Washington and Lee Law Review

Volume 21 | Issue 1 Article 19

Spring 3-1-1964

Impeaching Adverse Party Called As One'S Own Witness

cation. However, these statutes apply only after apprehension and conviction of the violator. Therefore, in light of the rising traffic fatality rate, Virginia must find more effective methods for the apprehension and conviction of violators, so that these provisions can serve their purpose of making Virginia roads safer.

CHARLES B. ROWE

IMPEACHING ADVERSE PARTY CALLED AS ONE'S OWN WITNESS

Whether and under what circumstances a party may impeach an adverse party called as his own witness has been a subject of controversy. The common law forbade the calling party to impeach his own witness, regardless of whether the witness was an adverse party or not.[1] The growth of the common law concerning this subject took its root in the idea that a party's own witness could not be discredited by him.[2] When a party offers a witness he is considered to be vouching for his credibility, and therefore later to attack the witness's general character for truth and veracity would indicate an act of bad faith toward the court.[3] In the United States, the general rule has become well established that, subject to certain exceptions, a party may not impeach a person called as his own witness,[4] whether that witness is the adverse party or not.

---

[1]McCormick, Evidence § 38 (1954).

[2]Nash, The Law of Evidence in Virginia and West Virginia § 35 (1954); 98 C.J.S. Witnesses § 477 (1957).

[3]Oates v. Glover, 228 Ala. 656, 154 So. 786 (1934); Hall v. Incorporated Town of Manson, 99 Iowa 698, 68 N.W. 922 (1896); Potts v. Pardee, 220 N.Y. 431, 116 N.E. 78 (1917); Carlisle v. Norris, 215 N.Y. 400, 109 N.E. 564 (1915); Arthur v. Parish, 150 Ore. 582, 47 P.2d 682 (1935).

[4]Dravo v. Fabel, 132 U.S. 487 (1889); Pollard v. State, 201 Ind. 180, 166 N.E. 654 (1929); Hall v. Incorporated Town of Manson, 99 Iowa 698, 68 N.W. 922 (1896); Coleman v. Commonwealth, 241 Ky. 8, 43 S.W.2d 185 (1931); Webber v. Jackson, 79 Mich. 175, 44 N.W. 591 (1890); Richeson v. Roebber, 349 Mo. 132, 159 S.W.2d 658 (1942); Blochwitz v. Blochwitz, 122 Neb. 385, 240 N.W. 586 (1932); Fox v. Forty-Four Cigar Co., 90 N.J.L. 483, 101 Atl. 184 (Ct. Err. & App. 1917); Carlisle v. Norris, 215 N.Y. 400, 109 N.E. 564 (1915); People v. DeMartina, 213 N.Y. 203, 107 N.E. 501 (1914); Helms v. Green, 105 N.C. 251, 11 S.E. 470 (1890); Culpeper v. State, 40 Okla. Crim. 103, 111 Pac. 679 (1910); Arthur v. Parish, 150 Ore. 582, 47 P.2d 682 (1935); People's Nat'l Bank v. Hazard, 231 Pa. 552, 80 Atl. 1094 (1911); Pearson Hardwood Flooring Co. v. Phillips, 22 Tenn. App. 206, 120 S.W.2d 973 (1938); In re Campbell's Will, 100 Vt. 395, 138 Atl. 725 (1927); Washington & O.D. Ry. v. Jackson's Adm'r, 117 Va. 636, 85 S.E. 496 (1915); Snodgrass v. Commonwealth, 89 Va. 679, 17 S.E. 238 (1893); Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391 (1901); State v. McComb, 33 Wyo. 346, 239 Pac. 526 (1925).

The common law arbitrarily excluded, as incompetent to testify, all parties or others who were shown to have a direct pecuniary or proprietary interest in the outcome of the litigation.[5] While at first the competency of parties was limited, all limitations have now been generally swept away. A party is competent as a witness in his own behalf and may be compelled to testify for others.[6] In Virginia, if the adverse party refuses to take the witness stand when called, the court may dismiss the suit or disregard the defense of the party so refusing.[7]

One party to an action may want to call his adversary as his own witness in two principal situations: (1) where the adverse party has presented his evidence without taking the witness stand himself, and the opposite party wants to question him concerning that evidence, (2) where the plaintiff calls the defendant to the witness stand at the opening of the case in order to catch the defendant "off guard and cause him to make significant admissions corroborative of the plaintiff's case."[8]

