

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
(LRC 34-1990)

REPORT
ON
OATHS AND AFFIRMATIONS

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon Mr. Justice Ronan Keane, Judge of the High Court, President;
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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-three Reports containing proposals for the reform of the law. It has also published eleven Working Papers, two Consultation Papers and Annual Reports. Details will be found on pp. 51-54.

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CHAPTER 1: INTRODUCTION

1. In its programme prepared in 1976 and approved by the Government, the Commission stated their intention of examining particular areas of the law of evidence with a view to reform. In particular, it was stated that the question of the desirability of retaining the oath for witnesses and jurors would be examined.
2. During the course of their examination of a topic referred to them by the then Attorney General on the 6th March 1987, i.e. *Child Sexual Abuse*, the Commission had occasion to consider the desirability of changes in the law as to the giving of unsworn evidence by children. In its Report submitted on the 17th August 1990 to the Attorney General, the Commission recommended that the law should be altered so as to enable courts to hear the evidence of children under the age of 14 without requiring them to give evidence on oath or affirm, provided the judge was satisfied as to the capacity of the child to give an intelligible account of events which he or she has observed. The Commission pointed out that it was in the process of examining the subject of oaths generally and would be presenting a Report to the Taoiseach on the topic in the near future. In the case of young persons between the ages of 14 and 17, it accordingly confined itself to recommending that the same regime as to the giving of sworn evidence should apply as would be proposed for adults generally in our forthcoming Report to the Taoiseach.
3. From the outset of its examination of the present law, it was clear that it was unsatisfactory in a number of respects. Two broad options for reform emerged almost immediately: either to abolish the oath for witnesses and jurors in all proceedings, civil and criminal, or to permit all witnesses and jurors to affirm, while allowing those who wish to take the oath to do so.
4. Last August, we circulated a Discussion Paper on this subject among interested persons and bodies and received a number of observations and submissions for which we are very grateful. Having carefully assessed the various views expressed, the Commission has now formulated final proposals for reform which are embodied in this Report.

5. The Commission express their gratitude to the following who assisted them in coming to their conclusions:

Eamonn Barnes, Esq.,
Director of Public Prosecutions

His Hon. Judge J. Gerard Buchanan

John Delahunty Esq.,
Chief Registrar of the High Court

The Hon Mr Justice Niall McCarthy

Rev. Enda McDonagh,*
Professor of Moral Theology,
St Patrick's College,
Maynooth

The Hon Mr Justice Rory O'Hanlon

Thomas P. Owens Esq.,
County Registrar,
County Cavan.

The Very Rev. John Paterson, B.D.,*
Dean of Christ Church

The General Council of the Bar of Ireland

We should emphasise that, while we much appreciate the assistance freely given by the foregoing, the Commission itself is solely responsible for the contents of this Report and recommendations.

*In his personal capacity

CHAPTER 2: THE CURRENT LAW

1. *The requirement that oral and written evidence be sworn evidence*

2.1 Sworn evidence is evidence given by a witness who has either taken an oath or made an affirmation as to the veracity of his testimony or, in the case of any affidavit or deposition made by him, as to the truthfulness of any statements contained therein. Whereas a witness giving evidence *viva voce* in open court must also be sworn in open court¹, specific provision² is made for the administering of oaths and affirmations by officers of the court or other persons appointed for the purpose of examining a witness who is permitted to make a deposition.³ In the case of affidavits, such evidence is usually sworn before a commissioner for oaths⁴, though it may also be sworn before a judge or any other person empowered to administer oaths⁵, such as the County Registrar of the Circuit Court⁶ or the Registrar, Assistant Registrar, Court Clerk or Senior Clerk or the High Court or Supreme Court.⁷

2.2 The general rule in both civil and criminal proceedings is that the *viva voce* or written evidence of any witness must be sworn. In the words of an American court in 1828:

"A man of the most exalted virtue, though judges and jurors might place the most entire confidence in his declarations, cannot be heard in a court of justice without oath. This is a universal rule of the common law, sanctioned by the wisdom of ages, and obligatory upon every court of justice whose proceedings are according to the course of the common law".⁸

1 *R v Tew*, Dears 429.

2 RSC O39, rr4 and 18; RCC O20, r3. Cf also RSC O85 r5 and RSC O86, r15.

3 Whereas in Circuit Court proceedings, a deposition may be made "where it shall appear necessary for the purposes of justice" (RCC O20, r3), in the Superior Courts the consent of the party against whom the deposition is offered must be obtained unless the Court is satisfied that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial (RSC O39, r17).

4 A commissioner for oaths is a person appointed by the Chief Justice to administer oaths and to take affidavits for the purpose of any court or matter (*Commissioners for Oaths Act 1889*, s1). Oaths include affirmations and declarations (*ibid*, s11). For the duties of a commissioner for oaths, cf *A Guide to Professional Conduct of Solicitors in Ireland*, ILSI (1988), Appendix C.

5 RSC O40, r5. For depositions taken outside Ireland, cf O 40, r7.

6 RCC O22, r1.

7 RSC O114, r1.

8 *Atwood v Welton*, 7 Conn 66, 72 (1828).

In consequence, a conviction or judgment founded on unsworn evidence may be set aside as a nullity.⁹ In civil proceedings, however, there is authority for the proposition that a party who acquiesces to the admission of unsworn evidence is not entitled on that ground alone to a new trial, providing always that no substantial wrong or miscarriage of justice has been occasioned by such admission.¹⁰ The principal practical consequence of the rule is that a person who asserts upon oath or affirmation the truth of some matter of fact material to the proceedings, which assertion he does not believe to be true when he makes it or of which he knows himself to be ignorant, may be prosecuted for the common law offence of perjury.¹¹

2.3 The most important exception to the requirement of sworn testimony, i.e. that relating to the evidence of children, has already been examined by the Commission in our Consultation Paper on Child Sexual Abuse,¹² and in our subsequent Report on the same subject we have made recommendations for the reform of the law relating to the tendering and acceptance of children's evidence in general.¹³

For the purposes of *viva voce* evidence, three further exceptions may also be noted. A witness called only to produce a document may give unsworn evidence provided that the identity of the document is either not disputed or can be identified by another witness.¹⁴ In addition, counsel acting for one of two parties who have reached a compromise may give unsworn evidence of its terms,¹⁵ though he has no general privilege from being sworn, even if he acts only as an interpreter.¹⁶ A judge or counsel may nevertheless give unsworn evidence by way of explanation of a case in which he acted as such. Finally, in criminal proceedings, the accused has a right to make an unsworn statement if he makes it by way of mitigation before the court passes sentence on him or, if unrepresented, to address the court or jury in like manner as his counsel or solicitor would have been so entitled if he had been represented.¹⁷

2.4 As regards written evidence, although this must generally be by way of deposition or affidavit and therefore be sworn in the usual manner, provision has also been made for the submission of such evidence by statutory declaration.¹⁸ This is a written statement of facts which the person making it, the declarant, signs and solemnly declares, conscientiously believing it to be true, before a notary public, a commissioner for oaths or a peace

9 So, in *R v Marsham, ex parte Pethick Lawrence* [1912] 2 KB 362, the accused, having been convicted of assault on summary trial on the basis of unsworn evidence, was held to have been properly retried by the same magistrates on the grounds that he was never in peril of a conviction on the first trial.

10 *Birch v Somerville* (1852) 2 Ir CLR 253 (in which the Lord Lieutenant in Ireland had sworn by his honour as a peer); *Andrews v Armit* (1971) 1 SASR 178 (Supreme Court of South Australia).

11 See para 2.28 below.

12 *Child Sexual Abuse, A Law Reform Commission Consultation Paper*, August 1989, chapter 5.

13 LRC 32 - 1990.

14 *Perry v Gibson* (1834) 1 Ad & El 48; *R v Gilmore* [1961] NZLR 384 (Supreme Court of New Zealand).

15 *Hickman v Berens* [1895] 2 Ch 638.

16 *R v Kelly* (1848) 3 Cox 75.

17 *Criminal Justice Act 1984*, s23. The 1984 Act abolished the former right of an accused to make an unsworn statement at the trial stage, cf *Criminal Justice (Evidence) Act 1924*, s1(h) and *The People v Riordan* [1948] IR 416 (CCA).

18 These were substituted for oaths in many cases by the *Statutory Declarations Act 1835* and are now required by many statutes, e.g., *Companies (Amendment) Act 1983*, s5(5). They are now governed by the *Statutory Declarations Act 1938*.

commissioner.¹⁹ Although the declarant will not be open to a charge of perjury for any false statement contained therein, by s6 of the Statutory Declarations Act 1938 it is a summary offence punishable by a fine of £50 and/or three months imprisonment to knowingly make a false or misleading declaration. The Schedule to the 1938 Act sets out the required form of such declarations.²⁰

Finally, it may be noted that a witness who, without lawful excuse, refuses to be sworn or to make an affirmation is guilty of contempt in the face of the court and may be fined and imprisoned.²¹

2. *History of the oath at common law*

2.5 The practice of administering an oath in judicial proceedings is rooted in the ancient concept of *judicium dei*, or divine judgment, shared by the early forms of proof in Anglo-Saxon law.²² These included trial by ordeal, trial by battle and compurgation. These forms of proof have themselves been traced to a pre-religious, indeed, pre-animistic period of history when supernatural beings were unknown and men were believed to possess magic powers which could be invoked through an uttered curse.²³ In this form, the oath was a traditional self-curse which could be used as security for a promise. As divine beings gained significance, the curse ceased to exist as an independent force, though it continued to work magically through the medium of the gods.²⁴ Eventually, the God of monotheistic religions acted as executor of man's oath. He was thought to respond to its magic, and it was believed to affect his actions with determinative power.²⁵

While pre-Christian Greek and Roman law occasionally employed oaths, many philosophers expressed grave doubts about their evidentiary efficacy and moral value.²⁶ Testimonial oaths were nevertheless institutionalised in Roman jurisprudence in the fourth century A.D., when Constantine, believing that he was following Christian practice, required witnesses' statements to be sworn.²⁷ This provision was later incorporated into the Code of Justinian,²⁸ and from that source it was adapted, primarily through the canon law, to all of

19 *Statutory Declarations Act 1938*, sections 1 and 2.

20 The form is set out in Appendix A to this Report.

21 E.g. *Hennegal v Evance* (1806) 12 Ves 201, 33 Eng Rep 77. In exceptional circumstances, the refusal may be justified, cf *Commercial Bank of Scotland v Lloyd's Gen Ital Assurance Co*, (1886) 2 TLR 780.

22 Cf Pollock, *English Law Before the Norman Conquest*, in 1 *Select Essays in Anglo-American Legal History* (1907) 88, and Thayer, *The Older Modes of Trial*, in Volume 2 of the same series (1908), at p367. An exhaustive examination of the origins and development of the oath is provided by Silving, *Essays on Criminal Procedure* (1964), pp1-188.

23 Silving, *op cit*, pp4-16.

24 The Assyrians, for example, believed in the autonomous operation of the oath long after the deity was first invoked in the oath formula, and in Greece and Rome, Zeus (Jupiter) was believed to strike perjurers with lightning, Silving, *op cit*, pp5-6, at notes 8 and 10.

25 Bentham attacked this notion as absurd and anti-Christian in making God the Sheriff and executioner and man the legislator and judge, in "Swear Not At All ..." (1817) 3-4.

26 Aristotle characterised the oath as "an unproved statement supported by an appeal to the gods", *Rhetoric* 17, and the Stoics advised shunning the oath whenever possible, *Thudichum* 4. The objection was based on moral, humanistic considerations relating to the dignity and veracity of man as a rational being, and not on theological grounds.

27 Constitution of Naissus, 334 A.D.

28 Code 4.20.9.

European Christendom.²⁹

2.6 Whether the oath had any foundation in Christianity is a matter of controversy. Both Jewish³⁰ and Christian authorities³¹ recognise that there is no warrant in the Bible for the requirement of a witness's oath, and several Biblical passages suggest censure.³² Moreover, the canon law was initially hostile to the reception of oaths, preferring to base its decisions on documentary and testimonial evidence.³³ It was only later, under the influence of Roman and Germanic law, that the oath became established as a rational means of proof and assumed, in criminal cases, the form of an oath of purgation.³⁴

As an early method of trial, compurgation involved an offering to prove by swearing an oath to the truth or falsity of the issue by the parties to the proceedings, who might, in addition, be supported by a number of oath helpers or compurgators.³⁵ Such oaths themselves decided the issue and were not subject to judicial scrutiny, even if the law otherwise recognised the principle of free judicial inquiry.³⁶ From the twelfth century onwards, the compurgators no longer swore to the issue but rather to their belief in the truth of their principal's oath, and as such oaths gradually fell into disfavour as a mode of proof in themselves, the rationale for the testimonial oath shifted towards the notion that it enhanced the credibility of a witness.³⁷

At first, by this "appeal to supernatural sanctions",³⁸ any person who swore falsely could expect the swift and certain vengeance of an omnipotent god bound to intervene on the side of truth. According to Wigmore, "[i]t was not a matter of weighing the credibility of a sworn statement; the thought was rather that such an appeal could not be made with impunity".³⁹ Thus, a sworn witness who remained unharmed after testifying was presumed to have been adjudged by God to have spoken the truth.⁴⁰

2.7 As the law entered a less superstitious age, the notion that truth was evidenced by the absence of an immediate physical manifestation of divine

29 Silving, *op cit*, pp16-80, traces the development of the various forms of oath in civil and common law countries to three sources, Roman law, Germanic law and canon law, though her essential thesis is that, in all forms, the oath remains essentially a primitive self-curse.

30 Cf. Boaz Cohen, "The Testimonial Oath, A Study in the Reciprocal Relations of Jewish and Roman Law in Medieval Europe", 7 *Historia Judaica* 51 (1945).

31 See the statement of the Council of Rome of 1725, cited in Moriarty, "Oaths in Ecclesiastical Courts, An Historical Synopsis and Commentary" (Catholic University of American Canon Law Studies No. 110, 1937), p33.

32 A clear condemnation of oath taking generally is expressed by Christ in Matthew 5: 33-37 and James 5:12. On the other hand, St. Paul remains the foremost Christian authority for the oath, e.g, Romans 1:9; 2 Corinthians 1:23, 11:11; and Hebrews, 6:13-6:16.

33 Silving, *op cit*, pp26-35.

34 *Ibid.*

35 *Supra*, note 22.

36 Therefore, observance of the ritual, rather than truthfulness, was of crucial importance. Any stumbling or stammering or any variation in gesture or bodily position was fatal; the oath was then said to have 'burst' and the proving party lost his cause. By the twelfth century, the requirements had become so elaborate that many preferred to take their chances with the hot iron, 2 Pollock & Maitland, *The History of English Law* (1952), 601.

37 Cf generally, Comment, "A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century" (1977) 75 *Mich L Rev* 1681; Weinberg, "The Law of Testimonial Oaths and Affirmations" (1976) 3 *Monash U L Rev* 268.

38 Pollock, *supra* note 22, at 92.

39 6 J. Wigmore, *Evidence in Trials at Common Law*, para. 1816 (rev'd J Chadbourn 1976).

