#34 10/27/64

Memorandum 64-81

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Division 6)

We have received no letters commenting specifically upon this division relating to witnesses. We have, however, several matters to raise in connection with this division for Commission consideration.

Section 703

At the last meeting, the Commission revised this section to provide in subdivision (c) that, in the absence of objection by a party, the judge presiding at the trial may testify in that trial as a witness. It was intended by this revision to give the judge discretion as to whether or not he will testify as a witness in the absence of objection by a party. (Compare subdivision (c) of Section 704, which provides that a juror may be compelled to testify as a witness in the absence of objection by a party.) The problem we see in subdivision (c) of Section 703 is that there is no language providing for the contingency of a judge who, in the absence of objection by a party, still refuses to testify as a witness. Either he should have no discretion to refuse to testify or we should provide specific language to the effect that, if he refuses to testify as a witness even in the absence of objection by a party, the judge shall declare a mistrial and order the action assigned for trial before another judge. Since we strongly suggest retaining a measure of the existing law in this regard, we recommend that the judge be given discretion in this matter but that language be added to subdivision (c) to provide for the contingency of his refusal to testify. Such language might be as follows:

(c) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness. If he refuses to so testify, the judge shall declare a mistrial and order the action assigned for trial before another judge.

Section 704

We believe that the section references in subdivision (d) of Section 704 should be clarified to avoid any possible confusion. Accordingly, we suggest that the section be revised to read as follows:

(d) Nothing in this section prohibits a juror from testifying as to the matters covered by Section 1150 of this code or as provided in Section 1120 of the Penal Code.

Section 722

As suggested in Memorandum 64-100, we recommend that additional language be added to subdivision (b) of Section 722 to clarify any ambiguity that may exist with respect to (1) the proper party to inquire into the subject mentioned in subdivision (b) and (2) the party who is to pay the witness. Accordingly, we suggest that subdivision (b) of Section 722 be revised to read:

(b) The compensation and expenses paid or to be paid to the witness by a party calling an expert witness not appointed by the court is a proper subject of inquiry by any adverse party as relevant to his the credibility of the witness and the weight of his testimony.

Section 730

We have no substantive suggestion to make in regard to this section. However, we believe the Commission might consider deleting the phrase "in the exercise of his discretion" appearing on page 31, line 49. This phrase adds nothing to the meaning of the section and does not appear in existing Code of Civil Procedure Section 1871, paragraph 1. The preceding phrase--"at such amount as seems reasonable to the judge [court]"--is a sufficient

statement of discretion without the unnecessary repetition contained on line 49.

Section 731

We believe that the language in subdivision (b) could be improved upon by restating the second sentence as a separate subdivision and revising the remaining language to clarify the intended purpose of this section. Accordingly, we suggest that subdivision (b) be revised to read as follows:

> (b) In any ~~civil action in any~~ county in which the procedure prescribed in this ~~article~~ subdivision has been authorized by the board of supervisors, the compensation fixed under Section 730 for ~~any~~ medical ~~expert or~~ experts in civil actions in such county shall ~~also~~ be a charge against and paid out of the treasury of such county on order of the court.
>
> (c) Except as otherwise provided in this ~~subdivision~~ section, in all civil actions, ~~such~~ the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in such proportion as the judge may determine and may thereafter be taxed and allowed in like manner as other costs.

Section 733

The staff recommends no change in the substance or language in this section. However, we wish to indicate that the substantive effect of this section, in regard to the allowance of ordinary witness fees as costs in the action, is inconsistent with a comparable provision in Section 894 (in the Uniform Act on Blood Tests to Determine Paternity). We suggest in Memorandum 64-83 that Section 894 be revised to conform with the substance of Section 733.

Section 752

Some Commissioners have expressed concern over the omission in this section of any reference to expressing "in the English language" testimony that

can be understood directly without the aid of interpretation. We believe the Commission should consider whether the phrase "in the English language" should be inserted in the introductory clause of subdivision (a) of Section 752 immediately following the word "himself" so that the subdivision would read:

> (a) When a witness is incapable of hearing or understanding the English language or is incapable of expressing himself in the English language so as to be understood directly, an interpreter whom he can understand and who can understand him shall be sworn to interpret for him.

