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Conviction of Crime as Affecting the Credibility of a Witness in the State of Washington—Competency of Persons Convicted of Perjury to Testify in Civil and Criminal Proceedings

Elmer Goering

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NOTES AND COMMENT

CONVICTION OF CRIME AS AFFECTING THE CREDIBILITY OF A WITNESS IN THE STATE OF WASHINGTON—COMPETENCY OF PERSONS CONVICTED OF PERJURY TO TESTIFY IN CIVIL AND CRIMINAL PROCEEDINGS—At common law persons convicted of heinous offenses were not competent as witnesses.[1] In order to be totally disqualified the witness must have been convicted of a crime making him infamous.[2] The infamous crimes consisted of treason, felony, and all forms of the *crimen falsi*.[3] Just what *crimen falsi* includes is not entirely clear, but generally it comprehends all crimes which involve fraud or falsehood rendering the guilty party entirely untrustworthy, and injuriously affecting the administration of justice.[4]

The disqualification of a witness for infamy has been quite generally abolished by statute. In the state of Washington several

[1] I GREENL. EV. sec. 572.

[2] *Pendock v. Mackinder* Willes 665 ENCYCLOPAEDIA OF EVIDENCE, III p. 204.

[3] I GREENL. EV. Sec. 373.

U. S. v. Yates, 6 Fed. 861 (1881) *Utley v. Merrick*, 11 Metc. (Mass.) 302 (1847)

statutes have been passed regulating this question. Rem. Comp. Stat., sec. 1212, enacted in 1891, provides

> "No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility Provided any person who shall have been convicted of perjury shall not be a competent witness in any case unless the conviction has been reversed, or unless he shall have received a pardon."

Upon reading this section the question immediately arises as to what crimes are meant by the statute, the conviction of which may be shown to affect the credibility of the witness. A very interesting situation has arisen in the state of Washington regarding the showing of convictions of crimes for the purpose of affecting the credibility of witnesses.

The decision in *State v. Payne*[5] was rendered two years after the enactment of Rem. Comp. Stat., sec. 1212. In that case the conviction of petit larceny before a justice of the peace was offered to affect the credibility of the witness. The court argued that statutes similar to ours were passed to remove the common law disability rendering persons convicted of infamous crimes incompetent to testify, and that therefore only such crimes as before the passage of these statutes, excluded witnesses from testifying on account of infamy, can be shown to affect their credibility Furthermore, petit larceny being a misdemeanor, and not being an infamous crime, the evidence should have been excluded.

It would seem that the decision in the *Payne* case was based upon the fact that petit larceny is not considered as being a crime of the grade *crimen falsi*. If it would have been a crime of that nature, the court would have probably held the evidence admissible.

In 1909 the criminal code was adopted in this state. Rem. Comp. Stat., sec. 2290, is a part of this code, and provides.

> "Every person convicted of crime shall be a competent witness in any civil or criminal proceeding, but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record thereof or a copy of such record duly authenticated by the legal custodian thereof, or by other competent evidence, or by his cross-examination upon which he shall answer any proper question relevant to that inquiry and the party cross-examining shall not be bound by his answer thereto."

The decision in *State v. Overland,*[6] rendered in 1912, is based upon the foregoing section of the criminal code. In that case the witness on cross-examination was compelled to admit prior con-

[5] 6 Wash. 563, 34 Pac. 317 (1893).

[6] 68 Wash. 566, 123 Pac. 1011 (1912).

viction of crime. In the opinion the court used the following language

> "Whatever may have been the rule before the adoption of the criminal code, it is now the law that a party accused of a crime, offering himself as a witness, it may be shown that he was previously convicted of crime. This is settled by statute. Nor does sec. 2290 retain the old distinction between misdemeanors and felonies. A crime is an act or omission forbidden by law, and punishable by death, imprisonment, fine, or other penal discipline, and any crime may be shown."

It will immediately be seen that this decision changes the rule of the *Payne* case. The *Overland* case holds that any crime may be shown to affect the credibility of the witness. The *Payne* case allows only such crimes to be shown as at common law rendered the witness infamous. The reasoning of the *Overland* case appears to be that the statutory definition of the word "crime" in the criminal code of 1909 has a wider scope with respect to impeachment of witnesses than the word "crime" contained in section 1212, passed in 1891, in other words, that the common-law meaning of the word "crime" read into the original act, had been so enlarged by the statutory definition of the word as to warrant a different result.

