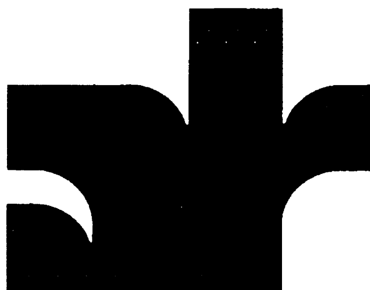

ARTICLES

Arie Freiberg and Richard Fox *

FIGHTING CRIME WITH FORFEITURE: LESSONS FROM HISTORY

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* Professor of Criminology, University of Melbourne and Professor of Law, Monash University respectively. This research was supported by the Criminology Research Council.

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1 THE PHOENIX OF FORFEITURE

In 1999 the Australian Law Reform Commission released its report *Confiscation that Counts.*[1] It called for an expansion of the use of federal powers for the forfeiture of the proceeds of crime and recommended greater uniformity in forfeiture laws throughout Australia.[2] It advised that statutory forfeiture should apply to a

1 ALRC, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999).

2 The main Acts are *Proceeds of Crime Act 1987* (Cth); *Crimes (Superannuation Benefits) Act 1989* (Cth); *Australian Federal Police Act 1979* (Cth); *Customs Act 1901* (Cth); *Criminal Assets Recovery Act 1997* (NSW); *Criminal Assets Confiscation Act 1996* (SA); *Confiscation Act 1997* (Vic); *Criminal Property Confiscation Act 2000* (WA); *Crimes (Forfeiture*

broader range of criminal offences and proposed that civil forfeiture be added to federal law under revised legislation to be entitled the *Confiscation (Unlawful Proceeds) Act.* This would authorise non-conviction-based forms of confiscation, such as already exist in New South Wales[3] and Victoria,[4] in respect of 'unlawful conduct' whether or not any criminal prosecution had been initiated.

The urge to punish lies deep.[5] It can be expressed not only against offenders, but also against objects which are the source of harm. It can be directed at, or affect, owners of property who may know nothing of how the offending property was used. To the modern mind, the ancient laws of forfeiture, and the punishment of inanimate objects or animals, appear strange and possibly brutal, but in moments of crisis, anger or pain, these almost atavistic responses are evoked. The consequences of the Port Arthur massacre in Tasmania in 1996 are a case in point.[6]

On 28 April in that year, in the ruins of the old prison complex of Port Arthur a young man, Martin Bryant, shot dead 35 people and wounded another 18. Many were killed in the Broad Arrow Café which served the tourist precinct. Bryant used two semi-automatic rifles that he lawfully owned in a state with notoriously lax gun control laws. On being subsequently captured, tried, convicted and sentenced to life imprisonment for multiple murder, not only were his weapons confiscated and ordered to be destroyed, but the state parliament passed the *Criminal Injuries Compensation Amendment Act 1996* (Tas) to enable the courts to freeze the assets of an alleged offender and, on conviction, to forfeit them. They could then be realised for the benefit of the victims of the crime, or their surviving families. This was directed against Bryant, but

of Proceeds) Act 1988 (NT); *Crimes (Confiscation) Act 1989* (Qld); *Proceeds of Crime Act 1991* (ACT); *Crimes (Confiscation of Profits) Act 1993* (Tas).

3 *Criminal Assets Recovery Act 1990* (NSW).

4 *Confiscation Act 1997* (Vic).

5 Tyler and Boeckmann, 'Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers' (1997) 31 *Law and Society Review* 237.

6 Chapman, *Over our Dead Bodies: Port Arthur and Australia's Fight for Gun Control* (1988).

its scope was much more general. Unlike other forfeiture laws, the new legislation did not require that the property seized be in any way connected with the commission of the offence.[7]

A more poignant sequel occurred in December 1996 when the Broad Arrow Café itself was demolished. The continued existence of this building, in which 20 of the 35 killings took place, was considered to be too painful a reminder of the awful events of April. In a sense, it was being 'punished' for being a 'party' to the murders. Like the animals and inanimate objects that had been tried and punished in previous centuries, the café had been turned into an object of wrath and retribution, a 'symbolic ransom' to the injured.[8] Its 'innocence', and that of its owner, was irrelevant to its fate.

Modern laws of forfeiture[9] continue to be directed at property associated with the offence or the offender. They have an ancient lineage. Their relationship tq conventional forms of punishment can only be properly understood in the light of their history.[10] Their roots can be found in a number of discrete, but related, concepts. The foremost is that of attainder, a form of *in personam* forfeiture at common law, under which a person's civil rights and capacities (including the right to hold, inherit or

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7 Möller, 'Serious Money, Funny Legislation: Tasmania and the Politics of Criminal Forfeiture' (1998) 22 *Criminal Law Journal* 99, 102.

8 Levy, *A License to Steal: The Forfeiture of Property* (1996) 11.

9 See above n 2. 'Forfeiture' is bound up with 'confiscation'. Both terms are used loosely and interchangeably. Each describes the alienation or withdrawal of certain legal rights. In both, the divestment of proprietary interests is ordinarily for the benefit of the Crown rather than a private complainant or victim. The proprietary interest appropriated need not necessarily be that of the offender. No compensation is payable. As understood at common law, the subject matter of forfeiture is generally specific property immediately connected with the commission of an offence. Confiscation is a more modern term often used, in contradistinction to forfeiture, to denote deprivation of an offender of assets being the benefits, proceeds or profits of crime.

10 Edwards, 'Forfeitures: Civil or Criminal?' (1970) 43 *Temple Law Quarterly* 191; Fox and Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) ch 6.

dispose of property) were automatically extinguished on being convicted of treason or felony and sentenced to death, or being pronounced an outlaw. There were also forms of *in rem* forfeiture directed against the 'guilty chattel', as exemplified by the concept of deodand. The latter permitted the confiscation at common law of the actual instruments of crime or damage without the need for the prosecution or conviction of any person. A third source was some four hundred years of customs law. Its mode of enforcing laws designed to raise and protect revenue relied more on the direct seizure of goods and vessels and their forfeiture under statute than on the criminal prosecution and conviction of smugglers.

Common-law forfeiture for crime was abolished in the late nineteenth century by the *Forfeiture Act 1870* (UK) and its local colonial analogues. The most recent incarnations date from the latter part of the twentieth century when law makers enthusiastically embraced the use of statutory forfeiture to attack the capital base of organised crime Confiscation of the proceeds of crime was seen as a means of combating the expanding illicit drug trade and the violence, money laundering, tax evasion, corruption and other evils that accompanied it by rendering the activity not only punishable, but unprofitable. The modern legislation includes, at minimum, the power to order forfeiture of property connected with a serious crime or derived from its proceeds; the power to impose pecuniary penalties calculated by reference to the benefits derived from serious crime; the power to restrain assets at an early stage pending the determination of the substantive applications; and the power to undertake wide-ranging investigations into the whereabouts of criminal assets.

Forfeiture still comes in a number of different forms and guises. There are at least six legislative paradigms in Australia,[11] but these collapse into two major ones: conviction-based recovery versus non-conviction-based recovery.[12] The legislators of the 1980s drew on historical precedents to

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11 Freiberg and Fox, 'Forfeiture, Confiscation and Sentencing' in Fisse, Coss and Fraser (eds), *The Money Trail: Confiscation of the Proceeds of Crime, Money Laundering, and Cash Transaction Reporting* (1992) 106.

12 ALRC, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) ch 4; Paul, 'Forfeiture Upon Conviction' (1941) 14 *Australian Law Journal* 310; Hodgson, *Profits of Crime and Their Recovery* (1984).

craft new versions of the old laws.[13] Since few modern texts on the history of crime and justice make reference to the effect of forfeitures in their discussions of criminal sanctions,[14] an understanding of the purposes of the original laws, how they were applied, and the perennial problems associated with their differing approaches should provide some insights into the potential areas of difficulty as well as success in the new forms of statutory forfeiture.

2 PRE-CONQUEST LAW

2.1 *Biblical and Customary Origins*

Forfeiture sanctions have existed in most systems of law. References can be found in the Bible and in customary law.[15] They commonly exhibit a retaliatory character. Where theories of criminal responsibility had not yet evolved beyond a concern with the immediate and objective consequences of conduct, animals and inanimate objects that were the cause of a death were regarded, like humans, to be appropriate subjects of punishment. For the life lost, a corresponding life or object was forfeit.[16] In societies in which dispute resolution contained elements of feud or payback, a baneful object could be surrendered to the family of the deceased, not by way of restitution, but as a means of forestalling a vengeful response.[17] Preventive considerations were pertinent since forfeiture could also serve to remove a source of danger from circulation and thus reduce the risk of further injury or damage. Forfeited property was of value and could be a source of reparation, and it is not surprising to find early justifications grounded in notions of compensation.

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13 Temby, 'The Pursuit of Insidious Crime' (1987) 61 *Australian Law Journal* 510.

14 For example, Beattie, *Crime and the Courts in England 1660–1800* (1986).

15 *Exodus* 21:28: 'If an ox gore a man or a woman, that they die, then the ox shall be surely stoned, and his flesh shall not be eaten, but the owner of the ox shall be quit'; Finkelstein, 'The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty' (1973) 46 *Temple Law Quarterly* 169.

16 Evans, *The Criminal Prosecution and Capital Punishment of Animals* (1906).

17 Finkelstein, above n 15, 181.

2.2 *Pre-Conquest England*

Private vengeance was characteristic of early English law and survived beyond the Norman conquest.[18] But the feud was gradually replaced by a system of composition and compensation for loss or injury which came to characterise pre-conquest English 'criminal' law. Ultimately this provided a basis for the creation and extension of ideas of public order. Wrongs such as theft, murder or rape could be expiated by *bot,* ie compensation, to the injured person. However these private procedures for recompense also functioned within a larger and more complex system of handling disputes. The development of public law enforcement, through institutions such as courts, not only maintained social harmony by providing forums for the settlement of individual conflicts, but enhanced the social dominance of those who established and maintained them.[19] Though law enforcement in pre-conquest England was essentially local, concentrated in the nobles or landowners, an uneasy and mutually dependent relationship existed between the landowners and the king.

Some of the early origins of forfeiture can be found in the social or 'public' dimension of conflict resolution. A landowner's power to mediate or arbitrate conflict not only served the social function of maintaining the peace, but the 'peace' itself became a possession or right adhering to the person in authority. Attached to this right was the notion that injuries to persons within the jurisdiction, or 'peace', could also amount to an affront to, or offences against, the person who owned or enforced the peace.[20] A penalty, fine or forfeiture would be due to the public authority in addition to, and ultimately instead of, the amount paid to the party who was directly injured. The idea of a breach of the peace of the lord or the community eventually evolved into the concept of the 'king's peace'.

Royal authority in pre-conquest England was limited. Offences against the king could be dealt with by him and his council. Such an offender risked forfeiting everything: all worldly possessions and life itself. It is

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18 Holdsworth, *A History of English Law* (1956) vol 2, 46.

