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You Do Solemnly Swear or that Perjury Problem

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"YOU DO SOLEMNLY SWEAR!" OR THAT PERJURY PROBLEM

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I asserted the other day in a public address that there was perjury in fifty per cent of all contested civil cases, in seventy-five per cent of all criminal cases, and in ninety per cent of all divorce cases; and the audience laughed! So notorious is false swearing in court proceedings that an intelligent group of American citizens looks upon it as a joke. And yet it must be obvious that if the stream of fact in a judicial proceeding is polluted, the stream of justice will also be impure. The present prevalence of perjury is not a joke but a tragedy.

The problem, however, is not a new one. Throughout history wherever oaths have been required either by custom or by law, perjury has been scandalously common. Formerly the means relied upon to cope with the problem were supernatural. The object of the oath was to frighten the witness into telling the truth lest he suffer under the hand of an outraged Deity. We still profess to believe, by the very fact that we retain the oath, that it has a supernatural sanction; but at the same time we make perjury a crime and threaten the oath-taker with dire secular penalties if he bears false witness. In addition the courts have the power to punish false swearers for contempt of court and occasionally do so. Neither lawyers nor judges, however, put their faith in the efficacy of the oath as a truth-compelling instrument. They persist in believing that one good piece of cross-examination is worth more than half a dozen oaths. When it comes to dealing with an evasive or dishonest witness one Max Steuer outweighs all the oaths ever invented.

Clearly, then, the oath itself with whatever power is inherent in it, the penal law, and the power of the courts to punish for contempt have up to the present been impotent to prevent perjury and to force witnesses to tell the truth in court; and, if for the moment we can cast aside our indifference to such an appalling condition, it is certainly pertinent to acquire whether we are wholly helpless or whether, on the other hand, there is a way of coping with the mo-

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mentous problem presented. Why are the present legal instrumentalities a failure? Can they be made more efficient? Or, if not, is there something better?

The oath as such has, of course, lost its old meaning and its old supernatural implications for many people. Not many persons would be deterred in these days from telling a lie under oath by any fear of divine wrath, either immediate or remote. If it were otherwise, the record for perjury would not be what it is. The oath may, however, have value for other reasons. It may be respected from other motives than the fear of God's displeasure. And so the first question that arises in this connection is whether the oath itself has any potency. For, if it has, perhaps it can be made more efficient, and, if it has not, perhaps it should be abolished altogether.

Like Gaul, all witnesses may be divided into three parts. First, there are those who would tell the truth without being sworn; second, there are those who will not tell the truth whether sworn or not sworn; and, third, those who tell the truth only because they are under oath. Now, if we could know how many natural liars are made to tell the truth by virtue of being sworn to do so, we could measure the oath's value. That not all who testify truthfully in court fall within this category is apparent from the fact that it is so small. For, despite the high authority we have for the statement that all men are liars, there are certainly many who testify truthfully simply because they are men of integrity. There are, of course, no available statistics on this subject. But that does not leave us entirely without evidence bearing on it.

Mexico abolished the judicial oath in 1878. China has never had it; and it was unknown in Hebrew criminal jurisprudence. In the latter case, there was, to be sure, a deep-rooted fear of the Lord's displeasure if false witness were borne. There was, in addition, also a severe secular punishment. But in both cases the apprehended penalty was for the lie and not for any false oath. Those who have written on the subject claim that the system gave satisfaction. That it has been satisfactory in China is testified to by many authorities; but the best evidence of that fact is to be found in the new codes adopted within recent years by the present regime. Though these codes are occidental in many other respects, in this they continue the practice of the old China. And as to Mexico, I am assured by Mr. Hermilo Guzman, of the New York bar, that there is much less wilfully false testimony in Mexican courts than there is in ours. Mr. Guzman has practiced for years in Mexico as well as here.

