NATURAL RESOURCES JOURNAL

Volume 2
Issue 3 *Fall 1962*

Summer 1962

Impeachment of Witnesses in New Mexico by Proof of Prior Inconsistent Statements

Jerald Jacob Monroe

IMPEACHMENT OF WITNESSES IN NEW MEXICO BY PROOF OF PRIOR INCONSISTENT STATEMENTS

Proving that a witness has on some occasion prior to trial made a statement inconsistent with his present testimony is probably the most popular and effective mode of impeachment.[1] Impeachment by proof of prior inconsistent statements has a long history and numerous rules governing its use have developed which lay an easy trap for the unwary examiner.

In New Mexico, use of prior inconsistent statements to impeach is governed primarily by the following statutes:

(1) Inconsistent Statements Not in Writing:

> If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it, but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement.[2]

(2) Inconsistent Writings:

> Upon the trial of any cause a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject-matter of the cause without such writing being shown to him, but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him.[3]

(3) Inconsistent Statements of Own Witness:

> [I]n case . . . [a party's own] witness, in the opinion of the judge, proves adverse, such party may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement.[4]

---

1. See McCormick, Evidence § 33 (1954).
2. N.M. Stat. Ann. § 20-2-2 (1953).
3. N.M. Stat. Ann. § 20-2-1 (1953).
4. N.M. Stat. Ann. § 20-2-4 (1953).

To avoid confusion insofar as possible, the person to be impeached by proof of the prior inconsistent statement (the primary witness) will often be referred to as *W*. Analysis will be facilitated by remembering there are two ways to prove a prior inconsistent statement: first, by obtaining an admission from the primary witness; second, by introducing extrinsic evidence. Distinct problems are raised by each method.

The topics to be considered are: (I) How the Primary Witness is Impeached by a Prior Inconsistent Statement, (II) Limitations on the Subject-Matter of the Prior Inconsistent Statement, (III) Necessity of an Inconsistency, (IV) Effect of an Admission of a Prior Inconsistent Statement, (V) Foundation for Introducing Evidence, and (VI) Competency of the Impeaching Evidence.

I

HOW THE PRIMARY WITNESS IS IMPEACHED BY A PRIOR INCONSISTENT STATEMENT

Little discussion is found concerning how a witness is impeached by showing he has made a prior inconsistent statement. Wigmore theorizes that the statement shows "the witness to be in general capable of making errors in his testimony."[5] He believes that whatever the cause for the inconsistency, *W's* general credibility has been impeached because the court is willing to conclude that if *W* is capable of making errors on the particular point, he is capable of making errors on other points. McCormick, on the other hand, says the inconsistency casts doubt on the truthfulness of both the statement at trial and the prior statement.[6] This seems the better theory since it focuses attention on the weight to be given *W's* testimony on the particular point, not merely on the weight to be given his overall testimony. Certainly, both of the statements cannnot be true; and the inconsistency justifys the jury's disregard of *W's* testimony on the particular point.

Under either of the above theories the prior statement is offered to show an inconsistency from which inferences may be drawn. The prior statement cannot be used to prove the truth of the matter asserted as it would be hearsay when offered for that purpose.[7] Although the rule thus limiting use of the statement to impeachment has been severely criticised,[8] it is well settled and arguments for its abolition are beyond the scope of this paper. It is sufficient to say the prior inconsistent statement may not be used to prove the truth of the matter asserted in the statement and use of the testimony must be strictly limited to impeachment.

5. 3 Wigmore, Evidence § 1017 (3d ed. 1940).
6. McCormick, Evidence § 34 (1954).
7. McCormick, Evidence § 39 (1954).
8. See, *e.g.*, 3 Wigmore, Evidence § 1018 (3d ed. 1940); McCormick, Evidence § 39 (1954).

II

LIMITATIONS ON THE SUBJECT MATTER OF THE PRIOR INCONSISTENT STATEMENT

According to the general rule, extrinsic proof of a prior inconsistent statement will not be admitted if the subject of the statement is "collateral."[9] In New Mexico, under Section 20-2-2, the statement must be "relative to the subject-matter of the cause." Since either rule is inherently ambiguous, application must turn on the rule's purpose.