40 *Ibid.*

retribution was supplanted by the effect of the oath on the 'mind and emotions' of the witness.⁴¹ On this view:

"The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon him to punish the false-swearer, but on the witness to remember that he will assuredly do so. By thus laying hold of the conscience of the witness, and appealing to his sense of accountability, the law best insures the utterance of truth".⁴²

Nevertheless, it was a necessary corollary of this doctrine that, in pledging his eternal soul as security for his promise to testify truthfully, the witness should believe in a supreme being who would punish him sooner or later for any false testimony.⁴³ In consequence, persons who were deemed to lack the requisite religious belief could not be sworn and were therefore not competent to testify.⁴⁴ As one court reasoned, "[i]t would indeed seem absurd to administer to a witness an oath, containing a solemn appeal for the truth of his testimony, to a being in whose existence he has no belief".⁴⁵

2.8 At common law, although no particular form of oath was prescribed, only Christians were initially deemed to possess the belief necessary to be sworn as witnesses.⁴⁶ In the 18th century, despite Coke's remonstrations that all 'infidels' were properly excluded from giving evidence,⁴⁷ it was nevertheless a customary practice to allow Jewish persons to testify.⁴⁸ So in *Robeley v Langston* (1667)⁴⁹ it had first been held that Jews sworn on the old Testament had sufficiently invoked the necessary obligations and sanctions required by the law, since both the old and new Testaments were considered to be the one 'word of God'.

It was not until 1744, however, that this competence was extended to other non-Christians. In *Omichund v Barker*,⁵⁰ the English Court of Chancery held

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- 41 Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv L Rev 177, 182 (1948).
- 42 *Clinton v State*, 22 Ohio St 27, 33 (1877), cited in Comment, *supra* note 33, at note 21.
- 43 So Coke maintained that "the oath ought to be accompanied with the fear of God", 4 Institutes of the Laws of England, 279 (London 1797). This doctrine can be distinguished from the earlier reliance on *judicium dei*, which sought a physical manifestation of divine interference as a sure gauge of testimonial truth. A judicial expression of this traditional view is to be found as late as 1786 in *R v White* (1786) Leach 430.
- 44 Although rejected much earlier in the United States, the requirement that the witness should also believe in divine punishment persisted at least until the end of the 19th century in England and Canada, e.g. *Maden v Catanach* (1971) 158 ER 512; *Bell v Bell* (1899) 34 NBR 615.
- 45 *Thurston v Whitney*, 56 Mass (2 Cush) 104, 110 (1848).
- 46 Cf Holdsworth, *History of English Law*, IX, pp190-91.
- 47 Coke defined the oath in exclusively Christian terms, 3 Institutes ..., *supra* note 39, at 165, this being a reflection of his view that "[a]ll infidels are in law *perpetui inimici*, perpetual enemies ... for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace". Calvin's case, 77 Eng Rep 377, 397 (KB 1609).
- 48 Hawkins, *A Treatise of the Pleas of the Crown*, Vol 4, para 153 (7th ed London 1795). In *Central Military Tract R.R. v Rockafellow*, 17 Ill 541, 552 (1856), a U.S. Court nevertheless characterised Coke's views as "a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and country". In fairness, though, his views met with similar criticism by the English Court of Chancery in *Omichund v Barker*, *infra*.
- 49 84 Eng Rep 196 (KB 1667).
- 50 125 Eng Rep 1310 (Ch 1744) at 1313 - 14, per Lord Willes, who distinguished in such a case between a witness's competency and his credibility, thereby suggesting that a jury might give more weight to the testimony of a Christian than a non-Christian.

that any person who believed in a god and in the solemn obligation of an oath was competent to testify once he had been sworn in whatever manner his conscience and religious convictions would find binding. Although the form of oath might vary, "still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say".⁵¹ In a critical limitation on its decision, however, the court stressed that persons who "do not think [God] will either award or punish them in this world or the next, cannot be witnesses in any case or under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them".⁵²

2.9 The broader competency of non-Christians established by *Omichund* was settled doctrine in England by the last half of the eighteenth century.⁵³ Indeed, the policy of swearing a witness by the peculiar method most binding on his conscience led to judicial approval of some unusual and even bizarre oaths. For example, the Chinese "chicken oath" involved the decapitation of a live cock followed by the incineration of the written oath;⁵⁴ other Chinese oaths included breaking a saucer⁵⁵ or snuffing a candle⁵⁶ at the witness box, with the exclamation that, should he not speak the truth, the witness's soul would likewise shatter or be extinguished. *Omichund* itself had been concerned with several Indian Gentoos who, upon receiving an interpretation of the customary English oath, assented by touching the hand or foot of a Brahmin priest.⁵⁷

Be that as it may, the common law continued to exclude the testimony of atheists, agnostics and other persons whose scepticism was irreconcilable with the oath. A witness's "own notions of honour, veracity, and amenability to criminal justice"⁵⁸ were thought no substitute for the fear of divine wrath. So, for example, a witness was excluded for his belief that "Nature" was God and that "when a man died, he died like a tree, and resolved into his natural elements".⁵⁹ A further limitation of the common law was that where it was impractical to swear an oath in accordance with the religious beliefs and practices of a witness,⁶⁰ or where the witness, although not precluded from being sworn as a result of his belief, could not indicate any form of oath binding upon his conscience,⁶¹ he could not be sworn at all.

Moreover, there continues to be some uncertainty as to the precise knowledge and understanding of religion required of a witness who wishes to take the oath. In the United States, after some initial confusion arising from

51 *Ibid*, at 1314.

52 *Ibid*, at 1315.

53 E.g. *The King v Taylor*, 170 Eng Rep 62. (KB 1790); *The King v Morgan*, 168 Eng Rep 129 (Old Bailey 1765), and generally, Lovekin, "The Whole Truth" [1960] 3 Crim LQ 227.

54 This was performed in the British Columbia case of *Rex v Ah Woocoy*, 9 B.C. 569 (1902). For a full description of the ceremony, cf Comment, *supra* note 37, at p1688.

55 *Regina v Entrehman*, 174 Eng Rep 493 (Central Criminal Court 1942). Wigmore, *supra* note 39, at 1818, relates that in one case concerning a Chinese gang fight the last witness stood ankle deep in smashed crockery.

56 Cf. Weinberg, *supra* note 37, at p31.

57 The term Gentoos was formerly used to describe Indian Hindus for the purposes of distinguishing them from Indian Muslims.

58 *Central Military Tract v Rockafellow*, *supra* note 48, at p554.

59 *United States v Lee*, 26 F Cas 908, 909 (CCDC 1834).

60 In *R v Moore* (1892) 8 TLR 287 and *R v Pritam Singh* [1958] 1 All ER 199, the evidence of Sikhs who had been prepared to swear on the Granth, a Sikh holy book, but who were affirmed instead due to its absence from the court, was held to be null and void.

61 This was the circumstance which precluded the swearing of a witness in *Nash v Ali Khan*, 8 Times Reports 444.

the publication of conflicting records of the *Omichund* decision,⁶² the majority of courts that had addressed the question by the middle of the nineteenth century had favoured the view that it was sufficient that the witness should have a basic belief in "God and his Providence" without any belief in future spiritual rewards or punishments, which belief was only relevant to credibility, and not to competence.⁶³ On the other hand, it was held by the Full Court of Queensland in 1977 that a child witness must also have an awareness of the divine sanction.⁶⁴

2.10 Recent Canadian and English decisions on the competence of children have been more liberal in reducing the question to whether the child understands the particular moral obligation to tell the truth.⁶⁵ In *R v Hayes*, the principle was stated as follows by the English Court of Appeal:

"It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct".⁶⁶

Commenting on similar decisions of Canadian courts, the Canadian Task Force on Uniform Rules of Evidence has argued that the same principles would apply to adults wishing to take the oath:

"The rationale of these cases is that in our modern secular age a witness need not profess a religious belief either in God or in future rewards and punishments. Children, particularly, may not have formed religious beliefs. The object of the law in requiring an oath is to get at the truth by obtaining a hold on the conscience of the witness'. The oath may obtain such a hold, say these most recent cases, upon those who do not profess religious beliefs but do not deny the possibility of the existence of a God or future rewards or punishments and who show that they realize that it is right and important to tell the truth in court and that, by taking an oath, they are in conscience bound to do so. Thus, a person who denies the existence of God or future rewards or punishments depending upon conduct on earth could not swear an oath even under this liberal test because the oath is an appeal to a supreme being whose existence the witness denies and his conscience is not bound by it. These latest cases would make the oath available to all witnesses except those who profess that an appeal to a supreme being is meaningless for them or who have religious

62 For an account of these cases, cf, Comment, *supra* note 37, pp1688-1690.
 63 E.g. *Hunscow v Hunscow*, 15 Mass 184 (1818); *Smith v Coffin*, 18 Me 157, 160 (1841); *Brock v Milligan*, 10 Ohio 121 (1840).
 64 *R v Brown* [1977] Qd R 220.
 65 *R v Hayes* [1977] 2 All ER 288; *R v Bannerman* (1966) 48 CR 110, requiring at least a belief in a deity, though later Canadian cases speak only of a moral obligation to tell the truth, e.g. *R v Taylor* (1970) 1 CCC (2d) 321; *R v Dinsmore* [1974] 5 WWR 121 (Supreme Court of Alberta).
 66 *Op cit*, per Bridge LJ for the court, at p291. The court added that the question of such understanding being very much within the discretion of the trial judge, an appeal court would be very reluctant to overturn such a finding. Hayes has been followed on subsequent cases, e.g. *R v Campbell* [1983] Crim LR 174 (child of 10 years and 4 months); *R v Bellamy* (1986) 82 Cr App R 222 (a mentally handicapped person).

objections to the oath".⁶⁷

3. *Statutory intervention*

2.11 The exclusion of atheists and agnostics from giving evidence was not the only difficulty created by the common law rules relating to the swearing of oaths. Members of certain Christian sects, namely the Quakers, the Separatists and the Moravians, refused to be sworn on the grounds that the act of swearing was blasphemous.⁶⁸ For such persons, it was precisely the strength of their belief in divine accountability which prevented them from taking the customary oath. In order to permit persons of such religious convictions to be 'sworn' within the confines of their faith, the law therefore developed the affirmation - a formal declaration, without direct reference to divine authority, that the witness recognises and will uphold his full obligation to tell the truth.

2.12 As a result of the greater religious toleration which followed the ascent of William and Mary to the throne, the right of Quakers to give evidence on affirmation was first established by statute in England in 1696.⁶⁹ This Act, however, continued to bar Quakers from giving evidence "in any criminal cause",⁷⁰ a limitation which was also preserved in respect of Moravians when the right to affirm was extended to them in 1749.⁷¹ The 'criminal cause' restriction was eventually removed by statute in 1828,⁷² and in 1833 the law was clarified by two further enactments which also applied to Ireland and which finally established the right of Quakers, Moravians and Separatists to make an affirmation in all proceedings requiring an oath.⁷³ Similar provision was made for former Quakers and Moravians by an Act of 1838.⁷⁴

The Common Law Procedure Amendment Act (Ireland), 1856,⁷⁵ extended the right to affirm in civil proceedings to all persons who refused or were unwilling from alleged conscientious motives to be sworn, whether in relation to *viva voce* evidence or evidence by affidavit or deposition, and in 1861 this more general provision was extended to all criminal proceedings.⁷⁶

All of these statutes had certain common elements, namely that such affirmations were for all purposes to have the equivalent force and effect of an oath, that the same penalties would result for any false statements as for perjury, and that the judge or other presiding officer or person qualified to take affidavits or depositions should be satisfied as to the sincerity of the conscientious objection. In this respect, the extension of the affirmation during this period did nothing to abrogate the established belief requirement. The affirmation, rather, enabled certain persons, otherwise competent to be

67 *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982), p236 (footnotes omitted). In one case, the British Columbia Court of Appeal held that adult witnesses likewise need not have a religious belief in order to be sworn, *R v Dawson* (1968) 4 CRNS 263.

68 The belief stemmed in part from the Biblical admonitions against swearing in Matthew 5:34 and James 5:12. Of the three groups, the Quakers were the most extreme in their repugnance of the oath, cf. Comment, *supra* note 37, at note 53.

69 7 & 8 Will 3, c34.

70 Section 6.

71 22 Geo 2, c30.

72 9 Geo 4, c32.

73 3 & 4 Will 4, c49 (Quakers and Moravians); 3 & 4 Will 4, c81 (Separatists).

74 1 & 2 Vict, c77.

75 19 & 20 Vict c102. The equivalent English enactment was passed 2 years earlier.

76 24 & 25 Vict, c66.

sworn under the common law oath, to testify without violating their religious scruples. However, a person who had no genuine religious belief could neither swear nor affirm.

2.13 The rigour of this rule was alleviated somewhat by the Evidence Further Amendment Act, 1869,⁷⁷ and the Evidence Amendment Act, 1870,⁷⁸ which substituted for all proceedings a requirement that the person having authority to administer oaths should be satisfied, on objection, that the taking of an oath would have no binding effect on the objector's conscience.⁷⁹ Finally, by the Oaths Act 1888,⁸⁰ all of the above enactments, apart from those relating to Quakers, Moravians and Separatists, were repealed, and the abolition of all restrictions on the testimony of agnostics and atheists was made explicit. Sections 1 and 3 of the 1888 Act provide as follows:

1. Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

.....

3. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath.

In addition, the Act set out the prescribed forms of such oral and written affirmations,⁸¹ and also facilitated the taking of an oath in the traditional Scottish form.⁸² These were in turn supplemented by the Oaths Act 1909,⁸³ which set out the prescribed forms of oath for Christians and Jews⁸⁴ and expressly preserved the common law right of a person other than a Christian or Jew to take an oath in any manner which was then lawful.⁸⁵

2.14 It should be noted that a further statute of 1838,⁸⁶ which sought to remove any doubts as to the validity of oaths administered other than in the usual form at common law, remains in force in Ireland.⁸⁷ Although merely

77 32 & 33 Vict, c68.

78 33 & 34 Vict, c49.

79 The requirement that the oath would have no binding effect on the person's conscience is more flexible than the criteria now in force, i.e. that the oath is either contrary to a person's religious belief or that a person has no religious belief, though this restriction was not recognised at the time of the passing of the 1888 Act.

80 51 & 52 Vict, c46.

81 Sections 2 & 4.

82 Section 5.

83 9 Edw 7, c39.

84 Section 2(1).

85 Section 2(2).

86 1 & 2 Vict, c105.

87 In England, the Act was repealed in part by the *Perjury Act 1911*.

declaratory of the common law, it continues to provide the legal basis for all such oaths as are administered to witnesses and persons making affidavits or depositions in a form or manner other than provided for by the Oaths Acts, 1888 and 1909.⁸⁸ Its sole provision states:

"That in all Cases in which an Oath may lawfully be and shall have been administered to any Person, either as a Juryman or a Witness, or a Deponent in any Proceeding, Civil or Criminal, in any Court of Law or Equity in the United Kingdom, or on Appointment to any Office or Employment, or on any Occasion whatever, such Person is bound by the Oath administered, provided the same shall have been administered in such Form and with such Ceremonies as such Person may declare to be binding; and every such Person in case of wilful false swearing may be convicted of the Crime of Perjury in the same Manner as if the Oath had been administered in the Form and with the Ceremonies most commonly adopted".

