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Kind and Degree of Evidence Necessary to Convict of Perjury or Subornation

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KIND AND DEGREE OF EVIDENCE NECESSARY TO CONVICT OF PERJURY OR SUBORNATION

The crime of perjury has been described in definitive terms as "a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a *course* of justice, swears absolutely in a matter of some consequence to the point in question, whether he believed or not."[1] Perjury has always been serious business. In England the crime was first recognized by statute[2] at a time when the taking of an oath was about the most profound thing a man could do, and its breach was not lightly dismissed.

In Florida perjury and subornation entail identical punishments: if perjury occurs in a trial on an indictment for a capital crime, the maximum punishment is life imprisonment; if perjury is committed under other circumstances, the maximum sentence is twenty years' imprisonment.[3] In Blackstone's day it was different:[4]

> "The punishment of perjury and subornation at common law has been various. It was antiently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment and never more to be capable of bearing testimony. But the statute 5 Eliz. c. 9 (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner: and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months' imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory."

The purpose of this note is to examine the origins and present characteristics of certain evidentiary problems in perjury and subornation cases. They are, essentially, the number of witnesses required by law to establish certain elements of the crimes – the quantitative problem – and the kind of evidence, direct or circumstantial, that these witnesses must present – the qualitative problem. The context for the discussion may be found in the following statement by the authors of *American Jurisprudence*:[5]

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[1] 3 ARCHBOLD, CRIMINAL PROCEDURE 1714, n.1 (8th ed. 1879).
[2] 3 HEN. 7, c. 1 (1487).
[3] FLA. STAT. c. 837 (1955).
[4] 4 BLACKSTONE, COMMENTARIES *138.
[5] 41 AM. JUR., *Perjury* §67 (1942).

"Although it seems once to have been the rule that to support a conviction for perjury the evidence of two witnesses was required to establish the falsity of the oath on which the indictment was based, it is now well settled that such a conviction may be had on the evidence of one witness supported by proof of corroborating circumstances . . . ."

ANTECEDENTS OF THE RULE

It will not do simply to state that the English common law in 1776 contained a rule that the element of falsity in a prosecution for perjury had to be proved by the direct evidence of two witnesses. In the first place, the statement may not be entirely accurate; just as important, a glib dismissal of the rule, however stated, as a quaint Anglicism that is absurd on its face fails to explain why this peculiarity lived on long after similar notions had disappeared from other criminal trials. It may tax the reader's durability but not the facts to demonstrate that the existence of the rule is bound up inextricably with the history of the Curia Regis, the Star Chamber, and the reign of Henry VIII — who must have spent most of his waking hours devising ways to harass twentieth century lawyers.

It may be fairly stated that the quantitative and qualitative aspects of the evidentiary rule survived to reach America because the Star Chamber and not the King's Bench had primary jurisdiction to try perjury and subornation cases in the sixteenth century. The gulf between the former, a court oriented toward civil and canon law, and the latter, a common law court that would have little to do with Roman peculiarities, was widened by professional jealousy in many ways; not the least of them was the divergence in methods of proof, a difference that probably caused the rule to persist in the eighteenth century.

The Star Chamber had an admirable ancestry.[6] The Council from which it sprang was the executive and judicial force for the ecclesiastical branch of the old, sprawling Curia Regis[7] — a select body of church and lay luminaries that from the time of The Conqueror had formed, with the Crown, the absolute center of authority in the slumbering empire. The Council was identified with the Crown from its in-

[6]See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 447-526 (7th ed. 1956), for a detailed account of the origins of the Star Chamber.

[7]See *id.* at *29 for a discussion of the Curia Regis.

ception; for this reason no love was lost for it by Parliament and the common law courts. This suspicion was due largely to the uncertain extent of the Council's judicial power, which has been generally stated to be:[8]

> "[C]ases which turned upon questions outside the jurisdiction of the common law courts, cases in which the king's interests were affected, cases in which the process of the common law courts could not act effectively, and cases in which the law itself was at fault, were all brought before the Council."

