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Some Observations on Credibility Impeachment of Witnesses

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SOME OBSERVATIONS ON CREDIBILITY: IMPEACHMENT OF WITNESSES

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The author presents the determination of credibility as a multiple process in which many truth testing devices must be combined, since many diversified factors join together in bringing to light the quality of the witness, the accuracy of his perceptions, and the worth of his testimony. The author emphasizes the skills and techniques required in using different types of impeachment testimony and also gives critical consideration to some of the existing rules of evidence relating to credibility, with a forecast as to future development. He concludes that final reliance must be placed upon the imagination, resourcefulness, experience, and ability of lawyers to bring out in the setting of the trial the strength and weakness of witnesses so that the triers may evaluate the true worth of their testimony.

Credibility of witnesses and evaluation of their testimony will always present critical problems difficult to solve in the trial court. Improved rules of evidence will give greater freedom to counsel in their attack upon the problem, but they cannot eliminate the difficulties of proof, for these difficulties vary with each factual situation and with each witness. If a perfect substantive law could be assumed and a perfected system of trials established, it might appear that these difficulties would be solved. Unfortunately, such would not be the case. As long as human beings are subject to error in perception and communication, failure of memory, and the willingness on the part of some to falsify whenever there is sufficient motivation, trials will require skills and techniques in the use of the law of evidence for solution of disputed questions of fact.

The present trend toward letting in more evidence and enlarging the competency of witnesses has the advantage of giving the triers all of the evidence which will be helpful to a solution, but it does not answer the question of whether a witness is mistaken or intentionally falsifying.[1] Under modern statutes, every person is qualified as a witness if he is capable of expressing himself concerning a matter so as to be understood

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[1] See generally Ladd, "A Model Code of Evidence," in Model Code of Evidence 329, 339 (1942); Dow, "Judicial Control of Credibility in Jury-Tried Actions," 38 Neb. L. Rev. 835 (1959); Heilbron, "Cross-Examination and Impeachment," 15 Ark. L. Rev. 39 (1960); Ladd, "A Modern Code of Evidence," 27 Iowa L. Rev. 213 (1942); McCormick, "Tomorrow's Law of Evidence," 24 A.B.A.J. 507 (1938); Slough, "Impeachment of Witnesses: Common Law Principles and Modern Trends," 34 Ind. L.J. 1 (1958); Weihofen, "Testimonial Competence and Credibility," 34 Geo. Wash. L. Rev. 53 (1965); Weinstein, "Some Difficulties in Devising Rules for Determining Truth in Judicial Trials," 66 Colum. L. Rev. 223 (1966).

and has the capacity to understand the duty to tell the truth.[2] Nevertheless, one remaining vestige of earlier disqualification because of interest is still found in most states, namely, the rule of incompetency to testify in an action against the estate of a deceased person.[3] Except for this rule, which is in need of revision, other limitations are proper qualifications essential to give meaningful testimony. The function of a witness is to communicate matters of his personal knowledge. Therefore, to testify as a witness, a person must have witnessed the thing about which he testifies and must have the capacity to perceive and to recollect what he perceived.[4] The value of his testimony depends in a large measure upon his opportunity to observe and his capacity to observe accurately, to remember, and to communicate in such a way that the triers of fact may know what actually happened. It is the quality of the witness, the circumstances surrounding his opportunity for observation, and the many variable factors which influence his perception that indicate the reliability of the testimony which he gives.[5]

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[2] See, e.g., Cal. Evid. Code §§ 700-02 (effective Jan. 1, 1967); Supreme Court of New Jersey Rules of Evidence 17-22 (codified with N.J. Stat. Ann. §§ 2A:84A-1-32 (Supp. 1965)). These New Jersey Rules are the same as the corresponding provisions of the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws, 9A U.L.A. 606-08 (1965). See also Orfield, "Competency of Witnesses in Federal Criminal Cases," 46 Marq. L. Rev. 324 (1963); Rowley, "The Competency of Witnesses," 24 Iowa L. Rev. 482 (1939). With the removal of common-law incompetencies, the things which formerly precluded a witness from testifying may be used to test his credibility.

[3] See McCormick, Evidence § 65 (1954) and the authorities cited in note 83 infra.

[4] The Uniform Rules of Evidence have set a pattern for the statement of the requirement of personal knowledge which has been substantially followed in recent legislation. Uniform Rule 19 provides:

> As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

Rule 19 must be considered in connection with rule 17, which disqualifies witnesses incapable of communicating or understanding the duty to tell the truth, and rule 7 which makes every person qualified to be a witness subject to rules 17 and 19.

[5] For a most enlightening and practical discussion of the multifold elements involved in judging credibility, see Judge Medina's opinion in the Communist Conspiracy Case, United States v. Foster, 9 F.R.D. 367, 388-90 (S.D.N.Y. 1949). He comments:

> By what yardstick and in accordance with what rules of law are you to judge the credibility of the witnesses . . . ?
>
> This judging of testimony is very like what goes on in real life. People may tell you things which may or may not influence some important decisions on your part. You consider whether the people you deal with bad the capacity and the opportunity to observe or be familiar with and to remember the things they tell you about. You consider any possible interest they may have, and any bias or prejudice. You consider a person's demeanor, to use a colloquial expression, you "size him up" when he tells you anything; you decide whether he strikes you as fair and candid or not. Then you consider the inherent believability of what he says, whether it accords with your own knowledge or experience. It is the same thing with witnesses. You ask yourself if they know what they are talking about. You watch them on the stand as they testify and note their demeanor. You decide how their testimony strikes you.

Id. at 388.

Credibility is sometimes thought to involve only a question of the truthfulness of a witness or of his intentional false swearing, but this overlooks the many other causes for the unreliability of testimony. In addition, there are many degrees and kinds of intentional falsification. They vary from the testimony of the witness who knows enough about the facts to enlarge upon them with convincing effect, to the witness whose skill is in deceptive distortion, to the witness who has no knowledge about the facts but who, through complete invention, testifies to whatever is needed as proof in the case. The frequent plausibility of the testimony makes detection of false swearing difficult.

CHARACTER EVIDENCE

In a direct attack upon the credibility of a witness believed to be giving perjured testimony, the evidence used is generic in character and designed to show the general propensity of a witness to falsify. From this the triers of fact may draw the inference that the particular testimony in question is false.[6] This type of truth testing is directed to the character of the witness and to his honesty and veracity.[7] In effect, it is designed to show that the conscience of the witness would not be disturbed if he falsified. Thus, a witness may be competent to testify because he recognizes the legal duty to tell the truth, but he may lack the traits of character which would cause him to do so if there is some advantage to be gained by falsifying.

Falsification by such a mendacious witness may be expected, but it does not always occur and, unless there is some motive for the falsification,

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[6] For basic principles in the use of character evidence, see Ladd, "Techniques and Theory of Character Testimony," 24 Iowa L. Rev. 498 (1939).

[7] There is much confusion as to the type of character evidence which may be used to attack credibility, but a consideration of this is not the subject of this article. Comment is made, however, to point out some of the variations regarding the selection of traits of which proof may be given. "Truth and veracity" as descriptive of the trait used for impeachment is common everywhere and in some jurisdictions is the only trait upon which proof by reputation may be given to challenge truthfulness. United States v. Walker, 313 F.2d 236, 239 (6th Cir. 1963); Andrews v. State, 172 So. 2d 505, 507 (Fla. Dist. Ct. App. 1965). Uniform Rule 22(c) limits inquiry to the traits of bonesty or veracity or their opposites. This designation is practical in that it is easily understood and includes the qualities logically associated with the question of a person's truthfulness. In a few jurisdictions, general moral character is permitted as a means of proof. This is objectionable as not being sufficiently informative for truth testing and if used against the accused as a witness in a criminal case, may be misapplied to provide a basis for inferring that he probably committed the crime. For an informative case, see State v. Teager, 222 Iowa 391, 397-98, 269 N.W. 348, 351 (1936). Compare State v. Ferguson, 222 Iowa 1148, 1159-60, 270 N.W. 874, 881 (1937) in which a question calling for character as to bonesty, integrity, and good citizenship was held to be bad. In State v. Williams, 337 Mo. 884, 894-900, 87 S.W.2d 175, 180-84 (1935), the Missouri court changed its former holdings which had permitted the use of general moral character to impeach credibility and pointed out the dangers of this broad use. For discussion of this problem, see Ladd, "Credibility Tests—Current Trends," 89 U. Pa. L. Rev. 166, 184-87 (1940). See also Curley, "Reputation of a Witness for Truth and Veracity in Civil and Criminal Cases," 46 Marq. L. Rev. 353 (1963).

perhaps it seldom occurs.[8] A witness who has been previously convicted of a felony involving dishonesty and false swearing may have very keen perception and the ability to communicate what he has observed. Without a reason to falsify, his testimony may be worth much more than that of a witness whose character qualifications are good but who has limitations upon his ability to perceive, or whose testimony is unconsciously influenced by the past experiences in his life or by associations which have created a biased perspective.

