34(L) 10/27/64

Memorandum 64-79

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Division 5)

We have received no further written comments concerning this division. However, at the State Bar Meeting in Santa Monica, several of the panelists on the Evidence Code raised certain objections to Sections 500 and 510. The comments made by the panelists indicate that we should think some more about these sections before the Evidence Code is submitted to the Legislature.

The problem seems to be that these sections declare no underlying rule. They state the factors that should be considered by a court in allocating the burden of proof, but they give no clue to what the usual rule ought to be. Hence, we have received several suggestions that the usual rule expressed in the California statutes--that the burden of proof is on the party with the affirmative of the issue--should be expressed in Section 510. We have considered these suggestions and rejected them because of the weakness of the "affirmative of the issue" rule.

Witkin says of the "affirmative of the issue" formula:

> The "affirmative of the issue" lacks any substantial objective meaning, and the allocation of the burden actually requires the application of several rules of practice and policy, not entirely consistent and not wholly reliable. [WITKIN, CALIFORNIA EVIDENCE 73.]

Another criticism of the "affirmative of the issue" criterion was articulated by Professor Cleary in 12 STANFORD L. REV. 5, 11 (1959):

> That the burden is on the party having the affirmative . . . [or] that a party is not required to prove a negative . . . is no more than a play on words, since practically any proposition may be stated in either affirmative or negative form. Thus a plaintiff's exercise of ordinary care equals absence of contributory negligence, in the minority of jurisdictions which place this element in plaintiff's case. In any event, the proposition seems simply not to be so.

Within identifies the basic rule (on page 73 of CALIFORNIA EVIDENCE) as follows:

> The basic rule, which covers most situations, is that whatever facts a party must affirmatively plead he also has the burden of proving.

This basic rule works fine so far as pleaded facts are concerned, but there are many issues which are never mentioned in the pleadings. A broader statement of the same rule might be that the party seeking relief from the court has the burden of proof as to all facts that are necessary to establish his right to such relief. In this broader form, the rule would then be applicable to non-pleaded issues--such as issues that arise on preliminary evidence rulings. Such a rule has been articulated in the California cases from time to time. For example, in Cal. Employment Com. v. Malm, 59 Cal. App.2d 322, 323 (1943), the court said:

> We are thus confronted with the settled rule that when a party seeks relief the burden is upon him to prove his case, and he cannot depend wholly upon the failure of the defendant to prove his defenses.

This latter test has also been criticized. In 9 WIGMORE, EVIDENCE 275, it says:

> It is sometimes said that it [the burden of proof] is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential.

Professor Cleary criticizes the rule as follows:

> That the burden is on the party to whose case the element is essential . . . does no more than restate the question. [12 STANFORD L. REV. at 11.]

Nonetheless, in view of the criticisms of Sections 500 and 510, we have come to the conclusion that some basic rule should be stated and that the most meaningful basic rule that can be stated is that the burden of proof is on the party seeking relief.

Accordingly, we recommend that Section 510 be revised to read in substance as follows:

> 510. (a) Except as otherwise provided by law, a party has the burden of proof as to each fact that is essential to the claim for relief or defense that he is asserting.
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> (b) In the absence of statute assigning the burden of proof as to a particular fact, the court in determining whether the law requires that the burden of proof be assigned other than as provided in subdivision (a) shall take into account:
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> (1) The most desirable result in terms of public policy in the absence of proof;
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> (2) The peculiar knowledge that litigants are likely to have concerning an issue of that nature;
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> (3) The probability of the existence or nonexistence of the fact in issue; and
>
> (4) The relative ease of proving the existence of the fact in issue as compared with proving its nonexistence.

Section 500 should then be revised to read as follows:

> 500. The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact. Thereafter, the burden of producing evidence as to a particular fact is on a party whenever a finding against him on the fact is required in the absence of further evidence.

This redraft of Section 500 is based on Wigmore's analysis in Section 2487 of his work. He says (commencing at 9 WIGMORE, EVIDENCE 279):

> [The burden of producing evidence] operates somewhat as follows:
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> (a) The party having the risk of non-persuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going forward with evidence; because, since he wishes to have the jury act for him, and since without any legal evidence at all they could properly take no action, there is no need for the opponent to adduce evidence; and this duty thus falls first upon the proponent (a term convenient for designating the party having the risk of non-persuasion). . . .
>
> (b) Suppose, then, that the proponent has satisfied this duty towards the judge, and that the judge has ruled that sufficient evidence has been introduced. The duty has then ended. Up to that point the proponent was liable to a ruling of law from the judge which would put an end to his case. After passing this point he is now before the jury, bearing only his risk of non-persuasion . . . . There is now no duty on either party, with reference to any rule of law in the hands of the judge, to produce evidence. Either party

may introduce it, and doubtless both parties will do so; but there is nothing that requires either to do so under penalty of a ruling of law against him . . . .

