THE LAW OF TESTIMONIAL OATHS AND AFFIRMATIONS

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"Uncle Rastus, testifying in a certain law suit, refused to be sworn. 'Ah will affirm', he said. 'But Uncle Rastus', said the judge, 'how is this? Last week, in the Calhoun case, you swore readily enough'.
'Yo' honah', said Uncle Rastus solemnly, 'Ah was mo' suah of mah facts in dat case den Ah is in dis one'."[1]

Recently[2] a sub-committee of the Chief Justice's Law Reform Committee considered the law relating to Oaths and Affirmations in Victoria in the light of certain problems associated with the construction of sections 100-104 of the *Evidence Act* 1958 (Victoria). The relevant provisions are as follows

"100. (1) Any oath may be administered and taken in the form and manner following: The person taking the oath shall hold the Bible or the New Testament or the Old Testament in his uplifted hand and shall repeat after the officer administering the oath or otherwise say the words 'I swear by Almighty God that . . .' followed (with any necessary modifications) by the words of the oath prescribed or allowed by law without any further words of adjuration imprecation or calling to witness.

(2) Any oath may be administered to and taken by two or more persons at the same time in the form and manner aforesaid or in the form and manner following: Each of the persons taking the oath shall hold the Bible or the New Testament or the Old Testament in his uplifted hand and the officer administering the oath shall say—'You and each of you swear by Almighty God that . . .' followed (with any necessary modifications) by the words of the oath prescribed or allowed by law without any further words of adjuration imprecation or calling to witness, and forthwith after the officer has said the words referred to, each of the persons taking the oath shall say—'I swear by Almighty God to do so'.

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1 *Minneapolis Journal* cited in *Wigmore on Evidence* para. 1827. (3rd ed. Boston: Little, Brown & Co. 1940.)

2 During the latter part of 1975.

(3) Any oath taken as aforesaid shall for all purposes be deemed to be as valid and effectual as if administered and taken in the manner prescribed or allowed by statute or otherwise.

(4) Any oath may be administered in any manner which is now lawful.

(5) The officer shall without question—

(a) unless the person or any of the persons about to be sworn voluntarily objects so to take the oath or is physically incapable of so taking the oath; or

(b) unless the officer or in the case of judicial proceedings unless the court, justice, or person acting judicially, has reason to think or does think that the form of the oath prescribed by sub-section (1) or sub-section (2) would not be binding on the conscience of the person about to be sworn—

administer the oath in the form and manner set out in the said sub-section (1) or sub-section (2) as the case may be: Provided that no oath shall be deemed illegal or invalid by reason of any breach of the provisions of this sub-section.

(6) In this section 'officer' includes any and every person duly authorized to administer oaths and any and every person administering oaths under the direction of any court justice or person acting judicially.

(7) This section shall apply notwithstanding that in any Act whether passed before or after the commencement of this Act a form of oath is prescribed which has introductory words other than the words 'I swear by Almighty God', or which includes words such as the words 'So help me God' or other words of adjuration imprecation or calling to witness. And whenever in any Act there is, in effect, a provision for subscribing the form of oath prescribed by such Act such provision shall be deemed to be complied with if the form of oath allowed by this section is subscribed in lieu of such prescribed form.

101. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.

102. 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 required by law, which affirmation shall be of the same force and effect as if he had taken the oath.

103. (1) Every oral affirmation shall commence: 'I, A.B., do solemnly, sincerely, and truly declare and affirm,' and then proceed with the words of the oath prescribed or allowed by law, omitting any words of adjuration imprecation or calling to witness.

(2) Every affirmation in writing shall commence—'I, of , do solemnly and sincerely affirm', and the form in lieu of jurat shall be 'Affirmed at , this day of 19 , before me'.

104. When 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."

Attention was focused on these sections by a letter from a Hindu woman to the Secretary of the Law Department in February 1974 in which she complained that while attending a Magistrates' court in Bendigo in connection with a car accident she was required, despite her initial objection, to take the oath on a glass of water, reciting the following incantation, which was entirely meaningless to her.

> "I swear by the Holy Waters of the Ganges and by the Sacred Animal the Cow, that the evidence I shall give in this case shall be the truth, the whole truth and nothing but the truth. If I do not tell the truth may my soul be damned."

This form of oath was formerly prescribed for Hindu witnesses in the *Clerks of Courts Manual.* However the *Tipstaff's Manual* currently in use in the Supreme Court suggests that a Hindu witness will usually desire to make an affirmation in lieu of an oath, and suggests that section 102 of the Victorian *Evidence Act* 1958 will enable a witness to make an affirmation instead of being sworn. The *Clerks of Courts Manual* was amended on the 9th May 1974 to stipulate that a Hindu witness would in future make an affirmation instead of an oath.

It is suggested that both the *Clerks of Courts Manual* and the *Tipstaff's Manual* are wrong in their exposition of the legal position, and that the various sections of the *Evidence Act* 1958 dealing with Oaths and Affirmations are in need of reform. The sub-committee of the Chief Justice's Law Reform Committee, of which the author was a member, recently recommended such reforms, and it is thought that a brief presentation of the background to the current problems may prove of assistance in evaluating its proposals.

