

OATH AS AN EVIDENTIAL TACTIC IN THE LEGAL PROCEDURE IN VOLHYNIA: LEGISLATION AND PRACTICE (1566 – EARLY 17TH CENTURY)

Natalia Starchenko

Kijev

Oaths are an archaic evidential tactic that goes back to ordeals. After ordeals were abolished, oaths became the chief instrument for establishing “the truth” through divine endorsement in the legal procedure.¹ Its position remained strong even after evidence started to erode its role, and the belief that one cannot lie on God’s watch was substantially undermined.² Evidently, the oath’s *longue durée* had several contributing factors, much like its presence in different spheres of life and applicability through different strata, from the sacred, highly ritualized act to sacrilegious profanation and comic riffs.³ John Spurr analyzed the temptation to discern a “project” behind the oath’s ubiquity in the late medieval and early modern era, when it was incorporated into mechanisms of authority binding an individual to big political entities, such as a state or a church.⁴ The goals of the present article, however, are much more modest: I will attempt to analyze the oath’s presence in the judiciary of the Volhynian Voivodeship, simultaneously treating the peculiarities of early modern judiciary as such.⁵ The interface between legal norms and cultural practices of the gentry milieu that transformed both the norm and the legal framework as its original context was of paramount

¹ *Bartlett R.* Trial by Fire and Water. The Medieval Judicial Ordeal. Oxford: Clarendon, 1986, p. 30.

² *Shapiro B.* Oath, Credibility and the Legal Process in Early Modern England. Part One // Law and Humanities. No. 6 (2). 2012, pp. 145–178; *idem.* Oath, Credibility and the Legal Process in Early Modern England. Part Two // Law and Humanities. No. 7 (1). 2013, pp. 19–54.

³ *Spurr J.* A Profane History of Early Modern Oaths // *Transactions of the Royal Historical Society*. Vol. 11. 2001, pp. 37–63.

⁴ *Ibidem*, p. 60.

⁵ Analyzing oaths as an evidentiary tactic in the Mazowsze land courts of the late 16th century, Adam Moniuszko took care to note that he would not deal with the cultural aspect of oaths. See *Moniuszko A.* Iuramentum corporale praestitit. Przyczynek do badań nad przycięgą dowodową w koronnym procesie ziemskim u schyłku XVI stulecia // Соціум. Альманах соціальної історії. No. 9. 2010, pp. 361–372. The article also features a bibliography about oaths as an evidentiary tactic in Polish historiography. The most comprehensive monographic study of oaths in the Medieval Crown process was written by Stanisław Borowski. See: *Borowski S.* Przysięga dowodowa w procesie polskim. Warszawa, 1926.

importance to me. My sources are the records of land (*zemski*) and castle (*grodzki*) courts of the Volhynian Voivodeship, which, under the Union of Lublin, would formally adopt the II Statute of Lithuania (henceforth II SL) as the basis of its judiciary until the partitions of Poland. The 1566 Statute would come to be known as “Volhynian,” after the Grand Duchy of Lithuania adopted a new legal codex of 1588 (III SL). Lawyers insisted on II SL as the only law to be used in Volhynian courts during court discussions, protesting the adoption of III SL norms, the Crown laws, and sometimes even Sejm constitutions.⁶ I will, however, turn to III SL norms and Sejm constitutions to analyze the trajectory of legislative initiatives in the Polish-Lithuanian Commonwealth of the late 16th century.

THE EXTENT OF OATHS IN THE JUDICIARY PROCESS

Both II and III SL indicated that oaths should be introduced when primary evidence, such as “writing” (documents) or witnesses, didn’t suffice (II SL, chapter 4, art. 52; III SL, chapter 4, art. 77). Cases concerning honor, abuse, attacks on gentry households or lands, as well as cases where the accused gentry man stood to lose his life or honor (that is, robbery, premeditated murder, theft or rape) constituted the exception. They entailed special evidentiary strategies based on oaths. Although statute articles listed these crimes and misdemeanors as an exception, they constituted a significant portion of cases treated by castle and land courts. Take, for instance, the notion of “abuse” (*gwalt*), an umbrella term for a broad spectrum of crimes against persons and property, from incursion onto private property and stealing or damaging goods to crimes against health or even life.⁷ Under the 1578 constitution, oaths could be used to get acquitted of accusations in robbery or hiding fugitive subjects.⁸ The list of so-called exceptions calling for oaths could be easily extended whenever statute norms were reviewed.⁹

Judicial practice, meanwhile, was rife with plaintiffs’ attempts to “criminalize” their opponents’ actions: that hurt their honor and demanded acquittal through oaths. For example, Prince Andrii Kurbsky accused Andrii Montovt of

⁶ These proclamations buttressed the regional identity of the gentry on Ukrainian territories, which were integrated into the Crown of Poland under the Union of Lublin. See *Starzenko N.* Unia lubelska jako legitymacja regionalizmu wołyńskiego (na przykładzie praktyki sądowej pierwszych pounijnych dziesięcioleci) // *Unia Lubelska: idea i jej kontynuacja*. Vilnius, 2011, p. 190.

⁷ *Малиновский И.* Учение о преступлении по Литовскому Статуту. Киев, 1894, с. 8–13.

⁸ *Volumina constitutionum*. T. II (1550–1609), Vol. 1 (1550–1585). Warszawa, 2005, pp. 411, 415–416.

