swinging from one view to the other. It would seem to this writer that the weight of authority is in accord with the *Schaefer* case, *i.e.*, that the remedy is neither alternative nor exclusive, but that it rests in the sound discretion of the court whether relief shall be given when there is another less desirable remedy and so the relief asked for is within the spirit of the act. This conclusion is arrived at by the fact that many jurisdictions have swung from one side to the other without any apparent reason except that in one case the remedy was more desirable than the coercive remedy and in another case less desirable. The fact that courts have taken a stand that the remedy is not alternative, and later given declaratory relief where another adequate remedy existed without any comment on the point; the fact that courts have taken a definite stand that the relief is alternative, and then when a close case came up justified their refusal to give the declaratory relief on some technical grounds; the very fact that the various writers have spent so much time trying to justify and distinguish these cases would tend to show that the courts have taken the view set down in the Ohio case while trying to uphold their former decisions.

The Ohio Supreme Court has laid a very flexible groundwork for a very far reaching remedy. In the face of all the clamor for procedural reform it is hoped that the bench and bar will use this remedy to cut down time and expense. The legislature has refused to define, lest the craft of man evade the definition. The bench should, in using this discretionary power, confine itself to the facts at hand and not lay down unnecessary precedents which will be binding on later equally competent courts. This decision and rule will further avoid the difficult problem with which equity has to contend of deciding what "adequacy of the other remedy" means and when it exists. ROBERT E. TEAFORD

EVIDENCE

EVIDENCE — IMPEACHMENT OF ONE'S OWN WITNESS

Defendant was charged with the crime of burglary. On trial the State introduced a witness who, before being convicted of the same crime, had made a sworn statement confessing his part in the affair and naming defendant as an associate. On the stand the witness failed to identify defendant as one of his accomplices. Surprised by this change of face the prosecutor was permitted to question the witness with regard to his previous sworn statement. In reversing the Court of Appeals which had reversed the Common Pleas Court, the Supreme Court held:

(1) That the prosecutor was justifiably surprised; and (2) that being thus surprised, it was proper for him to question the witness as to his prior inconsistent statements in order to probe his conscience and to refresh his recollection.[1]

The general rule that one may not impeach his own witness and the extent to which it has been modified by exceptions remains a troublesome problem today.[2] While the origin of this rule is not definitely known, it is commonly asserted to have had its roots in the primitive trial by compurgation.[3] However, it has recently been suggested that a more probable source is to be found in the gradual emergence of the adversary method of trial from the old inquisitorial system.[4] Whatever its background, the rule seems to have had its beginnings in modern jurisprudence at least as early as 1681.[5] After its application in the trial of Warren Hastings[6] in 1788, the rule became established beyond question in both civil and criminal cases.[7] Starting with the case of *State* v. *Norris*[8] in 1796, the rule has been quite generally accepted in this country, yet the modifications and exceptions attached to it have been so varied as to make it almost impossible to deal in terms of generalities when discussing the views expressed in the cases.[9]

Broadly speaking the usual ways of impeaching a witness are by showing bad character,[10] which includes proof of conviction of crime and reputation for truth and veracity; or by showing bias and interest; or by showing that the witness had made prior contradictory statements; or by showing the facts to be otherwise than as testified to by the witness. While the courts have been uniform in refusing to allow a party

[1] *State* v. *Duffy*, 134 Ohio St. 16, 11 Ohio O. 377, 15 N.E. (2d) 535 (1938).

[2] The numerous cases to be found in the digests attest the truth of this statement.

[3] WIGMORE, EVIDENCE (2d Ed. 1923) sec. 896; *Crago* v. *State*, 28 Wyo. 215, 202 Pac. 1099 (1922).

[4] Mason Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. of Chicago L. Rev. 69.

[5] In *Cooledge's Trial* of the same year the Lord Chief Justice said: "Whatsoever witnesses you call, you call them as witnesses to testify to the truth for you; and if you ask them any questions, you must take what they have said as truth. Therefore you must not think to ask him any questions and afterwards call another witness to disprove your own witness." 8 How. St. Tr. 636 (1681).

