1913
*Nov. 10.
*Nov. 17.

RONALD CURRY .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law—Perjury—Form of oath.

A witness who testifies to what is false is guilty of perjury, although, without being asked if he had any objection to being sworn in the usual manner, but without objecting to the form used, he was directed to take the oath by raising his right hand instead of kissing the Bible.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1) affirming, by an equal division of opinion, the conviction of the appellant for perjury.

The appellant was charged with having committed perjury on the investigation of a charge against a customs official and was tried at Sydney, N.S., and convicted. The following questions were reserved by the trial judge for the opinion of the Court of Appeal.

"Was I right in holding that there was sufficient corroborative evidence to warrant a conviction?

"The defendant was sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way.

"It was objected that the accused was never sworn, and that he could not be convicted of perjury on evidence so given.

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*PRESENT:—Sir Charles Fitzpatrick C.J., and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 47 N.S. Rep. 176. (This report incorrectly states that the conviction was quashed.)

"Was I right in holding that he could be convicted on the evidence so given ?"

The judges of the Court of Appeal were unanimous in answering the first question in the affirmative and it is, therefore, not before the Court on this appeal. On the second question they were equally divided.

Maddin for the appellant.

Jenks K.C., Deputy Attorney-General, for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of Nova Scotia sitting as a court for Crown cases reserved.

The appellant was convicted of perjury by the judge of the County Court District No. 7.

These two questions were reserved for the opinion of the Supreme Court en banc:—

1. In the circumstances in the reserved case was the trial judge right in holding that there was sufficient corroborative evidence to warrant a conviction ?

2. The defendant having been sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way, was the judge right in holding that he could be convicted on evidence so given ?

The Supreme Court held unanimously that there was sufficient evidence to warrant a conviction, and this appeal is, therefore, limited to the second question as to which the judges of that court were equally divided.

It is admitted that the accused appeared as a witness in a proceeding before a competent tribunal and being questioned with respect to a matter material in that proceeding made as part of his evidence an assertion of fact which, for the purpose of this appeal, it

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must be assumed he then knew to be false. The defence is that at the request of the commissioner the accused took his oath in the more ancient of the two forms known in modern proceedings, "the adjuratory invocation of the Deity with uplifted hand commonly called the Scotch oath," no attempt having been previously made to ascertain whether he had any objection to taking the oath in the comparatively modern form by kissing the book. And it is argued that in consequence the false assertion which is the foundation of the charge of perjury was not made upon oath. This defence is apparently based on the assumption that the acknowledged form of oath is that which is administered by kissing the book, and that the oath in the Scotch form can only be taken in exceptional cases, as it were, upon cause shewn.

With all deference I cannot see the force of this objection. Both forms are recognized and used in the provincial courts at the option of the witness. In this case, the investigating commissioner asked the accused to raise his hand, which he did without protest, and then repeated to him these words:—

> The evidence you will give in this inquiry will be the truth, the whole truth and nothing but the truth, so help you God,

after which he proceeded to give his evidence. If he did not, in these circumstances take an oath, that is, call God to witness the truth of what he was about to testify to, I am at a loss to understand what these words mean. Having taken the oath in that form without objection, it is an admission that the witness regarded it as binding on his conscience, and that is the object for which the oath was used both in ancient and modern times(1). To hold otherwise would be to

(1) Dal. 47, 4, 439.

put a premium upon perjury, and as those who take part in the administration of justice are painfully aware, a great amount of false swearing is allowed to go unpunished.

It is now admitted to be the absolute right of every person in the English courts to be sworn for every purpose in Scotch form without the use of any book and without any question being asked. It may be open to question whether it is not better as a matter of public policy for our courts and other persons administering oaths to adhere to the time-honoured custom of swearing witnesses upon the Bible or Testament in all cases except those where the witness or party claims to have conscientious objections to swearing in that mode or form.

But we think, however that may be, that where no such objection is raised and the oath is taken voluntarily by a person with uplifted hand and calling God to witness the truth of his evidence or statements, it would be alike a mocking of justice and a disregard of the common law as we understand it to allow such a person on an indictment for perjury to escape on the sole ground that he took the oath without being sworn on the Bible or New Testament.

