#34(L) 5/10/65

Memorandum 65-21

Subject: Study No. 34(L) - New Evidence Code

Attorneys for the Southern Pacific Company have expressed concern over the change made by the Evidence Code in the law now declared in Section 2055 of the Code of Civil Procedure. Prior to 1957, the last sentence of Section 2055 read:

> Such witness [a witness called under Section 2055], when so called may be examined by his own counsel, but only as to the matters testified to on such examination.

In 1957, this sentence was revised as follows:

> ~~Such witness~~ A party , when so called, may be examined by his own counsel, but only as to the matters testified to on such examination.
>
> A witness other than a party, when so called, may be cross-examined by counsel for a party adverse to the party calling such witness, but only as to matters testified to on such examination.

Counsel for Southern Pacific advise us that the reason for the amendment was to alleviate a problem arising in employer-employee litigation. When an employee is suing his employer for his injuries, his fellow employees are not really adverse to his position, they are his fellow workers and fellow union members. Frequently they are poker-buddies as well. Yet, under Section 2055 as it read prior to 1957, counsel for the plaintiff employee could cross-examine all of these fellow employees while counsel for the corporate defendant was barred on his cross-examination of the same witness from asking leading questions. The 1957 amendment removed the restriction from the corporate defendant in such a situation, and it permits a witness other than a party to be cross-examined as if under cross-examination by all parties.

The change made by the 1957 amendment has not been perpetuated in the

Evidence Code. The 1957 amendment went too far in solving the problem that existed under the former law. Under the 1957 amendment, a corporate defendant may always use leading questions in cross-examining a witness called under Section 2055, even when the litigation is between the defendant and a third party, and the employee called under Section 2055 is really identified in interest with the defendant. Hence, in the recodification of Section 2055 in Evidence Code Section 776, the Commission omitted the change made in the 1957 amendment. Instead, the Commission placed Section 767 in the Evidence Code to permit the court to restrict the use of leading questions whenever the witness appears to be willing to be led by the examiner. Whether the examination is cross or direct examination, Section 767 empowers the court to prohibit the use of leading questions.

The railroad attorneys do not believe this is a sufficient solution to the problem. The normal rule under Evidence Code Section 776 is that the corporate defendant cannot use leading questions when examining its own employee who has been called under Section 2055. The corporate defendant must show some justification for the use of leading questions, and the need for such examination is frequently not apparent to judges who are not familiar with this kind of litigation or with the issues in the particular case. The railroad attorneys would prefer that the normal rule be that the corporate defendant does have a right to full cross-examination of its own employee called under Section 776 in employee-employer litigation and that the plaintiff-employee's counsel should be required to show under Section 767 that the use of leading questions should be restricted.

The railroad attorneys would like to have an amendment to Section 776 that would permit an employer-defendant to cross-examine its employees who are called under Section 776 by an employee-plaintiff in employee-employer

litigation. There are two ways of accomplishing this result. First, subdivision (d)(2) can be amended to provide that an employee of a party is not "identified with the party" for the purpose of Section 776 in litigation between another employee of the party and the party-employer. This amendment would deprive an employee-plaintiff of the right to call a fellow employee under Section 776. Instead, the employee-plaintiff would be required to call his fellow employee as his own witness. The only restriction this would impose upon the examination would be the restriction of Section 767 on the use of leading questions. In an appropriate case, the court could allow the employee-plaintiff to use leading questions on this direct examination.

This amendment would bring the California rule into harmony with a rule being adopted in an increasing number of jurisdictions. In an annotation appearing in 38 A.L.R.2d 952, a number of cases are collected where it is held that the court may prohibit the use of leading questions on cross-examination where the witness is friendly or biased in favor of the cross-examiner. The supplemental decisions to this annotation indicate that an increasing number of jurisdictions are following this rule.

Another means of meeting the corporate defendant's problem is to amend subdivision (b)(2) to make it inapplicable in employer-employee litigation. This would preserve the right of a plaintiff-employee to cross-examine a fellow employee under Section 776 and to use leading questions in doing so unless prohibited by the court under Section 767. But this revision would give the defendant employer a right to cross-examine the employee also. The normal rule on both examinations would be that leading questions are permissible; however, the court in the interest of justice could restrict the use of leading questions on either examination pursuant to Section 767.

This amendment would bring the California rule into harmony with the rule adopted by the Arizona Supreme Court in construing a statute similar to Section 776. The case is J. & B. Motors v. Margolis, 257 P.2d 588 (Ariz. 1953). There, a former employee was suing the corporate employer for commissions and bonuses earned during the employment. Plaintiff-employee called the defendant's president and secretary-treasurer as adverse witnesses under Arizona's equivalent of Section 776. Arizona's statute gives a party the right to call an adverse party, or his employee, and to examine him with leading questions. The statute then gives the adverse party the right to cross-examine the witness even when the witness is the adverse party himself. The trial court prohibited defendant's counsel from using leading questions on such cross-examination. The Supreme Court affirmed. It held that the normal rule in Arizona prior to the adoption of the statute was that the trial judge could prohibit the use of leading questions on cross-examination where the witness was friendly or biased in favor of the examiner. The adoption of the statute in no way altered this rule. Hence, it was not error for the trial judge to prohibit the defendant's counsel from using leading questions in cross-examining the defendant's president and secretary-treasurer. Thus, under the Arizona statute, the plaintiff-employee may lead the employee-witness, and the employer normally has the usual rights of a cross-examiner; but where the witness is willing to be led by the cross-examining employer, the use of leading questions can be prohibited.

Set forth below are amendments designed to effectuate these alternative solutions:

AMENDMENT NO. 1

776. (d) For the purpose of this section, a person is identified with a party if he is:

* * * * *

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party. A person in any of the relationships specified in this paragraph is not identified with the party when the action is between the party and another person in any of such relationships with the party.

AMENDMENT NO. 2

776. (b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified. The limitations in this paragraph do not apply when the action is between the party with whom the witness is identified and another person who is identified with the party.

Because the Evidence Code bill has been passed by both houses, it is not feasible to amend the Evidence Code bill itself. Accordingly, if the Commission believes that either of the above amendments is desirable, it will be necessary to use another bill to amend Section 776 of the Evidence Code. We do not believe that it would be difficult to find such a bill available. The only question is whether the Commission should sponsor the additional amendment.

Respectfully submitted,

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