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# Impeaching the Credibility of a Witness by Showing Prior Criminal Convictions

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repair. A right to enter for the purpose of making repairs or a gratuitous custom of making repairs should be sufficient protection for his interests, yet either of these methods will probably not be enough "control" to hold him liable. As a last-ditch effort the landlord might try to convince the courts of the basic differences between the tenant, invitee, and stranger cases. Unfortunately, Ohio courts have been indiscriminate in citing authorities; commingling has proved disastrous.

THOMAS A. DUGAN

## *Impeaching the Credibility of a Witness By Showing Prior Criminal Convictions*

At the common-law any person convicted of an infamous crime (treason, felony and the *crimen falsi*)<sup>1</sup> was incompetent to testify as a witness.<sup>2</sup> The rationale behind the rule was that such a person was considered,

. . . morally too corrupt to be trusted to testify; — so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he [would] speak the truth at all.<sup>3</sup>

By statute the disqualification for conviction of a crime has been almost universally abrogated.<sup>4</sup> In Ohio civil actions this disqualification was removed by statute in 1853.<sup>5</sup> Today the successor to that statute provides:

All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined or of relating them truthfully.<sup>6</sup>

<sup>1</sup> *Crimen falsi* is a general designation of a class of offenses including those which involve deceit or falsification and offenses affecting the public administration of justice. Examples of these offenses are forgery, counterfeiting, using false weights or measures and perjury. BLACK, LAW DICTIONARY 446 (4th ed. 1951).

"The meaning of this term {*crimen falsi*} at common-law is not well defined." BOUVIER, LAW DICTIONARY 256 (1946).

<sup>2</sup> GREENLEAF, EVIDENCE §§ 372-73 (1850); See Kornreich v. Industrial Fire Ins. Co., 132 Ohio St. 78, 87, 5 N.E.2d 153, 157 (1936); Webb v. State, 29 Ohio St. 351, 358 (1876).

<sup>3</sup> GREENLEAF, EVIDENCE § 372 (1850).

<sup>4</sup> MCCORMICK, EVIDENCE § 43 (1954).

<sup>5</sup> 51 OHIO LAWS 57 (1853). See *In re Lieberman*, 163 Ohio St. 35, 37, 125 N.E.2d 328, 329 (1955).

<sup>6</sup> OHIO REV. CODE § 2317.01.

In criminal cases the disqualification was removed by statute in 1869.<sup>7</sup> The successor to that statute reads:

No person is disqualified as a witness in a criminal prosecution . . . by reason of his conviction of a crime. . . .<sup>8</sup>

Today the conviction of a crime may be introduced in evidence for impeaching the credibility of a witness.<sup>9</sup> It is used to test his truth-telling ability — his veracity. In Ohio the introduction of the prior conviction is expressly authorized in criminal cases. The statute reads:

Such . . . conviction . . . may be shown for the purpose of affecting the credibility of such witness.<sup>10</sup>

Although there is no similar provision in the Code authorizing the introduction of the prior conviction in a civil case, this evidence is still relevant and admissible in Ohio to impeach the credibility of the witness in a civil case.<sup>11</sup> Numerous Ohio cases have allowed the fact of a prior conviction to be elicited in a civil case in order to impeach the credibility of a witness.<sup>12</sup>

#### CONVICTIONS THAT MAY BE SHOWN

There are conflicting rules in different jurisdictions as to what kind of convictions may be used for impeachment purposes. In England "any felony or misdemeanor" is allowed to be shown.<sup>13</sup> Some states hold that conviction of "crime" or "any crime" is competent to be introduced.<sup>14</sup> Other states limit the introduction in evidence to convic-

<sup>7</sup> 66 OHIO LAWS 308 (1869). See *In re Lieberman*, 163 Ohio St. 35, 37, 125 N.E.2d 328, 329 (1955).

<sup>8</sup> OHIO REV. CODE § 2945.42.

