LAW COMMISSION OF INDIA

TWENTY-EIGHTH REPORT

(THE INDIAN OATHS ACT, 1873)

MAY, 1965

GOVERNMENT OF INDIA ⚙ MINISTRY OF LAW

33 M. of Law—1

CHAIRMAN,
LAW COMMISSION,
5, Jor Bagh, New Delhi-3,
Dated the 28th May, 1965.

Shri Asoke Kumar Sen,
Minister of Law,
New Delhi.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the Twenty-eighth Report of the Law Commission on the Indian Oaths Act, 1873.

2. The subject was taken up by the Law Commission in 1962. A draft Report on the subject was discussed at the 47th meeting of the Commission held on the 31st August, 1963. The draft Report was revised in the light of the discussion at that meeting, and circulated to State Governments, High Courts and other interested persons and bodies for comments.

3. The comments received on the draft Report were considered at the 65th meeting of the Commission held from the 15th to 18th February, 1965 and at the 66th meeting held on the 10th and 11th March, 1965. The draft Report, as revised in the light of the decisions taken at these meetings, was again considered at the 67th meeting of the Commission held from the 19th to 24th April, 1965. The Report was finalised at the 68th meeting of the Commission held on the 21st May, 1965.

4. I wish to add that in the preparation of this Report the Commission received a great deal of help and assistance from Mr. P. M. Bakshi, Joint Secretary & Draftsman. He also helped us in making a research into a number of old Regulations and Laws, some of which were difficult even to locate.

Yours sincerely,
J. L. KAPUR.

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REPORT ON OATHS ACT

Why the Act has been taken up for revision.

1. One of the functions of the Law Commission is to revise Central Acts of general application and importance. The Indian Oaths Act, 1873, falls in this category. It is a short Act, consisting of 14 sections only. But it is an important Act. The obligation of witnesses to state the truth arises from this Act. Section 14 of the Act requires a person giving evidence before any Court or person authorised by the Act to administer oaths and affirmations, to state the truth on the subject on which he is giving evidence[1-2] The administration of oath to witnesses is one of the securities devised[3] for ensuring their trustworthiness. We have, therefore, taken up the revision of this Act of our own motion, without any reference from the Government.

Historical background.

2. The Indian Oaths Act, 1873, did not enact any new laws. It merely consolidated[4-5] the law on the subject which was contained in some old Regulations and in Act 5 of 1840.

Act 5 of 1840 was an important Act. It appears[6], that before this Act was passed some old Regulations of the Government of the East India Company required that Muhammadans were to be sworn on the Quran and the Hindus on the water of the Ganges. Act 5 of 1840 abolished these forms of oath, and enabled Hindus and Muhammadans to give evidence on solemn affirmation.

The provisions of Act 5 of 1840 were extended by section 9 of Act 18 of 1863 to the High Courts. Then came Act 6 of 1872. The substance of that Act can best be given in the words of Lord Hobhouse, who was then the Law Member—

> "That Act introduced two very important alterations. One was this, that every witness who objected to take an oath might, instead, make a simple affirmation; and the other was that, notwithstanding any irregularity in the administration of any oath, or any irregularity in the making of an affirmation, or, in fact, any irregularity in the form or method of taking evidence, the proceedings should be valid.".

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[1]For punishment for false evidence, see sections 179, 181 and 191, Indian Penal Code.

[2]See also para. 66, *infra*.

[3]See para. 6, *infra*.

[4]See the *Gazette of India* (1872), Supplement, dated 3-8-1872, page 889, under "Oaths and Affirmations Bill".

[5]It appears that before the Act, the provisions were scattered in "four Acts, seven Statutes and fragments of resolutions". For a detailed review of the scattered statutory provisions existing at that time, see *Gazette of India*, (1873), Supplement, dated 15-2-1873, pages 235—241, particularly page 237, bottom.

[6]For history of the present Act, see *Q.E.* v. *Maru* (1888), I.L.R. 10 All. 207, 213, 217.

The Act of 1872 was repealed by the Act of 1873, which contains the existing law on the subject.

Analysis of the Act.

3. A brief analysis of the Indian Oaths Act, 1873, is given below:

Section 1 is a formal section containing the short title, etc. Section 2, which repealed certain enactments, was itself repealed by the Repealing Act of 1873 (12 of 1873). Section 3 excludes from the purview of the Act proceedings before Courts Martial. Section 4 enumerates the persons who are authorised to administer oaths and affirmations. Section 5 provides that all witnesses, interpreters and jurors shall make oaths or affirmations. Section 6 enacts that Hindus, Muhammadans and other persons who have an objection to making an oath may, instead, make an affirmation. Section 7 empowers the High Courts to prescribe the forms of oaths and affirmations. Sections 8 to 12 relate to what are commonly known as "special oaths". Section 13 enacts, that an omission to take an oath or make an affirmation shall not invalidate any proceedings, etc. Section 14 requires every person giving evidence on any subject before any court or person authorised to administer oaths or affirmations to state the truth on such subject.

Law in England.

4. In England the law on oaths and affirmations is to be found in the common law and in certain statutes. The power to administer oaths is contained in section 16 of the Evidence Act, 1851[1]. The liberty to substitute affirmation for an oath and the form of such affirmation are topics dealt with in the Oaths Act, 1888[2]. The Oaths Act, 1909[3], prescribes the form of oath and the procedure for administering it. Under the Oaths Act, 1961[4], the provisions of the 1888 Act are made applicable to a person to whom it is not reasonably practicable to administer an oath in the manner appropriate to his religious belief[5].

The Perjury Act, 1911[6], makes certain saving provisions regarding irregularities in the form and ceremony of administering an oath[7]. Finally, the Oaths and Evidence (Overseas Authorities and Countries) Act, 1963,[8] deals with oaths to be administered in England for obtaining evidence for use in a country outside England and *vice versa*[9].

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[1]Evidence Act, 1851 (14 and 15 Vict. c. 99).

[2]Oaths Act, 1888 (51 and 52 Vict. c. 46).

[3]Oaths Act, 1909 (9 Edward 7 c. 39).

[4]Oaths Act, 1961 (9 and 10 Eliz. 2 c. 21).

[5]For position before 1961, see *R.* v. *Pritam Singh* (1958), 1 W.L.R. 143 and (1958) L.Q.R. 179.

[6]Perjury Act, 1911 (1 and 2 Geo. 5 c. 6).

[7]As to Commissioners for Oaths, see Acts of 1889 and 1891 (52 and 53 Vict. c. 10 ; 54 and 55 Vict. c. 50).

[8]Oaths and Evidence, etc., Act, 1963 (chap. 27).

[9]See a discussion of this Act in (1964) Modern Law Review 333.

5. Coke[1] has defined an oath as an affirmation or denial by any *Christian* of anything before one or more persons who have authority to administer the same, for the discovery and advancement of truth and right, calling God to witness that the testimony is true. In the leading case of *Omychund* v. *Barker*[2], it was, however, said that oaths are as old as creation, and their essence is an appeal to the Supreme Being as thinking Him the rewarder of truth and avenger of falsehood, and that Lord Coke was the only writer who had grafted the word *"Christian"* into an oath. Meaning of oath.

6. Taylor[3], after referring to the ordinary definition of oath, namely "a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth[4]", goes on to say—

> "The definition may be open to comment, since the design of the oath is not to call the attention of God to man, but the attention of man to God, not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so; still it must be admitted that, by thus laying hold of the conscience of the witness, the law best insures the utterance of truth.".

7. Bentham has defined "oath[5]" as follows:— Definition by Bentham.

> "By the term *oath*. taken in the largest sense, is universally understood a ceremony composed of words and gestures, by which the Almighty is engaged eventually to inflict on the taker of the oath, or swearer, as he is called, punishment in quantity and quality liquidated, or more commonly unliquidated, in the event of his doing something which he, the swearer, at the same time and thereby engages not to do, or omitting to do something which he in like manner engages to do.".

8. The municipal laws of various countries have devised several securities for ensuring veracity and completeness of evidence given in courts of justice. These securities vary in different countries and with the system of law to which they are attached. Some of these prevalent in the system of Anglo-Saxon law and other systems based upon Anglo-Saxon law, are, the publicity of judicial proceedings, the compulsory presence of witnesses in open court, the Oaths as security for ensuring veracity of evidence.

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[1]Coke, 3 Inst. 164, cited in Boland and Sayer's Oaths and Affirmations (1961), page 1.

