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IMPEACHMENT AND REHABILITATION OF WITNESSES IN MARYLAND*

By Harry Kauffman**

The modern tendency admitting any evidence logically probative unless excluded by a clear ground of policy adds greater importance to the impeachment and rehabilitation of witnesses. Much of the untrustworthiness once handled by exclusion is now handled by impeachment. Statutes have abolished the common law disqualification of the infamous criminal or felon, leaving the crime only to impeach, save for convicted perjurers. The modern tendency is to avoid treating such mental conditions as insanity as a cause of total incompetency and to admit the person as a witness, leaving the defect in question to have whatever weight it deserves as discrediting the witness' power of observation, recollection, or communication.

We have had an almost total abolition of disqualification of witnesses for interest, and disqualifications of interested witnesses under dead man's statutes or in like situations have come in for severe criticism.

To admit any evidence logically probative of the credibility of a witness unless excluded by a clear ground of policy is, a priori, desirable. However when the grounds of policy are such tenuous things as undue consumption of time, confusion of the jury, unfair surprise, or the working...

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**Of the Cumberland, Md., Bar. A.B., 1939, LL.B., 1942, Harvard University. Second Lieutenant, United States Army (see the preceding footnote).

1 See Thayer, A Preliminary Treatise on Evidence (1898) 530, noted by Morgan and Maguire, Looking Backward and Forward at Evidence (1937) 50 Harv. L. Rev. 909, 923. See American Law Institute, Code of Evidence (1942) 118.

2 Thus greater attention must be given to the relevancy, to the weight of evidence, and to the credibility of witnesses, see Ladd, Credibility Tests—Current Trends (1940) 89 U. of Pa. L. Rev. 160, 167.


4 3 Wigmore, Evidence (3rd Ed., 1940), Secs. 930, 931.

5 Professor Morgan points out that the fear of perjury on which such statutes are based is unfounded. See Morgan, The Code of Evidence Proposed by the American Law Institute (1941) 27 B. A. J. 587, 588. Generally for competency as affected by interest, see Morgan and Maguire, Cases on Evidence (1937) 162-171. (In Maryland a party to a suit involving insane persons, testators, intestate one, etc., is generally incompetent as to transactions with such persons, Md. Code (1939) Art. 35, Sec. 3.)
of an illegitimate prejudice against one of the parties, it becomes apparent that the dividing line will not be one of sharp demarcation or cleavage. Any extended concern over the credibility of the witness will usually tend to go to the periphery or over the brink of the desirable; yet may be necessary to the fair trial of the parties before the court. The problem would be difficult even if the law were succinct and logical, for this is a field replete with rules of thumb which have hardened into unwieldy and cumbersome technicalities and kaleidoscopic theorems which cloud and befuddle the real issues. The problem may at least be clarified by attempting to suggest what evidence is logically probative to the credibility of the witness, the varying grounds of policy on which the exclusion of such evidence may be based, and the legislative or judicial application necessary thereto.

Generally, the problem falls into three categories: A. Who may be impeached; B. The process of impeachment; and C. Rehabilitation.

A. WHO MAY BE IMPEACHED

It is generally accepted, though qualified in a number of states by statute, that one may not impeach his own witness. It is law in Maryland today. Despite its almost

6 Consider for example the rule against the impeachment of one's own witness, the inflexible rule requiring the witness' writing to be shown to the witness or read aloud to him before it may be used to impeach him upon cross-examination, and the limitation of evidence of character to "reputation in the community where the witness lives." These will, of course, be considered later. (It might be here mentioned that most "sins" are typical, and that Maryland is a typical sinner.) See COMMONWEALTH FUND COMMITTEE, THE LAW OF EVIDENCE (1927) XVI.

7 That is, one cannot attack a witness called by him by evidence tending to show (a) bad character for veracity, (b) interest, bias, or corruption, (c) prior inconsistent statements. See 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Secs. 896-918; Ladd, Impeachment of One's Own Witness—New Developments (1936) 4 U. of Chi. L. Rev. 69. It is clear, however, that the witness can be contradicted by other witnesses called by the party calling him. 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Sec. 907. There are a few other exceptions, as for example, when a party must call an attesting witness. Also the better view would appear to be that a party may reveal the true character of his own witness at the beginning of the direct examination, without violating the general rule against impeaching one's own witness. See People v. Minsky, 227 N. Y. 94, 124 N. E. 126 (1919); Vause v. U. S., 53 F. (2d) 346 (C. C. A. 2d, 1931), cert. den., 284 U. S. 661 (1931).

