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Evidence—Impeaching One’s Own Witness in Nebraska: *State v. Fronning*, 186 Neb. 463, 183 N.W.2d 920 (1971)

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EVIDENCE—IMPEACHING ONE'S OWN WITNESS IN NEBRASKA. *State v. Fronning*, 186 Neb. 463, 183 N.W.2d 920 (1971).

I. INTRODUCTION

It has long been an established rule of courtroom procedure that a party calling a witness is prohibited from testing the credibility of that witness except under certain conditions, and then only in certain ways. The basic premise that one may not impeach one's own witness has, to a greater or lesser extent, been modified by courts and legislatures over the years,¹ but for the most part the decision-making process has remained impervious to the impressive array of judicial theorists who have roundly criticised the rule for not meeting the exigencies of modern practice.²

In *State v. Fronning*³ the Supreme Court of Nebraska overturned almost eighty years of precedent and abrogated virtually every restriction on the impeachment of one's own witness in Nebraska courts. The characteristically brief opinion written by Justice Smith employed no circumspection: "We abandon the rule; credibility of a witness may be attacked by any party, including the party calling him."⁴

But the holding was not the product of unanimity. Three Judges who concurred only in the result felt that the broad change was premature and that careful research was necessary in order to properly limit the operation of the traditional rule.⁵ At the very least, they thought the court should await the recommendations of the committee appointed to draft a Code of Evidence for the state.⁶

¹ Six jurisdictions have effectively abolished the common law rule by statute. CAL. EVID. CODE § 785 (West 1966); C.Z. CODE tit. 5, § 2825 (1963); KAN. STAT. ANN. § 60-420 (Vernon 1965); KY. REV. STAT., R. CIV. P. 43.07 (1963); N.J. STAT. ANN. § 2A:84A-16, Rule 20 (Supp. 1960); V.I. CODE tit. 5, § 834 (1957).

² See, e.g., 3A J. WIGMORE, EVIDENCE §§ 896-907 (rev. ed. 1970); C. MCCORMICK, EVIDENCE § 38 (1954). For succinct reviews of some of the treatises criticizing the common law rule see *United States v. Freeman*, 302 F.2d 347, 351 (2d Cir. 1962); *Johnson v. Baltimore & O. Ry.*, 208 F.2d 633, 635 (3d Cir. 1954).

³ 186 Neb. 463, 183 N.W.2d 920 (1971).

⁴ *Id.* at 465, 183 N.W.2d at 921. The only reason actually given for the holding was that parties no longer have free choice in selecting witnesses.

⁵ *Id.* at 466, 183 N.W.2d at 922.

⁶ *Id.*

The circumstances precipitating this controversy were hardly unique. Leland Fronning and seven of his teen-age friends were attending a party in Hastings when Fronning became involved in an argument with Richard Smith, whom Fronning did not know. Allegedly after a push by Smith, Fronning struck him on the jaw and Smith fell to the floor. Thinking he was not unconscious, Fronning fell on Smith and struck him three times in the side. Fronning then arose and kicked Smith twice in the face.

Fronning was tried and convicted of assault with intent to inflict great bodily injury.⁷ At trial the State called Fronning's friends as witnesses, and during direct examination the county attorney made reference to previous contradictory statements allegedly made by each witness concerning the push by Smith and his unconsciousness prior to Fronning's second attack. The county attorney stated that one of Fronning's friends was changing his story.

On appeal Fronning contended that the references to prior contradictory statements materially strengthened the substantive evidence of the State and that they constituted an invalid attempt by the county attorney to impeach his own witnesses. The court rejected both contentions and affirmed the conviction.⁸

II. THE HISTORICAL CONTEXT

At earliest common law, a party's "witnesses" were his friends and relatives, summoned to court in specified numbers to take a prescribed oath by means of which the issue was decided.⁹ They were mere "oath-helpers," not testifiers as to facts, and the party had complete freedom of choice in their selection.¹⁰ The logical implication of this was that one could not dispute his own witness. As Wigmore says: "So long as such a notion persisted, it was inconceivable that a party should gainsay his own witness; he had been told to bring a certain number of persons to swear for him; if one

⁷ NEB. REV. STAT. § 28-413 (Reissue 1964). Fronning pleaded self-defense, alleging that Smith had appeared to be under the influence of alcohol or drugs and that Fronning thought he was armed.

⁸ The court also rejected a second assignment of error concerning instructions relating to beer, marijuana and LSD, 186 Neb. at 465-66, 183 N.W.2d at 920.