2.15 Finally, it has been established that a failure to strictly comply with the statutory form of oath or affirmation will not in itself render the evidence given invalid. In all cases, the question is whether the particular form and ceremony were in fact binding on the person's conscience.⁸⁹

4. *Jurors*

2.16 The origin of the jury in English law is probably to be found in the importation, from Normandy, of a system of inquisitions in local courts by sworn witnesses.⁹⁰ As originally established, the function of the jury was not to weigh evidence but to decide on the basis of their own knowledge or on the general belief of the district, which they could readily ascertain, and for this reason they were always selected from the hundred or district where the question for decision arose. By the fifteenth century, all evidence was required to be given at the bar of the court, and the judges were enabled to exclude improper evidence. Nevertheless, it was not until the early eighteenth century that jurors were held to be barred from relying on their own knowledge in addition to the evidence.⁹¹

So long as jurors were supposed to make findings from their own knowledge, it followed that they would be guilty of perjury if they gave a wrong verdict. They were also liable to the writ of attainr where by the cause was tried again by a jury of 24 persons, and if their verdict was overturned, they were liable to be arrested and imprisoned, their lands and goods forfeited, and they became infamous.⁹² The independence of jurors was eventually established in 1670⁹³ and the writ of attainr fell into disuse, though it was not abolished until 1825.

88 And those relating to Quakers and Moravians. The special *Act for Separatists* (3 & 4 Will 4, c82) was repealed by the *Statute Law Revision Act 1890* (53 & 54 Vict, c33). Arguably, section 2(2) of the 1909 Act provides for a similar statutory authority for oaths admitted under the common law rules, though the fourth edition of Stringer, *Oaths and Affirmations in Great Britain and Ireland* (1928) prefers the older and more specific authority.

89 E.g. *R v Chapman* [1980] Crim LR 42 (CA, witness failed to take Testament in his hand).

90 Cf generally, Cornish, *The Jury*.

91 *Ibid.* Cf Silving, *supra* note 22, pp61-63.

92 The Tudor and Stuart Kings sometimes also had recourse to the illegal practice of fine and imprisonment by the Star Chamber as a means of punishing a jury for a false verdict, or where it has failed to convict.

93 *Bushell's Case* (1670), 1 St Tr 869; Vaughan 135.

2.17 In consequence, the origins of the jury are rooted in proof by witnesses and in the modes of proof employed by them. According to Thayer:

"[T]he accused party "tried" his own case by undergoing the given requirement as to hot iron, or water, or the crumb. So of the oath, the question, both law and fact, was 'tried' merely by the oath, with or without fellow-swearers And so when out of the midst of these methods first came the trial by jury, it was the jury's oath, or rather their verdict, that 'tried' the case".⁹⁴

Similarly, it was the number of jurors, like the number of compurgators, which served to increase the force of the oath and to decide the case.⁹⁵ According to Silving, "it is difficult to trace the process of thought which led to separation of the jury verdict from the jury oath or to determine the exact time in history when the members of the jury began to function as judges who reach a decision on the basis of evidence presented during trial".⁹⁶ Nevertheless, whether being required to give an answer to particular questions on oath or to evaluate the evidence on oath, the limitations of the common law rules relating to witnesses applied equally to jurors and the rationale of the oath was the same - that the taker of the oath would be subject to divine retribution if he violated what he swore to do.

2.18 Whereas the 1833 and 1838 Acts relating to Quakers, Separatists and Moravians,⁹⁷ as well as the 1838 Act which sought to codify the common law,⁹⁸ were of general application and therefore also applicable to jurors, the reforms introduced in subsequent Acts were limited to witnesses and deponents only. In England, jurors who refused to take the oath for alleged conscientious motives were permitted to affirm, subject to an inquiry as to the sincerity of such motives, by a statute of 1867.⁹⁹ In Ireland, however, it was not until 1888 that any general right of affirmation was introduced in respect of jurors and, as in the case of witnesses and deponents, the Oaths Act 1888 continues to govern the law relating to the eligibility of a juror to make an affirmation today.

On the other hand, the forms of oath provided for in the 1909 Act were superseded in respect of jurors by sections 53 and 54 of the Juries Act 1927,¹⁰⁰ and these provisions have now been re-enacted, with some modifications, in the Juries Act 1976.¹⁰¹ Section 17 of the 1976 Act provides, *inter alia*, as follows:

17.-(1) When swearing a juror the registrar or other officer acting as registrar shall call out the juror's name and direct him to take the Testament in his hand and shall administer the oath to him in accordance with sections 18 and 19.

94 'Law and Fact' in *Jury Trials* (1890) 4 Harv L. Rev 156-7.
 95 Silving, *op cit*, p62.
 96 *Ibid*.
 97 *Supra*.
 98 *Supra*.
 99 30 & 31 Vict, c35.
 100 No. 23 of 1927.
 101 No. 4 of 1976.

(2) The jurors shall be sworn separately.¹⁰²

(3) Any juror who objects to be sworn in the ordinary manner shall make his objection immediately after his name is called out and before the administration of the oath to him has begun.

...

(5) If any juror refuses to be sworn or insists on being sworn in a manner not authorised by this Act or otherwise by law, he shall not be included in the jury then being sworn.

...

(7) In this section and in the following section the word 'Testament' means, in the case of a person of the Christian faith, the New Testament and, in the case of a person of the Jewish faith, the Old Testament.

Section 18 provides:

18.-(1) The ordinary manner of administering the oath shall be as follows:

The juror to be sworn shall hold the Testament in his uplifted hand and the registrar or other officer shall say to the juror the words 'I swear by Almighty God that ...' followed by the appropriate form of oath provided by section 19 and the juror shall repeat after him the words so spoken by him.

(2) The Oaths Act, 1888 (which provides for the making of an affirmation instead of an oath) and also every Act for the time being in force authorising an oath to be taken in a court in any particular manner shall apply to the oaths required by this Act to be taken by jurors.

(3) A juror who states that he has a religious belief but that he is neither of the Christian nor of the Jewish faith may, if the judge so permits, be sworn in any manner that the juror states to be binding on him.

(4) The oath shall be administered to every juror in the ordinary manner without question unless the juror appears to be physically incapable of taking the oath in that manner or objects to taking the oath in that manner and satisfies the judge that he is entitled to take the oath in some other manner.

Section 19 of the Act provides for the particular forms of oath to be administered to jurors in particular proceedings, and these are set out in Appendix A.

Although section 18(3) would appear to place a limitation on the right of a Christian or Jew to take an oath other than that prescribed as the usual

¹⁰² Formerly jurors could be sworn in groups under the 1927 Act. The older common law authorities, however, show that in criminal cases it was the practice to place a folio Bible on a stand in view of the defendant, where upon each member of the jury approached and laid his hand upon it when called to do so, *R v Mellor* (1858) Dears & B 468, 470.

form, this is clearly not the case¹⁰³ - the right to choose the form most binding on one's conscience under the 1888 Act is preserved by the provisions of s18(2). By virtue of the 1888 Act, a juror may also swear in the Scottish form¹⁰⁴ and any oath taken by him will not be invalidated by the fact that he had no religious belief at the time it was administered without objection.¹⁰⁵

2.19 The number of jurors to be sworn is, by long tradition,¹⁰⁶ twelve, and if less than twelve are sworn the verdict will be ineffectual.¹⁰⁷ However, if more are sworn it appears that the subsequent proceedings will be valid, the jury consisting of the first twelve sworn.¹⁰⁸

It has long been established that misbehaviour by a juror in court may constitute a contempt in the face of the court,¹⁰⁹ and presumably, by analogy with witnesses, this would include a refusal to be sworn or to make an affirmation. Nevertheless, s37 of the 1976 Act provides that any person who, on being called upon to be sworn as a juror, refuses to be sworn in a manner authorised by the Act or otherwise by law is guilty of an offence and liable on summary conviction to a fine of £50.

5. *The form and manner of administering oaths and affirmations*

2.20 The above common law and statutory scheme continues to govern the law relating to the administering of oaths and affirmations to witnesses in Ireland. In addition, it has been seen that the provisions of the 1888 Act, and hence the forms of oath permitted to be sworn at common law,¹¹⁰ apply also to the swearing of juries under the Juries Act 1976. As it emerges from the operation of this scheme and from the decided cases and practice of courts, the required form and manner of administering oaths and affirmations may be summarised as follows.

A witness or a person making a deposition or affidavit who is of the Christian or Jewish faith will, unless he voluntarily objects thereto or is physically incapable of so taking the oath, be sworn without question in the manner laid down by s2 of the Oaths Act 1909:

"The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that ...", followed by the words of the oath prescribed by law."¹¹¹

According to McNally,¹¹² it has been the custom in Ireland to swear Roman Catholics upon a New Testament with a crucifix or cross upon it.

103 A similar confusion arises from the wording of s2(2) of the 1909 Act in respect of witnesses and deponents.
 104 Section 5.
 105 Section 3.
 106 Bacon, *Abr Juries*, A.
 107 2 Hale, 296.
 108 *Ibid.*
 109 E.g. *Wellden v Elkington* (1578) 2 Plowd 516.
 110 Pursuant to the provisions of the 1838 Act, 1 & 2 Vict, c105 *supra* note 82, which also expressly applies to jurors.
 111 The form of wording appropriate for taking oaths and affirmation respecting is set out in Appendix A.
 112 *Evidence*, 97.

2.21 Although the words of this section would appear to require that a Jew swear on the Old Testament, it seems clear that a Hebrew version of the Pentateuch, being the Jewish Testament, would come within the statute.¹¹³ On a similar construction, a Christian could use a copy of the Gospels. A Jew may be sworn with his head covered or uncovered, though the name 'Jehovah' should not be substituted for the name 'God'.¹¹⁴ In this connection, Stringer asserts that it is in any case contrary to the Jewish faith to invoke the name 'Jehovah'.¹¹⁵ A better view, however, would appear to be that the swearing of an oath on the Old Testament is also directly contrary to the Code of Jewish Law, whose adherents are enjoined whenever possible to abstain from taking oaths.¹¹⁶

If a person has been sworn without objection in the usual manner, no subsequent objection can be made to his testimony on the ground that being of a different faith, the oath is not in a form affecting his conscience¹¹⁷ or that some other form is more binding.¹¹⁸ In addition, it has been seen that specific statutory provision has been made for the validity of an oath taken without objection by a person who at the time of such taking had no religious belief.¹¹⁹

Section 5 of the Oaths Act 1888 provides that if a person "desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland", he shall be permitted to do so without further question. In this case, the witness stands, and holding up his right hand, repeats after the officer, no book being used: "I swear by Almighty God (as I shall answer to God at the Great Day of Judgment) that ..." etc. In Scotland, however, it is the practice for the presiding judge to administer the oath, himself standing with uplifted hand and pausing after uttering each clause until the witness has repeated it audibly after him.¹²⁰ In criminal trials, the words in brackets are omitted. This form of oath is said to be as old as Abraham, who, when he swore that he would take nothing from the King of Sodom, "lifted up his hand to the most High God".¹²¹

2.22 Apart from these three statutory examples, all other forms of oath derive from the practices developed by the courts at common law. As indicated above, although it is provided by a statute of 1838 that any oath will be valid provided it has been administered in such form and with such ceremonies as the person taking the oath himself declares to be binding, the common law continues to require that such persons at least have a belief in a supreme being to whom they are answerable.

In consequence, when there is any departure from the form of oath prescribed by the Oaths Acts, the oath must be administered so as to bring it within the provisions of the 1838 Act. For this purpose, the commissioner for oaths or judge or officer of the court must be guided as to the form or

113 Stringer, *supra* note 88, pp104-105.

114 *Ibid*, p104.

115 *Ibid*.

116 Cf Weinberg, *supra* note 37, p32 citing Ganzfried and Goldin, *Code of Jewish Law* (revised ed) Vol IV p70.

117 *Sells v Hogre*, 3 Brod & Bing 232.

118 *The Queen's Case*, 2 Brod & Bing 284.

119 *Oaths Act 1888*, s3.

120 This is the practice according to most authorities, e.g. *Phipson on Evidence* (12th ed 1976), para 1520, though Renton & Brown's *Criminal Procedure according to the Law of Scotland* (Ed 1984) indicates that this is only the case for witnesses, as jurors are sworn by the clerk of court.

121 *Phipson on Evidence*, *op cit*, para 1520.

ceremony by the statement of the witness, who must state that the particular mode of swearing is binding on his conscience. Then, whatever it may be, he may be so sworn and will be duly bound by his oath.¹²²

As regards Christians, a Roman Catholic may, if he so demands, be sworn on the Bible or the Douai Testament.¹²³ A Methodist, on objecting to being sworn on the New Testament, was permitted to be sworn on the Old,¹²⁴ and a member of the Greek Orthodox Church has been allowed to swear by pointing two fingers of his left hand upwards and calling on Heaven to witness his statements.¹²⁵ Formerly, it was the practice of Christians to kiss the Book after repeating the words of the oath. This process, however, came to be regarded as unsanitary and its abolition was one of the principal reasons for introducing an ordinary verbal form on all occasions by the Oaths Act 1909.¹²⁶ Nevertheless, if a witness voluntarily objects to the above form and requests to be sworn, as formerly, by kissing the Book, he may still do so, and may use his own Testament.¹²⁷

2.23 For persons other than Christians or Jews, the modern practice is to inquire what oath a witness or deponent will regard as binding and to swear him accordingly.¹²⁸ However, a system of oaths allegedly conforming to the beliefs of other religions grew up in the nineteenth and early twentieth centuries founded on the assumption that these oaths were in ordinary use in their own 'native' courts.¹²⁹ For example, a form of oath believed to be binding on a Buddhist is:

"I declare, as in the presence of Buddha, that I am unprejudiced, and if what I speak shall prove false, or if by colouring truth others shall be led astray, then may the three Holy Existences, Buddha, Dhamma, and Pro Sangha, in whose sight I now stand, together with the Devotees of the twenty-two Firmaments, punish me and also my migrating soul!"¹³⁰

It appears that a Siamese Buddhist may include a call to bring upon himself various kinds of death if he breaks his oath and also that he might migrate into the body of a slave for as many years as there are grains of sand in the four seas and, after this, that he might be born a beast through five hundred generations and an hermaphrodite for five hundred more.¹³¹

However, Buddhists are not sworn in countries where that faith is dominant,¹³² and it appears that this form of oath is insulting to Western Buddhists and would have no particular effect on their conscience - Western Buddhists do not even recognise the deity of Dhamma.¹³³ In one case, a Japanese Buddhist was allowed to sign the words: "The statement I shall make before the court shall be in the whole nothing but the truth, according

122 Stringer, *op cit*, p121.

123 *Ibid*, p105.

124 *Edmonds v Rowe*, R & M 77.

125 The Times, Jan 26, 1918, p3 cited in Phipson, *op cit*, para 1521.

126 *Per* Stringer, *op cit*, pp106-107. Wigmore, *supra* note 35, para 1818, describes the practice as 'repulsive'.

127 *Kabey v Birch*, 72 JP 106.

128 *Phipson on Evidence*, *op cit*, para 1522.

129 For criticism, cf Weinberg, *supra* note 37.

130 Stringer, *op cit*, p165; Weinberg, p32.

131 W Kett, *Oaths* (1952) 25 ALJ 681.

132 Phipson, *op cit*, para 1522.

133 Weinberg, *op cit*, p32 note 23.

to the custom, religion and belief of this country and my own"; while in another, a person unable to say what form was binding, as oaths were unknown in Japan, was directed to snuff a lighted candle, declaring that, if speaking falsely, his soul would be extinguished like a flame.¹³⁴

As noted above, the forms of oaths adapted to Chinese witnesses have also included the smashing of crockery, the burning of sacred characters and the beheading of a rooster. Yet these 'oaths' are misconceived exotics of European origin apparently deriving from the rituals attaching to certain secret societies, which bear no relationship at all to Chinese court procedure (either before or after the establishment of the People's Republic of China in 1949), where no oath is used.¹³⁵ Similar objection may be made in respect of other religions, which vary in their attitude to the taking of oaths and to the particular forms applicable.

