#34 10/27/64

Memorandum 64-83

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Division 7)

We have received two letters from interested persons commenting on this division. These are attached as Exhibits I and II.

Section 830

Mr. Baggot (Exhibit II) suggests that we delete Section 830 and insert the substance of the Commission's tentative recommendation on Opinion Testimony in Eminent Domain Proceedings. For the reasons mentioned in Memorandum 64-100, the staff recommends against this course of action.

Mr. Gleaves (Exhibit I, page 1) suggests a substantive amendment to Section 830. Without regard for his appraisment of the effect of the existing language in Code of Civil Procedure Section 1845.5 (which we question), the staff recommends against making any substantive change in Section 830. We believe that the defects in this section can be cured only with an overall revision of the entire subject as proposed in the Commission's tentative recommendation on Opinion Testimony in Eminent Domain Proceedings. Accordingly, we recommend against piecemeal, half-hearted substantive change in this section. Instead, Section 830 is intended merely to restate in acceptable language the substance of Code of Civil Procedure Section 1845.5.

In connection with Section 830, we do, however, have a minor language change to suggest. The first sentence refers to "real property" and to "real property to be taken." The second sentence refers in two places to "the property sought to be condemned." The staff recommends that the phrase "the property sought to be condemned" be used uniformly in the section.

We used this phrase in our 1961 revision of the eminent domain law.

Section 894

Chapter 2 (Sections 890-896) restates without substantive change the several existing sections constituting the Uniform Act on Blood Tests to Determine Paternity. The last sentence in Section 894 (identical to the last sentence in Code of Civil Procedure Section 1980.5) precludes a party who calls an expert witness not appointed by the court from recovering ordinary witness fees as costs in the action. This statement is inconsistent with the recovery allowed for other experts under Section 773 and under subdivision (b) of Section 731. The staff suggests that Section 894 be revised to make it consistent with Section 733. Accordingly, the second sentence of Section 894 should be revised to read:

> The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him ~~but shall not~~ and only ordinary witness fees shall be taxed as costs in the action.

"Court"

We plan to substitute "court" for "judge" in this division. The substitution creates no problems.

Respectfully submitted,

Jon D. Smock
Associate Counsel

Memo 64-83

EXHIBIT I

LAW OFFICES
ANSON, GLEAVES & LARSON
611 SUNSET BOULEVARD
LOS ANGELES, CALIFORNIA 90012

JOHN B. ANSON
MILNOR E. GLEAVES
JOHN H. LARSON
NORMAN G. OLIVER, JR.

TELEPHONE
624-9227
CABLE ADDRESS:
ANGLARS

October 6, 1964

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California 94305

Dear Sir:

I have a suggestion, involving my own specialty field, for the improvement of the proposed Evidence Code. Section 830, which is almost an exact copy of C.C.P. section 1845.5, preserves some language which has produced conflict and confusion in the trial of eminent domain cases where improved properties are being condemned. The following change is suggested, beginning at line 1 of page 39 of the preprinted Senate Bill No. 1 (basic changes underlined):

> ". . . be permitted to consider and give evidence as to the nature and value of the improvements upon, and the character of the existing uses being made of, the property sought to be condemned and the properties in its general vicinity."

The object of the suggested change is to eliminate the apparent restriction upon an expert witness in an eminent domain proceeding, whereby he apparently can not give, upon direct examination and as part of his reasoning, his opinion of the value of the improvements upon the very property being taken, even though he is expressly permitted by the section to do so in regard to the improvements upon comparable sales. Under the rule of expressio unius, this is the effect of the present section, even though section 1872 C.C.P. has always indicated that such a witness could

give his reasons for his opinion, and County of Los Angeles v. Faus (1957), 48 Cal. 2d 672, relied upon section 1872 in overturning the old and outdated rule against giving comparable sales prices on direct examination.

I have tried numerous cases since 1959 involving improved properties where a controversy has arisen on this point of interpretation of 1845.5, with differing rulings. This would be an excellent time to clear it up.

Yours very truly,

William E. Gleaves

of ANSON, GLEAVES & LARSON

MEG:ed

EXHIBIT II

THOMAS G. BAGGOT
ATTORNEY AT LAW
550 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE 626-5451

October 7, 1964

Law Revision Commission
Stanford University
Palo Alto, California

Re: Proposed Evidence Code

Gentlemen:

I attended the seminar on the proposed Evidence Code at the recently concluded State Bar Convention. At the close of the seminar members of the audience were invited to submit their suggestions or recommendations as to changes in the proposed Code. I am active in the field of condemnation and have a suggestion regarding proposed §830 respecting opinion testimony in eminent domain cases.

Proposed §830 is incomplete and could be misleading. This is because the section purports to allow testimony on direct examination as to sales of other properties but is silent upon other types of testimony respecting the witnesses' investigation and study and the issue of value. Such other testimony would include such matters as rent, income capitalization studies and cost of replacement or reproduction studies. These are all matters in common use by appraisers. The Law Revision Commission heretofore in its study relating to evidence in eminent domain proceedings recommended that such testimony be admissible on direct examination of a witness qualified to express an opinion of value. Further, 1961 Senate Bill 205 and more particularly proposed C.C.P. §1248.2 therein provided for the admissibility of such testimony on direct examination was unanimously passed by both houses of the California State Legislature. In its present form, proposed §830 might cause a trial judge to limit a qualified valuation witness to the testimony on direct examination of other sales to the exclusion of such other equally cogent and widely accepted appraisal techniques as are enumerated above. This would cause a miscarriage of justice and would almost certainly prolong trials by provoking long arguments on the admissibility of evidence. Therefore, Article 2 of Division 7 (Opinion Testimony and Scientific Evidence) of the proposed Evidence Code ought to be enlarged to follow the language of the prior Law Revision Commission recommendation and 1961 Senate Bill 205.

Very truly yours,

Thomas G. Baggot

THOMAS G. BAGGOT

TGB:jt