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IMPEACHMENT AND REHABILITATION OF WITNESSES
IN MINNESOTA

While the law of impeachment is in many respects well settled and uniform throughout the country there are areas in which the Minnesota law is as yet unsettled or in which it differs from that of other jurisdictions. There are also areas in which revision of the present law seems necessary, especially in view of the modern tendency of the courts to admit all evidence having probative value unless it should be excluded on clear grounds of policy.\(^1\) It is the purpose of this Note to examine and evaluate the Minnesota law on this subject with these views in mind.

\(^1\) Kauffman, *Impeachment and Rehabilitation of Witnesses in Maryland*, 7 Md. L. Rev. 118 (1943).
NOTES

I. BIAS, INTEREST AND CORRUPTION

A. Bias

Evidence of the bias of a witness is always admissible and may be offered by cross-examination or by extrinsic evidence. Bias includes both prejudice for and hostility against a party and is in many cases an effective means of impeachment since it shows a motive or reason why the witness could be lying. As stated by Wigmore, the range of circumstances from which bias may be inferred is infinite; some of the more common examples are: a prior lawsuit between a witness and a party, a statement of a witness indicating a desire to see the opponent defeated, and facts indicating an attitude of vengeance or jealousy of the witness against a party.

The first difficulty that arises in attempting to show bias is the question of the admissibility of facts from which bias can be inferred but which do not necessarily establish such bias. While the Minnesota decisions are in some conflict, the principle seems clear that the problem should be reduced to a consideration of whether the evidence offered is too remote to show a probable bias and should be left largely to the discretion of the trial court.

The question arises whether the cause and details of the bias may be shown. It is necessary to distinguish between situations where the inquiry is made on cross-examination by the party showing the bias and where it is made on redirect examination to rehabilitate the witness. In the former case the cause and details of the bias may be elicited to show the nature and elicited to show the

2. 3 Wigmore, Evidence § 948 (3d ed. 1940).
3. 3 id. § 950.
5. See Goss v. Goss, 102 Minn. 346, 113 N. W. 690 (1907).
7. The rule of the earlier cases was that only facts such as threats and quarrels which directly tend to establish bias could be shown, but not facts from which only the inference of bias could be drawn. Wischstadt v. Wischstadt, 47 Minn. 358, 50 N. W. 225 (1891) (admission of evidence of pending lawsuit by plaintiff against witness held error); see State v. Bilansky, 3 Minn. 246 (169), 260-261 (179-180) (1859) (facts tending to show that the witness and the defendant shared the affections of the same man and that therefore jealousy existed properly excluded). The rule has since been extended, however. E.g., State v. Elijah, 206 Minn. 619, 289 N. W. 575 (1940) (illicit relationship of party and witness admissible); Timm v. Schneider, 203 Minn. 1, 279 N. W. 754 (1938) (evidence of former lawsuit admissible); but see State v. Hurst, 153 Minn. 525, 193 N. W. 680 (1922) (extended evidence of membership of witness in opposing faction of labor strike properly excluded since collateral); State v. Hartung, 141 Minn. 207, 169 N. W. 712 (1918) (evidence of minor argument excluded since on immaterial matter).
8. 3 Wigmore, Evidence § 949.
nature and extent of the hostility. In the latter case the witness should be allowed to show that the hostility does not exist but should not be allowed to show that it exists but was justified by the opponent's conduct since this would tend to confuse the issues and might unduly prejudice the character of the witness or his opponent.

The question of whether it is necessary to lay the foundation usually required for a prior inconsistent statement when the former utterance shows bias remains unsettled in Minnesota. Wigmore's position is that from considerations of fairness the attention of the witness should be directed to the former statement before extrinsic evidence is introduced but he states that since the rule requiring such foundation has been so frequently abused by courts it should not be extended to a field where it is not required by precedent.

B. Interest

At early common law a person who had a pecuniary interest in the outcome of the action was precluded from appearing as a witness. This rule has long since been abolished in all jurisdictions, but while such persons may now testify, the fact of their interest may be shown to affect their credibility. Common examples of the proper showing of interest in criminal cases are evidence that immunity was promised to an accomplice who testified against the defendant and evidence that a witness for the state is a paid detective in civil cases the interest shown is usually a financial

9. State v. Dee, 14 Minn. 35 (27) (1869); 3 Wigmore, Evidence § 951. Wigmore states that the trial court should have the discretion to limit the evidence, however.


11. See note 25 infra and text thereto.

12. The point was raised, but not decided in State v. Dee, 14 Minn. 35 (27), 40 (31) (1869), and left expressly open in Goss v. Goss, 102 Minn. 346, 350, 113 N. W. 690, 692 (1907).

13. 3 Wigmore, Evidence § 953.


15. Minn. Stat. § 595.02 (1949). See 2 Wigmore, Evidence § 488. This is subject, however, to the limitation that an interested witness cannot testify to the conversations of a deceased or an insane person. Minn. Stat. § 595.04 (1949).

16. E.g., Olson v. Moorhead, 142 Minn. 267, 171 N. W. 923 (1919); State v. Tosney, 26 Minn. 262, 3 N. W. 345 (1879); see Flick v. Ellis-Hall Co., 138 Minn. 364, 367-368, 165 N. W. 135, 137 (1917).

17. State v. Madden, 161 Minn. 132, 201 N. W. 297 (1924).

stake in the outcome of the trial. If the evidence offered is relevant, the fact that such evidence does not necessarily establish interest should not preclude its admission since, if it is actually worthless for that purpose, no harm has been done by its admission.