19 Harding, *The Law Courts of Medieval England* (1973) 13.

20 Ibid 14; Holdsworth, above n 18, vol 2, 47.

possible to identify forfeiture as a sanction as early as 688 in nascent laws relating to breaches of the peace[21] and in prototypical treason laws in 871 in the reign of Alfred.[22] Forfeited lands could be redistributed to more loyal followers, so that the granting and forfeiture of land, and of the rights concomitant to interests in land,[23] represented a significant form of royal power and authority.

Uncompensable wrongs, or compensable ones that required additional payment to the lord or king, gradually grew in number. Instances of fines, or *wite*, can be found in the *Dooms of Aethelberht* in the year 600[24] and in those of Edmund in relation to some cases of murder where no compensation was paid.[25] By the early eleventh century an elaborate set of legal procedures was emerging that reserved some serious cases for the king alone to adjudicate. These carried with them severe consequences, including the sanctions of outlawry[26] and forfeiture.[27] With the growth of

21 *Dooms of Ine* (688–95) No 6: 'If any one fights in the King's house he shall forfeit all his inheritance, and it shall be in the King's judgment whether or not he shall lose his life': see Stephenson and Marcham, *Sources of English Constitutional History: A Selection of Documents from AD 600 to the Present* (1937) 6.

22 'If any one plots against the King's life, either by himself or by harbouring outlaws or their men, he shall forfeit his life and all that he has': *Dooms of Alfred* (871–901), No 4, see Stephenson and Marcham, ibid 10, 24.

23 These rights included the right to forfeitures: see eg *Dooms of Edgar* (946–63), one of which provided that in the case of theft the value of the stolen property would be paid to the owner and the rest of the thief's property would be divided, half to the hundred and half to the lord. For a fourth offence the offender would forfeit all that he had and be outlawed: Stephenson and Marcham, ibid 18.

24 *Dooms of Aethelberht* (600) No 9: 'If a freeman steals from a freeman, he shall pay threefold compensation [to the latter] and the King shall have the fine (*wite*) and all the goods of the thief': see Stephenson and Marcham, ibid 3.

25 *Dooms of Edmund* (942–46): see Stephenson and Marcham, ibid 17.

26 Outlawry was the ultimate remedy of the state to enforce its rules and carried with it the sanction of forfeiture to the king: Hunnisett, *The Medieval Coroner* (1961) 61. The judgment of outlawry meant that the person could hold no property, had no enforceable legal rights, and was in all respects outside the protection of the law.

central authority, the state gradually supplanted the injured individual as the locus of harm.[28] With that development came the gradual bifurcation of public and private wrongs and the emergence of the criminal law.

2.3 *Norman Law*

Forfeiture as a sanction was strengthened by feudal theory. Feudalism was a product of the Norman conquest. The feudalism imported from France was characterised as a contract between the lord and the vassal. Feudal theory regarded property, particularly real property, as being held of a superior lord on condition that the duties attaching to it were to be faithfully discharged:

> [W]hen it deals with sanctions, these are sanctions for bargain breach. ... Of course, the ultimate sanction in a law of this sort is the loss of land, the consideration for the performance of services.[29]

'Crime' was conceived of not so much as a social wrong, but as a breach of bargain for which the sanction was disinheritance. Consequently, if a bargain were breached, and the contract terminated, succession to land and property passed not to the heir, but to the lord—the other 'contracting party' of whom the land was held.[30] It is understandable that, when coupled with a highly organised system of taxation (also an aspect of Norman government) and the need to subdue a conquered land, forfeitures became identified as a source of revenue.

On being convicted or outlawed for offences punishable by death, corporal punishment or banishment, all the goods and chattels of the offender were forfeited to the duke to whom allegiance was owed. For treason the lands passed to the duke absolutely, but in other cases only for one year. At the end of that period, they reverted to the immediate feudal lord of the offender after the houses had been burnt or pulled down and

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27 Harding, above n 19, 23.
28 Holdsworth, above n 18, vol 2, 49, 256.
29 Goebel, *Felony and Misdemeanor* (1976) 249–50.
30 Ibid 253.

the trees destroyed.[31] In addition the offender's blood was 'corrupted', disinheriting any heirs.

3 Post-Conquest Law

The evolution of post-conquest English criminal law was closely allied to the emergence of the Crown as a public institution whose responsibility it was to maintain social order. This saw the gradual transformation of the feudal principle of breach of obligation into the concept of crime. Likewise, the pre-conquest system of tariffs of compensation were gradually replaced by a system of forfeitures and punishments.[32] The criminal procedure of the Crown in the Royal Courts emerged as a competitor for private actions in the local ones. Again, this had the benefit of securing revenue for the Crown.[33]

The distinctions between criminal and civil law that emerged at that time centred on the emerging concept of 'felony', which contained within it the Norman notions of breach of fealty, forfeiture as a sanction, and moral taint through corruption of blood.

3.1 *English Feudal Theory*

A 'feud'[34] was 'the right which the tenant had to enjoy lands etc rendering to the lord the duties and services reserved to him by contract'.[35] In return for this fealty and service the tenant was entitled to the lord's protection.[36] The lord retained a right to have the land returned on the expiration of the grant as reversion, afterwards called an escheat.[37] At civil law, if the tenant died without leaving any heirs the land fell to, or escheated to, the lord.[38] When this occurred the lord's interest in the land transformed into

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31 P V Smith, *On the Law of Forfeiture for Treason and Felony* (1870) 667.
32 Pollock and Maitland, *The History of English Law* (2nd ed, 1923) vol 2, 458.
33 Jenks, *A Short History of English Law* (4th ed, 1928) 42.
34 Also known as a 'fee' or 'fief'.
35 *Burgess v Wheate* (1759) 1 Eden 177, 191.
36 Stephen, *New Commentaries on the Laws of England* (4th ed, 1858) vol 1, 179.
37 From the French *'eschier'*, to fall.
38 Pollock and Maitland, above n 32, vol 2, 351.

one of ownership. This was understandable, as the 'contract' had been made with the tenant himself. Likewise, if a tenant had been outlawed or convicted of a felony, the tenement would revert to the lord, but only after the king had exercised his right to waste the land for a year and a day.[39] Originally, the right was only to waste, but as this practice was 'greatly to the prejudice of the public', it was accepted by the time of Henry I (1100–1135), that the king could enjoy the profits for a year and a day in lieu of physical destruction and despoilment.[40]

Although, in relation to treason, the right of forfeiture predated the concepts of feudal tenure and of escheat and was considered to be a prerogative of the king,[41] for lesser offences the Crown's right to forfeiture of lands was limited and the rights of the landowners to escheat prevailed and were expressly acknowledged in *Magna Carta*.[42]

3.2 *Forfeiture and Felony*

Some acts committed in violation of the feudal relationship indicated that the tenant could no longer be trusted. These had to be grave. Originally, some were the *botless* or unamendable offences that placed the offender's life and property at the mercy of the Crown.[43] However, it is difficult to disentangle the nature of the offence from its consequence. Stephen asserts that the concept of 'felony' and the act of forfeiture to the lord were almost synonymous. Crimes that resulted in forfeiture or escheat were denominated felonies:

> Felony came to mean that the consequence of crime was forfeiture. Ultimately the term felony signified the actual

39 Ibid. Dalton graphically describes the act of 'waste'. The 'offender's wife and children shall be cast out thereof, his houses razed, his trees rooted up, his meadows ploughed up, and all his land wasted and destroyed': Dalton, *Countrey Justice* (1619, reprint 1973) 266.

40 Blackstone, *Commentaries on the Law of England* (1765–1769) vol 4, 378.

41 Holdsworth above n 18, vol 3, 70.

42 *Magna Carta*, clause 32: 'We will hold the lands of those convicted of felony only for a year and a day and the lands shall then be given to the lords of the fiefs [concerned].'

43 Milsom, *Historical Foundations of the Common Law* (1969) 355.

> crime committed, not the penal consequence. It was this, more than capital punishment which was the true idea of felony. In short the true criterion of felony is forfeiture.[44]

A felony did not necessarily entail capital punishment,[45] nor did the fact that the offence was capitally punishable necessarily mean that it was a felony.[46] The Assizes of Clarendon in 1166[47] and Northampton in 1176[48] marked the process of distinguishing the major public offences, or felonies entailing forfeiture or banishment, from the private wrongs or minor offences which were to be dealt with by the local courts. As the concept of felony developed in the twelfth century so did the separation of criminal and civil law.

A major problem with the multi-tiered nature of fealty and of land-holding concerned the relative rights of those to whom fealty was owed. The immediate lord was theoretically entitled to the property of the miscreant subtenant. He could see no reason why part of his entitlement should be claimed by the king because of the subtenant's wrongdoings. But compromises had to be found between the lords' feudal rights and the Crown's prerogatives and fiscal requirements. The partial resolution of these conflicts is found in the different methods of dealing with the real and personal property of offenders.

4 Real and Personal Property

The law of forfeiture distinguished between personal property such as goods and chattels on the one hand, and real property on the other. It was easier to obtain forfeiture of the former than the latter.

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44 Stephen, above n 36, vol 4, 82. Etymologically, the word 'felony' is said to contain a reference to forfeiture. Blackstone suggests that it is made up of 'fee' (feudal holding) and 'lon' (price): Blackstone, above n 40, vol 4, 95.

45 Eg *felo de se* (suicide), excusable homicide and petit larceny did not carry the death penalty: Pollock and Maitland, above n 32, vol 2, 466.

46 Eg the offence of heresy: ibid.

47 By which the ancient hue and cry procedure was replaced by a formal presentation or indictment before the king's justices and sheriffs: Jenks, above n 33, 41.

48 Which increased the range of offences indictable under the assize.

4.1 *Real Property*

Land was the basis of wealth and power and was no simple commodity. It could be subject to a wide range of interests. These not only included those of the lord of whom it was held, and those in possession, but also of spouses and children, of those to whom it was willed, and of those who held it as trustee or beneficiary. As Goebel observed, real property could be 'so heaped through enfeoffment with a structure of ramified interests that it was only exceptionally something upon which a fisc could lay its hands without impinging upon the rights of innocent claimants'.[49] An Act of attainder in the reign of Richard II reveals the range of property interests. It provided for the forfeiture of all property, including

> all castles, seigniories, reversions, lands, tenements, fees, advowsons, franchises, liberties and all other possessions or property to the use of certain persons.[50]

Land held in fee tail[51] was particularly problematic since forfeiture would affect the rights of innocent third parties who had a legitimate expectation under the law of inheritance. As Lander notes:

> The tenant in fee simple had the sole interest in his estate. It could, therefore, be confiscated without necessarily injuring others. By contrast the tenant in fee tail had only a life interest. ... [M]en felt very strongly that lands held in fee tail should go to the heir, sentence of forfeiture notwithstanding, when his time came at common law after the death of the convicted traitor.[52]

49 Goebel, above n 29, 248.

50 11 Ric 2, c 1, s 2.

