

*Approver's Procedural Position in English Criminal Trial Between the 12th and 16th Centuries**

Abstract

The paper analyses the procedural position of the approver in the English criminal trial between the 12th and 16th centuries. *The medieval* prototype of King's evidence was the approver – a self-confessed felon who accused his accomplices of complicity in his crime. He was required to prove the truth of his accusation, either in trial by battle or by verdict of the jury. In the late 15th century, approvers seem to have become increasingly uncommon. The 16th century saw the development of a practice which historians refer to as “appeachment”. Unlike approvement, appeachment did not involve trial by battle, nor did it require accomplices to be convicted.

Keywords: approver, abjuration of the realm, benefit of clergy, pardon, sanctuary, trial by jury, trial by battle

Genetically, the institution of the King's or State's evidence is descended from the English legal culture of the Middle Ages. It is generally accepted that the approver, who was first mentioned by English sources in 1130, was the ancestor of the contemporary model of a witness turning the King's or State's evidence.¹ However, a Roman influence on the development of this institution also cannot be ruled out.²

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¹ F.C. Hamil, *The King's Approvers: A Chapter in the History of English Criminal Law*, “Speculum” 1936, vol. XI, p. 238.

² Wiesław Litewski noted the similarities with the institution of the *index*, known from the Roman law. W. Litewski, *Rzymski proces karny*, Kraków 2003, pp. 82–83. For more on the topic of the *index* see W. Mosakowski, *Delator w rzymskich procesach karnych*, “Studia Iuridica Toruniensia” 2013, vol. 12, p. 213. Sir Thomas Smith still referred to the approver as the *index* in the second half of the 16th century: “[...] approver, that is to saie an accuser or Index of his complices”. T. Smith, *De Republica Anglorum: A Discourse on the Commonwealth of England*, ed. L. Alston, Cambridge 1906, p. 106. See also an interesting passage from the chronicle *Gesta Regis Henrici Secundi*: “[...] fur ille, promissis sibi prius vita et membris, indixit socios suos, de quibus plures capti erant”. *The Chronicle of the Reigns of Henry II and Richard I, 1169–1192, Known under the Name of Benedict of Peterborough*, ed. W. Stubbs, vol. 1, London 1867, p. 156.

The approver (English *prover*, Latin *probator regis*) was an accuser who had been indicted for a felony earlier in the trial, who confessed himself guilty of the crime, revealed his accomplices and made a formal accusation against them.³ The accusation made by an approver was part of a particular type of appeal (approvement, approver's appeal) set in motion by a private person in cases of capital offences of felony and treason.⁴ The Crown controlled this type of prosecution by deciding who would be given the status of approver.⁵ The approver, as a party in the proceedings, was usually financially supported by the King.⁶ The latter was also in charge of making the final decision as to the approver's fate, if his accusation proved successful.⁷ This particular relationship between the approver and the Crown is synthetically expressed in the Latin term *probator regis*, which emphasises his procedural function and the public aspect of the institution. The sources also use more blunt phrases to describe the approver, such as "the King's child" or "the King's son".⁸ The proceedings set in motion by the approver are regarded as a special type of private accusation (appeal).⁹ However, unlike the latter, the approver's appeal did not require a complaint by the aggrieved party or their closest relatives.

Approvement was almost completely reserved for men of age. The right to receive the status of approver was denied to women, children, men over seventy years old or maimed, and those who claimed clergy (*clerici*).¹⁰ Plea rolls do, however, include

³ The term *approver* is usually used in English and French language sources (more precisely, in Anglo-Norman French). Latin texts, especially plea rolls, use the term *probator (regis)*.

⁴ For more detailed information on the classification of crimes in English law see K. Baran, *Strony procesowe przed angielskimi sądami karnymi doby Tudorów i wczesnych Stuartów (do roku 1640)*, Kraków 1994, pp. 17–18; *idem*, *Z dziejów prawa karnego w Anglii. Między Renesansem a Oświeceniem XVI–XVIII w.*, Kraków 1996, pp. 38–44.

⁵ A special royal *writ of approvement* allowed a person to be given the status of approver: "Breve quod rex concedit iustitiariis potestatem concedendi probatori vitam et membra". H. de Bracton, *De Legibus et Consuetudinibus Angliae*, ed. G.E. Woodbine, Yale 1922, vol. II, p. 430. See F.C. Hamil, *The King's Approvers...*, pp. 239–240.

⁶ F.C. Hamil, *The King's Approvers...*, p. 238.

⁷ During a session of itinerant justices in 1329–1330 in Northamptonshire, justice Thomas Louth pointed out that if a defendant confessed himself guilty of a serious crime, it was the King's decision whether the felon would be punished or his life would be spared. *The Eyre of Northamptonshire, 3–4 Edward III (A.D. 1329–1330)*, vol. 1, ed. D.W. Sutherland, Selden Society, vol. XCVII, London 1983, p. 239.

⁸ "Lenfant le Roy", "fiz le Roy", *Placita Corone or La Corone Pledem desant Justices*, ed. J.M. Kaye, London 1966, pp. 20, 24; *Crown Pleas of the Wiltshire Eyre, 1249*, ed. C.A.F. Meekings, Devizes 1961, p. 91; M.T. Clanchy, *Highway Robbery and Trial by Battle in the Hampshire Eyre of 1249* [in:] *Medieval Legal Records edited in memory of C.A.F. Meetings*, eds. R.F. Hunnisett, J.B. Post, London 1978, p. 29.

⁹ See T. Groot, *Teaching Each Other: Judges, Clerks, Jurors and Malefactors Define the Guilt/Innocence Jury* [in:] *Learning the Law, Teaching and the Transmission of Law in England, 1150–1900*, eds. J.A. Bush, A. Wijffels, London 1999, p. 19; F.C. Hamil, *The King's Approvers...*, p. 238; D. Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, "Law and History Review" 2001, vol. 19, p. 4; A. Musson, E. Powell, *Crime, Law and Society in the Later Middle Ages*, Manchester 2009, p. 137; A.J. Musson, *Turning King's Evidence: The Prosecution of Crime in Late Medieval England*, "Oxford Journal of Legal Studies" 1999, vol. 19, pp. 467–479.

