II Trial By Battle and the Appeals of Felony

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Having examined trial by battle in writs of right and discussed certain matters common to all forms of battle,[1] I shall now turn to the criminal appeal, which was the forerunner of today's private prosecution, although the appellor had to have a personal interest in the matter. In cases of assault, false imprisonment, robbery, larceny and arson, the victim himself normally brought the appeal, whilst in cases of murder the victim's nearest relative or servant would launch the proceedings. Doubtless all loyal citizens claimed a sufficient interest and duty to prosecute appeals of treason.

Treason

At the top of the list of appealable crimes was high treason.[2] We are told that in the earliest days battle was usual in treason cases in Wales,[3] although Howell and his judges condemned it as unjust in the 10th century.[4] Once launched, there could be no settlement of an appeal of treason without the King's consent,[5] whilst the other (more private) appeals could normally be compromised, except for the appeal of an approver (a self-confessed criminal). Hugh of Clinton owed £13.33 in 1166 for abandoning a battle concerning slander of the King.[6]

Fleta describes the grounds for resisting such an appeal at the outset. The defendant could allege that

> the appellor is a self-confessed thief and that he was arrested for theft and imprisoned at N, or that he broke the King's prison and escaped, or that he was out-lawed at N, so that nothing remains for the completion of the judgment upon him except the execution of the sentence of hanging or beheading, and he may crave judgment whether he need answer a convicted felon before execution of his sentence. Further he may answer that, whereas the accuser states that a plot was made in the presence of so-and-so, he had at no time speech with the aforesaid persons; and if this can be proved, he will depart quit.

Or he could answer that the appellor kept silent for too long, when he should have told the King. The appellor was committed to prison if he declined battle.[7]

As I can find only four reported cases of treason where battle was offered or fought before the age of chivalry, they are worth describing in detail. They are early cases reported mainly in the Chronicles and they were probably tried before the King himself. Certainly *Bainard* v *Eu* (1096)[8] came before the king and his council: a rare example of a regular appeal of treason and a trial by battle.[9] The appellor accused a kinsman of the king that he was concerned in treason against the king. The defendant was defeated in battle at Salisbury, and as part of his punishment he was blinded and castrated.

In *Montfort* v *Essex* (1163),[10] one of the defendant's relatives accused him of treason. The appellor asserted that, during the Welsh expedition of 1157, the defendant abandoned the king's standard, proclaimed his death and fled from the field, because he thought that the king was surrounded by the Welsh. The battle took place on an island at Reading, and after being struck down, the defendant was thought to be dead. His body was given to the monks for burial, but he revived and the king allowed him to become a monk himself.[11]

Camville's case (1194)[12] started as a minor case of receiving and turned into a treason trial. Soon after Richard I returned to England, he held a council at which the defendant was charged with receiving goods stolen from merchants at Stamford fair. He boldly replied that he did not wish to be tried by the king's judges: he was a man of Earl John (later King John, Richard I's brother) and claimed to be tried in his court. He was promptly appealed for treason, and it was alleged that he was aiding and abetting John and other enemies of the king to capture Nottingham and Tickhill castles. The defendant denied this and pledges were taken, but the result of the appeal is not known. Certainly the defendant was not hanged, for we find mention of him again in 1200.[13]

Finally in *Troite* v *Hoddom* (1199)[14] the appellor offered battle in Cumberland for treason, claiming that the defendant abandoned Henry II and allied himself to King William of Scotland during the siege of Carlisle castle. The appellor said that he had already made this appeal before Henry II some years earlier, when the defendant had defaulted and been expelled from the court. In the instant case the defendant pleaded two matters to avoid battle, namely (i) that he was over 60, and (ii) that the appeal was brought out of malice. He said that the appeal was in retaliation for a writ of right that the defendant was bringing against the appellor.[15] The appeal was finally quashed, the appellor fined and the defendant acquitted.

I can find no other private appeals of treason until 100 years later, when *Normaund* v *Renulf* (1293)[16] and *Vescy* v *John* (1294)[17] can be regarded as the start of the age of chivalry, leading to a brief revival of trial by battle in the second half of the 14th century within the jurisdiction of the Constable and Marshal's court. There is a side-note in the Rolls Series suggesting that

Godingham v *Cantilupe* (1224)[18] was a treason appeal for breach of the peace,[19] although it doubtless attracted the attention of the chronicler (and Bracton)[20] because the defendant was a knight of Essex, who was beaten and hanged, and the battle itself must have drawn a big crowd. Despite references to different Christian names for the defendant,[21] I think the reports relate to the same action, although a civil action at the same time by the same appellor may have involved a relative of the defendant as tenant.[22]

Murder

Appeals of murder were common. Where there was no direct evidence of the start of the crime, as in a poisoning case, the defendant could not elect for a jury,[23] 'except occasionally at the discretion of the judges and for equity's sake, because perchance there is a disparity between a weak man and a powerful one.'[24] In other appeals of murder, the defendant could choose a jury, unless there was a strong presumption of guilt, as where he was caught red-handed,[25] when (as we shall see) even the chance of battle was denied him. Because a woman was barred from fighting, *Magna Carta* provided[26] that 'no man shall be taken or imprisoned upon the appeal of a woman for the death of any other than her husband'.

In the early days an appeal of murder had to be brought promptly, but in 1278 it was enacted that the appellor had the usual year and a day after the murder within which to launch his appeal, provided that detailed particulars were given about the nature of the crime, the time and the place.[27] But an indictment had to wait until an appeal had been disposed of, or the time for appealing had passed. Because the number of murders had increased, it was enacted in 1487 that an indictment could be brought at any time, and need not wait for the year and a day.[28] But to preserve the rights of a prospective appellor, a person acquitted on indictment was committed to prison or bailed until the year and a day elapsed.

When an appellor died, released the defendant, or was non-suited, the defendant was then technically arraigned at the king's suit on the appeal, and not on indictment, though battle was not then available.[29] Appeals of murder were normally brought by the heir; amongst those who brought such appeals were the deceased's brother,[30] son,[31] or father,[32] or the deceased's servant.[33] Unlike the rules on the continent,[34] there was nothing to prevent relatives fighting each other: in one appeal, two brothers fought and the defendant was beaten and hanged.[35]

Assault

There were many appeals for breach of the peace or wounds. In an appeal for wounds, the appellor had to describe the nature of the wounds and the weapon used. Bracton explains that sharpened arms (like a sword or dag-

ger) make a cut (a sufficient 'wound' for the purpose of an appeal), whilst wooden and stone weapons make bruises (not 'wounds' for this purpose).[36] We shall see in a moment that, if the appellor's wounds were sufficiently serious, he avoided battle on the ground of mayhem. He would offer to prove against the defendant 'as a man maimed by that mayhem'.[37]

The victim himself had to bring the appeal if he was capable of doing so; if not, it seems that the senior relative could sue. In *Alice* v *Coventry* (1212),[38] Alice brought an appeal of mayhem and robbery, said to have been committed in the sight of her younger son, Robert, 'and this she offers to prove against him as a woman, as the court shall adjudge, and if the court shall adjudge that she herself cannot prove this, Robert her son offers to prove this as one who saw and heard it and was present at it'. To make matters doubly sure, Robert brought an independent appeal, with an offer to prove by his body. The defendant denied this against Alice as against a woman, and against Robert on two grounds: (i) as against one who made an appeal concerning a wound given and damage done to someone else, and (ii) as against one who had an elder brother who made no appeal. An appeal for false imprisonment could also lead to battle.[39]

Rape

An appeal for rape had to go to the jury.[40] In the earliest times, however, if a Norman appealed an Englishman for 'open rape which cannot be denied', the Englishman had the choice only of battle or ordeal.[41] In the late case of *Latimer* v *Constable* (1304),[42] there was an appeal of rape and larceny against Sir Robert the Constable, who said that 'if the court would allow, he was ready to affirm by his body as became a knight that he was not guilty; and he threw down his glove to the court'. The appellor was ready to do battle, but it was not allowed, because the court said that the appellor should have sued in trespass. The complaint must in reality have been a trivial one, but during the age of chivalry minor supposed wrongs were frequently magnified to justify a joust.[43]

Nowadays the absence of consent is an indispensable element of rape, but in the earliest days an adulterer or fornicator could be charged with rape if he had eloped with the woman, for the wrong in this case was to the husband or family of the woman.[44] Probably there was no such thing as consensual rape after the Norman Conquest,[45] although a much later statute specifically provided that a husband or next of kin of a woman consenting to rape could prosecute the ravisher despite the consent, and 'the defendant in this case shall not be received to wage battle, but the truth of the matter shall be tried by inquisition of the country'.[46]

Larceny, etc.

Both bailor and bailee could bring an appeal of larceny against a thief.

Some cases[47] show the bailee supporting his appeal ('perhaps unnecessarily')[48] by a statement that he is answerable to his bailor for the loss. Someone like a farm manager, however, did not have sufficient property in the owner's crops to bring an appeal of robbery.[49]

A successful appellor in an appeal of larceny or robbery usually recovered the goods, and this was often the object of the appeal.[50] If the goods were recovered in an approver's appeal, they doubtless went to the crown or the person robbed: we find a detailed order[51] to the sheriff of Cambridge

> to take Roger the scribe of London, who dwells by Cambridge castle and whom John of Drax, the king's approver, appeals of complicity and robbery, together with the chattels that John committed to his keeping, *i.e.*, 11 marks in money, 17 silver spoons, 3 plain silver cups, 1 cup of maize, a cape of bleached camlet and a rough robe of scarlet burret and bleached camlet with 48 silver buttons; and to cause Roger and the chattels to come to London under a sure guard by the octave of Trinity.