⁹ Oaths could be used to prove: the loss of objects left in one’s keeping; the loss of documents for landholdings or tolls; answers (announcements of revenge); wounds incurred in fights; manslaughter, dog bites and a number of other precedents.

raiding his land “like a robber,” setting fire to outhouses, damaging his property, and beating and abducting his subjects. Obviously, it was a classic hostility in a gentry conflict, where aggression was often directed not at an opponent but rather at his property and dependents (servants and subjects). Such cases usually ended in a compromise between the opponents, reached in a familial court that gave a chance for reconciliation, no matter how fleeting. A court verdict, meanwhile, favored one side and undermined the honor of the other, and thus could escalate prolonged conflicts and hostilities between enemies. Therefore, Kurbsky’s accusation qualified Montovt’s actions as a crime unworthy of a gentry man: robbery, a low attempt to steal material goods, was punishable by death and loss of honor. Montovt’s lawyer reacted appropriately: he stated that the accusations, which, if proven, would mean a loss of life and honor, dishonored his client. The starosta interrupted an exchange of direct and veiled offences that lasted throughout the court proceedings, and it was decreed that Montovt should swear with two witnesses. The case ended in an appeal: the defendant’s lawyer stated that this decree is inappropriate and offensive to his client.¹⁰

Attempts to avoid the oath in favor of witness testimony as the so-called priority evidentiary tactic were usually unsuccessful. After all, II SL mentioned oaths as the primary evidentiary tactic in 48 articles, as opposed to the 14 where it was an additional measure to support the evidence presented in court. Therefore, witness testimony did not suffice to prove that Ian Tsymynskiy’s subjects were beaten, and Mykhailo Serbyn could not prove his right of possession regarding pawned objects, although he produced a document to this effect and stated the following: “I am under no obligation to swear an oath, once a demonstrated Prince Velytskyi’s written letter.”¹¹

Finally, even ostensibly clear evidence sometimes did not suffice for the judges. For example, Olizar Kyrdei-Mylskyi and his wife Hanna Iuriivna of the princely Holshanskyi family accused Roman Hostskyi of helping their subjects to flee the Dubovytsi estate. In response, Hostskyi’s fiduciary Matei Stemkovskiy demonstrated the estates’ audit, which listed the escapees as Hostskyi’s subjects. Seeing that Roman had substantial evidence, the court ruled that he should swear an oath at the next session.

Therefore, both legal norms and judicial practices demonstrate that oaths were widely used to prove the plaintiff’s losses; occasionally oaths acquired an additional function, namely, to offend the opponent in a prolonged conflict

¹⁰ Центральний державний історичний архів України у Києві (henceforth – ЦДАІАК). Ф. 25, оп. 1, спр. 19, арк. 189 зв.–196 зв.

¹¹ ЦДАІАК. Ф. 26, оп. 1, спр. 7, арк. 710 зв.–711.

spanning multiple court cases. As Lukasz Gurnicki had put it, “one cannot win a thing here without an oath.”¹²

WHO HAD TO SWEAR AN OATH?

The majority of II SL norms reserved the right to prove their claims with an oath for plaintiffs as the injured party.¹³ It is more than likely that this choice was steeped in the fundamental belief that no party should be aggrieved. Courts were instrumental in restoring the disturbed balance, restituting the injured party’s losses and assuaging the hurts: “Customs command, much like written laws that, however, do not state so clearly, that, first and foremost, one has to be given his just deserts.”¹⁴ The principle dealt not so much with the social dimension of a crime (establishing guilt and punishing the offender according to the law) but rather with offence as the injured party’s private matter.¹⁵ This is how the gentry community saw the main goal of judiciary. Several articles on interpersonal gentry conflicts (*zwada*) describe the goal of the judiciary as ensuring that “none suffer from their injuries” (chapter 11, article 28), which also indicated that “injustice” was a private matter. When it was impossible to determine the guilty party (the party who started the conflict) and the losses were roughly equal, the right to swear an oath was determined by casting lots, or was relegated to the party that suffered more damages (chapter 11, article 26, 35).

About a quarter of cases mention, directly or obliquely, the accused’s right to “clear himself” of accusations by swearing an oath.¹⁶ These cases include those where the misdemeanor could be interpreted either as a *criminal* offence (punishable by death or the loss of honor) or as a *simple injustice* to be compensated materially (sometimes in conjunction with incarceration). The difference lay in the absence or presence of malintent, a matter to be determined by oath (chapter 11, art. 6, 7, 19, 27). Gentry had the right “to clear their reputation” of accusations of

¹² *Górnicki Ł.* O elekcyi, wolności, prawie i obyczajach polskich rozmowa Polaka z Włochem / Wyd. K. J. Turowskiego. Sanok, 1855, s. 396.

¹³ See the explanation on why oaths were initially reserved for plaintiffs and their witnesses in the English judiciary system: *Fisher G.* The Jury’s Rise as Lie Detector // *Yale Law Journal*. Vol. 107, no. 3. 1997, pp. 596–626.

¹⁴ ЦДІАК. Ф. 25, оп. 1, спр. 61, арк. 302 зб.

¹⁵ Any injury, including material injuries, were treated by the gentry as a blow to their honor, which the guilty party had to compensate further. Let us note that material losses were also often described as “an injustice.”

¹⁶ The II Statute of Lithuania (henceforth II SL), chapt. 7 art. 22; chapt. 11, art. 5, 6, 7, 19, 27, 29, 30; chapt. 13, art. 13; chapt. 14, art. 2, 3, 7, 12, 16, 17, 18, 19, 25.

theft, the crime that was not only punishable by death, but also tied to dishonor (chapter 14, art. 7, 18). The article on theft accusations proclaimed one of the founding principles of the judiciary, namely, the presumption of innocence: “the court should be more inclined to release than to punishment” (chapter 14, article 2). Despite the ostensibly contingent nature of this fundamental principle in II SL, it was broadened to a universal rule in judiciary practice: under unclear circumstances, the accused had a priority right to swear an oath. This principle became even more pronounced in III SL: several acts dictated that courts should give the right to swear to the side that procured *more conclusive evidence*.¹⁷ The ostensibly insignificant number of such acts does not mean that this principle had limited application in judicial practice, since lawyers argued that acts should be applied based on “similarity” or by analogy. Therefore, the presumption of innocence mentioned in the act on theft, or the requirement for “clear” evidence from several concrete legal texts, became a commonplace in judicial practice. To “increase certainty and mete out justice,” *scrutinium* (chapter 11, article 21) became a widespread judicial practice for determining the side that had “more pertinent and certain evidence and signs” (III SL, chapter 11, article 64). This prompted the judiciary to develop from competitive to inquisitorial, and gave judges broader powers.

Therefore, the Statutes had contradictory rules for who had priority in swearing: the plaintiff as the injured party; the defendant, due to the presumption of innocence; the person who has more solid evidence, so as to lower the risk of perjury and unjust verdicts. How did judges cope in practice?

