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Evidence—Prior Inconsistent Statements to Refresh Recollection and Impeach Credibility

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something in confidence to his wife, or that a third person has also been permitted to learn the content of the communication? The latter would seem to be the sounder view, and some weight is given to the belief that the Court also recognizes the latter as the basic fact by their adoption of certain language from the case of *Wolfle v. United States.*[8]

> "The uniform ruling that communications between husband and wife, voluntarily made in the presence of their children, old enough to comprehend them, or other members of the family within the intimacy of the family circle, are not privileged . . . is persuasive that communications like the present, *even though made in confidence*, are not to be protected." (Citations omitted.)[9]

If the basic fact of the presumption is that third parties only be aware that the wife has been told something, why did the Court in the *Wolfle* case feel that it was necessary that the children be *old enough to comprehend the communication*? The reason, it is submitted, is that the courts have generally recognized that the basic fact upon which the presumption is based is that a third party has not only become aware that the wife has been told something by the husband but that she has also been permitted to hear and comprehend the meaning of the communication. Is it not true that the accomplices, in both the hypothetical case and the present case, know the content of the communication, *i.e.*, their own presence, with the guns, in the wife's home?

The Court further found that the circumstances indicated a lack of intent by appellant that the wife observe the disclosive act. However, it appears to be just as reasonable to infer that appellant, knowing his wife to be in the house at the time, would recognize the probability of her "discovering" them.

Although weaknesses may be found in each of the separate factors relied upon by the majority in reaching their conclusion as to the nonconfidential nature of the disclosive act in the present case, it appears that their ultimate decision was rightly based upon the cumulative effect of these factors. It further appears that the admission of the alleged confidential communication in the present case would not frustrate the underlying policy of the statute, *i.e.*, to promote the family unity.

J. D.

PRIOR INCONSISTENT STATEMENTS TO REFRESH RECOLLECTION AND IMPEACH CREDIBILITY

In *People v. Freeman*,[10] the defendant was convicted of manslaughter in the first degree. The Court of Appeals reversed the conviction on the grounds that the prosecutor misused a witness' prior inconsistent statements and that the trial court's charge as to these statements was erroneous.

During the presentation of the State's case, the prosecutor called a witness,

8. 291 U.S. 7, 17 (1934).
9. People v. Melski, supra note 1 at 82, 217 N.Y.S.2d at 69.
10. 9 N.Y.2d 600, 217 N.Y.S.2d 5 (1961).

one Ross, to corroborate the details, as described by other witnesses, of defendant's assault upon the deceased. Ross denied having seen the occurrence, and the prosecutor was then permitted, over defendant's objection, to: 1) read the text of questions and answers of Ross' examination before the grand jury; 2) read an unsigned, unsworn written statement made by Ross to the assistant district attorney; 3) recall to Ross an oral statement given by him to the trial assistant. All three statements described the details of defendant's assault upon the deceased and effectively contradicted the witness' prior testimony that he had not seen the fight. Ross admitted having given the answers and the statements but denied that they were true accounts of the occurrence and asserted that they were all made under the threat of his being arrested. This examination covered twenty-five pages of the record.

At the end of this examination, the defendant asked the court for limiting instructions on the evidentiary value of Ross' examination. The court thereupon instructed the jury: "What he [the district attorney] is reading is not evidence in this case, but the questions and answers are. Not what he is reading, but the questions asked here, taken down stenographically, they are evidence in the case." Defendant objected to this instruction, and in an attempt at clarification, the trial court further remarked: "The District Attorney is within his right in asking these questions. However, the questions that are there in that paper are not evidence in this case, but the questions asked of this witness here and the answers given here; those are the questions upon which the jury will determine the issue here." Defendant, not satisfied with these instructions, again at the close of the entire case, asked the court to instruct the jury that the grand jury testimony and the statements were not evidence in the case. The trial judge merely remarked: "You are to consider only such evidence as the court permitted to get into the record."

It is to be noted here that after some hours of deliberation, the jury returned and called for a reading of the testimony given by Ross as to the occurrence of the fight. Approximately one hour after this reading, the jury returned with a verdict of guilty. Defendant then appealed to the Appellate Division contending that the error committed by the trial court in allowing the reading of the statements and the refusal of the trial court to give limiting instructions required a reversal and a new trial.[11] The Appellate Division agreed with defendant that the trial was not free from error but ruled that such error must be disregarded on consideration of the entire record.[12] On appeal, the Court of Appeals reversed the lower courts and remanded for a new trial.

At common law, a party was prohibited from impeaching his own witness by introducing prior inconsistent statements, by showing bias, interest, or corruption, or by an attack on his character.[13] Obscure historical justification

11. 11 A.D.2d 783, 205 N.Y.S.2d 693 (2d Dep't 1960).
12. N.Y. Code Crim. Proc. § 542.
13. McCormick, supra note 5 at 70.

is all that can be found to support such a rule, and so statutory exceptions have sprung up in some of the states.[14] New York has such an exception in providing that:

> any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath.[15]

This exception is limited to prior statements subscribed or made under oath, and hence the grand jury testimony given by Ross was admissible at defendant's trial. However, this statute has consistently been construed to allow introduction of a prior inconsistent statement made in a subscribed writing or under oath *only* for the purpose of impeaching the credibility of the witness and is not to be used as evidence of the facts stated therein.[16] Thus, it has been held to constitute reversible error if a request for limiting instructions on this account is refused.[17]

In this case, the trial judge's instructions were no doubt construed by the jury to mean that the paper from which the district attorney was reading was not evidence in the case, but as soon as he read them and the witness Ross admitted making them, the jury could then use what was said to determine the issue of defendant's guilt. This appears to be the only logical inference that can be drawn from the jury's request for a reading of Ross' testimony as to "what he saw outside around the deceased."

