OBLIGATIONS UNDER OATH -

ABSOLUTE OR AMBULATORY?

Attitudes to oath-taking in seventeenth-century England with particular reference to oaths in court proceedings and oaths of allegiance.

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Preface

Oath-taking is an integral part of my professional life; oaths are used almost as a tool of trade, and are accepted as guarantees of truth. Whilst there is now a statutory right to affirm, instead of to swear, an affirmation itself constitutes a formula, an asseveration to tell the truth. Zeeman J, in the case of R v Mansell decided in 1993, declined to accept evidence on oath from a child aged twelve years because he held inter alia that the child "[had] no notion of the nature or obligation of an oath in the sense that he [had] no understanding of what it is to swear to tell the truth or promising God to tell the truth and has no expectation that God will reward or punish in this world or the next".**(1)** Whilst His Honour's decision was overturned on appeal, the case demonstrates that oath-taking is fundamental to our legal system and its function in society. It is not only oaths in court proceedings though which are still the subject of debate; oaths of allegiance are also under scrutiny in the context of the so-called Republican debate in this country.

Montagu provides a definition of oath-taking which I adopt for the purposes of this paper, that oath-taking is "the legal procedure of calling down a curse upon oneself if one should deviate from what one has sworn to do or not to do... the desire of society to protect itself against the mendacity of the individual by causing him to call down upon himself the punishment of the Great Powers if he speak not the truth or keep not his bond." **(2)** Central to that definition, both in terms of oaths of allegiance and oaths in court proceedings, is the invocation of the divine sanction. It seems somewhat anomalous that oath-taking should still constitute a dilemma in a society which fits Professor Gilbert's criteria for being "post Christian". **(3)**

1. R v Mansell A91/1993 p. 1.
2. A. Montagu The Anatomy of Swearing (1967) pp. 59-60.
3. A.D. Gilbert The Making of Post-Christian Britain: A History of The Secularization of Modern Society (1980).

In this paper I seek to ascertain and analyse attitudes to oath-taking with particular reference to oaths in court proceedings and oaths of allegiance, in the crucible of the Civil War/Interregnum period in England. Did this time of national crisis, when allegiances were challenged, basic institutions threatened, and accepted truths re-assessed, impact upon attitudes to oath-taking? Did oaths matter at all, and if so to whom? Was it possible to fulfil obligations under oath to the succession of king, Commonwealth, Protectorate and ultimately Charles II? Was oath-taking essentially a political necessity, or a question of conscience and an individual's relationship with God? Were obligations assumed under oath absolute or ambulatory?

The paradox inherent in oath-taking, both in Civil War England and twentieth century Australia is encapsulated by Shakespeare in the passage from Titus Adronicus which opens the Introduction. Titus Adronicus was first printed in 1594, and although writing slightly earlier than the Civil War period, Shakespeare's works reflect a preoccupation with oaths and obligations thereunder; that preoccupation was obviously relevant and accessible to patrons of popular theatre in the late Elizabethan period. The balance of the Introduction provides a contextual overview of the state of religious belief in England in the Civil War period, and a selection of contemporary views as to the status of obligations under oath; it concludes with a consideration of interpretations of some current historians. Christopher Hill particularly postulates a view wherein changing seventeenth-century attitudes to oath-taking are consistent with his theory of the transition from a pre-industrial to a mercantilist society.

Chapter 1 concentrates upon the political crisis of the Civil War and the attempt by the victors to establish the legality and constitutionality of their victory. At a most simplistic level, the Civil War itself brought into focus attitudes to obligations under oaths of allegiance; this focus was sharpened by subscription to the Solemn League and Covenant and the Engagement. Thomas Hobbes wrote his Leviathan during the upheaval of the Civil War/Interregnum period; it was published in mid 1651. A consideration of Hobbes' political theories as expounded in Leviathan is fundamental to this chapter. Notwithstanding Hobbes' ultimate conclusion of obligations under oath as ambulatory, and co-extensive with the power of the Sovereign, his was not a

simplistic rationalisation for changing sides as a matter of convenience. Parliament adopted his theories in practice, but there is also clear evidence of a felt need to justify attitudes to oath-taking (and breaking) in terms other than expediency.

Chapter 2 is a consideration of the trial of Christopher Love, a Presbyterian Divine, executed in 1651 following a conviction for treason. The trial provides an interesting and enlightening source of contemporary attitudes to oath-taking; it marries both oaths in court proceedings (of necessity), and oaths of allegiance. Love's trial for treason in 1651 was directly referrable to the Engagement controversy; his perception of his obligations under the Solemn League and Covenant as absolute, is in tension with the political theories and accommodations considered in Chapter 1. The tension between the ultimate political pragmatism identified in Chapter 1, and the "martyrdom" of Love, brings out the full range of attitudes to obligations under oath as ambulatory on the one hand and absolute on the other.

The dichotomy is considered in Chapter 3 from the perspective of the Quakers, who like Love were prepared to face criminal and financial penalties to stay true to their religious imperatives. For the Quakers, the absolute nature of the obligation was to tell the truth; it existed independently of the oath. They, in common with Shakespeare and Hobbes recognised the paradox inherent in oath-taking, and they rejected the proposition that to subscribe an oath was preclusive of an independent consideration of truthfulness. Again though, there was nothing simplistic about seventeenth-century Quaker attitudes; it is evident that they too were aware of a tension between religious and political realities.

Chapter 4 considers the mirror image of perjury, a necessary adjunct to any consideration of attitudes to oath-taking, particularly in terms of the response of the institutional authorities of Church and State. The chapter concludes with an assessment as to whether Hill has told the whole story, and whether a consideration of obligations under oath as ambulatory or absolute is in fact reducible in his terms to the operation of market forces.

Introduction

Lucius Who should I swear by? thou believest no god:
That granted, how canst thou believe an oath?
Aaron What if I do not? as, indeed, I do not;
Yet, for I know thou art religious,
And hast a thing within thee called conscience,
With twenty popish tricks and ceremonies,
Which I have seen thee careful to observe,
Therefore I urge thy oath; for that I know
An idiot holds his bauble for a god.
And keeps the oath which by that god he swears,
To that I'll urge him: therefore thou shalt vow
By that same god, what god soe'er it be,
That thou adorest and hast in reverence,
To save my boy, to nourish and bring him up;
Or else I will discover naught to thee. **(1)**

At one level the whole concept of oath-taking as a guarantee of truth involves a fundamental circularity, if not flat contradiction. Oaths are taken to "ensure" a certain behaviour, whether it be to tell the truth in judicial proceedings, or to subscribe a certain allegiance in social or political terms. **(2)** Logically, if a person appreciates the

1. W. Shakespeare, Titus Andronicus, Act 5 Scene 1.

2. Hill cites "a learned member of the Assembly of Divines" in a declaration against the Anabaptists "[oaths] are necessary for the execution of the magistrate's office and the preservation of human society. For without such oaths the commonwealth hath no surety upon public officers and ministers: nor kings upon their subjects; nor lords upon their tenants; neither can men's titles be cleared in causes civil, nor justice done in causes criminal; nor dangerous plots and conspiracies be discovered against the state". Daniel Featly The Dippers Dipt (1646) p.142 from C. Hill, Society and Puritanism in Pre-Revolutionary England (1964) p. 383.

distinction between truth and falsehood, and understanding concepts of loyalty accepts them as intrinsically good and right, a superadded formulation of words should be superfluous. Similarly, if a person does not have those perceptions, or having them, chooses to act to the contrary, is it feasible or reasonable to posit the view that what could be described as an incantation renders such contrary behaviour impossible or unlikely? **(3)** Notwithstanding that Shakespeare identified this essential paradox, he replicated the orthodoxy that oaths are complete guarantees. Lucius had invited Aaron to "Tell on thy mind, I say thy child shall live." Aaron though would not proceed until Lucius swore to that effect.

Aaron accepted the efficacy of the oath because it bound Lucius, the subscriber of it. It was Lucius who believed and was religious, so Lucius' conscience would (apparently ipso facto) be bound. Aaron's non belief was irrelevant. The irony though, is that Aaron who avowedly did not believe, and who mocked and denounced as popish the observable ceremonies of religion (and oath-taking) accepted as self-evident that a person swearing by a god (any god) in whom he believed would unquestionably tell the truth. Lucius swore by his god, and Aaron disclosed his secret.

The Lucius/Aaron encounter resulted in an orthodox outcome - that oaths really are a guarantee of truth, but Shakespeare's reservations may be seen again in Henry V "Trust none: For oaths are straws, men's faiths are wafer-cakes..." **(4)** a sentiment echoed by Thomas Hobbes "Covenants, without the Sword, are but Words, and of no

3. Rev. Richard Ward expressed the same doubt "both magistrates and those who are wronged [should be] very careful not to constrain any offender to swear, if by any other means the matter may be known or decided... If he whom we desire should be put to his oath fear the Lord, then he dare no more lie than forswear himself... If he fear not the Lord, then how will he fear to forswear himself?" ibid p. 404. Hill goes on to say that Laud's licenser thought this "was dangerous doctrine".

4. Shakespeare, King Henry V Act 2 Scene 3. Hill expresses the view that "Almost any of Shakespeare's Histories could be quoted to illustrate the crucial importance atached to oaths". ibid p. 395.

strength to secure a man at all". **(5)** For Hobbes it is fear of punishment which ensures performance. Clearly though, scepticism was not universal. Sir Edwin Sandys expressed the view that "the sacred, the sovereign instrument of justice among men, what is it, what can it be in this world (emphasis mine) but an oath, being the strongest bond of conscience?" **(6)** Ralegh, whom Hill describes as "not... strictly veracious when on oath at his trial for high treason" subscribed to the orthodox (and socially repressive) view that "oaths defend "the life of man, the estates of men, the faith of subjects to kings, of servants to their masters, of vassals to their lords, of wives to their husbands, and of children to their parents, and ... all trials of right"" **(7)**

The debate of these individuals is a barometer for the concerns and preoccupations of English society in the late Elizabethan, early Stuart, and Civil War periods. The extent to which this is so is evidenced by the disparity of sources - Shakespeare as representative of the Elizabethan popular theatre; Hobbes a serious political theorist coming to terms with the reality of power structures in the context of civil war; Sandys a business man; and Ralegh a poet, explorer, court favourite and traitor. Obligations under oath obviously mattered enough to be the subject of debate. The dilemma inherent in oath-taking required resolution; a requisite brought into focus in the national crisis of Civil War.

The attempts to reconcile such obligations with conscience imperatives cannot be dismissed as merely the product of a less enlightened or more religious (or superstitious) age, although seventeenth-century England was both an intensely religious age, and an "intensely legalistic society". **(8)** Brailsford goes so far as to

5. T. Hobbes, Leviathan Ch 17 p. 223. All references to Leviathan in this and succeeding chapters are taken from the Penguin Classics Edition, 1968. See too the views of S. Butler, in Hudibras (1664), "Oaths are but words, and words, but wind".

6. E. Sandys, Europae Speculum p. 45 see Hill, Society and Puritanism p. 395.

7. Ralegh, History of the World 1614 (1820 Edition) II pp. 416-19 from ibid.

8. M. Ingram, Church Courts, Sex and Marriage in England 1570-1640 (1987) p. 328.

describe the "Revolutionaries" as "This God-intoxicated generation", **(9)** and according to Richard Baxter, admittedly writing from a Puritan, and hardly dispassionate perspective, it was "principally the differences about religious matters that filled up the Parliament's armies and put the resolution and valour into their soldiers", notwithstanding it was, on his assessment, "public safety and liberty" which motivated "the nobility and gentry". **(10)** Religious and legalistic (constitutional) imperatives were fused in the event of Civil War; a debate as to whether obligations under oath were absolute or ambulatory was necessary, maybe inevitable.

What may loosely be described as the Civil War/Interregnum period covered a wide spectrum of religious orientations, and provided (admittedly from time to time and in varying degrees) a measure of toleration for different expressions of Christian precepts. The description "intensely religious" is not a simplistic assertion of universal belief, but rather a recognition that religion was a "live issue", evidence of which is curiously provided by the negative proposition that a significant number of people chose to reject Church structures and teachings. The truth of this apparent paradox has been recognised by a number of modern historians.

Ingram states that the "vast majority of people in this period were at least nominally conforming members of the established church" **(11)**, and uses the illuminating description of "a broad spectrum of unspectacular orthodoxy". **(12)** He recognises the force, though, of Keith Thomas' findings in his book Religion and the Decline of Magic that "commitment to the church and official religion was minimal among large sections of the common people in... seventeenth-century England. Not only were religious ignorance and indifference widespread, but there also existed strong undercurrents of

9. H. N. Brailsford, The Levellers and the English Revolution (1961) p. 31.

10. M. Sylvester, (ed.) Reliquiae Baxterianae, or Richard Baxter's Narratives of the Most Memorable Passages of his Life and Times (1696) part i, p. 31: from M. R. Watts, The Dissenters (1978) p. 106.

11. Ingram, Church Courts p. 92.

12. ibid p. 94.

thought which, if not wholly atheistic, were strongly sceptical of basic Christian doctrines and could lead to a virtual rejection of all religion. Hence the orthodoxies of the national church were seriously challenged by magic, astrology and other non-religious systems of belief." **(13)**

Fulbrook agrees with Thomas that "a large proportion of the population [in pre-Revolutionary England] was prepared pragmatically to accept, with degrees of understanding and approval, whatever religious settlement was in force. The relatively large number of people - as much as 1/6th or 1/5th of the population in some places - who were prepared to remain excommunicate indicates the disregard of many for the spiritual sanctions of the Church. The existence of religious indifference (though probably not active atheism at this time)... is simple and ready evidence of a lack of general consensus on religion." **(14)** On these findings, maybe Aaron should have feared for his son.

The sanction standing behind oath-taking is essentially a divine one; "the universal belief in the existence of God, and in an after-life in which rewards and punishments are to be expected". **(15)** As seen in the Preface, the theory of the divine sanction remains a necessary concomitant of a valid and binding oath. Bishop Tillotson, in his contemporary pamphlet "The Lawfulness and Obligation of Oaths" (1681) went further though, and stated that "the obligation of an oath "reaches to the most secret and hidden practices of men, and takes hold of them when no law can""**(16)**

Zeeman J. in R v Mansell was of the view that "the reality [in twentieth-century Australian society] is that many adults do not understand the nature of the oath, but

13. ibid p. 93.

14. M. Fulbrook, "Legitimation Crises and the Early Modern State: the Politics of Religious Toleration" - in K. von Greyerz, (ed.), Religion and Society in Early Modern Europe 1500 - 1800 p. 153.

