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Prior Convictions As Impeaching Evidence

Many valid interests can be served through the use of summary procedures such as the creditor's interest in obtaining quasi-in-rem jurisdiction.[79] However, such public interest must be found to outweigh the private interest subjected to the procedure in order for the requirements of due process to be satisfied.[80]

The interest of an innkeeper in having a lien upon his guest's property should be balanced, as in *Klim*, against the private interest of the guest in the use and possession of his property.[81] Limiting the interpretation of *Sniadach* to wages and prejudgment garnishment is unduly restrictive of the actual position which the Supreme Court has taken. The unrestricted use of personal property may be of equal or greater value to its owner than the right to possession of rented premises,[82] welfare benefits[83] and wages.[84] If deprivation of only a portion of an employee's wages through garnishment proceedings may "drive a wage earning family to the wall,"[85] the conclusion seems inescapable that deprivation of all of one's personal property, resulting perhaps in a corollary inability to gain employment,[86] would very likely have the same result.

All liens, or innkeepers' liens, are not per se unconstitutional procedures as the court in *Klim* points out.[87] However, it seems that *Klim* properly concluded that this particular lien statute is unconstitutional, because it does not exempt from the operation of the lien such property as is essential for the health, safety and well-being of the owner prior to a satisfactory hearing.

MARK M. HEATWOLE

PRIOR CONVICTIONS AS IMPEACHING EVIDENCE

When a criminal defendant testifies in his own behalf he does so as an ordinary witness,[1] and evidence of prior convictions may be used to

[79]*See generally* Kennedy, *Due Process Limitations on Creditor's Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U. L. REV. 158, 160-63 (1970).

[80]*See* note 34 *supra*.

[81]315 F. Supp. at 120-22.

[82]Mihans v. Municipal Court, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970).

[83]Wheeler v. Montgomery, 397 U.S. 280 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970); Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969); Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968).

[84]Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[85]*Id.* at 341-42.

[86]This was one facet of the plaintiff's claim in *Klim*, 315 F. Supp. at 112.

[87]*Id.* at 124.

[1]3A J. WIGMORE, EVIDENCE §§ 890-91 (Chadbourn rev. ed. 1970).

impeach the credibility of his testimony.[2] The record of prior convictions as impeaching evidence is considered indicative of the defendant's criminal nature which allegedly signifies a propensity to falsify his testimony.[3] The courts are in agreement that the practice of using prior convictions to impeach a defendant's credibility is necessary for proper evaluation of his testimony.[4] However, the extent to which proceedings must have progressed before an accused is deemed to have been "convicted" for purposes of impeachment in a subsequent proceeding has been the subject of conflicting views among the courts.

In the recent decision of *State v. Frey*,[5] the Supreme Court of Missouri considered whether the record of a prior judicial proceeding, at which the defendant was found guilty but no sentence imposed, was admissible as a "conviction" for purposes of impeachment. The defendant Frey was convicted in a state circuit court for unlawful sale of hallucinogenic and narcotic drugs. At the trial, Frey's testimony[6] was impeached by evidence of a prior proceeding in which he had pleaded guilty to another narcotics violation, but in which imposition of a sentence had been suspended[7] and probation imposed. The supreme court, in reversing, ruled that impeachment of Frey's credibility by introducing evidence of the prior conviction was permissible,[8] but that impeaching convictions must be the products of final judgment. "[U]nless sentence is imposed or pronounced in the prior proceeding," the requisite finality is absent[9] and the proceeding may not be used to impeach the credibility of the defendant under the applicable Missouri statute.[10]

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[2]*Id.*

[3]Notes 60-62 and accompanying text *infra*.

[4]*See, e.g.*, State v. Reyes, 99 Ariz. 257, 408 P.2d 400, 405 (1965); State v. Cote, 108 N.H. 290, 235 A.2d 111, 114-16 (1967).

[5]459 S.W.2d 359 (Mo. 1970).

[6]The defendant was asked if he had previously been convicted on a narcotics charge. His reply was that he had not. 459 S.W.2d at 359-60.

[7]The supreme court was careful to note that this was not a suspended sentence, but a situation in which no sentence was imposed at all prior to the time the defendant was placed on probation for a period of two years. 459 S.W.2d at 360.

[8]*Id.* at 362.

[9]*Id.* The court relied upon *State v. Townley*, 147 Mo. 205, 48 S.W. 833 (1898), which held that conviction includes final judgment, and when sentence is not imposed a person is not convicted.

