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Reputation of a Witness for Truth and Veracity in Civil and Criminal Cases

Robert M. Curley

REPUTATION OF A WITNESS FOR TRUTH AND VERACITY IN CIVIL AND CRIMINAL CASES*

ROBERT M. CURLEY**

A witness undertaking to testify in an action before a Wisconsin court, whether the action be civil or criminal, and whether the person testifying be party in a civil action, accused in a criminal prosecution, or ordinary witness, lays himself open to an attack by the adverse party on his general reputation for truth and veracity in the community in which he lives.

The theory behind the rule is fundamental: In the fact-finding process, it is essential that courts and juries be able to repose absolute trust in the integrity of those relating those facts. The practice of testing that integrity by permitting a showing of a bad reputation for truth gives courts and juries what is perhaps the best possible yardstick for gauging the integrity of a witness—the general feeling of his neighbors and associates as to his reputation for truth-telling.[1]

Wisconsin, along with the majority of the states, permits a witness to be impeached as to his general reputation for *truth and veracity* only, and not as to his bad moral character in general. This question was settled in *Wilson v. Young*,[2] an action for assault and battery. Young was attempting to execute a writ of restitution, and in the process he attempted to remove a washing machine, on top of which the plaintiff, Wilson, was securely enthroned. Wilson rose up in anger, wielding a length of chain, and in the ensuing altercation, Young shot him in the cheek. In the subsequent assault and battery action, a witness testified that the shot was fired in malice.

Attempting to impeach this witness, counsel called an impeaching witness who was questioned about the witness' general character. The court held that a witness may be impeached only by his general reputation for truth and veracity. It was held that a witness, in testifying, puts in issue, in a certain sense, his character for truth and veracity. The party producing the witness must, therefore, be prepared to sustain that reputation under attack.

It would be unreasonable, however, to require him to be prepared to sustain character by disproving allegations which, in an infinite vari-

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** Circuit Judge, Milwaukee, Wisconsin. Prepared in collaboration with George D. Simos, Marquette Law School.

[1] See Wilson v. State, 3 Wis. 698 (1854).

[2] 31 Wis. 574 (1872).

ety of forms, may tend to discredit the general moral character of the witness. The court rejected the theory that a single vice possessed by the witness contaminates his whole moral character, pointing out the absurdity of such a theory by stating that if it were followed a sabbath breaker could be considered necessarily a liar; a profane person a thief; or it could be inferred that an avaricious person was, as a matter of course, also unchaste.

To prove the bad reputation for truth of a witness by using an impeaching witness, a proper foundation must be laid. The general sequence of questioning follows this pattern:

The impeaching witness is asked whether he knows the general reputation for truth and veracity of the witness in his neighborhood; whether it is good or bad; and if he answers that it is bad, whether, from his knowledge of that reputation, he would believe the witness under oath.

Some few states, primarily confined to the south and southwest, permit questioning to be directed to the issue of the witness' general moral character, while some apparently do not permit the third question: Whether the impeaching witness would believe him under oath.[3]

Wisconsin joined the ranks of those states permitting this question to be asked in 1854.[4] Defendants in that case were convicted of rioting. The trial court had excluded a question put by defendants' counsel to an impeaching witness as to whether he would believe the witness under oath. The impeaching witness had testified that he had known the witness sought to be impeached for sixteen years, was acquainted with the neighborhood in which he lived, and knew that his general reputation for truth and veracity among his neighbors and acquaintances was bad.

Using some colorful language, the court held the question should have been permitted. "When the source is polluted, the stream cannot be pure," the court declared, and added that to allow the impeaching witness to testify he would not believe him under oath, informs the jury as to the degree of reliance which persons acquainted with the impeached witness would place upon his sworn statements. "What better or more convincing evidence of a man's utter unfitness to testify or speak the truth in a matter concerning the lives, liberties or properties of his neighbors can be produced than the solemn statement of those who know him, that they would not believe him upon his oath?"[5]

The court answered the contention that a statement of such a belief could be only opinion of the impeaching witness and therefore should be excluded by holding that instead of an opinion such an expression of belief is a statement of conviction produced by the impeached witness'

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[3] See 58 Am. Jur. *Witnesses* §730 (1948).
[4] *Supra* note 1.
[5] *Id.* at 701.

common reputation, and that the belief may be founded upon general reputation only, and not, for example, upon specific acts of the witness.

