What Happens to Prejurers

H.L. McClintock
WHAT HAPPENS TO PERJURERS

By H. L. McClintock*

The opinion that perjury is common in our trial courts is one on which all of the writers on the question seem to be in complete agreement.\(^1\) Though the extent to which witnesses in our judicial proceedings wilfully testify falsely as to material matters is a question as to which the facts can never be ascertained so as to be made the basis of statistical investigation, we may accept the opinion of those who have examined the question as to the seriousness of the problem, especially when it is confirmed by everyday conversations of judges and trial lawyers. The suggestion that "hundreds of persons perjure themselves in the courts every day except Sunday"\(^2\) may be exaggeration, but there seems to be no reason to doubt that perjury is common enough to constitute a major problem in the administration of the law. The task of wisely adapting the law to the complicated fact situations that confront our courts so as to achieve a proper balancing of conflicting interests is difficult enough to engage the best thought of the legal profession. If in addition we have the impossibility of determining what the facts are, because we cannot rely on the testimony of the witnesses who present those facts to the courts, the task of proper administration of justice becomes an impossible one. Ever since the statute of 5 Elizabeth, ch. 9, perjury has been a crime punishable by the common law courts, as well as a religious offense which subjected the offender to spiritual punishment, but these penalties admittedly have failed to accomplish the purpose

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\(^2\)Note, Problem of Successful Perjury, (1934) 78 Sol. J. 423.
of imposing any substantial check upon the practice of bearing false witness.

While there is an agreement that perjury is rampant, and that, as a general rule what happens to perjurers is nothing, there is very little exact information available as to what has happened to those few who were so unfortunate for one reason or another as to be faced with a felony charge for doing what seemingly was regarded as the usual thing. This study will attempt to examine the information that is available in an endeavor to determine whether any light can thereby be thrown on the reason for the prevalence of this offense.

For reasons that are obvious, no information as to the number of perjuries that are being committed can be obtained from an examination of the police records of the country. Perjury is not the sort of crime that would be reported to the police, and even if such a report were made, there would be no assurance that there had been an actual commission of the offense. In most cases, a report of a homicide or a larceny indicates that such a crime has been committed by someone, but a report of a perjury would not give the same assurance that there had been some wilful false swearing. If the records of the investigations made by the offices of the prosecuting attorneys were accessible, we might get some clue as to the number of perjuries obvious enough, or important enough, to call for such investigation, as to which sufficient evidence to justify a prosecution could not be obtained. When such information has been obtained, as in the report that the district attorney of New York County, between 1900 and 1906, "disposed of" one hundred and seventy-three cases of perjury, fifty by plea or verdict of guilty, four by acquittal, thirty-eight by dismissal by the grand jury, and eighty-one by discharge, we get some statistical confirmation of the general opinion that only a very small percentage of the cases of perjury are ever investigated. Further confirmation of this opinion is furnished by the fact that none of the crime surveys in the various states which have been examined have published any statistics with reference to perjury; if it figures at all in the studies it is only as one of several "other offenses."4

With respect to the perjury prosecutions that actually reach the trial courts, the information is a little more extensive. It is true

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3Purrrington, The Frequency of Perjury, (1908) 8 Col. L. Rev. 67, 78.
4Perjury appears as a topic in the index to the Missouri Crime Survey (1926) 585 but the only reference under it is to a form of indictment.
that the classifications of crimes adopted by the United States Census Bureau in 1926, by the Committee on Uniform Crime Records in 1929, and by the Johns Hopkins Institute of Law in 1932, provided no separate class for perjury, but grouped it with "all other offenses." However, Professor Warner, in his study of these classifications, suggested that perjury, because of its importance, not because of the number of cases, should be given a separate classification, and that practice was adopted in the Census Bureau Reports for 1937. In that report we find figures submitted by twenty-six states and the District of Columbia which show the number of perjury cases pending in the trial courts of those states with the disposition made of them.

From these statistics, we see that there were 50,729 cases of major offenses reported in those states, of which 187 or .37 per cent were prosecutions for perjury. In the cases involving all major offenses, there were pleas of guilty in 66.6 per cent of the cases; convictions by the court or jury in 11.3 per cent; acquittals by the court or jury in 5.2 per cent; and dispositions not involving a determination on the merits in 16.8 per cent. In the perjury cases, there were pleas of guilty in 45 per cent of the cases, convictions by the court or jury in 10.7 per cent of the cases, acquittals in 5.9 per cent and dispositions not involving determination on the merits in 38.5 per cent.

The differences in the percentages of convictions and acquittals is not great enough to have any special significance, especially in view of the small number of perjury cases involved, but the differences in the percentages of pleas of guilty and of dismissals without a trial are striking. The explanation for the small percentage of pleas of guilty, compared with those in other prosecutions, is probably to be found in the nature of the crime, which indicates that it would probably rarely be committed by those whose circumstances did not permit them to employ defense counsel, or have such counsel furnished to them. The fact that there are

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6Warner, Crime and Criminal Statistics in Boston (1934) 95.
8These states are: Arizona, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Utah, Vermont Washington, Wisconsin, Wyoming. Two others, New York and Pennsylvania, also made reports, but they included perjury in the general catch-all of other offenses, so their reports are not included in this study.
9It is probable that at least some part of this difference in the proportion
dismissals without trial on the merits in more than twice as many cases, relative to the number filed, in cases of perjury, as in cases involving other offenses, may indicate an opinion by the prosecuting attorneys that there is more difficulty in obtaining convictions on charges of perjury than on other charges, though it also might be due to the fact that more pressure is exerted on behalf of perjurers than on behalf of ordinary criminals to induce the prosecuting attorney to dismiss the case. Some further indication of the fact that persons accused of perjury are more apt to be represented by counsel eager to prevent their conviction by any available means than are the ordinary defendants charged with a major crime may be found in the fact that, while the latter waived a trial by jury in 38.7 per cent of the cases which were tried, those charged with perjury waived a jury trial in only three of the 31 cases of perjury that were tried, or 9.7 per cent.\textsuperscript{10}

But there is very little basis for the formation of any conclusions from reports which give mere quantities of cases in different categories, with no chance for an examination of the cases to determine what factors have controlled the results. When we turn to the cases in the appellate courts, we are limited to a much smaller number for any given period, and are considering a selected group, but we do have the advantage of a fairly complete statement of the facts in each case from which we may draw some conclusions as to the factors that lead to the results in the particular case.

A study of all of the cases on the question would be manifestly impossible, so attention was confined to the more recent ones. Every case which was cited under the topic of “Perjury” of pleas of guilty to perjury charges from that found in other serious felony cases is due to the fact that many guilty pleas in several classes of the other felonies are entered because of a bargain between the defendant and the prosecuting attorney, whereby the latter consents to accept a plea of guilty to a lesser offense rather than assume the burden and risk of prosecuting for the highest offense. See Beattie, A System of Judicial Statistics for California (1936), ch. 12, pp. 139 ff., Pleas of Guilty and the Lesser Offense Problem. In most jurisdictions, a charge of perjury would offer no opportunity for a bargain of this kind.

\textsuperscript{10}There is some indication that trial judges are more apt to convict in cases tried before them than are juries, in the fact that in 75 per cent of the major felony cases in which a trial was had to the court after jury had been waived, the judge found the defendant guilty, whereas the juries rendered a verdict of guilty in only 65 per cent of the cases tried before them. It would be more consistent with the general attitude of attorneys who represent defendants charged with crime to assume that the jury would be waived more frequently in cases where the defendant thought he had a good defense on the facts, than in those cases where his only hope lay in covering up or distorting the facts, which would lead us to expect a greater percentage of convictions in the jury cases.
in the Fourth Decennial Digest, and in the annual continuations
down to December 31, 1939, has been read. Disregarding the
cases where the citation was to a dictum in a case not involving
perjury prosecution, there were a total of 313 cases, coming from
all but two of the federal circuits, and all but seven of the states.
Since the digests examined cover a period of fourteen years, this
means that an average of slightly more than 22 cases involving
perjury prosecutions were decided by our appellate courts each
year, certainly a very small number compared with the multitude
of cases dealing with other major felonies. These include not
only prosecutions for perjury proper, but also those for suborna-
tion of perjury, the statutory offense of false swearing in many
jurisdictions, and the offense of bribery or inducement of a witness,
which is in effect attempt to suborn if the purpose is to induce
false testimony, and is an offense of the same nature when the
purpose is to induce the witness to absent himself or otherwise
evade his duty to testify.

