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Evidence - Hearsay - Prior Inconsistent Statements

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EVIDENCE—HEARSAY—PRIOR INCONSISTENT STATEMENTS—The Pennsylvania Superior Court has held that prior inconsistent statements may be used substantively as well as for impeachment purposes.

Commonwealth v. Loar, 399 A.2d 1110 (Pa. Super. Ct.), *allocatur denied* (1979).

On November 9, 1976, the borough police of Waynesburg, Greene County, Pennsylvania, followed a stolen van to a certain address and arrested Thomas Ostrander, one of the occupants of the house, on a charge of theft.[1] Shortly thereafter, Ostrander allegedly stated to the police that Robert Loar, who was in the house when Ostrander was arrested, was involved with him in the thefts. Accordingly, the police arrested Loar the next day. At Loar's preliminary hearing on November 16, 1976,[2] Ostrander denied that he had named Loar in the statement he had given to the police and also denied that Loar was involved in the thefts.[3] Over the objection of Loar's counsel, the magistrate nevertheless admitted Ostrander's prior inconsistent statement for truth of its contents,[4] and Loar was bound over for trial.

Loar was tried for theft[5] in the Criminal Division of the Court of Common Pleas of Greene County, Pennsylvania. At the trial, the prosecution did not attempt to introduce Ostrander's statement into evidence. Instead, the commonwealth introduced evidence showing that the police had found the stolen van, with its engine still running, near the house where Ostrander was arrested. Footprints in the fresh snow led from the van to the house where the police found numerous articles which had been reported stolen. Nearby was another vehicle whose engine was still warm and from which there were also tracks leading to the house. In an upstairs bedroom were Loar and Ostrander. Loar was in bed, wearing thermal underwear. Ostrander was on the floor beside him, clothed. The legs of the pants of both men were wet. Loar, however, claimed to have been in bed for some hours.[6]

From this circumstantial evidence the commonwealth sought to prove that Loar and Ostrander were jointly involved in the thefts and

1. Commonwealth v. Loar, 399 A.2d 1110, 1112 (Pa. Super. Ct.), *allocatur denied* (1979); Brief for Appellants and Appendix at 3a, 4a.

2. The preliminary hearing was held before Magistrate John Watson, Waynesburg, Greene County, Pennsylvania. Brief for Appellants at 1a.

3. 399 A.2d at 1114-15; Brief for Appellants at 13a, 17a-19a.

4. 399 A.2d at 1114-15; Brief for Appellants at 15a.

5. The Pennsylvania theft statute is at 18 PA. CONS. STAT. ANN. § 3921(a) (Purdon 1973).

6. 399 A.2d at 1112.

had entered the house from the vehicles just before the police arrived.[7] Loar was convicted and sentenced to pay costs of prosecution, to make restitution of the property stolen if not already restored, and to be imprisoned for a term of not less than two years or more than five on three counts of theft.[8] Loar appealed to the Pennsylvania Superior Court,[9] asserting several points of error.[10] In an opinion by Judge Spaeth, the court affirmed the conviction.[11]

Judge Spaeth primarily considered Loar's argument that the lower court should have granted his motion to quash the criminal complaint because the commonwealth's evidence at the preliminary hearing was insufficient to show a prima facie case.[12] Loar argued that the only evidence presented at the preliminary hearing linking him to the thefts was Ostrander's statement to the police. The magistrate allowed Ostrander's statement to be introduced as substantive evidence[13] after Ostrander repeatedly denied naming Loar in the statement[14] and despite the defense attorney's repeated objections that the prior statement was hearsay and therefore inadmissible except to impeach the witness' credibility.[15]

In deciding whether or not Loar should have been bound over for trial, Judge Spaeth examined the Superior Court's prior decision in *Commonwealth v. Rick*,[16] which held that a prima facie case of driving while under the influence of intoxicating liquor was made out where the only evidence at the preliminary hearing was a hearsay report on blood-alcohol content. The court in *Rick* had also stated in dictum that if it were clearly established at the preliminary hearing that the only

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7. *Id.* at 1112-13; Brief for Appellee and Appendix at 9.

