11/16/64

Memorandum 64-103

Subject: 1965 Annual Report (Statutes Held Unconstitutional)

Except as noted below, we plan to use the same type used last year to print the Commission's Annual Report.

We plan to include the following under the title "CALENDAR OF TOPICS SELECTED FOR STUDY":

Studies on Which the Commission Expects to Submit a Recommendation to the 1965 Legislature

1. Whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.

The Commission plans to submit a new Evidence Code for enactment at the 1965 legislative session.

2. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

A series of recommendations relating to this topic were enacted upon recommendation of the Commission at the 1963 legislative session. The Commission has reviewed the legislation enacted in 1963 and plans to submit to the 1965 Legislature a recommendation for revisions of the 1963 legislation to clarify certain provisions.

Attached (Exhibit I) is a draft of the material on statutes held unconstitutional that is suggested for inclusion in the next Annual Report. It is important that you read the three cases cited in Exhibit I before the meeting so that agreement may be reached on this subject. In this connection, you are reminded of the policy decision that the Annual Report will not include a statement of the grounds on which statutes are held unconstitutional. See the Minutes for October 1962, page 4.

With respect to the "RECOMMENDATIONS" portion of the report, note that we recommend the repeal only of Elections Code Section 12047 and Welfare and Institutions Code Section 6650 to the extent that these sections have been held unconstitutional. We do not recommend revision of Section 11500 of the Health and Safety Code, since the Woody case involved only the application of this section to a particular state of facts. Thus, the section was interpreted to be unconstitutional only as applied to the particular circumstances involved in the Woody case.

Respectfully submitted,

Jon D. Smock
Associate Counsel

Memo 64-103

EXHIBIT I

REPORT ON STATUTES REPEALED BY IMPLICATION

OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

> The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

Pursuant to this directive, the Commission has made a study of the decisions of the Supreme Court of the United States and of the Supreme Court of California handed down since the Commission's last Annual Report was prepared.[1] It has the following to report:

(1) No decision of the Supreme Court of the United States holding a statute of this State unconstitutional or repealed by implication has been found.

(2) No decision of the Supreme Court of California holding a statute of this State repealed by implication has been found.

(3) Three decisions of the Supreme Court of California holding statutes of this State unconstitutional have been found.

In Department of Mental Hygiene v. Kirchner,[2] the Supreme Court held unconstitutional Section 6650 of the Welfare and Institutions Code to the extent that it imposes upon designated relatives of a person committed to a state institution for the mentally ill liability for the care, support, and maintainence of such person.

In Canon v. Justice Court,[3] the Supreme Court held unconstitutional Section 12047 of the Elections Code to the extent that it requires the

consent of a California voter before an individual can issue literature falling within the scope of the statute.

In People v. Woody,[4] the Supreme Court held unconstitutional Section 11500 of the Health and Safety Code as applied to certain persons using peyote in a bona fide pursuit of a religious faith.

1. This study has been carried through 61 Adv. Cal. 941 (1964) and 378 U.S. 589 (1964). [Note: We plan to update this report to the date of publication if no other cases holding statutes unconstitutional or repealed by implication are found.]

2. 60 Cal.2d 716, 36 Cal. Rptr. 488, 388 P.2d 720 (1964).

3. 61 Cal.2d ___, 39 Cal. Rptr. 228, 383 P.2d 428 (1964).

4. 61 Cal.2d ___, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics listed on pages 000-000 of this report.

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of Section 12047 of the Elections Code and Section 6650 of the Welfare and Institutions Code to the extent that these sections have been held unconstitutional.

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

proposing an

EVIDENCE CODE

BACKGROUND

The California Law Revision Commission was directed by the Legislature in 1956 to make a study to determine "whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

Pursuant to this directive, the Commission has made a study of the California law of evidence and the recommendations of the Commissioners on Uniform State Laws. The Commission has concluded that the Uniform Rules should not be adopted in the form in which they were proposed but that many features of the Uniform Rules should be incorporated into the law of California. The Commission has also concluded that California should have a new, separate Evidence Code which will include the best features of the Uniform Rules and the existing California law.

