

Impeachment by a Party of His Own Witness - Chenoweth v. Baltimore Contracting Company

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Evidence Commons](#)

Recommended Citation

Impeachment by a Party of His Own Witness - Chenoweth v. Baltimore Contracting Company, 4 Md. L. Rev. 193 (1940)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol4/iss2/6>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

IMPEACHMENT BY A PARTY OF HIS OWN WITNESS***Chenoweth v. Baltimore Contracting Company***¹

The Defendant-appellee contracting company operated a railroad yard in which coal cars were emptied, shifted and transferred. Decedent, an employee of the Defendant company, was found dead in this yard. The surviving widow and child brought this action on the ground that his death was caused by the negligence of Defendant. Plaintiffs called as their witnesses certain employees of the Defendant company and attempted to interrogate these witnesses as to other prior statements allegedly inconsistent with their statements at the trial. The lower court refused to permit the attempted interrogation and impeachment and Plaintiffs appealed from the ruling, after a verdict and judgment for the Defendants.

¹ 6 A. (2d) 625 (Md. 1939).

Held: Affirmed—A party will not be allowed either to impeach his own witness by proof of the latter's contradictory statements on other occasions, or to examine him as to such statements, unless the party was enticed or entrapped into calling the witness by the latter's statements made to him or his attorney, and the statements are inconsistent with his testimony at the trial.

As a general rule a party may not impeach his own witness. The basis for this restriction appears to be historical rather than logical. In Medieval England witnesses were not called to testify to the controverted facts but were more in the nature of character witnesses. Each litigant brought "oath helpers" who swore that, from their general knowledge of the litigant's character, his contention or claim must be valid and just. The witness was considered as a partisan testifying in behalf of the party who called him. A trace of this attitude exists today. Thus the party calling a witness is regarded as vouching for his credibility, since, by presenting him, he impliedly alleges that he is worthy of credence and may not thereafter impeach him.²

Several theories have been advanced in an attempt to explain why the rule of impeaching one's own witness persists in any form today. Dean Wigmore states that:

"If it were permissible and therefore common, to impeach the character of one's witness whose testimony had been disappointing, no witness would care to risk the abuse of his character which might be launched at him by the disappointed party. This fear of the possible consequences would operate subjectively to prevent a repentant witness from recanting a previously falsified story, and would more or less affect every witness who knew that the party calling him expected him to tell a particular story. . . . Speculative as this danger may be, it furnishes the only shred of reason on which the rule may be supported."³

It has also been suggested that by offering a witness in proof of his case the party thereby represents him as worthy of belief and is estopped from attacking his character or reputation for truth and veracity thereafter. To

² Holtzoff, *The New York Rule As to Impeachment By a Party of His Own Witnesses* (1924) 24 Col. L. Rev. 714; 2 WIGMORE, EVIDENCE (2nd Ed. 1923) Sec. 896; 1 GREENLEAF, EVIDENCE (Lewis's Ed. 1896) Sec. 442.

³ 2 WIGMORE, *op. cit. supra* n. 2, Sec. 899.

do so would be evidence of disrespect toward the Court.⁴ Furthermore, permitting a party to impeach his own witness may tend to confuse the jury by presenting it with the separate question of credibility of the witness and by disturbing the normal form and procedure of the trial.⁵ The situation devolves into a balancing of possible probative force against possible jury confusion. Whatever may be the reason for the rule it still exists to a modified degree in most jurisdictions.

In applying the rule a distinction is made as to the type of impeachment attempted. Impeachment of a litigant's own witness could possibly be accomplished in three general ways, not all of which are recognized by the courts as proper methods. These methods are: (1) by attacking the witness's general credibility (including bad reputation and bias or interest); (2) by showing through extrinsic evidence and testimony that the facts are otherwise than as testified to by the witness (contradiction as distinguished from impeachment); and, (3) by introducing prior statements of the witness inconsistent with those made on the witness stand.