Since the ownership of the goods depended on the result of the appeal, it was particularly important to deny a defendant battle when he had been caught red-handed, for 'the law is mindful that the thief could vanquish the appellor by strength of body, even though he were guilty, and thus have the chattels without cause.'[52] Note that by this time (1319) no one thought that God would favour the just in a battle.

Appeals were brought for a wide range of offences against property. Thus in one early appeal the defendants were accused of fraudulently selling the king's corn by false measure and of defrauding the king in various other ways.[53] We read of an approver's appeal against a forger and others for coinage frauds,[54] and of several 'approvers of the forest'.[55] One defendant owed £26.67 for settling a battle against an appellor 'for digging under his oaks at night', though the object of the nocturnal excavation is not revealed.[56] Appeals were also available for deforcement (keeping someone out of possession by force),[57] perjury,[58] and apparently arson.[59]

Rank

England broadly followed the continental rules that did not allow battle between people of widely different rank. Thus battle was not available in cases directly involving the king: 'since he has the country for a champion', such cases were tried by jury.[60] Similarly a peer of the realm who brought an appeal in the ordinary criminal courts was not to be challenged to battle because of the dignity of his person,[61] although appeals against peers were permitted, even ousting the House of Lords' usual exclusive jurisdiction for capital offences.[62] Battle was regarded as inappropriate between a lord and his tenant,[63] or a master and his servant,[64] except in cases of treason.[65]

In Wales, a lord's accusation of treason against his man was tried by battle, as being the only mode of prosecution befitting the lord's dignity:[66] here we have hints of the later age of chivalry. Waldin paid £33.33 to settle a battle between himself and his man.[67] In France, there was nothing to prevent a gentleman appealing a villein, although he would have to adopt the mode of battle applicable to a villein, namely a fight with batons and shields on foot.[68] Battle was not normally allowed between a Christian and a non-Christian,[69] and a Jew was not required to do battle. One poor Jewish defendant, who asked for trial in London because of bias in Oxford, was still languishing in prison five years later at the time of the general expulsion of the Jews.[70]

Mayhem

The *Mirror of Justices*[71] treats equality of status in the same context as equality of strength, and certainly battle was avoided if either party was maimed, under 14 or over 60, a clerk, or a woman.[72] In the earliest days, the hapless defendant was thrown on the ordeal, rather than on the country,[73] although an infirm Englishman appealed by a Norman could appoint another in his place.[74] After the abolition of the ordeal in 1215, jury trial was the substitute, when (in effect) the crown proceeded as though there were no private appeal but an indictment instead.[75]

There were elaborate rules about what degree of maiming sufficed to exclude battle. Glanville and Bracton refer to a broken bone or fractured skull.[76] Fleta draws a fine distinction between loss of one's front teeth, constituting mayhem, and loss of one's molars, which was no mayhem because one's strength was not thereby diminished.[77] Bracton elaborates by saying that front teeth could help a combatant to victory,[78] as was vividly illustrated in the late case of *Whitehorn* v *Fisher*.[79] Anything that made a man less able to defend himself was treated as mayhem, such as loss of a limb or an eye, and even crooked fingers,[80] castration, or loss of an ear or nose.[81] Other examples of mayhem were a broken leg[82] and blindness, but exemption could only be claimed if the injury resulted from disease rather than accident caused by the party's own foolishness.[83]

Age

As mentioned above, the permitted age range was 14 to 60.[84] It was not open to an appellor to call in aid the defendant's age. In one case[85] the appellor's counsel argued that the defendant (Sir Henry the Scrope) was over 70 and not permitted to do battle; the judge (Scrope, J., as it happened) was prepared to let the case proceed, however, and the appellor promptly withdrew: Sir Henry must have been a formidable old man. The defendant also could decline battle on account of age, even if he had already chosen it, but he could not change his mind a second time.[86] A

person witnessing a crime as an infant could bring an appeal when he came of age.[87]

The age limits were slightly different in Wales: there was no battle for those under 21 or over 63.[88] And Wales had that extraordinary rule that twins counted as one,[89] so that the other party must always have done his best to avoid such an unequal fight. The Welsh were really more civilised than the English, because pleas of land did not have to be tried by battle,[90] and as early as the 10th century Howell and his judges said that battle for treason, murder and theft was not just,[91] although it was previously common for treason.[92]

Clerics

The exemption of clerics dates back to 1176,[93] and in 1216 a Papal Bull, addressed to Christians in the Province of York and in Scotland, stressed that battle by a cleric was prohibited,[94] although (as we shall see) this had no effect in the border areas to which it was directed. The courts were always on their guard against spurious claims to clerical status. Thus in one case[95] the record noted that two defendants were found in long dress and without tonsure, and were delivered to gaol thus: no one before pledges were given essoined them as being clerks, but after battle was pledged they said that they were clerks. The usual procedure was for the bishop's or abbot's 'ordinary' to claim the defendant as a clerk, whereupon he would be delivered to the ordinary for an inquisition to be made; this procedure could save the clerk from the scaffold even if benefit of clergy was not claimed at the outset and he had been defeated in battle.[96]

A party within the exempt categories was not obliged to claim exemption. We find women approvers in 1156[97] and 1204,[98] and a clergyman took up an approver's challenge in a late case.[99] A cleric turned approver was not to be denied privilege of clergy.[100]

Red-handed

The defendant could not opt for battle if he was caught red-handed:[101] indeed, he was defenceless and inevitably destined for capital punishment in those circumstances.

> It certainly makes one retire with a degree of horror from the consideration of such laws, which prevented a man from explaining circumstances which, after all, were only *prima facie* and not conclusive evidence against him.[102]

But the early rough and ready justice knew nothing of the niceties of *prima facie* evidence and indeed the burden of proof tended to rest first on the defendant.

Bracton cites the case of a man who is found over a dead body with a bloody knife, or who has spent a night alone in a house with a body, or more than one in similar circumstances who have not raised a hue and cry, nor received any wounds in self-defence, nor can point to another culprit.[103] The Assize of Clarendon, in 1166, had provided that, if anyone was captured with stolen goods and was notorious, having evil testimony from the public and no warrant, he should not have law.[104] If he was not notorious, he should still be denied battle and (at that time) suffer ordeal on account of the goods in his possession.[105] Similarly, if anyone confessed before lawful men or in the hundred court to murder, robbery or theft, or to harbouring people guilty of those offences, he should not have law, even if he later wished to deny it.[106]

The defendant's reputation was an important element in criminal cases. It could affect his committal or otherwise, because a defendant free of suspicion might be released on producing a single surety, whilst a suspect would inevitably be committed to prison.[107] It could also affect his right to choose the mode of proof, since he might have no alternative to battle if he had a bad reputation. Thus in *Smallwood* v *Adam* (1220)[108] an approver appealed John and Adam (the sons of the priest of Leigh) of a substantial list of crimes, including three murders and robbery. The defendants put themselves upon the country, but the sheriff's inquest and the knights of the county testified that they were all of ill fame. The battle therefore proceeded against Adam, who won, so that the approver was hanged.

A defendant in frank-pledge with a lord to warrant him could always put himself on the country.[109] The appellor's reputation was usually irrelevant, for otherwise no approver would have been able to pursue his appeals. However, even here, particularly outrageous conduct could result in the approver's summary hanging, as in the case of two approvers who had broken out of prison and were caught red-handed for burglary.[110]

Lea says that a Scottish statute in 1400 provided that battle would only lie where there were reasonable grounds for suspecting the defendant, and no direct testimony of witnesses or documents. In addition, it was only available for capital offences committed secretly or treacherously.[111] The ambit of battles in criminal appeals was thus severely limited there, at a time when it had virtually ceased in practice here. But the theory was the same, namely that battle was ousted when the evidence against the defendant was thought to be clear, whilst battle was regarded as an eminently suitable method of proof when there was necessarily a dearth of evidence, as in a poisoning case, where a jury, lacking knowledge, was not to be trusted.[112] That battle came to be regarded as the last resort is most clearly illustrated by the rules of the Court of Chivalry (which was certainly not adverse to the grand spectacle): there battle was allowed only if the appellor could not prove his appeal by witnesses or in some other way.[113]

Malice

The defendant could escape battle if he established that the appeal was brought out of hatred and malice *(de odio et atia)*. If allowed to proceed, this preliminary allegation had to be tried by jury, and in effect it became a useful way for the defendant to substitute jury trial for battle on the main issue.[114] Even if the defendant was unsuccessful on this issue, his guilt was not established until the appeal itself had been determined against him.[115] If the preliminary issue was established in the defendant's favour, he might bring a separate action for damages against the person instigating the appeal.[116] The court would not necessarily pursue the preliminary issue: in one early case the first defendant offered £5 for an inquest whether an appeal of robbery and false imprisonment had been maliciously brought, but the court adjudged battle without further enquiry.[117]

Towards the end of the 13th century, the judges would frequently avoid battle by quashing an appeal because of formal defects, and promptly arraign the defendant at the king's suit.[118] A pardon from the king did not prevent an appeal, but Thurkelby, J., (in the same century) gave a friend this advice: go to battle as soon as a blow is struck, cry 'craven' and produce the pardon.[119] The defendant to the appeal would not then be punished, because the king had given him his life and limbs.

