Commissioner Primarily Responsible: Ball

63 7/10/68

Memorandum 68-69

Subject: Study 63 - Evidence Code (Section 1224)

Attached is another law review article critical of the decision of the California Supreme Court interpreting Section 1224 of the Evidence Code. You will recall that the court held that the terms "liability, obligation, or duty" in Section 1224 do not include tort liabilities of employees that are imputed to their employers under the doctrine of respondeat superior.

The attached article contains an interesting suggestion and a possible solution to the problem presented by the decision of the Supreme Court. The author suggests that the section be amended to make it clear that it applies in vicarious liability cases and be further amended to provide that the statement is not admissible if the judge finds that it was made under circumstances such as to indicate its lack of trustworthiness. This is the same approach taken in Evidence Code Section 1260 (statements concerning declarant's will) and Section 1261 (statements of a decedent in an action against his estate).

The case made by the author is stated as follows:

> Requiring the judge to make a finding of lack of trustworthiness before excluding the hearsay evidence would preserve a general attitude of admissibility that is desirable. If evidence of a certain type, such as an employee's statement, is likely to be reliable, it should be admitted. If it appears in the individual case that such evidence is untrustworthy, then it can be excluded in that instance. This is preferable to excluding all evidence of a certain type because in some cases it might be untrustworthy.

See the author's recommendation on the last page of the attached article.

Respectfully submitted,

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Executive Secretary

Markley v. Beagle: Rewriting the New Evidence Code

INTRODUCTION

On January 1, 1967, the new California Evidence Code became effective. As early as June, 1967, the Supreme Court of California had begun to interpret the new code. The first decision affected section 1224 of the Evidence Code. This section provides an exception to the hearsay rule when the liability of the party to the action is based on the liability of the hearsay declarant.

Section 1224 reads:

> 1224. When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of

seat belt equipped autos involved in accidents, the belts were not in use at the time of the accident in 63.3% of the cases."

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> duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

In the case of *Markley v. Beagle*,[1] the California Supreme Court held that the terms "liability, obligation, or duty" in this section do not include tort liabilities of employees that are imputed to their employers under the doctrine of respondeat superior.

On first impression this bit of judicial editing of a recently enacted statute seems to infringe upon the right of the Legislature to write its own copy.[2] Nothing in the language of the statute would exclude the respondeat superior cases. On the contrary, since the words "liability, obligation and duty" are commonly used in describing tort liabilities,[3] the statute appears to apply specifically to the respondeat superior situation. The decision, therefore, raises some questions about the logical basis for the opinion and the desirability of such restriction.

MARKLEY V. BEAGLE

Markley was injured when a guard rail gave way and he fell from a second floor mezzanine in a warehouse building to the floor below. Beagle, a contractor, had purchased certain equipment from the owner of the building. About ten months prior to the accident, Beagle had removed this equipment from the building. The equipment included storage bins built around the guard rail on the mezzanine.

In his action against Beagle and the owner of the building, Markley alleged that Beagle had created the dangerous condition of the guard rail in removing the bins, and that the owners negligently failed to inspect the premises and to either correct the condition or warn Markley about it. Whether Beagle's employees had removed and reinstalled the guard rail to facilitate removal of the storage bins was disputed at the trial. One of Beagle's employees testified at the trial that the guard rail had not been disturbed and the condition of the railing had not been changed in any way.

Markley offered as evidence an out of court statement by a former

1. 66 Cal. 2d 951, 59 Cal. Rptr. 809, 429 P.2d 129 (1967).
2. For another instance of judicial editing of the Evidence Code *see* Jackson v. Jackson, 67 Adv. Cal. 241, 60 Cal. Rptr. 649, 430 P.2d 289 (1967).
3. The word "liability," as used in Code Civ. Proc. § 339, providing that an action on contract, obligation, or liability not founded on an instrument in writing must be brought within two years, includes responsibility for torts. Lowe v. Ozmun, 137 Cal. 257, 258, 70 P. 87 (1902).
"The word 'duty' is used throughout the Restatement of this Subject to denote the fact that the actor is required to conduct himself in a particular manner . . . ." RESTATEMENT (SECOND) OF TORTS § 4 (1965).
See generally WORDS AND PHRASES, *"Liability—Tort"; "Obligation—Tort"; "Duty—In General"* (1961).

