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THE RULE AGAINST IMPEACHING ONE'S OWN WITNESS: A RECONSIDERATION

RALPH C. THOMAS*

One of the general rules of which the law is so fond is that you cannot impeach your own witness. This rule, subject to exceptions as are all general rules, comes into play when the lawyer attempts to question in any fashion the correctness of the testimony offered by a witness placed by him on the stand, or his motive for giving it.

The obvious rationale underlying the rule is sponsorship of the witness by his proponent. This presupposes, it would seem, that all witnesses become so as a result of deliberate choice by the party using them. Therefore, if his choice has been bad he must suffer the consequences. Such a concept is so obviously foreign to the actual situation that it seems strange that the rule has survived to this day. That those who work with witnesses really believe otherwise is indicated by the number of writings on the strategy of preparing for trial. Such writings deal with fortifying the witness with practice direct examinations and cross-examinations so that he will not say the wrong thing on direct and will adhere to his original story on cross-examination. They enlarge upon the frailties of witnesses on which counsel can capitalize by clever cross-examination in order to turn the tide in his favor. This material indicates that the witness, any witness, on either side, is a frail vessel who should be carefully strengthened by his proponent and whose destruction by the right tactics can be engineered by the opposite party.¹ In the face of the well-publicized malleability of witnesses a rule which fastens on a party the consequences of relying on them smacks of gamesmanship.

Nonetheless, the rule persists, despite the prevalence of biased, lying, or reluctant witnesses. It is the purpose of this article to trace the dimensions of the prohibition against impeachment and discuss the possible

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1. E.g., BUSCH, LAW AND TACTICS IN JURY TRIALS § 188 (1950); KELNER, PERSONAL INJURY, SUCCESSFUL LITIGATION TECHNIQUES chs. 5, 11 (1965); and 2 BELLI, MODERN TRIALS ch. XV (1954).
responses of counsel to the challenge of the reluctant, stupid, or recalcitrant witness.

I. THE DEVELOPMENT OF THE RULE

The origin of the rule is obscure and lost among the dim reaches of the development of the trial as we know it. Whatever its genesis, it seems to have developed in civil litigation by 1700 when "Holt, C. J., Would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him." It had appeared nineteen years earlier in criminal trials when the accused was informed in one case that he could not disparage his own witness nor seek self-contradiction from an unwilling witness. In another case of the same year the accused was told, "whatsoever witnesses you call, you call them as witnesses to testify the truth for you; if you ask them any questions you must take what they have said as truth . . . . [L]et him answer you if he will but you must not afterward go to disprove him."

By the opening of the next century logical reasons were being assigned for the prohibition. Phillips in his Treatise on the Law of Evidence, after stating that a party will not be permitted to produce general evidence to discredit his own witness, quotes from Buller's Nisi Prius that this privilege if granted would enable the party to destroy the witness if he spoke against him and to make him a good witness if he spoke for him. Phillips continues: "The meaning of this rule is, that a party cannot prove his own witness to be of such a general bad character, as would make him unworthy of credit. If he knew the infamy of his character, he was practicing a fraud on the court in producing him as a witness."

The idea that it is only fair play that a party stand or fall by his own witness is given clearer form a few years later in the American case of Whitaker v. Salisbury, where the court said:

But when a party calls a witness whose general character for truth is bad, he is attempting to obtain his cause by testimony not worthy of credit. It is to some extent an imposition on the court and jury. The law will not suppose, that a party will do

4. Fitzharris’ Trial, 8 How. St. Tr. 223, 369, 373 (1681).
5. Coolidge’s Trial, 8 How. St. Tr. 549, 636 (1681).
6. PHILLIPS, EVIDENCE 213 (1st Am. ed. 1816).
any such thing; but will rather hold the party calling the witness to have adopted and considered him as credible.\textsuperscript{7}

It is a grim choice that confronts the lawyer. Knowing his witness to be a liar, or at least biased, but assuming that he is telling the truth on this occasion, he can leave him off the stand and thereby refrain from "imposing" or "practicing a fraud" on the court. On the other hand, he may take the risk of the witness disappointing him even though he can do little to repair the damage.

The rule has always been that the witness can be contradicted by other witnesses who testify differently. Phillips puts it thus: "But if a witness unexpectedly give evidence against the party that called him, another witness may be called to prove those facts otherwise . . . ."\textsuperscript{8} And a modern decision clarifies the point by saying: "One who calls a witness vouches for his credibility . . . . He does not vouch for his infallibility and constitute him one incapable of being mistaken."\textsuperscript{9}

\textbf{II. LIMITS OF THE RULE}

What then are the boundaries of the rule against impeachment of one's own witness? Definition of the word "impeachment" would seem necessarily to precede an answer. The word carries more than one connotation. One is the establishing of the witness as, or as inclined to be, a liar. Another describes the attempt to prove that he has lied on this occasion, as evidenced by a prior inconsistent statement. A third is an attempt to prove mistake, or something akin to it which does not establish depravity but rather confusion or stupidity.

By the early decades of the nineteenth century the rule seems unquestioned that a general attack on character could not be made and a distinction was being drawn between such an attack and allowing proof of prior self-contradiction.\textsuperscript{10} The concept persists, taking its latest form in the 1965 revision of the Texas statutes, which in terse language provides for impeachment of one's own witness, "except by offering evidence of the witness' bad character."\textsuperscript{11} It found earlier expression in a case where attempts were made to show that the proponent's witness had been a

\begin{itemize}
\item \textsuperscript{7} 32 Mass. (15 Pick.) 534, 545 (1834).
\item \textsuperscript{8} Phillips, op. cit. supra note 6, at 213.
\item \textsuperscript{9} Aetna Life Ins. Co. v. Love, 149 S.W.2d 1071, 1075 (Tex. Civ. App. 1941).
\item \textsuperscript{11} Tex. Code Crim. Proc. art. 38.28 (1965).
\end{itemize}
prostitute and afflicted with venereal diseases; the New York Court of Appeals holding that if the only effect of an affirmative answer is to discredit the witness the question is objectionable. The North Carolina court refused to allow the state to impeach witnesses' general reputation for truth or to impugn their credibility by general evidence tending to show them unworthy of belief. And the Oklahoma court, in an early case, put it this way: "A party who places a witness upon the stand thereby vouches for his veracity, or at least vouches that the witness is not to deeply steeped in moral turpitude as to be worthy of some credence. Therefore such party shall not be permitted to impeach such witness by showing his general bad character for truth."