In addition, the Court expressed dissatisfaction with the trial court's handling of the unsigned, unsworn statements made by Ross to the trial assistant and to the assistant district attorney and reversed on this count too. The Court ruled that the trial judge far exceeded his discretion in allowing such a lengthy reading of the latter two statements when the only purpose for which such prior inconsistent statements could be used was to refresh the recollection of the witness and to show the reason for calling the witness.

This doctrine, which allows introduction of prior inconsistent statements for a limited purpose only, is set forth in the leading case of *Bullard v. Pearsall*.[18] In that case, plaintiff's witness on direct examination testified in regard to a material fact contrary to the expectations of counsel. The Court, in deference to the common law, indicated that counsel could not impeach the

14. Ibid.
15. N.Y. Code Crim. Proc. § 8(a); N.Y. Civ. Prac. Act § 343(a).
16. People v. Ferraro, 293 N.Y. 51, 55 N.E.2d 861 (1944); Fitzgibbons Boiler Co. v. Nat. City Bank, 287 N.Y. 326, 39 N.E.2d 897 (1942); Roge v. Valentine, 280 N.Y. 268, 20 N.E.2d 751 (1939). See McCormick, supra note 5 at 74, where the author sets forth some excellent arguments why the trier of fact should be allowed to use a witness' prior inconsistent statement as affirmative evidence of a material fact.
17. People v. Bishop, 270 App. Div. 133, 58 N.Y.S.2d 711 (2d Dep't 1945); Schuyler v. Nat. Transp. Co., 268 App. Div. 1030, 52 N.Y.S.2d 670 (1st Dep't 1945).
18. 53 N.Y. 230 (1873).

credibility of his own witness by showing him to be unworthy of belief. However, *since counsel was taken by surprise*, he should be permitted to interrogate as to prior inconsistent statements to refresh recollection, to draw out an explanation, and to show the witness his error.

However, nowhere in this case does the Court make any mention of surprise and nowhere does the opinion indicate that the district attorney made any showing of surprise at the trial. The question was raised by counsel for defendant in his brief on appeal, but the Court, for some reason chose not to discuss it. Of course, a discussion of surprise was not absolutely necessary to the holding of the case as the Court held that the prior inconsistent statements were *not* used to refresh recollection, but it seems that some mention of surprise was in order since it has been held to be a necessary element of the doctrine.[19] Therefore, whether the Court will in the future require a showing of the "troublesome" requirement of surprise before permitting counsel to refresh the recollection of his witness appears to be somewhat in doubt.[20]

J. S. M.

CONDUCT OF COUNSEL IS REVERSIBLE ERROR

In *People v. Steinhardt*,[21] the defendant, convicted of a felony,[22] contended that he was deprived of a fair trial. Defendant's trial lasted fifty-three days during which time the district attorney insulted the defense counsel,[23] made improper remarks to the defendant on cross examination,[24] and introduced into the record evidence completely unrelated to the subject matter of the action.[25] The Appellate Division affirmed the conviction stating that the evidence clearly

19. People v. Purtell, 243 N.Y. 273, 153 N.E. 72 (1926). See Blum v. Munzesheimer, 66 Hun. 633, 21 N.Y. Supp. 498 (1892); and Colter v. American Merchant's Un. Ex. Co., 56 N.Y. 585 (1874), for dicta that limits the doctrine to instances in which the calling party is surprised by his witness' testimony.

20. McCormick, supra note 5 at 72, where the author recommends the abolition of a showing of hostility or surprise in line with his other argument that the trier of fact should be allowed to use prior inconsistent statements as affirmative evidence of a material fact.

21. 9 N.Y.2d 267, 213 N.Y.S.2d 434 (1961).

22. Defendant was convicted of criminally buying and receiving stolen property and of concealing and withholding stolen property under N.Y. Penal. Law § 1308.

23. Appellant's Brief, 7768 Cases & Points, Case 10, pp. 28-30:

"Now, your Honor, that stirring Sarah Bernhardt speech makes me want to puke. . . ."

"The air that . . . [defense counsel] gives stinks to high heaven."

"I have seen desperate men trying cases but never as desperate as this. . . . [Defense counsel] now is fishing off the bottom of the barrel."

"Some time subconsciously the truth seems to come out of . . . [defense counsel's] mouth."

24. Id. at 26:

"Well, sir, I am not allowed, due to the rules of evidence and due to the fact that I am a District Attorney, to state to you now what you are. . . ."

25. In cross examination of the defendant's witness, the district attorney asked if the witness had ever been convicted of a crime. In redirect examination, defense counsel established that the witness was a veteran of the Second World War, had fought and had been wounded at the Battle of Anzio. These answers prompted the prosecutor on recross examination to review his military history during the Second World War, and question the witness exhaustively on the commanders, the terrain, and the fighting at Anzio. "Your Honor, may the record show that I am a holder of the Purple Heart, and an Oak Leaf