The current trend of improvements in the law, permitting opinion as well as reputation testimony as a means of proof of character but confining this testimony to traits indicating honesty and veracity or their opposites, provides a realistic method for permitting character evidence to perform its truth-testing function more effectively.[9] Likewise, the limitation of the use, for the purpose of impairing credibility, of evidence that a witness has been convicted of crimes involving dishonesty or false statement will prevent much of the abuse occurring in regard to this kind of testimony and make such testimony more meaningful to the triers of fact.

Scope of Credibility Testing

The problems of credibility involve much more than direct attacks upon the character of witnesses to discover intentional falsification. Rather they involve everything relating to a witness which discloses the probability of accuracy or error in his testimony.[10] Therefore, credibility testing is directed to the diversified factors which enable the triers of fact intelligently to estimate the value of the testimony by judging the quality of the witness who gave it and his opportunity to know the facts. For example, mental deficiencies of a witness are considered in determining credibility.[11] Similarly, intoxication at the time of observing reported events is recognized as affecting the capacity of a witness to correctly re-

[8] Cf. Gates v. Kelly, 15 N.D. 639, 110 N.W. 770 (1906).

[9] See Uniform Rules of Evidence 21, 22(c).

[10] See Weinstein, supra note 1, at 229; United States v. Foster, quoted in part at note 5 supra.

[11] Scheiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, 578, 69 N.E.2d 293, 298 (1946); Truttmann v. Truttmann, 328 Ill. 338, 341, 159 N.E. 775, 776 (1927); 2 Wigmore, Evidence § 501 (3d ed. 1940); Conard, "Mental Examination of Witnesses," 11 Syracuse L. Rev. 149 (1960). Professor Weihofen has, in an able article showing the greater need for expert psychiatrists, stated:

> That the court has found the witness to possess the minimal degree of capacity to testify should not foreclose a showing that because of mental defect or disorder his testimony is so untrustworthy that it should be given little weight. Some disordered persons, such as the psychopathic liar, may be so convincing that they can easily pass the test of competency; but it would be unjust to deny the other party the opportunity to show the existence of the condition and its effect upon reliability of testimony. Because modern practice admits as competent to testify persons proved or conceded to be mentally ill to some degree, a liberal admission policy for evidence on the effect of mental conditions upon credibility is needed.

Weihofen, supra note 1, at 68.

member.[12] Sometimes, in legal use, credibility has a narrow meaning, as in the interpretation of statutes which require that a will be witnessed by credible witnesses. In this type of application, the terms "credible" and "competent" are regarded as synonymous.[13] But, more broadly, credibility is concerned with witnesses who have passed the tests of competency, which tests show only the capacity of a person to be a witness and not the capability to testify upon the facts involved in a particular case. Thus, things which once rendered a witness incompetent may now be used instead to test his credibility.

If we assume that most people are honest and will try to be truthful, it is apparent that the greater problems of credibility testing arise in the discovery of error and mistake by witnesses who believe their testimony to be true. The means of detecting both the fact and the source of error because of mistake involve a different type of resourcefulness in truth testing than the direct attack upon perjury.

Refreshing Recollection

Reviving recollection is a primary source of correcting mistakes and supplying omissions in testimony. The oral or written statements made by a witness prior to the trial are commonly used to revive his dormant memory. Voice recordings through electronic devices also may be used for this purpose. A witness who gives what is believed to be inaccurate testimony or who, in answer to a question, may respond that he does not know the answer or that he has forgotten what he knew, may recall the true facts if informed of what he has previously said upon the matter. This requires good faith upon the part of the examiner to use statements to refresh recollection only when there is a reasonable belief that the statements were in fact made.

The courts are careful in their supervision of the use of notes or memoranda by a witness in answering questions put to him. If the witness is too dependent upon notes, it may indicate that he is reporting what the writing says rather than expressing his present memory of a past event. For the purpose of refreshing recollection, a writing cannot itself be used in evidence, as this would be hearsay.[14] Its sole purpose is to cause the

[12] See the many cases collected in Annot., 8 A.L.R.3d 749 (1966).

[13] See Wallace v. Harrison, 218 Miss. 153, 162, 65 So. 2d 456, 459 (1953), holding that a statute requiring a will to be attested by two "credible witnesses" requires that the witnesses be "competent" rather than "credible." But In re Killgore's Estate, 84 Idaho 226, 232, 370 P.2d 512, 516 (1962) held that a statute requiring a lost will to be clearly and distinctly proved by at least two "credible witnesses" was intended to apply the common-law rules as to credibility. Ealy v. State, 167 Tex. Crim. 265, 319 S.W.2d 710 (1958) illustrates another common situation in which there is the requirement that papers be sworn to by a "credible person." The complaint was challenged because not sworn to truthfully, but the court held the statute to require only that the affiant be "competent."

[14] See 3 Wigmore, supra note 11, § 763.

witness to correct himself or to become able to give testimony about which his memory has lapsed. Courts are liberal in permitting the use of former declarations by a witness to stimulate his present memory, as long as the statement or writing might reasonably accomplish this result.[15] When the use of the prior statement has been approved by the court, the opponent has the right to examine the statement if it be in writing. If he regards the writing to be inadequate or deceptive, he can offer it in evidence to discredit its effect in reviving the memory.[16]

Written statements used to refresh recollection are much more freely approved by the courts than are writings offered as proof of a past recollection recorded.[17] For the court to allow the writing to be used to revive the memory of a witness, the writing need not have been made contemporaneously with the events reported. Nor is it necessary that the particular written statement was his own writing, nor that it was written for the purpose of making a record of the events reported.[18] The circumstances, the timing, and the making of the writing are vital only as they reflect upon his memory of the events. Recognition of this purpose is important in order to avoid confusion with the rules pertaining to past recollection recorded. These rules require that the report be contemporaneously made with the events reported, and that before its use the witness must disclaim any present recollection of the events, but must recall the making of the statement as representing accurately his perceptions at the time.[19] The use of past recollection recorded is much less frequent than the use of former writings to refresh recollection, and ordinarily such use involves data rather than narrative observations. If the fact recorded consisted of figures, such as the numbers on a car seen at a robbery, the making of a

[15] Breeding v. Reed, 253 Iowa 129, 133-35, 110 N.W.2d 552, 555 (1961). In a federal case the witness was provided with earphones to hear a recording used to refresh his recollection. United States v. McKeever, 271 F.2d 669, 675-76 (2d Cir. 1959). See also Beecham v. Burns, 34 Cal. App. 754, 758, 168 Pac. 1058, 1060-61 (Dist. Ct. App. 1917); Neff v. Neff, 96 Conn. 273, 277-79, 114 Atl. 126, 127-28 (1921); United States v. Riccardi, 174 F.2d 883 (3d Cir.), cert. denied, 337 U.S. 941 (1949).

