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## Curses, Oaths, Ordeals and Tials of Animals

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# Curses, Oaths, Ordeals and Trials of Animals

Alan Watson\*

*To the outsider, a foreign legal system may at times appear irrational, with a belief in the efficacy, usually with supernatural assistance, of curses, oaths and ordeals, and that animals may properly be punished, even restrained from anti-human behaviour, after a criminal trial. But caution must be exercised. There may be little real belief that the deity will intervene—for instance, that the ordeal will reveal guilt or innocence. Rather, the society may be faced with an intolerable problem, with no reasonable solution, and the participants may resort to extraordinary legal measures as a “Last Best Chance”, or “The Second Best”. Something has to be done, even if nothing satisfactory can be done. This dodge reveals itself by its use being restricted to a few situations. Thus in ancient Hebrew law ritual legal cursing is not used as a punishment, and in fact is found only where a husband accuses his wife of adultery but has not the very strict evidence required by law. The medieval ordeal was normally used only for serious offences and where there was considerable evidence against the accused. The main purpose of “The Last Best Chance” is to produce a result but, paradoxically perhaps, it serves to preserve the integrity of the system.*

WILLIAM EWALD ASKS the almost fundamental question for legal history and for comparative law: “What was it like to try a rat?”<sup>1</sup> His claim is that an understanding of a foreign legal system cannot be obtained simply by heaping up nuggets of information. I agree. The crucial point for him is that one needs to know how the lawyers of that system think. Again, I agree. This leads him to his question. He shows that sophisticated lawyers and thinkers were involved in trials of animals. What did they think they were about? But Ewald seems not to answer his own question. For his purposes he has no need to. Actually, the question so phrased by Ewald is not quite right. The fundamental question should be: “What was it like to try *the rats*?” The difference in the questions is all important.

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1 “Comparative jurisprudence (1): what was it like to try a rat?” (1995) 143 *University of Pennsylvania Law Review* 1889–2149.

### A. THE LAST BEST CHANCE

It often happens that persons with a law job to do are in a quandary. There is nothing satisfactory they can do. Often judges do not know what to decide, but they are nowhere permitted to render the judgment: "I don't know." At times, law allows for concessions in such and similar dilemmas. (And I use the abstraction, "law allows", deliberately to avoid giving precision to the process.) It permits use to be made of what I want to call "Last Best Chance". I use the term because I have found none better. What we have is a dodge but the dodge cannot be admitted—that would destroy the gravity of the law. The court cannot say: "To resolve our perplexity, we leave everything to chance. Let us throw dice." Rather, the dodge, the figurative throwing of the dice, is imbued with particular solemnity. Legal process intervenes when in reality it should probably keep out.

I am, I must insist, not attributing bad faith to the inventors of "The Last Best Chance". They are doing the best they can in face of a serious problem. What really reveals a procedure to us as "The Last Best Chance" is precisely that it is not used always where an outsider might expect it, but precisely where a dodge is needed. It is given only limited scope. Legal historians and comparative lawyers must be on the lookout for "The Last Best Chance" because it will always appear in its society with enhanced importance, yet its precise significance is not that which appears.

"The Last Best Chance", as I conceive it, is a sub-category of what might be called "The Second Best" in the law. The special character of "The Last Best Chance" is that the fact that it is a last resort is concealed, and may not even be fully apparent to those involved. To show what I mean I select an example of "The Second Best" that is not "The Last Best Chance" from Deuteronomy 21.1–21.5:

If, in the land that the Lord your God is giving you to possess, a body is found lying in open country, and it is not known who struck the person down, then your elders and your judges shall come out to measure the distances to the towns that are near the body. The elders of the town nearest the body shall take a heifer that has never been worked, one that has not pulled in the yoke; the elders of that town shall bring the heifer down to a wadi with running water, which is neither ploughed nor sown, and shall break the heifer's neck there in the wadi. Then the priests, the sons of Levi, shall come forward, for the Lord your God has chosen them to minister to him and to pronounce blessings in the name of the Lord, and by their decision all cases of dispute and assault shall be settled.

We need not follow up the rest of the ritual. The essential element that initiates the procedure is that a man is slain in open country and the murderer cannot be found. Something must be done. A ritual that is both religious and legal is found to expiate guilt. But that the procedure is "The Second Best"—used because the murderer is not known—is not concealed, and is obvious on its face.<sup>2</sup>

2 "The Second Best" is not confined to law. Thus, when Odysseus had not returned to Ithaca many years after the Trojan War the goddess Athene advised his son Telemachus that he should search and if he hear that Odysseus is dead he should heap up a mound and pay funeral rites over it: Homer, *Odyssey*, book 1, lines 289–292.

## B. CURSES

A first illustration of "The Last Best Chance" may be taken from the formal or ritual curse, with legal and religious backing. The curse of this type has a long history but is mainly used in very limited circumstances: (1) where the wrongdoer cannot be established; (2) where the wrongdoer is beyond reach either because he cannot be found or is too powerful; (3) less often, where it cannot be proved that the suspected crime actually has occurred. An illuminating example occurs in the Bible, at Numbers 5.11–5.22. In certain circumstances when a husband accused his wife of adultery, an oath would be taken from her, the priest would utter a curse upon her, and if she was unfaithful she would suffer, perhaps have a miscarriage. When was the curse to be used? God was quite specific:

