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# Admissibility of Previous Consistent Statements by a Witness

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# ADMISSIBILITY OF PREVIOUS CONSISTENT STATEMENTS BY A WITNESS

Today the courts are almost unanimous in holding that proof of statements made by a witness out of court similar to and in harmony with his testimony are inadmissible.

"This rule of evidence," said Mr. Justice Holloway, speaking for the Supreme Court of Montana in the case of *Fairleigh v. Kelley* (1903),[1] "became settled long ago." It is unquestionably supported by the decided weight of authority, and in fact, it may now be said that the rule is more than general—it is well nigh universal.[2] There are, however , well settled exceptions to this general rule.[3] In fact, the exceptions "have become so well established as now to constitute themselves an independent rule."[4] They are, however, very few in number[5] and rest upon exceptional circumstances.[6]

In each case the question is whether the circumstances are such as to make the evidence admissible.[7]

## A. Imputations against Veracity

### 1. Charges of recent fabrication of testimony

The principal exception to the general rule of evidence that the statements of a witness out of court are inadmissible, is the one mentioned by Mr. Justice Story, that "Where the testimony of the witness is assailed as a fabrication of recent date, or a complaint recently made, in order to repel such imputation, proof of the antecedent declarations of the witness consistent with his testimony may be received."[8]

In the early Pennsylvania case of *Craig v. Craig* (1835),[9] the

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[1] 38 Mont. 421, 72 Pac. 756, 63 L. R. A. 319 (1903).
[2] Note, 41 L. R. A. (n. s.) 879 and cases there cited.
[3] *In re Hesdra*, 119 N. Y. 615, 23 N. E. 555 (1890).
[4] *Legere v. State*, 111 Tenn. 368, 77 S. W 1059, 102 A. S. R. 781 (1903).
[5] *Deehert v. Municipal Elect. Lt. So.*, 390 App. Div. 490, 57 N. Y. Supp. 225 (1899).
[6] *Ewing v. Keith*, 16 Utah 312, 52 Pac. 4 (1898).
[7] *U. S. v. Neverson*, 1 Mackay (D. C.) 152 (1880).
[8] *Ellicot v. Pearl*, 10 Pet. 412, 9 L. Ed. 475 (1836).
[9] 5 Rowle (Pa.) 91 (1835).

court reviewed all the authorities on this question and concluded.

> "That consonant declarations may be given in contradiction of evidence tending to show that the testimony at bar is a fabrication of recent date, and to show that the same statement was made before the ultimate effect on the question trying could have been foreseen."

The court, in discussing the facts of the particular case, continued.

> "We come to an inquiry into the time and circumstances of the declarations made by General Craig to entitle him to the benefit of the pension laws. These were made in 1822 and 1823—the last on the 12th day of May in that year. The earliest information we have of a contest between the parties is given by William Craig, who testifies to an inquiry by the defendant, in the October following, into the real state of the transaction in consequence of an intimation that the plaintiff was about to sue him. At this time for aught but appears, General Craig was in harmony with the parties, and his previous statements while his passions and prejudice were in a state of repose, and especially when he could not have foreseen the existence of the present controversy, or the bearing which his declarations might have on it, are indisputably within the exception to the general rule. These declarations were properly admitted."

The above case is a good illustration of the application of the exception to the general rule. The reasonableness of this exception is apparent. Because where counsel on the other side has attacked the testimony of the witness of a fabrication of recent date, the witness should be allowed to repel such imputation, which is successfully done where it can be shown he has made a similar statement prior to trial and at a time when its ultimate effect and operation arising from a change of circumstances could not be foreseen. Consequently "this use of former similar statements is universally conceded to be proper."[10]

This exception to the general rule is usually stated that "it may be shown in answer to evidence tending to make it appear that the testimony of a witness was a fabrication of recent date, that he gave the same account of the transactions to which he testified at a time when the ultimate effect and operation of his statements

[10] 2 Wigmore on Evidence (2nd Ed.), Sec. 1129, p. 648.

could not have been foreseen."[11] To bring the case within the exception, it is necessary, therefore, that the witness' testimony be impeached upon the grounds that it has been recently fabricated and secondly that the prior consistent statements offered to show that it is not a recent fabrication have been made at a time when its ultimate effect and operation could not have been foreseen.