[10]The applicable Missouri statute is as follows:

> Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

MO. ANN. STAT. § 491.050 (1952).

The practice of impeaching the credibility of a witness with evidence of prior convictions has evolved from the common law theory that a person convicted of an infamous crime[11] was incompetent as a witness.[12] This strict doctrine of incompetency was based on the theory that one convicted of this type of crime was a person of such dubious character that he was unworthy of belief.[13] Although this theory has not existed in Anglo-American law since the late 19th century,[14] the principle of presumed untrustworthiness associated with prior convictions has survived.

With impeachment by prior convictions a common practice in American courts,[15] it is important, before allowing the introduction of evidence of a prior conviction, to determine exactly what constitutes a proper conviction for purposes of impeachment. Generally, two views of the meaning of conviction emerge from the cases, one popular and one technical.[16] The popular view denotes the determination of the fact of guilt, as by plea or verdict, while the technical view is associated with official completeness of proceedings, denoting final judgment.[17] In construing the legislative intent of statutes permitting the use of prior convictions for impeachment, there has been disagreement among the courts as to whether the popular[18] or the technical[19] meaning of conviction is the proper standard for assessing impeaching evidence.[20]

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[11]Infamous crimes included treason, felonies, and acts of falsehood. 1 S. GREENLEAF, EVIDENCE § 373 (16th ed. 1892).

[12]3 F. WHARTON, CRIMINAL EVIDENCE § 752 (12th ed. 1955); 2 J. WIGMORE, EVIDENCE § 519 at 570 (3d ed. 1940).

[13]1 S. GREENLEAF, EVIDENCE § 372 (16th ed. 1892).

[14]In England the convicted criminal's competency as a witness was first assured by the Criminal Evidence Act of 1898, 61 & 62 Vict. c. 36.

[15]*See* 3A J. WIGMORE, EVIDENCE § 987 (3d ed. 1970). (List of statutes prescribing the use of prior convictions for impeachment).

[16]The two possible interpretations of conviction have been noted by many courts. *See, e.g.*, People v. Banks, 53 Cal. 370, 348 P.2d 102, 116, 1 Cal. Rptr. 669 (1959); Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (Dist. Ct. App. 1953); *Ex parte* White, 28 Okla. Crim. 180, 230 P. 522 (1924); Commonwealth *ex rel.* McClenachan v. Reading, 336 Pa. 165, 6 A.2d 776 (1939).

[17]*See, e.g.*, Commonwealth v. Reynolds, 365 S.W.2d 853 (Ky. 1963); Dial v. Commonwealth, 142 Ky. 32, 133 S.W. 976 (1911); People v. Fabian, 192 N.Y. 443, 85 N.E. 672 (1908); Commonwealth v. Palarino, 168 Pa. Super. 152, 77 A.2d 665 (1951).

[18]*See, e.g.*, State v. Reyes, 99 Ariz. 257, 408 P.2d 400 (1965); People v. Ward, 134 Cal. 301, 66 P. 372 (1901); Commonwealth v. Reynolds, 365 S.W.2d 853 (Ky. 1963).

[19]*E.g.*, City of Boston v. Santosuosso, 307 Mass. 302, 30 N.E.2d 278, 296 (1940); Commonwealth v. Finkelstein, 191 Pa. Super. 328, 156 A.2d 888, 892 (1959).

[20]Prior convictions also are used for various limiting or disqualifying purposes other than that of impeachment in subsequent proceedings. The majority of courts demand finality of proceedings before employing convictions for such purposes. *See, e.g.*, Medical Bd. v. Rodgers, 190 Ark. 266, 79 S.W.2d 83 (1935) (Probation without sentencing not sufficient conviction as grounds for revocation of doctor's license); Prewitt v. Wilson, 242 Ky. 231, 46 S.W.2d 90 (1932) (Sentencing required before conviction used to disenfranchise); Scott v.

