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Notes

PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE

In the recent case of *Pulitzer v. Chapman*[1] suit was brought in the Circuit Court of St. Louis to contest a will on the grounds of undue influence and fraud. The jury sustained the will, but the Court granted a new trial, assigning as its reasons that the verdict of the jury was against the weight of the evidence on the issue as to undue influence, and that there had been error concerning two instructions, neither of which is relevant to the ensuing discussion. The question of evidence pertinent to the issue of undue influence related to the effect of certain statements contained in a prior deposition taken in the same case from the will scrivener, as witness for the proponents, which statements were inconsistent with certain of his later testimony at the trial. These statements represented the only substantial evidence of undue influence in the case, but they were sufficient, if admissible as substantive proof, to sustain the order of the Circuit Court concerning the verdict of the jury.[2] After the witness had testified directly for the proponents, the contestants, during the cross-examination, read to him the identical questions and inconsistent answers contained in the prior deposition, and upon interrogation, he admitted having made such answers to the very questions. On appeal to the Supreme Court of Missouri, it was urged by the defendant-proponent-appellant that the above-mentioned statements were admissible only for purposes of impeachment, and not as substantive evidence of the facts contained therein, and it was contended by the plaintiff-contestant-respondent that such statements were admissible for both purposes. The Supreme Court, expressly negativing an intention to announce a general

[1] (Mo. 1935) 85 S. W. (2nd) 400.

[2] In Mo. where there has been an order granting a new trial because the verdict of the jury was against the weight of the evidence, the appellate court can interfere only where it finds that *no* verdict for the respondent would be allowed to stand i. e. the inquiry is limited to whether there was any substantial evidence to sustain the action of the trial court. Security Bank of Elvins v. Nat'l Surety Co. (1933) 330 Mo. 340, 344, 62 S. W. (2nd) 708, 709, and cases there cited.

rule, and specifically limiting its decision to the facts of the particular case, affirmed the order granting a new trial, and remanded the cause, holding that prior inconsistent statements made by a witness in a sworn deposition in the same case, and used to impeach his testimony at the trial, *may be accepted as substantive proof of the facts involved therein,* so far as they are competent and have probative value.

This decision presents a problem of evidence which has never been defined with particularity, nor analyzed with that acuteness of reasoning which the solution of its intricacies demands. Those authorities, including the Supreme Court of Missouri in the instant case, who have been sufficiently discerning to discover the existence of a problem, have been, unfortunately, so vague in the description of the fundamental desideratum, and so inadequate in the exposition of the *process of solution,* that both the legal situation and the legal theories affecting it remain obscure.

The object of this article is to make an analytical dissection of the problem and a nice scrutiny of its components, and to present a compendium of the theories of law possibly applicable to its solution. The scope of the discussion will embrace a comprehensive analysis of the law germane to prior inconsistent statements, an examination of Professor Wigmore's theory concerning such statements, a criticism of the authorities and rationale advanced in support of the result in *Pulitzer v. Chapman,* and finally, certain conclusions of the writer.

I.

THE ORTHODOX RULE AND THE ELEMENTS OF NON-HEARSAY

In order to forestall any possible confusion, and to more clearly define the thesis of this paper, let it be understood at the outset that certain irrelevant but similar legal situations will be entirely eliminated from the following discussion. The first of these occurs when a witness makes a statement adverse to the party giving the direct examination, and such party, having been surprised, then desires to prove that the witness made prior statements inconsistent with his present "surprise" testimony. This situation, at first blush, would seem to be pertinent here, but a closer examination reveals that the true issue involves the rule that a party cannot impeach his own witness,[3] and its solution imposes upon the rule the limitation that where a party is surprised in this manner, he may prove a prior inconsistent statement of "his" witness by the independent testimony of other wit-

[3] The principle is stated in 70 C. J. 793, "A party cannot ordinarily impeach a witness whom he has introduced either in a civil or a criminal case," and cases there cited. Also see Cooper v. Armour & Co. (1929) 222 Mo. App. 1176, 15 S. W. (2nd) 946.

nesses, even though the introduction of such testimony incidentally tends to impeach the witness who gave the "surprise" testimony upon direct examination.[4] The second situation results when a party's own prior statements are introduced by the adversary. Such statements, when against interest, are, of course, admissible as admissions against interest under a recognized exception to the hearsay rule,[5] and even irrespective of the rule according to Professor Wigmore.[5a] As a corollary to this second situation, it is equally as well established that where a witness is identifiable as an agent of a party, and the prior inconsistent statement is traceable to the legal scope of the agency, such statement is also admissible as an admission against the party's interest.[6] The following analysis will be limited specifically to the legal situation which is created when the *cross-examining* party wishes to introduce prior inconsistent statements made by a witness who has presently testified to the contrary upon direct examination by the adversary party.

From the time of the final establishment of the Hearsay Rule and its corollary exceptions until the publication of the second edition of Wigmore's *Evidence,* in the early twentieth century, the rule of law applicable to prior inconsistent statements remained unquestioned.[7] A concise statement of the rule is that ". . . proof of prior inconsistent statements of a witness can be introduced and considered only for the purpose of impeachment, and not as substantive evidence of the truth of the matter stated, and it is the duty of the court to instruct the jury that they can

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[4] Ewer v. Ambrose (1825) 3 Barn. & Cr. 746, 107 Eng. Rep. 910; Wright v. Beckett (1833) 1 Moody & R. 414, 174 Eng. Rep. 148; State v. Kohler (1910) 228 Mo. 367, 128 S. W. 721; Dauber v. Josephson (1922) 209 Mo. App. 531, 237 S. W. 149; Luzzadder v. McCall (Mo. App. 1917) 198 S. W. 1144; State v. Booth (1916) 186 S. W. 1019; Beier v. St. Louis Transit Co. (1905) 192 Mo. 615, 91 S. W. 509; Dunn v. Dunnaker (1885) 87 Mo. 597; Rhomberg v. Israel (1927) 222 Mo. App. 238, 296 S. W. 860; Deubler v. United Rys. Co. of St. Louis (1916) 195 Mo. App. 658, 187 S. W. 813. Also see 70 C. J. 1028, art. 1226, and cases cited.