Moslems are sworn on the Koran, the witness placing his right hand flat upon the book, putting his left hand on his forehead, and bringing his head down to the book; the officer then asks if he is¹³⁶ bound by this ceremony to speak the truth, and the witness replies that he is. It appears, however, that such a ceremony is not in conformity with the dictates of Islam, and that it would in fact be an embarrassment to Moslems.¹³⁷ Moreover, although some Hindus may be prepared to swear an oath on the Holy Gita, the Ramayana or the Vedas, many would regard the notion of an oath as itself entirely alien to their beliefs.¹³⁸ In India, both Hindus and Moslems are given an absolute right to affirm in lieu of taking an oath.¹³⁹

Similarly, Sikhs do not regard their scripture, the Guru Granth Sahib, as a holy book outside the temple, and the Punjab High Court has ruled that on no account may a Granth even be brought into court.¹⁴⁰ In England, Sikhs are still often asked to take an oath on this book, though it is clearly not binding on their conscience. Where the oath is so taken, the witness, having washed his hands, removed his shoes and covered his head with a large handkerchief, repeats the oath: "I swear by our Guru Nanak, the Founder of the Sikh religion, that ..." The Granth must be placed in a box for the witness himself to remove and cannot be touched by anyone not of the Sikh faith.¹⁴¹

Members of the Bahai faith are prepared to take an oath on their Holy Book, the Book of Aqbas,¹⁴² and a Parsee may be sworn on the Zendavesta or, if unavailable, while holding a 'holy cord' wound round his body.¹⁴³ Stringer gives the following Parsee form of oath: "I swear that ..., by God,

134 Phipson, *op cit*, para 1522, notes 77 & 78.

135 Weinberg, *op cit*, p31.

136 Stringer, *op cit*, p165. A verbal form of oath is provided by Johnson, *The Witness Sworn Saith* (1956) 30 ALJ 75, 76, citing *R v Morgan* (1764) 1 Leach 54, as follows: "I swear with the sacred Koran in my hand before Allah, that the evidence, etc ... Allah is my judge and my maker".

137 Weinberg, *op cit*, p32, note 24.

138 *Ibid*, note 25. Johnston, *op cit*, p76, gives the following verbal formula: "I swear by the Holy Waters of the Ganges and by the Sacred Animal the Cow, that etc ... If I do not tell the truth may my soul be damned". In 1974, a Hindu woman who was required to repeat this oath with a glass of water in her hand complained to the Secretary of the Victoria Law Department that it was entirely meaningless, Weinberg, *op cit*, p27.

139 By the *Oaths Act 1969* (India).

140 Weinberg, *op cit*, p33 note 28.

141 Cf Love [1958] Crim LR 324-25.

142 Weinberg, *op cit*, p33, note 27.

143 Stringer, *op cit*, p167.

God omnipresent, and God omnipotent, the God Almighty".¹⁴⁴ Finally, Scientologists have no particular objection to any form of oath, regarding their own beliefs in the 'Eighth Dynamic' as compatible with other faiths.¹⁴⁵

2.24 The number of possible binding forms of oath, then, are as infinitely extensible as the possible permutations of human faith. At first sight, this would appear to reflect an admirable degree of flexibility in the law. On examination, however, there are a number of difficulties in the operation of the scheme in respect of persons having a religious faith.

In the first place, it has been seen that many of the oaths developed by the courts are in fact regarded as either meaningless or blasphemous by the laws of the religions to which they are meant to apply. In such circumstances, the proper course would appear to be to swear by affirmation under the Oaths Act 1888. However, under s.1 of that Act, persons may only make an affirmation if they object to being sworn on one of the two grounds stipulated, i.e. that they have no religious belief or that the taking of an oath is contrary to their religious belief. In this respect, it is the duty of the judge or other person administering the oath to ensure that these statutory conditions are strictly complied with before permitting an affirmation,¹⁴⁶ so that if a person objects on grounds other than the above¹⁴⁷ or, though not objecting to an oath, cannot state what form is binding,¹⁴⁸ he cannot affirm. As a result, he will be adjudged incompetent to give evidence.

Similarly, where a person indicates that he is willing to be sworn in a particular manner and it is not reasonably practicable to administer the oath as requested, any evidence given by him on affirmation will be held to be null and void pursuant to s1 of the 1888 Act.¹⁴⁹ In the United Kingdom, this latter difficulty has been overcome by s5(2) of the Oaths Act 1978, which provides that a person may be permitted, and even required, to affirm where "it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief". It does not, however, overcome the problem of a person who has a religious belief but who is unable or unwilling to indicate what form of oath is binding. No similar legislation has been enacted in Ireland.

A final difficulty which arises relates to the improbable spectacle of persons desiring to be sworn in a manner which is neither contrary to the common law nor impracticable, but which is either so ludicrous in the eyes of ordinary people as to bring the whole procedure into disrepute, or which is so scandalous as to stretch the bounds of freedom of worship. Subject always to an inquiry as to the genuineness of the belief, it has been pointed out in this connection that there would appear to be no bar on a Satanist invoking the Devil or on a member of an obscure sect which worships goldfish from taking an oath which he claims to be binding while holding a goldfish in his hand.¹⁵⁰

2.25 It has already been seen that persons who have no religious belief may be sworn without objection and that their evidence will be valid by virtue of s3 of the 1888 Act. The judge or other person entitled to administer the

144 *Ibid.*

145 Weinberg, *op cit*, p33 note 26.

146 *R v Moore*, 61 LJMC 80; *Nash v Ali Khan*, 8 TLR 444; *R v Clark* [1962] 1 WLR 180.

147 *R v Clark*, *op cit*.

148 *Nash v Ali Khan*, *op cit*.

149 *R v Moore*; *R v Pritam Singh*; *supra* note 60.

150 Weinberg, *op cit*, p30 and p33, note 29.

oath is nevertheless entitled to question such person at any stage of his evidence in order to ascertain whether he recognises the obligation of an oath.¹⁵¹ If he objects to the oath, he must, in order to come within s1 of the 1888 Act and hence to be permitted to affirm, state as the ground of such objection that he has no religious belief.

Quakers and Moravians, as well as former Quakers and Moravians, may still affirm, if they so request, under the special Acts passed for their benefit in the 1830s referred to above. In such circumstances, the appropriate forms of oath are as follows:

"I, A.B, being one of [the people called Quakers/the United Brethren called Moravians] do solemnly, sincerely and truly declare and affirm that ...";¹⁵²

"I, A.B, having been one of [the people called Quakers/the United Brethren called Moravians] and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm that ...";¹⁵³

In practice, however, these statutes have been superseded by the Oaths Act 1888 and such persons would, together with any other person who declares that he has no religious belief or that the taking of an oath is contrary to such belief, be affirmed in accordance with the simplified form of affirmation laid down in s2 of that Act:

"I, A.B, do solemnly, sincerely, and truly declare and affirm that ...", followed by the appropriate words of the oath prescribed by the law, omitting any words of imprecation or calling to witness.

In the case of affidavits, the usual formal commencement -

"I, A.B, of ... make oath and say as follows."¹⁵⁴ is replaced by the formula -

"I, A.B, of ... do solemnly and sincerely affirm" and the jurat reads "affirmed, etc, before me" instead of "sworn, etc before me".¹⁵⁵

2.26 Whichever form is adopted, whether by oath or affirmation, and whether the oath is Christian or otherwise, special procedures may be adopted by the person administering the oath or affirmation to a blind or illiterate deponent,¹⁵⁶ to a deponent physically incapacitated from signing his name,¹⁵⁷ to deaf and dumb witnesses and to foreigners making an affidavit or deposition or giving testimony through an interpreter.¹⁵⁸ In this last connection, the interpreter must also be sworn, and this must be indicated in the jurat of any affidavit, though the affidavit need not be signed by the

151 *R v Clark, op.cit; R v Wilson*, 18 Cr App R 108.

152 3 & 4 Will 4, c49.

153 1 & 2 Vict, c77.

154 *Stringer, op cit*, pp82-83. The omission of the words "make oath and" from the usual formula is a fatal defect in an affidavit, and the court will refuse to file it, *Re Newton*, 8 WR 425; *Allen v Taylor*, 10 Eq 52.

155 *Oaths Act 1888*, section 4.

156 *Cf A Guide to Professional Conduct of Solicitors in Ireland, supra note 4*, pp52-53.

157 *Stringer, op cit*, p117.

158 *Ibid*, pp118-119; 164; 188-189. For an early case relating to a deaf and dumb person, cf *R v Ruston* (1786) 1 Leach 408 and for an Irish case, *R v O'Brien* 1 Cox 185.

interpreter himself.¹⁵⁹

2.27 As regards witnesses whose competency to take an oath or make an affirmation is objected to on the grounds of mental deficiency, it follows from the equal legal force which both forms enjoy that there should not be a higher standard of understanding for the oath and a lower one for affirmation. In principle, a witness who affirms should have a moral commitment to truthfulness equal to that of one who testifies under oath, so that the right to affirm is limited to those who understand the oath but whose consciences are not awakened by it.¹⁶⁰ In this connection, there are recent cases which show that courts will apply a test similar to that applied to children in the case of mentally handicapped persons, i.e. an understanding of the importance of telling the truth rather than an understanding of God.¹⁶¹

6. *Perjury*

2.28 The giving of false evidence on oath or affirmation may amount to the crime of perjury, a misdemeanour indictable at common law. There are also certain ancillary offences and provisions as to evidence and jurisdiction set out in statutes which are now of some antiquity.

The crime is committed by any person lawfully sworn as a witness or as an interpreter in a judicial proceeding who wilfully makes a statement, material in that proceedings, which he knows to be false or does not believe to be true.¹⁶² "Judicial proceedings", in this context, includes, in addition to the courts established under the Constitution and special criminal courts, other complementary proceedings (e.g. commissions established by order of the court to take evidence), all statutory tribunals at which evidence must be given an oath, and proceedings before persons who are authorised by law to hear, receive and examine evidence on oath. Preliminary proceedings in connection with judicial proceedings (eg. affidavits, depositions, answers to interrogatories, and examinations) are included, as are proceedings before every officer, arbitrator, commissioner, or other person having, by law or by consent of the parties, authority to hear, receive and examine evidence on oath.

2.29 A number of old Irish statutes of the pre-Union Parliament address matters incidental to the offence of perjury. These are the Perjury Act of 1586 (28 Elizabeth Chapter 1), of 1729 (3 George II Chapter 4) and of 1791 (31 George III, Chapter 18). Of these, the Act of Elizabeth was amended by the Statute Law Revision (Pre-Union Irish Statutes) Act 1962, but not in respect of its substantive content: the other two stand as originally enacted.

The Act of Elizabeth makes criminal the activity of any person who "shall unlawfully or corruptly procure any witness ... to commit any wilful or corrupt perjuries ..." It sets various punishment for the crime: a fine of forty pounds or six months imprisonment in default; and furthermore, "that no person or persons being so convicted or attainted, to be from thenceforth received as a witness, to be deposed or sworn in any court of record, or

159 *Ibid.*, pp118-119.

160 This argument is put forward by the Canadian Task Force on *Uniform Rules of Evidence*, *supra* note 67, at p238.

161 *R v Bellamy* (1986) 82 Cr App R 222 (CA). The traditional view is expressed in *R v Hill* (1851) 2 Den 254 and *R v Dunning* [1956] Crim LR 372.

162 Halsbury, *Laws of England*, Fourth Edition, Vol 11(1) para 299.

within any other court or courts, until such time as the judgment given against such person shall be reversed ..." A similar penalty is established for those *committing* perjury, by subornation or procuration, or "by their own act". Such offences can be heard and determined by the court where the perjury is committed or by a justice of the peace (i.e. a district justice).

The Act of George II, deeming the above measure insufficient, allocates the further punishment for perjury, or for subornation of perjury, of up to seven years imprisonment with hard labour, or transportation for seven years.¹⁶³

The Act of George III is designed "to render prosecutions for perjury, and subornation or perjury, more easy and effectual". In every prosecution for perjury, it is sufficient to set forth the substance of the offence charged and by what court, and before whom the oath was taken (averring such court or person to have competent authority to administer the same) together with averments to falsify the matter in respect of which perjury is alleged: similarly in respect of subornation of perjury. "[I]t shall not in either case be necessary to set forth the Bill, answer, information, indictment, declaration, or any part of any record or proceedings either in law or in equity, or the commission or authority of the court of person before whom the perjury was committed, or was agreed or promised to be committed." Section 3 of the Act reaffirms that justices of the peace (ie. District Justices) have jurisdiction in cases of perjury at common law.

The Act thus addresses, it would appear, a number of technical defences which had arisen based on questions of evidence and of jurisdiction. Interestingly, it also provides for a court to assign an injured or other prosecuting party counsel "who shall and are hereby required to do their duty without fee or reward, and every such prosecution so directed shall be carried on without payment of any tax or duty, and of any fee in court, or to any officer of the court".

2.30 Although prosecutions for perjury are comparatively rare, this does not appear to be due to any deficiencies in the existing law. While it would be desirable to set out the law, including the ancillary matters contained in the older statutes, in modern language with suitably revised penalties, the crime of perjury and ancillary offences are not within the scope of our present enquiry and, accordingly, we make no recommendations as to possible legislative reform.

Profane and Unlawful Oaths

2.31 This subject, again, is not strictly within the terms of our present enquiry. Our attention has been drawn, however, to a number of archaic statutes dealing with profane and unlawful oaths which could be repealed as part of a statute law revision programme. Details of the legislation in question will be found in Appendix B.

163 This Act was made perpetual by 17 and 18 George III c. 36, s.2.

CHAPTER 3: SOME COMPARATIVE ASPECTS

1. *The Oath in Other Common Law Jurisdictions*

3.1 The rule that, in general, oral and written evidence should be given on oath is applied in most of the common law jurisdictions of which we have knowledge. In a number of those jurisdictions, however, proposals have been made for reforming the law so as to enable witnesses who do not wish to take the oath to give evidence on affirmation as of right and, in the case of some of the States of the United States, such proposals have been implemented. These proposals for reform are considered in more detail in the following part.

2. *The oath in civil law jurisdictions*

(a) *Legal systems without an oath*

3.2 The practice of administering oaths in judicial proceedings is almost universal. There are, it appears, only three systems of law which do not make use of such an evidentiary procedure, namely Chinese law, Slavic law, and Swiss law, and in each of these the absence of the oath is attributable in part to the absence of any ancient tradition of swearing oaths as a means of proof in itself.¹⁶⁴ This supports the thesis that the oath is essentially atavistic.

In Chinese law, the special significance of giving testimony is drawn to the witness's attention by utilizing the same method which is used in private law to emphasize the binding force of an agreement - the written form. So, a Chinese witness is usually required to sign a bond or recognisance as to the veracity of his statements, either before or after giving evidence. Before signing, he is instructed as to the obligations it entails and the punishment imposed for false testimony, which is very heavy - seven years penal servitude. A witness who refuses to sign without good reason is also liable to a small fine, though exemptions are granted to certain witnesses on the basis of age, mental disability or relationship to the accused.¹⁶⁵

Slavic tradition, rather than communist ideology, is the basis of the abolition of the oath in the Soviet Union and Poland. Although a doctrinal rationale has also been put forward on the grounds of the oath's incompatibility with

¹⁶⁴ Cf generally, Silving, *supra* note 22, pp80-88 and 149-157.

