Commissioner primarily responsible: Stanton

#63 7/11/68

Memorandum 68-71

Subject: Study 63 - Evidence Code (Evidence Code Section 1202)

The attached letter presents a problem that has not, I believe, been previously discussed by the Commission.

We also attach a copy of Evidence Code Section 1202 and the official Comment to that section.

Respectfully submitted,

John H. DeMoully
Executive Secretary

MARTIN E. ROTHENBERG
JUDGE, DEPARTMENT 7

EXHIBIT I

Memo 68-71

Superior Court
State of California
COUNTY OF CONTRA COSTA
COURT HOUSE, MARTINEZ

April 30, 1968

California Law Revision
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

The CEB Panel on Preparation and Examination of Witnesses has discussed the problem raised by Section 1202 of the Evidence Code. The problem under discussion was the instance where an independent witness was about to leave the country and his deposition was taken for use at the trial. Both sides of the lawsuit are present at the taking of the deposition and the witness is examined both on direct and cross-examination. At the deposition one of the parties produced a prior inconsistent statement which is shown to the witness and attached to the deposition as an exhibit.

At the time of trial, the prior inconsistent statement would appear to be admissible only for the purpose of attacking the credibility of the witness and not as substantative evidence, by virtue of Section 1202 of the Evidence Code.

The Law Revision Commission notes state in substance that if the declarant is not a witness and not subject to cross-examination, there is no sufficient guarantee of the trust worthiness of his out-of-Court statement. In the problem discussed, the witness has been subjected to cross-examination, the deposition is read in evidence in place of the witness personally testifying, and under these circumstances, it seems unusual to apply the rule of Section 1202, rather than Section 1235 which allows an inconsistent statement of a witness to be used as substantative evidence.

I would appreciate knowing if the Law Revision Commission has ever discussed this problem and come to any conclusion concerning the same.

Yours very truly,

MARTIN E. ROTHENBERG,
JUDGE OF THE SUPERIOR COURT

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Ex. II Memo 68-71



§ 1202. Credibility of hearsay declarant

1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

**Comment.** Section 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It clarifies two points. *First*, evidence to impeach a hearsay declarant is not to be excluded on the ground that it is collateral. *Second*, the rule applying to the impeachment of a witness—that a witness may be impeached by an inconsistent statement only if he is provided with an opportunity to explain or deny it—does not apply to a hearsay declarant.

When hearsay evidence in the form of former testimony has been admitted, the California courts have permitted a party to impeach the hearsay declarant with evidence of an inconsistent statement made by the hearsay declarant *after* the former testimony was given, even though the declarant was never given an opportunity to explain or deny the inconsistency. *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946). Apparently, however, former testimony may not be impeached by evidence of an inconsistent statement made *prior* to the former testimony unless the would-be impeacher either did not know of the inconsistent statement at the time the former testimony was given or unless he had provided the declarant with an opportunity to explain or deny the inconsistent statement. *People v. Greenwell*, 20 Cal. App.2d 266, 66 P.2d 674 (1937), as limited by *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946). The courts permit dying declarations to be impeached by evidence of contradictory statements by the deceased despite the lack of any foundation, for only in very rare cases would it be possible to provide the declarant with an opportunity to explain or deny the inconsistency. *People v. Lawrence*, 21 Cal. 368 (1863).

Section 1202 substitutes for this case law a uniform rule permitting a hearsay declarant to be impeached by inconsistent statements in all cases, whether or not the declarant has been given an opportunity to explain or deny the inconsistency. If the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach. *Cf. People v. Lawrence*, 21 Cal. 368, 372 (1863). If the hearsay declarant is available, the party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies.

Of course, the trial judge may curb efforts to impeach hearsay declarants if he determines that the inquiry is becoming too remote from the issues that are actually at stake in the litigation. EVIDENCE CODE § 352.

Section 1235 provides that evidence of inconsistent statements made by a trial witness may be admitted to prove the truth of the matter stated. No similar exception to the hearsay rule is applicable to a hearsay declarant's inconsistent statements that are admitted under Section 1202. Hence, the hearsay rule prohibits any such statement from being used to prove the truth of the matter stated. If the declarant is not a witness and is not subject to cross-examination upon the subject matter of his statements, there is no sufficient guarantee of the trustworthiness of the statements he has made out of court to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

[Law Revision Commission Comment (Recommendation, January 1965)]

CROSS-REFERENCES

Definitions:
Action, see § 105
Conduct, see § 125
Declarant, see § 135
Evidence, see § 140
Hearsay evidence, see § 1200
Statement, see § 225