Of these 313 cases, only 85 came from the jurisdictions which
reported to the Bureau of Census the number of perjury prosecu-
tions for the year 1937. The caution with which the figures there
reported are to be regarded as typical of the country as a whole is
indicated by the fact that of the seven states which had an aver-
age of one perjury appeal a year or more, only California appears
in the list of those reporting perjury prosecutions, while of those
which had no perjury appeals in the fourteen year period, all but
two are among those reporting.

Of these cases, 258 were appeals, or other forms of application

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11 Probably there are other appeals in perjury cases, in which no point
peculiar to perjury was decided and which there was no practicable means
of locating.
12 The first and seventh circuits.
13 Maryland, Nebraska, Nevada, New Hampshire, New Mexico, Rhode
Island, Tennessee.
14 There are no figures available for the entire country. See Orfield,
Criminal Appeals in America (1939) 211-214.
15 Supra, note 8.
16 Orfield, Criminal Appeals in America (1939) 184.
17 These states, in the order of the number of perjury cases reported are:
Kentucky, 35; Texas, 27; California, 22; Florida, 19; New York, 18;
Georgia, 17, Oklahoma, 16. Five of these seven are states in the southern
and southwestern part of the country where the percentage of criminal
cases appealed is very much higher than in other parts of the country. Note,
Criminal Appeals in Southern States, (1923) 21 Mich. L. Rev. 584. The
presence of California and New York in the list may be due only to the
fact that they are large and populous states having intermediate courts of
appeal whose opinions are published and digested in the National Reporter
System.
for review, by defendants who had been convicted in the trial court, 28 were applications by the prosecution for review of a discharge of the defendant by the trial court, and the rest involved other forms of raising the question in the higher court, such as habeas corpus, or opinions by the trial courts on questions raised before them.

Of the 258 cases of review of a conviction at the behest of the defendant, there were 142 affirmances, 55 per cent, and 116 reversals, 45 per cent. No collected data as to the percentage of reversals in major felony cases over a similar period have been found, and the small number of perjury cases, together with the numerous factors that enter into the significant study of statistics as to appeals and reversals, has indicated that the undertaking of such a study would not be worth while. About all that can be concluded is that the percentage of reversals in cases appealed from perjury convictions is not so manifestly in excess of those in other felony cases as to explain the failure of our prosecuting agencies to undertake the prosecution of more perjury cases.

In making a study of the opinions of the cases reported, it was decided not to attempt a classification of the grounds upon which the reversals were based as was done for the Missouri Crime Survey, since it so frequently happens that several assignments of error are passed upon in the same opinion, and the ruling as to each would have an equal effect upon the prediction of the possible success of future prosecutions, whether it was the sole basis for the reversal, or not, and in the case of affirmance all of the rulings would be of equal importance. For that reason, each case has been examined for all rulings on points argued by counsel so far as they appear in the opinions, and a comparison has been made of the proportion of cases in which the lower court's ruling has been sustained to those in which it has been reversed, with respect to the several stages of the trial at which the rulings were made. It is evident that many of these rulings would not be affected by the fact that the charge was one of perjury, such as ordinary rulings on the impanelling of the jury, the competency of evidence, and misconduct of court or counsel. Other rulings are clearly affected by the nature of the charge. These include most rulings on the sufficiency of the indictment, the degree of proof of the falsity of the testimony which is required, and the materiality of the testimony. Do the cases show any significant

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18 Orfield, Criminal Appeals in America (1939) 184.
19 Missouri Crime Survey (1926) 223.
differences in the treatment of these particular objections which would tend to show a greater technicality in dealing with the crime of perjury? There seems to be a general opinion that such is the case; do the modern opinions support it?

At common law there could be no doubt that the indictment for perjury was a maze of technicalities.\(^2\) Not only did it have to allege all of the subsidiary facts essential to the proof of the crime, such as the facts that the testimony was given in a described cause then pending in a particular court; that the defendant was sworn by a named officer of the court; the issues before the court, generally by incorporating the entire record of the pending cause in the indictment; and the falsity of the testimony to the knowledge of the accused; but the pleader also had to allege the conclusions that the court had jurisdiction, the officer had the authority to administer the oath, the testimony was material, and it was wilfully and corruptly given. In addition to alleging that the testimony was false, the indictment generally had also to allege what was the truth with respect to the testimony.\(^2\) Since 1790, there has been a federal statute\(^2\) modifying these technical requirements, and similar statutes have been adopted in many of the states.\(^2\)

The courts have, as a rule, given reasonable effect to these statutes, and, even in matters not expressly covered by them, have shown a commendable tendency to disregard mere technical objections to the indictment.

There are a few decisions holding indictments invalid for defects which it is difficult to conceive had any prejudicial effect on the rights of the defendant. A court may still say that "an indictment for perjury is one of the most difficult indictments to draw, and the requirements are strict as to the essential parts of the indictment," in holding that an indictment which failed to state the names of the parties to the fight, which defendant was charged with falsely swearing did not take place, did not allege the substance of the cause before the court when the denial was made.\(^2\) Another court has held that an indictment is fatally defective if it fails to allege that the clerk of the court, who was

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\(^2\) Wharton, Criminal Law (12th ed. 1932) secs. 1551-1570.

\(^{21}\) It may be questioned whether this extreme technicality indicates a judicial hostility to perjury prosecutions, or is the natural result of the application of ordinary technical rules of pleading in indictments to what is inherently a complex crime.

\(^{22}\) Now 18 U. S. C. sec. 558.


\(^{24}\) Chenault v. State, (1929) 154 Miss. 21, 33, 122 So. 98, 100.
alleged to have administered the oath, had lawful authority to do so,\(^2\) which seems to require the pleading of a pure conclusion of law. An indictment which covered three and one-half pages was held to have failed to inform the defendant sufficiently of the charge which the grand jury was investigating when he gave the false testimony before it.\(^2\) But these decisions do not represent the present trend of the opinions. The Mississippi case from which the above quotation was taken was the only one of the six cases decided by that court in the period under examination in which the sufficiency of the indictment was questioned. Alabama has held that an allegation that the grand jury was investigating violations of the liquor laws was sufficient.\(^2\)

Variance between the pleading and the proof as to the date of the homestead entry in support of which the false affidavit was made,\(^2\) the name of the defendant in the case in which the testimony was given,\(^2\) the spelling of the name of the county in which the grand jury sat,\(^3\) and the designation of the court before which the testimony was given as the "district court" whereas it was the "criminal district court,"\(^2\) have been held not to be fatal.

