Volume 53 | Issue 2 Article 7

February 1951

Evidence--Testimonial Impeachment--Admissibility of Plea

R. C. K.
West Virginia University College of Law

to the Supreme Court of Appeals. W. VA. CODE c. 61, art. 5, § 26 (Michie, 1949).

In view of this West Virginia law, if the problem of cruel and unusual punishments as involved in this case would arise in West Virginia, our courts are not likely to follow the principal case.

The two dissenting judges each subscribed an opinion that the sentence was not cruel and unusual punishment, and this is in accord with the rule prevailing in this country. After a diligent search, no case was found in accord with the Georgia case.

The court left no inference as to what punishment the lower court could inflict without being in violation of the constitution. Such a decision seems arbitrary and renders no assistance to the lower court in administering the rules of justice.

J. L. A.

EVIDENCE—TESTIMONIAL IMPEACHMENT—ADMISSIBILITY OF PLEA OF GUILTY AND CONVICTION IN SUBSEQUENT CIVIL ACTION.—In an action for wrongful death resulting from the allegedly negligent operation of an automobile, the defendant was asked on cross-examination if he was by nature a careful driver and if he observed speed limits at all times. The defendant gave affirmative answers. Over objection he was then asked if he had not, on a prior occasion, pleaded guilty to a charge of reckless driving and been convicted for that offense. His answer was in the affirmative. The defendant excepted and moved that the answer be stricken. Motion overruled. *Held,* the plea of guilty was admissible as affecting the credibility of the defendant, but the court says it was not competent for the purpose of establishing his negligence. *Moore v. Skyline Cab, Inc.,* 59 S.E.2d 437 (W. Va. 1950).

The failure of the court to discuss the problems involved or to assign reasons for its decision makes difficult the interpretation and application of the rules evolved. It is a matter for conjecture whether the court was treating this plea of guilty (1) as evidence of a self-contradiction, or (2) as evidence of negligence. Cases cited by the court in support of its ruling are cases holding that evidence of a conviction of a misdemeanor is admissible as evidence of bad character which serves to discredit a defendant-witness. *Cf. State v. Friedman,* 124 W. Va. 4, 18 S.E.2d 653 (1942); *State v. Taylor,* 130 W. Va. 74, 42 S.E.2d 549 (1947). The citation of these cases indicates that the court is treating the plea of guilty as dis-

crediting evidence. If this is so, the result of the case is that a plea of guilty to a charge of reckless driving is evidence of bad character and serves to discredit the defendant-witness. Counsel indicate by the manner in which they asserted it, that is, by first eliciting from the defendant that he was a careful driver and then asking if he had not admitted that he was a reckless driver, that they were treating the evidence as a prior self-contradiction whereby the defendant-witness discredits himself. A prior self-contradiction may be a party's admission and is usable in either character. 3 WIGMORE, EVIDENCE § 1040 (3d ed. 1940). Clear authority is available in West Virginia to the effect that a plea of guilty in a prior criminal action is admissible as an admission in a subsequent civil action. *Utt v. Herold,* 127 W. Va. 719, 34 S.E.2d 357 (1945); see *Interstate Dry Goods Stores v. Williamson,* 91 W. Va. 156, 159, 112 S.E. 301, 302 (1922). An admission is admissible as an exception to the hearsay rule, *Anthus v. Rail Joint Co.,* 185 N.Y. Supp. 314 (1920), *aff'd mem.,* 231 N.Y. 557, 132 N.E. 887 (1921); or, when offered against the declarant as opponent, as not in violation of the hearsay rule since the declarant does not need to cross-examine himself. 4 WIGMORE, EVIDENCE § 1048. Testimonial impeachment is generally considered to be the first office of an admission. *Johnson v. Farrell,* 210 Minn. 351, 298 N.W. 256 (1941). *Contra*: *State v. Green,* 158 Wash. 574, 291 Pac. 728 (1930).

The court further says that the evidence is inadmissible for the purpose of establishing the negligence of the defendant. Desire to prevent the use of prior convictions for traffic violations as substantive evidence in actions arising from motor accidents has prompted several states to enact statutes prohibiting their introduction, even for purposes of impeachment. There is a contrary contention that prior negligent acts are highly probative on the issue of negligence. 3 WIGMORE, EVIDENCE § 987. It has been argued that a self-contradictory utterance should be given affirmative testimonial value, 3 WIGMORE, EVIDENCE § 1018; yet the same authority concedes that it is universally maintained by the courts that prior self-contradictions are not to be treated as having any substantive or independent testimonial value. *Butler v. Parrocha,* 186 Va. 426, 43 S.E.2d 1 (1947). The authorities are in conflict on the question of whether admissions are to be given substantive testimonial value. Most courts, including the West Virginia court, have given them such value. *Morrison v. Judy,* 123 W. Va. 200, 13 S.E.2d 751 (1941). 4 WIGMORE, EVIDENCE § 1048. If this is a

self-contradictory admission and admissions ordinarily serve substantive testimonial purposes, on what basis has the court excluded it on the issue of negligence? The court indicates that a judgment rendered upon a plea of guilty would have been admissible as an admission for this purpose had it arisen on the *same* facts.

R. C. K.

LIMITATION OF ACTIONS—PUBLIC OFFICER'S BOND.—*D,* a commissioner of the County Court of Barbour County, was paid forty dollars a month for a period of seven months during 1938. The correct pay rate for this period was fifteen dollars per month. The State brought an action of assumpsit to recover the overpayment. *Held,* that the five-year statute of limitations barred the action. *State* ex rel. *Alderson v. Holbert,* 56 S.E.2d 114 (W. Va. 1949). The State then brought an action of debt on the official bond against *D* and his surety to recover the money wrongfully paid to the principal. *Held,* that an action of debt brought on an official bond of a public officer is not barred if brought within ten years of the accrual of the cause of action [W. VA. CODE c. 55, art. 2, § 6 (Michie, 1949)]. *State* ex rel. *Alderson v. Holbert,* 58 S.E.2d 796 (W. Va. 1950).

It appears from all the West Virginia cases in point that the court was dedicated to a view contrary to that expressed in the principal case. This was the opinion expressed by Judge Lovins in his dissent. All of these cases follow the same pattern. An action is brought by a private citizen against the officeholder and the surety on his official bond after the expiration of the period of limitation for charging the officeholder with the tort itself. A typical example of this series of cases is *Town of Clendenin* ex rel. *Fields v. Ledsome,* 129 W. Va. 388, 40 S.E.2d 849 (1946). The *D* police officer and his surety were sued in covenant by the town on behalf of Fields who was negligently injured by fire while in the town jail. *Held,* that the action was barred by the running of the one-year statute of limitations for a tort action. The other cases are: *State* ex rel. *Sabatino v. Richards,* 127 W. Va. 703, 24 S.E.2d 271 (1945) (action against constable and surety to recover statutory penalty), and *Byrd v. Byrd,* 122 W. Va. 115, 7 S.E.2d 705 (1940) (action against surety and deputy sheriff who shot sheriff). These previous decisions recognize the principle that a tort claim may not be waived to extend the statute of limitations