⁹ 3 J. WIGMORE, EVIDENCE § 896 (3d ed. 1940); F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 12-13 (1968). The "witnesses" were required merely to swear that the oath of the party who called them was clean and unperjured. If they did so, there was an end to the case.

¹⁰ 9 J. WIGMORE, EVIDENCE § 896, at 383 (3d ed. 1940).

or more did not do so, that was merely his loss; he should have chosen better ones for his purpose."¹¹

But the emergence of the modern concept of the jury brought with it a change in the character of witnesses. No longer permitted merely to swear an oath on behalf of a friend, witnesses were obliged to have some knowledge of the facts bearing on the issue at bar, and the parties were correspondingly limited in their selection. This limitation and the complexity of new courtroom procedures were doubtless factors which led to a controversy concerning the impeachment of one's own witness in the English Courts.¹² In any case, the dispute was settled by a statute which allowed the use of prior inconsistent statements, subject to the trial court's discretion, to impeach a witness who proved to be adverse.¹³

The controversy made its first recorded appearance in a Nebraska court in *Blackwell v. Wright*.¹⁴ Citing no authority for the principle of law involved, nor for the simultaneously created exception, the court held that the calling of a witness was an implied recommendation that the witness was worthy of belief which could not be contradicted. This, said the court, prohibited a party from impeaching the character of his own witness.¹⁵ But while establishing this rule, the *Blackwell* holding offered an alternative to impeachment: a showing that the facts were not as stated by the party's own witness by means of additional evidence to the contrary.¹⁶ This distinction between impeachment and contradiction was to provide the framework within which much of the subsequent case law would be confined.

But the clarity of the *Blackwell* holding was short-lived. In *Nathan v. Sands*¹⁷ the court, presented with a trial situation similar to *Blackwell*, held that a party could not present any evidence the only effect of which was to demonstrate that his own witness was not worthy of belief. What made the holding confusing was the

¹¹ *Id.*

¹² The controversy is discussed in 4 B. JONES, EVIDENCE § 941 (5th ed. 1958).

¹³ *Id.*

¹⁴ 27 Neb. 269, 43 N.W. 116 (1889).

¹⁵ *Id.* at 273, 43 N.W. at 117.

¹⁶ *Id.*: "The rule will not prevent a person from proving the fact to be different from that which is stated by his own witness. The witness may be mistaken, may be misinformed, or he may have misled the party calling him. In either event, the party so calling him would not be prevented from showing the exact facts as they occurred, and this is not considered an impeachment of his witness."

¹⁷ 52 Neb. 660, 72 N.W. 1030 (1897).

fact that *Nathan* seemed to be prohibiting simple contradiction of a witness by subsequent evidence. While the details of the conflicting evidence are not provided, the opinion seems to indicate that the evidence was offered in an attempt to prove that a certain transaction which the defendant, as plaintiff's witness, denied making was, in fact, made. This was held to be impeachment of the witness¹⁸ even though *Blackwell* was presented as the controlling citation.¹⁹ Faced with waters thus muddied, attorneys of the period must have been thoroughly confused.

In any case, a new practice developed and, with it, a new avenue of analysis for the court. Although a party could not call additional witnesses to contradict the testimony of his previous witness without fear of having to resolve the *Blackwell-Nathan* dilemma on appeal, there seemed to be little danger in showing the witness was contradicting himself. The prior inconsistent statement, central to the development of this branch of the impeachment rules, was first considered in *H. F. Cady Lumber Co. v. Wilson Steam Boiler Co.*²⁰ where the court, relying entirely on foreign state precedent,²¹ held that it was within the discretion of the trial court to permit a party to ask his own witness whether or not he had made a statement prior to trial in contradiction to his present testimony. This, said the court, would permit "eliciting the truth from a confused or unwilling witness."²²

But the spectre of *Nathan* still plagued the court, and by 1922 it had limited the use of prior inconsistent statements so as not to allow anything that might be considered "impeachment" of the witness. While the statement could be used to refresh the witness's memory, it could not be introduced into evidence in its entirety,²³ nor could it be read from too extensively.²⁴ Furthermore, no addi-

¹⁸ The situation is briefly discussed, and no comments concerning the distinguishing character of the evidence are offered. It would seem, however, that the evidence was merely offered for the purpose of contradicting a material fact and, in view of the court's previous holding, should have been admitted.

¹⁹ *Nathan v. Sands*, 52 Neb. 660, 664, 72 N.W. 1030, 1032 (1897).

²⁰ 80 Neb. 607, 114 N.W. 774 (1908).

