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Impeachment of Witnesses

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the father was not a proper person to have its custody, still, so far as jurisdiction of the court over the child is concerned, that would seem sufficient as against the parent who is actually in the jurisdiction of the court, as was the case in the principal case.

The other consideration is that the divorce proceeding was a proceeding in equity, and that the relief obtainable there is as a matter of favor and not a matter of absolute right.³ Thus equity might in its discretion withhold relief to the complainant upon condition that he do equity, and he cannot complain if equity attaches conditions to the relief which he prays unless such conditions be inequitable.

As applied to the principal case, the complainant does not complain of the decree because it is inequitable, but solely because he assails the jurisdiction of the court to impose the conditions. Therefore, the presumption may be indulged that complainant was not a fit person to have the custody of the child and further that it was no more than fair that he should contribute something toward its support. If he obtained his divorce as a matter of equitable favor, then it would follow that he, at least, cannot complain, if under such circumstances the court imposed equitable conditions to his obtaining it.

ELMER M. LEESMAN.

RHODE ISLAND

EVIDENCE—IMPEACHMENT OF WITNESSES—BIAS.—P brought an action for injuries to his automobile resulting from a collision with the automobile of D; at the trial P read the deposition of an insurance adjuster who had examined the damaged car; this deposition had been taken by D, but was not used by him; in rebuttal D called P and was permitted to ask him whether this adjuster did not represent the insurance company which had insured the car. Held, error. *Brody v. Cooper*.¹

This ruling was put on the grounds: (1) that by taking the deposition D made the witness his own so as to prevent his impeachment of him; (2) that in any event he was not entitled to prove the bias of the deponent without first having laid the proper foundation by cross-examination as to such alleged bias.

Proof that P had insurance against accidents was not admissible on the issue of contributory negligence. At most it would only tend to show that P had less reason or motive to be careful. But the slight evidential value of this fact would be more than overbalanced by the probable misuse of it by the jury.²

The fact that the witness was a representative of the insurance company which was interested in the action under the doctrine of subrogation would naturally affect his credibility.³ The relation-

3. *Jennings v. Kotz* 299 Ill. 472; *Herczeg v. Weiss* 304 Ill. 551.

1. Rhode Island 124 Atl. 2.

2. *Capital Co. v. Holtzman* 27 D. C. App. 125; *Sawyer v. Arnold Shoe Co.* 90 Me. 369; *Dempsey v. Goldstein* 121 N. E. (Mass.) 429.

3. *Capital Co. v. Holtman* supra; *Cady v. Lang* 115 Atl. (Vt.) 140.

ship of the witness to a party interested in the action, if otherwise receivable for the purpose of affecting his credibility, would not be rendered inadmissible because it also disclosed that P had insurance on his car.⁴

The common statement that a party 'vouches' for the credibility of his own witness and therefore can not impeach him, is subject to a number of qualifications.

It is now uniformly held that a party may always prove a contrary state of facts by other witnesses, though the effect is to discredit his own witness in whole or in part.⁵

It is also generally agreed that if a party's own witness turns out to be adverse, what amounts to a cross-examination may be permitted, and under the guise of refreshing his memory he may be interrogated to prior contradictory statements.⁶

Where the witness admits making such contradictory statements and does not furnish a satisfactory explanation, he is bound to be discredited more or less; and according to the view of the Supreme Court of the United States the examination is allowed for the very purpose of discrediting him.⁷

Whether a party is permitted to prove by other witnesses that his own witness has made contradictory statements is a matter on which "courts have differed, and opinions may vary to the end of time."⁸

Lord Denman allowed a party thus to contradict his own witness and the ruling was affirmed by a divided court.⁹ Lord Denman's view, that the general rule, prohibiting a direct attack on the character of one's own witness, did not exclude proof of contradictory statements, was substantially embodied in the 17 and 18 Vict. c. 125 s. 22, quoted in *Putnam v. United States*, supra, and the question thus set at rest in England.