It is essential that the narrow limits of this exception be born in mind, for as was stated by the Supreme Court of Tennessee,[12] a prior consistent statement should never be admitted "where it is clear that the statement so relied upon was made at a time when it was to the interest of the witness to make a false statement," for, it is self-evident that a statement made under such circumstances would not have any corroborative support and therefore should be excluded. Furthermore, the testimony in every case should have been actually attacked as a recent fabrication before the exception is invoked, for, while in a certain sense it is always true that a prior statement of the witness inconsistent with his testimony on the trial, tends or may tend to show the testimony to have been recently fabricated, still, if the exception to the rule is to be broad enough to permit in every such case the introduction of prior consistent statements to prop up the credibility of the witness, the exception would very soon abolish the general rule.[13],

2. Motive to falsify

Another exception to the rule is recognized where the witness is testifying under the influence of some strong motive prompting him to make a false or colored statement, in which case his prior consistent statements are admissible to prove that he is not influenced by the motive imputed to him.

The application of this rule is well illustrated by the case of *Nashville, C. & St. L. R. Co. v. Lawson* (1900) [14] In that case a witness testifying in a civil action against a railroad company, was cross-examined with a view to establish that she had journeyed from another state in order to testify, upon a promise of a reward, in such wise as to attack her credibility and discredit her testimony The court held that it was competent to prove by another witness that immediately following the infliction of

[11] 41 L. R. A. (n.s.) 890 and cases there cited.
[12] See note 4, *supra.*
[13] *Com. v. Tucker* 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (n.s.) 1056 (1905).
[14] 105 Tenn. 639, 58 S. W 480 (1900).

such injuries, and before she could have known that she would be called upon as a witness, she had given a similar account of the accident. That a prior consistent statement has corroborative support under such circumstances seems unquestionable.

This exception is very well stated by Dean Wigmore, who in his work on Evidence, says:[15]

> "A consistent statement at a time prior to the existence of a fact said to indicate Bias, Interest, or Corruption, will effectively explain away the force of the impeaching evidence, because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence. The former statements are therefore admissible."

It is thus seen that this rule may be invoked under various sets of circumstances, as in the following examples.

a. Where a charge is made that the witness was induced to testify as he did on the trial by the hope or promise of money[16]

b. Where it is charged that the testimony is the result of some relation to the party or to the cause, or of some motive of personal interest.[17]

c. Where the witness was impeached by the testimony of a person who heard him say that detectives had been trying to get him to swear to a certain statement, but that he had refused because the statement was a lie; and when it has been further proved that such witness was resentful because the opposing party had refused to sell him a suit of clothes on credit.[18]

Under the rule it is sometimes a matter of nice judgment to determine that no motive at a given time existed to misrepresent the facts, but whenever it is clear that a prior consistent statement was made at a time when the witness was neither biased, corrupted or interested, either in the litigant or the cause, and the witness has been impeached in one of these ways, his prior consistent statement is valuable in removing the discredit so placed upon his testimony

3. Complaint in sex crimes.

In criminal trials for rape and assault with intent to ravish, the

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[15] 2 Wigmore on Evidence (2nd Ed.), Sec. 1128, p. 647.

[16] *Lyles v. Lyles*, 1 Hill Eq. 76 (1833).

[17] *Driggs v. U. S.*, 21 Okla. 60, 95 Pac. 612, 129 A. S. R. 823, 17 Ann. Cas. 66 (1908).

