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# The Scope of Permissible Cross-Examination of a Party Litigant or Defendant in a Jury Trial in West Virginia

Lee Ames Luce

*West Virginia University College of Law*

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## STUDENT NOTES

### The Scope of Permissible Cross-Examination of a Party Litigant or Defendant in a Jury Trial in West Virginia

Two fundamental restrictions limit the permissible scope of the cross-examination of a party litigant or defendant in a jury trial.<sup>1</sup> One is the evidentiary restriction limiting cross-examination to those matters discussed in chief, and the second is the constitutional privilege against compulsory self-incrimination. The purpose of this note is to examine the development and application of these restrictions in West Virginia jurisprudence.

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<sup>1</sup> To this list could also be added a third restriction, that of incompetency. Under the common law and during the period when this nation was formed, a person charged with a criminal offense was incompetent to testify under oath in his own behalf at his trial. He was at times permitted to make certain statements to the jury while not under oath, but he was not subject to cross-examination on such utterances. This restriction is, however, of little present-day importance since Georgia is the only jurisdiction in the common law world to retain this rule. See, *Ferguson v. Georgia*, 365 U.S. 570 (1960).

## EXAMINATION IN CHIEF

Apart from the problem of self-incrimination, the permissible latitude of cross-examination of a party litigant in a civil case may be substantially different in West Virginia from that permitted when a defendant is being examined in a criminal case. To aid in an understanding of these differences it will be helpful to examine the latitude of permissible cross-examination (1) in a civil case where a witness and then a party litigant is being cross-examined, and (2) in a criminal case where a witness and then the defendant is being cross-examined.

## CIVIL CASES

The majority prevailing evidentiary rule in this country is that, in a civil case where the non-litigant witness is testifying, the cross-examination must be limited to those areas which were covered by the examination in chief.<sup>2</sup> Within the discretion of the court, however, the witness may be cross-examined as to matters not touched upon in the examination in chief for the purpose of impeachment as to affect the credibility of the testimony of the witness.<sup>3</sup> West Virginia is in accord with these general principles.<sup>4</sup> Generally, in this country, when a party litigant is a witness in a civil case, cross-examination will be similarly limited, but West Virginia appears to deviate from this generally accepted pattern.

In *Ingles v. Stealey*,<sup>5</sup> the defendant had executed a note to one Hellem who in turn assigned it to plaintiff. Defendant took the stand and was cross-examined, over objection of his counsel, as to substantive matters not touched upon in the examination in chief. The court held, upon appeal, that "a party to a suit may, on cross-examination, be questioned in regard to any matter pertinent to the issue, whether he testified thereto in his examination in chief or not."<sup>6</sup>

<sup>2</sup> McCORMICK, EVIDENCE § 21 (1954). For an excellent discussion of the desirability of the various views regulating the latitude of permissible cross-examination see, 6 WIGMORE, EVIDENCE § 1887-1890 (3d ed. 1940).

<sup>3</sup> McCORMICK *op. cit. supra* note 2, § 22.

<sup>4</sup> Lambert v. Armentrout, 65 W. Va. 375, 64 S.E. 260 (1909).

<sup>5</sup> 85 W. Va. 155, 101 S.E. 167 (1919).

<sup>6</sup> It is interesting to note that as authority for this holding the court cites *McManus v. Mason*, 43 W. Va. 196, 27 S.E. 293 (1897). It is submitted that at best this case is doubtful authority for this proposition, for while the *McManus* case is not free from ambiguity, its indicated basis in sanctioning cross-examination beyond that in chief was for the purpose of attacking the party litigant's credibility and not for substantive purposes. Twelve years after the *McManus* case was decided, the court held in *Lambert v. Armentrout*,

It appears, therefore, that a wide open cross-examination of a party litigant is permitted in a civil case in West Virginia. A somewhat analogous end result could be reached by liberal application of Rule 43(b) of the West Virginia Rules of Civil Procedure permitting more latitude in examination and cross-examination of a party litigant.