In the United States there is much conflict on this point. A majority of the cases disapprove such contradiction, unless the party was "entrapped" by the witness,¹⁰ or unless there was collusion between the witness and the adverse party.¹¹ It is easy to understand a certain instinctive feeling which probably gave rise to the rule prohibiting a party from attacking the character of his own witness. He was thought of as attempting to perpetrate a fraud on the court when he put forward a witness as ostensibly credible, but whose character he was prepared to attack in case of unfavorable testimony. This notion seems to have little application to proof of contradictory statements, and less to proof of bias. The main objec-

4. *Dempsey v. Goldstein* 121 N. E. (Mass.) 429.

5. *Bradley v. Ricardo* 8 Bing. 57; *Cochburn v. Hawkeye Ass'n.* 143 N. W. (Ia.) 1006; *Moultrie v. Hall* 120 Ga. 730; *Municipal Court v. Kirby* 28 R. I. 287.

6. *Merlhuish v. Collier* 15 Ad. & El. (n. s.) 878; *Bullard v. Pearsall* 53 N. Y. 230; *Consol. Coal Co. v. Semiger* 179 Ill. 370.

7. *Putnam v. U. S.* 162 U. S. 687.

8. *Merlhuish v. Collier*, supra.

9. *Wright v. Becket* 1 Moody & R. 414.

10. *Moultrie v. Hall* 120 Ga. 730.

11. *Clancy v. Transit Co.* 192 Mo. 615.

tion urged to proof of contradictory statements is the danger that the jury may make a hearsay use of them, a danger equally applicable to similar contradiction of a witness of the adverse party, which is allowed as a matter of course. No plausible reason has been suggested for excluding proof of bias. Most of the courts appear to have taken it for granted that the rule against impeaching your own witness by proof of bad character applies equally to proof of bias.¹²

The majority of the cases support Professor Wigmore's view that the mere fact that A takes a deposition, which he does not offer to use, does not make the deponent the witness of A so as to prevent impeachment, when the deposition is read by B.¹³

A party who merely takes a deposition, which he does not use, has never put the witness forward as worthy of belief. The rule that a foundation must be laid by cross-examination of a witness before he can be impeached by proof of contradictory statements was first announced in the *Queen's Case*,¹⁴ though the advisory opinion of the judges indicates that the practice had prevailed for some time in the trial courts. This rule seems to be based largely on the idea of fairness to the witness, who might not otherwise have an opportunity to explain an actual or apparent discrepancy in his statements. So where it is sought to prove the bias of a witness by his declarations showing hostility or the like, the same reasons may require a foundation by cross-examination. The statements may have been misunderstood, or may be susceptible of some explanation which the witness alone can give. For this method of proving bias, the cases quite generally require a foundation to be laid.¹⁵ But where it is sought to prove facts, such as interest, relationship or the like, the reason for requiring a prior cross-examination wholly fails.¹⁶ In the principal case the distinction seems to have been overlooked.

EDWARD W. HINTON.

WISCONSIN

TORTS—PARENT'S LIABILITY FOR CHILD'S TORTS.—*Hopkins v. Droppers*,¹ which ruled that a father may become liable for his son's torts under circumstances not creating an agency, gives rise to reflections on some related aspects of our legal system, and this case is a suitable text for expounding the "firstly," "secondly," and "thirdly," that are involved.

12. *Wigmore "Evidence"* 901 and cases there cited.

13. *Wigmore "Evidence"* 913; *Cadsworth v. Ins. Co.* 4 Rich. (S. C. Law) 416; *Neil v. Childs* 10 Ired. (N. C.) 195; *Richmond v. Richmond* 10 Yerg. (Tenn.) 343; *City v. Osterlee* 139 Ill. 120 (semble).

14. (1820) 2 Brod. & Bing. 284, loc. 312 et seq.

15. *Fagan v. Lentz* 156 Cal. 681.

16. *People v. Brooks* 131 N. Y. 321; *People v. Lustig* 206 N. Y. 162; *People v. Michalard* 229 N. Y. 325; *State v. Smith* 183 N. W. 873.

1. Wisconsin 198 N. W. 738.