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Rehabilitation of Witnesses: May an Impeached, Contradicted or Discredited Witness Be Rehabilitated by Showing That He Has Made Declarations Out of Court Which Are Consistent with His Testimony?

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procedural and substantive law, but rather should seek to bring about substantially the same results as would obtain in a state court. By refusing to enforce Section 61-b a federal court may change the entire complexion of a case. On the one hand, if the court refuses to enforce the statute, the defendant corporation stands to lose a very substantial sum in counsel fees, and on the other hand, if the court does enforce it and plaintiff is unable to meet the statutory requirements, the case will be at an end. The result brought about by the ruling in *Boyd v. Bell* and the result that would have been brought about had the case been tried in a state court are strikingly at variance and assuredly the federal court there was far from being "another court of the state."

Adding emphasis to the rule that whether or not a statute is considered substantive or procedural is immaterial, the Supreme Court of the United States has held that a federal court in a diversity case should enforce the public policy of the state. The public policy of the State of New York will be completely ignored if *Boyd v. Bell* is to be followed.

The clash of authority both on the issue of applicability and on the issue of appealability makes it apparent that a decision by the United States Supreme Court will be required to decisively settle the controversy and it is hoped that such a decision will soon be forthcoming.[59]

THOMAS A. BOLAN.

REHABILITATION OF WITNESSES

MAY AN IMPEACHED, CONTRADICTED OR DISCREDITED WITNESS BE REHABILITATED BY SHOWING THAT HE HAS MADE DECLARATIONS OUT OF COURT WHICH ARE CONSISTENT WITH HIS TESTIMONY?

I. *The General Rule*

In England and in this jurisdiction until the latter part of the 18th and early part of the 19th centuries, it had been the practice of the courts to allow the testimony of a witness to be corroborated or confirmed by permitting the introduction of declarations of the witness made out of court, whether under oath or not, of the same tenor as the testimony then being given.[1] This appears to have been done

[59] The Supreme Court has an opportunity to decide these questions in the pending case of *Cohen v. Beneficial Industrial Loan Corporation.*

[1] People v. Vane, 12 Wend. 78 (N. Y. 1834); Jackson v. Etz, 5 Cow. 314 (N. Y. 1826); Knox's Trial, 7 How. St. Tr. 763, 790 (1679); Lutterell v. Reynell, 1 Mod. 282, 86 Eng. Rep. 887 (1671).

even in the absence of impeachment and on the theory that there was some corroborative force in the fact of reiteration.[2]

The admission of such declarations resulted in the trial of extraneous issues and was unfounded in reason. It was fallacious to assume that numerous repetitions of the same story clothed it with credence and rendered it trustworthy.[3]

Accordingly, by the middle of the 19th century the great weight of authority both in England and in this country recognized the fallacy of permitting such evidence and excluded it. The rule was then adopted that the testimony of an impeached, contradicted or discredited witness could not be corroborated, confirmed or bolstered by establishing that such witness made consistent declarations out of court.[4]

This rule of exclusion, entrenched as it became by authority, was founded upon sound, cogent reasoning. A contrary doctrine would degenerate litigation into a contest for the latest version of a witness, and enable such witness to control the effect of prior inconsistent declarations which he subsequently desired to qualify or destroy.[5]

II. *The Exception*

The present general rule, as stated above, was enunciated for the first time in New York in the case of *Robb v. Hackley*.[6] Coincident therewith the court recognized the existence of an exception to its operation.[7] Thus, where a witness is discredited and his testimony assailed as a fabrication formulated for the exigencies of the trial and motivated by some self-interest or otherwise, the party calling him may show that, at a time when the imputed motive did not

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[2] Lutterell v. Reynell, *supra* note 1; 4 WIGMORE, EVIDENCE § 1123 (3d ed. 1940). Since the statements referred to are received only as bearing on the credibility of the witness, and not as proof of any fact in issue, there is no conflict with the hearsay rule.

[3] *See* People v. Katz, 209 N. Y. 311, 342, 103 N. E. 305, 315 (1913).

[4] Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475 (1836); Robb v. Hackley, 23 Wend. 50 (N. Y. 1840); Rex v. Parker, 3 Doug. 242, 99 Eng. Rep. 634 (1783); see also 4 WIGMORE, EVIDENCE § 1125 *et seq.* (3d ed. 1940).

[5] *See* Ellicott v. Pearl, 10 Pet. 412, 440, 9 L. ed. 475, 487 (1836); and Crawford v. Nilan, 289 N. Y. 444, 451, 46 N. E. 2d 512, 516 (1943), where the court said: "Success would come to him who obtained it [the latest version] even though he had to keep the witness incommunicado, until rushed upon the witness-stand, for fear he might give a different and still later version, which he could make accord with the testimony he had then decided to give."

[6] 23 Wend. 50 (N. Y. 1840).