8. Petition for Allowance of Appeal and Appendix at 1, Commonwealth v. Loar, allocatur docket No. 1933 (1979).

9. The basis for jurisdiction was PA. STAT. ANN. tit. 17, § 183 (Purdon 1962) (now codified at 42 PA. CONS. STAT. ANN. § 742 (Purdon 1978)).

10. Loar's primary argument was that the commonwealth could not bind him over for trial based on Ostrander's prior inconsistent statement. He also contended that the commonwealth's evidence at the trial was insufficient to prove him guilty beyond a reasonable doubt; that the jury was impermissibly tainted because it included a juror who had sat on a jury which had tried Loar two weeks earlier on unrelated charges; and that the prosecutor had made prejudicial remarks during his closing arguments. *See* Brief for Appellants at 4-8. For the court's disposition of these arguments, see note 12 *infra*.

11. Commonwealth v. Loar, 399 A.2d 1110 (Pa. Super. Ct.), *allocatur denied* (1979).

12. *Id.* at 1114. The court rejected all of Loar's secondary arguments, which are discussed at note 10 *supra*. The court found that the evidence was sufficient to prove Loar guilty beyond a reasonable doubt; that the tainted jury issue had not been properly preserved for appeal; and that the prosecutor's allegedly prejudicial remarks had been adequately cured by the trial court's instructions to the jury. *Id.* at 1113-14.

13. *Id.* at 1115.

14. Brief for Appellants at 13a, 14a.

15. 399 A.2d at 1115; Brief for Appellants at 4a, 5a, 9a.

16. 244 Pa. Super. Ct. 33, 366 A.2d 302 (1976).

evidence to be presented at the trial would be hearsay then the case should not be submitted to the grand jury.[17] Judge Spaeth distinguished *Rick* from *Loar* by pointing out that in *Rick*, the magistrate could properly conclude that more than the hearsay evidence was to be introduced at the trial since it was likely that the commonwealth would produce the chemist who had prepared the report. This was not the case in *Loar*, however, because the only evidence before the magistrate was Ostrander's prior inconsistent statement, which, under existing Pennsylvania law, could be used only to impeach the declarant, and not as substantive evidence. Judge Spaeth concluded that by the reasoning of the *Rick* decision, Loar should not have been held for trial.[18]

Confronted with this conclusion, the court examined the old rule barring the use of prior inconsistent statements as substantive evidence.[19] If a prior inconsistent statement could be used as substantive evidence, dismissal of the charges against Loar was not warranted. Judge Spaeth noted that in *Commonwealth v. Gee*,[20] four justices of the Pennsylvania Supreme Court had questioned the wisdom of the old rule and had expressed approval of the Federal Rule of Evidence which authorizes the substantive use of certain prior inconsistent statements.[21] Moreover, Judge Spaeth found that the practice of admitting a witness' prior inconsistent statement as substantive evidence has been accepted in many jurisdictions. Drawing upon the rationale given in the comment to the California Evidence Code[22] and in the Ad-

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17. *Id.* at 37 n.1, 366 A.2d at 304 n.1.

18. 399 A.2d at 1116.

19. *Id.* at 1116-18. Eight years before *Loar*, Judge Spaeth, then a judge of the Court of Common Pleas of Philadelphia County, considered a hearsay problem similar to the one at issue in *Loar*. *See* Commonwealth v. Burton, 54 Pa. D. & C.2d 264 (Phila.), *aff'd mem.* 220 Pa. Super. Ct. 737, 286 A.2d 408 (1971). In *Burton*, prior statements made to the police by two witnesses were repudiated at the defendant's preliminary hearing. The magistrate nevertheless regarded the statements as substantive evidence in the murder charge against the defendant. Judge Spaeth held that although the orthodox rule adhered to by the higher courts of Pennsylvania required that the statements be used at a trial for impeachment purposes only, it was proper to admit the statements for substantive purposes at the preliminary hearing because they were in writing, signed by the witness, and the declarant was available for cross-examination. *Id.* at 288.

