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EVIDENCE CODE SECTION 1224—
ARE AN EMPLOYEE’S ADMISSIONS
ADMISSIBLE AGAINST HIS EMPLOYER?

Joseph B. Harvey*

About eighty years ago, a Central Pacific locomotive struck Milton Durkee, then aged four. In the boy’s action for negligence against the railroad, it was unquestioned that the engineer did not see young Durkee in time to avoid the accident. It was asserted, however, that if the engineer had been sufficiently careful, he would have seen the boy in ample time to stop the train before striking him. To prove this, a witness was called to testify that the engineer, about five minutes after the accident, was asked how the accident occurred. The engineer replied that when he started the engine he was looking a different direction and that when he turned around and saw the boy, it was too late to avoid the accident. Said the California Supreme Court, the engineer’s statement was not part of the res gestae, and, therefore, it was not admissible against the defendant railroad.¹ It should be noted that the engineer himself was not named as a party to the child’s action for negligence.

At the time that Durkee v. Central Pacific R.R.² was decided, section 1851 of the Code of Civil Procedure 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.

Under the terms of this statute, when the liability of a defendant has been dependent under the substantive law upon the liability of a third party, admissions of the third party have been admitted against the defendant to prove the third party’s liability in a variety of situations.³ The statute would seem to be applicable to the situa-

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¹ Durkee v. Central Pac. R.R., 69 Cal. 533, 11 P. 130 (1886).
² Id.
tion in *Durkee*—where the defendant railroad's liability was dependent solely on the engineer's liability under the doctrine of *respondeat superior*. Peculiarly, however, the statute was not discussed in *Durkee*. Neither has it been discussed in any other *respondeat superior* case until the recent decision of the California Supreme Court in *Markley v. Beagle.*

The rule stated by the supreme court in the *Durkee* case was accepted in California without question until recent studies of the California Law Revision Commission suggested that the *Durkee* rule might be inconsistent with section 1851 of the Code of Civil Procedure. In *Markley v. Beagle*, the attention of the supreme court was finally called to section 1851; the court was requested to admit the statement of an employee against his employer pursuant to its terms. The court rejected the invitation, holding that section 1851 was not intended to be applied in a *respondeat superior* case and suggesting in dictum that Evidence Code section 1224 (which states the same evidence principle) is inapplicable in *respondeat superior* cases also. Accordingly, under *Markley v. Beagle*, the statement of an employee is admissible against his employer in a *respondeat superior* case only if the employer authorized the employee to make the statement or if the statement can be qualified under one of the hearsay exceptions that are not dependent on the principal-agent relationship.

This article will discuss the rationale of the authorized admissions exception to the hearsay rule and will point out its inherent limitations. Increasing criticism of these limitations will be discussed. Means to circumvent the limits of the authorized admissions exception and still allow employee admissions into evidence in *respondeat superior* cases will also be explored. Finally, it will be suggested that the California Supreme Court has misinterpreted Evidence Code section 1224.

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7 *Id.* at 1010, 1012, 429 P.2d at 134-35, 59 Cal. Rptr. at 814-15.
8 *Id.* at 1009, 429 P.2d at 133, 59 Cal. Rptr. at 813.
It is the thesis of this article that section 1224 is applicable in a *respondeat superior* case. In such a case a servant's admissions should be admissible against the master to the extent that such statements are relevant to the servant's own liability and the master's derivative liability based thereon. Such an interpretation of Evidence Code section 1224 would fully meet the criticisms made of the doctrine of authorized admissions and would obviate the further extension and distortion of other hearsay exceptions now used to circumvent the limitations of the authorized admissions rule.

**EMPLOYEE'S STATEMENTS: THEORIES OF ADMISSIBILITY**

The traditional basis for permitting the extrajudicial statement of an employee to be used as evidence against his employer is the doctrine of authorized admissions. The limitations of that doctrine have been severely criticized, but their significance has been minimized by the development of other exceptions to the hearsay rule. This section explores the theory and scope of the authorized admissions exception and discusses some of the more important hearsay exceptions that can be used to circumvent the limitations of that doctrine.

**Authorized Admissions**

To understand the rationale of authorized admissions, it is first necessary to understand the theory of admissions in general. Professor Wigmore defines an admission as a party's previous out-of-court statement that is inconsistent with his position at the trial concerning the matter stated. In Wigmore's view, an admission has the same logical status as a witness' self-contradiction. Just as a witness' testimony is discredited when it appears that on another occasion he has made a statement inconsistent with that testimony, so also a party is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim.

Thus, it is not essential to the admissibility of a party's prior statement that it must have been made under circumstances that guarantee its trustworthiness. In fact, it is generally accepted that an admission is admissible to prove the truth of the matter stated even though it was self-serving when made. The trier of fact is

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9 See Restatement (Second) of Agency § 286 (1958).
10 4 Wigmore, Evidence § 1048 (3d ed. 1940).
11 *Id.* § 1048, at 3.
12 *Id.*
13 Witkin, California Evidence § 498 (2d ed. 1966); 4 Wigmore, Evidence § 1048, at 4 (3d ed. 1940). Similarly, it has never been essential to the admissibility of
entitled to hear the party's self-contradiction, to hear the party's explanation (if any) of the contradiction, and to determine which version of the facts is true. Admissions, therefore, are quite distinct from most of the other hearsay exceptions. Most hearsay is admissible only if made under circumstances that guarantee its trustworthiness. Admissions are admissible because the party-declarant has taken inconsistent positions that must be explained to the trier of fact.

Just as a party may be confronted at trial with a prior statement that is inconsistent with his position at the trial, he may be confronted also with such a statement that he has authorized another to make on his behalf. Logically, it makes little difference whether the actual utterance was made by the party himself or by another if the person who made the statement was actually instructed by the party to make the statement. The self-contradiction is still there and the trier of fact is entitled to an explanation. Because the substantive law of agency regards an agent's statement as that of the principal when the statement is one that the agent is authorized to make on the principal's behalf, a statement of the agent within the scope of his authority to speak on behalf of his principal is admissible against the principal as an admission.