As to the first method, it is an apparently universal rule that a party may not discredit his own witness by proof of his general bad reputation for truth and veracity.⁶ Nor may there be shown bias or interest. Poe is of the opinion that "When a party calls a witness he necessarily vouches for his credibility and good character; and accordingly the general doctrine is well established that he is not at liberty to assail or impeach the credit and character which he has represented as worthy of belief."⁷ The Court of Appeals has consistently supported this view,⁸ in one instance citing the exact language quoted above.⁹

⁴ Ladd, *Impeachment of One's Own Witness—New Developments* (1936)

⁴ U. of Ch. L. Rev. 69; GREENLEAF, *loc. cit. supra* n. 2.

⁵ *Murphy v. State*, 120 Md. 229, 87 A. 811, Ann. Cas. 1914 B 1117 (1913).

⁶ 70 C. J. 1033; GREENLEAF, *loc. cit. supra* n. 2.

⁷ 2 POE, PLEADING AND PRACTICE (5th Ed. 1925) 233.

⁸ "By offering the witness, the Plaintiff represented him as worthy of belief and he cannot afterwards offer any evidence for the purpose of discrediting him." *B. & O. Ry. v. State*, 107 Md. 642, 659, 69 A. 439 (1908).

"... It was not competent for the Plaintiff at any stage of the trial or of his examination to impeach the credibility of this witness." *B. & O. Ry. v. State*, 41 Md. 268, 295 (1875).

"In no case can a party calling a witness be permitted to impeach his general reputation for truth and veracity." *State v. B. & O. Ry.*, 117 Md. 280, 283, 83 A. 166 (1912); *Smith v. Briscoe*, 65 Md. 561, 568, 5 A. 334 (1886). See also *W. B. & A. v. Faulkner*, 137 Md. 451, 461, 112 A. 820 (1921); *Franklin Bank v. Steam Navigation Co.*, 11 G. & J. 28, 33 Am. Dec. 687 (Md. 1839).

⁹ *Patapsco Loan Co. v. Hobbs*, 134 Md. 222, 229, 106 A. 619 (1919).

However, where the witness is one required to be called by law, as for example, the attesting witnesses to a will, the restriction is not applicable, and the party may impeach the witness in such a case as to his character for truth.¹⁰

Another exception to the rule, recently enacted by statute,¹¹ has been made where the witness called is "an adverse party or any officer, director or managing agent of a public or private corporation or of a partnership or association which is an adverse party". In such a case the litigant may "interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party".

If the above authorities and cases mean that the litigant by calling an ordinary witness guarantees his general credibility, and apparently such an interpretation would be reasonable, then the litigant should be "prohibited from exposing, by any means whatever an error of that witness and especially an error which carries with it an implication of other errors from whatever source".¹² But it seems that this reasoning, logical as it may be, has not been followed by the courts in regard to all types of impeachment, for example incidental impeachment through contradictory testimony of another witness or, in certain cases, through proof of prior inconsistent statements.

In regard to the second method of impeachment it is again a generally universal rule that a party may show through extrinsic evidence and testimony of another witness that the facts are otherwise than as testified to by his own witness.¹³ "He may contradict him by another witness as to any fact material to the issue, to which he has deposed, in order to show how the fact really was."¹⁴ Clearly the collateral effect of such proof is to show that the witness is unworthy of belief, but this incidental impeachment has been permitted in Maryland at least since *Wolfe v. Hawver* in 1843.¹⁵ Even contradiction by other witnesses, however, is not unqualified for the only evidence which is allowed to be contradicted must be material, and on relevant points, and the purpose of such contradiction

¹⁰ GREENLEAF, *op. cit. supra* n. 2, Sec. 443.

¹¹ Md. Laws 1939, Ch. 380, (To be Md. Code Supp., Art. 35, Sec. 5).

¹² WIGMORE *op. cit. supra* n. 2, Sec. 902.

¹³ 70 C. J. 1341; 2 PoE, *op. cit. supra* n. 7, 273; GREENLEAF, *loc. cit. supra* n. 10.

¹⁴ B. & O. Ry. v. State, 107 Md. 642, 659, 69 A. 439 (1908).