[18] *Kelley-Goodfellow Shoe Co. v. Lib. Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W 1027 (1894).

courts are unanimous in holding that the fact that immediately following the commission of the offense the victim made a complaint of the outrage upon her, is admissible in evidence to corroborate her testimony of the crime, even though she has not been impeached.[19]

This exception to the general rule came down to us in our early law as a traditional relic of the old law of hue and cry [20] The following passage from Bracton, writing in the 1200's, is of interest in showing the ancient rule from which this exception was developed.[21]

> "When, therefore, a virgin has been so deflowered and overpowered, against the peace of the lord the king, forthwith and while the act is fresh, she ought to repair with hue and cry to the neighboring hills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the hundred and to the serjeant of the lord the king and to the viscount and make her appeal at the first county court."

In about the 1700's, as more attention began to be given the principles underlying the admissibility of evidence, the courts began to search for reasons to explain this inherited and hitherto unquestioned practice. As a result, the majority of the modern cases have taken the view that the fact a complaint was made is admissible in corroboration of the prosecutrix, for the reason that a failure to speak when it is natural to do so, is in effect an inconsistent statement or self-contradiction, and the fact that a complaint has been made negatives the supposed inconsistency of silence by showing that there was not silence.

The statement of Mr. Justice Bartch in the case of *State v. Neal* (1900),[22] is illustrative of the attitude of the courts adopting this analysis of the situation

> "The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence at the earliest opportunity, to the relative or friend who naturally has the deepest interest in her welfare, and the absence of such dis-

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[19] 41 L. R. A. (n.s.) 886 and cases there cited.

[20] Mr. Justice Holmes in the case of *Com. v. Cleary*, 172 Mass. 175, 51 N. E. 746 (1898), gives a very complete statement of the origin of this exception.

[21] H. D. Bracton, f. 147.

[22] 21 Utah 151, 60 Pac. 510 (1900).

> closure tends to discredit her as a witness and may raise an inference against the truth of the charge. To avoid such discredit, it is competent for the prosecution to anticipate any claim as to effects, and show by affirmative proof of the victim and of her relative or friends to whom she narrated the circumstances of the outrage, the complaint was made recently after its commission."

The only purpose under this theory in introducing the fact of complaint is to remove the inference of discredit, which would be imputed to her if she had remained silent. This object is accomplished by merely showing that in fact she did complain. The details of the complaint are consequently immaterial for the purpose and are therefore inadmissible.[23] Many courts have held the details of the complaint should be excluded because of the danger of allowing a designing female to corroborate her testimony by statements made by herself to third parties, and the difficulty of disproving the principal fact by the accused.[24]

This exception to the general rule holding the fact of complaint admissible, like the other exceptions, is based upon the reason that such evidence has valuable corroborative force. With this in mind, some courts have excluded even the fact of complaint where it was not seasonably made, on the ground that when made after a long delay it has lost its relevancy as corroborative evidence.[25] Other courts, however, have held that mere lapse of time affects only its weight, which is a circumstance for the consideration of the jury.[26]

Under the early law of hue and cry, the details of the complaint were undoubtedly admissible.[27] It would seem at first blush that some courts have adopted this traditional rule in its entirety and are in direct conflict with the cases holding admissible only the fact that a complaint was made.

These decisions, however, when closely analysed, will show in the great majority of cases, to be based on the rule that where a witness has been impeached, prior consistent statements are admissible as corroborative evidence. It would seem, therefore, that the conflict is apparent, rather than real, because if the prosecutrix' testimony has been impeached in such a way as to allow prior consistent statements, which will depend upon the view taken of the general principle in each particular jurisdiction, it

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[23] 2 Wigmore on Evidence (2nd Ed.), Sec. 1136, p. 658.
[24] 22 R. C. L. 1214.
[25] *State v. Griffin*, 43 Wash. 591, 86 Pac. 951 (1906).
[26] 2 Wigmore on Evidence (2nd Ed.), Sec. 1135, p. 657.
[27] 3 Wigmore on Evidence (2nd Ed.), Sec. 1760, p. 764.

cannot be denied that it is a legitimate application of the principle to admit the details of her complaint— the prior consistent statements.[28]