[5] See 2 Wigmore, *Evidence* (2nd ed.) arts. 1048-9, pp. 504-5, and references therein.

[5a] Ibid.

[6] See 2 Wigmore, *Evidence* (2nd ed.) art. 1078, p. 585 et seq.:—The rule is stated in 22 C. J. art. 440, p. 369, as follows:—"An admission of an agent may be received in evidence against his principal, where the agent, in making the admission, was acting within the scope of his authority, and the transaction or negotiation to which the admission relates was pending at the time when it was made." Kansas City v. Mastin Realty Co. (1913) 253 Mo. 619, 161 S. W. 1150; Atkinson v. American School of Osteopathy (1918) 199 Mo. App. 251, 202 S. W. 452; Koslove v. Dittmeier (Mo. App. 1918) 203 S. W. 499.

[7] It is submitted that an examination of the available digests and texts fails to elicit any authority which limits or challenges this statement. See infra, note 8.

consider the evidence for this purpose only, if such instruction is requested by the party who apprehends that such proof may be treated by the jury as substantive evidence against him."[8] For the purposes of this analysis, it is significant to note that the reason assigned, where any is given, for denying substantive effect to prior inconsistent statements of a witness, is that if such statements were accepted as proof of the facts stated, the testimony would be hearsay.[9] With this reason as the sole basis for the application of the rule, it is difficult to understand why the rule was for such a long time applied automatically to *all instances* of prior inconsistent statements of a witness, without some consideration of the *character* of the statements. This universal error of the courts resulted, probably, from a failure to see an inevitable implication of the rule, which is hidden in the dogmatic language of the rule as stated, but which becomes obvious when the rule is considered in conjunction with the reason for its application. For, if the sole objection to the introduction of prior inconsistent statements of a witness as substantive evidence is that such statements would be hearsay, it is unequivocal logic that when such statements are not hearsay, a rule of law based entirely upon the presence of the objectionable element, is inapplicable. Hence, it would seem to follow as an implied corollary to the rule, *that a prior inconsistent statement of a witness which is not hearsay, or which is admissible independently under any of the exceptions to the Hearsay Rule, is admissible as substantive proof of the facts stated therein, irrespective of the fact that it is also used to impeach the credibility of the witness, or whether it impeaches the witness incidentally by the fact of its introduction.*

At this point, then, it is necessary to determine what are the requisite elements of non-hearsay statements; that is, what are those characteristics of statements which, if present, will prevent the operation of the Hearsay Rule. Stated generally, these elements might be said to be:—1) that the statement was made under oath, 2) that the party adversely affected had the oppor-

[8] Charlton v. Unis (1847) 4 Gratt, 60; Gould v. Norfolk Lead Co. (1855) 9 Cush. 346; see 70 C. J. art. 1339, p. 1153, and cases cited; 28 R. C. L. art. 219, p. 633; 82 Am. St. Rep. p. 39, note; 21 Ann. Cas. p. 1238; 1 Greenleaf, *Evidence* (16th ed. 1899) art. 461 et seq., p. 590; 2 Wigmore, *Evidence* (1st ed. 1904) art. 1018 (b), p. 1180 (For Professor Wigmore's present view contra, see infra this article, and see 2 Wigmore, *Evidence* (2nd ed.) art. 1018 (b), p. 460, but see cases cited in note 1 thereto.

[9] Culpepper v. State (1910) 4 Okl. Cr. 103, 11 Pac. 679, 31 L. R. A. (N. S.) 1166, 40 Am. St. Rep. 668, 682; Medlin v. County Bd. of Education (1914) 167 N. C. 239, 83 S. E. 483, Ann. Cas. 1916E, 300, 302; Matter of Moore's Will (1905) 109 App. Div. 762, 96 N. Y. Supp. 729, 733. See 70 C. J. art. 1339, p. 1153, n. 66 (b), and excerpts there presented; 2 Wigmore, *Evidence* (1st ed. 1904) supra, note 8. Also see cases cited infra, note 10.

tunity to cross-examine the declarer, and 3) that the declarer was in court and confronting the present jury. Suppose, for the sake of argument, that all three of these requirements *must be present* to relieve a statement of the stigma of hearsay. What effect has this upon the admissibility of prior inconsistent statements of a witness?