This underlying logical basis for the admission of authorized admissions explains the holding in the Durkee case mentioned in the introduction to this article. The engineer was not speaking for the railroad when he admitted that he was not looking when he started the engine, and it was apparent that he had no authority to make the statement as a spokesman for the railroad. Hence, the court looked for a ground of admissibility in the res gestae rule; finding

a witness' prior inconsistent statement that it must have been made under circumstances that guarantee its trustworthiness. See the discussion of the requisite foundational showing in McBaine, California Evidence Manual §§ 429-33 (2d ed. 1960). Although the logical basis for permitting introduction of a party's admissions and a witness' self-contradictions is the same, prior case law permitted a trier of fact to use a party's admission as evidence of the matters stated but forbade the use of a witness' prior inconsistent statement as evidence of the matters stated. McBaine, California Evidence Manual § 432 (2d ed. 1960). The witness' prior statement could be used only to discredit his testimony at the trial. Id. The Evidence Code has eliminated this distinction. Under Sections 1220 and 1235 of the Evidence Code, admissions of parties and inconsistent statements of witnesses are placed on the same footing; both are admissible as exceptions to the hearsay rule and may be used as evidence of the truth of the matters stated. See Witkin, California Evidence §§ 537-38 (2d ed. 1965).

14 5 Wigmore, Evidence §§ 1420-23 (3d ed. 1940).
15 4 Wigmore, Evidence § 1048 (3d ed. 1940); McCormick, Evidence § 239, at 502-03 (1954).
16 See 4 Wigmore, Evidence § 1078 (3d ed. 1940).
17 69 Cal. at 535-36, 11 P. at 131.
that rule inapplicable, the court held the engineer's statement inadmissible. Dissatisfaction with the results of such cases as Durkee, however, has provoked criticism of the rule relating to authorized admissions and has caused some courts to distort the rule in disregard of its logical basis. In Myrick v. Lloyd, the defendant was both the father and the employer of the driver of an automobile that struck a child. After the accident, the defendant instructed the driver to transport the child's parents to the hospital where the child had been taken. During the journey, the driver said to the parents that the accident was his fault and not the fault of their child. The Florida Supreme Court pointed out that the driver was acting pursuant to the express authority and direction of the defendant at the time the statement was made. The statement had reference to the subject matter of the agency. Thus, "the agent was acting for the principal who might have made such an admission himself against his own interest. It is our conclusion that in this case the statement was admissible." Whitaker v. Keough, decided by the Nebraska Supreme Court, expresses the same rule as that stated by the Florida court in Myrick. Whitaker involved a chauffeur who, following an intersection collision, stated, "Lady, I am sorry. I just saw you the instant I collided with you.” This statement, too, was held admissible against the employer as an admission on agency principles.

Despite the holdings, it seems obvious that in neither case was the employee purporting to speak for his employer when he made the damaging statements. And in neither case did it appear that the employer authorized his employee to say anything on his behalf. The court in each instance distorted the limits of the authorized admissions exception in order to justify admitting a statement which seemed peculiarly relevant and probative. The self-contradiction of the employer, which is the essential basis for the admissibility of admissions, does not appear in either case. Most courts have not gone as far as the Florida and Nebraska courts. Actual scope of authority to speak for the principal remains the basis for decision. But the meaning of "scope of authority" has sometimes been expanded beyond the logical limits of the rule.

There are several cases involving reports to official agencies of various sorts. Martin v. Savage Truck Line and KLM Royal

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18 See 4 Wigmore, Evidence § 1078, at 121 (3d ed. 1940); Witkin, California Evidence § 518 (2d ed. 1966).
19 158 Fla. 47, 27 So. 2d 615 (1946).
20 Id. at —, 27 So. 2d at 616.
21 144 Neb. 790, 14 N.W.2d 596 (1944).
22 Id. at —, 14 N.W.2d at 600.
Dutch Airlines Holland v. Tuller\textsuperscript{24} are illustrative. The Martin case involved a statement made by a truck driver to an investigating policeman shortly after an intersection collision. The truck driver said that he was going 30 miles per hour (in excess of the speed limit) but that he had the green light. Said the court, the statement was admissible against the employer because the driver was the employer's agent not only to drive the truck but also to report correctly to the police concerning any accidents. The KLM case involved a radio operator's statement to an official agency investigating an airplane accident admitting that he had been guilty of some fault in the matter. Here, again, it is difficult to believe that either declarant was speaking officially for his employer in making the report, and it is equally difficult to believe that the employers believed that the employees were speaking officially for them. Yet, unless each statement was in substance the statement of the employer itself, the self-contradiction essential to the admissibility of admissions was lacking. Because the employer itself had not taken a position inconsistent with that taken at trial, the underlying logical basis for treating these statements as admissions was lacking.

Several cases have also involved reports made by employees to their own employers. Two federal cases, Chicago, St. Paul, M. & O. Ry. v. Kulp\textsuperscript{25} and Dotson v. Pennsylvania R.R.,\textsuperscript{26} concerned reports made by conductors about accidents involving their trains. The reports were made by the conductors to the railroad company on forms provided by the railroad company. In both cases, the court held that the report was made by the employee in the course and scope of his employment and, therefore, was admissible against the employer as an authorized admission.

The rationale of these cases was criticized and rejected in Dilley v. Chesapeake & Ohio Ry.\textsuperscript{27} The Dilley case involved a report made to his employer by a foreman of a railroad work crew. The report was made on the railroad's form concerning an accident that had happened to a member of the crew. The court of appeals held, however, that a report of an employee to his employer cannot be regarded as the statement of the employer. The court cited and relied on the Restatement of Agency, section 287:

Statements by an agent to the principal or to another agent of the principal are not admissible against the principal as admissions; such statements may be admissible in evidence under other rules of evidence.

\textsuperscript{24} 292 F.2d 775 (D.C. Cir. 1961).
\textsuperscript{25} 102 F.2d 352 (8th Cir. 1939).
\textsuperscript{26} 142 F. Supp. 509 (W.D. Pa. 1956).
\textsuperscript{27} 327 F.2d 249 (6th Cir. 1964).
As pointed out in the comment to the cited section of the Restatement, the principal does not purport to make the agent’s statements his own by requiring such reports to be made; hence, the logical basis for considering such statements as admissions of the employer is lacking. Both the Dotson and the Kulp cases were considered by the Dilley court, but they were distinguished on the ground that they involved conductors who were in charge of whole trains while Dilley involved merely the foreman of a 12 man work crew.