It might seem that plaintiffs had unmitigated advantage over defendants both under Statute norms and under basic judiciary principles. It was often stated in court battles that plaintiffs required restitution: “the law says that the accused should not be allowed to clear themselves by swearing, only the plaintiff as the injured party”;¹⁸ “the injured party should be first to prove injuries and theft”;¹⁹ “as the injured party, I have the right to prove before those who took something from me by force disprove it.”²⁰

The understanding of crimes as a private injustice to be remedied through court proceedings was made amply evident when Ian Kopystenskyi accused Bohush Zaiets of sending his subjects to kill the plaintiff’s father Stefan Kopystenskyi in 1597. The defendant died while the court case was ongoing; the

¹⁷ The III Statute of Lithuania (henceforth III SL), chapter 1, art. 20; chapter 4, art. 72; chapter 11, article 31; chapter 11, article 21.

¹⁸ ЦДАІАК. Ф. 26, оп. 1, спр. 6, арк. 560.

¹⁹ Ibidem. Ф. 25, оп. 1, спр. 39, арк. 77 зб.

²⁰ Ibidem. Ф. 28, оп. 1, спр. 19, арк. 533.

Tribunal decree of 1600 demanded that his children swear that their father did not order the murder. Ian Zaiets, the only child who was of age, asked to postpone the swearing until his younger brothers came of age, whereas the plaintiff insisted that he should swear in his name, and their guardian Mykhailo Hulvych Voiutynskyi, the Lutsk land court scribe, should swear for the other children. The castle court postponed the swearing till all Bohush's heirs were of age, but Ian Kopystenskyi was allowed to appeal.²¹

The sides competed in rhetoric rather than in procuring evidence, which was not conducive to establishing the actual circumstances of the crime. In the end, it was the plaintiff's word against the defendant's. The injured party was often unsure about the identity of the culprit or the details of the event, particularly when it came to raids on estates (the most common gentry way of settling scores). The defendant did not necessarily participate in raids personally: it was customary to send friends, servants or subjects; therefore, the plaintiff was tasked with proving that the raid was done on someone's orders, and with proving intent in cases where "the conscience and our heart of hearts are known to none but God" ("only God Our Lord knows <...> the hearts and thoughts of men").²² Plaintiffs were not necessarily home during attacks, and they often had to rely on hearsay or witness accounts to establish the circumstances or identities of participants. Accusations were often proven to be false. For example, after accusing Hryhorii Krasnoselskyi of raiding his estate, Kyrylo Zubtsovskyi eventually waived the demand for an oath when the defendant came to church with a large group of friends to swear: "Your grace, *Pan* Krasnoselskyi, had never raided my house, had never done me harm or robbery <...> Your grace I set free."²³

Murder accusations could be no less tentative, especially when there were no witnesses. Therefore, defendants often filed a counter-complaint about the abuse of their honor and reputation damages.²⁴ Even with fairly straightforward murder cases, plaintiffs often had to prove under oath that the guilty party had the intent to kill.²⁵

If the plaintiff provided shaky evidence, it could affect the judges' decision: "And so we, the court, having looked at *Pan* Malynskyi's evidence and judged

²¹ Ibidem. Ф. 25, оп. 1, спр. 61, арк. 327–329 зв. The practice was also normalized in III SL (chapter 4, art. 86).

²² Ibidem. Ф. 25, оп. 1, спр. 57, арк. 810–821.

²³ Ibidem. Ф. 25, оп. 1, спр. 34, арк. 393 зв.–395. See a similar case: Ibidem. Спр. 54, арк. 223–223 зв.

²⁴ *Старченко Н.* Честь, кров і риторика. Конфлікт у шляхетському середовищі Волині. Друга половина XVI – початок XVII століття. Київ, 2014, с. 242–244.

²⁵ In one case, this became grounds for refusing to swear: "<...> I don't want to swear because I do not know that for certain" (Ibidem. Ф. 25, оп. 1, спр. 30, арк. 716 зв.–718 зв.).

it imperfect in the eyes of law <...> ordered *Pan Ostafii Boreiko* to swear.”²⁶ In another case, the plaintiff accused a gentry man of masterminding a robbery, but later conceded that his servants were the guilty party; the court made notice of the plaintiff’s doubts and ordered the defendant to swear.²⁷

The extent of damages described by plaintiffs in complaints was another highly contentious element in accusations. Plaintiffs often adjusted and lowered the damages before the swearing.²⁸ Subsequently, III SL introduced an act against those who “adopted the custom of describing too many losses in their complaints about abuse and other quarrels, or even of naming many in oral complaints.” Therefore, should the plaintiff decrease the previously declared extent of damages before the oath, he stood to lose everything (chapter 11, art. 59).

III SL indicated that *scrutinium*, introduced as an inquiry into the circumstances of a case, was to be performed on site by court officials without a contribution from either party. However, under the 1588 constitution (in effect in the Crown of Poland, which included the Volhynian Voivodeship), *scrutinium* was limited to interrogating witnesses brought by the sides. Furthermore, courts did not automatically allow *scrutinium*: one had to win the right during court proceedings. After all, defendants sought to prove that their misdemeanor was not of criminal nature but a “simple injustice,” and, therefore, was not a crime that merited *scrutinium*. Therefore, in Volhynia, only about 50% of requests for a *scrutinium* were successful.²⁹

Judges factored in subjective circumstances when determining who should swear. It was considered important that one side should volunteer to swear, and the other should agree.³⁰

Gender mattered when it came to swearing. The judges conceded that *Pani Malakhovska* had the right to swear “as a lady, and a widow moreover.”³¹

It might seem that court battles for the right to swear and thus affirm one’s “truth” were ubiquitous. One can however notice a different trend: the opponents not only competed for the right to swear, but were also quick to relinquish

²⁶ Ibidem. Ф. 26, оп. 1, спр. 6, арк. 700.

²⁷ Ibidem. Ф. 28, оп. 1, спр. 14, арк. 504–506 зв.

²⁸ Ibidem. Ф. 26, оп. 1, спр. 6, арк. 561 зв.

²⁹ *Старченко Н.* Про ефективність судочинства на Волині (на прикладі роботи луцького городського суду 1598 і 1600 рр.) // Український історичний журнал. № 5. 2011, с. 4–27.

³⁰ In a case, the judge decreed that the defendant should swear “seeing that he willingly agreed to swear” and the plaintiff eventually released the opponent of this obligation (ЦДІАК. Ф. 27, оп. 1, спр. 9, арк. 51 зв.–52).