[6] *Warren Hastings' Trial*, Lords Journal, Feb. 9, April 10, 31 Parl. Hist. 369 (1788).

[7] WIGMORE, *supra*, note 3.

[8] 1 Haywood (N.C.) 429, 1 Am. Dec. 564 (1796).

[9] Werner, J., in *People* v. *De Martini*, 213 N.Y. 203, 212 (1914). "Probably no rule of evidence is more generally familiar than the rule that a party may not impeach his own witness and yet there is none that has caused greater confusion in practice."

[10] By "character" evidence the courts usually mean reputation, what others think of him and not what he is or what the speaker believes. But most courts will permit the question "Would you believe him on oath" to be asked if a proper foundation has been laid and if it is based on his reputation for truth and veracity.

to impeach his own witness by evidence of bad character,[11] some diversity of opinion exists with regard to bias and interest, with perhaps a greater number of courts excluding such evidence.[12] As to prior contradictory statements the law appears to be in a state of confusion; so much so, in fact, that unqualified statements regarding the various views expressed are bound to be inadequate; yet some observations can be made. In one way or another practically all courts have made some inroads on the rule under this form, whether they recognize an exception or not. Thus a substantial number of cases permit a party to interrogate his own witness as to previous inconsistent statements, not to discredit him, but merely to refresh his recollection.[13] Cases in this class impose, as a condition precedent, the requirement of surprise or hostility as in the principal case. Another line of cases, while adopting the doctrine of surprise, are more candid than those just considered. These cases recognize an exception and frankly admit that the purpose of showing such contradictory statements is to discredit the witness.[14] A few of the cases in this group appear to confine the procedure to a questioning of the witness,[15] whereas most of them go further and allow outside evidence, including other witnesses, to prove the inconsistent statement.[16] More liberal still have been some of the statutes on this point, adopted in a number of states.[17] Dispensing with the requirement of surprise, hostility, deception and the like, these statutes permit proof of inconsistent statements by outside evidence as in the case of an opponent's witness. Representative

[11] *Carrington* v. *Davis*, Wright, 735 (1834); *State* v. *Carlyle*, 4 Ohio Dec. Rep. 335, 1 Cleve. L. Rep. 338 (1878); *People* v. *Minsky*, 227 N.Y. 94, 124 N.E. 126 (1919); *State* v. *Freeman*, 213 N.C. 378, 196 S.E. 308 (1938); *Trout* v. *Commonwealth*, 167 Va. 511, 188 S.E. 219 (1936).

[12] *Schmeltz* v. *Tracy*, 119 Conn. 492, 177 Atl. 520 (1935); *People* v. *Washburn*, 104 Cal. App. 662, 286 Pac. 711 (1930); *State* v. *Lustberg*, 11 N.J. Misc. 51, 164 Atl. 703 (1933); *O'Rear* v. *Manchester Lumber Co.*, 6 Ala. App. 461, 60 So. 462 (1912).

[13] *Hurley* v. *State*, 46 Ohio St. 320, 21 N.E. 645, 4 L.R.A. 161 (1889); *People* v. *Michails*, 335 Ill. 590, 167 N.E. 857 (1929); *Baker* v. *Roberts & Beir*, 209 Iowa 290, 228 N.W. 9 (1930); *Stanley* v. *Sun Insurance Office*, 126 Neb. 205, 252 N.W. 807 (1934).

[14] *Williams* v. *State*, 184 Ark. 622, 43 S.W. (2d) 731 (1932); *Carroll* v. *State*, 55 Okl. Cr. 197, 28 Pac. (2d) 588 (1934); *Sullivan* v. *U. S.*, 28 Fed. (2d) 147 (1928); *State* v. *Lang*, 108 N.J. Law 98, 154 Atl. 864 (1931).

[15] *People* v. *Burnstein*, 261 Mich. 534, 246 N.W. 217 (1933). *State* v. *Saccoccio*, 50 R.I. 356, 147 Atl. 878.