The somewhat unrealistic distinction suggested by Dilley has also appeared in the California cases. In Shields v. Oxnard Harbor Dist., the employee whose statement was admitted was the port director of the defendant Harbor District. After inspecting the construction of a harbor on behalf of the district, the port director drove to a cafe where he consumed some alcoholic beverages. He left the cafe about two o’clock in the morning to begin the return trip to his home which was a considerable distance away. During the journey, his car collided with another driven by the plaintiff. After the accident the plaintiff said to the port director, “Well it kind of looks like you are in the wrong”; the port director responded, “Yes, I guess it does.” The court held that the port director’s statement was admissible as an authorized admission against the Oxnard Harbor District. The court did not discuss in any detail the basis for its holding. On the merits, it seems difficult to distinguish the type of statement made by the port director in the Shields case from the type of statement made by the engineer in the Durkee case. Apparently the holding was based on the high position held by the employee in the employer’s hierarchy.

Johnson v. Bimini Hot Springs is similar to the Shields case. In Johnson, the plaintiff slipped and fell in the shower room of a public bath house and plunge. A question arose whether the defendant corporation negligently permitted soap to gather on the floor. The court held that an admission made by the resident manager of the defendant corporation that the slippery condition of the floor was caused by the use of soap in the shower room was admissible against the corporation. Again the decision seems to have been based upon the high position held by the declarant in the defendant’s hierarchy.

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28 RESTATEMENT (SECOND) OF AGENCY § 287, comment a (1958).
30 327 F.2d at 252-53.
Despite the holdings in these cases, it seems unlikely that the authority of the port director, the resident manager, or the train conductors really extended to admitting facts upon which tort liability might be based. The courts' conclusions that these were really the statements of the employers seem strained, and in no real sense had the employer in any of these cases taken contradictory positions.

The efforts of the courts to escape the limitations of the authorized admissions rule reflect to a large degree Professor Wigmore's criticism:

The most difficult field in the application of this principle is that of tortious liability. For example, if A is an agent to drive a locomotive, and a collision ensues, why may not his admissions, after the collision, acknowledging his carelessness, be received against the employer? Are his statements under such circumstances not made in performance of the work he was set to do?4

In a note to this passage, Professor Wigmore stated:

E.g.: 1915, Northern Central Co. v. Hughes, 8th C.C.A., 224 Fed. 57 (superintendent of a coal company; "his general authority of superintendent gave him no such power"; and yet it is absurd to hold that the superintendent has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can be even listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughing stock of court methods); 1926, Rankin v. Brockton Public Market, 257 Mass. 6, 153 N.E. 97 (plaintiff was hit by a bottle, while a customer in the store, and fainted; as she came out of the faint, in an adjacent room, a sobbing saleswoman said "she was sorry, she was the one who tossed upon the [belt]-carrier the bottle that hit the plaintiff on the head"; excluded, because the saleswoman "had no authority to bind the defendant"; yet she had authority to sell goods and make a profit for defendant; then why not an authority to say how she sold them? Such quibbles bring the law justly into contempt with laymen); . . . 5

In response to criticism of this sort and decisions such as those in Myrick5 and Whitaker,6 both the Model Code of Evidence proposed by the American Law Institute and the Uniform Rules of Evidence proposed by the Commissioners on Uniform State Laws proposed that the requirement of the agent's authority be eliminated.7 As expressed in the Uniform Rules, the principle proposed was that a hearsay statement should be admissible against a party if:

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4 WIGMORE, EVIDENCE § 1078, at 121-22 (3d ed. 1940).
5 Id. at 121.
6 158 Fla. 47, 27 So.2d 615 (1946).
7 144 Neb. 790, 14 N.W.2d 596 (1944).
8 MODEL CODE OF EVIDENCE rule 508(a) (1942); UNIFORM RULE OF EVIDENCE 63(9)(a).
The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship...\(^{39}\)

In support of this principle, Professor McCormick argues:

The agent 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 continues, the employee is not likely to make such statements unless they are true.\(^ {40}\)

The comment to the Model Code recommendation states:

[T]he agent or servant in speaking about the transaction which it was within his authority to perform is likely to be telling the truth in most instances...\(^ {41}\)

Influenced by these considerations and recommendations, the California Law Revision Commission, too, recommended a hearsay exception similar to that proposed in the Uniform Rules of Evidence.\(^ {42}\) But, after the Law Revision Commission's recommendation was printed and distributed to the bar, the proposal was withdrawn.\(^ {43}\) Comments received by the Commission indicated that the bar was not persuaded as to the trustworthiness of these statements by the arguments of Professors Wigmore and McCormick.\(^ {44}\) It is true, as Professor Wigmore pointed out, and as was pointed out in the Commission's own study,\(^ {45}\) that many trustworthy statements have been excluded by the limitations of the authorized admissions rule. But the Commission concluded that the proposed reform went too far. It may be that the jury should be permitted to hear the engineer's mea culpa as well as the port director's,\(^ {46}\) but the rule proposed in the Model Code and the Uniform Rules of Evidence to permit this

\(^{39}\) Uniform Rule of Evidence 63(9)(a).

\(^{40}\) McCormick, Evidence § 244, at 519 (1954).

\(^{41}\) Model Code of Evidence rule 508, comment b (1942).


\(^{44}\) Committee of the State Bar of California upon the Uniform Rules of Evidence, Comments upon the Proposed Evidence Code, November 2, 1964 (unpublished report to the Law Revision Commission, now in the files of the Commission at Stanford, California). The Committee's comments were directed to Preprint Senate Bill No. 1, 1965 Session of the California Legislature, the first draft of the proposed Evidence Code to appear in print. Many objections to the proposed Code were made, some of minor significance and some of major significance. The State Bar Committee stated that its objection to the proposed section (numbered 1224 in the preprinted bill) embodying the substance of Uniform Rule 63(9)(a) was considered by the Committee to be one of its "most important" objections. The Commission deleted the section from the proposed Code in response to the Committee's objection. Calif. L. Revis. Comm. Minutes, p. 36, November 1964 (mimeo. contained in the files of the Commission at Stanford, California).

\(^{45}\) 6 Comm'N Rep. App., supra note 5, at 488.

\(^{46}\) Id.
would also permit many self-exculpatory, blame-shifting statements of agents to be received against their employers. The Commission was not persuaded, after hearing the comments of the bar, that all employees are so concerned with the welfare of their employers that they are likely to make true statements concerning the subject of their employment while employment continues.