It is submitted that there is a *possible* theory which would automatically satisfy all three requirements in the great majority of instances. As a requisite foundation for the introduction of the prior inconsistent statements the cross-examiner must first make known to the witness the alleged content of the statement if oral,[10] or read it to him verbatim from the document, if written,[11] and question him as to whether or not he made such statement.[12] In most cases, and especially where the statement is written in a produced document, the witness will admit having made the statement. In such an event, is not the witness reiterating the statement in every real sense? Can there be any sound distinction between a witness saying, "Mr. Ichthyosaurus was a pirate,"[12a] or saying, "Yes, now that you ask me, I admit having said that Mr. Ichthyosaurus was a pirate." The point is that in each instance the witness has said that Mr. Ichthyosaurus was a pirate, and, in the latter instance, he has said it under oath, and before the present jury. Moreover, there is no necessity for cross-examination, because the party adversely affected is the party who gave the direct examination, and, by hypothesis, elicited from the same witness the statement that Mr. Ichthyasaurus was not a pirate. Why not then, in such cases where the witness admits having made the prior inconsistent statement, consider such statement as *present evidence* by what might be termed the "theory of re-affirmation"? The only difficulty with such a theory is that the witness is saying opposite things almost at the same time, but since even an honest person might entertain alternately conflicting convictions in re facts concerning

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[10] Able v. Shields (1841) 7 Mo. 120; Clementine v. State (1851) 14 Mo. 112; State v. Davis (1860) 29 Mo. 391; State v. Curtner (1914) 262 Mo. 214, 170 S. W. 1141; State v. Sadowski (Mo. 1923) 256 S. W. 753; Rooker v. Deering Southwestern Ry Co. (1920) 206 Mo. App. 79, 226 S. W. 69. See 70 C. J. art. 1101, p. 909, and cases there cited.

[11] State v. Stein (Mo. 1883) 79 Mo. 330; State v. Gonce (1885) 87 Mo. 627; State v. Devlin (1879) 7 Mo. App. 32; Ely-Walker Dry Goods Co. v. Mansur (1901) 87 Mo. App. 105; State v. Elkins (1876) 63 Mo. 159; State v. Ripley (1910) 229 Mo. 657, 129 S. W. 646; Carder v. Prinn (1892) 52 Mo. App. 102; Also see 70 C. J. art. 1101, p. 900; 2 Wigmore, *Evidence* (2nd ed.) arts. 1019, p. 461, and 1028, p. 475, and cases cited in n. 1 thereto on pp. 475-7.

[12] See references supra, notes 10 and 11.

[12a] The witness apparently meant that Ichthyosaurus was a marine reptile.

which there cannot be an *objective* flux, there seems to be no good reason why such inconsistent statements should not both be allowed to go to the jury as substantive evidence, subject to mutual impeachment.

However, since this theory is new-born, and possibly stillborn, let us return to our suppositious problem. If all three of the elements of non-hearsay must be present in order that a prior inconsistent statement be admissible as substantive proof of the facts stated, then it is clear that if any one of the elements is absent, the statement is hearsay, and subject to the prevailing rule that it is admissible only for the purposes of impeachment. Thus, all statements which were not made under oath would be hearsay. The element of cross-examination, as above noted, may be dispensed with when the consideration affects prior inconsistent statements, because this element is only required to give the party adversely affected the opportunity to question the witness in regard thereto, and to attempt to detract from the detrimental effect of the bare statement,[13] et cetera, whereas here, by hypothesis, the witness has already made a contradictory statement upon direct examination at the trial: since the party in whose favor this statement runs has the right of cross-examination concerning the prior inconsistent statement, it would seem that his right has already been satisfied more completely than if he had exercised it originally. There remains only the element of confrontation to consider. No attempt will be made here to define that term finally in its legal significance, but rather, two possible theories thereof will be presented, and it will be demonstrated how each one affects the problem at hand.

The first of these theories is that advanced by Professor Wigmore, and discussed infra, which conceives of confrontation as composed of two elements, first, and primarily, that the declarer of a statement which is to be admitted into evidence must be brought into court so that the party adversely affected may have the opportunity to cross-examine him, and second, that such declarer must be brought into court so that the jury may judge of his credibility by observing his demeanor while testifying. It is this second element which shall be considered as "confrontation" for the purposes of this paper. The significance of this conception of confrontation is that all that it requires is that a particular witness *be in court and testify.* It will be at once apparent, then, that under this definition of confrontation, a prior inconsistent statement can never be objected to for lack of this postulated requisite of non-hearsay, for by hypothesis the declarer *is present and testifying in court.* For the purpose of

[13] See 70 C. J. art. 787, p. 617, and cases cited there.

easy reference, we shall designate this conception of confrontation as the *theory of general confrontation.*

The second possible conception of confrontation we shall designate as the theory of *specific confrontation,* since its requirements are more technical. Under this theory, which is first advanced here, not only should the witness be present and testifying in court, but he should make the very statement to the jury. The supporting rationale for this theory will appear infra under the next heading. Suffice it to designate here what effect the acceptance of such a theory would have upon the admissibility of prior inconsistent statements as substantive evidence. If this more strict requirement were imposed, then the confrontation element could only be hurdled if the witness admitted having made the prior inconsistent statement, for if he interposed a denial, or was unable to remember, or in any other way failed to substantially re-declare the statement, then under no conceivable theory could the statement be considered non-hearsay, for even if they had been made under oath, and in a deposition where the adversary party had the right and opportunity of cross-examination, they still could not be said to have been made to the present jury. In such an event, the cross-examiner could then establish by other witnesses that the particular witness did make the disputed statements,[13a] but this evidence would only go to the question of whether or not the statements were made, which logically does not in the least affect the question of whether the facts involved in the statement are true or untrue; hence, this evidence too, would seem to be admissible only for purposes of impeachment, and it is so held.[13b] Even where the witness admitted having made the prior statement, however, a consideration would still remain. It seems to the writer that under this theory nothing short of an unconditional admission would suffice. Conceding this, two possibilities would present themselves to the tribunal: first, to adopt the "theory of reaffirmation" and accept the statements as present evidence, or second, to employ the circumlocutory and fictional procedure of still speaking of the "prior inconsistent statements," and considering the disability of want of confrontation as having been removed by some sort of "relation back" doctrine.