[16] There is some conflict of authority upon the right of inspection of a memorandum used to refresh recollection, some decisions being based upon the distinction between memoranda used to refresh recollection in the courtroom and those used by the witnesses prior to coming into court. In People v. Scott, 29 Ill. 2d 97, 111, 193 N.E.2d 814, 821-22 (1963), the court saw no reason to draw a distinction and required inspection in both situations. Contra, State v. Couture, 151 Conn. 213, 218, 196 A.2d 113, 115 (1963); Commonwealth v. Fromal, 202 Pa. Super. 45, 195 A.2d 174 (1963). In admiralty, the right to inspect and offer the memorandum in evidence is approved. Petition of Massachusetts Trustees of E. Gas & Fuel Associates, 200 F. Supp. 625 (E.D. Va. 1962). For other authorities favoring the right of inspection, see Parry-Hill v. Downs, 148 A.2d 715, 717 (D.C. Munic. Ct. App. 1959); McCormick, Evidence § 9 (1954); 3 Wigmore, supra note 11, § 762.

[17] For classification and use of prior statements to refresh recollection and as past recollection recorded, see Morgan, "The Relation Between Hearsay and Preserved Memory," 40 Harv. L. Rev. 712 (1927).

[18] United States v. Rappy, 157 F.2d 964 (2d Cir.), cert. denied, 329 U.S. 806 (1947).

[19] Jaeger v. Hackert, 241 Iowa 379, 382-83, 41 N.W.2d 42, 45 (1950).

written report recording the numbers would likely be remembered although the facts reported are forgotten. Some courts, however, have applied the rules pertaining to past recollection recorded to the process of refreshing recollection.[20] New legislation would be valuable in clarifying the requirements of foundation testimony for the admission of each.

The rules pertaining to refreshing recollection are vitally associated with credibility and the exercise of judgment by the triers of fact upon the changed or new testimony admitted through this process. If the witness admits making the former statement and changes his testimony in an attempt to make it conform to the statement, the triers of fact have several choices as to how they will regard the testimony. They may conclude that the evidence as originally given represented the actual facts. More probably, they would look upon the new statement as an honest correction of a misstatement. On the other hand, they might disregard both statements. It is also possible that the witness will admit making the former statement but claim that it was incorrect and that the statement which he has made in court represents the true facts.[21] He may support this claim with an explanation of the difference in his statements. This may be accepted by the triers, although they could still regard the prior statement as self-impeachment. However, if the witness admitted making the statement offered to refresh recollection, but denied that it represented a true statement of facts, under existing law the triers could not accept the out-of-court statement as substantive proof, even though they considered it a true statement of the facts.[22] Under these circumstances, the only function of the statement would be to discredit the testimony of the witness given in court.

Impeachment by Prior Inconsistent Statement

The impeachment by proof of prior inconsistent statements occurs when the attempt to refresh recollection fails because the witness denies making the out-of-court statement and extrinsic evidence is admitted to prove that he did in fact make it. Ordinarily, the party who calls the witness en-

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[20] Putnam v. United States, 162 U.S. 687, 694-95 (1896). Compare Fanelli v. United States Gypsum Co., 141 F.2d 216, 217 (2d Cir. 1944) with United States v. Rappy, supra note 18.

[21] It has been held reversible error to exclude an explanation by the witness of an inconsistent statement made by him. Henslin v. Wingen, 203 Minn. 166, 280 N.W. 281 (1938); cf. Breeding v. Reed, 253 Iowa 129, 135, 110 N.W.2d 552, 556 (1961); Kellett v. Wasmie, 261 Minn. 440, 112 N.W.2d 820 (1962). In People v. Williams, 22 Ill. 2d 498, 177 N.E.2d 100 (1961), the court permitted the introduction of a statement admitted by the witness so that it could be clearly brought out and recognized.

[22] Tripp v. United States, 295 F.2d 418, 424 (10th Cir. 1961). Only where the statement in effect constituted an adoptive admission in court could the out-of-court statement be given substantive effect under prevailing rules. For a thorough discussion, see Schratt v. Fila, 371 Mich. 238, 123 N.W.2d 780 (1963). See also Hudson v. Smith, 391 S.W.2d 441, 448 (Tex. Civ. App. 1965).

deavors to refresh his memory by inquiry concerning his past contradictory statements. When impeachment by prior inconsistent statement is used by the adverse party in cross-examination, the primary objective is to destroy the testimony given in court; there is little hope that the witness will ever admit, much less acknowledge the correctness of, the out-of-court statement. Truth testing through this process involves a somewhat complicated combination of rules, skills, and techniques.

Preliminary analysis of what is known as the Rule of *The Queen's Case*[23] is required for comprehensive understanding of the use of inconsistent statements for impeachment. This 1820 English decision was widely followed in this country, although repudiated in England by legislation. However, its complete elimination is certain in the future development of the law in this country.[24]

The Rule of *The Queen's Case* confused the principles applicable to the best evidence rule with principles applicable to cross-examination concerning the terms of a writing of the witness, when he is being examined about the writing only for the purpose of discrediting his testimony given in court. Under the best evidence rule, where the writing itself is the subject of inquiry, the proof of the contents of the writing is the document itself. Inquiry through secondary sources as to its content cannot be made until it is shown by acceptable proof that the original document is unavailable.[25] If, however, the purpose of the examination into the content of the document is to discredit the witness about matters stated therein, cross-examination as to whether he wrote it and what he said in it may be a most effective method of determining his credibility if he denies making the writing or states its content to be something different than in fact it is. The Rule of *The Queen's Case* required that the writing be shown to the witness before permitting interrogation upon its content, thus eliminating what may be an effective part of the impeachment. Likewise, in reference to an oral statement made out of court, counsel on cross-examination may prefer, for the purpose of impeachment, first to ask the witness what he had said, if anything, rather than confront him initially with the statement.[26] In the situation either of a writing or of an oral statement, if the

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[23] 2 Br. & B. 284, 129 Eng. Rep. 976 (C.P. 1820).

[24] For example, the Uniform Rule of Evidence 22(a) permits questioning a witness about a writing for impeachment purposes without showing it to him. Section 768 of the California Evidence Code (effective Jan. 1, 1967) provides:

(a) In examining a witness concerning a writing, it is not necessary to show, read, or disclose to him any part of the writing.

(b) If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

[25] Lende v. Ferguson, 237 Iowa 738, 746, 23 N.W.2d 824, 829 (1946). Rogers, "The Best Evidence Rule," 1945 Wis. L. Rev. 278. Uniform Rule of Evidence 70.

[26] The cross-examiner would, of course, be taking a risk that the witness would respond

witness were asked what he said before being confronted with the statement, he might give a different story, thus disclosing his desire to evade the effect of what he had said previously. Whatever the effect of the divergent answers on his credibility may be, there have been strong protests against restraints on this type of cross-examination.[27]

The elimination of the Rule of *The Queen's Case* would be misleading if it were interpreted as meaning that it is no longer desirable in most situations to inform a witness of the content of his prior allegedly inconsistent statement before offering extrinsic proof that the statement was made. The modern trend is to leave this question to the court's discretion, but in most jurisdictions the rule is that, before proof of the statement or introduction of the writing, the statement must be made known or the writing shown to the declarant so that he will have the opportunity to identify and explain or deny it.[28] *The Queen's Case*, however, dealt only with the question of timing when the content of the alleged contradictory declaration should be made known to the declarant; the question of when proof of the statement should be offered was not involved in that case. The currently favored procedures make it possible to make the impeaching testimony more meaningful should the witness deny making the statement or claim that its contents were different than they in fact are.

A common practice is to proceed as though attempting to refresh the recollection of the witness, making the content of the statement known to him; then, if he denies making the statement, proof by extrinsic evidence may be offered. The detailed steps for impeachment by proof of prior statements of a witness contradictory to the testimony given in court fit into a simple formula, easy to follow and more effective in truth testing than in attempting to do less. A foundation should be laid, identifying the time, place, occasion, and the person to whom it is claimed the declaration in question was made. The witness should then be informed of the statement and asked if he made it. Only if he denies making the statement may those to whom the statement was made be called to present the im-

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with a hearsay statement favorable to his opponent which could have been excluded. Therefore, this procedure is less likely with oral statements than with writings. If confined to the point upon which impeachment testimony is available, ready for use, it might be effective to ask the witness what he had said and then confront him with a different version of the facts which he denies, followed by proof that the impeachment version was the statement actually made.

[27] See, e.g., 4 Wigmore, supra note 11, §§ 1259-63.