If the arguments supporting the proposals in the Model Code and the Uniform Rules are analyzed, it will be seen that a shift in the underlying theory of authorized admissions was proposed. Instead of basing the admissibility of an employee's statements on the fact of the employer's self-contradiction, it was proposed to base admissibility on the circumstantial trustworthiness of the employee's statements. Because the Commission found the "trustworthiness" argument unsound, the proposed exception based thereon was rejected. The Commission believed that the expansion of existing hearsay exceptions as proposed in the Evidence Code together with the recognition of section 1224 in respondeat superior cases would meet the criticisms that had been made of the limitations of the authorized admissions exception without destroying the logical base of that exception.

Res Gestae; Spontaneous Statements

The criticisms that have been leveled at the restrictions of the rule relating to authorized admissions have focused on those cases where an employee, after an accident, makes a statement tending to show his own fault. Where the statement was made spontaneously at or near the time of the accident, the hearsay exception for spontaneous statements frequently provides a basis for admission that is independent of the limitations of the exception for authorized admissions.

The exception for spontaneous statements grows out of an exception sometimes referred to as the res gestae rule. Unfortunately, however, the courts were confused for many years as to the precise meaning of this term, and the term was actually used to refer to several distinct rules. The original understanding of the California courts concerning the res gestae rule was that a spontaneous statement made contemporaneously with the event that provoked the statement was admissible as an exception to the hearsay

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49 See the discussion in Showalter v. Western Pac. R.R., 16 Cal. 2d 460, 465, 106 P.2d 895, 899 (1940).
rule. But if the statement was not actually made at the time of the event, it was inadmissible even though made spontaneously.

Because contemporaneous statements were frequently made by employees who were involved in accidents, the *res gestae* rule was sometimes confused by the courts with the rule relating to the admissibility of authorized admissions. Thus, in *Luman v. Golden Ancient Channel M. Co.* the supreme court said:

The admissions of an agent are not binding, unless they are made not only during the continuance of the agency, but in regard to a transaction then pending at the very time they are made.

The confusion of the courts concerning the rules that were embraced within the term "*res gestae*" was severely attacked by Professor Wigmore. He pointed out that the true basis for admitting a hearsay statement under the *res gestae* exception was that the spontaneity of the statement provided some assurance of the truth of the statement. Hence, actual concurrence of the statement and the exciting event was not essential. Even if made shortly after the event, "in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief." Professor Wigmore also pointed out that the rules relating to the admissibility of an agent's statements were quite distinct from those relating to spontaneous statements.

That there are two distinct and unrelated principles involved must be apparent; and the sooner the Courts insist on keeping them apart, the better for the intelligent development of the law of Evidence.

The California Supreme Court accepted Wigmore's theories in *Showalter v. Western Pacific R.R.* The court there abandoned its previous insistence that a spontaneous statement also be contemporaneous with the event that excited the declarant to make the statement. In cases involving an employee's statement, the scope of his employment and his authority to speak become irrelevant if the statement was sufficiently spontaneous. If it was, the statement is admissible hearsay and can be used as evidence against the employer.

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51 Id.
52 140 Cal. 700, 709-10, 74 P. 307, 311 (1903).
53 6 WIGMORE, EVIDENCE § 1750 (3d ed. 1940).
54 4 WIGMORE, EVIDENCE § 1078, at 121-22 (3d ed. 1940).
55 16 Cal. 2d 460, 468, 106 P.2d 895, 900 (1940).
57 Id.
Since Wigmore's writings clarified the basis for the admission of spontaneous statements, the courts have been under pressure to relax the requirement of spontaneity and to expand the length of time between the event and the declaration provoked by the event. The pressure seems to be producing some inconsistency in the cases. In _Lane v. Pacific Greyhound Lines_, a bus driver made statements two or three minutes after an accident and again about 15 or 20 minutes after the accident. The supreme court held that the trial court erred in instructing the jury that the statements were inadmissible against the defendant employer. In _White v. Los Angeles Ry. Corp._, a streetcar motorman's narrative statement to an investigating police officer was held to be sufficiently spontaneous to be admitted against the employer. Yet, in _Dolberg v. Pacific Electric Ry. Co._, the motorman's statements made to the investigating officer about five minutes after the accident were held inadmissible. In _People v. Fain_, the defendant, while semiconscious after an accident, stated to an investigating officer that "my buddy" was driving. Although the statement was made within five minutes of the accident, it has held inadmissible. In the federal case of _Wabisky v. D.C. Transit System, Inc._, a streetcar operator's statement made 15 or 20 minutes after the accident was held admissible under the broadened view of _res gestae_.

Despite the apparent inconsistency in these holdings, there seems to be a unifying thread running through these decisions. _Dolberg_ and _Fain_ both involved statements that did not implicate the declarant. In fact, both statements were exculpatory insofar as the declarant was concerned. The remainder of the cases cited involved statements that were relevant to the declarant's own liability. Although exceptions can be found, the courts seem more inclined to admit self-implicating statements where spontaneity is dubious than they are self-serving statements made under similar circumstances.

There may be some justification for these holdings. The fact that a declaration is self-serving may itself be some evidence that the declarant has had some time for reflection and understands the need for telling a self-protecting story. That a story is self-implicating may be some evidence that the declarant has not had time to think of self-protection. Nonetheless, the true basis of admissibility

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63 _See, e.g._, _Lane v. Pacific Greyhound Lines_, 26 Cal. 2d 575, 160 P.2d 21 (1945).
should be unreflecting spontaneity alone. But without a theory of admissibility that permits the employee's self-implicating statements to be admitted in *respondeat superior* cases, it seems likely that there will continue to be some relaxation of the requirement of true spontaneity when such statements are made reasonably soon after the event that generated the statement.

*Declarations Against Interest*

The hearsay exception for declarations against interest has been of limited significance in the past. The common law rule permitted hearsay statements to be admitted on the ground that they were against the interest of the declarant only if the statements were against a "proprietary" or "pecuniary" interest. The traditional view limited such statements to those concerning debts or the ownership of property. Statements of fact constituting a basis for the declarant's tort liability, or statements of fact that would negate the existence of a tort claim, were not regarded as within the exception. Accordingly, despite the exception for declarations against interest, the California cases have consistently followed the rule that an employee's statement of facts establishing his own tort liability is not admissible against his employer.