If, then, perjury continues to such a sad extent with us and is less rife in Mexico, we can only conclude that the value of the oath in constraining witnesses to be truthful is negligible. This conclusion is corroborated to some extent by recent psychological studies by men like Prof. P. R. Hightower, of Butler University, Prof. T. H. Howels, of the University of Colorado, Prof. Hugh Hartshorne, of Columbia, Prof. Mark A. May, of Yale, and Prof. George R. Mursell, of the Ohio Department of Public Welfare, all tending to show that "there is no significant relation between religious training and delinquent or non-delinquent behavior," nor between religious training or belief and truthfulness.

Some specific light is cast upon this subject by a recent experience in Massachusetts. It is, of course, a well-known fact that there are many oaths besides those taken in court. There are, for example, the promissory oaths of public officials, from constable to president. In addition there are numerous oaths of an assertory nature, like the oath to your income tax report. In the customs service alone there are over thirty-five forms that must be sworn to when used. In Nebraska, a typical state, I find more than forty different classes of officials authorized to administer oaths in as many different kinds of proceedings. Laboring under a similar condition, Massachusetts in 1926 enacted a law doing away with non-judicial oaths and requiring only that written statements, reports, and certificates that in the past had required sworn verifications should be certified by a written declaration made subject to the penalties of perjury. With like intent the national House of Representatives in 1928 passed a bill following in substance the Massachusetts act, but it died in the Senate Judiciary Committee. Regarding the effect of such legislation, the Massachusetts Commissioner of Corporations and Taxation has written me recently: "The present plan has worked so well that no one would think for a moment of going back on it."

That the non-judicial oath may be safely abolished thus seems clear; and theoretically this may enhance the value of the judicial oath, if some of its old-time solemnity is also restored. Practically, I doubt whether there is the slightest connection. But there are other sound reasons for the abolition of the non-judicial oath. Its value in doing away with a notorious nuisance is sufficient justification.

Evidence for the abolition of the judicial oath might also be adduced from the experience of Holland, England and many of our own states with Quakers and other religionists who have conscientious objections to swearing under any circumstances. For it has

never been contended by any intelligent person that the exemption of these classes from the law requiring an oath has militated in the slightest degree against litigants or the processes of justice. Furthermore, it may be doubted whether the use of the judicial oath is psychologically sound from another angle, namely, that the law against perjury puts the emphasis not on the offense of lying but on the offense of violating the oath. That its requirement is unjust to all who are disqualified or discriminated against by its retention is apparent. Hence, it may be safely concluded, I think, that its abolition would be a civilized act. But that it would in any degree increase the amount of truthful testimony in judicial proceedings is hardly to be imagined. To do away with the oath would not give us any relief so far as the problem of false testimony in courts is concerned.

Can we hope for anything more from the criminal laws against perjury?

To answer that question we must first inquire into the reasons for the present failure of our laws on that subject. That they do fail is too plain for argument. The latest statistics issued by the United States government giving the number of inmates in American penal institutions do not even have a classification for perjury; and I venture the assertion that there are not a hundred and fifty persons in the whole United States serving sentences for this crime. And prosecutions are rare because convictions are rare. In the state of Michigan, for instance, the Supreme Court has passed on only twenty-four perjury cases since Michigan became a state; and in Kentucky the Court of Appeals has been called upon to consider only eighty-one perjury and false swearing cases in a hundred and thirty years.

One reason for these figures is that perjury is one of the most difficult crimes to establish within the law and to the satisfaction of juries. This is so in part because of the highly technical nature of the offense. It is not sufficient, for instance, to prove in a given case that the accused on one occasion testified one way under oath and on another occasion testified to the exact opposite. The state must prove on which occasion he testified falsely; and it cannot make its case by merely proving the conflicting statements under oath.

But first of all the state must prove that the defendant had been properly sworn in a proceeding in which an oath was required by law. Then it must show that in that proceeding the evidence of the defendant on trial in the perjury case was material to the issue; and in addition it must show that the alleged false statement was an absolute one, and that the defendant made it knowingly and wilfully.