¹⁶⁵ *Ibid.*, pp87-88 and 149-151.

the notion of free evaluation of the evidence, there has never been anything but a very weak procedural reliance on the oath in both Russia and Poland. Whereas the oath is completely inadmissible in Soviet law, Poland has retained a 'promise to tell the truth' to which traditional civil law exemptions and disqualifications are applied.¹⁶⁶

In several Swiss cantons, the testimonial oath has practically disappeared by way of desuetude. The trend towards abandonment of the oath has also been accelerated by legislation - the Federal Law of Criminal Procedure has reduced the practice to the status of an exceptional measure and the Federal Law of Civil Procedure makes no mention of oaths at all, merely instructing the judge to admonish the witness as to his duty to tell the truth and as to the penalty for false testimony under the Penal Code. Although traceable to tradition, abandonment of the oath in the several Swiss jurisdictions is also attributable to the unique simplicity of Swiss courtroom procedures, which are plain and averse to dramatic effects.¹⁶⁷

(b) Other civil law jurisdictions

3.3 To an observer not familiar with common law procedure, the administering of an oath to all witnesses in all proceedings, including minor or trifling matters, and often in a form which conveys little sense of its importance and solemnity, would be surprising. As Glanville Williams has commented:

"On the Continent they are more discriminating. An accused person is not put on oath, because of the stark conflict between his self-interest and his sense of duty to speak the truth. Consequently, he is not subject to prosecution for perjury, or for any other offence if he tells a lie. Various Continental systems go even further in withholding the oath. In Sweden, for example, neither the defendant nor his wife or other close relative - nor, indeed, the victim of the alleged crime - can be sworn. In Germany the practice is to swear a witness (other than the accused) after he has made his spontaneous statement, the oath consisting of the simple affirmation that what he has said is true; and the judge may refrain from causing the oath to be administered to a witness if he thinks that the circumstances create a strong probability that he has been tempted to lie. By not taking the oath, the witness is saved from the risk of prosecution for perjury. Even in India, which has generally adopted the basic principles of English penal law, the accused gives evidence without an oath, and is not punishable for falsehood."¹⁶⁸

3.4 The desire to avoid placing witnesses who are liable to commit perjury in a position where they may be so prosecuted is not, however, a case of the law yielding to human frailty. Rather, it is a reflection of the coherence and consistency which civil law jurisdictions seek to invest in the practice of administering oaths. This is particularly evident in those jurisdictions which have retained a form of the "party oath" or "decisory oath", of which France and Italy are typical. This oath does not attest to the truth of testimony, but is an institution *sui generis* derived from Roman and Canon law.

The gist of it is that a party, being unable to prove a disputed fact (x) in

166 *Ibid.*, pp80-84 and 151-156.

167 *Ibid.*, pp84-87 and p157.

168 *The Proof of Guilt*, Stevens (2nd ed 1958), 66.

any other way, may 'defer an oath' to his opponent, provided the truth concerning fact x can be assumed to be within the latter's personal knowledge. This is done by asking the opponent to affirm, under oath, the proposition that x is untrue. If the latter refuses or fails to do so, the truth of fact x is deemed to be conclusively established; and if he duly takes the oath, this is treated as conclusive proof of the untruth of fact x. There is no issue of credibility to be determined, and judgment will be entered accordingly.

Only one party, then, may swear to any one issue. The statement to be sworn is formulated in advance with the utmost precision, and must not be departed from by the oath taker. However, if fact x, although denied, should turn out to be true, the only remedy is a criminal prosecution for perjury. Moreover, once judgment has been given on the basis of such an oath, even a conviction for perjury affords no ground for reopening the case, though the perjurer may be sued for damages.¹⁶⁹

3.5 The legal systems of the French-Italian group have also preserved a variant of the decisory oath which is called a 'suppletory oath'. This is not deferred by a party, but authorised by the court on its own motion. The judge, in his discretion, may tender this oath *ex officio* to either party - usually the one in whom the judge has greater confidence - on the theory that when the evidence thus far submitted is entitled to some weight, but is insufficient to form a judicial 'persuasion', the oath will afford the missing portion of proof. In France, neither the trial court nor the appellate court is bound by the oath, and the oath taker is not necessarily victorious. In Italy, however, the judge has no discretion, and must decide in favour of the oath taker or against a party who refuses to take the oath.¹⁷⁰

The alleged advantage of the party oath procedure is that it affords a method of disposing of an otherwise insoluble case within systems which otherwise render the testimony of such parties inadmissible. Some measure of trustworthiness is said to be provided by the practice of deferring the oath to the other party and by the practice of tendering the suppletory oath only to that party who is 'closer to proof'. Above all, the procedure has been praised for making the result foreseeable to the parties themselves and for facilitating the judicial function.¹⁷¹

At the same time, the procedure has been vigorously criticized for its artificiality and almost mechanical operation. The rigidity of the statement to be sworn, the difficulty of formulating it in such a fashion as to exclude mental reservations, the practical impossibility of determining on any given issue which of the parties is 'closer to proof' and, finally, the fact that the device tends to reduce judicial responsibility, have been grounds for attack.¹⁷² For these reasons, many civil law jurisdictions, of which Austria and Germany are typical, have abandoned the party oath.

In this respect, although Anglo-American procedure has served as a pattern of reform, it has not been whole heartedly embraced. In addition to the conflict of conscience and the danger of perjury thought to be incident to the use of a testimonial oath, the administering of an oath to two adverse parties in support of contradictory contentions, one of which is likely to be

169 Cf Schlesinger, *Comparative Law* (4th ed 1980), 400-401; Silving, *op cit*, pp107-116.

170 *Ibid.*

171 E.g. Pollak, *System des Österreichischen Zivilprozessrechts* (vol 2, 2d ed 1931), 687.

172 *Ibid.*

perjurious, has been found objectionable by the civil law. Doubts have also been expressed as to the wisdom of administering an oath in advance of knowing the nature and probable credibility of the parties' statements.¹⁷³

Following reforms first introduced in Austria, this second group of civil law countries has introduced a compromise procedure incorporating elements consciously adopted from the old suppletory oath and from the deposition procedure developed in English Chancery practice. Under this system, the court has a broad discretion to order the personal appearance of the parties and to interrogate them. No oath is administered to a party *before* he is interrogated; but *after* the interrogation of the parties the court, acting on the basis of their demeanour and of all the other evidence in the record, may in its discretion give one of them an opportunity to affirm his testimony by an oath. This oath is not conclusive, but subject to free evaluation of the witness's credibility. However, since the party admitted to the oath normally will be the one whose version of the facts appeared more plausible to the court in the first place, the chances are that in practice the party oath thus administered will determine the outcome of the case.

In evaluating the (as yet) unsworn testimony of a party, the court can therefore choose between three possibilities. It may reject the testimony as not credible. At the other extreme, it may credit the testimony even though it is and remains unsworn; in this case, there is no need for an oath. Or, as an in-between solution, the court may proceed to put the party under oath. This last alternative will recommend itself when the court is not sufficiently convinced by the unsworn testimony, but feels that the testimony should be believed if reaffirmed under oath.¹⁷⁴

3.6 In no civil law country is the oath administered to the accused in a criminal case. In France, this immunity is justified on the grounds that only witnesses can be sworn and that no one may be a witness in his own cause. In addition, Austria, Germany and other civil law countries bar a 'suspect', i.e. any person suspected of complicity in any part of "the entire historical event within which the *actus reus* has materialized", from taking the oath.¹⁷⁵ All civil law countries also forbid the administering of an oath to certain classes of person, either on the grounds of insufficient capacity (children) or on the basis of moral distrust (relatives of an accused; persons convicted of certain crimes).¹⁷⁶

3.7 Beyond this, most civil law jurisdictions show a traditional preference for sworn testimony of witnesses in both civil and criminal cases. Witnesses must usually be sworn under sanction of nullity of their testimony, and exemptions are restrictively interpreted. Even where the court has a discretion to forego swearing a witness, in certain cases unsworn testimony may not support a judgment.¹⁷⁷ Nevertheless, certain innovations point to a gradual diminution of the practice and significance of the oath. These include the introduction of a crime for unsworn false testimony,¹⁷⁸ of a

173 Cf the *Joint Report of the Upper and Lower Chamber of the Austrian Parliament*, June 5, 1895, in 2 *Materialien zu den neuen Osterreichischen Zivilprozessgesetzen* 310, 324-26 (1897).

174 Schlesinger, *op cit*, pp 402-403.

175 Silving, *op cit*, pp116-122.

176 *Ibid*, pp132-144. The rules on oath impediments constitute the area of widest divergence in the oath laws of the various civil law jurisdictions.

177 Cf generally, *Ibid*, pp122-132.

178 E.g. art 372 of the *Italian Penal Code*.

discretionary rather than a compulsory requirement to be sworn,¹⁷⁹ and of a practice of administering the oath after, rather than prior to, the witness's testimony.¹⁸⁰

The latter two procedures are intended to reduce the number of oaths, particularly in minor cases, and thereby enhance its significance in the eyes of the public. The post-testimonial oath also affords the witness an opportunity to alter his testimony without forcing him to commit perjury by retracting a sworn statement.

3.8 All civil law jurisdictions either provide for a right of affirmation as an alternative to the oath, or for a simple, universal statutory affirmation.¹⁸¹ The oath itself does not appear to have given rise to the same difficulties as have afflicted common law jurisdictions. In particular, there is no requirement that a witness understand the nature and consequences of the religious oath. Nor are there any stipulated criteria for choosing to make an affirmation.¹⁸² In this connection, recognition of a right to refuse to swear or to affirm, as distinct from a right to refuse to testify, is rare.¹⁸³ In France, for example, the requirement of a testimonial oath or affirmation is rigidly enforced, in accordance with the familiar principle that the oath "makes a person a witness" who may be prosecuted for false testimony. In consequence, there is no independent right not to be sworn.¹⁸⁴

3.9 Finally, it should be noted that all civil law countries adhere to the doctrine of free evaluation of the evidence, widely known under the French name of *intime conviction*. The generally accepted meaning of this doctrine is that it excludes binding rules of proof. In this sense, it is relevant to evaluation, and not to admissibility, and to the extent that the oath may be deemed to add to the value of testimony, it may be regarded as incompatible with the doctrine.¹⁸⁵

179 Whereas Austria and Germany permit unsworn evidence in both minor criminal and civil proceedings in certain circumstances, in Italy this is only the case for evidence given before the judge-investigator in criminal proceedings. At the trial stage, Italy shares with France a strict approach as to the requirement of a testimonial oath or affirmation: cf Silving *op cit*, pp 124-125.

180 E.g, art 59 of the *German Code of Criminal Procedure* expressly provides that the oath must be taken after giving testimony.

181 Semble, Silving, *op cit*, pp122-146. According to Williams *supra* note 168, Germany is one such country where the testimonial oath has been replaced by a simple affirmation.

182 *Ibid*.

183 One example is provided or by arts 63 and 52 of the *German Code of Criminal Procedure*.

184 Cf Art 109 of the *French Penal Code of Procedure* and, generally, Aberkane, "Les sanctions relatives au temoignage" 14 *Revue de science criminelle et de droit penal compare* (1959) 1, 11-13.

185 Cf Silving, *op cit*, p156.

CHAPTER 4: DISCUSSION AND PROPOSALS FOR REFORM

1. *Unsatisfactory features of the present law*

4.1 Clearly, the present law is in a number of respects unsatisfactory. In the first place, it has been seen that many forms of oath are at best embarrassing and at worst offensive to the religious beliefs of the persons to whom they are meant to apply. If the witness or deponent objects to the taking of an oath in such form, he must either -

- (a) indicate some other form and declare it to be binding on his conscience; or
- (b) declare that he has no religious belief, or that the taking of an oath is contrary to his religious belief, in which case he may affirm.

In principle, the first alternative is somewhat paradoxical and historically may be regarded more as the legacy of ethnocentric pragmatism than religious tolerance.¹⁸⁶ Whereas the use of the oath is on the one hand grounded in a level of distrust or suspicion of the witness, and therefore requires that he put his soul in peril, in such instances it relies on him to indicate truthfully what form of oath will bind his conscience.¹⁸⁷ Clumsily, if not zealously, the law then denies him the competence to testify if he cannot do so. In this respect, it has been pointed out that if it is true that the oath facilitates the securing of truth, it might be expected that more care would be taken to ensure that an appropriate oath is always available to be administered so that it may be taken into account in evaluating the witness's evidence.¹⁸⁸

Moreover, it has been argued that the practical consequence of the existing law is that the expedient is adopted either in law or in practice of administering a Christian form of oath regardless of the nature or existence of the religious beliefs of the witness.¹⁸⁹ According to the British Section of

186 In *Omichund*, one of the principal justifications advanced by the Court of Chancery for extending capacity to 'infidels' was that the law would thereby facilitate trade relations with such persons.

187 This paradox is alluded to by the Australian Law Reform Commission in its *Sixth Research Paper on Evidence* (1979), *Sworn and Unsworn Evidence*, p23.

188 P25, note 158: *ibid.* A similar contradiction arises from the use of contempt powers to compel the taking of an oath, and from the rule that evidence given on a defective oath will nonetheless be valid, Comment, *supra* 37, at p1702.

189 ALRC RP No. 6 (Evidence), *supra* note 157, p43; Canadian Law Reform Commission, *Draft Canada Code of Evidence* (1975) p87.

the International Commission of Jurists, the oath is "only too often regarded as a necessary formality, and rattled off with little outward sign of sincerity or understanding of its implications".¹⁹⁰ On this view, for Christians and others, the ancient institution of the oath has no special significance for the witness over and above some other form of non-religious promise to tell the truth - it has become a technical adjunct to the law of perjury, "more a genuflection performed out of habit than a ceremony sacred or significant to the law".¹⁹¹

4.2 Having regard to the erosion of the underlying rationale of the oath and to the great difficulties which may be encountered in determining the proper ceremonies, the Ontario Law Reform Commission has argued that the whole process of ascertaining people's religious beliefs (or lack of them) is also impractical in the daily administration of justice.¹⁹² The Scottish Law Commission has supported this view, on the grounds that the recognition and occasional adoption of several different religious procedures not only leads to inconveniences, but may also call for procedures which are hardly compatible with notions of judicial dignity.¹⁹³ In this connection, the incongruity of the oath in general becomes particularly apparent in minor cases such as those relating to traffic offences.¹⁹⁴

More serious objections may be made in respect of the second alternative referred to above. In requiring witnesses, deponents and jurors to reveal the nature of their religious beliefs or the fact that they hold no religious belief before being sworn, the law introduces an irrelevant consideration into the determination of competency and improperly excludes those persons who object on other grounds or who would prefer to affirm. Forcing a person publicly to decline to take an oath in this manner has been characterised by the Law Reform Commission of Canada as an invasion of religious privacy.¹⁹⁵

It may, as the Scottish Law Commission points out, also have practical consequences for the outcome of the trial itself:

"The strongest objection to the present practice is that persons who do not wish to take an oath, and have an absolute right not to do so, are obliged to make a public declaration of their religious beliefs, or the absence of them. This may put them in a position of some indignity and embarrassment by exposing them to the criticism of the ignorant and narrow-minded".¹⁹⁶

2. *Options for reform*

4.3 On the assumption that the present situation cannot be regarded as

190 Council of Justice, *False Witness* (1973) para 68 In *Wilcoxon v U.S.* 231, F 2d 384, 388, the perfunctory administering of an oath was described as 'indecorous' and inconsistent with the intended effects of the oath

191 Comment, *supra* note 37, at 1681

192 Ontario LRC, *Report on the Law of Evidence* (1976) 121

193 Scottish Law Commission, *Memorandum No 8 on Evidence* (1968), *Draft Code on Evidence*, p67

194 This use of the oath in minor cases has been criticised *inter alia* by the English Criminal Law Revision Committee in its *Eleventh Report on Evidence (General)* Cmnd 4991 (1972), p165. It appears that the use of the oath even in trifling matters is a peculiar feature of Anglo-American Law Silving, *supra* note 22, pp146-148.