¹⁰ An accused who claimed benefit of clergy could not become an approver (F.C. Hamil, *The King's Approvers...*, p. 240). However, the reverse situation was possible. An approver could claim benefit of clergy, which resulted in him being handed over to ecclesiastical authorities, "Robertus le Botiller [...] cognovit se esse latronem et devenit probator [...] dicit quod clericus est". The National Archives (TNA), Kew, London, JUST 1/1098, m. 78, Anglo-American legal tradition (AALT); <http://aalt.law.uh.edu/AALT4/JUST1/>

cases of children¹¹ and women¹² who confessed themselves guilty and accused others. Approvement was also not available to peers and lords of the Parliament.¹³

An approver usually set prosecution in motion during gaol delivery sessions (Latin *deliberacio gaole*), during which cases of prisoners accused of felonies were heard.¹⁴ The cases of those accused as a result of a complaint made by an approver could also be heard by itinerant justices (*justices in eyre*, Latin *iusticiarii in itinere*) and by the King's Bench.¹⁵

Receiving the status of approver required that the accused should confess his guilt. This could take place both during the pre-trial¹⁶ and the trial.¹⁷ In the latter case, in

JUST1no1098/bJUST1no1098Pt2fronts/IMG_7363.htm (access: 20 December 2009); *Year Books of the Reign of King Edward I, XXX–XXXI*, ed. A.J. Horwood, London 1863, pp. 543–545. See *Rolls of Northamptonshire Sessions of the Peace, Roll of the Supervisors, 1314–1316, Roll of the Keepers of the Peace, 1320*, ed. M. Gollancz, Northamptonshire 1940, p. 61; *The Eyre of Northamptonshire...*, p. 162.

¹¹ Edward I's act of 1305 (*Ordinacio de conspiratoribus*) is regarded as a measure against the practice of juveniles under twelve years of age using approvement; 33 Edw. I, *The Statutes of the Realm*, vol. 1, London 1810, p. 145; *Edward I, Vetus Codex*, i-183 [in:] *The Parliament Rolls of Medieval England, 1275–1504* (PROME), eds. P. Brand, J.R.S. Phillips, W.M. Ormrod, G.H. Martin, C. Given-Wilson, A.E. Curry, R. Horrox, Leicester 2005 (CD-ROM). See A.J. Musson, *Turning...*, p. 471.

¹² *Select Pleas of the Crown*, vol. I. A.D. 1200–1225, ed. F.W. Maitland, Selden Society, vol. I, London 1888, p. 123 (191); *Wiltshire Gaol Delivery and Trailbaston Trials 1275–1306*, ed. R.B. Pugh, Devizes 1978, p. 39 (42). See R.T. Groot, *The Early Thirteenth-Century Criminal Jury* [in:] *Twelve Good Men and True, The Criminal Trial Jury, 1200–1800*, eds. J.S. Cockburn, T.A. Green, Princeton 1988, pp. 17–20; F.C. Hamill, *The King's Approvers...*, p. 239, fn. 9. In 1293, a woman appeared in a trial as a *probatrix*. H. Summerson, *The Criminal Underworld of Medieval England*, "The Journal of Legal History" 1996, vol. 17, p. 202.

¹³ According to Sir Edward Coke, confessing one's guilt before a coroner would have been against the *Magna Carta* of 1215. A peer could only confess before the Lord High Steward. E. Coke, *The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient and Other Statutes*, London 1817, p. 49; *idem*, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes*, London 1817, p. 129.

¹⁴ During the gaol deliveries between 1275 and 1306 in Wiltshire, 34 persons appeared as approvers. Plea rolls from Norfolk from 1308–1316 reveal 94 approvers. From the 15th century onwards the practical significance of this institution diminished. During court sittings from 1399 to 1407 in Yorkshire, only four persons received the status of approvers (K.E. Ellis, *Gaol Delivery in Yorkshire, 1399–1407*, unpublished MA thesis, Carleton University, 1983, p. 39); one approver appeared during the gaol deliveries in 1416–1430 in the south-western judicial circuit (C.L. Elder, *Gaol Delivery in the Southwestern Counties, 1416–1430*, unpublished doctoral dissertation, Carleton University, 1983, p. 31); four approvers – from 1437 to 1441 in the eastern circuit, seven approvers – from 1439–1460 from Yorkshire. For more information see J.G. Bellamy, *The Criminal Trial in Later Medieval England: Felony Before the Courts from Edward I to the Sixteenth Century*, Toronto 1998, p. 40.

¹⁵ P.C. Madder, *Violence and Social Order: East Anglia, 1422–1442*, Oxford 1992, p. 71; A.J. Musson, *Turning...*, p. 476; J.B. Post, *The Evidential Value of Approvers' Appeals: The Case of William Rose, 1389*, "Law and History Review" 1985, vol. 3, pp. 96–98; *idem*, *The Justice of Criminal Justice in Late-Fourteenth-Century England*, "Criminal Justice History" 1986, p. 36.

¹⁶ The accused could use the institution of approvement in connection with the end of the maximum period of forty days in a sanctuary where he received shelter, R.F. Hunnisett, *The Medieval Coroner*, Cambridge 1961, pp. 51, 70. For more information on the topic of sanctuaries in English law see P. Złamańczuk, *Azyl w angielskim prawie karnym (XIII–XVI w.)*, "Miscellanea Historico-Juridica" 2011, vol. 10, pp. 47–69.

