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during the period of trusteeship.[62] As long as the debtor makes the required payments to the trustee, he is immune from garnishment of his wages, either in an attachment or proceeding in aid of execution, by any creditor listed.[63]

It is submitted that the above recommendations, though not comprehensive of all improvements that could be suggested in the area of garnishments, would go a long way toward relieving the harshness of the remedy as it presently exists in Kentucky.

Henry R. Snyder, Jr.

IMPEACHMENT OF WITNESSES ON COLLATERAL MATTERS

Kentucky Rules of Civil Procedure 43.07 and 43.08 outline the accepted procedure by which a witness's testimony may be impeached. Rule 43.07 specifies the four methods of impeachment presently allowed in Kentucky. They are: (1) introduction of contradictory evidence, (2) proof of prior inconsistent statements made by the witness, (3) proof of the witness's general reputation for untruthfulness, and (4) a showing that the witness has previously been convicted of a felony. We are here concerned primarily with the second of these, contradiction by introduction of prior inconsistent statements of the witness. Rule 43.08 requires that a foundation be laid for this type of impeachment in order to avoid unfair surprise.[1] This involves merely asking the witness if he made the out-of-court statement, identifying it as closely as possible with regard to time, place, and persons present. Then, if the witness denies having made the statement, contradicting witnesses may be called when the cross-examiner puts on his case. Their testimony is admissible, in this respect, only for purposes of impeachment and the opposing party is entitled to an admonition by the trial judge as to the limited effect the testimony is to have.

One very significant limitation upon this practice exists. A virtually universal rule of evidence prohibits contradiction, either by prior statements of the witness or by contradictory evidence, upon matters which are collateral to the issues in the case.[2] It is said that upon such

[62] Ohio Rev. Code Ann. sec. 2329.71 (Page 1954).
[63] 21 U. of Cincinnati L. R. 268 (1952).

[1] 3 Wigmore, Evidence 702 (3rd Ed. 1940).
[2] Id. at 657, et. seq. 692; McCormick, Evidence 66 (1954); 58 Am. Jur. 418, 432 (1948). The rule is deemed necessary to prevent undue waste of time resulting from the contradiction of any or all points in a witness's testimony. As was said in Powers v. Leach, 26 Vt. 277 (1847):

points the cross-examiner must "take the answer" given by the witness. The unanimity existing in regard to the rule, however, does not extend to the tests to be used in determining what matter is collateral and what is not. In fact, a majority of courts take the view that no test is to be used at all, but that collateralness can be determined only by investigation of the circumstances of the particular case.[3] Kentucky, until very recently, consistently followed this view.[4] It was rejected, however, in a 1955 decision, *Commonwealth* v. *Jackson*.[5]

The *Jackson* case was a trial for murder. James Jackson had admittedly killed one Levi Webb, but he contended that the killing was done in self-defense. Sallie Jackson, wife of the accused, testified generally in support of this contention. On cross-examination, in an attempt to lay the foundation for an impeachment by prior contradictory statement, Sallie was asked the following question:

> Didn't she . . . ask you what the reason was for the shooting and you said that James Jackson had shot and killed a man up there, and at the same time you said, *he had a crazy spell on then the same as he did a few days before when he shot you*? . . . (Court's italics)[6]

Objection to the question was immediately interposed, but before a ruling could be made, the witness answered "no". The trial judge subsequently granted defendant's motion for a new trial on the ground that the question, answered or not, was so prejudicial that the defendant was deprived of a fair trial. The Commonwealth appealed to have a certification as to the propriety of the ruling, contending that the question was a proper one with which to lay the foundation for impeachment, and that further witnesses might be introduced to contradict Sallie's denial. The Court of Appeals considered the chief question to be whether or not the matter was collateral. A majority held that it was not and, therefore, that contradiction was proper. Three members of the Court dissented on the ground that the matter was collateral and so prejudicial that no admonition could "remove its poisonous effects from the mind of the jury."

> "We may suppose, that such collateral issues might spring up in regard to the testimony of every witness upon the stand, and thus a single issue branch into an indefinite number of subordinate and collateral ones, and these again into many more, upon each point, so that it would become literally impossible ever to finish the trial of a single case."

