SOUTH AUSTRALIA

FORTY-SIXTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE FORM OF OATH TO BE USED IN COURTS AND OTHER TRIBUNALS

1978

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE KING, *Deputy Chairman.*

B. R. COX, Q.C., S.-G., *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE WHITE.

D. W. BOLLEN, Q.C.

J. F. KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000

FORTY-SIXTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE FORM OF OATH TO BE USED IN COURTS AND OTHER TRIBUNALS

To:

The Honourable Peter Duncan, M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration the question of whether the form of oath used in Courts, which in one form or another requires the witness to tell the truth, the whole truth and nothing but the truth, should be altered to an adjuration that the witness will tell the truth "as I know it to be".

There are three forms of oath in common use in this State. The first is that which is used in trials on indictment of an alleged criminal offence, which is in the following words:— "The evidence which you shall give to the court and jury sworn to try the issues joined between our Sovereign Lady the Queen and the prisoner at the bar (or if the trial be for misdemeanour the defendant) shall be the truth, the whole truth and nothing but the truth. So help you God. Say 'I swear'." In civil cases the usual form of the oath is:—"The evidence which you shall give touching the matter now before the court shall be the truth, the whole truth and nothing but the truth. So help you God. Say 'I swear'."

There is an alternative form of oath which is sometimes used in civil proceedings in the Supreme Court. It reads:— "The evidence you shall give to the court to try the issues joined between the parties in this cause, shall be the truth, the whole truth and nothing but the truth, so help you God."

There is a shorter form of oath which is used both in criminal and civil proceedings such as where the witness is giving evidence for the first time only on the voir dire, or is being sworn to a purely formal matter, such as production of documents on subpoena duces tecum, in such cases as it is necessary to take an oath at all. That oath is in the form:— "You shall true answer make to all such questions as may now be put to you. So help you God. Say 'I swear'." So it is only in two out of the three forms of oath in common use that the adjuration appears to speak the truth, the whole truth and nothing but the truth.

None of these three forms of oath are prescribed by any statute in force in South Australia. The first two are certainly centuries old and there is no record of exactly when they were adopted.

After the edict of the Lateran Council in 1215 prohibiting the use of trial by ordeal, gradually the use of an oath in judicial proceedings became, over the centuries, the normal and accepted way of qualifying a person who was to give evidence in a cause. It was a process which took some four to five centuries to approach its modern form as to witnesses giving evidence: see *Holdsworth: History of English Law volume IX pages 177-185.*

It did not take long for the Courts to discover the truth of the words which Aeschylus puts into the mouth of Athene, "Oaths are not proof to make the wrong the right" (Aesch. Eum. 432) and so perjury became an offence, probably at first at common law, and then by statute. As Holdsworth says, perjury was made a statutory offence in 1562 by the

statute 5 Eliz. c.9. That statute remained in force until 1911 in England when it was repealed by the statute 1 & 2 Geo. V c.6, and parts of it may still be in force in South Australia. It has always been held that perjury was an offence at common law but it seems impossible to prove this strictly from history. The Chancery and the Star Chamber had power to punish perjury from 1494 by the statute 11 Henry VII c.24 and some forms of perjury became offences in 1540 by the statute 32 Henry VIII c.9, but the law of perjury in its modern form dates from the Elizabethan statute of 1562.

Originally a witness could not qualify to give evidence unless that witness was a Christian and was prepared to be sworn on the gospels. That was the law as stated by Coke: the witness must be sworn tactis sacrosanctis evangeliis. This position was criticised by *Hale: Pleas of the Crown Volume II 279.* As Holdsworth says: Volume IX page 191—