I. *Oaths—general background*

Wigmore[3] suggests that the use of oaths in Anglo-Saxon systems of jurisprudence stems from early Germanic law and custom, in which an appeal

[3] Wigmore *op. cit.* para. 1815.

to the supernatural first played an important part in the administration of justice. Oaths were not used to enhance the credibility of a sworn statement. Rather by their very existence, if properly taken, they supplied a mode of proof. As an early method of trial compurgation involved an offering to prove by swearing on oath to the truth or falsity of the issue, in which the oath was taken by the parties to the litigation who might be supported by a number of oathhelpers or compurgators. From the twelfth century onwards, the compurgators did not swear to the issue but rather to their belief in the truth of their principal's oath.[4] After compurgation fell into disfavour as a mode of trial, along with trial by ordeal and trial by battle, in favour of a more modern adversarial, witness-oriented approach, the testimonial oath took on a different role. Coke in his first *Institute* rationalized the oath as enhancing the credibility of a witness, since if a witness testified on oath, and was not immediately struck down, Divine judgment was pronouncing him to be a truth teller. More recent rationales justify the oath as a reminder to the witness of the Divine retribution which awaits him in the future if he swears falsely.[5]

In the seventeenth century the question first arose as to the applicability of oaths to non-Christians and the question of what forms of oath were permissible to render a witness competent to testify in an English court. Notwithstanding Coke's insistence[6] that an oath was an affirmation by a *Christian* before a person authorized to administer the same, for the discovery and advancement of truth, and calling on God to witness the truth of the testimony, the old case of *Robeley* v. *Langston*[7] held that Jews were competent to take oaths as well. The celebrated case of *Omychund* v. *Barker*[8] extended this competence to infidels[9] who believed in a God as the creator of the world and in future rewards and punishments based on present conduct. Thus persons of the Gentoo religion who gave evidence on commission in India, the form of oath consisting of the witness touching the feet and hands of the Brahmin or priests of the Gentoo sect, were accepted as capable of taking the oath. In addition, Quakers, who regarded all forms of oath as repugnant, were permitted to testify by means of a statutory affirmation as early as 1696.[10]

4 H. Potter, *Outline of English Legal History*, (3rd ed., London: Sweet & Maxwell 1933) 143.

5 ". . . for that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth" *per* Jefferies C.J. in *Lady Lisle's Trial*, 11 How St. Tr. 325. This approach persisted at least until the end of the nineteenth century. Cf. W. M. Best, *Evidence* paras. 58, 161 ". . . Imprecation is however no part of the essence of an oath . . .".

6 3 *Inst.* 164.

7 (1668) 2 *Keb.* 314; 84 E.R. 196.

8 (1744) 1 *Atk.* 22; 26 E.R. 15.

9 The term "infidel" is used in this article in its secondary sense as referring to non-Christians. In *Omychund* v. *Barker* the term was used in this manner.

10 7 and 8 Will. ch. 34 s. 1.

II. *Statutory Reforms—England and Victoria*

Until the *Evidence Act* 1869 (U.K.) atheists and agnostics were incompetent to testify in England. The *Oaths Act* 1888 (U.K.) further remedied this situation by providing that persons who objected to being sworn might make a solemn affirmation instead, if the basis of their objection was that they had *no religious belief*,[11] or that the taking of an oath was *contrary to their religious belief*.[12] In addition this Act provided that the validity of any oath actually taken was not to be affected by the fact that the maker of the oath had no religious belief.[13]

The *Oaths Act* 1909 (U.K.) provided in section 2(1) a mode of taking the oath applicable to Christians and Jews in England.[14] The form prescribed in section 2(1) must be complied with unless the person taking the oath objects or is physically incapable of so taking the oath,[15] provided that in the case of a person who is *neither* a Christian nor a Jew, "the oath shall be administered in any manner which is now lawful".[16]

In England problems arose regarding the construction of the above-mentioned provisions. What if a witness professed a religious belief, of an obscure kind, but one which was not against taking an oath as such? Such a person did not come within the ambit of section 1 of the *Oaths Act* 1888 (U.K.) and would not be permitted to make an affirmation.[17] The problem

[11] See 'Oaths of Hindu Sikh and Mohammedan Witnesses' [1972] Vol. 136 J.P. 831.

[12] S. 1 *Oaths Act* 1888 (U.K.). (S. 102 of the Victorian *Evidence Act* 1958 is identical to this provision.)

[13] S. 3 *Oaths Act* 1888 (U.K.). (S. 104 of the Victorian *Evidence Act* 1958 is identical to this provision.)

[14] S. 2(1) of the *Oaths Act* 1909 (U.K.) provides as follows:

"Any oath may be administered and taken in the form and manner following: 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."

S. 2(2) provides in part that "in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful". Note that s. 100(1) of the *Evidence Act* 1958 is almost identical to s. 2(1) of the English *Act*, with the exception that it does not refer to Jews expressly. It does refer to the *Old Testament* however. S. 100(4) of the Victorian *Act* is similar to s. 2(2) of the English *Act*, except that it is not confined to non-Christians or non-Jews.

