Trial By Battle

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Most of the August 1916 issue of *Case and Comment* was devoted to accounts of famous trials such as those of Sir Walter Raleigh and John Brown. Dean William Reynolds Vance contributed a two page article on ”Trial by Battle.”

Vance served as Dean of the Law School from his appointment on August 10, 1911, to his resignation in May 1920 to accept a professorship at Yale University.

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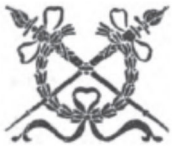

Trial By Battle

*BY WILLIAM R. VANCE, PH.D.**

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SUPPOSE we go back only so far as the reign of Queen Elizabeth, to the year 1571, a few years before Shakespeare was beginning to play in London and to observe lawyers and their ways, when the famous case of Lowe v. Paramour, 3 Dyer, 301a, came on to be heard on a writ of right before the bench. The whole trouble came from the shifty business methods of a youth named Chevin, who was seised of certain land in the county of Kent. This land was conveyed by Chevin to Paramour by means of a fine levied. Subsequently, and, I suppose, after Chevin had gotten Paramour's money, he had the conveyance set aside by legal proceedings, on the ground that he was under age. Then, having in the meantime reached his majority, this ingenious lad sold and conveyed the land again to Lowe. But Paramour, the first purchaser, declined to surrender possession, thus leaving all parties excepting the prosperous infant, in a highly litigious state of mind. Paramour went into chancery, and had that court to find that the youthful swindler was twenty-one, the first conveyance valid, and the second, to Lowe, void. But Lowe would not be so easily beaten. Ignoring the decree of the chancery court, Lowe brought his writ of entry against Paramour, but the jury found against him. More furious than ever, Lowe then brought attaint against Paramour and the petit jury, on the ground that the jury had wilfully brought in a false verdict, and should on that account be outlawed. But when the grand jury of twenty-four, before whom the attaint was tried, also found the issue against him, Lowe's rage was so great that he was ready to go to the limit. He brought the formidable writ of right against his opponent. By this time Paramour's patience was quite exhausted,—in fact, he was fighting mad. So he demanded trial by battle. The rest of the story will be told in the quaint words of Chief Justice Dyer, who presided:

"And Paramour chose the trial by battle, and his champion was one George Thorne; and the demandants e contra, and their champion was one Henry Nailer, a master of defence. And the Court awarded the battle; and the champions were by mainprise and sworn to perform the battle at Tothill, in Westminster, on the Monday next after the morrow of the Trinity, which was the first day after the Utas of the Term, and the same day given to the parties; at which day and place a list was made in an even and level piece of ground, set out square, s. sixty feet on each side due East, West, North and South, and a place or seat for the Judges of the Bench was made without and above the lists, and covered with the furniture of the same Bench in Westminster Hall, and a bar made there for the Serjeants at law. And about the tenth hour of the same day, three Justices of the Bench, s. Dyer, Weston, and Harper, Welshe being absent on account of sickness, repaired to the place in their robes of scarlet, with the appurtenances and coifs; and the Serjeants also. And their public proclamation being three times made with an Oyes, the demandants first were solemnly called, and did not come. After which the mainpernors of the champion were called, to produce the champion of the demandants first, who came into the place apparelled in red sandals over armor of leather, bare-legged from the knees downward, and bareheaded, and bare-arms to the elbow, being brought in by the hand of a Knight,

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namely, Sir Jerome Bowes, who carried a red baston of an ell long, tipped with horn, and a Yeoman carrying a target made of double leather; and they were brought in at the north side of the lists, and went about the side of the lists until the middest of the list, and then came towards the bar before the Justices with three solemn congies, and there was he made to stand at the south side of the place, being the right side of the Court; and after that, the other champion was brought in like manner at the south side of the lists, with like congies, etc., by the hands of Sir Henry Cheney, Knight, etc., and was set on the north side of the bar; and two Serjeants being the counsel of each party in the midst between them; this done, the demandant was solemnly called again, and appeared not, but made default; upon which default, Barham, Serjeant for the tenant, prayed the Court to record the nonsuit; which was done. And then Dyer, Chief Justice, reciting the writ, count and issue, joined upon battle, and the oath of the champions to perform it, and the fixing of the day and place, gave final judgment against the demandants, and that the tenants should hold the land to him and his heirs for ever; quit of the said defendants and their heirs for ever; and the demandants and their pledges to prosecute, in the Queen's mercy, etc. And then solemn proclamation was made, that the champions and all others there present (who were by estimation above four thousand persons) should depart, every man in the peace of God and the Queen. And they did so, cum magno clamore 'Vivat Regina.'"

This proceeding thus so graphically described by Chief Justice Dyer seems to us so ludicrous when regarded as a method of determining the justice of a cause, that we can scarcely conceive how it was possible for the people, even in Queen Elizabeth's day, to allow such a mockery of justice to persist. But it is evident that the lawyers of that day were not so clear that this procedure was unwise, for no movement whatever seems to have been made to have trial by battle abolished. It seems to have flourished through the next century, and even Milton, who was quite an insurgent in his day, in his methodical fashion makes the following entry in his note book:

"De Duellis: Not certain in deciding the truth, as appears by the combat fought between 2 Scots before the L. Grey of Wilton in the market place of Haddington, wherein Hamilton, that was almost if not clearly known to be innocent, was vanquish't and slain, and Newton the offender remained victor and was rewarded by the Ld. Grey."

The lawyer's characteristic unwillingness to make any fundamental change is well illustrated by the fact that as late as 1819 trial by battle was claimed, and, after long argument on technical points, was gravely allowed by the court of King's bench in the case of Ashford v. Thornton, 1 Barn & Ald. 405. We are not surprised that such a performance by the courts created amazement throughout England, and resulted in the speedy abolishing of this relic of barbarism in the same year.

You will perhaps be disposed to say that this is a strange and exceptional instance of the ultra-conservatism of our profession in conserving not only a useless and obsolete but barbarous method of trial some five hundred years longer than was reasonable. But we need not search far into the history of our common law to find other legal anachronisms little less shocking. For instance, in 1824, the case of King v. Williams, 2 Barn. & C. 538, came before the King's bench. The plaintiff brought debt on a simple contract, and came into court full-handed with proof, but the defendant pleaded nil debet per legem, that is, waged his law. When the issue was joined, the defendant swore that he did not owe the debt, and brought eleven compurgators who swore, in turn, that they believed the defendant. Under these circumstances the plaintiff had nothing to do but to abandon his action. Despite the gross injustice of such a proceeding, trial by wager of law still continued to be legal in England until it was swept away by statute in the great tide of reform that broke upon England in 1833.