As a matter of trial expedience, some reasonable limitation must be placed on proof of prior inconsistent statements. The essential question is how far down the chain of inferences from the ultimate fact the subject matter of the prior inconsistent statement may be before the court should conclude that the statement's probative value is too slight to justify the court's time and the risk of confusing the jury. This balancing process should control introduction of the statement.

Our Supreme Court has not analyzed the problem of "collateralness" in terms of Section 20-2-2; instead, it has fallen back on what Dean Leon Green calls the "word ritual" of simply repeating traditional common law language: if the prior inconsistent statement goes to one of the "issues" in the case, its subject is not "collateral and immaterial."[10] Also, it may be introduced if it goes to a "relevant or competent issue"[11] or bears "directly upon the question whether appellant did it."[12]

In addition to going directly to the merits, prior inconsistent statements going initially to *W's* interest or bias are properly introduced.[13] Apparently both types of statements meet the requirement of Section 20-2-2 by going to a subject which is "relative to the subject-matter of the cause."

This is all we have on the topic of what affirmatively is a proper subject for impeachment under the general rule of the statute. It is well to note that in appraising the value of a prior inconsistent statement the court must keep in mind that the statement cannot be used to prove the truth of the matter asserted unless some hearsay exception is found.

Another line of cases establishes one situation where impeachment by extrinsic proof of the prior inconsistent statement will *not* be allowed. Suppose *D* is on trial for the murder of *X*. Z, a witness for the prosecution, testifies to an argument between *D's* wife and *X* sometime prior to the murder. If *D* was not present at the argument, what actually took place is irrelevant; only what *D*

9. McCormick, Evidence § 36 (1954).

10. *In re* Chavez' Will, 39 N.M. 304, 305, 46 P.2d 665, 666 (1935).

11. State v. Pruett, 22 N.M., 223, 234, 160 Pac. 362, 366 (1916).

12. State v. Smith, 32 N.M. 191, 202, 252 Pac. 1003, 1008 (1927).

13. See, *e.g.*, State v. Smith, 54 N.M. 170, 216 P.2d 921 (1950); State v. Kile, 29 N.M. 55, 218 Pac. 347 (1923); State v. Newman, 29 N.M. 106, 219 Pac. 794 (1923).

heard of the incident is important. Nevertheless, since the prosecution has introduced the irrelevant evidence, *D* will be allowed to rebut it. If *D* then places *W* on the stand to testify that there was no such argument and the prosecution wishes to impeach *W's* testimony on the matter, he will not be allowed to do so by extrinsic evidence since the trial court has already determined the issue is irrelevant (or collateral).[14] The subject is too far removed from the ultimate issues to justify extrinsic evidence designed to cast doubt on *W's* testimony concerning that subject. Of course, any inconsistent statement may in some manner reflect on *W's* general credibility, but the reflection is too fuzzy to warrant the expenditure of time and possible confusion of issues entailed by extrinsic proof of the prior inconsistent statement.

III

NECESSITY OF AN INCONSISTENCY

A prior statement is of no value to the jury in assessing *W's* credibility unless it is inconsistent with his testimony at trial.[15] Our cases have not discussed what variance is required before the statements are "inconsistent;" apparently something less than a direct, express contradiction will suffice.

Many New Mexico cases have established the rule that *W's* previous failure to disclose facts given at trial may be shown if the witness would have been expected to speak in the situation. The evidence has been allowed where *W* had "an opportunity to speak and where it would have been natural to speak,"[16] where it was his "duty" to speak,[17] where the situation "called for him to speak,"[18] and where he had "the opportunity and the duty to speak."[19] For example, in *State v. Perkins*,[20] *W* originally implicated two men but later implicated another two and testified against them; the original two were not on trial. Failure to initially implicate the other men was an omission which could be shown as a prior inconsistent statement. Also, signing a complaint against the original two was said to have been an inconsistent act.

