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IMPEACHMENT OF ONE'S OWN WITNESS IN SOUTH CAROLINA

The purpose of this note is to analyze the cases as to the impeachment of one's own witness and, by interpreting the case of *State v. Nelson*[1] and subsequent cases, to determine what effect they have on the rule as it exists today.

Although at one time generally accepted in the United States, the doctrine that a party calling a witness may not impeach him has been the subject of much controversy since the earliest times; and the modern tendency is to enlarge the possibility of self-impeachment. One authority[2] goes so far as to advocate the complete abolition of the rule. It is commonly believed to have its roots in the ancient idea of trial by compurgation.[3] However, some authorities place its probable origin in the transition from the inquisitorial method of trial as it emerged into an adversary system.[4]

South Carolina Cases Prior to State v. Nelson[5]

Its conception in South Carolina was in 1828 in a case[6] which stated that the rule is confined to the introduction of general evidence to destroy the credit of the witness; counsel may call other witnesses to contradict him as to the particular facts relevant to the issue. The rule excludes not only general evidence against the character, but also former inconsistent declarations, and every matter that would be inadmissible or irrelevant except for the purpose of impeaching the credit. But, according to another case,[7] a party may introduce contradictory evidence upon the facts material to the issue, and thus incidentally impeach the credit of his own witness; and this will not let in evidence of good character in reply.

A witness whom a party is compelled to call by law is not his, in the sense that he cannot contradict or discredit him.[8]

A party may cross-examine his own witness if he is hostile or shows that the facts as detailed by him are otherwise, but he cannot contradict him by showing contrary or inconsistent statements, or, by his testimony at a preliminary hearing.[9] This rule was later

1. 192 S.C. 422, 7 S.E. 2d 72 (1940)
2. Ladd, *Impeaching One's Own Witness*, 4 U. CHI. L. REV. 69, 96 (1936-7).
3. 3 WIGMORE, EVIDENCE 896 (3d Ed. 1940).
4. 4 U. CHI. L. REV. 69 (1936-7).
5. 192 S.C. 422, 7 S.E. 2d 72 (1940).
6. Perry v. Massey, 1 Bail. 32 (S.C. 1828).
7. Farr v. Thompson, Cheves 37 (S.C. 1839).
8. Jerkowski v. Marco, 57 S.C. 402, 35 S.E. 750 (1900).
9. State v. McKay, 89 S.C. 234, 71 S.E. 858 (1911).

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interpreted as meaning that the court may, in its discretion, allow a party to propound leading questions to his own witness for the reason, among other things, that the witness is hostile to him.[10] However, a party cannot directly contradict his own witness without first laying the proper foundation, *i. e.*, he was taken by surprise and by request for cross-examination.[11] This case, which requires the laying of a foundation, and an earlier decision,[12] which states that it is not an abuse of discretion for a trial judge to permit the State to interrogate a witness as to his evidence at a coroner's inquest, where it is used to show that the State was taken by surprise by the witness, could possibly be "pointers" to the doctrine laid down in the *Nelson* case.

State v. Nelson[13]

The defendant was convicted of manslaughter. The defendant's mother made statements which were highly prejudicial to the defendant at a coroner's inquest. The State offered her as a witness and she gave testimony which was altogether different, in essential and material points, from the statements given at the inquest. The solicitor pointed this out and further stated that he had been taken by surprise, and upon this ground asked for permission to cross-examine the witness. Over objection by the defense, the solicitor was allowed to cross-examine her as to that testimony and to read at length from the questions and answers from the inquest and was allowed to ask the witness if she did not make the statements read to her. The defendant appealed claiming error in these admissions. It appears that the appellant served the solicitor with a written notice stating that the witness would not testify as she had at the inquest and also what and how she would testify at the trial. The error assigned is that, under the guise of surprise, the prejudicial testimony which was inadmissible was allowed.

The first portion of the opinion gives a summary of the law previously stated in this article, with the remark that if justly limited and rightfully applied, the rule is a wise and salutary one; but if not properly limited and employed it may be unjust and mischievous. For a more comprehensive view of that part of the opinion dealing with the possible exception to the rule, the court's language is used:

10. Scott v. International Agr. Corp., 180 S. C. 1, 184 S.E. 133 (1936).
11. See note 10 *supra*. The foundation was never laid in this case and therefore respondent should not have been allowed to directly contradict his own witness.
12. State v. Waldrop, 73 S.C. 60, 52 S.E. 793 (1905).
13. 192 S.C. 422, 7 S.E. 2d 72 (1940).