[16] *Williams* v. *State*, 184 Ark. 622, 43 S.W. (2d) 731 (1932); *Carroll* v. *State*, 55 Okl. Cr. 197, 28 Pac. (2d) 588 (1934); *Sullivan* v. *U. S.*, 28 Fed. (2d) 147 (1928); *Hulett* v. *Hulett*, 152 Miss. 476, 119 So. 581 (1929).

[17] Ark. Dig. 1921, sec. 4186; California Code Civ. Proc. 1931, sec. 2049; Idaho Code 1932, c. 16, sec. 1207; Burns Ind. Stat. 1933, c. 2, sec. 1726; Carroll's Ky. Code 1932, Civil Practice Code, sec. 596; Mont. Rev. Stat. 1921, sec. 10666; New York, Civil Proc. Act. 1937, sec. 343-a; Ore. Code 1930, c. 9, sec. 1909; Texas Code Crim. Proc. 1928, sec. 732; Wyo. Rev. Stat. 1931, c. 89, sec. 1706. In California the requirement of surprise has been read into the statute, *Whitelaw* v. *Whitelaw*, 122 Cal. App. 260, 9 Pac. (2d) 874 (1932).

of this class of statutes is the one adopted in Massachusetts which reads: "The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony . . ."[18] Other statutes have been less liberal, incorporating the requirements of surprise or hostility and thereby limiting their effectiveness.[19] With regard to impeachment by proving the facts to be different, it has been universally held, almost from the first, that a party is not bound by the testimony of his witness; that is, he may prove the facts to be other than as testified, even though the incidental effect will be to impeach such witness.[20]

Another exception, separate, in a way, from those just considered, exists where the witness is a necessary one as in the case of a will.[21] There the witness is considered the witness of the law and not that of the party calling him. Separate too is the exception where an adverse party is called as a witness. Some states, including Ohio, have enacted statutes on this problem.[22] Elsewhere the rule is less settled.[23]

Having considered in a general way the status of the law with respect to impeaching one's own witness, an analysis of the reasons behind the rule is appropriate. Curiously enough the recent cases in the field, by and large, offer little help on this score. Following unquestioningly the precedent laid down in the earlier cases, they make little or no attempt to justify the rule, but rather, consider it an elementary premise in the law of evidence. Outstanding in his vigorous assault on the rule, Professor Wigmore would eliminate it in its entirety;[24] others concur.[25] Among the reasons advanced to justify the existence and con-

[18] Mass. Gen. L. 1932, c. 233, sec. 233.

[19] D. C. Code 1929, tit. 9, sec. 21; Fla. Comp. Gen. L. 1927, sec. 4377; Ga. Code 1933, sec. 5879; La. Code Crim. Proc. 1932, sec. 487, 488; N. Mex. Ann. Stats. 1929, c. 45, sec. 607; Va. Code 1930, sec. 6215; Vt. Pub. L. 1933, sec. 1702.

[20] *State Auto. Mut. Ins. Ass'n. of Columbus, Ohio* v. *Friedman*, 34 Ohio App. 551, 171 N.E. 419, aff'd. 122 Ohio St. 334, 171 N.E. 591 (1930); *Kosienski* v. *State*, 24 Ohio App. 225, 157 N.E. 301 (1927); *Baldassarre* v. *Pennsylvania R. Co.*, 24 Fed. (2d) 201 (1928); *United Factories* v. *Brigham*, 117 S.W. (2d) 662 (Mo. App., 1938).

[21] *Lott* v. *Lott*, 174 Minn. 13, 218 N.W. 447 (1928); *Thompson* v. *Owen*, 174 Ill. 229, 51 N.E. 1046 (1898); *State* v. *Slack*, 69 Vt. 486, 38 Atl. 311 (1897); *Atwood* v. *Hayes*, 139 Okl. 95, 281 Pac. 259 (1928).