²¹ *People v. Payne*, 131 Mich. 474, 91 N.W. 739 (1902); *Dallas Street Ry. v. McAllister*, 41 Tex. Civ. App. 131, 90 S.W. 933 (1905); *Smith v. State*, 46 Tex. Crim. 267, 81 S.W. 936 (1904); *State v. Cummins*, 76 Iowa 133, 40 N.W. 124 (1888).

²² *H. F. Cady Lumber Co. v. Wilson Steam Boiler Co.*, 80 Neb. 607, 610, 114 N.W. 774, 775 (1908).

²³ *Masourides v. State*, 86 Neb. 105, 125 N.W. 132 (1910).

²⁴ *Erdman v. State*, 90 Neb. 642, 134 N.W. 258 (1912).

tional witnesses could be called to testify as to the prior statement, the party being limited to probing his own witness's recollection.²⁵

Then in 1922 the court again sought to liberalize the rule. After a review of the authorities criticizing the common law doctrine of immunity for one's own witness, the majority opinion in *Penhansky v. Drake Realty Construction Co.*²⁶ adopted what was apparently considered a broadly reformed rule:

Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statement made before trial.²⁷

In addition, the court specifically overruled *Blackwell*, as well as those cases which had qualified the previous reform instituted by *Cady*.²⁸

The force of this reform was dulled somewhat by the reappearance of *Nathan*, like Banquo's ghost, less than a year later. In *Krull v. Arman*²⁹ the court held that *Nathan* was still the true rule, and evidence could not be presented which could only tend to impeach one's own witness. But the court drew a distinction between impeachment and contradiction, and instead of citing *Blackwell*, which had been banned from the judicial process by the *Penhansky* holding, it cited a New York case.³⁰

With *Nathan* back at the banquet, the process of narrowing and qualifying the rule began again. The court held that a prior inconsistent statement could not be admitted if it did not comply with ordinary rules of evidence.³¹ Furthermore, the party had to be truly surprised by the testimony of his witness before *Penhansky* could be invoked.³² And the statement could be used only to refresh the memory of the witness and induce him to change his story, never for impeachment.³³

²⁵ *Merkouras v. Chicago, B. & Q. R.R.*, 101 Neb. 717, 164 N.W. 719 (1917).

²⁶ 109 Neb. 120, 190 N.W. 265 (1922).

²⁷ *Id.* at 122, 190 N.W. at 266.

²⁸ *Id.* at 123-24, 190 N.W. at 267.

²⁹ 110 Neb. 70, 192 N.W. 961 (1923).

³⁰ *De Noyelles v. Delaware Ins. Co.*, 78 Misc. 649, 138 N.Y.S. 855 (Sup. Ct. 1912).

³¹ *Lewis v. Miller*, 119 Neb. 765, 230 N.W. 769 (1930).

³² *Blochowitz v. Blochwitz*, 122 Neb. 385, 240 N.W. 586 (1932).

³³ *Krull v. Arman*, 110 Neb. 70, 192 N.W. 961 (1923); *Stanley v. Sun Ins. Office*, 126 Neb. 205, 252 N.W. 807 (1934).

In 1941 the court was again ready to broaden the rule. In *Cornell v. State*³⁴ the court provided its first comprehensive analysis of the practical problems a restrictive rule presented, particularly in the prosecution of criminal cases. The court observed:

The witnesses who must be called in a criminal case as eye witnesses of the alleged offense cannot be selected beforehand by the prosecutor, but are determined simply by the circumstances of who happened to be present at that time and place. It is the duty of the prosecutor to take such preliminary statements, examine into all the facts, weigh the character and standing of the witnesses, and if one of the witnesses, when the case comes to trial, unexpectedly changes his story, he is privileged to show the jury the facts which led him to call such witnesses to the stand.³⁵

Citing a 1928 holding that a prior inconsistent statement did not constitute substantive evidence,³⁶ the court held that it was permissible to admit the entire transcript of such a statement which had been taken by the county attorney from a witness who later contradicted it at trial. "Its only purpose," said the court "is to explain to the jury the reason why a hostile witness was called to the stand by the state."³⁷

But while the holding of *Cornell* liberalized the rule concerning prior inconsistent statements, it also reflected the constraint of *Nathan*. The "only purpose" language seems to be a tacit reference to the *Nathan* doctrine that evidence could not be admitted the "only purpose" of which was impeachment of one's own witness. The problem of foundation was also considered in *Cornell*, and the court held that questions and answers which indicated that the witness was changing his story provided a sufficient foundation of surprise to invoke *Penhansky*.³⁸

In *Moore v. State*³⁹ the court flirted with the *Nathan* rule, holding that it was always permissible to ask a witness if he had made a prior inconsistent statement, even though "the incidental effect of it is to impeach the witness."⁴⁰ This was the first time the court had conceded the possibility that impeachment might be a by-product of the use of a prior inconsistent statement. Generally, the use of such statements had been justified on the grounds that they

³⁴ 139 Neb. 878, 299 N.W. 231 (1941).