8 In Maryland one's own witness may not be impeached:

(a) By bias, interest, corruption or bad character for veracity, Smith v. Briscoe, 65 Md. 561, 5 A. 334 (1886); B. & O. R. R. Co. v. Black, 107 Md.
universal acceptance few rules have been more derided by modern writers, and some jurists (who nevertheless follow it). It seems clear that the rule should be abolished. Reasons usually given for the rule are (1) a party vouches for his witness or (2) the party ought not to have the means to coerce his witness. But “Except in the case of character witnesses and expert testimony, parties under the adversary system do not choose any person they might like to place on the witness stand, but are forced to take those, good or bad who by fate or chance happen to have been exposed to the opportunity of observing or hearing

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facts which pertain to the case on trial." As for the coercion of witnesses, "... it is a reason of trifling practical weight. It cannot appreciably affect an honest and reputable witness. The only person whom it could really concern is the disreputable and shifty witness; and what good reason is there why he should not be exposed."

The accused in a criminal case may generally be impeached in the same fashion as any other witness. The American Law Institute's Code of Evidence would limit this so as to prevent impeachment by proof of the conviction of a crime.

It is clear that every consideration of policy demands a limit be drawn as to impeachment of impeaching witnesses. The best solution would seem to be not to draw an arbitrary line, but to allow the trial judge full discretion.

B. The Process of Impeachment

The process of affecting the weight to be given to the witness' testimony is the process of impeachment. When the witness testifies that a certain fact exists, the inference is that the fact does exist. Anything that attacks or "explains" why we need not accept the inference impeaches. The ordinary process of attack excludes the likelihood of the pathological liar being more than a rare bird and assumes that a witness will lie only if he has a reason for lying. Likewise if a witness is mistaken, it must be assumed there is a reason for his being mistaken. Bias, corruption, and interest have been established as usual reasons for lying; assuming the average witness. On the other hand the witness may be impeached by establishing him as a witness particularly susceptible to "reasons," for example, by proving a bad moral character for veracity.

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12 Ladd, supra, p. 7, 77.
14 3 Wigmore, Evidence (3rd Ed., 1940) Sec. 890.
15 Rule 106 (3) of the American Law Institute's Code of Evidence.
16 See 3 Wigmore, Evidence (3rd Ed., 1940) Sec. 894; Wyeth v. Walzl, 43 Md. 426 (1876) (impeachment of impeaching witness allowed).
17 See 3 Wigmore, Evidence (3rd Ed., 1940) Sec. 874.
course, the biased witness may give truthful testimony despite a bias, and the “lying scoundrel” may tell the truth, but the process of impeachment is only concerned with dislodging the witness from his place as the ordinary, honest witness.

I. The Process of Impeachment by Establishing Reasons Why the Witness Could Be Lying

A. Bias

There is no doubt cross-examination would be of little value if a witness could not be freely questioned as to his motives or bias; and there would be little safety in a judicial proceeding if a biased witness could conclude the adverse party by statements denying his prejudice in the controversy. There is, however, a conflict of authority as to how far inquiry may be pressed. In Maryland while bias or prejudice may be shown, the causes of such bias may not be shown. The fact of animosity is enough—the rightfulness or wrongfulness of that animosity is not an issue. But the intensity of the feeling and its nature are relevant and important, and some courts allow inquiry to be pressed further. The best solution would be to allow such inquiry in the discretion of the judge. There is also

18 3 Jones, Evidence (4th Ed., 1938) Sec. 828. Particular conduct and circumstances are, of course, the only means practically available for effectively demonstrating the existence of the bias.


20 Blessing v. Hape, 8 Md. 31 (1855) (Court reversed judgment on refusal of trial court to allow witness to be cross-examined as to bias). But note Regester v. Regester, 104 Md. 1, 6, 64 A. 286 (1906), where court held it no error to refuse to admit cross-examination as to bias where testimony of the witness is uncontroversed. See Stockham v. Malcolm, 111 Md. 615, 74 A. 569 (1909); Daugherty v. Robinson, 143 Md. 259, 122 A. 124 (1923).

21 Chelton v. State, 45 Md. 564 (1876) (defendant testified the witness had a grudge against him. The court held it no error to refuse to allow defendant to state the ground of the grudge, saying “The rule is well settled that while it is competent to prove that a witness for the state has a bias or ill-will against a prisoner ... it is altogether inadmissible to go into any inquiry as to the causes or circumstances which have created such bias ... innumerable side issues, not pertinent or proper for the consideration of the jury”).

22 3 Jones, Evidence (4th Ed., 1938) Sec. 829; 3 Wigmore, Evidence (3rd Ed., 1940) Sec. 951; Alford v. U. S., 282 U. S. 687 (1931). A vast variety of circumstances may be relevant to prove bias. Certainly, the witness’s occupation, relationship to a party, possible indictment, etc., are relevant. 3 Wigmore, Evidence (3rd Ed., 1940) Sec. 949. Personality and conduct of
a conflict of authority as to whether a witness must be questioned as to bias on cross-examination before *extrinsic* evidence may be used. Wigmore suggests that it should not be required.\textsuperscript{23}

**B. Corruption**

It is clear that evidence of corruption may be shown by extrinsic evidence and freely inquired into on cross-examination.\textsuperscript{24} Ordinary evidences of a willingness to swear falsely include receipt of money for testimony, an offer to testify for money, an attempt to suborn another witness. Conduct indicating a disposition or general scheme to make false charges is relevant if it indicates a specific corrupt intention for the case at hand.\textsuperscript{25}

**C. Interest**

Evidence of interest is also freely admitted to impeach.\textsuperscript{26} The chief conflict is as to the status of the accomplice or co-indictee. Such evidence is relevant and should be admitted.\textsuperscript{27}

II. The Process of Impeachment by Establishing That the Witness Is Likely to Lie, If Given Reason

Reputation, particular instances of prior conduct, and the opinion of an observer are all *relevant* to prove character;\textsuperscript{28} but it is questionable "whether general character if provable is a sufficient barometer for predicting human
action in the specific case to justify its use [and] whether the methods available for its proof are reliable enough to warrant their application.”