It may be well to compare these two sections in order to see in what respects they differ. Sec. 1212 provides that one convicted of perjury shall be totally disqualified from testifying, whereas sec. 2290 makes no mention of this particular crime as disqualifying the witness. Sec. 2290 provides that the conviction may be shown by the record thereof, or by an authenticated copy thereof, or by other competent evidence, or on cross-examination and the party cross-examining shall not be concluded by his answer thereto. In other words if the witness on cross-examination denies that he has been convicted, the state may show by the record of the conviction that he was. Sec. 1212 does not include these provisions, and the rule under this section was that the party cross-examing is bound by the answer of the witness denying that he was ever convicted of a crime.[8]

In view of the fact that by construction in the *Overland* case the court has held that sec. 2290, passed in 1909, has modified sec. 1212, passed in 1891, with respect to the scope of the word "crime," and in view of the further fact that sec. 2290 in express terms abrogates the rule under 1212 as to proof of conviction in the event of defendant's denial, it seems plain that portion of sec. 1212 retaining the common-law disqualification in the single case

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State v. Turner 115 Wash. 170, 196 Pac. 638 (1921).

[8]*State v. Payne*, note 5, *supra*, *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523 (1901)

of perjury has also been repealed by the broad language of sec. 2290; in other words, that persons convicted of perjury have since 1909 been competent to testify This seems apparent not only from the clear language of sec. 2290, which in terms applies to both "civil" and "criminal" proceedings, a matter clearly covered by the title to the act of 1909,[9] but the court has applied the rule of sec. 2290 in a civil proceeding.[10] Moreover, New York, whence our criminal code is largely derived,[11] has judicially declared that the section which is the prototype of our sec. 2290, has removed the incompetency of convicted perjurers, in the following language:

> "Under the Revised Statutes (2 Rev. St. 681), a person convicted of perjury was not permitted to be a witness in any cause or matter, until his conviction was reversed. While this statute was in force, there was much reason, certainly, in the construction that where a witness, by his own confession on the stand, in presence of the jury, admitted that he had willfully perjured himself on a former occasion in respect to the same matter, his testimony ought to be wholly disregarded to the same extent as though his perjury had been judicially established by conviction. But now, by sec. 714 of the Penal Code, no conviction for crime disqualifies a witness, and the section expressly makes a person convicted of crime, not excepting perjury, a competent witness in any cause or proceeding, civil or criminal, but allows the conviction to be proved for the purpose of affecting the weight of his testimony It would be manifestly absurd, in the light of this statute, now to hold that an unconvicted perjurer was an incompetent witness, whose evidence could not be considered by the jury, when, under the statute, if he had been convicted, his evidence must be received and weighed by the jury In view of the present statute, whatever doubts may have therefore existed, the true rule is that stated by Judge Denio in *Dunn v. People,* 29 N. Y. 529,

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[9] The title to the criminal code of 1909 reads as follows: "An act relating to crimes and punishments and the rights and custody of persons accused or convicted of crime, and repealing certain acts." This act relates in part to "the rights of persons convicted of crime" and plainly appears broad enough to cover the qualifications of witnesses in civil actions, which section 2290 in express terms undertakes to cover.

[10] *Marshall v. Dunn,* 93 Wash. 156, 160 Pac. 298 (1916)

[11] Section 2290 of Remington's Compiled Statutes is in words almost identical with Chapter 41, section 2444 of Cahills Consolidated Laws of New York (1923). The Washington Criminal Code of 1909 was modeled after the criminal codes of New York and Minnesota. See references to New York and Minnesota Codes in 1 Remington and Ballingers Annotated Codes and Statutes of Washington (1910) commencing at section 2253. The corresponding section in the Minnesota Code is Mason's Minnesota Statutes (1927), section 9948.

> and which was followed on the trial of this case—that the testimony of a witness who has committed perjury in the same matter on a prior occasion, whether the perjury is established by a conviction or by his confession, or is found by the jury, 'must be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court, and subject to the determination of the court having a jurisdiction to grant new trials in cases of verdicts against evidence' "[12]

This point, that that portion of sec. 1212 rendering convicted perjurers incompetent has been repealed by sec. 2290, was completely overlooked by the supreme court of Washington in the late cases of *State v. Carpenter*,[13] which was decided on the theory that convicted perjurers are still incompetent as witnesses in this state.

