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DON'T BRING AN ARMY TO AN ARBITRATION (ENGLAND, 1411)

*David J Seipp**

The name of our friend Derek Roebuck will always be linked to the long history of arbitration and mediation which he has chronicled so thoroughly in a dozen volumes by my count and many articles and chapters. On a spectrum of dispute resolution methods from formal courtroom litigation to savage brute force, arbitration stands at an interesting intermediate point. In tribute to Derek's memory, I offer this glimpse of a curious episode at the intersection of due process of law, armed violence and principled arbitration. It reminds us that these three alternatives were not always as widely differentiated as we suppose.

This episode took place in England in 1411. A justice of the Court of King's Bench, one Robert Tyrwhit, had agreed to arbitrate a land dispute. He showed up to the arbitration with some 500 armed men. Parliament condemned and punished Tyrwhit for this outrage. I did not learn of this episode in 2013 from Derek Roebuck's masterful *Mediation and Arbitration in the Middle Ages: England 1154–1558*, though he recounts it there. His brief account takes up most of page 151 in that volume. The king's justice who brought an army to an arbitration had long before earned the attention of and condemnation by legal historians, however. Tyrwhit's betrayal of the rule of law was taken as emblematic of the lawlessness of late medieval England. Even a principal officer responsible for upholding the law had, it seemed, utterly abandoned the rule of law.

In volume 2 of his *History of English Law*, written in 1903, William Holdsworth summarised thus:

In 1411 Sir Robert Tirwhit, a justice of the bench, confessed that he had arrayed a small army of five hundred men and set an ambush for Lord Roos, who had arranged to meet to compromise a dispute as to a common of pasture; and he actually put forward in extenuation of his

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offence the wonderful plea that he, a royal judge, did not know that he had broken the law.

‘If these things were done by the lawyers’, Holdsworth asked, ‘what could be expected from the laymen?’¹ Holdsworth was preceded in this judgment by Charles Plummer, whose 1885 introduction to Fortescue’s *Governance of England* called this same Robert Tyrwhit a ‘turbulent justice’ and ‘guilty of the grossest turbulence and breach of the peace’.² Foss’s *Judges of England* likewise gave him a ‘violent disposition’.³

Writing well over a century ago, Holdsworth and Plummer had made Robert Tyrwhit a villain, an exemplar of 15th century lawlessness, a royal justice who betrayed the law and sided instead with the worst sort of violent interference with orderly dispute resolution. Derek Roebuck could only spare a bit less than 400 words for Tyrwhit’s story. He chose his selection of facts well, commented only that even in those troubled times, Tyrwhit’s behaviour ‘was unseemly for a judge in the eyes of his contemporaries’, and concluded with a wistful observation that the full historical record includes ‘much more detail’ of this episode. I think he wanted to say more, so I take this as his invitation for us to take a closer look at the episode and its main protagonist. One might call my inquiry ‘Who Framed Robert Tyrwhit?’

Tyrwhit was the son of a knight from Kettleby in Lincolnshire. He had been a serjeant at law since 1398. He was appointed king’s serjeant by Henry IV in 1399. From 1398 until 1411 he acted as justice of assize on the Midland circuit. In 1403 he was required to lend the king £100 to fight Welsh and Scottish campaigns. He could afford it, because as a serjeant he held annual retainers to counsel a duke, an earl, a couple of towns, a cathedral and an abbey. In 1408 he was appointed one of three Justices of King’s Bench and was knighted. He was one of two justices permitted by royal patent to take recognisances wherever he might happen to be. Beginning in 1410, he acted as a trier of petitions in Parliament. By the time he died, Tyrwhit held 14 manors in Lincolnshire, several manors in other counties and an inn in London.⁴

In 1411, Sir Robert Tyrwhit brought a writ of trespass in King’s Bench, his own court, against various defendants associated with William, Lord

1. WS Holdsworth, *A History of English Law*, 2, 415 (citing Rotuli Parliamentorum 3, 649). I adopt the spelling of Tyrwhit’s name in JH Baker, *The Order of Serjeants at Law* (1984), based on wills or royal patents.

2. J Fortescue, *The Governance of England*, ed. C Plummer (1885), 22 n.2, 385.

3. E Foss, *The Judges of England*, 4, 368 (1851).

4. Biographical details are taken from the entry by AF Pollard, revised by Edward Powell in the *Oxford Dictionary of National Biography* (2004, Oxford: Oxford University Press) and entries in Baker and Foss, cited *supra* notes 1 and 3, supplemented by RP Tyrwhitt, *Notices and Remains of the Family of Tyrwhitt* (1858).

