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CONTENTS

The Zimbabwe Law Review is no longer a thing of the past!

You may have been starting to think that the Zimbabwe Law Review had become redundant. One unkind person went as far as to suggest that we should rename our journal "The Historical Law Review" !

Unfortunately we had fallen a few years behind in the production of the Review. The last issue to appear previously was Volume 7 / 8 covering the years 1989 and 1990. The Editorial Board of the Review sincerely apologises to all of valued subscribers and buyers of the Review for the inconvenience caused to them. In order to speed up the process of getting up to date we decided to combine Volumes 9 / 10 (1991 and 1992) of the Review into a single number. Those who have subscribed in advance will be receiving their ordered issues within the near future. The next volume, Number 11 (1993), will be ready for distribution within the next few months. The Editorial Board would like to assure you that in the future the Law Review will be produced on a more regular basis.

We hope that you will renew your interest in this publication by renewing your subscriptions if you have allowed them to lapse. Details of current subscription rates are to be found on the cover of the Review. There is a reduced price for those ordering a set of the Zimbabwe Law Review.

We would like to call for the submission of articles, book reviews and casenotes for consideration for inclusion in this publication. These are momentous times for Southern Africa. Democratic rule has finally come to South Africa after so many years of struggle, suffering and oppression. We would like to take this opportunity to extend our heartfelt congratulations to the people of South Africa on the attainment of their liberation from apartheid rule.

In Southern Africa there is an urgent need to analyse and debate topical matters such as issues relating to development and reconstruction, equitable land redistribution, the impact of economic structural adjustment programmes, the protection of human rights, democracy and constitutionalism and the protection of the environment. We call for the submission of articles on these and other important issues.

The Editorial Board would like to extend its sincere gratitude to the Raul Wallenberg Institute of the University of Lund in Sweden for its generous donation of desktop publishing equipment to the Faculty of Law of the University of Zimbabwe. This equipment was donated for use in the production of the Zimbabwe Law Review and other Faculty publications. This current number of the Zimbabwe Law Review was produced using this equipment.

THE PROPRIETY OF ADMINISTRATION OF OATHS AND AFFIRMATIONS BY PROSECUTORS IN THE MAGISTRATES COURTS IN ZIMBABWE

by

Eddie Sekhonyana*

"An oath to constrain God's heart to pain"

Introduction

This article was mainly inspired by rather an anomalous but rampant practice by the magistrates in Zimbabwe of requiring prosecutors appearing before them to swear in witnesses. This practice is common at the Rotten Row and Tredgold magistrates courts. The position taken in this paper is that the prosecutor is unsuitable to administer oaths to witnesses appearing in his court simply because he has an interest in the outcome of the case. Swearing in of witnesses before leading evidence is part and parcel of the criminal justice system of many civilised countries including Zimbabwe.

In Zimbabwe the taking of any *viva voce* evidence by the courts is always preceded by a sworn declaration made *viva voce* by the witnesses before such witnesses can give evidence about what they have perceived with their senses. This "peremptory ritual" raises a whole spectrum of questions, amongst which are: What is this sworn declaration? By whom may such sworn declarations be administered? What is the legal efficacy and effect of a sworn declaration administered by an unauthorised person? These questions are addressed in this article, although the emphasis is on sworn declarations made in the criminal trials in the magistrate courts. The first part of this article chronicles the Roman-Dutch law approach to the administration of oaths or affirmations with a view to determining, from the historical perspective, by whom oaths and affirmations were administered under the Roman-Dutch law. This historical perspective is vital and crucial to the understanding of the common law of Zimbabwe, which is based on Roman-Dutch law. The second part of this article evaluates the practice pertaining to the administration of oaths, affirmations or admonitions in South Africa. The third and final part discusses, critically, the practice of administration of oaths, admonitions or affirmations in Zimbabwe's magistrates courts and proffers some suggestions for improvements to this practice.