The requirement that the omission be shown only when it would have been

14. State v. Kile, 29 N.M. 55, 218 Pac. 347 (1923); State v. Pruett, 22 N.M. 223, 160 Pac. 362 (1916). The facts of both cases are similar to the example.

15. Since the question of impeachment never arises unless *W* has given damaging testimony, the problem of what form the statement on direct examination must take is never discussed.

16. State v. Archer, 32 N.M. 319, 327, 255 Pac. 396, 400 (1927) (evidence also allowed if it was his duty to speak).

17. State v. Perkins, 21 N.M. 135, 153 Pac. 258, 259 (1915).

18. State v. Kidd, 24 N.M. 572, 585, 175 Pac. 772, 776 (1918).

19. State v. Fletcher, 36 N.M. 47, 50, 7 P.2d 936, 938 (1932) (the court states the rule as "opportunity *or* duty" in the same paragraph).

20. 21 N.M. 135, 153 Pac. 258 (1915).

"natural" to speak is uncertain at best. Yet the New Mexico cases have allowed the evidence only where there was a reasonable probability that *W* would have spoken.

To prove that *W* did not make the statement at a prior hearing, the entire record of the hearing may be allowed in evidence.[21]

IV

EFFECT OF ADMISSION OF PRIOR INCONSISTENT STATEMENT

Sections 20-2-1, 20-2-2, and 20-2-4 do not explicitly state that if *W* admits making the inconsistent statement the cross-examiner may not show the prior inconsistent statement by extrinsic evidence. But the statutes do say extrinsic proof will be permitted unless *W* distinctly admits making the statement, the implication being that if he does admit making the statement extrinsic proof will not be permitted. It should be noted, however, that only a distinct admission will suffice. If *W* says he "does not remember" whether he made the prior inconsistent statement, the cross-examiner may still introduce extrinsic proof of the statement.[22]

V

FOUNDATION FOR INTRODUCING EXTRINSIC EVIDENCE

Extrinsic evidence offered to prove a prior inconsistent statement may not be introduced unless a proper foundation has been laid. And the manner of laying the foundation depends upon whether the prior inconsistent statement was oral or written.

If cross-examiner wishes to prove an oral prior inconsistent statement, the general rule is that he must ask *W* whether he made the statement, having first mentioned "the time, the place, and the person" to whom the statement was made.[23] Our Supreme Court has said that a foundation is required to protect *W* by giving him an opportunity to deny the statement, explain it, or reconcile it with his present testimony.[24] Other courts find additional justification for the rule in that it helps to avoid unfair surprise to the opposing party and saves the court's time by making further proof unnecessary.[25]

Obviously the purpose of the rule is fulfilled if *W* is given enough information to jog his memory so that he will not deny the prior statement simply because

21. Territory v. Clark, 15 N.M. 35, 99 Pac. 697 (1909) (if error, it was not harmful).
22. State v. Rodriquez, 23 N.M. 156, 167 Pac. 426 (1917).
23. McCormick, Evidence § 37 (1954).
24. See, State v. Thompson, 68 N.M. 219, 360 P.2d 637 (1961); Nichols v. Sefcik, 66 N.M. 449, 349 P.2d 678 (1960); Maestas v. Christmas, 63 N.M. 447, 321 P.2d 631 (1958); State v. Fletcher, 36 N.M. 47, 7 P.2d 936 (1932); State v. Carabajal, 26 N.M. 384, 193 Pac. 406 (1920).
25. McCormick, Evidence § 37 (1954).

he has forgotton about it. This can be done without necessarily giving specific, detailed information concerning the time, place, and person to whom the statement was made. The trial court should be allowed to hold that a foundation is sufficient even if it does not strictly comply with the "time, place, and person" rule if on the facts *W* has been adequately informed. Our statute leaves the door open for such an approach, since it only says that "the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness."[26] Thus, the statute does not expressly require that the time, place and person to whom the statement was made be mentioned to *W*.[27]

