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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. 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.

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.

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. The relation—

1. Rhode Island 124 Atl. 2.
COMMENT ON RECENT CASES

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-

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 sug-
ggested 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 explana-
tion 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 re-
flections 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.
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.
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.