Beagle employee named Hood. Hood's statement had been obtained in a tape recorded interview in response to questions by an investigator for the plaintiff. This interview took place about one year after the accident (nearly two years after the work had been completed) at a time when Hood was no longer employed by Beagle. Hood's statement was somewhat vague about just what was done, but indicated that the railing had been removed and reinstalled during the course of the work. The statement did not, however, admit any negligence.

Beagle objected to the statement by Hood, because it was hearsay. The objection was overruled and the statement was allowed into evidence as an admission, an exception to the hearsay rule. The jury found for the plaintiff against both Beagle and the building owner, and for the building owner on his cross-complaint against Beagle. Beagle, on appeal, claimed prejudicial error in admitting Hood's statement into evidence. Markley argued that the hearsay was admissible under an exception to the hearsay rule provided by section 1851 of the California Code of Civil Procedure.

CCP 1851 provided, "And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties." The district court of appeal[4] found it was Hood's duty to securely replace the railing, and Beagle, as Hood's employer, was charged with Hood's breach of that duty. The question in dispute was whether Hood met his obligation or duty to make the railing safe. Since Hood's statement would be evidence against him, it was admissible against Beagle. The district court, in accepting this analysis of the application of section 1851, expressed a reservation: the section had never been applied to respondeat superior cases charging an employer with his employee's negligence. However, the court was swayed by an analysis of CCP 1851 made in connection with the California Law Revision Commission's study of the *Uniform Rules of Evidence*,[5] in which it was stated that respondeat superior cases came within the language of the section and the principle of the cases applying the section.

The supreme court reversed the decisions of the lower courts. Noting that section 1851 had never been applied to a respondeat superior situation, the court was convinced "the failure of any case to consider that possibility . . . reflected a tacit understanding that section 1851 did not change the settled and apparently universally followed rule that hearsay statements of an agent or employee . . . are not made ad-

4. Markley v. Beagle, 54 Cal. Rptr. 916 (Dist. Ct. App. 1966).

5. *Tentative Recommendations and a Study Relating to the Uniform Rules of Evidence* (Art. VIII. *Hearsay Evidence*), 6 CAL. LAW REVISION COM. REP., Appendix, pp. 494-495 (1964).

missible merely because they tend to prove negligence of the agent or employee that may be imputed to the principal or employer under the doctrine of respondeat superior."[6] When this decision was rendered, section 1224 of the Evidence Code had become effective and section 1851 of the Code of Civil Procedure had been repealed. Since section 1224 is characterized as a restatement or recodification of section 1851,[7] the court's decision was also made applicable to section 1224.

The Basis for the Court's Decision

The fact that no reported cases have applied section 1851 to respondeat superior cases indicated to the court the existence of a tacit understanding. This tacit understanding, or lack of cases, is cited as precedent for holding that section 1851 cannot be applied to respondeat superior cases. The use of a dearth of opinions as precedent is not often encountered. One example of the use of such precedent is found in an opinion by Justice Cardozo, where he stated, "Not lightly vacated is the verdict of quiescent years."[8] However, the absence of decisions does make for a rather amorphous precedent; one that may easily be misinterpreted and therefore to be used only when its implications are clear.

Since its enactment in 1873, only a few cases have considered the effect of section 1851. The most frequent application of the section has been to make the statement of a defaulting debtor admissible in an action against his surety or guarantor.[9] It has also been applied to allow an employee's confession of embezzlement into evidence against the indemnity company because his embezzlement was the foundation for the suit.[10] In another case of indemnity, an insured's admission that he had received summons in a suit for damages was held admissible in an action to enforce a default judgment against the declarant's insurer.[11] In the case of *Ellsworth v. Bradford*,[12] section 1851 was applied to admit a judgment against a corporation in an action to recover from the shareholders who were, by statute, primarily liable for the corporation's debts. And in *Ingram v. Bob Jaffe Co.*,[13]

