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THE USE OF PRIOR CONVICTIONS TO IMPEACH THE CREDIBILITY OF THE DEFENDANT IN PENNSYLVANIA

In all Anglo-Saxon jurisdictions, the admission of prior crimes of a defendant for the purpose of showing a disposition in the accused to commit crime is prohibited.¹ Wigmore states that "the doing of one act is itself no evidence that the same or like act was again done by the same person has been so often judicially repeated that it is a commonplace."² In Pennsylvania, "[i]t is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against the prisoner."³ Quoting Wigmore, the court in *Commonwealth v. Boulden* explained this exclusionary policy:⁴

The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of the crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take proof of it as justifying a condemnation irrespective of the present charge.⁵

However, there are numerous exceptions to the general rule, most of which fall within the principle that prior crimes are admissible if they are independently relevant to establish guilt. A prior crime may relate to the substantive merits of the case, performing such functions as neutralizing the defenses of accident, mistake or lack of guilty knowledge, establishing motive, showing plan, system or habit, or proving identity.⁶

Even though a prior crime may not be independently relevant to the substantive merits of the case, the previous conviction may be alluded to for the ostensible purpose of impeaching the defendant's credibility. Of course, these convictions could not be introduced if the defendant were not

1. This is not the practice in continental jurisdictions, 1 WIGMORE, EVIDENCE § 193 (3d ed. 1940). "The rule of exclusion thus expounded is so firmly established that it would be held to prevail even in jurisdictions where no express enunciation of it has been made." *Id.* § 194.

2. *Id.* § 192.

3. *Shaffner v. Commonwealth*, 72 Pa. 60, 65 (1872).

4. 1 WIGMORE, *op. cit. supra* note 1, § 194; *Commonwealth v. Boulden*, 179 Pa. Super. 328, 116 A.2d 867 (1955).

5. *Id.* at 333, 116 A.2d at 869.

6. In *Commonwealth v. Williams*, 307 Pa. 134, 148, 160 Atl. 602, 606 (1932), the supreme court listed "many well recognized exceptions."

Prior convictions can be admitted in evidence to show intent, scienter, motive, identity, plan, or the accused to be one of an organization banded together to commit crimes of the sort charged, or that such prior conviction or criminal act formed a part of a chain, or was one of the sequence of acts, or became part of the history of the event on trial, or became part of the natural development of facts; also to prove mental condition when the defense was insanity or to rebut the inference of mistake, or to show guilty knowledge. . . .

For a more recent and well delineated study of the exceptions, see *Commonwealth v. Boulden*, *supra* note 4.

to testify in his own behalf, but "[w]hen a party becomes a witness for himself, he stands in no better position than other witnesses not a party."⁷

It is the purpose of this paper to describe and to evaluate the manner in which prior convictions are admissible in Pennsylvania solely for the purpose of impeaching the accused's credibility. Emphasis has been placed on the following issues: (1) what crimes are relevant to the question of credibility; (2) in what manner may this type of evidence be introduced; and (3) what modifications should be made in the present Pennsylvania rules.

Prior bad acts are not admissible to impeach credibility;⁸ there must have been a crime resulting in a *conviction*.⁹ The court said in *Commonwealth v. Arcurio* that a judge should not "permit a question to the witness as to whether he has ever been arrested, incarcerated, or indicted. These facts are immaterial, for even innocent persons are arrested and subject to indictment."¹⁰ However, most courts treat a plea of *nolo contendere* as being equivalent to a guilty plea and admit evidence of a conviction wherein the defendant made such a plea.¹¹ The fact that the accused has been pardoned after a conviction for a previous crime will not prevent the admission of the record, but the defendant will then be allowed to show his pardon.¹²

But not all crimes are relevant to the issue of credibility. "[T]he only crimes admissible to attack veracity are such as affect credibility and refer to the conviction of a felony or misdemeanor in the nature of 'crimen falsi.'" ¹³ In *Commonwealth v. Gold*,¹⁴ the defendant contended that "in the nature of 'crimen falsi'" modified a felony as well as a misdemeanor, but the court replied:

Felonies of whatever character, being infamous crimes, stand in a class by themselves, but not every misdemeanor, only misdemeanors in the nature of "crimen falsi," carry with them a cloud upon the veracity of the defendant, as a witness whose credibility is attacked by the record of conviction.¹⁵

Thus, the court reasoned, a previous conviction for larceny could be used to impeach Gold's credibility. As "crimen falsi" describes the relevant misdemeanors, *Commonwealth v. Schambers*¹⁶ held that a defendant accused

7. *Commonwealth v. Quaranta*, 295 Pa. 264, 272, 145 Atl. 89, 92 (1928).