Authorities who argue for general character testimony as an impeachment base submit that it necessarily involves an impairment of the truth-telling capacity and to show moral degeneration is to show an inevitable degeneration in veracity, easy to note. But the scoundrel is not necessarily a lying scoundrel, and a majority of courts in the United States, including Maryland, limit character evidence to character for veracity.

Reputation is universally admitted as proof of character; “reputation” being limited usually to what is generally said of the witness in the community where the witness lives. It is strongly recommended that evidence of “reputation” be loosened to include reputation among business associates, and the like. “In the modern social life of cities with apartment house living, with limited associates in community life . . . the language universally found in the cases about reputation in a neighborhood represents the obsolete terminology of an earlier type of living.” The constricted interpretation of the word “community” would not seem to have modern justification.

The opinion of a witness as to another’s reputation based on the witness’ personal experiences is generally not ad-

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30 Ibid, 532-534.
31 Maryland follows the majority, Knight v. House, 29 Md. 194, 199, 96 Am. Dec. 615 (1868); Hoffman v. State, 93 Md. 388, 49 A. 658 (1901); Evening News Co. v. Bowie, 154 Md. 604, 619, 141 A. 416 (1928); 3 Wigmore, Evidence (3rd Ed., 1940) Sec. 923. Wigmore approves of limiting character evidence thus, pointing out the uncertain data of reputation evidence, and the desire not to increase the unpleasantness of the witness box; where the witness’ moral character is overemphasized—“No case! Abuse the opponent’s witness.” 1 Wigmore, Evidence (3rd Ed., 1940) Sec. 8c. Ladd also points out what is good and what is bad generally in a person’s make-up would depend in a large measure upon the environment and the attitudes of the particular person judging the character, whereas all persons are responsive in singling out qualities related to truthfulness. See Ladd, supra, n. 2, 172.
32 Vernon v. Tucker, 30 Md. 456, 463 (1869); Bonaparte v. Thayer, 95 Md. 548, 560, 52 A. 496 (1902) (reputation of witness among his business associates and not his general associates is not admissible to prove character).
33 Ladd, supra, n. 29, 514.
Both Wigmore and Ladd strongly recommend the adoption of opinion evidence to prove character, "the general belief in the untrustworthiness of personal opinion as proof of character is the only rational ground for its exclusion, and this may be seriously questioned . . . the personal judgment of a qualified and reliable witness ought to be better than reputation of character based upon the hearsay interchange of gossip and scandal in the community."

Generally the reputation of a woman for chastity is not admitted but when the woman is the prosecutrix in a charge of a sex-offense the testimony is especially relevant to impeach and should be admitted, and this better rule may obtain in Maryland, although the cases are confusing.

All witnesses may usually be cross-examined as to their general history to put them in their proper setting.

May particular instances of prior conduct be admitted to prove moral character and consequently impeach? The writer has examined this question and must admit his lack of certainty as to the law in Maryland on this question.

The weight of authority in other states seems to hold that particular acts of misconduct on the part of the witness may be inquired into upon cross-examination by the party seeking to impeach, but that such prior instances of

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34 However, after the impeaching witness has testified as the general reputation for veracity of the witness in the community he may be asked "whether from that reputation he would believe him on oath in a matter in which he was interested," Knight v. House, 29 Md. 194, 199, 96 Am. Dec. 515 (1868). The Court said in the same opinion (p. 199) that the effect of the question is not to elicit from the witness a mere opinion, but its object is to test the extent or degree of badness of the general reputation of the person impeached.


36 Ladd, supra, n. 33, 511.

37 Brown v. State, 72 Md. 468, 475, 20 A. 186 (1890); Kremis v. Kremis, 163 Md. 223, 231, 161 A. 225 (1932). If the prosecutrix testifies that there was no consent, the problem is whether from the testimony as to her chastity lack of veracity may be inferred. Wigmore, at Sec. 979, cites reason why there may very well be a reasonable inference.

38 Alford v. U. S., 282 U. S. 687 (1931) (history of the witness usually includes abode, occupation, environment and associations. Of necessity, laxity in examination must be allowed as it is difficult to ascertain in advance what answers will be forthcoming).