C. Corruption

A witness may always be impeached by evidence tending to show that he is disposed to testify falsely for gain. The ordinary evidence of this includes receipt of money for testifying, an offer to testify falsely for money, and an attempt to suborn another witness. Such facts may be brought out either on cross-examination or by the introduction of extrinsic evidence.

II. PRIOR INCONSISTENT STATEMENTS

The most commonly used and probably the most effective means of discrediting a witness is by showing that he has previously made statements inconsistent with his present testimony. If the prior statement was verbal it is necessary on cross-examination to ask the witness if he has made such a statement and sufficiently direct his attention to the time, place, and circumstances, thereby giving him an opportunity to explain. While this rule has been much too rigidly applied and treated as an arbitrary requisite in many jurisdictions, the Minnesota court has taken the realistic position that,

19. Olson v. Moorhead, 142 Minn. 267, 171 N. W. 923 (1919) (attorney who testified was retained on a contingent fee); Flick v. Ellis-Hall Co., 138 Minn. 364, 165 N. W. 135 (1917) (plaintiff's husband who testified had agreement to share proceeds of action).

20. State v. Ames, 90 Minn. 183, 96 N. W. 330 (1903); State v. Lucy, 41 Minn. 60, 42 N. W. 697 (1889). The court's charge, however, should be general and not reflect on the credibility of a particular witness. State v. Hoy, 83 Minn. 286, 86 N. W. 98 (1901); Harriott v. Holmes, 77 Minn. 245, 79 N. W. 1003 (1899).

21. 3 Wigmore, Evidence § 969.

22. Alward v. Oakes, 63 Minn. 190, 65 N. W. 270 (1895); State v. Tall, 43 Minn. 273, 45 N. W. 449 (1890).

23. 3 Wigmore, Evidence § 956.

24. Alward v. Oakes, 63 Minn. 190, 65 N. W. 270 (1895); State v. Tall, 43 Minn. 273, 45 N. W. 449 (1890).

25. State v. Hoyt, 13 Minn. 132 (125) (1868); see Horton v. Chadbourne, 31 Minn. 322, 323, 17 N. W. 865, 866 (1883); Castner v. Gunther, 6 Minn. 119 (63), 134 (80) (1861).

since the reason for the rule is to preclude possible unfair surprise,\textsuperscript{27} the foundation need not be perfect so long as the witness is not misled.\textsuperscript{28}

If the prior inconsistency is contained in a document, the document must be shown or read aloud to the witness as part of the foundation. This is the rule of \textit{The Queen's Case}\textsuperscript{29} and apparently is still the law in Minnesota.\textsuperscript{30} The rule is uniformly criticized\textsuperscript{31} as being unsound both in principle and policy and serving no other function than to protect the shift and dishonest witness. The requirement of foundation should be the same whether the prior inconsistency was written or oral; that is, that the attention of the witness should be directed to the prior statement in a manner sufficient to preclude unfair surprise. It is not necessary to lay the foundation where the witness is a party since the statements may be introduced as admissions as well as to impeach.\textsuperscript{32} As stated above, the question of whether the foundation is necessary when the prior statement shows fraud or bias remains unsettled in Minnesota.

Only if the witness denies making the statement can the inconsistency be introduced,\textsuperscript{33} but this denial need not be absolute and it is sufficient if the witness does not remember making the statement.\textsuperscript{34} Neither does the degree of variance between the prior statement and the present testimony determine the admissibility. If it differs in any material respect, it may be introduced.\textsuperscript{35}

\textsuperscript{27} An additional reason that is sometimes given is that the laying of the foundation saves time since, if the witness admits the inconsistency, the matter is at an end. Maguire, \textit{Evidence} 54-55 (1947).

\textsuperscript{28} \textit{E.g.,} Newton v. Minneapolis Street Ry., 186 Minn. 439, 243 N. W. 684 (1932); \textit{State v. Jensen}, 151 Minn. 174, 186 N. W. 581 (1922); \textit{Johnson v. Young}, 127 Minn. 462, 149 N. W. 940 (1914).

\textsuperscript{29} 2 B. & B. 284, 286-290 (C.P. 1820). While the rule has been abolished in England, it is still influential in this country. See Maguire, \textit{Evidence} 56-57 (1947).


\textsuperscript{31} 4 Wigmore, \textit{Evidence} § 1260; Maguire, \textit{Evidence} 56-57 (1947); Morgan, \textit{Foreward}, Model Code of Evidence 21-22 (1942). The Model Code in rule 106(1) abolishes the rule.

\textsuperscript{32} \textit{E.g.,} Williams v. Jayne, 210 Minn. 594, 299 N. W. 893 (1941); Johnson v. Farrell, 210 Minn. 351, 298 N. W. 256 (1941); see McManus v. Nichols-Chrisholm Lumber Co., 105 Minn. 144, 147, 117 N. W. 223, 224 (1908).

\textsuperscript{33} \textit{In re Estate of Jache}, 199 Minn. 177, 271 N. W. 452 (1937). Wigmore argues that even if the witness admits making the inconsistent statement the cross-examiner should not be precluded from emphasizing the point by his own witnesses, since the purpose of the preliminary question is to warn the witness and not to prove the statement. 3 Wigmore, \textit{Evidence} § 1037.

\textsuperscript{34} \textit{Koop v. Great Northern Ry.}, 224 Minn. 286, 28 N. W. 2d 687 (1947), see \textit{State v. Nelson}, 91 Minn. 143, 148, 97 N. W. 652, 654 (1903).