195 *Draft Canada Code* (1975), 87

196 Memo No 8, *op cit*, 67, cf also, CLRC *Eleventh Report on Evidence*, *op cit*, 65, and the views of the South Australian Law Reform Commission and the Victorian Chief Justice's Law Reform Committee discussed in ALRC RP No. 6 (Evidence), *op cit*, p46.

satisfactory, three broad possibilities for reform suggest themselves. First, the law could provide that any person should be entitled to affirm, instead of taking the oath, as of right and without having to satisfy the court as to his conscientious grounds (if any) for taking that course. Under this option, those who wish to do so could continue to give evidence on oath. Second, the taking of oaths could be abolished completely, all witnesses being required, however, to make some form of affirmation before giving evidence. Third, the law could be altered so as to enable all evidence to be given without the taking of any oath or affirmation.

4.4 While we have mentioned the third option for the sake of completeness, it has not attracted any significant support and we do not think it merits further consideration. We think that there would be widespread acceptance of the importance of requiring witnesses to acknowledge publicly before they give evidence that they are under a solemn duty to tell the truth. The real issue appears to us to be whether the making of affirmations should be the universal rule or whether those who wish to do so should be afforded the option of giving evidence on oath.

4.5 The Commission is aware that, where matters must be evidenced in written form, there has been a movement away from the giving of such evidence on affidavit, unless the relevant legislation actually requires the evidence to be given on affidavit. This will usually arise in non-litigious commercial and conveyancing contexts in which the preference to-day is generally for making use of the statutory declaration rather than the sworn affidavit. The motives which may lead people to opt for a statutory declaration rather than an affidavit as a means of giving evidence must remain a matter of surmise, but it can hardly be without significance that the use of statutory declarations has acquired such widespread acceptability where they are permitted by the law.

3. *Proposals for reform in other jurisdictions*

4.6 The solution proposed in many jurisdictions has been to provide for affirmation as of right without abolishing the oath. For example, the New South Wales Law Reform Commission doubted whether the act of affirming in itself carried the stigma it may once have carried in these "secular and relatively tolerant days", and therefore recommended that the existing law, whereby a witness is not obliged to state the basis upon which he chooses to affirm, be retained.¹⁹⁷ In the United States, Rules 603 and 610 of the Federal Rules of Evidence provide for a similar approach:

"Before testifying every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

...

"Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced."

¹⁹⁷ NSWLRC Discussion Paper, "Oaths and Affirmations" (1980), para 1.22.

These rules have been adopted in at least eighteen States, and in some instances a form of oath and affirmation is also provided.¹⁹⁸

As a supplement to such provisions, and in order to remedy the further defects in the law arising in the case of a person who either cannot identify an appropriate oath or whose chosen form of oath cannot reasonably be administered in the circumstances, provision may be made for a discretionary power in the court to compel such witness to affirm.¹⁹⁹ In this respect, the power would need to be wider than that provided for in the United Kingdom by s5(2) of the Oaths Act 1978, which extends only to the latter situation.²⁰⁰

4.7 After extensive examination, both the Australian Law Reform Commission²⁰¹ and the Canadian Task Force on Uniform Rules of Evidence²⁰² marginally favoured the retention of the oath as an alternative to affirmation and recommended that such simplified schemes be adopted in their respective jurisdictions. Their reasoning on the issues is broadly similar, and is set out succinctly in the Canadian Report:

"The Task Force recommends that the oath should be retained According to the most recent cases, the test of oath competency is whether the witness understands the moral obligation to tell the truth. A witness who does not have strong religious beliefs but who acknowledges the possibility of a supreme being can swear an oath. This test recognizes that for many people today, including agnostics, swearing an oath has an impact upon their consciences and motivates them to testify more carefully. The test of oath competency accommodates the beliefs of a substantial portion of the Canadian population. If the consciences of many people are more affected by swearing an oath than by making an affirmation, surely the oath should be retained.

Secondly, it is arguable that the proposed affirmation [requiring the witness to acknowledge liability for perjury] would be meaningless ritual, for the witness would probably be aware that successful prosecutions for false testimony are rare. Many witnesses would be offended by being required to state that the threat of prosecution for perjury is a factor which influences their truthfulness. Impartial and sincere witnesses want to tell the truth because of the dictates of their conscience and sense of public duty. The reference to prosecution will not deter a witness who intends to mislead the court and will not make proof of perjury any easier for the Crown. Since children under seven years of age are conclusively presumed not to be guilty of a criminal offence, such an acknowledgement would be untrue for these very young witnesses.

198 Cf generally, Weinstein & Berger, *Weinstein's Evidence* (Mathew Bender), 603[02] and 610[02], and Comment, *supra* note 37, p1682 at note 8.

199 In Western Australia, for example, s1 of the *Affirmations Act 1892-1970* provides that the person administering the oath has a discretion to order and direct any person required to take the oath to make an affirmation. The Criminal Law Revision Committee has pointed out that such a power is itself inconsistent with the rationale of the oath and provides a further ground for its abolition, *op cit*, p165.

200 *Supra*, p18.

201 *Research Paper No. 6, op cit; Interim Report on Evidence, No. 26 (Vol 2); and Report on Evidence (No. 38)*.

202 Report of the Federal/Provincial Task Force on *Uniform Rules of Evidence* (1982), pp234-240.

Finally, if the procedural aspects of the administration of the oath or affirmation were improved upon, the third criticism [relating to impracticality and privacy] would be met. In practice, when a prospective witness objects to taking an oath, the judge asks the witness why he or she wishes to affirm. The witness then explains his objection. Generally neither the judge nor the counsel for the opposing party ask any further questions. Accepting the witness's explanation as true, the judge allows the witness to affirm. This public inquiry into a witness's religious beliefs is both perfunctory and undesirable. It is an invasion of the witness's privacy. Also, the inquiry is impractical in the sense that the only one who can assess what is binding on a person's conscience is the particular person. A party who wishes to testify may feel that objecting to the oath and stating the reason for that objection may adversely affect the outcome of the case by bringing out religious prejudices held by the judge or jury. Similarly, the prospective witness who believes in a form of oath which is impractical or impossible to administer is in an awkward position and in practice is usually instructed to affirm.

As a matter of social policy, the oath and the affirmation should be equal. A witness need not have a religious belief to swear an oath if he understands the moral obligation to tell the truth. Why then should the *Evidence Act* require a witness to state a religious objection to the oath before being allowed to affirm? The implication is that the Legislature prefers the oath to the affirmation. The person who wishes to affirm is in the invidious position of asking for 'special treatment'.

For those reasons, a majority of the Task Force recommends that the Evidence Acts should be amended to provide that a prospective witness would have the choice of swearing an oath or making an affirmation without offering any reason for the choice. The witness's choice would be guided by his or her own conscience and by any instructions from the judge or from the counsel that might become necessary. The court clerk or registrar would ask each witness if he or she wishes to swear an oath or make an affirmation. The witness would indicate his or her preference, without stating any objection to the alternative. If the witness asked for a form of oath which the court could not administer, the judge would explain the difficulty and instruct the witness to choose a practical form of oath or affirm. As far as possible, the choice, as of right, to swear or affirm without any requirement to explain the choice, and the duty of the person administering the oath or affirmation to inform the person of this right should apply to the swearing of formal documents out-of-court. However, the failure of the person administering the oath or affirmation to inform the deponent of the choice to swear or affirm should not affect the validity of the document or afford a defence to a criminal prosecution arising out of a false statement in the document.²⁰³

4.8 The Australian Law Reform Commission gives statutory expression to these and other recommendations in section 20 of their proposed Federal Rules of Evidence, as follows:

203 *Ibid*, pp239-40.

"Evidence of witnesses to be an oath or affirmation

20.(1) Except as otherwise provided by this Division, a person may not give evidence, or act as an interpreter, in a proceeding unless the person has sworn an oath or made an affirmation in accordance with the appropriate form in the Schedule or in accordance with a similar form.

(2) It is for the person who is to give evidence to choose whether to swear an oath or make an affirmation.

(3) It is not necessary that a religious text be used in swearing an oath.

(4) The court may direct a person who is to give evidence to make an affirmation if -

(a) the person refuses to choose whether to swear an oath or make an affirmation; or

(b) it is not reasonably practicable for the person to swear an appropriate oath.

(5) An oath is effective for the purposes of this section notwithstanding that the person who swore it -

(a) did not have a religious belief or did not have a religious belief of a particular kind; or

(b) did not understand the nature and consequences of the oath.

(6) A person who is called merely to produce a document or object to the court need not swear an oath or make an affirmation before doing so.²⁰⁴

4.9 It must be acknowledged that there is much force in the arguments in favour of this scheme and that the solution is at first sight an attractive one. We are also mindful of the fact that in all those jurisdictions where the abolition of the oath had at first been recommended - by the English Criminal Law Revision Committee,²⁰⁵ by the Scottish Law Commission,²⁰⁶ the Ontario Law Reform Commission²⁰⁷ and the Law Reform Commission of Canada²⁰⁸ - the preferred solution has ultimately been to introduce a similar statutory scheme.

204 *Interim Report on Evidence* (Vol 2) pp24-25

205 *Op cit* The Committee did not go so far as to recommend the abolition of the oath, but merely expressed its support of the general policy. In common with the Law Reform Committee, 13th Report (April 1966), it was considered that the question was a social as well as legal one. In the *Oaths Act 1978*, the oath is retained.

206 In its *Draft Evidence Code (First Part)*, 1968, the Commission had recommended abolition of the oath, though in its *Memorandum No. 6 on the Law of evidence* (1980), this was abandoned in view of the contrary view taken by the Thomson Committee on *Criminal Procedure in Scotland (Second Report)* Cmnd 6218 (1975) and the consequent enactment of the *Act of Adjournal (Form of Oaths) 1976* and the *Oaths Act 1978*.

207 *Supra*, note 192.

208 *Draft Code* (1975), ss50, 51, and commentary, pp86-87, Commissioner la Forrest dissented.

4. The oath and competence to give evidence

4.10 In our Report on *Child Sexual Abuse*, we have recommended that, in the case of children under the age of 14, there should be no requirement as to the taking of an oath or an affirmation and that a judicial test of competence should be substituted, whereby children under that age will be allowed to give evidence provided they can give an intelligible account of events which they have observed. This test focuses on the cognitive ability of the witness rather than his or her moral or religious understanding and substitutes for the indirect test of the oath a test which seeks to determine the intelligence of the witness and his or her ability to make inferences and to be appropriately informative and relevant. A similar test is recommended in the case of persons with mental handicap in our Report on *Sexual Offences against the Mentally Handicapped*. Pending the presentation of a Report on the subject now under consideration, neither of these Reports made any final proposal to the Attorney General as to what should be the position in regard to the taking of oaths or affirmations by persons over the age of 14 who do not suffer from any form of mental handicap. The Report on *Child Sexual Abuse*, however, did propose that in the case of young persons between the ages of 14 and 17, precisely the same regime in this context should apply as in the case of persons over the age of 17.

4.11 The Commission, accordingly, commence their examination of the question whether the oath should be abolished in general on the basis that, whether or not there are arguments which justify its retention in whole or in part, it will not be retained, if these recommendations are implemented, as a means of determining competence to give evidence in cases (normally of young children or mentally handicapped persons) where such a determination becomes necessary.

5. The critical issues

4.12 In the view of the Commission, the critical questions which arise in this connection are whether and to what extent:

- (a) the oath would be more successful than the affirmation in encouraging witnesses to speak the truth and to take care in giving evidence;
- (b) the triers of fact may consciously or unconsciously and unjustifiably prefer the evidence of the witness who took the oath as compared to the witness who affirmed; and
- (c) the abolition of the judicial oath would be contrary to the provisions of the Constitution and particularly Article 44 thereof.

These questions will be examined in turn.

(a) The oath as security for the truth

4.13 As the origins of the oath reveal, the requirement that witnesses be sworn was for a long time based on the unexpressed assumption that all testimony would be inherently corrupt due to human self-interest or indifference unless it was supported by the indispensable security of the fear of an avenging God.²⁰⁹ The religious character of the oath was therefore the

²⁰⁹ *Supra*, pp4-6. For further discussion of this notion, cf White, *Oaths in Judicial Proceedings and their Effect upon the Competency of Witnesses*, 42 Am L Reg 373 (1903).

source of all confidence invested in such testimony by the courts, the oath embodying the "highest possible security which men in general can give for the truth of their statements".²¹⁰ In the words of George Washington:

"Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports ... A volume could not trace all their connections with private and public felicity - Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice?"²¹¹

4.14 The traditional reliance on the religious nature of the oath therefore cannot be overemphasized. Although the divine sanction has long been supplemented by a civil penalty for perjury,²¹² both sanctions continue to be invoked by the same oath. Evidently, this would not in itself give rise to difficulty were it not for the fact that an understanding of the nature and consequences of the oath continues to operate as a test of competency in certain circumstances.²¹³ Moreover, it has been seen that there is uncertainty as to the precise degree of understanding required.²¹⁴

4.15 Nevertheless, it is accepted that "for many modern persons, devoutly religious though they may be, the decline of any belief in hell or divine punishment makes the ... traditional basis of the oath inapplicable".²¹⁵ The oath no longer represents an objective and rational instrument of investigation in the hands of the courts and is no longer a rational test of competence. In consequence, the first question posed above is reduced to a subjective consideration - will a particular witness or juror be more likely to be truthful and careful having taken an oath (rather than an affirmation) by reason of its psychological effect on his mind and emotions? The Canadian Law Reform Commissioner La Forreest thought that he would:

"To those who take the oath seriously (and this covers a great many people) the certain demands of conscience are more likely to elicit the exact truth than the highly uncertain threat of a prosecution for perjury".²¹⁶

4.16 The single submission which we received arguing against the abolition of the oath in the case of children was in accordance with this view:

"To deny people the opportunity to call on God to witness the truth of what they say in court would limit their human freedom, as well as denying the judge and jury ... the opportunity to hear evidence supported by as solemn a guarantee of truthfulness as it is possible to have".²¹⁷

210 Whitcombe, *An Inquiry into Some of the Rules of Evidence Relating to the Incompetency of Witnesses* (London, 1824), 39. (emphasis original).

211 V Palitsits, *Washington's Farewell Address*, 151 (1935).

212 The doctrine of *judicium dei* gave way to such penalties as the possibility of divine intervention became less certain in legal minds. The dilemma is observed by Pollock & Maitland, *The History of English Law (Vol 2)* 541 (2nd ed 1952), "very ancient law seem to be not quite certain whether it ought to punish perjury at all. Will it not be interfering with the business of the gods?"

213 *Supra*, pp17-18.

214 *Supra*, pp8-9.