The effect of s. 2 is to preclude a Christian or Jew from taking an oath in England in any form other than that laid down by the *Act*. The English courts have not yet been called upon to decide how they would deal with a person born into the Christian or Jewish religions who claims he is now an adherent of another faith. Presumably evidence of formal conversion would not be required, but it is difficult to see how this question would be resolved.

[15] S. 2(2) *Oaths Act* 1909 (U.K.).

[16] Ibid. Note that s. 100(4) of the Victorian *Evidence Act* 1958 simply provides that "Any oath may be administered in any manner which is now lawful". This cryptic section does not specifically refer to non-Christians and non-Jews and would not seem to be limited to these groups in the same way that s. 2(2) of the English *Act* is. S. 100(4) was, no doubt, enacted in this form because no reference to Jews appears in s. 100(1) of the Victorian *Act*. It does however create certain problems of construction, as to which see below.

[17] *R.* v. *Moore* (1892) 8 T.L.R. 287; *R.* v. *Pritam Singh* [1958] 1 All E.R. 199—both cases involving Sikhs who were willing to take an oath sworn on the *Granth* a Sikh holy book. Apparently this book was very rare in England, and extremely

was partly rectified in England with the passing of the *Oaths Act* 1961 (U.K.) section 1(1) of which permitted persons who would have been able to take an oath if the appropriate books or other paraphenalia had been available, to make an affirmation instead, assuming it was not reasonably practicable to supply such material. Pursuant to section 1(2) of this *Act* such a person could also be required to make an affirmation instead of an oath.

In Victoria no provision equivalent to section 1 of the *Oaths Act* 1961 (U.K.) exists, hence the problem of the Hindu woman cited at the beginning of this article. Section 102 of the *Evidence Act* 1928 precluded her from making an affirmation. The non-availability of her particular mode of oathtaking in the Bendigo Magistrates' Court ought to have precluded her from taking an oath where the form suggested was not binding on her conscience, as in the case of the glass of water.

Even the English position as amended by the *Oaths Act* 1961 (U.K.) is far from satisfactory at present. Assume that a witness has a religious belief of a nature which does not preclude taking an oath. Assume further that the witness objects to taking an oath in the form prescribed by section 2(1) of the *Oaths Act* 1909 (U.K.) (section 100(1) of the *Evidence Act* 1958 is equivalent) and will not or cannot state what kind of oath would bind him. Even in England such a person cannot make an affirmation because of the requirement in section 1(1) of the *Oaths Act* 1961 (U.K.) that it be shown that it is "not reasonably practicable to administer an oath in the manner appropriate to his religious belief". In other words the nature of such appropriate oath must be known before section 1(1) of the *Oaths Act* 1961 (U.K.) comes into operation.

In Victoria the answer would of course be even clearer—such a witness would not satisfy the prerequisites of section 102 of the Victorian Act at all, and would be incompetent to testify.

III. *Special forms of oaths—England and Victoria*[18]

What is the position in England and Victoria of a person who professes a religious belief and wishes to take an oath, but an oath of a peculiar kind, assuming it is reasonably practicable to provide any necessary equipment? Assume a witness comes into court claiming to be a member of an obscure sect which worships goldfish, and is willing to take an oath which he claims to regard as binding while holding a goldfish in his hand.

We have seen how at common law the doctrine developed after *Omychund* v. *Barker* that an oath might be administered in such form or

hard to procure as late as 1958. In both cases the Sikhs made affirmations and these were held to be null and void pursuant to s. 1 of the *Oaths Act* 1888 (U.K.).

[18] See generally F. A. Stringer, *Oaths and Affirmations in Great Britain and Ireland* (2nd ed 1893); Boland and Sayer, *Oaths and Affirmations* (2nd ed 1961); 'Oaths of Hindu Sikh and Mohammedan Witnesses' [1972] Vol. 136 J.P. 831.

with such ceremonies as the witness might declare to be binding on his conscience (provided of course that the witness held a belief in the existence of a God, and a belief in rewards and punishment for one's acts by that Spiritual Being).

We have also seen that in England section 2(2) of the *Oaths Act* 1909 (U.K.) provided that in the case of non-Christians and non-Jews an "oath shall be administered in any manner which is now lawful". Presumably in England a Christian or Jew would be obliged to follow the form of oath set out in section 2(1) of the *Oaths Act* 1909, namely swearing with an uplifted *Old* or *New Testament* by "Almighty God that . . ." followed by the appropriate words. A Christian or Jew who did not wish to follow that form, could not make his oath in any other form. In addition as we have seen he would not be given the option of affirming, unless he came within the ambit of section 1 of the *Oaths Act* 1888 (U.K.).

