had proclaimed: "I protest upon my soul I never had conference with you in any treason."<sup>27</sup> In the retraction of that retraction, he was equally forthright: "I protest upon my soul to write nothing but the truth".<sup>28</sup> As Raleigh sardonically told the Commissioners: "You see how many souls this Cobham hath".<sup>29</sup>

After three of the four different versions – confession, retraction and retraction of the retraction – had been read out in public, at least in part, the presiding judge, Chief Justice Popham cleared it all up before the jury retired. He had been present, it transpired at the time of the first confession:

“I am persuaded that Cobham accused you truly. I observed his manner of speaking ...  
I am persuaded he spoke nothing but the truth.”<sup>30</sup>

The jury came back within fifteen minutes with a verdict of guilty of treason. Popham solemnly sentenced Raleigh to execution by being hung, drawn and quartered. In the course of the sentencing the Chief Justice, by way of afterthought, referred to the absence of oral evidence from Cobham:

“It now comes to mind why you may not have your accuser brought face to face: for such a one is easily brought to retract when he seeth there is no hope for his own life”<sup>31</sup>

Or, one could add, to tell the truth.

A few weeks later, Cobham, who *had* engaged in treasonous communications with the ambassador of the Spanish Netherlands, was brought to trial, Lord Ellesmere presiding. He confessed to some matters but denied key allegations. He re-affirmed, in a signed statement, that he had acted upon Raleigh’s incitement.

Many years later, when still a prisoner in the Tower, Cobham gave yet another version of his first confession. He had been tricked, he now said, by Sir William Waad into signing a blank sheet of paper to which his purported confession was later added.<sup>32</sup> This would have been entirely in character for Waad, a visceral hater of Catholics and the leading interrogator and torturer of his time who, with his father, served the Cecils, father and son, for half a century, including in such causes célèbre as Mary Queen of Scots, Father John Gerard and Dr Lopez. This final retraction by Cobham does not, however, explain the signed statement produced at his own trial, to which he made no objection. No doubt there were promises made from time to time of which we know nothing.

Cobham and two other participants were found guilty and sentenced to death. Each of them, observed by Raleigh, endured a process of being taken to the place of execution before being spared by the King at the last moment. Raleigh spent some fourteen years imprisoned in the Tower, writing historical and political works of which only one, *History of the World*, snuck past James’ veto and was published in his lifetime<sup>33</sup>.

Raleigh was eventually released upon a promise to find the gold of El Dorado for James, who was broke as usual. After all, Raleigh had been the principal progenitor of the myth two decades before with his naive narrative, *The Discovery of the Large, Rich and Beautiful Empire of Guiana*, in which he gave currency to the fable of a white crystal mountain covered in diamonds by saying that he had glimpsed a white mountain in the distance. Still the Elizabethan warrior, Raleigh destroyed a Spanish settlement in defiance of his orders. There was neither gold nor diamonds. When Spain complained – a close relation of the Spanish ambassador had been killed by Raleigh's expedition – James, then manoeuvring for a marriage alliance between his heir Charles and the Infanta of Spain, promised to act, if the King of Spain wanted him to. He did.

Rather than have a new trial, James relied on the original sentence imposed, ironically, for Raleigh's alleged conspiracy with Spain. Raleigh contended that he had impliedly been pardoned. The Chief Justice of the Kings Bench rejected that contention. A pardon for treason had to be express. He also rejected the suggestion that Raleigh's original trial had not been fair.<sup>34</sup> In 1618, fifteen years after sentence, Raleigh was executed. His original trial was so notorious a travesty that it may well explain, in part, future common law developments to ensure fairness in criminal procedure.

Cobham, after many years in the Tower, eventually had his liberty, but not his title, restored and died a pauper in the hovel of his former laundress.

## **GUNPOWDER PLOT**

The so-called Bye Plot was the first expression of Catholic disappointment with James' regime. Incomparably more significant was the conspiracy known to history as the Gunpowder Plot. After the first few months of his reign, when James manifested some degree of leniency towards English Catholics, his policy changed and the strict letter of the law was enforced. In addition to the participants in the Bye Plot, two seminary priests were executed for treason and the collection of the crippling recusancy fines recommenced.

The Gunpowder Plot was instituted and organised by Robert Catesby, whose family had long supported the covert Jesuit mission. Catesby had already manifested disaffection, as had some of his co-conspirators, by participating in the abortive Essex rebellion. Francis Bacon had received a moiety of Catesby's fine.<sup>35</sup> Catesby's leadership has been obscured by the fact that he died without trial, trying to incite rebellion even after the failure of the plot. The name that has passed into folk history is that of Guy Fawkes, an English born Catholic convert who, as a soldier of fortune in the armies of continental Catholic powers, understood explosives. He was the one caught with the gunpowder beneath Parliament on, it has always been said, 5 November 1605.

“Remember, Remember”, generations of British students were taught to chant, “The Fifth of November ... Gunpowder, Treason and Plot”. Except it wasn’t the Fifth of November at all. In almost all of Europe it was the Sixteenth of November.

Over the centuries from 45 BC, when Julius Caesar implemented what became known as the Julian Calendar, it lost time because it computed a year as eleven and a half minutes longer than a solar year. Easter was drifting from spring towards winter, Christmas from winter to autumn. The Gregorian Calendar, implemented by Pope Gregory XIII in 1582, corrected the problem, both for the future and the past. The latter was achieved by jumping from October 4 to October 15, so that October 5-14, 1582 simply never existed, except in England, Sweden and Russia, which did not recognise the pope’s authority.

As usual, England delayed before it joined Europe. In 1753, the British *Calendar Act* came into force and led to Euro-sceptic disquiet throughout England: “Give us back our eleven days” was one slogan and, in the words of a popular ditty:

“In seventeen hundred and fifty three  
The style it was changed to Popery”.<sup>36</sup>

By then it was too late to alter the date of Guy Fawkes’ night, which had become doubly significant as a day of Protestant deliverance, because it was on “5” November 1688 that William of Orange landed in England to ignite what immediately became known as The Glorious Revolution to depose the Catholic convert King James II, last of the Stuarts.

“5” November 1605 was the 9/11 of seventeenth century England. This was a conspiracy by religiously motivated terrorists. The role of Al-Qa’ida was played by the Jesuits, then widely regarded as an insidious covert organisation with revolutionary, albeit reactionary, objectives. The overwhelming majority of law abiding Catholics were treated, like Muslims today, as a potential fifth column and as the seed-bed for terrorists.