In 1964, the California Supreme Court departed from precedent and held that a hearsay statement against the penal interest of the declarant was admissible as a declaration against interest. Even in the absence of statute, it seems likely that this decision heralded the development of a new rule relating to the admissibility of employees' statements admitting civil liability. In any event, the enactment of Evidence Code section 1230 leaves no doubt that such statements are now admissible as declarations against interest. Section 1230 provides, in pertinent part:

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

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64 Witkin, California Evidence § 531, at 504 (2d ed. 1966).
Under this section, it seems likely that many of the cases that have provoked the criticism of the rule relating to authorized admissions would not be decided the same way if they were tried today. It is important to note, however, that the declarant must be unavailable as a witness before his statement can be admitted under the provisions of Evidence Code section 1230. But this limitation is not as significant as it may appear. If an employee has made a statement against his interest within the meaning of section 1230 but he is available as a witness, he may be called to testify. If he testifies in accordance with his prior statement, his testimony may be relied on by the trier of fact to support a finding of the employee's fault and the employer's liability under respondeat superior. If the employee testifies inconsistently, evidence of the prior statement may then be shown under section 1235 of the Evidence Code, and the trier of fact may base its finding on the prior statement.69

Statements of Knowledge

The California courts have developed another exception to the hearsay rule that has been of limited significance insofar as it relates to the statements of employees. Dressel v. Parr Cement Co.70 involved a roofer who was injured when the roof of a porch that he was shingling collapsed. The collapse occurred because the roof was not supported. The lack of support was obvious to anyone looking at the porch from the ground. The court admitted an admission of the defendant's superintending employee, made after the accident, that he had known prior to the accident that there were no supports under the roof. The court admitted the statement to show the superintendant's knowledge of the defect, which knowledge was imputed to the principal. In support of its holding, the court cited Diller v. Northern California Power Co.71 Its reliance was misplaced, however, for all that the Diller case held was that statements made to an agent and his response thereto were admissible to show the giving of notice to the agent and, through the agent, to the principal. The Diller case thus involved direct evidence of notice. It did not involve the employee's post hoc admission that he had had knowledge at a previous time.72 Although the Dressel case is readily distinguishable from the Diller decision on which it relied, it has become accepted as part of the California case law.73

71 162 Cal. 531, 123 P. 359 (1912).
72 See criticism of the Dressel case in 4 Wigmore, Evidence § 1078 (Supp. 1964 at 67).
Although the *Dressel* case and the subsequent decisions that have relied upon it have, without any analysis, seemingly developed another exception to the hearsay rule, the exception can be justified on the basis of the existing hearsay exception for statements of knowledge. The exception for statements of knowledge is now stated in sections 1250 and 1251 of the Evidence Code. Section 1250 provides an exception for statements of the declarant's then existing knowledge, while section 1251 provides an exception for statements of the declarant's past knowledge. The principal difference between the sections is that statements are admissible under section 1250 regardless of the availability of the declarant while statements are admissible under section 1251 only if the declarant is unavailable as a witness. Thus, for an employee's statement of prior knowledge to be admissible under the terms of the Evidence Code, the proponent of the statement would have to show that the employee is unavailable as a witness.

*Inconsistent Statements of Witnesses*

The enactment of the Evidence Code has added a major new exception to the hearsay rule that can be used to avoid the limitations of the rule relating to authorized admissions. Section 1235 of the Evidence Code provides a hearsay exception for a prior statement of a witness that is inconsistent with his testimony at the hearing. Thus, if an employee has made a statement of fact that is damaging to his employer, the party who wishes to use this statement against the employer can do so merely by calling the employee as a witness. If the employee testifies in accordance with his prior statement, the prior statement itself may not be used, but the witness' testimony will provide the party with his desired evidence. If the employee testifies inconsistently, the prior statement may then be shown and it can be used by the trier of fact as evidence of the matters stated therein under the exception provided by section 1235.

**Respondeat Superior and Its Relationship to an Employee's Admissions**

It has long been settled that not only are a person's own statements and statements authorized by him admissible against him, admissions of those who are privy in obligation with him are also admissible. Wigmore states the principle as follows:

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74 See, e.g., People v. One 1948 Chevrolet Convertible Coupe, 45 Cal. 2d 613, 290 P.2d 538 (1955) (statement of prior knowledge of the presence of narcotics admitted to prove such knowledge).

So far as one 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. Not only as a matter of principle does this seem to follow, since the greater may here be said to include the less; but also as a matter of fairness, since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish. Moreover, as a matter of probative value, the admissions of a person having virtually the same interests involved and the motive and means for obtaining knowledge will in general be likely to be equally worthy of consideration.\(^7\)

This is the principle that was expressed in section 1851 of the Code of Civil Procedure and is now expressed in Evidence Code section 1224. The principle has been most frequently applied in cases involving contractual obligations to indemnify or guarantee against loss caused by the default of another. Since both the actor and the indemnitor or guarantor are liable for the actor's default, the admissions of the actor are admissible against the indemnitor or guarantor in an action against the latter to prove the act which charges them both.\(^7\)\(^7\) The principle has also been applied against insurers to permit admissions of the insured to be admitted.\(^7\)\(^7\)

For reasons that are difficult to understand, the principle has never been cited nor applied in a respondeat superior case in California until the recent decision in Markley v. Beagle.\(^7\)\(^9\) Few other courts have considered the applicability of the principle to respondeat superior cases, with the consequences that the general rule is that the statement of an agent, though relevant to his own liability, is not admissible against the employer to show the employer's derivative liability unless some other hearsay exception is applicable (such as that for authorized admissions).\(^8\)\(^0\)

The cases establishing this general rule have made no effort to distinguish between those employee statements that are relevant to the employee's liability and those employee statements that are relevant only to show the employer's liability. The cases have considered the admissibility of all such statements under the general limitations of the exception for authorized admissions or another exception. Thus, the Durkee\(^8\)\(^1\) case cited at the beginning of this

\(^7\)\(^6\) Wigmore, Evidence § 1077, at 118 (3d ed. 1940).
\(^7\)\(^9\) 66 A.C. 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).
\(^8\)\(^0\) See Annot., 75 A.L.R. 1534 (1931).
\(^8\)\(^1\) Durkee v. Central Pac. R.R., 69 Cal. 533, 11 P. 130 (1886).
article sought to base admissibility on the doctrine of authorized admissions or the *res gestae* exception, and finding them both inapplicable held the statement inadmissible. Yet, the *Durkee* case involved a statement relevant to prove the declarant’s own culpable act for which both the engineer and the railroad were liable. In *Lissak v. Crocker Estate Co.* and *Luman v. Golden Ancient Channel M. Co.* the statements involved were not relevant to show the declarant-employee’s own liability (and, in turn, the employer’s derivative liability); the statements were relevant only to show the employer’s liability, for they consisted of allegations of equipment failure. Yet *Lumen* cited and relied on *Durkee*, which in turn cited and relied on a case involving a statement not relevant to show the declarant’s own liability. Subsequent cases have cited and relied on these authorities without regard to any possible distinction based on the relevancy of the statements to the declarant’s or the employer’s liability.