¹⁷ Edward II's statute of 1311 provided that the approver's accusation had to be formally made within three days of the coroner being appointed by the justices, 5 Edw. II (1311), c. 34. *The Statutes of the Realm*, vol. I, London 1810, p. 166; *Statham's Abridgement of the Law*, transl. M.C. Klingelsmith, Boston 1915, p. 418 (27). See J.H. Baker, *Some Early Newgate Reports (1315–1328)* [in:] *Law Reporting in Britain: Proceedings of The Eleventh British Legal History Conference*, ed. Ch. Stebbings, London 1995, p. 40;

response to the charges made against him, the accused could plead guilty before the court and pledge that he would not accuse anyone maliciously.¹⁸ The statement of the accused had to be recorded in writing. To this end, the coroner produced a record which included the confession of the accused and the pledge that he would accuse the persons who had committed the felony together with him.¹⁹

The formal granting of the status of approver could be preceded by an examination of the accused by royal officials. In the 14th century, there were cases of justices conducting examinations under oath.²⁰ On the other hand, 16th-century sources confirm that during pre-trials interrogators sometimes tried to get the accused to confess himself guilty.²¹ It is possible that such practices also preceded the initiation of approvement proceedings. There may have been attempts by the interrogators to make promises of the royal pardon or other benefits of cooperating with the Crown officials.²² In such situations, the institution of approvement took the form of an agreement, which resulted from assuring the accused of the opportunities to be gained from self-accusation and giving up his accomplices.²³ In the midst of such practices, the institution of plea bargaining was beginning to evolve in England.²⁴

Preventive measures could be used against the persons accused by the approver (appellees), usually in the form of attachment.²⁵ On the other hand, the approver was obligatorily put in prison, where he awaited his trial. This was because he belonged to the category of prisoners who could not be bailed (not replevisable prisoners).²⁶

F.C. Hamil, *The King's Approvers...*, p. 250; R.F. Hunnisett, *The Medieval...*, pp. 73–74; A. Musson, *Public Order and Law Enforcement: The Local Administration of Criminal Justice, 1294–1350*, Woodbridge 1996, p. 243. In 1329, during a session of itinerant justices in Northamptonshire, the opinion was recorded that there was no time limit for the approver to initiate the appeal, *The Eyre of Northamptonshire...*, p. 155. The accused could declare that he wanted to appear in the proceedings as an approver even after the jury retired to consider their verdict. *Year Books Pasch. 12 Edw. IV*, pl. 26, fol. 10b (1472), Seipp Number: no. 1472.034, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=20304> (access: 25 April 2015).

¹⁸ In a case from 1351, an approver was hanged on the basis of the sheriff's and the coroner's testimony; they showed that he accused strangers only to prolong his own life. *Statham's Abridgement...*, p. 419 (31).

¹⁹ *The Notebook of Sir John Port*, ed. J.H. Baker, Selden Society, vol. CII, London 1986, p. 83; F. Pulton, *De Pace Regis et Regni*, London 1609, fol. 185.

²⁰ Such a trial was conducted in 1384, in the case of the murder of John Imperial, the ambassador of Genoa: "Iohannes Algor [...] et mera et spontanea voluntate sua iuratus et examinatus [...] et cognouit se esse felonem domini regis [...] Iohannes Kyrkeby ipsum Iohannem Imperiall' tunc ibidem ex excitatione et abbetto prefati Iohannis Algor felonice interfecit, vnde idem Iohannes Algor prefatum Iohannem Kyrkeby appellat". *Select Cases in the Court of King's Bench under Richard II, Henry IV and Henry V* [SCKB], vol. VII, ed. G.O. Sayles, Selden Society, vol. LXXXVIII, London 1971, pp. 40–41.

²¹ The trial of John Udall from 1590, *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours*, London 1809, vol. I, p. 1276.

²² J. Bellamy, *Strange, Inhuman Deaths. Murder in Tudor England*, Sutton 2005, p. 26.

²³ See J.S. Cockburn, *Calendar of Assize Records: Home Circuit Indictments, Elizabeth I and James I: Introduction*, London 1985, p. 129.

²⁴ However, this institution in its classic form was not regularly used in the English criminal trial even in the 18th century. J.H. Langbein, *The Origins of Adversary Criminal Trial*, New York 2003, pp. 19–20.

²⁵ *Roll of the Justices in Eyre at Bedford, 1202*, ed. G.H. Fowler, "Bedfordshire Historical Record Society", vol. I, Aspley Guise 1913, p. 243 (258). See F.C. Hamil, *The King's Approvers...*, pp. 240–241. If the accused evaded the justice system, the procedure of exigent was used, followed by outlawry. H. de Bracton, *De Legibus...*, vol. II, p. 431. See *Fleta, Prologue, Book I, Book II*, vol. II, eds. H.G. Richardson, G.O. Sayles, Selden Society, vol. LXXII, London 1955, p. 93.

²⁶ The Statute of Westminster I, 3 Edw. I, c. 15 (1275), *The Statutes of the Realm*, vol. I, p. 30. Releasing an approver on bail was unlawful and met with a negative response of the royal authorities. See *Edward III: Parliament of 1368 May* [in:] PROME, ii-297.

The approver made a formal accusation before the court against the revealed accomplices.²⁷ The approver's right was not restricted as to the number of persons he could appeal. It was therefore permissible to accuse a few, several, or even several dozen persons.²⁸ Revoking or not supporting the accusation by the approver before the court resulted in his execution.²⁹ The approver who had confessed his guilt earlier during the trial had to take into consideration that he was in danger of certain execution on the basis of his testimony.³⁰ However, if the approver stopped performing the role of accuser, this did not completely eliminate the proceedings against the appellees he had accused. In such cases, the criminal trial was continued at the King's suit (*ad sectam regis*) before a jury.³¹ A new criminal charge was not required to continue the trial. The appellee was formally indicted on the basis of the approver's earlier testimony.

