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# COMMENT

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## 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<sup>1</sup> 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.

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<sup>1</sup> REM REV STAT § 2304

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<sup>2</sup> 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<sup>3</sup> 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<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> Thus it would seem

<sup>2</sup> State v Eaid, 55 Wash. 302, 104 Pac 275 (1909).

<sup>3</sup> State v Vane, 105 Wash. 421, 177 Pac 728 (1919).

<sup>4</sup> State v Carpenter, 130 Wash 23, 225 Pac 654 (1924).

<sup>5</sup> Garrahty v National Bank of Commerce, 8 Wn (2d) 439, 112 P (2d) 846 (1941); West Side Irrigating Co v Chase, 115 Wash 146, 196 Pac 666 (1921); State v Brunn, 145 Wash 435, 260 Pac 990 (1927); State v Tranchell, 164 Wash 71, 2 P (2d) 64 (1931).

<sup>6</sup> Section 832, NEW YORK CIVIL CODE OF PROCEDURE (as amended in 1876): "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 authoritative in Washington. In an early New York case<sup>7</sup> 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 enactment of the Code of Civil Procedure."

Additional support for an implied repeal is found in a New Jersey case<sup>8</sup> 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<sup>9</sup> 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 repealing clauses, that the Criminal Code should stand in the place of all previous enactments, as well as the former procedure, 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.<sup>10</sup> 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.<sup>11</sup> Nevertheless, where a later act covers the same subject matter more fully and completely, the earlier act is deemed to be impliedly repealed.<sup>12</sup> In addition, where the provisions of the two acts on the same subject matter are in direct conflict, the latter will abrogate the earlier.<sup>13</sup>

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, upon which he must answer any question relative to that inquiry, and the party cross-examining is not concluded by his answer to such a question."

<sup>7</sup> *New York v McGloin* 91 N Y 241 (1883)

<sup>8</sup> *State v Wendel* 96 N J Law 9, 115 Atl 390 (1921)

<sup>9</sup> *State v Blaine*, 64 Wash 122 116 Pac 660 (1911).

<sup>10</sup> *Merlo v Johnson & Big Muddy Coal Co*, 258 Ill 328, 101 N E 525 (1919)

<sup>11</sup> *Bachelor v Palmer*, 129 Wash 150, 224 Pac 685 (1924)

<sup>12</sup> *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)

<sup>13</sup> *State v Karsunky* 197 Wash 87 84 P (2d) 390 (1938)

state. 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.<sup>14</sup> 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."<sup>15</sup>

JOHN LEE

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<sup>14</sup> THE MODEL CODE OF EVIDENCE (1942) § 105

<sup>15</sup> WIGMORE, EVIDENCE (3rd ed 1924) § 519