\textsuperscript{35} Tinklepaugh v. Rounds, 24 Minn. 298 (1877).
statement cannot be introduced, however, if the inconsistency relates to a collateral matter. The ultimate determination of what is collateral rests within the discretion of the trial court, but the test is that the matter is collateral of the cross-examiner could not introduce it in his case in chief. The question has arisen whether the witness can be impeached on a prior statement involving his opinion rather than the underlying facts and it has been held that the opinion rule has no application in this situation since the statement is offered to impeach and not as substantive evidence.

When a witness has been impeached by the showing of a prior inconsistent statement he cannot be rehabilitated by showing prior statements consistent with his testimony. The reason usually given for this rule is that the prior consistent statements have no probative value since they do not alter the fact that the witness was inconsistent. Where the witness has denied making the inconsistent statement, however, as is usually the case, proof that he made prior statements is logically relevant to support the credibility of his denial and there seems to be no good reason for excluding them.

In Minnesota, as in most jurisdictions, an exception is recognized and prior consistent statements are allowed under the "recent contrivance" or "supervening influence" doctrine. The theory of this doctrine is that prior consistent statements are allowable to rebut an assertion that the present testimony is a recent fabrication motivated by some influence that did not exist at the time the prior consistent statement was made. This principle is illustrated in Sullivan v. Minneapolis Street Ry. a personal injury action by a passenger on a streetcar, in which the decisive issue was whether

36. E.g., State v. Marx, 139 Minn. 448, 166 N. W. 1082 (1918); Murphy v. Backer, 67 Minn. 510, 70 N. W. 799 (1897). 37. Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956 (1914); see State v. Jenkins, 171 Minn. 173, 175, 213 N. W. 923, 924 (1927). 38. Uggen v. Bazille & Partridge, 123 Minn. 97, 143 N. W. 112 (1913). 39. E.g., Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407 (1918); George Gorton Machine Co. v. Grignon, 137 Minn. 378, 163 N. W. 748 (1917); State v. La Bar, 131 Minn. 432, 155 N. W. 211 (1915). 40. Maguire, Evidence 61-62 (1947); see also Jones, Evidence § 869 (3d ed. 1924). 41. See 4 Wigmore, Evidence § 1126; Maguire, Evidence 62 (1947); McCormick, Cases on Evidence 172 n. 84 (2d ed. 1948). 42. Jones, Evidence § 870 (3d ed. 1924). 43. 161 Minn. 45, 200 N. W. 922 (1924). The recent contrivance doctrine has been recognized, but not applied on the facts in the following cases: In re Estate of Ylijarvi, 186 Minn. 288, 290-291, 243 N. W. 103, 104 (1932); State v. Jackson, 181 Minn. 68, 70, 231 N. W. 721, 722 (1930); State v. La Bar, 131 Minn. 432, 434, 155 N. W. 211, 212 (1915); cf. State v. Taran, 176 Minn. 175, 222 N. W. 906 (1929).
an emergency stop was justified. The conductor testified that the
sudden stop was made necessary by the unexpected movement of
a truck from a curb. The defendant was allowed to introduce an
emergency stop report made immediately after the accident which
in part substantiated this testimony. On appeal the admission of
the report was affirmed on the theory that plaintiff's counsel had
asserted that the testimony in respect to the truck was a false alibi
and that since the report was made before the conductor knew
that anyone was injured it could be introduced to rebut the impli-
cation of a recent contrivance. In this case, however, the witness had
not been impeached by the showing of a prior inconsistent statement
and the imputation of recent fabrication was not made until the
closing argument when the stop report had already been introduced.
The questions, therefore, of when during the course of the trial
the charge of recent fabrication must be made and, further, whether
the introduction of a prior inconsistent statements could in itself be
enough to bring the case within the exception have not been an-
swered in Minnesota. It would seem that rather than extend the
tenuous concepts of this exception the rule itself should be abolished.

III. REPUTATION FOR TRUTH AND VERACITY

The bad reputation of a witness for truth and veracity may be
shown to discredit him. While the showing of such reputation
serves a useful function in the law by calling to the attention of the
trier of fact what might otherwise be an unknown deficiency in the
witness, the effectiveness of this means of impeachment is often
questionable. A reputation for lack of truthfulness, while having
probative value and therefore being legally relevant, is yet quite
removed from establishing that the witness is testifying falsely in a
given case. The tactical considerations involved in this type of
impeachment to a degree outweigh the rules of law that attend the
problem.

The Minnesota court in State v. Palmersten has set out the
legal requirements for qualifying the impeaching witness: he must

44. McCormick indicates that attack by prior inconsistent statement al-
ways implies "recent contrivance" unless counsel disclaims it, and that con-
sistent statements made prior to the alleged inconsistencies should therefore
be admitted. McCormick, Cases on Evidence 172 n. 84 (2d ed. 1948).
45. See e.g., Buse v. Page, 32 Minn. 111, 19 N. W. 736 (1884); Rudsdill
v. Slingerland, 18 Minn. 380 (342) (1872); Simmons v. Holster, 13 Minn.
249 (233) (1868).
46. Ladd, Techniques and Theory of Character Testimony, 24 Iowa L.
Rev. 498, 534 (1939).
47. See generally Goldstein, Trial Technique §§ 612-620 (1935).
48. 210 Minn. 476, 482, 299 N. W. 669, 672 (1941).
first be asked if he is familiar with the reputation of the witness for truthfulness in the community where he resides; secondly, what that reputation is; and finally, whether from his knowledge of such reputation he would believe the witness under oath. While these three questions compose the minimum requirements of the foundation, the court did not intend thereby to limit the preliminary questioning, and this much alone would scarcely be adequate to effectively discredit a witness. Dean Ladd suggests seven additional questions to accomplish this purpose both from the tactical and the legal standpoint. 49

The ultimate opinion of the impeaching witness in respect to whether he would believe the witness under oath must be based on general community reputation, 50 and this reputation must be current. 51 The opponent's counsel is, of course, entitled to cross-

49. (The impeaching witness is referred to as $W$, and the principle witness who is to be impeached as $A$).