³⁵ *Id.* at 882, 299 N.W. at 233.

³⁶ *Sindelar v. T.B. Hord Grain Co.*, 116 Neb. 776, 219 N.W. 145 (1928).

³⁷ *Cornell v. State*, 139 Neb. 878, 883, 299 N.W. 231, 233 (1941).

³⁸ *Id.* at 882, 299 N.W. at 232.

³⁹ 147 Neb. 390, 23 N.W.2d 552 (1946).

⁴⁰ *Id.* at 394, 23 N.W.2d at 554.

would refresh the witness's memory, and impeachment, having been made a dangerous word by *Nathan*, was never considered. The court in *Moore* also restated the *Cornell* holding with regard to foundation.

In 1949 a general overview of the progress made toward reform of the impeachment rule was presented by the court in *Guyette v. Schmer*.⁴¹ *Nathan* was again dusted off and presented as the true rule, with *Penhansky* being characterized as an exception. And, once more, the distinction between impeachment and contradiction was stressed, *Blackwell*, of course, not being cited.⁴²

The cases which followed *Guyette*, with one exception, did little more than re-state the rule of *Moore*⁴³ and re-hash the difference between impeachment and contradiction.⁴⁴ The one exception was *Wilson v. State*⁴⁵ in which the court gave the first indication that it was becoming dissatisfied with the *Penhansky* rule concerning the use of prior inconsistent statements. In *Wilson* the trial court had permitted the county attorney to impeach his own witness by using such statements, even though the state had not been surprised by the witness's testimony. The court held that this was error under the *Penhansky* rule, but that the error was harmless.⁴⁶ Since the statement did not constitute substantive evidence, the court reasoned, it did not controvert or destroy the testimony given at trial and thus could not have prejudiced the defendant.⁴⁷

The holding in *Wilson* was far more significant than its language made it appear. By holding that such impeachment was not prejudicial error in the absence of surprise, the court dealt a crucial blow to the *Penhansky* rationale. Since the requirement of surprise had been the primary restriction on the use of prior inconsistent statements, *Wilson* must have led a good many attorneys and lower court

⁴¹ 150 Neb. 659, 35 N.W.2d 689 (1949).

⁴² *Id.* at 665, 35 N.W.2d at 693 (quoting *Thorp v. Leibrecht*, 56 N.J. Eq. 499, 39 A. 361 (1897)): "While the plaintiff, who calls defendants as his witnesses, cannot impeach their character for veracity generally, he may show that the whole or any part of what they have sworn to is untrue, either by their own examination and the improbability of their own story, or by other contradictory evidence material to the issue."

⁴³ *Svehla v. State*, 168 Neb. 553, 96 N.W.2d 649 (1959); *Welton v. State*, 171 Neb. 643, 107 N.W.2d 394 (1961).

⁴⁴ *State ex rel. Nebraska State Bar Ass'n v. Jensen*, 171 Neb. 1, 105 N.W.2d 459 (1960).

⁴⁵ 170 Neb. 494, 103 N.W.2d 258 (1960).

⁴⁶ *Id.* at 517, 103 N.W.2d at 273.

⁴⁷ *Id.*

judges to conclude that the court was implicitly overruling *Penhansky* and tacitly permitting prior inconsistent statements to be used for impeachment purposes under substantially more diverse circumstances, providing they met the ordinary requirements of admissibility. That there was justification for this view is manifest.

During the period following *Guyette* the legislature revised the statutes concerning the use of depositions but did little to contribute to reform. A party was permitted to impeach an adverse deponent by using a prior statement, even though a foundation for such impeachment had not been laid at the time the statement was taken.⁴⁸ Furthermore, at least in felony trials, a deposition could be used "by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness."⁴⁹ Nothing was said about any foundational requirements in the latter case, presumably leaving the party subject to the restrictions of the case law and thus doing little more than re-stating the previously established rules concerning prior inconsistent statements in general. In fact, the legislative provisions were narrower than the existing case law by virtue of their operative restriction to depositions, rather than statements in general.

