Impeaching One's Own Witness

The doctrine that a party calling a witness may not discredit such witness has generally been accepted in the United States, but with a tendency to enlarge the possibilities of self-impeachment. It is commonly believed to have its roots in the ancient idea of trial by compurgation.[1] Other authorities place its probable origin in the transition from the inquisitorial method of trial as it emerged into an adversary system.[2]

Everyone agrees it is ordinarily the best practice, if it can be effectively done, when a party shows that he has been surprised by the adverse testimony of a witness he has offered, to permit him to withdraw the witness and his testimony from the jury by having the whole evidence stricken from the record.[3] This course, if effective, would protect the party who offered the witness without complicating the issues or confusing the jury. It is doubtful if all positive adverse effect which might be created by the harmful testimony can be eliminated from the minds of the jury in this manner.[4]

Before a witness can be said to be that of the party calling him, he must be sworn and some material question put to him and answered by him.[5] Where a witness testifies for both parties, some courts hold impeachment of such witness by either party is not allowable.[6] Others say that such witness is the witness of each party only to the extent of the testimony elicited by that party.[7] These different views are also applied where a witness is cross-examined beyond the scope of the direct examination.[8]

Most jurisdictions adhere to the doctrine that, where it is necessary to produce a witness because it is required by law, such witness is not treated as being "one's own witness" and is subject to impeachment, the same as a witness called by the opposite party.[9] This exception has been held to include an available witness to the crime; a witness who has testified before the

[1] Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1922); 3 WIGMORE, EVIDENCE § 896 (3rd. ed. 1940).

[2] Ladd, *Impeaching One's Own Witness*, 4 UNIV. CHICAGO L. R. 69.

[3] Kuhn v. United States, 24 F. 2d 910 (9th Cir. 1928); 58 Am. Jur., Witnesses § 79.

[4] Young v. United States, 97 F. 2d 200 (5th Cir. 1938); 117 A. L. R. 316.

[5] Fall Brook Coal Co. v. Hewson, 158 N. Y. 1, 52 N. E. 1095 (1899).

[6] Stix Baer and Fuller Co. v. Waesthaus Motor Co., 284 Ill. App. 301, 1 N.E. 2d 796 (1936).

[7] 58 Am. Jur., Witnesses § 794.

[8] State v. Wheaton, 149 Kan. 802, 89 P. 2d 871 (1939).

[9] People v. Connor, 295 Mich. 1, 294 N. W. 74 (1940); White v. Southern Oil Stores, 19 S. C. 173, 17 S. E. 2d 150 (1941).

grand jury, and a subscribing witness to a will where a party is under a legal duty or obligation to call such witness.[10]

Except where a statute provides differently, a party called as a witness by his adversary is held to be a witness within the rule's prohibition.[11] However, a goodly number of states have such statutes, which provide relief from the strict application of the rule to the party calling his adversary as a witness.

Where a party is fearful of an important witness he may persuade the court, by motion, to put this witness on the stand and in such a case he is not treated as a witness for either side and is subject to examination and cross-examination by both parties.[12]

It is held by an almost unanimous weight of authority that a party producing a witness cannot impeach him as to character no matter what the circumstances.[13] With a like unanimity the courts exclude evidence of the bias, corruption, or interest of a witness as being included within the prohibition of impeachment.

The biggest inroads on the strict rule have been made by the exception which allows a party who called the witness to interrogate him in respect to declarations and statements previously made by him which are inconsistent with his testimony at the trial. This exception is recognized in the great majority of jurisdictions.[14] However, before this method of attacking one's own witness may be utilized, the person seeking to impeach is usually required to show that he is surprised,[15] or entrapped by the testimony of his witness, or that the witness is hostile.[16] The determination of the existence of these conditions precedent is committed to the discretion of the trial judge.[17]

Another limitation to this exception generally enforced by the courts is that these prior inconsistent statements may not be used as a device with which to put into evidence that which could be held incompetent on another possible ground.[18] Neither may a party resort to examination of his witness as to prior statements solely for the purpose of directly attacking his character or reputa-

[10] Meeks v. United States, 179 F. 2d 319 (9th Cir. 1950).

[11] Price v. Cox, 242 Ala. 568, 7 So. 2d 888 (1942); Tullis v. Tullis, 235 Iowa 428, 16 N. W. 2d 623 (1944).

[12] Young v. United States, 26 F. Supp. 574 (W. D. Tex. 1939).

[13] Weiner v. E. M. Loew's Enterprises, 120 Conn. 581, 181 Atl. 921 (1936); 3 WIGMORE, EVIDENCE § 900 (3rd ed. 1940).

[14] People v. Reese, 65 Cal. App. 2d 329, 150 P. 2d 571 (1944); State v. Rogers, 64 Ohio App. 39, 27 N.E. 2d 791 (1940).

[15] United States v. Maggio, 126 F. 2d 155 (3rd Cir. 1942); Young v. United States, 97 F. 2d 200 (5th Cir. 1938); 117 A. L. R. 316.

[16] Virginia Elec. & Power Co. v. Hall, 184 Va. 102, 34 S. E. 2d 382 (1945).

