DePaul Law Review

Volume 6
Issue 2 *Spring-Summer 1957*

Article 7

Impeachment by Prior Conviction Pending Appeal

DePaul College of Law

death or imprisonment in the penitentiary and every other offense is a "misdemeanor."[36]

The apparent justification for this provision is a desire, on the part of the legislature, to provide for prompt and competent final adjudication where one's rights to life and freedom are at stake.

CONCLUSION

The need for action is clear. The Supreme Court of Illinois must be relieved of its burden of compulsory appeal cases. Only then can it begin to function in a manner commensurate with its status as the highest tribunal of one of the country's leading commercial states. Given more discretion in the selection of cases it will review, the court will be free to take those cases that involve significant issues of law and matters of great public interest. It will be free to bypass cases involving settled propositions of law which fit into classifications deemed worthy of privileged consideration by the framers of a constitution now largely outmoded by intervening decades of economic, social and political change. The proposed Judicial Article, if adopted, will afford the Supreme court a much-needed increase of discretionary power.

[36] People v. O'Connor, 414 Ill. 51, 110 N.E. 2d 209 (1953).

IMPEACHMENT BY PRIOR CONVICTION PENDING APPEAL

That evidence of a prior criminal conviction is admissible to impeach a witness would seem to be a well-settled proposition of law. Yet an aspect of this proposition has arisen four times, all quite recently, in the federal system, and the decisions have demonstrated a need to go further into the matter. Specifically, the problem situation arises in this way: W, a witness, is questioned by the opposition about a previous criminal conviction, in an attempted impeachment. Objection is made, on the ground that the conviction is being appealed. Query: has W been convicted within the meaning of the proposition stated above?

Reference to the standard texts discloses no discussion of this problem although it has arisen many times in various states. That the problem is closely circumscribed and limited in its application must be admitted. Its implications, however, could become of prime importance in any number of ways.

To take but one example, suppose a situation in which a candidate for public office has been convicted of a crime, which conviction carries with it the penalty of forfeiture of civil rights. Suppose further that the conviction is being appealed at the time of the election. Query: has the conviction, i.e. the forfeiture of civil rights, taken place, or will it be held in

abeyance pending the appeal? If the reasoning in the cases discussed below is any criterion, the problem here under consideration would be expected to weigh heavily in the final determination of such an issue, barring direct precedent.

BACKGROUND—COMMON LAW

At common law a convicted felon was disqualified as a witness.[1] Under the various practice acts and codes of procedure this disqualification was universally eliminated. The reason behind the rule however, viz., that one convicted of a crime, or at least of certain specified crimes, was to be believed only with reservations, if at all, was preserved. This reasoning is set forth clearly in such cases as *United States v. Waldon*[2] in which the witness sought to be impeached was the defendant. The court said:

> [T]he conviction inquired about must reasonably tend to prove a lack of character with respect to his credibility as a witness. If the former conviction shows such lack of character, we see no reason why it should not be admitted for what it is worth to counteract the presumption of credibility with which the law clothes him.[3]

At common law the problem of the effect of an appeal on the conviction wherewith the witness was sought to be impeached did arise.[4] It is interesting to note however that in none of the reported cases examined (cases arising under the modern codes or practice acts) was any reference made to these earlier cases.

FEDERAL COURT DECISIONS

There are four federal decisions in point, all quite recent. Two hold that evidence of a prior conviction is admissible to impeach, despite the pendancy of an appeal, and the other two (both from the same circuit) hold the contrary.

In *United States v. Empire Packing Co.*[5] an appeal was taken from a conviction and sentence for filing false claims for government subsidies with the Defense Supplies Corp. One of the grounds for this appeal was the allowance of a line of cross examination of the president of Empire, also a defendant, relating to his prior conviction of income tax evasion, which conviction was being appealed at the time of the principal case.

