#34 7/16/64

Second Supplement to Memorandum 64-44

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 4--Judicial Notice)

We discuss in this supplement the comments we received on the tentative recommendation relating to Judicial Notice. We received comments only from Professor K. C. Davis and the staff of the Judicial Council.

Generally

Professor Davis (Exhibit I attached) states "The California Law Revision Commission's proposals about judicial notice are fundamentally unsound and unworkable." He took the time to write us six full, single spaced pages to demonstrate this. He regrets that his "circumstances prevent me from making a comprehensive comment."

He further states:

> My illustration is not an observation that a minor correction must be made. The Law Revision Commission has completely lost its bearings about judicial notice, because it is swallowing the misunderstandings of the American Law Institute, copied into the Uniform Rules of Evidence.

He further states that if the Commission's proposals are adopted, "they will do incalculable damage to the California judicial process, unless the California courts are able to undo by interpretation what you are trying to do."

We suggest that you read his letter. We will mention significant matters he discusses in connection with Evidence Code Section 450.

Section 450

This section restricts judicial notice to cases where authorized or required by statute. Thus, judicial notice cannot be taken of a

matter unless a statute can be found that authorizes or requires notice of it. The Commission may wish to change the word "statute" to "rule of law" in Section 450.

In connection with Section 450, you will note that Professor Davis is particularly concerned about our judicial notice recommendation because he believes that it might eliminate notice of "legislative facts." He fears that it will prevent use of the Brandeis Brief. This, of course, was not the Commission's intent as is indicated by the second paragraph of the Comment to Section 450. However, in order to make this intent clear, we suggest that after the words "treatises and law reviews," in the second paragraph of the Comment the words "materials containing controversial economic and social facts or findings or indicating contemporary opinion," be inserted. We also suggest that the following be inserted before the last sentence of the second paragraph of the Comment: "See also, Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948)(majority and minority opinions refer to texts and authorities in determining the constitutionality of a statute prohibiting interracial marriages)." We believe that this is a necessary revision of the Comment, regardless of whether the word "statute" is retained in Section 450.

Section 451

The staff of the Judicial Council would restrict this section to (1) decisional, constitutional, and statutory law of California and the United States, (2) regulations printed in the California Administrative Code or Register and proclamations, regulations and other matters published in the Federal Register and Code of Federal Regulations, and (3) California Rules of Court. The statutory, constitutional, and decisional law of other states and "universally

known facts and propositions of general knowledge" should, the staff of the Judicial Council believes, be included in Section 452 rather than Section 451. The following comment prepared by the staff of the Judicial Council is pertinent to this suggestion:

> Comment: Code of Civil Procedure Section 1875(3) provides that the courts of this state take judicial notice of the laws of sister states and of the interpretation thereof by the highest courts of appellate jurisdiction of those states. While not in terms mandatory, this C.C.P. section has been referred to in at least one Supreme Court case (In re Bartges (1955) 44 Cal.2d 241, at p. 245) as requiring that judicial notice be taken of the statutory law of other states (at least when the sister state law has been called to the court's attention, as it was in that case). And in Zinn v. Ex-Cell-O Corp. (1957) 148 C.A.2d 56, at p. 81, a fraud case (and really involving a conflict of laws question rather than one of judicial notice), the D.C.A. (1st. Dist., Div. 1) took judicial notice of Washington decisional law disallowing interest prior to judgment on unliquidated tort claims, and reversed that portion of the trial court's judgment which allowed such interest. Proposed Evidence Code Section 451 would go considerably further than either C.C.P. § 1875(3) or the California decisional law, in that not only would it require that notice be taken of the statutory law of sister states and of decisions by the highest appellate tribunals of those states, but also of the statutory law of territories and U.S. possessions (such as Guam and the Virgin Islands) and the decisional law of intermediate appellate tribunals and possibly even of trial courts (See the L.R.C. comment on subdivision (1) of U.R.E. Rule 9 on pp. 810 and 811 of the printed pamphlet).
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> Contrary to the view of the L.R.C. (and the Commissioners on Uniform Laws) we believe that judges should be permitted, but not required, to take judicial notice of the decisional and statutory law of other states, territories and possessions. The law of other states is often inaccessible, especially in small counties, and the conditions imposed by Section 453, i.e., request to take judicial notice, furnishing of source material, etc., therefore ought to apply just as they would to the law of foreign countries. If this amounts to a change in the existing law, such a change would appear to be warranted in view of the clear distinction which the proposed sections make between mandatory and permissive judicial notice.
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> The existing statutory and case law does not make clear whether judicial notice of the law of other states is mandatory when the parties have not presented information as to the tenor of such law. Several cases affirm that the courts do take judicial notice of the law of other states, but cases reversing a lower court for failing to so notice the law of another state really rest on grounds of improper choice of law rather than on improper refusal to take judicial notice. (See, e.g., Zinn v. Ex-Cell-O Corp., supra.)