The Lord spoke to Moses, saying: Speak to the Israelites and say to them: If any man's wife goes astray and is unfaithful to him, if a man has had intercourse with her but it is hidden from her husband, so that she is undetected though she has defiled herself, and there is no witness against her since she was not caught in the act; if a spirit of jealousy comes on him, and he is jealous of his wife who has defiled herself; or if a spirit of jealousy comes on him, and he is jealous of his wife, though she has not defiled herself; then the man shall bring his wife to the priest. And he shall bring the offering required for her, one-tenth of an ephah of barley flour. He shall pour no oil on it and put no frankincense on it, for it is a grain offering of jealousy, a grain offering of remembrance, bringing iniquity to remembrance. Then the priest shall bring her near, and set her before the Lord; the priest shall take holy water in an earthen vessel, and take some of the dust that is on the floor of the tabernacle and put it into the water. The priest shall set the woman before the Lord, dishevel the woman's hair, and place in her hands the grain offering of remembrance, which is the grain offering of jealousy. In his own hand the priest shall have the water of bitterness that brings the curse. Then the priest shall make her take an oath, saying, "If no man has lain with you, if you have not turned aside to uncleanness while under your husband's authority, be immune to this water of bitterness that brings the curse. But if you have gone astray while under your husband's authority, if you have defiled yourself and some man other than your husband has had intercourse with you"—let the priest make the woman take the oath of the curse and say to the woman—"the Lord make you an execration and an oath among your people, when the Lord makes your uterus drop, your womb discharge; now may this water that brings the curse enter your bowels and make your womb discharge, your uterus drop!" And the woman shall say, "Amen."<sup>3</sup>

The curse was to be used only when there was no sufficient proof of the adultery. Numbers 5.29 reads: "This is the law in cases of jealousy, when a wife, while under her husband's authority, goes astray and defiles herself, or when a spirit of jealousy comes on a man and he is jealous of his wife." What we do not find in the history of formal curses in biblical law is their application to the accused after guilt has been established. The curses in Deuteronomy 27.15–27.26 are not contrary to this position.

3 This is the translation of *The New Revised Standard Version*, which I regard as inaccurate for verses 21 and 22, but that issue need not detain us here. For the procedure as it came to be established, see Mishnah Sotah. I have used the edition of the Mishnah by Herbert Danby (1927).

What is in issue there is not the ritual cursing of a wrongdoer whose guilt has been proved. The curses are formulated as terms of a treaty. Thus, the opening verse:

“Cursed be anyone who makes an idol or casts an image, anything abhorrent to the Lord, the work of an artisan, and sets it up in secret.” All the people shall respond, saying, “Amen!”<sup>4</sup>

In this verse, indeed, the curse is invoked against anyone who in the future casts an idol and sets it up “in secret”.<sup>5</sup> The curse applies to anyone who so acts, whether apprehended or not. Moreover, the cursing of such persons is generalised: so far as our information goes, there was no formal curse intoned over such an individual. No ritual cursing takes place after conviction. The passage seems always to have been so understood. Thus, there is nothing in the Mishnah, the earliest surviving rabbinical texts, to show that cursing after conviction was ever part of the penalty.<sup>6</sup>

But why was a curse not so applied? It surely seems appropriate that a heinous wrongdoer be condemned by God as well as man. And it would surely add to the solemnity of the punishment. The ancient Israelites had some fancy penalties.<sup>7</sup> Why ever was a convicted wrongdoer not also cursed to increase the horror of the occasion?

The explanation cannot simply be that the curse was not used by the ancient Israelites as a punishment because it was not needed after guilt was established. Unnecessary punishments have always been fashionable. Thus, for the punishment of a parricide in ancient Rome it was not obviously necessary that he was, after a beating, put into a leather sack along with snakes and other animals—ancient authors name variously a cock, dog, ass—and put on a wagon drawn by black oxen to the Tiber, and thrown in.<sup>8</sup> A person convicted in the contemporary USA of multiple murders may well be sentenced to a term of imprisonment far longer than he can possibly live.<sup>9</sup> The excess penalty demonstrates the people’s horror of the crime, if nothing more. But the ancient Israelites did not add cursing to the penalty for even the most abominable wrong. The legal curse is used when the guilty party is beyond the reach of the law. Not otherwise. It is resorted to only as “The Last Best Chance”. It is the best that can be done in the circumstances, when, it is felt, something must be done.

Likewise, one cannot simply say that the use of the curse was restricted because of a reluctance to implore the deity for active help. In other contexts, prayer for

4 The verses have long been seen as a composite, but David Daube rightly sees them as a unity, concerning offences “as may easily evade earthly justice”: “Some forms of Old Testament legislation”, in *Oxford Society of Historical Theology: Abstract of Proceedings for the Academic Year 1944–45* (1946), 36–46 at 39. For present purposes it is interesting that Joseph Blenkinsopp, for example, holds that the provisions are not strictly curses: R E Browne et al (eds), *The New Jerome Biblical Commentary* (1990), 106.