Englishmen and Normans

The Laws of William the Conqueror laid down detailed rules for appeals between Normans and Englishmen, and gave the Englishman the choice of battle, even if he was the appellor.[120] If the English appellor did not choose battle, the Norman defendant could clear himself by oath; but if the English defendant did not choose battle, he had to defend himself by witness or ordeal.[121] Similarly an English defendant had to purge himself by ordeal in any matter leading to outlawry.[122] The Norman invaders were displaying their superiority by giving the choice to the Englishman, to whom battle was unfamiliar and probably distasteful, but Norman defendants were not to suffer the indignity of the ordeal if the Englishman 'does not dare to prove by battle'.[123] And this free choice for the Englishman supports the view that the Normans brought proof by battle with them from the continent: the Normans knew the ropes, but the English did not, and it was therefore unfair for a Norman to compel an Englishman to fight. It was a tribute to the Normans' impartiality that they allowed their newly-conquered subjects to bring criminal accusations against them, and William even decreed that, if an English defendant did not want battle or was not entitled to it, counsel should be obtained for him.[124]

Lea took the opposite view, that a Norman defendant could decline battle when an Englishman appealed him.[125] The law dealing with appeals of murder, robbery, rape and perjury certainly says in the original text

(after giving an English defendant the choice of battle or ordeal):[126] 'If however an Englishman appeals a Norman, and wishes to prove by ordeal or battle, I want the Norman to clear himself by oath'. Henderson must be right to read this as '. . . *does not wish* . . .,' for otherwise it would contradict the earlier law, which provides:[127]

> If an Englishman appeals a Norman by battle for theft, or homicide, or any other matter for which battle ought to be done, or ordeal between two men, he has full liberty to do this. And if the Englishman does not wish battle, the Norman shall clear himself by oath, by his witnesses, according to Norman law.

Border battles

By contrast, disputes that straddled the strife-torn border of England and Scotland regularly led to battle. The Laws of the Marches, 1249, show that battle was 'the remedy for almost every border wrong'.[128] Any malefactor of one country charged with a crime committed in the other had to answer for it at the march. Only kings and the Bishops of St. Andrew's and Durham were exempt from battle,[129] whilst lesser clerics had to fight.[130] The Pope's reminder in 1216 to Christians in the area that clerics were not allowed to fight[131] fell on deaf ears, because 21 years later one of the list of grievances presented by English clergy to the Papal legate was that even Abbots and Priors in the Diocese of Carlisle, involved in border appeals with Scotsmen either as appellors or defendants, were forced to battle on the marches. They were permitted to appear by champion, but if the champion was defeated, the cleric was beheaded. 'Thus in our own time, the Prior of Lide was subjected to this article of law.'[132]

There was an affinity between the border battle (fought with spears and swords) and the age of chivalry, so that it is not surprising that there was a brief revival of the contests on the marches towards the end of the 14th century. In 1380, we find safe conducts granted to a Scotsman and his companions to go to Lilliott Cross, Roxburghshire, for his battle against an English defendant.[133] The Scotsman is said to have won,[134] but the Englishman lived to fight another border battle 15 years later (this time as appellor) against another Scot and again in Roxburgh, before the Earls of Douglas and Northumberland as wardens of the marches.[135] On this occasion the Englishman was slain and Robert III gave land to his conqueror 'in reward for a noble deed'.[136]

There was another safe conduct for a battle at Lilliott Cross in 1381, when again a Scotsman had appealed an Englishman.[137] The Earl of Northumberland's son was on this occasion ordered to see that the battle was properly conducted (with three other border magnates), since the Earl was detained in parliament.[138] Sir William Faryndon was sent to make the necessary preparations, and he received £20 for his expenses on his

return.[139] A few years later there was an appeal of treason before the Earl of Northumberland, in his capacity as warden of the marches, when the appellor was slain in battle.[140] More blood was to be shed. The appellor's goods were forfeited to the king and granted to Thomas of Hexham and his wife Mary. An inquisition held by the sheriff of Northumberland and another determined what goods the appellor had at his death and who then held them.[141] Thomas was then killed in an ambush and his widow alleged that the holders of the forfeited goods were responsible; she ultimately received them.

A rider to Richard II's appointment of wardens of the marches provided that, when battle was waged, it should be reserved to the king or his deputy.[142] There was no battle as of right, but only with the king's leave; in *Chattowe* v *Badby*[143] the battle was waged with the express consent of Richard II and Robert II of Scotland. Indeed in this troubled area the king's safe conduct was (as we have seen) usually needed to enable the contestants to reach the appointed place. Latterly the border battle was more closely related to the chivalric battle than to a regular criminal appeal.

Champions

The essence of a criminal appeal was that, unlike the civil battle, the parties fought in person. A hired champion was certainly not allowed and faced dire penalties.[144] It is difficult to distinguish between a relative and a vouchee, for instance, who might properly offer battle, and a disinterested third party.

A murder appellor would often tender another relative of the deceased as an alternate in case anything happened to the appellor;[145] but in this case the alternate would have become a fresh appellor in his own right and he can hardly be regarded as the first appellor's champion. *Launcells* v *Moreton* (c. 1201)[146] is the case cited by Pollock & Maitland[147] to show that champions were put forward by both appellors and defendants. The appellor brought an appeal of robbery and offered to prove against Hugh of Moreton by his body or by his freeman. Moreton defended 'by his body, as a man who is over age, or by William his son'. It was adjudged that this first appeal was brought out of spite, and the appellor was in mercy. He then appealed Thomas of Dunham as a receiver, who defended 'as a man maimed with a broken leg, either by Richard his brother, or by Roger of Moreton'. This defendant pleaded an alibi, put himself on the country for proof, and the appellor was again in mercy. The appellor tried once more, this time accusing William of Dunham of robbery; he defended as one past age, either by John or another. Despite his choice of three crocks, the appellor was in mercy on each occasion.

There were a number of similar cases at about this time. In *Kemyell* v *Wucherchet* (1201)[148] the appellor offered to prove an appeal for the murder of his son by a certain freeman, Arkald, his son-in-law, as he himself was over 60. The defendant was suspected, ordeal by water was adjudged and the defendant purged himself. The appellor was in mercy, because he did not speak of his sight and hearing, and because he put another in his place who neither saw nor heard, yet offered to prove; Alkald was in mercy for the same reason. It seems from this that Arkald's offer would have been acceptable if he had been a witness, although as a brother-in-law of the deceased he may have been eligible to bring his own appeal.

In *Roger* v *Chimilli* (1201)[149] the defendant denied an appeal of robbery 'by his own body, if need be, or by a freeman of his, namely William Trenchefoile, or by Thomas of Hoe'. The appeal was later withdrawn. In *Brienon* v *Torell* (1202)[150] the defendant denied an appeal of mayhem, alleged spite and claimed a jury, or offered to prove by a witness the facts upon which the allegation of spite was based. He put forward an alternative freeman, who offered to defend this for his master because he was an infant. And in *Hilton* v *Butler* (1203)[151] a bailor brought an appeal of theft and offered to prove by his freeman, the bailee, from whom the goods had been stolen and who was bound to restore them to the bailor.

It is significant that, whilst the party's offer to prove or defend is 'by his body' (the hallowed phrase for battle), there is no reference to the body of the alternate (as was invariably the case in writ of right actions), except where that alternate could bring an appeal on his own.[152] Thus in *Dune* v *Trenchard* (1201)[153] the appellor offered to prove an appeal of mayhem and robbery 'as the court shall adjudge, either as a maimed man, or as one past the age of fighting, or by his brother Ralph, who offered to deraign against him by his body'. I suggest that in the other cases the party was simply tendering suit, and not putting forward a champion, which was throughout forbidden in criminal appeals.

A master would sometimes seek to use his servants as champions. In *Stokes* v *Percy* (1224)[154] Robert of Percy appealed four men of robbery, but because of his illness, he could speak of his hearing, but not of his sight. He therefore instigated four of his servants to bring separate appeals against each of the defendants, who declined to reply, because they had been attached by the appeal of the master, and not of his servants. The court upheld this view, and the master was in mercy. Lea says that a nobleman could put forward a substitute in Scotland,[155] just as a cleric could use a champion in the marches.[156] The *Grand Coustumier de Normandie*[157] talks about 'champions' in an appeal of murder, and those unfit to fight were allowed champions in France.[158]

Voucher to warranty

Battle could also settle the subsidiary voucher to warranty in a criminal appeal. Thus in *Goose* v *Bolare* (c.1275)[159] the appellor appealed the defendant (in a manorial court in Cumberland) of stealing an ox. The defendant vouched to warranty William the Long, who offered to prove by his body that the defendant never had the ox by delivery from him. The defendant offered himself as ready to prove the contrary by his body. The court adjudged battle on this issue; it was pledged and fought. The original defendant was beaten and hanged. The voucher was sometimes abused in an effort to bring in a hired champion by vouching him to warranty, as in the well-known case of *Mare* v *Piggun* (1220).[160]

Cross-appeals

A cross-appeal was sometimes brought by a defendant against his appellor and, if allowed, it apparently annulled the original appeal. In *Leicester* v *Shirle*[161] the defendant complained that the object of the appellor's appeal for mayhem against him and others at the Southampton County Court was to defeat his own appeal for robbery against the appellor. There was a further appeal between the same parties before the justices in eyre for robbery and breach of the peace, for which the defendant was attached, so that he had to seek an adjournment of yet another prospective battle, this time on a writ of right. Not surprisingly, it was ordered that both the civil and criminal disputes should be brought before the justices at Westminster.

Courts

As in civil cases, most battles were pledged and fought in the king's courts. Once we find the judges ordered to hold two battles before the king himself 'because he wishes to see them';[162] and in another case battle was not adjudged because the king and most of his council were absent.[163] But battle was not limited to the king's courts. In Cumberland it was claimed to be customary for manorial courts to deal with appeals of larceny.[164] The county courts had jurisdiction in appeals,[165] except when the appeal involved an allegation of breach of the king's peace, as was often the case. Thus in *Andrew* v *Ingarthin*[166] the jury claimed that battle had been pledged between two deceased parties on an appeal of robbery in the county court, but (as Maitland commented)[167] this would have been beyond the court's competence. In fact the court records showed that, as soon as mention was made of the king's peace, the suit was attached to the coming of the justices, and it was denied that battle had been pledged in the county court: the jurors were in mercy.