<sup>9</sup> 3 WIGMORE, EVIDENCE § 926 (3d ed. 1940). The conviction may be shown on trial by producing a copy of the journal entry, or as most states allow, by extracting an admission of the conviction on cross-examination. See 4 WIGMORE, EVIDENCE § 1270 (3d ed. 1940); MCCORMICK, EVIDENCE § 43 (1954). Cross-examination for eliciting the fact of conviction is permissible in Ohio. See *Kornreich v. Industrial Fire Ins. Co.*, 132 Ohio St. 78, 5 N.E.2d 153 (1936).

<sup>10</sup> OHIO REV. CODE § 2945.42.

<sup>11</sup> See this discussed in *Baltimore & Ohio R.R. Co. v. Rambo*, 59 Fed. 75, 78 (6th Cir. 1893) where the court had to decide what was the Ohio law governing the competency of witnesses in reference to convictions of crime.

<sup>12</sup> *Kornreich v. Industrial Fire Ins. Co.*, 132 Ohio St. 78, 5 N.E.2d 153 (1936); *Stover v. Yoakum*, 69 Ohio L. Abs. 51, 109 N.E.2d 87 (Ct. App. 1952) (Dicta); *State v. Liff*, 86 Ohio App. 396, 87 N.E.2d 917 (1948); *Killian v. Cleveland Ry. Co.*, 10 Ohio L. Abs. 14 (Ct. App. 1930); *Koeborle v. Green*, 6 Ohio L. Abs. 56 (Ct. App. 1927); *August v. Finnerty*, 20 Ohio C.C. Dec. 330, 10 C.C.R. (n.s.) 433 (1908).

<sup>13</sup> Criminal Procedure Act, 1865, 28 & 29 VICT. 6, c. 18.

<sup>14</sup> *State v. Cioffe*, 128 N.J.L. 342, 355, 26 A.2d 57, 65 (1942); *Coslow v. State*, 83 Okla. Crim. 378, 385, 177 P.2d 518, 522 (1947).

tions of an "infamous crime."<sup>15</sup> Still other states hold that if misdemeanors are to be considered, the crime must at least be one involving "moral turpitude."<sup>16</sup> In some states it is left to the trial judge's discretion to decide whether the particular conviction substantially affects the credibility of the witness.<sup>17</sup>

The latest Supreme Court pronouncement in Ohio, *Kornreich v. Industrial Fire Ins. Co.*,<sup>18</sup> states that cross-examination dealing with prior convictions should be limited to those offenses which, as a matter of law, do affect credibility, that is, treason, felony and *crimen falsi*. In this case it was also said in dicta that it would be "unfair" to ask the witness, for the purpose of affecting his credibility, whether or not he had been convicted of assault and battery, as the nature of this offense in no way reflects upon credibility.<sup>19</sup>

A much earlier Supreme Court case stated that a conviction, to be admissible, must be one which, before the enactment of the statute removing the disability of the witness in criminal cases, would have disqualified the person from testifying as a witness.<sup>20</sup> The court then concluded that the conviction of a violation of a city ordinance punishing acts which are not defined and punished as crimes by the State legislature never disqualified a person from testifying and therefore such conviction could not be introduced to impeach the witness.<sup>21</sup> In still another Supreme Court case, *Harper v. State*,<sup>22</sup> it was held that it was competent to show "convictions of high crimes and misdemeanors, [and] convictions under state and federal laws" for the purpose of affecting credibility.

This latter statement seems to have been interpreted by lower courts to mean that any conviction of a violation of a state statute may be shown to impeach credibility. Some Ohio cases have held that it is permissible to ask the witness if he has been convicted of any offense under the State law, whether the same is a misdemeanor or felony.<sup>23</sup>

<sup>15</sup> *People v. Thomas*, 393 Ill. 573, 581, 67 N.E.2d 192, 196 (1946); *Commonwealth v. Kostan*, 349 Pa. 560, 566, 37 A.2d 606, 609 (1944).