(1) General questions should first be asked with particular stress on how long $W$ has lived in the community, and his position in the community as indicated by his occupation and family.

(2) General questions should next be asked to show that $W$ knew $A$ personally and the length of time and place where he knew him.

(3) "Mr. $W$, have you heard remarks or comments concerning $A$ made by people generally in and about the community of $Z$ town?"

(4) "Have these remarks or comments been many or few in number?"

(5) "Were these persons members of some particular group of people? Answer. No. The remarks which I have heard came from various individuals in different occupations in the community."

(6) "Over how long a period of time have you heard comment and talk about $A$ by people generally in and about $Z$ town? Answer. For the last several years and quite recently."

(7) "Have the comments and remarks which you have heard about $A$ related to his veracity?"

These questions would then be followed by questions similar to those in the text. Question (2) is asked to identify $A$ particularly as the person at whom the comments heard by $W$ were directed, and also to identify $A$ as living in a particular place during a specified time. This question would also serve the incidental function of showing that $W$ agrees with the community reputation of $A$.

Question (3) is designed to prove that $A$ was talked about generally in the community. Question (5) is important since it establishes that the comments do not come from a limited group and may forestall cross-examination until the question sequence is completed. Question (6) serves both to show that it is a long-standing reputation and that it exists at the present time. Question (7) would of course be necessary in Minnesota since reputation for general moral character cannot be shown.


51. Exactly what constitutes "current" seems to be quite discretionary with the trial court. In State v. Bryant, 97 Minn. 8, 105 N. W. 974 (1905) evidence was properly excluded where the witness had had no knowledge for the preceding four years, but in Buse v. Page, 32 Minn. 111, 19 Minn. 736 (1884) evidence was properly admitted although that witness similarly had no knowledge for the preceding four years.
examine the witness on these qualifications before the ultimate opinion is given. The phrase "reputation in the community where the witness lives" has apparently not been construed restrictively in this jurisdiction but other states have taken the view that reputation among business associates and the like are excluded. This interpretation has been attacked as representing an obsolete mode of rural living having no justification in present society where a considerable percentage of the populace resides in large cities and has in effect no "community reputation." The rule that an opinion of a witness of another's reputation must be excluded if based on personal experience rather than community reputation has also been criticized. The position taken by the critics is that the considered opinion of a qualified witness drawn from his own experience is better evidence than reputation of character based on "hearsay interchange of gossip and scandal in the community."

The reputation for general bad character other than that relating to truth and veracity may not be shown in Minnesota, although this is allowed in some jurisdictions. Wigmore strongly urges an exception to this rule in cases involving sexual offenses where the witness is the female complainant. He argues that in such cases the witness' reputation for chastity is directly relevant to her disposition to falsify her testimony in the action. The Minnesota court has rejected this argument for the unconvincing reason that if evidence of the female complainant's reputation for chastity were allowed in one type of case, then such evidence could be shown concerning a female witness in any case.

The rehabilitation of a witness who has been impeached on his reputation for truthfulness is limited. The most effective manner would be by discrediting the impeaching witness as to his qualifications concerning the reputation. An inquiry into the motives of

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52. See Jones, Evidence § 864 (3d ed. 1924).
53. See Kauffman, Impeachment and Rehabilitation of Witnesses in Maryland, 7 Md. L. Rev. 118, 124 n. 32 (1943).
55. See note 50 supra.
56. See Ladd, Techniques and Theory of Character Testimony, 24 Iowa L. Rev. 498, 511 (1939); see also 7 Wigmore, Evidence § 1986.
57. E.g., State v. Kahner, 217 Minn. 574, 15 N. W. 2d 105 (1944); Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145 (1884); see Rudsdill v. Slingerland, 18 Minn. 380 (342), 382-383 (343-344) (1872).
59. 3 Wigmore, Evidence § 924a.
60. State v. Perry, 151 Minn. 217, 186 N. W. 310 (1922). Wigmore, of course, would limit this exception to the female complainant in a case involving a sexual offense.
the impeaching witness can also be effective in some cases. Moreover, a showing on rebuttal of the good reputation for truthfulness of the impeached witness may always be made, and the fact that no motive for the witness to falsify has been presented should always be stressed in argument.

IV. PRIOR MISCONDUCT

A. In General

The rule in Minnesota and most jurisdictions is that prior misconduct is within the proper scope of inquiry on cross-examination but that the examiner is bound by the answers of the witness and the particular acts may not be shown by extrinsic evidence. The reasons given for restricting the introduction of extrinsic evidence are that it will tend to confuse the issues and that the witness cannot be expected to come into court prepared to rebut all charges of his supposed prior misconduct.

