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## **Murder by Perjury**

### **Cover Page Footnote**

Administrator, The Rand Corporation, Santa Monica, California.

# MURDER BY PERJURY

JOHN C. HOGAN\*

## I. INTRODUCTION

**MURDER** by perjury, the bearing of false witness against another person with an express premeditated design to take away his life, so that the innocent person is condemned and executed, was a species of killing punishable by death under the ancient common law.<sup>1</sup> However, this offense was no longer "holden for murder"<sup>2</sup> in Lord Coke's time. Blackstone likewise declared it to be "dubious at this day"<sup>3</sup> (1765-1769) that such a crime was capital, since the modern law had never punished it as such. Murder by perjury nevertheless has been considered a capital offense in California, where the statute provides that "every person who, by wilful perjury or subornation of perjury, procures the conviction and execution of any innocent person, is punishable by death."<sup>4</sup>

Enacted in 1872, this section of the California Penal Code is derived from a similar provision in the "Crimes and Punishment Act of 1850."<sup>5</sup> Although it has been the law in California for over one hundred years, there is no evidence that the provision has in any way interfered with the administration of justice. This experience would seem to refute the arguments<sup>6</sup> frequently advanced that such a law is dangerous to society. Furthermore, if we trace the evolution of this doctrine through the cases and texts on the common law, we find that no satisfactory reasons have been given why it should not continue to be applied.

## II. COMMON-LAW HISTORY

In Blackstone's *Commentaries* we find a clear statement concerning murder by perjury, and the author laments the fact that this offense is no longer punishable by death in England:

There was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past: I mean by bearing false witness against another, with express premeditated design to take away his life, so as the innocent person be condemned and executed. . . . And there is no doubt

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1. 1 Britton 34-35 (Nichols ed. 1865).

2. 3 Coke, *Institutes of the Laws of England* 48 (6th ed. 1680).

3. 4 Blackstone, *Commentaries* \*196.

4. Cal. Pen. Code § 128.

5. Cal. Sess. Laws 1850, ch. 99, § 83. "Sec. 83. Every person who, by wilful and corrupt perjury or subornation of perjury, shall procure the conviction of any innocent person, shall be deemed and adjudged guilty of murder, and upon conviction thereof shall suffer the punishment of death." Garfielde & Snyder, *Compiled Laws of the State of California* 654 (1853).

6. See notes 36 and 54 *infra* and accompanying text.

but this is equally murder *in foro conscientiae* as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such.<sup>7</sup>

Three treatises are cited by Blackstone as authorities for his statement that the ancient common law punished this offense as murder: *The Mirror of Justices*,<sup>8</sup> *Britton*,<sup>9</sup> and *Bracton*.<sup>10</sup> However, murder by perjury apparently was not treated by Bracton.<sup>11</sup>

Britton, in a very early treatise on the common law, prescribes capital punishment for those who commit this offense. This work declares that an indictment for murder will lie against "those who falsely for hire, or in any other manner, have condemned, or caused to be condemned, any man to death by means of a false oath. . .,"<sup>12</sup> and, if anyone be convicted of this offense, "let their judgment be death for death."<sup>13</sup>

*The Mirror of Justices*, a work of doubtful reputation, distinguishes between "mortal" and "venial" perjury, so that "in the case of mortal perjury there is mortal judgment, as in the case of open homicide."<sup>14</sup> It is further explained that "homicides in will are also false jurors, false witnesses, and those who appeal others or defame them by indictment, or in other ways accuse persons falsely so that it is not their fault that death does not follow."<sup>15</sup> The author adds that jurors who testify falsely in notorious cases are to be punished the same as judges who falsely condemn a man to death, namely, they "should be adjudged to be hanged."<sup>16</sup> If this be a true statement of the law on this subject as it existed in the fourteenth century, then it would seem that a person

7. 4 Blackstone, Commentaries \*196-97.

8. *Mirror of Justices* 23 (Selden Soc'y ed. 1893).

9. 1 *Britton* 34-35 (Nichols ed. 1865).

