Washington Law Review

Volume 1 | Number 2

10-1-1925

Evidence: Contradiction of Collateral Matter

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EVIDENCE: CONTRADICTION OF COLLATERAL MATTER—It has been said so many times that a party is concluded by the answers of a witness on any collateral matter, that the real rule and the reasons therefor are very generally misunderstood and frequently misapplied.

Some cases and some textbooks draw a very clear distinction between impeachment as applied to a collateral matter and contradiction as applied to a collateral matter. The distinguishing feature seems to be found in whether or not the answer sought to be refuted is elicited on direct examination or cross-examination. If an answer given on direct examination is to be disproven it is called contradiction. If an answer elicited on cross-examination is to be disproven it is called impeachment. It is obvious, of course, that this is all a matter of definition and despite a confusion of terms the question of refuting answers elicited either on direct or cross-examination is really a matter of impeachment and by the better writers is generally called impeachment by contradiction. Definitions are not particularly material to our present inquiry as we are here chiefly interested in applying this rule of evidence to collateral matters.

The term "collateral matter" is frequently misunderstood. A test of whether a matter is collateral is: Is the cross-examining party entitled to prove the matter in support of his case?[1]

First, considering collateral matter elicited on cross-examination, the rule is well settled in all jurisdictions that a party is bound by the answers thus obtained.[2] It is this rule, so well and firmly settled, that has confused lawyers and judges alike concerning the right of a person to contradict answers given on a collateral matter in direct-examination. "The general rule is that, when a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question, but this limitation only applies to answers on the cross-examination. It does not affect answers to the examination in chief. "[3]

There is authority to the contrary.[4] This line of authority states

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[1] 10 ENCY. PL. & PR. 296; WHARTON'S CRIM. EV., Tenth Edition, § 484, and cases there cited.

[2] 28 R. C. L. 620; 10 ENCY PL. & PR. 295.

[3] *McArthur v. State,* 59 Ark. 431, 27 S. W 628 (1894) *Furst v. Second Ave. R. Co.,* 72 N. Y. 542 (1878) *Van Tassell v. New York, etc., R. Co.,* 20 N. Y. Supp. 708 (1892), 21 N. Y. Supp. 1131, 37 N. E. 566 (1893), *State v. Goodwin,* 32 W Va. 177, 9 S. E. 85 (1889) *People v. Roemer* 114 Cal. 51, 45 Pac. 1003 (1896), *People v. Evans,* 41 Pac. 444 (Cal., 1895) *Grimes v. Hill,* 15 Colo. 359, 25 Pac. 698 (1891) *Batdorff v. Farmers' Nat. Bank,* 61 Pa. St. 179 (1869), *Forde v. Com.,* 16 Gratt (Va.) 547 (1864) *Butler v. State,* 34 Ark. 480 (1879), *State v. Sargent,* 32 Me. 429 (1851) *Polk v. State,* 40 Ark. 482 (1833), 28 R. C. L. 620; Wharton's CRIM. EV., Tenth Edition, §484, and notes.

[4] *Lambert v. Hamlin,* 73 N. H. 138, 59 Atl. 941, 6 Ann. Cas. 713 (1905), *Merchants' L. Assoc. v. Yoakum,* 98 Fed. 251, 39 C. C. A. 56 (1899) *Blakey v. Blakey,* 33 Ala. 611 (1859) overruling *Dozier v. Joyce,* 8 Port. (Ala.) 303; *Ortez v. Jewett,* 23 Ala. 662 (1853), *Com. v. Fitzgerald,* 2 Allen (Mass.) 297 (1861), *Ehrman v. Whelan,* 40 So. 430 (Miss., 1906) *Bullock v. State,* 65 N. J. L. 557, 47 Atl. 62 (1900) *State v. Hendrick,* 70 N. J. L. 41, 56 Atl. 247 (1903) *Continental Nat. Bank v. Nashville First Nat. Bank,* 108 Tenn. 374, 68 S. W 497 (1902), *Craig v. Rohrer,* 63 Ill. 325 (1872).

the rule as follows: "The question is whether the statement of an immaterial fact can be contradicted, if it comes out on the examination of a witness in chief. It seems to us that if an immaterial fact is stated by a witness of his own accord, or as introductory merely to material testimony, or if the party who calls a witness is permitted, without objection, to question him as to immaterial facts, the irrelevant testimony must be regarded in the same manner as if it had come out on cross-examination, and the other party cannot call witnesses to contradict it."[5]

The reasons advanced in support of this line of authority to many courts appears very persuasive. They place their holding usually on two grounds·

1. If contradiction is allowed on collateral matters elicited on direct examination, the result would be a confusion of issues,

2. If a party is so careless, negligent and sleepy as to permit collateral matters to be injected in a direct examination that party should not be permitted to take advantage of the situation.

