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THE ADMISSIBILITY OF A PRIOR STATEMENT OF OPINION FOR PURPOSES OF IMPEACHMENT

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INTRODUCTION

Although impeachment of a non-party witness by means of a prior contradictory statement of fact has long been permitted,[1] impeachment by prior contradictory expressions of opinion has had to overcome much confusion and misunderstanding on the part of the courts. Generally stated, the cases prior to 1900 almost universally prohibited impeachment in this form, while the cases subsequent to that date have increasingly permitted it to the point where it is now recognized in the great majority of jurisdictions.

The usual situation in which this question arises is that of a general statement on the merits of a controversy by a witness who has testified to facts. Exclusion of such statements in the early cases was only seldom predicated upon the basis that the opinion was incompetent to contradict factual testimony. Usually it resulted from a failure on the part of the courts to comprehend what was at issue, or to appreciate that the proper consideration in such situations was not that the witness happened to express an opinion, but having testified to facts, was there in his prior statement anything sufficiently inconsistent with those facts to cast doubt upon their accuracy, or the credibility of the witness. If so, then the matter should have been submitted to the jury. Wigmore pointed this out in 1904,[2] expressing himself in favor of admission under circumstances where there was within the expressed opinion an implied assertion of fact inconsistent with the factual testimony. This "inconsistency test" would appear to be the only logical approach to the problem.

The objects of this study are twofold: first, to chronicle the misconceptions prevalent in the early cases; second, to show the increasing application of Wigmore's test as the only proper basis for admitting or excluding such impeaching evidence.

No particular concern is taken herein with the mechanics of impeachment. It is assumed that evidence of the alleged contradictory opinion is offered solely for impeachment purposes, that the jury is instructed that it is to be used for this purpose only, and, in those jurisdictions where it is required, that a proper foundation is laid during the cross-examination of the witness for the introduction of the impeaching evidence.

* See Contributors' Section, Masthead, p. 241, for biographical data.

1 See cases cited in Annot., 82 Am. St. Rep. 39, 40 (1898).

2 2 Wigmore, Evidence § 1041 (1st ed. 1904).

For the purposes of this discussion, it is of no importance whether the admissibility of the prior opinion is challenged when the primary witness is asked whether he expressed the opinion, or whether it is challenged when independent evidence is introduced to prove that the statement was in fact made—the primary witness having denied it. The determination of its admissibility would be the same in both instances.

Early Cases

With few exceptions the early cases excluded as improper attempts to introduce evidence of prior inconsistent statements of opinion made by a non-party witness for purposes of impeaching that witness. This would seem to be in accord with the positions taken by Greenleaf in 1842[3] and Wharton in 1877[4] in favor of exclusion. However, an examination of the cases reveals that in a great percentage of instances the exclusion resulted from a misconception on the part of the courts as to just what was at issue. The most frequent error was to regard such evidence as being offered on the merits—and to condemn it for its collateral aspect, or its opinion content.

In *Holmes v. Anderson*[5]—the earliest New York case directly on this point—a witness for the plaintiff testified that the defendant had tried to induce him to burn the plaintiff's barn, that the defendant had told him he would burn it himself, and that the defendant had left the witness' house about twelve o'clock the night the barn was burned. The supreme court of New York held proper the exclusion of evidence that he had declared he thought the defendant to be innocent. But the exclusion was predicated upon the ground that the statement was being offered on the merits, and since it was an opinion, its admission would have been prejudicial.

> Neither was it competent for Charles B. Anderson to give his opinion upon the case, whether the defendant was guilty or innocent of burning the barn. His opinion on oath could not be allowed to prejudice either party, as evidence in the case, much less, therefore, can his out-door statement of his opinion without oath be allowed to prejudice the party.[6]

In *Lane v. Bryant*,[7] the Massachusetts court fell into the same misconception. In an action for damages resulting from a collision, the servant of the defendant having testified as to his careful management of a team and carriage, the plaintiff was allowed to prove that after the accident the

[3] 1 Greenleaf, Evidence § 1041 (1st ed. 1842).
[4] 1 Wharton, Evidence § 551 (1st ed. 1877).
[5] 18 Barb. 420 (N.Y. Sup. Ct. Madison County 1854).
[6] Id. at 424.
[7] 75 Mass. (9 Gray) 245 (1857).

servant had stated that the plaintiff was not to blame. This was held to be error.

> Nor was the evidence admissible to contradict the testimony of the defendant's servant. He was asked on cross-examination by the plaintiff's counsel whether he did not excuse the plaintiff from blame at the time of the accident. His answer to this question could not be contradicted by the plaintiff. It was irrelevant and immaterial to the issue. The opinion of the witness on the subject was incompetent. The real question was, who was actually to blame and that was to be determined by the jury by the facts in the proof. The plaintiff [defendant?] was not bound by the opinion or declaration of his servant on this question.[8]

The feeling expressed here that the witness in stating his opinion as to fault was usurping the function of the jury appears in later cases as one of the reasons for exclusion. Thus in *Ross v. Commonwealth*,[9] an action for homicide, a witness for the defendant was asked if she had not said that the defendant had a bad case, and that it might go hard with him. Upon her denial, proof was admitted that she had so stated. The Kentucky Court of Appeals, in holding this one of the grounds for reversal, said:

> This was error, and very prejudicial to appellant, as it got before the jury, not the facts of the case, but a mere conclusion of one of appellant's witnesses as to its merits, when this was the thing the jury were to try from the evidence before them.[10]

This was, of course, wide of the real question. The fact that the witness happened to express an opinion on the matter ultimately to be determined by the jury should not bear on the admissibility point. It was not being introduced for the purpose of helping the jury determine fault, but rather to aid them in properly evaluating the weight to be accorded the witness's testimony.