15. Hill, Society and Puritanism p. 396.

16. ibid p. 416.

they are sworn without inquiry". **(17)** The extent to which "ordinary" people in seventeenth-century England knew of divine sanction theory is unclear. Hill cites the Tryal (sic) of John Lilburne as authority for the proposition that "in 1649 a judge could take it for granted that members of a London jury had often functioned as jurors before, and that there was no need to explain to them the sacredness of an oath." **(18)** Ingram, on the other hand, refers to the case of "Edward Somerode, a 24-year-old cobbler from Broughton Gifford who was called as a witness in 1617, confessed that "he received the communion at Easter last but was never taught the catechism...[and] knoweth not what an oath is or what punishment is appointed for those that swear falsely." **(19)** He goes on to say though that "such lamentable ignorance was very rarely shown to exist", acknowledging that "the poorest and most ignorant folk were least likely to be called as witnesses". He refers to Philip Smith, who whilst not brilliant at mathematics, **(20)** "was able to give a fair account of the spiritual consequences of taking a false oath, and could repeat the Lord's Prayer". **(21)**

Notwithstanding religious diversity, albeit within an essentially Christian context, oath-taking seems to have been endemic in seventeenth-century English society **(22)**. The widespread use of the ex officio oath (which will not be considered in any detail in this paper) and the vehement opposition it aroused, particularly from Puritans and common lawyers, both of whom it may be conceded had a vested interest, are evidence that

17. R v Mansell supra p. 4.

18. Hill, op cit p. 387.

19. Ingram, Church Courts pp. 97-8.

20. He could evidently calculate how many groats made a shilling, but did not know how many were in three shillings ibid p. 98.

21. ibid. One can't help feeling a certain scepticism as to the "fairness" of Smith's account, however the perception that basic calculus should be easier to grasp than divine sanction theory may in itself be a reflection of a more secular age.

22. The Book of Oaths and the severall formes thereof published (anonymously) in 1649 "contained 416 pages of oaths which a man might have to take (or had in the past taken) (emphasis mine) ranging from the oaths of jurors to the Solemn League and Covenant." See Hill, Society and Puritanism p. 387.

the "bishops realized the effectiveness of the oath as a weapon." **(23)** Hill cites a Puritan Petition to Parliament dated 1586, in which it was said that the oath ex officio "to a conscience that feareth God (emphasis mine) is more violent than any rack to constrain him to utter that he knoweth, though it be against himself and to his most grievous punishment." **(24)**

Maguire concludes though that Puritans did have a philosophical basis for their opposition to the ex officio oath. "[They] protested against its use not only because it was the most effective method ever devised of searching out their wayward acts and erroneous opinions but also because they sincerely believed that forcing a man to incriminate himself was against common law principles and the liberty of the subject". **(25)** The Puritans thus recognised that "the inquisitorial method of procedure is best adapted to the needs of social repression". **(26)**

Christopher Hill identifies the corollary of the proposition that oaths were used as an illegitimate arm of what was (in effect) a totalitarian regime, "the rejection of oaths contain[ed] an important social protest... refusal to swear was an act of anarchism". **(27)** He in part explains the non-compliance of churchwardens with the terms of their obligations, for example, as a defence of "the community's liberty against the

23. M. H. Maguire, "Attack of the Common Lawyers on the Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England" in Essays in History and Political Theory in Honour of C.H. McIlwain p. 209.

24. Hill, Society and Puritanism p. 384.

25. op cit p. 228. Somewhat ironically, Marchant points out that the ex officio oath had actually been initiated to make it more difficult for private accusers - to guard against malice. See R. A. Marchant, The Puritans and the Church Courts in the Diocese of York 1560-1642 p. 7.

26. Maguire, op cit p. 216. See too Brailsford, "Whenever confession is regarded as the ideal form of proof which every officer of justice is bent on achieving, not all of them will resist the temptation to use illegitimate forms of pressure..." The Levellers And The English Revolution p. 82.

27. Hill, Society and Puritanism p. 383.

inquisitorial central power, even when the hierarchy would regard this as "wilful, common and execrable perjury"". **(28)**

Quite apart from the ex officio oath, there is evidence that oath-taking was manipulated by those in power: "It was one of the privileges of peers that their word of honour was accepted in lieu of an oath, and therefore they were excused from swearing in court." **(29)** There is absolutely no justification in principle for this exemption; indeed, in the context of oaths of political allegiance in times of such volatility, it was patently self serving.

Ingram lends support to the proposition that the rigours of oath-taking were a matter of social status. He cites the case of William Marshman in 1639 who told the Court which had excommunicated him for refusing to take the ex officio oath that "he never knew any rich man cited to this court though they go to plough, [on Sunday?] or commit any other offences". **(30)**

Hill argues that attitudes to oaths in seventeenth-century England were symptomatic of a society in transition, from a medieval "semi- magical" world wherein the priest mediated between God and man inter alia by oaths and release from them (as a form almost of sacrament), to a commercial and mercantile world wherein an oath was no more sacred than a promise, **(31)** and it was the individual and that individual's conscience that determined behaviour. "Supernatural sanctions became less necessary in a society in which honesty was manifestly the best policy, in which those who did not keep their covenants made were apt to have difficulties in business

28. ibid p. 392.

29. ibid p. 408. Hill identifies the Test Act of 1673 as the first occasion on which an oath was statutorily demanded of peers.

30. Ingram, Church Courts p. 331.

31. See Hill op cit p. 397 incorporating reference to Tyndale, Expositions of Scripture pp. 56-7.

relationships... If I cannot take his word, I'll not take his oath." **(32)** His conclusion is that "in this society oaths lost their force because self-interest obliged... the supernatural sanction backing the oath of loyalty and the judicial oath - God the supreme overlord - was succeeded in capitalist society by the discovery that it paid a man to make his word his bond because of the rise in social importance of credit, reputation, respectability." **(33)** Whether Hill's conclusion is valid and exhaustive remains an open question for consideration throughout the balance of this paper.

32. ibid p. 399 and pp. 413-4. The medieval world view on the other hand was that only a fool would accept "a man's bare word not on oath: it is the child's "Oh, but I didn't promise!"" ibid pp. 396-7.

33. ibid pp. 417-18.

CHAPTER 1

The Political Crisis

Considerations of credit, reputation and respectability did not feature in Hobbes' assessment of obligations under oath, although his thesis may be cited in support of Hill's pragmatic view that "men keep their covenants made because it is to their mutual advantage to do so." **(1)** Hobbes accepted that seventeenth-century English society was in transition, but it was a transition born of the political crisis of the Civil War, not a stage in Hill's continuum from a medieval to a capitalist society. The crucial issue for Hobbes, and for Parliament, was to identify the content of obligations under oath, particularly oaths of allegiance, within the context of a Civil War which "seemed to most members of Parliament an appalling, incomprehensible breach of the natural order of things, perhaps a prelude to social dissolution." **(2)**

Hobbes believed that the conflict entailed by each individual's pursuit of power could only be averted, and individual self interest maximized, by cession of each individuals' power to a sovereign entity. His was not the simple proposition though that obedience to the sovereign equates with self interest; rather Hobbes believed there is a point at which obedience is no longer appropriate nor justified, and at that point, it is (virtually) a moral imperative to withdraw obedience. **(3)** It may be seen that Hobbes' theory was dangerous in practice - it must have been virtually impossible, in the flux of shifting fortunes and allegiances of Civil War England, to discern one's personal advantage with any degree of certainty.

1. Hill, Society and Puritanism p. 497.

2. B. Worden, The Rump Parliament 1648-1653 (1974) p. 13.

3 "The Obligation of Subjects to the Soveraign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them". T. Hobbes, Leviathan p. 272. For Gauthier, "Hobbes' concepts are practical, moral in so far as "moral" means "practical", "concerning what to do", but not in so far as "moral" means "opposed or superior to prudential."" The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes (1969) p. 28.

Whether or not it was from an acceptance of Hobbes' political theory, or whether they genuinely believed that the king had been manipulated and misled by evil counsellors, the simple fact must be recognised that those who fought for Parliament, at least in the first Civil War, broke their oaths of allegiance to Charles I. "The lines that divided classes and parties were fluid and a surprisingly long list can be compiled of important politicians and soldiers who changed sides during the struggle." **(4)** The decision to breach that oath of allegiance to Charles I was a serious one, a rejection not only of the absolute nature of obligations under oath, but of accepted political structures. Charles I maintained in "The King's Reasons for Declining the Jurisdiction of the High Court of Justice" that "the authority of obedience unto Kings is clearly warranted, and strictly commanded in both the Old and New Testament." **(5)** Parliament "put...forth... a claim to sovereignty really incompatible with kingship." **(6)**

Significantly there is evidence of a felt need by those in opposition to the king to find justification for their breach. The evidence does not support an assertion that oaths of allegiance were considered outmoded, and that political expediency or self interest had become the sole (and legitimate) determinants of action. Thomas maintains that the "successive imposition of ... the Solemn League and Covenant (1643), and the Engagement to the Commonwealth (1650) created acute dilemmas about the compatibility of each with its predecessor and of all with the Oaths of Allegiance and Supremacy to the Crown. In the process all the old 'Jesuitical' doctrines about equivocation, mental reservation, and dissimulation, supposedly unique to papists, were resurrected and strenuously employed against those who took a more rigorist view of such obligations; and much was made of the linguistic indeterminacy of all verbal agreements." **(7)**

4. Brailsford, The Levellers and the English Revolution pp. 13-14. "In all men might have had to take up to ten... conflicting oaths of loyalty between 1640 and 1660, to say nothing of the counter-swearing of the Restoration. And this does not include oaths of secrecy..." Hill, Society and Puritanism pp. 409-10.

5. Quoted from S. R. Gardiner, The Constitutional Documents of the Puritan Revolution 1628-1660 (1889) p. 285.

6. Ibid introduction p. xxxiv.

7 K. Thomas, "Cases of Conscience in Seventeenth-Century England" in J. Morrill, P. Slack, & D. Woolf Public Duty and Private Conscience (1993) p. 43.

Somewhat illogically, those who had broken (or chosen not to follow) oaths of allegiance to Charles I demanded oaths of allegiance in their turn. What seems even more ironic is that the possibility of a peaceful political solution between Independents and Presbyterians was precluded because of Presbyterian insistence upon adherence to the Solemn League and Covenant. It is as if there was an hierarchy of oaths - some oaths of allegiance could be negated, others were truly binding.

Aylmer is correct in his observation that "any revolutionary government, which comes to power by extra-constitutional means, has to win recognition of its own authority. This was particularly so with revolutionaries who were most reluctant to admit [within the context of a legalistic age] that they had ever acted illegally, or unconstitutionally". **(8)** Hence "there was a need... for a theory of political obligation in terms of which the new government might be legitimated... [that] it might be shown not merely to be beneficial to submit but in some way compatible with... loyalty to... existing oaths and obligations." **(9)**

The Solemn League and Covenant was taken by the House of Commons in September 1643. Significantly though, it is expressed as an all-encompassing pact between "noblemen, barons, knights, gentlemen, citizens, burgesses, ministers of the Gospel, and commons of all sorts in the kingdoms of England, Scotland, and Ireland [who] have (now at last) ... for the preservation of ourselves and our religion from utter ruin and destruction... resolved and determined to enter into a mutual and solemn league and covenant." Its preamble reads that it was "for Reformation and Defence of Religion, the honour and happiness of the King..." **(10)** Clause 1 dealt with the "preservation of the reformed religion in the Church of Scotland... [and] the reformation

8. G. E. Aylmer (ed.), The Interregnum: The Quest for Settlement 1646-1660 (1972) p. 10. See too Hill, Society and Puritanism p. 409. "An oath of allegiance was the means of bringing home national political transformations to the masses of the population, of involving them to some extent as participators. Each of the Governments which came to power in England in the revolutionary years tried to buttress its position by securing national subscription to an oath".

9. Q. Skinner, "Conquest and Consent: Thomas Hobbes and the Engagement Controversy" in Aylmer, The Quest for Settlement pp. 79 and 83.

10. "The Solemn League and Covenant" in Gardiner, Constitutional Documents p. 187.

of religion in the kingdoms of England and Ireland." **(11)** Clause 2 rededicated the subscribers to the "extirpation of Popery, prelacy... and whatsoever shall be found to be contrary to sound doctrine..." **(12)** The third clause is that which precluded any later political settlement "we shall with the same sincerity, reality and constancy... endeavour... to preserve and defend the King's Majesty's person and authority... we have no thoughts or intentions to diminish His Majesty's just power and greatness". **(13)**

The covenant was "[made] in the presence of Almighty God, the Searcher of all hearts, with a true intention to perform the same, as we shall answer at that Great Day when the secrets of all hearts shall be disclosed..." **(14)** - a clear invocation of the divine sanction. Clause 2 of the propositions of Uxbridge and Clause 2 of the propositions of Newcastle called for the king to become a signatory to the Covenant. **(15)**

The king in his "Letter of Charles I to the Speaker of the House of Lords" in November 1647 declined to abolish episcopacy, citing as his reasons that as a Christian he was satisfied that it was a system instituted by the Apostles, and "as a King at his coronation he hath... taken a solemn oath to maintain this order [and] His Majesty and his predecessors... have inseparably woven the right of the Church into the liberty of the subjects..." **(16)** It seems, though, that oaths were to an extent ambulatory for kings also, as Charles felt able to reinterpret that obligation to the extent that "they [bishops] exercise no act of jurisdiction or ordination... without the consent of their Presbyters, and [would] consent that their powers in all things be so limited, that they

11. ibid pp. 187-8.
12. ibid p. 188.
13 ibid.
14. ibid p. 190.
15. Interestingly, Lilburne, a Leveller, "felt obliged to refuse an offer of a high command, for once more the Covenant stood in his way. This oath, which troubled many an honest soldier, required loyalty to Genevan orthodoxy as well as to King Charles - if any man could reconcile these incompatibles". Brailsford, The Levellers and the English Revolution p. 89.
16. "Letter of Charles I to the Speaker of the House of Lords" op cit pp. 243-4.

be not grievous to the tender consciences of others". **(17)** Indeed, though, the king's apparently flexible attitude to obligations assumed under oath was not without support. Brailsford says that the (Anglican) bishops "who kept his conscience over the unpalatable prospect of tolerating Puritan dissent" advised Charles that "after giving his promise of toleration [the principle involved should not be limited merely to that] under pressure of necessity, he might with the church's blessing, break it ... so soon as he "regained the power given him by God"". **(18)** The bishops also advised Charles that there was a distinction between his public and private consciences. **(19)** The king evidently went so far in 1646 as to avail himself of the (Jesuitical) doctrine of mental reservation, asking "whether I may with a safe conscience give way to this proposed temporary compliance [to abolish episcopacy], with a resolution to recover and maintain that doctrine and discipline where I have been bred." **(20)** By December 1647 Charles had entered an Engagement with the Scots to the effect that "as soon as he [could] with freedom, honour and safety be present in a free Parliament [he would] confirm the said League and Covenant by Act of Parliament." **(21)** The alliance with the Scots precipitated the Second Civil War.