Ruling on the point, the court said:

[1] Some jurisdictions disqualified all convicted criminals. Others qualified this somewhat, by barring convicted felons, or those convicted of crimes involving moral turpitude.

[2] 114 F. 2d 982 (C.A. 7th, 1940). [3] Ibid., at 985.

[4] E.g., Bishop v. State, 41 Fla. 522, 26 So. 703 (1899); Arcia v. State, 26 Tex. App. 193, 9 S.W. 685 (1888).

[5] 174 F. 2d 16 (C.A. 7th, 1949).

Unless and until the judgment of the trial court is reversed, the defendant stands convicted and may properly be questioned regarding said conviction solely for the purpose of testing credibility.[6]

In that same year however, the Circuit Court of Appeals for the District of Columbia followed the opposite line of reasoning to reach a diametrically opposed result. In *Campbell v. United States*[7] the essential facts were the same. Here the appeal in the principal case was from a conviction of assault with intent to commit rape. The conviction being appealed, which the prosecution sought to introduce to impeach the defendant-witness, was of petit larceny.

The court held:

But it seems to us wholly illogical and unfair to permit a defendant to be interrogated about a previous conviction from which an appeal is pending. If the judgment of conviction is later reversed, the defendant has suffered unjustly and irreparably, the prejudice, if any, caused by the disclosure of the former conviction. We therefore hold that the pendency of an appeal prevents the prosecution from proving a previous conviction for impeachment purposes; and that the District Court erred in admitting evidence concerning Campbell's conviction when his appeal therefrom had not been determined.[8]

It should be noted however that the conviction in the principal case was affirmed, because the court believed that in the light of all the facts, "the jury was not substantially swayed by the error."

In the case of *Beasley v. United States*[9] the prosecution sought to cross examine the defendant about a prior conviction for selling narcotics. The trial court, citing the *Campbell* case, refused to allow this line of questioning, since *the time for appeal had not yet expired*, immediately ruling that the jury should not consider the statement, and later charging the jury that "the rule of law is that one may not show the innocence or guilt on a specific charge by proof of what transpired in another case."[10]

On appeal there was a finding of no error, the appellate court holding that no evidence of the prior conviction was admitted, since there was only the statement of the prosecuting attorney. The court said further, "We think the *error was cured* by the prompt action of the court considered with his charge."[11]

The point was not raised that no appeal actually was pending in this case, and that therefore the *Campbell* case was not squarely in point. However, we must take the *Beasley* case as going a step beyond the *Campbell* case, and holding that "conviction," as it relates to impeachment, oc-

[6] Ibid., at 20.

[7] 176 F. 2d 45 (App. D.C., 1949).

[8] Ibid., at 47.

[9] 218 F. 2d 366 (App. D.C., 1954).

[10] Ibid., at 369.

[11] Ibid., at 369 (italics added).

curs only after the appeal period has run, where no appeal has, in fact, been taken.

The fourth federal decision on this point is *Bloch v. United States.*[12] The same factual situation appeared again in a narcotics case. The appellate court held that in view of the uncertainty of the law on the question of whether a defendant may be questioned concerning a conviction of a felony when such conviction is being appealed, the action of the prosecutor, in questioning the defendant concerning a conviction which the prosecutor knew was being appealed, was not improper.

As is obvious, this is not a strong case arguendo. The appellate court simply refused to find error in the ruling of a trial court on a point where other jurisdictions had gone both ways. The same reasoning would have been equally cogent applied to the other side of the argument, had the trial court chosen to go that way. The case is further weakened by the fact that most of the information concerning the prior conviction was elicited by the defendant's attorney on redirect.

One element creeps into this decision which seems to be an echo from an earlier Texas decision.[13] This is the knowledge of the prosecuting attorney of the fact that an appeal was pending from the earlier conviction. It is difficult to see what this has to do with the issue of admissibility. In this case it evidently was raised as an argument by the defense, on appeal, and counts little, if at all, in the final determination of the issue. There shall be cause to refer to it later, however.