The Case for Recodification of the California Law of Evidence

In few, if any, areas of the law is there as great a need for immediate and accurate information as there is in the law of evidence. On most legal questions, the judge or lawyer has time to research the law before it is applied. But questions involving the admissibility of evidence arise suddenly during trial. Proper objections—stating the correct grounds—must be made immediately or the lawyer may find that his objection has been waived. The judge must rule immediately in order that the trial may progress in an orderly fashion. Frequently, evidence questions cannot be anticipated and, hence, necessary research often cannot be done beforehand.

There is, therefore, an acute need for a systematic, comprehensive, and authoritative statement of the law of evidence that is easy to use and convenient for immediate reference. The California codes provide such statements of the law in many fields—commercial transactions, corporations, finance, insurance—where the need for immediate information is not nearly as great as it is in regard to evidence. A similar statement of the law of evidence should be available to those who are required to have that law at their fingertips for immediate application to unanticipated problems. This can best be provided by a codification of the law of evidence which would provide practitioners with a systematic, comprehensive, and authoritative statement of the law.

An attempt at codification of the California law of evidence was made by the draftsmen of the 1872 Code of Civil Procedure. Part IV of that code, entitled "Of Evidence," was apparently intended to be a comprehensive codification of the subject. The existing statutory law of evidence still consists almost entirely of the 1872 codification. Isolated additions to or amendments of Part IV have been made from time to time, but the original 1872 statute has remained as the fundamental statutory basis of the California law of evidence.

Although Part IV of the Code of Civil Procedure purports to be a comprehensive and systematic statement of the law of evidence, in fact it falls far short of that. Its draftsmanship does not meet the standards of the modern California codes. There are duplicating and inconsistent provisions. There are long and complex sections that are difficult to read and more difficult to understand. Important areas of the law of evidence are not mentioned at all in the code, and many that are mentioned are treated in the most cursory fashion. Many sections are based on an erroneous analysis of the common law of evidence upon which the code is based. Others preserve common law rules that experience has shown do more to inhibit than to enhance the search for truth at a trial. Necessarily, therefore, the courts have had to develop many, if not most, of the rules of evidence with but partial guidance from the statutes.

Illustrative of the deficiencies in the existing code is the treatment of the hearsay rule. Perhaps no rule of evidence is more important or more frequently applied; yet, there is no statutory statement of the hearsay rule in the code. On the other hand, several exceptions to the hearsay rule are given explicit statutory recognition in the code. But the list of exceptions is both incomplete and inaccurate. The Commission has identified and stated in the Evidence Code a number of exceptions to the hearsay rule that are recognized in case law but are not recognized in the existing code, including such important exceptions as the exception for spontaneous statements and the exception for statements of the declarant's state of mind.

Moreover, the exceptions that are mentioned in the existing code sometimes bear little relationship to the actual state of the law. For example, portions of the common law exception for declarations against interest may be found in several scattered sections—Code of Civil Procedure Section 1853, 1870(4), and 1946(1). Yet, all of these sections taken together do not express the entire common law rule, nor do they reflect the law of California. Each requires that the declarant be dead when the evidence is offered. Nonetheless, the courts have admitted declarations against interest when the declarant is neither dead nor otherwise unavailable. None of these sections permits an oral declaration against pecuniary interest, not relating to real property, to be admitted except against a successor of the declarant. The courts, however, follow the traditional common law rule and admit such declarations despite the limitations in the code. Recently, too, the Supreme Court decided that declarations against penal interest are admissible despite the fact that the code refers only to declarations against pecuniary interest.

In the area of privilege, the existing code is equally obscure. It does state in general terms the privileges that are recognized in California, but it does nothing more. It does not indicate, for example, that the attorney-client privilege may apply to communications made to persons other than the attorney himself or his secretary, stenographer, or clerk. It does not indicate that the privilege protects only confidential communications. The generally recognized exceptions to the privilege —such as the exception for statements made in contemplation of crime —are nowhere mentioned. Nor does the code mention the fact that the privilege may be waived. Nonetheless, the courts have recognized such exceptions, have protected communications to intermediaries for transmittal to the attorney, have required the communication to have been in confidence, and have held that the privilege may be waived.