¹⁵ 1 Gill 84 (Md. 1843).

must be to get at the truth and may not merely be for the purpose of discrediting the witness.¹⁶

As to the third question, whether a party may impeach his own witness by introducing prior statements of the witness, inconsistent with those made by him at the trial, the courts are in conflict. Neither view is without its disadvantages. To allow a party to cross-examine his own witness on allegedly self-contradictory statements, and then by other witnesses to prove their having been made would enable the party to get before the jury declarations of the witness which were made out of court, were not under oath, and, in fact, were not subject to any of the various devices used to increase the reliability of testimony.

On the other hand to refuse to permit a party to introduce evidence of his own witness's prior inconsistent statements would be inequitable in situations where the testimony is entirely different from what the party had reason to believe the witness would give. Occasional permission to prove such statements is necessary for the litigant's "protection against the contrivance of an artful witness; and the danger of its being regarded by the jury as substantive evidence is no greater in such cases, than it is where the contradictory declarations are proved by the adverse party."¹⁷

It is well settled in Maryland that generally a party may not impeach his own witness by showing his prior inconsistent statements. However, in certain situations, the rule has been relaxed. As seen above for general credibility, it does not apply to witnesses required by law to be called nor to the adverse party when called as a witness. For that matter, prior inconsistent statements of the adverse party were permitted to be shown as party-opponents' admissions, even before the recent amendatory statute.¹⁸ The statute, therefore, has not changed the law in regard to impeachment by self contradiction of the adverse party but has merely extended this privilege to include officers, directors or managing agents of a corporation, partnership or association which is itself an adverse party.

¹⁶ *Murphy v. State*, 120 Md. 229, 87 A. 811, Ann. Cas. 1914 B 1117, 1124 (1913); *Wolfe v. Hauer*, 1 Gill 84 (Md. 1843); *Franklin Bank v. Steam Navigation Co.*, 11 G. & J. 38, 33 Am. Dec. 687 (Md. 1839); *Sewell v. Gardner*, 48 Md. 178 (1878).

¹⁷ *GREENLEAF, op. cit. supra* n. 2, Sec. 444.

¹⁸ *Supra* n. 11.

In regard to impeaching one's own ordinary witnesses through prior inconsistent statements the Maryland Court has relaxed the prohibition in certain cases. Its reason for so doing is capable of two rationalizations. First, it has been suggested that proof of prior inconsistent statements is permitted on the ground of putting the party right with the court and jury by explaining why the witness was called.¹⁹

On the other hand some authorities contend that the purpose of admitting proof of prior inconsistent statements is "merely for the purpose of neutralizing the unexpected testimony of the treacherous witness."²⁰

Let us consider a situation where the witness merely claims to have forgotten or contends that he doesn't know. If the first theory is correct then the party should be permitted to prove the witness's prior affirmative statement to explain why the witness was called, although there is not so much need for this as if positive damaging testimony were given. If the second theory is valid, however, such proof would not be admissible, for in such a case there is nothing to neutralize.

The accepted Maryland doctrine is that where the witness's testimony is such that it could not hurt the case of the party calling him, but is merely not helpful, there is no right of the party to introduce the prior statement.²¹ Therefore the second theory must be the true one.

Impeachment of one's own witness by prior statements is permissible in Maryland provided that two essential factors are present, namely surprise and damage.

Poe says of the first element:

" . . . where a party calls a witness in good faith, relying upon his assurance of what his testimony will be, and the witness, when on the stand, surprises and deceives the party calling him by giving testimony at variance with his former statements, it is competent to discredit the testimony of such artful witness by proof of his former contrary statements."²²

The surprise must be bona fide. A party is not permitted to call a witness whose testimony he knows will

¹⁹ *Smith v. Briscoe*, 65 Md. 561, 568, 5 A. 334 (1886), apparently supported by *B. & O. Ry. v. State*, 107 Md. 642, 659, 69 A. 439 (1908).

²⁰ 2 POE, *loc. cit. supra* n. 7.

