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Milligan: Use of Prior Inconsistent Statements of Opinion to Impeach
**THE USE OF PRIOR INCONSISTENT STATEMENTS
OF OPINION TO IMPEACH:
OHIO'S POSITION**

A WITNESS is called on behalf of the plaintiff and testifies as to facts tending to establish the negligence of the defendant. On cross-examination the defendant offers to show that immediately following the accident the witness stated to bystanders that the accident "was not the defendant's fault." The plaintiff immediately objects. Is the prior statement of opinion properly admitted?

In most states this prior inconsistent statement of opinion would be admitted for the purpose of impeachment.¹ In Ohio² and a few other states³ it would not be.

Until Wigmore wrote his treatise on evidence in 1904,⁴ the courts were nearly unanimous in excluding prior inconsistent statements of opinion.⁵ The prominent reason given for excluding these opinions is that they conflicted with the opinion rule.⁶ This rationale has led to exclusion of inconsistent statements of opinion for all the numerous reasons associated with the opinion rule.⁷

The purpose of this article is to examine prior inconsistent statements of opinion and point out why their exclusion, when offered to impeach, is improper. Ohio's three leading cases on this point will serve to exemplify the improper characterization and exclusion of these statements.

¹ See J. WIGMORE, EVIDENCE, § 1041 (3d ed. 1970); C. McCORMICK, EVIDENCE, § 35 (2d ed. 1972); Grady, *The Admissibility of a Prior Statement of Opinion for Purposes of Impeachment*, 41 CORNELL L. Q. 224 (1956).

² See *Cottom v. Klein*, 123 Ohio St. 440, 175 N.E. 689 (1931); *Schneiderman v. Sesanstain*, 121 Ohio St. 80, 167 N.E. 158 (1929); *Dorsten v. Lawrence*, 20 Ohio App. 2d 297, 253 N.E.2d 804 (1969). *Contra*; *Behrens v. Warrick*, 32 Ohio L. Abs. 437 (Ct. App. 1940); *Jandroziejowski v. Burghardt*, 18 Ohio L. Abs. 6 (Ct. App. 1934).

³ *Hirsh v. Manley*, 81 Ariz. 94, 300 P.2d 588 (1956); *Bright v. Wheelock*, 323 Mo. 840, 20 S.W.2d 684 (1929); *State v. Thompson*, 71 S.D. 319, 24 N.W.2d 10 (1946); *McDougal v. State*, 81 Tex. Crim. 179, 194 S.W. 944 (1917); *Webb v. City of Seattle*, 22 Wash. 2d 596, 157 P.2d 312 (1945).

⁴ 3A WIGMORE, EVIDENCE § 1041 (1st ed. 1904).

⁵ See the excellent treatment of this early history in Grady, *supra* note 1, at 225-230.

⁶ See McCORMICK, *supra* note 1, at § 35. As will be examined later in this article, see text accompanying notes 8-10, *supra*, Ohio still appears to take this position. See note 2, *supra*. The opinion rule as it developed in the 19th century was a rule excluding lay opinion testimony and requiring the witness to testify as to facts. McCORMICK, *supra* note 1, at § 11. In more recent times this distinction between fact and opinion has been recognized as a difference in degree only; all human expression contains to a greater or lesser degree. *Id.* The modern approach has been to follow Wigmore's lead and regard the opinion rule as a rule of trial practice allowing testimony in opinion form when convenience is served thereby, and excluding it when it is superfluous. *Id.*; FED. R. EVID. § 704. Corollaries of the opinion rule are that witnesses should not give opinions on the ultimate fact in issue, see *e.g.*, Note 20, U. CIN. L. REV. 484 (1951), or on matters of law. McCORMICK, *supra*, note 1, at § 12.

⁷ See *e.g.*, *Cottom v. Klein*, 123 Ohio St. 440, 175 N.E. 689 (1931).