In his letter to the House of Lords, Charles had agreed to "consent to an Act of Parliament for the suppressing and making null all Oaths, Declarations and Proclamations against both or either House of Parliament, and of all indictments and other proceedings against any persons for adhering unto them". The mechanism suggested was an "Act of Oblivion to extend to all his subjects". **(22)** After his

17. ibid p. 244.

18 The Levellers and the English Revolution p. 249. It is conceded that the word used is "promise", qualitatively different from "oath", however it seems reasonable to suppose that the promise would have been encapsulated in the form of an oath, and thus that the established church extended to oaths the argument of duress.

19 See Thomas, "Cases of Conscience in Seventeenth-Century England" p. 33.

20 ibid p. 33 citing State Papers Collected by the Earl of Clarendon vol ii pp. 265-8.

21. "The Engagement Between the King and the Scots"
From Gardiner, Constitutional Documents p. 259.

22. "Letter of Charles I to the Speaker of the House of Lords" ibid p. 246.

execution, Parliament in "The Act Abolishing the Office of King" March 17th, 1649 "enacted and ordained... that all the people of England and Ireland... of what degree or condition soever, are discharged of all fealty, homage, and allegiance which is or shall be pretended to be due unto any of the issue and posterity of the said late King, or any claiming under him." **(23)**

Charles therefore accepted the proposition that there could be release from the obligations of an oath - he did not claim for himself the ability to release from the divine sanction by virtue of being appointed by God, but said rather that he would consent to an Act of Parliament. There is no indication whence Parliament was to obtain jurisdiction to nullify oaths. It is almost as if oaths had become contractual obligations, which could be consensually released. **(24)**

Parliament in its "Act Abolishing the Office of King" certainly claimed to exercise the right which Charles had earlier acknowledged. Interestingly though, the discharge from oaths of allegiance accorded by Parliament was prospective only - it was not an absolution from breach of the oath of allegiance to Charles I. Rather, Parliament chose to found its jurisdiction in breaching its obligation to Charles I upon a "just and lawful" condemnation of him for treason, by which "his issue and posterity, and all others pretending title under him, are become incapable of the said Crowns [of England, Ireland and the territories and dominions thereunto belonging]". **(25)** There was no shrinking from the proposition that Charles was lawfully king, in fact the charge against him admitted it. **(26)**

23. "The Act Abolishing the Office of King" ibid p. 294.

24. Hobbes saw obligation to the Sovereign power once instituted in terms of contract, from which the subject was released if the Sovereign could no longer provide adequate protection. Even as the subject was released from the obligation, so he must automatically have been released from the oath; the oath in any event added nothing to the obligation. See Leviathan p. 272.

25. op cit p. 294.

26. See "The Charge Against the King" ibid p. 282. "That the said Charles Stuart, being admitted King of England..."

Hobbes took the view that "men have undertaken to kill their Kings, because... [history] make[s] it lawfull, and laudable, for any man so to do; provided before he do it, he call him Tyrant". **(27)** Hobbes, though, does not really lend support for a theory of sovereignty as a form of contract initially entered into on arms length terms between the sovereign power and the subject. Rather the contract, for Hobbes, is "onely of one to another, and not of him [the Sovereign] to any of them; there can happen no breach of Covenant on the part of the Soveraigne... that he which is made Soveraigne maketh no Covenant with his Subjects beforehand, is manifest; because either he must make it with the whole multitude, as one party to the Covenant; or he must make a severall Covenant with every man". **(28)**

"By 1647 Parliament had been split. On the one side were the Presbyterians, who were attempting to organise an Erastian Presbyterianism in England, and whose principle was to substitute the predominance of Parliament in Church and State for that of the King. On the other side were the Independents, who wished to introduce a larger, if not a complete toleration, and thus to liberate individual consciences from the control both of Parliament and King. As the Independents had a great hold upon the Army, the Presbyterians, who in the beginning of 1647 commanded a majority in both Houses, had strong reasons for falling back on the King." **(29)** Perhaps therefore, it is not as singular as it first might appear, that the Presbyterians, who in common with all other opponents of the king had by their participation in the first Civil War acted in breach of their oaths of allegiance, refused to "forswear" themselves by subscribing the Engagement.

The Engagement is dated 2nd January 1649/50. "Whereas divers dis-affected persons, do by sundry ways and means oppose and endeavour to undermine the Peace of the Nation under this present Government so that unless special care be

27. Hobbes, Leviathan p. 369.

28 ibid p. 230.

29. Gardiner, Constitutional Documents Introduction p. xlvii.

taken, a new War is likely to break forth: For the preventing whereof, and also for the better uniting of this Nation... The Parliament now assembled do Enact and Ordain... That all men whatsoever within the Commonwealth of England, of the age of eighteen years and upwards, shall... take and subscribe this Engagement... viz I Do declare and promise, That I will be true and faithful to the Commonwealth of England, as it is now Established, without a King or House of Lords." **(30)** It may be seen that Worden is right in his assessment that the Engagement was "far from divisive in its intentions" **(31)** - quite apart from the stated aim of uniting the nation, the tone is inclusive. The irony is inescapable too, that the obligation was not to swear **(32)** allegiance - it was really (apparently) a minimalist obligation. **(33)**

Further irony is identified by Worden, that "the Cavaliers, the principle (sic) target of the Engagement, were widely reported to have taken it without heed or scruple, a circumstance which offered no guarantee of their future loyalty. "Such oaths as are over-hastily swallowed," a newswriter commented "are the most easily vomited up again"." **(34)** Ministers, though, "found in their former subscription to the Solemn League and Covenant an insuperable objection to taking the Engagement".**(35)**

30. "The Engagement" in Firth and Rait, Acts and Ordinances of the Interregnum 1642-1660 Vol 2 p. 325.

31. Worden, The Rump Parliament 1648-1653 p. 227.

32. This distinction was appreciated at the time. In correspondence between Thomas Washbourne and Robert Sanderson, January 1650, it was recognised that "[The Engagement] is only a promise, not an oath, and consequently not so obliging the conscience, but only... whilst the State stands in force" See Hill, Society and Puritanism p. 410.

33. That may be so as a matter of legal and political theory, but there were significant civil penalties/impediments if the Engagement was not taken. For example, it was a precondition to "hold or enjoy any Place or Office of Trust or Profit, or any Place of Imployment of publique Trust whatsoever" and failure to subscribe resulted in forfeiture of office, distress and sale of goods and imprisonment. See Firth and Rait Acts and Ordinances of the Interregnum 1642-1660 Vol 2 pp. 325-6.

34 Worden, The Rump Parliament 1648-1653 p. 231. See too the attitude of the Levellers; Walwyn, Overton and Prince upon their release from the Tower in November 1649 signed the Engagement which "they promised to keep as faithfully as Bradshaw, Vane or Prideaux kept the Covenant". See Brailsford, The Levellers and the English Revolution p. 603.

35. Worden, op cit p. 232.

The Engagement issue sparked a plethora of pamphlets, and it was in this context that Hobbes' political theory was used virtually as propaganda. Those seeking to validate the Parliamentary regime essentially relied upon a more subtle version of the "might is right" principle. "We must obey *whatever* powers are in a position to command our obedience. And the reason is that their capacity to rule is in itself a sufficient sign of God's will and providence". **(36)** As Skinner points out, this argument was vulnerable to a different interpretation of Scripture "that lawfully invested authority ... is... alone... *ordained* of God, though God may well *permit* many forms of tyranny to exist." **(37)** Hence the obligation to obey de facto power was "vindicated less by citing God's providence than by stressing the needs of political society, and specifically man's paramount need for protection from himself and his fellow men." **(38)** Skinner identifies a confluence of these ideas, of whom the most notable exponent was Hobbes. **(39)**

Hill is of the view that "the more contradictory oaths men took, the less bound they felt by any of them." **(40)** He well illustrates the point by citing a Royalist song -

> "They force us to take
> Two oaths, but we'll make
> A third, that we ne'er meant to keep 'em". **(41)**

For Hobbes, "the Oath addes nothing to the Obligation. For a Covenant, if lawfull, binds in the sight of God, without the Oath, as much as with it: if unlawfull, bindeth not

36. Skinner "Conquest and Consent: Thomas Hobbes and the Engagement Controversy" in Aylmer (ed.), The Quest for Settlement p. 83. Of course, this view would justify obedience to every regime that exists from time to time, including Nazi Germany.

37. ibid p. 84.

38. ibid p. 87.

39. C. B. MacPherson, too, in his introduction to Leviathan states that "the received picture of Hobbes as an isolated thinker, rejected by his contemporaries, without influence in his own time... and thus outside the mainstream of political thought in the seventeenth century, is false". p. 23.

40. Hill, Society and Puritanism p. 411.

41. ibid p. 411 citing Rump; or an Exact Collection of the Choycest Poems and Songs Relating to the Late Times (1662) Volume 1 p. 235.

at all; though it be confirmed with an Oath" **(42)** The royalist preparedness to take the Engagement may in itself have been an endorsement of this view. They believed that the covenant was unlawful. Thus it "bindeth not at all; though it be confirmed with an Oath". The Presbyterians though, had recanted their initial breach of allegiance to the king, and held themselves bound by the Solemn League and Covenant. **(43)** That insistence was referrable primarily to their religious imperatives, but the elements of mutuality and compact cannot be ignored.

For Hobbes "the State is the sole interpreter of all laws, spiritual and profane. God's commandments are transmitted through the mouth of the civil power... In the last analysis, the State itself is deified, for its authority destroys any personal responsibility, even in religious matters." **(44)** The Presbyterians though, as signatories to the Solemn League and Covenant, resisted the Engagement, and did not accept the pragmatism of the Hobbesian (Parliamentary) position.

42. Hobbes, Leviathan p. 201.

43 There is some justification for the view that there is a valid distinction to be drawn between the allegiance to Charles I which must have been tacitly expressed, almost as an incident of citizenship, and the Solemn League and Covenant which was actually subscribed. See Hobbes, "For no man is obliged by a Covenant, whereof he is not Author; nor consequently by a Covenant made against, or beside the Authority he gave". Leviathan p. 218.

44. The New Cambridge Modern History (1961) Volume V p. 104.

CHAPTER 2

The Love Trial

"Did not our worthies of the House,
Before they broke the peace break vows?
For having freed us, first, from both
Th' allegiance and supremacy oath,
Did they not, next, compel the nation
To take, and break, the Protestation?
To swear, and after to recant,
The Solemn League and Covenant?
To take th' Engagement and disclaim it,
Enforced by those who first did frame it?" **(1)**

Samuel Butler's tone is flippant and cynical. Born in 1618, and dying in 1680, his adult life coincided with the Civil War/Interregnum and Restoration periods. His experience of the political crisis and Parliamentary reaction to it left him with a view of obligations under oath as at best ambulatory. Oaths for him, lost whatever magic they may once have held as guarantees of truth; they became a gambit for the casuists, and a subject of mockery. A consideration of the trial of Christopher Love in 1651, **(2)** though, serves to demonstrate that Butler's flippancy and cynicism were not universally shared. Love's trial provides us with a significant contemporary insight into attitudes to both the judicial oath and oaths of allegiance; it is a microcosm for the larger Engagement controversy.

1. S. Butler, Hudibras p. 133 from Hill, Society and Puritanism p. 409.

2. The Trial of Mr Christopher Love State Trials 188 p. 43.
(Page references in this chapter unless shown otherwise are from this source).

Worden suggests that in the heated political environment of the Rump's increasing conservatism and reaction to religious radicalism, the war in Scotland, and speculation of Royalist plots, "Love's case soon came to symbolise the conflict between on the one hand those for whom Pride's Purge and the execution of the king had been merely the starting point of the godly reformation, and for whom there could be no going back to the 1640s, and on the other all those who were anxious to heal the wounds of the parliamentary cause". **(3)**

Love was brought to trial in 1651 for high treason against the Commonwealth, accused of involvement in the so called Presbyterian plot, **(4)** the allegation being that he "as a false Traitor and Enemy of this Commonwealth and Free State of England, and out of a traiterous and wicked Design to stir up a new and bloody War, and to raise Insurrections, Seditions and Rebellions within this Nation, did in several days and times, that is to say, in the years of our Lord 1648, 1649, 1650, 1651, at London, and at divers other places within this Commonwealth of England... traitorously and maliciously combine, confederate, and complot, contrive and endeavour to stir and raise up Forces against the present Government of this Nation, since the same hath been settled in a Commonwealth and Free State, without a King and House of Lords, and for the Subversion and Alteration of the same..." **(5)**

Whilst the charge continued at length, the gist of the allegation was that Love had been in contact with the Scots, and involved with them in plots against the Army and Parliament for the restoration of Charles I. Further, it was alleged that after the execution of the King, Love had been in contact with Charles II who was in exile on the Continent, and particularly with respect to the Treaty of Breda. **(6)** According to

3. Worden, The Rump Parliament 1648-1653 p. 244. Worden goes so far as to say that "the significance of the Love episode has not... been adequately appreciated". p. 243.

4. See Worden p. 243. It should be noted, too, that "Love... had been in trouble with the [Commonwealth] regime before, and had received every warning". p. 244.

5. pp. 45-6.

6 "Prince Charles completed at Breda the negotiations by which he bought the support of the Scots for the recovery of his English crown... he signed the ominous treaty which subjected King and kingdom alike to the Solemn League and Covenant". Brailsford, The Levellers and the English Revolution p. 606.

the testimony of Major Alford "the substance of it [the alleged Treason] was to press the Prince to apply himself to take the Covenant, and to prosecute the ends of it, and to cast off all his cavaliering party about him, which had brought so much mischief to his father, and would do the like to him". **(7)**

The account of the trial discloses Love as a somewhat pedantic personality, constantly claiming ignorance of legal institutions, before launching into yet another dispute upon legal or quasi legal grounds; **(8)** his constant justification was that "he was on trial for his life". **(9)** His somewhat invidious position did not earn him any sympathy; rather, it was itself the subject of adverse comment, due in part to the Lord President's equation of the law of God with the law of England. "There is no law in England, but is as really and truly the law of God as any Scripture-phrase that is by consequence from the very texts of Scripture...whatsoever is not consonant to Scripture in the law of England, is not the law of England...And therefore to profess you are knowing in the laws of God, and yet to be ignorant of the laws of England...is not to your commendation, nor to any of your profession... we must walk in them [the laws of England which are the laws of God] as we would walk to heaven." **(10)**

Some important personal details are revealed by the transcript. From his rather moving speech delivered from the scaffold, it may be discerned that Love was born in Wales, of "mean parentage", and was apparently 35 years old **(11)**. Of primary significance though was Love's profession/status as a Presbyterian Minister of the Gospel. **(12)**

7. p. 89.

