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# Evidence: Prior Inconsistent Statements as Substantive Evidence

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**Evidence: Prior Inconsistent Statements as Substantive Evidence** — In the current case of *State v. Major*,[1] the accused was found guilty of unlawful possession and sale of narcotics in violation of secs. 161.02(1)[2] and 161.02(2)[3] of the statutes. On the trial one Hector X. Santoy, a witness called by the State, testified that he never saw or talked to the accused on the date of the alleged offense. This testimony was inconsistent with a previous stenographically recorded statement made by Santoy to two Milwaukee police officers in accordance with sec. 325.35[4] of the statutes. This recorded statement was to the effect that the accused possessed and sold narcotics to Santoy. Santoy admitted that he made the previous statement to the officers and volunteered:

> "About that testimony [statement] I gave, well, it is false because the only reason I gave it was because I thought I could get off easier if I would blame anybody."[5]

The State then asked the court to declare Santoy a hostile witness and the court over objection permitted the district attorney to read into the record certain portions of the statement and examine the witness on the questions and answers contained therein. The defendant was found guilty and then moved for a new trial which was denied. The defendant was thereupon sentenced and he then appealed to the Supreme Court. The Supreme Court reaffirmed its former position in holding with the orthodox view by announcing:

> "This court has long adhered to the majority rule that previous inconsistent statements of a witness cannot be accorded any value as substantive evidence."[7]

On appeal it was the State's position that the trial court's ruling

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[1] State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956).

[2] WIS. STATS. §161.02 (1) (1955): "It shall be unlawful for any person to manufacture, possess, have control of, buy, sell, give away, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this chapter. Any person violating this section shall upon conviction be imprisoned in the state prison not more than 5 years nor less than one year or in the county jail not more than one year."

[3] WIS. STATS. §161.02 (2) (1955): "Any person who shall sell, give, prescribe, administer or dispense any narcotic drug, except as authorized in this chapter, to any person under the age of 21 years, shall be imprisoned in the state prison not less than 3 years nor more than 25 years, provided that on a second conviction for such offense such person shall be imprisoned for not less than 5 years nor more than for life and for a third conviction for such offense such person shall be imprisoned for life."

[4] WIS. STATS. §325.35 (1955): "Where testimony of a witness on the trial in a criminal action is inconsistent with a statement previously made by him and reduced to writing and approved by him or taken by a phonographic reporter, he may, in the discretion of the court, be regarded as a hostile witness and eamined as an adverse witness, and the party producing him may impeach him by evidence of such prior contradictory statement."

[5] 274 Wis. at 111, 79 N.W.2d at 76.

[6] Hamilton v. Reinemann, 233 Wis. 572, 290 N.W. 194 (1940); Jaster v. Miller, 269 Wis. 223, 69 N.W.2d 265 (1955).

[7] 274 Wis. at 112, 79 N.W.2d at 77.

was a proper application of sec. 325.35.[8] It was urged by the State that sec. 325.35[9] was a legislative expansion of the procedure reviewed in *Malone v. State.*[10] In disposing of this argument the court stated:

> "In a criminal action examination of a hostile witness as an adverse witness allows the prosecutor to examine without being bound by the witness' answers and provides the opportunity to repair the harm done to the State's case by surprise, but the statute shows no intention on the part of the legislature to allow hearsay evidence to be considered as proof of the facts. The creation of sec. 325.35 Stats., by the enactment of Ch. 535, Laws of 1945, in no way changed the rule of evidence. In enacting the chapter the legislature declared it to be an act relating to the impeachment of hostile witnesses in criminal actions. Impeachment goes only to the credibility of the witness and the negation of his testimony."[11]

In light of this recent reaffirmation by the Court of the "orthodox" or "prevailing view" it is of merit to consider the evidentiary mechanics of both positions. A concise statement of the orthodox view is that:

> "Proof of prior inconsistent statements of a witness can be introduced and considered only for the purpose of impeachment and not as substantive evidence of the truth of the matter stated, and it is the duty of the court to instruct the jury that they can consider the evidence for this purpose only, if such instruction is requested by the party who apprehends that such proof may be treated by the jury as substantive evidence against him."[12]

The rationale employed to deny substantive effect to prior inconsistent statements of a witness is that if such statements were accepted as proof of the facts stated, the testimony would be hearsay.[13] It would appear that if the prior inconsistent statement were not hearsay or if it would fall within the standard exceptions to the hearsay rule, there would be no reason for denying substantive admission of the statement.