10. Bracton, *Tractatus de Legibus et Consuetudinibus Angliae* (Twiss ed. 1878).

11. Blackstone's citation of Bracton at 4 Blackstone, Commentaries \*196, as a source for this doctrine is an error. Justice Foster, who intimates that Bracton says something on this subject, cites no pages in Bracton's monumental work. See *The King v. Macdaniel and Others*, *Fost.* 121, 132, 168 *Eng. Rep.* 60, 65 (P.C. 1755). There is a statement in James Stephen's *History of the Criminal Law* to the effect that murder by perjury not being discussed in Bracton's book, Britton added it to his own work: "He [Britton] omits many of the topics dealt with by Bracton, and adds to the cases stated by him, 'Ceux ausi que fausement par louer. . ..'" This statement is quoted from Britton concerning this crime and its punishment. 3 Stephen, *A History of the Criminal Law of England* 33-34 (1883).

12. 1 *Britton* 34-35 (Nichols ed. 1865).

13. *Id.* at 35.

14. *Mirror of Justices* 144 (Selden Soc'y ed. 1893).

15. *Id.* at 23. See an elaborate list of misdeeds, which are mainly a breach of the offender's oath of fealty, classified as "perjury against the king." *Id.* at 15-19. These are described as "ridiculous and instructive." 2 Pollock & Maitland, *The History of English Law* 541 n.5 (2d ed. 1923).

16. *Mirror of Justices* 137 (Selden Soc'y ed. 1893).

(be he a judge, a juror, or a witness) who had condemned a man to death and against whom the charge of perjury was subsequently made, would forthwith seek to prove in a court of law the falsehood of the accusation. This is exactly what occurred in *Gilbert Twyt's* case,<sup>17</sup> where the jury that adjudged Roger of Alford to be hanged for certain felonies, demanded an immediate investigation and trial of the charges made by Twyt that the jury was perjured, thereby clearing itself of any consequences arising out of that false accusation.

The running-head of a page in James Stephen's book on the history of the criminal law is "Perjury in Witnesses Anciently Not a Crime."<sup>18</sup> The author explains that for several centuries no trace is to be found in the books on the common law concerning the punishment of witnesses for perjury, that "the only passage in an early book bearing on this offence which I have been able to find, besides those in Bracton and Fleta . . . is in the Mirror."<sup>19</sup>

The fact is that "our ancestors perjured themselves with impunity,"<sup>20</sup> say Pollock and Maitland, and they explain that the very "ancient law seems to be not quite certain whether it ought to punish perjury at all."<sup>21</sup> There are a few general references to this offense in the *Dooms* of the ancient English kings, e.g., "If any one swear a false oath on a relic, and he be convicted let him forfeit his hand, or half his 'wer' . . . and let him not be thenceforth oath-worthy."<sup>22</sup>

According to Holdsworth, in an age when juries were as much witnesses as judges of the facts, the only form of perjury punished by common law was perjury of a jury for which the common law provided the writ of attaint.<sup>23</sup> But when the jury changed its character, that is to

17. 5 *Select Cases in the Court of King's Bench Under Edward III*, at 87 (Selden Soc'y ed. 1958). The facts in the case were as follows: In 1336, the jury that adjudged Roger of Alford to be hanged for certain felonies was thereafter confronted by Gilbert Twyt, a prisoner of the King's Marshal at Lincoln, who abused them "in disgraceful language, cursing them with the coarsest words, and asserting that they were perjured." The seriousness of the charge, though not made under oath, was recognized, and it could have ended in attaint. The jury had the prisoner brought into court, where Twyt denied that he had ever said such things about the Alford jury and "puts himself on the country." A jury that was impanelled to try the case found Twyt guilty as charged, i.e., that he had abused the Alford jury by stating among other things that Roger had been "falsely put to death, and that the jurors would be accursed of God if they had not spoken the truth about him, and also that any one of the jurors was more worth hanging than Roger." Twyt was remitted to prison in the custody of the Marshal to await judgment thereon.

18. 3 Stephen, *A History of the Criminal Law of England* 243 (1883). The author repeats the fiction that Bracton discusses this subject.

19. *Id.* at 242-43.

20. 2 Pollock & Maitland, *The History of English Law* 543 (2d ed. 1923).

