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Evidence - Examination of Witnesses - Surprise as Grounds for Impeaching a Party's Own Witness

John A. Ziegler, Jr. S.Ed.
University of Michigan Law School

Raymond Dittrich
University of Michigan Law School

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EVIDENCE—EXAMINATION OF WITNESSES—SURPRISE AS GROUNDS FOR IMPEACHING A PARTY'S OWN WITNESS—The defendant was convicted of the statutory rape of his stepdaughter. Immediately following the alleged offense, the victim had signed a statement accusing the defendant of the crime charged. Before the trial, however, the district attorney was advised by the defense counsel, and by the victim herself, that the written statement was not true. At the trial, when called as a witness by the commonwealth, the girl repudiated her earlier statement, whereupon the district attorney pleaded surprise and was permitted to use the prior statement to impeach. On appeal, *held*, affirmed. The district attorney was "actually surprised" when the witness repudiated her earlier statement, and so he could impeach the witness to neutralize the effect of the unexpected testimony. *Commonwealth v. Bowers*, (Pa. Super. 1956) 127 A. (2d) 806.

By the early common law rule a party could not impeach his own witness¹ by prior inconsistent statements.² The rule has yielded a little to severe criticism,³ and now, in most jurisdictions, either by statute or by

¹Ladd, "Impeachment of One's Own Witness—New Developments," 4 UNIV. CHI. L. REV. 69 (1936). The reasons advanced for the rule are (1) that the party by calling the witness to testify vouches for his trustworthiness, (2) that by having the power to impeach puts a powerful coercive tool in the hands of a party in getting a witness to testify a certain way. The answers advanced against these reasons are that as to the first the fact is that a party usually has little choice in choosing his witness and as to the second, it would have validity only if a party could impeach by showing bad character. MCCORMICK, EVIDENCE §38 (1954).

²It is clear that under no circumstances will a party be allowed to impeach his own witness by showing bad character or corruption. 3 WIGMORE, EVIDENCE, 3d ed., §§900, 901 (1940).

³3 WIGMORE, EVIDENCE, 3d ed., §896 et seq. (1940); MCCORMICK, EVIDENCE §38 (1954).

court rule, a party is allowed to impeach his witness by cross-examination.⁴ Two requirements have been judicially grafted onto these statutes and court rules, viz., the party calling the witness must be surprised by the testimony, and the testimony itself must be damaging.⁵ What will constitute surprise is said to rest in the sound discretion of the trial court.⁶ The problem presented by the principal case is whether or not notice that a witness' testimony will not be as expected is sufficient to negate a claim of surprise at the trial.⁷ The courts have not agreed on the answer to this question. Many state, and a few federal, decisions hold that when a party has reasonable notice that the testimony of his witness will be different from that which was anticipated, the party cannot claim surprise.⁸ These courts seem to require a complete lack of awareness on the part of counsel that the witness will change his story. In some states, however, and in most of the federal courts, prior notice alone is not enough to defeat a claim of surprise.⁹ These courts seem not to regard surprise as the equivalent of being taken unaware. Rather, by comparing the statements relied upon with the notice of change, they look to see whether the party was reasonably justified in expecting the witness to testify a certain way.¹⁰ The lan-

⁴ For a discussion of the various types of statutes, see Ladd, "Impeachment of One's Own Witness—New Developments," 4 *UNIV. CHI. L. REV.* 69 (1936). Also see 11 *OHIO STATE L.J.* 364 (1950). Illinois seems to be one of the few states still adhering to the common law rule. See 1953 *ILL. L. FORUM* 296.

⁵ *Young v. United States*, (5th Cir. 1938) 97 F. (2d) 200; *Sturgis v. State*, 2 Okla. Cr. 362, 102 P. 57 (1909); *People v. LeBeau*, 39 Cal. (2d) 146, 245 P. (2d) 302 (1952), noted in 42 *CALIF. L. REV.* 178 (1954). See 74 *A.L.R.* 1042 (1931) on the right of a party surprised by unfavorable testimony of own witness to ask him concerning previous inconsistent statements.