20. 467 Pa. 123, 354 A.2d 875 (1976).

21. FED. R. EVID. 801(d)(1) provides in relevant part that a prior statement by a witness is not hearsay if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . ."

22. *See* CAL. EVID. CODE § 1235 (West 1966), and the California Law Revision Commission's Comment to § 1235, CAL. EVID. CODE § 1235 comment (West 1966).

visory Committee's Note to the Federal Rules,[23] Judge Spaeth held that where a witness is available to testify and to be cross-examined in court, his prior inconsistent statement, sworn or unsworn, is admissible for the truth of the facts asserted.[24] Thus, if the commonwealth had called Ostrander to the witness stand at Loar's trial, Ostrander's prior statement would have been admissible for the truth of its assertion, and it was, therefore, sufficient at the preliminary hearing to make out a prima facie case against Robert Loar.[25]

The old rule, also known as the orthodox rule, excludes prior inconsistent statements as substantive evidence because they were not made under oath, the declarant was not subject to cross-examination when he made them, and because there was no opportunity for the jury to observe the demeanor of the declarant when the statement was made.[26] Until *Commonwealth v. Loar*, Pennsylvania courts had adhered strictly to the orthodox rule.[27] In earlier cases, the Pennsylvania courts attached great significance to the trial court's instructions to the jury on the difference between using the evidence to impeach the credibility of the witness and considering the evidence for the truth of its contents.[28] In later civil cases, the Pennsylvania Supreme Court was

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23. Advisory Committee's Note to Proposed Rule 801, *reprinted in* 56 F.R.D. 183, 295-96 (1972).

24. 399 A.2d at 1117.

25. *Id.* at 1118.

26. *See, e.g.*, People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967); State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 251 (2d ed. 1972) [hereinafter cited as MCCORMICK]; Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613 and 607*, 75 MICH. L. REV. 1565 (1977) [hereinafter cited as Graham]; Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 HASTINGS L.J. 361 (1974).

27. *See, e.g.*, Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976); Commonwealth v. Tucker, 452 Pa. 584, 307 A.2d 245 (1973); Dincher v. Great Atl. & Pac. Tea Co., 356 Pa. 151, 51 A.2d 710 (1947); Stiegelmann v. Ackman, 351 Pa. 592, 41 A.2d 679 (1945). *See also* Commonwealth v. Commander, 436 Pa. 532, 260 A.2d 773 (1970) (listing cases but declining to discuss the issue); 3A J. WIGMORE, EVIDENCE § 1018 (Chadbourn rev. 1970); 2 G. HENRY, PENNSYLVANIA EVIDENCE § 801 (1953 & Supp. 1978); A. JENKINS, PENNSYLVANIA TRIAL EVIDENCE HANDBOOK § 17.13 (1974 & Supp. 1979); Comment, *Evidence—Admissibility of Hearsay—A Comparison of Some of the Uniform Rules of Evidence and Pennsylvania Law*, 4 VILL. L. REV. 117, 118 (1958).

28. *E.g.*, Scheer v. Melville, 279 Pa. 401, 123 A. 853 (1924) (papers used to contradict testimony of a witness may not be used for any other purpose); Dampman v. Pennsylvania R.R. Co., 166 Pa. 520, 31 A. 244 (1895) (trial court must take special care to prevent prior inconsistent statement from being used for any purpose other than impeachment); Commonwealth v. Blose, 160 Pa. Super. Ct. 165, 50 A.2d 742 (1947) (merely stating the rule is insufficient, as it must be done unequivocally, and the difference between impeachment and substantive uses must be explained).

less insistent on specific instructions,[29] although in criminal cases, if the effect of the prior inconsistent statement was highly prejudicial, the failure properly to instruct the jury was reversible error.[30]