[13a] Garrett v. State (1839) 6 Mo. 1; State v. Darling (1907) 202 Mo. 150, 100 S. W. 631; State v. Carter (1914) 259 Mo. 349, 168 S. W. 679; State v. Moore (Mo. 1930) 29 S. W. (2nd) 148; State v. Taylor (1896) 136 Mo. 66, 37 S. W. 907; Courter v. Geo. W. Chase & Son Mercantile Co. (1922) 222 Mo. App. 43, 299 S. W. 622; Trauerman v. Lippincott (1890) 39 Mo. App. 478. See 70 C. J. art. 1219, p. 1011, and cases cited in n. 17 thereto. Also see 2 Wigmore, *Evidence* (2nd ed.) art. 1037, p. 488.

[13b] See cases supra, note 13a; also see 3 Wigmore, *Evidence* (2nd ed.) art. 1361, p. 2, where this view would also seem to be substantiated.

Mayhap in the presentation of this preliminary analysis, certain theories and ideas have been presented which may appear to be refined to the point of repugnancy, but it is submitted that it is only by reducing a problem to its jesuitical potentialities that the best compromise between hypothesis and practicality is discoverable.

Thus far we have purposely limited the extent of this discussion to an isolation and rational analysis of the problem as a legal situation: we shall now proceed to a more particularized consideration of the existing authorities, beginning with an examination of Professor Wigmore's theory concerning prior inconsistent statements.

II. PROFESSOR WIGMORE'S THEORY CONCERNING PRIOR INCONSISTENT STATEMENTS

Professor Wigmore, after demonstrating irrefutably that the use of prior self-contradictions to impeach the credibility of a witness is not obnoxious to the Hearsay Rule,[14] goes on to say, "It does not follow, however, that prior self-contradictions, when admitted, are to be treated as having no affirmative testimonial value and that any such credit is to be denied to them in the mind of the tribunal. The only ground for doing so would be the Hearsay Rule. *But the theory of the Hearsay Rule is that an extra-judicial statement is rejected because it was made out of court by an absent person not subject to cross-examination*[15] . . . Here, by hypothesis, however, the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The *whole purpose*[16] of the Hearsay Rule has already been satisfied. Hence, there is nothing to prevent the tribunal from giving such testimonial credit to the extra-judicial statement as it may seem to deserve. . ."[17]

This succinct quotation represents the complete essence of Professor Wigmore's theory concerning prior inconsistent statements. It advances the unequivocal view that the genesis and application of the so-called "prevailing rule"[18] was a universal judicial error, and that prior inconsistent statements, which are competent and have probative value, *are inevitably admissible as substantive evidence,* since, by the very nature of the legal situation in which they are involved, they possess the requisite elements of non-hearsay statements, and in no conceivable way could

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[14] See 2 Wigmore, *Evidence* (2nd ed.) art. 1018 (a), p. 459.
[15] Italics supplied.
[16] Italics supplied.
[17] See 2 Wigmore, *Evidence* (2nd ed.) art. 1018 (b), p. 460.
[18] Discussed infra, under I.

they be said to be hearsay. At a glance, this seems to be a rather cursory dismissal of a problem which is as labyrinthine as the one under discussion. The explanation lies in the perspective. The problem seems relatively simple to Professor Wigmore because in its solution he adopted certain other of his own theories of evidence, which, if once accepted, do obviate all the difficulties of the problem. These theories relate to the elements of non-hearsay, and in order to understand the above theory, it is necessary to examine the collateral propositions upon which it rests.

It will be noted that in the above quotation from Wigmore, certain portions have been italicized. The import of such language is that, according to this theory, the Hearsay Rule is satisfied when 1) the witness is present in court, and 2) subject to cross-examination. There is no mention of the oath element which was propounded infra. This results, no doubt, from the fact that Professor Wigmore does not think that the oath is a requisite element of a non-hearsay statement. No attempt will be made here to advance a different view on that score; but some examination will be made of the *reasons* which support such a thesis, for it is apparent that if such a view is unimpeachable, and the oath is not to be considered as a necessary element of non-hearsay statements, then this obstacle to the admission of prior inconsistent statements as substantive evidence is removed.

Concerning the oath Professor Wigmore states: "In the foregoing (cases)[19]. . . Cross-examination alone is mentioned as the test required by and involved in the Hearsay Rule. In most instances, however, we find the *Oath* coupled with Cross-examination in the definition of the rule[20]. . . But it is clear beyond doubt

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[19] Citing Craig dem. Annesley v. Earl of Anglesea (1743) 17 How. St. Tr. 1160; Lord Melville's Trial (1806) 29 How. St. Tr. 747; Dysart Peerage Case (1881) L. R. 6 App. Cas. 503; Coleman v. Southwick (1812) 9 John. 50; Farmer's Bank v. Whitehill (1827) 16 S. & R. 89: U. S. v. Macomb (1851) 5 McLean 286; Bentham, *Rationale of Judicial Evidence* (1827) b. VI, c. I, art. 2.