8. *Commonwealth v. Williams*, 209 Pa. 529, 58 Atl. 922 (1904).

9. *Commonwealth v. Quaranta*, *supra* note 7, at 273, 145 Atl. at 93; *Commonwealth v. Wiswesser*, 124 Pa. Super. 251, 188 Atl. 604 (1936).

10. 92 Pa. Super. 404, 415 (1927).

11. See Annot., 146 A.L.R. 867 (1943).

12. *Supra* note 7, at 274, 145 Atl. at 93; see Annot., 30 A.L.R.2d 893 (1953).

13. *Supra* note 7, at 273, 145 Atl. at 93; *Melangro v. United States*, 88 F.2d 264 (3d Cir. 1937) (applying Pennsylvania law).

14. 155 Pa. Super. 364, 38 A.2d 486 (1944).

15. *Id.* at 371, 38 A.2d at 489.

16. 110 Pa. Super. 61, 167 Atl. 645 (1933).

of unlawfully possessing and transporting liquor could not be impeached by a prior conviction for the same crime. According to the superior court, misdemeanors "in the nature of 'crimen falsi'" are those crimes which disqualified a person as a witness at common law. The court gave as examples:

. . . forgery, perjury, subornation of perjury, suppression of testimony by bribery or conspiracy to procure the absence of a witness, barratry, the fraudulent making or alteration of a writing to the prejudice of another man's legal right. . . .¹⁷

When the defendant testifies, the crimes relevant to any witness's credibility may be used to impeach the accused's veracity, but the *manner* in which this evidence may be introduced is more limited. In 1884, *Buck v. Commonwealth*¹⁸ held that evidence of prior convictions could not be adduced on cross-examination of the defendant, but in 1909, that decision was overruled by *Commonwealth v. Racco*,¹⁹ when the court stated: "Under our statute permitting him to testify no restriction was placed upon the limit of his cross-examination."²⁰ As a result of the *Racco* decision, prosecutors were tempted to examine defendants concerning prior convictions without knowing the answers to their questions. As the court in *Commonwealth v. Doe*²¹ stated:

It was not an infrequent occurrence that such inquiry was made where there was neither the ability nor the expectation of proving the fact suggested if it were denied by the defendant and it is undoubtedly true that the mere asking of the question would excite the suspicions of jurors and create a prejudice against the defendant even if he denied the implication.²²

In 1911, the legislature passed the following act to prevent this practice prejudicial to the defendant:²³

Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation; unless,—

One. He shall have at such trial, personally or by his advocate,

17. *Id.* at 64, 167 Atl. at 646. One convicted of perjury is not a competent witness, PA. STAT. ANN. tit. 18, § 4322 (1945); see *Commonwealth v. Mueller*, 153 Pa. Super. 524, 34 A.2d 321 (1943).

18. 107 Pa. 486 (1884).

19. 225 Pa. 113, 73 Atl. 1067 (1909). The law prior to 1911 is clearly explained in *Commonwealth v. Doe*, 79 Pa. Super. 162 (1922).

20. *Commonwealth v. Racco*, *supra* note 19, at 116, 73 Atl. at 1067.

21. *Commonwealth v. Doe*, *supra* note 19.

22. *Id.* at 168.

23. PA. STAT. ANN. tit. 19, § 711 (1930).

asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or,

Two. He shall have testified at such trial against a co-defendant, charged with the same offense.

The Pennsylvania act was modeled after a similar English statute, but it was not copied verbatim.²⁴ The English version was construed to apply to both cross-examination and the admissibility of extrinsic evidence²⁵ and it made an express exception for crimes independently relevant to prove the guilt of the accused.²⁶ In Pennsylvania, the courts have construed the act as implying such an exception,²⁷ but have limited the scope of the statute to cross-examination.²⁸ However, the crime may not be shown by merely

24. Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36. The significant provision of the Act was the following section:

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offense other than that wherewith he is then charged, or is of bad character, unless—

- (i) the proof that he has committed or been convicted of such other offense is admissible evidence to show that he is guilty of the offense wherewith he is then charged; or
- (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
- (iii) he has given evidence against any other person charged with the same offense.