Obviously, an impeaching witness may testify only as to his personal knowledge of the reputation for truth of the witness sought to be impeached. This principle was illustrated clearly in *Cullen v. Hanisch.*[6]

In attempting to impeach the plaintiff, who testified in his own behalf, defendant's counsel asked an impeaching witness whether at a previous trial in which plaintiff was a party, eighteen witnesses were present who stated they would not believe the plaintiff under oath. The court treated this question summarily, stating that to permit this form of questioning would be to admit the merest hearsay.

While the foundation for the introduction of evidence bearing on the impeached witness' general reputation for truth and veracity in his community need not go beyond asking the sequence of questions previously listed, the scope of cross-examination, in testing the source and extent of the impeaching witness' knowledge of the reputation, is broad.[7]

For example, cross-examination may extend to his opportunity for knowing the reputation of the witness, the length of time, the generality of the unfavorable reports, the persons from whom he heard them, whether he has also heard conflicting statements that the witness is truthful and whether he has heard reports of other constituent elements of a good moral character which might tend to color his belief on the witness' reputation for truth; as, for example, whether he has heard the witness had been arrested for a crime.[8]

The most recent case in Wisconsin involving impeachment of a witness' reputation for truth and veracity by means of an impeaching witness is *State v. Baker.*[9]

Defendant was convicted in the trial court of indecent behavior with a minor.[10] The only evidence of guilt presented by the prosecution was the uncorroborated testimony of the fifteen-year-old cooperating minor, with successful prosecution of the case, therefore, hinging solely on the jury's belief of the boy's story.

The defendant called a minister who was a former teacher of the boy, and asked if he knew what was the boy's reputation for truth and veracity in the community. The question was excluded on objection, with the trial court giving defendant's counsel time during a recess to come up with some authority for his position. None was forthcoming, and the objection stood. The court stated that when the trial court permitted the state to shut out evidence bearing on the boy's reputation for truthfulness, under the circumstances of the trial, it was an error going

[6] 114 Wis. 24, 89 N.W. 900 (1902).
[7] See Duffy v. Radke, 138 Wis. 38, 119 N.W. 811 (1902).
[8] See 58 Am. Jur. *Witnesses* §732 (1948).
[9] 16 Wis. (2d) 364, 114 N.W. (2d) 426 (1962).
[10] Wis. Stat. §944.11(3) (1961).

to the heart of defendant's guilt or innocence. The jury should have been permitted to hear evidence of the boy's reputation for truth in his community.

The case is perhaps the clearest statement by the court that trial court error relating to evidence tending to impeach the reputation of the witness may be grounds for reversal. In view of the wide discretion exercised by the trial courts in this area, many of the previous statements were either painstakingly qualified by pointing out that reversal was called for on other grounds or were mere expressions of disapproval of a trial court ruling which was found not to be an abuse of discretion.

Once the reputation of a witness for truth and veracity has been attacked in impeachment, the party producing the witness may rehabilitate or bolster that reputation by introducing evidence of his own that the witness' reputation was good.

In *State v. Wrosch*,[11] Mrs. Wrosch was charged with the murder of her husband. He died in August of 1949, with the death certificate listing cancer as the cause of death. Acting on some unspecified information, the body was exhumed, and an autopsy showed a high concentration of lead arsenate, an easily procured plant spray, in his body.

At the trial, one Mrs. Pederson testified that in the course of a discussion of Mrs. Pederson's marital difficulties, Mrs. Wrosch had told her to get rid of him in the same way that she, Mrs. Wrosch, had got rid of hers; by giving him enough arsenic to kill an ox.