[20] Citing Hawkins, Pleas of the Crown (1716) b. II, c. 46, art 44, ". . what a stranger has been heard to say is . . no manner of evidence . . not only because it is not upon oath, but also because the other side hath no opportunity to cross-examine.": Fabrigas v. Martyn (1733) 20 How. St. Tr. 135—"Hearsay is no evidence. If they had brought him here, we could have his evidence on oath and could cross-examine him as to the facts."; Wright v. Tatham (1837) 7 Ad. and E. 313, 5 Cl. & F. 689—". . The general rule is that facts are to be proven by testimony of persons on oath and subject to cross-examination."; Grisham Hotel Co. v. Manning (1867) Ir. R. 1 C. L. 125—"Statements . . made by persons not upon oath or subject to cross-examination, would not be exempted from the general rule excluding hearsay evidence."; Chapman v. Chapman (1817) 2 Conn. 348; Warren v. Nichols (1843) 6 Metc. 261 "It is the familiar rule of hearsay. The reasons are obvious, *and they are two: first,* because the averment of the fact does not come to the jury sanctioned by the oath of the party on

that the oath, as thus referred to, is merely an incidental feature customarily accompanying Cross-examination, and that cross-examination is the essential and real test. . . That this is so is seen by the perfectly well-established rule that *a statement made under oath . . . is nevertheless inadmissible if it has not been subjected to cross-examination*[21]. . . Owing to the practice of requiring an oath . . . before proceeding to examination and cross-examination, *the case does not happen to arise of testimony which has been tested by cross-examination and yet lacks the oath, so that the tenor of the rule . . . cannot be tested by that situation. But it is sufficiently and clearly demonstrated (as above quoted) . . .; as well as by the further fact that, whenever an exception to the Hearsay Rule is found established i. e. whenever statements not subjected to cross-examination are exceptionally received, it is not required that they shall have been made under oath*[22] . . ."[23]

The italicized portions of this argument furnish the three reasons advanced by Professor Wigmore in support of the view that the oath is not an essential element of non-hearsay statements. Let us examine their substance respectively. The first reason is that the presence of the oath element alone will not be sufficient without the element of cross-examination. It is submitted that this reason actually demonstrates only that the cross-examination element is essential, and is no proof at all that the oath is *unessential,* for it is pregnant with the possibility that *both* elements are essential. The second reason is by way of implied assumption, rather than logic. It states that the theory cannot be tested by the situation where the cross-examination element is present and the oath element is lacking, but the implied assumption is that if such a case were possible, the statements would be non-hearsay. That this *impossible* test would be the only completely sound test is demonstrable: as for the assumption of the conclusion of an impossible premise, however authoritative the source, it is not a *test* in any sense except the intuitive. The third reason is that the oath element is not required as to statements admitted under *established exceptions* to the Hearsay Rule where cross-examination is not considered essential. This reason is equally as inadequate as the first two. The "raison d'etre" of

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whose knowledge it is supposed to rest; and *secondly,* because the party upon whose interests it is brought to bear has no opportunity to cross-examine him upon whose supposed knowledge and veracity the truth of the fact depends." (Italics supplied. This is strong statement supporting the view that the oath is an essential requirement, and not an incidental one.): Marshall v. R. Co. (1868) 48 Ill. 476.

[21] Italics supplied.

[22] Italics supplied.

[23] See 3 Wigmore, *Evidence* (2nd ed.) art. 1302, pp. 4-5.

the corollary theorems of exception to the Hearsay Rule is that *however numerous and weighty* the Rule's requirements ordinarily, they should be ignored in favor of the predominant desire for admissibility in the particular instance.[24] Hence, even if the oath were postulated as a requisite element of non-hearsay, it would not be required under the Hearsay Rule's exceptions, because of the very reason which led to their promulgation. It is certainly no argument against the possible ordinary essentiality of the oath element that it is not required as to exceptional statements which are concededly admitted in defiance of the ordinary requirements of the Hearsay Rule.[24a] What, then, remains of the collateral arguments advanced to support the view that the oath is not an essential element of non-hearsay? It is submitted that the only advocacy for the view is the intuitive direction of its propounder, which is still, however, a formidable sanction for its adoption. The effect of the acceptance of this theory upon the admissibility of prior inconsistent statements is considerable, for once the oath is dismissed as a requisite element of non-hearsay declarations, the lack of that element would in no way affect the introduction of such statements as substantive proof of the facts therein contained

It is thought here that the element of cross-examination is, in reality, not pertinent to a discussion of the admissibility of prior inconsistent statements. The rationale of this idea is adequately presented infra, under I. It would not be amiss, however, to state in addition that those authorities which stress the presence of the opportunity to cross-examine the declarer of prior inconsistent statements as a reason for accepting the statements as non-hearsay, interpose an unnecessary consideration to the solution of the problem. It is submitted that the true reason why the statements are non-hearsay on this score, is that, by hypothesis, the party entitled to cross-examination has been more than satisfied in having elicited from the declaror a direct contradiction of such statements, which is already admitted as substantive evidence.

The element of non-hearsay which remains to be considered is the element of confrontation. Professor Wigmore's theory of this element is as follows:—". . . It is generally agreed that the process of Confrontation has two purposes, a main and essential one, and a secondary and subordinate one:

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[24] See 3 Wigmore, *Evidence* (2nd ed.) arts. 1420-22, pp. 153-6.

[24a] See Tilghman, C. J., in Garwood v. Dennis (1811) 4 Binney 328: "It is objected that, however impressive the declaration of a man of character may be, yet the law admits the word of no one in evidence without oath. The general rule is certainly so; but subject to relaxation in cases of necessity or extreme inconvenience." (cited in 3 Wigmore, *Evidence* (2nd ed.) art. 1420, p. 154.

1) The main . . . *purpose of confrontation is to secure for the opponent the opportunity of cross-examination.* . .

