mortgage may be a ground for invoking the jurisdiction of equity just as is the inadequacy of the legal remedy, but the mere existence of jurisdiction is not a valid reason for granting this type of relief.[14]

The peculiar aspect of the present case is that the borrower is placed in his predicament not by any willful breach on the part of defendant but by the intermediary's forgery of complainant's endorsement. The action going to the heart of the matter would be one for money had and received against the bank which cashed the check, and plaintiff's recovery therein would be certain.[15] Despite this, the borrower has sought a type of relief which the application of sound equitable principles would deny to him, and it seems unfortunate that the decision granting him the relief overlooks the well-reasoned opinion of *Conklin v. People's B. & L. Assn.*, which had indicated New Jersey's approval of a salutary rule of equity.[16]

Witnesses—Neutralization of Party's Own Testimony—Insurer Real Party in Interest.—Suit for personal injuries sustained in automobile accident by plaintiff, who was a passenger in defendant's automobile. Before trial, defendant denied in a written statement that he had been careless and that plaintiff had warned him of the danger and of his carelessness; but on trial he surprised his counsel, while testifying as a witness in his own behalf, by making a statement inconsistent with this prior statement. Said examining counsel offered the prior inconsistent state-

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of Bloomingdale, 129 N.J.Eq. 440, 20 A. 2d 19 (Ch. 1941). Relief denied despite the existence of a mortgage in Kenner v. Slidell Savings & Homestead Assn., 170 La. 547, 128 So. 475 (1930).

14. *Supra*, note 8.

15. Buckley v. Second National Bank of Jersey City, 35 N.J.L. 400 (S. Ct. 1872).

16. Apart from the consideration of specific performance, could not the intermediary be held to be C's agent by estoppel or by implication. Intermediaries in similar situations have been so held. See Cooper v. Headley, 12 N.J.Eq. 48 (Ch. 1858); Rocco v. Geiger, 113 N.J.Eq. 583, 168 A. 44 (Ch. 1933).

ment in order to "neutralize" defendant's testimony, but it was excluded. From a judgment for plaintiff, defendant appealed. *Held*: *Affirmed.* The objection to the exclusion of this evidence is overruled on the ground that defendant, as a witness in his own behalf, may not contradict or "neutralize" his own testimony by proof of prior inconsistent statements. *Crothers v. Caroselli,* 126 N.J.L. 590, 20 A. 2d 77 (E. & A. 1941).

At common law a party could not impeach the testimony of his own witness; but with the advance of the law came a recognition of the need for a remedy in such a case.[1] New Jersey has long recognized the right of a party to "neutralize" the effect of testimony of his own witness when it is inconsistent with prior statements the witness has made.[2] Proof of prior self-contradictory statements of a witness, when the party calling him is surprised at his unexpectedly adverse testimony, is not an impeachment of the party's own witness. It is merely an attack upon the trustworthiness of a specific part of his testimony.[3] This right of contradiction or "neutralization" of a witness's testimony is recognized throughout the country, although by different names and in different degrees in the several states.[4] It is fundamental that a party cannot impeach a witness called by him by introducing general evidence that he is not worthy of belief. This would be an impeachment of the witness's character. But he can show that the witness has made other and different statements from those to which he has testified, for that is only contradicting the particular testimony as opposed to impeaching his character.[5] In this case defendant seeks

1. 14 BOSTON LAW REVIEW 888. Traces development of impeaching own witness.

2. State v. D'Adame, 84 N.J.L. 386, 86 A. 414 (E. & A. 1912); State v. Kysilka, 85 N.J.L. 712, 90 A. 309 (E. & A. 1914); State v. MacRorie, 86 N.J.L. 401, 92 A. 578 (S. Ct. 1914); State v. Bovino, 89 N.J.L. 586, 99 A. 313 (E. & A. 1916); Fox v. Forty-four Cigar Co., 90 N.J.L. 483, 101 A. 184 (E. & A. 1917); Lenz v. Public Service, 98 N.J.L. 849, 121 A. 741 (E. & A. 1923); State v. Bassone, 109 N.J.L. 176, 160 A. 391 (E. & A. 1932).

3. State v. D'Adame, *supra,* note 2.

4. 117 A.L.R. 326 (1938); 74 A.L.R. 1042 (1930).

