party intended to condone. This decision goes far in holding that the offending party's bad faith, though apparently short of active fraud, is conclusive proof that there is no condonation. The injured party is not forced to rely on the condition subsequent for protection. The court goes even further, suggesting that the offending party must affirmatively intend a reconciliation before there is condonation.[20] The court, however, did not consider the situation where there is a mere neutrality of intent, as where intercourse was had just as a satisfaction of desire. Thus, the language suggesting that the offender must affirmatively intend to be reconciled leaves open the question whether a mere neutrality of intent would result in a finding of no condonation as a matter of law.

The principal case is in line with the trend holding that a single act of intercourse is not conclusive on the issue of condonation, but merely an evidentiary factor. It goes further than any of the other cases in indicating that the offending party's intent may often be determinative. If the language of the court were taken at face value, condonation would be made to depend on the mutual intent and good faith of the parties. This seems a salutary result. The policy behind condonation is the maintenance of the home, and this would appear desirable only when both parties are in good faith in wanting to continue the marriage.

EVIDENCE—PARTY NOT BOUND BY TESTIMONY OF OWN WITNESS

Johnson v. Baltimore & Ohio R.R., 208 F.2d 633 (3d Cir. 1953)

A railroad detective shot and killed a man whose administratrix sued the railroad under a wrongful death statute. Plaintiff called to the stand the detective who was the sole witness to the shooting.[1] His uncontradicted testimony was that decedent attacked him with a knife when the detective attempted to arrest decedent for the commission of a felony. Corroborating testimony established that the detective showed the effects of knife wounds. A verdict and judgment for the plaintiff was affirmed by the appellate court which held that plaintiff was not bound by the uncontradicted testimony of the detec-

20. Daniels v. Daniels, 99 A.2d 717, 719 (Sup. Ct. Del. 1953). This seems to be the idea accepted in New Jersey. See Rushmore v. Rushmore, 12 N.J. Misc. 575, 588, 174 Atl. 469, 476 (Ch. 1934); Totten v. Totten, 60 Atl. 1095, 1096 (N.J. Ch. 1905).

1. The court pointed out that plaintiff did not try to invoke FED. R. CIV. P. 43 (b) which provides:

> A party may call an adverse party or an officer, director, or managing agent of a public or private corporation . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party. . . .

Since the detective was not an "adverse party or an officer, director, or managing agent" of the railroad corporation, it appears that plaintiff was not entitled to the benefits of this rule. See Dowell, Inc. v. Jowers, 182 F.2d 576 (5th Cir. 1950).

tive whom she called as her witness. The court stated that the evidence presented a question for the jury.[2]

The general rule is that a party is bound by the testimony of his own witness.[3] The rule is not without exceptions: the party calling the witness can show that his testimony is self-contradictory or inherently improbable,[4] or can show by additional witnesses[5] or other competent evidence[6] that it is false or mistaken. The principal case is not in accord with the general rule; the court held that plaintiff was not bound by the detective's testimony although it was not inherently improbable, nor was it contradicted by other evidence.

The court quotes text writers who say that a party need not vouch for everything his own witness says.[7] These writers, however, make this statement as an incident to their position, which is contrary to the general rule, that a party may impeach his own witness;[8] but impeachment was not involved in the principal case since plaintiff made no attempt to impeach or discredit the detective. The court apparently commingled two distinct legal rules: (1) one is bound by the testimony of his own witness; (2) one may not impeach his own witness. Within the first rule, a party producing a witness may prove material facts by other competent evidence although the effect of that proof is to contradict directly his prior witness.[9] Proof of these facts should be allowed whatever may be the incidental effect upon the credibility of any witness.[10] The object of impeachment, on the other hand, is to discredit the witness directly by evidence collateral to the material issues of the case. The position taken by the writers that a party *may* impeach his own witness may be sound. Impeachment, however, was not involved in the principal case and

2. Johnson v. Baltimore & Ohio R.R., 208 F.2d 633 (3d Cir. 1953).

3. Wright v. Gordon's Transport, Inc., 162 F.2d 590 (5th Cir. 1947); Wiget v. Becker, 84 F.2d 706 (8th Cir. 1936). See State v. Castino, 264 S.W.2d 372 (Mo. 1954). In Texas Prudential Ins. Co. v. Turner, 127 S.W.2d 563 (Tex. Civ. App. 1939), the court said that plaintiff must allege and prove that the death of her husband was caused accidentally. She offered as her witness the person who shot her husband, and was bound by this testimony because the testimony was not contradicted, nor was the witness impeached.

4. Greenfield v. Commissioner of Int. Rev., 165 F.2d 318 (4th Cir. 1947). *Cf.* United States v. Barber Lumber Co., 172 Fed. 948, 962 (C.C.D. Idaho 1909).

5. Pennsylvania R.R. v. Crouse, 286 Fed. 376 (6th Cir. 1923). *See* Michigan Cent. R.R. v. Zimmerman, 24 F.2d 23, 25 (6th Cir. 1928).

6. Zumwalt v. Gardner, 160 F.2d 298 (8th Cir. 1947). *See* Wirfs v. D. W. Bosley Co., 20 F.2d 632, 633 (8th Cir. 1927); Coonrod v. Kelly, 119 Fed. 841, 846 (3d Cir. 1902).

7. MAGUIRE, EVIDENCE—COMMON SENSE AND COMMON LAW 43 (1947); TRACY, HANDBOOK OF THE LAW OF EVIDENCE 193 (1952); 3 WIGMORE, EVIDENCE § 899 (3d ed. 1940). Ladd, *Impeachment of One's Own Witnesses—New Developments*, 4 U. OF CHI. L. REV. 69, 96 (1936). See MODEL CODE OF EVIDENCE, Rule 106 (1952).

8. *Ibid.*

9. Burris v. Kansas City Public Service Co., 226 S.W.2d 743 (Mo. 1950).

10. JONES, COMMENTARIES ON THE LAW OF EVIDENCE 4814 (2d ed. Henderson 1926).

since the case was not within one of the exceptions to the rule that one is bound by the testimony of his own witness, it is submitted that the court's decision was unsound.

Where uncontradicted, non-conflicting testimony is given by unimpeached witnesses so that disinterested and reasonable men could reach but one conclusion, there is no question for the jury, and a case is established for a directed verdict.[11] In the principal case there was no evidence by which the plaintiff could sustain her burden of proof. The fact that the sole witness to the encounter was an employee of the defendant did not discharge plaintiff's burden.[12] For these reasons the court should have reversed the trial court's denial of defendant's motion for a directed verdict. There was no need to consider the question whether a party is bound by his own witness, which question was unnecessary and immaterial to the decision in the case.

REAL PROPERTY—LATERAL SUPPORT—RIGHT OF EXCAVATING CONTRACTOR TO RECOVER COST OF UNDERPINNING ADJACENT BUILDINGS

Warfel v. Vondersmith, 376 Pa. 1, 101 A.2d 736 (1954)

Plaintiff, a general contractor employed to excavate a city lot, notified defendant, who owned the adjacent lot, that he should take measures to prevent the collapse of his buildings abutting the property line. Defendant took inadequate measures. To prevent injury to workmen and others and to prevent interference with his work, plaintiff entered defendant's land with defendant's permission and underpinned the buildings. When plaintiff's building job was completed, he brought an action to recover the cost of the underpinning. The jury returned a verdict for plaintiff. Defendant's motion for new trial was granted. On appeal, the Pennsylvania Supreme Court affirmed and held that because the defendant was under no duty to provide temporary support for his own buildings, the excavator would have to bear the expense of any support which the excavator supplied.[1]

A landowner's right to lateral support of his land is well defined. If his land is unimproved, he can recover the damages resulting from a

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11. Burdon v. Wood, 142 F.2d 303 (7th Cir. 1944); United States v. Barber Lumber Co., 172 Fed. 948 (C.C.D. Idaho 1909).

12. Moore v. Chesapeake & Ohio Ry., 184 F.2d 176 (4th Cir. 1950).

1. Warfel v. Vondersmith, 376 Pa. 1, 101 A.2d 736 (1954). It was impossible for the lower court to render a judgment *non obstante veredicto* in this case because of a counterclaim filed by defendant which was considered by the jury in assessing damages for plaintiff.