8. Note the Lord President's somewhat dry comment "He pleads he is ignorant of the Law, and yet can make use of it". p. 51.

9. See for example p. 51. "I am to plead for my life".

10 p. 172 & p. 238.

11. "I am a man of an obscure family, of mean parentage... born in an obscure country (in Wales)" p. 262. Love was converted in his 15th year, and "for these 20 years God hath kept me". p. 262. The Dictionary of National Biography though, puts Love's birth in 1618, making him 33 years old at the date of his execution in 1651; it puts his place of birth as Cardiff.

12. He described himself as "the first minister in England try'd for treason." p. 165.

The prosecuting Attorney-General in fact alleged that Love was the leader (or one of a cabal) of a Presbyterian party, **(13)** although he seemed at pains to avoid any implication that Love was being prosecuted (persecuted) because of his religious adherence. He also sought not to unduly antagonise Love's co-religionists - "That the Presbyterian name was made use of, you have had many concurrent evidences;... And if it be a fault [the meetings alleged as evidence of Treason]... it is... done to the Presbyterian party, who, I am sure, will not own him in it. **(14)**... [The alleged Treason] was undertook in the name of a Presbyterian party; though I think, and do believe it, for very many honest Presbyterians, that they would spit in his face, if he should say it of them." **(15)** Notwithstanding the Attorney-General's diligence, Worden says that Vane saw Love's case "as a purely political one" and that Hammond "did not exaggerate the widespread determination to use the Love case as a means of reconciling presbyterians and independents... Love would never have died at parliament's hands for his religious views alone. He was executed, at a time of acute political danger, for political misdemeanours." **(16)**

It could perhaps be argued, given the peculiar political circumstances, that any use of the trial as a case study of attitudes to obligations under oath in seventeenth-century England is unrepresentative. Such a dismissal would, however, be unjustified, as insight into attitudes to oaths comes from all participants: Love, the prosecution counsel, the Bench, the respective witnesses, and the interchange between them. The

13. "[Love] pretends (emphasis mine) so boldly to represent... the presbyterian party". p. 74 The designation of persons of Presbyterian sympathies into a party has been a notion subsequently challenged by historians, but in any event, Presbyterians were a grouping in a relationship of polarity with the Independents. See Worden p.6. Brailsford says that "the ultimate distinction between the Presbyterian and Independent parties in England may have been, to put it crudely, that between the arrived and the arriving". The Levellers and the English Revolution p. 23. See too p. 548.

14. p. 201.

15. p. 171. This concern to ensure that (in the modern aphorism) not only must justice be done, it must be seem to be done, recalls the earlier (1649) trial of Lilburne, similarly brought under the Treason Acts. See generally, D. Veall, The Popular Movement For Law Reform 1640 -1660 (1970) pp. 163-4.

16. See Worden, The Rump Parliament 1648 - 1653 pp. 244, 246 and 248 respectively.

Lord President (whose identity is disclosed in the transcript as Judge Keble) **(17)** in fact put the case in a Christian context in his early efforts to rebut Love's argument for counsel, by stating "we are men of conscience, and have souls to save as well as you...if we do not know that God is here present, we are the miserablest creatures in the world". **(18)** The Bench were triers of fact and law, sitting as judge and jury, although their participation in "interrogating" Love and commenting on the evidence jars modern ears and seems indicative of bias. **(19)**

The apparent prejudices, though, are illustrative. Both the Lord President and the Attorney-General (the leading Commonwealth Prosecutor) had concerns that Love may approach the oath and his evidence like "The Romish Ministers...[whose] faith is faction [and] whose religion is rebellion... they pray for strife, and fast for strife **(20)** ...that [he] would evade things with mental reservations, and say and unsay at the bar, as high as any Jesuit can do". **(21)** Love was assured though that he should "have Justice as well as ever any jesuit had;" **(22)** one suspects this assurance provided less than total comfort.

There was constant adverse reference throughout the trial to the Jesuit attitude to oath-taking. Essentially, it was thought that their evidence under oath could not be regarded as trustworthy, although as Hill recognises, "the horror of the Jesuit doctrine of equivocation... only theorized what some Puritans of necessity had to do when put

17. See p. 171 - the same judge who tried Lilburne in 1649. See Veall p. 163 ff. Curiously though, Veall says at p. 153 that Lord Commissioner Lisle presided over the Love trial, and it is clear he means the 1651 trial.

18. p. 62. This reads as an echo of Lilburne's trial. See Brailsford, The Levellers and the English Revolution p.589.

19. See Veall p. 18 ff. "This was an inquisitorial examination [specifically referring here to pre-trial examination]; the magistrate or judge did not act judicially, but as a detective drawing up the case against the accused. The purpose of the examination was to expose a man assumed to be guilty".

20. p. 74.

21. p. 62.

22. p. 76.

on oath". **(23)** That Anglican Bishops could accommodate an argument of duress as a defence to breaking an obligation assumed under oath (at least when the subject was the king), has already been noted. Notwithstanding that as a matter of practice the Jesuits were not alone in their attitude to oath-taking, it was against the Jesuits, and by extension all Roman Catholics, that opprobrium was levelled, by even such eminent jurists as Coke. When referring to those views in 1744, Lord Chief Justice Willes CB in Omichund v Barker described them as having been formulated in "very bigotted Popish times". **(24)**

A more balanced explanation of the perception of the Jesuit position was given by Martin B in Miller v Salomons. The issue for determination in that case, decided in 1852, was whether a Jew, elected as a Member of the House of Commons, could lawfully take up his seat given his refusal to subscribe the concluding words of the requisite oath of office, "upon the true faith of a Christian". The decision itself is not relevant to this paper, but the case accords detailed consideration of precedent, and particularly the Jesuit position. It identified that the prevailing idea in mid seventeenth-century England was "that Roman Catholics were in a different condition with regard to oaths from persons of other religious denominations; and that the Jesuits taught that the Pope had power to grant absolution from oaths, and to dispense with the performance of and adherence to them, and that Roman Catholics... made... oaths with mental evasions and secret reservations, which were supposed to have the effect of nullifying their obligation". **(25)**

According to the judgment of Alderson B in the same case, the Jesuitical theory could be traced back to a "Treatise on Equivocation" found in the chamber of one of the conspirators in the Gunpowder Plot, Francis Tresham, that "a person... may lawfully equivocate, by using ambiguous words, or reserving mentally a sense of the words

23. Hill, Society and Puritanism p. 395.

24. Omichund v Barker Willes 539 @ 542 - decided February 1744.

25. Miller v Salomons 7 EX 475 @ 518.

used different from that outwardly expressed by him, without incurring the sin of lying or the guilt of perjury... that he may equivocate and mentally reserve without danger to his soul". **(26)** Jesuit casuistry makes a mockery of any notion of obligations under oath as absolute. The extent to which this was so may be seen from the example given by St. Alfonso de Liguori, an eighteenth-century casuist, that "I say no" in reply to a question to which one believes the correct answer is "yes" is a truthful response, as the speaker does in fact say "no". **(27)** This end point of casuistry rendered the whole concept of obligations under oath meaningless, and casuistry as a system of thought was ultimately condemned by Pope Innocent XI in 1679.

The Love trial discloses unanimity between prosecutor, accused, witnesses and judiciary that they and the proceedings of which they were part were being conducted in the presence of God. That such was openly and repeatedly stated is in itself a significant point of departure from a modern trial. The assertion/acceptance of God's presence was not only reiterated many times by all involved, but the assertions were made in such circumstances as to imply that they were offered as a guarantee of truth. Love "[would] not lie for [his] life"; **(28)** his protestations of innocence were expressly made "in the presence of God". **(29)**

The Lord President's charge to the first witness, Captain Potter, was that "You are upon your oath, **(30)** and in the presence of God, than whom there is no higher upon

26. ibid p. 536. See too Thomas, "Cases of Conscience in Seventeenth-Century England" p. 32.

27. J. P. Sommerville, "The 'New Art of Lying': Equivocation, Mental Reservation, and Casuistry" in E. Leites, (ed.), Conscience and Casuistry in Early Modern Europe (1988) p. 182.

28. p. 62.

29. See for example p. 75. "I [Love] do declare and protest ... in the presence of ... God... I never ... "

30. The form of oath tendered by the Clerk to Captain Potter was "standard" and fundamentally familiar to modern ears."The evidence you shall give between the Keepers of the Liberties of England and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God. [He is sworn]" p. 76. The form of oath tendered to subsequent witnesses is not reported, although it seems a reasonable assumption that this formula remained uniform.

the earth, that is in the seat of justice... Now look upon the God of Truth, and speak the truth." **(31)** From the outset, Captain Potter's evidence disclosed a consciousness of the oath, although it is plausible that his consciousness was convenient, as he used it as a reason to decline to give certain evidence; he like later witnesses was a co-conspirator with Love. Potter was for example, reluctant to swear to the truth of hearsay: "I have taken an oath to speak the whole truth in this business; but that is the truth I know. I desire I may not be pressed to things that I have only heard." **(32)**

Whilst this comment seems a useful prevarication in reliance upon the words of the oath, Potter's answer to the Attorney-General's production of his examination (pre-trial proof of evidence) disclosed a genuine concern: "I intreat this may be remembered, which I premised at first, I had a latitude then [pre-trial], that I have not now: I am now upon my oath, and desire to be true to my own conscience, and to the state, and to this gentleman." **(33)** Potter clearly saw a distinction between his pre-trial statement and the sworn evidence he was asked to give at trial, a distinction he described as a "latitude". When pressed, Potter referred to the "oath I have taken (and I desire to speak it in God's presence)..." **(34)**

The parenthetical comment does not add anything in legal theory to the substance and power of the oath taken, nor the reliability and truth of the evidence given, but it does serve to emphasise an awareness of the divine presence (and hence sanction) as a real and intrinsically awesome thing, and a guarantee of truth. Potter stated that "no man shall so far tamper with me, as to make me say an untruth," **(35)** going so far as to say, perhaps again for emphasis, "I profess, if it had been to save my life, I could not affirm [certain allegations]...". **(36)**

31. pp. 77 and 76 respectively.

32. p. 77, but note Veall's comment that "there were no rules about the admissibility of evidence at the trial... Hearsay evidence was accepted. The confessions of accomplices were admitted against each other and were looked upon as decisive evidence". p. 19.

33. p. 80.

34. p. 81.

35. p. 81.

36. P 88.

Potter's steadfast refusal to "swear upon demand", and repeated references to pre-trial latitude and in-trial conscience placed him in what he himself saw as an invidious position vis a vis the prosecutor and court. Nevertheless this immediate antagonism, and its potentially dangerous, or at least adverse, consequences, were risked in preference to giving evidence under oath that Potter did not believe to be true. "I [Potter] am afraid I give offence by saying, I think, and I heard, and that I cannot speak positively" **(37)** That the risk so perceived by Potter was a real one is evidenced by the Attorney-General's comments that "this man [Potter] must not escape unpunished, if for no other fault but this, to accuse a man before authority, and when he comes to his oath, to deny every word of it". **(38)**

The evidence given by Major Adams disclosed a similar reticence. His evidence was consistently qualified. "I cannot say it upon my oath". **(39)** His reticence was more than a "desire to be cautious", **(40)** although one would reasonably assume that was part of it. He "dare[d] not swear" **(41)** certain propositions which were put to him. It was not that he dared not accept the purport of what the Attorney-General put to him, nor that he sought to evade self-incrimination; he quite readily accepted the substance of the evidence. Rather, he declined to "swear it in these words; but to this purpose it was"... **(42)** "No, I will not swear that; and upon my oath I cannot". **(43)**

The tenor of Adams' evidence is not that he sought to evade the facts, nor confuse the issue. The impression of him is rather of a very truthful person, genuinely concerned about the status of what he said. His refusal to swear to certain

37. p. 84.

38. p. 88.

39. For example see p. 103.

40. p. 105.

41. See for example p. 105.

42. p. 105.

43. p. 110. The witness, Captain Far, used the same language - there were matters to which he could not swear, for example, "I am upon my oath, and to say positively, I cannot". p. 128.

propositions, even whilst accepting the substance, was put in strong language - "dare not", "cannot". "Dare" is a particularly strong word **(44)** and imports an element of fear - what to fear but the divine sanction; the secular sanction was at the time not a strong deterrent; perjury for a first offence being only a misdemeanor. **(45).**

Master Jaquel was "called into the Court, and the Clerk tendered him his oath; and Mr Jaquel spake to the Court to this purpose: That there were many oaths abroad, and he could not tell what to say to them; and he desired to be excused." **(46)** Whilst the reference to the plethora of "oaths abroad" hints at religious (Quaker) reasons for him declining to swear, it is not clear that Jaquel's reluctance had its basis in religious principle. In any event, it seems apparent that he was a Presbyterian; he was a co-conspirator.

Jaquel advanced legal rather than religious reasons for refusing to swear - that since he was himself a co-accused, he was not a competent witness and "durst not in conscience swear against Mr Love." **(47)** Whether or not he was a competent witness would have been a matter of law for the Bench to decide, and the Lord President in fact pressed him to swear. Curiously though, Jaquel said "he would speak the truth of what he knew, as well as if he was under an oath" **(48)** but nevertheless declined to swear. Given there is no further elaboration as to the reason for this claimed distinction, Jaquel's statement seems non-sensical - if he was prepared to tell the truth about matters concerning his co-accused (and implicitly waive the privilege against self-incrimination) why not swear to the truth he told?

44. The Shorter Oxford English Dictionary defines "dare" in terms of "venture (to) have the courage or impudence (to)... attempt, take the risk of ...defy (person)... challenge (person)..."

45 Cambridge Modern History Vol V p. 313.

46. p. 113.

47. p. 113.

48. p. 113.