Ros of Helmsley: first, John Rate, who was the steward of the courts of Lord Ros, on his manor of Melton Ros; second, Lord Ros's bailiff of the same manor; and third, 11 named tenants at will and villeins of Lord Ros. It was not forbidden for Justices to be litigants in their own court, and in fact they and other officers of their court had a privilege to sue and be sued only in their own court. The writ was for digging turf, cutting trees and underwood and taking away the turf, wood, grass and ferns from a piece of Tyrwhit's land near Wrawby, in northern Lincolnshire, damaging Justice Tyrwhit to the amount of £40.⁵ This was, thus far, a perfectly ordinary writ of trespass like thousands of others.

Lord Ros's steward, bailiff and tenants pleaded that Lord Ros had rights of common to pasture cattle, take turf (right of turbary) and take wood (right of estovers) on that piece of land. Again, this was a perfectly ordinary pleading in defence. While this writ of trespass was pending, Lord Ros and Justice Tyrwhit submitted themselves with this lawsuit and all its corollaries to the arbitration and ordinance of William Gascoigne, Chief Justice of Tyrwhit's Court of King's Bench. No arbitrators other than Gascoigne were mentioned. Tyrwhit's opponent Lord Ros of Helmsley was a Knight of the Garter and a Privy Councillor, and had been Henry IV's Lord Treasurer of England six years before. Gascoigne, with the agreement of Justice Tyrwhit and Lord Ros, ordered them to be before him at the place of the alleged trespass, Wrawby in Lincolnshire, on Saturday, 3 October 1411, for what was called at the time a 'loveday'.⁶ The parties were expected to be there with their documents, in order to explain their titles and rights in this matter.

The arrangements for this arbitration specified who could accompany each party. Lord Ros was allowed to bring 'two barons' related to him, 'or other friends, in a peaceable manner, with as many persons as they customarily used to ride forth with'. Justice Tyrwhit was permitted to come to arbitration with two of his relatives or other friends, in a peaceable manner, with as many people as belonged to their status and degree, the usual retinue of persons of importance. Lord Ros brought with him Henry, Lord Beaumont, who was chamberlain of the Duchy of Lancaster and a second cousin of the king, and Thomas, Lord de la Warr, a son and brother of lords who fought under Edward the Black Prince, with lands in Gloucestershire, Somerset and Sussex. They would have had the usual number of servants, and probably some legal counsel for Lord Ros. Lord Ros came ready to explain his title and right and to abide by the arbitration.

5. These details and those that follow are taken primarily from *The Parliament Rolls of Medieval England*, ed. C Given-Wilson (2005), 8, 519–23 and appear also in *Rotuli Parliamentorum (1767–77)* 3, 649–651.

6. On this terminology, see JW Bennett, 'The Medieval Loveday', (1958) 33 *Speculum*, 351–70.

Lord Ros's petition to the king and Parliament told what happened next. 'Robert Tyrwhit, notwithstanding that he was a Justice of Assize and keeper of the peace' for that county of Lincolnshire, 'plotted by scheming and malice aforethought to raise and assemble at Wrawby that Saturday a large number of men, numbering about 500, armed and equipped to make war, against the king's peace, to the great disturbance of all the surrounding lands'. Justice Tyrwhit's little army, Lord Ros told Parliament, 'lay in wait there in several groups, in a warlike manner', close to the place specified by Chief Justice Gascoigne, 'in ambush for Lord Ros and for his kinsmen Lord Beaumont and Lord de la Warr, in order to forcibly overcome and dishonour the agreement to arbitrate, to the great shame of Lord Ros and the two other Lords'. I presume that Justice Tyrwhit's show of force put a halt to arbitration that day, and both sides went back to their manors. Lord Ros petitioned the king and Parliament to redress Tyrwhit's evil trespass and offence. Parliament took up this dispute immediately after the Chancellor opened its session with his customary speech on 4 November 1411. Lord Ros complained that what Justice Tyrwhit had done was an outrage, set out the circumstances in great detail and left the appropriate remedy up to the king.