#### CRIMINAL CASES

In criminal cases the evidentiary rules concerning cross-examination of a witness are analogous to those in civil cases. "Generally, a witness cannot be cross-examined as to matters not gone into on the direct examination, unless the question asked tends to show motive, interest, an animus, or unless it is for the purpose of testing his memory or credibility or laying the basis for impeachment."<sup>7</sup> West Virginia would again seem to be in accord with these general principles.<sup>8</sup> But authorities differ concerning the permissible latitude of cross-examination as to substantive matters when a defendant in a criminal case is being questioned. Some courts permit a wider latitude of cross-examination than when a regular witness is being questioned, somewhat analogous to West Virginia's practice in civil cases, while other courts restrict cross-examination of the accused as in the case of other witnesses.<sup>9</sup> In West Virginia, the permissible scope of the cross-examination of a defendant in a criminal case is at least partly controlled by statute which provides that the accused ". . . shall be subject to cross-examination as any other witness. . . ."<sup>10</sup>

The problem that is immediately presented is what is meant by the language "any other witness." If the court were to construe this statutory language to mean any other non-party litigant witness, then the scope of the cross-examination of a defendant would be limited to the scope of his examination in chief and West Virginia would be in accord with the majority rule. If, however, the statutory language is construed to include a party litigant in the meaning of "any other

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*supra*, when a party litigant was upon the stand that he could not, for substantive purposes, be cross-examined ". . . beyond facts elicited on his examination in chief." It is, therefore, highly probable that the expansion of the scope of cross-examination in a civil case where a party litigant is involved was the product of a judicial misinterpretation of the basis of a prior court decision.

<sup>7</sup> 3 WEHARTON CRIMINAL EVIDENCE § 868 (12th ed. 1955).

<sup>8</sup> *State v. Price*, 92 W. Va. 542, 115 S.E. 393 (1922); *State v. Carr*, 65 W. Va. 81, 63 S.E. 766 (1909).

<sup>9</sup> 3 WEHARTON, *op. cit. supra* Note 7, § 887.

<sup>10</sup> W. VA. CODE ch. 57, art. 3, § 6 (Michie 1961). Virginia has an analogous statutory provision. VA. CODE ch. 19.1-264 (Michie 1950).

witness" and the court were to follow the rule of *Ingles v. Stealey*, then the scope of cross-examination of a defendant in a criminal case would be analogous to the scope of cross-examination in a civil case and a wide open cross-examination of a defendant would be permissible, subject, of course, to self-incrimination and other recognized limitations.<sup>11</sup> No case authority precisely in point has been found, but the examination of certain West Virginia criminal cases may be helpful.

In *State v. Friedman*,<sup>12</sup> defendant was convicted of the statutory offense of sodomy. Upon cross-examination, defendant, over the objection of his counsel, was required to answer questions as to prior convictions. The court, while seemingly confusing the self-incrimination section of the statute with that section defining the scope of permissible cross-examination, held "the right to cross-examination 'as any other witness' implied the right to impeach his credibility by the same rules as those applicable to other witnesses," relying upon *Thaniel v. Commonwealth*<sup>13</sup> as authority. Numerous West Virginia cases are in accord.<sup>14</sup> It is thus seen that the court has treated a defendant in a criminal case much the same as any other witness with reference to matters affecting his credibility, but this sheds little light on whether the court would permit a wide open cross-examination of the accused. A literal interpretation of the statute would indicate that it would not.

#### SELF-INCRIMINATION

The second major limitation upon the permissible scope of cross-examination in a jury trial is concerned with the self-incrimination privilege. A comprehensive discussion of this constitutional privilege is beyond the scope of this note,<sup>15</sup> and only those aspects of the privilege peculiar to the limitation of cross-examination of a party litigant in a civil case or a defendant in a criminal case will be considered.

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<sup>11</sup> The same result could be reached if the court would hold that the statute is only applicable to the problem of self-incrimination.

<sup>12</sup> 124 W. Va. 4, 18 S.E.2d 653 (1942).

<sup>13</sup> 132 Va. 795, 11 S.E. 259 (1922).

<sup>14</sup> *State v. Riss & Co.*, 139 W. Va. 1, 80 S.E.2d 9 (1953); *State v. Blankenship*, 137 W. Va. 1, 69 S.E.2d 398 (1952) and cases cited therein; *State v. LaRosa*, 129 W. Va. 634, 41 S.E. 2d 1921 (1946).