5. Brinkmann v. Dorsey Motors, Inc., 121 N.J.L. 114, 1 A. 2d 641 (S. Ct. 1938)

merely to "neutralize" *testimony.*

The problem presented by the case under discussion is novel in New Jersey. It is necessary to decide whether a party may "neutralize" the testimony of a witness who unexpectedly contradicts a prior statement that he has made, *when that witness is the party himself.*[6] Of course, it is not to be inferred that a party can claim that his own testimony "surprises" him in all cases. The law is obviously opposed to that.[7] It is submitted, however, that this case is an exception to that rule. Here counsel for defendant, who is the one claiming surprise, is actually representing *a party other than defendant,* namely, the defendant's insurer. It is no secret that in a great number of automobile accident cases there are insurance companies upon whom the actual loss will fall if judgment is rendered in plaintiff's favor. Massachusetts recognizes that the insurance company is, in such cases, the real party in interest.[8] In a New Jersey Supreme Court case which did not reach the Court of Errors and Appeals because it was up on a rule for a new trial, it was held that, in the light of circumstances almost identical with those in this case, it was the right of counsel to offer in evidence the prior inconsistent statements made by defendant in order that the insurance company might be protected.[9] Therefore, it is urged that the defendant is not really the one seeking to contradict the testimony given by defendant, but that it is the insurance company which wants defendant's testimony neutralized. The courts should not be misled by the mere form of the suit, but should tear aside the veil of unreality

6. At common law parties to a suit could not testify in their own behalf, but R.S. 2:97-1; N.J.S.A. 2:97-1, has reversed that rule in New Jersey.

7. Newman v. Stocker, 161 Md. 552, 157 A. 761 (1931). "Only another party treating this defendant as a witness, could be permitted to introduce the contradictory evidence. . ." But, in Hill v. West End Railroad Co., 158 Mass. 458, 33 N.E. 582 (1893), the court took a broader but not generally accepted view, to the effect that there is no reason why the doctrine that a party may impeach his own witness' testimony should not apply when the party himself is the witness, in all cases where the party is acting in good faith and honestly. It is suggested that this view is too broad.

8. Horneman v. Brown, 286 Mass. 65, 190 N.E. 735 (1934).

9. Posner v. Nutkis, 5 N.J.Misc. 583, 137 A. 716 (S. Ct. 1927).

and recognize that the suit is really between the plaintiff and defendant's insurer, with defendant acting merely as a witness for the insurer.

The general rule, however, forbids any mention of insurance during the trial of personal injury cases between private parties as improper and prejudicial.[10] The leading New Jersey case in point states:

> "The ground of such exclusion is not that such evidential matter is lacking in relevancy or devoid of probative effect logically considered, but that, assuming it to be possessed of these qualities, it has been judicially determined that the introduction of such facts and inquiries tends in actual operation to produce in the mind of the jury a confusion of issues and an unfair prejudice against one of the parties. . ."[11]

By stating "one of the parties", the court obviously means the defendant, since the jury might naturally be inclined to grant a judgment in plaintiff's favor knowing that the loss will be paid by the insurance company.[12] But there have been exceptions carved out of this general rule where the court will refuse to direct a mistrial because plaintiff's counsel mentioned defendant's insurance, on the ground that the prejudice has been cured merely by directing the jury to disregard that part of the evidence.[13] It has also been held that it is permissible to question jurors on *voir dire* as to their connections, if any, with the defendant's insurer where a direction to disregard is given to the jury.[14] In most of the cases where mention of defendant's insurance is held to be prejudicial, the reference has been made by *plaintiff* or in his behalf.[15] The rule was obviously developed mainly to prevent prejudice to the defendant and his insurer. An Indiana case bears out this contention by holding that, if the attorney for *defendant* men-

10. 56 A.L.R. 1419 (1928); 74 A.L.R. 850 (1931); 95 A.L.R. 389 (1935).
11. Sutton v. Bell, 79 N.J.L. 507, 77 A. 42 (E. & A. 1910).
12. Patterson v. Surpless, 107 N.J.L. 305, 151 A. 754 (E. & A. 1930).
13. Hughes v. English, 9 N.J.Misc. 28, 152 A. 473 (S. Ct. 1930); Constantine v. D. L. & W. Railroad Co., 12 N.J.Misc. 518, 172 A. 803 (S. Ct. 1934).
14. Bashaw v. Eichenberger et al., 100 N.J.L. 153, 125 A. 130 (E. & A. 1924).
15. Sutton v. Bell, 79 N.J.L. 507, 77 A. 42 (E. & A. 1910).

tions that he actually represents defendant's insurer, it is admissible as showing his interest in the suit.[16] The rule has apparently been made for the benefit and protection of the defendant and his insurer and, that being the case, they should be allowed the privilege of waiving its protection. That would seem clearly to be the sensible approach to the problem.

The court should, it is submitted, take a more realistic attitude and recognize defendant's insurer as the real party in interest in this case. Assuming that said insurer *is* the real party in interest, it is the *insurer* who pleads "surprise" and not the *defendant,* as it would appear at first blush. However, the court, in seeking to preserve undue formality, in effect deprives the real party in interest from the protection to which he is entitled. The court has taken what appears to be an unrealistic and unfair position.

16. Grossnickle v. Avery, 96 Ind. App. 479, 152 N.E. 288 (1926). Accord: Tuohy v. Columbia Steel Co., 61 Ore. 527, 122 P. 36 (1912).