[2]*Omychund* v. *Barker*, Chancery, 1744 1 Atk 21 ; Willes 538 ; 1 Wils, K.B. 84 ; 26 E.R. 15, per Willes C.J. ; see Cockle, Cases and Statutes on Evidence, (1963), pages 279-280.

[3]Taylor, Evidence (1931) Vol. 2, page 872, para. 1382.

[4]*R.* v. *White* (1786) 1 Lea. 430 ; *The Queen's case* (1820), 22 R.R. 662. See Best on Evidence (1922), page 43.

[5]Bentham, Works, Vol. III, page 191.

right of cross-examination of witnesses, and the punishment for perjury[1]. To these securities may be added another very remarkable one which consists in requiring evidence in courts of justice to be given on oath—according to the maxim[2]—*In judicio non creditur nisi juratis*[3] (In judicial proceedings, testimony is not believed unless given upon oath). As Best has said[4], "However abused or perverted by ignorance and superstition, an oath has in every age been found to supply the strongest hold on the conscience of men either as a pledge of future conduct or as a guarantee for the veracity of narration.".

Oaths in ancient India.

9. Oaths existed in ancient India, both under the Hindu and under the Muhammadan Law. Dr. K. P. Jayaswal, states[5-6]:—

> "Oaths which have been treated by Hindu lawyers as a species of ordeal came under the province of the Dharma thinkers. They recommend its application to all witnesses in the King's courts, and Apastamba prescribes special formulae to be administered. (II, 11, 29. 7-10).".

10. Mahamahopadhyaya Kane, after a review of ancient texts, observes[7]:—

> "The oath consisted of two parts, *viz.*,—
>
> (1) the requirement to tell the truth, and
>
> (2) the exhortatory and imprecatory part.
>
> Both were administered by the presiding judge."

The learned author refers to the verses from Gautama, Manu, Vishnu and Narada[8] and says that they "contain very long exhortations addressed by the judge to the witnesses relating to the importance and high worth of truth, stating how the conscience of a man pricks him, what rewards await the truthful witness here and in the next world, and what sin and terrible torments in hell are the lot of an untruthful witness, what evil befalls even the deceased ancestors of an untruthful witness and how he is liable to be punished by the King.".

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[1]Best on Evidence (1922), pages 40-41, paras. 54-55.

[2]Best on Evidence (1922), page 42, para. 56.

[3]As to this maxim, see Best on Evidence (1922), paras. 1380 and 1378.

[4]Best on Evidence (1922), page 42, para. 56.

[5]Dr. K. P. Jayaswal, "Manu and Yajnavalkya" (Tagore Law Lectures 1917), (1930 Edn.), page 12, para. 18.

[6]As to the Arthashastra School, see Dr. Jayaswal, *ibid*, page 133.

[7]Kane, "History of Dharmashastras" (1946), Vol. 3, page 343.

[8]Kane, *ibid*, pages 1008 and 1009 gives the texts from Narada in Sanskrit.

11. In pure Muslim law, the practice of administering oaths was well recognised. "Lian" in Muslim law was testimony confirmed by oath[1] and accompanied with imprecation. The Quran says[2];— Oaths in Muslim law.

> "Violate not your oaths, since ye have made God a witness over you.....".

12. Apart from punishment for perjury, the main sanction behind an oath is the fear of God. Bentham has stated[3]— Sanction behind oath—fear of God—Bentham's view.

> "Fear of eventual *punishment* in most cases—fear of eventual *shame* in all cases—fear of punishment at the hand of the Almighty—these are the springs of action that have been brought to view in the character of improbity—restraining forces in general, and mendacity—restraining forces in particular.".

13. That fear of divine punishment is the sanction behind an oath is well illustrated by the form in which an oath is taken in some countries[4]:— Fear of divine punishment and forms of oaths.

> "The Chinese are usually sworn[5] by the ceremony of breaking a saucer, with the admonition: 'You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer.' Another form is for the witness to write sacred characters upon paper, which he burns, praying that his soul may be similarly burnt if he swears falsely, while the most binding of all is said to consist in the witness cutting off a cock's head with a like invocation.".

> "In Japan a witness unable to say what form was binding, as oaths are unknown in Japan, was directed to snuff a lighted candle declaring that if speaking falsely his soul will be extinguished like the flame.".

> In Siberia, in law suits between the Russians and the wild Ostiaks it was usual to bring into court the head of a bear, the Ostiak making the gesture of eating and calling on the bear to devour in like manner if he does not tell the truth[6]. Among the Nagas of

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[1]Mulla, Mahomedan Law (1961), page 277.

[2]Quran, Chapter XVI ; see Best on Evidence (1922), page 10, para. 18.

[3]Works of Jeremy Bentham, (1808), Vol. III, part V, page 196.

[4]Phipson on Evidence (1963), page 575, para. 1497.

[5]The statement as to the Chinese refers to the English practice. There is no "oath" in Chinese Courts—Wigmore, "Evidence" (1923), page 862 footnotes and Best on Evidence (1922), page 153, para. 163 ; Phipson on Evidence (1963), page 1497.

[6]See Encyclopaedia Britannica (New Edn.), Vol. 16, article on "oath".

Assam, men will lay hold of a dog or a fowl by the head and feet, which is then chopped in two with a single blow of the *dao*, this being emblematic of the fate expected to befall the perjurer. Or a man will take hold of a barrel of a gun, a spearhead or a tiger's tooth and solemnly declare "If I do not faithfully perform this my promise, may I fall by this[1]." Similar oaths are sworn on the head or skin of a tiger by the Santhals and other indigenous tribes of India.[1]

Utility of oath—criticism by Bentham and others.

14. Bentham thought that all oaths were useless. He has stated—

"The oath is taken by everybody, everybody violates the oath so taken, nobody is even punished for violating it, nobody is ever put to shame by the violation of it. And such, then, is the ground of the inference,—*viz.*, that, to whatsoever object direct, whether to the prevention of transgression in any other shape, or to the prevention of transgression in the particular shape of mendacity, the instrument in question, the ceremony of oath, is inefficient and useless[2].".

* * * *

"Consistently with the opinion so generally entertained by unreflecting prejudice, a place upon the list of securities for the trustworthiness of testimony, and thence against deception, and consequent misdecision and injustice, could not be refused to the ceremony of an oath. But, whether principle or experience be regarded, it will be found in the hands of justice an altogether useless instrument; in the hands of injustice, a deplorably serviceable one[3]."

* * * *

"Inefficacious as is the ceremony of an oath to all good purposes, it is by no means inefficacious to bad ones[4]."

The same view was expressed by Bentham in his supplementary work entitled "Swear Not At All", which contains "an exposure of the needlessness and mischievousness as well as anti-Christianity of the ceremony of an oath[5]".

15. The utility of oaths in any form has also been doubted by other people of eminence.

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[1] *See* Encyclopaedia Britannica (New Edn.), Vol. 16. article on "Both".

[2] Works of Jereny Bentham (1808), Vol. III, Part V, page 196.

[3] *Ibid*, Vol. VI, Part XI, page 309.

[4] *Ibid*, page 315.

[5] See Holdsworth, "History of English Law" (1952), Vol. XIII, page 83.

Thus "J.M."[1] wrote in 1874—

> "Profoundly convinced by a long judicial experience of the general worthlessness of oaths, I have become an advocate for the abolition of oaths as a test of truth[2].".

Contrary view as o utility.

16. On the other hand, there are equally eminent authorities who have taken a contrary view. Kant[3] regards the taking of an oath as a security for ensuring the trustworthiness of testimony.

Wigmore[4] after observing that the theory of oath in modern common law is a subjective one, states that the oath—

> "is a method of reminding the witness strongly of the Divine 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.".

Should oaths be abolished?

17. It has been argued, that the good man speaks the truth without an oath, while a bad man mocks at its obligation. Oaths, however, do serve some useful purpose. The case in favour of oaths can best be put in the following words[5]:—

> "It must be owned great numbers will certainly speak truth without an oath; and too many will not speak it with one. But the generality of mankind are of middle sort,—neither so virtuous as to be safely trusted, in case of importance, on their bare word; nor yet so abandoned as to violate a more solemn engagement. Accordingly, we find by experience that many will boldly say what they will by no means venture to swear; and the difference which they make between these two things is often indeed much greater than they should; but still it shows the need of insisting on the strongest security. When once men are under that awful tie, and, as the Scripture phrase is, have bound their souls with a bond (Numb. xxx. 2), it composes their passions, counterbalances their prejudices and interests, makes them mindful of what they promise, and careful of what they assert; puts them upon exactness in every circumstance: and circumstances are often very material things. Even the good

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[1]Believed to have been Mellor J.