51 The fee tail was a conditional grant, ordinarily of a life interest. It was the forerunner of the trust in that the legal title was held by one person for the benefit of another.

52 Lander, 'Attainder and Forfeiture, 1453 to 1509' (1961) 4 *Historical Journal* 119, 145–6.

The problems raised by the forfeiture of entailed lands[53] re-emerged through subsequent centuries, with the law vacillating between their forfeiture and their exclusion.[54] A similar problem related to lands held in trust. Those held by an attainted person as a trustee were not forfeited, but the interest as cestui que trust in trust estates was forfeited.[55] Forfeiture of land at common law had effect from the time of the offence, so that any subsequent sales and encumbrances were avoided.[56] Resistance to the forfeiture of real property was strong and persistent. In the words of the Lord Keeper in the mid-eighteenth century:

> Because confiscations are repugnant to the genius of a free country, ... the law of England seems to have confined them to the single case of a vacant possession ... and that not so much for the sake of the crown as to prevent disturbances of the public peace in society.[57]

4.2 *Personal Property*

Forfeiture of personal property was much more readily available. If a person were convicted of treason or felony, or any capital offence, or petit larceny, or had fled the jurisdiction for such offences, or had been

53 Originally, entailed lands could be forfeited for treason at common law, but a statute of William II, *De Donis Conditionalibus*, removed this power. A similarly named statute of 1285 (13 Ed 1) provided that lands in tail were not to be forfeited, either for felony or for treason. Its aim was to preserve the right to inheritance of the class of heirs prescribed by the tail, notwithstanding the attainder of the tenant in tail; Hale, *Historia Placitorum Coronae* (1736, reprint 1971) vol 1, 240.

54 See eg 26 Hen 8, c 13, which provided for forfeiture of entailed lands as against traitors and their heirs; 34 & 35 Hen 8, c 20 in respect of estates tail granted by the Crown; 5 & 6 Edw 6, c 11, s 6 which had the effect of making land held by a tenant in tail of the gift of the Crown liable for forfeiture: see generally Hale, ibid vol 1, 240; Holdsworth, above n 18, vol 4, 500.

55 *Burgess v Wheat* (1759) 1 Eden 177; *Attorney-General v Sands* [1688] Hardres 488, 496.

56 Pollock and Maitland, above n 32, vol 1, 460; Holdsworth above n 18, vol 3, 69.

57 *Burgess v Wheate* (1759) 1 Eden 177, 253–4.

outlawed, the person's personal property was forfeited to the Crown.[58] An actual sentence of death or pronouncement of outlawry was not required. Such forfeiture could not be avoided by suicide,[59] nor by the death which followed a refusal to answer to the indictment and the subsequent *peine forte et dure*.[60] Neither was it cancelled upon the offender being allowed benefit of clergy.[61]

The personal property that could be confiscated included chattels real, goods moveable and unmovable, growing crops, debts due to the convict by statute, recognisances, obligations or simple contracts, and money due upon accounts.[62] The king was entitled to chattels in the possession of the offender[63] and his rights to the goods prevailed over the those of any innocent owners of goods who had been deprived of them.[64] However, the forfeiture of goods and chattels had no relation back, so that people convicted of treason or felony etc could bona fide sell any of their chattels for the sustenance of themselves and their families between the offence and conviction.[65]

4.3 *Prior Restraint*

The problem of what to do in the period between the detection of the offence and the making of the final order vexed law enforcers from the

58 Hale, above n 53, vol 1, 362.

59 Suicide was a felony (*felo de se*) in relation to which a posthumous trial could be held. See '*Felo de se*' below.

60 Coke, *First Part of the Institutes of the Laws of England* (1628) 391a.

61 Blackstone, above n 40, vol 4, 374.

62 Dalton, above n 39, 266.

63 The Assize of Clarendon in 1166, cl 5 provided that 'no one shall have jurisdiction or judgment or forfeiture of chattels but the lord King in his court and in the presence of his justices; and the lord King shall have all their chattels'.

64 The Eyre of Kent in 1311 provided that only where the owner made fresh pursuit, captured the thief with the goods in possession and obtained a conviction would the owner's goods be saved from forfeiture: Holdsworth, above n 18, vol 3, 330. However, 12 Ric 2, c 4 provided that, if goods were pledged to another and the person committed a felony and was attainted, the king would not have the goods.

65 Hale, above n 53, vol 1, 362.

earliest days. In 1483, a statute of 1 Ric 3, c 3 was enacted to prevent the premature seizure by the sheriff or other officers of the accused person's goods prior to that person being convicted of felony or attainted. And, although accused felons or traitors could, before their conviction or attainder, bona fide sell their goods and chattels for their sustenance, they were not to 'disorderly sell, or waste their goods'.[66] Fraudulent alienations to defeat creditors, including the Crown, were an obvious problem. In 1571 parliament enacted a statute[67] that gave the Crown a right to recover any of the offender's personal property that had been fraudulently or collusively alienated prior to the event on which the forfeiture depended, with the intention of defeating the possibility of forfeiture.

The common law provided a primitive form of restraining order, for if a person were indicted or appealed against, the sheriff could seize the person's goods, but only for the purpose of making an inventory. It was intended that 'the party accused and his family have sufficient out of them for their livelihood and maintenance' until the accused was convicted of the felony.[68] A number of statutory modifications were made to the common law, but it appears that the practice of seizing the goods of persons accused of felony, whether imprisoned or not, was common.[69]

5 Common Law Forfeiture

Forfeiture of assets at common law was an automatic consequence of conviction for treason or felony, although it could occur in some instances without a formal conviction. The associated forfeiture of civil rights through attainder and corruption of blood could also follow conviction, but was not a necessary consequence.

66 Dalton, above n 39, 267.

67 13 Eliz 1, c 5.

68 Hale, above n 53, vol 1, 364.

69 Hale observed that, despite such statutes, 'nothing was more usual' than the practice of seizing the goods of persons accused of felony, whether imprisoned or not: Hale, above n 53, vol 1, 364.

5.1 *Conviction*

Until recent times, a conviction has normally been a prerequisite to the imposition of any significant criminal sanction.[70] Thus, in theory, offenders who had not been convicted could not suffer the forfeiture of their life, liberty or property. However, from earliest times, a number of exceptions to that rule have been accepted. Some pre-date the conquest. As ever, the law has been pragmatic about achieving certain results without regard to theory. Fudging the requirement of a conviction remains an example of that pragmatism even today.

In the seventeenth century a conviction occurred where:

> a man (being indicted for felony) upon his arraignment submits himself to be tried by the country, and then if found guilty by the verdict of twelve other jurors; or shall confess the offence upon his trial; or is outlawed for the same.[71]

Attainder required one further step, the judgment (ie the formal sentence) of the court. Dalton explained the difference in this manner:

> the person attainted has judgment of death given upon him; the person convict before judgment prays his clergy and has it etc. Or after verdict, confession, or outlawry, the felon is said to be convicted till judgment be given. Thus indicted when the offence is found by the great inquest or other jury of inquiry; convicted when the offender is found guilty by a second jury; [and] attainted when, after such conviction, judgement is given against the offender.[72]

Cognisant of the harsh consequences of conviction of felony, some alleged criminals refused to plead, while others fled the jurisdiction. Others became unamenable to the jurisdiction by committing suicide.

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70 Fox and Freiberg, 'Sentences Without Conviction: From Status to Contract in Sentencing' (1989) 13 *Criminal Law Journal* 297. Nowadays a finding of guilt without the formal recording of a conviction is often sufficient.

71 Dalton, above n 39, 268–9.

72 Ibid.

5.1.1 *Peine a Forte et Dure*

The criminal courts could not proceed with a trial if the defendant refused to plead. To extract a plea (one of 'not guilty' would suffice), the alleged offender was subjected to a form of torture known as *peine a forte et dure*.[73] If defendants died without making a plea, they remained unconvicted and their family could succeed to their estate.[74] This process was abolished by the *Felony and Piracy Act 1772*,[75] which treated a person standing mute as having pleaded guilty to the offence charged. Nowadays the opposite is true.[76]

5.1.2 *Flight*

Another means of attempting to avoid conviction and its consequences was to flee the jurisdiction. However, the common law dealt with this contingency from the earliest times by deeming a person who had fled when confronted by an allegation of serious crime to be guilty of that crime. Guilt was presumed from the conduct.[77] A jury was required to inquire whether or not the suspect had fled. If they found that a suspect had fled, the suspect's goods and chattels were forfeited.[78] Apparently, juries were reluctant to return a verdict of flight, for it was considered that the penalty was disproportionate to the offence. As Blackstone commented:

> But the jury very seldom find the flight: forfeiture being looked upon, since the vast increase of personal property of

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73 This procedure required the placing of heavy objects upon the chest of the defendant until he either pleaded or died. Even this means of saving the family from ruin was not available to a person indicted for treason or misdemeanour, since refusal to plead in such cases was taken to be a plea of guilty: Blackstone, above n 40, vol 4, 324.

74 Milsom, above n 43, 406; Hodgson, above n 12, 12.

75 12 Geo 3, c 20.

76 *Criminal Law Act 1827* s 2 (UK); *Crimes Act 1958* (Vic) s 392 (plea of not guilty to be entered on behalf of person mute of malice).

77 Blackstone, above n 40, vol 4, 379.

78 Hale, above n 53, vol 1, 362.

> late years, as rather too large a penalty for an offence, to which a man is prompted by the natural love of liberty.[79]

This rule was eventually abolished. By 7 & 8 Geo 4, c 28, s 5 it was enacted that where any person was indicted for treason or felony the jury empanelled to try such person was not required to inquire as to their lands, tenements or goods, nor whether they fled such treason or felony.[80]

5.1.3 *Outlawry*

Those who refused to appear in court when charged with felonies or lesser crimes or attempted to evade justice by disappearing could be subject to the process of outlawry, a procedure whereby an offender was placed outside the protection of the law.[81] This procedure resulted in people being considered attainted. Their property was forfeited,[82] as were all their civil rights. Such people could be lawfully slain:[83] 'Outlawry was the capital punishment of a rude age.'[84] Criminal outlawry was formally abolished by the *Administration of Justice Act 1838* s 12, having been long obsolete.

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79 Blackstone, above n 40, vol 4, 380.

80 A parallel provision is found in the *Crimes Act 1958* (Vic) s 396; *Burns* [1975] VR 241.

81 Curzon, *English Legal History* (1968) 233. The accused were summoned to four consecutive sittings of the county court. On their final failure to appear they were pronounced outlaws.

82 As with felony, the king was entitled to lay waste to their land which then escheated to the lord. Chattels were forfeited to the king. Every contract, bond of homage or fealty was dissolved. Outlawry related back to the moment when the crime was perpetrated so that any interim acts were avoided.