An approver who decided to support the accusation against his revealed accomplices spoke the words of the criminal complaint before the court and expressed his readiness to prove his accusation "with his own body" in a duel.³² He also had to recognise the persons he accused.³³ The formality of this stage of the trial required that the words of the complaint be spoken with great precision. This was because the appellee accused by the approver could file an exception which led to the trial being annulled on the basis of a mistake being identified or some necessary elements of the words of the complaint being overlooked.³⁴ The appellee could also ask for initiating special proceedings before a jury (*inquest de fidelitate*), which was to decide whether

²⁷ "Robertus le Botiller captus [...] cognovit se esse latronem et devenit probator et appellat", The National Archives (TNA), Kew, London, JUST 1/1098, m. 78; Anglo-American legal tradition (AALT), http://aalt.law.uh.edu/AALT4/JUST1/JUST1no1098/bJUST1no1098Pt2fronts/IMG_7363.htm (access: 20 December 2009); *Cases in the Court of King's Bench under Edward III*, vol. VI, ed. G.O. Sayles, Selden Society, vol. LXXXII, London 1965, p. 44; SCKB, vol. VII, p. 244.

²⁸ In 1389, an approver named William Rose accused 54 revealed accomplices. B. Post, *The Evidential...*, p. 95. The appellees could in turn use approvement to accuse others. A. Musson, *Public...*, p. 172.

²⁹ *Rolls of Northamptonshire...*, p. 70.

³⁰ *The Eyre of Northamptonshire...*, p. 239. See J.H. Baker, *John Bryt's Reports (1410–1411) and the Year Books of Henry IV*, "Cambridge Law Journal" 1989, vol. 48, p. 105.

³¹ *Statham's Abridgement...*, p. 419 (30); *Wiltshire Gaol Delivery...*, pp. 94–95 (424), 161 (1132, 1134). See *The Eyre of Northamptonshire...*, p. 162.

³² "Gilbertus Grom de Prudhowe, captus pro blado furato, venit et cognoscit se esse latronem de pluribus latrociniiis, et devenit probator et appellat [...] de societate [...] offert disrationare versus eos per corpus suum". *Assize roll, Northumberland, 40 Henry III, A.D. 1256* [in:] *Three Early Assize Rolls for the County of Northumberland*, ed. W. Page, "Surtees Society" 1891, vol. 88, p. 106.

³³ "Et oportebit probatorem certam rem exprimere, et omnes circumstantias sine variatione et mutatione aliqua. Et quod cognoscat personam appellati cum fuerit in iudicio productus, quia si eum non cognoverit, praesumetur contra ipsum quod numquam fuerunt socii". H. de Bracton, *De Legibus...*, vol. II, p. 431. See *Fleta...*, vol. II, p. 94; F.C. Hamil, *The King's Approvers...*, p. 243.

³⁴ During a trial in 1221, the objection that the approver did not include in the complaint the fact of accompanying the appellee in committing the crime led to the complaint being rejected and the approver executed: "Et Thomas venit et defendit totum sicut curia consideraverit quia non loquitur de societate quod cum eo furatus fuit nec in societate fuit. Consideratum est quod nullum est appellum et ideo suspendatur". *Pleas of the Crown for the County of Gloucester before the Abbot of Reading and His Fellows Justices Itinerant in the Fifth Year of the Reign of King Henry the Third and the Year of Grace 1221*, ed. F.W. Maitland, London 1884, p. 264. See also *Year Books of Edward IV. 10 Edward IV. and 49 Henry VI. (A.D. 1470)*, ed. N. Neilson, Selden Society, vol. XLVII, London 1931, p. 123; F.C. Hamil, *The King's Approvers...*, p. 243.

he was honest and righteous.³⁵ These proceedings were not directly related to examining the motives of the accusation made by the approver. The jury was only supposed to determine what reputation the appellee had and to decide whether he was a law-abiding citizen (*fidelis, legalis*).³⁶ A positive opinion allowed the appellee to be released with the help of pledges.³⁷ The approver was, in this situation, executed. If the jury decided that the appellee had a bad opinion (*de malo testimonio*) or was a suspect (*suspectus*), they ordered a trial by battle against the approver.³⁸

Trial by battle or duel (*duellum*) formally survived in England until the 19th century as a legally admissible form of evidence in a trial set in motion by an appeal or improvement.³⁹ A duel was to be fought by the approver against each of the appellees. However, a physical fight before the court had some important limitations. A duel was not permitted to women, children, men over seventy, and those maimed.⁴⁰ Until ordeals were abolished in trials in which a duel was inadmissible, appellees were sent to one-sided ordeals. After trials by ordeal were abolished in England, which formally took place in 1219,⁴¹ in such cases the trial was usually heard by a jury (a trial by jury).⁴² In the end, as a result of the changes which occurred in the English criminal trial by the end of the 13th century, the appellee had obtained the right to choose freely between trial by battle and

³⁵ This practice was mainly used in the first half of the 13th century. For more details see R.T. Groot, *The Early...*, pp. 16, 21; F.C. Hamil, *The King's Approvers...*, p. 245.

³⁶ R.T. Groot, *Teaching...*, p. 19; *idem*, *The Early...*, p. 16; F.C. Hamil, *The King's Approvers...*, pp. 243–244.

³⁷ “Et Rogerus [...] dicit quod ipse homo legalis est et boni testimonii, et offert j. marcam pro habendo testimonio et inquisitione patrie. Et xij. milites de wapentaco veniunt et dicunt quod ipsi bene inquisiverunt quod nunquam auditum fuit de eo nisi quod homo legalis fuit. Plegii de ilia marca et quod ipse staret recto si quis versus eum loqui voluerit...”. *Select Pleas of the Crown...*, p. 66.

³⁸ “Et eodem modo si ad appellum probatoris posuerit se quis super patriam de roberia et latrocinio, vel alia feloniam ei imposita a probatore, et per patriam fuerit inde male creditus, tunc cum sit par probatori procedat inter eos duellum”. H. de Bracton, *De Legibus...*, vol. II, p. 429. See *ibidem*, p. 433. “Et Ricardus defendit... Et quia est de mala fama consideratum est quod duellum sit inter eos”. *Select Pleas of the Crown...*, p. 134. See *Fleta...*, vol. II, p. 94; R.T. Groot, *Teaching...*, p. 19; *idem*, *The Early...*, p. 16–18; *idem*, *The Jury in Private Criminal Prosecutions before 1215*, “American Journal of Legal History” 1984, vol. 27, p. 129, fn. 88; F.C. Hamil, *The King's Approvers...*, pp. 243–244; *Pleas of the Crown for the County of Gloucester...*, pp. 17 (73), 141.