A less frequent basis for exclusion, but one closely allied to the belief that the opinion was being offered on the merits, was the "original evidence" test. By this criterion, impeaching evidence of prior statements was excluded unless the party attempting impeachment could have introduced what was stated as original, or independent, evidence in support of his plea. On this basis it was argued that since the opinion of the witness could not be introduced as evidence in a case where opinion was not at issue, it was improper to use it as a basis for impeachment. It was automatically rendered collateral by the curse resultant from the fact that the witness happened to cast his statement in the form of an opinion.

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[8] Id. at 247.

[9] 21 Ky. L. Rep. 1344, 55 S.W. 4 (1900). See also State v. Davidson, 9 S.D. 564, 70 N.W. 879 (1897); Saunders v. City & Suburban Ry., 99 Tenn. 130, 41 S.W. 1031 (1897).

[10] Id. at 1347, 55 S.W. at 6.

In *Saunders v. City & Suburban Ry.*,[11] an action for personal injuries, the daughter of the plaintiff having testified in his favor, the Tennessee Supreme Court held that she was improperly allowed to be contradicted by evidence that she had declared that the accident was her father's fault—she having denied saying so.

> . . . the statement on this point attributed to her by Hodges was inadmissible as original evidence for either side, and, being so, it could not properly be made the basis of contradiction or impeachment. . . . An approved test of the question whether or not a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove the fact as a part of, and as tending to establish, his case?[12]

In a few instances the court seemed to appreciate that the prior opinion was being offered solely for impeachment purposes, and not in any way upon the merits, but still excluded it upon the general ground that prior opinions were not competent to contradict facts. The degree of contradiction was of no importance. In *Sweeney v. Kansas City Cable Ry.*,[13] a negligence action for damages for the death of the plaintiff's husband in a collision between a gripcar and a wagon, a witness having testified to show the gripman had done nothing to stop the car until the moment of impact, it was held proper to prevent him from being asked whether he had not stated at the inquest that he thought the gripman had done all he could to stop the car.

> The rule (that the proof of contradictory statements goes to the credibility of the witness) does not extend so far as to introduce previous expressions of opinion. . . .[14]

The contradiction here was very nearly direct. Only complete obedience to a rule of exclusion could have kept it out.

While the *Sweeney* case seems plainly wrong in result, many early cases reached the right result though their reasoning was wrong, or at least extremely vague. In these cases no contradiction actually existed between the facts stated in testimony and the opinion previously expressed. But instead of excluding the attempted impeachment upon this simple ground, the courts tended to cast a baleful eye on the opinion aspect of the statement and banish it upon that basis.[15] Thus in *Sloan v. Edwards*,[16] an action for assault and battery, a witness for the defendant testified that he had seen the plaintiff shortly after the incident and there were no

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[11] 99 Tenn. 130, 41 S.W. 1031 (1897).

[12] Id. at 139, 41 S.W. at 1034.

[13] 150 Mo. 385, 51 S.W. 682 (1899).

[14] Id. at 400, 51 S.W. at 687.

[15] See Pruitt v. Miller, 3 Ind. 16 (1851); Rucker v. Beatty, 3 Ind. 70 (1851); Harper v. Indianapolis & St. L. R. R., 47 Mo. 567, 4 Am. Rep. 353 (1871).

[16] 61 Md. 89 (1883).

marks or bruises upon his face. It was considered error to allow the plaintiff to impeach him by showing that after the plaintiff had explained the incident to the witness, a week after its occurrence, the witness had stated it was a great outrage, and the defendant should be made to pay for it. There was no contradiction between this opinion and factual testimony as to absence of bruises on the plaintiff's face. But the error was predicated upon the following ground:

> . . . it would seem to be well established, that if a witness has simply testified to a fact, his previous *opinion* as to the merits of the cause, cannot be regarded as relevant to the issue.[17]