Because of these technical requirements a defendant who appealed from a conviction of perjury in a California case scored a victory over the state for the reason that his alleged false testimony had been given at a preliminary hearing before a justice of the peace on a complaint that did not state an offense against the laws of the state. In the same state another defendant won a dismissal in a perjury case only five or six years ago because the indictment on which he was tried only alleged that he knew the testimony which he had given was false without alleging that such prior testimony was false in fact.

A case illustrating the requirement that in order to constitute perjury a sworn statement must have been made in a proceeding required by law was decided by the Texas Court of Criminal Appeals in 1909. In that case the testimony on which the prosecution was based had been given during the trial of another party for rape but while that party was absent from the court room; and the appellate court held that the trial court did not have such jurisdiction during the defendant's absence from the court room as to make the evidence of a witness taken during that time perjury though false. Somewhat similar was the decision of the highest court of Mississippi to the effect that, where in a prosecution for the unlawful sale of intoxicating liquor the defendant pleaded guilty and the alleged purchaser of the liquor was then compelled to take the stand and swore that he had not bought any liquor from the defendant, the latter could not be prosecuted for perjury predicated on his alleged false statement made under the circumstances described. The holding of the higher court was that the trial court had no authority to compel a witness to testify after the defendant then before it had pleaded guilty, and that what the witness said then was not material to any issue still pending.

It is this question of materiality that constitutes the main stumbling-block to the successful prosecution of perjury cases. As a New York court said, "Evidence, to be material, must, in addition to having probative or persuasive character, be relative to the issue or properly material." Applying this rule, a Missouri appellate court held that, where during the trial of a defendant charged with disorderly conduct alleged to have occurred on J Avenue a witness was asked whether the defendant had not been guilty of such conduct on another avenue and falsely swore that he had not, the witness could not be convicted of perjury even if his evidence was false, for the reason that it was immaterial whether the defendant on trial for

disorderly conduct on J Avenue had committed the same offense at some other place.

The law with reference to perjury being as described, it is ineffectual as a means of dealing with the perjurer and, by virtue of that fact, practically worthless as a deterring influence; and it will remain so until it is simplified and freed from the present incubus of technicality. There is, then, some apparent ground of hope here; but unfortunately experiments along this line have not been very successful. Several states have tried to cope with the problem by enacting so-called false swearing statutes, providing for an offense so defined as to eliminate some of the elements essential to constitute the common law crime of perjury and that same offense as defined by statute. Under the Kentucky law the state need not show that the defendant's false testimony was material—it is required to show only that the court had jurisdiction, that the witness was sworn, and that he wilfully testified falsely. Yet of eighteen cases appealed by the Commonwealth on questions of law under this statute, only four were decided in favor of the Commonwealth. And of the whole eighty-one cases of perjury and false swearing already mentioned, passed upon by the state Court of Appeals, only twenty-five were decided against the defendants. With the exception of the eighteen appealed by the state, I did not attempt to segregate the false swearing cases, but of the eighty-one defendants prosecuted for one offense or the other, fifty-six were either granted new trials or completely discharged. Prosecutions under false swearing statutes, judging by the experience of Kentucky, do not promise any more relief than the old perjury laws. Perhaps it is futile to look to penal statutes to purify the evidential stream.

When we turn to the power of the courts to punish lying witnesses for contempt, we find again that its exercise is seriously hampered, as in the case of perjury, by technical rules and limitations. False swearing alone cannot be punished as contempt of court. It is punishable as such only when the following three conditions exist: first, the alleged false testimony must have had an obstructive effect when and where it was given; second, its falsity must have been judicially known; and, third, the testimony must have been material.

As to when the first condition is met, the Wisconsin Supreme Court held in 1930 that the mere fact that time was consumed by the trial court in demonstrating the falsity of the testimony involved did not constitute such an obstruction of justice as to make the witness subject to punishment for contempt. On the other hand, the

United States Court of Appeals sitting in New York City decided about the same time in the O'Connell case that, where a witness before a grand jury persisted in answering, "I don't remember" to questions in regard to matters of which he must have had some recollection and where his conduct as a whole was obstructive, he was properly committed for contempt, though even in that case there was a vigorous dissent. The truth is that so far as this element in the offense is concerned there is generally room for an honest difference of opinion.