The contrary rule that collateral matter elicited on direct examination can be contradicted is based on several grounds, the most usual of which is that the collateral matter was injected by a party to better his position before the court and is frequently permitted to go into the record on counsel's statement that it is merely preliminary It does seem unreasonable, particularly in a criminal case where the rule has a very powerful sway, that a defendant may thus unfairly place himself in a desirable position before the court. For example. Supposing a defendant charged with burglary gets on the witness stand and in rapid succession makes a series of statements to the effect that he has been a minister of the gospel, that he has never touched intoxicating liquor, used dope, etc. Now if these matters had been elicited on cross-examination by the prosecuting attorney, the state probably would be bound thereby under the rule above noted, but here the defendant has improved his position before the court and jury by a series of false statements. In fairness, and bearing in mind the danger, in the eyes of the jury, of objecting to a defendant giving a bit of his life history, the state should not be denied the opportunity of contradicting those statements.

In the state of Washington this particular point has not been passed upon by our own Supreme Court. In every case in which the question has arisen on appeal the contradiction sought to be admitted resulted from an answer elicited on cross-examination.[6] In some cases our

[5] *Com. v. Buzzell,* 16 Pick. (Mass.) 153 (1834).

[6] Among these cases are:

State v. Carpenter 32 Wash. 254 (1903) *State v. McLain,* 43 Wash. 267, 271, (86 Pac. 390, 2) (1906) *Anderson v. Globe Nav. Co.,* 57 Wash. 502, 506; 107 Pac. 376, 7 (1910) *Wharton v. Tacoma Fir Door Co.,* 58 Wash. 124, 125· 107 Pac. 1057, 8 (1910) *Kirk v. Seattle Electric Co.,* 58 Wash. 283, 289· 108 Pac. 604, 7 (1910) *Finigan v. Sullivan,* 65 Wash. 625, 627 118 Pac. 888, 9 (1911) *State v. Stone,* 66 Wash. 625, 631, 120 Pac. 76, 8 (1912).

Supreme Court has ruled that the contradiction was properly admitted because it was contradiction of a material matter elicited on cross-examination.[7]

It is, therefore, yet an open question what our own Supreme Court will do, but if it follows the weight of authority and what, it is submitted, is the weight of reason it will adopt the rule that answers elicited on direct examination on collateral matters may be contradicted.

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MAY A MAN PROVIDE IN HIS WILL THAT HIS WIFE SHALL NOT TAKE UNDER IT UNLESS SHE SHALL SURVIVE HIM FOR A PERIOD OF FORTY-EIGHT HOURS?—The advantages are apparent that might be gained by a man including in his will the provision that his wife should not take under it unless she should survive him for a period of, say, forty-eight hours. As an example, there is the famous French case of *Fair v. Vanderbilt,* in which both spouses were killed, the wife surviving the husband fifty-nine seconds, and of which a learned author once remarked, "It was the first time in history that a man and his wife were ever killed while riding together." No provision had been made in contemplation of either co-accidental or incidental death. These two vast estates became merged into one. How much more equitable it would have been to let the estates remain in the respective families. Due to this sudden and unexpected death, one family was enriched, to the detriment of the other. Who can say this was a just enrichment, using this principle as a comparison, and that such a distribution was any other than a mere interpretation of words in a will or statute?

Every practicing attorney knows of some local application of this distribution in his community. Because of the risk of automobile or similar accident, each spouse may advantageously incorporate a clause in his will providing for just such contingencies. Would such a will, then, be permissible in Washington? Objections may be raised that the statutes as they now exist are mandatory, in a way that would prevent such a will, that such a provision would leave the title to devised property nowhere during the interim, that the court would declare an intestacy. It may even be urged that the same result may be effected through some established form, such a life estate.

The statutes which must be taken into consideration are as follows: Remington's Compiled Statutes §1366 reads: "When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No adminis-

[7] *Allard v. Northwestern Contract Co.,* 64 Wash. 14, 116 Pac. 457 (1911) *McNall v. Sandygren,* 100 Wash. 133, 170 Pac. 561 (1918) *State v. Hood,* 103 Wash. 489, 491, 175 Pac. 27, 8 (1918).