6. Markley v. Beagle, 66 Cal. 2d 951, 959, 59 Cal. Rptr. 809, 814, 429 P.2d 129, 134 (1967).
7. *Id.* at 958, 59 Cal. Rptr. at 813, 429 P.2d at 133.
8. Coler v. Corn Exchange Bank, 250 N.Y. 136, 137, 164 N.E. 882, 884 (1928); *quoted with approval*, California Motor Express v. State Board of Equilization, 133 Cal. App. 2d 237, 240, 283 P.2d 1063, 1065 (1955).
9. Mahoney v. Founder's Ins. Co., 190 Cal. App. 2d 430, 12 Cal. Rptr. 114 (1961); Standard Oil Co. v. Houser, 101 Cal. App. 2d 480, 225 P.2d 539 (1950); Butte County v. Morgan, 76 Cal. 1, 18 P. 115 (1888).
10. Piggly Wiggly Yuma Co. v. New York Indem. Co., 116 Cal. App. 541, 3 P.2d 15 (1931).
11. Langley v. Zurich Gen. Accident & Liab. Ins. Co., 219 Cal. 101, 25 P.2d 418 (1933).
12. 186 Cal. 316, 199 P. 335 (1921).
13. 139 Cal. App.2d 193, 293 P.2d 132 (1956).

an admission by the owner of an automobile was admitted as evidence against the former owner who had not complied with registration statutes and was therefore still primarily liable by statute as the registered owner.

In each of these cases, the statement of a third party was admitted against the defendant who was liable because of some particular relationship to the declarant. In most cases the liability of the defendant was secondary, as in the principal-surety and principal-guarantor relationship. But in the *Ellsworth* and *Jaffe* cases the defendant was, by statute, primarily liable; just as an employer is primarily liable for the negligence of an employee under the doctrine of respondeat superior.

The supreme court acknowledges that the hearsay exceptions represented by the cases applying CCP 1851 are an extension of substantive law theories into the rules of evidence.[14] Where the substantive law provides for vicarious liability for the acts of another person, the rules of evidence provide for admissibility of hearsay statements of that other person. These statements are referred to as vicarious admissions. The court quotes Wigmore:

> "So far as one person is privy in obligation with another, i.e. is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally." He points out that "the admissions of a person having virtually the same interests . . . and the motive and means for obtaining knowledge will in general be likely to be equally worthy of consideration" as the admissions of the party himself.[15]

The respondeat superior case seems to fit nicely into this principle.

The court excludes the respondeat superior cases on the grounds that there is no basis for an assumption of reliability that would justify dispensing with the oath and cross-examination unless the statement also qualifies as a declaration against interest, a spontaneous statement, or a statement made within the scope of the employment.[16] While this conclusion may be warranted by the facts of the *Markley* case, it is questionable as a generalization. McCormick has noted:

> The agent [employee] is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment con-

14. Markley v. Beagle, 66 Cal. 2d 951, 960, 59 Cal. Rptr. 809, 815, 429 P.2d 129, 135 (1967).
15. *Id.* at 960, 59 Cal. Rptr. at 815, 429 P.2d at 135, *quoting from* 4 WIGMORE, EVIDENCE § 1077 (3d ed. 1940).
16. *Id.* at 960, 59 Cal. Rptr. at 815, 429 P.2d at 135.

> tinues, the employee is not likely to make such statements unless they are true.[17]

There is, then, some basis for presuming reliability, at least for those still employed.

In those cases where the employee is authorized to speak for his employer, i.e., making the statement is within the scope of his employment, the statement is allowed as an admission.[18] Further, the authority to make the statement may be implied if the employee is highly placed in the principal's organization.[19] Is this an exception based on reliability? A high ranking employee may be more cautious about making statements damaging to his employer but there is little reason to believe that he will be inherently more trustworthy about the matter.