³⁹ In the aftermath of the case *Ashford v. Thornton*, individual prosecution in the form of appeal was abolished in 1819. M.J. Russell, *II Trial by Battle and the Appeals of Felony*, “The Journal of Legal History” 1980, vol. I, pp. 157–158. See K. Baran, *Strony...*, p. 49.

⁴⁰ In the cases where the approver was a woman, the trial took place before a jury. *Wiltshire Gaol Delivery...*, p. 39 (42); see also R.T. Groot, *The Early...*, pp. 17–18. A woman took part in duels only in exceptional cases. Her opponent, the approver, fought with one hand bound behind his back. A. Musson, *Public...*, p. 170.

⁴¹ The canon introduced during the Fourth Council of the Lateran in 1215, which prohibited clerics from participating in ordeals, was interpreted by the English authorities as a prohibition against trials by ordeal. In January 1219, royal itinerant justices were sent a writ which instructed them as to the principles of conducting a trial. The introductory part of the instruction stated: “...cum prohibitum sit per ecclesiam Romanam iudicium ignis et aque...”. *Patent Rolls of the Reign of Henry III, 1216–1225*, London 1901, repr. Nendeln 1971, p. 186.

⁴² This type of trial took place for the first time during a session of itinerant justices in 1220. In one of the cases heard during this sitting, the approver was hanged already at the beginning of the trial after a lost fight against the first appellee. Further trials by battle therefore could not take place. The remaining appellees agreed to a trial by jury. R.T. Groot, *The Early...*, pp. 17–18, 23.

trial by jury.⁴³ In practice, in the majority of cases set into motion by means of approval, the appellees decided to have a trial by jury.⁴⁴ However, even in the 14th and 15th centuries we encounter trials in which the appellee decided to defend himself in a trial by battle *per corpus*.⁴⁵

An account of an approver's duel can be found in records of judicial proceedings for the year 1249. Apart from the description of the trial, the plea roll also includes a sketch depicting a duel that took place between the approver Walter Bloweberme and the appellee Hamo le Stare.⁴⁶ The figures of the opponents visible in the top part of the membrane show that the duel involved a shield and a weapon resembling a war hammer, with a sharp horn at the end. It follows from the written description of the case that the appellee was defeated by the approver.⁴⁷ Hamo le Stare was hanged, which is illustrated by a sketch of the gallows next to Bloweberme's figure.

Another account of an approver's duel can be found in one of the chronicles of London.⁴⁸ The duel took place in 1456, during the trial of the approver Thomas Whitehorn. The combatants were supposed to be clothed in white sheep's leather. The weapon had a sharp iron point. It was also permitted to fight with hands, fists, nails, teeth, feet and legs. In the end Whitehorn was defeated in the duel and admitted that his accusation was false.

A duel which ended successfully for the appellee led to the approver being executed. The appellee could then be set free on bail.⁴⁹ A particular form of ending a duel was to cry "craven" (*verbum recreantise*), which meant surrender by one of the combatants.⁵⁰ Crying craven was an oral declaration on the field, which functioned as a guilty plea.⁵¹

If the approver secured the conviction of all the appellees, he was entitled to royal pardon or stay of execution.⁵² Most often, however, he had to abjure the realm and leave

⁴³ F.C. Hamil, *The King's Approvers...*, pp. 244–245; *Pleas of the Crown for the County of Gloucester...*, p. 17 (73).

⁴⁴ M.T. Clanchy, *Highway...*, pp. 30, 50 (1–3), 52 (9–10, 12); *Crown Pleas of the Wiltshire Eyre...*, pp. 155 (22), 199–200 (261), 217 (341), 257 (563); *Wiltshire gaol Delivery...*, pp. 63 (197, 200), 65 (211), 89 (387–390), 90 (393–394, 396), 93 (418–419), 96 (428, 433); *Edward III: Parliament of 1368 May* [in:] *PROME*, ii–297; *Year Books of Edward IV... A. D. 1470*, pp. 121–124 (9).

⁴⁵ *The Eyre of Northamptonshire...*, p. 206; SCKB, vol. VII, pp. 126–128 (15). Hamil identified the last such case in 1456. F.C. Hamil, *The King's Approvers...*, p. 256. Also M.J. Russell, *II Trial...*, p. 154.

⁴⁶ *The National Archives* (TNA), Kew, London, KB 26/223.

⁴⁷ *Select Pleas of the Crown...*, pp. xxix–xxx.

⁴⁸ *William Gregory's Chronicle of London* [in:] *The Historical Collections of a Citizen of London in the fifteenth century*, ed. J. Gairdner, Camden Society, 1876, pp. 199–202; J. Bellamy, *Crime and Public Order in England in the Later Middle Ages*, London 1973, p. 132.

⁴⁹ If the appellee did not produce bailors, he remained imprisoned for life or abjured the realm. H. de Bracton, *De Legibus...*, vol. II, pp. 432–433; *Fleta...*, vol. II, p. 94; *Select Pleas of the Crown...*, p. 123 (190); *Somersetshire Pleas (Civil and Criminal), from the Rolls of the Itinerant Justices (Close of 12th Century – 41 Henry III)*, ed. C.E.H. Chadwyk-Healey, Somerset Record Society, vol. 11, London 1897, p. 29 (106). In the 14th century the appellee, after defeating the approver in battle, could be found innocent without continuing the trial *at the King's suit*, *The Eyre of Northamptonshire...*, p. 162.