Arkansas has even held that a variance as to the officer alleged to have administered the oath is not fatal under the statute, though it would have been at common law.\(^2\) The omission of such officer's name has been held not to invalidate the indictment.\(^2\) In other cases, the omission of certain adjectives used in the definition of the crime, such as "falsely,"\(^2\) "wilfully,"\(^2\) and "knowingly"\(^2\) has been disregarded where the other allegations sufficiently show the presence of these qualifications. The Louisiana court paid slight heed to the objection that the indictment alleged the false testimony related to a material "question" rather

\(^{26}\)People v. Lisandrelli, (1931) 139 Misc. Rep. 129, 249 N. Y. S. 55. The Court, however, ruled that the missing information should be supplied by a bill of particulars.
\(^{29}\)Fields v. State, (1927) 94 Fla. 490, 114 So. 317.
\(^{30}\)Lee v. State, (1933) 123 Tex. Cr. 32, 57 S. W. (2d) 123.
\(^{31}\)Castro v. State, (1933) 124 Tex. Cr. 13, 60 S. W. (2d) 211.
\(^{33}\)State v. Bolyon, (1928) 143 S. Car. 63, 141 S. E. 165.
\(^{34}\)Maddox v. State, (1938) 215 Ind. 537, 12 N. E. (2d) 947; Kemp v. State, (1933) 137 Kan. 290, 20 P. (2d) 499. In the latter case the indictment did not expressly allege the testimony was false.
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than "issue." Texas has held that where the indictment charged the defendant with false testimony before the grand jury while the latter was investigating charges against him, it need not allege that he was granted immunity before he testified. That court did hold that the variance between an allegation that an affidavit was made without qualification and proof that it was made on information and belief was fatal, but it recognized the general policy against technical objections, by pointing out that when the statement is made on information and belief, the indictment must allege that defendant did not have such information or belief, which was omitted from this indictment. The Idaho court held that the substance of the controversy was not alleged as required by statute where the indictment merely alleged the name of the parties to the suit in which the testimony was given, with the court and docket number. The court examined numerous authorities on the question and chose to follow what it called the Washington rule, rather than the contrary California rule, since the former more nearly accorded with the usual meaning of the word "substance." Oklahoma holds that the jurisdiction of the court over the particular case must be alleged, since the court does not take judicial notice of that as it does of the general jurisdiction of the court.

There has apparently not been much difficulty in alleging properly the administration of the oath. It has been held that an allegation that the oath was duly administered is sufficient to show that the officer had authority to administer it. On the other hand an allegation merely that defendant "swore" to certain facts was held not enough to show the oath was administered to him.

The statutes generally expressly relax the strict common law requirements with regard to pleading the materiality of the testimony, by providing that it shall be sufficient to set out the substance of the charge, without alleging the pleadings and other parts of the record of the case in which the testimony was given to show what the issues were. In some jurisdictions, it is still necessary

37State v. Sweat, (1926) 159 La. 769, 106 So. 298.
to allege the issues and facts which show the testimony to have been material, since the allegation that it was material is a mere conclusion. But the majority of the courts have held that materiality may be alleged either by alleging the issues and facts from which it appears, or by alleging merely that it was material. If the facts are alleged, they must establish the materiality of the testimony. An indictment which failed to allege that the property to which the testimony related was the same property as was involved in the suit in which the testimony was given, was fatally defective. In Colorado, it was held in one case that the information must allege what were the proceedings before the grand jury when the defendant gave the testimony before it in order that the materiality of the defendant's testimony might be determined, but in a later case it was held that an allegation that the testimony was material to the issues before the court was sufficient, the former case being distinguished on the ground that the grand jury could not determine, as a court could, whether the testimony was material. Georgia has modified its case holding that the facts must be alleged by holding that they need not be stated in detail to show how the testimony was material, and need not argue its materiality.

The requirement that the indictment set out what the truth of the matter was, as well as alleging that the testimony was false, has been generally discarded. Some courts have stated without qualification that it need not be set out, others have said that it need not be when the statement that the testimony was false sufficiently indicates what the truth must be. In none of the cases which

46Claborn v. United States, (C.C.A. 8th Cir. 1935) 77 F. (2d) 682; Carter v. State, (1930) 181 Ark. 655, 27 S. W. (2d) 781; People v. Low Ying, (1937) 20 Cal. App. (2d) 39, 66 P. (2d) 211 (unless facts alleged show it to have been immaterial); Dunn v. State, (1932) 203 Ind. 265, 180 N. E. 5, 80 A. L. R. 1437 (unless other allegations show it to have been immaterial); State v. Stegall, (1928) 318 Mo. 643, 300 S. W. 714 (by statute); Thomas v. State, (1927) 36 Okl. Cr. 209, 253 Pac. 514; State v. Reidt, (1929) 54 S. Dak. 178, 222 N. W. 677 (by statute); Davis v. State, (1927) 107 Tex. Cr. 389, 296 S. W. 605.
48Trecee v. People, (1934) 96 Colo. 32, 40 P. (2d) 233.
52Sharron v. United States (C.C.A. 2d Cir. 1926) 11 F. (2d) 689, (by statute); Pawley v. United States, (C.C.A. 9th Cir. 1931) 47 F. (2d) 1024.
qualified the rule did the court find that there was a necessity in that case to state what the truth was. An indictment which alleges two inconsistent statements of defendant under oath, but does not allege which was false, is not good.\textsuperscript{54} In Texas it has been held error to allege that an entire affidavit was false when parts of it were admittedly true.\textsuperscript{55}

In New York, the indictment may be attacked because the evidence before the grand jury was not sufficient to make a prima facie case. Two perjury indictments attacked on this ground were sustained, one by the trial court,\textsuperscript{56} and one by the appellate division\textsuperscript{57} after it had been dismissed by the trial court.\textsuperscript{58}

From this survey of the modern cases, it seems evident that the technical requirements for an indictment for perjury are not so strict as to form any basis for a reluctance on the part of prosecuting attorneys to undertake a prosecution of that crime if there is evidence that it has been committed. From the nature of the crime, the indictment will necessarily be more complex than that for most crimes, and from the infrequency of its use, there will be required more study before the preparation of the charge, but the degree of those difficulties is not so great as to excuse the failure of an attempt to prosecute. The indictment or information was attacked in 116 of the 313 cases studied. It was sustained in 80 of these cases and held insufficient in 36. The percentage of indictments sustained, 69 per cent compared with the 55 per cent of affirmances, shows that the difficulty of drafting a proper indictment is not a major problem in the successful prosecution of a perjury or subornation\textsuperscript{59} charge.

The indictment might be still further simplified by the adoption of a short form, such as has been adopted in Arkansas.\textsuperscript{60} That form would seem to be adequate to inform both court and defendant of the particulars of the charge, in fact would answer

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\item \textsuperscript{54}Hilliard v. United States (C.C.A. 4th Cir. 1928) 24 F. (2d) 99. But a statute authorizing such an indictment is valid. State v. Ellenstein, (1938) 121 N. J. L. 304, 2 Atl. (2d) 454.
\item \textsuperscript{55}Ziegler v. State, (1932) 121 Tex. Cr. 91, 50 S. W. (2d) 317.
\item \textsuperscript{56}People v. Miro, (1934) 151 Misc. Rep. 164, 271 N. Y. S. 341.
\item \textsuperscript{57}People v. Nicosia, (1938) 255 App. Div. 813, 7 N. Y. S. (2d) 345.
\item \textsuperscript{58}People v. Nicosia, (1938) 166 Misc. Rep. 597, 4 N. Y. S. (2d) 35.
\item \textsuperscript{59}The indictment for subornation must allege the completed crime of perjury by the person suborned, so that it is subject to the same rules as govern the indictment for perjury. The additional allegations of subornation seem to have caused little difficulty.
\item \textsuperscript{60}Arkansas Dig. of Stats., (Pope 1937) sec. 3278. And see the Arkansas form of perjury indictment set out with approval in Missouri Crime Survey (1926) 552.
\end{itemize}
that purpose to the defendant better than a technical common law indictment which would leave the ordinary layman utterly confused as to what it was all about. But the profession does not seem to be ready for the great innovation of the short form. The statute prescribed by the model code of criminal procedure, \textsuperscript{61} which simply provides that no indictment or information for perjury or related crimes shall be invalid because of the omission of allegations therein listed, does not offer any improvement in substance over the federal statute, \textsuperscript{62} and its negative form may lead to decisions that it does not apply to indictments not expressly covered by it, though they would be held to comply with the general affirmative language of the federal act.