Passing on the second essential of the offense of false swearing as contempt of court, that the court must have judicial knowledge of the falsity of the testimony, the Illinois Court of Appeals, after declaring that this was an indispensable element, stated in a certain case in 1913: "The substance of the testimony of Stone, alleged to be false in the case on trial, was that he had paid Greenfield a certain sum of money at a certain time and place. Presumably the court was not there, nor in a position to know the actual facts. All it could know, in the nature of things, was that Stone gave one version of the matter under oath and Greenfield another. It could not know judicially which had falsified."

The third essential element, that of materiality, is governed virtually by the same rules that prevail with reference to the criminal offense of perjury. A New York appellate court held, for instance, in 1925 that, where in an action in the Municipal Court of New York City the defendant, opposing the plaintiff's motion for summary judgment, filed an affidavit in which he denied that he was financially irresponsible, when he was as a matter of fact in that precise state so far as both goods and money were concerned, he could not be punished for contempt, for the reason that the question of his financial condition "was wholly immaterial in the determination of the merits of the plaintiff's application for summary judgment."

At first blush, to proceed against a lying witness by way of the contempt route seems so obvious a thing to do, that most laymen marvel that judges do not act more freely and more frequently in such cases. And there was no doubt a general feeling of approval and satisfaction when it was reported in the press a dozen years ago that a federal judge had interrupted a witness on the stand and said to him: "This has gone far enough, Mr. Witness, and you are going to be committed for contempt of court. The court is satisfied that you are lying when you testify that you cannot recall ever seeing Mr. MacMillan write. I am not going to allow you to obstruct the

course of justice here; and if this nation has delegated power enough to this court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it."

But the Supreme Court of the United States did not agree with the sentiments of this ruffled trial judge nor with his conception of his power in the premises. Speaking through Chief Justice White, it said: "If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully, the power would result to impose a punishment for contempt with the object of exacting from the witness a character of testimony which the court would deem truthful; and thus it would come to pass that the potentiality of oppression and wrong would result, and the freedom of the citizen, when called as a witness in court, would be imperiled."

Nor was Justice White's apprehension ill-founded. In all other fields arbitrary power has been curbed; and that of the courts to punish summarily for contempt certainly should not be extended. The perjury problem is not to be solved by empowering courts to punish suspected or guilty witnesses for judicial lese majesty. That remedy would be likely to prove more pernicious than the ill it was expected to cure.

But does that mean that we are helpless in the face of this serious situation? I do not think so. On the contrary, I submit that there are two things we can do. The first is to reform the rules governing the examination of witnesses and the admission of evidence in American courts; and the second is to make use of the discoveries of modern science to detect false testimony and to elicit testimony that is true.

As to the first suggestion, the vice of the present procedure lies in the fact that a witness called by either party is his witness, that he is examined by the method of question and answer to bring out only such evidence as is valuable to the party calling him, that he is cross-examined by the other party for the purpose of making him testify to something of an opposite tendency, and that he is permitted to give only an expurgated version of what he knows. No witness is allowed to do the thing he is sworn to do, "to tell the truth, the whole truth, and nothing but the truth." The party who called him does not want him to tell the whole truth because if he says anything unfavorable to that party, the party cannot impeach him—for the immediate purpose the evidence of the witness must be taken as true. The other party naturally does not want the witness to tell the whole

truth if it is unfavorable to him. And the court cannot ordinarily interfere to bring out what the parties litigant suppress. Every witness is, therefore, treated as a partisan, and usually becomes one. Furthermore he cannot be asked a leading question, his answers are stricken if they are not responsive or if he ventures to give an opinion or a conclusion, in relating a conversation he must give the exact words used as nearly as he remembers them, and he must avoid anything bordering on hearsay, which is always anathema except when it comes within certain exceptions that have little basis in anything but precedent.