In *State v. Kidd*,[28] an early New Mexico case, the court interpreted the statute as setting forth a flexible requirement: consideration will be given to all the circumstances including the testimony preceding the impeaching question, the question itself, and the answer to the impeaching question to see if *W* received fair warning.[29] Although the impeaching question did not specifically designate the place of the particular occasion, the court held that an adequate foundation had been laid. A rigid "time, place, and person" rule would have required exclusion of the extrinsic evidence.[30]

The court, however, soon began to change its attitude and follow a more restricted rule. In *Maestas v. Christmas*,[31] our Supreme Court affirmed exclusion of extrinsic proof of a prior inconsistent statement based on the trial court's conclusion that the foundation was insufficient. *W* had made statements concerning the matter in issue on two prior occasions: at the time of the accident and later at his home. On cross-examination, he was asked whether he had not made an inconsistent statement "that night," which might have referred to either occasion. In affirming the exclusion, the Supreme Court said:

> This Court has laid down a strict and fixed rule that before a witness may be impeached by proof of former contradictory statements, his attention must be first directed to what may be brought forward for that purpose. And, that this must be done with particularity as to time, place and circumstances. . . .[32]

As authority for the rule, the court cited *State v. Fletcher*,[33] a case dealing with the necessary foundation for showing a prior *omission* which was inconsis-

26. N.M. Stat. Ann. § 20-2-2 (1953).

27. The witness must also be asked "whether or not he did make such statement." N.M. Stat. Ann. § 20-2-2 (1953). And the impeaching question must be identical to the testimony of the impeaching witness. State v. Riley, 32 N.M. 83, 251 Pac. 384 (1926).

28. 24 N.M. 572, 175 Pac. 772 (1918).

29. State v. Kidd, 24 N.M. 572, 175 Pac. 772 (1918).

30. The trial court was reversed on other grounds. State v. Kidd, 24 N.M. 572, 175 Pac. 772 (1918).

31. 63 N.M. 447, 321 P.2d 631 (1958).

32. Maestas v. Christmas, 63 N.M. 447, 452-53, 321 P.2d 631, 635 (1958).

33. 36 N.M. 47, 7 P.2d 936 (1932).

tent with *W's* testimony at trial. In *Fletcher,* the Supreme Court combined the requirement that the witness have fair warning with a separate requirement which goes to the relevancy of the omission: the circumstances of the omission must be such that one would naturally be expected to speak out before the omission is relevant. As the court in *Fletcher* framed the requirement:

> [T]he cross-examiner, before putting the impeaching question, must by his cross-examination at least make a prima facie showing as to the time, place, and circumstances of the omission, on the prior occasion, sufficient to warrant the inference that the opportunity for disclosure and the duty to disclose existed.[34]

Since the court was concerned primarily with the relevancy of the prior omission—whether it was inconsistent with *W's* trial testimony—the case did not support the determination in the *Maestas* case. And since the court in *Maestas* merely affirmed the trial court's exclusion of extrinsic evidence, the case held only that the trial court may, not that it must, rigidly apply the "time, place, and person" rule.

In *Nichols* v. *Sefcik,*[35] the Supreme Court again affirmed exclusion of extrinsic evidence based upon the trial court's finding that a proper foundation had not been laid. *W* had been asked whether he had discussed the case with one of the parties "in Tucumcari or Amarillo" and whether he had told one of the parties that the defendant had "quoted this price of 300 thousand."[36] The impeaching witness was allowed to state whether he had had certain conversations with *W* in Tucumcari and Amarillo but not to state the substance of the conversations. In affirming this exclusion, the court went one step further than previous decisions, saying that "the details of the statement" must be called to *W's* attention.[37] However, the actual defect seems to have been that the impeaching witness was not asked whether *W* had made the specific statement referred to above but rather was asked if he had had "certain conversations" with *W*. Clearly the testimony of the impeaching witness on anything other than the specific statement could not come in since no foundation had been laid.[38] The court need not have added that the "details of the statement" must be called to *W's* attention, thus inserting another element in an already cumbersome rule. The court also noted that the time and place of the particular statement were "not too definitely fixed on cross-examination"[39] but did not say the foundation was insufficient in those respects.

