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WITNESSES — CONTRADICTION OF PARTY'S OWN TESTIMONY BY OTHER WITNESSES CALLED BY HIM — In an automobile guest action for injuries received when defendant drove his auto against the center pier of a viaduct on a city street, wherein the only defense was plaintiff's contributory negligence in remaining in the auto with knowledge that defendant was intoxicated, defendant testified that he was not under the influence of liquor. *Held*, defendant could not thereafter offer testimony of other witnesses to prove he was intoxicated at a time shortly after the accident, since his own testimony was

in regard to facts peculiarly within his own knowledge and given apparently in good faith. *Vondrashek v. Dignan*, (Minn. 1937) 274 N. W. 609.

In some circumstances, it would be a baffling problem to understand why a party would attempt to contradict his own testimony by that of other witnesses. Yet in the principal case, since it was admitted that the motorist was fully covered by insurance, it requires no ingenious reasoning to deduce why he so generously aided in strengthening the case of his opposing litigant. The situation is arising with increasing frequency where the nominal party, either because of chivalry or affection for the person bringing the suit, testifies in a manner calculated to destroy his own defense, leaving the insurance company, which actually bears the burden of the litigation, in a state of savage disgust. If the courts abhor the idea of forcing a party to be bound by the testimony of his first witness,[1] they should equally abhor the idea of an actual litigant being bound by the testimony of the nominal litigant. Nonetheless, it has been held that a party testifying to facts which, if true, would defeat his right to recovery, is bound by his own statements[2] for he cannot be heard to ask the court and jury to believe that he has not told the truth. However, there are courts which have taken exception to this rule and have refused to compel a party to stand or fall by his own testimony where his statements were subsequently modified or explained by him so as to show that he was testifying in good faith;[3] or where his testimony consists of a narration of events concerning which he might reasonably be mistaken.[4] Other courts, not satisfied with the rule or its exceptions, have gone a step further and have held that a party is not concluded by his own testimony, but that a jury may find in his favor from other contradictory evidence appearing in the case.[5] In a recent Michigan decision the court advanced the rule still another step by concluding that plaintiff himself may bring in other witnesses to contradict his own testimony and a jury might return a verdict based upon the contradictory evidence.[6] This result was reached by applying the doctrine that a party may contradict, though not impeach, his own witnesses[7] to a case where the party

[1] Darling v. Thompson, 108 Mich. 215, 65 N. W. 754 (1896).

[2] Bliss v. Brainard, 41 N. H. 256 (1860); Hanley v. Grand Trunk Ry., 62 N. H. 274 (1882); Bursiel v. Boston & M. R. R., 82 N. H. 363, 134 A. 40 (1926); Goodwin v. Nelson Grocery, 239 Mass. 232, 132 N. E. 51 (1921); Daughterty v. Lady, (Tex. Civ. App. 1903) 73 S. W. 837; Massie v. Firmstone, 134 Va. 450, 114 S. E. 652 (1922).

[3] Steele v. Kansas City Southern Ry., 265 Mo. 97, 175 S. W. 177 (1915); Stearns v. Chicago, R. I. & P. R. R., 166 Iowa 566, 148 N. W. 128 (1914).

[4] Harlow v. Laclair, 82 N. H. 506, 136 A. 128, 50 A. L. R. 973 at 979 (1927).

[5] Hill v. West End Street R. R., 158 Mass. 458, 33 N. E. 582 (1893); Kanopka v. Kanopka, 113 Conn. 30, 154 A. 144 (1931); Whiteacre v. Boston Elev. Co., 241 Mass. 163, 134 N. E. 640 (1922); Larson Co. v. Wrigley Co., (C. C. A. 7th, 1918) 253 F. 914; Jennings v. Swift, (Mo. App. 1908) 110 S. W. 21.

[6] Ritchie v. Reo Sales Corp., 272 Mich. 684, 262 N. W. 321 (1936).

[7] Mesce Loan Co. v. Marinaro, 117 N. J. L. 86, 185 A. 742 (1936); Baker v. Roberts, 209 Iowa 290, 228 N. W. 9 (1929); Gardner v. Connelly, 75 Iowa 205, 39 N. W. 650 (1888); Homesteaders' Life Assn. v. Salinger, 212 Iowa 251, 235 N. W. 485 (1931).

himself is a witness on his own behalf.[8] In the instant case, Justice Holt, in writing the opinion, followed the rule generally discussed in *Harlow v. Laclair*.[9] He concluded that drunkenness was a fact peculiarly within the knowledge of the person so affected, and therefore, since the motorist had already testified he was not drunk, the testimony of his other witnesses to the contrary was inadmissible. Yet the concurring judges, believing that intoxication was *not* a fact peculiarly within the knowledge of the person, likewise applying the rule of *Harlow v. Laclair*, reached the contrary result and were of the opinion that such evidence of other witnesses should have been admitted (but since the exclusion thereof was not prejudicial, it was not error). Neither position is precisely accurate, because drunkenness is of varying degrees,[10] the lesser stages of which might be peculiarly within the knowledge of the party, while as to the more excessive stages, a party might well be mistaken.[11] It is apparent that the rule of the *Harlow* case cannot readily be applied to the facts here involved. Had the concurring judges followed the theory of the Michigan court in *Ritchie v. Reo Sales Corp.*,[12] the same result could have been reached without encountering the above mentioned factual difficulty. Nor would any injurious consequences follow from allowing a party to contradict his own testimony. Since such evidence would tend to make declarant's statements unreliable,[13] and since the application of the rule will necessarily be limited to those cases where declarant is but a nominal party, there need be no apprehension that this rule will be abused or overworked.

[8] Hill v. West End Street R. R., 158 Mass. 458, 33 N. E. 582 (1893).

[9] 82 N. H. 506, 136 A. 128 (1927). Judge Branch summarized the decision as follows: "If a party's mental faculties are undeveloped or impaired, if his comprehension of his testimony is doubtful, if it relates to objective matters about which he may be mistaken, and he is contradicted by other witnesses, or if his statements are inconclusive, the effect of his testimony may be for the jury. But when a man of mature years and unimpaired mentality testifies understandingly and definitely to facts peculiarly within his own knowledge, any rational conception of justice demands that he be judged by what he says."

[10] 3 WORDS AND PHRASES, 1st ed., 2208 (1904).

[11] Lafler v. Fisher, 121 Mich. 60, 79 N. W. 934 (1899); Sapp v. State, 116 Ga. 182, 42 S. E. 410 (1902).

[12] 272 Mich. 684, 262 N. W. 321 (1936).

[13] Ibid.