Manorial courts of ecclesiastics dabbled in criminal appeals as well as civil claims. In *Cut* v *Blund*[168] battle was adjudged in the Prior of Bodmin's

court for stealing tin, but the king's court later held this to be a false judgment, and the Prior was fined and lost his court. It is extraordinary to find the ecclesiastical authorities quarrelling over the right to hang a defendant beaten in battle:[169] the bailiffs of the archbishopric of Canterbury complained that the bailiffs of the Prior of the Holy Trinity, Canterbury, had seized the defendant and, although he was not the Prior's man nor one of his tenants, hanged him 'in defiance of justice and the franchise of the archbishopric'.The Prior denied that he was responsible, but his bailiffs were committed to prison.

The king's court had exclusive jurisdiction over approvers' appeals. In *Richard* v *Walesham*[170] a battle had been adjudged and fought on an approver's appeal of larceny in the hundred court, and the defendant had been beaten. On bringing the record of this, the hundred were in mercy.

Multiple parties

The classic case of multiple defendants was the approver's appeal, which I shall deal with later. A defendant too could be appealed by more than one appellor. 'When one man is appealed by several, or several by one, and battles are to ensue, let not the battles be all joined at one time, but at different times'.[171] If there were several appellors for the same act, a successful defence against one acquitted the defendant from the other appeals and from any crown prosecution.[172] If one or more appellors died after wager but before battle, or became unable to fight through no fault of their own, the remaining appellors might proceed, but the position was otherwise if the first appellor defaulted.[173] If all the appellors died or became incapable before battle, the appeal failed, although the king might thereafter prosecute.[174] Needless to say, if the defendant died before battle, the appeal was at an end, and there was no conviction and therefore no forfeiture. If the defendant was defeated by one of several appellors, there was an immediate conviction and he could not afterwards try his luck against the others.

Where a principal and accessories were appealed, the accessories were committed[175] or bailed[176] until the first appeal against the principal was determined. If the principal was successful, the accessories were acquitted. If the principal lost, the accessories could no longer be bailed, and the appellor would fight them in turn.[177] Where there was more than one appellor for one death resulting from different acts, the appeals were treated as separate, so that there was no automatic acquittal on a successful defence.[178] The king could not prosecute until all the appellors had failed. Conversely, where one appellor appealed several defendants for different wounds, he proceeded against them all in turn,[179] but he was not allowed to appeal more than one person for a single wound.[180]

An unsuccessful prosecution by the crown was no bar to an appeal, if

brought within a year of the alleged crime.[181] But later, if the appellor procured an indictment, he could not proceed to battle.[182]

Approvers

The approver's appeal was the ancient equivalent of turning Queen's evidence. The early *Dialogus de Scaccario* (c.1178) sets out its origins.[183] The Treasurer (the Bishop of London) explained that crime was frequent 'on account of the innumerable riches of this kingdom, and likewise on account of the inclination to drunkenness inborn in the natives, which lust always follows as a companion'. But the judges thought they had a solution to the 12th century crime wave.

> On account of the great number of scoundrels and in order that, even in this way, the land may be purged from the miscreants, the judges at times agree upon this: that if anyone of this kind [*i.e.*, notoriously guilty], confessing his crime, be willing to challenge the accomplices in that crime and be able, by engaging in a battle, to prove the crime of which he charges the other or others, he shall escape the death which he merited and, with safety to his body, departing nevertheless beyond the boundaries of the entire kingdom, shall be banished and swear not to return. . . . Since whatever seems to promote the peace of the kingdom is, without doubt, to the advantage of the king, he is called a king's approver.

Thus a person accused of a crime could escape liability if he successfully appealed a specific number of alleged accomplices. Doubtless in many cases 'the community was well rid of a rogue, whatever the result of the combat'.[184] But the procedure was open to much abuse, because a hardened criminal might escape the gallows by becoming an approver and falsely accusing a series of weak innocents, forcing them into unequal fights. 'Divers common and notorious felons . . . for safeguard of their lives' became approvers.[185]

During their hey-day, approvers' appeals were so frequent that there were special appointments of judges to deal with them. Thus in 1222 four judges were appointed to hold approvers' battles at Newcastle,[186] and another four to deal with the approvers imprisoned at York,[187] although many approvers and their defendants were brought long distances to Newgate to fight in London.[188] And there were special hangmen: it was found in 1330 that John, the gaoler of Nottingham, held property there of the king 'by service of hanging approvers and taking those appealed by approvers in Nottingham' since time immemorial.[189] Approvers often died in prison, and no fewer than 50 died in York castle in 1349 (the year of the Black Death).

In a late case Skilling, J., said that an approver should denounce his companions within 24 hours of the deed, failing which the king could at any

time have him put to death,[190] but the judge may have misunderstood the rule that each successive battle had to be pledged on the day when the previous battle was successfully completed. And to prevent abuse, once a criminal became an approver, he had to bring all his appeals within three days.[191] Thus in *Mawer* v *Cook*[192] an approver appealed one batch of defendants on Tuesday, another on Wednesday and a final defendant on Thursday; and five years later, another approver appealed one batch on Monday and another on Tuesday.[193]

Bracton gives the form of the approver's writ:[194]

> The king to the judges greeting. Know ye that we grant to you the power of granting to X his life and limbs, who has come before you as an approver, and has made known a larceny [or other felony], on these terms, that he does battle to convict [five] by his body [or by the country], to which he has bound himself in your presence.

If necessary the sheriff was ordered to search for the new accused,[195] whom he attached, unless the accused was of good repute and bondsmen could be found, as on an ordinary appeal.[196] If more than one offered battle, the approver could choose whom he wished to fight first.[197]

The approver's charge was similar to that in any other criminal appeal,[198] but the oaths were somewhat different. The defendant swore:[199]

> Hear this, you whom I hold by the hand, who call yourself A by the name of baptism, that I am not a larcener, nor thy associate in a larceny or a robbery, or anything of that sort, nor have I together with you stolen X at Y, nor have we done anything of the kind as this robbery, nor have I had for my part £x. So help me God, etc.

The approver then swore:

> Hear this, etc., that you are perjured, and perjured on this ground, that you are a larcener and my associate in larceny, because at Y we together stole X [or we together made a robbery, etc.], and whence you had £x for your share. So help, etc.

If the defendant was defeated, the approver pledged battle on the same day against another accused, and a fresh day was appointed. If the defendant was successful, he was immediately released, unless the judges had some other grounds for suspicion, when the defendant might (for instance) have to find pledges for his future appearance.[200] If he could not find pledges, he might be faced with the choice of staying in prison or leaving the realm.[201] Bracton referred to a case where a defendant had beaten an approver, but on the same day was appealed by another approver, and the judges let the case proceed to wager. As Maitland thought,[202] this must be a reference to *Ives* v *Lal* (1221),[203] where an approver appealed four people of complicity. The first defendant sought to put himself on the country, but

battle was adjudged and pledged, and both parties committed to gaol. The court allowed the second defendant a jury, but his village and a neighbouring village said that he was a robber; so the court decided that, if the first defendant was beaten, a battle should also be pledged in the second appeal. Precisely the same thing happened in the third appeal, so that in this case at least the approver apparently managed to choose some likely rogues as defendants, and it was probably one of these notorious robbers who was accused again after beating the first approver.

The approver was a self-confessed criminal, and if he was defeated by any of his defendants or if he withdrew,[204] he had merely secured a postponement of his hanging. If, however, he beat all his defendants, he was banished from the realm, but not otherwise punished.[205] If the approver was beaten or otherwise died before his series of battles had finished, the remaining defendants remained under their sureties to stand trial if anyone else came forward against them. If the defendants were committed for more than one offence, they had to secure their release from the committal on the minor offence (*e.g.*, larceny) despite their acquittal on the major offence (*e.g.*, murder).[206]

In a late case,[207] the extraordinary suggestion was made that, if the defendant killed the approver in battle, he should be hanged for murder, because he would have killed the king's approver, although the king could pardon the defendant if he had a good reputation.A defeated defendant suffered the same fate as in any other appeal: hanging and forfeiture of goods. Sometimes a pardon would be sought for a successful approver to avoid banishment, but he would remain under pledge and his lord was responsible for ensuring this.[208] As an additional safeguard a statute of 1403 provided that the name of the person seeking the pardon should be inserted in the charter, and that person was liable to a fine of £100 if the approver committed another felony.[209] Occasionally a general pardon was given at the outset, conditionally on the approver's success.[210]

In fact battles did not often ensue in approvers' appeals: frequently the approver died in prison or was hanged following the acquittal of the defendant without battle.[211] The celebrated *Blowberme* v *Stare* (1249)[212] was an approver's appeal, and the remarkable illustration of the battle (and of the defendant's hanging) on the roll can surely be attributed to the rarity of a fight. The record of the case as it appears on the roll is, however, typical of an approver's appeal:

> The same Walter [Blowberme] comes and appeals Hamo the Stare of Winchester by the same words, to wit that they were [coming?] from the cross at Winchester, and there stole certain clothes and other goods, whereof Hamo had as his share two coats, to wit one of Irish cloth and the other half of Abingdon cloth and half of London busell, and that he was with him in committing the said larceny, and he offers to deraign against him by his body as the court should adjudge, etc.

> And Hamo comes and denies all of this, and says that he will defend himself by his body, etc. Therefore it is adjudged that there be battle between them, etc. And the battle between them is fought. And the said Hamo was defeated. Therefore to judgment against him, etc. He had no chattels.