One further point is worthy of note. In each of the four cases discussed thus far, the witness sought to be impeached is the defendant. In none of these cases did the court distinguish this situation from the situation in which the witness is not a party to the action. This point also will be discussed below, when there is a detailed examination of state decisions on which the above cases were based.

STATE DECISIONS

The state courts that have decided this point are much more nearly in agreement with one another than are the federal courts. Of the ten states in which the point has arisen, eight hold the evidence of the prior conviction admissible to impeach, notwithstanding the pendency of an appeal.

In *Viberg v. State*[14] a former conviction for petit larceny was admitted in evidence to impeach the defendant-witness, although an appeal was pending from the conviction. The question, again, was the interpretation of the word "convicted" in a statute allowing evidence of prior convic-

[12] 226 F. 2d 185 (C.A. 9th, 1955).

[13] Ringer v. State, 137 Tex. Cr. 242, 129 S.W. 2d 654 (1938).

[14] 138 Ala. 100, 35 So. 53 (1903).

tions of the defendant to be admitted against him if he took the stand on his own behalf. The defense argued that the appeal, and consequent statutory suspension of the sentence, operated to annul the judgment of conviction. The court held:

> They [the statutes in question] simply provide that, upon its being made known to the court that the defendant desires to take an appeal, the "judgment must be rendered on the conviction, but the execution thereof must be suspended pending the appeal." They do not in any wise interfere with the finality of the judgment or its validity. Nor do they make its finality dependent upon an affirmance or reversal by this court. Their effect is to prevent the enforcement or execution of the judgment while the appeal is pending, and this clearly marks the limit of their operation. Our conclusion is that the judgment of conviction remained in full force and effect, in so far as it was an adjudication of the guilt of the defendant, for the purpose for which it was offered in evidence.[15]

This case fairly answers the position taken by many defendants in this situation that statutes suspending execution of sentence on a judgment of conviction pending an appeal also operate to suspend the judgment of conviction itself, at least in so far as its use for impeachment purposes is concerned.

The leading case on this point in California is *People v. Rogers*.[16] Here the conviction in the principal case was for possessing a black-jack in violation of a statute.[17] The admission of evidence of a prior conviction of the defendant-witness was upheld on appeal on the precedent of an earlier case, *People v. Ward*.[18] The *Ward* case had held testimony of a prior conviction admissible to impeach the defendant-witness where the conviction had been had by verdict of a jury, but sentence had not been pronounced as of the time of the principal case.

The court said in the *Rogers* case:

> Since such evidence of conviction is only for purposes of impeachment and goes only to the matter of credibility of the witness, we see no reason why the mere pendency of an appeal should affect the question of the admissibility of the impeaching evidence.[19]

This statement by the court, considered together with the *Ward* case on which the court's reasoning is based, clearly demonstrates the short-

[15] Ibid., at 55.

[16] 112 Cal. App. 615, 297 Pac. 924 (1931).

[17] Defendant claimed he kept it as a curio.

[18] 134 Cal. 301, 66 Pac. 372 (1901).

[19] People v. Rogers, 112 Cal. App. 615, 297 Pac. 924, 926 (1931); see also People v. Braun, 14 Cal. 2d 1, 92 P. 2d 402 (1939). In the Braun case, decided on the precedent of the Rogers case, the admission of evidence as to a prior conviction was upheld on appeal even though the impeaching conviction had been reversed on appeal before the appeal in the principal case was decided.

comings of the mechanistic approach to legal reasoning, as applied to the situation at hand.

One of the oldest cases in point is *Hackett v. Freeman.*[20] In this case, which was a civil action for receiving and converting stolen hogs, evidence of a prior conviction of a witness for the defense was excluded by the trial court because it was being appealed at the time of the principal case. This exclusion was held to be in error by the appellate court, which said: "Until [the judgment is reversed] the conviction stands, and may be shown as bearing on the credibility of the person convicted when he testifies as a witness."[21]

This case, in many respects, is the key case in point, and together with a later Iowa decision may well demonstrate that a whole series of cases under consideration are based on faulty reasoning and/or weak precedent.

