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Proof of Conviction by Cross-Examination

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with reference to the default judgment seems to be contrary to that of the North Carolina court in the case under review.⁴¹

Whatever may be the state of the authorities, one may venture to suggest that nothing has been discovered which has caused any doubt of the feasibility of T's suing A and the undisclosed P in the same suit. This can be permitted without adopting the theory of *Beymer v. Bonsall*, supra. Up to this point the North Carolina court seems to have a majority of the authorities in its favor. It was a different and a further result when this court permitted two judgments to be rendered.

KENNETH C. SEARS.

BEST EVIDENCE—PROOF OF CONVICTION BY CROSS-EXAMINATION.—[Massachusetts] An interesting question under the "best evidence" rule is presented by a recent Massachusetts case.¹ The defendant was prosecuted under a statute increasing the penalty where the accused had previously been convicted of the same offense. The information charged a prior conviction, but the prosecution did not introduce any record to sustain it. When the defendant took the stand on his own behalf he was compelled to admit on cross-examination that he had previously pleaded guilty to a similar charge and paid a fine. The Supreme Court approved the conviction carrying the increased penalty on the ground that since the prior conviction could have been proved by the confession or extra-judicial admission of the defendant, it was equally provable by his admission on the witness stand, and that by taking the stand he waived his privilege and subjected himself to cross-examination on all elements of the offense.

There is suprisingly little authority on the point and apparently none supporting the present holding.

41. *Cross & Co. v. Mathews and Wallace* (1904) 91 L. T. R. 500, reached a result in accord with that in New Jersey. It should be noticed, however, that it was a case of a disclosed rather than an undisclosed principal. Upon that theory, there was no cause of action, normally, against the agent. Should the court, therefore, have disregarded the default judgment against him as the basis of an election? *Goodale v. Page* (1912) 92 S. C. 413, has some dicta that may be interpreted as requiring an "election" before suit is brought if T only desires to bring one suit.

In *Phillips et al. v. Rooper et al.* (1915) 134 Tenn. 457, a judgment against agents of a disclosed P by confession was held to be an election which would prevent "a further and final decree" against the principal. However, the court imputed to T that he had a definite theory by which he could proceed against the agents. It was suggested that T was attempting to hold the agents upon their implied warranty of authority or upon the theory that they had added their own responsibility. Thus, the case may be distinguished from *Cross & Co. v. Mathews & Wallace* supra.

M. Brennen & Sons v. Thompson (1915) 33 Ont. L. R. 465, 22 Dom. L. R. 375, is in accord with the New Jersey decision except that the court was even more strict. There T sued P and A together, got default judgment against A, was granted a motion to vacate judgment and amend as to P. On appeal, action was dismissed but judgment against A to remain.

1. *Commonwealth v. Fortier* (1927) 155 N. E. 8.

A conviction is the legal result of a judgment of a court—a matter always in writing. The proof of a conviction necessarily means the proof of a formal written entry. On general principles a witness could not be called to prove the existence and contents of such a writing, without showing that it was unavailable. For this reason a witness could not be disqualified by his admission on voir dire examination that he had been convicted of a felony or other infamous offense. It was necessary to produce the record.² The same rule in most jurisdictions prevents the cross-examination of a witness as to his prior conviction to discredit his testimony.³

Because a party cannot anticipate what witnesses will be called and therefore cannot be prepared to produce the impeaching record, the rule as to witnesses has been relaxed in some states,⁴ and changed by statute in others.⁵ Where the statute or the prevailing practice allows the cross-examination of a witness as to prior convictions to discredit, doubtless the same rule would apply to a defendant testifying on his own behalf, since he has voluntarily assumed the same position as any other witness.⁶

Massachusetts, as already seen, excludes such a cross-examination of ordinary witnesses, and, treating the defendant as any other witness, excludes cross-examination of him as to prior convictions to discredit his testimony.⁷ The reasons assigned for a different rule, where the cross-examination as to prior a conviction is for a different purpose, are not very satisfactory.

When the defendant voluntarily took the stand and testified on his own behalf, he waived his privilege of silence and his privilege against self incrimination, and subjected himself to all legitimate cross-examination. But it has never been thought before that he also waived the benefit of the ordinary rules of evidence. For example, he would not waive the benefit of the rule against forced disclosure of confidential communications with his attorney.⁸ He

2. *Rex v. Castell Careignion* (1806) 8 East 77.

3. *Commonwealth v. Quinn* (1855) 5 Gray 478; *Newcomb v. Griswold* (1862) 24 N. Y. 298; *People v. Goodman* (1918) 283 Ill. 414; *Morris Joseloff Co. v. Spirt* (1922) 97 Conn. 447.

4. *Clemens v. Conrad* (1869) 19 Mich. 170.

5. Hurd's Rev. Sts. Ill. ch. 51 sec. 1: "That no person shall be disqualified in any civil action, . . . but such interest or conviction may be shown for the purpose of affecting the credibility of each witness; and the fact of such conviction may be proved like any other fact not of record." The limitation of this section to civil actions leaves the rule unchanged in criminal prosecutions. *People v. Goodman supra*.

6. *State v. Spivey* (1905) 191 Mo. 87, 110. Where the statute expressly authorizes such cross-examination of witnesses to discredit their testimony it is quite natural that the statutory rule should be applied to a defendant assuming the position of a witness, though the same reason does not apply, because the prosecution could anticipate that the defendant would testify and be prepared to produce the discrediting record.