³¹ Ibidem. Ф. 26, оп. 1, спр. 7, арк. 671. The other side, however, did not necessarily concede a husband’s request to release his wife from swearing: Ibidem. Ф. 25, оп. 1, спр. 57, арк. 88–91.

the right in opponent's favor, which could also lead to a victory. For example, Janusz Zbarazki and his sister Marusha accused Davyd Iakovytzky in castle court of stealing 16 pigs during a raid on their land. After the defendant's fiduciary denied the fact of theft, the Prince's lawyer offered Davyd to swear. Iakovytzky refused, passing the right to the plaintiffs. Eventually the Prince's lawyer announced: "I'm not accepting your grace's oath, your grace shall not swear." Davyd Iakovnytskyi was thus cleared of accusations.³² Under the 1578 constitution, the Lutsk bishop Bernat Matseievskyi, accused of harboring fugitives, was expected to swear that he had not done so, but allowed the plaintiff Iatsek Bilostotskyi to swear that those subjects were his. Eventually, the plaintiff cleared the defendant "of the entire case and let go of the complaint of my own free will"³³ after some controversies. In these convoluted "games," one had to calculate the prospects of both his side and that of his opponent, and strategize or else rely on accident or fate.

Lawyers made frequent use of inconsistencies in legal norms during court proceedings. The Lutsk castle court gave the right to swear to the defendant in the majority of cases, underscoring the prevalence of the principle "Common law in murky cases <...> clearly teaches us to favor release over punishment."³⁴

CO-SWEARERS/WITNESSES

Punishments for a crime could range from capital punishment to various retributions, depending on the enquiry method chosen among the ones outlined in legal norms. The differences in evidentiary strategies usually concerned the number of people who would swear with the injured party to prove the injustice. For example, the initiator of a raid on a gentry household that led to its residents being wounded could face capital punishment, should the house owner swear with six others. If there were only three co-swearers, the criminal had to pay retributions for the crime (abuse), compensate the losses and spend six weeks in prison. If the estate owner refused to swear,³⁵ the right went to the injured person, and the defendant only had to pay "for the wounds" (II SL, chapter 11, article 2).

Co-swearers (their names and the texts of their oaths were seldom recorded) were supposed to be witnesses. "Witnesses," however, were not necessarily

³² Ibidem. Ф. 28, оп. 1, с. 14, арк. 95–95 зб.

³³ Ibidem. Ф. 25, оп. 1, с. 54, арк. 296–296 зб.

³⁴ Ibidem. Ф. 21, оп. 1, с. 32, арк. 32.

³⁵ The absence of co-swearers could be one reason for the refusal; in this case, the owner could not demand compensation for incurred damages, if there were any, and the attacker did not pay for "abuse," that is, the offence that he committed.

“eyewitnesses”: they were often owners of neighboring estates (“neighbors in land”) whom the injured party was legally obligated to inform about the damages. Therefore, they tended to have *heard* what happened rather than seen it. Let us focus on the written testimony of the so-called witnesses that Prince Kurbsky produced in the abovementioned case against Andrii Montovt. The Prince’s lawyer stressed that all formalities were observed in the enquiry: the witnesses, “all three of them, offer the same testimony word for word in their letters.” It was considered desirable that the initial complaint of the injured party that initiated the process, the text of the suit, the description of the offence provided by court officials and the testimonies of “surrounding” neighbors were identical. Obviously, the gentry were aware of the conditional nature of these “witnesses” and “testimonies.” They insisted on punctilious adherence to formalities but cared little about the essential integrity of the procedure.

The so-called co-swearers demonstrated a defendant’s good reputation and affirmed their loyalty. Let us note how a gentry man explained the opponents’ refusal to swear the oath decreed by court: “People did not want to help them in that.”³⁶ It is clear that the swearer had to be deemed trustworthy by the community; therefore, they had to be “local” and own real estate in Volhynia, preferably inherited, and thus integrated into the gentry network. A witness “unknown” to the community was considered the worst possible attestant.³⁷

Let us focus on Iona Okhlopovskiy’s description of how his opponents, the Oshchovskiy brothers, “coached” their witnesses when their sister Nastasia was accused of murdering her husband, Borys Okhlopovskiy. Iona posited that they gathered their friends and random persons, even “simple peasants,” “fed them well for two days and by ceaseless begging and loud crying, and, it is likely, with gifts too, plied those men to bend to their will.” Having appeared in court, these “witnesses” conducted an “unlawful, wrongful and unjust *scrutinium*, contradictory, mistaken and unrelated to the case.”³⁸ It should be noted that Okhlopovskiy only managed to find 8 persons willing to confirm his complaint under oath, whereas the defendant presented 30 persons. This is one of the few cases when the act of *scrutinium* was recorded in court books, and a scholar is thus

³⁶ ЦДАК. Ф. 28, оп. 1, спр. 15, арк. 66–66 зв.

³⁷ According to legal norms, witnesses could be either Greek or Roman Christians who knew the main prayers and came to confessions every year, also not accused of any petty crime (II SL, chapter 9, article 3). III SL expounds on this description: they should be Christian, “kind, honorable, God-fearing, suspected of nothing” (chapter 9, article 14).

³⁸ Архив Юго-Западной России, издаваемый Временной комиссией для разбора древних актов. Ч. 8, т. III: Акты о брачном праве и семейном быте в Юго-Западной Руси в XVI–XVII вв. Киев, 1909, с. 411.

given a unique opportunity to learn what witnesses said. The defendant presented the following version: while drunk, Borys Okhlopovskyi shot a twice-loaded gun, accidentally wounding himself in the throat with recoil and a splinter that blew off from the stock. He blamed nobody until his very death, left a testament in favor of his wife, and insisted that he did not remember the circumstances of the accident. Ten witnesses claimed to have heard it from Borys himself, another 20 that they heard it at the market or from other persons (6 said that they heard it from a witness procured by the plaintiff). The plaintiff's version was as follows: when Borys was drunk and asleep, someone wounded him in the throat with a knife; they stated that Borys himself said so, and since nobody but his wife, servants and maids were in the house, it was doubtlessly done either by Nastasia herself or by a servant. The judges decided that they should show clemency to the defendant who's "closer to proving her innocence and clearing her name," and decreed that both witnesses should swear. The judges noted that the number of witnesses does matter: "The accused party presented many more witnesses than the plaintiff."³⁹ All 30 confirmed Nastasia's innocence in her husband's death under oath. Without going into details of this curious case, I would like to voice a suggestion. The witnesses who relayed *what* they heard and then confirmed their words under oath did not necessarily had to relay *everything* they've heard. It is likely that unfavorable information could be left out of the confession.⁴⁰