25. *Barker v. Arnold*, [1911] 2 K.B. 120. The majority of the states allow cross-examination of a defendant concerning prior convictions for the purpose of impeaching his credibility. Most of them permit it by statute. The only state prohibiting it without a statute is Illinois; *People v. Grizzle*, 381 Ill. 278, 44 N.E.2d 917 (1942). See Annotations: 6 A.L.R. 1608 (1920), 25 A.L.R. 339 (1923), 103 A.L.R. 350 (1936), and 161 A.L.R. 233 (1946).

26. *Supra* note 24, § (i). Pennsylvania's omission of this section led Wigmore to say: "On first reading this Statute, the suspicious thought intrudes itself that it had been devised by some representative of the underworld." 1 WIGMORE, *op. cit. supra* note 1, § 194b.

27. See note 6 *supra*.

28. In *Commonwealth v. Dorst*, 285 Pa. 232, 132 Atl. 168 (1926), the defendant claimed that the reason and spirit of the act should prohibit the prosecution from producing the record of a prior conviction in order to impeach the defendant's credibility. However, the supreme court stressed the title of the act, "An Act Regulating in criminal trials the cross-examination of a defendant when testifying in his own behalf," and replied that the act did not apply to extrinsic evidence. It also cited *Commonwealth v. Doe*, *supra* note 19; *Commonwealth v. Pezzner*, 78 Pa. Super. 286 (1922); and *Commonwealth v. Vis*, 81 Pa. Super. 384 (1923), which had pointed out that before the enactment of the statute, records of previous convictions were admissible and if that practice had been intended to be eliminated, the statute should have expressly prohibited it. Finally at 239, 132 Atl. at 170, the court said:

To deny to the commonwealth the right to traverse the defendant's proffer of himself in this regard by showing that he is not worthy of credit because infamous by judicial finding would be tilting the scales against the commonwealth where they should be held even.

placing a rebuttal witness on the stand. A prior conviction may only be introduced by producing the record or an exemplified copy;²⁹ "[i]t is the highest and best evidence."³⁰

The Act of 1911 contains two exceptions which allow the prosecution to cross-examine the defendant about his prior convictions for the purpose of impeaching his credibility: (1) if he puts his character into issue,³¹ and (2) if he testifies against a co-defendant.³² Typical applications of the first exception are to be found in *Commonwealth v. Garanchoskie*,³³ where cross-examination was allowed after the defendant had called various character witnesses, and in *Commonwealth v. Lisowski*,³⁴ where the defendant testified as to his good character and was cross-examined concerning a previous conviction for assault and battery.³⁵ The second exception has not been construed.

In addition to the express exceptions, it has been held that the accused can lose the benefits of the act by the manner in which his defense is conducted before or during the time he is a witness. An opening address by the defendant's counsel which admits certain previous criminal acts by the accused waives the right of the defendant to invoke the statute,³⁶ and the admission of prior convictions on direct examination permits the prosecutor to ask the defendant about other crimes to which he has not alluded.³⁷ The courts reason that one should not be allowed to give the appearance of making a clean breast of prior misconduct when actually he has told half of the story.³⁸

Thus the Act of 1911 merely protects the defendant from the irresponsible questions alluded to in the *Doe* case.³⁹ It does not prevent the admission of extrinsic evidence of prior crimes to impeach the accused's credibility, and in certain circumstances the defendant can be subject to unfair interrogation. It is submitted that this phase of criminal procedure is unnecessarily and unduly prejudicial to the defendant.

Where a previous conviction is admitted for the purpose of testing veracity, it is said that such evidence may not affect the substantive merits of

29. *Commonwealth v. Anthony*, 91 Pa. Super. 518, 521 (1927).

30. *Supra* note 10, at 410.

31. PA. STAT. ANN. tit. 19, § 711(1) (1930).

32. PA. STAT. ANN. tit. 19, § 711(2) (1930).

33. 251 Pa. 247, 96 Atl. 513 (1916).

34. 274 Pa. 222, 117 Atl. 794 (1922).

35. See *Commonwealth v. Yeager*, 329 Pa. 81, 196 Atl. 827 (1938); *Commonwealth v. Comer*, 167 Pa. Super. 537, 76 A.2d 233 (1950); and *Commonwealth v. Wiswesser*, *supra* note 9.

36. *Commonwealth v. Garrison*, 398 Pa. 47, 157 A.2d 75 (1959); *Commonwealth v. Farley*, 168 Pa. Super. 204, 77 A.2d 881 (1951).

37. *Commonwealth v. Quaranta*, *supra* note 7.