Where the rule has been relaxed without statute the general tendency to treat the defendant as any other witness would lead to a uniform rule.

7. *Commonwealth v. Walsh* (1907) 196 Mass. 369. In this case, the court was urged to make an exception against the defendant, but refused to do so.

8. *Hemmenway v. Smith* (1856) 28 Vt. 701.

would not waive the benefit of the best evidence rule requiring a conviction to discredit him to be proved by the record.⁹ It would not be contended that he would waive the rule against involuntary confessions, so as to enable the prosecution to force him to admit on cross-examination that he had confessed to escape threatened violence by the police. The doctrine of waiver seems inadequate to sustain the ruling.

The other reason assigned seems equally untenable. The fact that a voluntary admission of the existence and contents of a writing is received as an exception to the best evidence rule does not lead to the conclusion that a party may therefore be compelled to make an admission.

At a fairly early period an English case¹⁰ approved the use of a voluntary admission to prove the existence and contents of a writing without accounting for its non-production, on the broad, though rather unsatisfactory, ground that what a party chooses to say against his own interest is presumably true and therefore admissible.

A party may be as much mistaken about the contents of a writing in general as an ordinary witness testifying from memory. Every lawyer is familiar with the frequent discrepancy between his client's statement of the contents of letters, contracts and the like, and the documents themselves when later brought to his office for his inspection. Casual admissions are frequently a very poor substitute for the writings themselves. But in spite of quite serious objections to reported admissions as substitutes for written instruments, many American courts, including those of Massachusetts,¹¹ are too firmly committed to the English rule to reopen that vexed question.

The English cases, however, lend no support to the innovation that a party may be examined against his objection so as to obtain admissions obviating the necessity of producing the original writing. Under an English statute providing for the submission of interrogatories to the adverse party, it has been held that his forced answer as to the contents of a document was secondary evidence and inadmissible until the original was accounted for.¹² It has also been held that the defendant could not cross-examine the plaintiff as to the contents of a document not shown to be unavailable.¹³ In an ordinary civil case the Supreme Court of Massachusetts took the same view, that a plaintiff, testifying on his own behalf, could not be cross-examined as to the contents of a written memorandum which he had not been notified to produce.¹⁴

There is, however, a practical difference between a cross-examination as to the contents of some documents and cross-examination as to the contents of a record alleged in the information.

9. *Commonwealth v. Walsh* supra.

10. *Slattery v. Pooley* (1840) 6 M. & W. 664.

11. *Smith v. Palmer* (1850) 6 Cush. 513.

12. *Sharpe v. Lamb* (1840) 11 Ad. & E. 805.

13. *Darby v. Ousley* (1856) 1 H. & N. 1.

14. *Smith v. Plant* (1913) 216 Mass. 91, 104.

In the latter case no actual prejudice is likely to result, because the record is ordinarily accessible, and the pleading has notified the defendant of its importance.

If no conviction has taken place he will naturally deny it on cross-examination. If there has been some sort of conviction in fact, but legally defective, as for want of jurisdiction, or insufficiency of the charge to state the necessary offense, or from a failure to enter the judgment as not infrequently happens on a plea of guilty in an inferior court, the defendant is in a position to produce the record itself and thus disclose the legal objection. In case of documents of which the defendant has no notice or warning, and which he may not be able to obtain in the midst of a trial, a cross-examination may be manifestly unfair and prejudicial. He may be forced to make general admissions as to the contents and effect of documents when he is in no position to correct erroneous impressions or raise legal objections by producing the instrument itself.

If the rule is strictly confined to situations like that in the principal case, there is no great practical objection. On the other hand there is no positive reason for breaking in on the general rule, because the prosecution ought to be prepared to produce the record alleged in the information. And our law of evidence is complicated enough without making unnecessary exceptions. If the exception is not strictly confined it leads to all the objections which the best evidence rule was designed to prevent.

E. W. HINTON.

CONSTITUTIONAL LAW—DUE PROCESS—POWER OF STATE TO REGULATE PRICE OF RESALE OF THEATRE TICKETS BY BROKERS.—[United States] In *Tyson & Bros.-United Theatre Ticket Offices, Inc. v. Banton*¹ the federal Supreme Court has just decided a question of much interest to theatre-goers of our larger cities. A New York statute² required a license from those engaged in the business of reselling theatre tickets, and criminally forbade a charge of more than fifty cents a ticket by licensees for this service. It was admitted that this price afforded a reasonable return for the service. Plaintiff, a corporation engaged in the business of reselling in New York City yearly about 300,000 theatre tickets out of a total of about 2,000,000 thus resold, sought an injunction in the local federal district court against the enforcement of this law by the local state district attorney. From a decree denying this, plaintiff appealed and secured a reversal in his favor by a five to four decision of the Supreme Court.

The opinion of the majority by Mr. Justice Sutherland proceeds chiefly upon the ground that the price at which theatres sell tickets cannot be regulated for lack either of an historical sanction (such as exists for inns, carriers, and grist mills) or of a sufficient public necessity for it—if the price of food and of rents can be limited

1. (1927) 47 Sup. Ct. 426.

2. New York Laws 1922 ch. 590 secs. 167, 168, 172.