39 See 3 Wigmore, Evidence (3rd Ed., 1940) Secs. 982-989. As to cross-examination a few courts say when the witness denies the misconduct, he may not be questioned further and the witness' evidence may not be contradicted. See 3 Jones, Evidence (4th Ed., 1938) Sec. 539. On Privilege, see Ibid, Secs. 830-832.
misconduct may not be shown by extrinsic testimony since there will tend to be a confusion of issues between the material issue and the issue of the credibility of the witness, and also because it tends to catch the witness by unfair surprise.

Moreover, even when these particular acts of misconduct are sought to be brought out by cross-examination a question of the scope of cross-examination arises, particularly as to what cross-examination is relevant to the witness' credibility. The inclination in most American courts seems to be to leave the question of the scope of cross-examination to the court and although, logically, the court should not be allowed to admit irrelevant material, that is, any kind of misconduct but only misconduct relating to veracity, discretion seems to have been invested in the court, both as to relevancy and policy. Most courts would seem to hold that there is no privilege in the witness to refuse to answer questions which would tend to disgrace or degrade him. Of course, this does not include that kind of disgraceful answer which might make him subject to criminal prosecution, in which case he may invoke his privilege against self-incrimination, subject to the rules which govern that privilege.\(^{39a}\)

There obtains to these rules a clear cut exception in the admissibility of extrinsic evidence by proof of prior conviction of crime; however, this exception would seem to be more than justified by the fact that the record easily discloses the conduct.

The situation in Maryland, however, is considerably obfuscated. There is decisive authority to the effect that extrinsic evidence of particular acts of misconduct is not admissible to impeach the witness.\(^{40}\)

\(^{39a}\) See Md. Code (1939) Art. 27, Sec. 27, on bribery; Art. 27, Sec. 427, on lotteries; Art. 27, Sec. 304, on gambling and betting; Art. 27, Sec. 43, on conspiring to commit above crimes, a series of statutes denying witnesses the right to exercise the privilege of self-incrimination in those crimes but containing an "Immunity" provision, similar to the I. C. C. clause, providing that if so compelled to testify they may not be prosecuted for crimes thus revealed.

\(^{40}\) Richardson v. State, 103 Me. 112, 63 A. 317 (1906); Rau v. State, 133 Md. 613, 616, 105 A. 867 (1919) (as to the third exception); Meno v. State, 117 Md. 435, 83 A. 769 (1912).
Does the privilege against disgraceful answers exist in Maryland? The later cases do not seem to attack the question from this angle, but two early cases\textsuperscript{41} indicate that such privilege does exist on the part of the witness, except as to matters which form a material part of the issue.

Once privilege would seem to be established, then the question of the scope of cross-examination would seem to be uncalled for; yet there are a few cases in Maryland which undoubtedly discuss the question of particular instances of misconduct as testimonial impeachment from the viewpoint of the scope of cross-examination and the relevancy of that scope.\textsuperscript{42} Thus we will find expressions stating that even by cross-examination questions of prior instances of lack of chastity will not be allowed, apparently on the basis of relevancy, seeking to confine the cross-examination to veracity character rather than chastity character or any other type of character.\textsuperscript{43} Of course, it may be possible to reconcile them by stating that the privilege against disgracing answers is a privilege of the witness and since it was not asserted by the witness in these cases last mentioned, then the court was back in its discretionary field. This is a reconciliation of a sort, and if true, it would seem to leave the law in Maryland at this stage: Particular acts of misconduct may not be shown by extrinsic testimony, except where it may be shown by a prior conviction of crime. As to such acts sought to be elicited on cross-examination if the witness chooses to assert it, he has the

\textsuperscript{41} Merluzzi v. Gleeson, 59 Md. 214 (1882); Smith v. State, 64 Md. 25, 20 A. 1026 (1885). Also see 2 Poe, Pleading and Practice (5th Ed., 1925) Secs. 277, 278, 278a.

\textsuperscript{42} Shartzer v. State, 63 Md. 149 (1885); Brown v. State, 72 Md. 468, 20 A. 186 (1890); Avery v. State, 121 Md. 229, 237, 88 A. 148 (1913); Hoffman v. State, 93 Md. 388, 49 A. 658 (1901); Ammarina v. Boland, 136 Md. 365, 111 A. 84 (1920).

\textsuperscript{43} Rau v. State, 133 Md. 613, 616, 105 A. 867 (1919) (a decision which sometimes seems to confuse the question of testimonial impeachment of character by showing disgraceful conduct and testimonial impeachment of character by showing habitual false charges as evidence of corruption).