The decision of the *Overland* case is now the law in this state, as is shown by the deciisons rendered since that time. In *State v. Maloney*[14] the state asked the defendant in regard to his conviction for a misdemeanor under the state liquor law The court held that it was once the rule in this case, that the conviction of a misdemeanor could not be shown to affect the credibility of the witness, but that rule has been abolished by Rem. Comp. Stat., sec. 2290, which allows the showing of either a felony or misdemeanor to affect the credibility of the witnesss.

In *State v Nichols*[15] the prosecuting attorney cross-examined the appellant as to a prior conviction for violation of a city ordinance. It was held that this may be done under the statute.

In the case of *Marshall v. Dunn*,[16] evidence of the conviction of Dunn in the police court of Spokane, for the violation of a city ordinance was offered. The court held that sec. 2290 allows this. The case of *State v. Overland* was cited in support of the court's conclusion. However the court in the case of *Marshall v. Dunn* did seem to consider it very important, that the particular crime was *malum in se.*

In *State v. Stone*[17] it was also held that the rule of the *Payne* case is no longer in existence, as it was changed by the criminal code of 1909.

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[12] *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68 (1888), quoted in *Irwin v. Metropolitan St. Ry.*, 54 N. Y. S. 511, see also *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469 (1890)

A similar result has been reached, though perhaps more expressly, in the federal law *Rosen v. United States*, 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406 (1918).

[13] 130 Wash. 23, 225 Pac. 654 (1924).

[14] 135 Wash. 309, 237 Pac. 726 (1925)

[15] 121 Wash. 406, 209 Pac. 689 (1922).

[16] 93 Wash. 156, 160 Pac. 298 (1916).

[17] 66 Wash. 625, 120 Pac. 76 (1912)

The foregoing decisions clearly indicate that it is now the rule in the state of Washington, that prior conviction of any crime may be shown to affect the credibility of the witness. The *Overland case* defines a crime as an act or omission forbidden by law, and punishable by death, imprisonment, fine, or other penal discipline.[18] This includes felonies, and misdemeanors, crimes *malum in se,* and *malum prohibita,* and crimes of the *crimen falsi.* In other words, crimes of any nature may be shown.

In conclusion, it may be said that there is no objection to the present rule except perhaps the fact that some crimes have no bearing whatsoever on the veracity of a witness. An individual may have been convicted of a crime, and yet may be an honest witness. For example, one may have been convicted for violation of a parking ordinance. Minnesota, whose statute on this subject was also a prototype[19] for our sec. 2290, has refused to permit traffic convictions under city ordinances to be shown.[20] It would seem that a crime of this nature should not effect the veracity of the person so convicted. Yet under the present rule in Washington, such a conviction could perhaps be shown to affect the credibility of the witness. ELMER GOERING.

SOME ASPECTS OF REGULATIONS OF FEDERAL RESERVE BOARD AND STATE STATUTES AUTHORIZING FORWARDING OF CHECKS FOR COLLECTION DIRECT TO DRAWEE BANKS AND ACCEPTANCE OF DRAFTS IN PAYMENT—The regulations of the Federal Reserve Board authorize federal reserve banks in handling checks and other negotiable instruments forwarded to them for collection to forward them direct to the banks on which drawn and accept the drawees' drafts in payment.[1]

Statutes have been enacted in California, Colorado, Montana and Oregon authorizing banks doing business in those states to forward checks and other negotiable instruments received for collection direct to the banks on which drawn and accept the drawees' drafts in payment.[2]

These regulations and statutes were enacted to counteract the effect of the decision of the Supreme Court of the United States in the case of *Federal Reserve Bank v. Malloy,*[3] in which case the Supreme Court of the United States held that a former regulation

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[18] Note 6, *supra.*

[19] See note 11, *supra.*

[20] *Carter v. Duluth Yellow Cab Co.,* (Minn.) 212 N. W 413; see also *Neal v. United States* (C. C. A. 8th), 1 F (2d) 637, where the municipal ordinance cases are discussed and the Washington cases inferentially criticised.

[1] Regulation J, Series of 1928, superseding Regulation J, Series of 1924.

[2] Laws of California, 1925, c. 312, sec. 5, Laws of Colorado, 1925, c. 64, p. 172; Laws of Montana, 1925, c. 63, p. 85, Laws of Oregon, 1925, c. 207, sec. 126. p. 360.

[3] 264 U. S. 160, 44 Sup. Ct. 296, 68 L. ed. 617 (1924).