Prior Statements of One's Own Witness to Counteract Surprise Testimony: Hearsay and Impeachment Under the "Damage" Test
PRIOR STATEMENTS OF ONE'S OWN WITNESS TO COUNTERACT SURPRISE TESTIMONY: HEARSAY AND IMPEACHMENT UNDER THE "DAMAGE" TEST*

A party may impeach the credibility of his own witnesses by proving that they have made prior statements out of court inconsistent with their positions at trial. While early common law forbade impeachment of one's


1. A witness is generally considered to be the witness of that party for whom he first furnishes relevant evidence. E.g., Milton v. State, 40 Fla. 251, 24 So. 60 (1898); see State v. Hulbert, 299 Mo. 572, 575, 253 S.W. 764, 766 (1923). Some courts have held, however, that when a witness is called by both parties, he is the witness of each to the extent of the testimony elicited by each. E.g., Smith v. Blakesburg Savings Bank, 182 Iowa 1190, 164 N.W. 762 (1917); Parr v. Parr, 207 S.W.2d 187 (Tex. Civ. App. 1947). In those jurisdictions in which cross-examination is restricted to matters brought out in direct examination, a party may make a witness his own by inquiring into other matters. E.g., State v. Richardson, 63 Mont. 322, 207 P. 124 (1922); Cavalier v. Bittner, 186 Misc. 848, 60 N.Y.S.2d 355 (Sup. Ct. 1946).

Where a party obviously does not vouch for the witness' credibility, he does not make the witness his own by calling him to testify. E.g., Necessary witnesses: In re Warren's Estate, 138 Ore. 283, 4 P.2d 635 (1931) (subscribing witness to a will); Meeks v. United States, 179 F.2d 319 (9th Cir. 1950) (witnesses whom the prosecution is required to call); Commonwealth v. Festo, 251 Mass. 275, 145 N.E. 700 (1925) (same); cf. People v. Connor, 295 Mich. 1, 294 N.W. 74 (1940). Party-opponent: Idaho Code § 9-1206 (1948); Mass. Ann. Laws c. 233, § 22 (1933); contra: Drennen v. Lindsey, 15 Ark. 359 (1854); Lawton Savings Bank v. Bremer, 205 Iowa 334, 218 N.W. 49 (1928). Some states provide that an adverse party is to be examined subject to the same rules of examination as any other witness. E.g., 2 N.J. Stat. Ann. § 97-12 (1939); N.C. Gen. Stat. § 1-569 (1943); Wash. Rev. Stat. Ann. § 1225 (Remington, 1932). If a party is unwilling to vouch for the credibility of a witness, he may be able to persuade the court to call the witness, who may then be impeached by both parties. E.g., Peoples v. State, 257 Ala. 295, 58 So.2d 599 (1952); People v. Bote, 379 Ill. 345, 40 N.E.2d 55 (1942). See, generally, on who is a party's witness, 3 Wigmore, Evidence §§ 909-18 (3d ed. 1940).

2. Normally, impeachment by a party of his own witness is limited to proof of prior contradictions. For the party's right to show possible bias, interest, or corruption of his own witness, see 3 Wigmore, Evidence § 901. In addition, three states allow evidence of bad character if the witness is "indispensable." 28 Ark. Stat. Ann. § 706 (1947); Ky. Civ. Code of Prac. § 596 (Carroll, 1948); Ind. Stat. Ann. § 2-1726 (Burns Cum. Repl., 1946) (also "in a case of manifest surprise"). Proof of bad character will also be allowed where a witness is not classified as a witness of the party calling him. See note 1 supra. When a party is called as a witness by his opponent, proof of bad character may also be allowed under statutes providing for examination of such a witness "in all respects as if he had been called by the adverse party" or "according to the rules applicable to cross-examination." 21 Ariz. Code Ann. § 922 (1939); Colo. Stat. Ann.
own witnesses, the danger that a litigant's case might be seriously harmed by his own witnesses' unexpectedly adverse testimony led legislators and courts to modify the prohibition. But the admission of a witness' extra-


A party may always prove by other witnesses that the facts are otherwise than as testified to by a witness, in spite of the incidental impeaching effect. E.g., Jacobson v. Mutual Ben. Health and Accident Ass'n, 70 N. D. 566, 296 N. W. 545 (1941); State v. Nelson, 192 S. C. 422, 7 S. E. 2d 72 (1940). The party also has the dubious privilege of having an adverse witness who surprises him withdrawn and his testimony stricken. Kuhn v. United States, 24 F. 2d 910 (9th Cir.), cert. denied, 278 U. S. 605 (1928).