[28] United States v. Dilliard, 101 F.2d 829, 836 (2d Cir. 1938); cf. People v. Williams, 22 Ill. 2d 498, 503, 177 N.E.2d 100, 102 (1961); Duran v. Mueller, 79 Nev. 453, 456, 386 P.2d 733, 735 (1963); Uniform Rule of Evidence 22(b):

> [E]xtrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement.

peaching testimony.[29] They, too, will be examined in a similar manner to establish the making of the statement. If the alleged statement was in writing, it would be shown to the declarant with opportunity to admit or deny it as his. In event of denial, the writing should be authenticated and offered in evidence.

The Uniform Rules of Evidence have not made the above procedure a rigid requirement, but leave it to the discretion of the judge to determine whether all of the protection afforded through bringing the prior contradictory statements to the attention of the witness while testifying is necessary in the particular case.[30] A significant exception applies when the witness is a party and has made an out-of-court declaration inconsistent with his testimony. The statement would be used by the adverse party only if disserving to the declarant and, therefore, is admissible as an admission.[31] It is substantive evidence requiring no foundation other than proof of the fact that the statement was made by the party against whom it is offered.

As a practical trial technique to gain the most from impeaching testimony through the proof of prior inconsistent statements, it is preferable to follow the procedure of laying the full foundation with a denial by the witness that he made the statement. If the triers of fact conclude that the statement was in fact made, the impeachment value is enhanced. The triers may look upon the denial as an intentional falsification rather than a failure to remember. The principle of *falsa in uno, falsa in omnibus* may

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[29] In Osborne v. McEwan, 194 F. Supp. 117, 118-19 (D.D.C. 1961), Judge Holtzoff commented:

> It is the prevailing rule, therefore, that the testimony of a witness may not be impeached by a contradictory statement said to have been made by him, unless he was confronted with this statement on cross-examination. The interrogation on cross-examination must identify the specific statement and indicate its contents, the occasion, and the person to whom it is alleged to have been made. This rule is no mere technicality. It is vital in the interest of fairness and justice and for the purpose of eliciting the truth. It helps to combat the "sporting theory of justice."

See also Ayers v. Watson, 132 U.S. 394 (1889); Liberty Nat'l Life Ins. Co. v. Harrison, 274 Ala. 43, 145 So. 2d 219 (1962); Hancock v. McDonald, 148 So.2d 56 (Fla. Dist. Ct. App. 1963); Mead v. Scott, 256 Iowa 1285, 1293, 130 N.W.2d 641, 646 (1964).

[30] Uniform Rule of Evidence 22(b), quoted in note 28 supra. An equally liberal rule was adopted in California but with more emphasis on the need of providing an opportunity to the witness to deny or explain his statement. Cal. Evid. Code § 770 (effective Jan. 1, 1967):

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action.

[31] Schratt v. Fila, 371 Mich. 238, 244-46, 123 N.W.2d 780, 783-84 (1963); Abramsky v. Felderbaum, 81 N.J. Super. 1, 10, 194 A.2d 501, 506 (App. Div. 1963); Woodruff v. Pennsylvania R.R., 52 Ill. App. 2d 341, 202 N.E.2d 113 (1964); Snyder v. Schill, 388 S.W.2d 208, 213 (Tex. Civ. App. 1964).

become applicable if there is other evidence indicating intention to falsify.[32]

SUBSTANTIVE EFFECT OF INCONSISTENT STATEMENTS

How may the impeaching statements of nonparty witnesses be used by the triers of fact? Can they be considered as proof of the facts stated in the declaration, or are they limited only to discrediting the testimony which the witness has given in court? It is almost the universal view today that the impeaching statements of a nonparty witness are confined to discrediting the testimony he gives in court.[33] The usual reason given is that the out-of-court statements are hearsay. In jury trials, the court is required to give an instruction upon the limitations of their use.[34] But it is difficult for the jury to follow these limitations effectively. If the jury concludes that the witness falsified when he denied making the out-of-court statement, and further believes that statement was true, it is difficult to expect them simply to consider its impeaching effect and disregard its substantive content.[35]

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[32] See People v. Kennedy, 21 Cal. App. 2d 185, 200, 69 P.2d 224, 232 (1937); Knihal v. State, 150 Neb. 771, 777, 36 N.W.2d 109, 112 (1949); 29 Neb. L. Rev. 122 (1949).

[33] E. L. Cheeney Co. v. Gates, 346 F.2d 197, 204 (5th Cir. 1965); United States v. Duff, 332 F.2d 702, 706 (6th Cir. 1964); United States v. Barnes, 319 F.2d 290 (6th Cir. 1963); People v. Newman, 30 Ill. 2d 419, 197 N.E.2d 12 (1964); People v. Tisdale, 18 App. Div. 2d 274, 239 N.Y.S.2d 226 (4th Dep't 1963); Wininger v. Day, 376 P.2d 206 (Okla. 1962).

[34] Bartley v. United States. 319 F.2d 717, 719, 720 (D.C. Cir. 1963). There Judge McGowan said:

> The error resides, rather, in the treatment of the statutory purpose for which the prior inconsistent statement was admissible. This is stated in terms to be that "only of affecting the credibility of the witness." The differentiation, of course, is between this rigorously limited objective, and the one of proving as a fact what is contained in the statement. The crucial character of this distinction has been recognized and emphasized by this Court. . . .
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> Without the protection of an admonition or instruction from the court to the latter end, we cannot say that the jury did not give weight, when it was not entitled to do so, to the prior written statement and feel itself free to choose between the conflicting versions.

See also Justice Schaefer's opinion in People v. Tate, 30 Ill. 2d 400, 197 N.E.2d 26 (1964).

[35] In United States v. De Sisto, 329 F.2d 929 (2d Cir.), cert. denied, 377 U.S. 979 (1964), Judge Friendly, in an able opinion, expressed approval of the use of prior inconsistent statements for substantive purposes, stating:

> The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that "the fresher the memory, the fuller and more accurate it is."

Id. at 933. In two thoughtfully considered opinions by Judge Learned Hand, the same position as that taken by Judge Friendly is strongly supported. Di Carlo v. United States, 6 F.2d 364, 367 (2d Cir. 1925); United States v. Allied Stevedoring Corp., 241 F.2d 925, 932 (2d Cir. 1957). In accord, Judge Woodbury in Asaro v. Parisi, 297 F.2d 859, 863 (1st Cir. 1962); Judge Phillips in Curtis v. United States, 67 F.2d 943, 946 (10th Cir. 1933). Judge Doerner in two state cases has applied the same rule. Turner v. Caldwell,

Under these circumstances, Professor Wigmore would have admitted the impeaching statement as substantive evidence, on the theory that the declarant is present in court and is subject to cross-examination under oath and therefore the purpose of the hearsay rule has been accomplished.[36] Most modern thinking points in this direction.[37] The danger of using the declaration as substantive proof is that it may be a complete fabrication, as the alleged declarant-witness claimed when he denied making the statement. This, however, would be equally true if an admission were fabricated, and would also apply to the use of the statement for impeachment. If the impeaching statement was not made, it should not be used for any purpose; if it was made, it should be used for all purposes. The question of fact as to whether the out-of-court statement was or was not made is no more difficult than any other question of fact to be decided by the jury. Although the reasons for permitting the inconsistent declaration to be considered as substantive evidence are strong, the heated feeling of many against this use prevents a forecast of early change of the limitation. Still, change should eventually come.[38]

If impeachment statements were to be admitted as substantive evidence, the rule that a party cannot impeach his own witness would receive a final death blow, at least as it relates to inconsistent statements.[39] The limitation upon impeachment of a party's own witness still has some life, but it is being frittered away by statute and by the courts because of its unfairness to the examining party in cases of surprise, deceit, and entrapment. Even now a party may show character limitations of his own witnesses if counsel examines in respect to them before the witness testifies

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349 S.W.2d 493, 496 (Mo. 1961); Blanks v. St. Louis Public Serv. Co., 342 S.W.2d 272, 273 (Mo. 1961). See also Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 Harv. L. Rev. 177, 192-96 (1948); McCormick, Evidence § 39 (1954).

36 3 Wigmore, supra note 11, § 1018.