⁶ *Wheeler v. United States*, (D.C. Cir. 1953) 211 F. (2d) 19; *Sturgis v. State*, note 5 supra. In *United States v. Maggio*, (3d Cir. 1942) 126 F. (2d) 155, it was held that there was no abuse of discretion in the trial court's acceptance of an unsworn statement by counsel that he was surprised as the basis for allowing impeachment of a witness called by counsel. As was said in *London Guarantee & Accident Co. v. Woelfle*, (8th Cir. 1936) 83 F. (2d) 325 at 334, "the claim of surprise has become largely a gesture, which adds little or nothing to the trial court's discretion."

⁷ There was no problem over whether the prosecutor's case had been damaged in the principal case. The courts generally hold that the scope of impeachment is limited to neutralizing the damage caused by the surprising testimony. See *People v. Le Beau*, note 5 supra.

⁸ See *Gondek v. Pliska*, 135 Conn. 610, 67 A. (2d) 552 (1949); *State v. Johnson*, 220 La. 1075, 58 S. (2d) 389 (1952); *Thompson v. State*, 97 Okla. Cr. 253, 261 P. (2d) 900 (1953); *Williams v. State*, 184 Ark. 622, 43 S.W. (2d) 731 (1931); *Young v. United States*, note 5 supra.

⁹ *Wheeler v. United States*, note 6 supra; *Weaver v. United States*, (9th Cir. 1954) 216 F. (2d) 23; *United States v. Graham*, (2d Cir. 1939) 102 F. (2d) 436; *People v. Spinosa*, 115 Cal. App. (2d) 659, 252 P. (2d) 409 (1953).

¹⁰ See the *Graham* case, note 9 supra, where the district attorney was allowed to cross-examine his witness as to statements made at two former trials even though the witness had told the district attorney that he would not so testify and that the prior statements were false. The court said in effect that the district attorney was privileged to believe that when the witness was placed under oath he would testify as he had done at the two prior trials. For a very liberal view see *London Guarantee & Accident Co. v. Woelfle*, note 6 supra, where the plaintiff was allowed to impeach her own witness "in the interest of seeking truth and securing justice."

guage of the court in the principal case seems to place it in this line of authority.¹¹ From the cases suggesting this more liberal approach, at least two rules of thumb can be derived. Usually, if the statement relied upon was given under oath and the contradictory one was not, it is said that a party is justified in calling the witness with the expectation that he will testify in accordance with his prior statement.¹² Conversely, where the form of notice is under oath and the statement relied upon is not, most courts would find no surprise.¹³ When both statements are either under oath or unsworn no general rule of prediction can be made.¹⁴

The no-impeachment rule seems questionable at best.¹⁵ The chief reason currently advanced in support of the rule is the fear that a party will call a witness whom he knows to be hostile in order to get the prior statements before the jury, hoping that the jury will use them (improperly, of

¹¹ See principal case, at 808, where the court says, "... the Commonwealth was entirely justified in believing that . . . she would respect the sanctity of her oath, and that her testimony in all probability would accord with the recitals of her statement freely given immediately after the event."

¹² *Wheeler v. United States*, note 6 supra; *United States v. Graham*, note 9 supra.

¹³ *State v. Nelson*, 192 S.C. 422, 7 S.E. (2d) 72 (1940); *Sandoval v. Southern Cal. Enterprise, Inc.*, 98 Cal. App. (2d) 240, 219 P. (2d) 928 (1950). Clearly in a jurisdiction which applies a strict rule the same result would follow. See *Hartley v. Crede*, (W. Va. 1954) 82 S.E. (2d) 672. *Contra*, *Weaver v. United States*, note 9 supra.

¹⁴ See *People v. Spinosa*, note 9 supra, where two contradictory statements were given under oath at the same proceeding and the party was allowed to rely on one. *Sullivan v. United States*, (9th Cir. 1928) 28 F. (2d) 147.