The appeal should be dismissed. No costs.

DAVIES, DUFF and BRODEUR JJ. concurred.

IDINGTON J.—The appellant having been convicted of perjury, two questions were reserved for the Court of Appeal. Of these one having been disposed of unanimously by that court against the contention of appellant, he can only appeal here in respect of the other regarding which that court was divided.

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That question brought thus before us is stated as follows:—

The defendant was sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way.

It was objected that the accused was never sworn, and that he could not be convicted of perjury on evidence so given.

Was I right in holding that he could be convicted on the evidence so given ?

The proceeding out of which the charge arises was an inquiry by a commissioner under and pursuant to chapter 104 of the Revised Statutes of Canada, 1906, wherein it admittedly was within the power and duty of the commissioner by virtue of section 4 of the said Act "to require witnesses to give evidence on oath or on solemn affirmation if they are persons entitled to affirm in civil matters."

The commissioner testified at the trial of the appellant, amongst other things, as follows:—

Q. Was the evidence given under oath ? A. I think under oath, although some little question with regard to that has been raised. There was no copy of the Bible used. In a few cases where the copy of the Scripture was not readily available I called the witness to hold up his right hand and went through the formula with the man. It was done in this case.

Q. Tell what was done? A. I called the witness to raise his right hand and I put this formula to him: "The evidence you will give in this inquiry will be the truth, the whole truth and nothing but the truth, so help your God ?"

Q. And did he raise his right hand ? A. He raised his right hand.

By the court.

Q. I suppose, Mr. Duchemin, you determined yourself the manner in which you would swear him ? A. Yes, I did not ask any questions.

The contention is that appellant so sworn and giving the evidence in respect whereof he has been convicted of perjury, never in law was sworn because the oath was not accompanied by his kissing the Bible or being examined by the commissioner as

to his religious belief entitling him to be sworn in the form adopted.

The crime of perjury of which he has been convicted and the circumstances under which a person may be convicted thereof, are defined by section 170 and subsequent sections of the Criminal Code:—

> Section 170. Perjury is an assertion * * * made by a witness * * * as part of his evidence upon oath or affirmation * * * such assertion being known to such witness to be false and being intended by him to mislead * * * the person holding the proceedings.

And inasmuch as the appellant in this case signed the evidence when read over to him, I think section 172 may also cover this case. It is as follows:—

> 172. Every one is guilty of perjury who—
> (*a*) having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing.

When we are asked as herein to discard the fundamental principle of giving effect to statutes and to fritter away the plain ordinary meaning of the language used in this one, it is somewhat difficult to treat such a contention seriously.

The form now in question herein of "taking or making the oath" is in law and in fact much older than the usual one of kissing the Bible, much older even than the common law, yet recognized by the common law.

This statute was so framed, I think in 1868, as to end, if possible, every frivolous attempt of the perjurer to escape, by way of technicalities and needless subtleties, from the consequences of his misconduct.

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It was amended by the Criminal Code so as to render it yet more comprehensive and plain.

It seems to me to subserve the purposes for which it was enacted and to fit well the case now presented to us.

The appellant took or made an oath and by virtue thereof was permitted to testify and if he wilfully and corruptly testified to that which was false, the plain purpose of the enactment is that he should suffer the punishment it awards.

It is entirely beside the question to cite cases where in the course of administering justice, men have been found to have taken oaths whereby their impiety or ill instructed consciences might permit them to make a secret mockery of justice, and might lead to their injuring others by speaking falsely; and hence out of regard to the rights of those so injured, the evidence so given has been set aside or treated as null.

We are not dealing here with such a question, but with the law which makes such men in any event liable to the punishments the law has provided for the misconduct involved not only in so trifling with the court and the rights of others, but also in so doing, speaking wilfully and corruptly that which was false. In the other case what had been said might have been absolutely true, but had to be treated as non-effective for want of the form of the sanctions the law looked upon as security for truth.