<sup>15</sup> For a good general discussion of the area of self-incrimination and contrasting views as to the desirability of this constitutional privilege, see Borarsky, *The Right of the Accused in a Criminal Case Not to be Compelled to Be a Witness Against Himself*, 35 W. VA. L. REV. 27, 126 (1929); Sloven, *Some Comments on Self-Incrimination*, 70 ANNUAL REPORT OF THE W. VA. BAR ASS'N. 76 (1954).

The West Virginia Constitution provides in part: ". . . nor shall any person, in any criminal case, be compelled to be a witness against himself. . . ."<sup>16</sup> This constitutional privilege is not limited merely to criminal cases wherein the defendant is a witness, but it is applicable to any judicial proceeding, civil or criminal.<sup>17</sup> The privilege is a private one, and, if a party litigant has answered questions upon examination in chief without objection, or without claiming the privilege, he will be deemed to have waived the right to object to incriminating questions upon cross-examination relating to his examination in chief. However, the party litigant could claim his self-incrimination privilege upon cross-examination as to those matters not discussed in his examination in chief.<sup>18</sup>

If the party litigant be given sufficient immunity from criminal prosecution, he cannot refuse to testify on the ground of self-incrimination. The West Virginia Code provides that "in a criminal prosecution other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination,"<sup>19</sup> but "the constitutional privilege of silence cannot be taken away by statute unless absolute immunity is provided . . ." and ". . . a provision merely that the testimony of a witness should not be used against him, does not secure such absolute immunity."<sup>20</sup> Since this statute does not provide the absolute immunity required to protect a party litigant from being subsequently prosecuted as a result of statements made during a civil case, the constitutional privilege against compulsory self-incrimination is still available to a party litigant in a civil case in West Virginia

The defendant's invocation of the constitutional privilege against self-incrimination in a criminal case is largely regulated by the West Virginia Code which provides that, in a criminal case, where the accused voluntarily ". . . becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself. . . ."<sup>21</sup> It should be noted that this statute is only applicable in a criminal case when a defendant is being cross-examined.

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<sup>16</sup> W. VA. CONST. art. III, § 5 (1872).

<sup>17</sup> *Dellostatiou v. Boyce*, 152 Va. 368, 147 S.E. 267 (1929); 3 WHARTON, *op. cit. supra* Note 7, § 721.

<sup>18</sup> 3 WHARTON, *op. cit. supra* Note 7, § 730.

<sup>19</sup> W. VA. CODE ch. 57, art. 2, § 3 (Michie 1961).

<sup>20</sup> 20 M.J. *Witnesses* § 81 (1952).

<sup>21</sup> W. VA. CODE ch. 57, art. 3, § 6 (Michie 1961). Virginia has an analogous statutory provision. Va. Code ch. 19.1-264 (Michie 1950).

It has been generally held that a waiver provision such as appears in the West Virginia statute will not deprive a defendant of his constitutional privilege if he has not understandingly and willingly taken the stand after being warned of the consequences of such an act.<sup>22</sup> Similarly, a defendant will not have waived his constitutional privilege merely because he testified to such collateral matters as the qualification of jurors or the change of venue.<sup>23</sup>

The phrase ". . . all matters relevant to the issue . . ." has been construed in several court decisions.<sup>24</sup>

In *State v. Foley*,<sup>25</sup> defendant and another were trying to obtain support for their respective unions which they represented in a coming election. Certain elements of the local population were against the unionization of the workers of the area and threatened Foley and the other union representatives with violence. In the resulting skirmish two persons were shot. Upon cross-examination in his subsequent murder trial, Foley was forced to answer that he had no license to carry a pistol at the time the killing took place. Upon appeal, the court held that Foley had been forced to be a witness against himself as to a matter not relevant to his guilt or innocence and that reversible error had thus been committed.<sup>26</sup>

In the recent case of *State v. Simmons*,<sup>27</sup> the deceased and his friend, both senior students at Davis & Elkins College, were returning to the college late in the evening when the deceased stopped beside the trailer home of defendant and beat upon it with a piece of wood. After a short time defendant appeared at the door of the trailer and fired a shot which hit Moore. Subsequently defendant struck deceased with the rifle and in the ensuing struggle deceased was shot three times. He died a few hours later as a result of these injuries. At his trial for the murder of deceased, defendant was

<sup>22</sup> *Powell v. Commonwealth*, 167 Va. 558, 189 S.E. 433 (1937).