WASHINGTON CASES

A. Charges of Recent Fabrication—Motives to Falsify

The admissibility of prior consistent statements to corroborate a witness whose testimony has been impeached by charges of fabrication, interest, bias or corruption, first arose in the State of Washington in the case of *State v. Mannville* (1894)[29] In that case Mannville was convicted of murder and appealed. During the progress of the trial, appellant called one Hartsock, who testified that Conboy, a witness for the state, had made a statement to him the day the tragedy occurred, concerning the manner in which the shooting was done, which statement was at variance with a material point in Conboy's testimony The state, in rebuttal, introduced three witnesses who testified that the statement made by Conboy to Hartsock was substantially the same as the statement made by him on the witness stand. Appellant alleged error in the admission of the testimony of the three witnesses to corroborate Conboy, contending that the testimony of a witness cannot be sustained by showing that his testimony corresponds with statements that he has previously made. In discussing the alleged error, the court said

> "While the general doctrine announced in that case (*Ellicot v. Pearl* (supra), which appellant had cited as sustaining his contention), and which is, no doubt, a correct doctrine, sustains appellant's contention, the exception made to the general rule is as plainly enunciated as the rule itself, and the case at bar falls squarely within the scope of the exception instead of the rule."

There is a difference, however, between the Mannville case and the ordinary case in which the recent fabrication rule is invoked, because the three witnesses testified in effect that Hartsock was mistaken as to what Conboy's statement was, and the evidence was not admissible in corroboration of Conboy but in contradiction of Hartsock, i.e., to show that Hartsock had misunderstood Conboy, and that therefore, no inconsistent statement had been made.

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[28] For a detailed discussion of the two holdings see 2 Wigmore on Evidence (2nd Ed.), Secs. 1133-1140, pp. 654-662. Many of the caess holding the details of the complaint admissible are also justifiable upon the grounds that in the particular instance the complaint was so recent as to be considered within the rule admitting *res gestae* statements.

[29] 8 Wash. 523, 36 Pac. 470 (1894).

The court, however, first held it came within the recent fabrication exception, saying·

> "The defendant in this case assailed the testimony of Conboy as a fabrication. That was the object of Hartsock's testimony, to make it appear to the jury that at first Conboy had told the truth, but that subsequently he had fabricated the statement which he made under oath."

The majority of courts, however, hold prior consistent statements inadmissible where the only impeaching evidence is a prior contradictory statement, because the imputation that he made a prior contradictory statement is not removed by showing he made a prior consistent statement.[30] Nor is the showing of a prior consistent statement, assailing evidence as a recent fabrication, as was intimated by the court. The evidence, however, was as before stated, admissible for the purposes of showing it was never made. The court recognized its admissibility for this purpose, for further in its opinion it said.

> "It seems to us that this testimony was plainly admissible to show, or at least to tend to show, that Conboy did not make the statement attributed to him by Hartsock, but that Hartsock was mistaken. It was the same conversation that they were testifying to that Hartsock had testified to, not an attempt to prove that at some other time and place the witness had made another or different statement."

It seems clear, upon an analysis of the facts of the case that the admissibility of the prior statement did not depend upon the recent fabrication exception, and if it had been admitted on that ground alone, would have been out of line with the great weight of authority

The next time the question arose in Washington was in the case of *State v. Coates* (1900) [31] In this case the defense impeached the state's main witness by proof of a contradictory statement made to three police officers. The witness, at the time, was under arrest and the evidence showed that his statement was made after he had been sweated for an hour, and after certain promises of lenience had been made to him. Upon the showing of the contradictory statement, the prosecution offered to show a consistent statement to cor-

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[30] *Chicago City R. Co. v. Matheson*, 212 Ill. 292, 72 N. E. 443 (1904) *Commonwealth v. Jenkins*, 10 Gray (Mass.) 485 (1858).

[31] 22 Wash. 601, 61 Pac. 726 (1900).

roborate the witness. In holding the evidence admissible, the court first cited from the case of *Dassett v. Miller* (1855),[32] as follows

> "Where the credit of a witness is attacked upon the ground that he had made statements inconsistent with the statements that he had made in court, testimony may be heard to show that at other times and on other occasions the witness had made statements consistent with his testimony given in court."

