#34(L)

5/25/64

Revised Memorandum 64-33

Subject: Study No. 34(L)--Uniform Rules of Evidence (Existing Provisions of Part IV of the Code of Civil Procedure)

We have sent you (5/13/64) a binder containing the four portions of Professor Degnan's Research Study on Existing Provisions of Part IV of the Code of Civil Procedure. This memorandum relates to Part IV (pages 62-105) of the research study.

We outline below the policy questions that must be considered by the Commission. Unless otherwise indicated, references are to sections of the Code of Civil Procedure. The research study should be considered in connection with this memorandum.

Section 1982

This section is discussed on pages 89-91 of the research study and is compiled as Section 1415 of the Evidence Code.

The consultant recommends repeal of Section 1982 as redundant. There appears to be no case which treats the section as merely a special rule about authentication of documents, requiring one who offers the document to explain any suspicious circumstances appearing on the face of the instrument which might raise doubts about whether it is still in the form in which it was originally executed. The staff included the section in the authentication portion of the Evidence Code on the mistaken assumption that the section provided a special rule concerning authentication.

Section 1983

This section is discussed on pages 91-94 of the research study and is compiled as Section 523 of the Evidence Code. (See Tentative Recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions, pages 12-13)

The consultant recommends that this section be retained. We suggest that Section 523 of the Evidence Code be approved.

Section 2061

First sentence. The research study discusses the first sentence of Section 2061 on pages 94-95. This sentence should be combined with Section 2101 of the Code of Civil Procedure, but we suggest that action be deferred

on the substance of the Evidence Code section that should replace these provisions of the existing law until we have received a research study on Section 2101.

Introductory clause of remaining portion. We suggest that the introductory clause of Section 2061 be compiled in the Evidence Code as Section 440 to read:

> 440. The jury is to be given the instructions specified in this chapter on all proper occasions.

Subdivision (1). This subdivision is discussed on page 95 of the research study and would be compiled as Section 441. Section 441 might read:

> 441. It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Section 441 is an exact copy of CALJIC Inst. No. 1.

Subdivision (2). This subdivision is discussed on pages 96-98 of the research study and would be compiled as Section 442. Section 442 might read:

> 442. You are not bound to decide in conformity with the testimony of any number of witnesses against a lesser number or against other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Section 442 is based on CALJIC Instruction No. 24, revised to eliminate the suggestion that the jury may decide against declarations "which do not produce conviction in their minds" and to eliminate the language indicating that a presumption is evidence.

It also might be desirable to include a general instruction in the statute based on CALJIC No. 25. The section might read:

> The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a finding in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that a balance of probability exists pointing to the accuracy and honesty of the one witness.

Subdivision (3). This subdivision is discussed on pages 98-99 of the research study. A section based on this subdivision might read:

> A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you believe that the probability of truth favors his or her testimony in other particulars.
>
> On the other hand, discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered.

This section is basically the same as CALJIC No. 27 and 27-A.

Subdivision (4). This subdivision is discussed on page 99 of the research study. The subdivision might result in two sections worded as follows:

> The testimony of an accomplice ought to be viewed with distrust.

> Any evidence that has been received of an act, omission, or declaration of a party which is unfavorable to his own interests should be considered and weighed by you as you would any other admitted evidence, but evidence of the oral admission of a party, other than his own testimony in this trial, ought to be viewed by you with caution.

The first section set out above is in the language of subdivision (4) of Code of Civil Procedure Section 2061. The second section is the same as CALJIC No. 29.

Subdivision (5). This subdivision is discussed on pages 99-101 of the research study. This subdivision also was amended in the tentative recommendation relating to Burden of Producing Evidence, Burden of Proof, and Presumptions. Subdivision (5) might result in a section phrased as follows:

> The judge shall instruct the jury that the burden of proof rests on the party to whom it is assigned by rule of law, informing the jury which party that is. When the evidence is contradictory, or if not contradicted might nevertheless be disbelieved by the jury, the judge shall instruct the jury that before the jury finds in favor of the party who bears the burden of proof, the jury must be persuaded by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt, as the case may be.

An alternative that should be considered:

> The judge shall instruct the jury on which party bears the burden of proof on each issue and on whether that burden is to prove by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt.

Subdivisions (6) and (7). These subdivisions are discussed on pages 101-102 of the research study. The research consultant recommends that the subdivisions be retained without attempting in any way to improve the language of the subdivisions. However, in the tentative recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions (page 61), an additional clause was added to subdivision (7). A section based on these subdivisions, including the clause added by the Commission, might be phrased as follows:

> Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict. Therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust and inferences unfavorable to a party may be drawn from any evidence or facts in the case against him when such party has failed to explain or deny such evidence or facts by his testimony or has wilfully suppressed evidence relating thereto.

Section 2079

This section is discussed on pages 102-103 of the research study. The consultant recommends the repeal of this section on the ground that it is

superfluous because it repeats what is said in Civil Code Section 130 and is misleading to the extent that it suggests that adultery is the only ground for divorce which requires corroboration of the testimony of the spouses.

Memorandum 64-25 is a staff study and recommendation on Section 2079. The staff also concluded that Section 2079 is unnecessary and also recommended repeal of the section.

Section 2079 is related to evidence only in that it declares that certain evidence is not of itself sufficient to justify a judgment. However, the section seems to be closely enough related to evidence to justify its repeal in the evidence bill if the Commission believes that the section should be repealed. The repeal of the section is not, however, essential to the evidence recommendations.

Respectfully submitted,

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Executive Secretary