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"If any error was involved, it seems hardly prejudicial enough, standing alone, to justify a new trial, at which the questions will explicitly state the assumptions clearly implicit in the testimony at the first trial."⁵⁶

Pending judicial exposition of the scope of *Todd's* effect on the *Penland* rule, attorneys should follow the *Todd* formula of introducing evidence and having it incorporated into a hypothetical question designed to elicit carefully phrased opinions of their physician-witnesses. Caution is advised, for *Todd's* undermining of *Penland* and its spiritual affinity with criticized evidence concepts⁵⁷ may wipe out verdicts presumptively grounded on medical testimony which, though uniformly acceptable outside of court, is not twisted into phrases suitable for the strangely dissimilar ears of jurymen.

RICHARD W. ELLIS

Evidence—Traffic Violations to Impeach a Witness

Although counsel may coach his witness to "assume a virtue, if you have it not,"¹ with the witness having a criminal record, it may be of little avail. Courts have assumed that such a witness does not have virtue and have not hesitated to allow questions about prior criminal convictions for impeachment purposes,² "to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case."³

In the recent case of *Ingle v. Roy Stone Transfer Corporation*,⁴ the North Carolina Supreme Court held that it was not error for the trial judge to allow defense counsel on cross examination to question plaintiff's witness concerning the following convictions: speeding 65 miles per hour in a 55 miles per hour zone, exceeding a safe speed, drunken driving, operating a motor vehicle while his

⁵⁶ *Id.* at 951.

⁵⁷ See note 28 *supra* (hypothetical question); note 48 *supra* ("could" or "might" rule).

¹ Shakespeare, *Hamlet* (III iv 160); see Bander, *Shakespeare and the Law*, CASE & COMMENT, Jan.-Feb. 1968 at 47.

² 3 J. WIGMORE, EVIDENCE § 926 (3d ed. 1940) [hereinafter cited as WIGMORE].

³ *State v Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930).

⁴ 271 N.C. 276, 156 S.E.2d 265 (1967).

license was suspended, disregarding a stop signal, public drunkenness, and allowing an unlicensed minor to operate a motor vehicle. This holding reaffirmed the North Carolina Court's position that convictions of all crimes, be they felonies or misdemeanors, are admissible for impeachment purposes.⁵ The reasoning behind this rule and the criteria on which convictions are admitted or excluded should be reevaluated.

Underlying this rule of evidence is a syllogism similar to the following: all men convicted of a crime are bad men; all bad men are untruthful; *ergo*, all men convicted of a crime are untruthful.⁶ The obvious fallacy in this theory is that it is an all inclusive generalization⁷ which ignores the problem of relevancy. With some men and some crimes a conviction, especially if repeated, may be indicative of the witness' lack of credibility,⁸ but such is not always the case. A consideration of three general observations will illustrate the danger of relying on such a fallacious theory to determine truth at a trial.⁹ In the first place even a person convicted of a crime involving dishonesty may have superior powers of observation and memory, and in the absence of a reason to falsify, his testimony may be worth more than that of a witness with a spotless reputation whose powers of observation are limited and whose past experiences

⁵ *Accord*, *State v. Sims*, 213 N.C. 590, 593, 197 S.E. 176, 178 (1938). D. STANSBURY, *NORTH CAROLINA EVIDENCE* § 112 (2d ed. 1963). [hereinafter cited as STANSBURY].

⁶ "It is not the specific tendency of the witness to falsify but the general bad character of the witness as evidenced by the single act of which he was convicted that creates the basis of admissibility." Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 176 (1940). [hereinafter cited as Ladd].

⁷ The psychologist would probably find the major and minor premises of the syllogism blatantly false, for as Wigmore indicates, "to the psychologist, the common law's reliance on character as an index of falsehood is crude and childish." WIGMORE § 922, at 447.

⁸ "While truth is truth whether it comes from a polluted or pure source when facts are in dispute the source of the conflicting testimony may cast light in determining what the truth is." Ladd 171.