And consider the ridiculous approach in *State v. Davidson*.[18] This was a homicide case in which the prosecution, to establish a motive, introduced facts tending to show a criminal intimacy between the defendant and the wife of the victim. The defense, to disprove this theory, introduced witnesses to establish that the alleged intimacy had not occurred. One of these witnesses was asked, for the purpose of impeaching his testimony, whether he had not stated that after an investigation of the matter he was convinced that the defendant had killed the deceased. It was held improper to permit evidence that he had so stated to be introduced after he had denied it. There can be little quarrel with this result. The opinion of the witness that the defendant had killed the deceased may have been due to any number of factors—none of which need have anything to do with the alleged intimacy. There was no reason why it would be inconsistent for the witness to believe the defendant guilty of the murder, and at the same time know him to be innocent of the adultery. But instead of reaching the result upon this lack of inconsistency, the court runs the gamut of incorrect reasoning discussed above. There is a hint that the evidence was being introduced on the merits ("The conclusions that Hodgkins had arrived at from his investigations were clearly immaterial to the issue in the case."); the function of the jury was being interfered with (". . . the jury had no right to know what his conclusions were after his investigations. Opinions of witnesses as to the guilt or innocence of the defendant are not admissible. . . ."); his statement couldn't have been offered as independent evidence by the defendant ("His opinion or conclusion could not have been given in evidence as criminative evidence by the prosecution. . . ."); an opinion was not competent to contradict facts ("The rule may be said to be well settled that the statement of the witness upon which he can be impeached . . . must be a matter of fact, and not merely a former opinion of the witness. . . .").[19]

[17] Id. at 105.

[18] 9 S.D. 564, 70 N.W. 879 (1897).

[19] Id. at 567, 568, 571; 70 N.W. at 880, 881.

One final illustration: in *Schell v. Plumb*[20] the issue was whether a contract to support had been made between the plaintiff and defendant's testator. A witness for the defendant testified in support of the contention that there was no contract. The plaintiff was allowed to introduce evidence that the witness had stated that the plaintiff ought to have $1,000 out of the estate. The New York Court of Appeals took the position that if this statement were one of fact, the admission was proper; but if one of opinion, then it was improper—regardless of how contradictory it might be.[21] With some hesitation, the court concludes that this was a statement of fact, and thus properly admitted. It is difficult to understand why the propriety of the impeachment of a witness should depend upon the label the court places upon his prior statement—particularly in a case where the distinction was as close as this one. If inconsistency was present, it was present under either characterization—and inconsistency is the important factor.

While the attitude outlined by the cases discussed above was overwhelmingly the prevalent one,[22] there were some exceptions—notably in Massachusetts. After an incorrect start in *Lane v. Bryant,* discussed previously, the Massachusetts Supreme Judicial Court changed its approach. In *Commonwealth v. Mooney,*[23] the attempted impeachment was held properly excluded—but at least partially upon the ground that the prior opinion did not contradict the facts. The defendant was charged with arson, and the witness testified to circumstantial evidence which tended to show the defendant guilty. He had previously stated he thought the defendant innocent. The finding that there was no contradiction is subject to some doubt.[24] But at least the court was more or less sighted upon the right target. Then in *Commonwealth v. Wood,*[25] a criminal action for overdriving a horse, the mother of the accused was allowed to be impeached by her prior statement that her son was guilty, she having testified that she saw him driving the horse and he was not then overdriving. This was considered proper.[26] Finally, in 1902 came the case of *Whipple*

[20] 55 N.Y. 592 (1874).

[21] An opinion expressed by a witness upon the merits is inadmissible, though in conflict with his testimony.
Id. at 599-600.

[22] See People v. Stockhouse, 49 Mich. 76, 13 N.W. 364 (1882), where the court, after expressing a personal inclination in favor of admission, held that the impeaching evidence should have been excluded on the basis of a rule so "firmly settled by the authorities that the question cannot be considered an open one."

[23] 110 Mass. 99 (1872).

[24] As pointed out in Whipple v. Rich, 180 Mass. 477, 63 N.E. 5 (1902), discussed infra.

[25] 111 Mass. 408 (1873).

[26] However it is possible that the witness' testimony amounted to the statement of an opinion—depending upon what was meant by "overdriving a horse." If analogous to the

v. Rich,[27] a tort action in consequence of a collision between a dray and a railway car. A witness for the plaintiff testified that there was nothing to obstruct the view of either driver. The defendant, Rich, was allowed to show that after the accident the witness had stated that Rich's driver was not to blame. The jury was carefully instructed that this was admitted solely so far as it tended to contradict the witness's testimony. This procedure was considered proper. After first discounting the "original evidence" objection,[28] the opinion, with Holmes, C. J., writing, goes on to set up a standard for admission, with contradiction as the guide.

> The question is whether the specific facts testified to lead so directly to a conclusion that it is obviously unlikely that a man will believe a contrary conclusion if he believes the specific facts. Different minds will differ more or less in drawing the line, and it may be that we should have felt some hesitation with regard to the decision in *Commonwealth v. Mooney*. But in our opinion the question in this case fell on the right side of the line, although pretty near it.[29]

The approach taken by Holmes here is very similar to that taken by Wigmore two years later when his treatise on Evidence was first published—though they start at opposite ends. Holmes would take the conclusion derivative from the factual testimony and compare it with the prior conclusion or opinion stated by the witness. Wigmore, as will be pointed out, would take the facts implicit in the expressed opinion and compare them with the facts stated in testimony. Under either method, if inconsistency appears then evidence of the prior opinion should be admitted.

After 1904

Against the background of the cases just discussed, Wigmore took the following approach:

> A common difficulty is to determine whether some broad assertion, offered in contradiction, really assumes or implies anything specifically inconsistent with the primary assertion. The usual case of this kind is that of a general statement upon the merits of the controversy, which is now offered against a witness who has testified to a specific matter. . . . The usual answer of some Courts is that the declaration should be excluded because it is mere

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speed of a car, the witness' testimony would have amounted to an opinion, and contradiction by her previous contrary opinion wouldn't have been unusual. This is discussed at page 239 infra.