It is, I respectfully submit, a mere confusion of thought thus to mix these entirely different things and their consequences.

Another confusion of thought is that involved in the argument that is sought to be derived from the modifications of the law which debarred many from

testifying in the only form which their consciences permitted them to adopt.

The old law debarred such persons often from testifying at all.

The law also debarred suitors from putting forward and using such witnesses or others not bound by any oath.

But the law in the most barbarous state in which it ever was, never excused him, who despite his incapacity to comply with the law, had taken a form of oath that the court had administered to him, from the consequences of his having wilfully and corruptly violated the pledges he had in any accepted form given the court.

The argument founded upon the 16th section of the Criminal Code has, if possible, still less to commend it.

There never was in the common law anything to justify or excuse any man for violating so plain a statute as this now in question.

It is extremely desirable that men appearing as witnesses in our courts and in such capacity taking any form of oath or making any affirmation, should understand they are, when wilfully and corruptly speaking falsely under any such circumstances, liable to be convicted of perjury, whatever may be their peculiar religious, mental or moral conceptions of the binding effect of the form of oath or affirmation.

The appeal must be dismissed.

ANGLIN J.—The question for determination in this case is whether the defendant took an oath which renders him liable to the penalties of perjury for false testimony given under it. The commissioner before

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whom the oath was taken was authorized to administer it. Because a copy of the Holy Scriptures was not at hand he administered the oath in what is usually known as the Scotch form — that is, the deponent with uplifted hand called upon Almighty God to witness that he would speak the truth. He was not asked whether he had any conscientious objection to taking the oath in the manner customary at the present day in English courts, nor did he explicitly state that the oath in the form in which he took it was recognized by him as binding upon his conscience.

From the short review of forms of oaths in the Encyclopædia of the Laws of England, vol. 10, page 103, it would appear that at common law the touching or kissing of the Bible or Testament is not essential to the taking of an oath. In the leading case of *Attorney-General* v. *Bradlaugh*(1), where various questions respecting oaths, their binding effect and their forms were carefully considered, Lord Justice Cotton, quoting a passage from the judgment of Martin B., in *Miller* v. *Salomons*(2), at page 515, says that that learned judge, after referring to *Omychund* v. *Barker* (3) as correctly stating the law, proceeds thus:—

> The doctrine laid down by the Lord Chancellor and all the other judges was that the essence of an oath was an appeal to a Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood, and that the form of taking an oath was a mere outward act not essential to the oath.

The Lord Justice adds:—

> I read that because it shews how, down to the latest times, what was laid down in *Omychund* v. *Barker*(3) has been recognized, as we recognize it, as correctly stating what the law of England is as regards taking an oath.

(1) 14 Q.B.D. 667. (2) 7 Ex. 475.
(3) 1 Atk. 21.

In the same case (at p. 701) Brett M.R. says:—

> If a person who could take an oath, * * * nevertheless took it in a manner which disregarded the due solemnities of the mode of taking an oath which are appointed in this Act of Parliament, or, if he took the oath, and did not, within the meaning of this Act of Parliament, subscribe the oath; * * * on reflection, I am of opinion that he would be liable to the penalty.

The defendant in the present case did that which constitutes "the essence of an oath" — he called upon Almighty God, in whose existence and divine attributes it is not suggested that he did not believe, to witness the truth of that which he was about to say.

For the defendant it is urged that with him rested the option of determining what form of oath he should take — that, unless he elected not to take the oath in the form customary in the English courts and claimed the right to take it in the Scotch form, an oath in that form should not have been administered to him and would not render him liable to the penalty of perjury. If the assent of the witness to the administration of the oath in any form other than that which is customary in the English courts be requisite, I am of the opinion that by taking the oath in the form in which it was tendered to him, making no protest against it but proceeding to give his evidence with the knowledge that it would be accepted and acted upon as testimony given under oath, he sufficiently assented to the oath being administered in the form in which it was, and that he cannot, upon being afterwards charged with perjury, be heard to say that he was not sworn.

For these reasons I would dismiss this appeal.

Appeal dismissed.