The charitable inclination of the Council to exercise jurisdiction in the last two situations led eventually to the inspired creation of an effective antagonist of common law courts, the separate court of Chancery.[9]

By the beginning of the sixteenth century a gradual process was almost completed whereby the Council split its work into two complementary parts: to its members sitting as the Privy Council went the executive functions, and to many of the same members who sat under a starred ceiling at Westminster went most of the judicial functions. The judicial group came to be recognized as "the king's Council in the Star Chamber."

The crimes of perjury and subornation of perjury were first recognized in 1487 by a statute[10] giving the Star Chamber jurisdiction to try those cases. In 1562 the first systematic statutory declaration of the crimes and their punishment was made.[11] Although the crimes could be tried in any criminal court, prosecutions almost invariably were brought in the Star Chamber — probably because of the moral enormity of the crime.

Firmly embedded in the civil law was the Roman notion that it took at least two witnesses to prove a fact.[12] Because of its origins and inclinations the Star Chamber adopted this rule without a murmur. In the common law courts, however, the quantitative evidence rule had no function; there simply was no need for it. In the thirteenth

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[8] *Id.* at 478.

[9] *Id.* at 479.

[10] 3 HEN. 7, c. 1 (1487).

[11] 5 ELIZ. 1, c. 9 (1562-63), explained in 2 RUSSELL, CRIMES *603-05 (8th Amer. ed. 1857).

[12] See 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 203 (1938); 7 WIGMORE, EVIDENCE §2032 (3d ed. 1940).

century the hoary common law methods of trials by witnesses, by the party's oath, by ordeal, and by battle were supplanted by a distant ancestor of our modern trial by jury. Jurors were not then mere finders of fact; they were in a very real sense witnesses, for their functions in a case included bringing to bear all facts known to them. The common law judges maintained a decent ignorance of the ways in which they obtained their information. In this sense, therefore, there were as many witnesses as there were jurors; and the quantitative evidence rule, which did not require more than two witnesses, was laid in the corner to rust.

At the accession of Henry VIII the Star Chamber was the public favorite; at his demise it was regarded as a deadly instrument. Although the political activities for which the Star Chamber is infamous took but a small portion of its time, the inquisitorial methods used by the body at the behest of Henry VIII and his immediate successors to the throne finally caused its destruction by law in 1640.[13] Blackstone has written a definitive statement of the life and times of the Chamber:[14]

> "Into this court of king's bench hath reverted all that was good and salutary of the jurisdiction of the court of *starchamber* . . . which was a court of very antient original, . . . consisting of divers lords spiritual and temporal being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemeanours contrary to the laws of the land. Yet this was afterwards (as lord Clarendon informs us) stretched 'to the asserting of all proclamations and orders of state; to the vindicating of illegal commissions and grants of monopolies; holding for honourable that which pleased and for just that which profited; . . . the council-table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the star-chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments, and corporal severities. . . .' For which reason it was finally abolished . . . to the great joy of the whole nation."

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[13] 16 CAR. I, c. 10 (1640).
[14] 2 BLACKSTONE, COMMENTARIES *266.

By the sixteenth century the common law courts had seen the testimony of the first persons who could be called witnesses in the modern sense. As the jury came to rely more upon the oral testimony of living witnesses the court in turn came to disregard the jurors as witnesses themselves. Among the new acquisitions of the King's Bench from the Star Chamber were jurisdiction over perjury and the civil law rule that was all but forgotten in that common law court — no fact may be proved by less than two witnesses. Although the quantitative rule had never been in issue in the common law courts, the reasons behind it were not unpopular there; indeed, there is reason to believe that common law juries were much swayed by the number of "oaths" heaped upon a given point. It was because of this feeling that the two witness rule survived in perjury cases. The two witness rule apparently was lifted from its context of universal application and was given a new reason for application only in perjury cases: if the prosecution presents only one witness to the fact of perjury, it is only "oath against oath" — an uncertain metaphysical argument that was not concerned particularly with the jury's dilemma in deciding which witness to believe, but with the crusty idea that an oath equaled one oath and no more, that two conflicting oaths actually canceled each other.

