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EVIDENCE—EXAMINATION OF WITNESSES—USE OF PARDONED CONVICTION TO ATTACK CREDIBILITY OF ACCUSED AS WITNESS—To attack the credibility of defendant charged with larceny of an automobile, the prosecution cross-examined him as to a prior conviction based upon unauthorized use of an automobile. Defendant had received a full pardon pursuant to a Presidential proclamation¹ of general amnesty for federal offenders with one year or more of honorable World War II service. On appeal after conviction,² *held*, affirmed, one judge dissenting. A full pardon does not deprive the state of the right to use a prior conviction in attacking the credibility of the accused as witness. *Richards v. United States*, (D.C. Cir. 1951) 192 F. (2d) 602.

The accused on the witness stand is both defendant and witness. The prosecution may not put questions concerning prior offenses to him as *defendant*, because the law rejects proof of present guilt by a mere showing of general propensity for crime.³ However, this policy of fair play is subverted by permitting such inquiry under the guise of attacking the credibility of the accused as *witness*.⁴ Defendant's credibility is subject to attack in substantially the same man-

¹ Proclamation No. 2676, 60 Stat. L. 1335 (1945).

² *United States v. Richards*, (D.C. D.C. 1950) 91 F. Supp. 323, noted 25 TULANE L. REV. 281 (1951) (trial court's evidence ruling).

³ If some relevance to guilt in addition to mere general propensity for crime was shown, other offenses were admissible under the original common law rule. But today in many jurisdictions other offenses are admissible on the issue of guilt only if within crystallized exceptions to the general rule of exclusion. E.g., *People v. Thau*, 219 N.Y. 39, 113 N.E. 556 (1919) (identity); *State v. Hyde*, 234 Mo. 200, 136 S.W. 316, 1912D Ann. Cas. 191 (1911) (motive). For the evolution see Stone, "The Rule of Exclusion of Similar Fact Evidence: England," 46 HARV. L. REV. 954 (1933); Stone, "The Rule of Exclusion of Similar Fact Evidence: America," 51 HARV. L. REV. 988 (1938).

⁴ Train, "The Bloodhound," MR. TURT'S CASE BOOK 494 (1936), illustrates how this credibility device may be abused to prejudice the accused.

ner as that of any other witness.⁵ In theory the jury is presumed able under instruction to restrict consideration of defendant's prior offenses to their bearing on his credibility, not his guilt. An attack on the credibility of a witness may take two forms: questions put to other witnesses as to his general reputation for lack of veracity, and questions put to the subject of attack himself concerning prior specific misconduct, including that evidenced by conviction.⁶ Convictions admissible for this latter technique commonly include all felonies; no attempt is made to apply relevancy principles in order to restrict this category to offenses exhibiting a disposition to lie. Many states also admit convictions of misdemeanors, but usually limit such offenses to those involving moral turpitude.⁷

The principal case adheres to the accepted rule that even a pardoned conviction is admissible to attack credibility.⁸ The premise is that a pardon implies guilt, not innocence, since its usual function as here is to restore civil and political rights for the future. Therefore a pardon does not destroy the relevancy of a conviction to attack credibility because it does not erase the fact that a criminal act has been committed.⁹ However, the pardon may be shown in rebuttal.¹⁰ The dissent accepts this relevancy argument, but insists on policy grounds that use of the conviction is inconsistent with the forgiveness of a full Presidential pardon. The accepted credibility rule should be compared with the rule that a pardon removes incompetency, fashioned in bygone days when conviction disqualified a witness.¹¹ It appears inconsistent to hold that a pardon removes incompetency but does not prevent an attack upon credibility. A possible explanation is that disqualification was a consequence of punishment rather than a protection against perjury. Unfortunately for this explanation, disqualification was thought of as protection as well as punishment.¹²

⁵ *State v. Velsir*, 61 Wyo. 476 at 488, 159 P. (2d) 371 (1945); 3 WIGMORE, EVIDENCE, 3d ed., §§889, 890, 891, 925 (1940).