On the question of the termination of a privilege, however, the courts have deemed themselves strictly bound by the language of the code. One case, for example, held that a physician's lips are forever sealed by the physician-patient privilege upon the patient's death—even though it was the patient's personal representative that desired to use the evidence. This strange result was deemed compelled because the code provides that a physician may not be examined "without the consent of his patient," and a dead patient cannot consent. That decision was followed by an amendment permitting the personal representative or certain heirs of a decedent to waive the decedent's physician-patient privilege in a wrongful death action; but, apparently, the law stated in that case still applies in all other actions and to all of the other communication privileges.

Other important rules of evidence either have received similarly cursory treatment in the existing code or have been totally neglected. Such important rules as the inadmissibility of evidence of liability insurance, the rules governing the admissibility and inadmissibility of various kinds of character evidence, and the requirement that documents be authenticated before reception in evidence are entirely nonstatutory. The best evidence rule, while covered by statute, is stated in three sections—Code of Civil Procedure Sections 1855, 1937, and 1938. The code states the judge's duty to determine all questions of fact upon which the admissibility of evidence depends, but there is no indication that, as to some of these facts, a party must persuade the judge of their existence while, as to others, a party need present merely enough evidence to sustain a finding of their existence.

These and similar deficiencies call for a thorough revision and recodification of the California law of evidence. It is true that the courts have filled in many of the gaps contained in the present code. They have also been able to remedy some of the anomalies and inconsistencies in the code by construction of the language used or by actual disregard of the statutory language. But there is a limit on the extent to which the courts can remedy the deficiencies in a stautory scheme. Reform of the California law of evidence can be achieved only by legislation thoroughly overhauling and recodifying the law.

Previous California Efforts to Reform the Law of Evidence

Efforts at legislative reform of the law of evidence in California have been made on several occasions. A substantial revision of Part IV of the Code of Civil Procedure—clarifying many sections and eliminating inconsistent and conflicting sections—was enacted in 1901; but the Supreme Court held the revision unconstitutional because the enactment embraced more than one subject and because of deficiencies in the title of the enactment. About 1932, the California Code Commission initiated a thoroughgoing revision of this field of law. The Code Commission placed the research and drafting in the hands of Dean William G. Hale of the University of Southern California Law School, assisted by Professor James P. McBaine of the University of California Law School and Professor Clarke B. Whittier of the Stanford Law School. The Code Commission's study continued until the spring of 1939, when it was abandoned because the American Law Institute had appointed a committee to draft a Model Code of Evidence and the Code Commission thought it undesirable to duplicate the Institute's work.

National Efforts to Reform the Law of Evidence

Efforts at reform in the law of evidence have also been made at the national level, for California's law of evidence has been no more deficient than the law of most other states in the union. The widespread deficiencies in the state of the law of evidence caused the American Law Institute to abandon its customary practice of preparing restatements of the common law when it came to the subject of evidence. "[T]he principal reason for the [American Law Institute] Council's abandoning all idea of the Restatement of the present Law of Evidence was the belief that however much that law needs clarification in order to produce certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it. The Council of the Institute therefor felt that a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law. A bad rule of law is not cured by clarification." MODEL CODE OF EVIDENCE, Introduction, p. viii (1942).

In 1942, after three years of careful study and formulation by some of the country's most distinguished judges, practicing lawyers, and professors of law, the Institute's Model Code of Evidence was promulgated. It was widely debated, in California and elsewhere. The State Bar of California referred it to the Bar's Committee on the Administration of Justice, which recommended that the Bar oppose the enactment of the Model Code into law. Reaction elsewhere was much the same, and by 1949 adoption of the Model Code was a dead issue.

But the need for revision of the law of evidence was as great as ever. The National Conference of Commissioners on Uniform State Laws began working on a revision of the law of evidence. The work of the Conference was based largely on the Model Code, but the Conference hoped both to simplify that code and to eliminate proposals that were objectionable. Four additional years of study and reformulation resulted in the promulgation of the Uniform Rules of Evidence.

In 1953, the Uniform Rules were approved by both the National Conference of Commissioners on Uniform State Laws and the American Bar Association. Since that time, many of the Uniform Rules have been followed and cited with approval by courts throughout the country, including the California courts. The Uniform Rules of Evidence, with only slight modification, have been adopted by statute in Kansas and the Virgin Islands. In other states, comprehensive studies of the Uniform Rules have been undertaken with a view to their adoption either by statute or in the form of court rules. In New Jersey, as a result of such a study, a revised form of the privileges article was adopted by statute and the remainder of the Uniform Rules, also substantially revised, was adopted by court rule.

RECOMMENDATIONS

The Uniform Rules of Evidence

The Uniform Rules of Evidence are the product of years of careful, scholarly work and merit careful consideration. Nonetheless, the Commission recommends against their enactment in the form in which they were approved by the National Conference of Commissioners on Uniform State Laws. Several considerations underlie this recommendation.

First, in certain important respects, the Uniform Rules would change the law of California to an extent that the Commission considers undesirable. For example, the Uniform Rules would admit any hearsay statement of a person who is present at the hearing and subject to cross-examination. In addition, they do not provide a married person with a privilege to refuse to testify against his spouse. In both respects —and in a number of other respects as well—the Commission has disagreed with the conclusions reached by the Commissioners on Uniform State Laws. Sometimes the disagreement has been upon matters of principle; in others, it has been upon matters of detail. In total, the disagreements have been substantial and numerous enough to persuade the Law Revision Commission that the Uniform Rules of Evidence should not be adopted in their present form.

Second, the existing California statutes contain many provisions that have served the State well and that should be continued but are not found in the Uniform Rules of Evidence. If the Uniform Rules of Evidence were approved in their present form, segregated from the remainder of the statutory law of evidence, California's statutory law of evidence would be seriously complicated. Yet, the contrasting formats of the Uniform Rules of Evidence and the California evidence statutes make it impossible to integrate these two bodies of evidence law into a single statute while preserving the Uniform Rules in the form in which they were approved by the Commissioners on Uniform State Laws.

Third, the draftsmanship of the Uniform Rules is in some respects defective by California standards. The Uniform Rules contain several rules of extreme length that are reminiscent of several of the cumbersome sections in the 1872 codification. For example, the hearsay rule and all of its exceptions are stated in one rule that has 31 subdivisions. Moreover, different language is sometimes used in the Uniform Rules to express the same idea. For example, various communication privileges (attorney-client, physician-patient, and husband-wife) are expressed in a variety of ways even though all are intended to provide protection for confidential communications made in the course of the specified relationships.

Fourth, the need for nationwide uniformity in the law of evidence is not of sufficient importance that it should outweigh these other considerations. The law of evidence—unlike the law relating to commercial transactions, for example—affects only procedures in this State and has no substantive significance insofar as the law of other states is concerned. Thus, although the adoption of the Uniform Rules elsewhere indicates that they are deserving of weighty consideration, such adoption is not in and of itself a reason to adopt the rules in California.

For all these reasons, the Commission has concluded that California's need for a thorough revision of the law of evidence cannot be met satisfactorily by adoption of the Uniform Rules of Evidence.

The Evidence Code

A new Evidence Code is recommended instead of a revision of Part IV of the Code of Civil Procedure for several reasons. Mechanically, it would be difficult to include a revision of the rules of evidence in Part IV of the Code of Civil Procedure because much of Part IV does not concern evidence at all.* Logically, the rules of evidence do not belong in the Code of Civil Procedure because these rules are concerned equally with criminal and civil procedure. But the most important consideration underlying the recommendation that a new code be enacted is the desirability of having the rules of evidence available in a separate volume that will be, in effect, an official handbook of the law of evidence—a kind of evidence bible for busy trial judges and lawyers.