At common law perjury could be committed only by false oath in connection with judicial proceedings. There was a separate offense known as false swearing which covered certain other false oaths. \textsuperscript{63} In this country, statutes have generally extended the offense of perjury to include all false oaths required by law, though in some jurisdictions there is a separate offense of false swearing which may be at least partly concurrent with perjury, \textsuperscript{64} but which omits some of the technical requirements of perjury. Under all of these statutes, however, as well as at common law, it must appear that the oath taken was one which was required, or at least authorized by law. \textsuperscript{65} No jurisdiction has undertaken to prosecute the making of a false affidavit which is purely voluntary. The fact that the court lacked jurisdiction of the particular divorce proceeding because the plaintiff in that suit had not resided in the state for one year, as the accused falsely testified he had, does not prevent the oath from being one in judicial proceedings on which a charge of perjury can be based. \textsuperscript{66} Nor does the invalidity of the municipal ordinance for the violation of which were brought the judicial proceedings in which the false testimony was given establish that the oath was not required by law. \textsuperscript{67} The California

\textsuperscript{62}18 U. S. C. sec. 558.
\textsuperscript{63}Wharton, Crim. Law (12th ed. 1932) sec. 1533.
\textsuperscript{64}See, for example, Weiner v. Commonwealth, (1927) 221 Ky. 455, 298 S. W. 1075, expressly overruling an earlier case and holding that the Kentucky crime of false swearing includes all perjury. In New York and Washington the lesser offense is called perjury in the second degree. People v. Reiss, (1938) 255 App. Div. 509, 8 N. Y. S. (2d) 209; State v. Dodd, (1937) 193 Wash. 26, 74 P. (2d) 497.
\textsuperscript{65}Larson v. State, (1927) 171 Minn. 246, 213 N. W. 900 (oath not required nor authorized on examination of defendant after conviction).
\textsuperscript{66}People v. Rogers, (1932) 348 Ill. 322, 180 N. E. 556, 82 A. L. R. 1124; Abrams v. State, (1930) 34 Ohio App. 13, 170 N. E. 188.
\textsuperscript{67}Mandehr v. State, (1926) 168 Minn. 139, 209 N. W. 750.
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appellate court held in two cases\(^6^8\) that an oath which was required only by a municipal ordinance was not required by law so as to be the basis for a perjury charge, but the second of these cases was reversed by the supreme court.\(^6^9\) All three of these opinions professed to follow the ruling of the United States Supreme Court on the power of the Land Office to require an oath in proceedings before it.

Kansas has held that an administrative board which has been given power to govern proceedings before it by rule may require an oath.\(^7^0\) But where there is no statute requiring an oath in an administrative proceeding, and it does not appear that any rule required it, a voluntary oath taken before such a body cannot be the basis for a perjury charge.\(^7^1\) Florida apparently restricts prosecutions for perjury to cases where the law required the defendant to take the oath, and has held that perjury cannot be sustained against one who impersonated an applicant for a marriage license for false swearing in the application,\(^7^2\) nor can it be maintained against one who gave false testimony before a grand jury, if he could not be compelled to testify because the grand jury was then investigating a charge against him.\(^7^3\) New York has held, however, that the right to refuse to testify before a grand jury investigating the defendant's own conduct may be waived, and if it is waived perjury may be based on false testimony there given.\(^7^4\) Likewise it has been held that one who volunteers testimony before the Securities Exchange Commission may be prosecuted for such testimony if false.\(^7^5\)

A similar question arises under the provisions of the Codes of Procedure for the verification of pleadings. Generally these permit the plaintiff to verify his complaint if he chooses, and give greater effect to a verified, than to an unverified, complaint. There has been no difference of opinion that the verification of the complaint is authorized, if not required, and that such an oath can sustain a perjury prosecution.\(^7^6\) Generally the answer must be


\(^{69}\)People v. Ziady, (1937) 8 Cal. (2d) 149, 64 P. (2d) 425.

\(^{70}\)State v. Whitlock, (1933) 138 Kan. 602, 27 P. (2d) 262.


\(^{72}\)Milligan v. State, (1931) 103 Fla. 295, 137 So. 388.

\(^{73}\)State ex rel. Hemmings v. Coleman, (1939) 137 Fla. 80, 187 So. 793.


\(^{75}\)Wooley v. United States, (C.C.A. 9th Cir. 1936) 97 F. (2d) 258.

verified if the complaint was, and that oath is clearly required, but California has held that where the defendant is not required to verify his answer to a verified complaint because the latter accuses defendant of a crime, the verification has no legal effect and defendant cannot be punished for perjury even though his verification was wilfully false.\textsuperscript{77} While there is ample justification for the state's refusal to concern itself with the falsity of an oath which has no legal significance, there seems to be no good reason to hold that when the defendant voluntarily takes an oath which is intended to affect legal proceedings, he should not be held to the same responsibility for testifying truthfully as when he could be compelled to take the oath. If anything, the law ought to be more lenient with a man who has to answer, and who answers falsely to protect himself or another, than with one whom it permits to remain silent, but who volunteers the false testimony.

Not only is it required that the taking of the oath be required or authorized by law, but it is also essential that it be administered by one authorized to administer it. There is little difficulty with this requirement when the oath was taken in court because of the rule that the court may authorize any of its officers to administer the oath,\textsuperscript{28} including an attorney in the case,\textsuperscript{79} and where the record showed only that the oath was administered by Mr. B. it was presumed that he was an attorney.\textsuperscript{80} This rule was disregarded in a South Carolina case which held that a deputy clerk of the court, who was a de facto and not a de jure officer because his appointment was not renewed after the re-election of the clerk, could not administer a valid oath, and that the judge could not delegate to him the authority to administer it.\textsuperscript{81} When the oath is not administered in open court the authority of the officer must be shown.\textsuperscript{82} The Pennsylvania court held, after a careful examination of the authorities, that the foreman of the grand jury had no authority at common law to administer the oath to witnesses appearing before the grand jury, and that the statute gave him such authority only in case the witness was one whose name had been endorsed on the bill presented to the jury.\textsuperscript{83} In Florida a statute

\textsuperscript{78}Wharton, Criminal Law (12th ed. 1932) sec. 1553.
\textsuperscript{81}State v. Brandon, (1938) 186 S. C. 448, 197 S. E. 113.
\textsuperscript{82}But the failure to prove all the steps in impanelling the grand jury and appointing the foreman is not fatal, since the presumption of regularity will prevail, Young v. Commonwealth, (1938) 275 Ky. 98, 120 S. W. (2d) 772.
\textsuperscript{83}Commonwealth v. Hubbs, (1939) 137 Pa. Super. 229, 8 Atl. (2d) 611.
authorizes the state's solicitor to administer the oath to witnesses called before him for examination. On the original hearing of one case, it was held that the court could take judicial notice that a named individual was the state's solicitor and had authority to administer the oath, but on rehearing, it was held his authority extended only to witnesses summoned before him.\textsuperscript{84} He does not have authority to swear a witness summoned to testify before the grand jury,\textsuperscript{85} but a defendant who was subpoenaed to testify before him, and who did appear and testify falsely, cannot attack the indictment on the ground of defects in the subpoena.\textsuperscript{86} An oath taken before a notary public who had not qualified as such within the time prescribed to give her commission validity is not binding.\textsuperscript{87}