The other Iowa case referred to is *Dickson v. Yates.*[22] This was a civil action. The plaintiff, on cross examination, was asked if he ever had been convicted of a felony. He answered "No." The defense then asked, "Do you mean by that that no final sentence has been passed?" This question was objected to, but plaintiff was ordered to answer, and he answered in the affirmative. Then, on redirect, plaintiff's own counsel brought out the fact that plaintiff had been convicted on one of seven counts with which he had been charged, and that that conviction was being appealed. On appeal, the reviewing court held no error, on the ground that whatever damaging information might have been admitted was elicited by the plaintiff's own counsel. In support of its holding, the court cited the *Hackett* case.

A few of the salient features of these two cases will be noted briefly. In the *Hackett* case, the witness against whom the evidence was admitted was not a party to the action. In the *Dickson* case, the witness was the plaintiff. Both actions were civil suits. In the *Dickson* case the damaging evidence admitted and objected to was brought out by the party objecting to its admission. In neither case was evidence of a prior conviction admitted against a defendant who took the stand in his own behalf in a criminal case.

In re Abrams[23] was an appeal from a judgment disbarring the defendant from the practice of law. During the proceedings the defendant was questioned about an earlier conviction of subornation of perjury, which conviction was being appealed. The defendant was required to answer, over objection. Prior to the review of the disbarment proceedings, the earlier

[20] 103 Iowa 296, 72 N.W. 528 (1897).

[21] Ibid., at 300, 301 and 529.

[22] 194 Iowa 910, 188 N.W. 948 (1922).

[23] 36 Ohio App. 384, 173 N.E. 312 (1930).

conviction was reversed. The reviewing court held there was no error in the admission of the evidence, adding that the earlier conviction "had nothing to do with the matter," meaning, presumably, the disbarment proceedings in question were not based on the earlier conviction.

In Oklahoma the question under discussion has arisen more often than in any other jurisdiction,[24] for no apparent reason. The leading case in Oklahoma is *Manning v. State*.[25] Here the appeal was from a conviction of manslaughter, and the evidence objected to was a prior conviction of manslaughter then being appealed. Upholding the trial court, the appellate court took the view that where a jury has found a defendant guilty, any previous presumption of innocence is wiped out. This, the court said, distinguished a conviction from mere arrest or indictment, the fact that an impartial tribunal has found him guilty of a crime indicating a want of moral character sufficient to affect his credibility.

The question presents itself as to whether the court's reasoning in regard to the defendant's now divested mantle of innocence does not fairly miss the point, which is not the guilt or innocence of the defendant in the impeaching case, but rather the question of the delicate balance to be maintained between the jury's need to know all pertinent facts, and the need to keep from that body certain facts which judicial experience has shown tend to be given rather more weight than ought to be the case, i.e., the whole conception of prejudice. The *Manning* case is the keystone for all the later Oklahoma decisions on this question.

Shaffer v. State[26] was an appeal from a conviction of cattle theft. On trial, evidence was admitted of a prior conviction of the defendant-witness on which an appeal was then pending. At no point is mention made of the reason for the introduction of this evidence, but it may be assumed that its purpose was impeachment. The reviewing court upheld the admission of the evidence, saying:

> A judgment or conviction in a criminal prosecution is not vacated by an undetermined error proceeding. Its enforcement may be temporarily suspended . . . but it is nevertheless a judgment until set aside, and as such it is evidence of a conviction.[27]

This holding is another strong ruling against the argument that an appeal suspends not only execution of the sentence, but the judgment of conviction upon which the sentence is pronounced.[28]

[24] James v. State, 64 Okla. Cr. 174, 78 P. 2d 708 (1938); Treadway v. State, 30 Okla. Cr. 239, 235 Pac. 929 (1925); Williams v. State, 26 Okla. Cr. 180, 223 Pac. 193 (1924); Newcomb v. State, 23 Okla. Cr. 172, 213 Pac. 900 (1923); Porter v. State, 20 Okla. Cr. 355, 202 Pac. 1039 (1922).