Legal scholars have long advocated that the orthodox rule be changed. The standard hearsay objections—lack of contemporaneous oath, cross examination, and observation of demeanor—are not applicable when a prior inconsistent statement is offered for the truth of the facts asserted, since the presence of the witness in court largely satisfies the purpose of the hearsay rule.[31] The value of the oath having diminished,[32] it is no longer considered a guarantee of the trustworthiness of testimony. The opportunity to cross-examine the witness at trial is sufficient to bring out the truthfulness of his earlier statement and to reveal the reasons for his change of story.[33] Similarly, the witness' presence at the trial gives the jury an adequate opportunity to observe his demeanor.[34] Related arguments for the exclusion of other forms of hearsay are that the declarant's out-of-court statement may be based upon faulty perception, faulty memory, lack of sincerity, or a peculiarity in his use of language which conveys a wrong impression.[35] Prior in-

29. *See* Wilson v. Pennsylvania R.R. Co., 421 Pa. 419, 219 A.2d 666 (1966) (trial court erred in admitting a witness' prior contradictory statements as substantive evidence, but counsel not having objected, it was not reversible error); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 139 A.2d 663 (1958) (failure to request limiting instructions constituted a waiver and lack of such instructions was thus not reversible error). In *Wilson*, the trial court had failed to distinguish between the statements of a party and those of a witness. The prior contradictory statements of a party qualify as an admission of a party opponent, a recognized exception to the hearsay rule. *See* Mitchell v. Shirey, 407 Pa. 204, 180 A.2d 65 (1962); Lemmon v. Bufalino, 204 Pa. Super. Ct. 481, 205 A.2d 680 (1964); MCCORMICK, *supra* note 26, § 262.

30. *E.g.*, Commonwealth v. DiPasquale, 424 Pa. 500, 230 A.2d 449 (1967).

31. *See* 3A J. WIGMORE, EVIDENCE § 1018(b) (Chadbourn rev. 1970).

32. *See* 6 J. WIGMORE, EVIDENCE § 1827 (Chadbourn rev. 1976); MCCORMICK, *supra* note 26, § 251; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 186 (1948) [hereinafter cited as Morgan].

33. California v. Green, 399 U.S. 149, 155 (1970). *See also* Copes v. United States, 345 F.2d 723, 726 (D.C. Cir. 1964) (upholding the admission of prior inconsistent statements for the purpose of impeaching credibility and showing motive); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573 (1947) [hereinafter cited as *The Turncoat Witness*].

34. In Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925), the court stated: "[i]f, from all that the jury see[s] of the witness, they conclude that what he says now is not the truth, but what he said before [was the truth], they are none the less deciding from what they see and hear of that person . . . in court." *See also* 5 J. WIGMORE, EVIDENCE § 1399 (Chadbourn rev. 1974).

35. *See* 2 J. WIGMORE, EVIDENCE § 478 (3d ed. 1940); MCCORMICK, *supra* note 26, § 245; Morgan, *supra* note 32, at 188; Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and The Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1 [hereinafter cited as Stewart].

consistent statements are not considered subject to these risks, because the declarant is in court and cross-examination can clear up any confusion or expose any defects to the fact finder. Some authorities feel that the closer in time to the event the statement is made, the closer to the truth it is likely to be; thus the prior statement may be more reliable than the declarant's in-court testimony.[36]

Allowing the substantive use of prior inconsistent statements affords protection from the turncoat witness who, unexpectedly or not, tells at the trial a different story from his earlier one, denies what he said earlier, or claims that he cannot remember events he had described earlier.[37] In criminal trials this generally occurs for one of two reasons. Either the witness is afraid to inculpate the defendant in open court for fear of the consequences, or the witness is a family member who has grown sympathetic toward the defendant and has become reluctant to inculpate him further.[38]

A frequent argument in support of the substantive use of prior inconsistent statements is that once the jury has heard the evidence, the limiting instructions as to its use are ineffective. Juries probably neither understand nor obey the instructions.[39] It would, therefore, be more realistic to let the statement in regardless of the purpose for which it is offered and then to permit the fact finder to decide if either version can be believed.