[2]Cited in Best on Evidence (1922), page 159, foot-note (*g*).

[3]Kant, "Philosophy of Law"; Dr. W. Hastie's translation (1887), at pages 151-152.

[4]Wigmore, Evidence (2nd Edition) (1923), Vol. III, page 857, para. 1816.

[5]Archbishop Secker, quoted in Best on Evidence (1922), pages 44-45.

might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act.".

The same view has been expressed by Wigmore, who says[1]:—

> "The class of persons whose belief makes them capable of being influenced by the prospect implied in an oath is decidedly the immense mass of the community. Furthermore, in practice these persons are apparently, for the most part, actually influenced for the better, in their mental operations on the witness-stand, by the imposition of the oath,.....There appears, therefore, in the present conditions, looked at as a whole, no reason to call for the abandonment of the oath for those persons whose belief makes them susceptible to its sanction.".

18. The practice of taking an oath has been in existence in this country since ancient times, and the Indian Oaths Act, 1873, itself is nearly a century old. Oaths have also been recognised in our Constitution. [Articles 60, 69, 99, 124(6), 148(2), 159, 188 and 209.] Taking all the circumstances into consideration, we would not recommend the abolition of oaths.

Form of oath according to conscience.

19. In the case of *Omychund* v. *Barker*[2], Lord Hardwicke, L. C. observed—

> "The next thing.....is the form of oath. .....It is laid down by all writers that the outward act is not essential to the oath..... All that is necessary appears in the present case; an external act was done to make it a corporal act..... This falls in exactly with what Lord Stair, Puffendorf, etc., say that it has been the wisdom of all nations to administer such oaths, as are agreeable to the notion of the person taking, and does not at all affect the conscience of the person *administering*, nor does it in any respect adopt such religion.".

20. According to Halsbury[3]—

> "At common law, the form of the oath is immaterial, provided that it is binding on the witness's conscience, whether he is of the Christian religion or not.".

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[1]Wigmore on Evidence (2nd Edn.) (1923), Vol. III, page 876, para. 1827 (1).

[2]*Omychund* v. *Barker*, Chancery, 1744, 1 Atk 21 ; Willes 538; 1 Wils. K. B. 84; 26 E.R. 15 ; see Cockle, Cases and Statutes on Evidence (1963), pages 280-281.

[3]Halsbury, Laws of England (3rd Edn.), Vol. 15, page 436.

In an American case[1], Reynolds C. J. said:

> "The pure principle of the common law is that oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences.".

21. A suggestion has been made that in order that the oath shall bind the conscience of the people, it should be based on religion. In other words, the oath should be taken on the appropriate religious scripture. It appears that the practice adopted by Muhammadan judges before the advent of the British rule required that Muhammadans were to be sworn on the Quran and Hindus on the water of the Ganga[2]. This practice was, however, altered by section 5 of Act 5 of 1840, which was in the following terms:

> "Whereas obstruction to justice and other inconveniences have arisen in consequence of persons of the Hindu and Muhammadan persuasion being compelled to swear by the water of the Ganges, or upon the Quran, or according to other forms which are repugnant to their consciences or feelings: It is hereby enacted, that except as hereinafter provided, instead of any oath or declaration now authorised or required by law, every individual of the classes aforesaid within the territories of the East India Company shall make an affirmation to the following effect:
>
> > 'I solemnly affirm, in the presence of Almighty God, that what I shall state shall be the truth, the whole truth, and nothing but the truth.' "

22. Thus, the practice of taking the oath upon a holy book or upon the water of Ganga was abandoned[3] as far back as 1840. It is not likely to succeed if it is revived now. Since 1840, society has become more sophisticated. In our opinion, there should be a uniform form of oath which should apply to all persons alike.[4] Any person may, however, with the permission of the Court, swear an oath in any other form[5]-[6].

Form of oath—other suggestions.

23. It has been argued, that the Act does not lay down a well-worded, rational or true form of oath, and therefore the deponents do not clearly understand the implications of the oath. The object of oath, it is stated, is to call the

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[1]*Gill* v. *Caldwell* (1822), 1 Illinois 53, referred to by Wigmore, Evidence (1923), page 862, para. 1818.

[2]See Q. *E.* v. *Maru* (1888), I.L.R. 10 All. 207, 214 (Mahmood J.).

[3]Para. 21, *supra.*

[4]App. I, Schedule.

[5]App. I, clause 6.

[6]See para. 61, *infra.*

attention of the witness to God, so that he must have the idea that there will be super-human retribution for falsehood; but, it is argued, if a person does not believe in God as separate from himself and as the rewarder of truth and avenger of falsehood, the love or fear of God cannot act on him. It is also argued, that people believe in different Gods, and their variety of belief affects their conduct, so that they do not in reality feel any obligation to state the truth. The word "God" in an oath, it is contended, refers to the Incorporeal Supreme Soul and not to any Corporeal Deity. Having regard to these reasons, it is suggested, the words "Supreme and Divine Justice" and the word "Incorporeal" should form part of the oath. Particular forms of oaths have also been suggested. A metaphysical discussion about the nature of God and about the constituent ingredients of that concept is, however, outside the scope of the Act with which we are dealing. The invocation of a super-human power to reinforce the moral obligation to state the truth may be of the essence of an oath in the name of God; but it is hardly appropriate to elaborate that aspect while laying down the form of oath in a statute.

Form prescribed by High Courts.

24. (a) Most High Courts have prescribed the following form of oath:—

> "I do swear in the name of God that what I shall state shall be the truth, the whole truth and nothing but the truth[1]."

The oath is taken in the name of God, like the oath taken under the Constitution by high dignitaries of the State such as the President, Governor, etc.[2]

(b) In our opinion, the form of oath which is being used at present, does not require any change. It is a general form which will apply in most cases. The Court should, however, have power to permit any person who does not like this form, to take an oath in any other form[3]. We recommend[4], that this form of oath should be specified in a Schedule to the Act, so that there should be no room for different forms of oath being prescribed by different High Courts.

Oaths to be administered by the Judge.

25. The oath, as administered by Courts in this country, has become a mere formal ritual; it is generally administered by a member of the ministerial staff, sometimes even by a peon of the Court. Administered in this manner, the oath loses all its sanctity. In order that the oath may be administered with due solemnity, we recommend[5], that except in

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[1]Or slight variations thereof; See Beotra: Oaths Act (1964), pages 74—94.

[2]See the forms of oaths in the Third Schedule to the Constitution.

[3]Para. 61, *infra*.

[4]See Appendix I, Schedule.

[5]Appendix I, clause 6.

the case of the Supreme Court and High Courts, it should be administered by the Judge himself.

Special oaths.

26. The Indian Oaths Act, 1873, provides also for what are commonly known as "special oaths". Section 8 of that Act allows any party to, or witness in, any judicial proceeding to give evidence on oath or solemn affirmation in any form common amongst or held binding by persons of the race or persuasion to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person. Sections 9 and 10 then provide, that if any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation if it is made by the other party to or by any witness in such proceeding, the court may ask such other party or witness whether or not he will make such special oath or solemn affirmation. If such other party or witness agrees to make and makes such special oath or solemn affirmation, then under section 11, the evidence given on such special oath or solemn affirmation is, as against the party who offered to be bound thereby, conclusive proof of the matter stated[1].

Question of retention of special oaths considered.

27. The question for consideration, is, whether the provisions relating to special oaths[2] and the conclusive nature of the evidence given on special oath as contained in sections 8 to 12 of the Indian Oaths Act, 1873, should be retained or repealed. Arguments may be advanced for the retention as well as for the repeal of these provisions. On a careful consideration of the arguments for and against these provisions, we are of the opinion, that the provisions relating to special oaths should be omitted from our statute book.

Arguments in favour of special oaths.

28. One important argument in favour of the retention of the provisions with respect to special oaths is that the special oath is an institution of long standing; it was recognised in ancient Hindu texts and commentaries[3]; it was recognised in the Old Regulations[4-5], it has been recognised in the Indian Oaths Act, 1873; and it is still in existence.

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[1]Section 12 deals with refusal to take the special oath.

[2]Para. 26, *supra*.

[3]Kane, History of Dharmashastras (1946), Vol. 3, page 357, bottom, 358, 359, 360.