\textsuperscript{44} Cases supra, n. 42. To be sure, the accused in a criminal case may, by witnesses introduced to show his good reputation and character, enormously widen the scope of his impeachment. Evidence of good character, except for rehabilitation purposes, is confined to this instance for general evidential purposes, though it may sometimes have a particularly pertinent aspect, e. g., in a slander suit.
privilege of not answering questions of his prior misconduct which might tend to disgrace or degrade him, and, of course, this same privilege obtains if the question of self-incrimination arises. Of course, this privilege is repudiated as to all matters relevant to the issue, but applies for matters affecting credibility of the witness. In the event the witness does not assert his privilege the court may, upon objection or on his own motion, assert discretion over the scope of cross-examination—apparently tending in Maryland to admit only such misconduct as indicates a lack of veracity.44

Of course in all cases of admission of an act of prior disgraceful conduct, character is attempted to be inferred from a single act. Dean Ladd feels that the admission of such proof to test credibility in its broad application would find little support upon psychological theories because as an isolated event it would not be sufficiently representative to become the basis of establishing a personality type; and he suggests that the principle if justifiable at all must rest on the assumption that the person convicted had committed other crimes of which he had not been convicted, or that the crime evidenced a course of conduct.45 However it would seem that the process of impeachment is not especially concerned in establishing a personality type, but in merely establishing a basis from which a personality type could be inferred. A conviction of a crime involving veracity is certainly more serious than proof of an ordinary lie, and when established would seem to be in most cases strong evidence of a personality type—at least strong enough to dislodge the witness from his position as the ordinary, honest witness. Ladd's position however points out boldly the necessity of admitting only those crimes relating to veracity, as these will stand the circuitous route of impeachment (from inference to inference) with greater strength.46

44 Cases supra, n. 42. See also infra, n. 50. Note the possible exceptions as to sex offenses prosecutrix referred to supra, n. 37.
45 Ladd, supra, n. 2, 177-8.
46 To summarize, prior disgraceful conduct concerning veracity infers a bad moral character for veracity, which infers a likelihood of falsehood in the particular case, if the witness is given reason.
IMPEACHMENT

It is thus difficult but necessary to limit prior disgraceful conduct including conviction of crime to that conduct involving veracity. As noted, most courts freely allow inquiring into prior disgraceful conduct; but convictions of crime are usually limited to felonies or infamous crimes by inference of statute, or crimen falsi. In Maryland by statute any "infamous" crime may be shown, but this has been interpreted by courts so that only crimes involving veracity, and not necessarily infamous, may be shown.

\[48\] See Ladd, supra, n. 2, 179 (crimen falsi are usually defined as crimes injurious to the administration of justice by the introduction of falsehood and fraud).
\[49\] Md. Code (1939) Art. 35, Sec. 9 (first enacted Md. Laws 1864, Ch. 109, Sec. 5, sub-sec. 1).
\[50\] Prior to Nelson v. Seiler, 154 Md. 63, 139 A. 564 (1927), witnesses had been impeached by proof of a former conviction of crime without reference to its nature, McLaughlin v. Mencke, 80 Md. 83, 30 A. 603 (1894) (witness could be asked whether he had ever been in jail and why he had been sent there). Semble: Annarina v. Boland, 136 Md. 365, 381, 111 A. 84 (1920). In Wilson Amusement Co. v. Spangler, 143 Md. 98, 121 A. 851 (1923), the witness was allowed to be questioned as to a conviction for assault, which was the issue in the case, on the ground it affected his credibility as a witness. Logically a conviction of assault would have no relation to veracity and credibility, and in this case is undoubtedly highly prejudicial. If such testimony is to be admitted it should not be admitted as impeaching evidence. But the conviction must not be so distant in time as to be irrelevant; Semble: Simond v. State, 127 Md. 29, 115 A. 1073 (1915) (conviction 10 years previously of drunkenness immaterial and properly excluded).

In Nelson v. Seiler, the Maryland Court analyzed the problem much more completely than at any other time, stating, (154 Md. 69) "Criminal law and criminal procedure are made use of for the enforcement of a large volume of mere regulations . . . wholly without relation to any moral qualities; and while it may have been less apparent in times past, it is now at least unescapable that some discrimination must be made when the courts come to receive evidence of violations to impeach the credibility of a witness. It is not required that the evidence be restricted to infamous crimes or those involving moral turpitude on the one hand, but on the other, the purpose of the admission, to impeach credibility, must impose some limits . . . the trial court must exercise discretion . . . decision will not be interfered with on appeal except when the evidence is clearly irrelevant." (In Nelson v. Seiler the convictions involved were speeding and driving without a license.) The Court of Appeals held the lower court was in error by overruling objections to questions put involving these convictions. Wigmore contends that the ruling was unsound and impractical as a conviction for traffic offenses discredits any driver testifying about his driving. 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Sec. 937. But this does not seem necessarily so. Certainly it has no connection with veracity directly, through moral character for veracity. (If it is inconsistent with testimony on the stand, of course it could not be admitted for truth of the matter asserted as it would be hearsay.) In any event the Seiler case indicates that conviction of crime must relate to the character of veracity before they can be used to impeach, and as such it is law today. See Gen Exch. Ins. Corp. v. Sherby, 165 Md. 1, 165 A. 809 (1933) (conviction of reckless driving held properly excluded). In Green v. State, 161 Md. 75,
It is difficult to classify crimes relating to veracity. Personal crimes of murder, assault and mayhem show a vicious disposition but not necessarily a dishonest one. On the other hand robbery, larceny, and burglary and such, disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness, and should be admitted although they do not show a propensity to falsify. And, of course, crimen falsi should be admitted.