Inevitably, like 9/11, the political and religious deployment of the Gunpowder Plot has spawned factual controversy and a penumbra of conspiracy theories. However, the broad picture is not attended by any real doubt. A small group of upper class Catholics, with an acute sense of religious persecution, who had hoped that things would change for the better when the son of the martyred Mary, Queen of Scots, succeeded to the throne, had become disillusioned. They realised that the peace treaty with Spain of mid 1604 meant that reinstatement

of the true faith by external invasion was no longer an option. They came to believe that only the anarchy that would follow from the assassination of the King and the decimation of the English elite could do that.

A substantial proportion of that elite always gathered in one place for the formal opening of Parliament by the King. They could be despatched in one explosion. Although the gunpowder of the era was of variable quality, if it had exploded as planned, modern scientists have calculated that the 36 barrels of gunpowder would have obliterated the Palace of Westminster, Westminster Hall and Westminster Abbey and caused structural damage within a radius of 500 metres. No one present in Parliament would have survived.<sup>37</sup>

The plot was discovered, according to the official version, because of the delivery to Cecil of a letter sent to Lord Monteagle, probably by his brother in law who was the most nervous of the plotters, warning him not to attend the opening of Parliament. Lord Monteagle was a Catholic but, in order to preserve his wealth and position, outwardly conformed to the Church of England, while his wife remained a recusant. The key words in the warning letter were: "They shall receive a terrible blow this Parliament".

Although it is very unlikely that Cecil, with his extensive intelligence network, did not have some knowledge of the plot, the identification of what might be inferred from the word "blow" was said to have been made by the King himself. This is, in fact, quite likely. His own father had been murdered in a gunpowder explosion and James had a well-developed sense of self-preservation arising from a number of attempts over the years to kidnap and/or assassinate him, manifestations of the disgruntle gene endemic in the Scottish aristocracy.

The investigation led to the revelation that Thomas Percy, cousin of the Earl of Northumberland, the leading Catholic noble, had rented a room directly under the House of Lords, where the opening ceremony would be held. The search of the room led to the discovery of Fawkes and the gunpowder. There is no reason to doubt these objective facts, unless one believes one of the conspiracy theories, which I do not. The basic nature of the plot is clear. Who precisely was involved and how they became involved, especially the Jesuits, requires assessment of a factual minefield of self-serving assertions and confessions, most of which were extracted under torture, transparent in the crippled hand that signed Fawkes' final statement. Nevertheless, as one would expect, in the trials that followed, Coke presented a prosecution brief devoid of nuance.

The full text of Cecil's detailed instructions to Coke on how the trial of the surviving plotters – Catesby and Percy had been killed – should be conducted has survived. Cecil's letter, no doubt confirming more detailed

conversations, reveals the political requirements of a show trial. As usual, guilt had been determined in the course of the interrogations. What remained was the show, for the public and for posterity.

In order to deflect the suggestion that the plot was a reaction to James' "severity" towards Catholics, the Attorney General should make it clear that the plotters approached Spain for support before James became King. In order to deflect the suggestion that Lord Monteagle was once part of the plot but changed his mind, the Attorney must make it clear that Monteagle was above reproach and had acted promptly upon receipt of the letter. Further, the official, just published version of the plot and its discovery, purportedly written by the King himself and called *The King's Book*, must be scrupulously followed, but with rhetorical license – "as you know best how", he said. Cecil's final, curt instruction was: "You must remember to lay Owen as foul in this as you can".<sup>38</sup> In this respect, Coke was told, his talent for vituperation was required.

Nicholas Owen, known as Little John, was the genius designer of the priest holes crafted into the framework of many Catholic houses in England which proved so successful in hiding visiting priests during Protestant raids. He would die under torture by Sir William Waad – who put out the usual over-zealous torturer's story that Owen committed suicide.

Owen was a Jesuit lay brother and a key confidante of Henry Garnet, who had led the English Jesuit underground for twenty years, with considerable success in terms of moral and intellectual leadership, even though at their height the Jesuits never numbered much more than a dozen of the 200 or so Catholic clergy covertly in England.

On the fourth day of destructive searches of Hindlip House in Worcestershire, after about a dozen of Owen's ingenious, secret cavities in the brickwork and chimneys had been discovered, Owen was captured. It was 24 January 1606, three days before the trial was to commence. At the time Cecil gave Coke his written instructions, Owen was the only Jesuit who had been caught. Cecil could not have anticipated that, on the very day of the trial, further searches at Hindlip House would reveal Garnet himself.

The principal thrust of the prosecution was to proclaim that the plot had been a conspiracy of the Jesuits, who had corrupted patriotic English Catholics into their nefarious scheme. Many Catholics, like Monteagle, were completely loyal. Contrary to the later conspiracy theorists, who believe the outburst of anti-Catholicism that resulted from the failed Plot must have been planned, with only Cecil capable of such deviousness, James and Cecil were determined that the trial would not demonise all Catholics. Like his father,

Lord Burghley, Cecil regarded the divided loyalty of English Catholics as a security risk, but believed the problem could be managed without persecution, which he thought was often counter-productive.

The official record of the day-long trial has been carefully vetted for publication. There is a minimum of detail of who said what. Only statements that were consistent with the Crown case are set out. The bulk of the report consists of a long speech by Coke. There are signs it was corrected and polished after the event. No doubt something like what is recorded actually took place. However both the evidence adduced, and the formal record, were plainly manipulated for reasons of state. How far back the manipulation went is a matter of conjecture.

Coke obeyed his instructions from Cecil, save in one respect. No respecter of the aristocracy, he could not bring himself to proclaim Lord Monteagle's innocence. He plainly thought Monteagle and the Earl of Northumberland were involved. He must have known that James was adamant that the Catholic aristocracy must be kept on side. This was an early sign of Coke's capacity for insubordination.

"These were", Coke began, "the greatest treasons that ever were plotted in England", adding with an obsequiousness that rings false to the modern ear, "that concern the greatest king that ever was in England".<sup>39</sup> The Powder Treason, as he called it, commenced, he proclaimed as instructed, even before the death of Elizabeth, when Garnet sent a mission to Spain in support of the Infanta's claim to succeed, led by one of the accused. Coke could not help noting that Cobham was the Lord Warden of the Cinque Ports, through which any invasion would pass. Later in his long and tedious address, replete with historical diversions and biblical references, he would compare the plot to Raleigh's "Main Plot", as if he knew that his conduct at that trial required justification.

Coke's main target was obvious from the terms of the indictment. Garnet and the other Jesuits were the first named of the list of conspirators and it was they who, the indictment alleged, did "maliciously, falsely, and traitorously move and persuade" the others.

