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### A Most Peculiar View of Provocation: Gentlemen and the Judge, Directions in English Duelling Trials, 1785-1842

In the case of *R v Rice* 1803, Grose J. somewhat testily observed that although there were men who through ignorance or perversity refused to accept that to kill a man in a duel was murder, 'to every lawyer this is a proposition perfectly clear'.<sup>1</sup> In the course of this paper however, I shall have cause to observe that from the behaviour of certain judges in the courtrooms that proposition was anything but clear. On the face of it though, the legal authorities upon whom Grose relied were quite impeccable. For instance, it was said in *Mawgridge* that where two men had deliberately appointed a time to fight 'it is murder in him that kills the other'.<sup>2</sup> Judge Foster had been similarly explicit, 'Deliberate duelling, if death ensueth, is in the eye of the law murder... what the swordsmen falsely call honour... that will not excuse'.<sup>3</sup>

However, not all killings with sword or pistol were said to be murder. Self-defence aside, the homicide could be partially justified where the death had resulted from a sudden chance medley, or where it had been occasioned by serious provocative conduct upon the part of the deceased. But both of these defences required that the killing had been done in hot blood. According to Crompton

Two men fight suddenly without malice aforethought, and one breaks his sword, and goes into his house to fetch another sword, returns and, taking up the fight with his opponent again, kills him. This is murder if it appears that, as a result of the killer's intentional actions, his blood was able to cool before his return.<sup>4</sup>

Where the defendant claimed to have been provoked, hot blood alone did not suffice. In addition the provocation offered had to be such as might provoke a normal man, for instance *Lord Morley's Case*, 'if the provocation be slight and trivial, it is all one in law as if there be none'.<sup>5</sup> Or *Mawgridge*, 'no words of reproach or infamy are sufficient to provoke another to such a degree of anger as to strike or assault the provoking party with a sword'.<sup>6</sup> Furthermore, the obligation was upon the defendant to produce some evidence as might require the jury to consider the possibility that in legal terms, the defendant had been provoked. According to Foster, 'The fact of killing being first proved, all the circumstances of Accident, Necessity, or Infirmity are to be satisfactorily proved by the prisoner, for the laws presumeth the fact to have been founded in malice, until the contrary appeareth'.<sup>7</sup>

It should by now be apparent that since most duels were carefully arranged and were not carried through in hot blood, neither the defence of provocation nor the older defence of chance medley should have availed a duellist in court. Yet convictions of duellists for murder were extremely rare and furthermore the *Edinburgh Review* could declare in 1814 that, 'no instance is known of the law being executed against any person for being engaged in a duel, fought in what is called a fair manner'.<sup>8</sup>

The *Review* referred rightly to the reluctance of prosecutors to prosecute and the sympathy of juries for the defendants in the dock but I will pass over these here. What interests me at present is the accusation that judges in their directions connived either to acquit duellists or to reduce their offence to mere manslaughter.

'The fact that death was occasioned by the prisoner at the bar, will, I am afraid, not be a matter of much doubt or enquiry'.<sup>9</sup> So said Sergeant Adair when opening the case against Mr England in 1796. Mr Knopp prosecuting Captain MacNamara in 1803 declared that there was 'very little law in the case'.<sup>10</sup> In none of the cases to which I shall refer were the facts as to the commission of the offence disputed by the defendant nor was there any attempt made by the defence to challenge the law as I have previously stated it. Such interplay and contest as there was between prosecution and defence focussed upon character and upon the defence's contention that the fatal affair had been conducted according to the rules of honour. Such engaged the sympathy of the jury, but also the sympathy of those judges upon the bench who were themselves implicated in that honour culture. Faced by such a homicide such judges did not hesitate to present to the jury as germane to their verdicts evidence of character which should only have been considered later in mitigation of sentence.

Some judges however, and I stress some, went somewhat further and seemingly did violence to the orthodox understanding of the law in order to resist the implications of the facts of the case before them. Specifically, they misdirected juries as to two points in law. The first, to which I shall return, was that they suggested to the jury that in duelling cases murder could not be established unless they could find evidence of malice express rather

than malice implied and in the paradigmatic duel the rituals of act and expression were formulated precisely to deny such resentments. Secondly, they speculated that the homicide may have been committed under the influence of provocation. In order to do so however, they had to endow the passion with which the homicide had allegedly been committed with a novel redemptive quality. That is to say that they had to contend that if at the actual moment of commission of the offence the defendant was in hot blood, this negated the earlier coolly formed or coolly maintained, intent to perform that self same act.