<sup>16</sup> *State v. Jenness*, 143 Me. 380, 383, 62 A.2d 867, 868 (1948); *Rylee v. State*, 131 Tex. Crim. 127, 130, 96 S.W.2d 988, 989 (1936).

<sup>17</sup> *Burgess v. State*, 161 Md. 162, 173, 155 Atl. 153, 157 (1931); *Zimmerman v. Goldberg*, 277 Mich. 134, 136, 268 N.W. 837, 838 (1936).

<sup>18</sup> 132 Ohio St. 78, 90, 5 N.E.2d 153, 158 (1936).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Coble v. State*, 31 Ohio St. 100, 102 (1876).

<sup>21</sup> *Ibid.*

<sup>22</sup> 106 Ohio St. 481, 484, 140 N.E. 364, 365 (1922).

<sup>23</sup> *Killian v. Cleveland Ry. Co.*, 10 Ohio L. Abs. 14 (Ct. App. 1930); *Koeborle v. Green*, 6 Ohio L. Abs. 56 (Ct. App. 1927).

One case held that it was competent to cross-examine the witness as to convictions for having defaced license plates, for failure to register an automobile, and for permitting an unlicensed operator to operate his automobile — all misdemeanors.<sup>24</sup> A recent common pleas decision has gone so far as to hold that a conviction for operating a motor vehicle while drunk is a conviction of a crime designated as *crimen falsi* and is well within the category of "high crimes and misdemeanors" as stated in the *Harper* case.<sup>25</sup>

The interpretation of the Ohio courts as to what kind of convictions may be shown for the purpose of impeaching the credibility of a witness thus seems exceedingly liberal and in no way limited to convictions which do *in fact* have a bearing on credibility. This is unfortunate as such an interpretation gives rise to very serious problems.

#### PROBLEMS CREATED BY THE PRESENT RULE

In a criminal case, when the accused takes the stand, he is subject to the same tests for impeaching his credibility as is any other witness<sup>26</sup> since he is a witness in his own behalf. If the prosecution is allowed to introduce prior convictions to impeach the accused's credibility, the jury is liable to convict the accused on his "record." If the conviction is not a serious one which bears on the truth-telling ability of the witness it should be excluded as it will only delay the trial proceedings and confuse the issues. It will also very likely prejudice the jury against the defendant. Although the evidence of the conviction will probably be limited by proper instructions to the purpose for which it is introduced, namely testing credibility, it takes no astute mind to realize that juries do not always limit the evidence to this purpose. They receive the evidence of the prior conviction and throw it into the "pot" with all the other facts in the case and decide guilt or innocence. The jury may very possibly conclude that because of the prior conviction,

. . . the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt.<sup>27</sup>

It seems that if the conviction is of a serious crime the jury should be entitled to know of the conviction in most cases so as to be in a better position to evaluate the testimony of the accused. If the conviction were for first or second degree murder it would seem plausible that the jury should be made aware of the fact that they are being urged to believe

<sup>24</sup> *State v. Polhamus*, 62 Ohio L. Abs. 113, 106 N.E.2d 646 (Ct. App. 1951).

<sup>25</sup> *State v. Hamm*, 62 Ohio L. Abs. 401, 104 N.E.2d 88 (C.P. 1952).

<sup>26</sup> *State v. Williams*, 85 Ohio App. 236, 238, 88 N.E.2d 420, 421 (1947).