[17] *Ibid.*

[18] United States v. Michener, 152 F. 2d 880 (3rd Cir. 1946); State v. Nevius, 77 Ohio App. 161, 66 N.E. 2d 243 (1945).

tion for truth and veracity.[19] This examination is permitted only for the purpose of refreshing the recollection of the witness[20] or for the purpose of discrediting or neutralizing the adverse effect of his specific testimony.[21] That the witness is incidentally discredited by this process is regarded by the courts as of no great moment.[22]

By the weight of authority, one's own witness may be impeached by the use of prior inconsistent statements only where the witness testified adversely on some material point, and then impeachment is confined to the subject matter of the adverse statement.[23] One may not impeach his own witness merely because the witness does not come up to his expectations or prove the fact for which he was called.[24]

Interrogation concerning prior inconsistent statements is restricted by some courts to the particular witness.[25] These courts hold that in case the witness denies having made such statements or his answer is ambiguous concerning them, it is not competent for the party calling him to prove by other witnesses that he had made statements inconsistent therewith. Other courts, however, permit extrinsic evidence to prove such prior inconsistent statements.[26] Some courts have approved still another restriction which excludes proof of statements not in any writing subscribed by the witness or made under oath.[27]

It is a well established qualification of the rule against self-impeachment, followed in all jurisdictions, that a party is not concluded by the unfavorable testimony of his own witness. Although a party may not impeach the general reputation of a witness for truth or veracity, he may by other witnesses prove that the facts are otherwise than as stated, and it is no objection to any relevant evidence of material facts on which he relies to sustain his case, that it may operate to contradict and thus discredit his own witness.

Attempted statutory modification of the rule may be divided into two general classes, those following the English statute enacted in 1854,[28] and those following the Massachusetts version enacted in 1869.[29]

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19 United States v. Maggio, 126 F. 2d 155 (3rd Cir. 1942).

20 Hickory v. United States, 151 U.S. 303 (1893).

21 State v. D'Adame, 84 N. J. L. 386, 86 Atl. 414 (1913).

22 State v. Duffy, 134 Ohio St. 16, 15 N. E. 2d 535 (1938).

23 State v. Saporen, 205 Minn. 358, 285 N. W. 898 (1939).

24 Virginia Elec. & Power Co., 184 Virginia 102, 34 S. E. 2d 382 (1945).

25 Hurley v. State, 46 Ohio St. 320, 21 N. E. 645 (1889).

26 Batchelder v. Batchelder, 139 Mass. 1, 29 N. E. 61 (1891).

27 Hurley v. State, 46 Ohio St. 320, 21 N. E. 645 (1889).

28 17 & 18 Vict. c. 125, § 22 (1854).

29 Ann. Laws of Mass. vol. 8 c. 233, § 22 (1869); P.S. 169, § 22; R.L. 175 § 24.

The English statute provides, "(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, (2) but he may, in case the witness shall in the opinion of the judge prove adverse, (3) contradict him by other evidence, (4) or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony." Florida, New Mexico, Vermont and Virginia have incorporated substantially the same provisions in statutes of their own.[30] It is readily apparent that this type of statute is only a codification of the case law concerning the rule and decisions of the courts in these jurisdictions have clearly affirmed this interpretation.

The Massachusetts statute differs from the English statute in not including the requirement that the witness prove adverse and has been adopted by eleven states.[31] Judicial interpretation has resulted in a rule not different from that of the modern common law rule.[32] In Massachusetts the courts have taken a very liberal approach requiring neither adversity or surprise as a condition to impeaching one's own witness.[33] Indiana has further liberalized the Massachusetts statute by providing that a witness may be impeached by evidence of bad character, where it is indispensable that a party produce a witness, or in case of manifest surprise.[34] In *Beneks v. State*[35] the court said, "Under this section the only requirement as a prerequisite to impeachment of a witness is that he testified to facts prejudicial to the party producing him upon some material issue." New York has added the restriction that only prior inconsistent statements that were written or were made under oath by one's own witness may be used to impeach him.[36]

Louisiana has enacted the common law rule in statutory form; it differs from the English statute in adding surprise as a basis of impeachment and because of its detailed provisions clearly precludes a liberal interpretation.[37] Georgia has by statute made the showing of surprise a condition precedent to impeachment by prior inconsistent statements.[38] In the District of Columbia there

[30] FLA. COMP. GEN. L. § 4377 (1927); N. M. ANN. STATS., c. 45 § 607; VT. PUB. L. § 1702 (1933); VA. CODE § 62.5 (1930).

[31] ARK. DIG. § 4186 (1921); CAL. CODE CIV. PROC. § 2049 (1931); IDAHO CODE 16 § 1207 (1932); BURNS IND. STATS. c. 2, § 1926 (1933); CARROLL'S KY. CODE § 596 (1921); ORE. CODE c. 9, § 1909 (1930); TEXAS CODE of CRIM. PROC. § 732 (1928); WYO. REV. STAT. c. 89 § 1706 (1931); N.Y. CODE CR. PROC. § 8a.

