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## The Effect in Virginia of Conviction of Crime on Competency and Credibility of Witnesses

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## VIRGINIA SECTION

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## THE EFFECT IN VIRGINIA OF CONVICTION OF CRIME ON COMPETENCY AND CREDIBILITY OF WITNESSES

### *Statutes Collected*

AT COMMON law, a person convicted of treason, felony, or any misdemeanor of the sort known by the term *crimen falsi* was incompetent afterwards to be a witness.<sup>1</sup> The precise scope of the *crimen falsi* has never been exactly defined, but it is agreed that petit larceny, forgery, and criminal fraudulent practices are included therein.<sup>2</sup> This rule of exclusion had its origin late in the 1600s.<sup>3</sup> The first statute passed in colonial Virginia on this subject was in the year 1748 and read as follows:

“And whereas convicts, as well as negroes, mulattos, and Indians, are commonly of such base and corrupt principles, that their testimony cannot be depended upon: To prevent the mischiefs which may happen, by admitting such pre-

<sup>1</sup> Taylor v. Beck, 3 Rand. (24 Va.) 316 (1825).

<sup>2</sup> 1 WIGMORE, EVIDENCE (2d ed. 1923) 937-938.

<sup>3</sup> *Id.* at 933.

carious evidence, Be it further enacted, by the authority aforesaid, That no person convicted, and sentenced to transportation, as is herein before recited, shall be admitted in any court of this colony, or before any justice of peace to be sworn as a witness, or to give evidence in any cause, civil or criminal, except against or between any other convicts, until the term for which such person was sentenced to be transported, shall appear to be fully expired \* \* \*.”<sup>4</sup>

A number of statutes on these matters have been passed subsequently by the Commonwealth as follows:

“No person convicted of perjury shall be capable of being a witness in any case, \* \* \*.” (1777)<sup>5</sup>

1. “Be it enacted by the general assembly, That no person convicted of treason, murder or other felony whatsoever, shall be admitted as a witness in any case whatsoever, unless he be first pardoned, or shall have received such punishment, as by law ought to be inflicted upon such conviction.”
2. “No person convicted of perjury, although he be pardoned or punished for the same, shall be capable of being a witness in any case.” (1792)<sup>6</sup>

“No person convicted of felony shall be admitted as a witness in any case unless he be first pardoned, or shall have been punished for such felony; but no person convicted of any perjury, although he be pardoned or punished for the same, shall be capable of being a witness in any case.” (1847-48)<sup>7</sup>

“Except where it is otherwise expressly provided, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor, and a person convicted of perjury shall not be a witness, although pardoned or punished.” (1849)<sup>8</sup>

The last mentioned remained the statutory rule of this State until the 1919 revision, save only that in the revision of 1887 it was given the Section Number 3898 and the title, “*Convicts as witnesses*”.

In the 1919 revision there is a fundamental change made in the law in keeping with the general policy of growing liberaliza-

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<sup>4</sup> 5 HENING'S STATUTES AT LARGE 546-547.

<sup>5</sup> 9 *Id.* 411.

<sup>6</sup> 1 STATUTES AT LARGE (N. S.) 196.

<sup>7</sup> Virginia Acts of Assembly 1847-48, p. 124.

<sup>8</sup> CODE OF VIRGINIA 1849, c. 199, § 19.

tion in the admission of evidence. The statute now reads as follows:

Section 4779. "*Convicts as witnesses.*—Conviction of felony or perjury shall not render the convict incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit."

It will be observed that none of these statutes say one word as to the status of one who has been convicted of an infamous crime not amounting to felony or perjury and of the nature of the *crimen falsi* such as petit larceny, forgery, receiving stolen property, and the like.

*Meaning of the Word "Convict" in Our Present Statute*

The title of our present statute is "*Convicts as witnesses*" and it is the "convict" that is rendered capable of testifying, but who can be impeached by showing the fact of conviction of felony or perjury. The question at once arises whether the term "convict" has the popular meaning of one confined in a penitentiary under sentence of conviction, or the original meaning of one who has been convicted of a felony at any time. While both meanings are given in modern dictionaries, it has been taken for granted by the courts of this State that the statute has used the word in its original sense. To hold otherwise would lead to one of two equally undesirable results, *viz.*, that convicts who have served their sentences must be treated as any other witnesses and not be subject to impeachment for conviction of crime; or, that since the status of such persons is not mentioned, they are still incompetent witnesses under common law principles. The Supreme Court of Appeals has repudiated the first of these alternatives,<sup>9</sup> and the second one (if adopted) would place convicts still serving their terms in a better position than convicts who had fully served their terms. In addition, it would be contrary to the whole modern tendency of liberalization.