37 Model Code of Evidence rule 503(b) (1942) is similar to Uniform Rule of Evidence 63(1), which provides for the admission of "a statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness."

38 The departures of the Model Code from the traditional common-law rules of evidence were felt by some to be too far reaching and drastic for present day acceptance. The most criticized area of the Code was the liberalization of the hearsay rule. The draftsmen of the Uniform Rules, however, still favored a rule which gave substantive effect to prior out-of-court statements, where the declarant was available for cross-examination. See note 37 supra.

39 See Johnson v. Baltimore & O.R.R., 208 F.2d 633, 634 (3d Cir. 1953), cert. denied, 347 U.S. 943 (1954). One of the main reasons urged for the rule restricting impeachment of a party's own witness is that it would enable the examiner to get before the jury out-of-court statements which might be used by the jury as substantive evidence. Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1922). For discussions see Slough, supra note 1; Morgan & Maguire, "Looking Backward and Forward at Evidence," 50 Harv. L. Rev. 909, 927-32 (1937); Schatz, "Impeachment of One's Own Witness: Present New York Law and Proposed Changes," 27 Cornell L.Q. 377 (1942); Ladd, "Impeachment of One's Own Witness—New Developments," 4 U. Chi. L. Rev. 69 (1936).

as to the merits of the case.[40] The awkward position before the jury of a party who seeks to show the general testimonial unreliability of his own witness, after the witness has given damaging testimony, should control any abuse which might arise if all restrictions were lifted. The party would not want the triers of fact to feel that he had presented a witness who was unreliable but did not inform them about it until he was hurt by the testimony which he gave. Hopefully, then, within a reasonable time all limitations upon impeachment of a party's own witness will be completely removed.

Limitations on the Use of Impeaching Statements

The new restrictions on the admissibility of confessions as substantive proof, represented in *Escobedo v. Illinois*[41] and *Miranda v. Arizona*,[42] also affect the use of confessions for impeachment purposes—that is, to show that an accused testified differently from the statements in his confession. It could be claimed that a confession, if not offered as proof of the facts stated, might still be used for the limited purpose of testing credibility. This, however, has not been the position taken by the courts.[43] The philosophy underlying the exclusion of otherwise admissible confessions obtained in violation of the rights of an accused is equally applicable to the attempted use of such confessions to impeach his subsequent statements. For example, the question of admitting an otherwise excludable confession for impeachment purposes would present the same dangers as would a practice of permitting the jury to determine the question of admissibility of a challenged confession. Even if the jury is instructed not to consider the confession if they decide it does not meet the tests of admissibility, the confession still becomes known to them. After years of vigorous court battle, highlighted by *Stein v. New York*,[44] the Supreme Court finally held

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[40] In Vause v. United States, 53 F.2d 346, 351 (2d Cir. 1931), a witness for the Government had been convicted of a felony and when put upon the stand the district attorney asked questions disclosing his real character before inquiry upon the merits of the case. The court stated:

> His credibility as a witness was an important matter for the jury to decide in order to get at the truth, and there is certainly no point in condemning the district attorney for frankly disclosing at the outset what would enable the jury to do its duty in that regard. The complaint now made rather savors of the thought that he stole a march on these defendants in not letting that phase of the matter wait until they could, if they saw fit, bring out the facts on cross-examination and make the most of their apparent desire to put the witness in his proper place . . . .

[41] 378 U.S. 478 (1964).

[42] 384 U.S. 436 (1966).

[43] See, e.g., White v. United States, 349 F.2d 965 (D.C. Cir. 1965); People v. Underwood, 61 Cal. 2d 113, 120-21 389 P.2d 937, 941, 37 Cal. Rptr. 313, 317 (1964); People v. Pelkola, 19 Ill. 2d 156, 161-62, 166 N.E.2d 54, 58 (1960); State v. Turnbow, 67 N.M. 241, 249-54, 354 P.2d 533, 539-43 (1960). Compare Smith v. United States, 312 F.2d 867, 870-71 (D.C. Cir. 1962); Tate v. United States, 283 F.2d 377, 381 (D.C. Cir. 1960).

[44] 346 U.S. 156 (1953).

in *Jackson v. Denno*[45] that admissibility of a confession must be decided by the court alone. The basis of this decision is distrust of the capacity of a jury to segregate the admissibility and proof functions.[46] For the same reason, the Court surely would not permit the jury to hear an objectionable confession even with an instruction that it could be used to impeach but was not itself to be believed.

Another troublesome, but proper, limitation upon the introduction of extrinsic evidence of statements for the purpose of impeachment is the requirement that the impeachment be upon a material matter. Confusion exists, however, as to what the borderline of materiality should be. It is clear that if the evidence sought to be impeached is not harmful to the party offering the impeaching testimony, the time of the court should not be wasted in permitting impeachment.[47] Also, a statement by a witness that he does not know the answer to a question asked about a particular event is ordinarily not regarded as testimony which may be impeached by independent proof of a declaration made by him disclosing full knowledge.[48] This is because material evidence adverse to the examiner has not been given, and therefore impeachment would serve no purpose other than to introduce the hearsay statement of the witness.[49] Without more foundation testimony, the denial of knowledge creates no material facts justifying impeachment. However, if circumstances are proved showing a probability that, if the events had occurred, the witness would have seen them, the denial of knowledge of the facts creates an inference that the events did not occur. In this situation, the proof of a previous declaration by the witness stating the happening of the event ought to be admissible to impeach this inference. As in other impeachment situations, the court could inform the triers that the impeachment statement could not be used as proof of the facts stated. Furthermore, if there were no other evidence of the happening of the event, there would be no danger of admitting the statement as the case would fail because of insufficient proof.[50] If, however, other evidence of the event were in the record, the impeaching statement would be important to destroy the inference created by the dis-

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[45] 378 U.S. 368 (1964).

[46] Jackson v. Denno, 378 U.S. 368, 381 (1964).

[47] Taylor v. Baltimore & O.R.R., 344 F.2d 281, 283-85 (2d Cir.), cert. denied, 382 U.S. 831 (1965); Hicks v. M.K. & O. Transit Lines, Inc., 368 P.2d 236 (Okla. 1961); Crago v. State, 28 Wyo. 215, 225, 202 Pac. 1099, 1102 (1922).

[48] Commonwealth v. Hartford, 346 Mass. 482, 486-87, 194 N.E.2d 401, 404 (1963) (dictum); cf. State v. Gordon, 391 S.W.2d 346, 349 (Mo. 1965). But see People v. Bush, 29 Ill.2d 367, 372, 194 N.E.2d 308, 312 (1963), cert. denied, 376 U.S. 966 (1964).

[49] People v. Welch, 16 App. Div. 2d 554, 558, 229 N.Y.S.2d 909, 913-14 (4th Dep't 1962).

[50] E.g., Comer v. State, 222 Ark. 156, 257 S.W.2d 564 (1953).

claimer of knowledge, which would otherwise weigh against the proof of the happening of the event.

The kind of materiality which will permit impeachment consists basically of two types: *first,* facts dealing with the substantive issues as disclosed by the pleadings,[51] and *second,* facts showing bias, prejudice, interest, or the willingness of the witness to be unscrupulous in giving testimony. The common qualification is that a witness cannot be impeached upon a collateral matter. The term "collateral" expresses a general idea but is not very helpful in the application of the rule. If the statement sought to be impeached is consequential to the determination of the litigated issues, or if it is a vital factor in its influence upon the outcome of a trial, the attempt to impeach it should escape this "collateral-matter" exclusion.

In *Ewing v. United States,*[52] Justice Rutledge ably discussed the admissibility of inconsistent statements concerning the bias of a witness who had otherwise testified upon matters material to the issues on trial, and stated that "it is not merely matters which are a 'part of the case' that may be the subject of a self-contradiction, but *any matter which would have been otherwise admissible in evidence.*"[53] Though it might be broadly stated that any fact which is relevant in evidence for any purpose other than mere contradiction itself may be shown in evidence, whether a matter is material or collateral is essentially a question of degree. No formula can articulate every application of the rule.