Entering a criminal proceeding, a defendant is presumed innocent; but upon a plea or verdict of guilty the courts which apply the popular meaning of conviction consider the defendant's guilt firmly established. In these courts, ascertainment of guilt is equated with conviction and such conviction is deemed acceptable for impeachment purposes.[21] This view was adopted by the Kentucky Court of Appeals in *Commonwealth v. Reynolds*,[22] where the defendant, charged with maliciously cutting and stabbing another with intent to kill, was impeached with a record of conviction for uttering forged checks. That record contained a plea of guilty with sentence postponed and probation imposed. Similarly, in *State v. Reyes*,[23] the Arizona Supreme Court relied on the record of a guilty verdict alone to impeach, although judgment and sentence had not been imposed at the prior proceeding. Both courts noted that the purpose of impeachment[24] did not demand finality of sentencing. Rather, as the court observed in the *Reynolds* case,

> [t]he Rule [of impeachment of a witness] is not concerned with the penalty which may or may not have been imposed or whether, if one was imposed, the accused served out his time in the penitentiary. If it is shown that he has been guilty of a felony and his guilt has been fixed either by a plea of guilty or a verdict of the jury, he has been convicted so far as this Rule is concerned . . . . *If the presumption of innocence has been overcome, the extent of the penalty is of little importance* and he has been convicted of a felony under this particular Rule.[25]

American Express Co., 233 S.W. 492 (Mo. Ct. App. 1921) (Final judgment of conviction of suspect necessary before reward given for his capture); People v. Fabian, 192 N.Y. 443, 85 N.E. 672 (1908) (Finality of proceedings required before conviction used to disenfranchise); Smith v. Commonwealth, 134 Va. 589, 113 S.E. 707 (1922) (Sentencing required for conviction before that conviction is proper grounds for removal from public office). *Contra*, O'Hara v. Montgomery, 275 Mich. 504, 267 N.W. 550 (1936) (Finding of guilt sufficient as grounds for removal from office). *See also* Sibron v. New York, 392 U.S. 40, 55-57 (1968) (Recognizing the importance of convictions because of their use in subsequent proceedings).

[21]State v. Reyes, 99 Ariz. 257, 408 P.2d 400 (1965); Holcomb v. State, 218 Ark. 608, 238 S.W.2d 505 (1951); People v. Tiner, 11 Cal. App. 3d 428, 89 Cal. Rptr. 834 (Ct. App. 1970); People v. Ward, 134 Cal. 301, 66 P. 372 (1901); People v. Andrae, 295 Ill. 445, 129 N.E. 178 (1920); Commonwealth v. Reynolds, 365 S.W.2d 853 (Ky. 1963); State v. Knowles, 98 Me. 429, 57 A. 588 (1904); State v. Shaw, 73 Vt. 149, 50 A. 863 (1901); State v. Robbins, 37 Wash. 2d 492, 224 P.2d 1076 (1950).

[22]365 S.W.2d 853 (Ky. 1963).

[23]99 Ariz. 257, 408 P.2d 400 (1965).

[24]The purpose of impeachment was stated to be that of a warning to the court and the jury that the testimony of the witness may not be trustworthy because he is a criminal. 408 P.2d at 405, *citing* Commonwealth v. Reynolds, 365 S.W.2d 853, 859 (Ky. 1963).

[25]365 S.W.2d at 856 (emphasis added).

To courts which apply this interpretation of conviction,[26] the alleged probative value of informing the jury of a person's questionable integrity is the deciding factor in a court's decision to consider as proper evidence a plea or verdict of guilty. There is no reason to withhold from the jury the defendant's history, which marks him as a witness of dubious integrity,[27] once there has been a prior judicial determination that the defendant is guilty of a criminal act. Nothing more is needed to fulfill the requirement and historical rationale of impeachment evidence than the fact of guilt. It is this fact of criminal misconduct, and not the subsequent sentencing, which is said to establish the untrustworthiness of the defendant whenever he takes the witness stand.[28]

In some jurisdictions the courts are concerned more with the effect that the introduction of a prior conviction has on the rights and status of the defendant than with the alleged probative value as possible impeaching evidence.[29] These courts adhere to the technical interpretation of conviction, which denotes finality of the proceeding. This position is demonstrated by the holding of the New York Court of Appeals in *People v. Fabian*.[30] In this case the defendant was charged with voting while knowing he was disqualified by his criminal record. The alleged disqualification was based on a "conviction" for burglary consisting of a guilty verdict upon which sentence was not passed. The court noted that the popular interpretation of conviction was appropriate when distinguishing one stage in a criminal proceeding from another.[31] But when the conviction is used to affect the status or rights of the defendant in a subsequent proceeding, a party is not deemed convicted unless final judgment has been passed on the verdict or plea and sentence imposed.[32]

The courts which adhere to this interpretation of conviction often do so upon the belief that final judgment will best protect the defendant from possible prejudice[33] due to the use of incomplete and unreliable records of prior proceedings.[34] In these courts there is an expressed aversion to the use as impeaching evidence of guilty pleas or verdicts without sentencing.[35]

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[26]Note 21 *supra*.