[3] Wigmore, note 1, supra, 657.

[4] Stephens v. Commonwealth, 20 Ky. L. Rep. 544, 47 SW 229 (1898); Southern Ry. v. Jones, 172 Ky. 8, 188 SW 873 (1916); Crawford v. Commonwealth, 235 Ky. 368, 31 SW 2d 618 (1930); Miller v. Commonwealth, 241 Ky. 818, 45 SW 2d 461 (1932); Nolan v. Commonwealth, 261 Ky. 384, 87 SW 2d 946 (1935); Keene v. Commonwealth, 307 Ky. 308, 210 SW 2d 926 (1948).

[5] 281 SW 2d 891 (Ky. 1955).

[6] Id. at 892.

The question of prejudice aside, it appears that the *result* reached by this decision on the issue of collateralness is correct. In the writer's opinion, however, a curious anomaly is created by the *opinion* of the Court. To begin with, the opinion works a major change in the Kentucky law by introducing two tests for determining collateralness; previously the Court merely decided from the circumstances of the case whether the matter sought to be contradicted was collateral or not. The first of these new tests, and one to which the entire Court subscribed, was laid down in the English case of Attorney General v. Hitchcock.[7] The Court there said:

> [I]f the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such a connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him. . . .[8]

Although some courts have held that this test limits the area of contradiction to matter which a party might have introduced as part of his case, most courts using the test have agreed with Wigmore that it was also meant to include contradiction on matter independently admissible to show bias, corruption, interest, or the like in the witness.[9] Both majority and dissenting opinions take the view that under this test contradictory testimony showing that Sallie Jackson had made the statement in question would not be admissible. They agree that the prejudicial effect of the statement would prevent it from being independently admissible.

The majority opinion, however, adopts a further test under which this evidence is admissible. This test, propounded by McCormick in his work on evidence, allows contradiction of:

> [A]ny part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true. . . .[10]

This is further defined by the majority opinion in the principal case as allowing contradiction by testimony which:

> [B]ear[s] upon the story of a witness with such force and directness as to give it appreciable value in determining whether or not that story is true. . . .[11]

or which "pull[s] out the linchpin of the story"[12]—and this applies even

[7] 1 Exch. 91 (1847).
[8] Id. at 99.
[9] Wigmore, note 1, supra, 693-700.
[10] McCormick, note 2, supra, 102.
[11] Note 5, supra, at 894.
[12] Id. at 895.

though the matter contradicted is not independently admissible. In applying this test to the principal case, the majority concluded that Sallie Jackson's prior inconsistent statement, though not independently admissible, was admissible to "pull the linchpin" out of her story of self-defense.

Clearly, the *Jackson* case introduces into Kentucky law two tests for collateralness not heretofore used. However it is the contention of the writer that at least one, and probably both, of these tests were unnecessary in deciding the principal case. The reason is that the Court mistakenly directed its attention to the material to be introduced —the prior inconsistent statement—rather than the matter already before the court. The basic rule with which we are concerned is not so stated or intended; it does not prohibit the introduction of collateral matter but rather introduction of contradictory matter *on a collateral point.*[13] Viewed from this angle, solution of the problem in the *Jackson* case is relatively simple. From examination of the circumstances of the case it is apparent that Sallie Jackson's testimony was not at all collateral but actually relevant to the *main* issue—self defense. Her earlier out-of-court statement, if true, was clearly inconsistent with such a story. It was, therefore, fundmentally sound to allow testimony to prove that such a contradictory statement was made, and the linchpin test was not necessary to reach that result.

