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doctrine, there is nothing inherent in the nature of a charity to justify such an application.

> [I]f the gift in trust for charity is itself conditional upon a future . . . event, it is subject . . . to the same rules . . . as any other estate [contingent] . . . upon a condition precedent. . . . [I]f it is so remote and indefinite as to transgress the limits of time prescribed by the law . . . against perpetuities, the gift fails *ab initio*.[137]

If the Rule Against Perpetuities is to be held inapplicable to charitable trusts, the only recognized reason should be an expressed public policy which encourages private charitable benefaction, not the abstract fictions which the *cy pres* doctrine has imposed on the rule against remoteness.

THE EFFECT OF PERJURY ON CREDIBILITY OF WITNESSES IN NEW YORK

I. INTRODUCTION

The law governing the effect of perjury[1] on the competency and credibility[2] of witnesses in New York has been static for seventy-five years. The fact that a witness has made inconsistent or false statements under oath—whether deliberately or not, and whether in the same proceeding or not—is admissible *only* to affect the weight of his testimony. A change in this rule would afford innocent parties greater protection against perjury, and would provide a more effective deterrent to perjury than presently exists.

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137. Chamberlayne v. Brockett, 8 Ch. 206, 211 (1872). See also Cherry v. Mott, 1 Myl. & C. 123, 133, 40 Eng. Rep. 323, 327 (Ch. 1836).

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1. In this discussion everything which is said concerning perjury applies with equal validity to subornation of perjury—that is, procuring another to commit perjury.

2. "Competency" refers to a witness' qualification to testify, and is always determined by the court. "Credibility" of a witness' testimony is its worthiness of belief, and it is a question of fact except in cases where the testimony is so ridiculous that it is incredible as a matter of law. This latter exception seems to be limited to cases where a witness testified to a physically impossible thing. See Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 246, 54 N.E.2d 809, 811 (1944); In the Matter of Estate of Harriot, 145 N.Y. 540, 545, 40 N.E. 246, 248 (1895); Hudson v. Rome, W. & O.R.R., 145 N.Y. 408, 40 N.E. 8 (1895); Schweitzer v. Forbes Fireproofing Corp., 5 App. Div. 2d 419, 172 N.Y.S.2d 511 (1st Dep't 1958); Tosto v. Marra Bros., 275 App. Div. 686, 86 N.Y.S.2d 549 (2d Dep't), aff'd mem., 299 N.Y. 700, 87 N.E.2d 74 (1949); Walker v. Murray, 255 App. Div. 815, 7 N.Y.S.2d 336 (2d Dep't 1938), aff'd mem., 280 N.Y. 709, 21 N.E.2d 209 (1939); Lindenbaum v. Georgakakos, 27 Misc. 2d 979, 214 N.Y.S.2d 64 (Sup. Ct. 1961); Royce Haulage Corp. v. Bronx Terminal Garage Inc., 185 Misc. 892, 57 N.Y.S.2d 760 (Sup. Ct. 1945); Smith v. State, 34 Misc. 2d 911, 229 N.Y.S.2d 438 (Ct. Cl. 1962).

II. Historically: Effect of Prior Conviction of Crime on Competency and Credibility

A. *Crime in General*

The common-law rule in New York, a carry-over from English law, disqualified any person from testifying who had been convicted of an infamous crime.[3] The dubious reasoning supporting this rule was that a person guilty of such a crime was not to be trusted in *any* regard, and therefore should not be allowed to testify.[4]

This rule was refined and enacted into statute in New York in 1827:

> No person sentenced upon a conviction for felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor or by the legislature; except in the cases specially provided by law; but no sentence upon a conviction for any offence other than a felony, shall disqualify or render any person incompetent to be sworn or to testify, in any cause, matter or proceeding, civil or criminal.[5]

The objections to such a statute were many. If it be taken literally, a felon, once sentenced, could not thereafter testify in his own defense, unless pardoned. The fact that a person has committed a crime should cast no reflection on his truthfulness, unless, of course, the crime involves perjury. The statute also imposed an unjust burden upon innocent third parties—as in cases where an erstwhile felon was the only eyewitness to an accident or crime; the disqualification of the witness might then have been the material element which unjustly prevented recovery (a burden upon the injured party) or a conviction (a burden upon society).

Some change, therefore, was inevitable. In 1869, by statute, all defendants in criminal prosecutions were rendered competent to testify.[6] The major step, however, was taken in 1876, with the enactment of the Code of Civil Procedure.[7] Section 832, the model for our present statute, provided:

> 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 weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any

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3. People v. McGloin, 91 N.Y. 241, 250 (1883); People v. Whipple, 9 Cow. 707, 708 (N.Y. Ct. of Oyer & Terminer 1827).