It is important to observe that this limitation upon impeachment by extrinsic evidence does not necessarily preclude examination of a witness as to collateral matters which have marginal relevancy. However, the examiner is confined to the answer given and cannot introduce evidence that the witness once spoke otherwise.[54]

A final observation about the limitations on impeaching statements is that the degree of inconsistency must be real.[55] When the statements are placed side by side, it must be possible to say that both cannot be true. Only in this circumstance will the triers have reason to nullify the testimony given in court, which is the only justification for the admissibility of the out-of-court statement. Should an impeaching statement be given substantive effect, it would have to be material to be admissible.

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[51] Phillips v. Mooney, 126 A.2d 305, 308 (D.C. Munic. Ct. App. 1956); cf. State v. McHenry, 207 Iowa 760, 771, 223 N.W. 535, 541 (1929).

[52] 135 F.2d 633 (D.C. Cir. 1942), cert. denied, 318 U.S. 776 (1943).

[53] Ewing v. United States, 135 F.2d 633, 641 (D.C. Cir. 1942), cert. denied, 318 U.S. 776 (1943).

[54] Fleetwood v. State, 95 Okla. Crim. 163, 174-75, 241 P.2d 962, 974 (1952).

[55] McElhattan v. St. Louis Pub. Serv. Co., 309 S.W.2d 591 (Mo. 1958).

In requiring that impeachment be upon material issues, the future need of the law is one of clarification. Generally, the rules limiting impeachment are sound. They are desirable to control the length of trials and, with all of the complications that arise in a trial, to help prevent the trials from diverting their attention from the main issues.[56]

Inconsistent Opinion and Impeachment

The introduction of a witness' prior declaration of inconsistent opinion to impeach his testimony is regarded as objectionable by some courts.[57] As a result, only inconsistent statements of fact may be used for impeachment purposes. The principle underlying this rule is that it is for the witness to testify as to facts and for the jury to draw conclusions. However, this rule is misapplied when used to exclude proof of the declaration of an inconsistent opinion offered only for the purpose of discrediting testimony the declarant gives in court. This evidence, if admitted, enables the triers of fact to check and evaluate testimony given in court by the expressed opinion of the witness, which opinion could only arise from the state of mind of one having an entirely different version of the facts.[58] The declaration of an inconsistent opinion may, in some instances, be more indicative of the weakness of the testimony than a statement of inconsistent facts,[59] and hence it may be more valuable for purposes of impeachment. The danger that the jury will use the inconsistent opinion as proof is no greater than the danger of using the inconsistent statement as substantive evidence. Considering the many places in which evidence excludable for one purpose is admissible for another, the reason favoring admissibility of declarations of inconsistent opinion should over-balance the possibility of misuse. Today courts are generally much more liberal in the use of opinion testimony than they have been in the past. Lay witnesses

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[56] See, e.g., Travelers Ins. Co. v. Miller, 104 Ga. App. 554, 122 S.E.2d 268 (1961). The Uniform Rules of Evidence attempted to solve the problem of preventing a trial from getting out of hand through the injection of collateral issues of limited value by giving the judge discretion to exclude admissible evidence. Rule 45 provides:

> Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

[57] Ewing v. United States, supra note 53, at 643-44 (Groner, C. J., concurring in the result); State v. Baker, 233 Iowa 745, 8 N.W.2d 248 (1943). For a contrary view see Atlantic Greyhound Corp. v. Eddins, 177 F.2d 954, 956-58 (4th Cir. 1949); Crawford v. Commonwealth, 235 Ky. 368, 31 S.W.2d 618 (1930); see 3 Wigmore, supra note 11, § 1041.

[58] See Arpan v. United States, 260 F.2d 649, 658-59 (8th Cir. 1958) (dictum); Webb v. City of Seattle, 22 Wash. 2d 596, 604-11 157 P.2d 312, 316-19 (1945); Bright v. Wheelock, 323 Mo. 840, 868-69 20 S.W.2d 684, 696 (1929).

[59] See Grady, "The Admissibility of a Prior Statement of Opinion for Purposes of Impeachment," 41 Cornell L.Q. 224 (1956).

are permitted to communicate their personal perceptions in the language of inference or opinion where it is difficult to communicate factually. Expert witnesses are permitted to express their opinions upon the ultimate facts in issue without invading the province of the jury.[60] In light of the modern trend in respect to opinion testimony and the realization that the triers of fact must always make the final fact decisions, it is strange to continue the unrealistic limitation upon impeachment by proof of a former declaration of an inconsistent opinion.

Consistent Statements To Sustain a Witness

Consistent statements of a witness, when admitted, are used to sustain his credibility concerning testimony given in court, but are not used independently to prove the truth of that which has been stated. Such statements are used to show that the witness spoke truthfully when he testified and that his testimony was neither a recent fabrication nor the result of intervening experiences creating bias.[61] The ultimate result is practically the same as if the consistent statement itself were used as a direct means to corroborate the testimony given in court. If the triers would accept the testimony given in court except for occurrences throwing doubt on the credibility of the witness, a consistent statement made by him before the reason to falsify occurred would both restore faith in the witness and belief in what he said. The rationale is directed only to the issue of credibility.[62] For instance, if a witness to an accident married the defendant's daughter before the trial, his consistent declaration about what he had seen, made before he met the daughter, would be admissible to dispel any claim that the testimony given in court was distorted because of his new-found love.

There are several views on the issue of admissibility of a prior consistent statement when the only attack upon the witness is proof of a prior inconsistent statement.[63] If there is no other evidence to support a claim that the witness colored his testimony, a prior consistent statement is held

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60 Grismore v. Consolidated Prods. Co., 232 Iowa 328, 342-45, 5 N.W.2d 646, 654-56 (1942); McCormick, "Some Observations Upon the Opinion Rule and Expert Testimony," 23 Texas L. Rev. 109, 117 (1945); Ladd, "Expert Testimony," 5 Vand. L. Rev. 414, 416-17 (1952); Ladd, "Expert and Other Opinion Testimony," 40 Minn. L. Rev. 437, 441-44 (1956).

61 People v. Singer, 300 N.Y. 120, 123-24, 89 N.E.2d 710, 711 (1949), 35 Cornell L.Q. 867 (1950). See Note, "Admissibility of Prior Statements To Corroborate Testimony," 17 Va. L. Rev. 696 (1931).

62 Sweazey v. Valley Transp., Inc., 6 Wash. 2d 324, 332-33, 107 P.2d 567, 571-72 (1940).

63 For examples of two possible approaches see Loser v. E. R. Bacon Co., 201 Cal. App. 2d 387, 20 Cal. Rptr. 221 (Dist. Ct. App. 1962); Huston v. Hanson, 353 S.W.2d 577 (Mo. 1962); see McCormick, Evidence, § 49, at 108-09 (1954); 4 Wigmore, supra note 11, §§ 1126-29.

by most courts to be inadmissible.[64] The fact that a witness related the facts twice the same way would add little, if anything, to assist the triers in determining the effect of the attempt to impeach by proof of an inconsistent statement where no fabrication or bias is claimed. The decision on credibility cannot be based upon a calculation of whether consistent statements were made more often than inconsistent ones.

Credibility Testing—A Multiple Process

The famous case of *Jencks v. United States*[65] has had a great impact upon the whole subject of impeachment testimony. In that case the Supreme Court regarded the use of inconsistent statements of witnesses to disprove their testimony to be of such importance that it ordered a new trial where the accused had been denied the production of certain papers for examination as to their inconsistent content. The Court stated that it was error for the trial court to deny production on the ground that the papers were privileged as government secrets.[66] The widespread criticism caused by the *Jencks* case led to congressional legislation limiting uncontrolled fishing expeditions into government records, but still requiring their production when there should be opportunity to check the testimony of government witnesses against contradictory statements made by them in reports held by governmental agencies.[67]

Solving questions of truth or falsity and of accuracy or mistake brings into play a number of facets of testimonial investigation, many of which are closely interrelated, and which in appropriate situations may be joined together for effective results. Some of the same factors which cause a witness, whose character for veracity is bad, to give perjured testimony may cause another witness whose character is good to make mistakes. Truth testing involves a consideration of the multiple effect of character, motive, contradiction, intelligence, knowledge, quality of memory, friendly or hostile feeling toward the parties, interest, bias and prejudice—all of which give insight into the probability of reliable testimony.[68] In addition

[64] United States v. Leggett, 312 F.2d 566, 572 (4th Cir. 1962); Wofford Beach Hotel, Inc. v. Glass, 170 So. 2d 62, 63 (Fla. Dist. Ct. App. 1964); Kesselring v. Hummer, 130 Iowa 145, 148-50, 106 N.W. 501, 502 (1906).