An insult is given, a challenge is issued, which is in itself a misdemeanour, then the blood cools. Both parties however, continue in their determination to meet, some time hence. They come as arranged to the field, but some act allegedly rouses the parties to anger, and the fatal thrust or shot occurs in passion. Under the aforementioned redemptive interpretation, this passion supposedly causes the law to forget the evidence of intent to perform the unlawful act the passion negates the prior intent. Alternatively, the judge fosters the fiction that when the parties arrived on the field, armed and with seconds in response to a challenge they had not done so with the intent to commit a felony.

Even with the evidence of prior intent negated or suppressed, mere passion at the moment of killing did not in orthodoxy suffice to reduce the offence to mere manslaughter. However, in seeking to tease out evidence of provocative conduct judges faced the difficulty that the studied mannered exchanges immediately prior to the homicide rarely furnished satisfactory examples. They therefore had to ignore the authorities that argued that any provocative conduct had to be shown to be of a sufficiently serious nature before the homicide could be partially excused. Finally, some judges went so far as to abandon the

contention that the defence had the obligation to offer at least some evidence of the presence of provocation.

Consider the direction of Mr Justice Rooke in *England*.<sup>11</sup> At the beginning he cited LCJ Holt in *Mawgridge*, 'In a set duel there are mutual passes between the combatants, yet, if there be original malice between the parties, it is not the interchange of blows will make any alteration in the original intention'.<sup>12</sup> The original intention in the duel was surely formulated when one party accepted the unlawful challenge of the other a full day before the encounter. Yet Rooke did not believe so. Towards the end of his direction he observed that after one exchange of shots a passer-by had attempted to interfere and England had told him that he had been injured in his honour and cruelly treated. Rooke asked the jury

to consider whether these were the words of an angry injured man, who had received that morning any particular insult; or of a man who did what he did in consequence of what had passed the day before at Ascot races... If you think they are the words of an angry man, as relating to something that passed immediately before the duel, they are in his favour.

However, there was no evidence offered that any communication passed between England and Rowls between the acceptance of the challenge and the firing of shots. They did not even speak upon the field. Rooke's hypothesis depends upon the possible existence of some novel provocative act, the obligation to demonstrate which did not lie upon the defendant and the gravity of which the law would not weigh.

In *Christie 1821* Abbott CJ again negated the contention that the law would imply malice from appearance armed upon the field.<sup>13</sup> Mr Christie had, during the first interchange of shots, not aimed at his opponent, Mr Scott. This was not, however, observed by his opponent, and a second fire was called for, at which Mr Christie aimed and killed Scott. Abbott directed the jury to consider the feelings of Christie; it was possible that he might have fired his second shot under an impulse of immediate anger in that case, although his adversary fell, the crime amounted only to manslaughter.<sup>14</sup>

Abbott suggested that an intent to fire at Scott was either formed only in heat after the first exchange. But had Christie, not contemplated his course if Scott had insisted upon continuing the duel? Note, Christie was already engaged in an unlawful act. It is interesting that Abbot did not use the word provocation, although it is clearly that defence to which he was referring. Perhaps this is because legally the conduct of Scot did not amount to a provocation. As Jeremy Horder points out, an important element in the defence of provocation was the commission of a deliberate wrong by the deceased that mitigated the crime against him. In respect of Scott, no deliberate provoking wrong was committed, merely an omission to notice an act. Christie may have been angered or frustrated; he was not, in the legal sense, provoked. Finally, of course, this was mere speculation upon the part of Abbott, for again Christie did not offer any evidence that he had fired under the influence of passion.

By rebutting the notion that appearance on the field, prepared for the encounter, was a circumstance from which the law would continue to imply malice, judges could admit into consideration subsequent acts which post-dated the formation of the intention to commit the felony. But they might also manipulate the more orthodox formulation of provocation by

stretching, apparently to absurdity, the period during which, they contended, the blood did not cool. In *O'Callaghan* 1818 Mr Justice Park began by departing from the notion of implied malice, he acknowledged its existence, but declared that in duelling case malice must be expressed and, It was for the Jury to say whether malice was expressed in this case'.<sup>15</sup>

Contrast this with the direction of Mr Justice Patteson, in the trial of the seconds of Sir John Jeffcot, directed the jury impeccably as to malice aforethought:

Malice aforethought was not that of private ill will towards the party but it was the malice the law presumed when persons went out intending to commit an act which was in itself unlawful. If they found themselves obliged to find these gentlemen guilty, it would not proceed upon the supposition that they had ill blood but that they had done an act which the law said was murder.<sup>16</sup>

Returning to Park, having rejected the notion of implied malice, he proceeded to direct the jury upon a defence of provocation. No evidence as to provocation had been offered by the defence because, in fact, they made no defence at all. Two of the indicted seconds said nothing, O'Callaghan himself, presented a brief written statement as to his regret at the death and his willingness to accept the verdict of the court. Witnesses gave evidence only as to character. The fact of the duel aside, the only thing known by the court was that the dispute which led to the duel had occurred the preceding morning a full day before the encounter. Park, however, placed upon the prosecution the onus of rebutting a contention of provocation that the defence had not in fact made. Indeed, he went further and actually

constructed such a defence upon the basis of two scenarios that were entirely speculative.