> "But Coke's intellectual outlook was often very mediaeval; and shortly after he wrote commercial considerations helped to give a decisive weight to the counter considerations of reason and tolerance. 'I take it', says Hale, 'that altho' the regular oath, as it is allowed by the laws of England, is *tactis sacrosanctis Dei evangeliis*, which supposeth a man to be a Christian, yet in cases of necessity, as in forein contracts between merchant and merchant, which are many times transacted between Jewish brokers, the testimony of a Jew *tacto libro legis Mosaicae* is not to be rejected, and is used, as I have been informed, among all nations'. Even in Spain the oaths of infidels who swore by their gods were admitted. 'And it were a very hard case if a murder committed here in England in presence only of a Turk or a Jew, that owns not the Christian religion, should be dispunishable, because such an oath should not be taken, which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the courts of England'. These principles were finally sanctioned by Lord Hardwicke and Willes, C.J., in 1744 in the case of *Omichund v. Barker.* And so, in this case, as in the case of the infant, the relaxation of the rule of absolute incapacity, had led the lawyers to see that the fact that a witness was not a Christian, was an objection, not to his competence as a witness, but to the weight of his evidence. 'But then', says Hale at the conclusion of his argument in favour of the competency of such witness, 'it must be agreed that the credit of such a testimony must be left to the jury'. "

It was held in the nineteenth century that the fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience: see *Sells v. Hore [1822] 3 B. & B. 232: 129 E.R. 1272,* a case in which a Jew was mistakenly sworn upon the gospels.

The present form of oath referring to the truth, the whole truth and nothing but the truth, was approved by the King's Bench Judges in January 1927, for use in civil and criminal courts: see *Halsbury's Laws of England 4th Edition paragraph 264 note 5,* but it had been in force for a long while before that.

However the law still is as it was laid down by Coke, that a new oath cannot be imposed upon any judge, commissioner or any other subject without authority of Parliament and the giving of every oath must be

warranted by Act of Parliament, or by the common law time out of mind: see *2 Institutes 479.* Accordingly if any alteration is to be made, it will have to be made by statute.

The law was altered in 1833 (3 & 4 Will. IV c.49) and again in 1838 (1 & 2 Vict. c.77) to provide that persons who have a tender conscience on this subject, such as Mennonites and Quakers, who interpret the injunction strictly "Swear not at all" as contained in St. Matthew 5:34 and James 5:12 may make an affirmation instead of being sworn. In more recent years the law has been further amended to permit atheists and persons of no religious belief to make an affirmation.

By Section 8 of the Evidence Act, 1929-1974, a person who objects to being sworn, on the ground that he has no religious belief, or that the taking of the oath is contrary to his religious belief or his conscience, or on any other ground that the Court thinks sufficient, or if the book upon which he requests that the oath be administered is not readily available to the Court, may make a solemn affirmation instead of taking an oath, which affirmation has the same force and effect as if the oath had been taken. The Committee thinks that it should not be necessary for a witness who desires to affirm to have to produce some religious or philosophical objection to the Court. It should be sufficient that he wishes to affirm and not to be sworn. Accordingly, although this goes beyond the terms of your remit, we would recommend to you for your consideration that Section 8 be amended by deleting all words after "sworn" in the first line down to "thinks sufficient" in line seven.

The present sections governing the administration of an oath are contained in Sections 6 and 7 of the Evidence Act and they read as follows:—

> "6. Subject to the provisions of this Act, and unless the person to whom an oath is administered requests that the oath be administered in some other manner, an oath, whether in judicial proceedings or otherwise, shall be administered and taken in the following manner, namely:—
>
> The person taking the oath shall, standing up, hold a copy of the Bible (New Testament or Old Testament) in his hand, and, after the oath has been tendered by the officer administering the same, shall utter the words, 'I swear':
>
> Provided that no oath shall be deemed illegal or invalid by reason of any breach of this section."
>
> "7. Notwithstanding anything in this Act or any other Act or law—
>
> 1. An oath, whether in judicial proceedings or otherwise, may be administered and taken in any form and in any manner which would have been lawful if this Act had not been passed:
> 2. Every such oath shall be binding for all purposes if it is administered and taken in any form and in any manner which the person taking the same declares to be binding:
> 3. Where any such oath has been administered and taken, the fact that the person taking the same had at the time no religious belief shall not for any purpose affect the legality or validity of the oath."