[65] 353 U.S. 657 (1957).

[66] Jencks v. United States, 353 U.S. 657, 669-72 (1957).

[67] Jencks Act, 18 U.S.C. § 3500 (1964). The act, although a limitation upon complete exposure of governmental records, feared as a result of the Jencks' decision, also recognizes the importance of inconsistent statements in securing a fair trial. See Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964), 5 A.L.R.3d 746 (1966) for a broad interpretation of the act permitting impeachment.

[68] See United States v. Foster, 9 F.R.D. 367, 388-90 (S.D.N.Y. 1949), quoted in part at note 5 supra; Ewing v. United States, 135 F.2d 633, 642 (D.C. Cir. 1942), cert. denied, 318 U.S. 776 (1943); People v. James, 218 Cal. App. 2d 166, 172-74, 32 Cal. Rptr. 283, 287-88 (Dist. Ct. App. 1963) (evidence admitted of alcoholism and of drinking at time of the event); State v. Elijah, 206 Minn. 619, 621-26, 289 N.W. 575, 577-78 (1940); Kubie,

to these qualitative areas of inquiry the candor and forthrightness of the witness, his hesitancy or willingness to testify, his evasion or concealment, his poise or frustration, and his emotional reaction to questions indicated through his demeanor and conduct on the witness stand also aid in determining the credit to be given his testimony.[69]

In many criminal and most civil cases, direct evidence upon character traits is not used, although where used, its significance is often great. If a direct attack is not made upon character, to show that, in relation to credibility, it is bad, direct evidence of good character cannot be introduced.[70] This rule limits the use of character evidence on the issue of veracity, especially when reputation is considered to be the only means of proof other than prior criminal convictions of the witness.[71] The absence of direct character evidence, however, does not mean that the character aspects of the truthfulness of the witness are overlooked or are unimportant, but only that other sources must be used to judge credibility.

The process and source of truth testing varies from case to case and with each witness. The perspective of a witness may be influenced by who the parties are, what the issues involve, and whether the action is civil or criminal; these factors may therefore have a vital bearing upon the reliability of what he says. The personal experiences, mental attitude, and interests of a witness are often reflected in what he observes, what he remembers, and how he communicates.[72] Observations may be controlled by what the witness, consciously or unconsciously, wants to see as well as by his opportunity to perceive. Events, however, may be so clear and definite that honest distortion could not occur.[73] Particularly when wit-

"Implications for Legal Procedure of the Fallibility of Human Memory," 108 U. Pa. L. Rev. 59 (1959); Hutchins & Slesinger, "Some Observations on the Law of Evidence—The Competency of Witnesses," 37 Yale L.J. 1017 (1928); Note, 13 Rutgers L. Rev. 330 (1958); see also Clark v. Geiger, 31 F.R.D. 268, 271 (E.D. Pa. 1962) (court refused to prohibit taking of deposition of allegedly incompetent person, but allowed other party to select a psychiatrist to be present to observe demeanor during taking of deposition and to testify at trial on question of competency and credibility); State v. Butler, 27 N.J. 560, 598-605, 143 A.2d 530, 552-56 (1958); Commonwealth v. Repyneck, 181 Pa. Super, 630, 637 n.2, 124 A.2d 693, 697 n.2 (1956).

[69] Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952); Rains v. Rains, 17 N.J. Misc. 310, 8 A.2d 715 (Ch. 1939), rev'd, 127 N.J. Eq. 328, 12 A.2d 857 (1940); Hale, "Bias as Affecting Credibility," 1 Hastings L.J. 1 (1949); see generally Ladd, "On the Witness Stand," in Perkins, Elements of Police Science 91-110 (1942); Keeton, Trial Tactics and Methods ch. 3 (1954).

[70] Colker v. Connecticut Fire Ins. Co., 224 Ky 837, 847, 7 S.W.2d 502, 506 (1928); People v. Tolewitzke, 332 Mich. 455, 457, 52 N. W. 2d 184, 185 (1952).

[71] For criticisms of this view, see Ladd, "Techniques and Theory of Character Testimony," 24 Iowa L. Rev. 498, 507-18 (1939).

[72] Davis v. Judson, 159 Cal. 121, 128, 113 Pac. 147, 150-51 (1910); Weihofen, "Testimonial Competence and Credibility," 34 Geo. Wash. L. Rev. 53, 59-60 (1965).

[73] Evje v. City Title Ins. Co., 120 Cal. App. 2d 488, 492, 261 P.2d 279, 280 (Dist. Ct. App. 1953). Uniform Rules of Evidence 19 provides that "the judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter."

nesses are the parties there is a tendency to see things that are favorable and discount or overlook things that are unfavorable.[74] This is why an attorney must be careful, in cross-examining his own client before trial, to get the full story by asking what the adverse party will claim the facts to be. Moreover, a nonparty witness willing to help a friend may, through omission, imaginative expansion, or planned distortion, supply needed testimony.[75] A witness whose conscience prevents a complete fabrication may be less disturbed by a false answer that he does not remember when questions are asked calling for damaging testimony.

Cross-examination on relevant matters affecting human behavior and on the opportunities for the witness to know the facts constitutes the most practical and reliable means of exposing falsity and error.[76] Scientific devices such as the lie detector, truth serum, and the clinical study of a psychiatrist may be helpful in the investigative steps in some cases, but these have had very limited courtroom use.[77] The use of psychiatrists in determining competency of witnesses with mental disabilities is already a common practice, and greater use of psychiatrists is sure to be made in respect to the capabilities of subnormal witnesses who are called to testify. Lawyers can learn much from the psychiatrists in respect to the relevant areas of inquiry in determining the mental health of their patients. It is surprising how many of the questions to be explored in considering whether a patient has a psychopathic personality or is a social deviate of one kind or another are similar to the points of inquiry to which questioning is directed by a skilled lawyer in determining the credibility of the ordinary witness. The growing interest of lawyers in psychiatry and of psychiatrists in the law is sure to be productive of better understanding by each of the other, and to increase the use of psychiatrists in the class of cases where their services can be most helpful.[78]

However, even assuming that much more assistance may be given, it

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74 Gross v. Rubbo, 133 Conn. 639, 53 A.2d 653 (1947); State v. Robbins, 35 Wash. 2d 389, 395, 213 P.2d 310, 315 (1950).

75 United States v. Foster, 9 F.R.D. 367, 388-89 (S.D.N.Y. 1949);

76 Alford v. United States, 282 U.S. 687, 691-92 (1931).

77 See United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950); State v. Lowry, 163 Kan. 622, 625-30, 185 P.2d 147, 149-52 (1947); Note, 29 Cornell L.Q. 535 (1944); McCormick, Evidence § 174 (1954). Upon the probative value of psychiatric opinion evidence on credibility, see Falknor & Steffen, "Evidence of Character: From the 'Crucible of the Community' to the 'Couch of the Psychiatrist,'" 102 U. Pa. L. Rev. 980 (1954).

78 Diamond & Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations," 63 Mich. L. Rev. 1335, 1338-40 (1965); Juviler, "Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach," 48 Calif. L. Rev. 648 (1960); Magnus, "Psychiatric Evidence in the Common Law Courts," 17 Baylor L. Rev. 1 (1965). But see Roberts, "Some Observations on the Problems of the Forensic Psychiatrist," 1965 Wis. L. Rev. 240; Sargent, "Problems in Collaboration Between Lawyer and Psychiatrist," 11 Wayne L. Rev. 697 (1965). Weihofen, supra note 72; see also Guttmacher & Weihofen, Psychiatry and the Law ch. 15 (1952).

is improbable that psychiatrists will ever be used to express their views on each and all of the witnesses called in a trial, or that such a development could serve a useful purpose. The experience, skills, techniques, and resourcefulness of the trial lawyer in the examination and stringent cross-examination of witnesses must be relied upon to detect mistakes and intentional false swearing. If a web of contradictions is found, along with other clouding influences or motivating circumstances which, judged in the light of human experience, would be likely to cause distortions, then the weaknesses in the quality of the witness and his testimony become apparent.[79] No testing method is isolated and sufficient in itself; rather, each operates in combination with others to develop a total picture of facts from which reasonable conclusions may be drawn.