The terms "oath", "affirmation" and "admonition" are referred to now and again right through this article. It is, therefore, important to determine the sense in which they are used. An "oath"[1] is in general simply a religious declaration of the truth of the

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1 Historically the oath used to be regarded as a summoning of divine vengeance upon false wearing whereby when spectators see the witness standing unharmed they know that the divine judgment has pronounced him t o be a truth-teller. But it is presently conceived as a method of reminding the witness strongly of the punishment somewhere in store for false swearing and thus of putting him in a frame of mind calculated to speak only the truth as he saw it.

statement of what the deponent has perceived with his senses,[2] or a calling upon the name of the Deity in support of the truth.[3] An "affirmation" is a declaration made by the witness, as an alternative to the taking of the oath, whose religious beliefs do not permit him to take an oath.[4] An "admonition" is a declaration made by a witness who does not have the belief and understanding to be able to take a binding oath or affirmation.[5] The administration of affirmations or admonitions to witnesses is intended to have the same effect as administration of oaths, which is to ensure that they are constrained to tell the truth about the events as they perceived them, nothing more.

Roman and Roman-Dutch Law

An oath, that mother of credibility (as Merula[6] puts it), constitutes an integral part of the proceedings in the higher courts, magistrates courts and the so-called quasi-judicial tribunals in Zimbabwe, be they criminal or civil. It is trite law that before any evidence can be adduced through witnesses during a criminal or civil proceeding such witness must first of all be sworn in, admonished or affirmed depending on the circumstances peculiar to the witness concerned, to ensure that they are constrained to tell the truth, the whole truth, nothing else but the truth. The content and form of the oath, and persons who are best qualified to administer such oath are provided for by the common law which has been **consolidated** by legislation.[7] A practice has evolved and taken root in Zimbabwe's magistrates courts whereby prosecutors are ordered everyday by the magistrates to administer the oath to witnesses including accused persons in matters in which they, prosecutors, are *dominis litis*. The central question here is whether this practice or custom should be countenanced or not. If not, what is the probative value of testimony deposed to under such circumstances?

There is, generally in Zimbabwe, a deep silence on the subject of administration of oaths both in judicial and academic literature. This area is still *terra incognita*. There is a dearth of academic and judicial authorities dealing directly or indirectly with the question of oaths in criminal trials. This is probably the reason why the administration of the oath in the magistrates courts is treated with such a high degree of laxity that one often hears the magistrate pronouncing with pomp and confidence, "Mr Prosecutor, swear in the witness, please!!" This practice is not restricted to prosecution witnesses. The prosecutor is also expected to swear in defence witnesses. The Roman-Dutch law approach to this subject is without doubt extensively chronicled.

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2 Percival Gane, *The Selective Voet Being The Commentary on the Pandects*, Vol 2, Butterworth, Durban, p 796.

3 *Ibid.*

4 Ibid. PP 799.

5 Resident Magistrate Courts Act, No. 2 of 1856.

6 Paulus van Merula, *Manier Van k in de Provintien van Hollandt, Zeelandt en West-Vriesland Belangend Civiele Zaken*, Leyden, 1592; 4.65.9.1.5.

7 The Criminal Procedure and Evidence Act [Chapter 59] section 237. The MagistratesCourt Act [Chapter 18] section 77 and the High Court of Zimbabwe Act, No. 2 of 1981 consolidates the common law practice relating to administration of oaths or affirmations in Zimbabwe.

The need to testify under oath is tersely stated by Merula[8], as "eed, moeder van geloofwaardigheid," which literally means the oath, mother of credibility. In the Dutch courts[9] witnesses were examined by a judge upon statements made by the witnesses, which were filed by the party calling them. Witnesses were cross-examined by the judge upon questions formulated and supplied by the opposing party. Neither of the parties was allowed to be present at the examination of the witnesses and they were sworn to secrecy until judgment had been given. The witnesses had to be sworn in, in the presence of the parties to the dispute so that they could be sure that witnesses would swear by the oath that would bind their conscience. It is interesting to note in passing that under the Dutch law oaths were admitted as a form of proof.[10] Parties often made use of it to perfect proof which could not be deemed conclusive. Under all circumstances mentioned above the judge as adjudicator of facts had personally to administer the oath. When witnesses were produced, especially in criminal trials, they had to be questioned separately and not simultaneously.[11] Before they could give evidence they had to be constrained by the judge with the solemnity of the oath or, where the testimony had already been given, they had to confirm such evidence with a solemn oath. The nature of the oath was such that the witnesses had to swear, not to what they believed or thought, but to the truth, and to give evidence of their own knowledge.[12] It was, therefore, imperative to administer such oath at the time when the witness was produced and not after an interval.[13]