83 *Bracton on the Laws and Customs of England* (Woodbine and Thorne eds) (1968–77) vol 2, 362: 'An outlaw also forfeits everything connected with the peace, for from the time he is outlawed he bears the wolf's head, so that he may be slain by anyone with impunity, especially if he resists or takes to flight so that his arrest is difficult'. In fact by the thirteenth century most localities were not allowed to execute captured outlaws without trial.

84 Pollock and Maitland, above n 32, vol 2, 451.

5.1.4 *Felo de se*

A person who killed himself while of sound mind was called a *felo de se*, a felon of himself (self murder).[85] Self-murderers were tried posthumously by a coroner's jury. If guilty, their personal property was forfeited to the Crown. Lands were not forfeited, neither was blood corrupted, nor the wife's dower lost.[86] According to Harding, the label *felo de se* was first applied to alleged criminals who took their lives because they feared a worse fate for themselves and their families.[87]

5.2 *Consequences of Capital Conviction*

Because forfeiture of property was an automatic consequence of conviction of treason or felony at common law, it did not require any further judicial order. However, if the conviction were for a capital offence and sentence of death imposed, or outlawry had been pronounced for a capital offence, the offender could also be attainted. The two principal common law consequences were the forfeiture and escheat of the lands of the criminal and the corruption of blood. The total effect was that the person was *civiliter mortuus.* Everything was forfeit: life, property and all civil rights.

5.2.1 *Attainder*

Attainder was the most solemn penalty known to the common law.[88] The judgment of attainder was a pronouncement that

> the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no farther care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or

85 The term 'suicide' was not coined until the 1630s and did not pass into general circulation until the eighteenth century. See further discussion below under 'Forfeiture and the Fiscal Interests of the Crown'.

86 Dalton, above n 39, 216.

87 Harding, *A Social History of English Law* (1966) 65.

88 Lander, above n 52, 119.

> blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; ... he is already dead in law.[89]

Attainder was the consequence of judgment in capital offences. There could be no attainder without judgment of death or pronouncement of outlawry for a capital crime.[90] It did not follow conviction or sentence for non-capital felonies or misdemeanours. A person attainted was not divested of the title to lands until found by office (ie inquisition) to be attaint. The inquest of office was an enquiry made by a sheriff, coroner, escheator or other royal officer to inquire into any matter that entitled the king to the possession of lands, goods or chattels.[91]

5.2.2 *Corruption of Blood*

A convicted felon or traitor who had been attainted was also subject to the common law doctrine of corruption of blood.[92] Its effect was that attainted people could neither inherit lands from their ancestors, nor retain or transmit by descent those they already possessed. Descent could not be traced through a person whose blood was corrupted. Corruption of blood could be reversed by pardon, or by an Act of parliament. Pardon only restored the rights of children to inherit it they were born after it had been granted.[93] A general restitution by Act of parliament restored not only the land, but the blood of the party attaint. A partial restitution restored the blood, but not the property lost.

It was not until 1814 that the statute of 54 Geo 3, c 14 provided that no attainder for felony except in relation to the commission or abetting of high treason, petit treason, or murder should cause the disinheriting of any heir or prejudice the right or title of any person except that of the offender during the offender's natural life only. This amounted to the abolition of corruption of blood and forfeiture of land in ordinary

89 Blackstone, above n 40, vol 4, 373–4.
90 *Nichols v Nichols* (1575) 2 Plow 477; 75 ER 711.
91 Blackstone, above n 40, vol 3, 258–9.
92 Ibid vol 4, 381.
93 Hale, above n 53, vol 1, 358.

felonies. Corruption of blood was completely abolished by the *Inheritance Act 1834* (UK).[94]

5.2.3 *Statutory Attainders*

In addition to attainder at common law, there was the possibility of attainder by way of statute. Acts of attainder had their origin in the fourteenth century and remained in use until the eighteenth century.[95] They remain in public memory as amongst the most abhorrent of legal practices. Parliament could attaint by statute because it was always capable of functioning as a court.[96] Bills of attainder were marked by two features: they were retrospective and they identified offenders by name. Parliament could determine guilt without regard for the laws of evidence and this was often used to evade common law proceedings when the existing law and evidence was insufficient.[97] Their principal objectives were to destroy the king's opponents, to exact revenge, to enrich the Crown, and to do so 'with as much appearance of legality as possible'.[98] The last Act of attainder appears to have been passed in 1798.[99] The relevant part of the Act usually read:

> That he should be of these Treasons attainted; and that by the same Authority he shall forfeit to the King all his Goods, Lands and Tenements, Rents and Possessions ... and his Blood corrupt and disabled forever.

Despite the distaste with which statutory attainders are generally regarded, there is much evidence that their impact was far less than appeared. Statutory attainder operated as part of a system of threats and rewards, 'a form of control over potentially dangerous, but also potentially useful men'.[100] Many ultimately had their attainders

94 3 & 4 Wm 4, c 106, s 10.
95 Stacy, *The Bill of Attainder in English History* (PhD Thesis, University of Wisconsin, Madison, 1986).
96 UK, *Halsbury's Laws of England* (4th ed, 1973+) vol 34, para 1312.
97 Stacy, above n 95.
98 Lander, above n 52, 120.
99 Walker, *The Oxford Companion to Law* (1980) 92.
100 Lander, above n 52, 136.

reversed.[101] Each successive revolution quickly reversed many of the attainders of the previous reign, resurrecting the victims from their legal death. Lander observes:

> Apart from the very sensible desire of these insecure regimes to encourage support from whomever was prepared to give it, contemporary opinion amongst the landed classes had a strong effect on the attitude of rulers. ... The landowner had a stake in the country. ... [I]f he offended against the law or the government, he might forfeit his land; but the land was not lost sight of, and the moral and social claims of the family which had possessed it were not barred by forfeiture. The restoration of the heirs of the dispossessed was an invariable result or condition of every political pacification; and very few estates were alienated from the direct line of inheritance by one forfeiture only.[102]

The aversion to Acts of attainder centres more on their retrospective and particular operation than on the consequent loss of property. Forfeited land and property were used less to enhance the royal finances than to create a web of obligation by its re-granting and possible restoration.

6 Forfeiture and the Fiscal Interests of the Crown

A fiscal element has always been present in the administration of criminal justice. From the earliest times, criminal jurisdiction had been a source of revenue and 'forfeitures were among the profitable rights which the King could grant'.[103] Prior to Norman rule, jurisdiction over disputes was being centralised by the Crown and the transfer of jurisdiction from the kindred

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101 Ibid 121. An attainder could be reversed either by letters patent under the great seal or by Act of parliament. Lander notes that the highest percentage of reversals was amongst the peerage as whole and that the lower the rank the more difficult it was to obtain restoration in blood and lands.

102 Lander, above n 52, 145.

103 Pollock and Maitland, above n 32, vol 2, 53.

of the injured to the king also saw a change from compensation to punishment.[104]

The death of a person could be lucrative in many ways. If the death were an accident, the object causing the death could be forfeit as a deodand, with its value going to the Crown. If it were a suicide, the person's goods would be forfeit to the king. If it were a murder, the felon's land would be available to the Crown for year, day and waste and the felon's goods would be forfeit.[105] Forfeitures arising out of outlawries were an additional source of revenue. Criminal procedure appeared to be as much concerned with preserving and maintaining the revenue of the Crown as it was with justice.

The coroner was the official charged with safeguarding the pecuniary interests of the Crown arising from the administration of the criminal law.[106] Coroners were elected in each county. Their main role was to appraise and safeguard any lands and goods that might later be forfeited to the Crown and to record the details.[107] The coroner was thus interested in felonies, particularly homicides (including suicides), and in offenders who had fled the realm, and those who had been outlawed.[108] Property could not be forfeited until the case against the alleged offender had been finally determined. In the meantime, the coroner had to commit the chattels to the safekeeping of the township in which they were found, or

104 The relationship between forfeiture and compensation has always been a complex one. From the earliest times, as the Crown grew stronger, the victim's rights were increasingly subordinated to the rights of the Crown. Felons forfeited their chattels to the king, including those chattels that they may have stolen. This was not altered until 21 Hen 8, c 11 which gave the owner of stolen goods a right to take out a writ of restitution if the thief were convicted on indictment with the owner's help: see Pollock and Maitland, above n 32, vol 2, 165; Holdsworth, above n 18, vol 3, 330. The superior rights of the Crown were also reflected in the rule that civil action could not proceed until the criminal prosecution had concluded, the so-called 'felonious tort' rule.

105 Pollock and Maitland, above n 32, vol 2, 500–1.

106 Holdsworth, above n 18, vol 1, 84.

107 Hunnisett, above n 26, 1.

108 Ibid 4.

to nominated individuals. Once the matter was finalised, either the sheriff or some official or person who held a franchise of the king in such matters[109] would, in theory, account to the exchequer for the confiscated assets.

However, from earliest times, a tension existed between the coroner's obligation to safeguard the pecuniary interests of the Crown and the attitude of the jurors empanelled by the coroner to assist in the inquisition. The jury members were more sensitive to local opinion. The divide between the potential harshness of the forfeiture laws and the social mores of the community was particularly evident in the law relating to suicide. Suicide was abhorred by the church and condemned as crime by law, folklore and religion. Those who were alleged to have killed themselves were tried posthumously by a coroner's jury. But not all suicides were identical. The coroner's jury had a choice of verdict. Suicides deemed to be sane were returned as *felo de se* (felons of themselves—a species of murderer). For this, they and their heirs were punished by forfeiture of all personal property. Those who were insane was found *non compos mentis* (not of sound mind) and did not forfeit their goods. Juries were aware of the consequences of a *felo de se* verdict. A family of paupers was a burden to the community the jurors represented and resentment of the right of the Crown to seize the goods of the deceased was clearly a factor in later jury nullification of the legal consequences of suicide.

The valuable study of suicide by MacDonald and Murphy[110] traces the changes in societal reactions to suicide in early England. They reveal that juries mitigated the laws of suicide and therefore frustrated the claims of the lords and the Crown in three major ways. They could decline to identify the death as a suicide;[111] they could bring in a verdict of *non compis mentis*; or they could deliberately undervalue the goods of a *felo*

109 Over the centuries monarchs had granted the rights to forfeited goods or deodands in a certain manor or town to particular individuals, usually the lord of the manor. The right could be sold or inherited with the property to which it was attached.