21. *Id.* at 541.

22. 2 Canute, *Dooms* 36.

23. 1 Holdsworth, *A History of English Law* 337 (3d ed. 1922).

say, when the law trial began to take on its modern form—whereby facts are established by the testimony of witnesses rather than by the personal knowledge of the jury—a development in the law of perjury was needed. According to Walsh,<sup>24</sup> we find this in the Star-Chamber, the court assuming jurisdiction to punish perjury not only of witnesses but of all jurors subject to attain. But there was an important limitation on this; *i.e.*, in murder by perjury, so that in cases of witnesses for the prosecution for felony or murder, the fear of discouraging witnesses in such cases led to the rule that after conviction (and execution) of the accused, no inquiry into perjury by such witness could be made.<sup>25</sup> It is in the law of the sixteenth and seventeenth centuries that the offense of perjury begins to assume its modern form, and Holdsworth advises us to look partly to the acts of the legislature and partly to the decisions of the courts for the origins of this development in the law.<sup>26</sup>

There are some clear statements in the cases decided in the sixteenth century that perjury by a witness was not punishable by the common law. In *Onslowe's Case*,<sup>27</sup> for example, we are told that all of the judges were assembled at Sergeants Inn where they perused the statutes of 3 *Hen. 7, c. 1*, and 11 *Hen. 7, c. 25*, as well as the proviso for the jurisdiction of the Court of Star-Chamber, looking for authority to punish perjury,

and they thought that it was not, for the statute 3. H. 7. does not provide any punishment for perjury, any more than it does for murder, although it is mentioned in the preamble to follow maintenance, and others the misdemeanors first recited. And this may appear by the conclusion of the punishment of the offenders, which ought to be according to the laws and statutes before provided; and there was no law for perjury before this time but attain. . . .<sup>28</sup>

Another early case involving perjury was *Damport v. Sympson*,<sup>29</sup> where again it was said that the common law did not punish this offense. The defendant's counsel moved in arrest of judgment that this action would not lie, "for the law intends the oath of every man to be true; and therefore until the statute of 3 *Hen. 7, c. 1*, which gives power to

24. Walsh, *History of Anglo-American Law* 312 (2d ed. 1932).

25. *Ibid.*

26. 3 Holdsworth, *A History of English Law* 401 (3d ed. 1927).

27. 2 Dyer 242b, 73 Eng. Rep. 537 (S.C. 1565). The headnote to this case reads: "Perjury in proof of a suggestion to obtain a prohibition in B.R. is not punishable in the star-chamber."

28. 2 Dyer 243a, 73 Eng. Rep. 537 (S.C. 1565).

29. Cro. Eliz. 520, 78 Eng. Rep. 769 (K.B. 1596). The headnote to this case reads: "An action on the case will not lie against a man for perjury in an action of trover whereby the plaintiff recovered less damages than he would otherwise have done." Ordinarily, aside from defamation and malicious prosecution, the courts will not recognize any injury from false testimony of which a civil action for damages can be maintained. See Annot., 12 A.L.R. 1247, 1264 (1921); Annot., 81 A.L.R. 1119, 1126 (1932).

examine and punish perjuries in the Star-Chamber, there was not any punishment for any false oath of any witness at the common law. . . ."<sup>30</sup> A majority of the judges were likewise of the opinion that the action would not lie.<sup>31</sup>

William Hudson<sup>32</sup> expresses surprise that the judges in *Onslow's Case* adopted such an opinion, and he declares: "I dare undertake to show them, that the common law of England had a punishment for perjury before the Conqueror. . . ."<sup>33</sup> In his treatise on the Court of Star-Chamber, however, he declares that murder by perjury is neither punishable nor examinable,<sup>34</sup> though he argues that it should be.<sup>35</sup> Hudson gives two reasons why this perjury was not allowed to be examinable: (1) it might deter men from giving evidence for the King, and (2) "lest it should bring a scandal upon the public justice of the kingdom, if the cause of a person so convicted should receive new examination. . . ."<sup>36</sup> The first of these is the standard argument used many times since by writers who would not punish this offense capitally; the second reason is indeed a little remarkable, if today it would be said to be applicable to criminal prosecution.