A further distinction is drawn in some jurisdictions which confine the impeaching effort to a demonstration that the witness is a liar, as opposed to showing he is so deficient in moral fiber that it is likely that he is one. New Jersey, although allowing impeachment of one's own witness, provides that traits of his character other than honesty or veracity shall be excluded.

By the early decades of the nineteenth century the choice restricting impeachment, for the most part, to proof of prior contradictory statements had been made. In Wright v. Beckett a witness who testified unsatisfactorily for plaintiff was asked if he had not given a contrary statement to the solicitor two days before. Lord Denman, who let the evidence in over objection at nisi prius, later paid his respects to Buller's rule on motion for new trial and said it was confined to proving general infamy but did not extend to self-contradiction. He continued:

But how can this prevent me from showing that he states an untruth on a particular subject, by producing the contrary statement previously made by him, which gave me just cause to expect the repetition of it now. If his character is injured, it is not directly, but consequentially; but perhaps no injury may arise; there may be a defect of memory; there may be means of perfect explanation.

13. State v. Freeman, 213 N.C. 378, 196 S.E. 308 (1938). Although this case involved prior contradictory testimony, the rule is clear.
The persistence of this rationale is indicated by the Missouri case of *Detjen v. Moerschel Brewing Co.*,\(^\text{18}\) allowing interrogation on inconsistent statements for the purposes of refreshing the recollection of the witness, of inducing him to correct his testimony, and of allowing counsel to show why the witness was called.

The rule that inconsistent statements could be inquired into carries a requirement, also of early origin, that it is the presence of surprise that allows the impeachment. Thus, in *Wright v. Beckett*, Lord Denman, in building the argument for admission of the impeaching testimony said:

Suppose that in some dispute happening in the street by a bystander declares his name to one of the contending parties, and his readiness to prove his conduct blameless; that he attends the solicitor, and gives in his deposition to the same effect, but, when sworn in open Court, takes part with the adversary . . . . Some one in Court happens to know him, and whispers to the attorney, "He has deceived you in every way; he has given you a false name; he is the adversary's brother and partner; moreover, he has been for years notoriously infamous." Or suppose such a trial for misdemeanor . . . and that some stranger, after voluntarily offering his testimony to a calumniated man, should unexpectedly side with his false accuser. If the rule against discrediting your own witness must be strictly construed, these deceptions cannot be exposed . . . . [I]f you are permitted, by reason of your late discovery of these facts, to prove them for your own necessary protection, this must be, because the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in the witness box. The rule therefore is limited by that condition; and you shall be at liberty to discredit your witness . . . . because you have been deceived and surprised.\(^\text{19}\)

The requirement of surprise is the characteristic factor in most of today's cases involving witness disappointment. It is the conditioning element in the majority of attempts to repair the damage done by a recalcitrant or untruthful witness. The concept of hostility plays an important part as well, and both merit more detailed discussion.

**III. The Anatomy of Surprise**

For the most part, "surprise" takes the same meaning in law that it does in other contexts, although courts, as in a Missouri case,\(^\text{20}\) have

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\(^\text{18}\) 157 Mo. App. 614, 138 S.W. 696 (1911).
\(^\text{20}\) Crabtree v. Kurn, 351 Mo. 628, 173 S.W.2d 851 (1943).
held that before impeachment by contradiction the court must find that
some statements or artifice entrapped or misled the party into calling
the witness. It is difficult to believe that the Missouri court was not
thinking in terms of conduct amounting to the less dignified, but more
expressive term, "double-cross."

Whether enunciated in terms of the double-cross or couched in less
condemnatory language, the cases indicate that counsel must justifiably
have expected an answer different from the one he got from his witness.
When this justifiable expectation is lacking there can be no impeach-
ment by confrontation with the prior inconsistent statement. In State v.
Nelson,21 one of the state's witnesses gave unfavorable testimony and the
prosecution was allowed to cross-examine her from her testimony at the
coroner's inquest. It was established that two days before the witness
was called in the trial she had furnished the prosecution an affidavit in
which she repudiated her testimony before the coroner. Holding that there
was no justifiable surprise, the court reversed for the damaging effect of
the inadmissible prior contradictory statements. In another case the wit-
ness had implicated the defendant in a statement to the prosecution
but had testified in the prosecution of one Steen so as to exculpate def-
fendant a few days before the trial in which impeachment was sought.
The county attorney when confronted with his adverse testimony was
prohibited from examining him on his statement. The court said that
the state had made no showing that since the Steen trial anything had
occurred leading to a belief that his testimony would differ from that pro-
ferred in the case against Steen.22 And, on re-trial, the recalcitrance of the
witness cannot be inquired into if it was manifested in the first trial.23

Less clearly expectable disappointment is apparent in Sullivan v. United
States24 where three convicts had signed a joint statement inculpating
Sullivan. They repudiated their statement, and impeachment by means
of the statement followed. It was held that there could be no claim of
surprise with respect to the last two witnesses because the three had
signed a joint statement indicating they were acting in concert, and the
first witness' repudiation was fair warning the others would follow suit.
Assuming the correctness of the court's premise it becomes apparent that

21. 192 S.C. 422, 7 S.E.2d 72 (1940).
24. 28 F.2d 147 (9th Cir. 1928).
the decisive factor is whether the double-cross coincides with the testimony. If it precedes it by enough time to allow counsel to avoid asking and receiving the disappointing answer, then surprise is not present. Also illustrative of this formulation is People v. Underwood\textsuperscript{25} where, after the trial was in progress, proceedings out of the jury's presence were held and the witness indicated that he would not testify as he had previously led his proponent to believe. Surprise was not found. Surprise is lacking in even the ordinary sense when the prosecution does not know that the witness has made a prior contradictory statement until after he testified and left the stand. Recalling him for impeachment is prejudicial error.\textsuperscript{26}

One trial court gained approval for action which controlled the element of surprise. Defense counsel having said that he intended to call the defendant's two sons, the court informed him that the District Attorney expected the sons to testify in a manner contrary to their statements. He extended to defense counsel an opportunity to talk to the boys in chambers and said that a failure to do so would preclude a finding that surprise was claimed in good faith.\textsuperscript{27} What seems a completely different attitude was displayed in McLain v. State,\textsuperscript{28} where the court noted that the witness' statement was taken the day after his mother's arrest and was reiterated before the grand jury. The court then said, "and the prosecutor very wisely, under the circumstances, refrained from talking to the witness again until he was placed on the stand. This is a perfect case authorizing the plea of surprise."\textsuperscript{29} This rule is lenient to the extent of according a privilege of "hear no evil, see no evil" conduct to counsel.