The defendant called five witnesses who testified that Mrs. Pederson's reputation for truth and veracity was bad. In rebuttal the State produced five who testified it was good, but three of these stated that their testimony was based on their own information and not on what others had told them.

The court, on appeal, agreed with defendant in principle that while testimony attacking the reputation of a witness for truth and veracity may be counteracted by testimony that the reputation is good, the inquiry on either side is ordinarily limited to general reputation and not mere opinion.

Illustrating the attitude of the supreme court toward trial court discretion in this area, the court stated that while the defective rehabilitating testimony might have been stricken, it will not find an abuse of the trial court's discretion, particularly since the effect of the testimony could not have been prejudicial. The key, then, to whether error will be found to constitute grounds for reversal is whether under the circumstances of the case the error was prejudicial.

In the *Baker* case, where the testimony of only one witness convicted the defendant of a disgusting and disgraceful crime, the error

[11] 262 Wis. 104, 53 N.W. (2d) 779 (1952).

was obviously prejudicial. In the *Wrosch* case, where ample evidence of guilt existed, though much of it was circumstantial, any question as to the reputation of the witness for truth and veracity was at best academic.

When the reputation of the witness for truthfulness is not put under attack by the adverse party, no reputation evidence tending to bolster his testimony may be admitted. The rule was well stated in *Johnson v. State*:[12] ". . . it is quite elementary that a witness is not to be supported by proof of his having a good reputation for truth and veracity till his reputation in that regard shall have been directly attacked. That rule is the logical result of the other one that the law presumes every person to be reputed truthful till evidence shall have been produced to the contrary . . .," and to attempt to establish the witness' reputation, which needs no support other than the legal presumption, is a useless act.

As witnesses cannot be called expressly to testify to the good reputation of one whose reputation has not been attacked, neither may witnesses being questioned directly as to the merits be incidentally asked about that reputation.

In *Volk v. Flatz*,[13] an action to recover unpaid salary in which the weight to be given to plaintiff's testimony by the jury was of crucial importance, just such a strategem was attempted by plaintiff's counsel. The court held, simply, that as the defendant had never offered testimony on the subject of plaintiff's reputation, the door had not been opened for plaintiff's introduction of such testimony.

Even though cross-examination of a party who testifies in his own behalf may be extensive, searching and penetrating, to the extent of casting doubt on the accuracy or truthfulness of his testimony, that party may not offer testimony as to his good reputation to dispel the effects of the cross-examination.

The principle was established in *McCauley v. Balsley*,[14] an action for personal injuries suffered when the plaintiff's car collided with a street car in Milwaukee.

After the plaintiff's testimony as to her sufferings was bitingly scrutinized in cross-examination, the trial court permitted her pastor to support her testimony by stating that her reputation for truth and veracity was good, and that he would believe her under oath.

The court held that the minister's testimony should not have been admitted, since there had been no direct attack on her character through impeachment. It was stated that even though searching cross-examination may have developed doubt as to her testimony, each witness must be his own support of his veracity until there has been an effort to

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[12] 129 Wis. 146 at 154, 108 N.W. 55 at 58 (1906).
[13] 206 Wis. 270, 239 N.W. 424 (1931).
[14] 242 Wis. 528, 8 N.W. (2d) 299 (1943).

impeach his character, and that the accuracy of the witness' statements is to be tested by her presence and testimony at trial.

As a final principle governing impeachment of witnesses by testimony as to their general reputation for truth and veracity, it should be pointed out that one may not impeach his own witness through the use of such reputation evidence.

In *Collins v. Hoehle*,[15] the court pointed out that the impeaching party had called the witness voluntarily, without any obligation to do so, thus implying that one who calls a witness without knowing what she is going to say should generally suffer the consequences in stern and noble, if painful, silence. The rule was stated that while a party may show that testimony of his own witness is false in a material matter, he may not impeach the witness by direct testimony, either of his bad reputation for veracity, or by the introduction of prior inconsistent statements.