⁶ Ladd, "Credibility Tests—Current Trends," 89 UNIV. PA. L. REV. 166 (1940).

⁷ *State v. Johnson*, 76 Utah 84 at 95-99, 287 P. 909 (1930) (jurisdictions reviewed). *State v. Witsil*, 37 Del. 553, 187 A. 112 (1936), noted 50 HARV. L. REV. 846 (1937) (conviction in foreign jurisdiction of crime not felony in forum held inadmissible). A limited explanation of offenses is permitted, 166 A.L.R. 211 (1947).

⁸ *State v. Serfling*, 131 Wash. 605, 230 P. 847 (1924); *Rush v. State*, 253 Ala. 537, 45 S. (2d) 761 (1950); cases listed principal case at 606, n. 7. Cf. *State v. Taylor*, 172 La. 20 at 26, 133 S. 349 (1931).

⁹ Williston, "Does a Pardon Blot Out Guilt?" 28 HARV. L. REV. 647 (1915). Cf. *Burdick v. United States*, 236 U.S. 79 at 91, 35 S.Ct. 267 (1914), with *Ex Parte Garland*, 71 U.S. 333 at 380, 18 L.Ed. 366 (1866).

¹⁰ *People v. Hardwick*, 204 Cal. 582, 269 P. 427 (1928), noted at an earlier stage, 16 CALIF. L. REV. 161 (1928), 1 So. CAL. L. REV. 200 (1928). *Contra*, *Gallagher v. People*, 211 Ill. 158, 71 N.E. 842 (1904).

¹¹ *Boyd v. United States*, 142 U.S. 450 at 454, 12 S.Ct. 292 (1892). The pardoned perjurer was a special case, *Diehl v. Rodgers*, 169 Pa. 316, 32 A. 424, 47 Am. St. Rep. 908 (1895).

¹² Jeremy Bentham attacked the foundations of the incompetency rules and was instrumental in securing their overthrow. E.g., see 5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 101 (bk. IX, pt. III, c. IV, §III) (1827).

Nevertheless, the principal case is satisfactory in that pardons, except for innocence, should not radically alter whatever bearing an offense may have on credibility.¹³ The real criticism is that in the general use of convictions to attack credibility courts and legislatures ignore relevancy and policy considerations. On relevancy principles only offenses indicating a tendency to lie should be used against ordinary witnesses.¹⁴ Even such offenses should not be used against the accused as witness, unless he opens the credibility door, because of the overriding policies against undue prejudice and in favor of encouraging the defendant in a criminal case to take the stand.¹⁵ Especially is this protection needed in states allowing comment on the failure of the accused to take the stand.¹⁶

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¹³ Pardons for innocence though substitutes for reversal are inadequately distinguished. Weihofen, "Effect of a Pardon," 88 *UNIV. PA. L. REV.* 177 (1939).

¹⁴ Offenses involving false statement and dishonesty (e.g., perjury, forgery, fraud, larceny). Ladd, "Credibility Tests—Current Trends," 89 *UNIV. PA. L. REV.* 166 at 180 (1940); A.L.I. Model Code of Evidence, Rule 106(1)(b). See also WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* §§185, 268-72 (1937). For another view see Hale, "Specific Acts and Related Matters as Affecting Credibility," 1 *HASTINGS L.J.* 89 at 101 (1950).

¹⁵ England appears to give substantial protection to the accused along these lines. Stone, "Cross-Examination by the Prosecution at Common Law and Under the Criminal Evidence Act, 1898," 51 *L.Q. REV.* 443 (1935). For policy considerations see Hammelmann, "The Evidence of the Prisoner at his Trial: A Comparative Analysis," 27 *CAN. B. REV.* 652 (1949).

¹⁶ *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672 (1947). Cf. A.L.I. Model Code of Evidence, Rule 106(3).