#34 10/27/64

Memorandum 64-93

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Amendments, Additions, and Repeals)

We received two letters concerning sections to be repealed in connection with the proposed Evidence Code. These are attached as Exhibits I and II.

Civil Code Section 130

Mr. Homer H. Bell (Exhibit II) suggests that Civil Code Section 130 be repealed in the bill to enact the proposed Evidence Code. Section 130 (Text on page 1 of Exhibit II) requires corroboration of the acts constituting the cause of action in a divorce matter. We advised Mr. Bell that it was unlikely that the Commission would undertake to repeal this section in the Evidence Code bill, but we call this letter to your attention in case the Commission wishes to repeal Section 130 as suggested by Mr. Bell.

The Dead Man Statute

Mr. Lloyd Tunik (Exhibit I) agrees with our recommendation for the use of hearsay evidence as to statements of a decedent in an action against his estate (Section 1261), but he believes certain prerequisites should be placed upon the plaintiff who seeks to testify in a situation now covered by the Dead Man Statute. He suggests that testimony by a plaintiff in a Dead Man Statute situation be considered admissible only under the following condition:

> Where it is established to the satisfaction of the Court that plaintiff has diligently sought all other evidence as to matters he seeks to testify on and said evidence which is admissible is before the Court, the Court, after considering said evidence may permit plaintiff to testify if said Court determines that it is in the interests of justice to permit such testimony.

As an alternative, he suggests that the plaintiff's testimony might be admissible only if the court was satisfied, in the exercise of its discretion, that sufficient corroboration existed to support such testimony.

Both of these alternatives were, of course, considered when the Commission prepared its recommendation on the Dead Man Statute in 1957. We attach a copy of the 1957 recommendation. The Discretion-of-the-Court Alternative is discussed on pages D-45--D-46; the Corroboration Alternative is discussed on pages D-46--D-47. The Hearsay-Exception Alternative (the one adopted in the Evidence Code_ is discussed on pages D-47--D-50. The case for the repeal of the Dead Man Statute is stated in the Recommendation on pages D-5--D-6.

We recommend that no change be made in the preprinted bill.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 64-93

EXHIBIT I

CARLOS R. FREITAS
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BRYAN R. McCARTHY
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October 12, 1964

California Law Revision Commission
School of Law
Stanford University,
Stanford, California

Re: Tentative Recommendation and Study
Relating to the Uniform Rules of Evidence

Gentlemen:

I am writing with regard to your recommendation that the "Dead Man Statute", as presently known in California, be repealed. I have certain recommendations that I believe to be worthy of consideration.

First, I agree with your recommendation for the use of hearsay evidence as to statements of a decedent.

Secondly, I believe certain prerequisites should be placed upon the plaintiff who seeks to testify, i.e. any testimony by a plaintiff in a "Dead Man Statute" situation be considered admissible only under the following condition:

> Where it is established to the satisfaction of the Court that plaintiff has diligently sought all other evidence as to matters he seeks to testify on and said evidence which is admissible is before the Court, the Court, after considering said evidence may permit plaintiff to testify if said Court determines that it is in the interests of justice to permit such testimony.

The above rule would place upon the person who is probably in the best position of knowledge, a duty to show that the Court has all of the facts, and it serves to forward the equities in a situation where, without such rule, a one-side evidenciary situation would result due to death.

(As an alternative, a plaintiff's testimony might be considered admissible only if the Court was satisfied, in the exercise of its discretion, that sufficient corroboration existed to support said testimony.)

Finally, I believe the presumption of truthfulness created by C. C. P. Section 1847 should apply neither to the testimony of the party plaintiff nor to the hearsay testimony submitted under your suggested rule. In short, a special instruction or rule should apply to such testimony, to wit, no presumption exists that the said testimony is either true or false; in deciding to accept true or reject as false one or both types of testimony, the trier of fact may consider the circumstances involved, as well as the other rules which normally permit the rejection of the truth of testimony.

I hope my suggestions are helpful.

I would appreciate it if you could also forward to me a copy of your Tentative Recommendations and Study concerning the Uniform Rules of Evidence, Article VI.

