#63 9/7/67

Memorandum 67-57

Subject: Study 63 - The Evidence Code

Attached as Exhibit I (pink) is a letter from John E. Thorne concerning Evidence Code Sections 1290-1291. The letter should be read to determine the problem that concerns Mr. Thorne.

The anticipated objection to the transcript offered by Mr. Thorne would be that it is hearsay. Is it hearsay? Section 1200 defines "hearsay evidence" as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Emphasis supplied.) Section 145 defines "the hearing" as "the hearing at which a question under this code arises, and not some earlier or later hearing." The Comment to Section 145 reads:

> Comment. "The hearing" is defined to mean the hearing at which the particular question under the Evidence Code arises and, unless a particular provision of its context otherwise indicates, not some earlier or later hearing. This definition is much broader than would be a reference to the trial itself; the definition includes, for example, preliminary hearings and post-trial proceedings.

The last sentence of the Comment might be some support for the proposition that the preliminary hearing for a temporary restraining order is not a different hearing than the trial and hence the hearsay rule does not exclude use of the transcript. However, whether the transcript is hearsay evidence is far from clear. Section 1290 defines "former testimony" as "testimony given under oath in . . . another action or in a former hearing or trial of the same action."

Mr. Thorne is of the view that testimony given in a former hearing of the same action should come within the hearsay exception provided by Section 1291 even where the declarant is available as a witness. Under

Section 1291, such testimony is admissible only if the declarant is unavailable as a witness.

Whether the transcript that Mr. Thorne desired to use would be admissible is not clear. Should the matter be clarified and, if so, how?

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 67-57 EXHIBIT I

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July 19th, 1967

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Re: Evidence Code Section 1290-1291

Gentlemen:

I am writing about the above Sections with a suggestion for possible revision of Section 1290.

As you know, 1290 defines "former testimony" as being testimony given under oath in "another action or in a former hearing or trial of the same action". I am concerned with the words "former hearing", as I think there is some ambiguity.

I recently had a situation arise in which we spent approximately eight (8) days in a preliminary hearing for a temporary restraining order, an order which was granted. Within a few months we then went to trial and the defendants indicated that they would object to our offering into evidence the transcript of the eight (8) day preliminary hearing. Fortunately, (or perhaps unfortunately) the case was settled and thus the issue was never joined, but I would like to avoid the issue in the future!!

It would seem to me that the term "former hearing" as used is not intended to eliminate the kind of ~~evi-~~ dence I have just described. I think the term is meant to apply, for example, to a preliminary hearing ~~preceding~~ a trial and the action is now being tried for a second time after a new trial is granted. The ~~preliminary~~ hearing in that situation would be comperable to the former trial, I also think that in the case that ~~I was~~ faced with, the testimony taken in the hearing for the

temporary restraining order was really testimony in the action itself, and therefore was not a "former hearing or trial" of the same action.

It seems to me that if the testimony I wanted to introduce would be barred unless we showed that the wintesses were unavailable, there would then be the strange situation of barring that kind of evidence when testimony taken at a deposition of the same witnesses (assuming them parties) could be introduced without objection under C.C.P. Section 2016. This does not make sense to me, as I would think the testimony taken in Court, before the Judge, with both counsel examining and cross-examining the witnessses, would be much more reliable testimony than that taken at a depesition.

I don't know if I am seeing a problem when one does not exist, but it seems to me that it definately could be a problem. It is my belief that testimony taken at any preliminary examination should be readily admissable at the trial of that action. I think, however, that to obtain this result there perhaps should be some language change as far as Section 1290 is concerned.

I would appreciate your thoughts with regard to this matter.

Sincerely,

JOHN E. THORNE

JET/m
cc: Philip F. Westbrook, Attorney at Law, 433 South Spring Street, Los Angeles, California