5 See already Daube, “Forms”, 39.

6 See note 3, above.

7 See, e.g. Mishnah Sanhedrin.

8 See, e.g. T Mommsen, *Römisches Strafrecht* (1899), 922.

9 This again may be seen as an example of “The Second Best” that is not “The Last Best Chance”.

example, such active help was and is continually implored. Rather, the use of formal cursing of an accused person in a legal setting is restricted to cases of "The Last Best Chance" because there is a feeling that it will not be wholly effective. I am not suggesting bad faith. A devout person may pray every day, firmly believing in the efficacy of prayer, but with no expectation that every prayer will be answered. The feeling is not that the deity does not hear. Rather, the notion is that the deity may not want to act. He does not always intervene. So the cursing is reserved for situations where no other solution would possibly help, but some action is felt to be required. What an outsider must not do when investigating an alien society is simply to say: "Formal cursing is accepted and approved by the society. That means that that group has faith in divine intervention every time." I do not at all agree with Gerhard von Rad that "ancient people considered such a curse [i.e., coming from God] to be a real destructive power".<sup>10</sup>

### C. OATHS

My second example of "The Last Best Chance" is the oath. Formal, legalised use of the oath has more applications than ritualised cursing had among the Israelites, but we find it above all in various societies in certain typical areas: (1) treaties with foreign powers; (2) oaths of office, such as those administered to presidents or judges; (3) oaths of jurors or witnesses; (4) oaths of personal allegiance by military officers to dictators. What these cases have in common is that an action for breach of contract—and an oath in some senses is contractual—would not be in law a satisfactory remedy. In Rome, part of a treaty was couched in proper legal form using the wording of a particular contract (*sponsio*) that may have originally involved an oath, but as the jurist Gaius writing around AD 160 noted, breach of the treaty would not give rise to a contractual remedy, but to the laws of war.<sup>11</sup> An oath is exacted from a president, not because it will make him *semper fidelis*, but because law has no sanction sufficiently powerful to be satisfactory. And a dictator, deserted by his troops, will not find an adequate remedy in the courts.

But the oath has still wider applications perhaps relating to past deeds or to a state of fact and these oaths are even more revealing for "The Last Best Chance". For example, in the whole of Roman private law there was only one situation, apart from procedures in court, where an oath was accorded legal recognition. That was the so-called *iusiurandum liberti* (oath of a freedman).

The background was this. When a Roman changed status (*capitis deminutio*), existing obligations such as those under contract were extinguished.<sup>12</sup> Means were eventually devised to avoid this. But there was one particularly difficult case. A master might wish to free a slave, yet want the slave to continue to provide him with

<sup>10</sup> G von Rad, *Deuteronomy* (1966), 167.

<sup>11</sup> G. 3.94.

<sup>12</sup> See, e.g. W W Buckland, *Text-Book of Roman Law from Augustus to Justinian*, 3rd edn (by P G Stein) (1963), 134–141; M Kaser, *Das römische Privatrecht*, 2nd edn (1971), vol 1, 271–272.

some services after manumission. The master could not take a legally binding promise before manumission—there could be no contract between owner and slave. But the slave, once freed, might simply refuse to give the binding promise (by *stipulatio*). The solution was for the slave to give an oath before he was freed, and this put him under a religious obligation to renew the promise usually by another oath though a *stipulatio* was possible. This second oath was then a formal verbal civil law contract, though the oath made while a slave did not constitute a legal obligation.<sup>13</sup> Thus, the freedman's oath creates a private law obligation, and that is its purpose. It is very secular. It is used to circumvent a private law difficulty. It must be remembered that in no other circumstances does an oath create a Roman contract or legally contribute to one. *Iusiurandum liberti* is a good example of "The Last Best Chance". As often, "The Last Best Chance" involves an illogicality that is simply ignored. How can a sacred oath, at a time when oaths have no secular legal effect, give rise to a secular legal obligation to make a secular contract?<sup>14</sup>

The oath also appears prominently in the archaic form of Roman procedure called *legis actio*, and was the basis of the *legis actio sacramento*, "action of the law by oath", which is often considered the oldest Roman action. This action could be brought either *in rem* or *in personam*. It will be enough for us to examine the former. Each party to the action claimed the object in dispute and stated that he had claimed properly. One then challenged the other to an oath with a penalty on the basis that he had claimed wrongly, and the other responded in kind. The penalty was fifty or five hundred *asses* depending on the value of the property claimed, and the penalty was deposited with an official. The next stage of the action proceeded on the issue of the veracity of the oaths, and the loser forfeited the penalty.<sup>15</sup> Of course, the main point—the sole point—of the action, which apparently has now slipped into the background, was the determination of ownership of the thing. But whose oath was true could be determined only on the basis of who had secular legal title. Gaius reports: "Procedure by oath was general. One proceeded by oath for those matters for which otherwise no action was provided by statute."<sup>16</sup> Thus is revealed that once again the oath is used as "The Last Best Chance". Where no action is provided, but where there ought to be one, the secular issue can be litigated on the basis of the oath. Again, the secular content of the institution has to be stressed. Magic or intervention of a god is not involved. The oath simply enables the trial to continue, with an examination of the facts by men. The problem at issue, ownership, is a secular one. There is no divine sanction for breach of the oath, simply the secular loss of the secular penalty.

13 See, e.g. D. 40.12.44pr; 46.4.13pr; cf Buckland, *Textbook*, 458; J A C Thomas, *Textbook of Roman Law* (1976), 264.

14 See, e.g. A Watson, *The State, Law and Religion: Pagan Rome* (1992), 44–50.

15 G. 4.10–20.

16 G. 4.13.

But more seems to be going on. There is again an element of illogicality. Except for the exceptional case of *iusiurandum liberti*, an oath cannot create a legal obligation, hence cannot validate the initiation of legal proceedings. How then can legal proceedings be begun in general, without any apparent validation, and then have their progress validated by an oath?