How these rules work a few cases decided within the last two or three years will serve to illustrate. The following statement, for instance, emanated from the Texas Criminal Appeals Court: "The state cannot impeach its own witness for merely failing to remember, refusing to testify, or failing to make out its case." In Georgia it was held in a will contest that a question put to a witness as to whether the contestant had called on the testator during his last illness was properly excluded as being leading. In Alabama the question whether a pedestrian had been intoxicated shortly before being hit by an automobile was declared leading. In Missouri a motorists' testimony that in a collision between two automobiles one of them "was knocked across the street by the impact" was held improper on the ground that it stated a conclusion instead of a fact. And the same court held that where a witness testified that someone had called him on the telephone, giving a certain name and number, such information was hearsay and what was said was properly excluded.

No mere description of judicial rulings can, however, be as illuminating in this connection as an actual excerpt, like the following, taken from the reporter's notes in a trial in a New York court, if the reader will muster up the patience to read it:

Defendant's Counsel: "Mr. Y, the best way to cover this is to tell exactly what was said to you by anybody and what you said. Tell what was said."

Witness: "I must include the price if I did that."

The Court: "That will include the price, because that tells the conversation which was had. Tell what was said."

Witness: "Mr. X, this broker, came to me and offered this property to me to buy."

The Court: "What did he say?"

Plaintiff's Counsel: "Mr. X offered the property to buy?"

The Court: "Yes."

Defendant's Counsel: "Speak louder, please."

The Court: "Now, you don't tell the conversation. You say he offered you that property to buy. Now, what did he say and what did you say?"

The Witness: "I told him it all depended on the terms, and that the terms were not satisfactory at that time."

Plaintiff's Counsel: "I move to strike that out."

The Court: "It may be stricken out. Now, can't you tell the conversation between two people?"

The Witness: "I am trying to do that, Judge."

The Court: "Yes."

Witness: "I cannot go back three or four months and remember every word exactly."

The Court: "The substance of the conversation."

Witness: "I am just telling you the substance, Your Honor."

The Court: "Well, Mr. X must have said something to you. Then you must have said something to him."

Witness: "Mr. X came to me to sell this property to me. And I could not buy it because the terms were not—."

Plaintiff's Counsel: "I move to strike that out."

The Court: "It may be stricken out. X must have said something to you. What did he say?"

Witness: "Well, the price was so much."

The Court: "No, what did he say?"

The Witness: "The price was so much. I can't say any more. I can't put words in his mouth what he didn't say."

The Court: "He said—X said: 'I have the property at such a place, such a lot to sell'?"

Witness: "Yes."

The Court: "'And I will sell it for so much'?"

Witness: "I do not know now whether he said those exact words."

The Court: "Well the substance of what he said."

Witness: "He was trying to interest me to buy this property, like he has done on many other occasions, and I simply asked him the terms, and he went and got terms."

Plaintiff's Counsel: "I move to strike that out."

The Court: "It may be stricken out."

And who is to blame if under such hocus pocus there is perjury? Either the witness invents the required conversation or, if he is a party, he loses his case. He is practically forced to lie.

A prominent Canadian jurist wrote a few years ago that these rules of evidence as applied by American courts were a constant source of wonder to English and Canadian lawyers and judges; and an American lawyer, after spending some months visiting courts in England and studying the English legal system, wrote: "One who visits English courts observes that evidence appears to have as small a role as in a meeting of the directors of a corporation." On the continent the rules of evidence so jealously observed by our courts are

wholly unknown. In German courts, a witness, far from being a partisan, is not even called by the parties, at least in civil cases—he is called by the judge and examined by him or by some other judge designated to hear his evidence. The parties may be present but generally are not. The witness gives his evidence in narrative form, and the judge questions him to determine his credibility. The witness may give hearsay evidence in part, and it is for the judge to place the proper value upon it. In France the witness may not be interrupted until he has first given his evidence in his own way. The ever-resounding "I object" of American lawyers is practically unheard in any courts except our own.

