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The Use of Prior Statements in Pennsylvania Civil Trials

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The Use of Prior Statements In Pennsylvania Civil Trials

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Questions regarding the use of prior statements in trials in Pennsylvania arise in almost every action. Yet there has been no comprehensive study made of the multiple decisions treating the subject. In attempting to define and correlate the many applicable principles, two things must be kept in mind: (1) frequently the issue raised is not fundamental and is decided on an *ad hoc* basis; (2) the material distinctions between the use and effect of statements of parties and witnesses are often overlooked. In order to make these distinctions clear, this study will consider prior statements made by parties and witnesses separately. Among the areas to be considered will be the types of statements admissible, the evidentary effect to be accorded the statement when it is admitted (when the statement can be used as substantive evidence and when it can come in only for purposes of confirmation or impeachment of record testimony), and when prior recorded statements may be used to refresh memory and when they can be admitted as a past recollection recorded. In addition, the procedural rules applicable to the admission of prior statements will be examined, including the necessity of offering the entire statement and the requirement of confronting the declarant with the prior statement as a prerequisite to its admission.

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I. Prior Statements of Parties

A. *Who is a Party*

The first step in analyzing the admissibility and effect of prior statements of parties is to determine precisely who is considered a "party" for these purposes. There are at least two situations when the prior statements of a person not technically a party may be admitted and considered as if they were made by an actual party. First: statements made by a real party in interest are admissible against his nominal party. Thus, statements made by the beneficiaries in a death action have been admitted,[1] as have the statements made by the decedent in an action by or against his estate.[2] It is questionable whether the statement of one who is merely a nominal party can be admitted under the rules applicable to parties with an interest.[3] Secondly, statements by one not an actual party are admissible as the statements of a party if they were authorized under established principles of agency. However, the statements of an agent are admissible only in limited circumstances: the general rule is that such statements, not otherwise admissible through another exception to the hearsay rule (such as the spontaneous declaration exception), will not be admissible against his principal or master.[4] Exceptions to this rule will be found where there is proof that (1) the declarer was especially authorized by his superior to make the statement; (2) he was a general representative of the principal having the management of the entire business; (3) his admissions formed part of the consideration of a contract; or (4) his action was ratified by his principal.[5]

However, authority to do an act or conduct a transaction does not of itself include authority to make statements concerning the transaction, and authority to make statements of fact does not include authority to make statements admitting liability based upon such facts.[6] Even a statement by a general representative, in order

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1. Geelen v. Pennsylvania R.R., 400 Pa. 240, 245, 161 A.2d 595 (1960).

2. Rudisill v. Cordes, 333 Pa. 544, 549-50, 5 A.2d 217 (1939); Hughes v. Delaware & Hudson Canal Co., 176 Pa. 254, 259, 35 A. 190 (1896); Webb v. Martin, 364 F.2d 229, 232 (3rd Cir. 1966).

3. Muzychuk v. Yellow Cab Co., 343 Pa. 335, 341, 22 A.2d 670 (1941). *Contra,* Titlow v. Titlow, 54 Pa. 216 (1867); Mertz v. Detweiler, 8 W.&S. 376 (1845).

4. Bergen v. Lit Bros., 354 Pa. 535, 539, 47 A.2d 671 (1946); Anderson v. London Guar. & Accident Co., 295 Pa. 368, 145 A.2d 431 (1929); Milwaukee Locomotive Mfg. Co. v. Point Marion Coal Co., 294 Pa. 238, 144 A. 100 (1928). Statements made by an agent are admissible against the employer if made as part of the res gestae. Michaels v. Tubbs, 221 Pa. Super. 255, 260 n.2, 289 A.2d 738 (1972) (citing cases).

5. Orluske v. Nash Pittsburgh Motors Co., 286 Pa. 170, 174, 133 A. 148 (1926), quoting McGrath v. Pennsylvania Sugar Co., 282 Pa. 265, 274, 127 A. 780 (1925). *See also* Burwell v. Crist, 373 F.2d 78, 80 (3rd Cir. 1967).

6. Campbell v. G.C. Murphy Co., 122 Pa. Super. 342, 186 A. 269 (1926); Giberson v. Patterson Mills Co., 174 Pa. 369, 34 A. 563 (1896).

to be admissible, must be a valid admission. For example, an accusation of negligence addressed to an employe by the manager of a store to which no response is made does not constitute an admission of liability which will bind the store.[7] Similarly, the president of a company has been held to have no authority to concede liability;[8] nor will the statements of the operator of a vehicle,[9] the superintendant of a business,[10] the fiduciary of an estate,[11] or the spouse of a party[12] be admitted as the statement or admission of a party.

Of course, the declarations of agents may be admissible on other grounds. Books and records of an agent, when corroborated by other evidence, may be admitted.[13] Declarations which are less than admissions, made while the agent is performing an action within the scope of his employment, may be admitted against the principal so long as there is independent evidence of the agency relationship. An example would be a statement by the agent of the subject matter of his authority.[14] Furthermore, a prior statement may become admissible upon proof that the agent had specific authority to make it or that the principal intended that the agent should speak on his behalf.[15] For example, judicial admissions made by an attorney for a party in a pleading are admissible, however, statements made in a pretrial memorandum or out of court, are not.[16]

In *Burwell v. Crist*,[17] a state police officer investigating an accident was introduced to an employe by one of the defendants.

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7. Smith v. American Stores Co., 156 Pa. Super. 375, 380, 40 A.2d 696 (1944).

8. Burns v. Flaherty Co., 278 Pa. 579, 581, 123 A. 496 (1924); Lombard Street Ry. v. Christian, 124 Pa. 114, 123, 16 A. 628 (1889).

9. Deater v. Penn Machine Co., 311 Pa. 291, 295, 166 A. 846 (1933); Murphy Auto Parts Co. v. Ball, 249 F.2d 508, 511 (3rd Cir. 1957). Of course the statement of an agent not admissible as an admission can be used to attack credibility. *See* text accompanying notes 66-68 *infra*.

10. McGrath v. Pennsylvania Sugar Co., 282 Pa. 265, 275, 127 A. 780 (1925); York Mfg. Co. v. Chelten Ice Mfg. Co., 278 Pa. 351, 357, 123 A. 327 (1924); Gilberson v. Patterson Mills Co., 174 Pa. 369, 372, 34 A. 563 (1896).

11. Compton v. Heilman, 331 Pa. 545, 549, 1 A.2d 682 (1938).

12. Evans v. Evans, 155 Pa. 572, 26 A. 755 (1893).

13. Dobbs v. Zink, 290 Pa. 243, 247, 138 A. 758 (1927); Stewart v. Climax Road Machine Co., 200 Pa. 611, 612, 50 A. 1119 (1901).

14. Sebastianelli v. Cleland Simpson Co., 152 Pa. Super. 203, 207, 31 A.2d 570 (1943).

15. Burwell v. Crist, 373 F.2d 78 (3rd Cir. 1967).

16. Taylor v. Allis-Chalmers Mfg. Co., 320 F. Supp. 1381, *aff'd* 436 F.2d 416 (3rd Cir. 1969); Conrad's Estate, 333 Pa. 561, 3 A.2d 697 (1938); Geesey v. Albee Pennsylvania Homes, Inc., 211 Pa. Super. 215, 221-22, 235 A.2d 176 (1967).

17. 373 F.2d 78 (3rd Cir. 1967).