The proposed Code of Evidence suggests that conviction of crime to impeach be limited to those involving "dishonesty or false statement." This evidently intends to exclude murder, and similar personal crimes, as not being "dishonest," and would include robbery, according to Ladd's analysis.

As we have noted, the accused in a criminal case is ordinarily subject to impeachment like any other witness. The Proposed Code in Rule 106 states that the accused should not be examined or evidence admitted as to facts proving conviction or commission of a crime unless he has first introduced evidence of good character to support his credibility. This is based chiefly upon two reasons, one the general belief that evidence of conviction of an accused, though received only as affecting his credibility as a witness, is constantly misused by juries to prejudice him on

155 A. 164 (1931) the court allowed the witness to be impeached by a conviction of rape in the same transaction as involved in the principal case; the court seemed to put impeachment by this showing on bias or motive. Query if a conviction of rape is a sufficient foundation for impeachment of veracity.


Supra, n. 2, 180.

Ibid.

Ibid, 179-180. In Maryland the perjurer is regarded as so unreliable he is incompetent. Md. Code (1939) Art. 35, Sec. 1.

AMER. LAW INST., CODE OF EVIDENCE (1942) Rule 106.

The author does not wish to suggest that murder is honest. Dean Ladd was, of course, one of the advisers of the American Law Institute's Proposed Code of Evidence.

Supra, circa n. 14.
the merits, and, two, since Rule 201 of the Code permits the judge and counsel to comment on the failure of the accused to take the stand it is only fair that prejudicial impeachment process be limited. What it boils down to, of course, is the desirability of obtaining the accused's evidence—"Does it mean more to have the accused testify than it does to keep him from the stand because of a fear of prejudicial cross-examination?" Rule 106, paragraph 3 of the Code, of course, is based on the answer "yes" to this question.

III. The Process of Impeachment by Showing that the Witness Is Now Mistaken on the Stand or Has Been Mistaken Previously—(Prior Inconsistent or Contradictory Statements).

A prior inconsistent statement may be due to any of a number of characteristics (some already discussed)—a moral disposition to lie, faulty memory, bias, corruption, and so forth.

To obviate possible unfair surprise almost all courts require a proper foundation; the impeaching litigant to ask the witness while on the stand under cross-examination

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57 It is said that the use of such evidence is the chief reason for the failure of the accused to take the stand. Note Arthur Train in "The Bloodhound" (from the "Tut, Tut! Mr. Tutt" stories, Charles Scribner's Sons, New York, 1920) at 21 "Paddy Mooney felt his way round behind the jury box and to the witness chair. He knew that he was innocent but he knew that he was going to be pilloried on cross-examination and utterly discredited. He was an ex-convict. That would be enough to send him up again. But unless he took the stand and denied the weapon was his, the jury... would have to convict him..."

58 In Maryland the accused's failure to testify creates no presumption against him. Md. Code (1939) Art. 35, Sec. 4. Likewise it is not evidence in a civil suit involving the same transaction, Art. 35, Sec. 7. See further, Note, Privilege of Counsel to Explain Traverser's Failure to Testify (1937) 2 Md. L. Rev. 76.

The effect of the new rules of practice and procedure of the Court of Appeals in Maryland, which became effective September 1, 1941, as to the right to comment on the failure of the witness to take the stand has not yet been fully determined, but it would seem that such comment under the language of these rules, would not yet seem proper. Note the fact that the American Law Institute's Proposed Evidence Code permits comment on the refusal to testify, Sec. 201(3).

59 Ladd, supra, n. 2, 184-91.
whether he made the supposed contradictory statement. The purpose of the preliminary question is to warn the witness, but American courts have treated it not as a warning but as an inherent requisite. The result is that unless an arbitrary formula is carefully followed the opportunity to impeach may be lost, even though the warning is adequate; unless the witness remains present and the court allows him to be recalled.

If the prior contradictory statement is in a writing most courts hold that the witness need not answer on cross-examination any question as to the contents of the writing (written or signed by him), unless it is produced and shown to him, or read aloud to him. "This view... hampers cross-examination by protecting the shifty witness, its abolition harms no honest witness or the party who presents him."

If a party litigant is a witness, his prior contradictory statements are admissible to impeach, and are also admissi-
ble as admissions, hence it would be erroneous to require warning.

If the witness cannot remember making the prior inconsistent statement when questioned as to it on cross-examination, there is a split of authority as to whether he may be impeached by it; Maryland allows proof of the contradictory or inconsistent statement to impeach if the witness cannot remember.

A prior inconsistent statement should not be admissible as to a collateral matter—which under the better view is any fact not relevant to some issue in the case or pleadings, or a fact admissible to discredit the witness, as to bias, corruption, lack of skill, knowledge, and so forth.