Very truly yours,

LLOYD TUNIK

LT:ch

EXHIBIT II

Law offices of
HOMER H. BELL
111 EAST COLORADO BOULEVARD
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ELLIOTT 8-2589

October 5, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California, 94305

ATTEN: Mr. John H. DeMoully

Re: Civil Code Section 130

Dear Mr. DeMoully:

For the past couple of years, I have been discussing with and writing to my state senators and assemblymen as well as the Assembly Interim Committee, the advisability of repealing Section 130 of the Civil Code. Having been receiving all of your reports on the subject of a new Evidence Code, it has suddenly occurred to me that my suggestion would more properly be directed to you, since the rule to which I am objecting is fundamentally a rule of evidence.

Section 130 of the Civil Code is perhaps the most ridiculous Code section in all of the Codes of California. It is the section that requires corroboration of the acts constituting the cause of action in a divorce matter. This section, enacted in 1872, reads as follows:

> "130. Default: proof required
> No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the Court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the Court, must be upon written questions and answers. (Enacted 1872. As amended Code Am. 1873-74, c. 612, p. 191, 32.)"

I recommend that the section be repealed in its entirety. For the past thirteen years I have done a very large volume of divorce work, and I have talked to numerous divorce attorneys about this section, and I think I can say without exaggeration that 100% of the attorneys who handle divorce matters, whether representing husbands or wives, are enthusiastically in favor of my suggestion.

That section is antiquated and unrealistic. It causes no end of difficulty and does absolutely no good whatsoever. It unrealistically requires corroboration of the testimony of the plaintiff (or cross-complainant) as to the acts of the defendant constituting grounds of divorce. Every attorney experienced in this field knows that most, and in many cases, all, of the misconduct of the offending party occurs out of the presence of corroborating witnesses. Certainly the technical form of desertion described in Civil Code Section 96 is of this nature, and that Section reads as follows:

> "Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion."

Now, how would a divorce plaintiff find someone to corroborate that, especially if the husband and wife continued to sleep in the same bedroom? As you know, all forms of desertion, including this one, must continue for a full year to constitute a ground of divorce. Even where there have been witnesses to marital misconduct, the witnesses may be out of the state, or at a distant point within the state.

A man may be sent to prison for life or for a long term of years without the necessity of a corroborating witness as a legal prerequisite. I am not talking about the persuasive effect of evidence, but of the legal technicality of having a corroborating witness to the same act. In fact, it is possible for a man to be sent to the gas chamber without the requirement of a corroborating witness. In the civil field, probate matters involving hundreds of thousands of dollars can be determined by the court on the testimony of a single witness, as can matters in civil litigation involving contracts, deeds, and all other types of problems settled by evidence in court.

Moreover, Section 130 is in direct conflict with Section 1844 of the Code of Civil Procedure, which reads as follows:

> "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

As the Code Section says, only treason and perjury require corroboration of the accusing witness, and in this high crime, the United States Constitution (also P.C. 1103) allows the accused to confess in open court, whereas Civil Code Section 130 doesn't even allow the divorce defendant to do this, in satisfaction of the "corroboration" requirement. Section 130 will not permit a divorce upon the uncorroborated "admission" of the defendant -- even in open court. (I do not overlook P.C. 1111, which will not permit conviction upon the uncorroborated testimony of an accomplice, but this pertains to the credibility of the witness rather than to the nature of the crime.)

Therefore, because Civil Code Section 130 serves no useful purpose, is totally unrealistic and archaic, and is more productive of injustice than of justice, it should be repealed in its entirety. It is doubtful that even corroboration of residence is important here in California, because it would be highly improbable that anyone would deliberately choose a state which had a one-year state residence and a three-month county residence requirement, followed by a one-year interlocutory period, when they could more easily choose Nevada, where they could obtain a "quickie" divorce.

Before you complete your work on the Evidence Code, it is hoped that you will see fit to take this matter under submission with a view of effecting the repeal of Section 130.

Very truly yours,

Homer H. Bell

HOMER H. BELL

HMB:r