34. State v. Fletcher, 36 N.M. 47, 50, 7 P.2d 936, 938 (1932).
35. 66 N.M. 449, 349 P.2d 678 (1960).
36. Nichols v. Sefcik, 66 N.M. 449, 456-457, 349 P.2d 678, 683 (1960).
37. Nichols v. Sefcik, 66 N.M. 449, 457, 349 P.2d 678, 683 (1960).
38. See note 27, *supra.*
39. Nichols v. Sefcik, 66 N.M. 449, 457, 349 P.2d 678, 683 (1960).

One year later, the Supreme Court in *State v. Thompson*[40] was faced with the trial court's admission of extrinsic evidence based upon a foundation which the Supreme Court deemed inadequate. On cross-examination defendant had been asked, "Did you ever communicate a threat against the life of Jack Kasem on or about December 10, 1958 to a Mr. Curley Maples or a man named Maples whose nickname is Curley Maples?"[41] Defendant replied that "there has never been a threat made against Jack to anyone."[42] The trial court allowed the impeaching witness to testify over objection, but the Supreme Court reversed,[43] citing Section 20-2-2 and saying:

> The statutory provisions are mandatory and it is clear that the question propounded to appellant on cross-examination failed to meet the statutory test, particularly as to the place, the occasion, and the circumstances attending the making of the supposed statement. . . .[44]

The holding of the *Thompson* case apparently is that a foundation is necessarily inadequate if the place at which the alleged prior inconsistent statement was made has not been mentioned to the witness. And the case further indicates that the court would hold that a failure to mention the time or circumstances is also fatal. Both the holding and the implication are unfortunate.

Insofar as the *Thompson* case itself is concerned, the witness probably received adequate notice of the prior inconsistent statement that the prosecution had in mind. Both the approximate date and the person to whom the statement was allegedly made were pointed out.[45] To exclude the prior inconsistent statement simply because the place was not mentioned seems to put undue emphasis on form at the expense of substance. As a rule of trial practice, the doctrine of *Thompson* imposes dangerous and unwarranted limits on the trial judge's authority. Foundations will be found insufficient though *W* had adequate warning; valuable evidence will be kept from the fact-finder. These risks need not be incurred. They would be largely eliminated, and the purpose of the foundation requirement would be fulfilled, if the trial court had the power to admit extrinsic proof of a prior inconsistent statement where the information given *W* was sufficient to apprise him of the statement to which the cross-examiner was referring. No black-letter rule is desirable, since whether *W* was sufficiently apprised will

40. 68 N.M. 219, 360 P.2d 637 (1961).

41. State v. Thompson, 68 N.M. 219, 221, 360 P.2d 637 (1961).

42. State v. Thompson, 68 N.M. 219, 221, 360 P.2d 637 (1961).

43. Since the impeaching witness was testifying in rebuttal, his testimony regarding the alleged prior inconsistent statement could not come in as an admission to prove the truth of the matter asserted. The evidence should have been offered in the case in chief. State v. Thompson, 68 N.M. 219, 360 P.2d 637 (1961).

44. State v. Thompson, 68 N.M. 219, 222, 360 P.2d 637, 639 (1961).

45. Also, the witness was a party to the action, a fact which is normally sufficient to allow dispensing with the foundation requirement. See text at note 54, *infra*.

depend on the facts of the particular case. Indeed, it is arguable that the trial court should have discretion to admit the evidence even though no foundation has been laid. After all, *W's* interest is not the only one to be considered. There is also an interest in placing relevant material before the fact-finder. Though such discretion is not permitted under our statute, the court could at least maintain the flexibility permitted by the statute. The *Thompson* case should be abandoned—overruled or quietly forgotten—and the language or the statute should be established as the test, the sole test, for determining the sufficiency of a foundation.

