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COMMENT

CONVICTION OF PERJURY AS A DISQUALIFICATION OF A WITNESS IN THE STATE OF WASHINGTON

Has Washington completely abrogated the common law rule which makes any person convicted of an infamous crime an incompetent witness?

During the last century England and the majority of the states have eliminated or modified the common law rule. Today, generally, such a conviction is admissible to affect the credibility of the witness but will not bar his testimony except that in some states a conviction of perjury continues to disqualify. At first blush it would seem as though Washington were within this group.

Rem Rev Stat § 1212 No person offered as a witness shall be excluded from giving evidence by reason of a conviction of crime, but such conviction may be shown to affect his credibility: Provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall receive a pardon (L '91, p 33 § 1) (Italics supplied)

However, a subsequent enactment (Section 38 of the Criminal Code of 1909) makes this conclusion questionable:

Rem Rev Stat § 2290 Every person convicted of a 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 concluded by his answer thereto.

In construing the scope of the latter statute in respect to its effect upon the former, reference must be made to the following provisions of the 1909 code:

Rem Rev Stat § 2300 The provisions of this act, insofar as they are substantially the same as existing statutes, shall be construed as continuations thereof and not as new enactments.

Rem Rev Stat § 2301 No statute, law or rule is continued in force because it is consistent with the provisions of this act on the same subject, but in all cases provided for by this act, all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this act, unless expressly continued in force by it, are repealed and abrogated.

Also included in the Criminal Code of 1909 was a special repealer clause\(^1\) in which a schedule of specific previous enactments were expressly repealed, Section 1212 as not among those listed. Such an omission might arguably indicate a legislative intent not to repeal that section.

\(^1\)Rem Rev Stat § 2304
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However, such a patent inconsistency appears upon the face of Sections 2290 and 1212 (1212 excludes as a witness any person convicted of perjury while the latter section provides without exception that every person convicted of a crime shall be a competent witness) that a question arises as to whether Section 1212 remains in force.

The court, as yet, has not ruled upon this point. Three cases have appeared in which the facts were such that had the issue been presented the court could have decided the question. In the first of these cases the defendant was being tried for perjury committed by him as a party in a civil action which had not terminated as of the time of the criminal trial. The defendant asked for a continuance on the ground that the prosecuting witnesses were his opponents in the civil suit and would profit by his conviction. The court granted the continuance, saying:

"If the judgment appealed from is affirmed, the appellant is rendered incompetent to testify in the civil action or any other action." (Italics supplied)

No reference was made to Section 2290 which, if literally applied, would have eliminated the necessity for a continuance since the defendant would have been a competent witness notwithstanding the prior conviction.

In the next case the defendant in a criminal action, who had a record of a conviction of perjury, asked for a continuance pending an appeal of that conviction so that he would be competent to testify in his own behalf in the present trial. The court denied the continuance, holding, in effect, that Section 1212 must yield to his constitutional right to testify in his own behalf and he was permitted to testify. It seems to be assumed in the opinion that a conviction of perjury continues to disqualify, generally.

In the third case the defendant was charged with perjury in the first degree as a result of his testimony in a former civil action, wherein he had testified that he had not previously been convicted of the crime of perjury. The court in affirming the conviction held that a convicted perjurer is not a competent witness in a civil action and that defendant's testimony was consequently material.

The effect of the Criminal Code of 1909 has thus not been considered by the court and the disqualification included in Section 1212 continues to be applied.

When a statute is adopted from another jurisdiction, the judicial construction placed upon the statute in that jurisdiction is also adopted and made a part thereof, unless to do so would violate the existing law of the adopting state. The Washington Code was patterned, in the main, after the New York Code; Section 2290 is similar to Section 832 of the Civil Code of Procedure of New York. Thus it would seem...