[25] 7 Okla. Cr. 367, 123 Pac. 1029 (1912).

[26] 124 Neb. 7, 244 N.W. 921 (1932). [27] Ibid., at 923.

[28] See Viberg v. State, 138 Ala. 100, 35 So. 53 (1903) as well.

In *State v. Crawford* [29] an appeal from a conviction of burglary, testimony elicited from the defendant-witness as to a prior conviction was admitted over objection on the ground that the conviction was being appealed. The admission was upheld, although the Utah Supreme Court, reviewing the decision, took note of the fact that it had reversed the impeaching conviction.

On the appeal, the defense took the position that the earlier conviction, having been appealed, was not a conviction. The court held:

> The weight of authority supports the rule, as stated in 40 Cyc, 2611: "The pendency of an appeal from a conviction of crime does not preclude the showing of such conviction as bearing on the credibility as a witness of the person convicted."[30]

In its decision, the reviewing court cited the *Hackett* case decided in Iowa.

State v. Johnson[31] is another case holding evidence of a prior conviction admissible notwithstanding pendency of an appeal. In this case it was a witness for the defense who was thus impeached. The court based its decision largely on the *Manning* case (Oklahoma's leading case) and quoted the reasoning in that case as to the effect of a conviction on the presumption of innocence with which the defendant formerly was clothed.[32]

State v. Robbins[33] held such evidence admissible against the defendant who takes the stand in his own behalf in a criminal case, and cited, as authority, the quotation in *State v. Johnson* from the *Manning* case.

Only two states refuse to allow, for purposes of impeachment, evidence that the witness had been previously convicted of a crime, when that conviction is being appealed.

In Texas, the leading case is *Jennings v. State*.[34] Here, the defendant, on cross examination, was questioned about an earlier conviction on which an appeal was pending. The trial court ordered him to answer, over objection. On appeal, it was held that the trial court erred in this ruling, the appellate court saying:

> It is settled that such appeal suspended the judgment, and that it was in no sense final. Whatever might be the rule, if the judgment of conviction had been final, it would seem necessarily to follow that, in case of conviction, where an appeal had been taken, this fact of conviction in another case should not be used against an appellant. If it were not the rule, then if the state in any manner had once secured a conviction, right or wrong, whether subject to reversal or not, and whether ultimately reversed or not, until such action had

[29] 60 Utah 6, 206 Pac. 717 (1922).
[30] Ibid., at 720.
[31] 141 Wash. 324, 251 Pac. 589 (1926).
[32] Authority cited note 27 supra.
[33] 37 Wash. 2d 492, 224 P. 2d 1076 (1950).
[34] 55 Tex. Cr. 147, 115 S.W. 587 (1909).

been taken, the illegal conviction could be used before the jury, not only for the purpose of discrediting the defendant, but as well as original evidence of his guilt. This is not the law.[35]

It is interesting to compare the result reached here with that reached in Alabama, in the *Viberg* case, and in Nebraska, in the *Shaffer* case. In those cases the courts applied a rule apparently without considering the results of its application, but simply interpreting the law as though no facts were involved. In the *Jennings* case, the court reached the rule by way of the results, yet without doing violence to either the letter or the spirit of the applicable law.