The familiar *Queen Caroline's Case*[46] established the rule that before a witness may be cross-examined as to a previous inconsistent writing the writing must have been shown to him. Section 20-2-2 is substantially identical to the statute enacted in England to abrogate this rule.[47] Under our statute, the written statement need not be shown to *W* prior to cross-examination. However, if cross-examiner wishes to introduce the writing to prove the prior inconsistent statement, he must first bring *W's* attention "to those parts of the writing which are to be used for the purpose of so contradicting him,"[48] either by showing or reading the statement to him.[49] The statute, which is in accord with the Uniform Rules of Evidence,[50] provides reasonable limits for impeaching a witness by proof of a prior inconsistent statement made in writing. Adequate protection is given the witness while cross-examiner retains an effective means of impeachment.

An early New Mexico case held that if the deposition of a witness who is not present at trial is offered in evidence, a written prior inconsistent statement shown to him at the deposition cannot be introduced at trial to prove he was impeached unless the foundation was laid at the deposition.[51] The witness must have been given the same opportunity to explain the inconsistent writing as he would have if he were present at the trial.[52]

Erroneous failure to allow cross-examiner to lay a foundation for impeachment is not reversible error if extrinsic proof of the prior inconsistent statement is admitted despite the absence of a foundation.[53] The result is based upon the theory that a foundation is required to protect the witness, not to allow the cross-

46. 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820). See Kirchner v. Laughlin, 6 N.M. 300, 28 Pac. 505 (1892) (noting the statute did not change the requirement of a foundation for *introducing* the writing).

47. St., 1854, 17 & 18 Vict. c. 125, § 24.

48. N.M. Stat. Ann. § 20-2-1 (1953); Lopez v. Atchison, Topeka and Santa Fe Ry., 60 N.M. 134, 288 P.2d 678 (1955).

49. United States v. Fuller, 5 N.M. (Gild.) 80, 4 N.M. (John) 358, 20 Pac. 175 (1889).

50. Uniform Rule of Evidence 22 in 4 Jones, Evidence, Civil and Criminal (5th Ed. 1958).

51. Sandell v. Norment, 19 N.M. 549, 145 Pac. 259 (1915).

52. Sandell v. Norment, 19 N.M. 549, 145 Pac. 259 (1915); see also McCormick, Evidence § 37 (1954).

53. State v. Carabajal, 26 N.M. 384, 193 Pac. 406 (1920).

examiner to prove the prior inconsistent statement through an admission by *W*. This theory is questionable. There might be instances where exclusion of the foundation would be harmful. An admission by *W* that he made the prior inconsistent statement may do more to impeach his credibility than the testimony of another that *W* did make an inconsistent statement. Where the prior inconsistent statement is proven by extrinsic testimony, the weight to be given the inconsistency depends on the credibility of the extrinsic evidence. If *W* would have admitted the prior inconsistent statement and if the credibility of the impeaching witness would have been impeached, the trial court's action in preventing a party from obtaining *W's* admission should be deemed erroneous and should lead to reversal if the circumstances of the case warrant.

Most courts do not require a foundation for introduction of a prior inconsistent statement if the prior statement is an admission by a party to the action.[54] New Mexico, however, in *State v. Thompson*,[55] required that a foundation be laid if the statement cannot be used as affirmative evidence because it had been offered in rebuttal. No mention was made of two prior decisions in the New Mexico Federal District Court.[56] Thus, the rule might be that no foundation is necessary if the statement may be used as an admission but that a foundation is necessary if the statement must be used as a prior inconsistent statement. This is an anomalous result since the normal theory is that no foundation is required for an admission because the party knows the issues in the case and will not be unduly surprised by the statement and will have an opportunity to explain the inconsistency sometime during the trial.[57] The same theory should hold if the statement is used for impeachment. Nevertheless, perhaps the Supreme Court recognizes that there are situations where the party is surprised by a prior inconsistent statement and should have the opportunity to explain before extrinsic evidence is offered. Although the admission rule is well settled and not likely to be changed, no reason appears why a foundation should not be required when the statement is used for impeachment.