110 MacDonald and Murphy, *Sleepless Souls: Suicide in Early Modern England* (1990) ch 1.

111 Ibid ch 7.

de se. The Tudors attempted rigorously to enforce forfeiture for suicide in an attempt to maintain their financial prerogatives. During this period, verdicts of *non compos mentis* were comparatively rare, and the pauperised family fared badly against the 'governmental greed typical of Henry Tudor'.[112] After the revolution attitudes began to change. The number of *non compos mentis* verdicts greatly increased[113] and, in relation to findings of *felo de se*, the percentage of inquisitions reporting goods fell. And, even when the coroner's jury found that there were goods to seize, it tended to set their value lower than in the past. Whereas in the mid-seventeenth century about one-third of forfeitures reported to the King's Bench were valued at more than one pound, by early in the next century, only seven per cent were so valued.[114] Such was the local hostility to forfeiture, that by 1714, when George I acceded to the Crown, the Crown's right to a suicide's goods had been severely eroded: 'Juries declaring openly that yeomen and even gentlemen whom they judged to have been self-murderers either possessed no chattels or owned goods that were worth only trivial sums.'[115] These undervaluations did not reflect corruption on the part of jurors. Rather, they were motivated by reverence for the rights of inheritance in an agrarian economy and sympathy for the suicide's immediate kin.[116]

There were other reasons for the erosion of the sanctions against self-murderers, reasons which may also have applied to forfeitures for other homicides. The constitutional crises surrounding the revolution had weakened the institution of kingship and altered attitudes to royal prerogatives and rights to property. During the Civil War there were attempts to abolish forfeiture for suicide and to lessen the penalties for treason.[117] Rights of private property and the notions of government by consent were being propounded. Although felons found few champions, the interests of their families were being considered. And while it was

112 Ibid 24.
113 From 7% in the early 1660s to more than 40% in the early eighteenth century: ibid 121–2 (Table 4.2).
114 Ibid 115 (Table 4.1).
115 Ibid 116.
116 Ibid 78.
117 Ibid 84; Veall, *The Popular Movement for Law Reform 1640–1660* (1970) 131.

unlikely that forfeiture laws in relation to traitors and felons would be relaxed, there was less resistance in the case of suicide. This process was aided by the gradual secularisation of suicide and increased leniency towards it.[118] By the mid-eighteenth century it was being argued that the legal sanctions for suicide should be abolished because they only operated to hurt the suicide's family[119] and that oppressive operation of the law only resulted in massive evasion.[120] The inequity of forfeiture in this area was the impediment to its enforcement. By the late eighteenth century, except where offenders had killed themselves in order to escape justice,[121] juries had virtually stopped punishing suicide by forfeiture, presuming that ordinary suicides were insane when they ended their lives.[122]

In relation to common law forfeitures generally, the lack of data as to their value seems to indicate that they did not make a significant contribution to the finances of the Crown, certainly after the fourteenth century.[123] Long before the abolition of common law forfeiture in 1870, the amounts received were insignificant. Between 1848 and 1870 these ranged from £253 to £317.[124] By that time forfeiture to the Crown was

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118 MacDonald and Murphy, above n 110, chs 4–6; cf Andrews, 'Debate: The Secularization of Suicide in England 1660–1800' (1988) 119 *Past and Present* 158, 165 who argues that the abolition of religious penalties for suicide in 1823 (burial in unconsecrated ground) was partly due to the desire to eliminate jury evasions of the law, not just secularisation of suicide.

119 'Georgian gentlemen were … bothered by a law that seized property that ought to have been inherited by the innocent to punish people already dead': MacDonald and Murphy, ibid 120.

120 Ibid 346.

121 Harding, above n 87, 64.

122 MacDonald and Murphy, above n 110, 121–2, 346. However it was not until 1870 that forfeiture for self-murder was abolished. MacDonald and Murphy, ibid 347, speculate that members of parliament felt that to abolish it earlier for this one offence would have weakened the deterrent effect of the law. The 1870 Act abolished common law forfeiture for felonies of all kinds.

123 Statutory attainders in the next four centuries would have played a greater role.

124 United Kingdom, *Bill to Abolish Forfeiture of Lands and Goods on Conviction of Felony*, Parl Paper No 136 (1864); United Kingdom, *Bill to*

regarded as anachronistic for a number of reasons. First, it dealt only with property of felons whereas much crime was misdemeanour; second, it was increasingly ineffective as a source of revenue; and third the Crown found that it could more effectively raise revenue by taxation than forfeiture. No doubt the lack of revenue from forfeiture may have been a reflection of the poverty of felons. But it would also be true to say that any rich offenders would have disposed of their wealth between arrest and conviction.

7 Avoiding Forfeiture

For the rich and powerful, forfeiture of property was always a threat. Stratagems to avoid the incidents of conviction and attainder existed from earliest times. In times of warfare and dynastic change to ensure survival of one's person or estate required not only astute political skills, but an acute understanding of the legal structures of the time. Protection of the interests of third parties such as family members was a prime concern.

7.1 *Forfeiture and Third Parties*

The effect of forfeitures on innocent third parties, in particular wives, has been a persistent problem in the law of forfeiture. The complex medieval law of property contained many rules governing the property rights of married women and those who stood to inherit property. In the thirteenth century, the status and rights of married women and widows were slowly being recognised. By the early fourteenth century, the common law was moving towards establishing a widow's right of dower in one third of her husband's estate. Under the law of jointure, she was entitled to property which she had brought into the marriage.[125] Both these doctrines were aimed at improving the legal and economic position of spouses and reducing a wife's dependence upon her husband.

Abolish Forfeiture of Lands and Goods on Conviction of Felony, Parl Paper No 125 (1870); Kenny, *Outlines of Criminal Law* (4th ed, 1909) 100.

125 Ross, 'Forfeiture for Treason in the Reign of Richard II' (1956) 81 *English Historical Review* 560, 566.

Forfeiture of a traitor's property was a drastic sanction where it left a wife without property or support and subject to royal charity.[126] The cost of rebellion was high. The widows of rebels against Edward II lost their inheritance and dower, indirect sanctions which struck deeply at the core of a landowning society and there were various attempts to ameliorate the rigours of a pure doctrine of forfeiture. In 1388 an Act[127] excluded from forfeiture as a result of statutory attainder the heritage of women or jointure with their husband.[128] Later Acts also provided generally that the wife of a felon would not lose her dower.[129] In the case of treason, a wife's jointure was not forfeitable for her husband's crime because it was settled on her prior to the act of treason. However, her dower was forfeited.[130]

7.2 *Transfers of Ownership and Entailments*

One of the major avoidance devices employed was that of entailment. Commoners mainly held their land in fee simple, which made concealment difficult.[131] In the early to mid-fourteenth century, entailment was limited to the magnate class and few landowners below the rank of baron had found it necessary to employ it systematically.[132] A statute of 1388 sought to protect estates tail[133] and this had the effect of

126 Ibid 569.

127 11 Ric 2, c 5.

128 A distinction was drawn between a woman's inheritance and jointure on the one hand, to which she had a valid claim dating from the time of her husband's conviction, and, on the other, the claim to common law dower, which could be made only after the husband's death, when his estates were regarded as already forfeit in consequence of his treason: Ross, above n 125, 561.

129 Hale, above n 53, vol 1, 359; Holdsworth, above n 18, vol 3, 195.

130 5 & 6 Edw 6, c 11.

131 Ross, above n 125, 570.

132 Of fourteen knights, judges and lawyers condemned for treason in 1388, only one had entailed any substantial portion of his estates: ibid 563.

133 11 Ric 2, c 5 which provided that the king should have forfeiture of lands of attainted persons, but 'it is not the intent of the King, nor of the Lords and Commons of the Parliament, that by force of statute the issues in tail, or in reversion or in remainder, or women of their heritage or jointure with their husbands, of gifts, grants and feoffments made before the said time limited

enabling the heirs of traitors to salvage some of their family inheritance.[134] Other attempts to avoid forfeiture saw the use of joint tenancies to conceal beneficial interests.[135]

Another means of avoiding forfeiture involved the simple transfer of property to another, hopefully trustworthy, person. Sir Thomas More, for example, who had been attainted for misprision in 1534 had, by a conveyance, earlier transferred the title to his home so that it would not be subject to forfeiture if he were attainted. This ploy was to no avail; two years later parliament annulled this indenture and confiscated the land. More was posthumously attainted of treason.[136] Another documented instance is that of Lord Cardigan, who had been charged in the early 1840s with the offence of duelling, conviction of which for a peer carried the penalty of forfeiture of his estates. He transferred the whole of this wealth to his nephew who, after Cardigan's acquittal, transferred it back.[137]

7.3 *Uses and Trusts*

The use was an ancient device whose origins can be traced back to the *Domesday Book*. It was employed by religious houses to avoid civil liability and was subject to attack as early as the 1380s. It was used by those contemplating treason or felony who wished to safeguard their family lands from forfeiture[138] for, originally, property held to the use of a person was not liable to forfeiture, even for treason.[139]

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of forfeiture shall be barred or foreclosed of their right when their time shall come according to the common-law'.

134 Ross, above n 125, 563.

135 Ibid 570.

136 Lehmberg, 'Parliamentary Attainder in the Reign of Henry VIII' (1975) 18 *Historical Journal* 675, 684.

137 The stamp duty on the transfer was £10 000, which was said to be a small price to pay in the event of conviction: Thomas, *Charge! Hurrah! Hurrah! A Life of Cardigan of Balaclava* (1974) 142.

138 Harding, above n 87, 107.

139 A series of Acts of attainder from the late fourteenth century onwards reveal that the problem of purported alienations of property was becoming increasingly common.

Medieval lawyers had problems with these new concepts. The common law recognised only legal rights, so that the estate of a cestui que use was unaffected by a forfeiture.[140] Thus, at common law, the king by attainder of treason was not entitled to uses or trusts belonging to the party attaint.[141] In the following centuries a series of statutes were enacted to reduce uses into possession. The king was also not entitled to chattels held in right of another, for example, as executor or administrator.[142]

A statute of 1388, although protecting entailed estates, made lands held to the use of a convicted traitor liable to forfeiture. This pattern of forfeiture was followed in later years in Acts of attainder in the reigns of Richard II and Lancastrian and Yorkist kings[143] but was of little significance, as conveyance of estates to use was not widespread.[144] However, the rise of the use in the later middle ages and the growth of equitable trusts in the sixteenth and seventeenth centuries created problems relating to the lord's right of escheat and the king's right of forfeiture to these interests in land.[145] As Lord Mansfield noted later:

> All the great estates of this Kingdom almost are now limited in trust. The trustees are generally men of business concerned for the family, and at a little distance of time probably their pedigrees are not to be traced.[146]

There were thus two major problems which arose out of the growth of equitable interests. The first related to the conviction or attainder of the trustee and the second to the conviction or attainder of the cestui que use. Where a trustee was attainted of treason or felony, it was obviously unjust for the innocent cestui que trust to forfeit the property held in trust for

140 Holdsworth, above n 18, vol 3, 1–2. However, the estate of the trustee or feoffee to uses was subject to forfeiture, so that if a sole feoffee was convicted of treason or felony, the land held in trust could be claimed by the Crown as an escheat or forfeiture.

141 *Attorney-General v Sands* [1688] Hardres 488, 496.

