NY CLS CPLR R 4514

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New York

Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 45 Evidence (§§ 4501 — 4551)

R 4514. Impeachment of witness by prior inconsistent statement

In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath.

History

Formerly § 4514, add, L 1962, ch 308; amd, L 1962, ch 315, § 1, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Earlier statutes: CPA § 343–a.

Advisory Committee Notes:

This rule is the same as former § 343-a, except that the words “by prior inconsistent statement” have been added to the title and the phrase “irrespective of the fact that the party has called the witness or made the witness his own” has been stricken. The use of the words “any witness” in place of “a witness” achieves the same result. When read with the words “any party,” it is clear

that a party may examine his own witness. The words “permitted by common law” have been substituted for “now permitted by law” without intending any change of meaning.

Former § 343, which permitted testimony of a party taken at the instance of the adverse party orally or by deposition to be rebutted, is unnecessary in the light of CPLR rule 3117(d) and is omitted.

Notes to Decisions

I. Under CPLR

1. In general

As a general rule, the credibility of any witness can be attacked by showing an inconsistency between his testimony at trial and what he has said on previous occasions; however, as this testimony is often collateral to the ultimate issue before the jury and bears only upon the credibility of the witness, its admissibility is entrusted to the sound discretion of the Trial Judge whose rulings are not subject to review unless there has been an abuse of discretion as a matter of law. In order to prevent surprise and give a witness the first opportunity to explain any apparent inconsistency between his testimony at trial and his previous statements, there must be a proper foundation laid which clearly and fairly apprises the witness of the statements which may be subject to impeachment and, as such, he must first be questioned as to the time, place and substance of the prior statement. People v Duncan, 46 N.Y.2d 74, 412 N.Y.S.2d 833, 385 N.E.2d 572, 1978 N.Y. LEXIS 2380 (N.Y. 1978), reh'g denied, 46 N.Y.2d 940, 415 N.Y.S.2d 1027, 1979 N.Y. LEXIS 3048 (N.Y. 1979), cert. denied, 442 U.S. 910, 99 S. Ct. 2823, 61 L. Ed. 2d 275, 1979 U.S. LEXIS 2273 (U.S. 1979).

In action for injury to left knee allegedly sustained in 1970 when plaintiff fell over paint cans while working in building under construction, cross-examination of plaintiff, over objection, concerning 1958 injury resulting from fall at construction site, whether plaintiff had claimed that party sued had left debris lying around, whether plaintiff had told his doctor how a 1965 knee injury occurred and whether it was caused by tripping over some cans was improper, as indicating that plaintiff was both litigious and generally careless, and required reversal of jury verdict for defendants in absence of curative instruction. Molinari v Conforti & Eisele, Inc., 54 A.D.2d 1113, 388 N.Y.S.2d 782, 1976 N.Y. App. Div. LEXIS 15092 (N.Y. App. Div. 4th Dep't 1976).

In a wrongful death action, the trial court committed reversible error by refusing to allow the defense counsel to impeach a defense witness by introducing a signed prior inconsistent

statement of the witness which contradicted his testimony that he had not seen the decedent hold onto or place his feet on the outside of the subway train prior to his fall. Johnson v New York City Transit Authority, 79 A.D.2d 982, 434 N.Y.S.2d 477, 1981 N.Y. App. Div. LEXIS 9873 (N.Y. App. Div. 2d Dep't 1981).

In a negligence action involving a vehicle accident the offered proof of an investigating officer's testimony to impeach the credibility of a bus driver who witnessed the accident was improper rebuttal evidence, since the contradiction between the testimony of the two witnesses had already been established, and since the proffered rebuttal evidence could not have enlightened the jury further inasmuch as the officer had already testified in plaintiffs' direct case. Yeomans v Warren, 87 A.D.2d 713, 448 N.Y.S.2d 889, 1982 N.Y. App. Div. LEXIS 16052 (N.Y. App. Div. 3d Dep't 1982).

Evidence that robbery complainant had told friend that he knew defendant was not guilty, but that he had to blame someone, was not admission, since admission can only be made by party, and parties in criminal action are state and defendant; statement was, rather, prior inconsistent statement, which could be admitted not for its truth but to impeach credibility of witness. People v Auricchio, 141 A.D.2d 552, 529 N.Y.S.2d 163, 1988 N.Y. App. Div. LEXIS 6294 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 954, 534 N.Y.S.2d 668, 531 N.E.2d 300, 1988 N.Y. LEXIS 4009 (N.Y. 1988).

Party may not impeach credibility of witness whom he calls unless witness made contradictory statement either under oath or in writing. Jordan v Parrinello, 144 A.D.2d 540, 534 N.Y.S.2d 686, 1988 N.Y. App. Div. LEXIS 11930 (N.Y. App. Div. 2d Dep't 1988).

A bill of particulars verified by a parent in a representative capacity is not a prior inconsistent statement of an infant who happens to be an adversary witness sought to be impeached. Arestivo v Matusewitz, 60 Misc. 2d 236, 303 N.Y.S.2d 139, 1969 N.Y. Misc. LEXIS 1546 (N.Y. Dist. Ct. 1969).

In a personal injury suit based on an automobile accident, the supreme court erred when it limited direct examination by plaintiffs of a defendant driver because the driver, as an adverse party, was a hostile witness. Plaintiffs were entitled to cross-examine the driver with leading questions and plaintiffs were entitled to attempt to impeach the driver with alleged inconsistencies between an accident report the driver filed and deposition testimony the driver gave. Fox v Tedesco, 15 A.D.3d 538, 789 N.Y.S.2d 742, 2005 N.Y. App. Div. LEXIS 1850 (N.Y. App. Div. 2d Dep't 2005).

2. Written statements; pleadings

A prior statement subscribed by the witness may be introduced in order to impeach his credibility where the statement contradicts the statement given by the witness at the trial, even though the party seeking to impeach his credibility is the one who called him as a witness. Caplan v New York, 34 A.D.2d 549, 309 N.Y.S.2d 859, 1970 N.Y. App. Div. LEXIS 5307 (N.Y. App. Div. 2d Dep't 1970).

In an action arising out of a 2-car collision, where the co-plaintiff testified at trial that he could not estimate the speed of the defendant’s vehicle, a prior written statement of the co-plaintiff that the defendant had been traveling at 15 miles per hour, was offered by the defendant to contradict this testimony and was admitted in evidence despite the plaintiff’s objection that it was self-serving. Packer v Allen, 37 A.D.2d 664, 322 N.Y.S.2d 945, 1971 N.Y. App. Div. LEXIS 3659 (N.Y. App. Div. 3d Dep't 1971).

Statement, which plaintiff’s witness, who has been declared hostile, had previously typed for plaintiff’s counsel, and which concerned a conversation which witness had with defendant’s officers concerning plaintiff, could be used by plaintiff’s counsel as a means of indirect impeachment to refresh witness’ memory in action for alleged breach of employment contract, even though statement was not signed by witness. Cooper v Taller & Cooper, Inc., 48 A.D.2d 624, 368 N.Y.S.2d 175, 1975 N.Y. App. Div. LEXIS 9609 (N.Y. App. Div. 1st Dep't 1975).

In action for wrongful death and conscious pain and suffering arising out of decedent's fall into elevator shaft after he had apparently opened shaftway door despite interlock device, extra-judicial written statement by expert witness should not have been excluded on cross-examination; latter portion of statement was not secondhand retelling of someone else's opinion, but rather appeared to be expert's final conclusion, though meaning could have been explored both on cross-examination and on redirect examination. Hennessey v Long Island University, 51 A.D.2d 965, 380 N.Y.S.2d 719, 1976 N.Y. App. Div. LEXIS 11690 (N.Y. App. Div. 2d Dep't 1976).

It is always competent to show contradictory statements made by a witness as bearing upon his credibility and such rule applies to statements made in pleadings or affidavits. Gonzalez v Colella, 55 A.D.2d 534, 389 N.Y.S.2d 577, 1976 N.Y. App. Div. LEXIS 15180 (N.Y. App. Div. 1st Dep't 1976).

In a wrongful death action against a city for a fatal shooting by a city police officer, although small portions of statements by city employees had been introduced by the plaintiff for impeachment of their entire statements, for the most part self-serving and consistent with their testimony, reading them to the jury in their entirety could have prejudiced the plaintiff's case by adding undue credence to the testimony of biased city witnesses and thus constituted reversible error. Shufelt v New York, 80 A.D.2d 554, 435 N.Y.S.2d 356, 1981 N.Y. App. Div. LEXIS 10218 (N.Y. App. Div. 2d Dep't 1981).

The trial court in a personal injury action erred in refusing to admit a signed written statement that had been given to defendants' representative prior to trial by a witness to the subject accident on the asserted ground that the written statement was "redundant" and was the product of "a typical job by an investigator with conclusions which he put into the mouth of a man who does not read English and who does not understand English very well," since, whatever the witness' language problems, any out-of-court statement made by a witness is admissible for impeachment purposes, though not as substantive proof of the truth of such statement, so long as the statement contradicts a material part of his testimony and is properly proven, since the

witness' subscription of the statement constituted some evidence that he had made the statement or had authorized it to be made for him, and any testimony by the witness that he had not read the statement, had not heard the statement read, or had not made the statement went to the weight, rather than the admissibility, of the statement, since defendants had laid a proper foundation for the admission of the statement for impeachment purposes, and since any objectionable material in the statement could have been readily excluded and the balance admitted. Ahmed v Board of Education, 98 A.D.2d 736, 469 N.Y.S.2d 435, 1983 N.Y. App. Div. LEXIS 21046 (N.Y. App. Div. 2d Dep't 1983).

In an action for personal injuries, the trial court erred in denying defendant's application to introduce as evidence a statement given by a witness on the day of the accident. Although the statement was written by a detective, it was signed by the witness, and should have been admitted into evidence in view of the inconsistencies between the statement and the testimony of the witness that were relevant to the jury's assessment of his credibility (CPLR § 4514). Robbins v New York City Transit Authority, 105 A.D.2d 616, 481 N.Y.S.2d 349, 1984 N.Y. App. Div. LEXIS 20716 (N.Y. App. Div. 1st Dep't 1984).

Taxpayer in real estate tax assessment review proceeding is entitled to impeach county's expert appraisal witness with unfiled prior inconsistent written appraisal which would otherwise be inadmissible as material prepared solely for litigation and immune from disclosure. Hicksville Properties, Inc. v Board of Assessors, 116 A.D.2d 717, 498 N.Y.S.2d 24, 1986 N.Y. App. Div. LEXIS 51570 (N.Y. App. Div. 2d Dep't 1986).

In personal injury action alleging that plaintiff's motorcycle was forced off road by defendant's car which had its high beam headlights on and crossed over center line of road, plaintiff's bill of particulars asserting that car lights blinded his eyes, without mentioning that car crossed center line, constituted inconsistent statement and thus was admissible against plaintiff under "statement by party opponent" exception to hearsay rule. Hayes v Henault, 131 A.D.2d 930, 516 N.Y.S.2d 798, 1987 N.Y. App. Div. LEXIS 48356 (N.Y. App. Div. 3d Dep't 1987).

Court properly admitted, at tax certiorari proceeding, earlier appraisal report on property prepared by another member of appraisal firm in which owner's expert witness was employed; report could be used, at court's discretion, to impeach witness' credibility as prior inconsistent statement. Carriage House Motor Inn, Inc. v Watertown, 136 A.D.2d 895, 524 N.Y.S.2d 930, 1988 N.Y. App. Div. LEXIS 1334 (N.Y. App. Div. 4th Dep't), aff'd, 72 N.Y.2d 990, 534 N.Y.S.2d 663, 531 N.E.2d 295, 1988 N.Y. LEXIS 2719 (N.Y. 1988).

In action for imposition of constructive trust and to recover damages for conversion of securities in certain accounts, plaintiff's 1994 affidavit in another action, in which he stated that he never had ownership interest in assets in those accounts and that his name had been added to them and later removed by his parents in attempt to avoid inheritance taxes on their death, was admissible as informal judicial admission. Koslowski v Koslowski, 245 A.D.2d 266, 664 N.Y.S.2d 821, 1997 N.Y. App. Div. LEXIS 12122 (N.Y. App. Div. 2d Dep't 1997), app. dismissed in part, app. denied, 92 N.Y.2d 835, 677 N.Y.S.2d 68, 699 N.E.2d 427, 1998 N.Y. LEXIS 1718 (N.Y. 1998).

In action against city for slip and fall, letter from plaintiffs' attorney to Big Apple Pothole Corporation was admissible against plaintiffs as admission against interest where letter described location of accident that was inconsistent with injured plaintiff's trial testimony, and there was no basis to question attorney's authority to make representations on plaintiffs' behalf as to location of accident. DiCamillo v City of New York, 245 A.D.2d 332, 665 N.Y.S.2d 97, 1997 N.Y. App. Div. LEXIS 12773 (N.Y. App. Div. 2d Dep't 1997).

In personal injury action arising from motor vehicle accident wherein plaintiff called, as witness, passenger who had previously sued him and served verified bill of particulars alleging that he negligently attempted to make right turn from left-hand turn lane, court should have allowed bill of particulars into evidence where it contained sworn statement which was materially inconsistent with testimony given by plaintiff's passenger at trial. Mantuano v Mehale, 258 A.D.2d 566, 685 N.Y.S.2d 467, 1999 N.Y. App. Div. LEXIS 1257 (N.Y. App. Div. 2d Dep't 1999).

Trial court properly permitted a worker to impeach his own witness with his prior sworn statement. Brownrigg v New York City Hous. Auth., 70 A.D.3d 619, 898 N.Y.S.2d 545, 2010 N.Y. App. Div. LEXIS 791 (N.Y. App. Div. 2d Dep't 2010).

Plaintiff was not permitted, pursuant to CPLR 4514, to offer prior inconsistent written statement of friendly witness for impeachment purposes where it appeared from minor nature of inconsistencies that plaintiff was attempting to offer such statement as affirmative evidence. Scarborough v Schenck Transp. Co., 76 Misc. 2d 1074, 352 N.Y.S.2d 825, 1974 N.Y. Misc. LEXIS 1069 (N.Y. Sup. Ct. 1974), aff'd, 47 A.D.2d 718, 366 N.Y.S.2d 1005, 1975 N.Y. App. Div. LEXIS 13279 (N.Y. App. Div. 2d Dep't 1975).

When in proceedings to recover use and occupancy payments from a sublessee, a lessee attempted to introduce sworn statements from related holdover proceedings in which the sublessee vigorously opposed the lessee’s claim to possession of the premises, which contradicted the sublessee’s claim in the current case that she had relinquished possession, and the trial court inexplicably denied admission of this evidence, the trial court erred, under N.Y. C.P.L.R. 4514. Gale P. Elston, P.C. v Dubois, 18 A.D.3d 301, 795 N.Y.S.2d 33, 2005 N.Y. App. Div. LEXIS 5255 (N.Y. App. Div. 1st Dep't 2005).

Because a letter from a real estate company’s president was not a prior statement of the witness and because no foundation was laid for its admission as a business record, the letter should not have been admitted under N.Y. C.P.L.R. 4514 or 4518(a). Miller v Moore, 68 A.D.3d 1325, 890 N.Y.S.2d 712, 2009 N.Y. App. Div. LEXIS 8963 (N.Y. App. Div. 3d Dep't 2009).

3. Oral testimony

Reversible error occurred in perjury prosecution where, although prosecution was forewarned that witness called by it might state that he could not recall events as to which he testified before grand jury, witness was nonetheless placed on stand, did so testify, and trial court allowed witness to be impeached by his prior grand jury testimony. People v Fitzpatrick, 40 N.Y.2d 44, 386 N.Y.S.2d 28, 351 N.E.2d 675, 1976 N.Y. LEXIS 2780 (N.Y. 1976).

In action by guardian of plaintiff who sustained irreversible brain damage due to oxygen deprivation following surgery, trial court did not err in precluding testimony by plaintiff's cousin regarding alleged conversation in which 17-year-old high school intern who was present during incident told her that plaintiff was "blue" but nobody paid any attention until anesthesia technician who was also present asked "is this supposed to be this way" and asked if "something [was] wrong"; such testimony, offered to establish that plaintiff's hypoxia was result of inattention by defendant anesthesiologist and hospital staff, constituted inadmissible hearsay even though intern and anesthesia technician were available for cross-examination, where intern denied making such statements, they were not made in writing or under oath, they were made several days after incident, they were reported by plaintiff's cousin who may have had strong motive to shade her testimony, some statements involved double hearsay, and intern had no medical training and was not agent of defendant hospital such that her statements could be considered declaration against interest. Nucci v Proper, 95 N.Y.2d 597, 721 N.Y.S.2d 593, 744 N.E.2d 128, 2001 N.Y. LEXIS 103 (N.Y. 2001).

In condemnation litigation in which expert witnesses gave evidence of reproduction cost less depreciation which was completely inconsistent with earlier reports submitted by such experts to a trustee in bankruptcy, cross-examination should have been permitted to impeach the credibility of the witness. Port Authority Trans-Hudson Corp. v Hudson & Manhattan Corp., 27 A.D.2d 32, 276 N.Y.S.2d 283, 1966 N.Y. App. Div. LEXIS 2691 (N.Y. App. Div. 1st Dep't 1966), aff'd in part, modified, 20 N.Y.2d 457, 285 N.Y.S.2d 24, 231 N.E.2d 734, 1967 N.Y. LEXIS 1153 (N.Y. 1967).

Where plaintiff in personal injury action testified that when she was on train tracks she saw train one city block away, defense should have been permitted to show that on first trial of such action plaintiff had estimated distance to be to far row of seats in courtroom, which she had estimated to be 150 feet but which was actually 40 feet. Testimony by personal injury plaintiff's father as to conversations he had after accident with two eyewitnesses were hearsay and inadmissible to impeach testimony of such eyewitnesses where they had not yet testified.

Millington v New York City Transit Authority, 54 A.D.2d 649, 387 N.Y.S.2d 865, 1976 N.Y. App. Div. LEXIS 14158 (N.Y. App. Div. 1st Dep't 1976).

Issue whether police officer's testimony was rendered too unreliable for belief by prior inconsistent statements in accident reports he signed was reserved for the trier of fact, unless the appellate court could declare with moral certainty that the officer's trial testimony was so inherently improbable that it could not be true. Keane v New York, 57 A.D.2d 789, 394 N.Y.S.2d 681, 1977 N.Y. App. Div. LEXIS 11959 (N.Y. App. Div. 1st Dep't 1977).

Patient in medical malpractice action was entitled to use, for impeachment purposes, defendant ophthalmologist's prior testimony before Committee of Professional Conduct, even though CLS Pub Health § 230(9) proscribes discovery of such testimony, where patient's counsel was aware of testimony by virtue of his representation of another physician charged with misconduct, and patient was not seeking to discover testimony but rather to impeach ophthalmologist with it regarding his views of when use of diagnostic instrument and performance of cataract surgery were proper; however, court's failure to admit testimony did not require reversal of judgment since testimony would not have had substantial influence on verdict given weight of evidence supporting acquittal. Fallon v Loree, 136 A.D.2d 956, 525 N.Y.S.2d 93, 1988 N.Y. App. Div. LEXIS 1293 (N.Y. App. Div. 4th Dep't 1988).

In action by accounting firm to recover for services rendered to corporation, wherein corporation's founder asserted that his son did not have authority to retain accounting firm, court properly considered deposition testimony given by founder in another action, which was materially inconsistent with his testimony concerning his son's authority. Coopers & Lybrand v Arol Dev. Corp., 210 A.D.2d 181, 621 N.Y.S.2d 24, 1994 N.Y. App. Div. LEXIS 13112 (N.Y. App. Div. 1st Dep't 1994), app. denied, 85 N.Y.2d 804, 626 N.Y.S.2d 756, 650 N.E.2d 415, 1995 N.Y. LEXIS 1315 (N.Y. 1995).

In wrongful death action against city, police department, and individual patrolman, it was in the interest of justice to permit discovery pursuant to subpoena duces tecum of grand jury testimony of defendant officer, another officer, and medical examiner for use in possibly impeaching

testimony of such individuals should they appear as defense witnesses in civil action. Foley v New York, 75 Misc. 2d 664, 348 N.Y.S.2d 813, 1973 N.Y. Misc. LEXIS 1302 (N.Y. Sup. Ct. 1973).

II. Under Former Civil Practice Laws

4. Generally

This section is in derogation of the common law and must be strictly construed. Jenkins v 313-321 W. 37th Street Corp., 284 N.Y. 397, 31 N.E.2d 503, 284 N.Y. (N.Y.S.) 397, 1940 N.Y. LEXIS 803 (N.Y. 1940), reh'g denied, 285 N.Y. 614, 33 N.E.2d 547, 285 N.Y. (N.Y.S.) 614, 1941 N.Y. LEXIS 1633 (N.Y. 1941).

Excluding proof of defendant’s prior contradictory statements, made at previous trial and offered to impeach credibility, was error. GOLDMAN v MONACO, 25 N.Y.S.2d 35, 1940 N.Y. Misc. LEXIS 2556 (N.Y. App. Term 1940).

Recollection of witness may be challenged, but not his honesty or integrity. Rosati v H. W. E., Inc., 81 N.Y.S.2d 412, 1948 N.Y. Misc. LEXIS 2802 (N.Y. Sup. Ct. 1948).

5. Application to testimony of party

No inconsistent prior utterance of a codefendant is admissible unless it has been sworn to or subscribed by him. People v Romano, 279 N.Y. 392, 18 N.E.2d 634, 279 N.Y. (N.Y.S.) 392, 1939 N.Y. LEXIS 870 (N.Y. 1939).

CPA § 343-a was directed toward witnesses and not parties, and where during trial defendant was called as witness in his own behalf and testified against himself, and then his trial counsel offered in evidence written statement signed by defendant, which seriously impeached defendant’s testimony and plaintiff’s as well, such statement was inadmissible. Friedman v Berkowitz, 136 N.Y.S.2d 81, 206 Misc. 889, 1954 N.Y. Misc. LEXIS 3094 (N.Y. City Ct. 1954).

Trial counsel, who represents both defendant insured and also his insurer, cannot be allowed to impeach his client of record, when that client wishes to admit liability, so as to protect his other client, insurer. Friedman v Berkowitz, 136 N.Y.S.2d 81, 206 Misc. 889, 1954 N.Y. Misc. LEXIS 3094 (N.Y. City Ct. 1954).

6. Sufficiency of statement generally

Where witness testifies on cross-examination “We were going to get the priest” he may on redirect examination be impeached by prior written statement “I didn’t hear him give any reason for going.” Crawford v Nilan, 264 A.D. 46, 35 N.Y.S.2d 33, 1942 N.Y. App. Div. LEXIS 4061 (N.Y. App. Div. 1942), rev'd, 289 N.Y. 444, 46 N.E.2d 512, 289 N.Y. (N.Y.S.) 444, 1943 N.Y. LEXIS 1167 (N.Y. 1943).

Proof need not be direct and positive contradiction of witness; it is enough if it be inconsistent with testimony or tend to prove different facts. McCoy v Gorenstein, 282 A.D. 984, 125 N.Y.S.2d 683, 1953 N.Y. App. Div. LEXIS 5624 (N.Y. App. Div. 1953).

The right to scrutinize prior inconsistent statements cannot be cut off by admission of witness that he has been guilty of inconsistency; neither may such right be limited by direction of trial court that counsel for defendant might read to jury testimony he deemed to be inconsistent. Wachs v Commercial Travelers Mut. Acci. Ass'n, 283 A.D. 29, 125 N.Y.S.2d 857, 1953 N.Y. App. Div. LEXIS 2972 (N.Y. App. Div. 1953).

Where truck driver sued for personal injuries allegedly due to fall from defective steel step at rear of truck, his claim for compensation, in his own handwriting, filed with Workmen’s Compensation Board, stating that his injury was due to breaking of rope, was contradictory and admissible. Nappi v Falcon Truck Renting Corp., 286 A.D. 123, 141 N.Y.S.2d 424, 1955 N.Y. App. Div. LEXIS 3991 (N.Y. App. Div. 1955), aff'd, 1 N.Y.2d 750, 152 N.Y.S.2d 297, 135 N.E.2d 51, 1956 N.Y. LEXIS 923 (N.Y. 1956).

7. Formal requisites of statement; writing; oath

A prior inconsistent written statement of a witness was properly received in evidence to impeach him. Underhill v Slutzky, 260 A.D. 882, 22 N.Y.S.2d 997, 1940 N.Y. App. Div. LEXIS 5212 (N.Y. App. Div. 1940).

Signed writing renders it competent against witness who subscribed it. Hanratty v Bartley, 268 A.D. 512, 51 N.Y.S.2d 878, 1944 N.Y. App. Div. LEXIS 3206 (N.Y. App. Div. 1944).

Where a statement is subscribed, it can be used to impeach a witness even if it had not been made under oath. Therefore an oath adds nothing to the legal effect of such a statement. People v Lillis, 3 A.D.2d 44, 158 N.Y.S.2d 191, 1956 N.Y. App. Div. LEXIS 3398 (N.Y. App. Div. 4th Dep't 1956).

8. —Party's own witness

Under this section a party may impeach his own witness by statement inconsistent with his testimony, provided the statement was made in any writing by him subscribed. Bachand v Daniel Reeves, Inc., 279 N.Y. 179, 18 N.E.2d 23, 279 N.Y. (N.Y.S.) 179, 1938 N.Y. LEXIS 815 (N.Y. 1938).

This section does not permit the receipt of impeaching evidence consisting of prior unsworn oral statements by a party's own witness. The section refers only to written statements and statements made under oath. Jenkins v 313-321 W. 37th Street Corp., 284 N.Y. 397, 31 N.E.2d 503, 284 N.Y. (N.Y.S.) 397, 1940 N.Y. LEXIS 803 (N.Y. 1940), reh'g denied, 285 N.Y. 614, 33 N.E.2d 547, 285 N.Y. (N.Y.S.) 614, 1941 N.Y. LEXIS 1633 (N.Y. 1941).

Where in an action for negligence, plaintiffs had called defendant's superintendent as their own witness, it was reversible error for the trial court to receive, over objection and exception, testimony offered by them of oral contradictory statements made by such witness. Jenkins v 313-321 W. 37th Street Corp., 284 N.Y. 397, 31 N.E.2d 503, 284 N.Y. (N.Y.S.) 397, 1940 N.Y.

LEXIS 803 (N.Y. 1940), reh'g denied, 285 N.Y. 614, 33 N.E.2d 547, 285 N.Y. (N.Y.S.) 614, 1941 N.Y. LEXIS 1633 (N.Y. 1941).

Party calling witness of automobile collision may impeach him by putting in evidence prior inconsistent written statement of witness who identified his signature thereon. Morrison v P. Ballantine & Sons, 261 A.D. 500, 26 N.Y.S.2d 28, 1941 N.Y. App. Div. LEXIS 7367 (N.Y. App. Div. 1941).

9. Accident reports

Accident report, to Motor Vehicle Bureau made shortly after accident, showing material inconsistencies between report and maker's proof, was admissible and its exclusion error. Nagel v Paige, 264 A.D. 231, 35 N.Y.S.2d 321, 1942 N.Y. App. Div. LEXIS 4117 (N.Y. App. Div.), app. denied, 264 A.D. 918, 36 N.Y.S.2d 237, 1942 N.Y. App. Div. LEXIS 5354 (N.Y. App. Div. 1942).

In action for personal injury, it was prejudicial error to admit in evidence police report as affecting credibility of police officer, where it was based on hearsay statements obtained by him at scene of accident after its occurrence and did not purport to assert any fact of his own knowledge, and so was not contradictory of anything to which he testified. Wilson v Bungalow Bar Corp., 285 A.D. 1191, 141 N.Y.S.2d 106, 1955 N.Y. App. Div. LEXIS 7116 (N.Y. App. Div. 1955).

Report of accident signed and filed with Motor Vehicle Bureau admissible to impeach filer's testimony. Simonetti v Melhorn, 9 A.D.2d 768, 192 N.Y.S.2d 505, 1959 N.Y. App. Div. LEXIS 6377 (N.Y. App. Div. 2d Dep't 1959).

A statement alleged to have been made by defendant's chauffeur to a police officer on the street shortly after an accident was not a statement made in an "inquiry," as that term is used in this section (prior to amendment by Laws 1937, chap 307), so as to permit the impeachment of the chauffeur, who, when called by the defendant, denied making the statements sought to be established. Peck v Saltzman, 296 N.Y.S. 299, 163 Misc. 50, 1937 N.Y. Misc. LEXIS 1280 (N.Y. App. Term 1937).

10. Inconsistent statements as affirmative evidence

The rule that prior contradictory statements, whether made in court under oath or outside of court orally or in writing, may in a proper case be introduced to impeach the credibility of a witness, but do not constitute affirmative evidence or “evidence in chief” of the facts stated, is not changed by this section. The statute enlarges the field in which impeachment of a witness by proof of prior inconsistent statements is permitted, but does not in express terms or by fair implication provide that such proof may be introduced for purposes other than impeachment of a witness. Roge v Valentine, 280 N.Y. 268, 20 N.E.2d 751, 280 N.Y. (N.Y.S.) 268, 1939 N.Y. LEXIS 1316 (N.Y.), reh'g denied, 280 N.Y. 809, 21 N.E.2d 695, 280 N.Y. (N.Y.S.) 809, 1939 N.Y. LEXIS 1599 (N.Y. 1939).

In a proceeding involving the dismissal of petitioner from a city police department on the charge of receiving moneys from a lawyer for recommending clients, statements made in disciplinary proceedings against the lawyer were not competent, under this section, where no attempt was made to have the witnesses affirm or deny such statements. Such prior statements may be received in evidence not as proof of an issue in dispute but solely on the question of the credibility of the witnesses. Roge v Valentine, 280 N.Y. 268, 20 N.E.2d 751, 280 N.Y. (N.Y.S.) 268, 1939 N.Y. LEXIS 1316 (N.Y.), reh'g denied, 280 N.Y. 809, 21 N.E.2d 695, 280 N.Y. (N.Y.S.) 809, 1939 N.Y. LEXIS 1599 (N.Y. 1939).

Statement in affidavit executed by witness prior to trial and introduced solely to impeach witness, cannot serve as affirmative evidence of truth of fact sought to be proved thereby. Fitzgibbons Boiler Co. v National City Bank, 287 N.Y. 326, 39 N.E.2d 897, 287 N.Y. (N.Y.S.) 326, 1942 N.Y. LEXIS 1114 (N.Y.), reh'g denied, 287 N.Y. 843, 41 N.E.2d 169, 287 N.Y. (N.Y.S.) 843, 1942 N.Y. LEXIS 1850 (N.Y. 1942).

In action for personal injuries from fall on defendant’s ice-covered sidewalk, written statement of plaintiff’s witness that plaintiff told him that plaintiff had fallen 20 feet from sidewalk was properly admissible on cross-examination by defendant to impeach witness, and it was competent for

that purpose only. Underhill v Slutzky, 260 A.D. 882, 22 N.Y.S.2d 997, 1940 N.Y. App. Div. LEXIS 5212 (N.Y. App. Div. 1940).

Exhibit was only pertinent for the purpose of impeaching the testimony of a witness. New York Life Ins. Co. v White, 260 A.D. 901, 23 N.Y.S.2d 57, 1940 N.Y. App. Div. LEXIS 5284 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 714, 34 N.E.2d 487, 285 N.Y. (N.Y.S.) 714, 1941 N.Y. LEXIS 1708 (N.Y. 1941).

Where witness' testimony was contradictory to prior written signed statement, refusal to charge that jury might not consider statement as affirmative proof of facts stated therein and that they might consider it only to impeach or correct testimony of witness, was error. Allen v Mendelson, 266 A.D. 969, 44 N.Y.S.2d 277, 1943 N.Y. App. Div. LEXIS 5536 (N.Y. App. Div. 1943).

Impeaching evidence is available only to impair credibility of witness, and does not establish negligence as substantive fact. Menkelunas v New York, 270 A.D. 827, 60 N.Y.S.2d 97, 1946 N.Y. App. Div. LEXIS 4133 (N.Y. App. Div. 1946).

Portions of statement inconsistent with testimony of witness may properly be admitted for purpose of impeachment, but such prior self-contradictions are not to be treated as having any substantive or independent value. McQuage v New York, 285 A.D. 249, 136 N.Y.S.2d 111, 1954 N.Y. App. Div. LEXIS 3315 (N.Y. App. Div. 1954).

Under proper circumstances, a prior statement which contradicts a witness may be introduced at a trial for the purpose of impeachment. However, a writing containing conclusory and hearsay matter cannot serve as evidence in chief of the truth of the facts stated therein. Woods v Mahbern Realty Corp., 5 A.D.2d 411, 172 N.Y.S.2d 503, 1958 N.Y. App. Div. LEXIS 6313 (N.Y. App. Div. 1st Dep't 1958).

In personal injury action against bus company, where testimony of company's witnesses had not been shaken on cross-examination or given the appearance of recent fabrication, the admission of their written statements, both of which contained a question and conclusory answer that they did not consider bus driver at fault, was prejudicial to plaintiff and warranted new trial. Blair v

Central Greyhound Lines, Inc., 12 A.D.2d 724, 208 N.Y.S.2d 106, 1960 N.Y. App. Div. LEXIS 6837 (N.Y. App. Div. 4th Dep't 1960).

11. Consistent statements

Consistent statement in accident report by witness. See Englberger v Hulse, 261 A.D. 921, 25 N.Y.S.2d 510, 1941 N.Y. App. Div. LEXIS 8096 (N.Y. App. Div.), aff'd, 286 N.Y. 653, 36 N.E.2d 693, 286 N.Y. (N.Y.S.) 653, 1941 N.Y. LEXIS 2198 (N.Y. 1941).

Where witness had testified to nothing which contradicted recitals in his statement, this section is inapplicable. Zbikowski v Saroc Holding Corp., 67 N.Y.S.2d 222, 187 Misc. 495, 1946 N.Y. Misc. LEXIS 3214 (N.Y. App. Term 1946).

12. Particular applications

In an action for personal injuries, letters signed by the wife of the plaintiff, to the effect that she is his wife and is trying to force him to support his two children, are admissible in evidence, under this section, to contradict her oral testimony. Lewis v Rau, 258 A.D. 57, 15 N.Y.S.2d 579, 1939 N.Y. App. Div. LEXIS 6358 (N.Y. App. Div.), reh'g denied, 258 A.D. 876, 16 N.Y.S.2d 1017, 1939 N.Y. App. Div. LEXIS 7394 (N.Y. App. Div. 1939).

Written statement, subscribed by witness, inconsistent with her testimony that complainant had not gone out with other boys, held admissible in filiation proceeding to impeach her. Commissioner of Public Welfare v Unger, 264 A.D. 894, 35 N.Y.S.2d 928, 1942 N.Y. App. Div. LEXIS 5286 (N.Y. App. Div. 1942).

In action against city, inconsistent written statement of city employee was admissible on question of credibility of witness. Aldridge v New York, 266 A.D. 652, 40 N.Y.S.2d 129, 1943 N.Y. App. Div. LEXIS 3656 (N.Y. App. Div. 1943).

In personal injury action against bus company, where testimony of company’s witnesses had not been shaken on cross-examination or given the appearance of recent fabrication, the admission

of their written statements, both of which contained a question and conclusory answer that they did not consider bus driver at fault, was prejudicial to plaintiff and warranted new trial. Blair v Central Greyhound Lines, Inc., 12 A.D.2d 724, 208 N.Y.S.2d 106, 1960 N.Y. App. Div. LEXIS 6837 (N.Y. App. Div. 4th Dep't 1960).

Grand jury testimony of witness, testifying in subsequent proceeding to discipline police officers, may be used to refresh his recollection or to attack his credibility. Application of Scro, 108 N.Y.S.2d 305, 200 Misc. 688, 1951 N.Y. Misc. LEXIS 2505 (N.Y. County Ct. 1951).

Research References & Practice Aids

Federal Aspects:

Impeachment of witness by prior inconsistent statement in United States courts, USCS Court Rules, Federal Rules of Evidence, Rule 613.

Jurisprudences:

58A NY Jur 2d Evidence and Witnesses §§ 933., 940., 942., 954. .

81 Am Jur 2d, Witnesses §§ 862., 863.

17 Am Jur Proof of Facts 163., Unintentional Errors and Distortions in Testimony.

49 Am Jur Trials 501., Examination of a Witness Based on a Prior Statement.

5 Am Jur Trials 807., Handling Perception and Distortion in Testimony.

Law Reviews:

Dilemma of a defendant witness in New York: the impeachment problem half-solved. 50 St. John’s L Rev 129.

Some observations on credibility: impeachment of witnesses. 52 Cornell L.Q. 239.

Policy considerations and changes in the hearsay rule: a comment. 19 N.Y.L. Sch. L. Rev. 761.

Statements of past physical condition as an exception to the rule against hearsay. 19 N.Y.L. Sch. L. Rev. 777.

Treatises

Matthew Bender’s New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4514, Impeachment of Witness by Prior Inconsistent Statement.

Matthew Bender’s New York CPLR Manual:

CPLR Manual § 20.10. Disclosure devices — the deposition.

Matthew Bender’s New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 10.15. Using Prior Inconsistent Statement to Impeach.

Matthew Bender’s New York Evidence:

2 Bender's New York Evidence § 131.03. Refreshing Recollection.

2 Bender's New York Evidence § 132.03. Limitations on Cross-Examination.

2 Bender's New York Evidence § 134.01. Impeachment.

2 Bender's New York Evidence § 134.06. Impeaching Witnesses with Prior Contradictory Statements.

Annotations:

Mode of proof of testimony given at former examination, hearing, or trial. 11 ALR2d 30.

Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him. 44 ALR2d 1027.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility. 44 ALR3d 1203.

Propriety and prejudicial effect of impeaching witness by reference to religious belief or lack of it. 76 ALR3d 539.

Denial of recollection as inconsistent with prior statement so as to render statement admissible. 99 ALR3d 934.

Admissibility of affidavit to impeach witness. 14 ALR4th 828.

Impeachment of defense witness in criminal case by showing witness' prior silence or failure or refusal to testify. 20 A.L.R.4th 245.

Admissibility of impeached witness' prior consistent statement—modern state civil cases. 59 ALR4th 1000.

Matthew Bender's New York Checklists:

Checklist for Using Prior Testimony in Civil Action LexisNexis AnswerGuide New York Civil Litigation § 10.13.

Texts:

2 New York Trial Guide (Matthew Bender) § 20.14; 3 New York Trial Guide (Matthew Bender) § 40.36; 4 New York Trial Guide (Matthew Bender) § 70.30.

Hierarchy Notes:

NY CLS CPLR, Art. 45