In a second use of the oath in procedure, the *iusiurandum in litem*, “the oath in the law suit”, the oath was used in more limited circumstances. The award, *condemnatio*, in a Roman private law action was always in money. But at times what the plaintiff really wanted, and it was reasonable for him to have, was the object of the dispute. Then, but only for certain types of action, the instructions to the judge might contain the *clausula arbitraria*, authorisation to order restitution to his satisfaction, failing which there would be the *condemnatio* in money. Restitution could not be directly enforced. But if it failed to occur, the judge could condemn either in his own estimation or he could proffer the oath, the *iusiurandum in litem*, to the plaintiff to state the value of the object, and this valuation would then be the judge’s monetary award. The jurist Paul writes: “It is not readily allowed to enquire into the perjury of one who swears the *iusiurandum in litem* under necessity of law.”<sup>17</sup> It remains to add that the *iusiurandum in litem* could only be taken when the defendant was acting maliciously or contumaciously.<sup>18</sup> We can thus exclude the possibility that the oath was used as a shortcut to find the true valuation. It is intended to force the defendant to return the thing, or suffer for it.

*Iusiurandum in litem* is a fine example of “The Last Best Chance”. Its purpose is purely secular, and it is used to achieve indirectly what cannot be achieved directly.<sup>19</sup> But it may easily be misunderstood by modern scholars. Fritz Schulz objects to the classicality of the oath on the ground that Romans would not easily foreswear themselves.<sup>20</sup>

Once again, I am not suggesting bad faith on the part of those who invented and continued to use the oath in Roman procedure and substantive law.<sup>21</sup> On the contrary, oaths were very prominent in Roman life, and until late in the Republic Romans were regarded and regarded themselves as the most religious of people.<sup>22</sup> Individuals frequently took oaths when making a contract:<sup>23</sup> only, these oaths did not have legal

17 D. 12.3.11.

18 D. 5.1.64pr; 6.1.68; 6.1.71; 12.3.2; 12.3.4.4; 12.3.5.3; 12.3.8.

19 For other not dissimilar uses of the oath in litigation see Buckland, *Textbook*, 633.

20 F Schulz, *Classical Roman Law* (1951), 370.

21 For Roman manipulation of religion for political ends see, e.g. Watson, *State, Law and Religion*, 58–62.

22 See, e.g. Cicero, *De haruspicum responsis* 9.19, and *De natura deorum* 2.3.8; Sallust, *Bellum Catilinae* 12.3, and *Bellum Jugurthinum* 14.19; Valerius Maximus, *Factorum et dictorum memorabilia*, 1.1.8–9; Tertullian, *Apologeticus* 25.2; Polybius, *Histories*, 6.56.6–00. Augustine pokes fun at this notion in *De civitate Dei* 4.8; cf e.g. G Wissowa, *Religion und Kultus der Römer*, 2nd edn (1912), 386–390; W H C Frend, *Martyrdom and Persecution in the Early Church* (1967), 77–80.

23 See, e.g. Cato, *De agri cultura*, 148.



impact. Indeed, unless there was some belief in the efficacy of oaths, they would have had no place in law at all. Only, there are levels of belief. It is their limited and purely secular role in law that enables us to see these legal oaths as “The Last Best Chance”. It may just be significant that whereas a normal Roman oath was proffered to a particular deity we are nowhere told that the oath with legal effect was made to a specific god or goddess.

#### D. SUPERNATURAL OATHS

But the Roman approach to the legal oath is not the only one. Other possibilities that really do involve an appeal to the supernatural can easily be envisaged. Only three need be mentioned here. First, where there is sufficient rational evidence, the oath may be imposed, and tested by supernatural means. Secondly, where there is no or little rational evidence, the oath may be used, and tested by supernatural means. Thirdly, where there is considerable, but not adequate, rational evidence, the oath may be used and tested by supernatural means. These approaches may in one system appear separately or together. When the first approach is taken, the oath is not “The Last Best Chance”. Those involved in the process have more faith in the intervention of the deity than in human reason. With the second approach, one cannot tell without more information. If the oath is used because there is considerable bewilderment about what should be done—but something must be done—the oath is “The Last Best Chance”. But there may be in a particular society firm belief in the deity’s intervention. With the third approach, where it appears in isolation without also the presence of the other two, we have to do with “The Last Best Chance”. The basic reliance is on using rational evidence. When there is considerable evidence against an accused, but not quite so much as to constitute the proof required by the legal system, there may be recourse to the oath. Of course, the hope will exist that the threat of the proof of the oath will induce a guilty accused to confess, thus providing what was lacking for proof.

#### E. ORDEALS

Closely similar to the oath is trial by ordeal. Trial by ordeal has not necessarily always the same justification, not even perhaps in a limited geographical area such as Western Europe. My discussion here will be limited to part of the earliest evidence for Western Europe.

Trial by ordeal seems in Europe to have emerged from Frankish custom, and it is first recorded in the *Pactus legis Salicae* attributed to King Clovis and issued between 507 and 511.<sup>24</sup> The ordeal was that of the cauldron.<sup>25</sup> According to Gregory of Tours, the cauldron was set on a fire, a ring was tossed into the

<sup>24</sup> See, e.g. R Bartlett, *Trial by Fire and Water* (1986), 4; K F Drew, *The Laws of the Salian Franks* (1991), 28.

<sup>25</sup> I am ignoring here the ordeal by lot, which was also accepted in Salic law.

bubbling water, and the person undergoing the ordeal had to pluck it out, not an easy task.<sup>26</sup> The most important provisions of the code for us are 132 and 73.<sup>27</sup>

132. If a man has witnesses who are proved to be false, [each of them] shall sustain a fine (*multa*) of fifteen *solidi*. He who accused them [the witnesses] of giving false testimony shall put his hand in the cauldron [i.e., submit to the ordeal of hot water], and if he takes his hand out clean (*sana*), they shall sustain that fine noted above. But if his hand sustains a dirty burn (*conbureit*), he [who accused the witnesses of a false testimony] shall sustain a fine of fifteen *solidi* [to each of the witnesses].

