

LETTERS TO THE EDITOR

From the Bishop of Stafford

Dear Sir

The Auld Report, in reviewing procedure in the criminal courts, recommends, amongst many sensible things the substitution of witness's and juror's oaths or affirmations by a solemn promise to tell the truth. Lord Justice Auld notes that this matter extends beyond the criminal law and would need a broad reform.

It is argued that witnesses giving evidence under oath is of relatively recent development (18th century). I would be interested to hear the view of legal historians on this assertion, granted the Third Commandment and the history of oaths in Jewish Law; the place of oaths in Canon Law and the otherwise pointless objection to oaths by some Christians since the Reformation (based on Matthew 5.33–37) with the contrary defence of oaths before the Magistrate in the last of the Thirty-Nine Articles of Religion.

It is fairly argued that the combination of archaic words and perfunctory performance detracts from the solemnity of the undertaking and that for many the oath has become no more than a quaint court ritual. Moreover, so the Report argues, "the diversity of religious beliefs or non-religious beliefs" (sic) points to a simple promise. The Report does however make very clear the need for something to mark the beginning of a witness's evidence with a solemn reminder of the importance of telling the truth and a commitment to do so. Will this essential aim be achieved by the elimination of a reference to God? I doubt it.

For Jews, Christians and Muslims God, truth and justice are intimately inter-related. The fact that fewer people 'practise' their faith than heretofore does not mean that people do not believe in God in some way. For such people a promise before God (as in marriage) does add significance.

By all means simplify the procedure: Lord Justice Auld helpfully cites the promise used in youth courts or when children or young people swear. He also suggests that the judge might administer the oath for added solemnity. I would, however, argue for a simplified retention of a promise before God, with, of course, the option of an alternative promise for an agnostic or atheist.

Yours etc
Christopher Hill

From Professor John Baker, QC, LL.D, FBA

Dear Sir

I have read the letter from the Bishop of Stafford with much interest. What Lord Justice Auld said in his Report (p. 599, para. 193) was that 'The general rule requiring witnesses to give evidence on oath has a relatively recent history by common law standards, developing only in the eighteenth century'. This could certainly be read as meaning that witnesses did not generally give evidence on oath until the eighteenth century, though I think the Lord Justice probably meant to say that there were for-

merly some exceptions to the general requirement of an oath. He refers to J. R. Spencer and R. Flin, *The Evidence of Children* (2nd edn., 1993), pp. 46–65, where it is correctly stated (p. 47) that there was ‘no blanket rule against the acceptance of unsworn evidence, and the courts would listen to unsworn evidence from those who were ineligible to be sworn’. The principal exception, and it was no small exception, was that of witnesses for the defence. Until 1702, when the position was changed by statute, defence witnesses were unsworn. The defendant himself could not give sworn evidence until 1898, though he could make an unsworn statement. A less well documented exception, according to Sir Matthew Hale (H.P.C., i. 634; ii. 279), was that of very young children as complainants—though Hale does not cite authority and seems to have been arguing for a change in practice, on the grounds that hearsay evidence was admissible of a complaint made by the child immediately after the offence. I am not sure that any clear instance of unsworn evidence from children has been found, and in 1779 the judges ruled such evidence inadmissible (East P.C. 444). The mention of the eighteenth century in the Auld Report is apparently a reference to the statute of 1702 and the decision of 1779.

This is a good example of how misunderstanding can arise from an unintended inversion of meaning. The normal rule, which as far as I know was always observed in civil cases, was that evidence should be given on oath. The exclusion of sworn evidence for the defence in criminal cases was admittedly a very large exception, but it arose from the former thinking—supposedly influenced by Roman law—which excluded defence witnesses (and counsel) altogether in cases of felony: see my *Legal Profession and the Common Law*, p. 288. Hale makes it clear that defence witnesses were sworn in trials for misdemeanour (H.P.C. ii. 283). The incompetence of the defendant was an application of the general common-law rule which excluded the parties themselves—in civil cases as well as criminal—from giving evidence on the grounds that they were biased. Allowing an unsworn statement was a relaxation of that rule in favour of the defendant in a criminal case. On the other hand, I know of nothing to suggest that prosecution evidence was ever unsworn, apart from the possible exception of children ‘of tender years’. Indeed, Hale regarded the oath as so important that he rejected Coke’s view that an infidel could not be sworn as a witness: for ‘it were a very hard case, if a murder committed here in England in presence only of a Turk or Jew, that owns not the Christian religion, should be dispunishable, because such an oath should not be taken...’ (H.P.C., i. 279). He did not in this case consider the possibility of an unsworn statement.

There is a dearth of information about trial procedure before the seventeenth century. But our earliest procedural manual for gaol deliveries (*Modus intrandi Deliberationem Gaole*, Bodl. Lib. MS. è Mus. 57, ff 88–89), which dates from about 1550, gives the witnesses’ oath as follows: ‘The evidence of information that you shall give to this inquest against John Dale, prisoner at the bar, shall be truth and nothing but the truth, and the whole contents thereof. So help ye God etc.’ The printed *Book of Oaths* (1649), pp. 204–205, gives ‘The Oath for Evidence upon the Arraignment of the Prisoner at the Barre. The Evidence that you shall give to this Inquest against the Prisoner at the Barre shall be the truth, and the whole truth, and nothing but the truth, as neere as God shall give you grace. So help you God and by the Contents of this Booke’. This version probably dates from around 1625: see a manuscript version in the British Library, MS. Harley 39, fo. 5lv. The first printed manual of assize practice, *The Office of the Clerk of Assize* (1676), pp. 13–14, says that when the witnesses for the king appear, ‘the Clerk of the Peace causeth them to lay their right hands upon the Book and giveth them this Oath. The Evidence that you, and every of you, shall give to this Inquest against J. S. Prisoner at the Bar, shall be the truth, the whole truth, and nothing but the truth, so help you God.’

It appears from these precedents that, although the oath was spoken by the clerk and not by the witnesses themselves—so that the Crown witnesses could be sworn collectively—it was nevertheless an oath, and (apart from the words ‘against the prisoner’) in much the same form as today. There is no reason to think that it was new in the sixteenth century, let alone the eighteenth. There seems to me, however, much to commend the qualification in the 1625/49 form—— ‘as near as God gives you grace’—since it is rash for anyone to swear to state the whole truth when that is known only to God. It will be noted that our earliest formulation does not mention the ‘whole truth’; the words ‘the whole contents thereof’ seem to refer to the evidence itself.

Since Lord Justice Auld says (para. 195) that ‘Much the same considerations apply to a juror’s oath’, I should add that jurors were always on oath, by definition, because that is what ‘juror’ (*jurator*) means. There is no such thing at common law as an unsworn jury or juror. Indeed, the formal entry of a presentment or verdict by a jury always referred to their oath (‘dicunt super sacramentum suum...’).

Yours etc
John Baker