⁵⁰ H. de Bracton, *De Legibus...*, vol. II, p. 432; *Fleta...*, vol. II, p. 94; *The Mirror of Justices*, ed. W.J. Whittaker, Selden Society, vol. VII, London 1895, p. 112. The accused could still claim benefit of clergy, *Calendar of the Patent Rolls, Edward III, A. D. 1367–1370*, London 1913, repr. Nendeln 1971, p. 167.

⁵¹ J. Bellamy, *Crime...*, p. 131. Cf. K. Baran, *Strony...*, p. 89.

⁵² SCKB, vol. VII, pp. 40–41 (20), 128.

the country.⁵³ In practice, however, cases of all the appellees being convicted were very rare and the approver was kept alive until his accusations were effective.⁵⁴ Moreover, in the vast majority of approvement trials before a jury, the verdict was favourable for the appellees.⁵⁵ The acquittal of even one appellee led to the execution of the approver on the grounds of a false accusation (*pro falso appello*).⁵⁶ It is noted in the literature that the jury may have been unfavourably inclined towards an accusation by a person who confessed committing other crimes. The question of credibility and the opinion about the approver probably had a direct influence on the low effectiveness of this type of prosecution.⁵⁷

The weakness of the institution of approvement lay in its susceptibility to abuse both by approvers and by the royal authorities. Approvement could serve the person arrested on the charge of committing a felony as a tactic, which led to the trial being prolonged.⁵⁸ A longer imprisonment, on the other hand, opened the way for organising an escape.⁵⁹ The approver could also prepare measures which would lead to the inadmissibility of the court trial. This sort of trial tactic gave the prisoner an opportunity to prepare for claiming benefit of clergy.⁶⁰ The approver also could, during the pre-trial, make attempts to receive the royal pardon.⁶¹

⁵³ M.T. Clanchy, *Highway...*, pp. 30–31; F.C. Hamil, *The King's Approvers...*, p. 238.

⁵⁴ *Calendar of London Trailbaston Trials under Commissions of 1305 and 1306*, ed. R.B. Pugh, London 1975, p. 12; F.C. Hamil, *The King's Approvers...*, p. 247; J.B. Post, *The Evidential...*, p. 93; *idem*, *The Justice...*, p. 45.

⁵⁵ In trials commenced on the basis of approvers' accusations in Norfolkshire in 1299–1349 the rate of convictions was only ca. 4 per cent, A. Musson, *Public...*, p. 213. In the first half of the 14th century, in over 36 per cent of trials the approvers retracted their accusations. For more details see J. Röhrkasten, *Some Problems of the Evidence of Fourteenth Century Approvers*, "The Journal of Legal History" 1984, vol. 5, pp. 15, 17. Also cf. J.G. Bellamy, *The Criminal Trial...*, p. 97; *Crown Pleas of the Devon Eyre of 1238*, ed. H. Summerston, Devon and Cornwall Record Society, 1985, vol. XXVIII, p. xxxv. Cf. J.B. Post, *The Evidential...*, p. 94.

⁵⁶ *Rolls of Northamptonshire...*, p. 70; *Wiltshire Gaol Delivery...*, p. 63 (197).

⁵⁷ A. Musson, *Public...*, p. 214; J. Röhrkasten, *Some Problems...*, p. 14.

⁵⁸ A. Musson, *Public...*, p. 173. An accusation by the approver meant that all the appellees had to be located and preventive measures had to be taken against them. *Crown Pleas of the Devon Eyre...*, p. xxxv; A. Musson, *Public...*, p. 172; J. Röhrkasten, *Some Problems...*, p. 15. The case of a series of accusations made by William Rose in 1389 did not end for him until 1396. J.B. Post, *The Evidential...*, pp. 94–95.

⁵⁹ Court records reveal cases of approvers escaping to a sanctuary, where they could legally stay for up to forty days, after which they had to leave the country. A.H. Hershey, *An Introduction to and Edition of the Hugh Bigod Eyre Rolls, June 1258 – February 1259: P.R.O. Just 1/1187 & Just 1/873*, unpublished doctoral dissertation, University of London, 1991, pp. 296–297 (A161).

⁶⁰ See SCKB, vol. VII, p. 33; F.C. Hamil, *The King's Approvers...*, p. 254; A. Musson, *Public...*, p. 173; J.B. Post, *The Evidential...*, p. 93; *idem*, *The Justice...*, p. 45; J. Röhrkasten, *Some Problems...*, p. 15. In the year 1383 we encounter the case of William Gore, an approver who was imprisoned in Cambridge as a layman. During his imprisonment, he was taught to read by John, an ecclesiastical representative. However, this deed was treated as a felony by the royal authorities and John was tried. In the end, however, he was acquitted; see P. Złamańczuk, *Dopuszczalność korzystania z pomocy prawnej przez oskarżonego w angielskim procesie karnym (XIII–XVI wiek)*, CPH 2010, vol. 62, no. 2, p. 93. More on benefit of clergy in England in: K. Baran, *Kilka uwag na temat dobrodziejstwa kleru w dawnej angielskiej procedurze karnej* [in:] *Dziedzictwo prawne XX wieku*, eds. A. Zoll et al., Kraków 2001, pp. 107–112.

⁶¹ We learn about such a situation from Henry VI's petition concerning the pardon of John Bolton, accused of rape and murder: "John Bolton of his subtle trickery, because he would not answer to the said indictment, nor to other various horrible felonies of which he was indicted, acknowledged various felonies and treasons, and became an approver, and thereof appealed various other men, and under pretence of that appeal thus pending, he acquired for himself a charter of pardon from you of all manner of treasons and felonies". *Henry VI: Parliament of 1445 February* [in:] PROME, tr-v-111.