27 180 Mass. 477, 63 N.E. 5 (1902).

28 But evidence admissible for one purpose, if offered in good faith, is not made inadmissible by the fact that it could not be used for another with regard to which it has a tendency to influence the mind.
Id. at 479, 63 N.E. at 6.

29 Idem.

> opinion. This is unsound, (1) because the declaration is not offered as testimony, and therefore the Opinion Rule has no application, and (2) because the declaration in its opinion-aspect is not concerned, and is of importance only so far as it contains by implication some contradictory assertion of fact. In short, the only proper inquiry can be, Is there within the broad statement of opinion on the general question some implied assertion of fact inconsistent with the other assertion made on the stand? If there is, it ought to be received, whether or not it is clothed in or associated with an expression of opinion.[30]

It will be noted that Wigmore placed inconsistency as the principal test for admission. He regarded the fact that the statement might happen to be in the form of an opinion as incidental. From the point of view of practical application, what this would seem to amount to would be to make a prior statement of opinion really no different from a prior statement of fact; or, in other words, to make the opinion statement merely one variation of prior statements. For whether the prior statement be one of opinion or one of fact the principal test for admissibility is the same—inconsistency. Wigmore, in speaking of the admissibility of prior statements in general, and without making any distinction between those of fact and those of opinion, states:

> In the present mode of impeachment, there must of course be a real inconsistency between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true. Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required.[31]

In short, whether the statement happens to be one of fact or opinion if it is inconsistent with the witness's testimony then the jury should have it for consideration in weighing the veracity of the witness and the accuracy of his testimony. The argument that an opinion is never competent to contradict facts is erroneous. A man may express in the form of an opinion a belief or an implied fact as much at variance with his factual testimony as would be a contradictory statement of fact. Admittedly an opinion may be so general that it is not in any real sense contradictory of the testimony, and admission under such circumstances would serve only to confuse and possibly prejudice the jury. But such opinions would, or at least should, be excluded under the inconsistency test. Concededly in this area there may be room for error and disagreement.[32] But such possible error is minor compared to that committed by those jurisdictions

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30 2 Wigmore, Evidence § 1041 (1st ed. 1904).

31 2 id. § 1040.

32 See State v. Matheson, 130 Iowa 440, 103 N.W. 137 (1906), where the admission might be questioned on the ground that no real inconsistency was present.

which, under a blanket rule of exclusion, would prohibit all statements of opinion[33]—even those admitted by the court to be directly contradictory.[34]

It is not contended that merely by saying that a statement of opinion should be admitted if inconsistent, and excluded if not, the problem becomes a simple one. Whether the opinion is inconsistent with the facts testified to is often a difficult and close question, since an opinion is generally more tenuous in its implications than a statement of fact. Wigmore would consider the opinion to be inconsistent if it contained "by implication some contradictory assertion of fact." By this method the attempt is made to reduce the opinion statement to a common denominator, so that fact can be compared with implied fact, and the inconsistency, if any, determined. But this is an explanation of Wigmore's test, rather than the test itself. It would be equally workable to say that the opinion should be admitted if it is such that no reasonable man could entertain it and the facts stated in testimony at the same time.

The task of determining inconsistency must fall initially upon the trial judge. In this regard he should be guided not by what he himself might consider inconsistent, but what a reasonable man would consider inconsistent. If this standard is met, then the impeaching evidence should be given to the jury with proper instructions. In *Commonwealth v. Grossman*[35] a witness testifying to the good character of the defendant was impeached by a showing that after the arrest he had said that it "looked bad" for the defendant. The existence of an inconsistency here was a close question. But the jury was carefully instructed that the admission was for a limited purpose, and it would be difficult to say that the trial judge was beyond his discretionary province in allowing the admission.

While the tendency thus far has been to consider cases of admission as correct, and those of exclusion as incorrect, that is not accurate. Wigmore doesn't declare himself in favor of admission, but only admission under certain circumstances. A case can be wrong where the opinion is admitted,[36] and correct and well reasoned where it is excluded.[37]

Thus what this paper seeks, and what Wigmore's test implies, is an approach on the part of the courts in determining the admissibility of a prior statement of opinion—an approach designed to avoid the misconceptions chronicled in the discussion of the early cases. This requires a disregard of the opinion aspect of the statement, a realization that it

[33] E.g., Missouri, Ohio, South Dakota, Texas, and Washington.

[34] See State v. Thompson, 71 S.D. 319, 24 N.W.2d 10 (1946), discussed infra.

[35] 261 Mass. 82, 158 N.E. 338 (1927).

[36] See Sanders v. H. P. Welch Co., 92 N.H. 74, 26 A.2d 34 (1942), discussed infra.

