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Evidence--Admissibility of Evidence of Subsequent Precautions for Impeachment of Witness Called under Code of Civil Procedure, Section 2055

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NOTES

EVIDENCE—ADMISSIBILITY OF EVIDENCE OF SUBSEQUENT PRECAUTIONS FOR IMPEACHMENT OF WITNESS CALLED UNDER CODE OF CIVIL PROCEDURE, SECTION 2055.

The value of a long standing rule of evidence may have been put in jeopardy by the California Supreme Court in *Daggett v. Atchison, T. & S. F. Ry. Co.*[1] For many years in forty-seven states, including California, evidence of repairs, alterations, or other precautions taken *after* an accident has been held inadmissible either as proof of antecedent negligence[2] or as an admission of negligence.[3] Early cases in several states including California[4] held to the contrary, but these cases have been overruled by later ones in all jurisdictions except Kansas.[5]

The reason for this rule is primarily the "very urgent policy against discouraging taking of safety measures."[6] Mr. Wigmore states that the evidence should be excluded because the inference of negligence from the act of taking subsequent precautions is not warranted. He points out that injuries result not only from negligence but also from accidents and contributory negligence. But he continues that although it is argued on the general theory of relevancy that such evidence is admissible, a policy argument strengthens the case for exclusion.

> "That argument is that the admission of such acts, even though theoretically not plainly improper, would be liable to over-emphasis by the jury, and that it would discourage all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disadvantage; and thus not only would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury."[7]

Evidence of subsequent precautions, however, has been held admissible in the past for other purposes, such as impeachment of witnesses produced by the defendant.[8] It is obvious that to the extent the evidence is admitted for any purpose such admission is likely to defeat the policy of encouraging remedial measures. Therefore, the admission of such evidence should be very restricted and should be limited to cases where the need for its admission outweighs the advantages to be gained from its exclusion. The holding of the *Daggett* case, however, may have opened wide the door to the unrestrained admission of such evidence by way of impeachment of an adverse party called under Code of Civil Procedure, section 2055.

The facts of the *Daggett* case are as follows. Mrs. Daggett and her two minor children were killed as a result of a collision between defendant's train and the

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[1] 48 Cal. 2d 655, 313 P.2d 557 (1957). See also Hercules Powder Co. v. Automatic Sprinkler Corp., 151 Cal. App 2d 387, 311 P.2d 907 (1957).

[2] Sappenfield v. Main St. & A.P. Ry., 91 Cal. 48, 27 Pac. 590 (1891); see note, 170 A.L.R. 7 (1947).

[3] Meyer v. San Francisco, 9 Cal. App. 2d 361, 49 P.2d 893 (1935); see note, 170 A.L.R. 7, *supra.*

[4] Butcher v. Vaca Valley, 67 Cal. 518, 8 Pac. 174 (1885).

[5] See Note, 170 A.L.R. 7, *supra.*

[6] MCCORMICK, EVIDENCE § 252 (1954).

[7] 2 WIGMORE, EVIDENCE § 283 (3d ed. 1940).

[8] Inyo Chemical Co. v. City of Los Angeles, 5 Cal. 2d 525, 55 P.2d 850 (1936).

automobile Mrs. Daggett was driving. The surviving husband brought an action for damages for their deaths. The motorman and a signal engineer employed by defendant were both called as witnesses for the husband under Code of Civil Procedure, section 2055.[9] The motorman testified that the speed limit set by defendant in the district in which the accident occurred was 90 miles per hour at the time of the accident *and at the time of the trial.* The signal engineer testified that the wigwag signal in place at the time of the accident was the safest type of automatic warning device. To impeach the testimony of the motorman, plaintiff was allowed to show that the speed limit in the district at the particular crossing where the accident occurred was at the time of the trial 50, not 90, miles per hour. He was also allowed to impeach the engineer's testimony by showing that by reason of a request of the California Public Utilities Commission the wigwag signal in place at the time of the accident had been replaced with a flashing red light.