Leniency of a lesser degree is accorded in an Oklahoma prosecution involving automobile speed. Shown his statement before trial and asked if it were true, the witness answered, "Yes, I don't want to mess with the speed." On trial he repudiated his former statement about speed. The court said that it was not unreasonable to expect a witness who had twice testified under oath to repeat his testimony and his statement before trial was not such as to "relieve the situation on the subject of the speed, of

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\item 25. 37 Cal. Rptr. 313, 389 P.2d 937 (1964).
\item 29. \textit{Id.} at 414.
\end{itemize}
the element of surprise." Expression of reluctance to "mess with the speed" could mean either that he did not wish to change his former testimony or that he did not wish to become involved on the question of speed. A more exacting court would have required the prosecutor to resolve the ambiguity before interrogation.

It has been held that even if the witness has given disparate accounts before trial this does not rob the proponent of surprise if the last account given by the witness is the one sought to be established by him. Thus, if the witness first accused defendant to the prosecutor, then testified on a preliminary hearing so as to exculpate him and followed this with inculpatory testimony before the grand jury, the prosecution could reasonably assume her testimony at the trial would be the same as before the grand jury. And counsel can claim surprise more than once while the same witness is testifying, the first disappointment not being held notice that his witness is likely to repudiate another part of his former story.

Surprise in the full sense is not demanded in one jurisdiction which allows counsel who has ground for believing that the witness will testify contrary to a statement that he has given to call the witness under the belief that when confronted by the prior statement he will abandon efforts to deviate from it. Confidence that the witness will adhere to the original statement because of his respect for the oath or his fear of a prosecution for perjury excuses the lack of surprise also. However, the assertion of such a belief is not always sufficient. It was denied in one case when the witness before trial had said that he would not identify defendant because he would prefer to go to jail rather than have his wife and children in jeopardy. The court ruled that not only was there no surprise because the witness had told the prosecutor before trial that he would not abide by his former statements but that it was unrealistic to expect him to implicate defendant when his reluctance to do so was based on fears for his wife and children.

In contrast to the more restrictive application of the concept of surprise is People v. Kidd, where the California court met the argument that the

defense had made no effort to inquire of the witness what his testimony would be, had not talked to him, and was not, therefore, entitled to claim surprise. The defense stated that they were relying on newspaper accounts of what the witness, a coroner, had said after the coroner's inquest. The court ruled that as the witness was a public official it would not appear unreasonable to assume that his testimony would be the same as the statement attributed to him in the press. California requires a showing of surprise and it is improper for the court to take the word of the counsel alone. But in People v. Kidd the court found that defendant showed the basis for surprise.

Peurifoy v. State, expressly allows the unsupported statement of the solicitor to establish surprise. The ninth circuit has held the same in criminal cases, allowing surprise to be shown by the statement of counsel or otherwise and explicitly ruling that no hearing on surprise was necessary. In an earlier ruling, the same circuit had held that the government was not required to contact the witness to ascertain whether she would abide by her story because they were under a duty to call the witness. Another federal court has allowed counsel to place his faith in the sobering influence of court even though he was aware of contradictory statements before trial.

IV. The Concept of Hostility

"Hostility" is an imprecise term in law, almost exclusively a term of art. The ordinary usage of the word would seem to indicate that a hostile witness is one who through association or inclination tends to be antagonistic to the interest of the proponent of his testimony. This is the meaning it takes in some instances. Louisiana, which in its Code of Criminal Procedure permits the impeachment of the witness who has surprised his proponent or is hostile, has had hostility defined as not dependent upon a belligerent or biased attitude in giving testimony, but capable of being established by a showing that the witness' interest is on the side of the accused to such an extent that he or she will not give a true account of

40. Stevens v. United States, 256 F.2d 619 (9th Cir. 1958).
41. Journeyman Plasterers' Soc'y v. NLRB, 341 F.2d 539 (7th Cir. 1965).
the transaction. In this case the court ruled that the witness' hostility was evident from her previous illicit relationship with the defendant.

By reading between the lines, the same meaning of hostility may be gleaned from some cases where it is not so clearly enunciated as in State v. Willis. In a prosecution for the death of a police officer two brothers named Bell were involved as well as three women, one of whom was identified as living with one of the brothers, William Bell. One of the two other women present at the altercation first gave a statement that the defendant George Bell killed the officer and then testified differently at the trial. The court allowed the prosecutor to claim surprise and to cross-examine, and this was approved, the court saying that she was plainly hostile to the state and had contradicted her former statement and testimony. Unless hostility consisted entirely in change of position, the inference arises that she was thought to be in sympathy with the defendant, George, because she was identified with him if with either of the two brothers.

In Commonwealth v. Bartell a house had been dynamited in labor strife and two of those implicated had been convicted. Called in Bartell's trial by the state they gave testimony which was characterized as reluctant and hostile. No plea of surprise was made nor was one needed, the court held, because the fact that they were hostile and adverse witnesses was alone sufficient to allow cross-examination by the prosecution. There was a conflict between their present and prior testimony.