Coke asserted:

"The principal offenders are the seducing Jesuits; men who use the reverence of religion ... as a mantle to cover their impiety, blasphemy, treason and rebellion and all manner of wickedness .... Concerning this sect, their studies and practices consist in two d's: deposing of kings and disposing of kingdoms."<sup>40</sup>

No doubt, the rhetorical flourish of alliteration was not then as clichéd as it is now.

Coke asserted that Catesby had been told by the Jesuits that the plot was both lawful and meritorious. He simply did not read those parts of the confessions which denied that any priest had been involved. Meticulous as always, the records reveal, he had marked the parts he would not read in red before the trial.<sup>41</sup>

The eight surviving conspirators were quickly found guilty of treason and sentenced to death by being hung, drawn and quartered. The next trial was of Garnet himself.

### **GARNET TRIAL**

Garnet was a most unlikely participant in mass murder. He had a particularly attractive concatenation of virtues – mild mannered, scholarly, over fifty, overweight and balding – just about perfect really. Hardly the man to play the role of Osama bin Laden.

The constant fear of two decades of covert missionary work had been rendered tolerable by the need to generally confine his mission to the stately homes of rich Catholics. There, the intermittent discomfort of confinement to priest holes – like sparrows on a rooftop, as one contemporary put it<sup>42</sup> – was ameliorated by the excellence of the food and wine of which he was so fond, as he was of the company of intelligent, idealistic, young women – which induced Cecil at the trial to call him *senex fornicarius*, roughly “dirty old man” in Latin.<sup>43</sup>

There seems no reason to doubt Garnet’s assertions that he had done what he could to calm the militant Catesby. There is, however, a tension between those assertions and his other testimony.

Notwithstanding torture, none of the conspirators admitted that any Jesuit had been part of the plot. Nor, after weeks of investigation of Garnet himself, had even a circumstantial case of direct involvement emerged against him. While imprisoned in the Tower, he had been allowed to send letters and the secret writing in lemon or orange juice in the margins was intercepted. He was placed in an adjoining cell to another Jesuit to enable his captors to eavesdrop on their evening whispered conversations. Save for one observation, which did not go beyond knowledge, this evidence was not inculpatory, although a conversation in which names were being named was drowned out by a crowing cock and a cackling hen, called by one historian “a conspiracy of chickens”.<sup>44</sup>

Garnet eventually admitted that he had learned of the plot when another priest, to whom Catesby had made confession, told him – also in confession. He later accepted, according to the official record of the trial, that this knowledge was not entitled to privilege in English law. “It is not fit”, he said, “the safety of a prince should depend upon any man’s particular conscience”.<sup>45</sup> However he could not have revealed the information for religious reasons. This was enough to convict him for misprision of treason.

After his trial, he continued to be interrogated in order to elicit an explicit confession. He then accepted that he knew enough outside confession. Indeed, when falsely told that the priest who had confessed to him had been caught, he started to qualify his position: perhaps it had not been so clear to the other priest that the revelation was during confession;<sup>46</sup> perhaps the revelation was “not in confession, but by way of confession”.<sup>47</sup>

However, there was never any evidence – not even in the carefully composed and frequently concocted official transcript – that he actively participated in, let alone instigated, the Plot. Indeed, this was barely suggested to him in the course of his interrogations, clearly indicating that no one, with the possible exception of Coke, really believed it. His was to be another show trial.

It was held at the Guildhall in the City of London – chosen instead of Westminster so that the general public would attend and directly hear of Jesuit perfidy. Again, according to the official version, the trial consisted primarily of a long speech by Coke, interspersed by the reading of statements. Unlike the trial of the conspirators, Coke’s tone was one of respect for the accused. He subjected the audience to a long dissertation on the various treasons of the Jesuits – from Edmund Campion to the Gunpowder Plot – and a detailed chronology of the latter, emphasising every statement, however procured, that mentioned any of the Jesuits.

“He is a Jesuit and a Superior,” Coke declaimed, “as indeed he is superior to all his predecessors in devilish treason”.<sup>48</sup> He had worked on his rhetorical flourishes. The two “D’s” of the first trial now became five D’s: dissimulation, deposing of princes, disposing of kingdoms, daunting and deterring of subjects (which counted as one D) and destruction.<sup>49</sup>

Perhaps to explain the absence of any confession that the Plot had been Garnet’s idea, Coke focused on dissimulation, namely the doctrine of equivocation, which he attacked as a form of lying invented by the Jesuits. One example was that it was permissible to answer “No” to the question “Are you a priest?” on the basis of not being a priest of Apollo.<sup>50</sup> Such mental reservations were said to be acceptable in response to inquiry that could lead to persecution of a believer.

Coke referred to a treatise on the subject which Garnet had marked up and of which, unknown to Coke, he was in fact the author. Indeed, in an unconsciously ironic manifestation of the craft, Garnet had changed the original title from *A Treatise on Equivocation* to *A Treatise Against Lying and Fraudulent Dissimulation*.<sup>51</sup> Coke was incapable of recognising irony. He could, however, appreciate the utility for a prosecutor of an admission by an accused that anything he said could be false.

Coke's emphasis on equivocation as a manifestation of Catholic, especially Jesuit, deviousness would have a permanent impact on British public opinion – featuring in “5” November Anniversary sermons for decades.

The prosecution brief was carefully vetted in many respects. Following his original instructions to show that the plotters were not responding to James' policies, Coke sought to prove that some English Catholics had promoted the Infanta of Spain's claim to succeed instead of James. However, the involvement of Lord Monteagle, the hero of the hour, in that scheme was omitted from the statements read out at Garnet's trial<sup>52</sup>, but the involvement of the Gunpowder plotters was trumpeted.

Garnet's own statements, which were the only evidence against him, were read out in open court. There is extant a version which bears the marks of instructions to the court officer, in Coke's own hand, as to what should be read and what left out. Garnet's protestations of innocence, his efforts to pacify the zealots and his denials were not read.<sup>53</sup> Coke's presentation of the prosecution case was replete with such editing which, perhaps ironically, manifested the same vices as equivocation. Again Vyshinsky would have been proud of him.

During the trial Garnet said that he had not been tortured. Of course the transcript is an official document, but the hearing was public and it is unlikely that so blatant a deceit would have been included in a document immediately given wide circulation. There is no real evidence that he was tortured, although understandably many assumed he must have been. Ben Johnson in his post-Gunpowder Plot play *Volpone* refers to Garnet's reputation for drinking to excess when his character says: “I have heard the rack has cured the gout”.