The view espoused by Dean Wigmore[14] and corroborated by Professor McCormick[15] is commonly considered the "unorthodox view." Dean Wigmore declares:

> "It does not follow, however, that prior self-contradictions, when admitted, are to be treated as having no affirmative testimonial value and that any such credit is to be strictly denied

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[8] See note 4 *supra.*
[9] *Ibid.*
[10] Malone v. State, 192 Wis. 379, at 388, 212 N.W. 879, at 882 (1927).
[11] 274 Wis. at 113, 79 N.W.2d at 78.
[12] Charlton v. Unis, 4 Gratt 60 (1847); Gould v. Norfolk Lead Co., 9 Cush. 346 (1855). See 70 C. J., *Witnesses* §1339b (1935).
[13] Culpepper v. State, 4 Okl. Cr. 103, 11 P. 679 (1903); Medlin v. County Bd. of Education, 167 N.C. 239, 83 S.E. 483 (1914); See 70 C. J., *Witnesses* 1339 (1935).
[14] See 3 WIGMORE, EVIDENCE §1018 (a) (3rd ed. 1940).
[15] See MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §39 (1954).

> them in the mind of the tribunal. The only ground for doing so would be the Hearsay Rule. But the theory of the Hearsay Rule is that an extra-judicial statement is rejected because it was made out of court by an absent person not subject to cross examination. . . . Here, however, by hypothesis, the witness is present and subject to cross examination. There is ample opportunity to test him as to the basis of his former statement. The whole purpose of the Hearsay Rule has already been satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extra-judicial statement as it may seem to deserve."[16]

It is apparent that Dean Wigmore has omitted the elemental objection that the statement must be made under oath to qualify as non-hearsay, however, Dean Wigmore found support for his view in such an eminent jurist as Learned Hand. Justice Hand, speaking relative to this matter, argued for a change in this regard:

> "The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are nonetheless deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."[17]

The best analytical dissection of the "unorthodox view" can be found in *State v. Saporen*[18] in which the legal issue and facts closely parallel that of the featured case.[19] In that case the accused was convicted of carnal knowledge and abuse of a female under 18 years. The main question was one of identification which the jury resolved against the accused. The point arose from the State's impeachment of its own witness, one Sekerman. The date of the offense was fixed by the State's evidence as Nov. 2, 1937 in room 201 of a boarding house. Sekerman was called in rebuttal by the State and asked if he had seen the prosecuting witness in room 201. He answered that he had seen her and when interrogated as to the date he replied, "I think it was in October." He was asked whether he would say it was not Nov. 2nd and he answered "Yes." The county attorney claimed surprise and he was given leave to impeach the witness which he did by reference to a previous unsworn statement, by way of question and answer, procured by a probation officer with the assistance of a stenographer. The Court reversed this conviction of the accused basing its decision on the majority view that such impeaching testi-

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[16] See note 13 *supra.*
[17] Di Carlo v. United States, 6 F.2d 364, at 368 (2d Cir. 1925).
[18] State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).
[19] See note 1 *supra.*

mony cannot be considered as substantive evidence. The Court considering the "unorthodox view" of Dean Wigmore remarked:

> "The previous statement was when made and remains an ex parte affair, given without oath and test of cross examination. Important also is the fact that, however much it may have mangled truth, there was assurance of freedom from prosecution for perjury. The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is to maintain falsehood rather than truth."[20]

The Court further remarked that there are additional practical reasons for not attaching anything of substantive evidential value to extra judicial assertions which come in only as impeachment. It was urged that such unrestricted use as evidence would increase both temptation and opportunity for the manufacture of evidence and declarations extracted by the most extreme of "third degree" methods could easily be made into affirmative evidence.[21]

It is the conclusion of this writer that the ratio decidendi of the orthodox view in this matter is preferable. Although the Wisconsin Court in the featured case did not give a detailed consideration to both positions, it is submitted that the Minnesota Court's reasoning in the *Saporen* case, is sound. Obviously any prior inconsistent statement which violates the rule against hearsay, that is: (1) is not made under oath; (2) is made without the opportunity for cross examination; (3) is made without confrontation, would be inadmissible as substantive evidence. However, even if the statement would be non-hearsay or fall within its exceptions, it would seem that for the policy reason of discouraging the manufacture of evidence, it would be more practical to exclude the prior inconsistent statement as substantive evidence.

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**Constitutional Law: Obscenity Not Within the Area of Constitutionally Protected Speech or Press** — In case No. 582, on certiorari to the United State Supreme Court, the defendant conducted a business in New York in the publication and sale of books, photographs, and magazines. Circulars and advertising matters were used to solicit sales. Defendant was convicted by a jury in the District Court for the Southern District of New York upon four counts of a

[20] See note 17 *supra*.
[21] *Ibid.*