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FIRST CATCH YOUR TOAD : MEDIEVAL ATTITUDES TO ORDEAL AND BATTLE

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The toad of the title appears in the diary of the Reverend Francis Kilvert in an entry dated February 1st 1871. Kilvert records that Mrs. Jones, the jockey's wife, had left some washing on a hedge to dry. She returned the next morning to discover the theft of two pairs of drawers and a "shimmy". "She and her husband", the diarist continues "consulted the ordeal of the key and Bible (turning the key in the Bible). The key said Bella Whitney. Then Jones the jockey went to the brickyard and got some clay which he made into a ball. Inside the ball he put a live toad. The clay ball was either boiled or put into the fire and during the process of boiling or baking the toad was expected to scratch the name of the thief upon a piece of paper put into the clay ball along with him . . . It is almost incredible".[1] Four years before this at Southampton a sailor had been subjected to the key and Bible test by his shipmates after he had been accused of theft. The ordeal suggested his guilt but the matter having been brought to court on no other evidence the prisoner was discharged.[2] These instances show the survival of an ancient belief in the possibility of determination of criminal responsibility by an appeal to the supernatural. It was a belief which had, centuries earlier, formed the basis of English criminal procedure.

The unilateral ordeal might have its adherents in country villages, it might be supported by nautical lore, but it formed no part of the legal system of the nineteenth century. This system did however concede that actions might still be decided by submission to divine providence in a bilateral ordeal and the recognition of this concession caused no little embarrassment. In 1817 Mary Ashford, a spinster, had been raped and thrown into a pond in the parish of Sutton Coldfield. She had died. Her brother, William Ashford, disturbed by the acquittal of one Abraham Thornton on an indictment for the crime, did what many a medieval litigant had done before him and undertook a private prosecution, an appeal of murder. Thornton did something eminently medieval himself ; he elected to be tried by battle.[3]

Mention of ordeal and battle only last century seems to us absurd and we look back on an age when legal disputes were settled regularly by recourse to the heated iron and armed combat as barbaric. It is hoped that this essay may shed a little light, light reflected from a continuing investigation of contemporary texts and case law, upon the way in which lawyers, litigants and academics of the middle ages regarded these methods of trial. It will be seen that even at a time when they occupied a central place in the administration of justice, ordeal and battle were viewed with considerable distrust and occasionally with open cynicism.

The unilateral ordeal, 'iudicium Dei' or 'vulgaris purgatio', was a pre-Christian institution but one which had been adopted and sanctioned by the Roman church. Its varieties were legion but in England four main types were employed : hot iron, which seems to have been used by men of

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rank and by women,[4] hot water, cold water, the most common test in criminal cases, and the morsel (the old Anglo-Saxon ' corsnaed ') which seems to have been restricted in its application to the clergy.[5]

In Saxon times and for some time after the Conquest ordeals were used to test the truth in a variety of causes, civil as well as criminal. Emma, the mother of Edward the Confessor, had walked over hot iron ploughhares to disprove an allegation of intimacy with Alwyn Bishop of Winchester, while Curthose, the Conqueror's son, is reputed to have undergone the ordeal to prove his paternity. The author of the Leges Henrici Primi, which probably dates from between 1114 and 1118, gives the ordeal in a number of instances apart from simple accusations of crime.[6] The nationality of a man who had been killed, a matter of course of considerable importance in that it determined whether the special ' murder fine ' was payable, might be proved in default of other evidence by the ordeal of iron.[7] If a person gives his oath that he is related to a dead man but is not believed then here too the ordeal might be employed.[8] The intervention of the Deity might be invoked in criminal cases not only to establish the veracity of the accused's denial of an act but also the issue of justification of that act if admitted. In this respect ordeal might be used to establish a plea of self-defence, although doubtless the accused would prefer to employ the alternative means of proving this defence which the author of the Leges allows him, namely the production of witnesses.[9]

Land disputes, we are told by the author of the Leges, may be determined by battle ' vel aliam legem '. Certainly in the Domesday survey we come across cases of ordeal being offered by parties to land disputes, either to be undertaken in person or by proxy.[10] One of these seems to show a lack of confidence in the precise effect which the Conquest had had on the availability of methods of proof. In a dispute over certain lands William de Chernet offers the evidence of the best and most respectable men of hundred and county to support him. Picot, his opponent, brings the evidence of villeins and "low persons" who are willing to defend their story by oath or ordeal. The entry continues "Sed testes Willelmi nolunt accipere legem nisi regis Edwardi usque dum diffiniatur per regem".[11] Domesday further shows the ordeal being used frequently to challenge the testimony of the hundred[12] and another case from William I's reign shows representatives of the county court defending themselves by iron on an allegation of false judgement.[13]

Enough has been said to illustrate the variety of different matters which might be determined by ordeal both before and shortly after the Norman invasion, yet within a century royal justice is employing the ordeal only as a test of guilt in criminal cases. FitzNigel's "Dialogus de Scaccario" written around 1178 dicusses the ordeal only in terms of criminal law as does Glanvill a decade later.[14] A conspicuous lack of evidence for use of the ordeal to determine private rights or relations from around the middle of the twelfth century clearly shows a change in policy with regard to the judgement of God. Later we will see that the manner and result of its use in criminal trials show a considerable lack of faith.