Some of the specific areas of inquiry used as a source of clues to what influences a witness' testimony will clarify the general observations above. In criminal cases, fear may cause a prosecuting witness to change his story completely, or to claim a want of memory. Inquiry into threats, duress, or attempts to tamper with the witness may be very revealing, and are proper subjects on cross-examination to determine credibility.[80] If the witness himself has done the tampering, his conduct causes his testimony to have little value.[81]

The relationship between a witness and a party, such as employer and employee, debtor and creditor, kinship, common membership in organizations showing close association and affiliation of views, and even improper relations, tends in varying degrees to show the character of the testimony.[82] Whether a witness is partisan is a basic inquiry which, in company with other facts, is valuable as a truth-testing device. Parties to litigation always have an interest in its outcome, but this does not mean that their testimony is necessarily false or mistaken. The accused in a criminal case has the greatest self-interest, but this does not mean that his defense is not true. Although interest has been generally eliminated as a ground of incompetency, the dead-man statutes still retain the rule of incompetency with regard to interested persons in an action against the estate of a deceased person. As objectionable as these statutes are, they represent a

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[79] La Jolla Casa deManana v. Hopkins, 98 Cal. App. 2d 339, 345-47, 219 P.2d 871, 876-77 (Dist. Ct. App. 1950). The observations of Professor Weinstein in "Some Difficulties in Devising Rules for Determining Truth in Judicial Trials," 66 Colum. L. Rev. 223, 232-41 (1966), show the influence of societal assumptions and values as it relates to the triers of fact in their conscious or unconscious evidential evaluations.

[80] Cf. Ware v. State, 204 Miss. 107, 37 So. 2d 18 (1948).

[81] State v. Hakon, 21 N.D. 133, 129 N.W. 234 (1910).

[82] Sylvester v. State, 46 Fla. 166, 35 So. 142 (1903); Godfrey v. State, 185 Miss. 70, 187 So. 199 (1939); Eden v. Klaas, 166 Neb. 354, 362-63, 89 N.W.2d 74, 81 (1958); Henderson v. Dreyfus, 26 N.M. 541, 568-70, 191 Pac. 442, 452-53 (1919); Hellstrom v. First Guar. Bank, 54 N.D. 166, 177-78, 209 N.W. 212, 216 (1926).

firm belief among some members of the bar that there is a tendency to give false testimony when the adverse party is not living to dispute it.[83] The answer to this is that recognition by the jury of the interest of the witness would be a sufficient safeguard against false testimony if the party were made competent to testify.

If a witness for the state in a criminal case is to receive a reward in the event of conviction, the triers should surely know this fact in testing his credibility.[84] For the same reason, an expert witness may be asked how much he was paid to make his investigation and testify in court.[85] Voluntary assistance through contribution to the expense of litigation would cause a witness to be judged as more than ordinarily concerned in the outcome of the case.[86] The fact that a witness has testified for the same party in other cases, or that he is himself a party in another action where the same questions are involved, are also important facts for the triers to know.[87]

Although customarily considered to be direct proof, physical facts and demonstrative evidence are among the most effective aids in proving mistakes and exposing fabrication.[88] Since the showing of the true facts repudiates the false, a falsification cannot possibly stand in the face of physical facts which disprove it.[89] Thus, a moving picture of a person engaging actively in a tennis match would destroy pretty quickly a false claim of physical incapacity.[90] Similarly, circumstantial evidence, by creating logical inferences, may indicate that the facts are not as otherwise claimed to be.[91] Inherent improbability alone may afford a reason for disregarding uncontradicted testimony.

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83 A number of commentators have criticized the rule and its rationale. See, e.g., Maguire, "Witnesses—Suppression of Testimony by Reason of Death," 6 Am. U.L. Rev. 1 (1957); Ray, "The Dead Man's Statute—A Relic of the Past." 10 Sw. L.J. 390, 395-99 (1956); Ladd, "The Dead Man Statute: Some Further Observations and a Legislative Proposal," 26 Iowa L. Rev. 207, 229-40 (1941); Ladd, "Admission of Evidence Against Estates of Deceased Persons," 19 Iowa L. Rev. 521 (1934). Modern Legislation abolishing the rule admits the testimony of interested witnesses against the estate of the deceased and provides protection to the estate by admitting the hearsay declarations made by the deceased. Uniform Rule 7 and Model Code rule 9 eliminate the old exclusion, and decedent's declarations are considered under different exceptions to the hearsay rule.

84 Harris v. United States, 169 F.2d 887 (D.C. Cir.), cert. denied, 335 U.S. 872 (1948).

85 State Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 405-07, 281 P.2d 707, 712-13 (1955) (dictum).

86 Henderson v. State, 94 Fla. 318, 333-35, 113 So. 689, 695 (1927).

87 Horton v. Houston & Tex. Cent. Ry., 46 Tex. Civ. App. 639, 643-44, 103 S.W. 467, 469 (Ct. Civ. App. 1907).

88 See McNamer v. American Ins. Co., 267 Wis. 494, 499-502, 66 N.W.2d 342, 344-46 (1954).

89 Lake Charles Stevedores, Inc. v. Mayo, 20 F. Supp. 698, 701-02 (W.D. La. 1935); Filter v. Mobr, 275 Mich. 230, 234-35, 266 N.W. 341, 342-43 (1936).

90 Heiman v. Market St. Ry., 21 Cal. App. 2d 311, 314-16, 69 P.2d 178, 180-81 (Dist. Ct. App. 1937); Sweet, "The Motion Picture as a Fraud Detector," 21 A.B.A.J. 653 (1935).

91 Edwards v. Washkuhn, 11 Wash. 2d 425, 433-36, 119 P.2d 905, 912-13 (1941); Dale v. Thomas H. Temple Co., 185 Tenn. 69, 86-88, 208 S.W.2d 344, 352 (1948).

CONCLUSION

The many ramifications of the means employed in the law to correct mistakes and expose false swearing show a dependency upon lawyers to bring to light matters which will enable the triers of fact to determine credibility. The Uniform Rules, in expressing an open-door policy for the admission of evidence, simply provide, subject to certain limitations, that

> [F]or the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.[92]

It is left to the lawyer to find and to use whatever is relevant to determine credibility. Though this problem concerns the intangible, nothing could be more real.

A significant observation comes from the *Gideon*[93] through *Miranda*[94] line of cases which recognize the high position and responsibility of the lawyer as both advocate and counselor. These cases place new emphasis upon the need for able trial lawyers if just results are to be obtained in the determination of a trial. It is true that every case should be decided upon the merits—that the facts alone can be the basis of a just decision. The difficulty lies in determining what the facts are. The law does not make the situations with which it deals; they are the product of people and society. In our adversary system of trial, each party, in an effort to sustain his own case, is expected to bring to light every relevant fact and consideration so that impartial triers of fact will have the opportunity to exercise a wise and correct judgment in rendering a decision. The best method of solving the credibility problem is to build a case so strong that it repels falsity and mistake, but this again is a question of what the facts are and how they may be proved. The law of evidence, of which credibility is but one of many essential parts, points to proof possibilities and controls their use. Credibility, therefore, is the lawyer's problem. It is his understanding of human behavior, his resourcefulness in discovering the motivating factors having a probability of influencing testimony, and his ability of comparative analysis in evaluating testimony in light of all the evidence in a trial that must be relied upon to secure a just solution to factual controversies. Improved rules of evidence should be designed to give the lawyer greater freedom to achieve this goal.

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92 Uniform Rule of Evidence 20.
93 Gideon v. Wainwright, 372 U.S. 335 (1963).
94 Miranda v. Arizona, 384 U.S. 436 (1966); see notes 41-46 supra.