We believe this addition would improve the substance of this section.

Section 760

Several Commissioners have asked the staff to examine Section 760 and the use of the defined term "direct examination" to determine whether the definition covers examination by a party who is not adverse to the party producing a witness. The staff has concluded that the present definition of "direct examination" is defective in that it fails to include a description of the type of examination permitted parties whose interests are not adverse to the party producing the witness. Accordingly, we suggest that this section be revised to read:

> 760. "Direct examination" is the examination of a witness by the party producing him and by any party whose interest is not adverse to the party producing the witness.

Section 761

Some question has been raised whether the definition of "cross-examination" covers the situation where an adverse party is examining a witness and desires to go beyond the scope of the direct examination (see Section 772) in his examination. The existing definition uses the word

"produced" advisedly. The extent to which this practice is permitted lies in the discretion of the trial court. Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85 (1906). However, to clarify any possible ambiguity in this regard, we suggest that Section 772 be revised to add the phrase: "; but, if the witness is examined concerning any other matter, such examination is subject to the same rules that are applicable to a direct examination." This phrase restates without substantive change a similar phrase that appears in Code of Civil Procedure Section 2048. The full text of Section 772 as recommended for revision is set out infra.

Section 765

We believe the Commission should consider deleting subdivision (b) of Section 765 and substituting therefor a reference in subdivision (a) to Section 351. The only reason subdivision (b) is included in the present section is that some Commissioners felt it was necessary to have a specific section which declared that the parties may ask a witness such legal and relevant questions as they see fit. Since this "right" is subject to exceptions, there appears to be no reason why the same purpose could not be accomplished by a "subject to" clause added to the principal section setting forth the judge's power to exercise control over the mode of interrogation of witnesses.

Section 770

The language in subdivision (a) of Section 770 is based on URE Rule 22(b). The staff is particulary concerned with the URE language, "to identify, explain, or deny the statement". The difficulty arises because of the disjunctive requirement of an opportunity for identification, explanation,

or denial. We have no problem with requiring an opportunity either to explain or to deny the statement because this is consistent with existing law and with several other sections in the Evidence Code that use this identical phrase. However, we have researched the California law and have found no case in which an opportunity to identify only has been considered a sufficient foundation for the admission of extrinsic evidence of an inconsistent statement. The crux of the foundational requirement is to give the witness the opportunity either to deny making the statement or, if he admits making the statement (i.e., identifies it), to explain the statement. The existing law (Code of Civil Procedure Section2052) states only that the witness "must be asked whether he made such statements, and if so, allowed to explain them." We believe the subdivision would accurately restate this existing law simply by deleting the disjunctive reference to "identify" so that the subdivision would read in its entirety:

> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or . . . .

Section 771

Except for the specific time reference--"either while testifying or prior thereto"--Section 771 restates existing Code of Civil Procedure Section 2047 in almost identical terms. In reading the section in its present form, the staff believes that the explicit statement that "a witness . . . may use a writing to refresh his memory" creates an unwarranted implication that a witness may not use anything other than a writing to refresh his memory. The primary purpose of this section is not to permit a witness to use a writing to refresh his recollection but rather to create a substantive right in the adverse party to examine any writing that may be so used.

Accordingly, we suggest that this section be revised to state the right more affirmatively as follows:

> 771. If a witness, either while testifying or prior thereto, ~~may use~~ uses a writing to refresh his memory with respect to any matter about which he testifies, ~~but~~ such writing must be produced at the request of an adverse party, who may, if he chooses, inspect the writing, cross-examine the witness concerning it, and read it to the jury.

Section 772

The staff believes that the introductory "subject to" clause in this section ought to contain a reference to the limitations on cross-examining an expert witness in regard to certain publications considered by him in forming his opinion (Section 721). Subdivision (b) of Section 721 is in fact a limitation upon the scope of cross-examination otherwise permitted of a witness. On the other hand, the reference presently contained in this introductory clause--i.e. the reference to Chapter 6 (commencing with Section 780)--may be unnecessary. There would appear to be nothing in Chapter 6 that, properly speaking, is a limitation upon the scope of cross-examination permitted of a witness. Accordingly,we suggest that Section 772 be revised to include a reference only to Section 721 and to delete the present reference to Chapter 6, reading as follows:

> 772. Subject to Section 721, a witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each adverse party to the action in such order as the court directs; but, if the witness is examined concerning any other matter, such examination is subject to the same rules that are applicable to a direct examination.