In criminal trials the application of the ordeal might vary even in Anglo-Saxon times according to the nature of the offence or the character of the accused. The "triple ordeal", under which the accused carries three times the normal weight of iron or is obliged to immerse his arm in the hot water as far as the elbow rather than the wrist, appears several times in our surviving Saxon laws.[15] In its use for the most serious crimes the three-fold

ordeal would seem to partake of the nature of punishment as well as of proof or, on the other hand, it might be suggested that a conviction was regarded as so important in such cases that the odds might justifiably be loaded against the accused. The stricter test is laid down by Aethelstan for plotting against a lord, church breach, killing by witchcraft or in secret, and arson.[16] Both Aethelred[17] and Cnut[18] give the triple ordeal in cases of plotting against the king. After the Conquest a person suspected of ' murdrum ', which had its roots in the old Saxon ' morth ' slaying, might be subjected to a similar proof.[19] In this offence all parties, save the accused, would have an interest in securing a conviction, for the suspect's failure at the ordeal would absolve the hundred from its liability to pay a fine.

Apart from the nature of the crime, however, the "iudicium triplex" might be applied in cases where the accused was particularly untrustworthy. Aethelred prescribes it for cases where the accused is ' of ill repute ' (' Tyhtbysig '),[20] while Cnut's provision, repeated by the author of ' Leges Henrici ' is similar, but is rather more expansive in indicating at least one circumstance in which the accused is considered untrustworthy, namely where he is unable to find compurgators willing to swear with him.[21] Proof of guilt might, the ritual insisted it did, belong to God, but at least, it would seem, He might be given a clue.

After the Conquest there would seem to have been a racial difference in attitude towards ordeal trial which appears to have been disfavoured by the Normans. As is well known William I provided that an Englishman might decline battle in favour of the ordeal, a factor which argues in favour of the novelty of the former. In addition to this, however, William's law does not give the option of ordeal to a Frenchman in circumstances where it was available to a native[22] and the evidence of the Leges Henrici supports this ethnic distinction.[23] Nevertheless there are certainly cases which show prominent Normans willing to submit to the ordeal. Bishop Remigius, accused of treason, was restored to royal favour after the iron had been carried on his behalf by a servant in the time of William I.[24] William's successor, Rufus, also seems to have been ambivalent in his attitude to the ordeal. Keen to use the hot iron in a dispute with Hildebert, Bishop of Le Mans,[25] he reacted bitterly when, on another occasion, fifty members of the old English nobility charged with taking the king's deer had come clean through a similar test. Rufus is reported to have exclaimed, ' stomachatus ', "What is this ? God a just judge ? Perish the man who after this believes so. For the future, by this and that I swear it, answer shall be made to my judgement not to God's which inclines to one side or another in answer to each man's prayer."[26]

Despite Rufus's intemperate outburst the ordeal remained at the heart of criminal procedure in England, although an exemption from its application might be granted as a privilege to a particular town. A contemporary biographer of Thomas Becket tells us that citizens of London, Oxford and some other towns need only submit to the judgement of iron or water if they so chose.[27] Outside these liberties, however, the ancient ritual continued and its position was confirmed in Henry II's overhaul of criminal procedure in the Assizes of Clarendon (1166) and Northampton (1176). The new system clearly demonstrates a lack of faith in the very mode of proof upon which it depended. Those who came clean through the water, which would appear to be the only ordeal dealt with in the legislation, were to find pledges for their future conduct while those sus-

pected of particularly serious crimes were given forty days to abjure the realm. It seems that this provision about abjuration might be evaded by payment ; in 1202 Hugh Shakespeare gives two marks to be allowed to stay in the kingdom[28] while in 1212 one Will Brun, having been cleared by the water and abjured, offers one mark to be allowed to return.[29] One who failed in the ordeal would not, however, be able to buy off his punishment. A noble and wealthy citizen of London having so failed on a charge of robbery in 1177 offered no less than five hundred marks to the king for his life. "Sed quia ipse per judicium aquae perierat, noluit [sc. rex] denarios illos accipere et praecepit ut judicium de eo fieret ; et suspensus est."[30]