[37] See Smith v. Holyoke St. Ry., 210 Mass. 202, 96 N.E. 135 (1911), and State v. Storrs, 105 Vt. 180, 163 Atl. 560 (1933), both discussed infra.

is not being offered on the merits any more than any prior statement of fact is offered on the merits, and a focus of attention upon the important consideration—the determination whether the opinion statement is inconsistent with the facts stated on the stand. To illustrate, suppose A sues B for damages resulting from a collision between their respective automobiles. W, a witness for A, testifies to facts tending to establish A's careful management of his car. B offers to show that subsequent to the accident W made one of the following statements: (1) "If A hadn't been driving so recklessly that accident would never have happened"; (2)"A was at fault"; (3) "B was not at fault"; (4) "A is a very careless person." Of these statements which should be admitted? With the inconsistency test as a guide it is apparent that statement (1) should be admissible because the opinion that A's reckless driving caused the collision would be incompatible with the testimony of W tending to show that A was driving carefully. Statement (2) presents almost as clear a case for admission, though the "at fault" opinion is not as directly contradictory of the careful management testimony as the reckless driving statement. Statement (3) is more difficult of analysis, but should probably be excluded, upon the ground that W's opinion as to B's freedom from fault isn't sufficiently contradictory of testimony tending to show that A was driving carefully —since the accident could well have resulted from the act of a third person, or from factors beyond the control of either party.[38] Statement (4) should be excluded because W's general opinion that A was a careless person wouldn't be incompatible with the fact that he observed A driving carefully on this particular occasion, and testified accordingly.

The majority of the early cases would have excluded all of these statements—for one or more of the reasons already discussed. The result as far as statements (3) and (4) are concerned would, as it happens, be the same as under the inconsistency test. The difficulty is that the same incorrect reasons would also exclude (1) and (2), which would be admissible on the inconsistency basis—and properly so.

It would be encouraging but incorrect to say that Wigmore's test, and the approach implicit in it, has been universally adopted by the courts, and the confused reasoning of the early cases discarded. Precedent has continued to prevail in some jurisdictions; and the same incorrect reasons are still often made the basis for exclusion. In *Bright v. Wheelock*[39] and

38 Though possibly the better procedure in such a situation would be to admit the statement subject to explanation on the part of W.

39 323 Mo. 840, 20 S.W.2d 684, 66 A.L.R. 263 (1929) (witness testified that pin lifter on engine in question was not enclosed in a gas pipe; impeachment was attempted upon the basis of his opinion that certain photographs correctly represented the pin lifter on the engine in question, and that such photographs showed the pin lifter to be enclosed in a gas pipe).

Webb v. City of Seattle[40] the question was discussed at some length in support of exclusion, and the cases of each jurisdiction reviewed. But the sum total of the discussion was that Missouri and Washington, respectively, had always excluded statements of opinion and would continue to do so. No attempt was made to determine the degree of inconsistency, since both decisions quote from 40 Cyc. 2712 to the effect that expressions of opinion should be excluded even though they are "wholly inconsistent with the facts testified to." Wigmore is not mentioned.

In *McDougal v. State*[41] the contradiction was very nearly direct. The wife of the defendant testified to facts tending to show that the deceased was the aggressor. It was shown that shortly after the incident she told the son of the deceased: "Ira killed your papa because he sued him; I tried to keep him from it but I couldn't do it." Yet this was held to be improper impeachment. The reasoning of the court is very confused. The gist is that such evidence was being improperly offered on the merits, and Texas cases have always excluded such statements of opinion. In *Wagnon v. Brown*[42] the inconsistent opinion was excluded upon the ground that the province of the jury was being interfered with. And in *State v. Thompson*[43] the exclusion was predicated upon the danger of the jury misusing such impeaching evidence—though the clear contradiction was conceded by the court, and prior statements of fact were admitted without any concern about misuse.[44]

As was true in the early cases, in many instances the exclusion was proper because in fact the prior opinion was not contradictory. But the excluding reasons were the incorrect ones previously mentioned.[45]

But though Wigmore's test was ignored in the above instances, it has

[40] 22 Wash.2d 596, 157 P.2d 312, 158 A.L.R. 810 (1945) (witness for plaintiff sought to be impeached by statement that plaintiff was at fault).

[41] 81 Tex. Crim. 179, 194 S.W. 944 (1917).

[42] 169 Okla. 292, 36 P.2d 723 (1934) (witness for defendant sought to be impeached by statement to plaintiff after the accident: ". . . you will get something out of this, or you ought to.").

[43] 71 S.D. 319, 24 N.W.2d 10 (1946). The wife of the defendant testified that he was with her at the time the alleged rape took place. Impeachment was attempted upon the basis of statements made by her to the girl's mother carrying with them her opinion that her husband was guilty.

[44] The argument used to support the admission of such statements of fact—that the danger of the jury misusing them had to be risked—would seem to apply equally well to statements of opinion where the inconsistency was clear.

