#34(L) 5/13/64

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 1844

This section is set out and discussed on pages 62-64 of the research study. The consultant states that the law would doubtless be the same if Section 1844 were wholly repealed, but that the section might be worth retaining as a basis for jury instructions if there is a significant number of sections which relate to the topic Weight of Evidence.

The staff suggests that the section be retained, but that it be revised to read as follows:

> (a) Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.
> (b) As used in this section, "direct evidence" means evidence that directly proves a disputed fact that is of consequence to the determination of the action, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

Subdivision (a) of this section is based on Section 1844. The introductory clause of subdivision (a) is necessary since other statutes require additional evidence in some cases. See research study at page 64.

Subdivision (b) is based on the definition of "direct evidence" found in Code of Civil Procedure Section 1831 (set out on page 82 of the research study). (We previously determined to repeal Section 1831, but also decided to include its substance in Section 1844 if necessary.) The language of Section 1831 has been revised to conform to the language used in other provisions of the new code. See, e.g., definition of relevant evidence in Section 225 of the Evidence Code.

The only effect of Section 1844 apparently is to eliminate any requirement of corroboration where there is direct evidence, unless corroboration is required by statute. However, where the evidence is not direct evidence (but instead is circumstantial evidence), a requirement of corroboration may be established by case law instead of statute. See People v. Gould, 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 685 (1960) (corroboration required where evidence was extra-judicial identification of defendant in a criminal case). Thus, in order to retain existing law, it is necessary to define direct evidence in the proposed section.

Section 1847

This section is discussed on pages 64-65 of the research study.

The Commission already has determined to repeal this section, and the research consultant concurs in that determination. (At a future meeting, we will submit a memorandum indicating whether the staff believes that we should (1) attempt to spell out in the new code the grounds for impeachment of a witness or (2) merely state in the new code that any evidence attacking or impairing the credibility of a witness is admissible, unless otherwise provided by statute.) See discussion in research study.

Section 1903

This section is discussed on pages 65-66 of the research study.

Although the repeal of this section is not essential, the consultant suggests that it be repealed because its repeal would merely strike a superfluous section from the Code of Civil Procedure. He states that the repeal would not change the law relating to construction or validity of statutes because the courts have not placed that law on the footing of this section.

Sections 1904-1917

These sections are discussed on pages 66-68 of the research study.

The consultant recommends that these sections be retained in the Code of Civil Procedure because they serve some purpose and do not relate to evidence. This recommendation is consistent with the Commission's decision (at the April meeting) to retain these sections.

Sections 1919a and 1919b

These sections are discussed on pages 68-70 of the research study and are compiled in Sections 1480-1486 of the Evidence Code.

The consultant recommends repeal of these sections on the ground that church records are business records. Perhaps the sections should be repealed and perhaps the Business Records Act may need to be amended to make it clear that church records are business records. (It is noted by the research consultant that Sections 1919a and 1919b were enacted before the enactment of the Uniform Business Records as Evidence Act.)

On the other hand, Sections 1480-1486 may serve a useful purpose by eliminating the necessity for bringing in the custodian of the church

records to establish the manner of keeping the records. For example, where the records are kept in a foreign country or even in another state, Sections 1480-1486 permit proof of the records without the necessity of having the custodian testify as a witness in California. Perhaps the application of these sections to church records should be limited to cases where the records are kept in a foreign country or another state.

Sections 1480-1486 provide, of course, not only a hearsay exception, but also an exception to the best evidence rule. They permit proof of the contents of the church record by a certified copy thereof. By way of contrast, the Business Records Act requires proof by the original record unless an exception is provided in the best evidence rule (Section 1420 of the Evidence Code)(and even where a certified copy may be used the testimony of the custodian is required). On the other hand, public records may be proved by a certified copy and perhaps it would be desirable to permit proof of the contents of church records by the same means.