It is the allegation of guilt, then, coupled with popular sentiment which Henry's assizes stress; the success or failure of the ordeal may only regulate the measure of punishment. Glanvill, whose brief treatment of criminal law takes into account, though it does not actually discuss, the Assizes of Clarendon and Northampton, indicates that a substantial prima facie case is necessary against the accused before he need go to the ordeal. In discussing treason, for example, he states that the truth must be investigated by "many and varied inquests and interrogations before the justices" and only then will the suspected man be put to the proof.[31] Occasionally the terse evidence of the rolls reveals the kind of prima facie case raised against an accused which will lead to purgation. In 1207 Marjorie Dobin carried the iron because she was suspected of killing her husband Hugo. We learn that there had often been fights between them because of her apparently indiscriminate adultery and also that all the chattels had been removed from the house, indicating her involvement.[32]

Ordeal depended both in its rationale and its ceremony upon the support of the church and it was the withdrawal of this support, as a result of c.18 of the Fourth Lateran Council of 1215, which resulted in the collapse of the institution as a method of proof in England. Yet before 1215 the Church had been unable to make up its mind on a procedure which on the one hand brought payments for blessing the ordeal pits and the awe of laymen but on the other savoured of a temptation of divine providence. As early as the ninth century Leo IV in a letter to the English bishops had condemned the use of ordeals[33] but other popes had been by no means as hostile.[34] The great compilers of Canon Law, Ivo of Chatres and Gratian, had been obliged to include in their collections canons both in favour of and aginst ordeals. During the twelfth century, however, a growing body of academic opinion hostile to the ordeal was making itself heard. Canonists such as Huguccio teaching at Bologna and theologians such as Peter the Chanter of Notre Dame adduced both religious and practical arguments which eventually earned the approval of Innocent III.

The Lateran Council decision removed the sanction of organised religion from an institution which, as we have already seen, had lost a degree of secular confidence and its regular use in England would seem to have been swiftly dropped. In 1219 Henry III was obliged to issue special instructions to his justices in eyre, "cum prohibitum sit per ecclesiam Romanam iudicium ignis et aquae."[35] A case of the same year sees the Abbot of Waltham making fine with the king for wrongfully obliging three men to abjure the realm after making them go to the water "contrary to the custom of the king."[36] In 1231 another cleric, the Abbot of St. Edmunds, was asked by the Bench to justify his use of a jury, a royal prerogative, in a case before him. The reply was that after the war (i.e. that of 1216) the jury had always been employed where before the court had

used fire and water.[37] Bigelow suggested more widespread post-1215 survival on the grounds of the reference to "lex manifesta" in the 1224 version of Magna Carta.[38] The adjective, which appears first in the 1216 Bodleian text (it is not in the Durham), recurs not only in 1224 but also in the 1251 and 1297 Charters, by which time it is clear that the proof had died out. It may be that the "lex manifesta" was from the start a reference to compurgation which is certainly what a Year Book writer of 1304 took it to mean.[39]

Of the unilateral ordeal we hear little more. The author of the Mirror of Justices, that curious hybrid of historical romance and legal criticism probably written around 1290, regrets its passing in cases where no other proof is available.[40] It re-emerged in England, particularly under James I who was convinced of the efficacy of the cold water test, in the sporadic waves of witch mania which for some years swept Europe and it was even requested in 1679 by a defendant in a case arising out of the Popish Plot.[41] These cases, and the illustrations of its survival in the popular consciousness as late as the nineteenth century given earlier, show that belief in the outcome of submission to miraculous proof was never entirely eroded. After the early years of the thirteenth century, however, it would never again occupy its former place at the heart of criminal procedure.

It remains to speak of the bilateral ordeal, trial by battle. This too was regarded as indicative of the judgement of God and its use was justified, the author of the Mirror tells us, by the precedent of *David* v. *Goliath*.[42] Certainly if God chose to intervene the results might be spectacular. Henry of Essex was defeated in 1163 in a duel with Robert de Montford, who had accused him of treason, when the angry spirit of St. Edmund appeared in the sky.[43] Henry's faith in God's judgement, he renounced the world after his defeat to become a monk, was not shared throughout the church. Trial by battle had been condemned alongside the iron and water tests by the 1215 Lateran Council, but survived the crisis. One reason for this seems to have been the less immediate nature of clerical involvement in the proof, the priest being concerned in the preliminaries too, but not in the actual execution of, the combat. It may also be that the relative novelty of the bilateral test in England and its natural appeal to a community with a strong military tradition were factors which weighed against the ecclesiastical cynicism of the beginning of the thirteenth century.