Garnet was permitted to give a long speech in his defence. He proclaimed that he was always opposed to the Plot and had done his best to prevent it. These contentions did not sit well with his denials that he knew any detail until late in the piece. Cecil intervened and engaged Garnet in debate with considerable effect, exposing a number of contradictions in his case and reinforcing the conclusion that Garnet had other sources of information than the confession. Indeed, Garnet would later acknowledge that he had.<sup>54</sup> However, the debate with Cecil did nothing to advance the Crown case that the Plot was organised by the Jesuits.

The jury took only 15 minutes to convict him. He was executed, as one contemporary sneeringly put it, "by hanging without equivocation".<sup>55</sup>

In October 1970 after a long campaign, forty English martyrs were canonised, including Nicholas Owen and Edmund Campion. Henry Garnet was not one. I do not know why. I suspect that the closeness of his relationship with his most devoted admirer, Miss Anne Vaux, was an important factor.

The fury of the government with the Jesuits – whom James called "Puritan Papists" – and the certitude that they had been involved, was no doubt influenced by the fact that it had been the Jesuit Father John Gerard, with the approval of Garnet, who had tipped off Cecil about the Bye Plot. There was no word of warning about the Gunpowder Plot, instigated by the Jesuit's own followers when, it appeared certain, that Jesuit priests knew. Indeed, the key planning meeting at which the core group of five plotters swore an oath of secrecy, on Sunday 20 May 1604 at the Duck and Drake Inn just off London's Strand, was immediately followed by mass in an adjoining room conducted by a Jesuit priest, albeit it is not clear which one.

There were written instructions from Rome, both from the Pope and from the General of the Jesuits, not to get involved in any rebellious moves by English Catholics. Yet there was no warning this time. It is not possible to accept that everything Garnet and his colleagues knew was revealed within the confessional. Garnet himself eventually accepted that he had other knowledge that Catesby was planning something and tried to talk him out of it. It was the detail of the gunpowder in Parliament plan that he said had been conveyed only in confession.

It is difficult to avoid the conclusion that there was, at the least, an element of wilful blindness in the Jesuit position. Even allowing for the scepticism that must attach to the authenticity of many of the documents, I do not think it likely that either Garnet or the other Jesuits were bound to silence because all they knew was received in confession. If, as appears clear, the Plot was contrary to instructions from Rome a warning, such as that promptly given of the Bye Plot, was called for.

The instructions from Rome may have been understood to be pragmatic, based on an assumption that armed resistance was futile, particularly after peace with Spain in mid 1604. No one in Rome could have contemplated the destruction of the English elite in one explosion. Nothing like it had ever happened before. It must have been tempting for men who had endured decades of furtive frustration to obey their instructions not to get involved directly, but not to reveal anything they did not have to reveal about a plan that could actually work.

There can be no doubt that during this era all Jesuits were dedicated to the destruction of Protestantism. Everything else was tactics.

## **AFTERMATH**

In the immediate wake of the Plot, Parliament enacted the Oath of Allegiance, requiring recusants to deny the pope's authority over kings or forfeit their property and liberty. Immediately denounced by Pope Paul V, it gave rise to an intense disputation with Rome, particularly with Cardinal Bellarmine, in which James energetically engaged, clearly enjoying the intellectual challenge. His most recent biographer notes that he spent most of the winter of 1607-1608 "cooped up with his books" and produced a lengthy defence of the Oath of Allegiance intended to have the effect that "the Pope's bulls would pull in their horns".<sup>56</sup>

For more than two centuries, on every Fifth of November, even after the calendar changed, the judges of England processed from Westminster Hall to Westminster Abbey to hear the Gunpowder Sermon and, like their co-religionists throughout the nation, to kneel and recite the prayer, which remained in the Book of Common Prayer until 1859: "Lord who didst this day discover the snares of death that were laid ... by Popish treachery in a most barbarous and savage manner beyond the examples of former ages ... scatter our enemies that delight in blood. Infatuate and defeat their counsels, assuage their malice and confound their devices. Strengthen the hand of our most gracious King ... to cut off such workers of iniquity as turn religion into rebellion and faith into faction ...".<sup>57</sup>

Popular English sentiment about the plotters remained that expressed by Lord Ellesmere at the time: "I am ashamed they be English; I am ashamed they be Christian; but at least they be but Roman Christians".<sup>58</sup> Few events in English history had more significant long term consequences. The bias, vituperation and knowing involvement in public deception by Coke as the prosecutor, played an important role in bringing about those consequences.

## **MACBETH**

Garnet's epitaph was mockingly provided by William Shakespeare in *Macbeth*, written in the aftermath of the Gunpowder Plot. Immediately after the murder of King Duncan, Macbeth and his wife hear knocking and Shakespeare intrudes the only comic scene of the play, where the Porter imagines the response of the gatekeeper of Hell (Act II.iii.8-11):

"Knock, knock. Who's there ... [In the] devil's name?

Faith, here's an equivocator, that could swear in

both the scales against either scale; who committed  
treason enough for God's sake, yet could not  
equivocate to heaven: O! come in, equivocator."

The theme of equivocation appears in a number of passages in *Macbeth*, usually ironic. It is quite likely that when the play received its première at court in 1606, James smiled when Birnam Wood did begin to move towards Dunsinane castle and Macbeth denounced the witches who had predicted his fall as "the equivocation of the fiend that lies like the truth" (V.v.42).

Shakespeare, of course, also revelled in ambiguity and enjoyed nothing better than to leave his audience guessing. That does not mean, contrary to the cottage industry that has grown up around his works, that he wrote in code with a secret message to be deciphered.

In the wake of the Gunpowder Plot, heightened religious tensions required anyone of suspect affiliation to affirm their loyalty without equivocation. Shakespeare had a suspect background. His father was a recusant and was probably converted by Edmund Campion. If Shakespeare had any such affiliation himself, it was not possible to continue it by 1606.

*Macbeth* was Shakespeare's Scottish play designed in part to ingratiate himself with the new regime. His theatre company had been elevated from The Lord Chamberlain's Men to become The King's Men and the members were given the status of Grooms of the Chamber. Royal patronage was not, however, enough. Every play had to reflect on stage the anxieties of the day in order to attract the fickle public to the unsubsidised commercial theatre – where Shakespeare profited both as promoter and as part owner of the Globe.

The themes of *Macbeth* – the pathology of ambition, the legitimacy of royal succession, treason, political assassination, the disaster of disorder, deception, witchcraft and royal divinity manifest in touching to cure scrofula – reflect James' personal preoccupations, as well as widely held fears and beliefs.