¹⁵ It should be noted that surprise is not the only ground upon which a party may be permitted to put in prior inconsistent statements to impeach his own witness. As the principal case indicates, where the party has no choice in calling the witness, he will be allowed to impeach the witness without showing surprise. *People v. Deitz*, 86 Mich. 419, 449 N.W. 296 (1891); *Commonwealth v. Sarkis*, 164 Pa. Super. 194, 63 A. (2d) 360 (1949); *Meeks v. United States*, (9th Cir. 1950) 179 F. (2d) 319. Some courts will call a witness on their own initiative or at the request of a party when neither side is willing to vouch for the witness' veracity. *Young v. United States*, (5th Cir. 1939) 107 F. (2d) 490. [This case is a sequel to the first action, *Young v. United States*, note 5 supra. Following the holding in the first trial that the prosecuting attorney could not legitimately claim to be surprised, the prosecuting attorney, on retrial of the defendant, asked the court to call the witness as its own. The trial judge indicated that he did so, not because requested by the government, but because the witness was an eyewitness whose testimony was needed. The case was noted in 18 TEX. L. REV. 530 (1940).] See also *United States v. Lutwak*, (7th Cir. 1952) 195 F. (2d) 748; *Chalmette Petroleum Corp. v. Chalmette Oil Dist. Co.*, (5th Cir. 1944) 143 F. (2d) 826. If the witness is called by the court, both parties are free to cross-examine and to impeach. If the court thinks that the party wants the witness called solely for the purpose of impeachment, it will refuse. See *Fong Lum Kwai v. United States*, (9th Cir. 1931) 49 F. (2d) 19, and *Young v. United States*, (5th Cir. 1939) 107 F. (2d) 490. It should be noted that many courts allow prior inconsistent statements to come before the jury on the grounds of refreshing recollection. *Hurley v. State*, 46 Ohio 320, 21 N.E. 645 (1889); *Hickory v. United States*, 151 U.S. 303 (1893). This will be permissible, however, only if the witness confesses either a lack of knowledge or a failure of memory. Another group of cases indicates that, instead of permitting impeachment, a court may order all of the witness' testimony stricken from the record if the party who called the witness cannot elicit from him the information expected. *Kuhn v. United States*, (9th Cir. 1928) 24 F. (2d) 910. See also *Young v. United States*, note 5 supra, and *State v. Thorne*, 43 Wash. (2d) 47, 260 P. (2d) 331 (1953).

course) as substantive evidence.¹⁶ Essential to this reasoning is the belief that these prior statements are hearsay.¹⁷ Yet in this type of situation the declarant (witness) is in court and is subject to cross-examination, and there is little reason why this testimony should not be used as substantive evidence.¹⁸ Neither is there strong reason to maintain the ban against impeachment of one's own witness. So long as the courts continue to consider the impeaching testimony objectionable as substantive evidence, however, the surprise and damage requirements provide desirable and workable rules of thumb for limiting the amount of this type of testimony which will go before a jury.¹⁹

John A. Ziegler, Jr., S.Ed.
Raymond Dittrich

¹⁶ See *State v. Nelson*, note 13 *supra*; *Young v. United States*, note 5 *supra*.

¹⁷ *Crago v. State*, 28 Wyo. 215, 202 P. 1099 (1922); *Albert v. McKay & Co.*, 174 Cal. 451, 163 P. 666 (1917).

¹⁸ For more extensive development of this argument, see: McCormick, "The Turncoat Witness: Previous Statements as Substantive Evidence," 25 *TEX. L. REV.* 573 (1947); 3 *WIGMORE, EVIDENCE* §1018 (1940); Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 *HARV. L. REV.* 177, 192 (1948). See also Rule 63 (1), *UNIFORM RULES OF EVIDENCE*.

¹⁹ See McCormick's informal study of the question of whether a judge's instruction will be effective to prevent a jury from considering the impeaching testimony as substantive evidence. The judges he surveyed seemed to doubt if the jury understood or obeyed the instruction. McCormick, "The Turncoat Witness: Previous Statements as Substantive Evidence," 25 *TEX. L. REV.* 573 (1947).