4. See Richardson, Evidence § 411 (8th ed. 1955); 2 Wigmore, Evidence § 519 (3d ed. 1940).

5. 2 N.Y. Rev. Stat. pt. IV, ch. 1, tit. 7, § 23 (1829).

6. "In the trial of all indictments . . . against persons charged with the commission of crimes . . . the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him." N.Y. Sess. Laws 1869, ch. 678, § 1.

7. N.Y. Sess. Laws 1876, chs. 448-49. The Code of Civil Procedure was originally entitled "The Code of Remedial Justice."

question, relevant to that inquiry; and the party cross-examining him is not concluded, by his answer to such a question.[8]

This provision effectively repealed the old common-law rule and the earlier enactments based on that rule.[9]

A similar provision was incorporated into the Penal Code in 1881.[10] The law established by these statutes still survives today, virtually unchanged, in the Civil Practice Act[11] and the Penal Law,[12] and will be continued in effect in the Civil Practice Law and Rules.[13]

The only other related statute is Section 343-a of the Civil Practice Act, which allows the introduction, for purposes of impeaching a witness, of proof of prior inconsistent statements, either written and subscribed by him or made under oath. This statute clearly does not apply to false statements made in the same trial, for they are already in the record and need not be proved. It further appears from the language of the statute that its purpose was merely to insure that evidence of prior inconsistent statements, admitted on the question of a witness' truthfulness, meets a minimum standard. Whether the proof be used to render a witness' testimony incredible as a matter of law or to impeach his credibility in the minds of the jury seems outside the purview of this statute.

B. *Perjury in Particular*

At common law (before 1827) it was unnecessary to consider separately the effect of conviction of perjury. One convicted of that crime was disqualified because it was an infamous crime, and the fact that it was directly related to the sacredness of the oath was extraneous.

The relationship between credibility and the specific crime of perjury was recognized by the legislature for the first and only time in 1827. Since perjury was a felony, the statute disqualifying felons would have been sufficient to disqualify convicted perjurers. Nevertheless, the Revised Statutes also included a provision with the definition of perjury, that one convicted of perjury "shall not thereafter be received as a witness to be sworn, in any matter or cause whatever, until the judgment against him be reversed."[14]

This statute was not a holdover from the common-law theory that one guilty of an infamous crime is not to be trusted. Rather, the rationale was that one convicted of perjury has been proved, beyond a reasonable doubt, to have a flagrant disregard for the sacredness of the oath—and therefore his testimony thereafter became entirely untrustworthy.

8. N.Y. Sess. Laws 1876, ch. 448, § 832. The bracketed words were added by amendment, N.Y. Sess. Laws 1879, ch. 542.

9. People v. McGloin, 91 N.Y. 241, 251 (1883).

10. N.Y. Sess. Laws 1881, ch. 676, § 714.

11. N.Y. Civ. Prac. Act § 350.

12. N.Y. Pen. Law § 2444.

13. N.Y. Civ. Prac. Law & Rules §§ 4513-14.

14. 2 N.Y. Rev. Stat. pt. IV, ch. 1, tit. 4, § 1 (1829).

This reasoning, however, was based on the theory that a person who has lied once will probably lie again. Stated so generally, the theory is clearly unsound. There may be present an overpowering motive to prevaricate in one situation which is absent in any other. Further, the theory runs contrary to the supposed remedial character of imprisonment for crime. In addition, a permanent punishment was thereby imposed which could, as a practical matter, deprive the perjurer of many of his civil remedies,[15] and render him vulnerable to unjust prosecution for crimes he did not commit.[16] Innocent third parties could also be injured, in cases where proof of a legitimate cause of action or defense depended on the testimony of the one-time perjurer.

Most probably it was these considerations which occasioned the repeal of the disqualification part of the 1827 perjury statute. The repeal was not express, but was effected indirectly[17] by the enactment of the general competency statutes, quoted above,[18] which did not segregate perjury from the class of crimes which no longer disqualified a witness. Although a perjury conviction no longer had any effect on his competency, it was nevertheless admissible, on a par with any other criminal conviction, to affect the "weight of his testimony" —presumably as a protection for the court and for third parties against further false swearing. Since that time, it has been the jury's task to determine the bearing of previous crime on the issue of a witness' truthfulness. Presumably the jury would consider the special nature of the crime of perjury in making its evaluations.