(c) Suppose, however, that the proponent has been able to go further and to adduce evidence which if believed would make it beyond reason to repudiate the proponent's claim,--evidence such that the jury, acting as reasonable men, must be persuaded and must render a verdict on that issue for the proponent. Here the proponent has now put himself in the same position that was occupied by the opponent at the opening of the trial, i.e. unless the opponent now offers evidence against the claim and thus changes the situation, the jury should not be allowed to render a verdict against reason,--a verdict which would later have to be set aside as against evidence. The matter is thus in the hands of the judge again, as having the supervisory control of the proof; and he may now, as applying a rule of law, require the opponent to produce evidence, under penalty of losing the case by direction of the judge. A duty of producing evidence, under this penalty for default, has now arisen for the opponent. It arises for the same reasons, is measured by the same tests, and has the same consequences as the duty of production which was formerly upon the proponent.

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§ 2488. . . . As to the tests for determining this [burden of producing evidence], it has already been pointed out that

(a) For the one burden (the risk of non-persuasion of the jury) the substantive law and the pleadings, primarily, served to do this, and, subsidiarily, a rule of practice, within the stage of a single pleading, may further apportion the burden; but this apportionment depends ultimately on broad considerations of policy, and, for individual instances, there is nothing to do but ascertain the rule, if any, that has been judicially determined for that particular class of cases.

(b) For the other burden (the duty of going forward with evidence to satisfy the judge) there is always, at the outset, such a duty for the party having the first burden, or risk of non-persuasion, until by some rule of law (either by a specific ruling of the judge upon the particular evidence, or by the aid of an appropriate presumption, or by a matter judicially noticed) this line is passed. Then comes the stage in which there is no such duty of law for either party (although, if the proponent has invoked some presumption, the stage is immediately passed over). Then, either by a ruling on the general mass of evidence, or by the aid of some applicable presumption, the duty of law arises anew for the oponent. Finally, it may supposedly, by similar modes, be later re-created for the proponent.

There is therefore no one test, of any real significance, for determining the incidence of this duty; at the outset the test is

> furnished by ascertaining who has the burden of proof, in the sense of the risk of non-persuasion of the jury, under the pleadings for other rules declaring what "facta probanda" are the ultimate facts of each party's case; a little later, the test is whether the proponent has by a ruling of the judge (based on the sufficiency of the evidence, or a presumption, or a fact judicially noticed) fulfilled this duty; later on, it will be whether the proponent, by a ruling of the judge upon a presumption or the evidence as a whole, has created a duty for the opponent; and still later, whether, for the purposes of the judge's ruling, the opponent has satisfied this duty.

The version of Section 500 as it now appears in the preprinted bill seems to indicate that the court determines the incidence of the burden of producing evidence independently of the burden of proof even though the same criteria are involved. We think that the redraft of Section 500, above, indicates more precisely that the burden of producing evidence follows the burden of proof until the production of evidence in satisfaction of the burden reaches the point where the burden is met or is shifted to the other party.

If the foregoing sections are approved, we suggest that Division 5 be reorganized to a certain extent. The title of Division 5 should be reorganized so that Burden of Proof appears first. Chapter 1, entitled "Burden of Producing Evidence", should be made Chapter 2 and the section in that chapter should be renumbered Section 550. Chapter 2, entitled "Burden of Proof", should be renumbered Chapter 1. Section 510, revised as suggested above, should be renumbered 500 and Section 511 should be renumbered 501.

We make the foregoing suggestions in order to minimize the renumbering problems while still presenting the sections in their logical order. Since the burden of producing evidence following the burden of proof, the section assigning the burden of producing evidence should also follow the section assigning the burden of proof.

There are some additional matters that should be noted:

Section 520. The word "wrong" should be changed to "wrongdoing". Without this change the section may be read as "the party claiming that a person is . . . wrong . . . ."

Section 608. We suggest that the definition of an inference in the last sentence be deleted. We believe that the word "inference" needs no definition. If the Commission is unwilling to delete the definition, we suggest that it be added to the definitions division. We have found that the word "inference" is used in some other sections of the code. See Sections 410 and 445.

Section 620. We have added a comma after "Article" in line 44 and another after "conclusive" in line 45.

Section 630. We have added a comma after "Article" in line 12 and another comma after "603" in line 14. Commissioner McDonough suggests that the words "fall within the criteria established by" be substituted for "meet the description in" in lines 13 and 14. We think the suggestion improves the section; and a similar revision should be made in Section 660.

Section 643. We suggest the substitution of "if" for "when" in line 50.

Section 661. In line 23, we suggest that the word "this" be substituted for "the" so that the drafting of this section will be comparable to the drafting of similar sections.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary