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Recent Cases

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RECENT CASES

Civil Procedure—Class Actions—Order Dismissing Class Action that Leaves Plaintiff To Litigate a Small Monetary Claim Is Not a Final Appealable Order Under 28 U.S.C. § 1291

Plaintiff consumer, claiming to represent one and one-half million purchasers of defendants'[1] products, filed a class action[2] under section 4 of the Clayton Act,[3] seeking treble damages, costs, and attorney's fees from defendants for alleged antitrust violations.[4] Defendants successfully moved for a stay of proceedings pending the district court's determination of whether the case could be maintained as a class action. The court found the class unmanageable[5] and, in accordance with Rule 23(c)(1) of the *Federal Rules of Civil Procedure*,[6] issued an order denying confirmation of the class action. Plaintiff, left with a valid individual

1. Defendants were 7 baking firms that sold bread within the Philadelphia market area.

2. FED. R. CIV. P. 23(b)(3) provides for the maintenance of a class action when the court finds that the issues of law or fact common to the class members predominate over individual issues, and that a class action is the superior method for a fair and efficient adjudication. The federal class action serves a dual purpose both by providing for efficient adjudication of multiple claims, and, perhaps more importantly, by creating an opportunity for plaintiffs with small claims to obtain judicial relief despite the prohibitive costs of individual litigation. Although this latter purpose has been somewhat circumscribed by the recent Supreme Court ruling in Snyder v. Harris, 394 U.S. 332 (1969), which precludes the aggregation of separate claims to obtain the required $10,000 jurisdictional amount, it does have continued vitality under several statutory causes of action that obviate the requirement of a minimum amount in controversy. *See, e.g.*, 15 U.S.C. § 15 (1970) (eliminating the $10,000 requirement in any suit brought under federal antitrust laws). Within the context of these statutes the class action serves not only as a source of individual relief, but also as a supplement to public regulatory enforcement. For a general discussion of the federal class action see 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01-.97 (2d ed. 1969) [hereinafter cited as MOORE].

3. 15 U.S.C. § 15 (1970).

4. Defendants were accused of conspiring to fix the prices and terms for sales of bread in the Philadelphia area, in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1970). A criminal indictment, under which the district court had accepted defendants' plea of nolo contendere, had already been filed. United States v. General Host Corp., Crim. No. 23,200 (E.D. Pa. 1968).

5. Among the matters pertinent to the court's determination under rule 23(c)(1) are "the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3)(D).

6. Rule 23(c)(1) provides that the district court shall, as soon as practical after the class action has been brought, determine by order whether the action may be maintained. The order may be conditional, and may be altered or amended at any time before decision on the merits. FED. R. CIV. P. 23(c)(1).

action for only nine dollars,[7] requested that the district court amend its order to certify immediate interlocutory appeal of the class action issue under 28 U.S.C. § 1292(b).[8] When certification was refused, plaintiff filed notice of appeal, contending that the order denying confirmation of her class action was a final appealable order within the scope of 28 U.S.C. § 1291.[9] Plaintiff based her contention on the "death knell" rule,[10] which treats an order dismissing a class action as final under section 1291 when that order for all practical purposes terminates the litigation by leaving plaintiff with an individual monetary claim too small to justify the costs of continued adjudication on the merits. On petition to the United States Court of Appeals for the Third Circuit, *held*, dismissed. An order denying confirmation of a class action that leaves a plaintiff to litigate a small claim for monetary damages is not a final appealable order within the meaning of 28 U.S.C. § 1291. Hackett v. General Host Corp., 455 F.2d 618 (3d Cir. 1971).

The "final judgment rule," as set forth in 28 U.S.C. § 1291,[11] grants federal appellate courts jurisdiction over all final district court decisions.[12] This prerequisite of a final decision, traditionally interpreted as one that "leaves nothing for the court to do but execute the judgment,"[13] implements a strong policy against the costs, delays, and docket-crowding of piecemeal litigation, which might result from allowing separate interlocutory appeals for various intermediate rulings within cases.[14] Since denying confirmation of a class action does not dismiss the individual actions of would-be class representatives, under the traditional finality doctrine such denials never would be immediately

7. The $10,000 jurisdictional requirement does not apply to suits brought under the Clayton Act. 15 U.S.C. § 15 (1970).

8. Upon certification by a district court that an interlocutory order involves a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ," the court of appeals may, in its discretion, permit immediate appeal of the order. 28 U.S.C. § 1292(b) (1970).

9. Section 1291 grants to the courts of appeal appellate jurisdiction over all final decisions of the district courts. 28 U.S.C. § 1291 (1970).

10. The "death knell" rule was first promulgated in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). *See* notes 32-33 *infra* and accompanying text.

11. *See* note 9 *supra*.

12. For a summary of development of the final judgment rule see generally 9 MOORE, *supra* note 2 ¶ 110.06-.08[1].

13. Catlin v. United States, 324 U.S. 229, 233 (1945); *see also Ex parte* Norton, 108 U.S. 237 (1883).

14. *See* Catlin v. United States, 324 U.S. 229, 233-34 (1945); Cobbledick v. United States, 309 U.S. 323, 324-25 (1940).

appealable. The need for judicial flexibility in the pursuit of both justice and efficiency,[15] however, has subjected the final judgment rule to several statutory and judicial qualifications. The oldest of these exceptions are the extraordinary writs[16]—particularly prohibition and mandamus—which enable an appellate court to confine or compel an inferior court to actions within the lower court's lawful jurisdiction.[17] These writs cannot be used, however, to limit or compel actions within the scope of the inferior court's discretion,[18] and therefore have severely limited application to orders dismissing class actions, since such orders seem well within the discretion of the district courts.[19] Instead, the principal statutory authority for interlocutory appeal is the Interlocutory Decisions Appeals Act of 1958,[20] which in section 1292(b) grants the courts of appeal discretion to review orders that, as certified by the district court, deal with a controlling question of law, the disposition of which by an appellate court might materially advance the termination of the litigation.[21] This section supplemented the pre-existing section 1292(a)(1),[22] which grants a mandatory right to interlocutory appeal from an order denying injunctive relief, but while section 1292(a)(1) has been applied to orders dismissing class actions when the order narrows or eliminates the injunctive relief sought,[23] only the Fifth Circuit has, to date, allowed section 1292(b) appeal of an interlocutory class action dismissal.[24] Rule 54(b) of the *Federal Rules of Civil Procedure*, however, provides a third exception to the finality of judgments doctrine. That rule vests in the district courts discretion to allow immediate appeal from an order that finally determines one or more claims in a multiple-

15. 9 MOORE, *supra* note 2 ¶ 110.08[1].

16. All Writs Act, 28 U.S.C. § 1651 (1970) (first enacted in 1789).

17. *Id. See* Note, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise with Finality*, 52 CALIF. L. REV. 1036 (1964). *See generally* 9 MOORE, *supra* note 2 ¶ 110.26.

18. *In re* Rice, 155 U.S. 396 (1894).

19. FED. R. CIV. P. 23 is easily read as contemplating a broad exercise of the district court's discretion in determining whether to permit maintenance of a class action. *Cf.* Interpace Corp. v. City of Pbiladelphia, 438 F.2d 401 (3d Cir. 1971) (denying petition by defendants in a class action suit for writ of mandamus to vacate order certifying the class action).

20. 28 U.S.C. 1292(b) (1970); *see* note 8 *supra*.

21. 28 U.S.C. 1292(b) (1970).

22. 28 U.S.C. 1292(a)(1) (1970).

23. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963).

24. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) (order substantially diminishing the class plaintiff could represent). *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 390 n.131 (1967).

claim litigation,[25] and at least one court has allowed Rule 54(b) appeal of an order dismissing a class action.[26] A more flexible method of avoiding the final judgment does not derive from statutory exception, but from liberal judicial interpretation of the rule itself. In *Cohen v. Beneficial Industrial Loan Corp.*,[27] for example, plaintiff in a shareholders' derivative action sought immediate appeal of an order that required the posting of a bond to cover the expenses of litigation. In a landmark decision, the Supreme Court held that the order was appealable under section 1291 because the bond requirement was important to the litigation and was separable from and collateral to the merits of the action, and because deferral of appeal might result in the irreparable loss of plaintiff's rights with respect to the issue upon which interlocutory appeal was sought.[28] The Court, in formulating this "collateral order" doctrine, emphasized that section 1291 must be given a practical rather than a technical interpretation.[29] This construction has been reaffirmed in *Gillespie v. United States Steel Corp.*,[30] in which the Supreme Court expanded the *Cohen* doctrine to allow the courts of appeal discretion to review questions "fundamental to the further conduct of the case" even when previously required indicia of finality were not present.[31] Only the United States Court of Appeals for the Second Circuit has applied the *Cohen* and *Gillespie* rationale to the appealability under section 1291 of orders dismissing class actions. In a series of decisions, the Second Circuit has undertaken to deliniate a doctrine on a case-by-

25. FED. R. CIV. P. 54(b). *See* 9 MOORE, *supra* note 2 ¶ 110.09.

26. Haynes v. Sealtest Food Div. of the Nat'l Dairy Prods. Corp., 396 F.2d 448 (3d Cir. 1968). The court apparently treated the class action dismissal as a final determination of the claims presented for the nonparty class members; the holding does raise questions of plaintiff's standing to appeal for the nonparty members who were denied relief. 9 MOORE, *supra* note 2 ¶ 110.13[9].

27. 337 U.S. 541 (1949).

28. *Id.* at 546. The *Cohen* rule requires 3 elements for qualification: (1) the order must be a final determination of rights separable from and collateral to the merits; (2) the order must present a serious and unsettled question too important to be denied review; and (3) review of the order cannot await ultimate judgment because appellant's rights may be irreparably lost through the delay. 9 MOORE, *supra* note 2 ¶ 110.10. For other orders held appealable under the *Cohen* rationale see Stock v. Boyle, 342 U.S. 1 (1951) (order denying motion to reduce bail); Swift & Compania Colombiana Del Caribe, 339 U.S. 684 (1950) (order vacating attachment); Collins v. Miller, 198 F.2d 948 (D.C. Cir. 1952) (order dismissing a petition for removal of an administrator). *See generally* 9 MOORE, *supra* note 2 ¶ 110.10.

29. 337 U.S. at 546.

30. 379 U.S. 148 (1964).

31. *Id.* at 153. In *Gillespie*, the district court had struck down 2 of plaintiff's 3 claims for wrongful death, eliminating the relief sought for nonparty dependents of the deceased. In allowing immediate appeal, the Court stressed the need to balance the inconvenience of piecemeal litigation against the danger of denying justice. *See* 51 CORNELL L.Q. 369 (1966).

case basis. In *Eisen v. Carlisle & Jacquelin*,[32] when an order dismissing a class action left plaintiff with an individual claim for 70 dollars, the court allowed immediate section 1291 appeal since, in view of the prohibitive costs of continued litigation on the merits, the order was, for all practical purposes, the "death knell" of the action.[33] In another case,[34] a similar result was reached when plaintiff was left with a 1,000 dollar individual claim. The Second Circuit's death knell doctrine, however, does not grant rights to section 1291 appeal of all orders dismissing class actions; the rule applies only when the situation justifies a reasonable inference that, unless the order is immediately appealed, the case will not be litigated because of plaintiff's insufficient claim. In decisions involving individual claims of 1,560,000[35] and 150,000[36] dollars, and most recently, 8,500 dollars,[37] the Second Cireuit denied section 1291 appeal on the grounds that the claims were sufficient to warrant continued adjudication on the merits, and that the dismissal of the class action therefore did not fall within the death knell rationale.[38]

In rejecting the death knell rule, the instant court first noted the limited scope of the doctrine's application. Since dismissals of class actions seeking injunctive relief have been granted mandatory rights of appeal under section 1292(a)(1),[39] and since the Second Circuit has denied application of the death knell rationale when plaintiff retained an individual claim of 8,500 dollars,[40] the instant court reasoned that the doctrine operates only within a limited category of claims requesting monetary relief under statutes providing exemptions from the 10,000 dollar jurisdictional requirement.[41] Since these federal statutes usually provide for judicial award of attorney's fees in addition to actual damages,[42] the instant court observed that dismissal of a class action leaving plaintiff with an insignificant monetary claim would not foreclose an

32. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

33. 370 F.2d at 120-21. Since the *Cohen* holding required a final determination of the issue on appeal, and since an order denying certification of a class action may be amended at any time prior to disposition on the merits, the chief support for the *Eisen* decision must be *Gillespie*. *See* notes 5 & 27, *supra* and accompanying text.

34. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

35. City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).

36. Caceres v. International Air Transport Ass'n, 422 F.2d 141 (2d Cir. 1970).

37. Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971).

38. Cases cited notes 35-37 *supra*. *See* 48 N.C.L. REV. 626 (1970).

39. *See* note 23 *supra* and accompanying text.

40. Korn v. Franchard, 443 F.2d 1301 (2d Cir. 1971). *See* note 37 *supra* and accompanying text.

41. *See* 15 U.S.C. § 15 (1970) (suits brought under federal antitrust laws).

42. *See* 15 U.S.C. § 15 (1970) (antitrust); 15 U.S.C. § 78aa (1970) (securities act violation).

individual suit since plaintiff's attorney would retain the incentive of compensation awarded by the court. Moreover, the court recognized that the increasing availability of legal service organizations and public interest law firms as consumer advocates would cause death knells to ring with less frequency. The court next examined the policies underlying class actions based on such federal statutes. Although it acknowledged that private enforcement under these acts effectively supplements federal regulatory aims, the court nevertheless stressed that federal appellate courts must be protected from excessive numbers of interlocutory appeals. From a balancing of these interests, the court concluded that both justice and efficiency were best served through limiting the availability of appeal to the existing procedures of section 1292(b),[43] rule 54(b),[44] and mandamus,[45] which possess the advantage of emphasizing judicial discretion in the decision to allow appeal.[46] Finally, viewing the death knell rationale as arising from the assumption that no competent lawyer would take complex litigation for a small amount of money, the instant court posed as the most basic issue whether an attorney possesses a separate interest in his fee sufficient to invoke the "collateral order" doctrine of *Cohen*.[47] The court refused to recognize this interest, and suggested that if an individual claim were so small that no lawyer would be willing to litigate it, then perhaps "the time of the lawyers and of the court should best be spent elsewhere."[48]

The instant court's refusal to adopt the death knell rationale underscores the difficulties of balancing the policies in favor of the final judgment rule against the policies supporting class actions. Although the need to avoid piecemeal litigation has become more urgent in recent years through the increased crowding of our courts,[49] that need must be circumscribed when necessary to preserve justice and to carry out the congressional intent behind remedial federal statutes. The denial of immediate appeal in death knell situations, when continued individual

43. *See* notes 8 & 20 *supra* and accompanying text.

44. *See* notes 25-26 *supra* and accompanying text.

45. *See* notes 16-18 *supra* and accompanying text.

46. The instant court apparently considered that a judicial option in granting appeals is preferable to an affirmative right of appeal.

47. 455 F.2d at 625-26.

48. *Id.* at 626. A vigorous dissent was entered by Judge Rosenn, who considered the order to be appealable under the death knell rationale as an extension of both the *Cohen* and *Gillespie* principles. The dissent emphasized the importance of a right to immediate appeal in such death knell situations to protect the rights of plaintiff and other small-claim consumers to relief. 455 F.2d at 631 (Rosenn, J., dissenting).

49. *See, e.g.*, Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

litigation is not feasible, may abrogate the rights of both the plaintiff and the represented class, and, in addition, may contravene a direct governmental interest in continued maintenance of the suit. Through provisions obviating the 10,000 dollar jurisdictional requirement in actions brought under the antitrust and securities statutes, Congress sought to encourage small-claim private litigation as a supplement to public enforcement of these federal laws. It is unlikely, however, that Congress intended thereby to promote a multiplicity of small individual suits which would overwhelm the already crowded dockets and prove costly to both plaintiffs and courts. The only means of efficiently implementing these provisions appears to be the class action, which, while providing only small individual recoveries, creates through its aggregate form a significant deterrent to regulatory violations. The instant court's preoccupation with the prevention of interlocutory appeals and with the attorney's role and motive in prosecuting class actions thus disregards the most significant interests at issue—those of the public and of the government in enforcing federal regulatory schemes. Moreover, the alternative appellate remedies deemed advantageous by the court do not provide adequate appellate protection for these interests. Certification under both section 1292(b) and rule 54(b) is at the discretion of the very court that ordered the action dismissed. In practiee, such certification appears difficult to obtain.[50] Plaintiffs should also not be forced to rely upon mandamus, which usually will be available only in situations involving an obvious misuse of a district court's power. Admittedly the death knell doctrine may be difficult to apply, since the cases indicate the need for ad hoc judgments in determining whether a plaintiff might reasonably continue his individual claim; perhaps the Supreme Court, in view of the conflict among the circuits, will have occasion to formulate new and more efficient guidelines. One possible approach would be to allow plaintiff the right to a voluntary dismissal of his individual claim under a modified form of Rule 41(a) of the *Federal Rules of Civil Procedure*, which, unlike the standard 41(a) dismissal, would operate as an adjudication on the merits and thus permit immediate section 1291 appeal.[51] This method would, in effect, allow plaintiff to establish the

50. *See* notes 22 & 26 *supra* and accompanying text (only one instance of application for each remedy was found).