The ups and downs of an approver's career are well illustrated by *Roger* v *Hereford* (1220),[213] when these appeals were at their peak. The approver, 'acknowledging himself to be a thief',[214] appealed the first defendant as an accomplice; he put himself on his townspeople for his honesty, they denied it, battle was therefore adjudged, and he was beaten and hanged. The approver then proceeded against the second defendant, whose townspeople said he was trustworthy, so that no battle followed. The same thing happened with the third and fourth defendants. For the fifth defendant the approver chose a clergyman, and he was then hanged himself. Similarly if an approver's defendants could not be found, he had failed in his task and was hanged;[215] so also if it was found that the appeal was brought out of malice.[216]

A defendant to an approver's appeal could himself become an approver, as in *Ramsey* v *Parmenter* (1223),[217] where the defendant acknowledged that he was a thief before the sheriff of Norfolk and others. In these circumstances, it was fatal to change your mind; in this case, the defendant later denied that he had become an approver, but after the sheriff and others testified that he had, he was promptly hanged, and two defendants appealed by him were released.[218] It is worth noting that even a defeated approver (twice convicted, in effect) was allowed a Christian burial in consecrated ground.

If the defendant was found to be an outlaw, the approver's appeal would not reach battle, for the defendant would be summarily hanged, whilst the approver would remain in prison to launch further appeals.[219] We have seen that the successful approver was banished, and a defendant of uncertain repute might be allowed to leave the realm without a battle; in one case a defendant left the country because nothing certain was spoken against him, and he had no pledges.[220] If the approver did not make his appeal in proper form, he was hanged without further ado. In *Plantefolie* v *Stafford* (1226)[221] the approver accused the defendant of complicity in a theft, but 'because he says nothing definite and does not show what has been stolen, it is adjudged that there is no appeal', and he is therefore hanged; the defendant was sent to prison for further enquiry. One approver was more fortunate than most: after his defendants had been acquitted, Geoffrey Cokerell was sentenced to death and hanged, but after his body had been carried to the cemetery of Oakham church for burial, 'he miraculously, as is said, revived and has stayed until now in the said church'. He was pardoned.[222]

In one late case[223] an approver caused much embarrassment by appealing various abbots, priors and other men of rank. Battle was actually pledged with a clergyman, but on the appointed day at Tothill the approver admitted that his appeal was false, so that he was drawn and hanged. On the petition of Parliament the king ordered the other defendants to be discharged. Sometimes an approver from outside the town was discriminated against, and the customs of Fordwich[224] (near Canterbury) laid down bizarre rules for such a 'foreign' approver. He had to stand in the River Stour up to his waist, whilst the defendant approached in a rowing boat armed with an oar three yards long. The boat was tied to the quay when opposite the approver and they fought in the water. 'These unusual conditions were evidently designed to discourage foreign approvers'.[225]

There was widespread abuse of approvers' appeals, not least in the way that sheriffs and others coerced prisoners into becoming approvers in order to extort money from those they appealed.[226] A statute of 1311[227] recited this particular mischief, which specially enraged the king, because he had no share in the takings:

> Many prisoners do become approvers for the saving of their lives and by means of divers oppressions and pains which sheriffs and gaolers, in whose custody they are, do cause to them, and set them on to approve the most rich persons of the country and those of good fame, whom they cause to be attached, and to be put into vile and hard imprisonment, and take grievous ransom of them, from which imposts and takings no advantage accrues to the king.

In theory, the approver was appealing his accomplices. In the 12th century, he might accuse only one accomplice,[228] But it later became expected that the approver would challenge several. The usual minimum was five,[229] but the writ would ask the judges to persuade the approver to appeal more.[230] William Smallwood seems to have appealed 17 alleged accomplices in 1219 and 1220; he succeeded against one, but lost to another and was promptly hanged.[231] John Mawer appealed 21 in 1367,[232] and fought and won no fewer than four battles whereupon 'the king, in consideration of the fact that the said approver conquered the said felons in battle with the help of the most High, has pardoned him his suit for the said felonies, also the execution of death which he deserved to undergo on account of his said confession and appeals and any consequent outlawries'.[233]

William Wokkyng appealed 23 some five years later, and fought and won three battles, including one against his own master; a fourth battle was adjourned until the approver recovered from the wounds he had sustained in the earlier battles, but finally the king pardoned him.[234] Martin Godard appealed 41,[235] John of Goldesburgh accused 46,[236] but perhaps Nicholas of Thropewell took the record by appealing 70 in 1294, and he would have his pardon only if he convicted 'the greater part' of them.[237]

Decline

Because of the approver's procedure, trial by battle flourished longer in the criminal courts than it had done in the civil. Approvers' appeals were common until the middle of the 14th century: we find the sheriff of London claiming 67p for executing 41 approvers in 1326, although he had to stage only two battles.[238] The last criminal fight was about 150 years after the last civil one.[239] The case was *Whitehorn* v *Fisher* (1456),[240] the last judicial fight in England,[241] nearly 400 years after its introduction here and nearly 400 years before its formal abolition. An approver appealed 19 men of complicity in theft and was kept at the king's expense for nearly three years. At last a defendant offered battle and the procedure was described in minute detail, although it was none too accurate after a long period of disuse. We must beware of treating the Chronicles as though they were law reports, but this one certainly captures some of the drama of the occasion.

Men from the defendant's neighbourhood spoke well of him, but when enquiry was made of the approver's character, people said that he should be hanged, for he was too strong to fight the defendant. This was irrelevant, however, for the defendant had offered battle, which was duly fought at Winchester. The defendant (weeping) knelt and prayed, 'and every man there being present prayed for him'. The approver cried: 'You false traitor! Why are you so long in false, bitter belief?' The defendant rose and said: 'My quarrel is as faithful and also [as] true as my belief, and in that quarrel I will fight'. He immediately struck at the approver and his baton broke. The approver struck back, but the officers then removed his weapon.

They fought with their fists for a long time and then rested. They fought again and rested. They bit each other, so that 'the leather of their clothing and flesh was all torn in many places of their bodies'. The approver knocked the defendant on to the ground, and the latter cried out. The defendant struggled to his knees, planted his teeth into the approver's nose and thrust his thumb into his eye (no Queensberry rules then). This was too much for the approver, who cried for mercy. The judge ordered them to stop. The approver admitted that his accusations had been false and asked for forgiveness. He was hanged.

Even offers of battle were rare in the Elizabethan era,[242] yet to a remarkably late date there were those willing to defend the criminal appeal. In 1601 Davies asked:[243]

> If by the very law of nature a man may defend his life with his life when he is violently assaulted by his enemy and has no other means of escape, shall he not by the same reason defend his life with his life when he is appealed of any capital crime, as treason, murder, or robbery, and has no other proof to clear him?

But he did admit that battle carried with it 'a little taste of barbarism', and

in another paper of the same date—this time apparently an address to an ecclesiastical assembly—he set out to demonstrate that trial by battle was unlawful and contrary to the scriptures.[244]

The French were fond of their duels, but, as one would expect, Montesquieu roundly condemned battle ('nothing was more contrary to good sense').[245] In this country there was much talk about murder appeals in the 1770s. The case of the two Kennedies (in 1770) attracted public attention, although it was settled, and a murder appeal resulting from an election disturbance caused the Attorney-General to seek leave to bring in a Bill to abolish such appeals, which he said were 'a Gothic custom'. One minister agreed that 'the right of appeal for murder is a shackle upon the king's mercy', but said that there was no time for the Bill then.[246] An appeal of murder was dismissed in the following year (*Smith* v *Taylor*).[247]

Yet when the appeal of murder was next discussed in the House of Commons (in 1774), it was stoutly defended by some liberals. The occasion was a debate on a 'Bill for the improved administration of justice in the province of Massachusetts Bay' to punish the rebellious Bostonians for destroying the tea. It originally contained a clause depriving the New Englanders of the appeal of murder, but after vigorous protests in the House the clause was struck out. Dunning (later Lord Ashburton) led the opposition, supported by Moreton ('one of the greatest pillars in this constitution'), Phipps ('the appeal for murder ought to be sacred') and Townshend ('This is a question, Sir, which has frequently been before the House, and has as often been rejected'). Obviously these members thought that the private prosecution should be retained, to avoid leaving the crown as the sole arbiter for the launching of a prosecution.

The supporters of the clause were rather more realistic. The Attorney-General (Stanley) said: 'There never was an instance wherein the trial by appeal was instituted that it was not for the sake of obtaining a sum of money. . . . It is nothing but barbarism and cruelty'. The Solicitor-General (Wedderburn, later Lord Loughborough) reminded the House that 'there is now no law in being to prevent trial by battle', but Edmund Burke apparently assumed that this was a dead letter, since he opposed the clause and commented: 'I allow that combat was part of this appeal; but it was superstition and barbarism to the last degree'. C. J. Fox thought that the appeal should be abolished entirely, but not in part; and finally Fuller, also favouring total abolition, said that he would raise the matter again as the clause had been withdrawn, but there is no record of his having done so.[248]

The Irish case of *O'Reilly* v *Clancy* (1815)[249] must have provided the inspiration for the tactics adopted in the *cause celebre* of *Ashford* v *Thornton* (1818).[250] The defendant made a full confession to the murder of the appellor's brother. In view of this the prosecution summoned no witnesses at the trial on indictment, whereupon the defendant's counsel successfully objected to the admissibility of the confession and the defendant had to be

acquitted. The appellor therefore brought an appeal of murder in Dublin, and (on the advice of his counsel) the defendant ultimately offered battle and thereby caused a sensation in court. A curious compromise was reached whereby the defendant pleaded guilty and agreed to be deported.