The rules of evidence referred to are the result of a judge-evolved psychology, based, not on the remotest attempt at scientific appraisal, but on introspection by generations of jurists confident of their own wisdom and deaf to the words of specialists in the science of human behavior. The judicial attitude was well expressed only a few years ago by a representative New York judge, who said: "Most courts are officered by people of intelligence and experience and are better qualified to pass on the class of cases coming before them than any possible array of mere professionals."

Judicial psychology is amateur psychology at its worst. It accepts as dogmatically established, doctrines long since rejected by the real psychologists of all schools—for example, the faculty concept of memory. Hence such incidents as the recent examination of a mother in a criminal case. She had testified as to the age of her son, and the prosecuting attorney was permitted to ask her what fact fixed the date of the birth of her son on her memory. Following a similar line of reasoning, our courts allow the habits of an animal to be shown but not those of a human being; receive statements made out of court to contradict a witness but not to corroborate him; permit the introdution of a dying accusation against a defendant in a murder case but refuse to permit the introduction of a confession by a third party in favor of a defendant on trial; and receive evidence of a woman's unchastity to impeach her credibility as a witness.

None of these rules have ever been submitted to scientific tests. And, if we sincerely wish to reduce the amount of perjury in court proceedings and to educe the maximum of truthful testimony, the first thing we need to do is to make such tests. Law needs to be correlated with the science of human behavior. The law of evidence needs to have the white light of science thrown upon it in laboratories

and in clinics. That is the first step in coping with the problem of false testimony. And the second is related to it.

I am contending that, if a small part of the time and money spent in fruitless litigation and prosecutions for perjury were devoted to an effort to find scientific ways of determining when and if witnesses are telling the truth, the problem of perjury would soon be solved. It is inconceivable that in this scientific age in which we live it is necessary to rely on juridical guess work and on cross-examination in this matter and that it is not possible to find scientifically reliable means of eliciting truth on the witness stand.

Some efforts in this direction have been made outside the court room without encouragement from either the bench or the bar. Several German scientists a quarter of a century ago, for instance, experimented with the association-reaction test for detecting lying, which was afterwards popularized in this country by Prof. Münsterberg. An Italian by the name of Bernussi worked with the respiratory test, later confirmed and advocated here by Prof. Burtt. And a Boston lawyer, named Marston, a pupil of Prof. Münsterberg, experimented with a blood pressure test. The first is based on the theory that if the subject is given, one at a time, a list of words, some of which evoke guilty associations, and is required to give the first word that comes to him on seeing the test word, the delayed responses will betray him. The second is based on the alleged fact that the utterance of a deliberate falsehood is usually accompanied by a change in the rate of breathing. And the third is based on the measure of the systolic blood pressure which is said to vary with the fear of detection.

All of these tests have in turn been combined in what is known as the Berkeley Lie Detector by Dr. Larson of the Berkeley Police Department, and in other forms by various other experimentors, including Prof. Leonard Keeler, of Northwestern University. But thus far the courts have absolutely refused to permit them to be used in judicial proceedings. "We think," said the Court of Appeals for the District of Columbia in 1923, "the systolic blood pressure test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development and experiments so far made."

Perhaps the court was right. But it is certainly along this line that we must look for the solution of the perjury problem; and the courts ought to encourage the few patient souls who are working in this thankless field. The real remedy for perjury will not be found

in criminal prosecutions nor in contempt proceedings, however much their efficacy may be increased by the elimination of the present technical obstacles to their wider use. It will be found in the invention of scientific means for the detection of false testimony and not in its punishment. The cure for the present scandalous condition will come, not from the bench or the prosecutor's office, but from the laboratory.

I expect to see the day when every trial court will have on the bench before it an instrument board comparable to that of an automobile and when by watching the needles on that board it can tell from moment to moment whether or not a witness is telling the truth. A crazy dream? Crazier ones than that have come true.