The officer questioned the employe (at least part of the time in the presence of that defendant) and obtained a statement of the facts from him. The Court of Appeals for the Third Circuit overturned a ruling that this statement was inadmissible, holding that the defendant had constituted the employe his agent to speak on his behalf. The court's sole local authority was *Baker v. Westmoreland & Cambria Natural Gas Co.*[18] (The concurring opinion expressed the view of a majority of the panel that the evidence should have been submitted to the jury with instructions to consider it only if they determined that the owner intended that the statements of the employe be made on his behalf.[19]) The *Baker* decision held that the statement of the employe there involved was properly admitted as being one made "by a representative of the [defendant], acting within the scope of his employment," but the grounds for admission in the court below were (more properly, perhaps) that it was a res gestae statement or one made as part of the verbal act of the employe.[20]

In two other instances the declarations of one who is not a party to the action may be admitted against a party as admissions against him. The declarations of an alleged partner are admissible to prove the existence of the partnership, and a statement by an admitted partner is competent as an "admission by adoption."[21] Secondly, declarations of third persons called by a party as witnesses in another action are admissible against the party if he is bound thereby because of agency, joint or common interest, or his having vouched for their credibility by calling them in the prior action.[22]

B. *Admissible Statements by Parties*

Basically, any prior statement made by a party to an action may be offered by his opponent to prove any relevant fact. Its admissibility is not subject to the hearsay rule, since the prior statement consitutes an admission against interest.[23] The statement

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18. 157 Pa. 593, 27 A. 789 (1893).

19. Burwell v. Crist, 373 F.2d 78, 82 (3rd Cir. 1967) (concurring opinion).

20. *Cf.* 6 WIGMORE, EVIDENCE § 1773.

21. Huron v. Schomaker, 123 Pa. Super. 82, 185 A. 859 (1936); Treon v. Shipman & Son, 275 Pa. 246, 119 A. 74 (1922).

22. Zank v. West Penn Power Co., 169 Pa. Super. 164, 82 A.2d 554 (1951); Becker v. Philadelphia, 217 Pa. 344, 66 A. 564 (1907).

23. Lock Estate, 431 Pa. 251, 261, 244 A.2d 677 (1968); Bruno v. Brown, 414 Pa. 361, 200 A.2d 405 (1964); Geelen v. Pennsylvania R.R., 400 Pa. 240, 161 A.2d 595 (1960); Geiger v. Schneyer, 398 Pa. 69, 157 A.2d 56 (1959); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 139 A.2d 663 (1958); Gougher v. Hansler, 388 Pa. 160, 130 A.2d 160 (1957); Muzychuk v. Yellow Cab Co., 343 Pa. 335, 341, 22 A.2d 670 (1941); Rudisill v. Cordes, 333 Pa. 544, 549, 5 A.2d 217 (1939); Braceland v. Hughes, 184 Pa. Super. 4, 133 A.2d 286 (1957).

Some of our decisions refer to "declarations against interest," a mis-

may be oral[24] or written[25] and may have been made to the other party,[26] to a police officer,[27] to an investigator[28] or to any other person.[29] A statement is admissible which has been given in a deposition[30] or at the prior trial of the same action[31] or at the trial of another action.[32] It may be contained in a pleading[33] even though the pleading was subsequently withdrawn, stricken, or superseded by amendment.[34] The extent to which an admission

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nomer, *e.g.*, Beardsley v. Weaver, 402 Pa. 130, 132, 166 A.2d 529 (1961); Panik v. Didra, 370 Pa. 488, 494, 88 A.2d 730 (1952); Salvitti v. Throppe, 343 Pa. 642, 644, 23 A.2d 445 (1942); Smith v. Farver, 173 Pa. Super. 391, 394, 98 A.2d 249 (1953).

24. Perciavelle v. Smith, 434 Pa. 86, 89, 252 A.2d 702 (1969); Miller v. Gault, 345 Pa. 474, 29 A.2d 71 (1942); Salvitti v. Throppe, 343 Pa. 642, 23 A.2d 445 (1942); Curry v. Riggles, 302 Pa. 156, 162, 153 A. 325 (1931); Lyke v. Lehigh Valley R.R., 236 Pa. 38, 84 A. 595 (1912); Smith v. Farver, 173 Pa. Super. 391, 98 A.2d 249 (1953).

25. Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 139 A.2d 663 (1958); Lemmon v. Bufalino, 204 Pa. Super. 481, 484, 205 A.2d 680 (1964).

26. Perciavelle v. Smith, 434 Pa. 86, 252 A.2d 702 (1969); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 139 A.2d 663 (1958); Salvitti v. Throppe, 343 Pa. 642, 23 A.2d 445 (1942).

27. Auerbach v. Philadelphia Transp. Co., 421 Pa. 594, 603, 221 A.2d 163 (1966); Mitchell v. Shirey, 407 Pa. 204, 180 A.2d 65 (1962); Geiger v. Schneyer, 398 Pa. 69, 157 A.2d 56 (1959); Panik v. Didra, 370 Pa. 488, 88 A.2d 730 (1952); Smith v. Farver, 173 Pa. Super. 391, 98 A.2d 249 (1953).

28. Beardsley v. Weaver, 402 Pa. 130, 166 A.2d 529 (1961); Fleischman v. Reading, 388 Pa. 183, 130 A.2d 426 (1957); Gougher v. Hansler, 388 Pa. 160, 130 A.2d 150 (1957); Whitfield v. Reading Co., 380 Pa. 566, 112 A.2d 113 (1955); Brueckner v. Pittsburgh, 368 Pa. 554, 84 A.2d 197 (1951); Brenner v. Lesher, 332 Pa. 522, 2 A.2d 731 (1938); Lemmon v. Bufalino, 204 Pa. Super. 481, 484, 205 A.2d 680 (1964).

29. Perciavelle v. Smith, 434 Pa. 86, 252 A.2d 702 (1969); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 139 A.2d 663 (1958); Lyke v. Lehigh Valley R.R., 236 Pa. 38, 84 A. 595 (1912).

30. Bruno v. Brown, 414 Pa. 361, 363, 200 A.2d 405 (1964); Greater Valley Terminal Corp. v. Goodman, 405 Pa. 605, 608, 176 A.2d 445 (1962) (not conclusive unless clear and unequivocal).

31. Bruno v. Brown, 414 Pa. 361, 200 A.2d 405 (1964); Little v. Straw, 326 Pa. 577, 192 A.2d 894 (1937); Foglia v. Pittsburgh Transp. Co., 119 Pa. Super. 94, 97, 179 A.2d 871 (1935).

32. Webb v. Martin, 364 F.2d 229, 232 (3rd Cr. 1966); Morse Boulger Destructor Co. v. Arnoni, 376 Pa. 57, 101 A.2d 705 (1954); Muzychuk v. Yellow Cab Co., 343 Pa. 335, 341, 22 A.2d 670 (1941); Ham v. Gouge, 214 Pa. Super. 423, 428, 237 A.2d 650 (1969).

33. Tops Apparel Mfg. Co. v. Rothman, 430 Pa. 583, 587, 244 A.2d 436 (1968); Bruno v. Brown, 414 Pa. 361, 200 A.2d 405 (1964); Morse Boulger Destructor Co. v. Arnoni, 376 Pa. 57, 101 A.2d 705 (1954); Giles v. Valentic, 355 Pa. 108, 110, 49 A.2d 384 (1946); Quartz v. Pittsburgh, 340 Pa. 277, 16 A.2d 400 (1940); Melnick v. Melnick, 154 Pa. Super. 481, 36 A.2d 235 (1943).