However, accepting the court's premise that an employee's statements may not be reliable does not justify exclusion of these statements from the principle of vicarious admissions. This same criticism has been made of all hearsay exceptions for vicarious admissions: they are not based on any inherent element of reliability. Professor Morgan pointed out, in his article "*The Rationale of Vicarious Admissions*,"[20] that the hearsay exceptions for vicarious admissions are dependent on substantive rules determining privity and not on a sound basis for admission of evidence, e.g., that the statement has some basis for being considered trustworthy. Wigmore, in the excerpt quoted by the court, refers to the statements of a person privy in obligation as equally worthy of consideration as the admissions of the party himself.[21] But the exception for the admissions of a party is not based on reliability. It is based on the idea that a party should not be heard to object to his own declarations.[22]

Statements made out of court by persons not testifying at the trial are admitted under several exceptions to the hearsay rule. The difference in the basis of these exceptions is made clearer by dividing them into two groups. The basis for the first group of exceptions is that the statement was made under circumstances indicating trustworthiness. In this group are declarations against interest,[23] spontaneous statements,[24] contemporaneous statements,[25] and dying declarations.[26]

17. McCormick, Handbook of the Law of Evidence § 244 (1954).
18. Cal. Evid. Code § 1222 (West 1966).
19. *Id.*, *Official Comment.*
20. 42 Harv. L. Rev. 461 (1929).
21. 4 Wigmore, Evidence § 1077 (3d ed. 1949).
22. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 Yale L.J. 355 (1921); *noted with approval*, McCormick, Handbook of the Law of Evidence § 239 (1954). *See also* Cal. Evid. Code § 1220 *Official Comment* (West 1966).
23. Cal. Evid. Code § 1230 (West 1966).
24. *Id.* § 1240.
25. *Id.* § 1241.
26. *Id.* § 1242.

The basis for the second group of exceptions is the privity between the declarant and the party against whom the statement is offered. In this group of exceptions are: statements by a person authorized by the party to make a statement for him,[27] statements of a co-conspirator,[28] statements of a predecessor in interest in real property,[29] and statements of a declarant whose liability or breach of duty is in issue.[30] The privity of interest which gives rise to the exceptions in this second group often, but not necessarily, involves circumstances which also indicate reliability; for instance, the statement will often also be against the interest of the declarant.

The presence, in some cases, of this overlap between the two types of exceptions tends to cloud the distinction between them. But if the hearsay statement is against interest, or is admissible under any of the other exceptions based on reliability, it is not necessary to invoke the exceptions in the second group based on privity. On the other hand, a statement by a declarant whose relationship to a party fits one of the exceptions based on privity is admissible against the party as a vicarious admission of the party without any test of reliability. The relationship creating the privity does not necessarily provide a basis for assumption of trustworthiness; a statement self-serving or apparently exculpatory when made would still be admissible under these exceptions.[31]

The exceptions for admissions of a party and for vicarious admissions are found in article 1 of chapter 2 of the California Evidence Code. The first exception is for admissions offered against a declarant who is a party to the action.[32] A statement adopted by a party is admissible against the party under the second exception.[33] The third exception provides for admission of statements if the declarant was authorized by the party to make a statement for him.[34] These statements are admissible under the same conditions as if made by the party himself.[35] The authority to make the statement may be implied and is determined under the substantive law of agency.[36] The fourth exception, for the statements of a co-conspirator,[37] is a specific example of an authorized admission.[38] The statement is admitted because it is an act of the conspiracy for which the party, as a co-con-

27. *Id.* § 1222.
28. *Id.* § 1223.
29. *Id.* § 1225.
30. *Id.* § 1224.
31. WITKIN, CALIFORNIA EVIDENCE § 498 (1966).
32. CAL. EVID. CODE § 1220 (West 1966).
33. *Id.* § 1221.
34. *Id.* § 1222.
35. *Id.* § 1222 *Official Comment.*
36. *Id.*
37. *Id.* § 1223.
38. *Id.* § 1223 *Official Comment.*

spirator, is legally responsible. Section 1224 is the fifth exception in this series: the statement of a declarant whose liability or breach of duty is in issue is as admissible against a party as it would be against the declarant. Statements by a declarant whose default is in issue in an action against his surety, and statements of a declarant whose embezzlement is in issue in an action against his endemnitor are within the exception provided by this section. The logical extension of the principle developed in the preceding exceptions for vicarious admissions would include as well the statement of an employee whose negligence is in issue in an action against his employer.

Since reliability is not necessarily the basis for the exceptions for vicarious admissions, the lack of a basis for assumption of reliability is not a distinguishing factor that would exclude respondeat superior cases from the principle expressed in other exceptions for vicarious admissions. In each of these exceptions the statement of the declarant is admitted against the party because the party is, under the substantive law, in privity with the declarant. Nor is there a distinguishing factor in the relationship of employee to employer that would exclude respondeat superior cases from the principle of the cases decided under section 1851. In each case, the reliability of the party is based on the liability of the declarant.