In Rossano v. Blue Plate Foods, Inc., plaintiff asked leave to examine a witness, Harris, under Federal Rule 43(b) which allows a party to call the managing agent of the adverse party and interrogate him by leading questions and to impeach and contradict him. The court noted that the first part of rule 43(b) allows leading an unwilling or hostile witness and, finding that Harris was not a managing agent as alleged, measured plaintiff's demands by whether Harris was a hostile witness. In so doing, the court ruled that the witness must be considered

44. State v. Bell, 359 Mo. 785, 223 S.W.2d 469 (En Banc 1949).
46. 314 F.2d 174 (5th Cir. 1963).
47. Fed. R. Civ. P. 43(b): "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party. . . ."
hostile by reason of clear alignment of interest with the other party or due to antagonism directed to the calling party. \(^48\)

The clearest recognition of hostility where there could be no surprise is in a Maine case \(^49\) in which the witness, after having testified and made statements, indicated that she did not want to testify again and would be out of town when the case was heard if she was informed of its setting. Counsel, in calling her to the stand, referred to her as a hostile witness and asserted that there are times when it is necessary to call one who is hostile.

Hostility does not always mean that the court has found alignment and sympathy with the other party. It usually means simply that there is adverse testimony which is surprising to the proponent. Hostility was asserted in *Commonwealth v. Turner* \(^50\) when the witness Lofton, after a bewildering succession of trials of Turner, refused to testify in Turner's fifth trial in the same fashion that he had testified in Turner's third trial. He had refused to testify in Turner's fourth trial. Reading of his testimony from the third trial was allowed and reversal followed, the court ruling that there was no basis for the claim of hostility as all the witness did was testify that his recantation affidavit was correct. No mention is made of Lofton's natural desire, which he had given as a reason in the fourth trial, to withdraw from participation in the aftermath of a crime for which he was now serving a life sentence.

Defining hostility in terms of surprising adverse testimony is common. Chamberlayne put it thus: "Certain jurisdictions hold that in the event a witness believed to be friendly, is in fact hostile, and counsel is thus surprised, he may show contradictory statements made at other times, the purpose being to explain the attitude of the witness and offset the effect of his testimony." \(^51\)

Conrad \(^52\) comments that surprise testimony, in the discretion of the trial court, characterizes the witness as hostile and opens the way to impeachment. Conrad cautions: "There must be a showing that the party offering a hostile witness has been taken by surprise at his testimony,

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48. There was no finding of hostility and the discussion is therefore dictum, but it was relied on by the Seventh Circuit, characterizing a witness as "aligned with the interests of the Union," in Journeyman Plasterers' Soc'y v. NLRB, 341 F.2d 539, 544 (7th Cir. 1965).
that he is in fact hostile, and that the party is damaged by the witness' unfavorable testimony.\(^{53}\) A leading work on criminal evidence, after discussing the non-binding character of witnesses a party is compelled to call and the ability of the party to contradict and impeach, continues:

Another exception occurs where the witness is treacherous and proves unexpectedly hostile in his testimony upon the stand. If he then gives a widely variant version of relevant facts, to the surprise of the party in whose favor he was called, his extrajudicial declarations may be proved, but solely for the purpose of impeachment.\(^{64}\)

Although it is common for witnesses to be characterized as hostile because their testimony is adverse, one court, after reciting facts which would show alignment against the proponent, described the contentious, blustering attitude of the witness and said that his attitude and testimony became so hostile that the proponent was allowed to cross-examine.\(^{55}\) Also, cross-examination was accorded by a Massachusetts judge who declared the witness hostile because he found it necessary to admonish her to sit in the proper attitude and to answer the questions audibly.\(^{56}\)

The Kansas court in *Johnson v. Hager*\(^{57}\) characterized a witness as hostile because her answers displayed familiarity with the events in question but no memory of what defendant was alleged to have said on these occasions. Hostility was found in this case because her answers showed her to be an unwilling and hostile witness. She was the niece of both parties and the court may have been indicating alignment when it later said she was hostile to the cause of the defendant. And, in Iowa, a witness was found to be hostile because he appeared evasive and antagonistic and the changes in his testimony surprised the prosecutor. No stress was laid on his present employment with the defendant, which would seem to presage disappointing testimony.\(^{58}\)

On balance it would seem that the marriage or near marriage of the concept of hostility to that of surprise is confusing and misleading and should be abandoned. The word "hostility" carries with it overtones of malice and wish to work a hurt. It does not correctly describe

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53. *Id.* at 304.
the attitude of all witnesses who change their former statements and disappoint their proponents. For example, the writer once succeeded in proving to a highway patrolman's satisfaction that his report was in error and subpoenaed him, only to have him put on the stand by the plaintiff in his case in chief. His description of the accident was ruinous to the opponent, who was undoubtedly surprised, but in no sense was the patrolman malicious or unfriendly to him.

V. Treatment of Surprising Witnesses

It is important to recognize for the purpose of discussion that counsel may be surprised even when there is no double-cross and no hostility which, in the nature of things, spawns the double-cross. The proponent is nonetheless embarrassed if he receives an unexpected answer from a confused or forgetful witness or from one who in good faith has changed his testimony. In fact, counsel is presented with three principal possibilities whenever he entrusts his case to a witness. There is the possibility that the witness is antagonistic to the cause and the client and is biding his time in order to strike a decisive blow against the side which calls him. This is the truly hostile witness. There is the possibility that the witness is confused and gives divergent testimony because of confusion. Here, there is no hostility, and a clear field for rehabilitation exists. For instance, one of the writer's witnesses, testifying in a retrial, was asked the distance between him and the writer's client when he first noticed him. His expected answer based on the same question in two earlier trials was eighty feet; his unexpected answer was one quarter mile. And, as indicated in the change in the highway patrolman's testimony referred to above, surprise may not come out of malice but out of conviction. After all, the trooper and the other party had made the same mistake. The basic question for trial counsel is his remedy when faced with any of these possible situations.