This text shows us the nature of the test, but perhaps more significantly indicates that the ordeal was not the only mode of proof; witnesses could be adduced, as here. Other methods of proof were also possible: oaths and oath-helpers. Oath-helpers were not witnesses, but persons who could give evidence of the general character of a party. Rebecca V Colman has pointed out in fact that in the Salic law, witnesses are mentioned six times more frequently than the ordeal.<sup>28</sup> The question for us is why, if there was faith that God would inevitably intervene to give the right answer in the ordeal, were other methods of proof used? After all, as the text indicates, witnesses could lie.

73. 2. And if the man summoned comes to the place, then he who called him to court, if the case is such a minor one that the composition involved is less than thirty-five *solidi*, should offer oath (*videredum* or *wedredo*) with six oath-helpers. And afterwards he who had been summoned, if he believes it proper for him to do so in such a case, shall absolve himself with the oaths of twelve oath-helpers.

3. But if it is a more serious case, one where he who is found guilty will be liable to pay thirty-five *solidi* or more (but less than forty-five), he who summoned him to court shall offer oath (*videredum* or *wedredo*) with nine oath-helpers. And he who was summoned, if he recognises it as proper for himself to do so, shall absolve himself with oaths given for him by eighteen oath-helpers.

4. If indeed it is such a case that the composition is forty-five *solidi* or more—up to the amount of the wergeld (*ad leudem*)—he who summoned him to court shall offer oath with twelve oath-helpers; and he who was summoned to court, if he knows that it is proper for him to do so, can absolve himself with oaths given by twenty-five oath-helpers.

[4. If indeed it is such a case that the composition is forty-five *solidi* or more—up to the amount of the wergeld (*ad leudem*)—he who summoned [the others] to court shall offer oath with twelve; and he who was summoned, if he knows that he is innocent, shall absolve himself with oaths given by twenty-five.]

5. But if a man has summoned someone to court in a suit involving a judgement that is the amount of the wergeld (*leudem*), he who summoned him should offer oath (*vidrido* or *wedredo iurare*) with twelve; and if he [who was summoned] neglects to come to court or does not want to place his hand in the cauldron, he [who summoned] should heat up the cauldron after fourteen days.

26 Gregory of Tours, *De gloria martyrum*, 80.

27 The translations are those of Drew, *Salian Franks*, at 156 and 132–133 respectively.

28 "Reason and unreason in medieval law", (1974) 4 *Journal of Interdisciplinary History* 571–591 at 577; cf Bartlett, *Trial*, 26.

What is here at issue is the summoning to court of one member of the king's retinue by another, as appears from 73.1. Reliance for proof is placed above all on oaths and oath-helpers, not upon the ordeal. More than that, the implication of the text is that the ordeal was used only in the most serious cases. Again, the question must be, if the ordeal unfailingly gave the right outcome, why was it used only for the most serious situations? Certainly, a person who was proven innocent by the ordeal would suffer pain, but still. . . .<sup>29</sup>

The answer to my questions is that from the outset there was no total reliance on divine intervention in the ordeal. We are once again faced with a last resort, "The Last Best Chance". A severe social problem exists. It ought to be solved by law, but the law cannot rationally give an answer in a direct manner. Recourse is had *in extremis* to an apparently irrational mode of proof. Once again, I am not suggesting bad faith on the part of the users of the ordeal.<sup>30</sup> Unless there was some degree of faith in its efficacy it would have served no purpose. Again I stress that one sign that we are dealing with "The Last Best Chance" here, as was the case with the Israelite curse and the Roman legal oath, is the solemnity that surrounds the ordeal. The solemnity of the occasion is well brought out in the formula intoned by priests for the ordeal of hot iron:

Oh God, the just judge, who are the author of peace and give fair judgement, we humbly pray you to deign to bless and sanctify this fiery iron, which is used in the just examination of doubtful issues. If this man is innocent of the charge from which he seeks to clear himself, he will take this fiery iron in his hand and appear unharmed; if he is guilty, let your most just power declare that truth in him, so that wickedness may not conquer justice but falsehood always be overcome by the truth. Through Christ.<sup>31</sup>

That scepticism about the ordeal existed from an early date is shown by a capitulary of Charlemagne from 809: "Let all believe the ordeal with no doubting."<sup>32</sup> Doubt existed. But I hesitate to accept Bartlett's judgement that the capitulary also "shows us the king's mind on this matter".<sup>33</sup> If doubt existed in the minds of some and Charlemagne wished the ordeal to continue, he had to insist that no one should doubt.

My point should be generalised. From time to time the claim will be made that the ordeal is not a satisfactory means to reach the truth, and should be abolished. The claim will be opposed, and for long the ordeal may continue. The demand for the retention of the ordeal should not then be seen as necessarily proof that its

29 In some circumstances a person sentenced to the ordeal could redeem his hand: *Pactus legis Salicae*, 53 (in Drew, *Salian Franks*, at 116).

30 But equally I accept that, just as Roman religion was manipulated for political purposes, so was the ordeal abused: cf Bartlett, *Trial*, 13–24. Where there is faith, it can always be abused.

31 K Zeumer (ed), *Formulae Merovingici et Karolini Aevi*, Monumenta Germaniae Historica (MGH), (1886), 700–701. The translation is that of Bartlett, *Trial*, 1.

