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must come from the choice-of-law rule of the situs, the United States. It is submitted that the Secretary of the Interior, as representative of the United States, would, at the choice-of-law level, give effect to a state decree. Such a result appeals to the sense of equity and justice which pervades our legal institutions. It is further submitted that federal courts will give effect to state decrees, and that the Secretary does in fact intend that leases and leasehold interests should go to those whom the law determines to be entitled to them.

URBAN ROTH

**CROSS-EXAMINATION OF COUNSEL'S OWN WITNESS
INITIALLY EXAMINED BY OPPONENT UNDER
ADVERSE WITNESS STATUTE**

The *Revised Codes of Montana*, 1947, section 93-1901-9 provides:

In any suit or proceeding in any court of law or equity in this state, either party, if he shall call as a witness in his behalf, the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to examine and cross examine such witness the same as if he were called by the opposite party; and the answer of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding and the party so calling and examining such witness shall not be bound to accept such answers as true.

A majority of the states have a statute similar to that set forth above.¹ The *Federal Rules of Civil Procedure* also contain a similar provision.²

Montana has never construed section 93-1901-9. However, other states have held that such a statutory provision has two purposes: first, to give litigants the right to call their opponents as witnesses and examine them as on ordinary cross-examination without vouching for the truth of their testimony or becoming bound by their answers;³ and second, to give a party the chance to get evidence which is entirely or peculiarly within the knowledge of his opponents.⁴

The examination of the opposite party under such statutes shall hereinafter be referred to as the "cross-examination," and the examination by party's own counsel *immediately* following the "cross-examination" shall be referred to as "re-examination."

¹See 70 C.J. *Witnesses* § 778 (1935) for a partial listing.

²FED. R. CIV. P. 43(b).

³McGregor v. Kawoka, 132 Cal. App. 2d 407, 282 P.2d 130 (1955).

⁴De Hoan v. Marvin, 331 Mich. 231, 49 N.W.2d 148 (1951).

Section 93-1901-9 and similar statutes in other states raise three questions of procedure:⁵

1. Is there a right to "re-examination"?'⁶

2. If "re-examination" is allowed, either as a matter of right or in the discretion of the court, is it confined to the scope of the "cross-examination"?'⁷

3. If "re-examination" is allowed, either as a matter of right or in the discretion of the court, may leading questions be asked?

In passing on the question of whether or not "re-examination" will be allowed, the courts have taken three distinguishable positions. One view is that after the "cross-examination" by an adversary the court should not allow the witness to be "re-examined" by his own counsel. This view was adopted by the North Dakota court in the case of *Luick v. Arends*.⁸ In an action for damages for alienation of affections the court, in interpreting a statute substantially like Montana's, said:⁹

In his main case the plaintiff called the defendant for cross-examination under the statute governing examination of the adverse party, elicited certain information, and dismissed the adverse party witness. Defendant's counsel then sought to explain the testimony so elicited under cross-examination by re-direct examination immediately following, and as part of the plaintiff's case. *The ruling of the court excluding such re-direct examination was proper.* There is no provision in the statute for the examination proposed by the defendant's counsel. While it is a question of practice largely discretionary with the court, the better practice is to keep separate the two sides of the case, and compel the defendant to delay testimony in explanation of his cross-examination until the defendant offers proof in his main case. (Emphasis added.)

⁵The scope of this Note is limited to those situations where the counsel for the party called as an adverse witness desires to "re-examine" him. It must be recognized that the discussion and the conclusions of the author which follow are likewise limited.

If a case involved multiple parties on one side, but those parties had conflicting interests, the result under our statute might well be different from that in situations involving only single parties. One defendant seemingly could be permitted to "re-examine" a co-defendant with conflicting interests under the general rule of evidence that a party may cross-examine any witness called against him.

A second problem under a statute like Montana's is, who may be called as an adverse witness? The statute includes the opposite party, his agents and employees. If a party wished to call, under this statute, one whom he believed to be an agent of his opponent, the fact of agency would probably have to be satisfactorily established before § 93-1901-9 would apply. It therefore appears that an alleged "agent" could *not* be called under this section, for the purpose of establishing the agency relationship.

⁶The statutes in Idaho [IDAHO CODE ANN. § 9-1206 (1947)], Arizona [ARIZ. CODE ANN. § 21-922 (1939)], California [CAL. CODE CIV. PRO. § 2055 (Deering 1957)], and the FEDERAL RULES OF CIVIL PROCEDURE [43(d)], expressly provide for "re-examination" by the witness' own counsel. The North Dakota [N.D. REV. CODE § 31-0202 (1943)], Georgia [GA. CODE § 5879 (1926)], Illinois [ILL. ANN. STAT. c. 110, § 60 (Smith-Hurd 1957)], Wisconsin [WIS. STAT. § 325.14 (1953)], and Montana [R.C.M. 1947, § 93-1901-9] statutes make no provisions for "re-examination" by the witness' own counsel.