The Victorian legislation seems to provide slightly broader scope for strange forms of oath. Section 100(4) is not confined to non-Christians or non-Jews, so that a Christian or Jew is eligible to take a different form of oath to that prescribed in section 100(1) of the *Evidence Act*. Many strange and wonderful rites have been held to constitute lawful oaths both in England and Victoria. For example, Chinese have been sworn by the ceremony of breaking a saucer with the warning "You shall tell the truth and the whole truth; the saucer is cracked and if you do not tell the truth your soul will be cracked like the saucer."[19] The story is told of a trial before Avory J., concerning a Chinese gang feud. Numerous Chinese witnesses were called, and by the time the last witness appeared he gave evidence standing ankle deep in smashed crockery.[20] Other trials involving Chinese have required witnesses to write sacred characters on paper which was burnt, the witness stating that his soul would be similarly burnt if he swore falsely. An even more spectacular oath was said to occur when a Chinese witness cut the head off a rooster with a similar invocation. Snuffing out a candle is another variant. These "oaths" bear no relationship at all to Chinese court procedure either before or after 1948, where no oath is used. They are merely rituals attaching to certain secret societies which have been adapted to the judicial procedure of Her Majesty's Courts of Justice.

Wigmore details even more exotic forms of oath accepted as lawful, ranging from the kissing of the tail of a sacred cow, to the tying of a rope around the witness's waist,[21] to an invocation calling on God to infect the witness's children with the "falling sickness" if he should lie.

Rather more orthodox in appearance is the oath of a Mohammedan on the *Koran*, and occasionally the oath sworn by Hindus on the *Vedas* or

[19] *The Orianada* (1907) 122 L.T. 531. See Stringer, *op. cit.* p. 124.
[20] Wigmore *op. cit.* para. 1818.
[21] See also Stringer *op. cit.* p. 124 who prescribes this as an appropriate form of oath for Parsee witnesses.

other sacred books, such as the *Gita* when these are available. It is interesting to note that ever since 1668 Jews have been permitted (and indeed in England apparently *required*) to take an oath on the *Old Testament*. Such an oath is directly contrary to the Jewish religion whose adherents are enjoined to abstain whenever possible from taking oaths.[22] The practice of ultra-orthodox Jewish persons in the courts in Victoria is to make an affirmation. This fact is not widely known, and most Jews are prepared to swear on the *Old Testament*. Other religions vary in their attitude to the taking of oaths, and the particular forms applicable. Buddhists,[23] Mohammedans,[24] Hindus,[25] Scientologists,[26] Bahai,[27] Sikhs[28] and Satanists[29] all pose interesting problems.

[22] Ganzfried and Goldin *Code of Jewish Law* (revised ed.) Vol. IV p. 70. In a telephone conversation with the author, Rabbi I. D. Groner of the Yeshiva College Melbourne, expressed the view that he would like to see all Jews making affirmations instead of taking oaths on the *Old Testament*. Furthermore he personally favoured the abolition of the oath as a method of enhancing testimonial credibility.

[23] In a telephone conversation with the President of the Buddhist Society of Victoria, Ms Elizabeth Bell, the author was told that Buddhists in this State were advised by the Law Department that the following was an appropriate oath to be taken by them:

> "I declare as in the presence of Buddha that I am unprejudiced and if what I shall 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."

The author was told that this form of oath was insulting to Western Buddhists and would have no particular binding effect on their conscience. The deity mentioned in the oath, Dhamma, is not even recognized as such by Western Buddhists. The deity Pro Sangha mistakenly appears as Pro Saugha in the *Clerks of Courts Manual*.

[24] The author also had conversations with Dr A. Kazi, Senior Lecturer in the Department of Middle Eastern Studies at the University of Melbourne. He was informed that the form of oath formerly administered to Mohammedan witnesses in Victorian courts, in which a copy of the *Koran* was handed to the witness who placed his right hand flat upon the book, and put the other hand upon his forehead, bringing his head down to the book and in contact with it, was not in conformity with the dictates of the Islamic religion. Dr Kazi claimed that this form of oath taking was an embarrassment to Moslems. He indicated a strong preference for being permitted to affirm rather than take such an oath, but s. 102 of the Victorian *Evidence Act* 1958 seems to preclude such a practice. *The Clerks of Courts Manual* suggests that the form of oath administered to Mohammedans should be the General Form, but using the *Koran* instead of the *Bible*. This dates from 14 November 1973. The form of oath adopted in Victorian courts for Buddhists (and formerly for Mohammedans) is taken from F. A. Stringer, *Oaths and Affirmations in Great Britain and Ireland* (2nd ed. 1893) at pp. 122, 123. Stringer himself suggested that it was doubtful whether Mohammedans should be sworn, despite the decision in *R.* v. *Morgan*, 1 Leach, C.C. 57 supporting the abovementioned form of oath. In India Mohammedans together with Hindus are given an absolute right to affirm in lieu of taking an oath. (*Oaths Act* 1969 (India)). Under Victorian law if a Mohammedan with a genuine religious belief appears as a witness, states that he does not regard the form of oath described above as one which is binding on his conscience, but is unable to instruct the court as to what form of oath might bind him, he is incompetent as a witness since he is not permitted to affirm (s. 102). (See *Reg* v. *Moore*, 61 L.J.M.C. 80; *Nash* v. *Ali Khan*, 8 Times Rep. 444).