As an alternative to the taking of the oath, for the benefit of those people[14] whose religious beliefs did not permit them to take an oath, the Roman-Dutch law recognised an affirmation instead, which, when administered properly by the judge had the same binding force and effect as the oath.[15] Therefore, the Roman-Dutch practice was that an affirmation just like the oath had to be administered by the judge presiding over the case, who, by virtue of his position, was best suited to impress upon the witness the constraints to tell the court the truth, the whole truth, and nothing else but the truth.

It is clear from the above brief analysis that under Roman-Dutch law the witnesses had to swear or affirm to the truth and give evidence of their own knowledge. It is also clear that it was imperative that the witnesses be sworn in or affirmed by the judge or the presiding officer. In matters relating to the administration of oaths, South African legislation and courts followed the Roman-Dutch approach delineated above.

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8 Merula, *Ibid* 4.65.9.1-5.

9 Lord Macharzie, *Studies in Roman Law*, William Blackwood and Sons, London (1876) p 370; Hugo de Groot, *An Introduction to Dutch Jurisprudence* translated by Maasdorp., Juta, Cape Town (1988) p 346; Van der Keesel, *Praelectiones Voorlessings* Vol v, AA Balkema. Cape Town p 529; Percival Gane, Huber's Jurisprudence, Ibid.

10 Percival Gane, The Selective Voet, p 803.

11 George T Morris, *Van der Linden's Institutes of the Laws of Holland*, T Maskew Miller, Cape Town (1914) p 88.

12 C W Decker, *Simon van Leewens commentary on Roman-Dutch Law* Vol 11, Stevens and Haynes, London (1886) p 495.

13 *bid.*.

14 *Ibid.*

15 Ibid.

South African Roman-Dutch Law

In South Africa, before the enactment of the current consolidated Magistrate Courts Act[16] the swearing of witnesses in the magistrates courts of the Cape of Good Hope was governed by the Resident Magistrate Courts Act.[17] Schedule B of the Act provides for the rules of procedure to be followed in the magistrates courts. Rule 20 stipulates that:

> [a] person examined or giving evidence in the said court shall be examined orally and apart, and in open court, and shall be sworn by the resident magistrate, according to the form of the religion they respectively profess, "to tell the truth, the whole truth and nothing but the truth," but all persons entitled by law to affirm, instead of taking an oath, may so affirm. Nothing contained shall extend to or affect the provisions of the sixth section Ordinance 14 of 1846.[18]

This rule was subject of judicial interpretation in the Supreme Court of South Africa. In the case of *R v Martheza*,[19] Martheza, who had been convicted in the magistrates court, appealed to the Supreme Court against his conviction. He had been convicted of having committed perjury in a civil suit in which he had given evidence. He appealed on the ground that he had not taken a valid oath in that in the civil court the oath had been administered to him by the messenger of the court, who, at the magistrate's direction, had acted as a clerk. The messenger had no direct authority to administer oaths. The matter was tried before a full bench and James Buchanan, who presided, had come to the conclusion that the essential requirement was that the oath should be administered before a competent court and that whether the magistrate went through the formality himself, or the clerk of the court or even the messenger of the court did so in the magistrate's presence under his direction, the oath was equally binding. A person who, after such administration of the oath, gave the evidence, was liable to prosecution and conviction for perjury. In *R v Mohammed Hossain*,[20] the facts were similar except that the accused had in the civil suit been sworn by the interpreter. The court opined that the oath was properly administered by an official of the court in the presence of the magistrate and at his direction. The court in this case held further that the administration of the oath by the interpreter was in accordance with the practice in both the Supreme and magistrate courts. These decisions confirmed the magistrates' discretion in directing court official to administer an oath or an affirmation. This discretion or existence thereof is further confirmed by the interpretation of the Resident Magistrate Court Act, Act 20 of 1856, read contextually with the provisions of Ordinance 14 of 1846.