A book could be written (—indeed, a book was written—)[251] about *Ashford* v *Thornton*. This was a brother's appeal for the murder of his sister after the defendant had been acquitted on indictment, and the drama of the opening exchanges is worth recapturing. The defendant pleaded: 'Not guilty; and I am ready to defend the same with my body'. His counsel handed him a large pair of gauntlets (apparently horsemen's gloves);[252] he put on one and threw down the other. The appellor is said to have moved forward to accept the challenge by taking up the gauntlet, but he was restrained from doing so.[253] The defendant's counsel therefore moved that the gauntlet should be kept in the custody of an officer of the court, and the following exchange ensued:[254]

Lord Ellenborough, C.J.:

> What have you got to say, Mr. Clarke [the appellor's counsel]?

Counsel:

> My Lord, I did not expect at this time of day that this sort of demand would have been made. I must confess I am surprised that the charge against the prisoner should be put to issue in this way. The trial by battle is an obsolete practice, which has long since been out of use; and it would appear to me extraordinary indeed if the person who has murdered the sister should, as the law exists in these enlightened times, be allowed to prove his innocence by murdering the brother also, or at least by an attempt to do so.

Lord Ellenborough:

> It is the law of England, Mr. Clarke; we must not call it murder.

The appellor's counsel applied for an adjournment, and the Lord Chief Justice said: 'In a matter so antiquated, and in a proceeding so obsolete, it is perhaps due to justice that this application should be acceded to'. The defendant's counsel did not object, and he explained that he had advised his client to offer battle 'in consequence of the extraordinary and unprecedented prejudice which has been disseminated against him throughout the country'. Affidavit evidence was later put in by both sides and there was a further adjournment. At a crowded bar the appellor's counsel made an elaborate historical review of trial by battle and the learned judge became impatient: 'Select out of the whole of those pleas the pregnant fact which shall oust the appellee of his trial by battle. I wish to see the matter brought to a point'.[255]

Actually the legal arguments were not as lengthy as might have been

expected in the circumstances: we are told that the appellor's counsel spoke for four hours and the defendant's for three on the following day. The court of four judges (including Holroyd, J., who had presided at the earlier trial on indictment) had no difficulty in deciding that battle lay at the defendant's election, and that the appellor had not brought himself within any of the recognised exceptions. 'Under these circumstances, however noxious I am myself to trial by battle, it is the mode of trial which we, in our judicial character, are bound to award. We are delivering the law as it is, and not as we wish it to be'.[256]

Ultimately the appellor declined to fight, the defendant was formally arraigned again at the suit of the crown, he pleaded *autrefois acquit* and was discharged. The murdered girl's epitaph reads (in part):[257]

> For though the deed of blood be veiled in night,
> Will not the Judge of all the earth do right?

Not surprisingly, *Ashford* v *Thornton* led to immediate pressure for the abolition of trial by battle. Kendall published in 1818 'An argument for construing largely the right of an appellee of murder to insist on trial by battle; and also for abolishing appeals'. Yet whilst everyone wanted to be rid of battle, many still echoed the views of the 1774 liberals that the appeal should be retained.[258]

> Many correspondents of several newspapers have exerted themselves to suggest what they conceive to be the means of obstructing the trial by battle, but none has betrayed a wish to get rid of the appeal [except a letter to *The Sun* on 21st November 1817]. And the editors themselves of those papers have either been silent, or have followed the sentiment of the vulgar, instead of applying themselves to the unpopular task of attempting their correction.

However, the reactionary Lord Eldon supported the abolition both of battle and of the appeal itself, though for the wrong reasons. Referring to the 1819 parliamentary session, Lord Campbell, C.J., said:[259] 'The great marvel of this session was that the Lord Chancellor himself actually proposed a Bill to abolish trial by battle'. Lord Eldon advanced the wrong reasons because he erroneously thought that an appeal could be brought 'from motives either of vengeance or avarice', and that the appellor could 'lawfully stay execution for a bribe'.[260]

Apparently an appeal of a somewhat similar nature to that in *Ashford* v *Thornton* was entered in 1819,[261] and a day or two later the Bill to abolish trial by battle was introduced, having its 1st, 2nd and 3rd readings in one night.[262]

> Whereas appeals of murder, treason, felony and other offences, and the manner of proceeding therein, have been found to be oppressive;

> and the trial by battle in any suit is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished: Be it therefore enacted [etc.] that [s. 1] from and after the passing of this Act, all appeals of treason, murder, felony or other offences shall cease, determine and become void; and that it shall not be lawful for any person or persons, at any time after the passing of this Act, to commence, take or sue appeals of treason [etc.] against any other person or persons whomsoever, but that all such appeals shall, from henceforth, be utterly abolished, any law, statute, or usage to the contrary in anywise notwithstanding.

One can wonder wistfully whether the formal abolition of battle at the beginning of the 19th century gives us hope for an end to wars as the 20th century runs out. Sir Gerald Fitzmaurice has commented[263] that war, and the use of force generally, is a means of settlement or enforcement of legal disputes 'analogous in the international field to the "blood feud" or "ordeal by battle".' He goes on to say that 'it has always been the case, and still is, that the international society tends to reflect national society at an earlier stage of development'. But in this sphere international behaviour lags a long way behind, for trial by battle was obsolete in this country 600 years ago: its statutory abolition followed long after its effective demise. The international picture is the other way round, with first the League of Nations and then the United Nations trying ineffectually under their charters to ban the use of force. The analogy is rather far-fetched and unpromising.

NOTES

1. See above, pp. 111ff.
2. Brac., 1.III, ii, c.3, 1. Fleta, i, c.21.
3. Welsh laws, 1.14, c.14, s.l.
4. *Ibid.*, 1.14, c.13, s.4.
5. Brac., 1.III, ii, c.3, 1. Fleta, i, c.21.
6. P.R.S. 9, 60.
7. Fleta, i, c.21.
8. R.S. 23, ii, 200; R.S. 51, i, 151; R.S. 90, ii, 372.
9. P. & M., ii, 506n.
10. C.S. 13, 51; R.S. 68, i, 310.
11. *Cf., Cokerel's* case, [1349] Pat. Rolls 270.
12. R.S. 51, iii, 242.
13. *Ibid.*, iv, 142.
14. *Rot. Cur. Reg.*, ii, 30; Bain's *Cal.*, i, pl.280.
15. *Hoddom* v *Troite* (1200), *Cur. Reg.* Rolls, i, 245. (1959) 3 A.J.L.H. 252.
16. [1293] Pat. Rolls 38. See (1953) 103 L.J. 343.
17. *Rot. Parl.*, i, 127.
18. R.S. 36, iii, 95.
19. *Cur. Reg.* Rolls, xi, 485; Brac. *N.B.*, pl.903.
20. Brac., 1.III, ii, c.21, 10, as well as *N.B.*

21. *Cur. Reg.* Rolls refer to Peter of Cantilupe, R.S. to Roger, and Bracton repeats the appellor's Christian name of Hugh.
22. (1225) *Cur. Reg.* Rolls, xii, 275. Hugh of Hodeng, or Hengham, must be the same as Hugh of Godingham, but the tenant was Simon of Cantilupe.
23. Brac., 1.III, ii, c.18, 5.
24. Fleta, i, c.31.
25. *Ibid.*
26. c.54.
27. Stat. of Gloucester 1278, c.9 (6 E.I.).
28. 3 H.VIII, c.1.
29. Hale, *P.C.*, ii, 149*. *Reade* v *Rochforth* (1554), Dyer 120a, at p. 121a.
30. *E.g., Maynard* v *Furno* (1224), *Cur. Reg.* Rolls, xi, 381.
31. *E.g., Adam* v *John* (1342), R.S. 31, 20.
32. *E.g., Kemyell* v *Wucherchet* (1201), S.S. 1, pl.19; S.S. 68, pl.619.
33. *E.g., William* v *Hose* (1203), S.S. 1, pl.80; S.S. 83, 87.
34. *Leges Barbarorum,* v, 209.
35. *Gernet* v *Gernet* (c.1217), Brac. N.B., pl.1336.
36. 1.III, ii, c.23, 2.
37. *Inniscaven* v *Domeliock* (1201), S.S. 1, pl.4; S.S. 68, pl.288.
38. S.S. 1, pl.105; *Abbrev. Plac.*, 84.
39. Brac., 1.III, ii, c.25, 1.
40. *Ibid.*, c.28, 2.
41. Laws of William the Conqueror, III, 12.
42. R.S. 31, 316.
43. *Cf., Vilenos* v *Walsh* (1384), R.S. 28, ii, 118; R.S. 41, ix, 53; R.S. 64, 361.
44. P. & M., ii, 490.
45. See Stat. of Westminster I, c.13, 1275.
46. 6 Ric. II, stat.1, c.6, 1382.
47. *E.g., Rusdike* v *Dumbleton* (1210), *Cur. Reg.* Rolls, vi, 67; S.S. 1, pl.126. *Roger* v *Croc* (1221), S.S. 59, pl.978.
48. Plucknett, *Concise Hist. of the Common Law* (4th ed.: 1948), 448.
49. *Sandford* v *Rupe* (1225), *Cur. Reg.* Rolls, xii, 148; Brac. *N.B.*, pl.1664.
50. (1319) S.S. 70, 92. Plucknett, *op. cit.*, 426.
51. *Drax* v *Roger,* [1250] Lib. Rolls 287.
52. (1319) S.S. 70, 92.
53. *Geoffrey* v *Barate* (1198), S.S. 68, pl.19.
54. *Lidinton* v *Lechelad,* [1242] Lib. Rolls 164. See also (1168) P.R.S. 12, 43; Madox, i, 429(p): 'Walter, the approver of forgers'. Osbert was similarly described a year later: (1169) P.R.S. 13, 170.
55. (1171) P.R.S. 16, 40. (1172) P.R.S. 18, 145. (1173) P.R.S. 19, 33.
56. *Croc* v *Stodlega* (1168), P.R.S. 12, 160; 13, 19.
57. *Britton* v *Ralph* (1203), *Cur. Reg.* Rolls, ii, 245.
58. Laws of William the Conqueror, III, 12.
59. Brac., 1.III, ii, c.27, 1.
60. Fleta, i, c.31.
61. Bl. *Comm.*, iv, 347.
62. H.L. *Jo.*, 14, 418 (1689).
63. *Baskerville* v *Roger* (c.1201), S.S. 1, pl.85. *Mirror of Justices,* c.3, 23; S.S. 7, 111.
64. *Baskerville* v *Roger, ibid. Rusdike* v *Dumbleton* (1210), *Cur. Reg.* Rolls, vi, 67; S.S. 1, pl. 126.
65. Brac., 1.III, ii, c.20, 5. *Cf., Davies* v *Catour* (1447), Grafton's *Chron.*, 628, in the Court of Chivalry.
66. Welsh laws, l.14, c.14, s.1.
67. (1167) P.R.S. 11, 143.
68. Beaumanoir, c.64, 2. See the illustration in his Berlin MS: Hamilton 193, fo.194ra.
69. *Prene* v *Pulet* (1285), O.H.S. 18, 221. *Mirror of Justices,* c.3, 23; S.S. 7, 111.
70. [1290] Pat. Rolls 402. See further O.H.S. (N.S.) 9, 79.
71. c.3, 23; S.S. 7, 109 & 111.