Outside this jurisdiction, however, the traditional rule was beginning to crumble. The American Law Institute had already provided in its Model Code that either party could impeach a witness, and it had noted that the common law rule had little but history to support it.⁵⁰ The Uniform Rules of Evidence were published in 1953, and they contained a provision that either party could examine a witness and introduce extrinsic evidence bearing on his credibility.⁵¹ The rules of evidence that were being proposed for the Federal District Courts provided the language that was ultimately to be used in *Fronning*: "[T]he credibility of a witness may

⁴⁸ NEB. REV. STAT. § 25-1267.07 (Reissue 1964).

⁴⁹ NEB. REV. STAT. § 29-1917 (Supp. 1969). The same is true of civil actions. NEB. REV. STAT. § 25-1267.04(1) (Reissue 1964).

⁵⁰ MODEL CODE OF EVIDENCE rule 106 (1) (1942): "[F]or the purpose of impairing or supporting the credibility of a witness, any party including the 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" The comment that the rule has little but history to support it is found in comment b.

⁵¹ UNIFORM RULES OF EVIDENCE rule 20 (1953): "[F]or the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility."

be attacked by any party, including the party calling him."⁵² And the legislatures of six jurisdictions had either completely abrogated the rule by statute or substantially liberalized it.⁵³

Foreign state case law, while indicating a trend toward reform, remained mixed.⁵⁴ But progress was being made in the Federal courts. In the Third Circuit the court held that a party is not bound by everything his witness says, particularly in cases where he is compelled to call the witness.⁵⁵ In the Second Circuit the court denounced the common law rule against impeachment in no uncertain terms. In *United States v. Freeman*⁵⁶ it noted that Federal Rule of Civil Procedure 43(b), which provides for impeachment by the calling party in the case of an "adverse" witness, had no counterpart in the Federal Rules of Criminal Procedure. But, said the court, there was even more reason to allow a defendant to impeach his own witness in a criminal trial "where every proper means of ascertaining the truth should be placed at the defendant's disposal."⁵⁷ Moreover, the court held that, in such a case, it would be "pointless to require a showing . . . that such witnesses are hostile."⁵⁸

The situation that faced the *Fronning* court, then, was compelling. Under the theory that one holds out his witnesses as worthy of belief, *Nathan* had been prohibiting or severely restricting impeachment of one's own witness for nearly three-quarters of a century. The analytical circumspection which it had generated had done little to alleviate the practical problems facing a party

⁵² PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICTS AND MAGISTRATES rule 607 (Rev. Draft 1971), which adopted verbatim the rule articulated in the preliminary draft, published in 1969.

⁵³ See CAL. EVID. CODE § 785 (West 1966); C.Z. CODE tit. 5, § 2824 (1963). KAN. STAT. ANN. § 60-420 (Vernon 1965); KY. REV. STAT., R. CIV. P. 43.07 (1963); N.J. STAT. ANN. § 2A:84A-16, Rule 20 (Supp. 1960); V.I. CODE tit. 5, § 834 (1957).

⁵⁴ The status of the case law in various jurisdictions concerning particular issues in this area may be found in 3A J. WIGMORE, EVIDENCE § 900 n.1 (evidence of bad moral character), § 905 n.6 (use of prior inconsistent statements), § 907 n.7 (contradiction by other witnesses) (rev. ed. 1970).

⁵⁵ *Johnson v. Baltimore & O. Ry.*, 208 F.2d 633 (3d Cir. 1953). Because the plaintiff was advised by the trial judge that he had so far failed to make out his case, he called the only eye witness to the alleged wrongful death of his deceased—the railroad detective who had shot him. The court said that to hold the plaintiff bound by everything the witness said would be absurd.

⁵⁶ 302 F.2d 347 (2d Cir. 1962).

⁵⁷ *Id.* at 351.

⁵⁸ *Id.*

who had been damaged by his own witness, particularly if the witness had made no statement prior to trial. In addition, the court was faced with the condemnation of the restrictive rule by judicial theorists, the statutes in other jurisdictions which abrogated the rule and the trend in the Federal courts to abolish the rule.

On the other hand, the court must have recognized the problems inherent in giving the calling party the power to attack his own witness.⁵⁹ The abuses which complete abrogation of the common law rule might precipitate doubtless weighed heavily with the judges. But while the minority thought it best to give the matter more thought, the majority decided to discard totally the prohibition on impeachment of one's own witness, while leaving a substantial amount of room for judicial qualification, on a case by case basis, as the abuses of the rule become apparent.