34. Monaco v. Gula, 407 Pa. 522, 180 A.2d 893 (1962); Commonwealth by Truscott v. Binenstock, 366 Pa. 519, 77 A.2d 628 (1951); Easton School Dist v. Continental Cas. Co., 304 Pa. 67, 72, 155 A. 93 (1931); Braceland v. Hughes, 184 Pa. Super. 47, 133 A.2d 286 (1957).

made in an answer in trespass is admissible is circumscribed by the Pennsylvania Rules of Civil Procedure.[35] However, an admission in the pleadings of another action[36] or in answers to interrogatories does not estop the party from taking a different position in a subsequent independent suit.[37] A self-serving answer to an interrogatory may not be used even though the answering party has died.[38] There is no requirement that the prior statement be made from personal knowledge,[39] nor that it be a statement of fact—an expression of opinion is equally admissible where the declarant has adequate knowledge to form an opinion.[40] If the original of a written statement has been lost, a copy may be used if the court is satisfied that it is authentic.[41]

C. *Offering the Statement in Evidence*

One of the major differences between the use at trial of prior statements made by witnesses and those made by parties is the broader range of trial tactics which may be employed when dealing with the introduction of the latter. Contrary to the rule applicable to use of the prior statements of ordinary witnesses,[42] it is not necessary to confront a party with his prior statement in order to lay the groundwork for its admission.[43] Trial strategy may dictate such confrontation in some circumstances, however. If the opposing party is confronted directly with the statement on cross-examination and he admits having made the statement, it will obviate the necessity for authentication of the statement in the offering party's case. In rare instances a plaintiff may even be persuaded to adopt

35. Rosenson v. Lyle, 436 Pa. 354, 261 A.2d 681 (1970); Pa. R. Civ. P. 1045(a).

36. Ham v. Gouge, 214 Pa. Super. 423, 428, 257 A.2d 650 (1969); Lapayowker v. Lincoln College Preparatory School, 386 Pa. 167, 176, 125 A.2d 451 (1956); Barclay v. Barclay, 230 Pa. 467, 471, 79 A. 667 (1911).

37. Cerino v. Philadelphia, 435 Pa. 355, 257 A.2d 571 (1969) (self-serving answers); Bruno v. Brown, 414 Pa. 361, 200 A.2d 405 (1964).

38. Cerino v. Philadelphia, 435 Pa. 355, 257 A.2d 571 (1969) (sub silentio); Pringle v. Pringle, 59 Pa. 281, 290 (1868). *But see* dissenting opinion in *Cerino*, 435 Pa. at 360 and Treharne v. Callahan, 426 F.2d 58 (3rd Cir. 1970). *Cf.* Deremiki v. Pennsylvania R.R., 353 F.2d 436, 443 (3rd Cir. 1965).

39. Salvitti v. Throppe, 343 Pa. 642, 644, 23 A.2d 445 (1942); *cf.* Shell v. Parish, 448 F.2d 528 (1971); 4 WIGMORE, EVIDENCE § 1048.

40. Beardsley v. Weaver, 402 Pa. 130, 133, 166 A.2d 529 (1961). *But see* Starner v. Wirth, 440 Pa. 177, 181, 269 A.2d 674 (1970). Even an admission of a party which is based upon hearsay may be admissible against him, although he must be given an opportunity to explain it, *cf.* Shell v. Parrish, 448 F.2d 528 (3rd Cir. 1971).

41. Brenner v. Lesher, 332 Pa. 522, 2 A.2d 731 (1938).

42. See text accompanying notes 101-102 *infra*.

43. Geelen v. Pennsylvania R.R., 400 Pa. 240, 246, 161 A.2d 595 (1960); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 644, 139 A.2d 663 (1958); Kreiter v. Bomberger, 82 Pa. 59, 61 (1876). Grzywacz v. Meszaros, 417 Pa. 51, 52, 208 A.2d 237 (1965), and Giles v. Valentic, 355 Pa. 108, 110, 49 A.2d 384 (1946), holding that it lies within the discretion of the trial judge are probably erroneous.

his contradictory previous statement as his final testimony and be nonsuited. However, the contradiction in the opposing party's case may have greater jury impact if it is reserved for presentation in the offering party's case in chief. When the statement is used in this manner its main purpose is for impeachment; however, its effect as substantive evidence is not diminished.

When authentication is sought by confrontation and the maker admits his signature to the statement and does not deny the truth of its contents, the statement is admissible even though the maker has testified to no positive facts which are contradicted by the statement.[44] Where the party denies the contents, even though he admits the signature, the statement becomes admissible upon proof of the authenticity of its contents.[45]

One who offers the prior non-judicial statement of an opposing party must take the bad with the good. The entire statement must be introduced, even when it contains matter which is unfavorable to the offeror which would constitute self-serving statements, if sought to be placed in evidence independently by the maker of the statement.[46]

The effect of the offer of the entire statement will vary with the circumstances. Ordinarily the principle stated in *Heyman v. Hanauer* will apply:

> But where, as here, admissions against interest and self-serving declarations are found in the same writing, and the other party wishes to take advantage of the admissions, it becomes necessary to offer the whole of the writing, even though part of it may contain matter favorable to the party making it: Yearsley's App., 48 Pa. 531, 534 (1865). However, parts against his interest are entitled to greater weight than those in his favor (Greenawalt v. McEnelley, 85 Pa. 352, 356 (1877)), and the jury may believe the admissions against himself and yet refuse to credit the statements in his own interest (Thommon v. Kalbach, 12 S.&R.

44. Beardsley v. Weaver, 402 Pa. 130, 132, 166 A.2d 529 (1961); Geelen v. Pennsylvania R.R., 400 Pa. 240, 161 A.2d 595 (1960). Failure to offer admission in pleadings not fatal where trial proceeded as if it were admitted: Skocich v. F.J. Boutell Driveaway Co., 317 Pa. 26, 176 A. 19 (1935).

45. Brueckner v. Pittsburgh, 368 Pa. 554, 84 A.2d 197 (1951); Lemmon v. Bufalino, 204 Pa. Super. 481, 484, 205 A.2d 680 (1964); Seckinger v. Economy Laundry, Inc., 133 Pa. Super. 414, 418, 3 A.2d 46 (1938); Denial of initials on first page of statement, Grossman v. U.S. Slicing Machine Co., 365 F.2d 687 (3rd Cir. 1966).

46. Jones v. Spidle, 446 Pa. 103, 108, 286 A.2d 366 (1971); Cooper's Estate, 320 Pa. 418, 420, 183 A. 45 (1936); Heyman v. Hanauer, 302 Pa. 56, 61, 152 A. 910 (1930); Dougherty v. Pennypack Woods Home, 181 Pa. Super. 121, 127, 124 A.2d 703 (1956); Hensel v. Cahill, 179 Pa. Super. 114, 118, 116 A.2d 99 (1955).

238, 239 (1825)); and the party offering an admission is not bound by self-serving declarations contained in the offer, but may introduce evidence to disprove them Yearsley's App., supra.[47]

Our courts have not attempted to reconcile the decision in *Miller v. Gault*[48] with this principle. In *Miller* a witness called by the plaintiff testified concerning several statements made by the defendant which were quite damaging to the plaintiff. Counsel for the plaintiff argued that the plaintiff should not be bound by the testimony of the defendant's utterances. The court ruled that the plaintiff put the defendant's statements in evidence and they were in for all purposes, precisely as they would have been if the plaintiff had called the defendant for cross-examination.[49]

The dissenting opinion in *Miller* strongly argues that *Miller* and *Heyman* are not reconcilable and that the majority opinion is an unjustified departure from the *Heyman* principle.[50] However, the *Heyman* principle has been applied only to written documents[51] and, if so confined, there is a basis for reconciliation and acceptance of both precedents.

When the prior statement was made in a judicial proceeding, the requirement that the entire testimony of the party be offered by his opponent is not strictly imposed. The offeror need offer only those portions of the testimony which constitute admissions against interest; but he may be required to read additional portions of the statement which qualify or modify the parts offered. If the offeror fails to place the statement in its proper context, the opposing party may do so.[52] Where the admission is contained in an answering pleading, the entire statement need not be offered if it contains matter by way of avoidance or defense, but a qualified admission may not be segregated from its stated conditions.[53]

D. *The Evidentiary Impact of Prior Statements by Parties*

When a prior statement of a party is introduced against him it becomes substantive evidence in the case,[54] even if offered solely

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47. 302 Pa. 56, 62, 152 A. 910 (1930). *See also* Cooper's Estate, 320 Pa. 418, 183 A. 45 (1936).