The common law placed various restrictions on impeaching one's own witness. Under Section 20-2-4 a party may impeach his own witness by showing a prior inconsistent statement if the witness "in the opinion of the trial judge, proves adverse." Numerous problems have arisen in interpreting this language.

Our court early established the requirement that before a witness may be deemed adverse within the meaning of the statute he must first have given

54. See McCormick, Evidence § 37 (1954).

55. 68 N.M. 219, 360 P.2d 637 (1961).

56. Central Surety & Ins. Co. v. Davidson, 46 F.2d 774 (10th Cir. 1931); United States v. Adamson, 184 Fed. 714 (8th Cir. 1910). Both cases held that the prior inconsistent statement was an admission and therefore no foundation was necessary for its introduction. *But cf.* State v. Rodriquez, 23 N.M. 156, 167 Pac. 426 (1917).

57. McCormick, Evidence § 37 (1954).

affirmative testimony which is prejudicial to the examiner.[58] If the witness merely responds "I don't remember," he has not given testimony hostile or prejudicial to the examiner and the trial court will be reversed for allowing such a witness to be impeached.[59] Although the court has offered no explanation for the rule, the theory probably is that since the witness has not given affirmative testimony he is simply "neutral" rather than "adverse." Using this theory, a witness cannot be adverse unless his testimony has been harmful. Apparently the court believes that "I don't remember" cannot be harmful. This may be true in most instances, but not always. For example, if cross-examiner asks *D* if he has made a contradictory statement to *W* and *D* denies that he has, a statement by *W* that he does not remember if *D* made such a statement will probably be taken by the jury as an assertion that *D* never made the statement. *W's* statement is harmful. In only one case has our Supreme Court held that "I don't remember" was not harmful; it is free to find such an answer harmful if the circumstances warrant.

If a party knows that *W's* testimony will be harmful but that *W* has made a prior statement that is helpful to the party, then the party might call *W* for the sole purpose of eliciting his harmful testimony as a basis for introducing the prior statement as a prior inconsistent statement. This certainly can be done if the only requirement for *W's* being "adverse" is that he give affirmative testimony harmful to the proponent. And, although the prior statement cannot properly be used as proof of the matter asserted (it is hearsay for that purpose), the jury may well use it as such proof and the party may be permitted, in effect, to circumvent the hearsay rule. This circumvention would be the result of not requiring something in addition to harm as a prerequisite to impeaching one's own witness.

Three cases have dealt with the question of whether something more than "harm" is required before a party's own witness will be said to have proven adverse. In *State v. Hite,*[60] the court noted that the statute apparently broadens the common-law rule which required a showing of "surprise" as an additional check against circumventing the hearsay rule. However, this statement was pure dictum since the court reversed on the ground that *W's* testimony had not been harmful to the party who called him. Also, *W* had given affirmative testimony at a grand jury hearing and seems to have surprised the examiner by his claimed inability to recall facts testified to at the hearing. In *State v. Lopez,*[61] the witness did not testify as expected and the trial court allowed impeachment. Surprise clearly was present, and no mention was made of the *Hite* dictum. Finally, in *State v. Garcia,*[62] a key witness for the state did an about-face when cross-

58. State v. Hite, 24 N.M. 23, 172 Pac. 419 (1918).
59. State v. Hite, 24 N.M. 23, 172 Pac. 419 (1918).
60. 24 N.M. 23, 172 Pac. 419 (1918).
61. 46 N.M. 463, 131 P.2d 273 (1942).
62. 57 N.M. 166, 256 P.2d 532 (1953).

examined. On re-direct examination, he refused to again give testimony favorable to the state. The Supreme Court found the witness to have been "hostile" and affirmed the trial court's action in allowing impeachment of the witness by introducing an affidavit consistent with his original testimony. Although the court did not speak of surprise, it certainly seems to have been present.

The Supreme Court has not established a rule that surprise is *not* required before a witness may "prove adverse;" on the contrary, surprise appears to have been present in every case.