51. FED. R. CIV. P. 41(a) permits a plaintiff to dismiss his individual action by either filing a notice of dismissal at any time before service of an answer from the adverse party, or by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise ordered by the court, such dismissal will not, however, operate as an adjudication on the merits. FED. R. CIV. P. 41(b) also allows an involuntary dismissal for plaintiff's failure to prosecute, which would act as an adjudication on the merits and permit immediate appeal. Involuntary dismissal,

basic requirement of the death knell doctrine that adjudication on the merits of the individual claim will not be continued, without the judicial fact finding necessary in applying the rule itself, and would create an efficient procedural vehicle through which the crux of the litigation—the class action issue—may be pursued.

Evidence—Impeachment—Admission of Prior Conviction To Impeach Defendant-Witness Violates Constitutional Right to Due Process

Defendant was tried in a Hawaii state court for first degree murder. During the trial, defendant chose to testify in his own defense. In order to impeach defendant's credibility as a witness, the prosecutor introduced the record of defendant's previous felony conviction.[1] The evidence was admitted for impeachment purposes pursuant to a state statute providing that evidence of prior convictions of a defendant-witness may be introduced in criminal cases to attack the credibility of the accused's testimony.[2] Upon conviction defendant appealed, contending that the trial court's admission of the prior conviction even for impeachment purposes constituted an unreasonable burden upon his constitutonal right to testify in his own behalf, and thereby denied him due process of law under the fourteenth amendment.[3] On appeal to the Hawaii Supreme Court, *held*, reversed. When a criminal defendant chooses to testify in his own defense, the admission of evidence of prior convictions to impeach his credibility as a witness denies the accused his fourteenth amendment right to due process. *State v. Santiago*, 492 P.2d 657 (Hawaii 1971).

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however, must be made by defendant's motion, just as 41(a) dismissal usually will require defendant's signature on the stipulation. This dependence upon defendant's cooperation would have to be eliminated in order to effectuate the 41(a) or (b) dismissal as a substitute for the death knell doctrine. *See* Note, *Interlocutory Appeal from Order Striking Class Action Allegations*, 70 COLUM. L. REV. 1292 (1970).

1. Defendant had been convicted previously of first degree burglary.

2. The prosecutor relied on HAWAII REV. LAWS § 621-22 (1968), which provides that "a witness may be questioned as to whether he has been convicted of any indictable or other offense . . . ."

3. Defendant also contended that custodial admissions which he had made were inadmissible to impeach his credibility as a witness, that the jury had been improperly instructed by the trial judge to presume the existence of malice aforethought, and that the trial court improperly excluded defendant's proposed self-defense instruction.

At common law, an individual convicted of an infamous crime was incompetent to testify as a witness.[4] The rationale supporting this rule was that persons who had committed such crimes could not be trusted.[5] The common-law rule was criticized on the ground that an individual's prior criminal conviction is not necessarily relevant to the question whether he will testify truthfully in a subsequent trial.[6] Although the common-law rule was effectively abrogated in the nineteenth century,[7] the principle of the rule, that individuals convicted of infamous crimes lack credibility, has persisted. While one who has a prior record conviction for an infamous crime is able to testify, his credibility as a witness is subject to attack through the introduction of his prior conviction into evidence.[8] The same rule governs a criminal defendant who testifies in his own behalf.[9] As a result of this rule, the previously convicted defendant is confronted with a dilemma. If he takes the stand and his prior convictions are admitted into evidence, the jury, despite limiting instructions, might consider the prior conviction as evidence of the defendant's guilt rather than as a measure of his credibility. On the other hand, if he does not testify, the jury is likely to infer that the defendant cannot truthfully deny or explain the charges against him and is therefore guilty.[10] Despite recognition of this dilemma, the courts have upheld this form of impeachment, reasoning that the possibility of prejudice is outweighed by the legitimate purpose to be served by informing the jury of the defendant's character.[11] The courts seek to reduce the prejudicial impact of the evidence through instructions that explain to the jury that the defendant's criminal record can be considered solely as a reflection

4. *See* 2 J. WIGMORE, EVIDENCE § 519, at 608 (1940).