3. For the history of the rule and speculation as to its origins, see Ladd, Impeachment of One's Own Witness—New Developments, 4 U. of Chi. L. Rev. 69 (1935); 3 Wigmore, Evidence §§ 890-903.


The statutes of Louisiana and Texas apply only in criminal cases. 15 La. Rev. Stat. § 487 (1950) (if witness' testimony "surprises" the party calling him or the witness shows "hostility towards the party"); Tex. Code Crim. Proc. art. 732 (Vernon, 1941) (if the witness' testimony is "injurious to the party calling him"). The civil cases are similarly handled through judicial decision. Leadman v. Querbes, 163 So. 745 (La. App. 1935); Federal Underwriters Exchange v. Rattler, 192 S. W. 2d 942 (Tex. Civ. App. 1946).


Two states have statutes which allow impeachment of one's own witness by prior inconsistent statements only when the statements are contained in depositions. 3 M. C. E., Gen. Rules of Prac. and Proc., Section 1, Rule 11(a)(1) (Flack, 1951); S. D. Code
judicial statements for impeachment purposes conflicts, in practice, with the policy embodied in the hearsay rule. The hearsay rule forbids admission of an assertion whose truth may not be tested by cross-examination, unless the circumstances under which the statement was made afford some assurance of its truth. An extrajudicial statement may be admitted for impeachment purposes, however, without regard to safeguards which ensure its probative value. Courts rationalize the admission of impeaching statements without safeguards on the theory that the truth of the statement is not considered by the jury. Rather, the jury decides whether the witness made the prior statement, and if he did, the statement is relevant only to the extent that the contradiction in the witness' story reflects upon his credibility. Indeed, the court will charge the jury to this effect.

§ 36.0506(1) (1939). See also Fed. R. Civ. P. 26(d) (1). But in these jurisdictions, courts may permit impeachment without depositions. See Young v. United States, 97 F.2d 200, 205-06 (5th Cir. 1938).

The Wisconsin statute, applicable only in criminal proceedings, allows impeachment where the judge regards the witness as "hostile" and the prior statement is contained in a writing approved by the witness or in a "phonographic report." Wis. STAT. § 325.35 (1951). In civil cases, the matter is wholly within the discretion of the trial court. In re Krause's Estate, 241 Wis. 41, 44, 4 N.W.2d 122, 124 (1942).

New York, in 1937, adopted a statute which allows impeachment if prior contradictory statements are contained in a writing subscribed to by the witness or were made under oath. N.Y. CIV. P.R.C. ACT § 343-a; N.Y. CODE CRIM. PROC. § 8-a. On the New York law and other proposals urged for adoption in that State, see Holtzoff, The New York Rule as to Impeachment by a Party of His Own Witness, 24 COLO. L. REV. 715 (1924); Ladd, supra note 3, at 91-4; Schatz, Impeachment of One's Own Witness: Present New York Law and Proposed Changes, 27 CORN. L.Q. 377 (1942).


5. 5 WIGMORE, EVIDENCE § 1362.

6. E.g., Ellis v. United States, 138 F.2d 612 (8th Cir. 1943); 3 WIGMORE, EVIDENCE § 1018. Contra: Pulitzer v. Chapman, 337 Mo. 298, 318, 85 S.W.2d 400, 410 (1935) (deposition considered as affirmative evidence even though deponent present at trial, since deposition is given under oath and deponent was subject to cross-examination when the statement was made). The Supreme Court of Missouri has since retreated from its position. Borsson v. Missouri-Kan.-Tex. Ry., 351 Mo. 229, 244, 172 S.W.2d 835, 845 (1943).

Where the witness is a party to the action, his prior statements may be admitted affirmatively as admissions against interest. 4 WIGMORE, EVIDENCE §§ 1048-87. Contra: Moses v. Kansas City Pub. Serv. Co., 239 Mo. App. 361, 373, 188 S.W.2d 538, 544 (1945).


8. "The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real..." L. Hand, J., in Di Carlo v.
policy behind the instruction only where he takes the case from a jury, lawyers frequently attempt to introduce extra-judicial statements as impeaching evidence when their real hope is that the jury will consider as true the facts which the prior statement asserts.

