Launch of

"So Help Me God – A History of Oaths of Office"

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Since the creation of the Legislative Council and Legislative Assembly in 1823 and 1856, members have taken various oaths of office. The form of the oath has changed with the changing role of the chamber. Let me give you three examples.

The original oath taken by the first five councillors who were sworn in in August 1824 extended to a promise of secrecy:[1]

> "I swear, that I will not, directly or indirectly, communicate or reveal to any Person or Persons, any Matter which shall be so brought under my Consideration, or which shall become known to me as a Member of the said Council. So help me GOD".

It may seem strange to modern ears for a councillor to keep events in the Legislative Council entirely secret, until one remembers that in 1824, before the first glimmer of representative government had arrived, deliberations of all five nominated councillors were confidential.

In April 1843, when the Council became partially elected, the oath was much longer, not to mention quite lively. It included:[2]

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1 4 Geo IV c 96 (Imp), s 32. The Council sat in various local buildings until moved to this site in 1829: see M Stapleton (ed), *Australia's First Parliament* (1987, Parliament of New South Wales) at 48.

2 5 & 6 Vic c 76 (1842) (Imp), s 25.

> "I … do sincerely promise and swear … that I will defend Her [Majesty], to the utmost of my Power, against all traitorous Conspiracies and Attempts whatever which shall be made against Her Person, Crown and Dignity; and that I will do my utmost Endeavour to disclose and make known to Her Majesty, Her Heirs and Successors, all Treasons and traitorous Conspiracies and Attempts which I shall know to be against Her or any of them; and all this I do swear without any Equivocation, mental Evasion or secret Reservation, and renouncing all Pardons and Dispensations from any Persons or Persons whatever to the contrary. So help me GOD".

This expanded form was, presumably, informed by the attempts to assassinate a young Queen Victoria by Edward Oxford in 1840 and, perhaps especially, by John Francis, on 29 and 30 May 1842.[3] The words were very familiar in the chamber. They were deployed during the passage of the Constitution Bill in 1853 to criticise William Charles Wentworth, who opposed an elected upper chamber.[4]

When responsible government was introduced, the oaths of members who commenced to sit in May 1856 reverted to a simpler type:[5]

> "I … do sincerely promise and swear that I will be faithful and bear true Allegiance to Her Majesty Queen Victoria as lawful Sovereign of the United Kingdom of Great Britain and Ireland and of this Colony of New South Wales dependent on and belonging to the said United Kingdom. So help me God."

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3 See "The man who tried to kill Queen Victoria twice" (*Daily Telegraph*, 30 May 2016) and P Murphy, *Shooting Victoria: Madness, Mayhem, and the Rebirth of the British Monarchy* (Pegasus Books, 2012) at 181-186.

4 See *New South Wales Constitution Bill: The Speeches in the Legislative Council of New South Wales on the Second Reading of the Bill for Framing a New Constitution for the Colony* (Thomas Daniel, Sydney, 1853) at 165, where the Attorney-General referred to a report that Wentworth had expressed his indifference to whether he lived under a republican President or under her Majesty the Queen, which the Attorney said "would come within the meaning of that oath which is taken by all magistrates and persons in authority 'to discover and make known all traitorous conspiracies against the Queen's Majesty, and to put them down.' (Loud cheers.)"

5 17 Vic c 41 (1853) (Imp), s 35.

You will note that while the form has varied quite substantially, the evocative, ancient words "So help me God" – a survival of the subjunctive that can also be seen in "Heaven help us" or "Heaven forfend" – have been used continuously.

It is a fine thing to provide, as this work does, a short, readable and accessible account of oaths. As the authors point out, the history of oaths is much older than representative, let alone responsible, government in the Colony. So too is the history of affirmations as a alternative to an oath. I shall say something about each.

Many people would say that one of the most characteristic features of the common law system is trial by jury. What we now call a jury was, in Norman French, a *jurata*, which was the collective noun for a body of *juratores* – people who have been *sworn* well and truly to try the issue between the parties. The notion of the swearing of an oath as an aspect of the legal process is quite ancient. Like most things, it is more interesting than one might expect.