The Court was unmoved by the subtleties of his position, and fined him £500 for refusing to swear. **(49)** He was asked again to swear and "when the oath was read to him, did not swear in that manner as the other witnesses did, but only put his hand to his buttons". **(50)** When asked by Love whether he was under an oath "he answered that he was as good as under an oath". **(51)** The Court, still unaccepting of the distinction he sought to draw, pressed him "and then he did say he was sworn, and was under oath". **(52)** This certainly has nuances of the bizarre, and the detail about him touching his buttons is mystifying. It appears he did not ever subscribe the oath in any form of words, but under pressure said he was sworn. The touching of the buttons preceded his statement that he was sworn; it is at least open to infer that the touching of buttons was done as a form of oath.

It may be that Jaquel was putting his hand, not so much on his buttons, but on his heart. **(53)** Brailsford relates an incident wherein Cromwell apparently did the same "with his hand upon his breast: In the presence of Almighty God, before whom he stood, [he said] that he knew the Army would disband and lay down their arms at their door, whensoever they should command them." **(54)** In this context, the placing of Cromwell's hand upon his heart/breast seems to have been for emphasis of the gravity and truth of what he declared; it may have been a form of invocation of the divine sanction. Whilst the inference is open that Jaquel was subscribing an idiosyncratic form of oath, given Love's later claims, it seems difficult to accept that Jaquel's

49. Veall gives an approximate equation of money values as at 1969, by multiplying the seventeenth century figure by twenty. Of course in 1994 the multiple must be significantly more. The equation is "very rough" (per Veall) but shows the seriousness with which refusal to swear was viewed. Some context is provided in that a £500 fine was also frequently imposed by the Court of High Commission for adultery. Veall p. 8.

50. p. 113.

51. p. 113.

52. p. 113.

53. I am grateful to Professor Bennett for this suggestion.

54. The Levellers and the English Revolution p. 192.

placing of his hand upon his heart/buttons was in fact the subscription of an oath binding upon his conscience; if it was intended to be, he should have so identified it. Further, if he was prepared to take that as a form of oath, his refusal to subscribe in the standard form seems difficult to understand.

Jaquel's evidence was "profess[ed] in the presence of God",**(55)** but Love was not satisfied as to the status of that evidence - "I would ask...Whether he hath spoken this as a mere relation, or whether he owns all this he hath spoken, as under an oath."**(56)** The Attorney-General's response was that "[Jaquel] did say, he was under an oath", **(57)** to which Love replied "If he say so, I am concluded". **(58)** This interchange is significant. It shows that the Attorney-General accepted the witness' statement as to the status of his evidence. **(59)** More striking, Love accepted the same proposition. **(60)** It seems all parties involved held the view that an oath was too serious (sacred) an obligation for challenge to be made to an (apparently) bona fide statement that a person regarded himself as sworn.

Notwithstanding Love's apparent acceptance that Jaquel was sworn, he sought in his defence to exclude Jaquel's evidence in its entirety on the basis that he was "no legal Witness; for he did declare he could not in conscience take an oath against me... If

55. p. 119.

56. p. 120.

57 p. 120.

58. p. 120.

59. Whilst this may prima facie seem expedient, it would not in fact have been self-serving. The Court had stated at the outset that "if he [Jaquel] did not swear, what he should say could not be received as any thing in matter of Evidence". p. 113.

60. The same instant acceptance that a person would not dissemble about oaths and evidence given thereunder was accorded by the Lord President in response to one of Major Adams' refusals to swear; (Adams) "No, I will not swear that; and upon my oath I cannot." (Lord President) "Will you not? I will press you to nothing." p. 110.

any person, good or bad, come under an oath, I must stand or fall by his testimony; and, according to God's ordinance, an oath is to decide all controversies". **(61)** Love thus declared an acceptance of the proposition that an oath is conclusive evidence of the truth of the statements made, regardless of the character of the person sworn. He went further though, and asserted that an oath derived its conclusive character from the laws of God.

His submission, therefore, was that Jaquel had not committed himself to truth, as he had not taken an oath; or in the alternative, if he had, it was from "fearing his fine .... though with much seeming regret of conscience." **(62)** Love refrained however, from developing two possible arguments; first, that Jaquel's oath, given under apparent duress, was somehow invalidated, and secondly, that there was an irregularity of form sufficient to render the oath invalid. Rather he relied upon "inform[ation] that he [Mr Jaquel] denies that he was under an oath." **(63)**

Whilst Love's submission, therefore, contradicted his initial acceptance of the status of Jaquel's evidence, he showed an entirely consistent preparedness to accept a subjective test as to whether, as a matter of fact, an oath had been taken such as to bind the conscience of the particular individual. He argued that on the facts of Jaquel's denial (that he was under oath) an oath had not been validly taken, and the evidence should thus be excluded and treated only as a "bare relation and naked information." **(64)**

In Love's last, somewhat desperate attempts towards the end of the trial to discredit the proceedings, he referred again to Jaquel as a "Witness [who] said, he could not

61. p. 154.

62. p. 154.

63 p. 154.

64. p. 154.

in conscience, [swear] and did not swear till he was threatened, nay, fined by you, and drawn out of the court" **(65)** This cannot be taken as an abandonment of his earlier position that Jaquel was not sworn at all. In response to the Attorney-General's defence of the court's actions in punishing Jaquel for refusing to swear, describing Jaquel's conscience as one, "well-wrought upon", **(66)** Love replied "He is not under an oath to this day, he hath declared it himself... he did but put his hand upon his buttons". **(67)** Again, Love consistently tested the existence and efficacy of an oath by reference to the subjective declarations of the individual concerned, whether in fact that individual considered his conscience bound. He obviously did not accept the proposition that touching buttons was in itself a valid oath, albeit in unconventional form.

Love's reiterations that Jaquel was not sworn were categorised by the Lord President as "very uncivil and indiscreet". **(68)** The Lord President had clearly lost his patience. Nevertheless his rejection of Love's proposition had its basis in principle. "We have heard all this .... before ... that he was saying ... he was not under an oath: it was said so again and again, and again... "Are you under an oath? till at last he did conclude and testify (emphasis mine) he was under an oath **(69)**. I testify this before all the company here, this is noised abroad again by many people, the care we had of that very man you speak of; you asked him three or four times then, and at the last, upon the conclusion, he confessed himself he was under an oath: he did not do as you do; you will say things are truth, but you will not speak those truths before God

65. pp. 244-5.

66. p. 245.

67. pp. 245-6.

68. p. 246.

69. Again, the test accepted by the Lord President as conclusive, is a subjective one; he accepts Jaquel's testimony (oath) that he was under oath.

in a testimonial way." **(70)** The ever present prejudice resurfaced "though some of your witnesses that proved it, said it was true in the presence of God, what they gave under their hands: these men that do thus, are no better than Jesuits in reality, though not in name". **(71)**

Master Jackson, whom the transcript advises was a Minister, dared not swear. **(72)** "I look upon this man as a man very precious in God's sight; and, my lord, I fear I should have an hell in my conscience unto my dying day, if I should speak anything that should be circumstantially prejudicial to his life; And in regard of these terrors of the Lord upon me, I dare not speak." **(73)** Having Love's death on his conscience was Jackson's stated fear. He evidently believed the nexus to be that if he subscribed his oath, he would be obliged to tell the truth, and Love would be convicted.

It is clear that the status of an oath for Jackson was that it had the divine sanction behind it. The Lord President, perhaps recognising the reality of God (or perhaps taking this for granted as part of the milieu in which the trial was conducted) asked Jackson "Are you a professor of Jesus Christ, a minister of God? The great errand you are sent hither about, is to speak the truth from him. Therefore lay your hand upon your heart, (emphasis mine) **(74)** and do as becomes you as a Christian, and as a rational man, and as one that will tell truth; for by the truth the world stands. We are

70. p. 246. There is no evidence that Love was afforded the opportunity to swear, although, note Veall's comments that "the accused had great latitude in what he was allowed to say". p. 20.

71. p. 246.

72. It is clear that Jackson was a Presbyterian Minister, not only from the fact that he was a co-accused. Rather, the evidence comes from the Lord President, in reply to Love's allegation that Jaquel had been importuned "you say we threatened [the witnesses]; true that we did threaten some; and I think we went thus far, that if [Jaquel] would not [swear], we would set £500 fine upon his head; but he would none of that, but came in again, and delivered his knowledge. But you had another of your own robe too (emphasis mine) that came in, and would not testify." p. 247.

73. p. 132.

74. Surely not necessary for subscription of a valid oath, but very interesting in the light of Jaquel's behaviour.

all no better than savage men, if we have not judgment to tell truth." **(75)** Jackson acknowledged that he "look[ed] to die" "and trust[ed] in Jesus Christ [he] shall live again". **(76)**

Jackson clearly had a well developed view of the divine sanction; he remained obdurate and would not swear. He was fined £500 and imprisoned. The Lord President's somewhat dismissive conclusion was that "you are the men that were spoken of before, Jesuits and priests: They say you are none, but you are their brethren". The Attorney General sought to press the advantage, "My lord, these go beyond Jesuits: The Jesuits will swear with a reservation, and these will not swear at all". **(77)** A view of obligations under oath as ambulatory, or idiosyncratic, was for the Attorney-General preferable to a perception of obligation as absolute, and a total refusal to compromise.

Not surprisingly, Love in his defence set out to discredit the evidence and witnesses against him. **(78)** He claimed, for example, an inconsistency between the evidence of Far and Alford, not laying account for the discrepancies upon "the badness of Far's conscience, but upon the badness of his memory. **(79)** I do not think he is such an atheist, to swear falsly deliberately; but being asked so many questions as he was ....

75 p. 133. "To conceal a truth, or tell a lie, you had better let the world fall about your ears." p. 133. Is concealment of truth also to be made subject to the divine sanction? See Dymond's comments in "Oaths; their Moral Character, And Effects" infra @ p. 9 "does the oath bind... to give an exact narrative of every particular connected with the matter in question, whether asked or not? If it does, multitudes commit perjury".

76 p. 133.

77. pp. 133 - 134.

78. Love did not call any witnesses himself. It is difficult though to reconcile the Lord President's (adverse) comment to Love that "[the Bench] expected you would have brought new witnesses" (p. 203) with Veall's statement of procedure that "the prisoner was not allowed to call any witnesses." The Popular Movement for Law Reform 1640-1660 p. 19.

79. Love made this distinction with respect to much of the testimony he sought to discredit. With respect to Major Alford, though, he went further and claimed "that for Alford's affirming that it was agreed upon among us, I am sure, if he had any conscience (emphasis mine), he could not say that I agreed to it." p. 140. The point is not developed, however it seems that Love's allegation is not the mild one that Alford was mistaken, but rather that he was lying (under oath); evidence that he had no conscience.

he might easily say he knew not what". **(80)** The equation is unequivocal - to lie under oath ("swear falsly deliberately") could only be the act of an atheist, one who by definition did not/could not believe that the divine sanction stood behind the judicial oath. **(81)**

Love's substantive defence was presented without benefit of counsel. "The refusal to allow the prisoner to be legally represented on questions of fact was justified by the contention that, to secure a conviction, the proof should be so evident that no lawyer could argue against it; further, legal representation was unnecessary since the court was counsel for the prisoner." **(82)** Legal representation was available "if the accused could convince the court that there was a point of law to be argued." **(83)**

Love's submissions as to the lack of credibility of witnesses and evidence are interspersed throughout with his own evidence; principally, and significantly, denials made "in the presence of God". Love himself though was never sworn - his evidence was not given on oath. Notwithstanding the absence of the formality of an oath, he called constantly upon God as witness to the truth of his assertions, and by implication acknowledged a divine sanction as a guarantee of truth. **(84)** This is in contrast to Love's challenge to "evidence" given by the Attorney-General at the very outset of the

80. p. 139.

81. Love refers not to an atheist per se, but to such an atheist. Notwithstanding the seeming logical impossibility of degrees of atheism, it is clear that lying under oath was regarded as reprehensible behaviour, inconsistent with belief in God; the "sinne of all sinnes". A. Hill, The Crie of England (1595) p. 32 quoted by M. Hunter, "The Problem of 'Atheism' in Early Modern England" in Transactions of the Royal Historical Society 5th Series 35 p. 137.

82. Veall p. 18.

83. ibid p. 18. Love had the benefit of counsel, principally Matthew Hale, to argue the legal niceties of whether the offence of Treason had been made out as a matter of law. James Fitzjames Stephen, described by Brailsford as "far from being a humanitarian" believed the result of the way in which the accused had to conduct his defence was "an amount of injustice frightful to think of." History of Criminal Law in England Vol I, p. 389 - 402 in Brailsford, The Levellers and the English Revolution p. 539.

84. Indeed, the Attorney-General made Love's continuous references the subject of adverse comment. "I did expect from this gentleman, that he would not have continued those fearful imprecations of calling God to witness;" (p. 168) an oblique insinuation that Love was lying.

trial "Sir, you are no Witness; if you be a Witness, come and swear." **(85)**

The Attorney-General in his reply to Love's defence identified this paradox "I wish there were not cause ... to think otherwise: but surely [Love] hath made large imprecations, and hath spoken much for himself; but I believe he knows there is so much justice here, that he expects not to be believed in what he says. **(86)** If it were enough to accuse, who should be innocent? And if it were enough to deny, who should be guilty? He doth not expect to be believed for his word certainly." **(87)** The Attorney-General reminded the court that Love had made "deep Protestations". Whilst the Attorney-General "did hope that they were not made with any relation to equivocation, or mental reservation, but [were] a positive denial of any facts of treason ... having looked upon them... [the Attorney-General found] that they [were] somewhat cautious, and perchance they may be true... in the sense spoken of by Mr Love; but whether true in the sense they should have been spoken by a Christian in a public assembly, that I shall not judge." **(88)**

In this context, though, it seems that the Attorney-General was referring not so much to whether Love may have been lying or seeking to mislead, but rather to his earlier submission that the "Christian way" was to confess as the first step to repentance **(89)** rather than to wait until the evidence given was so clearly adverse that an acknowledgement of its truth was rendered virtually inevitable. Love's response to this was that "I deemed it against nature for any to confess against himself, unless he could be sure his confession should not prejudice him. And I might have been guilty of my own blood, if I had confessed; for then, did the matter confessed amount to Treason by your law, my life would be at your mercy, and you might hang me upon mine own confession". **(90)**

85. p. 60.

86. This cannot have been deliberate irony.

87. p. 169.

88 p. 196.

89. p. 168.

90 p. 159. Love seems to be referring to the legal absurdity that suicide was a capital offence.