142 Hale, above n 53, vol 1, 239–58.

143 21 Ric 2, c 3 (1398); 5 Hen 4, c 1 (1403); 7 Hen 4, c 12 (1405).

144 Ross, above n 125, 569.

145 Holdsworth, above n 18, vol 3, 71.

146 *Burgess v Wheate* (1757) 1 Eden 177, 230.

him or her. This hardship was gradually relieved by a number of statutes until completely abolished in the nineteenth century.

The more substantial problem, from the point of view of the Crown, was the inability to obtain access to property in which the offender held only a beneficial interest. By the early sixteenth century, feudal revenues were being severely depleted. Family settlements and secret conveyances were rife and uses were often employed in the course of fraudulent dealings. Abuses by feoffees of cestuis que use were also common, but, more importantly, these devices meant that the king lost his forfeitures and he and the lords lost their incidents of tenure.[147] Henry VIII, short of funds and frustrated by a parliament that refused to grant him adequate supply, turned to the reform of the use to restore his financial fortunes. The *Statute of Uses 1535*[148] was intended to restore to the Crown revenue lost from the rights of forfeiture and escheat.[149] It did this by transferring the legal estate of the feoffees to uses to the cestui que use.[150] Thus the estate of the cestui que trust was made liable to forfeiture on attainder by subjecting the equitable interest in property to the liabilities of the legal estate. Its aim was not to abolish uses but to turn them into legal estates.[151]

Such actions were not unprecedented.[152] Acts of attainder for some centuries commonly included lands beneficially held by the attainted person and excluded those that that person held as feoffee to uses.[153] In 1541, an Act relating to cases of high treason in cases of lunacy or madness assimilated the two processes by providing:

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147 Holdsworth, above n 18, vol 3, 449.

148 27 Hen 8, c 10.

149 The preamble to the statute recites the king's deeply felt injustices: the loss of incidents of tenure of the lands of traitors, of the escheats and of the rights to year, day and waste of the lands of felons.

150 Holdsworth, above n 18, vol 3, 71.

151 Ibid 461.

152 See eg 21 Ric 2, c 3.

153 See eg 1 Ric 3, c 5 (1483); 21 Hen 8, c 25 (1530); 26 Hen 8, c 13, s 4 (1534).

> if any person or persons shall be attainted of high treason by the course of the common-laws or statutes of this Realm, that in every such attainder by the common-law shall be of as good strength, value force and effect as if it had been done by authority of Parliament; and that the King's Majesty his heirs and successors shall have as much benefit and advantage by such attainder, as well of uses rights entries conditions as possessions reversions remainders and all other things, as if it had been done and declared by authority of Parliament, and shall be deemed and adjudged in actual and real possessions of the lands tenements hereditaments uses goods chattels and all other things of the offender so attainted, which his Highness ought lawfully to have, and which they so being attainted ought or ought lawfully to lose and forfeit, if the attainder had been done by authority of Parliament, without any office of Inquisition to be found of the same.[154]

The law relating to forfeiture of property held to uses remained in this state until forfeiture was abolished in 1870.

8 DEODANDS

At common law, any personal chattel, animate or inanimate, that was 'the immediate occasion of the death of any reasonable creature' was forfeited to the king as a deodand.[155] The deodand was originally sold by the king and the money received for it devoted to pious uses for the soul that had died unabsolved.[156] By 1194, it went not for alms but to the royal

154 33 Hen 8, c 20, s 3; see also 5 & 6 Edw 6, c 11; Hale, above n 53, vol 1, 240.

155 Literally 'that which is given to God'. In English, the deodand was called the 'bane' or the slayer: Pollock and Maitland, above n 32, vol 2, 473. Note the related concept of 'waif', ie stolen goods thrown away by the thief in flight. These were also forfeited to the sovereign as punishment for the owner's failure to pursue the felon and recover the goods: Blackstone, above n 40, vol 1, 296.

156 Blackstone, above n 40, vol 1, 300, 374–89; Hale, above n 53, vol 1, 419; Pollock and Maitland, above n 32, vol 2, 473; *Cuthbertson* [1981] AC 470, 472–6; see Levy, above n 8, 12.

coffers.[157] If the item confiscated belonged to a poor person, or was needed to earn a living, it could be restored by a special writ.[158] The deodand was never regarded as a means of compensating the victim.[159] But, although there was no legal obligation to give the deodand or its proceeds to relatives of deceased, they were strong candidates for receiving any bounty and there was no impediment to them being recipients.[160]

The deodand was not only exacted when a human agent was criminally responsible for a death, but also where death was due to some natural accident or operation of an inanimate object. Horses, oxen, carts, boats, mill wheels and cauldrons were the commonest of deodands. It did not matter that the object did not belong to the person who caused the death, or even if it belonged to the dead person him or herself.[161] However, if the victim were under the age of fourteen the law of deodand did not apply.[162] The forfeiture related back to the time when the death occurred, so that any sales or disposition thereafter were void as against the king.[163]

The doctrine contained gradations of loss. It was not an all or nothing affair. According to Hale, in some cases the whole article was not deodand, so that if a water wheel caused a death, it, and not the whole mill, was forfeit.[164] In the case of merchandise held in ships and boats, the merchandise was forfeit, but not the ship. Deodands did not extend to sea because local customs of England did not extend to high seas.

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157 Hunnisett, above n 26, 32.

158 Ibid 32–3.

159 Pollock and Maitland assert that although in the earliest times, the thing would have gone to the kinsmen of the slain to purchase the peace or to enable the dead man's kinfolk to wreak vengeance upon it, it was never received as compensation: Pollock and Maitland, above n 32, vol 2, 474.

160 Smith, 'From Deodand to Dependency' (1967) 11 *American Journal of Legal History* 389.

161 Hale, above n 53, 419.

162 Dalton, above n 39, 226.

163 Ibid.

164 Hale, above n 53, 420.

The law of deodand can be traced back to Bracton[165] and to prior biblical sources.[166] Early laws contained the idea that all traces of an offence should be wiped out by destroying both the criminal and the criminal's property, whilst Anglo-Saxon law contained the similar concept of noxal surrender, the giving up of the guilty thing. Another theory see deodands serving as an alternative to the blood feud of early justice, with the instrument of death replacing the slayer's kin as the object of vengeance.[167] In Finkelstein's view, the institution of deodand was the result of the confluence of two traditions, the biblical and pre-Christian. Originally, the noxal surrender was a means by which the agent or instrument causing damage or death without any malicious intent on the part of the owner is surrendered to the victim or the victim's kin, 'not as true restitution for the damage done, but as a ransom by the owner of the wrongdoing chattel in order to forestall any further action by the injured party'.[168] More importantly, the deodand served as an early instance of the imposition of objective liability for unintended injury or harm.[169]

Under early English law, an object was not forfeited until after a coronial verdict.[170] The jury was required to find and appraise the deodand. Many medieval homicides were unpremeditated and the usual deodand was whatever weapon the felon had to hand. The usual appraisal was a halfpenny or a shilling.[171] It was not unknown for coroner's juries to falsely appraise deodands or only appraise one part of the object, for example, the wheel of a cart and not the whole cart and horse as part of

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165 Bracton, above n 83, vol 2, 284–6.

166 *Exodus* 21:28, above n 15. Finkelstein, however, argues that the institution of deodand was not strictly of biblical origin as the Bible does not deal with inanimate objects: Finkelstein, above n 15, 181–3.

167 According to Maxeiner, the principle of deodand was *sui generis* and did not extend to other areas of forfeiture law. In his view, English forfeiture statutes did not rest upon an analogy to deodand: Maxeiner, 'Bane of American Forfeiture Law: Banished at Last?' (1977) 62 *Cornell Law Review* 768, 771.

168 Finkelstein, above n 15, 181.

169 Ibid 229.

170 It was no deodand unless it were presented as such by a jury of twelve men: *R v Brownlow* (1839) 11 Ad & El 119.

171 Hunnisett, above n 26, 31.

the practice of jury nullification which continued right up to the nineteenth century. In 1858 Stephen observed:

> But in modern times juries very frequently took upon themselves to mitigate these forfeiture by finding only some trifling thing, or part of an entire thing, to have been the occasion of death. And, in such cases, although the finding by the jury were hardly warrantable by law, the Court of Queen's Bench generally refused to interfere on behalf of the lord of the franchise to assist so inequitable a claim.[172]

To the post-Enlightenment eye, the institution of deodand appeared 'barbarous and absurd'[173] but, like the law of forfeiture generally and the law of outlawry, it survived into the nineteenth century before being abolished in England in 1846.[174]

The legal paradox that confronted nineteenth-century legislators was that, while personal injury attracted a remedy, death did not.[175] The industrial revolution, with its attendant deaths and injuries, had not yet developed a system of workers' compensation. It was no coincidence that the Deodands Abolition Bill and the Death by Accident Compensation Bill were introduced in tandem in 1846 and moved by Lord Campbell, under whose name the latter legislation became known. Redirection of deodands to relatives of the deceased, while commendable as an act of mercy in relation to the death, was neither the primary purpose of deodand, nor could it provide a basis for a coherent system of compensation. Compensation by way of deodand was not made according to the extent of the injury, but according to the value of the deodand as assessed by a coroner's jury. Such juries, as has been noted, were already notorious for under-assessing forfeitures.

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172 Stephen, above n 36, vol 2, 559–60.

173 United Kingdom, *Parliamentary Debates*, House of Lords, 7 May 1846, 174 (Lord Denman, Deodands Abolition Bill). The preamble to the Act stated baldly: 'Whereas the law respecting the forfeiture of chattels which have moved to or caused the death of man, and respecting deodands, is unreasonable and inconvenient …'

174 *An Act to Abolish Deodands* 9 & 10 Vict, c 62.

175 The argument was that it was not possible to put a value on human life.

Smith's analysis of the operation of the deodand system in the early nineteenth century hypothesizes that coroner's juries tended to minimise the value of objects, either out of sympathy with the owner of the object or perhaps because they objected to respectable citizens being treated and stigmatized in a manner similar to felons.[176] When deaths were brought about by knives or swords, their value was not of great concern. However, when death was brought about by factory machines, things began to change. They altered even more dramatically with the coming of the railway age, for, while a jury could identify only a small part of the machine as the cause of death, it was more difficult in the case of locomotives. It was also becoming apparent that some juries were looking to the deodand as the only hope for some compensation, and there were indications that some 'brave' juries were evaluating the deodand according to the culpability of the owner. With deodands of £500, £800 and £2000 being assessed in some cases of death by railway, it became less possible to artificially depress their value.[177] Smith notes:

> Little doubt need now be entertained that the abolition of deodands came as a result of fear that really heavy losses would be sustained by railways. ... The real effect of abolishing deodands in that year was to deprive the relatives of railway victims who had no rights against the railway companies of even the smallest compensation. The losers would include the families of passengers who were uninsured, those of trespassers who were careless (or suicidal), and, equally tragically, those of unfortunate railway employees killed in the course of their employment.[178]

The Bill abolishing deodands was eventually passed on 18 August 1846[179] together with the Death by Accidents Bill at a time of considerable

176 Smith, above n 160, 394.

177 Ibid 395.

178 Ibid 396–7.

179 *An Act to Abolish Deodands* 9 & 10 Vict, c 62. The Act was quite short. The relevant parts provided: 'there shall be no forfeiture of any chattel for or in respect of the same having moved to or caused the death of man; and no coroner's jury sworn to inquire, upon the sight of any dead body, how the deceased came by his death, shall find any forfeiture of any chattel which

political turmoil.[180] The concern was as much to create a system to replace the deodand as to remove its inherent absurdities and injustices. Lord Campbell's Act provided new remedies in cases in which workers were killed, but it promised a great deal more than it delivered, as the doctrines of contributory negligence and common employment were developed to weaken its operation. Although the law of deodand and the law of compensation in theory threatened the interests of the owners of factories and railways, they had little effect in practice[181] and left property rights essentially intact.