5. *See id. See also* Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 184 (1940).

6. Many crimes have no reasonable relationship to veracity. *See* 7 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 406 (Bowring's ed. 1827) *quoted in* 2 J. WIGMORE EVIDENCE § 519, at 610.

7. In England, competency for witnesses in civil cases came first, followed by competency for criminal defendants. *See* An Act for Improving the Law of Evidence, 6 & 7 Vict., c. 85, 551-52 (1843); Criminal Evidence Act, 61 & 62 Vict., c. 36, 117-19 (1898).

8. *See, e.g.*, ALA. CODE tit. 7, § 435 (1960); CONN. GEN. STAT. REV. § 52-145 (1968); FLA. STAT. ANN. § 90.08 (1960); MD. ANN. CODE art. 35, § 10 (1971); MISS. CODE ANN. § 1692 (1957); ORE. REV. STAT. § 44.020 (1971); WASH. REV. CODE ANN. § 5.60.040 (1963).

9. *See, e.g.*, People v. Wright, 72 Ill. App. 2d 150, 218 N.E.2d 798 (1966), *cert. denied*, 390 U.S. 1008 (1968); State v. McClain, 404 S.W.2d 186, 190 (Mo. 1966), *cert. denied*, 385 U.S. 1016 (1967); Commonwealth v. Quaranta, 295 Pa. 264, 272, 145 A. 89, 92 (1928).

10. *See* C. MCCORMICK, EVIDENCE § 43, at 93-94 (1954). *See also* Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. & SOC. PROB. 215 (1968).

11. *See* State v. Cote, 108 N.H. 290, 297, 235 A.2d 111, 116 (1967), *cert. denied*, 390 U.S. 1025 (1968); State v. Duke, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956).

of his credibility.[12] Surveys have indicated, however, that juries are often unable to follow such limiting instructions.[13] The studies show that juries are less likely to acquit a defendant when they are informed of his criminal record.[14] Because the defendant is subjected to this danger of prejudice, commentators have roundly criticized the practice of admitting evidence of prior convictions to impeach defendant-witnesses.[15] The force of this criticism has prompted at least two efforts to reform statutory rules of evidence[16] concerning the impeachment of defendant-witnesses. Both the Model Code of Evidence[17] and the Uniform Rules of Evidence[18] recommend that the credibility of a defendant-witness should not be attacked by introduction of prior convictions unless the previous offense involved dishonesty or false statement. Neither of these proposed statutory reforms has been widely accepted, however, possibly because of the anticipated adoption of the proposed rules of evidence for the federal courts. The federal rules for impeachment of defendant-witnesses are not materially different from the recommendations of the Model Code and the Uniform Rules.[19] A prior conviction also is inadmissible under the federal rules, however, if it predates by more than ten years the witness's release from prison.[20] The federal rules are based primarily on the assumption that there is a positive correlation between an individual's prior criminal conviction and his subsequent disposition

12. *See* People v. Smith, 63 Cal. 2d 779, 409 P.2d 222, 46 Cal. Rptr. 382 (1966) (approving the following instruction to the jury: "You must not use this evidence in determining the defendant's guilt or innocence of the other charges, nor must you permit yourself to be influenced against the defendant because he may have suffered a prior felony conviction."). *Id.* at 791, 409 P.2d at 230, 46 Cal. Rptr. at 390.

13. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 127-30, 160 (1966). Juries that learned of past convictions through impeachment convicted defendants 27% more often than juries without knowledge of the defendant's criminal record. *See also* Note, *supra* note 10, at 217-18; Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264 (1966).

14. H. KALVEN & H. ZEISEL, *supra* note 13, at 160, 177-81.

15. *See, e.g.*, C. MCCORMICK, EVIDENCE § 43 (1954); 3A J. WIGMORE, EVIDENCE § 890 (Chadbourn rev. 1970); Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for United States District Courts*, 6 CRIM. L. BULL. 330 (1970); Griswold, *The Long View*, 51 A.B.A.J. 1017, 1021 (1965). *See also* Gustafson, *Have We Created a Paradise for Criminals?*, 30 S. CAL. L. REV. 1 (1956); McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 L. & SOC. ORDER 1.