Even then, the Attorney-General alleged that "these asseverations were studied to evade ... he would speak true, but not the whole truth." **(91)** Whilst it "begs the question" there is no indication whether Love's credibility would have been immune from such attack had his evidence been sworn, thus constituting actual (and contradictory) evidence rather than mere denial. One suspects not, given the rationale for not allowing an accused person to call witnesses, "if the prisoner's witnesses gave evidence which conflicted with that given on behalf of the prosecution, such a procedure would open the door to perjury." **(92)** It is ironic that the procedure should be endorsed as preventing perjury, not condemned as a bar to either establishing the innocence of the accused, or his guilt beyond reasonable doubt. **(93)**

Notwithstanding Love's defence upon the facts, Hale's submissions on the law, and Love's vehement protestations of innocence, he was found guilty and condemned to death. His Presbyterianism had always been acknowledged, but it is in his defence, and particularly in his speech from the scaffold, that the basis of his view about oaths is openly stated. Fundamentally, it lay in the religio/political "old covenanting principles, from which, through the grace of God, I will never depart for any terror or persuasion whatsoever." **(94)**

In his defence, Love revealed that he had "all along engaged [his] estate and life in the parliament's quarrel against the forces raised by the king:... not from any aim at profit, but out of a persuasion of conscience and sense of duty... Many gave [to parliament] out of their abundance; but [he] out of [his] want." **(95)** Clearly he had

91 p. 197.

92. Veall p. 19.

93. See too Munnings v Barrett [1987-89] TR 88 @ 88 wherein the views of Cave J in Reg v Shimmin [1882] 15 COX CC 122 @ 124 were cited with approval "... his statement was not made on oath, and ... he was not liable to be cross- examined by the prosecuting counsel, and what he said was therefore not entitled to the same weight as sworn testimony." I am grateful to Mr. P. Evans for this reference.

94. p. 160.

95 pp. 160-1.

preached "for the lawfulness of a defensive war"; **(96)** he deemed it his duty to do so. Indeed, Marchamont Nedham argued Love "had forfeited his title to godly minister when he preached rebellion in the second civil war". **(97)** The condemnation is ironical from a man described by Sampson as a "political turncoat," a man for whom, presumably, obligations under oath must have been at best ambulatory.

Whilst Love refrained from confessing complicity in the alleged Treason, he "thus far own[ed] the thing, that it was agreeable to [his] judgment and conscience. For [he] thought the interest of God and religion, and the good of the nation, would be more advanced if the king went into Scotland upon Covenant terms..." **(98)** Love says nothing as to his reasons or justification for the initial breach of allegiance to Charles I.

Love petitioned Parliament for a stay of execution, and petitioned Cromwell for remittance of the death penalty. Cromwell apparently acceded to this request, but the notification of same was delayed (by royalists) from reaching London until after the execution had taken place. **(99)** It is in Love's speech upon the scaffold, therefore, that one looks for truth - one would expect him to speak the truth unreservedly; he had nothing to lose, and was soon to meet his God, a God obviously accepted as Judge. **(100)** There can be no doubt, but that Love expected to answer to that judgmental God. "God is my record, whom I serve in the spirit; I speak the truth, and lye not... I hope you will believe a dying man, who dares not look God in the face with a lye in his mouth." **(101)**

96. p. 161.

97. See M. Sampson, "Laxity and Liberty in Seventeenth-Century English Political Thought" in E. Leites, (ed.), Conscience and Casuistry in Early Modern Europe p. 113.

98. p. 164.

99. See commentary at commencement of transcript pp. 43-4.

100. If God is not a judgmental God, the divine sanction is meaningless.

101. pp. 253 and 255.

In the same way as one would expect Love to speak the truth in his rather extreme circumstances, one would also expect him to address the issues which meant most to him - his preoccupation on the scaffold was with the political reality of the Engagement Controversy. Notwithstanding the Attorney-General's earlier efforts to avoid any likelihood that the trial be seen as a "show trial" brought for political ends, Love was quite blunt as to why he thought he was to die. "Upon a civil account my life is pretended to be taken away, whereas indeed it is because I pursue my Covenant, and will not prostitute my principles and conscience to the ambition and lusts of men". **(102)**

Love, representative of the Presbyterian mind set, would not break the oath he had taken in the Solemn League and Covenant; he would not recant for the sake of political expediency. Brailsford says of the Solemn League and Covenant that "the Presbyterian clergy... took it, voluntarily and very often with enthusiasm"; **(103)** an enthusiasm not shared, or at least not maintained by those in power in Parliament. Again though, it was not that Parliament expressed a belief that the oath could be broken casually or without explanation. Rather, the casuistry entailed for Cromwell that it was "an act of duty to break an unrighteous engagement; he that keeps it does a double sin, in that he makes an unrighteous engagement and in that he goes about to keep it." **(104)** Ireton believed an engagement (in the instant case that between Army and Parliament) "may, nay must be broken, if its observance involves "sin", that is to say disobedience to God". **(105)**

It is not so much that Love and his fellow Presbyterians denied that duty may dictate that an engagement be broken: "all agree there are cases in which it is lawful to

102. p. 253 and see p. 257. "Now this is only a political engine to make the Presbyterian party odious, who are the best friends to a well-ordered government, of any sort of people in the world."

103. Brailsford The Levellers and the English Revolution p. 260.

104. ibid p. 273.

105. ibid p. 280.

resist" **(106)**. Rather, as Hobbes recognised, the difficulty lay in identifying the case in which morality and right conduct demanded such breach of covenant or resistance. "The difficulty therefore consisteth in this, that men when they are commanded in the name of God, know not in divers Cases, whether the command be from God, or whether he that commandeth, doe but abuse Gods name for some private ends of his own." **(107)** For Love, adherence to the oath of the Solemn League and Covenant was a non-negotiable and continuing obligation.

Interestingly, Lilburne had, according to Brailsford "surprised everyone by taking [the Engagement], but promptly added the reservation that by the Commonwealth to which he promised fidelity, he meant "all the good and legal people of England" and not "the present Parliament, Council of State, or Council of the Army"". **(108)** There is a rather attractive irony in a Leveller adopting a mechanism usually regarded as the province of the Jesuits.

Love insinuated that the matter had been prejudged - the Bench were bound to find him guilty, regardless of the evidence. "As concerning my judges, I will not judge them, and yet I will not justify them: I will say but this of them, I believe that what moved Herod to cut off John Baptist's head, that moved them to cut off mine; and that was for his oaths sake: (emphasis mine) Herod, to avoid perjury, would commit murder; **(109)** whereas if John's head had been upon his shoulders, he would have been guilty of neither" **(110)**.

106. ibid p. 363.

107. Hobbes, Leviathan p. 609.

108. op cit p. 608. Alymer calls it a "tongue-in-cheek subscription" in "England's Spirit Unfoulded, or an Incouragement to Take the Engagement. A Newly Discovered Pamphlet by Gerard Winstanley" in Past and Present 40 (1968) p. 6.

109. It is interesting that Love uses the word "perjury" in this context.

110. p. 254. See too Willes C.B. in Omichund v Barker supra p. 545, and "A Sermon Against Swearing and Perjury" infra - "Herod as hee, tooke a wicked oath, so hee more wickedly performed the same, and cruelly slewe the most holy Prophet." p. 49.

That the political context of the Engagement was in truth operating upon the court may be seen from the treatment of two Counsel called on behalf of Love. Mr Archer and Mr Waller appeared for him; they had been assigned by the Court. The Attorney-General "demanded of them whether or no they had subscribed the Engagement? they answered, they had not done it... The Court [demanded] whether or no they would subscribe the Engagement? They answered, That they desired time to consider of it; and so withdrew." **(111)** Those Counsel were not heard on Love's behalf; apparently they did not swear and were thus excluded from appearing. The interesting question is the Court's state of knowledge.

The actual confrontation therefore, lay in Love's adherence to the Solemn League and Covenant, and his refusal to subscribe the Engagement. **(112)** "I was never for putting the king to death, whose person I did promise in my covenant to preserve:...I did in my place and calling oppose his forces, but I did never endeavour to destroy his person... I deemed it an ill way to cure the body-politick, by cutting off the political head...I die with my judgment absolutely set against the Engagement; I pray God forgive them that impose and subscribe it, and preserve those that refuse it". **(113)** Love believed he died a martyr. He claimed that he remained faithful to the oath of the Solemn League and Covenant; he had no doubt but that he died for it.

111. pp. 210-211.

112. Maybe it was also that he had actively opposed (preached against) it.

113. p. 258 and see further p. 259. "I die cleaving to all those oaths, vows, covenants, and protestations that were imposed by the two houses of parliament, as owning them, and dying with my judgment for them; to the protestation, the vow and covenant, the solemn league and covenant. And this I tell you all, I had rather die a covenant-keeper, than live a covenant-breaker".

CHAPTER 3

The Quaker Response

The religious intensity of the age, and perhaps the religious confusion, are evidenced by the transcript of the Love Trial. The assertion that a Presbyterian Minister was employing Jesuit devices to avoid obligation under oath is ironic to say the least. The same irony goes deeper; Quakers, "one of the most enthusiastic and radical fringe groups" **(1)** were, by their absolute refusal to swear, "exposed to the charge that they were Catholics in disguise." **(2)** Christopher Love and the Quakers had something else in common - they both suffered for the misidentification, and for their respective refusals to swear; whether limited to the Engagement, or absolutely.

It may be recognised that the trial and execution of Love had their genesis in politics. The persecution of Quakers too was politically motivated. Quite apart from the perennial quest for religious uniformity as a bulwark of loyalty to the State, the particular form of Quaker religious dissent was equated with anarchy. **(3)** Indeed, Brailsford in his deceptively quaint comment that "we should learn a good deal of the truth about class [in the seventeenth-century] if we could grasp the whole etiquette of hats" **(4)**, advances the view that the Quaker refusal to comply with social norms and etiquettes about hats "like most of the Quaker beliefs and practices, from the Anabaptist tradition... was an affirmation of human equality, a revolt against class." **(5)**

1. C. W. Horle, The Quakers and the English Legal System 1660 - 1688 (1988) p. xii.
2. ibid p. 11.
3. "The Quakers became a State within a State" ibid p. 15.
4. Brailsford, The Levellers and the English Revolution p. 45.
5. ibid. See too Horle op cit p. 14. "[Quaker] refusal to doff hats in the court could be construed as contempt of court and of magistracy".

Whilst the executive displayed a similar (persecuting) response to the Quakers and to those Presbyterians who would not subscribe the Engagement, the motivations for the dissenters were fundamentally different. For the Quakers it was not primarily a question of politics, but of religion; of observing the injunctions Christ gave in the Gospels; "they would never take an oath, for... they would not surrender their consciences to another's keeping." **(6)** It may be too that rejecting oath-taking was entailed by the Quaker rejection of sacraments. **(7)**

The Quakers based their refusal to take oaths primarily upon Matthew 5:33-37: "Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil." **(8)** Watts explains "the frequent Puritan accusation that... Quakers... were papists in disguise" by reference to the Quaker "reject[ion of] both Calvinism and the supremacy of Scripture." **(9)** If that explanation is correct, the literal interpretation of Matthew's Gospel seems somewhat anomalous.

Not all believed that Matthew's report of Christ's words constituted a complete prohibition against swearing. Even as Shakespeare's works reflect a lay consideration of the paradox inherent in oath-taking, so the religious question of whether or not it was open for a Christian to swear had been the subject of debate under Elizabeth, as

6. Brailsford, The Levellers and the English Revolution p. 31. See too Watts, "The Quaker refusal to render to Caesar the things that are God's is of the very essence of Dissent". The Dissenters; From the Reformation to the French Revolution p. 3.

7. "An oath was still almost a sacrament" Hill, Society and Puritanism p. 497.

8. Matthew 5: 33-37.

9. Watts, The Dissenters p. 208.

may be seen in "A Sermon Against Swearing and Perjury" appearing in Certaine Sermons or Homilies 1547-1571. The religious allegiance of the writer is not disclosed, although the fact that the sermon was preached is evidence that there was current debate as to whether or not it was lawful to swear; it was obviously the subject of concern for those wishing to live a godly life.

The writer, perhaps belying the title, concluded that some swearing was lawful, indeed mandatory for a true Christian. Perhaps not surprisingly, his conclusion was that "when Judges require othes of the people for declaration or opening of the trueth, or for execution of justice... also when men make faithfull promises with calling to witnesse of the Name of God to keepe covenants... when Subjects doe swear to be true and faithfull to their King and Soveraigne Lord... all these maner of swearing, for causes necessary and honest, be lawfull". **(10)**

The writer went further, to argue that "lawfull swearing is not forbidden, but commanded by Almighty God", the assertion cited in support being that "Christ, and godly men, in holy Scripture... did sweare themselves, and required othes of others likewise". **(11)** Provided therefore that an oath was taken for one of the legitimate purposes cited above, and "[done]... with judgement, not rashly and unadvisedly, but soberly, considering what an oath is [it] is a part of Gods glory, which we are bound by his commandements to give unto him. For hee willeth that wee shall sweare onely by his name". **(12)**

It may be seen that notwithstanding the numerous Biblical references, predominantly Old Testament, cited in support of the writer's position, there was also a secular and utilitarian basis for his view. "By lawfull oathes... common lawes are kept inviolate,

10. "A Sermon Against Swearing and Perjury" from Certaine Sermons or Homilies 1547 - 1571 (1623 Edition) pp. 45-6.

11. ibid p. 46.

12. ibid p. 47.

Justice is indifferently ministered, harmlesse persons, fatherlesse children, widowes, and poore men, are defended from murderers, oppressers and theeves, that they suffer no wrong, nor take any harme... by lawfull oathes, malefactors are searched out, wrong doers are punished, and they which sustaine wrong, are restored to their right." **(13)**

The debate intensified with the Quakers, whose essential position may be discerned from a work published in 1656. **(14)** It was written by a Quaker "a Sufferer for Christ and his Doctrine", and bears the initials F.H. **(15)** It is a rambling and repetitive document, and the arguments are not significantly different from the issues raised (more succinctly) in the Elizabethan Sermon referred to above. **(16)**.

The allegations made by Smallwood, and thus the Quaker response, fluctuated between the religious and the secular. The work concentrates upon the text in Matthew; the argument which Smallwood had advanced was clearly that that text could not be read in isolation, nor as an "absolute universal prohibition of all manner of swearing under the Gospel". **(17)** The primary allegation was, perhaps not

13. ibid p. 47.

14. The work is exhaustively entitled "Oaths no Gospel Ordinance But Prohibited by Christ Being in Answer to A. Smallwood, D.D. To his Book lately published, being a Sermon Preached at Carlisle, 1664 wherein he hath laboured to prove, Swearing lawful among Christians; his Reasons and Arguments are weighed and answered, and the Doctrine of Christ Vindicated against the Conceptions and Interpretations of Men, who would make it void". I do not understand the dating - clearly a book published in 1656 could not be in answer to a Sermon preached and "book lately published" in 1664.