III. THE PRESENT AND FUTURE IMPACT OF *FRONNING*

By virtue of the court's approach to this problem, the decision in *Fronning* raises as many questions as it does answers. While it will clearly have a substantial effect on courtroom procedure, the nature and scope of that effect are necessarily dependent on subsequent case law for delineation. *Fronning* is merely a starting point for what will likely be a long line of particularizing decisions, and the court is largely free to pursue whatever course it wishes in terms of permissive or restrictive rules.

But we are not without clues as to the court's present intention. The authorities cited in support of the new rule,⁶⁰ the circumstances surrounding it, the case law it appears to supplant, and the case law it leaves untouched all provide significant guidelines for the practitioner who wishes to avail himself of the new freedom.

To begin with, the spirit of the holding is to place the party calling a witness on generally equal footing with his adversary in terms of impeachment of that witness. The calling party is no

⁵⁹ The principles generally used to justify the common law rule include the notion that it is unwise to give the calling party the power to coerce his own witness since that tends to place the witness at the mercy of the party who called him. This principle, and others, are discussed in 3A J. WIGMORE, EVIDENCE § 896 *et. seq.* (rev. ed. 1970).

⁶⁰ *United States v. Freeman*, 302 F.2d 347 (2d Cir. 1962); C. McCORMICK, EVIDENCE § 38 (1954); MODEL CODE OF EVIDENCE rule 106 (1942); PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 6-07 (Prelim. Draft 1969); 3A J. WIGMORE, EVIDENCE § 904 (rev. ed. 1970); UNIFORM RULES OF EVIDENCE rule 20 (1953).

longer held to recommend his witnesses as worthy of belief, and he is as free as his opponent to attack their credibility. This general parity should have its most significant impact in three major areas: available impeachment tactics, use of prior inconsistent statements and the discretion of the trial court.

A. AVAILABLE IMPEACHMENT TACTICS

A party whose witness has damaged him on a material point is no longer confined to contradicting the witness by means of subsequent evidence or to the use of a prior inconsistent statement. Having been granted the same right to attack the credibility of the witness as his opponent, it is logical to assume that he will be permitted to employ much the same means to effectuate that right. Thus a party should be able to show that his own witness has an interest or bias in the case at bar or that he is corrupt,⁶¹ but the proof will be limited to material matters and should not be admissible on collateral issues such as the extent of the interest.⁶²

The use of character evidence, because of its susceptibility to abuse, will likely be circumscribed. The Model Code of Evidence provides that character evidence may be used by any party so long as it bears directly on the issue of credibility.⁶³ The Proposed Federal Court Rules are more specific, limiting the attack to the witness's general character for truthfulness and prohibiting extrinsic evidence concerning specific instances of conduct.⁶⁴ The Nebraska rules concerning impeachment of an opponent's witness are in accord with this general formulation and will likely be applied to the calling party as well. Thus he should be permitted to call a subsequent witness to testify as to the preceding witness's general reputation for untruthfulness⁶⁵ but will not be allowed to intro-

⁶¹ 3A J. WIGMORE, EVIDENCE § 901 (rev. ed. 1970). This is not only proper on policy reasons alone but follows logically from the fact that the calling party is now on an equal plane with his adversary in terms of impeachment of any witness, and the adversary is afforded these rights.

⁶² Thus in *Eden v. Klaas*, 166 Neb. 354, 89 N.W.2d 74 (1958), the defendant was permitted to show that the witness called by his adversary had filed suit in connection with the same accident but was properly precluded from going into the amount sought as damages in that suit. See also *Vassar v. Chicago, B. & Q. R.R.*, 121 Neb. 140, 236 N.W. 189 (1931); *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946).

⁶³ MODEL CODE OF EVIDENCE rule 106(1) (1942), cited in note 50 *supra*, and Comment c (5).

⁶⁴ PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 608 (Rev. Draft 1971).

⁶⁵ See, e.g., *Lee v. State*, 147 Neb. 33, 23 N.W.2d 316 (1946).

duce extrinsic evidence of specific acts.⁶⁶ The calling party should also be permitted to inquire of his witness whether or not he has been convicted of a felony but should not be permitted to introduce extrinsic evidence of the conviction, with the exception of the record. This is the rule which applies to his opponent.⁶⁷

Evidence concerning the witness's capacity for perception and recollection should also be allowed even though it is adduced by the party calling the witness. Matters such as insanity,⁶⁸ inadequacy of opportunity to observe,⁶⁹ impaired capacity by drink⁷⁰ or by drug addiction,⁷¹ or habitual defects in perception⁷² should now be open to inquiry by the calling party since all are open to his adversary.

B. THE PRIOR INCONSISTENT STATEMENT

Besides widening the scope of tactics available to a party whose witness has damaged him on a material point, *Fronning* has made permissible what *Wilson* called harmless error: the use of a prior inconsistent statement in the absence of surprise. Thus a party may call a witness knowing that his testimony will, in part, be adverse. In this way the party may get the helpful testimony before the court and use the prior statements to discredit that portion which is harmful.

The requirements of foundation have not been substantially altered except with regard to surprise (which was probably already altered by *Wilson*). Where previously the party was required to lay a foundation of surprise for the use of such a statement⁷³ and for its proof by extrinsic evidence,⁷⁴ the party should now be compelled to lay a general foundation only in the latter case. That is, before the party may prove a prior statement by extrinsic evidence he must ask his witness whether or not he made the statement. This is the approach of the Proposed Rules of Evidence for the Federal courts⁷⁵ and is also the rule which applies to the party's

⁶⁶ *Boche v. State*, 84 Neb. 845, 122 N.W. 72 (1909); *Myers v. State*, 51 Neb. 517, 71 N.W. 33 (1897).

⁶⁷ NEB. REV. STAT. §§ 25-1214 and 29-2011 (Reissue 1964).

⁶⁸ 3A J. WIGMORE, EVIDENCE § 900 (rev. ed. 1970).

⁶⁹ MODEL CODE OF EVIDENCE rule 106 and Comment c(2) (1942).

⁷⁰ *Id.*, Comment c(1); *Willis v. State*, 43 Neb. 102, 61 N.W. 254 (1894).

⁷¹ *Chicago & N.W. Ry. v. McKenna*, 74 F.2d 155 (8th Cir. 1934).

⁷² MODEL CODE OF EVIDENCE rule 106 and Comment c(2) (1942).

⁷³ *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946).

⁷⁴ *Cornell v. State*, 139 Neb. 878, 299 N.W. 231 (1941).

⁷⁵ PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES rule 613(b) (Rev. Draft 1971).

opponent in Nebraska.⁷⁶ The foundational requirement should not apply when the witness is a party, since the prior statement is admissible as an admission anyway, and extrinsic evidence should be permitted without the foundational questions unless, for example, it would be cumulative.⁷⁷ Although the *Fronning* court cited two authorities which indicate that the foundation rule is inflexible,⁷⁸ the Model Code of Evidence places it within the discretion of the trial court.⁷⁹

It must also be remembered that extrinsic evidence cannot be admitted to prove a prior inconsistent statement which concerns a collateral matter⁸⁰ and that the prior inconsistent statement must meet ordinary requirements of admissibility to be used.⁸¹ By virtue of the grant of additional impeachment tactics discussed above, however, the range of admissible content of a prior statement has been widened. Thus it may be used when it concerns bias, interest, corruption, and similar matters.

C. THE ROLE OF THE TRIAL COURT

Fronning permits a party to impeach his own witness as a matter of right without any prior invocation of the trial court's discretion. This does not, however, remove the court from the impeachment process altogether. Because the parties are now equally able to impeach a given witness they are also equally governed by the existing rules regulating impeachment. By granting the calling party the same right as his opponent *Fronning* impliedly subjects him to the same restrictions. Thus the court will retain its power to pass on the admissibility of evidence.

In addition, the trial court may be granted substantial latitude to exclude otherwise admissible evidence. This is the approach of the Model Code which views the application of the new rule as a balancing process. In each case, says the Code, "the value of the evidence . . . must be weighed against the risks that its admission will unfairly surprise the opponent, will cause undue consumption of time, will confuse the issues, or will work an illegitimate preju-

⁷⁶ *Pierce v. State*, 173 Neb. 319, 113 N.W.2d 333 (1962).

⁷⁷ *Falkinburg v. Inter-State Business Men's Accident Co.*, 132 Neb. 670, 272 N.W. 924 (1937); *McDaniel v. Farlow*, 132 Neb. 273, 271 N.W. 905 (1937).

⁷⁸ C. McCORMICK, EVIDENCE § 37 (1954); 3A J. WIGMORE, EVIDENCE § 906 (rev. ed. 1970).

⁷⁹ MODEL CODE OF EVIDENCE rule 106(2) (1942).

⁸⁰ *Griffith v. State*, 157 Neb. 448, 59 N.W.2d 701 (1953); *Whiteside v. Adams Express Co.*, 89 Neb. 430, 131 N.W. 953 (1911).