The Evidence Code recommended by the Commission contains provisions relating to every area of the law of evidence. In this respect, it is more comprehensive than either the Uniform Rules of Evidence or Part IV of the Code of Civil Procedure. The code will not, however, stifle all court development of the law of evidence. In some instances—the *Privileges* division, for example—the code to a considerable extent precludes further development of the law except by legislation. But, in other instances, the Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of the law. As a general rule, the code permits the courts to work toward greater *admissibility* of evidence but does not permit the courts to develop additional *exclusionary* rules. Of course, the code neither limits nor defines the extent of the exclusionary evidence rules contained in the California and United States Constitutions. The meaning and scope of the rules of evidence that are based on constitutional principles will continue to be developed by the courts.

The proposed Evidence Code is to a large extent a restatement of existing California statutory and decisional law. The code makes some significant changes in the law, but its principal effect will be to substitute a clear, authoritative, systematic, and internally consistent statement of the existing law for a mass of conflicting and inaccurate statutes and the myriad decisions attempting to make sense out of and to fill in the gaps in the existing statutory scheme.

The proposed Evidence Code is divided into 11 divisions, each of which deals comprehensively with a particular evidentiary subject. Several divisions are subdivided into chapters and articles where the complexity of the particular subject requires such further subdivision in the interest of clarity. Thus, for example, each individual privilege is covered by a separate article. A *Comment* follows each provision of the proposed legislation set out herein to explain in some detail the reason for the inclusion of each section in the Evidence Code and the reasons underlying any recommended changes in the law of California. The format of the code and its overall impact on existing law are discussed below.

Division 1—Preliminary Provisions and Construction. Division 1 contains certain preliminary provisions that are usually found at the beginning of the modern California codes. Its most significant provision is the one prescribing the effective date of the code—January 1, 1967. This delayed effective date will provide ample opportunity for the lawyers and judges of California to become familiar with the code before they are required to use it in practice.

Division 2—Words and Phrases Defined. Division 2 contains the definitions that are used throughout the code. Definitions that are used in only a single division, chapter, article, or section are defined in the particular part of the code where the definition is used.

* Part IV includes, for example, provisions relating to the safekeeping of official documents, provisions requiring public officials to furnish copies of official documents, provisions creating procedures for establishing the content of destroyed records, provisions on the substantive effect of seals, and the like. By placing the revision of the law of evidence in a new code, the immediate need to recodify these sections is obviated. Of course, the remainder of Part IV should be reorganized and recodified. But such a recodification is not a necessary part of a revision and recodification of the law of evidence.

Division 3—General Provisions. Division 3 contains certain general provisions governing the admissibility of evidence. It declares the admissibility of relevant evidence and the inadmissibility of irrelevant evidence. It sets forth in some detail the functions of the judge and jury. It states the power of the judge to exclude evidence because of its prejudicial effect or lack of substantial probative value. The division is, for the most part, a codification of existing law. Section 402 makes a significant change, however: It provides that exclusionary rules of evidence, except privileges, do not apply when the judge is determining the admissibility of evidence.

Division 4—Judicial Notice. Division 4 covers the subject of judicial notice. It makes minor revisions in the matters that are subject to judicial notice. For example, city ordinances may be noticed under the code while, generally speaking, they may not be noticed under existing law. But the principal impact of Division 4 on the existing law is procedural. Thus, the division specifies some matters that the judge is required to judicially notice, whether requested to or not—for example, California, sister-state, and federal law. It specifies other matters that the judge may notice; but he is not required to take judicial notice of any of these matters unless he is requested to do so and is provided with sufficient information to determine the matter. The division also guarantees the parties reasonable notice and an opportunity to be heard before judicial notice may be taken of any matter that is of substantial consequence to the determination of the action.

Division 5—Burden of Proof, Burden of Producing Evidence, and Presumptions. Division 5 deals with the burden of proof, the burden of producing evidence, and presumptions. It makes one significant change: Section 600 abolishes the much criticized rule that a presumption is evidence. The division also provides that some presumptions affect the burden of proof while others affect only the burden of producing evidence. Under existing law, presumptions also have these effects; but Division 5 classifies a large number of presumptions as having one effect or the other and establishes certain criteria by which the courts may classify any presumptions not classified by statute.