⁹ For an analysis of problems involved in determining truth in a jury trial see Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223 (1966). The weakness of the rule permitting prior criminal convictions to reduce the credibility of a witness is emphasized in those jurisdictions such as North Carolina where the witness' answer is conclusive and the record may not be introduced. While asking the question to make the jury disbelieve the testimony, if the witness blatantly lies about his prior conviction, the jury never knows. *See State v. King*, 224 N.C. 329, 30 S.E.2d 230 (1944); *Coleman v. Railroad*, 138 N.C. 351, 50 S.E. 690 (1905); STANSBURY § 112, at 254.

unconsciously influence his credibility.¹⁰ Secondly, there may be people without criminal records who have no qualms about prevaricating even under oath.¹¹ Finally, the nature of the crime rather than the seriousness of the crime is important.¹² As one writer has indicated, there may be some felonies, even murder and manslaughter, which have no bearing on a man's propensity to dishonesty or falsification; while some misdemeanors, for example petty larceny, may well be indicia of the credibility of the witness.¹³

From the nature of the crime, it is apparent that traffic violations should not be admissible to impeach a witness because they have no bearing on his credibility.¹⁴ Thus, the holding in *Ingle* illustrates the problem of establishing a relationship between the prior conviction and the search for truth in a trial, and the necessity of making relevancy the criterion. The immediate need in North Carolina,

¹⁰ Ladd, *Some Observations on Credibility: Impeachment of a Witness*, 52 CORNELL L. REV. 239, 241-42 (1967).

¹¹ With many telling the truth is a habit and a principle which they adhere to always though they may indulge in drinking, swearing, gambling, roystering, or making close bargains. With others, lying is the habit or principle, and if elevated to be senators, or made church members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth. Atwood v. Impson, 20 N.J. Eq. 150, 157 (Ch. 1869).

¹² See 21 AM. JUR. 2d *Criminal Law* §§ 18-21 (1965) for a discussion of the distinction between the terms felony and misdemeanor.

¹³ Ladd 180.

¹⁴ A number of courts have excluded evidence of traffic convictions to impeach a witness. In *New York* the use of traffic violations is prohibited by statute, and in *Same v. Davison*, 1 N.Y.S.2d 374 (1937) the court said that though a conviction arising out of the same occurrence was permissible as prima facie evidence of the facts, on cross-examination of the defendant, it should not have been permitted solely to affect credibility. *accord*, *De Stassio v. Jansen Dairy Corp.*, 279 N.Y. 501, 18 N.E. 2d 833 (1939); *see* *Dixie Culvert Mfg. Co. v. Richardson*, 218 Ark. 427, 236 S.W.2d 713 (1951); *Nesbit v. Cumberland Contracting Co.*, 196 Md. 36, 75 A.2d 339 (1950); *Nelson v. Seiler*, 154 Md. 63, 139 A. 564 (1927); *State v. Hickman*, 102 Ohio App. 78, 141 N.E.2d 202 (1956); *Contra*, *Monaghan v. Keith Oil Co.*, 281 Mass. 129, 183 N.E. 252 (1932); *Brown v. Howard*, 42 R.I. 571, 114 A. 11 (1921). *See also* ANNOT., 20 A.L.R.2d 1217 (1951). It is interesting to note that some courts refusing to admit evidence of traffic violations have justified the exclusion on grounds of relevancy as in *Nesbit v. Cumberland Contracting Co.* where the judge said, "prior convictions for traffic violations of the motor vehicle law seem clearly to have no direct bearing upon veracity. . . ." 196 Md. 36, 41, 75 A.2d 339, 341 (1950). In *State v. King*, 224 N.C. 329, 333, 30 S.E.2d 230, 232 (1944), Justice Seawell suggested that traffic violations not be used to impeach a witness, and Stansbury later termed this a "wholesome suggestion." STANSBURY § 112, at 255.

therefore, is to limit the felonies and misdemeanors¹⁵ admissible to those involving dishonesty and false statement. This formulation is the one proposed by the Uniform Rules of Evidence¹⁶ and has been praised as possibly the best solution.¹⁷

A look at the problem from the viewpoint of the jury and of the witness will further illustrate the wisdom of making this change in the rule. If a witness is a party to the action, it is doubtful that the jury will ignore these convictions in deciding the verdict, especially if these prior convictions are of a similar nature. The jury

¹⁵ Since the nature of the crime rather than the seriousness of the crime should be emphasized, the use of all crimes, both felonies, and misdemeanors, in North Carolina avoids the complications found in other jurisdictions using a different formula to determine the types of criminal convictions admissible. Either by legislation or judicial determination some courts allow felonies and misdemeanors involving *crimen falsi*, for example forgery, counterfeiting, and perjury, while other jurisdictions allow felonies and misdemeanors involving moral turpitude. See generally 98 C.J.S. *Witnesses* § 507 nn. 70 & 69 (1957); 58 AM. JUR. *Witnesses* § 740 (1948). For jurisdictions following the same rule as North Carolina see *Bostic v. United States*, 94 F.2d 636 (D.D.C. 1937); *Black v. State*, 215 Ark. 618, 222 S.W.2d 816 (1949); *McMullen v. Cannon*, 129 Ind. App. 11, 150 N.E.2d 765 (1958); *Quigley v. Turner*, 150 Mass. 108, 55 N.E.2d 765 (1889); *Breland v. State*, 221 Miss. 371, 73 So. 2d 267 (1954); *State v. McKissic*, 358 S.W.2d 1 (Mo. 1962).