As Shakespeare must have known, the main problem with James at the theatre was keeping him awake. Unlike his Queen, who was an avid supporter of the arts, James was not. He had little experience of the theatre, which had been banned in Scotland by the Calvinist Kirk. James compensated for some physical frailty with vigorous activity, especially hunting which he did about half of the time, to the fury of his senior officials used to the active involvement of the monarch in day-to-day decision-making. James' impatience at the theatre no doubt explains why *Macbeth* is one of Shakespeare's shortest plays.

The central theme of *Macbeth* is the disastrous effects of rebellion against legitimate authority and its ultimate futility. James would have nodded agreement, rather than nodded off, when Macbeth, having resolved to kill the king, prophesied his own doom when he referred to “bloody instructions which being taught return to plague the inventor” (I.vii.10).

As the repeated references to equivocation attest, one cannot understand *Macbeth* without knowing something about the immediate political background. Everyone in his contemporary audience had seen the commemorative Gunpowder Plot medal, issued to mark the nation’s deliverance, with a snake concealed by a garland of flowers. There was, no doubt, a shudder of recognition when Lady Macbeth, to strengthen her husband’s resolve, told him: “Look like th’innocent flower/ But be the serpent under’t” (I.v.65-66).

The drama of personal treachery when Macbeth, as host, murders Duncan, his guest, would have been understood by all as a reference to the Gowrie conspiracy against James in 1600, when a Scottish noble family, according to the dubious official version, tried to kill James but were themselves killed, allegedly in self defence. Contemporary observers recognised how convenient it was that James was thereby relieved of his debt of 80 thousand pounds to the deceased.

The introduction of witches in *Macbeth* was also designed to pander to one of the King’s obsessions. The European witch craze of, roughly, the period 1550 to 1700 was a bizarre late Renaissance phenomenon in which thousands of old women confessed to secret pacts with the Prince of Darkness. As Hugh Trevor-Roper observed, the craze was “a warning to those who would simplify the stages of human progress”.<sup>59</sup>

The craze was particularly virulent in Scotland. James was said to have been the target of treason by sorcery that led to a spate of witch trials in the 1590’s – replete with black toads’ venom and human body parts tied to christened cats. He was a true believer in black magic as a manifestation of the devil. To the bemusement of the urbane John Harrington, James earnestly sought an explanation from him of ‘Why the Devil did work more with old women than others’.<sup>60</sup>

In reply to a sceptical rationalist treatise, James had written a book entitled *Daemonologie* to prove the existence of witches and the threat they posed by doing the work of the Devil to destroy the kingdom and God’s anointed King, a divine status which James took very seriously, often calling kings God’s Lieutenants on earth who are themselves called gods.

Henri IV of France, who famously and unfairly called James “the wisest fool in Christendom” also said, in the same vein, perhaps with more justification: “Book writing is no occupation for a king”.<sup>61</sup> When he became King of England, James ordered that all copies of the treatise he had attacked be burned but, it seems, Shakespeare found a copy, for many of his witches’ best lines can be traced to that source.<sup>62</sup>

The most sycophantic element in the play is the character of Banquo, whom Macbeth murders only to be haunted by his ghost. Shakespeare distorted his historical source, in which Banquo was one of Macbeth’s murderous henchmen. However, the historical Banquo was regarded by James as the progenitor of the Stuart dynasty.

Plumbing the depths of obsequiousness, Shakespeare describes Banquo as “father to a line of kings” (III.i.60). When the witches conjure up apparitions of future kings of Scotland, he has Macbeth exclaim: “What! will the line stretch out to the crack of doom?” (IV.i.133). Macbeth’s vision of that royal line is reflected in a mirror displaying the image of the eighth descendent which, in the original royal command performance, was probably staged by showing James’ own reflection.<sup>63</sup>

This theatrical vision of a secure, long-lasting, legitimate, dynastic succession was calculated to appeal to James’ visceral fear of political assassination. James’ father had been murdered, his mother executed, there had been at least one attempt on his life in Scotland and, he believed, numerous attempts to kill him by witchcraft. One contemporary Englishman summed up the Scottish tradition: “They have not suffered above two kings to die in their beds these two hundred years. Our king hath hardly escaped them”.<sup>64</sup> And, of course, there was the Gunpowder Plot.

James, who could never abide the sight of an unsheathed sword, would have been mesmerised by Macbeth’s bloody dagger. As Rudyard Kipling would later put it, in a poem reflecting the bias of Whig historians:

“The sight of steel would blanch his cheek.  
The smell of baccy drive him frantic.”

The English public and political elite were all too conscious from their recent history just how fraught with danger succession uncertainty could be. The political message of the play was one of calculated reassurance.

Macbeth’s vision also contained what he called the “horrible sight” of Banquo’s line of kings: “That twofold balls and treble sceptres carry” (IV.i.120). This was a clear reference to the union of Scotland and

England under one monarch. The revelation of a harmonious future for a Great Britain reflected James' policy on one of the most controversial political issues of the time: the unification of the two kingdoms.

## UNIFICATION

James understood that a mere union of Crowns was inherently unstable and made his intent clear from the outset. He gave himself the grandiose title of Emperor of Britain and issued the first coin to portray a king of England as a Roman Emperor, replete with laurel wreath.<sup>65</sup> He had to drop the title in the face of resistance within England to any kind of formal unification of the two polities that had been at war so often. James adopted, by Proclamation without Parliamentary approval, his second preference, the title King of Great Britain. Formal union would not occur for a century.

In his address to the first Parliament of his reign in March 1604, James commenced by talking of peace, both externally with Spain and internally because of the legitimacy of his succession as a descendent of Henry VII, who had united the two Houses of Lancaster and York, just as James in his blood now united the two Kingdoms of England and Scotland.<sup>66</sup> He spoke lyrically and at length of the benefits of unity and described the geography of a single island as God's work:

"What God has conjoined then, let no man separate. I am the husband and the whole isle is my lawful wife; I am the head and it is my body; I am the shepherd and it is my flock. I hope therefore that no man will be so unreasonable as to think that I that am a Christian king under the Gospel, should be a polygamist and husband two wives."<sup>67</sup>

The House of Commons did not agree that this marriage was made in heaven. Dynasty was not destiny.

To James' consternation – he was not used to a legislature that operated with a will of its own – the most the House would agree to was a Commission of Inquiry on union and, after several years, that Commission achieved little beyond amending restrictions at the border. In the face of such obduracy in Parliament, which refused to naturalise Scotsmen by statute without conditions unacceptable to James, and after a blistering attack in a speech to the House of Commons in March 1607, James turned to the law. The status of Scots born after James' accession – called the *post-nati* – was a legal issue capable of determination by the courts.