[22] Ohio G. C., sec. 11,497 reads: "At the instance of the adverse party, a party may be examined as if under cross examination, either orally or by deposition, like any other witness. If the party be a corporation any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall thereby be concluded but may rebut it by counter testimony."

[23] *Sciffe* v. *Seiffe*, 267 Ill. App. 23 (1932); *Johnson* v. *Warrington*, 213 Iowa 1216, 240 N.W. 668 (1932).

[24] WIGMORE, *supra*, note 3, sec. 903.

[25] Report of the Committee of the Commonwealth Fund, the Law of Evidence, Some Proposals for Its Reform XVI, N. 1 (1927), "The rule prohibiting the impeachment of one's own witness . . . has no shadow of good sense in any of its parts."

tinued use of the rule are: (1) a party vouches for his witness or guarantees his credibility;[26] (2) a party should not be able to control his witness's testimony;[27] (3) without such a rule the jury might use prior contradictory statements substantively as proof rather than to determine the witness's credibility.[28]

A common expression of the rule founded upon the reason that a party vouches for the credibility of his own witness is found in GREENLEAF ON EVIDENCE:[29] "When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them unworthy of belief." The reason thus expressed has been vigorously assailed and not without cause.[30] The fallacy of this reason seems to lie in the assumption that a party knows the character of his witness when, as a matter of fact, he has no such knowledge for the obvious reason that he must choose his witnesses on the basis of the facts to which they can testify rather than on the basis of their character.[31] Moreover, this reason is not consistent with the rule, already noticed, that a party is not absolutely bound by the statements of his witness.[32]

A more sound reason in support of the rule is that a party should not be able to control his witnesses' testimony. This theory which was first asserted by Justice Buller in 1767,[33] was frequently reiterated in the earlier decisions. Wigmore makes more clear its foundation in the following statement: "If it were permissible, and therefore common, to impeach the character of one's witness whose testimony had been disappointing, no witness would care to risk the abuse of his character which might then be launched at him by the disappointed party. The fear of the possible consequences would operate subjectively to prevent a repentant witness from recanting a previously falsified story, and would more or less affect every witness who knew that the party calling him expected him to tell a particular story. Of this sort of abuse from the opposite

[26] *Biaggini* v. *Toye Bros. Yellow Cab Co.*, 163 So. 780 (La. App., 1935); *Stiffy* v. *Schultz*, 215 Iowa 837, 246 N.W. 910 (1933); *State* v. *Keefe*, 54 Kan. 197, 38 Pac. 302 (1894); *Cox* v. *Eayres*, 55 Vt. 24, 45 Am. Rep. 583 (1882).

[27] *Cox* v. *Eayres*, 55 Vt. 24, 45 Am. Rep. 583 (1882).

[28] *Young* v. *U. S.*, 97 Fed. (2d) 200 (1938); *Kuhn* v. *U. S.*, 24 Fed. (2d) 910 (1928); *Alabama Power Co.* v. *Hall*, 212 Ala. 638, 103 So. 867 (1925); WIGMORE, note 3, *supra*, sec. 903.

[29] GREENLEAF, EVIDENCE (1866), sec. 442.

[30] 82 A.S.R. 57 (1902).

[31] May, *Some Rules of Evidence* (1876), 11 Am. L. Rev. 261.

[32] Note 17, *supra*.

[33] Nisi Prius, 297 (1767).

side the witness is even now sufficiently afraid; were he liable to it from either side indiscriminately, the terrors of the witness box would be doubled. Speculative as this danger may be it furnished the only shred of reason on which the rule may be supported."[34] This theory has been discredited largely on the ground that as a practical matter the undesirable results prophesied in the absence of the rule are not only unnecessary, but improbable. Briefly, the arguments with respect to impeachment by bad character are that no coercion would take place if the attorney were honest and the witness informed him beforehand of his position; that were such not the case, the witness, being subject to exposure from the opposite party, would scarcely be influenced particularly by fear of exposure at the hands of the party calling him; that, in any event, fear of a perjury charge would be sufficient to overcome any possible fear of impeachment.[35] With respect to impeachment by bias and interest the argument is about the same as is offered with respect to impeachment by prior contradictory statements; mainly, that no coercion is possible when no fear exists. Wigmore summarizes the situation in the following words: "There is no necessary implication of bad character, no smirching of reputation, no exposure of misdeeds on cross examination, nothing that could fairly operate to coerce either an honest or a dishonest witness to persist in an incorrect story through fear of the party calling him. An honest witness could readily explain how he came to make the former statement; a dishonest one would not be deterred from returning to truth by such a trifling obstacle."[36]