To minimize misuse of the impeachment privilege, courts admit prior statements of a party's witness only in limited circumstances. Generally, the witness must have "entrapped" or "surprised" the party by his testimony at the trial. This forestalls the possibility that counsel will place a witness on the stand, knowing his testimony will be unfavorable, solely to introduce a prior statement of the witness. In addition, a party's interest in neutralizing the unexpected testimony must outweigh the danger that the jury will consider the content of the impeaching statement as evidence of the facts it asserts, rather than evidence of the witness' credibility. Thus, before a witness'...
credibility can be impeached, his testimony must “damage” the case of the party calling him.\textsuperscript{13} Courts have adopted a rule of thumb for interpreting the “damage” requirement: the witness must give affirmative testimony regarding some material fact, \textit{i.e.}, testimony which asserts the existence or nonexistence of a material fact.\textsuperscript{14} If the witness merely denies knowledge of facts, such testimony is held not to “damage” the case of the party calling him and the witness may not be impeached.\textsuperscript{15}

In the recent case of \textit{People v. LeBeau},\textsuperscript{16} the Supreme Court of California interpreted the “damage” requirement anew. Defendant, charged with illegal possession of narcotics, testified that he did not know what narcotics looked like and thus was unaware of the nature of the capsules found in his possession.\textsuperscript{17} On cross-examination defendant was asked whether he was a user of narcotics. When he denied this, he was asked if he had ever told a certain woman that he was a narcotics user. After defendant also denied this, the prosecution called the woman as its own witness and attempted to establish that the defendant had made a statement to her, admitting his use of narcotics. But the witness surprised the prosecution by denying that she had heard such a statement and further denied telling the police that she had heard it.\textsuperscript{18} Over objection, the prosecution then called a police inspector to impeach the witness.

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\item \textsuperscript{13} E.g., Ciardella v. Parker, 10 N.J. Super. 537, 77 A.2d 496 (1950); State v. Lemke, 207 Minn. 35, 290 N.W. 307 (1940); Malone v. Gardener, 362 Mo. 569, 242 S.W.2d 516 (1951).
\item \textsuperscript{15} 3 \textit{WIGMORE, EVIDENCE} § 1043. If the prior statement does not contradict any testimony at trial, it has, of course, no impeachment value at all and will be excluded as hearsay. Ciardella v. Parker, 10 N.J. Super. 537, 77 A.2d 496 (1950); Zbikowski v. Saroc Holding Corp., 187 Misc. 495, 67 N.Y.S.2d 222 (App. Term 1946); Fleetwood v. State, 241 P.2d 952 (Okla. Crim. Ct. of App. 1952). However, if objection is not made to the admission of a hearsay statement the jury may consider it as affirmative evidence. Crawford v. United States, 198 F.2d 976 (D.C. Cir. 1952); Crampston v. Osborne, 356 Mo. 121, 201 S.W.2d 336 (1947); Egli v. Hutton, 135 Ore. 175, 204 Pac. 347 (1930). Nor is the admission of hearsay over objection reversible error, unless the objector’s rights were prejudiced by the admission. Ceretti v. Des Moines Ry., 228 Iowa 548, 293 N.W. 45 (1940); Gaskins v. Firemen’s Ins. Co. of Newark, 206 S.C. 213, 33 S.E.2d 498 (1945).
\item \textsuperscript{17} People v. LeBeau, 39 Adv. Cal. Rep. 151, 152, 245 P.2d 302 (1952).
\item \textsuperscript{18} This witness was called both to impeach the defendant by proof of his prior statement and to refute his testimony. The defendant’s statement to her would have been admissible as affirmative evidence as an admission against interest. 4 \textit{WIGMORE, EVIDENCE} §§ 1048-87.
\item “I don’t believe that I stated anything that definite. I may have stated from conversations I have witnessed that the defendant talked about cocaine. Whether he used it, I wouldn’t know, and I have already told you that.” People v. LeBeau, 39 Adv. Cal. Rep. 151, 152, 245 P.2d 302, 303 (1952). The defendant stated that this witness had told
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ness by relating her earlier assertion out of court telling of defendant's state-
ment. On appeal from his conviction, defendant argued that the prosecution's
case had not been "damaged" by the woman's denial of knowledge of the
defendant's statement, and that her impeachment was not only improper but
highly prejudicial. However, the California court, sitting en banc, thought
otherwise. Over a vigorous dissent, the court held that the prosecution was
titled to correct the "damaging impression" which the woman might have left
with the jury that the district attorney "was harassing the defendant and
attempting to discredit him without any basis in fact."29