15. References to this document will subsequently be cited as FH.

16. Indeed, the arguments are also the same in later documents eg, "A Reply to so much of a Sermon Published in the Course of Last Year, by Philip Dodd, As Relates to the Well Known Scruple of the Society of Friends Commonly Called Quakers, Against All Swearing" by Joseph Gurney Bevan 1808 and "Oaths; Their Moral Character, And Effects" by Jonathan Dymond - undated, but citing Paley so at the earliest a late eighteenth-century document.

17. FH p. 1. I have been unable to obtain Smallwood's sermon/book; in any event, his arguments are set out in FH's reply; "laid down as AS hath published them, without varying from his own words".

unexpectedly, that "we who deny to swear, would abolish all judicable proceedings, and make them nothing," **(18)**, and that the Quakers' interpretation of Matthew's text "tends to overthrow all Judicatures... and we should be necessitated if not to disown the Magistrates authority, yet to disobey their loyal command, as having a countermand from Christ". **(19)** FH's answer is that "Witnesses, and all emergent suits and controversies ended according to the best evidence after diligent inquisition... without the needless and cumbersome formality of an Oath, which is sometime this, and sometime that... That which answers the cause in hand is not denyed, true testimony". **(20)**

Horle cites Edward Burrough who puts the same point: "A man that truly and uprightly fears God will be as much afraid and make as much conscience of speaking falsely, as of swearing falsely, and out of a good conscience will testify as truly, as if he swore". As for anyone who fears to swear falsely but was not afraid to speak falsely without an oath, "this is because there is a greater punishment to such, and it is accounted a greater offence among men, to swear falsely than to speak falsely."" **(21)** This shows the extent to which the Quaker's theory of obligation was at variance with "mainstream" religious, legal and political theory. It stands in direct contrast with the justification of the divine sanction theory of oaths as put by the Lord President in the Love Trial. "No man can tell here whose conscience is crazy and tender: conscience is a thing betwixt God and man only; and they that lay nothing upon their consciences to prove their integrity," (emphasis mine), they had as good say nothing before a judge...there are so many consciences as there are men; and no men have power to

18. FH p. 2.

19. FH p. 3.

20. FH p. 4.

21. Horle, The Quakers and the English Legal System 1660 - 1688 p. 169.

judge of it; but God." **(22)**

The other principal attack by Smallwood upon the Quaker interpretation was textually based upon Biblical grounds. First, that God, in the Old Testament, had commanded swearing: "Thou shalt fear the Lord thy God... and shalt swear by his name", **(23)** thus Christ could not have commanded the contrary. FH dismisses this - Christ came to perfect the Law that God had given to the Jews - in the event of inconsistency, the New Testament overrides the Old; "The Gospel exceeds the Law in every point". **(24)**

There is further technical debate as to whether the words "swear not at all" are then qualified by the following examples - whether the examples are illustrations of the general prohibition, or whether the only form of swearing which is in fact prohibited is that done by reference to that (limited) list. Perhaps more meaningfully, Smallwood asserted that Christ only forbad that which was intrinsically evil, whereas "Swearing was not evil in [itself] but because forbidden" **(25).** The Quaker response was a flat denial of the proposition: "we... affirme all swearing to be now a sin, because forbidden by the positive law of Christ under the Gospel". **(26).**

FH, acknowledging the severe penalties to which Quakers were liable, argued that the subject should be treated as a matter of substance, and not of form. "If the Law had been answered in the substance [the magistrate should] not... be so severe in the forme... the Consciences of believers could not yield obedience thereunto, when it was

22. The Trial of Mr Christopher Love State Trials 188 @ p. 247.

23. Deut 6:13.

24. FH p. 65.

25. FH p. 21.

26. FH p. 22.

repugnant under the Law of God". **(27)** His plea recalls, albeit with irony, the self-righteous assertions made by the Lord President in the Love trial, that there was total synonymity between the Laws of England and the Laws of God.

FH sought to argue that at one level, the dispute distilled into one purely of definition - what constitutes an oath? He asserted that "the substance of the Law was not denyed, though we except against the formality which is now used... those things which AS and others calls swearing, we have condescended unto; yet it's reckoned as insufficient, though themselves say it is an oath, yet it is not called so, nor accounted so, except the aforesaid needless trifles be observed. **(28)**... is not this a hard thing, and far from equity, justice and reason?" **(29)** The yea and nay, therefore, can be subscribed in a testimonial way; it is rather the attendant ceremonies which breach Christ's ordinance **(30)** . Using the same definitional argument, the examples cited by Smallwood when Christ or his disciples were alleged to have sworn, were dismissed by FH as examples of emphasis: "ardent and zealous, or fervent expressions, as the Spirit of God... did stir up in his heart." **(31)**

There is no doubt that FH was strongly committed to the Scriptural basis which underpinned the Quakers' determination not to swear. He was, though, a part of the wider community which recognised the basic dilemma - swearing did not seem to

27. FH p. 11. The point is reiterated by Dymond "Of him... who is assured of the prohibition, it is indispensably required that he should refuse an oath. There is no other means of maintaining our allegiance to God. Our pretensions to Christianity are at stake: for he who, knowing the Christian law, will not conform to it, is certainly not a Christian." from "Oaths, Their Moral Character, And Effects" p. 12.

28. The "needless trifles" are " a man holding up his hand, or laying it upon a Bible, and kissing it, and saying after a Clark or a Cryer, I swear". FH p. 28.

29. FH p. 28.

30. Watts agrees that many were "converted" to Quakerism because of "controversies about ceremonies", particularly among different Baptist communities. "To many... Baptists, bowed down by the legal requirements of their new religion, the Quaker exaltation of the Spirit over the letter came as a heaven-sent release." The Dissenters pp. 206-7.

31. FH p. 32. FH is referring here to words such as "Verily, verily", "Amen" etc.

operate as a matter of fact as a guarantee of truth or obligation. FH pointed out that "we see by experience notwithstanding all the reverent taking, and all the solemn taking, and the necessity that is put upon Oaths, yet they have never answered the end purposed... indeed... frequent swearing hath made men being got into a custome of it that it is become a light thing unto them... indeed... Oaths are becom'd of little or no force at all." **(32)** His empirical evidence for this proposition comprised mainly the numerous examples of breaches of oaths of allegiance. The later tract "Oaths; Their Moral Character and Effects" does not so confine the argument. Rather, Dymond asserted bluntly that "oaths... tend... powerfully to deprave the moral character... they are continually violated... men are continually referring to the most tremendous sanctions of religion with the habitual belief that those sanctions impose no practical obligation... you must speak the truth when you are upon your oath; which is the same thing as to say that it is less harm to violate truth when you are not on your oath." **(33)**

The Quakers had a subsidiary concern; that swearing for what the Elizabethan writer and Smallwood would identify as legitimate purposes, was really "the thin end of the wedge" **(34)**, and that it had the capacity to lead to vain swearing, blasphemy, and a breach of God's third commandment; "Thou shalt not take the name of the Lord thy God in vain; for the Lord will not hold him guiltless that taketh his name in vain". **(35)** "Oh what sad times do we behold, nothing but extreames of evil are presented to our eyes and eares, some do little but swear ordinarily, commonly and vainly... almost everywhere are full of dreadful Oathes and Mens discourses interwoven with execrable and direful Oaths, even as it were daring God to confound them and damn them". **(36)**

32. FH pp. 16-17.

33. J. Dymond, "Oaths, their Moral Character And Effects" p. 11.

34. "We never swear", says the Quaker, "not even in a Court of justice, being of opinion that the most holy name of God ought not to be prostituted in the miserable contests betwixt man and man". Montagu, The Anatomy of Swearing p. 222.

35. Exodus 20:7.

36. FH pp. 79-80.

The Quakers were neither the first to express this concern, nor alone; it has a history through the Middle Ages. **(37)** Montagu identifies a pamphlet in 1540 wherein a Stephen Hawes "Depicts the sufferings that, as he believed, were daily being inflicted upon the body of Christ. In gory detail he describes how the hands and feet of Christ were being literally pierced anew and every member and portion of his body torn and lacerated by the imprecations of unheeding Christians". **(38)**

That the Quakers were sincere in their belief cannot be doubted. As FH recognised, "myself and many more are great sufferers" **(39)** because they would not/could not swear. Horle identifies the significant consequences for the Quakers arising from their refusal to swear; they were wide ranging and penal. "Normal legal practice prevented those who refused to swear from sitting on juries, recovering stolen goods, suing for debts, carrying on trades in corporate towns, probating wills involving goods and chattels, giving evidence to defend titles, entering into copyholds, answering suit either in equity or church courts, or holding any law enforcement position which required an oath of office... refusal [of the Oath of Allegiance] also resulted in indictment and trial, with guilt punishable by praemunire, which placed the offender outside the king's protection and involved forfeiture of goods and chattels, loss of all income from real property and imprisonment for life or at the king's pleasure." **(40)** Notwithstanding the severity of the penalties and disabilities, the Quakers believed their interpretation of Matthew was "truly and conscientiously grounded upon the Doctrine of Christ, and consonant to the Primitive Christians". **(41)**

In order to remain true to their religious imperatives, the Quakers defied the legal system, but like Love, they did not meekly submit to it, but rather sought to use it for

37. See Montagu, The Anatomy of Swearing p. 117 ff.

38. ibid p. 128.

39. FH p. 1.

40. Horle, The Quakers and the English Legal System 1660-1688 p. 49.

41. FH p. 1.

their own protection. **(42)** They forced the issue to be confronted; were oaths really a guarantee of truth and obligation such that they should be exacted as a threshhold to admissible testimony?

For Love the obligations entailed by subscription of the Solemn League and Covenant were absolute; for the Quakers, telling the truth was the absolute obligation. Oaths were prohibited to Quakers, and in any event, in their view, did not necessarily operate as a guarantee of truthfulness. "So do we make void the law, or the perfection of it, by speaking the truth, and bearing witness to the truth; though... we cannot own those typical ceremonious way of swearing... he that speaks the truth and bears witness in and from the truth, honours Gods name, and reverences it, forasmuch as he is called the God of truth... being lawfully called before a Magistrate to bear testimony in any thing wherein the glory of God, or our Neighbour is concerned, or the decision of Controversy... true testimony is a medium that concernes as much to that purpose now as swearing [once] did". **(43)**

42. "Friends [were forced] to rely on technical arguments that only a lawyer could love." Horle, op cit p. 210.

43. FH p. 36.

Conclusion

"An oath, an oath! I have an oath in heaven;
Shall I lay perjury upon my soul?" **(1)**

Shakespeare in his Merchant of Venice, probably written in 1596, links oaths with their "mirror image" of perjury. Shylock's resistance to Portia's plea for mercy and his reliance upon the letter of the law and his bond resulted in his humiliation, the forfeiture of his goods, and the pardon of his life conditional upon him becoming a Christian. Whilst mercy may be "an attribute to God himself" **(2)** it is an irony that Shylock's refusal to perjure himself, **(3)** to jeopardise his soul and to defy the divine sanction should be the cause of his grief. Love would certainly have been surprised. "I have finished my course, I have fought the good fight, I have kept the faith, henceforth there is a crown of righteousness laid up for me; and not for me only, but for all them that love...our Lord Jesus Christ" **(4)**

The Quakers based their absolute refusal to swear in part upon Scripture, believing that to swear constituted a breach of Christ's ordinance as set out in the Gospel, and a breach of the third commandment. In contrast, Hobbes when considering "the actions of Divine Worship [held it] a most generall Precept of Reason, that they be signes of the Intention to Honour God... *Not to swear by any but God* [was] naturally a signe of Honour: for it is a confession that God onely knoweth the heart; and that

1. Shakespeare, The Merchant of Venice Act IV Scene 1.

2. ibid.

3. Hobbes believed that "Men are freed of their Covenants two wayes; by Performing; or by being Forgiven. For Performance, is the naturall end of obligation; and Forgivenesse, the restitution of liberty; as being a retransferring of that Right, in which the obligation consisted." Leviathan p. 198.

4. The Trial of Mr Christopher Love supra p. 264.

no mans wit, or strength can protect a man against Gods vengence on the perjured." **(5)** A consideration of seventeenth-century English attitudes to oath-taking and the obligations thereby created is necessarily amplified by a consideration of attitudes to perjury.

The belief that God has the power to punish or reward in this world and the next is axiomatic to the theory of oath-taking. The writer of the Elizabethan "Sermon Against Swearing and Perjury" wished his audience to know "how great and grievous an offence against God...[is] wilfull perjurie...whosoever wilfully forsweare themselves upon Christs holy Evangelie, they utterly forsake Gods mercy, goodnesse, and trueth, the merits of our Saviour Christs nativity, life, passion, death, resurrection and ascension, they refuse the forgivenesse of sinnes, promised to all penitent sinners, the joyes of heaven, the company with Angels and Saints for ever...[and] doe betake themselves to the Divels service...provoking the great indignation and curse of God against them in this life, and the terrible wrath and judgement of our Saviour Christ... whosoever forsaketh the trueth, doeth forsake Christ, and with Judas betray him." **(6)** Once again, it is evident that the sermon was given in response to a perceived evil.

The case of Anne Nightingale of St. Martin in l635 is evidence of contemporary acceptance of the reality of God's punishment for perjury. "Her master, having got her with child, had offered her ten pounds to nominate her fellow-servant as the father. She succumbed to the temptation, but afterwards repented: "she confesseth to have done him great wrong and doth desire God's great mercy to forgive her... and she likewise confesseth that God is a just and a righteous God unto her and that he hath justly punished her for her foul and false accusation by taking from her the use of her limbs."" **(7)** The attribution of her disability to God's justice (or wrath) is of the same

5. op cit pp. 403-404.

6. "A Sermon Against Swearing and Perjury" from Certaine Sermons or Homilies 1547 - 1571 p. 50.