16. *See, e.g.*, ALA. CODE tit. 7, § 435 (1960); CONN. GEN. STAT. REV. § 52-145 (1968); FLA. STAT. ANN. § 90.08 (1960).

17. MODEL CODE OF EVIDENCE rule 106 (1942).

18. UNIFORM RULES OF EVIDENCE 21.

19. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, Rule 6-09 (1969).

20. *Id.* 6-09(b).

to tell the truth. Not all attempts to modify the conviction-impeachment rules have involved proposals for legislative reform. On the judicial side, the United States Court of Appeals for the District of Columbia held in *Luck v. United States*[21] that a trial court is not required, under the applicable statute,[22] to allow impeachment by prior convictions every time a defendant takes the stand in his own defense. The District of Columbia Circuit has followed *Luek* in subsequent decisions,[23] but the vitality of the *Luck* doctrine was substantially limited by a recent amendment[24] to the statute upon which the *Luck* decision was based. The amendment was challenged in *Dixon v. United States*[25] as violative of the fifth and sixth amendment principles incorporated in the previous version of the statute through the gloss placed on that version by the *Luck* decision; the District of Columbia Court, however, held that the *Luck* decision was not based on constitutional grounds, and that the amendment was valid. Aside from use of the apparently limited *Luck* rationale by the District of Columbia Circuit, the only other judicially imposed limitation on the impeachment rule has been that applied by the Hawaii Supreme Court. In a civil case, *Asato v. Furtado*,[26] the Hawaii court held that prior convictions can be admitted to impeach the defendant-witness only when the trial judge is convinced that the proponent of the evidence has satisfactorily established that the past conviction is relevant to the present veracity of the witness.[27] The *Luck* and *Asato* decisions represent judicial attempts to restrict impeachment through evidence of prior convictions. Nevertheless, neither court was willing to prohibit this form of impeachment evidence.

In the instant case, the court initially acknowledged that the conviction-impeachment rule is generally accepted. After examining the manner in which this general rule is applied, however, the court concluded that the rule is unnecessarily prejudicial to defendants with prior

21. 348 F.2d 763 (D.C. Cir. 1965).

22. D.C. Code Ann. § 14-305 (1967).

23. *See, e.g.*, Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968); Barber v. United States, 392 F.2d 517 (D.C. Cir. 1968); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967). *But see* Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966) (trial court did not abuse its discretion by permitting the government to impeach defendant's testimony by showing a prior conviction). Most of the cases have involved a criminal proceeding in which defendant had a prior criminal record. The court, however, has held that the *Luck* doctrine applies to all witnesses. Davis v. United States, 409 F.2d 453, 456 (D.C. Cir. 1969).

24. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 133(b), 84 Stat. 473.

25. 40 U.S.L.W. 2554 (D.C. Cir. Jan. 31, 1972).

26. 52 Hawaii 284, 474 P.2d 288 (1970).

27. The court restricted the statutory provision allowing such impeachment, HAWAII REV. LAWS § 621-22 (1968).

convictions. In addition, the court found that this form of impeachment unreasonably burdens the previously convicted defendant's constitutional right to testify in his own defense.[28] Citing the *Asato* restriction on the conviction-impeachment rule in civil cases, the court concluded that there is no compelling reason supporting any continued adherence to the rule in criminal cases. Admittedly extending prior law, the court held that to convict a criminal defendant when prior crimes are introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense and that a statute providing for this form of impeachment is violative of the due process clause of the fourteenth amendment of the United States Constitution.

The instant decision marks the first time a court has declared unconstitutional a statute permitting the admission of evidence of prior convictions to impeach the credibility of a defendant-witness. The immediate significance of the decision is the constitutional protection it extends to the criminal defendant with prior convictions who chooses to testify in his own defense. The wider protection afforded effectively eliminates the dilemma with which previously convicted criminal defendants have been confronted.[29] The criminal defendant no longer will be reluctant to take the stand for fear that he will be prejudiced by the introduction of his prior criminal record into evidence. The impact of the instant decision may extend considerably beyond the abolition of the conviction-impeachment rule in Hawaii, since other states may follow the Hawii lead and declare unconstitutional statutes[30] similar to the Hawaii statute. Nevertheless, should the courts of other jurisdictions find the due process analysis of the instant decision unpersuasive, there are three additional constitutional challenges to impeachment statutes that can be asserted. First, the statutes may violate the equal protection clause of the fourteenth amendment because defendants with criminal records are usually more reluctant to take the stand than those without such records, and they are more often convicted when they do testify.[31]

28. The U.S. Supreme Court has held that due process requires that the accused receive a trial by an impartial jury free from outside influences. Sheppard v. Maxwell, 384 U.S. 333, 362. In addition, the Court has held that a procedure which "involves such a probability that prejudice will result . . . is deemed inherently lacking in due process." Estes v. Texas, 381 U.S. 532, 542-43 (1965).