[25] Many Hindus would regard the notion of an oath as itself entirely alien to their beliefs. Some would be prepared to take an oath on the Holy *Gita*, a method of oath taking which is available in India. (Letter from Miss Shanta Chandnani,

IV. *The Victorian position—a summary*

1. Atheists and agnostics may affirm as of right instead of taking an oath. (Section 102.)
2. If an atheist or agnostic does give evidence under oath, the validity of such oath is not affected by the non-existence of any religious belief. (Section 104.)
3. If a witness has a religion which precludes him from taking an oath he may make an affirmation. (Section 102.)
4. A person called as a witness may take the oath in a manner prescribed by section 100(1), namely by holding the Old or New Testament in the uplifted hand.
5. The Scottish form of oath, namely swearing with an uplifted hand is recognized expressly by section 101.
6. Any person who professes a religious belief involving the existence of a Creator who punishes evil and rewards goodness may take an oath in any form at all, no matter how strange it may appear, provided that he indicates that he regards himself as bound by such an oath. The witness's word to this effect is enough. (Section 100(4).)
7. If it is impracticable to supply any material needed for a witness to make a special kind of oath, he should be precluded from testifying entirely. (Section 102.) (In practice he is often simply permitted to affirm.)
8. No witness has an absolute right to make an affirmation instead of an oath—he must come within section 102, either as having no religious belief, or as having a religious belief which precludes oath taking.

V. *Other Australian Jurisdictions*

How have other Australian States dealt with the kinds of problems associated with oaths and affirmations discussed above? Set out below is a

Department of Mathematics, Bendigo Institute of Technology to the Secretary of the Law Department, February 1974). Others would swear on the *Vedas*, or *Ramayana*.

[26] Scientologists have no particular objection to any form of oath, regarding their own beliefs in the "Eighth Dynamic" as compatible with other faiths (telephone conversation with the Church of Scientology, 7 October 1975).

[27] Members of the Bahai faith are prepared to take an oath but only on their Holy Book, the *Book of Aqbas*, needless to say not widely available in Victorian courts.

[28] It seems that Sikhs do not regard their scripture, the *Guru Granth Sahib*, as a holy book outside the temple. A Sikh would not regard a *Granth* produced to him in court as being particularly binding on his conscience. The Punjab High Court has ruled that on no account may a *Granth* even be brought into court. In England Sikhs are still often asked to take an oath on this book.

[29] Consider finally the mind boggling spectacle of a Victorian court faced with a witness who was a Satanist and wished to make his invocation to the Devil. Such a witness would not seem to be competent to take an oath within the doctrine of *Omychund* v. *Barker* (*ante*), and would also be precluded from making an affirmation under s. 102 of the *Evidence Act*, since he has a religious belief which does not preclude oath taking.

cross-sectional summary of the various State provisions classified according to the kind of problem they deal with

(A) *Who can make a solemn affirmation instead of an oath?*

Every State permits atheists and agnostics to make solemn affirmations instead of oaths. In Tasmania and West Australia the legislation is wider in scope in that it authorizes any person to make an affirmation instead of an oath as of right.[30]

In New South Wales any person who "objects to take an oath, or is reasonably objected to as incompetent to take an oath, or appears to such court or justice or person so authorized incompetent to take an oath" is permitted to make a declaration or solemn affirmation in lieu of such oath.[31]

In South Australia the legislation restricts the right to make an affirmation to the same classes of person as in Victoria and England, namely persons who object to being sworn on the basis that they have no religious belief, or that the taking of an oath is contrary to their religious belief or conscience.[32] It is interesting to note that the relevant provision allows an objection to be based "on conscience" as an alternative to the oath being contrary to the religious belief of the witness. The English and Victorian provisions make no special provision for an exception based on "conscience" as distinct from religious belief.

In Queensland the legislation is peculiar in form in that the right to make an affirmation instead of an oath is contained in separate Acts. In addition special provision is made for certain sects whose religion forbids oath-taking.

The *Oaths Acts* 1867 to 1960 (Qld.) provide for a person to be able to refuse to take an oath if he objects for "conscientious motives" provided the judge or person qualified to administer oaths is satisfied of the sincerity of such objection.[33] This would appear to cover the case of a person who claims that an oath is not permitted by his religious beliefs, assuming that "conscientious motives" includes such an objection.[34]

In the light of this construction it appears quite redundant for the Queensland legislation to make special provision for Quakers and Moravians[35] and Separatists[36] to be permitted to make affirmations in a form peculiar to their own sect. Perhaps the only justifications for the continued existence of such provisions are historical (the form of the provisions was taken from the old English legislation designed to alleviate

30 *Evidence Act* 1910 (Tas.) s. 126; *Evidence Act* 1967 (W.A.) s. 99.
31 *Oaths Act* 1900-1962 (N.S.W.) s. 13.
32 *Evidence Act* 1969 (S.A.) s. 8.
33 *Oaths Acts* 1867-1960 (Qld.) s. 17.
34 In *Narne* v. *Brisbane Tramways Co. Ltd* [1914] Q.W.N. 6 this was held to be so in the case of a juror who declined to take an oath.
35 *Oaths Acts* 1867-1960 (Qld.) s. 18.
36 *Oaths Acts* 1867-1960 (Qld.) s. 19.

the burdens on Quakers in the time of William III), and it may also be advantageous for a Quaker not to have to "satisfy the court" that oath-taking is against his "conscientious motives" each time.