The Parliament roll mentions that both parties put forward various arguments, responses and replications on the days assigned to them during the Parliament session. On Friday 27 November 1411, Lord Ros and Justice Tyrwhit both came with their counsel before Henry IV and the lords. All that was recorded of their argumentation was that Justice Tyrwhit explained to the king how 'through foolishness and ignorance he had acted in this matter otherwise than as he ought to have done, to the king's displeasure'. Tyrwhit put himself on the king's mercy and prayed for his mercy and pardon. The king asked the justice whether he put himself on the king's mercy for his ignorance, or for the deed he was said to have committed. Justice Tyrwhit told the king that it was for the deed specified in Lord Ros's petition. Justice Tyrwhit did not deny the material allegations against him. He had brought with him to the arbitration a large assembly of armed men.

Parliament's consideration of this dispute ended when Tyrwhit capitulated. He submitted himself to arbitration by any two lords related to Lord Ros, whom Lord Ros would name. Lord Ros readily agreed to this, and in the presence of the king and lords in Parliament he nominated Thomas Arundel, the Archbishop of Canterbury and Lord Grey of Codnor, the king's Chamberlain, to be the arbitrators between them. The king was relieved that he would not himself have to decide between Justice Tyrwhit and Lord Ros, so he told Justice Tyrwhit that Tyrwhit 'would not depart entirely without the king's grace', whatever that meant.

The Archbishop and Lord Grey then proceeded to their arbitration of the entire dispute. Their award was enrolled in Parliamentary records in English. They said that contrary to the 'loveday' arranged by Chief Justice Gascoigne, Justice Tyrwhit had not come to arbitration with the number of men who should have accompanied him according to his degree. They awarded that Tyrwhit and Ros should submit themselves back to Chief Justice Gascoigne for decision of the underlying legal dispute as to Lord Ros's claimed rights of common on Tyrwhit's land. They further awarded that at a time settled by Lord Ros, Justice Tyrwhit had to deliver to Lord Ros's manor of Melton Ros two tuns (500 gallons) of wine from Gascony, two fattened oxen, and 12 fattened sheep, to be eaten at dinner by those present. They awarded that Justice Tyrwhit had to come to Melton Ros with the wine, oxen and sheep, and with the knights, squires and yeomen who had led Tyrwhit's armed force. In front of his own men and those of Lord Ros, Justice Tyrwhit was ordered to repeat the confession that he had made to the king in Parliament, and then was ordered to make a further speech dictated by the Archbishop and Lord Grey:

My Lord Ros, I know well that you are of such birth, estate, and might that if you had wished you could have come to the ... loveday with such a following that I should have been quite unable to challenge you; yet you wished to come [without a large accompanying force of men], having consideration for your position. And through misleading information, I was afraid that I would be harmed, so with the intention of saving myself, I did assemble these persons there, not to cause harm or offence to you, my lord Ros; and I will apologise here in any way you wish. Moreover, since I am a Justice, I should have behaved more wisely and peacefully than any other common man, and I know well that I have failed and have offended you, my Lord Ros, whereof I pray for your grace and mercy and offer you 500 marks [£333 6s 8d, this when a justice's annual salary was £10] to be paid at your will.

The Archbishop and the Chamberlain were not finished. They ordered further that Lord Ros should politely refuse the 500 marks, taking only the wine, oxen and sheep from Justice Tyrwhit for the dinner, and that Lord Ros should publicly forgive Justice Tyrwhit and all those he led in his armed company of all their offence and trespasses, with the exception of four named knights who could not be forgiven with the rest. Justice Tyrwhit had to bring these four to Lord Ros's castle at Belvoir to ask his grace and mercy. Lord Ros was further ordered to act toward these four

knights in such a manner that they should consider themselves well and mercifully treated.⁷

In brief, Justice Tyrwhit was allowed to say by way of apology that he led an army of 500 men in an act of self-defence, because he was led to believe that Lord Ros would come to their arbitration with an even larger and stronger army. This may have been what Tyrwhit had been arguing to the king and to these arbitrators all along. What interests me particularly is what happened to Justice Tyrwhit next. Tyrwhit did not lose his job. He remained on the Court of King's Bench, was reappointed at the accession of Henry V in 1413 and at the accession of Henry VI in 1422, serving for another 16 years, until shortly before his death in January 1428. He continued in active participation in Year Book cases. The only effect on Tyrwhit's career stemming from his armed encounter with Lord Ros seems to have been his transfer some time late in 1412 from the Midland circuit (which included Lincolnshire, where this dispute arose) to the Northern circuit. A statute of the same year charged justices of the peace and sheriffs to prosecute any 'riot, assembly, or rout of people' or to pay the king £100 if they did not.⁸ Chris Given-Wilson, who edited the Parliament roll for this reign, suggests that this Statute of Riots might have been Parliament's response to the Tyrwhit-Ros affair.⁹

