Kentucky Law Journal

Volume 47 | Issue 2 Article 9

1958

Evidence--Impeachment--Prior Contradictory Statements of a Party's Own Witness

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Recent Cases

EVIDENCE—IMPEACHMENT—PRIOR CONTRADICTORY STATEMENTS OF A PARTY'S OWN WITNESS—In a murder prosecution, a witness for the Commonwealth testified that he did not know or remember whether he had made statements to law enforcement officers concerning the guilty involvement of his brother, the defendant. On the theory that the Commonwealth was impeaching a hostile witness, the trial court admitted the testimony of the officers as to the contents of the statements previously made to them by the witness. Held, reversed. Where the testimony of a party's own witness was wholly of a negative character, merely failing to prove what was expected of him, the introduction of pror statements, on the ground they were inconsistent or contradictory, statements for the purpose of impeachment was reversible error. *Webb* v. *Commonwealth,* 314 S.W. 2d 543 (Ky. 1958).

Proof of prior inconsistent statements is one of the six accepted grounds on which a witness may be impeached. The common law rule forbidding a party to impeach his *own* witness by the use of such statements has been widely criticized, and has been changed in many states by statute.[1] Kentucky, in 1851, modified the common law rule by adoption of the Code of Civil Procedure sec. 660, which provided:

> The party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it was indispensible that the party should produce him; but he may contradict him by other evidence, and by showing that he has made *statements different from his present testimony.*[2] (emphasis added)

This apparently broad statute was construed narrowly[3] by the decision of *Champ* v. *Commonwealth,* 59 Ky. (2 Metc.) 17 (1859),

[1] 3 Wigmore, Evidence sec. 905 (3rd ed. 1940); McCormick, *The Turncoat Witness,* 25 Texas Law Rev. 573 (1947); Ladd, *Impeaching of One's Own Witness,* 4 U. Chi. L. Rev. 69 (1936).

[2] Renumbered Kentucky Code of Civil Procedure sec. 596 (1854); cf. English statutory modification of the common law rule, Common Law Procedure Act, 1854, 17 & 18, Vict. c. 125, sec. 22, providing that:

> [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.

[3] It might be argued that the accepted Kentucky rule that testimony of the witness that he "does not remember" or "does not know" may not be impeached by introduction of prior extrajudicial statements is not a "narrow" interpretation of sec. 596. That is, the statement that the witness does not remember making a prior statement is not "different from" that prior statement. On the other hand, the writer suggests that where a witness has been given an opportunity to recall

which, after holding that the provision of the Code of Civil Procedure was applicable to criminal trials, held that the introduction of prior inconsistent statements to impeach the calling party's own witness was permissible only where the testimony of the witness at trial was distinctly prejudicial to the calling party, or clearly favorable to the advesary.[4] The holding of this case, that there existed an essential difference between a mere denial or a refusal to acknowledge prior statements on the one hand, and affirmative prejudicial statements on the other, has been seized upon repeatedly by the Court of Appeals.[5]

By such a rule, if the witness called by a party denies having made or testifies that he "doesn't know" or "can't remember" if he made certain statements, such answers will be characterized as negative statements, and the mere failure of the witness to prove what was expected of him is said not to open the door to his impeachment by showing prior statements on the theory they are inconsistent or contradictory statements. On the other hand, where the Commonwealth's witness to the alleged rape of a twelve year old girl not only denied having made statements incriminating the defendant, but asserted on the stand that the youthful prosecutrix had actually consented to the relationship, evidence of the prior statements was admissible for purposes of impeachment.[6] In other cases such prior statements have been admitted to impeach the calling party's own witness, where his present testimony is clearly prejudicial to the calling party, or beneficial to the adversary.[7]

The promulgation of the Kentucky Rules of Civil Procedure in

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the time, place, company and occasion in which prior statements were made, his continuing insistence on a "convenient memory lapse" is in fact not only different from his prior statement, but is actually a denial of its very existence. The result of the Kentucky rule is to carve out for the turncoat a happy no-man's land where he may rest without fear of impeachment or perjury prosecution. He need neither affirm a prior statement, nor make a different statement now. He may merely let his memory lapse.

[4] The incidental ruling of this case that Ky. Code of Civil Procedure sec. 596 was applicable to criminal trials has been followed expressly in Haley v. Commonwealth, 261 S.W. 2d 439 (Ky. 1953), and Harvey v. Commonwealth, 287 Ky. 92, 152 S.W. 2d 282 (1941).

[5] Cases where a mere denial or failure to remember did not give rise to proper admission for impeachment are: Click v. Commonwealth, 269 S.W. 2d 203 (Ky. 1954); Coleman v. Commonwealth, 241 Ky. 8, 43 S.W. 2d 185 (1931); Johnson v. Commonwealth, 277 Ky. 153, 12 S.W. 2d 308 (1928); and Couch v. Commonwealth, 202 Ky. 677, 261 S.W. 7 (1924). Cases where evidence of prior statements was admitted to impeach are: Commonwealth v. Strunk, 293 S.W. 2d 629 (Ky. 1956); Haley v. Commonwealth, 261 S.W. 2d 439 (Ky. 1953); and Buck v. Kleinschmidt, 279 Ky. 569, 131 S.W. 2d 714 (1939).