Section 6 of Ordinance 14 of 1846 makes provision for the administration of an admonition to witnesses, who according to the enactment are members of or have sprung from "The barbarous and uncivilized tribes and races of Africa and who, as such, have not the belief and understanding to be able to take binding oath".[21] It makes provision for the judge and the magistrate to administer the admonition or

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16 Act 32 of 1944.
17 Act 28 of 1856.
18 *bid.*
19 3 HCG 456.
20 1913 CPD 841.
21 Section 6 of Ordinance 14 of 1846.

to cause it to be administered, that is, to direct someone else to do so. This section heralded a radical departure from the law of evidence which was extant then. Though the Jews and similar sects were, on account of their religious queasiness regarding the taking of the oath, excused from swearing and allowed to give their evidence upon affirmation,[22] there was no similar provision for the taking of the evidence of the agnostic or persons who could not comprehend the nature or recognise the religious obligations of the oath under Roman-Dutch law. In terms of Ordinance 14 of 1846, the magistrate could personally administer the admonition or direct someone else to do so. If this latitude of directing someone else to administer an admonition is allowed to the magistrate in terms of the Ordinance would it be appropriate to surmise that the legislature's intention was to deny them the same latitude in cases of oaths or affirmations? This surmise would be completely illogical. It would surely be anomalous to suppose that the legislature intended that the magistrate had personally to administer the oath and affirmation, which are in fixed verbal form and readily understood, but that in the case of an admonition, which is much more difficult to articulate in words that will impress the mind and bind the conscience of the witnesses, they may speak through the mouth of an official. The view that the magistrate has discretion to direct court officials to administer oaths, affirmations or admonitions was confirmed in the case of *State v Bothma*.[23] In this case Bothma, who had been convicted on two counts of assault with intent to do grievous bodily harm by the magistrate court, noted an appeal against the conviction. One of the grounds upon which she based her appeal was that the trial magistrate had committed serious irregularity in that he had allowed the prosecutor, who was *dominis litis*, to swear all the witnesses. The court held that the magistrate had a discretion to direct some official of the court to administer the oath to witnesses appearing before him and that the official may be the clerk of the court, an interpreter or even the messenger of the court, but certainly not the prosecutor conducting the case simply because he has an interest in the outcome of the trial. The law in South Africa is now that a person having an interest in the outcome of either a civil or criminal trial is not a fit and proper person to administer the oath, confirmation or admonition, and the prosecutor, being such a person, cannot be competent to administer the oath, confirmation or admonition.

Zimbabwean Roman-Dutch Law

The law relating to the administration of oath or affirmation in Zimbabwe must be viewed from the historical perspective to understand the present Magistrates Court Act provision relating to the administration of oath, affirmation or admonition. Before the enactment of the current successive Magistrates Court Act the law applicable to the administration of oath, affirmation or admonition was generally accepted to be that of the Colony of Good Hope as it was upon the 10th day of June 1891, according to the High Commissioner's Proclamation.[24] In these circumstances the provisions of the Resident Magistrate Courts Act, Act 20 of 1856, were equally applicable in Zimbabwe as well as the *ratio decidendi* in *R v Martheza*[25] where it was held that the provisions of Rule 20 of Schedule B of the foregoing enactment, which

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22 Percival Gane, *Hubers Jurisprudence, p 513.*

23 1971 (1) SA 333.

24 10th June, 1891.

25 3 HCG 456.

are to the effect that a witness in the magistrates court shall be sworn by the magistrate. It stands to reason that even then the oral evidence, whether in the criminal or civil proceedings, had to be sanctioned by an oath, affirmation or admonition to forcefully remind the witness of the punishment in store for false swearing, and to put him in a frame of mind calculated to speak only the truth as he saw it. Since the provisions of the above Act were held to be directory it follows that the magistrate in Zimbabwe could direct any official of the court to administer the oath, affirmation or admonition. The question is whether he could direct the prosecutor conducting the case before him to administer the oath, affirmation or admonition to witnesses? The answer to this question, in as far as it relates to the prevailing state of law relating to the administration of oath, is not easy to come by: But if the question were to be answered before the enactment of the Magistrates Court Act,[26] it would have been answered in the negative, precisely because the prosecutor conducting a criminal case is in a unique position in relation to witnesses testifying in the case as compared, for instance, to the interpreter, the clerk of court or any official or officer of the court; the prosecutor is interested in the outcome of the case.