Moreover there is one class of cases where the convict never goes to the penitentiary, as in the case of the imposition of a jail sentence or fine in lieu of a sentence to the penitentiary, where

<sup>9</sup> See *Davidson v. Watts & Flint*, 111 Va. 394, 69 S. E. 328 (1910).

such punishment is allowed in the discretion of the jury. In such cases the fact of conviction can be shown to impeach the witness so convicted<sup>10</sup> it being well settled that it is the possibility of giving confinement in the penitentiary as punishment rather than the action of so giving it that determines whether an offense is a felony or a misdemeanor.<sup>11</sup>

So we are safe in concluding that "convicts" refers to anyone who has been convicted of a felony and not merely to those who are still serving their sentences (subject to what is stated in the next section).

*Effect of Conviction of Felony or Perjury in Another Jurisdiction*

There are two Virginia cases which hold that under our statute as it existed prior to 1919, a conviction in the courts of another jurisdiction of felony or perjury did not disqualify the witness in the courts of Virginia.<sup>12</sup> In neither of these cases is there any discussion of whether or not such conviction could be shown for purposes of impeachment. But since conviction of felony or perjury in the Federal courts or in the courts of a sister State is just as relevant on the question of veracity as a conviction in our own courts, it is just as desirable to allow such a conviction to be shown in the one case as in the other. This is Wigmore's view.<sup>13</sup> In *Samuel's* case<sup>14</sup> the court quoted *Greenleaf on Evidence* approvingly as follows:

"Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of a witness in the courts of this country is a question upon which jurists are not entirely agreed. But the weight of modern opinion seems to be that personal disqualifications, not arising from the law of nature, but from the positive law of the country, and especially such as are of a penal

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<sup>10</sup> *Fletcher v. Commonwealth*, 163 Va. 1007, 175 S. E. 895 (1934).

<sup>11</sup> *Id.*

<sup>12</sup> *Samuels v. Commonwealth*, 110 Va. 901, 66 S. E. 222 (1909) (conviction for perjury in a Federal court sitting in Virginia); *Kain v. Angle*, 111 Va. 415, 69 S. E. 355 (1910) (conviction for felonious fraud in a Federal court sitting in Virginia).

<sup>13</sup> 2 WIGMORE, EVIDENCE (2d ed. 1923) 363.

<sup>14</sup> *Supra* n. 12.

nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated. Accordingly, it has been held, upon great consideration, that a conviction and sentence for a felony in one of the United States did not render the party incompetent as a witness in the courts of another State; *though it might be shown in diminution of the credit due to his testimony.*" (Italics added.)

There are a number of decisions outside of Virginia that have allowed convictions in other jurisdictions to be shown by way of impeachment.<sup>15</sup>

Thus it would seem that the law on this question would be clear; but there is some doubt thrown upon the matter as the result of a headnote to *Uhl v. Commonwealth*,<sup>16</sup> there being in that case a refusal of a writ of error without any written opinion, and hence no discussion of our question. The headnote in question reads, "A record of the conviction of a witness for petty larceny, in another State, is not admissible evidence to impeach the veracity of the witness". This, of course, implies that the fact that the conviction was in another State is the reason that it can not be shown to impeach a witness in this State. But when it is considered (1) that it was petit larceny (only a misdemeanor) that was involved, (2) that there is no opinion to support the headnote, and (3) that the Supreme Court of Appeals in *Barbour v. Commonwealth*<sup>17</sup> says that the decision in *Uhl v. Commonwealth*<sup>18</sup> does not appear to rest upon that ground, it is believed that the doubt raised by that headnote is totally dispelled, and that conviction of felony or perjury (at least where the crime would be felony or perjury if committed in Virginia) in the courts of another jurisdiction can be shown by way of impeachment.

#### *Effect of Conviction of Petit Larceny and the Crimen Falsi*

At common law conviction of the crime of petit larceny disqualified a witness. In our statutory enactments only the terms

<sup>15</sup> See for instance *Attorney General v. Pelletier*, 240 Mass. 264, 134 N. E. 407 (1922); *State v. Foxton*, 166 Iowa 181, 147 N. W. 347 (1914).

<sup>16</sup> 6 Gratt. (47 Va.) 706 (1849).

<sup>17</sup> 80 Va. 287 (1885).

<sup>18</sup> *Supra* n. 16.

"felony" and "perjury" are used, and hence it is arguable that these statutes have no effect on the common law rule of disqualification for conviction of the crime of petit larceny, and that conviction of that crime still renders the convicted one incompetent. But if we so decided, we would have the ridiculous result that one convicted of grand larceny was a competent witness while one convicted of petit larceny was not.