The adverse party seems to have been called for some other purpose, however, in the recent decision of *Smith v. Lohr*.[9] This case presented the Supreme Court of Appeals of Virginia with the opportunity to decide whether one party to an action may impeach his adversary for truth and veracity when such person is called by the impeaching party. *Smith v. Lohr* was an action to recover damages for injuries received by the plaintiff in an automobile collision. Counsel for the plaintiff called the defendant as an adverse party at the opening of the case, and proceeded to question the defendant concerning the accident. After both the plaintiff and defendant had concluded with their evidence, counsel for the plaintiff asked and received permission to recall the defendant to the stand. The plaintiff's counsel then asked the defendant on redirect examination if he had ever been convicted of a felony. The defendant objected but the objection was overruled.[10]

In deciding the case, the court had to construe the Virginia statutes on impeachment. The Virginia statute provides that an adverse party called as one's own witness may be examined according to the rules applicable to cross examination,[11] which would seem to allow any

---

[5]3 Jones, Evidence, § 766 (5th ed. 1958).

[6]Id. at § 768.

[7]Va. Code Ann. § 8-290 (Repl. Vol. 1957).

[8]Busch, Law and Tactics in Jury Trials § 268, at 413 (1949).

[9]204 Va. 331, 130 S.E.2d 433 (1963).

[10]204 Va. at 332, 130 S.E.2d at 434.

[11]"A party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross examination." Va. Code Ann. § 8-291 (Repl. Vol. 1957).

type of impeachment. However, the court held applicable the broader Virginia statute which concerns the impeachment of one's own witnesses in general, and which prevents a party producing a witness from impeaching his credit by evidence of bad character.[12] Under the Code of 1904, these two statutory provisions were included under the same Code section, and is was clear that the provision pertaining to impeachment of witnesses in general applied to adverse parties also.[13] The court felt that the original legislative intent still governed, even though the original statute has been split into two sections.[14] In reversing and remanding the case for retrial, the Supreme Court of Appeals said:

> A reading of the Code . . . nowhere indicates that it was the intention of the legislature to permit a litigant to call an adverse witness for the purpose of helping his case and later impeach his credibility by evidence of bad character as was done in this instance. Such a rule would permit one to call a witness known to be unworthy of belief for the purpose of proving his case.[15]

The Virginia court also implied criticism of the method by which the defendant was recalled to the stand as the last witness for the purpose of asking him whether he had been convicted of a felony. The court concluded that such procedure was prejudical to the defendant.[16]

Wigmore, in his treatise on evidence, states that the one place where the common law rule against impeaching one's own witness most clearly breaks down is where one party to an action calls his adversary as a witness.[17] Wigmore further states that to say the calling party vouches for the adverse party "is to mock him with a false formula."[18] However, it is questionable whether Wigmore would still allow impeachment when the plaintiff recalls the defendant as the last witness in order to impeach him as was done in the *Smith* case. In making such a statement, Wigmore was most likely referring to the situation where the adverse party has presented his evidence without taking the stand, and the opposite party calls him as his own witness.

---

[12]"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the court prove adverse, by leave of the court, prove that he had made at other times a statement inconsistent with his present testimony...." Va. Code Ann. § 8-292 (Repl. Vol. 1957).

[13]Va. Code § 3351 (Pollard 1904).

[14]204 Va. at 334, 130 S.E.2d at 435.

[15]Ibid.

[16]204 Va. at 336-37, 130 S.E.2d at 437.

[17]3 Wigmore, Evidence § 916, at 431 (3d ed. 1940).

[18]Ibid.

The question of whether the calling party can impeach the adverse party called as his witness has not come up frequently because of the common law rule that a party cannot impeach his own witness.[19] Therefore, whether impeachment of the adverse party called by the impeaching party will be permitted, is determined by the statute enacted in the particular state involved, and partially by the procedure by which the adverse party is summoned and impeached. These statutes fall into three classifications: (1) those which prevent impeachment by the calling party regardless of the situation in which the adversary is called, (2) those which are ambiguous, and so the particular factual situation in which the adverse party is called will usually be controlling, and (3) those which allow impeachment as long as the situation in which the adversary is called appears proper and in good faith.

In those states[20] which prohibit impeachment by the calling party regardless of the situation in which he is called, the applicable statute is usually modeled after the English Procedure Act of 1854. This Act provides that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character,"[21] and no

---

[19]In re Erickson, 13 F. Supp. 853 (W.D.N.Y. 1936); Murphy v. Pickel, 264 Ala. 568, 87 So. 2d 844 (1956); Price v. Cox, 242 Ala. 568, 7 So. 2d 288 (1942); Tullis v. Tullis, 235 Iowa 428, 16 N.W.2d 623 (1944); Federal Land Bank v. Bennett, 226 Iowa 112, 284 N.W. 97 (1939); Pike v. Coon, 217 Iowa 1068, 252 N.W. 888 (1934); Horneman v. Brown, 286 Mass. 65, 190 N.E. 735 (1934); Toler v. Owens, 231 Miss. 753, 97 So. 2d 728 (1957); Hutchinson v. Steinke, 353 S.W.2d 137 (Mo. Ct. App. 1962); Cavalier v. Bittner, 186 Misc. 848, 60 N.Y.S.2d 355 (Sup. Ct. 1946); State v. Tilley, 239 N.C. 245, 79 S.E.2d 473 (1954); Schlatter v. McCarthy, 113 Utah 543, 196 P.2d 968 (1948).