At common law no particular form of administering the oath was prescribed; what was required was that the witness be sworn by a form which he regarded as binding on his conscience,\textsuperscript{88} and that rule seems to prevail still, even in Florida.\textsuperscript{89} Though a witness who has conscientious scruples against taking an oath may testify in probably all of our states on merely being "affirmed," none of the cases studied have dealt with a witness of that kind. This merely confirms what one would expect to find, that a witness who had scruples against taking an oath would have equally strong ones against bearing false witness. When the oath is not administered in court, more attention is paid to form, though probably not many courts would go as far as the Georgia court which held that an oath by a witness before a grand jury to testify truly in the "case" then before the grand jury did not comply with the requirement of the statute that he be sworn to testify truly in "here state the case."\textsuperscript{90} Where an affidavit is sworn to before an officer authorized to administer oaths, certain required formalities must be observed or no prosecution for perjury can be sustained thereon. An instrument which contained several blanks when defendant signed and swore to it is not a valid affidavit after the blanks are thereafter filled in.\textsuperscript{91} The failure of deponent to sign the deposition\textsuperscript{92} or of the notary to attach the official seal to an

\textsuperscript{84}Campbell v. State, (1926) 92 Fla. 775, 109 So. 809.
\textsuperscript{85}State ex rel. Stewart v. Coleman, (1936) 122 Fla. 368, 165 So. 272.
\textsuperscript{86}State ex rel. King v. Coleman, (1938) 134 Fla. 802, 184 So. 334.
\textsuperscript{87}Faubion v. State, (1926) 104 Tex. Cr. 78, 282 S. W. 597.
\textsuperscript{88}Wharton, Crim. Law (12th Ed. 1932) sec. 1517.
\textsuperscript{89}Fields v. State, (1927) 94 Fla. 490, 114 So. 317.
\textsuperscript{91}Rives v. State, (1927) 107 Tex. Cr. 370, 296 S. W. 576.
\textsuperscript{92}State v. Ledford, (1938) 195 Wash. 581, 81 P. (2d) 830.
affidavit\textsuperscript{93} invalidates the instrument. But the affidavit does not have to be read to the affiant.\textsuperscript{94} It has also been held that the testimony of the notary public merely to the effect that the defendant signed the affidavit is not sufficient to establish its validity.\textsuperscript{95} On the other hand the Kansas court recognized the problem created by the administration of the oath by uninformed notaries in a case where the notary testified that, after the defendant signed the affidavit, she asked him if he acknowledged it as his free and voluntary act and deed, by holding that the jury was authorized to believe the official certificate that defendant swore to the affidavit rather than the inconsistent oral testimony given some time later, and anyway the parties had both done what they thought was necessary to make the oath binding and that was all that was required.\textsuperscript{96}

In prosecutions for perjury, the statements made by the defendant in giving the testimony alleged to be false may be proved in accordance with the usual rules of evidence by anyone who heard the testimony,\textsuperscript{97} by the court reporter after refreshing recollection from his notes,\textsuperscript{98} or by the transcript of the testimony.\textsuperscript{99} It has been held that the proof of the defendant's testimony should be limited to those statements alleged to have been false,\textsuperscript{100} but often other parts of the testimony are admissible for other purposes, especially on the issue of materiality.\textsuperscript{101}

While perjury still can be based only on false statements which are material to the issues involved in the suit, or to the purpose for which the oath is otherwise required, or authorized, the courts have tended to be very liberal in their application of the rule. In the cases examined, the objection that the alleged false testimony was not material was raised sixty-three times and was sustained only thirteen times. The 80 per cent of decisions overruling the objection is significantly in excess of the 55 per cent of the cases in which convictions were affirmed. One court has gone to the extent of stating that generally any evidence that is relevant in the

\textsuperscript{93}State v. Epstein, (1926) 138 Wash. 118, 244 Pac. 388.
\textsuperscript{95}Stewart v. State, (1932) 25 Ala. App. 155, 142 So. 590.
\textsuperscript{96}State v. Kemp, (1933) 137 Kan. 290, 20 P. (2d) 499.
\textsuperscript{99}State v. Brissell, (1934) 106 Vt. 60, 170 Atl. 102.
\textsuperscript{100}Riley v. State, (1934) 26 Ala. App. 203, 155 So. 882.
\textsuperscript{101}See post, notes 122, 124.
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trial is sufficiently material to be the basis of a perjury prosecution.102 Other courts have held that, to be material, the testimony does not need to relate to the main issue in the case.103 It is uniformly held that testimony which is relevant only because it affects the credibility of a witness in the case has sufficient effect upon the determination of that case to be material.104 The application of these principles is illustrated by the following rulings which held the testimony to be material: in a suit for annulment of a marriage not based on impotency, the denial that plaintiff had had intercourse with the defendant after the ceremony;105 in a prosecution for larceny by trick of a load of potatoes, testimony that defendant had paid for loads formerly delivered, which tended to strengthen his defense that the load in question was delivered on credit;106 on hearing to modify a custody order, defendant's denial of intercourse with the child's mother before the order was entered;107 denial of making to officers statements tending to implicate the defendant in a criminal prosecution, though there was no evidence that the statements made were true;108 testimony as to an alibi, though it did not cover the entire time necessary;109 testimony that another, since deceased, had participated in a robbery with the accused then on trial for that offense;110 denial that defendant, a constable, had testified before the grand jury that he had not requested accused to aid him in making an arrest, though defendant contended such a request would not have excused the carrying of the pistol by accused.111

The following testimony was ruled to be immaterial: in a prosecution for perjury committed in testifying in defense to a former charge of subornation of perjury, testimony that defendant

102State v. True, (1937) 135 Me. 96, 189 Atl. 831.
was never in a certain court house, there being no evidence that the subornation occurred in that building;¹¹² in a suit for cancellation of insurance policies, testimony that the premiums were not paid by the state bank commissioner, where the evidence did not show that the premiums were paid on the same policies as those it was sought to cancel;¹¹³ in a criminal prosecution, testimony that two of the jurors had expressed an opinion on the case;¹¹⁴ denial by a witness that she was in the room where the homicide occurred, the court saying that she might have seen the homicide from outside of the room and it was not shown what her testimony would have been in that regard;¹¹⁵ testimony in a police court, where the charge before the court was one which it did not have jurisdiction to try;¹¹⁶ false testimony as to the time a witness in a murder prosecution had returned to a city, when no issue before the court was affected by his return at that time or later;¹¹⁷ deposition in aid of a petition for an injunction to restrain the enforcement of a judgment rendered in a personal injury suit, to the effect that defendant's testimony in that suit was false, where the injunction must be denied regardless of the fraud because defendant had prosecuted his appeal from it after learning of the fraud;¹¹⁸ denial by a witness for the state in a burglary prosecution that he had signed an affidavit for the prosecuting attorney in which he substantially confessed he was an accomplice of the defendant on trial in the commission of the burglary, since that affidavit was not admissible in the burglary trial, and in fact was excluded from evidence in that case.¹¹⁹ In two cases it has been held that the grand jury has a wide latitude in the investigation of charges under consideration by it and the determination of materiality of the false testimony has been governed thereby.¹²⁰ Most of the cases in which the issue of materiality has been discussed have been judicial proceedings, but it has been held in one case that testimony before a Senate |

¹¹²Kuskulis v. United States, (C.C.A. 10th Cir. 1930) 37 F. (2d) 241.
¹¹³Stonebreaker v. People, (1931) 89 Colo. 550, 4 P. (2d) 915.
¹¹⁴Bolen v. State, (1931) 103 Fla. 22, 137 So. 8.
¹¹⁷State v. Hall, (1930) 88 Mont. 237, 292 Pac. 734.
¹²⁰Carroll v. United States, (C.C.A. 2d Cir. 1927) 16 F. (2d) 951, cert. denied 273 U. S. 763, 47 Sup. Ct. 477, 71 L. Ed. 880 (testimony no one was in the bathtub from which defendant was charged with distributing liquor to his guests in violation of the Prohibition Act); State v. Sang, (1935) 184 Wash. 444, 51 P. (2d) 414 (connection of defendant with gambling resort under investigation).
Committee investigating campaign expenses of candidates for the Senate, which falsely denied contributions to the primary campaign fund of a candidate, was material to the issues the committee had authority to investigate, though the Senate had no power to regulate primary elections for that office.\(^{121}\)