The court then commented on the fact that this rule had been denied in the leading case of *Commonwealth v. Jenkins* (1858),[33] and then made the following citation from that case

> "The decision of the point raised in this case is not to be understood as conflicting with a class of cases in which a witness is sought to be impeached, by cross-examination or by independent evidence, tending to show that at the time of giving his evidence he is under a strong bias or in such a situation as to put him under a sort of moral duress to testify in a particular way In such case, it is competent to rebut this ground of impeachment and to support the credit of the witness by showing that when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those which he has given at the trial."

The court then stated that "the rule laid down by the Supreme Court of Massachusetts case is perhaps the correct rule," and under it the testimony was admissible. The Massachusetts case is undoubtedly the weight of authority on the question, and it is submitted that the Washington case is only supportable on the theory that the inconsistent statement was made at a time when there was no influence or pressure upon him, and, therefore, worthy of some corroborative force.

The next case in which the point was raised in this jurisdiction, was *Callihan v. Wash. Water Power Co.* (1902) [34] That was an action for personal injuries sustained by the plaintiff, who claimed to have been a passenger on defendant's cars. The defendant denied that she was a passenger, and the conductor testified that she was not. To corroborate the conductor's testimony, the defendant company was permitted to introduce the conductor's trip report showing the number of passengers carried on the trip in question. Ap-

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[32] 3 Sneed 71 (1855).
[33] 10 Gray 485 (1858).
[34] 27 Wash. 154, 67 Pac. 697 (1902).

pellant claimed the evidence was self-serving and therefore inadmissible. The court held that the case came under the exception to the general rule, and that the evidence was admissible for the reason that the conductor, being an employee of the defendant company, would be prompted to testify in favor of his employer, and that there existed a motive for him to fabricate. The court sets out the exception under which this evidence was admitted, in the following language.

> "If a witness be impeached by proof of his having previously made statements that were in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of recent date, it may be shown that he gave a similar account, before its effect and operation could be foreseen."

Inasmuch as the witness' testimony was not attacked as a recent fabrication in this case, it would seem that the court, in arriving at its decision, really made a loose statement of the rule that a witness charged with a motive or interest to misstate or misrepresent the facts concerning which he has testified, consequent upon or growing out of the relation to the cause or the litigant in whose behalf he gave testimony, may be supported and corroborated by proof that he made statements consistent and in harmony with his testimony before its effect and operation could be foreseen.

In three of the remaining four cases which have been determined on this particular point in this state, the rule was invoked under somewhat similar circumstances. In the case of *Conover v. Heher-Ross Co.* (1905),[35] the plaintiff, Conover, had had his arm cut off in the defendant's shingle mill, and sued for damages. The defendant introduced evidence that the plaintiff had made a statement soon after the accident that his injury occurred through his own fault, and the trial judge admitted evidence of statements consistent with plaintiff's testimony on the stand. The court held such evidence admissible.

In the case of *State v. Spisak* (1917),[36] the accused, in a trial of assault, was impeached by the testimony of the sheriff, that at the time of his arrest, he had made inconsistent statements. The court held that accused was entitled to corroborate his testimony by showing that he had made other statements consistent with his testimony on the stand, on the day of his conversation with the sheriff.

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[35] 38 Wash. 172, 80 Pac. 281 (1905).
[36] 94 Wash. 566, 162 Pac. 998 (1917).

In the case of *Russell v. Cavelero* (1926),[37] the plaintiff was in the employ of defendant as a farmhand and was injured by falling through the haychute while working in the hay mow of the defendant's barn. Three witnesses testified that defendant had said that his injuries were the result of his own fault. The plaintiff, in rebuttal, offered to show prior consistent statements. The court held such evidence admissible. After citing the general rule excluding prior consistent statements, the court continued

> "But many of the courts recognize and we have recognized an exception to the rule. When a witness has been impeached by showing that he has made statements concerning the event to which he testifies at the trial contradictory of his evidence there given, and the impeaching evidence is of such a nature as to indicate that his testimony is a fabrication of recent date, proof of antecedent statements of the witness consistent with his testimony may be introduced."