Lord Coke says that "perjury before the Conquest was punished sometimes by death, sometimes by banishment, and sometimes by corporal punishment. . . ."<sup>37</sup> He adds that "in the star-chamber in the case of *Rowland Ap Eliza*, it was resolved, that perjury in a witness was punishable by the common law, as hereafter shall be shewed more at large."<sup>38</sup> In 1606, a man was prosecuted in the Star-Chamber for giving false evidence against a person accused of a criminal offense, and his counsel argued that the court would not take cognizance of this case because the Statute of Perjury did not empower it to try that particular kind of perjury. Lord Coke, the Chief Justice of the Common Pleas who

30. Cro. Eliz. at 521, 78 Eng. Rep. at 769.

31. Ibid.

32. Hudson, *The Court of Star-Chamber*, in 2 *Collectanea Juridica* 1 (Hargrave ed. 1791-1792).

33. Id. at 72.

34. "Another perjury not punishable, nor examinable, is perjury committed against the life of a man for felony or murder whereof the party accused is convicted by verdict and judgment. . . ." Id. at 81.

35. Ibid.

36. Ibid.

37. 3 Coke, *Institutes of the Laws of England* 163 (6th ed. 1680).

38. Id. at 164. James Stephen observes that, although oaths held a prominent place in the scheme of government of the early English kings, the present law on this subject "originated entirely as far as I can judge in decisions by the Court of Star Chamber." He examines Hudson's argument at length attempting to show that it is unsound; he says of Lord Coke's remarks simply that this is "a good illustration of the unintelligent patchwork way in which he writes on all subjects." 3 Stephen, *A History of the Criminal Law of England* 245, 248 (1883).

was then sitting on the bench of Star-Chamber, "reproved him for presumption and ignorance in disputing the Star-Chamber's unlimited jurisdiction."<sup>39</sup>

Murder by perjury, however, was no longer a capital crime in Lord Coke's time (1600-1615), and we are told in the Third Part of the *Institutes of the Laws of England*, "Concerning High Treason and other Pleas of the Crown and Criminal Cases" that: "Britton mentioneth another kind of murder (which is not holden for murder at this day) when he saith: *Ceux ausi que fausement pur lover, ou en auter manner ount ascun home damne ou fait damner au mort*, . . . yet this is murder before God."<sup>40</sup> He adds that "David killed Uriah with his pen, and these men with their tongue."<sup>41</sup> About three hundred years development in the common law separated Britton and Lord Coke, and this offense which had originally been held to be murder was now no longer punishable as such.

Several legislative attempts in England to remedy this defect in the law failed.<sup>42</sup> According to Holdsworth, "the main reason for their failure seems to have been the fear of discouraging prosecutions."<sup>43</sup>

### III. THE KING V. MACDANIEL AND OTHERS

The only instance in modern times of a court in England passing on this subject is *The King v. Macdaniel and Others*.<sup>44</sup> The facts in this case were as follows: By statute, the government had offered to reward, with forty pounds, any person who would convict a highway robber. Mary Jones (a widow), Stephen Macdaniel, John Berry, and Thomas Cooper conspired against an innocent person, Joshua Kidden, to recover this reward. They arranged an indictment of Kidden for hav-

39. Select Cases in the Council of Henry VII, at lxx-lxx (Selden Soc'y ed. 1958).

40. 3 Coke, Institutes of the Laws of England 48 (6th ed. 1680). In the Titus Oates Case, 19 St. Tr. 813 (1685), although public opinion was high against the defendant who perjured himself and caused the death of innocent persons he was not given the death penalty. Justice Stephen declares: "Oates directly and distinctly caused the death of several innocent persons by perjury, but the fact that the judges and juries who tried the case acted upon their own responsibility, and because they chose to believe Oates' testimony, so disconnected his perjury from the death which he caused that even in 1685 it was not thought possible to convict him of murder." 3 Stephen, A History of the Criminal Law of England 9 (1883).

41. 3 Coke, op. cit. supra note 40, at 48.