The question raised a matter of constitutional principle: Was national allegiance a product of the law or was it a personal bond to the sovereign? James and his advisors asserted that allegiance – what we would now call citizenship – was a personal bond between subject and King. Led by the common lawyers, the House of

Commons maintained the other view: allegiance was not owed to the person of the King but to the Crown and laws of England. In a conference between the two Houses of Parliament to resolve the issue, the senior judiciary listened to the debate and provided an advisory opinion in favour of the King's position. Coke was one of the signatories.

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The post of Chief Justice of the Court of Common Pleas had become vacant and Coke was appointed in mid 1606. The Solicitor General, as was customary, was promoted to Attorney and it appeared that, at last, Bacon would have an official post. He wrote, complaining, to Ellesmere about how his reputation was "taken away by continual disgraces, every new man coming above me".<sup>68</sup> It was notable that, despite his formal status as Learned Counsel for the King, he had played no part in any of the dramatic legal cases of the first few years of the reign.

Francis Bacon never repeated the display of independence in his first Parliament of 1593. He never again failed to obey a royal order or failed to promote the royal interest.

James had promised to acknowledge Bacon's loyal work in Parliament for the Crown on the issue of union. Drawing on the King's proclivity to find the rules for a Christian kingdom in the Old Testament, Bacon had compared James to King David who united the kingdoms of Israel and Judea.<sup>69</sup> He was nevertheless kept waiting until mid 1607, when he was finally appointed Solicitor-General.

With his marriage to a wealthy alderman's daughter, that Cecil had brokered, and the death of the aged holder of the life estate of a sinecure in the Star Chamber, two decades after Queen Elizabeth had conferred the reversion on him, Bacon felt secure for the first time in his life. He sat down in July 1608 and methodically wrote out in longhand his personal balance sheet. He computed his assets – real estate, jewellery, furniture, plate, the lot – as worth 24,155 pounds, with the value of his offices being 8400 pounds, of which 2000 was the capital value of being Solicitor-General and 6000 was the capital value of the sinecure in the Star Chamber.<sup>70</sup>

One of Bacon's first tasks as Solicitor was to prepare the Crown's submissions in the case of the *post-nati*.

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The infant known to history as Robert Calvin – his actual name was Colville,<sup>71</sup> but accuracy in this respect was an immaterial detail in the contrived suit – was born in Edinburgh in 1606. Real property was bought in his supposed name in England and parallel suits were instituted: one in Kings Bench asserting title to land of which he had allegedly been deprived and a second in Chancery for access to documents touching the title of other land and an account of profits for its use. The compliant defendants pleaded that the Scottish born plaintiff was an alien and could not hold freehold in England.

The opinion of the judges was already known. With one dissentient, the common law judges had formally informed Parliament that the *post-nati* were not aliens at common law. The result was never in doubt. Nevertheless the formality of a test case was essential to establish the precedent and to do so on a reasoned basis that might convince the common lawyers, so influential in the House of Commons. Both proceedings were removed into the Exchequer Chamber, on which all of the judges sat to decide difficult questions of law. In June 1608, by a majority of 12 to 2 the bench held that a Scot born after James' succession was not an alien in England. Parliament had been by-passed.

In the Seventh Volume of his *Reports*, published in the immediate wake of the judgment, Coke called *Calvin's Case* "the greatest Case that ever was argued in the Hall of Westminster".<sup>72</sup> Lord Ellesmere, who had led the royal campaign for union in the House of Lords with Cecil, understood the realpolitik of the occasion and was less effusive. When presenting Cecil with a copy of his judgment, that the grateful King had ordered be published, Ellesmere described it as "an idle tale, ill told, which you heard with much patience but not without weariness."<sup>73</sup>

Coke published a version purporting to summarise the reasoning of the numerous judgements as a single piece of reasoning, probably mainly based on his own judgment. Neither the submissions for the defendants nor the two dissents were published, although their content can partially be deduced from another brief report and the contemporary parliamentary and private documents of the opponents of union.

Notwithstanding the constitutional significance of *Calvin's Case*, it must be remembered that the judiciary was not then independent of the Executive. The result was pre-ordained. Most of the judges had expressed a formal opinion on the very issue at the Parliamentary conference the year before. Scholars have spent much time assessing and comparing the respective theories of the nature of government which these documents reveal. However, all the authors, including the judges, should be treated as advocates not jurists.

*Calvin's Case* was so obviously contrived that Bacon felt obliged to commence his submissions by asserting that it was "no feigned or framed case; but a true case between true parties".<sup>74</sup> Similarly Coke, knowing that the political nation believed that the judges were just doing the King's bidding, felt it necessary to proclaim: "No commandment or message by word or writing was sent or delivered from anyone whatsoever to any of the judges to cause them to incline to any opinion in this case".<sup>75</sup> The judges needed no message to appreciate what was expected of them. Bacon and Coke were, to employ one of Shakespeare's most over-used phrases, protesting too much.

In his submission's Bacon drew on the law of nature – not the common law – where life, as his secretary Hobbes would later famously say, was "nasty, brutish and short". Persons submitted to sovereignty for protection in nature, not via the intermediation of the law. "Kings were more ancient than lawgivers", Bacon said. "The allegiance of subjects to hereditary monarchs can no more be said to consist by laws, than the obedience of children to parents".<sup>76</sup>

His best precedent was the fact that residents of Gascony and Anjou could hold land in England when Henry II was their Duke. He also called in aid what, in accordance with contemporary usage that regarded Parliament as a court, he called "judgments" of the High Court of Parliament in recent statutes, which made reference to James' dual role, no doubt references which he slipped into the Bills as the Crown's representative in the negotiations and which he now deployed for purposes directly contrary to Parliament's intention.

Bacon accepted the medieval theory of the King's two bodies: one natural – his person; the other politic – the monarch as the manifestation of the law, relevantly the King in Parliament. The allegiance of a subject, Bacon argued, was owed to the natural body, which operated with, but was not subsumed by, the body politic. Robert Calvin's allegiance to the natural body arose when he was born. It required no Act of the English Parliament.

Coke's report, after the necessary archaeological dig through reams of irrelevant historical references, was also grounded in the law of nature. Natural law, Coke said, preceded any judicial or municipal law. The first kings assumed sovereignty under that law, before there was any man-made law. Accordingly, the immutable law of nature was the source of allegiance for all subjects, not man-made law. Coke also asserted that allegiance was owed to the King's natural body, not to his body politic. After all, treason must be committed against the natural body because the mystical body politic can never die.

After 14 judgments had been delivered over about eight days, the last judgment was delivered by the Lord Chancellor on 7 June 1608. His speech took some four hours and is one of Ellesmere's few judgments to survive. He focussed on the suit in Chancery. He commenced by emphasising, as Bacon had, the "judgment" of the High Court of Parliament that England and Scotland were now perpetually united in allegiance to a single King. Like Bacon, but unlike Coke, he was selective in drawing on historical precedent.