²¹ *Travelers Insurance Co. v. Herman*, 154 Md. 171, 140 A. 64 (1928)

²² 2 POE, *loc. cit. supra* n. 7.

be unfavorable to him, for the purpose of getting before the jury favorable hearsay evidence by way of impeachment of his own witness.²³

Nor is a party permitted to impeach his own witness through prior inconsistent statements which were not made to him, to his attorney or, in a proper case, to some one to be communicated to them.²⁴ Thus in *Murphy v. State*²⁵ the Court properly refused, in a prosecution for assault with intent to kill, to permit the introduction of evidence of a prior inconsistent statement made, not to the prosecuting attorney but to the prosecuting witness. "The admission of such evidence should be strictly confined to the only purpose for which it is at all admissible, namely, to explain the surprise occasioned by contrary statements made to the party calling the witness or his attorney in reference to the pending case."²⁶

In regard to this limitation, an interesting contention was advanced by the appellants in the principal case. They contended that since this action was brought under the wrongful death statute, i. e., by the State for the use of the plaintiff, the statements made by the witness before the coroner were made to the appellants because the State was a party to that proceeding as well as to this. The Court held that such a theory "is too tenuous and fragile for serious consideration. The coroner's inquest was an inquisition, not a case. There were no parties to it. In this case the State is a nominal statutory party, it has no control of the case, is not liable for costs, has no voice in the selection of counsel, receives no benefit if the equitable plaintiff succeeds and suffers no loss if they fail."²⁷

Whether the party calling the witness has sustained surprise or not is a question to be answered within the discretion of the trial judge. As the Court has put it:

" . . . it is not every statement that may be made even to the party litigant or his attorney, that should be allowed to be contradicted by the party calling the

²³ See Annotation to *Young v. U. S.*, 97 Fed. (2d) 200, 117 A. L. R. 316, 329 (C. C. A. 5th 1938); 70 C. J. 1227.

²⁴ *Smith v. Briscoe*, 65 Md. 565, 568, 5 A. 334 (1886); 70 C. J. 1226.

²⁵ *Supra* n. 5.

²⁶ *Murphy v. State*, 120 Md. 229, 234, 87 A. 811, Ann. Cas. 1914 B. 1117 (1913). Compare *Queen v. State*, 5 H. & J. 232 (Md. 1821), where it appears that statements made to another were admitted by the trial court and affirmed on appeal. However, the decision on appeal was due to a procedural defect. The Court by way of dictum said that if this issue could have been properly prosecuted the decision of the lower court would have been reversed.

²⁷ *Supra* n. 1.

witness. It should be left to the discretion of the judge before whom the case is tried below to allow it to be done. The court should be satisfied that the party has been taken by surprise, and that the evidence is contrary to what he had just cause to expect from the witness based on his statements, and that such statements were about material facts in the case. It is not every light or trivial circumstance that would justify it."²⁸

The second essential factor necessary to be shown before the rule against impeaching one's own witness will be relaxed is damage.

The statement in Court must be material²⁹ and it must be injurious to the case of the party calling the witness. A statement which is merely disappointing but which is not detrimental to the party's case will not be sufficient basis to relax the general rule.³⁰

"The witness must give testimony prejudicial to the party calling him and it is not enough that he disappoints the expectations of such party by failing to give beneficial testimony. So in order to bring himself within the exception to the general rule against the impeachment of one's own witness it must appear that the party calling the witness was entrapped by his previous statements into putting him on the stand and was surprised by his testimony."³¹

A further question of importance is the effect of the prior statement, if it be permitted to be proved. It has been held that the prior statement which is proved in this manner must not be considered as evidence of the facts stated. The result of such proof is merely to detract from the weight to be given to the witness's testimony, and upon motion the trial court should so instruct the jury.³² "The statement, however proved, has only an impeaching effect and is not independent testimony."³³

The principal case is in close accord with the law as set out above. The opinion states, in clear language, the general rule and its exceptions and seems to follow the antecedent cases.

²⁸ *Supra* n. 24.

²⁹ *Ibid.*

³⁰ *Supra* n. 21.

³¹ 28 R. C. L. 228.

³² *Mason v. Poulson*, 43 Md. 161 (1875); *WIGMORE, op. cit. supra* n. 2, Sec. 906.

³³ *POE, loc. cit. supra* n. 7.