A similar result was reached in *Ringer v. State* where the court said:

> [A] conviction for an offense, in the event of an appeal, is not final until the same has been acted upon by the appellate court, and it was well known to the attorney asking this question that this . . . conviction was at the time on appeal in this appellate court.[36]

Note here again the appearance of the knowledge of the prosecuting attorney of the pendency of an appeal in the earlier conviction as an element to be considered. This was present also in *Bloch v. United States*.[37] Here however, unlike the court in the *Bloch* case, the appellate court found error in the admission of the evidence. One cannot help but wonder if the court was moved by the knowledge of the prosecuting attorney, and if so, what possible effect this could have on the admissibility of such testimony. The issue, after all, is not the culpability of the prosecutor, but the desirability of admitting such evidence. It will be interesting to see if this point is raised in future cases on this question, and if so how it will be resolved.

The other state which refuses to admit evidence of the nature being considered here, is Missouri. The Missouri court, in *State v. Shelton*,[38] dealt with a prosecution witness whom the defense sought to impeach by bringing into the record evidence of a prior conviction, then being appealed. The trial court refused to admit the evidence, and was affirmed on appeal. The appellate court held: "When the case [referring now to the earlier conviction of the witness] was appealed to this court, the appeal suspended the operation of said judgment and transferred the cause here."[39] Note here that it was not execution on the judgment, but the "operation of said judgment" that was held to be suspended by the appeal.

There were two strong dissents in this case, both citing the *Viberg* case.

In Illinois, though there are no cases in point, there are strong indica-

[35] Ibid., at 588.

[36] 137 Tex. Cr. 242, 129 S.W. 2d 654, 656 (1938).

[37] 226 F. 2d 185 (C.A. 9th, 1955).

[38] 314 Mo. 333, 284 S.W. 433 (1926). [39] Ibid., at 348 and 437.

tions that when the question does arise, it will be decided in accordance with the minority viewpoint.

Illinois is among the strictest states in the matter of the admissibility of evidence of prior convictions to impeach a defendant who takes the stand in his own behalf.[40] In addition, Illinois is one of the few states in which a distinction is drawn between a defendant as a witness and a non-party witness.[41] Where this degree of definition is attempted, it is not too highly speculative to allow that the courts will be wary of submitting the rights of a defendant-witness (if not a non-party witness, or the party for whom he appears) to the prejudice which might result from admitting in evidence an appealed conviction.

CONCLUSION

It has been observed that of the jurisdictions which have passed on the point, two out of three federal circuits and eight out of ten states will allow evidence of a prior conviction to be used to impeach a witness, even though the conviction relied upon is being appealed at the time of its introduction into evidence. The case for admitting evidence of a prior conviction, to impeach a witness, is not as strong as might appear from a mere statistical tabulation of cases pro and con, as the vast majority of jurisdictions have not yet considered the point.

In summary, the question resolves itself to a simple one. Should the jury hear *all* the facts concerning the credibility of a witness, even at the risk of injecting highly prejudicial matter into the trial? Specifically, if the witness is found, on appeal, to be innocent of the crime convicted of, then the calling party, or the witness himself (if he is the defendant), has been unduly prejudiced by the discrediting of the witness. Hope for the solution of this legal dilemma lies either in the hands of the legislature, or perhaps in a clearly-defined judicial decision from one of the jurisdictions from which there has been no adjudication in this area.

[40] Ill. Rev. Stat. (1955) c. 38, § 587.

[41] See, for example, People v. Roche, 389 Ill. 361, 59 N.E. 2d 866 (1945) and People v. Halkens, 386 Ill. 167, 53 N.E. 2d 923 (1944). On the other hand, People v. Andrae, 295 Ill. 445, 129 N.E. 178 (1920) holds that a prior conviction may be shown, to impeach a witness, though no sentence was imposed. Followed in the spirit of the Viberg case this could lead to the same result.

DISCOVERY OF INCOME TAX RETURNS IN THE FEDERAL COURTS

Among the privileges of an individual, once held most sacrosanct, were those relating to the privacy of his income tax returns. This is no longer true. This so called "immunity" has been steadily reduced for the last thirty-five years.