<sup>23</sup> *Enoch v. Commonwealth*, 141 Va. 411, 126 S.E. 222 (1925).

<sup>24</sup> This phrase is not contained in the analogous Virginia Statute, VA. CODE ch. 19.1-264 (Michie 1950), and may somewhat limit the implied waiver of a defendant's constitutional privilege when he elects to testify.

<sup>25</sup> 128 W. Va. 166, 35 S.E.2d 854 (1945).

<sup>26</sup> In the more recent case of *State v. Bragg*, 140 W. Va. 585, 87 S.E.2d 689 (1955), the court reaffirmed this position in a situation analogous to the *Foley* case, stating that "this court has never departed from the principle that the accused in a criminal case is protected against compulsory self-incrimination. This principle was inherent in the common law, both in England and the Colonies, and was recognized in the Virginia Bill of Rights of 1776. It is applicable, in our opinion, to the instant case."

<sup>27</sup> 135 S.E.2d 257 (W. Va. 1964).

forced to answer, upon cross-examination, as to whether he had been selling liquor at his trailer home. The trial court instructed the jury that such evidence could only be considered for the purpose of impeachment. In reversing defendant's conviction, the appellate court held that the issue in the case was whether defendant was guilty of murder. "Whether the defendant sold whiskey is not a matter relevant to the issue and compelling the defendant to reply to this improper question is a violation of his rights under the reasoning of the provisions of Code, 1931, 57-3-6."

The court has, however, permitted cross-examination with reference to prior convictions apparently considering such to be "relevant to the issue" of a defendant's guilt or innocence in that such evidence will affect his credibility.<sup>28</sup>

#### CONCLUSION

The rules controlling the permissible latitude of cross-examination of a party litigant in a civil case appears to be well established. While the majority rule would limit cross-examination to those matters touched upon in chief, except for the purposes of impeachment or credibility, West Virginia follows the minority rule and permits the cross-examination of the party litigant to range over the entire case. A limitation, however, is imposed upon this rule by the constitutional privilege against compulsory self-incrimination which is applicable in a civil case. While the party litigant may not claim this privilege so as to bar cross-examination as to matters voluntarily testified to in chief, yet he may claim the privilege when cross-examined as to matters outside his examination in chief which would tend to incriminate him.

The rules regulating the permissible scope of cross-examination of a defendant in a criminal case are not so clearly settled. By statute West Virginia has provided the accused shall be subject to cross-examination as any other witness. Since the ordinary witness may only, for substantive purposes, be examined as to those areas touched upon in his examination in chief, the cross-examination of the accused, when a witness, might be similarly restricted. The other alternative would be for the court to construe the words "any other witness" to include a defendant and permit a wide open cross-examination as applied to civil cases where a party litigant is being cross-examined.

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<sup>28</sup> *State v. Pettock*, 133 W. Va. 645, 169 S.E. 480 (1933).

The constitutional privilege against compulsory self-incrimination will also be a limitation on the cross-examination of a defendant. If a defendant, after being warned of the consequences of his act, voluntarily takes the stand and testifies, the West Virginia Code provides that he voluntarily waives his right to claim the constitutional privilege as to all matters relevant to the issue. This provision has been interpreted to mean, in two limited situations, that a defendant may be compelled to answer questions relating to prior convictions, but not as to whether he had a license to carry a weapon with which a homicide was committed. A more comprehensive interpretation of this statutory provision awaits further court decisions. In view of the federal and state constitutional guaranties against compulsory self-incrimination, other constitutional and statutory guaranties as to trial procedures in the interest of the accused in criminal cases, and the generally recognized presumption of innocence, one may well ponder the development of the law, particularly the rules of evidence, with reference to the permissible limits of cross-examination of the defendant when on trial in a criminal case. Firmly recognized in American jurisprudence is the principle that truth and justice are the objects of judicial proceedings. Certainly this principle is to be weighed in the balances in shaping tomorrow's law by legislation and court decisions.

*Lee Ames Luce*