¹⁶ Uniform Rule of Evidence § 21.

¹⁷ C. McCORMICK, EVIDENCE § 43, at 90 (1954) [hereinafter cited as McCORMICK]. It should be noted here that there is another rule of evidence relied upon in the principal case, i.e., proof of general character to impeach a witness, which may hinder the North Carolina court in making this much needed transition. Most courts permit only reputation for veracity to be shown to impeach a witness and expressly refuse to allow proof of general character. See Ladd 172. In *Ingle*, however, the first statement made by the court was that "a witness may be impeached by evidence that his general character is bad. . . ." 271 N.C. 276, 279, 156 S.E.2d 265, 268 (1967). Then, quoting from *State v. Sims*, 213 N.C. 590, 197 S.E. 176 (1938), the court continued: "any act of the witness which tends to impeach his character may be inquired about or proven by cross examination." 271 N.C. at 280, 156 S.E.2d at 269. Having made this determination, the court came rather easily to its holding that all crimes including traffic violations are admissible to impeach a witness's character by stating:

Nor do we think that a person who has been guilty of drunken driving or consistently violates laws designed to protect life and property on the highway can claim an unblemished *general character*. *Id.* at 282, 156 S.E.2d at 270. (emphasis added). Thus, by using general character, the court avoided the issue of the relevancy of the prior criminal convictions to ascertain the witness's credibility. It should be noted, however, that an inconsistency between the rule for proving character to impeach and the rule for admitting prior criminal convictions exists even in jurisdictions permitting only character for veracity to be shown to impeach a witness. In these latter jurisdictions honesty and veracity do not seem to be the criteria for admitting prior criminal convictions. WIGMORE § 926, at 470; § 982, at 550.

will decide on the basis of the witness' record rather than on the merits of the case.¹⁸ The North Carolina court felt that because jurors are intelligent people they will be able to weigh such evidence properly,¹⁹ but not all authorities agree.²⁰ If the witness is not a party to the action, introducing prior convictions of traffic violations having no bearing on veracity is judicially inefficient. Since most jurors are motorists, the chances are quite good that many of them will also have a record of traffic violations. Realizing that if they were the witness, the same would be used to cast doubt on their credibility, many jurors will simply ignore the evidence or else become antagonized.

Since the effect on the jury may be highly negative, a second reason for excluding proof of prior traffic convictions is the abuse to the witness. The court in *Ingle* said "responsible counsel will not abuse the rule."²¹ Counsel have not always been noted for such restraint, however.²² It should be remembered that "witnesses have rights as well as parties; it is too often the case that they are set up as marks to be shot at."²³ When this element of abuse is overlooked, the witness stand becomes a nightmare of pain and embarrassment. A witness of upstanding character in the community, coerced into exposing a prior drunken driving charge, may find himself prejudiced thereafter. Under these circumstances witnesses with the true

¹⁸ It would seem that the same reason for not allowing evidence of general character of the party to a civil suit should apply to evidence of prior criminal convictions for impeachment purposes when the party becomes a witness on his own behalf and consequently subject to cross-examination. See STANSBURY § 103, at 238-39; 59 WIS. L. REV. 312, 320-21 (1959).

¹⁹ *Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 282, 156 S.E.2d 265, 270 (1967).

²⁰ As one author has eloquently stated:

One may consciously accept impeachment evidence for what it is worth, but the barbs of prejudice possess an uncanny faculty for impressing the unconscious self. Warning judicial instructions may carefully distinguish the uses to which particular items of proof may be put, yet it is highly improbable that cold, judicial analysis will temper or control the juror's very human propensity to take all things into account.

Slough, *Impeachment of Witnesses; Common Law Principles and Modern Trends*, 34 IND. L.J. 1, 21-22 (1958). See also, 59 WIS. L. REV. 312, 322 (1959).

²¹ 271 N.C. 276, 282, 156 S.E.2d 265, 270 (1967).

²² In WIGMORE § 983, at 550-51 the suggestion is made that abuse of witnesses may be one policy reason for excluding some evidence that is relevant.

²³ *Id.* at 551.

facts will hesitate voluntarily to subject themselves to the ordeal.²⁴ Consequently, the judicial process is hampered.