The question of whether all types of misconduct may be the subject of inquiry or only those types which bear directly on veracity is left largely to the discretion of the trial court in Minnesota. While it is impossible to determine or predict with certainty what would be an abuse of discretion in a given case, the following examples serve to illustrate the type of problems that arise: it was not an abuse of discretion in a prosecution for larceny to allow a witness, not the defendant, to be asked if he had stolen a gun since the case arose; in a civil assault to allow the plaintiff to be asked about a previous unrelated assault; and in a civil contract action to sustain an objection to a question to the plaintiff whether he had more than one

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61. See Cornelius, Trial Tactics 300-302 (1932). The author states that the impeaching witness is usually hostile to the original witness but will in most cases deny this fact. The suggested method of exposing the witness’ hostility is by pointedly asking whether he is a friend or an enemy of the first witness and if the answer is that he is a friend then to ask if he considers the present mission of besmirching the other’s reputation a friendly act.

62. See State v. O’Connor, 154 Minn. 45, 49, 191 N. W. 50, 51 (1922) (the court stated, however, that the evidence of good character for truth and veracity of the witness should not have been admitted in this case since an attack had not been made on his character for truthfulness); see 4 Wigmore, Evidence §§ 1104-1105.


64. 3 id. § 979.

65. State v. McCartey, 17 Minn. 76 (54) (1871).

66. See Campbell v. Aarstad, 124 Minn. 284, 287, 144 N. W. 956, 957 (1914).
wife living.\textsuperscript{67} It was an abuse of discretion, however, in a civil action for the wilful burning of property to allow an extensive inquiry into the personal habits and morals of the defendant\textsuperscript{68} and in an action to set aside a deed to allow a witness to be asked if she had deserted her husband and children thirty-one years before.\textsuperscript{69}

A distinction must be made in respect to the defendant in a criminal action. The rule as commonly stated\textsuperscript{70} is that unless the defendant introduces evidence of his good character, his character in respect to the trait involved in the alleged crime may not be inquired into regardless of whether he testifies; and secondly, that, if the defendant testifies, his character in respect to credibility is at issue but not his general character.

When the defendant testifies, the question of what type of conduct may be introduced to affect his credibility is again largely discretionary,\textsuperscript{71} but additional considerations must be applied. In \textit{State v. Haney}, a prosecution for carnal knowledge, the court stated that:

"... evidence as to independent and disconnected acts may be received for the specific purpose of affecting the credibility of the accused if its effect upon credibility is not too remote or if its probative value is not outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) if it does not unfairly surprise the accused when he has not had reasonable ground to anticipate that such evidence would be offered."\textsuperscript{72}

\textsuperscript{67} McArdle v. McArdle, 12 Minn. 98 (53) (1866).
\textsuperscript{68} Malone v. Stephenson, 94 Minn. 222, 102 N. W. 372 (1905).
\textsuperscript{69} Howard v. Farr, 115 Minn. 86, 131 N. W. 1071 (1911). The allowance of this question met with the emphatic disapproval of the appellate court, since it tended to degrade and disgrace the witness and had no legitimate bearing on veracity. The question of whether a privilege exists regarding degrading answers, distinct from that against self-incrimination, was raised in the early case of \textit{State v. Bilansky}, 3 Minn. 246 (169) (1859) where the question tended to show fornication by the witness. The court after discussing the problem held that it should be left to the discretion of the trial court. There have apparently been no cases since in which the question of privilege, as such, has been considered. The history and scope of the privilege is discussed in 3 Wigmore, Evidence § 984.
\textsuperscript{70} State v. Nelson, 148 Minn. 285, 181 N. W. 850 (1921); see \textit{State v. Silvers}, 230 Minn. 12, 15, 40 N. W. 2d 630, 632 (1950).
\textsuperscript{71} The admission of the evidence was held to be within the discretion of the trial court in the following cases: \textit{State v. McTague}, 190 Minn. 449, 252 N. W. 446 (1934) (inquiry into past life of accused); \textit{State v. Quirk}, 101 Minn. 334, 112 N. W. 409 (1907) (murder— inquiry into gambling habits of accused); but was held to be an abuse of discretion in the following cases: \textit{State v. Stockton}, 181 Minn. 566, 233 N. W. 307 (1930) (inquiry into criminal friends of accused); \textit{State v. Abdol}, 165 Minn. 440, 206 N. W. 933 (1926) (carnal knowledge—misconduct of accused with other women); \textit{State v. Nelson}, 148 Minn. 285, 181 N. W. 850 (1921) (murder— extended inquiry into prior thefts, quarrels, threats, and killings).
\textsuperscript{72} 219 Minn. 518, 520, 18 N. W. 2d 315, 316 (1945) (citing Model Code of Evidence, Rule 303).
In this case the prosecution repeatedly cross-examined the defendant about alleged misconduct with other girls, and although the questions for the most part were excluded the net result was to prejudice the jury unduly, and a new trial was granted.

B. Prior Convictions

By statute in Minnesota a person convicted of a crime shall nevertheless be a competent witness, but the prior conviction may be shown to discredit his testimony. The word "crime" in this section has been defined to mean all felonies and misdemeanors with the exception of municipal ordinances and violations of the traffic code less than a felony. The evidence of the conviction may be elicited either on cross-examination or by the introduction of the record of conviction and the nature of the crime may be brought out. The latitude of cross-examination for the purpose of showing the details of the crime is largely discretionary with the trial court. The court may properly instruct the jury in respect to the relation of the conviction to the witness' credibility. It is not proper, however, to show that the witness has been merely arrested or indicted.