215 New South Wales Law Reform Commission, *supra* note 197, para 1.12.

216 *Supra* note 208, p87.

217 Submission of Family Solidarity

The submission argues further that "the calling of God to witness the truth of what one has said is so much part of human experience (and by no means only Irish culture) that its extirpation would need a coherent justification", though this is not "to suggest that every witness who takes the oath tells the truth or that a solemn non-religious affirmation would not be treated in a moral and responsible way by most witnesses".²¹⁸

4.17 The confidence of these conclusions is, however, not shared by most legal commentators and is, moreover, unsupported by scientific evidence. The Law Reform Sub-Committee of the Department of the Chief Justice of Victoria expressed the following view:

"Whilst in general we favour the retention of the religious oath, the Sub-committee after much debate and very considerable reflection came ultimately to the unanimous conclusion that the administration of the religious oath leads generally to no greater likelihood of a witness telling the truth than would the making of a secular affirmation. And the telling of deliberate lies on affirmation is punishable at least in this world."²¹⁹

Religious belief is also, as Bentham argued,²²⁰ essentially a private matter for the conscience of the individual, so that the external ceremony can have no effect on the incidence of perjury. This point is well taken by the English Criminal Law Revision Committee:

"There would be a good case for keeping the oath if there were a real probability that it increases the amount of truth told. The majority do not think that it does this very much. For a person who has a firm religious belief, it is unlikely that taking the oath will act as any additional incentive to tell the truth. For a person without any religious belief, by hypothesis, the oath can make no difference. There is value in having a witness 'solemnly and sincerely' promise that he will tell the truth, and from this point of view the words of the affirmation are to many at least more impressive than the customary oath. The oath has not prevented an enormous amount of perjury in the courts. A witness who wishes to lie and who feels that the oath may be an impediment can easily say that taking an oath is contrary to his religious beliefs."²²¹

4.18 Such psychological studies as have been available to the Commission in this area are of little assistance and appear to be out of date. We are not aware of any convincing body of expert opinion which would support the view that an oath would have greater psychological consequences for the speaker than an affirmation.

In this connection, Silving has argued that if the religious oath does have a greater impact on the speaker, it is a negative and irrational one which is incompatible with modern principles of evidence:

"Oaths are essentially archaic self-curses. Our modern judicial oath may include remnants of pagan, prereligious and, indeed, preanimistic beliefs in the omnipotence of man and in his power to create by the

218 *Ibid.*
 219 Report No. 7, cited in ALRC RP No. 6, *op cit*, p39.
 220 Bentham, *Rationale of Judicial Evidence* (1843), 308.
 221 Eleventh Report, *op cit*, p165.

magic of language a self-operative entity, the curse, which will haunt him, if he fails in his promise They similarly affect the unconscious of the contemporary oath taker. The anxiety -the Biblical 'pahad'²²² - they evoke in him is likely to disturb the spontaneity of his testimony and to impede his conscious efforts to reconstruct a Past observation correctly. While there is thus ground to believe that the oath impairs the recollective and reconstructive capacities of the veracious oath taker, there is good reason to doubt its force to deter perjury in a man bent on lying.²²³

4.19 Having regard to the formality of court proceedings and to the numerous pressures which are calculated to make a witness conscious of the need to speak the truth and to be as careful as possible in giving evidence, including the possibility of being publicly embarrassed in cross-examination or prosecuted for perjury, the Commission does not find this last argument persuasive. Nevertheless, on the basis of the above considerations, we conclude that the most that can be stated is that:

- (i) there will clearly be some witnesses for whom the oath will be subjectively more significant than an affirmation; and
- (ii) for such witness, it is doubtful whether the public utterance of a religious oath offers anything more than a marginal degree of greater security for the truth than a statutory affirmation, whether or not the latter is accompanied by a private invocation of religious duty.

(b) Potential prejudice resulting from choice of affirmation

4.20 In some jurisdictions, the argument for the abolition of the oath has been supported by the incontestable decline in the number of people with strong religious beliefs and in the significance of religion in the community as a whole.²²⁴ The judgment of the English Court of Appeal in *R v Hayes* and those decisions of Canadian courts which have virtually eliminated any requirement of religious belief for the purposes of children giving evidence on oath²²⁵ are themselves a judicial reflection of how far the oath has moved away from its common law origins. Ireland, however -

"remains an outstandingly religious country ... every indicator of belief, informal and formal practice, and attitudes to the Church or Churches shows Irish people, North and South, to be far more inclined to religion than those of other countries in Europe".²²⁶

Evidently, this general pattern is subject to variations - many persons do not subscribe to orthodox religious views and this is particularly so amongst younger people, who at the present time represent the majority of the population.²²⁷ Nevertheless on the view of the oath put forward by the Canadian Task Force,²²⁸ all that is required is a belief in some supreme being, so that even agnostics may take the traditional oath. It is argued further that such an oath will have an equal value for agnostics as a solemn

222 Meaning 'anxiety', from Jacob's oath on the fear of his father, Isaac, in Genesis 31:53.

223 Silving, *supra* note 22, pp239-240.

224 Cf ALRC RP No. 6, *op cit*, pp40-41.

225 *Supra* pp8-9.

226 Fogarty, Ryan & Lee, *Irish Values and Attitudes* (Dublin, 1984) p8.

227 *Ibid.*

228 *Supra* note 202.

affirmation.²²⁹ Yet this argument is at best two-edged - the proposition that the oath has no greater impact on the conscience of the witness equally supports the view that there is little point in retaining it.

Moreover, it does not address the point which has been identified by most commentators and law reform agencies as the central objection to maintaining the oath alongside the affirmation: that the quality of the evidence given might, quite unjustly, be impaired in the eyes of some jurors and judges on the grounds that it has not been given under oath.²³⁰ Although this might appear to be a veiled imputation of bigotry to all triers of fact in Irish courts, the danger that such a consideration will be unconsciously taken into account in evaluating the evidence is a real one, and is recognised as such by the Canadian Task Force and by others who favour retention of the oath.²³¹ By extension, there is also a danger that a juror who has affirmed will be regarded with suspicion, consciously or unconsciously, by his fellow jurors.

4.21 Clearly, the danger is exacerbated by the present requirement that a witness or juror should state the grounds for his objection to taking an oath. Our consultations have suggested to us that in many tribunals the enquiry as to the nature of the witnesses' or jurors' objections to taking the oath has become somewhat perfunctory. Retaining the option of giving evidence on oath but relieving those who wish to affirm from their present formal obligation to state their reasons would, to that extent, merely bring the law into conformity with what appears to be a growing practice.

If this solution were adopted - of providing for affirmation as of right and excluding any enquiry whatsoever as to the religious beliefs of the persons concerned - the choice of affirmation would become less pointed and the credibility of the witness or juror might be adjudged on his evidence or his contributions in the jury room.

With such procedural modifications, it has been argued that the matter depends entirely on the person who chooses to be affirmed:

"While the witness may be regarded with suspicion at the outset because he did not take the oath, this simply creates an obstacle to be overcome by that witness before he can have his evidence accepted. It is likely that as his evidence progresses, concentration will tend to focus on the evidence and the behaviour of the witness and the fact that an affirmation was taken at the outset, whilst this may have seemed significant at the time, will gradually lose its significance in the mind of the trier of fact".²³²

This may well be true, but it begs the question as to why certain witnesses should be placed in a position where they may be regarded with suspicion in the first place, and as to why they should be required to overcome this additional, albeit simple, obstacle to the acceptance of their evidence. In the view of the Commission, once it is accepted that there is a real risk of such prejudice, it is necessary to find some stronger justification for the retention of the oath which would operate to override that danger. For this reason, we do not consider that the creation of a scheme providing for affirmation

229 *Ibid.*

230 *Supra* note 202.

231 *Cf.* ALRC RP No. 6, *op cit*, p50.

232 *Ibid.* A similar view is put forward by the New South Wales LRC.

as of right, but retaining the oath as an option, is necessarily an adequate solution to the problem.

4.22 In our Consultation Paper on *Child Sexual Abuse*, we argued that while it was perfectly permissible in law to have twin co-existing tests of competence or reliability, we were of the view that it was precisely because religious practice and awareness of the significance of an oath was such a feature of Irish life that many jurors consciously or unconsciously would, attach greater weight to evidence on oath than to affirmed evidence.²³³

"The submission objecting to the abolition of the oath also took issue with this conclusion, arguing that no evidence is available that an Irish jury would in fact attach inappropriate weight to sworn rather than affirmed evidence. Yet, in the same submission, it is asserted that the oath is 'as solemn a guarantee of truthfulness as it is possible to have'. We take the view that there is a clear implication in that argument that evidence on oath is more of a guarantee of truthfulness than a solemn non-religious affirmation. Individual jurors may or may not share that perception. One way or the other, the question of the religious belief of the jurors and the witness enters into the perception of the truthfulness of the witness. This is an unsatisfactory state of affairs."²³⁴

Apart from that one submission, there was widespread support for the provisional recommendation that the oath should be abolished in the case of children.

4.23 Having reviewed all these factors, and in particular having regard to our conclusion that the oath offers little or no greater security for the truth than a statutory affirmation, the Commission considers that the potential prejudice to witnesses and jurors who choose to affirm, together with the great attraction of providing for a universal and simplified procedure which would place all persons on an equal footing, weighs in favour of the abolition of the oath generally.

4.24 Those whom we consulted were in general in agreement with this conclusion. However, it was argued in one submission we received that we were attaching insufficient weight to the possibility that, in a country where religion remains a potent force, the abolition of the oath could lead to an increase in perjury. The same submission also took issue with our conclusion that allowing witnesses and jurors the option of being sworn or affirming might result in some triers of fact giving less weight to the evidence of those who choose to affirm. It was suggested that this did not, or at any rate should not, happen in practice.

Having carefully considered these objections, we still adhere to our provisional conclusion. The general approach on which this objection is based seems to us to be flawed by a basic inconsistency. It is precisely because religion plays a more important part in Irish life than in other societies where secular values predominate that the risk of evidence being given on affirmation being treated as a form of second-rate evidence is significantly greater. We remain of the view that those who are determined to commit perjury will do so whether they are required to give evidence on oath or affirmation and that, in the result, the incidence of false testimony

233 Law Reform Commission, *op cit*, para 1.17.

234 Report on *Child Sexual Abuse*, (LRC 32 - 1990) September 1990.

which might result from our provisional recommendations would be insignificant. The balance of the argument weighs heavily, accordingly, in favour of requiring all witnesses without distinction to affirm.

(c) *Constitutional considerations*

4.24 It remains for us to consider whether there is any constitutional bar to the abolition of the oath.

4.25 Reference has already been made to the submission which argued that to "deny people the opportunity to call on God to witness the truth of what they say in court would limit their human freedom".²³⁵ Implicit in this argument is the idea that the constitutional guarantee of freedom of worship,²³⁶ combined perhaps with the right to express one's opinions freely,²³⁷ extends to the taking of a religious oath in judicial proceedings.

4.26 The present position may, however, be open to a number of constitutional objections. In our Consultation Paper on *Child Sexual Abuse*,²³⁸ we expressed the view that the exclusion of children from giving evidence on the sole ground of their religious understanding might have difficulty in surviving constitutional scrutiny, a consideration which applies equally to those who cannot affirm on the grounds that they cannot indicate a form of oath binding upon their conscience or who object to the taking of an oath on grounds other than those stipulated in section 1 of the 1888 Act. In this connection, Article 44.2.3 of the Constitution provides that the State shall not impose any disabilities or make any discrimination on the grounds of religious profession, belief or status. The argument is supported by a number of nineteenth century decisions in the United States²³⁹ which held that the denial of competency on religious grounds constituted a violation of state constitutional guarantees of freedom of worship. It might also be regarded as an unjustified restriction on the right of access to the courts.²⁴⁰

4.27 In addition, it has been seen that the requirement that persons state the grounds of their objection to taking the oath may be regarded as an unjustified invasion of religious privacy.²⁴¹ Although a general right of privacy has not, as yet, been established under Article 40.3.1 of the Constitution,²⁴² the Commission considers that privacy attaching to one's religious beliefs is clearly protected. Equally, the guarantees of freedom of conscience and the free profession and practice of religion under Article 44.2.1 and of freedom of expression under Article 40.6.1(i) may be regarded as necessarily importing

235 *Supra*, note 189.

236 Article 44.2.1 of the Constitution.

237 *Ibid.* Article 40.6.1(i).

238 *Child Sexual Abuse. A Law Reform Commission Consultation Paper* (August 1989), p102.

239 E.G. *Perry v Commonwealth*, 44 Va (3 Gratt) 632 (1846); *Hronek v People*, 134 Ill 139, 24 NE 861 (1980); *Colter v State*, 37 Tex Crim 284, 39 SW 576 (1897); *Bush v Commonwealth*, 80 Ky 244.

240 As first recognised by Kenny J in *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, as deriving from Article 40.3.1 and 34.3.1 of the Constitution. See also *O'Brien v Manufacturing Engineering Co Ltd* [1973] IR 334, *State (McEldowney) v Kelleher* [1983] IR 289, and generally, Casey, *Constitutional Law in Ireland* (1987) 322-28.

241 *Supra*, p29.

242 Cf generally, Forde, *Constitutional Law of Ireland*, 538-566. The only express reference to privacy in the Constitution is contained in Article 40.5, relating to privacy in the home, though some aspects of such an interest have been held to be guaranteed under Article 40.3.1 see *McGee v Attorney General* [1974] IR 284; *Kennedy v Ireland* [1988] ILRM 472; *Murray v Ireland* [1985] IR 532; *Kane v Gov. of Mountjoy Prison* [1988] IR 757.

a co-equal right not to profess any religion and not to be required to express opinions.²⁴³

4.28 Evidently, these objections may be overcome by abolishing the oath as a requirement of competency in itself, by providing for affirmation as of right and by excluding any inquiry as to the religious beliefs of the witness, juror or deponent. Nevertheless, there remain those considerations which have led us to reject this option, which in constitutional terms may be regarded as importing elements of the right to fair procedures,²⁴⁴ to equality before the law²⁴⁵ and, more generally, as facilitating the administration of justice. The right to fair procedures is, of course, no more absolute than any other constitutional right and may have to yield to countervailing considerations.²⁴⁶

4.29 In this respect, the very first words of the Preamble to the Constitution declare that the Constitution is enacted:

"In the Name of the Most Holy Trinity, from whom is all authority and to Whom, as our final end, all actions both of men and States must be referred".

In recognition of this, the constitutional declarations required of the President under Article 12.8 and of every judge under Article 34.5.1 before taking office begin with the words "In the presence of Almighty God" and end with the words "May God direct and sustain me". Moreover, Article 44.1 provides:

"The State acknowledges that the homage of public worship is due to Almighty God. It shall hold his name in reverence and shall respect and honour religion".

4.30 While these provisions are a reflection of what has been described as the "deep religious conviction and faith and intention to adopt a constitution consistent with that conviction and faith and with Christian beliefs"²⁴⁷ on the part of the Irish people, they do not extend to the procedures laid down for the administration of justice in Irish courts and, in particular, do not require that witnesses and jurors be permitted or required to take an oath in judicial proceedings. To abolish the oath is not by the same token to hold God's name in any less reverence, nor does it demonstrate any lack of respect or honour for the free practice and profession of religion.