It was mentioned above that two of the alternative methods of proof in common law courts prior to the thirteenth century advent of "trial by jury" was "trial by the party's oath, 'with or without fellow swearers'," and "trial by witnesses."[15] In each of these methods the idea was paramount that a person's oath was one unit of probative weight; it therefore followed — as a scientific fact, if you accept the major premise — that credibility in the modern sense was unheard of and that the oath of the Duke of Roaringham on one side could be canceled by the oath of the village tramp on the other. Even with the concomitant growth of the modern trial by jury and the use of witnesses whose credibility was open to inspection, the quantitative theory of evidence did not disappear completely. Juries in the seventeenth century were still prone to "weigh" the evidence.

Mr. Wigmore has described the acceptance of the two witness rule in perjury cases by the King's Bench:[16]

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[15]THAYER, EVIDENCE 16 (1898); see also the discussion in 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 299-312 (7th ed. 1956).

[16]7 WIGMORE, EVIDENCE §2040 (3d ed. 1940). Professor Wigmore's is by far the best current statement of the history of the evidentiary rules in perjury and subornation.

> "[A] charge of perjury was the one case where a plausible inducement for such a rule was presented; because in all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence, and thus, if but one witness was offered, there would be merely . . . oath against oath."

This explanation may in fact bridge the gap between the Star Chamber and the King's Bench in 1640; if it does, it describes a shift in reasoning by the common law judges. The common law courts had theretofore been concerned with the metaphysical balancing of an oath on one side in a case by an oath on the other side of the same case; Mr. Wigmore's explanation assumes that the same balancing occurred when the prosecution introduced both oaths in the perjury trial of a silent defendant: one oath by a prosecution witness to prove the falsity of another oath given by the defendant at some earlier time. Whether this thought explains the actual reason for the retention of the rule after the abolition of the Star Chamber or just the later rationalization, it is doubtless the explanation given by eighteenth century English courts as well as by modern American courts that find it necessary to justify the rule and its relatively recent exceptions and refinements.[17]

Nineteenth century writers sought with indifferent success to describe the characteristics of the surviving quantitative evidence rule; about all they were able to agree on was that there is something to the "oath against oath" argument. Mr. Starkie stated:[18]

> "To convict a man of perjury, a probable and credible witness is not sufficient, but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for otherwise there is but oath against oath. . . . And *semble,* that the contradiction must be given by *two direct witnesses,* and that the negative supported by one direct witness and by circumstantial evidence would not be sufficient."

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[17]See, in summation, 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 207 (1938): "The requirement of two witnesses in the case of perjury is due to two main causes. In the first place, the offense was developed in the court of Star Chamber, where the tendency to the adoption of the civil and canon law rule had always been stronger. In the second place, the requirement of more than one oath against another oath is a particularly obvious measure of justice . . . ."

[18]2 STARKIE, EVIDENCE 859, n. (q) (7th Amer. ed. 1842).

Starkie's reference to the "more numerous" evidence of the prosecution indicates an awareness of the original "oath as a unit of probity" theory of the common law courts, and his statement of the two witness rule blends in the categorical civil law rule of the Star Chamber. He based the latter conclusion quoted upon something that he "heard" from Lord Tenterden; Mr. Best,[19] writing in 1849, seemed to doubt that Starkie was being quite frank in his report of the Tenterden position and pointed to nineteenth century English decisions to show that one witness directly contradicting the defendant's sworn description of an event is sufficient to convict if he is corroborated by circumstantial evidence.