These rules have the advantage of being clear and well settled, but the serious disadvantage of being founded on no clear and convincing principle. It was argued that the statute allowing prior convictions to be shown should be restricted to those "infamous crimes" which at common law had disqualified the witness, but the Minnesota court rejected this argument stating that the rule allowing all crimes to be shown did no injustice to the witness, thus

73. Minn. Stat. § 610.49 (1949).
74. See e.g., Brase v. Williams Sanatorium, Inc., 192 Minn. 304, 306, 256 N. W. 176, 177 (1934); Harding v. Great Northern Ry., 77 Minn. 417, 419, 80 N. W. 358, 359 (1899); State v. Sauer, 42 Minn. 258, 260, 44 N. W. 115, 116 (1890).
75. Carter v. Duluth Yellow Cab Co., 170 Minn. 250, 212 N. W. 413 (1927).
77. Minn. Stat. § 610.49 (1949).
81. State v. Bryant, 97 Minn. 8, 105 N. W. 974 (1905); State v. Renswick, 85 Minn. 19, 88 N. W. 22 (1901).
83. See 2 Wigmore, Evidence § 520.
avoiding the difficulty of defining infamous crimes. The Minnesota court has also stated that there is no room for inquiry under the statute as to whether or not the crime is one which relates to the credibility of the witness.

The justification for allowing any prior conviction to be shown rests on the double assumption that the single conviction is a true indication of bad moral character and, further, that bad moral character has a substantial correlation with a readiness to lie in a particular case. The first assumption encounters the difficulty of being inconsistent with the theory of character evidence which postulates that a long-standing reputation for such character, gained mostly from successive acts, is the necessary basis for the introduction of this type of evidence. The second assumption runs afoul of the common sense realization that many crimes, for example, simple assault, have little if any bearing on veracity. In addition, as this type of impeachment is extremely embarrassing to the witness, it may well deter people from volunteering important testimony in cases where their information is unknown to the parties.

Many jurisdictions limit the showing of prior convictions to those crimes relating to truth and veracity. The Model Code of Evidence restricts this type of impeachment to crimes involving dishonesty or false statement. While there will be some difficulty in determining which crimes relate to untruthfulness or dishonesty, all effort should not be abandoned for this reason. Convictions for crimes such as perjury, fraud and embezzlement would be within the scope of dishonesty or false statement, while murder and assault would probably not be.

The Model Code gives special treatment to the defendant in a criminal case. If he does not offer evidence for the sole purpose of supporting his credibility, his prior convictions may not be

84. Harding v. Great Northern Ry., 77 Minn. 417, 80 N. W. 358 (1899) (drunkenness).
87. Id. at 177-178. The argument can be made that the convictions represent only the times that the witness was caught, but this seems much too speculative a reason upon which to base a rule of law of general applicability.
88. See 3 Wigmore, Evidence § 987.
shown even though he testifies.91 The draftsmen of the Code have found that the threat of this type of impeachment is one of the main causes of defendants' refusing to testify and have included this provision to encourage them to testify in their own behalf, especially since under this Code failure to testify may be commented on. Moreover, this type of impeaching evidence is believed to be constantly misused by juries to prejudice the defendant on the merits.92

Perhaps the most important aspect of this type of impeachment as it exists today is the rehabilitation of the discredited witness. It should always be emphasized that the witness has no motive to lie in the given case. Even conceding that he is a hardened criminal, if he has no interest in the outcome of the case, his testimony is in all probability truthful. That the witness has been pardoned should of course be brought out, and in general the attempt should be made to show that the behavior of the witness since the time of his conviction has been such as to merit trust and confidence. This principle is well illustrated in State v. Storey,93 where it was properly brought out on redirect examination that after the witness had served his sentence he was received into the employment of the attorney who had prosecuted him. The length of time that has elapsed since the crime is also important in restoring the credit of the witness. This is best illustrated by Harris' classic account94 of an ill-advised impeachment. This same account also serves to emphasize the fact that this type of impeachment is often unpopular

91. Model Code of Evidence, Rule 106(3) (1942). If the defendant introduces evidence for the sole purpose of affecting his credibility, convictions involving dishonesty and false statement may be shown.
92. Id. comment.
93. 148 Minn. 398, 182 N. W. 613 (1921).
94. "I will give one instance out of many where character was once in my hearing cruelly assailed in cross-examination by an inexperienced advocate, and upon whom it recoiled with crushing severity. He asked a witness if he had not been convicted of a felony. In vain the unfortunate victim in the box protested that it had nothing to do with the case. 'Have you not been convicted of felony?' persisted the counsel. 'Must I answer, my lord?' 'I am afraid you must,' answered his lordship. 'There is no help. It will be better to answer it, as your refusal in any event would be as bad as the answer.' 'I have,' murmured the witness, under a sense of shame and confusion I never saw more painfully manifest. The triumphant counsel sat down. Not long, however, was his satisfaction."

"In re-examination the witness was asked: 'When was it? A. Twenty-nine years ago!' The judge: 'You were only a boy?'—Witness: 'Yes, my lord.'"