72. *Anon.* (1226), Brac., 1.III, ii, c.21, 11 & 12. Fleta, i, c.31 & 33. Britton, c.22, 6. *Cf.,* Beaumanoir, c.63, 1.
73. Gl., 1.xiv, cc. 1 & 3. *Inniscaven* v *Domeliock* (1201), S.S. 1, pl.4; S.S. 68, pl.288.
74. Laws of William the Conqueror, III, 12.
75. Brac., 1.III, ii, c.21, 11. See also Burgher laws, c.22.
76. Gl., 1.xiv, c.1. Brac., 1.III, ii, c.24, 2.
77. i, c.38.
78. 1.III, ii, c.24, 4.
79. (1456) C.S. (N.S.) 17, 202.
80. Brac., 1.III, ii, c.24, 3.
81. *Ibid.,* 4.
82. *Keinel* v *London* (1199), *Rot. Cur. Reg.,* ii, 172; S.S. 67, 309. *Launcells* v *Moreton* (c.1201), S.S. 1, pl.84.
83. *Upton* v *Red* (1227), *Cur. Reg.* Rolls, xiii, 54; Brac. *N.B.,* pl.259.
84. Britton, c.22, 6, gives 'over 70', but LXX must have been a mistake for LX: Kelham's ed. (1762), 136n. Beaumanoir gives 15 as the minimum age: c.63, 4.
85. *B.* v *Scrope* (1317), S.S. 61, 263.
86. Brac., 1.III, ii, c.19, 7.
87. *Baskerville* v *Roger* (c.1201), S.S. 1, pl.85.
88. Welsh laws, VIII, xi, 34.
89. *Ibid.*
90. *Leg. Wall.,* 870.
91. Welsh laws, 1.14, c.13, s.4.
92. *Ibid.,* I.14, c.14, s.1.
93. R.S. 44, i, 395; R.S. 68, i, 410.
94. Glasgow *Chart.,* 94.
95. *Waville* v *Beckering* (1220), *Cur. Reg.* Rolls, viii, 381; S.S. 1, pl.197.
96. *Mawer* v *Cook,* [1368] Pat. Rolls 167.
97. Hunter, *Pipe Rolls,* i, 4; Madox, i, 372(*r*).
98. P.R.S. (N.S.) 18, 9.
99. *Taylor* v *Conway* (1402) S.S. 88, 132.
100. 9 Edw. II, stat. 1, c.16 (1315).
101. *Anon.* (1331), Y.B. 4 E.III, *lib. ass.,* pl.1.
102. *Ashford* v *Thornton* (1818), 1 B. & Ald. 405, at p.428, by Lord Ellenborough, C.J.
103. *Burgh's* case (1225), Brac., 1.III, ii, c.18, 4.
104. c.12.
105. (1319) S.S. 70, 92. *Aliter: Calethorp* v *William* (1212), *Cur. Reg.* Rolls, vi, 214.
106. Assize of Clarendon, c.13. *Cf.,* Montesquieu, *De l'esprit des lois,* l.28, c.25.
107. *Malherbe* v *Witham* (1203), *Cur. Reg.* Rolls, ii, 195; S.S. 1, pl.89. *Waville* v *Beckering* (1220), *Cur. Reg.* Rolls, viii, 381; S.S. 1, pl.197: 'Thomas' pledge, the Fleet gaol.'
108. *Cur. Reg.* Rolls, viii, 270; S.S. 1, pl.190.
109. *Egham* v *Dymchurch* (1221), P.C. Glouc., 17.
110. *Goldsmith's* case (1228), *Cur. Reg.* Rolls, xiii, 170. *Cf.,* Fleta's list (cited above) of the grounds upon which an appeal of treason could be resisted.
111. He cites Robert III, c.3, but I cannot trace this in Scots Acts: *Superstition & Force* (4th ed.: 1892), 239.
112. Again *aliter: Calethorp* v *William* (1212), *Cur. Reg.* Rolls, vi, 214.
113. R.S. 55, i, 305.
114. Plucknett, *Concise History of the Common Law* (5th ed.: 1956), 120. *E.g., Butcher* v *Essart* (1198), Madox, i, 433(*c*). *Brienon* v *Torell* (1202), S.S. 1, pl.87.
115. Maitland, S.S. 1, 49n.
116. *Peche* v *Harang* (c.1204), S.S. 3, pl.181.
117. *Beston* v *Gramaticus* (1201), *Cur. Reg.* Rolls, i, 379. The above cases indicate that the exception was not limited to appeals of homicide, as suggested in P & M, ii, 587 & 589.
118. P. & M., ii, 619n.
119. Camb. Univ. Lib., MM, i, 27, fo.124.
120. II, 1 & 3.
121. II, 2; III, 12.

122. II, 3.
123. *Ibid.*
124. II, 2. Surely the reference to *legalem defensorem* is to counsel rather than a champion: we shall see that champions were not normally allowed in appeals, but compare n.74 above.
125. *Op. cit.*, 115.
126. III, 12.
127. II, 1.
128. Neilson, *Trial by Combat* (1890), 126. See Scots Acts, i, 83*.
129. *Ibid.*, 84.
130. R.S. 44, 92.
131. Glasgow *Chart.*, 94.
132. R.S. 36, i, 256.
133. *Grant* v *Strother* (1380), *Rym. Fœd.* (R.), iv, 101; C.S.(3), 57, 386.
134. *Baronage of Scotland*, 342.
135. *Strother* v *Inglis* (1395), Bower, xv, c.3. See also *Beverley* v *Strathern* (1395), *Rym. Fœd.*(H.), iii, IV, 110.
136. *Baronage of Scotland*, 198.
137. *Chattowe* v *Badby* (1381), *Rym. Fœd.*(R.), iv, 134.
138. *Rot. Scot.*, ii, 39b.
139. Bain's *Cal.*, iv, No. 309.
140. *Hall* v *Dode* (c.1398), *Rym. Fœd.*(H.), iii, IV, 167.
141. [1398] Pat. Rolls 507.
142. *Rot. Scot.*, ii, 50b.
143. (1381) *Rym. Fœd.*(R.), iv, 134.
144. (1959) 3 A.J.L.H. 258.
145. Fleta, i, c.31.
146. S.S. 1, pl.84.
147. P. & M., ii, 605n; S.S. 1, 42n.
148. S.S. 1, pl.19; S.S. 68, pl.619.
149. S.S. 1, pl.86.
150. *Ibid.*, pl.87.
151. *Cur. Reg.* Rolls, ii, 181.
152. The translation in *Kemyell* v *Wucherchet* (1201), S.S. 1, pl.19, wrongly refers to the body of the alternate, as does Professor Plucknett when discussing *Hilton* v *Butler: Concise History of the Common Law* (4th ed.: 1948), 447.
153. S.S. 68, pl.384.
154. *Cur. Reg.* Rolls, vi, 409. See also *Brienon* v *Torell* (1202), S.S. 1, pl.187.
155. In the 3rd ed. of his *Superstition & Force* (1878), 171, he refers to a statute of David II, c.28, whilst in the 4th ed. (1892), 193, he refers to a statute of Alexander II, c.1250, but I can trace no such reference in the Scots Acts.
156. R.S. 36, i, 256.
157. c.68.
158. Beaumanoir, c.61, 14.
159. R.S.(Scot.) 3, i, 362.
160. *Cur. Reg.* Rolls, viii, 271 & 277; S.S. 1, pl.192. (1959) 3 A.J.L.H. 258.
161. (1225) *Cur. Reg.* Rolls, xii, 198 & 336; [1228] Close Rolls 41.
162. *Lancells* v *Stoddon* (1200), *Cur. Reg.* Rolls, i, 238 & 278; S.S. 1, pl.83.
163. *Scroty* v *Muncelyn* (1240), *Cur. Reg.* Rolls, xvi, 239.
164. *Goose* v *Bolare* (c.1275), R.S.(Scot.) 3, i, 362. *Cf.*, (1284) Cal. Inq. Misc., i, 384.
165. *Geoffrey* v *Barate* (1198), S.S. 68, pl.19: accusation of defrauding the king.
166. (1221) S.S. 1, pl.172; S.S. 59, pl.1322.
167. S.S. 1, 112n.
168. (1221) *Cur. Reg.* Rolls, x, 229.
169. *Southernden* v *Hackendown* (c.1241), S.S. 60, 66.
170. (1235) Brac. *N.B.*, pl.1159. See Maitland's note: *ibid.*, iii, 174n.
171. Britton, c.24, 12. *Cf.*, *Malherbe* v *Witham* (1203), *Cur. Reg.* Rolls, ii, 195; S.S. 1, pl.89.
172. Brac., 1.III, ii, c.19, 8. Beaumanoir, c.63, 1.
173. Brac., 1.III, ii, c.19, 9. *Cf.*, (1959) 3 A.J.L.H. 249 for civil actions.