LeBeau's "damaging impression" test expands the basis for impeachment
of a party's own witness. The holding assumes that in some circumstances, a
witness' denial of knowledge of a fact may be as "damaging" to a party's
case as a positive assertion concerning the fact. Since, under traditional
doctrine, a party's witness must give affirmative testimony before he can be
impeached, there is no question that LeBeau's "damaging impression" test
broadens the basis for introducing prior statements,21 although the extent of
expansion is not clear. The court may have meant to restrict the test to
criminal cases while preserving the traditional "damage" test for civil suits,
for the prosecution has always been allowed to impeach its witnesses more freely
than has a private party.22 Or the "damaging impression" may be limited solely
to the type of situation occurring in LeBeau: where sharp questioning of a
defendant may cast the prosecution or plaintiff in a disreputable light if surprise
testimony eliminates the opportunity of showing a reasonable basis for the
questions. Of course, the rationale of the "damaging impression" test might
also apply where counsel, having sharply questioned any witness, finds that
later surprise testimony prevents his showing the reasonable basis for the
questions. In any event, the court made no attempt to limit its test in any of
these ways. And shortly after LeBeau, in Bassett v. Crisp,23 the California

21. See Young v. United States, 97 F.2d 200 (5th Cir. 1938); People v. Dascola,
322 Ill. 473, 153 N.E. 710, (1926); State v. Trautler, 109 Mont. 275, 97 P.2d 330 (1940);
Carroll v. State, 143 Tex. Crim. Rep. 269, 155 S.W.2d 532 (1942). And see 3 WRIGHT,
EVIDENCE § 918; May, Some Rules of Evidence, Discrediting One's Own Witness, 11 AM.
L. REV. 261, 264 (1877).


District Court of Appeals read the test to permit introduction of prior statements for impeachment of a witness in a civil case simply where the witness unexpectedly denied knowledge of the facts about which he was questioned. The witness was not a party, nor was there any question of a harmful impression being created because of an inability to show a reasonable basis for the questions; testimony of other witnesses amply justified counsel’s line of interrogation. In fact, then, Bassett interprets LeBeaut to make “damage” equivalent to a showing of surprise, when a witness denies knowledge of facts.24

In broadening the scope of permissible impeachment situations, the California courts have disregarded the prejudicial effect of admitting some impeaching testimony. In LeBeau, for example, the jury was permitted to hear impeachment testimony that related directly to material issues but which was admitted without safeguards as to its probative value. As the dissenting justices pointed out, the prosecution’s impeachment of the witness through the introduction of the police inspector’s testimony presented the jury with a highly damaging and material “admission” by the defendant regarding his use of narcotics.25 It is true that the defendant did profit when the witness denied that she told the police that defendant had said he used narcotics. But, since she denied making this statement, she could not be cross-examined as to its truth.26 Nor were there any indications that the conditions under called the other occupants of the car to show that defendant had passed through a number of red lights and that he had continued to do so after having been warned by the other passengers. One of the other passengers, however, claimed that he did not remember defendant’s having passed through any red lights and did not remember any warnings about this. Plaintiff was allowed to use a deposition of the witness to impeach him. In the deposition were statements that defendant had passed through red lights and had been warned.

The District Court of Appeals affirmed on the authority of LeBeau. It also held that “even if the admission of such evidence was erroneous, it did not result in a miscarriage of justice,” id. at 345, 248 P.2d at 177, evidently because the other witnesses had testified to the facts contained in the deposition. If the testimony of other witnesses which removes the possibility of “damaging impression” is also to be considered as repairing any error from the improper impeachment, the “damaging impression” test is obviously meaningless.

24. The Bassett interpretation apparently has been confirmed by a similar California ruling, People v. Spinosa, 115 Adv. Cal. App. 773, 252 P.2d 409 (1953). Defendant was convicted of illegal possession of heroin. His defense was that he had no connection with the packet of heroin which detectives had found in a toilet bowl, and that it had been placed there by one Severson. At the examination before the committing magistrate, Severson admitted placing the heroin in the bowl. When called at trial by the defendant, however, Severson denied putting it there. Holding that there was no damage, the trial court did not permit defendant to introduce Severson’s prior statement. The District Court of Appeals, citing LeBeau, reversed on the ground that “there was ‘damage’ both in the testimonial and the psychological meanings of that term.” Id. at 782, 252 P.2d at 414. The court found a “damaging impression” arising not from harassment of a witness or the defendant, but from the embarrassment to the party of placing before the jury a witness who failed to testify as expected.


