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by Byron Warnken

The general rule is that prior inconsistent statements of a witness are inadmissible as substantive evidence because of the hearsay rule, and the prior inconsistent statement can only be used for the purpose of impeaching the credibility of the witness. The prior inconsistent statement, under this traditional view, is hearsay because it was not taken under oath, is not subject to cross-examination, and was not taken in the presence of the trier of fact. The contra, more modern, minority view is that an oath does not guarantee trustworthiness of testimony, that the declarant can be cross-examined, and that the trier of fact can observe and judge the demeanor of the witness on the stand. (*McCormick on Evidence* § 251)

Maryland follows the traditional view that prior inconsistent statements are not probative evidence on the merits and are not to be treated as having any substantive or independent testimonial value. (*Wilson v. State,* 20 Md. App. 318, 326 (1974); *Kraft v. Freedman,* 15 Md. App. 187, 195-96 (1972); *Sun Cab Co. v. Walston,* 15 Md. App. 113, 135 (1972); *West v. Belle Isle Cab Co.,* 203 Md. 244, 253 (1953). Although not admissible as substantive evidence, the prior inconsistent statement made by a witness is admissible for the purpose of impeaching the credibility of the witness. (*Sun Cab Co., Inc. v. Cusick,* 209 Md. 354, 361-62 (1956); *Parks v. State,* 113 Md. 338, 340 (1910). This includes the witness' testimony from a previous trial. (Foble v. Knefely, 176 Md. 474, 485 (1939).

To pursue the impeachment process, the inconsistency between the prior statement and the testimony at the trial must pertain to a material issue. (*Sun Cab Co. v. Walston,* 15 Md. App. 113, 132; *Joppy v. Hopkins,* 231 Md. 52, 56 (1962). In addition, before the prior inconsistent statement can be admitted for impeachment purposes, a proper foundation must be laid, by asking the witness on cross-examination whether he or she had made such contradictory statement to a designated person and apprising the witness of the time and place when the statement was supposed to have been made. (*Cooper v. State,* 14 Md. App. 106, 111 (1972); *Estep v. State,* 14 Md. App. 53, 70 (1972); *Sanders v. State,* 1 Md. App. 630, 640-42 (1967); *Campbell v. patton,* 227 Md. 125, 141 (1961). Where the prior inconsistent statement was verbal, the witness' attention must be called to the statement, with a specification of the time and place, so that the witness may be given an opportunity to explain the circumstances surrounding the making of the statement, and so that it may be determined whether there is actually an inconsistency. (*Baltimore Transit Co. v. State ex. rel. Castranda,* 194 Md. 421, 433 (1950). If the witness states that he does not recall making the alleged prior inconsistent statement, it is competent to prove that the statement was made and to let the jury consider such proof in estimating the credit to be given to the testimony of the witness. (*Leister v. State,* 136 Md. 518, 523 (1920). Thus, impeaching evidence may be offered if the witness denies having made the previous statement, or if he states that he does not remember whether he made it.

If the witness making the contradictory statement is one's own witness, an additional criterion exists because of the general rule that a party may not impeach his own witness. In this case, the party calling the witness must first satisfy the Court that he has been taken by surprise, and that the testimony is contrary to what he had a right to expect. If the Court is so satisfied, it may allow the party to question the witness in a leading manner; this is to elicit proof of the prior inconsistent statement to show that the party calling the witness has been surprised by the witness' testimony, why the witness was called, and that the witness was called in good faith. These prior inconsistent statements are, of course, not probative evidence. (*Green v. State,* 243 Md. 154, 157-58 (1966).

A witness whose testimony has become suspect by a showing of prior inconsistent statements may rehabilitate himself by offering evidence of other statements made by him which are in accord with his testimony or by explaining the reasons for any such inconsistencies. (*Virginia Freight Lines, Inc. v. Montgomery,* 256 Md. 221, 226 (1969). The witness may thus render his prior statements consistent, or there may exist a situation of prior statements having been consistent all along. In either case, the prior consistent statements, like the prior inconsistent statements, have no substantive value, but only credibility value. In the case of the prior consistent statement, there is no need to look to the prior statement for substantive value in any event, since its consistent counterpart — the testimony at the trial — is substantive evidence.