[20]Ark. Stat. § 28-706 (Supp. 1962); Colo. Rev. Stat. Ann. § 153-1-16 (1953); Conn. Gen. Stat. Rev. § 52-178 (1958); Fla. Stat. Ann. § 90.09 (1960); Hawaii Rev. Laws § 222-27 (1955); Idaho Code Ann. § 9-1207 (1947); Ill. Ann. Stat., ch. 110 § 60 (1956); Ind. Ann. Stat. § 2-1726 (Repl. Vol. 1946); Kan. Gen. Stat. Ann. § 28-60-2803 (1949); Mass. Gen Laws ch. 233, § 23 (1959); Mich. Stat Ann. § 27A-2161 (1962); Miss. Code Ann. § 1710 (1942); Mo. Ann. Stat. § 491.030 (Supp. 1952); Mont. Rev. Codes Ann. § 93-1901-9 (1947); N.J. Rev. Stat. § 2A:81-11 (1952); N.M. Stat. Ann. § 20-2-4 (1953); N.Y. Code of Crim. Proc. § 8-a; Okla. Stat. tit. 12, § 383 (1951); Pa. Stat. Ann. tit. 28, § 381 (1958); R.I. Gen. Laws Ann. § 9-17-14 (1956); S.C. Code § 26-510 (1962); Wash. Rev. Code § 5.04.010 (1963); Wis. Stat. Ann § 325.14 (1958); Wyo. Stat. Ann. § 1-141 (1957). Compare Ala. Code. tit. 7. § 484 (Recomp. 1958); Iowa Code Ann. § 622.17 (1946); La. Rev. Stat. 15:487 (1950); Ohio Rev. Code § 2317.52; Tex Code Crim. Proc. Act 8-7-732a (1941).

[21]17 & 18 Vict. c. 125 § 22 provides: "A party producing a Witness shall not be allowed to impeach his Credit by general Evidence of bad Character, but he may, in case the Witness shall in the Opinion of the Judge prove adverse, contradict him by other Evidence, or, by Leave of the Judge, prove that he has made at other Times a Statement inconsistent with his present Testimony...." See also McCormick, Evidence § 38, at 72 (1954).

exception is made for the case where the witness is the adverse party. In *Labrie v. Midwood*,[22] an action for criminal conversation, the defendant was called as a witness by the plaintiff during the presentation of the plaintiff's evidence in chief. At the conclusion of the defendant's testimony, the plaintiff sought to impeach him for conviction of a crime. The procedure by which the defendant was summoned to the stand was apparently proper, as no mention of this aspect of the case was made by the court. The statute in effect provided that "the party who produces a witness shall not impeach his credit by evidence of bad character."[23] The Supreme Judicial Court of Massachusetts held the impeachment improper because it came within the express prohibition of their statute.[24] and in *Lomesto v. Hamilton*,[25] an action contesting the probate of a will, the plaintiff properly and in apparent good faith called the defendant in the presentation of his evidence in chief. The plaintiff then attempted to impeach the defendant by showing the conviction of a crime. The applicable statute provided that a party producing a witness "shall not impeach his credit by evidence of bad character."[26] The Supreme Court of Rhode Island held that such impeachment was improper under the wording of their statute.[27]

In those states[28] where the statutes are ambiguous or conflicting on impeachment of the adverse party, the situation in which the adverse party is called is the determining factor. If the court feels that the adverse party was properly summoned as a witness in good faith, impeachment is allowed.[29] But where the defendant is recalled as the last witness in the case, as was done in *Smith*, for the sole purpose of impeachment, the court will disallow impeachment. In determining that the manner in which the plaintiff recalled the defendant was highly prejudicial to the defendant, the *Smith* court was attempting to add weight to its decision that such impeachment was improper under the Virginia statute. But in doing so, the court implied that the result might have been otherwise had the plaintiff impeached the defendant at the beginning of the case, when the plaintiff first examined him.

