Indiana Law Journal

Volume 9 | Issue 8 Article 9

5-1934

Witnesses-Cross Examination-Impeachment

WITNESSES—CROSS EXAMINATION—IMPEACHMENT—The defendant was on trial for rape; at this time there were other charges pending against him in the same court. The defendant had taken the witness stand and testified in his own behalf. On cross-examination he was asked the following question, "Are you the same A.P. that is charged in this court with burglary and that charge is still standing against you?" The defendant was compelled to answer this question after proper objection. The question before the court on appeal was whether it is proper on cross-examination to ask the defendant, who is being tried on a particular charge, if he has not been arrested or indicted on other charges distinct from the one he is on trial for, or to so frame the question as to be equivalent in meaning to the above question. Held: No. Reversed.[1]

This case resolves the doubt which has surrounded the question of whether for the purposes of impeaching the credibility of the witness he may be interrogated on cross-examination as to prior arrests, indictments, and prosecutions for crimes, or as to convictions for crimes only.[2] The statutes in Indiana on the point are broad; the two statutes on the point read as follows: "Any fact that might heretofore be shown to render the witness incompetent may be shown to affect his credibility," and "In all questions affecting the credibility of the witness his general character may be given in evidence."[3] The cases decided under this statutes are not strictly in accord; the earlier cases leaning toward the rule that past arrests and indictments could not be inquired into to affect the credibility of a witness.[4] However, the later cases generally followed the rule that it was in the sound discretion of the trial court to allow such question to be asked.[5] The principal case expressly overruled two prior decisions[6]

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[13] Petty v. Phoenix Cotton Oil Co. (1924), 150 Tenn. 292, 264 S. W. 353.

[14] Ibid.

[1] Petro v. State (1933), Supreme Court of Indiana, 184 N. E. 710.

[2] Wigmore, Law of Evidence (1923, 2nd ed.), Vol. II, p. 392; Watson's Revision of Work's Practice and Forms (1921), Vol. II, sec. 1495.

[3] Burns' Ann. Ind. Stat. 1926, sec. 560.

[4] Glenn v. Glose (1873), 42 Ind. 60; Farley v. State (1887), 57 Ind. 331, 337; Canada v. Curry (1881), 73 Ind. 246.

[5] City of South Bend v. Hardy (1884), 98 Ind. 527; Spencer v. Robbins (1886), 106 Ind. 580, 5 N. E. 726; Parker v. State (1893), 136 Ind. 284, 35 N. E. 1105; Stalcup v. State (1896), 146 Ind. 270, 45 N. E. 334; Ellis v. State (1898), 153 Ind. 331, 52 N. E. 82; Dunn v. State (1904), 162 Ind. 174, 70 N. E. 521; Enock v. State (1907), 169 Ind. 488, 82 N. E. 1039; Crum v. State (1897), 148 Ind. 401, 47 N. E.

and some of the language in another.[7] A late case[8] followed the general rule of these cases and is thus impliedly overruled.

The rule of the principal case is a part of a broad field in the law of evidence—that of testimonial impeachment of a witness by showing his moral character. The principle behind the admission of such evidence is that whether or not we believe a person depends usually on some part of his actual personality. The witness' moral character is a part of that personality, and with an insight into this, we are better able to make an estimate of the witness' credibility. In showing the moral character of the witness it is necessary to resort to some kind of evidence. Evidence of a particular fact may be introduced to show the moral character of the witness. Certain particular facts are not admissible for this purpose largely because of the discrimination against extrinsic evidence. In the principal case the particular facts of arrest, indictment, and prosecutions for crimes are held to be inadmissible. Thus the question involved is the nature of the particular facts to be allowed in evidence.[9]

Where evidence of past indictments and arrests is permitted to be introduced to show the moral character of the witness, extrinsic evidence is being admitted.[10] The interrogation as to past arrests and indictments is merely evidence from which to determine whether there has been misconduct that would indicate a poor moral character and not evidence of misconduct. Thus the admission of such evidence runs afoul of the discrimination against the admission of extrinsic on collateral issues in the law of evidence.[11] The admission of such particular facts is a violation of the hearsay rule, since it is merely a hearsay assertion by some person of the witness' guilt.[12] When the witness is questioned on trial as to prior arrests and indictments, he is being asked whether some one in the past charged him with misconduct, not whether he actually did the acts. One court said, "An indictment is nothing more than the accusation of a crime, and the arrest is nothing more than the reassertion of this accusation. . . . Both by statutory provisions and by general principles of the law, every person accused of crime is presumed to be innocent until his guilt is established in a court of competent jurisdiction, by legal evidence beyond a reasonable doubt. To allow a witness to be asked if he has been indicted, arrested or imprisoned for a crime before conviction is to place hearsay suspicion and malice upon the same footing with and to give the same