The discussion thus far has been concerned with church records. However, Sections 1480-1486 also make admissible the original marriage, baptismal, confirmation, or other certificate (the one given by the clergyman to the interested person or persons). This original certificate would not qualify as a business record and the hearsay exception found in the Evidence Code (Section 1275) applies only to marriage certificates. Thus, an important effect of Sections 1480-1486 is to permit, for example, proof of age by recitals in original birth or confirmation certificates (as well as church records). And such certificates would seem to be as reliable as the original church records or other evidence of family history or reputation (Sections 1285, 1286, 1287). In some cases, the original

certificate might be admissible as an ancient document under Section 1292.

It should be noted that Section 1272 of the Evidence Code makes admissible a report of a birth, death, or marriage if the maker of the report was required by statute to file it in a designated public office and the report was made and filed as required by statute. (If so recorded in California, Health and Safety Code Section 10576 makes the record prima facie evidence.) However, church certificates might be useful in cases where there is no official record of the birth, death, or marriage.

In the absence of Sections 1919a and 1919b, it is not clear whether recitals of age in church certificates would be admissible under existing law to prove the truth of such recitals. Moreover, in view of our revision of the hearsay evidence law, church certificates would not be admissible (except for marriage certificates) since no hearsay exceptions exist unless provided by statute.

Note the guarantee of trustworthiness provided by Sections 1480-1486: Subdivisions (a) and (b) of Section 1480 require that the record of the certificate be kept or issued by a clergyman or other person in accordance with law or in accordance with the rules, regulations, or requirements of a church.

The policy questions presented are:

1. Must church records be proved as business records or should all or a portion of Sections 1480-1486 be retained to provide an alternative means of providing such records? Should these sections be limited to out-of-state records? Also, should the words "or religious" be inserted after "governmental" in the second line of Section 1470 of the Evidence Code to make it clear that church records are business records?

2. Should certified copies of church records be admissible?

3. Should original certificates issued by a clergyman be admissible to prove the truth of recitals contained in such certificates? When we included Section 1275 in the Evidence Code (marriage certificates), we also stated we intended to save Sections 1919a and 1919b as an additional hearsay exception.

4. Should the rather complex authentication requirements of Sections 1480-1486 be retained? An examination of the requirements will indicate that they are not as burdensome as they are complex.

5. Should the evidence admissible under Sections 1480-1486 be prima facie evidence? See research study at page 70.

Section 1925

This section is discussed on pages 70-71 of the research study and is compiled as Section 1553 of the Evidence Code.

Consultant recommends that this section be retained, but that the word "primary" be changed to "prima facie." The staff had already made this change in Section 1553 of the Evidence Code.

It is suggested that Section 1553 of the Evidence Code be approved.

Section 1926

This section is discussed on pages 71-72 of the research study.

The Commission recommended repeal of this section in the tentative recommendation on Hearsay Evidence because a hearsay exception was provided that covered the same subject matter. The consultant concurs in the repeal of this section because he believes that only those entries in public records should be prima facie evidence that are made prima facie evidence by specific statutory provision.

Section 1927

This section is discussed on pages 72-73 of the research study and is compiled as Section 1551 of the Evidence Code.

The consultant recommends retention of this section, and it is suggested that Section 1551 of the Evidence Code be approved.

Section 1927.5

This section is discussed on pages 72-73 of the research study and is compiled as Section 1550 of the Evidence Code.

The consultant recommends retention of this section, and it is suggested that Section 1550 of the Evidence Code be approved.

Section 1928

This section is discussed on page 73 (top of page) of the research study and is compiled as Section 1552 of the Evidence Code.

The consultant recommends retention of this section, and it is suggested that Section 1552 of the Evidence Code be approved.

Sections 1928.1-1928.4

These sections are discussed on pages 73 and 74 of the research study and the consultant recommends that the sections be retained.

Memorandum 64-26 contains a more complete discussion of Sections 1928.1-1928.4. We will consider that memorandum in connection with this problem.

Sections 1928.1-1928.4 are compiled in the Evidence Code as Sections 1500-1502. They are compiled in the revised form suggested in Memorandum 64-26. The staff recommends approval of Sections 1500-1502, subject to consideration of Section 1502 at a later time in connection with the provisions on authentication.