The witness' prior statement may contain "A". In court he may say "B" when questioned by the party calling him. The party calling him will claim surprise, and upon laying the proper foundation, will be permitted to bring in the prior statement "A", not as substantive evidence, but to show why the witness was called. Once the surprise phase has been concluded, firect examination will resume, whereupon the witness may say "A". Now "A" is substantive evidence, not through its prior statement form, but through its probative value as direct testimony. (*Tates v. State,* Md. App. No. 624 (unreported) (1974).

These rules as to prior statements apply only to a witness. There is a wide difference between the declaration of an ordinary witness, a stranger to the case, and the declaration of a party to the record. The latter, being the admissions of a party to the record against his interest, are substantive evidence and may be offered to prove the truth of the matters

thus admitted. (*Smith v. Branscome,* 251 Md. 582, 589 (1968); *Wolfe v. State ex. rel. Brown,* 173 Md. 103, 110 (1937); *Bartlett v. Wilbur,* 53 Md. 485, 497-98 (1880); *M.L.E.* Evidence § 141).

A related area is the difference between a memorandum of past recollection recorded and a memorandum used to revive present recollection. A past recollection recorded is used in a situation where a witness, who is either devoid of a present recollection or possessed of an imperfect present recollection, desires to use a past recollection. The witness must identify the memorandum as made immediately after, or contemporaneously with, the event, and that the memorandum is a correct statement of those facts which the witness recorded. It must be adduced from the witness that he or she at one time had personal knowledge of the facts, that the writing was, when made, an accurate record of the event, and that after seeing the writing, he has not sufficient present independent recollection of the facts to testify accurately in regard thereto. Present recollection revived involves the use, by a witness, of a writing or other object to refresh his recollection so that he may testify about events from present recollection. The memorandum in the former instance has substantive value; in the latter it does not. (*Askins v. State,* 13 Md. App. 702, 709-10 (1971).

Although Maryland recognizes and continues to reaffirm the principle that a substantive fact cannot be established by impeachment of a witness, not a party to the suit, by previous contradictory statements, both the Court of Special Appeals and the Court of Appeals have acknowledged the existence of a contra minority view. (*Wilson v. State,* 20 Md. App. 318, 326-27 (1974); *Kraft v. Freedman,* 15 Md. 187, 195-96 (1972); *Clay v. State,* 211 Md. 577, 583 (1956); *West v. Belle Isle Cab Co.,* 203 Md. 244, 253). This view permits the substantive use of prior inconsistent statements on the theory that the usual dangers of hearsay are largely nonexistent where the witness testifies at trial. Having been urged by most legal commentators, this view finds expression in current proposals to codify the law of evidence and has been adopted in some jurisdictions.

The America Law Institute Model Code of Evidence Rule 503 (a) provides that evidence of a hearsay declaration is admissible if the judge finds that the declarant is present and subject to cross-examination.

The Uniform Rules of Evidence Rule 63 (1) provides that a statement previously made by a person who is present at the hearing and available for cross-examination, is substantively admissible provided the statement would be admissible if made by declarant while testifying as a witness. The comment to the rule contends that when sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay.

Federal Rules of Evidence Rule 801 (d) (1) provides that prior statements by a witness are not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement.

Some form of the above three rules is now used not only in the federal court system, but also in several state jurisdictions (e.g., California, Kansas, Kentucky, New Jersey, Utah). In addition, Wisconsin, without the aid of a statute or general rule of court, has held that prior inconsistent written statements, made by a witness who is in court and subject to cross-examination, are admissible not only for impeachment, but also for substantive evidence. (*Gelhaar v. State,* 41 Wis.2d 230 (1970).

Concerning the constitutionality of admitting prior inconsistent statements as substantive evidence, the Supreme Court said that the confrontation clause of the Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, is not violated by admitting a declarant's out-of-court statements, as long as he is testifying as a witness at trial and is subject to full cross-examination. The court said that the purposes of the Amendment are satisfied at the time of trial, even if not before, since the witness is under oath, is subject to cross-examination, and his demeanor can be observed by the trier of fact. (*California v. Green,* 399 U.S. 149, 153-64 (1970).

In Maryland, in addition to the Court of Appeals' 1974 reaffirmation of its adherence to the traditional view prohibiting prior inconsistent statements as substantive evidence (*Wilson v. State,* 20 Md. App. 318, 326-27 (1974), it is noted that the 1975 regular session of the General Assembly received no bills proposing statutory evidentiary rules. Thus, there is nothing at the present time to indicate to the bar or the bench that Maryland will adopt the modern minority, yet apparently ever-growing, view that prior inconsistent statements can be used as substantive evidence.

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