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seems to contemplate such in its statute providing that no suit shall be brought against devisees and legatees to contribute to payment of a claim by excepting from the operation thereof, creditors whose claims were not due ten months before the day of settlement or whose claims were contingent and did not become absolute ten months before such day.[44]

It is believed that good legislation on this point should provide that: All absolute claims whether matured or unmatured, liquidated or unliquidated, shall be presented within ten months or be forever barred. Claims which are contingent as of the date of death of the deceased and which become absolute within the ten month's period shall be presented as fixed claims or be forever barred. If such contingent claims become absolute after the ten month period but before the estate is settled, they may be presented as a claim against the estate subject to the right of the personal representative to reject the claim on the ground of undue delay and embarrassment to him in the final administration of the estate. If such contingent claims becoming absolute after the ten month period are presented and rejected or if not presented to the administrator, suit may be brought against the heirs, devisees and legatees, each being held according to the proportion of the decedent's property each received.

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[44]R.C.M. 1935, 10314. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order for payment, has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section 10171, such creditor may recover on the bond of the executor or administrator the amount of his claim or such part thereof as he would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day

EFFECT OF PRIOR CONTRADITORY STATEMENTS IN IMPEACHMENT

The unorthodox view,[1] that prior self-contradictory statements are not only admissable for impeachment purposes but also as evidence of the fact contained in the prior statement, was adopted by the Montana Supreme Court in *State* v. *Jolly.*[2]

The defendant was being prosecuted for receiving stolen

[1]3 WIGMORE, EVIDENCE (3d ed. 1940) §1018, p. 687.
[2](1941) 112 Mont. 352, 116 P(2d) 686.

property. The only evidence bearing on the defendant's knowledge that the property had been stolen was testimony of one witness presented by the state. In answer to the county attorney's question relating to the stolen property, "Did you ever hear Mr. Jolly say that it was hot and that you would have to be careful," the witness answered, "I don't recollect that. I don't remember."

With leave of court the prosecution cross-examined the witness and an affidavit made by the witness about three months before the trial was admitted without objection or effort to limit its evidentiary effect. In the affidavit the witness stated that the defendant, Jolly, had in the spring of 1939, told him that the property was "hot" and that they would have to be careful.

Though the statement in court was not a direct denial of the previous statement, the court discussed the nature and effect of impeachment at length. A special concurring opinion by one justice agreed with the result reached in the case but not with the views expressed regarding the effect of impeachment by the balance of the court.

A leading authority[3] has discussed at length the historical development of the right to impeach one's own witness. In the primative modes of trial it was inconceivable that one should be allowed to dispute what his own chosen witness has said.[4] Today the rule is well established that the party on whose behalf a witnes appears can impeach that witness in certain ways.[5]

Under the Montana Statutes[6] he may not be impeached by evidence of bad character, but a proof of prior inconsistent statements is allowed under some circumstances. The circumstances under which such impeachment is permissible have

[3]WIGMORE, EVIDENCE (3d ed. 1940) §896 through §900.
[4]3 WIGMORE, EVIDENCE (3d ed. 1940) §896, p. 383.
[5]3 WIGMORE, EVIDENCE (3d ed, 1940) §896, p. 383.
[6]R.C.M. 1935, §10666. "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony as provided in §10669."
R.C.M. 1935 §10669. "A witness may also be impeached by evidence that he has made, at other times statements, inconsistent with his present testimony, but before this can be done the statements must be related to him, with the circumstance of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

been stated in several Montana cases.[7] The construction given by the Calfiornia Supreme Court to the California code sections, which were adopted in Montana,[8] was approved by the Montana Supreme Court in State v. Richardson.[9] The Court in the same case, citing two other Montana cases,[10] stated:

> "We think under the express terms of this statute[11] the state has the right to cross-examine one of its own witnesses where it satisfactorily appears that the evidence has taken the county attorney by surprise, and is contrary to the examination of such witness preparatory to the trial, or what the prosecuting attorney had reason to believe the witness would testify to."

One case[12] indicates the mere failure to testify to a material fact as expected is not sufficient, but, in addition to showing surprise, the witness must have given testimony hurtful to the party calling him. Though the county attorney was, on the day before the trial, apprised of the fact that the witness was unfriendly to the state, still his claim of surprise was allowed.[13] In this latter case the Court stated:

> "If the element of surprise be deemed material, we think it need not be confined to what develops after the witness takes the stand. No such narrow construction of the statute[14] is permissible. The purpose of the statute is to elicit the truth. This . . . must be reposed in the sound discretion of the court."