174. Brac., 1.III, ii, c.19, 10, & c.21, 11.
175. *Waville* v *Roger* (1220), *Cur. Reg.* Rolls, viii, 381; S.S. 1, pl.197. Bail was later granted: *Rot. Claus.*, i, 410.
176. *Inniscaven* v *Domeliock* (1201), S.S. 1, pl.4; S.S. 68, pl.288. *Mawer* v *Cook*, [1368] Pat. Rolls 167.
177. Brac., 1.III, ii, c.19, 11; c.21, 5 & 8.
178. *Ibid.*, c.19, 12.
179. *Ibid.*, 13.
180. *Lide* v *Darnel* (1224), *Cur. Reg.* Rolls, xi, 441.
181. *Adam* v *John* (1342), R.S. 31, 20.
182. Co. *Inst.*, ii, 247.
183. 1.2, c.7. I hope to examine elsewhere the financial and other assistance that was given to approvers by the crown.
184. Flower, S.S. 62, 113. *Cf.* (1249) R.S. 57, v, 60.
185. 5 H.IV, c.2 (1403).
186. [1222] Pat. Rolls 343.
187. *Ibid.*, 347.
188. *E.g.*, [1232] Lib. Rolls 186 (Lincoln). [1238] Lib. Rolls 327 (Devon).
189. *Plac. de quo warr.*, 617: this has *proditores* (traitors) rather than *probatores*, but in the context it is clearly wrong. See [1344] Pat. Rolls 251.
190. *Whitehorn* v *Fisher* (1456), C.S. (N.S.) 17, 199, at p.200.
191. 5 Edw. II, c.34 (1311).
192. [1368] Pat. Rolls 166.
193. *Wokkyng* v *Chippenhale*, [1373] Pat. Rolls 297.
194. 1.III, ii, c.33, 2.
195. *Chelry's* case, [1244] Lib. Rolls 233.
196. 5 Edw. II, c.34 (1311). *Cat. Anc. Deeds*, vi, No. C6095.
197. *Mawer* v *Cook*, [1368] Pat. Rolls 167.
198. Brac., 1.III, ii, c.34, 1.
199. *Ibid.*, 2.
200. *E.g.*, *Smallwood* v *Adam* (1220), *Cur. Reg.* Rolls, viii, 270; S.S. 1, pl.190. *Richard* v *Buffet*, [1240] Lib. Rolls 470; [1240] Close Rolls 193.
201. *John* v *Comber*, [1243] Close Rolls 117.
202. Brac. *N.B.*, III, 425n. Brac., 1.III, ii, c.34, refers to Robert the son of John's case at York in Hil., 5 H.III; the place and date tally (except that it was the next term, Easter), but on the rolls the approver is named as Robert the son of Ives—doubtless his father was John Ives.
203. *Cur. Reg.* Rolls, x, 67; Brac. *N.B.*, pl.1517.
204. (1176) P.R.S. 25, 198. [1254] Close Rolls 306.
205. *Dialogus de Scaccario*, 1.2, c.7. Brac., 1.III, ii, c.34, 4. [1252] Close Rolls 127.
206. *Chetmede* v *Thorpe*, [1361] Pat. Rolls 70.
207. *Whitehorn* v *Fisher* (1456), C.S. (N.S.) 17, 200.
208. (1178) P.R.S. 27, 111; 28, 107. Odo, the approver, had been active in Hampshire two years earlier: P.R.S. 25, 198.
209. 5 H.IV, c.2.
210. [1294] Pat. Rolls 61.
211. Pike, *Hist. of Crime in Eng.*, i, 286.
212. S.S. 1, xxix.
213. *Cur. Reg.* Rolls, ix, 199; Brac. *N.B.*, pl.1472.
214. This was the standard phrase in the rolls at the time: *e.g.* (1220) *Cur. Reg.* Rolls, ix, 155, 199, 255 & 285.
215. *Duffield* v *Smith* (1219), S.S. 56, pl.823. *Dunwich's* case (1220), *Cur. Reg.* Rolls, viii, 397.
216. *Sprouton* v *Maukael*, [1261] Close Rolls 359.
217. *Cur. Reg.* Rolls, xi, 94.
218. *Cf.*, *Herchiecesham's* case (1226), Brac. *N.B.*, pl.1431.
219. *Page* v *Godman* (1222), *ibid.*, pl.135.
220. *Wechin* v *Eton* (1220), *Cur. Reg.* Rolls, ix, 125; Brac. *N.B.*, pl.1431.

221. Brac. N.B., pl.1692.
222. [1349] Pat. Rolls 270. *Cf., Montford* v *Essex* (1163), C.S. 13, 51.
223. *Taylor* v *Conway* (1402), S.S. 88, 132; Rot. Parl., iii, 511a.
224. (c.1300) S.S. 18, 33. For borough exemptions from trial by battle see p. 118. *above,* re Privileged Places.
225. (1936) *Speculum,* xi, 246.
226. Further details are given in Mr. F. C. Hamil's well-researched article on *The King's Approvers* in (1936) *Speculum,* xi, 238, at pp.249–52.
227. 5 Edw. II, c.34. See also 1 Edw. III, stat. 1, c.7 (1327) & 14 Edw. III, stat. 1, c.10 (1340).
228. *Dialogus de Scaccario,* l.2, c.7: '. . . he charges *the other* or others . . .'
229. *E.g., Robert's* case (1221), S.S. 1, pl.140; S.S. 53, pl.1177. *Champeneis* v *Pigesfot* (1223), *Cur. Reg.* Rolls, xi, 118.
230. *Siward's* case, [1237] Close Rolls 472. *Dunwich's* case, *ibid.,* 474.
231. *Smallwood* v *Adam* (1220), *Cur. Reg.* Rolls, viii, 134, 143, 269, 270, 274, 275 & 279; S.S. 1, pl.190.
232. *Mawer* v *Cook,* [1367] Pat. Rolls 446.
233. [1368] Pat. Rolls 167.
234. *Wokkyng* v *Chippenhale,* [1372] Pat. Rolls 241; [1373] Pat. Rolls 297.
235. [1348] Pat. Rolls 237.
236. [1365] Pat. Rolls 149.
237. [1294] Pat. Rolls 61.
238. Madox, i, 376(*u*).
239. *Denewent* v *Kantelowe* (c.1300), R.S. 31, xxxix; S.S. 80, B.14. *B.* v *Prior of Leus* (c.1300), R.S. 31, xl.
240. C.S. (N.S.) 17, 199.
241. Neilson, *op. cit.,* 203, gives this accolade to *Vaughan* v *Parker* (1492), Stow's *Annales,* 474, but I suspect that this was more in the nature of a private duel than a judicial combat.
242. *Reade* v *Rocheforth* (1554), Dyer 120a. *Scavage* v *Freeman* (1588), Cro. Eliz. 69.
243. Hearne's *Coll.,* ii, 181.
244. *Ibid.,* 187.
245. *De l'esprit des lois,* l.28, c.23.
246. Hargrave, *St. Tr.,* xi, 278.
247. (1771) Burrows, v, 2798.
248. Cobbett's *Parliamentary History,* xvii, 1291.
249. See N. & Q. (2nd ser.), ii, 241.
250. 1 B. & Ald. 405.
251. Except where otherwise indicated, my references are to this book on the case by Cooper (1818), rather than to the normal law report in 1 B. & Ald. 405, although doubts have been expressed about the accuracy of Cooper's report: (1861) N. & Q. (2nd ser.), xi, 432.
252. (1856) *ibid.,* ii, 241. (1885) N. & Q. (6th ser.), xi, 252 & 463.
253. (1867) N. & Q. (3rd ser.), xi, 407.
254. Cooper, 72.
255. *Ibid.,* 105.
256. *Ibid.,* 139, by Lord Ellenborough, C.J. Lord Simon thought that the decision should have gone the other way on the ground that a disused rule of law should not be revived 'when it would be grossly anomalous and anachronistic'.—*McKendrick* v *Sinclair,* 1972 S.L.T. 110, at p.116 (H.L.). He explains *Ashford* v *Thornton* (at p.117) on the basis that it was tried at the height of counter-revolution and romantic revival, and decided by Lord Ellenborough who was 'probably the most conservative judge ever to sit on the English bench'. Lord Simon's reasoning here was criticised in (1973) 89 L.Q.R. 30.
257. (1861) N. & Q. (2nd ser.), xi, 432. Rather like the spate of early 17th century tracts on battle in Hearne's *Collection,* N. & Q. gave a lot of wistful attention to the subject in the second half of the 19th century: 2nd ser.: ii, 241 (1856); xi, 432 (1861). 3rd ser.: xi, 407 (1867). 6th ser.: ii, 287 (1880); xi, 144, 252 & 463 (1885); xii, 52 (1885). 7th ser.: iv, 461 (1887).

258. Kendall's *Argument* (2nd ed.: 1818), viii.
259. *Lives of the Lord Chancellors* (3rd ed.: 1850), vii, 330. He had been present in court when Thornton threw down the gauntlet.
260. *Ibid.*, 331.
261. (1885) N. & Q. (6th ser.), xi, 463.
262. 59 Geo. III, c.46 (1819).
263. (1956) 19 M.L.R. 3. *Cf.*, Lord Devlin in (1976) 39 M.L.R. 3, precisely 20 years and 20 volumes later.