Division 6—Witnesses. Division 6 relates to witnesses and makes several significant changes in the existing law. The Evidence Code contains no provision that disqualifies a juror from giving evidence concerning jury misconduct while, under existing law, a juror may give such evidence only when the misconduct consists of the making of a chance verdict or the giving of false answers on *voir dire*. There is no Dead Man Statute in the code. A party is permitted to attack the credibility of his own witness without showing either surprise or damage. The nature of a criminal conviction that may be shown to impeach a witness has been substantially changed.

There are also several minor revisions of existing law that, while important, will have less effect on the manner in which cases are tried. For example, the conditions under which a judge or juror can testify have been revised, and the foundational requirements for the introduction of a witness' inconsistent statement have been modified.

Despite these changes, the bulk of Division 6 is a recodification of well-recognized rules and principles of existing law.

Division 7—Opinion Testimony and Scientific Evidence. Division 7 sets forth the conditions under which opinion testimony may be received from both lay and expert witnesses. The division restates existing law with but one significant change. If an expert witness has based his opinion in part upon a statement of some other person, Section 804 permits the adverse party to call the person whose statement was relied on and examine him as if under cross-examination concerning the subject matter of his statement.

Division 8—Privileges. Division 8 covers the subject of privileges and, unlike most of the other provisions of the code, applies to all proceedings where testimony can be compelled to be given—not just judicial proceedings. The division makes some major substantive changes in the law. For example, a new privilege is recognized for confidential communications made to psychotherapists; and, although the privilege of a married person not to testify against his spouse is continued, the privilege of a spouse to prevent the other spouse from testifying against him is not. But the principal effect of the division is to clarify rather than to change existing law. The division spells out in five chapters, one of which is divided into 11 articles, a great many rules that can now be discovered, if at all, only after the most painstaking research. These provisions make clear for the first time in California law the extent to which doctrines that have developed in regard to one privilege are applicable to other privileges.

Division 9—Evidence Affected or Excluded by Extrinsic Policies. Division 9 codifies several exclusionary rules that are recognized in existing statutory or decisional law. These rules are based on considerations of public policy without regard to the reliability of the evidence involved. The division states, for example, the rules excluding evidence of liability insurance and evidence of subsequent repairs. The rules indicating when evidence of character may be used to prove conduct also are stated in this division. The division expands the existing rule excluding evidence of settlement offers to exclude also admissions made in the course of settlement negotiations.

Division 10—Hearsay Evidence. Division 10 sets forth the hearsay rule and its exceptions. The exceptions are, for the most part, recognized in existing law. A few existing exceptions, however, are substantially broadened. For example, the former testimony exception in the Evidence Code does not require identity of parties as does the existing exception. Dying declarations are made admissible in both civil and criminal proceedings. A few new exceptions are also created, such as an exception for a decedent's admissions in an action for his wrongful death and an exception for prior inconsistent statements of a witness. The division permits impeachment of a hearsay declarant by prior inconsistant statements without the foundational requirement of providing the declarant with an opportunity to explain. The division also permits a party to call a hearsay declarant to the stand (if he can find him) and treat him in effect as an adverse witness, *i.e.*, examine him as if under cross-examination.

Division 11—Writings. Division 11 collects a variety of rules relating to writings. It defines the process of authenticating documents and spells out the procedure for doing so. The division substantially simplifies the procedure for proving official records and authenticating copies, particularly for out-of-state records. The best evidence rule appears in this division; and there are collected here several statutes providing special procedures for proving the contents of certain writings with copies. For the most part, the division restates the existing California law.

Thus, the bulk of the Evidence Code is existing California law that has been drafted and organized so that it is easy to find and to understand. There are some major changes in the law, but in each case the change has been recommended only after a careful weighing of the need for the evidence against the policy to be served by its exclusion.