I. THE OHIO VIEW: EXCLUSION OF PRIOR INCONSISTENT STATEMENTS OF OPINION

On the basis of two supreme court cases,⁸ and one court of appeals case,⁹ Ohio has been recognized as one of the few states that still excludes prior inconsistent statements of opinion offered to impeach.¹⁰ The first of these cases is *Schneiderman v. Sesanstein*,¹¹ decided in 1929. *Schneiderman* concerned an automobile-pedestrian accident. Schneiderman, the 10-year old plaintiff, was struck and injured by the defendant's automobile. At trial the defendant produced a witness who testified as to the speed at which the defendant's automobile was traveling. On cross-examination the plaintiff's counsel asked the witness whether he had previously made statements to counsel that the accident had been defendant's fault. The trial court, upon the defendant's objection, prevented the witness from replying. On appeal to the Supreme Court of Ohio the court affirmed the trial court's ruling, stating in its syllabus: "A witness who testifies as to facts cannot be discredited by evidence of the expression of an opinion relative to the merits of the case."¹² Elaborating in the body of the opinion the court went on to state:

A mere conclusion or opinion of the witness was sought, which was not competent either upon direct or cross-examination. An inquiry is incompetent which seeks the opinion of the witness upon the ultimate question involved in the case, in this instance the very issue to be submitted to and determined by the jury.¹³

The second supreme court case was decided three years later. It too involved an automobile-pedestrian accident. In *Cottom v. Klein*,¹⁴ the plaintiff, a young child, was injured when she broke from her brother's grip and ran across the street in front of the defendant's automobile. One of the witnesses for the plaintiff was the father of the injured child. Over objection, he was asked whether he had made a statement after the accident to the defendant and his wife that "there had been an accident, . . . it was not your husband's fault, it was the child's fault, she jerked away from me and

⁸ *Id.*; *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929).

⁹ *Dorsten v. Laurence*, 20 Ohio App. 2d 297, 253 N.E.2d 804 (1969).

¹⁰ See, *McCORMICK*, *supra* note 1, at § 35 n. 31; 3A *WIGMORE*, *supra* note 1, at § 1041 n. 2; *Grady*, *supra* note 1, at n.33.

¹¹ 121 Ohio St. 80, 167 N.E. 158 (1929).

¹² *Id.*

¹³ 121 Ohio St. at 91, 167 N.E. at 161. As authority for this proposition the court went on to cite 40 Cyc. 712:

A witness who gives opinion evidence may be discredited by showing that he has expressed an opinion inconsistent with that expressed by him on the stand; but a witness who testifies as to facts cannot be discredited by a showing of prior expression of opinion by him, even though such expressions tend to contradict the inference which might be drawn from his recital of facts, or are wholly inconsistent with the facts testified to. *Id.*

ran in front of the car."¹⁵ The father denied making the statement. The defendant husband and his wife when called to the stand testified that he had made the statement. The supreme court reversed the trial court stating:

The ultimate question to be decided was, Who was negligent or at fault? That was a question of fact to be determined by the jury, and should be determined, not by the conclusion or by the opinion of the witness, but by testimony detailing facts and circumstances from which the jury could determine the issue of negligence.¹⁶

Finally, there is the more recent court of appeals case, *Dorsten v. Lawrence*.¹⁷ In *Dorsten*, the plaintiff brought an action against the defendant for injuries arising out of an intersectional collision. At trial, the plaintiff's chief witness testified that the defendant ran a red light.¹⁸ On cross-examination, the court permitted the defendant to impeach this witness by an alleged inconsistent statement of opinion to the effect that the plaintiff was at fault.¹⁹ Holding the admission of this statement improper, the court stated:

A witness who testifies as to fact cannot be discredited by evidence of the expression of an opinion relative to the merits of the case. *Schneiderman v. Sesanstein* . . . The declaration of an eyewitness, who was not a party to the suit, that the accident was caused by the fault of one of the parties, is but an expression of an opinion on an ultimate issue to be determined by the jury, and is not competent, either as original or impeaching evidence, and because of its prejudicial character its admission for the purpose of impeaching the witness constituted reversible error. *Cottom v. Klein* . . .²⁰

As a result of these three cases, Ohio is among the minority of states excluding prior inconsistent statements of opinion offered to impeach.²¹ It is tendered that Ohio's approach is mistaken.

