Volume 34 | Issue 3 Article 11

April 1928

Witnesses--Making a Witness One's Own by Cross-Examination--Impeachment

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WITNESSES—MAKING A WITNESS ONE'S OWN BY CROSS-EXAMINATION—IMPEACHMENT.—The so-called Federal rule is that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination.[1] Wigmore says that the Federal rule, which concerns merely the order of evidence, is sometimes joined with the rule against impeaching one's own witness so as to produce the singular effect that if the cross-examining party does ask about his own case, in violation of the above rule, he thereby makes the witness his own, and is thus prohibited from impeaching the witness on the subject of such questions.[2] In support of this statement, Wigmore cites *Lambert* v. *Armentrout*,[3] and *McGuire* v. *Railway Company*[4] in accord; but he cites *Teter* v. *Moore*[5] as contra.

It is a general rule that a party may not impeach his own witness in certain ways, *e.g.*, by proof of general reputation for truth and veracity or by proof of prior inconsistent statements.[6] *Teter* v. *Moore* refers to *Lambert* v. *Armentrout*[7] for the proposition that a cross-examining party, who interrogates the first party's witness as to new matter, thereby makes the witness his own.[8] The court, in *Teter* v. *Moore*, while stating that a party introducing a witness cannot impeach his character for truth and veracity, holds that where a witness testifies on cross-examination as to matter not touched upon in his direct examination the *party originally calling* the witness may impeach him in regard to such matter by proof of a prior inconsistent statement. In *Lambert* v. *Armentrout*[9] the court said that a *cross-examining party*, who had made the first party's witness his own on cross-examination, could not impeach this witness by attacking his reputation for veracity or by proving by others previous contradictory statements. It would seem, therefore, that the two cases are distinguishable on their facts.

It is regrettable that *Teter* v. *Moore* is not contra to *Lam-*

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[1] 2 WIGMORE ON EVIDENCE, § 914 (1923); State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626 (1900).
[2] WIGMORE, *supra*, n. 1.
[3] 65 W. Va. 375, 64 S. E. 260 (1909).
[4] 70 W. Va. 538, 74 S. E. 859 (1912).
[5] 80 W. Va. 443, 93 S. E. 342 (1917).
[6] 2 WIGMORE ON EVIDENCE, § 896 (1923).
[7] *Supra*, n. 3.
[8] *Supra*, n. 5, at p. 466.
[9] *Supra*, n. 3.

bert v. *Armentrout*.[10] Why this rule that a party may not impeach his own witness? The reason usually assigned for the rule is that a party calling a witness vouches for his credibility.[11] To say the least, the soundness of the rule is doubtful. Indeed, the court in *Lambert* v. *Armentrout*[12] laments the fact that the rule exists. Wigmore says that in point of fact neither party knows the character and trustworthiness of the witness he calls; and that the courts do not practically enforce this rule because of the universal permission to discredit one's witness by proving the facts to be contrary to his assertion.[13] As a matter of fact, the rule is modified by our court which holds that a party calling a witness is not bound by all he says, because the party may prove the material facts to be otherwise by other evidence, even though the effect of it is directly to contradict his own witness.[14] And further, our court holds that a party making an opponent's witness his own by cross-examination may in the same way directly impeach his testimony.[15] Again, in *Lambert* v. *Armentrout*,[16] our court holds that evidence of prior admissions against interest made by a witness, who is a party in interest, is admissible, although the effect of such evidence is *directly* to impeach a party's own witness. *Teter* v. *Moore* is another modification of the rule because the party introducing a witness may impeach him by proof of prior self-contradictory statements as to matter not elicited on the examination-in-chief. In the light of these decisions it is difficult to see any practical necessity for the continued existence of the rule. The state of Virginia has taken a step in the right direction by declaring that a party may impeach the credibility of his own witness who becomes adverse by proof of his prior inconsistent statements.[17]

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[10] *Supra*, n. 3.
[11] WIGMORE, *supra*, n. 1, § 909.
[12] *Supra*, n. 3, at p. 377.
[13] WIGMORE, *supra*. n. 1, § 898.
[14] Stout *v.* Sands, 56 W. Va. 663, 668; 49 S. E. 428 (1904).
[15] State *v.* Weissengoff, 89 W. Va. 279, 109 S. E. 707 (1921).
[16] *Supra*, n. 3.
[17] CODE OF VIRGINIA, 1924, § 6215; Handy *v.* Commonwealth, 11D Va. 910, 912, 67 S. E. 522 (1910).