With respect to matters of fact, as distinguished from matters of law, the L.R.C. takes the view, based on certain dictum in Varcoe v. Lee (1919) 180 Cal. 338, 347, that present California law permits, but does not require, judicial notice of matters of general knowledge and notoriety (See the L.R.C. comments on "universally known" facts on p. 812 of the pamphlet, and the consultant's comments on p. 840 of the pamphlet). Proposed Section 451 of the Evidence Code would place "facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute" in the same category as the statutory and decisional law of this state, i.e., require courts to judicially notice such facts regardless of whether requested by a party litigant so to do, regardless of whether notice of such request has been given, and regardless of whether source materials have been provided.

On these matters of request, notice, and furnishing of source materials, it should be noted that the L.R.C. draws a distinction between "universally known facts of generalized knowledge" and "specific facts of common knowledge within the territorial jurisdiction of the court" by making judicial notice of "universally known" facts mandatory, regardless of request, etc., and notice of "specific facts" permissive, subject to notice, etc. Is this distinction a valid one? The Commission's consultant, on p. 848 of the pamphlet, expresses the view that it is not and should be eliminated. In this connection, it is interesting to note the business district status of Mission Street, between 20th and 22nd, in San Francisco, which the trial court judicially noticed in Varcoe v. Lee is not a "universally known fact of generalized knowledge" falling within the mandatory provisions of proposed Evidence Code Section 451; but rather a "specific fact of common knowledge within the territorial jurisdiction of the court" which would come under the permissive provisions of Section 452.

If there is no rational basis for the distinction between "universally known facts of generalized knowledge" and "specific facts of common knowledge within the territorial jurisdiction of the court," we submit that they should be treated the same. We further submit that they should both be made permissive rather than mandatory, so that (1) the parties will be afforded an opportunity to present argument as to the propriety of taking judicial notice, (2) the court can require the parties to furnish source materials, and (3) the court will not have to rely on the doctrine of invited error as his only protection in the event he fails to take judicial notice in the particular case.

It should also be noted, in connection with judicial notice of factual matters, that C.C.P. § 1875(9) refers only to certain types of universally known facts, i.e., "laws of nature, the measure of time, and the geographical divisions and political history of the world." Proposed Evidence Code Section 451 is much broader in scope, but as hereinabove noted in the comments on proposed Section 450, the C.C.P. section does not purport to set forth all of the matters which may, or must, be judicially noticed.

Section 452

See discussion under Section 451.

Sections 453-454

There were no comments on these sections.

Section 455

With reference to this section, the staff of the Judicial Council makes the following recommendation:

Recommendation: Revise subsection (a) to make it applicable in all cases, rather than limit it to the matters specified in Section 452; and revise subsection (b) to limit its application to cases where the parties have furnished source materials but the judge sees fit to rely on information obtained from outside sources.

Comment: Subsection (a) is a modification of U.R.E. Rule 10(1), which provides that not only in the cases where judicial notice is permissive, but in those where it is mandatory, the parties must be given an opportunity to present information on the matters to be judicially noticed. The L.R.C. modification would limit this requirement to the permissive matters specified in Section 452, on the ground that "it would not be practicable" (See the L.R.C. comment at the bottom of p. 819 of the pamphlet) to make this requirement applicable to the matters which the court is required to notice. In the absence of further explanation as to why it would not be practicable, it appears to us that the U.R.E. rule, affording the parties opportunity to present information even in the mandatory cases, is preferable to the L.R.C. modification.

Subdivision (b) provides that before taking judicial notice of any of the permissive matters "specified in Section 452," if the court resorts to any source of information not received in open court, the information and its source must be made a part of the record in the action, and the parties must be afforded an opportunity to meet it. This language is not derived from the U.R.E. but from C.C.P. § 1875, where it is limited to matters of foreign law. We think that is a reasonable requirement, which should be applicable in all cases where the parties have furnished source materials, including the cases specified in Section 451, where the taking of judicial notice is mandatory.

