

# Michigan Law Review

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Volume 46 | Issue 6

---

1948

## EVIDENCE-HEARSAY-IMPEACHMENT OF HEARSAY BY DECLARANT'S INCONSISTENT STATEMENTS

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### Recommended Citation

Ira M. Price, II S.Ed., *EVIDENCE-HEARSAY-IMPEACHMENT OF HEARSAY BY DECLARANT'S INCONSISTENT STATEMENTS*, 46 MICH. L. REV. 842 (1948).

Available at: <https://repository.law.umich.edu/mlr/vol46/iss6/17>

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EVIDENCE—HEARSAY—IMPEACHMENT OF HEARSAY BY DECLARANT'S INCONSISTENT STATEMENTS—In an action of trespass to try title to land claimed through adverse possession by defendant, the date when defendant first asserted a hostile claim to the premises so as to start the ten year statute of limitations was in issue. Plaintiff's witness, *W*, was allowed to testify that defendant had told him and others that plaintiffs owned individual interests in the land and that he did not exclusively claim the land. Defendant's witness,

Y, then testified over objection that witness, W, had told him that defendant had long claimed the land, and had farmed and fenced the tract. *Held*, the testimony of witness, Y, was hearsay evidence which should not have been admitted for purposes of impeachment because no foundation had been laid for that purpose. *Payne v. Price*, (Tex. 1947) 203 S.W. (2d) 544.

If one party proves his case by an exceptionable hearsay statement,<sup>1</sup> may that statement be impeached by testimony that the utterer made another and inconsistent statement to someone else? The older and now minority view is that testimony of contradictory statements is inadmissible to impeach a dying declaration, chiefly on the ground that such evidence is hearsay, and that no foundation has or can be laid for impeachment as required in regard to living witnesses.<sup>2</sup> But the prevailing and sounder rule in most jurisdictions is to allow dying declarations to be discredited by conflicting statements of the declarant, although such statements do not qualify as dying declarations themselves.<sup>3</sup> When an attesting witness to a document is dead or unavailable, admission of the document in effect admits the hearsay assertion of the witness that the document was lawfully executed. Some cases hold that extra judicial statements of attesting witnesses are inadmissible to impeach the attestation because the alleged declarant cannot be cross-examined to deny or explain the statements.<sup>4</sup> Other decisions state broadly that formal documents must not be jeopardized by "loose and random declarations" attributed to an absent witness.<sup>5</sup> But probably the weight of authority is favorable to admitting such evidence.<sup>6</sup> There is no logical inconsistency between relaxing the rule requiring the laying of a foundation for impeachment and relaxing the rule that the witness must be produced and sworn before his testimony is admissible.<sup>7</sup> It is a generally accepted principle

<sup>1</sup> The term "exceptionable statement" or "exceptionable testimony" is used herein to mean a statement admitted in evidence by exception to the hearsay rule.

<sup>2</sup> The leading case for this view is *Wroe v. State*, 20 Ohio St. 460 (1870), which was followed in *Maine v. People*, 9 Hun. (16 N.Y.S. Ct.) 113 (1876) and *State v. Taylor*, 56 S.Ct. 360, 34 S.E. 939 (1900).

<sup>3</sup> *State v. Debnam*, 222 N.C. 266, 22 S.E. (2d) 562 (1942), where in prosecution for murder, statements by the deceased that the shooting was accidental were admitted to impeach a dying declaration that defendant had shot deceased intentionally; *Felder v. State*, 23 Tex. App. 477, 5 S.W. 145 (1887). See generally, 3 WIGMORE, EVIDENCE, 3d ed., § 1033 (1940). See also *State v. Lodge*, 9 Houst. (14 Dela.) 542, 33 A. 312 (1892).

<sup>4</sup> *Speer v. Speer*, 146 Iowa 6, 123 N.W. 176 (1910) (statements of deceased attesting witness regarding testator's capacity to make a will, excluded); *Runyan v. Price*, 15 Ohio St. 1 (1864) (exclusion of contradictory declarations of deceased attesting witness where deposition had been used). This view has the approval of I GREENLEAF, EVIDENCE, 16th ed., § 126 (1899).

<sup>5</sup> *Craig v. Wismar*, 310 Ill. 262, 141 N.E. 766 (1923).

<sup>6</sup> *Mobley v. Lyon*, 134 Ga. 125, 67 S.E. 668 (1909); *Boylan v. Meeker*, 28 N.J.L. 274 (1860).

<sup>7</sup> *Colvin v. Warford*, 20 Md. 357 (1863); *Harden v. Hays*, 9 Pa. St. 151 (1848). An interesting theory of "constructive presence" of the attesting witness was used in *German Evangelical Church v. Reith*, 327 Mo. 1098, 39 S.W. (2d) 1057 (1931).

that statements of fact against the interest of the utterer are admissible, if the declarant is unavailable at the trial.<sup>8</sup> In considering testimony of this nature some courts have excluded other contradictory statements of the declarant, usually under the foundation rule.<sup>9</sup> But increasingly courts have relaxed the technical rule and have admitted such testimony.<sup>10</sup> Further, there is a line of cases, principally involving alleged gifts, where inconsistent statements have not only been allowed for impeachment purposes but also as substantive proof, on the theory that such declarations help to explain an ambiguous act or to show the state of mind of the declarant, and are thus outside the hearsay rule.<sup>11</sup> As to the proper way to prove inconsistent statements discussed herein, courts have generally adhered to the rule followed in the principal case that, when possible, a foundation must be laid by asking the declarant whether he made the supposed contradictory statement.<sup>12</sup> Usually, however, the utterer is not present at the trial. In this situation, at least one court has said that the impeaching witness should be asked directly what the declarant said to him and should be permitted to answer in his own words, and should not be asked whether or not the declarant at a certain time and place made a given statement.<sup>13</sup> It is submitted that the same necessity which allows hearsay evidence to be admitted in the first place should also sanction impeachment by proof of self-contradiction. The exclusion of such evidence in the past has often had the double-barreled effect of unreasonably protecting admitted hearsay statements while at the same time stripping from the adverse party his only practicable method of impeachment.<sup>14</sup>

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<sup>8</sup> 5 WIGMORE, EVIDENCE, 3d ed., § 1455 et seq. (1940).

<sup>9</sup> *Hamilton v. Smith*, 74 Conn. 374, 50 A. 884 (1902); *State v. Segar*, 96 Conn. 428, 114 A. 389 (1921).

<sup>10</sup> See, for example, *Stiles v. Newschwander*, (N.J. 1946) 49 A. (2d) 572 and *Jones v. State*, 111 Tex. Cr. 172, 11 S.W. (2d) 798 (1928).

<sup>11</sup> *Gordon v. Munn*, 87 Kan. 624, 125 P. 1 (1912); *Sherman v. Sherman*, 75 Iowa 136, 39 N.W. 232 (1888). See also, *Whitwell v. Winslow*, 132 Mass. 307 (1882) and *Stone v. Stroud*, 6 Rich. (S.C.) 306 (1853).

<sup>12</sup> *People v. Collup*, 27 Cal. (2d) 829, 167 P. (2d) 714 (1946); *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337 (1895).

<sup>13</sup> *State v. Mayo*, 42 Wash. 540, 85 P. 251 (1906).

<sup>14</sup> The Model Code of Evidence provides for the admission of such testimony: "Wherever hearsay evidence has been received, (a) Evidence of a statement or other conduct by the declarant inconsistent with the declaration is admissible though he had no opportunity to deny or explain it." Rule 531 (1942).