"It need scarcely be added that a just and manly indignation burst from all parts of the Court, and the comments of the learned Judge were anything but complimentary to the injudicious advocate." Harris's Hints on Advocacy, 177-178 (18th ed. 1943).
with the jury. Evidence of the good character of the witness is, of course, admissible.\textsuperscript{95}

\textbf{V. General Defects of the Witness}

A proper and necessary function of impeachment is to discredit the testimony of a witness by showing that the witness is incapable of correctly observing, remembering, or narrating the facts to which he testifies. Usually such defects as general faulty memory and poor powers of observation cannot be shown by extrinsic evidence but must rather be exposed by the cross-examiner while the witness is on the stand.\textsuperscript{96} Evidence of insanity of a witness is admissible if it can be shown to affect his powers of observation or recollection,\textsuperscript{97} but a merely ancestral or collateral insanity or prior illusions of the witness which do not directly bear on his present testimony may not be shown.\textsuperscript{98} Evidence of intoxication is admissible if it directly affects his present testimony such as where the witness was intoxicated at the time he observed the facts,\textsuperscript{99} but a mere habit of intemperance cannot usually be shown.\textsuperscript{100} In Minnesota, as in most jurisdictions, religious belief cannot be commented upon as indicating that the witness is not bound by the oath,\textsuperscript{101} and of course the race of the witness has no bearing on his veracity and comment concerning this is precluded.\textsuperscript{102}

\textbf{VI. Impeachment of a Party's Own Witness}

With the exception of an adverse party called for cross-examination\textsuperscript{103} and a witness required by statute, such as an attesting witness to a will,\textsuperscript{104} a party cannot impeach his own witness by a showing of a prior inconsistent statement unless the party was sur-
prised by the testimony. There are two reasons usually given for this rule: that a party vouches for the credibility of his witness and that a party should not have the means to coerce and control the testimony of his witness. The fallacy of the first reason, often recognized by courts and writers, is that with the exception of expert and character witnesses the party has no choice but must rather produce the witness who knows the facts. Wigmore disposes of the second reason as being of "trifling practical weight" since it would not affect the honest witness and the shifty witness should be exposed in any case.

A third reason advanced in support of the rule that has more validity is that the jury may accept the impeaching statements as substantive proof. While this objection would hold true for the introduction of prior inconsistent statements made by the opponent's witness as well as those of the party's own witness, in the former situation the prior inconsistency also serves the legitimate function of discrediting the adverse testimony of that witness, while in the latter case, unless there was actual surprise, the only purpose in having the witness testify would be to get the statement before the jury. This distinction might well be reason enough to warrant different treatment in the two situations, but in order to properly consider this objection as a reason for retaining the rule against impeaching one's own witness it is necessary to evaluate the reasons for excluding the prior statement as substantive evidence.

The substantive objection is, of course, that the statements are made ex parte out of court and are therefore hearsay. Wigmore answers this by saying that the hearsay rule does not apply since

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105. E.g., State v. Shea, 148 Minn. 368, 182 N. W. 445 (1921); Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958 (1906); Selover v. Bryant, 54 Minn. 434, 56 N. W. 58 (1893).

106. See Selover v. Bryant, 54 Minn. 434, 437-438, 56 N. W. 58 (1893); see 3 Wigmore, Evidence § 898; 21 Minn. L. Rev. 603, 604 (1937).

107. 3 Wigmore, Evidence § 899; Jones, Evidence § 853 (3d ed. 1924).


109. 3 Wigmore, Evidence § 899; see also Ladd, Impeachment of One's Own Witness—New Developments, 4 U. of Chi. L. Rev. 69, 80-86 (1936).

110. 3 Wigmore, Evidence § 903. Wigmore believes this is not a serious disadvantage and can be guarded against by proper instructions. This argument is discussed at length in Ladd, Impeachment of One's Own Witness—New Developments, 4 U. of Chi. L. Rev. 69, 86-88 (1936).

111. Where the party is actually surprised by the testimony, the prior inconsistent statement legitimately serves to neutralize the adverse testimony and discredit the witness.
the witness is now in court and subject to cross-examination. This argument was rejected in *State v. Saporen* where the court stated in effect that the value of cross-examination is in striking "while the iron is hot," that the right to cross-examine is greatly impaired where the witness has time after making the statement to consider its implications and fortify his position. This reasoning has some merit where the witness is corroborating his present testimony by prior consistent statements but not, at least to any appreciable degree, where the witness is now disclaiming or rejecting his former utterance. In the latter case the reliability of the ex parte statement will depend on the truth of his present statement and his explanation of the inconsistency both of which are subject to immediate cross-examination.

A party may always impeach his own witness if he is surprised by the testimony. While in theory the testimony must be actually unexpected, in practice the question of whether a surprise exists is left in the nearly unfettered discretion of the trial court. The situation faced by the Minnesota court is that in many cases the prior inconsistent statements are both reliable and essential evidence, but in some cases, at least under the *Saporen* doctrine, the statements are too unreliable to be considered by the jury. The present solution to this dilemma is by means of the elastic surprise doctrine. It would seem that a much more direct and satisfactory approach would be to have the trial judge exercise the same latitude of discretion that he now exercises in determining whether surprise exists in determining whether to call the witness as a court's witness, thereby allowing both parties to cross-examine and impeach.

The practical needs and supposed dangers of introducing the prior inconsistent statements of a party's own witness are illustrated by two Minnesota cases decided just one year apart. In

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112. 3 Wigmore, Evidence §§ 903, 1018.
114. See note 105 supra.
115. In *State v. Bauer*, 189 Minn. 280, 249 N. W. 40 (1933), a conviction for carnal knowledge, the prosecuting witness testified that the defendant was innocent of the crime and the state claimed surprise. The defendant established, however, that the witness had informed the county attorney's office of what her testimony would be ten days before the trial. In affirming the finding that surprise existed the court stated that notice to one member of the county attorney's office was not notice to the one trying the case.
116. This method has been approved in the federal courts and in a minority of states. See 3 Wigmore, Evidence § 918. See especially *Young v. United States*, 97 F. 2d 200 (5th Cir. 1938); United States v. Young, 26 F. Supp. 574 (W.D. Texas 1939).
State v. Saporen,\textsuperscript{117} a prosecution for carnal knowledge, the state on a plea of surprise impeached a witness who had made a former statement implicating the defendant. This witness had pleaded guilty to a similar charge and the disposition of his case was still pending. On cross-examination the witness claimed that the prior statement had been extracted from his under a threat of seven years in the reformatory if he did not "say something against the defendant." The conviction was reversed because the impeaching statement went beyond the subject matter of the adverse testimony of the witness and in respect to the surprise the court stated, "It was for the trial judge to determine whether the asserted and naive lack of suspicion of a change of heart by [the witness] was well-founded."