843; Shear v. State (1897), 147 Ind. 51, 46 N. E. 331; Rock v. State (1915), 185 Ind. 51, 110 N. E. 212; Pierson v. State (1918), 188 Ind. 239, 123 N. E. 118; Bush v. State (1920), 189 Ind. 467, 128 N. E. 448; Denny v. State (1921), 190 Ind. 76, 129 N. E. 308.

[6] Vancleave v. State (1898), 150 Ind. 273, 49 N. E. 1060; Tosser v. State (1928), 200 Ind. 156, 162 N. E. 49.

[7] Dotterer v. State (1909), 172 Ind. 357, 88 N.E. 689, 30 L. R. A. (N. S.) 846.

[8] Durke v. State (1932), 183 N. E. 97.

[9] Wigmore, Evidence (1923, 2nd ed.), secs. 943, 977, 979-981; Jones, Evidence (1926, 2nd ed.), sec. 2372.

[10] Wigmore, Evidence (1923, 2nd ed.), sec. 982; Coulston v. U. S. (1931), 51 Fed. (2nd) 178.

[11] Jones, Evidence (1926, 2nd ed.), sec. 2370.

[12] Wigmore, Evidence (1923, 2nd ed.), sec. 982; Jones, Evidence (1926, 2nd ed.), sec. 2370; Coulston v. U. S. (1931), 51 Fed. (2nd) 178; People v. Morrison (1909), 195 N. Y. 116, 88 N. E. 21.

consideration, dignity, and conclusive character as is attached to the solemn judgments of court . . ."[13]

The majority of the courts thus distinguish misconduct itself from mere accusation of misconduct in allowing only convictions for crimes to be shown and not arrests, indictments or prosecutions to be shown to impeach the credibility of the witnesses.[14] However, there is a sizable minority of the courts following the opposite result.[15] The only support for this result is that a mere encounter with the law so affects the antecedents of the witness that his credibility is impaired. Dean Wigmore points out that while this might have been true in the early part of the last century, it can no longer be said to be true today.[16]

It is submitted that the court in the principal case was correct in changing the rule in Indiana to conform to the weight of authority since that rule is correct on principle.

R. S. M.

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[13] Slater v. U. S. (1908), 1 Okla. Crim. 275, 98 P. 110.

[14] Coulston v. U. S. (1931), 51 Fed. (2nd) 178; Massenberger v. U. S. (1927), 19 Fed. (2nd) 62; Tarling v. People (1921), 69 Colo. 471, 194 Pac. 939; Groves v. State (1932), Ga., 164 S. E. 822; People v. Brothers (1932), 347 Ill. 350, 180 N. E. 442; East v. Commonwealth (1933), 249 Ky. 46, 69 S. W. (2nd) 137; State v. Taylor (1931), 172 La. 20, 133 S. 349; Burgess v. State (1931), 161 Md. 162, 155 A. 153; Commonwealth v. Danton (1923), 243 Mass. 552, 137 N. E. 652; People v. Morrison (1909), 195 N. Y. 116, 88 N. E. 21; People v. Malkin (1928), 250 N. Y. 185, 164 N. E. 900; Commonwealth v. Quaranto (1928), 295 Pa. 264, 145 A. 89; State v. Dale (1922), 119 Wash. 604, 296 Pac. 369; Thornton v. State (1903), 117 Wis. 338, 93 N. W. 1107; See Notes in 6 A. L. R. 1608, 25 A. L. R. 339.

[15] Grossing v. State (1922), 155 Ark. 85, 243 S. W. 951; People v. Statkway (1929), 247 Mich. 630, 225 N. W. 540; Harper v. State (1922), 105 Ohio 481, 140 N. E. 364; State v. Colson (1927), 194 N. C. 206, 139 S. E. 230; Rose v. State (1922), 92 Tex. Crim. Rep. 560, 244 S. W. 1009. For the rule in Texas see Chandler, Attacking the credibility of witnesses by proof of charges or convictions of crime (1931), 10 Tex. L. R. 257.

[16] Wigmore, Evidence (1923, 2nd ed.), sec. 2370.