26. Probing of the witness’ observation, memory, and narration of the facts contained in the prior statement will only bring forth the answer that it was not made or is not
which the woman's prior assertion was made were such as to give assurance of the statement's truth. Yet, despite the trial court's instruction that the impeaching testimony was to be considered only in relation to the woman's credibility, it is difficult to imagine that the jury was not influenced by the police inspector's testimony in deciding whether the defendant had used narcotics.

*LeBeau* and *Bassett* suggest a more realistic approach to the concept of "damage." Contrary to the traditional "damage" rule, both California cases assume that there are situations in which a witness' denial of knowledge may present just as legitimate a basis for impeachment as would an affirmative assertion of fact. Practically speaking, this may be true. Where, for example, a witness might be expected to know certain facts, a denial of knowledge may certainly be equivalent to an assertion of the non-existence of those facts. But while both decisions recognize that a denial of knowledge may be the basis for impeachment, neither case presented a situation where the denial was obviously equivalent to an affirmative statement of fact. Rather, they emphasize a new type of "damage," one that rests on the psychological effect on the jury of the badgering of a witness—and not on the ability of a jury to make a finding of fact on the basis of a surprise statement. Here, too, the approach may be realistic, for psychological effects can indeed be "damaging" to one's case in the common sense meaning of that term.

But the question which both courts failed to face was the advisability of permitting impeachment to offset this new type of "damage," in the light of the likelihood of prejudicial effects on the opposing party. Sharp questioning leading to an impression of badgering is not likely to occur unless an issue is relatively significant to the case. But these are just the issues which should not be put before a jury in the form of unreliable extra-judicial statements, with only the uncertain force of the judge's instruction to prevent their misuse. Thus, the realistic test of *LeBeau* expands impeachment only where it is least desirable to do so. *Bassett*, on the other hand, presents a worse rationale. Here, since the testimony of other witnesses amply demonstrated a reasonable basis for counsel's sharp questioning, there was really no damage at all. Thus the reasoning of *Bassett* not only broadens impeachment where remembranced. Thus the jury will be allowed to hear a statement without having any opportunity to judge its accuracy.

27. In *Bassett*, the prior statement was contained in a deposition. Its reliability was thus assured by the oath and cross-examination available when the statement was made. See note 29 infra. The court, however, made no mention of this fact in approving the impeachment. In *Spinosa*, supra note 24, the prior statement had been made at a hearing before a committing magistrate. Here also the safeguards of oath and cross-examination were present. *Cal. Pen. Code §§ 865, 866* (Deering, 1949); see *People v. Cohen*, 118 Cal. 74, 50 Pac. 20 (1897). These factors, however, were not mentioned in the court's decision.

28. 3 Wigmore, *Evidence* § 1043. The intermediate court in *LeBeau* apparently subscribed to this view. See note 20 supra.
prejudicial testimony is most dangerous, but it does so without even the
limited justification present in LeBeau. However, Bassett may be justified on
other grounds. While it did not form a part of the court's explicit reasoning,
the fact that the prior statement was contained in a deposition adequately
ensured the statement's reliability.29 Thus, as a practical application of balanc-
ing danger from admitting possibly unreliable statements against necessity
of counteracting surprise, Bassett's result might even be commendable.

Experience with impeachment doctrines demonstrates that they are inade-
quate alone in coping with the harm created by a party's own witness who
unexpectedly changes his story at trial. The traditional "damage" require-
ment represents an attempt of courts to reconcile the dangers which accom-
pny the admission of unreliable extra-judicial statements with the undes-
irability of tying the hands of a party who is harmed by the testimony of
his own witnesses. But the test does not allow a party to counter the harm
which may result from a witness' denying knowledge of facts. As a result
counsel cannot take steps to protect himself from the danger that his witnesses
will be tampered with between the time he interviews them and the time
of trial, or that a witness he interviews may have been planted.30 Counsel's
only recourse is a probably futile attempt to refresh the witness' recollection
and induce him to correct his testimony.31 But even where impeachment
does occur, it is defective. In some circumstances it admits unreliable testi-
mony. And elsewhere it may be completely impotent to rectify the harm
created by the surprise testimony. When a witness whose testimony is essen-
tial to a party's case fails to testify as expected, the essential testimony simply
becomes unavailable and impeachment is valueless, since the jury will not be
permitted to base a finding of fact on prior inconsistent statements used to
impeach. Here failure to testify can only result in a directed verdict against
the surprised party. The danger of sabotage to a party's case by the failure
of a key witness to testify as expected can be overcome only by admitting the
prior statement so that the jury may utilize it as the basis for a finding of
fact.

