

#63

4/17/67

Memorandum 67-29

Subject: Study 63 - Evidence Code

Attached is a copy of the November 1966 issue of the Hastings Law Journal. This issue contains several articles on the new Evidence Code. Some of these articles contain suggestions for revision of the new Evidence Code. You may find all the articles of interest. We indicate below those articles that contain suggestions for possible revision of the new code.

Judicial Notice and the California Evidence Code (page 117)

On pages 138-140, the writer suggests that, where the court is resorting to judicial notice of legislative facts, the court should provide the litigants with an opportunity to be heard and to supplement or rebut the information acquired by the court. Nothing in the text of the Evidence Code deals with judicial notice of legislative facts. A comment in the code indicates that the court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials, in construing statutes, determining constitutional issues, and formulating rules of law.

We do not believe that it would be desirable to attempt to spell out the procedure for taking judicial notice of legislative facts in the text of the Evidence Code. We previously decided that this was not appropriate. We believe that the courts can be relied upon to provide the parties with an opportunity to present materials in their briefs and in oral argument and that this problem is not one that lends itself to a legislative solution.

Statutory Rules of Evidence for Eminent Domain Proceedings (page 143)

We will consider this article in connection with our study of condemnation law and procedure. We do not believe that it is feasible to consider the rules of evidence in eminent domain proceedings until we have considered the subject of just compensation.

Note: The Constitutionality of Evidence Code Section 413 in Criminal Cases (page 198)

The writer points out that Section 413 may have some unconstitutional applications in criminal cases. We have previously considered this problem and determined that it would be best to leave this matter to the courts since Section 413, and all other provisions of the code, are subject to constitutional limitations. See the following statement contained in our recommendation to the 1967 session on the Evidence Code:

Sections 412 and 413

Sections 412 and 413 authorize the trier of fact, in determining what inferences to draw from the evidence, to consider the failure of a party to explain or deny the evidence or facts in the case against him, his willful suppression of evidence, or his production of weaker evidence when it was within his power to have produced stronger.

In Griffin v. California, 380 U.S. 609 (1965), the United States Supreme Court held that comment by the court or counsel upon a criminal defendant's failure to produce or explain evidence, when such failure is predicated on an assertion of the constitutional right of a person to refuse to testify against himself, violates the defendant's rights under the 14th Amendment of the United States Constitution.

The Commission considered revising Sections 412 and 413 to indicate the nature of the constitutional limitation on the rules they express. The Commission determined to make no recommendation in this regard, however, for the extent of the constitutional limitation is as yet uncertain. Moreover, all sections in the code, not merely these two sections, are subject to whatever constitutional limitations may be found applicable in the particular situations where they are applied. An amendment of these sections providing that they are subject to a constitutional limitation in a particular situation would merely state a truism.

The writer suggests that Section 413 be modified to read: "the party's failure to explain or to deny by his evidence," rather than "his testimony." While this might be an appropriate revision for criminal cases, absent any waiver, it would not be an appropriate provision for civil cases.

The writer also points out that Section 413 does not specifically cover the case where the prosecution suppresses evidence in a criminal case. To meet this problem, the section might be revised to read:

In determining what inferences to draw from the evidence or facts in the case for or against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such the evidence or facts in the case against him, or his willful suppression of evidence relating thereto to the case, if such be the case.

We do not consider this revision to be necessary; we do not believe that the courts will hold that the Evidence Code has overruled the Crowder case. See discussion on pages 207-208 of law review note.

Note: Modification of the Foundational Requirement for Impeaching Witnesses: California Evidence Code Section 770 (page 210)

The writer of this note suggests that the Commission made an undesirable change when it modified the foundational requirement for impeaching statements. He prefers the URE rule. On the other hand, another article was recently published which attacked the Evidence Code because it does not include the URE hearsay exception that would permit the use of any hearsay statement when the declarant is available and can be called to the stand for cross-examination by the other party. See Miller, Beyond the Law of Evidence, 40 Southern California Law Review 1 (1967). (We are not planning to consider this article because a superficial examination of the article indicates that the suggestions are far beyond anything that would have a reasonable chance of legislative approval, assuming that the Commission would be willing

to recommend basic changes in the philosophy of evidence rules. If the Commission wishes, however, we will purchase copies of the article and will prepare an analysis for a future meeting.)

Assuming that no change is to be made in the policy reflected in Section 770, the writer suggests a clarifying revision of the section. The section is set out in the text at page 213. The suggested revision is set out in the text at page 216. The change suggested may be a desirable one, but we do not believe that subdivision (b) of the revised text of the section should be phrased positively.

Note: The Marital Testimonial Privilege: California Evidence Code
Section 970 and Wey v. United States (page 222)

Nothing in this note persuades us that any change is needed in the Evidence Code.

Respectfully submitted,

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Executive Secretary