[27]State v. Duke, 100 N.H. 292, 123 A.2d 745, 746 (1958); *accord*, State v. Cote, 108 N.H. 290, 235 A.2d 111 (1967).

[28]Notes 60-62 and accompanying text *infra*.

[29]Notes 55-59 and accompanying text *infra*.

[30]192 N.Y. 443, 85 N.E. 672 (1908).

[31]85 N.E. at 675.

[32]*Id.*

[33]Notes 65-70 and accompanying text *infra*.

[34]American Bank v. Felder, 59 Pa. Super. 166, 170-71 (1915); *cf.* Commonwealth v. Finkelstein, 191 Pa. Super. 328, 156 A.2d 888, 892 (1959).

[35]*See* Karasek v. Bockus, 293 Mass. 371, 199 N.E. 726 (1936); Attorney General v. Pelletier, 240 Mass. 264, 134 N.E. 407, 420 (1922); Neibling v. Terry, 352 Mo. 396, 177

Absent the finality of sentencing, a verdict may be set aside on a motion for a new trial, new evidence may be introduced, and in subsequent proceedings the defendant may actually be found not guilty.[36] Until final judgment the verdict may go for naught and "injure the witness in the estimate of the jury, just as in a less degree the mere indictment of the witness would."[37]

While the *Frey* court held that a proceeding in which the imposition of sentence was suspended did not constitute a proper conviction for impeachment purposes, other courts have found probation before sentencing of sufficient finality to constitute a conviction. Such holdings appear to fall somewhere between the popular and technical interpretations of conviction. There is a requirement of more than a bare finding of guilt but less than imposition of sentence. The holding in the Pennsylvania case of *Commonwealth v. Palarino*[38] reflects this position. In *Palarino* the defendant had been impeached by a record of a guilty verdict, suspension of imposition of sentence, and probation. The court stated the requirement that there must be prior conviction before a record is admissible as impeaching evidence[39] and that the probation was not sentencing.[40] While it was contended by the defendant that there could be no conviction without sentencing, the court held that since the probation order was a proper substitution for sentencing, the proceeding constituted a conviction for purposes of impeachment.[41]

In reaching its conclusion, the *Palarino* court considered probation the product of conclusive adjudication of the defendant's guilt, and that nothing more was required for impeaching evidence.[42] The court's interpretation is consistent with that expressed by the United States Supreme Court in *Korematsu v. United States*,[43] which found the record

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S.W.2d 502, 504 (1944); Commonwealth v. Finkelstein, 191 Pa. Super. 328, 156 A.2d 888, 892 (1959).

[36]Commonwealth v. Kiley, 150 Mass. 325, 23 N.E. 55 (1890).

[37]American Bank v. Felder, 59 Pa. Super. 166, 170 (1915). The value of a record of indictment after arrest was considered slight for purposes of impeachment in *Slater v. United States*, 1 Okla. Crim. 275, 98 P. 110 (1908), where it was held arrest or indictment may be associated with innocent parties and may be no more than mere hearsay. In *People v. Eddington*, 23 Mich. App. 210, 178 N.W.2d 686 (1970) and *People v. Brocato*, 17 Mich. App. 277, 169 N.W.2d 483 (1969), the courts noted the overwhelming possibility of prejudice in the use of records of arrest and indictment as weighed against their probative value.

[38]168 Pa. Super. 152, 77 A.2d 665 (1951); *accord*, Pedorella v. Hoffman, 165 A.2d 721 (R.I. 1960).

[39]77 A.2d at 667.

[40]*Id.* The court considered probation as judgment.

[41]*Id.* Probation was considered as much a form of judicial control as imposition of sentence.