Atheists and agnostics are governed by the *Oaths Act Amendment Act* 1884 in Queensland.[37] Section 2 provides as follows

> "If any person tendered for the purpose of giving evidence in respect of any Civil or Criminal proceeding before a Court of Justice, or any officer thereof, or on any Commission issued out of the Court, objects to take an oath, or by reason of any defect of religious knowledge or belief or other cause, appears incapable of comprehending the nature of an oath, it shall be the duty of the Judge or person authorized to administer the oath, if satisfied that the taking of an oath would have no binding effect on the conscience of such person and that he understands that he will be liable to punishment if his evidence is untruthful, to declare in what manner the evidence of such person shall be taken, and such evidence so taken in such manner as aforesaid shall be valid as if an oath had been administered in the ordinary manner."

How is a judge to "satisfy" himself as to the matters set out therein? In practice the judge simply asks the witness his reason for desiring to affirm, and generally accepts his answer without question. This is true also of Victoria and England where the judge is not required by the legislation to expressly "satisfy himself" that the prerequisites for making an affirmation instead of an oath are met. Such a requirement has however on occasion been read into the *Oaths Act* 1888 s. 1 in England.

The leading case on the role of the judge in determining whether to permit an affirmation to be made in lieu of an oath is the case of *R.* v. *Clark*.[38] This involved a charge arising out of a "Ban the Bomb" incident, in which it was alleged that the appellant incited other persons to commit a public nuisance by calling on them to sit down in a street in front of the American Embassy in London. The appellant denied having told the other persons to sit down, claiming they had acted of their own volition. The trial judge refused to hear the evidence of one witness for the appellant. The dialogue was as follows

> ". . . the usher turned to the chairman and said:
> 'This witness wishes to affirm, my lord.
> The Chairman: Why?
> The Witness: I don't believe that the Bible tells the whole truth and would rather affirm.
> The Chairman: Do you believe in the New Testament? Do you think that tells the truth?

[37] They do not come within s. 17 of the *Oaths Acts* 1867-1960 (Qld.) because absence of religious belief is not held to constitute a basis for having "conscientious motives" against being sworn pursuant to that section. See *R.* v. *Craine* (1898) 9 Q.L.J. 47.

[38] [1962] 1 All E.R. 428.

The Witness: Parts of it, yes.
The Chairman: Which parts?
The Witness: Well I think the synoptic gospels mainly are true.
The Chairman: Give him the New Testament and he can take the oath.
The Witness: Can I not affirm?
The Chairman: No you cannot. Take the oath.
The Witness: I am an agnostic, you see.
The Chairman: You have told us you believe in some of the Bible. You can take the Bible and take the oath.
The Witness: I am not sure I agree.
The Chairman: Don't argue. Take the oath.
The Witness: I am not going to take the oath.
The Chairman: Very well. Stand down.' "[39]

On appeal the Court of Criminal Appeal held that it was proper for a trial judge to go beyond the answers given by a witness as to his grounds for seeking to affirm in certain circumstances, e.g. if the nature of some of those answers leads the judge to doubt their honesty. On the facts of the case however the Appeal Court held that the trial judge erred in classifying this witness as capable of taking an oath since although he accepted parts of the New Testament as true he did not apparently accept that the central person was divine.

(B) *What level of religious understanding is necessary in order to take an oath?*

A second problem raised by section 2 of the *Oaths Act Amendment Act* 1884 (Qld.) is what constitutes a "defect of religious knowledge" sufficient to warrant requiring or permitting the witness to affirm instead of making an oath? This is a provision analogous to but not identical with those provisions which permit the reception of unsworn evidence of children under the age of fourteen years who do not in the opinion of the court understand the nature of an oath, but who do understand the duty of speaking the truth.[40] By virtue of the Queensland provision a person who has a "defect of religious knowledge" is permitted or required to make an affirmation instead of an oath. Such an affirmation is in all respects equal in binding force to an oath and can be the subject of a prosecution for perjury.[41]

What is the position in the various Australian States where the witness wishes to take an oath in the normal manner, but some doubt arises as to his level of religious awareness? In Queensland it would appear that the trial judge is permitted to direct that the witness make an affirmation. In Victoria and South Australia it is suggested such a witness is incompetent. He certainly does not come within section 102 of the *Evidence Act* 1958

[39] Ibid. 429.
[40] *Evidence Act* 1958 s. 23(1).
[41] Cf. *Evidence Act* 1958 s. 23(3).

as having "no religious belief". The cases are not consistent as to the kind of religious awareness a witness must have in order to render him competent to take an oath.

In *Omychund* v. *Barker*,[42] it will be recalled the test was expressed to be whether the witness believed in a Supreme creator who punished evil and rewarded goodness. More recent cases stress the need for an understanding of the nature and quality of an oath.[43] Where a person has a religious belief, but no comprehension of the nature of an oath it is suggested that the current law renders him incompetent to make an oath. In Tasmania, West Australia and New South Wales this will not matter as a witness has a right to make an affirmation if he objects to taking an oath. In New South Wales, in addition, a witness may be objected to as incompetent to take an oath.[44] In Queensland the problem is alleviated by virtue of the "defect of religious knowledge" clause in section 2 of the *Oaths Act Amendment Act* 1884 (Qld.) (though of course that still does not permit a person holding a religious belief the nature of which simply renders oaths irrelevant to make an affirmation unless such a belief comes within the ambit of s. 17 of the *Oaths Acts* 1867-1960—a highly unlikely interpretation). But in Victoria and South Australia such a person is debarred from making an affirmation in place of an oath.