⁷21 N.D. 614, 132 N.W. 353 (1911).

⁸*Id.*, 132 N.W. at 316.

The North Dakota view, then, is based on two propositions: first, that the statute itself does not provide for "re-examination," and second, that to allow it would be to disrupt the orderly course of the trial. It should be noted that if "re-examination" is delayed until the witness' own case in chief, it ceases to be a medium of rebuttal and rehabilitation; the delayed testimony is then probably no more valuable than if the witness had been called for the first time by his own counsel. Furthermore, the second basis above is founded on a misconception. Permitting "re-examination" immediately following the "cross-examination" would not disrupt the course of the trial or confuse the case any more than does cross-examination of any other witness.

A second view, diametrically opposed to the North Dakota rule, was adopted by the Illinois court in the case of *Edwards v. Martin*.⁹ The plaintiff's counsel examined two of the defendants as adverse witnesses.¹⁰ The court then held that the remaining defendant's counsel had the right to examine these witnesses on matters as to which they had been interrogated by the plaintiff. Two other Illinois decisions also adopt this position.¹¹ Wisconsin has adopted a similar view.¹² Although the Illinois and Wisconsin cases do not specifically state that leading questions may not be asked on "re-examination" within the scope of the "cross-examination," there is language forbidding "unqualified cross-examination" in the Illinois cases, which seems to indicate that leading questions may not be used.

Georgia, in adopting a third view, has placed the right to conduct a "re-examination" within the discretion of the trial court.¹³ Further, the

⁹2 Ill. App. 2d 23, 117 N.E. 2d 864 (1954).

¹⁰While this case involves co-defendants with distinct interests, it would seem that the fact that the court limited the "re-examination" to the scope of the "cross-examination" in this case would *a fortiori* require similar treatment in a case where the witness' own counsel was "re-examining" him.

¹¹*Horner v. Bell*, 336 Ill. App. 851, 84 N.E.2d 672 (1949); *Combs v. Young*, 281 Ill. App. 339 (1935).

¹²*Guse v. Power & Mining Machinery Co.*, 151 Wis. 400, 139 N.W. 195 (1912).

¹³*Scarborough v. Walton*, 36 Ga. App. 428, 136 S.E. 830 (1927); *Jones v. Chambers*, 94 Ga. 433, 95 S.E.2d 335 (1956); *Barton v. Strickland*, 208 Ga. 163, 65 S.E.2d 602 (1951).

The Missouri adverse witness statute, Mo. REV. STAT. § 491.030 (1949), provides: "Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses: *Provided*, that the party so called to testify may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses." The Missouri courts have taken two seemingly inconsistent positions in construing it. The following cases interpret it as giving the trial court discretion to permit or deny a litigant the privilege of calling and cross-examining an adverse party not previously called. *Wipfler v. Basler*, 250 S.W.2d 982, 986 (Sup. Ct. Mo. 1952) (dictum); *Burnam v. Chicago Great Western R. Co.*, 340 Mo. 25, 100 S.W.2d 858 868 (1936); *Wilcox v. McKinney*, 68 S.W.2d 741, 744 (Mo. App. 1934). On the other hand, the following cases in the courts of appeal have interpreted the statute as permitting "re-examination," including leading questions, by a witness' own counsel after he has been initially called and "cross-examined" by opposing counsel. *Wilcox v. Erwin*, 49 S.W.2d 677, 679 (Mo. App. 1932); *A. Graf Distilling Co. v. Wilson*, 172 Mo. App. 612, 156 S.W. 23, 27 (1913). *Randall v. Steelman*, 294 S.W.2d 583, 594 (Mo. App. 1956), also implicitly follows the second view in holding that the "re-examination" is not limited to the scope of the "cross-examination." It is submitted that the statute is susceptible to either construction, but not both. The difficulty lies in interpretation of the words *opposite party* in the statutory proviso. The first view assumes the words mean "opposite to the party called." The second view assumes the words mean "opposite to the counsel calling the witness."

Georgia court has held that the trial court may, in its discretion, permit leading questions on "re-examination." In *Akridge v. Atlantic Journal Co.*,¹⁴ the court in referring to an earlier case¹⁵ which had held that "re-examination" and the asking of leading questions were within the discretion of the trial judge, stated:

Indeed it [the earlier case] goes further and holds that counsel, on cross-examination ["re-examination"] may be allowed, in the discretion of the trial judge, to ask his own client leading questions, although this is against the usual procedure and general rule.

The above excerpt seems to indicate that in Georgia counsel may ask his own witness leading questions after he has been examined under an adverse witness statute, realizing the general rule is to the contrary. It would appear that there is no justification for such an exception.

