Kentucky Law Journal

Volume 43 | Issue 2 Article 9

1954

# Evidence--Prior Conviction--Impeachment and Rehabilitation

George B. Baker Jr.
*University of Kentucky*

whether it falls within the last mentioned class of social relationships. If not, then the character of the act should be given some consideration. It may be that the policy of the state is against binding anyone to anticipate certain kinds of acts. Thirdly, it is submitted that even though the court may speak in terms of an independent superseding cause, the case will be better understood if one applies the test of "extraordinary or abnormal acts" as a criteria of foreseeability in cases of intentional intervention, as well as negligent intervention.

THOMAS A. MITCHELL

## EVIDENCE–PRIOR CONVICTION–IMPEACHMENT AND REHABILITATION

The early common law rule that one who had been convicted of an infamous crime was deemed incompetent to testify in a court of law has been generally modified or abrogated by statutes. Nevertheless, these statutes, usually by express terms, subject witnesses, whether the action be civil or criminal, to impeachment by proving a previous conviction of some crime.[1] This previous conviction will generally be brought out as bearing on the credibility of the witness, and there is great disagreement as to the types and degree of crime which may be used for this purpose. There appear to be three general classes. The majority of jurisdictions takes the view that the crime must be a felony before it can be used for impeachment purposes; a growing minority of the jurisdictions which have statutes permitting prior conviction of crime to be shown has construed the word crime as including both felonies and misdemeanors; in Texas and a few other jurisdictions evidence as to previous conviction of crime for the purpose of effecting a witness's credibility must relate to offenses involving moral turpitude.[2]

In general these rules are applied without making any distinction as to whether the case is civil or criminal,[3] and whether the accused or a third party testifies.[4] At least one jurisdiction differentiates between the criminal defendant and the third party witness by holding that the latter may be cross-examined to establish his conviction while the former is free from the risks of such cross-examination.[5] In nearly

[1] 58 AM. JUR. 397 (1948).
[2] See 2 WIGMORE, EVIDENCE sec. 987 (1940), as to the statutes of the various jurisdictions.
[3] See *supra* note 1.
[4] Kimbrough v. State, 66 Okla. Crim. Rep. 66, 89 P. 2d 982 (1939).
[5] People v. Halkens, 386 Ill. 167, 53 N.E. 2d 923 (1944).

every state the practice is now regulated by statutes which provide that the fact of a previous conviction may be proved either by cross-examination or by the production of the record.[6]

The accused in a criminal prosecution does not have to take the witness stand to testify in his own behalf; and where he chooses not to, the State is precluded from introducing any evidence as to his credibility.[7] Where the defendant does choose to testify in his own behalf, he thereby assumes the position of an ordinary witness and may be discredited by cross-examination as to his previous conviction, in the same manner and under the same rules as any other witness.[8] Such cross-examination is not an infringement of the constitutional privilege against self-incrimination.[9]

When, for the purpose of impeaching his credibility, it has been shown that a witness previously has been convicted of a crime, the question arises whether the impeached witness or the party calling him has a right on redirect-examination to assert his innocence of the offense or to give an explanation so as to bring out exculpating or extenuating circumstances and thereby restore or bolster his credibility. In other words, can an impeached witness be rehabilitated? The courts are in much conflict not only as to whether there can be rehabilitation, but also, in those jurisdictions which do allow it, as to what conditions must be present.

The generally recognized rule is that a witness or the accused in a civil or criminal case will not be allowed to assert to the jury that he was in fact *innocent* of the crime for which he was previously convicted and is now impeached.[10] The rule is based upon two solid foundations: (1) the prior conviction is a solemn adjudication of guilt which is conclusive upon the matter and not subject to contradiction in a collateral proceeding; (2) it would prolong the trial and tend to confuse the issues.[11]

A more difficult problem is presented where a witness attempts to *explain* a previous conviction. The jurisdictions which do not allow such explanations justify their decisions with the same two reasons previously mentioned for not allowing a witness to claim innocence of a previous conviction. This is stated very clearly by the eminent Justice Holmes:

> Upon redirect examination the witness was asked to state the circumstances, the evidence being offered to show the extent of the

[6] See note, 6 A.L.R. 1626 (1920).
[7] 20 AM. JUR. 195 (1939).
[8] Swango v. Com., 298 Ky. 572, 183 S.W. 2d 523 (1944).
[9] State v. Larkin, 250 Mo. 218, 157 S.W. 600 (1913).
[10] 4 WIGMORE, EVIDENCE sec. 1116 (1940).
[11] See note, 166 A.L.R. 220 (1947).