The reason for the addition of the underlined phrase is indicated under Section 761, supra.

Sections 774 and 778

The second sentence in each of Sections 774 and 778 is identical with the last sentence in Code of Civil Procedure Section 2050. In the interest of shortening this sentence and making the references to the court's

discretion uniform throughout the code, the staff suggests that each of these sentences be revised to read:

Leave may be granted or withheld in the court's discretion.

Section 776

For the purpose of clarification, the staff believes it would be desirable to insert the word "such" on page 34, line 48, in subdivision (a) of Section 776 as follows:

> 776. (a) . A party to the record of any civil action, or a person indentified with such a party, ...

Section 780

The staff believes that the Commission ought to consider whether the introductory clause of Section 780 should refer to "statute" instead of "law". Generally speaking, we have used the reference "except as otherwise provided by law" only in those cases where the Evidence Code is specifically framed to permit the courts to continue to develop rules of admissibility. On the other hand, the phrase "except as otherwise provided by statute" usually is used in the Evidence Code in those situations where additional court development would result in new exclusionary rules. Section 780 appears to be the only case where the code departs from this general scheme and provides the courts with the power to develop additional exclusionary rules. This may be one important area where the courts should be free to protect a witness against unwarranted intrusion into matters that only remotely bear upon his credibility. Accordingly, the staff makes no specific suggestion for change in this section but merely presents the matter for Commission consideration so that you will be aware of this singular difference in treatment.

Section 786

If there is no objection from the Commission, the staff plans to set off

in commas the phrase "or their opposites" that appears on page 36, line 28, to eliminate any possible ambiguity in this section and to make its punctuation consistent with the punctuation in other similar sections.

Section 788

The staff believes the Commission should be aware of the action taken at the recent State Bar Convention on the resolution, previously mentioned in Memorandum 64-62 (pages 4 and 5), recommending amendment of Code of Civil Procedure Section 2051 to limit the prior criminal convictions permitted to be shown for impeachment purposes to convictions for perjury only. This resolution (1963 No. 69) received a favorable committee report which is reproduced as Exhibit I hereto. Three minority reports, at least two of which are somewhat favorable to the principal purpose of the suggested amendment, also are reproduced as Exhibits II, III and IV hereto. We believe that the Conference of State Bar Delegates referred it to the Board of Governors for referral to the appropriate committee for additional study and recommendation. The staff recommends no change in the substance of Section 788 but merely presents these attachments for your information.

Respectfully submitted,

Jon D. Smock
Associate Counsel

REPORT OF COMMITTEE ON 1963
CONFERENCE RESOLUTION NO. 69

TO: Conference of State Bar Delegates

The resolution which is the subject of this report is:

RESOLVED that the Conference of State Bar Delegates recommends to the Board of Governors of the State Bar that the State Bar sponsor legislation to amend Section 2051 of the Code of Civil Procedure as follows:

> Section 2051. Impeachment of witness; contradictory evidence; reputation; conviction of felony; effect of pardon. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of ~~a felony~~ the crime of perjury unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.
>
> (Proposed new language underlined; language to be deleted shown by strike-out).

This resolution was proposed to the 1963 Conference by the Criminal Courts Bar Association of Los Angeles and was referred to this Committee.

In support of the proposal certain arguments were advanced by the Criminal Courts Bar Association. It was pointed out that under Sections 2051 and 2065 of the Code of Civil Procedure, and the cases interpreting these sections, that witnesses may be impeached not only by inquiring as to the conviction of the felony but that this has been extended to:

(1) The number of felonies (including those from other jurisdictions).
(2) The dates and places.
(3) The type of felonies.
(4) Fact of imprisonment and place of incarceration.
(5) Particular facts of the felony (e.g. A burglary of a warehouse by entry through the skylight).
(6) Allowing argument of various characterizations as to the purpose of proof of the prior felony conviction.

It has been contended that this permitted introduction of a prior felony conviction for the purpose of impeaching the credibility of the witness is illogical and frequently prejudicial without any compensating beneficial purpose. Proponents note that legal arguments against the use of such an impeachment privilege are:

(1) Abuse by putting in all the felonies. (commonly referred to as "punitive impeachment").