32 A Boretius (ed), *Capitularia Regum Francorum*, MGH (1883), vol 1, 150 § 20: "*Ut omnes iudicium Dei credant absque dubitatione.*"

33 Bartlett, *Trial*, 12.

proponents believe it will always give the right result. Other factors may influence their stance though they cannot say so. First, law is in general very resistant to change.<sup>34</sup> Second, there is the problem of deciding how else the dispute will be resolved. Should it simply be allowed to fester? A serious crime has been committed. There is considerable evidence against the accused, but not enough for the standards of the time. Should he just walk away, despite the wrath of members of the community? What if there should be retaliation which many might regard as justified? The main point of a legal process is to resolve a dispute with the aim of inhibiting further unregulated conflict.<sup>35</sup> Third, there is the hope, conscious or unconscious, that the threat of the ordeal will persuade the guilty to confess.

I have chosen to look at aspects of the ordeal from our earliest evidence because the suggestion might be made that "The Last Best Chance" is simply to be explained by survival from a primitive to a rational age. The suggestion might be, for instance, that when Roman law was perhaps as rational as law can be, the legal oath flourished in its limited circumstances as a survival from the time when all believed in the divine force of the oath. I would rather suggest, though proof can never be adduced for remote origins, that the limited scope and use of legal oath and ordeal in the instances examined are not survivals but original. In no sense, however, do I intend to suggest that there are no cases where a procedure continues to survive long after the reasons for it have been forgotten. An example from William Blackstone will soon appear.

I have, as mentioned, chosen to discuss aspects of the ordeal from the earliest time for which we have evidence, but Robert Bartlett has convincingly shown that in the heyday of the ordeal it was used in criminal cases only when there was considerable but not sufficient evidence.<sup>36</sup>

Finally on the ordeal, we should return to provision 132 of the *Pactus legis Salicae*, the ordeal facing one who accused a witness of being false. The normal use of the ordeal was in the trial of a suspected criminal, but it is no surprise to find it here. To give false evidence can have such serious consequences that evidence is typically given under oath. This is one of the situations I have mentioned where legal oaths are frequently found. But it is equally serious to claim that the evidence is false—the whole legal process is now in jeopardy. To put the claimant on his oath would scarcely be satisfactory: it would be one oath against another. There is a dilemma. The solution of the Salian Franks was to subject the claimant to the ordeal. (I am, of course, assuming that the ordeal was imposed when the veracity or otherwise of the claim was not self-evident.)<sup>37</sup>

34 See, e.g. A Watson, *Society and Legal Change* (1977), *passim*.

35 See A Watson, *The Nature of Law* (1977).

36 Bartlett, *Trial*, *passim*.

37 I have not dealt with trial by battle which also involves "The Last Best Chance", and is close in nature to the ordeal.

With the ordeal, too, modern scholars must be on their guard when investigating an alien system. I believe John Baker was misled in part when he wrote that "oaths involved an appeal to God to reveal the truth in human disputes".<sup>38</sup> But he does recognise that the plaintiff had to make out a *prima facie* case.

#### F. THE RATIONALITY OF "THE LAST BEST CHANCE"

My claim should be properly understood. I am not arguing that the examples I am adducing for "The Last Best Chance" are entirely rational. They are not. Only, the procedure is much less irrational than is usually thought. The persons involved have a problem that they feel must be dealt with, but it cannot be solved directly. They do the best they can. It is not a coincidence that my examples to this point all involve religion. There is nothing so reasonable as one's own religion, nothing seemingly so irrational as another's religion. These two opposing perspectives on religion must be stressed for an understanding of "The Last Best Chance". Of the examples looked at so far, the most apparently rational instance is that of the Roman legal oath. The explanation for that, I think, is that it is the one least obviously based on religion. More than that, unlike the Israelite curse and the medieval ordeal, it does not call upon a deity to intervene directly in human affairs. I should not be thought to be suggesting that "The Last Best Chance" in law always involves religion. Purely secular dodges would include the fictions of English common law such as those to found jurisdiction. Another example from medieval England would be common recovery, which in effect barred unbarrable entails.<sup>39</sup> But when "The Last Best Chance" is purely secular, its nature is readily apparent.

Indeed, there is a crucial difference between "The Last Best Chance" that is purely secular and "The Last Best Chance" that has a basis in religion. For the former, the fact of "The Last Best Chance" may be apparent to all and known to all. For "The Last Best Chance" with a basis in religion, some degree of faith is needed on the part of some of those involved, even if only as spectators. In fact, when "The Last Best Chance" is found in secular law it is usually very close to being "The Second Best" that does not involve "The Last Best Chance".

#### G. TRIALS OF ANIMALS

My last example of "The Last Best Chance" takes us back to the beginning: trials of animals. "What was it like to try the rats?"<sup>40</sup> Ewald puts the problem: "What needs to be explained is not why one would put down a dangerous cow, but why one would first bring the matter to the Law Faculty of Leipzig."<sup>41</sup> He shows convincingly that

38 J H Baker, *An Introduction to English Legal History*, 3rd edn (1990), 5.

39 See, e.g. A W B Simpson, *A History of the Land Law*, 2nd edn (1986), 129–139.

40 The *locus classicus* is E P Evans, *The Criminal Prosecution and Capital Punishment of Animals* (1906).

41 "Comparative jurisprudence (1)", 1905.

none of the explanations previously adduced for trials of animals is plausible. He also demonstrates that those who were involved in such trials or who favoured them are not to be dismissed as primitive.

But not only animals; inanimate objects also might be put on trial. The mental outlook behind such trials may well not be the same everywhere. The most I wish to claim here is that in the three examples I will consider there are pointers to "The Last Best Chance".