It is apparent from Wigmore’s criticism and such cases as *Myrick* and *Whitaker* that it is the failure of the courts to distinguish an employee’s self-implicating statements, and their consistent refusal to admit them in *respondeat superior* cases, that has provoked the criticisms and distortions of the authorized admissions rule. Yet the supreme court in *Markley v. Beagle*, with an ample statutory basis for making the distinction, concluded that there was a tacit understanding that the employee’s self-inculpating statements were inadmissible to show the employer’s derivative liability and that this tacit understanding was frozen into statute. The court was able to perceive some fundamental distinction between those cases where the defendant’s derivative liability is based on contract, property ownership, or statute from those where the defendant’s derivative liability is based on *respondeat superior*. What the distinction is, however, is not at all clear. Unfortunately the court did not consider the fact that its holding cannot rationally be applied in any *respondeat superior* case to which the employee is a party, and hence it failed to consider whether admissibility should be dependent on whether the employee is also a party to the lawsuit.

Under the principle of *respondeat superior*, an employer, even

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82 119 Cal. 442, 51 P. 688 (1897).
83 140 Cal. 700, 74 P. 307 (1903).
84 *Id.* at 709, 74 P. at 311.
85 69 Cal. at 536, 11 P. at 131.
87 *Myrick v. Lloyd*, 158 Fla. 47, 27 So. 2d 615 (1946).
89 66 A.C. at 1011, 429 P.2d at 134, 59 Cal. Rptr. at 814.
90 *Id.* at 1010-11, 429 P.2d at 134, 59 Cal. Rptr. at 814.
though without personal fault, is liable to any third party who is injured by his employee's tortious conduct within the course and scope of his employment.\(^{91}\) Inasmuch as an employer's liability under the doctrine of \textit{respondeat superior} is based on the wrongful conduct of the employee, the employer cannot be liable unless the employee is liable.\(^{92}\) A judgment which purports to hold the employer under the theory of \textit{respondeat superior} while it exonerates the employee is self-stultifying and must be reversed.\(^{93}\) A judgment against an employee in an action to which the employer is a party is determinative of the employer's liability when the fact of agency is established.\(^{94}\)

The liability of the servant for his tortious conduct and that of the master under \textit{respondeat superior} is a joint and several liability, and under California law the third party may maintain an action against either or both.\(^{95}\) Although the liability of the master and the servant is joint and several insofar as the third party is concerned, as between themselves the liability of the servant is primary and the liability of the master secondary. Thus an employer who has been held liable under the doctrine of \textit{respondeat superior} may recover his losses in an action against the negligent employee.\(^{96}\)

At common law, the action against the servant was an action for trespass while the action against the master was trespass on the case. Since the forms of action were different, they could not be joined.\(^{97}\) Thus, the common law plaintiff was forced to choose between suing the servant and suing the master. Under California's code procedure, the plaintiff need not make such an election.\(^{98}\) He can sue both as defendants in a single action.\(^{99}\) He can also sue the master alone, and the agent is not a necessary party.\(^{100}\)

Thus, at common law, the rule prohibiting the use of an employee's admissions to prove the derivative liability of the employer under \textit{respondeat superior}, while subject to criticism, was at least workable. But under the code procedure of California, the rule re-

\(^{91}\) 1 WITKIN, SUMMARY OF CALIFORNIA LAW, Agency and Employment § 67, at 439 (1960); RESTATEMENT (SECOND) OF AGENCY § 219 (1958).
\(^{97}\) 98 A.L.R. 1057 (1935).
\(^{98}\) CAL. CODE CIV. PROC. § 379(a) (West 1954).
sults in an absurdity whenever the employee is joined as a defendant with the employer. Where both the employer and the employee are sued, and the theory of the employer's liability is *respondeat superior*, the doctrine is expressed in the following instruction that is currently being given to California juries:

There are two defendants in this action. Under the law, if one is liable both are liable. Therefore, it follows that if you return a verdict against one of the defendants you must return a verdict against both.\(^{101}\)

At the same time, the California courts instruct juries in such cases that the employee's admissions, although admissible to show the employee's negligence, may not be used against the employer for the purpose of determining his liability.\(^{102}\)

Peculiarly, the fact that these instructions are in hopeless conflict has apparently been noted by only two California decisions. In *Gorzeman v. Artz*,\(^ {103}\) a district court of appeal resolved the conflict with the following language:

In this case the statements of Poling [the employee] were admissible against him to show his negligence, although such statements were not binding upon the employer. It is uncontradicted, however, that Poling was employed by and on the employer's business at the time of the accident. If Poling, under such circumstances, is found negligent, then upon the doctrine of *respondeat superior* his employer, Artz, is responsible for such negligence. This does not mean that the employer has no right to question the judgment merely because the employee does not, or that in the absence of any appeal by the employee an employer has no right to take an appeal . . . ; or that in an action brought against the employer alone, admissions made by the employee can be used against the employer . . . ; or that the employee can default in an action in which he is made a party, thus binding his employer to a judgment which the employer has had no opportunity to defend, but *in our opinion it does mean that when both employee and employer are made parties to the action, and the employer does have an opportunity and actually does defend, and a case of negligence is made out against the employee, by evidence competent against such employee, that the employer is bound by the judgment irrespective of whether the evidence which proved the negligence of the employee was admissible against him, or not, unless for some prejudicial error the judgment against employee is reversed or modified*.\(^ {104}\)

In effect, the court held that if both the employee and the employer are named as defendants, the rule restricting the use of the employee's admissions to the determination of the employee's liability

\(^{101}\) *California Jury Instructions* (Civil) No. 54 (Supp. 1967).
\(^{104}\) Id. at 662-63, 57 P.2d at 551 (emphasis added).
must yield to the rule that the employer is liable if the employee is liable.

