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## Evidence--Witnesses--Impeachment of Court Witness By Prior Statements

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*Its Possible Curtailment*, 56 NW. U.L. REV. 235 (1961). It is recognized that a major problem arises as to which "agent" qualifies as being able to apply the doctrine.

Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956), provides an excellent depth study of the problems involved in the attorney-corporation client privilege. Including corporations within the privilege is favored.

UNIFORM RULE OF EVIDENCE 26(1), would terminate the lawyer-client privilege available to a corporation upon dissolution, and RULE 26(3)(a) defines a client as a "corporation or other association that directly or through an authorized representative, consults a lawyer . . . for the purpose of . . . securing legal relief."

Judicial review may soon be forthcoming on this question. Prior to the *Radiant Burners* case, it was generally assumed corporations could avail themselves of the attorney-client privilege. Attention has now been sharply focused on the issue. Action by the Court of Appeals and the Supreme Court of the United States will be awaited.

*Thomas Edward McHugh*

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### **Evidence—Witnesses—Impeachment of Court Witness By Prior Statements**

At *D*'s trial for murder, the state sought to impeach a court witness, called by the court at the state's request, by showing that the witness had previously made a statement which he would not acknowledge at the trial. The trial judge's ruling admitted only the first sentence of the statement pertaining to the time and place thereof. The state's attorney, over the objection of *D*'s attorney, and despite the judge's ruling, proceeded to introduce the contents of the statement by inquiring of the witness whether he had made specific statements. The judge, to remove any prejudicial error, instructed the jury that the questions and answers were not to be considered as evidence and that they related only to the credibility of the witness. From an adverse judgment, *D* appealed. *Held*, reversed and case remanded for a new trial. The introduction of the contents of the statement was prejudicial error. *Rankin v. State*, 143 So. 2d 193 (Fla. 1962).

The principal case raises some interesting issues involving impeachment of a witness. The witness was called by the court because the state's attorney frankly admitted that it was feared he would be hostile and could not be vouched for. He had been an eyewitness to the crime, and it is clear his testimony would have been most valuable to the prosecution. The witness, however, declined to give any affirmative testimony and answered each question with the phrase "I don't remember." The issue considered here is whether it is permissible to impeach a witness, who professes to ignorance and gives no testimony of value to either party, by disclosing to the jury the contents of a prior statement made by the witness. Such disclosure is especially significant because of its harmful effect on the defendant, who is being tried for a capital offense.

As a general rule of law, any person offered as a witness is subject to impeachment. In criminal cases both the witnesses for the state and those for the defendant may be impeached in a proper manner. 58 AM. JUR. WITNESSES § 680 (1948).

The testimonial qualifications of the adversary's witness are always open to attack. After the proper foundation has been laid, it is permissible to attack the credibility of a witness by showing that at other times and places he has made statements which are inconsistent with, or contradictory to, the testimony which he has given. *Lee Dong Sep v. Dulles*, 220 F.2d 264 (2d Cir. 1955). If prior statements of the witness are to be admitted for impeachment purposes, there must be real inconsistency between the two assertions of the witness. *Grunewald v. United States*, 353 U.S. 391 (1957); *State v. Price*, 92 W. Va. 542, 115 S.E. 393 (1922). The matter involved in the supposed contradiction must not be merely collateral in its character, but must be relevant to the issue being tried. *State v. Carduff*, 142 W. Va. 18, 93 S.E.2d 502 (1956). Where the witness clearly denies having made the statement in question, impeachment is in order. *Weaver v. United States*, 216 F.2d 23 (9th Cir. 1954). If the witness states that he does not remember or does not recall, impeachment is still generally allowed. *Spence v. Browning Motor Freight Lines, Inc.*, 138 W. Va. 748, 77 S.E.2d 806 (1953).