42. 4 Holdsworth, A History of English Law 517 (1924). William Hawkins classified as murder those cases in which "a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another . . .," and he gives as an example the situation "where one by duress of (a) imprisonment compels a man to accuse an innocent person who on his evidence is condemned and executed. . . ." 1 Hawkins, The Pleas of the Crown 185 (7th ed. 1795).

43. 4 Holdsworth, op. cit. supra note 42, at 517 n.7.

44. 1 Leach 44, 168 Eng. Rep. 124 (P.C. 1754). The reporter's headnote to this case reads: "A person cannot be indicted for murder in procuring another to be executed, by falsely charging him with a crime of which he was innocent."

ing robbed Mary Jones on the highway, a crime he never committed. Mary swore in court positively as to the person of the prisoner, equally positively as to the circumstances of the fictitious robbery, and she was confirmed in all this by the false testimony of John Berry. After Kidden's conviction and execution as a highway robber, the reward was collected and divided among the conspirators. Sometime later, the Constable of Blackheath arrested one Blee on suspicion of theft, and this led to the discovery of the conspiracy and contrivance to gain the reward. Subsequently, Stephen Macdaniel, John Berry, and Mary Jones were indicted before Mr. Justice Foster at the Old Bailey, June session 1756, "for the wilful murder of Joshua Kidden, in maliciously causing him to be unjustly apprehended, falsely accused, tried, convicted, and executed, well knowing him to be innocent of the fact laid to his charge. . . ."<sup>45</sup>

Both accounts<sup>46</sup> of the case say that the defendants were convicted of this offense, but the judgment was respited, and that the Attorney General, Sir Robert Henley, refused to argue the point of law; not necessarily, though, because he believed it was not good law, but for other reasons, which are not clearly stated in any of the sources. Thus, Blackstone observes: "I have good grounds to believe it was not from any apprehension on his [part] that the point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of the prosecution."<sup>47</sup> Edward Hyde East<sup>48</sup> who notes that it has been "much doubted" whether an indictment for murder will lie for this offense, says concerning Blackstone's observation: "The author has heard Lord Mansfield, C.J. make the same observation; and say, that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment."<sup>49</sup> Edward Christian who footnoted Blackstone's discussion of murder by perjury with some views of his own on this subject,<sup>50</sup> agreed with Blackstone that this offense was no longer punished as murder, but he disagreed with the Vinerian Professor's contention that it should be punishable

45. *Id.* at 44, 168 Eng. Rep. at 125.

46. 1 Leach 44, 168 Eng. Rep. 124 (P.C. 1754) and *Fost.* 121, 168 Eng. Rep. 60 (P.C. 1755).

47. 4 Blackstone, Commentaries \*196 note g.

48. 1 East, *The Pleas of the Crown* 333 note a (2d ed. 1806).

49. *Ibid.*

50. 4 Blackstone, Commentaries 196 n.5 (12th ed. Christian 1795). William Draper Lewis observes that "the inflicting of capital punishment by officers of the law in conformity to a judicial record can hardly be deemed the act of false witness; and should we undertake to regard the government as the innocent agent of the witness, there is a difficulty in making the act and intent appear concurrent in point of time, because he has lost power over this agent, and he cannot prevent the execution if he repents." 4 Blackstone, Commentaries 197 n.62 (Lewis ed. 1902).

as that offense. Admitting that the "guilt of him who takes away the life of an innocent man by a false oath, is much more atrocious than that of an assassin, who murders by poison or a dagger . . .,"<sup>51</sup> Christian repeats Lord Coke's observation that this offense is "not holden for murder at this day,"<sup>52</sup> observes that there is no modern authority (citing the *Macdaniel* case) to induce us to believe that it is murder under the laws of England, and declares that "such a distinction in perjury would be more dangerous to society, and more repugnant to principles of sound policy, than in this instance the apparent want of severity in the law."<sup>53</sup> Christian then offers the standard reason given why such a law is bad, namely, that "few honest witnesses would venture to give evidence against a prisoner tried for his life, if thereby they made themselves liable to be prosecuted as murderers."<sup>54</sup>