As the original reason for the two witness rule became more and more obscure with the passage of time, its attraction diminished and the rule was relaxed to permit conviction if the prosecution produced one witness to refute directly the substance of the defendant's sworn statement, plus "corroborating circumstances equal to another witness."[20]

What had begun as a purely quantitative rule in the Star Chamber — a rule stating how many witnesses would have to testify to convict a man for perjury — became a rule with qualitative as well as quantitative aspects — stating the kind of evidence, direct or circumstantial, that the witnesses had to give.

The American trend toward destruction of the vestiges of the rule will be described and evaluated in the main section of this note. The question is whether any direct, as distinguished from circumstantial, evidence is required and whether the quantitative aspects of the rule are honored by modern courts. It must be admitted that the line between "direct" and "circumstantial" evidence is a shadowy one indeed. Theoretically, a man who was on the corner of Elm and Main Streets at noon and did not see Jones cannot testify *directly* that Jones was not there, but in close cases whatever qualitative requirement a court feels it must honor can be satisfied simply by calling the circumstantial evidence direct in nature. Professor Wigmore[21] fur-

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[19]BEST, EVIDENCE *439 (1849): "But this decision, if it ever took place, is most certainly not law. It is a startling thing to proclaim openly, that so long as a man can eloign all direct, he may defy all circumstantial evidence, and commit perjury with impunity; and we accordingly find a contrary doctrine laid down in a variety of cases."

[20]See this language — of doubtful meaning — in Kier v. State, 152 Fla. 389, 393, 11 So.2d 886, 888 (1943) (dictum).

[21]1 WIGMORE, EVIDENCE §§24, 25 (3d ed. 1940).

ther documents the hazy distinction between direct and circumstantial evidence. Nevertheless, for purposes of a working definition, it may be said that a witness can testify directly of a fact in issue only when he asserts knowledge of the fact through the operation of his senses. On the other hand, he can testify indirectly, or circumstantially, of the fact in issue if he claims direct knowledge of a fact that infers the existence or nonexistence of the fact in issue.

Element of Falsity in Perjury Cases

The majority of the jurisdictions in the United States, which reiterate the rule that the falsity of the oath must be proved by "the testimony of more than one witness or by the testimony of one witness and corroborating circumstances,"[22] give no indication of the kind of evidence required of the minimum number of witnesses or of the dimensions of the term "corroborative circumstances."[23] Assuming that there is an intentional distinction made between the type of evidence required of the one direct witness and that demanded by the corroborating circumstances, it seems clear that circumstantial evidence, however introduced into evidence, is intended by the "corroborating circumstances" language. If the evidence required is not circumstantial, it must be direct; and we are transported back to the eighteenth century requirement of the direct testimony of two witnesses.

In fairness to most of these courts it must be stated that they have not been confronted with the problem of circumstantial evidence as opposed to direct evidence. There is a significant scarcity of cases in which it was necessary for the court to state, as a matter of law, the type of evidence the minimum number of witnesses must give. In a case of first impression in Delaware[24] Justice Rodney, after discussing the

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[22]State v. Crowley, 226 S.C. 472, 474, 85 S.E.2d 714, 716 (1955). "[I]t should be observed that this rule does not extend to all the facts, which are necessary to be proved on the trial of an indictment for perjury; but only to the proof of the falsity of the matter upon which the perjury is assigned. Thus, the holding of the court, the proceedings in it, the administering the oath, and even the evidence given by the defendant, may all be proved by one witness." 2 Russell, Crimes *654 (8th Amer. ed. 1857).

[23]*E.g.*, Weiler v. United States, 323 U.S. 606, 156 A.L.R. 496 (1945); People v. O'Donnell, 132 Cal. App.2d 840, 283 P.2d 714 (1955); Rader v. State, 52 So.2d 105 (Fla. 1951); State v. Rogers, 149 Me. 32, 98 A.2d 655 (1953); State v. Bulach, 10 N.J. Super. 107, 76 A.2d 692 (App. Div. 1950); State v. Crowley, 226 S.C. 472, 85 S.E.2d 714 (1955).