[42]*Id.*

[43]319 U.S. 432 (1943).

of suspended imposition of sentence a sufficient judgment to permit appellate review.[44] Although the *Korematsu* Court stated that the requirement of sentencing is necessary to constitute an appealable judgment, it further held that sentencing was necessary only where there is no other judicial determination or control imposed on the defendant.[45] Probation was deemed sufficient judicial control over the defendant since it took the form of a mild ambulatory punishment.[46] There would be no such disciplinary measures imposed if the guilt of the defendant had not been judicially determined, for probation is only imposed on a convicted person.[47]

However, neither sentencing nor other forms of judicial control imposed by the trial court are always determinative of finality of conviction. The question of the admissibility as impeaching evidence of a prior conviction pending appeal is an example of this situation. The majority of federal[48] and state[49] jurisdictions allow the use of records of prior proceedings where the outcome of that proceeding is under appeal. These courts reason that until a conviction is set aside, it is a verity and proper proof of criminal misconduct indicating the witness' questionable veracity.[50] However, problems do exist when this majority practice is followed. If an appellate court reverses, a conviction becomes a nullity

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[44]The defendant was found guilty by a federal district court in California of violating restrictions imposed on Japanese-Americans during World War II. The defendant was placed on five years probation and he appealed the decision to the Court of Appeals for the Ninth Circuit. The circuit court, doubting whether it had jurisdiction to hear an appeal from a probation order, asked the United States Supreme Court to resolve the question. Korematsu v. United States, 323 U.S. 214, 215-16 (1944).

[45]319 U.S. at 434. The court followed the holdings of *Hill v. Wampler*, 298 U.S. 460, 464 (1936), and *Miller v. Aderhold*, 288 U.S. 206, 210 (1933). Both cases stated that there could be no final judgment in a criminal case until actual sentence had been imposed.

[46]319 U.S. at 435, *following* Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937).

[47]319 U.S. at 435, *following* Nix v. United States, 131 F.2d 857 (5th Cir. 1942). The *Nix* court held that even where imposition of sentence is suspended there is judgment of conviction because probation can only be "visited" on one convicted and probation is a form of "punishment." 131 F.2d at 858.

[48]Newman v. United States, 331 F.2d 968 (8th Cir. 1964), *cert. denied*, 397 U.S. 975 (1965); Bloch v. United States, 226 F.2d 185 (9th Cir. 1955), *cert. denied*, 350 U.S. 948 (1956); United States v. Empire Packing Co., 174 F.2d 16 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949). *Contra*, Campbell v. United States, 176 F.2d 45 (D.C. Cir. 1949).

[49]Latikos v. State, 17 Ala. App. 655, 88 So. 47 (1921); State v. Johnson, 99 Ariz. 52, 406 P.2d 403 (1965); State v. Reyes, 99 Ariz. 257, 408 P.2d 400 (1965); People v. Braun, 14 Cal. 2d 1, 92 P.2d 402 (1939); Gonzalez v. State, 97 So. 2d 127 (Fla. App. 1957); Dickson v. Yates, 194 Iowa 910, 188 N.W. 948 (1922); Shaffer v. State, 124 Neb. 7, 244 N.W. 921 (1932); *In re* Abrams, 36 Ohio App. 384, 173 N.E. 312 (1930); McGee v. State, 206 Tenn. 230, 332 S.W.2d 507 (1960); State v. Crawford, 60 Utah 6, 206 P. 717 (1922); State v. Martin, 176 Wash. 637,30 P.2d 660 (1934). *Contra*, Adkins v. Commonwealth, 309 S.W.2d 165 (Ky. 1958); McCauley v. Stone, 315 S.W.2d 476 (Mo. Ct. App. 1958).

[50]State v. Reyes, 99 Ariz. 257, 408 P.2d 400 (1965).

and cannot be used for impeachment.[51] Accordingly, while an appeal is pending or undecided it cannot be determined with certainty whether the conviction will be sustained or reversed. Therefore, it would appear premature to use such a conviction since it may later be reversed and declared a nullity.[52]

The minority of courts which prohibit convictions under appeal from being used as impeaching evidence follow the principles enunciated in *Foure v. Commonwealth.*[53] The Kentucky court considered an appeal as a suspension of the original proceeding, which does not become final until termination of that appeal.[54] In essence, the trial is not concluded nor is guilt established while the case is under appeal. Rather, the trial is viewed as being "continued" until the appellate court makes its ruling.[55] By demanding finality of appellate review before a conviction could be used for impeachment purposes, the evidence of guilt would be definitely established and there would be no possibility of exposing to the jury a conviction which may later be reversed.