The above statements apply with equal generality to civil and criminal actions alike when a witness is sought to be impeached as to his truthful repute through the use of an impeaching witness.

In cross-examination, however, a significantly broader field of inquiry is allowed counsel, who may attack the credibility of the witness with questions concerning past misconduct having a bearing on veracity. Perhaps the widest discretion in the general area of credibility and veracity of witnesses is exercised by the trial judges in this specific field of cross-examination as to past acts of misconduct.

In contrast to the scope of inquiry permitted when an impeached witness is utilized, counsel may ask about specific acts of misconduct. The requirement that these acts must have some bearing on the witness' character for veracity was established in *Dungan v. State*,[16] which also clearly illustrates the extent of the trial judge's discretion in allowing this type of cross-examination.

The family involved in that case could hardly be called pillars of the church or leaders of the community's aspirations for a better moral environment; the defendant, who was convicted of assault with intent to rape his minor stepdaughter, was a long-time operator of bawdy houses in Chicago and Milwaukee, and his wife, the complainant's mother, was a veteran prostitute.

During the trial, the State on cross-examination propounded three categories of questions: the first tending to insinuate that the defendant had conducted or lived in houses of prostitution; the second that his wife was a prostitute, and the third that the parties lived in a house of prostitution at the time the offense was committed.

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[15] 99 Wis. 639, 75 N.W. 416 (1898).
[16] 135 Wis. 151, 115 N.W. 350 (1908).

Defendant contended on appeal that all three classes of questions should not have been admitted. The court stated that evidence of disgraceful, immoral or criminal conduct of the accused unconnected with the crime charged is wholly inadmissible on the issue of guilt, because the jury may not infer from evidence of general bad character or specific misconduct that the accused committed the crime charged. Since it is practically impossible to prevent such an inference once such evidence has been given, the trial court must suppress such questioning with whatever explanation to the jury is required to remove its ill effects, or reversal is called for.

The accused, however, is not only the defendant, but a witness, once he chooses to testify in his own behalf, and he is, therefore, subject to the same rules as other witnesses as to cross-examination which may impair his credibility. It was held that a witness may be questioned on the morality of his past life, on the assumption that immorality may have a bearing on his character for veracity, but such information is relevant to the question of veracity only. The rule possesses wide possibility of abuse by counsel, and when any attorney goes so far as to outrage the feelings and reputation of the witness, with the resulting embarrassment of the courts because of the understandable reluctance of witnesses to subject themselves to insult and ridicule, the trial court must protect both the witness and the forum from being debased into an area of mere scandal. CROSS EXAMINATION TO ASCERTAIN THE CHARACTER FOR VERACITY OF WITNESSES, THEREFORE, MAY SAFELY BE LEFT TO THE DISCRETION OF THE TRIAL JUDGES.

In testing the specific questions involved in the *Dungan* case by the standards set out, it was held that while whether a witness has in the past conducted a disreputable business ordinarily bears only slightly upon his character for veracity, the court refused to say that to permit the questioning was an abuse of the broad discretion vested in the trial judges.

Questions as to the wife's career in prostitution, however, could under no stretch of the imagination be relevant to the veracity of the accused, and the court reversed the conviction on this ground.

The contrast between the narrow limitations on impeachment evidence bearing on reputation for truth and the almost all-encompassing field of inquiry allowed in cross-examination is well illustrated by comparing the *Dungan* case with *Robinson v. State*,[17] a prosecution for statutory rape.

Defendant introduced evidence of good character of himself and as to the respectable character of his business, a candy and variety store (such evidence is relevant to the claimed innocence of the accused; the

[17] 143 Wis. 205, 126 N.W. 750 (1910).

charge in itself is an attack on his character justifying use of character evidence).

In rebuttal the state offered evidence of defendant's past history of libidinous acts and lewd suggestions with and to girls and young women who patronized his store. The state's justification on appeal was that this evidence of specific immoral acts went to refute the defendant's character evidence. The court stated the rule, in contrast to what may be elicited on cross-examination, that such refutation must consist of proof of general reputation, and that specific acts are not admissible. The evidence was held properly admitted, however, on another ground.