His is the most eloquent, lawyerly, subtle and convincing of the three expositions. His prose is often pointed – "Can there be wars between the King of England and the King of Scotland?" and eloquent – "Divide a man's heart and you lose both parts of it, and make no heart at all."<sup>77</sup> Ellesmere was civil to those who had a different opinion – a virtue of which Coke had again proven himself incapable – but could not resist pointing out that the two dissenting judges were both called Thomas, like the doubting Thomas of the New Testament.

Ellesmere made passing reference to the law of nature, but primarily emphasised how the common law develops when a case without direct authority arises. Like Bacon and Coke he gave weight to precedents from English rule over places like Gascony and Anjou and concluded: "Where there is one Sovereign, all his subjects born in all of his Dominions ... are bound to him by one bond of faith and allegiance ... yet under several laws and customs".<sup>78</sup> Unlike Coke, who always ignored them, Ellesmere also drew extensively on civil law texts.

The most distinctive part of Ellesmere's reasons was his rejection of the medieval concept of the king's two bodies. He saw authority as flowing from the body personal, not the body politic. He warned of dangers in any distinction between the King and the Crown, particularly the implication, which he attributed to traitors, puritans and papists, that the king derived his authority from the people.<sup>79</sup> He felt no need to indulge in philosophical disputation about what came first: kings or laws. Aristotle and Plato – whom Coke had invoked – were interesting, but they lived a long time ago in pre-Christian times and, worse, in a democracy. They were as irrelevant to contemporary debate, he said, as the Utopia of that well known traitor and papist, Sir Thomas More.

The operative principle in England was simple: God made Kings and Kings made laws.<sup>80</sup> The circumlocutions of Bacon and Coke, his approach suggested, were just verbiage.

Ellesmere's judgment is imbued with the pragmatism that characterised his career. His concern was with what the contemporary polity needed. This was no time for new fangled social contract theories. Responding to the obduracy of the House of Commons he asked: "How long shall this suspicion and doubt continue? Shall there be a disunion forever?"<sup>81</sup> The concerns of the opponents of unification were as irrelevant,

he proclaimed, as the social and legal differences that still existed between England and Wales or between Kent and Cornwall. Get over it, was his message. Accept the inevitable.

## CONCLUSION

Towards the end of his speech in *Calvin's Case*, Ellesmere commented on the fact that the decision of the judges in favour of the plaintiff was overwhelming. The common law was quite clear. Otherwise it may have been necessary to invoke the court of last resort – recognised, he said, by both the civil law and the common law – a personal decision by the King himself.<sup>82</sup>

Ellesmere knew full well that there was an incipient controversy about whether the King could exercise judicial power. He was also aware that Coke was displaying signs of heresy and probably understood that Coke was driven by a new institutional imperative.

King James had made his views explicit in his first constitutional tract, entitled *The Trew Law of Free Monarchies*, when he drew on the Old Testament to say, as King David had, that the principal duty of the King was “To minister Justice and Judgment to the people” and to promise to do, as King Solomon had done, “To decide all controversies that can arise among them”.<sup>83</sup>

Coke's philosophy of the common law, as technical learning based on immemorial custom - what he would come to call “the artificial perfection of reason”<sup>84</sup> - had no place for a monarch as judge. Even more fundamental was the divergence about the nature of law, a divergence which would arise often thereafter. Is law the result of an evolutionary process based on reason, as Coke believed, or is it a manifestation of a sovereign will, as Ellesmere proclaimed and Bacon accepted?<sup>85</sup>

At Coke's swearing in, Ellesmere had administered the judicial oath, which read in part, in words which echo today: “Ye shall do equal law and execution of right to all the Kings subjects rich and poor, without having regard to any person”.<sup>86</sup> Coke understood the oath to extend to impartiality with respect to the interests of the King, which interests he had hitherto so dutifully served. Perhaps even more indicative of the conflicts to come was the personal motto Coke adopted: *Lex est tutissima cassis* – The law is the safest shield.<sup>87</sup>

On his first circuit at the Norwich assizes, he had commenced his charge to the jury with an express acknowledgement that his new office required him to “take leave of all former acquaintances”.<sup>88</sup> His intention to

serve the institutional requirements of his new office, as single-mindedly as he had those of his former office, was emphasised in a lengthy attack on the evils of judicial corruption.

No one could have been in any doubt that this was not merely an elevation. This was a transmutation. The first battle would be with the ecclesiastical courts. The Third Address will begin there.

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<sup>1</sup> A Fraser, *Faith and Treason: The Story of the Gunpowder Plot*, Anchor, London, 1997, p 45.

<sup>2</sup> A Hogge, *God's Secret Agents*, Harper Collins, London, 2005, p 305.

<sup>3</sup> A Stewart, *The Cradle King: a Life of James VI & I*, Pimlico, London, 2004, p 229.

<sup>4</sup> *Ibid*, p 309.

<sup>5</sup> M Kishlansky, *A Monarchy Transformed: Britain 1603-1714*, Penguin, London, 1997, p 72.

<sup>6</sup> Stewart, above n 3, pp 206-207.

<sup>7</sup> R Trevelyan, *Sir Walter Raleigh*, Henry Holt, New York, 2003, p1.

<sup>8</sup> L De Lisle, *After Elizabeth: The Death of Elizabeth and the Coming of King James*, Harper Perennial, London, 2006, p 78.

<sup>9</sup> *Ibid*, p 79.

<sup>10</sup> C D Bowen, *The Lion and the Throne: the Life and Times of Sir Edward Coke*, Atlantic-Little Brown, Boston, 1957, p 179; C Lee, *1603: The Death of Elizabeth I and the Birth of Stuart Era*, Review, London, 2003, p 268.

<sup>11</sup> Bowen, above n 10, p 1841.

<sup>12</sup> Bowen, above n 10, pp 181-182.

<sup>13</sup> D R Coquillette, *Francis Bacon*, Stanford University Press, Stanford, 1992, p 70.

<sup>14</sup> L Stone, *The Crisis of the Aristocracy: 1558-1641*, Clarendon Press, Oxford, 1965, p 74.

<sup>15</sup> Kishlansky, above n 5, p 24; *ibid*, pp 81-82.

<sup>16</sup> De Lisle, above n 8, p 206.

<sup>17</sup> Kishlansky, above n 5, p 83.

<sup>18</sup> *Ibid*, p 86.

<sup>19</sup> T B Macaulay, "Lord Byron" in *Critical and Historical Essays*, Longmans Green, London, 1877, p 355.