[4]Before the Indian Oaths Act, 1873 was passed, provisions regarding special oaths were contained in Madras Regulations No. 3 of 1802, No. 4 of 1816 and No. 6 of 1816, which were in force in certain parts of the country. Sub-section (3) of section 14 of Madras Regulation 4 of 1816 (so far as it related to special oaths) was in the following terms :—

> " If either party is willing to let the cause be settled by the oath of another, the village munsif shall give his decision according to such oath.".

[5]The relevant portion of section 27 of Madras Regulation 6 of 1816 was as follows :—

> " If either party agrees in writing to let the cause to be settled by the oath of the other, without appeal, the District Munsif shall give his decision according to such oath.".

An institution of such long standing, it is contended, should not, therefore, be abolished.

The argument is *prima facie*, attractive. But if it can be shown that special oaths—and particularly the binding and conclusive nature of the evidence given on special oaths—are intrinsically opposed to sound juristic principles, and, instead of subserving any common good, have an inherent tendency, having regard to the frailties of man, to do harm and mischief, then, the mere ancient origin of special oaths cannot be a strong ground for their retention.

Arguments against special oaths.

29. First, in the present-day India, our system of law hardly contains any precepts or injunctions laid down in our ancient codes and shastras. Neither in the field of substantive law, nor in the field of adjective law, are we governed today by the ancient texts or the commentaries thereon. A special oath is in the nature of an ordeal, and any ordeal, whether it be an ordeal by fire or an ordeal by water or an ordeal in any other form, ceased to be a part of our living law, long long ago.

30. In the next place, though special oaths might have been in vogue in Hindu India under the Dharmasastra School[1], it may be mentioned that in earlier times under the Arthasastra School, it was not necessary to administer oaths in many cases[2].

31. It is, no doubt, true that in some of the old Regulations there were provisions similar to those contained in sections 8 to 12 of the Indian Oaths Act, 1873. Thus, provisions regarding special oaths similar *in substance* to those under discussion, were contained in Madras Regulations No. 3 of 1802, No. 4 of 1816 and No. 6 of 1816[3]. But we find, that even at that distance of time the Sudder Court took exception to these provisions, as is clear from the observations which Muthusami Ayyar, J. made[4] with reference to section 3 of Regulation 3 of 1802—

> "It is to be observed that by this Regulation the decision of a suit by the oath of one of the parties was expressly recognised if the other party consented to that mode of decision. In their proceedings of the 14*th December*, 1816, the late Sudder Court deprecated the principle of the Regulation and ruled that according to

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[1]Para. 28, *supra*.

[2]See Dr. K. P. Jayaswal, 'Manu and Yajnavalkya' —(T.L.L., 1917), (1930 Edition), page 133, para. 9.

[3]See para. 28, *supra*.

[4]*Vasudeva Shanbhog* v. *Naraina Rai* (1879), I.L.R. 2, Mad. 356.

its true construction, a court cannot decide a suit simply upon the oath of one party, even though the other consented to that mode of decision.".

It is significant, that as early as 150 years ago the Madras Sudder Court deprecated the principle underlying the provisions relating to special oaths and the binding nature of the evidence given thereon.

Harm caused by special oaths—Privy Council case.

32. Let us, then, examine the claim made on behalf of special oaths that there is no evidence to show that special oaths have done any harm. This claim does not appear to be well-founded. In this connection, attention may be drawn to the Privy Council case of *Inder Prasad* v. *Jagmohan Das*[1]. The facts of that case, as stated in the judgment of the Privy Council delivered by Lord Blanesburgh, made some startling revelations. In a partition suit between the plaintiff, Inder Prasad, and the defendant, Jagmohan Das, the disputes as to the immovable properties were amicably settled. But with regard to the movables, the disputes became highly embittered. After several years of protracted litigation, both the plaintiff and the defendant came to some amicable settlement even with regard to the movables, and, in pursuance of the agreement of both the parties which was recorded by the court, several lists of movable properties were filed by the plaintiff. Under the agreement as recorded by the court, these lists would have secured for the plaintiff a decree for practically the whole of his claim, and there would have been due to him from the defendant a sum exceeding two lakhs of rupees.

33. But then suddenly a strange thing happened. The whole situation cannot be better described than in the words of Lord Blanesburgh himself. His Lordship in the course of his judgment observed—

> "But, then, a strange thing happened. For some reason unknown—the Subordinate Judge describes it as '*a fit of responsive generosity*' on the part of the first plaintiff, he on the 30th March, 1922, when filing his lists, made in the court, in the presence of the first defendant, the offer on which everything now turns. It is thus recorded by the Subordinate Judge--
>
> 'Lala Inder Prasad says he will give up out of his lists such items as Jagmohan Das denies before the Deity Lachmi Narsinghi. Jagmohan Das accepts this'."

34. In pursuance of this offer, Jagmohan Das, the defendant, took a special oath before the Deity and gave his

[1] *Inder Prasad* v. *Jagmohan Das* (1927), 54 I.A 301 ; I.L.R. 2 Luck. 316 ; 31 C.W.N 1053 ; A.I.R. 1927 P.C. 165.

evidence, the effect of which may best be stated in the words of the Privy Council—

> "By admitting.....practically all the items which involved any liability on the part of the first plaintiff, and denying practically all the items which involved any liability on his own, the first defendant had transformed the lists which disclosed an indebtedness of over two lakhs of rupees from him to the plaintiff into a bill ultimately adjusted at Rs. 93,672-15-3 due by the plaintiff to himself and his son."

35. The plaintiff, thereafter, being thoroughly alarmed at this, protested to the Subordinate Judge about the proceedings, and the matter came ultimately to the Privy Council. Relying upon the language used in sections 8 to 12 of the Oaths Act, 1873, their Lordships of the Privy Council dismissed the appeal of the plaintiff with costs. But it will appear from the judgment of the Privy Council, that in more places than one the Privy Council stated that they were *constrained* to adhere to the view of the agreement taken by the courts below. Thus, their Lordships stated[1]—

> "But on full consideration, their Lordships are in this matter *constrained* to adhere to the view of the agreement taken by the Courts below.".

Again, their Lordships observed[2]—

> "For all these reasons, their Lordships dealing on this branch of the appeal.....are *constrained* to agree with both courts in India that the statements made by the first defendant in the presence of the family Deity and before the Commissioners were conclusive upon the plaintiff.".

36. A study of the facts of this case leaves no room for doubt that a great mischief and harm was done to the plaintiff in this case, because the courts, including the Privy Council, had no other alternative than to give effect to the mandatory provisions of sections 8 to 11 of the Indian Oaths Act, 1873. But it is clear from the judgment of the Privy Council, that the Privy Council was not at all satisfied with the result of the appeal; otherwise their Lordships would not have used the word 'constrained' more than once in the course of their judgment.

Special oaths and wager of law.

37. The conclusive character of the evidence given on special oath makes it look like a wager of the law. As is stated by Best[3],—

Decisory and suppletory oaths.

> "One of the greatest of these (abuses) is the *investing of oaths with a conclusive effect*,—where the law announces to a person whose life, liberty or pro-

[1] 31 C.W.N. 1053, 1058 ; right hand, in A.I.R. 1927, P.C. 165, 168.

[2] 31 C.W.N. 1053, 1062 ; right hand, in A.I.R. 1927, P.C. 165, 172.

[3] Best on Evidence (1922), pages 45-46, para. 59.

perty is in jeopardy, that in order to save it he has only to swear to a certain indicated fact. This was precisely the case of the *wager of law* anciently used in England, and the system of purgation under the cannon law. So, in the civil law, either of the litigant parties might in many cases tender an oath, called 'the decisory oath', to the other; who was bound, under peril of losing his cause, either to take it, in which case he obtained judgment without further trouble, or refer it back to his adversary, who then refused it at the like peril, or took it with like prospect of advantage. The Judge also..... had a discretionary power of deciding doubtful cases by means of another oath, called the 'suppletory oath', administered by him to either of the parties.

With reference to these, one of the greatest foreign authorities (Pothier), who to the learning of a jurist added the practical experience of a judge, expressed himself as follows :—

> 'I would advise the judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted'[1]."

38. Partaking of the nature of wager of the law[2], the provisions relating to the conclusive and binding nature of the evidence[3] given on special oaths appear to be opposed to sound public policy.

Fundamental objections to special oaths.

39. The provisions relating to special oaths are open to more fundamental objections. According to the normal judicial process, every dispute which comes before a court should be decided according to the evidence adduced in accordance with law by the parties to the dispute. But, in the case of a special oath, a dispute is settled on the mere statement of the adversary or any witness.

Freedom of contract considered.