In the nineteenth century, it continued to be uncertain in England whether murder by perjury was a capital offense. Henry Stephen, in 1845, could only say that: "It is doubtful whether by our law the bearing of false witness against another, with intent to take away his life, is murder, though he be, consequently, condemned and executed."<sup>55</sup> This observation, which appears as a footnote to the first edition of Stephen's *New Commentaries on the Laws of England*<sup>56</sup> and which is annotated with a citation to the *Macdaniel* case and with a citation to Blackstone's *Commentaries*, remains the same in the tenth edition of Stephen's work (1886), except that now it "seems doubtful" that this offense constitutes murder.<sup>57</sup> After the turn of the century, however, Edward Jenks, in a revised edition of Stephen's work published in 1925, in which he cites only the *Macdaniel* case as authority,<sup>58</sup> makes the positive and certain statement that under the laws of England "the bearing of false witness against another, with intent to take away his life, is not murder, even though the person be convicted on such testimony and executed."<sup>59</sup> In England, therefore, murder by perjury is not a capital offense, and this is supported by the statement of the law on this subject in the 1958 edition of *Russell on Crimes*, although that book is not entirely positive about the matter.<sup>60</sup>

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51. 4 Blackstone, Commentaries 196 n.5 (12th ed. Christian 1795).

52. *Ibid.*

53. *Ibid.*

54. *Ibid.*

55. 4 Stephen, Commentaries on the Laws of England 116 note t (1st ed. 1845).

56. *Ibid.*

57. 4 Stephen, Commentaries on the Laws of England 69 note x (10th ed. 1886).

58. 4 Stephen, Commentaries on the Laws of England (18th ed. Jenks 1925).

59. *Id.* at 54.

60. 1 Russell, Crimes 481 (11th ed. Turner 1958). Citing Bracton, Britton, Hawkins, Coke, and Blackstone as sources for the proposition that at ancient common law it was murder to bear false witness against another with an express premeditated design to take

## IV. OTHER LEGAL SYSTEMS

Legal systems other than the ancient common law and California have prescribed severe punishment for false witness. In Greece<sup>61</sup> and in Rome,<sup>62</sup> for example, although an oath was required of witnesses in homicide trials, a false oath was not punished by human laws, since it was believed that perjury was a sin, the punishment of which should be left to the gods.<sup>63</sup> Both legal systems, however, punished false testimony. In Greece, the false evidence of witnesses was dealt with by means of a suit known as *dike pseudomarturion*,<sup>64</sup> and Attic courts awarded damages to the prosecutor of such a suit if he won and "perhaps also impose[d] other penalties upon the defendant, though Athenian practice in the matter is not clear."<sup>65</sup> A man thrice convicted of giving false testimony was disfranchised.<sup>66</sup> In Plato's *Laws*, he was punished with death.<sup>67</sup> Under Roman law, the witness giving false testimony in a lawsuit committed an offense against the administration of justice, and the punishment inflicted for this was severe. The law of the Twelve Tables, for example, commands that those convicted of false testimony shall be hurled from Tarpeian Rock.<sup>68</sup>

The *Lex Cornelia de Sicariis et Veneficiis*,<sup>69</sup> which deals with assassinations and poisonings, also condemns those, who by false testimony procure the execution of an innocent person. According to the *Digest*,<sup>70</sup> the punishment for this crime is deportation if the offender is a person of honor or rank and capital punishment for those of the second grade, *i.e.*, the common people. The 1614 edition of the *Corpus Juris Civilis*<sup>71</sup> contains

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away his life, if the innocent person was convicted and executed, the author says: "But this proposition is of doubtful authority." *Id.* at 481. He adds in a note that this "principle was certainly not strong enough to lead the authorities to prosecute Titus Oates for murder in 1685." *Id.* at 481 n.22.

61. 2 Bonner & Smith, *The Administration of Justice from Homer to Aristotle* 166 (1938).

62. Code Theod. 11.39.3 (Pharr transl. 1952).

63. 2 Bonner & Smith, *The Administration of Justice from Homer to Aristotle* 190 (1938).