The leading legal historian Sir John Baker writes that the classical form of the jury first appeared in the 13th century in criminal suits and actions of trespass.[6] "Trespass" like most old-fashioned legal terms is a word with a very rich history. In modern legal usage, perhaps reinforced by the ubiquity of "No Trespassing" signs, it is most associated with trespass to land, and we tend to neglect trespass to goods and trespass to the person, notwithstanding that they remain basic common law torts.[7] Trespass, it turns out, once had a broader meaning. Blackstone wrote that in its largest sense, trespass "signifies any transgression or offence against the law of nature, of society, or of the country in which we live".[8] That breadth explains how the same word came to be used as the English translation for both *peccatum* and

6 J Baker, *An Introduction to English Legal History* (5th ed, Oxford University Press, 2019) at 80. Divergent views as to the ultimate source of juries may be seen in R von Moschzisker "The Historic Origin of Trial by Jury: Part III" 70 *University of Pennsylvania Law Review* 159 (1922).

7 For modern instances of the classification of wrongs as trespass to the person, see *Croucher v Cachia* (2016) 95 NSWLR 117; [2016] NSWCA 132 at [20], and for trespass to goods, see *Simon v Condran* (2013) 85 NSWLR 768; [2013] NSWCA 388 at [44]-[45].

8 W Blackstone, *Commentaries on the Laws of England*, Vol III (18th ed, Sweet & Maxwell, London, 1829) at [208].

debitum in the Vulgate,[9] and how it is found in the Book of Common Prayer's translation of the Lord's Prayer.

Trespass, when regarded as a breach of the King's peace, was an action in the King's courts, and thereby formed part of the *common* law – the law which was common throughout the kingdom, as opposed to the various local laws administered in the borough and the manors. And that meant that if the proceeding went to trial, it was determined by a jury – by men who had taken the juror's oath. For not all issues in litigation were determined by the jury considering the evidence. It has been said that "medieval English law knew of no law of proof but rather a law of proofs".[10] A much older approach was trial by ordeal. If the party's hand was not burnt by a hot iron (or, if burnt, the burn did not fester), or if his or her body sank in cold water, then that was regarded as a sign of divine favour.[11] Even in the 13th century, there was a feeling of disquiet at the regular invocation of divine intervention in order to determine ordinary civil disputes, and in 1215 the Lateran Council prohibited clerics' involvement in any such practice. Trial by ordeal seems to have withered thereafter.[12] But what did survive for centuries was compurgation, also known as wager of law, which had oathmaking as its centrepiece.

The point of wager of law, in proceedings where it was allowed, was to remove an issue from the determination of the jury. It was described by the High Court in a decision in 2014. The defendant could meet an action in, say, debt:[13]

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9 J Baker, *An Introduction to English Legal History* at 67.

10 R Ireland, "The Presumption of Guilt in the History of English Criminal Procedure" (1986) 7(3) *Journal of Legal History* 243 at 243.

11 Baker, *An Introduction to English Legal History* at 7. Thus one woman proved that Duke Robert Curthose had fathered her children by carrying the hot iron and escaping "without the slightest burn": see R Bartlett, *Trial by Fire and Water* (Oxford, Clarendon Press, 1986), p 20.

12 It is true that trial by battle survived until the early nineteenth century: see *Ashford v Thornton* (1818) 1 B & Ald 405; 106 ER 149 and 59 Geo III c 46 (1819), s 2 ("That from and after the passing of this Act, in any Writ of Right now depending, or which may hereafter be brought, instituted or commenced, the Tenant shall not be received to wage Battel, nor shall Issue be joined nor Trial be had by Battel in any Writ of Right; any Law, Custom or Usage to the contrary notwithstanding").