Relating to the admissibility of the statements in the Callihan case, supra, it was said

> "The undoubted theory which appellant sought to impress upon the jury was that respondent's testimony at the trial was a recent fabrication."

And in the Spisak case, supra, that

> "This state is committed to the rule that evidence of prior consistent statement is admissible when testimony is assailed as a recent fabrication, and that it is so assailed when it is susceptible of such attack before the jury "

It should be noticed that in these three cases the impeachment was a prior inconsistent statement. As before noted, the mere fact that a prior inconsistent statement has been made will not warrant, by the weight of authority, the introduction of a prior consistent statement, because it in nowise tends to show the prior inconsistent statement was not made. The Supreme Court of Washington acknowledged this in the case of *State v. Coates,* supra, but in all its subsequent decisions it has held that the introduction of a prior inconsistent statement is of such a nature as to indicate that the witness' testimony is a fabrication of recent date. The Washington Court seems to be the only court which has held that the mere introducing of such evidence is attacking the testimony of a witness as a recent fabrication. The test laid down by the court, that testi-

[37] 139 Wash. 177, 246 Pac. 25 (1926).

mony is assailed as a recent fabrication when it is susceptible of such attack before the jury, seems to be also peculiar to the Washington Court alone. It is unquestionably a broader test than has been adopted by any other court in its application of the recent fabrication rule as such. Carried to its logical conclusion, it would seem that practically any impeachment would justify the admission of prior consistent statements in corroboration.

The Conover, Spisak and Russell cases seem to be also without authority on another ground. The cases in other jurisdiction seem to hold that even where there has been a charge of recent fabrication, evidence of consistent statements is admissible only in those cases where the consistent statements were made when the effect of making them could not have been foreseen. In other words, if the motives and interests of the witness at the time of making the consistent statements were the same as the time of giving his evidence at the trial, evidence of such statements is not admissible. In these three cases, the prior consistent statements were all made subsequent to the time the party had been injured or accused of crime. It would seem clear that any statement made at such a time could hardly have been said to have been made at a time when the witness would not have a motive to speak in his own interests. The fact that he has made similar statements at a time when his interest is the same as at the trial, could have no probative weight as corroborative evidence, and consequently, should be rejected. Although the determination of whether or not a motive to fabricate existed at the time the statement was made, is within the discretion of the trial judge, still it is hard to reconcile the fact that no motive to fabricate did not exist, when the parties were in the position of prospective litigants.

The only other case on this particular question in Washington is that of *State v. Braniff* (1919).[38] Braniff was convicted of larceny of certain horses. Practically the only testimony against accused was that of two accomplices. The defense, in its opening statement, made the statement that the charge was a "frame up." During cross-examination of one of the accomplices by defense counsel, he was asked and answered as follows.

> Q. Is it not a fact, Roy, that you and Sank and Bosley ran off the horses, and afterwards made up the scheme to throw the blame onto Tom Braniff?
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> A. No, it is not.

[38] 105 Wash. 327, 177 Pac. 801 (1919).

The State was then allowed to corroborate the witnesses by testimony of the sheriff that in his confession one of the accomplices had made previous consistent statements. The Supreme Court, on appeal, held this was reversible error on the grounds that such impeachment did not amount to an assailing of the witness' testimony as a recent fabrication. The court seems to intimate that positive impeaching evidence, such as a prior inconsistent statement, is necessary before the rule may be invoked. It would seem that such a holding is indicative of an intention to interpret strictly the test as to when testimony has been so impeached as to render it susceptible of an attack as a recent fabrication. The court is still committed to the view, however, that showing prior inconsistent statements is assailing testimony as a recent fabrication.[39]

The court also said.

> "This is not a case of Clarke making a previous consistent statement against his own interest, nor is it a case of Clarke making a previous consistent statement at a time when he had any motive or interest different from that at the time he testified in this case, insofar as we are concerned with appellant's rights here involved."