The court in holding that no error was committed by admitting this evidence of subsequent changes in the speed limit and signals reasoned in the following manner. Although evidence of subsequent precautions is not admissible to show a negligent condition at the time of the accident,[10] such evidence has been held admissible to impeach the testimony of a witness produced by the other party to the action.[11] In answer to defendant's argument that such evidence is permissible only to impeach evidence produced by the other party to the action and not to impeach original evidence produced by the plaintiffs, the court replied that a witness called under section 2055 is not a witness of the party calling him[12] and may be impeached.[13] Mr. Wigmore was quoted to the effect that:

> "If there is any situation in which any semblance of reason disappears for the application of the rule against impeaching one's own witness, it is when the opposing party is himself called by the first party, and is sought to be compelled to disclose under oath that truth which he knows but is naturally unwilling to make known."[14]

The Supreme Court continued that the extent to which cross examination of a witness may be carried rests largely within the discretion of the trial court and the same rule applies to examination of a witness under section 2055.[15] The court concluded that there is no sound reason why evidence of subsequent precautions, since admissible for impeachment purposes generally, should not also be admissible for impeachment of a witness called under section 2055.

From a quotation from the transcript in the dissenting opinion it would appear

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[9] CAL. CODE OF CIVIL PROCEDURE § 2055. "A party to the record of any civil action or proceeding . . . may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him."

[10] 48 Cal. 2d at 660–661, 313 P.2d at 560–561 citing Helling v. Schindler, 145 Cal. 303, 78 Pac. 710 (1904).

[11] 48 Cal. 2d at 661, 313 P.2d at 561 citing Inyo Chemical Co. v. City of Los Angeles, 5 Cal. 2d 525, 55 P.2d 850 (1930).

[12] *Id.* at 662, 313 P.2d at 561–562, citing Smellie v. Southern Pac. Co., 212 Cal. 540, 299 Pac. 529 (1931).

[13] *Id.* at 664, 313 P.2d at 563, citing Batchelor v. Caslavka, 128 Cal. App. 2d 819, 276 P.2d 64 (1954).

[14] *Id.* at 662, 313 P.2d at 561 (1957), quoting 3 WIGMORE, EVIDENCE § 916, p. 431 (3d ed. 1940).

[15] *Id.* at 663, 313 P.2d at 562, citing Paul v. Key System, 80 Cal. App. 2d 21, 180 P.2d 940 (1947).

the motorman's testimony as to the present speed limit was a non-responsive answer.[16] But the case does not disclose the precise manner in which the engineer's testimony that was impeached was given—whether as a direct answer to defense counsel's question or as information volunteered by the witness. The opinion merely states that the engineer was the second witness called by the plaintiff as an adverse party under section 2055 and while so testifying gave the testimony which was impeached.

The opinion notes in passing that the statements of both witnesses "could be considered as having been volunteered by the witnesses prior to the impeaching questions asked by plaintiff's counsel."[17] The court, however, does not appear to base its holding on this uncertain observation. If the holding of the case permitting impeachment by evidence of subsequent precautions of witnesses called under section 2055 is limited to impeachment of testimony actually volunteered by such witnesses, there still would be adequate means of keeping out such evidence, as witnesses could be cautioned against volunteering information.

But the holding of the case may be given the broader interpretation that since evidence of subsequent precautions is admissible to impeach witnesses produced by the other party to the action, it is likewise admissible to impeach a party's own witnesses who are called under section 2055. There is a substantial difference, however, between permitting such impeachment of the opponent's witnesses and of a party's own witnesses testifying under section 2055. In the former, the opponent can so restrict his direct examination of his witnesses that the opportunity to impeach by evidence of subsequent precautions does not arise. The opponent must in such a case not only refrain from inquiring as to present conditions, but also refrain from introducing expert opinion that might be impeached by evidence of subsequent precautions.

Where the opponent has asked his witness on direct examination his opinion of the adequacy of precautions previously taken, it would be unfair to the other party to refuse to permit him to impeach that testimony by evidence of subsequent precautions. Or when the opponent himself once opens up the question of subsequent conditions he should not be allowed to object to a full disclosure of those conditions, including any precautions taken.

Allowance of impeachment by evidence of subsequent precautions of a party's own witness called under section 2055 leaves inadequate means of keeping out such evidence. The rule against the admission of such evidence could be nullified by the simple device of calling an adverse party under section 2055, asking his opinion of the safety of the appliance or condition at the time of the accident, and on the reply that the appliance or condition was safe, impeaching by evidence of subsequent precautions. A party thus could invite the testimony and then introduce highly prejudicial evidence in the guise of impeachment of the testimony which would not be in the case except for the party's own inducement.

Objection to a question as to the safety of a signal or method or appliance might be sustained in some cases on the ground that the answer sought is an opinion.[18] As a general rule an expert cannot be questioned as to safety of a street, appliance, or piece of machinery, nor whether certain methods were prudent

[16] *Id.* at 669, 313 P.2d at 566.
[17] *Id.* at 665, 313 P.2d at 563.
[18] *Supra* note 2.