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1 State v. Elaid, 55 Wash. 302, 104 Pac. 275 (1909).
2 State v. Vane, 105 Wash. 421, 177 Pac. 728 (1919).
3 State v. Carpenter, 130 Wash. 23, 226 Pac. 654 (1924).
5 Section 832, NEW YORK CIVIL CODE OF PROCEDURE (as amended in 1876):
6 "A person who has been convicted of a crime or misdemeanor, is notwithstanding a competent witness in a civil or criminal action, or special proceeding, but the conviction may be proved for the purpose of affecting the..."
that a holding in New York interpreting that section should be author-
itive in Washington. In an early New York case, an issue arose as
to the competency of a person who had been convicted of a crime. The
court held that Section 832 of the Civil Code of Procedure repealed
by implication an earlier act which had disqualified a witness who had
been convicted of a crime. The court said:

"From the irreconcilable repugnancy which exists between
these acts, the inference follows, that the provisions of the
Revised Statutes were intended to be repealed by the enact-
ment of the Code of Civil Procedure."

Additional support for an implied repeal is found in a New Jersey
case holding that a statute section nearly identical to Section 2290
repealed by implication a section nearly identical to Section 1212.
Some indication that our legislature intended a comprehensive change
by enacting the Criminal Code is shown by the title of the act, "An
Act Relating to Crime and Punishments and the Rights and Custody
of Persons Accused or Convicted of Crimes," and also by reference to
Section 2301 quoted above. Judicial notice of such an intent was taken
by the court in an early Washington case construing the act. The
court said:

"It was the evident intention of the legislature, manifested
not only by the title of the act, but by the comprehensiveness
of the act itself, to which were added general and specific re-
pealing clauses, that the Criminal Code should stand in the
place of all previous enactments, as well as the former pro-
cedure, whether defined by statutes or declared by the court."

The question of whether an act repeals another by implication is a
judicial question which is not affected by a legislative declaration that
a repeal has or has not been affected. Repeals by implications are not
favored and, unless there is a clear showing that the legislature intended
to repeal but failed to do so in so many words, the court will hold that
there has been no repeal. Nevertheless, where a later act covers the
same subject matter more fully and completely, the earlier act is deemed
to be impliedly repealed. In addition, where the provisions of the
two acts on the same subject matter are in direct conflict, the latter will
abrogate the earlier.

Therefore, if the issue were to be squarely presented, it appears that a
strong argument could be made that Section 2290 repealed by implication
Section 1212, and that, therefore, a person convicted of perjury is,
notwithstanding Section 1212, a competent witness in the courts of this

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weight of his testimony, either by the record or by his cross-examination,
on which he must answer any question relative to that inquiry, and the
party cross-examining is not concluded by his answer to such a ques-
tion."

7 New York v McGloin 91 N Y 241 (1883)
8 State v Wendel 96 N J Law 9, 115 Atl 390 (1921)
9 State v Blaine, 64 Wash 122, 116 Pac 660 (1911)
10 Merlo v Johnson & Big Muddy Coal Co., 258 Ill 328, 101 N E 525
   (1919)
11 Bachelor v Palmer, 129 Wash 150, 224 Pac 685 (1924)
12 In re Donnellan 49 Wash 460, 95 Pac 1085 (1908); State v George,
   84 Wash 113, 146 Pac 378 (1915); McCloskie v Kinnear, 145 Wash 686 261
   Pac 795 (1927)
13 State v Karsunky 197 Wash 87 84 P (2d) 390 (1938)
Such a holding would establish a rule in this state which is looked upon with favor by most of the writers on the law of evidence. The Model Code of Evidence provides that a prior conviction may be proved only to affect the credibility of a witness. In addition, a leading authority in this field says:

"There can be, then, no justification for the disqualification of a person by reason of a conviction of a crime; and legislation has now in almost all states recognized this, with more or less thoroughness, by abolishing the common law rule."

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24 The Model Code of Evidence (1942) § 105
25 Wigmore, Evidence (3rd ed 1924) § 519