The various jurisdictions show a bewildering diversity of treatment for the witness who has disappointed his proponent when called. In some the proponent is allowed to impeach, in others to neutralize, in others to give the jury a choice between the former and the present statements. In still others the former statements are usable only to establish surprise, refresh the memory, and provide the witness with the opportunity of adhering to the correct testimony. It cannot be said that there is any central theme, although, for the most part, the disappointed counsel is permitted to attack the testimony by contradiction.
Alabama holds that when a party introduces a witness he will not be allowed to impeach him but, upon receiving unexpected answers, is entitled to interrogate the witness about prior contradictory statements to refresh his recollection, to show surprise, and to relieve himself of the disadvantage he has been put to by such evidence. And, this may be done although its incidental effect is impeachment of the witness.\(^59\)

Incidental impeachment is allowed also in Nebraska where upon surprise the witness may be asked about prior statements to establish counsel’s surprise, test the witness’ recollection, refresh his memory, induce him to change his testimony, procure an explanation of his apparent inconsistency, or show the circumstances that induced the party to call him and that he has been placed at a disadvantage by unexpected evidence.\(^60\)

In Illinois the prior contradictory statement is allowed to show the testimony is unexpected, to refresh the memory of the witness and awaken his conscience, and to cause him to speak the truth if he is lying.\(^61\)

That incidental impeachment is also worked was conceded by the court.

Absent the possibility of covert testifying by designing counsel who asks about a fictitious statement, most would agree that opportunity should exist for refreshing the memory of the witness, for allowing him to rectify mistakes, and for extending to the perjurious witness a *locus poenitentiae*. It is apparent that these formulations also include some degree of solicitude for the party (that is, his lawyer) who has put on a witness whose testimony is the opposite of that which the party wants. That it is opposed to the party’s interest is almost always readily apparent to the jury and, in any event, probably could be guessed by the look on counsel’s face. This seems to be the basis for the privilege extended counsel to demonstrate that he not only can recognize testimony good for his case but that he had reason to expect it from this witness. The element of face-saving seems more important here than the more abstruse concept of vouching for one’s witnesses.

One of the difficulties inherent in letting the questions be asked of the witness, even though no independent proof is allowed, is that the jury may assume the truth of either the making of the prior contradictory statement or of the content of the statement itself. This problem seems

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to have been solved, in criminal cases at least, in Missouri, which allows the interrogation of a recalcitrant state’s witness for the purpose of refreshing his memory but holds that this must be done out of the presence of the jury.\textsuperscript{62} In a jurisdiction where the articulated reasons for asking the witness about the prior statements do not include outright impeachment or the jury’s privilege of taking the statements as substantive proof, the interrogation should be done out of the jury’s presence.

In jurisdictions which allow counsel to do more than suggest to the witness that he is mistaken or lying or attempt to refresh his memory, a substantial problem remains. If the purpose of the question is to impeach, or to show why counsel has called this witness, it is necessary that the jury must know of the prior statements and therefore may, despite instructions, rely on them for the truth of the matter in issue. It would seem that there should be at least some requirement of good faith on the part of counsel in order to establish that he has grounds to believe that the asserted prior statements were made.

Impeachment has been defined as “to call in question the veracity of a witness by means of evidence adduced for that purpose.”\textsuperscript{63} Maguire wrote, “It really means something like ‘derogate from credibility.’”\textsuperscript{64} Whether it can mean more than attacking credibility and can also embrace establishing the truth when a prior contradictory statement is used is decided by most courts by resort to the hearsay rule. The great majority of cases hold that the hearsay rule is violated when the prior statement is allowed to be taken as expressive of the truth.\textsuperscript{65} Consequently, in most jurisdictions it is unquestioned that a cautionary instruction is appropriate and needed to divert the jury from the choice.

Whether the jury follows the instruction is problematical. McCormick, in attacking the distinction, notes that it is the possibility of truth of the prior statement that damages the credibility of the witness. He deprecates the idea that the judge and jury may decide unreliability from the fact of contradictory statements without considering the likelihood of

\textsuperscript{62} State v. Patton, 255 Mo. 245, 164 S.W. 223 (1914) suggests this technique and State v. Gregory, 339 Mo. 133, 96 S.W.2d 47 (1936) converted it into strong holding by reversing when the prosecution had gotten before the jury not only the contradictory statements but also evidence that the unruly witnesses were both under sentences of death and thus had nothing to fear as a result of their actions.

\textsuperscript{63} BLACK, LAW DICTIONARY (3d ed. 1933).

\textsuperscript{64} MAGUIRE, EVIDENCE COMMON SENSE AND COMMON LAW 42 (1947).

\textsuperscript{65} Id. at 57.
the truth of one or the other and says this would indicate, "a finical neutrality alien to the atmosphere of jury trial."

There is no certain way of testing to determine whether the jury has decided the case by believing the matter asserted in the prior contradictory statement. If the prima facie case or defense rests entirely on the witness who has disappointed his proponent and the witness denies the prior statement, the jury does not get the case. There has been a failure of proof. However, if there are other witnesses to make out the case, the outcome of the lawsuit may be based on the jury's acceptance as truth of the matter contained in the statement. The proponent in this instance has an advantage that the law seeks in most instances to deny him. What appears to be an acceptance of this fact is seen in one jurisdiction which, upon proof of prior contradictory statements, allows the jury to decide which of the two versions represented truth.

One device, that of "neutralizing," has the merit of decisive action, at least. It obtains in New Jersey by court rule as well as decision. The rules allows introduction of evidence impairing the credibility of a witness including those called by the party, "except that the party calling a witness may not neutralize his testimony by a prior contradictory statement unless the judge finds he was surprised."

The device has been explained as authorizing the cancellation or erasure of the damaging testimony when necessary to prevent a miscarriage of justice. Its sole effect is to restore the status prevailing before the witness testified, and his neutralized testimony is out of the case as if he had never testified. The virtue of such a rule would seem to lie in the removal of tainted testimony from the jury's concern by an instruction which relieves them of a duty to weigh it. However, as the jury hears the neutralizing testimony, the New Jersey court fears, as do courts in other jurisdictions, that there will be improper use made of it as substantive proof.

VI. THE DILEMMA OF NECESSARY BUT ADVERSE TESTIMONY

With minor exceptions the procedures outlined in this article to this point have afforded relief to counsel who have been the victim of a double-

70. Ibid.
cross of some magnitude. Such relief is meager and consists either in witness-prompting or in witness-destruction, and help is extended only to counsel who is or who claims to be surprised. It seems apparent that these measures do not go far enough and indeed miss the mark so long as they are tied to surprise or entrapment.