40. But, then, it is contended that the freedom of choice of a person should not be interfered with. If a person out of his own free will offers himself to be bound by the testimony of his adversary, then the law should not stand in his way. The argument is specious, and does not stand

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[1] 1 Ev. Poth, article 831.
[2] Para. 37, *supra*.
[3] Existing section 11.

close scrutiny. It may for the sake of argument, be conceded that a man may out of his free will agree to settle his dispute in any way he likes, so long as he does not bring his dispute within the seisin and cognizance of the court. The moment he does so, he is bound by the rules which govern and regulate all judicial process. Even in the compromise or adjustment of a suit, it is expressly required by the Code of Civil Procedure[1] that it must be proved to the satisfaction of the court that the suit has been adjusted wholly or in part by a *lawful* agreement or compromise, and it is only after the court has been so satisfied that the court can pass a decree in accordance with such agreement or compromise and not otherwise. And what is a "lawful" agreement is to be determined by reference to the provisions of the Indian Contract Act, 1872, specially those contained in Chapter II (sections 10 to 30) of that Act. But in the case of a decision of a dispute by special oath, the court is a passive spectator, and the statement of the adversary is given the character of conclusive evidence as against the other party. It is not desirable that the court should become a powerless and silent spectator and be constrained to accept the evidence sworn to on special oath as conclusive, whatever may be its own view on such evidence. The court cannot be made to abdicate its own judicial functions in this way.

41. Then, the so-called freedom of choice or agreement or will may turn out on ultimate analysis to be a complete negation of freedom, because the parties to a dispute may not be in a position of real equality. One may be a simple, illiterate gullible person having implicit faith in his adversary, specially when he is making a statement in the name of religion or God or in the presence of some religious symbol. The adversary, on the other hand, may be a cunning person or a person having no moral scruples or religious fear or qualms of conscience. He may not hesitate to utter a downright and deliberate falsehood or to perpetrate any other dishonest or corrupt act for the achievement of his selfish ends. To him, the touching of a copy of the Gita or the Quran or a pot of water of the Ganga may mean no more than touching a few pages of paper or a pot containing some liquid substance.

42. It may, perhaps, be safely asserted that, by and large, man has not reached that stage of moral stature or spiritual illumination wherefrom he does not hesitate at all to give up and forsake his self-interest for the sake of truth and *dharma*. When that stage will be reached among mankind, the necessity for law as an instrument of social control will perhaps no more be. But, as long as that stage is not reached, courts and laws are necessary for the settlement of antagonistic jural relations among the members of the society. The oft-quoted saying of

[1]Order 23, rule 3, Code of Civil Procedure, 1908.

Sir Henry Maine that the movement of society has been from status to contract[1] no longer holds good in its entirety. The law now steps in to regulate human relations at every stage, and does not allow them to be governed by agreements and free will, because it has been found by bitter experience that freedom of contract and will in many fields of human relations instead of subserving the ends of social justice, brings about glaring injustice and unfairness in relations between man and man. Therefore, the central point in a modern developed system of law, specially in systems based upon the Anglo-Saxon jurisprudence and common law, is not will, but relation.

43. The law is not so much concerned with the agreements and stipulations which brought a relation into existence, as with the legal rights, duties and obligations involved in that relation. This relational aspect of the law was noted by Brett. J. in the well-known case of *Heaven* v. *Pender*[2] as early as the eighties of the last century. He observed—

> "The questions which we have to solve in this case are—what is the proper definition of the relation between two persons other than the relation established by the contract or fraud which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property.".

44. Reference may be made in this connection also to the well-known observations of Lord Atkin in the famous case of *Donoghue* v. *Stevenson*[3]. We need not dilate on this point. A glance at the modern statute book of any country will provide innumerable instances of statutory relations which have supplanted purely contractual relations. The doctrine of *laissez faire* or naked individualism of the eighteenth or early nineteenth century, is a far cry from the social and juristic philosophy of the second half of the twentieth century. The moment a person appears before the court as a plaintiff and drags the other party before the court as a defendant, that very moment the two stand to each other in the relation of plaintiff and defendant, and the court becomes the arbiter of their disputes. The court is bound, therefore, to decide the dispute according to known and well-established rules of judicial procedure. After that relationship has been established, the decision of the dispute should not be left to the mere statement of the person taking the special oath.

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[1]Maine, Ancient Law (Pollock's Edn.), page 182. See Graveson, "Movement from Status to Contract", (1941) 4 M.L.R. 261.

[2]*Heaven* v. *Pender*, (1883) 11 Q.B.D. 503.

[3]*Donoghue* v. *Stevenson*, (1932) A.C. 562, 579-584.

Recommendation for omitting special oaths.

45. In view of the above considerations[1], we recommend that the provisions contained in sections 8 to 12 of the Indian Oaths Act, 1873, should be omitted.

Sections examined.

46. Having made these general observations, we now proceed to deal with the important points that seem to arise on a study of the various sections of the Act.

Preamble.

47. A suggestion has been made that the preamble should be amended so as to bring forth the impact of the Act in the ethical sense, to emphasise the correct concept of the oath and the consequences flowing from false swearing, and to lay down a uniform system of oath. We do not think that it is necessary to amend the preamble for this purpose, particularly when it is not the usual practice in modern Acts of Parliament to have a preamble[2].

Definition of oath.

48. The Act does not contain any definition of 'oath'. The expression 'oath' is defined in section 3(37) of the General Clauses Act, 1897, as including an 'affirmation', and this definition applies to all Central Acts made after the 3rd January, 1868[3-4]. It is, however, not necessary to rely upon this definition, because, wherever the expression 'oath' is used in the Indian Oaths Act, 1873, the expression 'affirmation' is also mentioned.

Section 3 and Courts-martial.

49. Section 3 of the Act excludes from its operation proceedings before courts-martial, as these courts have power to administer oaths under the various statutes relating to armed forces. [See section 130 of the Air Force Act, 1950, section 131 of the Army Act, 1950 and section 110(1) of the Navy Act, 1957. There are also provisions in sections 108 and 109 of the Navy Act, 1957, regarding oaths and affirmations to be administered to interpreters and shorthand writers. The section does not require any change in this respect.

Section 4 and other laws.

50. Section 4 enumerates the persons authorised to administer oaths. As the Act is confined to judicial oaths, the section does not mention persons who have power to administer oaths for purposes other than judicial proceedings. Thus, it does not mention—

(i) Notaries Public; [section 8(1)(e) of the Notaries Act, 1952, authorises a notary public to administer oaths];

(ii) Diplomatic officers; [See the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948];

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[1]Paras. 26—44, *supra*.

[2]The Bill proposed (Appendix 1) has no preamble.

[3]See section 4 (1), General Clauses Act, 1897.

[4]See also section 51, Indian Penal Code.

(iii) Persons before whom affidavits may be sworn for the purposes of civil and criminal proceedings; [See section 139, Code of Civil Procedure, 1908, and sections 539 and 539AA, Code of Criminal Procedure, 1898];

(iv) Oath Commissioners, mentioned in section 539, Code of Criminal Procedure, 1898, and contemplated in section 139(b), Code of Civil Procedure, 1908.

Section 4 and affidavits.

51. At present there is no specific provision for the administration of oaths for the purpose of affidavits. While the provisions in section 4 of the Oaths Act and in section 139 of the Code of Civil Procedure, 1908, and sections 539 and 539AA of the Code of Criminal Procedure, 1898 are adequate for certain situations, there is no comprehensive provision on the subject. Having regard to the fact that affidavits may be required not only in connection with judicial proceedings but also for other purposes, we think that a specific and comprehensive provision on the subject would be helpful. We have, accordingly, proposed an amendment[1] in section 4, under which the High Court or the Government, as the case may be, can empower any court, Judge, Magistrate or other person to administer oaths or affirmations for the purpose of affidavits for all purposes.

Section 4 and powers of Commanding Officers.

52. Under section 4(b), proviso (2), the power of a Commanding Officer to administer an oath or affirmation is restricted by two conditions; firstly, that the oath, etc., is administered within the limits of his station, and secondly, that the oath, etc., is such as a Justice of the Peace is competent to administer. Now, the second condition is slightly obscure, for the reason that the oath or affirmation which a Justice of the Peace is competent to administer in India cannot be ascertained.

The sections in the Code of Criminal Procedure, 1898, which deal with Justices of the Peace (sections 22 to 25) do not lay down the oath or affirmation which a Justice of the Peace is competent to administer.