Proponents of the orthodox rule argue that it prevents the manufacture of evidence.[40] The answer to this is that such a possibility exists anyway,[41] and that the advantages of admitting valuable evidence otherwise excluded by the rule outweigh the disadvantages of admitting a minority of perjured statements. Those who prefer the orthodox

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36. *See* United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1964); Commonwealth v. Gee, 467 Pa. 123, 144, 354 A.2d 875, 885 (1976) (Roberts, J., dissenting). *See also* MCCORMICK, *supra* note 26, § 251; *The Turncoat Witness*, *supra* note 33, at 577.

37. In *The Turncoat Witness*, *supra* note 33, at 575, the author suggests that "[the orthodox] doctrine is highly inconvenient, not to say poisonous to the interests of a party who has had the misfortune of having his crucial witness persuaded, suborned, seduced, or intimidated into changing his story." *See also* Stalmack, *Prior Inconsistent Statements: Congress Takes a Compromising Step Backward in Enacting Rule 801(d)(1)(A)*, 8 LOY. CHI. L.J. 251, 252 (1977) [hereinafter cited as Stalmack].

38. *See* Silbert, *Federal Rule of Evidence 801(d)(1)(A)*, 49 TEMPLE L.Q. 880 (1976) [hereinafter cited as Silbert].

39. United States v. De Sisto, 329 F.2d at 933; United States *ex rel.* Ng Kee Wong v. Corsi, 64 F.2d 564, 565 (2d Cir. 1933); 3A J. WIGMORE, EVIDENCE § 1018(b) (Chadbourn rev. 1970); Morgan, *supra* note 32, at 193; *The Turncoat Witness*, *supra* note 33, at 580; Graham, *supra* note 26, at 1572. *But see* United States v. Schwartz, 390 F.2d 1, 4 (3d Cir. 1968) where the court expressed the view that juries do understand the instructions.

40. State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

41. *See The Turncoat Witness*, *supra* note 33, at 586.

rule also express the fear that the substantive use of prior inconsistent statements in a criminal proceeding might lead to a conviction based solely upon a prior inconsistent statement.[42] There need be no risk of such a conviction if the courts are careful not to confuse admissibility with sufficiency of the evidence.[43]

In addition to the changes in the common law approach urged and endorsed by the scholars, there have been various statutory changes to the old rule. The English Evidence Act of 1938[44] allowed for the admission, as evidence of the fact stated, of any previous written statement made by a person with first-hand knowledge and who is called as a witness at the trial. The English Civil Evidence Act of 1968[45] allows for the admissibility in a civil proceeding of a previous inconsistent statement, if proved, as evidence of any fact stated therein. The orthodox rule is still applicable to criminal proceedings in England,[46] how-

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42. *See* Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309, 323 n.59 (1970); Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3, 20 (1975) [hereinafter cited as Blakey].

43. *See* Blakey, *supra* note 42, at 20, where the author suggests that the danger arises because the rule itself is silent on the matter. However, in Pennsylvania, the test for the sufficiency of the evidence has been clearly stated.

> [T]he test of the sufficiency of the evidence is whether, accepting as true all the evidence and all reasonable inferences therefrom, upon which if believed the jury could properly have based its verdict, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime or crimes of which he has been convicted.

Commonwealth v. Thomas, 465 Pa. 442, 445, 350 A.2d 847, 848 (1976). *See also* Commonwealth v. Fortune, 456 Pa. 365, 318 A.2d 327 (1974); Commonwealth v. Petrisko, 442 Pa. 575, 275 A.2d 46 (1971).

44. Evidence Act, 1938, 1 & 2 Geo. 6, c. 28, § 1 provides in relevant part:

> (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
>
> (i) if the maker of the statement . . .
>
> (a) had personal knowledge of the matters dealt with by the statement . . . . . and
>
> (ii) if the maker of the statement is called as a witness in the proceedings . . . .