Virtually every jurisdiction has enacted a statute eliminating the common-law disqualifications for crime.[19] A few retain the rule for perjury, and others apply it only to criminal trials.[20]

III. Historically: The Effect of Deliberately Inconsistent or Wilfully False Testimony on Competency and Credibility

If a witness gives testimony materially different from that given in a prior proceeding on the same matter, there is clearly false testimony[21] in at least one instance. If this is shown to be deliberate, or if there is an admission that the prior testimony was perjured, that circumstance is equivalent, for present purposes, to an admission of wilfully false testimony upon the same trial. There

15. A plaintiff is usually the chief witness in his own behalf. If he were rendered incompetent to testify, he would often be unable to adduce enough other proof to sustain his cause of action.

16. In many cases, one on trial for a crime would have difficulty defending himself against the charge if he could not testify.

17. See note 9 supra and accompanying text.

18. See notes 8 & 10 supra and accompanying text.

19. See 2 Wigmore, Evidence § 488 (3d ed. 1940).

20. Id. at § 524.

21. In this discussion it is assumed that any false testimony referred to is materially false.

is a common factor in these situations of demonstrated perjury *on the facts in issue*. The question then arises whether that witness should thereby be rendered incredible as a matter of law, and his testimony removed from the consideration of the jury.

At common law a witness was entirely discredited, as a matter of law, if it was proved that he had deliberately testified falsely as to a material fact.[22] The rationale was that the witness was thus shown to have both a motive for lying and a present willingness to lie in the matter at issue, and that therefore his testimony in that matter was completely unreliable. The maxim, *falsus in uno, falsus in omnibus*, would properly be applied in this situation.[23]

The problem was first squarely presented to the New York Supreme Court in 1825, in *Dunlop v. Patterson*.[24] There, the plaintiff's verdict was obtained on the uncorroborated testimony of one witness, who at the trial had plainly contradicted his testimony given in a prior proceeding on the same matter. In reversing the judgment on the verdict and holding that such testimony should have been totally disregarded, the court stated:

> No reason whatever is assigned for this prevarication, and disregard to truth. He was not, therefore, a credible witness, unless supported as to the material fact which he attempted to establish. . . . The Court ought to have charged the jury . . . that the unsupported testimony of a single witness, who swore at one time in direct contradiction to the testimony given by him at another, in relation to the same transaction, *was not entitled to credit, and ought not* to be regarded.[25]

In 1864, however, in *Dunn v. People*,[26] the New York Court of Appeals ruled to the contrary. There, the defendant had been convicted on the uncorroborated testimony of a sole witness who had admitted that she had committed perjury in a prior proceeding involving the same facts.[27] In upholding the conviction, the court ruled that the witness' testimony must remain in the case for the consideration of the jury, under instructions that her testimony *might* (not "must") be disregarded.[28] Chief Judge Denio stated:

> The court could not go further, without usurping the domain of the jury; for to

22. The Santissima Trinidad, 20 U.S. (7 Wheat.) 129 (1822) (see note 47 infra and accompanying text); Dunlop v. Patterson, 5 Cow. 243 (N.Y. Sup. Ct. 1825); Silva v. Low, 1 Johns. Cas. 184 (N.Y. Sup. Ct. 1799). See also 3 Wigmore, Evidence § 1009 (3d ed. 1940).

23. The Santissima Trinidad, supra note 22.

24. 5 Cow. 243 (N.Y. Sup. Ct. 1825).

25. Id. at 247-48. (Emphasis added.)

26. 29 N.Y. 523 (1864).

27. In a prosecution for advising the use of a medicine with intent to cause a miscarriage, the defendant was convicted on the uncorroborated testimony of the mother, who admitted having perjured herself in a prior proceeding against the defendant for support of the illegitimate child.

28. 29 N.Y. at 530.

them the law has entrusted the right of determining upon the credibility of witnesses.[29]

Dunlop was distinguished as having held merely that the charge to the jury had not been sufficiently cautious.[30]

Both *Dunlop* and *Dunn* were decided before the statutes disqualifying a witness for conviction of crime were repealed.[31] In *Deering v. Metcalf*,[32] the first case thereafter in which the same issue arose, it was contended by the appellant that the respondent's sole witness was, as a matter of law, not entitled to belief, because he had testified falsely at the trial and, therefore, there was no evidence to support the verdict. The court of appeals sidestepped the question by deciding that the testimony had not been shown to have been *deliberately* false. It is noteworthy that *Dunn* was not considered the law. In fact, the language used by the court indicated that it deemed still unsettled just what effect perjury at the trial would have on the credibility of the witness *in law*.[33]