53. In England, under section 16 of the Evidence Act, 1851[2], every court, Justice, etc., having, by law or by consent of the parties, authority to hear, receive and examine evidence is empowered to administer oath to all such witnesses as are legally called before them respectively.[3]

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[1] See Appendix 1, clause 3.

[2] Evidence Act, 1851 (14 and 15, Vic. c. 99).

[3] The Act of 1851 is not one of the British Statutes which was applicable to India. For a list of such British Statutes, see 5th Report of the Law Commission (British Statutes Applicable to India), page 9 *et seq.* See also the British Statutes, etc. Repealing Act (57 of 1960).

54. It would appear from the proceedings in the Governor-General's Council (at the time when the Bill which led to the existing Act was discussed),[1] that there was an old Act—Act 9 of 1836—relating to the Commanding Officer's power to administer oath, and that Act was being repealed by the Bill and the provision contained therein was proposed to be re-enacted in the Bill. As the power of a Justice of the Peace to administer an oath is obscure so far as India is concerned, this part of the proviso should now be omitted.[2]

Section 5—Obligation to make oath.

55. Section 5 provides that oaths or affirmations "shall be made" by certain persons. Failure to make an oath or affirmation would attract the provisions of section 178 of the Indian Penal Code, under which any person who refuses to bind himself by an oath or affirmation to state the truth commits an offence.

Section 5 and oath by accused examined as a witness.

56. It has been suggested, that in section 5, last paragraph, for the words "unless he is examined as a witness for the defence", the words "unless he voluntarily *offers himself as a witness for defence*" should be substituted. This provision is to be read along with section 342A, proviso (a), of the Code of Criminal Procedure, 1898, under which the accused is a competent but not a compellable witness. No such change in the section is, therefore, necessary.

Section 5—other points.

57. A few other points regarding section 5 are dealt with separately.[3]

Section 6—Principle.

58. Section 6 provides that where the witness, etc., is a Hindu or Muslim or has an objection to making an oath, he can make an affirmation. But in every other case the witness, etc., shall make an oath. Thus, the liberty of substituting an affirmation for an oath is dependent on the community to which the deponent belongs or on his raising an objection to making an oath. We think, that every witness, irrespective of the community to which he belongs, and whether or not he raises a formal objection to taking an oath, should have an absolute and unconditional right to make an affirmation instead of an oath. It may be noticed, that the Constitution gives such a

[1]Gazette of India, (1873), Supplement 2, para. 238.

[2]See App. 1, clause 4.

[3]See App. 2, Notes on Clauses, clause 4.

liberty to holders of certain offices who are required to take an oath on assumption of office[1-2].

We, therefore, recommend,[3] that the section be amended so as to give absolute liberty to a witness to affirm instead of making an oath.

59. The change proposed by us in section 6[4] will, incidentally, obviate the criticism that the section, by *expressly* exempting Hindus and others from making an oath, *encourages* them to make a solemn affirmation

Section 6—other suggetions.

60. The form in which an oath should be taken has been discussed elsewhere[5].

Section 7—Form of oath.

61. We are of the opinion, that while ordinarily the general form of oath or affirmation[6-7] should be adhered to, the court should have a power to permit a witness to take the oath, etc., in another form which is regarded as binding by the class of persons to which he belongs. We have, accordingly, proposed a suitable provision[8] on the subject, on the lines of existing section 8.

Section 7 and permission to witness to take an oath in a particular form.

62. A suggestion has been made that, while taking an oath the deponent should hold in his hand the religious scripture in which he believes, *e.g.*, the Gita or the Quran. This aspect of the matter has been discussed elsewhere.[9]

Section 7—Holding of book.

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[1]Article 60 . . . . . President ;

Article 69 . . . . . Vice-President ;

Article 99 . . . . . Members of Parliament ;

Article 124 (6) . . . . Judges of the Supreme Court;

Article 148 (2) . . . . Comptroller and Auditor-General ;

Article 159 . . . . . Governors ;

Article 188 . . . . . Members of the State Legislatures ;

Article 219 . . . . . Judges of High Courts.

[2]Article 75 (4) relating to Ministers of the Union, and article 164 (3) relating to State Ministers, speak of oaths of office and secrecy without mentioning " affirmation " ; but the forms given in the Third Schedule (forms I, II, V and VI) allow affirmation without any condition.

[3]Appendix I, clause 5.

[4]See para. 58, *supra*.

[5]Para. 24 (*b*), *supra*.

[6]App. 1, Schedule.

[7]Para. 22, *supra*.

[8]App. 1, clause 6.

[9]Para. 21, *supra*.

Section 7—who should administer oath.

63. It has also been suggested that the oath should be administered by the presiding officer of the Court. We have accepted the suggestion, for the reason stated elsewhere[1].

Sections 8-12. (Special oaths).

64. Sections 8—12 are proposed to be deleted, in view of our recommendation[2] to abolish special oaths.

Section 13.

65. Section 13 provides that an omission to take an oath, etc., or any irregularity therein shall not—

(i) invalidate the proceedings;

(ii) render inadmissible any evidence;

(iii) affect the obligation to state the truth.

A suggestion has been made to limit the saving to (iii) only. We are not inclined to accept the suggestion.

Section 14—obligation to state the truth—significance.

66. Section 14 provides that every person giving evidence on any subject before any court or person "hereby authorised" to administer oaths and affirmations shall be bound to state the truth on such subject. The significance of this section can be best understood by a reference to the relevant provisions of the Indian Penal Code. Thus, under section 179 of the Code, whoever, being "legally bound" to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, is punishable with the punishment provided in the section. Similarly, under section 181 of that Code, a person so legally bound is punishable if he makes a false statement. Lastly, under section 191 of that Code, whoever being legally bound by an oath or *by an express provision of law to* state the truth makes a false statement, is said to give false evidence and punishable under section 193.

Section 14—when applies.

67. It may be noted, that the taking of an oath is not a condition precedent to the obligation to state the truth flowing from section 14. All that section 14 requires is, that the Court or other person should have power to administer oath in order that the evidence given before the court or other officer may become subject to the obligation to state the truth. The decision in a Calcutta case[3], to the effect that the offence of intentionally giving false evidence under section 193 of the Indian Penal Code (which applies to false evidence in a stage of judicial proceeding and also to false evidence in other cases) may be committed although the person giving evidence has neither been sworn nor affirmed, can be said to be based on this reasoning. [The judgment does not give the reasons

[1]Para. 25, *supra*.
[2]Para. 45, *supra*, regarding special oaths.
[3]*Gobind Chandra* v. Q. *E.*, (1892), I.L.R. 19 Cal. 355, 358.

and is a very short one, but the arguments of Mr. Kilby, who appeared for the Crown, may be seen.]

68. We have proposed a Schedule which contains the form of oath[1]. Schedule (New).

69. The important changes which we have recommended have been discussed above. The other points on which we have recommended changes in the law will appear from the notes on clauses[2]. Other changes.

70. In order to give a concrete shape to our recomendations, we have, in Appendix 1, put them in the form of a draft Bill. Appendices.

Appendix 2, contains notes on clauses, explaining, with reference to each clause in Appendix 1, points that might need elucidation.

Appendix 3 summarises our recommendations in respect of other Acts.

Appendix 4 contains a comparative table, showing the section in the existing Act and the corresponding clause, if any, in Appendix 1.

1. J. L. KAPUR—*Chairman.*
2. K. G. DATAR.
3. S. K. HIRANANDANI.
4. S. P. SEN VARMA.
5. T. K. TOPE.
6. R. P. MOOKERJEE.

} *Members.*

P. M. BAKSHI,
Joint Secretary and Draftsman.

NEW DELHI,
The 22nd May, 1965.

[1]See para. 24 (*b*), *supra*.
[2]See Appendix 2, Notes on Clauses.

APPENDIX 1

PROPOSALS AS SHOWN IN THE FORM OF A DRAFT BILL

(This is a tentative draft only)

INDEX TO THE BILL

THE OATHS BILL, 196....

A Bill to consolidate and amend the law relating to judicial oaths and for certain other purposes.

BE it enacted by Parliament in the .....Year of the Republic of India as follows:—

Short title and extent. (S. 1)

1. (*1*) This Act may be called the Oaths Act, 196——

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

Saving of certain oaths and affirmations. (S. 3)

2. Nothing herein contained applies to proceedings before Courts Martial or to oaths, affirmations or declarations prescribed by the Central Government with respect to members of the Armed Forces of the Union.