As part of his trial tactic the accused could, therefore, use the institution of approvement to falsely plead guilty to prolong the proceedings.⁶²

Royal justices were aware that an accusation by an approver could lead to the trial proceedings being protracted. However, the Crown was interested in this form of prosecuting felonies, especially in cases of revolt and treason and due to the opportunity to break up larger crime groups.⁶³ Sources reveal that in order to achieve a confession of guilt and an accusation of accomplices, royal officials repeatedly used intimidation and physical violence or so-called "hard punishment" (*forte et dure*) against prisoners.⁶⁴ The problem became serious enough that efforts against such illegal practices were supervised and controlled by the Crown through delegated royal justices in individual counties.⁶⁵ Prison conditions and physical violence used against approvers were the subject of English statutory law in the first half of the 14th century.⁶⁶ Adopting illegal practices while using the institution of approvement was also reflected in English legal literature. Criticism of torture in England notably included the unlawful methods used against approvers. Chief Justice of the King's Bench, Sir John Fortescue, condemning torture in his work *De Laudibus Legum Angliae*, drew attention to the resulting false confessions of guilt and accusations of others as accomplices in the felony.⁶⁷ Even in the 16th century Sir

⁶² During a trial in 1447, the accused was acquitted after he revealed that he had been found guilty by a jury on which his enemies sat and, to save his life, he had pleaded guilty, receiving the status of approver. *Calendar of the Patent Rolls, Henry VI, 1446–1452*, London 1909, repr. Nendeln 1971, p. 34.

⁶³ F.C. Hamil, *The King's Approvers...*, pp. 238, 247–248; E. Powell, *Kingship, Law and Society: Criminal Justice in the Reign of Henry V*, Oxford 1989, p. 73.

⁶⁴ Approvers were a particular group of prisoners vulnerable to illegal practices. *Some Sessions of the Peace in Cambridgeshire in the Fourteenth Century 1340, 1380–1383*, ed. M.M. Taylor, "Cambridge Antiquarian Society" 1942, vol. LV, p. xvi; F.C. Hamil, *The King's Approvers...*, pp. 248–251; R.F. Hunnisett, *The Medieval...*, p. 35; A. Musson, *Public...*, pp. 243–244; J. Röhrkasten, *Die Folter in Rechtstheorie und Rechtswirklichkeit des englischen Spätmittelalters* [in:] *Vera Lex Historiae. Studien zu mittelalterlichen Quellen. Festschrift für Dietrich Kurze zu seinem 65. Geburtstag*, eds. S. Jenks, J. Sarnowsky, M.-L. Laudage, Köln–Weimar 1993, pp. 438–440; *idem*, *Some...*, p. 14. For more on *prisonne (peine) forte et dure* see P. Złamańczuk, *Peine forte et dure w Anglii do końca XV w.*, "Studia Iuridica Lublinensia" 2009, vol. XII, pp. 235–260.

⁶⁵ Under Edward I such circumstances were subject to examination by itinerant justices, as part of the instructions they received for sessions. *Capitula Itineris, The Statutes of the Realm*, vol. I, p. 235. Cf. F.C. Hamil, *The King's Approvers...*, pp. 248–250; A. Musson, *Public...*, p. 173; J.B. Post, *The Evidential...*, p. 93; J. Röhrkasten, *Some Problems...*, p. 14. The royal patent rolls from the second half of the 14th century recorded a case of an order to examine a gaol to establish whether there had been cases of inflicting physical pain in order to make prisoners turn approvers and appeal others. *Calendar of the Patent Rolls, Richard II, 1385–1389*, London 1900, repr. Nendeln 1971, p. 551. Cf. J. Röhrkasten, *Die Folter...*, p. 439.

⁶⁶ 5 Edw. II (1311), c. 34, *The Statutes...*, vol. I, p. 165. Edward I's statute from 1326–1327 stipulated special investigations and punishing the clerks guilty of "inflicting pain on prisoners" in order to coerce them to appeal innocent people. 1 Edw. III (1326–1327), c. 7, *The Statutes of the Realm*, vol. I, p. 253. Cf. A. Musson, *Public...*, p. 244. The statute of 1340 confirms the continuing phenomenon of using violence against prisoners in order to make them turn approvers. Finding evidence of such circumstances in the course of an investigation led to sentencing the prison guard guilty of abuse to the judgement of "life and member". 14 Edw. III (1340), Stat. 1, c. 10, *The Statutes of the Realm*, vol. I, p. 284. Cf. F.C. Hamil, *The King's Approvers...*, p. 251.

⁶⁷ J. Fortescue, *De Laudibus Legum Angliae*, ed. S.B. Chrimes, Cambridge 1949, pp. 46, 50. Cf. also K. Baran, *Tortury w angielskim procesie karnym*, CPH 1979, vol. 31, no. 2, pp. 59, 66.

John Spelman and Sir Thomas Smith reminded readers that sending prisoners to torture in order to force them to accuse others was a felony punishable by death.⁶⁸

As a last resort, the approver could try to defend himself before the court and make the case that his statement had resulted from unlawful methods being used. A special jury was then appointed to examine the circumstances described by the defendant. In practice, the effectiveness of accusations made by an approver was low.⁶⁹ If the jury established that the approver's confession of guilt was voluntary, he was almost immediately executed.⁷⁰ However, in such a situation the approver could still avoid death by claiming benefit of clergy.⁷¹

Approvement probably lost its practical significance towards the end of the 15th century.⁷² However, it continued to attract the interest of English jurists in the following centuries.⁷³ In the 16th century the practice of appeachment evolved which, unlike approvement, did not require trial by battle or securing the conviction of revealed felons. In return for the accusation (appeach, appeche) or revealing accomplices, the person (appeacher) who confessed their guilt or was convicted could count on the royal pardon.⁷⁴

⁶⁸ *Spelman's Reading on Quo Warranto Delivered in Gray's Inn (Lent 1519)*, ed. J.H. Baker, Selden Society, vol. CXIII, London 1997, p. 103; "There is an olde lawe of England, that if any gaoler shall put any prisoner being in his custodie to any torment, to the intent to make him an approver, that is to saie an accuser or Index of his complices, the gaoler shall dye therefore as a felon". T. Smith, *The King's Approvers...*, p. 106.