Ten years later, the landmark case, *People v. O'Neil*,[34] was decided. The trial court,[35] in a prosecution for bribery, refused to charge that if the jury found that any of the people's witnesses had committed perjury in a Senate subcommittee hearing on the same matter, they *must* wholly disregard the testimony of these witnesses. The court of appeals affirmed the conviction, adopting the *Dunn* rule[36] as the correct one under the new statutory provisions on competency. Judge Andrews stated the court's reasoning as follows:

> [T]he section [N.Y. Penal Code § 714] expressly makes a person convicted of crime, not excepting perjury, a competent witness in any cause or proceeding, civil or criminal. . . . 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 heretofore existed, the true rule is that stated by Judge Denio in *Dunn v. People* (29 N.Y. 529), 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

29. Ibid.

30. Id. at 528-29.

31. See notes 6 & 7 supra and accompanying text.

32. 74 N.Y. 501 (1878).

33. "Now we are not called upon in the case in hand to say what is, or should be the rule in the case of a witness, of whom it is apparent that he had sworn corruptly false." Id. at 506. "How it would be in a case where it was, to our judgment, conclusively shown that the witness was corruptly false, we are not now called upon to say." Id. at 507.

34. 109 N.Y. 251, 16 N.E. 68 (1888).

35. 48 Hun 36 (N.Y. Sup. Ct. 1888).

36. See note 26 supra.

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."[37]

Two years later, in *People v. Chapleau*,[38] the court of appeals again discussed at length the bearing of perjury upon competency and credibility. Judge Gray stated:

[T]he weight of authority was . . . that the question of the credibility of a witness was one for the jury, and that the only exception to the rule was in cases where the discrepancies in the testimony were the result of deliberate falsehood. (*The Santissima Trinidad*, 7 Wheat. 339 . . . .) But, since the enactment of section 714 of the Penal Code and section 832 of the Code of Civil Procedure, we must hold that a new rule obtains, *and that the rule and policy of the law are to allow all testimony to go to and be weighed by the jury.*[39]

IV. Criticism

A. *The Present Rule*

There is under the present law virtually no deterrent to a would-be perjurer. The difficulty and consequent infrequency of perjury prosecutions makes the criminal sanction of dubious effect. Trial judges hesitate to overturn a verdict when the only issue is the credibility of a witness, and appellate courts likewise give the jury almost absolute discretion in deciding what parts of the testimony are true. While we may not assume that every witness is two-faced, neither may we close our eyes to abuses that do exist.[40] There is clearly a need for a more effective deterrent to perjury. It is submitted that a slight extension of the present credibility rules would meet this need, and that it is within the power of the courts to make the change.

The present rule on credibility of perjurers is not statutory; rather, it was laid down in dictum of the court of appeals[41] in the course of a discussion of inapplicable statutes. It is essential here to distinguish credibility from competency. The statutes[42] which made criminals competent were intended merely to qualify criminals to testify, and to allow introduction of proof of a felony conviction to affect the weight of the testimony. It is clear, then, that all

37. 109 N.Y. at 266-67, 16 N.E. at 71.

38. 121 N.Y. 266, 24 N.E. 469 (1890).

39. Id. at 276, 24 N.E. at 472. (Emphasis added.)

40. See cases cited in note 2 supra. As recently as December 1962, in Levy v. Reilly, 18 App. Div. 2d 632, 234 N.Y.S.2d 1021 (1st Dep't 1962) (per curiam), it appeared that in a trial arising out of an automobile accident, the defendant gave incredible testimony regarding the happening of the accident, and the plaintiff gave equally incredible testimony concerning his injuries. Such situations rarely appear in the reports unless the case is appealed on another ground besides credibility. In the cited case, the appeal was on the ground of interference by the trial court with the examination of witnesses.

41. See notes 37-39 supra and accompanying text.

42. See notes 6 & 7 supra and accompanying text.

criminals were rendered *competent* to testify. However, these statutes did not purport to remove or even to limit the court's power to determine, in a proper instance, the *credibility* of a witness as a matter of law. Naturally the court could not thereafter circumvent the law by deciding that all convicted felons were incredible; but it is submitted that without violating the statutes, the court could still decide that a witness who *perjured* himself on the facts in issue was *incredible as a matter of law*—not because perjury is a crime, but because such perjury is an act which evinces conscious disregard for the sanctity of the oath under the very circumstances of the particular case. Thus, by operation of the statutes, proof of a felony conviction as such could at most affect the weight of the witness' testimony; but proof that a witness had demonstrated contempt for the truth in the same or identical circumstances could affect the witness' credibility in law. The fact that perjury is a crime should not obscure the special nature of the act. As a crime, perjury has a very limited effect because of the competency statutes; but due to the *nature of the act*, perjury could properly be given a much greater effect.