64. 2 Bonner & Smith, *op. cit. supra* note 63, at 261. Greek legal procedure required that such suits be announced and filed before termination of proceedings in the main trial, and upon denunciation of testimony of a witness in a serious case, the penalty was not inflicted upon the defendant until the false testimony suit was settled.

65. Morrow, *Plato's Cretan City* 286 (1960). "The nature of the penalty attached to perjury has been subject to some dispute." Bonner, *Evidence in Athenian Courts* 91 (1905).

66. Meier, Shomann & Lipsius, *Der Attische Recht und Rechtsverfahren* 783 (1905).

67. Plato, *Laws* 332 (Taylor transl. 1934).

68. 1 *The Civil Law* 71 (Scott ed. 1932).

69. "The Cornelian law respecting assassins and poisoners passed by the dictator Scylla." *Id.* at 325.

70. 11 *The Civil Law* 63 (Scott ed. 1932).

71. Gothofredus, *Corpus Juris Civilis* 1828 note a (1614).

the following marginalia elaborating on this subject: "*Falsus testis in causa vel lite homicid.j., punitur tanquam homicida, si malo testimonium tulerit. . .*"<sup>72</sup> *Testis cuius opera effectum est, ut innocens damnaretur, punitur ut sicarius.*"<sup>73</sup>

An essential part of a formal accusation in a criminal trial under Roman law was the *inscription*, which required that the accuser, in a capital case, "obligate himself by the bonds of the law and undertake . . . to conduct the controversy subject to the risk of the same punishment as the accused."<sup>74</sup> Gothic law inflicted punishment not only upon the false witness who "led the judge astray" in such a case, but also upon the judge who imposed the death penalty, and especially upon the prosecutor of the suit.<sup>75</sup>

Under Chinese law, the offense of perjury was divided into two categories:<sup>76</sup> ordinary perjury in a law court, and false accusation (which is identical with giving false evidence).<sup>77</sup> The provision of the Chinese Code against procuring the conviction of an innocent person by false accusation (evidence) is as follows:

If the false accusation involves the more severe degrees of transportation (i.e., for life and/or with servitude on the frontiers or at the mines), or the commission of an abominable crime, the false accuser shall suffer death.<sup>78</sup>

If the false accusation (evidence) involves an offense, the sentence of which is death, and "if the capital sentence has been executed, the false accuser shall be strangled or decapitated . . . and half his property shall go to the family of the deceased."<sup>79</sup> A further provision is that should one of the family of the falsely accused man die "in consequence of

72. "A false witness in a lawsuit or a murder trial will be punished just as a murderer if he gives bad (false) testimony." *Id.* at 1828 note a.

73. "The witness whose deeds (testimony) caused an innocent person to be condemned is to be punished as a murderer." *Id.* at 1828 note f.

74. Code Theod. 9.1.14 (Pharr transl. 1952).

75. 1 Stiernhook, *De Jure Sueonum et Gothorum Verusto* 3 (Holmiae ed. 1682) quoted in 4 Blackstone, *Commentaries* \*196. See also *Legis Romanae Wisigothorum Fragmenta ex Codice Palimpsesto* 117-79 (Matriti ed. 1896).

76. Alabaster, *Notes and Commentaries on Chinese Criminal Law and Cognate Topics* 502 (1899).

77. "To give false evidence against a person is identical with bringing false accusations; and to make a man swear to what is false is very much the same thing as deliberately inducing him to do so." *Id.* at 344. See the case of Kao Yung-hsiang, in Alabaster, *op. cit.* supra note 76, at 344.

78. *Id.* at 503.

79. *Id.* at 503. In Swift, *Gulliver's Travels* 44 (Ross ed. 1948), Gulliver says the inhabitants of Lilliput have some peculiar criminal laws that are "directly contrary" to those of England, and one of these provides that "if the person accused [of a capital crime] maketh his innocence plainly to appear upon his trial, the accuser is immediately put to an ignominious death . . .," and the innocent person is quadruply recompensed out of the accuser's goods or lands for the danger he underwent.

the accusation,"<sup>80</sup> the false accuser shall be sentenced to death by strangulation.

