Michigan Law Review

Volume 48 | Issue 5

1950

WITNESSES-PRIOR CONVICTION OF CRIME TO IMPEACH-CIRCUMSTANCES OF SENTENCING NOT ADMISSIBLE

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WITNESSES—PRIOR CONVICTION OF CRIME TO IMPEACH—CIRCUMSTANCES OF SENTENCING NOT ADMISSIBLE—In an action to recover for personal injuries sustained in 1945, at which time he was a prisoner of the State of Virginia, plaintiff testified in his own behalf at the jury trial. On cross-examination, he admitted that he had been convicted of assault in 1943, that sentence had been suspended on condition that he enter the service, and that he had been sentenced to jail when he failed to enter the service. In his argument, defendant's attorney declared that the action had its inception in 1943, and emphasized that plaintiff had failed to enter the service when the sentence for assault was suspended. Verdict and judgment entered for defendant. On appeal, *held,* reversed. The introduction of evidence relating to plaintiff's failure to enter the service, and the argument of defendant's attorney referring to that failure, were improper and prejudicial. *Hockaday v. Red Line,* (App. D.C. 1949) 174 F. (2d) 154.

In almost all jurisdictions, a conviction of crime may be shown to impeach a witness in a civil suit.[1] Two principal questions arise as to such a showing: (1) What sort of crime can be used to impeach? (2) May the conviction be brought out on cross-examination? The range of decisions on the former point is so diverse as to defy summary description.[2] As to the latter, the conflict narrows to two views: that only the record of conviction may be shown;[3] and that conviction can be introduced also on cross-examination.[4] The better view allows introduction on cross-examination, since the flexibility of procedure is greatly

[1] 3 WIGMORE, EVIDENCE, 3d ed., §§980, 981, 987 (1940); 41 A.L.R. 337 (1926).

[2] A great part of the diversity is dependent upon statutory differences. See, for example: Ohio Gen. Code (Page, 1939) §13444-2; N.Y. Consol. Laws Ann. (McKinney, 1944) Penal Law, §2444; Ill. Stat. Ann. (Smith-Hurd, 1935) c. 51, §1; c. 38, §734; Mich. Stat. Ann. (1938) §27.912, Mich. Comp. Laws (1948) §617.63; Ind. Stat. Ann. (Burns, 1933) §2-1725.

The crime must bear on veracity of witness: Richardson v. Gage, 28 S.D. 390, 133 N.W. 692 (1911); must be a felony: Hunt v. State, 114 Ark. 239, 169 S.W. 773 (1914); must involve moral turpitude: Ex parte Marshall, 207 Ala. 566, 93 S. 471 (1922); may be "any crime": Rittenberg v. Smith, 214 Mass. 343, 101 N.E. 989 (1913). In many instances, the crime has little bearing on the issue of credibility. The showing of assault in the principal case is in that class. See 3 WIGMORE, EVIDENCE, 3d ed., §982 (1940).

[3] 6 A.L.R. 1638 (1920); 25 A.L.R. 347 (1923); 41 A.L.R. 340 (1926); 103 A.L.R. 362 (1936); 161 A.L.R. 267 (1946). The cases cited in these annotations represent a minority rule.

[4] Fire Assn. of Philadelphia v. Weathered, (C.C.A. 5th, 1932) 62 F. (2d) 78; Bockman v. Rorex, 212 Ark. 948, 208 S.W. (2d) 991 (1948); Gantt v. Columbia Coca-Cola Bottling Co., 204 S.C. 374, 29 S.E. (2d) 488 (1944). See also 6 A.L.R. 1635 (1920); 25 A.L.R. 346 (1923); 41 A.L.R. 337 (1926); 103 A.L.R. 362 (1936); 161 A.L.R. 253 (1946).

increased. The witness can hardly be in error on such an important matter, and the likelihood of surprise is negligible.[5] The principal case, however, illustrates difficulties produced when cross-examination is extended in such a fashion as to become highly prejudicial. As a consistent principle, such an extension of the cross-examination into questions which are of doubtful relevance, yet at the same time highly prejudicial, is regarded as ground for reversal.[6] Evidence of plaintiff's failure to enter the service should not have been received, since, even though it might have possessed a limited relevance, control of its effect upon the jury would have been impossible. In view of the conduct of defendant's attorney in employing the subject-matter in his argument to the jury, introduction of the evidence was plainly prejudicial. Conduct of defendant's attorney in attempting to link the conviction to the instant action, and in emphasizing plaintiff's disobedience to the wishes of a court, was in itself sufficient to justify the setting aside of the verdict and judgment in the lower court.[7]

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[5] 3 WIGMORE, EVIDENCE, 3d ed., §981 (1940).

[6] Powell v. State, 195 Miss. 161, 13 S. (2d) 622 (1943); People v. Wynn, 44 Cal. App. (2d) 723, 112 P. (2d) 979 (1941); Lee Kwong Nom v. United States, (C.C.A. 2d, 1927) 20 F. (2d) 470; Bunch v. Texas Employers Ins. Assn., (Tex. Civ. App., 1948) 209 S.W. (2d) 657.

[7] Testimony brought in for purposes of impeachment can be used only in that way, and not to excite prejudice. State v. Jackson, 336 Mo. 1069, 83 S.W. (2d) 87 (1935). See also Union Pac. R. Co. v. Field, (C.C.A. 8th, 1905) 137 F. 14; N.Y. Cent. R. Co. v. Johnson, 279 U.S. 310, 49 S.Ct. 300 (1929); 6 WIGMORE, EVIDENCE, 3d ed., §1807 (1940).