[45] Cottom v. Klein, 123 Ohio St. 440, 175 N.E. 689 (1931) (opinion incompetent to establish issue of negligence); Dixie Motor Coach Corp. v. Meredith, 45 S.W.2d 364 (Tex. Civ. App. 1931) (precedent); Hankins v. State, 140 Tex. Crim. 520, 146 S.W.2d 195 (1940) (precedent). In Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N.E. 158 (1929), the exclusion was both upon the ground that the function of the jury was being interfered with, and that no inconsistency was present.

been increasingly accepted elsewhere. In *Holder v. State*[46] the defendant was accused of murdering his father. His mother gave testimony tending to support his alibi. She was impeached by a showing that after the shooting she said: "Is it possible that I have raised a boy that would kill his father?" The Tennessee court held such impeachment proper, citing section 1041 of Wigmore. Though the statement was in the form of an opinion it "necessarily implied a contradiction in fact of her subsequent statement on the witness stand that her son was in her presence at the time of the murder." This result seems completely sound. Yet Tennessee had previously adhered to a rule of exclusion under which the impeachment here would have been considered improper. A not altogether successful attempt is made in this case to reconcile the result in *Saunders v. City & Suburban Ry.*, previously discussed, with this rule on the ground that the stated opinion in that case was not inconsistent, and therefore the exclusion was correct, though admittedly for the wrong reason.[47]

In *Smith v. Holyoke St. Ry.*,[48] a witness for the plaintiff testified that he did not hear the defendant's motorman ring his bell until just before the collision. Impeachment was attempted on the ground that after the accident he'd said to the conductor, ". . . it is no fault of you people." The Massachusetts Supreme Judicial Court held the exclusion of this evidence proper after determining that it failed to meet the following requirement:

> But the test is not whether there is a pointed contradiction between the testimony and the statement made on another occasion. It is enough if an opinion has been expressed by a witness, which is so incompatible with the facts he has testified to as a witness, that an honest mind, knowing the facts, would not be likely to entertain the opinion.[49]

Though Wigmore is not mentioned, the similarity between this approach and his is readily apparent.

The approach of the New York cases has been excellent. In *Judson v. Fielding*[50] a witness testifying to the illegal position of a bus in the road was impeached by his statement after the accident "that the bus was not to blame." The fact that this was an opinion was considered not impor-

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[46] 119 Tenn. 178, 104 S.W. 225 (1907).

[47] See also King v. Leeman, 204 S.W.2d 384 (Tenn. App. 1946), where the court attempts to tread a thin line between the Holder and Saunders cases. Wigmore's test is applied, and the prior opinion is excluded on the basis of lack of inconsistency. But the result is questionable.

[48] 210 Mass. 202, 96 N.E. 135 (1911).

[49] Id. at 205, 96 N.E. at 136.

[50] 227 App. Div. 430, 237 N.Y. Supp. 348 (3d Dep't 1929), aff'd, 253 N.Y. 596, 171 N.E. 798 (1930).

tant, since it was entirely incompatible with his testimony. Wigmore is cited with approval, and his test used to determine inconsistency. The inconsistency established, the jury was entitled to the impeaching evidence.[51] In *Wolfe v. Madison Ave. Coach Co.*[52] a bus driver was impeached by his statement that the accident was all his fault, having previously testified to his careful operation of the bus. Wigmore is cited in support of the propriety of this impeachment, the inconsistency having been determined. The court shows a complete understanding of the problem.

> The statement is not received as expressing the opinion of the driver. The declaration is not offered as substantive testimony; it is not received as an admission of the driver's liability which would in no event be binding on his employer. It is used as a statement inconsistent with the entire line of testimony given by the driver on direct examination, to the effect that he had acted as a prudent cautious operator of the bus and is to be considered only insofar as it tended to impeach his credibility as a witness.[53]

In *Crawford v. Commonwealth*[54] the Kentucky court, following the correct approach, upholds the impeachment of a witness testifying in support of a murder charge by his prior statement that: "Caney had to kill Bill Lawson to keep from getting killed himself." Conceding such statement to be one of opinion, it was "based by implication on a fact or set of facts entirely inconsistent with the testimony given by Johnson as to how the killing took place. . . . The appellant, then, had a right to introduce it to affect the credibility of Johnson."[55] To this should be added the excellent discussion in *Leinbach v. Pickwick Greyhound Lines*,[56] where inconsistency is held to be the key to admission.[57]

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[51] In considering the evidence so sharply in dispute the jury was entitled to know the contrary views the witness had expressed . . . the jury should have all the facts in making an appraisement of the value and weight to be given the testimony. Id. at 433, 237 N.Y. Supp. at 352.

[52] 171 Misc. 707, 13 N.Y.S.2d 741 (App. T. 1st Dep't 1939).

[53] Id. at 710, 13 N.Y.S.2d at 744. See also the excellent discussions in Burke v. Borden's Condensed Milk Co., 98 App. Div. 219, 90 N.Y. Supp. 527 (2d Dep't 1904), and in Larkin v. Nassau Electric R.R., 205 N.Y. 267, 98 N.E. 465 (1912). The latter case also presents in some detail the mechanics involved in introducing the impeaching evidence.

[54] 235 Ky. 368, 31 S.W.2d 618 (1930). See also the well reasoned, earlier Kentucky case, Rockport Coal Co. v. Barnard, 210 Ky. 5, 273 S.W. 533 (1925).

[55] Id. at 372, 31 S.W.2d at 620.

[56] 135 Kan. 40, 10 P.2d 33 (1932) (witness for the plaintiff impeached by his prior statement that the driver of a third car was responsible for the accident).