2) There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of *a witness' deportment while testifying,* and a certain subjective moral effect is produced upon the witness. . ."[25] (This statement goes on to say that the *"demeanor-evidence"* may be dispensed with if necessary.)

It is apparent from this excerpt that Professor Wigmore goes even further than what has been hereinbefore termed the "theory of general confrontation," which demands only that the declarer of a non-hearsay statement be present and testifying in court, and states that once there has been an opportunity for cross-examination, the secondary element, or demeanor-evidence, *may be dispensed with if necessary.* This further limitation on the "theory of general confrontation" is irrelevant to a consideration of prior inconsistent statements, however, since by hypothesis, the declaror has already testified before the present jury and judge, and the demeanor evidence is executed. As to this limitation of dispensability, then, Professor Wigmore probably has reference to situations arising under the *exceptions* to the Hearsay Rule, which, following the above explanation, form a distinct and separable category.

As has been pointed out, if the "theory of general confrontation" is followed the problem of the admissibility of prior inconsistent statements as substantive evidence is further simplified, because, by hypothesis, the witness is present and testifying in court.[26]

There remains but one further item to be considered. The writer has been unable to find any direct authority to support the "theory of special confrontation" advanced infra, and which, it will be remembered, demands that the particular disputed state-

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[25] See 3 Wigmore, *Evidence* (2nd ed.) art. 1395, pp. 94-7. See Ryland, J., in State v. McO'Blemis (1857) 24 Mo. 421—"There are many things aside from the literal import of the words uttered by the witness while testifying on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witness are reproduced in the form of a deposition."

[26] Where the witness has died since testifying in court and the party adversely affected wishes to introduce his prior inconsistent statements, the same general principles as enunciated would govern i. e. if the statement were made in a deposition taken in the same manner or prior trial it would probably be admissible under statute. If the statement were made not subject to cross-examination, it would still be admissible following the theory that this element is satisfied by hypothesis.

ment be substantially declared to the present jury in order to meet the requirements of non-hearsay. On the other hand, there is apparently no primary authority in point for the proposition that where a prior inconsistent statement has satisfied the oath and cross-examination elements of the non-hearsay requirement, it is nevertheless admissible as substantive evidence, irrespective of the exceptions to the Hearsay Rule, although the statement was not substantially re-declared to the jury, as where the witness denied making the statement, or was unable to remember, or in any other way failed to substantially re-affirm, or where the witness has died before the prior inconsistent statement was sought to be introduced. However, there is some possible thread of argument in favor of the "theory of special confrontation," which will be presented in the form of a question. What is the purpose of the requirement that before introducing the prior inconsistent statement into evidence, even to impeach, the cross-examining party must first ask the witness whether or not he made the statement?[27] Is it not that where the witness is available and before statements attributed to him are introduced to impeach him, he should first be asked, as a matter of justice, whether or not he made the statements? Can it be maintained that such procedure should be relaxed when the statements are sought to be given even greater force by their introduction as substantive evidence? Hardly. Is not the imposition of this precautionary measure an indication that what the law seeks to do is force the witness to substantially re-affirm the statement to the present jury before allowing it any substantive value, which is the essence of the "theory of special confrontation"? The fact that where the witness denies etc., proof that he made the prior inconsistent statements by other witnesses is only admissible for purposes of impeachment,[28] even according to Professor Wigmore's theory,[29] strengthens this view. Furthermore, of what value is the estimate of a witness' general credibility gathered from an observance of his demeanor, to test his credibility as to a particular statement: the particular testimony might betray some uncertainty, hesitance, or other sanction for disbelief, not at all discoverable through an observance of the witness' demeanor while delivering all of his other testimony. It does not seem too severe to exact this more specific kind of confrontation.

III. CRITICISM OF THE THEORY AND AUTHORITIES ADVANCED IN *PULITZER V. CHAPMAN*

The theory of the court in *Pulitzer v. Chapman* in respect to the admissibility of prior inconsistent statements was borrowed

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[27] Supra, notes 10 and 11.
[28] Supra, notes 13a and 13b.
[29] Supra, note 13b.

in its entirety from Wigmore's *Evidence*. But under the special facts of the case, the problem was considerably reduced. The disputed statements were made in a deposition[30] during the same trial, and hence were made under oath and with an opportunity for cross-examination,[31] thus disposing of two of the possible elements of non-hearsay. As to the third, confrontation, the Court, adopting Professor Wigmore's theory, naturally dismissed it in short order. Since the original source of the theory has already been discussed, it is unnecessary to repeat the criticism here.

Before proceeding to an examination of the primary authorities advanced in support of the result in the instant case, some estimate of the scope of the decision will be made. According to the facts of the case, the party adversely affected by the introduction of the prior inconsistent statements allowed the evidence to be introduced without making any total or limitational objection, and allowed the trial to proceed to a verdict without requesting a limitational instruction, although he had such a right according to the state of the authorities before this decision.[32] The limitational objection was first made on appeal to the Supreme Court of Missouri. The objector, at that time, was guilty of laches in

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[30] The problem, here, was incidentally complicated by a Missouri statute, R. S. Mo. (1929) sec. 1780 (Mo. St. Ann., sec. 1780, p. 4037) which provides that the testimony of a witness given by deposition in a former trial of a cause, can only be used at a subsequent trial when the witness is dead, absent from the jurisdiction, etc. The Court, in admitting the evidence met the statute with the argument that the deposition of a present witness may be used to impeach, and ". . . To say such former statements may be considered as impeaching testimony, but not as substantive evidence is to make a distinction without a difference." (*Pulitzer v. Chapman*, supra, note 1, l. c. 411) and that ". . . a jury could not be expected to comprehend the difference . . ." (Ibid., l. c. 411). As to the correctness of this result no comment is offered.