The competitive nature of the judicial process turned court cases into verbal duels between the opponents, supported by slim scaffolding of evidence. Therefore, the injured party did not necessarily come to court with the intention of seeing the case through to the final verdict: the goal was often to tar the honor of the defendant and to make him negotiate and thus settle the conflict with material concessions. The defendant meanwhile sought to restore his reputation in the community; therefore, his actions were devised with the intention to "show for the future, primarily to God Our Lord and then to honorable people, that I was right."⁴¹ Under the circumstances, one's social capital in the community of "good men," ready to come to help in tough circumstances, was of paramount importance. As Stanislaw Kapusta said when accusing his opponent and questioning his status, "I'm better than you because I have whom to stand with, and you don't."⁴²

³⁹ Ibidem. C. 106–107.

⁴⁰ See the case when the *scrutinium* regarding a raid was based on the testimony of 68 "witnesses," of whom only 10 state that they heard shots and saw the consequences of the attack, whereas the rest heard about it "from many trustworthy persons" (Ibidem. Ф. 25, оп. 1, спр. 28, арк. 8–25 зб.).

⁴¹ Ibidem. Ф. 25, оп. 1, спр. 34, арк. 835 зб.–836.

⁴² Ibidem. Спр. 34, арк. 835 зб.–836.

OATH AS A SIN

Breach of law was understood not only as the injured party's private injury or as a social misdemeanor: it was also seen as a sin violating the higher order established by God, the holy justice: "Where one sins, one has to atone for it publically."⁴³ The opening formulae of complaints and speeches that did occasionally get recorded stress that court verdicts and punishments were interpreted as atonement: "a father should not atone for his son, and neither should a son for his father,"⁴⁴ one went to prison to "atone,"⁴⁵ one agreed to "atone for disrespect" in familial courts.⁴⁶ Therefore, readiness to atone was understood as reconciliation not only with the injured party, but also with God: "Reconciled primarily through *God's wrath* and friends."⁴⁷ Ian Hoholevskyi also appealed to Christian values when explaining his willingness to spend a year imprisoned in a castle for his murder of Pavlo Drevynskyi: "Feeling guilty and wishing to be set right before *God and my conscience*, as well as before the murdered man's relatives."⁴⁸ Another case demonstrates that the judicial process was understood not only as a secular procedure but also as a duel before God: "All the laws of God and mankind teach us that those who were injured in any way must resort to laws and holy justice."⁴⁹

Despite the fact that opponents seemed to fight for the right to swear, oaths were a rare occurrence. A theologian, the archimandrite of the Kyiv-Pechersk Lavra and the dean of the Kyiv-Mohyla Collegium Innokentii Hizel analyzed the sins against the Ten Commandments in his treatise *Peace with God for Men* (1669), including sins against the third ("Thou shalt not take the name of the Lord thy God in vain"). He claimed that those who swear unnecessarily, no matter how honestly, commit a sin. Unlike lying under oath, this is not a mortal sin, "but neither is it innocuous:" "Sirach said: 'every one that sweareth, and nameth, shall not be wholly pure from sin. A man that sweareth much, shall be filled with iniquity, and a scourge shall not depart from his house'" (Sir. 23).⁵⁰

⁴³ Ibidem. Спр. 28, арк. 46. The phrase fell under the trivial circumstances: the conflict was about where a court case, brought by a person and not settled in Volhynia, should proceed.

⁴⁴ Ibidem. Ф. 28, оп. 1, спр. 13, арк. 431.

⁴⁵ Ibidem. Арк. 34–35 зв.

⁴⁶ Ibidem. Спр. 28, арк. 82–89.

⁴⁷ Ibidem. Спр. 13, арк. 35 зв.

⁴⁸ Ibidem. Спр. 16, арк. 117.

⁴⁹ Ibidem. Спр. 23, арк. 298.

⁵⁰ *Гізелъ І. Вибрані твори в 3 томах / Упорядник Л. Довга. Т. 1, кн. 1: Мир з Богом чоловіку. Переклад Р. Кисельова. Київ, 2012 (henceforth *Гізелъ І. Вибрані твори в 3 томах*), с. 212–213.*

Therefore, swearing was undesirable for a good Christian. Court records demonstrate the same understanding of swearing. With inherently obscure accusations and inquiries, it was really easy to cross the line between undesirable (“not innocuous”) actions and those that could be qualified as the mortal sin of lying under oath. Therefore, in decreeing an oath, a judge “would remind both sides, as is our custom, that they should mind God Our Lord and remember about their souls.”⁵¹ In a case proceeding toward an oath, a court official persuaded the parties to settle the conflict outside of court.⁵²

According to the records of *kapturovy* courts during the third Interregnum (1586–1587), oaths were decreed in 35 out of 59 cases, but, as far as we can ascertain, only 14 cases actually proceeded to that stage. A person may refuse to swear even at a price,⁵³ with a possible motivation that “I wouldn’t want to swear about such small a matter, because, as an honorable man, I had never sworn about anything from my youth to these days.”⁵⁴ Meanwhile, Valentii Vskrynskyi first maintained that he did not send his servants and subjects to raid Nastasia Shumska’s land, yet when the oath was decreed, he stated: “Knowing my innocence but being in no rush to swear, I repay the damages suffered by Shumska’s subjects here in court.”⁵⁵

It was not only considered sinful to swear: provoking others to do so or not preventing it was little better. This can be seen in cases when the convict condemned to death freed the plaintiff of the need to swear, “remembering your conscience” and hence admitting his guilt: “[the defendants] were released of the oath and were not allowed to swear, and he admitted his guilt in full.”⁵⁶

Often the very readiness to swear encouraged the opponent to not demand it. For example, Hryhorii Oranskyi, who previously maintained that he did not order his servants and subjects to rob and beat Iukhnona Oranska, released her from the deposition once she voiced her readiness to swear. He promised that he would spend 12 weeks in the castle with his servant for the abuse, whereas his

⁵¹ ЦДАК. Ф. 21, оп. 1, спр. 17, арк. 55 зв.