Section 20-2-4 says that you may impeach your own witness if he "proves adverse." The quoted words can be construed to mean "comes to be adverse to the calling party." So construed, *W* could not be impeached if the calling party knew before trial that *W's* testimony would be harmful since a witness "proves adverse" only if the facts showing him to be adverse come out for the first time during his examination at trial. This not only is a tenable construction, but it is the only sensible construction. It is absurd to permit impeachment of a witness who is called solely for the purpose of being impeached. Section 21-1-1(43) (b) provides that a "hostile or unwilling" witness may be examined through leading questions. Under this section, impeachment is permitted only if the witness is an adverse party. Since the mere hostile witness is treated differently from the adverse party under 21-1-1(43)(b), the implication is that the hostile witness cannot be impeached. Before the witness is adverse and can be impeached something more is required; and it is suggested that that something should be "surprise."

An additional question is whether one's own witness may be asked on direct examination whether he has made a prior inconsistent statement, even though he has not proven to be adverse. That is, does the "adverse" requirement only go to introduction of extrinsic evidence? In an early New Mexico case, the Supreme Court indicated that this question should be answered in the affirmative since it upheld the trial court's ruling that a party's own witness may be examined as to a prior inconsistent statement in an effort to obtain an admission from the witness himself.[63] No mention was made of the "adverse" witness requirement. Although the danger of subterfuge perhaps is not as great when the party is not allowed to offer extrinsic evidence, the case establishes a rule which is difficult to justify and therefore should not be followed. Nothing in the statute indicates that the "adverse" witness requirement goes only to the introduction of extrinsic evidence.

The proponent of a witness may read a prior inconsistent writing to the witness for the purpose of refreshing his recollection, in which case it is unnecessary

63. State v. Fernandez, 37 N.M. 151, 19 P.2d 1048 (1933).

to find the witness to be adverse.[64] A traditional mode of direct examination, this rule raises a whole area of problems beyond the scope of this article.[65]

VI

COMPETENCY OF THE IMPEACHING EVIDENCE

All evidence offered for consideration by the trier of fact must meet some minimum standard of competency. Impeaching evidence is no exception.[66] New Mexico cases have discussed the competency of only two types of evidence offered to prove a prior inconsistent statement for impeachment: (1) confessions and (2) statements made at an inquest without jurisdiction.

The Supreme Court in *State v. Turnbow*,[67] ruled that a confession may not be introduced as a prior inconsistent statement to impeach unless the trial court is satisfied that the confession was voluntarily given. Yet, even though the foundation has not been laid "the state may initially cross-examine a defendant as to whether he has made a statement contrary to his testimony, but upon his denial thereof or his claimed inability to recall, may proceed no further."[68] The rule allowing cross-examination as to specific statements apparently follows from an earlier case (not mentioned in the opinion) which held that if *W's* prior statement was anything less than an acknowledgment of guilt, it is not a confession.[69] And since it is not a confession, no foundation is required for its introduction. Such a result is consistent with the confession rule as it has developed. Nevertheless, since an admission establishes a fact from which guilt may be inferred, cross-examination concerning the admission should not be permitted if the policy of requiring a voluntary confession is to be carried out. Otherwise, in order to avoid the confession rule all the cross-examiner need do is ask *W* about each element of the crime instead of whether he is guilty.

A prior inconsistent statement may be proved though made at an inquest which was without jurisdiction.[70] Inasmuch as a prior statement may be shown though not made at a formal hearing, the rule seems proper.

JERALD JACOB MONROE

64. Territory v. Livingston, 13 N.M. 318, 84 Pac. 1021 (1906).
65. See 3 Wigmore, Evidence ch. XXVIII (3d ed. 1940).
66. See State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960).
67. 67 N.M. 241, 354 P.2d 533 (1960).
68. State v. Turnbow, 67 N.M. 241, 255, 354 P.2d 533, 543 (1960).
69. State v. Lindsey, 26 N.M. 526, 194 Pac. 877 (1921).
70. State v. Coats, 39 N.M. 155, 42 P.2d 772 (1935).