Baron Montesquieu<sup>81</sup> declared that "in France, the punishment against false witness is capital; in England it is not . . .,"<sup>82</sup> and he explained this difference of laws in the two legal systems as follows:

[I]n France the rack is used against criminals, but not in England . . . in France the accused is not allowed to produce his witnesses; and . . . they very seldom admit of circumstantial evidence in favour of the prisoner; in England they allow of witnesses on both sides. These three French laws form a close and well-connected system; and so do the three English laws.<sup>83</sup>

Since the French courts listened to witnesses on one side of the controversy only, the fate of the accused, says Montesquieu, sometimes depended entirely upon their testimony, and hence apparent justification existed under such a system for harsh treatment of witnesses. By the ancient French law, witnesses were formerly admitted on both sides of a legal controversy, and then, "there was only a pecuniary punishment against false witnesses."<sup>84</sup>

Blackstone, commenting upon Montesquieu's statement of the French law on this subject, observes that "certainly the odiousness of the crime pleads strongly in behalf of the French Law . . .,"<sup>85</sup> and further, under "such a constitution . . . it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown; on whom alone the prisoner's fate depends; so naturally does one cruel law beget another."<sup>86</sup>

In the United States, Texas, as well as California has a statute that punishes murder by perjury with death.<sup>87</sup> This statute was commented upon in the case of *Smith v. State*,<sup>88</sup> where the defendant sought to have a witness declared incompetent to testify against him because she was not old enough to incur the death penalty for false testimony.<sup>89</sup> The court said that in order to make this position tenable, the conviction would have to have been for the death penalty, not for imprisonment. The statute requires . . . not only that the death penalty might be inflicted, . . . and that the witness testified to some material fact bringing about or tending to bring about that conviction. . . . It is not every perjury committed in capital cases

80. Alabaster, Notes and Commentaries on Chinese Criminal Law and Cognate Topics 504 (1899).

81. Montesquieu, *The Spirit of Laws* (6th ed. De Secondat transl. 1793).

82. *Id.* at 430.

83. *Ibid.*

84. *Id.* at 430 note p.

85. 4 Blackstone, *Commentaries* \*138.

86. *Ibid.*

87. *Tex. Pen. Code* art. 309 (1952).

88. 73 *Tex. Crim. App.* 273, 164 S.W. 338 (1913).

89. *Ibid.*

that would justify a prosecution or conviction for perjury with a view of obtaining the death penalty. . . . [T]o obtain the death penalty in death cases, the terms of the statute must be met, and the record must show that these terms were fully met.<sup>90</sup>

Thus, while the court gave its interpretation of the statute, and remarked that "had the jury awarded the defendant in the case the death penalty, the question would have been fraught with many difficulties . . . ,"<sup>91</sup> there has been no case directly in point. Likewise, there has been no case decided in California under the murder by perjury statute.<sup>92</sup> Nevertheless, the penal statutes in these two states make the law the same as Britton said it was in 1300,<sup>93</sup> and as Blackstone wished it was in 1769.<sup>94</sup>

However, the *Macdaniel* case, a dubious authority that destroyed the doctrine of murder by perjury in England, and which is the only case directly in point, has never been overruled.

#### V. CONCLUSION

It is unfortunate that there is such a dearth of case law interpreting the Texas and California statutes. However, it is obvious that in enacting the statutes, the legislatures of these two states found them to be potentially necessary and practicable. The two sole reasons proffered by adversaries of murder by perjury laws are of little value when measured against the light of experience under the two American statutes and pose no true opposition to their obvious worth to modern criminal law as an added safeguard for the lives of the innocent.

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90. *Id.* at 278, 164 S.W. at 840.

91. *Ibid.*

92. Shepard's California Citations is in error in citing *People v. Smith*, 218 Cal. 484, 24 P.2d 166 (1933) (*per curiam*), because this case refers to Cal. Pen. Code § 190. The other case cited by the Shepard's California Citations, namely, *Ex parte Mooney*, 10 Cal. 2d 1, 73 P.2d 554 (1937) (*per curiam*) made only passing reference to § 128 in dicta.

93. See note 1 *supra* and accompanying text.

94. See note 7 *supra* and accompanying text.