⁵² Ibidem. Ф. 25, оп. 1, спр. 12, арк. 398–399 зв.

⁵³ Ibidem. Ф. 26, оп. 1, спр. 7, арк. 88 зв.: the court decreed that the injured party should swear to confirm the damages, but the opponents prevented the oath by “summoning gentle men” and repaying all losses.

⁵⁴ Ibidem. Спр. 3, арк. 714.

⁵⁵ Ibidem. Ф. 21, оп. 1, спр. 23, арк. 280–281.

⁵⁶ Ibidem. Ф. 28, оп. 1, спр. 35, арк. 58 зв.–60, 100–101. See a similar case: Ibidem. Ф. 25, оп. 1, спр. 27, арк. 223 зв. – 224. In another case, the accused admitted his guilt and stated: “I am not asking them to swear and will no longer hurt my soul so, because I am guilty of Ian Tsyvynskyi’s murder” (Ibidem. Ф. 21, оп. 1, спр. 23, арк. 293–294 зв.).

subjects would proclaim “out loud these words: we are taking this punishment because we had wronged Iukhnova Oranska, as described in the lawsuit” at the first market from dawn till dusk.⁵⁷

Sometimes a party would be released from swearing once the first words of the text were already said. Ivan Seletskyi was ready to swear in church in a case against Mykolai Hulevych, who hadn’t returned his money. “He was already down on his knees when Mykolai Hulevych, who was here too, stopped Seletskyi, told him not to swear, and set him free,” promising that he would return the sum.⁵⁸

Co-swearers were released from the oath fairly often. The Tribunal decree demanded that the accused Hrytsko Perekladovskiy with six witnesses should confirm under oath that he was not guilty of setting fire to an estate in Perekladovychi. He did swear in court, but the plaintiff freed the witnesses who were ready to obey the decree.⁵⁹ When a married couple had to swear, the husband was occasionally asked to release his wife as the person in his care.⁶⁰

There are also cases when the defendant bought his way out of swearing with the consent of the plaintiff; in these cases, however, the oath usually concerned procedural formalities rather than the case as such. Such oaths usually confirmed that the illness, which made the accused miss a court session, was real. However, there were also more serious cases. In the case about the murder of Demian Hulevych and a number of other persons, Hnivosh Koshka, one of the accused, disputed the decree adopted in his absence, arguing that he did not receive the summons. The court suggested that he should confirm the claim under oath, but when Koshka agreed, the plaintiffs released him of the burden of proof.⁶¹

Finally, one could postpone a decreed oath through appeals, by “falling ill” right after the decree (the fate that happened to befall the majority) or by asking one’s friends to help settle the conflict: “Our mutual friends did not let me swear and settled the matter between us thusly.”⁶² Therefore, by decreeing an oath, the court effectively encouraged opponents to reconcile.

⁵⁷ Ibidem. Ф. 27, оп. 1, спр. 4, арк. 2–5.

⁵⁸ Ibidem. Ф. 25, оп. 1, спр. 460, арк. 453 зб.–454 зб. See similar cases: Ibidem. Ф. 28, оп. 1, спр. 23, арк. 252 зб.

⁵⁹ Ibidem. Ф. 25, оп. 1, спр. 61, арк. 469 зб.–470 зб.

⁶⁰ Ibidem. Спр. 57, арк. 88–91.

⁶¹ Ibidem. Спр. 61, арк. 369–375. This is not a unique case when the plaintiff released the accused of the oath once the latter claimed that he had not received the summons (Ibidem. Спр. 54, арк. 223–223 зб.).

⁶² Ibidem. Ф. 26, оп. 1, спр. 3, арк. 525–526 зб.

The oath was ostensibly the fastest and most efficient way of getting the desired result: after the oath, the losing side could no longer appeal, and the plaintiff who accused the opponent of “lying under oath” could be arrested for four weeks, should his opponent’s honor be wounded (II SL, chapter 4, article 50). In reality, however, the oath was often postponed either till the next court session or indefinitely at intercession of friends; it could substantially prolong the case. Unwillingness to swear also encouraged the sides to reconcile and arrive at a compromise as a way to mend their relations. It is also obvious that an oath was a chip in courthouse negotiations, a convenient act in the high-stakes game between the opponents. For example, an accusation, never mind an unfavorable verdict, was a substantial blow to one’s honor and undermined one’s symbolic capital. Refusing to swear under the pretext of the fear of sin, the guilty party could extricate themselves from a tricky situation without losing face, preserving or even augmenting one’s reputation.

SWEARING FALSELY

In his treatise, Innokentii Hizel said that lying under oath was a mortal sin “because of the great dishonor it causes God, because he who is Truth incarnate is invoked to confirm a lie.”⁶³ It was punishable with a great misfortune that was to befall the house of those “who falsely swears invoking my name, and it will enter his house, and purge him (Zech. 5).”

The fear of punishment, however, did not necessarily stop one from attaining one’s goals, even at the price of damning one’s conscience. Court records mention offers to swear falsely for a price, as well as attempts to force one to swear. For example, Iakub Bobrovskiy, a former servant of Baltser Martyshevskiy, admitted to a court official that he left his master because he forced him to “falsely” accuse Prince Sokolskiy. He maintained: “My good Christian conscience and my beliefs as gentry wouldn’t and don’t allow me to let him do that, I didn’t allow that and even tried to persuade him not to do that, so that he won’t betray and offend his and my conscience.”⁶⁴

Meanwhile, a Volodymyr-based locksmith Bakhor admitted that the regional scribe Fedir Soltan “started to beg me with kind words” to make the correct confession in court on the promise of 10 zloty and a hut in Volodymyr on his land. He, however, refused, because this misdeed would “offend his conscience.” The

⁶³ *Гізелъ І. Вибрані твори в 3 томах. Т. 1, кн. 1, с. 118.*

⁶⁴ ЦДАК, Ф. 25, оп. 1, спр. 31, арк. 616–618 зв.