> wickedness involved in the act, and to show the circumstances. This evidence was excluded. Logically, there is no doubt that evidence tending to diminish the wickedness of the act, like evidence of good character, which is admissible, does meet, as far as it goes, the evidence afforded by the conviction, since that discredits only by tending to show either general bad character, or bad character of a kind more or less likely to be associated with untruthfulness. . . . Nevertheless, the conviction must be left unexplained. Obviously, the guilt of the witness cannot be retried. . . . It is equally impossible to go behind the sentence to determine the degree of guilt. Apart from any technical objective, it is impracticable to introduce what may be a long investigation of a wholly collateral matter into a case to which it is foreign, and it is not to be expected or allowed that the party producing the record should also put in testimony to meet the explanation ready in the mouth of the convicted person. Yet, if one side goes into the matter, the other must be allowed to also.[12]

Those jurisdictions which do allow a brief explaination of a previous conviction maintain that a brief explanation would neither seriously confuse the issues nor prolong the proceedings. In these jurisdictions the witness is permitted to state the nature of the offense for which he was convicted, to better enable the jury to determine to what extent his credibility is impaired.[13]

Much can be said in support of this rule when one considers a situation where a witness has been convicted for a violation of a municipal ordinance or for a misdemeanor involving no element of moral weakness and where such a conviction is allowed to impeach him. Certainly such a witness should be allowed to give an explanation so that he will not be unjustly prejudiced by the impeachment.[14] A majority of the authorities agree that where previous *arrests* and *indictments* are charged to attack a witness's credibility he should be permitted to explain them, for such charges without subsequent convictions are mere accusations and do not evidence acts of misconduct nor affect the credibility of said witness.[15] There also is authority that a witness should be permitted to explain that a conviction was reversed on appeal,[16] and that he should be allowed to explain a conviction subsequent to which he was adjudged not guilty by reason of insanity.[17]

The right to introduce a pardon to rehabilitate a witness is another point about which there is conflict in the different jurisdictions. In a jurisdiction which allows a pardon to be introduced for such a pur-

---

[12] Lamoureux v. New York, N. H. & H. R. Co., 169 Mass. 338, 47 N.E. 1009, 1010 (1897).
[13] Dixon v. State, 189 Ark. 812, 75 S.W. 2d 242 (1934).
[14] Harper v. State, 106 Ohio St. 481, 140 N.E. 364 (1922).
[15] 4 WIGMORE, EVIDENCE sec. 1117(4) (1940).
[16] Bolling v. U.S., 18 F. 2d 863 (4th Cir. 1927).
[17] People v. Hoenschle, 132 Cal. App. 387, 22 P. 2d 777 (1933).

pose, it is said that a full pardon gives a new character to the person convicted and re-establishes his credibility as a witness.[18] The jurisdictions which do not admit a pardon to rehabilitate an impeached witness, say that unless the pardon expressly states that it is based upon a finding of innocence, it throws no new light upon a witness' credibility.[19]

It is submitted that the better solution to this problem of rehabilitation by explanation of a conviction would be to give the trial judge considerable discretionary powers.[20] To attempt to state a rule which will meet and satisfy the many situations herein mentioned would be an almost insurmountable task. The trial judge is aware of the situation which is present in the case before him, and he can best determine the solution to that problem. He is better able to observe the counsels and witnesses, and also to evaluate the effect of their actions on the jury. Lastly, the trial judge is the one best able to determine the extent, if any, of diverting the court from the real issue of the case.

GEORGE B. BAKER, JR.

## CONSTITUTIONAL LAW— STATE TAXATION OF INTERSTATE COMMERCE

The City of Chicago, by ordinance, imposed a "license tax" on trucks operated "within the city" for hire. The tax was graduated according to the size of the trucks, ranging from $8.25 on a truck of no more than two ton capacity to $16.50 on a truck of four ton capacity or more.[1] Respondent, an Illinois corporation, with its place of business in Chicago, owned a fleet of trucks which it employed to transport goods within Chicago, and between Chicago and points in other states. One truck often made both intrastate and interstate

[18] Bryant v. U.S., 257 F. 378 (5th Cir. 1919).
[19] 4 WIGMORE, EVIDENCE sec. 1116(3) (1940).
[20] U.S. v. Boyer, 150 F. 2d 595 (D.C. Cir. 1945).

[1] "Every . . . truck . . . which shall be operated . . . for the purpose of transporting . . . goods . . . within the city for hire or reward shall be deemed a cart . . . .

"Any person engaged in the business of operating a cart shall be deemed a carter.

"An annual license tax is imposed upon every carter for each cart operated or controlled by him, according to the following schedule:

"Automotive vehicles—

| | |
|---|---|
| Capacity not exceeding two tons | $ 8.25 |
| Capacity exceeding two but not exceeding three tons | 11.00 |
| Capacity exceeding three but not exceeding four tons | 13.20 |
| Capacity exceeding four tons | 16.50" |

Municipal Code of Chicago, Ch. 163 (January 14, 1949).