[24]Marvel v. State, 33 Del. 110, 113, 131 Atl. 317, 318 (1925).

early two witness version of the quantitative rule, stated, "Later cases have, however, generally held that one witness giving positive evidence is sufficient if supported by corroborating circumstances." Continuing, he stated that "in most of the cases so holding, however, the courts have contented themselves with a general statement of the rule and were not confronted with the presence of circumstantial evidence alone. Most courts have been confronted by questions as to the number of the witnesses, rather than the character of the evidence."[25]

It cannot be seriously doubted that the qualitative aspect of the two witness rule in its more popular days required that the testimony of each witness directly refute the substance of the defendant's oath.[26] When the pristine rule was relaxed to allow convictions on the testimony of one corroborated witness, no one could consistently argue that there had to be direct evidence from more than one witness. It is the reasonable import of the common dicta[27] as well as the holdings[28] of most courts actually faced with the problem that the single requisite witness must directly refute the defendant's oath.

The rule of one witness plus corroboration has on its face no qualitative requirement for direct evidence; its qualitative aspect was supplied without changing the common statement of the rule. At least two courts have been given statutes as clean slates to write upon. The Texas codification[29] of the quantitative requirement of one witness plus corroboration was interpreted by the court to allow a conviction on circumstantial evidence alone. The California court, given a similar statute,[30] stuck by the requirement of direct evidence from at least one witness.

In areas in which the falsity of the oath is not susceptible of proof

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[25]33 Del. at 116, 131 Atl. at 319.

[26]See note 18 *supra* and accompanying text.

[27]See note 22 *supra* and accompanying text.

[28]See cases collected in 41 AM. JUR., *Perjury* §67, n.18 (1942); 7 WIGMORE, EVIDENCE §2042, n.4 (1940).

[29]TEX. CODE CRIM. PROC. art. 723 (1948): "In trials for perjury . . . no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statement under oath . . . ." See Plummer v. State, 35 Tex. 202, 33 S.W. 228 (1895).

[30]CAL. CODE CIV. PROC. §1968 (Deering 1946): "Perjury . . . must be proved by testimony of more than one witness. . . . [P]erjury [must be proved by] the testimony of two witnesses, or one witness and corroborating circumstances." Essentially the same provision is contained in CAL. PEN. CODE §1103a (Deering 1949). See People v. O'Donnell, 132 Cal. App.2d 840, 283 P.2d 714 (1955).

by direct, extrinsic evidence, some jurisdictions have recognized exceptions to the qualitative requirement of direct evidence, whether offered by one witness or two. Justice Wayne declared in *Wood v. United States*[31] that the qualitative requirement applied only in cases in which oral testimony was relied on and not to situations in which the only proof possible was documentary. The New York court, another adherent to the qualitative rule of direct evidence, convicted a man of perjuring himself by saying "I don't remember" by presenting strong circumstantial evidence that he did remember.[32] These cases, it should be noted, are not those in which the prosecution was simply unable to produce direct evidence of facts contradicting the defendant's sworn statement; these are cases in which the falsity of the statement was inherently insusceptible of direct proof.[33] These states, while still adhering to the hard rule of two witnesses or one with corroboration, have at least suffered a crack to be made in the stern facade of stare decisis.

In the last half-century a few courts faced with perjury convictions on purely circumstantial evidence in cases of first impression have unshackled themselves from the past and upheld the convictions.[34] Their decisions generally are based on the refutation of the rule's common law basis and a feeling that the crime of perjury is no more heinous than the crime of murder and should not be more difficult of conviction.[35] The degree of circumstantial evidence required for conviction is not clear, but an indication may be garnered from *State v. Cerfoglio*.[36] The Nevada court first upheld a conviction on circumstantial evidence, then reversed on rehearing, stating:[37]

> "While we adhere to the general proposition that the crime of perjury may be established by circumstantial evidence, we have reached the conclusion that there is not in the instant case

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[31]39 U.S. (14 Pet.) 430 (1840); see also Mallard v. State, 19 Ga. App. 99, 90 S.E. 1044 (1916).