Courts and commentators alike have urged that prior statements of a party's
own witness be admitted affirmatively, rather than only for impeachment.32

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29. The policy of the hearsay rule is satisfied by the fact that a deposition is made
under oath, with the deponent available for cross-examination. E.g., CAL. CODE
CIV. PROC. § 2004 (Deering, 1946). See Pulitzer v. Chapman, 337 Mo. 298, 85 S.W.2d
400 (1935).

30. For discussion, see May, supra note 22, at 265, and articles cited note 32 infra.

31. Hickory v. United States, 151 U.S. 303 (1894) (prior statement may be used as
moral suasion).

32. See, e.g., Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir.), cert. denied, 268
McCormick, The Turncoat Witness: Previous Statements as Substantive Evidence, 25
TEX. L. REV. 573 (1947); Morgan, Hearsay Dangers and the Application of the Hearsay
Concept, 62 HARV. L. REV. 177, 192-6 (1948). Dean Wigmore approved the orthodox
Prior extra-judicial statements of a witness may have greater evidentiary value than those made at trial. There is less chance that the prior statements were affected by corruption, lapse of memory, or sympathy for the opposing side. Further, it has been argued that the rule forbidding use of prior statements as the basis of a finding of fact is arbitrary, since the jury often gives affirmative value to an impeaching statement theoretically aimed at credibility. Finally, commentators have argued that since the declarant is present at trial, much of the force behind the hearsay objection to extra-judicial statements is removed. The declarant is on the stand and is available for cross-examination both as to his prior statement and as to his statement at trial, cross-examination by each side on both statements offers the jury a perfect opportunity to decide which, if either, of the statements is true.

Despite the arguments of commentators, however, the presence of the witness at trial does not always ensure the reliability of his prior statements. Where a witness admits making the prior statement, it is true that he is subject to cross-examination, and the reliability of the statement may thus be tested. But where the witness denies making the statement, there is no possibility for cross-examination as to the statement’s truth. Here, use of prior statements to counteract surprise testimony would, as does impeachment, place assertions before a jury without check on reliability. And here the danger is even greater, for the jury must consider the prior statement affirmatively. Where a key witness is involved, verdict might there rest entirely on facts contained in the prior untested statement. However, objection to the hearsay nature of the testimony may be met if safeguards other than cross-examination are present to ensure the statement’s truth. If the prior statement is contained in an affidavit, this assurance is provided.

Theories in the first edition of his treatise but upon “further reflection” came to the conclusion that prior contradictory statements of a witness do not violate the policy of the hearsay rule. 3 WIGMORE, EVIDENCE § 1018.


34. Id. at 581-2.


37. Traditional doctrine requires not only a finding that the statement is to some degree reliable, but also that there is a “necessity” for admitting it. 5 WIGMORE, EVIDENCE § 1421. Although this “necessity” must often rest on the unavailability of the witness, it may be found, even if the witness is present, in the superior trustworthiness of his extra-judicial statements. Compare the “necessity” found for admitting spontaneous utterances, 6 WIGMORE, EVIDENCE § 1748. Where “necessity” rests solely on the absence of witnesses, its underlying premise is that the testimony will be lost unless the hearsay is admitted. The same justification applies to prior statements, where a witness refuses to testify as expected.