[6] Commonwealth v. Strunk, 293 S.W. 2d 629 (Ky. 1956).

[7] Garrison v. Commonwealth, 122 Ky. 882, 93 S.W. 594 (1906); Blackburn v. Commonwealth, 75 Ky. (12 Bush) 181 (1876).

1953 replaced the older Kentucky provision with the modern Rule 43.07, which provides that:

> A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence, by showing that he had made statements different from his present testimony. . . .

Commonwealth v. *Strunk*[8] held this rule to be applicable to criminal trials, and allowed the introduction of prior contradictory statements to impeach the Commonwealth's own witness, where his testimony was affirmative and prejudicial. The rationale of the decision applied the criteria accepted under the former Code of Civil Procedure provision. The holding of the present case, denying admission to prior extra-judicial statements of a party's own witness where his present statements are negative, indicates that the court has every intention of interpreting the new rule as narrowly as it did the old.

This position of the Kentucky Court of Appeals in narrowly restricting the introduction of prior extra-judicial statements to impeach the calling party's own witness has been criticized by both Wigmore and McCormick. It is their position that such decisions, together with its refusal to treat such statement as substantive evidence,[9] rest on archaic policies of common law exclusion which are currently discredited,[10] ignore the likelihood that juries will disregard such fine distinctions,[11] and constitute a serious obstruction to the final ascertainment of truth.[12] The Kentucky rule is narrower than either the Uniform Rules of Evidence[13] or the American Law Institute Model Code of Evidence.[14] Legitimate attacks on the narrowness of such a rule are understandable from the standpoint of the party who suddenly has a material witness he has called deny ever having made the statements

[8] 293 S.W. 2d 629 (Ky. 1956).

[9] Roberts v. Roberts, 310 S.W. 2d 55 (Ky. 1958); Model Laundry v. Collins, 241 Ky. 191, 43 S.W. 2d 693 (1931); Hays v. Commonwealth, 140 Ky. 184, 130 S.W. 987 (1910).

[10] 3 Wigmore, Evidence sec. 902 (3rd ed. 1940). For a full discussion of Wigmore's entire argument against the exclusion of prior contradictory statements to impeach one's own witness, see secs. 896-918.

[11] McCormick, Evidence 77 (1954).

[12] *Id.* at 73.

[13] Uniform Rule of Evidence 63 provides:

> Evidence of a statement which is made other than by a witness while testifying at a hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible, except
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> (1) a statement, previously made by a person who is present at the hearing and available for cross examination. . . .

This is believed to be a succinct statement of the positions of both Wigmore and McCormick.

[14] Model Code of Evidence rule 503(b) (1942) provides:

> Evidence of a hearsay declaration is admissible if the judge finds that the declarant
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> (b) is present and subject to cross examination.

relied on. The difficulties of a perjury prosecution against the turncoat witness who suddenly developes a convenient loss of memory are obvious. Perhaps a better result is found in those decisions which allow the introduction of prior inconsistent or contradictory statements to impeach the calling party's own witness where the party is *actually surprised* by the turncoat statement. Such an approach was examined at length in *Young* v. *United States*.[15] The test of actual prejudicial surprise would seem to be a more workable rule than any artificial distinction between negative and affirmative statements. It would appear that the merely negative statement, where it is actually surprising to the calling party, may be as devastating as any positive assertion.[16]

Conclusion

The present case epitomizes the Kentucky rule as to impeachment of a party's own witness on the grounds of prior inconsistent statements. The cases dating back for almost a century draw a clear line of departure between the impeachibility of affirmative and negative statements by such a witness. It is suggested that the adoption of a rule which would allow the calling party to impeach his own witness by proof of prior contradictory statements where the party was *actually surprised,* without regard for the negative or affirmative quality of the witness's present testimony, would better provide both an adequate protection for the nerves of prosecutors and an adequate check against the unwarranted introduction of hearsay testimony.

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LEGAL ETHICS—DISBARMENT PROCEEDINGS—CONVICTION FOR WILLFUL EVASION OR AVOIDANCE OF FEDERAL INCOME TAXES AS GROUNDS.—Subsequent to the conviction of an attorney in the United States District Court of willfully and knowingly failing to make his federal income tax return for 1952 in violation of federal law,[1] the Kentucky State Bar Association brought disbarment proceedings. The attorney con-

[15] 97 F. 2d 200 (5th Cir. 1938). It was the factual disposition of this case that the calling party had not in fact been surprised, and was, indeed, using the turncoat witness as an artifice to introduce irrelevant and hearsay evidence. For this reason impeachment was not allowed.

[16] The Kentucky Court of Appeals in Model Drug Co. v. Patton, 208 Ky. 112, 270 S.W. 998 (1925) allowed impeachment by proof of prior inconsistent statements of the witness where the party calling him was surprised. The rule there used was not defined, but the statements of the turncoat witness on the stand were affirmative and prejudicial. Maddox v. Commonwealth, 311 Ky. 685, 225 S.W. 2d 107 (1949) which held that actual surprise of the calling party was not enough to allow impeachment by prior contradictory statements where the statements of the witness on the stand were not prejudicial or affirmative.

[1] Int. Rev. Code of 1954 sec. 7201.