[32]People v. Doody, 172 N.Y. 165, 64 N.E. 807 (1902).

[33]See State v. Wooley, 109 Vt. 53, 192 Atl. 1 (1937).

[34]Marvel v. State, 33 Del. 110, 131 Atl. 317 (1925); Blakely v. Commonwealth, 183 Ky. 493, 209 S.W. 516 (1919) (false swearing); People v. Dowdall, 124 Mich. 166, 82 N.W. 810 (1900); State v. Storey, 148 Minn. 398, 182 N.W. 613 (1921); State v. Cerfoglio, *infra* note 36; Metcalf v. State, 8 Okla. Crim. 605, 129 Pac. 675 (1913).

[35]State v. Storey, 148 Minn. 398, 182 N.W. 613 (1921).

[36]46 Nev. 348, 213 Pac. 102, *reversing on rehearing* 46 Nev. 332, 205 Pac. 741 (1923).

[37]46 Nev. 332, 350, 213 Pac. 102 (1923).

that clear, strong, and satisfactory proof of the crime charged which is necessary to a conviction."

In summation, the evidentiary rules in perjury cases have evolved in several steps. Initially the direct testimony of two witnesses was required. With the passage of time this requirement has been relaxed to allow convictions based on the direct testimony of one witness and corroboration by circumstances "equal to another witness." The Florida Court has not yet been called upon to go beyond this point.[38] Exceptional cases — those in which the element of falsity is not susceptible of direct proof — have come to be successfully prosecuted on circumstantial evidence alone. And, recently, a handful of courts have placed perjury on a par with other crimes, requiring only circumstantial evidence for conviction.

Subornation of Perjury

Subornation of perjury has been defined as the procurement of perjured testimony.[39] There are two elements of the crime: perjured testimony by the one suborned and procurement of the testimony by the defendant.[40]

Proof of the first element of this crime thus includes proof of the commission of perjury. With the exception of one jurisdiction,[41] it has been held that the evidentiary rule to prove the falsity of the oath in a subornation prosecution is the same as is necessary to prove the falsity of the oath in a perjury prosecution.[42] In the excepted state, Missouri, it was held[43] that both of the elements of the crime may be proved by one uncorroborated witness — in this case the suborned perjurer — even though to prove the falsity of the oath in a perjury prosecution the one witness plus corroboration rule applied. No sub-

[38]*E.g.*, Rader v. State, 52 So.2d 105 (Fla. 1951); Keir v. State, 152 Fla. 389, 11 So.2d 886 (1943); Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Tindall v. State, 99 Fla. 1132, 128 So. 494 (1930); Yarborough v. State, 79 Fla. 256, 83 So. 873 (1920); McClerkin v. State, 20 Fla. 879 (1884).

[39]Perkins, Criminal Law and Procedure 209 (1952).

[40]State v. Fahey, 19 Del. 594, 54 Atl. 690 (1902); Bell v. State, 5 Ga. App. 701, 63 S.E. 860 (1909).

[41]State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913).

[42]*E.g.*, Hammer v. United States, 271 U.S. 620 (1926); Bell v. State, 5 Ga. App. 701, 63 S.E. 860 (1909); Commonwealth v. Fine, 321 Mass. 299, 73 N.E.2d 250 (1947); State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954); State v. Corporale, 16 N.J. 373, 108 A.2d 841 (1954).

[43]State v. Richardson, 248 Mo. 563, 154 S.W. 735 (1913).

ornation cases were found in those jurisdictions that hold that the false oath in perjury prosecutions may be proved by circumstantial evidence. Consistency would dictate, however, that the same requirement be respected in proving the perjury element of the crime of subornation.