Battle was used principally to decide two types of case, the action on the writ of right and the appeal of felony. In Glanvill it also appears as a method of proof in defending the judgement of a court,[44] in actions of debt[45] (the availability here would seem to have been short lived, I know of no examples of its use in such cases) and for disputes over villein status,[46] warranty[47] and suretyship,[48] which latter cases seem to be examples of its use to challenge the testimony of a witness. Indeed this seems to have been the essence of trial by combat, it proved not the facts of the case but the truth of the oaths of the parties. Even in the criminal action it was necessary to claim not merely that the defendant did the deed but also that he perjured himself in his denial of it.

On the writ of right battle was waged not by the demandant himself but by a suitable witness.[49] In at least one instance this rule seems to have caused annoyance to a litigant. During a dispute over land in 1220 the Earl of Pembroke, William Marshall, offered no less than 1,000 marks to the king for the privilege of fighting in person against his old enemy, the

ubiquitous Fawkes de Breaute (who did not accept the invitation to risk his life).[50] The tenant might defend the action himself or by the body of a free man of his and the cases show that the tenant almost invariably declined personal participation. The defeated champion, a proven perjurer, was liable to a penalty of sixty shillings (the author the Mirror rather quaintly adds a halfpenny—the cost of a purse in which to carry off the money), and would in addition "lose his law".[51]

Battles on the writ of right in the thirteenth century were, however, rarely conducted between assured witnesses and dutiful retainers; the combatants were likely to be trained fighting men, hired champions. Obviously the use of such professionals demonstrates a lack of trust in the notion that it was the will of God not prowess in the field which decided the outcome of the encounter. As a matter of strict law the employment of a hired champion was not allowed, it would lead to the principal losing his suit and the champion "losing his law", that is being unable to appear as a witness in future.[52] In truth the objection to a hired champion was seldom taken and the same names appear frequently on the rolls fighting in various parts of the country and sometimes accompanied by a "magister" (possibly a trainer or what would now be termed an agent).[53] Even within the relatively small selection of cases where battle is waged on a writ of right contained within Bracton's Note Book the names of Richard de Newnham, Duncan Scot and William le Champenays recur.[54] William of Copeland appears in the rolls at the beginning of the century and features in eight cases as far apart as Yorkshire and Somerset over a period of seventeen years.[55] Ranalph Picot's career was almost a decade longer.[56] As well as being hired by individuals such men might also find themselves under a long term contract to an institution such as a religious house.[57] Again champions may have been employed, possibly under the cover of one who was in the county on the day on which the action was tried, in cases where the record of the court was disputed.[58] Perhaps it was fear of an encounter with such a man which led Marmeduc de Tweng to insist on personal combat with a member of the court of the Bishop of Durham in a case of 1204.[59] Eventually, at least in so far as the oath of the demandant's champion on the writ of right was concerned, the law caught up with the reality of events and recognised that those who fought might have no genuine connection with the substance of the dispute.[60]

In the thirteenth century it is clear that the number of civil duels fought was very small. Even where we have a record of duel actually being waged it is probable that the action would be compromised without a blow being struck. Fewer and fewer actions were even getting as far as the wager, they were being decided by jury. The Grand Assize had been introduced to avoid the "casus ambiguus" of battle and to preserve life and status as well as reducing the expense consequent upon the delays which, as we will see, contributed much to the unpopularity of the duel in criminal as well as civil trials.[61] Further ground had been taken over by the possessory assizes and the writs of entry. In introducing his law to the newly conquered lands in Wales Edward I could afford to introduce a new writ for land actions, the "breve commune" to which trial by battle was expressly stated not to apply.[62]

Since the introduction of the Grand Assize the tenant in the writ of right might always elect to be tried by jury. Obviously he would only opt for the duel if he had good grounds for thinking that he would fare better by that proof. Anyone in the position of the Abbot of Meaux who in 1251 had

hired seven champions, presumably to render his opponent unable to find a good professional, had reasonable cause for optimism.[63] On the other hand combat might be seen as the only choice for a litigant who thought he might be faced by a jury partial to his opponent. Considerations of this type seem to have been behind the decision of the Abbot of Bury St. Edmunds to defend his right to the manors of Semer and Groton by the body of Roger Clerk in 1287.[64]

Even after the thirteenth century we occasionally came across a civil duel being waged if not actually fought. The procedure is described minutely in *Tilliol* v. *Percy*, a case from 1422, a fact which demonstrates the lack of familiarity with trial by combat which prevailed by this time.[65] In 1571 the production of the champions Thorne and Nailer in the case of *Lowe* v. *Paramour* drew a crowd of 4,000 to Tothill Fields. The action was compromised before combat, and the multitude went home, though not without a great shout of "Vivat Regina".[66] To the amazement of the judges a duel was waged, though they never fought, in a land plea of 1638.[67] This promoted the presentation of a bill to the Long Parliament for the abolition of trial by battle but the bill was not implemented and the possibility of civil duel was apparently forgotten.