Authority to administer oaths. (S. 4)

3. (*1*) The following courts and persons are authorised to administer, by themselves or, *subject to the provisions of sub-section* (2) *of section* 6, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law, *namely*—

(*a*) all courts and persons having by law or consent of parties authority to receive evidence;

(*b*) the Commanding Officer of any military, naval, or air force station or ship occupied *by the armed forces of the Union;* provided the oath or affirmation be administered within the limits of the station.

(2) *Without prejudice to the powers conferred by sub-section* (1) *or by or under any other law for the time being in force, any court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf—*

(*a*) *by the High Court, in respect of affidavits for the purpose of judicial proceedings; or*

(*b*) *by the State Government, in respect of other affidavits*[1].

Oaths or affirmations to be made by witnesses jurors and interpreters. (S. 5)

4. (*1*) Oaths or affirmations shall be made by the following persons, *namely*:—

(*a*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(*b*) interpreters of questions put to, and evidence given by, witnesses; and

(*c*) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Affirmation by persons desiring to affirm. (S. 6)

5. A witness, interpreter or juror *may*, instead of making an oath, make an affirmation.

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[1]*Alternative Draft of clause* 3 (2) :

The High Court, in the case of affidavits for the purposes of judicial proceedings, and the State Government, in the case of other affidavits, may empower any court, Judge, Magistrate or person to administer oaths and affirmations for the purpose of such affidavits.

Forms of oaths and affirmations. (S. 7)

6. (*1*) All oaths and affirmations made under section 3 shall be administered according to such *one of the forms given in the Schedule as may be appropriate to the circumstances of the case*:

Provided that if a witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the class to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding anything hereinbefore contained, allow him to give evidence on such oath or affirmation.

(*2*) *All such oaths and affirmations shall, in the case of all courts other than the Supreme Court and the High Courts, be administered by the presiding officer of the Courts himself, or, in the case of a Bench of Judges or Magistrates, by any one of them.*

Proceedings and evidence not invalidated by omission of oath or irregularity. (S. 13)

7. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Persons giving evidence bound to state the truth. (S. 14)

8. Every person giving evidence on any subject before any court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.

Repeal.

9. (*1*) The Indian Oaths Act, 1873, is hereby repealed. 10 of 1873.

(*2*) Where, in any proceeding pending at the commencement of this Act, the parties have agreed to be bound by any such oath or affirmation as is specified in section 8 of the said Act, then, notwithstanding the repeal of the said Act, the provisions of sections 9 to 12 of the said Act shall continue to apply in relation to such agreement as if this Act had not been passed.

SCHEDULE

[*See* section 6]

FORM OF OATHS

[New] *Form No.* 1 (*Witnesses*):—

I do $\frac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that what I shall state shall be the truth, the whole truth and nothing but the truth.

Form No. 2 (*Jurors*):—

I do ——— swear in the name of God / solemnly affirm ——— that I will well and truly try and true deliverance make between the State and the prisoner(s) at the bar, whom I shall have in charge, and a true verdict give according to the evidence.

Form No. 3 (*Interpreters*):—

I do ——— swear in the name of God / solemnly affirm ——— that I will well and truly interpret and explain all questions put to and evidence given by witnesses and translate correctly and accurately all documents given to me for translation.

Form No. 4 (*Affidavits*):—

I do ——— swear in the name of God / solemnly affirm ——— that this is my name and signature (or mark) and that the contents of this my affidavit are true.

APPENDIX 2

NOTES ON CLAUSES

Clause 1

(Existing s. 1)

The word "Indian" has been omitted, in conformity with recent legislative practice.

Clause 2

(Existing s. 3)

No changes are proposed in existing section 3.

Clause 3

(Existing s. 4)

Since a provision about administration of oaths by the presiding officer himself (except in certain cases) is proposed[1], this section has been made subject to that provision.

In paragraph (b), the words "troops in the service of Government" have been replaced by the phraseology

[1]See clause 6.

"armed forces of the Union", in accordance with modern usage.

The requirement that the oath, etc., administered by a Commanding Officer should be the same as that which a Justice of the Peace can administer, has been omitted.[1]

A provision regarding affidavits is added.[2]

A few other points have already been dealt with.[3]

Clause 4

(Existing s. 5)

1. No changes are recommended in section 5. Certain points relating to the section have been dealt with.[4]

2. As to the admissibility of unsworn testimony of a child witness, the existing proviso makes the position quite clear. In a Privy Council case,[5] from Somaliland, (where the Indian Evidence Act and Oaths Act applied), reliance was placed on section 13 to support the conclusion that such unsworn testimony of a girl of 10 years is admissible, and that corroboration goes only to weight and value.

Before the proviso was inserted, there was some controversy as to the value of the unsworn evidence of a child.[6-7-8] That cannot survive now.

3. Paragraph (c) of section 5 requires oaths to be made by jurors. If and when the provisions regarding jury in the Code of Criminal Procedure, 1898, are deleted,[9] consequential changes may become necessary in this part of the section. In the meantime, the provision may stand.

4. Section 5, last paragraph, provides that "nothing herein contained shall render it lawful to administer in a criminal proceeding oath or affirmation to an accused person....." It has been held,[10] that the expression "criminal proceeding" denotes a proceeding before a criminal court, and does not mean a proceeding relating to a case pending in a criminal court; accordingly, it was decided that a *confession* made under section 164, Code of Criminal

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[1]See the body of the Report, paras. 52—54.

[2]See the body of the Report, para. 51.

[3]See the body of the Report, para. 50.

[4]See the body of the Report, paras. 55-56.

[5]*Mahomed Sugal* v. *The King*, A.I.R. 1946 P.C. 3.

[6]See *Queen Empress* v. *Maru*, (1888) I.L.R. 10 All. 207.

[7]*Queen Empress* v. *Lal Sahai*, I.L.R. 11 All. 183; also see I.L.R. 16 Mad. 105.

[8]See also *Ah Fuht* v. *Emp.*, A.I.R. 1939 Rangoon 402.

[9]The question of amendments to the Code of Criminal Procedure for abolition of the Jury system is under consideration of the Law Commission. See also the 14th Report of the Law Commission, Vol. 2, page 873, para. 18.

[10]*Karam Ilahi* v. *Emperor*, A.I.R. 1947 Lah. 92, 96, para. 17 (D.B.).

Procedure, 1898, cannot be recorded on oath. (However, applying section 537 of the Code of Criminal Procedure, the court admitted the confession in evidence on the ground that no failure of justice had been occasioned.) No change need be made in this respect.[1]

Section 5 and statements under section 164, Cr. Procedure Code.

5. The question how far section 5 of the Oaths Act empowers Magistrates acting under section 164, the Code of Criminal Procedure, 1898 to administer oaths is one on which uncertainty now prevails. A recent decision of the Allahabad High Court[2] holds, that a Magistrate has no jurisdiction to administer oath to a person before recording his statement under section 164. Such Magistrate, it was stated, was not authorised by law to take "evidence", because he is not charged with the duty of deciding any case, and there is no matter to be "proved" or "disproved" before him. The matter (it was held) stood at the stage of investigation, during which no authority had been conferred upon any court to "receive evidence", and, therefore, an oath could not be administered. The Magistrate is not a "court". He does not record any "evidence", and the person examined is not a "witness". The proceeding is not a "judicial proceeding".

Decisions of the Madras,[3] Bombay[4] and Andhra Pradesh[5] High Courts to the contrary were dissented from, on the ground, that they did not give any detailed reasons for holding that investigation is a stage of "judicial proceeding", and also on the ground that when a person makes a statement under section 164, he has not the status of a "witness" (that is, a person who may lawfully be examined or be required to give *evidence*). The statement of such a person is made voluntarily, and he may refuse to be examined or to make a statement. It was also pointed out, that the Magistrate is not a "court"[6], and that such statement is not "evidence" in a stage of "judicial proceeding".[7]

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[1] As to *witnesses* whose statements are recorded under section 164, Cr. P.C. see Appendix 2, Notes on Clauses, section 5 and statements under s. 164, Cr. P. C.

[2] *Sheo Raj* v. *The State*, A.I.R. 1964 All. 294, paragraph 8 (F.B.) (July 1964).

[3] *Queen Empress* v. *Alagu Kone*, (1898) I.L.R. 16 Mad. 421 (The word "Court" includes all Magistrates, and section 164 "permits" the statement by a witness ; the person examined is a "witness" within section 5, Oaths Act.) *Suppa* v. *Emp.*, (1906) I.L.R. 29 Mad. 89.

[4] *Emp* v. *Vishwanath*, (1906) 8 Bom. L.R., 589.