⁸¹ *Lewis v. Miller*, 119 Neb. 765, 230 N.W. 769 (1930); *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960).

dice out of proportion to its legitimate influence."⁸² Such a notion would permit the trial judge to exclude otherwise admissible evidence in situations where the new rule might present a danger either to the opposing party or to the economy of court time. In fact, the court might be persuaded to extend this grant of discretionary power beyond those cases which involve the *Fronning* rule.⁸³

Although there will doubtless be a substantial narrowing of the broad *Fronning* language along the lines discussed above, it would seem that *Nathan* has finally been exorcised from the body of case law in this area. It is unlikely, in view of the firm stance taken by the court, that the *Fronning* rule will soon be abandoned and a resurrection of *Nathan* effected, but the circumstances surrounding the holding leave a good deal of room for judicial retreat.

To begin with, *Fronning* was not the most desirable vehicle for such sweeping change. Neither party had been faced with a tactical problem generated by the old rule, and neither party questioned the wisdom of the impeachment prohibition in *Nathan*. In general, the questions presented by opposing counsel concerned the use of pre-trial statements, the primary issue being whether or not the county attorney who used them should have been compelled to introduce them into evidence in their entirety.⁸⁴ In short, the pressures for reform came from sources wholly extrinsic to the argument and factual situation presented in *Fronning*. This being true, it would

⁸² MODEL CODE OF EVIDENCE rule 106, Comment b (1942).

⁸³ This is the approach of the Model Code. MODEL CODE OF EVIDENCE rule 303 (1942), provides: "(1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered. (2) All rules stating evidence to be admissible are subject to this Rule unless the contrary is expressly stated."

⁸⁴ *Fronning* contended that they should have been introduced. The implication of his argument was that the county attorney effectively substituted the prior statement for the evidence given at trial, thus interfering with *Fronning's* right of cross-examination. Brief of Appellant at 19. *Fronning* wanted the entire statement admitted, or at least produced in court. The state contended that it was always permissible to ask a witness whether he had made a prior inconsistent statement, citing *Welton v. State*, 171 Neb. 643, 107 N.W.2d 394 (1961). Brief of Appellee at 5-6. There was also an error charged concerning a reference by the county attorney to a jail sentence served by one of the state's witnesses, but the reference appears to have been brief and neither side chose to make a central issue of it. Brief of Appellant, at 18; Brief of Appellee at 8.

be difficult for the court to limit the holding to its precise facts. Indeed, such a notion is meaningless in this context since the facts bear only a minimal relation to the holding.⁸⁵

Nor can the holding be limited to its general facts in the sense that the rule may be said to apply only to criminal cases. While it would have been possible to leave litigants in civil cases subject to the traditional *Nathan* constraints, the court chose not to do so. In *Conn v. ITL, Inc.*⁸⁶ the court held that a plaintiff in a personal injury action was not bound by the testimony of his witnesses because *Fronning* had established that he did not vouch for their credibility. While not actually dealing with an impeachment problem, *Conn* at least established that the *Fronning* reasoning and its implications are equally applicable to both civil and criminal trial situations. If the plaintiff no longer vouches for the credibility of his witnesses, it seems logical to assume that he should be permitted to impeach them, even in a civil action.

There is, of course, the possibility that the court will vitiate the rule in subsequent case law by refusing to allow parties to implement it. This could be done by narrowing the range of permissible impeachment weapons, restricting admissibility of prior inconsistent statements or generally upsetting the parity that the calling party now enjoys with his opponent. While all of the indications are against such action, it is available to the court.

IV. CONCLUSION

The history of the rule against impeaching one's own witness in this jurisdiction has been one of judicial vacillation; while apparently recognizing the need for reform, the court has repeatedly felt constrained by the *Nathan* doctrine and its deep roots in common law. Although it is possible that the *Fronning* reform may be substantially circumscribed, it is doubtful that the basic holding will be altered. The court has recognized that there is no basis in reason for a rule which prohibits the impeachment of one's own witness, yet it has left itself sufficient room to deal with the abuses which the new rule may present, and this seems a sensible result. It has taken seventy-four years to lay *Nathan* to rest. Perhaps now it will be permitted to rest in peace.

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⁸⁵ On the other hand, the holding is hardly dictum simply by virtue of this minimal relation. The case required a judgment concerning impeachment of one's own witness. If the language is considered a mere dictum, then no such determination was made. See *City of Lincoln v. Steffensmeyer*, 134 Neb. 613, 279 N.W. 272 (1938).

⁸⁶ 187 Neb. 112, 187 N.W.2d 641 (1971).