(C) *What about peculiar forms of oaths?*

Every State provides for peculiar forms of oaths to be taken.[45] In *Walsh* v. *Ervin*[46] it was held that a witness who so desired might be sworn "before" instead of "by" Almighty God. In *R.* v. *McIlree*[47] it was held that a Chinese witness, though not a Christian, was validly sworn on the New Testament since he had indicated he regarded such an oath as binding on his conscience. It is this latter requirement which is all important. *Stringer on Oaths*, sets out many forms of oath appropriate to individual ethnic groups.[48] It has been suggested that these forms of oath are often inappropriate and embarrassing to adherents of the religions in question.

[42] *Ante.*

[43] *Spooner* v. *Taylor* [1926] S.A.S.R. 396—held admissible the sworn evidence of a witness where he said "I know I have got to tell the truth. I know where you go when you don't tell the truth: to gaol". The answer was said to be not inconsistent with an understanding of the nature of an oath. Accord *R.* v. *Smith* (1872) 11 S.C.R. (N.S.W.) 69. Cf. *R.* v. *Paddy* (1876) 14 S.C.R. (N.S.W.) 440; *Ex parte Boyle* (1868) 7 S.C.R. (N.S.W.) 147. In *R.* v. *Moses Sydney Morning Herald* (N.S.W.) 12 October 1848 a witness who claimed to be a religious believer, proved on examination by the magistrates to have no knowledge of the nature of an oath. He was tutored by the magistrates there and then, and then permitted to give testimony on oath.

[44] *R.* v. *Peters* (1882) 3 L.R. (N.S.W.) 455; *R.* v. *Smith* (1906) 6 S.R. (N.S.W.) 85.

[45] *Evidence Act* 1910 (Tas.) s. 123, 125; *Evidence Act* 1967 (W.A.) s. 97; *Oaths Act* 1900-1962 (N.S.W.) s. 11A(6)(a) and (b); *Evidence Act* 1969 (S.A.) s. 7; *Oaths Acts* 1867-1960 (Qld.) s. 32; *Oaths Act Amendment Act* 1891 (Qld.) s. 1. The Victorian provision of course is s. 100(4) of the *Evidence Act* 1958.

[46] [1952] V.L.R. 361.

[47] (1866) 3 W.W. and A'B(L) 32.

[48] See fn. 22 (ante), *et seq.*

VI. *What should be done about sections 100-104 of the Victorian EVIDENCE ACT 1958?*

Clearly there are a number of possible avenues of reform. Some possibilities are—

(i) Amend the Victorian legislation by introducing a section equivalent to s. 1 of the *Oaths Act* 1961 (U.K.) and s. 1 of the *Oaths Act Amendment Act* 1891 (Qld). This would avoid the harsh consequences of a case like *R.* v. *Pritam Singh*,[49] and the case of the Hindu woman mentioned at the beginning of this article. If it is not reasonably practicable to administer an oath in the peculiar form regarded as binding by the witness, an affirmation may be permitted or indeed required instead.

However such an approach still fails to enable a witness to make an affirmation if he claims to have a religious belief, claims that he could be bound by an oath administered in proper form, but cannot say what kind of oath that might be. Furthermore while his religion may not render oaths unlawful (in the religious sense), the very concept of an oath may be totally alien to the religion itself. Such persons, it is suggested would not be permitted to make an affirmation in England even after the 1961 *Oaths Act* (U.K.), or in Victoria. They are often subjected to the indignity of having to take an "oath" in a form which is meaningless to them (such as holding a glass of "Ganges" water taken from the Yarra). Given that they do not regard such an oath as binding on their conscience it is suggested that they are in fact not competent to take an oath, as well as being incompetent to affirm.

(ii) Amend the Victorian legislation in accordance with the approach taken in West Australia, Tasmania and New South Wales to allow affirmations as of right. In addition the court ought to be given the power to require an affirmation to be taken if a peculiar form of oath is requested, but facilities for rendering such an oath are not readily available.

The problem may still arise of course as to whether a person who seeks to take an oath is competent to do so even in those jurisdictions. The unedifying spectacle of a judge attempting to assess the true religious beliefs of a witness could still arise under this approach.

(iii) Abolish oaths entirely and substitute for them a universal secular affirmation or declaration. Such an approach has been much canvassed over the years. For example, a majority of the members of the Criminal Law Revision Committee recently recommended the abolition of the oath entirely.[50] Their arguments varied from persuasive to puerile. In summary

[49] [1958] 1 All E.R. 199. Queensland foreshadowed the 1961 English legislation by virtue of s. 1 of the *Oaths Act Amendment Act* 1891. Thus the *Pritam Singh* problem would never have arisen in that State.