---

[22]273 Mass. 578, 174 N.E. 214 (1931).
[23]Mass. Gen. Laws ch. 233, § 23 (1959).
[24] 174 N.E. at 216.
[25]76 R.I. 114, 68 A.2d 39 (1949).
[26]R.I. Gen. Law Ann. § 9-17-14 (1956).
[27]68 A.2d at 41.
[28]Cal. Civ. Proc. Code § 2049, § 2051. Va. Code Ann. § 8-291, § 9-292 (Repl. Vol. 1957).
[29]Lovinger v. Anglo Cal. Nat'l Bank, 243 P.2d 561, 575 (Cal. 1952).

The District Court of Appeals in California, in the case of *Lovinger v. Anglo Cal. Nat'l Bank*,[30] reached the opposite result from the Virginia court in a slightly different situation, but agreed with the *Smith* court on an important issue. Lovinger was an action against an executor by a woman who claimed the reasonable value of her services rendered to the decedent. Coplin was the executor of the will and was sued as the original defendant.[31] (Since Coplin was no longer the defendant, there is some question whether he was an adverse party, but the court referred to him as such.) The plaintiff questioned Coplin for the duration of two days and rested. After the defendant rested the plaintiff asked and received permission to recall Coplin. The plaintiff then asked Coplin if he had ever been convicted of a felony. California had adopted the English Procedure Act,[32] but a further provision of their Code provided that a "witness may be impeached by the party against whom he was called . . . it may be shown . . . that he had been convicted of a felony."[33] The California court, in light of these two provisions of its code, held the impeachment of Coplin entirely proper. However, it agreed with the *Smith* court on one important point:

> "It should be pointed out that ordinarily this type of question should not be left until rebuttal. Unless there is some good reason for not using it on the first calling of the witness, it should not be permitted on rebuttal and particularly as the only or main subject of rebuttal . . . . In holding that conviction of a felony may be shown by the party calling the adverse party under section 2055, we desire to point out that the adverse party should never be called solely for that purpose."[34]

In those states[35] allowing impeachment of the adverse party by the calling party, the applicable statute is usually modeled after Federal Rule 43(b). This rules provides that "a party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by

---

[30]Ibid.

[31]Id. at 574.

[32]Cal. Civ. Proc. Code, § 2049 (1955).

[33]Cal. Civ. Proc. Code, § 2051 (1955).

[34]Lovinger v. Anglo Cal. Nat'l Bank, supra note 29.

[35]Ariz. Rev. Stat. Ann., Civ. Rule 43(g) (1956); Del. Code Ann., Super Ct. Rules, Rule 43(b) (1953); Ga. Code Ann. § 38-1801 (1954); Ky. Rev. Stat. Ann., Rules of Civ. Proc., Rule 43.06 (1953); Me. Civ. Proc., Rule 43(b) (1959); Md. Ann. Code art. 35, § 9 (1959); Minn. Stat. Ann., Rules of Civ. Proc., Rule 43.02 (1958); Nev. Rules Civ. Proc., Rule 43(b) (1959); N.H. Rev. Stat. Ann. § 516.24 (1955); N.D. Code Ann., Rules of Civ. Proc., Rule 43(b) (1960); Ore. Rev. Stat. § 45-590 (1961); S.D. Code § 36.028 (Supp. 1960); Utah Code Ann., Rules of Civ. Proc., Rule 43(b) (1953); Vt. Stat. Ann. tit. 12, § 1641a (1958). See generally Annot. 35 A.L.R.2d 756, 759 (1959).

the adverse party..."[36] As long as the adverse party is called in a proper situation, courts will allow impeachment by the calling party where a statute like Federal Rule 43(b) is in effect. In *Lindsay v. Teamsters Union, Local 74*,[37] the defendant called the plaintiff, one of the co-partners of the plaintiff partnership, as an adverse party in presenting its case. The Supreme Court of North Dakota, in commenting on this situation, stated that the defendant could have impeached the plaintiff on material matters as if the plaintiff had originally been called by his own counsel.[38] And in *Walsh v. Schafer*,[39] the defendant called the plaintiff to the witness stand in presenting his case. The Municipal Court of Appeals for the District of Columbia held that the party producing the adverse party as a witness could impeach him as if he had taken the stand on his own, and provided further that the defendant was not bound by the plaintiff's testimony.[40]

Where one party to the action presents his case without taking the witness stand, and the adverse party is forced to call him as his own witness, Wigmore is correct in saying that the calling party should be allowed to impeach his adversary as if he had taken the stand on his own. But where the plaintiff calls the last witness in the case for the sole purpose of impeaching him, as was done in *Smith*, Virginia has taken the only tenable position.

PHILIP D. SHARP, JR.

---

[36]Rules of Civil Procedure, Rule 43(b), 28 U.S.C. 5164 (1958).
[37]Id. at 694.
[39]Walsh v. Schafer, 61 A.2d 716 (D.C. Munic. Ct. App. 1948).
[40]Id. at 718.