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Impeaching the Credibility of a Witness by Showing Conviction of a Crime

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Finally, when an obstruction is created out of necessity, policy implications should be the controlling factors. Two interests conflict here: one is a pedestrian's right to free use of the sidewalk, and the other is the encouragement of efforts to protect this same pedestrian from other danger. In these "necessity" situations, the socially desirable aspects of such conduct should justify the obstruction.

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IMPEACHING THE CREDIBILITY OF A WITNESS BY SHOWING CONVICTION OF A CRIME

At common law the conviction of a person for an infamous crime rendered him thereafter incompetent as a witness. It rested on the theory that one who engaged in such conduct was a person without honor and wholly unworthy of belief. The incompetency also was regarded as part of the punishment. Felonies were the usual crimes considered infamous so as to render one incompetent, and it was also extended to the so-called misdemeanor crimen falsi. The term crimen falsi has not been well defined but may be said to include, generally, crimes injurious to the administration of justice by the introduction of falsehood and fraud.

Statutes were later enacted to reduce the effect of such crimes to allow evidence of them merely to attack the credibility of the witness rather than render him incompetant. These statutes did away so effectively with incompetancy that even where one was under sentence of death he was still declared a competant witness.[1]

In Pennsylvania[2] the act provided that all persons should be competant witnesses except those convicted of perjury or subornation thereof. The only time a person who has been convicted of perjury and who has not received a pardon or reversal of his judgment can be called as a witness is in an action for violence or wrong done to the witness himself or his property.

It is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses, and that in the exercise of this duty the court should not interfere with the decision of the jury. Nor is there any distinction in this respect between civil and criminal cases.[3] The reason for disbelieving a witness is his supposed readiness to lie, inferred from his general readiness to do evil which is predicated upon his former conviction of a crime. Some courts have held that evidence of such crimes should be limited to those of the crimen falsi variety, be they felonies or misdemeanors.[4] On the other hand robbery, larceny and bur-

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1 State v. Jones, 176 N. C. 702, 97 S. E. 32 (1918).
2 PA. STAT. ANN. tit 28, § 315 (Purdons 1955).
3 JONES, EVIDENCE § 901 (3d ed. 1938).
4 3 WIGMORE, EVIDENCE, § 980 (3d ed. 1940).

glary, while not showing a propensity to falsify, do disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness. If the witness. has no compunction against stealing another's property or taking it away from him by physical threat or force it is hard to see why he would hesitate to obtain an advantage for himself or a friend in a trial by giving false testimony.

Some notable difference should be mentioned between the accused in a criminal action as a witness and the parties in a civil suit. In a criminal trial the accused will not be examined concerning any previous crimes he has been convicted of unless he himself or through his counsel brings the matter before the court. This does not hold true for the principal parties in a civil suit or for any witnesses called in a criminal action or civil suit.

It is for the trial judge to decide what crimes will effect the credibility of a witness, and he has considerable discretion in the matter. Generally it can be said that any felony malum in se or a misdemeanor of a crimen falsi type, for example, a conspiracy to commit perjury or an attempt to bribe a jury, will impeach credibility. Other misdemeanors of a minor character such as assault and battery, will not.[5] Disbarment has been held to impeach the credibility of an attorney.[6] However sentence for draft evasion could not be used to attack credibility[7], and the credibility of a witness cannot be impeached either by showing a conviction of adultery or by instances of misconduct.[8]

The American Law Institute[9] provides in its *Uniform Rule of Evidence No.* 21 that the test should be whether the crime involved dishonesty or false statement rather than whether it was a felony or misdemeanor crimen falsi.

The right to submit such evidence is not confined to one party in a suit or criminal action; either party may attack the credibility of an adversary's witness by production of a record of conviction.[10] It has been universally acknowledged that proof of a crime may be made by production of a "record of a judgment of conviction" and that this would not bring unfair surprise to the other party or run the risk of raising collateral issues. Since the witness is aware of his conviction, no surprise arises; and since the judgment is conclusive, it could not be attacked. Even if the witness has supporting witnesses to prove his innocence he could not use them.[11] The majority of the courts have ruled that such evidence must be of convictions, not merely arrests. It was held error to cross-examine one as to arrests, indictments, etc., not resulting in a conviction, or as to offenses which do not affect his credibility.[12] The word conviction, as commonly understood,

5 Zubrod v. Kuhn, 357 Pa. 200, 53 A. 2d 604 (1947).
6 Burke v. Harkins, 296 Pa. 414, 146 Atl. 94 (1929).
7 Malkey v. Flory Milling Co., 283 Pa. 331, 129 Atl. 109 (1925).
8 Gerhart v. Gerhart, 162 Pa. Super. 252, 57 A. 2d 595 (1948).
9 MODEL CODE OF EVIDENCE rule 106 (1)b.
10 Com. v. Doe, 18 Dost. 611, 11 North. 301 (1908).
11 3 WIGMORE, EVIDENCE, § 980 (3d ed. 1940).
12 Com. v. Wiswesser, 124 Pa. Super. 251, 188 Atl. 604 (1936).