Instead, the issue falls to be considered under Article 44.2.1, which provides as follows:

"Freedom of conscience and the free profession and practice of

243 Whereas the right not to profess any religion has been specifically alluded to by Walsh J in *McGee v AG* [1974] IR 284, 316-17, Casey, *op cit*, pp457-58, argues that there is a strong case for the recognition of a constitutional right not to express opinions, on the reasoning of the Supreme Court in *Educational Co Ltd v Fitzpatrick* (No. 2) [1961] IR 345 and *Meskill v CIE* [1873] IR 121.

244 Under Article 40.3.1. For an example of an evidentiary dimension to this right, see *S v S* [1983] IR 68. In the United States, the equivalent notion of due process has also been held to have implications for the rules of evidence, *Santosky v Kramer* (1982) 455 U.S. 745.

245 Article 40.1. This guarantee has been held to extend to equality in the administration of the law, *East Donegal Co-op Ltd v AG* [1970] IR 317; *McMahon v Leahy* [1984] IR 525.

246 Casey, *op cit*, p337.

247 Per O'Higgins CJ in *Norris v AG* [1984] IR 36, 64.

religion are, subject to public order and morality, guaranteed to every citizen".

4.31 The protection accorded to freedom of conscience by this Article must clearly yield, under its express terms, to the requirements of public order and morality. Thus, to take an obvious example, it could not result in immunity from prosecution in the case of those espousing a religious faith which required its adherents to commit acts contrary to the criminal law. If it were the case that the doctrine of any religion obliged its adherents to give evidence in judicial proceedings only on oath, the conscientious belief of its members could not take precedence over the public interest in the administration of justice. Hence, if the Oireachtas were of the view that the administration of justice would be facilitated by the abolition of the oath, the provisions of article 44.2.1. would present no obstacle, in our view, to such legislation.

4.32 It would appear in any event, as we have already seen, that the practice of administering an oath in judicial proceedings is not part of the doctrinal faith of any religion, including Christianity. Nor has any such claim been made by any church, including the Roman Catholic Church, in those jurisdictions where they have recently been consulted on the matter. Our own consultations confirm that the same view would probably be taken in Ireland. We should add that these consultations also satisfied us that the present system can prove offensive to persons with religious convictions and not merely because they regard, as some do, the taking of oaths in judicial proceedings as contrary to certain passages in scripture. It is also felt by some that the requirement that all evidence without distinction be given on oath, including that of the most routine nature in minor cases such as traffic offences, trivializes and lessens respect for what should be a matter of solemnity. It was also suggested that the institution of the oath could encourage double standards, i.e. the belief that people must tell the truth when on oath, but not necessarily in other circumstances.

4.33 The Commission would stress that our conclusion on this point in no way implies that the Constitution does not protect against interference with religious beliefs and opinions. Any person making an affirmation may continue privately to call on God to witness the truth of his statements if he so desires.

Nor are we suggesting that the religious beliefs of a witness may not be admitted in evidence where this is material to the case. Nor, indeed, is it proposed to impose a blanket uniformity on all persons without regard to distinctions of belief and faith.

Instead, and in accordance with the principle of equality, we consider that the abolition of the oath will eliminate a possible departure from the principle that persons having a religious belief and others are equal in the eyes of the law on the particular issue of their credibility as witnesses and the mutual confidence which they share with other jurors. In this context, their religious beliefs are irrelevant.

Conclusions

4.34 Having considered the matter in the light of the three issues which we have isolated as critical, we have accordingly concluded that the most desirable reform would be to abolish the taking of oaths completely and to require all witnesses and jurors to make a form of affirmation before giving evidence. The existing form of affirmation in s2 of the Oaths Act 1888

provides a useful model for the purposed universal form of affirmation, i.e.

"I, A.B., do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth."

4.35 The change should apply to both witnesses and jurors and should apply to all proceedings, civil and criminal. It should also apply to deponents submitting affidavits in all proceedings, civil and criminal. The change should also apply to any statutory requirement that an oath be taken, such as the provisions in the Electoral Act 1963 (ss 51 and 57), enabling the presiding officer at an election to require a person to swear that he is the person whose name appears on the electoral register or that he is physically incapacitated or illiterate so as to be unable to vote without assistance.

4.36 We have also considered whether it would be desirable, as has been suggested in other jurisdictions, that the affirmation should be accompanied, in the case of witnesses and deponents, by a verbal acknowledgement of liability to prosecution for perjury. While the proposal was rejected by the Canadian Task Force, its adoption has been urged on us by the Director of Public Prosecutions. Alternatively, he has suggested that the witness should be so informed by the person administering the oath. We think that there is some merit in this proposal and see no reason why it should not be adopted. It would eliminate the possibility of any misapprehension there might be that the abolition of the oath in some sense meant that witnesses were no longer exposed to prosecutions for perjury. The declaration recommended should accordingly conclude with the words:

"I am aware that if I knowingly give false evidence I may be prosecuted for perjury."

CHAPTER 5: SUMMARY OF RECOMMENDATIONS

1. The oath should be abolished for witnesses and jurors and for deponents submitting affidavits in all proceedings, civil and criminal.
2. Any juror or any other person who at present may be required to take an oath in judicial proceedings should be required instead, before giving evidence, whether *viva voce* or by deposition or affidavit, or before acting as a juror or in any other capacity in judicial proceedings, to make a solemn statutory affirmation in the form set out in the next recommendation, adapted where necessary.
3. The form of affirmation in the case of witnesses should be as follows:

" I, A.B., do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth. I am aware that if I knowingly give false evidence I may be prosecuted for perjury."
4. Where any statute requires that an oath be taken for any purpose other than the giving of evidence or acting as a juror, it should be amended so as to provide for the making of an affirmation by the person concerned in the form set out above.
5. These recommendations, if implemented, may necessitate consequential amendments in rules of court and the Superior Courts Rules Committee, the Circuit Court Rules Committee and the District Court Rules Committee should be asked to consider what amendments, if any, should be made.
6. We have already recommended in our Report on Child Sexual Abuse that s30 of the Children Act 1908 should be repealed and replaced by a provision enabling the court to hear the evidence of children under the age of 14 without requiring them to give evidence on oath or affirm where the court is satisfied that the children are competent to give evidence in accordance with the criteria as to competency proposed in that Report. We have also recommended that, in the case of young persons between the ages of 14 and 17, the same regime as to the giving of sworn evidence should apply as is proposed in this Report. We have also recommended in our Report on Sexual Offences Against the Mentally Handicapped that a similar test of competence to give evidence should be adopted in the case of persons

with mental handicap. These proposals were made in the context of criminal proceedings: we recommend that they be extended to civil proceedings.

APPENDIX A

FORMS OF OATHS, AFFIRMATIONS AND STATUTORY DECLARATIONS
AS AT PRESENT REQUIRED

1. *Form of oaths to be taken by witnesses*

"I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth".

2. *Form of affirmation to be made by witnesses*

"I, A.B., do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth".

3. *Form of oaths to be taken by jurors*

(a) *Criminal Trials*

"I swear by Almighty God that I will well and truly try the issue whether the accused is guilty or not guilty of the offence charged in the indictment against him and a true verdict give according to the evidence."

(b) *Competence to Plead*

"I swear by Almighty God that I will well and diligently enquire whether A.B., the prisoner at the bar, be insane or not and a true verdict give according to the best of my understanding."

(c) *Civil Cases*

"I swear by Almighty God that I will well and truly try all such issues as shall be given to me to try and true verdicts give according to the evidence."

4. *Form of Statutory Declaration*

"I, A.B., do solemnly and sincerely declare that:

and I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1938

(signed) A.B.

Declared before me by A.B. who is personally known to me (or who was identified to me by C.D. who is personally known to me) at this day of

APPENDIX B

PROFANE AND UNLAWFUL OATHS

Profane Oaths

The Profane Oaths Act of 1695¹, as amended by section 1 and the Schedule of the Statute Law Revision (Pre-Union Irish Statutes) Act 1962, is still in force. The Act does not define profanity, but it is elsewhere described as "the irreverent use in everyday speech of the name of God or Christ, distinguishable from blasphemy"², or as "irreverence towards sacred things, particularly an irreverent ... use of the name of God ... [or] ... vulgar, irreverent or coarse language."³

The 1695 Act makes it an offence (for which conviction may be secured by the oath of one witness, or by a confession) profanely to swear and curse in the presence or hearing of any justice of peace⁴ ... or of the mayor, or other head officer or justice of the peace of the city or corporate town where the offence is committed. The penalty is a fine of one shilling in the case of soldiers, seamen, servants and day-labourers, and two shillings in all other cases, to be paid to the use of the poor of the parish where the offence is committed; with provision for the doubling and trebling of the fine on second and third conviction respectively⁵, and with provision for the placing in the stocks, or for the whipping, or offenders. Prosecution must be within ten days of the commission of the offence.⁶ The Act is directed to be publicly read in all parish churches and all public chapels on four specified Sundays in the year, under pain of a fine of twenty shillings for every omission or neglect of this duty.

It would appear that profanity and disrespect before a district justice in court is adequately provided for under the rubric of contempt of court; and that, on all other occasions, respect for public officials does not require this legislative backing. The legislation can only fall into disrepute with the change in modern standards on the use of foul language which can hardly be reversed by legal measures. In any event, the primary motivation for the 1695 measure may not have been that of ensuring that due respect was shown to certain office-holders, but a religious one: profanity had long previously

1 7 William III, c.9.
 2 D.M. Walker, "The Oxford Companion to Law" (1980).
 3 "Black's Law Dictionary" 5th ed., St. Paul Minn., (1979).
 4 Now a district justice, under s.6 of the Adaptation of the Enactments Act, 1922.
 5 S.1, 1695 Act.
 6 S.5 1695 Act.

been within the jurisdiction of the ecclesiastical courts. The more secular content of modern law suggests that the 1695 Act has no place in it and this is borne out by the present dearth of prosecutions under the Act.

Unlawful Oaths

Though unlawful oaths are not directly in point in a consideration of oaths and affirmations, it would be convenient to address anachronisms that exist in that area of the law in any general programme of reform.

Sections 16 and 17 of the Offences against the State Act 1939 outlaw secret societies in the army or police i.e. groups whose members make an oath, affirmation or declaration not to disclose its proceedings; and the administration of any oath, etc, binding a person to commit a crime or breach of the peace, to join an organisation with such acts as one of its objects, or to refrain from disclosing information about such an organisation or about its criminal activities, or about its members and their activities. Any person taking such an oath is also guilty of an offence, save in cases of duress, or where the person makes a full declaration of his involvement, and of the circumstances and persons involved, within four days of taking such an oath.

Two earlier Acts must also be considered. The Riot Act 1787⁷, a pre-Union Irish Statute, addresses in section 6 the matter of unlawful oaths (which are not defined), making it a felony either to administer or to make such oaths or engagements. Section 7 concerns the evidence required to prove either offence: it deems it sufficient to set forth in any indictment the general import of the oath or engagement, rather than the precise form of words used; and in respect of the offence of administering unlawful oaths, "it shall not be necessary to set forth the name or names of the person or persons to whom such oath or engagement was tendered, or by whom such oath or engagement was taken". This presumably was designed to protect informers.

The later Unlawful Oaths (Ireland) Act 1810, of the Union Parliament at Westminster⁸ substantially reenacted the above, in more detailed terms. No reference was made in the text to the Act of 1787; insofar as it defines more precisely the contents of an unlawful oath, it could be termed a *particular* enactment, and sections 6 and 7 of the Riot Act 1787 a *general* one. On this point, Halsbury remarks as follows:

"To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the special provision being to exempt the case in question from the operation of the general enactment or, in other words, to repeal the general enactment in relation to that case".⁹

This is of interest because in one respect the Union statute clearly contradicts the Irish one. The latter provides a defence of "inevitable necessity" for those taking unlawful oaths. Section 2 of the Act of 1810 provides for a similar defence, but makes it subject to the person who took an oath under duress coming forward to the authorities within ten days (or within seven days of any duress or illness preventing him from doing so in that period).

7 27 Geo III c.15.

8 50 Geo III c.102.

9 Halsbury's Laws of England, 4th ed., vol. 44, paragraph 962 at p.603.

This suggests a two-tier scheme: the 1787 Act covers unlawful oaths generally, and the 1810 Act constitutes a very substantial exception to it (and an implied amendment of it within its area of application). But this is only if types of unlawful oath exist in the general area outside the particular (and extensively defined) ambit of the later Act. If they do, the old defence would still apply. In all other cases, the qualified defence would be applicable. But if the 1810 Act fully embraces all types of unlawful oath covered by the earlier legislation, it can be considered to have amended *in toto* the defence of necessity in section 6 of the Irish statute (rather than amending it only in respect of a more limited area of application).

But whichever was the case, it would seem that the amendment (whether partial or total) was by way of the *addition* of the qualifying closure to the pre-existing defence, rather than by the *substitution* of a *new defence of necessity* subject to disclosure. (There seems no possibility of an implied repeal of the entirety of the relevant sections of the Act of 1787 by that of 1810, because in no other respects is there the "manifest inconsistency" required for such a repeal¹⁰).

This degree of pedantry is important, because the Act of 1810 was later repealed, by the Statute Law Revision Act 1983. The distinction submitted above, if correct, would mean that the defence of necessity survives in the Act of 1787 in its original form, rather than disappearing entirely in the form of the repealed 1810 substitution.

It is likely, then, that the relevant provisions of the Riot Act 1787 have survived entirely intact, probably due only to an oversight of the draftsmen of the Act of 1983. The relationship of the 1787 Act to section 17 of the Offences against the State Act 1939 remains to be discussed. The latter statute does not refer in terms to the former; again it is a particular enactment. Given that its terms are not quite as wide as those of the 1810 Act, it can probably be presumed that the 1787 Act retains a more general application to cases of unlawful oaths outside its peculiar ambit.

This is of interest because there are material discrepancies between the two statutes. First, the 1939 Act makes no mention of the evidence required to prove its offences, and it cannot be presumed that the standard set out in 1787 would necessarily apply i.e. that setting forth the general import of the oath or engagement would be sufficient. Secondly, the defence of necessity under the 1939 Act *is* subject to disclosure within a specified period, and it now appears that it is not under the earlier legislation. Thirdly, the provision in section 7 of the 1787 Act for the protection of informers is not repeated in the Offences against the State Act. Finally, there is a marked divergence in point of the penalties available: under the 1939 Act, there is provision for imprisonment for up to two years for the misdemeanours of taking or administering particular unlawful oaths; the provision for those offences, of a more general nature, in the 1787 scheme, is the anachronism of transportation for seven years and for life respectively.

This again suggests a two-tier scheme, with the 1939 Act impliedly repealing sections 6 and 7 of the Riot Act 1787 within its particular, but nonetheless wide, area of application; while the 1787 Act retains a residual application.

If such is the case, it is submitted that the definitions and provisions of the

10 See Halsbury, *ibid*, paragraph 962 at p.603.

Offences against the State Act are sufficient in respect of unlawful oaths (or, in the alternative, that if a wider definition of unlawful oaths is required, it should be secured by specific amendment to the Act of 1939 rather than be retaining the 1787 statute). Therefore, the relevant provisions of the earlier Act should be repealed. If, on the other hand, the areas of application of the two Acts are entirely co-extensive, and the inconsistencies between them so great that the latter can be deemed, by implication, to have repealed the former, sections 6 and 7 of the 1787 Act should nonetheless be expressly repealed. In either case, and whatever one believes is the subsisting content, if any, of those provisions (for some of the above submissions on their interpretation are rather speculative), they should be removed from the statute books. They are clearly a source of confusion in the law, and of no obvious utility.