The problem of the trial lawyer consists not only in surprise but in the knowledge that information necessary to the trial rests in the hands of witnesses who are hostile in the laymen's sense of the word. That is, they are antagonistic to the cause of the person who must call them. Unless the advocate adopts the "hear no evil, see no evil" approach and does not interrogate these witnesses before calling them, their pre-trial statements are sure to disclose their antipathy and the futility of calling them because he is bound by their testimony. This problem seems as important as surprise, if not more so.

One procedure that has been utilized for this circumstance is to rule that the party calling them is not bound by their testimony. In Johnson v. Baltimore & O.R.R.14 plaintiff's decedent was killed by a railroad policeman. The only description of the encounter came from the policeman who testified he killed in self-defense. Plaintiff called the policeman in order to make out a prima facie case. The question was whether the plaintiff, having called the policeman, was concluded by his story of self-defense or whether the whole story should go to the jury. The court discussed the theory of witness sponsorship and said:

Nothing could make the rule look more foolish than its application in a case like this . . . . What could be more human than that Hall would make his story show the propriety of his own conduct and the wrongfulness of that of his opponent in the fight. And what would be sillier than to insist that the jury is compelled to believe all that testimony which the witness offered in explanation of an intentional killing on his part?12

The action of the district court in leaving the fact questions to the jury was approved.

This rule is consonant with trial realities. No reliance on surprise was demanded. Indeed, if there had been any surprising element in the trial it would have occurred if the policeman testified so as to negative self-defense. Although the disregard of witness sponsorship seems a

72. Id. at 635-36.
healthy sign, it must be noted that the circumstances of this case are not often duplicated. Plaintiff needed to call the policeman in order to establish that the decedent was dead in the railroad yards at the hands of the railroad. If she had not done this she would have lost because she had not established a prima facie case. There are few instances where the proponent's need is so stark.

The rules against impeachment of one's own witnesses ordinarily does not apply to impeachment of the "compelled witness." The most common of the compelled witnesses are those who have witnessed wills and whose testimony is compelled in the sense that if they are within the jurisdiction they must be called to prove the will. Where such a witness negates the execution of the will by repudiating his apparent act of witnessing, it has been held that he may be impeached. In Lott v. Lott 73 the trial court was confronted with an attesting witness who sought to convey the impression that he did not know that the document he witnessed was a will. The trial court's refusal to allow the proponent of the will, who called the witness pursuant to statute, to ask questions which would have shown that the witness in fact did know the nature of the instrumen earned the condemnation of the Minnesota court. The court said that, although the proponent of the will was bound to call the attesting witnesses, their testimony did not thereby become binding on her. The Kansas case of Amerine v. Amerine 74 lays down the same rule in a situation where the attesting witness denied all knowledge of the will or of his purported signature on it. The court commented that any general rule about witness sponsorship had no application to a compelled witness. 75

The courts have allowed such impeachment when the witness was not a compelled witness because of the force of law but was one in fact because the party calling him could not make out his case without him. In Atwood v. Hayes 76 the defendant needed to prove the contents of a letter. His proof traced it into the hands of Froebel, whose deposition was taken. In the deposition Froebel denied any recollection of such a document. The defendant and his attorney were allowed to testify that before taking Froebel's deposition he had told them he had had the letter

73. 174 Minn. 13, 218 N.W. 447 (1928).
75. This part of the ruling may be dictum because the impeachment took the form of contradiction by other witnesses and the court noted that when this is done impeachment is incidental.
76. 139 Okla. 95, 281 Pac. 259 (1929).
but it had been lost or destroyed. Argument that this was impeachment of the defendant's own witness was to no avail. The Oklahoma court found that, having traced it to Forebe's hands, plaintiff was under a duty to put Froebe on the stand before he could offer secondary evidence of its contents, because it would be presumed that Froebe still had it and could produce it if called. The witness being compelled, impeachment was proper. It may be seen that the witness was compelled only in the sense that Froebe's testimony was necessary in order for defendant to make out a defense. The trail of the letter had reached to Froebe. It had to be shown that it could not be procured before secondary evidence would be allowed. When Froebe testified that it was a false trail the unavailability of the letter became fixed, but defendant needed to show that Froebe was not believable when he said he had never had it; otherwise, the unavailability of the letter would not be established.

What seems to be similar thinking is found in Fine v Moomjian, where plaintiff cross-examined defendant when defendant was testifying in his own case in chief. Objection was raised that plaintiff, having already called defendant as a witness in her case, could not attack his general credit. The court noted that the witness had been called by plaintiff solely for the purpose of identifying certain signatures he had made and, other than that, he had been called and examined solely as a witness for the defendants.

Atwood v. Hayes, although decided upon different language, is strikingly similar in effect to Johnson v. Baltimore & O.R.R. Although there was no impeachment as such in the Johnson case, the end result was that the party in each case was allowed to call a witness only a part of whose testimony he wished to sponsor. In Johnson the court allowed the jury to draw their own conclusions about the reliability of the testimony and to find that there was a fight between decedent and the railroad policeman but that there had not been a situation calling for self-defense. In Atwood the jury, aided by the impeaching testimony, was allowed to draw the conclusion that the trail of the letter stopped with Froebe since his testimony, which was to the effect he did not have it, was not believable and, as it had been traced into his hands, his obduracy made the letter unobtainable and secondary evidence of its contents admissible.

77. 114 Conn. 244, 158 Atl. 241 (1932).
A realistic view of trials indicates that in the sense of the Atwood and Fine cases, the decisions to use many witnesses are compelled. It is only where the party has a choice between two or more witnesses to an event that he may have a choice. If there is only one witness he must rely on the concept of compelled witnesses or he must concede the case. It is apparent that in the Atwood case the court is allowing the impeaching testimony in for its truth.