[57] Of interest is State v. Moore, 135 Kan. 164, 9 P.2d 653 (1932), decided subsequent to the Leinbach case but in the same montb. A witness testifying in support of a plea of self-defense was impeached by his prior statement: "I have studied about this matter and it is just cold-blooded murder." The court held the impeachment proper, but went to some length to make the statement one of fact rather than opinion. It is difficult to see why the reasoning of the Leinbach case was ignored in favor of this approach.

Of interest in another aspect is *State v. Storrs*,[58] where Wigmore is used as a guide to exclusion. The defendant was charged with operating a motor vehicle while under the influence of intoxicating liquors. The officer who placed him under arrest, but who had not removed him from his car nor seen him in it, testified for the state. On cross-examination he was asked whether he had not stated that he "had no evidence to show that the respondent had been operating a motor vehicle under the influence of intoxicating liquor." This question was excluded. The Vermont court, using the inconsistency test, held the exclusion proper.

> But, of course, there must, in any event, be something in the witness's testimony with which the claimed statement is inconsistent. In this instance the inspector had given no evidence as to the acts of the respondent regarding the operation of the automobile which have been made the basis of this proceeding. . . . The question, therefore, called for an answer, which, if in the affirmative, would not contradict the witness's testimony.[59]

In a few instances, Wigmore's test is used to reach a questionable result. In *Sanders v. H. P. Welch Co.*,[60] the driver of the plaintiff's car was sought to be impeached by his prior plea of guilty to a charge of reckless driving in connection with the same accident. The rejection of this by the trial court was considered to be error, the New Hampshire Supreme Court feeling that it contradicted the "general drift" of the witness' testimony. Undoubtedly some element of contradiction was present. But a man may plead guilty to such a charge for reasons known to himself alone, while yet considering himself innocent. At least it does not stand upon the same footing as an opinion expressed voluntarily and spontaneously.[61]

In many cases, though Wigmore is not mentioned, the basis for admission is the approved one of inconsistency. Particularly noteworthy in this respect are *Bates v. State*,[62] *Denver City Tramway Co. v. Lomovt*,[63] and *Hanton v. Pacific Electric Ry.*[64] In others the reasoning is less clear, but the approach is substantially the same.[65]

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58 105 Vt. 180, 163 Atl. 560 (1933).

59 Id. at 186, 163 Atl. at 563.

60 92 N.H. 74, 26 A.2d 34 (1942).

61 See also Salvo v. Market St. Ry., 116 Cal. App. 339, 2 P.2d 585 (1931), which is subject to the same objection (witness impeached by evidence of her pending action charging proponent with negligence).

62 4 Ga. App. 486, 61 S.E. 888 (1908) (witness in support of murder charge impeached by statement containing opinion defendant not guilty).

63 53 Colo. 292, 126 Pac. 276 (1912) (witness for defendant impeached by statement that defendant's motorman ought to be lynched).

64 178 Cal. 616, 174 Pac. 61 (1918) (witness who testified that car didn't start moving until after plaintiff reached it, impeached by prior opinion that it must have been moving before he could have gotten to it).

65 See Powell Bros. Truck Lines v. Barnett, 196 Ark. 1082, 121 S.W.2d 116 (1938);

The increasing adoption of Wigmore's test to the point where it is now the prevalent approach is reflected by the recent decisions in which this point has been at issue. Of four recent cases, three[66]—*Atlantic Greyhound Corporation v. Eddins*,[67] *Southern Passenger Motor Lines, Inc. v. Burks*,[68] and *Crowley v. Dix*[69]—cite Wigmore and use the inconsistency test as a guide.

Of particular interest is the *Atlantic Greyhound* case, where the court faced the unique problem of an opinion expressed at a time when the witness was not in possession of all the facts stated in testimony. Wigmore's test is approved and exclusion by the trial court is held proper, upon the ground that there was no contradiction involved in view of the increased knowledge on the part of the witness.

In the *Burks* and *Crowley* cases the impeachment involved the plaintiff as a witness, which is technically beyond the scope of this paper. But the evidence of the prior opinion was offered for impeaching purposes, and its admission was predicated upon that basis. Wigmore is cited and approved in both cases. In the *Burks* case the plaintiff was injured when the taxicab in which he was riding collided with a parked car. His testimony was to the effect that the cab driver was negligent. The defense was prohibited from showing that after the accident he had said it was not the cab driver's fault. The exclusion was one of the grounds for reversal —the court considering such evidence proper to contradict the plaintiff's contrary testimony. In the *Crowley* case the facts were very similar. The plaintiff was a passenger in a pleasure car involved in a collision with a taxi. His suit was against his host, and his testimony was to the effect that his host had been negligent. The trial court permitted impeachment by his statement that the accident was due entirely to the fault of the taxi driver and not to that of his host. This was sustained on the ground that such an opinion was "indicative of an attitude inconsistent" with his testimony.

State v. Baker, 233 Iowa 745, 8 N.W.2d 248 (1943); DeBose v. State, 18 Okla. Crim. 549, 197 Pac. 176 (1921); Richie v. Pittman, 144 Ore. 228, 24 P.2d 328 (1933); Weilbacker v. Rudlin, 125 N.J.L. 631, 17 A.2d 538 (1941).