Tyrwhit seems to have reconciled quickly with Lord Ros, as shown by the roles the two men played just a year later in another 'loveday' gone wrong. In 1411, Alexander Meryng and John Tuxford disputed over part of the manor of Little Markham in Nottinghamshire. Tuxford brought in a powerful neighboring landowner, Sir Richard Stanhope, on his side, and in retaliation Meryng enlisted Sir John Zouche and Sir John Leek to help him. The confrontation ended just short of bloodshed. Early in 1412, Meryng then brought an assize of novel disseisin against Tuxford, and this they brought before the assize justices for the Midland circuit, who were still headed by Justice Tyrwhit. In October 1412, while the action was still pending, both sides submitted their dispute to the arbitration of three men. The three arbitrators, just one year after the Wrawby ambush, were Justice Robert Tyrwhit, Chief Justice Gascoigne and William, Lord Ros of Helmsley – that is to say, the two opponents in the October 1411 loveday ambush and their arbitrator. It took four years for these three to complete their arbitration for Meryng and Tuxford, and Meryng had to get a royal order to proceed with the assize. In the end, however, Tyrwhit, Gascoigne

7. Archival and manuscript sources include C65/72 m.14; 3 Rot. Parl. 648b–651a; Cottonian Records of Rolls of Parliament, 13 Henry IV, m. 14, Lansdowne MS 207 *a*, dated about 1411–1412; also Lansdowne MS 2076, fol. 593, cited in the Lincoln volume of Proceedings of the Archaeological Society (1850), 66.

8. Statute of 13 Hen. 4, ch. 7 (1411).

9. Parliament Rolls of Medieval England, *supra* at note 5, 558 n.2.

and Lord Ros were sufficiently reconciled to agree that the disputed lands should be divided equally between the two parties.¹⁰

Robert Tyrwhit's descendants also did not suffer for their ancestor's 'turbulent' behaviour and 'violent disposition'. His son Sir William fought alongside Henry V at Agincourt as part of his bodyguard, and another descendant, Sir Robert, a courtier to Elizabeth I, was married to the Queen's former governess. This Sir Robert renewed the feud with the Ros family, leading to the loss of several lives. Between the two parcels of land, a gallows was erected by order of James I that stood until the 20th century. An 18th century descendant, Thomas Tyrwhitt, was a fellow of Merton College, Oxford, edited Chaucer's *Canterbury Tales* and served as Undersecretary of War and Clerk of the House of Commons.¹¹

One reason why Justice Tyrwhit might have thought he did nothing wrong on 3 October 1411 was that, five years earlier, the Chief Baron of the Exchequer, John Cokayn, had ejected Chief Justice William Gascoigne and former Exchequer Baron Laurence Allerthorpe, with two others, from the manor of Baddesley Ensor in Warwickshire. According to Gascoigne and Allerthorpe's petition to the king and Parliament, Chief Baron Cokayn came against them with a force of 200 men arrayed to make war, and this little army had terrorised their tenants.¹² The result of the complaint by these two king's justices against a third royal justice are not recorded, but immediately after this petition Chief Baron Cokayn was also made a Justice of Common Pleas, held both judicial positions and both salaries for six years and remained on the Common Pleas bench for 23 years in all. Cokayn died in possession of this manor of Baddesley Ensor. The response to Cokayn's 200-man show of force seems to have been to give him a second judicial position and salary. Perhaps Tyrwhit can therefore be forgiven, five years later, for thinking that he had done what any landholder, royal justice or not, would do in such a dispute – if he could afford to rally 500 armed men. Even for a king's justice, there seemed nothing particularly unusual or inappropriate about a show of force of this type.

Tyrwhit's ambush became memorable not because of his own show of armed force but because of Lord Ros's brilliant strategy against him. Lord Ros outmanoeuvred Justice Tyrwhit by coming to the arbitration with just the two friends and their usual retinues, as their arbitrator Gascoigne had

10. Edward Powell, 'Arbitration and the Law in England in the Late Middle Ages', *Transactions of the Royal Historical Society*, 33 (1983), 57–58, citing KB 9/204/2, mm. 6, 10; Alan Cameron, 'Meering and the Meryng Family', *Transactions of the Thoroton Society of Nottinghamshire*, 77 (1973), 41–52; also KB 27/64, Rex mm. 9 and 12; *History of Parliament*, see under Meryng, Sir William (d. 1449).