In arriving at its holding in the principal case, the *Frey* court possibly considered the rehabilitative valve of probation as more important than the probative value of impeachment with prior convictions. The refusal to employ the record of probation suggests that the court looked not to the fact of prior guilt of the defendant but rather to the possibility that rehabilitation of the defendant could best be accomplished without exposing his record of crime. Probation allows the defendant, through compliance with the terms of that probation, the opportunity to permanently avoid punishment and the stigma of being considered a convict. To look only to the determination of guilt and not to the fact that the defendant is capable of rehabilitation would defeat the purpose of probation.[56] The practice of stigmatizing the witness despite his probation

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[51]Adkins v. Commonwealth, 309 S.W.2d 165 (Ky. 1958); Foure v. Commonwealth, 214 Ky. 620, 283 S.W. 958 (1926); State v. Blevins, 425 S.W.2d 155 (Mo. 1968); *see* People v. Van Zile, 80 Misc. 329, 141 N.Y.S. 168 (Sup. Ct. 1913); Ringer v. State, 129 S.W.2d 654 (Tex. 1939). *Contra,* Latikos v. State, 17 Ala. App. 655, 88 So. 47 (1921); People v. Braun, 14 Cal. 2d 1, 92 P.2d 409 (1939); State v. Crawford, 60 Utah 6, 206 P. 717 (1922).

[52]When a prior conviction which is later reversed and theoretically struck from a defendant's record remains a factor in the conviction of a defendant witness where he is impeached by that prior conviction, the erroneous conviction is in fact not completely abrogated. Foure v. Commonwealth, 214 Ky. 620, 283 S.W. 958, 962 (1926); State v. Blevins, 425 S.W.2d 155, 159 (Mo. 1968).

[53]214 Ky. 620, 283 S.W. 958 (1926).

[54]283 S.W. at 962.

[55]State v. Blevins, 425 S.W.2d 155, 159 (Mo. 1968).

[56]The purpose of probation was well stated in the following language from the case of *Delaney v. State,* 190 So. 2d 578 (Fla. 1966):

> The obvious purpose [of probation] was to provide for the rehabilitation of one who had committed a crime without formally and

might remove the incentive to complete his rehabilitation program.[57]

In considering suspended imposition of sentence as something less than final judgment, the *Frey* court reasoned that the defendant's guilt could not be conclusively established by such a record.[58] The court relied on an earlier New York case holding that suspended sentence before imprisonment was not final judgment,[59] and reasoned that where no sentence was imposed there was no final judgment which could be used for impeachment purposes. Apparently underlying this decision was the belief that when there is a possibility that a record will work to the detriment of the defendant in future proceedings, probation is not final judgment.[60]

By following the technical interpretation of conviction and requiring that there be sentencing before an accused is convicted for impeachment purposes, the *Frey* court apparently did not consider the policy upon which impeachment by prior conviction is founded: That a person's veracity can be determined by examining his previous conduct. In appraising the theory underlying impeachment by prior conviction, Justice Holmes once stated that

> . . . when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.[61]

> judicially branding the individual as a convicted criminal with consequent loss of civil rights and other damning consequences.

Id. at 580. *See* Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967); *Ex parte* Medley, 73 Idaho 274, 253 P.2d 794 (1953).

[57]The court in *Ex parte Medley*, 73 Idaho 274, 253 P.2d 794 (1953) spoke of probation

> [as creating] and rightfully so, a hope in the heart of the accused that he may ultimately be released under an order of probation without the stigma of a judgment of conviction. This is an incentive for complete rehabilitation and reform. . . .

Id. at 797.

[58]459 S.W.2d at 362; *accord*, Attorney General v. Pelletier, 240 Mass. 264, 310, 311, 134 N.E. 407, 420 (1922).

[59]People v. Page, 125 Misc. 538, 31 N.Y.S. 401 (1925).

[60]This concern for a person's future rights was evidenced in the holding of *People v. Fabian*, 192 N.Y. 443, 85 N.E. 672 (1908) wherein it was stated:

> . . . where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed.

Id. at 674.

[61]Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884).

As noted by Justice Holmes, this assumed untrustworthiness is not predicated upon a party's specific history of falsification, but rather upon his presumed general bad character and contempt for the law. Proof that a person is willing to commit criminal acts tends to show a disregard for acceptable behavior in society, which is translated into a willingness to give false testimony.[62] Thus once a party's guilt has been judicially determined, his testimony may be regarded with suspicion whenever he takes the witness stand.