It seems probable that many of the decisions holding the testimony to be immaterial could have been avoided by more care in the introduction of evidence to show materiality. The safe practice seems to be to offer in evidence all of the pleadings and evidence in the case in which the testimony was given, and that practice has been held not prejudicial to defendant when the evidence is limited by the instructions to the issue of materiality.\(^{122}\)

When such practice has been followed, the court may properly instruct the jury that the testimony was material as a matter of law.\(^{123}\) It has been held, however, to be prejudicial error to admit in evidence all of the record of the original cause, including the names of the jurors and the rendition of a verdict inconsistent with the testimony of the defendant, and thereby inform the present jury that an earlier one had disbelieved the testimony.\(^{124}\)

Since the seventeenth century, it has been the rule in perjury prosecutions that the falsity of the testimony could be established only by the testimony of two witnesses, or of one witness with strong corroboration from circumstances.\(^{125}\) Though the rule has been rejected in one recent case,\(^{126}\) and criticized in others,\(^{127}\) it is still the law in the great majority of the jurisdictions. In some cases the rule has been further relaxed by permitting the falsity to be proved by circumstantial evidence alone,\(^{128}\) but another court has limited that relaxation to cases where the nature of the testimony is such that no direct evidence of its falsity could be obtained,\(^{129}\) such as testimony as to the witness's knowledge or

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\(^{121}\)Seymour v. United States, (C.C.A. 8th Cir. 1935) 77 F. (2d) 577.

\(^{122}\)Hall v. State, (1939) 136 Fla. 644, 187 So. 392.


\(^{124}\)State v. Olson, (1932) 186 Minn. 45, 242 N. W. 348.

\(^{125}\)Wigmore, Evidence (2d ed. 1915) sec. 2040.


\(^{129}\)Otto v. United States, (C.C.A. 2d Cir. 1932) 54 F. (2d) 277.
belief; the court refused to permit proof of the falsity of defendant's denial that he had talked about engaging in a lottery with his co-defendant to be established by proof that he and the co-defendant had been jointly indicted in another jurisdiction for the use of the mails in the promotion of a lottery and had pleaded guilty thereto, since there might have been a witness to that conversation, even though as a matter of fact there was none. In California, the statutory requirement of two witnesses is satisfied if the required number testify to circumstances which are inconsistent with the truth of the testimony, direct testimony as to its falsity not being required.

In applying this rule it was held that the testimony of all the motormen who operated street cars on the route on the day when plaintiff in a personal injury suit claimed he was struck by a car, that there was no such accident to the car each witness drove, together counted as the testimony of but one witness, but sufficient corroboration was found in the absence of any report of an accident in the records of the company, which were admissible as business records.

In applying the two-witness rule, the courts of New Jersey have held that the testimony of the corroborating witness, or the circumstances relied on, must relate to a material matter in order to be sufficient. The testimony of the several witnesses to the falsity of the testimony must agree, so that a conviction for falsely denying certain statements cannot stand where the witnesses disagreed as to the statement defendant made. Texas has held that the corroboration required must be furnished by credible testimony and that accomplices are not credible witnesses. New York has held the corroboration insufficient where the circumstances are as consistent with the truth as with the falsity of the statement. The courts have disagreed as to whether

180Circumstantial evidence was held sufficient to prove the falsity of defendant's denial of recollection of the facts in Behrle v. United States, (1938) 69 App. D. C. 304, 100 F. (2d) 714.
182People v. Layman, (1931) 117 Cal. App. 476, 4 P. (2d) 244. The court quoted an earlier case to the effect that the corroboration may be slight.
184Phair v. United States, (C.C.A. 3d Cir. 1932) 60 F. (2d) 953.
186People v. Quinn, (1930) 228 App. Div. 822, 240 N. Y. S. 231. Without questioning the legal rule of this case, its application may be doubted where the defendant testified that the injured man received his injury
the instructions must require the corroboration to be "strong" or not.\textsuperscript{137} The rule applies only to proof of the falsity of the testimony,\textsuperscript{138} all of the other elements of the crime may be proved by any evidence which satisfies the jury beyond a reasonable doubt.

A common application of the rule is made in refusing to permit convictions where the only evidence of the falsity of the testimony of defendant consists of statements made by himself which are inconsistent with the testimony.\textsuperscript{139} The same result has been reached in other cases by applying the rule that the corpus delicti cannot be proved by the statements of the defendant alone.\textsuperscript{140} Where the false testimony was the denial of the making of extra-judicial statements, proof of the making of such statements is sufficient to show defendant's guilt, since it establishes the falsity of the testimony regardless of the truth of the extra-judicial statement.\textsuperscript{141} But where there is testimony of another witness to the falsity of the testimony charged to be perjury, the statements of defendant inconsistent with his testimony may furnish sufficient corroboration to sustain the conviction.\textsuperscript{142} Even the failure of the defendant, who took the stand in her own defense, to deny the falsity of the statements in her affidavit, she claiming they resulted from a mistake, has been held to be sufficient corroboration.\textsuperscript{143}

As Dean Wigmore has pointed out,\textsuperscript{144} the only logical reason for the adoption of the two-witness rule from the ecclesiastical


\textsuperscript{138}Brake v. Commonwealth, (1927) 218 Ky. 747, 292 S. W. 305.;

\textsuperscript{139}Hammer v. United States, (1926) 271 U. S. 620, 66 Sup. Ct. 603, 70 L. Ed. 1118.;
McGuire v. State, (1926) 171 Ark. 238, 283 S. W. 980.;

\textsuperscript{140}Richardson v. State, (1933) 45 Ohio App. 46, 186 N. E. 510.;

\textsuperscript{141}State v. Studen, (1936) 54 Ohio App. 417, 7 N. E. (2d) 671.

\textsuperscript{142}Wofford v. State, (1926) 21 Ala. App. 521, 109 So. 886, cert. denied, 215 Ala. 105, 109 So. 887.;

\textsuperscript{143}People v. Todd, (1935) 9 Cal. App. (2d) 237, 49 P. (2d) 611.

\textsuperscript{144}Wigmore, Evidence (2d ed. 1915) secs. 2040, 2041.
courts by way of the Star Chamber which for a time handled all of the important perjury cases, namely that there should be no conviction where there is oath against oath, has lost its validity since defendants have been allowed to testify in their own behalf; so that today in all other criminal prosecutions, except for treason, the law permits a conviction where one oath stands against another. The practical reason given for it, that it tends to protect a witness against the danger of trumped up charges of perjury by disappointed litigants is not self-demonstrable, and there has been no study of the facts brought forward to sustain it. The extent to which the existence of this rule has operated to deter prosecutions for perjury cannot be estimated from the fact that the objection that the proof of the falsity of the testimony was insufficient was sustained in only 25 of the cases in which it was asserted, and overruled in 38 cases, because the existence of any rule prescribing the minimum evidence necessary to convict of any crime obviously operates to prevent the institution of the prosecution in all cases where the prosecutor knows that he cannot obtain the required evidence. Of course, it is ordinarily true that the testimony of one witness, standing alone, that the testimony of another witness is false, ought not to establish that fact beyond a reasonable doubt, neither ought it to establish any other fact essential to convict the defendant of any felony. But where the oath is one of a witness of unquestioned probity in the community, who has no interest in the controversy, weighed against the oath of a defendant who had very strong motives for lying, there is no reason why it should not be accepted on the issue of the falsity of testimony alleged to be perjured, as it may be on all other issues in the perjury prosecution, and on all issues in prosecutions for other felonies. The rule ought to be discarded, but, if it were, that would not alone increase the proportion of prosecutions in perjury cases to anything like the figures for other felonies.