scribe claimed that, as an artisan, Bakhor wouldn't face consequences of the act, and even promised that "I will give you atonement for the oath." The locksmith, however, refused and begged "that he wouldn't push me to such iniquities."⁶⁵ For the gentry, lying under oath was associated with the loss of "conscience, honor and good reputation."⁶⁶ After his master died, the gentry man Holubytskyi admitted that the former forced him to lie under oath threatening his family, but he no longer wished to "carry this heavy burden on my conscience and offend God."⁶⁷

It does, however, seem that in certain cases when life or health was at stake falsely swearing might be deemed acceptable (for example, when one had to promise one's captors not to complain about the abuse to get out of captivity). For example, having captured his foe's servant and abused him, Demian Hulevych said: "If you do not want dishonorable death, swear to me that you will not avenge everything that happened on me, because all this should have happened to your master." As the servant admitted later, "I was forced to swear, fearing that he would destroy me."⁶⁸ This practice seems to have been quite wide-spread: it was noted that Vasyl Hulevych's friends advised him to apologize to starosta, Prince Oleksandr Pronskyi, in order to escape captivity: "People escape captivity with an oath, and that does them no harm."⁶⁹

Cases about coerced false swearing that do occasionally surface in court records document not only "the normative" early modern fear of God's wrath but also the existence of these practices. Obviously, only a fraction of such cases reached court records. They concern mostly dependents: gentry servants and non-gentry. It appears that their relations with God were seen as mediated through earthly ties, where a part of servant's conscience belonged to his master and thus was up for negotiation.⁷⁰ The gentry's conscience, meanwhile, was firmly tied to his honor and good reputation that largely belonged to and was affected by the community: it gave to each according to preexisting beliefs about "justice." Fear of losing reputation could have been a strong control mechanism, although devoid of formal legal sanctions;⁷¹ coupled with the "fear of God" ("not

⁶⁵ Ibidem. Ф. 28, оп. 1, спр. 25, арк. 227–228 зв. Див. також: Ibidem. Спр. 22, арк. 173–175 зв.

⁶⁶ Ibidem. Спр. 23, арк. 174 зв.–175 зв.

⁶⁷ Ibidem. Спр. 22, арк. 642–644, 389 зв.–391.

⁶⁸ Ibidem. Ф. 25, оп. 1, спр. 42, арк. 389–391 зв. Див. також: Ibidem. Арк. 295–296.

⁶⁹ Ibidem. Ф. 28, оп. 1, спр. 16, арк. 18–19 зв.

⁷⁰ The motif of a master's power over his servant's conscience was voiced in the Statute (III SL, chapter 12, art. 23).

⁷¹ See *Schwerhoff G.* Early Modern Violence and the Honour Code: from Social Integration to Social Distinction? // *Crime, History and Societies*. Vol. 17, no. 2. 2013, pp. 27–46.

offending my soul and fearing God the Creator”),⁷² it guaranteed the veracity of testimony under oath.

THE SITE AND RITUAL OF SWEARING

The information about the ritual of swearing is usually fragmentary. Customarily only the site was mentioned, with sporadic clarifications about additional details (for example, one was expected to genuflect): “he swore the oath in court session, as described in the Tribunal’s decree, in the presence of the court <...> *genuflecting*.”⁷³ One was expected to swear in a church, “facing a Gospel and a cross,”⁷⁴ in front of a church, or in court.⁷⁵ In one case, a side insisted on the courtroom as the most appropriate place for this inquiry, noting that the oath was to be sworn “not on a Gospel, as is the law and common custom, but simply standing in the docket.”⁷⁶ The fact that the text of the oath, compiled and signed by a scribe,⁷⁷ was read not by a court official “according to the Statute” but by a random person, was deemed inappropriate. Oaths were to be sworn before noon: “Those subjects were ready to swear before dinner, but now, after dinner, they will not swear, and neither should they swear after dinner.”⁷⁸ Swearing during holidays was considered inauspicious, as underscored by the commoner Severyn Bedrytskyi, who offered the following arguments to support his claim: “Even his holy majesty the king does not sit in court when a session falls on a high holiday;” “courts let up for these glorious and high holidays.”⁷⁹

Oaths were to be officiated by court officials, with “good men” as witnesses; it seems that oaths attracted quite an audience. The opponent or his representative had to be present to confirm that the procedure was correct. If the latter failed to appear, the situation could develop according to two scenarios. The person who had to swear could do so in the presence of a court official and his witnesses.⁸⁰ In certain cases, the absence of those who had to perform the rituals accompanying the oath (the opponent or his representatives) entailed the dismissal of the

⁷² ЦДАІАК. Ф. 28, оп. 1, спр. 18, арк. 126–127.

⁷³ Ibidem. Ф. 25, оп. 1, спр. 61, арк. 505 зв.

⁷⁴ Ibidem. Спр. 28, арк. 119.

⁷⁵ Ibidem. Спр. 22, арк. 129 зв.–134.

⁷⁶ Ibidem. Спр. 35, арк. 1043.

⁷⁷ Ibidem. Спр. 21, арк. 319; Спр. 459, арк. 91 зв.–92.

⁷⁸ Ibidem. Спр. 22, арк. 574 зв.–575.

⁷⁹ Ibidem. Спр. 46, арк. 8–10 зв.

⁸⁰ Ibidem. Спр. 39, арк. 49–51.

requirement to swear. For example, Losiatynska neither appeared herself nor sent a deputy to Serbyn's oath (with six witnesses) to confirm that she ordered his beating and abuse; therefore, the court adopted a verdict in Serbyn's favor "excepting the oath."⁸¹

The matter, however, was not normalized in II SL. III SL, meanwhile, explained why an oath had to be sworn not at once but in three day's time: the parties had to be given time "for contemplation." It also noted that, should an oath be unavoidable, the presence of the opposing party was mandatory. If the opponent failed to appear, he lost the case, and the other party was released from swearing (chapter 4, article 81).