But the Court, in making this observation, apparently overlooked the fact that in the particular case it was for the *Court* to decide, if any distinction was to be made, since whether or not the order of the trial court was sustainable depended the *question of law* as to whether the prior inconsistent statements could be considered as substantive proof. It is submitted that where the prior inconsistent statements form the *sole* substantial evidence on a particular issue, it makes no difference that the jury wouldn't be able to make the distinction which has been referred to, because the court should direct a verdict on that issue if the statements are considered inadmissible as substantive evidence, and seasonable objection is made.

[31] 8 R. C. L. 1130—"A deposition is sometimes used both in common parlance and in legislative enactment as anonymous with "affidavit" or "oath" but in its more technical and appropriate sense, the meaning of the word is limited to the written testimony of a witness given in the course of a judicial proceeding at law or in equity, in response to interrogatories either oral or written, and where an opportunity is given for cross-examination."

[32] Snyder v. Murray (Mo. App. 1929) 17 S. W. (2nd) 639, 645; State v. Kilgore (1879) 70 Mo. 546, 558. Also see supra, note 8.

respect to the objection, which raised an issue of waiver of defect by failure to object seasonably. Concerning this factor, the Court stated: "The testimony was received without objection. . . But in order that we may not be misunderstood, we hold further that even if an attempt had been made by proponents to limit the effect of Judge Cave's deposition to mere impeachment, it would have been futile, and that the parts of the deposition mentioned, *as proven by the witness' admissions,*[33] were competent as substantive evidence."[34]

This statement, strictly speaking, is dictum, since as a matter of fact such a case was not presented to the Court. But it is dictum of such a forceful nature that it might well be relied upon as primary authority in similar cases which may arise in the future. The Court deliberately avoided deciding the case on the issue of waiver.

Ordinarily, it might be considered too critical to make a belabored examination of the primary authorities relied upon in a particular decision, but the peculiar nature of the present problem, and the signal importance of the present case, should excuse such an investigation here.

Until the enunciation of the present decision, the Missouri cases followed the "prevailing rule" mentioned herein,[35] with only one apparent "exception." This "exception" which the Court leans upon for its solitary primary precedent is *Berry v. Peacock Coal & Development Co.*,[36] where, in an action for personal injuries the defendant's employee gave testimony at the trial inconsistent with statements made by him in a deposition taken before the trial. The deposition itself was offered and received in evidence without question, and concerning an objection to its use as substantive proof of the facts contained therein, the Kansas City Court of Appeals stated: "It is said that deposition . . . cannot be considered by the jury as a proof of the statements made therein, but only as affecting the witness' credibility. This, however, is untenable. The statements were made under oath and as evidence in this case; they were in a deposition regularly

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[33] Italics supplied. It is submitted that the word "admissions" here has reference to the witness' affirmative answer when asked whether he made the prior inconsistent statement, and is not be construed as the technical use of the word under the exception to the hearsay rule, described as "admissions against interest."

[34] Pulitzer v. Chapman, supra, note 1, l. c. 412.

[35] Peck v. Ritchie (1877) 66 Mo. 119; State v. Kilgore (1879) 70 Mo. 558; State v. Hughes (1880) 71 Mo. 635; Fesler v. Hunter (Mo. App. 1931) 35 S. W. (2nd) 641; Staley v. Lawler (1930) 224 Mo. App. 884, 27 S. W. (2nd) 1039; Swift v. St. Louis & S. F. Ry. Co. (Mo. App. 1929) 15 S. W. (2nd) 964; Gardner v. Eldridge (1910) 149 Mo. App. 210, 130 S. W. 403; Shoninger v. Day (1893) 53 Mo. App. 147.

[36] (Mo. App. 1923) 253 S. W. 456.

taken in this case, and the deposition was offered and received in evidence without objection or limitation in any way."[37] This opinion merely states its conclusion dogmatically without any express analytical process, or citation of authority. The only logical inference is that the Court failed to see the existence of a problem, and reached its result more by intuition than by conscious ratiocination. To begin with, the case differs from *Pulitzer v. Chapman* in that here *the deposition itself* was received in evidence, and it is not clear from the report whether or not the witness was ever asked whether he made all the statements in the deposition. Secondly, since the witness in the *Berry* case was an employee of the party adversely affected by the introduction of the deposition, and since no objection was made to its introduction, it is suggested that the Court might have allowed the statements to be given probative value on some theory of vicarious admissions,[38] rather than upon the unprecedented theory for which the case is cited in *Pulitzer v. Chapman.* It is significant in this regard that the Court in that case refers to the deposition statements in the *Berry* case as "admissions made by the witness *in his deposition,*"[39] whether by design, or incidental ambiguity of phrase. Thirdly, the opinion in the *Berry* case fails to discuss the issue raised by the use of a deposition of a present witness, although a statute identical to the one referred to in *Pulitzer v. Chapman* was operative at the time.[40] Fourthly, *Berry v. Peacock* was overruled "sub silentio" by the case of *Snyder v. Murray*[41] where the Kansas City Court of Appeals, in an opinion delivered by Judge Bland, held that the prior inconsistent statements of a defendant's witness (who was also a co-defendant), contained in his deposition taken during the trial, and used by the plaintiff for purposes of impeachment, were not admissible as substantive evidence, the Court expressly stating: "This testimony was contained in the deposition of Murray (the witness and co-defendant),[42] used by plaintiff solely

[37] Ibid., l. c. 460.