VII. Solutions to the Dilemma

Recognition that regardless of surprise the calling party may be faced with the necessity of putting on an antagonistic witness is accorded in statutes which allow the calling of adverse parties, and those aligned in some fashion with them, and treatment of them in a manner not governed by the traditional rules of witness sponsorship. There are differing provisions in the various jurisdictions. In Missouri any party to a civil action may compel "any adverse party, or any person for whose immediate and adverse benefit such action . . . is instituted . . . to testify . . . under the rules applicable to the cross-examination of witnesses."78 Oklahoma, in 1965, adopted a statute which enlarges on the theme by providing that "any such adverse party, his agent, servant, or employee called as a witness by the opposing party shall be deemed a hostile witness and may be examined by the party calling him to the same extent as any opposition witness."

These statutes do not base the right to treat a witness as hostile upon surprise. For this reason these statutes are admirable advances. But neither of these statutes go far enough. The newer Oklahoma statute included some of those witnesses which common sense indicated would be as antagonistic to the position of the calling party as would his opponent, but the older Missouri statute confines its treatment to the adverse party or the person for whose benefit the action is brought, the latter provision seeming to include the real party in interest, those who sue by next friend, and similar persons. However, neither recognizes that among those witnesses that the trial lawyer can anticipate as hostile by nature are those related by blood, by marriage, by like pursuits begetting sympathy, and by shared antipathy to the calling side.

78. § 491.030, RSMo 1959.
A treatment which is broader in its scope is that of the Federal Rules of Civil Procedure. There it is provided:

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation ... which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party . . . .80

It may be seen that the first clause is wide in scope and recognizes the factor of unwillingness or hostility of the witness as a danger to the party who must call him, placing no limitations by definition on those who may be hostile. It recognizes hostility in fact. The latter clause is more narrow. Oklahoma provides for impeachment of the “agent, servant and employee” while the federal rule confines this treatment to “an officer, director, or managing agent.”

The idea that leading questions can be put to an unwilling or hostile witness is not new. Phillips in 1816 wrote: “But if a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the court will in its discretion allow the examination in chief to assume the form of a cross-examination.”81 One characteristic of cross-examination is the use of leading questions. What is unclear is the further extent of the permissible cross-examination. Ordinary cross-examination of the other party’s witness comprehends examination not only on the contents of the direct testimony but also impeachment. That a distinction between the treatment of a hostile witness and that of an adverse party or his agent is intended is indicated by the court in Degelos v. Fidelity and Casualty Company of New York,82 which notes that the treatment of the adverse party is of broader scope. Clearly, the treatment of the adverse party or his agent can contain not only contradiction but impeachment.

Counsel faced with an unwilling or hostile witness he has called receives assistance from the federal rule that has little to do with impeachment. The nature of non-leading examination is such that an obdurate witness can evade by pretended misunderstanding. The first clause gives counsel the right to forestall the evasive tactics by pinpointing his examination. This privilege is subject to the same vice that ordinary cross-examination

80. FED. R. CIV. P. 43 (b), supra note 47.
81. PHILLIPS, EVIDENCE 205 (1st Am. ed. 1816).
82. 313 F.2d 809 (5th Cir. 1963).
for the purpose of impeachment carries, that is, that the examiner might by his questions convey to the jury a picture of the facts not testified to by anyone.

The first clause of the federal rule by its language extends no help to the examiner who is aware of prior contradictory statements. Nor was this the intention. The committee which framed the Federal Rules recommended that the rule provide: "A party may show that any witness, whether called by him or by an adverse party, has previously made, under oath or otherwise, statements contradictory to his testimony . . . ." However, the Supreme Court did not approve.

The distinction between a non-party recalcitrant witness and one who is a party is artificial. This artificiality seems to have been recognized in one case, when the court said:

[I]t has for some time been recognized that the truth might not always spill forth from witnesses who are possessed of pertinent information but who also have the interest of one of the opposing parties close to his heart. Here the techniques of cross-examination or impeachment may well be needed to jog the memory or bring into clear focus the full import of testimony often obtainable from no other source. Recognizing this, Rule 43(b) explicitly provides in its first sentence that a party may interrogate any unwilling or hostile witness by leading questions . . . . There is no specific provision concerning cross-examination of a witness who is not a party, or an officer, director or managing agent of a party, though there is persuasive precedent that the Court may in its discretion allow a party to cross-examine and impeach his own witness if it appears that the witness is hostile.

And the artificiality of the distinction is more clearly brought out in the case, which arose in the same circuit, where suit was brought against a liability insurance company under the Louisiana direct action statute. The assured was the son of the decedent and, as the court said, would be torn between a desire to testify so as to secure money to his mother for the father's death and a desire to exculpate himself from the disgrace of negligently killing his father. In reversing the trial court's ruling that the assured, not being joined, was not a party within the second clause of rule 43(b) the court said:

83. 5 Moore, Federal Practice ¶ 43.10, at 1347 (2d ed. 1964).
Just what Lyle’s real interests might be was not a matter for the
District Judge, nor for us . . . . That was for the jury to appraise
in the light of a full and searching revelation. Our system of justice
rests necessarily on the historic assumption that civilized moral
people try their dead level best to tell the truth no matter how
much it helps or hurts. But being a mechanism for the resolution
of man’s disputes, the instrument of cross examination is an
integral part of that system in order to penetrate all the conflicting
impulses or obstacles to lay bare the whole truth.85

It is just this ability of cross-examination to probe into the con-
flicting impulses and obstacles that makes the difference. Although leading
is a valuable right on cross-examination, it is not the only value of cross-
examination. Cross-examination is far more comprehensive and allows
interrogation into the motives, biases, and prejudices of the witness, while
leading means only that the answer sought may be suggested to the
witness in order to forestall the non-cooperative witness. Whatever the
original intention in the adoption of rule 43(b), and whatever its present
state with respect to the content of the leading questions allowed by the
first clause, the practice should be to allow cross-examination as well as
leading of all witnesses who are hostile whether because they are the
opposite party, his agents, or merely those aligned with him because of
sympathy for him or antipathy toward the other party.