(2) Confusion of issues.
(3) Impossibility of jurors properly confining the evidence to the issue of credibility. [See U. S. vs. Banmiller (U. S. ex rel Scoleri) 310 F 2d 720 (1962)].
(4) Marked differences in the laws of the several states as to what is a "felony".
(5) Illogical and irrelevant nature of particular felonies for impeachment - not relevant to trait of "honesty".
(6) Age of prior felony - (youthfulness of offender).
(7) Refusal to allow defendant to show true facts - "(innocuous felonies" under terminology of "breaking and entering, theft - fraud etc.").
(8) Inability of/or refusal to allow defendant to show rehabilitation, successful completion of probation, restitution, etc.
(9) Distance and time, the defense cannot seek (or afford to send for) the Court records or trial proceedings
(10) Changes in the law - what is a "felony" (certain check cases heretofore filed as felonies are now misdemeanors; bigamy now requires intent).
(11) Changes and expansion of Juvenile law and proceedings (what was prosecuted as a felony twenty years ago would now go to Juvenile).
(12) That the defendant may have pled guilty to the prior felony instead of contesting it.
(13) Reluctance of persons with prior felonies to institute civil suits or defend or be a witness where their past is unknown.
(14) Conviction of a felony does not really affect credibility. (Crimes not requiring intent)
(15) Weak cases are made stronger for the prosecution if the defendant has a prior - particularly if the prior is for the same type of offense. (See People v. Wilkins, 14 Cal.App.2d 557 at 560).
(16) The effect of the newly enacted plea of Nolo Contendere is open to question. (See Wig. Supl. p. 191 (p.575 under 4)).
(17) The question that should be at issue is the truth of the witness' statements concerning the present cause. A truthful witness, upon whom the rights or property of other parties may depend, may be disbelieved because the (only) witness is impeached by a prior felony.
(18) The prejudicial effect of a prior felony conviction cannot be discounted, particularly if it is for narcotics, sex offense with children or even draft evasion.

An examination of the laws of other jurisdictions indicates that there has been a change in the rules in some areas. Some states permit only present proof of convictions of an "infamous" crime or one involving "moral turpitude". Others allow only proof of the particular trait which bears a similarity to the crime presently involved.

It is also noted that cases indicate that this is in conflict with other basic rules of law. For example, (1) The defendant's character is not in question until he places it in issue.

(2) All witnesses are presumed to speak the truth.
(3) The right to take the stand and defend.

The objective in impeaching a witness is to determine his credibility; the only real issue is whether he has been convicted of the crime of perjury. It is therefore the recommendation of this committee that the proposed amendments to Section 2051 of the Code of Civil Procedure be adopted by this conference and recommended to the Board of Governors of the State Bar.

S/
Joseph M. Rosen
Chairman Pro-tem

Charlotte F. Cohelan
Edward I. Gorman
H. Pitts Mack
Frank W. Shuman
Robert A. Sikes
Henry C. Todd
Bergen H. Van Brunt
Robert V. Wasson

Committee members not joining in the report:

Joseph L. Carr
Richard M. Clare
Ira M. Price, II

1963 CONFERENCE COMMITTEE
ON RESOLUTION NO. 69

Minority Report by Richard M. Clare

TO: Conference of State Bar Delegates

The proposal is that Section 2051 of the Code of Civil Procedure be amended to provide that the only conviction of a felony which might be used to impeach a witness would be the conviction for the crime of perjury.

The majority opinion states that the only crime which has any effect on the credibility of a witness is that of perjury. The undersigned cannot accept this view.

It has been the view of the courts for hundreds of years that a man who will steal or cheat will also lie. Your reporting minority feel that this view is sound and is based upon the common experience of humanity.

It should be pointed out that the proponent of the amendment is the Criminal Courts Bar Association of Los Angeles whose members perhaps have more need to protect their clients against this type of impeachment and whose interest in doing so may transcend their interest in the orderly development of the law.

In any event the minority wishes to remind the conference that if this proposal were to become the law, then any person convicted of the felonies of bribery, obtaining money under false pretense, forcible rape, or forgery would testify in any civil or criminal action without court or jury having any knowledge of his unsavory character.