<sup>27</sup> *MCCORMICK, EVIDENCE* § 43 (1954).

the testimony of a murderer. But query — what if the conviction were for manslaughter or automobile manslaughter? Would knowledge of this fact really help the jury in weighing the testimony of the accused or would it only multiply the issues, and prejudice the jury? The problem is not one of easy solution. Possibly the most satisfactory answer is to vest broad discretion in the trial judge whereby he may exclude a particular conviction if he feels that its admission will only multiply issues, prejudice the jury, and not aid them in finding the facts. This would be similar to the discretion which is retained by the trial judge in some jurisdictions to exclude a particular conviction if too remote in time.<sup>28</sup>

The Uniform Rules of Evidence and the Model Code of Evidence state that the use of previous convictions for testing the credibility of the accused in a criminal case shall not be admissible unless the accused first introduces evidence supporting his credibility.<sup>29</sup> This does not seem to solve the problem, as the accused when he takes the stand, is a witness in his own behalf and should be subjected to the same tests for impeachment as any other witness. It seems that in most cases the jury should have knowledge of a prior conviction of a serious crime for the purposes of evaluating the testimony of the accused.

Another problem arises when previous convictions of reckless driving, drunken driving, speeding, or the like are introduced to impeach the credibility of the defendant in a civil or criminal case involving the negligent or reckless operation of an automobile. These convictions may be introduced, for example, in a civil automobile negligence or wrongful death action, or, in a criminal automobile manslaughter, reckless driving or drunken driving prosecution. As a practical matter the admission of such convictions may have the effect of creating an inference as to the negligent driving habits of the driver defendant. The case may well turn on the admission of this evidence. Convictions of this nature should never be admitted for the purpose of impeaching the credibility of the driver defendant for the practical and pragmatic reason that these convictions do not show a lack of veracity or truth-telling ability on the part of the defendant. It seems difficult to understand how a conviction of drunken driving or speeding would possibly indicate that the witness was less likely to tell the truth than a person not so convicted.<sup>30</sup>

<sup>28</sup> *Fire Ass'n of Philadelphia v. Weathered*, 62 F.2d 78 (5th Cir. 1932); *State v. Kent*, 5 N.D. 516, 557, *State v. Pancost* (alias Kent) 67 N.W. 1052, 1064 (1896); *Everett v. State*, 122 Tex. Crim. 626, 634, 57 S.W.2d 140, 144 (1932).

<sup>29</sup> UNIFORM RULES OF EVIDENCE, Rule 21; MODEL CODE OF EVIDENCE, Rule 106.

<sup>30</sup> Indeed, many people plead guilty to offenses of this nature for reasons of convenience.

New York has alleviated this problem to some degree by enacting a statute which provides that a conviction for a traffic infraction may not be introduced in evidence to impeach the credibility of a witness.<sup>31</sup>

The Uniform Rules of Evidence and the Model Code of Evidence have perhaps gone too far in trying to avoid the foregoing consequences when they provide that the evidence of a crime not involving dishonesty or the making of false statement shall be inadmissible for the purpose of impairing the credibility of a witness.<sup>32</sup> It seems reasonable that the jury should know if the witness has been convicted of a serious crime such as murder. Yet this information is not admissible by the proposed rules.

#### IMPEACHMENT LIMITED TO SHOWING ONLY CONVICTIONS

It is worthy to note that although the conviction of a crime may be shown, the general rule, supported by the great weight of authority, is that it is not permissible to show merely that a witness has been arrested, charged with a crime, or indicted for the purpose of throwing doubt on the credibility of the witness.<sup>33</sup>

Reasons assigned for the rule are: (a) that such evidence does not logically affect credibility; (b) that such inquiry or evidence might unduly prejudice the jury against the witness; (c) that one accused of a crime is presumed innocent until proven guilty; (d) or that a witness may not be impeached by particular acts of misconduct.<sup>34</sup> In Ohio, admission of evidence of this nature is considered "improper" and "highly prejudicial."<sup>35</sup> It should be remembered that although the introduction of evidence of a prior arrest or indictment is improper, it is not prejudicial

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<sup>31</sup> N.Y. CIV. PRAC. ACT § 355. See *De Stasio v. Janssen Dairy Corp.*, 279 N.Y. 501, 18 N.E.2d 833 (1939); *Walther v. News Syndicate Co.*, 276 App. Div. 169, 93 N.Y.S.2d 537 (1949). The effectiveness of the statute seems somewhat impaired by a holding that a conviction for drunken driving is not a traffic infraction which falls under the purview of the statute. *Geiger v. Weiss*, 245 App. Div. 817, 281 N.Y.S. 154 (1935).