9 CUSTOMS LAW

Forfeiture based upon unlawful activity, but not upon conviction, originally derives from actions for seizures and forfeitures taken in the revenue side of the exchequer jurisdiction of the courts. The Court of Exchequer was concerned with managing the king's revenue. It developed prerogative processes designed to recover money due to the Crown. These were ultimately translated into forms of legislation. English customs legislation was of particular significance. It made use both of forfeiture and conventional prosecutions. Its focus upon the goods themselves is of great significance in the development of modern approaches to forfeiture as a sanction against crime.

Statutory provisions governing customs activities originate in the thirteenth century, but the basis of modern customs law can be found in legislation passed in the late seventeenth century.[182] This remained in essentially unchanged form to the present time.[183] Originally, 'customs'

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may have moved to or caused the death of the deceased, or any deodand whatsoever; and it shall not be necessary in any indictment or inquisition for homicide to allege the value of the instrument which caused the death of the deceased, or to allege that the same was of no value'.

180 Smith, above n 160, 397.

181 Ibid 401–2.

182 3 & 4 Will, c 53; See also Elliott, 'Forfeiture Under the Customs Laws' [1958] *Criminal Law Review* 786, 790.

183 See Cooper, *Customs and Excise Law* (1984) 4. The first single Act was the *Customs Consolidation Act* 11 Geo 1, c 7 in 1725. There was further

were the inherent rights of the Crown to maintain and defend property and commerce, to support the Crown in office and to defray expenses. In England, the principal duties paid to the Crown were those relating to exports and imports of merchandise. Customs were the duties payable for native commodities exported, particularly wool and wool products. These duties, as well as many other prerogatives of the Crown, were eventually yielded to parliament, with the major changes taking place after the restoration of Charles II in 1649.

The roots of the forfeiture provisions can be traced to the reign of Richard II and the attempts of the English to regulate trade and encourage indigenous shipping.[184] In 1564, an Act of the Elizabethan parliament restricted coastal trade to English ships.[185] Goods carried in foreign vessels were to be forfeited.[186] One of the primary reasons for relying upon forfeiture as a means of enforcement of the customs regulations was the inadequacy of the administrative apparatus required to enforce the laws along the English coastline.[187] The forfeiture sanction was deliberately chosen for the administrative convenience it offered over standard criminal enforcement:

> the effort was to free the customs staff from the necessity of proving the evil intent and the overt acts usually required to convict of crime, and to reduce the task merely to one of discovering goods unladen or shipped without accompanying documents to prove that they had been duly declared.[188]

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consolidation in 1826, 1853 and 1876. The last formed the basis of the *Customs Act 1901* (Cth).

184 Harper, *The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering* (1939) 19.

185 5 Eliz 1, c 5.

186 Harper, above n 184, 26–7; Gras, *The Early English Customs System* (1918).

187 An establishment to collect customs appears to date back to 1275. In the sixteenth and seventeenth century customs duties were farmed out to private individuals but in 1671 control returned to government customs commissioners: see Harper, above n 184, 77.

188 Ibid 87.

This meant that proceedings could be brought either against the smuggler, by what was in effect an action *in personam*, or, in those days, against the offending ship and its illegal cargo by an action *in rem*. Exchequer had used *in rem* procedures from the distant past to give the sovereign title to treasure trove, wrecks and the like where there was no obvious owner against whom action could be brought.[189] The latter device was well suited to customs seizures because the authorities apprehended smuggled goods more often than they did smugglers. The procedure was geared to permit a summary disposal of the seized articles, though the legislation allowed the owner to challenge the forfeiture or otherwise recover the goods on entering a compromise with the customs authorities. Compromises had to be approved by a court. The owner's lack of knowledge or intention in respect of the breach of the revenue law was irrelevant to the forfeiture. The fact of forfeiture, or any later compounding of proceedings, did not bar criminal prosecution of the actual participants for breach of the law involving the same property. Any such prosecutions were not regarded as part of the same proceedings because non-judicial, or *in rem*, forfeitures did not derive from common law forfeiture in criminal matters.

The latter always required as a prerequisite the conviction of the offender for felony or treason. In *The Palmyra*, Story J in the United States Supreme Court explained:

> It is well known, that at the common-law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment or conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common-law, the

189 Blackstone, above n 40, vol 3, 262.

> offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum prohibitum, or malum in se. The same principle applies to proceedings in rem, on seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been ... that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings in rem is usually vested in different courts from those exercising criminal jurisdiction.[190]

In the colonies, the admiralty courts often exercised this jurisdiction. They were accustomed to the process of condemnation because of their experience with the condemnation of prizes, and the rules of civil law that they followed permitted the use of the proceedings *in rem* against an offending ship or smuggled merchandise, which were often necessary when punishing offences.[191] Customs legislation has long been noted for its severity and its complexity. Chief Justice Dixon once observed: 'in the history of English and Australian Customs legislation forfeiture provisions are common, drastic and far-reaching'.[192] Customs forfeitures, like those based on deodand, focus on control of property, rather than control of persons, in the effort to protect revenue and suppress crime. In doing so, issues of culpability, proportion and mitigation can be largely swept aside.

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190 25 US (12 Wheat) 1, 12; 6 L Ed 531, 535 (1827).

191 Harper, above n 184, 184.

192 *Burton v Honan* (1952) 86 CLR 169, 178–9.

10 The Demise of Common Law Forfeiture

10.1 *United Kingdom*

By the latter half of the nineteenth century, a range of legislative measures had mitigated the harshness of the common law of forfeiture. The absence of forfeitures as sanctions worthy of note testified either to the fact that most convicted offenders had little property to forfeit, or to the ease with which the sanction could be evaded. In 1870, the year in which common law forfeiture was abolished, a contemporary commentator observed:

> Although in the abstract the law appeared severe, in fact the large majority of people who are affected by it possess little or nothing upon which the forfeiture can take effect. In cases where the defendant owns a substantial amount of property, the enforcement of the law is very lax, and the property seized is frequently restored, either wholly or in part, to the relatives of the criminal. The practical working of the law is therefore attended with far less hardship than is theoretically involved in it. At the same time its continued existence in its present shape is, with good reason, almost universally admitted to be indefensible.[193]

Arguments favouring the abolition of forfeiture were not new. In the mid-seventeenth century, forfeiture was seen as a form of double jeopardy, punishing both the offender and the offender's family. The latter were then exposed to poverty and would be forced into crime in order to obtain the necessaries of life. The fact that forfeited money went to the Crown instead of innocent victims was another complaint. Creditors were disadvantaged, there being no estate to sue for debt. Moreover, the property of those who had been falsely convicted and executed was never returned to the family. It was also observed that there was no relationship between the rate of crime and the existence or otherwise of forfeiture sanctions.[194]

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193 Smith, above n 31, 674.

194 Veall, above n 117, 131.

Attempts to abolish forfeiture commenced in earnest in 1864 with a Bill which sought its complete abolition. This was dispatched to a Select Committee and did not emerge again for some years. In 1866, a Convicts' Property Bill passed through the House of Commons, but failed in the Lords because of a change in the ministry.[195] In 1870, the Felony Bill was introduced into the House of Commons. The arguments in support of abolition regarding the effect of forfeiture on innocent parties had a familiar ring. In addition it was pointed out that the amounts being forfeited were minuscule. In 1864, £1200 was forfeited to the Crown, of which £400 was returned to the families. In 1868, £1589 was forfeited, of which £112 was returned.[196]

The law was also criticised for being a 'mass of inconsistencies.'[197] It attached to felonies, but not misdemeanours, and, more seriously, it was unequal and unfair in operation, being only enforced in exceptional and occasional circumstances. Furthermore, it was unjust as 'not being proportionate to the gravity of the offence.'[198] It was not tied to the crime, but to the amount of property that the offender happened to possess.

The Act, which received royal assent in July 1870,[199] abolished forfeiture for treason and felony[200] but substituted other forms of disability. Traitors and felons were declared to be incapable of suing for or alienating property,[201] they could be ordered by the court to pay prosecution costs,[202]

195 This Bill was very similar to the 1870 Act.

196 United Kingdom, *Parliamentary Debates*, House of Commons, 30 March 1870, 934.

197 Ibid 935.

198 Ibid 936.

199 *Forfeitures For Treason and Felony Act 1870* 33 & 34 Vict, c 23.

200 Ibid s 1: 'no confession, verdict, inquest, conviction or judgement of or for any treason or felony or felo de se shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry'. Remarkably, forfeiture as an incident of outlawry survived until abolished by s 12 of *Administration of Justice (Miscellaneous Provisions) Act 1938* (UK).

201 *Forfeitures For Treason and Felony Act 1870* s 8.

202 Ibid s 3.

or compensation to victims,[203] and the Crown was permitted to appoint a curator to administer their assets.[204] The effect of this last provision was that all the real and personal property to which offenders were entitled at the time of their convictions, or which might otherwise come to them during their imprisonment, was held on their behalf by the curator. The latter was empowered to use the assets to meet any costs awarded against the offenders, to pay their debts, to compensate persons who had suffered loss as the result of the crimes, and to provide support for the offenders' families. This Act provided the model for almost all Australian jurisdictions, which followed the lead of the mother country soon after.[205]

10.2 *Australia*

Deodands were abolished in New South Wales in 1849.[206] Forfeiture for felony was abolished in 1883 by the *Criminal Law Amendment Act 1883* (NSW) s 416, though the Act was in a different form to the English legislation. It provided for the provision of compensation of up to £500 to aggrieved persons who had suffered as a result of the offence, for voiding dispositions made within twelve months of the conviction, for civil disabilities of convicts and for the sequestration of property until the sentence expired. Provision was also made to meet the claims of creditors and for the needs of the offender's family.[207] These sections were re-enacted in the *Crimes Act 1900* (NSW) ss 465–9 and remained in force until 1970 when the provisions relating to the sequestration of property were repealed.[208] The concept of 'civil death', whereby a felon was incapable of suing in the civil courts, was not abolished until 1981.[209]

The abolition of the consequences of common law forfeiture for felony took a slightly more tortuous form in Queensland than it did in other

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203 Ibid s 4.