38. For the reliability of the affidavit, see note 39 infra. There are other safeguards, besides the oath, perjury sanction, and cross-examination, which may be accepted as
Admission of affidavits as affirmative evidence would constitute a highly effective and desirable means of combating sabotage of a case by the surprise testimony of a party's witness. Because the affidavit is made under oath and subject to the sanctions of perjury, it provides its own guarantee of reliability. Moreover, a signed affidavit provides clear evidence of an earlier statement, and a signature is not too difficult to prove. Thus, it is unlikely that the witness who surprises will deny making the affidavit, and, consequently, cross-examination will usually be available as a further safeguard. In addition, since the prior statements are always reliable, the necessity for the traditional "damage" test is removed, and "surprise" alone should justify introduction of the affidavit. Thus, counsel can cope with surprise where a witness denies knowledge. And because the affidavit will come in as affirmative evidence, it will enable a party to counteract sabotage in a situation where impeachment is valueless: where an essential witness surprises. At the same time, since it is a relatively easy matter for counsel to reduce the statements of his key witnesses to affidavit form, the affidavit provides convenient and assuring the probative value of an extra-judicial statement. Traditionally, courts have accepted statements of fact against interest, 5 WIGMORE, EVIDENCE § 1455; regular business entries, 5 id. § 1517; and spontaneous utterances, 6 id. § 1746; for this purpose. Although some of these exceptions might be applicable and should be recognized here, the affidavit exception would obviously be of greatest assistance to the lawyer, since the surprise usually consists of discrepancy between pre-trial interviews by counsel and testimony at trial.

Reliability is also assured, of course, where the statement is contained in a deposition. See note 29 supra. Depositions are presently admissible as affirmative evidence in some situations. E.g., FED. R. Civ. P. 26(d) (where witness is dead or otherwise unable to attend trial); CAL. CODE CIV. PROC. § 2021(6) (Deering, 1946) (if the witness' presence cannot be procured at the time of the trial).

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39. See, e.g., ILL. STAT. ANN. c. 101, § 5 (Smith-Hurd, 1935); N.Y. PENAL LAW § 1620 (application of perjury sanctions to affidavits). Affidavits are considered sufficiently probative to support many types of judicial decisions such as summary judgments. FED. R. Civ. P. 56. For other instances where proof by affidavit is acceptable, see 6 WIGMORE, EVIDENCE § 1710.

40. Proof may be had through one who has seen the witness write, 3 WIGMORE, EVIDENCE §§ 694-7; by the jury's comparison with known genuine documents, 3 id. §§ 699-708; or by expert testimony, 3 id. § 709.


42. The purpose of the traditional "damage" test was a reconciliation between the danger of admitting unreliable extra-judicial statements and the undesirability of tying the hands of a party suprised by his witness' testimony. Where the statement's reliability is assured, the necessity for the test accordingly disappears. The requirement of "damage" might, of course, be retained if use of the affidavit be considered a privilege to be exercised only where there is strong reason to vary usual practice. But a finding of "damage" in a factual sense depends on many variables, even where other witnesses are available to testify to the desired facts. The witnesses' accounts may vary slightly, and their opportunities to observe the facts may have been quite different. Since the affidavit is reliable, there seems to be no reason to create a difficult factual determination as a requisite to its admission when surprise occurs.
simple insurance against later surprise harm. True, there are some dangers attached to the use of affidavits. Counsel, in the affidavit, may overstate a witness' testimony, or coercion may be used to induce signature to certain facts. But since the affidavit is used only where a witness surprises at trial, the witness is present to explain why his trial testimony differs; and, as in any case where evidence conflicts, a jury is competent to use demeanor, plausibility, and other signs of veracity to determine which, if either, statement is to be believed.\footnote{43}

Since the affidavit will not always be available to counteract surprise, impeachment should be retained as an ancillary means of coping with the harm presented by surprise testimony. Undoubtedly, the insurance provided by affidavits will lead counsel to obtain them wherever possible. But situations are conceivable in which affidavits may not be obtained, as for example, where a witness who is unwilling to give the affidavit must nevertheless be utilized at trial. In these limited circumstances impeachment is the only available means of counteracting surprise. But here, use of impeachment should be restricted to those situations in which the likelihood of harm from surprise testimony outweighs the danger of the jury's hearing unreliable testimony. The traditional "damage" requirement, though far from perfect, is apparently the most desirable standard for this purpose. As a general rule, where a witness surprises with adverse statements about material facts, harm will be greater than where he simply denies knowledge of the facts, for in the former instance the jury may definitely base findings on the adverse assertions. The defects of the traditional test can in part be remedied by a recognition of the affirmative nature of a denial of knowledge in certain situations. Beyond this, contrary to the California "damaging impression" test, impeachment of one's own witness should be scrupulously circumscribed.

\footnote{43. The jury would be faced with a similar determination when a witness denied making an affidavit.}