[32] Ralph Estate, 192 Cal. 451, 221 Pac. 361 (1924).

[33] Brooks v. Weeks, 121 Mass. 433 (1876).

[34] BURNS IND. STATS. c. 2, § 1926 (1933).

[35] Beneks v. State, 208 Ind. 317, 196 N.E. 73 (1935).

[36] N. Y. CODE CR. PROC. § 8a; People v. Romano, 279 N.Y. 392, 18 N.E. 2d 634 (1939).

[37] LA. CODE CR. PROC. §§ 487, 488, 489 (1932).

[38] GA. CODE ANN. § 38-1801.

is a statute permitting a party to impeach his own witness by proof of prior inconsistent statements in event of surprise with the included proviso that if the statements are made to a party or his attorney before trial the requisite element is met.[39]

A very common type of statute provides that a party calling his adversary as a witness may impeach him in the same manner as any other witness not his own.[40] These statutes generally expressly include impeachment of officers and agents of a corporation where the corporation is the adverse party.

The MODEL CODE OF EVIDENCE as adopted and promulgated by the American Law Institute at Philadelphia, Pennsylvania, May 15, 1942, eliminates the rule against impeaching one's own witness.[41] Impeachment is permitted under the code by any party, including the party calling a witness, through examination, as to any conduct and any other matter relevant upon the issue of his credibility as a witness.

The rule against impeaching one's own witness is generally justified on the theory that a party calling a witness vouches for his credibility and represents him as worthy of belief and it would be bad faith towards the court thereafter to attack his witness.[42] The answering argument is that a party generally has no choice in the selection of his witnesses. Thus to hold a party responsibile for the character and trustworthiness of the witnesses called by him is to disregard practicabilities.[43]

Another reason given to support the rule is that the party should not have the means of coercing his witness.[44] In other words, no witness would risk the abuse of his character which might be launched against him. This fear it is claimed would operate to prevent a witness from retracting a previously falsified story and would affect every witness who knew he was expected to tell a particular story. It is argued by the critics that an honest witness would not be appreciably affected but that only a disreputable witness would adhere to false testimony solely for fear of exposure by the party calling him.[45] The fear theory also does not take account of the fact that the reputation of a witness may be used against him by the other party. To approve this reason for the rule one must also hold the belief that most lawyers are dishonest and

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[39] D. C. CODE tit. 9 § 21 (1929).

[40] OHIO GEN. CODE § 11497; ILL. CIVIL PRACTICE ACT § 60.

[41] MODEL CODE OF EVIDENCE, Rule 106 (1942); *See* Professor Ladd's Article p. 341.

[42] 3 WIGMORE EVIDENCE §§ 896-918 inc. (3rd Ed. 1940).

[43] State v. Wolfe, 109 W. Va. 590, 156 S. E. 56 (1931).

[44] Ladd, *Impeaching One's Own Witness*, 4 UNIV. CHICAGO L. R. 69.

[45] Buller J., *Trials at Nisi Prius* 297 (1767); State v. Wolfe, 109 W. Va. 590, 156 S. E. 56 (1931).

would take advantage of such fear to suborn a witness. It would seem that fear of prosecution for perjury would operate to counteract fear of such unethical impeachment. Another assumption indispensable to this reason is that all witnesses within the rule who testify adversely at trial are testifying truthfully and repudiating a previous falsity.[46] Professor Ladd points out the fallacy of this assumption by considering the influence other than the inclination to tell the truth which causes a witness to change his mind *e.g.*, sympathy for the accused in criminal trials, bribery and threats of physical harm.

The decisions illustrate that the judiciary is dissatisfied with the common law rule inasmuch as one exception or qualification after another has been adopted which circumscribes the limits of the rule. Neither does the lawyer approve the difficulties and confusion which the enforcement of the rule creates. The text writers conclude that the rule against impeaching one's own witness should be completely done away with by statute.[47]

That there is no concentrated effort to eliminate the rule against impeaching one's own witness can be explained. If one considers the rule with all of its ramifications and exceptions, the conclusion is inevitable that one may impeach his own witness. It must be admitted that pitfalls abound and the impeacher must carefully adhere to a circuitous path to accomplish his goal. Even impeaching the character or reputation of a witness is condoned if it is done incidentally and not directly. Still, confusion for the judge, lawyer, and jury who must deal with the rule against the impeaching of one's own witness remains. This confusion occasionally results in a miscarriage of justice which could be avoided. Can a rule founded on no valid reason, not enforced in reality and resulting in avoidable injustices be condoned any longer? It must be concluded that the rule must be completely abrogated and in the words of Professor Ladd, "A . . . . simple form of legislation, which would dispose of the entire problem is suggested as follows: No party shall be precluded from impeaching a witness because the witness is his own."[48] *Donald H. Hauser*

[46] Ladd, *Impeaching One's Own Witness*, 4 UNIV. CHICAGO L. R. 69; 3 WIGMORE, EVIDENCE §§ 896-918 inc. (3rd Ed. 1940).

[47] *See* note 46 *supra*.

[48] *See* note 46 *supra*.