To further illustrate that the supreme court on appeal will not lightly find that the trial judge has abused his discretion in the control of cross-examination, refer to the *State v. Nergaard,*[18] a prosecution for violation of fish and game laws by taking and transporting illegal amounts of fish.

After the defendant testified in his own behalf, he was asked on cross-examination whether it was true that while in business in another city he had been under constant surveillance by state officers who on occasion took fish from his possession. The court agreed with defendant's argument that even under the considerable discretion of the trial courts, questions regarding previous *supposed* (as distinguished from convictions) crimes were not allowed. However, it was held that "it has been wisely deemed that both court and jury are entitled to know the manner of life of the witness to a reasonable extent—where he has been and what have been his occupations, and the circumstances under which he has lived."

"We are unable to say that there was any abuse of discretion in this respect in the present case."[19]

The question of what constitutes past misconduct bearing on character for veracity was raised in *Ketchingman v. State.*[20]

The case involved a prosecution for adultery, instituted by complaint of the husband of one Caroline White, defendant's long-time inamorata and the other party whose presence was, of course, necessary to the perpetration of the crime. Mrs. White, who was understandably the sole witness to the illegal acts complained of, was the prosecution's chief witness. On cross-examination defendant's counsel questioned her at tedious and repetitious length as to times, places and circumstances under which the forbidden act was committed. Recognizing that the previous unchastity of the complaining witness is a proper subject for cross-examination in cases involving sexual offenses, the court upheld the validity of this line of questioning. But when counsel asked Mrs. White

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[18] 124 Wis. 414, 102 N.W. 899 (1905).
[19] *Id.* at 423.
[20] 6 Wis. 417 (1857).

whether defendant or anyone else had ever produced an abortion upon her, he went too far. The question was irrelevant and properly overruled, since it had no reference to the fact of adultery, the matter in issue.

Mrs. White had definitively established the limits of her chastity with her own admissions, and evidence to impeach the character of a witness is commonly confined to his general character for veracity. The dissent pointed out that the case presented a situation fraught with peril to defendants who could too easily be victims of well-planned conspiracies perpetrated by "injured" husbands and dissolute wives.

The dissent stated that the case presented ". . . the disgusting spectacle of the husband becoming the prosecutor of the defendant for adultery with his wife, and calling upon the wife, the sole witness . . . to sustain the prosecution."[21] To guard against this danger, the dissent urged that cross-examination should not be too critically circumscribed in these circumstances.

To conclude this section it should be pointed out that one cannot do indirectly through cross-examination, despite its broad scope, what he could not do directly through impeachment of the witness' reputation for truth through an impeaching witness.

This principle was stated in *Cullen v. Hanisch*,[22] in which counsel asked plaintiff on cross-examination whether at his divorce trial some years before six witnesses had testified that his reputation for veracity was bad and that they would not believe him under oath. The practice was struck down as calling for a hearsay statement and not a proper way of impeaching a plaintiff as a witness in his own behalf.

MORAL: Find your own testators as to the witness' penchant for exaggeration and myth-making; don't rely on those someone else used at another time, another place.

A final method of affecting the credibility of a witness, or accused in a criminal trial, whether he testifies or not, is by proving a previous conviction of a crime. The right is created by statute as a corollary of the law making a convict a competent witness, removing his common-law disability.[23] The question of what constitutes a "conviction of a criminal offense" has created some problems in definition.

In *Farrell v. Phillips*,[24] for example, an action for malicious prosecution, the luckless defendant was asked on cross-examination whether he had not been convicted and fined for contempt of court some twelve years previously for taking a juryman in an action to which he was a party on a fun outing in a house of ill fame. Defendant was naturally reluctant to admit that the friendly night out took place in a bawdy

[21] *Id.* at 424.
[22] 114 Wis. 24, 89 N.W. 900 (1902).
[23] Wis. Stat. §325.19 (1961).
[24] 140 Wis. 611, 123 N.W. 117 (1909).

house, whereupon counsel for plaintiff proceeded to read into the record all of the proceedings in the contempt action, from complaint to judgment.