II. WHY PRIOR INCONSISTENT STATEMENTS OF OPINION SHOULD BE ADMISSIBLE TO IMPEACH

Logic and consistency are ideally at the heart of the law. Ohio's approach to prior inconsistent statements of opinion conform to neither. What follows is an argument to persuade a court that Ohio's course is untenable and ought not be followed.

To understand the nature of prior inconsistent statements of opinion,

¹⁵ *Id.* at 444, 175 N.E. at 690.

¹⁶ *Id.*

¹⁷ 20 Ohio App. 2d 297, 253 N.E.2d 804 (1969).

¹⁸ *Id.* at 299, 253 N.E.2d at 807.

¹⁹ *Id.* at 304, 253 N.E.2d at 809.

²⁰ *Id.* at 304, 253 N.E.2d at 809 (citations omitted).

it is necessary to examine the larger genre of which they are a part: prior inconsistent statements.

Prior inconsistent statements have always been admissible to impeach a witness.²² The statements, *if inconsistent*, are relevant to aid the jury in determining the credibility of a witness' testimony.²³ Of course, the statements made outside the courtroom are *not* hearsay; they are not offered for the truth of the matter asserted.²⁴ Hence, testimonial infirmities causing hearsay concern are not present. Where the proper foundation has been laid, only two objections can normally be raised to admitting the prior statements: (1) they are not inconsistent with the trial testimony²⁵ and (2) they concern a collateral issue.²⁶

As to the first objection, the absence of an inconsistency renders the statement irrelevant for impeachment purposes. Where there is no inconsistency, there can be no impeachment; the statement is clearly being offered for the truth of the matter asserted and runs afoul of the hearsay rule.²⁷ There would appear to be few other purposes for which the statement is offered.

The degree of inconsistency required to allow the statement in is a matter of disagreement between jurisdictions.²⁸ Wigmore states the general rule:

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

Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. But it must appear 'prima facie' before the impeaching declaration can be introduced. As a general principle, it is to be understood that this inconsistency is to

²² See 3A WIGMORE, *supra* note 1, at §§ 1017-46; McCORMICK, *supra* note 1, at § 341.

²³ *Id.*

²⁴ See *e.g.*, Fitzgerald v. Graham, 8 Ohio L. Abs. 20 (Ct. App. 1929); Dilcher v. State, 39 Ohio St. 130 (1883); Green v. Baltimore & Ohio Ry. Co., 337 F.2d 673 (6th Cir. 1964) (interpreting Ohio law).

²⁵ See, *e.g.*, State v. Clay, 29 Ohio App. 2d 206, 280 N.E.2d 385 (1972) *aff.*; 34 Ohio St. 2d, 250, 298 N.E.2d 137 (1973); Shadwick v. Hills, 79 Ohio App. 143, 69 N.E.2d 197 (1946); WIGMORE, *supra* note 1, at §§ 1040-43; McCORMICK, *supra* note 1, at § 34; Dec. Dig. Witnesses, Key No. 386.

²⁶ See, *e.g.*, Brown v. State, 10 Ohio L. Abs. 581 (Ct. App. 1931); 3A WIGMORE, *supra* note 1, at § 1023; McCORMICK, *supra* note 1, at § 36; Dec. Digest, Witnesses, Key No. 383.

²⁷ See, *e.g.*, McCORMICK, *supra* note 1, at § 34.

A strong case can be made for an exception to the hearsay rule allowing these statements to be admitted on the merits. McCORMICK, *supra* note 1, § 251; FED. R. EVID. § 801(d)(2).

²⁸ See McCORMICK, *supra* note 1, at § 34.

be determined not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done. On a comparison of two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?²⁹

Although courts disagree on the degree of inconsistency required,³⁰ all courts recognize that to justify their use to impeach, the statement must lend itself to an interpretation that casts doubt on the witness' credibility.³¹

The second ground of objection, the collateral nature of the statement, arises from considerations of time.³² To allow impeachment on any fact would tend to confuse the jury and use unnecessary amounts of the court's time. Thus, the rule has been recognized that on collateral matters the cross-examiner must take the witness' answer as given; the party cannot bring in others to contradict it.³³ Only the witness can contradict himself.

Prior inconsistent statements of opinion are but a species of this same category of evidence. The failure of some courts to recognize this is at the heart of the minority viewpoint leading to exclusion.³⁴ That these statements are but a sub-category of the larger category of inconsistent statements is apparent from the purpose for which they are both offered. Like prior inconsistent statements of fact, prior inconsistent statements of opinion are introduced to impugn the credibility of the witness. The statement of opinion, like that of fact, is *not* offered as testimony on the merits.³⁵ The only distinction between the two statements is the form which they take.³⁶ The couching of a statement of fact in the form of an opinion does not logically transform that statement, when offered to impeach, into testimony. Most courts recognize this and admit the statement.³⁷

Those that don't admit the statement are looking first at the form in which the opinion is couched rather than the nature of the statement itself and why it is being offered. The opinion rule is held applicable to the statement although the statement is not offered in its opinion aspect. The proper analysis is that the opinion is being offered for the inconsistent assertion of *fact* that can be implied from the opinion expressed. It is this inconsistent assertion of fact, *not opinion*, that is being offered to question the credibility of the witness' testimony.

²⁹ 3A WIGMORE, *supra* note 1, at § 1040.

³⁰ *Id.*

³¹ *Id.* at § 1018.

³² See, e.g., 3A WIGMORE, *supra* note 1, at § 1023; MCCORMICK, *supra* note 1, at § 36.

³³ See, e.g., *Clinton v. State*, 33 Ohio St. 27 (1877); OHIO JUR. 2d, Witnesses, § 393 (1963).

³⁴ See generally, *Grady*, *supra* note 1.

³⁵ See text accompanying note 32, *infra*.

³⁶ Indeed, the title of McCormick's section on this matter is "Prior Inconsistent Statements: Opinion in Form." MCCORMICK, *supra* note 1, at § 35.

³⁷ See cases cited in 3A WIGMORE, *supra* note 1, at § 1041 n.2.

These two observations for admission of inconsistent statements of opinion are succinctly expressed by Wigmore:

The usual answer of some courts is that the declaration should be excluded because it is mere opinion . . . This is unsound, (1) because the declaration is not offered as testimony . . . , and therefore the opinion rule has no application, and (2) because the declaration in its opinion aspect is not concerned, and is of importance only so far as it contains by implication some contradictory assertion of fact. In short, the only proper inquiry can be, Is there within the broad statement of opinion on the general question *some implied assertion of fact* inconsistent with the other assertion made on the stand? If there is, it ought to be received, whether or not it is clothed in or associated with an expression of opinion.³⁸

The opinion rule is a recognition of the common law preference for witnesses testifying in the form of "facts" and not "opinions."³⁹ Although this distinction is dubious⁴⁰ - being more a distinction between varying levels of generality - these are the terms in which the courts apply the rule. As Wigmore recognized, the rule is nothing more than the exclusion of superfluous evidence; the expressing of opinion on facts testified to adds nothing to the proceeding since the jury already has the experience to draw conclusions from the facts presented.⁴¹

In Wigmore's words the rule "simply endeavors to save time and avoid confusing testimony by telling the witness: 'The tribunal is in possession of the same materials of information on this subject as yourself; thus, as you can add nothing to our materials for judgment, your further testimony (opinion) is unnecessary, and merely cumpers the proceedings.'"⁴² Hence, the opinion rule is primarily a rule governing courtroom practice. As applied to out-of-court statements the rule transcends its reason. An out-of-court

³⁸ *Id.* at § 1041.

³⁹ See 7 WIGMORE, *supra* note 1, at § 1919; McCORMICK, *supra* note 1, at § 11; Note, *Opinion Testimony "Invading the Province of the Jury,"* 20 U. CIN. L. REV. 484 (1951); Fed. R. Evid. 701.

⁴⁰ *Id.* Wigmore identifies the fallacy of such a distinction:

(a) . . . no such distinction is scientifically possible . . .

(b) . . . an examination of the so-called opinion rule, as applied in its various instances, shows that the opinion element is, in the very law itself, a merely superficial and casual mark and not the essential feature. On the one hand, *that which is excluded is not always "opinion"* (in the sense of "inference from observed data" or in any other sense), but may be "fact" . . . On the other hand, *that which is admitted is not always "fact" but often "opinion."*

7 WIGMORE, *supra* note 1, § 1919 (1940) (emphasis in original).

⁴¹ *Id.* at § 1917-18. Wigmore puts it thus:

wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous; and that thus an expert's opinion is received because and whenever his skill is greater than the jury's, while a law opinion is received because and whenever his facts cannot be so told as to make the jury as able as he to draw the inference.

Id. at § 1917 (emphasis in original).

opinion introduced to impeach is non-testimonial. The proponent is not asking the trier of fact to believe the matter asserted, but is rather requesting that the trier of fact make certain circumstantial inferences regarding the witnesses' credibility.

A secondary, less important reason for the opinion rule is to improve the objectivity and reliability of *testimonial* assertions.⁴³ By requiring counsel to question specifically, and the witness to respond likewise, faulty generalizations and conclusions are left for the jury to make. The purpose of the opinion rule is, then, twofold: to aid trial administration by reducing wasted time and to increase the reliability and objectivity of testimony.

Neither purpose is served by excluding prior inconsistent statements of opinion used to impeach. Prior inconsistent statements of opinion are out-of-court utterances. As we have seen,⁴⁴ the opinion rule is primarily a rule governing courtroom proceedings. Unlike courtroom testimony, out-of-court statements of opinion cannot be reformulated to comply with the opinion rule. They must either be accepted or rejected *as they are*. To exclude these prior inconsistent statements merely because they happen to be in opinion form is unfortunate since they will often aid the jury in assessing the credibility of a witness. While opinions are not the preferred form of evidence, they are preferable to having no evidence at all.

Unfortunately, the incorporation of the opinion rule restraints into the area of prior inconsistent statements has resulted in this exclusion of probative evidence. Logic compels a different result.

Ohio admits out-of-court statements of opinion in other contexts where the reasons for so doing are even less compelling than in the instance of prior inconsistent statements of opinion.

Most noteworthy in this respect is Ohio's clear position excepting admissions of a party-opponent that are in the form of an opinion from the operation of the hearsay rule.⁴⁵ *Dorsten* while stating that prior inconsistent statements of opinion are admissible, made a curious reference to the existence of this apparently contradictory position:

The rule that a witness who is not a party cannot be impeached by his prior statement expressing an opinion about the fault of one of the parties is not to be confused with the rule which permits introduction into evidence of an *admission against interest* made by a party to the

⁴³ *McCORMICK*, *supra* note 1, at § 11.

⁴⁴ See text accompanying notes 33-36, *supra*.

⁴⁵ See *Faxon Hills Construction Co. v. United Brotherhood of Carpenters and Joiners of America*, 168 Ohio St. 8, 151 N.E.2d 12 (1958); *Freas v. Sullivan*, 130 Ohio St. 486, 200 N.E. 639 (1936); *Ferrebee v. Boggs*, 24 Ohio App. 2d 18, 263 N.E.2d 574 (1970); *Eakins v. Nash*, 118 Ohio App. 280, 194 N.E.2d 148 (1963); *Kaczmarek v. Murphy*, 78 Ohio App. 449, 70 N.E.2d 784 (1946).

case where such admission concerns an *opinion* or conclusion as to his fault . . .

Such admission against interest by a party is admissible as substantive proof on the issues, without any need of testimony from the party making such admission. It may serve a secondary purpose of impeaching the party making such admission if he testifies.⁴⁶

The reasons for making the distinction, other than fortuitous historical developments, is not apparent. In fact, the rationale for admitting opinions as admissions is much less compelling than that present for prior inconsistent statements of opinion; admissions, opinion in form, are being admitted *as substantive evidence*;⁴⁷ prior inconsistent statements, opinion in form, are being admitted for the limited purpose of impeachment. It would appear that the "dangers" acknowledged by the opinion rule are more prevalent in the former and not the latter. This is true particularly in light of the limiting instruction to be given by the court in the instance of impeachment by prior inconsistent statements of opinion.

The similarity between the two areas is striking. As both Wigmore and McCormick point out, the admissions exception to the hearsay rule is justifiable by the circumstantial value of the prior statement arising from its inconsistency with the present claim.⁴⁸ As we have seen,⁴⁹ inconsistency is at the heart of admitting prior statements to impeach. Why then should the distinction be made as to statements opinion in form? Perhaps the only answer that can be given is that *Schneiderman* and *Cottom* are quirks in Ohio's law of evidence.

The extent to which this is true can be seen by examining the numerous Ohio opinions allowing admissions, opinion in form, to be used as substantive evidence.

Ohio's approach can be traced back to the Supreme Court case of *Freas v. Sullivan*.⁵⁰ In *Freas*, the court upheld the admission of the defendant, testified to by a witness: "Well, he [the defendant] said he had an accident and he felt as though he would be responsible for it, it was his fault."⁵¹ The court upheld the admission of this testimony stating in syllabus number eight:

8. Admissions of an alleged tort-feasor, made two weeks after a col-

⁴⁶ *Dorsten v. Lawrence*, 20 Ohio App. 2d at 304, 253 N.E.2d at 808-10 (emphasis in original).

⁴⁷ See note 39, *supra*.

⁴⁸ 4 WIGMORE *supra* note 1, at § 1048 (1972); MCCORMICK, *supra* note 1, at § 262; See also *Eakins v. Nash*, 118 Ohio App. at 282, 194 N.E.2d at 149.

⁴⁹ See text accompanying notes 22-25, *supra*.

⁵⁰ 130 Ohio St. 486, 200 N.E. 639 (1936).

⁵¹ This language was not incorporated into the supreme court's opinion but was derived from the record by a later court of appeals case, 78 Ohio App. at 454, 70 N.E.2d at 786.

lision, relative to his individual responsibility in causing such collision, are competent against such tort-feasor.⁵²

The same problem was presented in a later court of appeals case, *Eakins v. Nash*⁵³ where the defendant testified as follows:

Q. Did you say anything to Mrs. Eakin after the accident?

A. Well I asked her if she was O.K.

Q. I don't mean that; I mean with reference to how the accident happened?

A. You mean whose fault it was?

Q. Yes.

A. Yes, it was my fault.

Q. And you said so to her didn't you?

A. Yes, I did.⁵⁴

In upholding the admission of this testimony, the court stated:

While admittedly the declaration, or even the sworn testimony, of third parties *on the ultimate issue of fact* are improper, there is no question that such admissions, when made by a party, are freely admissible . . . The theory of admissibility is that it is inconsistent with later denial of the claim.⁵⁵

Again, the court in *Eakins*, like the *Dorsten* court, stated the distinction between admissions, in the form of opinion, and prior statements used to impeach, opinion in form.

The existence of these cases provides a powerful argument against following the *Schneiderman - Cottom* view. The soundness of the view taken by *Freas* and its progeny is unquestioned and supported by all the commentators.⁵⁶

Toppling the view expressed by *Schneiderman, Cottom* and *Dorsten* is aided by the weakness of the cases revealed upon close reading.