There is no doubt too that the ultimate adjuration of the oath has been shortened over the centuries. It appears from *Blount's Law*

Dictionary, 3rd edition (1717), s.v. "oath" and *Jacob's Law Dictionary (1739)*, s.v. "oath", that the ending in earlier times was "so help me God at his holy Dome" (i.e., the last day of judgment) and a reference is given to the *Black Book of Hereford, folio 46*. That form is still in use in Scotland in a different wording, namely "I swear by Almighty God as I shall be answerable to God at the great day of judgment", etc. Forms of oath have in fact differed in various particulars over many centuries in England: see *Encyclopaedia Britannica (1947 edition), volume 16, s.v. "oath", at page 663.*

At present as we have said there is no prescribed from of oath in judicial proceedings in this State except by long standing usage. There are of course prescribed forms of oath, contained in the Oaths Act, 1936, relating to oaths to be taken by Governors, Judges, and other persons holding public office, but nothing in this report is intended to deal with those special forms of oath.

We are mindful of the criticism in the letter that you sent us, that only the ignorant think that they know the whole truth, but we feel that if the witness was sworn to tell the truth, as he knows it to be, that would provide a subjective test which would make prosecutions for perjury very difficult indeed. The present forms have been in use for a very long time. The obligation is well understood by ordinary people as well as by those presiding in Courts which is a matter of considerable importance. We do not think that a case has been made out to disturb long established usage in relation to the matter, and we accordingly advise against making the change. We may add that this recommendation has the concurrence of the Acting Chief Justice of the Supreme Court and the Senior Judge of the Local Court each of whom read through and commented on this report in its draft stage.

If however Government feels that some alteration ought to be made we should like to draw attention to the Spanish form of oath referred to in *Ford on Oaths 8the Edition* (1903) *page* 52:—

> "Will you swear by God and by these holy Gospels to speak the truth to all you may be asked?"

To which the witness answers "I swear it".

Leaving out the references to the Almighty and to the Gospels, which is implicit in our form or oath in any event that form of oath is quite close to our short form of oath at present in use and would, we feel, be less liable to subjective, and sometimes to deliberate, misinterpretation by a less than candid witness.

There are two matters which arose out of the consideration of the draft report to which we think we should draw your attention although they go beyond the terms of your reference.

Mr. Justice Bright communicated with us about the present Section 8 of the Evidence Act. He said that the change made in the section in 1972 was as a result of representations made by him following difficulties experienced in a case he was trying. The Judge considers that the right to affirm given by the present Section 8 is seen by Buddhists (and possibly by those of other similar religions, e.g. Shinto) as being in a sense derogatory because it classes them in effect with atheists and agnostics. He told us that a Buddhist witness in the case before him was insistent that he was a religious man; the only difficulty was that his religion does not possess a sacred book like the Bible or the Qoran. Bright J. suggests that there ought to be a form of oath to meet such cases where the witness has a belief in a Supreme Being but has no holy

book such as "I swear in manner binding on my conscience that I shall truthfully answer the questions now put to me", and that Section 7 of the Act be amended accordingly.

The other matter arises from the case of *Flinders University v. Clark* (not yet reported) in which three members of the Committee were involved either as counsel or judges. In that case Judge Murray (as she then was) sitting as Chairman of a Board of Discipline set up pursuant to Section 20 of the Flinders University Act 1966-1973 administered an oath to witnesses appearing before the board and questions arose as to her power to do so. In fact the general power to swear witnesses otherwise than in Court proceedings is contained in Section 41 of the Acts Interpretation Act. No one who did not know where the power was contained would think of looking in that Act to find it, as was obvious when the appeal to the Full Court came to be heard. The reason for this is the purely historical one that the power was originally given by Section 21 of the Language of Acts Act 9 of 1872. We think that the section ought to be transferred either to the Evidence Act or the Oaths Act where an inquirer would reasonably expect to find it.

We have the honour to be

Howard Zelling

L. J. King

B. R. Cox

J. M. White

D. W. Bollen

J. F. Keeler

Law Reform Committee of South Australia

29th August, 1978.

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