While no Georgia cases have been found relative to the scope of the "re-examination," it would appear that inasmuch as "re-examination" itself, and the use of leading questions on "re-examination," is within the trial court's discretion, the scope of the "re-examination" would be given similar treatment.

Some states have statutes which expressly provide that an adverse party witness may be "re-examined" by his own counsel,¹⁶ and some of these statutes expressly limit the scope of the "re-examination" to matters brought out on the "cross-examination."¹⁷ The Arizona court has held that although their statute expressly provides for "re-examination" within the scope of the "cross-examination," this does not permit the use of leading questions on "re-examination" in the absence of a showing that the adverse witness was in fact hostile to the position of the "re-examiner."¹⁸ Idaho, under a similar statute,¹⁹ has adopted the same rule. In *Barton v. Dyer*,²⁰ the Idaho court said:

When this statute says that 'such a witness [referring to an adverse party witness] when so called may be examined by his own counsel, but only as to matters testified to on such examination,' [referring to "cross-examination"] it means that the examination by his own counsel shall be according to the rules governing direct examination. *It does not give a party the right to cross-examine his own witness.* (Emphasis added.)

The foregoing cases would seem to indicate that jurisdictions which limit the "re-examination" to the scope of the "cross-examination," either by express statutory provision or judicial decision, will not permit leading

¹⁴*Akridge v. Atlantic Journal Co.*, 56 Ga. 812, 194 S.E. 590, 593 (1937).

¹⁵*Lauchheimer v. Jacobs*, 126 Ga. 621, 55 S.E. 55 (1906).

¹⁶*E.g.*, CAL. CODE CIV. PRO. § 2055 (Deering 1957); IDAHO CODE ANN. § 9-1206 (1947).

¹⁷*Ibid.*

¹⁸*J. & B. Motors v. Margolis*, 75 Ariz. 392, 257 P.2d 588 (1953).

¹⁹IDAHO CODE ANN. § 9-1206 (1947).

²⁰38 Idaho 1, 220 Pac. 488, 490 (1923).

questions on "re-examination." *McKinney v. Preston Mill Co.*,²³ a Washington decision, may constitute an exception to this rule. The court there held that when a party to an action is called as an adverse witness, he may be interrogated on cross-examination by his own counsel, but such cross-examination should be confined to subjects upon which he has testified. This language seems to indicate that leading questions may be asked since the court states a cross-examination is permitted, and the term cross-examination connotes that leading questions may be asked. However, this may be entirely a problem of semantics. In light of the basic policy against permitting counsel to lead his own witness, it seems likely that the Washington court would not sanction leading questions if the issue were squarely presented.²⁴

Three general rules of evidence are relevant to a discussion of adverse witness statutes: first, that the cross-examination should be limited to the scope of the direct examination;²⁵ second, that counsel may not ask his own witness leading questions;²⁶ and, third, that on ordinary cross-examination leading questions may be used.²⁷ The fundamental reason for the leading question rule is that if the witness is friendly there is not only no reason for suggesting, but leading questions might even elicit incorrect answers. On the other hand if the witness is hostile to the cause of the examiner, he is unlikely to accept or be influenced by the examiner's suggestions. Further, in the latter situation leading questions are permissible in order to test the accuracy of or to discredit direct testimony.²⁸

The late Dean Wigmore in his treatise on Evidence states that when the reason for the rule allowing leading questions ceases, so does the rule. Thus, in resolving the conflict between the rule allowing the cross-examiner to use leading questions and the rule forbidding counsel to lead his own witness, it seems clear that the rule forbidding counsel to lead his own witness should prevail; the need for leading questions has ceased.

It is submitted that the position taken by the North Dakota court is undesirable. The procedure which would best serve the purposes for which the adverse witness statutes were enacted would be: (1) to allow a "re-examination" limited to the matters brought out in the "cross-examination," and (2) to allow leading questions on "re-examination" only when the established rules of evidence will allow them.²⁹

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²³39 Wash. 681, 237 P.2d 788 (1951).

²⁴Rule 43(b), FED. R. CIV. P., seems on its face to also constitute a possible exception, inasmuch as it likewise uses the term "cross-examination." However, the Arizona statute was adopted from and is almost identical to the Federal Rule; yet the Arizona court has refused to permit leading questions on "re-examination." See note 17 *supra*.

²⁵6 WIGMORE, EVIDENCE § 1880(2) (3d ed. 1940).

²⁶3 WIGMORE, EVIDENCE §§ 773, 915 (3d ed. 1940).

²⁷*Ibid.*

²⁸*Ibid.*

²⁹*E.g.*, in a suit involving multiple defendants having inconsistent interests if the plaintiff should call one of the defendants under the adverse party witness statute, the witness' co-defendant might very properly be permitted to "re-examine" and use leading questions.