means a verdict of guilty, or perhaps a plea of guilty; in its strict technical meaning it implies "judgment" or "sentence" upon the verdict or plea.[13] A conviction on a plea of nolo contendere has the same force and effect as a conviction on a plea of guilty, or a jury verdict following a plea of not guilty.[14] The conviction need not be of the same jurisdiction as the one in which the trial court is sitting; the crime is the discrediting fact wherever it may have been committed.

Sentence must be imposed; a verdict of guilty without sentence does not meet the test of conviction as it is used here. Also, an admission of a crime is not a substitute for conviction. Thus, an admission by a witness that he has committed perjury will affect his credibility but not his competency.[15]

If the evidence of a conviction of a crime by the witness is admitted, the witness can show in rebuttal that he received a pardon. A pardon restores competency, but the conviction may still be used to attack credibility.[16] The proof of a pardon or reversal of judgment of conviction must be the proper documentary evidence; the general rule is, that the best evidence must be produced. But if evidence of the conviction is given orally, such conviction is sufficiently rebutted by oral evidence of the pardon.[17]

A judgment, finding or proceeding of delinquency in a juvenile court is, by modern statutes, forbidden to be used "against the child" in any other court. It would not serve the ends of justice to construe these statutes as forbidding the use of such proceedings to affect the credibility of a juvenile when appearing as a witness in another court.

Some courts have refused to admit proof of prior convictions when they are regarded as so remote that they cannot reasonably bear upon the present character of the witness. Remoteness of evidence has been defined[18] as, when the fact or facts proposed to be established as a foundation from which indirect evidence may be drawn by way of inference, have not a visible, or necessary, connection with the proposition eventually to be proved.

Most of the courts have placed no definite time limitation on previous convictions.[19] A lapse of time of 20 and 14 years was held too long.[20] Four or five years was held near enough in time to bear on credibility.[21] Although several years had elapsed since the conviction of the witness for bigamy, that did not prevent the introduction of evidence of that fact to affect his credibility.[22] Conviction of a crime 23 years before was held not to be too remote to affect the

13 Com. v. Palarino, 168 Pa. Super. 152, 77 A. 2d 665 (1951).
14 Com. v. Albert, 169 Pa. Super. 318, 82 A. 2d 695 (1951).
15 Com. v. Billingsly, 160 Pa. Super. 140, 50 A. 2d 703 (1947).
16 Com. v. Guaranto, 295 Pa. 264, 145 Atl. 89 (1929).
17 Howser v. Com., 51 Pa. 332 (1865).
18 BLACK, LAW DICTIONARY (4th ed. 1941).
19 State v. Farmer, 84 Me. 436, 24 Atl. 985 (1892); State v. Bezemer, 169 Wash. 559, 14 Pac. 460 (1932).
20 Winn v. State, 54 Tex. Crim. 539, 113 S. W. 918 (1908).
21 White v. State, 57 Tex .Crim. 196, 122 S. W. 391 (1909).
22 Richardson v. State, 91 Tex. Crim. 318, 239 S. W. 218, 20 A.L.R. 1249 (1922).

credibility of a witness.[23] Conviction of a crime 17 years before was admitted.[24] A recent Pennsylvania case[25] held that the admission of a witness's criminal record of crimes he had committed 7 years ago was too remote to bear on his credibility, despite the fact that he was still on parole from his last crime, that his prior crimes were felonies, and their commission extended over several years.

In summation it would seem that in Pennsylvania if the crime is a felony or one which partakes of fraud or dishonesty, it may be admissable to attack the credibility of a witness. The final test is its remoteness: That is if, in the trial judge's opinion, its probative value outweighs the possible undue weight a jury may give it in determining the witness's credibility. This becomes most apparent where the witness in question is a defendant in a criminal action. Appellate courts have allowed trial judges wide discretion in their rulings as to the admission of such convictions in evidence. They have reversed these courts only where there was an abuse of discretion, and from the cases it seems that the abuse must be a pronounced one. Since it is within the province of the jury to weigh credibility, the courts should allow all evidence that will have a bearing on the witness's past experiences and his capacity for truth and veracity.

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[23] Bayha v. Munford, 58 Kan. 445, 49 Pac. 601 (1897).
[24] Busby v. State, 10 Okla. Crim. 343, 136 Pac. 598 (1913).
[25] Keough v. Republic Fuel & Burner Co., 382 Pa. 593, 116 A. 2d 671 (1955).