Whether *Gorzeman* still states the law, however, is in doubt. In *Lane v. Pacific Greyhound Lines*, the supreme court said of the *Gorzeman* decision:

That case holds that where an employer and employee are joined as defendants in an action for damages caused by the employee's negligence, the employer's liability being based solely on the doctrine of *respondeat superior*, and the employer admits that his employee was acting in the scope of his employment, a spontaneous declaration by the employee showing negligence, while ordinarily not binding on the employer, may nevertheless support a judgment against both the employer and employee. As heretofore stated that case was overruled by *Showalter v. Western Pac. R.R. Co.*, supra, on the point that such declarations were not admissible against the employer, hence, the result reached in the case (affirmance of the judgment) was correct and the conclusion that admissions of an employee other than spontaneous declarations, outside the scope of employment, while not binding on the employer would support a judgment against him, was not necessary to the decision.

*Lane* thus dismisses the *Gorzeman* reasoning as dictum. In *Lane*, the court held that the employee's admission was admissible as a spontaneous declaration. The court then pointed out that the jury was instructed both (1) that if the employee—a Greyhound bus driver—was liable then the employing corporation was liable and (2) that the driver's declarations could not be used against the corporation even though they could be used against the driver. The court then held that these instructions were "hopelessly conflicting" and prejudicial in the context of the case for they permitted the jury to reason that, there being no evidence of the corporation's liability in the absence of the declarations, the driver could not be found liable either:

The last instruction and forms of verdict may well have led them [the jury] to believe that the declarations of Perkins [the driver] could not be considered by them as to either defendant.

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106 Id. at 586-87, 160 P.2d at 26-27. Despite the assertions made in this passage, *Gorzeman* was not mentioned in the *Showalter* case. Moreover, *Gorzeman* did not consider whether the statement there involved might have been admissible as a spontaneous declaration. There was no determination in *Gorzeman* whether the statement was made spontaneously. Because it did not hold that the declaration was not admissible though spontaneous, it could not have been overruled by *Showalter*, which merely held that spontaneous statements are admissible. See notes 55-57 supra, and accompanying text. The language used by the *Gorzeman* court was essential to the decision as it was written. The Supreme Court in *Lane* supplied an alternative basis for the *Gorzeman* decision by making an ex post facto determination of spontaneity. Having supplied an alternative basis for the decision (which had not been relied on by the *Gorzeman* court itself), the Supreme Court was then able to dismiss the stated basis for the decision as "not necessary to the decision."

107 26 Cal. 2d at 586-87, 160 P.2d at 26-27.
The court apparently did not realize that the hopeless conflict did not result from the peculiar facts of that case; it is inherent in the rules enunciated by the court. If scope of employment is conceded, one must either follow the Gorzeman rationale and abandon the rule that forbids the use of the employee's admission as evidence of the employer's liability as well as his own or adopt the reasoning that the court feared the jury followed in Lane: use the declaration against neither. There is no possible way that a jury can use an employee's declaration for determining his own liability, refuse to use the declaration for determining the employer's wholly derivative liability, and still find the employer liable under the doctrine of respondeat superior if it finds the employee is liable.

The Court of Appeals for the Tenth Circuit recently recognized the conflict in these rules. In Grayson v. Williams,108 decided in 1958, the court pointed out that adherence to the traditional limitation on the use of an employee's admission could lead to a judgment holding the employee liable while the employer was exonerated, despite the fact that it was conceded that the employee was acting within the scope of his employment.109 Said the court:

But there is yet another reason why we think the judgment must be affirmed. This is not a case in which the corporation is charged with wrongful acts of commission or omission which would make it liable, such as putting defective equipment upon the highway. It is charged with no wrongdoing other than the wrongdoing of its agent, Grayson. It is liable only if Grayson, acting within the scope of his employment, was guilty of conduct which would impose liability upon him. Then by operation of law alone and without more, liability is imposed upon it . . . .

In order to find Southern Freightways, Inc. liable because of Grayson's acts, it was necessary to establish two facts (1) that Grayson was acting within the scope of his employment; and (2) that he was guilty of actionable negligence. The first fact was admitted. Grayson's admissions against his interest were properly admitted to establish his negligence. These admissions constituted evidence from which the jury could find together with other facts that he was liable for the accident. . . .

Let us assume that the court had instructed the jury that it could consider Grayson's declarations only in determining his negligence and together with a general verdict had submitted these three special questions to the jury.

1. Was plaintiff guilty of contributory negligence?
2. Was Grayson guilty of negligence?

108 256 F.2d 61 (10th Cir. 1958).
109 California case law seems to forbid such a result. See note 94, supra, and accompanying text. But it is difficult to see how this result can be avoided if courts adhere to case law forbidding the use of an employee's admission against the employer in a respondeat superior case.
3. Was his negligence the proximate cause of the accident?

If the jury had answered "no" to the first question and "yes" to questions 2 and 3, and then had returned a general verdict against Grayson and a general verdict in favor of Southern Freightways, Inc., would not the court have been required to sustain a motion of judgment against Southern Freightways, Inc., notwithstanding the general verdict in its favor? To hold otherwise would be to make a mockery of the law, because it would mean that the agent had been found guilty of actionable negligence, upon competent evidence, while acting within the scope of his employment, yet his principal had escaped.110

But suppose that the employee is not made a party. Should the employee's admission be admissible in such a case? The present California rule seems to place too high a premium upon the plaintiff's trial tactics. Apparently the major mistake made by the plaintiff in Markley v. Beagle was that he failed to name the employee as a party defendant. Had the employee been named as a defendant, his admission could have been used against him (but not against the employer!), and the plaintiff would have been entitled to the instruction that the employer must be found liable if the employee is found liable for acts performed within the scope of his employment. Application of the rule stated in Grayson v. Williams should not depend on whether plaintiff's counsel is sufficiently astute to name the declarant-employee as a party defendant.