Both *Schneiderman* and *Cottom* involve circumstances which, even under the modern majority view, would result in the exclusion of the statements. The *Schneiderman* and *Cottom* courts both recognized that the statements at issue were *not* inconsistent with the testimony given at trial. As all the commentators recognize, this is a proper reason for excluding the statement.⁵⁷ Thus, in *Schneiderman*, although the statement is not set out

⁵² 130 Ohio St. 486, 200 N.E. 639.

⁵³ 118 Ohio App. 280, 194 N.E.2d 148 (1963).

⁵⁴ *Id.* at 281, 194 N.E.2d at 149.

⁵⁵ *Id.* at 282, 194 N.E.2d at 149.

⁵⁶ See, e.g., 4 WIGMORE, *supra* note 1, at 1053 (1972); McCORMICK, *supra* note 1, at § 264.

⁵⁷ 3A WIGMORE, *supra* note 1, at § 1041; McCORMICK, *supra* note 1, at § 35; Grady, *supra* note 1, at 232-34.

in the opinion, the court stated: "The statements which counsel's questions assumed had been made by the witness *were in no wise contradictory to his testimony* on direct examination, nor were they competent for the purpose of impeachment.⁵⁸ The lack of inconsistency is much more apparent in the *Cottom* opinion wherein the reader is provided with the statement in issue. In *Cottom*, it will be remembered, the plaintiff, a young child, was injured when she broke from her brother's grip and ran across the street in front of the defendant's automobile. At trial, the father, who was with the children at the time of the accident, was called in behalf of the plaintiff and testified as follows:

Q. She left loose of her brother's hand and went on ahead across the street?

A. Yes.

Q. You were about the middle of the street when she left you and the other children?

A. Practically so, yes.⁵⁹

Upon cross-examination, the witness-father was asked whether he had made a statement after the accident to the defendant and his wife that "there had been an accident, . . . it was not your husband's fault, it was the child's fault she jerked away from me, and ran in front of the car."⁶⁰ The plaintiff denied making the statement; the husband and wife when called to the stand testified that he had.

It is clear, then, that the prior statement was *not* inconsistent at all with the trial testimony. Thus, as the court itself noted, it should not have been admitted:

Cottom had not denied that the child had broken away from him. That fact was admitted and not subject to impeachment, so the sole purpose of this testimony was to impeach the credibility of the father by showing that he had stated that the collision was not the defendant's fault; but the fault of the child.⁶¹

It can thus be seen that the two Ohio Supreme Court cases on point have an independent leg on which to stand that is not at odds with admitting prior inconsistent statements of opinion. Perhaps the language contained in *Schneiderman* and *Cottom* concerning the inadmissibility of prior inconsistent statements of opinion may be viewed as dictum.

As for the more recent court of appeals case, *Dorsten v. Lawrence*,⁶²

⁵⁸ 121 Ohio St. at 91, 167 N.E. at 161 (emphasis added).

⁵⁹ 123 Ohio St. at 443, 175 N.E. at 689.

⁶⁰ *Id.* at 444, 175 N.E. at 690.

⁶¹ *Id.*

it too can be analyzed so that its language supporting the view of not admitting prior inconsistent statements is dictum. Specifically, the court in *Dorsten* made a point of stating that the inconsistent statement of opinion had no independent basis of fact in the record.⁶³ It was only through counsel's questioning that the statement was put before the jury; no subsequent witness supported the contention that the statement had indeed been made:

The absence of such impeaching testimony from an impeaching witness, or from some documentary evidence properly admitted, gives rise to no proof that the witness, sought to be impeached, ever made the contradictory or inconsistent statement; and, when this is followed at the close of the evidence and final arguments to the jury by trial court's general instructions to the jury, as it was in the present case, concerning the rules pertaining to determining credibility and impeachment of witnesses, the prejudicial nature of the error incident to attempted impeachment of a witness is compounded and made much more serious.⁶⁴

Schneiderman, *Cottom*, and *Dorsten* all rest on shaky ground with regard to their views on excluding prior inconsistent statements of opinion. Logic and consistency demand that their views on prior inconsistent statements of opinion be disregarded.

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⁶³ *Id.* at 305, 253 N.E.2d at 810.