45. Civil Evidence Act, 1968, c. 64, Pt. I, § 3 provides:

> (1) Where in any civil proceedings—
>
> (a) a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865; or
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> (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,
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> that statement shall be virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

46. *See* S. PHIPSON, EVIDENCE 286 (12th ed. 1976). The Criminal Law Revision Committee's 11th Report recommended provisions substantially similar to those of the 1968

ever, even though the 1968 Act seems to be moving toward complete abolition of the hearsay rule.[47]

In 1942, the American Law Institute's Model Code of Evidence proposed that *any* statement, written or oral, should be admissible if the declarant was either unavailable or present at the trial and subject to cross-examination.[48] This rule has not been adopted in any jurisdiction, presumably because it is so sweeping.[49] The Uniform Rules of Evidence in 1953 proposed that evidence of prior statements be admissible for the truth of the fact stated where the declarant is available for cross-examination on condition that the statement be otherwise admissible.[50] The 1953 Uniform Rule was adopted in several states.[51]

In 1975, the Federal Rules of Evidence were adopted by Congress after various versions had been debated in the House and Senate.[52]

Act for the admissibility of previous statements of witnesses. *See* R. CROSS, EVIDENCE 500 (4th ed. 1974). *See also* Williams, *The Proposals for Hearsay Evidence*, 1973 CRIM. L. REV. 76.

47. For American references to the English statutes, see Graham, *supra* note 26, at 1584; Evans, *Article Eight of the Federal Rules of Evidence: The Hearsay Rule*, 8 VAL. L. REV. 261 (1974); Stewart, *supra* note 35, at 2.

48. The model rule stated: "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE rule 503 (1942).

49. *See* Read, *The New Confrontation—Hearsay Dilemma*, 45 S. Cal. L. Rev. 1, 12 (1972) [hereinafter cited as Read].

50. The Uniform Rule provided:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> (1) *Previous Statements of Persons Present and Subject to Cross Examination.* 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.

UNIFORM RULE OF EVIDENCE 63 (1953 version).

51. The 1953 enactment of the Uniform Rules of Evidence was adopted by statute in several jurisdictions. *See* CAL. EVID. CODE §§ 100-1550 (West 1966); KAN. STAT. ANN. §§ 60-401 to 470 (1976); N.J. STAT. ANN. §§ 84A-1 to 49 (West 1976); C.Z. CODE tit. 5, §§ 2731-2996 (1963); V.I. CODE ANN. tit. 5, §§ 771-956 (1967).

The new Uniform Rules of Evidence, which are almost identical to the Federal Rules of Evidence, were approved by the National Conference of Commissioners on State Laws in 1974, with some changes made in 1975. These new rules have been adopted in seven states. *See* ARIZ. R. EVID. (West. Pamp. 1978); ARK. STAT. ANN. § 28-1001 (1979); FLA. STAT. ANN. §§ 90.101-.958 (West Pamp. 1979); MINN. R. EVID. (West Pamp. 1979); NEB. REV. STAT. §§ 27-101 to 1103 (1975); N.D. R. EVID. 101-1103 (1975); OKLA. STAT. ANN. tit. 12, §§ 2101-3103 (West Pamp. 1979). Still other states adopted the rule through case law. *See, e.g.*, Gelhaar v. State, 41 Wisc. 2d 230, 163 N.W.2d 609 (1969); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