In the light of this reasoning let us examine the *O'Neil* and *Chapleau* decisions. In *O'Neil*, the court of appeals really held only that a person convicted of perjury was not thereby rendered *incompetent* to testify. Judge Andrews stated: "It would be manifestly absurd . . . to hold that an unconvicted perjurer was an *incompetent witness*. . . ."[43] True, it was further indicated that "under the statute, if he [the perjurer] had been convicted, his evidence must be received and weighed by the jury."[44] It is submitted, however, that Judge Andrews was concerned merely with competency as affected by crime—not with credibility and the court's power to determine credibility.

The *Chapleau* case did not even involve the question of perjury. There the court found that the witnesses who had testified falsely had done so not deliberately, but rather out of fear and ignorance. Therefore, the court's statements concerning the changed effect of perjury upon credibility (which, incidentally, was attributed solely to the statutes in question, although the statutes affected competency only) were obiter dicta. It is true that the court stated that "the rule and policy of the law are to allow all testimony to go to and be weighed by the jury."[45] However, this rule had not been observed as law;[46] but even assuming, *arguendo*, that it were the law where perjury is concerned, it is court-made law and, therefore, may be overruled.

B. *Proposed Revisions*

Where wilfully and materially false testimony has been proved, by admission, or by self-contradiction as to facts about which the witness could not have been mistaken, or by clear and unchallenged evidence—either on trial or in

43. 109 N.Y. at 266, 16 N.E. at 71. (Emphasis added.)

44. Ibid.

45. 121 N.Y. at 276, 24 N.E. at 472 (dictum).

46. See note 2 supra.

a former proceeding on the same matter—the witness should thereby be rendered incredible as a matter of law, and his testimony should be entirely removed from the consideration of the jury.

Furthermore, where wilfully false testimony is alleged, the jury should be instructed that if they find that a witness has wilfully falsified his testimony on a material fact, they *must* disregard his testimony entirely.

The reasoning which would justify such rules was well stated by the United States Supreme Court in 1822, in *The Santissima Trinidad*:

> But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake . . . if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno, falsus in omnibus. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?*[47]

Such a determination by the court that a witness is incredible as a matter of law would no more be a usurpation of the jury's function than is the court's concededly valid determination, in the proper cases, that *part* of a witness' testimony is incredible.[48] The effect in each instance is the same—to remove testimony from the jury's deliberations. Whether part or all of the testimony is so removed is immaterial to the basic question of whether the court is infringing upon the domain of the jury.

It is important to note that the proposed rules would take credibility from the jury only where the witness was clearly shown to be totally unworthy of belief on the particular matters at issue. The penalty is not too drastic, and would only be imposed in the clearest cases. The procedure would be the same as in any case where an issue is decided as a matter of law, and may be justified in the usual way. The purpose is to save the time of the court and all the parties, and to avoid the remote, but real, possibility of an emotional verdict.

While perjury can never be totally eliminated, the proposed rule should serve to minimize it. For instance, in negligence cases arising from an automobile accident, a passenger would be less likely to testify falsely to assist his host if he knew that later, in his own suit against his insured host, he would be rendered incredible as a matter of law if he testified to a new version of the facts favorable to himself. A plaintiff testifying in a negligence action would be deterred from magnifying his damages too greatly, knowing that if the jury found that he perjured himself, his entire testimony in the case would have to be disregarded and his cause of action might very well fail. In both civil and criminal cases, defendants would be better protected against adverse verdicts based on one witness' testimony, since the appellate courts could reverse where perjury was evident in even one material aspect.

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47. 20 U.S. (7 Wheat.) 129, 153-54 (1822). (Emphasis added.)

48. See note 2 supra.

V. Conclusion

When the subject of perjury in relation to credibility is examined in the context of its historical development, it is apparent that the present-day rule was merely a collateral outgrowth of the repeal of the old crime disqualification, and has no proper foundation of its own, either in law or in logic. What is sorely needed is positive legislation establishing a definite public policy and a coherent set of specific rules governing credibility of witnesses, and imposing severe civil penalties for perjury.