At this point, the anomaly previously mentioned is apparent. The case accepts two tests, the Hitchcock-Wigmore test and McCormick's linchpin test. The Hitchcock-Wigmore test, in reality no more than a restatement of the basic rule, was not considered sufficient to solve the problem. Instead, it was decided by use of the linchpin test; and this appears to be the most significant change wrought by the case. This very change, however, created the anomaly of a case adopting a proposition for which its bare holding cannot be considered authority. The reason for it is this: The linchpin test is intended to operate only when contradiction, by most tests, would be considered to be on collateral matter. It is allowed if contradiction, even though on a collateral point, serves to discredit the witness's entire story. In the principal case, however, recourse to the linchpin test was unnecessary, since, as has been shown, the contradiction was on a material point and, hence, allowable by any test. The holding of the case, therefore,

[13] 3 Wigmore, Evidence 657: ". . . *no contradiction,* we are told, *shall be permitted on collateral matters.*" 58 Am. Jur. 432: "If a statement of fact collateral to the issue is drawn from a witness upon cross-examination, the party eliciting the testimony cannot contradict it." And even the principal case states, "It is generally recognized that a witness may not be impeached with respect to a matter which is irrelevant and collateral to the issues in the action."

constitutes no departure from earlier Kentucky decisions supporting the basic rule. As a result, adoption of the linchpin test by the Court's opinion is superfluous and confusing.

As an aid in clarification, the writer offers two suggestions. *First: The linchpin test should be rejected.* This test was adopted by the Court only when the normal avenues of admission were overlooked and its acceptance seemed necessary to reach what was, to the majority of the Court, obviously a just and logical result. It is doubtful that the Court, already split on the proposition, would ever accept the test in all its ramifications, for it is very broad in scope and elastic in operation.

An example of the extremes to which the linchpin test can run is found in *Gulf, C. and S.F. Ry. Co.* v. *Matthews*,[14] a Texas case cited by both McCormick and the principal case. There, the plaintiff sought to recover from the railroad for the wrongful death of her husband whose body had been found on the defendant's tracks. Since there were no witnesses to the accident the question of the deceased's condition, drunk or sober, became an important point in the determination of negligence and contributory negligence. To support her contention that deceased had been sober at the time of the accident and thus, more likely than not, exercising due care, plaintiff introduced Andrews, a hotel night clerk. Andrews testified that a man named Matthews, answering deceased's description, had occupied a room in his hotel the night of the accident, leaving at about six in the morning, quite sober. On cross-examination, Andrews further stated that he had told only one person, a man by the name of Wilkinson, of this incident prior to his examination as a witness. To impeach this testimony, the defense showed that Andrews thought Wilkinson to be dead, and then introduced Wilkinson who denied that Andrews had ever told him anything about Matthews.

The Supreme Court of Texas, like the Kentucky Court in the *Jackson* case, directed its attention to the material to be introduced. They held that it was admissible, considering the prior silence of the witness to be relevant in view of the extensive publicity given the case. The opinion said:

> When the existence of facts material to a plaintiff's case are put in issue by the defense, the truth of the testimony of witnesses to those facts is also put in issue; and evidence which has a tendency to show the untruth of such testimony is as relevant to the issues as testimony of other witnesses denying that the facts exist.[15]

[14] 100 Tex. 63, 93 SW 1068 (1906).
[15] Id. at 1070.

This statement, together with the holding of the case, could easily be construed to mean that Texas will admit any contradictory evidence which indicates that a witness is lying. It seems to say that credibility, always in issue, may be tested on any point in the testimony of a material witness. When attention is directed to the material here sought to be contradicted, the inadvisability of this is apparent. Of what consequence is it to a disposition of the case that the witness had told his story to no one but Wilkinson. Virtually none! To contradict it fails to put any material point in doubt, or even to substantially impair the credibility of the witness. If Kentucky means to adopt a test as broad as this, it means to permit almost unlimited contradiction. This could make the settlement of a particular case practically impossible with a never-ending trial of the witnesses overshadowing completely the major issues.

Another case used by McCormick to exemplify his test is *East Tennessee, V. & G. Ry. Co.* v. *Daniel.*[16] Daniel was suing the railroad company for damages for the killing of his mule. Evidence was generally circumstantial except for the testimony of one Lofton, who claimed to have seen the train strike the mule. Upon cross-examination it developed that the witness was at the scene of the accident by virtue of having gone to town to buy some tobacco at a certain store; on his way home from making the purchase he saw the accident. The defendant offered to prove by testimony of the proprietor of the store that Lofton had not been in his store at the time stated. The Georgia Court allowed the contradiction, saying:

> While the fact which the witness proposed to prove by Copeland was not directly material on the circumstances of the killing, it was indirectly material because it contradicted the witness as to the train of events which led him to be present, and thus tended to discredit him as to the fact of his presence.[17]

Once again, contradiction is allowed on a point collateral to the issues. It was not shown that the primary witness was not at the scene of the accident, nor that he did not go to town at the time stated, nor even that he did not buy tobacco, but only that he may not have bought tobacco at the particular store named. Many possibilities still remain to explain his presence at the scene of the accident, each of which would have to be discounted in order to negative his story. This is exactly the sort of thing sought to be prevented by the basic rule against contradiction on collateral matters—a "trial" of the witnesses which can result only in confusion of the jury and a prolongation of the trial.

[16] 91 Ga. 768, 18 SE 22 (1893). [17] Ibid.

In a third case cited by McCormick, *Stephens* v. *People*,[18] similar objections apply. Stephens was on trial for the murder of his wife by arsenic poisoning. Evidence had been introduced to show that the accused or his brother-in-law, while they were together, purchased a quantity of arsenic. Witnesses for the defendant, called to explain away this purchase, testified that the poison had been used to exterminate rats which infested a cellar where provisions were stored. Prosecution sought to contradict this testimony by showing that no provisions were kept in the cellar. The contradiction was allowed, the point being called "not strictly collateral". Here again the contradiction fails to accomplish any purpose, except to show that one witness is lying. And to what end? If there were, in fact, no provisions kept in the cellar, certainly this alone would not prove that no rats existed there. And so long as the possibility remains that there were rats in the basement, the possibility also remains that it was for their extermination that the arsenic was purchased. The story told by the primary witness thus remains essentially intact, just as it did in each of the two preceding cases. In such a situation, then, why permit the contradiction? It accomplishes little, except to confuse the jury, because it is on a point not material to the issues in the case, a collateral point.

Second: A new test should replace the two used in the Jackson case. That test is: If the matter to be contradicted is such that a timely objection to its relevancy should have been sustained, it is collateral, and contradiction may not be allowed. This test accomplishes two things. In the first place, it limits the area of allowable contradiction roughly to that encompassed by the Wigmore test. As pointed out in the discussion of cases supporting the linchpin test, restriction of contradiction to material points is necessary if the contradiction is to be meaningful. And secondly, the proposed test directs attention to the matter to be contradicted and away from the matter sought to be introduced. This is a primary concern. The testimony to be introduced is brought in for a limited purpose only, to impeach the witness. Whether it is independently admissible or not is of little concern so long as it, in fact, contradicts a portion of the witness's story which is material to the case.

And finally, the test is stated in familiar terms. Determination of relevancy is a common task, both for the lawyer and the judge. Using this as a basis for a test of collateralness reduces the lawyer's job of predicting and the judge's task of deciding. They are governed by the familiar, certain rules pertaining to relevancy.

[18] 19 N.Y. 549, 572 (1859).

Applied to the cases discussed herein, the proposed test comes to what the writer considers a reasonable result in each case. In the *Jackson* case the point to be contradicted was Sallie's testimony on the issue of self-defense. Since the principal defense of the accused was self-defense, it could hardly be argued that this was not relevant. Contradiction was, therefore, properly allowed.

In the other three cases, the application of the test reaches a different result. The statement to be contradicted in the *Matthews* case, for instance, was that the witness had told his story to someone else, prior to his testifying in court. This is hardly relevant to the fundamental issue of negligence, or, as pointed out, to the ever-present issue of the witness's credibility. Having once determined this, it follows that contradiction should not have been allowed, the point being a collateral one. Similarly, in the *Daniels* case the cross-examiner sought to contradict the primary witness on a point which helped to explain his presence at the scene of the accident. Actually, the point was only one in a series of events leading to the witness's presence. Objection to its relevancy would most certainly have been sustained, since it was hardly material to the witness's testimony. It was, therefore, a collateral point. In the *Stephens* case, proof that defendant was in possession of arsenic was highly relevant, as was the defendant's attempt to explain this away. But it was not necessary to his story nor relevant to this issue that provisions were kept in the basement. Although this might have explained the presence of rats, it was actually collateral to the main issues—those surrounding the killing.

J. Leland Brewster