[38] This suggestion results from the very absence of a rationale in the case under discussion. It is at least questionable whether the Kansas City Court of Appeals would make such a direct departure from the historic rule without some explanation. For the theories of adoption and agency which might have authorized the decision, see: 2 Wigmore, *Evidence* (2nd ed.) art. 1069, p. 552 (general statement): Ibid, art. 1075, p. 577 (theory of adoption): Ibid., art. 1078, p. 586 (theory of agency).

[39] Italics supplied. Pulitzer v. Chapman, supra, note 1, l. c. 412. The use of this language removes the possibility that the Court meant "admissions" by the witness that he made the disputed statements, as explained in supra, note 33. It is still, possible, however, that the Court is using the word "admissions" here as a generality, synonymous with "statements."

[40] R. S. Mo. (1919) sec. 5467, p. 1748.

[41] Supra, note 32, cited with approval in Fesler v. Hunter, supra, note 35.

[42] Parenthetical comment supplied.

for purposes of impeachment, and therefore this testimony cannot be considered *for any other purpose except impeachment. . .*"[43] The evidence, if admissible, was otherwise competent and had probative value on the main issue in the case, which was whether or not the one defendant was liable via agency for the acts of the co-defendant witness which had allegedly contributed to the plaintiff's injury. Lastly, it must be remembered that in the *Berry* case, too, the party objecting to the introduction of the prior inconsistent statements was guilty of laches in not raising his objection until appeal. It is very possible that the Court's decision was based entirely upon this fact. At least, the Court, in that case did not expressly negative such a construction of its decision, as was done in *Pulitzer v. Chapman.* This forceful dictum creates a strong inference that the Court was aware of the latent limitation of the *Berry* case, but was nevertheless citing the case for the point which the decision apparently did not consider. Considering all these factors, it is at least questionable whether *Berry v. Peacock* is reliable authority for the decision in *Pulitzer v. Chapman.*

The only other case cited here as authority for the result was *United States ex rel. Ng Kee Wong v. Corsi*[44] where, in a proceeding before a special board of the bureau of immigration, the "prevailing rule" was termed "an artificial doctrine," and it was held that a transcript of the earlier sworn inconsistent testimony of a witness could be received in another case, not only to impeach the witness, but also as affirmative proof of the facts stated. The only difficulty with this citation is that it is authority as well for the proposition that such administrative boards are not bound by the common law rules of evidence.[45]

The purpose of this fulsome treatment of the authorities advanced in *Pulitzer v. Chapman* has not been, in any sense, a criticism of the Supreme Court of Missouri, and it is not to be so considered, but rather, it has been an attempt to show that the decision in the instant case upon the point of evidence under discussion, was unprecedented, and that, in reality, the authority for the proposition enunciated is Professor Wigmore's theory thereof.

IV. CONCLUSION

In the preceding analysis it has been the intention of the writer to sound the depths of the rule of law that prior inconsistent statements of a witness are admissible only for the purposes of impeachment, and to gather together, for the first time, the theory and primary authority relevant to the application of the rule, in

[43] Supra, note 32, l. c. 645.
[44] (C. C. A. 2, 1933) 65 Fed. (2nd) 564.
[45] Ibid., l. c. 565.

order to arrive at some rational formula for the solution of any particular situation which might happen to arise in the future. It is believed that such a formula is discoverable from a perusal of this note. But to etch the idea more distinctly, the various components of the process will be brought together here.

In considering the admissibility of prior inconsistent statements of a witness, the following rationale is suggested. The tribunal should first consider the rule that prior inconsistent statements are admissible only to impeach, and should realize that the rule is only applicable where the statements are hearsay. The next consideration is whether or not the particular statements are hearsay. If Professor Wigmore's theory is adopted, it would seem that in no case could such statements be considered hearsay; but as above noted, that theory is subject to some considerable adverse criticism. At all events, the tribunal should determine what it believes to be the requisite elements of non-hearsay, and if the particular statements possess all of those elements, then the rule should not be applied, and the statements should be given substantive effect. Where the statements are admissible under any of the exceptions to the Hearsay Rule, it is submitted that the limitational rule is equally as inapplicable, since the exceptional rule has a preferential sanction.

Concerning Professor Wigmore's theory, which, if adopted, would abolish entirely the prevailing rule, the above consideration has attempted to illustrate that such a theory is extreme in certain respects. The fact that such an eminent and authoritative juristic scholar should have entertained, for such a long time, the idea that the prevailing rule should inevitably apply,[46] and then swing to the other pole, and advance the theory that the prevailing rule should inevitably not apply,[47] is evidence that at least there are two facets to this legal "gem," and indirectly serves to suggest that there is possibly a "golden mean" solution, which is represented by the theory that *prior inconsistent statements which are hearsay, but not subject to any exceptional hearsay rule, are admissible only for purposes of impeachment: that it is possible to have prior inconsistent statements which are not hearsay; and that such statements are admissible as substantive evidence as well as for purposes of impeachment.*

Whether or not the writer has succeeded in establishing this possible theory is unimportant. It is submitted that the primary object of the discussion has been to assemble and clarify the issues raised by the legal situation.

ARTHUR J. BOHN '36.

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[46] 2 Wigmore, *Evidence* (1st ed. 1904) art. 1018 (b), p. 1180.
[47] 2 Wigmore, *Evidence* (2nd ed.) art. 1018 (b), p. 460.