52. For a detailed discussion of these debates, see Graham, note 26 *supra* and Stalmack, note 37 *supra*.

The original Rule 801(d)(1)(A) proposed by the Advisory Committee would have treated as non-hearsay *all* prior inconsistent statements if the declarant testified at the trial and was subject to cross-examination.[53] However, the Advisory Committee failed to persuade Congress that all prior inconsistent statements should be admitted for substantive purposes. The limitation on the final version reflects congressional concern about the unreliability of statements which are offered into evidence in the absence of proof that the statements were in fact made. As adopted, the rule allows only the most reliable statements to be introduced for substantive purposes, since they must have been made while the declarant was under oath, subject to the penalty of perjury, in a formal proceeding.[54] Since the adoption of the Federal Rules of Evidence, an increasing number of states have enacted codes of evidence patterned after the Federal Rules. However, the states have not universally adopted the hearsay rules exactly as enacted in the final version of the Federal Rules of Evidence. In some states, the rule on prior inconsistent statements is identical to the Supreme Court's proposed version, and in others, the rule has limitations which are peculiar to the jurisdiction.[55] Challenges to these rules have been largely foreclosed at the federal level, since the United States Supreme Court held in *California v. Green*[56] that the confrontation clause is not violated by the admission of a declarant's out-of-court statements for substantive purposes, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.

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53. This proposal, known as the Supreme Court's version, was put forth in 1972. RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, Rule 801(d)(1)(A), 56 F.R.D. 183, 293 (1972). *See also* Stalmack, note 37 *supra*.

54. The final version treats the prior statements of a witness as non-hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . ." FED. R. EVID. 801(d)(1)(A). The term "other proceeding" has been interpreted to include grand jury proceedings, *see, e.g.*, United States v. Coran, 589 F.2d 70 (1st Cir. 1978); United States v. Mosley, 555 F.2d 191 (8th Cir.), *cert. denied*, 434 U.S. 851 (1977); United States v. Henry, 448 F. Supp. 819 (D. N.J. 1978), and immigration interrogations, *see* United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir.), *cert. denied*, 429 U.S. 983 (1976) (reasoning that interrogation is conducted with legal formality).

55. For example, NEB. REV. STAT. § 27-801(4)(9)(i) (1975) is identical to Federal Rule 801(d)(1)(A); ARIZ. R. EVID. 801(d)(1)(A) (West. Pamp. 1978) is identical to the Supreme Court's version; and MICH. R. EVID. 801(d)(1) (Pamp. 1979) provides that the statement is not hearsay if the declarant is subject to cross-examination on the statement and the statement is one of identification. *See* Wieder & Speed, *Evidence, Hearsay and the Federal Rules of Evidence: A Practitioner's Guide*, 1977 ANN. SURVEY AM. L. 621, citing the state codes patterned after the Federal Rules of Evidence. *See also* 3A J. WIGMORE, EVIDENCE § 1018 (Chadbourn rev. 1970).

56. 399 U.S. 149 (1970).

The rule adopted by the Pennsylvania Superior Court in *Commonwealth v. Loar* is broader than the federal rule, since it allows the substantive use of any prior inconsistent statement by a witness who is available for cross-examination at trial. The *Loar* court was persuaded by the Advisory Committee's Note to Federal Rule 801(d)(1)(A) that the requirement of the oath and formal proceeding is unnecessary.[57] This is a plausible approach, as there are other exceptions to the hearsay rule which do not require the statement admitted to have been made under oath, provided that the statement is sufficiently trustworthy by its nature to minimize the risk of recent fabrication.[58] Moreover, by requiring the declarant to be available for cross-examination at the trial as a predicate to admissibility, the *Loar* rule satisfies the requirement of the confrontation clause as enunciated in *Green*.[59] The effect of the *Loar* rule will be to increase the amount of relevant and reliable information which is brought before the fact finder.[60] With its decision in *Loar*, the court has taken an enlightened step, joining the scholars, courts, and legal draftsmen who over the last forty years have shown a perception of the realities of what goes on in the courtroom, and who have urged the substantive use of all prior inconsistent statements, provided that the declarant is available for cross-examination.

Stephanie G. Spaulding

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57. 399 A.2d at 1117-18. *But see* text accompanying notes 54 & 55 *supra* for discussion of the reasons why Congress rejected the Advisory Committee's recommendations.

58. *See* Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9, 31-33 (1974). *See also* note 36 and accompanying text *supra*.

59. 399 U.S. 149 (1970).

60. *See* Silbert, note 38 *supra*.