The suborning element is treated like the elements of other crimes; the ordinary rules of proof of an issue apply. The Missouri court summed this up when it stated, "All of the authorities hold that a single witness, uncorroborated, can make sufficient proof of the suborning."[44]

Many pages of reported opinions have been devoted to explanations why the original two witness rule is inapplicable to the suborning element; they fail to state, however, the kind and degree of evidence that one lone witness may give to warrant a conviction. Although the inference is that the witness' evidence may be circumstantial, research has brought to light only one case in which circumstantial evidence of suborning was held sufficient to convict.[45] With this sole exception all the cases found in which a subornation conviction was upheld contained the direct testimony of the recanting perjurer. It does not necessarily follow, however, that a court having only circumstantial evidence available would be reluctant to hold the proferred testimony sufficient to convict, if this testimony showed the suborning element beyond a reasonable doubt.

The only Florida case[46] on subornation of perjury reaching the Supreme Court was not decided on evidentiary grounds; thus there is no basis for predicating the position the Court might take. Con-

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[44]*Id.* at 571, 154 S.W. at 737. *Contra,* People v. Evans, 40 N.Y. (1 Hand) *1 (1869), in which the uncorroborated testimony of the perjurer was held legally insufficient to convict the alleged suborner. In reversing the conviction the court of appeals observed, *id.* at *5, "The jury must by their verdict convict Near of perjury, for this is the very question to be tried; and after they have done that, to place their verdict of the defendant's guilt in suborning him upon the sole uncorroborated evidence of this perjured witness . . . ." In conclusion, the court remarked, *id.* at *7, that "no jury should ever have the opportunity given them by any court to render so disgraceful a verdict in a court of justice as this. The jury are required literally to stultify themselves." In deciding the *Richardson* case the Missouri court distinquished *Evans* and pointed out that New York had since retreated from this position; but even subsequent to the *Richardson* case the United States Supreme Court cited *Evans* with approval and reached an identical result. Hammer v. United States, 271 U.S. 620 (1926).

[45]Babcock v. United States, 34 Fed. 873 (C.C.D. Colo. 1888).

[46]Milligan v. State, 103 Fla. 295, 137 So. 388 (1931).

sidering, however, the long line of Florida decisions following the majority rule in perjury cases, it is reasonable to assume that the majority rule would be adhered to in a subornation prosecution.

CONCLUSION

The persistence of the common law fetish of "oath against oath," embodied in the rule that requires the direct testimony of at least one witness plus corroborative evidence, is a tribute to the stolidity of the judiciary and the legislature. Now that the accused is competent to testify in his own behalf in all criminal prosecutions and the weight of proof is determined by credibility rather than number of witnesses, the "oath against oath" anomaly can be justified only on a historical basis. In the present legal generation it is a throwback. This fact is suggested even by courts that still adhere to the quantitative rule in some form.[47] Even California, staunch adherent to the two witness or one plus corroboration rule that she is, admits that "there has been growing dissatisfaction with the somewhat anomalous and technical rules of evidence hedging about a prosecution for perjury."[48]

It has been suggested that law enforcement depends on the co-operation of society and that this co-operation will be enhanced by protecting a witness from the threat of vengeful accusations of perjury by a defeated litigant.[49] That this end may be achieved by the present majority view will be conceded; it is suggested, however, that this rule may also encourage perjury by making conviction so difficult that it provides an added stimulus to one disposed to fabrication. Discarding the majority rule might well have the effect of reducing the number of witnesses willing to testify "at their risk." The basic question then arises: Does the protection afforded a witness warrant the difficulty of conviction of perjury? Although as yet only a few courts have answered this in the negative, all courts eventually will be faced with an inescapable reappraisal of the quantitative and qualitative rules of evidence in perjury and subornation cases.

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[47]"It may well be doubted whether any distinction should now be made between the proof necessary to convict of perjury and that necessary to convict of other crimes." Goins v. United States, 99 F.2d 147, 149 (4th Cir. 1938), *cert. dismissed*, 306 U.S. 622 (1939).

[48]People v. O'Donnell, 132 Cal. App.2d 840, 844, 283 P.2d 714, 717 (1955).

[49]BEST, EVIDENCE *436-37 (1849).