In the similar case of State v. McClain,\textsuperscript{118} also a conviction for carnal knowledge, the prosecuting witness, who had previously signed a statement admitting the intercourse and identifying the defendant, testified to both her own and the defendant's innocence. The state claimed surprise and while this was contested by the defendant,\textsuperscript{119} the prior inconsistent statement was allowed. In affirming the conviction the court stated in respect to the surprise:

"If the trial judge suspected that . . . the girl . . . [was] by perjury attempting to obstruct justice, that someone had done a finished job of 'fixing' the witnesses for the state, there is scant ground in the record for disagreement. When a defendant finds himself in such a predicament, he must expect a liberal exercise of the court's discretion against him."\textsuperscript{120}

The McClain case illustrates the necessity of showing the prior inconsistent statements of witnesses, while the Saporen case is an example of the possible attending danger of allowing impeaching statements allegedly gained through "third degree" methods to be brought out to the jury, although it would seem that this danger is offset, at least insofar as the law should attempt to offset it, by the opportunity to cross-examine the witness who is then in court. While the illustrations used are criminal cases the same considerations apply, though perhaps to a lesser degree, in civil cases.\textsuperscript{121}

There are apparently no decisions in this jurisdiction which

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\item \textsuperscript{117} 205 Minn. 358, 285 N. W. 898 (1939).
\item \textsuperscript{118} 208 Minn. 91, 292 N. W. 753 (1940). Justice Stone wrote the majority opinion in both cases.
\item \textsuperscript{119} Transcript of Record, p. 22, State v. McClain, 208 Minn. 91, 292 N. W. 753 (1940).
\item \textsuperscript{120} State v. McClain, 208 Minn. 91, 93, 292 N. W. 753, 754 (1940).
\item \textsuperscript{121} See State v. Saporen, 205 Minn. 358, 362, 285 N. W. 898, 901 (1939); see 3 Wigmore, Evidence § 918.
\end{itemize}
restrict the showing of bias, interest, or corruption of a party's own witness, and the writers are uniform in urging that this type of impeachment be allowed.\textsuperscript{122} There is a dictum in an early Minnesota case\textsuperscript{123} stating that the bad reputation for truthfulness of the party's own witness should not be allowed, and while there are divergent views\textsuperscript{124} expressed by the courts and the writers both as to reputation and prior misconduct, the need for this type of impeachment is much less urgent.

\textbf{VII. Suggested Reform}

The time when science will be able accurately to detect the untruthful witness is apparently quite remote,\textsuperscript{125} and until that time the credibility of witnesses must be determined in the more traditional methods. These methods can be enhanced, however, by a careful evaluation of the existing rules that govern them. There are many areas, as indicated throughout this Note, in which the rules that have developed and that are presently followed have no substantial justification for continued use today. The most notable of these are the rule against a party's impeaching his own witness, the rule of \textit{The Queen's Case} and the rule allowing all types of prior convictions to be shown. Since the latter rule is statutory and the former rules are firmly imbedded in precedent, legislative revision would seem to be the most simple and direct method of reform. The adoption, either in toto or in part, of Rule 106 of the Model Code of Evidence\textsuperscript{126} should be seriously considered.

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\item \textsuperscript{122} See 3 Wigmore, Evidence § 901; Ladd, \textit{Impeachment of One's Own Witness—New Developments}, 4 U. of Chi. L. Rev. 69, 91-96 (1936). The Model Code of Evidence, Rule 106(1) (1942) allows the party producing the witness to impeach him in the same manner as the opposing party.
\item \textsuperscript{123} Selover v. Bryant, 54 Minn. 434, 437, 56 N. W. 58 (1893).
\item \textsuperscript{124} See 3 Wigmore, Evidence § 900; Ladd, \textit{Impeachment of One's Own Witness—New Developments}, 4 U. of Chi. L. Rev. 69, 91-96 (1936).
\item \textsuperscript{125} See 3 Wigmore, Evidence §§ 997-999a; Ladd, \textit{Techniques and Theory of Character Testimony}, 24 Iowa L. Rev. 498, 535 (1939); Note, 53 Harv. L. Rev. 285 (1939).
\item \textsuperscript{126} "Rule 106. Evidence Affecting Credibility.
  "(1) Subject to Paragraphs (2) and (3), for the purpose of impairing or supporting the credibility of a witness, any party including a party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness, and need not, in examining him as to a statement made by him in writing inconsistent with any part of his testimony, show or read to him any part of the writing, except that extrinsic evidence shall be inadmissible
  "(a) of traits of his character other than honesty or veracity or their opposites, or
  "(b) of his conviction of crime not involving dishonesty or false statement, or
\end{itemize}
“(c) of specific instances of his conduct relevant only as tending to prove a trait of his character.

“(2) The judge in his discretion may exclude extrinsic evidence of a written or oral statement of the witness offered under Paragraph (1) unless the witness was so examined while testifying as to give him an opportunity to deny or explain the statement.

“(3) If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him; if he introduces evidence for the sole purpose of supporting his credibility, all evidence admissible under Paragraph (1) shall be admissible against him.”