204 Ibid ss 9–18.

205 The provisions relating to control of convict property were repealed in England in 1948.

206 *An Act to Abolish Deodands*, 13 Vict, c 18.

207 *Criminal Law Amendment Act 1883* (NSW) ss 417–21.

208 See *Supreme Court Act 1970* (NSW) Second Schedule.

209 *Felons (Civil Proceedings) Act 1981* (NSW); see also *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

colonies. Corruption of blood was abolished by the *Succession Act 1867* (Qld) s 24. Attainder, forfeiture and escheat upon conviction of treason, felony or *felo de se*, except in the case of forfeiture consequent upon outlawry,[210] were abolished by the *Escheat (Procedure and Amendment) Act 1891* s 12. The scheme for the control of convict's property that was created in the *Forfeitures For Treason and Felony Act 1870* (UK) appeared in Queensland in the *Public Curator Act 1915* ss 86–91. These provisions can still be found in the *Public Trustee Act 1978* (Qld) ss 90–97. They are limited in their application to prisoners serving life sentences, indefinite or indeterminate ones, or custodial terms of three years or more.

In South Australia, forfeiture for treason and felony was abolished by the *Treason and Felony Forfeiture Act 1874* (SA). These provisions found their way into the *Criminal Law Consolidation Act 1935* (SA) ss 329–46 and remained, with minor amendments,[211] until totally repealed in 1984.[212]

There appears to be no legislation that expressly abolishes deodands in Tasmania. Castles notes one case in Van Diemen's Land in 1837 in which the Chief Clerk of Police followed the practice in England whereby coronial juries were called upon to identify the cause of death and its worth and returned very low values or found that only part of a thing was involved in the death.[213] Forfeiture for felony was abolished in 1881 by the *Criminal Law Procedure Act 1881* (Tas) and the provisions enabling sequestration of property were re-enacted in the *Criminal Code Act 1924* (Tas) ss 424–52. All civil disabilities upon prisoners were finally removed by the *Prisoners (Removal of Civil Disabilities) Act 1991* (Tas).[214]

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210 Judgment of outlawry appears never to have been applicable in Queensland: *R v Governor* (1900) 21 NSWLR 278.

211 See *Criminal Law Consolidation Act Amendment Act 1965–66* (SA); *Criminal Law Consolidation Act Amendment Act (No 3) 1972* (SA).

212 See *Criminal Law Consolidation Act Amendment Act 1984* (SA).

213 Castles, *An Australian Legal History* (1982) 286.

214 See also *Smith v Coleman and the State of Tasmania* (1996) 5 TasR 469.

Victoria abolished deodands in 1849.[215] The substance of the 1870 forfeiture legislation was adopted in Victoria by the *Forfeitures for Treason and Felony Abolition Act 1878* which re-appeared in the *Crimes Acts* of 1890, 1915, 1928 and as Part V of the *Crimes Act 1958* (Vic). Traces of the sections on costs and compensation are still evident.[216] However, those sections of the *Crimes Act* that prevented offenders from suing for or alienating property and that allowed for the appointment of curators of their property were repealed in 1973.[217]

Corruption of blood was abolished in 1844 in Western Australia by the *Acts (Adoption of Imperial Acts) Act 1844* (WA)[218] and deodands were abolished in 1849.[219] The *Forfeitures for Treason and Felony Abolition Act* was adopted in 1873 with certain modifications. After the abolition of common law forfeiture, the property of convicts was held by prison authorities and returned to them on release. If a convict died while still serving a sentence, the Crown Solicitor in his or her capacity as curator of intestate estates was responsible for the administration of the estate.[220] The common law of forfeiture was never strictly enforced in Western Australia. In one recorded case in 1843, in which property was forfeited to the Crown, the magistrate recommended that the chattels be sold, but they were in fact only notionally sold and then delivered to the nearest non-implicated relative. The real property was forfeited, but leased back to the convict.[221] Provisions for sequestration of property were inserted

215 *An Act to Abolish Deodands*, 13 Vict, c 18. New South Wales and Victoria were one colony at that time. Its abolition in Victoria was confirmed by s 111(2) of the *Penalties and Sentences Act 1985* which stated that 'there shall be no forfeiture of any chattel which may have moved to or caused the death of any human being for or in respect of that death'. The repeal of this Act by the *Sentencing Act 1991* (Vic), which contains no mention of deodands, sees the last vestige of this doctrine removed.

216 Costs: *Crimes Act 1958* (Vic) s 545; Compensation: *Sentencing Act 1991* (Vic) s 86.

217 *Crimes (Amendment) Act 1973* s 5(1), repealing *Crimes Act* ss 549–561.

218 Adopting 4 & 5 Will 4, c 23.

219 See *Acts (Adoption of Imperial Acts) Act 1849* (WA).

220 Russell, *History of the Law of Western Australia 1829 to 1979* (1980) 141.

221 This unnamed case is discussed by Russell, ibid 141–2.

into the *Criminal Code* in 1913,[222] which later stood as ss 683–6. These provisions still remain in force and a curator of property may still be appointed in Western Australia in respect of the property of a person sentenced to a term of imprisonment exceeding twelve months or to detention during the governor's pleasure.[223]

11 THE LESSONS

This article has sought to identify the main precursors of modern forfeiture and confiscation laws and, in describing their origins, to highlight the lessons that may be drawn from past experience in the use of such measures. The problems that were faced and the legal responses to them are just as pertinent today as they were in former times.

First, forfeiture was never a unitary system. There were both non-conviction and conviction-based paradigms. Being derived from different sources, they served different purposes. The former were rooted in an attraction to objective rather than subjective conditions of culpability. The fact of harm, rather than the intention that accompanied it, was the basis of intervention. The deodand and the actions *in rem* under customs legislation are the prime examples. They did not require initiation of criminal processes, only evidence of unlawful activity. The use of *in rem* forfeitures compensated for inadequacies in public administration and law enforcement, but did so by sacrificing principles of culpability in substantive criminal law and of proportion and mitigation in modes of punishment. This promotion of expediency over principle remains a feature of the modern uses of forfeiture.[224]

Second, when forfeiture measures were applied to persons in more conventional criminal contexts, they operated differentially and with inconsistent results according to the relative gravity of the predicate crime, hence the unequal application to treason, felonies and misdemeanours. Furthermore, the concept of a 'conviction' itself had to

222 See *Criminal Code Amendment Act 1913* (WA) inserting ss 666B–666E.

223 On the application of the chief executive officer of the relevant department. See *Criminal Code* (WA) s 684.

224 Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *Australian and New Zealand Journal of Criminology* 44.

be reworked to make conviction-based forfeiture functional. An extended meaning of conviction was essential to efforts to gain access to the property of those who could not be convicted or sentenced because they refused to plead, or who had fled the jurisdiction, or who had died. Conviction-based forfeiture under current proceeds of crime legislation has to face similar problems with offenders who, for various reasons, are not amenable to the jurisdiction, but who still have assets within it.

Third, these laws tended not to be directed against conventional crime. The earliest targets were as much political as criminal. Forfeiture and attainder served to control or destroy the 'enemies' of the state, rather than to incapacitate conventional criminals. Those 'enemies' were dangerous because their treasonable activities were supported by property and wealth and they were treated as a significant threat to the social order. Organised crime exhibits similar characteristics and is now the major target with its involvement in the illicit drug industry, frauds on the public revenue, and money laundering and other continuing criminal enterprises. However the use of exceptional measures against exceptional offenders has spill-over effects when the model is applied to an ever-widening circle of perceived threats. The new Tasmanian legislation applied to Martin Bryant in response to the Port Arthur massacre referred to at the beginning of this article is a telling example.

Fourth, forfeited assets have always been viewed as an attractive source of revenue for the sovereign or state. It was the business of the coroner to keep an eye out for the interests of the Crown in property that might be forfeited, but the experience with common law forfeiture, and evidence in relation to current Australian confiscation of proceeds of crime legislation,[225] strongly suggests that forfeiture is not the source of largesse hoped for.

Fifth, the early law of forfeiture had trouble with the scope of the property open to being forfeited. It distinguished between personal property and real property. It was far easier to obtain forfeiture of the former than the latter. Although, under feudal theory, reversion of land to

225 Freiberg and Fox, 'Evaluating the Effectiveness of Australia's Confiscation Laws' (2000) 33 *Australian and New Zealand Journal of Criminology* 239.

the lord or sovereign was the appropriate sanction for breach of fealty, this result was resisted. This was not only because real property was the primary source of income and influence of those in power, but also because their land was often subject to such a wide range of third party interests that it was inevitable that innocent persons would be gravely affected by any forfeiture. Even under modern proceeds of crime legislation, defining what property is capable of being forfeited and deciding the extent to which third party relief should be granted remain burning issues.

Sixth, the problem of the extent to which a person's property should be restrained between the time of the alleged offence and the time of trial or other decision about forfeiture remains as pertinent today as it was 500 years ago. The disruptive effect of forfeiture proceedings on property holders and their families prior to conviction or acquittal raises longstanding questions about the accused's right to access assets for the purpose of maintaining a livelihood, supporting a family, and challenging the proceedings.

Seventh, a clear lesson from history is that, as forfeiture becomes more potent, the avoidance techniques become more inventive. The early crude efforts at circumventing forfeiture by refusing to plead, or fleeing the jurisdiction, or by fraudulently disposing of property, have given way to more subtle means of concealing beneficial interests, or maintaining effective control of assets by indirect means. The modern response has been to cast an ever-widening legislative net to recapture forfeitable property that appears to have been lawfully divested. Again, history warns of the resultant risk of injustice to those who are not party to the criminal activity.

Eighth, harshness of laws and their disproportionate consequences is always an impediment to their enforcement. Resistance to forfeiture because of its oppressive impact on innocent third parties manifested itself through jury nullification of the laws of suicide, false appraisal of deodands and reversal of the doctrine of corruption of blood by pardon or Act of parliament. Ultimately common law forfeiture was unable to survive the erosion of communal support because of its obvious injustice.

Finally, despite the wide ambit of forfeiture laws and their long history, they have had little obvious impact on the operation of the criminal justice system, or its theoretical underpinning. The value of common law forfeitures in the United Kingdom were insignificant by the mid-nineteenth century and their deterrent effect minuscule. By 1870, forfeiture to the Crown in that jurisdiction had come to be regarded as an anachronism and was abolished. The Australian colonies followed suit shortly thereafter. Yet, by the mid-twentieth century, the concept of forfeiture as a weapon against crime reappeared in the guise of new confiscation of proceeds of crime legislation in each of the Australian jurisdictions with the lessons from history largely unlearnt and the tensions still unresolved.