[50] See the ill-fated Eleventh Report of the Criminal Law Revision Committee entitled *Evidence (General)*, Cmnd 4991 (1972) at pp. 163 ff.

they said the oath is a primitive verbal formula akin to a curse, that oaths are not required in many other areas of law enforcement where truth is at issue, that many inroads have been made into the practice of taking oaths in relation to non-believers and infidels, that it is incongruous to invoke the Deity in trivial law suits, that little if any additional credibility is in fact given to witnesses who take an oath rather than making an affirmation, and that the oath is unlikely to promote a great additional incentive to tell the truth. It is argued that a person who has a genuine religious conviction will tell the truth irrespective of whether he gives evidence on oath. *Ex hypothesi* a person who has no such belief will not be affected by an oath at all. It is also argued that the existence of oaths has not prevented much perjury in the courts, and a witness who wishes to lie but is genuinely worried about the religious sanction of an oath can avoid the problem now by simply asserting that he has no religious belief. Needless to say the majority were in favour of abolishing the oath for jurors as well as witnesses. Somewhat illogically they refused to comment on whether the oath ought to be preserved in relation to making affidavits.

Against this it can be argued that the oath may serve a useful function in the truth ascertainment process. Recent developments in linguistic jurisprudence among Scandinavian legal philosophers provide a useful model for analysis. Taking from J. L. Austin an analysis of the use of words,[51] it has been persuasively argued by these writers that many legal terms operate as "performative utterances", rather than descriptive or conceptual utterances. For example the statement "I take this woman to be my lawful wedded wife" does not state a fact or describe an event. Its meaning is that something shall be brought about—to use the language of a leading exponent of this approach, such a statement is a "veiled imperative".[52] Austin himself included as performatives many expressions not imperative in nature, such as "I congratulate you", or "I apologize",[53] but the Scandinavians were concerned only with those performative utterances intended to call forth certain effects merely from the pronunciation of the imperatives in question. These imperatives need not be addressed to anyone in particular—what is important is their effect. The chain of cause and effect as postulated by the Scandinavians involves a statement of the law, leading because of a general reverence for the law, to a psychological feeling that one ought to act in a certain manner. In other words it is suggested that performative imperatives are instrumental in guiding people's behaviour.[54]

[51] J. L. Austin, *How to do Things with Words* (1962).
[52] K. Olivecrona, *Law as Fact* (2nd ed.) (1971) p. 218. See also Alf Ross, *Directives and Norms* (1968); and Julius Stone, *Legal System and Lawyers' Reasonings* (1964) p. 30 for an excellent discussion of linguistic theory as manifested in the science of "pragmatics" (the relation of words to those who utter, receive or understand them).
[53] Ibid.
[54] Ibid. 223. "The performatory imperatives aimed at the creation, modification, and

Analytically speaking, the nature of an oath involves a promise to speak the truth, coupled with an invocation of spiritually based punishment in the event that this promise is not carried out. Recognizing the words as performative utterances designed to bring about psychological rather than physical effects (i.e. taking an oath does not of itself ensure the physical fact that truth will be spoken just as pronouncing an invocation to the clouds to disperse their water over the earth does not bring rain, though it may affect people's expectations and beliefs in this regard), it follows that to achieve the desired psychological effect the act must be performed in a manner which accords with the kind of customary form which elicits such psychological responses. In this way effects can be brought about through words. The use of the expression "I promise" is not a description of a factual inner process. Using the words does not mean that the person reciting them has in fact inwardly undertaken to speak the truth. Nevertheless, Austin for one denied that such a statement as "I promise" was nonsensical if seen in its performative context. If a promise is made in accordance with legal forms, psychological effects may occur—the promisor may feel bound.

If this model has any application to the law relating to oaths and affirmations, namely if it is meaningful to speak of a person who recites a formal oath as engaging in a kind of ritual by the use of performative utterances designed to have psychological effects, two further questions arise. Is this element of the performative utterance lost if the solemn oath is replaced by an almost as solemn affirmation? In other words are the psychological effects lessened by a change of ritual from one which calls down the wrath of the supernatural to one which places before the witness his duty to tell the truth coupled with a direct and realistic threat of prosecution if he does not?[55] Finally has the existence and perpetuation of such forms of truth enhancement as the oath and affirmation prevented us from properly evaluating the contributions which natural science may have to make in this sphere, through the use of truth serums, lie detectors and probability theory? It is suggested that these questions may be answered respectively no and yes, and that the arguments in favour of replacing the oath with a secular affirmation are persuasive.

extinction of such effects. Their immediate psychological effect was to make people think that the supersensible legal effects really took place in accordance with the meaning of the imperatives. Consequential ideas concerning behaviour were associated with the idea that this was so; and people's conduct was largely determined by them."

[55] Although the incidence of obvious perjury in our courts is undoubtedly high, prosecutions for this ancient offence are rare. A more effective deterrent to untruthful testimony would be the creation of a new offence, perhaps of a summary kind punishing untruthful and recklessly inaccurate testimony. Community recognition that charges in relation to such testimony were brought as a matter of course, and that there were not the same evidentiary and procedural obstacles to proving such a charge might well prove more effective in truth enhancement than the theoretical possibility of being presented on a charge of perjury.