11. *Notices and Remains of the Family of Tyrwhitt*, *supra* note 4.

12. *Parliament Rolls of Medieval England*, *supra*, at note 5, 414 no. 15, correctly dates this petition to March 1406 and summarises it briefly. The petition is recorded in full in *Rotuli Parliamentorum*, *supra* at note 5, vol 3 cols 360–361.

ordained. This gambit allowed Lord Ros to play the victim, to petition the king and Parliament, to decry the hypocrisy of royal justices doing what Cokayn and Tyrwhit had done, to humiliate Justice Tyrwhit, to get a good dinner for his tenants, and almost certainly to gain an advantage in the decision of the underlying dispute about rights of common of pasture, turbary and estovers.

Holdsworth in 1903 and Plummer in 1885 did not need all of these details to condemn Robert Tyrwhit for his betrayal, in their eyes, of the rule of law. The fact that this royal justice admitted bringing a force of several hundred men against an opposing party during litigation was damning enough. They may have considered Tyrwhit suspicious for agreeing to arbitration with Lord Ros in the first place. Legal historians take the view that law is a good thing, and more law is better than less. For those of us trained in the law, how could law be the villain? So if law is the good guy, the winner, the hero of the story, surely the bad guys are crime, violence and disorder. Legal histories often presume a constituency for law, a market for law, a demand within society for more and better law as a way of arranging people's affairs, accomplishing their goals and resolving their disputes. Orderly procedures in the courts are always better than armed gangs in the streets or pitched battles in the fields. Abstract, impersonal principles should determine winners and losers, not brute force or threats of violence.

Arbitration, viewed as an alternative to courtroom litigation, has sometimes incurred the hostility of courts and lawyers. It has sometimes been dismissed by legal historians as 'not law'. The late medieval period was not one of those times. Fifteenth-century judges and lawyers participated actively in arbitration, as the episode described here shows. Courts regularly enforced covenants to ensure compliance with arbitral awards. Edward Powell, in the second of his excellent 1983 and 1984 articles about arbitration in 15th-century England, taught us to stop viewing arbitration as an enemy of the common law. Instead, he wrote, '[t]he two were used in conjunction and often simultaneously, as alternative means to the same end of securing the favorable resolution of a dispute'.¹³ Powell added parenthetically after this sentence, '[a] popular third means was of course the use of violence or armed force'. Those inside the legal system as well as outsiders all weighed the costs and benefits of arbitration versus courtroom litigation. The use and threat of violence was, I am suggesting here, a third alternative with its own risks and opportunities, like the other two courses. Still more alternatives would be resort to other tribunals, to the Chancellor, to the king's council or, very late in the century, to the Star Chamber.

13. Edward Powell, 'Settlement of Disputes by Arbitration in Fifteenth-Century England', (1984) 2 *Law and History Review*, 21, 38; also Edward Powell, 'Arbitration and the Law in England in the Late Middle Ages', (1983) 33 *Transactions of the Royal Historical Society*, 49, 64 on resort to Chancery.

Fifteenth-century judges and lawyers co-existed with this third way of settling disputes, by shows of force, alongside their core preoccupation with courtroom litigation and their thriving sideline of arbitration. It is a commonplace nowadays to suppose that settlement negotiations and arbitration take place 'in the shadow of the law', with both sides guessing the likely outcome of potential litigation. Fifteenth-century litigation, I am suggesting, may have taken place in the shadow of the violent world of private warfare among powerful lords. Lawyers and judges were not a besieged, embattled minority defending a pure rule of law against lawless magnates, nor were they prelates and priests of a secular religion of common law observance, non-combatants by choice in the escalating private warfare of ordinary landholders. It is that ancient maxim of the law: If you cannot beat them, join them. And bring an army of 500 with you if you possibly can.

On a personal note, I want to express my appreciation for the friendship of Derek Roebuck, whom I first met more than 25 years ago. He showed me hospitality then and since, and has been for me a model of scholarly generosity. I am proud that some work of mine was of help to him in his research on *Mediation and Arbitration in the Middle Ages*, and I especially treasure his kind words on pages 10 and 351 of that book. I am happy now to be able to contribute this essay in his memory.