It is generally recognized that impeachment may be resorted to where a witness, by his testimony, has surprised the party offering him. *Young v. United States*, 97 F.2d 200 (5th Cir. 1938);

*Everett v. State*, 231 Ark. 880, 333 S.W.2d 233 (1960); *State v. Blankenship*, 137 W. Va. 1, 69 S.E.2d 398 (1952). In a significant number of jurisdictions it is also required that the testimony of the witness must be damaging before impeachment will be permitted. *People v. Newson*, 37 Cal. 2d 34, 230 P.2d 618 (Cal. 1951); *Hernandez v. State*, 156 Fla. 356, 22 So. 2d 781 (1945). The witness must testify positively to the existence of a fact prejudicial to the party. If the witness merely fails to testify to facts expected to be elicited, the party offering the witness on this point cannot, under the guise or impeachment, supply the evidence from a third party, or get before the jury statements that are otherwise inadmissible. *Bryon v. State*, 90 Tex. Crim. 175, 234 S.W. 83 (1921).

For impeachment purposes, a court witness would appear to be in much the same position as the witness of an adversary. A court witness, however, is not a witness for either party. Where such a witness in a criminal case gives testimony that is detrimental to the state's case, it is not error for the court to permit the state's attorney to lay a predicate to impeach, and later to permit him to introduce testimony tending to impeach such witness. *Brown v. State*, 91 Fla. 682, 108 So. 842 (1926). It has been held that a court witness who testifies to a mere negative and testifies to no substantive fact may not be impeached. *Peoples v. State*, 257 Ala. 295, 58 So. 2d 599 (1952). In *People v. Johnson*, 333 Ill. 469, 165 N.E. 235 (1929), a witness, who denied all knowledge of the commission of the crime, was called by the court at the request of the prosecution. When the witness denied making a prior contradictory statement, the prosecution was permitted to impeach. Under the guise of impeachment, the prosecution was thus able to get a prejudicial unsworn statement before the jury. This was held to be reversible error.

Whatever the appropriate conditions for impeachment might be, it is well settled that impeaching proof is not substantive evidence, but is received only to affect the credibility of the witness. The impeaching evidence is admissible only for the purpose of detracting from the weight to be given to the witness' testimony, and to eliminate from the jury's minds any positive adverse effect therefrom, and is not to be considered as evidence of the facts brought out by the impeaching testimony, or for the purpose of supplying what the hostile witness was expected to, but did not say, as a basis for a verdict. *Young v. United States*, *supra*. With that in mind, the

grounds for impeachment of a witness who testifies to a mere negative are questionable unless it can be said that a negative reply is so adverse to a party's interest as to qualify as damaging testimony. Even if impeachment of the witness were proper, the introduction of the full contents of his prior statement would hardly seem to be necessary or permissible. Perhaps, however, the view expressed in *Morton v. Hood*, 105 Utah 484, 143 P.2d 434 (1943), has some merit. There it was said that a witness cannot be permitted to prevent disclosure of material facts nor to evade impeachment by refusing to answer, or merely saying that he does not remember, since the purpose of a trial is to disclose the truth and receive competent proof of material and relevant facts.

Case precedents would indicate that West Virginia law is in accord with the majority views on the subject of impeachment and may serve as a summary of the law in general. A trial court is sometimes warranted and may, at times, have a duty to call a witness in a criminal case, but the right should be exercised cautiously. *State v. Loveless*, 142 W. Va. 809, 98 S.E.2d 773 (1957). A witness may be impeached, after a proper foundation is laid by calling attention to prior inconsistent statements, by proving such statements, and whether the witness denies or fails to recollect them, is not material. *State v. Worley*, 82 W. Va. 350, 96 S.E. 56 (1918). There must be contradiction. If there is no substantial variance between such statements and the testimony, the statements cannot be introduced for purposes of impeachment. *State v. Price, supra*. Contradictory statements of a witness as to material facts are admissible to weaken or destroy the value of his testimony, though they probably are inadmissible as primary evidence of the controverted fact. *Wilson v. McCoy*, 86 W. Va. 103, 103 S.E. 42 (1920).

Thus, in West Virginia, it would seem that if a witness offers testimony which is materially inconsistent with his prior statements, he may be impeached to an extent permitted by the court in the proper exercise of its discretion. If the witness fails to give any positive testimony whatsoever, there appears to be little basis for attacking his credibility, which is the legitimate purpose of impeachment, by the introduction of prior statements.

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