As the civil duel gave way to jury trial so, perhaps a little more reluctantly, did the criminal. Again alternatives to the old action grew up ; here the indictment procedure and the writ of trespass, which latter the author of Britton commends in cases of wounding in that it avoids the "doubtful outcome" of battle.[68] In addition to these external forces the availability of jury trial within the framework of the old procedure of appeal further limited the occasion for combat. By the time of Bracton the accused had the option of defending himself by his body against the appellor or placing himself on his country. Pressure would often be put on him to opt for jury trial. Our most vivid thirteenth century text, Placita Corone, shows judges skilled in tricking men to opt for jury trial even against their wills, for this would allow of a speedier disposition of cases on the list.[69] We also find the justices eager to discover some minor technical deficiency in the formula of the appeal which would cause it to abate, allowing the justices to hold an ex officio investigation into the crime, which procedure would result in trial by jury.[70] Recourse to such practices is regarded by the author of Fleta as necessary "since resort may not lightly be had to battle if it may otherwise be avoided."[71] The author of the Mirror, however, takes a different line, in keeping with his general conservatism. "It is an abuse", he says, "that justices drive a lawful man to put himself on his country when he offers to defend himself by his body."[72] The practice of abating appeals by a technicality is finally condemned by an ordinance of Edward II in 1311.[73] By then, as we shall see, few battles were being fought.

As we have seen in relation to unilateral ordeal so with the duel the exemption which a particular borough might have was regarded as a valued privilege. The exemption was a common one, battle being either entirely excluded or strictly limited in its application. In the case of the London franchise we are told that it exists to protect the weak and old against the strong and young.[74] Even outside the boroughs the law was concerned to prevent too uneven a contest ; God's miracles need only be minor. Infants, those over sixty years of age (Britton gives the maximum age as 70)[75] women and those who had been injured in such a way as to impair their ability to fight were not obliged to undertake combat, their

causes are to be determined by jury. Bracton gives another limitation to prevent battle being used to give absurd results. He tells us that if anyone is found in circumstances which give rise to a violent presumption of guilt, such as standing over a body with a dripping knife, no further proof is necessary. No one is to be allowed to displace such evidence by martial skill or otherwise.[76] The issue of "violentia praesumptio" was the very one argued almost six hundred years later in *Ashford* v. *Thornton*. There the appellor claimed that Thornton's bloodstained clothes and footprints in the dew formed such evidence as to override his wager of battle. The objection was not allowed by the court. Ashford withdrew his appeal and Abraham Thornton went off to a new life in America.[77]

Jury trial, we have said earlier, was an alternative to the duel for the appellee, but some cases were unsuitable for determination by a medieval jury, for if the act complained of had been done secretly they could not speak of their own knowledge. Even here lawyers were anxious to avoid the duel. Bracton recognises the difficulty when he discusses poisoning, but nevertheless allows jury trial in such a case for otherwise anyone might bring the appeal, even a hired champion, "quod non est sustinendum".[78] Fleta insists that duel must be joined in such a case except occasionally at the discretion of the justices when there is a disparity between a weak man and a strong one.[79] Goliath must have turned in his grave.

It is clear from Bracton's statement that there is no room for the hired champion in the criminal duel. The appellee had to fight in person[80] while the appellor had to show sufficient locus standi to maintain the prosecution. There are, however, cases on the rolls which show attempts by litigants to employ professional pugilists. In one instance from 1207 the appellor offers proof in a case of robbery by one whom he claims was present when it happened, but the supposed witness is challenged as being a hired man.[81] In another, from 1210, there is a suspicion that a champion had been placed in court there to appeal someone who had been attached to appear as a result of someone else's suit.[82] The most celebrated of such attempts, Hamo Moor's appeal of Philip King over a stolen horse, resulted in King's attempt to vouch to warranty a hired professional, Elias Piggun. Elias, his venality exposed, lost a foot, a fate Bracton might have regarded as rather too good for him.[83]