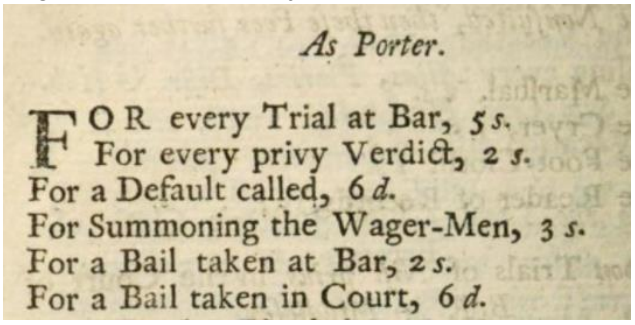
13 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560; [2014] HCA 14 at [109].

> "by formally swearing that he owed nothing in circumstances where he was able to bring to court "compurgators" or "oath-helpers" who would swear that his oath was not perjured."

These oath-helpers might have no personal knowledge of whether the defendant owed a debt; their testimony was only as to whether the defendant was telling the truth. In time this became institutionalised, with professional wagermen being paid for by the litigant, and court officials being allowed fees for finding them,[14] and you can read accounts of clerks' various fees, including 3 shillings for "Summoning the Wager-Men".[15] Partly in order to outflank this defence, courts developed new procedures. Speaking very generally (and abandoning the Latin in which the writs were framed), rather than suing in debt, a plaintiff would plead that there had been a promise to pay the amount. In support of this innovation, Sir Edward Coke argued that the theory of wager of law was that "the law presumeth that no man will forswear himself for any worldly thing", but that that theory had been rebutted by experience.[16] Ultimately, one foundation of the modern law of contract lies in the desire to avoid a proces which could be met by a defence of compurgation.[17] Of course the actual position was much more complex than I have just summarised, noting that there was ample room to improve on a system which did not let the plaintiff or the defendant give evidence, and would refuse to admit into evidence, say, signed writing that the

14 The "porter" or "court-keeper": see J Baker, "New Light on *Slade's Case*" (1971) 29(2) *Cambridge Law Journal* 213 at 228.

15 See *The Compleat Clerk in Court; or Practising Solicitor* (Lacy and Clark, London, 1726) at 280, which, under the heading "Fees due to the Cryer and Porter", includes the following:



As Porter.

FOR every Trial at Bar, 5 *s.*
For every privy Verdict, 2 *s.*
For a Default called, 6 *d.*
For Summoning the Wager-Men, 3 *s.*
For a Bail taken at Bar, 2 *s.*
For a Bail taken in Court, 6 *d.*

16 J Baker, "New Light on *Slade's Case"* at 229-230.

17 This was not unconnected with the economic incentives whereby courts received fees based on litigation commenced in their courts: see D Klerman, "Jurisdictional Competition and the Evolution of the Common Law" 74 *University Chicago Law Review* 1179 (2007) at 1191.

defendant had already paid the debt.[18] Nor were juries an answer to all of the deficiencies of the common law. From the perspective of a merchant, who might be a foreigner with no local support, a claim in debt might be expected to fail irrespective of whether the defendant could rely on oath-helpers and thus quite elaborate steps were taken to remove much commercial law from common law courts.[19]

The fact that wager of law survived in England until 1833[20] well illustrates the significance the law has given to an oath. For centuries oath-taking was an essential aspect of the common law legal system. Nonetheless, the enactment of perjury statutes and the steps taken to develop legal remedies which were not met by a defence of compurgation show that the fallibility of an oath was well appreciated.

One aspect of the significance of the making of an affirmation rather than an oath was brought home to me when I was at the Bar during a long trial concerning land owned by one of the orthodox churches.[21] There was a dispute between the Australian church, which regarded itself as separate and independent,[22] and the traditional hierarchy, which had continued in Eastern Europe under communism, and which regarded the Australian church to be schismatic. Expert evidence on canon law was given by eminently qualified academic theologians. None gave their evidence under oath. That was based on their understanding of the effect of Matthew 5:34-37[23] and James 5:12.[24]

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18 This was the position in *Moses v Macferlan*; see M Leeming, "Overlapping claims at common law and in equity — An embarrassment of riches?" (2017) 11 *Journal of Equity* 229 at 242.

19 Hence the merchants litigated in specialist commercial courts – the piepowder courts, the staple courts and the Admiralty courts, as I have elsewhere described: M Leeming, "The enduring qualities of commercial law", The Bathurst Lecture, 22 April 2021.