### (1) In ancient Athens

For ancient Athens, Aristotle records a special procedure: "When the king does not know who committed the act he institutes proceedings against 'the guilty man', and the king and the tribal kings try the case, as also the prosecutions of inanimate objects and animals for homicide."<sup>42</sup> The case is before the Prutaneion, not the ordinary courts that dealt with prosecution for homicide. The first indication that we have "The Last Best Chance" to deal with here is that, where a human is the slayer, this procedure is used only when the killer is unknown. A killing must be dealt with by law, it is felt, and the best that can be done is try "the guilty one" by a *special* procedure.<sup>43</sup> A second indication of "The Last Best Chance" is that animals and inanimate things are tried only if they killed. No doubt for a lesser injury a dangerous beast would simply be put down. This limitation was because of the seriousness of killing not simply because of questions of jurisdiction and this is also indicated by Plato in his discussion of ideal laws. He lays down a procedure for trying an animal that commits homicide and another for an inanimate object that kills.<sup>44</sup> He establishes no procedure for prosecuting animals that simply wound.

### (2) In eighteenth-century England

In Book 1 of his *Commentaries on the Laws of England*, William Blackstone treats the forfeiture of animals and inanimate objects that kill.<sup>45</sup> His discussion makes it very clear that he is puzzled by the forfeiture,<sup>46</sup> which probably should be regarded as a survival from a previous age. Distinctions are drawn in true legal fashion. Thus, if an infant under the years of discretion falls from a stationary cart and is killed, the thing is not forfeit, but it is if the person killed is an adult. If a man climbing on a wheel falls and is killed, the wheel alone is forfeit, but if a wheel ran over him and killed him the whole cart and its load are forfeit. Whether or not the object was under the control of its owner is irrelevant for its forfeiture. What must again be

<sup>42</sup> Aristotle, *Athenian Constitution*, 57.4. We may assume a religious element in the procedure.

<sup>43</sup> If we had more information we might see here an example of "The Second Best" that did not involve "The Last Best Chance".

<sup>44</sup> Plato, *Laws*, 9:873E.

<sup>45</sup> W Blackstone, *Commentaries on the Laws of England* (1765–69), vol 1, 290–292 (1.8.15).

<sup>46</sup> Cf already Ewald, "Comparative jurisprudence (1)", 1910–1912.

stressed is that the procedure is reserved for killing, and is not extended to wounding, an indication that the procedure is to be seen as a last resort.

### (3) In sixteenth-century Autun

Trials of animals were not uncommon in the past in Europe. One particular example will suffice. In 1522 rats were put on trial in Autun before the ecclesiastical court for the felony of eating and wantonly destroying barley crops. A formal complaint was laid before the bishop's vicar who cited "some rats" to appear on a certain day. Barthelemy Chassenée was appointed for the defence. The rats failed to appear. Chassenée successfully argued that (1) his clients were spread over a wide area and one summons was insufficient; (2) the summons was addressed only to "some rats," but should have been addressed to all. The court ordered that a second summons addressed to all the rats be read from the pulpit of all the local parish churches. The rats again failed to appear, and Chassenée again successfully pleaded that his clients were widely dispersed and needed more time to make preparations for their journey. After a further summons not heeded by the rats, Chassenée once again successfully argued that the rats were entitled to fair treatment under the law; a person summoned to a place where he cannot appear in safety may lawfully refuse to appear; the rats were very unpopular in the district, would have to face their natural enemies, the cats, who, moreover, belonged to the plaintiffs. The court adjourned *sine die* on the issue of timing, and judgement for the rats was granted by default.<sup>47</sup> The sophistication of the proceedings and the requirement of due process should be emphasised: we are not dealing here with what might be termed a "primitive mentality".

The people of Autun were faced with a crisis. No doubt all sorts of other measures to deal with it had been tried, in vain. No doubt, during all these legal proceedings, the people of Autun were killing as many rats as they could get hold of. Yet the legal proceedings dealt very seriously with issues of due process. The trial, however instituted, was to be seen as a common endeavour. The community as a whole would be involved. Whatever the technicalities of the pleadings, the plaintiff was in effect the community. The injured individuals were united in a single process against the common enemy. Something had to be done. Recourse was had to law as a last resort. We should not see here infinite faith that a conviction of the rats would stop their felonious behaviour. But all due formalities had to be observed, as is typical with "The Last Best Chance".

Trials of animals seem to fall into only two types:<sup>48</sup> first, where a particular animal has committed an especially atrocious act, but not a minor offence; second, where there is an ongoing crisis of epic proportions, not simply normal predations by beetles

<sup>47</sup> See, above all, Evans, *Criminal Prosecution*, 18–20; cf Ewald, "Comparative jurisprudence (1)", 1898–1901.

<sup>48</sup> I am relying on the evidence in Evans, *Criminal Prosecutions*.

or rats. For lesser offences no trial was called for; the creatures were simply put down, further proof that the trials are examples of "The Last Best Chance". One should not conclude from the trial of the rats of Autun, as Ewald for instance insists, that those involved would concede to all God's creatures a right to share in the fruits of the earth.<sup>49</sup> Such a feeling is entirely absent for the time from the slaughtering of pigs or cattle for food, or the mindless killing of rats going about their business in a normal year. I would conjecture that we should not be surprised that the rats of Autun won, yet not by an acquittal, but on a technicality. The same was also true of the beetles that infested the vineyards of St Julien in 1545 and subsequently.<sup>50</sup> I would suggest that in situations of ongoing destruction by small creatures the judges would be chary of pronouncing a sentence on them which in all probability would be to no avail. The majesty of the law is not lightly to be shown to be contemptible.