It is trite law in this country that the judicial officer presiding at a trial is responsible for the administration of the oath to all witnesses testifying in the case. The oath must be administered in open court and in the presence of the parties. There rests upon the presiding officer the duty to try any issue regarding the oath to be sworn by each witness. It may be necessary for him to hear evidence before he can determine what oath should be administered and in what manner it should be administered, and witnesses called in this connection can be cross-examined by the opposing party, or both parties if they (witnesses) are called by the court. Having determined what oath is to be administered and the manner of administration, it is the duty of the presiding officer to see that the oath is administered and administered properly. Part of the proper administration of oath is that it should be made clear to the witness that it is the court that is requiring him to swear. Therefore the weight of an oath is determined in the first instance by three factors: by what God or Gods the attesting party swears; by whom he is sworn; and the place at and the occasion on which he swears. It is essential that the witness should realise that constraint of the oath to tell the truth is being laid upon him by judicial authority. The gravity of the oath is generally more effectively conveyed through the mouth of the presiding officer than through the mouth of some lesser officer. This view is also expressed by the American Bar Association.[27] It is the duty of the court to be impartial and, if the magistrate does not himself administer the oath, then he must call upon someone who has no interest in the outcome of the case to perform this function for him.

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26 Chapter 18.

27 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law;* Vol. 6, Little, Brown and Company, Boston 1940 at p 297. The American Bar Association's Committee on Improvement of the Law of Evidence is quoted to have stated "Oath. The sense of responsibility impressed by the oath is still ... decidedly felt by most persons called as witness. Inasmuch as it helps to that extent to stir the conscience and elicit truth, it must be preserved. But the degeneration of its administration, as practise today in most courts, is calculated to minimize the effect of the oath. The administration must positively be improved, to obtain maximum effiency for oath ... To obtain the maximum efficiency of the oath, the following features should be restored.

The prosecutor conducting the case is no such person. He has a direct interest in the outcome of the case. It is his duty to present the state's case in the best light warranted by the facts, and for this purpose he may have consultation with witnesses and, at such consultations, if he thinks the witness is not being truthful he may bring pressure to bear upon the witness to try to get him to speak what, according to the prosecutor's knowledge of the facts, is the truth. In the conduct of a case, almost inevitably, a bond arises between the prosecutor and the State witnesses and especially between him and the complainants; they regard him as their champion and feel bound to assist him in their cause. It is indeed hard to think about a more unsuitable person to administer the oath to the witnesses than the prosecutor in the case. The court in doing so is calling upon one of the parties to perform an important function of the court: to constrain the witness by his oath to speak the truth, and, when the prosecutor performs this function, the administration of the oath is no longer vested with that impartiality and gravity which the law intended to achieve by requiring the magistrate or judge in the case to administer the oath. Therefore where the prosecutor had sworn in witnesses, the testimony given thereafter cannot be said to have been deposed after witnesses had been sworn in open court to tell the truth, the whole truth and nothing else but the truth under the circumstances that they should have realised that the oath was being administered to them by the court. This constitutes serious irregularity. Is such irregularity so serious as to negate or make proceedings null and void?

Before the irregularity can be of such force as to make the proceedings amenable to being declared *pro non scripto* it must be of such a nature that a failure of justice appears to have taken place[28]. Real and material prejudice is sufficient.[29] The court need not form an opinion that an innocent man has been convicted. The question is purely whether he had a fair trial.[30] There are irregularities which can be regarded as "injustice per se" — in such a case the conviction will be set aside however strong the evidence for the prosecution may be. In this way a distinction is made between irregularities which are fatal and irregularities which are excusable. The irregularity which is fatal is one where there was such a far-reaching departure from the acknowledged rules of procedure that the accused did not undergo a proper trial. It is then per se an injustice and it is unnecessary to decide whether a reasonable trial court would in any event have found the accused guilty if the irregularity had not taken place.[31] It is submitted that where a prosecutor conducting a case, personally swears in witnesses in a criminal trial, as practised in Zimbabwean magistrates courts, that that per se constitutes an irregularity so fatal that it can be said that the accused did not undergo a proper trial. However, in this country this does not constitute an answer to the prevailing problem, particularly when the prevailing practice of magistrates requires prosecutors conducting cases to swear in witnesses appearing before them, as scrutinized in the light of the provisions of Chapter 18 of the Magistrates Court Act.

