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Criminal Law—Evidence—Impeachment

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Evidence—Impeachment

It is universally maintained by the courts that evidence of prior self-contradictions made by a witness is admissible only to impeach or discredit the witness or to refresh his recollection and as such is not competent as substantive evidence of the facts to which the statements relate.[50] In *People v. Cannizzaro*[51] the Court of Appeals unanimously reversed a conviction, affirmed by the Appellate Division, where the trial court, in applying section 8-a of the Code of Criminal Procedure,[52] permitted the jury to see the entire extra-judicial statement of a witness which included hearsay, conclusory and prejudicial language. It was held that, for impeachment purposes, only so much of the pretrial statement of the witness as controverted his trial testimony should have been admitted into evidence.

The reason generally given for the above proposition is that the pretrial statement is made out of court by one not subject to cross-examination and thus falls within the hearsay rule. It seems clear that the contents of such a statement should not be allowed to constitute affirmative evidence against the defendant.[53]

Virtually alone in a dissenting position, although he concedes that the Court of Appeals' view is universally followed, is Wigmore in his treatise on evidence.[54] However, notwithstanding this practical evaluation, the preponderence of authority holding in accord with *People v. Cannizzaro* would indicate that the point is now settled law in New York in both civil and criminal proceedings.[55]

Evidence—Prosecuting Attorney as Unsworn Witness

The conviction in *People v. Lovello*[56] was reversed by the Court of Appeals

50. *People v. Portese*, 279 App. Div. 63, 108 N. Y. S. 2d 471 (3rd Dep't 1951); *People v. Bishop*, 270 App. Div. 133, 58 N. Y. S. 2d 711 (2d Dep't 1945).

51. 1 N. Y. 2d 167, 134 N. E. 2d 206 (1956).

52. N. Y. CODE CRIM. PROC. § 8-a. In addition to impeachment in the manner now permitted by law, 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. See §343-a N. Y. CIV. PRAC. ACT.

53. *People v. Portese*, 279 App. Div. 63, 108 N. Y. S. 2d 471 (3d Dep't 1951); *People v. Bishop*, 270, App. Div. 133, 58 N. Y. S. 2d 711 (2d Dep't 1945); *People v. Shingles*, 281 App. Div. 647, 121 N. Y. S. 2d 651 (3d Dep't 1953).

54. 2 WIGMORE, EVIDENCE § 1018 (2d ed. 1923). The witness, being present, can be subjected to cross-examination to test the basis of his former statement. Thus the hearsay rule is satisfied, and nothing prevents the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.

55. *Roge v. Valentine*, 280 N. Y. .268, 20 N. E. 2d 751 (1939); *People v Ferraro*, 293 N. Y. 51, 55 N. E. 2d 861 (1944); *People v. Marino*, 288 N. Y. 411, 43 N. E. 2d 466 (1942); *People v. Shingles*, 281 App. Div. 647, 121 N. Y. S. 2d 651 (3d Dep't 1953).

56. 1 N. Y. 2d 436, 136 N. E. 2d 483 (1956).