But, even assuming that the supreme court's analysis of the scope of section 1851 is correct, there is the question whether this decision must also apply to section 1224. The *Markley* case was brought to trial before the Evidence Code became effective, and was governed by the prior law. The court's ruling as to section 1224 would therefore be dicta except for the assertion that this section recodifies section 1851. The official comment to section 1224 refers to this section as a restatement of section 1851; and, together with section 1302, a recodification of the cases applying section 1851. The comment includes a reference to a research study of the *Uniform Rules of Evidence* prepared by Professor Chadbourn of the School of Law, University of California at Los Angeles.

The California Assembly[39] and Senate Judiciary Committees,[40] in reports to the respective houses of the Legislature, approved the comments to the Evidence Code as indicative of the Committees' intent in approving the adoption of the code. The official comment reference to section 1224 as a "restatement" of section 1851 would seem to settle the matter; except for the reference to the research study.

The Evidence Code, as enacted, is based on the recommendations

39. CAL. ASSEMBLY JOURNAL (April 6, 1965).
40. CAL. SENATE JOURNAL (April 2, 1965).

of the California Law Revisions Commission. The research study by Professor Chadbourn was made at the request of the Law Revision Commission and was published in 1962 with the Commission's preliminary report and again in 1964 with the Commission's recommendations. Although the research study does not purport to represent the official views of the Commission or its members, it is this study to which reference is made in the official comment to section 1224. Within the pages cited in the comment, Professor Chadbourn analyzed section 1851 and the cases applying it as follows:

> Although it is difficult to discover a distinguishing principle, for some reason Section 1851 has never been cited nor discussed in any of the cases dealing with the liability of an employer under the doctrine of respondeat superior. It would appear that a respondeat superior case would fall within both the language of Section 1851 and the principle upheld in the *Ingram* and *Ellsworth* cases.[41]

The research study was available to the Legislature two years before section 1224 was enacted. If any legislative intent is to be presumed here, it would be that the Legislature was restating section 1851 *according to the interpretation that was before them*, and to which the official comment makes reference. That interpretation was that a respondeat superior case would fall within the language of section 1851 and the principle upheld in the cases.

CONCLUSION

The court could easily, and perhaps more logically, have found that, based on the language of section 1224, the statements of an employee are admissible against his employer in an action against the employer under the doctrine of respondeat superior. In many cases, the statement of an employee is admissible under other exceptions of the Evidence Code, e.g., declarations against interest, spontaneous statements, and authorized admissions. But in those cases where the employee's admission does not fit any other exception to the hearsay rule the court was justifiably concerned about the reliability of the employee's statements. Even so, the decision is unnecessarily restrictive.

This restrictive nature of the decision reflects the continued resistance of the bar to any relaxation of the hearsay rule. Lawyers long ago developed a conditioned reflex to hearsay and automatically rejected it without consideration of its possible evidentiary value. As a result, the jury may be denied access to evidence with some proba-

41. *Tentative Recommendations and a Study Relating to the Uniform Rules of Evidence* (Art. VIII. *Hearsay Evidence*), 6 CAL. LAW REVISION COM. REP., Appendix, pp. 494-495 (1964).

tive value while less reliable evidence is admitted. Hearsay evidence is, after all, only evidence which the jury weighs with all other evidence.

Relaxation of the hearsay rule has not kept pace with the increasing sophistication of the modern jury.[42] Could not the jury properly evaluate the reliability of a statement if given all the circumstances under which the statement was made, and with the knowledge that it has not been tested by cross-examination? If a jury can be expected to absorb and understand the approved jury instructions regarding evidence,[43] negligence,[44] or reasonable doubt,[45] they can be trusted to reasonably evaluate relevant hearsay evidence if it is not highly prejudicial.