38. *Ibid.*

39. *Commonwealth v. Doe*, *supra* note 19, at 168.

the case. The fact of the conviction serves only to judge the witness's credibility.⁴⁰ Not only is the jury expected to compartmentalize the evidence it receives, but it is presumed to have done so. However, presumptions do not always reflect reality. Even though a juror makes a determined effort to effect such a classification of legal concepts, he may well be subconsciously influenced by "the natural and inevitable tendency of the tribunal . . . to give excessive weight to the . . . [accused's] record."⁴¹ It is quite probable that the jury will consider evidence of a prior conviction as proof of a disposition in the accused to commit crime. The prejudice to the defendant is apparent.

Thus, unless such evidence is a necessary tool for impeaching the accused's veracity, it should not be admitted even though it may have some probative value. But the use of prior convictions is not necessary to impeach a defendant's credibility. The defendant's temptation to lie in order to escape punishment does not go unnoticed by the jury. Since the accused's veracity is questioned by the jury in the absence of knowledge of prior convictions, that knowledge serves little useful purpose. If there is any value in such evidence, it is certainly outweighed by its tendency to prejudice the defendant's right to be judged on the substantive merits of his case.

Even if certain prior crimes have a probative value in ascertaining the veracity of the witness which outweighs the prejudice to the defendant, Pennsylvania has not adopted a logical classification of crimes for the purpose of testing credibility. As all felonies and those misdemeanors "in the nature of 'crimen falsi'" are relevant to credibility, it is no wonder that the prosecutor in *Commonwealth v. Wiswesser* felt it permissible to ask the defendant if he had committed *any crimes* in the past.⁴² There may be a reasonable basis for the inclusion of certain misdemeanors in a list of crimes affecting credibility. Those listed in the *Schambers*⁴³ case tend to show the witness's attitude toward the sanctity of the judicial process. A crime such as subornation of perjury is one which not only shows that the witness has been dishonest in the past, but that his dishonesty was a complete disrespect for the obligation of the oath. Less clear is the case where the conviction pertains to a lack of veracity outside the courtroom, *i.e.*, crimes such as embezzlement, larceny by bailee and obtaining money by false pretenses.⁴⁴ These crimes relate to dishonesty in general, not to an attitude toward the judiciary or the oath. Still of less probative value is a previous conviction for a crime such as rape. Although at common law, "a person of such depravity of nature as permitted him to be guilty of a serious crime was not worthy of

40. *Commonwealth v. Davis*, 396 Pa. 158, 150 A.2d 863 (1959).

41. 1 WIGMORE, *op. cit. supra* note 1, § 194.

42. *Supra* note 9.

43. *Commonwealth v. Chambers*, 225 Pa. 113, 73 Atl. 1067 (1909).

44. *Commonwealth v. Vis*, *supra* note 28.

credit and was incapable of making such contribution to the truth in any judicial inquiry as was entitled to consideration,"⁴⁵ a previous conviction for rape⁴⁶ should have no more significance in ascertaining the veracity of a witness than a prior conviction for the illegal possession of liquor.⁴⁷ While the court in *Commonwealth v. Schambers*⁴⁸ held that a prior conviction for "bootlegging" had no probative value on the issue of the defendant's credibility, it implied that a valid distinction between crimes *mala in se* and crimes *mala prohibita* could be made.⁴⁹ Whether or not the prior crime is relevant to a witness's veracity should not be dependent upon whether it was morally wrong, but upon whether the crime was of such a nature that the witness has shown a tendency not to respect the obligation to tell the truth when he is testifying.

In short, those crimes which society considers most heinous have less probative value in ascertaining veracity than certain misdemeanors. At first glance, such a classification appears at least anomalous. It is probably the apparent absurdity of the classification that led to the rule admitting all felonies, but only certain misdemeanors. However, when relating past crimes to the question of veracity, one is not concerned with the danger of the crime to society in general, but with the danger to the validity of the judicial process.

One cannot expect the Supreme Court of Pennsylvania to modify the present rules concerning prior convictions admitted to impeach the defendant's credibility. The vast body of case law decided since 1911 on this subject provides such extensive authority for the court's present position that it would be difficult for the court to change its point of view. Only recently it said:

If a defendant offers himself as a person worthy of belief, the jury has a right to know what kind of man he is—to aid in assessing his credibility. His previous record is admissible for this purpose. . . . The "Split-Verdict" Act of 1959 . . . did not intend to, nor did it, change this long established rule.⁵⁰

Therefore, if a change is to be made, it seems that it must be done by the legislature.⁵¹ *Rule 21* of the Uniform Rules of Evidence entitled "Limitations

45. *Commonwealth v. Doe*, *supra* note 19, at 166-67.