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28 *S v Moodie* 1961 (4) SA 752 (A) at 758; S v Mayeza 1983 (A) SA 242; *S v Gaba* 1985 (4) SA 734 at 750; *S v Thipe* 1988 (3) SA 343 (T) at p 347.

29 *S v Moodie ibid* p 758; *S v Gaba Ibid* p 750.

30 *S v Moodie ibid*.

31 *Ibid*

Zimbabwean Statute Law

According to s 77 of the Magistrates Court Act [*Chapter 18*]:

> The oath to be taken by any witnesses in any proceedings, whether civil or criminal, in any court or at any preparatory examination shall be administered by the officer presiding at such proceedings **or by the prosecutor** or the clerk of the court in the presence of the said officer or, if the witness is to give his evidence through an interpreter, by the said officer through the interpreter or by the interpreter in the said officer's presence. (my emphasis)

The Act *expressis verbis* mentions the prosecutor as a fit and proper person to administer the oath on instruction of the presiding officer. Could it be said that the Legislature intended to expose the accused person to the injustice of being sworn in by the party prosecuting him? *Ex facie* the above stated provision of the Act it may be surmised that it is exactly the meaning which the legislature intended. But if the section is scrutinized in the light of appropriate cannons of construction, a different viewpoint would be reached. If the section is scrutinized closely it would become obvious that the presiding officer is the person who is enjoined by the section to administer the oath: "the officer presiding at such proceedings"; "the clerk of the court", and "the interpreter" are phrases or words denoting a specific genus of court officials bound together by what is expected of them: impartiality in the proceedings taking place before the court. But the same cannot be said of the prosecutor. As argued above[32], the prosecutor is not an impartial officer of the court. He has an interest in the outcome of the proceedings. There can be no plausible reason or logical explanation as to why the draftsman decided to include the prosecutor in the group of the above mentioned court officials. The presumption then is directed to the genus indicated by the specific words — impartial officials of the court — and that he did not intend to stray beyond the boundaries. Consequently the word "prosecutor" is not a member of the genus of the words mentioned above and the logical explanation is that it might have been inserted *per incuriam*.

This observation is fortified by the interpretation of the provision of another statute *in pari materia*. Section 5 of the High Court of Zimbabwe Act, 1981, states:

> (1) The High Court or any judge thereof may require and administer any necessary oath.
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> (2) The oath to be administered to any person shall be administered in the form which most clearly conveys to him the meaning of the oath and which he considers to be binding on his conscience.

The amendment to the Magistrates Court Act was introduced in 1949 and the High Court of Zimbabwe Act, 1981 came into operation in 1981. Nothing is mentioned in the High Court Act, about the prosecutor being competent to administer the oath. In fact the latter Act clearly and tersely restates the common law position relating to the administration of oath. In the High Court, the practice or custom has arisen for the judge generally to call upon his clerk or the interpreter to swear the witnesses.

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[32] Supra p 12.

Where the clerk is for the moment absent, the judge swears the witness or, if an interpreter is present, calls an interpreter to do so. Where the court has to do with a witness who is not conversant with the official language, the witness is sworn through an interpreter who obviously must have sworn to act as such, either for the particular case or in the court generally. In the High Court it is also customary for the clerk to administer the affirmation to a witness who does not wish to swear. Where the oath or affirmation is administered by an official, he does so under the supervision of the presiding judge who, if there are any difficulties or doubts, will himself intervene and administer the oath to ensure, as far as it is possible for him to do so, that the witness's conscience has been so bound that he feels constrained to speak the truth, and where the witness requests not to swear but to affirm, the court, if it has any doubt as to the integrity of this request, may intervene and examine the witness to determine whether the witness honestly objects to taking the oath or whether he is avoiding the taking of the oath to escape the dictates of his conscience or the retribution that overtakes the perjurer. This practice or custom in the High Court is in line with the common law and practice in South Africa. It is submitted that the case law cited above would be equally persuasive in Zimbabwe. Can it be said that the intention of the legislature was to make the practice in the High Court different from that of the magistrates courts. There is no basis for such reasoning and it is submitted that the inclusion of the prosecutor was a mistake as it is not supported either by the High Court of Zimbabwe Act, 1981, or by the practice in the High Court. Even the history of s 77 of the Magistrates Court Act strongly suggests and conclusively proves that the inclusion of the prosecutor as a person competent to administer the oath was per *incuriam*. It is trite law in this country that the parliamentary history of legislation in the form of House of Assembly debates is not a permissible aid to construing a statute.[33]

It is submitted that it is now time for the governing consideration in the interpretation of legislation to become the spirit, the general purpose, of the statute, because it is only under such circumstances that the parliamentary history of the legislation could constitute an integral part of aids to construction. Looking at the parliamentary debates preceding the enactment of the Magistrates Court Act relating to the administration of the oath it is surprising to note that the Minister of Justice, in his opening speech during the second reading of the Act, states:

> Then there is one formal matter dealing with the administration of the oath. In terms of the law the oath is administered to a witness by the presiding judicial officer. What actually happens is that the oath is administered either by the clerk of the court or by the interpreter in the case of a native witness, and the Act is amended accordingly to give effect to what has become current practice.[34]

Expressis verbis, the Minister only referred to the practice of requiring the clerk of court or the interpreter to administer an oath, which was the custom or practice that the amendment sought to make law. This strongly supports the view expressed above that the inclusion of the prosecutor conducting the case, as a fit and proper person

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33 *Motiba v Mosche* 1920 AD 360 at p 362; *Hewlett v Minister of Finance* 1982 (1) SA 490 at pp 496-7.

34 Hansard, House Assembly Debate Report, 1949 Vol. 30 Part 1 Column 90.

to administer the oath, was a mistake. This mistake was made in the precursor of the present s 77 of the Magistrates Court Act. Section 4 of the Magistrates Court Amendment Act, 1949, which inserted s 66A into the main Act, provides:

> "66A: The oath to be taken by any witness in any proceedings, whether civil or criminal in any preparatory examination shall be administered by the officer presiding at such proceedings or by the prosecutor or the clerk of the court in the presence of the said officer, or if the witness is to give his evidence through an interpreter by the said officer through the interpreter or by the interpreter in the said officer's presence."

It is not clear from the *Hansard*, House of Assembly Debate Report[35] at what stage of the legislative process the words "... or by the prosecutor ..." were inserted. It could certainly not have been during the second, the third, nor during the Committee stage, because the Report does not advert to such an amendment. The only logical conclusion that can be reached in the circumstances is that this undebated material might have been inserted at the time when the Bill was being prepared for the Governor's signature. Even if the conclusion that the provision requiring or authorising the magistrate to direct the prosecutor to swear in witnesses was inserted by mistake is correct, that does not *per se* affect or alter the legal position. Section 77 or its precursor, s 66A mentioned above, is the law.

Conclusion

The administration of oath, affirmation or admonition is not merely a ritual without any legal implication. There are serious consequences for giving false evidence under oath, affirmation or admonition. The party giving false evidence may be indicted for perjury. It is, therefore, imperative that the administration of any form of oath in the courts must be without any iota of blemish or reproach. The accused must feel that the witnesses giving evidence against him have been constrained by the court of law to give evidence about what they have experienced with their own senses. Where such oath, affirmation or admonition is administered by the prosecutor who is supposed to controvert the defence witnesses through cross-examination, it cannot be said that the accused person was exposed to fair and just trial. It is submitted that in order to make the practice in the magistrates court accord with the common law and the practice in the High Court, the legislature must amend the provisions of s 77 of the Magistrates Court Act [*Chapter 18*], by deleting the words or the Prosecutor ..."

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[35] *Ibid*.