Firstly, he remarked:

If the prisoners went deliberately to the field, where the deceased was shot, it was murder, but, if they went thither suddenly and in the heat of blood, and no appearance to the contrary was proved<sup>17</sup>, they might, for ought that appeared, have passed the preceding night in a tavern, and gone forth before their blood had cooled... if this was the case it was manslaughter.<sup>18</sup>

Through the mechanism of the unknown tavern, the blood is prevented from cooling during the day which passed between the dispute and the duel, a continuous bout of drinking enables them to maintain their hot blood through from one day to the next. Lest this be too ambitious, Park has an alternative possibility to put to the jury. Perhaps they had not been drinking since the moment of first dispute, but perhaps there had been a second meeting of which the court was ignorant. Perhaps they had met again upon the morning of the duel and it was only at this point and after a quarrel that the intent to commit the felony was formulated. 'Here it did not appear when the quarrel took place. The circumstance that had caused the quarrel had happened on the preceding morning; they might have afterwards met in a tavern or playhouse and proceeded to fight in the heat of blood'.<sup>19</sup> He concluded by directing that absent proof of direct malice and incontrovertible evidence of the absence of heat of blood, the jury must return a verdict of manslaughter, which they duly did. In both *O'Callaghan* and *Christie* the judges revealed their unwillingness to accept the premise that attendance upon the field was 'voluntary and of set purpose for if it be voluntary the law implieth malice'.<sup>20</sup>



Some judges in their rhetoric at least went even further. Mr Baron Hotham presided over the trials of Mr Purefoy in 1794 and of Lieutenant Rea in 1802. In *Purefoy*, The Times reports, Hotham directed accurately as to the law but then closed as follows:

Such is the law of the land... Such is the law and such are the facts, if you cannot reconcile the latter to your consciences, you must return a verdict of guilty, but if, the contrary, though the verdict may trench upon rules of rigid law, yet the verdict will be lovely in the sight of God and man.<sup>21</sup>

The law is rigid and a verdict in contradiction to its rules might accord with the values of society and even merit divine approval.

In *Rea*, eight years later, the defendants (the principal and two seconds) made no statements to the jury; counsel merely called evidence as to character. Hotham early conceded to the prosecution that the facts were not such as would permit a defence of provocation yet he then shamelessly employed the possibility of there having been provocation whilst closing his direction to the jury.

There was no evidence as to the original cause of the quarrel, how the provocation took place, or whether circumstances had occurred, which if disclosed this day would have altered the case entirely. It was possible that the Prisoner Rea might have endeavoured to prevent the duel, and that the fatal catastrophe was occasioned by the wrong headed conduct of the deceased, which might have been such as the other

could not endure...the lives of three persons were at stake and it was for them to say whether they could, thus in the dark find the Prisoner's guilty, when there might be circumstances which, had they known, they would sooner have cut off their hands than down those persons to the fate that must follow their verdict of guilty..<sup>22</sup>

Hotham raised provocation in the jurors' minds by using the word. He dwelt upon what was not known, which was, 'the original cause of the quarrel.' He suggested that the duel might have been occasioned by the 'wrong headed conduct of the deceased', which the other could not bear. The direction was legally and logically unsustainable. It was, in short, that the circumstances of the homicide were such as to establish that it was committed with malice prepensed, and thereby a defence of provocation was irrelevant. Nevertheless, the jury should consider that there may have been provocative conduct even though no evidence had been offered and even though, as aforementioned, he had already conceded that the defence of provocation was not available. Finally, he concluded with an emotive appeal. The jury are 'in the dark'. Might they not regret their verdict? Could they 'down those persons to the fate that must follow'? Since no duellist in England had been executed in the lifetime of the presiding judge, the last was a remarkable assertion. However, again Hotham did not refer to the probability of mercy. He did not wish to alleviate the burden upon the jury.