48. 345 Pa. 474, 29 A.2d 71 (1942). *See also* Geiger v. Schneyer, 398 Pa. 69, 74, 157 A.2d 56 (1959).

49. Miller v. Gault, 345 Pa. 474, 479, 29 A.2d 71 (1942).

50. *Id.* at 484 (dissenting opinion, Maxey, J. distinguishing cases in which a party calls his adversary for cross-examination and is, therefore, bound by his testimony if uncontradicted). *Cf.* Geiger v. Schneyer, 398 Pa. 69, 157 A.2d 56 (1959) (proof of statement of adverse party not contradicted).

51. *See* Brandeis v. Charter Mutual Benefit Ass'n, 149 Pa. Super. 545, 549, 27 A.2d 425 (1942); Thommon v. Kalbach, 12 S. & R. 238 (1825).

52. Weaver v. Welsh, 325 Pa. 571, 575, 191 A. 3 (1937).

53. Melnick v. Melnick, 154 Pa. Super. 481, 491, 36 A.2d 235 (1943).

54. Mitchell v. Shirey, 407 Pa. 204, 180 A.2d 65 (1962); Geelen v. Pennsylvania R.R., 400 Pa. 240, 245, 161 A.2d 595 (1960); Geiger v. Schneyer,

for impeachment.[55] As such, the content of a defendant's prior statement may constitute a substantial, even an essential, element of a plaintiff's case.[56] If the prior statement is not explained or denied and remains uncontroverted, a clear and unequivocal admission may properly be used to support a finding of fact[57] and may even support the direction of a verdict for the party offering the statement of his opponent.[58] It is the duty of the trial judge to instruct the jury on the effect of the statement[59] and it is reversible error for the judge to limit the statement's purpose,[60] a principle which is sometimes overlooked.[61]

A prior statement in a pleading in the action being tried is conclusive upon the party who made it; however, where the admission was made in a pleading in another action or in a superseded pleading in the same action it may be explained or contradicted.[62] When an offer of a prior statement of a party has been made and received, the party must be given the opportunity to explain the meaning of or the reason for the admissions made therein,[63] or to repudiate the statement entirely.[64] The party confronted with contradictions contained in a prior inconsistent statement is permitted to have his case determined by whichever statement he finally says is true. Nevertheless, prior statements of a party which are clear and unequivocal may be sufficient of themselves to support a finding against that party,[65] and the contradictions, even

398 Pa. 69, 73, 157 A.2d 56 (1959); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 644, 139 A.2d 663 (1958); Gougher v. Hansler, 388 Pa. 160, 166, 130 A.2d 150 (1957); Lemmon v. Bufalino, 204 Pa. Super. 481, 485, 205 A.2d 680 (1964); Braceland v. Hughes, 184 Pa. Super. 4, 6, 133 A.2d 286 (1957).

55. Morse Boulger Destructor Co. v. Arnoni, 376 Pa. 57, 65, 101 A.2d 705 (1954).

56. Perciavelle v. Smith, 434 Pa. 86, 89, 252 A.2d 702 (1969); Geiger v. Schneyer, 398 Pa. 69, 157 A.2d 56 (1959).

57. Gougher v. Hansler, 388 Pa. 160, 166, 130 A.2d 150 (1957).

58. Miller v. Gault, 345 Pa. 474, 477, 29 A.2d 71 (1942). *But see* dissenting opinion at 484. Geiger v. Schneyer, 398 Pa. 69, 74, 157 A.2d 56 (1959).

59. Mitchell v. Shirey, 407 Pa. 204, 180 A.2d 65 (1962).

60. Geiger v. Schneyer, 398 Pa. 69, 157 A.2d 56 (1959).

61. *Cf.* Grzywacz v. Meszaros, 417 Pa. 51, 52, 208 A.2d 237 (1965).

62. Gougher v. Hansler, 388 Pa. 160, 130 A.2d 150 (1957); Ham v. Gouge, 214 Pa. Super. 423, 428, 237 A.2d 650 (1969); Easton School Dist. v. Continental Cas. Co., 304 Pa. 67, 72, 155 A. 93 (1931).

63. Geelen v. Pennsylvania R.R., 400 Pa. 240, 191 A.2d 595 (1960); Fleischman v. Reading, 388 Pa. 183, 130 A.2d 429 (1957); Quartz v. Pittsburgh, 340 Pa. 277, 279, 16 A.2d 400 (1940).

64. Lemmon v. Bufalino, 204 Pa. Super. 481, 485, 205 A.2d 680 (1964); Fleischman v. Reading, 388 Pa. 183, 130 A.2d 429 (1957); Lambert v. Polen, 346 Pa. 352, 355, 30 A.2d 115 (1943); Seckinger v. Economy Laundry, Inc., 133 Pa. Super. 414, A.2d 46 (1938).

65. Beardsley v. Weaver, 402 Pa. 130, 133, 166 A.2d 529 (1961);

though explained, may be sufficient to justify the grant of a new trial after a verdict in favor of the party who is so contradicted.

In addition to providing substantive evidence, the credibility of a party, as well as any other witness, may be attacked by his prior inconsistent statements.[66] Even when offered solely for impeachment, however, a party's prior statement may be considered for any purpose for which it is competent and, therefore, may be used as substantive evidence.[67] The definition of "collateral matter," which may not be inquired into when testing the credibility of a witness by way of his prior statements, may be relaxed when dealing with a party if it may reveal the party's lack of candor or honesty, or demonstrate an inclination to exaggerate or the like.[68]

II. Prior Statements of Witnesses

Prior statements made by individuals who are not parties to the action, whether available to testify or not, are ordinarily not admissible because of the hearsay rule. However, in addition to the recognized spontaneous declaration exception to the rule, there are other circumstances in which prior statements may be admitted.

A. *Admissible Prior Statements*

1. *Prior judicial testimony*

Under limited circumstances the testimony of a witness which was given in a prior judicial proceeding may be admitted as substantive evidence on behalf of either party in a later action. Subsequent use of prior judicial testimony was permitted at common law[69] and its admission is currently governed by the provisions of the Act of 1887:

> Whenever any person has been examined as a witness in any civil proceeding before any tribunal of this commonwealth or conducted by virtue of its order or direction if such witness afterwards die, or be out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found, or if he becomes incompetent to testify for any legally sufficient reason, and if the party, against whom notes of the testimony of such witness are offered, had actual or constructive notice of the examination and an opportunity to be present and examine or cross-examine, properly proven notes of the examination of such

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Dougherty v. Pennypeck Woods Home, 181 Pa. Super. 121, 128, 124 A.2d 703 (1956). Subject to the general principle that a party is not bound even by his own testimony in certain areas: *cf.* Readinger v. Gottschall, 201 Pa. Super. 134, 139, 191 A.2d 694 (1963).