In *Barbour v. Commonwealth*<sup>19</sup> the issue was presented squarely to our Supreme Court of Appeals. The Court held that our statutes suspended the whole common law on this subject and hence that any witness was competent (so far as conviction for crime might be concerned) unless expressly excluded by our statutes. And as petit larceny is not a felony or perjury, the witness is competent.

But can the fact of the witness' conviction be shown to impeach his credibility? On principle one who shop-lifts merchandise worth forty-nine dollars is just as unlikely to tell the truth as one who steals property worth fifty dollars. And in other jurisdictions there are decisions to the effect that conviction of petit larceny can be shown to impeach a witness.<sup>20</sup> But in *Barbour v. Commonwealth*<sup>21</sup> the court not only refused to disqualify the witness who had been convicted in Virginia of petit larceny, but also refused to allow his impeachment by showing his conviction (*semble*) on the ground that such a proceeding would violate the rule against proving particular discreditable acts rather than proof of general character for truth. It is necessary to say "*semble*" for it does not specifically appear that the particular acts and offences committed by the witness included his conviction of the crime of petit larceny.

In *Smith v. Commonwealth*<sup>22</sup> the Supreme Court of Appeals speaking through Mr. Justice Holt said,

"It is not proper to ask a witness if he has been indicted, and it is not proper to show that he has been convicted of an *ordinary* misdemeanor \* \* \*." (Italics added.)

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<sup>19</sup> *Supra* n. 17.

<sup>20</sup> See for instance *State v. Dyer*, 139 Mo. 199, 40 S. W. 768 (1897).

<sup>21</sup> *Supra* n. 17.

<sup>22</sup> 155 Va. 1111, 156 S. E. 577 (1931).

Quaere: Does this mean that it is proper to show that he has been convicted of a misdemeanor which (unlike the general run of misdemeanors) would indicate that he might not be worthy of belief upon the witness stand?

The right to impeach a witness for any crime involving his character for truth is recognized, at least impliedly, by *Langhorne's* case<sup>23</sup> and some dicta in other cases. In *Langhorne's* case<sup>24</sup> a witness was asked, "Were you not arrested, tried, and convicted before a magistrate's court in the city of Lynchburg?" An objection was sustained. The Supreme Court of Appeals approved the sustaining of the objection, saying,

"The question does not imply that the witness had been guilty of an offense which would affect his credibility on oath, and unless it was shown by the question that the inquiry was in relation to such a conviction, the prisoner was not entitled to an answer."

Since only a misdemeanor could have been involved (as the magistrate had no jurisdiction over felony trials), there is clear implication that if the offense had been of such a nature as to affect his credibility on oath then the conviction could have been shown.

As to the dicta, the most prominent pronouncement is that of Judge Burks in *Harold v. Commonwealth*<sup>25</sup> in which the learned judge said,

"Whatever may be the rule elsewhere, it is well settled in this state that the character of a witness for veracity cannot be impeached by proof of a prior conviction of crime, unless the crime be one which involved the character of the witness for veracity."

Note that Judge Burks does not say "felony" but "crime".

Whether or not a witness may be impeached by showing his conviction of a misdemeanor affecting his credibility is thus left in doubt. If he cannot be, it is regrettable. The matter should be clarified by statute.

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<sup>23</sup> 76 Va. 1012 (1882).

<sup>24</sup> *Supra* n. 23.

<sup>25</sup> 147 Va. 617, 136 S. E. 658 (1927).



*Must the Felony Be One Affecting Credibility?*

At common law all felonies were infamous, and no distinction was drawn between felonies affecting credibility, as grand larceny, and those not affecting credibility, as involuntary manslaughter. Our Virginia statute likewise draws no such distinction. It now provides that the fact of conviction of felony or perjury may be shown in evidence to affect the credit of the witness.<sup>26</sup> To date no case has been reversed because a trial court allowed impeachment of a witness by showing conviction of a felony not affecting credibility.

But in *Harold v. Commonwealth*<sup>27</sup> there is the dictum of Judge Burks as follows:

“Whatever may be the rule elsewhere, it is well settled in this state that the character of a witness for veracity cannot be impeached by proof of a prior conviction of crime, unless the crime be one which involved the character of the witness for veracity.”