The court was unquestionably correct as to this point, which would also seem to indicate a tendency to return to the rule in its stricter form in this respect. In the Russell case, supra, however, the fact that the witness making the statement was a party litigant, who certainly did not make the prior statement at a time when he had any motive or interest different from that at the time he testified, was not even mentioned.

B. Complaint in Sex Crimes.

The rule allowing the corroboration of an assaulted female in cases of rape and assault with intent to ravish, by showing the fact of complaint was early recognized in Washington in the case of *State v. Bunter* (1898) [40] In that case the court held it was not error to permit the mother of the prosecutrix to testify that the prosecutrix made complaint to her. The court noted the seeming conflict upon the question as to the admissibility of the details of the complaint and concluded by saying·

> "After a pretty thorough examination of the cases we think the better rule is to restrict the evidence to the fact

[39] *Russell v. Cavelero*, 139 Wash. 177, 246 Pac. 25 (1926).
[40] 18 Wash. 670, 52 Pac. 247 (1898).

> of complaint, and that anything beyond that is hearsay of the grossest character."

Since this case was decided, the question has been before the court several times and it has consistently adhered to this doctrine, holding it to be reversible error wherever the trial court has allowed the details of the complaint to be admitted in evidence.[41]

The Washington Court has also taken the position in this type of cases that the complaint should only be admissible when seasonably made. This was first held in the case of *State v. Griffin* (1908).[42] In that case the appellant was charged with the crime of rape upon a girl fifteen years of age who had lived with appellant and his wife at their hotel about two and one-half years prior to the commission of the alleged offense. She made no complaint until nearly a year and a half after testimony showed the appellant first took liberties with her person, until about eight months after he had made his first felonious assault, and until nearly six months after the crime was consummated. No threat, no restraint, or lack of opportunity to excuse the delay was shown. The court, in holding that under such circumstances the fact of complaint should be excluded, said.

> "Since the only purpose of admitting evidence of the complaint is to show that the conduct of the prosecuting witness was consistent with her testimony, and to rebut any inference that might arise from silence or concealment, it would seem to follow, on principle, that evidence of the complaint should be excluded whenever from delay or otherwise it ceases to have corroborative force. In the nature of things there must be some limit of time beyond which such complaints cease to corroborate While under ordinary circumstances the court must submit the complaint with all the attending circumstances to the jury, under proper instructions, yet in a case such as this, where there have been months of inexcusable delay, we think that

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[41] *State v. Griffin*, 43 Wash. 591, 86 Pac. 951 (1906). In this case it was held reversible error to permit the witnesses to whom the prosecutrix had made complaint to state the name of the person whom she claimed to have committed the offense. In the cases of *State v. Beaudin*, 76 Wash. 306, 136 Pac. 137 (sodomy case) (1913) *State v. Aldrick*, 97 Wash. 593, 166 Pac. 1130 (1917) and *State v. Arnold*, 144 Wash. 367, 258 Pac. 20 (1927), the complete details of the complaint had been admitted. This was held erroneous in each case, the court, in *Aldrick* case, saying: "This court has adopted the view that, while the complaint may be shown, the details or particulars are subject to objection." In the following cases the general rule that the fact of complaint is admissible was enunciated: *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622 (1909), *State v. Gay*, 82 Wash. 423, 144 Pac. 711 (1914) *State v. Dixon*, 143 Wash. 262, 255 Pac. 109 (1927).

[42] 43 Wash. 591, 86 Pac. 951 (1906).

> justice demands that the complaint should be entirely excluded from the consideration of the jury ''

To bring the case within this rule it is only necessary, however, that the complaint be seasonably made, which is a relative question, resting for the most part in the discretion of the trial court. It was held in the case of *State v. Myrberg* (1909),[43] that where the time of the alleged rape was fixed by the state as the last of February or first of March, complaints made by the prosecutrix about the first or middle of March were seasonably made.

HERALD A. O'NEILL.*

[43] 56 Wash. 384, 105 Pac. 622 (1909).
*Of the Seattle Bar.