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65 3 JONES, EVIDENCE (4th Ed., 1938) Sec. 846a, 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Sec. 1048, Bartlett and Robbins v. Wilbur, 53 Md. 485, 497-498 (1880). Inconsistent statements can impeach only, Foble v. Knefely, 170 Md. 474, 6 A. (2nd) 48, 122 A. L. R. 851 (1939), such impeaching effect having no independent probative testimonial effect or value, Mason v. Pouison, 43 Md. 161, 177 (1875). Wigmore suggests such evidence be admissible for the truth of the matter asserted, as the witness is present and subject to cross-examination, but admits this is against the holding of all the courts. 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Sec. 1018.

66 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Sec. 1051.


68 Wigmore bases the exclusion of collateral matter on auxiliary policy—danger of unfair surprise and confusion of issues in collateral matter. Thus on principle Wigmore would not object to cross-examination as to self-contradiction on collateral matters. 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Secs. 1020-1023.


There is probably such a rule limiting inconsistent statements as to collateral matters in Maryland but it is somewhat confused. In Munschower v. State, 55 Md. 11, 29 Am. Rep. 414 (1880), and Sloan v. Edwards, 61 Md. 89 (1883) there is talk of limiting cross-examination as to irrelevant contradictions but there is no inconsistent statement. In Pindell v. Rubinstein, 139 Md. 567, 576, 115 A. 859 (1921), the inconsistent statement could not have been allowed as direct testimony because it was hearsay and therefore the court said it could not be allowed to impeach; by authority of Sloan v. Edwards. (At 139 Md. 576: "They were only hearsay, and therefore irrelevant and incompetent"). This reasoning seems erroneous since the statement was not offered for the truth of the matter asserted, but to impeach only. In Quimby v. Greenhawk, 106 Md. 335, 344-345, 171 A. 59 (1934), evidence contradicting the statement of a witness that she had not been paid for services rendered decedent (trial involved validity of a will) was held properly excluded as involving an attempt to impeach witness on a collateral and immaterial matter, citing as authority City Pass. By. Co. v. Tanner, 90 Md. 315, 320, 45 A. 188 (1900), which, in turn, as to a point which could involve inconsistent statements cites as the only Maryland authority Sloan v. Edwards. For general statements as to the admissibility of evidence to impeach as not being collateral, see Wise v. Ackerman, 76 Md. 375, 384, 25 A. 424 (1892); and Mahan v. State, 172 Md. 373, 380, 191 A. 575 (1937).
IV. The Process of Impeachment by Giving Reasons Why the Honest Witness May Be Mistaken, Attacking the Witness’ Memory or Power of Observation

Generally the witness’ mental capacity to recollect, observe, and narrate can be tested by cross-examination or extrinsic evidence. On cross-examination (and perhaps somewhat by extrinsic evidence) common tests of memory and observation are, of course, allowed. However, usually one cannot introduce extrinsic evidence to prove the witness had a poor grade memory.

C. REHABILITATION

Rehabilitation is the process of restoring the impeached witness to his standing as the ordinary, honest witness; and ordinarily one may not introduce testimony of the witness’ good character for veracity, or accurate perception until the witness has been impeached.

All courts agree a direct impeachment of moral character opens the way to rehabilitation by evidence of good character. It is more difficult to explain rehabilitation by good character evidence when the witness has been im-

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69 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Secs. 931, 932. Intoxication is admissible if faculties are affected, Ibid, Sec. 933.
69a Ibid, Secs. 993, 994, 995.
70 Ibid, Sec. 935. The American Law Institute's Code of Evidence follows the minority view, and also would allow evidence of exceptional mental faculties (see Code, page 120). Wigmore feels the method of proof at present is not reliable enough to warrant admission of such evidence. See 3 WIGMORE, EVIDENCE (3rd Ed., 1940) Secs. 997, 998. However, he does recommend that any diseased impairment of testimonial powers, including nymphomania derived from whatever source, if ascertainable with accuracy, should be considered. See Ibid, Secs. 934, 935.
71 The Code of Evidence proposes that there should be admitted evidence of honesty and veracity or exceptional mental powers, or any conduct of his having substantial value bearing on his credibility as a witness without the necessity of impeachment of the witness, subject of course to the rules limiting testimony generally, and to the direction of the judge to exclude admissible evidence (Rule 403). See Rule 106 and comments following: Of course good character for veracity is relevant to indicate the probability of truth telling as bad character for veracity is to indicate the probability of the contrary. But until his character is brought into question good character should be assumed to exist. See 4 WIGMORE, EVIDENCE (3rd Ed., 1940) Sec. 1194. The theory of the Code must be that good character evidence increases the value of the testimony and is of probative value. (Raises witness above ordinary witness.)
72 4 WIGMORE, EVIDENCE (3rd Ed., 1940) Sec. 1105. See Vernon v. Tucker, 30 Md. 456 (1869); Davis v. State, 38 Md. 15, 49 (1875); Poe, supra, n. 60, Sec. 286
peached by a conviction of a crime; as testimony of good repute is not enough to explain the impeachment or the crime base away, but practically it is important and is allowed by most courts. Where the witness is impeached by bias or interest, good character does little to refute the inference raised, and should not be allowed.