66. Morse Boulger Destructor Co. v. Arnoni, 376 Pa. 57, 65, 101 A.2d 705 (1954).

67. *Id.*

68. Bruno v. Brown, 414 Pa. 361, 364, 200 A.2d 405 (1964).

69. Lock Estate, 431 Pa. 251, 260, 244 A.2d 677 (1968).

> witness shall be competent evidence in any civil issue which may exist at the time of his examination, or which may be afterwards formed between the same parties and involving the same subject-matter as that upon which such witness was so examined; but for the purpose of contradicting a witness, the testimony given by him in another, a former proceeding, may be orally proved.[70]

The use of previous testimony is strictly limited to situations in which the witness is not available to testify for one of the reasons set forth.[71] When the previous testimony was given in another proceeding it must appear that it was a civil proceeding; that the party against whom it is offered had an opportunity to cross-examine the witness at the time it was given, that the subject matter is the same and that there is substantial identity of parties and issues in the two proceedings. There is no requirement that the form of the proceeding, the theory of the case, or the nature of the relief sought, be the same. Nor is the character of the tribunal in the prior proceeding material.[72] Of course, even if the prior testimony is found inadmissible because it does not fulfill all of the requirements of the statute, it may still be admissible under another exception to the hearsay rule, such as an admission against interest made by a party in a prior proceeding which was not a civil proceeding. Such prior testimony may be proved in many ways, including introduction of the prior judicial transcript or direct testimony by one who was present at the prior tribunal and heard the testimony given.[73] A similar rule applies to the use of testi-

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70. Act of May 23, 1887, P.L. 158, § 9, PA. STAT. ANN. tit. 28, § 327. A similar provision is made for criminal cases: PA. STAT. ANN. tit. 19, § 582, *cf.* Commonwealth v. Crosby, 444 Pa. 17, 279 A.2d 73 (1971); Commonwealth v. Clarkson, 438 Pa. 523, 265 A.2d 802 (1970).

71. Commonwealth *ex rel.* Huff v. Memolo, 170 Pa. Super. 49, 51, 82 A.2d 764 (1951). The nature of the proof required rests in the discretion of the court: Delvitto v. Schiavo, 370 Pa. 299, 302, 87 A.2d 913 (1952); *Cf.* MCCORMICK ON EVIDENCE 495. Incompetent to testify: Lock Estate, 431 Pa. 251, 244 A.2d 677 (1968); Death: Nestor v. George, 354 Pa. 19, 23, 46 A.2d 469 (1946); Sickness: Shields v. Larry Constr. Co., 370 Pa. 582, 88 A.2d 764 (1952); Aged and infirm: Thornton v. Britton, 144 Pa. 126, 131, 22 A. 1048 (1891); Loss of Memory: Rothrock v. Gallaher, 91 Pa. 108, 112 (1879); Unavailable—out of jurisdiction: Watsontown Brick Co. v. Hercules Powder Co., 265 F. Supp. 268, 276 (M.D. Pa.) *aff'd.*, 387 F.2d 99 (3rd Cir. 1967); Delvitto v. Schiavo, 370 Pa. 299, 303, 87 A.2d 913 (1952); Giberson v. Patterson Mills Co., 187 Pa. 513, 41 A. 525 (1898); Almar Bldg. and Loan Ass'n v. Broad St. Trust Co., 116 Pa. Super. 465, 470, 176 A. 767 (1935).

72. Lock Estate, 431 Pa. 251, 244 A.2d 677 (1968); American Trust Co. v. Kaufman, 287 Pa. 461, 468, 135 A. 210 (1926); Nixon Estate, 104 Pa. Super. 506, 510, 159 A. 172 (1931).

73. Stenographer may read from his notes provided he testifies they were correctly taken: Commonwealth v. Carter, 187 Pa. Super. 159, 164, 144 A.2d 493 (1958); but his transcript is not per se admissible, Ingram

mony of a witness given in a discovery deposition in the same case who is unavailable to testify at trial.[74]

2. *Prior contradictory statements*

Prior statements may also be used in certain circumstances to attack the credibility of opposing witnesses and bolster the credibility of favorable witnesses. Any statement previously made by a witness concerning a material fact to which he has testified may be introduced to contradict the witness and thereby diminish his credibility.[75] If the contradiction between the witness's prior statement and his in-court testimony is direct, admission of the prior statement is not subject to the discretion of the trial judge.[76] A statement used for this purpose may be oral or written, and need not have been made in a prior judicial proceeding.[77] However, hearsay evidence of such a statement may not be used to contradict or impeach the witness.[78]

The use of a witness's prior inconsistent statements for impeachment purposes is limited by the general rule applicable to all attempts to discredit a witness: a witness may not be impeached through cross-examination on matters not germane to the issue involved, unless such matters were first introduced during direct examination.[79] In order to prevent the trial from becoming confused through the introduction of collateral matters, the facts upon which the witness is sought to be contradicted must be material and relevant. However, a direct contradiction is not necessary to attack credibility, and a prior statement showing any material variance in the witness's testimony will suffice. In one decision, *Bruno v. Brown*,[80] this principle was broadened to permit cross-

v. Pittsburgh, 346 Pa. 45, 47, 29 A.2d 32 (1942), unless he is an official court stenographer: Act of 1907 P.L. 135, § 5, 1911 P.L. 279, § 4. Calling the magistrate or other persons present: Commonwealth v. Neff, 149 Pa. Super. 513, 515, 27 A.2d 737 (1942); persons who heard him testify if no notes taken: Wolfe v. Scott, 275 Pa. 343, 346, 119 A. 468 (1923); and even the personal notes of counsel if he testifies that they are complete: Philadelphia and Reading R.R. v. Spearen, 47 Pa. 300, 306 (1864).

74. *See* Pa. R. Civ. P. 1020.

75. DeJohn v. Orell, 429 Pa. 359, 363, 240 A.2d 472 (1968); Auerbach v. Philadelphia Transp. Co., 421 Pa. 594, 603, 221 A.2d 163 (1966); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 645, 139 A.2d 663 (1958); Wolansky v. Lawson, 389 Pa. 477, 479, 133 A.2d 843 (1957); Commonwealth v. Rothman, 168 Pa. Super. 163, 165, 77 A.2d 731 (1951); Commonwealth v. Blose, 160 Pa. Super. 165, 171, 50 A.2d 742 (1947).

76. DeJohn v. Orell, 429 Pa. 359, 240 A.2d 472 (1968); Commonwealth v. Rothman, 168 Pa. Super. 163, 77 A.2d 731 (1951).

77. DeJohn v. Orell, 429 Pa. 359, 240 A.2d 472 (1968). As to prior depositions, *see* Puskarich v. Trustees of Zembo Temple, 412 Pa. 313, 318, 194 A.2d 208 (1963); Pa. R. Civ. P. 1020(a)(1).

78. Herr v. Erb, 163 Pa. Super. 430, 435, 62 A.2d 75 (1948); Selden v. Metropolitan Life Ins. Co., 157 Pa. Super. 500, 506, 43 A.2d 571 (1945).

79. Zubrod v. Kuhn, 357 Pa. 200, 203, 53 A.2d 604 (1947); *cf.* Commonwealth v. Petrillo, 341 Pa. 209, 223, 19 A.2d 288 (1941) as to what is "collateral."

80. 414 Pa. 361, 200 A.2d 405 (1964).

examination which did not contradict the witness's instant testimony but tended to show that the witness was "capable of making errors."[81] However, in *McGoldrick v. Pennsylvania Railroad Co.*[82] the court disapproved the language of *Bruno* and ruled that while the admission of collateral matters for the purposes of contradiction should normally be left to the trial judge, if the collateral contradiction concerns a matter which is "unreasonably prejudicial to one of the parties, the trial court abuses its discretion by permitting the contradiction."[83]

A further limitation on counsel's right to attack the credibility of a witness through the introduction of a prior inconsistent statement is the requirement that the witness's original testimony must have been harmful to his cause. If the witness has not said anything damaging to a party, there is no need to contradict him.[84]

In addition to their admissibility against opposing witnesses to show lack of credibility, prior inconsistent statements are also admissible against a party's own witness in certain circumstances. A prior statement may be used to contradict and impeach a party's own witness called for cross-examination[85] or upon a plea of surprise[86] or a showing of hostility in some cases.[87] However, before the testimony of such a witness may be contradicted, it must be damaging[88] and there must have been actual surprise.[89] The requisites for a plea of surprise, the manner in which the plea should be made, and the substance of the plea are fully considered in *Selden v. Metropolitan Life Ins. Co.*[90]

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81. *Id.* at 365, 200 A.2d at 407, citing 3 WIGMORE, EVIDENCE, § 1017 at 684-85.