20 It was abolished by the *Civil Procedure Act 1833* (UK), s 13.

21 *Metropolitan Petar v Mitreski* [2012] NSWSC 16.

22 More technically, "autocephalous".

23 "But I tell you, do not swear an oath at all: either by heaven, for it is God's throne; or by the earth, for it is his footstool; or by Jerusalem, for it is the city of the Great King. And do not swear by your head, for you cannot make even one hair white or black. All you need to say is simply 'Yes' or 'No'; anything beyond this comes from the evil one."

But there have long been others who have taken seriously the statements in the Bible about not swearing oaths. Examples predating the Norman Conquest may be found in standard works of legal history.[25] In fact, this prompted an early example of law reform. In 1696, fairly shortly after the Glorious Revolution, William III none too secure in his position effected a rapprochement with Quakers (many of whom had been leaving for the American colonies) and acceded to a statute[26] which provided, temporarily, that every Quaker "who shall be required upon any lawful occasion to take an oath, in any case where by law an oath is required, shall, instead of the usual form, be permitted to make his or her solemn affirmation or declaration in these words following, viz: 'I … do declare in the presence of Almighty God, the witness of the truth of what I say.'" The temporary measure was extended in 1702, made permanent in 1715, and incrementally extended to other groups and ultimately to non-Christians, and into criminal law as well as civil law.[27] In the Australian colonies analogous reforms were informed by the perceived difficulty of obtaining testimony from indigenous witnesses.[28] Time constraints preclude going into the details which have culminated in the position today where there is a statutory entitlement to make an affirmation in all occasions that the law requires an oath.[29]

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24 "Above all, my brothers and sisters, do not swear—not by heaven or by earth or by anything else. All you need to say is a simple "Yes" or "No." Otherwise you will be condemned."

25 F Pollock and F Maitland, *The History of English Law Before the Time of Edward I*, Vol II (2nd ed, Cambridge University Press, 1908) at 198-199: it was asserted in the Laws of Wihtraed at 18 that a priest should not be compelled to swear beyond declaring "Veritatem in Christo dico, non mentior".

26 7 & 8 Will III, c 34.

27 See M Geiter, "Affirmation, Assassination, and Association: The Quakers, Parliament and the Court in 1696" (1997) 16 *Parliamentary History* 277.

28 See 3 Vic c 16 (1839) (Imp) ("An Act to allow the Aboriginal Natives of New South Wales to be received as competent Witnesses in Criminal Cases"), a rare example of a New South Wales colonial statute being disallowed (see the despatch of 11 August 1840 reproduced in *Historical Records of Australia*, Series 1, Vol XX, p 754 at 756). For the divergent judicial approaches when a generation later, affirmations were permitted, see *R v Lewis* [1877] Knox 8 and *R v Peters* (1882) 3 LR NSW 455. See further, B Chen, "Diminution and secularisation of oaths in Australian courts" (2013) 37 *Australian Bar Review* 291.

29 See *Oaths Act 1900* (NSW), s 12 "when an oath is required to be taken, any person who objects to take an oath may instead of taking such oath make a solemn affirmation in the form of such oath substituting the words 'solemnly, sincerely and truly declare and affirm' for the word 'swear' or for any other word or words to the like effect and omitting the words 'so help me God' or any other word or words to the like effect"; see also s 13.

The point is that the history of affirmations is not merely the history of secularisation of society; quite to the contrary, it started with reforming legislation which was driven by people who took their religion and the significance of their oath very seriously indeed.

We have long needed a way of making plain that spoken or written words are really important, and will be accompanied by serious sanctions if the person is not doing his or her best to tell the truth. Like most things, over-use, as occurred in the hey-day of compurgation, devalues the currency. And there is a very sound justification for the modern alternative of an affirmation. But for the purpose of achieving appropriate solemnity and seriousness, using old fashioned language and invoking traditions of many centuries is no bad thing. The precise syntactical structure of the words “So help me God” may be elusive to many who utter them, but the significance of invoking words which have continuously appeared in oaths for centuries is well understood. It is a fitting title for this work.