It is, therefore, the recommendation of this minority that the proposed amendments to Section 2051 of the Code of Civil Procedure be rejected.

S/
Richard M. Clare

1963 CONFERENCE COMMITTEE
ON RESOLUTION NO. 69

Minority Report by Ira M. Price II

The undersigned believes that some change in C.C.P. Section 2051 is desirable but that sufficient study and consideration have not yet been given to certain factors relevant to the Conference resolution. There are other acts calculated to defeat the administration of justice, such as subornation of perjury and bribery of witnesses or jurors, which may adversely reflect upon one's credibility as strongly as the crime of perjury. Consideration should be given to including conviction for such other crimes as a basis for impeachment in any amended statute.

It is believed, also, that if C.C.P. Section 2051 is to be changed, study should be given to the placing of a time limitation in the statute so that a witness could not be impeached for a felony committed prior to a certain period (say, five years) before the trial or hearing in which it is sought to impeach him.

It is felt, also, that before changing this statute, careful consideration should be given to whether or not there ought to be a distinction drawn between impeachment procedure in civil trials and in criminal cases.

The undersigned has been advised that the Commission to Revise the Penal Code is now studying possible revisions of this state's criminal statutes. In addition, we have an active State Bar Committee on Uniform Rules of Evidence and a State Bar Committee of Criminal Law and Procedure. The views of the Commission and of these committees may be helpful before taking final action on the proposed amendment to C.C.P. Section 2051.

In view of the above matters, the undersigned respectfully submits that this important matter should be continued for further study by this or another committee before a final report or recommendation is filed thereon with the Conference.

Respectfully submitted,

S/
Ira M. Price II, Member

1963 CONFERENCE COMMITTEE
ON RESOLUTION NO. 69

Minority Report by Joseph L. Carr

TO: Conference of State Bar Delegates

RESOLVED The resolution which is the subject of this report is that the Conference of State Bar Delegates recommends to the Board of Governors of the State Bar that the State Bar sponsor legislation to amend Section 2051 of the Code of Civil Procedure as follows:

Section 2051. Impeachment of witness; contradictory evidence; reputation; conviction of felony; effect of pardon. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of ~~a felony~~ the crime of perjury of subornation of perjury, offering false evidence, i.e., the offering in evidence as genuine and true a book, paper, document, record or other instrument in writing, knowing the same to be forged or fraudulently altered, preparing false documentary evidence with intent to produce or allow to be produced with a fraudulent purpose at any trial or proceeding, bribing, or offering to bribe a witness or person about to be called as a witness with intent to keep said witness or person from attending a trial, bribing a witness with intent to influence his testimony, accepting a bribe or offering to accept a bribe by any public executive or ministerial officer with intent to influence his official conduct thereby, or as to any witness in a criminal proceeding including the defendant who has suffered a prior conviction of a felony of the same class of offense then being heard before the Court, said prior conviction shall be limited to those which have occurred within five years prior to the date of the commission of the offense of which the defendant is on trial; or from the date the witness was released from custody, parole or probation, pursuant to said prior conviction, whichever date is later, unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

(Proposed new language underlined; language to be deleted shown by strike-out.)

This resolution was proposed to the 1963 Conference by the Criminal Courts Bar Association of Los Angeles and was referred to this Committee.

In support of the proposal were arguments advanced by the Criminal Courts Bar Association, and the interpretation by the Courts of Sections 2051 and 2065 of the Code of Civil Procedure to the extent to which impeachment by conviction of a felony may be carried.

It is respectfully submitted that this Section could be amended to bring it into line with contemporary practice and thinking.

It appears to the undersigned that the first group of offenses being crimes against public justice are just as reprehensible as the offense of perjury and could as definitely affect the weight and creditability to be given to a witness's testimony as a conviction of perjury. As to the later group of offenses, pertaining to criminal cases, it would appear that a witness, including the defendant who had within five years suffered a conviction or been released from custody, parole or probation for a felony of the same class as that which is then on trial, should have this factor considered in regard to the creditability and weight, if any, to be given to his testimony.

Respectfully Submitted,

S/
JOSEPH L. CARR, Member

JLC:dh