82. 430 Pa. 597, 241 A.2d 90 (1968).

83. *Id.* at 601, 241 A.2d at 93.

84. Goodis v. Gimbel Bros., 420 Pa. 439, 218 A.2d 574 (1966); Bryzywacz v. Meszaros, 417 Pa. 51, 52, 208 A.2d 232 (1965); Commonwealth v. Knudsen, 443 Pa. 412, 415, 278 A.2d 881 (1971); Selden v. Metropolitan Life Ins. Co., 157 Pa. Super. 500, 509, 43 A.2d 571 (1945). *Contra,* Bruno v. Brown, 414 Pa. 361, 364, 200 A.2d 405 (1964).

85. Crawford v. Manhattan Life Ins. Co., 208 Pa. Super. 150, 162, 221 A.2d 877 (1966).

86. Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 139 A.2d 663 (1958); Commonwealth v. Smith, 424 Pa. 544, 548, 277 A.2d 653 (1967) (rule relaxed to prevent injustice). But surprise must be shown: Selden v. Metropolitan Life Ins. Co., 157 Pa. Super. 500, 505, 43 A.2d 571 (1945).

87. *Cf.* Commonwealth v. Bartell, 184 Pa. Super. 528, 544, 136 A.2d 166 (1957).

88. Commonwealth v. Knudsen, 443 Pa. 412, 415, 278 A.2d 881 (1971); Goodis v. Gimbel Bros., 420 Pa. 439, 442, 218 A.2d 574 (1966).

89. Goodis v. Gimbel Bros., 420 Pa. 439, 218 A.2d 574 (1966); Selden v. Metropolitan Life Ins. Co., 157 Pa. Super. 500, 48 A.2d 591 (1957).

90. 157 Pa. Super. 500, 48 A.2d 591 (1957). *See also* Commonwealth v. Smith, 178 Pa. Super. 251, 255, 115 A.2d 782 (1955).

When a witness has not been attacked or impeached, his prior *consistent* statements are inadmissible. However, when a witness has been attacked by the use of prior inconsistent statement or by evidence tending to prove that his testimony is recently contrived, or by any other attack on his credibility, the party offering the witness may be entitled to rehabilitate him by proving his prior consonant statements.[91]

The consonant statement must be consistent with his present testimony.[92] It has been urged that the introduction of a prior consistent statement does nothing to eliminate the contradiction between his testimony and his earlier inconsistent statement,[93] but this argument is rejected by Wigmore[94] and most courts by asking the question: "But is it a *proved fact* that he has uttered the self-contradiction? And may not the consistency of his other statements help with the jury to controvert the testimony that he did utter the contradiction?" When the inconsistent statement is not explained or denied, there would appear to be no justification for admitting the consonant statement. But this situation seldom occurs. The question usually raised is whether the testimony proving an inconsistent statement is to be believed. Because of this, inquiry must sometimes be made as to *when* the prior consonant statement was made. Whether a time limitation should be imposed is an open question;[95] Wigmore refuses to limit the principle to consistent statements made *before* the self-contradiction.[96] This limitation, frequently alluded to and sometimes applied, has validity if the self-contradiction is urged solely on the ground that the testimony at trial is recently contrived.[97] On this basis the principle might also be justifiably limited to admit only consistent statements made before a motive to falsify existed. If the same reason to lie existed at the time the consonant statement was made that formed the basis for the charge of recent fabrication, it would

91. Felice v. Long Island R.R., 426 F.2d 192 (3rd Cir. 1970); Commonwealth v. Wilson, 431 Pa. 21, 244 A.2d 734 (1968); Commonwealth v. Vento, 410 Pa. 350, 353, 189 A.2d 161 (1963); Keefer v. Byers, 398 Pa. 447, 450, 159 A.2d 477 (1960); Risbon v. Cottom, 387 Pa. 155, 160, 127 A.2d 101 (1956); Lyke v. Lehigh Valley R.R., 236 Pa. 38, 48, 84 A. 595 (1912); Commonwealth v. Marino, 213 Pa. Super. 88, 102, 245 A.2d 868 (1968); Commonwealth v. Friedman, 193 Pa. Super. 640, 647, 165 A.2d 678 (1960); Commonwealth v. Bartell, 184 Pa. Super. 528, 542, 136 A.2d 166 (1957).

92. Commonwealth v. Peterman, 430 Pa. 627, 635, 244 A.2d 723 (1968).

93. Craig v. Craig, 5 Rawle 91, 97-98 (1835).

94. 4 WIGMORE, EVIDENCE § 1126.

95. Risbon v. Cottom, 387 Pa. 155, 168, 127 A.2d 101 (1956); *see* concurring opinion distinguishing Lyke v. Lehigh Valley R.R., 236 Pa. 38, 84 A.2d 595 (1912).

96. Risbon v. Cottom, 387 Pa. 155, 127 A.2d 101 (1956); Commonwealth v. Bartell, 184 Pa. Super. 528, 136 A.2d 166 (1957).

97. 4 WIGMORE, EVIDENCE § 1129; Felice v. Long Island R.R., 426 F.2d 192 (3rd Cir. 1970); Commonwealth v. Westwood, 324 Pa. 289, 188 A. 304 (1936).

appear that nothing of value is added by admission of the consistent statement. But where the witness's explanation of his statement is corroborated by the consonant statement, there is reasonable basis for a ruling admitting the latter.[98]

For the same reasons, our courts have approved the admission of consonant statements where witnesses have been sought to be impeached or discredited by cross-examination generally, without reference to inconsistent statements.[99] Again, the admission of such statements lies within the sound discretion of the trial judge.[100]

B. *Placing the Statement in Evidence*

Contrary to the rule applicable to statements of parties, the prior statement of a witness may not be used or proved until the witness is confronted with it and given an opportunity to confirm or deny making it,[101] although this requirement is usually said to lie within the discretion of the trial judge.[102] If the prior statement is written and the witness admits signing it, it may be offered in evidence even though he denies some or all of its contents.[103] If the statement is oral and the witness does not deny making it, there is no need to produce the person to whom it was made.[104] However, when the witness denies signing a written statement or making an oral statement, or states that he does not recall doing so, the opponent is required to produce proof that it was made.[105] Proof that the statement was made may come in

98. Commonwealth v. Bartell, 184 Pa. Super. 528, 136 A.2d 166 (1957).

99. Commonwealth v. Patskin, 372 Pa. 402, 93 A.2d 704 (1953); Commonwealth v. Westwood, 324 Pa. 289, 188 A. 304 (1936); Commonwealth v. Friedman, 193 Pa. Super. 640, 165 A.2d 678 (1960); Commonwealth v. Bartell, 184 Pa. Super. 528, 136 A.2d 166 (1957).

100. Commonwealth v. Bartell, 184 Pa. Super. 528, 136 A.2d 166 (1957); Lyke v. Lehigh Valley R.R., 236 Pa. 38, 84 A. 595 (1912).

101. Quartz v. Pittsburgh, 340 Pa. 277, 279, 16 A.2d 400 (1940); Commonwealth v. Carter, 187 Pa. Super. 159, 164, 144 A.2d 493 (1958); Commonwealth v. Bartell, 184 Pa. Super. 528, 539, 136 A.2d 166 (1957); Herr v. Erb, 163 Pa. Super., 430, 62 A.2d 75 (1948). *Cf.* Harrah v. Montour R.R., 321 Pa. 526, 527, 184 A. 666 (1936).

102. Giles v. Valentic, 355 Pa. 108, 110, 49 A.2d 384 (1946); Harrah v. Montour R.R., 321 Pa. 526, 184 A. 666 (1936); Marshall v. Carr, 275 Pa. 86, 89, 118 A. 621 (1922); Commonwealth v. Rothman, 168 Pa. Super. 163, 166, 77 A.2d 731 (1951).

103. Mitchell v. Shirey, 407 Pa. 204, 208, 180 A.2d 65 (1962); Beardsley v. Weaver, 402 Pa. 130, 166 A.2d 529 (1961); Hughes v. Delaware & Hudson Canal Co., 176 Pa. 254, 259, 35 A. 190 (1896).

104. Auerbach v. Philadelphia Transp. Co., 421 Pa. 594, 603, 221 A.2d 163 (1966).

105. Geelen v. Pennsylvania R.R., 400 Pa. 240, 246, 161 A.2d 595

any manner,[106] and the issue of whether the statement was made is for the jury.[107] The jury is permitted to know that the statement was taken by an insurance company investigator,[108] except when the veracity of the scrivener is not in issue.[109] When the alleged contradiction is contained in testimony given in a former proceeding, it may be orally proved under the Act of 1887; however, fairness requires that the stenographer's notes be transcribed.

When a prior statement is produced for the purpose of contradiction, the witness is entitled to read the entire statement and the offeror is required to offer it in its entirety, except where prejudice will result. Subject to the same exception, the opponent is entitled to put in evidence the entire statement if he so desires, if the same is relevant, explanatory or will aid in construction.[110]

C. *Evidentiary Impact of Prior Statements*

When either a prior inconsistent or consonant statement of a witness (including the party's witness, on a plea of surprise or one called for cross-examination) is admitted, its sole purpose and effect is to attack or support the credibility of the witness.[111] Its contents do not become substantive evidence in the case. An apparent exception may exist in the rare instance in which the witness recants during the trial and testifies that the content of the prior statement is true and that his present testimony is untrue,[112]

(1960); Fleischman v. Reading, 388 Pa. 183, 130 A.2d 421 (1957); Lemmon v. Bufalino, 204 Pa. Super. 481, 484, 205 A.2d 680 (1964).

106. Bruno v. Brown, 414 Pa. 361, 364, 200 A.2d 405 (1964); Gougher v. Hansler, 388 Pa. 160, 164, 130 A.2d 150 (1957); Brueckner v. Pittsburgh, 368 Pa. 554, 557, 84 A.2d 197 (1951).

107. Williams v. Philadelphia Transp. Co., 415 Pa. 370, 374, 203 A.2d 665 (1964).

108. Goddis v. Gimbel Bros., 420 Pa. 439, 444, 218 A.2d 574 (1966); Lemmon v. Bufalino, 204 Pa. Super. 481, 485, 205 A.2d 680 (1964). *See also* Fleischman v. Reading, 388 Pa. 183, 189-91, 130 A.2d 429 (1957) (dissenting opinion).

109. Beardsley v. Weaver, 402 Pa. 130, 134, 166 A.2d 529 (1960); Geelen v. Pennsylvania R.R., 400 Pa. 240, 161 A.2d 595 (1960); Fleischman v. Reading, 383 Pa. 183, 130 A.2d 429 (1957).

110. Capozi v. Hearst Publishing Co., 371 Pa. 503, 518, 92 A.2d 177 (1952); Cary v. Cary, 189 Pa. 65, 42 A. 19 (1899). *See also* 7 WIGMORE, EVIDENCE § 2113.

111. Contrary to that of a party, *see* text accompanying notes 54-61 *supra*. Wilson v. Pennsylvania R.R., 421 Pa. 419, 431, 219 A.2d 666 (1966); Goodis v. Gimbel Bros., 420 Pa. 439, 218 A.2d 574 (1966); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 645, 139 A.2d 663 (1958); Dincher v. Great A. & P. Tea Co., 356 Pa. 151, 156, 51 A.2d 710 (1947); Stiegelmann v. Ackman, 351 Pa. 592, 598, 41 A.2d 679 (1945); Scheer v. Melville, 279 Pa. 401, 405, 123 A. 853 (1924); Crawford v. Manhattan Life Ins. Co., 208 Pa. Super. 150, 221 A.2d 877 (1966); Commonwealth v. Blose, 160 Pa. Super. 165, 172, 50 A.2d 742 (1947); Selden v. Metropolitan Life Ins. Co., 157 Pa. Super. 500, 508, 43 A.2d 571 (1945). See the attempt to overrule this principle in Commonwealth v. Commander, 436 Pa. 532, 541, 260 A.2d 773 (1970). *Cf.* 3 WIGMORE EVIDENCE § 1018; HENRY, EVIDENCE § 801; Gougher v. Hansler, 388 Pa. 160, 166, 130 A.2d 150 (1957).

112. Wolansky v. Lawson, 389 Pa. 477, 479, 133 A.2d 843 (1957); *Cf.*

but this exception is open to serious question.[113] It is the duty of the trial court to instruct the jury as to the limited effect of the prior statement[114] but, in the absence of a request so to do, the court's omission may not be considered reversible.[115] The content of the prior statement will not support a finding based solely thereon, and the jury must be permitted to resolve all alleged contradictions.[116] Written prior statements admitted in evidence, may, in the discretion of the trial judge, be sent out with the jury.[117] However, the reduction to writing of an oral statement which was used to impeach the credibility of a witness does not make the writing admissible.[118]

D. *Prior Statements as Memory Aids*

1. *To refresh recollection*

There is no limitation upon the right of a witness to refresh his recollection from a previously prepared document *before* he takes the witness stand, since he is testifying from present recollection when he is on the stand.

> The means by which a witness can refresh his recollection prior to trial are almost unlimited. He may refresh his recollection from his own notes, which may have been made at the time of the event or at a later date. He may refresh his recollection by examining them at the trial, or immediately before trial or many months prior thereto. Mere retelling of an event may refresh the recollection of the teller. A visit to the scene of an occurrence may refresh one's recollection. Asking another person for a name

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Commonwealth v. Bartell, 184 Pa. Super. 528, 136 A.2d 166 (1957); Commonwealth v. Kibler, 215 Pa. Super. 367, 370, 258 A.2d 681 (1969).

113. *See* dissenting opinion in Wolansky v. Lawson, 389 Pa. 477, 133 A.2d 843 (1957).

114. Goodis v. Gimbel Bros., 420 Pa. 439, 442, 218 A.2d 574 (1966); Commonwealth v. Vento, 410 Pa. 350, 354, 189 A.2d 161 (1963); Herr v. Erb, 163 Pa. Super. 430, 433, 62 A.2d 75 (1948); Commonwealth v. Blose, 160 Pa. Super. 165, 172, 50 A.2d 742 (1947).

115. Wilson v. Pennsylvania R.R., 421 Pa. 419, 432, 219 A.2d 666 (1966); Keefer v. Byers, 398 Pa. 447, 451, 159 A.2d 477 (1960); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 645, 139 A.2d 663 (1958) (dissenting opinion); Risbon v. Cottom, 387 Pa. 155, 163, 127 A.2d 101 (1956).

116. Danko v. Pittsburgh Rys., 230 Pa. 295, 79 A. 511 (1911).

117. Wilson v. Pennsylvania R.R., 421 Pa. 419, 219 A.2d 666 (1966); Mitchell v. Shirey, 407 Pa. 204, 208, 180 A.2d 65 (1962) (party's statement should be sent out); Whitfield v. Reading Co., 380 Pa. 566, 571, 112 A.2d 113 (1955) (unsigned transcript of stenographic statement of party—questionable—*see* dissent); Brueckner v. Pittsburgh, 368 Pa. 554, 558, 84 A.2d 197 (1951) (statement of party); Durdella v. Trenton-Philadelphia Coach Co., 349 Pa. 482, 484, 37 A.2d 481 (1944) (statement not sent out, discretion of trial judge); Brenner v. Lesher, 332 Pa. 522, 528, 2 A.2d 731 (1939).

118. Dinger v. Friedman, 279 Pa. 8, 17, 123 A. 641 (1924).

> which "slipped one's mind" can refresh the recollection. A look at a telephone book or calling the Revenue Department for a license number may refresh one's recollection of a forgotten number. Reading another's account of an event may refresh the recollection of forgotten details. Between the time of an event and the time of testifying concerning it, a witness's recollection may be, and generally is, refreshed many times in many different ways.[119]

The use of a prior statement by the witness in this way does not permit the opposing party to introduce the statement in evidence, and even its production by the witness for examination by the opponent rests within the sound discretion of the court.[120]

When on the witness stand, the witness must testify, if at all possible, as to his *present* recollection. He may, therefore, use a prior statement to refresh his recollection[121] but he must testify to what he presently recalls, his memory having been refreshed.

> Where a witness has a present recollection of a past event, although his memory is refreshed by a memorandum made at the time of the event, he testifies from such recollection; but where he has no present recollection of such past event, even when aided by his memorandum, the latter itself may be offered in evidence, on proof by the witness of his knowledge of its accuracy when made and that it was made when the transaction was fresh in his mind.[122]

When the prior statement is sought to be used by the witness *while on the witness stand,* multiple problems arise: *First,* the nature of the statement which may be used;[123] *second,* when must it have been made;[124] *third,* does it in fact refresh his recollection;[125] *fourth,* may the statement be offered in evidence;[126] and *fifth,* if it

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119. Commonwealth v. Fromal, 202 Pa. Super. 45, 46-47, 195 A.2d 174 (1963). *See also* Nestor v. George, 354 Pa. 19, 46 A.2d 469 (1946).

120. Commonwealth v. Fromal, 202 Pa. Super. 45, 195 A.2d 174 (1963).

121. Panik v. Didra, 370 Pa. 488, 88 A.2d 730 (1952); Nestor v. George, 354 Pa. 19, 46 A.2d 469 (1946); Lardieri v. Lamont, 172 Pa. Super. 35, 37, 92 A.2d 229 (1952).

122. Commonwealth v. Kendig, 215 Pa. Super. 139, 257 A.2d 354 (1969); Miller v. Exeter Borough, 366 Pa. 336, 342, 77 A.2d 395 (1951).

123. Personal memoranda: Commonwealth v. Laniewski, 427 Pa. 455, 235 A.2d 136 (1967); Smith v. Smith, 364 Pa. 1, 9, 70 A.2d 630 (1950); Lardieri v. Lamont, 172 Pa. Super. 35, 92 A.2d 229 (1952). Diary: Brown v. Brown, 124 Pa. Super. 237, 188 A. 389, 189 A. 711 (1937). Police reports: Panik v. Didra, 370 Pa. 488, 88 A.2d 730 (1952); Commonwealth v. Ford, 199 Pa. Super. 102, 184 A.2d 401 (1962). Typescript of notes: Edwards v. Gimbel, 202 Pa. 30, 38, 51 A. 357 (1902). Mechanics' lien prepared by attorney but sworn to by the witness: Gallizzi v. Scavo, 406 Pa. 629, 179 A.2d 638 (1962). Book or memo: Nestor v. George, 354 Pa. 19, 46 A.2d 469 (1946). Refused: (Record made by another) Gordon v. Blizard, 106 Pa. Super. 112, 114, 163 A. 43 (1932); (Prior notes of testimony) Velott v. Lewis, 102 Pa. 326, 333 (1883).

124. Gibson v. Campbell, 242 Pa. 551, 555, 89 A. 662 (1914); Lardieri v. Lamont, 172 Pa. Super. 35, 92 A.2d 229 (1952); Savin v. Michaelsen, 72 Pa. Super. 226 (1919).

125. Miller v. Exeter Borough, 366 Pa. 336, 77 A.2d 395 (1951); Polizzi v. Commercial Fire Ins. Co., 255 Pa. 297, 99 A. 907 (1919); Commonwealth v. Kendig, 215 Pa. Super. 139, 257 A.2d 354 (1969).

126. Miller v. Exeter Borough, 366 Pa. 336, 77 A.2d 395 (1951); Com-

does not refresh his recollection, may the statement itself be used as evidence of past recollection.[127]

2. *Past Recollection Recorded*

There are occasions on which the witness has read and considered his prior statement either before he takes the stand or during his testimony; his recollection is not refreshed and he has no present recollection of the facts. The question arises whether such prior statements may be admitted.

A previous writing, made under appropriate circumstances, may be used by the witness to testify as to his past recollection of the facts—if he can verify on the witness stand that the writing accurately represented his knowledge of those facts at the time it was made[128] and that his knowledge was first-hand and not hearsay at the time.[129] It is more difficult to determine exactly what statements should be admitted under these circumstances. Generally, the writing must have been made at or near the time of the events which it describes;[130] the witness need not be the person who made the writing;[131] the original, and not a copy of the writing must be produced if it is procurable;[132] but not otherwise;[133] a written copy of an oral statement made by the witness may be used if the person who made the written copy is produced to authenticate it[134] but the copy may not be used if the witness himself does not testify.[135]

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monwealth v. Kendig, 215 Pa. Super. 139, 257 A.2d 354 (1969); *In re* Reiter Liquor License, 173 Pa. Super. 552, 98 A.2d 465 (1953). *Cf.* Selover v. Rexford's Executor, 52 Pa. 308, 310 (1866). But the statement is admissible if a statement of a party: Finnerty v. Darby, 391 Pa. 300, 321, 138 A.2d 117 (1958). Note that we are not here concerned with the admissibility of certain types of records such as hospital or physicians' charts which may be admissible under the "regular entries" exception to the hearsay rule.

127. Miller v. Exeter Borough, 366 Pa. 336, 77 A.2d 395 (1951); Christian Moerlein Brewing Co. v. Rusch, 272 Pa. 181, 187, 116 A. 145 (1932).

128. *See*, 3 WIGMORE, EVIDENCE, § 747; Piggott v. Holloway, 1 Binney 436 (1808).

129. Nestor v. George, 354 Pa. 19, 46 A.2d 469 (1946); *cf.* District of Columbia's Appeal (*In re* Finks Estate), 343 Pa. 65, 73, 21 A. 883 (1941); 3 WIGMORE, EVIDENCE § 747.

130. 3 WIGMORE, EVIDENCE § 745.

131. The J.S. Warden, 219 F. 517 (3rd Cir. 1914); WIGMORE, EVIDENCE § 748.

132. 3 WIGMORE, EVIDENCE § 749.

133. Edwards v. Gimbel, 202 Pa. 30, 51 A. 357 (1902).

134. 3 WIGMORE, EVIDENCE § 751; Ingraham v. Bockins, 9 S.&R. 285 (1823); Jones v. Fong, 3 Watts 328 (1834); Heart v. Hummel, 3 Pa. 414 (1846).

135. 3 WIGMORE, EVIDENCE § 752.

When a statement is used for this purpose, it must be shown to the opponent on request, to inspect and use on cross-examination.[136] When such a statement is verified and adopted by the witness, it may be exhibited to and even sent out with the jury, in the court's discretion.[137] Thus, under some circumstances, the use of a writing as past recollection recorded may prove to have greater jury impact than its use to refresh present recollection.

136. WIGMORE, EVIDENCE § 753.

137. WIGMORE, EVIDENCE § 754; Commonwealth v. Butts, 204 Pa. Super. 302, 204 A.2d 481 (1964); Christian Morlein Brewing Co. v. Rusch, 272 Pa. 181, 116 A. 145 (1932); Farmers & Mechanics Bank v. Boraef, 1 Rawle 152 (1829); Smith v. Lane, 12 S.&R. 80 (1824).