Aside from the requirements of the two-witness rule, not many questions have arisen with respect to the proof of the falsity of the testimony. The judgment rendered in the case, either civil or criminal, in which the testimony was given is not conclusive as to its truth or falsity, or even presumptive proof on that issue. Where the indictment charges the making of more than one false statement, the falsity of all need not be

\footnote{People v. Fink, (1932) 118 Cal. App. 631, 5 P. (2d) 641.}
established to sustain a conviction. It has been held that an affidavit that defendant was too ill to register on registration day is false where it appeared that he was not taken ill until the afternoon of that day, though he still had time to register. On the other hand it has been held that the falsity was not proved if the statement was technically true, as when defendant denied knowledge that any of "his" tobacco had not been delivered, and the proof showed that the tobacco referred to belonged to his wife, and when the charge was a false denial of the purchase of liquor on "the second Sunday in April," which the court judicially knew was April 10, but the question asked him at the liquor trial was whether he had purchased the liquor on April 11.

Even where the testimony was clearly false, it has been held that a retraction, or correction, of it on the next day, before any witness had testified contrary to it, barred a prosecution for perjury, since the law encourages the correction of erroneous testimony. But a correction made only after it became apparent that the falsity was known is not a bar. In a case in which the recantation was not made until after other witnesses had testified to different facts, the United States Supreme Court sustained the prosecution without qualifying what it found to be the established rule that the offense was complete as soon as the false testimony had been willfully given.

To establish the crime of subornation of perjury, the prosecution must prove that the person suborned actually committed the crime of perjury, which includes proof of every essential element of the crime, and must also prove that the defendant induced the commission of the offense. The only suggestion in the cases studied that the proof of the perjury in a prosecution for subornation differs at all from the proof necessary to convict the perjurer himself, relates to the two-witness rule. It has been held that the rule does not apply in a prosecution for subornation, at least when the single witness to the falsity of the testimony is not the

147 Jennings v. Commonwealth, (1928) 222 Ky. 95, 300 S. W. 353.
150 Brannen v. State, (1927) 94 Fla. 656, 114 So. 429.
perjurer himself.\textsuperscript{154} In a leading case, the United States Supreme Court had held that in a prosecution for subornation the falsity of the testimony of the person suborned, cannot be established by the testimony of that person alone.\textsuperscript{155} The lower federal court ruled that the case did not hold that the two-witness rule applied in all prosecutions for subornation, but the reasoning of the opinion clearly leads to that result, the unqualified statement of the rule being expressly approved. The rule does not apply to proof of the inducement of the testimony by the defendant.\textsuperscript{156} On that issue, it has been held that the person suborned is not an accomplice of the suborner, within the common law or statutory definition of that term as one who may himself be prosecuted for the same offense, and, therefore, does not come within the rule that a conviction may not be sustained on the uncorroborated testimony of an accomplice.\textsuperscript{157}

Some quantitative comparisons of the 313 cases studied may be of interest, even if they are not conclusive, or even very persuasive, of the truth of any hypotheses that may be formed to explain the infrequency of perjury prosecutions. The legal rules generally mentioned to support the assertion that perjury is one of the most technical of our crimes would manifest themselves mostly in objections to the indictment or information, to the necessity and sufficiency of the oath, to the materiality of the testimony, and to the sufficiency of the proof of falsity. Objections to the competency of evidence, to its sufficiency on issues other than falsity, to the instructions of the court, and to misconduct of the court or prosecutor would generally not involve any rules peculiar to perjury. There were 284 objections which were classified as belonging to the first group, of which 193, or 68 per cent were overruled, and 91, or 32 per cent sustained. In the second group there were 247 objections raised, of which 166, or 67 per cent, were overruled and 81, or 33 per cent were sustained.

If these figures do not furnish any evidence that the courts

\textsuperscript{154}Cohen v. United States, (C.C.A. 2d Cir. 1928) 27 F. (2d) 713.
\textsuperscript{155}Hammer v. United States, (1926) 271 U. S. 620, 46 Sup. Ct. 603, 70 L. Ed. 1118.
\textsuperscript{156}Ruskin v. State, (1928) 117 Ohio St. 426, 159 N. E. 568, 56 A. L. R. 403.
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are not over-technical in their rules affecting perjury, at least they furnish no confirmation for the hypothesis that they are more technical in dealing with perjury than they are ordinarily. The possibility that the rulings on non-perjury points may be affected by the fact that the objection was raised on review of a conviction for perjury cannot be tested without an analysis of the courts' treatment of similar objections in prosecutions for other serious felonies, which is not available. But it would seem that the only two possible reasons for such an attitude on the part of the court would be either a feeling that the act punished is not a reprehensible one, or that it is punished too severely. Even if we discount the frequent statements by the courts condemning perjury as a crime which strikes at the foundations of the administration of justice, as we must in view of their failure to take any more active steps toward its suppression, we can hardly assume that the offense meets with the tolerance of more than a small proportion of our judges. The other reason is not sustainable when we remember that at common law, when the technicalities surrounding this crime were originated, and when they prevailed to a much greater extent than they do today, perjury was only a misdemeanor.

Some facts with respect to the penalties imposed in the cases studied also tend, so far as they have any value, to show that the severity of the penalty does not affect the rulings of the court. The sentences imposed are reported in only 87 of the cases studied. The average of all sentences was two and a half years, the great majority being for either one or two years. Seven of the reported sentences were for terms exceeding five years, and all 158 The longest sentence was 12 years, imposed in Dunkin v. State, (1932) 53 Okl. Cr. 115, 7 P. (2d) 1912, for testimony in a prosecution of two other persons for a crime whose nature was not stated in the report. Three others were for testimony in murder prosecutions, Slade v. State, (Miss. 1929) 119 So. 355; State v. McGee, (1937) 341 Mo. 451, 106 S. W. (2d) 480, 111 A. L. R. 821; State v. Kämpfer, (1938) 342 Mo. 1007, 119 S. W. (2d) 294. The two Missouri cases each involved testimony to alibis for two other persons charged with a murder which caused such local feeling that the conviction of one was reversed for denial of change of venue. State v. McGee, (1937) 341 Mo. 148, 106 S. W. (2d) 478. Another long sentence was imposed in Blakemore v. State, (1928) 39 Okl. Cr. 355, 265 Pac. 152 for perjury in a trial for larceny of car tires, and in McCollum v. State, (1931) 52 Okl. Cr. 28, 2 P. (2d) 291 where the original prosecution was for bank robbery. The only one of seven cases which did not arise out of testimony in a prosecution for crime, was Weadock v. State, (1931) 118 Tex. Cr. 537, 36 S. W. (2d) 757, where defendant, an undertaker, had verified an account against the estate, including items for a casket and a burial suit, when he had buried the body in a cheap box, and unclothed. This was the only case of all those examined where the court considered an objection that the sentence was excessive. It held an eight year sentence not too severe, but it was regarded more as a punish-
but two of these were affirmed. Those two cases both came from Oklahoma, where the usual sentence imposed greatly exceeds the average. The suggestion that the courts resort to technicalities because they do not like to sustain perjury convictions, also fails to explain why they resort to technicalities in order to affirm, as they have done in holding that a person suborned is not an accomplice of the person who suborned him, and as the Kentucky court did in its ruling that one who had pleaded guilty to perjury was a competent witness against the suborner, notwithstanding a statute making one who had been convicted of perjury incompetent to testify in any case thereafter, for the reason that the witness had not been convicted because no judgment had yet been rendered on his plea. In both of these situations, the reason for the rule would clearly lead to its application, but the application was not made because the case was not within the literal meaning of the statement of the rule.

Since there is no substantial evidence that courts are technical in perjury cases simply because they are charges of perjury, nor even that there is any great difference in the amount of technicality in these cases, we must look elsewhere for the explanation of the scarcity of perjury prosecutions. One of the reasons assigned for it is that perjury is difficult to prove. We have seen that the relaxation of the requirements of materiality and quantum of proof have left little difference between the legal requirements of proof in perjury cases, and those applying to ordinary felony charges. It would seem to be obvious that with the same expenditure of intelligence and effort, evidence of the falsity of testimony given in open court with full opportunity for cross-examination could be obtained more easily than evidence of ordinary crimes which are committed in secret.