The requirement of sentencing in *Frey* does not correspond with the principle that it is the criminal misconduct itself and not the punishment which demonstrates a party's trustworthiness or lack thereof. There was little doubt as to Frey's guilt in the prior proceeding, as he pleaded guilty to the narcotics violation. Yet the Supreme Court would not permit a guilty plea to be used as evidence to warn the jury of possible testimonial unreliability. If the court had followed the popular interpretation of conviction, this ascertainment of guilt may have indicated the defendant's propensity to lie under oath.[63] Instead the court, reluctant to allow incomplete proceedings as impeaching evidence, protected the defendant from impeachment by possibly unreliable evidence, by implicitly questioning the rationale of the popular view.[64]

However, the *Frey* decision is compatible with the opinion expressed by several writers[65] that the practice of impeachment by record of prior convictions is of questionable value because of the inevitable prejudice it creates in the minds of the jury.[66] When prior convictions are introduced

[62]*See* Ladd, *Credibility Test—Current Trends*, 89 U. PA. L. REV. 166, 176 (1940). *See also* PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 6-09 comment (1969).

[63]Notes 61-62 and accompanying text *supra*.

[64]Notes 33-37 and accompanying text *supra*.

[65]*See* Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166 (1940); McGowan, *Impeachment of Criminal Defendants By Prior Convictions*, 1 ARIZ. ST. U. L. J. 1 (1970); Note, *Constitutional Problems Inherent In The Admissibility Of Prior Record Conviction Evidence For The Purpose Of Impeaching The Credibility Of The Defendant Witness*, 37 U. CIN. L. REV. 168 (1968).

[66]*E.g.*, Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966) (Classic illustration of prejudicial affect of impeachment far outweighing probative value of showing prior conviction). In *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963) it was held that basic to the concept of fair trial is the contention that a defendant is entitled to be judged on the specific offense charged rather than on a history of his past convictions which may mark his conduct as "reprehensible." Courts continue to allow the use of prior convictions for impeachment in the face of prejudice of impartiality on the reasoning that such prejudice can be controlled by limiting instructions. This is predicated on the belief exhibited in *Delli Paoli v. United States*, 352 U.S. 232 (1957) that jury instructions are successful in accomplishing this purpose; but in actuality, as pointed out in *Krulewitch v. United States*, 336 U.S. 440 (1959), their effectiveness in this respect has been less than satisfactory. *See generally* Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264 (1966).

to the jury, it may properly use them to judge the witness' credibility. The jury may also improperly apply the impeaching evidence and either use the conviction as conclusively showing the defendant's general criminal tendencies or conclude that since the defendant has been guilty of a previous crime he is probably guilty of the crime with which he is presently charged. While the purpose of exposing the defendant's history of conviction is limited only to impeachment of the credibility of his testimony,[67] the jury is often unable to completely divorce this evidence from the material issues which it must consider.[68] This danger of jury prejudice was noted in *Richards v. United States*,[69] which stated that impeachment may properly display questionable credibility, but there also may exist "such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual law breaker who should be punished and confined for the general good of the community."[70]

Even with the concern expressed over the use of prior conviction as impeaching evidence,[71] this well-established practice has, and will likely continue to be used to evaluate the credibility of a defendant's testimony. This is evidenced by the provisions allowing impeachment by prior convictions in the PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES.[72] In light of the continued use of impeachment by prior conviction it will become incumbent upon the courts to balance the probative value of impeachment by prior convictions against the ever-present threat of jury prejudice. The courts will have to demand that the evidence of convictions introduced for impeachment will not unduly prejudice a defendant. Some courts recently have moved in this direction by allowing broad judicial discretion to

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[67]Commonwealth v. Finkelstein, 191 Pa. Super. 358, 156 A.2d 888, 892 (1959); 2 J. WIGMORE, EVIDENCE § 488 at 590 (3d ed. 1940).

[68]Any testimony given by the defendant after impeachment by prior conviction is regarded with the greatest suspicion by the jury, and the defendant is marked with the stigma of prior conviction which weighs heavily upon the supposedly impartial determination of the jury. In one survey, results showed that juries granted acquittals far less often to defendants with prior convictions than to defendants without criminal convictions. The defendants were divided into two groups. One group consisted of defendants who had no previous criminal record or were able to keep that fact from the jury. The second group was made up of defendants who had previous criminal records and the jury knew of those records. In similar prosecution cases the first group of defendants received acquittals in 65%of the cases reported. The second group of defendants received acquittals in only 38%. H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

[69]192 F.2d 602 (D.C. Cir. 1951).

[70]*Id.* at 605.

[71]Note 73 *infra.*

[72]PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 6-09 (1969).