Champions are not allowed in criminal cases then, but many appeals are brought by "approvers" ("probatores")—convicted criminals who are granted their lives and allowed exile if they appeal and convict a given number of their former accomplices.[84] They were paid an allowance in prison and had their weapons provided, being occasionally referred to as the king's "child" or "son" in that they were held to fight for his peace.[85] The Dialogus explains that such men are necessary because: "The untold riches of the kingdom and the natural drunkenness of its inhabitants, with its invariable concomitant, lust, bring about a multiplicity of thefts, robberies as well as larcenies, besides manslaughter and other crimes, and the evildoers are so urged on by their women that there is nothing they will not venture under their influence."[86] One appealed by an approver might take a preliminary exception, triable by jury, that he was a law-abiding man, in frankpledge and having a lord to warrant him and accordingly he need not answer a confessed felon. If he was found suspect by the country then the duel would proceed ;[87] there was no great objection to the use of battle in cases where the combatants are, on the one hand a convicted criminal and, on the other, one suspected by the neigh-

bourhood. Even if the appellee defeated the approver, he would only be released under pledges, "propter suspicionem appelli' and if he could find no security he was to abjure the realm or lie in prison for ever.[88] As with the unilateral ordeal after Clarendon and Northampton it was the accusation rather than the judgement of God which is regarded as significant.

Occasional appeals by approvers are being decided by battle even in the fifteenth century,[89] but it is clear that duel in all types of criminal action had been almost entirely superceded by jury trial by the time of Edward I.[90] The sight of the combatants in their white leather armour, armed with shield and horned batons, a sight which had led to a case in 1200 being transferred "coram rege" so that the king himself might be a spectator,[91] had been all but forgotten. Battles were at times fought in cases of treason within the rather different atmosphere which prevailed in the Court of Chivalry before the Constable and Marshal, the last being waged in 1630.[92] Such occasional outbursts of atavistic procedure led to attempts being made to abolish battle by the introduction of Parliamentary bills in 1620 and 1623 and again in 1770 and 1774 but all were unsuccessful.[93] *Ashford* v. *Thornton* finally spelt the end of the judicial duel, although it might be pointed out that the case may not have surprised the court as much as we are led to believe—in 1815 in Ireland battle had been claimed in a similar case.[94] The abolition bill was passed in the Commons on its third reading by a majority of 64-2 and on June 22nd 1819 it became law, ending trial by battle in civil and criminal cases.[95] As far as I know the wisdom of the legislation has only once been challenged. In 1953 Harman J., confused in a passing off action concerning two boxers who both claimed the right to use the title "Welterweight Champion of Trinidad", regretted that he was unable to use the method of proof he regarded as most apposite.[96]

This article has attempted to assemble evidence as to the way in which the irrational methods of proof were regarded at a time when they played such an important role in English jurisprudence. The story is one of increasing scepticism against the background of conservatism and sense of tradition which characterizes lawyers of all ages. We must not judge too harshly the legal system of a time which saw the intervention of God as natural—God was no more remote nor more unlikely to exist than was the king. On the other hand it is not necessary to view the astutest medieval lawyers as unthinking slaves to superstition. If this has been shown then a purpose has been served.

FOOTNOTES

The following editions of the texts have been used and works are cited in these notes by the abbreviations given.

L.H.P. :	Leges Henrici Primi, Downer ed. (1972)
C.R.R. :	Curia Regis Rolls : (HMSO 1926—)
P.A.N. :	Placita Anglo Normannica : Bigelow ed. (1881)
B.N.B. :	Bracton's Note Book : Maitland ed. (1887)
Glanvill :	Tractatus de legibus et consuetudinibus regni Angliae qui Glanvilla vocatur, Hall ed. (1965)
Dialogus :	FitzNigel's Dialogus de Scaccario, Johnson ed. (1950)
Bracton :	De Legibus et Consuetudinibus Angliae : Thorne Revision (1968)
Britton :	Nichols ed. (1865)
Fleta :	Richardson and Sayles ed., vols. 72 & 89 S.S.
P.C. :	Placita Corone, Kaye ed., S.S. Supplementary Series Vol. 4
S.S. :	Selden Society
Liebermann :	Gesetze Der Angelsachsen : F. Liebermann, in 3 volumes (1903-16)
Mirror :	The Mirror of Justices, Whittaker ed., 7 S S.

[1]"Kilvert's Diary", Plomer ed. (1938), vol. 1 p. 300.

[2]The Times, 24th Jan. 1867. This ordeal generally involved suspending a bible from a key tied in at Psalm 1.18. In this case Ruth Ch. 1 was employed (possibly because of the preceding Judges 21.12 ?). The bible was supposed to turn or fall at mention of name of the guilty party. For another late use of ordeal, this time by water, see The Times, 19th July 1825

[3]*Ashford* v *Thornton* (1818) 1 B & Ald 405.

[4]Glanvill XIV, 1, restricts it to free men, villeins are to go to the water. See also Poole : "Obligations of Society in the XII and XIII Centuries" p. 79f. For an example of difference in application according to sex see the entries at V C.R.R. 64 ; Marjorie Dobin is to clear herself of a charge of homicide by carrying iron while her alleged accomplice and a man suspected of another homicide go to the water.