7. Ingram, Church Courts p. 330.

ilk as explaining national disasters in terms of God's punishment upon a sinful people. **(8)** That the church promoted the divine sanction is a self-evident proposition - perjury was a cardinal sin. **(9)**

Notwithstanding a general acceptance of the reality and immediacy of God's punishment, though, the secular ramifications of the performance of obligations under oath were significant; the State's attitudes to oathtaking seem rather ironically to have been influenced by an endeavour to avoid perjury, rather than by punishment of it. This curiosity has been noted as a reason why accused persons could not call their own witnesses; inconsistent with a pursuit of justice. Hill explains that examination on oath in tithe suits was abolished because it led to "widespread perjury among dishonest traders... All took it for granted that men would forswear themselves rather than give up what they thought necessary economic and social activities; what was resented was the action of the church courts in forcing (emphasis mine) them to commit perjury in the attempt to maintain obsolete standards of conduct." **(10)**

The same rationale appears to have been operative in attitudes to the ex officio oath. Indeed, Article 27 of the Root and Branch Petition 1640 complained of "the imposing of oaths of various and trivial articles yearly upon churchwardens... which they cannot take without perjury, (emphasis mine) unless they fall at jars continually with their ministers and neighbours." **(11)** Clearly, the impact of community was more significant than the divine sanction, but the concept of being forced to breach obligations under oath, and of being forced by law to regard those obligations as at best ambulatory, is an incredible abnegation of (criminal) responsibility.

8. B. Lenman, "The Limits of Godly Discipline in the Early Modern Period with Particular Reference to England and Scotland" in von Greyerz (ed.), Religion and Society in Early Modern Europe 1500 - 1800 p. 128.

9. See Maguire, "Attack of the Common Lawyers on the Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England" in Essays in History and Political Theory in Honour of C.H. Mc Ilwain p. 215.

10. Hill, Society and Puritanism pp. 400-401. See too p. 393. Hill there cites a Petition from Kent in 1640 that "Bishops "impose oaths upon churchwardens, to the most apparent danger of filling the land with perjury."

11. "The Root and Branch Petition" from Gardiner, Constitutional Documents p. 72.

Ingram notes that the "selectivity of presentments [before the Church Courts] scandalised some contemporary observers, who viewed it as a symptom of mass perjury." **(12)** He argues that the churchwardens exercised a "laudable discretion... [in which they] showed a robust regard for the distinctions between the serious and the trivial."" **(13)** He notes further and significantly that "judges... made very sparing use of the [ex-officio] oath, tendering it...only when there was some particular reason to do so. Apparently this did not undermine efficiency, and it probably represented the wisest policy in the circumstances." (emphasis mine) **(14)** Again, there is apparent a policy of "prevention is better than cure". Further, there was "a slight but increasing tendency for defendants to refuse flatly to be sworn." **(15)** If not sworn, the issue of perjury as legally defined does not arise.

It was always open to the accused to "deny the articles and make the prosecution prove its case, in fact a plea of "not guilty". Even when the evidence was overwhelmingly against the accused he was never...prosecuted for having denied something on oath which was patently true." **(16)** That remains the situation in secular courts today, yet there is no basis in logic for the exception; there is a qualitative difference between the legitimate course of claiming the privilege against self-incrimination and putting the prosecution to proof, and actually tendering false evidence under oath.

12. Ingram, Church Courts p. 325.

13. ibid p. 328. It has been suggested that "selective enforcement was a valuable tool of class power... [and] that a discretionary legal system offered [advantages] to those in control and... that the ability to grant mercy or to deny it was an essential expression of the power of paternalism."
C. B. Herrup, "Law and Morality in Seventeenth-Century England"
Past and Present 106 (1985) p. 103.

14. op cit p. 330.

15. ibid.

16. R. A. Marchant, The Puritans and the Church Courts in the Diocese of York 1560 - 1642 p. 191.

The seventeenth-century response to perjured informers discloses a curious attitude to oath-taking; oaths and obligations thereunder were apparently not of pre-eminent concern to the executive, but rather secondary to the issues of stability and social control. It certainly reflects a selective reading of Scripture, and a convenient lapse of memory of the commandment "Thou shalt not bear false witness against thy neighbour", **(17)** quite apart from satisfying even the most fundamental requisites of justice.

Horle cites the case of Francis Plumstead, a London Quaker, who appealed against fines imposed upon him after being convicted for having attended two meetings and preached at one. For the purposes of the appeal, he "secured an affidavit from the informers that they had sworn falsely and produced two witnesses who testified he hadn't preached." The judge though "rather than grant the appeal, persuaded the jury to find Plumstead guilty of having been at one meeting." **(18)** Whilst there is something incongruous about securing an affidavit (evidence on oath) from a person to the effect that his previous evidence on oath had been perjured, the response of the State is illustrative. The judge involved was Sir Thomas Jenner, who was "either aiding and abetting informers in appeal trials, or refusing to censor their lying." **(19)**

It seems that the impetus to punish the perjury of informers came not from the State but from the Quakers who were the victims. **(20)** The institution of appeals delayed proceedings, and thus the payment of the financial reward to the informer, and

17. Exodus 20:16. As Thomas points out though, "the application of the Ten Commandments to daily life had never been a straightforward business; it did not grow easier with the passage of time and the emergence of conditions very different from those of ancient Israel." Thomas, "Cases of Conscience in Seventeenth-Century England" p. 30.

18. Horle, The Quakers and the English Legal System 1660 - 1688 p. 138.

19. ibid p. 202.

20. Ultimately the State is also adversely affected if the law falls into disrepute, and confidence in it is lost.

afforded the Quakers the opportunity to produce their own witnesses. **(21)** That the Quakers were able to produce witnesses on appeal is surprising, however it seems that the evidence was discounted "for though no proof will be allowed in the negative of the informers' testimony in the affirmative, yet if the appellant's evidence be able to prove that the party convicted was not at the time of the supposed conventicle at the place mentioned in the conviction, but at another place far distant from it, such proofs are such negative evidence as in themselves do carry an affirmative. And in case such witnesses should exceed in number the informers' witnesses, all courts of justice ought to (emphasis mine) allow of such witnesses on the appellant's behalf, as affirmative evidence to destroy the first conviction of the informers." **(22)** This summary of the status of witness' evidence is clearly only a submission that the law should be changed.

It seems incredible that the State could have taken such an indulgent attitude to perjury, however "the system... depended to an inordinate degree on informers. Far more than mere informants, they were an integral feature of law enforcement, acting as witnesses, prosecutors, and motivators of reluctant officers." **(23)** One can only agree that the State's attitude to the perjury of informers was inexcusable, **(24)** and agree further with Dymond's argument that the conclusion to be drawn was "that the law thinks light of the crime which it does not punish." **(25)** It seems odd indeed that perjury should go relevantly unpunished, whilst Quakers were persecuted for refusing to swear, without investigation as to whether or not their evidence was (or would be) true.

21. See ibid p. 203.

22. ibid p. 204.

23. ibid p. 273.

24. ibid.

25. J. Dymond, "Oaths; Their Moral Character, And Effects". p. 11.

A divergence between Church and State may be discerned in the treatment of and attitudes to perjury. Love held the view that perjury could only be committed by an atheist; that it was a sin so gross as to be inconsistent with belief in God. Whilst the demarcation was still inchoate, the State's at best pragmatic response to perjury indicates that sin and crime were becoming recognised as disparate. Perjury provides a rather surprising example of this separation.

The Statute of Frauds 1677 is cited as "an attempt by the legislature to deal, if only indirectly and in part, with what was known to be the chief social evil of the age - perjury." **(26)** (emphasis mine); it had become common for shopkeepers to swear falsely that a customer had verbally contracted to purchase goods, hence the imposition of a statutory requirement that such transactions be evidenced in writing. The irony here is a somewhat bitter one though, and a sad reflection upon the priorities in a "period of universal oath-taking... while a man who stole five shillings was likely to be hanged, if he obtained the same by perjured evidence resulting in the death of an innocent man he was punished only by a small fine and an appearance in the pillory". **(27)** It can be seen that the prime motivation for the legislature in punishing as a crime the sin of perjury was a secular one; perjury was undermining contract.

There is a fundamental inconsistency between the significance attached in seventeenth-century England to oath-taking and obligations created thereunder, and the indifference if not active encouragement of perjury. A parallel may be seen with the apparent contemporary failure of excommunication as an enforcement mechanism. **(28)** "Recusants... were glad to be excommunicated, since they did not intend to

26. The New Cambridge Modern History vol V p. 313.

27. ibid.

28. It should be noted, though that perjury could result in excommunication. See Hill, Society and Puritanism p. 355.

come to church anyway: it saved them from having to pay a fine." **(29)** Quakers, for example, were "not scare[d] by the threat of excommunication... for the number of excommunicates was immense." **(30)** Ingram notes that the popularity of excommunication as a punishment "was bitterly attacked by contemporary critics of the Church courts, who urged that the sanction should be... a solemn penalty employed in only the most serious cases." **(31)**

Perhaps the apparent absurdity is entailed in the nature of the offence; that it is a matter between the individual and God. Excommunication, like the enforcement of obligations under oath, "relied for its effect on its immediate social and legal implications rather than on supernatural terrors such as the possibility of punishment in the world to come," **(32)** and, as Hobbes identified, "had its effect onely upon those, that beleeved that Jesus Christ was to come again in Glory, to reign over, and to judge both the quick, and the dead, and should therefore refuse entrance into his Kingdom, to those whose Sins were Retained". Always though is that central paradox "for it is a punishment, whereof none could be sensible but such as they who so beleeved, and expected the coming again of our Saviour to judge the world; and needed no other opinion, but onely uprightnesse of life, to be saved." **(33)**

29. ibid p. 371 quoting Bishop Overton of Coventry and Lichfield in Strype, Annals of the Reformation III Part ii p. 217.

30. Horle, The Quakers and the English Legal System 1660 - 1688 p. 230.

31. Ingram, Church Courts p. 341 see too Hill, Society and Puritanism p. 362.

32. ibid p. 342. Again, an increase in divergence between Church and State is discernible. "Medieval courts operated in an atmosphere in which the right of the church to regulate all aspects of religious and moral behaviour was rarely questioned and in which purely spiritual sanctions of ... excommunication were still viewed with some dread". Even then though, the dread was "partly because the church was still able to ensure that those sanctions had social and economic repercussions." from R. O'Day, and F. Heal, Continuity and Change: Personnel and Administration of the Church in England 1500 - 1642 (1976) p. 19.

33. Hobbes, Leviathan pp. 537-8.

Aaron and Shylock were outside the mainstream of English social and religious life; the one a Moor, the other a Jew. Both were the subject of prejudice and discrimination; both were used by Shakespeare to express a view about oaths and obligation. That such concern was not the preserve of the marginal in seventeenth-century English society though is clear. Love epitomises the dilemma caused by successive and conflicting oaths of allegiance; the Quakers who refused to swear on religious grounds were predominantly middle class.

Irony provides one of the thematic unities of this paper. Another unity though is the reality of the struggle by ordinary people to grapple with issues of conscience, and to reach some conclusion, even in the face of persecution or death, as to what was the rightful action. Love, the Quakers and Hobbes personified those who were genuinely trying to assimilate the social and political realities with their conscience imperatives. **(34)**

It was eventually acknowledged by the legislature that the essential element of evidence in court proceedings was that it be truthful; after 1696 the Quakers were not obliged to give such evidence under oath, although many Quakers refused also to affirm "on the grounds that the words used were tantamount to an oath". **(35)** The Presbyterians though, who, like Love, had kept the faith, and had facilitated the return of the Stuart monarchy, enjoyed only a Pyrrhic victory. They "naturally assumed that toleration would be extended to them...they were betrayed...the responsibility lay with the majority of the House of Commons ... to them, all forms of Dissent - Presbyterian, Quaker and Baptist alike - appeared to be treasonable". **(36)**

34. Of course, there were also those who became "tutors in... the black art of breaking all sacred bonds and obligations whatsoever, and that under the notation of satisfying the consciences and resolving the scruples of such who cannot swallow down this camel of perjury as easily as themselves". Thomas, "Cases of Conscience in Seventeenth-Century England" p. 44.

35. Watts, The Dissenters p. 265. The words were changed in 1772 "to meet the objections of the more scrupulous Quakers." ibid p. 267.

36. The New Cambridge Modern History Vol V pp. 302 and 306.

England's post-Restoration religious settlement was not determined in accordance with the Solemn League and Covenant. Nevertheless, religious diversity was at least assured; "the existence of dissent is what gave life and vitality to religious institutions. It meant that someone cared enough to struggle. Without that struggle religious institutions, or any others, would have atrophied. The religious life of England was remarkable because the dissenting spirit never really died." **(37)**

Obligations under oath were brought into focus in Civil War England; oaths mattered. They mattered to members of Parliament in rebellion against the king; breach needed to be justified, and Hobbes' theories of an ambulatory obligation satisfied that need. It may be putting the claim too high to say that oaths mattered to Christopher Love, but there is no doubt that the Solemn League and Covenant was one oath which did. For him, the Solemn League and Covenant was an absolute obligation, and it was not possible to adapt that obligation to the changing political reality. It is unquestioned that oaths mattered to the Quakers, who were prepared to defy the State on what was for them an issue of conscience and obedience to God. A consideration of attitudes to perjury indicates an ambivalence by the State, and the legal system of which it was an arm, to obligations under oath. The State's attitude to perjured evidence and the Quakers at best calls into question its commitment to the truthfulness of evidence under oath.

Notwithstanding there were individuals (and groups) to whom conscience mattered, it may be accepted that "as the national battle was fought out, so oaths of loyalty succeeded one another with bewildering frequency, until the currency was hopelessly debased". **(38)** In the last analysis, despite the "odour of sanctity" **(39)** accorded to

37. J. W. Wilkes, "The Transformation of Dissent: a Review of the Change from the Seventeenth to the Eighteenth Centuries" from C. R. Cole & M. E. Moody, (ed.), The Dissenting Tradition (1975) pp. 118-9.

38. Hill, Society and Puritanism p. 497.

39. ibid p. 384.

obligations assumed under oath, and despite the "martyrdom" of Love and others, Hobbes' rather bleak conclusions seem accurate and justified. "Bonds, by which men are bound, and obliged: Bonds, that have their strength, not from their own Nature, (for nothing is more easily broken than a mans word,) but from Feare of some evill consequence upon the rupture." **(40)** If one concedes the validity of Hobbes' contemporary conclusions, it follows that oath-taking in seventeenth-century England constituted "a doubtful security". **(41)**

Hill's conclusions of a diminution in the centrality of oath-taking to seventeenth-century English life are correct, but with respect, he has not given a fully accurate account of attitudes to oaths and obligations thereunder. He has emphasised the result, but has understated the very real struggle of conscience. The struggle of the individual conscience was the same, whether that individual's conclusion was that obligations under oath were absolute or ambulatory. Any fully satisfying assessment of attitudes to obligations under oath in seventeenth-century England must take cognisance of the essential element of conscience and the belief in the immediacy and reality of God.

40. Hobbes, Leviathan p. 192.

41. Montagu, The Anatomy of Swearing p. 64.

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