Lord Erskine, in his early career, acting in defence of Lieutenant Bourne upon a criminal information for a challenge, addressed the Bench as follows:

I build my principal hope of a mild sentence upon much more that will be secretly felt by the court, than may be decently expressed from the bar...Your lordships must

speak to him the words of reproach and reprobation for doing that, which if he had not done, your lordships would scorn to speak to him at all as private men.<sup>23</sup>

Yet I would not want to suggest that all judges were willing to countenance duelling or bend legal doctrines to come to their aid, there were other judges whose directions in this period appear to have been exemplary. In contrast to Erskine, Lord Kenyon had been scathing of judges who had accommodated duellists, 'Beyond all contradiction all the parties are murderers, and a judge who would fritter away the law in such a case, would but ill deserve to continue on the seat of justice.'<sup>24</sup>

The fact remains though that few were convicted for murder in a duel and in the nineteenth century no British subject is known to have been executed for having killed another in a duel, save one, Major Campbell. He quarrelled with a Captain Boyd in Ireland in 1808 and the result was a hurried duel, conducted entirely against normal forms, behind closed doors without seconds or other witnesses. Sabine summarised the reasons for Campbell's subsequent conviction and execution succinctly, Campbell's offence was not that he had killed Boyd, but 'that he killed him contrary to established rules'.<sup>25</sup> The judge at the trial had suggested that the jury consider the last words of the dying Boyd, which were that he had been hurried to the field without seconds, if that was so said the judge, the contract of opposing life to life could not have been perfect.

The law of course did not recognise the validity of a contract of opposing life against life; through it seems that many judges, as Swift put it, could see nothing wrong in fellows

killing each other according to a means devised by mutual consent. One observes in these duelling trials, not so much the power of the judge as source of law, but the power of the judge as narrator. It mattered very much how the judge told the story of the killing, utilising as he did the suggestive power of language, constructing as he also did hypothesis about facts that were not or could not be known, mixing fact and law in a blend that was indeed his very own.

On the face of it, the legal materials with which the sympathetic judge had to work were not promising, for the orthodox defence of provocation was never constructed around the needs of the duellist. Provocation was rather predicated upon a concession to spontaneous, (and particularly masculine) violence, the very type of violence that the duel had supposedly evolved to restrain. It is a testimony to the power of the honour culture that whilst offering their own, unlawful substitute for spontaneous violence, duellists and their sympathisers were able to distort the defence of provocation in such a fashion as to enable them to shelter under its umbrella. In doing so however, they did not turn it aside from its historical path, for they left provocation as a defence still very much dependent upon honour paradigms, upon notions of appropriate outrage and upon the impulse to instant masculine violence. Whether, now that the gravitational pull of honour culture has slackened, it is appropriate to leave it upon that path is another question.

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- <sup>1</sup> *R v Rice* 1803, 3 East 581.
- <sup>2</sup> *Mawgridge* Kel, 119, 131.
- <sup>3</sup> Foster Crown Law 296
- <sup>4</sup> Crompton of 26 a-b.
- <sup>5</sup> *Lord Morley's Case* 1666. 6. St. Tr. 770, 780.
- <sup>6</sup> *R v Mawgridge* 1707, Kel 119, 130.
- <sup>7</sup> Foster 255.
- <sup>8</sup> *Edinburgh Review*, 1814, p. 74.
- <sup>9</sup> *R v England* 1796, 2 Leach 767, 168 ER 483. *Old Bailey Proceedings Online* ([www.oldbaileyonline.org](http://www.oldbaileyonline.org), 01/06/07), 17 February 1796, trial of Richard England (ref. t17960217-27).
- <sup>10</sup> *The Times* 23 Apr. 1803 p. 2 cols. d-f.
- <sup>11</sup> *R v England* 1796, 2 Leach 767, 168 ER 483. *Old Bailey Proceedings Online* ([www.oldbaileyonline.org](http://www.oldbaileyonline.org), 01/06/07), 17 February 1796, trial of Richard England (ref. t17960217-27).
- <sup>12</sup> Kel 119, 84 ER 1107.
- <sup>13</sup> *The Times* 14 April 1821 p. 3 col. f.
- <sup>14</sup> Millingen *History of Duelling*, II. p. 251
- <sup>15</sup> *Ibid.*
- <sup>16</sup> *R v Halstead, Holland and Melford* 1833. *The Times* 29 Jul. 1833 p. 6 col. b. Millingen, *History of Duelling*, ii., pp. 327-334.
- <sup>17</sup> My italics.
- <sup>18</sup> *The Times* 17 Jan. 1818 p. 3 col. d.
- <sup>19</sup> My italics.
- <sup>20</sup> 3 Inst. C. XIII, p. 62.
- <sup>21</sup> *The Times* 16 Aug. 1794 p. 3 col. b.
- <sup>22</sup> *The Times* 22 Sep. 1802 p. 3 cols. a-c.
- <sup>23</sup> Anon. 'The Life of Lord Erskine', *Law Mag. Quart. Rev. Juris.* 22 (1839), pp. 121-147 at p. 129-131.
- <sup>24</sup> Anon 'The Life of Lord Kenyon', *Law Mag. Quart. Rev. Juris.*, 17 (1837), pp. 252-297 at p. 281.
- <sup>25</sup> Sabine, *Notes on Duels and Duelling, Alphabetically Arranged With A Preliminary Historical Essay* (Boston: Crosby and Nichols, 1859) p. 72.