As noted, prior inconsistent statements may involve the moral disposition to lie, erroneous memory, bias, and so forth; rehabilitation by evidence of good character is relevant only if the moral disposition to lie is involved and "considering the usual remoteness of the inference as to moral character, and the minor value of reputation—evidence in modern times, it is not worthwhile to cumber the trial with it for so trifling a use." However, Maryland permits it.

Rehabilitation by prior consistent statements is generally allowed, usually after impeachment by prior contradictory statements. But prior consistent statements would only seem to indicate volubility or verbosity and not veracity. In Maryland it would seem that consistent statements may be admitted after impeachment of any sort, but there is no reason for such a rule, for the probative value of such rehabilitation is usually remote, and involves confusion of issues and undue consumption of time.

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73 4 WIGMORE, EVIDENCE (3rd Ed., 1940) Sec. 1106. The crime itself may not be gone into, but Wigmore suggests that proof of extenuating circumstances should be admitted. Ibid, Sec. 1117. See Vernon v. Tucker, 30 Md. 450 (1869); Donnelly v. Donnelly, 156 Md. 81, 143 A. 648 (1928) (The witness who has been impeached cannot testify against his innocence, but can be allowed to explain the circumstances of his offense, if in extenuation of the act and in investigation of its effect—in discretion of the trial court).

74 However, of course you may put in evidence that bias does not exist, or explain the circumstances. Under the American Law Institute's Code (Rule 106) if the witness is biased against the person whom he testifies for, such bias is relevant for the party.

75 4 WIGMORE, EVIDENCE (3rd Ed., 1940) 181-2 Sec. 1108.

76 Davis v. State, 38 Md. 15, 49 (1873).

77 4 WIGMORE, EVIDENCE (3rd Ed., 1940) Secs. 1122-1126.

78 Wigmore suggests that the prior consistent statement should be allowed as proof that the prior inconsistent statement was not made, if that is in issue. Ibid, Sec. 1126. However, consistent statements are usually only allowed to rehabilitate.

79 See McAleer v. Horsey, 35 Md. 439, 467 (1872) (prior consistent statement allowed after contradiction by another witness) (dissent, 35 Md. 468), cf. Maitland vs. Citizens' National Bank, 40 Md. 540 (1874); Cross v.
If the witness has been impeached for bias, interest, or corruption, rehabilitation by prior consistent statement should be allowed if the bias, etc., occurred after the statement, as obviously the statement tends to disprove the inference to be made from the bias. If impeachment is based on a recent contrivance, i.e., the witness' testimony has undergone radical change since last interviewed, prior consistent statements are usually allowed, and some courts allow prior consistent conduct where the witness has identified the defendant at a prior time.

**CONCLUSION**

Impeachment and rehabilitation of witnesses in its present state represents a transitional myriad of evil and good. Generally speaking there is no great, crying need for reform, except perhaps as to impeachment of one's own witness. However, the law should know no place where undesirable technicalities or obsolete rules cause injustice or undue consumption of time and energy by courts and suitors. Errors of both omission and commission should be corrected—the rule against impeaching one's own witness, the rule of Queen's Case, the rules hampering character evidence, the too free use of the prior consistent statements are among the especially undesirable. Moreover, with the relaxing or dispensing with such rules the problem of relevancy which must be left to the trial judge will become more acute. The time when the psychometrist and the psychologist will be of great help in determining the credibility of ordinary witnesses seems pretty remote.
As has been indicated throughout, the adoption of Rule 106 of the Code of Evidence is on the whole highly desirable.\footnote{As to the adoption of the Code of Evidence generally see Morgan, \textit{supra}, n. 5, Wigmore, \textit{The American Law Institute Code of Evidence Rules: A Dissent} (1942) 28 A. B. A. J. 23. See also Niles, \textit{Comments on Proposed Code}, Baltimore Daily Record, March 30, 1942.}

\begin{enumerate}
\item Subject to paragraphs (2) and (3) of this Rule for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may:
\begin{enumerate}
\item Examine him concerning any conduct by him and any other matter of substantial probative value upon the issue of his credibility as a witness, without being required, in examining him as to a statement made by him in writing inconsistent with any part of his testimony to show or read to him any part of the writing; and
\item Introduce other evidences of his conduct or of other matter having substantial probative value, except that evidence of traits of his character, other than honesty or veracity, or of his commission or conviction of a crime not involving dishonesty or false statement shall be inadmissible.
\end{enumerate}
\item The judge in his discretion may exclude evidence of a written or oral statement of the witness offered under Paragraph (1)b of this Rule unless the witness was so examined while testifying as to give him an opportunity to deny or explain the statement.
\item For the purpose of impairing the credibility of an accused in a criminal action who testifies at a trial therein the accused shall not at that trial be examined, nor shall any evidence be admitted, as to facts tending to prove his commission or conviction of another crime, unless he has first introduced evidence of his good character to support his credibility.
\end{enumerate}