<sup>32</sup> UNIFORM RULES OF EVIDENCE, Rule 21; MODEL CODE OF EVIDENCE, Rule 106.

<sup>33</sup> For a full discussion and many case citations see annotation in 20 A.L.R.2d 1421 (1951).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Wagner v. State*, 115 Ohio St. 136, 152 N.E. 28 (1926); *Keveney v. State*, 109 Ohio St. 64, 141 N.E. 845 (1923); *Harper v. State*, 106 Ohio St. 481, 485, 140 N.E. 364, 365 (1922); *Morrow v. State*, 38 Ohio L. Rep. 241, 242, 14 Ohio L. Abs. 484, 486 (Ct. App. 1933). In the *Keveney* case it was stated that an indictment against a witness could be shown if in the discretion of the trial judge the admission of the evidence was relevant to show the interest of the witness in the present proceedings.

error to ask the witness whether he has been indicted or arrested.<sup>36</sup> If the objection is made to this question and sustained then the witness could not be prejudiced by the question alone. Without this rule it would be impossible to conduct a trial in such a manner that a judgment would stand, as the admissibility of evidence can only be tested by the asking of the question.<sup>37</sup>

#### ABILITY OF THE WITNESS TO EXPLAIN OR DENY THE CONVICTION

It is generally thought that once the conviction is shown the witness should not be allowed to make a short explanation or denial of guilt.<sup>38</sup> This is a logical consequence of the presumption of the conclusiveness of the judgment. Some jurisdictions in opposition to this position allow a brief explanation or denial of guilt<sup>39</sup> or leave it to the discretion of the trial judge.<sup>40</sup> Dean Wigmore states:

. . . it would seem a harmless charity to allow the witness to make such protestations on his own behalf as he may feel able to make with a due regard to the penalties of perjury.<sup>41</sup>

In Ohio it has been said in dicta that the judgment of conviction is conclusive and can not be questioned.<sup>42</sup> This, it is stated, is based on principles of res judicata and the feeling that the witness has had his "day in court."<sup>43</sup>

#### CONCLUSION

The problems presented by the present rule concerning which convictions may be shown to impeach credibility could be minimized by the adoption of a new one. The proposed rule should have two facets. First, evidence of the conviction of a crime which has no substantial bearing on the truth-telling ability or credibility of the witness should not be admitted for purposes of impeachment. Second, the trial judge should

<sup>36</sup> *Lloyd v. Eastern Grill, Inc.*, 24 Ohio L. Abs. 348 (Ct. App. 1937); *Clark v. State*, 23 Ohio App. 474, 156 N.E. 219 (1926).

<sup>37</sup> *Clark v. State*, 23 Ohio App. 474, 156 N.E. 219 (1926).

<sup>38</sup> MCCORMICK, EVIDENCE § 43 (1954).

<sup>39</sup> *Hopper v. State*, 151 Ark. 299, 236 S.W. 595 (1922); *State v. Oxendine*, 224 N.C. 825, 32 S.E.2d 648 (1945).

<sup>40</sup> *United States v. Boyer*, 150 F.2d 595 (D.C. Cir. 1945); *Donnelly v. Donnelly*, 156 Md. 81, 143 Atl. 648 (1928).

<sup>41</sup> 4 WIGMORE, EVIDENCE § 1117 (3d ed. 1940).

<sup>42</sup> *Harper v. State*, 106 Ohio St. 481, 487, 140 N.E. 364, 366 (1922).

<sup>43</sup> *Ibid.* It should be noted that in this case it was also said in dicta that a pardon or subsequent acquittal may be shown. That the pardon does not preclude the use of the conviction see Annot., 30 A.L.R.2d 893 (1953).