29. *See* materials citcd note 10 *supra.*

30. *See, e.g.*, ALA. CODE tit. 7, § 435 (1960); CONN. GEN. STAT. REV. § 52-145 (1968); FLA. STAT. ANN. § 90.08 (1960); MD. ANN. CODE art. 35, § 10 (1971); MISS. CODE ANN. § 1692 (1957); ORE. REV. STAT. § 44.020 (1969); WASH. REV. CODE ANN. § 5.60.040 (1963).

31. *See* 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).

The de facto distinction between defendants having prior criminal convictions and those having none may violate the equal protection clause, because there may be no rational basis for differentiating between the classes of criminal defendants.[32] Secondly, statutes that compel defendants who testify in their own behalf to answer inquiries about prior convictions[33] possibly are violative of the fifth amendment privilege against self-incrimination. To the extent that prior conviction testimony by defendants may prejudice the jury and result in the conviction of defendants who otherwise would be acquitted, admission of prior convictions would seem tantamount to a confession of guilt. Thirdly, the introduction of unnecessarily prejudicial information about the defendant's past may constitute an infringement of the sixth amendment guarantee of a trial by an impartial jury by rendering it unlikely that the defendant will receive a fair opportunity to establish his innocence.[34] Therefore, the primary significance of the instant decision is that it may serve as the catalyst for an emerging judicial trend toward abrogation of conviction-impeachment statutes. Moreover, the instant decision suggests a viable alternative to the two proposed statutory reforms. Since the previously formulated statutory reform proposals have not yet gained broad acceptance,[35] the drafting of a statute to incorporate the holding of the instant case might represent the key to widespread statutory reformation. Although it is important that other jurisdictions adopt the principle of the instant decision, two further considerations are relevant in a decision to alter the conviction-impeachment rule. First, the instant decision may produce substantially more litigation for already crowded state court dockets. Since all criminal defendants could testify without fear that prejudicial evidence of their prior convictions would be introduced, defendants with previous convictions may forego bargained guilty pleas in favor of jury trials,

32. Furthermore, since the jury is presumably qualified to determine whether or not a witness is telling the truth from his demeanor and his reaction to probing cross-examination, there was actually no need for the impeachment rule in the first place, regardless of the nature of the defendant's prior conviction. *See* Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 440 (1964).

33. *See* Note, *The Use of Prior Convictions to Impeach the Credibility of the Criminal Defendant*, 71 W. VA. L. REV. 160, 165-66 (1969).

34. *See* Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 286 (1966).

35. Kansas has adopted verbatim the recommendation of the Uniform Rules of Evidence. *See* KAN. STAT. ANN. § 60-421 (1964). New Jersey recently adopted the Uniform Rules, but omitted rule 21. *See* N.J. REV. STAT. § 2A:84A-16 (Supp. 1971). California recently revised its evidence code, but evidence of a witness's prior felony conviction is still admissible for impeachment purposes. CAL. EVID. CODE § 788 (West 1966).

thereby increasing the burden on state courts and prosecutors. Nonetheless, to the extent that the holding in the instant case requires the state to prove the guilt of a defendant who previously feared conviction by a prejudiced jury, the impact of the decision is commendable. Secondly, the instant decision does not prohibit the introduction of prior convictions in the form of circumstantial evidence. Criminal defendant-witnesses will be subjected to prejudice whenever the prosecutor can successfully convince the court that evidence of the previous conviction should be admissible to establish an essential element of the charged offense.[36] Although the instant court failed to take steps to avoid these problems, the important stride that it did take should be followed by other states to establish uniform protection for criminal defendant-witnesses.

36. *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 560-61 (1967); Drew v. United Sates, 331 F.2d 85, 90 (D.C. Cir. 1964). *See also* C. MCCORMICK, EVIDENCE § 157, at 328-31 (1954).