The orthodox view[15] as to the effect to be given prior contradictory statements, has been stated as follows.[16]

[7]State v. Kinghorn (1939) 109 Mont. 22, 938 P. (2d) 964;
State v. Clark (1930) 87 Mont. 416, 288 P. 186;
State v. Richardson (1922) 63 Mont. 322, 209 P. 124;
State v. Willette (1912) 46 Mont. 326, 127 P. 1013;
State v. Bloor (1898) 20 Mont. 574, 52 P. 611.

[8]State v. Kinghorn, see note 7, *Supra.*

[9]See note 7, *Supra.* "In construing these sections, the Supreme Court of California has held that, before a party calling a witness could impeach him, it must be shown that the party by whom the witness has been produced has been mislead and taken by surprise, that he had reason to believe the witness would give testimony favorable to him; and that a party under a guise of this rule cannot present to the jury mere hearsay declarations."

[10]State v. Willette, State v. Bloor, See note 7, *Supra.*

[11]R.C.M. 1935, §10666, See note 6 *supra.*

[12]State v. Kinghorn, See note 7, *Supra.*

[13]State v. Clark, See Note 7, *Supra.*

[14]R.C.M. 1935, §10666, See note 6, *Supra.*

[15]3 WIGMORE, EVIDENCE (3d ed 1940) §1018, p. 687.

[16]See note 15, *Supra.*

> "It is the repugnancy of his evidence that discredits him, obviously the prior self-contradiction is not used assertively; i.e., we are not asked to believe his prior statement as testimony and we do not have to choose between the two . . . We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other—but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one."

This view has been followed by the majority of courts,[17] including the Montana Supreme Court.[18] In support of this doctrine, it has been propounded that to give any other effect to such extra-judicial utterances would be violative of the Hearsay Rule.[19]

In State v. Jolly[20] the Montana Supreme Court held that such statements may have affirmative testimonial value. A

[17]Southern Railway Company v. Gray (1916) 241 U. S. 333, 60 L. Ed. 1030; Woody v. Utah P. and L. Co. (1939) (C. C. A. 10th, 1931) 54 F. (2d) 220; New York Life Insurance Company v. Bacalis (1938) (C. C. A. 5th, 1938) 94 F. (2d) 200; Minor v. State (1924) 162 Ark 136, 248 S. W. 121; Albert v. McKay and Co. (1917) 174 Cal. 451, 163 P. 666; Patton v. People (1946) 114 Colo. 534, 168 P. (2d) 266; Davis v. State (1923) 86 Fla. 103, 97 So. 350; Perdue v. State (1906) 126 Ga. 112, 54 S. E. 820; Ritter v. People (1889) 130 Ill. 255, 22 N. E. 605; Hogan v. State (1921) 191 Ind. 675, 133 N. E. 1; Dippert v. State (1929) 220 Ind. 483, 164 N. E. 626; Brown v. Commonwealth (1920) 188 Ky. 814, 224 S. W. 362; Manning v. Carberry (1899) 172 Mass. 432, 52 N. E. 521; Rankin v. Brockton Public Market (1926) 257 Mass. 6, 153 N. E. 97; People v. Miner (1905) 138 Mich. 200, 101 N. W. 536; People v. Nemeth (1932) 258 Mich. 682, 242 N. W. 808; State v. Johnson (1867) 12 Minn. 488; Simms v. Forbes (1905) 86 Miss. 412, 38 So. 546; State v. Baker (1896) 136 Mo. 74, 37 S. W. 810; Zimmerman v. Bank (1899) 59 Neb. 23, 80 N. W. 54; State v. Guida (1937) 118 N. J. 289, 192 Atl. 445; Balding v. Andrews (1903) 12 N. D. 267, 96 N. W. 305; Kent v. State (1884) 42 Ohio St. 433; State v. Chynoweth (1912) 41 Utah 354, 126 P. 302.

[18]State v. Kinghorn, See note 7, *Supra;* Wise v. Stagg (1933) 94 Mont. 321, 22 P (2d) 308; Monaghan v. Standard Motor Co. (1934) 96 Mont. 165, 29 P. (2d) 378; Stevens v. Woodmen of the World (1934) 105 Mont. 121, 71 P. (2d) 898; State v. Traufer (1940) 109 Mont. 275, 97 P. (2d) 336.

[19]3 WIGMORE, EVIDENCE, (3d ed. 1940) §1018, p. 687. "The prior statement is primarily hearsay, because it is not offered assertively, i.e. not testimonially. The Hearsay Rule simply forbids the use of extrajudicial utterances as credible testimonial assertions; the prior contradiction is not offered as a testimonial assertion to be relied on. It follows, therefore, that the use of Prior Self-Contraditions to discredit is not obnoxious to the Hearsay Rule."

[20]See note 2, *Supra.*

small minority of courts in other jurisdictions have also adopted such a view.[21] Though he expresses that the orthodox view is the majority opinion, Dean Wigmore has written:[22]

> "It does not follow, however, that Prior Self-Contradictions, when admitted, are to be treated as having no affirmative testimonial value, and any such credit is to be strictly denied 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 extrajudicial statement is rejected because it is made out of court by an absent person not subject to cross-examination. Here 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 process of the Hearsay Rule has been already satisfied. Hence there is nothing to prevent the tribunal from given such testimonial credit to the extrajudicial statement as it may seem to deserve."

The same author, in discussing the Hearsay Rule has said: "The most important objection to admission of hearsay as affirmative proof is that the declarant is not available for cross-examination and the court and the jury are without the opportunity to observe his demeanor on the stand.'[23]

This statement implies that the availability of the witness for cross-examination erases this objection.

In a footnote referred to in a discussion of the view, that prior contradictory statements may be treated as substantive evidence, Dean Wigmore states the following:[24]

> "The orthodox view was approved in the first edition of this Treatise. Further reflection, however, has shown the present writer that the natural and correct solution is the one set forth in the text above."

Another author[25] has indicated that a further objection to the orthodox rule is that it is, by its very nature, practically impossible to enforce. That it is an extremely difficult task

[21]Stewart v. Baltimore and Ohio Ry. Co. (1925) (C. C. A. 1st, 1925) 137 F. (2d) 527; Dicarle v. U. S. (1925) (C. C. A. 2d, 1925) 6 F. (2d) 364; Chicago, St. Paul, Minneapolis and Omaha Ry. Co. v. Kulp (1939) (C. C. A. 8th, 1939) 102 F. (2d) 352; Thomas v. State (1921) 200 Ala. 416, 90 So. 295; Rowe v. Goldberg Film Delivery Lines (1937) 50 Ariz. 349, 72 P. (2d) 432; Pulitzer v. Chapman (1935) 337 Mo. 298, 85 S. W. (2d) 400; People v. Kelly (1889) 113 N. Y. 647, 21 N. E. 122.

[22]3 Wigmore, Evidence (3d ed. 1940) §1018, p. 688.

[23]5 Wigmore, Evidence (3d ed, 1940) §1363.

[24]See note 22, *Supra.*

[25]6 Jones, Evidence (2d ed, 1926) §2414, p. 4769.

for a jury to obey the admonition of the court to consider the evidence for one purpose but to disregard it for all others.

While neither the Montana Court in the Jolly case, nor Dean Wigmore express any limitation upon the unorthodox rule, it is significant that the courts without stating any limitation, have in fact applied one. The cases in which prior self-contradictory statements have been given substantive value are cases in which the contradictory statements were either in affidavit from,[26] a deposition,[27] an official report,[28] or a statement admittedly uttered by the witness.[29] Where the witness has denied making the statement, and where the proof that he did make it rests in parol evidence, the courts have refused to apply the rule. Thus in Batchoff v. Craney,[30] decided by the Montana Court after the Jolly case, the court had before it what it regarded as a prior contradictory statement,[31] The court followed the Peterson[32] and Stagg[33] cases and held that a prior inconsistent statement had no substantive value. The court did not refer to the Jolly case in the opinion, which was written by the justice who had dissented in the Jolly case, and presumably did not intend to over-rule that case.

These cases can be harmonized only on the basis of the limitation suggested. In the absence of such a limitation the hearsay rule would be almost completely ineffective, since if substantive value can be given oral statements made cut of court by a witness who denies having made them, and notwithstanding the proof of such statements by oral testimony, then any case can be proven by hearsay evidence once a witness for the opposition has taken the stand.

In those cases where the witness being impeached is before the court, subject to cross-examination, and has either admitted prior contradictory statements or writings exist as proof of them, it is questionable whether the orthodox view should be retained.

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[26]Stewart v. Baltimore and Ohio Ry. Co., See note 21, *Supra;* State v. Jolly, See note 2, *Supra.*
[27]Puliter v. Chapman, See note 21, *Supra.*
[28]Chicago, St. Paul, Minneapolis and Omaha Ry. Co. v. Kulp, See note 21, *Supra.*
[29]Dicarlo v. U. S.; Thomas v. State; People v. Kelly; See note 21, *Supra.*
[30](1946) .... Mont. ...., 172 P. (2d) 308.
[31]It is interesting to note that in the Batchoff case the court failed to notice that statements made by a party to the law suit are admissions and as such are admissable as substantive evidence. (R.C.M. 1935 §10531, Sub-Sec. 2: Carey v. Guest (1927) 78 Mont. 415, 258 P. 236.) If the courts language in the Batchoff case states the law of Montana then the admissions exception to the hearsay rule has been abolished.
[32]State v. Peterson (1936) 102 Mont. 495, 59 P. (2d) 61.
[33]Wise v. Stagg, See note 18, *Supra.*