Three noted commentators on the law of evidence, Wigmore, Morgan, and McCormick, have urged relaxation of the hearsay rule. Wigmore states that "The Hearsay rule stands in dire need of, not stopping its violation, but of a vast deal of . . . elastic relaxation." He asks, "Would it be more sensible, instead of curtly excluding the statement made by a person who presumably knows something, to let in the statement and then bring him into court, if desired, for testing the value of that statement?" He characterized the hearsay rule as "an objection much overdone in our court practice [which] could readily be met, either by an elastic relaxation or by a more practical way of enforcement."[46] Morgan would expand the exception for declarations against interest and dispense with the requirement that the declarant be unavailable. Then the exceptions based on privity of interest could be eliminated and all exceptions for statements of third parties made dependent on some element indi-

42. Regarding juries generally, *see* KALVEN & ZEISEL, THE AMERICAN JURY (1966).

43. "Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn.

"An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

"The law makes no distinction between direct and circumstantial evidence as to degree of proof required; each is accepted as a method of proof and each is respected for such convincing force as it may carry." 1 CAL. JUR. INST. CIV. No. 22 (4th ed. 1956, 1967 pocket part).

44. "Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person." 1 CAL. JUR. INST. CIV. No. 101 (4th ed. 1956, 1967 pocket part).

45. "Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." CAL. JUR. INST. CRIM. No. 21 (Rev. ed. 1958).

46. 4 WIGMORE, EVIDENCE § 1080a (3d ed. 1940).

cating reliability.[47] McCormick agrees that there is a need for widening the exceptions. He states that "the failure of the courts to adjust the rules of admissibility more flexibly and realistically to . . . variations in the reliability of hearsay . . . constitutes one of the pressing needs for liberalization of the evidence law."[48]

It would have been preferable for the court to allow the admission of employees' statements in respondeat superior cases under section 1224 and leave the trial judge the discretion to exclude any admissions made under circumstances that indicate lack of trustworthiness. In this way, the hearsay rule could have been relaxed and at the same time a more uniform criterion for allowing exceptions to the hearsay rule could have been established.

Unreliable hearsay could be excluded by holding that reliability is implicit in all exceptions to the hearsay rule and therefore, if the judge finds that the statement was made under circumstances such as to indicate its lack of trustworthiness, it is not admissible. This is the same judicial discretion allowed in section 1260 of the Evidence Code in regard to statements concerning a declarant's will, and in section 1261 for statements of a decedent in an action against his estate. In addition, the judge now has the authority under section 352 of the Evidence Code to exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Requiring the judge to make a finding of lack of trustworthiness before excluding the hearsay evidence would preserve a general attitude of admissibility that is desirable. If evidence of a certain type, such as an employee's statement, is likely to be reliable, it should be admitted. If it appears in the individual case that such evidence is untrustworthy, then it can be excluded in that instance. This is preferable to excluding all evidence of a certain type because in *some* cases it might be untrustworthy.

As applied in the *Markley* case, the discretion to exclude untrustworthy evidence would have allowed the exclusion of Hood's statement. The statement was made a year and ten months after completion of the work and Markley was no longer employed by Beagle. The statement was vague and was made in response to leading questions from the plaintiff's investigator. The parties to the action had taken Hood's deposition at a time subsequent to the interview when

47. Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 480 (1929).

48. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 224 (1954).

all parties were present and had an opportunity to cross-examine, but neither side chose to introduce this deposition. These circumstances, when combined, would justify a finding that Hood's statement was not reliable and not needed as evidence and therefore not admissible. Even within the present provisions of the Evidence Code, these circumstances would justify the exercise of judicial discretion to exclude the evidence under section 352.

RECOMMENDATION

The purpose of the Evidence Code was to clarify and revise, where recommended, the California law of evidence. Section 1224 does neither after the supreme court decision. Whether or not statements by employees should be admitted as evidence against their employer on the basis of respondeat superior is a policy decision that should be made and clearly expressed by the Legislature. Whatever the legislative decision, it is desirable to have statutes that mean what they say. The Legislature should re-enact section 1224 in words that clearly indicate its application to respondeat superior cases. If considered necessary, the section could contain a provision allowing the court to exclude evidence where the circumstances indicate lack of trustworthiness. In the alternative, if the Legislature agrees with the decision of the supreme court, amendment should be made to section 1224 so that its limited application is apparent in the language of the statute itself.

*William R. Potter**

* Member, Second Year Class.