Unfortunately the learned judge cites no authority for the statement that the rule is “well settled” insofar as conviction of felonies is concerned. The particular case involved proof of conviction of a witness for a minor violation of the then existing Federal prohibition law in the District of Columbia; only a misdemeanor. In *Davidson v. Watts & Flint*<sup>28</sup> the Supreme Court of Appeals considered the question of whether or not grand larceny was a felony affecting credibility, but since it obviously is such a felony, it was wholly unnecessary to determine (and the court did not determine)<sup>29</sup> what the result would have been had the felony not involved his character for truth. In *Langhorne v. Commonwealth*<sup>30</sup> in which similar language is used there was only an unnamed misdemeanor involved. And in *Cutchin v. City of Roanoke*<sup>31</sup> only the question of whether the reputation for chastity of a female witness could be shown by way of im-

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<sup>26</sup> VA. CODE (Michie, 1936) § 4779.

<sup>27</sup> *Supra* n. 25.

<sup>28</sup> *Supra* n. 9.

<sup>29</sup> But *cf.* Note (1911) 16 VA. L. REG. 689.

<sup>30</sup> *Supra* n. 23.

<sup>31</sup> 113 Va. 452, 74 S. E. 403 (1912).

peachment was involved. There is no square *holding* that the felony must be one that involves the witness' character for truth, and in *Fletcher v. Commonwealth*<sup>32</sup> the Supreme Court of Appeals held that no error was committed by asking the accused on cross examination if he had ever been convicted of a felony (where the felony was unlawfully *but not maliciously* shooting at an automobile occupied by passengers). The untenable objection was made that this was only a misdemeanor since the jury, in its discretion, had only sentenced him to jail and to pay a fine, although the witness could have been sent to the penitentiary. Had the objection been made that such a felony does not involve one's reputation for truth we might have had a clear cut decision on this point.

On principle it is difficult to see how the commission of a felony not affecting one's character for truth could be relevant on the question of veracity, but since the circumstances of each felony may vary greatly, it would be best not to have the hard and fast rule that our statute apparently fixes, but to let the court in its discretion determine in each case whether or not the conviction of the felony is relevant on the question of the witness' credibility.

#### *Method of Proof*

The witness is customarily asked on cross examination whether he has been convicted of such and such a felony. If he denies it, then the so-called best evidence rule applies and the record of conviction must be produced.<sup>33</sup> Since such fact could be proved independently by the record, the impeaching side is, of course, not bound by the witness' answer.

#### *Rehabilitation*

If a witness has been impeached by showing his conviction of a felony, the spirit of the rule laid down in *George v. Pilcher*<sup>34</sup> would certainly allow the offering party to attempt to rehabilitate

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<sup>32</sup> *Supra* n. 10.

<sup>33</sup> For full discussion, see 2 WIGMORE, EVIDENCE (2d ed. 1923).

<sup>34</sup> 28 Gratt. (69 Va.) 299 (1877).

him by showing his present good reputation for truth. The Court in that case said,

“Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross examination, \* \* \* or, in general, *whenever his character for truth is impeached in any way known to the law* the party calling him may sustain him by evidence of his general reputation for truth.” (Italics added.)<sup>35</sup>

But the rule allowing rehabilitation is a very liberal one in this State, and can be best stated by quoting from Mr. Justice Hudgins' majority opinion (three judges dissenting on another point) in *Smith v. Commonwealth*<sup>36</sup> as follows:

“The only ground for the admissibility of evidence of a former conviction is to discredit the witness in the case then being tried. To remove that stain, or to weaken its weight, the accused has a right to show the nature of the charge, the mere fact, if it was a fact, that he was convicted on conflicting evidence, and that he had served his time or had been paroled or pardoned by the governor.”

In the trial of the above case the trial court refused to allow the party offering the impeached witness to show that his conviction had been obtained by perjury, that this perjury had been admitted, and that the party committing the perjury had settled a civil action for the wrong committed by him in bearing false witness by the payment of \$1,000. This refusal was held to constitute reversible error.

#### *Suggested Statutory Change*

In order to (a) make clear at a glance the meaning of the word “convict”, (b) determine the status of a witness who has been convicted of a misdemeanor involving his character for truth, (c) determine the effect of a conviction of crime in another jurisdiction, and (d) determine whether the conviction of felony must involve a crime affecting one's character for

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<sup>35</sup> See also the decision of Mr. Justice Holmes in *Gertz v. Fitchburg Railroad Company*, 137 Mass. 77 (1884).

<sup>36</sup> 161 Va. 1112, 172 S. E. 286 (1934).

truth, it is recommended that Section 4779 of the Code be changed from its

*Present Reading*

Section 4779. "*Convicts as witnesses.*—Conviction of felony or perjury shall not render the convict incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit."

to the

*Proposed Reading*

Section 4779. *Impeachment of witnesses for conviction of crime.*—Conviction of crime or perjury shall not render the person convicted incompetent to testify, but the fact of conviction, wherever taking place, if involving character for truth, may be shown in evidence to affect his credit.

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