> Hence, the general rule that a party cannot directly impeach or discredit his own witness is subject to the exception that when a witness proves hostile or recalcitrant, the party calling him may probe his conscience or test his recollection to the end that the whole truth may be laid bare; and the extent to which this may be done depends upon judicial discretion exercised in the light of the circumstances in which the question arises. The State, however, contends that it not only had a right to cross-examine the witness, but also to read to her before the jury her testimony taken at the inquest, and to question her concerning her inconsistent statements as shown by such testimony upon the ground of surprise.
>
> The cases generally hold that for a party to be able to impeach his own witness on the ground of surprise or entrapment, it is essential that it appear that the party has actually been surprised by the testimony of such witness, or that he has been deceived or entrapped into introducing the witness because of such contradictory statements; and, as a corollary to this rule it follows that a party who introduces a witness will not be permitted to avail himself of a feigned surprise in order to get to the jury contradictory statements of the witness previously given when such statements are otherwise incompetent as evidence. 70 C.J. Section 1227, page 1032. And in the same word (page 1035), it is said that where the side calling the witness is on notice that the witness will not testify in accordance with statements previously made by him, he cannot, of course, be impeached by the side calling him, on the ground of surprise.[14]

The court further said that evidence of contradictory statements is theoretically evidence affecting credibility only, and is not substantive evidence of the facts embraced in the contradictory statements. However, evidence of inconsistent statements does often influence the jury, and because of this, a party should not be allowed to interrogate his own witness in respect to previous inconsistent statements unless he has actually suffered surprise or entrapment. The court found that the State did not actually suffer surprise, and therefore reversed the judgment and ordered a new trial.

Cases Subsequent to State v. Nelson[15]

In a 1941 case[16] the *Nelson* decision was discussed and affirmed

14. Opinion by Justice Fishburne.
15. 192 S.C. 422, 7 S.E. 2d 72 (1940).
16. White v. Sou. Oil Stores, 198 S.C. 173, 17 S.E. 2d 150 (1941).

as to the general rule, but no mention was made of the surprise or entrapment phase of the case. A case in 1946 states that it is always permissible, however, for a party when taken by surprise to ask his own witness whether he had made prior statements inconsistent with his testimony.[17] Three cases[18] which reaffirm the general rule or portions of the general rule have been handed down since 1946, but none of these dwell with the question of surprise or entrapment.

Conclusion

Thus, from a review of the cases, the general rule may be stated as follows: A party is not concluded by the unfavorable testimony of his own witness, but may prove any facts relevant to the issue by any competent evidence even though it may be a direct contradiction of the testimony of a former witness called by him. Furthermore, when a witness called by him proves hostile, the trial judge may allow his examination to assume the character of cross-examination to the extent that leading questions may be asked of the witness.

The *Nelson* case stands as a liberalizing exception to this rule. If the party calling the witness suffers *actual* surprise or entrapment, the judge in the light of the circumstances, may allow the witness to be examined so that the truth may be laid bare. Therefore, if the party who called the witness had actual or possibly constructive notice that the witness would not testify as he had previously, then he cannot claim the exception under the guise of feigned surprise. Should a party be surprised or entrapped, the former inconsistent statements of the witness can be used for his impeachment only. They tend to neutralize his testimony and go to the jury to impeach the credibility of the hostile witness, but the jury cannot use such evidence as proof of the matter stated, and they should be so charged.

The *Nelson* case, in 1940, seems to indicate a trend toward following the modern view which liberalizes the self-impeachment rule. Although it covers only one small phase, this alone will possibly be South Carolina's liberalizing effect until the Legislature acts by statute to modify the rule sufficiently to make it just, or abolishes it entirely.

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17. State v. Russ, 208 S.C. 449, 38 S.E. 2d 385 (1946).
18. Ex Parte Nimmer, 212 S.C. 311, 47 S.E. 2d 716 (1948); State v. Hughey, 214 S.C. 111, 51 S.E. 2d 376 (1949); State v. Clough, 220 S.C. 390, 68 S.E. 2d 329 (1951).