<sup>20</sup> Bowen, above n 10, pp 194-196.

<sup>21</sup> W Cobbett, *Cobbett's Complete Collection of State Trials*, London, Vol 2, 1809, pp 26-27; A Wharam, *Treason: Famous English Treason Trials*, Sutton, London, 2005, p 35.

<sup>22</sup> J Hawarde, *Les Reportes del Cases in Camera Stellata 1593-1609*, London, 1894, pp 203-204.

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- <sup>23</sup> Cobbett, above n 21, p 25.
- <sup>24</sup> Cobbett, above n 21, p 22.
- <sup>25</sup> D Jardine, *Criminal Trials*, Volumes 1 and 2, Charles Knight, London, 1832, p 410n.
- <sup>26</sup> Trevelyan, above n 7, pp 361-365. M Nicholls "Sir Walter Raleigh's Treason: A Prosecution Document" (1995) 110 *English History Rev* 902.
- <sup>27</sup> *Ibid*, p 448.
- <sup>28</sup> *Ibid*, p 444.
- <sup>29</sup> *Ibid*, p 446.
- <sup>30</sup> Bowen, above n 10, p 215.
- <sup>31</sup> *Ibid*, p 217.
- <sup>32</sup> Jardine, above n 25, p 444n.
- <sup>33</sup> C Hill, *The Intellectual Origins of the English Revolution – Revisited*, Clarendon Press, Oxford, 1997, pp 181ff.
- <sup>34</sup> Jardine, above n 25, pp 500-501; Cobbett, above n 21, pp33-34, 37 which refers to Coke presiding as Lord Chief Justice, but he had been removed from office two years before.
- <sup>35</sup> A Haynes, *The Gunpowder Plot*, Sutton, London, 1994, p 47.
- <sup>36</sup> Michael Stacey "Clash of the Time Lords" *Harpers Dec.* 2006 pp 53-55.
- <sup>37</sup> J Sharpe, *Remember, Remember the Fifth of November*, Profile Books, London, 2006, pp 7-8.
- <sup>38</sup> Jardine, above n 25, pp 120-121n.
- <sup>39</sup> Cobbett, above n 21, p 166.
- <sup>40</sup> *Ibid*, p 171.
- <sup>41</sup> Fraser, above n 1, p 222.
- <sup>42</sup> A G R Smith (Ed), *The Reign of James VI and I*, Macmillan, London, 1973, p 93.
- <sup>43</sup> J Travers, *Gunpowder: The Players Behind the Plot*, National Archives, Kew, 2005, p168.
- <sup>44</sup> *Ibid*, p 148.
- <sup>45</sup> Jardine, above n 25, p 292.
- <sup>46</sup> Jardine, above n 25, pp 326-327.
- <sup>47</sup> Jardine, above n 25, pp 333-334.
- <sup>48</sup> Jardine, above n 25, p 262.
- <sup>49</sup> Jardine, above n 25, p 262.
- <sup>50</sup> Fraser, above n 1, p 242.

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- <sup>51</sup> Fraser, above n 1, pp 240-241.
- <sup>52</sup> Fraser, above n 1, p 257.
- <sup>53</sup> Jardine, above n 25, pp 357-358, 375.
- <sup>54</sup> Jardine, above n 25, pp 323,341,343,374. See also Jardine's summary of the objective facts at pp 388-402.
- <sup>55</sup> Travers, above n 43, pp 169.
- <sup>56</sup> Stewart, above n 3, p 227.
- <sup>57</sup> Bowen, above n 10, p 272.
- <sup>58</sup> Kishlansky, above n 5, p 67.
- <sup>59</sup> H R Trevor-Roper, *The European Witch Craze of the 16<sup>th</sup> and 17<sup>th</sup> Centuries*, Penguin, London, 1969, p 11.
- <sup>60</sup> S Greenblatt, *Will in the World: How Shakespeare Became Shakespeare*, W.W Norton, New York 2004, p 342.
- <sup>61</sup> Stewart, above n 3, p 231.
- <sup>62</sup> Greenblatt, above n 60, p 353.
- <sup>63</sup> Greenblatt, above n 60, p 335.
- <sup>64</sup> B Galloway, *The Union of England and Scotland: 1603-1608*, John Donald, Edinburgh, 1986, p 4.
- <sup>65</sup> L L Peck (Ed), *The Mental World of the Jacobean Court*, Cambridge University Press, 1991, p 5.
- <sup>66</sup> J P Sommerville (Ed), *James VI and I: Political Writings*, Cambridge University Press, 1994, pp 134- 135.
- <sup>67</sup> *Ibid*, p 136.
- <sup>68</sup> J Spedding (Ed), *The Letters and the Life of Francis Bacon*, Longmans, London, 1868, Vol III, p 296.
- <sup>69</sup> *Ibid*, p 98.
- <sup>70</sup> *Ibid*, Vol. IV, pp 82-83, 85.
- <sup>71</sup> Galloway, above in n 64, p 148.
- <sup>72</sup> S Sheppard, *The Selected Writings of Sir Edward Coke*, Liberty Fund, Indianapolis, 2003, Vol 1, p 162.
- <sup>73</sup> L A Knafla, *Law and Politics in Jacobean England: the Tracts of Lord Chancellor Ellesmere*, Cambridge University Press, 1977, p185.
- <sup>74</sup> Cobbett, above n 21, p 576.
- <sup>75</sup> Cobbett, above n 21, p 657.
- <sup>76</sup> Cobbett, above n 21, p 596.

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<sup>77</sup> Knafla, above n 73, pp 246-247.

<sup>78</sup> Knafla, above n 73, p 237; Cobbett above n 21, p 684.

<sup>79</sup> Knafla, above n 73, pp244-245.

<sup>80</sup> Knafla, above n 73, pp 247-248.

<sup>81</sup> Knafla, above n 73, p 252.

<sup>82</sup> Knafla, above n 73, p 249.

<sup>83</sup> Sommerville (Ed), above n 66, p 64.

<sup>84</sup> E Coke, *The First Part of the Institutes of the Lawes of England or a Commentary upon Littleton*, London, 1823, Vol 1, s 97b.

<sup>85</sup> See J U Lewis, "Sir Edward Coke (1552-1634): Theory of 'Artificial Reason' as a context for Modern Legal Theory" (1968) 84 LQR 33.

<sup>86</sup> J Hostettler, *Sir Edward Coke: A Force for Freedom*, Barry Rose, Chichester, 1997, p 62.

<sup>87</sup> Bowen above n 10, p 280.

<sup>88</sup> Sheppard, above n 72, Vol II, p 528.