On principle, too, the employee's admission should be admissible even though the employee is not named as a party. The rationale underlying the admissibility of the admissions of those who are privy in obligation with a party cannot be that the party himself has made a self-contradiction, for plainly he has not. The argument based on procedure (above) is inapplicable in any case where only one party is named defendant. Apparently, then, the rationale for admitting such statements is that a person whose interest in the facts is identical with that of a party has taken a position inconsistent with that taken by the party in the action. The trier of fact deserves an explanation of the inconsistency so that it can determine which version of the facts is more likely to be true.111

Thus, a principal under a surety bond has the identical interest in being found innocent of default that the surety has in having the principal found innocent of default, for if the principal is found guilty, both are liable. Hence, the principal's admission of some fact relevant to establish his default is admissible against either the principal or the surety.112 An insured has the same interest in being found

110 256 F.2d at 67-68.
111 Cf. 4 Wigmore, Evidence § 1077 (3d ed. 1940).
112 Butte County v. Morgan, 76 Cal. 1, 18 P. 115 (1888).
free from liability that his insurer has in establishing the insured's freedom from liability. Hence, the insured's admission is admissible against the insurer to the same extent that it is admissible against himself. 113 A person who has transferred his car to another without complying with the registration requirements of the Vehicle Code has the same interest as the transferee in establishing that a negligent driver of the car was driving without the transferee's permission, for both the transferor and transferee are liable (within statutory limits) if the negligent driver had the transferee's permission. 114 Hence, the admission of the transferee that he had given permission to the negligent driver is admissible against both the transferor and transferee. 115

In Markley v. Beagle, 116 the supreme court distinguished the foregoing cases from respondeat superior cases; but it is difficult to see a basis for the distinction. In all of the foregoing cases, the admission was offered to prove the liability of the declarant only. The responsibility of the defendant—by virtue of insurance or surety contract, or vehicle ownership—was established by independent evidence. Similarly, in respondeat superior cases we are concerned with an employee's admission that is offered only to establish his own liability. The responsibility of the employer must be established by independent evidence of the employment relationship and its scope. None of the cited cases suggested that the actor's admission might be admissible to establish the relationship between the parties; similarly, an employee's admissions should not be used for that purpose in a respondeat superior case. The parties' interest is identical only insofar as the act that gives rise to the actor's personal liability also gives rise to a derivative liability on the part of the other.

Under the substantive law, the relationship between the plaintiff, the actor, and the defendant in the cited cases precisely parallels the relationship of a plaintiff, an employee-actor, and an employer-defendant in a respondeat superior case. Given the requisite relationship between the actor and the defendant, the plaintiff may obtain a judgment against either principal or surety, vehicle owner or permittee, on proof of the liability of the actor only. Similarly, given the requisite relationship, a plaintiff may obtain a judgment against either employer or employee on proof of the liability of the actor only. In suretyship cases, and in vehicle ownership cases, the actor is primarily li-

able and the surety or the vehicle owner is entitled to indemnity from the actor.\textsuperscript{117} Similarly, in \textit{respondeat superior} cases, the employer is entitled to indemnity from the actor.\textsuperscript{118} No valid distinction can be drawn, therefore, on the basis of the nature of the relationship that gives rise to the defendant's derivative liability.

\textit{Markley v. Beagle} suggests that an employee's admissions are unreliable. The court is thus invoking a test that has never been used as a basis for the admissibility of admissions. None of the cases admitting admissions of persons privy in obligation have based their holdings on the peculiar reliability of the statements. The admissions of such privies are admitted on the same basis that a party's personal admissions are admitted.\textsuperscript{110} A case cannot be found excluding a principal's admission when offered against his surety on the ground that the statement was self-serving when made. On the merits of this suggestion, however, one may question whether an insured's admission when used against an insurer\textsuperscript{120} who has no right of indemnity against the insured is more reliable than an employee's admission when used against an employer who does.

During the preparation of the Evidence Code, many of the foregoing considerations were brought to the attention of the Law Revision Commission.\textsuperscript{121} In response, the Commission broadened the language of the applicable statute when it prepared its recommendations. Thus, Evidence Code section 1224 now reads:

\begin{quote}
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 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.
\end{quote}

The language chosen expresses the principle involved far more clearly than did the former statute. The deliberate addition of the word "liability" in the light of the analysis provided in the Commission's study forcefully suggests that the Commission believed that it was correcting the oversight of the courts in failing to consider the application of this principle to \textit{respondeat superior} cases. It is difficult to conceive of language that could express the principle more clearly.

Moreover, the application of the principle of section 1224 to \textit{respondeat superior} cases fully meets the criticisms that have been lev-

\begin{footnotes}
\textsuperscript{118} \textit{Bradley v. Rosenthal}, 154 Cal. 420, 97 P. 875 (1908).
\textsuperscript{119} \textit{4 Wigmore, Evidence} § 1077 (3d ed. 1940).
\textsuperscript{121} See 6 \textit{Comm'n Rep. App.}, \textit{supra} note 5, at 491-96.
\end{footnotes}
eled at the limitations on the admissibility of authorized admissions without creating the hazards that were inherent in the solution proposed in the Uniform Rules of Evidence and the Model Code of Evidence. It is unfortunate, therefore, that the Supreme Court deemed it necessary to attempt to stifle this reform.

**CONCLUSION**

It is submitted, however, that although *Markley v. Beagle* may delay the day that the rule of *Grayson v. Williams* becomes the law of California, it will not prevent the arrival of that day. It may be argued, for instance, that *Markley v. Beagle* involved an interpretation of Code of Civil Procedure section 1851 only and that the court’s construction of Evidence Code section 1224 was unnecessary dictum. In another case, the hopeless conflict in the existing rules may be drawn to the court’s attention and the court forced to resolve the conflict. Evidence Code section 1224, correctly construed, and *Grayson v. Williams* point the way to the proper rule: *In a respondeat superior case, an employee’s admission is admissible against the employer to the extent that the admission is relevant to show the employee’s own liability and the derivative liability of the employer based thereon.*

To paraphrase Wigmore:

So far as [an employer] is privy in obligation with [his employee], i.e., is liable to be affected in his obligation under the substantive law [of respondeat superior] by the acts of the [employee], there is equal reason for receiving against him such admissions of the [employee] as furnish evidence of the act which charges them equally.122

Until the day when this rule is adopted, however, it behooves informed counsel to avoid the restrictions of the present rule either by joining the employee as a party-defendant or by calling him as a witness. If the employee is a party, his admissions may be used as an evidentiary base for his own liability; if the employee was acting in the scope of his employment, counsel may then invoke the rule that the employer must be held liable if the employee is liable. If the employee is not a party, but is called as a witness, the employee can be asked to repeat the damaging statement in testimony; if he testifies inconsistently, the damaging statement can then be offered under Evidence Code section 1235 as substantive evidence of its content. We earnestly hope, however, that the day will soon arrive when the admissibility of this sort of evidence in *respondeat superior* cases will depend on application of sound principles of evidence instead of adroit tactical maneuver.

122 Cf. 4 Wigmore, Evidence § 1077, at 188 (3d ed. 1940).