Admissibility of Prior Conviction, Arrests, and Confession to Impeach Credibility of a Witness.

The recent case of *Kornreich* v. *Industrial Fire Ins. Co.*, 132 O.S. 78, 5 N.E. (2d) 153 (1936) presents the problem of the admissibility of questions upon cross-examination asked for the purposes of impeaching the credibility of a witness. The plaintiff brought the action upon a fire insurance policy issued by defendant. The plaintiff upon the cross-examination was asked, "Isn't it a fact that when Sperling refused to pay you any money you went to the police department and made a confession of your part in the plot to destroy the Middle West Hat Co.?" The trial court sustained an objection to the question. The Supreme Court reversed the ruling and held the question was proper.

At common law questions whether the witness had committed any crime have frequently been asked upon cross-examination. Of course, the witness may have a privilege against answering such questions. But in many states the trial court in its discretion may permit such questions to be asked. *People* v. *Turney*, 124 Mich. 542, 83 N.W. 273 (1900); *Tla-Koo-Yelee* v. *United States*, 167 U.S. 274 17 Sup. Ct. 855 (1896); *State* v. *Wells*, 54 Kan. 161, 37 Pac. 1005 (1894); 5 Jones on Evidence Sec. 832.

In Ohio it has been held permissible to ask a witness whether he has been arrested. *Hanoff* v. *State*, 37 Ohio St. 178, 41 Am. Rep. 496 (1882); *Colbe* v. *State*, 31 Ohio St. 100, 20 O.L.R. 487 (1876); *Wroe* v. *State*, 20 O. S. 460, 5 Dec. Rep. 55 (1870). In the Wroe Case the court said, "The limits to which a witness may be cross-examined on matters not relevant to the issue, for the purpose of judging of his character and credit from his own voluntary admissions, rests in the sound discretion of the court trying the cause. Such questions may be allowed when there is reason to believe it will tend to the ends of justice; but they ought to be excluded when a disparaging course of examinations seems unjust to the witness, and uncalled for by the circumstances of the case." *Brandon* v. *People*, 42 N.Y. 265, 40 Cyc. 2621 (1870); *People* v. *Fong Ching*, 78 Cal. 169, 20 Pac. 396 (1889); *Parker* v. *State*, 58 Ark. 513, 25 S.W. 603 (1894); *State* v. *Duncan*, 7 Wash. 336, 38 Am. St. Rep. 103 (1893).

Hamilton v. *State* 34 Ohio St. 82 2 Ohio Dec. Rep. 103 (1880) was the first case in Ohio in which the court held that it was permissible to ask a witness on cross-examination if he had been indicted for a crime. This case was soon followed by *Hanoff* v. *State*, *supra*, which said it was not reversible error to ask a witness whether he had been arrested and indicted. This seemed to be the prevailing view in

Ohio until the case of *Wagner* v. *State*, 115 Ohio St. 136, 152 N.E. 28 (1926) was decided. The Supreme Court held in that case that the only proper course to follow when cross-examining a witness with reference to collateral offenses, for the purpose of affecting his credibility is to ask him whether he has been convicted of the offense in question. The court said that if the party had been convicted, there was no need to show the indictment, and if he had not been convicted, there was no more reason for presuming him guilty of that crime because of the indictment than for presuming him guilty of the one for which he is now being tried. And for the present trial the presumption of course, is that he is innocent. In the syllabus of the principal case the Wagner case is "approved, followed, and distinguished." But the rule of the Wagner case that you canot inquire about previous indictments is not altered in the instant case.

In the principal case the court held that a witness could be asked if he had voluntarily confessed that he had committed a crime. Of course, this could not be reconciled with a doctrine that the only way to prove a crime is by showing proof of conviction. But such a rule seems to unduly limit the cross-examination. In many states a witness may be asked if he committed a certain crime.

The holding in the principal case, however, may be reconciled with the ruling that an indictment cannot be shown. In proving the indictment, the party is offering the opinion of the grand jury that there was probable cause to believe the witness guilty of the crime. It is hearsay since the grand jury is not present in court to be examined. While the confession also is hearsay since it was made out of the court there is not the same objection to admissibility since the party making the confession is present in court and upon the stand. The confession, if voluntary, is convincing and for probative effect falls little if any short of proof of a conviction. It is submitted that the Supreme Court rightly held that the question was proper. R. W. VANDEMARK.

EVIDENCE OF KNOWLEDGE OF DEFENDANT OF DEFECT NECESSARY TO TAKE CASE TO JURY ON ISSUE OF NEGLIGENCE.

The plaintiff proved that she was a customer in the defendant's store; that a foot-stool or sewing-stool obstructed the aisle; that the defect in the aisle caused her to fall; and that the stool belonged to the counter of which a saleslady had charge, supervision, and control, and was returned to the counter after the plaintiff fell over it. The court held that the plaintiff had not presented a prima facie case to go to the