⁶⁹ One of the few cases proven before the court that the confession had been obtained through torture took place in 1330 in the case of John le Couker. See J. Röhrkasten, *Die Folter...*, p. 439.

⁷⁰ During a gaol delivery session in 1356, the court heard the case of Robert de Hampton, who claimed that he had been coerced into turning approver by the harsh prison conditions and unusual punishments. However, the jury appointed for the case established that the defendant had pleaded guilty voluntarily. Hampton was consequently sentenced to death. *Extracts from the Plea Rolls, 16 to 33 Edward III* [in:] *Collections for a History of Staffordshire*, vol. 12, London 1891, p. 147. See also *Year Books of the Reign of King Edward The Third, Years XI and XII*, ed. A.J. Horwood, London 1833, Kraus repr. 1964, p. 626.

⁷¹ We encounter such a case in the year books of the reign of Edward I, in the year 1293/1294. Arrested on suspicion of several felonies, Robert le Botiler claimed before the court that his confession had been obtained through coercion and harsh prison conditions. The jury ordered an investigation among the other prisoners to examine the defendant's claims. However, the result of the investigation did not corroborate the defendant's claims. Robert le Botiler's confession was found legitimate, as it had been given before an authorised royal official. He only managed to avoid the death penalty by claiming benefit of clergy. However, he was found guilty on the basis of the earlier confession and his property was confiscated. *Year Books of the Reign of King Edward I, XXX-XXXI*, pp. 543-544.

⁷² Hamil found one of the last cases of approvement in 1470. See F.C. Hamil, *The King's Approvers...*, p. 257. In the court year books, we will even find an accusation by an approver in 1472. *Year Books Pasch. 12 Edw. IV*, pl. 26, fol. 10b (1472), Seipp Number: 1472.034. In 1473, the court heard the case of Robert Beverly, an approver who was sentenced to death after he claimed before the court that he did not uphold the earlier appeal. *Extracts from the Plea Rolls, 34 Henry VI. to 14 Edward IV* [in:] *Collections for a History of Staffordshire*, New Series, vol. 4, London 1901, p. 191.

⁷³ W. Blackstone, *The Commentaries on the Laws of England: A Fascimile of the First Edition of 1765-1769*, vol. IV. *Of Public Wrongs (1769)*, introduction by T.A. Green, Chicago 1979, pp. 325-326; E. Coke, *The Third Part...*, pp. 128-130; W. Lambarde, *Eirenarcha or of the Office of the Justices of Peace*, London 1588, p. 234; F. Pulton, *De Pace Regis et Regni*, fol. 185-189; W. Staunford, *Les Plees del Coron*, 1583 (cap. 52); *The Complete Works of St. Thomas More*, vol. 10, eds. J. Guy et al., New Haven-London 1987 p. 107.

⁷⁴ In 1522, Robert Holforde was promised the royal pardon for revealing his accomplices, who had committed a robbery: "Rob. Holforde, of Acton, Chesh. Pardon for being concerned with Rob. Spencer, alias Watson, late of London, and Ric. Astley, late of Derby, in the robbery from an Irishman of 10d., and of his coat, sword and buckler. [...] Holforde should be pardoned, for finding a 'fawcon' of the King's in co. Bucks, if he would disclose the names of the two others concerned". *Letters and Papers, Foreign and Domestic, of*

The institution of appeachment may therefore be the actual prototype of the modern institution of turning the State's evidence.⁷⁵ In the 17th and 18th centuries sources clearly treated as a witness the person (impeacher) who pleaded guilty and testified against their accomplices (evidence of an accomplice). Such a person was considered witness for the Crown or evidence for the Crown. However, the principle that the right to perform this trial role was dependent on the justice's discretion was preserved.

Conclusion

The approver had the trial status of a prosecutor who had been a defendant at the earlier stage of the proceedings. An analysis of the functional structure of the trial with the participation of the approver shows that he performed the function of prosecutor, consisting in filing and supporting an accusation before the court. The function was performed by the approver as part of the burden of proof, which rested on him. Therefore, the term "turning the State's or King's evidence" in reference to the institution of approvement does not seem entirely precise.

The paradigm of the institution of approvement stipulated that in order to receive the status of approver, the person accused of a felony punishable by death had to plead guilty of the charge, to disclose his accomplices and to make a formal accusation against them. In return for securing the conviction of the persons he disclosed, the approver could count on being pardoned or legally leaving the realm.

Pleading guilty in order to participate in the trial as an approver could be a trial tactic. It enabled the accused to avoid being punished if he secured the conviction of the accomplices he disclosed.

Receiving the status of approver was the result of an agreement of sorts with the state authorities. The initiation of the proceedings was controlled by the Crown – which is why the approver was sometimes referred to as the "royal child" or "royal son" in the sources. The proceedings started by the approver were not, therefore, strictly private. This specific form of prosecution was sometimes used by the accused as a tactical opportunity to delay the trial. The proceedings against the defendant were suspended as long as his accusations were effective.

Under the institution of appeachment, which began to develop in the 16th century, the function of prosecution typical of the approver started to diminish. The defendant who turned appeacher became a source of evidence closer to the modern system of turning the State's or King's evidence.

Translated by *Anna Sosenko*

the Reign of Henry VIII, vol. III, ed. J.S. Brewer, London 1867, p. 941 (2214/18). In 1597, William Harris was pardoned after he pleaded guilty of stealing horses and accused felons unknown to the royal authorities: "Pardon to Wm. Harris, convicted of stealing two horses, price 6l. from Thos. Astyll, of Evesham, co. Worcester, he having after conviction appeached divers unknown felons, whereby many had restitution of their lost goods". *Calendar of State Papers, Domestic Series of the Reign of Elizabeth, 1595–1597*, London 1869, p. 457 (24 [2]).

⁷⁵ For more details see J.G. Bellamy, *The Criminal Trial...*, pp. 142–143.

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