[5] *Public Prosecutor* v. *Nagalinga Reddi*, I.L.R. 1958 A.P. 614 ; A.I.R 1959 Andhra Pradesh 250.

[6] Relying on *Nazir Ahmed* v. *King Emperor*, 63 I.A. 372 ; A.I.R. 1936, P.C. 253.

[7] Citing *Emperor* v. *Purshottam*, I.L.R. 45 Bom. 834 ; A.I.R. 1921 Bom. 3.

6. In the undermentioned decisions,[1-2-3] however, the power to administer oath in such cases was assumed, and a person making a false statement under section 164 was held guilty under sections 191 and 193 (second para.) I.P.C. of giving false "evidence".

7. The offence would not, perhaps, amount to giving false evidence in a "judicial proceeding"[4].

8. The question of inserting a provision on the subject in the Oaths Act has been considered[5].

9. It is, however, felt that the matter should be considered when the Code of Criminal Procedure is revised.

Clause 5

(Existing s. 6)

1. The change made in the principle of the existing section has been already explained.[6]

2. The mention of jurors has to be retained so long as the jury is retained in the Criminal Procedure Code.

Clause 6

(Existing s. 7)

1. The forms have been laid down in the Schedule to the Act, instead of being left to be prescribed by rules as at present.[7]

2. The court has, however, been given power to permit a witness to take the oath in a different form.[8]

3. It has been provided that the oath should be administered by the presiding officer, except in the case of certain courts.[9]

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[1]*Emp.* v. *Parmanand*, I.L.R. 14 Lah. 507 ; A.I.R. 1933 Lah. 321.

[2]*A. T. Krishnamachari*, A.I.R. 1933 Mad. 767.

[3]*Rambharose*, A.I.R. 1944 Nag. 105, 112, 119.

[4]*Sajawal* v. *Emp.*, A.I.R. 1932 Lah. 254.

[5]A tentative draft would be—

"*A Magistrage recording the statement of a person under section* 164 *of the Code of Criminal Procedure*, 1898, *shall be deemed to be a court within the meaning of section* 4, *and the person whose statement is so recorded shall be deemed to be a witness within the meaning of section* 5.".

[6]See the body of the Report, para. 58.

[7]For reasons, see the body of the Report, paras. 24 (*b*) and 60.

[8]For reasons see the body of the Report, para. 61.

[9]See the body of the Report, paras. 25 and 63.

4. The forms of oaths in England are as follows:—

Witnesses in England:—

Practice in England.

In England[1] the standard form of oath now is that prescribed by section 2 of the Oaths Act, 1909, which provides that the person taking the oath shall hold the New Testament (or, in the case of a Jew, the Old Testament) in his uplifted hand and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that .... (followed by the words of the oath prescribed by law)".

A person who objects to being sworn has, under section 1 of the Oaths Act, 1888, the option to make a solemn affirmation (see also the Oath Act, 1961). The form of such solemn affirmation under section 2 of that Act is—

"I, A. B., do solemnly, sincerely and truly declare and affirm"—then proceeding with the oath prescribed by law, omitting any words of imprecation or calling to witness.

For Quakers and Moravians a solemn affirmation or declaration instead of oath is expressly allowed by the Quakers and Moravians Act, 1833[2].

Subject to these rules, the actual form of oath in criminal cases in England is as follows[3]:—

> "I swear by the Almighty God (or I do solemnly, sincerely and truly declare and affirm) that the evidence I shall give to the court and jury sworn between our sovereign lady the Queen and the prisoner(s) at the bar shall be the truth, the whole truth and nothing but the truth.".

Jurors in England—

In England, the oath for jurors in criminal cases is in the following form[4]:—

> "I swear by almighty God (or I do solemnly, sincerely and truly declare and affirm) that I will faithfully try the several issues joined between our sovereign lady the Queen and the prisoner(s) at the bar and give a true verdict according to the evidence.".

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[1]For details, see Boland and Sayer's Oaths and Affirmations, (1961) pages 23-24 and page 106, *et seq.*

[2]Quakers and Moravians Act, 1833 (3 and 4 Will. IV, c. 49).

[3]Archbold, Criminal Pleadings, etc. (1962), paragraph 548.

[4]Archbold, Criminal Pleadings, etc. (1962), paragraph 524.

Forms of Oath—India

As an example of forms of oaths in use in India, we may refer to the Bombay High Court Rules on the Original Side, 1957, under which the forms are as follows[1]:—

"Witnesses" Oaths (Form No. 88)—Bombay High Court.

Christian (on New Testament)—

I swear that what I shall state shall be the truth, the whole truth and nothing but the truth. So help me God. (In case of Quaker substitute, for 'swear' "being one of the people called Quakers do solemnly, sincerely and truly declare and affirm."

Jew (on the Hebrew Testament)—

I swear that what I shall state shall be the truth, the whole truth and nothing but the truth. So help me God.

Parsi—

[The witness with his shoes on and placing his right hand on the open Zend Avesta, shall say]—

I swear in the presence of Almighty God that what I shall state shall be the truth, the whole truh and nothing but the truth. Manashi, Gavasni, Kunasni.

Hindu and Muhammadan—

I solomnly affirm in the presence of Almighty God that what I shall state shall be the truth, the whole truth and nothing but the truth.

Juror's Oaths (Form No. 89)—Bombay High Court.

I..... do swear in the name of Almighty God solemnly, sincerely and truly declare and affirm that I will well and truly try and true deliverance make between the State and the prisoner(s) at the bar, whom I shall have in charge and a true verdict give according to the evidence.

Interpreter's Oath (Rule 37)—Bombay High Court

Every Interpreter and Translator before his admission to office shall take an oath or solemn affirmation that he will well and truly interpret and explain all questions put to and evidence given by witnesses, and translate correctly and accurately all documents given to him for translation.

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[1]For Oaths by witnesses, etc., before Commissioners, see Bombay High Court O.S. Rules (1957) Form No. 85, end.

Clause 7

(Existing s. 13)

No changes are proposed in existing section 13. As to the wide ambit of this section, the under-mentioned decisions may be seen[1-2].

The scope of section 13 has been discussed elaborately in a recent case[3], which points out, that section 13 cures three kinds of disobedience to the provisions of the Act:—

(i) disobedience by *omission* to administer either an oath or an affirmation;

(ii) disobedience by *substituting* an oath, where an affirmation had to be administered;

(iii) disobedience committeed by the adoption of a *wrong form* of an oath or affirmation, when such oath or affirmation is, in fact, administered and there has been no omission to administer it. Each one is a distinct category of disobedience. (The third category has *no association* with the first two. The third category refers only to cases in which there has been an administration of oath or affirmation, but it was not administered in the *form* prescribed for that purpose.)

Clause 8

(Existing s. 14)

No changes are proposed in existing section 14.

1. The Schedule is new, and gives the forms of oath for witnesses, jurors, interpreters, etc[4].

2. As to the form of oath for affidavits, compare the undermentioned precedents [5-6-7-8]. A simple form has been adopted, after a study of the various precedents.

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[1] *Mahomed Sugel* v. *King*, A.I.R. 1946 P.C. 3.

[2] *Lalaran* v. *State*, A.I.R. 1960 M.P. 59, holding that the section is not confined to cases where the omission to give oath is accidental.

[3] *C. K. Chandrasekhariah and another* v. *State of Mysore and another* A.I.R. 1963 Mysore 232.

[4] See notes to clause 6.

[5] Bombay High Court O.S. Rules, (1957), Form No. 19.

[6] Boland and Sayer's Oaths and Affirmations (1961), Forms at page 100 *et seq.*

[7] Civil Procedure Code, First Schedule, Appendix C, Forms Nos. 3 and 5.

[8] Form prescribed by Madras High Court—see Beotra: Oaths Act, (1964), age 79.

APPENDIX 3

Recommendations in respect of other Acts

Code of Criminal Procedure, 1898:

The question whether an oath can be administered where the statement of a witness is recorded under section 164 of the Code of Criminal Procedure should be considered when that Code is revised[1].

APPENDIX 4

Comparative Table

Showing the provision in the existing Act, and the corresponding provision, if any, in the Bill in Appendix I.

Provision in the existing Act	Provision in Appendix I
Section 1	Clause 1.
Section 2 (Repealed)	..
Section 3	Clause 2.
Section 4	Clause 3.
Section 5	Clause 4.
Section 6	Clause 5.
Section 7	Clause 6.
Sections 8 to 12	Omitted.
Section 13	Clause 7.
Section 14	Clause 8.

[1]See Appendix 2, Notes on Clauses, Clause 4.

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