The court reversed a plaintiff's judgment on this basis, holding that a conviction for contempt of court, whether civil or criminal, is not a conviction of a criminal offense which may be proved to affect the witness' credibility. Even if it were, the court continued, the proof should consist only of the record of the conviction or judgment, and not the full record of the case.

Finally, on the alternative question of whether the procedure should have been permitted as an exercise of the cross-examination right of inquiry into the witness' previous life, habits and occupations in order to throw light on his veracity, the court held that this right did not extend to a single, isolated act of contempt of court, committed twelve years prior, and that furthermore, the fact of the conviction's remoteness in time alone should bar its admission.

As the *Farrell* case indicated, the method of proving the prior conviction is rather rigidly confined. This fact was further illustrated in *Cullen v. Hanisch,*[25] in which plaintiff on cross-examination was asked whether he had ever spent time in jail. It was held that the question was properly excluded, since plaintiff was not asked whether he had ever been convicted of any criminal offense, and the statute authorizes only proof of such conviction as going to affect the witness' credibility.

A final aspect of the statutory right to prove prior convictions is the inherent right of the witness to explain the conviction or rehabilitate his credibility. *Rice v. State,*[26] was a prosecution for taking indecent liberties with a minor female.

In the course of the trial the defendant was asked by the district attorney if he had ever been convicted of a crime. The next question related to the nature of the crime for which he had been convicted, and when defendant launched an explanation of the circumstances, the trial court cut him off and asked what he had been charged with. The court reversed, stating that where such evidence of the nature of a former conviction is admitted, the defendant must be allowed to make a general explanation. In ordering a new trial, the court noted that even such a general explanation would not have relieved the prejudice in this case, particularly because of the emphasis given the conviction by the judge's questions to the accused.

When proof of a former conviction is admitted, the witness has the right to introduce witnesses to testify to his good reputation for truth and veracity. In *Kralmer v. State,*[27] defendant testified on cross-exami-

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[25] *Supra* note 22.
[26] 195 Wis. 181, 217 N.W. 697 (1928).
[27] 117 Wis. 350, 93 N.W. 1072 (1903).

nation that he had been convicted of horse thievery in Indiana and spent eighteen months in prison. He subsequently called a reputation witness, but the testimony was excluded on the state's objection. The state contended that the evidence was inadmissible because the defendant's reputation for truth and veracity had not been attacked.

The court, however, held that the statute permitting proof of prior convictions exists simply for the purpose of affecting credibility; in other words, to impeach the witness. "It is simply a method of impeaching for truth and veracity,"[28] and when a witness is impeached, whether by reputation witnesses or proof of former conviction, witnesses may be introduced to testify to his good character.

The court's interpretation of the statute makes it obvious that, for defendant's counsel in a criminal proceeding, at any rate, valor for once takes precedence over discretion. It would seem that the better practice would be to have the defendant-witness make a simple recital of the *fact* of his previous convictions on direct-examination, thus limiting the prosecution's scope of inquiry on cross-examination and precluding the admission into evidence of specific facts showing the nature and circumstances of the previous convictions, facts which, by their very nature, tend to prejudice the jury against the defendant.

This, however, is solely a question of tactics of counsel; one area in which the trial court's discretion does not operate to guide a course of action. The rule that the prosecution may not inquire into the nature of the prior conviction when the defendant has testified that he has been previously convicted on direct-examination was expressed in *State v. Adams*.[29]

The *Adams* case does not in terms make this rule applicable to civil actions in which the wrongdoer is a party, and Judge Neelan, in a paper prepared for our Summer Conference, expressed the possibility that the court may limit the *Adams* Rule to state cases. In fact, Judge Neelan states that the trial court itself could so rule.

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[28] *Id.* at 353.
[29] 257 Wis. 433, 43 N.W. (2d) 446 (1950).