46. *Commonwealth v. Garner*, 35 *Lanc. L. Rev.* 373 (Pa. 1918).

47. *Commonwealth v. Schambers*, *supra* note 43.

48. *Ibid.*

49. *Id.* at 64, 167 *Atl.* at 646.

50. *Commonwealth v. Butler*, 405 Pa. 36, 47, 173 A.2d 468, 474 (1961).

51. In 1947, the Pennsylvania Legislature passed an act for just this purpose, Pa. Laws 1947, act 1239, § 1, but it was ruled unconstitutional in *Commonwealth v. DePofi*, 362 Pa. 229, 66 A.2d 649 (1949). The court reasoned: (1) the title did not give sufficient notice of the contents of the Act; (2) the contents contained more than one subject; and (3) the wording of the Act was ambiguous.

on Evidence of Conviction of Crime as Affecting Credibility" could be used as a model.⁵² It provides:

Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction for a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

According to *Rule 21*, there is a standard for the ordinary witness and a separate standard for the defendant-witness in a criminal proceeding. Unless the defendant makes his credibility an issue, no record of any crime, including perjury,⁵³ is admissible for the sole purpose of impeaching his credibility. It is important to emphasize that the test is not whether the defendant puts his reputation in issue, but whether he places his credibility in issue. If the accused acts so as to lose the benefits of his special position, he can be impeached by the showing of prior convictions, but they must involve "dishonesty or false statement." No exception has been made for the defendant who testifies against a co-defendant.

As another alternative, Pennsylvania could apply the provisions of *Rule 21* concerning ordinary witnesses to a defendant-witness. This approach would allow the prosecution to introduce prior convictions of felonies such as obtaining money by false pretenses and misdemeanors in the nature of "crimen falsi." It would be a compromise between the present Pennsylvania position and the one taken by the Uniform Rules.

The Uniform Rules of Evidence have been approved by the American Bar Association, the American Law Institute, and the Pennsylvania Bar Association.⁵⁴ In a supplement to the Report of the Committee on Judicial Administration of the Pennsylvania Bar Association, it is stated:

This provision, however, cannot be evaluated without considering the section governing the privilege of the accused not to be called as a witness and not to testify. *Rule 23(4)* permits counsel to comment on the accused's failure to take the stand and to dispel any doubt, further provides that "the trier of fact may draw all reasonable

52. UNIFORM RULE OF EVIDENCE 21. "*Rule 21* appears to be modeled closely after the 1947 Act approved by the Pennsylvania Legislature, but subsequently held unconstitutional for highly technical reasons, albeit remedial deficiencies. . . ." Levin, *The Impact of the Uniform Rules of Evidence on Pennsylvania Law*, 26 PA. B. A. Q. 216, 223 (1955).

53. PA. STAT. ANN. tit. 18, § 4322 (1945).

54. Committee on Judicial Administration, *Report on the Uniform Rules of Evidence*, 26 PA. B. A. Q. 213 (1955). "It is believed that the proposed Uniform Rules are wholly sane and workable and that their adoption will materially improve the functioning of our legal processes." *Ibid.*

inferences therefrom." In short the draftsmen have attempted to encourage testimony by the accused in the interest of fuller development of all relevant evidence. To accomplish this without undue prejudice to the accused they have rendered him immune from attack by proof of prior convictions regardless of whether the ostensible theory of such attack relates to his credibility as a witness or to his role as defendant.⁵⁵

Although the presence of *Rule 23(4)* and the general policy of the rules made the present approach of *Rule 21* necessary in order to protect the defendant, the absence in Pennsylvania of a rule permitting the prosecutor to comment on the accused's failure to take the stand, merely reduces the immediate incentive to enact something comparable to *Rule 21*; it certainly does not extinguish the need for some legislation in this field.

Whether or not the legislature desires to accept completely the policy of *Rule 21*, it should limit in some way the use of prior convictions to impeach the credibility of the defendant. Inasmuch as misdemeanors in the nature of "crimen falsi" probably have little prejudicial effect on the substantive merits of the case and have some probative value in ascertaining the veracity of a witness, they could be admissible as a compromise. The Act of 1911 was enacted merely to stop an unfair practice arising as a result of the *Racco* decision. Pennsylvania, in accordance with the Uniform Rules, should adopt a policy pertaining to all evidence, not merely cross-examination.

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55. Levin, *supra* note 52, at 223.