Section 456

With reference to this section the staff of the Judicial Council makes the following recommendation:

Recommendation: Revise to make the requirement applicable in all cases except where judicial notice is being taken of decisional, constitutional and statutory law of this state.

Comment: U.R.E. Rule 11, on which this section is based, provides that if a matter judicially noticed is other than "the common law or constitution or public statutes of this state" the judge must indicate for the record the matter which is judicially noticed. We think the U.R.E. rule is preferable to the L.R.C. modification. The L.R.C. states, on p. 821 of the pamphlet, that the reason for the requirement is "to provide the parties with an adequate opportunity to try their case in view of the judicially noticed law and facts" and to avoid needless dispute as to what matters have been judicially noticed. It appears to us that this reasoning is sound, and applicable even to the decisional, constitutional and statutory law of this state (except that the judge and counsel are more familiar with the local law, or if not, can look it up more readily, which may be the reason the Commissioners on Uniform Laws saw fit to except matters of local law from the provisions of U.R.E. Rule 11). It is our view that if there is to be an exception, it should not go beyond the U.R.E. provision.

Respectfully submitted,

John H. DeMoully
Executive Secretary

DIVISION 4. JUDICIAL NOTICE

450. Judicial notice may be taken only as authorized by statute.

450. Judicial notice may not be taken of any matter unless authorized or required by statute.

451. Matters which must be judicially noticed.

451. Judicial notice shall be taken of:

(a) The decisional, constitutional, and public statutory law of the United States and of every state of the United States.

(b) Any matter made a subject of judicial notice by Section 11383, 11384 or 18576 of the Government Code or by Section 307 of Title 44 of the United States Code.

(c) Rules of court of this State and of the United States.

(d) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

452. Matters which may be judicially noticed.

452. Judicial notice may be taken of the following matters to the extent that they are not embraced with Section 451:

(a) Resolutions and private acts of the Congress of the United States and of the legislature of any state of the United States.

(b) Legislative enactments and regulations of governmental subdivisions or agencies of (1) the United States and (2) any state of the United States.

(c) Official acts of the legislative, executive, and judicial departments of this State and of the United States.

(d) Records of any court of this State or of the United States.

(e) The law of foreign countries and governmental subdivisions of foreign countries.

(f) Specific facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(g) Specific facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

453. Compulsory judicial notice upon request.

453. (a) Except as provided in subdivision (b), judicial notice shall be taken of each matter specified in Section 452, if a party requests it and:

(1) Furnishes the judge sufficient information to enable him to take judicial notice of the matter; and

(2) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request.

(b) Judicial notice need not be taken under subdivision (a) if:

(1) An adverse party disputes the propriety of taking such notice or the tenor thereof; and

(2) The party requesting that judicial notice be taken fails to persuade the judge as to the propriety of taking such notice and as to the tenor thereof.

454. Information that may be used in taking judicial notice.

454. In determining the propriety of taking judicial notice of a matter or the tenor thereof:

(a) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(b) No exclusionary rule except a valid claim of privilege shall apply.

455. Opportunity to present information to judge.

455. (a) Before judicial notice of any matter specified in Section 452 may be taken, the judge shall afford each party reasonable opportunity to present to him information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) With respect to any matter specified in Section 452, if the judge resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action, and the judge shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

456. Noting for record matter judicially noticed.

456. If a matter judicially noticed is other than a matter specified in subdivision (a) of Section 451, the judge shall at the earliest practicable time indicate for the record the matter which is judicially noticed and the tenor thereof.

457. Instructing jury on matters noticed.

457. If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the judge may and upon request shall instruct the jury to accept as a fact the matter so noticed.

458. Judicial notice in proceedings subsequent to trial.

458. (a) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

(b) The reviewing court shall judicially notice each matter specified in Sections 451 and 452 that the judge was required to notice under Section 451 or 453. The reviewing court may judicially notice any matter specified in Section 452 and has the same power as the judge under Section 321. The reviewing court may judicially notice a matter in a tenor different from that noticed by the judge.

(c) In determining the propriety of taking judicial notice of a matter or the tenor thereof, the reviewing court has the same power as the judge under Section 454.

(d) The judge or reviewing court taking judicial notice under this section of a matter specified in Section 452 shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(e) In determining the propriety of taking judicial notice of a matter specified in Section 452, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or

not included in the record of the action, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action, and the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.