The final reason urged in support of the rule is that without it the jury might consider the prior statements offered as substantive proof. It is indeed questionable whether this reason is sound in view of the many instances in which the same danger is present and where no particular difficulty is felt. Thus if a party be allowed to cross examine a witness with regard to contradictions for the purpose of refreshing his memory, the former statement is before the jury; similarly the cross examination of an adversary's witness presents the same situation. Therefore it would seem that the danger could be guarded against by proper instructions to the jury as prescribed in these other cases.[37]

As has been pointed out, eminent authorities on the law of evidence favor a complete abolition of the rule that one may not impeach his own witness, not only because it is felt that no substantial reason can be given in support of it, but also because the ascertainment of truth and the

[34] WIGMORE, note 3, *supra*, sec. 899.
[35] See note 4, *supra*.
[36] WIGMORE, note 3, *supra*, sec. 902.
[37] The Judicial Council, Second Report (New York 1936).

promotion of justice would be greatly aided thereby. Actually a statute designed to approximate this result was proposed in New York in 1935,[38] but was not accepted. Later a modified form of the proposal was enacted which allows for impeachment by prior inconsistent statements provided they be in writing and sworn to.[39] Commenting on the proposal, Professor Ladd suggested that it would be simpler to solve the entire problem by enacting a statute reading: "No party shall be precluded from impeaching a witness because the witness is his own."[40]

In view of the statutes which have been enacted and the exceptions recognized in some States, there can be little doubt that the trend in the development of the law today is towards a modification of the rule, particularly with respect to prior inconsistent statements. It may be that the courts can find some justification for retaining the rule with respect to the other modes of impeachment, but it would be helpful if they would review its foundations in the light of present day circumstances.

WILLIAM L. ANDERSON

EVIDENCE — PRESUMPTION AGAINST SUICIDE — NATURE AND EFFECT ON BURDEN OF PROOF

Under the early common law suicide was a felony of serious import considered more atrocious than murder. Hartman, *The Presumption Against Suicide As Applied in Insurance Cases* (1935) 19 Marq. L. Rev. 20; *State* v. *LaFayette*, 15 N. J. Misc. 115, 188 Atl. 918 (1937). Blackstone describes how the suicide was given an ignominious burial along the highway, with a stake driven through his body; moreover, all his goods and chattels were forfeited to the crown. 4 Bl. Comm. Although the exact date when the presumption against suicide arose is not known, it was during this early period that the judges created this device to ease the harshness of the penalty placed upon the innocent family of the deceased. At the present time suicide is not treated with such severity and the original basis for the presumption is gone. However, the presumption still continues to be a rule of law in most of our states. *Mitchell* v. *Industrial Commission of Ohio*, 135 Ohio St. 110, 19 N.E. (2d) 769 (1939); *Wilder's Admr.* v. *Southern Mining Co.*, 265 Ky. 219, 96 S.W. (2d) 436 (1936); *Dow* v. *United States Fidelity and Guaranty Co.*, 7 N.E. (2d) 426 (Mass., 1937); *Falkinburg* v. *Prudential Ins. Co. of America*, 132 Neb. 831, 273

[38] Recommended changes in Practice Procedure & Evidence, Commission on the Administration of Justice in New York State, p. 61, sec. 38.

[39] New York Civil Proc. Act. 1937, sec. 343-a.

[40] See note 4, *supra*.