Section 1936

This section is discussed on page 74 of the research study. The Commission previously determined to repeal this section, and the research consultant agrees that it should be repealed.

Section 1946

This section is discussed on pages 74 and 75 of the research study. The Commission previously determined to repeal this section, and the research consultant agrees that it should be repealed.

Section 1948

This section is discussed on pages 75-80 of the research study and is compiled as Section 1450 of the Evidence Code.

The consultant points out the existing law is unsatisfactory and suggests that this section be revised to read in substance:

> 1450. A private writing, other than a will, which is acknowledged or proved and certified in the manner provided for conveyances of real property may, together with the certificate of acknowledgment or proof, be read in evidence without further proof.

The staff suggests that Section 1450 be approved as thus revised. We urge you to read the discussion of Section 1948 in the research study. Note that the consultant urges the repeal of Section 1933 (text on page 76 of research study). However, this section appears to be beyond the scope of the evidence recommendation and, consistent with the Commission's determinations of the April 1964 meeting, we suggest that Section 1933 be retained in the Code of Civil Procedure without change.

Section 1951

This section is discussed on pages 80-82 of the research study and is compiled as Section 1451 of the Evidence Code.

The Commission determined to delete a portion of Section 1951 in its tentative recommendations on Hearsay Evidence and Authentication. However, the

consultant believes that it is necessary to retain the deleted portion of Section 1951. If this is true, it is because the hearsay exception provided by Section 1280 of the Evidence Code does not accomplish its purpose. This hearsay exception will be considered at a later time. For the time being, since Section 1451 of the Evidence Code retains the deleted portion of Section 1951, it is suggested that the section be approved as contained in the Evidence Code, subject to revision if necessary when the hearsay exception in Evidence Code Section 1280 is considered.

Sections 1957, 1958, and 1960

The consultant recommends repeal of these sections and the Commission determined to repeal them in its tentative recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions. See discussion on pages 82-86 of the research study, noting especially the consultant's discussion of whether "circumstantial evidence" should be defined. At the April 1964 meeting we concluded that existing case law adequately defines this term and that we should not provide a statutory definition.

Section 1967

This section is discussed on page 87 of the research study. The consultant suggests the section be repealed as useless and we have not included it in the Evidence Code.

Section 1968

This section is discussed on page 87 of the research study. The consultant recommends its repeal as unnecessary and we have not included it in the Evidence Code.

Sections 1971, 1972, 1973, and 1974

These sections are discussed on page 87 of the research study. The consultant states that these sections are not rules of evidence and suggests

that they should be placed in the Codes in conjunction with the subject matter to which they relate.

These sections have been compiled in the Evidence Code as Sections 1400, 1401, and 1402. Section 1400 is the same as the Statute of Frauds in the Civil Code except that (1) Section 1400 applies to "agreements" while the Civil Code section applies to "contracts" and (2) Section 1400 contains the following sentence which is not contained in the Civil Code Section: "Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents." In view of this sentence, we believe that the only purpose of Section 1971 (compiled as Section 1400) is to provide a rule of evidence.

Section 1401 is phrased in terms of admissibility of evidence.

Section 1402 is not phrased in terms of admissibility of evidence. The staff suggests that if these sections are not to be compiled in the Evidence Code, they should be retained without change in the Code of Civil Procedure together with the other sections to be retained without change.

Section 1978

This section is discussed on pages 88-89 of the research study. The consultant recommends that, if the section is to be retained, it be revised to read substantially as follows:

> No evidence is conclusive or unanswerable unless declared to be so by statute.

The consultant questions the desirability of retaining the section because it prevents the courts from finding that certain evidence is scientifically so certain that it cannot be disbelieved by the factfinder. However, the provisions on judicial notice would be applicable in such a

case, and the staff believes that no harm should result from retaining the section.

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.
>
> At the same time, 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 mis-recollection 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