



# England & Wales: Oaths of Witnesses Testifying Before Parliament Prior to 1759

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## ENGLAND &amp; WALES

## OATHS OF WITNESSES TESTIFYING BEFORE PARLIAMENT PRIOR TO 1759

*Executive Summary*

*There were a number of formal procedures in place for summoning witnesses before the English House of Commons in the seventeenth and eighteenth centuries. Despite these procedures and the use of witnesses to gather evidence, the House of Commons did not have the authority to administer oaths to those that it wished to have testify before it. Instead, the accuracy of the testimony provided was determined by the credibility of the witness combined with the potential that an untruthful witness could be prosecuted for breach of privilege.*

**I. Introduction**

The English Parliament's traditional role in the seventeenth and eighteenth centuries has been observed to be as the "grand inquest of the nation, remedying individual grievances and keeping a jealous eye on the government of the country."<sup>1</sup> In order to effectively fulfill this role, the House of Commons utilized witnesses to gather evidence and information, resulting in a large number of procedural rules governing their use.<sup>2</sup> The origins of these procedural rules are in many instances uncertain, and seasoned scholars of Parliamentary procedure and history assert the difficulties of finding the foundation of the many customs that have become the law and constitution of Parliament.<sup>3</sup> The following report provides an overview of summoning witnesses before the House of Commons and administering oaths to them during the seventeenth and eighteenth centuries.

**II. Bringing Witnesses Before the House of Commons**

A rule of the House of Commons, stated in 1640, was that witnesses should only be summoned during an inquiry, the commencement of which had to be decided upon by the House.<sup>4</sup> In order to bring a witness to testify before the House, the Member presenting the witness must have acquainted the House with the witness and expressed his desire that "he might have leave to examine" the witness.<sup>5</sup> This procedure was affirmed in the early 1700s when the Speaker of the House noted that "no witness could be produced without prior notice to and leave from the House."<sup>6</sup>

During this period, witnesses were summoned to appear to be examined in the House of Commons or a committee of the House by being ordered to attend at a stated time.<sup>7</sup> The order was signed by the Clerk of the House of Commons. If the witness resided in the area of London, it was served

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<sup>1</sup> P.D.G. THOMAS, *THE HOUSE OF COMMONS IN THE EIGHTEENTH CENTURY* 14 (1971).

<sup>2</sup> *Id.* at 20.

<sup>3</sup> ERSKINE MAY, *A TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT* 406 (5<sup>TH</sup> ED., 1863).

<sup>4</sup> P.D.G. THOMAS, *SUPRA* NOTE 1, at 20.

<sup>5</sup> 2 JOHN HATSELL, *PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS; WITH OBSERVATIONS* 102 ¶2 (2D ED., 1785).

<sup>6</sup> P.D.G. THOMAS, *SUPRA* NOTE 1, at 20.

<sup>7</sup> ERSKINE MAY, *A TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT* 239 (1<sup>ST</sup> ED., 1844).

personally and if the witness resided further away, it was forwarded to the witness by the sergeant at arms by mail or, in certain cases, messenger.<sup>8</sup>

The procedure to obtain the attendance of witnesses before Committees of the House of Commons varied slightly. For Election Committees

witnesses are summoned before the appointment of the committee by a speaker's warrant, on the application of the parties, without any special order of the house ... but under a general order ... after the appointment of an election committee, the witnesses are summoned by orders signed by the chairman.<sup>9</sup>

Select Committees secured the attendance of witnesses by an order signed by the chairman of the committee upon the direction of the committee. The attendance of a witness before the committee on a private bill could only be ensured by an order of the House.<sup>10</sup>

## II. The Use of Oaths in the House of Commons

The House of Commons did not have the authority to administer oaths to witnesses appearing before it during the seventeenth and eighteenth centuries. A leading scholar of Parliamentary procedure has noted that

By the laws of England, the power of administering oaths has been considered essential to the discovery of truth; it has been entrusted to small debt courts, and to every justice of the peace; but is not enjoyed by the House of Commons, the grand inquest of the nation. From what anomalous cause, and at what period this power, which must have been originally inherent in the High Court of Parliament, was retained by one branch of it and severed from the other, cannot be satisfactorily established; but even whilst the commons were contending most strenuously for their claim to be a court of record, they did not advance any pretension to the right of administering oaths.<sup>11</sup>

The scholar further notes that during the eighteenth century the House of Commons was aware of the importance of the right to administer oaths to witnesses “and were anxious to exercise it; but, for reasons not explained,<sup>12</sup> they admitted, by various acts, that the right was not inherent in them; and resorted to various expedients in order to supply the defect in their own authority.”<sup>13</sup> These methods included having Members of Parliament that were justices of the peace administer oaths in their magisterial capacity. There were numerous scholars who believed that this practice was “manifestly irregular, if not illegal, since justices may only administer oaths in investigating matters within their own jurisdiction.”<sup>14</sup> The House of Commons also would ask assistance of judges and would look to examine witnesses under oath at the House of Lords and through Joint Committees of both Houses.<sup>15</sup> Some scholars argued that the reasons that the House of Commons did not administer oaths to witnesses was that the House did not have a right to do so, that administering the oath would turn the House into a Court of Record, and that some were concerned that it would upset the balance between the House of Commons and the House of Lords.<sup>16</sup> The inability of the House to administer oaths routinely was considered to be a

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* AT 240.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* AT 244.

<sup>12</sup> P .D.G. THOMAS, *SUPRA* NOTE 1, AT 22

<sup>13</sup> ERSKINE MAY, *SUPRA* NOTE 7, AT 244.

<sup>14</sup> *Id.* AT 244.

<sup>15</sup> *Id.*

<sup>16</sup> P .D.G. THOMAS, *SUPRA* NOTE 1, AT 22.

defect in obtaining information from witnesses, however, the concerns over the custom of Parliament and encroaching into the territory of the House of Lords as the judicial body appear to have restrained the House of Commons from pursuing the use of oaths for witnesses testifying before it.

Just as the procedure for summoning witnesses by Election committees varies from the House, so does the process for administering oaths. Election committees may take evidence from witnesses under oath, as provided by an Act of Parliament.<sup>17</sup>

### III. Consequences of False Testimony

As there was no formal administration of an oath for witnesses testifying before the House of Commons, there was subsequently no formal penalty of perjury for false evidence and thus “the reliance placed on such evidence ... depended entirely on the credibility of individual witnesses, and often this was suspect.”<sup>18</sup> To help combat this problem, the House of Commons treated false testimony as a breach of privilege. A leading treatise on Parliamentary procedure notes that

to give notice of this fact, and to secure respect to the authority of the house in its inquiries, two resolutions are made at the beginning of each session: That if it shall appear that any person hath been tampering with any witness, in respect of his evidence to be given to this house, or any committee thereof, or directly or indirectly hath endeavoured to deter or hinder any person from appearing or giving evidence, the same is declared to be a high crime and misdemeanor; and this house will proceed with the utmost severity against such offender [and] that if it shall appear that any person hath given false evidence in any case before this house, or any committee thereof, this house will proceed with the utmost severity against such offender. ... the Journals are full of cases in which witnesses have been punished by commitment to the serjeant-at-arms ... for prevaricating, or giving false testimony, or suppressing the truth; for refusing to answer questions, or to produce documents in their possession.<sup>19</sup>

### IV. Concluding Remarks

Despite the formal procedures in place to ensure the attendance of witnesses and the importance placed on the testimony of these witnesses brought before the House of Commons, the lack of formal ability of the Commons to administer an oath appears to have been a defect in its proceedings. While recognizing that the lack of authority to administer oaths did at times hamper the ability of the Commons to accurately obtain important information, there was no rush to establish formal mechanisms; instead informal, and possibly unlawful, methods of administering oaths were relied upon until the enactment of the Parliamentary Witnesses Oaths Act, 1871.<sup>20</sup>

Prepared by Clare Feikert  
Foreign Law Specialist  
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<sup>17</sup> ERSKINE MAY, *supra* note 7, at 246.

<sup>18</sup> P .D.G. THOMAS, *supra* note 1, at 21.

<sup>19</sup> ERSKINE MAY, *supra* note 7, at, 245-6.

<sup>20</sup> Parliamentary Witnesses Oaths Act, 1871, 34 & 35 Vict. c. 83.