Unfortunately, there are few clear instances where cross-examination,
when permitted, has done more than confront the witness with his prior
contradictory statements. This is often provided for by statute, and one
case, in construing the prohibition against impeachment by evidence of
bad character, noted that the witness did not offer himself but was invol-
untarily called by his opponent. Under these circumstances the usual
questions of cross-examination, including conviction for crime, were pro-
hibited.86 Even where the statute did not specifically interdict impeach-
ment by showing bad character, the Wisconsin court held that impeach-
ment of the adverse witness must be limited to the matters testified to,
including prior inconsistent statements, unless and until the witness takes
the stand in his own behalf, at which time he can be asked questions
impeaching his character and credibility generally.87

California has held directly the opposite. In Lovinger v. Anglo Cali-

85. Degelos v. Fid. & Cas. Co. of N.Y., 313 F.2d 809, 813-14 (5th Cir. 1963).
fornia National Bank of San Francisco the court, noting that the statute provides that the party calling the adverse witness will not be bound by his testimony, concluded that the party calling would be entitled to the same cross-examination as would have been available if the party had taken the stand in his own behalf, which would include the proof that the witness had been convicted of a felony. California has hardened this concept into statute. In its Evidence Code provision is made for attacking the credibility of one's own witness. But evidence of traits of character, except those for honesty or veracity, are excluded. Prior felony convictions, on the other hand, may be admitted for the purpose of attacking the credibility of the witness.

It seems regrettable that the full right of cross-examination does not accompany the calling of the adverse party or those in his camp. Limitation to prior inconsistent statements presupposes that such statements are the only means of successful shaking of the testimony. Although it is possible that such statements are the principal sources, they are not the only sources of success on cross-examination. Cross-examination may disclose bias or prejudice or improper motives not enunciated before and, therefore, not available as a prior inconsistent statement.

One answer to the problem of the recalcitrant witness is that the party who wishes to call him refrain from doing so because of danger and that the court call him. This is the so-called "court's witness." The courts in the federal system may call a witness "neither party will risk calling" and examine him, giving to both sides the right of cross-examination and impeachment. This privilege may be availed of by the trial judge in North Carolina and Oregon. In Illinois the court may call a witness the state's attorney refuses to put on because of doubts of his credibility, and either side may cross-examine. Questioning must be kept to the issues and apparently cannot include matters of bias or prejudice.

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89. Effective January 1, 1967.
90. CAL. EVID. CODE § 785 (1965).
91. CAL. EVID. CODE § 786 (1965).
92. CAL. EVID. CODE § 788 (1965).
93. Chalmette Petroleum Corp. v. Chalmette Oil Distrib. Co., 143 F.2d 826, 829 (5th Cir. 1944).
97. People v. Cleminson, 250 Ill. 135, 95 N.E. 157 (1911).
court should not call the witness unless his failure to do so would result in a miscarriage of justice.\textsuperscript{98}

The "court's witness" concept is one of the most engaging devices offered to meet the problem. There is no vouching for a witness and the witness rightly stands accountable for his utterances in the past. However, in appraising the worth of such a practice it is well to consider some of the phenomena of trial. The jury's impressions must be taken into consideration. If such a designation is made for one or more witnesses, what significance is this to have on the jury's mind? Are they not likely to consider the witness to be of the court's own choosing and therefore unbiased and entitled to extra weight? This is the fear of those who oppose the calling of expert witnesses by the court.\textsuperscript{99} If this is a real fear one antidote might be to tell the jury that the witness is called because the party wishing to examine him does not trust him and does not wish to be bound by his testimony. But it has been held that this cannot be done because the fact that he has been called at the request of a party is not a challenge to his truthfulness and veracity, nor is it proper for one party only to appear distrustful.\textsuperscript{100} Perhaps the problem might be solved by all of the witnesses, with the exception of the parties, being designated court's witnesses. There seems no reason why this should excite the interest of the jury, particularly if they are told that this is simply a new way of doing things.

If all the witnesses were summoned in this fashion and were examined by the parties, in turn, by the techniques of cross-examination, including leading questions, the transformation it would work would be more apparent than real. The interdict against leading operates to cause skillful counsel to so prepare their witnesses for trial that they will respond to a non-leading question with the correct answer. To a well-prepared witness a non-leading question is the cue to which he will respond. The suggestion has simply been accomplished before trial. The outcome, in terms of testimony, would be little different if leading were openly permitted.

A more difficult question is that dealing with confronting the witness with prior inconsistent statements. Any formulation which allows counsel to demonstrate surprise or his reason for summoning a witness carries with it the distinct possibility that the jury is taking the prior inconsistency

\textsuperscript{98} People v. Touhy, 361 Ill. 332, 197 N.E. 849 (1935).

\textsuperscript{99} Lambert, Impartial Medical Testimony: A New Audit, in Legal Essays of the Plaintiff's Advocate 434 (Klonsky ed. 1961).

\textsuperscript{100} People v. Robinson, 14 Ill.2d 325, 153 N.E.2d 65 (1958).
for the truth it asserts. This is so even though the jury is warned to consider it only for its allowable purposes. It would seem, therefore, that the jurisdictions courting this danger as a matter of course would accomplish little transformation if the jury were told that they could consider it for the truth asserted, even though the witness does not admit the statement or the truth of it. This, after all, is what is allowed in the case of parties, their prior inconsistent statements being admissions.101

A sensible reconciliation of the conflicting considerations which beset this problem would seem to be that all witnesses should be called as court's witnesses with the exception of the parties. They should be examined openly as to their prior inconsistent statements, after counsel has demonstrated the existence of such a statement. The jury should be allowed to use the statements for the truth they assert. And, cross-examination for the purpose of demonstrating bias, prejudice and the like should be allowed in order for the jury to properly appraise the testimony of the witness.

VIII. Conclusion

It seems time that a vestige of the earliest trial procedure be excised from modern practice. Particularly is this so for a rule which has been under constant attack and has suffered intermittent erosion over the years. Attempts at reform have been patchwork and timid, and none have accorded with the psychology of witnesses and juries as understood by the bar. Once sanction is given the jury to do what the bar knows they are doing anyway, counsel can, by his forensic talents, properly treat the material the jury is considering. It is submitted that such a change would not stultify jury trial but would invigorate it. It would accord to juries the dignity of decision now denied them. Most important, it would put sense in an area overgrown with centuries of nonsense.