[5]For details see Lea : "Superstition and Force" Ch. III; Plucknett "Concise History of the Common Law" p.114 ; Liebermann 1. 401-32.

[6]On which see L.H.P. 18, 1 ; 49, 6 ; 65, 3a.

[7]L.H.P. 75, 6 b.

[8]L.H.P. 92, 13.

[9]L.H.P. 80, 7 b ; 87, 6.

[10]2 Domesday 146 b, ibid. 110b—see P.A.N. p. 37 ff.

[11]1 Domesday 44 b, P.A.N. 38. I am indebted to Robert Ireland of University College London for his comments on this case.

[12]E.g. 2 Domesday 146 b., P.A.N. p. 41.

[13]P.A.N. 34.

[14]Dialogus II, vii. Glanvill, XIV.

[15]For an explanation of the procedure see the two short laws of Aethelstan printed in Attenborough : "Laws of the Earliest English Kings" 170.

[16]II Aeth. 4, 5, 6 (Liebermann, 1, 152, Attenborough 131), and see note [15] supra. III Eth 8 allows it for false coining (Liebermann,1, 230)

[17]V Eth 30, VI Eth 37 (Libermann,1, 244, 256)

[18]II Cn 57 (Liebermann,1, 348 ff.)

[19]L.H.P. 92, 9c.

[20]1 Eth 1 (Liebermann,1, 215 ff.)

[21]II Cn 30 (Liebermann,1, 330 ff.) L.H.P. 64, 9 ; 65, 3 ; 65, 3 b.

[22]1 William 3.2, cf. idem 2.3. (Liebermann,1, 484).

[23]L.H.P. 18, 1 and note the combined effect of L.H.P. 65, 1 f and 64, 3 a.

[24]P.A.N. 30. Also Curthose's case, supra.

[25]See Baldwin, "The Intellectual Preparation for the Canon of 1215 Against Ordeals" (1961) 36 Speculum, p. 618.

[26]"Quid est hoc ? Deus est iustus iudex ? Pereat qui deinceps hoc crediderit. Quare, per hoc et hoc, meo judicio amodo respondebitur, non Dei, quod pro voto cujusque hinc inde plicatur." Eadmer, "Historia Novorum in Anglia", Rolls Series, 102. Bosanquet Translation (London 1964) p. 106.

[27]Materials for the History of Becket Vol. IV, Rolls Series, 148. The author of the MS. is anonymous. And see Gross, "Modes of Trial in Medieval Boroughs" (1901-2) 15 Harvard L.R. 692-3.

[28]Poole, Obligations of Society, p.83.
[29]VI C.R.R. 256. On the usual procedure see, e.g., VII C.R.R. 241 and 248.
[30]P.A.N. 231.
[31]"per multas et varias inquisitiones et interrogationes". Glanvill XIV. 1. Treason, of course, had not been discussed in the two Assizes, but the requirement of strong evidence would seem to have been general, see Glanvill XIV. 2. on treasure trove and XIV. 3. on homicide.
[32]V C.R.R. 64, note [4] supra.
[33]Lea : Superstition and Force p. 355.
[34]The summary of opinion within the church is based on Baldwin, note 25 supra, which should be consulted for source references. For a review of the change in ecclesiastical philosophy in general at this period vide Southern, "Western Society and the Church in the Middle Ages" esp. pp. 24-44, 100-133.
[35]Patent Rolls 1216—25, p. 186.
[36]VIII C.R.R. 42.
[37]B.N.B. 592. For an interesting result of the clerical prohibition vide Campbell, Lives of the Lord Chancellors, 2nd ed., vol. 1 introduction p. 18.
[38]Bigelow : History of Procedure at Common Law p.324, 9 Henry III c.28, text as given in Statutes of the Realm ; sed quaere, Bracton uses the similar "lex apparens" for battle (F.148.)
[39]Y.B.B. 32 & 33 Edward I 516 (Rolls Series).
[40]Mirror V. 127.
[41]Whitebreads Case, 7 How St. Tri. 383, Stephen, I History of the Criminal Law 253. On witchcraft, of which space forbids fuller investigation, see Lea, op cit 286-294.
[42]Mirror III, xxiii. For an attempt to rationalize battle in one of its applications see Watkin : 1979, 10 Cambrian L.R. 43.
[43]Cronica Jocelini de Brakelonda. (Butler ed. 1949) 68-71.
[44]Glanvill VIII, 9.
[45]ibid. X, 12.
[46]ibid. V, 5.
[47]ibid. III,1 ; VI, 11 ; VII, 3 ; X, 14.
[48]ibid. X, 5.
[49]For reasons see Mirror III, xxiii.
[50]VIII C.R.R. 251, Neilson, "Trial by Combat" p. 41.
[51]L.H.P. 59. 15, Glanvill II, 3, Mirror III, xxiii.
[52]Glanvill II, 3.
[53]See generally, Russell : "Hired Champions" (1959) 3 American Journal of Legal History 242., I use the term agent in the theatrical sense.
[54]B.N.B. 185, 328. 400 (all three !) 1675.
[55]Russell op cit 245. Payment was normally in cash, but note a grant of land in II C.R.R. 185.
[56]Russell 251.
[57]ibid. 254.
[58]See Glanvill, VIII, 9. Despite Glanvill's distinction battle was used frequently in the thirteenth century to defend the record : for examples see VIII C.R.R. 388, 223.
[59]III C.R.R. 108. This is a splendid case. One can only sympathize with the scribe who finishes the entry on the roll with a borrowing from Horace : "Et ita quo teneam nodo mutantem Prothea vultus".
[60]Statute of Westminster I (1275) c. XLI.
[61]Glanvill II, 7.
[62]Statute of Wales (1284) cc. VI, VIII, on which see Smith : (1980) Welsh History Review.
[63]Russell, op cit. 254.
[64]Chronicle of Bury St. Edmunds. Gransden ed. (London 1964) p. 88, Galbraith "Death of a Champion" in Studies in Medieval History presented to F.M. Powicke 283.
[65]50 S.S. p. 95.
[66]3 Dyer, 73 E.R. 677. Neilson, op cit. p. 158, Lea p. 213.
[67]*Claxton* v *Lilburn.*, Neilson p. 326.
[68]Britton F. 49a.
[69]P.C. p. 23 (on indictment) and see p. 14, Kaye Introduction xxiv-xxviii.
[70]Bracton F. 142, P.C. Introduction ibid.
[71]Fleta, I, 32. "quia tamen de levitate non est ad duellum procedendum, si alias evitari poterit".
[72]Mirror, V, 19 "Abusion est qe justice chace loial home prendre sei a pais ou il se proffre sei defendre countre provour par soun cors."