In Volhynian judicial practice, swearing was customarily postponed until the following court session (in castle judiciary, no less than 6 weeks). In one case, it was noted that the opponent had to be personally present for the oath, "because the principal can relieve of the oath," whereas his representatives cannot. Therefore, the gentry community saw the presence at the swearing not only as a way to control the act but also as a last-moment chance to free the opponent of the obligation. Similar arguments appear in the case when Prince Kostiantyn Vyshnevetskyi had to swear, and the Castellan of Kraków Ianush Ostrozkyi had to appear as witness. Claiming illness, Ostrozkyi sent his representative instead, and Prince Vyshnevetskyi's lawyer objected: "One cannot send a representative to such cases when an oath is about to be sworn or heard, because it is *personalis actus* for both sides." The court agreed with his reasoning and freed Prince Vyshnevetskyi of the oath.⁸²

The situation could, however, develop slightly differently. For example, Hryhorii Kolmovskyi arrived in court at the agreed time to swear in the case against Prince Ostrozkyi, as decreed by the Tribunal. The Prince, however, failed to appear and, citing illness, sent his representative with a request to postpone the oath. Kolmovskyi reminded the court that the oath had already been postponed for the same reason, and suggested that Ostrozkyi's lawyer should act as witness. The court agreed, but the Prince's representative objected. As the result, the judges decreed that Prince Ostrozkyi had lost the case, and Kolmovskyi requested to record his "readiness to swear."⁸³

I saw a lengthy description of a botched swearing: a subject of Princess Maryna Kurtsevycheva tried to repeat the text of the oath thrice, failing each time, and eventually "fell silent and did not utter a word after the mid-point of the

⁸¹ Ibidem. Спр. 460, арк. 163 зб.-164.

⁸² Ibidem. Ф. 21, оп. 1, спр. 30, арк. 24 зб.-26.

⁸³ Ibidem. Ф. 25, оп. 1, спр. 57, арк. 51-54 зб.

oath.” The Princess’s fiduciary, who was present, confirmed that the subject has a speech impediment.⁸⁴ It is perfectly understandable that the anxiety felt by a person who called on God as his witness and voluntarily risked horrifying sanctions could pose a substantial challenge to performing the act. Simultaneously, a person forced to swear could resort to the trick to avoid doing so.

* * *

III SL and Sejm constitutions of the latter third of the 16th century document attempts to reform the judiciary and make it more efficient, which affected the norms pertaining to oaths. For example, III SL (1588) decreased the number of co-swearers in the majority of cases, and introduced the demand that the oath should be sworn by the party that presented more substantial evidence. It also introduced *scrutinium* as the instrument to determine how substantial the evidence was. However, in the Crown of Poland and on some of its territories, including Volhynia, *scrutinium* became proof by witnesses, as stated in several cases that I have come across. Therefore, it might be said that all these reforms did not much change the competitive nature of the judiciary, where both sides relied heavily on rhetoric arguments. Under the circumstances, there was no other way than the oath to determine who had “the truth” on their side, relegating the matter to God’s hands. As long as the judicial process took the form of competition between sides, crimes continued to be perceived as a private matter of the injured party, and the court had to help “restore the injured justice.” Hence, the oath could not be replaced by “substantial” evidence.

PRIESAIKA KAIP ĮRODYMO BŪDAS VOLUINĖS TEISMO PRAKTIKOJE: TEISĖ IR PRAKTIKA (1566 M.–XVII A. PRADŽIA)

Natalia Starchenko

Santrauka

Straipsnio šerdis – priesaikos funkcionavimas Voluinės vaivadijos pilies ir žemės teismuose priėmus Antrąjį Lietuvos Statutą (1566 m.). Autorė daugiausia dėmesio skiria bajorų visuomenės teisinių normų ir kultūros praktikos sankirtai bei toms transformacijoms, kurias patyrė teisėtvara dėl „teisingo“ bajorų etoso ir komunikacijos ypatumų.

Analizuojamas priesaikos svarbos teiseje klausimas, platus jos vartojimas ne tik įstatymo numatytais atvejais, bet ir tada, kai bajoras gynė savo garbę. Nagrinėjama, kuriai šaliai – ieškovui ar atsakovui – buvo priteisiama priesaika. Autorė atskleidžia keletą prieštaringų principų, kurie padeda atsakyti į šį klausimą. Juos įteisino Statutas, taip pat – kaip retorinę priemonę – plačiai naudojo advokatai. Pirmumo teisė prisiėkti priklauso: 1) ieškovui, nes „niekas neturi kentėti dėl žalos“; 2) atsakovui, nes teismas turi verčiau „išteisinti, nei nubausti“; 3) tam, kurio

⁸⁴ Ibidem. Ф. 28, оп. 1, спр. 5, арк. 11 зб.–13.

įrodymai svaresni, kad būtų išvengta melagingo liudijimo. Tačiau šaltiniai rodo, kad teisė prisiekti dažniausiai būdavo suteikiama atsakovui, t. y. vyravo nekaltumo prezumpcijos principas.

Autorė atskirai aptaria liudytojų, dažnai turėjusių prisiekti drauge su bylos šalimi, klausimą. Teigiama, kad daugeliu atvejų jie nebuvo veikos liudininkai, bet paliudydavo ieškovo / atsakovo reputaciją. Todėl procesas buvo greičiau bylininkų simbolinio kapitalo bajoriškojoje visuomenėje konkurencija.

Straipsnyje taip pat analizuojami nusikaltimo, kaip nuodėmės, ir baudmės už jį – kaip atgailos / atpirkimo, o priesaikos – kaip geram krikščioniui nepageidautino veiksmo – suvokimo klausimai. Šalys, kurios proceso metu aršiai siekė prisiekti, dažnai atsisakydavo priesaikos arba atleisdavo nuo jos priešininką, perduodamos teisę spręsti konfliktą bičiuliams. Būtent trečiųjų teismas, kai bylos šalys pasiekdavo kompromisą ir susitaikydavo, buvo pats pageidautiniausias ir veiksmingiausias bajorų visuomenėje. Autorė aptaria ir „kreivos“ priesaikos, kuri buvo traktuojama kaip mirtina nuodėmė, atvejus. Taip pat nagrinėjami priesaikos vietos ir ritualo klausimai.

Autorė daro išvadą, kad varžybiniame procese, nesant oficialaus tardymo, kai vienos bylos šalies daugiausia retoriniams argumentams kita šalis priešpriešindavo tokius pat argumentus, nebuvo kito būdo nustatyti „tiesą“, kaip tik priesaika.

Iš rusų kalbos išvertė I. Valikonytė