In Yessler v. Dodson, 104 S.W.2d 95 (Tex. Civ. App. 1937), the impeaching evidence is excluded, partly on the basis of precedent, and partly on a lack of inconsistency. The decision implies that in a case where inconsistency was present, admission would be proper. No other Texas case has adopted this criterion, however.

[66] The fourth, Ford v. Dahl, 360 Mo. 437, 228 S.W.2d 800 (1950), follows the Missouri rule of blanket exclusion. Wigmore is mentioned, but summarily dismissed in favor of precedent.

[67] 177 F.2d 954 (4th Cir. 1949).

[68] 187 Va. 53, 46 S.E.2d 26 (1948).

[69] 136 Conn. 97, 68 A.2d 366 (1949).

One aspect of this problem which has been disregarded until now is the use of a prior contradictory opinion to impeach testimony which amounts to an expression of opinion. The opinion testimony may be that of an expert,[70] or it may be a layman testifying to the speed of an automobile,[71] the capacity to make a will,[72] the strength of beer,[73] or the value of services.[74] This is permitted everywhere.[75] Just as a prior statement of fact can be used to contradict factual testimony, the courts have had no hesitation about permitting a prior statement of opinion to contradict opinion testimony.[76] But this is the "a fortiori" situation insofar as this discussion is concerned only because the comparison of prior opinion with testified opinion renders the contradiction more readily apparent than in the prior opinion versus testified fact situation.

CONCLUSION

It has not been the object of this paper to show that in any particular instance the admission or exclusion of this type of impeaching evidence was correct or incorrect. Rather it has been sought to indicate what is considered to be the correct approach to the problem: that prior statements of opinion should be accorded the same treatment as prior statements of fact, both being admissible for impeachment purposes if sufficiently inconsistent with the testimony of the witness to warrant the consideration of the jury.[77] Most jurisdictions have in varying degrees come to this position.[78]

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[70] McGrath v. Fash, 244 Mass. 327, 139 N.E. 303 (1923) (doctor's opinion as to extent of injuries).

[71] Langan v. Pianowski, 307 Mass. 149, 29 N.E.2d 700 (1940).

[72] Griffin v. Barrett, 185 Ga. 443, 195 S.E. 746 (1938).

[73] Commonwealth v. Moinehan, 140 Mass. 463, 5 N.E. 259 (1886).

[74] Dalton's Appeal, 59 Mich. 352, 26 N.W. 539 (1886).

[75] All Courts, however, concede that expert opinions, as well as other opinions ordinarily admissible, if inconsistent with those expressed on the stand, are receivable. 3 Wigmore, Evidence § 1041 (3d ed. 1940).

[76] Of course, if the two opinions are reconcilable then the inconsistency test would prevent admission. In Myers v. Manlove, 164 Ind. 128, 71 N.E. 893 (1904), the witness testified that the testatrix was of sound mind when she last saw her, a year before the making of the will. Evidence was admitted that after the death of the testatrix the witness stated that judging from the face of the instrument she was not capable of making a will. This was held improper. The passage of time between the two periods involved made the opinions not inconsistent.

[77] For a very recent statement in favor of the inconsistency test, see McCormick, Evidence § 35 (1954).

[78] California has done so by code. Cal. Code Civ. Proc. Ann. (Evid.) § 2052 (Deering 1946): "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony. . . ." (the remainder pertains to laying the foundation). No differentiation is made between statements of fact and of opinion. Annotation B.9 to § 2052 (Deering 1946), specifically includes opinions.

Admittedly the presence of a requisite degree of contradiction is more difficult to determine where opinion is concerned. The trial judge, who must make the initial determination, is of necessity given a large discretion in this matter. The correctness of the exercise of this discretion is something about which men may differ. But this is a reason only for the exercise of great care, and not for the use of a different approach.

While Wigmore's test encourages admission, impeachment by this method should remain a cautious thing. Promiscuous admission would be little better than blanket exclusion. Though there has been no hint of it in the cases thus far, it would be unfortunate if in the future admission should be permitted without careful consideration of the prior opinion, on the theory that lack of inconsistency can be made apparent through rehabilitation. Any attempt to explain an opinion couched in emotional terms, for instance, may be completely inadequate. *Denver City Tramway v. Lomovt* should serve as a model in such situations. The statement of the witness, Murray, that the motorman ought to be lynched carried with it the implication that the motorman was at fault, and was sufficiently at variance with his testimony to make admission proper. But the form of the expression was much more dramatic than a simple statement as to fault. Admission of opinions expressed in such form, without the careful consideration in regard to the inconsistency factor given in the *Lomovt* case, might well leave the proponent of the witness with an insuperable task of explanation.

The only conformity proper in connection with impeachment of this type is conformity of approach. It should matter little in any given jurisdiction whether the previous decisions have predominantly admitted or excluded such opinions. The particular circumstances of each individual case are all important. A prior opinion may bear heavily upon the accuracy of the facts testified to, or it may cast little or no doubt upon their accuracy. Admission or exclusion should rest upon that criterion alone.