Much of the blame for the prevalence of perjury has been placed on unethical trial attorneys who are willing to resort to its...
use to win their cases, and even sometimes maintain staffs of witnesses who are ready to commit perjury in any cause. There is some indication of the existence of such a situation in one New York subornation case, and there is no reason to deny that it exists in other cases. But, admitting that to be the partial explanation of the frequency of the crime, it contains no suggestion as to why there are so few prosecutions, unless it is charged that the prosecutors and courts are willing to wink at such a practice. There are some expressions by lawyers and judges that indicate an opinion that in some cases, such as testifying in one's own defense in a prosecution for crime, or a woman denying unchastity when questioned about it, it is excusable to give false testimony, but there is no proof that is a general professional or judicial opinion, and if it were, the number of cases where such an excuse is present is so small that it does not count appreciably in the problem.

About the only explanation that remains is that in most cases nobody has any particular interest in prosecuting perjury cases and nobody is especially charged with the duty of investigating and prosecuting them. Of the 188 cases where perjury was charged to have been committed at the trial of some other criminal charge, 36 of those other charges were violations of the liquor laws, almost one in five; and of 72 cases where the testimony was given in a civil action, or proceeding, 15, or more than one in five, were either negligence or bankruptcy cases. We have no means of knowing how many of the prosecutions for perjury in liquor trials were due to the insistence of law enforcement organizations; nor how many of the negligence and bankruptcy witnesses were prosecuted because of the activity of insurance companies or creditors' organizations which were interested not only in the particular case, but in reducing perjuries in those classes of cases.

Various remedies for the situation have been suggested. One reason urged for the adoption of the English practice of exam-

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165 "In the case of prisoners testifying in their own defense, it is at least arguable that the law which permits of such testimony almost appears, in injudicial language, to 'ask for it.'" Note, Problem of Successful Perjury, (1934) 78 Sol. J. 423. The writer has heard similar sentiments expressed by a trial judge.
166 Perjury in Judicial Proceedings, (1930) 64 U. S. L. Rev. 1, quoting a reported statement of a trial judge.
ining witnesses before trial, and soon after the event concerning which they testify is that it will make perjury rarer, but the writer does not notice that the complaints in England concerning the prevalence of perjury are as strong as they are here.

The adoption of a statute defining a lesser crime which will be free from the technicalities of perjury is also advocated. Several states have adopted such statutes and in Kentucky the prosecutions are almost always brought under it. We might conclude that here we have the explanation for the fact that there were more appeals in perjury cases in Kentucky during the period studied than in any other jurisdiction, except for the fact that we find a writer stating that there had been in Kentucky only 81 perjury and false swearing cases in 130 years. Some other reason must underlie the fact that there have in the last fourteen years been 34 of such cases, of which all but two were for false swearing or subornation, which includes inducement to false swearing, as well as inducement to perjury. In other jurisdictions in which a similar statute has been adopted, it does not appear to have been used to any great extent.

Two writers have prophesied that within a short time science would perfect a device by which it could be told infallibly whether a witness is testifying to the truth and then there will be no perjury problem. If we accept the premise, we cannot deny the


170Of the Kentucky cases examined, two were said to be prosecutions for perjury, and twenty-seven were for false swearing.


172In a Kentucky prosecution for false swearing it is not required that the testimony be material, but all of the other elements of perjury as defined in other states seem to be required. The oath must be taken in connection with judicial proceedings, or be otherwise authorized or required by law. Commonwealth v. Strunk, (1935) 260 Ky. 35, 83 S. W. (2d) 861. If it is given in judicial proceedings, the indictment must allege the matter pending in the court. Sainlin v. Commonwealth, (1926) 212 Ky. 394, 279 S. W. 648. Contradictory statements of defendant are not alone sufficient to convict, Commonwealth v. Sesco, (1939) 279 Ky. 791, 132 S. W. (2d) 314. The two-witness rule applies, Pancake v. Commonwealth, (1931) 237 Ky. 1, 34 S. W. (2d) 735; and has been extended to apply to every essential fact, Commonwealth v. Wheeler, (1930) 235 Ky. 327, 31 S. W. (2d) 377. Contra, Shepherd v. Commonwealth, (1931) 240 Ky. 261, 42 S. W. (2d) 311.

WHAT HAPPENS TO PERJURERS

conclusion, but nine years have elapsed since the first of the prophecies was uttered, and it has not yet been fulfilled, and the scientists themselves seem to have less confidence now in the perfection of such a device than they had nine years ago. The law is hardly justified in refusing to do anything to solve the problem because of the prospect that the problem will soon cease to exist.

A few courts have undertaken to solve the problem by treating perjury as contempt of court, but the use of that device has been severely restricted by the requirements that, to be contempt, the answer of the witness must be false to the court's own knowledge, and the falsity must be such as to be equivalent to a refusal to answer, such as a denial of recollection of the facts which it is apparent to the court the witness must remember. These restrictions seem to be essential unless we intend to substitute summary proceedings before a judge to determine guilt of a felony for the constitutional requirements which govern prosecutions for crime.

It looks very much as though the remedy is not to be found in any reform measure that we can persuade the legislature to adopt and which will then automatically work out the desired result without too much trouble to anyone. If every judge felt it to be as much his duty to report to the proper investigating officers every instance of suspected perjury, as it would be to report every death he saw which aroused suspicions of murder, and if the enforcement officers would then devote the same diligence in investigating those charges as they do in investigating other charges of felony, it is highly probable that within a few years there would have been so many convictions for perjury that it would be extremely difficult to find many who were willing to run the risk of incurring the penalty for the reward the offense might offer. It may be that a statute expressly imposing such a duty upon the judges and the enforcement officers would be of some aid, but it could not alone be sufficient. What we must

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174 The successful use of such a device in the investigation of criminal charges is not overlooked, but no progress seems to be made in perfecting a device which can be used on witnesses during the progress of a trial for the information of court or jury.


176 Rowley, Perjury and False Swearing as Contempt, (1933) 21 Cal. L. Rev. 582.

177 New York has had such a statute for some time but very little use has been made of it. Perjury in Judicial Proceedings, (1930) 64 U. S. L. Rev. 1. Probably no such statute is required unless it is desired to
work and wait for is the development of a professional and official conviction of duty to stamp out perjury, which will not manifest itself solely in verbal castigations of the offense in opinions reversing convictions for it, but will hold lawyers, judges and officers to a steady performance of a very disagreeable duty for no other reward than the knowledge that they are playing their part in the great work of administering justice between their fellow men. Until that sense of duty is developed, it will doubtless continue to be true, regardless of other palliatives that may be adopted, that, in the great majority of cases, nothing happens to perjurers.

authorize the judge to make the commitment in open court, as seems to be the opinion of the comments on the New York statute. It is hard to see any benefit such a spectacular proceeding would have over the wiser and safer practice of having the report made after the court adjourns. In United States v. Freundlich, (C.C.A. 9th Cir. 1938) 95 F. (2d) 376 the opinion stated that the prosecution was instigated by the court. In Mundy v. Commonwealth, (1933) 161 Va. 1049, 171 S. E. 691, a prosecution for subornation, it appeared that the trial judge had ordered the arrest of the perjurer, who then confessed and implicated defendant. It is probable that in many other cases the judge before whom the false testimony was given has taken the initiative. See People v. Miller, (1933) 261 Mich. 598, 246 N. W. 678, holding it misconduct for the prosecuting attorney to state that the prosecution had been instigated by the judge who was sitting as a "one-man grand jury" and before whom defendant gave his testimony, when that fact did not appear in the record.