In many jurisdictions allowing evidence of all crimes for impeachment purposes, it is possible for the trial judge to exclude evidence of some prior convictions.²⁵ After *Ingle*, this safeguard may or may not exist in North Carolina. Having stated the absolute rule that all convictions are admissible to impeach a witness, the court said, "furthermore, the judge is in charge of the trial, and he has plenary power to protect a witness from harrassment and to keep cross-examination within the bounds of reason."²⁶ Thus the phantom of certainty vanishes. Attorneys and trial judges are left to ponder what will happen on appeal if the judge exercises his discretion and excludes evidence of a prior criminal conviction. Will the Supreme Court uphold the mandate that all convictions are admissible, or will the court uphold the trial judge's exercise of plenary power?

The need to avoid cluttering up the trial with confusing, collateral issues and to prevent abuse of witnesses supports having broad discretion in the trial judge. Since most courts place no time limit on convictions admissible to impeach a witness,²⁷ absent discretion in the trial judge to eliminate some convictions, the jury might be considering a conviction so remote as not even to have bearing on general character.²⁸ Moreover, at the trial the judge has the advantage of demeanor evidence to guide him.²⁹

It is interesting to note that in the case of *McMullen v. Cannon*³⁰ cited in *Ingle* to support the admissibility of traffic convictions, the Indiana court definitively resolved in the negative the issue of dis-

²⁴ WIGMORE § 921, at 446.

²⁵ "There should be some discretion in the court to determine whether the question is asked for the purpose of honestly discrediting the witness or whether its purpose is merely to arouse suspicion in the mind of jurors." *Williams v. United States*, 3 F.2d 129 (8th Cir. 1924); see *Hunter v. State*, 193 Md. 596, 69 A.2d 505 (Ct. App. 1949); *Commonwealth v. Quaranta*, 295 Pa. 264, 272, 145 A. 89, 92 (1928).

²⁶ 271 N.C. 276, 282, 156 S.E.2d 265, 270 (1967).

²⁷ Ladd 176; McCORMICK § 43, at 91.

²⁸ See *Simond v. State*, 127 Md. 29, 39, 95 A. 1073, 1077 (1915) where the court said that to permit evidence of a conviction for drunkenness ten years prior tended "to reflect on the intelligence of the jury to suppose they would be influenced in passing on credibility by such evidence."

²⁹ Being able to observe the reaction of both the witness and the jury, the trial judge is in a better position to detect abuse than is the appellate court with only a record of the trial.

³⁰ 129 Ind. App. 11, 150 N.E.2d 765 (1958).

cretion in the trial judge to eliminate some evidence.³¹ However, until the North Carolina court further elucidates the nature of this "plenary power" and the "bounds of reason," the answer in this jurisdiction is uncertain.

The argument has been made that if the legislature labels certain conduct a crime, it is indicative of the moral tenor of society, and he who violates that law should thereafter be accountable for impeachment purposes in a court of law.³² It should not be forgotten, however, that "there may be convictions of violations of hundreds of police regulations, which in no real sense can be taken as tending to make one so convicted unworthy of belief."³³ No one would contend that, with traffic fatalities mounting each year, traffic laws should be regarded lightly, but the law makes provision for punishment of such offenders, and the witness stand is not the proper place. Veracity and honesty should be the criteria as to the type of criminal convictions permitted in evidence. The trial judge should have discretion to eliminate evidence of convictions that are irrelevant, remote and abusive. Only when these prerequisites are met will the jury have testimony that can be weighed with intelligence rather than emotion.

SARAH E. PARKER

Labor Law—Decreasing Importance of Employer Motivation as an Element of Unfair Labor Practice

Though inquiry under section 8(a)(3) of the National Labor Relations Act¹ specifically requires a finding of discrimination and a

³¹ The court followed the decision in *Niemeyer v. McCarty*, 221 Ind. 688, 700-01, 51 N.E.2d 365, 370 (1943) where the court held that the trial judge was not authorized to exclude entirely evidence of a prior criminal conviction even though the extent to which cross examination may be carried is within his sound discretion. 129 Ind. App. 11, 150 N.E.2d 765, 767 (1958).

³² *State v. Johnson*, 76 Utah 84, 116, 287 P. 909, 921 (1930).

³³ *Burgess v. State*, 161 Md. 162, 173, 155 A. 153, 157 (1931).

¹ 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a) (1964): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under section 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 61 Stat. 140 (1947), as amended, 29 U.S.C. § 157 (1964): "Employees shall have the right to self-