[7] "If an attempt is made to discredit the witness, on the ground that his testimony is given under the influence of some motive prompting him to make a false or colored statement, the party calling him has been allowed to show in reply, that the witness made similar declarations at a time when the imputed motive did not exist." *Id.* at 52.

exist, the witness made declarations consistent with the testimony being given.[8]

In the more than one hundred years since the *Robb* case was decided the general rule and the exception thereto have remained without limitation or qualification on the one hand, or engraftment or enlargement on the other.[9] Neither has any distinction been drawn as to the applicability of the general rule and its exception between civil and criminal causes.[10]

Clear and simple as the rule and its exception seem to be, difficulty in application has developed, as often happens, and there has crept into some of the decisions a lapse of rigid enforcement with disturbing consequences.

III. *Applying the General Rule and the Exception*

In *People v. Van Arsdale*[11] a witness volunteered under cross-examination, the information that he had made a statement to the District Attorney's office prior to testifying. Counsel for the defendant charged that the witness had been "coached" before the statement (which was in narrative form) had been taken, and sought to establish this by a line of questioning as to what occurred in the District Attorney's office immediately preceding the transcription of the statement.[12] The paper was then offered in evidence by the District Attorney on the ground that it and the testimony given were consistent. No error in its receipt was found.[13]

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[8] Neither the general rule nor the exception thereto should be confused with the rule that ". . . where declarations or acts of a party are used against him as admissions tending to show an inconsistent attitude, it is always open to him to explain the apparent contradiction." Ferris v. Sterling, 214 N. Y. 249, 254, 108 N. E. 406, 408 (1915); D'Ambra v. Rhinelander, 234 N. Y. 289, 137 N. E. 333 (1922).

[9] *See* Crawford v. Nilan, 289 N. Y. 444, 46 N. E. 2d 512 (1943).

[10] *Compare* Crawford v. Nilan, *supra* note 9, *with* People v. Katz, 209 N. Y. 311, 103 N. E. 305 (1913).

[11] 264 App. Div. 300, 35 N. Y. S. 2d 426 (2d Dep't 1942), *rev'd on other grounds*, 289 N. Y. 810, 47 N. E. 2d 53 (1943) (evidence legally insufficient to sustain verdict).

[12] "In connection with this paper he flatly charged that the witness under examination was 'coached.' After thus impugning the integrity of the witness, and with the paper in his hand, he asked repeatedly whether the witness had been interrogated in question and answer form, ..." People v. Van Arsdale, 264 App. Div. 300, 301, 35 N. Y. S. 2d 426, 428 (1942).

[13] "Certain questions insinuated that what happened while the witness was being questioned by the district attorney was not reflected in the paper; others charged or insinuated that the witness had been influenced or corrupted by named individuals. All these things constituted further attacks upon the integrity of the witness *in relation to the paper*. This conduct of defendant's counsel made the exhibit admissible in evidence because the charges and the manner of interrogation of the witness made applicable the exception to the general rule in respect of a prior consistent statement which permits its receipt in evidence 'when the witness rests under the imputation of a recently formed motive to falsify,' as well as on the theory that 'it tends to support the in-

Clearly it was the method used in procuring the statement that was under attack. The statement itself was not inconsistent with the testimony given. As a statement it could not be used to impeach or contradict the testimony given upon the trial. The defendant's asserted grievance was that the statement was false and untrue and born of coaching and subornation and was followed through by the witness giving similar tainted testimony upon the trial. It is difficult to understand upon what theory the court received the paper in evidence when offered by the District Attorney. Certainly it was not admissible as "a prior consistent declaration" since nothing inconsistent with its contents had been offered or produced. Furthermore, it was not admissible upon any theory that it came within the exception to the general rule to show that the statement was made at a time when there was no motive to falsify.[14] If he lent himself to coaching or subornation at the time he made the statement, then whatever motive he had at that time also controlled the testimony given upon the trial. In other words, the testimony given upon the trial was not attacked as a recent fabrication prompted by a present motive to falsify. If such had been the case, then with entire propriety the District Attorney could have shown that a statement consistent with the testimony given was made before any motive to falsify existed.

There does not seem to be any validity to the contention made to support the competency of the statement that it tended to negative the charge that the witness had been coached or suborned into making it. The inflexible rule, followed throughout the years, was sorely strained by the untenable theory upon which the decision was predicated.

In *Donovan v. Moore-McCormack Lines, Inc.*,[15] plaintiff was injured by a bag which was being unloaded from a steamship. The claim of negligence was failure to give warning of the delivery of the bag into a chute leading from the steamship to the dock. Plaintiff testified to the failure to give such warning. Upon the trial he was confronted with a written statement made a day after the acci-

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tegrity of the witness, no less than the accuracy of his recollection'; or where the witness rests, as in the case at bar, under the charge that he has been suborned or has recently fabricated his testimony to meet the exigencies of the case." (Emphasis supplied.) *Id.* at 302, 35 N. Y. S. 2d at 428.