[73]5 Edward II Ordinances c. XXXVI.

[74]Bateson, Borough Customs I, 18S.S. p. 34 and the numerous other examples given there.

[75]Britton, F. 40 cf. Bracton F. 142, Fleta I, xxxii.

[76]Bracton F. 137. It is true that jury trial as well as battle is excluded, although later law was to allow the former in such cases (see *Ashford* v *Thornton*) but I would suggest that it was principally the irrationality of battle which was being excluded, a jury could hardly do otherwise than convict on such evidence.

[77]Lea op cit. 215, note 2.

[78]Bracton F. 137, and note Thorne's belief that the passage allowing the election is an insertion, (vol. II, p. 387).

[79]Fleta I, xxxi. "Item nec per patriam se defendere debet quis in appello de veneno dato set tantum per corpus suum, eo quod inicium facti non fuit tam publicum quod sciri poterit a patria, nisi per discrecionem et aequitatem hoc fiat quandoque pro inconvenienti quod contingere possit inter debilem et potentem."

[80]But see P.A.N. 283—despite the wording of appeal this might possibly, I suppose, be a case of ordeal. Even so it would be remarkable.

[81]I.C.R.R. 437.

[82]VI C.R.R., 67 ; cf. VII C.R.R. 330.

[83]The case is from 1220. VIII C.R.R. 272 ; I.S.S. 192 ; Bracton F. 151 b.

[84]See generally Hamil : "The King's Approvers : A Chapter in the History of English Criminal Law", (1936) 11 Speculum, 238.

[85]Clanchy : "Highway Robbery and Trial by Battle" in Medieval Legal Records (P.R.O.) 26.

[86]Dialogus : II, vii. Johnson's translation of "propter innumeras regni huius divitias et item propter innatam indigenis crapulam, quam semper comes libido sequitur contingit in ipso frequentius furta fieri manifesta vel occulta, necnon et homicidia ac diversorum generum scelera, addentibus stimulos mechis ut nichil non audeant vel non attemptent qui suis se consiliis subiecerunt."

[87]Bracton F. 152.

[88]ibid. F. 153.

[89]See the examples in Neilson, op cit. part V, and Bellamy : "Crime and Public Order in the Later Middle Ages" 126-34.

[90]For figures see Clanchy, op cit. 29-30.

[91]I.C.R.R. 278.

[92]On these chivalric duels, Neilson, op cit. 160 ff.

[93]Neilson op cit. 327 ff.

[94]*Clancy's Case* (N & Q., 2S, ii 24) Neilson p. 330.

[95]59 Geo III c. 46.

[96]*Serville* v *Constance* [1954] 1 WLR 487 at 491.