Trials of animals incidentally present very real problems for legal theorists such as Hans Kelsen who claim that "norms of a legal order regulate human behaviour".<sup>51</sup> They must emphasise that laws govern *human* behaviour, because for them law is about regulating conduct, and only humans can regulate their behaviour according to law. Hence they will wrongly claim that the "absurd legal content is the result of animistic ideas, according to which not only men, but also animals and inanimate objects, have a 'soul' and are therefore basically not different from human beings".<sup>52</sup>

## H. LEGAL HISTORY AND "THE LAST BEST CHANCE"

"The Last Best Chance" is a legal device. It is an official creation, whether of church or state, not obviously a creation of individuals that is then acquiesced in by the state.<sup>53</sup> The purpose is to resolve by legal process in some indirect way a pressing problem that cannot be coped with directly by law. It always involves an abuse of the law though I hesitate to suggest bad faith in the invention or use of "The Last Best Chance". "The Last Best Chance" involves a deviation from established principle or accepted practice in law: derogation from accepted standards of evidence, such as two eye-witnesses for proof of adultery in biblical law, or breach of the universal standard in Roman private law that a judicial award was always monetary. Typically, but not inevitably, "The Last Best Chance" appears at an intersection of law and religion. Then religion may also be abused. From the outsider's perspective there is also always some absence of rationality. But what is rational or an abuse is culturally determined. The existence of other abuses in law or religion in the society does not

49 Ewald, "Comparative jurisprudence (1)", 1914–1915.

50 For this see Evans, *Criminal Prosecutions*, 37–49.

51 *The Pure Theory of Law*, 2nd edn (translated by M Knight), (1967), 30–31.

52 *Ibid*, 31.

53 As at Rome were *manumissio censu* and *vindicta*.



indicate cynicism in the use of "The Last Best Chance". For "The Last Best Chance" to be appropriately used there must both be proper solemnity and some degree of faith in its power.

It is important for comparative legal historians to be on the watch for "The Last Best Chance"; otherwise they will make serious mistakes about the faith patterns and credulity of the people whose law they study, and about the relationship between law, religion, and society.

I have emphasised elsewhere that one often comes across a notion that I have termed "Law keeps out".<sup>54</sup> Some problems are often not regulated by law. It is, I suggest, very revealing for the postulates of a particular system that it applies legal rules where another system avoids such regulation. "Law keeps out" is important for understanding "The Last Best Chance". "The Last Best Chance" often occurs in a particular system precisely where other systems avoid resolution by law of the (very real) problem.<sup>55</sup>

### I. INTEGRITY OF THE SYSTEM

I have claimed that "The Last Best Chance" involves an abuse of law. More importantly, though less obviously, it functions to preserve the integrity of the system. Thus, for the biblical curse more is involved than a husband wishing to be rid of his wife. Divorce for the male was easy.<sup>56</sup> But the husband in this situation wanted and was insisting upon vengeance though he had not sufficient proof of the adultery. The curse was an innovation to avoid tampering with and reducing the strict standards of proof that were insisted upon for all capital—indeed, all criminal—cases.<sup>57</sup> The *legis actio sacramento* was provided to allow law to develop for situations not covered. Control was exercised because the elected official responsible would not allow the case to proceed to the next stage unless he felt the plaintiff's claim had some merit. The *iusiurandum in litem* preserved the principle that all awards in a private law suit should be in money. Trial by ordeal in the medieval West permitted the strict standards of proof to be otherwise maintained. The action in ancient Athens against a human unknown killer, animal or inanimate object, preserved the integrity of the legal system because it was brought in a special separate court.<sup>58</sup> The trial of the rats of Autun<sup>59</sup> preserved the integrity of the system by the insistence on

54 A Watson, *The Spirit of Roman Law* (1995), 172–179.

55 But "Law keeps out" is wider in scope than "The Last Best Chance". For instance, most societies would not regulate the issue of how long a mother should suckle her baby; but it is provided for—not by a dodge—in the Prussian *Allgemeines Landrecht für die preussischen Staaten* of 1794: §§ 2.267 et seq.

56 Deuteronomy, 24.1.

57 Ibid, 19.15.

58 I say nothing about the trials discussed by Blackstone because, like him, I am at a loss to know their origins.

59 Cf the trial of the beetles in the vineyards.

due process, even in a crisis, even against a hated, non-human adversary. The rats, after all, won.<sup>60</sup>

## J. CONCLUSION

I observed that Hans Kelsen has great problems in trying to fit trials of animals into his theory of positive law. He is not alone. Though I did not deal with the issue, such trials do not really fit my own rather different minimal definition of law: "Law is the means adopted to institutionalise dispute situations and to validate decisions given in the appropriate process which itself has the specific object of inhibiting further unregulated conflict."<sup>61</sup> Kelsen, further, also would have problems with the Israelite curse unless one, rather fatuously, wanted to argue that the rules were designed to regulate the conduct of the priest. Legal theory (which is not my concern in this paper) has to recognise "The Last Best Chance" for what it is, and somehow or other take account of its nature.<sup>62</sup>

60 I am not suggesting that "The Last Best Chance" is necessarily intentionally used to preserve the integrity of the system. Other typical features of law operate to the same effect. Thus, the prime factor in legal change is borrowing; but, strangely perhaps, one system is usually chosen to be the source more often than a variety of sources. Again, in a particular system there will be accepted parameters of reasoning: some types of argument, but not others, will be acceptable.

61 Watson, *Nature of Law*, 22.

62 I need scarcely add that for understanding the nature of law I find comparative legal history much more valuable than abstract legal theory.