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Evidence—Cross-Examination to Impeach Credibility Held Prejudicial

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to allow them to challenge a prior divorce of a surviving spouse. *In re Pusey's Estate,* 180 Cal. 368, 181 P. 648 (1919). See *Nimmer's Estate v. Nimmer,* 212 S. C. 311, 47 S. E. 2d 716 (1948), where on similar facts collateral attack by heirs was allowed.

Decisions which seem to deny this interest in heirs are distinguishable because of the appearance of the other party in the divorce proceedings, thereby estopping any collateral denial of jurisdiction. *Johnson v. Muelberger,* 340 U. S. 581 (1951); *Shea v. Shea,* 270 App. Div. 527, 60 N. Y. S. 2d 823 (2d Dep't 1946).

The instant case represents the great reluctance by courts to allow collateral attack on seemingly valid marriages, but this writer suggests the majority reasoning here is too restrained, especially in view of decisions in other jurisdictions and the policy underlying the Uniform Divorce Recognition Act. This policy is to refuse recognition of foreign divorce decrees acquired by domicilaries, subject *only* to constitutional limitations. The *Williams* case suggests that there would be no constitutional obstacle to declaration of the invalidity of the instant divorce decree.

Paul A. Foley

EVIDENCE — CROSS-EXAMINATION TO IMPEACH CREDIBILITY HELD PREJUDICIAL

In an action to recover for personal injuries received while boarding a bus, plaintiff was cross-examined as to prior convictions for intoxication. *Held* (4-1): Since intoxication is not a crime, such questioning was not competent to impeach credibility and should have been excluded. *McQuage v. City of New York,* 285 App. Div. 249, 136 N. Y. S. 2d 111 (1st Dep't 1954).

For purposes of attacking credibility, a witness may be cross-examined concerning any immoral, vicious, or criminal act of his life which may affect his character and tend to show him to be unworthy of belief. RICHARDSON, EVIDENCE (7th ed. 1948) § 576; *People v. Sorge,* 301 N. Y. 198, 93 N. E. 2d 637 (1950). Jurisdictions differ as to what types of moral misconduct are relevant to veracity and thus a proper subject of cross-examination. The English rule has been to allow anything to be asked. Diametrically opposed are two or three states which forbit any inquiries into the moral past of the witness. However, most states, including New York, follow a middle course. According to this theory, the range of the questioning is left to the control of the trial judge. WIGMORE, EVIDENCE § 146 (Students' Ed. 1935). In *Freidel v. Board*

of Regents, 296 N. Y. 347, 73 N. E. 2d 545 (1947), (review of administrative agency ruling), the New York Court of Appeals held that the extent of cross-examination of an adverse witness to impeach credibility rests in the discretion of the tribunal, whose exercise thereof is not reviewable unless abused.

Generally the cases holding that the extent of cross-examination to impeach a witness' credibility rests within the discretion of the trial judge deal with situations in which the judge refused to permit disparaging questions. Questions attacking the character of the witness were held properly excluded in *Third Great Western Turnpike Road Co. v. Loomis,* 32 N. Y. 127 (1865) and in *LaBeau v. People,* 34 N. Y. 223 (1866) (questions concerning female witness' illicit relations with various men). Where the basis for appeal has been that the trial judge allowed too much in the way of attack on character, courts in the past warned against overstepping the limits, but nevertheless permitted the testimony to be introduced. *People v. Bloodgood,* 251 App. Div. 593, 601, 298 N. Y. Supp. 91, 100 (3d Dep't 1937) (prosecutor's claim that defendant associated with "crooks" improper, but not grounds for reversal). These cases indicated that discretion must be plainly abused to form a basis for reversal.

More recent cases have specifically *held* that there are limits to a trial judge's area of discretion and that his exceeding those limits by permitting questions that tend to prejudice the jury is a basis for reversal. *People v. Malkin,* 250 N. Y. 185, 164 N. E. 900 (1928) (questions concerning witness' expulsion from a labor union held prejudicial). Cross-examining a policeman about his poor department record was held to be prejudicial in *People v. Bilanchuk,* 280 App. Div. 180, 112 N. Y. S. 2d 414 (1st Dep't 1952). In that case the court held that a defendant who takes the witness stand may be cross-examined concerning any previous vicious, illegal or immoral acts, but questions which do not fairly tend to impeach his credibility as a witness may not be allowed. It is significant that it was the *appellate* court's opinion as to what "queries fairly tend to impeach credibility," not that of the trial court, that was decisive.

A recent federal court decision has carried this idea even further by holding that specific acts of misconduct not resulting in *conviction* of a crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes. *U. S. v. Provoo,* 215 F. 2d 531 (2d Cir. 1954) (defendant cross-examined as to homosexuality). Likewise, in an action based on alleged carelessness in the operation of a bus, it was held error to permit cross-examination of defendant's driver as to prior accidents,

whether or not for the purpose of attacking the credibility of the witness, since the effect was to prejudice the minds of the jurors. *Grenadier v. Surface Transportation Corp. of New York,* 271 App. Div. 460, 66 N. Y. S. 2d 130 (1st Dep't 1946).

To impeach a witness' credibility, much is allowed. However, the above cases indicate a trend towards limiting the extent of cross-examination for impeachment. This restriction is two-fold. First, certain areas have been banned, *e. g.* previous negligent acts, whether or not affecting credibility. *Grenadier v. Surface Trans. Corp. of N. Y., supra.* Second, from a position of leaving complete control in the hands of the trial judge, the courts in *People v. Bilanchuk, supra,* and the instant case, have taken it upon themselves to decide whether the cross-examination was a legitimate attack on credibility.

It is the writer's opinion that where an appellate court limits a trial judge's discretionary area in allowing cross-examination for impeachment purposes by forbidding certain subjects, it is acting within its proper sphere. However, where the appellate court, as in the instant case, substitutes its opinion for that of the trial judge as to whether or not the cross-examination was for the purpose of attacking credibility, it is not acting properly and is seriously interfering with the right of cross-examination.

Alan H. Levine

FEDERAL PROCEDURE — APPEALABILITY OF DENIAL OF MOTION FOR SUMMARY JUDGMENT

Plaintiff's motion for summary judgment under Federal Rule of Civil Procedure 56 (a) (c) (e) on his complaint praying for both a temporary and permanent injunction to prevent defendants from copying plaintiff's trade name and corporate title was denied by the District Court. *Held:* The order denying the motion was appealable under 28 U. S. C. A. 1291, 1292(1). *Federal Glass Co. v. Loshin,* 217 F. 2d 936 (2d Cir. 1954).

Finality has been the historic characteristic of federal appellate procedure ever since it was written into the first Judiciary Act. (Now 28 U. S. C. A. 1291). *Cobbledick v. United States,* 309 U. S. 323 (1940). The basis for this policy is not only to protect judicial administration from piecemeal litigation but also to eliminate delays and avoid obstruction of just claims which would otherwise be jeopardized by harassment and the cost of the various successive appeals before final judgment. *Catlin v. United States,* 324 U. S. 229 (1945).