[14] Apparently the departure from the rule was recognized for immediately after holding the receipt of the evidence proper the court said, "In any event, . . . the admission of the paper under the circumstances, even if it were not strictly proper, involved no prejudicial error." *Id.* at 302, 35 N. Y. S. 2d at 429. *See also* Donovan v. Moore-McCormack Lines, Inc., 266 App. Div. 406, 407, 42 N. Y. S. 2d 441, 442 (1st Dep't 1943). "We are cognizant of the prevalence of the practice of having investigators interview injured persons and receive statements from them. Under all the circumstances we hold that it was not error to receive the 'consistent' statement in evidence; or, if error occurred, that it was harmless."

[15] 266 App. Div. 406, 42 N. Y. S. 2d 441 (1st Dep't 1943).

dent which indicated that due warning had been given, but that his back was turned toward the chute at the time. The statement if given and true was directly opposed to the testimony and destructive of plaintiff's claim of negligence. Clearly they were hopelessly inconsistent.

However, there was some question whether the statement accurately reflected what the plaintiff actually said when it was taken a day after the accident. There was no unqualified admission by the plaintiff that the statement as produced in court constituted his version of what occurred. Thus an issue arose as to the correctness of the statement which on its face was at complete variance with the testimony.

Under these circumstances plaintiff was permitted to show that five days subsequent to the date of the statement in question he made another to his employer in which he denied that any warning was given. It was held that no error was committed in admitting into evidence the latter "consistent" declaration; that it was competent on the theory that it had some probative value as to whether or not the prior contradictory or inconsistent statement had in fact been made or given.

Again it is difficult to follow the theory or reasoning employed. And again we find what appears to be an obvious intrusion upon the rule and its exception under consideration. Plaintiff's denial upon the trial of the giving of warning and that the first statement which was inconsistent with his testimony was inaccurate could not be confirmed and the witness rehabilitated by showing a subsequent statement to his employer which tended to confirm the trial testimony. Contradictory versions of the same transactions made at different times should not form the basis of admitting into evidence the statement confirmatory of the testimony being given.[16] It would be entirely proper to show that an inconsistent statement was not given or was inaccurately transcribed or that some overreaching conduct was practiced in obtaining it. The witness should be permitted to explain the circumstances under which it was obtained if the statement in question, which is inconsistent with his testimony, was in fact untruthfully or inaccurately reported.

But the admission into evidence of the second statement given to the employer could have no probative value in determining the truth or accuracy of the declaration contained in the first statement. The motive of the witness had no bearing on the question so as to render admissible that which clearly was not competent. Upon the trial his motive was to establish negligence arising out of failure to give warning. The same motive prompted the exculpatory statement given to the employer in which he sought to hold himself blameless for the happening of the accident.

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[16] Crawford v. Nilan, 289 N. Y. 442, 46 N. E. 2d 512 (1943).

IV. *Conclusion*

Whenever the question of the admissibility of prior consistent declarations has heretofore been raised before the Court of Appeals, all of the elements stated in the exception to the rule had to be present before receipt of such declarations was sanctioned. Thus, the confession of an accomplice, discredited only by the distrust and suspicion inherent in the fact that he was an accomplice, was rejected when offered to confirm his testimony;[17] but where an accomplice has been impeached on the ground that he was testifying to gain immunity, it has been held proper to show that the same account was given by him before immunity was promised.[18] Similarly, where it is charged that ownership of an automobile has been disclaimed at the trial for the first time to avoid liability, it has been held competent to show that weeks and months prior to the accident the same disclaimer was made.[19]

But where the witness is contradicted only by a statement inconsistent with the version presently given it has been held incompetent to bolster his testimony with other statements made subsequent to the impeaching document.[20] In the main the courts have studiously followed the general rule and strictly limited the application of the exception thereto.[21]

The departures made in the *Van Arsdale* and *Donovan* cases seem well calculated, if followed, to permit a party or a witness who is conscious of having made declarations, the force of which he would like to qualify, weaken or destroy, to control their effect by making subsequent declarations of the same tenor as the testimony he plans to give upon the trial. The infringements and incursions of these cases upon a salutary rule of evidence are disquieting and may give rise to additional variations from a principle to which there should be unyielding adherence. "Harmless error" in the admission of these otherwise incompetent statements is an unsatisfactory answer to the question involved.

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[17] People v. Edwards, 282 N. Y. 413, 26 N. E. 2d 757 (1940).
[18] People v. Katz, 209 N. Y. 311, 103 N. E. 305 (1913).
[19] Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406 (1915).
[20] Crawford v. Nilan, 289 N. Y. 442, 46 N. E. 2d 512 (1943).
[21] *See* People v. Racciatti, 225 App. Div. 284, 232 N. Y. Supp. 329 (4th Dep't 1929); Doherty v. Rogers, 209 App. Div. 291, 204 N. Y. Supp. 536 (4th Dep't 1924); Dechert v. Municipal Electric Light Co., 39 App. Div. 490, 57 N. Y. Supp. 225 (1st Dep't 1899).